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Resolving Boundary Disputes

LECTURE OUTLINE
CONTRACTS AND LIABILITY

I. Basic Contract Law

II. Case Law and Statutes Applicable to Surveyor:

   A. Statute of Limitations Pertinent to Surveyors
   B. Scope of Duty
   C. Forms of Negligence
   D. Privity
   E. Damages

III. Check List for Contract Review (34 Subjects)

IV. Proposal Format for Basic Surveyor Proposal Contract

V. Contract for Surveyor as Expert Witness/Consultant

VI. Complex Survey Contract

BASIC CONTRACT LAW

PAROL EVIDENCE

1. Overview

The Parol Evidence Rule precludes oral evidence used to vary or contradict the terms of an unambiguous and complete written instrument absent:

1. Fraud
2. Mistake
3. Accident
4. Erroneous omission

Norden v. Friedman, 756 S.W. 2d. 158 (Mo. 1988); Specialty Restaurants Corp. v. Gaebler, 956 S.W.2d. 391 (Mo. App. W.D. 1997); J. R. Waymire Co. v. Antares Corp., 975 S.W. 2d. 243 (Mo. App. W.D. 1998).

The Rule applies to all categories of contracts, including conveyances of interest in real property, personal service contracts, guaranty agreements, bills and notes, and similar contracts.

The justification of the Parol Evidence Rule as a rule of substance of law has recently been stated as twofold:

1. Written documents are more reliable that fallible human memory; and

2. Allowing oral testimony to vary the terms of a writing opens the door to purgery.

Poelker v. Jamison, 4 S.W. 3rd 611, 613 (Mo. App. E.D. 1999)

2. Rule of Substantive Law

The Parol Evidence Rule is not a rule of evidence but a rule of substantive contract law. Gibson vs. Harl, 857 S.W. 2d. 260 (Mo. App. 1993). Consequently, the Rule must be applied by the court and such evidence must be ignored even without an objection raising it. Central Prod. Credit Ass'n v. Reed, 805 S.W. 2d. 300 (Mo. App. 1991). See also Poelker, *supra*; Brewer v. Devore, 960 S.W. 2d, 519 (Mo. App. S.D. 1998).

3. Integrated or Complete Writings

The Parol Evidence Rule is applicable only if the writing in question is "integrated", i.e., was intended to represent, in fact, the complete Agreement of the parties. Wulfing v. Kansas City, S. Indus., Inc., 842 S.W. 133 (Mo. App. 1992).

- Determining Integrated Character of the Written Agreement

Many written contracts will expressly state that they are intended to be the complete and final expression of the Agreement of the parties. In cases where such explicit provisions (known as "merger clauses") exists. They are, for the most part, conclusive concerning the parties' intent and will automatically require application of the Parol Evidence Rule. W. E. Koehler Constr. Co. v. Medical Ctr. of Blue Springs, 670 S.W. 2d. 558 (Mo. App. 1984).

Note: Even in the absence of a merger clause, if a contract appears to be the complete agreement of the parties on its face, it will be presumed to be the final, complete agreement between the parties. Jake C. Byers, Inc., v. J. B. C. Inv., 834 S.W. 2d. 806 (Mo. App. 1992). Omission of a minor or non-essential term of a contract, such as the date (where the date is not vital), will not remove a contract from the operation of the Parol Evidence Rule. Norden, *supra*.

- Evidence of Intent to Integrate

Evidence, including oral evidence, of prior or contemporaneous agreements or negotiations may be admitted on the threshold issue of the parties' intent that the written agreement in question was intended to be an integrated contract. Wulfing, *supra*.

4. Evidence Varying or Contradicting a Writing

- Admissibility of evidence which does not vary or contradict.

The Parol Evidence Rule applies only when oral evidence is offered for the purpose of varying or contradicting the writing. Consequently, notwithstanding the Parol Evidence Rule, it has been held that oral evidence concerning prior or contemporaneous agreements and negotiations can be admitted, if consistent with the writing, to support a party's interpretation of the Agreement. Gibson, *supra*.; Coale v. Hilles, 976 S.W. 2d. 61 (Mo. App. S.D. 1998). While most contracts that do not have a clear meaning usually are ambiguous or incomplete, the rule as stated in Gibson makes clear that oral testimony offered for a purpose other than to vary or contradict a complete writing is admissible. Cameron v. Morrison, 901 S.W. 2d. 171 (Mo. App. 1995); Simul Vision v. Continental Cable Vision, 983 S.W. 2d. 600 (Mo. App. E.D. 1999).

5. **Fraud**

Parol Evidence is admissible in cases in which it is claimed that a contract was entered into as a result of fraud because the issue is not the terms of the contract but whether the contract can be enforced by reason of the misconduct of one of the parties. Lollar v. A. O. Smith Harvest Store, 795 S.W. 2d. 441 (Mo. App. 1990).

6. **Mistake**

Parol Evidence will be admitted for the purpose of showing that a written contract, through a common or mutual mistake (usually scrivener's error or a mutual failure to include an essential term), does not accurately reflect the true agreement of the parties. Fulton v. Bailey, 413 S.W. 2d. 514 (Mo. 1967).

Note: The parties seeking reaffirmation to establish the existence of a mutual mistake or other admission is by clear, cogent and convincing evidence. CMI Food Service v. Hatridge Leasing, 890 S.W. 2d. 420 (Mo. App. 1995).

7. **Accident or Erroneous Omission**

Accident or erroneous omission, identified as an additional exception to the Parol Evidence Rule, seems to be indistinguishable from mistake. The reported cases do not address the distinction, if any.

8. **Consideration**

Parol Evidence may be admitted for the purpose of showing consideration or the lack of consideration, even if the evidence tends to vary the consideration stated in the Agreement. Rose v. Howard, 670 S.W. 2d. 142 (Mo. App. 1984).

9. **Subsequent Modifications**

The Parol Evidence Rule does not prohibit evidence of agreements entered into after the contract that issue was executed, whether the subsequent agreements are oral or written, even though the contract at issue contains a prohibition of oral modifications. Nooney Krombach v. Blue Cross, 929 S.W. 2d. 888 (Mo. App. 1996); Warrenton Campus Shopping v. Adolphus, 787 S.W. 2d. 852 (Mo. App. 1990). However, a contract that must be in writing to conform to the statute of frauds cannot be modified by a subsequent oral agreement. Klinckman v. Pharris, 969 S.W. 2d. 769 (Mo. App. S.D. 1998).

10. **Ambiguity**

- In General.

An agreement is ambiguous if it is susceptible to two or more different meanings or calls for inconsistent or different performances by the same party. Daniels Express vs GMI Corp. 897 S.W. 2d. 90 (Mo. App. 1995); Sadler v Board of Educ., 851 S.W. 2d. 707 (Mo. App. 1993).

- Textual evidence.

Ambiguities are to be resolved within the four corners of the written contract, utilizing standard rules of construction, if possible. If the ambiguity cannot be resolved by construction, Parol Evidence is admissible to establish the true intent of the parties. Silver Dollar City v. Kitsmiller Constr., 931 S.W.2d. 909 (Mo. App. 1996); Young Dental MFG Company v. Engineered Prods., Inc., 838 S.W. 2d. 154 (Mo. App. 1992).

- Patent Ambiguity.

A patent ambiguity is one that appears on the face of the writing. Royal Banks of Missouri v. Fridkin, 819 S.W. 2d. 359 (Mo. 1991).

- Latent Ambiguity.

A latent ambiguity is one that arises from a collateral matter which makes uncertain the meaning of a facially clear and unambiguous writing. Alack v. Vic Tanny of Missouri, 923 S.W. 2d. 330 (Mo. 1996); Smith v. Taylor-Morley, 929 S.W. 2d. 918 (Mo. App. 1996); Royal Banks v. Fridkin, *supra.*; Warren v. Tom, 946 S.W. 2d. 754 (Mo. App. S.D. 1997).

Ordinarily, Parol Evidence may not be received for the purpose of creating ambiguity but such evidence may be received if offered to demonstrate the existence of collateral matters that create a latent ambiguity, as where it is shown that a fact reference in the written contract did not actually exist.

- Disagreement and Ambiguity Distinguished.

Ambiguity is not created merely because the parties disagree over a contract's meaning. Young Dental, *supra.*; Morgan v. City of Rolla, 947 S.W. 2d. 834 (Mo. App. S.D. 1997).

- Role of the Court and Jury.

The determination of whether a contract is ambiguous is a question of law to be decided by the court. Jamieson v. McClintock, 996 S.W. 2d. 884 (Mo. App. E.D. 1999). If

a contract is ambiguous, and the ambiguity cannot be resolved by construing the document, extrinsic evidence concerning the true intent of the parties is admissible. The issue of the parties' true intent may be submitted to the jury. Graham v. Goodman, 850 S.W. 2d. 351 (Mo. 1993).

CHOICE OF FORUM/VENUE/WHAT COURTHOUSE

The Missouri venue Statute RSMo. §508.010 states a Plaintiff must file a lawsuit for breach of contract in the county of the Defendant's residence.

If a Plaintiff brings an action for Defendant causing property damage, the action must be filed in the county where the damage occurred.

By contract, a Surveyor/Engineer can control what county is used for trial and what court system is engaged.

Most contract lawsuits are filed in Circuit Court.

If the contract is silent as to venue or forum, and one party resides out of state, the lawsuit can be filed in the Federal District Court.

To be in Federal Court, the "amount in controversy" must exceed $75,000.00.

As a Surveyor, you need an advantage against a huge corporate Defendant or Plaintiff. Your contract may require all litigation to occur in your county of residence which affords to you familiarity, ease of getting to court, avoiding flying and staying in a hotel and selecting a lawyer that practices across the street from the courthouse.

You want to minimize your attorney's time and possibly save you tens of thousands of dollars. The "hometown advantage" is real and is huge.

Be mindful you have a bargaining chip for you can give up or waive your contractual provisions as to venue in order to obtain a benefit.

JURY TRIAL

The most expensive and the case that takes the longest to get to trial is that of presenting your case to a jury. However, when a jury trial has concluded the verdict is handed down generally on the same day and there is no wait.

In some cases having a judge tried case or what is called "bench" trial, is far easier on the attorney's and the parties because the trial procedures and evidentiary rules are relaxed in a judge tried case.

In a jury tried case, the trial follows a specific pathway from opening statement to closing argument. In a judge tried case, the parties to the litigation can accommodate one another and take testimony of any given witness at any given time provided consent of the adversary is obtained. The judges have more flexibility with which witness will be called when and what day of trial will be used to finalize the case.

In your contract, you may have a provision where the jury trial is waived or given up. In the alternative, it can be the surveyor's special right to decide alone whether or not a jury trial would be best.

Cost of a jury trial is substantial and the losing party pays for the jury costs.

ATTORNEY'S FEES

Missouri follows the American Rule in that each side or litigant pays for their own attorney unless changed contractually or if "allowed by law".

"Allowed by law" means in areas of contested divorce, motions to modify child support or custody, contested adoption, attorney's fees are specifically allowed by statute and are discretionary with the judge. Compare a partition lawsuit, multiple owners of the real estate are in litigation and the first party to file suit as Plaintiff gets his/her attorney's fees paid off the top at the time of the sale of the real estate. Thus, all parties pay a percentage of your attorney's fees if you are the first Plaintiff to file your partition action. The partition rules and statutes clearly allow for the recovery of attorney's fees by only the Plaintiff that files suit. An action for declaratory judgment also authorizes an award of attorney's fees to a party in a dispute over the meaning of a term or provision in a "contract or document".

When a contract or agreement allows for the recovery of attorney's fees and costs of litigation, that can be a game changer.

Keep in mind that by contract you can have language where only the surveyor recovers attorney's fees, win or lose.

The fairest approach is to allow the prevailing party to recovery fees from the non-prevailing party. This approach will make the attorneys for the parties really study the facts and law that applies to their case to make certain they have a "strong case" or what sometimes we refer to as "slam dunk".

MODIFICATION OF CONTRACT/CHANGE ORDER

Most contracts have an integration clause which means that all oral terms and conditions are merged into the single written agreement. The parties are governed or bound by what is referred to as the Four Corner Rule. Simply stated, the Four Corner Rule means that the terms and conditions contained within the four corners of the document are the only provisions authorized to govern the parties and outside (extrinsic) evidence is not allowed to change or alter those terms and provisions.

If a change is necessary after the prime or main contract has been entered into between the parties, it is best to put the addenda, addendum or change order in writing to make certain there are absolutely no misunderstandings.

MECHANIC'S LIEN/RECOVERY OF SURVEY FEES

By statute, an unpaid land surveyor/engineer has the right to perfect and file a Mechanic's Lien for unpaid services against the property and improvements that have been surveyed.

If the surveyor is under contract with the owner of the real estate, the surveyor is declared a "General Contractor".

If the surveyor is under contract with a General Contractor or Subcontractor, then the surveyor is classified as a "Subcontractor". A Subcontractor does not deal with the Owner of the real estate.

In most instances, a Subcontractor has less difficulty in perfecting its Mechanic's Lien against the real estate in question.

If you are a General Contractor, before you may file and perfect a Mechanic's Lien, you must first have inserted in a document signed by the owner two special statutory sections to advise the Owner that the surveyor has the legal right to file a Mechanic's Lien. If the statutory sections are not in 10-point bold print in the Contract signed by the owner, then the General Contractor is prohibited from filing its Mechanic's Lien.

A Mechanic's Lien is a powerful mechanism to get paid for the lien of the surveyor is given high priority and is superior to the Note and First Deed of Trust or construction loan.

A mechanic's lien will generally survive bankruptcy for the Mechanic's Lien creditor is a "secured party" just as the lender involved in funding the construction of the development.

MECHANIC'S LIEN CHECKLIST

1. **Your Status**: Are you a general contractor, i.e. did you deal exclusively with the landowner, OR are you a subcontractor (or sub-subcontractor), i.e. did you deal partially with the landowner and with others, such as general contractors or other subcontractors? Who agreed to pay your account? Who did you bill? Did anyone payt you by check? Attach your bid or contract.

2. **Persons Involved**: Furnish the complete names, addresses and phone numbers of:

   (a) All recorded landowner(s):
   (b) Tenants or lessees and type of lease involved.

3. **Legal Description**: Secure a complete legal description of land involved. (Provide a copy of deed or deed of trust, etc.) You can go to the Recorder of Deeds and obtain a copy of deed and the construction mortgage (deed of trust).

4. **Construction mortgage or permanent mortgage**? If a mortgage is involved, please furnish:

   (a) Type of mortgage: _____
   (b) Name and address of lender;
   (c) Name and address of trustee;
   (d) Copy of recorded note and deed of trust(s) executed by landowners. If the mortgage is not a new or construction mortgage your lien will not have priority.

5. **Other mechanic's lien actions**? Provide any other information concerning other mechanic's lien actions filed by contractors or material suppliers.

6. **Itemized Statement of Account**: Please furnish an itemized statement of account showing the present amount due on your claim. This would include furnishing copies of invoices, contracts, any addendums or additional billings, work tickets and detailed list of materials and labor installed and the specific dates of installation of labor and materials into the project.

7. **Last Day Worked**: The most critical fact is the exact date that the last work or materials were furnished or installed into the premises. How do you intend to prove the exact date? (e.g. work ticket, calendar, or invoice, etc.)

8. **Complaints**: Provide a summary of all complaints, if any, made by the landowners or any general or subcontractors concerning your work and/or materials installed. Attach all correspondence.

9. **Statutory Compliance with "Notice to Owner" and "Consent of Owner to File Lien"**: Please furnish evidence of your compliance with Missouri Statutes wherein you are obligated to give special form of notice to the landowner. This Notice is usually contained within your construction contract or on your first invoice to the landowner involved.
   If you are a General Contractor, you cannot file a lien without having given the two notices.

10. **Time Factor**: Please note that if you are a subcontractor you have six months less ten days to file your lien from the last date that work or materials were installed. A general contractor has six months to file the mechanic's lien from the "last day worked".

11. **Owners**: Please provide the complete names, addresses and phone numbers of the following Owners that held legal title with regard to the real estate:

1. Owner at the time the General Contractor entered into the prime contract;
2. Owner at the time the Subcontract was made;
3. Owner at the time the Subcontractor/Lien Claimant commenced work on the project;
4. Owner at the time the Mechanic's Lien is to be filed if different from the time the work was started.

12. **Payment to General Contractor**: Has the General Contractor been paid by Owner and Lender, but you were left out.

13. **Lien Waivers**: Did you sign any lien waivers? If so, attach.

ALTERNATIVE DISPUTE RESOLUTION: MEDIATION AND ARBITRATION

"Mediation" is a process in which a neutral third party facilitates communication between the parties to promote settlement. A mediator may not impose his or her own Judgment on the issues for that of the parties.

"Arbitration" is a procedure in which neutral persons, typically one person or a panel of three persons, hears both sides and decides the matter. The arbitrator's decision is not binding and simply serves to guide the parties in trying to settle their lawsuit. An arbitration is typically less formal than a trial, is usually shorter, and may be conducted in a private setting at a time mutually agreeable to the parties. The parties, by agreement, select the arbitrator or arbitrators and determine the rules under which the arbitration will be conducted.

With regard to confidentiality and settlement, an alternative dispute resolution process, shall be regarded as settlement negotiations. Any communication relating to the subject matter of such dispute made during the alternative dispute resolution process by a participant or any other person present at the process shall be a confidential communication. No admission, representation, statement or other confidential communication made in setting up or conducting such process shall be admissible as evidence or subject to discovery, except that, no fact independently discoverable shall be immune from discovery by virtue of having been disclosed in such confidential communication.

With regard to discovery, (Interrogatories and Motions for Production of Documents), discovery may proceed as in any other action, and all motions regarding discovery disputes shall be ruled upon by the court as in any other action. Discovery may take place both before and after an alternative dispute resolution process held pursuant to Supreme Court Rule 17.

All alternative dispute resolution processes shall be non-binding unless the parties enter into a written agreement as provided for in Rule 17.06(c). A written agreement shall be binding to the extent not prohibited by law.

Practice Note: In order to compel mediaton/arbitration, the Contract between Surveyor and Client/Owner must contain the following wording in the Contract:

"THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES."

INDEX TO STATUTES PERTAINING TO SURVEYORS AND STATUTES OF LIMITATION

1.	RSMo. §516.110	What action shall be commenced within 10 years
2.	RSMo. §516.010	Actions for recovery of lands/adverse possession
3.	RSMo. §516.040	Possession of land under color of title
4.	RSMo. §516.070	Limitation where equitable title to land emanates from government
5.	RSMo. §516.098	Statute of limitation for surveys of land/error – omissions
6.	RSMo. §516.097	Tort action against engineers or builders of defective improvement to real property brought within 10 years of completion
7.	RSMo. §516.090	Statutes of limitation, adverse possession claim not extend to government lands
8.	RSMo. §516.095	Action for breach of covenant restricting land use barred after 2 years
9.	RSMo. §516.100	Extends certain statutes of limitation until damage is capable of ascertainment
10.	RSMo. §516.120	Actions within 5 years for trespass on real estate
11.	RSMo. §516.130	Action against government official within 3 years (County Land Surveyor)
12.	RSMo. §516.140	Action by employee for payment of unpaid wage, overtime within 2 years
13.	RSMo. §508.010	Venue for actions in Contract

V.A.M.S. 516.110

516.110. What action shall be commenced within ten years

Currentness

Within ten years:

(1) An action upon any writing, whether sealed or unsealed, for the payment of money or property;

(2) Actions brought on any covenant of warranty contained in any deed of conveyance of land shall be brought within ten years next after there shall have been a final decision against the title of the covenantor in such deed, and actions on any covenant of seizin contained in any such deed shall be brought within ten years after the cause of such action shall accrue;

(3) Actions for relief, not herein otherwise provided for.

V.A.M.S. 516.010

516.010. Actions for recovery of lands commenced, when

Currentness

No action for the recovery of any lands, tenements or hereditaments, or for the recovery of the possession thereof, shall be commenced, had or maintained by any person, whether citizen, denizen, alien, resident or nonresident of this state, unless it appear that the plaintiff, his ancestor, predecessor, grantor or other person under whom he claims was seized or possessed of the premises in question, within ten years before the commencement of such action.

V.A.M.S. 516.040

516.040. Possession of land under color of title, effect

Currentness

The possession, under color of title, of a part of a track or lot of land, in the name of the whole tract claimed, and exercising, during the time of such possession, the usual acts of ownership over the whole tract so claimed, shall be deemed a possession of the whole of such tract.

V.A.M.S. 516.070

516.070. Limitation where equitable title to land emanates from government

Currentness

Whenever any real estate, the equitable title to which shall have emanated from the government more than ten years, shall thereafter, on any date, be in the lawful possession of any person, and which shall or might be claimed by another, and which shall not at such date have been in possession of the said person claiming or who might claim the same, or of anyone under whom he claims or might claim, for thirty consecutive years, and on which neither the said person claiming or who might claim the same nor those under whom he claims or might claim has paid any taxes for all that period of time, the said person claiming or who might claim such real estate shall, within one year from said date, bring his action to recover the same, and in default thereof he shall be forever barred, and his right and title shall, ipso facto, vest in such possessor; provided, however, that in all cases such action may be brought at any time within one year from the date at which this section takes effect and goes into force.

V.A.M.S. 516.098

516.098. Surveys of land error or omissions--action must be brought when

Effective: August 28, 2011
Currentness

Except where fraud is involved, no action to recover damages for an error or omission in the survey of land, nor any action for contribution or indemnity for damages sustained on account of an error or omission may be brought against any person performing the survey more than ten years from the completion of the survey.

516.097. Tort action against architects, engineers or builders of defective improvement to real property must be brought within ten years of completion of improvement, exceptions

Currentness

1. Any action to recover damages for economic loss, personal injury, property damage or wrongful death arising out of a defective or unsafe condition of any improvement to real property, including any action for contribution or indemnity for damages sustained on account of the defect or unsafe condition, shall be commenced within ten years of the date on which such improvement is completed.

2. This section shall only apply to actions against any person whose sole connection with the improvement is performing or furnishing, in whole or in part, the design, planning or construction, including architectural, engineering or construction services, of the improvement.

3. If any action is commenced against any person specified by subsection 2 of this section, such person may, within one year of the date of the filing of such action, notwithstanding the provisions of subsection 1 of this section, commence an action or a third party action for contribution or indemnity for damages sustained or claimed in any action because of economic loss, personal injury, property damage or wrongful death arising out of a defective or unsafe condition of any improvement to real property.

4. This section shall not apply:

(1) If an action is barred by another provision of law;

(2) If a person conceals any defect or deficiency in the design, planning or construction, including architectural, engineering or construction services, in an improvement for real property, if the defect or deficiency so concealed directly results in the defective or unsafe condition for which the action is brought;

(3) To limit any action brought against any owner or possessor of real estate or improvements on such real estate.

5. The statute of limitation for buildings completed on August 13, 1976, shall begin to run on August 13, 1976, and shall be for the time specified in this section.

6. Notwithstanding subsection 1 of this section, if an occupancy permit is issued, the ten-year period shall commence on the date the occupancy permit is issued.

V.A.M.S. 516.090

516.090. Statutes of limitation, claims of adverse possession not to extend to certain lands

Effective: August 28, 2007
Currentness

Nothing contained in any statute of limitation shall extend to any lands given, granted, sequestered, or appropriated to any public, pious, or charitable use, or to any lands belonging to this state. This section shall be construed to prohibit any judgment granting adverse possession to a claimant where the defendant possesses an interest in land described in a recorded deed and is a public utility as defined in section 386.020, or is a rural electric cooperative as defined in chapter 394, or is an organization operating under section 394.200.

V.A.M.S. 516.095

516.095. Action for breach of covenant restricting land use, barred, when

Currentness

No action for breach of a covenant restricting use of land caused or resulting from the size, height, cost or location of buildings or other visible improvements on the premises in violation of the covenant, including a proceeding to compel the removal of buildings or visible improvements on the land because of the violation of the terms of the covenant, shall be commenced after two years from the date this section takes effect or from the date when the right of action accrues, whichever is the later. Notwithstanding the provisions of any section of the statutes tolling the statutes of limitations, saving any causes of action which may have been otherwise barred thereunder, establishing a time when a cause of action accrues, or excluding certain lands from the operation and effect of any statute of limitations, no disability or lack of knowledge on the part of anyone shall suspend the running of the two-year period; and for the purposes of this section, the right of action shall be deemed to accrue immediately upon the completion of the building or visible improvements which are in violation of the covenant.

V.A.M.S. 516.100

516.100. Period of limitation prescribed

Currentness

Civil actions, other than those for the recovery of real property, can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued; provided, that for the purposes of sections 516.100 to 516.370, the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment, and, if more than one item of damage, then the last item, so that all resulting damage may be recovered, and full and complete relief obtained.

V.A.M.S. 516.120

516.120. What actions within five years

Currentness

Within five years:

(1) All actions upon contracts, obligations or liabilities, express or implied, except those mentioned in section 516.110, and except upon judgments or decrees of a court of record, and except where a different time is herein limited;

(2) An action upon a liability created by a statute other than a penalty or forfeiture;

(3) An action for trespass on real estate;

(4) An action for taking, detaining or injuring any goods or chattels, including actions for the recovery of specific personal property, or for any other injury to the person or rights of another, not arising on contract and not herein otherwise enumerated;

(5) An action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud.

V.A.M.S. 516.130

516.130. What actions within three years

Currentness

Within three years:

(1) An action against a sheriff, coroner or other officer, upon a liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the omission of an official duty, including the nonpayment of money collected upon an execution or otherwise;

(2) An action upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the state;

(3) An action under section 290.300.

V.A.M.S. 516.140

516.140. What actions within two years

Effective: August 28, 2014
Currentness

Within two years: an action for libel, slander, injurious falsehood, assault, battery, false imprisonment, criminal conversation, malicious prosecution or actions brought under section 290.140. An action by an employee for the payment of unpaid minimum wages, unpaid overtime compensation or liquidated damages by reason of the nonpayment of minimum wages or overtime compensation, and for the recovery of any amount under and by virtue of the provisions of the Fair Labor Standards Act of 1938 [1] and amendments thereto, such act being an act of Congress, shall be brought within two years after the cause accrued.

508.010. Suits by summons, where brought

Effective: August 28, 2014
Currentness

1. As used in this section, **"principal place of residence"** shall mean the county which is the main place where an individual resides in the state of Missouri. There shall be a rebuttable presumption that the county of voter registration at the time of injury is the principal place of residence. There shall be only one principal place of residence.

2. In all actions in which there is no count alleging a tort, venue shall be determined as follows:

(1) When the defendant is a resident of the state, either in the county within which the defendant resides, or in the county within which the plaintiff resides, and the defendant may be found;

(2) When there are several defendants, and they reside in different counties, the suit may be brought in any such county;

(3) When there are several defendants, some residents and others nonresidents of the state, suit may be brought in any county in this state in which any defendant resides;

(4) When all the defendants are nonresidents of the state, suit may be brought in any county in this state.

3. The term **"tort"** shall include claims based upon improper health care, under the provisions of chapter 538.

4. Notwithstanding any other provision of law, in all actions in which there is any count alleging a tort and in which the plaintiff was first injured in the state of Missouri, venue shall be in the county where the plaintiff was first injured by the wrongful acts or negligent conduct alleged in the action.

5. Notwithstanding any other provision of law, in all actions in which there is any count alleging a tort and in which the plaintiff was first injured outside the state of Missouri, venue shall be determined as follows:

(1) If the defendant is a corporation, then venue shall be in any county where a defendant corporation's registered agent is located or, if the plaintiff's principal place of residence was in the state of Missouri on the date the plaintiff was first injured, then venue may be in the county of the plaintiff's principal place of residence on the date the plaintiff was first injured;

(2) If the defendant is an individual, then venue shall be in any county of the individual defendant's principal place of residence in the state of Missouri or, if the plaintiff's principal place of residence was in the state of Missouri on the date the plaintiff was first injured, then venue may be in the county containing the plaintiff's principal place of residence on the date the plaintiff was first injured;

(3) Notwithstanding subdivisions (1) and (2) of this subsection, if the plaintiff was first injured in a foreign country in connection with any railroad operations therein and any defendant is a:

(a) Corporation that, either directly or through its subsidiaries, wholly owns or operates the foreign railroad; or

(b) Wholly-owned subsidiary of a corporation that, either directly or through its subsidiaries, wholly owns or operates the foreign railroad;

then venue shall exclusively be in the county where any such defendant corporation's registered agent is located, regardless of venue as to any other defendant or, if the plaintiff's principal place of residence was in the state of Missouri on the date the plaintiff was first injured, then venue may be in the county of the plaintiff's principal place of residence on the date the plaintiff was first injured.

6. Any action, in which any county shall be a plaintiff, may be commenced and prosecuted to final judgment in the county in which the defendant or defendants reside, or in the county suing and where the defendants, or one of them, may be found.

7. In all actions, process shall be issued by the court in which the action is filed and process may be served in any county within the state.

8. In any action for defamation or for invasion of privacy, the plaintiff shall be considered first injured in the county in which the defamation or invasion was first published.

9. In all actions, venue shall be determined as of the date the plaintiff was first injured.

10. All motions to dismiss or to transfer based upon a claim of improper venue shall be deemed granted if not denied within ninety days of filing of the motion unless such time period is waived in writing by all parties.

11. In a wrongful death action, the plaintiff shall be considered first injured where the decedent was first injured by the wrongful acts or negligent conduct alleged in the action. In any spouse's claim for loss of consortium, the plaintiff claiming consortium shall be considered first injured where the other spouse was first injured by the wrongful acts or negligent conduct alleged in the action.

12. The provisions of this section shall apply irrespective of whether the defendant is a for-profit or a not-for-profit entity.

13. In any civil action, if all parties agree in writing to a change of venue, the court shall transfer venue to the county within the state unanimously chosen by the parties. If any parties are added to the cause of action after the date of said transfer who do not consent to said transfer then the cause of action shall be transferred to such county in which venue is appropriate under this section, based upon the amended pleadings.

14. A plaintiff is considered first injured where the trauma or exposure occurred rather than where symptoms are first manifested.

BAUBLIT, OWNER v. SURVEYOR, 768 S.W. 2d. 233 (Mo. App. W.D. 1989)

In a landowner's negligence action against the surveyor, who performed a survey for the owners of an adjoining parcel in connection with their sale thereof, alleging that the survey erroneously placed a well on the wrong side of the property line between the two parcels, the court concluded that the Plaintiff could not maintain a negligence claim against the surveyor in the absence of privity of contract. Stating the general rule in Missouri was that "no cause of action in tort can arise from the breach of a contractual duty, unless there is privity of contract," but also taking notice of the fact that many exceptions have been engrafted upon the rule throughout the years that it perhaps could be said the exceptions now have effectively "swallowed up the rule," the Court found that negligent misrepresentation had been recognized in Missouri as an exception to the privity rule and proceeded to determine whether it was applicable under the facts presented.

Finding that in order for the Plaintiff to prevail on a claim of negligent misrepresentation in this case, Plaintiff would have to prove that:

1. The survey was negligently prepared; and

2. The surveyor should have reasonably known that Plaintiff would rely on the survey; and

3. Plaintiff justifiably relied on the survey; and

4. Plaintiff's reliance resulted in a pecuniary loss.

The court concluded that it is doubtful whether the Plaintiff could satisfy the second prong of the aforementioned for factor test, and in any event, Plaintiff could not prove justifiable reliance on the survey since the uncontradicted deposition testimony of the Plaintiff, as well as court documents in a boundary dispute action brought by the subsequent purchaser of the surveyed land, showed that the Plaintiff continually disputed the results of the 1981 Survey.

Furthermore, although affirming the trial court's dismissal of the case on other grounds – a lack of standing to bring negligence action the surveyor – the court agreed with the trial court's determination that the statute of limitations, RSMo. §516.120, barred the claim. Finding that the claim accrued in 1981 when the survey was performed because Plaintiff had contested the results of the survey from the outset, the court concluded the complaint was not filed within the required 5-year period.

MARTIN v. SURVEYORS, 702 S.W.2d. 57 (Mo. 1985)

In a negligence action by landowners against the surveyor whom that hired to survey their lot and plot the location of a home to be constructed thereon, seeking damages for their construction of the home too close to the property line, allegedly done in reliance on the surveyor's erroneous staking of the location for the home, the court held that the trial court erred in granting the surveyor's motion to dismiss the petition and complaint for failure to comply with the 5-year statute of limitations, RSMo. §516.120.

The landowners advise the surveyor that they wanted their home set back 50 feet from the front boundary line to the property and 12 feet east of the west property line. The surveyor made his survey in 1973, prepared the plot plan, staked the lot lines, and staked the location for the house.

Thereafter, the landowners built the home, placing it in the location delineated by the stakes and plot plan. In 1981, Plaintiffs discovered that the house was located only 6 feet, rather than 12 feet, from the west boundary line.

Applying the discovery rule to determine the date when the claim accrued for the purposes of the 5-year statute of limitations, the court concluded that dismissal was improper because "from the pleadings, involving a layman/expert relationship, nothing indicates Plaintiffs knew or should have known of any reason, until May 1981, to question the Defendant surveyor's work."

Furthermore, the court ruled the landowners had no duty to make sure the boundary markers were properly located, even though the defects were visible and ascertainable by an easy inspection of the land. Concluding that the facts were insufficient to find that the statute of limitations commenced running more than 5 years from the filing of the complaint in 1983, the court reversed and remanded to the trial court with direction to reinstate the landowners' Petition and Complaint.

It is axiomatic that the 5 year statute of limitations begins running when the cause of action accrued. §516.100, RSMo. 1978. That Section further provides impertinent part:

[T]he cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is *sustained and is capable of ascertainment*, and, if more than one item of damage, then the last item, so that all resulting damage may be recovered, and full and complete relief obtained.

GIPSON, OWNER v. SURVEYOR, 820 S.W. 2d 595 (Mo. App. W.D. 1991)

Plaintiff landowners brought an action against a Surveyor alleging negligence in connection with the survey of adjoining land.

The court held that the Surveyor owed no duty of care to adjoining landowners with whom he was not in privity of contract and who had not relied on the survey.

The Surveyor was hired by a landowner to perform a survey of the West boundary line of their property. Plaintiff was an abutting property owner sharing a common boundary with the landowner. The landowners, relying upon the survey that had been conducted for them, cleared away trees and destroyed retaining walls that had been constructed by the Plaintiffs. The landowners sued the Plaintiffs seeking ejectment and damages for trespass. In successfully defending the action, the Plaintiffs who lost the case incurred costs of $68.90 and attorney's fees of $6,080.50.

Plaintiffs filed suit against the Surveyor, claiming actual and punitive damages. Plaintiffs claim that Surveyor was grossly negligent in conducting the survey by not conducting it in accordance with the applicable Statute and State regulations. Surveyor filed a Motion to Dismiss for failure to state a cause of action upon which relief may be granted. The trial court dismissed the lawsuit against the Surveyor. Plaintiffs claimed that they were entitled to recover by what is referred to as the "negligence *per se*" doctrine. For an action in negligence *per se* to lie, four requirements must be met:

1. A violation of a rule or regulation;
2. That the injured party was within the class of persons intended to be protected by the Statute or Ordinance;
3. That the injury complained of must be of the nature that the Statute is designed to prevent; and
4. That the violation of the Statute or Ordinance must be the proximate cause of the injury.

Sayers v. Haushalter, 493 S.W. 2d 406, 409 (Mo. App. 1973). The trial court held the Plaintiff could not satisfy the second prong of the test for the Plaintiffs were not within the class of persons that the Statute was designed to protect.

The primary goal promoted by the statutory scheme of Chapter 327 is the regulation of land surveyors by their licensing, registration and discipline, for the purpose of protecting those members of the public who contract for the services of a land surveyor, rather than the general public as a whole. The court held that the Plaintiffs were not the employers of the Surveyor. Plaintiffs did not contract for the Surveyor's services. Thus, the Plaintiffs were not within the class of persons protected under the Statute and an action of negligence *per se* will not lie.

Plaintiffs then asserted that their Petition stated a cause of action in negligence. The question of whether a cause of action can be maintained against the Land Surveyor by a party other than the person with which the Surveyor entered into a contractual relationship was addressed in Baublit, 768 S.W. 2d. 233 (Mo. App. 1989).

The Baublit court held and ruled that a Surveyor of a disputed boundary line does not owe a duty of care to a non-reliant third party, i.e. an adjoining landowner. The general rule is that no cause of action in tort can arise due to the breach of a contractual duty unless there is privity of contract.

PASTA HOUSE CO. v. SURVEYORS, 833 S.W. 2d 460 (Mo. App. E.D. 1992)

Restaurant owner filed breach of contract and negligence action against Contractors which performed engineering and survey services during construction of a restaurant building, which later had to be partially removed due to encroachment of a building restriction line.

There was testimony in this case from an officer of Plaintiff restaurant that the consultants were told not to worry about the property setback lines, because the Owner was going to get the setback lines changed.

Restaurant owner failed to show that the building site engineering and survey consultants were negligent with regard to staking the location of the building in relation to the building restriction line.

Restaurant owner failed to present expert testimony as to the customary practices and procedures of other engineers and surveyors in the community and cited Statutes setting forth for property boundary surveys, not for the staking of a building with respect to building restriction lines. RSMo. §327.272.

In the year that the Plaintiff owner hired the engineering and survey services for the construction of a new restaurant, there was an Amendment to the Declaration of Restrictions on the restaurant property that was filed with the County Recorder of Deeds reducing the distance allowable between the City boulevard and the building restriction line.

After the foundation was laid, the building shell was constructed and the structural roof was in place, an out bound survey revealed that a portion of the entry and the southern corner of the restaurant extended over the building restriction line. When the owner's efforts to remove the building restriction line closer to the boulevard failed, the restaurant owner was caused to remove the encroaching portions of the new restaurant building. The officer of the restaurant did not supply the Surveyor with the information that the building restriction line had been moved.

The trial court concluded there was no breach of contract in the staking of the property. Rather, the trial court found that the Plaintiff's testimony was that the Defendants were told not to worry about the setback lines because Plaintiff owner was going to get the setback lines changed. Thus, the trial court concluded the Defendants had completed the work in accordance with the contract and in accordance with the Plaintiff's request. Plaintiff owner had further asserted that the Surveyor had "failed to exercise the same degree of care and accuracy of a reasonably competent Surveyor dealing with the same or similar facts and circumstances in the or similar locale". The trial court stated that expert testimony was required to establish the alleged standard or performance. Plaintiff presented no such testimony and the trial court dismissed the negligence action due to lack of proof.

RSMo. §327.272 merely defines the term "land surveyor". That Statute establishes no standard of care for such persons. Further, 10 C.S.R. 30-2.010, which sets forth "minimum standards for property boundary surveys" does not set forth a standard of care applicable to the issue raised in this case.

Plaintiff asserted that prior to making a survey, the Surveyor, as necessary shall acquire other data, such as adjoining deeds, maps and certificate of title, subdivision plats and original plats and notes.

Plaintiff testified they made no claim that the building was stake improperly with respect to the outer boundaries of the property. Plaintiff's claim related only to the staking of the building with respect to the building restriction line. The court held that performance of that task does not appear to come within the purview of 10 C.S.R. 30-2.010 (2).

Comment: Therefore, in an action against a Surveyor, it is highly recommended that the Plaintiff present expert testimony as to the customary practices and procedures of other Surveyors in the community in order to make a *prima facia* case for negligence.

Two significant developments have recently taken place in the tort field with regard to Land Surveyor liability. The courts have adopted the "discovery rule" which states simply that the 5-year Statute of Limitations for a Land Surveyor's error or omission does not begin to run until the error or omission is discovered by the Plaintiff, damaged party. See Rozny v. Marnul, 227 N.E. 2d. 656 (IL. 1969). This clearly lengthens indefinitely the period in which the Land Surveyor may find himself liable and underscores the importance of exercising due care.

Secondly, the courts have eliminated the need for privity between the Land Surveyor and the party seeking relief (i.e. the damaged Plaintiff). That is, the party complaining no longer has to be the party with whom the Land Surveyor enjoyed a contractual relationship. The courts are measuring the liability of the Land Surveyor by the scope of the duty owed rather than any artificial concepts of privity as previously observed. This means that the Land Surveyor will be liable to those he should have reasonably foreseen as relying on his survey. For example, if the Land Surveyor lays out a subdivision, the Surveyor could reasonably expect to be liable to persons who purchased lots in that subdivision, even though the actual names of those persons to whom damages will be paid may not be foreseeable.

The issue of the expanded notion of scope of duty was discussed in Cook Consultants, Inc. v. Larson, 700 S.W. 2d. 231 (1985) where the Defendant/Appellant, Cook Consultants, appealed a Judgment of Liability for negligently serving property owned by the Plaintiff Larson. The Surveyor argued that:

1. Absent privity of contract, it owed no duty whatsoever to Plaintiff landowner;
2. The claim was barred by the applicable 2-year Statute of Limitations;
3. The actual damages were improper;
4. Evidence of Plaintiff's physical and emotional distress was irrelevant; and
5. The award of exemplary/punitive damages were excessive.

The court held that:

1. Defendant Surveyor was liable for negligent misrepresentation;
2. The Statute of Limitations did not bar the claim;
3. There was no evidence of gross negligence;
4. Any error in admitting the evidence of physical and emotional injury was harmless; and
5. The award of exemplary/punitive damages was excessive.

In 1970, Commonwealth Development Corporation, the builder of Larson's home, contracted with Surveyor Cook to execute a completion survey to locate all improvements on the lot. The survey clearly indicated that the residence was within the lot lines. Thereafter, a mortgage corporation approved Larson's loan and Larson purchased the property. In 1977, Larson's neighbor, Bates, suspected an encroachment and hired another Surveyor to resurvey Larson's lot. The new Surveyor discovered that Larson's home encroached on Bates property by 2.5

feet to 6.0 feet. Bates sued Larson and the court ordered Larson to remove all improvements encroaching upon Bates' property within 90 days of the Judgment.

The parties stipulated that removal of a portion of the house was economically and physically infeasible. Larson, in October of 1979, hired a demolition company to tear down the entire structure. Larson sued Stewart Title Company for breach of contract alleging that her title insurance policy covered the encroachment and joined Cook, alleging negligence, breach of contract through a third party beneficiary and breach of express and implied warranties.

The jury found Cook grossly negligent and awarded Larson $32,150.00 in actual damages and $230,000.00 in exemplary/punitive damages.

Cook conceded that its survey was erroneous but argues that it was not liable to Larson because, absent privity of contract, it did not owe Larson a duty of care. The trial court did not need to address Larson's theory that Larson was a third party beneficiary of the Cook/Commonwealth Contract because the court held that Cook owed Larson a common law duty of care under the circumstances.

SURVEY CONTRACT REVIEW/SUBJECT MATTER CHECKLIST

1. Parties to Agreement
2. Effective date
3. Scope of Work/Services
4. Change Orders
5. Schedule for Services
6. Compensation Schedule
7. Invoices and Payments
8. Reimbursable Expenses
9. Standards of Performance
10. Time is of the Essence
11. Document Retention/Ownership
12. Insurance: General Liability
13. Insurance: Worker's Compensation
14. Insurance: Professional Liability
15. Insurance: Automobile
16. Suspension of Work
17. Termination Procedure
18. Controlling Law
19. Venue, Jury Trial
20. Attorney's Fees
21. Mechanic's Lien
22. Indemnification
23. Assignment of Work/Successors
24. Notices
25. Survival/Non-Merger
26. Severability
27. Waiver of Enforcement
28. Alternative Dispute Resolution
29. Amendment
30. Integration/Total Agreement
31. Designated Representative
32. Confidentiality
33. Authority to sign
34. Guarantor of Fees

1. Parties to Agreement:

Who is your client? Did client's attorney hire you?

If married person engages your work, always secure signature of spouse.

Corporation: By proper Officer and Corporate Resolution of Board of Directors

Limited Partnership: By all General Partners not Limited Partners; obtain Resolution

General Partnership: All partners if possible; One Partner may work

Limited Liability Company: By Manager/Member by Resolution

Living Trust: All Trustees with Trust Certification

City, town, village, school, county, government agency: By Statute, there must exist a written agreement and a resolution of the governing board. If not, unenforceable.

Guarantor: May be an individual involved in the entity or may be an unrelated third party exhibiting sound financial backing.

2. Effective Date:

Triggers a time table. You may negotiate for several weeks or months and then execute on a date certain with a retroactive effective date.

By common law, effective date is the date of the last signature creating an enforceable contract.

3. Scope of Work/Services:

What exactly is expected of you as a Surveyor to perform.

If any possible ambiguities in your description of service, provide a list of areas of work that are excluded to avoid any dispute.

4. Change Orders:

Serves as an amendment to the main/prime contract

More work, more money/compensation. Avoid verbal change orders. Complete the brief memorandum in complete understandable terms.

5. Schedule for Services:

Liberal/lax enforcement or strict. Avoid default. Distinguish minor breach from major breach. Avoid schedule for services being disrupted by another party or by events beyond your control. What can happen which can cause your survey work to be "derailed"?

6. Compensation Schedule:

One time retainer, all upfront. No more!

Escrow all retainer funds with third party under Escrow Agreement.

Payment at end of each stage of work. It is critical to be paid up to date at time of any termination.

Ideal to be paid in advance of all scheduled work.

7. Invoices and Payments:

Your sent invoice triggers a payment time frame. Your invoice may trigger interest accrual. Your invoice may evidence work performed through date of billing.

8. Reimbursable Expenses:

General Definition is an out of pocket expense/cost related to work.

Better practice is to list each and every anticipated out of pocket expense.

Utilize the language "including, but without limitation", etc. to cover unforeseen expenses.

9. Standards of Performance:

Accuracy requirements.

Tolerance requirements.

Competence based upon Surveyor's in community.

The term "negligent" means the failure to use that degree of skills and learning ordinarily used under the same or similar circumstances by the members of the Surveyor's profession.

10. Time is of the Essence:

Hyper emphasizes the importance of meeting all time tables and deadlines. A missed date may be declared critical and support termination. Phrase makes dates more critical. Court is more apt to declare a breach even if violation of time table has virtually no consequences.

11. Document Retention/Ownership:

Who owns what documents. Who must share documents. Surveyor may retain copies with originals to Client. Time of retention for future work. Escrow important records with protected custodian.

12. Insurance: General Liability:

Involves personal injury or tort. Protects against dangerous conditions causing injury. Includes both property damage and personal injuries or death to a person.

Classic Event: Hard to see survey pin/marker causes slip and fall. Property damage caused by vehicle damage or removal of trees, driving over crops.

Classic Example: Leaving gate open and livestock escape causing injury.

Truck driven into field and sets dry grass on fire.

13. Insurance: Worker's Compensation:

Surveying company must have five or more employees to be forced to provide coverage.

Construction company is mandated to secure coverage even with only one employee.

Negligence is immaterial for recovery of worker's compensation injury.

Severe penalties if do not provide worker's compensation with serious results.

14. Insurance: Professional Liability/Malpractice:

Surveyor to provide certification with coverage details, various deductibles, insurance for one project, claims made policy versus policy requiring claim originating during period of coverage. Avoid gap in coverage when changing carriers.

15. Insurance: Automobile:

Minimum limits in Missouri - $25,000.00

Liability insurance covers only bodily injury for $25,000.00 and property damage with uninsured motorist (UM) coverage that is mandatory. $1 million umbrella policy has a minimal premium cost.

Practice Note: Secure under insured motorists (UIM) to protect your survey company and employees.

Medical Pay Coverage (MPC) anywhere from $1,000.00 to $100,000.00 can provide assistance to employee if there does not exist work medical insurance or private medical insurance.

Employee of survey crew has serious auto crash; both employee and survey company are sued and liable.

16. Suspension of Work:

What event will allow delay of survey work.

Will event extend all time tables. Suspension of work allowable by contract typically causes compensation to be paid by pressured client.

Critical for a one man survey company under time constraints.

Acts of God: Flood, fire, weather, illness, etc.

17. Termination Procedure:

Structure termination allowing for full compensation for all work performed. Failure to comply with substantial component of work allows for termination.

Make certain all alleged breaches of contract are cured within time required by contract. "Equity abhors a forfeiture": a contract principle of law.

18. Controlling Law:

Missouri Contractor entering into Contract with out state owner.

What law governs is critical.

Missouri Surveyor entering into contract with out state client.

Contract should be governed by Missouri law especially if litigate contract in Missouri.

19. Venue, Jury Trial

Where must the lawsuit be filed. Time and cost are critical factors for profitable contract litigation even though contract specifies forum i.e., Circuit Court in a given County.

There may also be a right to change venue to another county which is generally adjacent and in the same circuit.

Jury trial tremendously expensive.

Jury trial gives decision at close of trial as compared to Judge tried case which may take months.

20. Attorney's Fees:

One sided Contract may favor only Surveyor.

Generally, the prevailing party by contract recovers attorney's fees from non-prevailing party.

Attorney's fees should cover all costs of litigation, including depositions, litigation cost such as your expense for expert witness fees and document retrieval.

Contract provision may specify all attorney's fees or "reasonable" attorney's fees. To avoid discretion of trial court, best to provide for all attorney's fees incurred as a result of litigation.

21. Mechanic's Lien:

If Surveyor is General Contractor,

Special 10-point bold print statutory notices are required.

NOTICE TO OWNER

FAILURE OF THIS CONTRACTOR TO PAY THOSE PERSONS SUPPLYING MATERIAL OR SERVICES TO COMPLETE THIS CONTRACT CAN RESULT IN THE FILING OF A MECHANIC'S LIEN ON THE PROPERTY WHICH IS THE SUBJECT OF THIS CONTRACT PURSUANT TO CHAPTER 429, R.S.Mo. TO AVOID THIS RESULT YOU MAY ASK THIS CONTRACTOR FOR "LIEN WAIVERS" FROM ALL PERSONS SUPPLYING MATERIAL OR SERVICES FOR THE WORK DESCRIBED IN THIS CONTRACT. FAILURE TO SECURE LIEN WAIVERS MAY RESULT IN YOUR PAYING FOR LABOR AND MATERIAL TWICE.

CONSENT OF OWNER

CONSENT IS HEREBY GIVEN FOR FILING OF MECHANIC'S LIENS BY ANY PERSON WHO SUPPLIES MATERIALS OR SERVICES FOR THE WORK DESCRIBED IN THIS CONTRACT ON THE PROPERTY ON WHICH IT IS LOCATED IF THEY ARE NOT PAID.

General Contractor is one dealing with the Owner of the land.

Subcontractor is any contractor dealing with the General Contractor or another Subcontractor.

Time to file Mechanic's Lien is within 6 months from date of last work if you are a General Contractor with Statutory Notices in Contract.

You have 6 months minus 10 days if you are a Subcontractor.

Mechanic's lien is superior to construction mortgage.

Avoid contractual provisions that subordinate your Mechanic's lien in any manner.

A proper Mechanic's Lien can save your claim from being bankrupted.

22. Indemnification:

Term means that you will pay damages incurred by another person and provide an attorney for their defense. If your survey generates litigation and other parties are involved, avoid having to "indemnify" those other parties by paying damages and providing for attorney's fees.

If you are the party to be protected (i.e. indemnified), then make certain contractual language allows you to retain your own selected attorney and not use attorney selected by the other party.

23. Assignment of Work/Successors:

Can you substitute another Surveyor or Surveying Company to complete your work.

Are you able to "farm" out any portion of your work assignment.

Are you required to have the Professional Land Surveyor actually perform the onsite work rather than an unlicensed crew chief.

24. Notices

Hand delivery

Ordinary mail

Certified mail

Restricted Certified mail

Email

Personal service by process server with a return Affidavit

25. Survival/Non-Merger

Promises, covenants, obligations continue beyond closing date (transfer of title) when survey complete

Follow up work may be required by a continuing contractual warranty to correct errors

26. Severability:

A contractual provision may be unenforceable. A contractual provision may be against public policy.

Example: Usurious interest charged on unpaid bill beyond amount allowed by Statute.

Even though provision of Contract may be invalid, remainder of Contract stands as being enforceable.

27. Waiver of Enforcement:

Strict enforcement requires notifications of any and all violations regardless of how minor.

Parties may at times be lax, not complain and fail to send out demands to cure the default.

Purpose is to allow for a default or termination even though the event triggering may have occurred many previous times before without a complaint ever made.

28. Alternative Dispute Resolution:

Select a Mediator to discuss.

Set up arbitration procedures where you are bound by decision.

Expenses of Mediator or Arbitrator requires costly upfront payment.

Benefits are speed and saving huge attorney's fees.

29. Amendment:

Critical to follow all protocol for amending contract. Even though no consideration may pass between Surveyor and Client, the amendment is enforceable.

Minimal consideration is generally found when there is even a slight change in obligations.

30. Integration/Total Agreement:

This provision enforces the four corner rule of no evidence shall be stated in Court to add to or revise contract and related obligations "beyond the four corners" of the instrument.

All contractual obligations, terms and conditions are stated within four corners of contract.

31. Designated Representative:

Who are the named individuals or entities that can represent and bind the Client.

In absence of a designated agent/representative of party to Contract, good to have Board Resolution designating the person or Minutes of a meeting by the management of the party to name the person serving as representative.

32. Confidentiality:

This provision supports an injunction if even a threatened violation of release of confidential information.

Can protect all parties to contract or only a given named party.

Difficult to support a damage award unless violation is tied to an event that causes damages.

Make certain that all officers, directors, supervisors, employees are aware of the covenant of confidentiality.

Secret survey protects party involved in transaction. Surveyor may even be dealing with a third party/straw party to avoid disclosure of principal involved in project.

Disclosure of client and purpose of the survey should remain strictly confidential.

33. Authority to Sign:

May be different than the designated representative.

Substantial changes to contract may require higher level management.

Simple, insignificant changes may be approved by lower management.

34. Guarantor of Fees:

Entity retaining survey or may be an "empty shell" i.e., no assets.

Person(s) may have minimal net worth and requiring construction funding for entire project.

Guarantor must submit to jurisdiction of Surveyor's Circuit Court.

"Promise" by Guarantor MUST be in writing to be enforceable.

SURVEYING * ENGINEERING
PROFESSIONAL SERVICES PROPOSAL

JOB:
PROJECT NAME:

OWNER/DEVELOPER:

GENERAL DESCRIPTION:

This proposal is tendered for professional services pertaining to surveying and engineering requirements pursuant to your request.

We propose to furnish the services required to prepare boundary and topographic surveys and engineering construction drawings and record/easement plats and process these plans through the required agencies/utility companies for approval.

Should the layout change substantially from this plan, the fees shall be reviewed and adjusted, if necessary at our discretion.

SCOPE OF SERVICES

BOUNDARY SURVEY

1. Research existing public records for deeds, plats, easements and road right-of-ways.

2. Field traverse of boundary to locate existing monumentation.

3. Office calculations to close field data and resolve land boundaries.

4. Review title report (which must be supplied by client prior to boundary certification). If title report is not supplied when needed, it will be obtained at Client's expense.

5. Preparation of a certified boundary survey plat in accordance with the current Missouri Standards for Boundary Surveys.

6. Set monuments at corners as necessary.

7. Stop Work: Should unforeseen boundary or title conflicts appear, we will stop work on project and reevaluate contract to complete work. Payment for work completed will be required before work will resume.

TOPOGRAPHIC SURVEY

1. Establish benchmark on site as required by local agencies.

2. Provide field or aerial topographic surveys to obtain elevations, structure locations, tree masses, visible utilities, roadways and other pertinent data within the specified project boundary.

3. Research available public records to determine type, size and location of utilities not visible in the field.

PRELIMINARY PLAN (BOUNDARY AND TOPOGRAPHIC SURVEY MUST BE COMPLETED)

1. Meet with Architect and/or Client to review information and zoning and discuss development plan.

2. Prepare preliminary plan to meet criteria of governing authority.

3. Submit preliminary plan to planning & zoning to be placed on agenda for meeting.

4. Preparation for and attendance at planning commission meetings.

5. Follow-up with planning department to revise any conditions imposed by planning commission.

SITE IMPROVEMENT PLAN

1. Attend all meetings with client and/or his representatives to review site design criteria and based on approved preliminary plan.

2. Obtain from Client complete and fully detailed architectural plans showing all dimensions, elevations and construction details necessary to properly site the building(s).

3. Preparation of a base plan showing existing site conditions, overlaid with the location, dimension and configuration of all proposed site improvements such as buildings, streets, right-of-ways, lots, sewers, water systems and other appropriate notes, maps and details necessary for site layout. Preparation of plan showing

existing and proposed contours along streets, lots, buildings, parking areas and other items necessary to determine the proper elevations of all above-ground improvements. (Site Plan & Grading Plan).

4. Determination of earthwork quantities reflected on the grading plan.

5. Design of storm sewers and preparation of plans including profiles and details. (Storm Sewers)

6. Design of sanitary sewers and preparation of sanitary sewer profiles complete with lateral locations, wye locations and tail-stake elevations. Also included are sewer details and specifications as necessary. (Sanitary Sewers).

7. Design and preparation of plans for the interior street and/or parking system including the horizontal and vertical alignment, centerline profiles, typical sections, warping details and pavement details. (Street/Parking Lots)

8. Attend meetings with the Client at appropriate intervals to monitor the design progress and assure compliance with the Client's project requirements.

9. Submit site improvement plans and support calculations to appropriate agencies of jurisdiction including county, state, municipality, sewer district, fire district and private utility companies.

RECORD PLAT

1. Preparation of a record plat showing existing easements of record, lot lines and building lines, complete with all notations, calculations and certificates which meet the standards of the Recorder of Deeds and the Missouri Standard of Property Boundary Surveys.

2. Submission of said records plat to the agencies of jurisdiction for review and approval.

3. Obtain necessary signatures of record plat and submit to Client for recording.

4. Set monumentation as required by County, City and State.

CONSTRUCTION STAKING

1. CLEARING AND UPGRADING: Flag the limits of areas to be cleared prior to grading operation. Stake street centerline. Stakes will be marked cut or fill to finished grade.

2. SANITARY SEWERS: Stake all manholes and sewers on 10-foot offset with stakes set at each manhole only. Also, stake all lateral terminations and mark with cut.

3. STORM SEWERS: Stake all inlets, manholes, sewers, culverts and other structures pertaining to the storm sewer system on offsets as directed by the contractor, including face stakes for curb inlets.

4. STREETS: Provide centerline stakes @ 50-foot intervals marked cut or fill to finished grade.

5. PAVING STAKES: Provide 4' offset stakes @ 50 foot intervals (25' through curves) marked Cut or Fill to Finished Grade.

6. CENTERLINE CONTROL: Mark the centerline of the roadways with permanent control for lot location or offset control for lot location.

7. AS-CONSTRUCTED: Provide an as-constructed survey for sanitary sewers and submit as-built drawings to the sewer district for review and approval.

8. UTILITIES: Stake utilities as required (Union Electric, Bell Telephone, Water, Gas, etc.)

9. WATER: Stake water lines per Water District.

Fees for construction staking are based on "one-time service". Any re-staking will be billed in accordance with the stated hourly rates.

CONSTRUCTION ADMINISTRATION

1. Provide assistance to the Client and/or contractor as required to clarify design or to provide revisions to drawings resulting from unforeseen field conditions or changes requested by the Client. (Hourly Fee).

FIXED FEE SCHEDULE

Boundary & Topographic Survey	$	
Preliminary Plan	$	
Site Improvement Plans	$	
Record Plat	$	
As-Built (Final Survey)	$_____	
Total Fixed Fee	$	(½ Down Payment Required)

CONSTRUCTION STAKING

Clearing & Grading	$	)	
Sanitary Sewers	$	)	
Storm Sewers	$	)	
Streets	$	)	
Paving Stakes	$	)	Hourly As Needed
Centerline Control	$	)	
As Constructed (Sewer & Storm)	$	)	
Utilities (UE, Tele, Gas, Etc.)	$	)	
Water	$	)	

HOURLY RATES

Principal	$	125.00
Engineer	$	125.00
2 Man Crew	$	145.00
3 Man Crew	$	160.00
Survey Technician	$	77.00
Designer	$	80.00
Technician	$	66.00
Drafter	$	60.00

LIEN WAIVERS

NOTICE TO OWNER

FAILURE OF THIS CONTRACTOR TO PAY THOSE PERSONS SUPPLYING MATERIAL OR SERVICES TO COMPLETE THIS CONTRACT CAN RESULT IN THE FILING OF A MECHANIC'S LIEN ON THE PROPERTY WHICH IS THE SUBJECT OF THIS CONTRACT PURSUANT TO CHAPTER 429, R.S.Mo. TO AVOID THIS RESULT YOU MAY ASK THIS CONTRACTOR FOR "LIEN WAIVERS" FROM ALL PERSONS SUPPLYING MATERIAL OR SERVICES FOR THE WORK DESCRIBED IN THIS CONTRACT. FAILURE TO SECURE LIEN WAIVERS MAY RESULT IN YOUR PAYING FOR LABOR AND MATERIAL TWICE.

CONSENT OF OWNER

CONSENT IS HEREBY GIVEN FOR FILING OF MECHANIC'S LIENS BY ANY PERSON WHO SUPPLIES MATERIALS OR SERVICES FOR THE WORK DESCRIBED IN THIS CONTRACT ON THE PROPERTY ON WHICH IT IS LOCATED IF THEY ARE NOT PAID.

INVOICING

Invoices are prepared bi-monthly. Lump sum items shall be invoiced as percent complete. Time and material items shall be invoiced on an actual time and materials expended basis. Invoice terms are "Net 30 Days". A 2.0% per month service handling fee will be applied to amounts not remitted within the terms of the invoice, in addition to any legal fees and expenses necessary for collection of such delinquent accounts.

If payment becomes delinquent Surveyor reserves the right to stop services on the project. Services will be suspended prior to the preparation of site improvement plans if payment has not been received for boundary and topographic surveys and preliminary engineering. Similarly, construction staking will not commence until the improvement plans invoice has been paid. Any liabilities and/or additional expenses incurred as a result of Surveyor's termination of activity, whether temporary or permanent, shall be assumed by the Client.

REIMBURSABLES

Reimbursables are expenses paid by Surveyor for the convenience of the Client to help expedite the processing of the project. These items include such things as blue-printing, photogrammetric services (aerial mapping), courier service, car rental, air transportation, lodging, etc. These items will be billed at direct cost.

NON-REIMBURSABLES

Expenses such as computer services, Xerox copies, telephone calls, mileage, are a normal part of the services provided by Surveyor, and are included in fees outlined herein, except as otherwise noted.

EXTRA SERVICES

Services that are not specified herein are subject to an additional fee. Changes in the scope of services shall be agreed upon by written contract, addendum or confirmation letter.

REVISIONS TO PLANS

Any changes requested by Agencies above and beyond normal errors and omissions will be billed at the hourly rate.

ASSIGNMENT

The Surveyor may assign or transfer this contract or any part of any interest therein.

LICENSES AND PERMITS

The Client shall secure and pay for all permits required for the services.

FORUM

In the event any litigation results with respect to enforcement of this contract, Client agrees to submit to the jurisdiction of the Circuit Court of the county of Surveyor's residence or principal place of business. Client waives any objection to improper or inconvenient forum. Client further waives right to jury trial on all issues.

INDEMNIFICATION

Client will indemnify and save and hold Surveyor and Engineer from and against any and all claims, demands, causes of action, liability and loss of every kind and nature whatsoever, together with costs and expenses, including Surveyor and Engineers reasonable attorney's fees, made by third parties relating to or resulting or arising from the performance of this Contract by Surveyor and Engineer.

MODIFICATION

This Contract fully constitutes the entire agreement between the parties hereto with respect to the subject matter hereof and no amendment thereof or modifications hereto or additions hereto shall be valid or effective unless the same shall be in writing and signed by each of the parties hereto.

CLIENTS AGENT

Development of all activities shall be through the Client or his/her representative, who shall be considered the Client's Agent insofar as authorization and scheduling of consulting services is concerned.

PLANS

The Client will be supplied with 5 sets of plans, plus sufficient quantity for review and agency approval. Upon request, additional sets will be provided at direct cost. Surveyor retains ownership of all plans, and said plans cannot be used for any purposes not specifically agreed to by Surveyor. Reproducible plans provided to the Client shall remain the property of the Client. Reproducible copies shall have no signature or seal. Electronic files will be provided at additional cost.

LIMITATION

The foregoing proposal is valid for six (6) months from the date hereon. Should the services outlined herein fail, for whatever reason, to be completed within one (1) year from the date of this proposal the fees for the work remaining will be subject to increase. Date of discovery shall being upon completion of plans and/or plat.

In recognition of the relative risks and benefits of the project both to Owner and Engineer, the risks have been allocated such that Owner agree, to the fullest extent permitted by law, to limit the liability of Engineer and its sub-consultants to Owner for any and all claims, losses, costs, damages of any nature whatsoever, or claims and/or expenses for any cause or causes, including attorneys' fees and costs and expert witness fees and costs, so that the total aggregate liability of Engineer and its sub-consultants shall not exceed Engineer's total fee for services rendered on this project. It is intended that this limitation apply to any and all liability or cause of action however alleged or arising, unless otherwise prohibited by law.

SPECIAL CONDITIONS

No costs have been included for preparation of separate drawings for permits to construct a portion of the improvements: it is assumed that all site improvements will be designed, drafted and submitted for approval simultaneously.

No costs are included for flood plain studies or HEC2 Studies.

Soils and rock test are to be performed and reported by a geo-technical engineer retained by the Client. Reports are to be sent to engineers and governing body.

The Client shall provide necessary trust indentures.

No costs have been included for retaining walls design.

No costs have been included for Bridge Design.

No costs are included for negotiation of any off-site easements, grading or otherwise for the development of this site.

No costs are included for environmental studies, reports, etc.

No costs are included for changes created by reviewing Agencies.

No costs for traffic signal design.

No costs for traffic study.

No costs are included for wetlands mitigation or wetland studies.

No costs are included for receiving construction bids, analyzing the bids, awarding the contract, etc.

No costs are included for participation in negotiations of special financing such as Neighborhood Improvement District, Industrial Development Bonds, etc.

NOTICE TO PROCEED

If this agreement is acceptable, please sign and return. Thank you.

Should you require additional information, pleas advise.

SUBMITTED BY:	ACCEPTED BY:
_____	_____
Surveyor/Engineer	Owner/Developer
_____	_____
Date	Date

SURVEYOR - EXPERT WITNESS RETAINER AGREEMENT FOR CONSULTING AND TRIAL

This Agreement between _____ (Surveyor) and _____(Client). Client retains Surveyor for assistance in the following case and litigation:

Name of Case: _____
Case Number: _____
Court Case filed in _____ County, Missouri
Attorney for Plaintiff: _____
Attorney for Defendant: _____

1. Retention:

1.1 Surveyor will commence work for Client upon receipt of payment of a $_____ retainer.

1.2 Surveyor agrees not to work for any other person or party involved in this case on matters relating to this case upon receipt of the retainer fee.

2. Services:

2.1 Surveyor agrees to perform consulting and/or expert witness services as requested by Client and Attorney and in connection with such services agrees to perform such investigation, survey review, document review, studies and survey research so as to be able to consult with Client and/or Client's attorney as an expert witness with respect to Surveyor's findings, opinions and conclusions. Surveyor agrees to verbally report his facts, conclusions and findings to Client, and, if desired by Client, Surveyor will prepare a written report and cause it to be sent or delivered to Client and/or Client's attorney. Surveyor further agrees to assist in trial preparation and to testify in court as an expert witness in those areas in which Surveyor is amply qualified.

2.2 The full scope of Surveyor's work will be determined as the matter and litigation proceeds to trial and will be subject to the needs and request of Client.

2.3 Surveyor and Client agree that Surveyor will be performing services under this Agreement as an independent contractor and not an employee.

3. Confidentiality:

3.1 Surveyor agrees to retain all non-public information obtained from Client as confidential and agrees not to release or discuss any of such information unless

Surveyor has obtained the prior written consent of Client or is otherwise forced, compelled, or required to disclose this information by operation of law or applicable government authority or by Court Order.

4. <u>Compensation</u>:

4.1 Surveyor will bill the Client by the tenth of an hour with a minimum charge of two-tenths of an hour as follows:

4.1.1 Travel time at $150.00 per hour.

4.1.2 Testimony at deposition or trial at $200.00 per hour. This hourly rate further applies to office or courtroom waiting time, as well as actual time testifying.

4.1.3 All other work including conference with client, conference with attorney, research, report preparation and telephone calls, $175.00 per hour.

4.2 When in the local area, away from Surveyor's office, time is billed from the time of departure from Surveyor's office until the time of return.

4.3 Each full day away from the local area on assignment is billed on the basis of an 8-hour day. Where more than 8 hours work or travel is performed in one day, actual time is billed. Day of departure and day of return are prorated.

4.4 A retainer of $2,500.00 is charged for each case. $1,000.00 of the retainer is a non-refundable minimum fee charged. Billings for services performed or expenses incurred will be charged against the retainer until such time as the retainer is exhausted.

4.5 Permission to use Surveyor's name or in any way indicate that Surveyor is an expert witness or Surveyor for Client's side of the case, either informally or formally with other parties, is not granted until the initial retainer has been paid.

4.6 Notwithstanding the agreement of Surveyor to bill Client at a hourly rate and one-tenth of a hour increments for services performed, the following minimum fees will be due, whether or not Surveyor is required to spend the amount of time necessary to result in these minimum fees if time was charged on an hourly basis. The minimum fees and types of services exclusive of travel to which they apply are as follows:

4.6.1 Attendance at deposition either to assist Client or to testify as an expert witness $500.00.

4.6.2 Attendance in Court to assist Client, testify as an expert witness or while waiting at court for an opportunity to testify or assist Client in court $500.00.

4.6.3 The above are a minimum billings and of actual time spent results in amount due which exceeds these minimums, then the actual amount will be due.

4.7 Fees and rates, once established for a job, will not be increased for that job even though fees or rates may increase for new jobs for a period of one year. Twelve months after being retained, fees may be raised to those currently charged other Clients at that time but shall not exceed at 10% increase per year.

5. <u>Expenses</u>:

5.1 Travel and miscellaneous expenses, including mail, overnight mail, special delivery costs, are charged at cost plus 10%. Travel by vehicle is at the rate of 50 cents per mile.

5.2 Travel will be performed by the most economical means compatible with the Clients' time constraints except that first class air travel accommodations will be used for all flights of more than 4 hours duration, including cumulative time where connecting flights are required.

5.3 Client may avoid the 10% surcharge on expenses by furnishing travel and lodging which is billed directly to Client by the carrier or hotel.

5.4 Client will reimburse Surveyor for all other reasonable out of pocket expenses, but Surveyor shall strive to seek Client's permission before incurring any expense in excess of $100.00.

6. <u>Billing</u>:

6.1 Surveyor will tender invoices at the end of each month. Payment is due within 15 days of the invoice date. Late charges at the rate of 1.5% per month will be added to bills not paid within that time.

6.2 The payment of all fees and expenses is the responsibility of the Client notwithstanding Client's relationship with Third Parties, contingency arrangements, subrogation, etc. As a convenience, Surveyor may agree to prepare a separate billing for an Attorney taking Surveyor's discovery deposition, that the responsibility for payment remains that of the Client. Failure to include a

chargeable items in one billing shall not constitute a waiver of the right to access the charges in a subsequent billing.

6.3 Request for corrections by client must be submitted in writing within 15 days after date of billing in question.

7. Termination:

7.1 Client may terminate this Agreement upon 15 days written notice for any reason. Upon termination of Surveyor's services by Client, Client shall immediately pay all fees and expenses incurred by Surveyor.

7.2 Surveyor may terminate this Agreement upon 15 days written notice for any reason. Optional: [If payments are not made within 60 days of the date billing is mailed.] This does not relieve Client in any way from payment for services rendered or expenses incurred.

8. Disputes:

8.1 The parties agree that the exclusive venue for any action rising out of this Agreement shall be the Court of residence of the Surveyor. In any such action, the parties waive the trial by jury and Client waives any objection to *inconvenient forum.* Client agrees to submit to the jurisdiction of the Circuit Court located in the County of Surveyor's residence.

8.2 Optional: [Before filing any action against Surveyor, Client must first provide Surveyor with written notice of the nature of Client's claim and wait at least 30 days from the date notice was sent.]

8.3 In the event that either party is required to retain the services to have an attorney enforce the provisions of this Agreement, then in such case the Client agrees to pay reasonable attorney's fees and all costs and expenses incurred by Surveyor, including collection costs, provided that Surveyor is the prevailing party in said matter either by settlement, litigation or otherwise.

9. Governing Law:

9.1 This Agreement shall be governed by the laws of the State of Missouri.

10. Invalidity:

10.1 A determination by a Court that any provision in this Agreement is invalid shall not invalidate the entire Agreement. If any such provision is declared

unenforceable or invalid due to its scope or breath, such provisions shall be deemed valid to the extent of the scope or breath permitted by law.

11. Interpretation

11.1 Should any provision of this Agreement require judicial interpretation, the Court shall not apply a presumption that the term shall be more strictly construed against one party or the other by reason of the rule of construction that a document is to be construed more strictly against the party who prepared the document.

12. Entire Agreement/Modification:

12.1 This Agreement contains all the representations by each party to the other and expresses the entire understanding between the parties with respect to the matters at issue. The parties agree that all prior communications are merged into this Agreement, and that there are no terms or conditions other than those set forth herein. No statement or promise of a party shall be binding unless reduced to writing and signed by that party. No modifications of this Agreement shall be binding unless they are in writing and signed by all parties.

_____	_____
Signature/Surveyor	Signature/Client