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The Certificate of Merit: Overview and Update on Emerging Trends

Charles J. Cain

Author contact information:
Charles J. Cain
Cain & Skarnulis LLP
Austin, Texas

ccain@cstrial.com
512-477-5000

I. INTRODUCTION

We originally presented this paper at the 2011 Construction Law Conference. The UT CLE Committee asked that we update it given how actively the statute is being litigated. In the last year, there have been a steady stream of new opinions from the courts of appeal that substantively address Chapter 150, including opinions addressing the amended 2009 version. This paper provides a short history of the statute's evolution, examines the recent case law from the past year, identifies conflicts and trends in courts' analysis, and addresses its potential interplay with the most recent round of tort reform legislation.

Compliance with the certificate of merit statute is often a dispositive issue in litigation involving licensed or registered professional. Thus, mastery—or at least a darn good working knowledge—of this key “gate-keeping” statute is crucial to any practicing construction litigator in Texas.

The certificate of merit statute has been amended multiple times since 2003, but its general purpose remains the same: to provide a mechanism that, at the outset of a case, before discovery begins, provides the trial court with a basis to determine if a plaintiff's claims have merit and should be allowed to proceed.¹ Whether or not it achieves that purpose has been and will be the subject of considerable debate. Courts have criticized the statute for being ambiguous, poorly constructed, a “trap for the unwary,” and, in certain contexts, “utterly unforgiving and procedurally draconian.”² They have a point.

II. SHORT HISTORY OF THE STATUTE

A. The Current Version

The current version of the statute, effective September 1, 2009, provides:

- (a) 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:
 - 1. is competent to testify;
 - 2. holds the same professional license or registration as the defendant; and

¹ See *Criterium-Farrell Eng. v. Owens*, 248 S.W.3d 395, 399 (Tex. App.—Beaumont 2008, no pet.) (“The purpose of the certificate of merit is to provide a basis for the trial court to conclude that the plaintiff's claims have merit.”).

² *Sharp Eng'g v. Luis*, 321 S.W.3d 748, 754-55 (Tex.App.—Houston [14th Dist.] 2010, no pet.) (Sullivan, K., concurring).

3. is knowledgeable in the area of practice of the defendant and offers testimony based on the person's:
 - a. knowledge;
 - b. skill;
 - c. experience;
 - d. education;
 - e. training; and
 - f. practice.
- (b) The affidavit shall 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 skill claimed to exist and the factual basis for each such claim.
- (c) The contemporaneous filing requirement of Subsection (a) shall not apply to any case in which the period of limitation will expire within 10 days of the date of filing and, because of such time constraints, the plaintiff has alleged that an affidavit of a third-party licensed architect, licensed professional engineer, registered landscape architect, or registered land surveyor could not be prepared. In such cases, the plaintiff shall have 30 days after the filing of the complaint to supplement the pleadings with the affidavit. The trial court may, on motion, after hearing and for good cause, extend such time as it shall determine justice requires.
- (d) The defendant shall not be required to file an answer to the complaint and affidavit until 30 days after the filing of such affidavit.
- (e) The plaintiff's failure to file the affidavit in accordance with this section shall result in dismissal of the complaint against the defendant. This dismissal may be with prejudice.
- (f) An order granting or denying a motion for dismissal is immediately appealable as an interlocutory order.
- (g) This statute shall not be construed to extend any applicable period of limitations or repose.
- (h) This statute does not apply to any suit or action for the payment of fees arising out of the provision of professional services.

TEX. CIV. PRAC. & REM. CODE § 150.002 (Vernon Supp. 2012).

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