

Construction Law Practice Tip: Texas Certificate of Merit 'Factual Basis' Requirement

December 12, 2018

RELATED PRACTICES Construction Litigation, Litigation

In Texas, a plaintiff suing a “licensed or registered professional,” such as an architect, a professional engineer, or a land surveyor, must file a “certificate of merit” together with the first-filed petition.¹ A certificate of merit is an affidavit by a qualified third-party professional that must

set 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.²

Certificates of merit help protect professionals against frivolous claims by requiring some basis for the plaintiffs’ allegations.³

Texas courts of appeals were split until recently regarding the level of detail required in a certificate to satisfy §150.002(b)’s requirements. One line of cases held that the certificate needed to provide the factual basis for the allegations of professional errors or omissions.⁴ In other words, the certificate merely needed to explain the professional’s mistakes as they related to the plaintiff’s claims. Other courts held that the certificate needed to address every element of all the plaintiff’s claims.⁵ In *Melden & Hunt, Inc. v. East Rio Hondo Water Supply Corp.*, the Texas Supreme Court resolved the split in favor of the first line of cases.⁶ Ultimately, the Court held, the test is whether the certificate “sufficiently demonstrates” to the trial judge that the plaintiff’s claims are not frivolous.⁷ Two appellate cases that follow *Melden* show that this threshold burden is not particularly high.

In *Melden*, the plaintiff, East Rio, complained of an allegedly poorly designed water treatment plant. East Rio’s certificate of merit alleged five specific technical failures in Melden’s plant design, such as the failures to design proper solids contact clarification, water filtration, and air filter scour systems. The certificate further explained how these failures caused the plant’s defective operation. Melden challenged the certificate on the basis that it failed, *inter alia*, to “provide factual support for the elements of each theory or cause of action” in East Rio’s petition. The Texas Supreme Court rejected this argument and, upholding the court of appeals, it affirmed the trial court’s denial of Melden’s motion to dismiss.

Analyzing the statute’s language through its successive amendments, the Court reasoned that §150.002(b) focused on the existence of the professional’s putative errors or omissions. The section’s concluding “factual basis for each such claim” language “plainly” referred to the “preceding ‘any error or omission in providing advice, judgment, opinion or a similar professional skill *claimed to exist*.’”⁸ The certificate, therefore, required the factual basis of the professional’s errors or omissions. The section’s leading “for each theory of recovery for which damages are sought”

language did not require the certificate to discuss the elements of each alleged claim. This language merely meant that the certificate had to “identify and verify the existence of any professional errors or omissions that are elements or operative facts under any legal theory on which the plaintiff intends to rely to recover damages.”⁹ Section 150.002(b) did not require the certificate to address the elements of the plaintiff’s claims. It only required that plaintiffs make a “threshold showing” of their claims’ merits, so the trial judge could determine that the plaintiff’s claims were not frivolous. Plaintiffs were not required to “fully marshal” their evidence before filing suit and conducting discovery.¹⁰

The Supreme Court upheld the trial court’s denial of Melden’s motion to dismiss, but it did not specifically opine on the sufficiency of East Rio’s certificate. This point is important because the certificate appeared to contain relatively detailed technical arguments, and *Melden* might have been construed to set a precedent in this regard. Two subsequent cases show that appellate courts have explicitly declined to require the high level of technical detail found in East Rio’s certificate of merit.

In *Jaster-Quintanilla & Assocs., Inc. v. Prouty*, Prouty sued Jaster after suffering injury from a collapsing overhead steel canopy that Jaster designed.¹¹ Prouty’s certificate of merit stated that the structure that failed “was a deficient design detail, and fail[ed] to achieve the necessary design strength needed to safely support the critical connection of the canopy structure to the concrete pier.”¹² Jaster argued that the certificate was impermissibly conclusory because it did not connect the alleged design deficiencies to Prouty’s injuries, as in *Melden*. The court expressly rejected such a “high [] hurdle.” To require more than a statement of alleged errors or omissions in the certificate would require the plaintiff to satisfy the standard of evidence admissibility required for trial. Nothing in the statutory language suggested that the legislature intended this result.

The Tyler Court of Appeals reached the same result in *H. W. Lochner, Inc. v. Rainbo Club, Inc.*¹³ In that case, Rainbo complained that dirt work run off from roadway construction contaminated its fishing lake, despite the existence of a pollution prevention plan. Rainbo sued Lochner, the construction project inspector, for its failure to adequately inspect and prevent the contamination. Rainbo’s certificate of merit stated that Lochner, as the on-site inspector, had duties to supervise and inspect the dirt work, and to report and prevent problems in case of rain. The certificate stated that Lochner’s alleged failure to perform its duties demonstrated its negligence, which resulted in the lake’s contamination. Lochner argued that Rainbo’s certificate was conclusory and did not meet § 150.002(b)’s requirements. The court of appeals disagreed. It held that the certificate contained enough information to allow the trial court to determine that Rainbo’s claims were not frivolous.

¹ Tex. Civ. Prac. & Rem. Code § 150.001 *et seq.*

² *Id.* § 150.002(b).

³ *CTL/Thompson Tex., LLC v. Starwood Homeowner’s Ass’n, Inc.*, 390 S.W.3d 299, 300–01 (Tex. 2013).

⁴ *See, e.g., Couchman v. Cardona*, 471 S.W.3d 20, 26 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

⁵ *See, e.g., Packard Eng’g Assocs. v. Sally Grp., L.L.C.*, 398 S.W.3d 389, 395 (Tex. App.—Beaumont 2013, no pet.) (holding that a certificate was sufficient for breach of contract and DTPA claims but not fraud because it did not address certain elements of that claim).

⁶ 520 S.W.3d 887 (Tex. 2017).

⁷ *Id.* at 896–97.

⁸ *Id.* at 895 (quoting *M-E Eng'rs, Inc. v. City of Temple*, 365 S.W.3d 497, 505–06 (Tex. App.—Austin 2012, pet. denied)) (emphasis in original).

⁹ *Id.*

¹⁰ *Id.* at 896–97.

¹¹ 549 S.W.3d 183, 185 (Tex. App.—Austin 2018, no pet.).

¹² *Id.* at 192.

¹³ No. 12-17-00253-CV, 2018 WL 2112238 (Tex. App.—Tyler May 8, 2018, no pet.).