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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

May 12, 1998

Lt. W. E. Robbins
Department Training Officer
City of York, Police Department
P. O. Box 500
York, South Carolina 29745

Re: Informal Opinion

Dear Lt. Robbins:

You have asked for advice with respect to the following situation:

> Problem: A home owner allowed his adult son to come and stay with him and now after several months the owner wants the son to leave and the son will not leave. The son does not pay any rent or compensates the owner in any way.
>
> Question: Is this a criminal trespass under 16-11-620 to be handled by police or is this a civil problem to be handled by the Magistrate?
>
> My Municipal Judge feels that this is a criminal trespass and states that he would handle in his court, because the owner's permission to stay in the home has been withdrawn.
>
> The local Magistrate states that she feels this would be a problem for the Magistrate, and if owner came to her she would handle as a civil trespass under 15-67-610. She states that she would handle the problem this way, because there

Request Letter.

seems to be no Landlord Tenant relationship between the owner and his son which would allow her to evict the son.

In the past it has been our practice to direct persons to the Magistrate in situations such as this and we have not had a problem. I have not talked with the Judges in the past, but now that I have I find that they disagree.

Law / Analysis

S.C. Code Ann. Sec. 16-11-620 provides as follows:

> [a]ny person who, without legal cause or good excuse, enters into the dwelling house, place of business, or on the premises of another person after having been warned not to do so or any person who, having entered into the dwelling house, place of business, or on the premises of another person without having been warned fails and refuses, without good cause or good excuse, to leave immediately upon being ordered or requested to do so by the person in possession or his agent or representative shall, on conviction, be fined not more than two hundred dollars or be imprisoned for not more than thirty days.
>
> All municipal courts of this State as well as those of magistrates may try and determine criminal cases involving violations of this section occurring within the respective limits of such municipalities and magisterial districts. All peace officers of the State and its subdivisions shall enforce the provisions hereof within their respective jurisdictions.
>
> The provisions of this section shall be construed as being in addition to, and not as superseding, any other statutes of the State relating to trespass or entry on lands of another.

Section 15-67-610 further provides:

> [i]f any person shall have gone into or shall hereafter go into possession of any lands or tenements of another without his consent or without warrant of law, the owner of the land so

> trespassed upon may apply to any magistrate to serve a notice on such trespasser to quit the premises, and if, after the expiration of five days from the personal service of such notice, such trespasser refuses or neglects to quit then such magistrate shall issue his warrant to any sheriff or constable requiring him forthwith to eject such trespasser, using such force as may be necessary.

Our Court of Appeals, in Snow v. City of Columbia, 305 S.C. 544, 409 S.E.2d 797 (Ct. App. 1991) has made the following general statement regarding the law of trespass and the nature of such action:

> [a]t common law, all land held in peaceable possession is deemed to be enclosed. Harris v. Baden, 154 Fla. 373, 17 So.2d 608 (1944). Subject to limited exceptions not relevant to this case, the person in peaceable possession has the right to exclude all others from the enclosure. See Stratos v. King, 282 S.C. 501, 319 S.E.2d 356 (Ct. App. 1984). The unwarrantable entry on land in the peaceable possession of another is a trespass, without regard to the degree of force used, the means by which the enclosure is broken, or the extent of the damage inflicted. Lee v. Stewart, 218 N.C. 287, 105 S.E.2d 804 (1940). The entry itself is the wrong. Thus, for example, if one without license from the person in possession of land walks upon it, or casts a twig upon it, or pours a bucket of water upon it, he commits a trespass by the very act of breaking the enclosure. See Moore v. Duke, 84 Vt. 401, 80 A. 194 (1911); 1 G. Addison, A TREATISE ON THE LAW OF TORTS, 388 (Wood ed. 1881); Restatement 2d of Torts, 158, comment i, illustration 3 (1965). It is immaterial whether any further damage results. See Brown Jug, Inc. v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 959, 688 P.2d 932 (Alaska 1984). The mere entry entitles the party in possession at least to nominal damages. Lee v. Stewart, supra. To constitute an actionable trespass, however, there must be an affirmative act, the invasion of the land must be intentional, and the harm caused must be the direct result of that invasion. Alabama Power Co. v. C.G. Thompson, 278

> Ala. 367, 178 So.2d 525 (1965). Trespass does not lie for nonfeasance or failure to perform a duty. Id.
>
> Intent is proved by showing that the defendant acted voluntarily and that he knew or should have known the result would follow from his act. Snakenberg v. Hartford Casualty Insurance Co., 299 S.C. 164, 383 S.E.2d 2 (Ct. App. 1989). Although neither deliberation, purpose, motive, nor malice are necessary elements of intent, the defendant must intend the act which in law constitutes the invasion of the plaintiff's right. Id. Trespass is on intentional tort; and while the trespasser, to be liable, need not intend or expect the damaging consequence of his entry, he must intend the act which constitutes the unwarranted entry on another's land. See Phillips v. Sun Oil Co., 307 N.Y. 328, 121 N.E.2d 249 (1954); Lee v. Stewart, supra (it is immaterial whether defendant in committing the trespass actually contemplated the resulting damage to plaintiff). ...

It is often said that "[c]riminal trespass statutes do not afford a substitute for adequate civil remedies for trespass." 75 Am.Jur.2d, Trespass, § 166. On the other hand,

> [t]he right to exclude others is an essential right which may be protected, in appropriate cases, by the utilization of criminal trespass laws. Thus, the legislative purpose of some criminal trespass statutes to protect any possessor of land, whether titleholder or not, from intrusions by unwanted persons, and to prevent violence or threats of violence, the legislatures in some jurisdictions, having determined that when a person refuses to leave another's property after he has been ordered to do so, a threat of violence becomes imminent.

Id. at § 165.

With respect to § 15-67-610, our Supreme Court in Richland Drug Co. v. Moorman, 71 S.C. 236, 239, 50 S.E. 792 (1905), has said the following:

> [t]his statute was designed to give the real owner of land an expeditious method of ejecting trespassers, but it was not intended to give a mere claimant of land any advantage

> over one in rightful possession. The plaintiff claiming right of summary ejectment must bring himself within the statute by at least making before the magistrate a prima facie showing that he is the owner of the premises and that defendant is a trespasser. The mere statement of his claim in the notice is not sufficient if the defendant appears and challenges the claim, but he must make such proof as should satisfy the magistrate that the case is one falling within the statute. This, it appears, the relator has so far declined or failed to do. The duty of the magistrate to issue his warrant of ejectment does not arise until after the expiration of five days from service of notice to quit, and upon its appearing that the defendant, being a trespasser, refuses or neglects to quit after such notice.

It is often the case that both civil as well as criminal remedies exist with respect to a particular tort. Assault and battery is a good example. This Office has previously distinguished between criminal remedies and civil relief with respect to debt in the following way:

> [i]ndeed, the satisfaction of a debt and a criminal prosecution are entirely separate and independent matters. The satisfaction of a debt is a civil concern to fulfill obligations owed to private parties, while a criminal prosecution initiated by warrant or indictment is sought on behalf of and is controlled by the State to vindicate the public interest in adherence to the law. State v. Addis, 257 S.C. 482, 487, 186 S.E.2d 415 (1972); State v. Addison, 2 S.C. 356, 363-4 (1870) ... .
>
> Our Supreme Court has held that restitution by the criminal court does not operate as an accord and satisfaction with respect to a debt. Fanning v. Hicks, 284 S.C. 456, 327 S.E.2d 342 (1985). Moreover, the converse is also true: satisfaction of a debt cannot foreclose criminal prosecution. Our Court has cautioned time and again that the criminal process may not be used as a form of coercion to settle a financial obligation. As was stated in Huggins v. Winn Dixie of Greenville, Inc., 249 S.C. 206, 153 S.E.2d 693 (1967), it is abuse of process if a criminal process is employed to obtain a collateral advantage ... .

> Further, our Supreme Court has stressed the important public policy reasons for seeing that criminal prosecution is not hindered regardless of the outcome of private restitutions ... .

Thus, criminal prosecution and private civil actions are initiated for different public policy reasons. Accordingly, there is no "right" or "wrong" answer for whether the criminal or civil trespass statutes should be used in the above situation. Either remedy is available in the circumstance referenced. A number of factors would go into the individual's choice of remedies, not the least of which would be the relationship between father and son. I cannot answer whether in the above factual situation the father would want to seek a criminal warrant for trespass against his son -- that is a question only he could answer. Moreover, civil ejectment in magistrate's court is viewed as the most "expeditious" remedy and would avoid the repercussion of a criminal penalty. Too, the evidentiary burden is less in civil court.

Again, either remedy would be available to the individual. The father would have to weigh all the factors referred to above (and others as well) in deciding whether to seek a civil writ of ejectment or a criminal warrant against his son.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/an