

805.25 PRIVATE NUISANCE—DAMAGES (REAL PROPERTY).

The *(state number)* issue reads:

"What amount is the plaintiff entitled to recover from the defendant for substantially and unreasonably interfering with the plaintiff's use and enjoyment of *(identify real property)*?"

If you have answered the *(state number)* issue "Yes" in favor of the plaintiff, the plaintiff is entitled to recover nominal damages even without proof of actual damages.¹ Nominal damages consist of some trivial amount such as one dollar in recognition of the technical damages incurred by the plaintiff.²

The plaintiff may also be entitled to recover actual damages. On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, the amount of actual damages proximately³ caused by the nuisance of the defendant.

Proximate cause is a cause which in a natural and continuous sequence produces a person's [injury] [damage] and is a cause which a reasonable and prudent person could have foreseen would probably produce such [injury] [damage] or some similar injurious result.

There may be more than one proximate cause of [an injury] [damage]. Therefore, the plaintiff need not prove that the defendant's wrongful conduct was the sole proximate cause of the [injury] [damage]. The plaintiff must prove, by the greater weight of the evidence, only that the defendant's wrongful conduct was a proximate cause.

(Direct Damages. Use where there is competent evidence of direct damages:4

[Direct Damages-Fair Market Value. Use where the plaintiff relies on the difference in fair market value formula to provide damages: The plaintiff's actual damages equal the difference between the fair market value of the property immediately before the nuisance occurred and its

fair market value immediately after the nuisance was removed.⁵ The fair market value of any property is the amount which would be agreed upon as a fair price by an owner who wishes to sell, but is not compelled to do so, and a buyer who wishes to buy, but is not compelled to do so.⁶ (Evidence of [estimates of the cost to repair] (and) [the actual cost of repairing] the damage to the *(name real property)* may be considered by you in determining the difference in fair market value before and after the nuisance occurred.)⁷

[Direct Damages-Cost of Repair. *Use where damages measured by market value are impractical because there is no market by which the degree of damage to the property can be measured:*⁸ The plaintiff's actual property damages are equal to the amount reasonably needed to [repair the damage to the *(identify real property)*]⁹ [replace the *(identify real property)* damaged]¹⁰, less [the salvage value of the [*(identify real property)*] [parts replaced]] [the accumulated depreciation¹¹ on the property replaced].¹²

[Direct Damages-Intrinsic Value. *Use where damages measured by market value would not adequately compensate the plaintiff and repair or replacement would be impossible or economically wasteful:*¹³ The plaintiff's actual damages equal the actual value of the *(identify real property)* immediately before it was damaged (less the salvage value, if any, that it had after its damage). The actual value of any property is its intrinsic value; that is, its reasonable value to its owner.¹⁴ In determining the actual value of the *(identify real property)*, you may consider:

[the original cost of *(labor and materials used in producing)* the *(identify real property)*]

[the age of the *(identify real property)*]

[the degree to which the *(identify real property)* has been used]

[the condition of the (*identify real property*) just before it was damaged]

[the uniqueness of the (*identify real property*)]

[the practicability of [repairing] [reconstructing] the (*identify real property*)]

[the cost of replacing the (*identify real property*) (taking into account its depreciation; that is, the degree to which it had been used up or worn out with age)]

[the insured value of the (*identify real property*)]¹⁵

[the opinion of the plaintiff as to its value. You should not consider any fanciful, irrational or purely emotional value that (*identify real property*) may have had.¹⁶]

[the opinion of any experts as to its value]

[*state other appropriate factors supported by the evidence*¹⁷].)

(Incidental Damages. *Use where there is competent evidence of loss of use of the benefit of the property:* The plaintiff's actual property damages may also include compensation for the loss of use of (*identify real property*).¹⁸ (Here give the applicable alternative statement (*give only one*):)

[Repairs feasible at reasonable cost in reasonable time. When (*identify real property*) damaged by the nuisance of another can be repaired at a reasonable cost and within a reasonable time, the owner may recover for the loss of its use. The measure of such damages is the cost of renting similar (*identify real property*) for a reasonable repair period (whether or not the owner actually rented such a similar (*identify real property*)).]

[Repairs not feasible at reasonable cost in reasonable time. When (*identify real property*) damaged by the nuisance of another cannot be repaired at a reasonable cost and within a reasonable time, and if a replacement (*identify real property*) is not immediately obtainable, the owner may recover for loss of use during the period of time reasonably necessary to acquire a replacement (*identify real property*) and put it into service. The measure of damages is the cost of renting a similar (*identify real property*) during the period of time it takes to locate a replacement (*identify real property*) and put it into service (whether or not the owner actually rents such temporary (*identify real property*)).]

[Total destruction. When (*identify real property*) is totally destroyed or damaged by the nuisance of another and a replacement (*identify real property*) is not immediately obtainable, the owner may recover for loss of use during the period reasonably necessary to acquire temporary (*identify real property*). The measure of such damages is the cost of renting a temporary (*identify real property*) for the period of time reasonably necessary to replace the (*identify real property originally destroyed*) (whether or not the owner actually rented such a similar (*identify real property*)).]

[Owner elects to replace repairable property. When a (*identify real property*), damaged by the nuisance of another can be repaired at a reasonable cost and within a reasonable time, but the owner elects to replace it by acquiring a substitute (*identify real property*), the owner may recover for loss of use during the time reasonably required to make repairs or to acquire the substitute, whichever is shorter. The measure of such damages is the cost of renting a similar (*identify real property*) during such period].])

(Consequential Damages. *Use where there is competent evidence of consequential damages:*

[Consequential Damages-Lost Net Revenues. *Do not use the following paragraph unless supported by the evidence:* If an owner proves with reasonable certainty the net revenues lost through inability to use the (*identify real property*), the owner may recover such net revenues lost during a reasonable period within which to make repairs.]

[Consequential Damages-Other. *Give such other consequential damage instruction as is supported by the evidence.*)]

(Other Damages. *Give such further instruction as may be supported by the evidence.*)

Finally, as to this (*state number*) issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, the amount of actual damages proximately caused by the nuisance of the defendant, then it would be your duty to write that amount in the blank space provided.

If, on the other hand, you fail to so find, then it would be your duty to write a nominal sum such as "One Dollar" in the blank space provided.

1. *Phillips v. Haynes*, 244 N.C. App. 543, 543, 781 S.E.2d 350, 350 (2015).

2. *Wolfe v. Montgomery Ward & Co.*, 211 N.C. 295, 296, 189 S.E. 772, 773 (1937).

3. In *Binder v. General Motors Acceptance Corp.*, 222 N.C. 512, 514-15, 23 S.E.3d 894, 895 (1943), the Supreme Court, quoting *Conrad v. Shuford*, 174 N.C. 719, 94 S.E. 424, 425 (1917), said:

"A wrongdoer is liable for all damages which are the proximate effect of his wrong, and not for those which are remote; that direct losses are necessarily proximate, and compensation, therefore, is always recoverable; that consequential losses are proximate when the natural and probable effect of the wrong."

4. *Note Well*: Where the defendant's operation is an agricultural or forestry operation, there is a limit on the compensatory damages that may be awarded. See N.C. Gen. Stat. § 106-702 (limiting compensatory damages for both permanent and temporary nuisances caused by agricultural or forestry operations).

5. *Paris v. Carolina Portable Aggregates, Inc.*, 271 N.C. 471, 484, 157 S.E.2d 131, 141 (1967).

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6. *Huff v. Thornton*, 23 N.C. App. 388, 394, 209 S.E.2d 401, 405 (1974), *aff'd*, 287 N.C. 1, 213 S.E.2d 198 (1975).

7. *Huff v. Thornton*, 213 S.E.2d at 205-06.

8. When the property cannot be valued by reference to a market, the measure of damages may properly be gauged by the cost of repair. See *In re Appeal of Amp*, 287 N.C. 547, 570-574, 215 S.E.2d 752, 766-769 (1975). Plaintiff's recovery for repair should be limited by the value of the property damaged. *Carolina Power & Light Co v. Paul*, 261 N.C. 710, 712, 136 S.E.2d 103, 105 (1964). However, where the repair or replacement does not provide a realistic measure of the plaintiff's loss (such as where the property cannot be repaired or replaced, or where it has primarily or exclusively intrinsic value), use the next paragraph.

9. If the property replaced needed repairs at the time it was destroyed, the measure of damages would be replacement cost less the reasonable cost of repairs. *Beaufort & Morehead R. Co. v. The Damyank*, 122 F.Supp. 82 (E.D.N.C. 1954) (railroad bridge over river damaged by ship).

10. If manufacturing materials with no market value are destroyed, the measure of damages should include the replacement cost of the raw materials. *In re Appeal of AMP, Inc.*, 287 N.C. at 570-74, 215 S.E.2d at 765-68.

11. No deduction for depreciation should be made unless the evidence would justify a finding that the plaintiff will eventually recapture the worth of the depreciation. *Carolina Power & Light Co.*, 261 N.C. at 712, 136 S.E.2d at 105; *In re Appeal of Amp, Inc.*, 287 N.C. at 570-74, 215 S.E.2d at 765-68.

12. *State v. Maynard*, 79 N.C. App. 451, 339 S.E.2d 666 (1986).

13. *William F. Freeman, Inc. v. Alderman Photo Co.*, 89 N.C. App. 73, 365 S.E.2d 183 (1988). Even though an item has no measurable market value when tortuously destroyed, it nonetheless may have intrinsic value to its owner, which is recoverable. *Id.*

14. *William F. Freeman, Inc. v. Alderman Photo Co.*, 89 N.C. App. 73, 365 S.E.2d 183.

15. *William F. Freeman, Inc.*, 89 N.C. App. at 77, 365 S.E.2d at 186.

16. *William F. Freeman, Inc.*, 89 N.C. App. at 77, 365, S.E.2d at 186; *Thomason*, 159 N.C. at 1024 ("damages which are merely imaginary or have no real or substantial existence, should not be allowed"). *Lee v. Bir*, 116 N.C. App. 584, 590-91, 449 S.E.2d 34, 36 (1994). See also *Blum v. Worley*, 121 N.C. App. 166, 169-70, 465 S.E.2d 16, 19 (1995).

17. Other factors could include the earnings generated by the property, the capitalized value of those earnings, the market value (where there is a market at some other place) and cost of transportation, the market value where there will be a market at some other time (such as for crops, for which cost of harvesting, etc. would also be a consideration). See *Freeman*, 89 N.C. App. at 77, 365 S.E.2d at 186; *Thomason v. Hackney & Moale Co.*, 159 N.C. 299, 74 S.E. 1022 (1912).

18. *Binder*, 222 N.C. at 514, 23 S.E.2d at 895.