

TEXAS' CERTIFICATE OF MERIT STATUTE UPDATES

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Texas' Certificate of Merit Statute

WHAT IS IT?

Texas Civil Practice and Remedies Code Section 150.002

A statutory requirement that a claimant who raises a claim in litigation or arbitration against a licensed or registered professional by seeking recovery of damages, contribution, or indemnification* arising out of the provision of professional services by the licensed or registered professional, must file contemporaneously a supporting expert affidavit with any petition or other pleading which, for the first time, raises the claim(s) against certain licensed or registered design professionals.

Texas' Certificate of Merit Statute

- ▶ A claimant's failure to file the affidavit in accordance with this section shall result in dismissal of the complaint against the defendant.
- ▶ This dismissal may be with or without prejudice.
 - Within the Trial Court's Discretion
- ▶ This statute does not apply to any suit or action for the payment of fees arising out of the provision of professional services.

Texas' Certificate of Merit Statute

WHAT IS ITS PURPOSE?

To discourage frivolous claims and provide a basis for the trial court to conclude early on in the litigation whether the claimant's claims against the design professionals have merit, allowing design professional defendants to save time and money.



Contemporaneous Filing Requirement

Certificate of Merit must be filed contemporaneously with the complaint, except:

- ▶ When the period of limitations will expire within 10 days of the date of filing the petition AND, because of such time constraints, the plaintiff has alleged that an affidavit could not be prepared.
 - ▶ In such cases, the plaintiff is allowed an extension of 30 days after filing to supplement the pleadings with a certificate of merit.
 - ▶ The trial court may, on motion, after a hearing and for good cause, extend this deadline beyond 30 days.
- ▶ “Good cause” exception only applies if BOTH requirements are met.

Certificate of Merit Requirements

- ▶ Contain each theory of recovery for which damages are sought (i.e. attesting to the defendant's professional errors or omissions on their factual basis)
- ▶ Authored by a third-party licensed architect, licensed engineer, registered landscape architect, or registered professional land surveyor who is
 - Competent to testify;
 - Holds the same professional license or registration as the defendant; and
 - Practices in the area of practice of the defendant
- ▶ Author must be actively engaged in the practice of architecture, engineering, or surveying

Waiver of Certificate of Merit

- ▶ Because Section 150.002 imposes a mandatory, non-jurisdictional filing requirement, a defendant may waive its right to seek dismissal under the statute.
- ▶ Waiver is largely a matter of intent, and for implied waiver to be found through a party's actions, intent must be clearly demonstrated by the surrounding facts and circumstances.
- ▶ Evidence of waiver generally takes one of three forms:
 - (1) Express renunciation of a known right;
 - (2) Silence or inaction, coupled with knowledge of the known right, for such an unreasonable period of time as to indicate an intention to waive the right; or
 - (3) Other conduct of the party knowingly possessing the right of such a nature as to mislead the opposite party into an honest belief that the waiver was intended or assented to.

Waiver of Certificate of Merit

Some factors considered by Courts:

- ▶ The moving party's degree of participation in discovery;
- ▶ Whether the party sought affirmative action or judgment on the merits; and
- ▶ At what time during the judicial process the party sought dismissal.

Enacting Certificate of Merit Statute

- ▶ Enacted in 2003 as part of the Texas Legislature's tort reform efforts
- ▶ In any action for damages alleging professional negligence by a design professional, the plaintiff shall be required to file with the complaint an affidavit of a third-party registered architect or licensed professional engineer competent to testify and practicing in the same area of practice as the defendant. The affidavit shall set forth specifically at least one negligent act, error, or omission claimed to exist and the factual basis for each claim. The third-party professional engineer or registered architect shall be licensed in this state and actively engaged in the practice of architecture or engineering.
- ▶ Plaintiff's failure to file the affidavit in accordance with Subsection (a) or (b) may result in dismissal with prejudice of the complaint against the defendant.

2003 Statute

- ▶ Claims against registered architects and licensed professional engineers were both defined as “Design Professionals” under the Code
- ▶ Actions or claims “alleging professional negligence by a design professional”
- ▶ Affiant Qualifications:
 - ▶ Third-party registered architect or licensed professional engineer;
 - ▶ Competent to testify;
 - ▶ Practicing in the same area of practice as the defendant;
 - ▶ Licensed in Texas;
 - ▶ Actively engaged in the practice of architecture or engineering

2003 Statute

- ▶ Scope of Affidavit:
 - ▶ Required to “set forth specifically at least one negligent act, error, or omission claimed to exist and the factual basis for each claim”

2003 Statute – Questions Raised

- ▶ What constitutes the same practice area?
 - Example: Can only a Geo-Tech Engineer provide an affidavit criticizing the work of another Geo-Tech Engineer? Or is it more broadly interpreted so as to allow any of type of engineer who possesses knowledge about Geo-Tech Engineering to offer an opinion on the Defendant's work?
- ▶ What does "any action" entail?
 - Limited only to lawsuits filed in Court or Arbitrations too?
 - ▶ Arbitration is a widely used form of dispute resolution in the construction industry. Limiting it just to lawsuits filed Court would provide Plaintiff's an escape from the statute's requirement.
- ▶ Is the Statutory definition of "Design Professional" limited just to individual architects or engineers, or does it extend to the companies they were working for as well?

2005 Additions to Statute

The Texas Legislature made the following changes to the Statute to provide some clarifications on the questions that arose after the Statute was enacted in 2003:

- ▶ The 2003 version only applied to negligence actions. In 2005, the statute was expanded to any cause of action seeking damages arising out of the provision of professional services.
- ▶ The 2005 version added the requirement that an expert providing the affidavit must hold the same professional license as the defendant.
- ▶ "Any Action" was defined to include Arbitration
- ▶ "Design professional" changed to "licensed or registered professional" which added registered professional land surveyors to the list of types of Defendants the statute covers. It also applied the certificate of merit requirement to any firms in which a licensed professional practices.

2005 Additions to Statute

- ▶ Failure to comply with §150.002 resulted in mandatory dismissal of the plaintiff's complaint. However, dismissal with prejudice remains within the discretion of the court.

2009 Amendments

The most notable change from the 2005 version:

- ▶ The expert affidavit no longer required the factual basis for “at least one negligent act, error, or omission”, but now 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 service ... and the factual basis for each such claim.”
- ▶ Inclusion of the words “each” and “or” appears to clearly encompass more than just negligence claims, but also those sounding in tort or contract

2009 Statute – Covered Parties

Defendants Covered

- ▶ Licensed architects;
- ▶ Licensed professional engineers;
- ▶ Registered professional land surveyor;
- ▶ Registered landscape architect; or
- ▶ Any firm which employed licensed or registered professional practices

2009 Statute – Affiant Qualifications

- ▶ A third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor who is competent to testify and holds the same professional license or registration as the Defendant
 - No longer required to be practicing in the same area of practice as the defendant
- ▶ Affiant now required to be “knowledgeable in the area of practice of the defendant and offer testimony based on the affiant’s:
 - Knowledge;
 - Skill;
 - Experience;
 - Education;
 - Training; and
 - Practice

2009 Statute – Questions Raised

Do all Claims against licensed and registered professionals request the statutory affidavit to accompany it?

- ▶ No, only those claims that *arise out* of the provision of professional services if the claim *implicates* the professional's education, training and experience in applying special knowledge or judgment.

However, Texas Courts applied a broad interpretation in its applicability

- ▶ *Capital One, N.A. v. Carter & Burgess, Inc.*, 344 S.W.3d 477 (Tex. App.—Fort Worth 2011): Plaintiff sued Defendants for misrepresentation and Court held the Certificate of Merit Statute applied because Defendants alleged false representations were made as part of Defendants' performing a professional service necessary for the ... completion of its engineering services – an activity that expressly constitutes the practice of engineering.

2019 Amendment

In any action or arbitration proceeding for damages arising out of the provision of professional services by a licensed or registered professional, the plaintiff shall be required to file with the complaint an affidavit of a third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor...

- ▶ Courts construed "plaintiff" to mean the original plaintiff
- ▶ "Complaint" was interpreted to mean the original petition or any amendment or supplement that, for the first time, brought an applicable cause of action
- ▶ 2019 Amendments include two new definitions that impacted this analysis

2019 Amendment - Definitions

2019 Amendment replaced "Plaintiff" with "Claimant" and defines "Claimant":

- ▶ "Claimant" means a party, including a plaintiff or third-party plaintiff, seeking recovery for damages, contribution, or indemnification.

2019 Amendment defines "Complaint" for the first time:

- ▶ "Complaint" means any petition or other pleading which, for the first time, raises a claim against a licensed or registered professional for damages arising out of the provision of professional services by the licensed or registered professional.

2019 Amendments

OLD

- ▶ ...the **plaintiff** shall be required to file with the **complaint** an affidavit of a third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor who...

NEW

- ▶ ...a **claimant** shall be required to file with the **complaint** an affidavit of a third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor who...

2019 Amendments – Affiant Qualifications

OLD

- ▶ (3) is **knowledgeable** in the area of practice of the defendant...

NEW

- ▶ (3) **practices** in the area of practice of the defendant...

2019 Amendment

- ▶ Very impactful on Third-Party practice
- ▶ Expanded scope of pleadings that must be filed with a Certificate of Merit
- ▶ Expanded the types of parties who must file a Certificate of Merit
- ▶ Changed one affiant requirement back to pre-2009 language

2019 Amendment – Why?

Response to decisions in *Engineering and Terminal Services, L.P. v. TARSCO, Inc.* and *Orcus Fire Protection, LLC.* and *Jaster v. Comet II Construction, Inc.*

- ▶ *ETS* (2017): Trial court dismissal of third-party claims reversed because appellate court reasoned that, had the Texas Legislature intended the certificate of merit requirement to apply to a party filing a third-party claim it could have used the broader term “claimant” instead of the using language that ties the requirement solely to the pleading that initiates the lawsuit.
- ▶ *Jaster* (2014): Supreme Court held that section 150.002 does not apply to third-party plaintiffs seeking indemnity and contribution because the affidavit requirement is limited to actions “for damages.”

2019 Amendment - Summary

- ▶ Certificate of Merit requirements expressly applies to Third-Party Plaintiffs, and appears to apply to Counter-Plaintiffs, Cross-Plaintiffs, Intervenors, and any other Party asserting a claim for the first time
- ▶ Requirements now apply to “any petition or other pleading”
- ▶ Affiant must be actively practicing in the applicable area → no more retirees or professional experts
- ▶ Definition of “claimant” includes those asserting claims for indemnification and contribution

2023 Amendment

- ▶ Added an exception for claims by third-party plaintiffs arising out design and construction services for work on government projects
- ▶ Applied to claims commenced after September 1, 2023
- ▶ States a third-party plaintiff that is a design-build firm or a design-build team, architect, or engineer are not required to file a Certificate of Merit when filing a third-party claim or cross-claim against a professional if the action arises out of a design-build project in which a government entity contracts with a single entity to provide both design and construction services for work on a government building, structure, civil works project, or highway project.

New Certificate of Merit Opinions since 2022

- ▶ *Thompson v. Hancock Witte & Assocs., Inc. v. Brazos Presbyterian Homes, Inc.*, 2022 WL 1010256 (Tex. App.-Houston [14th Dist.] April 5, 2022)
- ▶ *Thompson Hancock Witte & Assocs., Inc. v. Stanley Spurling & Hamilton, Inc.*, 650 S.W.3d 741 (Tex. App.-Houston [14th Dist.] April 5, 2022)
- ▶ *Strahan v. James Deaver Services Inc.*, 2022 WL 3452898 (Tex. App.-Houston [14th Dist.] August 18, 2022)
- ▶ *T & T Engineering Services, Inc. v. Danks*, 2022 WL 3588718 (Tex. App.-Houston [1st Dist.] August 23, 2022)
- ▶ *Terracon Consultants, Inc. v. N. Pride Commc'ns, Inc.*, 2023 WL 2316351 (Tex. App.-Houston [1st Dist.] March 2, 2023)
- ▶ *Costello, Inc. v. Briggs Brothers Enterprises Corp.*, 2024 WL 187435 (Tex. App.-Houston [1st Dist.] January 18, 2024)

Thompson Hancock Witte & Assocs., Inc. v. Brazos Presbyterian Homes, Inc., 2022 WL 1010256 (Tex. App.–Houston [14th Dist.] April 5, 2022)

- ▶ Appellee Brazos contracted with Thompson Hancock, an architectural firm, to design an addition which included design of a retaining wall
- ▶ Brazos alleged Thompson Hancock's improper design caused flooding during Hurricane Harvey which resulted in substantial damage
- ▶ Brazos attached a Certificate of Merit prepared by Daniel Figert, a licensed architect emeritus in the State of Texas, to its petition
- ▶ Thompson Hancock filed a motion to dismiss Brazos' claims against it alleging Mr. Figert's emeritus architect license was different from the license held by the architect of record on the project and therefore he was not qualified to prepare a Certificate of Merit because he could not actively engage in the practice of architecture

Thompson Hancock Witte & Assocs., Inc. v. Brazos Presbyterian Homes, Inc., 2022 WL 1010256 (Tex. App.–Houston [14th Dist.] April 5, 2022)

- ▶ Trial Court denied Thompson Hancock's motion to dismiss
- ▶ 14th Court of Appeals affirmed the denial of Thompson Hancock's motion to dismiss
 - ▶ Emeritus architects are statutorily authorized to practice architecture in multiple ways including providing expert opinions
 - ▶ The Texas Occupations Code does not limit an emeritus architect to only rendering opinions regarding buildings on which the emeritus architect could serve as the architect of record

Thompson Hancock Witte & Assocs., Inc. v. Stanley Spurling & Hamilton, Inc., 650 S.W.3d 741 (Tex. App.—Houston [14th Dist.] April 5, 2022)

- ▶ After being brought into the prior lawsuit by Brazos, Thompson Hancock filed a third-party petition against Stanley Spurling alleging Stanley Spurling was responsible for the design of the retaining wall
- ▶ Thompson Hancock's third-party petition stated Brazos filed a Certificate of Merit relating to its claims against Thompson Hancock, so Thompson Hancock was not required to file an additional Certificate of Merit.
- ▶ Stanley Spurling filed a Chapter 150 motion to dismiss Thompson Hancock's third-party petition
- ▶ Trial Court granted Stanley Spurling's Chapter 150 motion to dismiss because Thompson Hancock failed to file a Certificate of Merit with its third-party petition

Thompson Hancock Witte & Assocs., Inc. v. Stanley Spurling & Hamilton, Inc., 650 S.W.3d 741 (Tex. App.—Houston [14th Dist.] April 5, 2022)

- ▶ Appellate court affirmed holding Thompson Hancock did not comply with the certificate of merit statute because the statute requires a “claimant” as opposed to a “plaintiff” to file a Certificate of Merit contemporaneously with the complaint which the architect failed to do
- ▶ The Court did not decide whether a Certificate of Merit could be incorporated by reference
 - ▶ The Court stated that even if it assumed the statute allowed Certificate of Merit incorporation, Thompson Hancock did not incorporate it by reference because it failed to affirmatively state it was incorporating the Certificate of Merit by reference, failed to specify which Certificate of Merit was incorporated, and failed to attach the Certificate of Merit to the petition

Strahan v. James Deaver Services Inc., 2022 WL 3452898
(Tex. App.–Houston [14th Dist.] August 18, 2022)

- ▶ James Deaver was hired to perform a windstorm inspection on Strahan's new roof. James Deaver did not design the roof or provide labor to build the roof. The roof leaked and collapsed. Strahan filed suit against James Deaver for professional negligence without attaching a Certificate of Merit.
- ▶ James Deaver filed a Chapter 150 motion to dismiss.
- ▶ Strahan argued windstorm inspections do not require special engineering knowledge or education and although James Deaver was a licensed professional engineer that did not mean the inspection invoked his engineering knowledge or engineering services
- ▶ Trial court granted James Deaver's motion to dismiss

Strahan v. James Deaver Services Inc., 2022 WL 3452898
(Tex. App.–Houston [14th Dist.] August 18, 2022)

- ▶ Appellate court affirmed holding that Strahan's claim was a claim for professional negligence because his petition alleged the services provided by James Deaver were engineering services and James Deaver owed Strahan a duty to provide engineering services which an engineer of ordinary prudence in the exercise of ordinary care would have done.

T & T Engineering Services, Inc. v. Danks, 2022 WL 3588718 (Tex. App.–Houston [1st Dist.] August 23, 2022)

- ▶ Appellant alleged Appellee's Certificate of Merit Professional (1) did not practice in the areas of practice of Appellant, (2) did not hold the same professional license or registration as Appellant, and (3) did not identify the particular defendant at fault and the specific conduct that constituted an error
- ▶ 1: The Texas Supreme Court has not addressed the meaning of "practices." The Appeals Court found that although the Professional practiced in petroleum engineering while Appellant practiced in structural and mechanical engineering, being a licensed engineer was sufficient to be considered "in the area of practice" as required by the statute

T & T Engineering Services, Inc. v. Danks, 2022 WL 3588718 (Tex. App.–Houston [1st Dist.] August 23, 2022)

- ▶ 2: Nothing in the Board of Professional Engineers rules provides that the license holder is restricted to an engineering designation if, in his professional judgment, he is competent in other areas of engineering
- ▶ 3: The statute does not require the Professional to identify the particular defendant at fault and the specific conduct that constituted an error. The affidavit is

Terracon Consultants, Inc. v. N. Pride Commc'ns, Inc.,
2023 WL 2316351 (Tex. App.–Houston [1st Dist.]
March 2, 2023)

- ▶ Appellee sued Appellant, a professional engineering firm, for breach of contract and negligence asserting Appellant breached its duties in providing materials, engineering, and testing services.
- ▶ Appellee did not file a Certificate of Merit. Appellant filed a Chapter 150 motion to dismiss.
- ▶ Trial court denied the motion to dismiss
- ▶ Appellate court reversed the trial court's order and remanded the case to the trial court to grant Appellant's Motion to Dismiss
 - ▶ Appellate court found that Appellee's claims pertained to Appellant's engineering firm's performance of its scope of testing and completion under the parties' engineering services agreement therefore Appellee was required to file a Certificate of Merit

Costello, Inc. v. Briggs Brothers Enterprises Corp., 2024
WL 187435 (Tex. App.–Houston [1st Dist.]
January 18, 2024)

- ▶ Appellee contractor sued Appellant engineer for tortious interference alleging Appellant interfered with Appellee's contracts with subcontractors
- ▶ Appellee did not file a Certificate of Merit.
- ▶ Appellant filed a Chapter 150 motion to dismiss the claims because Appellant was hired to provide engineering and other professional services. Therefore, any service provided by Appellant was the practice of engineering which required Appellee to file a Certificate of Merit with its pleading.
- ▶ Trial court denied the motion to dismiss

Costello, Inc. v. Briggs Brothers Enterprises Corp., 2024
WL 187435 (Tex. App.–Houston [1st Dist.]
January 18, 2024)

- ▶ Appellate court affirmed the Trial Court's ruling denying Appellant's Motion to Dismiss
- ▶ Chapter 150 does not apply to every claim against a professional engineer or engineering firm
- ▶ Appellee's tortious interference claim against Appellant did not allege any claims regarding Appellant's education, training, or experience as engineers

Lessons Learned

- ▶ Don't risk it - get a Certificate of Merit before initiating any potentially applicable claim
- ▶ Be specific in petition – if allegations in the petition implicate a licensed or registered professional's education, training, or experience in applying special knowledge or judgment then a Certificate of Merit will be required
- ▶ If approaching limitations deadline, use diligence in trying to get an affidavit. This will help support arguments for application of "good cause" exception, if needed
- ▶ Conduct discovery and file Motion to Dismiss promptly, or risk waiver

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