

NUISANCE INSTRUCTIONS

Introduction

These instructions are designed to be used when liability is sought to be imposed upon a person who, or an entity that, unreasonably interferes with another's property or rights and may cause harm. There is a distinction between public and private nuisances.¹ A private nuisance is strictly limited to an interference with a person's interest in the enjoyment of property.² The Restatement defines a private nuisance as "a nontrespassory invasion of another's interest in the private use and enjoyment of land."³ In contrast, a public nuisance is not limited to an interference with the use and enjoyment of the plaintiff's land. Public nuisance encompasses any unreasonable interference with a right common to the general public.⁴ The Arizona legislature adopted a similar requirement in the criminal code, defining a public nuisance as an interference "with the comfortable enjoyment of life or property by an entire community or neighborhood, or by a considerable number of persons...."⁵

Often, the same facts will support both claims for private nuisance and public nuisance.⁶

These instructions are intended to address nuisance claims for damages. A suit to enjoin a nuisance sounds in equity, so no jury instructions would be necessary in most circumstances concerning injunctive relief.⁷

SOURCES:

¹ *City of Phoenix v. Johnson*, 51 Ariz. 115, 123, 75 P.2d 30, 34 (1938).

² *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Ariz.*, 148 Ariz. 1, 8, 712 P.2d 914, 921 (1985); *Spur Indus., Inc. v. Del Webb Dev. Co.*, 108 Ariz. 178, 183, 494 P.2d 700, 705 (1972); *Tucson v. Apache Motors*, 74 Ariz. 98, 245 P.2d 255 (1952); *United Verde Extension Mining Co. v. Raltson*, 37 Ariz. 554, 296 P. 262 (1931).

³ *Armory Park*, 148 Ariz. at 4, 712 P.2d at 917 citing RESTATEMENT (SECOND) OF TORTS § 821D.

⁴ *Id.* at 8, 712 P.2d at 921 citing RESTATEMENT (SECOND) OF TORTS § 821B and PROSSER ON TORTS, § 86 at 618.

⁵ A.R.S. § 13-2917. A public nuisance may subject the defendant to liability for both criminal and tort liability. See A.R.S. § 13-2917. Plaintiff need not prove, however, a violation of criminal law in order to establish liability for the tort of public nuisance. *Armory Park*, 148 Ariz. at 9, 712 P.2d at 922.

⁶ *Armory Park*, 148 Ariz. at 4, 712 P.2d at 917; for issues relating to standing to bring an action for public nuisance, see *infra* at Instruction 3.

⁷ *Spur Indus., Inc. v. Del Webb Dev. Co.*, 108 Ariz. at 184, 494 P.2d at 707.

USE NOTE: These instructions do not include an instruction on coming to the nuisance. See generally *Spur Indus., Inc. v. Del Webb Dev.*, *supra*, for a discussion on coming to the nuisance and the equitable nature of suits to enjoin a nuisance, which balance the public interest with protections of a lawfully operating business.

NUISANCE 1

Private Nuisance: Definition and Statement of Claim

[*Plaintiff*] claims that [*defendant*] created a nuisance consisting of [*describe the alleged nuisance*]. A nuisance is a condition which unreasonably interferes with another person's use and enjoyment of [his] [her] [its] property and causes substantial harm. In order to recover on this claim, [*plaintiff*] must prove each of the following elements:

1. The [*condition*] [exists] [existed];
2. [*Defendant*] intentionally caused, created or contributed to this condition;
3. The condition unreasonably [interferes] [interfered] with [*plaintiff's*] use and enjoyment of [his] [her] [its] property; and
4. The interference with [*plaintiff's*] use and enjoyment of property is substantial.

SOURCES: *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Ariz.*, 148 Ariz. 1, 7, 712 P.2d 914, 920 (1985); *Nolan v. Starlight Pines Homeowners Ass'n*, 216 Ariz. 482, 489, 167 P.3d 1277, 1284 (App. 2008); *Graber v. City of Peoria*, 156 Ariz. 553, 555, 753 P.2d 1209, 1211 (App. 1988) (citing *City of Phoenix v. Johnson*, 51 Ariz. 115, 75 P.2d 30 (1938)). The Restatement (Second) of Torts 821 has been cited with approval by the Arizona Supreme Court. *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Ariz.*, 148 Ariz. at 7, 712 P.2d at 920. However, no reported opinion specifically applies the Restatement (Second) of Torts § 822, which allows nuisance liability for negligent acts and even strict liability for ultra-hazardous activities.

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NUISANCE 2

Private Nuisance: Injury Determines Unreasonableness

Whether an interference with another person's use and enjoyment of property is unreasonable is determined by the injury that the condition caused, not by the conduct of the party that created the condition.

For an interference to be unreasonable it must be more than a slight inconvenience or a petty annoyance. The continuation or recurrence of the interference is often necessary to make the harm substantial.

SOURCES: *Graber v. City of Peoria*, 156 Ariz. at 555, 753 P.2d at 1211; *Gainey v. Folkman*, 114 F. Supp. 231, 233-34 (D. Ariz. 1953).). The nuisance must constitute “more than slight inconvenience or petty annoyance. The law does not concern itself with trifles, and therefore there must be a real and appreciable invasion of the plaintiff's interests....” *Nolan v. Starlight Pines Homeowners Ass'n*, 216 Ariz. 482, 489, 167 P.3d 1277, 1284 (App. 2008).

NUISANCE 3

Public Nuisance: Definition and Statement of Claim

[*Plaintiff*] claims that [*defendant*] created a public nuisance consisting of [*describe alleged nuisance*]. A public nuisance is a [condition or event] that substantially interferes with the enjoyment of life or property by an entire community, neighborhood, or considerable number of persons. On this claim, [*plaintiff*] must prove each of the following elements:

1. The condition substantially [interferes] [interfered] with a [community's] [neighborhood's] [a considerable number of persons'] comfortable enjoyment of life or property;
2. [*Defendant*] intentionally caused, created, or contributed to this event or condition;
2. The event or condition [is] [was] unreasonable under the circumstances;¹ and
3. [*Plaintiff*] was substantially damaged.

¹ A claim for public nuisance requires a showing both of substantial interference with a right held collectively by the public and that the substantial interference is unreasonable under the circumstances. Reasonableness is assessed using a balancing test, considering “the utility and reasonableness of the conduct and balanc[ing] these factors against the extent of the harm inflicted and the nature of the affected [area].” RESTATEMENT (SECOND) TORTS § 821B.

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NUISANCE 4

Distinction Between Private and Public Instructions

A nuisance is a private nuisance if it affects one or a definite number of persons in the enjoyment of some private right that is not common to the public. A nuisance is a public nuisance when it affects the rights of persons as a part of the public.¹

SOURCE: *Armory Park Neighborhood Ass'n v. Episcopal Cty. Servs. in Ariz.*, 148 Ariz. 1, 4, 712 P.2d 914, 917 (1985).

USE NOTE: This instruction is intended to be used when both public and private nuisance claims are being asserted.

NUISANCE 5

Damages for Public or Private Nuisance

If you find that [*defendant*] is liable to [*plaintiff*] on the claim of [private or public] nuisance, you must then decide the full amount of money that will reasonably and fairly compensate [*plaintiff*] for any of the following elements of damage proved by the evidence to have resulted from the nuisance:

1. Harm to the property;
2. Loss of use of the property; and
3. Discomfort and annoyance to [*plaintiff*] as an occupant of the property.

SOURCES: *Burns v. Jaquays Mining Corp., D.W.*, 156 Ariz. 375, 379, 752 P.2d 28, 32 (App. 1987) (citing with approval RESTATEMENT (SECOND) OF TORTS § 929 (1979); *City of Globe v. Rabogliatti*, 24 Ariz. 392, 398-99, 210 P. 685, 687 (1922); *cf. Dixon v. City of Phoenix*, 173 Ariz. 612, 620-22, 845 P.2d 1107, 1115-17 (App. 1992) (citing with approval RESTATEMENT (SECOND) OF TORTS § 929 for damages for trespass and negligence).

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NUISANCE 6

Measure of Damages for Harm to the Property

The measure of damages for harm to the property is the difference between the reasonable market value of the property immediately before the nuisance and the reasonable market value of the property immediately after the nuisance, unless the property can be [replaced] [restored].

If the damaged property can be [replaced] [restored], the measure of damages for harm to the property is the reasonable cost of [replacement] [restoration], up to but not exceeding the difference in the reasonable market value of the property before and after the nuisance. But if [*plaintiff*] proves that the property has intrinsic value, the measure of damages is the cost of [replacement] [restoration] without regard to the difference in the reasonable market value before and after the nuisance, so long as that cost is reasonable in relation to the damage caused.

SOURCES: *Burns v. Jaquays Mining Corp., D.W.*, 156 Ariz. 375, 379, 752 P.2d 28, 32 (App. 1987) (citing with approval RESTATEMENT (SECOND) OF TORTS § 929 (1979)); *cf. Dixon v. City of Phoenix*, 173 Ariz. 612, 620-22, 845 P.2d 1107, 1115-18 (App. 1992) (citing with approval RESTATEMENT (SECOND) OF TORTS § 929 for damages for trespass and negligence); *City of Globe v. Rabogliatti*, 24 Ariz. 392, 398-99, 210 P. 685, 687 (1922); *Graber v. City of Peoria*, 156 Ariz. 553, 557, 753 P.2d 1209, 1213 (App. 1988); *A.I.D. Ins. Servs. v. Riley*, 25 Ariz. App. 132, 135-36, 541 P.2d 595, 598-99 (1975).

NUISANCE 7

Continuing or Permanent Nuisance

The nuisance is continuing if its injury to another can be stopped by [defendant] but [defendant] failed to do so. If you find the nuisance is a continuing nuisance, only those damages that have accrued up to the time of the filing of the complaint are recoverable.

The nuisance is permanent if [describe the thing causing the nuisance] cannot continue without being a nuisance. If you find that the nuisance is a permanent nuisance, all past, present, and future damages are recoverable.

SOURCES: *City of Phoenix v. Johnson*, 51 Ariz. 115, 75 P.2d 30 (1938); *City of Tucson v. Apache Motors*, 74 Ariz. 98, 245 P.2d 255(1952).

USE NOTES: If plaintiff(s) suffered an indivisible injury to the use and enjoyment of property caused by the acts of multiple defendants such that it would be impossible for plaintiff(s) to apportion damages caused by the multiple defendants, the burden falls on the defendants to apportion damages. *A Tumbling-T Ranches v. Paloma Inv. Ltd. P'ship*, 197 Ariz. 545, 552 ¶¶ 22-25, 5 P.3d 259, 266 (App. 2000).

The duty to mitigate damages has no application in cases of nuisance. *City of Tucson v. Apache Motors*, 74 Ariz. 98, 107, 245 P.2d 255, 261 (1952); see also *United Verde Extension Mining Co. v. Ralston*, 37 Ariz. 554, 296 P. 262 (1931).