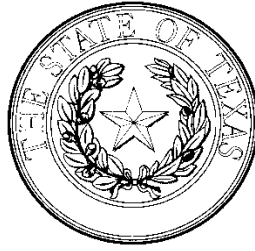


Opinion issued April 13, 2021



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

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NO. 01-19-00965-CV

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**RESOURCE PLANNING ASSOCIATES, LLC, ROBERT A. RANDALL,  
RANDALL-PORTERFIELD ARCHITECTS, INC., DAN SHIPLEY  
ARCHITECT, INC. A/K/A SHIPLEY ARCHITECTS,  
AND PAUL ENGINEERING, INC., Appellants**

**V.**

**SEA SCOUT BASE GALVESTON AND POINT GLASS, LLC, Appellees**

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**On Appeal from the 122nd District Court  
Galveston County, Texas  
Trial Court Case No. 16CV1095**

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**MEMORANDUM OPINION**

Appellees, Sea Scout Base Galveston and Point Glass, LLC (collectively, “SSBG”), brought various claims against appellants, Resource Planning Associates,

LLC, Robert A. Randall, and Randall-Porterfield Architects, Inc. (collectively, “RPA”), Dan Shipley Architect, Inc., also known as Shipley Architects (“Shipley”), and Paul Engineering, Inc. (“Paul”), asserting that appellants’ errors and omissions in designing, supervising, and inspecting a construction project resulted in damage to SSBG’s property. Appellants moved to dismiss the claims against them on the ground that SSBG failed to file sufficient certificates of merit.<sup>1</sup> In this interlocutory appeal,<sup>2</sup> appellants assert that the trial court erred in denying their motions to dismiss SSBG’s claims and erred in failing to dismiss the claims “with prejudice.”

We affirm.

### **Background**

SSBG is a non-profit organization that provides educational and leadership programs for participants in the Boy Scouts of America and Sea Scouts. At its facilities in Galveston, SSBG hosts various maritime and aquatic programs, provides community outreach for disabled veterans, and promotes sailing activities in the community.

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<sup>1</sup> See TEX. CIV. PRAC. & REM. CODE § 150.002 (requiring “certificate of merit” in certain actions against licensed architects or engineers). The legislature amended section 150.002 in 2019. Because SSBG filed its original petition on September 14, 2016, however, the 2009 amended version of section 150.002 governs this suit. See Act of May 29, 2009, 81st Leg., R.S., ch. 789, §§ 2–4, 2009 TEX. GEN. LAWS 1991, 1992 (amended 2019) (current version at TEX. CIV. PRAC. & REM. CODE § 150.002). Because the amendment does not affect our analysis and for ease of reference, we cite to the current version of the statute.

<sup>2</sup> See TEX. CIV. PRAC. & REM. CODE § 150.002(f) (authorizing interlocutory appeal).

In October 2012, SSBG retained Jacob White Construction Company (“JWC”)<sup>3</sup> to construct a building, consisting of five stories and 60,000 square feet of dormitory and community rooms, and associated decks, pool, bulkheads, landscaping, and outdoor chapel (collectively, “the Project”) on SSBG’s ten-acre property in Galveston. The cost of the Project was approximately \$44,000,000.00. SSBG retained RPA as the principal architect on the Project. RPA then “retained and/or recommended” Shipley and Paul.

By December 2014, the Project was substantially complete. SSBG alleges that numerous construction defects later became apparent, including water leaking through the roof, cracking in the roofing and flooring, improperly specified and installed lighting, deterioration of the exterior, cracking and separating of the pool decking, rusting of the docks, and failure of the silo collection and irrigation system.

SSBG brought claims against numerous entities involved in the Project,<sup>4</sup> alleging:

- a. Roof – Leaking and Cracked. The facility’s roof system, including the green roof assembly, continually permits moisture intrusion, evidencing either poor design or poor construction, or both. The roof has numerous leaks, some of which manifested even before completion of the Project. There is evidence of water

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<sup>3</sup> JWC is not a party to this appeal.

<sup>4</sup> The defendants include JWC, Meeco Sullivan, LLC, f/k/a Atlantic Meeco, Inc., Hampshire Roofing Company, LLC, Hines, Inc., Innovative Metals Company, Inc. a/k/a IMETCO, Postel International, Inc., T.A.S. Commercial Concrete Construction, L.L.C., Water Storage Tanks, Inc., Mitchell Chuoke Plumbing, Inc., and SLSCO, Ltd., f/k/a Sullivan Land Services, Ltd., RPA, Shipley, and Paul.

intrusion on all levels of the dormitory building. After heavy rains, puddles regularly appear on the 5th floor and have even appeared down to the 2nd floor. The concrete slab layer of the roof is cracked in a number of places. Patch repair attempts by the various installers failed, leaving an unsightly mess and allowing water to pond in multiple areas. The ponded water has caused leaks at outside doorways and is likely contributing to the rusting of the drain filters on the roof. However, there is concrete installed over the roofing system and so the leak locations are inaccessible. The entire roofing system appears to be failing and is in need of replacement.

- b. Interior Water Damage. There is pervasive leaking throughout the building that has caused water damage on all levels of the dormitory. There is damage to the ceiling tiles in multiple areas on the 5th floor. On other floors, the ceilings of rooms both interior and in outer hallways are severely cracked and show evidence of calcification, indicating long term water intrusion through the cracks. The leaks were enhanced by Hurricane Harvey and continue to the present. The calcification on the ceiling cracks progresses and the ceiling tile damage on the 5th floor worsens. Such water damage would not be occurring in such a new building if properly designed and constructed.
- c. Deterioration of Exterior. The specifications for the building called for the installation of galvanized steel as the outer wall of the building. The specifications required the use of metal painted or forged to withstand a marine environment. However, the outer “skin” of the metal is rusting. This should not be occurring after such a short time. The metal was either specified incorrectly by RPA and Shipley, and/or installed improperly or improper or poor metals were approved by JWC and installed by JWC’s subcontractors.
- d. Phase II Docks. The bolts holding the docks together have severely rusted, compromising the docks. Other rust is now visible as well. The plans and specifications were supposed to require the use of galvanized metals and bolts and materials that would be appropriate for a marine environment. Meeco Sullivan failed to construct these docks as specified and/or produced faulty designs, and the docks may need to be replaced after only two years of use.

- e. Lighting. Numerous light fixtures on the interior and exterior were either specified improperly by RPA and Shipley, and/or installed improperly or the wrong type of lighting was approved by JWC for installation. Water is leaking into a number of light fixtures. A number of the outside lighting fixtures appear to have been incorrectly installed and/or have failed due to wet conditions, indicating Defendants approved the installation of fixtures not specified for outdoor use or use in a marine environment.
- f. Cracks in 5th Floor Flooring. The concrete floors of the meeting area and kitchen of the 5th floor are severely cracking, indicating poor installation and/or design.
- g. Leaks in Maintenance Stairwell. The stairwells have experienced numerous leaks and cracks. Mold and rust are appearing on the stairwell walls and fittings, which were specified to be both galvanized and fit for use in a marine environment.
- h. Silo Collection and Irrigation System. This system was one of the key aspects of the facility's LEED ratings. The system was designed to collect rainwater in silos to be used for irrigation. However, the system has failed to function. The pump system does not work, which in turn does not allow the silos to drain, and they consequently overflow from the top during hard rains. Additionally, the bases of the silos are rusting and screws and bolts used on the system are rusting, despite plan specifications to use materials for these tanks that would withstand a marine environment. This puts into question the structural integrity of the tanks, which may pose a safety risk. These issues are the result of improper construction and installation and/or design. This system is useless and must be replaced or removed with associated retrofitting of drainage.
- i. Stairwells for Public Use. There is rust on the corrugated steel, and there are cracks in the pipe that cause water to drain onto electrical boxes and lights in the stairwells. SSBG has already had to replace multiple fixtures. This is now a permanent problem due to faulty installation and construction, use of poor materials, and/or defective design. During rainy weather, water pours onto scouts using the facility's stairwells. Further, JWC failed to install lightning rods to ground these stairwells.

- j. Bulkheads. The bulkheads were improperly constructed. There has been subsidence in material under the bulkheads, causing pavers to dip and crack. . . .
- k. Emergency hoses on docks. The hoses and fire prevention systems for the docks were improperly installed. . . .
- l. Pool. The swimming pool concrete decking has cracked just beyond the edge of the pool. There are vertical separations between the pool and the concrete walk. The integrity of the pool may have been compromised.
- m. Landscaping. The rainwater collection and irrigation system for watering the landscape does not work.

This appeal concerns SSBG's claims against RPA and Shipley, both licensed architects, and against Paul, a professional engineer. SSBG alleged that appellants' designs caused the above defects.

With respect to RPA, SSBG asserted claims for negligence, breach of warranty, breach of contract, and misrepresentation. Specifically, SSBG alleged:

RPA failed to properly specify and illustrate the Project's design intent, was negligent in the performance of its duties on the Project, breached its contract with Plaintiffs, made errors and omissions in providing advice, judgment, specifications, oversight, drawing, as well as breached its warranties, including the warranty of good and workmanlike performance. More specifically, [RPA's] performance fell short in the following manner:

- i. With regards to life safety and fire code compliance;
- ii. With regards to the design, drawing and specifications of the exterior wall panels, which among other things, is allowing significant water penetration;
- iii. With regards to the structural and architectural details of the topping slabs on level two, three, and four, which among other things, is allowing significant water penetration;

- iv. With regards to providing sufficient information to convey design intent to the contractor or sub-contract[or] in connection with the metal/fiberglass louvers that form the exterior walls and guardrails at levels two through five;
- v. With regards to providing sufficient information to convey design intent to the contractor or sub-contract[or] in connection with ensuring compliance with the requirements of the Texas Department of Insurance [(“TDI”)]; and
- vi. With regards to providing properly detailed plans so as to minimize and/or prevent water infiltration.

SSBG asserted that RPA breached its duty to perform the work with the professional standard of skill and care expected of architects in like circumstances and that such breach caused damages. SSBG also alleged that RPA breached its warranty to perform the work in a good and workmanlike manner and to review the work on the Project to ensure compliance with plans.

With respect to its breach of contract claim, SSBG asserted that Robert Randall of RPA agreed to be the principal architect on the Project, to provide all professional services necessary for the complete design and construction documentation of the Project, and to do so in a manner consistent with the professional skill and care required and expected of architects practicing under like circumstances and conditions. However, RPA breached its duty to deliver the professional standard of skill and care required, resulting in a facility with the defects described above. And, SSBG alleged that RPA misrepresented its qualifications to perform the work, leading to its hire as principal architect.

SSBG further alleged that RPA negligently hired and supervised a number of persons and entities who provided materials and performed services on the Project. And, such persons and entities, including Shipley and Paul, negligently performed their obligations, for which RPA was vicariously liable.

With respect to Shipley, SSBG asserted claims for negligence, breach of warranty, breach of contract, and misrepresentation. Specifically, SSBG alleged:

Shipley failed to properly specify and illustrate the Project's design intent, was negligent in the performance of its duties on the Project, breached its contract with Plaintiffs, made errors and omissions in providing advice, judgment, specifications, oversight, drawing, as well as breached its warranties, including the warranty of good and workmanlike performance. More specifically, [Shipley's] performance fell short in the following manner:

- i. With regards to life safety and fire code compliance;
- ii. With regards to the design, drawing and specifications of the exterior wall panels, which among other things, is allowing significant water penetration;
- iii. With regards to the structural and architectural details of the topping slabs on level two, three, and four, which among other things, is allowing significant water penetration;
- iv. With regards to providing sufficient information to convey design intent to the contractor or sub-contract[or] in connection with the metal/fiberglass louvers that form the exterior walls and guardrails at levels two through five;
- v. With regards to providing sufficient information to convey design intent to the contractor or sub-contract[or] in connection with ensuring compliance with the requirements of [TDI]; and
- vi. With regards to providing properly detailed plans so as to minimize and/or prevent water infiltration.



SSBG asserted that Shipley breached its duty to perform the work with the professional standard of skill and care expected of architects in like circumstances and that such breach caused damages. SSBG also alleged that Shipley breached its warranty to perform the work in a good and workmanlike manner and to review the work on the Project to ensure compliance with the plans.

With respect to its breach of contract claim, SSBG asserted that Dan Shipley of Shipley Architects agreed to be an architect on the Project, to provide all professional services necessary for the complete design and construction documentation of the Project, and to do so in a manner consistent with the professional skill and care required and expected of architects practicing under like circumstances and conditions. However, Shipley breached its duty to deliver the professional standard of skill and care required, resulting in a facility with the defects described above. And, SSBG alleged that Shipley misrepresented its qualifications to perform the work, leading to its hire as an architect.

SSBG further alleged that Shipley negligently hired and supervised a number of persons and entities who provided materials and performed services on the Project. And, such persons and entities negligently performed their obligations, for which Shipley was vicariously liable.

With respect to Paul, SSBG asserted claims for negligence, breach of warranty, and breach of contract. Specifically, SSBG alleged:

Paul was negligent in the performance of its duties on the Project, including its duty to ensure compliance with the Windstorm Insurance requirements through [TDI], breached its contract with [SSBG], made errors and omissions in providing oversight and inspecting the Project, and breached its warranties, including the warranty of good and workmanlike performance. More specifically, [Paul's] performance fell short in the following manner:

- i. With regards to the design, approval and inspection of the exterior formed metal wall panels;
- ii. With regards to the design, approval and inspection of the exterior formed metal wall panels and the hat channels/anchorage as a complete system;
- iii. With regards to the design, approval and inspection of the fasteners from the hat channel to the building framing, the exterior metal panel system and trim attachment, and the exterior coping and its attachment to the building; and
- vi. With regards to inspecting and ensuring compliance with Windstorm and [TDI] requirements.

SSBG asserted that Paul breached its duty of care with respect to each of the above and that such errors and omissions caused damage to SSBG's property. SSBG also alleged that Paul breached its warranty to perform the work in a good and workmanlike manner. SSBG asserted that Paul breached its contract with JWC, of which, SSBG was a third-party beneficiary, by failing to properly perform the work.

In support of its allegations against RPA and Shipley, SSBG attached the certificate of merit of its expert, William H. Coltzer, Jr., AIA, discussed below. In support of its claims against Paul, SSBG attached the certificate of merit of its expert, Jeffrey Tay Bishop, P.E., discussed below.

RPA and Shipley moved to dismiss SSBG's claims against them on the ground that Coltzer's certificate of merit failed to specify which acts and omissions were committed by RPA and which were committed by Shipley. In its response, SSBG asserted that RPA and Shipley, both architects, each applied their professional seal to the design drawings at issue, making them equally responsible for the negligent results. And, RPA was vicariously liable for Shipley's errors and omissions. Paul moved to dismiss SSBG's claims against it on the ground that Bishop's certificate of merit "only identified potential issues, not specific complaints." In its response, SSBG asserted that Bishop provided numerous specific factual bases. After a hearing, the trial court denied appellants' motions to dismiss SSBG's claims.

### **Certificates of Merit**

In their first issue, RPA, Shipley, and Paul argue that the trial court erred in denying their motions to dismiss the claims against them because SSBG's certificates of merit are substantively insufficient. *See* TEX. CIV. PRAC. & REM. CODE § 150.002(b). RPA and Shipley assert that SSBG's expert, in his affidavit, referred to RPA and Shipley collectively and failed to attribute any specific error or omission either to RPA or to Shipley. Paul argues that SSBG's expert identified only "potential issues" and failed to attribute any specific error or omission to Paul.

**A. *Standard of Review and Governing Legal Principles***

Civil Practice and Remedies Code section 150.002 provides that, in any action for damages arising out of the provision of professional services by a licensed architect or professional engineer, the claimant must file a “certificate of merit” with the complaint. *See id.* § 150.002(a); *see also id.* § 150.001(1-c). Stated generally, a certificate of merit is a sworn written statement certifying that the defendant’s actions were negligent or erroneous and stating the factual basis for the opinion. *CBM Eng’rs, Inc. v. Tellepsen Builders, L.P.*, 403 S.W.3d 339, 346 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). The function of a certificate of merit is to provide a “substantive hurdle that helps ensure frivolous claims are expeditiously discharged.” *LaLonde v. Gosnell*, 593 S.W.3d 212, 216 (Tex. 2019).

To satisfy section 150.002, the claimant must file an affidavit from a third-party professional, who is competent to testify, is licensed or registered in the State of Texas, holds the same license or registration as the defendant, is actively engaged in the same practice area as the defendant, and offers testimony based on the affiant’s knowledge, skill, experience, education, training, and practice. *See* TEX. CIV. PRAC. & REM. CODE § 150.002(a), (b). The expert’s 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 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. . . .

*Id.* § 150.002(b).

The Texas Supreme Court has held that the language, “for each theory of recovery for which damages are sought,” in section 150.002(b) simply clarifies the statute’s application to any action arising out of the provision of professional services, regardless of legal theory, and does not enlarge the factual-basis requirement to include the various elements of each underlying theory that the plaintiff alleges.<sup>5</sup> *Melden & Hunt, Inc. v. E. Rio Hondo Water Supply Corp.*, 520 S.W.3d 887, 894–95 (Tex. 2017). The statute’s applicability is not limited to professional-negligence claims. *Id.* at 894. And, section 150.002(b) does not require that the expert’s affidavit address the elements of the plaintiff’s various legal theories or causes of action. *Id.* at 896. Rather, the statute “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.* The trial court then determines whether the expert’s affidavit sufficiently demonstrates that the complaint is not frivolous. *Id.*

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<sup>5</sup> Read as a whole, section 150.002(b) “reveals a core focus on ascertaining and verifying the existence of errors or omissions in the professional services provided by a licensed or registered professional.” *Melden & Hunt, Inc. v. E. Rio Hondo Water Supply Corp.*, 520 S.W.3d 887, 895 (Tex. 2017) (quoting *M–E Eng’rs, Inc. v. City of Temple*, 365 S.W.3d 497, 505–06 (Tex. App.—Austin 2012, pet. denied)). “This core focus . . . is not altered by the first portion of subsection (b), which requires a certificate to provide these facts ‘for each theory of recovery for which damages are sought.’” *Id.* (quoting *M–E Eng’rs, Inc.*, 365 S.W.3d at 505–06). The effect of this phrase is to emphasize that the certificate must identify and verify the existence of any professional errors or omissions that are elements or operative facts under any legal theory on which the plaintiff intends to rely to recover damages. *Id.*

At this preliminary stage, the plaintiff is not required to marshal its evidence or to provide the full range of information that the defendant is entitled to obtain through formal discovery. *See id.* at 897 (citing *Dunham Eng’g, Inc. v. Sherwin-Williams Co.*, 404 S.W.3d 785, 795 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (noting that “at the certificate-of-merit stage, before discovery and before other dispositive motions are available, the plaintiff is not required to fully marshal his evidence”); *CBM Eng’rs*, 403 S.W.3d at 346; *M–E Eng’rs, Inc. v. City of Temple*, 365 S.W.3d 497, 504 (Tex. App.—Austin 2012, pet. denied) (noting that statute “reflects a legislative goal of requiring merely that plaintiffs make a threshold showing that their claims have merit”)).

A claimant’s failure to file a certificate of merit in accordance with section 150.002 “shall result in dismissal of the complaint against the defendant,” and such dismissal “may” be with prejudice. TEX. CIV. PRAC. & REM. CODE § 150.002(e).

We review a trial court’s order on a motion to dismiss under section 150.002 for an abuse of discretion. *CBM Eng’rs*, 403 S.W.3d at 342. A trial court abuses its discretion if it acts in an unreasonable and arbitrary manner, without reference to any guiding rules or principles, or if it fails to analyze or apply the law correctly. *Dunham Eng’g*, 404 S.W.3d at 789.

When the outcome of a case turns on a question of statutory interpretation, however, we review those questions de novo. *Pederal Energy, LLC. v. Bruington*

*Eng’g, Ltd.*, 536 S.W.3d 487, 491 (Tex. 2017). In construing a statute, our goal is to determine and give effect to the legislature’s intent. *Id.* “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.* Words and phrases must be “read in context and construed according to the rules of grammar and common usage.” *Id.* We construe statutes so that no part is surplusage, but so that each word has meaning. *Id.*

## **B. *Analysis***

For clarity in the analysis, we first consider the certificate of merit with respect to SSBG’s claims against Paul.

### **1. *Paul***

SSBG sued Paul, a professional engineer, for negligence, breach of warranty, and breach of contract, all of which stem from the same factual allegations. Namely, SSBG alleged that Paul failed to exercise ordinary and reasonable care with respect to the design, approval, and inspection of the exterior formed metal wall panels, the fasteners from the hat channel to the building framing, the exterior metal panel system and trim attachment, and the exterior coping and its attachment to the building. In addition, Paul made errors and omissions in providing oversight and inspecting the Project, including its duty to ensure compliance with the Windstorm

Insurance requirements through TDI. Further, SSBG alleged that Paul failed to perform its services in a good and workmanlike manner and that Paul breached the parties' contract by failing to properly perform the work.

The parties do not dispute that SSBG's claims against Paul arise out of the provision of professional services by a licensed engineer and that the certificate-of-merit requirement applies. *See* TEX. CIV. PRAC. & REM. CODE § 150.002(a). It is likewise undisputed that, when SSBG filed its live pleading, i.e., Seventh Amended Petition, it contemporaneously filed a certificate of merit pertaining to Paul. *See id.* It is further undisputed that SSBG's expert, Bishop, is qualified to render an opinion in this case. *See id.* § 150.002(a), (b). The parties dispute whether Bishop, in his affidavit, met the requirement in section 150.002(b) that he

set forth specifically for each theory of recovery for which damages are sought, the negligence, if any, or other action, error, or omission of [Paul] 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. . . .

*Id.* § 150.002(b). Thus, we consider whether Bishop verified the existence of professional errors or omissions by Paul and their factual bases. *See Melden & Hunt*, 520 S.W.3d at 896–97.

In his affidavit, Bishop testified that he has been a licensed engineer in the State of Texas since 2017 and has been appointed as a qualified inspector for TDI. Bishop is the director of engineering at Z6 Commissioning, LLC, a firm specializing



in the performance testing of various components of the exterior building envelope. His work is focused on exterior building envelope components and cladding on projects ranging in scope from \$30,000,000.00 to \$450,000,000.00. His experience includes reviewing and inspecting new institutional-grade mid-rise and high-rise steel-reinforced concrete buildings for TDI compliance in Galveston. He has also performed exterior rehabilitation and forensic engineering on existing institutional-grade mid-rise and high-rise steel-reinforced concrete buildings.

Bishop testified that he investigated the reported defects and problems existing at the SSBG property. He testified that, based on his knowledge, skill, experience on projects of similar size and scope, education, training, practice, and knowledge related to exterior building envelopes, as well as his review of sealed construction documents prepared by Paul and the conditions at the SSBG property, it was his professional opinion, that Paul, as the engineer of record and the appointed inspector for TDI, did not fulfill his duty to ensure compliance with the code requirements. Specifically, Bishop noted:

6. *The Formed Metal Wall Panel specification (07 42 13.13) does not delegate the design (engineering) of the formed metal wall panels to a qualified responsible third party (registered professional engineer) and does not disclose that the panels must meet the requirements of [TDI]. Sheet S1.0 calls for “contractor to submit for approval all windows, door, roofing and curtain-wall products prior to purchase. All products must be approved for windstorm certification,” but does not address the metal wall panels. Z6 could not find product evaluations, “for construction” shop drawings, calculation packages, or test data in the*

production for the metal panel cladding that would've been required for the approval and inspections of the metal wall panels. Z6 could not find evidence (in the production) that the panels were engineered as a complete system (specifically the anchorage of hat channels to the structure). As observed in product evaluation FL19180 (not provided in production), the metal panel system requires verification from the structural plans examiner for the framing and fastener attachment beyond the metal panel and clip. The hat channel and fasteners used to attach the hat channel to the wall must also conform to corrosion resistance requirements of 2006 Texas Revisions to the International Building Code.

....

7. As of June 5, 2019, a limited visual investigation of the components behind the panels has been performed. Observations show that the conditions differ from the “for review” shop drawing dated 02-28-14 sheet 12 of 15, only this sheet was produced of the 15. Fasteners from clip to hat channel are called out “\*SEE SHEET #1 FOR TYPE.” however, sheet #1 was not included. *Fasteners from hat channel to framing are called out in detail P/12 as “FASTENER @ 12” o.c. (by erector) typ. but framing observed on the penthouse was spaced at 16” on center. Fasteners from hat channel into concrete are not called out in this shop drawing or the architectural and structural drawing set.* The hat channel is called out as “36[inch] o.c. max”. Wind design pressures are called out in the structural set, DS8.1, as 50 PSF for typical wall pressure and 90 PSF for edge wall pressure. The metal wall panels fall into both of these zones as indicated on A/DS8.1. According to the product evaluation . . . the allowable load is 66.7 PSF.

....

8. *Trim components in the metal panel system do not appear to have an adequate amount of rivets to attach the trim back to the continuous clip in a manner that would resist specified wall pressures noted in DS8.1. The shop drawing sheet provided calls out [parts] . . . for trim attachment but does not specify spacing. In at least one location, no rivets were found in an outside corner detail at a location which they were drawn in L/12.*

....

9. *The coping attachment at one location was visually observed during the limited visual investigation of the metal wall panels. Z6 could not find product evaluations, “for construction” shop drawings, calculation packages, or test data in the production for the metal coping that would’ve been required for the approval and inspections of the coping. . . .*

....

10. *Based on my knowledge, skill and experience on projects of similar size and scope, education, training, practice, knowledge related to exterior building envelopes, my review of the sealed construction documents prepared by Paul Engineering Inc. for the [SSBG], my review of conditions on site at [SSBG] as of June 5th, 2019 and owner furnished construction correspondence; it is my professional opinion, that the Engineer of Record and appointed qualified inspector for TDI, Dennis Robert Paul, P.E. did not fulfill his duty to ensure compliance with the code requirements for Windstorm Insurance through [TDI]. If the information regarding the wind resistance of the metal wall panel system and metal coping does not exist, testing and/or engineering analysis should be performed to ensure that these components (as installed) are capable of resisting the code required loads. Cost of said testing and engineering analysis should be borne by the Architect and the windstorm Engineer. If the testing and engineering analysis produces results that do not satisfy applicable codes, cost of improving these conditions should also be borne by the Architect and windstorm Engineer.*

(Emphasis added.)

Thus, Bishop, noting his investigation of the reported defects and issues at the SSBG property and his review of sealed construction documents prepared by Paul, concluded that Paul failed to use ordinary care in the performance of its professional duties relating to the facility’s design. Bishop identified Paul’s errors and omissions to include a failure to ensure compliance with the code requirements of TDI. He

noted that the drawings did not specify that the metal wall panels must be approved for windstorm certification, and fasteners were not called out in the shop drawings or did not match the framing. In addition, trim components in the metal panel system did not have an adequate number of rivets, were not attached in a manner that would resist the specified wall pressures, and the drawings did not specify the spacing of the rivets. Bishop explained each of the acts and omissions in greater detail.

In *Melden & Hunt, Inc. v. East Rio Hondo Water Supply Corp.*, the Texas Supreme Court considered whether an expert's affidavit was sufficient to satisfy section 150.002(b). 520 S.W.3d 887, 889 (Tex. 2017). There, the plaintiff retained Melden to provide engineering-design and project-supervision services for the construction of a new water-treatment plant. *Id.* Subsequently, the plaintiff sued Melden, and others, for negligence, breach of contract, breach of warranties, and misrepresentation, alleging water-quality issues attributable to the plant's design and construction. *Id.* The plaintiff's expert, Leyendecker, noting his review of the engineering plans, construction documents, and specifications, and his on-site inspections and tests, concluded that Melden failed to use ordinary care in the performance of its professional duties relating to the plant's design and filtration system. *Id.* at 896. Leyendecker identified Melden's errors to include the failure to: (1) provide and design a water treatment plant without cross connections, (2) select and design a properly functioning solids contact clarifier, (3) design a filtration

system that could be properly backwashed and safely brought into operation without dangerous turbidity spikes, (4) provide adequate assistance and support, and (5) design a proper air filter scour system. *Id.* The court concluded that the certificate of merit was sufficient to satisfy section 150.002 and held that the trial court did not abuse its discretion in denying Melden’s motion to dismiss the plaintiff’s claims. *Id.* at 897–98.

In *CBM Engineers, Inc. v. Tellepsen Builders, L.P.*, this Court considered whether an expert’s affidavit was sufficient to satisfy section 150.002(b). 403 S.W.3d 339, 341 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). There, the plaintiff sued an engineer, CBM, for damages related to the design and construction of the Camp Allen Retreat and Conference Center. *Id.* The plaintiff alleged that it engaged CBM as a design specialist to prepare construction documents and specifications and to provide administrative services related to construction. *Id.* After construction, the project showed signs of structural and water damage. *Id.* The plaintiff alleged that the damage was caused by “several deficiencies in the design of the project” and “deficiencies in the installation of waterproofing systems.” *Id.*

The plaintiff brought claims against CBM for negligence, breach of warranty, and breach of contract, all of which stemmed from the same factual allegations. *Id.* at 343. Namely, the plaintiff alleged that CBM failed to exercise ordinary care with respect to the design and construction of its part of the project; did not perform

services in a good and workmanlike manner; and breached the parties' contract by failing to "properly" perform the work. *Id.* In the certificate of merit, the plaintiff's expert testified that, based on his review of the drawings, a factor contributing to the facility's instability was a "structural flitch beam design error and omission of lateral bracing." *Id.* at 342. CBM moved to dismiss the plaintiff's claims on the ground that the expert failed to provide the requisite level of detail. *Id.*

This Court noted that the purpose of a certificate of merit is merely to provide a basis for the trial court to conclude that the plaintiff's claims are not frivolous. *Id.* at 345. The certificate of merit must provide a factual basis for the allegations of professional errors or omissions. *Id.* It need not recite the applicable standard of care and how it was allegedly violated in order to provide an adequate factual basis for the identification of professional errors. *Id.* And, the plaintiff is not required to marshal his evidence or to provide the full range of information that the defendant is entitled to obtain through formal discovery. *Id.* at 346. Because the expert identified an error or omission in the facility's design and identified the factual basis for his professional opinion, which was his review of the drawings prepared by CBM, this Court held that the certificate of merit was sufficient to fulfill the requirements of section 150.002(b). *Id.*

Here, like in *Melden* and *CBM*, Bishop identified specific errors and omissions by Paul in the facility's design, and he identified the factual bases for his

professional opinion, which was based on his review of Paul’s drawings and Bishop’s investigation of the SSBG property. *See Melden & Hunt*, 520 S.W.3d at 896; *CBM Eng’rs*, 403 S.W.3d at 346. Thus, SSBG’s certificate of merit satisfied the requirements of section 150.002(b) and provided a basis for the trial court to conclude that SSBG’s claims are not frivolous. *See* TEX. CIV. PRAC. & REM. CODE § 150.002(b); *Melden & Hunt*, 520 S.W.3d at 897–98; *CBM Eng’rs*, 403 S.W.3d at 346.

Paul argues on appeal, as he did in the trial court, that Bishop’s affidavit is insufficient based on portions of Bishop’s statements in paragraph 10 above: “If the information regarding the wind resistance of the metal wall panel system and metal coping does not exist . . .” and “If the testing and engineering analysis produces results that do not satisfy applicable codes . . .” Paul asserts that these statements state only potential errors and omissions and fail to identify any specific actual error or omission by Paul. Rather, they “merely identif[y] [that] the panels might not meet the specifications, and if they don’t meet the specifications they might not meet the windstorm requirements.”

We read an affidavit as a whole, not by viewing single sentences in isolation. *See Morello v. Seaway Crude Pipeline Co., LLC*, 585 S.W.3d 1, 16 (Tex. App.—Houston [1st Dist.] 2018, pet. denied) (“[W]e are not permitted to read excerpts of legal documents in isolation to determine the drafter’s intent; instead, we are to read

them in their entirety, allowing each portion to provide context and guidance for the whole.”). The statements at issue, when read in the full context of paragraph 10 and the affidavit as a whole, add superfluous information that does not render Bishop’s conclusions insufficient. *See Starwood Mgmt., LLC v. Swaim*, 530 S.W.3d 673, 680 (Tex. 2017) (holding that because expert’s main conclusion was supported by demonstrable and reasoned basis, his intermediate conclusions or subjective commentary did not render his affidavit insufficient).

We hold that the trial court did not abuse its discretion in denying Paul’s motion to dismiss SSBG’s claims against it.

## 2. *RPA and Shipley*

SSBG sued RPA, a licensed architect, for negligence, breach of warranty, breach of contract, and misrepresentation, all of which stem from the same factual allegations. Namely, SSBG alleged that RPA made errors and omissions with respect to specifying and illustrating the Project’s design intent; ensuring life-safety and fire-code compliance; providing design, drawing, and specifications of the exterior wall panels and the structural and architectural details of the topping slabs on levels two, three, and four; providing sufficient information to convey design intent to the contractor or sub-contractors in connection with the metal/fiberglass louvers that form the exterior walls and guardrails at levels two through five; providing sufficient information to convey design intent to the contractor or sub-



contractors in connection with ensuring compliance with the requirements of the Texas Department of Insurance; and providing properly detailed plans to minimize or prevent water infiltration.

In addition, SSBG alleged that RPA breached its duty to perform the work in a good and workmanlike manner and to review the work on the Project to ensure compliance with plans and that it misrepresented its qualifications to perform the work, leading to its hire as principal architect. SSBG further asserted that Robert Randall of RPA agreed to be the principal architect on the Project, to provide all professional services necessary for the complete design and construction documentation of the Project, and to perform his services consistent with the professional skill and care required and expected of architects practicing under like circumstances and conditions. However, RPA breached the parties' contract by failing to properly perform the work. And, RPA, as the principal architect on the Project, was vicariously liable for the negligent acts of Shipley and Paul.

SSBG also sued Shipley, a licensed architect, for negligence, breach of warranty, breach of contract, and misrepresentation, all of which stem from the same factual allegations. SSBG also alleged that Shipley made errors and omissions with respect to specifying and illustrating the Project's design intent; ensuring life-safety and fire-code compliance; providing design, drawing, and specifications of the exterior wall panels and the structural and architectural details of the topping slabs

on levels two, three, and four; providing sufficient information to convey design intent to the contractor or sub-contractors in connection with the metal/fiberglass louvers that form the exterior walls and guardrails at levels two through five; providing sufficient information to convey design intent to the contractor or sub-contractors in connection with ensuring compliance with the requirements of TDI; and providing properly detailed plans to minimize or prevent water infiltration.

In addition, SSBG alleged that Shipley breached its duty to perform the work in a good and workmanlike manner and to review the work on the Project to ensure compliance with plans and that it misrepresented its qualifications to perform the work, leading to its hire as an architect. Further, SSBG asserted that Dan Shipley of Shipley Architects agreed to be an architect on the Project, to provide all professional services necessary for the complete design and construction documentation of the Project, and to perform its services consistent with the professional skill and care required and expected of architects practicing under like circumstances and conditions. However, Shipley breached the parties' contract by failing to properly perform the work.

The parties do not dispute that SSBG's claims against RPA and Shipley arise out of the provision of professional services by licensed architects and thus the certificate-of-merit requirement of section 150.002 applies. *See* TEX. CIV. PRAC. & REM. CODE § 150.002(a). It is likewise undisputed that, when SSBG filed its live

petition, i.e., Seventh Amended Petition, it contemporaneously filed a certificate of merit pertaining to RPA and Shipley. *See id.* It is further undisputed that SSBG’s expert, Coltzer, is qualified to render an opinion in this case. *See id.* § 150.002(a), (b).

Again, the parties dispute whether Coltzer, in his affidavit, met the requirement in section 150.002(b) that he

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. . . .

*Id.* § 150.002(b). Thus, we consider whether Coltzer verified the existence of professional errors or omissions by RPA and Shipley and their factual basis. *See Melden & Hunt*, 520 S.W.3d at 896–97.

In his affidavit, Coltzer testified that he has been a licensed architect in the State of Texas since 1993 and is actively engaged in the practice of architecture. He has extensive experience related to the construction of commercial structures. And, he is knowledgeable in the area of practice required to produce documents suitable for the construction of facilities similar to those at SSBG’s property. He is the managing and founding partner of W.H. Coltzer International (“WHCI”); president of Zero/Six Consulting, LLC, a firm engaged in the diagnosis, design, and inspection of the exterior building envelope; the president of Z6 Commissioning, LLC (“Z6”),

a firm specializing in the performance testing of exterior building components; and the president of Coltzer Company, LLC, a construction company familiar with Gulf Coast construction standards. To assist with and validate opinions related to Life Safety, he engaged the engineering firm of Jensen Hughes, and he attached its report. To assist with and validate opinions related to windstorm design, he engaged Z6.

Coltzer testified that he investigated the SSBG structures at issue and sealed construction documents prepared by RPA and Shipley. He noted that “each Architectural sheet has the seal associated with Mr. Randall and Mr. Shipley.” And, that he was “not aware of the division of responsibilities between the two Architects.” Coltzer testified that, based on his training and experience, that “[p]ortions of the plans prepared by [RPA] and [Shipley] under the seals of Mr. Randall and Mr. Shipley are not correct from a technical perspective.” That is, “if the details are constructed as drawn, they will not perform adequately.” Specifically:

7.1 With regard to life safety and fire codes . . . :

- A. Fire pump room 202 does not have a one hour rating as required by 2009 IBC table 508.2.5.
- B. Exterior stairs one and three are not separated from the interior of the building (at level five) by a two hour separation as required by IBC 1026.6.
- C. The distance between stair one to the adjacent building is less than the ten feet required by table 602 the 2009 IBC. (Sheet A0.0 acknowledges that this distance will be less than 7’7”).
- D. Outdoor sprinkler equipment does not appear to be designed for saltwater environments. Sprinkler

escutcheons and pipe hangers were found to be deteriorating from apparent salt water exposure.

7.2 *With regard to the wall section through the metal panels at the fifth and sixth floors:*

- A. *Although the specifications call for the Fluid Applied Air Barrier to be the “drainage plane flashed to discharge to the exterior incidental condensation or water penetration” . . . , the drawings do not provide details that accomplish that task. In fact, details provided in the construction documents typically illustrate windows sealed to the metal wall panel cladding . . . , not the drainage plane. Chapter 14 of the 2009 IBC refers to the drainage plane as the “Water Resistive Barrier” (WRB) and also calls for “Flashing to be installed in such a manner so as to prevent moisture from entering the wall or to direct it to the exterior.” . . . Investigations performed by WHCI and testing performed by [Z6] have confirmed that these details have been constructed as drawn, allow water infiltration when tested, and rely on interior finishes to provide environmental separation (not the air barrier). Exposure of interior finishes to unconditioned air will eventually deteriorate finishes as well as indoor air quality and water infiltration will become more pronounced.*
- B. *Drawings (and shop drawings) illustrate light gauge framing attaching through compressible insulation material; this not only places hundreds of “blind” holes in the air barrier (drainage plane) it creates a difficult condition with regard to holding the furring channels straight (panels visibly travel in and out of plane).*

. . . .

7.3 *With regard to the topping slabs at levels two, three, and four:*

- A. *Structural details are not coordinated with architectural details and architectural details are not coordinated with each other. Refer to drawing excerpts below.*
- . . . .
- B. *None of the details . . . require the cold joint between the topping slab at the exterior breezeway and the topping*

*slab at interior spaces to be sealed. As a result, there has been extensive water infiltration (from rain events) into the void between the structural slabs and the topping slabs. Water trapped in this space is able to migrate through slab penetrations and cracks in concrete to the interior spaces below. . . .*

8. *Portions of plans prepared by [RPA] and [Shipley] . . . do not provide sufficient information to convey design intent to contractor/sub-contractors. Observations that temper this comment include but are not limited to:*

*. . . .*

8.2 *Formed Metal Wall Panel specification (074213.13) does not delegate the design (engineering) of the formed metal wall panels to a qualified responsible third party (registered professional Engineer) and does not disclose that the panels must meet the requirements of [TDI]. . . . Sheet 51.0 calls for “contractor to submit for approval all windows, door, roofing and curtain-wall products prior to purchase. All products must be approved for windstorm certification,” but does not address the wall panels. Additionally, WHCI could not find evidence (in the files reviewed) that the panels were engineered as a complete system (specifically anchorage of hat channels to structure). . . .*

9. *Based on my knowledge, skill and experience on projects of similar size and scope, education, training, practice, knowledge related to exterior building envelopes, my review of the sealed construction documents prepared by [RPA] and [Shipley] for [SSBG], my review of conditions on site at Sea Star Base Galveston as of May 30, 2019 and owner furnished construction correspondence, it is my professional opinion that [RPA] and [Shipley] were professionally negligent in several respects including but not limited to their failure to properly specify and illustrate the “design intent” as outlined in items seven and eight above. It is also my professional opinion that water infiltration experienced (and damages observed) at Sea Star Base is in part due to the acts of professional negligence by [RPA] and [Shipley] (i.e. items that were either not detailed at all or*

*detailed incorrectly). The same facts support a conclusion that [RPA] and [Shipley] made errors and omissions in providing advice, judgment, specifications, oversight, drawings, and the contract documents, breached its contract (depending on a legal opinion regarding terms), its warranties (depending on a legal opinion regarding terms), and its implied warranty of good and workman like performance.*

10. Based on my knowledge, skill and experience on projects of similar size and scope, education, training, practice, knowledge related to exterior building envelopes, my review of the sealed construction documents prepared by [RPA] and [Shipley] for the Sea Star Base Galveston, my review of conditions on site at Sea Star Base Galveston as of May 30, 2019 and owner furnished construction correspondence; *it is my professional opinion that [RPA] and [Shipley] . . . contributed to the need for significant remedial work needed to remedy the problems at the Sea Star Base Galveston.*
11. *The errors and omissions of [RPA] and [Shipley] (under the seals of Mr. Randall and Mr. Shipley) cited in this certificate, which contains my opinions, are based on [RPA] and [Shipley's] failure to meet the standard of care . . . for an Architect providing these same services in the location of the project.*

(Emphasis added.)

Thus, Coltzer testified that, based on his knowledge, skill, and experience on projects of similar size and scope, his education, training, practice, and knowledge related to exterior building envelopes, and his review of sealed construction documents prepared by RPA and Shipley for SSBG, his review of conditions on site as of May 30, 2019, and owner-furnished construction correspondence, it was his professional opinion that RPA and Shipley failed to meet the standard of care for an architect providing these same services in the location of the Project.

Namely, RPA and Shipley failed to “properly specify and illustrate the ‘design intent’ as outlined in items seven and eight above.” The formed metal wall panel specifications did not delegate the design of the panels to a registered professional engineer and did not disclose that the panels must meet TDI requirements. The specifications called for the Fluid Applied Air Barrier to be the “drainage plane flashed to discharge to the exterior incidental condensation or water penetration.” However, the drawings illustrated windows sealed to the metal wall panel cladding.

In addition, the drawings illustrated light-gauge framing attached through compressible insulation material, which not only placed hundreds of “blind” holes in the air barrier (drainage plane), but created a difficult condition with regard to holding the furring channels straight (panels visibly travel in and out of plane). Further, with regard to the topping slabs at levels two, three, and four, the structural details were not coordinated with architectural details and the architectural details were not coordinated with one other. Coltzer noted that none of the details required the cold joint between the topping slab at the exterior breezeway and the topping slab at interior spaces to be sealed. As a result, there had been extensive water infiltration from rain events into the void between the structural and topping slabs.

Coltzer further testified that it was his “professional opinion that water infiltration experienced (and damages observed) at Sea Star Base [were] in part due to the acts of professional negligence by RPA and Shipley.” RPA and Shipley



committed errors and omissions in providing advice, judgment, specifications, oversight, and drawings, which “contributed to the need for significant remedial work needed to remedy the problems at the Sea Star Base Galveston.”

Again, like in *Melden* and in *CBM*, discussed above, Coltzer identified specific errors and omissions by RPA and Shipley in the facility’s design, and he identified the factual bases for his professional opinion. *See Melden & Hunt*, 520 S.W.3d at 896; *CBM Engineers*, 403 S.W.3d at 346. We conclude that SSBG’s certificate of merit satisfied the requirements of section 150.002(b) and provided a basis for the trial court to conclude that SSBG’s claims against RPA and Shipley are not frivolous. *See TEX. CIV. PRAC. & REM. CODE* § 150.002(b); *Melden & Hunt*, 520 S.W.3d at 896–97; *CBM Engineers*, 403 S.W.3d at 346.

RPA and Shipley argue on appeal, as they did in the trial court, that SSBG’s certificate of merit is insufficient because Coltzer did not segregate the allegations between RPA and Shipley. Rather, Coltzer states: “I am not aware of the division of responsibilities between the two Architects.” And, thereafter, Coltzer “jointly refers to both RPA and [Shipley] where he makes an allegation of deficient architectural work.” RPA and Shipley argue that such collective allegations render SSBG’s certificate of merit insufficient and requires the dismissal of its claims.

The Texas Administrative Code provides that “[o]n every Construction Document prepared by an Architect or under an Architect’s Supervision and Control,

the Architect shall affix or cause the affixation of” the architect’s seal, signature, and date. *See* 22 TEX. ADMIN. CODE § 1.103(a). An architect may not issue or authorize the issuance of such plans and specifications for regulatory approval, permitting, or construction use unless the document bears the architect’s seal, signature, and date. *See id.* § 1.101. “If only a portion of a document was prepared by an Architect, or under an Architect’s Supervision and Control,” the architect’s seal may not be affixed to the document unless:

- (1) the portion of the document prepared by the Architect or under the Architect’s Supervision and Control is clearly identified; and
- (2) it is clearly indicated on the document that the Architect’s seal applies only to that portion of the document prepared by the Architect or under the Architect’s Supervision and Control.

*Id.* § 1.104(b). Thus, the Administrative Code contemplates that an architect might prepare only a portion of a document or that more than one architect might participate in preparing a document. *See id.* In such cases, each architect must affix his seal to the document and must identify the portion of the document that he prepared. *See id.* §§ 1.103(a), 1.104(b).

Here, SSBG’s expert, Coltzer, testified that “each Architectural sheet has the seal associated with Mr. Randall *and* Mr. Shipley. I am not aware of the division of responsibilities between the two Architects.” (Emphasis added.) That is, RPA and Shipley each affixed a seal to the documents at issue but did not identify any specific portions of the documents that each prepared. *See id.* §§ 1.103(a), 1.104(b).

Accordingly, Coltzer attributed the errors and omissions he cited to both architects, i.e., “[p]ortions of the plans prepared by [RPA] and [Shipley] under the seals of Mr. Randall and Mr. Shipley are not correct from a technical perspective.”

We note that section 150.002 requires that a certificate of merit be filed at the beginning of a lawsuit, with the petition. *See* TEX. CIV. PRAC. & REM. CODE § 150.002(a). At this preliminary stage, the plaintiff is not required to marshal its evidence or to provide the full range of information that the defendant is entitled to obtain through formal discovery. *See Melden & Hunt*, 520 S.W.3d at 897 (citing *Dunham Eng’g*, 404 S.W.3d at 795 (noting that “at the certificate-of-merit stage, before discovery and before other dispositive motions are available, the plaintiff is not required to fully marshal his evidence”)). Again, the function of the certificate of merit is to provide a basis for the trial court to determine merely that the plaintiff’s claims are not frivolous, and to thereby conclude that the plaintiff is entitled to proceed in the ordinary course to the next stages of litigation. *Id.*; *M–E Eng’rs*, 365 S.W.3d at 504 (noting that statute “reflects a legislative goal of requiring merely that plaintiffs make a threshold showing that their claims have merit”). Notably, RPA was sued, in part, under a theory that it was vicariously liable for Shipley’s errors and omissions.

Were we to adopt the approach that RPA and Shipley espouse, any two or more architects working on a large project, as here, could advance the project by

affixing their respective seals, *see* 22 TEX. ADMIN. CODE. § 1.103(a), while insulating themselves from future liability simply by not identifying the portions of the document each prepared. *See id.* § 1.104(b). A plaintiff's expert being unable to attribute any certain error to a specific architect would render the plaintiff unable to produce a sufficient certificate of merit, thus ending the suit. *See* TEX. CIV. PRAC. & REM. CODE § 150.002(e) (providing that claimant's failure to file certificate of merit in accordance with section 150.002 "shall result in dismissal of the complaint against the defendant"). We decline to adopt such an approach.

In support of their argument, RPA and Shipley rely on *Macina, Bose, Copeland and Associates v. Yanez*, No. 05-17-00180-CV, 2017 WL 4837691 (Tex. App.—Dallas Oct. 26 2017, pet. dism'd) (mem. op.). In *Macina*, the plaintiff sued a group of engineers and architects after her husband was severely injured while working on a construction site. *Id.* at \*1. Two architects moved to dismiss the claims against them on the ground that the plaintiff's expert, in his affidavit, merely referred to the "Defendant Architectural Firms" and failed to distinguish between their actions. *Id.* at \*5. The court noted that section 150.002 "has been interpreted to require the affidavit to set forth the asserted negligence of each professional and does not permit collective assertions of negligence." *Id.* (citing *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 concluding that the trial court erred in denying

the architects' motions to dismiss the plaintiff's claims, the court of appeals noted that the expert not only made no distinction between the two architects, but *he also did not testify that both were involved in all aspects of the work.* *Id.* at \*6–8.

Here, unlike in *Macina*, Coltzer testified that RPA and Shipley were involved in all aspects of the work and in the errors and omissions he outlined.

Appellants also rely on *Robert Navarro & Assocs. Eng'g*, 389 S.W.3d 475. There, the plaintiff hired two engineers, Navarro and Bath, to provide design services related to the construction of a warehouse facility. *Id.* at 476–77. After the project was substantially complete, it was discovered that the design and construction documents incorrectly showed existing and accessible water and sewer lines adjacent to the warehouse. *Id.* at 477. The plaintiff brought negligence and breach-of-contract claims against Navarro and a negligent misrepresentation claim against Bath. *Id.* In support, the plaintiff attached a certificate of merit from a licensed engineer, who opined 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 constitute[d] professional negligence by [Navarro] and and/or [Bath].” *Id.* at 478, 480–81. Navarro and Bath moved to dismiss the claims against them, asserting that the expert's affidavit was insufficient to meet the statutory requirements because it failed to attribute the alleged error solely to a particular defendant. *Id.* at 478. The trial court denied their motions. *Id.*

The court of appeals stated that section 150.002(a) “does not allow for collective assertions of negligence” and that “[i]t 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.* at 482 (emphasis added). The court noted that the basis for all of the plaintiff’s claims was a single alleged omission, i.e., that the project documents incorrectly showed the location of water and sewer lines. *Id.* The court considered which engineer sealed the project documents, noting that tying liability to the sealing of engineering documents is statutory. *Id.* at 480, 482. “Upon sealing, engineers take full professional responsibility for that work.” *Id.* at 480 (quoting 22 TEX. ADMIN. CODE § 137.33(b)). Because the expert’s affidavit did not specify which engineer had certified and sealed Drawing Sheet MO.1, the court concluded that the certificate of merit was insufficient. *Id.* at 480, 482.

Here, unlike in *Navarro*, there are numerous alleged acts and omissions with respect to the design drawings, and Coltzer specified in his affidavit that *both RPA and Shipley sealed* the documents.

We hold that the trial court did not abuse its discretion in denying RPA’s and Shipley’s motions to dismiss SSBG’s claims.

Accordingly, we overrule appellants’ first issue.

Because we conclude that the trial court did not abuse its discretion in denying appellants' motions to dismiss SSBG's claims against them, we do not reach appellants' second issue, in which they argue that the trial court erred in not dismissing SSBG's claims with prejudice. *See* TEX. R. APP. P. 47.1.

### **Conclusion**

We affirm the trial court's orders denying appellants' motions to dismiss SSBG's claims.

Sherry Radack  
Chief Justice

Panel consists of Chief Justice Radack and Justices Goodman and Farris.