

Client Alert

Business Litigation Practice Group

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Texas Supreme Court Removes Procedural Gotcha in Lawsuits Against Engineers, Architects, and Other Licensed Professionals

On April 28, 2017, the Texas Supreme Court held that trial courts have discretion whether to dismiss a lawsuit against a licensed professional with or without prejudice when a plaintiff fails to file an expert affidavit (“Certificate of Merit”) contemporaneously with its original petition. The Supreme Court rejected a “good cause” requirement for failing to file the Certificate, holding that the guiding principle in applying this discretion is only whether the lawsuit has merit. This ruling is important because defendants in many cases have argued—and one intermediate appellate court had held—that failing to file a Certificate of Merit with an original petition or filing an inadequate Certificate of Merit requires a trial court to dismiss the lawsuit with prejudice, regardless of the underlying merits of the claims. The Supreme Court’s opinion removes this procedural “gotcha.”

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Section 15.002(a) of the Civil Practice and Remedies Code requires a plaintiff to file a Certificate of Merit contemporaneously with any lawsuit or arbitration that alleges damages arising out of professional services by licensed or registered professionals (e.g., engineers, architects, etc.). Section 15.002(e) mandates dismissal for failure to file the Certificate of Merit and states that the dismissal “may” be with prejudice. The statute does not explain when dismissal with prejudice is required or otherwise provide guidance for how a court should decide whether dismissal with prejudice is warranted.

In *Pederal Energy, LLC v. Bruington Engineering, Ltd.*, Plaintiff Pederal failed to file a Certificate of Merit with its original petition alleging damages arising out of engineering services. Defendant Bruington filed a motion to dismiss with prejudice for failure to comply with the statute, and Pederal non-suited Bruington shortly thereafter (the lawsuit continued against another defendant). Pederal later filed an amended petition with a Certificate of Merit adding Bruington back to the lawsuit. Bruington filed another motion to dismiss with prejudice for Pederal’s failure to comply with the statute with respect to its original petition and because the Certificate of Merit attached to the amended petition was allegedly insufficient. The trial court denied Bruington’s motion, and Bruington filed an interlocutory appeal.

The San Antonio Court of Appeals held that the trial court should have dismissed the amended petition, but remanded the case so the trial court could determine whether the dismissal should be with or without prejudice. On remand, the trial court held an evidentiary hearing and dismissed the lawsuit without prejudice. Again, Bruington appealed. This time the San Antonio Court of Appeals held that the trial court abused its discretion in dismissing the lawsuit without prejudice. It reversed and rendered, dismissing the case against Bruington with prejudice.

The San Antonio Court of Appeals' decision conflicted with the other intermediate appellate courts in Texas that had addressed this issue. Those courts found that trial courts have discretion to dismiss with or without prejudice for failure to attach a Certificate of Merit to an original petition. But even in those opinions, there was no consensus as to what standard should govern the application of this discretion.

The Texas Supreme Court's decision removes any uncertainty on these issues. Applying the plain meaning of the statute's words, the Court found that the word "may" in Section 15.002(e) means that the trial court has discretion to dismiss with or without prejudice. The Court noted, however, that this provision does not provide a trial court with unbridled discretion; rather, trial courts must apply this discretion with reference to guiding principles or rules.

The Court rejected Pedernal's argument that the "good cause" standard in *Craddock v. Sunshine Bus Lines, Inc.* should be the guiding principle. The Court noted that Section 15.002 has a "good cause" requirement in another subsection, so the Court presumed that had the Legislature intended for a similar "good cause" requirement to apply to Section 15.002(e), then the Legislature would have expressly included it. The Court ultimately concluded that Section 15.002 contains no guiding principles for a trial court to follow, so the Court considered various other factors to find a guiding principle. The Court found important that the title of Section 15.002 is "Certificate of Merit" and that Section 15.002(e) states that dismissal is a sanction "to deter meritless claims." The Court therefore inferred that the statute was designed to ensure lawsuits against professionals have some merit, and adopted this as the guiding principle.

Applying this standard to the facts of the case, the Court found that the trial court did not abuse its discretion in dismissing the lawsuit without prejudice because the trial court had found that the lawsuit was meritorious. The trial court relied on statements in the engineering affidavit that Pedernal submitted that discussed the alleged engineering failures by Bruington. It was not an abuse of discretion to dismiss without prejudice based on this record. Importantly, the Court held that the "failure to file [a Certificate of Merit] with its original petition was not, by itself, evidence that the allegations in its petition lacked merit or mandated the sanction of dismissal with prejudice."

This ruling is important for any plaintiff filing suit against an engineer, architect, or other licensed professional in Texas. Although the better course is always to file a Certificate of Merit with an original petition, this ruling removes the threat of automatic dismissal with prejudice for mistakenly failing to do so. In addition, plaintiffs in professional negligence lawsuits often expend significant time and effort before filing suit to ensure that their Certificate of Merit covers every conceivable error and cause of action that they may later allege. Again, it is still prudent to make sure your Certificate of Merit is robust and adequate, but at least now, a dismissal with prejudice is not required if the trial court determines your Certificate of Merit is inadequate for some unforeseen reason or because your claims or theories change later in the case.

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