

EVOLUTION OF TRESPASS AND NUISANCE

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INTRODUCTION

A toxic tort is a civil wrong arising from exposure to a toxic substance, such as asbestos, radiation or a hazardous waste.¹ Most toxic torts cases are brought under the common law trespass and nuisance causes of action. Although many plaintiffs often join common law claims with claims for potential recovery under federal environmental laws, the common law claims tend to provide more monetary damages, whereas the statutory claims may simply recoup cleanup costs.²

Trespass is an interference with the plaintiff's interest in the exclusive possession of property.³ The definition of a common law trespass has evolved from an interference of a person's possession of property, to an invasion by a pollutant that was once considered only a nuisance. With the increasing rise of pollution, contamination, and killer chemicals and toxins in the air, state law has elasticized the theory of trespass to include contamination, and has even allowed toxic trespass to surface in a complaint. Today's trespass and nuisance allegations often involve substances that cannot be seen without a microscope.

While the theory of trespass was traditionally the vehicle to remedy all injuries done against person and property, trespass on the case was the theory for recovery for all injuries that were indirect.⁴ Historically, a specific interference with one's property had to be proven before any trespass remedy would be granted.⁵ Today an indirect interference with one's property constitutes a trespass provided there is proof of negligence or intent.⁶ Trespass claims are now virtually indistinguishable from negligence claims because both require that a person should have foreseen that his or her act would cause damage to another.⁷

Trespass and nuisance claims tend to coincide and are often alleged simultaneously. Ala. Code (1975) § 6-15-20 defines a nuisance as "anything that works hurt, inconvenience or damage to another." Although trespass and nuisance claims offer similar remedies—an injunction or damages—they are not mutually exclusive. The difference lies in whether there was an interference with exclusive possession of property or an interference with the use and enjoyment of property.⁸ Unlike a trespass action, a nuisance action can be caused by intentional, involuntary or negligent conduct.⁹ According to Ala. Code § 6-5-120 (1975), damages for a nuisance may exist even if there has been no finding of negligence.

Federal legislation such as the Clean Air Act, the Clean Water Act, the Toxic Substances Control Act, the Resource Conservation and Recovery Act (RCRA), and the Comprehensive Environmental Response, Compensation and

Liability Act (CERCLA) were all enacted by Congress in the 1970s and 1980s to create legislative relief in addition to the common law relief of trespass and nuisance.¹⁰ The state of Alabama broadly defines the common law remedies of trespass and nuisance in Ala. Code § 6-5-210 and 120 (1975) respectively. Alabama has embraced both tort actions in environmental cases, and has applied the law on a case-by-case basis.

In an Alabama Supreme Court case of first impression, the court in *Rushing v. Hooper-McDonald* acknowledged that an action for trespass could be brought to seek relief against the discharge of foreign matter.¹¹ In *Rushing*, a holder of a leasehold interest in a fishpond brought a trespass action against the adjacent landowner for emptying asphalt onto his property so that it ran downhill into the plaintiff's pond, killing the fish or causing them to be unmerchantable. The court upheld this action as a trespass and created an entry for future contamination cases by allowing foreign particles polluting another's land to be deemed a trespass or nuisance.¹² To define a trespass, the Supreme Court of Alabama adopted a Comment to the Restatement (Second) of Torts § 158 that states "in order for there to be a trespass...it is not necessary that the foreign matter should be thrown directly and immediately upon another's land. It is enough that an act is done with knowledge that it will to a substantial certainty result in the entry of foreign matters."¹³ If the intrusion interferes with the right to exclusive possession of property, then the law of trespass applies.¹⁴

I. TRESPASS

In Alabama, trespass is statutorily defined as an unlawful or wrongful interference with another's possession of property.¹⁵ To assert a claim based on an indirect trespass, proof of negligence or intent and proof of damages are required.¹⁶ In toxic torts lawsuits, an indirect trespass can be shown by proof of pollutants or particulates being carried in the air to adjoining property.¹⁷ But for a direct trespass, proof of negligence is not required.¹⁸

Trespass actions can be brought whether the trespass is to personalty or realty, and are usually brought when the conduct is inadequate to support an action for conversion.¹⁹ It is not necessary to have proper legal title over property before bringing an action for trespass, because public policy favors one's peaceful possession of land.²⁰ Trespass actions have a 6-year statute of limitations and "trespass on the case" actions have a two-year statute of limitations.²¹ Consent is the primary defense to a trespass action.²² Although Alabama requires only proof of an intentional invasion to support a trespass action, some courts require proof that the level of contamination in a trespass or nuisance action constitute an actual health risk.²³

The 1979 Supreme Court of Alabama case of *Borland v. Sanders* defined the elements of trespass and held that compliance with the Alabama Air Pollution Control Act did not release the defendant from liability.²⁴ In *Borland*, agricultural land owners sued a lead company for an accumulation of lead particulates and

sulfoxide deposits in the air that caused property damage. Although *Borland* is not the first case to establish a trespass by an intangible object, the *Borland* court held that the property owner's "interest interfered with" was the test used to determine whether to apply the law of trespass or the law of nuisance.²⁵ In Alabama, if an individual's possessory interest of property has been invaded, then the remedy of trespass is appropriate.²⁶ A nuisance remedy is usually available when the use and enjoyment of property is interfered with, and the injury is indirect and less substantial than a trespass injury.²⁷ Alabama favors the Restatement (Second) of Torts § 158 definition of trespass:

One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally:

- (a) enters land in the possession of the other, or causes a thing or a third person to do so, or
- (b) remains on the land, or
- (c) fails to remove from the land a thing which he is under a duty to remove.²⁸

The *Borland* case establishes the basic elements of an indirect trespass: (1) an invasion affecting an interest in the exclusive possession of property, (2) an intentional doing of the act which results in the invasion, (3) reasonable foreseeability that the act done could result in an invasion of the plaintiff's possessory interest, and (4) substantial damage to the *res*.²⁹ *Borland* extended its ruling from *Rushing v. Hooper-McDonald*, which held that a trespass is not limited to a person entering another's property, but may be committed by disturbing the possession of the occupant.³⁰

In *Born v. Exxon Corp.*, a property owner brought suit against Exxon Oil Company for the interference with her property by the company's treating facility.³¹ The court in *Born* held that the light and odor that stemmed from the company's treating facility did not constitute a trespass, and the action for nuisance was barred by the statute of limitations.³² Because the court found that there was no evidence to prove an intentional entry of the substance onto the plaintiff's property, the indirect invasion was not an actionable trespass.³³ The court held that for a person to be liable to another for a direct trespass, "a person must intentionally enter upon the land in possession of another or must intentionally cause some substance or thing to enter upon another's land."³⁴

A. CONTINUING AND PERMANENT TRESPASS

Although the distinctions are unclear, a continuing trespass involves a continuous interference because of a person's failure to remove that interference.³⁵ A continuing trespass creates successive causes of action during its continuance.³⁶ A permanent trespass permanently alters the physical condition of the land.³⁷ Examples of a permanent trespass include the removal of a structure or excavation of the earth.³⁸

Whether the trespass is continuing or permanent will affect a plaintiff's measure of damages and statute of limitations.³⁹ Alabama case and statutory law does not provide a precise distinction between a continuing and permanent trespass, but the difference remains important because a permanent trespass does

not extend the statute of limitations, whereas a continuing trespass renews itself with each continuing trespass.⁴⁰ Ala. Code § 6-5-217 (1975) states that the damages for a continuing trespass will be limited to actions that occurred before and after trial. The Alabama Supreme Court recently held that a defendant will be liable for a continuing tort when the multiple consequences follow the single wrong.⁴¹ For a continuing tort, or trespass, the statute of limitations begins to run the date the plaintiff was last exposed.⁴²

B. DAMAGES

The measure of damages for a trespass action is typically the difference between the value of the property before the injury, and its value after the injury.⁴³ If trespass damages are permanent, the damages must be recovered for the past, present, and future, with the difference in fair market value before and after the trespass, based on the plaintiff's use of the property or adaptability of the property before the trespass.⁴⁴

If the injury is continuous, the plaintiff can recover fair rental value of the property or cost of restoration, coupled with the loss of use, or diminution in value of the land, whichever is less.⁴⁵ An injunction is also an appropriate remedy for a continuing trespass when any other remedy would prove to be insufficient.⁴⁶ Ala. Code § 6-5-217 (1975) states that damages for a continuing trespass are limited to those that have occurred before and up to the trial.⁴⁷ The plaintiff must be compensated for the actual value of the land whether or not the

trespass enhanced the value of the land, because the owner may choose the prior use of the land to be more desirable.⁴⁸ If the plaintiff used his property for a particular purpose, that purpose will also be considered in determining the actual damages of the land.⁴⁹

Plaintiffs exposed to trespassing chemicals may seek medical monitoring or fear of cancer claim in some states; however, Alabama has yet to recognize either of these actions unless an illness or physical injury is present.⁵⁰

II. NUISANCE

Ala. Code (1975) § 6-5-120 defines a nuisance as intentional, negligent, or unintentional conduct that works to hurt, inconvenience, or cause damage to another.⁵¹ Even lawful acts can constitute a nuisance.⁵² To determine a nuisance action, the court must use a reasonable person standard and not the standard of a person with “fastidious tastes or sensibilities.”⁵³ A nuisance can be found for actions that are lawful or careful, but the basic tort elements of duty and causation are indispensable proof of a prima facie nuisance case.⁵⁴ Differing from its trespass counterpart, a nuisance claim can be intentional, unintentional, or negligent.⁵⁵ A nuisance can be found even if the defendant’s conduct was lawful, and not a failure to exercise due care.⁵⁶

In Alabama, some nuisance cases are brought to court before the nuisance even begins.⁵⁷ In *Parker v. Ashford*, the Alabama Supreme Court held that the plaintiffs had stated a proper cause of action, and granted a permanent

injunction for the possible construction site of a racetrack that would cause a nuisance in the future.⁵⁸ The court allowed a permanent injunction against the construction and operation of a racetrack because the noise and debris from the project would be a nuisance to surrounding neighbors.⁵⁹

A. PUBLIC AND PRIVATE NUISANCE

Claims for nuisance, either public or private, are brought based on the conduct's injurious effects to an individual or group of individuals. A public nuisance causes damages to a large group of people, even though the damages may vary.⁶⁰ Basically, to create a public nuisance, the toxic substances must interfere with the rights that are common to the general public.⁶¹ An individual can bring a public-nuisance action, but only if nuisance causes a special damage that is different in kind and degree from the damage suffered by the public in general.⁶² Absent such special damage, only the injured party may sue over a public nuisance. A private nuisance gives a right of action only to the person injured, and usually the toxic trespass will interfere with the plaintiff's use and enjoyment of the land.⁶³ Ala. Code § 6-5-121 (1975) states:

Nuisances are either public or private. A public nuisance is one which damages all persons who come within the sphere of its operation, though it may vary on its effects on individuals. A private nuisance is one limited in its injurious effects on individuals. Generally, a public nuisance gives no right of action to any individual, but must be abated by a process instituted in the name of the state. A private nuisance gives a right of action to the person injured.

In *Monsanto Chem. Co. v. Fincher*, the court held that the plaintiffs had standing to sue for a public nuisance because the injury they suffered was special and different from that of the public generally.⁶⁴ The plaintiffs claimed that the defendant chemical company's operations released gases and odors that made the plaintiffs ill and made their property decrease in value.⁶⁵ The plaintiffs were allowed to seek and obtain an injunction abating the nuisance.⁶⁶

B. DAMAGES

A court may order money damages along with an injunction where a condition from the nuisance is continuous and other remedies did not prove to alleviate the problem.⁶⁷ In the case of *Gregath v. Bates*, the plaintiffs were awarded an injunction against waste contamination that developed on their property from the defendant's hog parlors. In this case, the plaintiffs did not receive a damage award for their "shattered nervous systems" because Alabama does not recognize mental suffering as an element of damage for a nuisance when the damage done was not accompanied by malice, insult, inhumanity, or physical injury.⁶⁸ Here, offensive odors satisfied the elements of a nuisance, but the requirements to recover for mental suffering were not met.⁶⁹

CONCLUSION

The common law theories of trespass and nuisance are still viable in Alabama today. Because the state lacks applicable statutes to provide remedies

for specific land or water contamination, common law tort remedies such as trespass and nuisance have become avenues for recovery beyond what could have ever been imagined. Although trespass and nuisance claims can offer similar remedies, they are not mutually exclusive and the difference lies in whether there was an interference with property possession or an interference with the use and enjoyment of property. Once that difference is established, common law remedies and Alabama statutes allow plaintiff to recover for property damage and personal injury.

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¹ BLACK'S LAW DICTIONARY 714 (2nd Pocket Ed., 2001).

² D. Alana Rudlin and Christopher R. Graham. *Toxic Torts: A Primer*. 17 SPG Nat. Resources & Env't 210 (2003).

³ *Cox v. Stuart*, 157 So. 458 (Ala. Ct. App. 1933).

⁴ MICHAEL L. ROBERTS & GREGORY S. CUSIMANO. ALABAMA TORT LAW § 30.1 (3D ED. 2000).

⁵ *Id.*

⁶ *Id.*

⁷ William Watts. *Common Law Remedies in Alabama for Contamination of Land*. 29 Cumb. L. Rev. 37 (1998-1999).

⁸ *Borland v. Sanders*, 369 So. 2d 523 (Ala. 1979).

⁹ Watts, *supra* note 7, at 48. See also *Hilliard v. City of Huntsville*, 585 So.2d 889 (Ala. 1991).

¹⁰ G. Nelson Smith, III, *Nuisance and Trespass Claims in Environmental Litigation: Legislative Inaction and Common Law Confusion*, 36 SANTA CLARA L. REV. 39, 44-45 (1995) (discussing federal legislation that eases environmental litigation).

¹¹ 300 So. 2d 94 (Ala. 1974).

¹² *Id.*

¹³ *Id.* at 96 citing Comments to Restatement (Second of Torts) § 158.

¹⁴ *Courtaulds Fibers, Inc. v. Long*, 779 So.2d 198, 203 (Ala. 2000).

¹⁵ *Cox*, 157 So. 458 (Ala. Ct. App. 1933).

¹⁶ ROBERTS & CUSIMANO, *SUPRA* NOTE 4 § 30.4.

¹⁷ MICHAEL AXLINE, A GUIDE TO TOXIC TORTS VOL. 1 §3.05[2] (MARGIE SEARCY-ALFORD ESQ. ED. 2005).

¹⁸ *Borland*, 369 So.2d 523 (Ala. 1979).

¹⁹ ROBERTS & CUSIMANO, *SUPRA* NOTE 4 § 30.1.

²⁰ *Id.*

²¹ ALA. CODE § 6-2-34(2) (1975); ALA. CODE § 6-2-38(D) (1975).

²² ROBERTS & CUSIMANO, *SUPRA* NOTE 4 § 30.7.

²³ *Supra*, note 17 at § 3.05[4]. *See also* note 4 at §30.5.

²⁴ 369 So. 2d 523 (Ala. 1979).

²⁵ *Id.*

²⁶ *Id.*

²⁷ ROBERTS & CUSIMANO, *SUPRA* NOTE 4 § 31.0.

²⁸ Restatement (Second) of Torts § 158.

²⁹ *Id.* at 529. *See also LaBauve v. Olin Corp.*, 231 F.R.D. 632, 673 (S.D. Ala. 2005).

³⁰ *Rushing*, 300 So. 2d 94 (Ala. 1974).

³¹ 388 So. 2d 933 (Ala. 1980).

³² *Id.* at 934.

³³ *Id.*

³⁴ *Id.*

³⁵ ROBERTS & CUSIMANO, *SUPRA* NOTE 4 § 30.6.

³⁶ *Id.*

³⁷ *Watts*, *supra* note 7, at 44.

³⁸ *Id.*

³⁹ *Id.* at 43.

⁴⁰ ROBERTS & CUSIMANO, *SUPRA* NOTE 4 § 30.7.

⁴¹ *LaBauve v. Olin Corp.*, 231 F.R.D. 632, 655 (S.D. Ala. 2005).

⁴² *Id.*

⁴³ *Borland*, 369 So. 2d 523, 530 (Ala. 1979).

⁴⁴ *Id.* at 531.

⁴⁵ *Id.*

⁴⁶ *Underwood v. West Point Mfg. Co.*, 116 So.2d 575 (Ala. 1959).

⁴⁷ *Ratliff Co. Inc., v. Henley*, 405 So.2d 141, 142 (Ala. 1981).

⁴⁸ *Id.*

⁴⁹ *Id.* at 530.

⁵⁰ *Hinton v. Monsanto Co.*, 813 So. 2d 827 (Ala. 2001).

⁵¹ ALA. CODE § 6-5-120 (1975).

⁵² *Id.*

⁵³ ALA. CODE § 6-5-125 (1975).

⁵⁴ *Persky v. Vaughn*, 741 So.2d 414, 417 (Ala. Civ. App. 1998).

⁵⁵ *Id.* at 416.

⁵⁶ *Watts*, *supra* note 7, at 48. *See also Hilliard v. City of Huntsville*, 585 So.2d 889 (Ala. 1991).

⁵⁷ *See Parker v. Ashford*, 661 So.2d 213 (Ala. 1995).

⁵⁸ 661 So.2d 213 (Ala. 1995).

⁵⁹ *Id.*

⁶⁰ *Watts*, *supra* note 7, at 50.

⁶¹ AXLINE, *supra* note 17, at § 3.06.

⁶² *Id.* at § 3.06[2]. *See also* note 7, at 52.

⁶³ *Id.*

⁶⁴ 133 So.2d 192 (Ala. 1961).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Gregath v. Bates*, 359 So. 2d 404 (Ala. 1978).

⁶⁸ *Id.* at 409. *See also* D. ALAN RUDLIN HUNTON & WILLIAMS, TOXIC TORTS PRACTICE GUIDE § 15.6 (2005).

⁶⁹ *Id.*