Dismissed and Memorandum Opinion filed December 31, 2009.

In The

Fourteenth Court of Appeals

NO. 14-09-00410-CV

BRAD HUGHES AND BAY ARCHITECTS, INC., Appellants

V.

BAY AREA MONTESSORI HOUSE, INC., Appellee

On Appeal from the 295th District Court
Harris County, Texas
Trial Court Cause No. 2008-36863

M E M O R A N D U M O P I N I O N

This interlocutory appeal arises out of an architecture-malpractice case. An architect and architectural firm sought dismissal of a school's claims against them on the basis that the school claimant failed to comply with the certificate-of-merit statute. The trial court denied their motion to dismiss without stating the basis for the denial. In a single issue, the architect and architectural firm assert that the trial court incorrectly applied section 150.002 of the Texas Civil Practice and Remedies Code because the affidavit filed by the school allegedly did not contain a mandatory element. Because the school's cause of action accrued before the legislature amended the certificate-of-merit

statute to permit an interlocutory appeal from the denial of a motion to dismiss, this court lacks jurisdiction to consider this appeal.

FACTUAL AND PROCEDURAL BACKGROUND

In 2003, Bay Area Montessori House, Inc. (the "School") contracted with Pinnacle Construction Industries, Inc. to design and construct an addition to the School's building. Pinnacle contracted with Bay Architects, Inc. and Brad Hughes (collectively, the "Architects") to prepare the plans and specifications for the project. The Architects included an elevator in the design. The School alleges that the Architects specified an elevator and elevator shaft in the construction plans that did not comply with the requirements of the Texas Accessibility Standards or the Americans with Disabilities Act. These plans were completed sometime prior to construction, which took place from June 2003 to September 2004. The elevator shaft was constructed based on this design. Evidence submitted by the School shows that, by September 1, 2004, the School knew that the elevator and elevator shaft specified by the Architects was not compliant. Evidence submitted by the Architects indicates that the School may have made this discovery in 2003. In any event, the School discovered this noncompliance no later than September 1, 2004.

The School initially sued the Architects for negligence in November 2005. However, the parties entered into a tolling agreement under which the School dismissed its claims without prejudice. The School then pursued a variance that would allow it to use the elevator shaft that had been built based on the Architects' plans. The School alleges that this variance request was partially granted, but that, even under the variance that was granted, the elevator shaft still will have to be enlarged. The School filed suit against the Architects again in June 2008.

In March 2009, the Architects filed a motion to dismiss under the certificate-of-merit statute, alleging that the affidavit included with the School's petition did not contain the elements required by section 150.002(a) of the Texas Civil Practice and

Remedies Code. The following month, the trial court denied the Architects' motion to dismiss.

APPELLATE JURISDICTION

The Architects seek to appeal from an interlocutory order; however, interlocutory orders are not appealable unless explicitly made so by statute. *Stary v. DeBord*, 967 S.W.2d 352, 352–53 (Tex. 1998). When construing a statute that establishes appellate jurisdiction, this court cannot expand its jurisdiction beyond that conferred by the legislature. *Jani-King of Memphis, Inc. v. Yates*, 965 S.W.2d 665, 668 (Tex. App.—Houston [14th Dist.] 1998, no pet.). The only statute that might provide the Architects with an interlocutory appeal in this case is Chapter 150 of the Texas Civil Practice and Remedies Code. However, the original version of this statute did not provide for an interlocutory appeal from a trial court's denial of a motion to dismiss for failure to comply with Chapter 150. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 20.01, 2003 Tex. Gen. Laws 847, 896–97 (amended 2005, 2009). The 2009 amendments to Chapter 150 apply "only to an action or arbitration filed or commenced on or after the effective date of this Act [September 1, 2009]." Act of May 29, 2009, 81st Leg., R.S., ch. 789, §§ 3,4 2009 Tex. Sess. Law Serv., Ch. 789 (S.B. 1201). The action in this case was filed before September 1, 2009. The 2005 amendments to Chapter 150 that provide for an interlocutory appeal apply "only to a cause of action that accrues on or after the effective date of this Act [September 1, 2005]." Act of May 18, 2005, 79th Leg., R.S., §§ 4,5 ch. 208, 2005 Tex. Gen. Laws 369, 370. Therefore, we have appellate jurisdiction in this case only if the School's cause of action accrued on or after September 1, 2005.

ACCRUAL OF CAUSE OF ACTION

The determination of when a cause of action accrues is a legal question. *See Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 351 (Tex. 1990). Generally, a cause of action accrues and the statute of limitations begins to run when facts come into existence that authorize a claimant to seek a judicial remedy. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 221 (Tex. 2003); *see also Apex Towing Co. v. Tolin*, 41 S.W.3d

118, 120 (Tex. 2001). This principle applies even if all resulting damages have not yet occurred. *S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex. 1996). In cases involving allegedly faulty professional advice, the claimant suffers legal injury when the advice is taken. *Murphy v. Campbell*, 964 S.W.2d 265, 270 (Tex. 1997). Thus, under the School's negligence cause of action, the School suffered legal injury when it constructed the addition based upon the Architects' allegedly faulty plans. *See id.* Presuming that the discovery rule applies, then the School's cause of action accrued when the School knew or in the exercise of ordinary diligence should have known of the negligent advice and resulting injury.[1] *See id*. at 271. By September 1, 2004, the Architects had provided the School with the allegedly negligent plans, the elevator shaft had been constructed based on those plans, and the School had discovered the basis upon which it alleges the Architects were negligent. Therefore, we conclude that the School's cause of action accrued no later than September 1, 2004.

The Architects assert that there was no "legal injury" in this case until the School's request for a variance was denied in 2007. However, we conclude that reliance upon the allegedly negligent plans to construct the elevator shaft is a sufficient legal injury.[2] *See id*. at 271, 273.

CONCLUSION

Even if the discovery rule applies, the School's cause of action accrued no later than September 1, 2004. Because the cause of action accrued before September 1, 2005, the version of Chapter 150 effective before this date applies to this case. *See* Act of May

[1] The Architects assert that the Supreme Court of Texas's opinion in *Murphy* conflicts with its opinion in *Atkins v. Crosland*, 417 S.W.2d 150, 153–54 (Tex. 1967). However, even if there is such a conflict, the *Murphy* court described the holding in *Atkins* and relied upon this holding in reaching the result in *Murphy*. *See Murphy*, 964 S.W.2d at 271–72. Therefore, if there is any conflict, we are bound by *Murphy*. The Architects also cite *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc*., 962 S.W.2d 507, 515 (Tex. 1998). However, the court in that case distinguished *Atkins*, and it did not mention *Murphy*. *See Johnson & Higgins of Tex., Inc.*, 962 S.W.2d at 515.

[2] The Architects assert several arguments in which they attack the merits of the School's cause of action. These arguments are not relevant to the issue at hand. We presume for the sake of argument that the School's cause of action has merit, and we inquire as to when this cause of action accrued.

18, 2005, 79th Leg., R.S., §§ 4, 5, ch. 208, 2005 Tex. Gen. Laws 369, 370. This version does not provide for an interlocutory appeal from the denial of a motion to dismiss under Chapter 150. *See* Act of 2003, 78th Leg. R.S., ch. 204, § 20.01, 2003 Tex. Gen. Laws 896, 897 (amended 2005, 2009). Accordingly, we lack appellate jurisdiction, and we dismiss this appeal.

/s/ Kem Thompson Frost
Justice

Panel consists of Justices Yates, Frost, and Brown.