

## **SUMMARY OF LAWYERS TITLE INSURANCE CORPORATION V. HOFFMAN**

245 Neb. 507, 513 N.W.2d 521 (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 third and fourth party claims by survey firms against survey firms seeking indemnification for encroachments that were discovered after the surveys were completed.

A landowner sought title insurance to cover the possibility of encroachments. The title insurance company required a survey. A surveying firm agreed to provide a survey. This firm subcontracted for an "as-built survey" from a second surveying firm. This firm in turn relied in part on a boundary survey previously performed by a third surveying firm. The second firm certified to Lawyers Title Insurance Corporation that there were no encroachments and a title insurance policy was issued to the landowner. Subsequently, a claim based on encroachments was made against Lawyers Title Insurance Corporation. Lawyers Title Insurance Corporation settled the various claims. In turn, Lawyers Title Insurance Corporation sought indemnification from the first survey firm for \$7,500 in damages and \$12,346.72 in legal fees. The first survey firm in turn sought indemnification from the second firm for indemnification (third party claim). The second survey firm sought indemnification from the third survey firm that had performed the boundary survey (fourth party claim).

The third survey firm denied liability relying on 1) the professional statute of limitations (2 years) and 2) lack of privity with the subsequent surveyors. The trial court found for the third surveyor and dismissed the claims against the third survey firm. On appeal the court affirmed in part (no privity, hence no duty).

The appellate court, in deciding the issue, determined that:

1. Profession is defined as "a calling requiring specialized knowledge and often long and intensive preparation, including instruction in skills and methods as well as in the scientific, historical, or scholarly principles underlying such skills and methods, maintaining by force of organization or concerted opinion, high standards of achievement and conduct, and committing its members to continued study and to a kind of work which has for its prime purpose the rendering of a public service." (p. 512/524) They refused to determine on their review that surveying was a profession and all survey work was professional work. The Court recognized that the

term "profession" originally contemplated only theology, law, and medicine but that other vocations were later designated as a profession (p. 512/524).

2. Ordinarily the "duty would have to be determined from the terms of the agreement between [the surveyor] and the party for which the survey was performed." (p. 513/525)
3. There is a "common-law duty to perform the activity agreed to be done with care, skill, reasonable expediency, and faithfulness and that a negligent failure to do these conditions may be a tort as well as a breach of contract." (p. 513/525)

This case introduces several considerations that surveyors should ponder:

1. The surveyor should perform thorough research on the client's and adjoiner's records to avoid litigation. The failure to disclose encroachments that would be evident from an examination of the adjoiners' records will involve the surveyor in costly litigation. To help avoid litigation it is not enough to simply locate the boundaries according to the client's deed description. A careful examination of the adjoiner's deeds are required to identify encroachments and problems.
2. A surveyor is taking a risk anytime the surveyor relies on the work of another surveyor. However, it must be recognized that all surveying requires some reliance on the work of a previous surveyor. While the practice is common and even necessary it does not necessarily excuse the reliant party from liability. By relying on the work of another, a subsequent surveyor accepts responsibility for any errors, omissions, or problems in the earlier work.
3. A surveyor should use written contracts to clearly limit the scope (and liability) of surveying services. For example, most surveyors define an "as built survey" as a survey to locate improvements relative to the original design and boundary as previously marked. The scope of services for an "as built survey" do not ordinarily encompass a boundary retracement survey and the location of the adjoiner's boundary lines. Nevertheless, indemnification was sought for the failure to show encroachments evidenced by title records of the adjoining property during an "as built survey."
4. The surveyor should not certify to statements (especially those prepared by third parties) that are outside the scope of the services that were sought and performed. For example, performing an "as built survey" and certifying that there are no boundary encroachments is unwise.
5. If services are limited in scope, the surveyor should clearly and accurately state the limitations on the documents and other work products to prevent unjustifiable reliance. Realistically, economics and resources compel surveyors to provide services that sometimes fall below normal standards. It is not enough that the surveyor and client understand and agree to lower the standards. The surveyor's work products must also be prepared in such a manner that all foreseeable

parties will be unable to use the surveyor's work without accepting a risk with full knowledge of the consequences.

6. For surveying to be considered a profession, the requirements stated by the appellate court clearly call for knowledge and training beyond any conceivable apprentice program. The knowledge and training required by the Court to be a profession point toward a formal education program.
7. Avoid litigation whenever possible. Legal fees frequently exceed the actual damages. Consequently, any analysis, whether to settle or proceed with litigation, should take into consideration the cost of litigating. In this case like so many cases the cost of litigation exceeded the damages. Often, the amount recovered is less than the cost for recovering the fee.