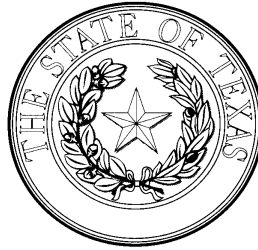


Opinion issued August 4, 2020



In The  
**Court of Appeals**  
For The  
**First District of Texas**

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NO. 01-19-00895-CV

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**TRW ENGINEERS, INC., Appellant**

**V.**

**HUSSION STREET BUILDINGS, LLC, Appellee**

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**On Appeal from the 133rd District Court  
Harris County, Texas  
Trial Court Case No. 2017-71486**

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**OPINION**

Appellee, Hussion Street Buildings, LLC, sued appellant, TRW Engineers, Inc., among others, asserting that TRW's professional negligence during a construction project on an adjacent plot damaged Hussion's property. TRW moved to dismiss Hussion's claims against it, arguing that Hussion failed to file a certificate

of merit with the petition as required by Texas Civil Practice and Remedies Code chapter 150. The trial court denied TRW's motion. In its sole issue on appeal, TRW asserts that the trial court erred in denying its motion to dismiss. Because we conclude that the trial court abused its discretion, we reverse the order of the trial court and remand for the trial court to determine whether to dismiss Hussion's claims against TRW with or without prejudice.

### **Background**

This appeal arises out of litigation over alleged damages to Hussion's property located at 1901 Hussion Street in Houston, Texas (the Property). Hussion alleges that construction work by the Harris County Housing Authority Public Facility Corporation's (PFC) on the adjacent Fenix Estates housing project damaged the Property. Among other assertions, Hussion contends that it sustained damage to the sewer lines and other water flow to the Property.

In October 2017, Hussion sued PFC and the general contractor on the Fenix Estates project. In April 2018, as part of the discovery on these claims, Hussion designated James Andrews, a licensed engineer, as an expert. Andrews was deposed in advance of a temporary injunction hearing, resulting in several hours of testimony recorded in a 146-page transcript. Andrews's deposition testimony was read into the record at the temporary injunction hearing, and other witnesses involved in the case also testified, including Dr. Kathleen S. Jeng-Bulloch, the managing engineer for the

Office of the City Engineer for the City of Houston. At least one employee of TRW, Dariuosh Kermany, a civil engineer, was subpoenaed to attend the temporary injunction hearing as well.

In September 2018, Hussion amended its pleadings to name TRW, among others, as a new defendant in its suit. TRW is a professional engineering company that employed professional engineers in connection with PFC's development of the Fenix Estates. In relevant part, Hussion alleged that TRW was one of several engineering firms "who each in some manner developed the drainage and sewage systems which violated City of Houston code section and ordinances which have served to harm [Hussion]." It is undisputed that Hussion did not file a certificate of merit affidavit at the time it filed its amended petition.

TRW moved to dismiss Hussion's claims against it, asserting that Hussion did not comply with Civil Practice and Remedies Code section 150.002, which requires that an affidavit, or certificate of merit, from a qualified professional accompany a plaintiff's "complaint" in a case that "aris[es] out of the provision of professional services by [certain] licensed or registered professional[s]," such as engineers. *See* TEX. CIV. PRAC. & REM. CODE § 150.002(a). TRW argued that because Hussion failed to file the certificate of merit, the trial court was required to dismiss Hussion's claims against TRW. *See id.* § 150.002(e) ("A claimant's failure to file the affidavit

in accordance with this section shall result in dismissal of the complaint against the defendant. This dismissal may be with prejudice.”).

In its response to TRW’s motion to dismiss, Hussion did not deny that it failed to file an affidavit with its amended petition naming TRW as a defendant. Rather, it argued that its earlier deposition of expert James Andrews, read into the record at the temporary injunction hearing, along with the testimony of Dr. Bulloch, satisfied the certificate of merit requirement because those experts’ testimony included specific statements identifying TRW’s alleged failures.

The trial court denied TRW’s motion to dismiss, and this appeal followed. *See id.* § 150.002(f) (“An order granting or denying a motion for dismissal is immediately appealable as an interlocutory order.”).

### **Chapter 150 Certificate of Merit**

In its sole issue on appeal, TRW asserts that the trial court erred in denying its motion to dismiss Hussion’s claims.

#### **A. Standard of Review**

We review a trial court’s order on a motion to dismiss for failure to file a certificate of merit in accordance with Civil Practice & Remedies Code section 150.002 for an abuse of discretion. *Kayne Anderson Capital Advisors, L.P. v. Hill & Frank, Inc.*, 570 S.W.3d 884, 885 (Tex. App.—Houston [1st Dist.] 2018, no pet.); *Gessner Eng’g, LLC v. St. Paraskevi Greek Orthodox Monastery, Inc.*, 507 S.W.3d

865, 867 (Tex. App.—Houston [1st Dist.] 2016, pet. denied). A court abuses its discretion if it fails to analyze or apply the law correctly. *Dunham Eng’g, Inc. v. Sherwin-Williams Co.*, 404 S.W.3d 785, 789 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (citations omitted). “[T]rial courts do not have discretion to make decisions in an arbitrary or unreasonable manner, without reference to guiding rules or principles.” *Pedernal Energy, LLC v. Bruington Eng’g, Ltd.*, 536 S.W.3d 487, 492 (Tex. 2017) (citing *CTL/Thompson Tex., LLC v. Starwood Homeowner’s Ass’n, Inc.*, 390 S.W.3d 299, 301 (Tex. 2013) and *Samlowski v. Wooten*, 332 S.W.3d 404, 410 (Tex. 2011) in context of section 150.002).

When the outcome of a case turns on a question of statutory interpretation, however, we review those questions de novo. *See Pedernal Energy*, 536 S.W.3d at 491; *Kayne Anderson Capital*, 570 S.W.3d at 885; *Couchman v. Cardona*, 471 S.W.3d 20, 23 (Tex. App.—Houston [1st Dist.] 2015, no pet.). In construing a statute, our goal is to determine and give effect to the legislature’s intent. *Pedernal Energy*, 536 S.W.3d at 491 (citing *Tex. Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 452 (Tex. 2012)). “We look to and rely on the plain meaning of a statute’s words as expressing legislative intent unless a different meaning is supplied, is apparent from the context, or the plain meaning of the words leads to absurd or nonsensical results.” *Id.*; *Crosstex Energy Servs., L.P. v. Pro Plus, Inc.*, 430 S.W.3d 384, 389–90 (Tex. 2014). Courts must presume that the legislature chose the statute’s language with

care, including that words were chosen or omitted for a purpose, and we must construe statutes so that no part is surplusage, but so that each word has meaning. *Pedernal Energy*, 536 S.W.3d at 491–92; *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 256 (Tex. 2008) (“The Court must not interpret the statute in a manner that renders any part of the statute meaningless or superfluous.”). “We also take statutes as we find them and refrain from rewriting text chosen by the Legislature.” *Pedernal Energy*, 536 S.W.3d at 492.

## **B. Analysis**

Neither party disputes that Hussion’s claims against TRW arise out of the provision of professional services by a licensed or registered engineer, so it is undisputed that the certificate of merit requirement of section 150.002 applies in this case. *See* TEX. CIV. PRAC. & REM. CODE § 150.002(a) (“In any action . . . for damages arising out of the provision of professional services by a licensed or registered professional, a claimant shall be required to file with the complaint an affidavit of a third-party” professional in the same field). It is likewise undisputed that, when Hussion filed the amended petition that first alleged professional negligence claims against TRW, it did not contemporaneously file an affidavit. *See id.* (requiring affidavit to be filed “with the complaint”).

Hussion argues that it nevertheless complied with the requirements of section 150.002 because its previous discovery in the case—specifically James’s deposition

and the other evidence introduced during the temporary injunction hearing that occurred before TRW became a defendant—qualifies as an affidavit pursuant to section 150.002. This argument, however, ignores the plain language of section 150.002. *See Pedernal Energy*, 536 S.W.3d at 491 (in construing meaning of statute, we look to its plain language).

Section 150.002 requires an affidavit of a third-party licensed professional who is “competent to testify”; who “holds the same professional license or registration as the defendant”; and who “practices in the area of practice of the defendant and offers testimony based on the person’s: (A) knowledge; (B) skill; (C) experience; (D) education; (E) training; and (F) practice.” TEX. CIV. PRAC. & REM. CODE § 150.002(a). The third-party licensed professional engineer “shall be licensed or registered in this state and actively engaged in the practice of” engineering. *Id.* § 150.002(b). And the required 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.” *Id.*

Courts have interpreted the language of section 150.002(a) to require plaintiffs to file a certificate of merit affidavit contemporaneously “with a ‘first-filed petition’ as to the defendants in which a section 150.002 claim applies.” *Barron, Stark & Swift Consulting Eng’rs, LP v. First Baptist Church, Vidor*, 551 S.W.3d 320, 322 (Tex.

App.—Beaumont 2018, no pet.); *see 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 Tex. S. Univ. v. Kirksey Archs., Inc.*, 577 S.W.3d 570, 575–76 (Tex. App.—Houston [14th Dist.] 2019, no pet.) (holding that section 150.002 “generally requires that a certificate of merit affidavit be filed contemporaneously with a petition asserting claims against” certain professionals); *Pakal Enters., Inc. v. Lesak Enters. LLC*, 369 S.W.3d 224, 228 (Tex. App.—Houston [1st Dist.] 2011, pet. denied) (“[S]ection 150.002 requires a plaintiff to file a certificate of merit with the first-filed complaint asserting a negligence claim against a professional.”). Moreover, courts have applied the certificate of merit requirement to actions against professionals that are alleged for the first time in amended pleadings. *See, e.g., Nangia v. Taylor*, 338 S.W.3d 768, 770, 772 (Tex. App.—Beaumont 2011, no pet.) (applying section 150.002 to plaintiff’s second amended petition); *see also DHM Design v. Morzak*, 05-15-00103-CV, 2015 WL 3823942, at \*3 (Tex. App.—Dallas June 19, 2015, pet. denied) (mem. op.) (“[I]f the plaintiff files more than one petition in a single action, it must file the certificate of merit with the first petition that raises claims subject to section 150.002’s provisions.”).

In light of these statutory requirements, Hussion argues that the testimony of both James and Bulloch, entered as evidence before the trial court during the temporary injunction hearing, provided the information required by section



150.002(a) and (b). Hussion asserts that the deposition and temporary-injunction evidence establish Andrews's and Bulloch's qualifications and their opinions identifying deficiencies in TRW's work, including identifying incorrect drainage calculations that contractors used in the Fenix Estate project to Hussion's detriment. And Hussion argues that TRW had notice of this evidence because representatives of TRW, including Kermany, were subpoenaed to testify at the temporary injunction hearing. Hussion argues that nothing precluded the trial court from using all sources in the record to determine that the Certificate of Merit requirements were met in this case. We disagree.

Hussion's earlier filed deposition testimony and the evidence presented at the temporary injunction hearing are not "an affidavit of a third-party" professional filed contemporaneously "with the complaint" naming TRW as a defendant. *See* TEX. CIV. PRAC. & REM. CODE § 150.002(a); *Barron, Stark & Swift Consulting Eng'rs*, 551 S.W.3d at 322 (interpreting language of section 150.002(a) to require plaintiffs to file certificate of merit contemporaneously "with a 'first-filed petition' as to the defendants in which a section 150.002 claim applies"). And even assuming that Hussion is correct that James's deposition and the evidence adduced at the temporary injunction hearing contained information supporting its eventual claims against TRW, they cannot be said to "set[] forth specifically" the conduct giving rise to TRW's alleged liability. Any portions of Andrews's deposition or Bulloch's

testimony addressing that specific information are a smaller part of hundreds of pages of discovery that Hussion filed against different defendants for different purposes than complying with the requirements of section 150.002. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 150.002(b) (requiring affidavit from proper third-party professional that “sets forth specifically” defendant’s conduct giving rise to liability “for each theory of recovery” and “the factual basis for each such claim”).

Hussion argues that “it is within the trial court’s discretion to piecemeal the Certificate of Merit” from other sources in the record, citing *Melden & Hunt, Inc. v. East Rio Hondo Water Supply Corp.*, 520 S.W.3d 887 (Tex. 2017). However, *Melden & Hunt* does not stand for the proposition that a trial court can “piecemeal” the requirements for a section 150.002 affidavit when no certificate of merit had been filed. The supreme court rejected *Melden & Hunt*’s interpretation of the statute as requiring “the expert’s affidavit to address the elements of the plaintiff’s various theories or causes of action” and observed, instead, that section 150.002 “obligates the plaintiff to get an affidavit from a third-party expert attesting to the defendant’s professional errors or omissions and their factual basis.” *Id.* at 896. It held that, based on the affidavit, “[t]he trial court then determines whether the expert’s affidavit sufficiently demonstrates that the plaintiff’s complaint is not frivolous.” *Id.* The supreme court held that the certificate of merit filed by the plaintiff in that case

provided a sufficient factual basis for concluding that the defendant's actions were negligent or otherwise erroneous. *Id.* at 896–97.

Contrary to Hussion's argument, *Melden & Hunt* relies on the plain language of the statute in concluding that section 150.002 obligates a plaintiff to obtain an affidavit from a third-party expert specifically attesting to the defendant's professional errors or omissions and their factual basis. *See id.* Section 150.002 sets out a single exception to what the statute itself calls the "contemporaneous filing requirement of Subsection (a)" for "any case in which the period of limitation will expire within 10 days of the date of filing and, because of such time constraints, a claimant has alleged that an affidavit" in compliance with subsection (a) could not be prepared. *Id.* § 150.003(c). This exception does not apply here, and Hussion does not point to any other provision or authority that would permit it to proceed without filing the certificate of merit affidavit required by section 150.002. As we have previously held,

By its plain language, the certificate-of-merit statute is compulsory, not discretionary. Although the statute gives the trial court discretion to allow a plaintiff more time in which to obtain the certificate in the one circumstance identified, it does not grant the trial court discretion to waive the requirement altogether, and it mandates dismissal of any claims for which a certificate is required and not produced.

*UOP, L.L.C. v. Kozak*, No. 01–08–00896–CV, 2010 WL 2026037, \*4 (Tex. App.—Houston [1st Dist.] May 20, 2010, no pet.) (mem. op.); *see also TDIndustries, Inc. v. Citicorp N. Am., Inc.*, 378 S.W.3d 1, 5 (Tex. App.—Fort Worth 2011, no pet.)

(citing TEX. CIV. PRAC. & REM. CODE § 150.002(a) and quoting *Kozak*). We must take the statute as we find it and “refrain from rewriting text chosen by the Legislature.” See *Pedernal Energy*, 536 S.W.3d at 492. “We ‘are bound, not only by the ultimate purposes [the Legislature] has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes.’” *Jaster v. Comet II Constr., Inc.*, 438 S.W.3d 556, 570–71 (Tex. 2014) (quoting *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 n. 4 (1994)). The statute itself requires an affidavit filed with the complaint, and it does not provide the trial court with authority to waive this requirement.

Even if we were to agree as a general proposition that an expert’s deposition taken in litigation against one party could satisfy section 150.002’s affidavit requirement as to an entirely different party—a conclusion we do not reach<sup>1</sup>—we observe Andrews’s deposition here does not satisfy the certificate of merit requirement as to TRW. In *Hydrotech Engineering Inc. v. OMP Development, LLC*, the Dallas Court of Appeals confronted a similar circumstance. 438 S.W.3d 895, 897 (Tex. App.—Dallas 2014, pet. denied). The plaintiff, OMP Development, filed a

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<sup>1</sup> Hussion argues that “under current Texas law, ‘affidavits’ are interchangeable with unsworn declarations.” See TEX. CIV. PRAC. & REM. CODE § 132.001 (providing that “an unsworn declaration may be used in lieu of a written sworn declaration, verification, certification, oath, or affidavit required by statute or required by a rule, order, or requirement adopted as provided by law.”). Because Hussion has not filed such an unsworn declaration, however, we conclude that this assertion is irrelevant to our analysis.

construction-defect suit against a general contractor, ICI. *Id.* ICI then filed third-party claims against several parties, including against one of the architects on the project, Swaback. *Id.* This pleading referenced, but failed to attach, the “Yarbrough Affidavit” supporting ICI’s claims against Swaback, so ICI filed an amended third-party petition the next day attaching the affidavit. *Id.* at 898. OMP, the original plaintiff, subsequently filed its own fifth-amended petition alleging, for the first time, claims against Swaback. *Id.* This amended petition did not include a certificate of merit. *Id.*

Swaback, the architect, moved to dismiss OMP’s claims against it in the fifth amended petition due to the plaintiff’s failure to file the required certificate of merit. *Id.* The Dallas Court of Appeals held that dismissal pursuant to section 150.002 was proper:

Plaintiffs simply argued that the ICI certificate upon which they relied had been filed by the time they served the fifth amended petition. In light of the court’s holding in *Crosstex*, we are not persuaded by this argument. The only statutory exception to an untimely filing is set forth in subsection (c), and this exception is inapplicable here. The Yarbrough Affidavit was not timely filed, and the amended pleading did not remedy the failure to comply with the contemporaneous filing requirement mandated by the statute. Therefore, the trial court erred in denying Swaback’s motion to dismiss Plaintiffs’ fifth amended petition as to the claims asserted against Swaback.

*Id.* at 902–03. We agree with this reasoning. The deposition testimony filed with respect to Hussion’s original claims against PFC and the general contractor could

not be considered as a “timely filed” affidavit pursuant to section 150.002, and Hussion failed to comply with the express requirements of the statute.

To hold as Hussion asks would require that we ignore the statute’s plain requirement that an affidavit addressing TRW’s conduct specifically be filed contemporaneously with the complaint against TRW. And it would require TRW to sort through documents and records filed before it was named as a defendant and to parse 146 pages of deposition testimony primarily addressing claims against different parties in order to identify the portions of Andrews’s deposition that “set forth specifically . . . [TRW’s] negligence” as alleged by Hussion. *See* TEX. CIV. PRAC. & REM. CODE § 150.002(b). This would vitiate the protections to professional defendants embodied by the legislature’s enactment of section 150.002.

Hussion dismisses these protections afforded by section 150.002 as “technicalities” and argues that dismissing its claim against TRW under these circumstances would be an elevation of form over substance. The protections of section 150.002—enforced by a requirement that a plaintiff file an affidavit meeting specific requirements at the time it files its action—are not mere technicalities. Although the legislature did not expressly declare its purpose in enacting section 150.002, the Supreme Court of Texas has explained that “a section 150.002(e) dismissal ‘is a sanction . . . to deter meritless claims and bring them quickly to an end.’” *Pedernal Energy*, 536 S.W.3d at 494 (quoting *CTL/Thompson Tex.*, 390

S.W.3d at 301). The supreme court has also stated that the purpose behind the certificate of merit requirement is that plaintiffs make a threshold showing that their claims have merit before proceeding further. *See Melden & Hunt*, 520 S.W.3d at 896; *M-E Eng'rs, Inc. v. City of Temple*, 365 S.W.3d 497, 504 (Tex. App.—Austin 2012, pet. denied); *see also Jaster*, 438 S.W.3d at 570 (holding that purpose of section 150.002 is to require plaintiff in any action to file certificate of merit with its complaint, thereby “provid[ing] licensed and registered professionals with early protection against most . . . meritless claims.”).

Hussion failed to file the required certificate of merit. Section 150.002 provides that “[a] claimant’s failure to file the affidavit in accordance with this section *shall* result in dismissal of the complaint against the defendant. This dismissal may be with prejudice.” *Id.* § 150.002(e) (emphasis added); *Tex. S. Univ.*, 577 S.W.3d at 577 (“If a plaintiff fails to comply with the certificate of merit requirement, the trial court must dismiss the action[.]”); *see Pedernal Energy*, 536 S.W.3d at 492 (stating that “[t]he first sentence [of section 150.002(e)] requires dismissal”). Thus, section 150.002’s certificate-of-merit requirement is mandatory, and the “failure to file a certificate of merit with the [first-filed] petition cannot be cured by amendment.” *Crosstex*, 430 S.W.3d at 393, 395. Furthermore, “[a]bsent a properly filed certificate of merit, professionals have the right to avoid litigation entirely.” *LaLonde v. Gosnell*, 593 S.W.3d 212, 220 (Tex. 2019). In addition to the

mandatory dismissal provision, section 150.002(d) provides that a defendant like TRW “shall not be required to file an answer to the complaint and affidavit until 30 days after the filing of such affidavit.” TEX. CIV. PRAC. & REM. CODE § 150.002(d). “By enabling defendants to quickly jettison meritless lawsuits, the certificate-of-merit requirement saves parties the expense of protracted litigation.” *LaLonde*, 593 S.W.3d at 220.

We conclude that Hussion’s failure to file the required affidavit mandated that the trial court grant TRW’s motion to dismiss. *See Pedernal Energy*, 536 S.W.3d at 492 (“[T]rial courts do not have discretion to make decisions in an arbitrary or unreasonable manner, without reference to guiding rules or principles.”); *Dunham Eng’g*, 404 S.W.3d at 789 (holding that court abuses its discretion if it fails to analyze or apply law correctly).

We sustain TRW’s sole issue on appeal.



## Conclusion

We reverse the trial court’s order denying TRW’s motion to dismiss, and we remand the case to the trial court to determine whether the dismissal should be with or without prejudice. *See* TEX. CIV. PRAC. & REM. CODE § 150.002(e) (providing that dismissal is required but “may” be with prejudice); *see also see Pedernal Energy*, 536 S.W.3d at 492, 495–96 (holding that statute requires dismissal, but it also provides that dismissal “may” be with prejudice, granting trial courts discretion in determining whether to dismiss with or without prejudice; discussing factors courts can consider in determining whether to dismiss with or without prejudice, such as other avenues of relief available to plaintiff, prejudice to parties, and expense).

Richard Hightower  
Justice

Panel consists of Justices Goodman, Landau, and Hightower.