Opinion issued February 9, 2012

In The

Court of Appeals

For The

First District of Texas

NO. 01-11-00025-CV

PRO PLUS, INC., Appellant

V.

CROSSTEX ENERGY SERVICES, L.P., Appellee

On Appeal from the 55th District Court
Harris County, Texas
Trial Court Case No. 2010-23663

DISSENTING OPINION

In the trial court, Pro Plus, Inc. ("Pro Plus") filed a motion to dismiss the claims of Crosstex Energy Services, L.P. ("Crosstex") on the ground that Crosstex had failed to file a certificate of merit with its original petition, as required by Civil

Practice and Remedies Code section 150.002.[1] Identifying eleven issues, Pro Plus appeals the trial court's order denying its motion to dismiss.

Because I believe Pro Plus knowingly and voluntarily waived its right to a certificate of merit under the circumstances of this case, I would affirm the judgment of the trial court.

I agree with the majority that, by its plain language, the Certificate of Merit Statute is mandatory, not discretionary. *See TDIndustries, Inc. v. Citicorp N. Am., Inc.*, No. 02–10–00030–CV, 2011 WL 1331501, at *3 (Tex. App.—Fort Worth Apr. 7, 2011, no pet.) (mem. op.); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 150.002(e) (Vernon 2011) (providing that plaintiff's failure to file affidavit "in accordance with this section *shall* result in dismissal of the complaint against the defendant") (emphasis added). However, I disagree with the majority's position that "the Certificate of Merit Statute does not grant the trial court discretion to completely waive the requirement; rather, it mandates dismissal, on the defendant's motion, of any claims for which a certificate is required and not produced." Slip Op. at 18–19 (citing *Citicorp N. Am.*, 2011 WL 1331501, at *3; *UOP, L.L.C. v. Kozak*, No. 01–08–00896–CV, 2010 WL 2026037, *4 (Tex. App.—Houston [1st Dist.] May 20, 2010, no pet.) (mem. op)). Rather, the Texas Supreme Court has recognized that waiver may indeed apply when compliance

[1] TEX. CIV. PRAC. & REM. CODE ANN. § 150.002 (Vernon 2011).

with a statutory requirement is mandatory, so long as the elements of waiver are satisfied. *See Jernigan v. Langley*, 111 S.W.3d 153, 156–57 (Tex. 2003) (applying doctrine of waiver with respect to right to dismissal of medical malpractice action based on claimant's failure to comply with mandatory expert report requirements of Medical liability and Insurance Improvement Act where defendant's silence or inaction is inconsistent with intent to rely upon right to dismissal).

Waiver is an intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right. *Id.* at 156; *Palladian Bldg. Co. v. Nortex Found. Designs, Inc*., 165 S.W.3d 430, 434 (Tex. App.—Fort Worth 2005, no pet.). Waiver becomes a question of law when the facts and circumstances are admitted or clearly established. *Jernigan*, 111 S.W.3d at 156; *Palladian Bldg*., 165 S.W.3d at 434. Waiver is largely a matter of intent. *Jernigan*, 111 S.W.3d at 156; *Ustanik v. Nortex Found. Designs, Inc*., 320 S.W.3d 409, 413 (Tex. App.—Waco 2010, pet. denied). Intent must be clearly demonstrated by the surrounding facts and circumstances for implied waiver to be found through a party's actions. *Ustanik*, 320 S.W.3d at 413 (citing *Jernigan*, 111 S.W.3d at 156). Waiver of a right cannot be found if the party against whom waiver is sought says or does nothing inconsistent with its intent to rely on such right. *Id.* (citing *Jernigan*, 111 S.W.3d at 156 and *Palladian Bldg*., 165 S.W.3d at 434).

As the majority points out, participating in the litigation process or delaying pursuit of dismissal, without more, does not show intent to waive a right to dismissal under section 150.002. *See, e.g.*, *Jernigan*, 111 S.W.3d at 157; *Ustanik*, 320 S.W.3d at 414; *DLB Architects, P.C. v. Weaver*, 305 S.W.3d 407, 411 (Tex. App.—Dallas 2010, pet. denied); *Landreth v. Las Brisas Council of Co–Owners, Inc.*, 285 S.W.3d 492, 500–01 (Tex. App.—Corpus Christi 2009, no pet.). Moreover, Crosstex acknowledges that the Certificate of Merit Statute does not include a deadline to file a motion to dismiss. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 150.002; *see also Ustanik*, 320 S.W.3d at 413 (observing that section 150.002 does not contain deadline to file motion to dismiss); *cf.* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a) (Vernon 2011) (establishing 21-day deadline to object to expert report in health care liability claim). Finally, the mere fact that a defendant waits to file a motion to dismiss pursuant to section 150.002 is not sufficient to establish waiver. *See Ustanik*, 320 S.W.3d at 413–14 (holding that delay of two years, five months to file motion to dismiss did not constitute waiver); *DLB Architects*, 305 S.W.3d at 411 (waiting more than one year to file dismissal motion did not manifest intent to waive); *see also Jernigan*, 111 S.W.3d at 157 (holding that physician who waited 600 days after receiving expert report to move for dismissal did not waive his right to pursue motion to dismiss under former version of health care liability statute). Here, however, the record clearly

demonstrates Pro Plus's intentional conduct inconsistent with claiming the right to a certificate of merit. Such conduct supports a finding of waiver. *See Jernigan*, 111 S.W.3d at 156; *Palladian Bldg.*, 165 S.W.3d at 434.

Crosstex's cause of action arose from a natural gas fire that occurred when a gasket exploded at the Godley Station on November 15, 2008, causing significant property damage. Pro Plus, a registered engineering firm, had been the principal contractor for the construction of the Godley Station. Crosstex sued Pro Plus and another defendant for damages arising from the fire on April 14, 2010, well within the statute of limitations. In its Original Petition, Crosstex asserted causes of action against Pro Plus for general and specific negligence, negligent misrepresentation, breach of implied and express warranty, and breach of contract. It did not attach the certificate of merit statutorily required by section 150.002 for negligence claims against an engineering firm. Pro Plus filed its answer on May 28, 2010.

Pro Plus generally denied Crosstex's claims and asserted a number of affirmative defenses and special exceptions. Pro Plus thus acknowledged the gravity of the claims, and it clearly knew those claims alleged specific acts of professional negligence, to which it responded with a denial and affirmative defenses, yet it did not move to dismiss the claims. Instead, knowing that the deadline for the joinder of parties and the designation of expert witnesses was

November 8, 2010—within the statute of limitations for Crosstex's negligence claims—Pro Plus signed a Rule 11 agreement with Crosstex and the other defendants. That agreement provided, inter alia, that Crosstex's deadline to designate its experts was extended to April 8, 2011, well outside the negligence statute of limitations. All parties consented to the agreement and filed it with the trial court on November 29, 2010, two weeks after the statute of limitations on negligence had run. Three days later, on December 2, 2010, Pro Plus filed its "Motion to Dismiss Plaintiff's Claims Under Chapter 150 of the Texas Civil Practice and Remedies Code" based on Crosstex's "failure to attach the statutorily required certificate of merit to its Original Petition." It sought dismissal of Crosstex's claims with prejudice.

The action of negotiating and signing a Rule 11 agreement postponing critical deadlines, including the designation of experts, from within the statute of limitations until six months after the expiration of limitations plainly signaled that Pro Plus did not intend to rely upon its right to dismiss Crosstex's claims for lack of a certificate merit. Rather, it expressed its intent to participate in the litigation process and to designate experts in accordance with its sworn agreement. This behavior was plainly inconsistent both with Pro Plus's assertion of its right to dismissal and with Pro Plus's simultaneously preparing a motion to dismiss for filing three days after the filing of the Rule 11 agreement and two weeks after the

running of limitations. *See Jernigan*, 111 S.W.3d at 156; *Palladian Bldg*., 165 S.W.3d at 434. Therefore, this case is distinguishable from those cases in which the defendant did nothing inconsistent with its right to seek dismissal.[2] *See Ustanik*, 320 S.W.3d at 413–14; *DLB Architects*, 305 S.W.3d at 411; *Landreth*, 285 S.W.3d at 500–01.

Moreover, Pro Plus's action in entering the Rule 11 agreement extending deadlines and delaying filing its motion to dismiss with prejudice until the statute of limitations had run had the additional consequence of increasing the harshness of the statute beyond the express intent of the Legislature. Under section 150.002, dismissal of claims by the trial court is mandatory if the plaintiff fails to file a certificate of merit with its original petition. TEX. CIV. PRAC. & REM. CODE ANN. § 150.002(e). However, dismissal with prejudice is discretionary. *Id.*

---

[2] In *Palladian*, in its analysis of whether the defendant waived its right to seek a dismissal under section 150.002, the court of appeals noted that parties have been held to have waived their right to compel arbitration by substantially invoking the judicial process. *Palladian Bldg. Co. v. Nortex Found. Designs, Inc*., 165 S.W.3d 430, 434 & n.8 (Tex. App.—Fort Worth 2005, no pet.) (citing *In re Bruce Terminix Co.*, 988 S.W.2d 702 (Tex. 1998) (orig. proceeding); *In re Winter Park Constr., Inc.*, 30 S.W.3d 576 (Tex. App.—Texarkana 2000, orig. proceeding); *EZ Pawn Corp. v. Gonzalez*, 921 S.W.2d 320 (Tex. App.—Corpus Christi 1996, writ denied); and *Marble Slab Creamery, Inc. v. Wesic, Inc.*, 823 S.W.2d 436 (Tex. App.—Houston [14th Dist.] 1992, no writ)). It held that the plaintiff in that case had failed to provide documentation in the record that the defendant had, in fact, substantially participated in the litigation process; but it did not reject the applicability of the doctrine of waiver by substantial participation in the litigation process to cases alleging waiver of the right to a certificate of merit. *Id.* at 434–35. Here, Pro Plus's signing of the Rule 11 agreement clearly shows substantial participation by Pro Plus in the litigation process.

(providing, "This dismissal *may* be with prejudice") (emphasis added). Thus, by its plain language, section 150.002 contemplates the trial court's having discretion to permit the refilling of claims erroneously filed without a certificate of merit when it deems the case meritorious. Pro Plus's action in engaging in the litigation to the point of entering a Rule 11 agreement extending the deadline for filing of expert reports while preparing a motion to dismiss for filing three days later—two weeks after the running of the statute of limitations on Crosstex's negligence claims—had the effect of denying Pro Plus any opportunity to refile its time-barred claims, thus rendering the statute more severe than plainly intended by the Legislature.

Conclusion

I would hold that Pro Plus knowingly and voluntarily waived its right to a certificate of merit. Accordingly, I would affirm the judgment of the trial court.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Higley, and Massengale.

Keyes, J., dissenting.