

IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

**FILED**

**October 23, 1996**

**Cecil Crowson, Jr.**  
Appellate Court Clerk

DAVID L. ALLEY, SR., and	)	C/ A NO. 03A01-9605-CV-00160
DAVID L. ALLEY, JR.,	)	
	)	KNOX LAW
Plaintiffs-Appellants,	)	
	)	HON. DALE C. WORKMAN,
v.	)	JUDGE
	)	
JOHN W CLEVELAND, and	)	
CLEVELAND & CLEVELAND,	)	
A Professional Corporation,	)	VACATED IN PART,
	)	AFFIRMED IN PART,
Defendants-Appellees.	)	AND REMANDED

THOMAS M LEVEILLE, Knoxville, for Plaintiffs-Appellants.

FRANK Q. VETTORI, O'NEIL, PARKER & WILLIAMSON, Knoxville, for Defendants-Appellees.

O P I N I O N

Franks. J.

In this action, the Trial Court, responding to a motion to dismiss filed pursuant to Tennessee Rules of Civil Procedure, Rule 12.06, dismissed "all causes of action" except for conversion of personal property of the plaintiffs, and directed the entry of judgment as to the dismissed claims

pursuant to T.R.C.P., Rule 54.02. Plaintiffs have appealed.

Plaintiffs insist that the Trial Judge improperly dismissed their cause of action based on trespass to real property and their cause of action based on invasion of privacy.

The "amended and restated complaint" alleges that two employees of the defendants, entered the building where plaintiffs maintain their offices and entered plaintiffs' offices without invitation, which it was alleged "are generally not open to the public" and took several documents from said offices and thereby converted them to defendants' use.

T.R.C.P. Rule 8, requires that the facts upon which a claim for relief is founded must be stated in the complaint. *W. & O. Construction Co., v. City of Smithville*, 557 S.W2d 920 (Tenn. 1977). The Rule also cautions that all pleadings are to be construed so as to do substantial justice. *Id.* 8.06. The unauthorized entry on land in the possession of another, and the taking and carrying away of property thereon, constitutes a trespass. *Luttrell v. Hazen*, 35 Tenn. 20 (1855). The facts alleged state a cause of action for trespass.

Defendants counter that plaintiffs offices were business offices, and since the building was open to the public, their entering did not constitute a trespass. While an office open to transact business constitutes a tacit invitation to all individuals having business with such office, there is no trespass so long as the person engages in no acts inconsistent with the purposes of the business or

facility. 75 Am Jur.2d §48, p.41. But where an individual has gained a right of entry but abuses his right after entry, trespass lies. See *Crawford v. Maxwell*, 22 Tenn. 476 (Tenn. 1842).

Next, defendants contend that no cause of action will lie in this jurisdiction for invasion of privacy. We cannot agree. The Tennessee Supreme Court in *Martin v. Senators, Inc.*, 220 Tenn. 465, 418 S.W2d 660 (1967), considered the issue of whether invasion of privacy was an actionable tort in this jurisdiction.<sup>1</sup> Subsequently, the Supreme Court revisited the issue in *Swallows v. Western Electric Co., Inc.*, 543 S.W2d 581, and quoted with approval from *Martin* to the effect that liability for invasion of privacy "exists" if the defendant knew or should have known that his actions would be offensive and the intrusion had gone beyond the limits of decency. *Id.* at 583.<sup>2</sup> While the Court in both cases "assumed" the action existed at common law, the cases did not "assume without deciding the issue." Those cases recognize this tort action.

Finally, defendants argue that these actions are barred by the statute of limitations. The gravamen of an action determines which statute of limitations is applicable. *Yater v. Wachovia Bank of Georgia, N.A.*, 861 S.W2d 369 (Tenn.

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<sup>1</sup>[Defendant] presented to the Trial Court and this Court both the question whether invasion of privacy is an actionable tort in Tennessee, and the question whether the declaration alleged facts making an actionable case for such violation.

220 Tenn. 474.

<sup>2</sup>Defendants argue the tort is "for invasion of business privacy?". However, plaintiffs are individuals suing for violation of personal rights.

App. 1993). No special damages have been alleged for trespass, and essentially the alleged harm is the alleged conversion of personal property. The three year statute of limitations expressly applies to the detention or conversion of personal property. See T.C.A. 28-3-105. The three year statute is applicable to the allegations of trespass.

As to the action based on invasion of privacy, the one year statute is applicable. The tort lies for damages personal to the plaintiff. In this case the record on its face shows that the complaint was filed more than one year after the cause of action arose, and this action is barred.

We conclude that the complaint states a cause of action for trespass, and the Trial Court's judgment is vacated on this issue. However, appellants will be required to elect their remedy. The remaining causes of action arise from the same alleged facts, and where damages are sought for trespass and conversion of personal property, a party may not avail himself of both remedies. See *Allen v. Dent*, 72 Tenn. 676 (1880). Where two or more remedies are given for the same wrong, plaintiff will be put to his election. See *Kendrick v. Moss*, 104 Tenn. 376, 58 S.W. 127, (1900). However, in such circumstances the election is not irrevocable, where the remedies are derived from the same facts. See *Grizzard v. Fite*, 191 S.W.2d 967 (Tenn. 1917).

The judgment of the Trial Court is vacated in part, and affirmed in part, and the cause remanded with the costs of the appeal assessed one-half to appellants, and one-half to appellees.

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Herschel P. Franks, J.

CONCUR:

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Charles D. Susano, Jr., J.

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William H. Inman, Sr. J.