

800.23A ALIENATION OF AFFECTION - STATUTE OF LIMITATIONS.

NOTE WELL: N.C. Gen. Stat. § 52-13, effective October 1, 2009, and applicable to actions arising from acts occurring on or after that date, provides as follows:

(a) No act of the defendant shall give rise to a cause of action for alienation of affection . . . that occurs after the plaintiff and the plaintiff's spouse physically separate with the intent of either the plaintiff or plaintiff's spouse that the physical separation remain permanent.

(b) An action for alienation of affection . . . shall not be commenced more than three years from the last act of the defendant giving rise to the cause of action.

This instruction incorporates the foregoing statutory amendment and should be used in all actions arising from acts occurring on or after October 1, 2009.

Actions arising from acts occurring prior to October 1, 2009, are governed solely by the North Carolina Supreme Court decision in McCutchen v. McCutchen, 360 N.C. 280, 624 S.E. 2d 620 (2006). For actions arising from acts occurring before October 1, 2009, use N.C.P.I.-Civil 800.23 ("Alienation of Affection - Statute of Limitations").

The *(state number)* issue reads:

"Did the plaintiff file this action within three years of the date of the last act of the defendant giving rise to the plaintiff's claim?"¹

If you have answered the *(state number)* issue "Yes" in favor of the plaintiff, the plaintiff's claim may nonetheless be legally barred by what is called the statute of limitations.² The law provides that a lawsuit claiming alienation of affection must be filed within three years of the date of the last act of the defendant which gave rise to the plaintiff's claim. [The law further provides that if the plaintiff and the plaintiff's

spouse have physically separated with the intent on the part of either the plaintiff or *his* spouse that the physical separation remain permanent, then no act of the defendant which occurs following such separation may give rise to the plaintiff's alienation of affection claim.]³ The plaintiff filed the present lawsuit on (*state date of filing of alienation of affection action*).

By answering issue (*state number*) "Yes" in favor of the plaintiff, you found that the malicious and wrongful conduct of the defendant consisted of [an act] [acts] which occurred prior to the physical separation of the plaintiff and *his* spouse with the intent on the part of either the plaintiff or *his* spouse that the physical separation remain permanent.

On this (*state number*) issue, the burden of proof is on the plaintiff.⁴ This means that the plaintiff must now prove, by the greater weight of the evidence, that the last act of the defendant upon which you based your finding in issue (*state number*) must have occurred less than three years before the date of the filing of this lawsuit by the plaintiff.

Finally, as to this issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the plaintiff filed this action within three years of the date of the last act of the defendant giving rise to the plaintiff's claim, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.

1. See N.C. Gen. Stat. § 52-13(b) (2009).

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2. A "statute of limitations" is "the action of the State in determining that, after the lapse of a specified time, a claim shall not be legally enforceable." *South Dakota v. North Carolina*, 192 U.S. 286, 346 (1904). "Generally, whether a cause of action is barred by the statute of limitations is a mixed question of law and fact." *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 69 N.C. App. 505, 508, 317 S.E.2d 41, 43 (1984).

3. N.C. Gen. Stat. § 52-13(a).

4. "While the plea of the statute of limitations is a positive defense and must be pleaded, . . . when it has been properly pleaded, the burden of proof is then upon the party against whom the statute is pleaded to show that his claim is not barred, and is not upon the party pleading the statute to show that it is barred."

Hudson v. Game World, Inc., 126 N.C. App. 139, 145, 484 S.E.2d 435, 439 (1997) (quoting *Solon Lodge v. Ionic Lodge*, 247 N.C. 310, 316, 101 S.E.2d 8, 13 (1957)). See also *White v. Consolidated Planning, Inc.*, 166 N.C. App. 283, 305, 603 S.E.2d 147, 162 (2004) (stating that the burden rests on the plaintiff to prove claims were timely filed when the defendant asserts the statute of limitations as an affirmative defense).