Opinion issued September 13, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-22-00194-CV

JAMES DEAVER SERVICES, INC., Appellant

V.

DON MAFRIGE, Appellee

On Appeal from the 56th District Court
Galveston County, Texas
Trial Court Case No. 21-CV-0386

MEMORANDUM OPINION

This case is an interlocutory appeal from the trial court's denial of the motion to dismiss filed by appellant James Deaver Services, Inc. ("JDSI"). Appellee Don Mafrige sued JDSI and Bichon Roofing and General Contractors, Inc. ("Bichon") for negligence and fraud in connection with the replacement of a

roof on commercial property that Mafrige owned in Galveston. Mafrige alleged that the materials used on the roof replacement were unsuitable and improperly installed, resulting in his inability to obtain windstorm insurance coverage. JDSI filed a motion to dismiss under Chapter 150 of the Texas Civil Practice and Remedies Code. JDSI argued that the certificate of merit did not comply with the statute because it failed to provide an adequate factual basis upon which a court could conclude that the allegations against JDSI had merit and were not frivolous. *See* TEX. CIV. PRAC. & REM. CODE. §§ 150.001–.004. The trial court denied the motion, and JDSI appealed.

Because the certificate of merit did not describe JDSI's professional errors or omissions and their factual basis, we reverse the trial court's order, and we remand to the trial court for entry of an order dismissing Mafrige's claims against JDSI and for further proceedings.

Background

Appellee Don Mafrige owns a strip mall business complex on Seawall Boulevard in Galveston, Texas. On June 5, 2020, Mafrige contracted with Bichon to replace the roof and garage doors on the property. Only Mafrige and Bichon signed the agreement. The contract between Bichon and Mafrige described the re-roofing project and stated that Bichon would "provide JDSI Engineering for [the Texas] Windstorm [Insurance] application," that JDSI would "inspect [the] job"

throughout the progress of the construction, and that JDSI would "approve all work performed by Bichon." James Deaver is a licensed professional engineer and the principal of James Deaver Services Inc. ("JDSI"), a professional engineering firm.

Four days after Mafrige and Bichon signed the agreement, JDSI sent Bichon a letter containing project information. Deaver stated that he would be "the engine[er] of record for this project," and he made the following recommendation for replacing the roof:

> - Metal Roof—The existing roof will be removed and replaced with PBR-Panel Steel Roof Panels by McElroy Metal, Inc. Please refer to TDI Product Evaluation RC-284, found at this link: https://www.tdi.texas.gov/wind/prod/rc/rc284.pdf. The design uplift pressure capacity for panel installation on steel purlins at 48" OC is 96.7psf. According to the ASCE 7-05, which is the current code used for TDI Windstorm, the governing uplift pressure requirements are:
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>   - 93psf for corner.
>   - 63psf for perimeter.
>   - 36psf for field.
>
>   The capacity is greater than the pressure requirement. Therefore, JDSI approves of this product and its installation based on the TDI product evaluation listed above.

According to Mafrige's original petition, Bichon removed the existing roof and replaced it with a new metal roofing system. Mafrige alleged that after the new roof was installed, he learned that the newly installed roof did not comply with requirements for obtaining insurance from Texas Windstorm Insurance Association and that it was not constructed with the materials specified in the

contract. In August 2020, the director of engineering for McElroy Metal, the company that supplied materials to Bichon for the roof replacement, wrote to Mafrige regarding the use of its "Met-Tile" roof panel. The engineering director stated:

> This is to confirm that per the TDI [Texas Department of Insurance] evaluation report, RC-425, on McElroy's Met-Tile roof panel, Met-Tile has only been evaluated installed over plywood deck and has not been evaluated over open framing. In addition, McElroy Metals does not recommend this product be installed over open framing in any circumstance.

In October 2020, the Texas Department of Insurance ("TDI") sent JDSI an inquiry about the use of the Met-Tile product for the roof installation project. The inquiry included questions and instructions for testing and demonstrating the suitability of the Met-Tile product as installed on Mafrige's building. JDSI responded:

> JDSI plans to replace the existing Met Tile roof with another product at no additional cost to the building owner. JDSI is arranging communication with the building owner to coordinate the product installation time.
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> . . . .
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> JDSI will use a product with current and relevant test data and will not require outside testing.
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> . . . .
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> JDSI is ready to commence the process of removal of existing Met Tile Roof product and replacement with approved product selection, the start of replacement, and at the completion of the project. Upon

> completion, JDSI will reissue a WPI-2-BC6 [TDI Inspection Verification form] to TDI. This process will require no funds from the building owner.

In March 2021, Mafrige filed suit against Bichon and JDSI. As to JDSI, Mafrige pleaded claims for common law fraud and fraud in a real estate transaction, based on JDSI's allegedly intentional misrepresentations about its intentions and ability to perform the work in compliance with the contract. Mafrige also pleaded a claim for professional negligence based on JDSI's failure to use ordinary care as a reasonable and prudent licensed professional.[1] Mafrige attached a certificate of merit to his original petition. The certificate of merit from Chandra Franklin Womack, a professional structural engineer licensed in Texas, Louisiana, New Jersey, New York, and Florida, stated her professional credentials and her familiarity with the "construction materials to be used on commercial structures," including those normally used on buildings like Mafrige's building. She also specified that she is familiar with the "construction materials, means, and methods for use in accordance with the International Building Code (IBC)." In relevant part, the certificate of merit states:

> 13. The date of the re-roof began July 2, 2020, which is pertinent for establishing governing codes at the time of the re-roof. This date was noted on the WPI application 2193702 filed by James

[1] Bichon pleaded crossclaims against JDSI for negligence and breach of contract, alleging that JDSI failed to provide proper instructions as to the material and method of installation for the roof replacement. Those crossclaims are not part of this appeal.

Deaver PE and listed as commencement of construction date. The WPI-2 certification has not been filed by the engineer.

14. The documents that I have reviewed are the types of materials that are normally and regularly utilized by and reasonably relied upon by experts in the field of engineering. The materials and the work I have done assisted in the formulation of my opinions expressed herein. Metal Roofing Product was McElroy Metal, Inc. Met-Tile 26 ga. steel panel, TDI RC-425 (pressure -86.0 psf) and Florida Building Code Product number FL 17905-R6 (UL 671, pressure +0/-52.5 psf). There is no published Miami Dade NOA on this product.

    The second roof product for the flat metal roof area was identified as McElroy Metal, Inc. PBR-panel 26 ga. formed metal panels installed over steel purlins at 24" o.c. (TDI RC-284, pressures -175 psf) and appears to be the correct installation for this product.

15. The existing building framing and substrate roof deck have also been assessed to determine metal product installment. Both published reports for the Met-Tile product require installation over a plywood deck. Additionally, the Manufacturer was consulted for alternate installations directly over a steel purlin system and they do not support this type of installation without a plywood deck. Please see attached manufacturer's letter.

16. Transitions between the pitched and flat portions of the roof are experiencing water infiltration. Improper roof installation and lack of counter flashing are leading to this condition causing damage to the interior of the building. The manufacturer requires counter flashing between the parapet walls and the roof building which is not evident in current inspections. Please see attached Detail H from the manufacturer regarding counter flashing.

17. The opinions expressed herein were formulated using methodologies that are commonly accepted in the field of Engineering.

18. The opinions expressed herein are based upon reasonable engineering probability.

19. Based upon my review of the materials and considering my knowledge, skills, training, education, and experience, it is my opinion that the contractor Rycon Construction in accordance with the express and/or implied warranties made with respect to their work, which caused and/or contributed to cause, in whole or in part, the water infiltration at the building a well as the potential inability of the owner to obtain windstorm insurance. [*Sic*.] Additionally, the engineer of record James Deaver P.E. has not accepted this roof installation for final TDI windstorm certification. The roof installation is not in compliance with tested installation nor is the counter flashing installed in an acceptable manner to prevent water infiltration which is preventing insurability and safe use of the structure.

Conclusion:

As described, the contractor failed to exercise ordinary care in providing TDI Windstorm compliant roof system. Specifically, the contractor failed by not providing TDI windstorm compliant roof system to meet windstorm provisions of ASCE 7-16 to a tested assembly. Contractor also was negligent in following the IBC 2012 and manufacturer's installation requirements for counter flashing, which allowed water infiltration to occur in the building. Such negligence caused and/or contributed to the damages described herein, in whole or in part.

20. The factual bases for the descriptions of the negligence, errors and/or omission that occurred in providing professional contracting services, failing to fulfill the professional obligations, and other acts have been set forth in this affidavit.

/s/

Chandra Franklin Womack, P.E.

JDSI filed a motion to dismiss Bichon's claims under Chapter 150 of the Texas Civil Practice and Remedies Code. JDSI argued that the certificate of merit

did not comply with the statute because it failed to provide a factual basis for Bichon's claims or allegations of actions, errors, or omissions in the provision of professional services. In response, Mafrige asserted that the motion to dismiss was frivolous and argued that references in the certificate of merit to the "contractor" and its errors and omissions necessarily included JDSI because the contract included both construction and engineering services. After a non-evidentiary hearing, the trial court denied the motion to dismiss, and JDSI appealed.

Analysis

In a single issue on appeal, JDSI argues that the trial court abused its discretion by denying its motion to dismiss because the certificate of merit failed to state a factual basis for Mafrige's allegations of professional errors or omissions.

I. We apply an abuse-of-discretion standard of review to the trial court's ruling on a motion to dismiss and review statutory construction questions de novo.

"We review a trial court's order on a motion to dismiss for failure to file a compliant certificate of merit in accordance with Civil Practice & Remedies Code section 150.002 for an abuse of discretion." *TRW Eng'rs, Inc. v. Hussion St. Bldgs., LLC*, 608 S.W.3d 317, 319 (Tex. App.—Houston [1st Dist.] 2020, no pet.); *see Pedernal Energy, LLC v. Bruington Eng'g, Ltd.*, 536 S.W.3d 487, 493–95 (Tex. 2017) (discussing trial court's discretion to grant dismissal with or without prejudice). "A court abuses its discretion if it fails to analyze or apply the law

correctly," *TRW Eng'rs*, 608 S.W.3d at 319, and when it makes decisions in an arbitrary or unreasonable manner, without reference to guiding rules or principles. *Pedernal Energy*, 536 S.W.3d at 492.

When resolution of an appellate issue requires interpretation of a statute, we engage in a de novo review. *See id.* at 491. Our goal in construing a statute is to determine and give effect to the Legislature's intent. *Id.* (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). "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.

II. The certificate of merit must identify the defendant's professional errors and omissions and state the factual basis for each.

Section 150.002 of the Civil Practice and Remedies Code gives licensed and registered professionals and the firms where they practice "the right to a professional certification that any complaint about their services has merit before any litigation may be undertaken at all." *LaLonde v. Gosnell*, 593 S.W.3d 212, 220 (Tex. 2019) (citing TEX. CIV. PRAC. & REM. CODE § 150.002(a), (b), (d)).

> (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 licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor who:
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> (1) is competent to testify;
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> (2) holds the same professional license or registration as the defendant; and
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> (3) practices in the area of practice of the defendant and offers testimony based on the person's:
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> (A) knowledge;
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> (B) skill;
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> (C) experience;
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> (D) education;
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> (E) training; and
>
> (F) practice.

TEX. CIV. PRAC. & REM. CODE § 150.002(a).

The affiant third-party licensed or registered professional "shall be licensed or registered in this state and actively engaged in the practice of architecture, engineering, or surveying." *Id.* § 150.002(b). The certificate of merit "shall set forth specifically for each theory of recovery for which damages are sought, the negligence, if any, or other action, error, or omission of the licensed or registered professional in providing the professional service, including 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.*

The statute applies both to professional negligence claims and to any action arising from the provision of professional services, regardless of legal theory. *Melden & Hunt, Inc. v. E. Rio Hondo Water Supply Corp.*, 520 S.W.3d 887, 894–95 (Tex. 2017). To satisfy the factual basis requirement, a claimant need not separately address the various elements of each legal theory the claimant alleges. *Id.* at 896. "The statute instead 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 certificate of merit should identify the professional errors or omissions and their factual basis of each defendant or expressly state that all defendants were involved in every aspect of the work. *See T & T Eng'g Servs., Inc. v. Danks*, No. 01-21-00139-CV, 2022 WL 3588718, at *7 (Tex. App.—Houston [1st Dist.] Aug. 23, 2022, no pet. h.) (mem. op.) (quoting *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.) (holding that section 150.002(b) "does not allow for collective assertions of negligence" in certificate of merit); *Fluor Enters., Inc. v. Maricelli*, No. 09-19-00121-CV, 2020 WL 2070257, at *5 (Tex. App.—Beaumont Apr. 30, 2020, pet. denied) (mem. op.) (concluding that certificate of merit must specifically

address "the conduct of the professional who provided the service at issue"); *Macina, Bose, Copeland & Assocs. v. Yanez*, No. 05-17-00180-CV, 2017 WL 4837691, at *7–8 (Tex. App.—Dallas Oct. 26, 2017, pet. dism'd) (mem. op.) (concluding that claims against group of defendants should have been dismissed because certificate of merit "did not distinguish between the acts, omissions, and errors of each defendant but collectively assigned the negligence and errors to both of them"); *DHM Design v. Morzak*, No. 05-15-00103-CV, 2015 WL 3823942, at *3 (Tex. App.—Dallas June 19, 2015, pet. denied) (mem. op.) ("The plain language of the statute requires the certificate to speak specifically to the conduct of the professional who provided the service at issue in the theory of recovery. . . . The certificate must identify the particular defendant and that defendant's specific conduct."); *see also Res. Planning Assocs., LLC v. Sea Scout Base Galveston & Point Glass, LLC*, No. 01-19-00965-CV, 2021 WL 1375797, at *16–17 (Tex. App.—Houston [1st Dist.] Apr. 13, 2021, pet. denied) (mem. op.) (distinguishing *Macina* on basis that expert averred that both defendants "were involved in all aspects of the work and in the errors and omissions [the expert] outlined"). Thus, "[i]n a case involving multiple defendants, the court must be able to 'determine which acts or omissions should be ascribed to which company,' or the certificate of merit should opine that 'both companies were involved in all aspects of the work.'"

T & T Eng'g Servs., 2022 WL 3588718, at *7 (quoting *Macina, Bose, Copeland & Assocs.*, 2017 WL 4837691, at *6).

When a claimant fails to file a certificate of merit that complies with section 150.002, the trial court shall dismiss the complaint against the defendant. TEX. CIV. PRAC. & REM. CODE §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."). *See generally*, *Melden & Hunt*, 520 S.W.3d at 896 (stating that when plaintiff files certificate of merit, trial court "determines whether the expert's affidavit sufficiently demonstrates that the plaintiff's complaint is not frivolous"); *CTL/Thompson Tex., LLC v. Starwood Homeowner's Ass'n, Inc.*, 390 S.W.3d 299, 301 (Tex. 2013) (describing dismissal as "sanction . . . to deter meritless claims and bring them quickly to an end").

Dismissal under Chapter 150 "may be with prejudice." TEX. CIV. PRAC. & REM. CODE §150.002(e). "The right to dismissal under section 150.002 is clear and unequivocal." *LaLonde*, 593 S.W.3d at 225. "But dismissal for noncompliance with the certificate-of-merit requirement may be with or without prejudice, a matter within the trial court's discretion." *Id.*; *see Pedernal Energy*, 536 S.W.3d at 494–95 (discussing trial court's discretion to dismiss with prejudice and holding that only facts in existence at time of filing petition and certificate of merit are material to whether dismissal should be with prejudice).

III. The trial court abused its discretion by denying the motion to dismiss because the certificate of merit does not provide the factual basis of any alleged error or omission.

The certificate of merit in this case does not identify JDSI's errors or omissions or provide the factual basis for any alleged errors or omissions.[2] Instead, it explains that the roof was erroneously installed without counterflashing, and this error in installation caused the infiltration of water. It also states that the improper installation "prevent[ed] insurability and safe use of the structure." But nothing in the certificate of merit connects the flawed or incorrect installation to an error or omission made by JDSI. Instead, Womack attested that it was "the contractor Rycon Construction" that caused the faulty installation: "[I]it is my opinion that the contractor Rycon Construction . . . which caused and/or contributed to cause, in whole or in part, the water infiltration at the building as well as the potential inability of the owner to obtain windstorm insurance." Womack expressly concluded that "the contractor failed to exercise ordinary care in providing [a] TDI Windstorm compliant roof system," by failing to follow industry standards and manufacturer's installation requirements.

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[2] In this case, it is undisputed that JDSI is considered a "licensed or registered professional" in which Deaver, a licensed professional engineer, practices. *See* TEX. CIV. PRAC. & REM. CODE §150.001(1-c) (defining "licensed or registered professional" to include "any firm in which such licensed or registered professional practices").

Womack attested that "the engineer of record James Deaver P.E. has not accepted this roof installation for final TDI windstorm certification," but it is not clear that this statement is an identification of an error or omission made by JDSI. Nothing in the certificate of merit states that failing to certify the insurability of a noncompliant roof installation is a professional error or omission. Womack also stated that the metal roofing that JDSI recommended, a McElroy Metal product that corresponded to TDI RC-284, "appear[ed] to be the correct installation for this product." This is likewise not an assertion that JDSI made an error or omission.

Mafrige argues that the certificate of merit "blatantly states that [JDSI's] failure to ensure the quality and material of the roof replacement is preventing insurability of the strip mall business complex." We disagree. To the extent that the certificate of merit assigns fault, it was a collective assertion of negligence as to JDSI and "Rycon" Construction.[3] This is insufficient to satisfy the requirements of section 150.002.[4] *See T & T Eng'g Servs.*, 2022 WL 3588718, at *7.

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[3] In its brief, JDSI asserts that Womack substituted "Rycon" for "Bichon" in the certificate of merit. Rycon Construction is not a party to this case. Our conclusion that a collective assertion of negligence is insufficient to satisfy the certificate of merit requirements does not rely on the erroneous naming of "Bichon" as "Rycon."

[4] In the trial court, Mafrige argued that the reference to the "contractor" in the certificate of merit necessarily included JDSI. Specifically, Mafrige argued: "Since the Contract at issue here includes both construction and engineering services, reference to the 'contractor' in Ms. Womack's certificate of merit includes the engineering services [JDSI] provided pursuant to the contract. Any reference to the Contractor's errors and/or omissions in the certificate of merit

The certificate of merit simply does not identify an error or omission made by JDSI and provide a factual basis for it. Therefore, it does not comply with section 150.002 of the Civil Practice and Remedies Code. Because JDSI's right to dismissal is clear and unequivocal, *see LaLonde*, 593 S.W.3d at 225, we conclude that the trial court abused its discretion by denying JDSI's motion to dismiss. We sustain JDSI's sole issue.

Conclusion

We reverse the trial court's order denying the motion to dismiss, and we remand to the trial court for entry of an order dismissing Mafrige's claims against JDSI and for further proceedings.

Peter Kelly
Justice

Panel consists of Justices Kelly, Rivas-Molloy, and Guerra.

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necessarily included [JDSI]." We disagree. First, JDSI was not a party to the contract between Mafrige and Bichon. Second, the certificate of merit refers to "the contractor Rycon Construction." Third and finally, this argument also depends on a collective assertion of negligence, which is improper in the context of a Chapter 150 certificate of merit. *See, e.g.*, *See T & T Eng'g Servs.*, 2022 WL 3588718, at *7.