**13.05 TRESPASS – DAMAGES**

If you decide in favor of the plaintiff, then you must decide how much money, if any, would fairly compensate the plaintiff for the defendant's trespass. The (first, second, etc.) item of claimed loss is damage to plaintiff's real property. The amount that will reasonably compensate the plaintiff for this loss is the following:

[A] The difference in the fair market value of the property immediately before and immediately after the trespass. In a moment I will explain how to measure the fair market value.

[B] The cost of restoring the property to its condition immediately before the trespass. However, for the plaintiff to recover this cost, you must find that

(1) the damage to the property is temporary or reparable; and

(2) the cost of restoring the property is not disproportionate to the loss in property value caused by the trespass or, if it is disproportionate, that there is a reason personal to the plaintiff for restoring the property to its original condition.

To determine the loss in property value caused by the trespass, you must calculate the difference in the fair market value of the property immediately before and immediately after the trespass. In a moment I will explain how to measure the fair market value.

To determine whether there is a reason personal to the plaintiff for restoring the property, you may consider the nature of the property, how it was used, the likelihood that the plaintiff would actually restore it, or any other factors you think are important.

If you find that the damage can be repaired and that the cost of restoring the property is not disproportionate to the loss in value caused by the trespass, or that there is a reason personal to the plaintiff for restoring the property, then you must award the plaintiff the cost of restoring the property. Otherwise, you must award the plaintiff the difference in the fair market value of the property immediately before and immediately after the trespass.

[C] If there is no difference in the fair market value, but you previously found that defendant's entry on the property was intentional, then you must award the plaintiff the amount of $1. Otherwise, the plaintiff is not entitled to any compensation for this item of claimed loss.

Use Note

This is the general trespass damage instruction. In cases of mineral conversion or tree cutting, Instructions 13.04 or 13.05 should be used instead of this instruction.If the plaintiff seeks to recover the diminution in value caused by the trespass, then paragraph A should be used. If the plaintiff seeks to recover repair costs, then paragraph B should be used instead of paragraph A. Paragraph C should be used in combination with paragraph A or B in any case dealing with intentional entry. Instruction 20.17A (Fair Market Value Defined) should be given with this instruction. Instruction 27.02, the fair market value instruction for condemnation cases, could also be used with some modifications.

This instruction addresses claims for the damage to plaintiff's property. The plaintiff may also have a claim for loss of use of the property. If so, Instruction 20.16 (Loss of Use) should be used.

Comment

The Restatement (Second) of Torts § 929 (1979) includes the following description of the damages recoverable for trespass:

(1) If one is entitled to a judgment for harm to land resulting from a past invasion and not amounting to a total destruction of value, the damages include compensation for

(a) the difference between the value of the land before the harm and the value after the harm, or at his election in an appropriate case, the cost of restoration that has been or may be reasonably incurred,

(b) the loss of use of the land, and

(c) discomfort and annoyance to him as an occupant.

This instruction sets out the general measures of compensatory damages for harm to real property. Diminution in value is the generally recognized measure of damages. See Andersen v. Edwards, 625 P.2d 282, 289 (Alaska 1981). However, the cost of restoration may also be used in certain circumstances. Id. at 288-89; G & A Contractors, Inc. v. Alaska Greenhouses, Inc., 517 P.2d 1379 (Alaska 1974).

The Alaska Supreme Court has adopted the Restatement rule on recovery of restoration costs:

We believe the appropriate rule is that if the cost of restoring the land to its original condition is disproportionate to the diminution in the value of the land caused by the trespass, the restoration measure of damages is inappropriate unless there is a 'reason personal to the owner' for restoring the original condition.

Andersen v. Edwards, 625 P.2d at 288 (quoting Restatement (Second) of Torts § 919 comment b (1977)). Thus, in G & A Contractors Inc. v. Alaska Greenhouses, Inc., the court found that the property owner's use of the property to create a showplace in connection with his nursery business was a reason personal to the owner justifying restoration damages. Andersen v. Edwards, 625 P.2d at 288 (explaining the decision in G & A Contractors, Inc. v. Alaska Greenhouses, Inc., 517 P.2d at 1379).

Restoration is only an appropriate remedy where the harm to the real property is temporary. G & A Contractors, Inc. v. Alaska Greenhouses, Inc., 517 P.2d at 1386 (court upheld award of restoration damages because harm to the land was not "fixed and irreparable").

The instruction also sets out the rule for nominal damages in trespass. Plaintiff may recover nominal damages when the trespass is intentional even in the absence of actual damages. Brown Jug, Inc. v. Int'l Bhd. of Teamsters, 688 P.2d 932, 938 (Alaska 1984) (citing Restatement of Torts § 164 (1965)).