

**CAUSE NO. 2019-33415**

<b>ABEL AND NANCY VERA, ET AL.,</b>	§	<b>IN THE DISTRICT COURT OF</b>
<i>Plaintiffs,</i>	§	
	§	
<b>v.</b>	§	<b>HARRIS COUNTY, TEXAS</b>
	§	
<b>FIGURE FOUR PARTNERS, LTD., PSWA, INC.,</b>	§	
<b>and REBEL CONTRACTORS, INC.,</b>	§	
<i>Defendants.</i>	§	<b>234th JUDICIAL DISTRICT</b>

**DEFENDANTS' MOTION TO DISMISS**  
**FOR FAILURE TO FILE CERTIFICATE OF MERIT**

Defendants Figure Four Partners, Ltd. (“Figure Four”) and PSWA, Inc. (collectively “Defendants”) file this Motion to Dismiss for Failure to File a Certificate of Merit pursuant to Texas Civil Practice and Remedies Code Chapter 150 and, in support thereof, respectfully show the Court as follows<sup>1</sup>:

**SUMMARY**

Chapter 150 of the Texas Civil Practice and Remedies Code (“Chapter 150”) requires a “certificate of merit” accompany claims arising out of the rendition of professional services by a licensed or registered professional. The failure to attach a certificate of merit “shall result in dismissal of the complaint against the defendant.” Plaintiffs, whose lawsuit speculatively alleges faulty engineering work, failed to attach a certificate of merit to their original petition. Pursuant to the express language of Chapter 150, their claims must be dismissed.

**EXHIBITS**

Exhibit A: Plaintiffs’ Original Petition;

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<sup>1</sup> This Motion is filed subject to, and without waiving, Defendants’ Motion to Transfer Venue.

Exhibit B: The May 17, 2019 Original Petition in cause number 2019-34366, pending in the 11th Judicial District Court, Harris County, Texas; and

Exhibit C: The May 24, 2019 Original Petition in cause number 2019-36139, pending in the 164th Judicial District Court, Harris County, Texas.

#### **FACTUAL BACKGROUND**

On May 7, 2019, parts of Kingwood, particularly the subdivision of Elm Grove, experienced an unprecedented rainfall. Early reports show rain fell at a rate of up to 6 inches per hour, with a total of 16 inches within a 24-hour period. This massive rainfall was of historical significance; the rate of rainfall in and around the Elm Grove area over such a short time period surpassed even that of Hurricane Harvey.

Not surprisingly, the infrastructure of Elm Grove—most of which is within a 100-year floodplain—was unable to keep up. The Plaintiffs, mostly Elm Grove residents and nearly all within the 100-year flood plain, apparently flooded in this 100-year rain event. Within days, Plaintiffs’ attorney Mr. Webster and his co-counsel Ms. Spurlock began holding town hall meetings, speculating as to the cause.

Without engineering plans, design data, or scientific input; without taking time to gather facts; and apparently without consultation with any professional engineer, Plaintiffs blamed Defendants and contractors involved in a nearby development. As a result of a groundswell of social media activity and town hall gatherings, a number of Elm Grove residents hired Jason Webster to represent them. This lawsuit was the first filed by Mr. Webster, less than one week after the rain fell. Over the next ten days, Mr. Webster hastily filed two additional identical lawsuits on behalf of additional plaintiffs, all with identical allegations against the same three defendants. *See Exhibits A, B, C.*

As alleged in the petitions, Figure Four is the developer of a new subdivision called Woodridge Village. Woodridge Village is directly north of Elm Grove in Montgomery County. On May 7, 2019, Woodridge Village was under construction. The surface land area had been largely cleared and construction of the engineered drainage and detention systems was underway. It is this construction, including the newly-installed drainage and detention structures, that Plaintiffs allege caused their homes to flood.

Without any specifics, Plaintiffs allege the drainage or detention of water flowing out of Woodridge Village was improper or inadequate. Notably, the engineered drainage and detention plans were approved by Montgomery County and the Woodridge Village Municipal Utility District (the “MUD”). Nevertheless, Plaintiffs seek damages arising from the alleged engineering or design failures. Such allegations require more than speculation and bare-bones petitions. Texas Civil Practice and Remedies Code Chapter 150 requires the Plaintiffs to support their allegations with a certificate of merit attached to the first-filed petition. Plaintiffs failed to attach a certificate of merit and, therefore, their claims must be dismissed.

#### ARGUMENT AND AUTHORITIES

##### A. **Chapter 150 applies to all claims for damages arising from engineering services.**

A plaintiff must file a certificate of merit with the first-filed petition “[i]n any action or arbitration proceeding for damages arising out of the provision of professional services by a licensed or registered professional.” TEX. CIV. PRAC. & REM. CODE ANN. § 150.002(a); *TIC N. Cent. Dall. 3 v. Envirobusiness, Inc.*, 463 S.W.3d 71, 76-77 (Tex. App.—Dallas 2014, pet. denied). Failure to file a certificate of merit “**shall** result in dismissal of the complaint.” TEX. CIV. PRAC. & REM. CODE ANN. § 150.002(e) (emphasis added). The certificate of merit must state the specific errors or omissions alleged and the factual basis for each claim so as to demonstrate the claims are

not frivolous. *Jennings, Hackler & Partners, Inc. v. North Texas Mun. Water Dist.*, 471 S.W.3d 577, 580-81 (Tex. App.—Dallas 2015, pet. denied). The purpose of the requirement, similar to Chapter 74 of the Texas Civil Practice and Remedies Code, is to inform the defendant of the specific conduct called into question and to provide a basis for the trial court to conclude that the plaintiffs' claims have merit. *Criterion-Farrell Eng'rs v. Owens*, 248 S.W.3d 395 (Tex. App.—Beaumont 2008, no pet.); *see also Robert Navarro & Assoc. Eng'g, Inc. v. Flowers Baking Co. of El Paso*, 389 S.W.3d 475, 481 (Tex. App.—El Paso 2012, no pet.).

An engineer is a “licensed or registered professional.” TEX. CIV. PRAC. & REM. CODE ANN. § 150.001(1-a). Chapter 150 ascribes the same definition to the “practice of engineering” as found in the Texas Occupation Code. TEX. CIV. PRAC. & REM. CODE ANN. § 150.001(3). This definition is broad and includes:

- [T]he performance of . . . work . . . [requiring] engineering education, training, and experience in applying special knowledge or judgment of the mathematical, physical, or engineering sciences to that service or creative work;
- “**planning the use or alteration of water or the design or analysis of works or systems for the use or alteration of land or water;**”
- “engineering for construction, alteration, or repair of real property;” and
- the legal aspects of site development, including . . . **surface drainage.**

TEX. OCC. CODE ANN. §§ 1001.003(b), (c); 1001.0031(d)(1)(B) (emphasis added). Moreover, an engineer is responsible for engineering plans and specifications for “**hydraulic management calculations and design of surface water control and detention necessary for compliance with ordinances and regulations.**” TEX. OCC. CODE ANN. § 1001.0031(c)(4) (emphasis added).

Chapter 150 governs any claims for damages arising from any of the above activities. TEX. CIV. PRAC. & REM. CODE ANN. § 150.002. These activities include the design and construction

of drainage, including grading, sloping, subsurface drainage, and water retention. *See e.g., Benchmark Eng'g Corp. v. Sam Houston Race Park*, 316 S.W.3d 41, 48 (Tex. App.—Houston [14th Dist] 2010, no pet.) (Chapter 150 applied to claims that insufficient subsurface drainage caused flooding in the infield of an outdoor race park); *Belvedere Condominiums at State Thomas, Inc. v. Meeks Design Group, Inc.*, 329 S.W.3d 219 (Tex. App.—Dallas 2010, no pet.) (Chapter 150 applied to claims that improper drainage design of a courtyard caused flooding of condominiums).

The certificate of merit requirement applies to all “claims for damages” that arise out of the rendition of engineering services, not just claims for professional negligence. *Benchmark Eng'g Corp.*, 316 S.W.3d at 49 n. 2; *Dunham Eng'g, Inc. v. Sherwin-Williams Co.*, 404 S.W.3d 785, 792 (Tex. App.—Houston [14th Dist.] 2013, pet. denied). Indeed, “the statute was meant to encompass far more than negligence.” *Pelco Const., Inc. v. Dannenbaum Eng'g Corp.*, 404 S.W.3d 48, 55 (Tex. App.—Houston [1st Dist.] 2013, no pet). A claim “arises out of the provision of professional engineering services if the claim implicates the engineer’s education, training, and experience in applying special knowledge or judgment.” *CBM Engineers, Inc. v. Tellepsen Builders, L.P.*, 403 S.W.3d 339, 343 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).

To determine whether the claim implicates an engineer’s services, courts “are not bound by the labels that the plaintiff uses in formulating her pleadings.” *Carter & Burgess, Inc. v. Sardari*, 355 S.W.3d 804, 810 (Tex. App.—Houston [1st Dist.] 2011, no pet.). “The question is not whether the specific acts creating the claim for the tort also constituted the provision of professional services.” *Pelco*, 404 S.W.3d at 55. “Instead, the acts creating the claim must arise from the provision of professional services.” *Id.*

**B. Chapter 150 applies to Plaintiffs' claims.**

Plaintiffs' lawsuit arises out of the provision of professional engineering services, thereby invoking Chapter 150's certificate of merit requirement. Among other things, Plaintiffs allege Defendants:

- improperly added box culverts in an attempt to create drainage;
- blocked water flow from existing water channels;
- sloped or graded Woodridge Village toward Plaintiffs' homes;
- did not allow adequate drainage after construction;
- did not instruct in proper construction and/or drainage requirements;
- did not train in proper construction and/or drainage requirements;
- improperly filled or blocked existing drainage channels;
- did not install proper silt barriers; and
- failed to maintain and follow a proper storm water pollution prevention plan.

See Exhibit A at ¶¶ 11, 15.

These allegations fit squarely within the purview of the “provision of professional [engineering] services.” Looking beyond the labels of the claims, Plaintiffs allege Defendants improperly engineered the Woodridge Village drainage plan, and that the plan was somehow improper or deficient. The critical liability question is whether Defendants' engineered and approved drainage and detention plan was proper. Put another way, for Plaintiffs to prevail, they must prove, at a minimum, that the Woodridge Village drainage and detention plan was inadequate or improper.

This is precisely the type of claim for which Chapter 150 was created. The “practice of engineering,” as defined by Chapter 150 and the Texas Occupations Code, encompasses all aspects of Plaintiffs’ claims, including without limitation:

- “planning the use or alteration of water or the design or analysis of works or systems for the use or alteration of land or water;”
- “engineering for construction, alteration, or repair of real property;”
- “the legal aspects of site development, including . . . surface drainage;” and
- “creating hydraulic management calculations and design of surface water control and detention necessary for compliance with ordinances and regulations.”

*See* TEX. OCC. CODE ANN. §§ 1001.003(b), (c); 1001.0031(d)(1)(B).

Accordingly, on the face of their petition, Plaintiffs seek damages arising from the provision of professional engineering services. Chapter 150, therefore, applies to Plaintiffs’ claims, requiring Plaintiffs to attach a certificate of merit to their original petition.

**C. The Court should dismiss Plaintiffs’ claims with prejudice.**

As discussed above, Chapter 150 is clear: if a plaintiff fails to attach a certificate of merit to its first-filed petition, the trial court “shall” dismiss the petition. While dismissal is mandatory, the Court has discretion to dismiss the lawsuit with or without prejudice. *See* TEX. CIV. PRAC. & REM. CODE § 150.002(e) (“The dismissal **may be with prejudice.**”) (emphasis added). Because Chapter 150 is silent as to when claims should be dismissed with prejudice, the Supreme Court of Texas explained the decision is a matter of judicial discretion. *See Pedernal Energy, LLC v. Bruington Eng’g, Ltd.*, 536 S.W.3d 487, 494 (Tex. 2017) (noting Section 150.002 provides no guidance on whether claims should be dismissed with or without prejudice). Trial courts must determine whether a plaintiff “should be given a second opportunity,” based on the “facts and

circumstances of the particular case.” *CDI Corp. v. TOTAL Specialties USA, Inc.*, 528 S.W.3d 802, 807 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

Dismissal without prejudice may be appropriate where the failure to attach a certificate of merit was inadvertent. *See e.g., Gessner Eng’g, LLC v. St. Paraskevi Greek Orthodox Monastery, Inc.*, 507 S.W.3d 865, 870-71 (Tex. App.—Houston [1st Dist.] 2016, pet. denied) (dismissal without prejudice was warranted where the petition referenced a certificate of merit, but the plaintiff failed to attached it due to an “accidental, clerical error that [plaintiff] promptly cured.”). When the plaintiff promptly cures its mistake, and evidences the “intent to comply with the statute,” dismissal without prejudice is justified. *Id.* Conversely, “the filing of an original complaint without filing an affidavit might under some circumstances support a dismissal with prejudice.” *Pederal Energy, LLC*, 536 S.W.3d at 496. Dismissal with prejudice may be appropriate if the court determines the claims lack merit. *Id.*

Here, Plaintiffs’ original petition evidenced no intent to comply with Chapter 150. There is no mention of a certificate of merit, or that the allegations are based on a review of facts by a licensed engineer. Significantly, Plaintiffs’ counsel filed not one, but three, separate and identical petitions alleging identical claims against Defendants, and made no effort to support the merits of the claims in any of the three petitions. *See* Exhibits A, B, C. None of the three petitions reference a certificate of merit. Instead, Plaintiffs’ counsel rushed to the courthouse to make unsubstantiated and speculative allegations. This circumstance does not justify a second opportunity. Accordingly, this Court should exercise its discretion to dismiss Plaintiffs’ meritless claims with prejudice.

**PRAYER**

Based on the foregoing, Defendants respectfully request the Court dismiss Plaintiffs' claims with prejudice, along with any such other and further relief to which Defendants may be justly entitled.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANTS FIGURE  
FOUR PARTNERS, LTD. and PSWA, INC.

**CERTIFICATE OF CONFERENCE**

Pursuant to Harris County District Courts Civil Division Local Rule 3.3.6, I hereby certify that on June 17, 2019, I conferred by telephone with Omar Chawdhary, counsel for Plaintiffs, concerning this Motion. Mr. Chawdhary stated that he opposed this motion.

*/s/ Andrew K. York* \_\_\_\_\_

ANDREW K. YORK

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing instrument was duly furnished to the following counsel of record (1) electronically through the electronic filing manager ([www.efiletexas.gov](http://www.efiletexas.gov)), and (2) via e-mail on this 17th day of June, 2019 as follows:

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*/s/ Gabe T. Vick* \_\_\_\_\_

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