

Construction Law Practice Tip: TX Certificate of Merit Author Qualification Matters

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PRACTICES Litigation, Construction Litigation

The Texas Certificate of Merit Statute continues to entrap the unwary (Tex. Civ. Prac. & Rem. Code § 150.001 *et seq.*). In *Gignac Assocs., LLP v. Hernandez*, the Corpus Christi Court of Appeals held that the trial court should have dismissed plaintiff's lawsuit because the plaintiff attached a certificate of merit signed by a traffic engineer (instead of an architect) in a traffic accident lawsuit filed against an architect.¹

The Certificate of Merit Statute requires that

in any action or arbitration proceeding for damages arising out of the provision of professional services by a licensed or registered professional, the plaintiff shall be required to file with the complaint an affidavit of a third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor who: . . . (2) *holds the same professional license or registration as the defendant . . .*²

Thus, an action against an architect that alleges defective architectural services requires a certificate of merit (an "affidavit") from an architect, and likewise for engineers and surveyors.

Gignac, an architectural firm, designed a traffic circle in McAllen, Texas. An inebriated driver plowed into the circle island, killing Hernandez and incapacitating his companion. Representatives of the victims sued Gignac for negligence in designing the traffic circle. The plaintiffs filed with their petition an affidavit signed by a traffic engineer³. Gignac moved to dismiss the suit on the ground that the affidavit's author held a different professional license than Gignac. The trial court denied the motion and Gignac took its argument on interlocutory appeal.⁴

In response, appellees first argued that they were not, in fact, required to file an affidavit because Gignac did not provide professional architectural services when it designed the traffic circle. Succinctly stated, architects design buildings, engineers design roads, and no affidavit is required if the services provided fall outside the professional's licensed expertise. The court of appeals refused to consider this otherwise interesting argument because appellees had failed to first raise it in the trial court.⁵

The court of appeals also rejected the representatives' second argument that "the certificate statute must be read in conjunction with the occupations code, which allows an engineer to provide a certificate of merit against an architect."⁶ The Texas Occupations Code includes in the practice of engineering "providing an engineering opinion or analysis related to a certificate of merit," and states that an engineer may provide "expert opinion and testimony with respect to issues within the responsibility of the engineer or architect."⁷ The representatives argued that the two "statutes, when harmonized, clearly demonstrate[d]" that an engineer could author an affidavit against an architect.⁸ But the court held that § 150.002(a)'s statutory "language 'unambiguously provide[d]"

that a certificate of merit must be authored by someone holding the same professional license” as the defendant. No extrinsic evidence, such as the Occupations Code, was required because the statutory language was “clear and unambiguous.”⁹

Because Gignac was an architectural firm and its principal Raymond Gignac was a licensed architect, the engineer-authored affidavit did not comply with the statute. The court of appeals held, therefore, that the trial court abused its discretion when it denied Gignac’s motion to dismiss. The court remanded to determine whether the dismissal should be with or without prejudice.¹⁰ In a footnote, the court clarified that its decision was without prejudice to the threshold issue of whether an affidavit was required under the facts of the case.¹¹

Construction law practitioners with certificate of merit experience might plausibly infer that the *Gignac* plaintiffs struggled to find an architect willing to author an affidavit regarding a traffic circle design. The statute requires that the affidavit’s author must be “knowledgeable in the area of practice of the defendant based on [six professional criteria, including] experience.” Not many architects might have traffic circle design credentials and agree to author an affidavit. This case raises the question of what counsel should do when a plaintiff’s claims arise out of the provision of professional services peripheral to, but arguably outside the putative defendant’s professional license. *Gignac* shows that retaining the next-best qualified professional with a different license is not an option. This result makes the answer to the question of whether an affidavit is required in the first place all the more pressing. Perhaps this question will soon return to the court of appeals following the case’s remand.

¹ No. 13-17-00336-CV, 2018 WL 898144, at *1 (Tex. App.—Corpus Christi Feb. 15, 2018, no pet. h.) (mem. op.).

² Tex. Civ. Prac. & Rem. Code § 150.002(a) (emphasis added).

³ *Gignac*, 2018 WL 898144, at *1.

⁴ *Id.*; see also Tex. Civ. Prac. & Rem. Code § 150.002(f) (“order granting or denying a motion for dismissal [under Chap. 150] is immediately appealable as an interlocutory order.”).

⁵ *Gignac*, 2018 WL 898144, at *2 (citing Tex. Occ. Code §§ 1051.001, 0016).

⁶ *Id.* at *3. In their brief, appellees cite to Texas Occupations Code §§ 1001.003(c)(11), 0031(e)(4). Appellees’ Brief, *Gignac*, at 17 (with typo erroneously citing to Tex. Occ. Code § 1001.003(e)(4)). Pleadings are available on line at <http://www.txcourts.gov/13thcoa/>.

⁷ Appellees’ Brief, *Gignac*, at 17; Tex. Occ. Code §§ 1001.003(c)(11), 0031(e)(4).

⁸ Appellees’ Brief, *Gignac*, at 17-18.

⁹ *Gignac*, 2018 WL 898144, at *3 (citing *Jennings, Hackler & Partners, Inc. v. N. Tex. Mun. Water Dist.*, 471 S.W.3d 577, 583–84 (Tex. App.—Dallas 2015, pet. denied) (rejecting an engineer’s affidavit for direct claims against a defendant architect, but holding that vicarious claims against same arising out of engineering subcontractor’s negligence did not require an affidavit against architect because claims did not arise out of wrongful professional conduct)).

¹⁰ *Id.* at *4.

¹¹ *Id.* n.4.