

800.27 CRIMINAL CONVERSATION - STATUTE OF LIMITATIONS.

NOTE WELL: For actions arising from acts occurring prior to October 1, 2009, use this instruction. For actions arising from acts occurring on or after October 1, 2009, see N.C.P.I-Civil 800.27A ("Criminal Conversation - Statute of Limitations").

The (*state number*) issue reads:

"Did the plaintiff file this action within three years of the date it became apparent or ought reasonably to have become apparent to the plaintiff that the defendant had committed criminal conversation with the plaintiff's spouse?"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 criminal conversation must be filed within three years after the date the plaintiff discovered or ought reasonably to have discovered, whichever event first occurred, that the defendant committed criminal conversation with the plaintiff's spouse.³ The plaintiff filed the present lawsuit on (*state date of filing of criminal conversation action*).

On this issue, the burden of proof is on the plaintiff.⁴ This means that the plaintiff must prove, by the greater weight of the evidence, that the plaintiff filed this action within three years after the date it became apparent or ought reasonably to have become apparent to the plaintiff, whichever event first occurred, that the defendant had committed criminal conversation with the plaintiff's spouse. An event would have been or would have become reasonably apparent to the plaintiff when it would have been or would have become apparent to a reasonable and prudent person in the same or similar circumstances as 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 after the date it became apparent or ought reasonably to have become apparent to the plaintiff, whichever event first occurred, that the defendant had committed criminal conversation with the plaintiff's spouse, 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 N.C. Gen. Stat. § 1-52(16) provides that a cause of action "for personal injury . . . shall not accrue until bodily harm to the claimant . . . becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs."

In *Misenheimer v. Burrus*, 360 N.C. 620, 623-24, 637 S.E.2d 173, 175-76, the North Carolina Supreme Court ruled that "an action for criminal conversation falls under the . . . definition of personal injury as it concerns an invasion of a [sic] individual's personal right" and "the discovery rule" in N.C. Gen. Stat. § 1-52(16) "tolls the statute of limitations" set out in § 1-52(5) "in cases of criminal conversation," although "such actions remain subject to the [ten year] statute of repose provision in § 1-52(16), which states that 'no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action.'"

2 N.C. Gen. Stat. § 1-52(5) (2009) provides that a plaintiff must file an action within three years "[f]or criminal conversation." 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 See *Misenheimer*, 360 N.C. at 624-25, 637 S.E.2d at 176 ("[W]e interpret N.C. Gen. Stat. § 1-52(5) and § 1-52(16) together to mean that . . . the statute of limitations for criminal conversation begins to run when the tort is discovered or should have been discovered, not upon completion of the last act constituting the offense.") Whether a plaintiff exercised due diligence in discovering the criminal conversation is ordinarily an issue of fact for the jury absent dispositive or conclusive evidence indicating neglect by the plaintiff as a matter of law. In other words, when there is a dispute as to a material fact regarding when the plaintiff should have discovered the [criminal conversation], summary judgment is inappropriate, and it is for the jury to decide if the plaintiff should have discovered the [criminal conversation]. Failure to exercise due diligence may be determined

N.C.P.I.-Civil. 800.27
CRIMINAL CONVERSATION-STATUTE OF LIMITATIONS.
GENERAL CIVIL VOLUME
JUNE 2015

as a matter of law, however, where it is clear that there was both capacity and opportunity to discover the [criminal conversation].

Ward v. Fogel, ___ N.C. App. ___, 768 S.E.2d 292, 299 (2014) (quoting *Spears v. Moore*, 145 N.C. App. 706, 708-09, 551 S.E.2d 483, 485 (2001) (internal citation omitted)). Unless the circumstances are such that any reasonable party would have acted upon the opportunity, determination as a matter of law is inappropriate. See *Wells Fargo Bank, N.A. v. Coleman*, ___ N.C. App. ___, 768 S.E.2d 604 (2015).

4 See *Hudson v. Game World, Inc.*, 126 N.C. App. 139, 145, 484 S.E.2d 435, 439 (1997):

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. (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 plaintiff to prove claims were timely filed when defendant asserts statute of limitations as an affirmative defense).