COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00376-CV

KELLY THOMAS — APPELLANT

V.

LOGIC UNDERWRITERS, INC. AND JOY YVONNE SMITH — APPELLEES

FROM COUNTY COURT AT LAW NO. 2 OF DENTON COUNTY
TRIAL COURT NO. CV-2016-02299

MEMORANDUM OPINION[1]

I. Introduction

Appellee Logic Underwriters, Inc., via Appellee Joy Yvonne Smith, an independent insurance agent, assisted in the sale of a Standard Casualty Company insurance policy to pro se Appellant Kelly Thomas. Thomas subsequently sued Standard, Standard's claims manager and adjusters, an

[1]*See* Tex. R. App. P. 47.4.

independent claims investigation firm and adjusters used by Standard, and the engineering firm and engineer used by Standard, in addition to Logic Underwriters and Smith. Logic Underwriters and Smith moved to dismiss the claims against them under rule of civil procedure 91a. The trial court granted their motions. This appeal, in which Thomas brings seven issues, followed. We affirm.

II. Background

As to Logic Underwriters and Smith, Thomas complained in her second amended petition—the live pleading at the time of Logic Underwriters's and Smith's rule 91a motions to dismiss—that she had been "knowingly, willingly, and intentionally deceived" when they "did not perform duties required by law, caused confusion, did not report losses accurately, and attempted to profit of[f] the losses incurred for their own gain."[2]

[2]In her second amended petition, Thomas complained that Smith "did not help [her] and told [her] she did not know what the policy stated, that she was busy and in a class" and told Thomas that she "did not understand the exclusions designated by the Standard Insurance Company on the declarations page and to call the company, she was busy and in a class." Thomas also stated that Smith "did not put the correct phone number on the application but listed Plaintiff's phone number with all zeros." Thomas asserted that Logic Underwriters "would not help Plaintiff in the understanding of policy terms, hung up on her, and would not answer or return calls, as she could never get any straight answers or facts from any Defendants who is a party in this complaint."

Thomas's original petition and first amended petition are not included in the record of this case but were included in a companion case in appellate cause number 02-16-00379-CV. In her original petition, Thomas alleged that she had made claims to Standard Casualty Company and attributed Standard's acts to Logic Underwriters and Smith, who had issued Standard's policy to Thomas but

A. Rule 91a Motions to Dismiss

Logic Underwriters and Smith each moved to dismiss under rule of civil procedure 91a. Logic Underwriters argued that Thomas's suit had no basis in fact because it had "merely assisted in the sale of a Standard Casualty Company insurance policy to [her] and has had no involvement whatsoever in the adjustment and payment of any insurance claim made by [Thomas]" and that in her second amended petition, Thomas made "absolutely no reference, argument, or evidence as to how [Logic Underwriters] has had any involvement whatsoever in the adjustment and payment of any claim made by [Thomas]." Logic Underwriters supported its request for $1,815 in attorney's fees with an affidavit by its attorney.

Smith likewise argued that Thomas had alleged too few facts to demonstrate a viable, legally cognizable right to relief against her and that she had "merely assisted in the sale of a Standard Casualty Company insurance

---

who allegedly had not timely sent the premium money to the insurance company and had allegedly signed Thomas's name to documents, failed to include the correct phone number on the policy, did not return calls or help Thomas, and told Thomas to call the insurance company herself. Most of Thomas's claims pertained to damage to her house from HVAC and water heater discharge and from wind storms. Thomas listed claims for breach of contract, unfair insurance practices, violations of the Texas Deceptive Trade Practices Act, delay in payment under insurance code chapter 542, and breach of the duty of good faith and fair dealing. In her first amended petition, Thomas added claims for defamation, loss of credit, common law fraud, and negligence, among others, and attempted to incorporate her original petition by reference. Thomas did not attempt to incorporate her original or first amended petition by reference into her live pleading.

policy to [Thomas] and has had no involvement whatsoever in the adjustment and payment of any insurance claim made by [Thomas]" and that Thomas's second amended petition provided "absolutely no reference, argument, or evidence as to how [Smith] has had any involvement whatsoever in the adjustment and payment of any claim made by [Thomas]." Smith supported her request for $1,072.50 in attorney's fees with an affidavit by her attorney.

Thomas objected to the rule 91a motions, complaining that Logic Underwriters's motion was premature because citation had not been issued although she had "allowed the defendants to have a copy of the petition filed in order to notify them personally" in her attempt to act "in full openness and compliance." She complained that Logic Underwriters had failed in its responsibilities by hanging up on her, ignoring her calls and emails, and by not answering her questions when she tried to understand the policy terms. Thomas objected to Smith's motion because Smith's lawyer "did not give [Thomas] statutory notice of motion prior to filing this motion" and did not adhere to the court's local rules, and she accused Smith of ethics violations and violations of insurance regulations. Thomas subsequently filed supplemental objections to the motions to dismiss, alleging that Logic Underwriters had contradicted reports by the insurance company (and vice versa) and that Smith did nothing instead of mediating or acting within her licensing requirements.

The trial court granted the motions after a hearing.

B. Nunc pro Tunc

During the hearing on the rule 91a motions, Logic Underwriters and Smith's attorney informed the trial court that he had requested attorney's fees for Logic Underwriters in the amount of $1,815 and for Smith in the amount of $1,072.50. The trial judge stated, "I will grant your Motion[s] to Dismiss, as well as granting the requested attorney's fees." However, in the order granting Logic Underwriters's motion, the trial court awarded $1,815 in attorney's fees to *Smith*, while also awarding $1,072.50 to Smith in the order granting Smith's motion.

Logic Underwriters subsequently filed a motion for judgment nunc pro tunc to correct the attorney's fee error. The trial court held a hearing on the motion on June 28, 2017. Thomas objected, explaining at the hearing on the motion that she did not agree that it was a clerical error because "[t]he clerks didn't err in writing or recording the documents." At the hearing, the trial court admitted as an exhibit the reporter's record from the hearing on the rule 91a motions to dismiss. The court granted the motion for judgment nunc pro tunc and Logic Underwriters and Smith's motion to sever.

C. The Appeal

As in appellate cause number 02-16-00376-CV, Thomas requested and received multiple extensions to file her appellate brief. After Thomas's appellate brief was filed, we informed her that her brief required correction because it did not comply with rule of appellate procedure 38.1(b), (d), (g), and (i), and we gave her until May 11, 2017, to file an amended brief that complied with these rules.

We warned Thomas that failure to comply with the rules of appellate procedure could result in striking her brief, dismissing the appeal, or waiver of the noncomplying points and that she could not raise additional or different points in the amended brief without first filing a motion and obtaining an order from the court permitting her to do so. *See* Tex. R. App. P. 38.8(a), 38.9(a), 42.3. We subsequently granted to Thomas an additional extension to May 15, 2017.

Logic Underwriters and Smith moved to dismiss the appeal, arguing that Thomas's amended brief did not meet the briefing requirements set out in rule of appellate procedure 38.1. They also moved for this court to order Thomas to rebrief. We denied the motions and granted them two briefing extensions. We also granted Thomas an extension to file her reply brief.

III. Dismissal

Thomas's first and second issues appear to ask whether the trial court erred by granting Logic Underwriters's and Smith's rule 91a motions because it did not hear the claims that she set forth in her original petition and to complain that the trial court incorrectly awarded attorney's fees twice to Smith.[3] The

[3]In her first issue, Thomas asks,

> Did the Trial Court take judicial notice of the Trial Court Orders and dismissed 2 of 8 defendants listed as parties in the Original Petition that he had never heard or tried or has never been heard or tried by any Judge or Jury, awarding two dismissals and two attorney fees to only one defendant, Joy Yvonne Smith, an independent agent/broker, and separate entity who through associations with Standard Casualty Insurance Company/Standard Insurance Company is possibly insured through Logic Underwriters, Inc.; the

incorrect double-award of attorney's fees to Smith has already been corrected by the judgment nunc pro tunc, and the claims set forth in Thomas's original petition were no longer before the trial court because Thomas filed a first amended petition and then a second amended petition. The second amended petition was the live pleading at the time of Logic Underwriters's and Smith's motions and the

---

> E&O (errors and omissions) Insurer The Standard Insurance/Standard Casualty Insurance; and the insurance company that the defendant Joy Yvonne Smith sold the Plaintiff/Appellant; and did the Trial Court Judge read the Orders that he signed? Did the trial Court Judge read those Orders titles with the two defendants names and awards only One defendant within the text of those two separate Court Orders, that was presented to the Trial Court Judge by Defendant's Attorney Mr. Nathan Barbera, which had two separate headings, and only the independent agent/broker was awarded attorney fees, who is a separate entity from Logic Underwriters Inc.; and is named in the text of each of the 2 different Orders as prevailing party. Did the Trial Court Judge read the two Order he signed?

In her second issue, Thomas asks,

> Did the Trial Court take judicial notice of the fact that Appellant/Plaintiff filed her Original Complaint or "THE ORIGINAL PETITION" and this Original Petition has never been heard or tried by Judge or by Jury. The Original Petition is based on DTPA 17.50 as a result of the knowledgeable, willing, and malicious fraudulent activities of all eight defendant's, who and which all separate entities but listed and identified, associated parties on the Original Petition, in which two (2) of the 8 (8) defendant's, Logic Underwriter's and the separate entity, Independent agent/Broker Joy Yvonne Smith, who sold her the Standard Insurance/Standard Property and Casualty homeowners Policy. As the seller of the Standard Casualty Insurance Policy causes her to be included in that relationship with the Standard Casualty Insurance Company/Standard Insurance Company who is insured by Logic Underwriters in the errors and omissions (E&O) policy that Standard Casualty Insurance Company owns.

hearing. *See generally Fawcett v. Grosu*, 498 S.W.3d 650, 658–59 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (op. on reh'g) (explaining that an amended petition adds to or withdraws from that which was previously pleaded to correct or to plead new matter and completely replaces and supersedes all prior petitions, which "shall no longer be regarded as a part of the pleading in the record of the cause"). *Compare* Tex. R. Civ. P. 62 (explaining the difference between an amendment and a supplement), *and* Tex. R. Civ. P. 65 (explaining that previous pleadings, once a subsequent pleading is filed, "shall no longer be regarded as a part of the pleading in the record of the cause"), *with* Tex. R. Civ. P. 69 (explaining how a supplemental—as opposed to amended—pleading works). A pro se litigant is held to the same standards as licensed attorneys and must comply with rules of procedure. *Avdeef v. Nat'l Auto Fin. Co.*, No. 02-10-00344-CV, 2011 WL 6260859, at *2 (Tex. App.—Fort Worth Dec. 15, 2011, pet. denied) (mem. op.). Accordingly, Thomas has presented nothing for us to review in her first two issues, and we overrule them as moot.

In her third issue, Thomas argues,

> Plaintiff had pointed out, to the Court in the hearing and filed Objections that Mr. Barbera also reversed the roles of the defendants in Trial Court Hearing October The Court filings by Mr. Baraber that the Logic Underwriter was the Insurance Agent and the Insurance Agent, Joy Smith, was written as the Logic Underwriter. Did Trial court notice this error?

Thomas has not presented this court with any authority to explain how *counsel*'s alleged error caused the trial court to commit reversible error in its

decision to grant both rule 91a motions to dismiss. *Cf.* Tex. R. App. P. 44.1(a). Accordingly, we overrule this issue as inadequately briefed. *See* Tex. R. App. P. 38.1(i).

In her fourth and seventh issues, Thomas raises complaints related to judicial notice, asking,

> 4. Was Judicial Notice given to the voluminous number of exhibits and objections filed by the Plaintiff in hopes of a fair and appropriate hearing; that included 3 different Texas Government Agencies' regulations, including the Business and Commerce Codes and laws of the State of Texas, Texas Insurance Department and Department of Licensing and regulations who are the authorities that govern all people within[] the insurance industry; and signed an Order of Dismissals with only part of Rule 91 in consideration, awarding Defense attorney fees and heard 14 days after the Motion was filed, instead of 21 days that is required by the Texas Rules of Civil Procedure?
>
> . . . .
>
> 7. Was Judicial notice taken that the Texas Rule of Civil Procedure were broken?

We have identified no ruling by the trial court that it would take judicial notice of anything filed in this case, *cf.* Tex. R. Evid. 201–204, and Thomas has provided no explanation as to how judicial notice, or the lack thereof, might have led to a reversible error by the trial court.[4] *Cf.* Tex. R. App. P. 44.1(a). And as to her

[4]Rule 91a.6 states that except as to evidence of costs and attorney's fees, "the court may not consider evidence in ruling on the motion and must decide the motion based solely on the pleading of the cause of action, together with any pleading exhibits permitted by Rule 59." Tex. R. Civ. P. 91a.6. Rule 59 provides that

seventh issue, Thomas does not identify which rule of civil procedure is the basis of her complaint, although she does assert that "no less th[a]n 13 Texas Rules of Civil Procedure" were broken at the hearing and that "[a]pproximately a rule a minute was broken or allowed to be broken." Accordingly, we overrule this portion of her fourth issue and her seventh issue as inadequately briefed. *See* Tex. R. App. P. 38.1(i).

> [n]otes, accounts, bonds, mortgages, records, and all other written instruments, constituting, in whole or in part, the claim sued on . . . may be made a part of the pleadings by copies thereof, or the originals, being attached or filed and referred to as such, or by copying the same in the body of the pleading in aid and explanation of the allegations in the petition or answer made in reference to said instruments and shall be deemed a part thereof for all purposes. Such pleadings shall not be deemed defective because of the lack of any allegations which can be supplied from said exhibit.

Tex. R. Civ. P. 59. Thomas did not attach anything to her second amended petition included in the clerk's record before this court, but the record in appellate cause number 02-16-00379-CV contains the following exhibits attached to the second amended petition: (1) Exhibit A: "Letter of Notification to Defense Attorney," which appears to be an email from Thomas to an attorney representing one or more of the defendants, dated August 30, 2016, in which Thomas states that she was planning to provide service of process; (2) Exhibit B: "Copy of Texas Efile Court omitting Charles Rist but adding Scott Schmidt ***after*** Plaintiff filed Motion and Memorandum to Court regarding Citations and this Efile printout contradicts Court Order Signed by The Honored Judge Ramirez on September 1, 2016"; and (3) Exhibit C: "Letter Sent to Webb Joiner regarding E File and 2nd amendment of Original Petition." None of these "exhibits" provide any further information about Thomas's claims against Logic Underwriters and Smith. Although Thomas refers us to the authorities that she filed on September 25, and "500-100[0] exhibits on September 16, 2016," to the extent that any of these documents could be construed as "pleading exhibits permitted by" Rule 59, none of these items were filed with the second amended petition on September 9, 2016.

As to the remainder of her fourth issue, under rule of civil procedure 91a, subsection a.3 provides that a motion to dismiss must be filed at least 21 days before the motion is heard and subsection a.6 provides that each party is entitled to at least 14 days' notice of the hearing on the motion. *See* Tex. R. Civ. P. 91a.3, 91a.6. But Thomas did not raise lack of notice under rule 91a in her objections or supplemental objections to the motions, did not object at the October 3, 2016 hearing that the rule 91a notice requirements had not been met, and did not raise notice under rule 91a as a complaint in a motion for new trial.[5] Accordingly, she has not preserved this complaint for our review. *See* Tex. R. App. P. 33.1; *Caldwell v. Zimmerman*, No. 03-17-00273-CV, 2017 WL 4899447, at *2 & n.2 (Tex. App.—Austin Oct. 26, 2017, no pet. h.) (mem. op.) (holding no preservation of rule 91a.3 complaint when appellant failed to raise issue in his motion for new trial); *Odam v. Texans Credit Union*, No. 05-16-00077-CV, 2017 WL 3634274, at *5 (Tex. App.—Dallas Aug. 24, 2017, no pet.) (mem. op.) (holding no preservation of rule 91a.6 complaint when appellant failed to bring insufficient notice complaint to trial court's attention at the hearing or lack of notice complaint in a timely postjudgment motion). We overrule the remainder of Thomas's fourth issue.

[5]Logic Underwriters's motion was filed on September 16, 2016, and Smith's motion was filed on September 19, 2016, and the motions were heard on October 3, 2016, along with other motions pending in the trial court. In a letter dated September 23, 2016, Logic Underwriters and Smith's attorney informed Thomas that the motions had been set for a hearing on October 3, 2016.

In her final two issues, Thomas complains about presumptions:

> 5. Were Presumptions made by the Court of Defense Attorney's omissions of required conduct or were presumptions made by the Trail Court in regards to a defense attorney in that a member of the Texas State Bar would not violate the standards set and oath taken to the State Bar of Texas?
>
> 6. Were Presumptions the Ruling factor instead of the Law and Rules of Texas and the God Given Constitution; and did the Court Presume that the Plaintiff would not care if her rights to a response were violated in regards to the "Oral" motion for severance?

However, Thomas does not identify for us any presumption applied or misapplied by the trial court in granting Logic Underwriters's and Smith's motions. Accordingly, without any guidance from Thomas, we are unable to ascertain her complaint about the trial court's decision, and we overrule her fifth issue and part of her sixth issue for inadequate briefing. *See* Tex. R. App. P. 38.1(i) (requiring a brief to contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record). As to the remaining portion of Thomas's sixth issue, about whether the trial court presumed that she would not care if her right to a response was violated by opposing counsel's oral motion for severance, Thomas did not object to the oral motion during the hearing[6] and has not explained how severing the dismissals from the primary case harmed her in any way. *See* Tex. R. App. P. 33.1, 38.1(i), 44.1(a). Accordingly, we overrule the remainder of Thomas's sixth issue.

---

[6]Thomas complains that the trial court did not give her the opportunity to respond to opposing counsel's oral motion to sever but does not explain how the denial of a response harmed her.

Thomas complains that the October 3, 2016 hearing "was divesting for so many reasons other th[a]n the Plaintiff's Cause or Defense Motions Order signed. It was an insult to so many in our justice system who DO the right thing simply, '**BECASUE IT"S RIGHT**[,]'" and she leaves it up to this court to decide whether opposing counsel "mistook zealous representation for zealous misrepresentation" and asks us to grant her mercy "for all the harm in intentional delays, and stress his activities caused the Plaintiff/Appellant, and the wasted time and energies of the Court clerks, and the Court itself." But our justice system requires parties to adequately brief their complaints in order for justice to be properly administered. *See Barcroft v. Walton*, No. 02-16-00110-CV, 2017 WL 3910911, at *5 (Tex. App.—Fort Worth Sept. 7, 2017, no pet.) (mem. op.) (explaining that pro se litigants are held to the same standards as licensed attorneys to ensure fairness of the court's treatment of all litigants through the use of a single set of rules); *see also Murry v. Bank of Am., N.A.*, No. 02-13-00303-CV, 2014 WL 3866154, at *4 (Tex. App.—Fort Worth Aug. 7, 2014, pet. dism'd w.o.j.) (mem. op.) (observing that appellant's comments in her brief "indicate that she does not understand the role of the judge and of the attorneys at trial, and as a result, she has confused normal legal procedures with criminal activity"). Accordingly, to the extent that Thomas has raised any additional, unnumbered issues, we overrule them as inadequately briefed. *See* Tex. R. App. P. 38.1(i).

Because we are bound to address only the issues Thomas raised in her brief, we do not address any unassigned errors that may have occurred in the use of rule 91a in this case. *See Pat Baker Co. v. Wilson*, 971 S.W.2d 447, 450 (Tex. 1998) ("It is axiomatic that an appellate court cannot reverse a trial court's judgment absent properly assigned error."); *see also* Tex. R. App. P. 38.1(f), 53.2(f); *Sonat Exploration Co. v. Cudd Pressure Control, Inc.*, 271 S.W.3d 228, 236 (Tex. 2008) ("It is of course true that an appellate court cannot reverse on a ground an appellant has never raised."); *Obgomo v. Am. Homes 4 Rent Props. Two, LLC*, No. 02-14-00105-CV, 2014 WL 7204552, at *2 (Tex. App.—Fort Worth Dec. 18, 2014, pet. dism'd w.o.j.) (observing that an appellate court cannot reverse based on a complaint not raised in the trial court or a ground not presented in the appellate briefs).

IV. Conclusion

Having overruled all of Thomas's issues, we affirm the trial court's judgment.

/s/ Bonnie Sudderth

BONNIE SUDDERTH
CHIEF JUSTICE

PANEL: SUDDERTH, C.J.; GABRIEL and KERR, JJ.

DELIVERED: November 16, 2017