

SUMMARY OF HANNEMAN V. DOWNER

871 P.2d 279 (Nev. 1994)

by

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Note: The principles discussed may not apply to all states. The reader is encouraged to research the law in their own state.

This case involves a third party action against a surveyor by a subsequent purchaser seeking indemnification for damages the purchaser suffered because the surveyor failed to properly locate the boundary.

A surveyor agreed to perform a retracement survey that was used to create a subdivision. Surveying the property, the surveyor found and rejected monuments and accessories as the corners because they did not conform to the field notes of the original survey. He believed the monuments and accessories to be fraudulent. He established new corners based on the original field notes. The new corners were used to establish lot boundaries within the subdivision. The property was subsequently sold and then sold again. The last purchaser, after putting considerable money and time into improving the property, found out the house was on and most of the property was federal land. (The surveyor's boundary was judged incorrect by the Department of Interior Board of Land Appeals).

The last purchaser sued his grantor for \$120,000 in damages. The grantor in turn sued the surveyor for indemnification of that amount. In his defense, the surveyor claimed his procedures were reasonable even if not ultimately correct. In addition, he had no privity or duty to a subsequent purchaser. The trial court found the surveyor liable and the surveyor appealed. The appellate court upheld the trial court's decision.

The appellate court discussed several points that may be of interest to surveyors.

1. The grantor, in an attempt to shift the liability, tried to hold the developer liable under the theory of respondeat superior (i.e., the surveyor was an employee of the developer). Rejecting the grantor's argument, the Court said "the doctrine does not apply where, as here, there is no relationship of superior and subordinate, or, as it is generally expressed, of master and servant, in which the latter is subject to the control of the former. The responsibility is placed where the power exists ... [the surveyor] was an independent contractor over whom [the developer] exercised no control" (p. 284)
2. In reviewing the evidence used to establish the boundary, the surveyor tried to discredit the testimony of a BLM surveyor who was not licensed in Nevada. The Court pointed out what other courts have frequently said — "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." (p. 286)
3. The Court ruled that the surveyor's procedures failed to conform as a matter of law to the acceptable standard of care and survey procedures for retracing a boundary. The Court said "[T]he location of monuments prevails over calls and distances ... as a matter of law ... the original monument evidencing the corner ... if found and identified (or, if destroyed or obliterated, if its location could be fixed), would control the situation irrespective of the field notes and, undoubtedly, irrespective of the testimony of the defendants' witnesses hereinafter referred to."(p. 286)

Based on the decision in this case, the surveyor is cautioned to consider the following:

1. The surveyor should clearly communicate all potential problems, concerns, and conflicts to the client. Whenever the surveyor disagrees with a previous surveyor's services or work, the surveyor should accurately show the area of disagreement or contention and apprise the client of the potential ramifications that may result — even if the surveyor is certain of an error by the previous surveyor. In this case, the surveyor failed to apprise the client of the disagreement (at least in a manner that the client was compelled to act upon). As a result, a subsequent purchaser suffered damages that was shifted to the surveyor.
2. Whenever there is a potential problem discovered by the surveyor on property being contemplated for subdivision, the surveyor should take steps to have the problem resolved before subdivision. Failure to discover or address potential problems before sale of lots increases the extent of harm and the likely damages. Understandably, the developer will be concerned if not upset with any delay in the subdivision and sale of lots. However, one problem and one upset person is better than many upset people with numerous problems.
3. Control is responsibility. This case brings to light one aspect of determining employee/employer relationships. Some surveyors attempt to avoid workman's compensation insurance, payroll deductions, etc. by hiring unlicensed party personnel under the guise of "subcontractors." Form does not substitute for substance. If the surveyor controls when, where, and how the "subcontractors" survey, the surveyor controls them and must consider them as employees. (On the other hand, if the surveyor allows the subcontractor to make these decisions, the surveyor may be liable for aiding the unauthorized practice of surveying.)
4. Consider the end use and potential liability in order to determine the standards and price of the services provided. Frequently courts have held the surveyor liable to subsequent purchasers even though there was no contractual relationship between the surveyor and subsequent purchasers. Multiple litigious parties along with a substantial increase in damages is likely where a subdivision was foreseeable and subsequently occurred. In this case, the omission of approximately four acres caused potential liability to exceed \$100,000.