

ENGINEER AND LAND SURVEYOR LIABILITY

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ENGINEER AND LAND SURVEYOR LIABILITY

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DISCLAIMER

- ***I Am Not Your Attorney.*** This seminar is not intended to provide you with legal advice. Seek legal advice from an attorney who is familiar with your particular situation and the facts in your particular case. The example contract clauses contained herein are intended as examples only and should be reviewed and modified by competent legal counsel to reflect variations in applicable state and local law specific to your circumstances.

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JEFF'S 10 COMMANDMENTS TO LIMIT YOUR LIABILITY

1. THOU SHALT HAVE A CONTRACT.

Having a contract in place when providing professional services helps to eliminate miscommunication that often leads to litigation.

JEFF'S 10 COMMANDMENTS TO LIMIT YOUR LIABILITY

2. THOU SHALT AVOID LITIGIOUS CLIENTS.

A client who has a tendency to sue any and everybody, or even a client who has had several lawsuits in the past, will be more prone to sue should anything go bad in your relationship.

**JEFF'S 10 COMMANDMENTS
TO LIMIT YOUR LIABILITY**

**3. THOU SHALT PRACTICE
DEFENSIVELY.**

Conduct your business and your professional practice defensively, as if you're going to court.

**JEFF'S 10 COMMANDMENTS
TO LIMIT YOUR LIABILITY**

**4. THOU SHALT READ ALL
CERTIFICATIONS CAREFULLY.**

Read any and all certifications that you are asked to sign, very carefully. Do not be afraid to go back to the Client and negotiate the language in the certification.

**JEFF'S 10 COMMANDMENTS
TO LIMIT YOUR LIABILITY**

**5. THOU SHALT KNOW THE LAW THAT
GOVERNS YOUR PRACTICE.**

We've all heard the phrase: "Ignorance of the law is not excuse." This is especially applicable to the professional service provider.

**JEFF'S 10 COMMANDMENTS
TO LIMIT YOUR LIABILITY**

**6. THOU SHALT NOT SIGN YOUR
CLIENT'S CONTRACT.**

If you can avoid it, don't sign your Client's contract. If you must sign your Client's contract have it reviewed by legal counsel for potential pitfalls.

**JEFF'S 10 COMMANDMENTS
TO LIMIT YOUR LIABILITY**

**7. THOU SHALT NOT PRACTICE
OUTSIDE THINE AREA OF EXPERTISE.**

Do not perform, or attempt to perform services that you do not have the training, education, or expertise to handle, even if your license allows for such services.

**JEFF'S 10 COMMANDMENTS
TO LIMIT YOUR LIABILITY**

**8. THOU SHALT OPERATE BEHIND A
CORPORATE SHIELD.**

If possible, operate behind a corporate shield. This is just another layer of protection that you should add to your overall protective armor.

**JEFF'S 10 COMMANDMENTS
TO LIMIT YOUR LIABILITY**

**9. THOU SHALT BE AN EXPERT
EVALUATOR OF EVIDENCE.**

Surveyors must be expert measurers:
YES. But measurements are the least
scrutinized aspect of what we do, when we
go to court. Our evaluation of the evidence
is what will be scrutinized.

**JEFF'S 10 COMMANDMENTS
TO LIMIT YOUR LIABILITY**

10. THOU SHALT WIN IN COURT.

In this litigious society, it is no longer an
option to be wrong in court (lose). The
results of you survey should be a well
reasoned opinion based on the law and
the facts.

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

- **Introduction**
- Liability as it relates to the engineer and
land surveyor in ordinary practice is
primarily dictated by state law.

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

- **Introduction**
- For the purposes of this seminar, court cases have been selected from across the country that are representative of the principles being discussed.

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

- **Introduction**
- Nevertheless, and with few exceptions, the principles of liability and contract that will be discussed have universal application.

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

- **Introduction**
- The relatively small number of cases against engineers and land surveyors that appear in the case reporters is no indication as the total number of cases that come up against engineers and land surveyors.

THE ENGINEER AND LAND SURVEYOR LIABILITY

- **Introduction**
- Many cases in the United States have been decided in lower courts (that were never appealed to higher courts) that are just bad law, bad rulings, and actually against the law.

THE ENGINEER AND LAND SURVEYOR LIABILITY

- **Introduction**
- One area, however, that has a wide variation in its application is the area of limitations on actions as they apply to the engineer and land surveyor.

THE ENGINEER AND LAND SURVEYOR LIABILITY

- **Introduction**
- Statutes of Limitations as applied across the States:
- Statutes apply to ALL professions;
- Statutes apply to SOME professions;
- Apply though a combination of Statutes and Common Law.
- More on Statutes of Limitation...

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

- **Introduction**
- Another area that has almost universal application, but with some very noticeable differences, is in the application of the so-called “discovery rule.”
- More on the discovery rule...

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

- **Privity of Contract**
- The history of the engineer and land surveyor’s liability has been somewhat long in coming.

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

- **Privity of Contract**
- Consumers were being barred from their remedies in court because they were not in “privity” of contract with the manufacturer who produced the product that caused the injury.

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

“The principle that performance of a private contract can give rise to duties in tort seems to have been first articulated in the 19th century. While attempts to recover by third parties injured by negligent performance of contractual duties had generally failed because of a lack of privity, this restriction in cases involving physical injuries was lifted in cases such as *MacPherson v. Buick Motor Co.* (1916).”

Rozny v. Marnul, 250 N.E.2d 656 (Ill.1969).

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

- **Privity of Contract**
- *MacPherson* has been cited over 2,000 times on the overall issue of third party liability.

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

- **Privity of Contract**
- In explaining the ruling in *MacPherson* as it relates to professional service providers, the Supreme Court of Wisconsin put it this way:

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

“The defendant placed its entire reliance upon the argument that there was no duty to the particular plaintiff, because there was no privity of contract with it. The privity-of-contract defense is, however, a legal defense; and as a legal defense, it was substantially shattered with the mandate of *MacPherson v. Buick Motor Co.* ...

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

“It is now the almost universal rule that the contractor is liable to all those who may foreseeably be injured by the structure, not only when he fails to disclose dangerous conditions known to him, but also when the work is negligently done. This applies not only to contractors . . . but also to . . . supervising architects and engineers....

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

"We can perceive no justifiable reason why a building contractor should be relieved from all liability to third persons for his negligence after completion and acceptance of the work by the owner where the defect is concealed or latent in character..."

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

"We see no difference in principle whether the negligence results in personal injury or property damage."

A.E. Inv. Corp. v. Link Builders, Inc., 214 N.W.2d 764 (Wisc.1974).

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

- **Privity of Contract**
- *MacPherson* opened the door to third party liability, and that theory has clearly been expanded to the professional service provider, such as the engineer and land surveyor.

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

"Although we are aware of cases, which evidence the increasing disregard for the privity requirement through continued expansion of the class of permissible plaintiffs under the third-party beneficiary doctrine, and realize that in factual situations similar to the instant case recovery has been granted under this theory, we believe the fundamental reasoning underlying the tortious misrepresentation theory more nearly accommodates this case than the expanded third-party beneficiary doctrine."

Rozny v. Marnul, 250 N.E.2d 656, (Ill.1969)

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

- **Privity of Contract**
- In 1969, Illinois was recognizing that the third party beneficiary doctrine was on the rise with the breakdown of the privity requirement, but in many cases, the foreseeability of the professional's actions, the proximate cause of the injury, and the breach of duty owed as a professional, give rise to a tort action against the professional service provider completely outside the contract context.

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

- **Privity of Contract**
- Eight years later, in extending the erosion of privity of contract to professionals service providers, the California Court of Appeals put it this way:

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

“The general rule in California is that a professional person may be held liable to third persons who suffer damage proximately caused by the negligence of the professional person as an independent contractor in the performance of his professional duties even though there is no privity of contract between the third person and the professional person and even though the client does not complain about the quality of the professional service....”

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

“The reason for the rule is that the action is *ex delicto*, not *ex contractu*.... Originally professional persons were exempt from liability to third persons because it was believed that they owed their duty to their clients not to third persons.”

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

“In...rejecting the privity of contract requirement [California] declared that whether or not liability to third persons existed involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.”

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

“Foreseeability and proximate cause now supplant the former requirement of privity of contract.”

Huber et al v. Moore et al, 67 Cal.App.3rd 278, 301 (1977).

THE ENGINEER AND LAND SURVEYOR LIABILITY

- **Privity of Contract**
- From the 1960's to today, case after case involving engineers and land surveyors continue to hold that privity of contract is no bar when it is foreseeable that the professional's services will be relied upon by third parties.

THE ENGINEER AND LAND SURVEYOR LIABILITY

- **Privity of Contract**
- "[T]he courts have eliminated the need for privity between the Land Surveyor and the party seeking relief...that is, the party complaining no longer has to be the party with whom the land surveyor enjoyed a contractual relationship."

Madsen, T.S. and Robert John Munro, *Understanding Your Professional Liability as a Land Surveyor*, Land Surveyors Seminars, Gainesville, Florida (1979), at 66.

THE ENGINEER AND LAND SURVEYOR LIABILITY

- **Privity of Contract**
- These commentators also imply that the discovery rule is alive and well throughout the country and extends the surveyor's liability in perpetuity, and that's not exactly true.

THE ENGINEER AND LAND SURVEYOR LIABILITY

• Privity of Contract

“The day of privity of contract between the surveyor and client is over; the surveyor is obligated to disclose, for the possible benefit of third parties, all information that may lead to damages.”

Robillard, Walter G., Donald A. Wilson, Curtis M. Brown, *Evidence and Procedures for Boundary Location, Fifth Edition*, Page 475.

THE ENGINEER AND LAND SURVEYOR LIABILITY

• Privity of Contract

• Again, these are state law driven issues and nothing beats knowing the laws that affect you as a professional land surveyor in your own state.

THE ENGINEER AND LAND SURVEYOR LIABILITY

“Surveyors may be held liable for the damages that result from their mistakes, misrepresentations, or negligence. Lack of contractual privity between the parties is not a defense in an action for tortious negligence. A surveyor’s duty has been held to extend to subsequent purchasers who relied upon the survey to their detriment.”

THE ENGINEER AND LAND SURVEYOR LIABILITY

“Downer fully understood that his survey would affect future purchasers of the divided Jacobsen tract. We conclude...that Downer indeed had a duty to the Hannemans as foreseeable subsequent purchasers of the property, and that Downer breached that duty, thereby causing damage to the Hannemans.”

Hanneman v. Downer, Swenson and Jacobsen, 871 P.2d 279 (Nev.1994).

THE ENGINEER AND LAND SURVEYOR LIABILITY

- **Watts v. Shannon and Leggins**
- First of all, if you are ever in court and you and your survey are on trial, and the judge says that the results of your survey are “hair raising,” then you know you’re in big, big trouble.

Watts v. Shannon and Leggins, 2005 Tenn.App. LEXIS 403.

THE ENGINEER AND LAND SURVEYOR LIABILITY

- **Watts v. Shannon and Leggins**
- When you perform a boundary survey, you’re not only surveying your client’s property, you are surveying the common boundary with every adjoiner.

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

- **Watts v. Shannon and Leggins**
- Watts brought the action under tort law for misrepresentation, breach of duty, negligence, fraud and outrageous conduct.

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

- **Watts v. Shannon and Leggins**
- Leggins claimed privity of contract resulting in an award to the Watts in the amount of \$10,691.89 for actual damages consisting of attorney's fees, survey fees, and court cost.

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

- **Watts v. Shannon and Leggins**
- Throwing out Leggins' privity defense quoted an earlier decision: "One who through the tort of another has been required to act in the protection of his interest by bringing or defending an action against a third person is entitled to recover reasonable compensation for loss of time, attorney fees and other expenditures thereby suffered or incurred in the earlier action."

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

- **Watts v. Shannon and Leggins**
- “The Trial Court said that the surveyor (Leggins) had an absolute duty to do his own surveying and not let someone else show him where the lines were.”

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

- **Watts v. Shannon and Leggins**
- Leggins, ostensibly, relied exclusively on a tax map and the description of the property as provide by Shannon, with no other research.

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

- **Watts v. Shannon and Leggins**
- No research of adjoining deeds, no regard for occupation, no regard for superior rights, no regard for the rights of third parties.

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

- **Watts v. Shannon and Leggins**
- In establishing plaintiff's boundary line as found by plaintiff's surveyor, the Court said that plaintiffs had owned the property in dispute for 40 years, possessed it, cut timber on it, etc. and had superior title to the property.

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

- **Watts v. Shannon and Leggins**
- All Leggins had to do was what every boundary surveyor in America is obligated to do (whether you want to believe this or not), survey your client's description—but—you must look at the other incidences of title.

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

- **Watts v. Shannon and Leggins**
- Deeds and descriptions in deeds are only evidence of title, not proof of title.

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

- **Watts v. Shannon and Leggins**
- Occupational rights that have ripened into legal rights and senior rights are both superior to written conveyances.

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

- **Watts v. Shannon and Leggins**
- Instead, Mr. Leggins “testified that he felt that he owed no duty to the community or other property owners, but only owed a duty to his client, to survey [his client’s deed] and did not have to go behind his client’s deed so long as he was ‘comfortable’ with it.”

**LIMITATIONS ON THE BOUNDARY
SURVEYOR’S LIABILITY**

- **Statutes of Limitation**
- Statutes of limitations are just what the name implies; legislatively enacted limitations on certain causes action.

**LIMITATIONS ON THE BOUNDARY
SURVEYOR'S LIABILITY**

- **Statutes of Limitation**
- I would venture to guess that every state in the Union has statutes that limit certain actions.

**LIMITATIONS ON THE BOUNDARY
SURVEYOR'S LIABILITY**

- **Statutes of Limitation**
- I would further venture a guess that almost every state has a limitations period that applies to professional services providers.

**LIMITATIONS ON THE BOUNDARY
SURVEYOR'S LIABILITY**

- **Statutes of Limitation**
- The kicker is whether or not the statute applies to the land surveyor.
- In other words, is the land surveyor one of the included "professions"?

**LIMITATIONS ON THE BOUNDARY
SURVEYOR'S LIABILITY**

- **Statutes of Limitation**
- Nebraska law is illustrative of the problem.

**LIMITATIONS ON THE BOUNDARY
SURVEYOR'S LIABILITY**

"Any action to recover damages based on alleged professional negligence or upon alleged breach...shall be commenced within two years next after the alleged act or omission...if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery...."

**LIMITATIONS ON THE BOUNDARY
SURVEYOR'S LIABILITY**

"[I]n no event may any action be commenced to recover damages for professional negligence or breach...more than ten years after the date of rendering or failure to render such professional service which provides the basis for the cause of action."

Lawyers Title Ins. Co. v. Hoffman, 513 N.W.2d 521 (Neb.1994).

**LIMITATIONS ON THE BOUNDARY
SURVEYOR'S LIABILITY**

- **Statutes of Limitation**
- This statute has it all.
- A two year statute of limitations with a tolling of the statute until "discovery," but in no event may an action be brought after ten years.
- The only problem is that it doesn't apply to land surveyors.

**LIMITATIONS ON THE BOUNDARY
SURVEYOR'S LIABILITY**

"The Legislature has not specifically stated which occupations are governed by § 25-222. We recognized that the term 'profession' originally contemplated only theology, law, and medicine but that other vocations were later designated as a profession...."

**LIMITATIONS ON THE BOUNDARY
SURVEYOR'S LIABILITY**

"We have applied the professional period of limitations contained in § 25-222 to architects and engineers, to accountants, to medical technicians, and to those giving investment advice...."

**LIMITATIONS ON THE BOUNDARY
SURVEYOR'S LIABILITY**

“Defining the class of persons who will receive the benefit of a shortened statute of limitations may require the court to engage in a form of classification which more properly should be done by the Legislature....”

**LIMITATIONS ON THE BOUNDARY
SURVEYOR'S LIABILITY**

“On the limited facts articulated by this pleading, we decline to even consider whether surveyors render professional services under § 25-222.”

**LIMITATIONS ON THE BOUNDARY
SURVEYOR'S LIABILITY**

- **Statutes of Limitation**
- A Colorado case that is instructive on the professional's knowledge of his or her own State's laws.
- The case is *Cornforth v. Larsen and Larsen Surveying*, 49 P.3d 346 (Colo.App. 2002).

**LIMITATIONS ON THE BOUNDARY
SURVEYOR'S LIABILITY**

"The statute states in relevant part that, 'all actions against any land surveyor brought to recover damages resulting from any alleged negligent or defective land survey shall be brought within the time provided in section 13-80-101 after the person bringing the action either discovered or in the exercise of reasonable diligence and concern should have discovered the negligence or defect which gave rise to such action, and not thereafter, but in no case shall such an action be brought more than ten years after the completion of the survey upon which such action is based.'"

**LIMITATIONS ON THE BOUNDARY
SURVEYOR'S LIABILITY**

"NOTICE: According to Colorado law, you ***must*** commence any legal action based upon any defect in this survey within three years after you first discover such defect. In no event may any action based upon any defect in this survey be commenced more than ten years from the date of the certification shown hereon."

**LIMITATIONS ON THE BOUNDARY
SURVEYOR'S LIABILITY**

"When construing a statute, we must determine and give effect to the intent of the General Assembly. To determine that intent, we look first to the plain language of a statute. If we can give full effect to the ordinary meaning of the words used, we construe the statute as written, because we presume the General Assembly meant what it clearly said. We also presume the General Assembly intends a just and reasonable result. A statutory construction that leads to absurd results will not be followed...."

**LIMITATIONS ON THE BOUNDARY
SURVEYOR'S LIABILITY**

“Statutes of repose set a date after which a claim may be barred whether or not an injury has been discovered previously. Such statutes begin to run on the date of the act or omission giving rise to the injury. In contrast, statutes of limitation run from the date the injury was discovered or should have been discovered. The purpose of a statute of repose is to prevent the assertion of stale claims and to reduce the so-called 'long tail' of liability created by the discovery rule.”

**LIMITATIONS ON THE BOUNDARY
SURVEYOR'S LIABILITY**

“Under the plain language of the statute, in order for the ten-year statute of repose to apply, the survey has to contain the notice. Since it is undisputed that the survey did not contain the notice, the ten-year statute of repose has no application.”

**LIMITATIONS ON THE BOUNDARY
SURVEYOR'S LIABILITY**

“Without express direction from the legislature, the Court is unwilling to read into the statute an automatic ten-year period of repose.”

Cornforth v. Larsen and Larsen Surveying, 49 P.3d 346 (Colo.App. 2002).

THE ENGINEER AND LAND SURVEYOR LIABILITY

- **Discovery Rule**
- The basic concept behind the discovery rule as it would be applied to the engineer or land surveyor, is that an applicable statute of limitations will be tolled (will not begin to accrue), until the discovery of the error.

THE ENGINEER AND LAND SURVEYOR LIABILITY

- **Discovery Rule**
- The problem for the engineer and especially for the land surveyor is that the discovery of an error or omission may not occur for years or even decades, thereby potentially tolling the statute until that time.

THE ENGINEER AND LAND SURVEYOR LIABILITY

“Observing how the discovery rule is applied nationally to the issue of surveyor negligence or breach of contract does not indicate any dispositive national trend. A number of jurisdictions have applied the discovery rule to surveyor negligence, while others have rejected it.”

Klinger v. Kightly, 791 P.2d 868 (Utah 1990).

THE ENGINEER AND LAND SURVEYOR LIABILITY

- **Discovery Rule**
- Fortunately, most discovery rules state that they will toll the statute until the error is discovered or *should have been discovered*.

THE ENGINEER AND LAND SURVEYOR LIABILITY

- **Rule of Repose**
- In addition, many states, have included an outside ultimate limit within which the aggrieved party must come forward or the claim will be forever barred (a statute of repose).

LIMITATIONS ON THE BOUNDARY SURVEYOR'S LIABILITY

“The ‘discovery rule’ has been used by courts and legislatures to avoid the harsh result that often allows a statute of limitations to run when some damage is incurred, even if the plaintiff has not yet discovered that he has suffered damages. Many statutes of limitations that incorporate a discovery rule also include an outer time limit, called a statute of repose.”

**LIMITATIONS ON THE BOUNDARY
SURVEYOR'S LIABILITY**

"Indeed, *Minn. Stat. § 541.052* (1998) is such a statute, as it incorporates elements of a discovery rule, by requiring actions to be brought within two years of discovery of a surveying error, with a statute of repose, by limiting any action to 10 or 12 years after the date of the survey."

Lovejoy v County of Dakota, 2000 Minn.App. Lexis 1036.

**LIMITATIONS ON THE BOUNDARY
SURVEYOR'S LIABILITY**

- **Rule of Repose**
- Even though the application of statutes of limitation is state specific as it applies to the boundary surveyor, there is still a common thread that runs through all of the law, across all 50 states. Legislative bodies and the courts hate antiquated claims that often have in them more injustice than justice.

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

- **Rule of Repose**
- The Courts and State Legislatures that enact "rules of repose" or "statute of repose" recognize the need to balance the plaintiff's right to have a remedy with the professional's right to have finality.

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

“The establishment of a boundary line by acquiescence for the statutory period of twenty-one years has long been recognized in Pennsylvania. Two elements are prerequisites: 1) each party must have claimed and occupied the land on his side of the line as his own; and 2) such occupation must have continued for the statutory period of twenty-one years. As recognized by the Superior Court and the common pleas court, the doctrine functions as a rule of repose to quiet title and discourage vexatious litigation.”

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

“As President Judge Coffroth aptly observed...a prospective purchaser will see the fence or similar marking; given its obvious presence as apparent boundary, he is therefore put on notice to inquire about its origin, history, and function. After 21 years, the chips will be allowed to fall where they may, for reasons of equity and peace.”

Zeglin v. Gahagan, 571 Pa. 321, 325, 326 (Pa. 2002).

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

“As a matter of public policy and for the repose of society, it has long been the settled policy of this state, as of others, that antiquated demands will not be considered by the courts, and that, without regard to any statute of limitations, there must be a time beyond which human transactions will not be inquired into...It is necessary for the peace and security of society that there should be an end of litigation, and it is inequitable to allow those who have slept upon their rights for a period of 20 years [to come forward with a claim.... After 20-years] the memory of transactions has faded and parties and witnesses passed away....”

McDermont v. Crenshaw, 489 So.2d 550 (Ala. 1986)

THE ENGINEER AND LAND SURVEYOR LIABILITY

- **Negligence**
- Before *MacPherson v. Buick Motor Co.*(1916), negligence had to arise under contract. This is no longer the case. Negligence is now well founded in tort law.

THE ENGINEER AND LAND SURVEYOR LIABILITY

“The difference between a tort and a contract action is that a breach of contract is a failure of performance of a duty arising under or imposed by agreement, whereas a tort is a violation of a duty imposed by law.”

Bender v. Kansas Secured Title, 119 P.3d 670 (Kan. 2005).

THE ENGINEER AND LAND SURVEYOR LIABILITY

- **Negligence**
- Tort – A private or civil wrong or injury, including action for bad faith breach of contract, for which the court will provide a remedy in the form of an action for damages. *Black’s*.

THE ENGINEER AND LAND SURVEYOR LIABILITY

- **Negligence**
- Tort – A violation of a duty imposed by general law or otherwise upon all persons occupying the relation to each other which is involved in a given transaction. *Black's*.

THE ENGINEER AND LAND SURVEYOR LIABILITY

- **Negligence**
- Tort – A legal wrong committed upon the person or property independent of contract.
Black's. [Emphasis added]

THE ENGINEER AND LAND SURVEYOR LIABILITY

- **Negligence**
- The four elements required for ordinary negligence are:
 1. Existence of Duty;
 2. Breach of that Duty;
 3. Causation due to the Breach; and
 4. Damages.

Roberts, Michael L. and Gregory S. Cusimano, *Alabama Tort Law, Third Edition*, Page 1.

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

- **Professional Negligence**
- In contrast, there are only three elements required for Professional Negligence.

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

“A claim of surveyor liability is founded on the three elements common to any tort: a breach of duty, causation, and damages.”

Lawson v. Winemiller, 1995 Ohio App. LEXIS 2043

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

“More specifically, to recover in an action for professional negligence, the plaintiff has the burden of proving: (1) the standard of care within the profession; (2) the defendant's failure to adhere to the professional standards; and (3) that the defendant's failure to adhere to the professional standards proximately caused harm to the plaintiff.” *Id.*

THE ENGINEER AND LAND SURVEYOR LIABILITY

“In a professional negligence action, the plaintiff bears the burden of presenting evidence which establishes the applicable standard of care, demonstrates that this standard had been violated, and develops a causal relationship between the violation and the harm complained of.”

Bell v. Jones, 523 A.2d 982 (D.C. App. 1986).

THE ENGINEER AND LAND SURVEYOR LIABILITY

- **Professional Negligence**
- So where does the “duty” come from?

THE ENGINEER AND LAND SURVEYOR LIABILITY

- **Professional Negligence**
- Check any State Statute creating the requirement for the licensure of professional engineers and land surveyors and you will find something similar to this...

THE ENGINEER AND LAND SURVEYOR LIABILITY

“In order to safeguard life, health, and property and to promote the public welfare, the practice of land surveying in this state is a learned profession to be practiced and regulated as such, and its practitioners in this state shall be held accountable to the state and members of the public by high professional standards in keeping with the ethics and practices of the other learned professions in this state...”

Code of Alabama 1975, Section 31-11-2(c), in pertinent part.

THE ENGINEER AND LAND SURVEYOR LIABILITY

- **Professional Negligence**
- You are licensed by the State “In order to safeguard life, health, and **property** and to promote the public welfare...” of the citizens of the State. [Emphasis added]

THE ENGINEER AND LAND SURVEYOR LIABILITY

- **Professional Negligence**
- What about damages?

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

- **Professional Negligence**
- As far as damages go, in the early days there had to be physical, bodily damage, as in *MacPherson*.

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

- **Professional Negligence**
- Later cases have thrown out the requirement for bodily damages and determined that monetary damages will do just as well.

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

- **Professional Negligence**
- In more recent cases, those monetary damages do not have to be actual but are presumed by the law, whether they actually occurred or not.

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

- **Professional Negligence**
- Therefore, you can almost automatically assume that there will be damage in any negligent act, error or omission committed by the professional service provider.

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

“One who through the tort of another has been required to act in the protection of his interest by bringing or defending an action against a third person is entitled to recover reasonable compensation for loss of time, attorney fees and other expenditures thereby suffered or incurred in the earlier action.”

Watts v. Shannon and Leggins, 2005 Tenn. LEXIS 403.

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

- **Professional Negligence**
- If you are in court on a professional negligence charge, in all likely hood, the causal connection between your actions and the Plaintiffs damages have been made, or else you would be out on a Summary Judgment motion.

THE ENGINEER AND LAND SURVEYOR LIABILITY

- **Professional Negligence**
- Therefore, the only question remaining is whether or not you fell below the requisite Standard of Care.

THE ENGINEER AND LAND SURVEYOR LIABILITY

- **Standard of Care**
- What is the Standard of Care for the Land Surveyor?

THE ENGINEER AND LAND SURVEYOR LIABILITY

“It is the duty of a land surveyor in his (her) profession to use that degree of knowledge, skill, and care ordinarily possessed and used by members of that profession, and to perform any service undertaken as a land surveyor, in a manner that a reasonably prudent land surveyor would use under the same or similar circumstance.”

Alabama Pattern Jury Instructions, Sec. 25.20, Malpractice, Non-Medical Professionals.

THE ENGINEER AND LAND SURVEYOR LIABILITY

"We note that a mere difference of professional opinion does not establish professional negligence. Moreover, professional negligence is not established by proving that a professional opinion turned out to be erroneous. Rather, to recover for professional negligence based on an incorrect professional opinion, one must establish that the professional fell below the standard of skill and knowledge commonly possessed and utilized by members within the profession when rendering his opinion."

Lawson v. Winemiller, 1995 Ohio App. LEXIS 2043.

THE ENGINEER AND LAND SURVEYOR LIABILITY

"We have not had the occasion to state the standard of care owed by a land surveyor. Medical and legal malpractice actions are analyzed according to tort law principles instead of contract law, and in those cases liability is predicated on 'deviation from the professional standard of care.' We have said that 'standards for demonstrating the elements of professional negligence do not differ from profession to profession.'"

THE ENGINEER AND LAND SURVEYOR LIABILITY

"The duty of care that the Superior Court imposed in this case required the Graveses to demonstrate that S.E. Downey's work on the survey was below that of an ordinarily and reasonably competent land surveyor in like circumstances. Courts in other jurisdictions have articulated the duty of care of land surveyors in similar ways. For example, in West Virginia a surveyor is held to the standard of care that a 'reasonably prudent surveyor' would have applied with regard to the same project."

THE ENGINEER AND LAND SURVEYOR LIABILITY

“Both Maryland and North Carolina state that a surveyor must ‘exercise that degree of care which a surveyor of ordinary skill and prudence would exercise under similar circumstances.’ We agree with the Superior Court that the duty of care a land surveyor is obligated to provide is that degree of care that an ordinarily competent surveyor would exercise in like circumstances.”

Graves v. Downey Land Surveyor, 885 A.2d 779 (Me. 2005).

THE ENGINEER AND LAND SURVEYOR LIABILITY

“In determining whether Jones was negligent, the trial court considered whether his actions were consistent with what “a surveyor of ordinary prudence in the Washington metropolitan area” would do under the same or similar circumstances. Such language as this, used repeatedly by the court in its findings of fact and conclusions of law, makes clear to us that the court applied the proper standard of care in finding Jones negligent.”

Bell v. Jones, 523 A.2d 982 (D.C. App. 1986).

THE ENGINEER AND LAND SURVEYOR LIABILITY

- **Standard of Care**
- How is the Standard of Care established?

THE ENGINEER AND LAND SURVEYOR LIABILITY

“Proof of the standard of care and competence that a business or profession requires must necessarily be provided through expert testimony unless the lack of skill or care is so apparent as to be within the comprehension of laymen and requires only common knowledge and experience to understand and judge it.”

Dickerson v Klockner, 743 N.E.2d 984 (Ohio 2000).

THE ENGINEER AND LAND SURVEYOR LIABILITY

“Normally, expert testimony is required to establish the standard of care for a profession and whether or not that standard of care was met is a question of fact. There are, however, exceptions to this general proposition. If the standard of care has risen to the level of becoming a rule of law, then the standard is not subject to expert opinions expounding local practices.”

Wilbanks v. Watson, 2000 Va.Cir. LEXIS 177 (VA 2000).

THE ENGINEER AND LAND SURVEYOR LIABILITY

- **Standard of Care**
- If you are going to provide expert witness testimony, you have to establish what the standard is, not what you yourself would do.

THE ENGINEER AND LAND SURVEYOR LIABILITY

“Jones contends that Hansen failed to establish the standard of care relating to the survey requested by Bell because he testified only what he would do under similar circumstances, not what a reasonably prudent surveyor would do. Testimony from an expert witness as to what he or she would do under similar circumstances is not sufficient to prove a standard of care....”

THE ENGINEER AND LAND SURVEYOR LIABILITY

“But that was not the substance of Hansen's testimony. It is true that Hansen responded to several questions from Bell's counsel by saying what 'I' or 'we' would have done. When asked about his use of the word 'we,' however, he said that he was referring to 'surveyors in general,' and in his previous answers he had been talking about 'what surveyors normally do.'”

THE ENGINEER AND LAND SURVEYOR LIABILITY

“Hansen also confirmed that his answers were based on his opinion 'with reasonable surveying certainty.' While his testimony might have been a bit clearer, we are satisfied that it met the requirements....”

Bell v. Jones, 523 A.2d 982 (D.C. App. 1983)

THE ENGINEER AND LAND SURVEYOR LIABILITY

- **Standard of Care**
- Do you need to be a registered or licensed Engineer or Land Surveyor in order to offer expert witness testimony?

THE ENGINEER AND LAND SURVEYOR LIABILITY

“Downer contends that Forsythe was not qualified to render an opinion as to the standard of care because he is not a licensed surveyor in Nevada. Downer’s contention lacks merit... [A] person need not be licensed to qualify as an expert; rather, the witness must simply possess ‘special knowledge, skill, experience, training or education’ relating to the subject matter.”

Hannemen v. Downer, et al, 871 P.2d 279 (Nev. 1994).

THE ENGINEER AND LAND SURVEYOR LIABILITY

- **Standard of Care**
- What are the qualifications necessary to be an expert witness? The simple answer is that if the judge says you are an expert, you are an expert—if not, then you aren’t.

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

- **Standard of Care**
- This comes from the line of cases collectively known as the *Daubert* test.

Frye v. United States, 293 F. 1013 (D.C. Cir. 1923);
Daubert v. Merrell Dow, 509 U.S. 579 (U.S. 1993); and
Kumho Tire Co. v. Carmichael, 526 U.S. 137 (U.S. 1998).

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

- **Standard of Care**
- The decision in *Daubert*, upheld and expounded in *Kumho Tires*, effectively gives the judge a “gate keeper” role in allowing or disallowing expert testimony.

Frye v. United States, 293 F. 1013 (D.C. Cir. 1923); *Daubert v. Merrell Dow*, 509 U.S. 579 (U.S. 1993); and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (U.S. 1998).

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

- **Standard of Care**
- *Daubert*, overturned the common law rules for expert witnesses expressed in *Frye* in favor of the Federal Rules of Evidence, which grant the judge great latitude on the issue of expert testimony.

Frye v. United States, 293 F. 1013 (D.C. Cir. 1923); *Daubert v. Merrell Dow*, 509 U.S. 579 (U.S. 1993); and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (U.S. 1998).

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

- **Standard of Care**
- The vast majority of the States have adopted the Federal Rules of Evidence and the Federal Rules of Civil Procedures, with modifications. One sources puts the figure at 42 States. This makes *Daubert* relevant in State civil cases.

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

- **Standard of Care**
- That brings us to the reverse question. Can a professional engineer or land surveyor be excluded as an expert?

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

- **Standard of Care**
- If an expert's proffered testimony is deemed to be unreliable or doubtful, in the opinion of the judge—no matter the apparent qualifications of the expert—that testimony will not be allowed in court.

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

"[I]n the present case, where the survey is offered to show where one body of water met another body of water in 1869, and the proper methodology for such a survey was not followed, and the survey is not what it purports to be, the trial court did not abuse its discretion in excluding that evidence as unreliable based upon the methodology employed by Grant Parish's surveyors."

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

"Nor can we give credence to the argument by Grant Parish that the survey, which failed to meet the minimum standards requirements for surveys, should have been admitted for the limited purpose of proving legislative intent. We fail to see how a faulty drawing, determined to be misleading and misrepresentative of where major markers are on the ground, can be used to show the location of the markers that the legislature was pointing to in 1869...."

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

"Moreover, the faulty new survey was purportedly based upon an ancient survey created over thirty-one years before the Act of 1869 was drafted, and the trial court found no evidence that the underlying survey was used by the legislature or referenced or connected in any manner to the Act of 1869."

Rapids Parish v. Grant Parish, 924 So.2d 357 (La.App. 2006).

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

- **Standard of Care**
- A “faulty” and “unreliable” survey determined to be “misleading and misrepresentative” that “failed to meet the minimum standards requirements for surveys” simply cannot be the basis for expert testimony. Those who prepare such a survey are not experts and will not be qualified as such.

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

“[W]hen asked whether they had meandered courses and followed the footsteps on the ground of the original GLO surveyor, which methodology is required in a “retracement” survey, the Grant Parish surveyors admitted that they had not... No attempts were made by Grant Parish to rehabilitate the damaging testimony regarding the mistakes marked on the survey in open court, or to address the specifics of the methodology used in preparing the survey, or to refute the negative evidence adduced by Rapides Parish.”

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

“Following the testimony of the three PAE surveyors and their crew chief in the field, expert testimony at the hearing indicated that the PAE survey was not what it purported to be, ‘a retracement survey,’ because proper methodology was not followed in rendering the survey.”

THE ENGINEER AND LAND SURVEYOR LIABILITY

“More specifically, the PAE surveyors entitled their survey a Retracement Survey, and their Proces Verbal stated that, ‘The meandered courses and distances were tied to section corners and therefore could be reasonably re-established utilizing survey retracement techniques to in effect follow the footsteps of the original surveyor. By retracing the meander lines, we could re-establish the location where the Little River emptied into Catahoula Lake.”

THE ENGINEER AND LAND SURVEYOR LIABILITY

“However, the testimony of the surveyors demonstrated that the meander lines were not retraced on the ground by following in the footsteps of the original surveyor, but rather were mathematically calculated in an office using computers .”

Rapids Parish v. Grant Parish, 924 So.2d 357 (La.App. 2006).

THE ENGINEER AND LAND SURVEYOR LIABILITY

- Rapids Parish’s surveyor recently sent me an e-mailed and told me that Grant Parish sued PAE and that PAE settled out of court for \$275,000.

THE ENGINEER AND LAND SURVEYOR LIABILITY

- **Other Torts**

- Trespass. Trespass to real property is a wrongful act that intrudes upon or invades the possessory interest of the owner or of another person entitled to possession. Possession, whether based on good or bad title, will support a trespass action as against a wrongdoer without a superior right to possession.

Evans, Alabama Property Rights and Remedies, Second Edition, Page 445

THE ENGINEER AND LAND SURVEYOR LIABILITY

- **Other Torts**

- Nuisance. A “nuisance” is anything that works hurt, inconvenience, or damage to another. The fact that the act done may otherwise be lawful does not keep it from being a nuisance.

Evans, Alabama Property Rights and Remedies, Second Edition, Page 475

THE ENGINEER AND LAND SURVEYOR LIABILITY

- **Other Torts**

- Slander of Title. The action of slander of title only applies to property rights or interest. The aspersions may relate to any property...they may be about lack of title...the plaintiff need not be the legal title holder...publication of the aspersion is required.

Evans, Alabama Property Rights and Remedies, Second Edition, Page 506

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

“Disparagement of title, also known as slander of title, occurs when a person, without a privilege to do so, publishes a false statement that disparages title to property and causes pecuniary loss. The elements of the tort are (1) publication, (2) absence of justification, (3) falsity and (4) direct pecuniary loss. What makes conduct actionable is not whether a defendant succeeds in casting a legal cloud on plaintiff’s title, but whether the defendant could reasonably foresee that the false publication might determine the conduct of a third person buyer or lessee. The gravamen of the tort is the damage to the salability of the property.”

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

“Master Lee hired a lawyer, Kent O’Mara, who recommended Carlton Engineering to survey the property. Carl Damoude and Jim Wilson, both engineers and land surveyors for Carlton Engineering, determined that the existing monuments on the ground in El Dorado County were consistent with those described in the parcel map that created the Temple’s property. Thus, the eastern boundary reflected on the Temple deed was accurate.”

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

“Unconvinced, Master Lee asked Damoude to set survey monuments on the ground in El Dorado County consistent with his belief that the Temple was entitled to move the boundary 140 feet farther east. He was unhappy when the professionals from Carlton Engineering refused.”

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

"O'Mara also consulted with Arthur Marinaccio, an expert on land use, boundary, and easement issues. Marinaccio confirmed what Carlton Engineering had already concluded -- the Temple's eastern boundary was properly reflected on its deed. At a meeting in April 2001 the engineers and consultant explained to Master Lee, Yamasaki, and others that the parcel in El Dorado County was established by the parcel maps creating it, that the found monuments were consistent with those indicated on the parcel map, and that there was no question as to the location of the boundary."

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

"Master Lee was not satisfied. He fired his lawyer, as well as the consultants, and hired a new lawyer.... Master Lee also hired a new surveyor, Steven Gardner. A year after he was hired, Gardner concluded that the boundary should be 147 feet east of the existing boundary and therefore well into the Nelidovs' property. Gardner's boundary would give the Temple an additional 1.79 acres. He documented his findings in a letter and a survey map. Master Lee directed Gardner to finalize the map and then to record it."

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

"In July 2002 Gardner set new survey monuments on the ground purporting to establish a boundary that placed the Nelidovs' home and driveway on the Temple's property. The following month, he attempted to file a survey map with the El Dorado County Surveyor's Office, but the county rejected the map and made a list of suggestions. Gardner discussed the comments with the Temple but decided not to follow up on any of the suggestions."

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

"In December 2002 the Temple filed a quiet title action against the Nelidovs. The Nelidovs cross-complained for, among other things, slander of title and interference with their easement. Karen Nelidov spent "a couple hundred hours" attending 21 depositions, answering two sets of special interrogatories, responding to document demands, and conducting independent research on real estate surveying."

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

"In March 2003 Gardner recorded the map describing the 1.79 acres between the Nelidovs' existing boundary and what he believed the true boundary to be as an "area of conflict." In April the Temple trenched across the easement once again and failed to compact the trenches. Karen's car became stuck in the mud. An engineering contractor proposed repair of the road would cost \$ 4,669."

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

"The Nelidovs incurred \$ 43,475 in attorney fees and costs to clear their title. Their claims for slander of title and nuisance were tried before a jury."

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

"The Nelidovs' experts testified that Gardner had no factual or legal basis for filing the survey map with boundaries at odds with all the prior surveys, maps, and documentation. They opined that no one could have entertained a good faith belief in the accuracy of the Gardner survey or the need to record it."

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

"The Temple insists Gardner was duty bound to record the area of conflict pursuant to *section 8762 of the Business and Professions Code*. Its expert opined that none of the documents or representations made by the Temple created a cloud on the Nelidovs' property."

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

"In a special verdict, the jury found for the Nelidovs on both the slander of title and nuisance claims. The jurors awarded the Nelidovs \$ 152,443 in damages."

YEO LAI SAH BUDDHIST MONASTERY AND ZEN TEMPLE OF AMERICA v. GEORGE NELIDOV, 2006 Cal. App. Unpub. LEXIS 2766.

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

• **OTHER TORTS**

- Negligence. Existence of a duty, breach of that duty, causal relationship between the breach and the damages, and resulting injury to plaintiff.

Roberts, Alabama Tort Law, Third Edition, Page 506

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

• **OTHER TORTS**

- Fraud. The Bryants correctly note that four elements must be proven in a fraud action: (1) false representation, (2) as to a material fact, (3) reliance on that representation, and (4) damage resulting from the reliance.

*Bryant v Robledo, 2005 Ala.Civ.App.LEXIS 359
(Ala.Civ.App.2005)*

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

• **OTHER TORTS**

- Outrage. "*Plaintiffs alleged...Leggins' negligent performance of his duties as a surveyor, and further that defendants were guilty of negligence, fraud and outrageous conduct. Plaintiffs asked for damages and that the Court establish the true boundary line between the parties.*"

*Watts v Shannon and Leggins, 2005 Tenn.App.LEXIS 403
(Tenn.App.2005)*

THE ENGINEER AND LAND SURVEYOR LIABILITY

• OTHER TORTS

- Mental Anguish. Cases describe a general rule to the effect that the law does not allow recovery for damages for mental anguish or distress where the tort results in mere injury to property.

Roberts, Alabama Tort Law, Third Edition, Page 779.

THE ENGINEER AND LAND SURVEYOR LIABILITY

• OTHER TORTS

- Mental Anguish. However, there is a well established exception involving an injury to property committed under circumstances of "insult or contumely [contempt or disdain]," where mental suffering is recoverable.

Roberts, Alabama Tort Law, Third Edition, Page 779.

THE ENGINEER AND LAND SURVEYOR LIABILITY

"The trial court charged the jury that Mrs. Donovan could recover damages for mental anguish if the jury was satisfied that the contractual duties imposed by this contract are so coupled with matters of mental solicitude as to the duty that is owed, that a breach of that duty will necessarily or reasonably result in mental anguish....[W]here it is demonstrated that the breach of the contractual duty actually caused the complaining party mental anguish or suffering and that the breach was such that it would necessarily result in emotional or mental detriment to the plaintiff, damages for annoyance and inconvenience may be awarded...."

Orkin Exterminating v. Donovan, 519 So.2d 1330 (Ala. 1988).

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

• PUNITIVE DAMAGES

- Unlike compensatory damages, whose purpose is to compensate an injured party for his actual loss, punitive damages may be awarded for certain types of aggravated wrongful conduct for the purpose of punishment and deterrence.

Roberts, Alabama Tort Law, Third Edition, Page 1379.

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

• PUNITIVE DAMAGES

- Punitive damages in Alabama may be awarded only in tort actions where there is either (a) oppression, (b) fraud, (c) wantonness, or (d) malice.

Roberts, Alabama Tort Law, Third Edition, Page 1379.

**THE ENGINEER AND LAND
SURVEYOR LIABILITY**

• PUNITIVE DAMAGES

- Oppression. Subjecting a person to cruel and unjust hardship in conscious disregard of that person's rights.

Roberts, Alabama Tort Law, Third Edition, Page 1400.

THE ENGINEER AND LAND SURVEYOR LIABILITY

• PUNITIVE DAMAGES

- Wantonness. Conduct which is carried on with a reckless or conscious disregard of the rights or safety of others.

Roberts, Alabama Tort Law, Third Edition, Page 1401.

THE ENGINEER AND LAND SURVEYOR LIABILITY

• PUNITIVE DAMAGES

- Malice. The intentional doing of a wrongful act without just cause or excuse, either: (a) with an intent to injure the person or property of another, or (b) under such circumstances that the law will imply an evil intent.

Roberts, Alabama Tort Law, Third Edition, Page 1399.

CONTRACT PROTECTION

- A contract can establish the scope of services, overall professional relationship, system of communication, standard of care, and the rights and responsibilities of both parties.

CONTRACT PROTECTION

- A contract can also help limit the Engineer or Land Surveyor liability.

CONTRACT PROTECTION

- Most claims are brought against Land Surveyors and other professional service providers by their Clients. Most of these are due to mis-communication, poor management techniques, and disagreements over fees.

ELEMENTS OF A CONTRACT

- **Offer and Acceptance** - An agreement exists when one party makes an offer and the other party accepts.

ELEMENTS OF A CONTRACT

- **Consideration** - Consideration is the inducement to enter into the contract.

ELEMENTS OF A CONTRACT

- **Capacity** - Capacity refers to one's legal qualification, competency, power, or fitness to enter into a contractual relationship.

ELEMENTS OF A CONTRACT

- **Subject Matter** - Subject matter, or legal form, refers to the contract being enforceable if it is not against public policy.

ELEMENTS OF A CONTRACT

- **Legal Purpose** - A contract must be for a legal purpose. A contract to undertake illegal activity is not enforceable in courts of law.

ELEMENTS OF A CONTRACT

MANDATORY ELEMENTS:

- Offer and Acceptance
- Consideration
- Capacity
- Subject Matter
- Legal Purpose

REVIEW OF OPTIONAL ELEMENTS

- Project Identification
- Standard of Care
- Schedule
- Deliverables
- Payment Terms
- Applicable Law
- Attorney's Fees
- Additional Services Provision
- Statement of Hourly Rates

THE ONE-PAGE CONTRACT
Letter of Engagement

- **Offer, Acceptance, Project Identification, and Legal Purpose:**

February 2, 2006

Mr. Big Bucks Landowner
1313 Mockingbird Lane
Munsterville, Alabama 35555

Fax Transmission: (205) 425-5253

RE: Property Identification
Brief Description of the Project or Services

THE ONE-PAGE CONTRACT
Letter of Engagement

- **Offer, Acceptance, Project Identification, and Legal Purpose:**

Dear Mr. Bucks:

This letter shall serve as a Letter of Engagement, whereby Mr. Big Bucks, hereinafter referred to as Client, engages Thomas Jefferson, hereinafter referred to as Surveyor, to perform land surveying services on the above described property (the Property). Execution of this letter will confirm acceptance and shall constitute an agreement between Client and Surveyor.

THE ONE-PAGE CONTRACT
Letter of Engagement

- **Subject Matter and Standard of Care:**

Surveyor will provide a Boundary Survey of the Property which will include re-establishment of property corners, location of improvements, identification of encroachments, determination of acreage, and preparation of a map of survey depicting the results of the survey. Six original surveys will be provided. The survey will meet all applicable provisions of the "Standards of Practice for Surveying in the State of Alabama" relative to Land or Boundary Surveys and defined therein.

THE ONE-PAGE CONTRACT

Letter of Engagement

- **Consideration, Schedule, Payment Terms, Applicable Law and Attorney's Fees:**

Our lump sum fee for services will be \$2,500.00, plus reimbursement for out-of-pocket expenses. The survey will be completed within three (3) weeks from the date of receipt of an executed copy of this agreement. Surveyor will make every reasonable effort to meet this schedule, however, this is not a guarantee. All invoices are due and payable within 15-days of receipt. A late fee of 1.50% per month will apply. In the event collection proceeding become necessary, Alabama law will apply and Attorney's fees will be reimbursed to Surveyor.

THE ONE-PAGE CONTRACT

Letter of Engagement

- **Additional Services Provision and Statement of Hourly Rates:**

In the event that additional services are deemed necessary, Surveyor will perform those services at an hourly rate of \$100.00. Surveyor will only perform additional services with Client's written or verbal approval. This offer will expire if not executed within 15 days.

THE ONE-PAGE CONTRACT

Letter of Engagement

- **Execution:**

FOR SURVEYOR:

FOR CLIENT:

Thomas Jefferson

Mr. Big Bucks
SSI or EIN _____

February 2, 2008

Mr. Big Bucks Landowner
1313 Mockingbird Lane
Munsterville, Alabama 35555

FAX TRANSMISSION: (205) 555-1313

**RE: Property Identification
Brief Description of the Project or Services to be Provided**

Dear Mr. Big Bucks:

This letter shall serve as a Letter of Engagement, whereby Mr. Big Bucks, hereinafter referred to as Client, engages Southland Surveying Company, LLC, hereinafter referred to as Surveyor, to perform land surveying services on the above described property (the Property). Execution of this letter will confirm acceptance and shall constitute an agreement between Client and Surveyor.

Surveyor will provide a Boundary Survey of the Property which will include re-establishment of property corners, location of improvements, identification of encroachments (if any), determination of acreage, and preparation of a map of survey depicting the results of the survey. Six original surveys will be provided. The survey will meet all applicable provisions of the "Standards of Practice for Surveying in the State of Alabama" relative to Land or Boundary Surveys as defined therein.

Our lump sum fee for services will be **\$2,500.00**, plus reimbursement for out-of-pocket expenses. The survey will be completed within three (3) weeks from the date of receipt of an executed copy of this agreement. Surveyor will make every reasonable effort to meet this schedule, however, this is not a guarantee. All invoices are due and payable within 15-days of receipt. A late fee of 1.50% per month will apply. In the event collection proceeding become necessary, Alabama law will apply and Attorney's fees and cost of collection will be reimbursed to Surveyor.

In the event that additional services are deemed necessary, Surveyor will perform those services at an hourly rate of \$100.00. Surveyor will only perform additional services with Client's written or verbal approval. This offer will expire if not executed within 15 days. The persons signing below certify that they have legal capacity as the individuals, representatives, or agents for the parties to this contract.

FOR SURVEYOR:

FOR CLIENT:

_____ Date: _____

Date: _____

By: _____

Printed Name and Title

Thomas Jefferson
Chief Surveyor

SSI or EIN: _____

[If you can get this, great. If not, don't make it a deal breaker. This only comes into play with collections. If that's a concern then this may be a deal breaker.]

LETTER OF UNDERSTANDING

*Concepts Taken from an Article Written by Knud Hermansen
Entitled "Send a Letter"*

- Many Surveyors continue to provide professional services without benefit of a written record or other recording of their contract.

LETTER OF UNDERSTANDING

*Concepts Taken from an Article Written by Knud Hermansen
Entitled "Send a Letter"*

- Many surveyors point out that a formal written contract is not worth the time, effort, or aggravation—especially when an unsophisticated client seeks simple and seemingly uncomplicated services.

LETTER OF UNDERSTANDING

*Concepts Taken from an Article Written by Knud Hermansen
Entitled "Send a Letter"*

- Fortunately for the surveyor, the expansion of the court's equity jurisdiction and increased volume of commercial transactions has caused many courts to liberalize the written form and contents necessary to evidence a contract.

LETTER OF UNDERSTANDING

*Concepts Taken from an Article Written by Knud Hermansen
Entitled "Send a Letter"*

- As a result, the surveyors that are unwilling or reluctant to use formal contracts for small jobs should at least prepare and send a letter of understanding.

LETTER OF UNDERSTANDING

*Concepts Taken from an Article Written by Knud Hermansen
Entitled "Send a Letter"*

ELEMENTS OF A LETTER OF UNDERSTANDING:

- The Purpose or Type of Survey
- Standards and Specifications to be used
- The Fee or Cost
- Any Time Constraints

LETTER OF UNDERSTANDING

*Concepts Taken from an Article Written by Knud Hermansen
Entitled "Send a Letter"*

- To help insure that the terms of the letter will be binding on the client, a sufficient period of time should be allowed between mailing the correspondence and starting the survey work.
- This allows the client sufficient time to contest any provisions of the letter that are not agreeable.

LETTER OF UNDERSTANDING

*Concepts Taken from an Article Written by Knud Hermansen
Entitled "Send a Letter"*

- The credibility of the letter can be improved significantly by making sure it is not one-sided.
- Include terms that bind the Surveyor as well as the Client.

LETTER OF UNDERSTANDING

*Concepts Taken from an Article Written by Knud Hermansen
Entitled "Send a Letter"*

- This isn't a formal contract, but a letter to your Client.
- Make the language less formal and more personal.
- Be sure the Client knows you appreciate his/her business.

LETTER OF UNDERSTANDING

*Concepts Taken from an Article Written by Knud Hermansen
Entitled "Send a Letter"*

- As with a proposal, this type of letter can be used to help educate your Client about what you have to do in order to perform the survey work under consideration.
- But as with the proposal, be careful not to "over promise" or use expansive or global language.

LETTER OF UNDERSTANDING

*Concepts Taken from an Article Written by Knud Hermansen
Entitled "Send a Letter"*

- This type of letter should not be a substitute for a formal contract.
- And, as we will see, preparing a One-Page Contract (or Letter of Engagement) is just as easy.

LETTER OF UNDERSTANDING

*Concepts Taken from an Article Written by Knud Hermansen
Entitled "Send a Letter"*

- **Purpose of Survey and Standard:**

June 6, 2006

Mr. Bill Gates
Microsoft Corporation
One Microsoft Way
Redmond, Washington 98052-6399

Dear Mr. Gates:

Thank you for calling us today and requesting our surveying services. According to our phone conversation, you have requested a boundary survey of your expansive residential mansion located on Bill Gates Drive, in Bill Gates, Washington. Our survey will comply with the State of Washington's Minimum Survey Requirements, for Land Boundary Surveys.

LETTER OF UNDERSTANDING

*Concepts Taken from an Article Written by Knud Hermansen
Entitled "Send a Letter"*

- **Time Constraints and Client Education:**

Our services include a review of your property records and the records of adjoining properties at the County Courthouse, a search of the County tax rolls for ownership information, and a retrieval of maps and plats necessary for a determination of your property boundaries. We anticipate completion of the survey in about three weeks. As a courtesy to you and your neighbors, we will attempt to make contact with your neighbors to inform them of our activities in and around your neighborhood.

LETTER OF UNDERSTANDING

*Concepts Taken from an Article Written by Knud Hermansen
Entitled "Send a Letter"*

- **Fee or Cost of Survey:**

*The estimated cost of the survey is \$5,500.00. Should unforeseen
circumstance arise, we will not exceed this amount without first contacting
you to explain the situation and get your approval for the additional work.*

*If we have misstated the terms of our agreement or omitted any anything,
please contact our office immediately. If you have any concerns or any
further questions, I will be more than happy to discuss them with you. We
will assume that we are in agreement and will commence work on or after
June 9th, unless we hear from you otherwise.*

Sincerely,

*George Washington
Chief Surveyor*

February 2, 2008

Mr. Bill Gates
Microsoft Corporation
One Microsoft Way
Redmond, Washington 98052-6399

FAX TRANSMISSION: (555) 555-1313

**RE: Property Identification
Brief Description of the Project or Services to be Provided**

Dear Mr. Gates:

Thank you for calling us today and requesting our surveying services. According to our phone conversation, you have requested a boundary survey of your expansive residential mansion located on Bill Gates Drive, in Bill Gates, Washington. Our survey will comply with the State of Washington's Minimum Survey Requirements for Land Boundary Surveys.

Our services include a review of your property records and the records of adjoining properties at the County Courthouse, a search of the County tax rolls for ownership information, and a retrieval of maps and plats necessary for a determination of your property boundaries. We anticipate completion of the survey in about three weeks. As a courtesy to you and your neighbors, we will attempt to make contact with your neighbors to inform them of our activities in and around your neighborhood.

The estimated cost of the survey is \$5,500.00. Should unforeseen circumstance arise, we will not exceed this amount without first contacting you to explain the situation and get your approval for the additional work.

If we have misstated the terms of our agreement or omitted anything, please contact our office immediately. As is the custom in our industry, time is always a concern. Unless we receive instructions from you to the contrary within two days from the date of this letter, we will feel free to commence with the services as outlined in this letter. If you have any concerns or any further questions, I will be more than happy to discuss them with you.

Sincerely,

George Washington
Chief Surveyor