This chapter will address the question, how much easement information should typically be shown on a plat of survey, or record of survey? The discussions and principles to be presented will also be helpful in determining other professional "standards of care".

For the purposes of this chapter, easements will be divided into two classes. First, those that are created by a written instrument duly recorded with the Clerk and Recorder. These easements are traceable in the chain of title, and typically can be found on the exception schedule (usually schedule B-2) of most title commitments. Bear in mind that sometimes even title companies miss recorded instruments but, most recorded easements can be found on this exception page. This class of easement will hereafter be referred to as "easements of record". The second class of easements are those established by some unwritten method (prescription, etc., see the chapter on Easements), or a written easement grant that was not recorded with the Clerk and Recorder's Office. This class of easement will hereafter be referred to as "unrecorded easements".

The term "apparent easement" means that from a visual inspection of the physical condition of real estate or instruments relating to real estate, there exists evidence that reasonably might be interperted with conclusion that an easement or other servitude may exist upon one of the tenements.

Both easements of record and unrecorded easements have the potential of being an apparent easement, depending on whether there is physical evidence of an easement upon a parcel of land. For example, utilities or roadways crossing a parcel of land are all associated with easements. Seeing these features in the field would certainly indicate the possibility of some class of easement. At the time they are viewed, and without the results of title research, they are only apparent easements.

DUTY/BREACH OF CONTRACT/DAMAGES

Typically when performing a boundary survey, we surveyors show on our plats, all sorts of extrinsic and intrinsic evidence that can affect the legal location of the boundary line(s). For example, original lines are usually shown, occupation lines (fences, etc.), and other conflicting evidence such as unacceptable or questionable survey monuments. This duty is seldom questioned. In other words, when a surveyor contracts to perform a boundary survey for a certain parcel of land and to "prepare a survey map showing the results of said survey", it goes without saying that all information relating to legal interpretation of the parcel's boundary(s) will be shown. This obligation is an implied duty of the surveyor. It does not need to be written in a contract. The client will probally assume (and should) that more than just the "deed" lines will be shown.

They want to know possible ownership lines. This is the professional "standard of care".

It is clear that certain duties can be implied, that is, not specifically mentioned in the contract. If a duty is owned, whether it is by an implied situation or whether it was expressly provided for in the contract, this duty must be fulfilled. If this duty is breached, and the client suffers subsequent damages as a result of this breach, then the surveyor can be held liable for damages. The following indicates this:

"The elements needed to impose liability upon the Defendant are: (1) a duty owed to plaintiff, (2) a breach thereof by Defendant and (3) as a legal result the Plaintiff is injured." Safeway Stores, Inc. v. Cone, 2 Ariz. App. 151, 406 P.2d. 869.

STANDARD OF CARE

As previously shown, if there was a duty owed to the client, that duty must be fulfilled. And also as shown, that duty can be implied. This implied duty is based upon the standard of care for a given profession. The surveyor has many implied duties and may be held liable for damages as a result of failing to do what a prudent surveyor in a similar circumstance would do. See Boundary Control and Legal Principles, by Brown, Robillard, and Wilson, 3rd edition.

If the surveyor does not perform to a standard of care, he may be found guilty of negligent conduct. The following addresses this:

"The traditional elements which generally must be proved in order to establish negligent conduct are as follows:

"1. A duty, or obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks.

"2. A failure on his part to conform to the standard required."...

Where, as here, the duty which the law recognizes arises because the defendant has held himself out to be trained in a particular trade or profession, the standard required for the protection of others against unreasonable risks is that the defendant exercise the skill and knowledge normally possessed by members of that trade or profession in good standing in similar communities...The plaintiff has the burden of establishing what conduct this standard of care requires and that the defendant has failed to comply therewith." Kreisman v. Thomas, 12 Ariz. App. 215, 469 P.2d. 107. (underlines added for emphasis).

Now to the question of this chapter, whether easements of record, unrecorded easements, and/or apparent easements must be shown on survey plats, even without a contractual provision to do so.

Assume the situation to be that there are no expressed contractual provisions to show any class of easement, or apparent easements on the survey map. It appears that there would need to be a standard of care established that requires showing these easements on survey plats or, at least notifying the client of easements found (or easements that should have been found). Typically what would happen is that the plaintiff (damaged client) would hire several surveyors to testify in court that the standard of care requires surveyors to show, say at least, apparent easements. The defendant surveyor of course would hire several surveyors to testify that they do not consider showing easements to be an implied situation. Remember, the burden is on the plaintiff to show what the standard of care is. Simply hearing conflicting testimony would make it difficult for a judge or jury to decide if the plaintiff's expert witnesses clearly showed the standard of care. But, it appears clear from some authorities that there is a standard of care that would dictate easements be shown or discovered, and reported to the client.

The surveyor should examine all documents that pertain to the client's property. The surveyor should get copies of all adjoining parcels, records of surveys, road maps, deeds, available title reports (which will often show vacated roadways where tax maps might not) and examine these documents. Any encumbrance which may affect the property should be checked into. See Boundary Control and Legal Principles, by Brown, Robillard, and Wilson, 3rd. edition at page 370.

When the land survey is complete the surveyor should prepare a plat of said survey and deliver it to the client. This plat should show and identify all easements and their locations. This concept is widely practiced and accepted throughout the United States. Most of the leading authorities in the surveying profession will emphasize the importance of preparing a plat and showing easements. See Boundary Control and Legal Principles, by Brown, Robillard, and Wilson, 3rd. edition at page 373.

The following case of Jarrard v. Seifert, 22 Wash.App. 476, 591 P.2d. 809, apparently is the only case to date that specifically addresses whether a surveyor must show easements. In this case the court heard testimony from surveyors as to what the standard of care was, and then the court stated as follows:

"The defendants were employed as professional engineers and land surveyors because of their superior knowledge in that field. The plaintiffs were entitled to rely on that superior knowledge and to expect that such professionals would fulfill the duty of reasonable diligence, skill and ability...The standard of care (common practice) required that defendants check for and discover easements, and if found, bring that fact to the attention of the owner, preferrably by letter...".

FORESEEABILITY

Foreseeability means the ability to know in advance, or to see in advance that by reasonable interpertation one might conclude that harm or injury may be the result of errors and omissions.

The facts of the Jarrard v. Seifert case, supra, show that the surveyor proceeded with a building layout knowing an easement existed, and without conclusively informing the client. What this indicated is that the surveyor had foreseeability of the use of the property. This element of foreseeability appears to be a requirement to establish a duty. The following addresses this:

"A duty of care is indispensable to liability for negligence and one element of the duty is foreseeability." Davis v. Mangelsdorf, 138 Ariz. 207, 673 P.2d. 951.

The question is, how is foreseeability established? The first way, of course, is to establish what the client is going to use the survey for. This is something in itself that may be an implied duty of the surveyor. Whenever a client requests a survey it is wise for the surveyor to ask what the survey is to be used for, and tell the client what is needed to protect their interests. This may include telling the client that easements need to be investigated. There is seldom an excuse for not knowing what the survey is to be used for. If the client wants to be secretive, then this should be documented in memos or in the contract. For the most part, the surveyor will always know what the survey will be used for. Once the surveyor establishes the use of the survey (or future use of the property), certain conditions can be set forth in the contract. It is at this point the surveyor can reduce liability and clarify whether easements will be researched and or shown.

CONCLUSION

As stated many times throughout this text, the surveyor is usually the "eyes of the client". The client will rely upon the surveyor to find many conflicts of rights that encumber the property. The following case of Shalimar v. D.O.C., 142 Ariz. 36, 688 P.2d. 682, shows that with respect to purchase of land, the grantee is obligated to take notice of rights that are apparent upon inspection of the premises:

"A subsequent purchaser of a servient tenement is bound to take notice of rights that may be evident upon an inspection of the premises as well as those of which he may learn by an inspection of the records...Where a reasonably careful inspection of the premises, followed by inquiry, would disclose the existence of a property right, the grantee of the servient tenement takes title subject to the property right to the extent that his grantor is bound thereby."

From this it is clear that the grantee must be aware of encumbrances on the property and takes possession accordingly. Any presumption of an obligation for the surveyor to adhere to a standard of care that requires finding and reporting easements may result in the client's right to rely on that implied duty. If damages are suffered by the client, the surveyor may be held liable.

It is apparent that the surveyor may be responsible for establishing foreseeability. Often the surveyor knows what the survey is to be used for. Therefore, failure to show or report encumbrances that clearly exist, may be in violation of the standard of care with respect to reporting easements.

The surveyor should attempt to limit liability in the contract (scope of services). There are several possibilities for what circumstances can determine the duty owed for a particular contract.

1). If easements of record are not to be researched by the surveyor, then this should be specifically stated in the contract. Also, the plat should have a statement on it that also states easements of record were not researched. This will help reduce liability for subsequent use by a third party. However,

if during the course of the survey, the surveyor discovers an easement of record that clearly could affect the use of the property, as foreseen by the surveyor, the standard of care dictates that it be shown or reported to the client.

2). If easements are to be shown, but the research is to be provided by the client, such as in a title report of some type, this should be specifically stated in the contract. Also, a statement on the plat should clearly indicate that a particular document(s), such as a title report, was provided by the client and relied on for the purposes of the survey. Even with this procedure, if an easement not found by others is discovered by the surveyor, and the surveyor has foreseeability, the standard of care would dictate reporting of the easement.

3). The surveyor may specify one of the two situations just mentioned and make no mention of whether unrecorded easements are to be shown. This creates an implied situation whereby if there is foreseeability for the use of the land, then the standard of care will demand that evidence of apparent easements are shown or reported.

4). The surveyor may state that easements of record and unrecorded easements are not to be reseached or shown. This is fine, however like the other situations, if there is foreseeability for the use of the land, the standard of care will require that easements be shown or reported, if discovered.

5). The surveyor may neglect to state anything about easements of record or unrecorded easements. Coupled with foreseeability, this situation establishes that the standard of care is to show or report all easements of record and evidence of apparent easements.

With the forgoing authorities cited and principles outlined, the following are minimum guidelines to follow when preparing a contract with the client and subsequently preparing the survey plat.

1). Clearly establish what the survey is to be used for. If the degree of foreseeability is not established, the surveyor may be held liable because he "should have known" what the survey was to be used for. After all, surveyors do hold themselves out to have superior skill and knowledge in surveying, which includes extensive knowledge of the nature and extent of easements and encumbrances.

2). Expressly set forth in the contract, whether easements of record will be shown and who will do the research.

3). Always show "apparent easements" when they would affect the proposed use of the survey or the land as foreseen by the

surveyor. The surveyor does not know whether the evidence on the ground would constitute an easement of record or unrecorded easement. Notifying the client of the evidence suggesting that an easement of some class may exist will usually include most easements of record and most unrecorded easements.

4). Always show apparent easements on the plat or report them to the client in writing. If the locations are not surveyed in, then at least put a note on the plat of the existence of the evidence indicating the easement. Assuming the element of foreseeability exists, the standard of care will always require that evidence of apparent easements be shown, when the evidence is reasonably discovered.

5). Do not take anything for granted. Always report any evidence of easements of record or unrecorded easements if evidence of them is discovered during the course of the survey, no matter what the contractual obligations. Coupled with foreseeability, this is the standard of care.

OTHER STANDARDS OF CARE

The guidelines and discussions presented in this chapter were specifically designed to discuss the question presented. However, many situations exist within the world of the surveyor that require a sound understanding of "standard of care". The element of foreseeability is required. It is important to remember that even with contractual provisions that attempt to limit the standard of care, or duty, the element of foreseeability can create an implied duty above and beyond, and contrary to the express provisions of a contract.

Too often the statement is made, "We were not being paid to do..." or "We only contracted to provide...". Surveyors have specialized training in many areas of land law and should not believe that standards of care can simply be defined by a contract. It seems to be poor business to not assert and sell a higher quality product when it is clear that the client needs a better product. The general public is not knowledgeable with legal aspects and technical provisions of surveying and is not expected to be. The public has placed their trust in surveyors. We must take time to educate clients and the general public as to why certain tasks must be done and to explain the dangers of omitting these tasks. Educating clients in itself is fast becoming a standard of care.

Understand also that people will purchase a product and often push it to the limit. Understanding the limits of a survey is important and the limits of the survey are not always controlled by a contract.

22 Wash.App. 476

Ernest JARRARD and Paul Putnam, Respondents,

v.

Donald W. SEIFERT and Jane Doe Seifert, husband and wife, Arthur G. Forbes and Jane Doe Forbes, husband and wife, and Harry William Berry and Jane Doe Berry, husband and wife, d/b/a Seifert, Forbes & Berry, Appellants.

No. 2755-II.

Court of Appeals of Washington, Division 2.

Jan. 22, 1979.

Joint venture that had undertaken a condominium development brought suit against architectural, engineering and land survey firm, seeking to recover for losses arising from the alleged negligence of the defendants in staking the condominium site in such a way that a building encroached on an easement. The Superior Court, Pierce County, E. Albert Morrison, J., entered judgment for plaintiffs, and defendants appealed. The Court of Appeals, Johnson, J., held that: (1) the trial court did not abuse discretion in examining two witnesses to clarify some inconsistent statements that the witnesses had made; (2) the trial court properly admitted testimony on the standard of care in the engineering and land survey profession; (3) plaintiffs were enti-

tled to rely on the superior knowledge of defendants, who were employed as professional engineers and land surveyors; (4) the standard of care applicable to defendants required them to check for and discover easements and, if any were found, to bring that fact to the attention of the owners, and (5) where the professional engineers and land surveyors had failed to perform their professional duty with reasonable diligence, skill and ability, they were liable for losses arising therefrom.

Affirmed.

1. Appeal and Error ⇐1011.1(5)

When a trial court has based its findings of fact on conflicting evidence and there is substantial evidence to support the findings, the reviewing court will not substitute its judgment for that of the trial court even though the reviewing court might have resolved a factual dispute differently.

2. Witnesses ⇐246(2)

The trial court has broad discretion in propounding questions to witnesses in order that it may gain all the information possible to aid in correctly determining the disputed questions presented by the parties.

3. Witnesses ⇐246(2)

Where witnesses made inconsistent statements during testimony, trial court did not abuse discretion in examining the witnesses to clarify their testimony.

4. Negligence ⇐124(3)

In suit wherein condominium developers sought to recover for alleged negligence of architectural, engineering and land survey firm that was employed to draw up a site plan and place stakes on the ground in conformity with precise legal descriptions, trial court properly allowed the developers to present testimony on the standard of care in the engineering and land survey profession.

5. Negligence ⇐2

Real estate developer and contractor who formed a joint venture to construct fourplexes on certain property were entitled to rely on superior knowledge of professional engineers and land surveyors whom they employed and to expect that such professionals would fulfill the duty of reasonable diligence, skill and ability.

6. Negligence ⇐2

Standard of care applicable to professional engineers and land surveyors who were employed to draw up a site plan for proposed condominium required that the engineers and surveyors check for and discover easements, and if found, bring that fact to the attention of the owner, preferably by letter; additionally, if the property had been staked for a building prior to discovery of such easement, applicable standard of care required that the stakes be removed.

7. Negligence ⇐4

Where professional engineers and surveyors who were employed to draw up site plan for condominium, including the preparation of precise legal descriptions and the placement of stakes on the ground in conformity with the descriptions, did not check preliminary title report or consult auditor's office to ascertain whether there were any easements and where, after construction of one fourplex was nearly completed, it was discovered that one corner of the fourplex encroached on a sewer easement and that this necessitated relocation of a sewer, engineers and surveyors failed to perform their professional duty with reasonable diligence, skill and ability and thus were liable to developers.

Thomas C. Lowry, Tacoma, for appellants.

Grant L. Anderson, Tuell, Anderson & Hunson, Tacoma, for respondents.

JOHNSON, Judge.*

Ernest Jarrard, a real estate developer, and Paul Putnam, a contractor, formed a joint venture to construct 9 fourplexes on

* Judge Bertil E. Johnson is serving as a judge pro tempore of the Court of Appeals, pursuant to RCW 2.06.150.

property located at 44th Street and Bridgeport Way in Pierce County. It was a condominium-type arrangement with each fourplex to be sold with the land beneath it only, and a common, undivided interest in the surrounding property. In the spring of 1973, Mr. Jarrard employed the defendants, Seifert, Forbes & Berry, an architectural, engineering, and land survey firm, to draw up a site plan, place the fourplexes on the limited-size property, lay out the parking, and secure the approval of the county authorities for said site plan. The defendants prepared a site plan, submitted it to the county, corrected it because of some objections, and it was approved. The defendants were further employed to prepare precise legal descriptions for each fourplex and to place stakes on the ground in conformity with the descriptions. The defendants did not check the preliminary title report or consult the auditor's office to ascertain whether there were any easements. The legal descriptions were prepared and the stakes set. At about the time the stakes were set for fourplex "D", a manhole was discovered by the surveyor, Mr. Cantor, who brought it to the attention of Mr. Putnam. Mr. Putnam immediately went to the Westside Water District office, where he talked with Mr. Bleecker, the manager, who in turn came to the site and brought his maps which showed an easement and a sewer line. He discussed the matter with Mr. Cantor. There is a conflict in the evidence as to whether or not Mr. Putnam was present during all of that conversation. Mr. Cantor reported to Mr. Berry of defendant's firm, but nothing further was done by the defendants. The stakes were not removed. Approximately 2 weeks later, Mr. Putnam commenced constructing the fourplexes, including "D", on the land staked by the defendants. When the fourplex "D" was nearly completed, it was discovered that one corner of it encroached on the easement, and as a result it was necessary to relocate the sewer. The plaintiffs paid the cost thereof, and brought this action to recover that cost from the defendants.

The court entered its findings of fact, conclusions of law, and judgment for the plaintiffs in the sum of $12,612.82. The defendants appeal and make 27 assignments of error, 12 of which are directed against the court's findings and 11 for the failure of the court to adopt the defendant's proposed findings.

We have read the entire record in this case. There was a considerable conflict in the evidence which was resolved by the court's findings of fact. We are of the opinion that the court's findings of fact are supported by substantial evidence.

[1] When a trial court has based its findings of fact on conflicting evidence and there is substantial evidence to support the findings, the appellate court will not substitute its judgment for that of the trial court, even though it might have resolved a factual dispute differently. *Beeson v. Atlantic-Richfield Co.*, 88 Wash.2d 499, 563 P.2d 822 (1977); *Neiffer v. Flaming*, 17 Wash.2d 443, 563 P.2d 1300 (1977).

Defendants assign error to the trial court's examination of Mr. Bleecker and Mr. Berry. Mr. Bleecker at one point in his testimony testified that Mr. Putnam was present during his conversation with Mr. Cantor, and at another point that he did not remember. The trial court examined Mr. Bleecker to clarify that inconsistency. Mr. Berry also made some inconsistent statements, and the court examined him to clarify his testimony.

[2, 3] The trial court has broad discretion in propounding questions to witnesses in order that it may gain all the information possible to aid in correctly determining the disputed questions presented by the respective parties. *In re Estate of Ward*, 159 Wash. 252, 292 P. 737 (1930); *Dennis v. McArthur*, 23 Wash.2d 33, 158 P.2d 644 (1945); *In re Burtts*, 12 Wash.App. 564, 530 P.2d 709 (1975). We find there was no abuse of discretion in this case.

[4] Did the trial court err in allowing plaintiffs to present testimony on the standard of care (custom of the trade, common practice) in the engineering and land survey

profession? There is no argument set forth in defendant's brief to support this assignment of error, and no authority cited, therefore we need not address ourselves to it. However, we are of the opinion that such testimony was proper.

[5, 6] The defendants were employed as professional engineers and land surveyors because of their superior knowledge in that field. The plaintiffs were entitled to rely on that superior knowledge and to expect that such professionals would fulfill the duty of reasonable diligence, skill, and ability. *Loyland v. Stone & Webster Eng'r Corp.*, 9 Wash.App. 682, 514 P.2d 184 (1973). The standard of care (common practice) required that the defendants check for and discover easements, and if found, bring that fact to the attention of the owner, preferably by letter, and if the property is staked for a building that the stakes be removed.[1] Mr. Putnam did have some information in this case that there might be a problem, but he immediately called the manager of the water district, who came to the site with his maps and discussed the matter with the surveyor, Mr. Cantor. The court found that Mr. Putnam paid no further attention to the problem, believing it was a matter to be disposed of by the engineer. Mr. Cantor did bring it to the attention of Mr. Berry, who, even though he had a telephone conversation with Mr. Jarrard shortly thereafter, did not mention it. No letter was ever written. The stakes were not removed. Mr. Berry testified that the buildings should have been constructed on the stakes. The stakes not having been removed or orders to the contrary given, Mr. Putnam erected fourplex "D" on the stakes.

A case closely analogous to the facts in this case is *School Dist. 172 v. Josenhans*, 88 Wash. 624, 153 P. 326 (1915), wherein the court said at page 628, 153 P. at page 327:

> If we accept the finding that the architects were paid for and did superintend the construction of the building, and that they certified the building as completed in accordance with the plans and specifications, then the respondents would be entitled to rely on the sufficiency of the construction, and although they may have detected what seemed to them to be faulty construction, they would be justified in relying on the appellants' judgment that it was a proper construction, as they had engaged the appellants to see that the construction was correct.

[7] Here the plaintiffs had a right to rely on the acts and judgment of the defendants. The defendants failed to perform their professional duty with reasonable diligence, skill and ability.

We find no error, and the judgment is affirmed.

REED, Acting C. J., and SOULE, J., concur.

1. Mr. Berry testified that normally he would check the preliminary report or the auditor's records, but did not do so in this case.