

805.65 DUTY OF OWNER TO TRESPASSER.<sup>1</sup>

*NOTE WELL: Use for claims arising before 1 October 2011. For claims arising on or after 1 October 2011, use the N.C.P.I.-Civil 805.64 series.*

The (*state number*) issue reads:

"Was the plaintiff [injured] [damaged] [death] proximately caused by the willful or wanton conduct of the defendant?"

(You will answer this issue only if you have answered the (*state number*) issue "No" in favor of the defendant. If you answered the (*state number*) issue "Yes" in favor of the plaintiff, you will answer the (*state preceding issue*) and not this one.)<sup>2</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, that the defendant acted willfully or wantonly and that such willful or wanton conduct was a proximate cause of the plaintiff's [injury] [damage] [death].

[An owner] [A person in possession] is under a duty not to cause [injury] [damage] [death] to a trespasser by willful or wanton conduct.

An act is willful if the [owner] [person in possession] intentionally<sup>3</sup> fails to carry out a duty imposed by law or contract which is necessary to protect the safety of the person or property to which the duty is owed.<sup>4</sup>

An act is wanton if the [owner] [person in possession] acts in conscious or reckless disregard for the rights and safety of others.<sup>5</sup>

(The [owner] [person in possession] is not required to anticipate the presence of a trespasser.)

The plaintiff not only has the burden of proving willful or wanton conduct, but also that such willful or wanton conduct was a proximate cause of the [injury] [damage] [death].

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

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

As to this (*state number*) issue, the plaintiff contends, and the defendant denies, that the defendant engaged in willful or wanton conduct in one or more of the following ways:

*(Read all contentions of willful or wanton conduct supported by the evidence.)*

The plaintiff further contends, and the defendant denies, that the defendant's willful or wanton conduct was a proximate cause of the plaintiff's [injury] [damage] [death].

I instruct you that willful or wanton conduct is not to be presumed from the mere fact of [injury] [damage] [death].

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, that the defendant acted willfully or wantonly (in any one or more of the ways contended by the plaintiff) and that such willful or wanton conduct was a proximate cause of plaintiff's [injury] [damage] [death], 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. See *Bell v. Page*, 271 N.C. 396, 156 S.E.2d 711 (1967); *Dean v. Constr. Co.*, 251 N.C. 581, 111 S.E.2d 827 (1960); *Hood v. Queens*, 249 N.C. 534, 107 S.E.2d 154 (1959); *Jessup v. Railroad Co.*, 244 N.C. 242, 93 S.E.2d 84 (1956); *Wagoner v. Railroad Co.*, 238 N.C. 162, 77 S.E.2d 701 (1953); *McLamb v. Jones*, 23 N.C. App. 670, 209 S.E.2d 854 (1974).

2. Give only where there is a preliminary issue as to whether the plaintiff was a lawful visitor or a trespasser. See N.C.P.I.-Civil 805.50.

3. For an instruction on intent, see N.C.P.I.-Civil 101.46.

4. *Abernathy v. Consol. Freightways Corp.*, 321 N.C. 236, 241, 362 S.E.2d 559, 561 (1987).

5. *Bullins v. Schmidt*, 322 N.C. 580, 584, 369 S.E.2d 601, 603 (1988).