Written Materials for Tri-State Surveying Conference

DEED INTERPRETATION, IDENTIFYING AND RESOLVING AMBIGUITIES©

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Much has been written on the rules and law of deed interpretation. Some treatises are quite dense, and pose the additional problem of understanding and applying the lessons espoused. How does a surveyor, attorney or property owner know if a deed is ambiguous? Some deeds are poorly drafted. Some are simply wrong. Some do not reflect the terms of the purchase and sale agreements. Ultimately, it is up to the civil court system to interpret and give effect to legal instruments. The court is called upon to determine the intent of the parties to the deed. In the case of ambiguous deeds, the court will admit extrinsic evidence to determine the intent of the parties. Can the court admit extrinsic evidence to create an ambiguity in the first place? After the decision has been made to admit extrinsic evidence, what type of evidence is admissible? What is the role of the surveyor in presenting testimony in a case concerning an ambiguous deed?

1. The Parol Evidence Rule – Generally

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Surveyors generally refer to extrinsic evidence. Attorneys and courts refer alternately, and usually synonymously, to extrinsic evidence or parol evidence. The parol evidence rule, however, applies throughout the law of contracts and is not limited to ambiguous deeds. In fact the parol evidence rule is a substantive rule of law concerning contract interpretation, and is not a rule of evidence. See State of Nevada v. Courtesy Motors, 95 Nev. 103, 107, 590 P.2d 163 (1979) (citing Wheeler, Kelly & Hagny, Inv. Co. v. Curts, 147 P.2d 737, 740 (Kan. 1944)). The case of Holland v. Crummer, 78 Nev. 1, 368 P2d 63 (1962) contains one of the leading recitations of the parol evidence rule in Nevada:

> When the language used is fairly susceptible to one of two constructions, extrinsic evidence may be considered, not to vary or modify the terms of the agreement, but to aid the court in ascertaining the true intent of the parties, … not to show that "the parties means something other than what they said" but to show "what they meant by what they said,"… Where any doubt exists as to the purport of the parties' dealings as expressed in the wording of their contract, the court may look to the circumstances surrounding its execution – including the object, nature and subject matter of the agreement, … -- as well as to the subsequent acts or declarations of the parties "shedding light upon the question of their mutual intention at the time of contracting." Id. at 8 (quoting Child v. Miller, 74 Nev. 223, 327 P.2d 342 (1958)).

The court may rely upon parol evidence to resolve an ambiguity. The court cannot resort to parol evidence to contradict the terms of a deed that is clear on its face. The parol evidence rule finds a similar recitation in Idaho and Utah. See e.g. Simons v. Simons, 134 Id. 824, 11 P.3d 20 (2000); Garrett v. Ellison, 93 Utah 184, 72 P.2d 449 (1937).

In fact, although these citations all contain appropriate statements of when parol evidence may not be admitted, they fail to contain a complete statement of when parol evidence may be admitted. Parol evidence may be admitted to resolve ambiguities in a written instrument, to show that the written instrument was procured through fraud, or that the written instrument is the result of a mistake.

Example 1 (a variation on a real case). A owns a large tract of ranch land and conveys the following portion to B who intends to build a house on the property:

> All that certain lot, piece or parcel of land, situate in the County of Fortune, State of Nevada, described as follows, to wit:
>
> A portion of the NW 1/4 of the NE 1/4 of Section 33, T. 12 N., R. 23 E., M.D.B.&M., more particularly described as follows:
>
> BEGINNING at a point on the South line of the NW 1/4 NE 1/4 of Section 33, from which the Northeast corner of said Section 33, T. 12 N., R. 23 E., bears N. 61E 10' 28" E 2,741.73 feet; thence
>
> N. 89E 52' 25" W., 264.00 feet; thence
> N. 0E 50' 05" E., 380.00 feet; thence
> S. 89E 52' 25" E., 528.00 feet; thence
> S. 0E 50' 05" W., 380.00 feet; thence
> N. 89E 52' 25" W., 264.00 feet to the point of beginning.

Unfortunately, A meant only to convey a 330 foot strip of land, and thereby conveyed too much property. Her well is located on the extra 50 foot strip of land that was conveyed by mistake. Assume that the reference to 380 feet, instead of 330 feet, is a simple typographical error. B, however, takes a hard line and claims that she intended to purchase the property including the well.

Question 1.1. Can A introduce extrinsic evidence to show that the deed is ambiguous?

Answer to Question 1.1. No. The deed on its face is not ambiguous.

Question 1.2. Can A introduce extrinsic evidence to show that the extra 50 feet was conveyed by mistake?

Answer to Question 1.2. Strict adherence to the parol evidence rule and principles of contract law would enable A to introduce parol evidence only to show a mutual mistake. B claims there is no mistake. [There may be room here for the court to disregard B's testimony and analyze the case as one of mutual mistake].

Question 1.3. Can A introduce extrinsic evidence to show that the deed was procured through fraud.

Answer to Question 1.3. In theory, yes. This example does not support an allegation of fraud.

2. The Merger Doctrine.

The law of contract interpretation, with certain well-developed refinements, governs the interpretation of deeds. In fact, according to the doctrine known as the "Merger Doctrine", the deed is the final embodiment of the contracting parties' intent, and will govern over the actual contract if the two are at odds. See Hanneman v. Downer, 110 Nev. 167, 177, 871 P.2d 279 (1994). ("When the terms of the deed cover the same subject matter as the earlier contract and the two are at variance, the deed controls"). Therefore, the resolution of an ambiguous deed should not be had by reference back to the contract, escrow instructions, etc. The Merger Doctrine does not preclude allegations that the deed and underlying contract were procured through fraud, misrepresentation or the result of a mutual mistake.

Example 2. C acquires two ranches, the first one known as Whiteacre, and the second known as Blackacre. Whiteacre contains 160 acres in the NW ¼ of Sec. 10 and Blackacre contains 160 acres in the NE ¼ of Sec.10. C enters into a written agreement to sell Whiteacre to D for a price of $160,000. C grants a deed to D with a legal description that recites, in part, "all real property in the NE ¼ of Sec. 10." Time passes and C's heirs attempt to undo the transaction, claiming that C mistakenly switched Blackacre for Whiteacre in the deed.

Question 2.1. Does the variance between the deed and the contract create an ambiguity, such that the court should consider parol evidence, i.e., the contract?

Answer to Question 2.1. No. The deed on its fact is not ambiguous.

Question 2.2. Can C's heirs justify the admission of parol evidence by claiming he made a mistake in conveying the NW ¼ instead of the NE ¼ of Sec. 10?

Answer to Question 2.2. Probably not, unless he finds a sympathetic judge or he can make a showing of a mutual mistake.

Question 2.3. Can C's heirs justify the admission of parol evidence by alleging that his signature on the deed was procured through fraud?

Answer to Question 2.3. In theory, yes, but this fact pattern does not support an allegation of fraud.

3. Parol Evidence Uses

What happens once the court has determined that a deed is ambiguous, and that parol evidence will be considered? What evidence may be considered? How does parol evidence affect the interpretation of the deed?

Example 3. E conveys the following property to F:

> [A]ll that certain tract or parcel of land lying and being in the County of Douglas, State of Nevada, to wit, five acres of land embracing the South West Corner of the West half of the North West quarter of Section Fourteen Township No. (12) Range (20) East, the same being and lying on the South side of the East Branch of Carson River.

A recent survey of the area shows that there is currently in excess of eight (8) acres in this quarter corner lying to the south and west of the river. The area term therefore conflicts with the reference to the natural monument.[2] E's successors in interest claim that the conveyance was limited to five (5) acres, and assert title to the remaining property. E's successors have found documents depicting a fenceline that embraced approximately five (5) acres, and assert that E

[2] While conflicts do not, as a matter of law, equate to ambiguities, "inconsistencies in a deed may throw a shadow of ambiguity over an instrument, thereby warranting the introduction of parol evidence as an aid to discovering the intention of the parties." Simons v. Simons, 134 Id. 824, 828, 11 P.3d 20 (2000) (citing Currie v. Walkinshaw, 113 Id. 586, 589, 746 P.2d 1045, 1048 (Ct. App. 1987)).

intended to convey only the property bounded by the fenceline. F's successors in interest claim that E conveyed all property south and west of the river, notwithstanding the conflict with the five (5) acre area term.

Question 3.1. Can the court consider parol evidence to help interpret the deed?

Answer to Question 3.1. Yes. The court will likely decide that the deed is subject to a latent ambiguity and/or conflict between the calls to area and the natural monument.

Question 3.2. Can F's heirs introduce parol evidence regarding the fence line?

Answer to Question 3.3. It depends on what they intend to use it for. See generally Donald A. Wilson, *Court Decisions Every Surveyor Should Know About* (Pathfinders Pub. 2001). Parol evidence cannot alter, change, or contradict the monuments called for in the deed, or assert a new monument. "What the monument is is determined by the deed, but where it is is a question of fact to be determined by the jury." Smart v. Huckins, 82 N.H. 342 (1926).

> For a monument to be controlling it must be (1) called for, (2) identifiable, (3) undisturbed. If the monument is obliterated, it is controlling if its former position can be identified (a) by reliable witness evidence, (b) by surveyor's notes, (c) by improvements, and (d) sometimes by hearsay and reputation.
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> In written conveyances or documents, uncalled-for monuments cannot be considered as controlling. If it is the intent of the parties to have a monument controlling, it should be so stated in the deed.

Brown's Boundary Control and Legal Principles, p. 269 (4th ed. 1995). Under no circumstances can the fence, a natural monument that is not called for in the deed, be considered a controlling monument over the river, a natural monument that is called for in the deed. The fence may be considered along with other evidence, subject to the considerations below, of the location of the five (5) acre boundary. It is unlikely that any such evidence exists in this case, as the deed is silent as to the location of the proposed five (5) acre boundary.

4. Parol Evidence – Types and Relevance.

Discovering the intent of the parties is particularly problematic in the interpretation of ancient deeds where the parties and witnesses have died or are otherwise unavailable. If private surveys were made, they were not recorded. If they were recorded, they likely contain errors in the depiction of water boundaries and the field notes cannot be located. A careful reading of the many recitations of the parol evidence rule reveals that the focus is on the intent of the parties, and that intent should not be affected by changed circumstances that would create additional, plausible interpretations. By reference to the Holland v. Crummer case, supra, the focus is on the "parties' dealings", "the circumstances surrounding [the] execution of the instrument", and "subsequent acts or declarations of the parties", in order to determine "their mutual intention at the time of contracting."

Consider that the deed reviewed in example 3 was executed in 1871. The parties have long since passed on and the landscape of the area has been altered so dramatically that it is not possible to know what the circumstances were at the time of contracting. The successors in interest to the grantor, who are trying to limit the conveyance to five (5) acres, rely primarily on unrecorded maps developed by the federal water master and the bureau of reclamation in the 1930s, some of which depict a fence enclosing approximately five (5) acres. Arguably, those maps are irrelevant to the question of the parties' intent at the time of the conveyance in 1871. Parol Evidence must be legally relevant.

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible. (FRE 402)
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> 1. All relevant evidence is admissible, except:
> (a) As otherwise provided by this Title;

(b) As limited by the Constitution of the United States or of the State of Nevada; or
(c) Where a statute limits the review of an administrative determination to the record made or evidence offered before that tribunal.
2. Evidence which is not relevant is not admissible. (NRS 48.025)

Even relevant evidence may be excluded in some cases.

1. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.
2. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time or needless presentation of cumulative evidence. (NRS 48.035)

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. (FRE 403)

5. Parol Evidence – Hearsay

If the Court decides to consider parol evidence, and the parol evidence is legally relevant and not prejudicial, the proponent of the evidence must still lay a foundation for the evidence, i.e., prove facts sufficient to support its admission into evidence. One of the biggest obstacles to admission is the hearsay rule. Hearsay is defined in different ways in different courts. Idaho and Utah have generally adopted the Federal Rules of Evidence. Nevada has a different codification system with largely the same effect.

Fed.R.Evid. 801(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

NRS 51.035 "Hearsay" defined. "Hearsay" means a statement offered in evidence to prove the truth of the matter asserted unless:

1. The statement is one made by a witness while testifying at the trial or hearing;

2. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:

(a) Inconsistent with his testimony;

(b) Consistent with his testimony and offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive;

(c) One of identification of a person made soon after perceiving him; or

(d) A transcript of testimony given under oath at a trial or hearing or before a grand jury; or

3. The statement is offered against a party and is:

(a) His own statement, in either his individual or a representative capacity;

(b) A statement of which he has manifested his adoption or belief in its truth;

(c) A statement by a person authorized by him to make a statement concerning the subject;

(d) A statement by his agent or servant concerning a matter within the scope of his agency or employment, made before the termination of the relationship; or

(e) A statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

A survey map, generally speaking, is hearsay. In order to be admitted into evidence, it must be supported by the testimony of the surveyor. However, the trial court has discretion on evidentiary matters, and its decisions on evidence generally are not subject to review on appeal. As seen below, most of the exceptions to the Hearsay Rule still require a showing of reliability. The rules of evidence also grant the trial Court discretion to admit hearsay if it is deemed reliable. In addition, the practice varies from court to court and even from judge to judge within the same court. Federal court judges are usually more exacting than state court judges on all evidentiary matters.

Evaluation of evidentiary questions should be made with a contiuum in mind. At the clearly admissible end of the contiuum is a surveyor called to testify at trial regarding a survey that she recently completed and recorded. The surveyor witness has all of her field notes. At the

clearly inadmissible end of the contiuum is party who wishes to introduce a map discovered in a government office, that was not recorded, lacks field notes and other explanatory materials, and further a lacks a foundational witness with first hand knowledge of how the map was prepared or kept.

The following is an analysis of the exceptions to the hearsay rule that apply to surveyor witnesses.

Federal Rules of Evidence	**Nevada Revised Statutes**
RULE 803: Hearsay Exceptions; Availability of Declarant Immaterial A. OFFICIAL TEXT The following are not excluded by the hearsay rule, even though the declarant is available as a witness:	
(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term business as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.	**NRS 51.135 Record of regularly conducted activity.** A memorandum, report, record or compilation of data, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony or affidavit of the custodian or other qualified person, is not inadmissible under the hearsay rule unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.
A survey map and field notes, in some instances, may be considered business records that fall within this exception to the hearsay rule. Note the exception to the exception for lack of trustworthiness.	The same analysis applies here. In addition, Nevada court will accept an affidavit from the custodian of records.

Federal Rules of Evidence	Nevada Revised Statutes
(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.	**NRS 51.155 Public records and reports.** Records, reports, statements or data compilations, in any form, of public officials or agencies are not inadmissible under the hearsay rule if they set forth: 1. The activities of the official or agency; 2. Matters observed pursuant to duty imposed by law; or 3. In civil cases and against the state in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or the method or circumstances of the investigation indicate lack of trustworthiness.
Private surveys are not public agency reports, and do not fall under this exception, even if they are recorded.	The same analysis applies.
Maps prepared by the bureau of reclamation, state lands office, water resources, etc., may be analyzed under this section if they satisfy the criteria A-C and do not indicate lack of trustworthiness. Without field notes or a person with first hand knowledge of the preparation and storage of the maps, it is unlikely that such maps will be admitted under this exception.	
(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.	**NRS 51.215 Records of documents affecting interest in property.** The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, is not inadmissible under the hearsay rule if the record is a record of a public office and an applicable statute authorized the recording of documents of that kind in that office.
Copies of deeds, surveys and other real property records are admissible to prove that the original documents were executed and recorded. A surveyor may therefore rely on such records in defending a survey in court.	The same analysis applies
(15) Statements in documents affecting an	**NRS 51.225 Statement in document affecting**

Federal Rules of Evidence	Nevada Revised Statutes
interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.	**interest in property.** A statement contained in a document purporting to establish or affect an interest in property is not inadmissible under the hearsay rule if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.
Recitals contained in legal instruments are admissible under this exception to the hearsay rule.	The same analysis applies
(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.	**NRS 51.235 Statements in ancient documents.** Statements in a document more than 20 years old whose authenticity is established are not inadmissible under the hearsay rule.
A good example is an old newspaper. Newspapers should always be checked for historical information.	The same analysis applies.
(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.	**NRS 51.255 Learned treatises.** To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, a statement contained in a published treatise, periodical or pamphlet on a subject of history, medicine or other science or art, is not inadmissible under the hearsay rule if such book is established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice
A surveyor expert witness may resort to text books and treatises in forming an opinion. The author of the book does not have to testify.	The same analysis applies.
(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.	**NRS 51.275 Reputation concerning boundaries or general history.** Reputation in a community, arising before the controversy, as to: 1. Boundaries of or customs affecting lands in the community; and 2. Events of general history important to the community or to the state or nation in which the community is located, are not inadmissible under the hearsay rule.
The opinions of another party are not relevant	The same analysis applies.

Federal Rules of Evidence	Nevada Revised Statutes
to the question of the intent of the parties to the original transaction, even if they fall within this exception to the hearsay rule?	
(23) Judgment as to personal, family, or general history, or boundaries. Judgments as proof of matters of personal, family, or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.	**NRS 51.305 Judgment as to boundaries or personal, family or general history.** A judgment is not inadmissible under the hearsay rule as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the matters would be provable by evidence of reputation.
Our discussion proceeds on the assumption that the expert witness surveyor will be called upon to provide testimony in a case where there is no judgment affecting the boundary.	

7. Expert witness testimony.

> **Rule 702. Testimony by Experts.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.
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> **Rule 703. Bases of Opinion Testimony by Experts.** The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible.
>
> [i.e., hearsay rules do not strictly apply to experts].

The United States Supreme Court decided in Kuhmo Tire Company. Ltd. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999) that expert witness testimony presented in federal district courts has to meet a threshold reliability standard.

> We conclude that *Daubert*'s general principles apply to the expert matters described in Rule 702. The Rule, in respect to all such

matters, "establishes a standard of evidentiary reliability." 509 U.S. at 590. It "requires a valid . . . connection to the pertinent inquiry as a precondition to admissibility." 509 U.S. at 592. And where such testimony's factual basis, data, principles, methods, or their application are called sufficiently into question, see Part III, *infra*, the trial judge must determine whether the testimony has "a reliable basis in the knowledge and experience of [the relevant] discipline." 509 U.S. at 592.

The petitioners ask more specifically whether a trial judge determining the "admissibility of an engineering expert's testimony" *may* consider several more specific factors that *Daubert* said might "bear on" a judge's gate-keeping determination. These factors include:

-- Whether a "theory or technique . . . can be (and has been) tested";

-- Whether it "has been subjected to peer review and publication";

-- Whether, in respect to a particular technique, there is a high "known or potential rate of error" and whether there are "standards controlling the technique's operation"; and **[*150]**

-- Whether the theory or technique enjoys "general acceptance" within a "relevant scientific community." 509 U.S. at 592-594.

Emphasizing the word "may" in the question, we answer that question yes.

Kuhmo Tire at 149-150.

8. Role of the Surveyor

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