Affirmed and Memorandum Opinion filed May 10, 2018.

In The

Fourteenth Court of Appeals

NO. 14-16-00859-CV

JODI WAGLEY, Appellant

V.

NEIGHBORHOOD INSURANCE SPECIALISTS AND TERRY LYNN STANLEY D/B/A NEIGHBORHOOD INSURANCE SPECIALISTS, Appellees

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On Appeal from the 269th District Court
Harris County, Texas
Trial Court Cause No. 2015-70695

M E M O R A N D U M O P I N I O N

A customer who filed suit against an insurance agency asserting claims for negligence, breach of contract, and violations of the Insurance Code and Deceptive Trade Practices Act challenges the trial court's (1) granting of summary judgment in favor of the insurance agency, (2) failure to grant the customer's motion for new trial, and (3) failure to grant the customer's motion for leave to amend her pleadings after the trial court rendered judgment. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In June 2015, after purchasing a new car, appellant/plaintiff Jodi Wagley contacted appellee/defendant Neighborhood Insurance Specialists, an insurance agency, to discuss insurance coverage for the new car. Neighborhood Insurance Specialists quoted Wagley rates for insurance policies from several insurance companies.

In connection with her inquiry, Wagley communicated with Neighborhood Insurance Specialists's receptionist Kathy Thorn, who was not a licensed insurance agent. Wagley asked questions about the different quotes and commented that the quoted coverage seemed expensive. Wagley had not accepted any of the quotes Neighborhood Insurance Specialists had provided when, in July 2015, about a month after she bought the new car, an individual broke the car's windshield in an attempted theft. Wagley lost the use of the car during the time the car was being repaired. After the incident, Wagley continued to communicate with Neighborhood Insurance Specialists about different quotes for insurance coverage for the car.

Wagley submitted the loss resulting from the windshield incident to her existing insurer, but the insurer denied Wagley's claim on the stated basis that the damage to the new car was not a covered loss because Wagley had not added the new car to the policy and the policy covered a new car only for twenty days after purchase unless the car was added to the policy.

Wagley's Lawsuit

Wagley filed suit against Terry Lynn Stanley d/b/a Neighborhood Insurance Specialists and Neighborhood Insurance Specialists. Wagley alleged that Thorn had represented to Wagley that Thorn was a licensed insurance agent and that

Thorn did not timely procure coverage for Wagley's new car. According to Wagley, Thorn assumed Wagley's new car would be covered by Wagley's existing insurance coverage. In her suit, Wagley asserted claims under the Insurance Code and Deceptive Trade Practices Act (DTPA) based on Neighborhood Insurance Specialists's alleged representation that Thorn was a licensed insurance agent when she was not a licensed insurance agent as well as claims for negligence and breach of contract.

Summary Judgment

Neighborhood moved for traditional and no-evidence summary judgment asserting various traditional and no-evidence summary-judgment grounds against each of Wagley's claims. Wagley filed a response to the summary-judgment motion in which she asserted that the evidence shows Thorn represented that (1) Thorn was a licensed insurance agent and (2) Wagley's new car would be covered under Wagley's existing insurance policy. Wagley asserted that she relied on those representations.

Wagley's Summary-Judgment Evidence

Wagley attached to her summary-judgment response her own affidavit and Thorn's affidavit. Wagley averred to the following in her affidavit:

- "I asked Kathy Thorn, an insurance agent with NEIGHBORHOOD INSURANCE SPECIALISTS, to cover the vehicle made the basis of this suit."
- "Ms. Thorn assumed that I would be covered based on the existing policy I had in place with SGA [the existing insurer]. She did not bind the new coverage I requested in time to cover the loss made the basis of this suit."
- "After the loss I discovered Ms. Thorn was not licensed."
- NEIGHBORHOOD INSURANCE SPECIALISTS and Ms. Thorn represented to me that their services had sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities which they did not

and do not have, specifically that Kathy Thorn was a licensed agent."

Thorn's affidavit states:

- "I was asked by [Wagley], a long-time customer, to obtain a quote on the vehicle made the basis of this suit."
- "The quotes were in process when Ms. WAGLEY incurred the property damage to her vehicle. She believed she would be covered under her prior coverage."
- "Because I was not available to bind her coverage on the date she requested (as I was out sick), the coverage was not bound by NEIGHBORHOOD INSURANCE SPECIALISTS in time to cover the loss."
- "JODI WATLEY (sic) understood during the two years that I worked with her that I was a licensed insurance agent. I was not a licensed insurance agent. She was reasonable in this belief based on my representations to her. I know she was shocked when she found out that I was not licensed."
- "NEIGHBORHOOD INSURANCE SPECIALISTS and I represented to Ms. Wagley that our services had sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities which they did not and do not have."
- "An employee of NEIGHBORHOOD INSURANCE SPECIALISTS . . . contacted SGA [the existing insurer] and did everything he could to have [Wagley's] claim denied."

Terry Lynn Stanley d/b/a Neighborhood Insurance Specialists moved to strike certain parts of the affidavits Wagley attached to her response based on the following objections.

Affidavit Statement	**Terry Lynn Stanley d/b/a Neighborhood Insurance Specialists's Objection(s)**
Wagley's affidavit: "Ms. Thorn assumed that I would be covered based on the existing policy I had in place with [the existing insurer]."	Wagley lacks personal knowledge or any personal knowledge is based on hearsay.

Thorn's affidavit: "[Wagley] believed she would be covered under her prior coverage."	Thorn lacks personal knowledge.
Thorn's affidavit: "[Wagley] understood during the two years that I worked with her that I was a licensed insurance agent."	Thorn lacks personal knowledge.
Thorn's affidavit: "[Wagley] was reasonable in this belief based on my representations to her."	Thorn lacks personal knowledge. The statement is an improper legal conclusion.
Thorn's affidavit: "I know [Wagley] was shocked when she found out that I was not licensed."	Thorn lacks personal knowledge.
Thorn's affidavit: "NEIGHBORHOOD INSURANCE SPECIALISTS and I represented to Ms. Wagley that our services had sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities which they did not and do not have."	Thorn lacks personal knowledge. The statement contains an improper legal conclusion.
Thorn's affidavit: "[An employee of Neighborhood Insurance Specialists] . . . did everything he could to have [Wagley's] claim denied."	Thorn lacks personal knowledge.

The trial court granted Terry Lynn Stanley d/b/a Neighborhood Insurance Specialists's motion to strike and struck these parts of the affidavits.

Wagley asserted that after learning that her existing insurer had denied her new-car claim, she discovered that Thorn was not a licensed insurance agent.

According to Wagley, Thorn and Neighborhood Insurance Specialists represented to her that Thorn was a licensed insurance agent and Wagley relied on that representation. According to Terry Lynn Stanley d/b/a Neighborhood Insurance Specialists, Thorn occasionally communicated with Wagley on behalf of the agency's licensed insurance agents. The parties disagree about the specifics of these communications. The trial court granted Terry Lynn Stanley d/b/a Neighborhood Insurance Specialists's summary-judgment motion.

Motion for New Trial

Wagley moved the court to grant a new trial and attached to the motion for new trial a supplemental affidavit from Thorn. Wagley asked the trial court to accept the supplemental affidavit as newly discovered evidence that "cured" Terry Lynn Stanley d/b/a Neighborhood Insurance Specialists's objections to the statement in Wagley's affidavit about Thorn's assumption. The trial court did not expressly rule on (1) Wagley's motion for leave to file additional evidence or (2) the motion for new trial, by a written order signed within seventy-five days after the trial court signed the judgment.

Motion for Leave to Amend Pleadings

After the trial court granted summary judgment, Wagley moved for leave to file an amended petition. Wagley reiterated this request in her motion for new trial. The trial court did not rule on this post-judgment motion for leave to file an amended pleading.

ISSUES

On appeal, Wagley raises two issues. First, she asserts that the trial court erred in granting Terry Lynn Stanley d/b/a Neighborhood Insurance Specialists's summary-judgment motion. Second, she asserts the trial court erred in failing to

grant her motion for new trial.

ANALYSIS

A. Is the summary judgment final?

Wagley filed suit against Neighborhood Insurance Specialists and Terry Lynn Stanley d/b/a Neighborhood Insurance Specialists. Terry Lynn Stanley d/b/a Neighborhood Insurance Specialists answered the lawsuit. In the First Amended Petition, Wagley pleaded that "Defendant, NEIGHBORHOOD INSURANCE SPECIALISTS, may be cited with process by serving it at its business address in Texas . . . Defendant has purported to answer through Terry Stanley as an assumed name business. NEIGHBORHOOD INSURANCE SPECIALISTS is a domestic insurance agency doing business in the State of Texas." In her response to Terry Lynn Stanley d/b/a Neighborhood Insurance Specialists's summary-judgment motion, Wagley asserted that "NEIGHBORHOOD is doing business as NEIGHBORHOOD INSURANCE SPECIALISTS through its owner TERRI (sic) LYNN STANLEY." Wagley effected service of process on Terry Lynn Stanley d/b/a Neighborhood Insurance Specialists, but did not effect service of process on Neighborhood Insurance Specialists.

Neither party argues that the summary-judgment order is not a final, appealable order, but we review sua sponte issues affecting appellate jurisdiction. *M.O. Dental Lab v. Rape*, 139 S.W.3d 671, 673 (Tex. 2004). The Supreme Court of Texas has held that when (1) the trial court grants summary judgment expressly disposing of the plaintiff's claims against all parties named in the petition except one, (2) so far as can be determined from the record, the remaining defendant was never served with citation and did not file an answer, and (3) nothing in the record indicates that the plaintiff ever expected to obtain service upon the remaining party, "the case stands as if there had been a discontinuance as to [the remaining

party], and the judgment is to be regarded as final for the purposes of appeal." *Youngstown Sheet & Tube Co. v. Penn*, 363 S.W.2d 230, 232 (Tex. 1962). The trial court's judgment grants summary judgment expressly disposing of the plaintiff's claims against all parties named in the petition except Neighborhood Insurance Specialists. So far as can be determined from the record, Neighborhood Insurance Specialists was never served with citation and did not file an answer. Nothing in the record indicates Wagley expected to obtain service of process on Neighborhood Insurance Specialists. To the contrary, the record suggests that Neighborhood Insurance Specialists is not a separate entity from Terry Lynn Stanley d/b/a Neighborhood Insurance Specialists (hereinafter, "Neighborhood"). Under these circumstances, the trial court's order granting summary judgment is final for the purposes of this appeal. *See M.O. Dental Lab*, 139 S.W.3d at 675; *Youngstown Sheet & Tube Co.*, 363 S.W.2d at 232.

B. Did the trial court err in granting summary judgment?

In a traditional motion for summary judgment, if the movant's motion and summary-judgment evidence facially establish the movant's right to judgment as a matter of law, the burden shifts to the nonmovant to raise a genuine, material fact issue sufficient to defeat summary judgment. *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000). In reviewing a no-evidence summary judgment, we ascertain whether the nonmovant pointed out summary-judgment evidence raising a genuine issue of fact as to the essential elements attacked in the no-evidence motion. *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 206–08 (Tex. 2002). In our de novo review of a trial court's summary judgment, we consider all the evidence in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *Mack Trucks, Inc. v. Tamez*,

206 S.W.3d 572, 582 (Tex. 2006). The evidence raises a genuine issue of fact if reasonable and fair-minded jurors could differ in their conclusions in light of all of the summary-judgment evidence. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007).

In her first issue, Wagley challenges the trial court's order granting summary judgment dismissing her claims against Neighborhood. In addressing this challenge, we begin by noting that the trial court granted Neighborhood's summary-judgment motion without specifying the grounds upon which the trial court relied. Therefore, we must affirm the summary judgment if any of the independent grounds supports the trial court's judgment. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000).

In her appellate briefing, Wagley asserts that:

- The trial court erred in granting Neighborhood's summary-judgment motion because the trial court "accepted a dubious argument that no damages had flowed from the misrepresentations, and that Ms. Wagley knew she was not covered at the time of the loss."
- Each of the elements supporting the breach-of-contract claim was present at the time of summary judgment and proved by admitted evidence.
- Appellant raised a material fact issue regarding which agent she was working with at Neighborhood.
- Neighborhood failed to establish as a matter of law that it timely bound coverage or informed Wagley that it was unable to bind coverage.
- The suggestion that Wagley caused her own damages is a jury argument on comparative causation, not a conclusion to be made as a matter of law.
- The evidence is legally sufficient to show that Thorn's misrepresentation about her licensure and Thorn's assumption that Wagley would be covered was a producing cause of Wagley's damages under the DTPA.

We analyze Wagley's appellate briefing to determine whether she challenged all possible bases for the trial court's ruling by examining whether Wagley challenged

each summary-judgment ground on which the trial court could have relied in granting Neighborhood's summary-judgment motion.

Insurance Code Claims

In her live pleading, Wagley asserted that Neighborhood violated the Texas Insurance Code by failing to pay for the damages Wagley allegedly incurred when her existing insurer denied her new-car claim. Specifically, Wagley claimed that Neighborhood (1) failed to attempt in good faith to effectuate prompt, fair, and equitable settlement of her claims, (2) represented that Thorn was a licensed insurance agent when she was not, (3) violated Chapter 541 of the Texas Insurance Code through engaging in conduct that included, but was not limited to, misrepresenting the terms of the insurance policy.

With respect to Wagley's claims under the Insurance Code, Neighborhood asserted the following summary-judgment grounds:

> 1. The alleged violations of the Insurance Code apply to insurance companies, not insurance agencies like Neighborhood.
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> 2. Neighborhood did not have a duty to discuss or explain to Wagley the terms of her existing insurance policy and Wagley was charged with knowledge of the terms of her existing insurance policy, so Wagley was charged with knowledge that coverage for the new car would lapse under her existing policy twenty days after her new-car purchase.
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> 3. Wagley has no evidence of any misrepresentation of the terms of her existing insurance policy.

Wagley did not challenge each of these summary-judgment grounds in her appellate briefing. Even presuming that under a liberal construction, Wagley's briefing would suffice as a challenge to the second and third grounds, Wagley did not brief any argument challenging the first ground, that the the Insurance Code provisions Wagley cited do not apply to insurance agencies such as Neighborhood. Even liberally construing Wagley's brief, we conclude that because Wagley has

not challenged all of the summary-judgment grounds on which the trial court could have relied in granting Neighborhood's summary-judgment motion as to Wagley's claims under the Insurance Code, we must affirm the trial court's granting of summary judgment on those claims. *See Equity Industrial Ltd. P'ship IV v. Southern Worldwide Logistics, LLC*, No. 14-14-00750-CV, 2016 WL 1267848, at *2–*3 (Tex. App.—Houston [14th Dist.] Mar. 31, 2016, no pet.) (mem. op.).

DTPA Claims

Wagley asserted that Neighborhood violated the DTPA by representing that Thorn was a licensed insurance agent. Neighborhood moved for the summary-judgment on the grounds that:

> 1. There is no evidence that Neighborhood misrepresented Thorn's licensure.
>
> 2. There is no evidence that any misrepresentation regarding Thorn's licensure was a producing cause of Wagley's damages.
>
> 3. There is no evidence that Neighborhood acted knowingly and with the intent to induce Wagley into purchasing (or not purchasing) insurance for her new car.

Wagley contends that the summary-judgment evidence creates a fact issue on causation because a reasonable juror could conclude that Thorn's misrepresentation about her licensure and Thorn's assumption that Wagley would be covered under Wagley's existing insurance policy was a producing cause of Wagley's damages. We presume that under a liberal construction of Wagley's brief, Wagley has presented a challenge to each summary-judgment ground.

Section 17.46(a) of the DTPA states that "False, misleading or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." Tex. Bus. & Comm. Code Ann. § 17.46(a) (West, Westlaw through 2017 1st C.S.). Section 17.46(b)(5) explains that certain representations amount to false, misleading, or deceptive acts, including a representation that goods or

services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or a representation that a person has a sponsorship, approval, status, affiliation, or connection which the person does not have. Tex. Bus. & Comm. Code Ann. § 17.46(b)(5) (West, Westlaw through 2017 1st C.S.). To prevail on a DTPA claim under this section, a plaintiff must prove that: (1) the plaintiff is a consumer, (2) the defendant engaged in false, misleading, or deceptive acts, and (3) these acts constituted a producing cause of the consumer's damages. *See* Tex. Bus. & Comm. Code Ann. § 17.50 (West, Westlaw through 2017 1st C.S.); *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 478 (Tex. 1995). Thus, to maintain her action, Wagley needed to produce more than a scintilla of evidence that a misrepresentation that Thorn was a licensed insurance agent was a producing cause of Wagley's damages. *See A.I.G. Const. Co., Inc. v. Thomson*, No. 14-03-00021-CV, 2004 WL 2002556, at *3 (Tex. App.—Houston [14th Dist.] Sept. 9, 2004, pet. denied) (mem. op.).

Wagley asserts that Thorn's licensure misrepresentation combined with evidence that Thorn assumed Wagley's existing insurance policy would cover Wagley's new car suffices to show that Thorn's misrepresentation was a producing cause of Wagley's damages. But, the trial court struck all references to any such assumption by Thorn regarding whether Wagley's new car would be covered under Wagley's existing insurance policy. So, the summary-judgment record contains no evidence of any assumption by Thorn. *See Rivers v. Charlie Thomas Ford, Ltd.*, 289 S.W.3d 353, 362 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (affirming summary judgment on ground that the record contained no evidence of producing cause because appellant did not point to evidence in summary-judgment record raising fact issue on that ground). Wagley attached evidence to her motion for new trial that Wagley asserts proves Thorn assumed Wagley's new car was covered

under Wagley's existing insurance policy, but we do not consider that evidence because it was not before the trial court at the time the trial court signed the judgment.[1] *See McMahan v. Greenwood*, 108 S.W.3d 467, 482–83 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

The summary-judgment record contains evidence that (1) Wagley thought Thorn was a licensed insurance agent, (2) Thorn was not a licensed insurance agent, and (3) Thorn did not bind coverage for Wagley. In particular, Wagley states in her affidavit that she paid "$12,535.05 to repair the damages which were uncovered due to the failure of Kathy Thorn to bind the coverage I requested." But, the summary-judgment record does not contain any evidence that Thorn's lack of a license caused Thorn not to bind coverage. To the contrary, Thorn's affidavit states that she was not available to bind the new-car coverage for Wagley in time because Thorn was out of the office.

Nor does the summary-judgment record contain any evidence that any misrepresentation about Thorn's status caused Wagley not to obtain coverage. There is no summary-judgment evidence that Wagley relied on any statement by Thorn or that Thorn made or any incorrect statement due to her lack of licensure. Specifically, the summary-judgment record contains no evidence that Thorn did not obtain coverage for the new car because Thorn was under the impression that Wagley's new car was covered by Wagley's existing insurance policy. The record does not contain any evidence that Thorn's lack of a license had any relationship to Wagley's damages. The summary-judgment record contains no evidence showing that Thorn's lack of an insurance license related to Wagley's damages, much less amounted to a producing cause of Wagley's damages. *See Zoya Enter., Inc. v.*

[1] Wagley does not challenge the trial court's order granting Neighborhood's motion to strike this evidence.

Sampri Invs., L.L.C., No. 14-04-01158-CV, 2006 WL 1389592, at *5 (Tex. App.—Houston [14th Dist.] May 23, 2006, no pet.) (mem. op.). The trial court did not err in granting Neighborhood's summary-judgment motion on the ground that there is no evidence that any misrepresentation regarding Thorn's licensure was a producing cause of Wagley's damages. *See id.*

Negligence Claim

In her live petition, Wagley asserted that Neighborhood's conduct was negligent and tortious. Neighborhood asserted entitlement to summary judgment on Wagley's negligence claim on the stated basis that Neighborhood fulfilled its duties to Wagley. Specifically, Neighborhood asserted that it procured multiple quotes from multiple insurance companies and communicated those quotes to Wagley in a timely manner. According to Neighborhood, the only reason no insurance policy was issued is because Wagley never accepted any of the proffered quotes despite her knowledge that her new car was not covered and she needed insurance coverage for it.

The elements of a negligence claim are a duty, breach of that duty, and damages proximately caused by the breach of the duty. *Doe*, 907 S.W.2d at 477. On appeal, Wagley does not mention any negligence duty or make any argument that the summary-judgment evidence raises a fact issue as to whether Neighborhood breached any negligence duty to Wagley. Even liberally construing Wagley's appellate brief, we conclude that Wagley did not brief any arguments challenging Neighborhood's summary-judgment ground as to Wagley's negligence claim. Because the trial court did not specify the grounds on which it relied in granting summary judgment, to successfully challenge the summary judgment on appeal, Wagley had to attack all possible bases for the trial court's ruling. *See In re A.M.P.*, 368 S.W.3d 842, 845 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

Wagley has not challenged this summary-ground, so we affirm the trial court's summary judgment on Wagley's negligence claim. *See id.*

Breach-of-Contract Claim

In the summary-judgment motion, Neighborhood asserted entitlement to summary judgment on Wagley's breach-of-contract claim on the grounds that:

- There is no evidence of a contract between Wagley and Neighborhood.
- Even if a contract existed between Wagley and Neighborhood, there is no evidence that Neighborhood breached any agreement to procure insurance for Wagley's car.
- Wagley's damages were caused by Wagley's failure to accept any of the quotes proffered by Neighborhood.
- There is no evidence that any breach by Neighborhood caused Wagley's injury.

On appeal, Wagley asserts that each of the elements supporting the breach-of-contract claim "was present at the time of Summary Judgment and proved by admitted evidence." Wagley does not elaborate on how any of the evidence showed a contract existed between Wagley and Neighborhood.

Texas Rule of Appellate Procedure 38.1(i) requires an appellant's brief to contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record. Tex. R. App. P. 38.1(i). We must construe briefs "reasonably yet liberally." *Republic Underwriters Ins. Co. v. Mex-Tex, Inc.*, 150 S.W.3d 423, 427 (Tex. 2004). Still, we enforce the briefing rules, and they require the appellant to put forth some specific argument and analysis showing that the record and law support the appellant's contentions. *See Deutsch v. Hoover, Bax & Slovacek*, L.L.P., 97 S.W.3d 179, 198–99 (Tex. App.—Houston [14th Dist.] 2002, no pet.). Wagley has not sufficiently briefed challenges to each of the summary-judgment grounds on her breach-of-contract claim, even under a

liberal construction. *See San Saba Energy, L.P. v. Crawford*, 171 S.W.3d 323, 338 (Tex. App.—Houston [14th Dist.] 2005, no pet.). Wagley's briefing does not mention anything about how Neighborhood breached any alleged agreement or make any mention of how the summary-judgment evidence showed that any breach by Neighborhood resulted in Wagley's alleged contract damages. By failing to brief any argument as to how the trial court erred in concluding that the summary-judgment record contained no evidence of breach of contract or causation, Wagley has waived these complaints. *See Ryan Construction Servs., LLC v. Robert Half International, Inc.*, No. 14-16-00181-CV, 2017 WL 5505741, at *3 (Tex. App.—Houston [14th Dist.] Nov. 16, 2017, no pet.). That means Wagley has not challenged all of the summary-judgment grounds on which the trial court could have relied in granting Neighborhood's summary-judgment motion as to Wagley's breach-of-contract claims, so we must affirm the trial court's granting of summary judgment on those claims. *See Equity Industrial Ltd. P'ship IV*, 2016 WL 1267848, at *2–*3.

Because Wagley has not shown that the trial court erred in granting summary judgment on Wagley's claims, we overrule Wagley's first issue.

C. Did the trial court abuse its discretion in failing to grant Wagley's motion for new trial?

In her second issue, Wagley challenges the trial court's failure to grant her motion for new trial, which was overruled by operation of law. *See* Tex. R. Civ. P. 329b(c). We review a trial court's ruling on a motion for new trial for an abuse of discretion. *Strackbein v. Prewitt*, 671 S.W.2d 37, 38 (Tex. 1984). The abuse-of-discretion standard applies when a trial court does not expressly rule on a motion for new trial and the motion is overruled by operation of law. *Awoniyi v. McWilliams*, 261 S.W.3d 162, 165 (Tex. App.—Houston [14th Dist.] 2008, no pet.). An abuse of discretion occurs when a court acts in an arbitrary or

unreasonable manner, or without reference to guiding rules and principles. *Downer v. Aquamarine Operators*, 701 S.W.2d 238, 241–42 (Tex. 1985).

Breach-of-Contract Claim

Under her second issue, Wagley first asserts that the trial court abused its discretion in failing to grant her motion for new trial because she showed that Neighborhood breached the express terms of their agreement. In her motion for new trial, Wagley does not mention anything about her breach-of-contract claim much less state that she showed Neighborhood breached the express terms of any agreement. Wagley did not say a word about her breach-of-contract claim in any post-judgment motion. On this record, we conclude the trial court did not abuse its discretion in denying Wagley's motion for new trial as to her breach-of-contract claim. *See Villalon v. Galindo*, No. 14-14-00556-CV, 2015 WL 7456023, at *4 (Tex. App.—Houston [14th Dist.] Nov. 24, 2015, no pet.) (mem. op.).

Alleged Newly-Discovered Evidence

Wagley also asserts under her second issue that the trial court abused its discretion in failing to grant her motion for new trial because Wagley attached newly-discovered evidence that "cured" Neighborhood's objections to Wagley's affidavit. Wagley asserts that the trial court sustained objections to a portion of Wagley's affidavit in which Wagley stated that Thorn assumed Wagley's new car was covered under Wagley's existing insurance coverage. Wagley proffered a supplemental affidavit from Thorn in which Thorn stated that Thorn had assumed that Wagley's new car was covered under Wagley's existing insurance policy.

"Generally, a party may not rely on new evidence in a motion for new trial without showing that the evidence was newly discovered and could not have been discovered through due diligence prior to the ruling on a summary judgment

motion." *McMahan v. Greenwood*, 108 S.W.3d 467, 500 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). A party seeking a new trial on grounds of newly-discovered evidence must demonstrate to the trial court that (1) the evidence has come to its knowledge since the trial; (2) the party's failure to discover the evidence sooner was not due to the party's lack of diligence; (3) the evidence is not cumulative; and (4) the evidence is so material that it probably would produce a different result if a new trial were granted. *See Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 813 (Tex. 2010); *Phillips v. Abraham*, 517 S.W.3d 355, 362 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (applying same standard to new trial motion filed after summary judgment).

In her motion, Wagley addressed the third element, stating that the evidence was not cumulative because the trial court struck her affidavit. Wagley did not address the first, second, or fourth elements in her motion for new trial or on appeal. *See Houston Laureate Assocs., Ltd. v. Russell*, 504 S.W.3d 550, 561 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (affirming denial of motion for new trial when party did not address elements in trial court or on appeal). Nor did Wagley explain why she did not have access to the evidence before the trial court granted summary judgment. Wagley did not attach to her motion for new trial an affidavit or any other evidence showing that the "newly discovered" evidence came to her attention after the trial court granted summary judgment or that she used due diligence yet still was unable to obtain the evidence at the time she responded to the motion for summary judgment.

The summary-judgment record suggests that Wagley had access to the evidence before the trial court granted summary judgment. Wagley filed an affidavit in which she stated that Thorn made an assumption and Wagley also filed an affidavit from Thorn. This information suggests that the evidence was not

newly discovered. We conclude that the trial court did not abuse its discretion in failing to grant Wagley's motion for new trial. *See Lee v. Palacios*, No. 14-06-00428-CV, 2007 WL 2990277, at *3 (Tex. App.—Houston [14th Dist.] Oct. 11, 2007, pet. denied) (mem. op.).

D. Did the trial court abuse its discretion in failing to grant Wagley's motion for leave to file an amended petition after the trial court rendered judgment?

Wagley asserts that the trial court abused its discretion in failing to grant her motion for leave to file an amended petition because the evidence supported amending her pleading to add a claim for breach of fiduciary duty. The trial court signed the final judgment granting Neighborhood's summary-judgment motion on August 9, 2016. Wagley did not seek leave to amend her pleadings until August 30, 2016. After the trial court renders judgment, it is too late to ask to amend the pleadings to add new claims. *Spencer v. Don McGill of Katy, Ltd.*, No. 14-10-00018-CV, 2011 WL 722505, at *3 (Tex. App.—Houston [14th Dist.] Mar. 3, 2011, pet. denied) (mem. op.); *Mitchell v. LaFlamme*, 60 S.W.3d 123, 132–33 (Tex. App.—Houston [14th Dist.] 2000, no pet.). Because Wagley did not seek leave to amend her petition until after the trial court had rendered judgment, the trial court did not err in failing to grant Wagley leave to amend her petition. *See Spencer*, 2011 WL 722505, at *3.

We overrule Wagley's second issue.

CONCLUSION

The trial court did not err in granting Neighborhood's summary-judgment motion. Nor did the trial court err in failing to grant Wagley's motion for new trial or motion for leave to file an amended pleading. Having overruled all of Wagley's

appellate challenges, we affirm the trial court's judgment.

/s/ Kem Thompson Frost
Chief Justice

Panel consists of Chief Justice Frost and Justices Jamison and Busby.