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DISTINGUISHING TRESPASS AND HUNTING ON POSTED LAND

Pursuant to Section 6 of House Bill No. 1021 (2019), the Legislative Management's interim Natural Resources Committee is studying "access to public and private lands for hunting, trapping, fishing, and related issues, including trespass violations and penalties." During committee discussions, questions arose regarding the differences between trespass and hunting on posted land. This memorandum describes and distinguishes trespass offenses and the offense of hunting on posted land.

TRESPASS OFFENSES

Trespass may be a civil or criminal offense. Criminal trespass is defined by statute, but civil trespass exists as a matter of common law recognized by courts. An individual found guilty of criminal trespass may be punished by fines and imprisonment, while an individual found liable for civil trespass may have to pay monetary damages to the owner or lawful occupant of the land on which the trespass occurred.

Civil Trespass

Civil trespass is not defined by statute. According to the North Dakota Supreme Court, "[i]n North Dakota, civil trespass exists at common law . . . We have previously defined civil trespass as occurring 'where a person 'intentionally and without a consensual or other privilege . . . enters land in possession of another or any part thereof or causes a thing or third person so to do.'"*Gray v. Berg*, 2016 ND 82, 83 (N.D. 2016). A trespasser is liable to the property owner even if the trespasser does not cause harm to a legally protected interest. However, a property owner does not have a claim for civil trespass if the alleged trespasser did not interfere with the property, intend to enter the property without consent or privilege, or take an affirmative voluntary act to enter the property without consent or privilege. For example, in *Tibert v. Slominski*, 2005 ND 34 (N.D. 2005), the Supreme Court said a landowner did not have a claim of civil trespass against a grain company based on a mere anticipation the company's trucks would cause dust to settle on the landowner's property. The Supreme Court said the grain company had not interfered with the plaintiff's property.

Criminal Trespass Elements and Definitions

Criminal trespass is defined by statute. Under North Dakota Century Code Section 12.1-22-03, an individual who **knows** the individual is **not licensed or privileged** to do so:

- Is guilty of a felony if the individual enters or remains in a dwelling or highly secured premises; and
- Is guilty of a misdemeanor if the individual:

Enters or remains in or on a building, occupied structure, or storage structure, or separately secured or occupied portion of a building or structure;

Enters or remains in a place enclosed as manifestly to exclude intruders; or

Enters or remains in a place as to which notice against trespass is given by actual communication to the individual by the individual in charge of the premises or other authorized individual, or by posting in a manner reasonably likely to come to the attention of intruders if the name of the person posting the land appears on each sign in legible characters. Even if an authorized individual complies only substantially with the notice requirements, and notice against trespass is clear from the circumstances, an intruder is guilty of criminal trespass.

Under the statute, criminal trespass requires knowledge. An individual has to know the individual is not licensed or privileged to enter or remain on the property at issue to commit criminal trespass. For example, an individual walking up to a residential front door is not trespassing if there is no communication or indicia the individual should not be there. However, an individual does not have to know the individual is committing a crime to be guilty of criminal trespass.

The statutory definition of "knowingly" provides the basis for determining when an individual knows the individual is not licensed or privileged to remain on property. Under Section 12.1-02-02, a person acts knowingly if "when he

engages in the conduct, he knows or has a firm belief, unaccompanied by a substantial doubt, that he is doing so, whether or not it is his purpose to do so." In *State v. Bertram*, 2006 ND 10 (N.D. 2006), the Supreme Court stated a person's knowledge depends on all the surrounding facts and circumstances and is a factual question that may be established by circumstantial evidence.

Under the statutory definition of criminal trespass, an individual licensed or privileged to be on the property at issue is not trespassing. The Supreme Court has defined the terms "licensed" and "privileged". In *State v. Purdy*, 491 N.W.2d 402, 410 (N.D. 1992), the Supreme Court said an individual is licensed to be on property "if the entry was consensual." In the same case, the court said an individual is privileged to be on property if the individual "naturally may be expected to be on the premises often and in the natural course of his duties or habits" or the individual has "the freedom or authority to act and to use property."

Criminal Trespass on Fenced Property

Generally, an individual is not allowed to enter or remain on fenced property if the individual knows the individual is not licensed or privileged to be there. However, the North Dakota Supreme Court has held culpability for trespass on fenced property depends, in part, on the fence at issue. Under Section 12.1-22-03, "[a]n individual is guilty of a class A misdemeanor if, knowing that that individual is not licensed or privileged to do so, the individual . . . [e]nters or remains in any place so enclosed as manifestly to exclude intruders." The word "manifestly" is not defined by statute; however, so courts look to the plain, ordinary, and commonly understood meaning of the word to determine its legal meaning, pursuant to Section 1-02-02.

In *State v. Bearrunner*, 2019 ND 29 (N.D. 2019), the Supreme Court noted "[t]he word 'manifest' is defined as 'readily perceived by the senses' or 'easily understood or recognized by the mind: obvious.'" According to the court, not all fences satisfy the requirements of Section 12.1-22-03:

A plain reading of the statute indicates the fence must be enclosed in a manner that obviously excludes intruders before an individual is guilty of trespass. Fences differ in size, materials of construction, and purpose. One fence may clearly communicate that trespassers are not allowed while another fence may not. Accordingly, whether a fence is so enclosed that it obviously excludes intruders is a finding of fact, not a matter of law . . . [W]e decline to hold as a matter of law that an open gate is an invitation to outsiders to gather on private property.

As a result, cases in which an individual is alleged to have trespassed criminally on fenced property will turn, in part, on what type of fence and gate are on the relevant property.

In 1990 the North Dakota Attorney General issued a legal opinion to Representative Dick Tokach regarding various types of trespass violations:

[The statute regarding trespass on enclosed property] has been generally construed to involve an enclosure more substantial than a typical barbed wire fence. Barbed wire fences may be construed as utilized to keep livestock in a property rather than keeping people out of that property. Fences of the type which have generally been found to come within this section include chain link or other fences of similar height or mass which clearly evidence the owner's intent that access to that owner's property is not permitted. However, a prosecutor may determine that this section may apply depending upon the specific facts and circumstances of the individual case.

In contrast, in *Bearrunner*, the Supreme Court upheld the defendant's conviction for criminally trespassing on land enclosed by a barbed wire fence. Ultimately, juries must weigh the facts of any allegation of trespassing on fenced property to determine whether the enclosure manifestly excludes intruders.

Criminal Trespass After Receiving Actual Communications

If an individual in charge of the premises or another authorized individual tells an intruder not to enter the premises or to leave the premises, the intruder is on notice and must leave. If the intruder does not leave, the intruder is guilty of criminal trespass. To satisfy the elements of criminal trespass under this provision, a landowner must provide "actual communication" to the intruder either verbally or in writing. Even if a landowner or other authorized individual only "substantially complies" with this provision, as long as notice against trespass is clear from the circumstances, an intruder is guilty of criminal trespass. However, it is unclear what actions would constitute substantial compliance with the notice requirement.

Criminal Trespass on Posted Land

Section 12.1-22-03 prohibits an individual from entering or remaining on land posted in a manner reasonably likely to come to the attention of intruders. The statute also provides the name of the person posting the premises

must appear on each sign in legible characters. As with the requirement to provide actual communication, a landowner or other authorized individual only has to "substantially comply" with the posting requirements, provided notice against trespass is clear from the circumstances. However, in a recent case, the Supreme Court found two "no trespassing" signs placed near the entrance to a heavy machine lot were insufficient to constitute posting for purposes of the criminal trespass statute because the signs did not include the name of the poster. *Interest of K.V.*, 2019 ND 255 (N.D. 2019). The Supreme Court held signs without the poster's name do not substantially comply with posting requirements. The court did not provide guidance regarding what would constitute substantial compliance.

HUNTING ON POSTED LAND

In contrast to trespass, hunting on posted land without permission is a strict liability offense under Section 20.1-01-18. This means an individual who hunts on posted land is guilty of the offense even if the individual does not know the individual is on posted land. An individual's mistaken belief about the facts or law are not relevant to the individual's culpability under the statute. The strict liability statute also requires trappers to obtain written permission before trapping protected fur-bearing animals on posted land. An individual who traps protected fur-bearing animals or hunts on posted land without permission is guilty of a Class B misdemeanor for the first offense and a Class A misdemeanor for a subsequent offense within 2 years. Section 20.1-01-26 also provides when an individual is convicted of hunting on posted land, the court is required to suspend the individual's hunting, fishing, and trapping privileges for a period of at least 1 year, 2 years for the second conviction, and 3 years for the third or subsequent conviction. The court also is required to determine whether the defendant must complete a hunter education course before obtaining a new hunting license.

The requirements for posting land to prohibit hunting are found in Section 20.1-01-17, which requires posting by:

[P]lacing signs alongside the public highway or the land giving notice that hunting is not permitted on the land. The name of the person posting the land must appear on each sign in legible characters. The signs must be readable from the outside of the land and must be placed conspicuously not more than eight hundred eighty yards [804.68 meters] apart. As to land entirely enclosed by a fence or other enclosure, posting of signs at or on all gates through the fence or enclosure constitutes a posting of all the enclosed land.

Although the requirements for posting against hunting are more detailed than the requirements for posting under the criminal trespass statute, Section 20.1-01-17 provides some leeway for posters. Similar to Section 12.1-22-03, Section 20.1-01-17 provides an intruder is guilty of hunting on posted land if the posting substantially complies with the posting requirements and "notice against hunting or trespassing is clear from the circumstances."

The Supreme Court clearly has held hunters are responsible for determining whether they are on posted land. In *State v. Mittleider*, 2011 ND 242 (N.D. 2011), the Supreme Court upheld a conviction for individuals who shot a deer on a wildlife refuge that was posted improperly. The individuals said they did not know they were on a wildlife refuge but knew a refuge was nearby. The Supreme Court said the individuals "could have determined the boundaries of the refuge before the deer was shot." Similarly, in *State v. Bandbord*, 2014 ND 228 (N.D. 2014), the Supreme Court upheld the conviction of a hunter who did not think he was hunting on posted land, and held "the illegal hunting statutes do place the burden upon the hunter to ensure that the land is open to hunting."

RELATIONSHIP OF CRIMINAL TRESPASS TO HUNTING ON POSTED LAND

Criminal trespass and hunting on posted land are separate offenses with separate elements and penalties. In some situations, a prosecutor may be able to bring charges against an individual under either the criminal trespass statute or the hunting on posted land statute. For example, an individual hunting on posted land who knows the individual does not have a license or privilege to be on the land likely satisfies the elements of both statutes, and the prosecutor's choice will determine the penalties that may be imposed on the defendant. As the Supreme Court held in *Bearrunner*, "N.D.C.C. § 20.1-01-17 does not create an exception to N.D.C.C. § 12.1-22-03. Instead, it creates a separate offense imposing a separate penalty that includes the loss of hunting privileges."

Additionally, a prosecutor's choice of statutes may depend on whether the prosecutor can show all elements of the offense were met. For example, if a hunter has a reasonable basis for believing the hunter has a license or privilege to be on the posted land, a prosecutor may not be able to show all elements of a criminal trespass offense are met. In that case, the prosecutor may charge the individual with hunting on posted land because it is a strict liability offense.