# NUMBER 13-17-00336-CV

**COURT OF APPEALS**

**THIRTEENTH DISTRICT OF TEXAS**

**CORPUS CHRISTI - EDINBURG**

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**GIGNAC & ASSOCIATES, LLP,** **Appellant,**

**v.**

**FIDENCIO HERNANDEZ, MARIA GARCIA, FIDENCIO HERNANN HERNANDEZ, AND ERIK ALLEN HERNANDEZ, INDIVIDUALLY AND AS REPRESENTATIVES OF THE ESTATE OF ALEJANDRO HERNANN HERNANDEZ, DECEDENT; AND PEDRO JUAN GONZALEZ, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF ROSA AMBER CORDOVA, INCAPACITATED,** **Appellees.**

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**On appeal from the 92nd District Court of Hidalgo County, Texas.**

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## MEMORANDUM OPINION

**Before Justices Rodriguez, Benavides, and Longoria**
**Memorandum Opinion by Justice Rodriguez**

Appellant Gignac & Associates, LLP challenges the denial of its motion to dismiss a suit that was filed by appellees.[1] By one issue, Gignac asserts that dismissal was required because appellees filed a defective certificate of merit. We reverse and remand.

## I. Background

The petition alleges that on the evening of October 3, 2016, Hernann Hernandez was with Rosa Cordova in a pedestrian area in the middle of a roundabout intersection near the McAllen Convention Center. According to the petition, Robert Pena, an intoxicated motorist, drove through the intersection, plowing into the central traffic island. The collision killed Hernann and incapacitated Rosa. Appellees filed this suit, individually and on behalf of Hernann and Rosa.

Named among the defendants was Gignac, the architectural firm that designed the convention center and its roundabout. The petition alleged that Gignac was negligent and grossly negligent in designing the roundabout intersection.

Attached to the petition was a certificate of merit affidavit authored by David Steitle, a licensed professional engineer specializing in traffic engineering. Steitle averred that the standard of care required the roundabout's designers to give oncoming drivers adequate notice of the unusual roadway feature, and that Gignac made several departures from that standard of care. Among the alleged breaches, Steitle discussed the particular warning signs that should have been placed ahead of the intersection, defects in the signs that were placed, and a failure to elevate the central island farther

[1] Appellees are Fidencio Hernandez, Maria Garcia, Fidencio Hernann Hernandez, and Erik Allen Hernandez, individually and as representatives of the Estate of Alejandro Hernann Hernandez, Decedent; and Pedro Juan Gonzalez, individually and as representative of the Estate of Rosa Amber Cordova, incapacitated.

above street level. Steitle's affidavit cited specific sources for each of these alleged breaches.

In response, Gignac filed a motion to dismiss challenging the adequacy of Steitle's affidavit under the requirements of Texas Civil Practice and Remedies Code chapter 150 (the "certificate statute"). *See* TEX. CIV. PRAC. & REM. CODE ANN. § 150.001 *et seq.* (West, Westlaw through 2017 1st C.S.). Gignac asserted that appellees did not satisfy the certificate statute's requirement that the author of the certificate must hold the same professional license as the defendant; Steitle is a licensed engineer, whereas Gignac is an architectural firm and its principal Raymond Gignac is a licensed architect. *See id.* § 150.002(a)(2). The trial court denied Gignac's motion to dismiss. This interlocutory appeal followed.

## II. PROFESSIONAL SERVICES AND PRESERVATION

In the trial court, appellees asserted that their certificate of merit satisfied the requirements of the certificate statute. However, for the first time on appeal, appellees assert that they were not required to provide a certificate of merit in the first instance because the certificate statute did not apply to them.

A certificate of merit is required in "any action or arbitration proceeding for damages arising out of the provision of professional services" by architects, as well as the firms in which they practice. *Melden & Hunt, Inc. v. E. Rio Hondo Water Supply Corp.*, 520 S.W.3d 887, 889–90 (Tex. 2017). On appeal, appellees now argue that their claims did not arise out of the provision of professional architectural services. According to appellees, road design is the province of an engineer, and Raymond Gignac acted beyond the scope of his professional license as an architect when he negligently designed

the roadway in question. As support, appellees cite multiple sections of the Texas Occupations Code which describe the practice of architecture as oriented towards the design of buildings and their environs, *see generally* TEX. OCC. CODE ANN. §§ 1051.001(7), 1051.0016(a) (West, Westlaw through 2017 1st C.S.), whereas road design is specifically excluded even from the scope of "landscape architecture." *See id.* § 1051.001(6); *cf. Rosenthal v. Boyd*, 2013 WL 1876513, at *3 (Tex. App.—Austin May 1, 2013, no pet.) (mem. op.) (concluding that the design of roads and sidewalks qualified as engineering services). Appellees reason that their action did not arise out of any professional service that Gignac was actually licensed to provide as an architect, and therefore they were not required to produce a certificate of merit.

Gignac responds that because appellees did not raise their professional-services argument in the trial court, we may not consider this argument on appeal as a basis for affirmance. Gignac cites civil cases in which courts have refused to affirm a judgment based on an argument that the appellee never brought before the trial court. *See Pro Plus, Inc. v. Crosstex Energy Servs., LP*, 388 S.W.3d 689, 707 n.6 (Tex. App.—Houston [1st Dist.] 2012), *aff'd*, 430 S.W.3d 384 (Tex. 2014); *HSBC Bank USA, NA v. Watson*, 377 S.W.3d 766, 779 (Tex. App.—Dallas 2012, pet. dism'd); *Victoria Gardens of Frisco v. Walrath*, 257 S.W.3d 284, 289–90 (Tex. App.—Dallas 2008, pet. denied); *see also Villarreal v. Villarreal*, No. 04-15-00551-CV, 2016 WL 4124067, at *2 (Tex. App.—San Antonio Aug. 3, 2016, no pet.) (mem. op.); *but see City of San Antonio v. Winkenhower*, 875 S.W.2d 388, 391 (Tex. App.—San Antonio 1994, writ denied).

In *Miramar Petroleum, Inc. v. Cimarron Engineering, LLC*, this Court similarly refused to consider an appellee's argument in favor of affirmance because it was not

presented to the trial court. 484 S.W.3d 214, 216 n.2 (Tex. App.—Corpus Christi 2016, pet. denied) (quoting *Victoria Gardens*, 257 S.W.3d at 290). *Miramar* dealt with nearly the exact situation before us: an appellee argued, for the first time on appeal, that there was an exception with regard to the certificate of merit requirement in a suit against an engineering firm. *Id.* We rejected the attempt to raise a new argument in favor of affirmance, reasoning that the opposing party had not had the opportunity to respond, and the trial court did not have the opportunity to rule on it. *Id.*

In reply, appellees deny that they have raised a new argument. Appellees cast their argument as a discussion of the ways that Gignac has failed to produce a factual record demonstrating an abuse of discretion. We disagree. Appellees have raised, for the first time on appeal, an entirely new legal ground for affirming the trial court's denial of Gignac's motion to dismiss. In the limited context of the certificate statute, we have held that we may not affirm the trial court's ruling on a ground not raised before the trial court, and appellees do not ask us to overrule this holding. *See id.*; *Pro Plus*, 388 S.W.3d at 707 n.6 (same, as to a certificate of merit); *cf. Victoria Gardens*, 257 S.W.3d at 289–90 (similar, as to an expert report requirement). Accordingly, we will not consider appellees' professional-services argument as a possible basis for affirming the denial of Gignac's motion to dismiss.

## III. COMPLIANCE WITH THE CERTIFICATE STATUTE

By its sole issue on appeal, Gignac argues that appellees did not satisfy the certificate statute's requirement that the certificate's author must hold the same professional license as the defendant. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 150.002(a)(2). Gignac is an architectural firm, and its principal Raymond Gignac is a

licensed architect.[2] By contrast, the author of appellees' certificate is a licensed engineer, and he does not hold an architectural license.

Appellees respond that under the rule of *in pari materia*, the certificate statute must be read in conjunction with the occupations code, which allows an engineer to provide a certificate of merit against an architect. Appellees' argument presents a question of statutory construction.

**A. Statutory Construction**

We review a trial court's decision to grant or deny a defendant's motion to dismiss under the certificate statute for an abuse of discretion. *WCM Grp., Inc. v. Brown*, 305 S.W.3d 222, 229 (Tex. App.—Corpus Christi 2009, pet. dism'd). A trial court abuses its discretion if it acts arbitrarily, unreasonably, or without regard for guiding principles. *Id.* We review matters of statutory construction de novo. *Levinson Alcoser Assocs., LP v. El Pistolon II, Ltd.*, 513 S.W.3d 487, 493 (Tex. 2017). A statute is ambiguous if its words are susceptible to two or more reasonable interpretations, and we cannot discern legislative intent in the language of the statute itself. *Tex. State Bd. of Exam'rs of Marriage & Family Therapists v. Tex. Med. Ass'n*, 511 S.W.3d 28, 41 (Tex. 2017). If the statute is clear and unambiguous, we do not resort to rules of construction or extrinsic aids to construe the text. *Melden & Hunt*, 520 S.W.3d at 893. Instead, we rely on the statute's plain meaning as an expression of legislative intent unless a different meaning is supplied or apparent from the context, or the plain meaning leads to absurd results. *Id.*; *Crosstex Energy Servs., LP v. Pro Plus, Inc.*, 430 S.W.3d 384, 389–90 (Tex. 2014).

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[2] *See Melden & Hunt, Inc. v. E. Rio Hondo Water Supply Corp.*, 520 S.W.3d 887, 889–90 (Tex. 2017) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 150.001(1-a) (West, Westlaw through 2017 1st C.S.)) (attributing a defendant engineering firm with the licenses held by its engineer employees, for purposes of the statute's same-license requirement).

It is a well-established rule of statutory construction that where two or more separate statutory provisions pertain to the same subject, appellate courts should attempt to construe the provisions so that the statutes will be in harmony. *Lenhard v. Butler*, 745 S.W.2d 101, 105 (Tex. App.—Fort Worth 1988, writ denied); *see DLB Architects, PC v. Weaver*, 305 S.W.3d 407, 410 (Tex. App.—Dallas 2010, pet. denied) (construing the certificate statute); *The Cadle Co. v. Butler*, 951 S.W.2d 901, 907 (Tex. App.—Corpus Christi 1997, no writ). Such provisions are referred to as *in pari materia*.[3] *Lenhard*, 745 S.W.2d at 105.

**B. Application**

Pursuant to the certificate statute, the certificate of merit must come from a competent third-party expert who meets certain qualifications. *Levinson*, 513 S.W.3d at 492. The sworn certificate or affidavit must come from a third-party professional who:

> (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) is knowledgeable in the area of practice of the defendant and offers testimony based on the person's:
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> > (A) knowledge;
> >
> > (B) skill;
> >
> > (C) experience;
> >
> > (D) education;
> >
> > (E) training; and
> >
> > (F) practice.

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[3] "'Statutes *in pari materia*' are those relating to the same person or thing or having a common purpose." *The Cadle Co. v. Butler*, 951 S.W.2d 901, 907 n.4 (Tex. App.—Corpus Christi 1997, no writ) (quoting BLACK'S LAW DICTIONARY 711 (5th ed. 1979)).

*Id.* at 491–92 (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 150.002(a)) (emphasis added).

The parties dispute the construction of a single requirement in the certificate statute: the third-party professional rendering the certificate must hold "the same professional license or registration as the defendant." *See id.* This language "unambiguously provides that a certificate of merit must be authored by someone holding the same professional license" as the defendant. *Jennings, Hackler & Partners, Inc. v. N. Tex. Mun. Water Dist.*, 471 S.W.3d 577, 583–84 (Tex. App.—Dallas 2015, pet. denied) (rejecting an engineer's certificate of merit against a defendant architect). Because this language is clear and unambiguous, we need not resort to rules of construction such as the principle of *in pari materia*. *See Melden & Hunt*, 520 S.W.3d at 893. Instead, we construe and apply this provision according to its plain meaning. *See id.*

It is undisputed that appellees' expert does not hold a license as an architect. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 150.002(a)(2). Gignac has therefore shown that appellees did not comply with the statute's plain requirements. *See id.* A plaintiff's failure to file the affidavit in accordance with the certificate statute "shall result in dismissal of the complaint against the defendant." *Id.* § 150.002(e). Appellees presented no other grounds in the trial court to justify the denial of the motion to dismiss their claims against Gignac.[4] *See Miramar Petro.*, 484 S.W.3d at 216 n.2. The trial court denied Gignac's motion to dismiss without regard to the certificate statute's directive to dismiss

[4] The parties argued this matter in the trial court under the assumption that the suit arose from Gignac's provision of professional architectural services, and the certificate statute therefore applied. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 150.002(a) (West, Westlaw through 2017 1st C.S.). Under that assumption, appellees were required to file a certificate of merit from a third-party professional who holds the same professional license as the defendant. *See id.* Appellees did not do so, and dismissal is therefore required. *See id.* § 150.002(e). If the trial court dismisses appellees' claims without prejudice and appellees choose to refile their claims, our holding does not prevent the parties from, among other things, revisiting their initial assumptions and questioning whether the certificate statute applies to appellees' claims.

noncompliant suits. *See WCM Grp.*, 305 S.W.3d at 229. Accordingly, the trial court abused its discretion. *See id.*

We sustain Gignac's sole issue.

## IV. CONCLUSION

Having determined that dismissal is required, we reverse the trial court's order denying Gignac's motion to dismiss and "remand this case to the trial court to determine whether the dismissal should be with or without prejudice to refiling." *See Garza v. Carmona*, 390 S.W.3d 391, 398 (Tex. App.—Corpus Christi 2012, no pet.); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 150.002(e); *CTL/Thompson Tex., LLC v. Starwood Homeowner's Ass'n, Inc.*, 390 S.W.3d 299, 301 (Tex. 2013) (per curiam); *Miramar Petro.*, 484 S.W.3d at 217–18.

NELDA V. RODRIGUEZ
Justice

Delivered and filed the
15th day of February, 2018.