Course of Action

Why plaintiffs' attorneys should start early when suing providers of custom-designed industrial software.

BY **PIERRE GROSDIDIER**

A recent Texas appellate decision, *Jacobs Field Servs. N.A., Inc. v. Willeford*, illustrates the challenges that the state's certificate of merit statute places on a plaintiff wanting to sue a professional services organization for allegedly defective custom-designed industrial software.[1] Troy Willeford sued a refiner and three Jacobs entities, among others, for injuries he allegedly suffered after responding to an accident. The accident involved heavy equipment normally suspended vertically from a cable under tension. The cable lost tension during operations and severed Willeford's co-worker's feet when it suddenly snapped into place.

Willeford alleged that Jacobs negligently configured the programmable logic controllers, or PLCs, that controlled the equipment's operation.[2] Willeford filed a Chapter 150 certificate of merit with his petition, an affidavit by a qualified third-party professional who "holds the same professional license or registration as the defendant."[3] The certificate seeks to prevent frivolous suits against professionals by requiring that the affiant "set forth specifically for each theory of recovery . . . the negligence, if any, or other action, error, or omission of the licensed or registered professional..."[4] The certificate's author must be "knowledgeable" in the defendant's practice area.[5]

In his petition, Willeford alleged that Jacobs defectively designed, wired, installed, constructed, and programmed the PLCs.[6] The certificate identified various shortcomings in the equipment and the procedures but did not specifically identify how the PLCs were incorrectly programmed.[7] Its author, Gregg Perkin, declared that he was a registered professional mechanical engineer with expertise in process equipment but said nothing about his computer expertise.[8]

The trial judge denied Jacobs' motion to dismiss Willeford's claims, which argued that the certificate fell short of its statutory requirements. On interlocutory appeal, Jacobs argued, inter alia, that the certificate did not comply because Perkin manifested no expertise in "computer programming and software engineering for control of industrial machinery."[9] The appellate court agreed. Nothing in the record indicated that the affiant held the requisite computer expertise. The court found telling that Perkin stated he was "informed that the PLC . . . was not fully functioning."[10] The court remanded to determine whether to dismiss Willeford's claims with or without prejudice. But either way, the court ruled almost seven months after the end of the two-year limitations period for Willeford's negligence claims. Willeford's new suit might be untimely because the statute bars the extension of "any applicable" limitations period.[11]

The court declined to address Jacobs' other, and arguably more interesting, argument that the certificate failed to specifically identify Jacobs' errors and omissions, per § 150.002(b).[12] Indeed, Perkin's 11-bullet point summary of his "minimal expectations" for the failed system described mechanical design issues but mentioned neither Jacobs nor the PLCs.[13] Perkin also apparently did not review Jacobs' PLC code.[14]

This last argument raises an important issue for a would-be plaintiff in Willeford's position, namely a party who alleges defects in custom-designed software developed by a professional engineering firm for an operating company. The plaintiff must obtain the code and the real-time database histories that track and record the code's execution to substantiate a certificate's coding error allegation—assuming a certificate is required. But, this essential information is in the hands of the operating company (the engineering firm will only have the code). Appellate courts are split regarding whether it is discoverable via pre-suit discovery pursuant to Texas Rule of Civil Procedure 202.[15] The plaintiff might, therefore, have to first sue the operating company, obtain the code and histories through discovery, find a qualified expert for the certificate, then sue the engineering firm—all within two years. The discovery rule might not help because once a plaintiff knows of an injury, failure to know its specific cause does not toll limitations.[16]

Other legal obstacles might stymie the plaintiff. Workers' compensation might bar the first suit if the plaintiff is an operating company employee. Texas Civil Practice & Remedies Code Chapter 95 might also bar the first suit (filed as a third party over action) if the plaintiff is an independent contractor employee, unless the plaintiff can show that the operating company had actual knowledge of the coding error—an unlikely premise.[17] Best to start early if you are the plaintiff's attorney, considering all these obstacles. **TBJ**

Notes

1. No. 01-17-00551-CV, 2018 WL 3029060 (Tex. App.—Houston [1st Dist.] June 19, 2018, no pet.) (mem. op.); Tex. Civ. Prac. & Rem. Code ch. 150.
2. A PLC is an industrial-grade computer that controls sequences of machinery events through programmable logic decision trees.
3. Tex. Civ. Prac. & Rem. Code § 150.002(a).
4. *Id.* § 150.002(b); *CTL/Thompson Texas, LLC v. Starwood Homeowner's Ass'n, Inc.*, 390 S.W.3d 299, 301 (Tex. 2013).
5. Tex. Civ. Prac. & Rem. Code § 150.002(a)(2)–(3).
6. *Willeford*, 2018 WL 3029060, at *8.
7. Brief for Appellant at Tab 2, p. 11, para. 69, *Willeford*, 2018 WL 3029060.
8. *Willeford*, 2018 WL 3029060, at **2–3.
9. *Id.* at *8. Willeford waived the issue of whether his petition required a certificate in the first place. *Id.* at *5.
10. *Id.* at *8.
11. Tex. Civ. Prac. & Rem. Code § 150.002(g).
12. *Willeford*, 2018 WL 3029060, at *8 n.14; Brief pp. 20–36.
13. *Willeford*, 2018 WL 3029060, at *8 n.13; Brief, Tab 2, p. 6, para. 34.
14. *Willeford*, 2018 WL 3029060, at *8 n.12; Brief, Tab 2, pp. 15–16.
15. *Compare In re City of Tatum*, No. 12-18-00285-CV, --- S.W.3d ---, 2018 WL 6715889, at *6 and n.7 (Tex. App.—Tyler, Dec. 21, 2018, no pet.) (not released for publication) (document production allowed under Rule 202), *with In re Pickrell*, No. 10–17–00091–CV, 2017 WL 1452851, at **1, 6 (Tex. App.—Waco Apr. 19, 2017, no pet.) (mem. op.) (no document production allowed under Rule 202).
16. *Town of Dish v. Atmos Energy Corp.*, 519 S.W.3d 605, 613 (Tex. 2017).
17. *See* Tex. Civ. Prac. & Rem. Code § 95.003 (property owner not liable without a showing of control and actual knowledge).

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