**13.00 TRESPASS AND NUISANCE – INTRODUCTORY COMMENT**

A trespass is an intrusion onto land possessed by another without consent or other privilege. Trespass includes not only entry onto land, but also remaining on land, or causing a third person or thing to enter or remain. See Restatement (Second) of Torts § 159-161 (1965).

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, liability and damages are determined by the character of the entry.

If an entry was intentional, the trespasser is liable for damages regardless of whether the entry caused harm. See id. at § 158 & 165 Comment b. However, if the entry was the result of negligent or reckless conduct or an abnormally dangerous activity, there is no liability in the absence of actual harm. See id. at § 165. Accidental entry does not give rise to liability for trespass even if the entry results in actual harm. See id. at § 166.

A person who intentionally enters someone else's property commits an intentional trespass and is liable even if the person mistakenly believed he or she had a right to be on the property. Brown Jug, Inc. v. Int'l Bhd. of Teamsters, 688 P.2d 932, 938 (Alaska 1984).

Diminution in value is the generally recognized measure of damages for any harm to real property caused by a trespass. See Andersen v. Edwards, 625 P.2d 282, 289 (Alaska 1981). However, a defendant may elect to recover restoration costs 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").

Damages for severance of trees or minerals are addressed by statute. See AS 09.45.730 (treble damages for trespass by cutting or injuring trees) and AS 09.45.735 (treble damages for removal of minerals or geotechnical data).

The Restatement explains the difference between trespass and private nuisance as follows:

 A trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it. A nuisance is an interference with the interest in the private use and enjoyment of the land, and does not require interference with the possession.

Id. at § 821D Comment d (citations omitted).

AS 09.45.230 allows a "person to bring a civil action to enjoin or abate a private nuisance" and to receive damages. Injunction and abatement are traditionally equity matters for the court to decide. It is only when damages are claimed that the case goes to the jury.

AS 09.45.255 defines nuisance as ". . . a substantial and unreasonable interference with the use or enjoyment of real property, including water." The statute does not give any guidance as to what constitutes substantial or unreasonable interference.

The Restatement requires "significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose." Restatement (Second) of Torts § 821F (1979).

The Restatement describes "significant harm" as ". . . harm of importance, involving more than slight inconvenience or petty annoyance." Restatement (Second) of Torts § 821F, Comment c (1979). There must be "a real and appreciable invasion of the plaintiff's interests . . . ." Restatement (Second) of Torts § 821F, comment c (1979).

According to the Restatement, whether an interference is unreasonable is determined by use of a balancing test: if the gravity of the harm outweighs the utility of the conduct, the invasion is unreasonable. Restatement (Second) of Torts § 826 (1979).

Alaska's nuisance statutes identify certain public nuisances, but do not define the elements of a cause of action for public nuisance. At common law, "the same act or structure may be a public nuisance, also a private nuisance as to a person who is thereby caused a special injury other than that inflicted upon the general public." Snyder v. Kelter, 4 Alaska 447 (Alaska 1912).

The Restatement explains recovery of private damages from public nuisance as follows:

 The private individual can recover in tort for a public nuisance only if he has suffered harm of a different kind from that suffered by other persons exercising the same common right. It is not enough that he has suffered the same kind of harm or interference to a greater extent or degree.

Restatement (Second) of Torts § 821C, Comment b (1979).

In addition to the requirement that the plaintiff have suffered an injury different from that suffered by the public, the plaintiff must have suffered the injury in the exercise of a public or common right. Maier v. Ketchikan, 403 P.2d 34, 38 (Alaska 1965). "A public right is one common to all members of the general public." Restatement (Second) of Torts § 821B, Comment g (1979).

The Alaska Statutes identify some specific public nuisances. See, e.g., as follows: AS 03.05.050 (agricultural or fishing products); 03.30.030 (wire fences); 09.50.170-.240 (bawdy houses); 16.05.800 (fishing equipment); 16.05.880 (construction in specified waters); 19.25.150 (advertising signs); and 19.27.060-.080 (junk yards). These statutes may eliminate the necessity of proving one or more of the elements of a cause of action for public nuisance.

A person may suffer a nuisance that is both public and private:

 When the nuisance, in addition to interfering with the public right, also interferes with the use and enjoyment of the plaintiff's land, it is a private nuisance as well as a public one.

Restatement (Second) of Torts § 821C, Comment e (1979).