Affirm in part; Reverse in part; Opinion Filed October 26, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00180-CV

MACINA, BOSE, COPELAND AND ASSOCIATES D/B/A MBC ENGINEERS, MCCORD ENGINEERING, INC., JORDAN & SKALA ENGINEERS, INC., SAGE GROUP, INC., AND SAGE ARCHITECTURE, INC., Appellants
V.
ERIKA YANEZ, INDIVIDUALLY AND AS NEXT FRIEND OF JOSE MANUEL LOPEZ, E.L.Y., A MINOR X.L.Y., A MINOR, AND SAMUEL MEJIA, Appellees

On Appeal from the 68th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-15-01388

MEMORANDUM OPINION

Before Justices Francis, Myers, and Whitehill
Opinion by Justice Myers

This case concerns the certificate-of-merit requirements parties must follow in suits against licensed or registered professionals under section 150.002 of the Texas Civil Practice & Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 150.002 (West 2011). Macina, Bose, Copeland and Associates, McCord Engineering, Inc., Jordan & Skala Engineers, Inc. (collectively, the engineering defendants), Sage Group, Inc., and Sage Architecture, Inc. (collectively, the Sage defendants) appeal the denial of their motions to dismiss appellees' claims against them. We affirm the trial court's orders denying the engineering defendants' motions to dismiss Yanez, but we reverse the trial court's orders denying the Sage defendants' motions to

dismiss her. We reverse the trial court's orders denying Jordan & Skala's and the Sage defendants' motions to dismiss Mejia.

BACKGROUND

Appellants are engineers (Jordan & Skala, Macina Bose, and McCord) and architects (Sage Group and Sage Architecture[1]) hired for the construction of an apartment complex in Georgetown, Texas. Jose Manuel Lopez and his coworker, Samuel Mejia, were seriously injured when a ladder they were using at the construction site touched or came too close to an overhead high-voltage power line and electrocuted them. Lopez's wife, Yanez, brought suit on his behalf as well as on behalf of herself and their children against numerous defendants for negligence and gross negligence. In her first amended petition, Yanez added the engineering defendants to the case, and she added the Sage defendants in the second amended petition. Yanez filed affidavits with her amended petitions that purported to comply with the certificate-of-merit requirements in section 150.002.

Jordan & Skala filed a motion to dismiss Yanez's claims for failing to comply with the certificate-of-merit requirements. A month later, the trial court granted the motion and dismissed without prejudice Yanez's claims against Jordan & Skala. Yanez's claims against the remaining appellants and the other defendants remained pending.

After the trial court granted Jordan & Skala's motion to dismiss, Mejia filed his petition in intervention. Mejia intervened in the suit as a plaintiff, bringing claims nearly identical to Yanez's against appellants, including Jordan & Skala and the other professionals. Mejia did not file an affidavit with his petition.

After Mejia filed his petition in intervention, Yanez nonsuited without prejudice her claims against Macina Bose and McCord, but her claims against the remaining defendants

[1] Sage Group is a firm of both architects and landscape architects. Sage Architecture appears to practice only architecture.

remained pending. Six days later, Yanez filed her third amended petition including claims against the engineering defendants including Jordan & Skala, and she also filed a new affidavit concerning them.

Each appellant then filed motions to dismiss Yanez's and Mejia's claims, asserting Yanez and Mejia did not comply with the requirements of section 150.002. After a hearing, the trial court denied their motions to dismiss. Appellants now appeal the denial of their motions to dismiss. *See* CIV. PRAC. § 150.002(f).

CERTIFICATE OF MERIT

Section 150.002 provides that in a suit "for damages arising out of the provision of professional services by a licensed or registered professional," "the plaintiff" must file with its petition an affidavit of a third-party licensed or registered professional. The affidavit must show that the affiant "(1) is competent to testify; (2) holds the same professional license or registration as the defendant; and (3) is knowledgeable in the same area of practice of the defendant." The affiant's testimony must be based on the affiant's "(A) knowledge; (B) skill; (C) experience; (D) education; (E) training; and (F) practice." CIV. PRAC. § 150.002(a). The affidavit must "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 . . . professional in providing the professional service." *Id.* § 150.002(b). If the plaintiff fails to file an affidavit meeting these requirements, then the trial court must dismiss the claims against the professional. "This dismissal may be with prejudice." *Id.* § 150.002(e).

This case requires interpretation of statutes. When construing statutes, we attempt to ascertain and effectuate the legislature's intent. *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003). We start with the plain and ordinary meaning of the statute's words. *Id.* If a statute is unambiguous, we generally enforce it according to its plain

meaning. *Id.* We read the statute as a whole and interpret it so as to give effect to every part. *Id.*; *see also Phillips v. Bramlett*, 288 S.W.3d 876, 880 (Tex. 2009) ("We further try to give effect to all the words of a statute, treating none of its language as surplusage when reasonably possible."). We apply a de novo standard of review to the trial court's interpretation of statutes. *Levinson Alcoser Assocs., L.P. v. El Pistolon II, Ltd.*, 513 S.W.3d 487, 493 (Tex. 2017).

We review a trial court's order denying a motion to dismiss under section 150.002 for an abuse of discretion. *Morrison Seifert Murphy, Inc. v. Zion*, 384 S.W.3d 421, 424 (Tex. App.—Dallas 2012, no pet.). An abuse of discretion occurs when the trial court acts in an unreasonable and arbitrary manner or without reference to any guiding rules or principles. *Id.*

THE ENGINEERING DEFENDANTS' APPEALS OF THEIR MOTIONS TO DISMISS YANEZ'S CLAIMS

In Jordan & Skala's second issue, Macina Bose's first issue, and McCord's sole issue, the engineering defendants contend that when Yanez's claims against them were dismissed, either by the trial court granting Jordan & Skala's motion to dismiss or by Yanez nonsuiting the claims, Yanez could refile those claims only by bringing them in a separate lawsuit and not by filing an amended petition in the same lawsuit.

Jordan & Skala

Section 150.002 and the cases interpreting it require the affidavit "be filed with the first petition filed in a particular 'action' or suit raising claims subject to the statute." *TIC N. Cent. Dallas 3, L.L.C. v. Envirobusiness, Inc.*, 463 S.W.3d 71, 77 (Tex. App.—Dallas 2014, pet. denied); *see also* CIV. PRAC. § 150.002(c) (referring to requirement of filing affidavit with complaint as "[t]he contemporaneous filing requirement of Subsection (a)"). Jordan & Skala relies on *TIC* in support of its argument that after the trial court dismissed Yanez's claims, she could not reassert them in an amended petition but had to file a second, separate lawsuit asserting the claims.

In *TIC*, TIC filed suit against multiple defendants, but it did not file an affidavit with its petition. *Id.* at 75. Envirobusiness moved to dismiss the claims against it under section 150.002 because TIC did not file the affidavit. The trial court dismissed the claims without prejudice. TIC then brought the same claims against Envirobusiness in a new petition filed in a different district court. The new case was eventually transferred to the original court and consolidated with the original suit. Envirobusiness asserted the procedure TIC followed amounted to filing the affidavit with an amended petition instead of the first petition raising claims subject to its provisions as required by section 150.002(a); the trial court agreed and dismissed with prejudice the claims against Envirobusiness. *Id.* This Court disagreed, concluding that

> when a plaintiff files a new action and includes a certificate of merit with the first-filed petition in that action, the plaintiff has complied with the plain language of the statute. This conclusion is not only supported by the text of the statute, but also recognizes the legal effect of a dismissal without prejudice, which places the parties in "the position that they were in before the court's jurisdiction was invoked just as if the suit had never been brought."

Id. at 77 (quoting *Crofts v. Court of Civil Appeals*, 362 S.W.2d 101, 104 (Tex. 1962)). Another court has also concluded that a plaintiff whose claims are dismissed without prejudice under section 150.002 complies with the statute by filing a second lawsuit raising the claims with a proper affidavit. *See CTL/Thompson Tex., LLC v. Starwood Homeowner's Ass'n*, 461 S.W.3d 627, 629, 630–31 (Tex. App.—Fort Worth 2015, pet. denied).

The question before us is whether the following procedure complies with section 150.002: a plaintiff sues multiple defendants in a suit containing claims subject to section 150.002, the plaintiff files an inadequate affidavit, a professional defendant objects to the affidavit and moves to dismiss, the trial court dismisses the claims against the professional defendant without prejudice, and the plaintiff then files an amended pleading with a revised affidavit asserting the same claims against the professional defendant as those that were dismissed. We did not hold in *TIC* that the only way a plaintiff may reassert claims dismissed

under section 150.002 was to bring them in a separate lawsuit. As we stated in *TIC*, the dismissal of the case without prejudice placed the parties in the position they were in before suit was brought. In an ordinary case, a plaintiff that has sued other defendants may bring in additional defendants by amending its petition. *See, e.g.*, *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 578 (Tex. 2017) (plaintiff amended petition to add Exxon as defendant). There is no requirement that additional parties be brought into the suit by filing a separate suit that is then transferred to and consolidated with the original suit. Likewise, we see no reason to require a separate suit to be brought in this situation when that suit will almost certainly be transferred to the original suit and be consolidated with it. To require such a procedure would be a waste of judicial resources. Instead, a plaintiff whose claims are dismissed by the trial court without prejudice because the affidavit did not meet the requirements of section 150.002 should be able to reassert those claims through any appropriate procedure for asserting claims previously dismissed without prejudice.

We conclude the trial court did not err by denying Jordan & Skala's motion to dismiss because Yanez refiled her claims in an amended petition instead of a separate lawsuit. We overrule Jordan & Skala's second issue.

McCord and Macina Bose

In McCord's sole issue and Macina Bose's first issue, these engineering defendants contend that the trial court erred by determining Yanez did not violate section 150.002 when she nonsuited her claims against them and then refiled the claims through an amended petition and filed a revised affidavit with the amended petition.

Yanez originally filed suit against McCord and Macina Bose in her first amended petition. At the same time, Yanez filed Gerald Hietpas's first affidavit under section 150.002. McCord and Macina Bose filed answers including as an affirmative defense the allegation that

"Plaintiffs have failed to comply with the provisions of Texas Civil Practice & Remedies Code § 150.002." Despite this pleading, McCord and Macina Bose did not file motions to dismiss these claims even though Jordan & Skala filed a motion to dismiss based on the inadequacies of Hietpas's first affidavit. After the trial court granted Jordan & Skala's motion to dismiss without prejudice, Yanez nonsuited her claims against McCord and Macina Bose. Yanez then refiled those same claims against them in her third amended petition and simultaneously filed Hietpas's revised affidavit. McCord and Macina Bose then moved to dismiss, asserting Yanez could not cure the defective affidavit by nonsuiting her claims and refiling through an amended petition with a revised affidavit.

McCord and Macina Bose rely on *Bruington Engineering Ltd. v. Pedernal Energy L.L.C.*, 403 S.W.3d 523 (Tex. App.—San Antonio 2013, no pet.). In *Bruington*, Pedernal sued Bruington for claims that fell under section 150.002, but Pedernal did not file an affidavit with its original petition. *Bruington*, 403 S.W.3d at 525, 529. Bruington moved for dismissal under the statute, but before the hearing on the motion to dismiss, Pedernal nonsuited without prejudice all of its claims against Bruington. *Id.* at 525–26. Six months later, Pedernal filed its first amended petition, which included the same claims against Bruington as those it had nonsuited, and Pedernal filed an affidavit with the amended petition. *Id.* at 526. Bruington moved to dismiss the claims against it in the amended petition, but the trial court denied the motion to dismiss. *Id.* The San Antonio Court of Appeals reversed, stating, "A plaintiff who does not timely file the certificate of merit should not be allowed to circumvent the unfavorable ruling of a dismissal by nonsuiting and then filing an amended complaint with the appropriate certificate." *Id.* at 532. The court stated that Bruington's motion for dismissal survived the nonsuit and applied to Pedernal's subsequent amended petition and the affidavit filed with it. *Id.* at 528.

Bruington is distinguishable on its facts. In *Bruington*, the defendant had filed a motion to dismiss and therefore was entitled to have a trial court determine whether the plaintiff's claims should be dismissed with or without prejudice. By nonsuiting its claims, the plaintiff tried to take that decision from the trial court. In this case, the record does not show that McCord and Macina Bose moved for dismissal of Yanez's original claims against them. Therefore, unlike the situation in *Bruington*, Yanez's nonsuit did not thwart an attempt by Macina Bose and McCord to have Yanez's claims dismissed with prejudice. *Cf. id.* at 532.

These appellants also rely on *TIC*. As discussed above, we held in *TIC* that a plaintiff whose claims are dismissed without prejudice and who brings those same claims in a separate lawsuit with a proper affidavit complies with section 150.002. However, we did not conclude that refiling the claims in a separate lawsuit was the only way the claims could be reasserted following dismissal without prejudice under section 150.002.

A plaintiff has an absolute right to nonsuit its claims before it rests in a trial on the merits as long as doing so does not prejudice the rights of other parties to be heard on pending claims for affirmative relief. *See* TEX. R. CIV. P. 162; *CTL/Thompson Tex., LLC v. Starwood Homeowner's Ass'n*, 390 S.W.3d 299, 300 (Tex. 2013) (per curiam). The *Bruington* court characterized a motion to dismiss under section 150.002 as a claim for affirmative relief that would survive a nonsuit. *Bruington*, 403 S.W.3d at 527–28. However, because McCord and Macina Bose had not moved for dismissal of the claims with prejudice before Yanez's nonsuit, they had no claims for affirmative relief that were prejudiced by the nonsuit. Instead, when Yanez nonsuited her claims, the parties were returned to the positions they were in before Yanez filed suit against them. *See Waterman Steamship Corp. v. Ruiz*, 355 S.W.3d 387, 399 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) ("As a result of the nonsuit, it was as if Hicks had never brought suit against Waterman and Maersk in the first place."). Therefore, when Yanez

filed her amended petition bringing claims against them after the nonsuit, that amended petition became the first-filed petition as to the previously nonsuited defendants. Therefore, Hietpas's revised affidavit complied with section 150.002's requirement that the affidavit be filed with the first-filed petition.

We conclude the trial court did not err by denying McCord's and Macina Bose's motions to dismiss asserting Yanez failed to file the affidavit with the first-filed petition. We overrule McCord's sole issue on appeal and Macina Bose's first issue.

Sufficiency of Hietpas's Affidavit

Macina Bose asserts in its second issue that Hietpas's original and revised affidavits failed to meet the requirements of section 150.002. Jordan & Skala complains in its third and fourth issues that Hietpas's revised affidavit failed to meet the requirements of section 150.002. However, Macina Bose did not complain in the trial court that either affidavit was deficient, and Jordan & Skala did not complain in the trial court that the revised affidavit was insufficient.

Generally, an appellant may not present a new theory for the first time on appeal.[2] *See* TEX. R. APP. P. 33.1(a); *Larsen v. FDIC/Manager Fund*, 835 S.W.2d 66, 74 (Tex. 1992) (absent fundamental error, court of appeals has no discretion to reverse based on new argument raised for first time on appeal). Instead, a party must first present its arguments or objections to the trial court and the trial court must rule on them or the party must object to the trial court's failure to rule. TEX. R. APP. P. 33.1(a). If these requirements are not met, then the error is not preserved for appellate review. *Id.* The supreme court has not held that defects in affidavits filed under

[2] There are exceptions to this general rule, including subject-matter jurisdiction, fundamental error, certain aspects of summary judgment practice, and error on the face of the record in a restricted appeal. *See Henry v. Cox*, 520 S.W.3d 28, 35 (Tex. 2017) ("subject-matter jurisdiction can be raised for the first time on appeal"); *Alexander v. Lynda's Boutique*, 134 S.W.3d 845, 848 (Tex. 2004) (appellant in restricted appeal must not have participated in hearing resulting in complained-of judgment and must establish error on face of record); *Jose Fuentes Co. v. Alfaro*, 418 S.W.3d 280, 287 (Tex. App.—Dallas 2013, pet. denied) (en banc) (legal sufficiency of no-evidence or traditional motion for summary judgment may be challenged for first time on appeal); *S & I Mgmt., Inc. v. Sungju Choi*, 331 S.W.3d 849, 855 (Tex. App.—Dallas 2011, no pet.) (substantive defects in affidavits presented in summary judgment proceedings may be raised for first time on appeal). Section 150.002 is not jurisdictional, and this case does not involve fundamental error, a summary judgment, or a restricted appeal.

section 150.002 may be raised for the first time on appeal. Macina Bose and Jordan & Skala have cited no authority permitting defects in the affidavit to be raised for the first time on appeal. Therefore, Macina Bose and Jordan & Skala had to object in the trial court to the defects in the affidavit to preserve their arguments for appellate review. Because they did not do so, their arguments are not preserved, and we may not review them. *See id.* We overrule Macina Bose's second issue and Jordan & Skala's third and fourth issues.

SAGE DEFENDANTS' APPEALS OF THEIR MOTIONS TO DISMISS YANEZ'S CLAIMS

Sage Group brings three issues and Sage Architecture brings two issues asserting the trial court erred by denying their motions to dismiss Yanez's claims. Both contend in their first issues that the trial court erred by denying their motions to dismiss Yanez's claims because the affidavit of her expert architect, Robert Plichta, does not distinguish between their actions.[3]

Section 150.002 provides that 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 professional skill claimed to exist and the factual basis for each such claim.

CIV. PRAC. § 150.002(b). This provision has been interpreted to require the affidavit to set forth the asserted negligence of each professional and does not permit collective assertions of negligence. *See Robert Navarro & Assocs. Eng'g, Inc. v. Flowers Baking Co. of El Paso, LLC*, 389 S.W.3d 475, 482 (Tex. App.—El Paso 2012, no pet.).

In this case, Plichta's affidavit did not differentiate between the two companies' actions. Instead, he referred to them collectively as "the Defendant Architectural Firms":

[3] Sage Group contends in its second and third issues that Plichta's affidavit is deficient because it does not show Plichta holds the same license as Sage Group, that of a landscape architect, and because the affidavit does not address the scope of the work taken on by Sage Group or any other landscape architect. However, because we conclude the affidavit was deficient because it did not distinguish between Sage Group's and Sage Architecture's actions, we do not reach these issues.

13. ". . . Because the retaining wall and guardrail system did not provide sufficient clearance, the Defendant Architectural Firms had other options available in the design and placement of the retaining wall and guardrail system or other methods available for the placement of the overhead electrical lines and poles.

. . . .

14. "The Defendant Architectural Firms designed the retaining wall and guardrail system along the western property line of the Westinghouse Pointe residential complex. The Defendant Architectural Firms also undertook to perform services that its [sic] consultants and employees knew, or should have known, were necessary for the protection and safeguarding of members of the public, residents and users of the subject area, such as the Plaintiff, who were expected to work at this location.

15. ". . . The Defendant Architects' conduct in developing, approving, designing, assessing and documenting the retaining wall and guardrail fell below the applicable work product standards of design professionals in Texas.

16. "The primary responsibility of the Defendant Architectural Firms, just as it is for all architects in the United States, is to protect the health, safety and welfare of human life. . . . The retaining wall and guardrail system do not meet acceptable standards.

. . . .

18. "The Defendant Architectural Firms, employees and consultants also had the responsibility to comply with all applicable codes . . . .

19. ["]The Defendant Architectural Firms were knowledgeable, or should have been knowledgeable, of the need to exercise reasonable care in the designing of the retaining wall and guardrail system, given the risks of serious physical harm to those persons intended to be protected by the design.

20. "Additionally, the Defendant Architectural Firms had the duty to warn its [sic] clients of the standards and the risks. If they failed to do so, this was a breach of their duty.

21. ["]It is my professional opinion that the errors and/or omissions listed above constitute negligence in that the Defendant Architectural Firms failed to exercise that degree of care which would have been exercised by a reasonably prudent architect and architectural firm under the same or similar circumstances. The Defendant Architectural Firms also failed to meet the applicable work product standards of design professionals with regard to the design of the retaining wall and guardrail system in a manner that safely accommodates the use for which the property was intended.

As these quotations from the affidavit show, Plichta made no distinction in the work performed by the two companies. Thus, there was no way for a court to determine which acts or omissions should be ascribed to which company. Nor does he state that both companies were involved in all aspects of the work.[4]

In arguing that Plichta's affidavit was deficient because it did not differentiate between their work, the Sage defendants cite *Robert Navarro & Assocs. Engineering, Inc. v. Flowers Baking Co. of El Paso, LLC*, 389 S.W.3d 475 (Tex. App.—El Paso 2012, no pet.). In that case, the Flowers Baking Co. was having a warehouse built, and two engineering companies, Navarro Engineering and Bath Engineering, provided professional services. *Id.* at 476. Navarro's engineering drawings showed the existence of water and sewage lines, and Bath assured the plaintiff that there were existing water and sewage lines. *Id.* at 477. In fact, there were no water or sewage lines near the construction site. The plaintiff sued Navarro for negligence for including the connections in the drawings without checking to see if water and sewage lines existed, and it sued Bath for negligent misrepresentation for representing the connections existed when they did not. The plaintiff filed an engineer's affidavit stating the defendants' failure to confirm the actual location and existence of the water and sewage lines constituted professional negligence. *Id.* at 480. The affidavit then stated, "Therefore, it is my opinion that the failure to confirm the actual location and existence of the water and sewer lines that are indicated on Drawing Sheet No. MO. 1 constitutes professional negligence by Robert Navarro and Associates Engineering, Inc. and/or Bath Engineering Corporation." The court of appeals determined the affidavit failed to meet the requirements of section 150.002. The court stated, "If Bath sealed the Project Documents, it may bear liability for negligence. But Bath was sued for negligent

[4] Neither of the Sage defendants complained in the trial court or assert on appeal that Plichta's affidavit failed to describe the actual acts, omissions, or errors he determined constituted negligence. Accordingly, we do not address whether Plichta's affidavit was defective for that reason.

misrepresentation, a totally separate tort requiring different elements of proof. If Navarro did not seal the drawing, it may or may not bear liability for breach of contract or negligence. One cannot ascertain the nuanced distinctions based upon Spencer's [the expert's] affidavit." *Id.* at 482 (citations omitted). The court concluded "that the statutory language does not allow for collective assertions of negligence." *Id.* The court stated, "it cannot be presumed that anytime two defendants are accused of similar conduct that valid claims exist against both of them—if such claims indeed exist, the expert must actually say so, and do so in the form of positive averments made under oath." *Id.*

Yanez argues *Navarro* is distinguishable because the affidavit stated the failure to identify existing water and sewer lines was the negligence of Navarro and/or Bath, which made it impossible for the trial court to determine which of the defendants was allegedly liable. Plichta's affidavit contains no "and/or" statements, which Yanez argues distinguishes it from the situation in *Navarro*. We agree with Yanez that *Navarro* is factually distinguishable because Plichta's affidavit identifies both Sage Group and Sage Architecture as engaging in the negligent conduct. However, we agree with the statement in *Navarro* that "the statutory language does not allow for collective assertions of negligence." *Id.*

Section 150.002(b) requires the affidavit to "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." CIV. PRAC. § 150.002(b) (emphasis added). This is similar to the requirement for an expert report in section 74.351(r)(6) that the report provide "a fair summary . . . of the manner in which the care rendered by *the* physician . . . failed to meet the standards." *Id.* § 74.351(r)(6) (emphasis added). The courts have interpreted section 74.351(r)(6) as requiring the report to discuss each defendant's actions individually. *See Univ. of Tex. Med. Branch v. Railsback*, 259 S.W.3d 860, 864 (Tex. App.—Houston [1st Dist.] 2008, no

pet.) ("When a plaintiff sues more than one defendant, the expert report must set forth the standard of care for each defendant and explain the causal relationship between each defendant's individual acts and the injury, i.e., '[c]ollective assertions of negligence against various defendants are inadequate.'" (quoting *Taylor v. Christus Spohn Health Sys. Corp.*, 169 S.W.3d 241, 244 (Tex. App.—Corpus Christi 2004, no pet.))).

Yanez asserts that because the defendants' actions overlapped, the statute does not require the affidavit to assign the negligent acts to each defendant, citing *Howe-Baker Engineers, Ltd. v. Enterprise Products Operating, LLC*, No. 01-09-01087-CV, 2011 WL 1660715 (Tex. App.—Houston [1st Dist.] Apr. 29, 2011, no pet.) (mem. op.). In that case, Enterprise sued Howe-Baker and CB & I. *Id.* at *1. Enterprise alleged that Howe-Baker breached contracts and was negligent and fraudulent in performing engineering design and that CB & I was vicariously liable and the alter ego of Howe-Baker. Enterprise also alleged that CB & I tortiously interfered with its contracts. *Id.* at *2. Enterprise filed an affidavit from an engineer setting forth how Howe-Baker was negligent, but the affidavit did not assign error to CB & I. The court of appeals concluded the affidavit did not have to assert any misconduct by CB & I because Enterprise's claims against CB & I were based on vicarious liability and on actions that did not involve the provision of professional services. *Id.* at *6. In this case, Yanez did not assert that either of the Sage defendants was vicariously liable for the other's negligence, so *Howe-Baker* does not apply. Contrary to Yanez's assertions, *Howe-Baker* does not stand for the proposition that where defendants actions overlap, an expert's affidavit may make collective assignments of negligence against multiple defendants. Moreover, Yanez's petition and Plichta's affidavit did not allege these defendants' work "overlapped." Instead, they described the acts, omissions, and errors and ascribed them to both Sage Group and Sage Architecture.

Yanez also asserts that Sage Group and Sage Architecture are not distinct entities. Yanez cites to the fact that the signature blocks in various documents in the record show they have the same address, telephone and fax numbers, website, and e-mail addresses. However, Yanez's petition does not assert they are the same. Her petition describes Sage Group as "a Domestic For-Profit Corporation doing business in Texas," and she describes Sage Architecture as "a foreign limited liability company doing business in Texas." She did not allege that these defendants were the alter ego of one another. The fact that two entities share headquarters and employees does not make them the same entity. *See, e.g., BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 799 (Tex. 2002); *Conner v. ContiCarriers & Terminals, Inc.*, 944 S.W.2d 405, 419 (Tex. App.—Houston [14th Dist.] 1997, no pet.).

We conclude the trial court erred by denying the Sage defendants' motions to dismiss because Plichta's affidavit did not distinguish between the acts, omissions, and errors of each defendant but collectively assigned the negligence and errors to both of them. We sustain their first issues.

MOTIONS TO DISMISS MEJIA'S CLAIMS

In Jordan & Skala's first issue, Sage Architecture's second issue, and Sage Group's fourth issue, these parties contend the trial erred by not dismissing Mejia's claims because Mejia did not file an affidavit.[5] Section 150.002(a) requires "the plaintiff" to file the affidavit. *See* CIV. PRAC. § 150.002(a). Mejia argues he was not "the plaintiff" but that Yanez was "the plaintiff" because Yanez initiated the lawsuit and Mejia later intervened in it. Mejia relies on *Jaster v. Comet II Construction, Inc.*, 438 S.W.3d 556 (Tex. 2014), in support of its argument.

[5] McCord and Macina Bose do not contend in this appeal that the trial court erred by not dismissing Mejia's claims against them. Macina Bose notes in its brief that "the trial court has not yet ruled as to whether Mr. Mejia was required to file a certificate as an intervening plaintiff." However, the record shows the trial court denied Macina Bose's motion to dismiss Mejia. McCord asserted in its motion to dismiss that Mejia's claims should be dismissed because he did not file an affidavit, but McCord does not present that argument on appeal.

Jaster was a divided decision of the supreme court with no majority opinion. Four justices joined the plurality opinion, and four justices joined the dissenting opinion. Three justices joined a concurring opinion, two of whom had also joined the plurality opinion but one of whom had not joined the other opinions. From this splintered group of opinions there is only one holding regarding a party's duty to file an affidavit under section 150.002: "the certificate-of-merit requirement in section 150.002 of the Civil Practice and Remedies Code applies to 'the plaintiff' who initiates an action for damages arising out of the provision of professional services by a licensed or registered professional, and does not apply to a defendant or third-party defendant who asserts such claims." *Id.* at 571. However, the plurality expressly did not reach "the issue of whether section 150.002 requires each individual plaintiff in a multi-plaintiff suit and those added as plaintiffs by joinder or intervention to file separate certificates of merit." *Id.* at 568 n.15. Because there is no majority for any broader holding, *Jaster* should be limited to its stated holding, i.e., section 150.002 does not apply to a defendant asserting claims against another defendant or a third-party defendant. *See Univ. of Tex. Med. Branch at Galveston v. York*, 871 S.W.2d 175, 176 (Tex. 1994) (plurality opinion "has very limited precedential value and would control the result only in identical cases"). This case, involving an intervenor coming into the case as a plaintiff, does not involve cross claims and third-party claims, and it is not identical to *Jaster*.

Jaster's plurality opinion and concurring opinion agree on the definition of "the plaintiff" under section 150.002(a) as "a party who initiates the 'action' or suit, not any party who asserts claims or causes of action within the suit." *Jaster*, 438 S.W.3d at 565; *id.* at 572 (Willett, J., concurring). Therefore, the question is whether Mejia initiated an "'action' or suit" or whether he is a "party who asserts claims or causes of action within [Yanez's] suit." *See id.* at 565. *Jaster* concluded that third-party plaintiffs and cross-claimants seeking contribution or indemnity

in the event they are held liable to the plaintiff or other party are not "the plaintiff" under section 150.002. *Id.* at 571.

A third-party plaintiff or cross-claimant seeking contribution or indemnity is not "a party who initiates the 'action' or suit" under section 150.002 because its claim does not seek damages independent of the plaintiff's suit but is dependent upon the plaintiff's suit. *See id.* at 573 (Willett, J., concurring) (claim for contribution or indemnity does not seek damages, and section 150.002 applies to "any action or arbitration proceeding for damages"). If the plaintiff or other party had not sued the third-party plaintiff or cross-claimant, then the third-party plaintiff or cross-claimant would not have a claim against the party it is suing for indemnity or contribution. Instead, those are "claims or causes of action within the suit," that is, claims within the original plaintiff's suit. *See id.* Unlike the third-party plaintiffs and cross-claimants in *Jaster*, Mejia's claim is an independent suit for damages that Mejia chose to bring under the same cause number as Yanez's suit by intervening in her suit. Mejia's claims are not "claims or causes of action within" Yanez's suit. If Yanez's claims were dismissed or nonsuited, that would not affect Mejia's standing to bring his claims.

Unlike the third-party plaintiffs and cross-claimants in *Jaster*, Mejia could have filed his suit in a separate lawsuit. Had he done so, there is no question but that he would have been "the plaintiff" and required to file an affidavit under section 150.002. Mejia's claims involve facts similar to those in Yanez's case, but Mejia's claims are not "within" Yanez's suit the way the claims of a third-party plaintiff or cross-claimant seeking contribution or indemnity are "within" the action brought by "the plaintiff." Instead, when Mejia filed his petition in intervention, he initiated his own suit that was not part of Yanez's suit. Thus, this case is two lawsuits filed under one cause number, each seeking separate damages. Each lawsuit has its own "the plaintiff" under section 150.002: Yanez is "the plaintiff" in *Yanez v. Macina Bose, et al.*, and

Mejia is the plaintiff in *Mejia v. Macina Bose, et al.* Because each is "the plaintiff" of a separate "action . . . for damages arising out of the provision of professional services," each is required to comply with section 150.002. *See* CIV. PRAC. § 150.002(a).

We conclude Mejia was required to file an affidavit in compliance with section 150.002. Because he did not do so, the trial court erred by denying the motions to dismiss. We sustain Jordan & Skala's first issue, Sage Architecture's second issue, and Sage Group's fourth issue.

CONCLUSION

We reverse the trial court's order to the extent it denies Sage Group's and Sage Architecture's motions to dismiss Yanez's and Mejia's claims and denies Jordan & Skala's motion to dismiss Mejia's claims, and we remand the case to the trial court for determination of whether these claims should be dismissed with or without prejudice. In all other respects, we affirm the trial court's orders denying the motions to dismiss.

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/Lana Myers/
LANA MYERS
JUSTICE

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

Macina, Bose, Copeland and Associates d/b/a MBC Engineers, McCord Engineering, Inc., Jordan & Skala Engineers, Inc., Sage Group, Inc., and Sage Architecture, Inc., Appellants

No. 05-17-00180-CV V.

Erika Yanez, individually and as next friend of Jose Manuel Lopez, E.L.Y., a minor and X.L.Y., a minor, and Samuel Mejia, Appellees

On Appeal from the 68th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-15-01388.
Opinion delivered by Justice Myers. Justices Francis and Whitehill participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED** in part and **REVERSED** in part as follows:

> The trial court's orders denying appellants Macina, Bose, Copeland and Associates d/b/a MBC Engineers', McCord Engineering, Inc.'s, and Jordan & Skala Engineers, Inc.'s motions to dismiss the claims of appellee Erika Yanez, individually and as next friend of Jose Manuel Lopez, E.L.Y., a minor, and X.L.Y., a minor, are **AFFIRMED**;
>
> The trial court's orders denying appellants Sage Group, Inc.'s and Sage Architecture, Inc.'s motions to dismiss the claims of appellees Erika Yanez, individually and as next friend of Jose Manuel Lopez, E.L.Y., a minor, and X.L.Y., a minor, and Samuel Mejia are **REVERSED** and those claims are **REMANDED** to the trial court for determination of whether the claims should be dismissed with prejudice;
>
> the trial court's order denying appellant Jordan & Skala Engineers, Inc.'s motion to dismiss the claims of appellee Samuel Mejia is **REVERSED** and the claims are **REMANDED** to the trial court for determination of whether the claims should be dismissed with prejudice.

It is **ORDERED** that appellants Sage Group, Inc. and Sage Architecture, Inc. recover their costs of this appeal from appellees Erika Yanez, individually and as next friend of Jose

Manuel Lopez, E.L.Y., a minor, and X.L.Y., a minor, and Samuel Mejia. It is **ORDERED** that appellant Jordan & Skala Engineers, Inc. recover its costs of this appeal from appellee Samuel Mejia. It is **ORDERED** that appellee Erika Yanez, individually and as next friend of Jose Manuel Lopez, E.L.Y., a minor, and X.L.Y., a minor, recover her costs of this appeal from appellants Macina, Bose, Copeland and Associates d/b/a MBC Engineers, McCord Engineering, Inc., and Jordan & Skala Engineers, Inc.

Judgment entered this 26th day of October, 2017.