SURVEYOR IMMUNITY REVISITED

by Michael L. Matuska, Esq.

As a practicing real estate litigation attorney, and associate NALS member, it was with great interest that I read Knud Hermansen's article *Surveyor Immunity* in *The Nevada Traverse*, Vol. 30, No. 2, 2003. Mr. Hermansen commented in that article that:

> *[A]llegations, opinions, and statements made by a surveyor in good faith and relevant to a disputed boundary involved in or likely to be involved in litigation shall enjoy an absolute privilege.*

After exchanging e-mails with some NALS members, including your editor-in-chief, it appears that this topic is important enough to professional land surveyors to warrant further commentary. This article attempts to expand on the following questions: (1) What liabilities are covered by the absolute privilege; and (2) when does the absolute privilege attach?

1. What liabilities are covered by the absolute privilege?

The absolute privilege for statements made in the context of judicial proceedings provides a shield from claims of slander and defamation. Claims of slander and defamation arise in a number of contexts. One type concerns slander of public officials. In order to strike a balance with the First Amendment that affords political speech heightened protection, a false statement regarding a public official is only actionable if it is made with actual malice. *New York Times v. Sullivan*, 376 U.S. 254 (1964). If the statement does not concern a public official or a matter of public concern, a false statement may be actionable without a showing of actual malice.

Slander of title is a species of slander. Nevada surveyors may take comfort with the knowledge that the Nevada courts require a showing of malice that is the same or similar to the malice required in slander cases concerning public officials. "Slander of title involves false and malicious communications, *Rowland v. Lepire*, 99 Nev. 308, 313, 662 P.2d 1332, 1335 (1983), disparaging to one's title in land, *see Summa Corp. v. Greenspun*, 98 Nev. 528, 530, 655 P.2d 513, 514 (1982), and causing special damage, *Rowland*, 99 Nev. at 313, 662 P.2d at 1335." *Higgins v. Higgins*, 103 Nev. 443, 445, 744 P.2d 530 (1987).

A successful plaintiff in a slander of title action may recover attorney's fees, court costs and other expenses to clear title. *Day v. Vincent Coast Holdings*, 101 Nev. 260, 265, 699 P.2d 1067, 1071 (1985) (citing *Summa Corp. v. Greenspun*, 98 Nev. 528). The award of attorney's fees is discretionary with the court. *Michelsen v. Harvey*, 110 Nev. 27, 30 (1994). Following the Nevada Supreme Court's decision in *Summa Corp. v. Greenspun*, it is no longer necessary to prove damages other than attorney's fees and other costs incurred to remove the cloud on title.

Malice appears to be the most difficult element to establish in a slander of title action. "In order to prove malice it must be shown that the Defendant knew that the statement was false or acted in reckless disregard of its truth or falsity." *Rowland v.*

Lepire, 99 Nev. 308 at 313 ("reversing trial court's decision that contractor acted with malice when it filed a mechanic's lien after consulting with counsel." In *Higgins v. Higgins* 103 Nev. 443 and *DeCarnello v. Guimont*, 101 Nev. 412, 415, 705 P.2d 650 (1985) the Nevada Supreme Court affirmed the dismissal of slander of title claims where there was no showing of malice.

If a statement is made outside of the litigation context, and satisfies the above identified elements, it is actionable as slander of title. That same statement, if made inside of the courtroom, is not actionable as slander. "[C]ommunications uttered or published in the course of judicial proceedings are absolutely privileged." *Fink v. Oshins*, 118 Nev. Adv.Op. 45 (2002) (quoting *Circus Circus Hotels v. Witherspoon*, 99 Nev. 56, 60, 657 P.2d 101, 105 (1983)).

The absolute privilege does not protect the surveyor witness from a claim of malpractice or negligence. A surveyor still has to satisfy the duty of care owed to her client and any other parties affected by her work.

While surveyors seldom need to issue statements about people, the work product that surveyors produce, i.e., maps, legal descriptions, and other documents, should be considered publications or statements that may invoke the doctrine of slander of title. There is no immunity for a slanderous statement about another person's title to real property if made outside of the litigation context.

Although it difficult to conceive of a situation where a surveyor would act with actual malice in disparaging an owner's title to real property, the true standard is "malice or reckless disregard for the truth." There is no bright line test for what constitutes "reckless disregard for the truth" and this determination must be made on a case by case basis. Mr. Hermansen noted that "*The surveyor is entrusted with performing a service that often lacks a clear and unimpeachable solution.*" This writer believes that a surveyor should not be considered negligent every time a surveyor is wrong, and "reckless disregard for the truth" should be more difficult to prove than mere negligence. Lacking guidance in the case law on when a surveyor may be said to have acted "in reckless disregard of the truth," I propose the following hypothetical for consideration:

A owns a large tract of land with the following exception:

> 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. 61° 10' 28" E, 2,741.73 thence
>
> N 89° 52' 25" W., 264.00 feet; thence
> N 0° 50' 05" E., 330.00 feet; thence
> S 89° 52' 25" E., 528.00 feet; thence
> S 0° 50' 05" W., 330.00 feet; thence

N 89° 52' 25" W., 264.00 feet to the point of beginning.

This description is repeated in the deed to A's successor, B, and then to B's successor, C.

Neighbor N owns the portion of land that was excepted from the previous legal description. This legal description is repeated in the deed to N's successor, O. However, the deed to O's successor, P, describes the excepted portion as containing 380 feet instead of 330 feet. N's deed to O thereby clouds title to 50 feet of C's property. As a result, C hires an attorney who explains the error to O and P and requests their consent to a deed of correction. However, P refuses, and instead, hires Surveyor S to record a new survey with this description. Surveyor S ignores the warnings from C's attorney, places new monuments, and records the new survey.

A surveyor should not be obligated to stop work each time an affected neighbor complains. However, the foregoing example is one in which this writer believes that Surveyor S was so clearly wrong that Surveyor S may have acted "in reckless disregard of the truth." If no litigation had been proposed or threatened when Surveyor S recorded the survey, there is no reason to think that P or Surveyor S would be immune from a suit for slander of title. Even if Surveyor S believes that her exposure for slander of title is remote, Surveyor S should not proceed on the assumption that she enjoys absolute privilege from such liability. Surveyor S might also have exposure for a cause of action for negligence or malpractice.

2. When does the privilege attach?

The reader will note that the word "lawsuit" was not used in the above hypothetical. Consider the same hypothetical, but in this case, Owner C and Neighbor P already decided to sue each other before Surveyor S placed the new monuments and recorded the new survey. Would this change the result of whether Surveyor S's work product is absolutely privileged from a lawsuit for slander of title? What if Surveyor S did not place new monuments or record the survey, but testified in the court proceedings that P rightfully owned the disputed fifty (50) feet?

There is little doubt that the statements Surveyor S made in court are absolutely privileged. The more difficult question is whether her work product prior to the commencement of the lawsuit enjoys the same privilege. As with many difficult questions in the legal and surveying professions, there is no clear cut answer. The decision has to be made on a case-by-case basis in reference to established guidelines and decisions.

> "When the defamatory communication is made before a judicial proceeding is initiated, it will be cloaked with immunity only if the communication is made 'in contemplation of initiation' of the proceeding. In other words, at the time the defamatory communication is made, the proceedings must be 'contemplated in

> good faith and under serious consideration.' Within these limits, the courts should apply the absolute privilege liberally, resolving any doubt "in favor of its relevancy or pertinency." *Fink v. Oshins*, 118 Nev.Adv.Op. 45 (2002).

Referring back to the initial hypothetical, it is unlikely that Surveyor S can successfully argue that the work product was produced in contemplation of judicial proceedings, and Surveyor S may not be able to invoke the absolute privilege against a claim of slander of title.

In conclusion, the absolute privilege shields a surveyor from claims of slander of title for statements made during or in contemplation of legal proceedings. The absolute privilege does not apply to all a surveyor's work product, and has no application to statements made by a surveyor before a lawsuit is contemplated. The absolute privilege affords the surveyor little or no protection against claims for negligence or malpractice.

Mr. Matuska is an attorney with the Brooke Shaw Zumpft law firm in Carson City, Nevada. He is a member of the State Bars of Nevada and California. He appears regularly in federal, state and appellate courts in California and Nevada. His practice focuses on real estate litigation and related areas, including title and boundary defense, construction disputes, landlord/tenant matters and homeowners associations. He was a panelist at the 2002 Tri State Surveying Conference in Elko (Quasi-Legal Interpretations – Lost v. Obliterated & Deed Ambiguities) and a presenter at the CLAS/NALS conference in 2004. He is also a co-author of Practical Real Estate Title Skills In Nevada (HalfMoon LLC) and Commercial and Residential Eviction (SES). He was awarded the "Article of the Year Award" from the Nevada Association of Land Surveyors for his article "Surveyor Immunity Revisited," which appeared Volume 30, No. 4 of the Nevada Traverse (2003).

Mr. Matuska welcomes your questions or comments. He can be reached at (775)782-7171.

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