IN THE

# ARIZONA COURT OF APPEALS

DIVISION TWO

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KELLEY ROLLINGS, TRUSTEE OF THE ROLLINGS TRUST DATED APRIL 22, 1982; DONALD B. ROLLINGS, TRUSTEE OF THE ROLLINGS TRUST DATED APRIL 1, 1989; AND BACON INDUSTRIES, AN ARIZONA CORPORATION,
*Plaintiffs/Appellees/Cross-Appellants*,

*v.*

THE CITY OF TUCSON,
*Defendant/Appellant/Cross-Appellee*.

No. 2 CA-CV 2014-0069
Filed May 14, 2015

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
*See* Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

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Appeal from the Superior Court in Pima County
No. C20020509
The Honorable Jeffrey T. Bergin, Judge

**VACATED AND REMANDED**

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COUNSEL

Khalidi Law Firm, PLLC, Tucson
By Thabet N. Khalidi
*Counsel for Plaintiffs/Appellees/Cross-Appellants*

Mesch, Clark & Rothschild, P.C., Tucson
By Gary J. Cohen
*Counsel for Defendant/Appellant/Cross-Appellee*

Ellen M. Van Riper, Phoenix
*Counsel for Amicus Curiae the League of Arizona Cities and Towns*

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**MEMORANDUM DECISION**

Presiding Judge Kelly authored the decision of the Court, in which Judge Howard and Judge Vásquez concurred.

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K E L L Y, Presiding Judge:

**¶1** The City of Tucson ("City") appeals from the trial court's judgment awarding damages to Kelley Rollings, Trustee of the Rollings Trust dated April 22, 1982, Donald Rollings, Trustee of the Rollings Trust dated April 1, 1989, and Bacon Industries, Inc., (collectively "Rollings") for damage to Rollings's historic buildings allegedly caused by leaks in the City's water lines. The City argues the court's instructions to the jury regarding trespass and nuisance were incorrect because they omitted the element of intent. The City also contends the court erred in giving an indivisible injury instruction. Rollings cross-appeals from the court's denial of its motion for prejudgment interest. For the following reasons, we vacate the judgment in favor of Rollings and remand for a new trial.

**Factual and Procedural Background**

**¶2** Rollings owns a number of historic adobe buildings in Tucson. In 2002, Rollings filed a complaint against the City, alleging that it had negligently allowed water to leak from city pipes, causing damage to several of Rollings's buildings. Rollings also asserted claims of trespass and nuisance. A jury found in favor of the City on all claims, and the trial court entered judgment in favor of the City. Rollings appealed to this court, and we reversed the judgment in favor of the City on the nuisance and trespass claims, affirmed the jury's verdict on the negligence claim, and remanded the matter for further proceedings.

**¶3** Following a second trial, the jury found in favor of Rollings on the trespass and nuisance claims and awarded damages

totaling $2,945,158. After the trial court entered judgment in favor of Rollings, the City filed a timely motion for a new trial, which the court denied. The City then filed a timely notice of appeal, and Rollings cross-appealed.

## Discussion

### Issues in First Trial and First Appeal

**¶4** Rollings contends that our previous memorandum decision forecloses the City's argument that intent is an element of trespass and nuisance. Each of Rollings's primary arguments—that our decision and mandate required the second trial court to instruct the jury that trespass and nuisance are strict liability torts, that the law of the case doctrine applies, and that the City should be judicially estopped from asserting intent is an element of trespass and nuisance—turns on our decision in the first appeal. *See Cyprus Bagdad Copper Corp. v. Ariz. Dep't of Revenue*, 196 Ariz. 5, ¶ 7, 992 P.2d 5, 7 (App. 1999) (on remand, trial court may not reconsider matters decided by appellate court); *Ziegler v. Superior Court*, 134 Ariz. 390, 393, 656 P.2d 1251, 1254 (App. 1982) (law of the case applies in subsequent proceeding when facts and issues are substantially the same as those in first proceeding); *Bank of Am. Nat'l Trust and Sav. Ass'n v. Maricopa Cnty.*, 196 Ariz. 173, ¶ 7, 993 P.2d 1137, 1139 (App. 1999) (for judicial estoppel to apply, question involved in prior proceeding must be same). Accordingly, we first must decide if the question of whether intent is an element of trespass and nuisance was before us in the first appeal.

**¶5** During the first trial, Rollings requested an instruction that "plaintiffs need not show that the City acted negligently or wrongfully" to prove trespass or nuisance. The City, in contrast, argued that "the law requires negligence be shown in order for liability to be assessed against a water company for leaks from its mains," regardless of whether the claim is one for "nuisance, trespass, or otherwise." The court declined to give the requested instruction.

**¶6** The court instructed the jury that, to prove trespass, Rollings had to prove "[t]hat the City trespassed by leaking water

onto [their] property without their permission" and "[t]hat the City's trespass caused damage to [their] property." The court further instructed the jury that, to prove nuisance, Rollings had to prove that "[t]he leaking water unreasonably and substantially interfered with [their] use and enjoyment of their property" and "[c]aused damage to [their] property." In an instruction entitled "Negligence Instruction," the court instructed the jury that "[a] water distributor may not be held liable for leaks unless the injuries complained of are proximately caused by its negligence." The jury found in favor of the City on all claims.

**¶7** On appeal, Rollings argued that "the Court's instruction on proximate causation, which apparently was intended as a negligence instruction, gave the impression that *any* liability had to be based on damages proximately caused by negligence." Relying on *City of Phoenix v. Johnson*, 51 Ariz. 115, 75 P.2d 30 (1938), Rollings claimed that Arizona law was clear that "a plaintiff who sues a city for nuisance or trespass resulting from operation of a municipal system need not prove that the city was negligent in its design, operation, or maintenance of the system." Thus, according to Rollings, "the defendant's negligence is not an element of a claim for nuisance or trespass, and the absence of negligence is not a defense to those claims."

**¶8** In its answering brief, the City stated that "[t]he trial court's nuisance, trespass and negligence instructions adequately set forth the applicable law" and argued that the proximate cause instruction "states that it relates solely to the negligence claim and not to Rollings' claims of trespass or nuisance." Neither Rollings's nor the City's briefs addressed whether intent is an element of trespass or nuisance.

**¶9** In our memorandum decision, we noted that although the City had challenged Rollings's statement of the law that the jury could find the City liable for nuisance or trespass without finding it negligent, the City had not raised that argument on appeal. *Rollings v. City of Tucson*, No. 2 CA-CV 2006-0183, n.2 (memorandum decision filed Dec. 24, 2007). We stated that the trial court correctly instructed the jury on the elements of each cause of action, *id.* ¶ 9, but agreed with Rollings that the instructions the court gave

regarding the elements of nuisance, trespass, and negligence, "when viewed within the context of other instructions, . . . suggested that the jury had to find the City had been negligent in order to find it liable under any of the three causes of action," *id.* ¶ 8. We stated that "under Arizona law pertaining to claims of trespass and nuisance, Rollings was not required to demonstrate that the City had committed any wrong or error—only that the City's water had invaded Rollings's property and had caused Rollings damage." *Id.* ¶ 10. We concluded that, particularly in light of the City's closing argument, there was "'substantial doubt as to whether the jury was properly guided in its deliberations'" and that the trial court erred by failing to give Rollings's requested clarifying instruction. *Id.* ¶ 18, *quoting Thompson v. Better-Bilt Aluminum Prods. Co.*, 187 Ariz. 121, 126, 927 P.2d 781, 786 (App. 1996).

**¶10** At the second trial, the City requested that the trial court instruct the jury that, to prove trespass, Rollings had to prove "the City trespassed by intentionally leaking water onto [Rollings's] property without their permission" and "'[i]ntent' means that the actor desires to cause the consequences of his acts or that he believes that the consequences are substantially certain to result from it." The City also requested that the court instruct the jury that, to prove nuisance, Rollings had to prove "the leaking water is a legal cause of an invasion of their interest in the private use and enjoyment of land, and the invasion is either 1) intentional and unreasonable; or 2) unintentional and reckless." When the parties were settling final instructions, the City objected to the court's trespass and nuisance instructions, arguing that the instructions should have included intent as an element of both claims. The court overruled both objections and gave instructions on trespass and nuisance that did not include an intent element.

**¶11** After reviewing the record in the first trial, the briefs in the first appeal, and our memorandum decision, as set forth above, we conclude that the parties did not properly bring before us in the first appeal the question of whether intent is an element of trespass and nuisance. Rather, the parties limited their arguments to whether Rollings had to prove the City was negligent in the construction or maintenance of the water main in order to establish claims for trespass and nuisance and whether the court's

instructions to the jury were confusing or misleading. We did not hold, as Rollings suggests, that "strict liability applies to Rollings's claims of trespass and nuisance," nor did we direct the trial court on remand to instruct the jury that Rollings did not need to prove intent to prove its claims of trespass and nuisance. *See Rollings*, No. 2 CA-CV 2006-0183, ¶¶ 6-19. Instead, we concluded only that the first trial court's instructions as given could have confused the jury as to whether Rollings was required to prove the City had been *negligent* in order to prevail on its trespass and nuisance claims, which we determined Rollings did not need to do. *Id.* ¶¶ 8, 10. Even the question of whether negligence was required to prove trespass and nuisance was not squarely before us because, as we noted, the City had challenged Rollings's statement of the law that the jury could find the City liable for nuisance or trespass without finding it negligent but had not raised that argument on appeal. *Id.* n.2.

**¶12** We acknowledge our statement that "under Arizona law pertaining to claims of trespass or nuisance, Rollings was not required to demonstrate that the City had committed any wrong or error—only that the City's water had invaded Rollings's property and had caused Rollings damage," *id.* ¶ 10, could suggest that Rollings was not required to prove any mental state on the part of the City to prevail on its trespass and nuisance claims. But, taken in the context of the proceedings at the first trial, the arguments made by the parties in their briefs, and the remainder of our decision, it is clear that the question of whether intent is a required element of trespass and nuisance was not properly presented on appeal and we did not address it.

**Effect of Memorandum Decision and Mandate**

**¶13** Rollings argues that "[t]he second trial court was mandated to apply this Court's holding that strict liability applies to Rollings's claims of trespass and nuisance." The City contends that our previous memorandum decision did not "legally adjudicate[] the issue of whether intent is an element of trespass and/or nuisance in this case" and therefore "provides no legal basis upon which the substance of the City's challenges to the jury instructions can be properly avoided." Indeed, "[a] trial court does not have 'authority to transgress upon the obvious intent of this court' by contravening

on remand a decision and mandate previously issued." *Raimey v. Ditsworth*, 227 Ariz. 552, ¶ 6, 261 P.3d 436, 439 (App. 2011), *quoting Tucson Gas & Elec. Co. v. Superior Court*, 9 Ariz. App. 210, 212, 450 P.2d 722, 724 (1969). "Thus, an appellate mandate, along with the decision it seeks to implement, is binding on the trial court and enforceable according to its 'true intent and meaning.'" *Id.*, *quoting Vargas v. Superior Court*, 60 Ariz. 395, 397, 138 P.2d 287, 288 (1943). And on remand, a trial court may not consider "matters decided by an appellate court" but "may address any issues that the appellate court 'did not dispose of either expressly or impliedly.'" *Cyprus Bagdad*, 196 Ariz. 5, ¶ 7, 992 P.2d at 7, *quoting Pan-Pacific & Low Ball Cable Television Co. v. Pac. Union Co.*, 987 F.2d 594, 596 (9th Cir. 1993).

**¶14** As discussed above, however, we did not decide in the first appeal whether intent is an element of trespass and nuisance. Instead, we decided only that the trial court's instructions in the first trial could have confused the jury about whether Rollings needed to prove negligence to prevail on its trespass and nuisance claims. Our decision required only that the second trial court not instruct the jury that negligence is required to prove trespass and nuisance, which the court did not do. The question of intent—undecided by us—was not addressed. Thus, our previous memorandum decision did not require the court in the second trial to instruct the jury that trespass and nuisance are strict liability torts.

**Law of the Case**

**¶15** Rollings argues we "specifically rejected the idea that Rollings must prove any species of conscious or unconscious fault that could be imputed to the City" and that decision is the law of the case. The City contends our decision was not the law of the case because "the issue in the first appeal (*i.e.*, should the trial court have clarified, under the unchallenged-on-appeal instructions it gave, that *negligence* was not an element of nuisance and trespass) was different than the issue in this appeal (*i.e.*, whether trespass and nuisance are strict liability torts devoid of any *mens rea*)."

**¶16** The law of the case doctrine "describes the judicial policy of refusing to reopen questions previously decided in the same case by the same court or a higher appellate court."

*Powell-Cerkoney v. TCR-Mont. Ranch Joint Venture, II*, 176 Ariz. 275, 278, 860 P.2d 1328, 1331 (App. 1993). Our decision in a case "is the law of that case *on the points presented* throughout all the subsequent proceedings in the case in both the trial and appellate courts, provided the facts and issues are substantially the same as those on which the first decision rested." *Ziegler*, 134 Ariz. at 393, 656 P.2d at 1254. Law of the case "is generally held to be a rule of policy and not one of law," and our supreme court has recognized that it is "a harsh rule and that it should not be strictly applied when it would result in a manifestly unjust decision." *Dancing Sunshines Lounge v. Indus. Comm'n*, 149 Ariz. 480, 482, 720 P.2d 81, 83 (1986). The law of the case doctrine does not apply when

> 1) there has been a change in the essential facts or issues; 2) there has been a substantial change of evidence; 3) there has been an error in the first appellate decision so as to render it manifestly erroneous or unjust; 4) there has been a change in the applicable law; 5) the issue was not actually decided in the first decision or the decision is ambiguous; and 6) . . . the prior appellate decision was not on the merits.

*Id.* at 483, 720 P.2d at 84.

**¶17** As discussed above, the question of whether intent is an element of trespass and nuisance was not presented to us in the first appeal and therefore "was not actually decided." *Id.* Accordingly, we conclude the law of the case doctrine does not apply here.

**Waiver and Judicial Estoppel**

**¶18** Rollings argues the City "waived any arguments that strict liability does not apply" because it "insisted the Court's instructions regarding the strict liability elements of trespass and nuisance were correct statements of the law." Asserting that "[t]he City never made any argument that the strict liability standard in trespass and nuisance was an incorrect statement of law at any point during the appellate proceedings after the first trial," Rollings

contends "the City never gave this Court an opportunity to consider its various arguments that strict liability should not apply to this case."

**¶19** The City argues, and we agree, that it could not have filed a cross-appeal because it obtained a complete defense verdict in the first trial. Only a "party aggrieved by a judgment" may appeal. Ariz. R. Civ. App. P. 1(d); *In re Estate of Friedman*, 217 Ariz. 548, ¶ 9, 177 P.3d 290, 293 (App. 2008). "A party is aggrieved if (1) its interest is direct, substantial, and immediate, (2) its interest would be prejudiced by the judgment or benefitted by reversal of the judgment, and (3) a legal right or its pecuniary interest has been directly affected." *Douglas v. Governing Bd. of Window Rock Consol. Sch. Dist. No. 8*, 221 Ariz. 104, ¶ 7, 210 P.3d 1275, 1279 (App. 2009). "Generally, when a court enters judgment in favor of a party, that party is not 'aggrieved' and thus has no standing to appeal." *Id.* ¶ 8, *citing Trus Joist Corp. v. Safeco Ins. Co. of Am.*, 153 Ariz. 95, 101, 735 P.2d 125, 131 (App. 1986) ("It is the general rule that a party has no right to appeal from a judgment in its favor since it cannot be an aggrieved party."); *see also Kalil Bottling Co. v. Burroughs Corp.*, 127 Ariz. 278, 282, 619 P.2d 1055, 1059 (App. 1980) (party is "not entitled to cross-appeal from a judgment wholly in its favor on any ground since it is not an aggrieved party"). The judgment in the first trial was wholly in the City's favor; accordingly, it was not an aggrieved party and could not have cross-appealed from the judgment. Thus, we reject Rollings's contention that the City waived its arguments by not asserting them in the first appeal.

**¶20** Rollings also maintains the City should be judicially estopped from arguing that the trial court's instructions regarding the elements of trespass and nuisance were erroneous. "Judicial estoppel is a doctrine that protects the integrity of the judicial system by 'prevent[ing] a party from taking an inconsistent position in successive or separate actions.'" *Bank of Am.*, 196 Ariz. 173, ¶ 7, 993 P.2d at 1139, *quoting State v. Towery*, 186 Ariz. 168, 182, 902 P.2d 290, 304 (1996) (alteration in *Bank of Am.*). "For judicial estoppel to apply, three requirements must be met: '(1) the parties must be the same, (2) the question involved must be the same, and (3) the party asserting the inconsistent position must have been successful in the prior judicial proceeding.'" *Id.*, *quoting Towery*, 186 Ariz. at 182, 920

P.2d at 304. However, "[i]f a court has not accepted a party's position or assertion, 'there is no risk of inconsistent results.'" *Id.* ¶ 8, *quoting Towery*, 186 Ariz. at 183, 920 P.2d at 305.

**¶21** As discussed above, the question of whether intent is an element of trespass and nuisance was not before us in the first appeal. Accordingly, the question presented here is not the same as the question raised in the first appeal, and because the City never presented the argument that intent is required to prove trespass and nuisance in the first appeal, we could not have "accepted [its] position or assertion" in our decision. Thus, we conclude judicial estoppel does not apply here.

**Intent as an Element of Trespass and Nuisance**

**¶22** Having concluded that we did not address in the first appeal whether intent is an element of trespass and nuisance, and that the law of the case doctrine and judicial estoppel do not apply, we now must consider whether the trial court's instructions on trespass and nuisance should have included an intent element. "We review a court's jury instructions for an abuse of discretion . . . [b]ut we review whether a jury instruction correctly states the law de novo." *A Tumbling-T Ranches v. Flood Control Dist.*, 222 Ariz. 515, ¶ 50, 217 P.3d 1220, 1238 (App. 2009) (citation omitted).

**¶23** In *Mountain States Telephone and Telegraph Co. v. Kelton*, our supreme court stated, "'Without an intentional act, the defendant's conduct cannot give rise to a trespass.'" 79 Ariz. 126, 132, 285 P.2d 168, 172 (1955), *quoting Socony-Vacuum Oil Co. v. Bailey*, 109 N.Y.S.2d 799, 802 (1952). The court also stated it was not necessary "'that the trespasser intend to commit a trespass or even that he know that his act will constitute a trespass. . . . The actor may be innocent of moral fault, but there must be an intent to do the very act which results in the immediate damage.'" *Id.* at 171-72, *quoting Socony-Vacuum*, 109 N.Y.S.2d at 802. In *Taft v. Ball, Ball & Brosamer, Inc.*, we applied the Restatement's definition of trespass to affirm summary judgment in favor of the defendant "[b]ecause the requisite intent was not present." 169 Ariz. 173, 176, 818 P.2d 158, 161 (App. 1991). The Restatement (Second) of Torts § 158 (1965) provides, "One is subject to liability to another for trespass,

irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally (a) enters land in the possession of the other, or causes a thing or third person to do so . . . ." And in *Mein ex rel. Mein v. Cook*, we considered the Restatement (Second) of Torts § 8A (1965), in determining the meaning of "intent," noting that section 8A had been considered in prior appellate decisions.[1] 219 Ariz. 96, ¶ 15, 193 P.3d 790, 793 (App. 2008). We stated, "the act that caused the harm will qualify as intentional conduct only if the actor desired to cause the *consequences*—and not merely the act itself—or if he was certain or substantially certain that the *consequences* would result from the act." *Id.* ¶ 17.

**¶24** Similarly, we have stated that to prevail on a nuisance claim, plaintiffs must show that the defendant's actions "unreasonably interfered with their use and enjoyment of their property, causing significant harm." *Nolan v. Starlight Pines Homeowners Ass'n*, 216 Ariz. 482, ¶ 32, 167 P.3d 1277, 1284 (App. 2007), *citing Graber v. City of Peoria*, 156 Ariz. 553, 555, 753 P.2d 1209, 1211 (App. 1998), *and* Restatement (Second) of Torts §§ 821D, 821F (1979). We further stated that "[t]he interference must be 'substantial, intentional and unreasonable under the circumstances.'" *Id.*, *quoting Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Ariz.*, 148 Ariz. 1, 7, 712 P.2d 914, 920 (1985) (relying on Restatement (Second) of Torts §§ 826 cmt. c, 821F (1979)). Restatement (Second) of Torts § 822 (1979) provides,

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[1]Restatement § 8A provides, "The word 'intent' is used . . . to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it." Comment a to that section states that intent "has reference to the consequences of an act rather than the act itself. . . . 'Intent' is limited . . . to the consequences of the act." Comment b provides, "All consequences which the actor desires to bring about are intended," but intent is not "limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result."

> One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either (a) intentional and unreasonable, or (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

**¶25** The case law is clear that to constitute a trespass or a nuisance, an act must be intentional. Our supreme court's decision in *Johnson* is not to the contrary. First, *Johnson* addressed only a nuisance claim, not one for trespass. The plaintiff sued the city for nuisance,[2] alleging the city had dumped sewage into a river near their property, causing "noisome and obnoxious odors, gases and foul and nauseating smells" to be carried onto the plaintiffs' property. 51 Ariz. at 120, 123, 75 P.2d at 32-33, 34. The trial court had instructed the jury that

> even though you may find the defendant's sewage disposal plant to have been properly constructed and efficiently operated, if notwithstanding these factors such plant constitutes a nuisance to the

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[2]Our supreme court defined "nuisance" as

> such a use of property or such a course of conduct, irrespective of actual trespass against others, or of malicious or actual criminal intent, which transgresses the just restrictions upon use or conduct which the proximity of other persons or property in civilized communities imposes upon what would otherwise be rightful freedom.

*Johnson*, 51 Ariz. at 123, 75 P.2d at 34.

> plaintiffs, the manner of construction and operation constitutes no defense to plaintiffs' cause of action. The manner of construction and operation standing alone, constitutes no defense to plaintiffs' cause of action.

*Id.* at 129, 75 P.2d at 36. Our supreme court concluded the instruction was not erroneous, because "[n]either an individual nor a municipal corporation has the right to maintain a nuisance without being responsible in damages therefor. No matter how great may be the necessity of providing a sewer system for the city, it may not rightfully be done in such a manner as to maintain a nuisance." *Id.* at 129-30, 75 P.2d at 36.

**¶26** Viewed in context, to the extent it can be read to address the element of intent, *Johnson* is consistent with Restatement § 822. In contrast to the water leak at issue here, *Johnson* dealt with a sewage disposal plant that transported sewage, 51 Ariz. at 120, 75 P.2d at 32, which arguably was an abnormally dangerous activity, *see Boswell v. Phoenix Newspapers, Inc.*, 152 Ariz. 9, 15, 730 P.2d 186, 192 (1986), *citing* W. Page Keeton et al., *Prosser and Keeton on Torts* § 78, at 546-47 (5th ed. 1984) (characterizing accumulating sewage as an abnormally dangerous activity). Restatement § 822, as noted above, provides that one may be subject to liability for nuisance if an act is intentional and unreasonable or if it is unintentional, but actionable under the rules relating to, inter alia, abnormally dangerous activities. Thus, the City could be held strictly liable for the nuisance created by its hazardous disposal system. In contrast, nothing about the City's acts here could be deemed "abnormally dangerous." Thus, Rollings could not establish liability for an unintentional act, but rather was required to prove, in accordance with case law and the Restatement, that the City's conduct was "intentional and unreasonable." *See* Restatement § 822. Contrary to Rollings's contention, *Johnson* does not stand for the proposition that proof of intent never is required for a nuisance claim.

**¶27** We conclude intent is an element of trespass and nuisance and the trial court erred in instructing the jury on the elements of those claims.

**Indivisible Injury Instruction**

**¶28** The City also argues the trial court erred in instructing the jury on indivisible injury and apportionment of damages over its objection because the case did not involve fault or comparative fault. Because this issue is likely to recur on remand, we address it. *See Girouard v. Skyline Steel, Inc.*, 215 Ariz. 126, ¶ 9, 158 P.3d 255, 258 (App. 2007).

**¶29** The trial court's instruction on indivisible injury and apportionment of damages stated that, once Rollings had proven "that it is more probably true than not true that Defendant's water system was a cause of damage to Plaintiffs' property," the burden shifted to the City to prove that "sources of water other than its water system caused specific items of damages . . . and that its water system did not contribute to those specific claimed damages." The court further instructed the jury that if it found the City had "met its burden to prove that a source of water other than its water system caused specific items of damage and that its water system did not contribute to those specific items of damages, then [it] should subtract from the Plaintiffs' total damages those specific damages." The City objected to the instruction, stating, "This is not a fault case, so there is no apportionment of fault that is appropriate in this case. We have asserted as a defense that the source of the damages is another source, but we don't think it's an appropriate damages[] instruction in this case."

**¶30** Generally, the plaintiff has the burden to prove damages. *Patania v. Silverstone*, 3 Ariz. App. 424, 429, 415 P.2d 139, 144 (1966); Restatement (Second) of Torts § 433B(1) (1965). Once such damages are established, damages may be apportioned when "there are distinct harms" or "there is a reasonable basis for determining the contribution of each cause to a single harm." Restatement (Second) of Torts § 433A(1) (1965). Thus, when harms are distinct or may be apportioned on a reasonable basis, apportionment of harm may be appropriate even in cases "where one or more of the contributing causes [to the plaintiff's harm] is an innocent one, as where the negligence of a defendant combines with . . . the operation of a force of nature . . . to bring about the harm to the plaintiff." Restatement § 433A cmt. a. But neither Rollings nor

the City argued that the City's conduct combined with a force of nature to cause the damage. Instead, the City's theory of the case was that rainwater alone caused the damage to Rollings's buildings, while Rollings argued the leaking pipes alone caused the damage. Neither party provided the jury a basis upon which to apportion damages.

**¶31** However, under the indivisible injury rule, "two or more independent tortfeasors who have caused injuries to a plaintiff are liable for all the plaintiff's damages where 'it is not reasonably possible to make a division of the damage caused by the separate acts of negligence.'" *Potts v. Litt*, 171 Ariz. 98, 100, 828 P.2d 1239, 1241 (App. 1991), *quoting Holtz v. Holder*, 101 Ariz. 247, 251, 418 P.2d 584, 588 (1966). In such a case, "once a plaintiff proves that the defendants' conduct contributed to the plaintiff's damages, the burden of proof shifts to the defendants to apportion damages." *A Tumbling-T Ranches v. Paloma Inv. Ltd. P'ship*, 197 Ariz. 545, ¶¶ 23, 25, 5 P.3d 259, 266 (App. 2000) (citation omitted); *see also* Restatement (Second) of Torts § 433B(2).

**¶32** Thus, the indivisible injury rule only applies in cases in which there is more than one wrongdoer. It does not apply when a single defendant presents as a defense that the damage sustained by the plaintiff was not caused by him, but by a natural phenomenon because there is no second actor who can be held liable for the damage. *See Martinez v. City of Cheyenne*, 791 P.2d 949, 961-62 (Wyo. 1990), *overruled on other grounds by Beaulieu v. Florquist*, 86 P.3d 863 (Wyo. 2004) (approving trial court's refusal to give instruction shifting burden to defendant to prove damages were caused by act of God). In such a case, there can be no apportionment of damages.

**¶33** In order to recover damages against the City, Rollings had the burden to prove the City caused damage to its buildings and to establish with "reasonable certainty" the amount of the damages caused by the City. *See Jowdy v. Guerin*, 10 Ariz. App. 205, 209, 457 P.2d 745, 749 (1969). In order to recover all of its damages from the City, Rollings had to refute the City's defense that rainwater caused the damage. The instructions given by the court on indivisible injury and apportionment of damages, however, only required Rollings to prove the City was one cause of its damage and

improperly placed the burden on the City to prove the amount of damages another source had caused. Thus, we conclude the trial court erred in instructing the jury regarding apportionment of damages.

## Disposition

**¶34** For the foregoing reasons, we vacate the judgment in favor of Rollings and remand for a new trial consistent with this decision.[3]

[3]Because we vacate the judgment and remand for a new trial, we need not address Rollings's cross-appeal from the trial court's denial of its request for prejudgment interest.