

800.27A CRIMINAL CONVERSATION - STATUTE OF LIMITATIONS.

NOTE WELL: For actions arising from acts occurring on or after October 1, 2009, use this instruction. For actions arising from acts occurring prior to October 1, 2009, see N.C.P.I.-Civil 800.27 ("Criminal Conversation - 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 criminal conversation 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 physical separation may give rise to the plaintiff's criminal conversation claim.³] The plaintiff filed the present lawsuit on (*state date of filing of criminal conversation action*).

By answering issue (*state number*) "Yes" in favor of the plaintiff, you found that the defendant had sexual intercourse with the spouse of the plaintiff 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 sexual intercourse between the defendant and the plaintiff's spouse occurred less than three years before the date of the filing of this lawsuit by the plaintiff. [(*In cases where there is physical separation*)] Furthermore, because the plaintiff and *his* spouse have physically separated with the intent on the part of either the plaintiff or *his* spouse that the physical separation remain permanent, the plaintiff must also prove that the act occurred prior to the physical separation.]

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 The statute of limitations for "criminal conversation" is three years. N.C. Gen. Stat. § 1-52(5). N.C. Gen. Stat. § 52-13(b), effective October 1, 2009, and applicable to actions arising from acts occurring on or after that date, establishes the statute of repose for such actions. It provides as follows: An action for . . . criminal conversation shall not be commenced more than three years from the last act of the defendant giving rise to the cause of action. This specific statute of repose is an exception to the general statute of repose for causes of actions for personal injury found in N.C. Gen. Stat. § 1-52(16). Thus, for actions for criminal conversation arising from acts occurring on or after October 1, 2009, the statute of repose and the statute of limitations are the same: three years.

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 See N.C. Gen. Stat. § 52-13(a).

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

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

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).