In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-20-00068-CV

LINDA WHITAKER, INDIVIDUALLY, AND AS REPRESENTATIVE OF THE ESTATE OF JAN WHITAKER, (DECEASED) KRIS WHITAKER, STACY WHITAKER, AND RANDA WHITAKER LANDUSKY, APPELLANTS

V.

R2M ENGINEERING, LLC AND CP&Y INC., APPELLEES

On Appeal from the 99th District Court
Lubbock County, Texas
Trial Court No. 2019-536,798, Honorable William C. Sowder, Presiding

May 28, 2020

OPINION

Before QUINN, C.J., and PIRTLE and PARKER, JJ.

Linda Whitaker, individually, and as representative of the estate of Jan Whitaker (deceased), Kris Whitaker, Stacy Whitaker, and Randa Whitaker Landusky (collectively referred to as Whitaker) appeal from orders dismissing their suit against R2M Engineering, LLC and CP&Y Inc. Dismissal occurred under § 150.002(e) of the Texas

Civil Practice and Remedies Code.[1] The suit arose from the death of Jan Whitaker, who lost control of his motorcycle while attempting to enter an exit ramp. The ramp led from North Loop 289 to University Avenue. The Loop was undergoing renovation/reconstruction at the time. Due to excavation or resurfacing, there appeared a lip or rise approximating three to five inches between the roadway and ramp.[2] Jan attempted to travel over same, lost control of his motorcycle, fell, and died.

R2 and CP were two entities retained by the Texas Department of Transportation (TxDOT) to perform the renovations and two of the several defendants sued by Whitaker for negligence relating to the purported "special" defect in the roadway. They moved for dismissal because Whitaker failed to file an affidavit per § 150.002(a) of the Civil Practice and Remedies Code.[3] The trial court agreed that such an affidavit was required from Whitaker, granted the motions, and dismissed, with prejudice, the claims against R2 and CP. Whitaker appealed. We affirm.

Authority

The applicable standard of review in an appeal like this is one of abused discretion. *Ronald R. Wagner & Co. v. Apex Geoscience, Inc.*, 560 S.W.3d 407, 411 (Tex. App.—Amarillo 2018, no pet.). Under that standard, the decision of the trial court is erroneous

[1] TEX. CIV. PRAC. & REM. CODE ANN. § 150.002(e) (West Supp. 2019) (stating that a claimant's failure to file an affidavit in accordance with this section shall result in dismissal of the complaint against the defendant and "[t]his dismissal may be with prejudice").

[2] Rises or lips are not uncommon when road surfaces undergo repair or reconstruction. As evinced here, they can prove hazardous to motorists, especially motorcyclists.

[3] TEX. CIV. PRAC. & REM. CODE ANN. § 150.002(a) (stating that "[i]n 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").

if the court fails to correctly analyze or apply the law, *id.*, or the decision is arbitrary, unreasonable, or made without reference to guiding rules and principles. *Allen v. Comerica Bank*, No. 07-16-00018-CV, 2016 Tex. App. LEXIS 8805, at *6 (Tex. App.—Amarillo Aug. 11, 2016, no pet.) (mem. op.).

Next, and as previously alluded to, statute obligates a claimant to file (with his petition) an affidavit of certain third-party licensed professionals in suits for damages "arising out of the provision of professional services." TEX. CIV. PRAC. & REM. CODE ANN. § 150.002(a). Therein, the affiant must "set forth . . . for each theory of recovery . . ., 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 . . . and the factual basis for each such claim." *Id.* § 150.002(b). Should that not occur, then the action is subject to dismissal with prejudice. *Id*. § 150.002(e).

That R2 and CP are entities generally engaged in engineering which may provide professional engineering services seems undisputed; at the very least, we see nothing in Whitaker's brief suggesting otherwise. Instead, the dispute involves whether Whitaker's action "arises out of the provision" of such services. She argues that it did not because her claims were "not predicated upon R2M and CP&Y's errors or omissions in providing professional services and do not implicate a professional engineer's specialized education, training, and experience in applying special knowledge or judgment of the mathematical, physical, or engineering sciences."

To resolve the dispute normally requires the consideration of 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. *Jennings, Hackler & Partners, Inc. v. N. Tex. Mun. Water Dist.,* 471 S.W.3d 577, 581 (Tex. App.—Dallas 2015, pet. denied). Again, the former is not in play here. So, we turn to the latter question. As can be seen, it consists of multiple components, that is, 1) professional services, 2) their provision, and 3) damages arising from their provision.

Like many words or phrases incorporated into their writings, the legislature failed to define what it meant by "provision of professional services." *Id.* Yet, we know that when words are undefined, we assign them their plain meaning, unless a different meaning is apparent or the plain meaning leads to an absurd result. *Jaster v. Comet II Constr., Inc.*, 438 S.W.3d 556, 562 (Tex. 2014). Given that, "provision" would mean the act or process of providing or supplying something. *Provision, Provide* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1999). So, the something being provided or supplied here would be "professional services." Yet, "professional services" also went undefined by statute. We hesitate, though, to simply turn to a dictionary to garner the plain meaning that phrase given its context. It immediately precedes reference to the passage "by a licensed or registered professional" in § 150.002(a). In other words, the "professional services" are those supplied by the licensed/registered professional. So, logically, what services that professional is licensed or registered to do would tend to define what was meant by "professional services."

The "professionals" here being engineers, it is appropriate to see what services an engineer provides, and, luckily, those are described by the Texas Occupation Code. *See Amec Foster Wheeler USA Corp. v. Goats*, No. 09-18-00477-CV, 2019 Tex. App. LEXIS

7543, at *7–8 (Tex. App.—Beaumont Aug. 22, 2019, no pet.) (mem. op.) (noting that the Texas Occupation Code provides guidance as to the meaning of "professional services" when engineering is involved); *TDIndustries v. Citicorp N. Am., Inc*., 378 S.W.3d 1, 5 (Tex. App.—Fort Worth 2011, no pet.) (same). Needless to say, the statutory scope of those services is rather expansive. Generally, the "practice of engineering" encompasses "the performance of or an offer or attempt to perform any public or private service or creative work, the adequate performance of which requires engineering education, training, and experience in applying special knowledge or judgment of the mathematical, physical, or engineering sciences to that service or creative work." TEX. OCC. CODE ANN. § 1001.003(b) (West Supp. 2019). And, that includes:

> (1) consultation, investigation, evaluation, analysis, planning, engineering for program management, providing an expert engineering opinion or testimony, engineering for testing or evaluating materials for construction or other engineering use, and mapping;
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> (2) design, conceptual design, or conceptual design coordination of engineering works or systems;
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> (3) development or optimization of plans and specifications for engineering works or systems;
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> (4) planning the use or alteration of land or water or the design or analysis of works or systems for the use or alteration of land or water;
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> (5) responsible charge of engineering teaching or the teaching of engineering;
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> (6) performing an engineering survey or study;
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> (7) engineering for construction, alteration, or repair of real property;
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> (8) engineering for preparation of an operating or maintenance manual;
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> (9) engineering for review of the construction or installation of engineered works to monitor compliance with drawings or specifications;

> (10) a service, design, analysis, or other work performed for a public or private entity in connection with a utility, structure, building, machine, equipment, process, system, work, project, or industrial or consumer product or equipment of a mechanical, electrical, electronic, chemical, hydraulic, pneumatic, geotechnical, or thermal nature;
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> (11) providing an engineering opinion or analysis related to a certificate of merit under Chapter 150, Civil Practice and Remedies Code; or
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> (12) any other professional service necessary for the planning, progress, or completion of an engineering service.

Id. § 1001.003(c).

From this, then, we conclude that the "professional services" supplied or provided by a licensed engineer, for purposes of § 150.002(a), means work or services requiring "engineering education, training, and experience in applying special knowledge or judgment of the mathematical, physical, or engineering sciences to that" work or service, examples of which are itemized in § 1001.003(c). *See Jennings, Hackler & Partners, Inc.*, 471 S.W.3d at 581–82 (noting that a claim arises out of the provision of professional services if it implicates "a professional's education, training, and experience in applying special knowledge or judgment"); *Curtis & Windham Architects, Inc. v. Williams*, 315 S.W.3d 102, 108 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (stating that a plaintiff's claim for damages that "does not implicate the special knowledge and training of an architect" is not a claim for damages arising out of the provision of professional services).

One other phrase bears definition as well. It consists of the words "arises out of." Again, § 150.002(a) requires that the claimant's damage "arises out of" the aforementioned professional services supplied by the engineer. This leads to another instance of journeying into the realm of the statutorily undefined. What the legislature meant by it appears nowhere in Chapter 150 of the Civil Practice and Remedies Code.

Luckily again, though, we do not write on an empty slate. Our Supreme Court most recently dealt with the phrase as used in other areas of our jurisprudence. In doing so, it observed that "arise" meant to "originate," "stem," or "result" from. *Pinto Tech. Ventures, L.P v. Sheldon*, 526 S.W.3d 428, 437 (Tex. 2017) (involving the interpretation of the phrase "any dispute arising out of the Agreement" in a forum selection clause). So too did it observe the "broad significance" often assigned to "arising out of," especially when the intent to more narrowly apply it cannot be discerned from the context. *Id.* Given this, we interpret "arising out of" as meaning originating, stemming, or resulting from.

So, per § 150.002(a), the damages sought by the plaintiff must originate, stem, or result from the professional (i.e., here, the engineer) performing work which utilizes his engineering education, training, and experience in applying his unique knowledge or judgment of the mathematical, physical, or engineering sciences. Some have substituted the word "implicate" for "utilize." *See, e.g.*, *Jennings, Hackler & Partners, Inc.*, 471 S.W.3d at 581–82 (and authorities cited therein). We see little difference, for their use of "implicates," like our use of "utilize," in the context of § 150.002(a) litigation, describes the exercise by the engineer of his specialized education, training, and experience in performing the tasks from which the damages stem, originate, or result.

Additionally, "damages" do not occur in a vacuum. Rather, they are the consequence of an act or omission. Ergo, § 150.002(a)'s reference to "damages arising out of" necessarily alludes to the act or omission from which the damages spring. In other words, the damages must be caused by acts or omissions originating, stemming, or resulting from the engineer's exercise of specialized knowledge, training, or experience while performing the engineering services for which he was hired. This does not mean

that the acts themselves must constitute professional or engineering services encompassed with § 1001.003 (b) or (c); they need only originate, stem, or result from the engineer's supplying services which utilize his special engineering talents, education, and the like. *Jennings, Hackler & Partners, Inc.*, 471 S.W.3d at 582; *TIC N. Cent. Dallas 3, L.L.C. v. Envirobusiness, Inc*., 463 S.W.3d 71, 79 (Tex. App.—Dallas 2014, pet. denied); *see RCS Enters., LP v. Hilton*, No. 02-12-00233-CV, 2013 Tex. App. LEXIS 15337, at *5 (Tex. App.—Fort Worth Dec. 19, 2013, no pet.) (mem. op.) (explaining that "[i]f, in the course of providing a professional service to which the statute is applicable, the defendant committed some act that gave rise to the claim, the statute applies"). The opinion in *Found. Assessment, Inc. v. O'Connor*, 426 S.W.3d 827 (Tex. App.—Fort Worth 2014, pet. denied) is a good illustration of this.

Foundation Assessment involved a suit based upon a misrepresentation made within an engineering report. The engineering company providing the report, Foundation Assessment, said that someone with the company personally visited and evaluated the property in question when no one actually had. In reviewing whether the trial court erred in holding that O'Connor need not have complied with § 150.002(a), the court said the question was "not whether the alleged acts and omissions by appellants—fraudulently stating in the engineering reports that the foundation assessments were based, in part, on an inspection of the site—constitute the provision of the professional services." *Id.* at 835. It was "whether appellants' act of providing engineering reports constituted the provision of professional services." *Id.* Providing those engineering reports were part of the engineer's exercise of his unique training, education, or knowledge for which he was hired. So, "[t]he alleged acts, omissions, and misrepresentations of appellants were

made as part of their providing initial and final engineering reports [i.e., that specialized experience, knowledge, and training of an engineer for which Foundation Assessment was hired] and, consequently, arose out of the provision of professional services." *Id.* Thus, § 150.002(a) applied. *Id.*; *accord TIC N. Cent. Dallas 3, L.L.C.*, 463 S.W.3d at 79 (finding that the misrepresentations underlying the plaintiff's claim against Perkins & Will did not arise from the provision of professional services because TIC did not allege Perkins & Will made the representations as architects or in the course of its business as architects but rather as the seller of the building involved).

Another way of saying that of which we speak appears in words from *RCS Enterprises.* As said by that court, "[i]f a defendant happens to be a licensed engineer and provided some sort of service to the plaintiff, but not a professional engineering service, then a claim that arises out of the defendant's performance of that service does not fall within the statute's application." *RCS Enters., LP*, 2013 Tex. App. LEXIS 15337, at *8. "For example, an engineer who has a side business of mowing lawns could be sued for an act done in the course of providing those lawn care services, and no certificate of merit would need to be provided." This would be so because the damages sought must stem, result, or originate from acts or omissions while the engineer exercised his training and the like for which he was hired.

Lastly, and needing no construction as to what it means is the rule that the substance of the plaintiff's pleadings generally controls the foregoing analysis. *TIC N. Cent. Dallas 3, L.L.C.*, 463 S.W.3d at 79. That said, we turn to Whitaker's live pleadings.

Application of Authority

Whitaker began by discussing, in her pleading, the manner in which Loop 289 was undergoing renovation and the excavation near the off ramp her husband intended to take. That excavation left a ridge, rise, or lip several inches high, which he tried to negotiate on his motorcycle.[4] Though effort had been made to taper the severity of the rise and angle with some substance, the taper purportedly was deficient. Furthermore, the material used to form the taper allegedly was defective and eroded due to a recent

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storm. Finally, few to no markers or like warning devices informed travelers of the condition or lip created by the excavation. These circumstances formed the basis of Whitaker's negligence claim. The negligent acts consisted of 1) leaving the exit ramp open to the public, when it should have been closed due to the difference in elevation of ramp and excavated right lane; 2) placing barricades in a way that channeled traffic into the hazardous area; 3) utilizing inadequate signage to advise drivers of the uneven lanes of travel; 4) using inappropriate materials to construct "the makeshift ramp/tapering of the uneven lanes"; 5) failing to maintain "the makeshift ramp/tapering"; and 6) providing inadequate drainage for the rain. All defendants were accused of engaging in that purportedly negligent conduct.

Whitaker further averred that R2 and CP "acted as project managers and agents of TXDOT" and "on-the-ground inspectors for TXDOT [charged with] . . . monitoring the day-to-day operations at the project site." As such, they "approv[ed] the decision to leave the exit ramp open to traffic . . . [the] decision to use inadequate materials to taper the [lip], fail[ed] to require notice of the dangerous condition . . . and . . . fail[ed] to monitor and maintain the ramp/tapered edge after it had been washed away from rainwater."

Again, Whitaker does not question the status of R2 and CP as entities which provide engineering services. Rather, she questions whether each act of negligence for which they were accused stemmed from the exercise of their unique training, education, and experience for which they were hired. Did it implicate that unique training and the like? It takes no stretch of the imagination to see that such things as determining 1) how deep the excavation needed to be next to the ramp, 2) what material to use to taper the severity of the perpendicular, multi-inch lip, or 3) how to affix that material to the lip require

the exercise by R2 and CP of their unique training, education, and experience in the science of engineering. On the other hand, one could question whether posting warning signs, monitoring the taper, or even deciding whether to leave the exit open implicated the use of math or similar engineering sciences. Such decisions could be made by anyone capable of using their eyes and exercising common sense to perceive and assess the potential danger. Yet, that is not the proper focus under the law.

Again, the 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 § 150.002(a). And, as mentioned earlier, the umbrella of practicing engineering casts a large shadow. Many of the panels of that umbrella represented in § 1001.003(c) encompass the services which R2 and CP were hired to do when they engaged in the allegedly negligent acts cited by Whitaker. Being hired by TxDOT to reconstruct and/or monitor the reconstruction or modification of a public roadway reasonably entails 1) "planning the use or alteration of land . . . or the design or analysis of works . . . for the use or alteration of land . . ."; 2) "engineering for construction, alteration, or repair of real property"; 3) "a service . . . analysis, or other work performed for a public . . . entity in connection with a . . . structure"; and, 4) "any other professional service necessary for the planning, progress, or completion of an engineering service." TEX. OCC. CODE ANN. § 1001.003(c)(4), (7), (10), (12). Those categories, like the rest of Chapter 1001 of the Occupations Code, are to be liberally construed per legislative edict. *Id.* § 1001.004(d) (West Supp. 2019) (stating that chapter 1001 of the Occupations Code "shall be liberally construed to carry out the intent of the legislature"). In so liberally construing them, we cannot escape the conclusion that it was

while performing services within the aforementioned categories that R2 and CP allegedly committed the negligence in question. In short, they stemmed, originated, or resulted from other work that utilized or implicated engineering education, training, and experience.

Accordingly, the trial court did not misapply the law, act unreasonably, or ignore guiding rules and principles when granting the motion to dismiss under § 150.002(e) of the Civil Practice and Remedies Code. It may be, as she suggests, that § 150.002(a) and (e) are harsh or that the legislative history suggests a different interpretation of the statute. Yet, our legislature wrote and selected particular words to place within it. That application of its own words may lead down a route deviating from its purported intent does not relieve us from having to abide by those words. This would not be the first time such has happened. Nor will it be the last. Nevertheless, we are bound to follow what the statute actually said.

The orders of dismissal are affirmed.

Brian Quinn
Chief Justice