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TEXAS SUPREME COURT CLARIFIES TEXAS LAW REGARDING SUITS AGAINST ARCHITECTS AND ENGINEERS

On February 24, 2017, in a case litigated by Thompson & Knight, the Supreme Court of Texas clarified the meaning of Texas Civil Practice and Remedies Code Chapter 150, which requires that suits against architects, engineers, surveyors, and landscape architects be supported by an affidavit, commonly known as a "certificate of merit," from a similarly licensed third-party expert. The purpose of a certificate of merit is to provide a basis for the trial court to determine—at the outset of the case—whether a party's claims are frivolous. The Court held that a plaintiff suing an architect or engineer must demonstrate not only that the third-party expert who signs the required certificate of merit holds the same license as the defendant, but also that the expert is knowledgeable in the defendant's practice area. Prior to this ruling by the Court, lower courts had issued conflicting opinions about whether Chapter 150's requirement regarding knowledge of the defendant's practice area could simply be inferred based on the third-party expert holding the same license.

Chapter 150 requires that a sworn certificate of merit signed by a third-party expert must accompany a plaintiff's petition in any case "arising out of the provision of professional services by a licensed or registered professional" named in the statute. The expert signing the certificate of merit must (a) hold the same type of professional license or registration as the defendant; (b) be actively engaged in the practice of architecture, engineering, or surveying; (c) be knowledgeable in the defendant's practice area; and (d) set forth the defendant's negligence or other wrongdoing and its "factual basis."

Defendant Levinson Alcoser Associates, L.P., a Houston-based architecture firm, designed a shopping center in McAllen, Texas for plaintiff El Pistolon II, Ltd. Years after completion of the project, El Pistolon sued Levinson for allegedly failing to design the center to its "highest and best use."

Levinson moved to dismiss the lawsuit because (a) there was nothing showing that the third-party expert who signed El Pistolon's certificate of merit had any knowledge of the defendant's practice area, and (b) the certificate of merit failed to provide a factual basis for the defendant's alleged wrongdoing.

The trial court denied Levinson's motion to dismiss. The court of appeals affirmed and held that the expert's knowledge of the defendant's practice area could be "inferred" from the expert's status as a licensed architect. Levinson filed a petition for review in the Supreme Court of Texas.

The Supreme Court of Texas reversed the trial court's denial of Levinson's motion to dismiss. Writing for the majority, Justice Devine held that the requirement that the third-party expert be knowledgeable in the defendant's practice area cannot be satisfied simply because the expert holds the same type of professional license as the defendant:

> We conclude then that the statute's knowledge requirement is not synonymous with the expert's licensure or active engagement in the practice; it requires some additional explication or evidence reflecting the expert's familiarity or experience with the practice area at issue in the litigation.

The Court ruled that El Pistolon's certificate of merit failed because nothing in the certificate or any other document submitted to the trial court provided any evidence from which the trial court could infer such knowledge.

Because it held that the third-party expert was not qualified under Chapter 150 to sign the certificate of merit, the majority did not decide whether the certificate of merit stated an adequate factual basis. But Justice Brown, in a concurring opinion, wrote that he would have reversed the lower court's rulings because the affidavit was conclusory and, therefore, failed to include the factual basis required by the statute. Justice Brown noted that:

> A certificate of merit must set forth "the factual basis" for each claim of professional liability. TEX. CIV. PRAC. & REM. CODE § 150.002(b). But [the third-party expert's] affidavit is devoid of substance. Its text could be copied and pasted into any certificate of merit without regard to the particular facts of the case.

The Supreme Court of Texas is set to hear another Chapter 150 case on March 22 that may give the Court an opportunity to provide further clarification regarding the factual basis requirement.

To view the full opinion in *Levinson Alcoser Associates, LP v. El Pistolon II, Ltd.*, please follow this link.

Please contact the Thompson & Knight LLP attorney with whom you regularly work or one of the attorneys listed below to discuss any questions you have regarding the impact of this case on your policies and practices.

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