IN THE SUPREME COURT OF TEXAS

NO. 15-0232

LEVINSON ALCOSER ASSOCIATES, L.P. AND LEVINSON ASSOCIATES, INC., PETITIONERS,

v.

EL PISTOLÓN II, LTD., RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

JUSTICE BROWN, concurring.

Though the Court is correct to reverse the court of appeals and render judgment for Levinson, I cannot join its opinion. El Pistolón's certificate of merit, an affidavit sworn out by architect Gary Payne, is deficient because it is conclusory. A certificate of merit must set forth "the factual basis" for each claim of professional liability. TEX. CIV. PRAC. & REM. CODE § 150.002(b). But Payne's affidavit is devoid of substance. Its text could be copied and pasted into any certificate of merit without regard to the particular facts of the case.

The Court does not base its decision on the certificate's conclusory nature. Instead, the Court renders judgment for Levinson because the record lacks proof of Payne's "knowledge in the area of practice." Ante at ___. The Court holds that "the statute's knowledge requirement . . . requires some additional explication or evidence reflecting the expert's familiarity or experience with the practice

area at issue in the litigation." Ante at ___. But the text of Chapter 150 contains no such requirement. I agree with those courts of appeals that have noted the statute's silence "as to how and when the third-party architect's qualifications must be established." *Hardy v. Matter*, 350 S.W.3d 329, 333 (Tex. App.—San Antonio 2011, pet. dism'd). "Chapter 150 requires only that a licensed professional, practicing in the same area of expertise as the defendant, provide a sworn written statement certifying that the defendant's actions were negligent or erroneous and stating the factual basis for this opinion." *CBM Eng'rs, Inc. v. Tellepsen Builders, L.P.*, 403 S.W.3d 339, 346 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); *see also Dunham Eng'g, Inc. v. Sherwin-Williams Co.*, 404 S.W.3d 785, 794–95 (Tex. App.—Houston [14th Dist.] 2013, no pet.) ("Moreover, the statute does not require the affiant explicitly establish or address that he is 'knowledgeable in the area of practice of the defendant' on the face of the certificate."). "Indeed, section 150.002 'imposes no particular requirements or limitations as to how the trial court ascertains whether the affiant possesses the requisite knowledge.'" *Dunham Eng'g*, 404 S.W.3d at 795 (quoting *M–E Eng'rs, Inc. v. City of Temple*, 365 S.W.3d 497, 503 (Tex. App.—Austin 2012, pet. denied)).

The majority correctly states that we should presume the Legislature "deliberately and purposefully" chooses the words it uses. Ante at ___. This highlights the difference between subsections (a) and (b) of Chapter 150.002. Subsection (a) requires that the licensed professional submitting the certificate "is knowledgeable" in certain areas; subsection (b) explicitly directs that the negligence and accompanying factual basis "shall [be] set forth specifically" in the affidavit. TEX. CIV. PRAC. & REM. CODE § 150.002 (a)–(b). The plain text of the statute simply does not require that a curriculum vitae be attached to the certificate, that the certificate lay out the affiant's

qualifications, or even that the record contain any other extrinsic evidence from which to draw the inference that the affiant was knowledgeable in the area of practice.

The statute requires that the affiant have certain qualifications. But it does not set forth a method for the trial court to determine whether he actually does. Rather than create a scheme on behalf of the Legislature and conclude that the trial court abused its discretion by not employing such a scheme, I would dispose of the case on other grounds. Regardless of whether the affiant in this case possesses the requisite qualifications, his certificate is conclusory. I would render judgment for Levinson on that basis alone.

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Jeffrey V. Brown
Justice

OPINION DELIVERED: February 24, 2017