

CAUSE NO. 2019-33415

ABEL AND NANCY VERA, et al. § **IN THE DISTRICT COURT OF**
Plaintiffs, §
§
vs. § **HARRIS COUNTY, TEXAS**
§
FIGURE FOUR PARTNERS, LTD., PSWA, INC., §
and REBEL CONTRACTORS, INC. §
Defendants. § **234th JUDICIAL DISTRICT**

CONSOLIDATED WITH

CAUSE NO. 2019-34366

JEFFREY ATWOOD, et al. § **IN THE DISTRICT COURT OF**
Plaintiffs, §
§
vs. § **HARRIS COUNTY, TEXAS**
§
FIGURE FOUR PARTNERS, LTD., PSWA, INC., and §
REBEL CONTRACTORS, INC. §
Defendants. § **11th JUDICIAL DISTRICT**

CONSOLIDATED WITH

CAUSE NO. 2019-36139

JENNIFER BECKER, et al. § **IN THE DISTRICT COURT OF**
Plaintiffs, §
§
vs. § **HARRIS COUNTY, TEXAS**
§
FIGURE FOUR PARTNERS, LTD., PSWA, INC., §
and REBEL CONTRACTORS, INC. §
Defendants. § **164th JUDICIAL DISTRICT**

**PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO
DISMISS FOR FAILURE TO FILE CERTIFICATE OF MERIT**

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, ABEL AND NANCY VERA, JEFFREY AND KATHY ADAMS,
RONNIE BALDON, KURT BASLER, LEWEY AND DONNA BECKHAM, PAUL

AND CHRIS BENNETT (misnomered in Plaintiff's Original Petition), **DAVID AND NORMA BURCIAGA, JAMES CASEY, CODY AND MELISSA CLARK, FRANCISCO COLON, DEBBIE RAHBANI, WENDY CURTS** (misnomered in Plaintiffs' Original Petition), **SONYA DAVIS, LAWRENCE DEFURIA, PAMELA POTTER, BRIAN AND JENNIFER DERBY, SYLVIE DESCOURS, CECILIA DIAZ, STEVEN AND RACHEL DUERRINGER, ANTHONY DUNCAN, JOHN AND MARILYN EASTON, JOHNATHAN AND BLANCA EVANS, THOMAS FLAHERTY, MICHAEL AND JAN FRAZIER, ROGELIO GARCIA, YESENIA GONZALEZ, JOHN GIBBS, TRAVIS GRAMS, GREG AND KELLY GUY, BRADLEY HALES, JAMES AND NATALIE HUMPHREY, NILDA HYNES, DONAVON AND TRACI KRAHN, ADAM AND JENNIFER LAURIE, RICHARD AND KATHLEEN LAURIE, CARLOS LEIJA, TODD AND KERRILEE MALMGREN, GARY AND KAY MASSON, JOSHUA MCCOLLUM, MARTE MCDOWELL, BILLY MCKEE, RICHARD AND CINDY MCMAHON, RICHARD MOYER, RYAN MURPHY, KEVIN NGUYEN, MARY BROOKE NICOTRA** (misnomered in Plaintiffs' Original Petition), **DARYL PALMER, MONTE PENCE, JIM AND JOSEPHINE PEREZ, JENNIFER PERRY, SUSAN PETROSKI, KEITH AND HOLLY POLI, DARREN PORTER, DEBBIE WILLIAMSON, JOHN AND REBECCA PURSELL, DEAN AND PETRA RINGEISEN, AARON RIOS, NATHAN AND MERRIE RODRIGUEZ, ANDREW AND MINERVA ROMO, TIM SHEEHY, MARTHA GOMEZ, GARY STANIZESKI, PATRICK AND DEBORAH TERRELL, MARCUS TICER, STEPHANIE TINER, WILLIAM AND ANNE TRAPANI, WILLIAM AND CHERYL TRIMBUR, SUSAN VALDES, DANA VARISCO, LUIS ALEJANDRO CANTU VASQUEZ** (misnomered in Plaintiffs' Original Petition),

JEFFREY ATWOOD, DIMITRY BEZSMERTNY, JAMES BOLDEN, MICHAEL BURKE, JAMES AND DEBORAH BURNETT, PHYLLIS CARVAJAL, WESLEY AND MARY ALICE COX, ELIZABETH DANISE, KARL DUPREE, VICKI DYKES, LARISSA FEHRENBACHER-POWELL (misnomered in Plaintiffs' Original Petition), JENNIFER FERNANDEZ, SHERRI FORSCHLER, JOHN WRIGHT, JIM GATLING, DARIN GILMORE, WILLIAM AND CYNTHIA GOEBEL, ELIZABETH GUIDE, KIMBERLY AND RICHARD HAGGERTY, JACOB HARGRAVE, BRYAN HENRY, GREGORY HOLLIDAY, RYAN AND AMY HORTON, LES HURST, ANDREA LYNN JARDINICO, MICHAEL KLASNO, KEVIN AND MICHELLE KINKEAD, KENNETH RAY, MARTHA, AND DENISE KORANDA, WILEY AND LINDA LANTZ, CHARLES AND ROSE LYONS, GARY AND PAULA MCMINN, RONALD RAYMAN, JOHN AND MARY REIDY, JEFFREY ROMIG, MICHAEL AND LORI SCOTT, CURTIS STIFFLEMIRE, PATRICK AND DEBORAH TERRELL, ALICE THROCKMORTON, DANIEL AND MARIA WARING, SUSAN AND ROBERT WEBB, SHAREL WEBBER, REGINA WHEATLEY, ABDULA MILES, DAVID WHITE, RHONDA WHITESELL, LEONARD WIGGINS, JR., CHRISTOPHER AND TAMMY YATES, DAVID AND CATHERINE YOUNG, JENNIFER BECKER, WALTER STEWART, WILLIAM BUTLER, HUGO CHAMBON, DANIEL AND KATHY COOGLER, SCOTT CRAWFORD, THOMAS CURCIO, JESSICA AND BEATRIZ DAVENPORT, AUSTIN DRYE, MABEL FLOYD, MICHAEL AND DANNA GENCO, JAMES HEMPEL, NGOC HUONG THI LE, PETER JEDRZYNSKI, LINDA JONES, AMY AND JASON LOWERY, DEAN AND ESTHER LUHMAN, JESSICA MENCHACA, JOSEPH AND CHARLOTTE NICKNISH, PETER AND

MARTA RICHARDSON, JAMES ROACH, JEFFREY ROBINSON, KIM RODGERS, RYAN RODRIGUEZ, BARBARA SMITH, DONALD, ELEANOR, AND DANIEL TAYLOR, LINDA AND TERRY TRAYLOR, BRIAN AND SHARON VOORHES, MICHAEL WOOD, DEBORAH YOCHAM, ANDREW POTTER, KIMBER POTTER, PAULA BRIDGES, JOHN-RUSSELL THORNBURG, CHRISTOPHER TINER, RUTH MALINS, CAROLYN CLARK ROBIN, MATTHEW SCARAMUZZI, ALYSON AND RANDAL STEVENS, MICHAEL JORDAN, CARL AND WENDA MUELLER, JOSEPH NOZEMACK, IAN ROBINSON, TONYA TRISTAN, AARON FULLER, JULIE GREEN, WILLIAM RITTER, PETER PAUL AND MERCEDES BILNOSKI, EDWARD AND JAN THERRIEN, SHAH JAHAN, SALVADOR AND MICHELLE SANCHEZ, LEAH GYURE, JACK AND SHARON DOVER, JAMES AND JENNIFER GOODE, THERESA HARPER, NANCY SCARLETT, PETER VERZAL, CHRISTOPHER FREY, CHRISTINA DE VILLAR, MARK AND CALI WOOD, SUNG CHUL YOON, CALVIN CANUP, BEN THOMAS, MICHAEL ANTASH, KEITH BYRD, IRA, LEAH, AND MELISSA DEAN, GWENDOLYN JEANNINE JONES, DAVID AND PAMELA OTT, KEELY PIERCE, BRIAN MCKENDREE, ANDREW AND KIMBER POTTER, SHARON AND JAMES SCOTT, DANIEL WILLIAMS, EDUARDO AND DEBORAH LEAL, WALTER MATTHEWS, JULIE SHEARER, FELIX OSCOTO, SONIA OSBORNE, and KATHRYN CHAPMAN, (collectively referred to as “Plaintiffs”), and file their response in opposition to Defendants **FIGURE FOUR PARTNERS, LTD., PSWA, INC., and REBEL CONTRACTORS, INC.’s** (collectively referred to as “Defendants”), Motion to Dismiss¹ and would respectfully show

¹ Defendants filed three identical Motions to Dismiss prior to consolidation and this response addresses all

the following:

I. INTRODUCTION

Plaintiffs have been residents of or near the Elm Grove neighborhood in Kingwood, Texas. Prior to May 7, 2019, none of Plaintiffs' homes had ever flooded. In May 2019, Defendants, Figure Four and PSWA, were developing a plot of land (the "Development") bordering the north side of Elm Grove. These Defendants hired Rebel as the general contractor to prepare the Development for construction. The Development is intended for a residential community and is neighboring the north side of Elm Grove.



As of May 7, 2019, the Development was not completed, but Defendants had begun the removal of trees and debris from the Development. Defendants trenched out certain areas and added box culverts in an attempt to create drainage for the Development. Defendants also filled in existing creeks and drainage channels while developing the land. In doing so, Defendants completely blocked waterflow from the existing water channels—ridding Elm Grove of proper drainage. Additionally, as Defendants cleared the land, the Development was sloped toward Plaintiffs' neighborhood such that water would flow directly towards Plaintiffs' homes.



On May 7, 2019, a rainfall no worse than any other rainfall Plaintiffs had experienced in the last 25 years hit the Kingwood area. The water drained from the Development directly into Elm Grove's streets and into Plaintiffs' homes. This water caused extreme damage to the structures and the personal effects of the Plaintiffs.



II. STANDARD OF REVIEW

An order granting or denying a motion to dismiss for failure to file a certificate of merit is immediately appealable. *See* Tex. Civ. Prac. & Rem. Code Ann. § 150.002(f) (West 2011). *Pelco Const., Inc. v. Dannenbaum Eng'g Corp.*, 404 S.W.3d 48, 52 (Tex. App.—Houston [1st Dist.] 2013, no pet.). A court's decision to grant or deny a Defendant's Motion to Dismiss under §150.002 is reviewed under an abuse of discretion standard. *Criterion-Farrell Engineers v. Owens*, 248 S.W.3d 395 (Tex. App.—Beaumont 2008, no pet.); *Palladian Bldg. Co., Inc. v. Nortex Found. Designs, Inc.*, 165 S.W.3d 430, 433 (Tex. App.—Fort Worth 2005, no pet.).

Section 150.002(e) provides: [t]he plaintiff's failure to file the affidavit in accordance with this section shall result in dismissal of the complaint against the defendant. Tex. Civ. Prac. & Rem. Code Ann. § 150.002(e) This dismissal may be with prejudice. *Id.* “Because

the statute states the dismissal “may” be with prejudice, it expressly does not require a dismissal with prejudice. Tex. Civ. Prac. & Rem. Code Ann. § 150.002(e). Consequently, the trial court has discretion to determine whether a dismissal should be with or without prejudice.” *CTL/Thompson Texas, LLC v. Starwood Homeowner's Ass'n, Inc.*, 390 S.W.3d 299, 301 (Tex. 2013).

In exercising this discretion, a trial court should consider the broader purposes of the statute which are to deter and end meritless claims quickly. *TIC N. Cent. Dallas 3, L.L.C. v. Envirobusiness, Inc.*, 463 S.W.3d 71, 76 (Tex. App.—Dallas 2014, pet. denied). To determine whether a trial court abused its discretion, the court must have acted without reference to any guiding rules or principles, in other words acted arbitrary or unreasonable. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–242 (Tex. 1985).

The court reviews matters of statutory construction de novo. *EpcO Holdings, Inc. v. Chicago Bridge & Iron Co.*, 352 S.W.3d 265, 269 (Tex. App.—Houston [14th Dist.] 2011, pet. dismissed); *Benchmark Eng'g Corp. v. Sam Houston Race Park*, 316 S.W.3d 41, 44 (Tex. App.—Houston [14th Dist.] 2010), review granted, judgment vacated, and remanded by agreement (Jan. 14, 2011). *Dunham Eng'g, Inc. v. Sherwin-Williams Co.*, 404 S.W.3d 785, 789 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

III. ARGUMENTS AND AUTHORITIES

Defendants’ motion to dismiss is not based on the allegations in Plaintiffs’ Original Petition but rather on Defendants’ claim that Plaintiffs’ lawsuit “speculatively alleges faulty engineering work.”² Defendants ask this court to dismiss Plaintiffs’ lawsuit because

² Defendants’ motion at pg. 1.

Plaintiffs did not file a certificate of merit pursuant to Chapter 150. Plaintiffs will demonstrate that a certificate of merit was not required because the conduct giving rise to the claim did not involve the provision of services by licensed or registered professional architects, engineers, or land surveyors.

A. Chapter 150 does not apply to Plaintiffs’ claims

Civil Practice and Remedies Code section 150.002 governs the filing of a certificate of merit in suits against licensed or registered professional architects, engineers, or land surveyors. Plaintiffs’ claims are based on the condition of the development as of May 7, 2019, when Defendants had begun removing trees and debris and clearing the land for development.

Defendants claim that looking beyond the labels of Plaintiffs’ claims, Plaintiffs allege Defendants improperly engineered the Development’s drainage plan, and that the plan was somehow deficient; however, Plaintiffs’ claims in no way relate to the engineering of the development. Plaintiffs’ claims relate to Defendants’ failure to perform their work properly.

Plaintiffs’ Second Amended Petition, filed concurrently with this Response, specifies that Plaintiff are not alleging any fault with the engineering plans or designs. Defendants were not complying with any engineering plans and in doing so, Defendants completely blocked waterflow from the existing water channels—ridding Elm Grove of proper drainage.³

1. Plaintiffs do not seek damages arising from “alleged engineering or design failures”

Defendants base their motion to dismiss on a claim that Plaintiffs’ lawsuit “speculatively alleges faulty engineering work.”⁴ Defendants claim “Plaintiffs seek damages

³ Plaintiffs’ Second Amended Petition at ¶11

⁴ Defendants’ motion at pg. 1.

arising from the alleged engineering or design failures” even though Plaintiffs’ Original Petition made no such allegations. Defendants, citing the “practice of engineering” as found in the Texas Occupations Code §1001.003, provides examples of acts included in the practice of engineering, including “the legal aspects of site development, including...surface drainage.”⁵

Texas Occupations Code §1001.003. Practice of Engineering

(b) In this chapter, “practice of engineering” means 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.

(c) The practice of engineering 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;

(2) design, conceptual design, or conceptual design coordination of engineering works or systems;

(3) development or optimization of plans and specifications for engineering works or systems;

(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;

(5) responsible charge of engineering teaching or the teaching of engineering;

(6) performing an engineering survey or study;

(7) engineering for construction, alteration, or repair of real property;

(8) engineering for preparation of an operating or maintenance manual;

(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,

⁵ Notably, one of the acts purported to be part of the practice of engineering originated from the list of tasks within the scope of both engineering and architecture. “the legal aspects of site development, including setback requirements, zoning and other legal restrictions, and surface drainage. Tex. Occ. Code Ann. § 1001.0031(d)(1)(B) (West). (West)

electronic, chemical, hydraulic, pneumatic, geotechnical, or thermal nature;

(11) providing an engineering opinion or analysis related to a certificate of merit under Chapter 150, Civil Practice and Remedies Code; or

(12) any other professional service necessary for the planning, progress, or completion of an engineering service.

Tex. Occ. Code Ann. § 1001.003

Despite Defendants claim that Plaintiffs' allegations fit within the purview of the provision of professional engineering services, *none* of the above acts are implicated in Plaintiffs' Original or First Amended Petition.⁶ It is important to note that as of May 7, 2019, the Development was only at the stage where the land was being cleared and drainage implemented. Plaintiffs' allegations are clearly related to negligent acts during the clearing of the land and preparing it for development. Defendants fail to cite any case law indicating that the process of clearing the land and preparing for development implicated the rendition of engineering services. Defendants further fail to explain how removing trees and clearing land implicate "an engineer's education, training, and experience in applying special knowledge or judgment."⁷

Defendants, citing *Pelco*, indicate that "the question is not whether the specific acts creating the claim for the tort also constitute the provision of professional services" rather "the acts creating the claim must arise from the provision of professional services." *Pelco Const., Inc. v. Dannenbaum Eng'g Corp.*, 404 S.W.3d 48, 55 (Tex. App.—Houston [1st Dist.] 2013, no pet.). Here, the acts creating the claim included clearing the land in preparation for development. It is doubtful that removing trees and debris arose out of the practice of engineering or architecture. Defendants claim Plaintiffs' allegations fit within the purview of the provision of professional engineering services but do not allege that the

⁶ Defendants' claim that Plaintiff's seek damages from the provision of professional engineering services "on the fact of their petition" is false.

⁷ Defendants' motion at 5 citing CBM Engineers.

specific actions alleged in Plaintiff's Original Petition require "...engineering education, training, and experience in applying special knowledge or judgment of the mathematical, physical, or engineering sciences to that service or creative work." *TDIndustries, Inc. v. Rivera*, 339 S.W.3d 749, 754 (Tex. App.—Houston [1st Dist.] 2011, no pet.) quoting Tex. Occ. Code Ann. § 1001.003(b) (West Supp.2009).

Defendants also erroneously claim the critical liability question is whether Defendants' engineered and approved drainage plan was proper. Plaintiffs' allegations are based on the condition of the land as it was being prepared for development, not whether the plans were engineered correctly. As of May 7, 2019, Defendants had just begun removing trees and preparing the land for development—including implement drainage plans. Plaintiffs' allegations are based on Defendants' negligent conduct while clearing and developing the land. Defendants filled in existing creeks and drainage channels while developing the land and failed to properly construct retention ponds on the Development. Defendants were not complying with any engineering plans and in doing so, Defendants completely blocked waterflow from the existing water channels.⁸ Additionally, as Defendants cleared the land, the Development was sloped toward Plaintiffs' neighborhood such that water would flow directly towards Plaintiffs' homes.

Plaintiffs' allegations do not implicate engineering services, but rather the actions taken in preparing the land for development such as failing to have a proper rain event action plan while clearing the land for development or failing to create temporary drainage channels. It is well established that courts examine the substance of the pleadings to determine whether the cause of action arises out of the provision of professional services. *TIC N. Cent. Dallas 3, L.L.C. v. Envirobusiness, Inc.*, 463 S.W.3d 71, 79 (Tex. App.—Dallas

⁸ Plaintiffs' Second Amended Petition at ¶11

2014, pet. denied); *Carter & Burgess, Inc. v. Sardari*, 355 S.W.3d 804, 811 (Tex. App.—Houston [1st Dist.] 2011, no pet.). Here the substance of the allegations in Plaintiffs’ petition clearly implicates the actions taken in beginning to prepare the land for development failed to protect against water runoff. Plaintiffs’ Second Amended Petition clarifies the issues by specifying that Plaintiffs’ allegations are related to the Defendants’ failure to comply with engineering plans rather than alleging fault with said plans; accordingly, Chapter 150 is not applicable.⁹

2. Cases cited by Defendants are Distinguishable

Defendants claim Chapter 150 governs the following activities: design and construction of drainage, including grading, sloping, subsurface drainage, and water detention. However, the cases cited in support are easily distinguished as none of them were brought prior to the construction of the structure at issue.

Defendants cite *Benchmark Eng'g Corp. v. Sam Houston Race Park*, indicating Chapter 150 applied to claims that insufficient drainage caused flooding in an outdoor race park. *Benchmark Engineering Corp.*, 316 S.W.3d at 43.¹⁰ *Benchmark* is easily distinguished as the allegations specifically described three areas of engineering negligence: (1) failure to design an adequate subsurface drainage system; (2) failure to make a detailed and thorough analysis of subsurface conditions; and (3) failure to install a subsurface drainage system. *Benchmark Engineering Corp.*, 316 S.W.3d at 43. More importantly, the lawsuit was brought after the project was completed and the park became dissatisfied with the effectiveness of the water drainage.

⁹ Plaintiffs’ Second Amended Petition at ¶16.

¹⁰ Defendants’ citation to the case failed to indicate review was granted, judgment was vacated, and remanded by agreement. Sherwin–Williams’ argument that a certificate of merit has no relevance to the intentional torts it alleges and thus would not aid the trial court is unpersuasive because it relies on cases interpreting the 2005 version of section 150.002 as only requiring a certificate of merit for negligence claims. *Dunham Engineering, Inc.*, 404 S.W.3d at 793

Similarly, Defendants' citation to *Belvedere Condominiums at State Thomas, Inc. v. Meeks Design Group, Inc.*, is distinguishable. The claims in *Belvedere* relating to the drainage system from the roof and within the courtyard area were asserted against Meeks, an architect/landscape architect firm, for negligence and breach of warranty in its design and construction. *Belvedere Condominiums at State Thomas, Inc. v. Meeks Design Group, Inc.*, 329 S.W.3d 219, 220 (Tex. App.—Dallas 2010, no pet.).

Defendants also cite *Benchmark* and *Dunham* to support that “[t]he certificate of merit requirement applies to ‘all claims for damages’ that arise out of the rendering of engineering services, not just claims for professional negligence.”¹¹ Regardless of whether the statute was meant to encompass more than negligence, it was still limited to causes of action that implicate an engineer’s education, training, and experience in applying special knowledge or judgment. Similarly, the fraudulent misrepresentation allegations in *Pelco Const., Inc. v. Dannenbaum Eng'g Corp.*, were related to representations made against defendants “in their capacities as a registered architect and registered professional engineer...” The “misrepresentations that Pelco Construction alleged that McGarraugh, Hirshman, and Dannenbaum Engineering made were made in the context of their participation in the redesign and construction of the fire station.” *Pelco Const., Inc.*, 404 S.W.3d at 54. Unlike the cases cited by Defendants, the substance of Plaintiffs’ allegations do not arise out of the rendering of engineering services.

B. In the alternative, if this Court finds chapter 150 to apply to Plaintiffs’ claims, the Court should exercise its discretion and dismiss without prejudice.

Chapter 150 is silent as to when claims should be dismissed with prejudice, thus the decision is a matter of judicial discretion.

¹¹ Defendants’ motion at 5

In *Pedernal Energy, LLC v. Bruington Eng'g, Ltd.*, the Texas Supreme Court examined §150.002(e) which provides that if an affidavit is not filed in accordance with the statute, the trial court *shall* dismiss the claim and the dismissal *may* be with prejudice. *Pedernal Energy, LLC v. Bruington Eng'g, Ltd.*, 536 S.W.3d 487, 488 (Tex. 2017), reh'g denied (June 23, 2017).

Pedernal Energy, Ltd. sued Bruington Engineering, Ltd., alleging that Bruington provided substandard engineering services but failed to file a certificate of merit with its claim. Bruington moved for dismissal and Pedernal non-suited, then re-sued Bruington, but this time filing an expert affidavit. Bruington again moved for dismissal. The trial court denied Bruington's motion, and Bruington appealed. “The court of appeals construed section 150.002(e) to require a plaintiff to file an affidavit with the first-filed complaint asserting a claim arising out of the provision of professional services.” *Bruington Eng'g Ltd. v. Pedernal Energy L.L.C.*, 403 S.W.3d 523, 532 (Tex. App.—San Antonio 2013, no pet.) “Because Pedernal did not file an affidavit with its first-filed complaint, the court dismissed Pedernal's claims against Bruington and remanded the case to the trial court with instructions that it determine whether the dismissal should be with or without prejudice.” *Bruington Engineering Ltd.*, 403 S.W.3d at 532.

On remand, the trial court ordered dismissal without prejudice, and Bruington again appealed. This time, the court of appeals held that section 150.002(e) required Pedernal's claim to be dismissed with prejudice because an expert affidavit was not filed with the original petition. The Supreme Court disagreed

The Texas Supreme Court held that while “Section 150.002 requires dismissal if the plaintiff fails to file an affidavit contemporaneously with the complaint, it does not require dismissal with prejudice. Rather, it gives the trial court discretion to do so.” *Pedernal*

Energy, LLC, 536 S.W.3d at 494–95. The court further held that “Pedernal's failure to file an expert affidavit with its original petition was not, by itself, evidence that the allegations in its petition lacked merit or mandated the sanction of dismissal with prejudice.” *Id.* Accordingly, the Texas Supreme Court held the court of appeals erred by reversing the trial court's dismissal without prejudice. *Id.*

Several courts have noted that the purpose of section 150.002(e) dismissal is to deter meritless claims and bring them quickly to an end. *Gessner Eng'g, LLC v. St. Paraskevi Greek Orthodox Monastery, Inc.*, 507 S.W.3d 865, 868 (Tex. App.—Houston [1st Dist.] 2016, pet. denied); *CTL/Thompson Texas, LLC*, 390 S.W.3d at 301. In the case at hand, Plaintiffs’ failure to file a certificate of merit is not a reflection of the merits of their claims.

Defendants erroneously claim Plaintiffs’ claims lack merit and that Plaintiffs’ original petition “evidenced no intent to comply with Chapter 150.” Defendants’ claims ignore the substance of Plaintiffs’ allegations which were clearly related to negligent acts during the clearing of the land and preparing it for development. Defendants fail to cite any case law indicating that the process of clearing the land and preparing for development implicated the rendition of engineering services. Defendants fail to explain how removing trees and clearing land implicate “an engineer’s education, training, and experience in applying special knowledge or judgment.”¹² Further, Plaintiffs’ Second Amended Petition clarifies that Plaintiffs are not alleging any fault with the engineering plans or designs.¹³

In *CDI Corp. v. TOTAL Specialties USA, Inc.*, after the dismissal of TOTAL’s petition without prejudice, CDI sought a hearing on its motion to dismiss with prejudice. *CDI Corp. v. TOTAL Specialties USA, Inc.*, 528 S.W.3d 802, 807 (Tex. App.—Houston

¹² Defendants’ motion at 5 citing CBM Engineers.

¹³ Plaintiffs’ Second Amended Petition at ¶¶11 and 16.

[14th Dist.] 2017, no pet.). The parties stipulated that CDI was a corporation in which registered professional engineers practiced and that Total's Original Petition sought damages arising in part out of the provision of professional engineering services by CDI. When the court of appeals considered the facts and circumstances of the case, it found that because counsel was unaware of the statutory requirements, his failure to file a certificate of merit was not intentional or for improper purpose and thus held the trial court did not abuse its discretion in dismissing the petition without prejudice. *CDI Corporation*, 528 S.W.3d at 804. Similarly, Plaintiffs' failure to file a certificate of merit was not for improper purposes but rather due to the fact that Plaintiffs' allegations which were clearly related to negligent acts during the clearing of the land and preparing it for development did not implicate the provision of professional engineering services.

Since *Pederal*, at least two intermediate courts of appeals, including this court, have affirmed dismissals without prejudice when a plaintiff fails to file a certificate of merit with its original claim. *Texas S. Univ. v. Kirksey Architects, Inc.*, 14-18-00146-CV, 2019 WL 922296, at *6 (Tex. App.—Houston [14th Dist.] Feb. 26, 2019, no pet.)

IV. CONCLUSION

Plaintiffs' claims are based on the condition of the development as of May 7, 2019, when Defendants had begun removing trees and debris and clearing the land for development. Plaintiffs' allegations do not implicate engineering services, but rather the actions taken in preparing the land for development before the contractors began installing storm sewers, drainage ditches and detention ponds in the area. Plaintiffs' Second Amended Petition clarifies that Plaintiffs are not alleging any fault with the engineering plans or designs Accordingly, chapter 150 does not apply to Plaintiffs' claims and a certificate of merit is not required.

In the alternative, if this Court finds the actions taken in preparing the land for development implicate engineering services, Plaintiffs' respectfully request that dismissal be without prejudice as to re-filing of the same.

WHEREFORE PREMISES CONSIDERED Plaintiffs respectfully request that Defendants' motion to dismiss be denied.

Respectfully submitted,

THE WEBSTER LAW FIRM

/s/ Jason C. Webster
JASON C. WEBSTER
State Bar No. 24033318
HEIDI O. VICKNAIR
State Bar No. 24046557
OMAR R. CHAUDHARY
State Bar No. 24082807
6200 Savoy Drive, Suite 150
Houston, Texas 77036
713.581.3900 (telephone)
713.581.3907 (facsimile)
filing@thewebsterlawfirm.com

and

SPURLOCK & ASSOCIATES, P.C.

Kimberley M. Spurlock
State Bar No. 24032582
kspurlock@spurlocklaw.com
17280 West Lake Houston Pkwy.
Humble, TX 77346
Tel. (281) 548-0900
Fax. (281) 446-6553

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served on the 8th day of July, 2019 in accordance with the Texas Rules of Civil Procedure.

J. Cary Gray
Drew York
GRAY REED & MCGRAW LLP
1300 Post Oak Blvd., Suite 2000
Houston, Texas 77056
Attorneys for Defendant, Figure Four Partners, Ltd. and PSWA, Inc.

William Cozort, Jr.
BROTHERS ALVARADO, P.C.
Two Memorial City Plaza
820 Gessner, Suite 1075
Houston, Texas 77024
Attorneys for Defendant, Rebel Contractors, Inc.

/s/ Jason C. Webster
Jason C. Webster