

LAND-DISTURBING ACTIVITY--SEDIMENTATION POLLUTION CONTROL
ACT OF 1973¹--VIOLATION OF ACT-VIOLATION OF ORDINANCE, RULE OR ORDER OF
SECRETARY OF ENVIRONMENT AND NATURAL RESOURCES OR OF LOCAL GOVERNMENT.

The (*state number*) issue reads:

"Did the defendant violate the [Sedimentation Pollution Control Act [and]] [[an ordinance] [a rule] [an order] adopted by [the Secretary of Environment and Natural Resources] [(*state name of local government*)] pursuant to the Sedimentation Pollution Control Act], causing damage to the plaintiff's property?"²

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 undertook land-disturbing activity in violation of the Sedimentation Pollution Control Act and that such violation was a proximate³ cause of the damage to the plaintiff's property.⁴

¹ See N.C. Gen. Stat. §§ 113A-50 to 113A-67.

² See N.C. Gen. Stat. § 113A-66 ("Any person injured" by land-disturbing activity that amounts to a violation of the Sedimentation Pollution Control Act or related local regulations "may bring a civil action against the person alleged to be in violation" seeking: "injunctive relief"; "an order enforcing the law, ordinance, or erosion and sedimentation control plan violated"; "damages caused by the violation"; and litigation costs, where actual damages awarded amount to \$5,000 or less.).

³ 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; however, the Pattern Jury Committee believes proximate cause is the appropriate standard. 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 appellate decisions involving jury trials under, *inter alia*, N.C. Gen. Stat. § 113A-66, the issue was not addressed. See *Whiteside Estates, Inc. v. Highlands Cove, L.L.C.* ("*Whiteside I*"), 146 N.C. App. 449, 553 S.E.2d 431 (2001), and *Whiteside Estates, Inc. v. Highlands Cove, L.L.C.* ("*Whiteside II*"), 169 N.C. App. 209, 609 S.E.2d 284 (2005); 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.").

⁴ See *Whiteside I*, 146 N.C. App. at 459-61, 553 S.E.2d at 439-40 (holding that downstream landowner could recover for damages caused by sediment runoff from the upstream landowner's property into a stream and lake); and *Whiteside II*, 169 N.C. App. at 212, 609 S.E.2d at 806 (affirming award of damages for cost of restoring a creek to its "non-silt-depositing pre-nuisance condition" in order to prevent further damage).

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Land-disturbing activity means any use of land by any person⁵ in [[residential] [industrial] [educational] [institutional] [commercial] development] [highway and road construction and maintenance] that results in a change in the natural cover or topography, and that may cause or contribute to sedimentation.⁶ Sedimentation is the process by which solid particulate matter, both mineral and organic, has been or is being transported by water, air, gravity, or ice from its site of origin.⁷

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 the plaintiff's property. The plaintiff is not required to prove that the defendant's undertaking of land-disturbing activity in violation of the Sedimentation Pollution Control Act was the *sole* proximate cause of the damage to the plaintiff's property. Rather, the plaintiff must prove by the greater weight of the evidence that the defendant's land-disturbing activity in violation of the Act was *a* proximate cause.

In this case, the plaintiff contends, and the defendant denies, that the defendant violated the Sedimentation Pollution Control Act, in [the following way] [one or more of the following ways]:

⁵ "Person" includes any "individual, partnership, firm, association, joint venture, public or private corporation, trust, estate, commission, board, public or private institution, utility, cooperative, interstate body, or other legal entity." N.C. Gen. Stat. § 113A-52(8).

⁶ N.C. Gen. Stat. § 113A-52(6).

⁷ See N.C. Gen. Stat. § 113A-52(10) (defining "sediment").

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[The *(state appropriate number)* contention is that the defendant undertook land-disturbing activity in proximity to a natural watercourse or lake and failed to provide a sufficient buffer zone. The Sedimentation Pollution Control Act requires that an undisturbed buffer zone along the margin, that is the edge, of the watercourse be 25 feet wide or of sufficient width to confine visible siltation within the twenty-five percent (25%) of the buffer zone nearest the land-disturbing activity, whichever is greater.]⁸

[The *(state appropriate number)* contention is that the defendant, in undertaking land-disturbing activity, created an angle for graded slopes and fills greater than the angle that can be retained by vegetative cover or other adequate erosion-control devices or structures. The Sedimentation Pollution Control Act requires the angle for graded slopes and fills to be no greater than the angle that can be retained by vegetative cover or other adequate erosion control devices or structures.]⁹

[The *(state appropriate number)* contention is that the defendant, in undertaking land-disturbing activity, left graded slopes exposed for 21 calendar days without planting or otherwise providing temporary or permanent ground cover, devices, or structures sufficient to restrain erosion. The Sedimentation Pollution Control Act requires that graded slopes left exposed shall, within 21 calendar days of completion of any phase of grading, be planted or otherwise provided with temporary or permanent ground cover, devices, or structures sufficient to restrain erosion.]¹⁰

The *(state appropriate number)* contention is that the defendant, in undertaking

⁸ See N.C. Gen. Stat. § 113A-57(1)

⁹ See N.C. Gen. Stat. § 113A-57(2).

¹⁰ See *id.*

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land-disturbing activity, violated [an ordinance] [a rule] [an order] adopted pursuant to the Sedimentation Pollution Control Act by [the Secretary of Environment and Natural Resources] [*state name of local government, e.g., Wake County*] which provides as follows: (*State provisions of ordinance, rule or order*). The law requires compliance with [ordinances] [rules] [orders] adopted by [the Secretary of Environment and Natural Resources] [local governments, such as (*state name of local government*)].

(If it is contended that more than one ordinance, rule or order has been violated, state such additional contentions individually in the format of the paragraph above.)

(NOTE WELL: The following two alternatives address land-disturbing activity in violation of an approved erosion and sedimentation control plan. The first alternative is based upon N.C. Gen. Stat. § 113A-66; the second is based upon N.C. Gen. Stat. § 113A-57(5), effective August 23, 2006. As n.12 implies, the distinction may well be one of form rather than substance; however, an abundance of caution dictates using one or the other alternative according to the chronology of the case at issue.)

[The (*state appropriate number*) contention is that the defendant [initiated] [continued] [initiated and continued] land-disturbing activity in violation of an approved erosion and sedimentation control plan. Under the Sedimentation Pollution Control Act, land-disturbing activity for which an erosion and sedimentation control plan is required must be [initiated] [continued] [initiated and continued] in accordance with the terms, conditions, and provisions of an approved plan.]¹¹

[The (*state appropriate number*) contention is that the defendant conducted land-disturbing activity in violation of an approved erosion and sedimentation control plan. The Sedimentation Pollution Control Act requires that land-disturbing activity be conducted in accordance with the approved erosion and sedimentation control plan.¹²]

¹¹ See N.C. Gen. Stat. § 113A-66(a).

¹² See N.C. Gen. Stat. § 113A-57(5), "effective August 23, 2006." However, this amendment appears

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(NOTE WELL: The following four alternatives apply when land-disturbing activity is undertaken that will disturb more than one acre¹³ on a tract¹⁴.)¹⁵

[The *(state appropriate number)* contention is that the defendant, in undertaking land-disturbing activity that would disturb more than one acre on a tract, failed to install erosion and sedimentation control devices and practices sufficient to retain the sediment generated by the land-disturbing activity within the boundaries of the tract during construction and development of the tract. Erosion refers to the wearing away of land surface by the action of wind, water or gravity, acting separately or in combination.¹⁶ Sediment is solid particulate matter, both mineral and organic, that has been transported by water and gravity from its site of origin.¹⁷ When land-disturbing activity that will disturb more than one acre is undertaken on a tract, the Sedimentation Pollution Control Act

simply to clarify the pre-existing provisions of 113A-66(a) that "any person injured . . . "by the initiation or continuation of a land-disturbing activity for which an erosion or sedimentation control plan is required other than in accordance with the terms, conditions, and provisions of an approved plan, may bring a civil action against the person alleged to be in violation" See 2006 N.C. Sess. Laws 255 (amending N.C. Gen. Stat. § 113A-57 to include a new subdivision (5)) which is entitled in part "An Act to Amend Certain Environmental and Natural Resources Law to . . . (2) Clarify the Requirement that Land-Disturbing Activity be Conducted in Accordance with an Approved Plan"

¹³ See *Williams v. Von Allen*, 182 N.C. App. 121, 125, 641 S.E.2d 391, 393 (2007) (N.C. Gen. Stat. § 113A-57(3)-(4) "condition their application on land-disturbing activity that disturbs more than one acre." However, N.C. Gen. Stat. §§ 113A-57(1) and (2) "contain no such limitation" and are applicable "without regard to the size of the land area that is disturbed"; see also *McHugh v. N.C. Dept. of E.H.N.R.*, 126 N.C. App. 469, 476, 485 S.E.2d 861, 866 (1997) ("Had our General Assembly . . . wished [N.C. Gen. Stat. § 113A-57(1)-(2)] to contain a one acre requirement, they could have added it to these sections.").

¹⁴ "Tract" refers to all contiguous land and bodies of water being disturbed as a unit, regardless of ownership. See N.C. Gen. Stat. § 113A-52(10b).

¹⁵ See N.C. Gen. Stat. § 113A-57 (3)-(4).

¹⁶ N.C. Gen. Stat. § 113A-52(5).

¹⁷ See N.C. Gen. Stat. § 113A-52(10).

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requires the installation of erosion and sedimentation control devices and practices sufficient to retain the sediment generated by the land-disturbing activity within the boundaries of the tract during construction and development of the tract.^{18]}

[The (*state appropriate number*) contention is that the defendant, in undertaking land-disturbing activity that would disturb more than one acre on a tract, failed to plant or otherwise provide a permanent ground cover sufficient to restrain erosion after completion of construction or development of the tract. Erosion refers to the wearing away of land surface by the action of wind, water or gravity, acting separately or in combination.¹⁹ When land-disturbing activity that will disturb more than one acre is undertaken on a tract, the Sedimentation Pollution Control Act requires the planting or other provision of permanent ground cover sufficient to restrain erosion after completion of construction or development within a time period specified by the North Carolina Sedimentation Control Commission.]²⁰

[The (*state appropriate number*) contention is that the defendant, before initiating land-disturbing activity that would disturb more than one acre on a tract, failed to file an erosion and sedimentation control plan for the activity with the agency having jurisdiction. Before land-disturbing activity is undertaken that will disturb more than one acre on a tract, the Sedimentation Pollution Control Act requires the filing of an erosion and sedimentation control plan with the agency having jurisdiction [30 or more days prior to initiating the

¹⁸ See N.C. Gen. Stat. § 113A-57(3).

¹⁹ N.C. Gen. Stat. § 113A-52(5).

²⁰ See N.C. Gen. Stat. § 113A-57(3).

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activity²¹].²² The (*state name of agency*) is the agency having jurisdiction over the activity at issue in this case.]

[The (*state appropriate number*) contention is that the defendant, before initiating land-disturbing activity that would disturb more than one acre on a tract, failed to secure approval of an erosion and sedimentation control plan for the activity from the agency having jurisdiction. Before land-disturbing activity is undertaken that will disturb more than one acre on a tract, the Sedimentation Pollution Control Act requires approval of an erosion and sedimentation control plan for the activity by the agency having jurisdiction [30 or more days prior to initiating the activity²³].²⁴ The (*state name of agency*) is the agency having jurisdiction over the activity at issue in this case.]

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 violated the Sedimentation Pollution Control Act in [the way] [any one or more of the ways] that I have explained to you, and that such violation was a proximate cause of damage to 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"

²¹ "An erosion and sedimentation control plan may be filed less than 30 days prior to initiation of a land-disturbing activity if the plan is submitted under an approved express permit program." N.C. Gen. Stat. § 113A-57(4).

²² *See id.*

²³ Once a plan filed under an express permit program less than 30 days prior to initiation of a land-disturbing activity has been approved, "the land-disturbing activity may be initiated and conducted in accordance with the plan." *Id.*

²⁴ *See id.*

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in favor of the defendant.