Opinion and Judgment filed October 10, 2017 Withdrawn, Appellants' Motion for En Banc Reconsideration Denied as Moot, Appellees' Motion to Dismiss Granted, Appeal Dismissed, and Substitute Memorandum Opinion filed November 21, 2017.

In The

Fourteenth Court of Appeals

NO. 14-17-00543-CV

JACOBS FIELD SERVICES NORTH AMERICA, INC., JACOBS ENGINEERING GROUP, INC., AND JACOBS ENGINEERING, INC., Appellants

V.

MAURICE WARE AND VALIERY JACKSON-WARE, INDIVIDUALLY AND AS NEXT FRIEND OF MAURICE WARE, JR., MINOR, Appellees

On Appeal from the 61st District Court
Harris County, Texas
Trial Court Cause No. 2015-27771

S U B S T I T U T E M E M O R A N D U M O P I N I O N

We withdraw our opinion issued October 10, 2017, vacate our previous judgment, and issue this substitute opinion and judgment.

Appellants, Jacobs Field Services North America, Inc., Jacobs Engineering

Group, Inc., and Jacobs Engineering, Inc. (Jacobs), bring this interlocutory appeal from the trial court's order signed June 30, 2017. Appellees, Maurice Ware and Valiery Jackson-Ware, Individually and as Next Friend Of Maurice Ware, Jr., Minor (Ware), filed a motion to dismiss contending this court lacks jurisdiction as appellants failed to timely perfect an appeal. We grant Ware's motion and dismiss the appeal.

BACKGROUND

Ware brought suit against Jacobs[1] alleging claims of negligence, gross-negligence, strict liability, and product-defect. Ware's petition included a certificate of merit by Gregg S. Perkin, P.E. in support of the claims. On January 13, 2016, Jacobs filed a motion to dismiss contending Perkin's certificate of merit did not comply with the requirements of chapter 150.[2] Jacobs specifically complained that Perkin's certificate did not set forth negligence, errors, or omissions for each defendant, or a factual basis for same, but rather included collective assertions of negligence. The trial court signed an order on March 15, 2016 denying Jacobs's motion to dismiss. Jacobs did not appeal that order.

On May 31, 2017, Jacobs filed an amended motion to dismiss pursuant to chapter 150. In the amended motion, Jacobs contended recent case law from the Texas Supreme Court clarified chapter 150's knowledge requirement. Jacobs argued that Perkin's certificate failed to satisfy the knowledge requirement under chapter 150. Jacobs noted the trial court had not considered whether Perkin's certificate satisfied the knowledge requirement under chapter 150 when it denied Jacobs's first motion to dismiss. In the amended motion, Jacobs again contended Perkin's

[1] Appellees underlying suit involves additional defendants who are not parties to this appeal.

[2] Tex. Civ. Prac. & Rem. Code Ann. § 150.002 (West 2011).

certificate included collective assertions of negligence as to all defendants and therefore did not satisfy chapter 150's requirements. Ware responded that the court should not reconsider Jacobs's motion challenging the sufficiency of Perkin's certificate under chapter 150. Additionally, Ware argued, among other things, that Jacobs's argument based on the knowledge requirement under chapter 150 was waived as it was not included in the first motion to dismiss.

The trial court signed an order denying Jacobs's amended motion to dismiss on June 30, 2017. Jacobs filed a notice of appeal on July 13, 2017.

ANALYSIS

A. Jacobs's Interlocutory Appeal

Interlocutory appeal is not permitted unless expressly authorized by statute. *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 352 (Tex. 2001). Statutes authorizing interlocutory appeal are strictly construed because they are a narrow exception to the general rule that interlocutory orders are not appealable. *See Branch Law Firm, L.L.P. v. Osborn*, No. 14-14-00892-CV, 2016 WL 444867, at *3 (Tex. App.—Houston [14th Dist.] Feb. 4, 2016, pet. denied). Section 150.002 of the Texas Civil Practice and Remedies Code provides that an order denying a motion to dismiss for a certificate of merit's failure to comply with the requirements of the section is an immediately appealable interlocutory order. *See* Tex. Civ. Prac. & Rem. Code Ann. § 150.002(e), (f).

An appeal from an interlocutory order is accelerated. Tex. R. App. P. 28.1(a). In an accelerated appeal, absent a motion to extend time, the deadline for filing a notice of appeal is strictly set at 20 days after the judgment or order is signed. *In re K.A.F.*, 160 S.W.3d 923, 927 (Tex. 2005); *see also* Tex. R. App. P. 26.1(b). A motion for reconsideration will not extend the deadline. *See City of Houston v. Estate of*

Jones, 388 S.W.3d 663, 667 (Tex. 2012). The deadline for filing a notice of appeal is jurisdictional, and absent a timely filed notice of appeal or request for extension of time, we must dismiss the appeal. *Garg v. Pham*, 485 S.W.3d 91, 99 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

Ware contends that the amended motion to dismiss was a motion to reconsider the trial court's ruling on March 15, 2016. Further, Ware contends that the amended motion did not extend the deadline to file a notice of appeal from the March 15, 2016 order. Ware argues the notice of appeal filed July 13, 2017 is untimely. Jacobs argues that the amended motion to dismiss is a distinct motion and subject to different appellate deadlines. Specifically, Jacobs argues the amended motion contained new arguments under section 150.002 and waiver and estoppel and that new exhibits were relied on related to the disposition of the amended motion.

In support of their contentions, Ware relies on *CTL/Thompson Texas, LLC v. Morrison Homes*, 337 S.W.3d 437 (Tex. App.—Fort Worth 2011, pet denied). In *Morrison Homes*, CTL filed two motions to dismiss Morrison Homes's claims based on the alleged inadequacy of the certificate of merit filed with the petition under chapter 150. *Id.* at 441. The court stated the purpose a certificate of merit is to provide a basis for the trial court to conclude that a plaintiff's claims have merit. *Id*. at 442. The court further stated that in denying the first motion to dismiss, the trial court determined that the certificate satisfied the statutory requirement by providing a basis for the court to conclude that at least one of the plaintiff's claims had merit. *Id.*

In *Morrison Homes*, the second motion alleged additional inadequacies not alleged in the first motion and contained additional case law, but was otherwise the same. *Id*. at 441. The court concluded the order ruling on the second motion was not an appealable order "because nothing in chapter 150 authorizes a defendant to raise

successive adequacy challenges to the same certificate of merit, one challenge at a time, or to perfect successive appeals from a trial court's rulings on those motions." *Id*. at 442. The court stated the objectives of section 150.002 would be undermined by such a construction. *Id*. Further, the court concluded the second motion was not substantively different from the first as both challenged the adequacy of the certificate of merit. *Id*. at 443.

Jacobs's contends, relying on our court's opinion in *Branch Law Firm*, that the inclusion of an additional argument in the amended motion results in the June 30, 2017 order being a separate, appealable interlocutory order. *Branch Law Firm* involved a motion to compel arbitration. *Branch Law Firm*, 2016 WL 444867, at *1. After the first motion to compel arbitration, the Branch parties filed an interlocutory appeal. *Id*. at *2. Our court affirmed the denial without prejudice to filing another motion as [appellants] failed to submit the entirety of the MSA containing the arbitration provision to the trial court. *Id*. The failure to include the exhibits was a possible defect in the motion preventing the trial court from properly determining whether a valid arbitration agreement existed and whether the claims fell within the scope of the agreement. *See Branch Law Firm, L.L.P. v. Osborn*, 447 S.W.3d 390, 398 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

On remand, the Branch parties filed a second motion, wherein they attached the entire MSA, but not all exhibits to the MSA. *Branch Law Firm*, 2016 WL 444867, at *2. In denying the motion, the trial court, in light of the objection due to the lack of exhibits, stated it was denying the motion but not disqualifying the parties from filing another motion. *Id*. The third motion to compel arbitration included the entire MSA and all exhibits, along with a new argument that they had not waived the right to compel arbitration. *Id*. at *3. Osborn contended, in response to the third motion, that it was really a motion for reconsideration. *Id*. The trial court declined

to treat the third motion as a motion for reconsideration and denied the third motion to compel arbitration. *Id*. In concluding there was jurisdiction over the interlocutory appeal from the order denying the third motion, the court noted the third motion contained a new argument regarding waiver of arbitration. *Id*. at *5. The court also noted the additional exhibits to the MSA attached to the third motion. *See id.* The court concluded the third motion was a "distinct motion" to compel arbitration. *See id*.

In determining whether Jacobs's second motion is a distinct motion which merits an independent twenty-day interlocutory appeal period, we evaluate "whether the substance of the two relevant motions differed substantially." *See City of Magnolia 4A Economic Development Corp. v. Smedley*, — S.W.3d —, 2017 WL 4848580, at *3 (Tex. 2017). Both motions challenge the adequacy of Perkin's certificate of merit under chapter 150. Jacobs's amended motion raises an additional argument under chapter 150. However, it does not seek dismissal of the lawsuit on a ground other than a deficiency in the certificate of merit under section 150.002. While Jacobs raised a new argument in the amended motion to dismiss, the substance of the motion is not substantially different from the original motion to dismiss. We conclude the amended motion is substantively a motion to reconsider the denial of the original motion which does not merit an independent interlocutory appeal period. *See Estate of Jones*, 388 S.W.3d at 667 (court of appeals did not have jurisdiction over interlocutory appeal as to second plea to the jurisdiction which raised a new argument, but not a new ground).

B. Jacobs's Alternative Request for Mandamus Relief

Alternatively, Jacobs requests we treat the appeal of the trial court's June 30, 2017 order as a petition for writ of mandamus. We consider Jacobs's alternative request for relief. *See CHM Homes v. Perez*, 340 S.W.3d 444, 453 (Tex. 2011).

Mandamus review is appropriate if the trial court clearly abused its discretion and the party has no adequate remedy on appeal. *See In re Prudential Ins. Co. of America*, 148 S.W.3d 124, 135–36.

Jacobs is seeking review of an order denying a motion to dismiss under Chapter 150 of the Texas Civil Practice and Remedies Code. Such an order is reviewable by interlocutory appeal. *See* Tex. Civ. Prac. & Rem. Code Ann. § 150.002(f). We are without jurisdiction over Jacobs's appeal of the interlocutory order because Jacobs's notice of appeal was untimely filed. *See Garg v. Pham*, 485 S.W.3d 91, 99 (Tex. App.—Houston [14th Dist.] 2015, no pet.). However, the failure to timely pursue an adequate legal remedy does not justify mandamus relief. *See In re Robertson*, No. 14-16-01013-CV, 2017 WL 506807, at *2 (Tex. App.—Houston [14th Dist.] Feb. 7, 2017, orig. proceeding) (per curiam) (mem. op.). As an adequate remedy on appeal exists, mandamus relief is not appropriate in this case.

CONCLUSION

We conclude the amended motion to dismiss was substantively a motion to reconsider the trial court's March 15, 2016 order. As Jacobs's notice of appeal was not filed within 20 days of the March 15, 2016 order, we conclude that we do not have jurisdiction to consider this untimely interlocutory appeal. As Jacobs has not established that it is entitled to mandamus relief, we deny Jacobs's alternative request to treat this appeal as a petition for writ of mandamus. We grant Ware's motion to dismiss and order the appeal dismissed for lack of jurisdiction.

PER CURIAM

Panel consists of Justices Christopher, Brown, and Wise.