

Presented:
2012 Construction Law Conference

September 13-14, 2012
Dallas, Texas

Construction Law Update

Matthew B. Cano
Will W. Allensworth
S.W. “Whitney” May

Matthew B. Cano
Allensworth & Porter, LLP
100 Congress, Suite 700
Austin, Texas 78701

mbc@aaplalaw.com
(512) 708-1250

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	CHAPTER 150 CERTIFICATE OF MERIT	1
	A. What Constitutes the “Provision of Professional of Services”?	1
	B. Limitations Exception	2
	C. Standard of Care	4
	D. Each Theory of Recovery	5
	E. Waiver	6
	F. Procedure—Motion to Dismiss is Not Affirmative Relief	8
	G. Date of Suit	8
III.	<i>SHARYLAND</i> AND THE ECONOMIC LOSS RULE	9
	A. <i>Barzoukas</i> —Where is the Contract?	10
	B. <i>Barzoukas</i> —Which Contract?	11
	C. <i>Wolf Hollow</i>	12
	D. <i>Arlington Homes</i>	13
	E. <i>McGregor</i>	14
IV.	MISCELLANEOUS	15
	A. Statute of Repose	15
	B. Insurance—CGL	16
	C. Implied Warranty of Workmanlike Performance of Repairs	17
	D. Premises Liability for Contractors	17
	E. Prevailing Wage and Local Conditions	18
	F. Arbitration	18
	G. No Damages for Delay and Liquidated Damages Clauses	19
	H. Notice Requirement Enforced as a Condition Precedent to Suit	20
	I. Statute of Limitations and the Relation Back Doctrine	21
	J. Mechanic’s Lien Claims	23

I. Introduction

Texas construction law is a building that will never be completed. Its bricks are so numerous that no one person could count them all, much less precisely describe their character or quality. For these reasons, this paper is not intended to comprehensively address every recent appellate decision affecting the construction industry. Instead the cases described below constitute merely a selection of the major developments in recent construction law, hopefully to the benefit of the readers.

II. Chapter 150 Certificate of Merit

Chapter 150 of the Texas Civil Practice & Remedies Code requires that any plaintiff filing any action or arbitration asserting claims against design professionals—architects, engineers, and land surveyors—file with the original “complaint” an affidavit from a similarly licensed and experienced professional, setting forth the factual basis for the plaintiff’s claims. Tex. Civ. Prac. & Rem. Code § 150.002. The requirements set forth in the statute provide a set of hurdles for a plaintiff initiating litigation, in an effort to reduce or eliminate unmeritorious claims. The statute, which resides in “relative obscurity” in the Civil Practice & Remedies Code, mandates dismissal of the plaintiff’s claims for the failure to file an affidavit from a similarly licensed design professional, a result that has been described as “utterly unforgiving and procedurally draconian.” See *Sharp Engineering v. Luis*, 321 S.W.3d 748, 754 (Tex. App.—[14th Dist.] 2010 no pet.) (Sullivan, J., concurring).

Due to this unforgiving result, and the fact that the statute also authorizes an interlocutory appeal of the trial court’s order

granting or denying a motion to dismiss,¹ appellate case law related to Chapter 150 has developed rapidly, producing dozens of cases per year, at a rate that has continued to increase over the last 12 months.

a. What Constitutes the “Provision of Professional Services”?

Chapter 150 applies only to suits “arising out of the provision of professional services” by certain design professionals. See Tex. Civ. Prac. & Rem. Code § 150.002(a). Whether the plaintiff’s suit asserts claims relating to the defendant’s professional services has been a frequent source of dispute at the appellate level.²

In *Carter & Burgess, Inc. v. Sardari*, the plaintiff cut her wrist on a door when entering a restaurant. 355 S.W.3d 804 (Tex. App.—Houston [1st Dist.] 2011, no pet.). She originally sued the restaurant owner and a contractor, and later joined Carter & Burgess, an architectural firm, after the firm was named as a responsible third party by the contractor. Carter & Burgess filed a motion to dismiss because the plaintiff did not file a certificate of merit, to which the plaintiff responded by stating that her case was for the

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

² See, e.g., *TDIndustries, Inc. v. Rivera*, 339 S.W.3d 749, 755 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (holding that statute did not apply to plaintiff’s negligence claim where defendant’s non-professional employee’s alleged negligence did “not implicate a professional engineer’s education, training, and experience in applying special knowledge or judgment”); *Curtis & Windham Architects, Inc. v. Williams*, 315 S.W.3d 102, 108 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (holding that statute cannot apply if “plaintiff’s claim for damages does not implicate the special knowledge and training” of a design professional).

“negligent supervision and negligent repair” of the door, rather than for negligent design. *Id.* at 808. The trial court denied the motion.

In determining whether the plaintiff’s claim arose from Carter & Burgess’ professional services, the Court deferred to the legislature’s definition of architectural services, found at Tex. Occ. Code § 1051.001(7).³ As the legislature included construction observation in its definition of professional services, *id.* at 1051.001(7)(C), the Court reasoned that the plaintiff’s claims implicated architectural services, thus necessitating a certificate of merit. *Sardari*, 355 S.W.3d at 810-11. The Court reversed the trial court’s denial of the Carter & Burgess’ motion, holding that the fact that the allegedly negligent employee (a project manager) was not licensed was also irrelevant. *Id.* at 811-12.

b. Limitations Exception

As previously noted, the statute requires that the plaintiff file a certificate of merit “with the complaint.” Tex. Civ. Prac. & Rem. Code § 150.002(a). Texas courts have interpreted this language to mean that the plaintiff must file the certificate of merit with the *first* petition alleging claims against design professionals, even to the point of disallowing the plaintiff to cure by subsequent

amendment.⁴ The statute is not entirely heartless in this regard, as it does allow, under certain circumstances, the plaintiff to file the certificate of merit after the original petition. Tex. Civ. Prac. & Rem. Code § 150.002(c) states:

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 professional 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.

The courts have not uniformly resolved when, where, and how the plaintiff is required to seek the limitations exception of 150.002(c).⁵

³ A similar result, although under somewhat convoluted facts, was reached with regard to engineering services under Tex. Occ. Code § 1001.003(7), in *V.R. & Sons, L.P. v. Cive Consulting, Inc.*, No. 01-11-00967-CV, 2012 WL 3133605 (Tex. App.—Houston [1st Dist.] Aug. 2, 2012, no pet. h.) (mem. op.). A plaintiff asserting a cause of action against a design professional for the professional’s alleged failure to monitor or observe construction should file a certificate of merit in support of that claim, or risk dismissal.

⁴ See, e.g., *Landreth v. Las Brisas Council of Co-Owners, Inc.*, 285 S.W.3d 492, 499 (Tex. App.—Corpus Christi 2009, no pet.) (holding that Chapter 150 does not allow plaintiff to cure his failure to file a certificate of merit by amended petition, except as expressly permitted under the statute).

⁵ Compare *WCW Group, Inc. v. Brown*, 305 S.W.3d 222, 231 (Tex. App.—Corpus Christi 2009, pet. dismissed) (holding that plaintiff could file certificate of merit more than 30 days after filing

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Construction Law Update

Also available as part of the eCourse

[Construction Law and Construction Liens Update: What's New, What Can Hurt You](#)

First appeared as part of the conference materials for the
2012 Construction Law session
"Construction Law Update"