805.65A DUTY OF OWNER TO CHILD TRESPASSER - ATTRACTIVE NUISANCE.[1]

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

The (*state number*) issue reads:

"Was the plaintiff's [injury] [damage] [death] proximately caused by the negligence of the defendant?"

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, five things:

First, that the defendant maintained or allowed to exist on *his* premises a condition inherently dangerous to children.

Second, that the defendant knew or, in the exercise of ordinary care should have known, that children [would be likely to trespass on *his* premises] [would likely be attracted to *his* premises by the inherently dangerous condition] [had previously been attracted to *his* premises by the inherently dangerous condition].

Third, that the defendant failed to exercise ordinary care to [guard] [cover] [fence off] such inherently dangerous condition to prevent access by a child. Ordinary care means that degree of care which a reasonable and prudent person would use under the same or similar circumstances to protect children from [injury] [damage] [death]. A person's failure to use ordinary care is negligence.

Fourth, that the risk presented by the inherently dangerous condition was not obvious to or realized by the plaintiff because of *his*

youth, capacity and experience.[2]

And Fifth, that the defendant's negligence 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 negligence 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 negligence was a proximate cause.

In this case, the plaintiff contends, and the defendant denies, that the defendant was negligent in one or more of the following ways:

(*Read all contentions of negligence supported by the evidence*).

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

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

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 was negligent in any one or more of the ways contended by the plaintiff and that such negligence was a proximate cause of the

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 generally Green v. Duke Power Co.*, 305 N.C. 603, 290 S.E.2d 593 (1982); *Walker v. Sprinkle*, 267 N.C. 626, 148 S.E.2d 631 (1966); *Matheny v. Stonecutter Mills Corp.*, 249 N.C. 575, 107 S.E.2d 143 (1959).

2. "Children" does not mean all minors. The doctrine of attractive nuisance is reserved only for "infants," children of "tender years," "small children," and those with "childish" curiosities and propensities. *Walker*, 267 N.C. at 628, 148 S.E.2d at 633; *Lanier v. N.C. State Hwy. Comm.*, 31 N.C. App. 304, 311-312, 229 S.E.2d 321, 325 (1976). The doctrine "applies to children who, 'because of their youth, do not discover the condition or realize the risk involved in intermeddling in it or coming within the area made dangerous by it,'" *Lanier*, 31 N.C. App. at 311, 229 S.E.2d at 325 (quoting *Restatement of Torts* § 339(c) (1934)). The doctrine "'does not extend to those conditions the existence of which is obvious even to children and the risk of which is fully realized by them.'" *Id*. (quoting *Restatement of Torts* § 339, cmt. b (1934)).