By Stephen Gibson[1]

Certificates of Merit: Necessity of filing a certificate of merit was waived by defendant's litigating the case and not asserting failure to file as grounds for dismissal until the eve of trial after limitations expired.

Lelond v. Gosnell was a homeowner's suit against professional engineers for alleged negligence that resulted in further foundation damage to the plaintiff's home. Under Texas Civil Practice & Remedies Code Chapter 150 ("Chapter 150"), motions to dismiss suits against engineers must be granted if plaintiff fails to file a certificate of merit ("COM"). The COM requirement can be waived by litigating the merits without moving for dismissal.

Plaintiffs filed their suit without a COM. Twenty months later, the engineers answered with a general denial and entered a scheduling order setting discovery deadlines, and a trial date. After an unsuccessful mediation, the parties litigated the case in earnest over the next eighteen months. The engineers amended their answer, participated in discovery, designated potentially responsible third-parties, and changed counsel. After discovery closed and only a few weeks before a rescheduled trial, the engineers sought for the first time dismissal for failure to file a COM. The court of appeals reversed the trial court's dismissal, reasoning the engineers waived the right to dismiss for want of a COM.

1. The test for implied waiver by litigation is a clear demonstration of intent to forego the right in question, regardless of origin; whether the test is satisfied is based on the totality of the circumstances.

The engineers first urged that "totality of the circumstances" differed from the "traditional" waiver analysis and was the wrong standard for deciding whether by participating in the litigation a party waived a statutory, as opposed to contractual, right. The 6:3 opinion by Justice Guzman pointed out the engineer's argument rests entirely on "linguistic variations" in opinions concerning everything from arbitration clauses to forum-selection agreements. The opinion rejects the contention these differences in the manner of expression articulated a distinct and different test. "[T]he universal test for implied waiver by litigation conduct is whether the party's … action or inaction

… clearly demonstrates … intent to relinquish, abandon, or waive the right at issue—whether th[at] right originates in a contract, statute, or the constitution." Intent to forego a right is evaluated according to the "totality of the circumstances."

The absence of a precisely defined deadline in Chapter 150 does not prevent implied waiver if the defendant's litigation activities cannot be reconciled with insisting on the right. Actions that are purely dilatory or defensive to the plaintiff's actions such as filing an answer or discovery to learn about the case is not necessarily irreconcilably inconsistent. The opinion devotes substantial attention to the dissent by Justice Boyd, joined by Chief Justice Hecht and Justice Blacklock, that absence of a Chapter 150 dismissal deadline meant the right to seek dismissal had no temporal limits.

[1] The opinions expressed are solely those of the author. They do not necessarily represent the views of Munsch, Hardt Kopf & Harr, P.C. or its clients.

2. Totality of the circumstances is the appropriate standard for deciding whether a party's conduct is sufficiently inconsistent with the right in question that waiver can be fairly implied.

The opinion makes plain that "totality of the circumstances" does not focus on any one action or inaction, be it delay alone, seeking discovery, or participating in alternative dispute resolution. These alone may not be dispositive, but their cumulative effect may be to show defendant's ongoing participation implies intent to waive the right to dismiss. What a party intends depends on the right in question. A given activity may not suffice to impliedly waive a right under a forum selection clause, for example, but the same action may be sufficient to impliedly surrender the right to end the litigation entirely. In this case, the engineers' litigation conduct plainly showed they preferred resolving the claim on its merits instead of seeking dismissal. Accordingly, the majority ruled that the engineers waived their right to seek dismissal for failure to

3. The dissent would require an overt inconsistency with claiming a statutory right that had no temporal limits.

The dissent posits the majority opinion confuses waiver based on intent, with estoppel based on tendency to mislead. The dissent argues that "substantially invoked" is shorthand for litigation conduct so inconsistent with the particular right that it clearly demonstrates intentional relinquishment. The dissenters reason no such intent should be found "where neither explicit language nor conduct indicates … such … intent." Mere delay was insufficient because the

statute imposed no deadline which implied legislative permission to litigate without risking implied waiver. The dissenters also pointed out that prejudice is only required to show estoppel. They reasoned that the majority's conditional consideration of prejudice revealed it was applying an estoppel concept that was irrelevant to waiver.

To the dissent, implied waiver of the Chapter 150 right is not a matter of the degree or duration of the participation in litigation. Rather, it must be based on other conduct irreconcilably inconsistent with dismissal, such as moving for summary judgment or announcing ready for trial. Both of these, in the dissenters' estimation, are clear elections to resolve the case on the merits instead of the right to dismiss. Because there was no such clear expression in this case, the engineers should not have been deemed to impliedly waive that right.

4. What about judicial economy and the public interest?

The engineer's delayed until the expiration of limitations to seek dismissal for failure to file a COM. The majority and the dissent differed over what this said about the engineer's intent. The dissent appears to have given no in-depth consideration to whether it clearly expressed intent to forego a curable procedural defect enforceable by dismissal without prejudice in favor of a final ending based on limitations. Yet, delaying until limitations was clear circumstantial evidence of knowing, strategic calculation, not mere delay or ignorance of the right to dismiss. Neither dissent nor majority apparently considered judicial economy and whether the public interest is best served by consuming years of judicial time and attention to litigate while allowing a litigant to also hold a perpetual get-out-of-jail-free card.

Tort Claims Act: Actual notice sufficient to excuse formal notice requires actual awareness of facts connecting the occurrence to the government's alleged act or omission.

§ 101.101 of the Torts Claims Act requires formal notice to the governmental entity within six months unless the entity already has "actual notice" the alleged death, injury or damage occurred. "Actual notice" means the governmental unit must be subjectively aware of the fault allegedly causing the incident. In Worsdale v. City of Killeen, plaintiffs' decedents died when their motorcycle struck an unbarricaded dirt mound that had blocked an unlit country road for

nearly two years. In a jurisdictional dispute between city and county, the city insisted that road maintenance for this location fell on the county. Days after the accident, investigation identified the contributing hazards and the circumstances creating the city's maintenance responsibility.

Ordinarily, a routine safety investigation accident report is not sufficient actual notice. In a 7:2:0 opinion by Justice Guzman, the court held the city had actual notice of facts disclosed in the police, city works and legal department

reports sufficient to excuse plaintiff's failure to provide the §101.101 formal notice. This was true even though the city maintained before and after the accident the county was responsible for road maintenance.

The actual notice dispute centered on whether the city was aware of the facts and circumstances allegedly making it liable for the incident. Actual awareness of the alleged fault is required because the government may not know of the need to abate a dangerous condition, properly budget for potential liability and, the need settle the claim, if meritorious, promptly. Notice is not "actual," however, if the facts in an investigative report neither imply nor expressly assert the government's fault. No actual determination of liability is necessary if there is subjective awareness of facts connecting alleged governmental conduct to the cause of the alleged injury.

Applying these principles, the opinion explains the city was almost immediately knew of allegations that (1) the road condition and lack of warning contributed to the incident and (2) road maintenance was the city's responsibility. Actual awareness requires the city to either actually make that connection or know that the connection had been made. The city's knowledge of this connection was demonstrated by the facts disclosed in the investigation and the city's action to remedy the lack of barricades once it learned after the accident that it may have been responsible for maintenance. Because this evidence showed ownership or right of control, it could be considered without violating the rule generally prohibiting evidence of post-loss remedial measures.

It was not sufficient that the city ought to have known of the connection. Nor was it necessary for the city to believe it was, in fact, liable. The post-accident reports in this case not only showed that the lack of barricades contributed to the accident, but also that the city was allegedly responsible for putting out barricades to prevent it and acted on these reported facts. The opinion distinguished these circumstances from Cathey v. Booth's holding actual notice

requires "subjective awareness" of the government's fault as ultimately alleged by the plaintiff to have produced or contributed to the harm.

Otherwise, the majority posits in response to Justice Boyd's concurring opinion that the actual notice exception would make the statute's formal notice requirement a pointless redundancy. The opinion also asserts that the longevity of the Cathey rationale is, in and of itself, grounds not to overrule it and upset settled expectations, especially when the Legislature could have but did not amend §101.101.

Justice Boyd, joined by Justice Blacklock, urges that Cathey and the majority's analysis are simply irreconcilable. Justice Boyd's concurrence tracks the drift in the "actual knowledge" analysis.

> Since Cathey, the Court has repeatedly morphed the test from requiring the governmental defendant's
> - "actual notice" of its "alleged fault," Cathey, 900 S.W.2d at 341, to "subjective awareness of its fault, as ultimately alleged," as opposed to mere knowledge of information "that would reasonably suggest its culpability," Tex. Dep't of Criminal Justice v. Simons, 140 S.W.3d 338, 347–48 (Tex. 2004), to
> - actual awareness "that it was at fault," Univ. of Tex. Sw. Med. Ctr. at Dall. v. Loutzenhiser, 140 S.W.3d 351, 358 (Tex. 2004), to
> - knowledge that its "liability" is "at issue," so that it is incentivized to "investigate its potential liability," City of Dallas v. Carbajal, 324 S.W.3d 537, 539 (Tex. 2010), to
> - knowledge not of "liability" or "culpability" at all, but rather of "responsibility" for the injury claimed, Univ. of Tex. Sw. Med. Ctr. at Dall. v. Estate of Arancibia ex rel. Vasquez-Arancibia, 324 S.W.3d 544, 550 (Tex. 2010), to
> - a subjective belief that it "acted in error," Tenorio, 543 S.W.3d at 778–79.

According to the concurring Justices, the majority is not trying to determine what the statute actually says, but what it should have said by adopting the "the potential-responsibility/alleged-responsibility test" for actual awareness.

Interlocutory Appeals from Denials of TCPA Motions to Dismiss: No trial court may lift the statutory stay pending resolution of an interlocutory appeal from the denial of a TCPA motion to dismiss.

Employees of a scrap metal recycler, EMR, left to start Geomet, a competing scrap business. EMR sued Geomet for allegedly misappropriating trade secrets and breach of fiduciary duty claims. The trial court issued a TRO prohibiting

Geomet from using EMR's confidential information. Geomet filed a motion to dismiss under the Texas Citizens Participation Act ("TCPA").

Under Texas Civil Practice & Remedies Code §51.014(b), the pendency of an interlocutory appeal from a denial of a motion a motion to dismiss under the Texas Citizens Participation Act ("TCPA") stays all other trial proceedings. While Geomet's TCPA dismissal motion was pending, the parties signed an agreed scheduling order that permitted the trial court to lift this stay, if the TCPA dismissal were denied and appealed. The agreement to lift the statutory stay was limited to extending the TRO until the hearing on EMR's temporary injunction motion. After the trial court denied the TCPA dismissal and Geomet perfected its interlocutory appeal, EMR moved to lift the stay so that the trial court could hear its temporary injunction and contempt motions. In re Geomet Recycling was a mandamus action challenging the court of appeals' order permitting the trial court to lift the stay for this limited purpose.

A unanimous opinion by Justice Blacklock pointed out that §51.014(b) permitted no exceptions. It was beyond the court's authority to provide one in the guise of statutory interpretation. Nor could that authority be supplied under Texas Rule of Civil Procedure 29.3 which permits the appellate court in an interlocutory appeal to "make any temporary orders necessary to preserve the parties' rights until disposition of the appeal." Statutes prevail over conflicting procedural rules. Rule 29.4 added no support for the appellate court's action. That rule only applies to enforce the appealed order, not to allow it to be undermined. Geomet's appeal involved neither the temporary injunction nor contempt motions. The stay was lifted, not to obtain the trial court's assistance with the appealed order, but to lift the stay so it could enter new orders. Such orders are forbidden under §51.014(b). The statute staying all proceedings in the trial court removed any authority to lift the stay. Whether lifting the stay was an exercise of ostensible authority under appellate procedural rules or an exercise of inherent court authority, both were overridden by the plain stay of all proceedings under §51.014(b). If

continuation of the stay threatened EMR with irreparable harm, it could ask the appellate court which was not affected by the statute to grant temporary orders to preserve the parties' rights pending resolution of the interlocutory appeal.