

LAND-DISTURBING ACTIVITY—SEDIMENTATION POLLUTION CONTROL ACT<sup>1</sup> OF 1973— VIOLATION OF ACT—VIOLATION OF ORDINANCE, RULE OR ORDER OF SECRETARY OF ENVIRONMENT AND NATURAL RESOURCES OR OF LOCAL GOVERNMENT—DAMAGES

The (*state number*) issue reads:

"What amount is the plaintiff entitled to recover?"<sup>2</sup>

If you have answered the (*state number*) issue "Yes" in favor of the plaintiff, the plaintiff is entitled without further proof to recover a nominal or trivial amount such as one dollar in recognition of the technical damage to the plaintiff's property.

The plaintiff may also be entitled to recover actual monetary damages.<sup>3</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, the monetary amount of actual property damages proximately<sup>4</sup> caused<sup>5</sup> by the land-disturbing activity of the defendant in violation of the Sedimentation Pollution Control Act.

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<sup>1</sup>N.C. Gen. Stat. § 113A-50 to 113A-67.

<sup>2</sup>For a discussion of damages in reference to violation of the Sedimentation Pollution Control Act, see *Whiteside Estates, Inc. v. Highlands Cove, L.L.C.*, 146 N.C. App. 449, 461-63, 553 S.E.2d 431, 439-41 (2001) ("*Whiteside I*") and *Whiteside Estates, Inc. v. Highlands Cove, L.L.C.*, 169 N.C. App. 209, 211-13, 609 S.E.2d 804, 805-07 (2005) ("*Whiteside II*").

<sup>3</sup>In consequence of the specific statutory limitation to "damages" in N.C. Gen. Stat. § 113A-66(a)(3), "punitive damages are not recoverable under the [Sedimentation Pollution Control] Act." *Hubert v. Holly*, 120 N.C. App. 348, 355, 462 S.E.2d 239, 244 (1995).

<sup>4</sup> N.C. Gen. Stat. § 113A-66(a)(4) authorizes private civil actions seeking "damages caused by the violation" (emphasis added) of the Sedimentation Pollution Control Act. No appellate decision has thus far addressed whether damages under this section must have been "caused" or "proximately caused" by the violation. Cf. N.C.P.I.--Civil 810.00 ("Personal Injury Damages"), NOTE WELL and n.1 (Negligence cases require an instruction on proximate cause. Intentional tort cases generally do not require proximate cause and an instruction solely on cause should be given.). In the only decisions involving jury trials under, *inter alia*, N.C. Gen. Stat. § 113A-66, the issue was not addressed. See "*Whiteside I*" and "*Whiteside II*." However, the transcript reveals the trial court instructed the jury on proximate cause in submitting a single damages issue on the combined claims of nuisance, trespass and violation of the Sedimentation Pollution Control Act. See also 61C Am. Jur.2d, *Pollution Control*, § 2038, p. 798 ("Where an action alleges that pollution constitutes a nuisance, the proof should show that the plaintiff suffered injury, and that the defendant's acts of pollution were the proximate and efficient cause thereof.").

<sup>5</sup>See *Whiteside I*, 146 N.C. App. at 459-61, 553 S.E.2d at 439-40 (downstream landowner could recover for damages caused by sediment runoff from upstream landowner's property); *Whiteside II*, 169 N.C. App. at 212, 609 S.E.2d at 806 (affirming award of damages for costs of restoring a creek to its "non-silt-depositing pre-nuisance condition" in order to prevent further damage).

A proximate cause is a cause which in a natural and continuous sequence produces damage to property, and is a cause which a reasonable and prudent person in the same or similar circumstances could have foreseen would probably produce such damage or some similar damaging result. There may be more than one proximate cause of damage to property. The plaintiff is not required to prove that the defendant's land-disturbing activity was the *sole* proximate cause of the damage. The plaintiff must prove by the greater weight of the evidence that the defendant's land-disturbing activity was *a* proximate cause.

The purpose of awarding actual monetary damages is to restore the plaintiff's property to its condition prior to the damage proximately caused by the defendant, that is, to give back to the plaintiff that which was lost in so far as it may be done by compensation in money.<sup>6</sup> The amount of the plaintiff's monetary damages is to be reasonably determined from the evidence presented. Although this does not require proof of that amount with mathematical precision,<sup>7</sup> you may not make any award based upon speculation or conjecture.<sup>8</sup>

The monetary amount of actual property damages is that sum which you find by the greater weight of the evidence to be the reasonable cost to the plaintiff of the expenses necessary to repair and restore the plaintiff's property<sup>9</sup> to its condition prior to any acts of the defendant that occurred before (*state date of filing of suit*).<sup>10</sup>

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<sup>6</sup>*Whiteside II*, 169 N.C. App. at 212, 609 S.E.2d at 806 (*citing Phillips v. Chesson*, 231 N.C. 566, 571, 58 S.E.2d 343, 347 (1950)).

<sup>7</sup>*Whiteside I*, 146 N.C. App. at 462, 553 S.E.2d at 440.

<sup>8</sup>*See State Properties v. Ray*, 155 N.C. App. 65, 76-77, 574 S.E.2d 180, 188 (2002).

<sup>9</sup>*Whiteside I*, 146 N.C. App. at 461, 465, 553 S.E.2d at 442 (approving the trial court's instructions using this language as "sufficiently defin[ing] the law"); *see also Whiteside II*, 169 N.C. App. at 212-13, 609 S.E.2d at 806-07 (reaffirming this measure of damages).

<sup>10</sup>NOTE WELL: In light of case language stating that "for an abatable nuisance, plaintiff may only recover damages up to the time of the complaint or trial," *Whiteside I*, 146 N.C. App. at 461, 553 S.E.2d at 440 (*citing Phillips*, 231 N.C. at 569-70, 58 S.E.2d at 346), the Pattern Jury Committee carefully considered the practical problems involved in submitting alternative dates to the jury or in submitting the date of trial. The Committee recommends use of the date of filing suit as appropriate to claims under the

This amount may include the reasonable costs of repair and restoration of the plaintiff's property to its condition prior to damage,<sup>11</sup> diminished rental value,<sup>12</sup> and other reasonable amounts for incidental losses.<sup>13</sup> You may not consider or speculate in regard to any future damage to the plaintiff's property, nor include in your award under this issue any amount in compensation for possible damage to plaintiff's property which could or may have occurred after (*state date of filing of suit*).

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 monetary amount of

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Sedimentation Pollution Control Act; *see also Evans v. Lochmere Recreation Club, Inc.*, 176 N.C. App. 724, 729, 627 S.E.2d 340, 343 (2006) (a "landowner may not as a matter of right recover permanent damages from a private corporation or individual for the maintenance of a continuing nuisance or trespass. His remedy is to recover in separate and successive actions for damages sustained to the time of trial. However, the parties may consent that an issue as to permanent damages be submitted, and in such case the defendant, upon payment of permanent damages so assessed, acquires a permanent right to continue such nuisance or trespass") (*citing Wiseman v. Tomrich Constr. Co.*, 250 N.C. 521, 524, 109 S.E.2d 248, 251 (1959)).

<sup>11</sup>The costs of repair and restoration may also include the costs of taking "adequate and reasonable measures to control the source [of the sedimentation damage] on [the plaintiff's] property, *Whiteside I*, 146 N.C. App. at 463, 553 S.E.2d at 441, or of "preventive measures" to "restore [the property] to its [prior] non-silt-depositing . . . condition," *Whiteside II*, 169 N.C. App. at 213, 609 S.E.2d at 807. The court in *Whiteside I* explained as follows: "Plaintiff would be entitled to costs for controlling the source of the sediment on defendant's property when it impacts plaintiff's property if necessary to repair and restore the creek and lake. If defendant does not adequately detain sediment from leaving its property or prevent injury to plaintiff's property, plaintiff can take reasonable measures to protect its property in order to repair and restore its lake and creek." *Whiteside I*, 146 N.C. App. at 463, 553 S.E.2d at 441.

In *Whiteside II*, the court reviewed a jury issue stating: "[w]hat amount, if any, is the Plaintiff entitled to recover to prevent future injury to its property because of the defendant's prior acts?" *Whiteside II*, 169 N.C. App. at 211, 609 S.E.2d at 806. The court "conclud[ed] that the jury did not award damages for future injury" but that the "plaintiff's recovery under [the jury instructions] was for the cost of repairs, necessitated by defendant's actions, that were required to forestall further silt deposition into the creek and the lake. This does not constitute an award for 'future injuries.'" *Id.* at 212, 609 S.E.2d at 806.

<sup>12</sup> *Whiteside I*, at 462, 553 S.E.2d at 440.

<sup>13</sup>Apparently because of the corporate nature of the parties, neither *Whiteside* case discusses loss of use as a possible element of actual property damages for violation of the Sedimentation Pollution Control Act. *Cf. Whiteside I*, 146 N.C. App. at 456-57 and 464, 553 S.E.2d at 437 and 441. If such an instruction is deemed appropriate, it should be submitted as a separate and additional issue. *See, e.g.*, N.C.P.I.--Civil 107.60.

actual property damages proximately caused to the plaintiff's property by defendant's land-disturbing activity, then you will answer this issue by writing that amount in the space provided.

However, if the plaintiff has failed to prove the monetary amount of actual property damages by the greater weight of the evidence, then you will answer this issue in the space provided by awarding the plaintiff some trivial amount such as one dollar in recognition of the technical damage to the plaintiff's property by the defendant's violation of the Sedimentation Pollution Control Act.