



Certificate of Merit Failure May Result in Engineer's Success

The statutes can prevent a plaintiff from bringing a frivolous claim for professional malpractice against a licensed professional.

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More than half the states in the country have enacted Certificate of Merit statutes to serve as a check on a plaintiff who wishes to bring an action for professional malpractice against a licensed professional, such as an engineer or architect.

(applewebdata://48DB524C-E5AD-4E81-9B1F-D547656305A2#_ftn1) These statutes, which in some jurisdictions are known as Affidavit of Merit statutes, vary in terms of their requirements, but they have the same overall purpose: to prevent a plaintiff from bringing a frivolous claim for professional malpractice against a licensed professional.

Many statutes state that if a plaintiff fails to provide such a certificate or affidavit in accordance with the state's statute, then the plaintiff's malpractice claim is subject to dismissal. Since engineers have a vested interest in achieving such a favorable result if faced with a malpractice action, it is important for engineers to know if their state has an Affidavit or Certificate of Merit statute. If their state has such a statute, they should understand the details of it.

Variety of Statutory Requirements

While the requirements of the statute vary from state to state, most of the existing statutes generally require a similarly licensed professional to certify, affirm or swear that he has reviewed the plaintiff's malpractice claims against the defendant and there is a reasonable likelihood that the defendant's conduct fell below the applicable, professional standard of care.

Again, the details in state statutes vary. These details include which professionals are subject to the statute, what kind of professional is required to certify, what the affidavit or certificate is required to contain and the time limits when it must be filed. To understand how a plaintiff's failure to comply with the requirements of the applicable statute could translate into success for an engineer in malpractice litigation, we will look at a recent case out of the Court of Appeals of Texas.

In

Whitaker v. R2M Engineering, LLC

, 603 S.W.3d 530 (Tex. Ct. App. 2020), the estate of a deceased motorcyclist brought a professional negligence action against engineering contractors for alleged defects in a roadway that caused the motorcyclist's death. The estate failed to file a Certificate of Merit in accordance with the applicable Texas statute.

Texas Requirements

Section 150.002(a) of the Texas statute,

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, provides: "In any action or arbitration proceeding for damages arising out of the provision of professional services by a licensed or registered professional, 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: (1) is competent to testify; (2) holds the same professional license or registration as the defendant; and (3) practices in the area of practice of the defendant and offers testimony based on the person's: (A) knowledge; (B) skill; (C) experience; (D) education; (E) training; and (F) practice."

Section (b) of the Texas statute provides: "The affidavit shall 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.

“The third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor shall be licensed or registered in this state and actively engaged in the practice of architecture, engineering, or surveying.”

Although the statute has a few more requirements, for purpose of this example, the only other relevant provision is Section (c): “A claimant’s failure to file the affidavit in accordance with this section shall result in the dismissal of the complaint against the defendant. The dismissal may be with prejudice.”

The Facts

The facts in
Whitaker

are fairly straightforward. Jan Whitaker lost control of his motorcycle while attempting to enter an exit ramp. The roadway of the ramp was undergoing renovation/reconstruction at the relevant time. As a result of excavation or resurfacing, there was a “lip” or rise between the roadway and ramp. Mr. Whitaker was riding his motorcycle over this lip, lost control of his motorcycle, fell and died. R2M Engineering, LLC (“R2M”) was one of the entities retained by the Texas Department of Transportation to perform the renovations.

Whitaker’s estate sued R2M for negligence. R2M moved to dismiss the complaint because Whitaker’s estate file an affidavit pursuant to
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§ 150.002. The trial court granted R2M’s motion. On appeal, the Court of Appeals of Texas affirmed the trial court’s decision, finding that Whitaker’s estate was required to file an affidavit or certificate of merit but failed to do so.

In reaching its decision, the Court of Appeals analyzed “two threshold questions. One is whether the defendant is a licensed or registered professional, e.g., a licensed engineer; the other is whether the damages sought by the plaintiff arise out of the provision of those professional services by the professional.”

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, 603 S.W.3d at 533.

In response to the first question, the court found that R2M was a licensed engineer. As for the second question, the court looked to the applicable Texas statute governing the practice of engineering.

Whitaker
, 603 S.W.3d at 533-34.

It further looked to the allegations in the estate’s complaint, noting: “[T]he tortious acts themselves need not constitute an exercise in the practice of engineering. They need only originate, stem or result from the defendant engaging in such practice to fall within the ambit” of the Affidavit of Merit statute.

Whitaker

, 603 S.W.3d at 538.

The court found R2M's conduct as pleaded in the complaint "stemmed, originated, or resulted from other work that utilized or implicated engineering education, training, and experience."

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, 603 S.W.3d at 538-39. Answering both questions in the affirmative, the Court of Appeals upheld the dismissal of the action against R2M by the trial court.

It bears repeating that this example is just that, an example of the application of a particular Affidavit of Merit statute — namely, the Texas statute. Since Affidavit of Merit statutes are state-specific, the requirements will vary, depending on applicable state law.

If your jurisdiction is one of the 29 with an Affidavit of Merit statute, you (as well as your defense attorney) should know the statutory requirements for your state. That way both of you can make sure the plaintiff complies with them.

Many states construe these statutes strictly and a plaintiff is expected to follow their requirements or face the harsh ramification of dismissal. In short, a plaintiff's failure to furnish an affidavit or certificate as required by statute may translate into a successful defense for an engineer in malpractice litigation.