TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-21-00565-CV

Tucker Engineering, Inc., and Matthew Joseph Solum, P.E., Appellants

v.

Mary Temperley and Scott Kerry Burkhart, Appellees

FROM THE 21ST DISTRICT COURT OF BASTROP COUNTY
NO. 1812-21, THE HONORABLE CARSON TALMADGE CAMPBELL, JUDGE PRESIDING

MEMORANDUM OPINION

Tucker Engineering, Inc. (TEI) and Matthew Joseph Solum, P.E.—an engineering firm and a licensed professional engineer—appeal from the trial court's order denying their motion to dismiss pursuant to chapter 150 of the Texas Civil Practice and Remedies Code. *See* Tex. Civ. Prac. & Rem. Code §§ 150.001(1-c) (defining "licensed or registered professional"), .002(e) (requiring trial court to dismiss complaint when claimant fails to comply with section). TEI and Solum moved to dismiss the claims of Mary Temperley and Scott Kerry Burkhart (the Burkharts) for failure to file a certificate of merit. *See id.* § 150.002(a) (generally requiring claimant to file certificate of merit, a third-party professional's affidavit, in action for damages arising out of provision of professional services). Because we conclude that the trial court abused its discretion, we reverse the trial court's order and remand the case to the trial court to determine whether the Burkharts' claims against TEI and Solum should be dismissed with

or without prejudice. *See id.* § 150.002(e) (giving trial court discretion to dismiss with or without prejudice).

BACKGROUND

In May 2021, the Burkharts, acting pro se,[1] sued Jamila Kahany, who is not a party to this appeal; TEI; and TEI's employee Solum. In their original petition, the Burkharts alleged that in July 2020, Kahany sold them residential property without disclosing "that the property needed a major foundation repair"; that approximately one month prior to the sale, Kahany had hired TEI "to conduct a Structural Inspection of the property in order to convince the Burkharts to buy the house"; that Solum, "an engineer working for [TEI], signed the inspection report which failed to address the fact that the property was in need of a major foundation repair"; and that the Burkharts relied on his report causing them injury. The Burkharts alleged that after they purchased the property, they began to see cracks on the wall, the flooring, and the foundation; they hired a "foundation expert"; and the expert "was able to observe that the property had suffered major damages, and that the foundation needed to be repaired in order to preserve the structural integrity of the building."

As to their causes of action, the Burkharts asserted that Solum as a licensed engineer had breached his fiduciary duty to them as members of the public who foreseeably could rely on his report:

> As a licensed engineer, not only does Matthew Solum have a fiduciary duty to his clients, but to members of the public who could foreseeably rely on the information provided in his reports. In this case, the Burkharts relied on the information provided on his report to make a determination whether to buy the house or not. Mr. Solum breach[ed] that fiduciary duty to the Burkharts when he

[1] The Burkharts also are acting pro se on appeal.

> carelessly prepared a clearly erroneous report that did not identify any major foundation problems with the house. To their detriment, the Burkharts relied on this report to buy a property with serious foundation issues.

The Burkharts also alleged that Solum was negligent "when he did not come to the conclusion, in his report, that the property had a serious foundation problem" and grossly negligent because he "was aware of the high degree of risk of harming a potential buyer" but, "in order to please his customer, [he] took the risks anyways, and provided her a report that concealed the fact that the house was in dire need of foundation repair." The Burkharts' claims against TEI were limited to vicarious liability claims. They asserted that TEI was liable for Solum's "wrongful acts and omissions" because he was an employee and acting within the course and scope of his employment. As support for their claims against TEI, the Burkharts relied on Solum's signature on the report "under the seal of this corporation." Based on their claims against TEI and Solum, the Burkharts sought compensatory damages in the amount of the cost to repair the foundation and house and exemplary damages.

The Burkharts' original petition referenced and attached the "Structural Inspection Report" that Solum had prepared. In the report, Solum described his observations and, based on those observations, stated his conclusions and recommendations about the house's foundation, drainage around the house, and its "superstructure."[2] As to the house's foundation, he observed "a hairline sheetrock crack" above a bedroom door, a "1/64-inch sheetrock crack above the opening to the vestibule containing the attic access," downward deflections of the

[2] Solum concluded that no remedial work to the drainage around the house or the house's superstructure was necessary. He did not observe "excessive movements, deflections or any other evidence which would indicate a structural problem with the roof or wall framing of this house."

foundation with no discernable pattern, and "expansive clay loam" as the lot's soil. His conclusions and recommendations about the foundation were:

> The foundation has experienced movements with deflections and damage as previously described. It is my opinion that the deflections measured are more representative of deficiencies in workmanship than structural movement. The damage has been very minor, the foundation is structurally intact, and the house is safe and livable.
>
> The central Texas area has clay soil, which shrinks and swells with variations in the moisture content. This phenomenon can cause foundations to move and cracks to occur. The homeowner must maintain a constant moisture content in the soil around the foundation in order to reduce foundation movement in the future.

Solum warranted that he or his representative had visually inspected the components of the property addressed in the report and that he had honestly reported his findings of existing conditions and made recommendations "based on [his] experience and opinion." He further stated:

> Neither [TEI] nor I express or imply any guarantee of specific future structural performance with the limited scope of this inspection; rather, this is my best effort to interpret my observations and develop an opinion as to structural significance.

He signed the report as a "structural engineer" with the designation of "P.E." and his professional engineering seal.

TEI and Solum filed an answer and moved to dismiss the Burkharts' claims pursuant to section 150.002 of the Texas Civil Practice and Remedies Code because the Burkharts did not file a certificate of merit contemporaneously with their original petition. *See id.* § 150.002(a), (e). They asserted that Solum was a licensed engineer and TEI a registered professional engineering firm, *see id.* § 150.001(1-c), and that the Burkharts' claims, which were based on Solum's lack of an opinion or omission from the structural inspection report that the

house had "a serious foundation problem," arose out of Solum's provision of professional engineering services and, thus, that a certificate of merit was required, *see id.* § 150.002(a). TEI and Solum attached evidence to their motion including the structural inspection report and Solum's affidavit.

The Burkharts filed a response to TEI and Solum's motion to dismiss but did not amend their original petition. Their response relied on the factual allegations in their petition and Solum's structural inspection report to support their causes of action against TEI and Solum. They expressly identified Solum as an engineer employed by TEI and asserted their complaint that the structural inspection report "failed to address the fact that the property was in need of a major foundation repair" but argued that no certificate of merit was required because Solum "was not engaged in the 'practice of engineering.'" They argued that he was acting as a third-party inspector while providing services to Kahany and that "merely inspecting a foundation does not involve an engineer's specialized education, training, or experience, and is therefore not the practice of engineering." They attached a "foundation expert evaluation" to their response, which provided an evaluation of the foundation and listed required repairs with corresponding costs "to preserve the structural integrity of the building."

TEI and Solum filed a reply to the response, arguing that the Burkharts were improperly seeking to circumvent the certificate of merit requirement in section 150.002 because their claims "clearly seek to implicate the professional expertise of [Solum and TEI] in their capacity as an engineer" and that "the complained of services (including the inspection and subsequent Structural Inspection Report) were integral components to [Solum and TEI] providing a professional engineering service."

Following a hearing, the trial court denied the motion to dismiss, and this interlocutory appeal followed. *See id.* § 150.002(f) (providing right to interlocutory appeal from order granting or denying motion to dismiss).

ANALYSIS

In three issues, TEI and Solum argue that: (i) chapter 150 applies when an engineer provides a structural inspection report on a residential building; (ii) chapter 150 applies when an engineer conducts an inspection of a residential building's foundation, drainage, and superstructure; and (iii) the trial court abused its discretion in failing to dismiss the Burkharts' claims because they did not comply with the requirement in section 150.002 to file a certificate of merit contemporaneously with their original opinion. *See id.* § 150.002. Review of TEI and Solum's third issue is dispositive of this appeal.[3] *See* Tex. R. App. P. 47.1.

Standard of Review

We review a trial court's decision on a defendant's motion to dismiss under section 150.002 for abuse of discretion. *Jaster v. Comet II Constr., Inc.*, 382 S.W.3d 554, 557 (Tex. App.—Austin 2012), *aff'd*, 438 S.W.3d 556 (Tex. 2014). A trial court abuses its discretion when it reaches an arbitrary and unreasonable decision. *Id.* at 557–58 (citing *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 800 (Tex. 2002)). "A trial court acts arbitrarily and unreasonably if application of the law to the facts dictates only one correct decision, but the trial court reaches a different one." *Id.* at 558 (citing *Rivenes v. Holden*, 257 S.W.3d 332, 336 (Tex. App.—Houston [14th Dist.] 2008, pet. denied)). "A trial court abuses its discretion when it fails

[3] We need not and expressly do not decide whether chapter 150 would always apply when an engineer provides a structural inspection report on a residential building or conducts an inspection of a residential building's foundations, drainage, and superstructure.

to analyze or apply the law correctly." *Id.* (citing *In re Southwestern Bell Tel. Co.*, 226 S.W.3d 400, 403 (Tex. 2007) (orig. proceeding)).

Certificate of Merit Requirement

When it applies, section 150.002 requires a claimant to file with its complaint a certificate of merit, which is an affidavit of a third-party licensed professional in "any action . . . for damages arising out of the provision of professional services." *See* Tex. Civ. Prac. & Rem. Code § 150.002(a). The certificate of merit "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 an omission in providing an opinion, and "the factual basis for each such claim." *Id.* § 150.002(b). Requiring the claimants to set forth the factual basis for their allegations of professional negligence, errors, or omissions provides a basis for the trial court to conclude that the complaints are not frivolous. *See CBM Eng'rs, Inc. v. Tellepsen Builders, L.P.*, 403 S.W.3d 339, 345 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (stating purpose and required substance of certificate of merit).

To determine whether section 150.002 applies, "one must examine the relevant acts alleged by the plaintiff in his petition" to determine whether "a claim falls within the 'provision of professional services.'" *Marquez v. Calvo*, No. 03-18-00597-CV, 2019 Tex. App. LEXIS 5719, at *2–3 (Tex. App.—Austin July 10, 2019, no pet.) (mem. op.) (citing *RCS Enters., LP v. Hilton*, No. 02-12-00233-CV, 2013 Tex. App. LEXIS 15337, at *14–16 (Tex. App.—Fort Worth Dec. 19, 2013, no pet.) (mem. op.)); *see TDIndustries, Inc. v. Citicorp N. Am., Inc.*, 378 S.W.3d 1, 6 (Tex. App.—Fort Worth 2011, no pet.) (noting that "statute itself contemplates

that the determination of whether a certificate of merit is required is determined at the time the claim is filed, before any discovery," and with that in mind, concluding that "proper approach when determining whether a certificate of merit is required is to look solely at the pleadings to determine the nature of the claim").

When examining the parties' pleadings in this context, courts "are not bound by the labels used by the parties with regard to their claims" but "look to the pleadings to determine . . . what claims have been asserted, considering the source of the duty owed to the plaintiff and the nature of the remedy sought by the plaintiff." *Childress Eng'g Servs., Inc. v. Nationwide Mut. Ins.*, 456 S.W.3d 725, 728 (Tex. App.—Fort Worth 2015, no pet.); *see TIC N. Cent. Dall. 3, L.L.C. v. Envirobusiness, Inc.*, 463 S.W.3d 71, 79 (Tex. App.—Dallas 2014, pet. denied) (explaining that in context of chapter 150, court looks to allegations in party's pleadings but that it is "not bound by the labels the plaintiff uses in formulating its pleadings" and "examine[s] the 'substance' of the plaintiff's pleadings to determine whether the 'cause of action' arises out of the provision of professional services"); *see also Whitaker v. R2M Eng'g, LLC*, 603 S.W.3d 530, 536 (Tex. App.—Amarillo 2020, pet. denied) (explaining that "substance" of plaintiff's pleadings "generally controls" analysis under chapter 150).

For purposes of chapter 150, the "practice of engineering" is statutorily defined to mean:

> the performance of or an offer or attempt to perform any public or private service or creative work, the adequate performance of which requires engineering education, training, and experience in applying special knowledge or judgment of the mathematical, physical, or engineering sciences to that service or creative work.

See Tex. Occ. Code § 1001.003(b) (defining "practice of engineering"); Tex. Civ. Prac. & Rem. Code § 150.001(3) (stating that "practice of engineering" has meaning assigned by section 1001.003 of Texas Occupations Code). The statutory definition of the "practice of engineering" includes specified types of professional services and "any other professional service necessary for the planning, progress, or completion of an engineering service." *See* Tex. Occ. Code § 1001.003(c) (listing types of engineering services); *Whitaker*, 603 S.W.3d at 537 (observing that "umbrella of practicing engineering casts a large shadow").

When a certificate of merit is required, a claimant's failure to file one under section 150.002 "shall result in dismissal of the complaint against the defendant." Tex. Civ. Prac. & Rem. Code § 150.002(e); *see TDIndustries*, 378 S.W.3d at 5 (noting that dismissal is mandated "for any claims for which a certificate is required and not produced"). When dismissal is mandated, it is within the trial court's discretion whether to dismiss with or without prejudice. *See* Tex. Civ. Prac. & Rem. Code § 150.002(e) ("This dismissal may be with prejudice."); *Pedernal Energy, LLC v. Bruington Eng'g, Ltd.*, 536 S.W.3d 487, 492, 495–96 (Tex. 2017) (observing that statute's use of "may" "indicates that the provision [to dismiss with prejudice] is discretionary" (citing Tex. Gov't Code § 311.016(1))); *Texas S. Univ. v. Kirksey Architects, Inc.*, 577 S.W.3d 570, 577 (Tex. App.—Houston [14th Dist.] 2019, no pet.) (explaining that courts are not permitted to apply "their discretion arbitrarily or unreasonably" when determining whether to dismiss claims with prejudice pursuant to section 150.002).

Did the trial court abuse its discretion by determining that the Burkharts' claims are not subject to the certificate of merit requirement?

In their third issue, TEI and Solum argue that the trial court abused its discretion in failing to dismiss the Burkharts' claims because they were required to but did not file a

certificate of merit contemporaneously with their original petition. *See* Tex. Civ. Prac. & Rem. Code § 150.002. The Burkharts counter that chapter 150 does not apply because the inspection that Solum performed on their house "could have also been done by a Texas Real Estate Inspector" and, thus, that his inspection "did not require an engineer's specialized education, training, and experience, and is therefore not the practice of engineering." They contend that the structural inspection report "is no different than any report that could be done by a Texas Licensed Home Inspector." *See* 22 Tex. Admin. Code § 535.228(a) (Tex. Real Estate Comm'n, Standards of Practice: Minimum Inspection Requirements for Structural Systems) (setting forth standards of practice for real estate inspectors).

Examining the Burkharts' factual allegations, however, we observe that Solum's alleged negligence, errors, or omissions in his capacity as a "licensed engineer" form the basis of their claims. *See TDIndustries, Inc. v. Rivera*, 339 S.W.3d 749, 754 (Tex. App.—Houston [1st Dist.] 2011, no pet.) ("Texas courts of appeals have held that a claim 'arises out of the provision of professional [engineering] services' if the claim implicates the engineer's education, training, and experience in applying special knowledge or judgment."). The Burkharts' breach of fiduciary duty claim is expressly based on Solum's duty as "a licensed engineer" "to members of the public who could foreseeably rely on the information provided in his reports"; their negligence claim is based on Solum's omission or failure to conclude that the house's foundation had serious problems in his opinions in his report, which addressed the house's structural integrity; their gross negligence claim is based on Solum's concealment of "the fact that the house was in dire need of foundation repair"; and their claims against TEI are limited to vicarious liability claims because Solum, an engineer employed by TEI, was acting within the course and scope of his employment. *See Childress Eng'g Servs.*, 456 S.W.3d at 728

(considering "source of the duty owed to the plaintiff" to determine what claim has been asserted). The nature of the remedy that the Burkharts seek—damages in the amount of the costs to repair the foundation and house—also stems from Solum's allegedly negligent omission from his opinions concerning the house's structural integrity, which opinions were based in part on his experience. *See id.* (considering "nature of the remedy sought by the plaintiff" to determine what claim has been asserted); *see also* Tex. Civ. Prac. & Rem. Code § 150.002(b) (requiring certificate of merit to address allegation of negligence, error, or omission in providing professional service, including omission in providing opinion); *Whitaker*, 603 S.W.3d at 535–36 (explaining that damages "need only originate, stem, or result from the engineer's supplying services which utilize his special engineering talents, education, and the like").

Based on our examination of the substance of the Burkharts' pleaded factual allegations, we conclude that Solum's inspection of the foundation—even if the inspection itself would not be the provision of engineering services[4]—was done as a component part of the necessary steps for preparing the structural inspection report, which was the provision of an engineering service and for which the Burkharts' claims arose. *See* Tex. Occ. Code § 1001.003(c) (including within "practice of engineering" "any other professional service necessary for planning, progress, or completion of an engineering service"); *RCS Enters.*, 2013 Tex. App. LEXIS 15337, at *16 ("Inspection of a foundation can be done as part of the provision of an engineering service, in which case the act would fall within the practice of engineering."); *see also Foundation Assessment, Inc. v. O'Connor*, 426 S.W.3d 827, 835 (Tex.

[4] Because we have concluded that Solum's inspection of the house was a component part of the necessary steps for preparing the structural inspection report and that preparing the report was an engineering service, we do not address TEI and Solum's alternative argument that the inspection itself was the provision of engineering services. *See* Tex. R. App. P. 47.1.

App.—Fort Worth 2014, pet. denied) (concluding that alleged fraud in stating that foundation assessments were based on inspection of site was made as part of "providing initial and final engineering reports and, consequently, arose out of the provision of professional services").

In the report, Solum made recommendations "based on [his] experience and opinion" about the house's structural integrity, including its foundation; stated that his opinion as to "structural significance" was his "best efforts to interpret [his] observations and develop an opinion"; and signed the report as a structural engineer with the designation P.E. and with his professional engineering seal, representing that the report was an "engineering product." *See* 22 Tex. Admin. Code § 137.33(a) (Texas Bd. of Prof. Eng'g and Land Surveyors, Sealing Procedures) (stating that "purpose of the engineer's seal is to assure the user of the engineering product that the work has been performed or directly supervised by the professional engineer named and to delineate the scope of the engineer's work"), (f)(2) (requiring engineers to seal and sign certain engineering work), (f)(3) (requiring engineers to date and sign with designation P.E. or other term "[a]ll other engineering work" and authorizing engineers to add seal on such work including "opinions, recommendations, [and] evaluations"); *see also* Tex. Occ. Code § 1001.003(b) (defining "practice of engineering" to include performing service, "the adequate performance of which requires engineering education, training, and experience in applying special knowledge or judgment of the mathematical, physical, or engineering sciences to that service").

The Burkharts analogize their factual allegations to those asserted by the plaintiffs in *RCS Enterprises* and argue that case "is dispositive of whether a certificate of merit is required." In that case, our sister court concluded that no certificate of merit was required, but the facts in that case are distinguishable. *See* 2013 Tex. App. LEXIS 15337, at *1–3. The

plaintiffs brought claims against a company and its employee who prepared engineered foundation plans for the plaintiffs' modular home. The plaintiffs did not dispute that providing the foundation plans fell within the practice of engineering but alleged that the defendants were acting as a third-party inspection agency and a third-party inspector (TPI) and that the defendants owed duties to the plaintiffs "by virtue of [the employee's] role as the TPI." *See id.* at *10–12. The plaintiffs alleged that in the capacity of a TPI, the defendants "assumed duties under rules promulgated by the Texas Department of Licensing and Regulation (TDLR), which regulates the construction and installation of modular homes like the one purchased by [the plaintiffs]" and that the defendants breached those duties.[5] *See id.*

In reaching its decision that no certificate of merit was required, our sister court explained, "If a defendant happens to be a licensed engineer and provided some sort of service to the plaintiff, but not a professional engineering service, then a claim that arises out of the defendant's performance of that service does not fall within the statute's application." *Id.* at *8; *see also Whitaker*, 603 S.W.3d at 536 (discussing example provided in *RCS Enterprises* of claim against engineer that would not arise from performance of engineering services because claim concerned engineer's side-business of mowing lawns). Our sister court also observed that a TPI is not required to be an engineer or to have a college degree of any kind, *RCS Enters.*, 2013 Tex. App. LEXIS 15337, at *12, and concluded that because a TPI's work does not require "any of the specialized knowledge of an engineer," that the complained-of acts by the employee in his

[5] Under the TDLR rules, a TPI is required to inspect a foundation construction to verify that the foundation is being constructed in accordance with the foundation plans for the home, to post a deviation notice if the TPI discovers that the construction does not conform with the plans, and to file reports with the TDLR. *See RCS Enters., LP v. Hilton*, No. 02-12-00233-CV, 2013 Tex. App. LEXIS 15337, at *10–11 (Tex. App.—Fort Worth Dec. 19, 2013, no pet.) (mem. op.). The plaintiffs alleged that the defendants breached each of these duties. *See id.* at *11.

capacity as the TPI "did not implicate an engineer's specialized education, training, and experience," *id.* at *16. To the extent that our sister court held that a TPI does not have to be an engineer, we do not disagree. More importantly, however, the plaintiffs did not allege that the employee "acted as the TPI as part of the provision of engineering services." *Id.*

In contrast to the plaintiffs' allegations in *RCS Enterprises*, the substance of the Burkharts' claims is not asserted against Solum based on identified duties that he breached in the capacity of a TPI but as an engineer. The Burkharts' claims of omission and failure to identify "that the property was in need of a major foundation report" arise from Solum's status as a licensed engineer acting within the course and scope of his employment with TEI when he prepared, signed, and sealed the report in which he made recommendations based on his opinions as to the house's structural integrity. *See* Tex. Civ. Prac. & Rem. Code § 150.002(b) (requiring certificate of merit to state action or *omission* in providing professional service (emphasis added)); 22 Tex. Admin. Code § 137.33(a) (addressing use of engineering seal to denote "engineering product"); *Foundation Assessment*, 426 S.W.3d at 834 (explaining that "when determining whether an action arises out of the provision of professional services, question is not whether alleged tortious acts constituted provision of engineering services but "whether *the tort claims* arise out of the provision of professional services").

Based on our examination of the substance of the Burkharts' factual allegations in their petition, we conclude that their claims arise out of Solum's provision of engineering services and, thus, that a certificate of merit is required. *See* Tex. Civ. Prac. & Rem. Code § 150.002(a); *see Marquez*, 2019 Tex. App. LEXIS 5719, at *2–3 (examining relevant acts alleged by plaintiff in petition to determine whether claim falls within provision of professional services). We sustain TEI and Solum's third issue and conclude that the trial court abused its

discretion when it denied their motion to dismiss pursuant to section 150.002. *See* Tex. Civ. Prac. & Rem. Code § 150.002(e); *Jaster*, 382 S.W.3d at 557–58.

CONCLUSION

For these reasons, we reverse the trial court's order denying the motion to dismiss and remand the case to the trial court to determine whether the Burkharts' claims against TEI and Solum should be dismissed with or without prejudice. *See TRW Eng'rs, Inc. v. Hussion St. Bldgs., LLC*, 608 S.W.3d 317, 324–25 (Tex. App.—Houston [1st Dist.] 2020, no pet.) (reversing trial court's order denying motion to dismiss and remanding case for trial court to determine whether dismissal should be with or without prejudice (citing *Pedernal Energy*, 536 S.W.3d at 492, 495–96)).

Melissa Goodwin, Justice

Before Justices Goodwin, Baker, and Smith

Reversed and Remanded

Filed: December 15, 2022