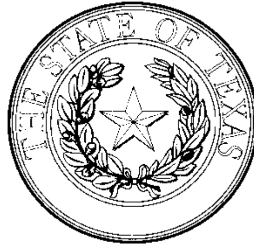
Opinion issued December 8, 2011



In The

Court of Appeals

For The

First District of Texas

NO. 01-11-00586-CV

JOSEPH G. GARTRELL, JR., Appellant

V.

ERNEST JOSEPH WREN AND BEVERLY SUE WREN, Appellees

On Appeal from the 10th District Court
Galveston County, Texas
Trial Court Case No. 10CV2512

MEMORANDUM OPINION

Appellant Joseph G. Gartrell, Jr., a registered professional land surveyor, brings this statutory interlocutory appeal. He complains that the trial court should have granted his motion to dismiss. The alleged ground for dismissal was that

when appellees Ernest Joseph Wren and Beverly Sue Wren sued Gartrell for errors contained in surveys prepared by him, they failed to fully comply with the statute requiring a contemporaneously filed certificate of merit. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 150.001–.003 (West 2011). We find no error in the denial of Gartrell's motion, and accordingly we affirm.

Background

Gartrell performed two surveys on the Wrens' residential property in 2000 and 2001. According to Gartrell, the Wrens sued him in 2006, but they dismissed that lawsuit without prejudice, only to refile the suit again in 2010. The Wrens' 2006 petition is not part of the record for this appeal, but the 2010 petition alleged negligence and gross negligence related to Gartrell's preparation of the surveys. The Wrens alleged that Gartrell

> was negligent and fell below the standard of care for surveyors in that he falsely described the two surveys he prepared for [them] to contain acreage that was not part of the subject property; that incorrectly showed on the latter survey prepared by James W. Gartrell, Jr. the location of the house on the subject property; and that included easements and/or "easements not shown" that did not exist on the subject property.

The Wrens attached a certificate of merit to their 2010 petition—an affidavit from Christopher Trusky, a registered professional land surveyor. In it, Trusky stated that he had examined the two surveys prepared by Gartrell. He further attested:

> 4. I have walked the subject property and have prepared a survey of my own on the subject property;

5. I find that the two surveys of Mr. Gartrell, Jr. are incorrect and note the following:

   a. The two surveys incorrectly show the acreage of the subject property;

   b. The second survey, which was prepared on or about October 1, 2001, incorrectly shows the location of the house located on the subject property;

   c. The two surveys incorrectly state that there are pipeline easements and/or "easements not shown" that do not exist on the subject property or that physical evidence does not support.

6. It is my opinion that Mr. Gartrell, Jr. failed to use proper care in connection with the two surveys described above and that this failure and breach of the standard of care required of Mr. Gartrell, Jr. was the proximate cause of loss by Joseph and Beverly Wren.

7. I have read this affidavit, and every statement contained in it is true and correct and is within my personal knowledge.

Gartrell generally denied the allegations, pleaded the affirmative defense of limitations, and moved to dismiss under Chapter 150 of the Civil Practice and Remedies Code. He objected that the certificate of merit was untimely because no such certificate had been filed in 2006 with the previous petition. The motion to dismiss also alleged that the certificate of merit was substantively insufficient for four reasons: (1) inadequate specificity as to the alleged error concerning "acreage of the subject property"; (2) inadequate specificity as to the alleged error concerning "location of the house"; (3) an equivocal reference to easements on the survey; and (4) failure to address the applicable standard of care. Gartrell also

objected that the certificate of merit did not satisfy the statute because Trusky was originally "employed" by the Wrens in connection with the sale of their property, and therefore he was "not a disinterested 'third party' within the meaning and intent of Chapter 150."

The trial court rejected Gartrell's arguments and denied the motion to dismiss. On appeal, Gartrell reurges the same arguments he presented to the trial court, which we summarize as: (1) because the Wrens did not file a certificate of merit in the earlier lawsuit, their current lawsuit should be dismissed; (2) the certificate of merit was insufficiently specific as to the area of the real property, the location of the house, and the description of easements; (3) it also lacked specificity because it did not state a standard of care; and (4) Trusky was not an appropriate third party affiant.

Standards of Review

We review a trial court's ruling on a motion to dismiss for failure to file a certificate of merit under an abuse of discretion standard. *Curtis & Windham Architects, Inc. v. Williams*, 315 S.W.3d 102, 106 (Tex. App.—Houston [1st Dist.] 2010, no pet.). A trial court abuses its discretion when it acts in an arbitrary or unreasonable manner without reference to guiding rules or principles. *Id.* We cannot say that a trial court has abused its discretion merely because this Court would decide a discretionary matter differently in a similar circumstance, and we

may not substitute our own judgment for that of the trial court. *Id.* However, a trial court has no discretion in determining what the law is or in applying the law to the facts. *Id.* (quoting *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992)).

We review questions of statutory construction de novo. *Id.* (citing *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003)). In construing statutes, our primary goal is to determine and give effect to the legislature's intent, and we begin with the plain language of the statute and apply its common meaning. *Id.* When the statutory text is unambiguous, we adopt a construction supported by the statute's plain language, unless that construction would lead to an absurd result. *Id.* (citing *Fleming Foods of Tex., Inc. v. Rylander*, 6 S.W.3d 278, 284 (Tex. 1999)).

Analysis

The original petition giving rise to this appeal was filed on August 31, 2010. Accordingly, the current version of Chapter 150 of the Civil Practice and Remedies Code applies. Section 150.002 requires that a plaintiff suing for damages arising from the provision of professional services by a licensed or registered professional must file a certificate of merit "with the complaint." TEX. CIV. PRAC. & REM. CODE ANN. § 150.002(a). The certificate of merit is an affidavit of a third-party licensed professional who is competent to testify and holds the same professional license or registration as the defendant, and who is knowledgeable in the area of

practice of the defendant. *Id.* § 150.002(a)(1)–(3). To satisfy the requirement of a certificate of merit, the affiant must offer testimony based on the person's knowledge, skill, experience, education, training, and practice. *Id.* § 150.002(a)(3). In addition,

> 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. The third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor shall be licensed or registered in this state and actively engaged in the practice of architecture, engineering, or surveying.

Id. § 150.002(b). Failure to file a certificate of merit in accordance with the statute shall result in dismissal, which may be with prejudice. *See id.* § 150.002(e).

I. Effect of prior lawsuit

Gartrell argues that the Wrens first raised their claims in a prior lawsuit filed years earlier. He asserts that they filed no certificate of merit before voluntarily filing a nonsuit of that action. At the hearing on his motion to dismiss the 2010 action, Gartrell conceded that he did not seek dismissal of the prior suit due to the Wrens' failure to file a certificate of merit.

Without expressing any opinion about the viability of Gartrell's legal theory that the failure to file a certificate of merit with the 2006 petition requires dismissal of the subsequent 2010 lawsuit, the first step of analysis under this theory would

require us to examine the 2006 petition to determine whether a certificate of merit was required. That petition from the earlier lawsuit was not provided to the trial court in support of Gartrell's motion to dismiss, and it is not part of the record in this appeal. Thus we have no basis to conclude that a certificate of merit was required to be filed with the 2006 petition, and we also cannot conclude that dismissal of the 2010 petition was required for that reason. *See* TEX. R. APP. P. 33.1(a) (preservation of error requires showing of complaint and trial court action on record).

II. Sufficiency of physical description

The adequacy of the Wrens' certificate of merit was challenged because Trusky merely alleged survey errors concerning acreage, location of the house, and existence of easements. Gartrell argues that Trusky's failure to describe particular errors in his observation or computation renders the affidavit insufficiently specific.

The statute requires that the affidavit set forth "specifically" for each theory of recovery "the negligence, if any, or other action, error, or omission" of the defendant "and the factual basis for each such claim." *See* TEX. CIV. PRAC. & REM. CODE § 150.002(b). Trusky testified by affidavit that he had "walked the subject property and [had] prepared a survey of [his] own on the subject property." We

hold that this statement provided the required "factual basis" for his statements identifying Gartrell's alleged errors.

Gartrell contends that an expert report must list specific "objectively verifiable" acts, errors, or omissions. In support of that argument, he argues that the certificate of merit at issue in *Howe-Baker Engineers Ltd. v. Enterprise Products Operating, LLC*, No. 01-09-01087-CV, 2011 WL 1660715, at *6 (Tex. App.—Houston [1st Dist.] Apr. 29, 2011, no pet.) (mem. op.), survived scrutiny because the affiant included several objectively verifiable acts, errors, or omissions. However, the specificity of the factual basis for errors identified in the affidavit was not at issue in that case. Rather the appellant in *Howe-Baker* challenged the sufficiency of the affidavit based on the affiant's qualifications, whether the affidavit addressed both of two projects for which the plaintiff sought damages, and whether the affidavit addressed the negligence of a codefendant, against whom the plaintiff alleged only a theory of vicarious liability. *See Howe-Baker*, 2011 WL 1660715, at *4–7.

Similarly, Gartrell asserts that the certificate of merit in *Elness Swenson Graham Architects, Inc. v. RLJ II-C Austin Air, LP*, No. 03-10-00805-CV, 2011 WL 1562891, at *5 (Tex. App.—Austin Apr. 20, 2011, pet. denied) (mem. op.), was sufficient only because of its "objective specificity." But the issues in that case were whether the affiant was qualified and whether the affidavit needed to

recite a standard of care. *See Elness Swenson*, 2011 WL 1562891, at *2–5. Moreover, the certificate of merit held to be adequate in that case appears to have been similar to Trusky's affidavit in terms of its specificity. The affidavit alleged that Elness Swenson deviated from the standard of care by "(1) failing to advise the geotechnical consultant of the final finished floor elevations, (2) failing to provide effective drainage around the building, (3) failing to design a recommended wall drain, and (4) failing to specify backfill of cohesive (clay) soil around the building to control surface water percolation." *Id.* The affidavit identified the alleged errors but did not describe how or why the errors occurred. *Id.* Similarly, Trusky's affidavit stated the alleged errors, i.e., that Gartrell deviated from the standard of care by: (1) incorrectly showing the acreage of the subject property, (2) incorrectly showing the location of the house located on the subject property, and (3) incorrectly stating that there were pipeline easements "and/or easements not shown" that did not exist on the subject property or that physical evidence did not support.

Gartrell also argues that the certificate of merit was insufficient because it did not address the applicable standard of care. Trusky's affidavit did state that Gartrell "failed to use proper care in connection with the two surveys" and that "this failure and breach of the standard of care" caused the Wrens' damages. But Trusky provided no further detail in describing the applicable standards of care or

how Gartrell allegedly failed to satisfy them. However, the statute does not expressly require the affiant to state the applicable standard of care as part of the "factual basis" for the professional's alleged error. *See* TEX. CIV. PRAC. & REM. CODE § 150.002(b). By contrast, the Legislature has expressly required a description of the standard of care in an analogous context. An expert report required to be filed in support of a health care liability claim must provide:

> a fair summary of the expert's opinions as of the date of the report regarding applicable standards of care, the manner in which the care rendered by the physician or health care provider failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed.

Id. § 74.351(r)(6) (West 2011); *see also Elness Swenson*, 2011 WL 1562891, at *5. We conclude that a Chapter 150 certificate of merit need not include an express description of the applicable standard of care and how it allegedly was violated in order to provide an adequate "factual basis" for the identification of professional errors.

III. Third-party affiant requirement

Finally, we consider Gartrell's contention that Trusky was not a third-party licensed professional within the meaning of Chapter 150 because he had been employed by the Wrens and purportedly had corrected parts of the surveys he criticized in his affidavit. Nothing in the statute expressly precludes a third-party fact or expert witness from serving as the third-party affiant. *See* TEX. CIV. PRAC.

& REM. CODE ANN. §§ 150.001–.003. This is consistent with the conventional and common-sense understanding of a "third party" as "[a] person who is not a party to a lawsuit, agreement or other transaction but who is usually somehow implicated in it; someone other than the principal parties." BLACK'S LAW DICTIONARY 1617 (9th ed. 2009). Trusky is not the plaintiff, the defendant, or an officer or agent of either. He is a person other than the principal parties to the litigation and is, therefore, a third party with respect to the lawsuit.

Conclusion

Having considered all of the arguments and examined the certificate of merit in light of the statute, we conclude that Gartrell has failed to demonstrate any abuse of discretion by the trial court's denial of his motion to dismiss. We overrule Gartrell's sole issue and affirm the judgment of the trial court.

Michael Massengale
Justice

Panel consists of Justices Keyes, Higley, and Massengale.