

Construction Law Practice Tip: A Certificate of Merit Affidavit Need not Address Elements of the Plaintiff's Claims

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PRACTICES Construction Litigation, Litigation

In Texas, a plaintiff who files an action for damages arising out of the provision of professional services by a licensed architect or engineer, or a registered land surveyor or landscape architect, must include a certificate of merit with the first-filed petition. Tex. Civ. Prac. & Rem. Code Chapter 150. The certificate of merit is an affidavit by a third-party licensed professional that

set[s] forth specifically for each theory of recovery for which damages are sought, the negligence, if any, or other action, error, or omission of the licensed or registered professional in providing the professional service, including any error or omission in providing advice, judgment, opinion, or a similar professional skill claimed to exist and the factual basis for each such claim.¹

The Texas Supreme Court recently resolved a split between courts of appeals regarding the meaning of the “factual basis” provision’s requirement. *Melden & Hunt, Inc. v. E. Rio Hondo Water Supply Corp.*, No. 16-0078, 2017 WL 2492006, --- S.W.3d --- (Tex. June 9, 2017) (not released for publication). The question is whether this provision requires the affidavit “to provide factual support for the elements of each theory or cause of action” alleged in the petition, as defendant-appellant *Melden & Hunt* argued? Or does it merely require that the affidavit “include the factual basis for the expert’s claims of negligence or other professional errors or omissions,” as *East Rio* responded? In other words, and in reference to § 150.002(b), does the expression “factual basis for each such claim” refer to “each theory of recovery” or to “the [professional’s] negligence, if any, or other action, error, or omission . . . claimed to exist”? Texas Courts of Appeals have split on this question.

For example, in *Packard Eng’g Assocs. v. The Sally Group, LLC*, the Beaumont Court of Appeals held that the trial court abused its discretion when it denied defendants’ motion to dismiss as to plaintiffs’ fraud claim because the affidavit did not “identify or otherwise discuss any knowingly false or recklessly made representations by Packard upon which Packard intended appellees to rely to their detriment.”² But in *M-E Eng’rs Inc. v. City of Temple*, the Austin Court of Appeals held that “nothing in Chapter 150 . . . require[s] that a certificate address operative facts other than the professional errors or omissions that are the focus of the statute.”³

After reviewing the statute’s rich amendment history to understand its context, the Texas Supreme Court adopted the Austin Court of Appeals’ reasoning in *M-E Eng’rs*, which held that the “factual basis for each such claim” provision “plainly” referred to the “negligent act, error, or omission” of the professional that the expert “claimed to exist.”⁴ The Certificate of Merit statute only required the plaintiff to file an affidavit from a third-party licensed professional “attesting to the defendant’s professional errors or omissions and their factual basis.” It did not require the affidavit “to address the elements of the plaintiff’s various theories or causes of action.” But, importantly, the affidavit must still address the first part of § 150.002(b), which requires that the affidavit provide the errors

and omissions and their factual basis “for each theory of recovery for which damages are sought.” In *Melden & Hunt*, this requirement was satisfied because the court of appeals was able to connect the expert’s professional errors and omissions claims “to each of East Rio’s pled theories.”⁵

¹ Tex. Civ. Prac. & Rem. Code § 150.002(b).

² 398 S.W.3d 389, 395 (Tex. App.—Beaumont 2013, no pet.) (also holding that the affidavit provided factual bases for plaintiffs’ negligence, breach of contract and DTPA claims).

³ 365 S.W.3d 497, 506 (Tex. App. — Austin 2012, pet. denied).

⁴ *Melden & Hunt*, No. 16-0078, 2017 WL 2492006, at **6—7 (citing *M-E Eng’rs*, 365 S.W.3d at 505—06) (emphasis in original).

⁵ *Id.* at *8.