



**IN THE
TENTH COURT OF APPEALS**

10-14-00355-CV

WILLIAM M. WINDSOR,

Appellant

v.

SAM ROUND,

Appellee

10-14-00392-CV

WILLIAM M. WINDSOR,

Appellant

v.

SEAN D. FLEMING,

Appellee

10-15-00069-CV

WILLIAM M. WINDSOR,

Appellant

v.

KELLIE McDOUGALD,

Appellee

No. 10-15-00092-CV

WILLIAM WINDSOR,

Appellant

v.

JOEYISALITTLEKID, ET AL.,

Appellee

From the 378th District Court
Ellis County, Texas
Trial Court No. 88611

ORDER

In these four appeals in which William M. Windsor is the appellant,¹ the Court has reviewed all pending matters and the status of each appeal. The Court issues the following orders:

10-14-00355-CV, Windsor v. Round

In a July 16, 2015 order, the Court struck Windsor's appellant's brief, which had been prematurely filed—it was filed before the appellate record was filed, and thus lacked the required citations to record references.²

Windsor filed his appellant's brief on September 22, 2015. It too lacks the required

¹ All four appeals arise from the same underlying case in the trial court. For the reasons set forth in the Court's December 18, 2014 order, each appeal has been separately docketed. *Windsor v. Round*, --- S.W.3d ---, 2014 WL 7235538 (Tex. App. — Waco 2014, order).

² Windsor's briefs in the other three cases were struck for the same reason.

citations to record references.³ In an October 15, 2015 order, the Court therefore stayed the briefing schedule in all four cases while it considered pending motions and whether to strike Windsor's deficient briefs.

Windsor has filed a response to the Court's October 15, 2015 order and a *motion to amend* his brief. Windsor claims that he did properly cite to the record by citing to his appendix and that the rules and case law do not require citation to the record. Windsor is wrong.

The appellate record consists of the clerk's record and the reporter's record, if one is necessary to the appeal. TEX. R. APP. P. 34.1. A brief's Statement of the Facts "must be supported by record references," *id.* R. 38.1(g), and a brief's Argument "must contain ... appropriate citations to authorities and to the record." *Id.* R. 38.1(i); *see Serrano v. Francis Props. I, Ltd.*, 411 S.W.3d 661, 666 (Tex. App. – El Paso 2013, pet. dismiss'd w.o.j.) (appellate court is "not required to sift through the record"). A brief's Statement of the Case "should be supported by record references." *Id.* R. 38.1(d). A party's appendix may contain items that are in the appellate record, *see id.* R. 38.1(k)(1) (A, B), (2), and while a party may cite to the party's appendix,⁴ it must be done so in addition to – not in lieu of – citing to the appellate record because, as just stated, a brief "must" contain record references.

Because Windsor's brief lacks citations to the record, we strike it, but we grant

³ Windsor also filed briefs in the other three cases, and they all lack the required citations to record references. Windsor's briefs cite to either the trial-court docket or to his appendix, which appears to contain uncertified copies of documents that may be in the clerk's record.

⁴ Inclusion in an appendix of documents that are otherwise in the clerk's record but that are, for example, a party's personal, uncertified copy of a pleading is not helpful to the Court. The better practice is to include in the appendix the version of the document as it is found in the clerk's record.

Windsor's *motion to file an amended appellant's brief*.⁵ **Windsor's amended brief in this case is due to be filed within thirty-five (35) days of the date of this order.** Windsor's amended appellant's brief shall substantially comply with Rule 38.1 and must include appropriate citations to the record. TEX. R. APP. P. 38.1, 38.9. "If another brief that does not comply with this rule is filed, the court may strike the brief, prohibit the party from filing another, and proceed as if the party had failed to file a brief."⁶ *Id.* R. 38.9(a).

10-14-00392-CV, Windsor v. Fleming

In a July 16, 2015 order, the Court struck Windsor's premature appellant's brief in this case. Windsor then filed his appellant's brief on September 22, 2015, and, like his brief in No. 10-14-00355-CV, it too lacks the required citations to record references. Windsor has filed a response to the Court's October 15, 2015 order and a motion to amend his brief in this case.

Because Windsor's brief in this case lacks citations to the record, we strike it, but we grant Windsor's *motion to file an amended appellant's brief*. Further, we dismiss as moot Appellee Fleming's *motion to strike appellant's brief*, and we deny Fleming's *motion to dismiss appeal for want of prosecution*. **Windsor's amended brief in this case is due to be filed within forty-nine (49) days of the date of this order.** Windsor's amended appellant's brief shall substantially comply with Rule 38.1 and must include appropriate

⁵ Windsor states that he is now able to cite the record "as a courtesy" to the Court because he has obtained volume and page numbers from the trial-court clerk. As explained above, record citations are a requirement, not an optional courtesy.

⁶ If an appellant fails to timely file a brief, the court may dismiss the appeal for want of prosecution. TEX. R. APP. P. 38.8(a)(1).

citations to the record. TEX. R. APP. P. 38.1, 38.9. “If another brief that does not comply with this rule is filed, the court may strike the brief, prohibit the party from filing another, and proceed as if the party had failed to file a brief.” *Id.* R. 38.9(a); *see id.* R. 38.8(a)(1) (if appellant fails to timely file brief, the court may dismiss appeal for want of prosecution).

Fleming’s *second motion to dismiss* is denied. *See Baum v. Blue Moon Ventures, LLC*, 513 F.3d 181, 191-92 (5th Cir. 2008); *Sieverding v. Colo. Bar Ass’n*, 469 F.3d 1340, 1344 (10th Cir. 2006); *Martin-Trigona v. Lavien*, 737 F.2d 1254, 1263 (2d Cir. 1984).

The clerk’s record reflects that Windsor filed a notice of appeal regarding Fleming’s motion to dismiss on November 13, 2014. It further reflects that the trial court (Hon. Bob Carroll, Judge Presiding) issued a November 28, 2014 “memorandum ruling” that “grants the [Fleming’s] Motion to Dismiss.” That ruling further requested that Fleming’s counsel draft a dismissal order consistent with the trial court’s ruling and set a hearing on the award of costs, attorney’s fees, expenses, and sanctions. Thereafter, on December 17, 2014, Judge Carroll recused himself, and also on that date the case was transferred to the 378th District Court of Ellis County.

On December 18, 2014, at 2:09 p.m., Windsor filed a notice of removal that states that he removed this case to the United States District Court for the District of South Dakota, Central Division.⁷ Also on December 18, 2014, in an order of assignment that was filed on December 18, 2014, at 5:06 p.m., the Honorable Richard Davis was assigned by the Presiding Judge of the First Administrative Judicial Region (Hon. Mary Murphy,

⁷ The Court is aware that the federal district court dismissed Windsor’s “case” on January 28, 2015 and that the Eighth Circuit Court of Appeals dismissed Windsor’s appeal for failure to prosecute on September 3, 2015.

Presiding Judge) to preside over this case. Further on December 18, 2014, Judge Davis signed an order granting Fleming's motion to dismiss and awarding costs, expenses, and attorney's fees and assessing sanctions.

In light of the above, the Court requests that, **within fourteen (14) days of the date of this order**, Fleming submit a letter brief on the effect, if any, of Windsor's notice of appeal *and* notice of removal on the above-mentioned trial-court rulings. Windsor may submit a reply letter brief **within fourteen (14) days of the date of the filing of Fleming's letter brief**.

10-15-00069-CV, Windsor v. McDougald

In a July 16, 2015 order, the Court struck Windsor's premature appellant's brief in this case. Windsor then filed his appellant's brief on September 24, 2015, and, like his brief in No. 10-14-00355-CV, it too lacks the required citations to record references. Windsor has filed a response to the Court's October 15, 2015 order and a motion to amend his brief in this case.

Because Windsor's brief in this case lacks citations to the record, we strike it, but we grant Windsor's *motion to file an amended appellant's brief*. **Windsor's amended brief in this case is due to be filed within sixty-three (63) days of the date of this order.** Windsor's amended appellant's brief shall substantially comply with Rule 38.1 and must include appropriate citations to the record. TEX. R. APP. P. 38.1, 38.9. "If another brief that does not comply with this rule is filed, the court may strike the brief, prohibit the party from filing another, and proceed as if the party had failed to file a brief." *Id.* R.

38.9(a); *see id.* R. 38.8(a)(1) (if appellant fails to timely file brief, the court may dismiss appeal for want of prosecution).

Appellee McDougald's *motion to dismiss* is denied.⁸ *See Baum v. Blue Moon Ventures, LLC*, 513 F.3d 181, 191-92 (5th Cir. 2008); *Sieverding v. Colo. Bar Ass'n*, 469 F.3d 1340, 1344 (10th Cir. 2006); *Martin-Trigona v. Lavien*, 737 F.2d 1254, 1263 (2d Cir. 1984). Windsor's *request for sanctions* within his response to McDougald's motion to dismiss is denied.

Windsor's *request for leave to file motion to strike and motion for sanctions* is denied. The Court's October 15, 2015 order stayed only the briefing schedule for appellees' briefs in these appeals. That order did "not, however, prevent any party from filing ... any motions regarding other relief sought, if any." McDougald's "second supplement to appellee's motion to dismiss" thus did not violate the stay.⁹

10-15-00092-CV, Windsor v. Joeyisalittlekid, et al.

In a July 16, 2015 order, the Court struck Windsor's premature appellant's brief in this case. Windsor then filed his appellant's brief on September 24, 2015, and, like his brief in No. 10-14-00355-CV, it too lacks the required citations to record references. Windsor has filed a response to the Court's October 15, 2015 order and a motion to amend his brief in this case.

⁸ Because the trial court dismissed this case in its entirety in a February 2, 2015 order, the February 13, 2015 sanctions order that Windsor is appealing in this appeal is not interlocutory.

⁹ Windsor's *request for leave to file motion to strike and motion for sanctions* seeks leave to file a motion for sanctions also because McDougald's motion to dismiss lacks a certificate of conference. We note that Windsor's *request* also lacks a certificate of conference.

Because Windsor's brief in this case lacks citations to the record, we strike it, but we grant Windsor's *motion to file an amended appellant's brief*. **Windsor's amended brief in this case is due to be filed within seventy-seven (77) days of the date of this order.** Windsor's amended appellant's brief shall substantially comply with Rule 38.1 and must include appropriate citations to the record. TEX. R. APP. P. 38.1, 38.9. "If another brief that does not comply with this rule is filed, the court may strike the brief, prohibit the party from filing another, and proceed as if the party had failed to file a brief." *Id.* R. 38.9(a); *see id.* R. 38.8(a)(1) (if appellant fails to timely file brief, the court may dismiss appeal for want of prosecution).

We dismiss as moot Appellee Fleming's *motion to strike appellant's brief*. Appellee McDougald's *motion to dismiss* is denied. *See Baum v. Blue Moon Ventures, LLC*, 513 F.3d 181, 191-92 (5th Cir. 2008); *Sieverding v. Colo. Bar Ass'n*, 469 F.3d 1340, 1344 (10th Cir. 2006); *Martin-Trigona v. Lavien*, 737 F.2d 1254, 1263 (2d Cir. 1984).

Fleming's *motion to dismiss for lack of jurisdiction* is granted in part. Fleming correctly asserts that he had already been dismissed as a defendant in the underlying trial-court case before the trial court's February 2, 2015 dismissal of the underlying case in its entirety. Fleming's dismissal is on appeal in 10-14-00392-CV; Fleming is a party to that appeal and is not a party to this appeal (10-15-00092-CV). We dismiss this appeal as to Fleming alone to the extent that he has appeared or been treated as an appellee in this appeal.

PER CURIAM

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
(Chief Justice Gray dissenting)
Order issued and filed August 3, 2016
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