Reversed and Remanded, and Majority and Concurring Opinions filed August 10, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00645-CV

SHARP ENGINEERING AND PRADEEP SHAH, Appellants

V.

SERGIO R. LUIS AND JUDITH YANET DELGADO, INDIVIDUALLY AND AS NEXT FRIEND OF SERGIO LUIS DELGADO, JACKELINE LUIS AND JOHNATHA LUIS, MINORS, Appellees

On Appeal from the 133rd Judicial District Court
Harris County, Texas
Trial Court Cause No. 2009-10120

CONCURRING OPINION

I respectfully concur. I write separately to note my concerns about the operation and efficacy of this statute. Its ostensible purpose is to provide a mechanism for the threshold elimination of meritless claims against certain professional service providers.[1]

[1] *See Criterium-Farrell Eng'rs v. Owens*, 248 S.W.3d 395, 399 (Tex. App.—Beaumont 2008, no pet.); *but see Palladian Bldg. Co. v. Nortex Found. Designs, Inc.*, 165 S.W.3d 430, 436 (Tex. App.—Fort Worth 2005, no pet.) ("[N]o legislative history exists regarding the legislature's intent in enacting the

That is, of course, a legitimate legislative purpose. However, as this case illustrates, the actual application of this statute is fraught with ambiguity and potentially unintended consequences.

On its face, the statute is hardly a model of clarity, and it has already spawned a fairly impressive volume of litigation in its short history.[2] Recent cases have raised some significant issues of statutory construction, including the following:

- What constitutes an adequate "factual basis" for the mandated certificate of merit;[3]

- Whether a certificate of merit must reference some relevant "standard of care" for the professional;[4]

---

statute, and . . . the statute itself does not reflect its purpose or include a stated policy.").

[2] *See Benchmark Eng'g Corp. v. Sam Houston Race Park*, ___ S.W.3d ___, 2010 WL 1709225 (Tex. App.—Houston [14th Dist.] Apr. 29, 2010, no pet.); *Hughes v. Bay Area Montessori House, Inc.*, No. 14-09-00410-CV, 2010 WL 862861 (Tex. App.—Houston [14th Dist.] March 11, 2010, no pet.) (mem. op.); *Found. Design, Ltd. v. Barzoukas*, No. 14-08-00485-CV, 2009 WL 1795130 (Tex. App.—Houston [14th Dist.] June 25, 2009, no pet.) (mem. op.); *Ustanik v. Nortex Found. Designs, Inc.*, ___ S.W.3d ___, 2010 WL 2404453 (Tex. App.—Waco June 16, 2010, no pet. h.); *UOP, L.L.C. v. Kozak*, No. 01-08-00896-CV, 2010 WL 2026037 (Tex. App.—Houston [1st Dist.] May 20, 2010, no pet. h.) (mem. op.); *Curtis & Windham Architects, Inc. v. Williams*, ___ S.W.3d ___, 2010 WL 670584 (Tex. App.—Houston [1st Dist.] Feb. 25, 2010, no pet.); *Ashkar Eng'g Corp. v. Gulf Chem. & Metallurgical Corp.*, No. 01-09-00855-CV, 2010 WL 376076 (Tex. App.—Houston [1st Dist.] Feb. 4, 2010, no pet.) (mem. op.); *DLB Architects, P.C. v. Weaver*, 305 S.W.3d 407 (Tex. App.—Dallas 2010, pet. denied); *JNY, L.P. v. Raba-Kistner Consultants, Inc.*, 311 S.W.3d 584 (Tex. App.—El Paso 2010, no pet.); *WCM Group, Inc. v. Brown*, 305 S.W.3d 222 (Tex. App.—Corpus Christi 2009, pet. dism'd); *WCM Group, Inc. v. Camponovo*, 305 S.W.3d 214 (Tex. App.—Corpus Christi 2009, pet. dism'd); *Parker County Vet'y Clinic, Inc. v. GSBS Batenhorst, Inc.*, No. 2-08-380-CV, 2009 WL 3938051 (Tex. App.—Fort Worth Nov. 19, 2009, rule 53.7(f) motion granted) (mem. op.); *Landreth v. Las Brisas Council of Co-Owners, Inc.*, 285 S.W.3d 492 (Tex. App.—Corpus Christi 2009, no pet.); *Consol. Reinforcement, L.P. v. Carothers Executive Homes, Ltd.*, 271 S.W.3d 887 (Tex. App.—Austin 2008, no pet.); *Criterium-Farrell Eng'rs*, 248 S.W.3d 395; *Gomez v. STFG, Inc.*, No. 04-07-00223-CV, 2007 WL 2846419 (Tex. App.—San Antonio Oct. 3, 2007, no pet.) (mem. op.); *Kniestedt v. Sw. Sound & Elecs., Inc.*, 281 S.W.3d 452 (Tex. App.—San Antonio 2007, no pet.); *Palladian Bldg. Co.*, 165 S.W.3d 430.

[3] *Benchmark*, ___ S.W.3d ___, 2010 WL 1709225, at *6; *see* Tex. Civ. Prac. & Rem. Code Ann. § 150.002(b) (Vernon Supp. 2009).

- Whether the statements contained in a certificate of merit must meet standards of evidentiary admissibility;[5]

- Whether a certificate of merit is required in non-negligence cases against a professional;[6]

- What is the scope of the limited good cause exception to extend the deadline for the filing of a certificate of merit;[7]

- Whether the statute extends to claims against non-resident professionals;[8] and

- Whether any deadline exists for a defendant to move for dismissal.[9]

More litigation is almost certain to follow in light of the statute's opaqueness and ambiguity.

And the construction and application of the statute in this case is particularly troubling. As noted, its apparent purpose is to screen meritless claims. *See Criterium-Farrell Eng'rs*, 248 S.W.3d at 399. However, counsel for the defendant

---

[4] *Benchmark*, ___ S.W.3d ___, 2010 WL 1709225, at *4–5 (holding certificate need not recite standard of care); *but see Criterium-Farrell Eng'rs*, 248 S.W.3d at 400 ("[T]he certificate of merit must necessarily address the applicable standard of care . . . .").

[5] *Benchmark*, ___ S.W.3d ___, 2010 WL 1709225, at *5.

[6] *Parker County Vet'y Clinic*, 2009 WL 3938051, at *3; *Gomez*, 2007 WL 2846419, at *2–3; *Kniestedt*, 281 S.W.3d at 455.

[7] *Brown*, 305 S.W.3d at 230; *see* Tex. Civ. Prac. & Rem. Code Ann. § 150.002(c).

[8] *DLB Architects*, 305 S.W.3d at 411.

[9] *Id*. ("[T]he statute does not contain any deadline for requesting dismissal."); *Landreth*, 285 S.W.3d at 500; *Palladian Bldg. Co.*, 165 S.W.3d at 434–35. The omission of any such deadline is disconcerting because it may encourage a defendant to wait for limitations to expire before requesting dismissal, thus rendering illusory the statute's option of dismissal without prejudice. *See* Tex. Civ. Prac. & Rem. Code Ann. § 150.002(e).

acknowledged in oral argument that he does not actually contend in his motion to dismiss (or this appeal) that the plaintiff's claim is meritless. Instead, his argument is simply that the statute, properly construed, is utterly unforgiving and procedurally draconian in the context of this case.

Unfortunately, as it turns out, he is correct. As the majority notes, the literal language of the statutory provision in question seemingly cannot be reconciled with any other construction or result. And we are bound by the rules of statutory construction – even though it would appear that the legislative draftsmanship has yielded in this case only a statute that is a trap for the unwary[10] rather than a screen for meritless claims.

One can only hope that the Legislature will recognize the need for significant revisions to this statute. Other states have enacted similar statutes,[11] and they have generally included more comprehensive frameworks for the threshold screening of claims.[12] Texas is also not new to this arena; it has substantial experience with the

---

[10] The lack of any meaningful opportunity to cure is particularly troubling given chapter 150's relative obscurity. Notwithstanding its applicability to negligence actions against design professionals, the statute is not grouped with similar statutes in Title 4 of the Civil Practice and Remedies Code – called "Liability in Tort" – although the legislature left room in that section for expansion. *See* Tex. Civ. Prac. & Rem. Code Ann. tit. 4 (Vernon 2005). Instead, chapter 150 may be found among the Code's "*Miscellaneous* Provisions" in Title 6, where its unexpected neighbors consist of statutes regarding the Y2K computer problem and corporate successors' asbestos-related liability. *See id*. tit. 6 (Vernon 2005).

And, unlike its comprehensive medical-malpractice counterpart, chapter 150 primarily affects only one small – but crucial – part of an engineering-malpractice action. *Compare* Tex. Civ. Prac. & Rem. Code Ann. §§ 74.001–.507 (Vernon 2005 & Supp. 2009) (governing both substance and procedure of medical-liability suits) *with* Tex. Civ. Prac. & Rem. Code Ann. §§ 150.001–.003 (Vernon 2005 & Supp. 2009) (covering only certificates of merit and liability during a disaster). Thus, its obscure location and limited application may prevent prudent attorneys from even *knowing of* the statute's existence and the requirement of a certificate of merit. Respectfully, the legislative purpose of filtering between meritorious and frivolous claims is not well served by an obscure, hard-to-find statute that offers no quarter even for an attorney's inadvertence. *Cf., e.g.*, Ga. Code Ann. § 9-11-9.1(f) (2006) (permitting plaintiff to cure inadvertent failure to file expert's affidavit).

[11] *See* Del. Code Ann. tit. 18, § 6853 (Supp. 2008); Ga. Code Ann. § 9-11-9.1; Mich. Comp. Laws § 600.2912d; N.J. Stat. Ann. § 2A:53A-27; N.Y. C.P.L.R. § 3012-a; Ohio Civ. R. 10(D)(2); Pa. R.C.P. 1042.3.

[12] The Georgia model, for example, encompasses malpractice claims against twenty-six categories

statutory regulation of medical-malpractice claims.[13] Hopefully, one or more of these statutes can provide a roadmap to a revised Texas statute in which purpose and application more closely align.

/s/ Kent C. Sullivan
Justice

Panel consists of Justices Frost, Boyce, and Sullivan. (Boyce, J., majority).

---

of licensed professionals, including architects and engineers, accountants, lawyers, nurses, and medical doctors. *See* Ga. Code Ann. § 9-11-9.1(g). In some ways, chapter 150 resembles a pared-down version of the Georgia statute, employing similar language and procedural requirements. *Compare id. with* Tex. Civ. Prac. & Rem. Code Ann. §§ 150.001–.002. Notably, under Georgia law, a claimant may revive a professional-liability action that has been dismissed, even after the expiration of limitations, if the initial failure to file the expert's affidavit resulted from mistake or inadvertence, as apparently occurred here. *See* Ga. Code Ann. §§ 9-11-9.1(f), 9-2-61(a); *see also, e.g.*, N.J. Stat. Ann. § 2A:53A-27 (allowing trial court to grant one extension, upon a finding of good cause, to file report); Pa. R.C.P. 1042.3(d) (permitting trial court to extend filing deadline 60 days for "good cause shown").

[13] *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 74.001–.507.