**13.03 ENTRY PRIVILEGED**

In this case, the defendant claims that [his] [her] [its] entry was privileged. A privileged entry is an entry that is allowed by law.

The law allows entry onto the property of another [by agreement] [by consent, which may be actual or implied] [under authority of law] [if necessary to prevent serious harm].

To determine whether the entry in this case was allowed by law, you must decide whether it is more likely true than not true that

[the defendant had an agreement with the plaintiff which authorized the defendant to enter the property.]

[the plaintiff consented to the entry. Consent means that the plaintiff said or did something to [indicate agreement to] [cause the defendant to reasonably believe the plaintiff agreed to] the defendant's entry.]

[a reasonable person under similar circumstances would assume consent to the entry.]

[the defendant entered the property under authority of law.]

[the entry was or reasonably appeared to be necessary to prevent serious harm to [the defendant] [the defendant's property] [another person] [another person's property].]

If you decide that this is more likely true than not true, then you must [decide in favor of the defendant on this claim.] [decide whether the defendant exceeded the privilege. I will tell you how to do this in a moment.]

Otherwise, you must decide in favor of the plaintiff.

Use Note

This instruction should be used when the defendant claims that the entry was privileged. It should be given with Instruction 13.01A or 13.01B when the defendant denies the trespass and on its own (with a new introductory sentence) when the defendant admits the trespass.

This instruction does not cover all possible privileges. For other privileges, see chapter 8 of the Restatement (Second) of Torts (1965). The judge can choose to use the language about the agreement or the language about consent when there has been a contract between the parties.

This instruction should be used with Instruction 13.02A if the plaintiff contends that the defendant exceeded the privilege.

Comment

This instruction does not use the term license. The language "an agreement with the plaintiff that authorizes the defendant to . . ." covers the same concept but in language that will be more familiar to the jury.

A legal right to enter is entering under government authority such as a police officer responding to a call for help. This is not a trespass. See Herrin v. State, 449 P.2d 674 (Alaska 1969).

The "reasonable person under similar circumstances . . ." language covers what some sources refer to as the custom and usage defense, e.g., the right of a door-to-door salesman to enter property and knock at a house door unless it has been made clear that sales people are not wanted, see, e.g., 75 Am. Jur. 2d *Trespass* § 87 (1991), and what other sources treat as consent by custom. See Restatement (Second) of Torts § 892 comment d (1965).

The Restatement (Second) of Torts § 197 (1965) describes the private necessity privilege as follows:

(1) One is privileged to enter or remain on land in the possession of another if it is or reasonably appears to be necessary to prevent serious harm to

(a) the actor, or his land or chattels, or

(b) the other or a third person, or the land and chattels of either, unless the actor knows or has reason of know that the one for whose benefit he enters is unwilling that he shall take such action.

In Bird v. Municipality of Anchorage, 787 P.2d 119 (Alaska App. 1990), the defense of necessity was asserted in a criminal trespass case. The court concluded that the defense is available in Alaska, except where precluded by statute, and that to establish the defense, the defendant must show that:

(1) the act charged was done to prevent a significant evil;

(2) there was no adequate alternative; and

(3) the harm caused was not disproportionate to the harm avoided.

Id. at 120-21. This instruction includes the Restatement's formulation of the private necessity privilege rather than the necessity defense described in Bird; however, there is no Alaska authority that has applied the criminal defense in a civil trespass action.