



**COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH**

NO. 02-11-00118-CV

ED GUTIERREZ, INDIVIDUALLY
AND DBA J.E. & ASSOCIATES

APPELLANT

V.

CLASSIC REFLECTIONS POOLS,
INC.

APPELLEE

FROM THE 431ST DISTRICT COURT OF DENTON COUNTY

MEMORANDUM OPINION¹

Appellant Ed Gutierrez, individually and d/b/a J.E. & Associates, appeals the trial court's order denying his motion to dismiss appellee Classic Reflections Pools, Inc.'s cross-claim. In two issues, Gutierrez contends that the trial court abused its discretion by denying his section 150.002 certificate-of-merit motion to

¹See Tex. R. App. P. 47.4.

dismiss because: (1) a certificate of merit was not timely filed by Classic, a cross-claimant at the trial court, and (2) a certificate of merit was not filed by the original plaintiff below and the trial court already dismissed the plaintiff's claims for failure to file a certificate of merit; thus, dismissal of cross-claimant Classic is mandatory under this court's holding in *CTL/Thompson Texas, LLC v. Morrison Homes*. 337 S.W.3d 437, 441 (Tex. App.—Fort Worth 2011, pet. denied). We will affirm.

This appeal arises out of a suit brought against Gutierrez by Ken and Deanna Murphy. The Murphys sued Gutierrez and Classic for the faulty design and construction of a swimming pool at the Murphys' home. Gutierrez, as the engineer, designed the pool, and Classic constructed the pool.

In this case's companion case, *Murphy v. Gutierrez*, No. 02-11-00108-CV, at *1 (Tex. App.—Fort Worth, July 12, 2012, no. pet. h.), the trial court dismissed the Murphys' claims because the Murphys failed to file a certificate of merit contemporaneously with their original petition. See Tex. Civ. Prac. & Rem. Code. Ann. § 150.002 (West 2007). This court reversed the trial court holding that the trial court abused its discretion by dismissing the case. *Murphy*, No. 02-11-00108-CV, at *1. Specifically, we held that Gutierrez substantially invoked the judicial process in this case and waived his right to assert a section 150.002 certificate-of-merit motion to dismiss. *Id.*

Because our holding in this case's companion case relieves the certificate-of-merit requirement by the original plaintiffs in this case, the foundation of both of Gutierrez's issues is eviscerated. Thus, we overrule both of Gutierrez's issues and affirm the trial court's order denying his motion to dismiss appellee Classic Reflections Pools, Inc.'s cross-claim.

BILL MEIER
JUSTICE

PANEL: GARDNER, MEIER, and GABRIEL, JJ.

DELIVERED: July 12, 2012