

**TRIAL COURT MAY DISMISS CLAIMS AGAINST ARCHITECTS AND ENGINEERS
WITH OR WITHOUT PREJUDICE FOR PLAINTIFF'S FAILURE TO COMPLY WITH
CERTIFICATE OF MERIT LAW**

Palladian Building Company, Inc. v. Nortex Foundation Designs, Inc.

The Fort Worth Court of Appeals recently affirmed the trial court's dismissal of claims against an engineering firm (Nortex) because the plaintiff (Palladian) failed to file an affidavit of an engineer detailing at least one act of negligence by Nortex, as required by Chapter 150 of the Texas Civil Practice and Remedies Code, commonly referred to as the "certificate of merit" statute. *Palladian Building Company, Inc. v. Nortex Foundation Designs, Inc.*, 2005 WL 1048081 (Tex. App. – Fort Worth, May 5, 2005, no pet. his.). This is the first appellate opinion addressing that statute.

Palladian initially argued that Nortex had waived its right to seek dismissal under the certificate of merit statute by answering before the affidavit was filed by Palladian, propounding and responding to written discovery, noticing and taking a deposition, and filing two motions for summary judgment. Because the appellate record did not contain the written discovery, deposition notice or transcript, or motions for summary judgment, the Court of Appeals refused to consider whether those actions by Nortex constituted a waiver of its rights under the certificate of merit statute. The Court of Appeals concluded that it did not have to decide whether the doctrine of waiver applies to motions to dismiss under the certificate of merit statute because it concluded that Nortex having answered when it was not required to do so did not constitute a waiver of its right to seek dismissal for failure to comply with the statute.

Palladian also argued that dismissal was an impermissible "death penalty" sanction violating *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913 (Tex. 1991) (orig. proceeding). The Court of Appeals found that it could not review that argument because Palladian failed to obtain a record of the hearing (if there was one) in the trial court.

Finally, Nortex argued that the trial court should have dismissed the lawsuit with prejudice. Citing the certificate of merit statute's language that "failure to file the affidavit. . . may result in dismissal with prejudice," the Court of Appeals concluded that trial courts have discretion to dismiss lawsuits in which the petition fails to comply with the certificate of merit law with or without prejudice.

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