**13.06 TRESPASS – DAMAGES FOR TREE CUTTING**

If you decide in favor of the plaintiff, you must then decide how much money, if any, would fairly compensate the plaintiff for loss of the [trees] [timber] and 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 plaintiff's property immediately before and immediately after the [trees were cut down] [timber was harvested]. In a moment I will explain how to measure the fair market value.

[B] The market value of the [trees less the cost of cutting them down] [timber less the cost of harvesting it].

[C] The cost of restoring the property to its condition immediately before the [trees were cut down] [timber was harvested]. 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 [trees were cut down] [timber was harvested][, excluding the value of the [trees themselves] [timber itself]. 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, the plaintiff is only entitled to recover the loss in property value caused by the trespass.

[D] After you have decided the amount that would compensate the plaintiff for loss of the [trees] [timber], you must consider the defendant's claim that the plaintiff is not entitled to treble damages. To do this, you must decide whether either of the following things is more likely true than not true:

(1) the defendant did not intend to enter the property or [cut down the trees] [harvest the timber]; or

(2) the defendant had an honest and reasonable belief that [the property was [his] [her] [its] own property] [[he] [she] [it] was authorized to enter the property and [cut down the trees] [harvest the timber]].

If you decide that either of these things is more likely true than not true, then you must award the plaintiff only the amount you decided would reasonably compensate the plaintiff for loss of the [trees] [timber].

Otherwise, you must award the plaintiff three times the amount you decided would reasonably compensate the plaintiff for loss of the [trees] [timber].

Use Note

In cases involving damages to or removal of trees or timber, this instruction should be given instead of the general damages instruction (Instruction 13.03).

If the plaintiff seeks to recover the diminution in value of plaintiff's land as a whole, then part A should be used. If the plaintiff seeks to recover the value of the trees or timber, then part B should be used instead of part A. If the plaintiff seeks to recover restoration costs as well as the value of the trees or timber, then both parts B and C should be used, and the bracketed language in part C should be included. (The bracketed language should not be included when part C is used without part B.)

Part D should be used when the plaintiff seeks to recover treble damages under AS 09.45.735, unless the defendant concedes that the trespass was intentional. In such a case, part D should be eliminated and the jury should be instructed to treble the compensatory damage award.

Instruction 20.17A (Fair Market Value Defined) should be given with this instruction.

Comment

This instruction is based on AS 09.45.730 which allows treble damages for trespass by cutting or injuring trees.

When this instruction was prepared, the Alaska Supreme Court had decided four cases involving trespass by cutting of trees: Anderson v. Edwards, 625 P.2d 282 (Alaska 1981), containing a good discussion on the restoration remedy and the statute on treble damages; Matanuska Electric Association, Inc. v. Weissler, 723 P.2d 600 (Alaska 1986), discussing the exceptions to the treble damages statute for trespasses that are unintentional or committed with probable cause to believe that trespass was authorized; Wernberg v. Matanuska Electric Association, 494 P.2d 790 (Alaska 1972), a non-statutory case, holding that the damages for waste and trespass are the same; and Scavenius v. City of Anchorage, 530 P.2d 1161 (Alaska 1975), holding the statute inapplicable where tree removal was by a lawful court order.

In Andersen v. Edwards, 625 P.2d 282, 289 (Alaska 1981), the Alaska Supreme Court held that diminution in value of the property or the economic value of the timber cut was the appropriate measure of damages. The court indicated, however, that restoration costs could also be awarded if the cost of restoration is not disproportionate to the diminution of value or there is a reason personal to the owner for restoring the original condition. Id. at 288-89 (citing the Restatement (Second) of Torts § 919 (1977)). The court rejected the appellant's contention that "treble damages are appropriate where the damages awarded are based on the lumber or timber value of the trees but are clearly inappropriate where damages are assessed on some other basis." Id. at 289. The court cited with approval a Michigan case, Schankin v. Buskirk, 93 N.W.2d 293, 295-96 (1958), in which the court based a treble damages award on the value of the timber taken plus the cost of restoring the property to a condition of usefulness. Andersen v. Edwards, 625 P.2d at 289.

This instruction reflects the limitations imposed on the restoration measure of damages set forth in Andersen v. Edwards, 625 P.2d 282 (Alaska 1981) and G & A Contractors, Inc. v. Alaska Greenhouses, Inc., 517 P.2d 1379 (Alaska 1974).

In Wernberg v. Matanuska Electric Association, 494 P.2d 790 (Alaska 1972), the court approved an instruction in which the jury was allowed to choose between the diminution in value and the value of the trees cut measure of damages. However, under the Restatement (Second) of Torts § 929 (1979), the plaintiff makes the election:

(2) If a thing attached to the land but severable from it is damaged, he may *at his election* recover the loss in value to the thing instead of the damage to the land as a whole.

(Emphasis added.) The Comment on this section states:

For the destruction of or damage to houses, buildings, crops or mature timber trees that have a market value or a value distinguishable from the value of the land, *the owner can, at his election*, recover for the loss or diminution of the value of the thing injured or destroyed, in substitution for the diminution in value of the land as a whole.

Id. at cmt. f (emphasis added).

The issue before the court in Wernberg was whether a measure of damages other than diminution of value or loss of the value of the trees should have been used. The court did not address whether it was proper to allow the jury to select the measure to be used. Therefore, because the issue was not directly addressed in Wernberg, this instruction follows the Restatement and allows the plaintiff to make the election.

Once the plaintiff has proven trespass and damages, the burden shifts to the defendant to show that the defendant falls within the exceptions to the treble damages provisions. Matanuska Electric Ass'n, Inc. v. Weissler, 723 P.2d 600, 608 (Alaska 1986).