

# Liability of A Surveyor to Third Persons

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## Introduction

Surveyors have been held liable in the courts for inaccurate surveys — mistaken boundary line location, incorrect placement of construction stakes, incorrect acreage computation, and incorrect plats (2, 5, 6, 7, 9). The liability is incurred regardless of whether the inaccurate survey is one of intent or mistake. In researching surveyor liability cases occurring after 1956, not one case in the appellate court records was found to indicate that a surveyor had intentionally performed an inaccurate survey. There are several legal theories under which a surveyor may be liable to his client for an inaccurate survey. In a recent article Boyd (5) has discussed these theories as they relate specifically to Florida law. For each theory, a given set of circumstances or facts must exist before the appropriate law may be applied under the theory. However, basically, regardless of the theory — negligence, misrepresentation, breach of warranty, breach of contract, or malpractice — the surveyor owes a duty to his client and a breach of this duty may result in litigation for the surveyor. The duty owed to a client may be either specifically stipulated in a written contract or it may be a professional responsibility that is left to the discretion of the surveyor to comply with standards as promulgated by the surveying profession. To fulfill the latter duty, it is often stated that a surveyor must perform a survey such as any other prudent surveyor would under the same or similar set of circumstances. A breach of duty not under contract is called a tort. Howell (7) has discussed the nature of the surveyor's duty under a tort.

## Liability to Third Persons

A surveyor may also be liable to a third person even though there is no contract or privity between them. An example of a third person and lack of privity is illustrated as follows: The defendant surveyor has performed an inaccurate survey for landowner A, plaintiff B has relied on the inaccurate survey and has suffered damage as a result. The plaintiff B is the third person. Privity is absent because there is not a contractual relationship between the plaintiff and the defendant.

Prosser (8) has classified the various relationships between the plaintiff third person and the defendant in cases of misrepresentation. According to Prosser (8) liability for misrepresentation is

founded upon one of three bases — intent, negligence, or strict liability without either. Misrepresentation based on intent occurs when a false representation is consciously made and is considered as deceit. Deceit is actually one of four species of fraud (1). Negligence is involved when the defendant fails to exercise due care and prudence and is unconscious of the false representation. The doctrine of strict liability holds the defendant responsible merely because he has made the false statement, even though he reasonably believes it to be true and has exercised prudent care under the circumstances. Bohlen (4) indicates that the treatment of a statement in this manner is considering the statement as having the same legal effect as a warranty.

The objective of this paper is to make the surveyor aware of the possibility of liability to third persons even in the absence of privity and to illustrate by using Prosser's classification, circumstances under which this liability may be incurred. This paper is not a statement or prediction of the law in any jurisdiction. When available, actual court cases involving surveyors have been used as illustrations in each classification. When cases were not available, situations have been synthesized to illustrate the appropriate classification with respect to the surveyor. Perhaps the reader will be able to visualize examples other than those given. Following are examples of the various circumstances that Prosser (8) classified.

*A. Plaintiff is identified: Defendant's purpose is to influence him.*

This condition is illustrated with a hypothetical example.

The situation could arise when a surveyor is employed to make a survey which will establish a boundary line in an exceedingly valuable stand of walnut timber and the surveyor knows the location will influence a prospective investor. Here, there is invariably liability for deceit, negligence, or strict liability (8).

*B. Plaintiff is identified: Defendant has special reason to expect his action.*

This situation is exemplified by the case of **Craig v. Everette M. Brooks Co., 222 N.E. 2d 752 (1967)**, in which the defendant, a surveyor, was employed to design and stake out a road and the plaintiff, a general contractor, was employed independently by the same person to construct the road. The surveyor erroneously located construction stakes, causing the contractor to sustain monetary losses. A Massachusetts appellate court overruled the judgment of the trial court

which held the defendant was not liable for the negligent placement of road stakes. The same effect was established in **Tartera v. Palumbo, 453 S.W. 2d 780 (1970)**. In this case a surveyor was employed by a prospective purchaser of land to survey and partition the plaintiff's property. Transactions between the prospective purchaser and the plaintiff were to be based on the survey. Subsequently, transactions, which relied on the survey, were made and the plaintiff unknowingly conveyed part of his house. The trial court judgment which was in favour of the defendant was reversed by the Tennessee Supreme Court.

From the examples cited, it is evident that one may be held liable for an inaccurate survey to a third person even in the absence of privity when one has reason to believe the third person is going to rely on the survey. Also under this classification, liability is incurred by intentional misrepresentation as well as when one is responsible under strict liability (8).

*C. Plaintiff is identified: Defendant has no special reason to expect his action.*

A hypothetical example of this circumstance would occur when a surveyor is employed by adjoining landowners, who own surface rights only, to establish the boundary between them. At the time the property was surveyed a company owning mineral rights under one of the properties was stripmining coal. The company stripped coal up to the line which was erroneously established for the adjoining surface owners. Is the surveyor liable to the coal company which suffers damage as a result of acting in reference to the incorrect survey line between the properties? According to the principles documented by Prosser (8), the surveyor would not be held liable to such a third person on any basis — even deceit — provided the survey was made exclusively for the benefit of the adjoining surface owners and the surveyor had no reason to expect the mining company to place any reliance in the survey.

*D. Plaintiff is an unidentified member of a group or class: Defendant's purpose is to influence any of its members.*

A hypothetical example of this situation occurs when a surveyor is employed to design and lay out a sufficiently attractive subdivision to induce people to invest in lots. Here again the surveyor would be liable for misrepresentation — on any basis — to a third person who buys a lot in the subdivision.

*E. Plaintiff is an unidentified member of a group or class: Defendant has special*

*reason to expect that any member of it may be reached and influenced.*

Again a surveyor would be liable to a third person for misrepresentation whether the misrepresentation was based on intent, negligence, or strict liability. The case of **Rozny v. Marnull, 250 N.E. 2d 656 (1969)**, is a case in which a surveyor was liable to a third person for misrepresentation that was based on both negligence and strict liability. The defendant made a survey of a lot and furnished to a landowner a plat showing monumented corners and boundary limits on the street line and in addition provided on the plat a statement that guaranteed accuracy. Subsequently, the plaintiff purchased the lot and built a house relying on the plat and monumented corners, which were inaccurately located, and as a result the plaintiff suffered damage. The Supreme Court of Illinois held the surveyor liable for negligence. The court offered six reasons for the holding, two of the pertinent ones are: (1) "The express, unrestricted and wholly voluntary 'absolute guarantee for accuracy' appearing on the face of the inaccurate plat" and (2) "Defendant's knowledge that this plat would be used and relied on by others than the person ordering, including the plaintiff." This case is interesting in that it overruled, in Illinois, other case law which required privity between plaintiff and defendant to sustain an action to recover damages for tortious misrepresentation. It is most interesting to the surveyor and should be a sufficient warning when the court said, "The recovery here by a reliant user whose ultimate use was foreseeable will **promote cautionary techniques among surveyors**" (emphasis added).

#### *F. The effect of a public duty.*

A surveyor making a subdivision plat which is required to be recorded in the public records would certainly be liable for any misrepresentation on the plat, regardless of the basis of misrepresentation. Prosser (8) states, "statutes requiring information to be filed for public record, and particularly those which require it to be published after filing, may considerably expand the class of persons whom the defendant has special reason to expect his representations to reach."

An Annotation in 40 A.L.R. 1358 states: "an engineer or surveyor employed by a municipality is liable for any damage by his negligence." Only where the duty of a municipal officer is discretionary or judicial is he not liable for negligence in the discharge of his duty (3).

*G. Plaintiff is unidentified: Defendant has no special reason to expect that he may act in reliance.*

Under this circumstance the surveyor

is not liable to a third person for misrepresentation, whether on the basis of intent, negligence, or strict liability (8). The absence of liability to a third person in such a situation is documented in the case of **Howell v. Betts, 362 S.W. 2d 924 (1962)**. In this case the surveyor made an error in a survey and description for a landowner in 1934. The plaintiff purchased the land from the owner in 1958 and relied on the inaccurate survey and description. The Supreme Court of Tennessee held that the surveyor was not liable and expressed concern about unlimited liability for unlimited time and for an indeterminate class.

#### *H. The Different Transaction.*

No liability is incurred if a product or service is not used in the way it is intended to be used (8). An example involving a surveyor is illustrated in a hypothetical situation when a surveyor makes a topographic map to be used for reconnaissance purposes and then later the map is used in the final design for some facility. Any damage suffered with respect to the final design of the facility, as a result of the reconnaissance map being used, would not be the responsibility of the surveyor who made the map. Using a reconnaissance map as a basis for a final design would certainly be a violation of the use for which the map was made.

#### **Time Limitation for Legal Action**

Surveyors as well as other defendants are somewhat protected from unlimited liability, once a mistake is discovered, by the Statute of Limitations. This means that a client or a third person must bring litigation to recover damages as a result of an inaccurate survey within a given period of time. Originally, the time the Statute of Limitations started running was when the breach of duty occurred. However, this doctrine is not adhered to now and the "discovery rule" is applied by most courts. An exception exists in the State of Florida — see the article by Boyd (5). The Washington appellate court in **Kundahl v. Barnett, 486 P. 2d 1164 (1971)**, in commenting on the original rule, but applying the "discovery rule" said, "courts then believed that 'it is better for the public that some rights be lost than that stale litigation be permitted'" and then went on to say, "the Statute of Limitations for action against a surveyor does not 'accrue' until the injured party discovered or had reasonable grounds to discover the error in survey." Also the Maryland Court of Appeals in **Mattingly v. Hopkins, 253 A. 2d 904 (1969)**, confirmed the trial court holding "that the Statute of Limitations begins to run at 'discovery of breach of duty' not when it occurred and not at 'the time of maturation of harm.'" In this case the plaintiff lost part of the property he was possessing

and subsequently suffered pecuniary losses in litigation due to relying on the defendant's incorrect survey. The plaintiff did not initiate litigation against the surveyor at the time the error was discovered but waited until he suffered damages in litigation related to the incorrect survey. The surveyor was not held liable for his incorrect survey because he was within the Statute of Limitations as calculated by the "discovery rule."

States vary somewhat concerning the period necessary for the Statute of Limitations to run. In **Schenburn v. Lehner Associates, 177 N.W. 2d 699 (1970)**, the Michigan court pointed out the following: (1) "The period of limitations is two years for actions charging malpractice," (2) "The period of limitation is three years for all other actions to recover damages for damage for injury to persons or property," and (3) "The period of limitations is six years for other actions to recover damages or sums due to breach of contract." Whereas in **Rozny v. Marnull (supra)** the court reported that Illinois had a specific limitation period of four years for surveyors, a Maryland court in **Mattingly v. Hopkins (supra)** referred to a 12-year period of limitations for any document classified as a "special instrument of record." Generally, the period of limitations for breach of duty is longer when under a written contract than when under a tort.

#### **Summary**

In summary, the surveyor is required to discharge his duties with due care and caution and to perform as any other ordinary prudent surveyor would in similar circumstances. For a breach of duty either under contract or tort the surveyor may be liable to his client for an inaccurate survey.

The surveyor may also be liable for an inaccurate survey to either an identified or an unidentified third person with whom there is no privity. Liability may be incurred if it is reasonable to believe that the third person may act in reliance toward the survey. In view of the court's warning provided in **Rozny v. Marnull (supra)** every surveyor should ask himself the following questions: (1) "Is this survey free of negligence?" (2) "Have I performed the survey as any other prudent surveyor would under the same circumstances?" and (3) "Whom do I expect to rely on my survey?" Also, the surveyor may want to certify the accuracy of the survey specifically to the client rather than expressing an absolute guarantee of accuracy to an indeterminate class. Some survey certifications are similar to expressed warranties or guarantees and liability claims arising from expressed warranties or guarantees are generally not covered by liability insurance (10).

The surveyor is protected, somewhat, from unlimited liability in that once an error is discovered, the person to whom the surveyor is liable for the inaccurate survey, must bring litigation within the time required by the Statute of Limitations. In many states the time when the Statute of Limitations starts running is not until the blunder has been discovered while in other states the time starts running when the survey job is completed.

For protection against liability to a client or a third person, a surveyor should:

1. Have knowledge of circumstances where liability has been or might be incurred.
2. Have a knowledge of the basis of liability, i.e., have an understanding of the nature of the duty owed as a result of offering professional services.
3. Seek professional legal counsel on contracts with clients, on survey certifications to limit liability, or to ascertain any aspect of the law relating to liability, in the jurisdiction where the surveyor practices.
4. Based on 1, 2, and 3 determine whether liability (errors and omission) insurance should be obtained for all services rendered or perhaps just for selected services or clients.

#### References

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