Missouri Land Surveyor Liability Overview

By Harry Styron, hs@styronlaw.com, presented to Missouri Society of Professional Surveyors, October 23, 2020

This presentation categorizes types of incidents that lead to liability claims against surveyors as revealed by appellate court decisions. Fortunately, there are not many such decisions in Missouri, which indicates that Missouri surveyors do good work; when surveying errors are alleged, they usually work out solutions without protracted litigation.

1. Procedural Issues

Many appellate decisions concern issues of legal procedure, rather than deciding whether a surveyor was negligent or which survey was correct. Procedural disputes often arise early in a lawsuit. If the procedural issue results in resolution of the claim, then the parties are sometimes spared the expense of lengthy litigation.

Statute of limitations. For example, the statute of limitations can be an important defense. In Baublit v. Barr & Riddle Engineering Co. (1981), the Court of Appeals for the Western District ruled that the trial judge was correct in basing the dismissal of the claim against the surveyor because the 5-year statute of limitations had run. A statute of limitations starts to run when the right to sue arises, which means when damages are actually sustained and capable of ascertainment. However, the appeals court went a step further, as explained below under the heading *Standing and privity of contract*.

Procedural defenses are attractive because they are generally available early in the life of a the lawsuit. In Martin v. Crowley, Wade and Milstead, Inc. (1985), however, the Missouri Supreme Court reversed the trial court's dismissal of the case, which had been based on the statute of limitations, sending the case back to square one with the trial court. Today, when it takes a couple of years to get an appellate ruling after litigating for months or a year or two at the trial court--and then you may have to start over--it often makes sense to reach a painful settlement rather than be tied up in litigation for four or five years. In *Martin*, the surveyor apparently erred in construction staking for a home, which was built according to the stakes in 1973.

Martin did not discover until 1981 that the house was only six feet from the property line, rather than 12 feet as they had desired. Martin claimed that this difference resulted in a diminution in value, as a result of the surveyor's negligence.

In evaluating motions to dismiss, courts are required to accept the plaintiff's allegations of fact as true. Even though the claim of diminution in value seems weak, the court was obligated to ignore that possibility in ruling on the motion to dismiss. In *Martin*, the Supreme Court wrote, "We hold, that from the pleadings, involving a layman/expert relationship, nothing indicates plaintiffs knew or should have know of any reason, until May, 1981, to question defendant's work….Hence under the facts alleged the damages were not 'capable of ascertainment' in October, 1973." In other words, the property owner was not obligated to check the survey for accuracy in order to preserve the right to sue for malpractice. The result of the appeal was to send the case back to the trial court for litigation. In instances like this, the surveyor may be inclined to make a settlement offer rather that to go to the expense and incur the headaches and lost productivity from the litigation process.

Standing and privity of contract. The Baublit court chose to affirm the trial court's summary judgment in favor of the surveyor for the simple reason that Baublit lacked standing to sue because the survey was done for someone else. The term "standing" in this context means having the right to sue. In some kinds of cases, "privity of contract" is required, which meant in this case that Baublit had no right to rely on a survey that they did not contract for.

The facts of the case are that Baublit's neighbor sued Baublit, claiming that a water well was not on Baublit's property. Even though a 1918-year old survey showed the well to be on Baublit's property, several more recent surveys disagreed, including a 1981 survey contracted for by Baublit's neighbor Bryant. A lawsuit in 1982 resulted in a judgment that held that Bryant owned the well. Baublit then sued Bryant's surveyor, claiming that its erroneous survey resulted in Baublit losing the well.

As with any rule of law, there are exceptions, so the appellate court discussed other cases in which a professional was held liable to a third-party. To prevail against a

professional not hired by the plaintiff, the plaintiff must show the three things required for any negligence case:

1. The existence of a duty by the professional to protect the plaintiff from the injury that resulted.
2. Failure of the professional to perform that duty.
3. Injury to the plaintiff resulting from the breach of that duty.

These three elements are the basic elements of any negligence claim. Negligence is a "tort," which is an act or omission that a court may award damages for, even in the absence of a contract between the plaintiff and defendant.

If the surveyor had contracted with Baublit, then the existence of the duty would be clear, and the case could be made as a breach of contract case or a negligence case. Without a contract, the plaintiff must show that he had a right to rely on the survey and that the surveyor could have foreseen that Baublit was relying on the survey to Baublit's detriment. Since Baublit purchased the property in 1965, Baublit could not credibly claim to have relied on the 1981 survey in purchasing the property.

Statute of repose. First enacted in 1989 to provide a 5-year period, and amended in 2011, the Missouri General Assembly has given surveyors protection against claims made more than 10 years after completion of a survey:

> 516.098. *Surveys of land error or omissions* — action must be brought when. — Except where fraud is involved, no action to recover damages for an error or omission in the survey of land, nor any action for contribution or indemnity for damages sustained on account of an error or omission may be brought against any person performing the survey more than ten years from the completion of the survey.

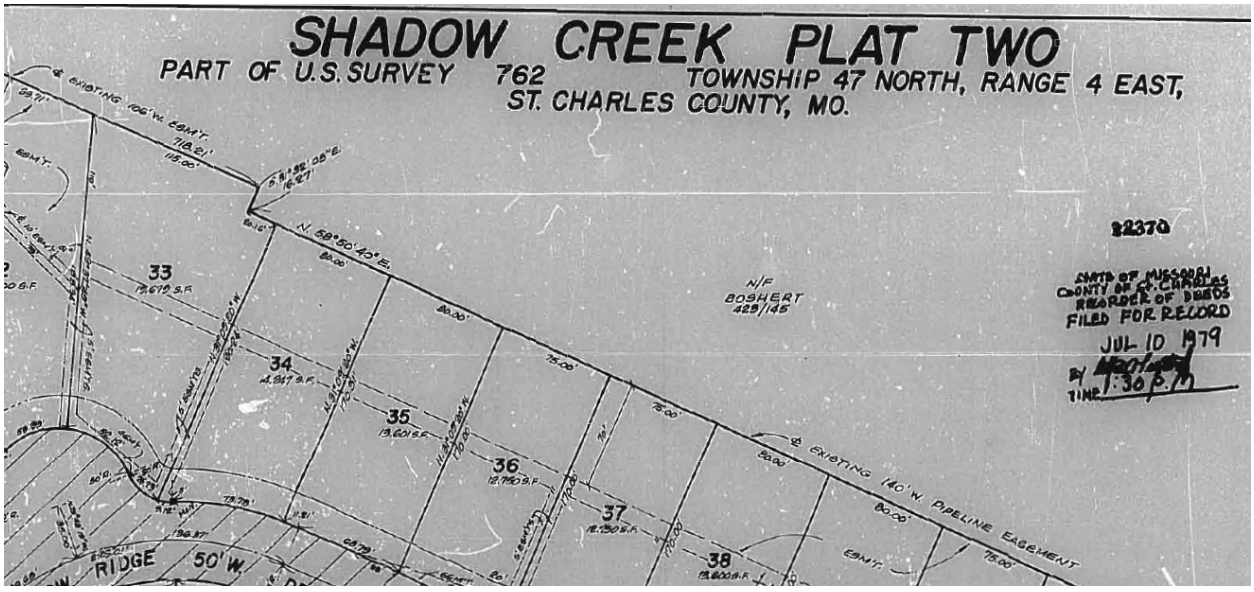
PRACTICE TIP: Though many surveys that I see contain language that indicates that it may be relied on only by the party named on the survey, I see a lot of carelessness in identifying the party that the survey is addressed to. Frequently, the survey is addressed to an owner or employee of a corporation or limited liability company that

owns the surveyed property, who is not realistically the party who should be entitled to rely on the survey.

Contracts and engagement agreements are also documents that can limit the parties who may rely on a survey. In some instances, if I am representing a buyer, lender or a borrower, who is relying on a survey performed for another, I may recommend that my client obtain a new survey or a "reliance letter" from the surveyor, which would allow my client to rely on the survey. There is certainly nothing wrong with asking to be paid for a reliance letter.

2. Vague description of easement

In Crossman v. Yacubovich (2009), Crossman, as purchaser of Lot 33 of Shadow Creek Plat Two, claimed that the 1979 subdivision plat as well as the survey that Crossman obtained did not disclose that three petroleum pipelines crossed Lot 33, within a 140-ft. right-of-way, depriving the purchaser of the opportunity to extend the deck, add a pool, plant a garden and build a batting cage, and fence the yard. A note on the plat said, "Easements shown are for utility purposes unless noted otherwise." The plat identifies a 140-ft. pipeline easement, but doesn't show the right-of-way for it as encumbering Lot 33.



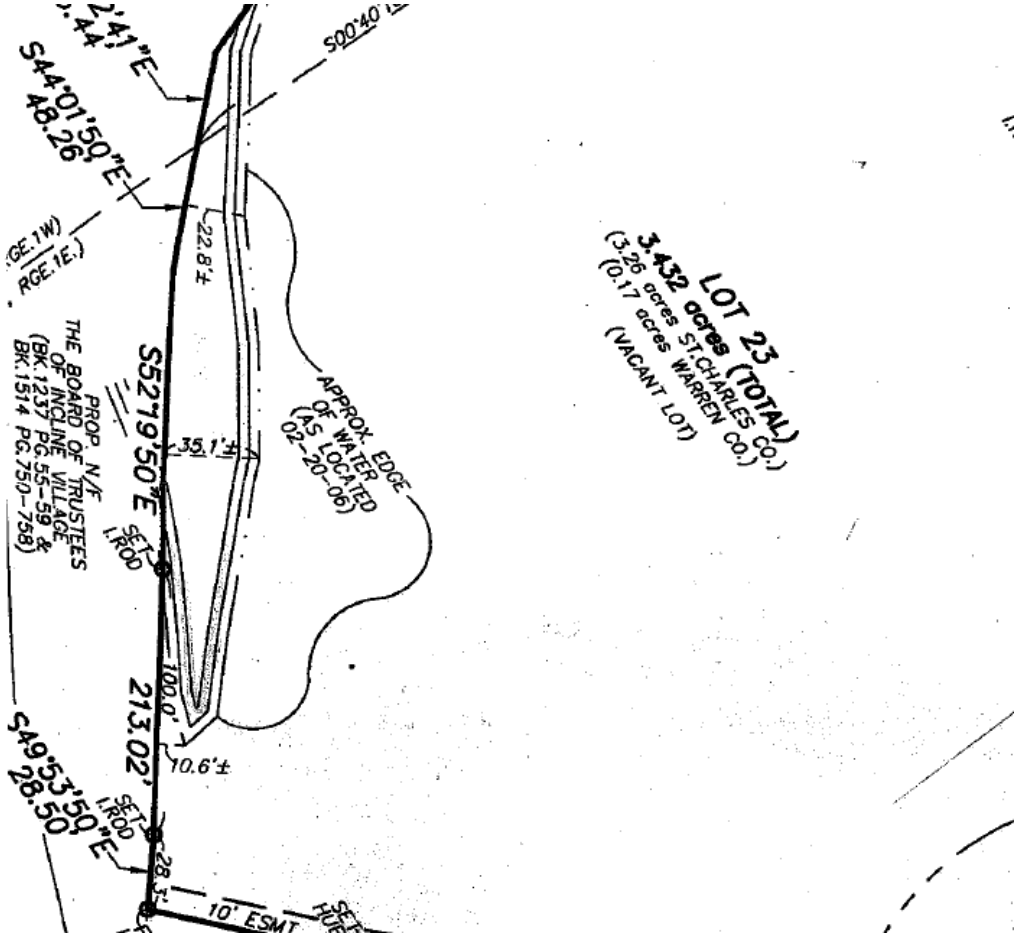
This case was decided before the court files were completely digitized, so I was unable to obtain Crossman's survey. The docket sheet indicates that after the appeal and

another year of litigation, Crossman and the title insurance company were dismissed, which suggests that a settlement was reached.

PRACTICE TIP: If an easement affects a lot, show the right-of-way on the drawing.

3. **Sliding by**

Sometimes we are lucky that the parties to litigation don't drag us in. Incline Village v. Edler (2019) is one of the most interesting recent Missouri riparian rights cases. Edler purchased Lot 23 of Sumac Ridge subdivision, as shown on this portion of a subdivision plat, which revealed a part of the lake (called "Main Lake") on Lot 23:



Edler quickly built a dock and began enjoying the lake. However, the board of trustees of Incline Village claimed to own Main Lake, which had been constructed by the developer and maintained and improved at enormous cost (nearly $3 million) by the owners of lots in Incline Village. Edler also owned a lot in Incline Village. The trial court held that an adjacent owner to a privately-owned artificial lake obtains no riparian

rights, and the Missouri Supreme Court affirmed the trial court's decision. The trial court also ruled that Edler's ownership of a lot in Incline Village permitted Edler to use the lake for recreation, but "had no right to use the Main Lake from the [Edler] Property."

The plat excerpt above states that the lake is the property of the Board of Trustees of Incline Village, at least where those words are. I have found nothing in the Minimum Standards that requires a disclaimer regarding riparian rights by a surveyor whose results show land abutting an artificial lake. However, Matthew Edler made the following declaration in an affidavit filed in the case, "We relied on the fact that our Property abutted Main Lake, and our understanding of the riparian rights that thereby existed, in our assessment of the value of the Property when we purchased it." The surveyor may not have anticipated that a court would rule that the owner of a lot could not enter the lake on or abutting the lot owner's property, but that's what happened.

Many lawsuits in other contexts have been filed based on a failure to warn. Are there circumstances in which surveyor could be argued to have a duty to warn? The Missouri Uniform Condominium Act, section 448.2-109 RSMo, requires that a condominium plat include a legal description of any real estate subject to development rights, to warn unit purchasers that the beautiful wooded tract outside their window might eventually contain additional buildings; labeling the future development property as such is optional.

PRACTICE TIP: If you know that a privately-owned body of water adjoins a parcel, the survey plat should note that no riparian rights should be implied to the adjoining parcel.

4. **Whether the surveyor made an error may be determined in a case in which the surveyor is not a party**

In Thurmond v. Moxley (1994), adjoining landowners in Mississippi County in the Missouri Bootheel disputed 5.244 acres, in question because two surveyors each had a different opinion of the location of the centerline of Section 21-T27N-R16E. The GLO plat showed the north east-west line to be 5,280 feet across, but Lucas found it to be 5,285.5 in length, while Harrison found it to be 5,287.64 in length. The appellate court summarized their methods as follows:

> Lucas testified in regard to the center of the north-south line that he "did not try to make a line.... just tried to reestablish what was of record" based on the location of the center of the section by a 1931 survey. Apparently, because of an iron pin noted in the 1931 survey, Lucas determined that the dividing line of the section is 2639.9 feet west of the northeast corner of the section (according to his survey plat), leaving the west portion of the section 2645.6 feet.
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> Harrison placed the center of the north line halfway across the section as he measured it, making the east and west halves along the north line each 2643.82 feet. He found a "rebar 4.21 feet east" of the halfway point of the north line. This is .29 feet from where Lucas found the pipe on which he relied. Lucas testified that inside the pipe he found was an iron bar and he placed "a half-inch rebar on top of the center of the bar in the pipe to bring it up closer to the surface of the road." Harrison chose to disregard this marker because it was not in the center of the section as he determined it.
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> Harrison located the center of the north line of the section by first finding the corners of the section and then set the center line so that the quarters, except for those along Big Lake, were "proportionately equal". Harrison acknowledged that he and Lucas agreed on the north line and the west line of the section.

The appellate court found that Lucas was wrong in relying on the iron pin of unknown origin noted in the 1931 survey and that Harrison was correct in disregarding the iron pin and reestablishing a lost corner, then using the proportional measurement method to divide the section in equal halves.

Lucas and Harrison testified in the trial, but were not parties. The appellate opinion does not specifically state that Lucas was negligent, but it does specifically say, “By whom and when the pipe [which covered the iron pin] relied on by Lucas was placed there, the record does not show….There is no indication in the record that the pipe was placed there by the United States public land survey. Section 60.305, RSMo Supp. 1993,

requires that if the monument was placed there as a part of the survey, then erroneous or not, it cannot be changed."

It is possible that Lucas had evidence that the iron pin and pipe were government monuments, but that the bumbling lawyer for his client failed to understand the importance of getting this fact into evidence.

PRACTICE TIP: If a court is going to make a determination of whether you screwed up, you might want to discuss with your errors and omissions carrier and your attorney whether you should try to intervene in the case as a party or provide support to your client so that you can prevent a court from determining that you screwed up.

5. **Criminal liability for surveyors**

While Missouri surveyors are immune from prosecution for trespassing in doing their work, they could incur criminal liability. In 1992, the U. S. Department of Justice obtained the indictment of the Northwest Chapter of the Arkansas Society of Professional Surveyors and five surveyors for price fixing. The press release indicates that the Chapter and the surveyors had agreed on a fee schedule for "lot and block surveys" in connection with loan closings on residential transactions involving federally-insured mortgage loans. One of the charges against an individual surveyor was for mail fraud, because he sent a letter to the Chapter members asking them to agree to the price schedule.

The case never went to trial. According to an article in the *Hoosier Surveyor (*Winter 2007, page 21), by Knud Hermansen, the Chapter paid a $60,000 fine as a part of the plea agreement, that resulted in the charges against the individual surveyors being dropped. Hermansen advised the following to avoid the charge of price fixing:

> Surveyors should not fix fees in concert with other practitioners or take part in any activities that establish by written, verbal, or implied consent a minimum fee for professional services.
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> Do not base a fee solely on a competitor's fee. Bargain and reach an agreement with the client to determine the fee and not with the

competitor. Fair competition is healthy among knowledgeable and ethical professionals.

The interest level of the Department of Justice in antitrust prosecution waxes and wanes. With its focus on Google, Facebook, Apple, Amazon and Microsoft, it seems unlikely that land surveyors would be targets. However, surveyors should admit that they are not the objects of the obsessive love that protects these tech giants. If the right party complains, an antitrust investigation of surveyors could happen again.

Conclusion

So much rests on your work, and it is relied on by people, businesses and other organizations that often do not know what they are looking at when they see the results of a survey. And you may bear the consequences of their misunderstandings.