

805.26 PRIVATE NUISANCE - NUISANCE BY WATERFLOW.

The (state number) issue reads:

“Did the defendant cause substantial damage to or interference with the plaintiff’s use and enjoyment of the plaintiff’s property by unreasonably altering the flow of surface water on the defendant’s property?”

North Carolina law allows every landowner to make a reasonable use of the owner’s land, even if that reasonable use alters the flow of surface water and causes harm to others. A landowner incurs liability under the law only when the owner’s harmful interference with the flow of surface water is unreasonable and causes substantial damage to another.<sup>1</sup>

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, two things:

First, that the defendant’s action(s) in altering the flow of surface water [was] [were] unreasonable.<sup>2</sup> The reasonableness of the defendant’s action(s) should be determined by weighing the gravity of the harm to the plaintiff against the utility of the conduct of the defendant. A defendant’s action(s) [is] [are] unreasonable if a person of ordinary prudence and discretion would consider those actions excessive or inappropriate after giving due consideration to the interests of the plaintiff, the interests of the defendant, and the interests of the community.

In evaluating the gravity of the harm to the plaintiff, you may consider:

[the extent and character of the harm to the plaintiff]

[the social value which the law attaches to the type of use which is invaded]

[the suitability of the locality to that use]

[the burden on the plaintiff to minimize the harm] [and]

[state any other factor arising from the evidence]

In evaluating the utility of the conduct of the defendant, you may consider:

[the purpose of the defendant's conduct]

[the social value which the law attaches to that purpose]

[the suitability of the locality for the use the defendant makes of the property] [and]

[state any other factor arising from the evidence].<sup>3</sup>

Even when the alteration of the flow of surface water is reasonable in the sense that the social utility arising from the change outweighs the harm to the plaintiff, you may still find that the defendant's action(s) [is] [were] unreasonable if the resulting interference to the plaintiff's use and enjoyment of [his] [her] property is greater than it is reasonable to require the plaintiff to bear under these circumstances.

Second, that the defendant's alteration of the flow of surface water caused substantial damage to the plaintiff's property or substantially interfered with the plaintiff's use and enjoyment of the plaintiff's property.<sup>4</sup> Such damage or interference is substantial when it results in significant annoyance, material physical discomfort, or injury to a person's health or property. Minor harms, slight inconveniences, or petty annoyances are not substantial damage or interference.<sup>5</sup>

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 defendant's action(s) in altering the flow of surface water [is] [was]

unreasonable and the defendant's alteration of the flow of surface water caused damage to the plaintiff's property or substantially interfered with the plaintiff's use and enjoyment of the plaintiff's property, 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.

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1. *Pendergrast v. Aiken*, 293 N.C. 201, 216, 236 S.E.2d 787, 796 (1977); see also *Brown v. Lattimore Living Tr.*, 264 N.C. App. 682, 689, 826 S.E.2d 827, 831 (2019) (summarizing *Pendergrast*); *Board of Transp. v. Terminal Warehouse Corp.*, 300 N.C. 700, 268 S.E.2d 180 (1980) (same).

2. *Rainey v. St. Lawrence Homes, Inc.*, 174 N.C. App. 611, 613, 621 S.E.2d 217, 220 (2005); *Pendergrast v. Aiken*, 293 N.C. 201, 216, 236 S.E.2d 787, 796 (1977).

As stated in *Pendergrast*, "most nuisances of this kind are intentional, usually in the sense that 'the defendant has created or continued the condition causing the nuisance with full knowledge that the harm to the plaintiff's interests is substantially certain to follow.'" *Pendergrast*, 293 N.C. at 216, 236 S.E.2d at 796. However, a nuisance by water flow may also exist where the defendant acts negligently or recklessly or in the course of an abnormally dangerous activity. *Id.* at 217, 236 S.E.2d at 796. "Regardless of the category into which the defendant's actions fall, the reasonable use rule explicitly, as in the case of intentional acts, or implicitly, as in the case of negligent acts, requires a finding that the conduct of the defendant was unreasonable. This is the essential inquiry in any nuisance action." *Pendergrast*, 293 N.C. at 217, 236 S.E.2d at 797.

3. *Pendergrast v. Aiken*, 293 N.C. 201, 217, 236 S.E.2d 787, 797 (1977).

4. *Pendergrast v. Aiken*, 293 N.C. 201, 221, 236 S.E.2d 787, 799 (1977) ("The jury could not find that a nuisance existed at all without a finding of substantial damage to plaintiffs.").

5. *Pendergrast v. Aiken*, 293 N.C. 201, 221, 236 S.E.2d 787, 799 (1977).