**13.01 SIMPLE TRESPASS AND DENIAL – INTENTIONAL ENTRY**

The plaintiff claims that the defendant trespassed on the plaintiff's property.

To determine whether the defendant trespassed, you must decide whether it is more likely true than not true that:

(1) the defendant entered the property;

(2) the plaintiff was in possession of the property when the entry occurred; and

(3) the defendant's entry was intentional.

The entry was intentional if the defendant intended to be in that location. An entry can be intentional even if the defendant mistakenly thought [he] [she] [it] had a right to be on the property.

If you decide that all three of these things are more likely true than not true, then you must [decide in favor of the plaintiff on this claim.] [decide whether the defendant's entry on the property was allowed by law. I will tell you how to do this in a moment.]

Otherwise, you must decide in favor of the defendant.

Use Note

This instruction should be used where a simple trespass is alleged and denied and the plaintiff claims that the entry was intentional. If the plaintiff claims that the entry was negligent, reckless or the result of abnormally dangerous activity, then Instruction 13.01B should be used instead of this instruction.

In simple trespass cases in which no privileges or mitigation factors are asserted, this instruction should be given with Instruction 13.03 on damages and the first bracketed phrase in the fourth paragraph of this instruction should be used. If the defendant claims that the entry was privileged, this instruction should be given with Instruction 13.02 and the second bracketed phrase in the fourth paragraph should be used. If the defendant admits the entry but claims a privilege, then only Instruction 13.02 should be given.

A modified version of this instruction (or Instruction 13.01B) should be used in cases involving damage to or removal of trees or timber, or removal of minerals or geotechnical data. In these cases, the plaintiff may be entitled to treble damages under AS 09.45.730 (removal of trees) or AS 09.45.735 (mineral conversion).

For example, in a case in which the plaintiff claims that the defendant cut down trees or harvested timber on plaintiff's property, the elements portion of this instruction should be modified to read:

The plaintiff claims that the defendant trespassed on plaintiff's property and [cut down trees] [harvested timber].

To determine whether the defendant trespassed in this manner, you must decide whether it is more likely true than not true that:

(1) the defendant entered the property;

(2) the plaintiff was in possession of the property when the entry occurred;

(3) the defendant's entry was intentional;

(4) during the entry, the defendant [cut down trees] [harvested timber] located on the property; and

(5) the defendant was not authorized to [cut down the trees] [harvest the timber].

. . . .

The language of the tree cutting statute is slightly different than the language of the mineral conversion statute. In a mineral conversion case, it may also be necessary for the plaintiff to prove that the defendant entered the property in order to take mineral resources or gather data. Compare AS 09.45.730 with AS 09.45.735.

In tree cutting or mineral conversion cases, this instruction should be followed by Instruction 13.04 (Damages for Tree Cutting) or Instruction 13.05 (Damages for Mineral Conversion).

Comment

At common law, harm was inferred from every direct entry on land belonging to someone else. In Wernberg v. Matanuska Elec. Ass'n., 494 P.2d 790, 793 (Alaska 1972), the Alaska Supreme Court rejected the common law rule in favor of the more modern approach taken by § 165 and 166 of the Restatement (Second) of Torts (1965). Under the Restatement, the damages recoverable for trespass depend on whether the entry resulted from conduct that was negligent, reckless, or abnormally dangerous or from an intentional trespass.

For there to be liability for a trespass that resulted from conduct that was negligent, reckless, or abnormally dangerous, harm must result from the entry. See id. at § 165. However, liability results from intentional trespass regardless of whether the entry causes harm. See id. at § 158 & 165 Comment b. Even if there is harm, no liability results from an entry that is not intentional, negligent, reckless, or the result of abnormally dangerous activity. Id. at § 166.

According to the Alaska Supreme Court, "[a]n intentional entry onto the land of another constitutes an intentional trespass even if the trespasser believes he or she has a right to be on the property." Brown Jug, Inc. v. Int'l Bhd. of Teamsters, 688 P.2d 932, 938 (Alaska 1984) (citing the Restatement (Second) of Torts § 164 (1965)).

Possession, or the right to possession, is required to bring a trespass action. See McKean v. Hammond, 445 P.2d 679, 682-83 n.7 (Alaska 1968) (citing Restatement (Second) of Torts § 329 (1965)). Title is not necessary and may well be in a third party. "To maintain a trespass action . . . plaintiff must have been in actual or constructive possession of the land on which the trespass was committed." Cape Fox Corp. v. U.S., 456 F.Supp. 784, 804 (Alaska 1978) (citing Restatement of Torts (Second) § 157 (1965); Prosser, Handbook of the law of Torts § 13 at 68-69 (4th ed. 1971)).

Possession (or the right to possession) is part of the plaintiff's prima facie case, and the burden of proof therefore rests on the plaintiff. See Anderson v. Edwards, 625 P.2d 282, 287-88 (Alaska 1981). The right to possession will frequently be a question of law for the judge.

Trespass by livestock is not covered in these instructions. Under Alaska law, liability is limited (AS 03.35.040-no more than $500 for any one trespass by any one animal) and is recoverable only within a controlled livestock district (AS 03.35.040, 03.35.030).