SPRING 2014 NEWSLETTER

PREMISES LIABILITY LITIGATION UPDATE

By Gerald B. Lotzer

1. *Gaertner v. Langhoff*, 01-13-00555-CV (Tex.Civ.App. – Houston [1st. Dist.] March 18, 2014, no pet.)

This case arises out of an accident that occurred in January 2010 when the Plaintiff, Robert Langhoff was injured after allegedly slipping and falling down the stairs of a Fort Bend County historic property, the Lamar-Calder House. Langhoff sued the building owners and managers, as well as the construction company and the architect that were hired to convert the building from residential to commercial in 2002, alleging that they "failed to conform with and implement safety guidelines, building code requirements and generally accepted design and building practices when renovating the property, or otherwise provide complete building code compliance or oversight." Langhoff complained that his injuries were caused by the "proper safety measures or devices" being "absent from the stairway." Langhoff pleaded a negligence claim against architect Michael Gaertner d/b/a Michael Gaertner & Associates, pursuant to Section 150.002 of the TEXAS CIVIL PRACTICES & REMEDIES CODE which requires that a suit against a licensed architect be accompanied by a "Certificate of Merit". As part of Langhoff's petition he attached the affidavit of Robert A. Bueker, an architect.

Defendant Gaertner filed a motion to dismiss, arguing that Robert A. Bueker's Certificate of Merit failed to comply with Chapter 150 of the TEXAS CIVIL PRACTICES & REMEDIES CODE in that Bueker was not "knowledgeable in the area of practice of the defendant." TEX.CIV.PRAC. & REM. CODE § 150.002(e)(West 2011). More specifically, Bueker lacks sufficient experience in "Historic Preservation" in that the building codes referenced by Bueker are not required to be followed by historical buildings.

In Bueker's deposition, he testified that he never designed a historic preservation project; never been through the process of having a building designated as a historic building; never investigated the process of having a building designated as a historic building; and was not familiar with the building code provisions that are applicable to historic preservation. Bueker was also not familiar with the Texas Historic Commission.

Langhoff argued that the motion to dismiss should be denied because he had fully complied with all statutory requirements set forth in § 150.002 of the TEX.CIV.PRAC. & REM. CODE. Bueker did not need to be an expert in the subspecialty of historic renovations and that Bueker had been licensed as a professional architect since 1980, had extensive experience in both commercial and residential buildings, actively practiced "Architecture, Construction management, and general Contracting," and testified to his belief that he possessed sufficient knowledge to opine whether Gaertner was negligent and failed to comply with applicable standards of care for an architect because "my knowledge extends to any building that is accessible by the general public." The trial court denied Gaertner's Motion to Dismiss and he

filed a timely interlocutory appeal.

The Court of Appeals affirmed the trial court's order holding that the trial court did not abuse its discretion by denying Gaertner's motion to dismiss. Gaertner relied primarily on *Landreth v. Las Brisas Council of Co-Owners, Inc.*, 285 S.W.3d 492, 497-98 (Tex.App. – Corpus Christi 2009, no pet.) holding, under an earlier version of the statute, that the trial court abused its discretion in denying a motion to dismiss based on an architect's failure to establish in his Certificate of Merit that that he "practice[ed] in the same area of practice as the defendant." Gaertner acknowledged that the courts have subsequently rejected the four corners of the certificate of merit analysis. *Hardy v. Matter*, 350 S.W.3d 329, 334 (Tex.App. – San Antonio 2011, pet. dism'd) holding that the third party architect who signed the affidavit must hold the qualifications listed in the statute, but the statute does not require these qualifications to appear on the face of the affidavit. The court held that they may look beyond Bueker's affidavit in assessing his experience and knowledge. The court went on to hold that the purpose of a certificate of merit is to provide a basis for the trial court to conclude that the plaintiff's claims are not frivolous. See, *CBM En'grs, Inc. v. Tellepsen Builders, L.P.*, 403 S.W.3d 339, 345 (Tex.App. – Houston [1st Dist.] 2013, pet. denied). The statute does not require a plaintiff to marshal his evidence nor does it foreclose the defendant from later challenging the sufficiency of plaintiff's evidence on the admissibility of an expert's opinion. *Id.* at 346. Gaertner's arguments about the impact of the historical nature of the property on his duty and standard of care implicate issues to be resolved at a later stage and such arguments do not go to whether Bueker is knowledgeable in the area of Gaertner's practice, i.e. architectural design and construction management, for purposes of section 150.002.

Because the record demonstrates that Bueker is knowledgeable in the area of Gaertner's practices, the trial court did not abuse its discretion in denying Gaertner's motion to dismiss. They therefore overrule Gaertner's sole issue.