FLETCHER | FARLEY
CONFLICT RESOLVED

FOR THE DEFENSE

June 2017

"Do not withhold good from those to whom it is due, when it is in your power to act."

Proverbs 2:27

Greetings from Mike Shipman

We are now in June and starting the dog days of summer and vacation time. We want to remind everyone to be safe on the highways. Always take your time, never text and watch the other drivers on the road. Summer is a special time to spend with family and friends in the backyard or around the pool grilling your favorite food. For those that don't know, I'm big into grilling! We are celebrating our 25th Anniversary this year and want to take this opportunity to thank all of you for your support and confidence over these many years. We work hard every day to provide the best and most cost effective legal services available and believe that shows by the 25 years we've been in business and the many clients that have worked with us for so many years. Our wish for each of you this summer is to have fun and enjoy some well-deserved time off. Again, thank you for allowing us the opportunity to work with you and we look forward to working together for many years to come.

Certificate of Merit: Courts Focusing on Merit over Following Procedure

Keith A. Robb

The certificate of merit requirement is supposed to be a high hurdle for a plaintiff to clear when suing design professionals. Plaintiffs must file with their original petition an affidavit from an appropriately licensed design professional, and the affidavit must explain the defendant design professional's mistake. The statute mandates that "the plaintiff's failure to file the affidavit in accordance with this section *shall* result in dismissal of the complaint against the defendant." That seemingly ironclad requirement comes with its own

In This Issue

Welcome to the latest edition of Fletcher Farley's Newsletter, which we hope you find interesting and helpful.

If you have any comments, questions or would like more information from us, please contact Doug or Joanna.

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significant caveat: "This dismissal *may* be with prejudice." Courts are lowering one hurdle by allowing plaintiffs who did not comply with the certificate of merit requirement fix the problem with later "first-filed" petitions.

The Texas Supreme Court recently discussed whether a dismissal should be with or without prejudice in *Pedernal Energy, LLC. v. Bruington Engineering, Ltd*. Pedernal Energy owned a well that it believed was damaged by the fracturing operation, and it sued several businesses involved in those operations, including Bruington, who provided engineering services. Unfortunately for Pedernal, the first petition did not contain a certificate of merit. In response to Bruington's inevitable motion to dismiss, Pedernal non-suited Bruington and later followed up with an amended petition that included a certificate of merit.

Bruington responded with a new motion to dismiss asserting that Pedernal must lose because its first-filed petition didn't include a certificate of merit. The trial court denied that motion to dismiss, but the appellate court agreed with Pedernal and instructed the trial court to determine whether the dismissal should be with or without prejudice. In response, the trial court held an evidentiary hearing where it learned that Pedernal's lawyers were not aware of the certificate of merit requirement until they read Bruington's motion to dismiss. The trial court made further findings that Pedernal's complaint had merit and entered an order dismissing Pedernal's claims without prejudice. The appeal to the Texas Supreme Court asked whether the trial court abused its discretion by granting the dismissal without prejudice.

The Supreme Court noted that the underlying statute did not provide "guiding rules or principles" to tell a trial court how to use its discretion. In the absence of that guidance, the Supreme Court focused on whether the plaintiff's claim had merit. The Court noted that the trial court decided that Pedernal's failure to comply with the certificate of merit statute was "neither intentional nor done with conscious indifference" and that the eventually-filed affidavit provided meritorious grounds to pursue a claim against Bruington. Therefore, the Court determined that the trial court did not abuse its discretion by allowing Pedernal to continue to pursue a claim against Bruington.

An earlier case provides a similar example of the idea that a meritorious claim defeats procedural failure to follow the statute. Houston's First District Court of Appeals heard *Gessner Engineering, LLC v. St. Paraskavi Greek Orthodox Monastery, Inc*. The Monastery hired Gessner Engineering to participate in the design of a dining hall, but the Monastery was unhappy with the results and sued several businesses. The monastery sued and then non-suited Gessner several times before it filed a petition that invoked the certificate of merit requirement. But even when it invoked the statute, it failed to comply because the filed petition attached a subcontract agreement instead of the affidavit. Eventually, the monastery corrected its error and filed a petition with a certificate of merit. In response to Gessner's motion to dismiss, the monastery filed an uncontroverted affidavit from a paralegal asserting that the paralegal was instructed to file the certificate of merit but mistakenly attached a subcontract. The trial court dismissed the case against Gessner without prejudice.

Welcome J. Evan Farrior

We welcome J. Evan Farrior to the firm's Dallas office. This actor turned lawyer brings to the firm insurance defense litigation experience emphasizing a variety of complex areas of the law involving automobile liability, UM/UIM claims and personal injury.

Honoring 25 Years with 25 Acts of Kindness

Fletcher Farley Sponsored Kobers for the Cure

The 4th Annual Tee off "*Fore*" Parkinson's golf outing was held on May 12th at the Royce Brook Country Club in Hillsborough, NJ.

This event is a fund raiser for the exclusive benefit of the Michael J. Fox Foundation for Parkinson's Research (MJFF).

Fill a Box for Homeless Pets

The Dallas and Austin offices combined forces to help our local animal welfare offices by donating items from each shelters wish list.

After we "Filled a Box", we sent our donations

Gessner appealed in attempt to make the dismissal prejudicial. The appellate court noted that the failure to include the certificate of merit was an uncontroverted clerical error, and it noted the preference for deciding disputes on their merits over deciding them on procedural errors. Therefore, the appellate court concluded that the long string of the monastery's failures to comply with the certificate of merit statute did not merit a dismissal with prejudice.

Although plaintiffs file lawsuits against design professionals without following the requirements to do so, they are successfully getting more than one attempt to comply with the requirements by convincing trial courts that the underlying claims have merit.

Conflicts Resolved

Another Summary Judgment Victory

On May 26, 2017, a U.S. Federal District Judge in the Northern District of Texas granted a summary judgment in a premises liability lawsuit filed against one of the firm's client, another national retail store. The Motion for Summary Judgment was briefed by Fred Arias and Lorin Subar. The Plaintiff had alleged that she slipped on "size nubs" that had fallen on the floor after they had become unattached from clothing hangers. She claims she then fell to the floor and was injured. She allegedly sustained a severe knee injury for which surgery would be required and for which she experienced significant impairment. Plaintiff claimed that a store employee had gone through the same area where the incident occurred just a few moments prior, and therefore should have seen the nubs on the floor and removed them. Most important, that store employee later testified that size nubs on the floor were a store-wide problem and that it was not unusual to find them falling to the floor or scattered. Plaintiff, through her attorney, cleverly sought to broaden the definition of constructive notice to include knowledge of a store-wide problem. *i.e.,* well known problems with size nubs falling to the floor. The court refused Plaintiff's contention. Instead, the judge ruled that the condition is limited to the specific hazard which is the basis of the incident. The judge also ruled that the Plaintiff failed to establish how long the nubs were on the floor and that the store employee's recent inspection was sufficient to show that the retail store was taking remedies to avoid the existence of unreasonably dangerous conditions. The Court's decision formally disposed of all claims against the firm's client.

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to the SPCA of Texas in Dallas and the Austin Humane Society in Austin.

Austin offfice with the AHS donation box.

Dallas office donation box for the SPCA of Texas.