Reversed and Rendered in Part and Affirmed in Part and Majority and Dissenting Opinions filed March 15, 2016.

In The

Fourteenth Court of Appeals

NO. 14-14-00578-CV

TRELLTEX, INC. D/B/A TEXCEL, Appellant

V.

INTECX, L.L.C. D/B/A ROCKY MOUNTAIN INDUSTRIAL TECHNOLOGIES, Appellee

---

On Appeal from the 295th District Court
Harris County, Texas
Trial Court Cause No. 2012-52277

D I S S E N T I N G O P I N I O N

"Should have known" is not the standard for common-law waiver under Texas law. Yet, today the court holds that a party waives its right to recover if the party *should have known* that its failure to act was inconsistent with its known rights. Because today's holding goes against our court's precedents, I respectfully dissent.

Insufficiency of the Evidence to Support Waiver

Appellee Intecx, L.L.C. d/b/a/ Rocky Mountain Industrial Technologies ("RMIT") argues on cross-appeal that the record contains insufficient evidence that it waived its right to receive commissions not paid between May 1, 2006 and February 29, 2012. The majority holds the statute of limitations bars recovery of some of these commissions and that waiver bars recovery of the rest.

The statute of limitations bars all of RMIT's claims to funds owed before September 10, 2008, as the majority concludes. But, there is no waiver, so waiver does not bar recovery of the funds owed between September 2008 and February 2012. The majority errs in holding otherwise.

The majority notes that waiver may be asserted as an affirmative defense against a party who intentionally relinquishes a known right or engages in intentional conduct inconsistent with claiming that right.[1] The elements of waiver include (1) an existing right, benefit, or advantage held by a party, (2) the party's actual knowledge of its existence, and (3) the party's actual intent to relinquish the right, or intentional conduct inconsistent with the right.[2] According to the majority, RMIT's failure to make calculations that would have revealed the underpayments and RMIT's failure to complain about them amount to intentional conduct inconsistent with the right to collect unpaid commissions. Our precedent does not support that conclusion.

[1] *Singleton v. Elliott*, 14-13-00040-CV, 2014 WL 1922260, at *4 (Tex. App.—Houston [14th Dist.] May 13, 2014, no pet.) (mem. op.).

[2] *Ulico Cas. Co. v. Allied Pilots Ass'n*, 262 S.W.3d 773, 778 (Tex. 2008).

Actual knowledge is a prerequisite to intentional conduct inconsistent with claiming a known right.

Citing *Tenneco Inc. v. Enterprise Products Company*,[3] the majority holds that RMIT's silence and inaction — not calculating and not complaining — constitute intentional conduct inconsistent with claiming a known right to receive commissions at a rate of nine percent.[4] But, case law holds that silence and inaction are sufficient to constitute intentional conduct inconsistent with claiming a known right *only* when a party has actual knowledge that its conduct is inconsistent with claiming a known right.[5] Our court already has rejected the interpretation of the *Tenneco Inc.* precedent the majority applies today.[6]

In *Clear Lake Center, L.P. v. Garden Ridge, L.P.*, our court explained that the *Tenneco Inc.* holding is based on the party's actual knowledge of the facts constituting the breach.[7] This actual knowledge is a crucial part of establishing waiver.[8] Constructive knowledge — *what RMIT might have discovered if it had only performed the math* — is not enough for waiver.[9] In *Clear Lake Center*, our court held that paying an improper fee was not intentional conduct inconsistent with claiming a known right because the paying party did not realize the fee was improper.[10] Our court implicitly held that a party does not intentionally act in a way that is inconsistent with claiming a known right unless the party has actual

[3] *See* 925 S.W.2d 640, 642–44 (Tex. 1996).

[4] *See ante* at 15.

[5] *See Clear Lake Ctr., L.P. v. Garden Ridge, L.P.*, 416 S.W.3d 527, 542–43 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

[6] *See id.* at 542.

[7] *See id.*

[8] *Id.* at 543.

[9] *See id*. at 542–43.

[10] *Id*.

knowledge that the action is inconsistent with claiming the right.[11] There is no evidence of actual knowledge in today's record.

The majority misreads *Clear Lake Center* as holding that a party intentionally acts inconsistently with claiming a known right if the party knew facts pertinent to its right of recovery but did not act upon its right to recover.[12] In *Clear Lake Center*, our court actually held that a party's simple knowledge of pertinent facts coupled with inaction is not enough for a court to conclude a party intentionally acted inconsistently with its right to recover for breach of contract.[13] Under the *Clear Lake Center* precedent, a party must have actual knowledge of the facts constituting the breach of contract for its inaction to be intentionally inconsistent with its right to recover based on that breach.[14]

The majority points out that a party is presumed to know the contents of any contract the party signs and the contract's legal effects. The statement is true but the majority misapplies it. As properly applied to this case, the presumption means that if RMIT knew Texcel was not paying the proper amount of commission – nine percent of the sales revenue – RMIT presumptively would know that this failure by Texcel constituted a breach of the contract. The presumption does not mean that the court should presume RMIT knew Texcel was not paying the proper amount because RMIT knew some facts pertinent to the breach. As the majority

---

[11] *Id.* at 542–43.

[12] *See ante* at 15–16.

[13] *See Clear Lake Ctr.*, 416 S.W.3d at 543.

[14] *Id.* at 542–43. *See also Shannon v. Memorial Drive Presbyterian Church U.S.*, 476 S.W.3d 612, 627 (Tex. App.—Houston [14th Dist.] 2015, pet. filed) (concluding that waiver was not established because the party in question "did not unequivocally manifest the intent not to assert" the rights at issue); *Davis-Lynch, Inc. v. Asgard Techs., LLC*, 472 S.W.3d 50, 68 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (concluding that waiver was not established and relying upon the *Clear Lake Center* case for the proposition that "actual knowledge is required to establish waiver").

acknowledges, the question of whether RMIT knew Texcel was not paying the proper amount is a question of fact.[15] The fact finder determined RMIT did not know Texcel was not properly compensating RMIT.

In *Clear Lake Center*, the party with the known right of recovery (Garden Ridge) took an action that was inconsistent with claiming that right.[16] But, our court held that the action — paying an improper fee — was unintentional because the party paid the fee "without actually knowing that the fee was in part [improper.]"[17] Emphasizing the importance of actual knowledge, our court held "Garden Ridge's lack of knowledge is crucial."[18] The standard for finding waiver through a party's intentional action inconsistent with a known right, articulated in *Clear Lake Center*, is that a party may engage in intentional conduct inconsistent with claiming a known right *only* when the party has actual knowledge the action is inconsistent with the right. [19]

Lack of awareness of any facts pertinent to a breach is sufficient, but not necessary, to meet the standard *Clear Lake Center* articulates.[20] Because lacking knowledge of the facts pertinent to the breach was sufficient to show Garden Ridge lacked actual knowledge of the facts constituting the breach, the *Clear Lake Center* court appropriately noted that Garden Ridge did not know the facts pertinent to the breach.[21] Because it is possible to know some facts pertinent to a

---

[15] *See ante* at 13–14.

[16] *See Clear Lake Ctr.*, 416 S.W.3d at 542–43.

[17] *Id.*

[18] *Id.* at 543. The court was not referring to a lack of knowledge by Garden Ridge that it had a right to sue for breach of contract. *Id.*

[19] *See id.*

[20] *See id.*

[21] *See id.* at 542.

breach[22] but still lack knowledge of the facts constituting the breach, neither *Tenneco, Inc.* nor *Clear Lake Center* state that the standard for determining waiver is a party's lack of knowledge of facts pertinent to the breach.[23] Indeed, such a standard would present a slew of thorny problems. The majority does not articulate how courts should determine which facts are pertinent to the breach or how many pertinent facts a party needs to know to be charged with waiver. Nor does the majority square this proffered standard with waiver jurisprudence that cuts against it.

Today's holding is at odds with *Clear Lake Center*. Though the majority purports to follow that precedent, the majority opinion clashes with *Clear Lake Center's* interpretation of *Tenneco Inc.* on the central issue. Rather than follow that interpretation, as other panels have done,[24] the majority steps right over the holding. Reasonable people can disagree about which is the better rule – actual knowledge (as the *Clear Lake Center* court held) or constructive knowledge (as the majority holds today) – but all should agree that it is a bad idea to have two rules. That is why no panel of this court is at liberty to disregard another panel's interpretation of supreme court precedent.[25] This important principle of stare

---

[22] At one point, the majority suggests that the "facts pertinent to the breach" equate to the "material facts sufficient to support a legal conclusion that the contract had been breached." *See ante* at 18. The problems inherent in using actual knowledge of "facts pertinent to the breach" as the legal standard apply with equal force vis á vis to the legal standard of actual knowledge of "material facts sufficient to support a legal conclusion that the contract had been breached." Although the majority states RMIT knew material facts that would have enabled it to learn of the facts constituting the breach, the trial court specifically found that RMIT did not know the facts constituting the breach. The majority does not suggest RMIT knew the facts constituting the breach. "Should have known" is not the standard, but that is the standard the majority applies.

[23] To the extent the majority relies upon *Slay v. Burnett Trust* as authority for the proposition that a party waives its right to recovery if it knows "facts pertinent to the breach," *Slay* did not involve common-law waiver. *See* 187 S.W.2d 377, 394 (Tex. 1945).

[24] *See Shannon,* 476 S.W.3d at 627; *Davis-Lynch, Inc.*, 472 S.W.3d at 68.

[25] *See Chase Home Fin., L.L.C. v. Cal Western Reconveyance Corp.*, 309 S.W.3d 619,

decisis safeguards predictability in the law so that our court does not require actual knowledge for some and only constructive knowledge for others. The panels of the court should apply the same rule to all. Absent a decision from a higher court or this court sitting en banc that is on point and contrary to the prior panel decision, or an intervening and material change in the statutory law, this panel is bound by the holding in *Clear Lake Center*.[26] Today's contrary holding muddles the jurisprudence.

The trial court found RMIT lacked actual knowledge.

The majority characterizes the dissenting opinion as stating that "implied waiver requires direct evidence that a party had actual knowledge of a breach of contract."[27] The majority also says the dissent views the evidence that RMIT knew facts relating to the breach as insufficient to support the trial court's conclusion of waiver.[28] Neither characterization is accurate.

The trial court found that "RMIT could have calculated that it was only being paid 5%," but that "RMIT never made those calculations." The evidence is sufficient to support the trial court's finding that RMIT never calculated the percentage of commissions it was receiving. In making this finding, the trial court found RMIT did not have actual knowledge of the facts constituting the breach. The majority is not the fact finder. This court should give deference to the trial court's express finding[29] — no actual knowledge — and conclude that the trial

---

630 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

[26] *See id.*

[27] *See ante* at 15 n.7.

[28] *See ante* at 15 n.7.

[29] Nothing in this dissent suggests that implied waiver requires direct evidence. And, nothing in this dissent suggests that the trial court's findings of fact are not supported by sufficient evidence. The dissent does not conflict with *Ulico Cas. Co.*, 262 S.W.3d at 778, or *In re Gen. Elec. Capital Corp.*, 203 S.W.3d at 316. While intentional conduct inconsistent with a

court's findings of fact do not support its conclusion of law regarding waiver.[30] The majority does neither.

Although the majority criticizes reliance on the trial court's findings, the majority does not set aside the trial court's finding that RMIT did not have actual knowledge that it was being underpaid. Absent actual knowledge, RMIT's inaction was not *intentional* conduct inconsistent with its known right to recover the full amount of commissions owed under the contract, even if RMIT's silence and inaction could be considered conduct inconsistent with its known right of recovery.[31]

Relying on the trial court's findings that RMIT *could have* discovered that its conduct was inconsistent with its known right of recovery, the majority skirts the requirement that for a party to act intentionally in a way that is inconsistent with the party's rights, the party must have actual knowledge of the facts constituting the breach. Just as Garden Ridge in *Clear Lake Center* lacked actual knowledge that the fee it paid was improper,[32] RMIT lacked actual knowledge that the commissions it received were improper amounts. Without citing any authority (and ignoring binding precedent), the majority fashions a new rule that a party intentionally acts inconsistently with its known rights (and therefore, waives those rights) if the party *should have known* the action it took was inconsistent with its known rights.[33] Holding a party's inaction is intentionally inconsistent with its

---

known right may be proven with evidence of the surrounding facts and circumstances, in this case, after considering the evidence of the surrounding facts and circumstances, the trial court found RMIT did not have actual knowledge of the facts constituting the breach.

[30] *See Clear Lake Ctr.*, 416 S.W.3d at 543.

[31] *See id.*

[32] *See Clear Lake Ctr.*, 416 S.W.3d at 542–43.

[33] *See ante* at 14–17.

known right of recovery when a party lacks knowledge of the inconsistency goes against our precedents and creates a conflict in this court's case law.[34]

Conclusion

RMIT did not know its inaction was inconsistent with its right to recover the full amount of commissions owed under the contract, so RMIT's inaction does not operate as a waiver of its right to pursue recovery. Neither the record nor this court's binding precedent supports the majority's waiver analysis.[35]

Kem Thompson Frost
Chief Justice

Panel consists of Chief Justice Frost and Justices Jamison and Busby (Busby, J., majority)

[34] *See Shannon*, 476 S.W.3d at 627; *Davis-Lynch, Inc.*, 472 S.W.3d at 68; *Clear Lake Ctr.*, 416 S.W.3d at 543.

[35] *See Shannon*, 476 S.W.3d at 627; *Davis-Lynch, Inc.*, 472 S.W.3d at 68; *Clear Lake Ctr.*, 416 S.W.3d at 543.