# COURT OF APPEALS
**SECOND DISTRICT OF TEXAS**
**FORT WORTH**

**NO. 02-16-00379-CV**

KELLY THOMAS — APPELLANT

V.

EFI GLOBAL, INC. AND MICHELE BOGDON — APPELLEES

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FROM COUNTY COURT AT LAW NO. 2 OF DENTON COUNTY
TRIAL COURT NO. CV-2016-01893

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## MEMORANDUM OPINION[1]

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### I. Introduction

Pro se Appellant Kelly Thomas sued her insurance company, among others—including Appellees EFI Global, Inc. and Michelle Bogdon—in connection with her various home insurance claims and complaints. EFI is the engineering firm that the insurance company used for Thomas's home

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

inspection, and Bogdon is EFI's senior engineer who inspected Thomas's home and completed a wind and water intrusion assessment report on May 18, 2015. In five issues, Thomas appeals the trial court's order granting EFI and Bogdon's motion to dismiss with prejudice.[2] We affirm.

## II. Background

In her original petition, which she filed on August 18, 2016, Thomas alleged that EFI and Bogdon's report on the property was "in error" and that Bogdon had allegedly omitted findings in it and had damaged her house by lifting roof shingles and breaking shingle seals during the inspection. Thomas filed her first amended petition seven days later. In her second amended petition—the live pleading against all of the defendants, which she filed on September 9, 2016—Thomas alleged that Bogdon had written "a false report, broke seals of roof shingles, omitted findings[,] and totally mislead" her.

On September 29, 2016, EFI and Bogdon moved to dismiss Thomas's claims under civil practice and remedies code chapter 150 because Thomas had not included with any of her pleadings the certificate of merit required for a suit arising out of the provision of professional services by a licensed professional engineer. *See* Tex. Civ. Prac. & Rem. Code Ann. § 150.001(1-a) (West Supp. 2017), § 150.002(a)–(e) (West 2011); Tex. Occ. Code Ann. § 1001.003(c)(1)–(12) (West 2012). They further requested that Thomas's claims be dismissed

[2]To the extent that any remaining motion still pending is not explicitly addressed in this opinion, it is DENIED.

with prejudice "[b]ecause of the vexatious nature of this proceeding, the ambiguity in [Thomas's] pleadings, and the unlikelihood that [she] will be able to satisfy the certificate of merit requirement." They attached the wind and water intrusion assessment report to their motion and incorporated it therein.

On October 1, 2016, Thomas objected to EFI and Bogdon's motion as premature because she had not yet received her requested jury trial, had not yet served them with citation, and was "potentially" suing Bogdon for having "lifted up the shingles and br[eaking] the seals in the roof on the south side of the home allowing" more rain to intrude, "[a]nd not for reasons listed by defense attorney." But Thomas also stated in her objection that Bogdon's report was "so very incorrect" and filled with errors. And Thomas complained that the certificate of merit was not due yet because her case fell under chapter 150's limitations exception, giving her thirty days after filing her second amended petition on September 9, 2016, i.e., until October 9, 2016. Thomas asserted that she could and would satisfy the certificate of merit requirement.

The trial court held a hearing on the motion on October 3, 2016. At the hearing, Thomas stated that while Bogdon had been at her house, she did not believe that Bogdon wrote the report because it was "ridiculous" and "not the right house" but that she did blame Bogdon for lifting shingles. She also asserted that the "statute of limitations of the original policy would have been up on August 18, 2016," thus entitling her to the limitations exception for filing the certificate of merit. In response, EFI and Bogdon's attorney pointed out that even if the

limitations exception applied, because Thomas had filed her original petition on August 18, 2016, the certificate of merit would have been due September 19, 2016.[3] They filed their motion on September 29—ten days later—and they pointed out that any alleged interaction with the shingles "was performed during the investigation," and thus was within the scope of the professional engineering services in occupations code section 1001.003. *See* Tex. Occ. Code Ann. § 1001.003(c) (describing items that fall under the broadly termed "practice of engineering," as including "any other professional service necessary for the planning, progress, or completion of an engineering service").

The trial court granted EFI and Bogdon's motion and dismissed Thomas's claims against them with prejudice. On October 21, 2016, someone—apparently Thomas, from context—filed an attempt at a certificate of merit[4] but did not file a motion for reconsideration or for a new trial or seek any sort of relief from the trial court. On October 25, Thomas nonsuited the defendants who had not yet been dismissed.

[3]September 17, 2016 fell on a Saturday.

[4]The document, entitled "CERTIFICATE OF MERIT," does not indicate who filed it or whether it was served on anyone and purports to be from David Kugler, a licensed home inspector. It is not notarized and contains no signature by the purported affiant. *Cf.* Tex. Civ. Prac. & Rem. Code Ann. § 150.002(a)(2) (requiring the certificate of merit to contain, among other things, the affidavit of a third-party licensed professional who "holds the same professional license or registration as the defendant").

We gave Thomas multiple extensions to file her appellate brief.[5] On May 5, 2017, after ordering her tendered brief filed, we informed Thomas that her brief did not comply with rule of appellate procedure 38.1(i) and (k), in that it did not contain a clear and concise argument for the contentions made, with appropriate citations to legal authorities and to the record and did not contain an appendix. We asked Thomas to file an amended brief complying with rule 38.1(i) and (k) by May 15, 2017, and informed her that failure to do so could result in striking her brief, dismissal of the appeal, or waiver of noncomplying points. *See* Tex. R. App. P. 38.8(a), 38.9(a), 42.3. We also informed Thomas that no additional or different points should be raised in the amended brief without filing a motion and obtaining an order from the court permitting her to do so. We subsequently granted Thomas until June 16, 2017 to file her amended brief.

After Thomas filed her amended brief, EFI and Bogdon moved to dismiss the appeal because Thomas had failed to correct one of the deficiencies we identified in her original brief and because she had raised new points without first asking for the court's permission. We denied the motion but granted EFI and Bogdon an extension of time to file their brief.

[5]On January 10, 2017, the court reporter filed the reporter's record, and Thomas's briefing deadline was set for February 9, 2017. We granted Thomas extensions in March, April, and May, ultimately ordering her tendered brief filed on May 5, 2017.

## III. Dismissal

In her first issue, Thomas complains that the trial court could not dismiss EFI and Bogdon before she served them with process or had a bench or jury trial on her claims. In her second issue, Thomas asks, "Was Judicial Notice taken 2015 the Court service by certified register mail return receipt requested was returned and noted on the Court register four days after the Trial Court hearing on October 3, 2016[]?" In the body of her second issue, Thomas complains that EFI and Bogdon "had not been cited by due processes until after the hearing," and that they were "served by due process October 7, 2016."

The formal issuance of service of citation on a defendant is unnecessary if he or she voluntarily appears. *See* Tex. R. Civ. P. 121; *Seals v. Upper Trinity Reg'l Water Dist.*, 145 S.W.3d 291, 296 (Tex. App.—Fort Worth 2004, pet. dism'd) ("To constitute an answer or appearance, the party must seek a judgment or a decision by the court on some question."); *Torres v. Johnson*, 91 S.W.3d 905, 910 (Tex. App.—Fort Worth 2002, no pet.) (stating that the company entered an appearance in the suit by moving for summary judgment after Torres amended his pleadings); *see also Baker v. Monsanto Co.*, 111 S.W.3d 158, 160 (Tex. 2003). EFI and Bogdon voluntarily appeared when they filed their motion to dismiss seeking a decision by the court on the issue. *See Seals*, 145 S.W.3d at 296.

The purpose of civil practice and remedies code chapter 150 is to deter meritless claims and bring them quickly to an end before they ever reach a bench

or jury trial. *See* Tex. Civ. Prac. & Rem. Code Ann. § 150.002(a), (c) (requiring the plaintiff to contemporaneously file with her complaint "an affidavit of a third-party . . . licensed professional engineer"); *Found. Assessment, Inc. v. O'Connor*, 426 S.W.3d 827, 831 (Tex. App.—Fort Worth 2014, pet. denied). Accordingly, Thomas was not entitled to a bench or jury trial before she met the certificate-of-merit requirement. *See* Tex. Civ. Prac. & Rem. Code Ann. § 150.002(a); *Found. Assessment, Inc.*, 426 S.W.3d at 831. We overrule Thomas's first and second issues.

In her third and fourth issues, Thomas asks,[6]

> [3.] Was Judicial Notice taken the Signed Court order was to dismiss with prejudice based on Texas Practice and Remedies Code Chapter 150.002(a), yet the Plaintiff had satisfied the requirements of the Texas Practice and Remedies Code 150.02(b). by the filing of the AFIDAVIT within a required time stating that the Certificate of Merit could not be acquired due to the Expiration of the State if Limitation for the initial filing of the Original Petition. Was that affidavit overlooked by Trial Court Judge and Defense Counsel? Judicial notice taken of the Court filed Affidavit stating the Certificate of Merit could not be acquired in time to avoid the expiration of the Statue of Limitations.
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> [4.] Was Judicial Notice given to in the TRPC 150.0 2(b) objections by Mr. Thomas submitted and clearly stating the UN-SERVED UN-CITED PARTY and defendant to an UN-TRIED LAWSUIT, had now HAD HER DAY IN COURT. (Defense had moved their hearing up

[6]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.) (citing *Mansfield State Bank v. Cohn*, 573 S.W.2d 181, 184–85 (Tex. 1978)). In light of our obligation to liberally construe briefs, we address Thomas's arguments to the extent that they are adequately briefed and that we can understand them. *See id*.

> one day), Heard by the Court, and the Plaintiff Objection to Defense motion based on TPRC 150.02(b)

Section 150.002 requires a certificate of merit in any action for damages arising out of the provision of professional services by a licensed professional engineer. *Found. Assessment, Inc.*, 426 S.W.3d at 834. The limitations exception in section 150.002(c) provides,

> *The contemporaneous filing requirement of Subsection (a) shall not apply to any case in which the period of limitation will expire within 10 days of the date of filing and, because of such time constraints, the plaintiff has alleged that an affidavit of a third-party licensed . . . professional engineer . . . could not be prepared*. In such cases, the plaintiff shall have 30 days after the filing of the complaint to supplement the pleadings with the affidavit. The trial court may, on motion, after hearing and for good cause, extend such time as it shall determine justice requires.

Tex. Civ. Prac. & Rem. Code Ann. § 150.002(c) (emphasis added). Tort claims generally have a two-year limitations period in Texas. *See id.* § 16.003(a) (West 2017).

The engineering report at issue was completed on May 18, 2015. Accordingly, it appears that Thomas had until at least May 18, 2017 to sue EFI and Bogdon for their alleged actions arising out of the provision of their professional services. Thomas filed her original and first amended petitions in August 2016 and her second amended petition in September 2016, which happens to be well within the limitations period for an action against EFI and Bogdon. Because it appears that limitations was not in danger of expiring at the

time that Thomas filed any of her petitions in this case, section 150.002(c)'s exception did not apply. We overrule Thomas's third and fourth issues.

In her final issue, Thomas asks, "Was PRESUMPTION the deciding factor in the decision for Dismissal[?]" However, she does not identify for us any presumption applied or misapplied by the trial court in granting EFI and Bogdon's motion. 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 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).

## 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