

A Summary and Comments
on
KHLH, INC. V. WISCONSIN LAND SURVEYORS, LTD.
239 Wis.2d 232, 619 N.W.2d 307 (2000)
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.

Wisconsin Land Surveyors had a contract with a landowner to survey property prior to the erection of a house. The original contract with the landowner did not require the surveyor to place building stakes. While at the site surveying the property, the general contractor asked and the surveyor agreed to set building stakes. The surveyor made an error in their placement. (The surveyor claimed the stakes were fraudulently moved but the court did not give credit to this argument.) The house's foundation was constructed using the stakes. The building was found to be in violation of the building set back requirements. The contractor paid damages to the landowner as a result of the error. The contractor then sought and was awarded damages from the surveyor (indemnification damages).

Two relevant principles were discussed by the Wisconsin Supreme Court that may be of interest to surveyors.

Economic Loss Doctrine: The economic loss doctrine limits recovery in tort actions (e.g., negligence) initiated by third parties where the defense of privity of contract is not followed or allowed. The economic loss doctrine denies damages beyond the value of the work and materials actually furnished. It limits damages to direct damages. Consequently, lost rents, future earnings, etc. are not recoverable. One basis for the economic loss doctrine is to prevent endless complications in following out cause and effect and provide some stability to contracts and their negotiation. Another basis for the economic loss doctrine is that a practitioner should not be expected

to assume liabilities to others they would not ordinarily assume by contract with their client. The damages resulting from constructing the building within the setback was determined by the court not to be excluded by reason of the economic loss doctrine.

Contribution: It is often thought unfair that a surveyor can be held responsible for costs that were established by other parties without the surveyor having “their day in court” to contest the costs. The principle of contribution allows such an unfair result. Contribution arises where there was payment either by: 1) judgment, or 2) a reasonable settlement agreement. Contribution requires the party who contributed or helped cause the loss to pay damages to other negligent parties. Contribution is often confused with indemnification. Indemnification shifts the monetary loss from one person who is required to pay as a result of a judgment or settlement with another person as a result of equity or contract. Insurance is one form of indemnification based on contract. Because the contractor constructed the building based on the negligently placed stakes, equity required the surveyor indemnify the contractor for the costs.

There are several lessons to be learned from this case:

Recognizing that the stakes or monuments could be fraudulently moved, a surveyor should either make it difficult to move monuments or stakes without detection or take steps to make it easier to prove monuments or stakes were fraudulently moved. In the first instance, use caps solidly fastened to the monument that will be damaged or destroyed if the monument is removed and an attempt is made to reuse the monument. In the second instance, purchase a digital camera and take a picture of the monuments and its position or for that matter any surveying service performed that is not otherwise documented.

There is often some increased risk taken on when the scope of surveying services are expanded while at the site. In some cases, the field crew is unable to adequately prepare beforehand to do the type of work requested. In a case similar to this case, a field crew may not be familiar with the municipality set back distances or have to calculate measurements in the field rather than rely on information loaded into the total station or data collector back in the office. In other cases, the field crew may not be familiar or as experienced with the type of surveying

services requested. For example, an experienced retracement surveyor may not know how to properly mark construction stakes to convey the proper information. Avoid performing work that time will not allow adequate preparation.

Always be cognizant of the possibility that surveying services may create liability exposure far in excess of the fee earned. Staking out a residential building during the course of a boundary survey may be done for less than \$100 in some cases but the increased liability exposure could easily exceed several thousand dollars as occurred in this case (i.e., \$30,000). In cases where the surveying services expose the practitioner to liability far in excess of the fee sought, an indemnification agreement should be sought from the client to reduce the surveyor's exposure to out-of-pocket damage awards.