NO. 12-17-00253-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

H. W. LOCHNER, INC., APPELLANT	*§*	***APPEAL FROM THE 392ND***
V.	*§*	***JUDICIAL DISTRICT COURT***
RAINBO CLUB, INC., APPELLEE	*§*	***HENDERSON COUNTY, TEXAS***

MEMORANDUM OPINION

In this interlocutory appeal, Appellant H. W. Lochner, Inc. contends the trial court erred in not dismissing the claims brought against it by Appellee, Rainbo Club, Inc. In two issues, Lochner argues that the certificate of merit required to be filed pursuant to Section 150.002 of the Civil Practice and Remedies Code was inadequate because the certificate's author was unqualified and his affidavit did not include an affirmative factual basis to support the claims of professional errors or omissions being made.[1] We affirm.

BACKGROUND

The underlying litigation arose from roadway improvements to upgrade an approximate seven mile stretch of highway on US 175 southeast of the city of Athens in Henderson County (the Project). In 2014, the Texas Department of Transportation (TXDOT) contracted with A. L. Helmcamp, Inc. and Big Creek Construction, Ltd. to act as general contractors on the Project. The Project's plans called for adding extensive soil embankments to elevate the roadway's existing profile. This, in turn, required nearby areas of excavation to acquire the necessary soil to build the embankments.

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[1] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 150.002(f) (West 2011) (providing that an order denying or granting dismissal pursuant to this statute is immediately appealable as an interlocutory order).

TXDOT required the formulation of a Storm Water Pollution Prevention Plan (SW3P) before construction began to address the potential risk of storm water runoff carrying disturbed soils, from both excavation and soil embankment sites, and polluting downstream surface waterways. Engineering work for the Project was performed by TranSystems Corporation who subcontracted the development of the SW3P to Arredondo, Zepeda and Brunz, LLC. (AZB). Lochner was contracted to be the Project Construction Engineering Inspector.

Almost from the outset of construction in the summer of 2015, the Project was plagued by heavy rains. Storm water runoff carrying disturbed soils from the Project site made its way into Safari Lake, a privately owned lake downstream from the Project. Further downstream from the construction site lies Rainbo Lake, owned by Rainbo Club, and described as a first class bass trophy fishing lake. Fishing is restricted to members, some of whom live in homes constructed around the lake. The lake is managed and stocked to provide its members the ultimate fishing experience.

Rainbo retained an expert who confirmed that the storm water runoff carrying displaced soils which affected Safari Lake had made its way further downstream and was also polluting Rainbo Lake. Armed with its expert's reports, Rainbo demanded that Helmcamp cease work on the Project and reimburse it for its expenses and proposed remediation costs. Helmcamp denied Rainbo Lake had been damaged from storm water runoff, did not cease work, and did not modify the SW3P plan.

In a March 2016 report, Rainbo's expert confirmed that continued high levels of suspended clay particles were present within the lake and addressed its impact on the lake's fish population. The report stated that unless greater efforts to stabilize the soil at the Project site were implemented, the attempted remedial efforts would fail, and the lake's fish population would continue to be endangered. Rainbo engaged in communications with TXDOT in an attempt to resolve its complaints and obtain remediation compensation, but were unsuccessful.

Rainbo initially filed suit against TXDOT and the Project's general contractors in 2016. By its first amended petition, Rainbo also sued TranSystems, AZB, and Lochner for claims related to the SW3P. To comply with the certificate-of-merit statute, Rainbo attached the affidavit of a professional engineer, Jason Womack, P.E., to its amended petition. Womack's affidavit asserted the SW3P plan prepared by AZB did not include adequate means for the timely control and stabilization of disturbed soils in either the embankments or excavation sites. He

faulted both TranSystems and AZB for not recognizing the inadequacies in the SW3P design during the final plan reviews and modifying the plan to correct the inadequacies.

The affidavit identified Lochner, which was contracted to be the on-site inspector for the Project, as the Project Construction Engineering Inspector. Womack asserted Lochner was negligent in that role for (1) failing to properly inspect and identify the inadequacies of the SW3P during construction, (2) report to TXDOT and the contractors that heavy rains caused extensive soil erosion which entered into downstream waterways, and (3) take steps to seek temporary suspension of work on the Project and pursue modifications in the design and implementation of the SW3P to address the pollution of downstream surface waters from soil infiltration. Lochner filed a motion to dismiss pursuant to Section 150.002(e) asserting Womack's affidavit failed to satisfy Chapter 150's requirements. The district court denied the motion to dismiss. This appeal followed.

STANDARD OF REVIEW AND APPLICABLE LAW

We review a trial court's decision to grant or deny a defendant's Chapter 150 motion to dismiss for abuse of discretion. ***Gaertner v. Langhoff***, 509 S.W.3d 392, 395 (Tex. App.—Houston [1st Dist.] 2014, no pet.). To the extent we analyze statutory construction, however, our review is de novo. ***Id.*** Once we determine the statute's proper construction, we must then decide whether the trial court abused its discretion in applying the statute. ***Morrison Seifert Murphy, Inc. v. Zion***, 384 S.W.3d 421, 425 (Tex. App.—Dallas 2012, no pet.). In general, a trial court abuses its discretion when it acts without reference to any guiding rules and principles. ***Downer v. Aquamarine Operators, Inc.***, 701 S.W.2d 238, 241–42 (Tex. 1985).

In construing statutes, we ascertain and give effect to the Legislature's intent as expressed by the statutory text. ***M-E Eng'rs, Inc. v. City of Temple***, 365 S.W.3d 497, 500 (Tex. App.—Austin 2012, pet. denied). We consider the words in context, not in isolation. ***Id.*** We rely on the plain meaning of the text, unless a different meaning is supplied by legislative definition or is apparent from context, or unless such a construction leads to absurd results. ***Id.*** We also presume that the Legislature was aware of the background law and acted with reference to it. ***Id.***

Chapter 150 mandates the filing of a certificate of merit, the purpose of which is to require a plaintiff to make a threshold showing that its claims have merit. ***Melden & Hunt, Inc. v. East Rio Hondo Water Supply Corp.***, 520 S.W.3d 887, 897 (Tex. 2017). A plaintiff must file

a certificate of merit in any action for "damages arising out of the provision of professional services by a licensed or registered professional." TEX. CIV. PRAC. & REM. CODE ANN. § 150.002(a) (West 2011). The term "licensed or registered professional" includes licensed architects, licensed professional engineers, and firms in which licensed architects or licensed professional engineers practice. ***Id***. § 150.001(1).

If a certificate of merit is required, the general rule is that the plaintiff must file the certificate with its original petition. *See* ***id***. § 150.002(a). A certificate of merit must be an affidavit by a person who is competent to testify, holds the same professional license or registration as the subject defendant, is knowledgeable about the defendant's area of practice, and offers testimony based on the affiant's knowledge, skill, experience, education, training, and practice. ***Id***. § 150.002(a)(1)-(3). The affiant must also be licensed or registered in Texas and actively engaged in the practice of architecture, engineering, or surveying. ***Id***. § 150.002(b).

The affidavit must 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 plaintiff's failure to file the affidavit in accordance with this section shall result in dismissal of the complaint against the defendant. ***Id***. §150.002(e). The dismissal may be with prejudice. ***Id***. In reviewing a trial court's ruling on a motion to dismiss, we consider the live pleadings when the trial court ruled on the motion to dismiss. ***JJW Dev., L.L.C. v. Strand Sys. Eng'g, Inc.***, 378 S.W.3d 571, 576 (Tex. App.—Dallas 2012, pet. denied).

WOMACK'S SUBJECT AREA EXPERTISE

In its second issue, Lochner argues Womack's affidavit is insufficient because it fails to demonstrate that he has knowledge and expertise in Lochner's practice area of construction engineering inspection. Specifically, Lochner contends that to be qualified to offer opinions against it in this case, Womack must have, and his affidavit must reflect, familiarity or experience specifically with the engineering inspection services Lochner was providing on the Project. The argument continues that because Womack's affidavit fails to specify that he has experience and familiarity with road construction engineering inspections, he is not qualified to assert that Lochner failed in that role.

Lochner argues that Chapter 150 requires that Womack practice in the specific area of practice at issue in the litigation. We disagree. Although at one time an expert authoring a report under Chapter 150 had to practice in the same area of practice as the defendant to be qualified to give opinions, the statute was amended in 2009 to delete that requirement. *Compare* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 20.01, 2003 Tex. Gen. Laws 847, 896-97, *with* Act of May 29, 2009, 81st Leg., R.S., ch. 789, § 2, 2009 Tex. Gen Laws 1989, 1989 (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 150.002(a)(3)). The current version of Chapter 150 only requires, with respect to subject-area expertise, that the affiant is "knowledgeable in the area of practice of the defendant." TEX. CIV. PRAC. & REM. CODE ANN. § 150.002(a)(3); ***M-E Eng'rs, Inc.***, 365 S.W.3d at 503.

The plain language of Section 150.002 does not require the opining professional to demonstrate expertise in the defendant's sub-specialty. ***Morrison Seifert Murphy, Inc.***, 384 S.W.3d at 427. Section 150.002 does not require the affiant to state that he is knowledgeable in the same area of practice of the defendant, rather it requires him to be knowledgeable in that area. ***Id.*** (citing ***Elness Swenson Graham Architects, Inc. v. RLJ II-C Austin Air, L.P.***, No. 03-10-00805-CV, 2011 WL 1562891, at *2 (Tex. App.—Austin Apr. 20, 2011, pet. denied) (mem. op.)). Thus, Chapter 150 does not require Womack to practice in the subspecialty of engineering inspections.

In his affidavit, Womack states he holds a Bachelor of Arts degree with a major in Civil Engineering from The University of Texas at Austin, and a Master of Business Administration from The University of Texas at Dallas. He states he has been engaged in the practice of Civil Engineering for over twenty-six years and has specialized knowledge, skill, practice, training, and technical expertise in the design and construction of roadways, having been previously employed by the Texas Department of Transportation. He holds a professional license in the field of civil engineering of which roadway design and construction are areas of practice. He states that he practices engineering extensively in the field of civil engineering and has been "actively engaged in the engineering aspects of roadway design and construction" including having designed, reviewed, and inspected SW3P plans. He repeats that he is "knowledgeable about the design and construction which the defendants were responsible for," is licensed in Texas to perform the "required analysis civil engineering work," and has "actively engaged in the practice of engineering in areas encompassing such design and construction practices." We

conclude that these statements reflect Womack is sufficiently knowledgeable in the practice area of engineering inspection to satisfy the requirement of Section 150.002(a). ***M-E Eng'rs, Inc.***, 365 S.W.3d at 503; ***Morrison Seifert Murphy, Inc.***, 384 S.W.3d at 427. Accordingly, we overrule Lochner's second issue.[2]

ADEQUACY OF FACTUAL BASIS TO SUPPORT CLAIMS

In its first issue, Lochner argues Womack's affidavit fails to set forth any affirmative factual allegations to support the claims being made that Lochner failed in the role of Project Construction Engineering Inspector. Lochner argues that Womack does not address any theory of liability asserted against it and that Womack's statements are conclusory. Lochner asserts Womack's affidavit only refers to all the defendants collectively rather than specifically addressing what Lochner failed to do as the engineering inspector on the Project. As such, Lochner characterizes Womack's statements as prohibited collective assertions of negligence against all defendants.

Rainbo's lawsuit asserts that TranSystems and AZB failed to design and implement a SW3P plan which would prevent disturbed soils from being carried away from the Project site in storm water runoff and polluting downstream surface waters. Rainbo's claim against Lochner, as the Project Construction Engineering Inspector, is that it failed to adequately monitor the implementation of the SW3P and, thereafter, failed to adequately inspect the Project's ongoing construction activities or identify and notify TXDOT and the contractors of the SW3P's failures and deficiencies.

It does not appear to be in dispute that constructing soil embankments to raise the profile of the existing roadway, as well as the associated excavation, would disturb otherwise stable soils that would then be subject to erosion from storm water runoff. TXDOT recognized this risk and required development and implementation of a SW3P to provide safeguards to stabilize disturbed areas of soil as soon as possible to protect the ecosystem of downstream waterways and lakes from storm water runoff carrying loose soils from the project site.

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[2] Lochner further argues, citing ***Bruington Eng'g Ltd. v. Pedernal Energy L.L.C.***, 403 S.W.3d 523, 530–32 (Tex. App.—San Antonio 2013), *rev'd on other grounds*, 536 S.W.3d 487 (Tex. 2017), that Rainbo's attempts to show Womack's familiarity and expertise in road construction engineering inspection by attaching his resume to the certificate of merit in a second amended petition failed because it was not included in the first-filed complaint against Lochner. Because we find that statements within Womack's affidavit sufficiently show he is knowledgeable in the practice area of engineering inspection, we need not address this aspect of Lochner's second issue. *See* TEX. R. APP. P. 47.1.

Assuming Rainbo Lake was polluted from storm water runoff from the project site, the ultimate question the trier of fact will address is why this event occurred.[3] Rainbo alleges the cause, in whole or in part, is a defectively designed and improperly implemented SW3P, improper or insufficient monitoring of project construction activities, and the failure to recognize the plan's inadequacies. Rainbo supplied Womack's affidavit as a certificate of merit as to the claims being made against TranSystems, AZB, and Lochner regarding those parties' professional errors or omissions.[4]

In section 7 of his affidavit, Womack sets forth what he viewed as relevant facts:

> a. The roadway plans and construction would ultimately result in raising the profile elevation above that of the existing roadway.
> b. Due to the higher elevated roadway, large amounts of soil embankments were added to raise the height of the roadway as proposed. Areas of excavation were also required, which would disturb otherwise stable soil.
> c. In September 2015, the area received significant amounts of rainfall and the subsequent runoff from the rainfall caused extensive erosion of loosely placed, sandy roadway embankment soils and soils within excavated areas. The storm runoff collected un-stabilized soils on the project prior to entering nearby streams, creeks, and lakes. The soil infiltration into the nearby waterways polluted and contaminated the previously clean and pollutant free waters.
> d. The storm water pollution prevention plan (SW3P), which was required and included in the set of plans, did not include adequate means to address the immediate control and stabilization of the loose, exposed sandy type soil used as embankment on the project or disturbed soils in excavation areas. No efforts to identify and/or stabilize loose and disturbed soils during construction were evident.

In section 7(d), Womack identifies Lochner as the Project Construction Engineering Inspector. In its Second Amended Petition, Rainbo alleges that Lochner was contracted to be the Project's Construction Engineering Inspector with responsibility to ensure the engineering work was properly implemented and provide additional engineering work as necessary to prevent pollution as the Project progressed. No other entity is identified in either Womack's affidavit or Rainbo's amended petition as being responsible for any project inspections. It is clear to us that in both

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[3] At this early stage of the litigation, there has been only limited discovery to develop the true facts, and Lochner disputes Rainbo's allegations. As discussed herein, our analysis in this appeal is limited to the sufficiency of the certificate of merit not the validity of any claim asserted. Only for purposes of providing background and addressing the sufficiency of the certificate, do we rely on statements contained within Womack's affidavit and the allegations contained within Rainbo's pleadings.

[4] Neither TranSystems nor AZB filed a motion to dismiss attacking the sufficiency of the certificate of merit.

Rainbo's pleadings and in Womack's affidavit, references to the construction engineering inspectors are directed towards Lochner.

In section 8 of the affidavit, Womack addresses what he opines were negligent acts, errors, or omissions by the identified parties. As it pertains to the duties, responsibilities, and omissions of the project inspector, Womack states:

> c. Following commencement of the project, it then became the responsibility of construction field inspectors and the contractor to practice due diligence and notify TXDOT engineers and the named design engineering firms that potential problems existed so that preemptive actions could be taken.
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> d. HW Lochner, being the contracted on-site inspectors for the project, had a duty to supervise construction activities such that all plans and specifications pertaining to the project were implemented and adhered to. In addition, Lochner representatives assigned to the project had a duty to inspect the project for potential problems and hazards such as the potential for unstabilized embankment soils to rapidly erode and enter nearby waterways if heavy rains occurred at the project site. Potential problems such as this would require notification to TXDOT and the contractor. Work on the project should then have been temporarily suspended while a solution, typically a change order to the plans, [sic] to be administered and implemented. Failure to do so demonstrates negligence. This negligence resulted in an environmental disaster.

Lochner argues that these statements fail to allege any affirmative factual allegations against it sufficient to satisfy the requirements of Section 150.002. We disagree.

Womack's affidavit sets out Lochner's responsibility to monitor the implementation of the SW3P and to supervise construction activities to ensure that all remedial requirements set forth in the SW3P were in place. In the event any of the SW3P's control measures were determined to be insufficient, Womack states that Lochner had the duty to notify TXDOT and the contractors of any failures noted so necessary modifications to the SW3P could be addressed. The affidavit avers that no efforts to identify or stabilize loose and disturbed soils during construction were evident and that the failure to discharge the responsibility of adequate monitoring, inspection, recognition, and notification of deficiencies was negligence. Womack states that storm water runoff containing eroded soils from the Project site that should have been prevented by a properly designed and implemented SW3P entered and damaged Rainbo Lake.

The essence of Womack's affidavit is that the risk of pollution of downstream waterways from eroded soils being carried away in storm water runoff from the Project site was foreseeable and preventable and that Lochner's failure to adequately monitor, inspect, and provide notice of the SW3P's inadequacies constituted professional error in the services it was contracted to

provide. This represents sufficient facts and a description of professional errors or omissions committed by Lochner to allow the trial court to determine that the plaintiff's complaints against it were not frivolous. ***Melden & Hunt, Inc.***, 520 S.W.3d at 897.

Regarding Lochner's assertion that "there is no certificate of merit addressing any theory of liability against Lochner," we note that the supreme court has specifically rejected an interpretation of Section 150.002(b) which would require the affidavit to address the elements of the plaintiff's various theories or causes of action. ***Id***. at 896. The statute instead obligates the plaintiff to obtain an affidavit from a third party expert attesting to the defendant's professional errors or omissions and their factual basis. ***Id***. It need not recite the applicable standard of care and how it was allegedly violated in order to provide an adequate factual basis for the identification of professional errors. ***CBM Eng'rs, Inc. v. Tellepsen Builders, L.P.***, 403 S.W.3d 339, 346 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (op. on reh'g).

As to Lochner's assertion that jointly referring to inspectors and contractors in section 8(c) fails to identify a factual basis for claims against Lochner, we also disagree. The function of the certificate is to provide a basis for the trial court to determine merely that the plaintiff's claims are not frivolous and to thereby conclude that the plaintiff is entitled to proceed in the ordinary course to the next stages of litigation. ***Id***. The plaintiff is not required to marshal its evidence or establish every element of its claims. ***Id***. The two logical parties in the best position to observe deficiencies in the SW3P were Lochner, as the Project Construction Engineering Inspector, and the contractors performing the work. Collectively referring to "construction field inspectors and the contractor" as having the responsibility to practice due diligence and notify TXDOT engineers and the named design engineering firms that potential problems existed so that preemptive actions could be taken merely states Womack's opinion that both parties failed in that responsibility.

In section 8(d), Womack reiterates and outlines Lochner's duty and responsibility to supervise construction activities to (1) insure proper implementation of the SW3P, (2) inspect the project for potential problems and hazards such as the erosion of unstable soils in storm water runoff during heavy rains, and (3) notify TXDOT and the contractors when these problems were identified so that work could be temporarily stopped to allow modification of the SW3P to address the inadequacies noted. This represents sufficient facts and a description of professional

errors or omissions committed by Lochner to allow the trial court to determine that the plaintiff's complaints are not frivolous. *See* ***Melden & Hunt, Inc.***, 520 S.W.3d at 896.

Lastly, Lochner argues that Womack's affidavit is deficient because it contains conclusory statements. In support, Lochner points to the first sentence of section 7(d) which states:

> The erosion of the soils into the waterways occurred as a result of negligence on the part of the design engineers, TXDOT, the Project Construction Engineering Inspectors (HW Lochner) and the contractor (A.L. Helmcamp, Inc.).

We first note that this sentence is under the part of Womack's affidavit which addresses his view of relevant facts on which he bases his opinions. This sentence is followed by Womack's representation that the SW3P did not include adequate means to address the immediate control and stabilization of loose, exposed, sandy type soil used for embankments or disturbed soils in the excavation areas. He concludes this section with the observation that "[n]o efforts to identify and/or stabilize loose and disturbed soils during construction were evident."

A certificate of merit is not insufficient because it contains conclusory or inadmissible statements. ***Charles Durivage, P.E. v. La Alhambra Condo. Ass'n***, 13-11-00324-CV, 2011 WL 6747384 at *2 (Tex. App.—Corpus Christi 2011, pet. dism'd) (mem. op.). Because the purpose of the certificate of merit is to provide a basis for the trial court to conclude that the plaintiff's claims have merit, an evaluation of whether a factual basis has been established should be performed with this in mind. ***Id***. at *3. Even if the sentence Lochner makes reference to is an impermissible collective assertion of negligence as to multiple defendants, this is not the only part of Womack's affidavit which addresses Lochner's alleged failings. As noted above, section 8(d) specifically addresses Lochner's duties and alleges Lochner's failure to adequately monitor implementation of the SW3P, or inspect ongoing construction activities to identify soil erosion into downstream surface waters, or notify the appropriate parties of the inadequacies of the SW3P. When read as a whole, Womack's affidavit provided sufficient facts and a description of professional errors or omissions committed by Lochner to allow the trial court to determine that the plaintiff's complaints are not frivolous. *See* ***Melden & Hunt, Inc.***, 520 S.W.3d at 896. We find no abuse of discretion in the trial court's denial of Lochner's motion to dismiss based on the failure to set forth any affirmative factual allegations to support the claims being made that

Lochner failed in the role of Project Construction Engineering Inspector. Accordingly, we overrule Lochner's first issue.

CONCLUSION

Having overruled each of Lochner's issues, we ***affirm*** the trial court's order denying Lochner's motion to dismiss.

GREG NEELEY
Justice

Opinion delivered May 8, 2018.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

MAY 8, 2018

NO. 12-17-00253-CV

H. W. LOCHNER, INC.,
Appellant
V.
RAINBO CLUB, INC.,
Appellee

Appeal from the 392nd District Court
of Henderson County, Texas (Tr.Ct.No. CV16-0461-392)

THIS CAUSE came to be heard on the oral arguments, appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the trial court's order.

It is therefore ORDERED, ADJUDGED and DECREED that the order denying Appellant's motion to dismiss **be in all things affirmed**, and that all costs of this appeal are hereby adjudged against the Appellant, **H. W. LOCHNER, INC.,** for which execution may issue, and that this decision be certified to the court below for observance.

Greg Neeley, Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.