

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-19-00122-CV

AMEC FOSTER WHEELER USA CORPORATION, Appellant

V.

JARED MARICELLI AND MARCI NICOLE MARICELLI, Appellees

On Appeal from the 172nd District Court
Jefferson County, Texas
Trial Cause No. E-202,378

MEMORANDUM OPINION

This is an interlocutory appeal of the trial court’s order denying AMEC Foster Wheeler USA Corporation’s (Foster Wheeler) motion to dismiss for the failure of Jared and Marci Nicole Maricelli (Plaintiffs or Appellees) to file a “sufficient” certificate of merit with their first-filed petition in which Foster Wheeler was named

as a defendant. *See* Tex. Civ. Prac. & Rem. Code Ann. § 150.001-.002.¹ Foster Wheeler argues on appeal that the trial court abused its discretion in denying Foster Wheeler’s motion to dismiss by improperly considering a new certificate of merit submitted months after the petition and original certificate of merit and in refusing to strike the new certificate of merit. Foster Wheeler also argues that, even if the trial court did not consider the new certificate of merit, the trial court abused its discretion in denying the motion to dismiss because the original certificate of merit made no allegations of negligence or other wrongful acts or omissions against Foster Wheeler. We affirm.

Background

Plaintiffs filed suit against four Defendants: Foster Wheeler, Fluor Enterprises, Inc. (Fluor Enterprises)², Triple “S” Industrial Corporation (Triple “S”), and Wyatt Field Service Company (Wyatt). According to Plaintiffs’ first amended petition (the petition), on or about November 22, 2016, Plaintiff Jared Maricelli sustained injuries when a threaded pipe connection within the Coker unit’s fines removal filter system (the system) at Total’s refinery in Port Arthur, Texas

¹ The legislature recently amended sections 150.001 and 150.002. The amendments became effective on June 19, 2019 and are applicable to actions filed on or after the effective date but do not impact the outcome of this appeal.

² Fluor Enterprises has filed a separate interlocutory appeal.

unexpectedly rotated and struck him. The petition alleged that the unit was designed, manufactured, and maintained by Fluor Enterprises and Foster Wheeler, and that the pipe that unexpectedly rotated and injured Maricelli was installed, inspected, and/or approved by Triple “S” and/or Wyatt. Plaintiffs sued Foster Wheeler for a design defect, manufacturing defect, marketing defect, negligence, and breach of implied warranty of merchantability regarding the system. Plaintiffs attached a certificate of merit to their petition. The certificate of merit was provided by Professional Engineer Michael Sawyer and it stated, in relevant part:

On or about 22 November 2016 an incident occurred in the Delayed Coker Unit at the Total Port Arthur Refinery that injured Mr. Jared Maricelli. This certificate of merit discusses the design deficiency that was the proximate cause of Mr. Maricelli’s injury.

Total commissioned an expansion of its Port Arthur Refinery in 2008 that included a 50,000 BPD Coker as well as a vacuum distillation unit and distillate hydrotreater. The expansion allowed the refinery to produce more ultra-low sulfur diesel and was known as the Deep Conversion Project.

Fluor Corporation performed the feasibility study, front-end engineering and design, procurement, construction and commissioning support for the Deep Conversion Project. The technology licensee for the Deep Conversion Project was from AMEC Foster Wheeler USA Corporation. Mr. Corbella-Torne confirmed that Foster Wheeler was the licensee for the project. . . .

. . . .

Experienced engineering and construction firms know that it is paramount to the safety of workers and the environment that piping

systems are properly designed and constructed to prevent failure and the subsequent release of hazardous chemicals. These professional engineering firms are also aware that the risk involved in process design modifications must be adequately assessed and proper adherence to protocols and good engineering practices incorporated before startup.

7.0 CONCLUSIONS

Fluor Corporation provided the front-end engineering and design and construction for the AMEC Foster Wheeler USA Corporation licensed Delayed Coker at the Total Port Arthur Refinery. The hazard associated with Mr. Maricelli's incident would have been present during the design and construction of the Deep Conversion Project. A thorough hazard and operability study should have identified the hazard associated with maintenance of the 304 Strainers and a safer alternative design implemented. The firms associated with the engineering and design of the Coker at Total failed to identify the piping hazard and such failure was a proximate cause of Mr. Maricelli's incident.

Wyatt Field Service Company and Triple S Industrial Corporation provided process maintenance services at the Total Refinery prior to Mr. Maricelli's incident. Likewise, both contractors were involved with maintenance and modifications to the 30FL-304A/B Fines Removal Strainers and associated piping before the incident. Based on available information and understanding pertaining to the installation of the piping modification that injured Mr. Maricelli it is more likely than not that the installation was conducted by an engineering contractor during Total's 2016 Coker Unit Turnaround. The contractor who conducted the piping modification failed in their responsibilities and duties, as set forth above, constituting a breach of the standard of care and negligence and negligent undertaking, and such failures were a proximate cause of Mr. Maricelli's 22 November 2016 incident.

In addition, Total bears some responsibility for failing to ensure the piping modifications were adequately inspected through the refinery's mechanical integrity quality assurance process.

Foster Wheeler filed a motion to dismiss Plaintiffs' claims pursuant to section 150.002 of the Texas Civil Practice and Remedies Code. In its motion, Foster Wheeler argued that the certificate of merit was deficient because it did not indicate if Foster Wheeler (1) was negligent or strictly liable; (2) committed any error or omission; or (3) how Foster Wheeler was negligent or committed an error or omission. Foster Wheeler further asserted that any collective assertions made in Sawyer's affidavit are improper and require dismissal. Foster Wheeler argued that the trial court should dismiss Plaintiffs' claims with prejudice because limitations had run.

Plaintiffs filed a response to the motion to dismiss arguing that section 150.002 only requires a "threshold" showing that the Plaintiffs' claims are not frivolous and that Foster Wheeler's attack on Sawyer's certificate of merit is "impermissible hair-splitting." Plaintiffs argued that the certificate of merit demonstrates that Foster Wheeler was responsible for the technology of the fines removal system, which is an engineering design issue; that Sawyer's attached affidavit explained that, as designed and installed, the original piping from the strainers to the oily water sewer presented a tripping hazard; and that Sawyer opined in the conclusions in the certificate of merit that "[t]he firms associated with the engineering and design of the Coker at Total failed to identify the piping hazard and

such failure was the proximate cause of Mr. Maricelli's incident." According to Plaintiffs, the cases Foster Wheeler cited in support of its argument that collective assertions in a certificate of merit are improper are distinguishable from the facts here. Plaintiffs attached to their response an additional affidavit of Sawyer which provided the following, in relevant part:

[] In my Certificate of Merit where I stated "the technology licensee for the Deep Conversion Project was from AMEC Foster Wheeler USA Corporation" I was relying on the testimony of Victor Corbella-Torne who testified as Total Petrochemical USA, Inc.'s corporate representative where he testified as follows:

Q: Do you know who the engineering company is that engineered that unit? [referring to the Coker Unit at its Port Arthur Refinery]

A: Fl[uo]r. I think it's a license from Foster Wheeler and Fl[uo]r implements the—the design and construction."

My Certificate of Merit contained a typographical error in that "licensee" should have been "license."

[] In the engineering industry, it is commonly understood that the owner of technology such as that used for the Total Port Arthur Refinery's Coker Unit who then licenses that technology to another is the original creator who designs and engineers the technological concept.

[] It is also commonly understood in the engineering industry that "front-end engineering and design" (FEED) is the work required to define detailed engineering specifications for fabrication and construction of the process facility. One of the most critical aspects during the front-end engineering and design is to conduct hazard and operability evaluations. Fl[uo]r Enterprises, Inc. performed the front-end engineering and design for the work at issue.

[] As the developer and engineer of its Delayed Coking design, AMEC Foster Wheeler USA Corporation engineered the On-Line Fines Removal System and was responsible for design safety and operability features of Coker Unit, including "ergonomic layouts." Ergonomic

layouts would include analysis of operability hazards when designing the Delayed Coker unit.

[] Fl[uo]r Enterprises, Inc., as the FEED contractor also had an obligation for design safety that would include analyzing the design so that process and operability hazards were eliminated or controlled. In other words, the responsibilities of AMEC Foster Wheeler USA Corporation and Fl[uo]r Enterprises, Inc. overlapped with regard to the identification and control of process and operability hazards.

[] Both AMEC Foster Wheeler USA Corporation and Fl[uo]r Enterprises, Inc. separately and independently failed to identify the piping hazard and operability issue and such failure was the proximate cause of Mr. Maricelli's incident.

After a hearing on Foster Wheeler's motion to dismiss, the trial court denied the motion. Foster Wheeler filed this interlocutory appeal.

Standard of Review and Applicable Law

A trial court's denial or grant of a motion to dismiss pursuant to section 150.002 is immediately appealable. *See id.* § 150.002(f). We review a trial court's order denying a section 150.002 motion to dismiss for an abuse of discretion. *See Barron, Stark & Swift Consulting Eng'rs, LP v. First Baptist Church*, 551 S.W.3d 320, 322 (Tex. App.—Beaumont 2018, no pet.) (citations omitted); *CBM Eng'rs, Inc. v. Tellepsen Builders, L.P.*, 403 S.W.3d 339, 342-43 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). "If a trial court acts arbitrarily or unreasonably, without reference to any guiding rules and principles, it constitutes an abuse of discretion." *Barron, Stark & Swift*, 551 S.W.3d at 322 (citing *Downer v. Aquamarine Operators*,

Inc., 701 S.W.2d 238, 241-42 (Tex. 1985)). A court abuses its discretion if it fails to analyze or apply the law correctly. *Dunham Eng'g, Inc. v. Sherwin-Williams Co.*, 404 S.W.3d 785, 789 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (citations omitted). If our review necessitates statutory interpretation, we conduct that review de novo. *See Jaster v. Comet II Constr., Inc.*, 438 S.W.3d 556, 562 (Tex. 2014) (citation omitted); *Barron, Stark & Swift*, 551 S.W.3d at 322 (citations omitted).

Section 150.002 of the Texas Civil Practice and Remedies Code generally requires that a sworn “certificate of merit” accompany a plaintiff’s “complaint” in a case that “aris[es] out of the provision of professional services by a licensed or registered professional[.]” named in the statute. *See* Tex. Civ. Prac. & Rem. Code Ann. § 150.002(a). The sworn certificate or affidavit must be from a licensed professional who meets certain qualifications and attests to the lawsuit’s merit. *Id.* § 150.002(a), (b).

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. . . . *Id.* § 150.002(b). The “failure to file the affidavit in accordance with [section 150.002] shall result in dismissal of the complaint against the defendant[.]” and the dismissal may be with prejudice. *Id.* § 150.002(e) (emphasis added). Section 150.002

“shall not be construed to extend any applicable period of limitation[.]” *Id.* § 150.002(g). The purpose behind the certificate of merit statute is to require that plaintiffs make a threshold showing that their claims have merit before proceeding further. *Melden & Hunt, Inc. v. E. Rio Hondo Water Supply Corp.*, 520 S.W.3d 887, 896 (Tex. 2017); *M-E Eng’rs, Inc. v. City of Temple*, 365 S.W.3d 497, 504 (Tex. App.—Austin 2012, pet. denied).

Analysis

In its first issue, Foster Wheeler argues on appeal that the trial court abused its discretion in denying Foster Wheeler’s motion to dismiss by improperly considering a new certificate of merit submitted months after the petition and original certificate of merit and in refusing to strike the new certificate of merit. In issue two, Foster Wheeler also argues that, even if the trial court did not consider the new certificate of merit, the trial court abused its discretion in denying the motion to dismiss because the original certificate of merit made no allegations of negligence or other acts of omissions against Foster Wheeler.

Plaintiffs contend that Sawyer’s additional affidavit which was attached to their response to Foster Wheeler’s motion to dismiss is not a new certificate of merit. The record is unclear whether the trial court, in denying Foster Wheeler’s motion to dismiss, considered Sawyer’s additional affidavit that was attached to Plaintiffs’

response to the motion to dismiss. In Foster Wheeler’s first issue, it contends the trial court erred in considering the supplemental affidavit because it was a “new affidavit” filed in response to the motion to dismiss. In its second issue, Foster Wheeler argues that if the trial court did not consider the additional affidavit, the original certificate of merit is deficient and fails to comply with section 150.002. We need not reach the first issue if we find the original certificate was sufficient. Therefore, we will decide Foster Wheeler’s second issue before we decide its first issue.

As stated recently by the Texas Supreme Court in *Melden & Hunt, Inc.*, the certificate-of-merit statute “obligates the plaintiff to get an affidavit from a third-party expert attesting to the defendant’s professional errors or omissions and their factual basis[.]” in order for the trial court to determine “whether the expert’s affidavit sufficiently demonstrates that the plaintiff’s complaint is not frivolous.” 520 S.W.3d at 896. The Texas Supreme Court further explained that the statute does not require that the expert’s affidavit “address the elements of the plaintiff’s various theories or causes of action.” *Id.*

According to Foster Wheeler, the original certificate of merit contains only two sentences regarding Foster Wheeler:

The technology licensee for the Deep Conversion Project was from AMEC Foster Wheeler USA Corporation. Mr. Corbella[-]Torne confirmed that Foster Wheeler was the licensee for the project. . . .

Fluor Corporation provided the front-end engineering and design and construction for the AMEC Foster Wheeler USA Corporation licensed Delayed Coker at the Total Port Arthur Refinery.

Foster Wheeler contends that these sentences do not comport with the certificate-of-merit requirement as set forth in section 150.002, because the sentences do not “set forth specifically . . . the negligence, if any, or other action, error, or omission of the licensed or registered professional in providing the professional service” and do not set forth “the factual basis for each such claim.”

Plaintiffs argue that the original certificate of merit included the following as to Foster Wheeler:

Fluor Corporation provided the front-end engineering and design and construction for the AMEC Foster Wheeler USA Corporation licensed Delayed Coker at the Total Port Arthur Refinery. The hazard associated with Mr. Maricelli’s incident would have been present during the design and construction of the Deep Conversion Project. A thorough hazard and operability study should have identified the hazard associated with the maintenance of the 304 Strainers and a safer alternative design implements. The firms associated with the engineering and design of the Coker at Total failed to identify the piping hazard and such failure was the proximate cause of Mr. Maricelli’s incident.

According to Plaintiffs, Sawyer’s reference to “[t]he firms” in his conclusions clearly referred to Foster Wheeler and Fluor Enterprises as those firms were

mentioned in the same paragraph and the other entities sued were Maricelli's employer (Total) and two contractors for the 2016 turnaround (Wyatt and Triple "S"). Plaintiffs argue "[a] logical reading of the certificate of merit shows it is sufficient."

As to Plaintiffs' reliance on Sawyer's reference to "[t]he firms" in his conclusions, Foster Wheeler argues that, "[e]ven assuming, arguendo, that 'the firms' included Foster Wheeler, . . . this conclusory sentence is a collective assertion of negligence not permitted by Chapter 150 or the case law interpreting same." In its motion to dismiss, at the hearing on the motion, and on appeal, Foster Wheeler cites to three cases in support of this argument: *Macina, Bose, Copeland & Assocs. v. Yanez*, No. 05-17-00180-CV, 2017 Tex. App. LEXIS 10128, at **14-22 (Tex. App.—Dallas Oct. 26, 2017, pet. abated) (mem. op.); *DHM Design v. Morzak*, No. 05-15-00103-CV, 2015 Tex. App. LEXIS 6255, at **7-8 (Tex. App.—Dallas June 19, 2015, pet. denied) (mem. op.); and *Robert Navarro & Assocs. Eng'g, Inc. v. Flowers Baking Co. of El Paso, LLC*, 389 S.W.3d 475, 480-82 (Tex. App.—El Paso 2012, no pet.).

In *Macina*, the plaintiff filed suit on behalf of herself, her husband, and their children after her husband sustained injuries when a ladder he was using working at a construction site came close to a high-voltage power line and electrocuted him.

2017 Tex. App. LEXIS 10128, at **1-2. In her second amended petition, the plaintiff added defendant-architects Sage Group and Sage Architecture.³ *Id.* The trial court denied their motions to dismiss, and Sage Group and Sage Architecture appealed. *Id.* at *3. On appeal, Sage Group and Sage Architecture argued that the trial court abused its discretion in denying their motions because the certificate of merit by the expert architect did not distinguish between their actions. *Id.* at *14. In concluding that the trial court erred in denying the motions to dismiss, the Dallas Court of Appeals explained that the certificate of merit referred to Sage Group and Sage Architecture as “The Defendant Architectural Firms” but “made no distinction in the work performed by the two companies.” *Id.* at **17, 22. According to the Dallas Court of Appeals, “there was no way for a court to determine which acts or omissions should be ascribed to which company. Nor does he state that both companies were involved in all aspects of the work.” *Id.* at *17. The Dallas Court of Appeals rejected the plaintiff’s argument that the statute did not require the affidavit to assign the negligent acts to each defendant when the defendant’s actions overlap and noted that the certificate of merit did not allege the defendants’ work “overlapped,” and the

³ Another plaintiff and other defendants were parties to the suit and other issues were presented on appeal in *Macina, Bose, Copeland & Assocs. v. Yanez*, No. 05-17-00180-CV, 2017 Tex. App. LEXIS 10128 (Tex. App.—Dallas Oct. 26, 2017, pet. abated) (mem. op.). We limit our discussion of this case to that part of the opinion related to the collective assertion of negligence.

Court also rejected the plaintiff's argument that the certificate of merit was sufficient because the two companies are not distinct entities and noted that her petition did not assert they were the same entity or allege that these defendants were an alter ego of one another. *Id.* at **20-22. Unlike *Macina*, in the present case, the trial court could have determined from the original certificate of merit the role of Foster Wheeler in the project and the alleged acts or omissions that the plaintiff attributed to Foster Wheeler.

In *Morzak*, the plaintiff filed suit against BRS, alleging BRS had negligently designed the seating area and stairway at a ballpark where she was injured, and the plaintiff attached a certificate of merit to her petition. 2015 Tex. App. LEXIS 6255, at **1-2. The plaintiff's attorney received information from BRS's attorney that BRS had only designed the roof over the grandstands at the park, and that DHM, a landscape architecture firm, had designed the seating area and stands. *Id.* at *3. The plaintiff filed her first amended petition, adding DHM as a defendant and alleging that DHM had negligently designed the bleachers. *Id.* DHM filed a motion to dismiss for failure to file a certificate of merit specifically addressing DHM and its conduct. *Id.* The plaintiff filed a response to the motion (which included an alternative request for an extension of time) and a second amended petition with a "new" second certificate of merit from the same architect expert stating the first certificate applied

to both BRS and DHM. *Id.* DHM filed a second motion to dismiss, arguing Morzak failed to provide a sufficient certificate with her first amended petition and did not timely seek an extension. *Id.* The trial court denied the motion to dismiss and granted Morzak an extension for filing a certificate of merit until the same date she filed her second amended petition and second certificate of merit. *Id.* at *4. DHM filed an interlocutory appeal. *Id.* On appeal, the Dallas Court of Appeals determined that when Morzak filed her first amended petition, which added DHM as a defendant she made claims that fell within the ambit of section 150.002. *Id.* at *7. However, the Dallas Court found that she did not file a certificate of merit addressing DHM's conduct and only re-filed the certificate initially filed with her original petition that addressed BRS's conduct. *Id.* The Dallas Court of Appeals concluded that Morzak did not comply with the statutory requirement to file a certificate of merit addressing DHM's conduct contemporaneously with her first petition asserting claims against DHM. *Id.* at **7-9. In the present case, the original certificate of merit names Foster Wheeler and, it made allegations of wrongful conduct against Foster Wheeler.

In *Navarro*, Flowers Baking was having a warehouse built, and two engineering companies, Navarro Engineering and Bath Engineering provided professional services. 389 S.W.3d at 476. Navarro's engineering drawings showed the existence of water and sewage lines, and Bath assured the plaintiff that there

were existing water and sewage lines. *Id.* at 477. However, there were no water or sewage lines near the construction site. *Id.* The plaintiff sued Navarro for including the connections in the drawings without checking to see if the lines existed, and sued Bath for negligent misrepresentation for representing the lines existed when they did not. *Id.* at 477-78. In the certificate of merit filed by the plaintiff, the engineer stated that the defendants' failure to confirm the actual location and existence of the water and sewage lines constituted professional negligence and he opined that "the failure to confirm the actual location and existence of the water and sewer lines that are indicated on Drawing Sheet No. MO. 1 constitutes professional negligence by Robert Navarro and Associates Engineering, Inc. and/or Bath Engineering Corporation." *Id.* at 480-81. The certificate of merit did not specify who certified and sealed Drawing Sheet No. MO. 1. *Id.* In reversing the trial court's denial of Navarro's motion to dismiss, the El Paso Court of Appeals focused on the theories of recovery pleaded and the allegations of negligence against each defendant and explained:

If Bath sealed the Project Documents, it may bear liability for negligence. But Bath was sued for negligent misrepresentation, a totally separate tort requiring different elements of proof. If Navarro did not seal the drawing, it may or may not bear liability for breach of contract or negligence. One cannot ascertain the nuanced distinctions based upon [the engineering expert]'s affidavit. We thus agree with Appellants that the statutory language does not allow for collective assertions of negligence:

It cannot be presumed that anytime two defendants are accused of similar conduct that valid claims exist against both of them – if such claims indeed exist, the expert must actually say so, and do so in the form of positive averments made under oath.

Id. at 482 (internal citations omitted). In contrast, in the present case the trial court could have concluded that the original certificate of merit meets the minimum threshold requirement because it specified facts that could bear on the allegations made against Foster Wheeler.

In Plaintiffs’ original certificate of merit, Sawyer names Foster Wheeler and explains that Foster Wheeler was the technology licensee for the Deep Conversion Project. In the original certificate of merit, the affidavit identifies Fluor as the entity providing the front-end engineering and design and construction for the defendant “Foster Wheeler USA Corporation licensed Delayed Coker at the Total Port Arthur Refinery[,]” and it states that the hazard associated with Mr. Maricelli’s incident would have been present during the design and construction of the project, and asserts that a study would have identified the hazard associated with maintenance of the 304 Strainers and a safer alternative design implemented. The paragraph then concludes that “[t]he firms associated with the engineering and design of the Coker at Total failed to identify the piping hazard and such failure was a proximate cause of Mr. Maricelli’s incident.” The certificate refers to Wyatt and Triple “S” as

contractors that were involved with maintenance and modifications to the 30FL-304A/B Fines Removal Strainers and associated piping before the incident and opined as to how the contractors who conducted the piping modification were negligent. And, the certificate describes how Total “bears some responsibility” for the incident.

While the allegations in the original certificate may be poorly worded, we cannot say the trial court erred in denying the motion to dismiss on the record now before us as the trial court could have construed the original certificate in context with the paragraphs that specifically referenced Foster Wheeler as describing Foster Wheeler as the licensee, and Fluor as the engineers, and that both were involved in the engineering and design of the Coker at Total, and that they both “failed to identify the piping hazard and such failure was a proximate cause of Mr. Maricelli’s incident.”⁴ The trial court could have reasonably concluded that the original certificate of merit makes specific averments about Foster Wheeler, its role in the project, and its errors or omissions, and that it provided enough detail from which the trial court could determine Plaintiffs’ complaint is not frivolous. *See Melden &*

⁴ The defendant may still challenge the allegations and theories by use of a subsequent dispositive motion.

Hunt, Inc., 520 S.W.3d at 896; *see also* Tex. Civ. Prac. & Rem. Code Ann. § 150.002(b).

We cannot say the trial court acted arbitrarily or unreasonably, without reference to any guiding rules and principles, in determining the certificate of merit meets the threshold requirement and is sufficient for section 150.002 purposes. *Barron, Stark & Swift*, 551 S.W.3d at 322 (citing *Downer*, 701 S.W.2d at 241-42). Accordingly, the trial court did not abuse its discretion in denying Foster Wheeler's motion to dismiss. We overrule issue two.

Because we have determined that the trial court did not abuse its discretion in denying the motion to dismiss and determining that Plaintiffs' original certificate of merit complies with threshold requirement set forth in section 150.002, we need not address Foster Wheeler's first issue. *See* Tex. R. App. P. 47.1. We affirm the trial court's order.

AFFIRMED.

LEANNE JOHNSON
Justice

Submitted on July 8, 2019
Opinion Delivered July 2, 2020

Before Kreger, Horton and Johnson, JJ.