**13.02 SIMPLE TRESPASS AND DENIAL – NEGLIGENT / RECKLESS ENTRY**

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

To determine whether the defendant trespassed, you must decide whether it 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 entry was [negligent] [reckless];

(4) the entry was a legal cause of the plaintiff's harm; and

(5) the plaintiff was actually harmed.

The entry was [negligent if it occurred because the defendant failed to exercise reasonable care. Reasonable care is the care that a reasonably prudent person would have exercised under similar circumstances.] [reckless if the defendant intentionally acted or failed to act under circumstances where the defendant knew or a reasonable person would know that the act or failure to act created an extreme risk of entry onto the property of another.]

I will define legal cause for you in a moment.

If you decide that all five 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 negligent, reckless or the result of abnormally dangerous activity. If the plaintiff claims that the entry was intentional, then Instruction 13.01A 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.

Whether an activity is abnormally dangerous is to be determined by the court based on the following factors:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;

(b) likelihood that the harm that results from it will be great;

(c) inability to eliminate the risk by the exercise of reasonable care;

(d) extent to which the activity is not a matter of common usage;

(e) inappropriateness of the activity to the place where it is carried on; and

(f) extent to which its value to the community is outweighed by its dangerous attributes.

Restatement (Second) of Torts § 520 (1965). In a case in which the court determines that the defendant was engaged in abnormally dangerous activity, the second paragraph of this instruction must be modified to eliminate the third element ((3)).

A modified version of this instruction (or Instruction 13.01A) 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 damaged trees located 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 damaged trees located on the property.

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 entry occurred because the defendant was [negligent] [reckless];

(4) during the entry, the defendant damaged trees located on the property.

. . . .

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

See Comment following Instruction 13.01A.

With respect to the definitions of "negligent" and "reckless", the Restatement states:

The rules which determine whether the actor's conduct is reckless or is negligent as involving an unreasonable risk of an invasion of the other's interest in the exclusive possession of land are the same as those which determine the recklessness or negligence of conduct as threatening bodily harm.

Id. at § 165 cmt. d. The definition of negligent in this instruction is based on Instruction 03.03A. The definition of reckless is derived from Restatement (Second) of Torts § 500. See Restatement (Second) of Torts § 165 cmt. d (1965) (standard for reckless conduct for trespass is same as standard for recklessness threatening bodily harm, in Restatement (Second) chapters 12 and 19); Chizmar v. Mackie, 896 P.2d 196, 210 (Alaska 1995) (applying Restatement (Second) of Torts § 500).

The Restatement (Second) of Torts § 520 (1965) lists six factors that must be considered in determining whether an activity is abnormally dangerous. Comment f to § 520 explains how these six factors should be used:

In determining whether the danger is abnormal, the factors listed in Clauses (a) to (f) of this Section are all to be considered, and are all of importance. Any one of them is not necessarily sufficient of itself in a particular care, and ordinarily several of them will be required for strict liability. On the other hand, it is not necessary that each of them be present, especially if others weigh heavily. Because of the interplay of these various factors, it is not possible to reduce abnormally dangerous activities to any definition.

For a discussion of the function of the court in determining whether an activity is abnormally dangerous, see Comment l to § 520.