AFFIRMED in Part; and REVERSED and REMANDED in Part; and Opinion Filed July 26, 2023

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-21-00151-CV

SOUTH CENTRAL JURISDICTIONAL CONFERENCE OF THE UNITED METHODIST CHURCH AND BISHOP SCOTT JONES, Appellants
V.
SOUTHERN METHODIST UNIVERSITY, Appellee

On Appeal from the 162nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-19-19359

OPINION

Before Justices Partida-Kipness, Reichek, and Goldstein
Opinion by Justice Goldstein

This is an appeal from the trial court's orders granting Rule 91a dismissal and summary judgment in favor of appellee Southern Methodist University (SMU). In eight issues, appellant South Central Jurisdictional Conference of the United Methodist Church (Conference) asserts that the trial court erred in ruling that the Conference lacked standing; dismissing the Conference's claims for declaratory judgment, breach of contract, breach of fiduciary duty, and promissory estoppel; granting summary judgment against the Conference on its remaining statutory claim;

and denying the Conference's motion for partial summary judgment on its own equitable-title claim. In one issue, appellant Bishop Scott Jones challenges the trial court's order dismissing his claim for lack of standing.

In this case of first impression, we must determine whether a nonprofit corporation like SMU, whose governing documents provide that it is to be "forever owned, maintained and controlled" by the Conference and that no amendments to said articles "shall ever be made" without the Conference's prior approval, can unilaterally amend the articles to remove these provisions and all other references to the Conference. Based upon the record, the evidence, the historical context in which this relationship was established, and the applicable law, we affirm in part, reverse in part, and remand this case for further proceedings consistent with this opinion.

BACKGROUND

SMU was founded in 1911. Its original charter, filed that year with the Secretary of State, provided that the university had no capital stock and was "to be owned, controlled and managed" by one of the Conference's predecessors-in-interest.[1] The charter named twenty initial members to SMU's Board of Trustees and

[1] The 1911 charter vested ownership, management, and control of SMU in the Texas Conferences of the Methodist Episcopal Church South. That conference, through amendments to SMU's charter, passed ownership, management, and control of SMU to successor conferences as follows: (1) to the General Conference of the Methodist Episcopal Church in 1916; (2) to the South Central Jurisdictional Conference of The Methodist Church in 1940; and (3) to appellant South Central Jurisdictional Conference of the United Methodist Church in 1968. Our reference to "the Conference" includes these predecessor entities.

provided that the board members' successors "shall be selected in such manner as may be determined by" the Conference.

Later that year, three families conveyed 133 acres of land in Dallas—consisting of the one-hundred-acre Armstrong Tract and the thirty-three-acre Daniels Tract—to the Conference for use as SMU's campus.[2] In 1922, the Conference conveyed both tracts by deed without warranty to SMU's trustees (1922 Deed) "for the use of [SMU] and its successors forever to be used, held, maintained and disposed of for educational purposes according to the Discipline and usages of the Methodist Episcopal Church South as from time to time shall be authorized and determined by the General Conference of said church."

Over the next five decades, the Conference and SMU amended the 1911 charter several times to, among other things, make changes to the membership and composition of SMU's Board of Trustees. In 1961, the Conference and SMU adopted articles of incorporation pursuant to the then-recently enacted Texas Non-Profit Corporations Act (TNPCA). *See* Act of April 27, 1959 (H.B. 145), 56th Leg., R.S., ch. 162, art. 1.01, 1959 Tex. Gen. Laws 286 (expired Jan. 1, 2010). The Conference and SMU amended the articles of incorporation several more times

[2] The Daniels Tract was previously owned by A.V. and Bessie McNeny Rozelle (4/15th interest) and F.L. and Agnes McNeny (11/15th interest). The Rozelles and McNenys conveyed the Daniels Tract via warranty deed to several individuals named in the deeds as "Trustees for the Methodist Episcopal Church South." The Armstrong Tract was previously owned by Alice Armstrong, who conveyed it via deed of gift directly to SMU's Board of Trustees in 1911. In 1914, the Conference created the Educational Commission of the Methodist Episcopal Church South. In 1917, SMU conveyed the Armstrong Tract to the Educational Commission. Thus, by 1917, the Conference had title to both tracts.

between 1961 and 1996, when SMU adopted its Restated Articles of Incorporation of Southern Methodist University (the 1996 Articles[3]), one of the documents at issue

[3] The 1996 Articles provide, in relevant part:

> II.
>
> The purpose for which this corporation is formed is for the support of an educational undertaking, to wit[:] the establishment, maintenance and support of an institution for higher learning, including education and instruction in literary, scientific, theological, vocational and professional branches, with authority to confer all college and university degrees, said educational institution to be forever owned, maintained and controlled by the [Conference].
>
> . . . .
>
> V.
>
> This corporation has no capital stock and is not organized for the purpose of pecuniary gain or profit.
>
> VI.
>
> 1. The membership of the Board of Trustees shall consist of three (3) bishops of the [Conference] and nine (9) other members, all of whom shall be recommended for nomination by the College of Bishops of the [Conference], plus not fewer than twenty-eight (28) additional members. At least one-half of the voting members of the Board of Trustees shall be members of the United Methodist Church.
>
> 2. Upon the nomination by the Board of Trustees of [SMU], the representatives upon [*sic*] the Board of Trustees shall be elected by the [Conference] or by any agency or Board to which it may delegate such authority.
>
> . . . .
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> 5. Any elected trustee may be removed for cause by the [Conference] or by any agency or Board to which it may delegate such authority.
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> . . . .
>
> VIII.
>
> The qualifications of Trustees shall be those fixed by the Discipline of the United Methodist Church for the Trustees of its educational institutions, if there be any, and, if not, then the qualifications of the Trustees shall be fixed by the [Conference].
>
> . . . .

here. Despite all the amendments to SMU's charter and articles of incorporation, one provision remained constant: SMU was to be "forever owned, maintained and controlled" by the Conference.

In February 2019, the Conference and other regional conferences gathered at the General Conference of the United Methodist Church. One of the items on the agenda was a contentious vote on a matter of church doctrine, the result of which caused a schism in the church, with several Methodist entities deciding to disaffiliate from the national church.[4] Among these was SMU, whose Board of Trustees met in November 2019 to consider amendments to the 1996 Articles. The proposed

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XII.

> No amendment to these Articles of Incorporation shall ever be made unless the same shall have been first affirmatively authorized and approved by the [Conference], or by some authorized agency of said [Conference].

XIII.

> The real estate of the corporation shall be subject to the Board of Trustees, who may dispose same through the officers thereof, except the campus property and such other property as may be used for the conduct of the business of the corporation, or matters incident thereto, and such property may be sold or leased only by consent of the South Central Jurisdictional Conference, or such agency as it may create therefor, and then only for use for religious or educational purposes or for dormitories or fraternity or sorority houses under the immediate discipline and control of the University authorities and with provision for the reversion to the University on cessation of such use.

XIV.

> The corporation shall have no members.

[4] The subject matter of the vote and the basis for the schism are of no import to this decision. Neither party asks us to consider the propriety of this vote under the 1996 Articles or otherwise. Nor could we, even if asked. *See Jennison v. Prasifka*, 391 S.W.3d 660, 665 (Tex. App.—Dallas 2013, no pet.) (explaining that under the ecclesiastical-abstention doctrine, courts have no jurisdiction over matters of "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of a church to the standard of morals required of them").

amendment would remove all references to the Conference, including provisions regarding the Conference's ownership and control of SMU, right of approval over amendments to SMU's articles of incorporation, and authority to elect members to the Board of Trustees. By a vote of 34-to-1, the Board resolved to approve the amendments (2019 Amendments). Bishop Jones cast the sole negative vote. On November 15, 2019, SMU filed the 2019 Amendments by way of a certificate of amendment with the Texas Secretary of State.

The Conference filed this lawsuit on December 4, 2019, seeking only declaratory relief and attorney's fees. The Conference sought entry of the following declarations under the Uniform Declaratory Judgments Act (UDJA):

> (a) The [2019 Amendments] are void;
>
> (b) Any actions taken by any representatives of SMU in reliance upon the [2019 Amendments] are void;
>
> (c) The 1996 Articles are the operative Articles of Incorporation of SMU, and any actions taken by representatives of SMU in violation of such articles are void;
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> (d) [The Conference] retains all its rights, and its long-standing and permanent relationship with SMU, as guaranteed by SMU's governing documents; and,
>
> (e) Such other and further declarations and relief as may be necessary to protect [the Conference's] rights and [ensure the Conference's] beneficial interest in SMU's assets, worth billions of dollars, [is] held in trust for [the Conference].

SMU moved to dismiss the Conference's claims under Texas Rule of Procedure 91a, or alternatively, as a plea to the jurisdiction. Under either theory, SMU argued chiefly that the Conference lacked standing because its claims complained of *ultra*

vires acts by the Board of Trustees and that the Conference is not among the category of plaintiffs authorized to bring *ultra vires* claims under the Texas Business Organizations Code (TBOC). *See* TEX. BUS. ORGS. CODE ANN. § 20.002(c). The Conference filed a response to the motion and a first amended petition. The trial court granted the motion on February 5, 2020 (February 2020 Order), dismissing the Conference's declaratory-judgment claim to the extent it sought "a determination as to whether the November 2019 amendment to the Articles of Incorporation constitutes an ultra vires act."

In its first amended petition, the Conference added claims for breach of contract, breach of fiduciary duty, and violations of § 4.007 of the TBOC. The Conference also modified its claim for declaratory judgment, seeking the following declarations:

> (a) The 1996 Articles are the effective Articles of Incorporation of SMU, and all actions taken by SMU or its representatives in violation of such articles are void;
>
> (b) The [2019 Amendments] are void, and any actions taken by SMU or its representatives based upon such articles are similarly void;
>
> (c) [The Conference] retains all its rights, and its long-standing and permanent relationship with SMU, guaranteed by SMU's governing documents;
>
> (d) [The Conference] retains a beneficial interest in the assets of SMU held in trust for [the Conference] by the SMU Trustees in perpetuity;
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> (e) The SMU Trustees owe fiduciary duties to [the Conference]; [and]

> (f) Any amendments to the 1996 Articles must comply with all terms of the 1996 Articles including, but not limited to, the requirement that any such amendment to the 1996 Articles must first be authorized and approved by [the Conference.]

SMU filed a second motion to dismiss under Rule 91a, arguing *inter alia* that the new claims were subject to dismissal on the same grounds as SMU's prior motion. On March 2, 2020, the Conference filed its response to this motion and a second amended petition, adding a claim for promissory estoppel. The same day, the Conference also filed a motion for partial summary judgment on its claims for breach of contract, breach of fiduciary duty, promissory estoppel, and declaratory judgment that it was the equitable owner of SMU's campus. On March 4, 2020, SMU filed a third motion to dismiss under Rule 91a, seeking dismissal of the promissory-estoppel claim.

On May 5, 2020, the trial court denied the Conference's motion for summary judgment (May 5, 2020 Order). The following day, the trial court partially granted SMU's second Rule 91a motion (May 6, 2020 Order), dismissing the Conference's claims for breach of fiduciary duty, breach of contract, and declaratory-judgment claims (a), (b), (c), and (f). The trial court denied the motion as to the TBOC § 4.007 claim and declaratory-judgment claims (d) and (e). By written order dated October 1, 2020, the trial court granted SMU's third motion, dismissing the promissory-estoppel claim (October 2020 Order).

The Conference's live claims after the October 2020 Order were the TBOC § 4.007 and declaratory-judgment claims (d) and (e) above. On November 30, 2020,

SMU moved for summary judgment on these remaining claims, which the trial court granted in an order dated February 8, 2021 (February 2021 Order).

Meanwhile, Bishop Jones intervened in the case on April 16, 2020, asserting a claim for injunctive relief against SMU. Three days later, SMU's Board of Trustees terminated Bishop Jones's board membership. Bishop Jones amended his petition to add claims for declaratory relief, including a declaration that his termination was void. On May 15, 2020, SMU moved to dismiss Bishop Jones's claims on grounds that he lacked standing. Bishop Jones then filed his second and third amended petitions in intervention, adding third-party claims against Paul Ward, SMU's general counsel. On September 7, 2020, the trial court granted SMU's motion and dismissed Bishop Jones's claims with prejudice.

On February 24, 2021, the trial court entered final judgment against the Conference and Bishop Jones. This appeal followed.

SUBJECT-MATTER JURISDICTION

As a threshold matter, we consider sua sponte whether we are authorized to address the parties' issues, as they potentially involve matters of church doctrine.[5] The First Amendment takes ecclesiastical matters out of our subject-matter jurisdiction. *Masterson v. Diocese of Nw. Tex.*, 422 S.W.3d 594, 608 (Tex. 2013) (citing U.S. CONST. amend. I). We may, however, decide any non-ecclesiastical

[5] We note the parties raise no issue or challenge associated with the ecclesiastical-abstention doctrine.

issues based on neutral principles of law applicable to all entities. *See id*. (adopting neutral-principles methodology from *Jones v. Wolf*, 443 U.S. 595, 603–04 (1979)).

Masterson involved a schism between a local parish and a regional diocese of a national church, the Episcopal Church, and the property dispute that followed. *See id.* at 597. The parish's corporate bylaws provided that it would be managed by a vestry elected by its members and any amendments to the bylaws would be by majority vote. *See id*. at 597–98. Due to doctrinal differences, the parish voted to dissociate from the national church. *Id.* at 598. The parish voted to amend its corporate bylaws to remove all references to the national church and revoke any trusts imposed on its property in favor of the national church or the regional diocese. *Id*. The bishop of the regional diocese concluded that the parish's vote was invalid and appointed a new reverend to lead the church. *Id*. Thus, two factions were formed: one loyal to the national church and one that voted to withdraw. *See id.* The loyal faction elected a new vestry and was recognized by the bishop as the true "continuing" parish of the church. *Id.* In the ensuing litigation, the central question was which faction had rights to the parish's property. *See id*. at 598–99. The trial court concluded that the courts must defer to the bishop's decision as a doctrinal matter, and the court of appeals affirmed. *Id*. at 599.

On review, the supreme court considered two alternative approaches to resolving disputes that involve hierarchical churches. The first, called the "deference" approach, requires courts to "defer[] to and enforce[] the decision of the

highest authority of the ecclesiastical body to which the matter has been carried." *See id*. at 602 (citing *Jones*, 443 U.S. at 604–05). The second, called the "neutral principles of law" approach, authorizes courts to resolve disputes "by applying generally applicable law and legal principles." *See id.* at 603 (citing *Jones*, 443 U.S. at 602–03). The Court adopted the neutral-principles approach as the exclusive method to be used by Texas courts:

> We hold that Texas courts should use the neutral principles methodology to determine property interests when religious organizations are involved. Further, to reduce confusion and increase predictability in this area of the law where the issues are difficult to begin with, Texas courts must use only the neutral principles construct.

Id. at 607.

Similar to *Masterson*, we are asked to determine property interests and other rights under pertinent corporate documents where there is an associational relationship between a controlling religious organization and an educational institution. A core issue is whether SMU could unilaterally amend the 1996 Articles to remove all references to the Conference despite Article XII of the 1996 Articles, which states:

> No amendment to these Articles of Incorporation shall ever be made unless the same shall have been first affirmatively authorized and approved by the [Conference], or by some authorized agency of said [Conference].

There is no requirement that church doctrine be considered in either the proposal or approval of article amendments. We therefore conclude that we have jurisdiction to

consider the parties' issues under the neutral-principles methodology. *See id.* at 607–08. We now turn to the merits of this dispute.

DISCUSSION

I. STANDARDS OF REVIEW

A. Rule 91a

With exceptions not applicable here, a party may move for dismissal under Rule 91a when the pleadings show that the plaintiff's cause of action has no basis in law or fact. TEX. R. CIV. P. 91a.1. "A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought." *Id.* "A cause of action has no basis in fact if no reasonable person could believe the facts pleaded." *Id.* A Rule 91a motion "must state specifically the reasons the cause of action has no basis in law, no basis in fact, or both." TEX. R. CIV. P. 91a.2. In ruling on the motion, the trial court may not consider evidence 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.

We review the merits of a Rule 91a dismissal de novo. *San Jacinto River Auth. v. Medina*, 627 S.W.3d 618, 628 (Tex. 2021). Rule 91a provides a harsh remedy and should be strictly construed. *Renate Nixdorf GmbH & Co. KG v. TRA Midland Props., LLC*, No. 05-17-00577-CV, 2019 WL 92038, at *10 (Tex. App.—Dallas Jan. 3, 2019, pet. denied) (mem. op.); *In re RNDC Tex., LLC*, No. 05-18-00555-CV, 2018

WL 2773262, at *1 (Tex. App.—Dallas June 11, 2018, orig. proceeding) (mem. op.). The rule is neither a substitute for special exceptions under Rule 91 nor motions for summary judgment under Rule 166a, both of which come with protective features against summary dispositions on the merits. *Royale v. Knightvest Mgmt., LLC*, No. 05-18-00908-CV, 2019 WL 4126600, at *4 (Tex. App.—Dallas Aug. 30, 2019, no pet.) (mem. op.).

When a trial court dismisses a claim under Rule 91a but does not specify the grounds for dismissal, an appellant challenging the trial court's order must negate the validity of each ground on which the trial court could have based its decision. *Buholtz v. Gibbs*, No. 05-18-00957-CV, 2019 WL 3940973, at *3 (Tex. App.—Dallas Aug. 21, 2019, pet. denied) (mem. op.).

B. Plea to the Jurisdiction

We review the trial court's ruling on a plea to the jurisdiction de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004); *City of Plano v. Hatch*, 584 S.W.3d 891, 895 (Tex. App.—Dallas 2019, no pet.). In performing this review, we do not look to the merits of the case but consider only the pleadings and evidence relevant to the jurisdictional inquiry. *City of Seagoville v. Lytle*, 227 S.W.3d 401, 408 (Tex. App.—Dallas 2007, no pet.). A plea to the jurisdiction is a dilatory plea that contests the trial court's authority to determine the subject matter of the cause of action. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). When a plea to the jurisdiction challenges the pleadings, we must

determine if the pleader has alleged sufficient facts to demonstrate affirmatively the trial court's jurisdiction to hear the cause. *See Ryder Integrated Logistics, Inc. v. Fayette Cnty.*, 453 S.W.3d 922, 927 (Tex. 2015); *Hatch*, 584 S.W.3d at 895. To make this determination, we look to the pleader's intent, construe the pleadings liberally in favor of jurisdiction, and accept the allegations in the pleadings as true. *Hatch*, 584 S.W.3d at 895. Where the pleadings do not allege sufficient facts to demonstrate affirmatively the trial court's jurisdiction but do not affirmatively demonstrate an incurable jurisdictional defect, the issue is one of pleading sufficiency, and the plaintiffs should be given an opportunity to amend. *Miranda*, 133 S.W.3d at 226–27. If the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiffs an opportunity to amend. *Id.* at 227.

C. Summary Judgment

We review summary judgments de novo. *De La Cruz v. Kailer*, 526 S.W.3d 588, 592 (Tex. App.—Dallas 2017, pet. denied). Under the traditional summary-judgment standard, the movant has the burden to show there is no genuine issue of material fact and it is entitled to judgment as a matter of law. *Vince Poscente Int'l, Inc. v. Compass Bank*, 460 S.W.3d 211, 213–14 (Tex. App.—Dallas 2015, no pet.) (citing TEX. R. CIV. P. 166a). In deciding whether there is a disputed fact issue precluding summary judgment, we take evidence favorable to the nonmovant as true. *Id.* at 214. We indulge every reasonable inference, and resolve any doubts, in the

nonmovant's favor. *Id.* at 214. Once the movant establishes its right to summary judgment as a matter of law, the burden shifts to the nonmovant to present evidence raising a genuine issue of material fact, thereby precluding summary judgment. *Id.* A genuine issue of material fact exists if the nonmovant produces more than a scintilla of probative evidence regarding the challenged element. *Id.*

A plaintiff who moves for summary judgment on its own claims must conclusively establish every necessary element in its favor. *Riner v. Neumann*, 353 S.W.3d 312, 314 (Tex. App.—Dallas 2011, no pet.). A matter is conclusively established by the evidence if ordinary minds could not differ as to the conclusion to be drawn from the evidence. *Id.* A defendant is entitled to traditional summary judgment if it conclusively disproves at least one essential element of the plaintiff's claim or conclusively establishes every element of an affirmative defense. *Ward v. Stanford*, 443 S.W.3d 334, 342 (Tex. App.—Dallas 2014, pet. denied). When the parties file cross-motions for summary judgment, each party bears the burden as to its own motion. *McKinney Millennium, LP v. Collin Cent. Appraisal Dist.*, 599 S.W.3d 57, 60 (Tex. App.—Dallas 2020, pet. denied). If the trial court grants one party's motion and denies the other's, we consider both motions, review the evidence presented by both sides, determine all issues presented, and render the judgment the trial court should have rendered. *Id.*

D. Statutory Construction

We review a trial court's interpretation of statutory language de novo. *Ritchie v. Rupe*, 443 S.W.3d 856, 866 (Tex. 2014). In construing statutes, our primary objective is to give effect to the Legislature's intent as expressed in the statute's language. *Id.* It is not our place "to impose our personal policy choices or 'to second-guess the policy choices that inform our statutes or to weigh the effectiveness of their results.'" *Id.* (quoting *Iliff v. Iliff*, 339 S.W.3d 74, 79 (Tex. 2011)). We rely on the plain meaning of the text unless a different meaning is supplied by legislative definition, a different meaning is apparent from the context, or a plain-meaning construction leads to absurd results. *State v. K.E.W.*, 315 S.W.3d 16, 21 (Tex. 2010). Language in a statute is presumed to have been selected and used with care, and every word or phrase in a statute is presumed to have been intentionally used with a meaning and purpose. *Id.* Proper construction requires reading the statute as a whole rather than interpreting provisions in isolation. *In re Mem'l Hermann Hosp. Sys.*, 464 S.W.3d 686, 701 (Tex. 2015) (orig. proceeding). We give effect to "every sentence, clause, and word of a statute" so that no part of it is rendered superfluous. *Duarte v. Disanti*, 292 S.W.3d 733, 735 (Tex. App.—Dallas 2009, no pet.). We also consider the objective the law seeks to obtain and the consequences of a particular construction. *Id.* Finally, we do not give a statute a meaning that conflicts with other provisions if we can reasonably harmonize the provisions. *Id.*

II. THE CONFERENCE'S ISSUES

We begin by briefly setting forth the Conference's claims, SMU's grounds for dismissal or summary judgment for each claim, the trial court's disposition of each claim, the appellate issues under which each ground is addressed, and the section of this opinion in which we dispose of these issues. Where the parties' issues overlap, we address them together.

Declaratory Judgment Claims (a), (b), (c), and (f). These claims, asserted by the Conference in its original and first amended petitions, relate to the validity and effectiveness of the 1996 Articles and the 2019 Amendments. SMU sought dismissal on the ground that these are *ultra vires* claims that the Conference lacked standing to assert pursuant to TBOC § 20.002. The trial court dismissed these claims in its February 2020 Order and May 6, 2020 Order. The Conference addresses the dismissal in its first two issues. In Issue 1, the Conference argues that it had standing *despite* § 20.002, under TBOC § 22.207. In Issue 2, the Conference argues that it had standing *even under* § 20.002. We address the standing issue under Section (A) and the merits of the Conference's claims in Section (F) below.

Declaratory Judgment Claims (d) and (e). These claims relate to whether the 1922 Deed and SMU's governing documents resulted in a trust and fiduciary relationship between the parties, as alleged by the Conference in its first amended petition. The Conference sought summary judgment in its own favor on these

claims.[6] SMU sought dismissal on standing grounds. The trial court denied the Conference's motion for summary judgment in its May 5, 2020 Order and denied SMU's Rule 91a motion to dismiss as to these claims in its May 6, 2020 Order. SMU later moved for summary judgment on the grounds that the campus is not held in trust for the Conference and the Conference lacked standing to assert these claims. The trial court granted SMU's motion for summary judgment in its February 2021 Order. On appeal, the Conference argues in Issue 7 that the trial court erred in granting SMU's motion for summary judgment. In Issue 8, the Conference argues that the trial court erred in denying the Conference's own motion for summary judgment as to these claims. We address these issues in Sections (C) and (F) below.

Breach of Contract. The Conference asserted a claim for breach of contract in its first amended petition, alleging that the 1996 Articles formed a valid contract between itself and SMU, which SMU breached by adopting the 2019 Amendments. SMU moved to dismiss this claim, arguing that: (1) the Conference lacked standing to assert it, (2) the 1996 Articles are not a valid contract as a matter of law, (3) the Conference suffered no contract damages, and (4) the Conference failed to plead consideration and performance consistent with its fiduciary duties. The trial court granted SMU's motion to dismiss in its May 6, 2020 Order. The Conference argues

[6] The Conference's motion also sought traditional summary judgment on its claims for breach of contract and breach of fiduciary duty. On appeal, however, the Conference asserts that the trial court erred in denying its motion for summary judgment only as to declaratory-judgment claims (d) and (e).

that the trial court erred in dismissing this claim under Issue 3. We address the standing issue in Section (A) and the remaining arguments in Section (B) below.

Breach of Fiduciary Duty. The Conference asserted a claim for breach of fiduciary duty in its first amended petition, alleging that SMU owed it fiduciary duties under SMU's governing documents, the 1922 Deed, and the Conference's Chapter 81 election. SMU sought dismissal of this claim on grounds that the Conference lacked standing to assert it and SMU did not owe fiduciary duties to the Conference for various reasons. The trial court granted dismissal of this claim in its May 6, 2020 Order. The Conference challenges the trial court's ruling under Issue 4. We address the standing issue in Section (A) and the remaining arguments in Section (C) below.

Promissory Estoppel. In its second amended petition, the Conference asserted a claim for promissory estoppel as an alternative to its breach-of-contract claim. SMU moved to dismiss this claim for lack of standing, for lack of damages, and because promissory estoppel may not be used to enforce another entity's articles of incorporation. The trial court dismissed this claim in its October 2020 Order. The Conference challenges the trial court's ruling in Issue 5. We address the standing issue in Section (A) and the remaining arguments in Section (D) below.

TBOC § 4.007. In its first amended petition, the Conference asserted that SMU violated § 4.007 by filing a materially false certificate of amendment with the Secretary of State to effectuate the 2019 Amendments. SMU sought dismissal of this

claim, which the trial court denied in its May 6, 2020 Order. SMU later sought summary judgment on this claim on grounds that its certificate of amendment was not false, the certificate of amendment contained only non-actionable statements of opinion, and the Conference suffered no compensable loss. The trial court granted summary judgment on this claim in its February 2021 Order. The Conference challenges that ruling in Issue 6. We address this issue in Section (E) below.

Briefing Waiver. On appeal, SMU argues that we should affirm certain of the trial court's rulings because the Conference failed to challenge every possible ground for dismissal of the Conference's claims for breach of contract, breach of fiduciary duty, and promissory estoppel. Given our disposition of the Conference's fourth and fifth issues, we need not address SMU's waiver arguments as to fiduciary duties and promissory estoppel. We address the remaining waiver argument, as to the Conference's claim for breach of contract, in Section (B).

A. Standing

In its first and second issues, the Conference challenges the trial court's orders dismissing the Conference's claims to the extent the trial court based its ruling on the Conference's lack of standing.

1. The Parties' Arguments

SMU contends that the Conference lacked standing to assert not only its declaratory-judgment claims but also its claims for breach of contract, breach of fiduciary duty, and promissory estoppel. Because the Conference challenges the

actions of SMU's Board of Trustees, SMU characterizes the Conference's pleadings as asserting *ultra vires* claims. SMU argues that the Conference lacks standing because § 20.002 of the TBOC limits who may bring *ultra vires* claims to an enumerated class of plaintiffs, none of which include an entity like the Conference. *See* TEX. BUS. ORGS. CODE ANN. § 20.002(c).

The Conference argues it had standing to pursue its claims, relying primarily on § 22.207 of the TBOC, which provides that a board of directors of a nonprofit corporation may be "affiliated with, elected, and controlled" by a religious organization like the Conference. *Id.* § 22.207(a). In the hundred years that § 22.207 has been part of Texas law, it has never been expounded upon by a Texas appellate court, until now. We address § 22.207 at subsection (A)(3) below.

The Conference also asserts a multitude of other arguments. First, the Conference argues that it had "common law standing" because it pleaded an injury in fact that was fairly traceable to SMU's conduct and could be redressed by its requested relief. Second, the Conference avers that TBOC § 20.002 does not apply because the Conference has not filed an *ultra vires* claim. Alternatively, the Conference contends that even if its claims could be characterized as *ultra vires*, § 20.002 does not apply because it authorizes suit by those who, unlike the Conference, otherwise lack standing. Thus, according to the Conference, § 20.002 does not deprive it of standing to seek declaratory relief for SMU's breach of the 1996 Articles and 1922 Deed. Third, the Conference maintains that § 20.002 does

not apply because the SMU Board's act of adopting the 2019 Articles was not merely *ultra vires* but also illegal under TBOC § 4.007 or, alternatively, in violation of public policy and thus void *ab initio*. Fourth, the Conference asserts that the trial court's dismissal orders violated the Texas Constitution's open-courts provision and general ban on retroactive laws. Finally, the Conference argues that it had standing to sue as a member of SMU by virtue of the Conference's "membership rights" under the 1996 Articles.

2. Jurisdictional Standing

We must first address the type of "standing" involved in this case. SMU's three motions to dismiss the Conference's claims were styled as motions "Under Texas Rules of Civil Procedure 91a and 85." *See* TEX. R. CIV. P. 85, 91a. In each motion, SMU urged the trial court to dismiss the Conference's claims under Rule 91a because its pleadings "triggered a clear legal bar to recovery." Alternatively, SMU asked the trial court to consider its motions as pleas to the jurisdiction under Rule 85 and dismiss the claims on grounds that the pleadings affirmatively negated standing.[7] The Conference responded in part that it had "common law standing" because it pleaded an injury in fact that was fairly traceable to SMU's conduct and

[7] The trial court dismissed the Conference's declaratory judgment claims to the extent they sought a determination that the 2019 Amendments were *ultra vires* acts. But the trial court did not specify whether it was granting dismissal pursuant to Rule 91a or SMU's plea to the jurisdiction. We must therefore consider both. *See Buholtz*, 2019 WL 3940973, at *3 (when trial court does not state basis for granting Rule 91a dismissal, appeals court must affirm on any meritorious ground asserted by the movant).

could be redressed by its requested relief. *See Meyers v. JDC Firethorne, Ltd.*, 548 S.W.3d 477, 484 (Tex. 2018) (listing elements of jurisdictional standing).

These trial-court filings and the parties' appellate briefs conflate two different legal principles that courts have referred to as "standing." As the supreme court recently observed, *standing* "is a word of many, too many, meanings." *Pike v. Tex. EMC Mgmt., LLC*, 610 S.W.3d 763, 773 (Tex. 2020) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998)). In *Pike*, the Court was asked to determine whether a limited partner of a limited partnership had standing to recover damages individually for an injury to the partnership. *See id.* The Court noted that it was unclear whether the appellant was challenging "standing in the true constitutional sense of that term, which if lacking would deprive the trial court of subject-matter jurisdiction." *Id.* The Court explained, as a threshold matter, that there is a distinction between the different uses of the term:

> Texas courts, having drawn upon the standing doctrine of our federal counterparts, sometimes apply the label "standing" to statutory or prudential considerations that do not implicate subject-matter jurisdiction but determine *whether a plaintiff falls within the class of persons authorized to sue* or otherwise has a valid cause of action. Yet we have been clear in this century that the question whether a plaintiff has established his right to go forward with his suit or satisfied the requisites of a particular statute pertains in reality to the right of the plaintiff to relief rather than to the subject-matter jurisdiction of the court to afford it. Thus, a plaintiff does not lack standing in its proper, jurisdictional sense simply because he cannot prevail on the merits of his claim; he lacks standing when his claim of injury is too slight for a court to afford redress.

Id. at 773–74 (internal citations and punctuation omitted) (emphasis added). The case before the Court involved TBOC provisions "that define and limit a stakeholder's ability to recover certain measures of damages." *See id.* at 778–79 (construing TEX. BUS. ORGS. CODE ANN. §§ 152.201–.211). The Court concluded that the appellant's challenge under these provisions did not implicate a trial court's subject-matter jurisdiction; rather, they raised the issue of the limited partner's capacity. *See id.*

Here, the dispute is over a different TBOC provision. Under § 20.002 of the TBOC, only certain enumerated persons may file what is commonly known as an *ultra vires* claim. *See* TEX. BUS. ORGS. CODE ANN. § 20.002(c). SMU argues that the Conference lacks standing because it is not the type of person listed in that section. Thus, the gravamen of SMU's standing challenge is that the Conference is not "within the class of persons authorized to sue." *See Pike*, 610 S.W.3d at 773–74. Such a challenge goes to the merits and does not implicate the trial court's subject-matter jurisdiction. *See id.* Accordingly, the trial court erred to the extent it dismissed the Conference's claims for lack of subject-matter jurisdiction.[8]

[8] To the extent SMU argues that the Conference lacked traditional, jurisdictional standing to sue, we disagree. Where a nonprofit entity alleges injury to its nonprofit mission that is fairly traceable to the defendant's conduct, the requirement for jurisdictional standing is met. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (nonprofit had standing to sue where defendants' conduct impaired nonprofit's ability to provide counselling and referral services for low- and moderate-income homeseekers). Our courts may redress such injuries not only through an award of damages but also by injunctive and declaratory relief.

3. Statutory Standing: TBOC § 22.207

We now turn to the other type of "standing" involved in this case—whether the Conference was statutorily authorized to challenge SMU's adoption of the 2019 Amendments. The Conference argues that it is entitled to enforce the 1996 Articles irrespective of the *ultra vires* statute, contending that *Masterson* provides the rule of decision in this case. We agree.

In *Masterson*, the Court considered whether a local parish, organized as a nonprofit corporation, was controlled by the national church of which it was a part. *See Masterson*, 422 S.W.3d at 609–10. The national church argued that the corporation's powers were limited by virtue of its affiliation with the national church and its adoption of the national church's constitution, canons, and rules. The Court rejected the argument because the vestry of parishioners, in whom the governing documents had vested the power to amend the corporation's bylaws, had voted to delete from its bylaws any reference to the national church's documents. *Id.* at 609. The Court explained that "absent specific, lawful provisions in the corporate documents" prohibiting such an action, the vestry was authorized to make that change. *See id.* at 610. The national church next argued that the vestry had no authority to amend its bylaws because the governing documents were required to, but did not, state that the corporation would be member-managed. *See id.* at 610; TEX. BUS. ORGS. CODE ANN. § 3.009(2) (providing that nonprofit corporation's certificate of formation must state whether management of its affairs will be vested

in its members). The Court rejected this argument as well, explaining that "even if the corporation were not member-managed, that would not mean that its management could be appointed by or was under the control of [the national church and its representatives], *absent corporate documents and law so providing*." *Masterson*, 422 S.W.3d at 610 (emphasis added). Comparing the current statutory scheme to the one in effect when the parish was incorporated, the Court explained: "The current statutory scheme changes the default rule on who is authorized to amend the bylaws, but under neither the former nor the current statute is an external entity empowered to amend them *absent specific, lawful provision in the corporate documents*." *Id.* (emphasis added). *Masterson* thus stands for the proposition that an external entity may exercise control over a nonprofit corporation only if (1) the corporation's governing documents expressly provide as much and (2) any such provisions do not violate any governing law. *See id.*

The Conference argues that both requirements are met here. We agree. The 1996 Articles provide that SMU is to be "forever owned, maintained and controlled by" the Conference. Additionally, Article XII provides that "[n]o amendment to these Articles of Incorporation shall ever be made unless the same shall have been first affirmatively authorized and approved by [the Conference], or by some authorized agency of [the Conference]." Unlike the national church in *Masterson*, when the Conference established SMU, it expressly reserved the right to approve or reject any amendment to SMU's governing documents.

We also agree with the Conference that Articles II and XII of the 1996 Articles are lawful pursuant to § 22.207 of the TBOC, which provides:

> The board of directors of a religious, charitable, educational, or eleemosynary corporation may be affiliated with, elected, and controlled by an incorporated or unincorporated convention, conference, or association organized under the laws of this or another state, the membership of which is composed of representatives, delegates, or messengers from a church or other religious association.

TEX. BUS. ORGS. CODE ANN. § 22.207(a). There is no dispute that SMU is an educational corporation or that the Conference meets the definition in the second half of § 22.207(a).[9] As § 22.207(a) does not define "control," we apply its ordinary meaning. *Jaster v. Comet II Constr., Inc.*, 438 S.W.3d 556, 563 (Tex. 2014) (undefined words in statutes must be construed according to their plain, ordinary meaning); *see also VIA Metro. Transit v. Meck*, 620 S.W.3d 356, 369 (Tex. 2020) ("To determine the meaning of ['negligence' as used in the Tort Claims Act], we must consider the term's original public meaning, that is, 'the meaning which it had when [the statute was] enacted.'" (quoting *Taylor v. Firemen's & Policemen's Civil Serv. Comm'n*, 616 S.W.2d 187, 189 (Tex. 1981))).

When § 22.207 was first enacted,[10] the word "control" was, and still is, synonymous with the word "manage": "to have authority over the particular matter,

[9] The Conference's pleadings assert that it is "an unincorporated association with its principal place of business in Oklahoma City, Oklahoma."

[10] Section 22.207(a) has remained intact and substantially unchanged since it was originally enacted in 1923. Act of March 19, 1923, 38th Leg., R.S., ch. 81, § 1 1923 Tex. Gen. Laws 171, *codified at* TEX. REV. CIV. STAT. ANN. art. 1408 (Vernon 1925), *repealed and recodified at* TEX. REV. CIV. STAT. ANN. art. 1396–

to check, to restrain, to govern with reference thereto." *Anderson v. Stockdale*, 62 Tex. 54, 61 (1884); *see also Control*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("1. To exercise power or influence over; 2. To regulate or govern; 3. To have a controlling interest in."). The power to review and approve or reject a corporate board's proposed amendments to the corporation's governing documents is a way to check and restrain the board and therefore a way to exert control over it.[11]

We conclude that Article XII's requirement that the Conference affirmatively authorize and approve any amendment to the Articles of Incorporation complies with § 22.207 of the TBOC and is therefore a lawful provision.[12] The question, then, is how it may be enforced. The Conference argues that it may enforce its rights under the 1996 Articles by asserting the claims it has asserted in this lawsuit. SMU argues that those claims are barred by TBOC § 20.002, the *ultra vires* statute. We therefore turn to the applicability of § 20.002.

2.14, § B *by* Act of April 27, 1959, 56th Leg., R.S., ch. 162, 1959 Tex. Gen. Laws 294 (current version at TEX. BUS. ORGS. CODE ANN. § 22.207(a)).

[11] We note that the power to control an entity might equally be exercised by appointing the people who will govern the entity. The Conference enjoyed that power under the 1996 Articles as well. However, § 22.207 includes both powers. Thus, the power to control a board of directors must mean something different from the power to elect its members. *See K.E.W.*, 315 S.W.3d at 21 (we presume the Legislature selected its words carefully and strive to give meaning to every word).

[12] To the extent SMU argues that § 22.207 does not create an independent cause of action, we reject the argument as irrelevant. The Conference did not file a claim under § 22.207, nor do we conclude that such a claim would be viable if pursued. We conclude merely that § 22.207 is the statute under which Articles II and XII of the 1996 Articles were "lawful." *See Masterson*, 422 S.W.3d at 609–10.

4. Ultra Vires *Standing: TBOC § 20.002*

SMU argues that the Conference's claims allege that the actions of SMU's Board of Trustees are *ultra vires* and thus governed by § 20.002 of the TBOC. Section 20.002 provides:

> (a) Lack of capacity of a corporation may not be the basis of any claim or defense at law or in equity.
>
> (b) An act of a corporation or a transfer of property by or to a corporation is not invalid because the act or transfer was:
>
> (1) beyond the scope of the purpose or purposes of the corporation as expressed in the corporation's certificate of formation[13]; or
>
> (2) inconsistent with a limitation on the authority of an officer or director to exercise a statutory power of the corporation, as that limitation is expressed in the corporation's certificate of formation.
>
> (c) The fact that an act or transfer is beyond the scope of the expressed purpose or purposes of the corporation or is inconsistent with an expressed limitation on the authority of an officer or director may be asserted in a proceeding:
>
> (1) by a shareholder or member against the corporation to enjoin the performance of an act or the transfer of property by or to the corporation;
>
> (2) by the corporation, acting directly or through a receiver, trustee, or other legal representative, or through members[14] in a representative suit, against an officer or director or former

[13] The term "certificate of formation" is synonymous with "charter" and "articles of incorporation." *See* TEX. BUS. ORGS. CODE ANN. § 1.006(1). For ease of reference, we refer to SMU's historical governing documents by their names. In describing TBOC provisions that reference a "certificate of formation," we will use the term articles of incorporation or charter to the extent applicable to SMU's governing documents that bear such title.

[14] We note without analysis that the Legislature recently amended subsection (c)(2) by adding "or shareholders" after "members." *See* Act of May 13, 2023 (S.B. 1514), 88th Leg., R.S., ch. 27, § 21 sec. 20.002, eff. Sept. 1, 2023 (available at https://webservices.sos.state.tx.us/legbills/files/RS88/SB1514.pdf).

officer or director of the corporation for exceeding that person's authority; or

(3) by the attorney general to:

(A) terminate the corporation;

(B) enjoin the corporation from performing an unauthorized act; or

(C) enforce divestment of real property acquired or held contrary to the laws of this state.

(d) If the unauthorized act or transfer sought to be enjoined under Subsection (c)(1) is being or is to be performed or made under a contract to which the corporation is a party and if each party to the contract is a party to the proceeding, the court may set aside and enjoin the performance of the contract. The court may award to the corporation or to another party to the contract, as appropriate, compensation for loss or damage resulting from the action of the court in setting aside and enjoining the performance of the contract, excluding loss of anticipated profits.

The Conference argues under its first issue that § 20.002 does not divest it of standing to sue but merely provides that persons who otherwise *lack* standing may sue for *ultra vires* conduct in certain circumstances. We agree. The Legislature enacted § 20.002 "to limit materially, not abolish, the doctrine of *ultra vires*." *See* Michael T. Brimble, *Ultra Vires Under the Texas Business Corporation Act*, 40 TEX. L. REV. 677, 679 (1962) (quoting TEX. REV. CIV. STAT. ANN. art. 1396–2.04, Comments of Tex. Bar Comm.). At common law, if a corporation exceeded its corporate powers in entering into a contract, either the corporation or the other contracting party could petition a court to set the contract aside, subject to estoppel and laches. *See id.* Under § 20.002, however, neither party to the contract can sue to

avoid it. In other words, the statute removes the ability of the corporation to assert *ultra vires* as a defense to a breach-of-contract action.[15] *See Inter-Cont'l Corp. v. Moody*, 411 S.W.2d 578, 585 (Tex. App.—Houston 1966, writ ref'd n.r.e.). Rather, the corporation's members or shareholders can seek to enjoin the performance of a threatened *ultra vires* act or contract under subsection (c)(1), and the corporation or its representatives can sue its officers and directors under subsection (c)(2). *See* TEX. BUS. ORGS. CODE ANN. § 20.002(c). But the only circumstance in which a court can set aside a corporation's contract on grounds that it is *ultra vires* is pursuant to subsection (d)—that is, a suit under subsection (c)(1) brought by a shareholder or member in which the other contracting party is joined as a party to the lawsuit. *See id.* § 20.002(d).

The act at issue here is the adoption by the SMU Board of Trustees of the 2019 Amendments, which had already gone into effect when the Conference filed this lawsuit. An injunction cannot undo that act. *Tex. Health Care Info. Council v. Seton Health Plan, Inc.*, 94 S.W.3d 841, 853 (Tex. App.—Austin 2002, pet. denied) ("Generally, it is the purpose of injunctive relief to halt wrongful acts threatened or that are in the course of accomplishment, rather than to grant relief against past actionable wrongs or to prevent the commission of wrongs not eminently threatened."); *see also Pondersosa Pine Energy, LLC v. Illinova Generating Co.*,

[15] Prior to the enactment of the predecessor to TBOC § 20.002, *ultra vires* was an affirmative defense to a contract action and needed to be pleaded and proved by a corporate defendant. *See Pollock Paper & Box Co. v. E. Tex. Motor Freight Lines*, 201 S.W.2d 228, 230 (Tex. 1947).

No. 05-15-00339-CV, 2016 WL 3902559, at *9 (Tex. App.—Dallas July 14, 2016, no pet.) (mem. op.) ("The purpose of an injunction is to prevent ongoing or imminent injuries."). Therefore, a suit under subsection (c)(1) would not allow for the type of relief the Conference seeks in this case. Subsection (c)(2) similarly provides no authority for a party to set aside a corporate act. A claim under subsection (c)(2) must be brought against the corporation's officers and directors for injuries to the corporation caused by their unauthorized acts. *See* TEX. BUS. ORGS. CODE ANN. § 20.002(c)(2). But nothing in subsection (c)(2) authorizes a court to set aside the unauthorized act. Rather, the only time a court may set aside a corporate act is under subsection (d), which applies only to claims by members or shareholders under subsection (c)(1) and only when the corporate act in question "is being or is to be performed or made under a contract to which the corporation is a party." *See id.* § 20.002(d).

5. Summary

We conclude that, although the SMU Board's adoption of the 2019 Amendments could constitute an *ultra vires* act under TBOC § 20.002(b), a question we do not resolve, a suit under § 20.002(c) cannot be used to set aside that act. The question remains, however, whether an *ultra vires* amendment to a corporation's governing documents can be challenged by other means. SMU essentially argues that any claim alleging *ultra vires* conduct is subject to § 20.002 and may be brought only by the parties listed in subsection (c). We disagree. Under subsection (b), a

corporate act is not invalid merely because it is *ultra vires*. *See id.* § 20.002(b). But if the act breaches some other legal duty imposed on the corporation *in addition* to being *ultra vires*, it may be challenged on that additional ground.[16] Indeed, that is the very purpose of § 20.002—if a corporate board of directors acts in a way that is both *ultra vires* and simultaneously in breach of some other legal duty, § 20.002 ensures that the corporation cannot assert the former to escape liability for the latter. *Moody*, 411 S.W.2d at 585.

Therefore, for the purposes of Rule 91a, we must consider whether the Conference has pleaded a viable claim that SMU's adoption of the 2019 Amendments violated a legal duty irrespective of whether it was *ultra vires*. The Conference alleges three such breaches. Specifically, the Conference asserts that by adopting and filing the 2019 Amendments, SMU (1) breached the 1996 Articles, a contract to which the Conference was a party; (2) breached its fiduciary duties to the Conference; and (3) violated § 4.008 of the TBOC, a criminal provision. Based on these allegations, the Conference asserted claims for breach of contract, breach of

[16] We note that § 20.002 is not the exclusive means of challenging *ultra vires* conduct even if the conduct is not also in violation of some other legal duty. In 2019, the Legislature enacted Subchapter J to Chapter 22 of the TBOC, which governs nonprofit corporations. Act of May 22, 2019, 86th Leg., ch. 664 (S.B. 1969), § 1, eff. Sept. 1, 2019 (codified at TEX. BUS. ORGS. CODE ANN. §§ 22.501–.516). Subchapter J provides a mechanism for corporations to ratify their defective corporate acts. *See* TEX. BUS. ORGS. CODE ANN. §§ 22.501 *et seq.* A defective corporate act includes "any act or transaction purportedly taken by or on behalf of the corporation that is, and at the time the act or transaction was purportedly taken would have been, within the power of a corporation to take under the corporate statute, but is void or voidable due to a failure of authorization." *Id.* § 22.501(2)(B). Under § 22.512, a district court may, on the application of a proper party, determine the validity and effectiveness of any defective corporate act that has yet to be ratified. *See id.* § 22.512(b)(3), (4). Neither party addresses the applicability of Subchapter J to this case. We therefore do not consider its applicability and cite it only in support of our conclusion that § 20.002(c) is not the exclusive means by which a party may challenge a corporate board's *ultra vires* conduct.

fiduciary duty, violation of TBOC § 4.007 (the civil counterpart to the criminal statute in § 4.008), and declaratory judgment. The trial court dismissed the Conference's claims for breach of contract, breach of fiduciary duty, promissory estoppel, and certain of the Conference's claims for declaratory judgment.[17]

As we conclude in the following sections, the Conference sufficiently pleaded a claim for breach of contract and presented more than a scintilla of evidence supporting the elements of its § 4.007 claim. Therefore, for the purposes of the Conference's first issue, we conclude the trial court erred to the extent it dismissed these claims for lack of standing under Rule 91a.[18] We now consider the merits of SMU's remaining grounds for dismissal and summary judgment for each of the claims asserted by the Conference.

B. Breach of Contract

In its third issue, the Conference asserts that the trial court erred in dismissing its claim for breach of contract because SMU's adoption of the 2019 Amendments breached Article XII of the 1996 Articles. SMU sought dismissal of the Conference's breach-of-contract claim in its second motion to dismiss. SMU's grounds for dismissal of this claim included the following: (1) the Conference lacked standing to assert it under TBOC § 20.002, (2) the 1996 Articles do not constitute a

[17] The trial court did not dismiss the § 4.007 claim under Rule 91a but did later grant summary judgment on that claim.

[18] Because we conclude that TBOC § 20.002 did not bar the Conference's claims, we do not address the Conference's second issue, under which the Conference argues in the alternative that it had standing to sue as a "member" of SMU under TBOC § 20.002(c).

contract, (3) the Conference failed to plead consideration, (4) the Conference failed to plead that it performed its obligations consistent with its fiduciary duties to SMU, and (5) the Conference suffered no damages from SMU's purported breach. The trial court granted the motion without stating its basis. We must therefore address all five grounds. We have already concluded that § 20.002 does not bar the Conference's claims on the basis of standing. We address the remaining grounds in turn.

1. Contract Formation and Validity

"Whether parties intend to make a contractual agreement is usually a question of fact." *Chapman v. Mitsui Eng'g & Shipbuilding Co., Ltd.*, 781 S.W.2d 312, 316 (Tex. App.—Houston [1st Dist.] 1989, writ denied) (citing *Scott v. Ingle Bros. Pac. Inc.*, 489 S.W.2d 554, 556 (Tex. 1972); and *Henry C. Beck Co. v. Arcrete, Inc.*, 515 S.W.2d 712, 716 (Tex. App.—Dallas 1974, writ dism'd)). "But whether a particular agreement constitutes a valid contract is generally a legal determination that the court must make." *Id.*; *see also Power Reps, Inc. v. Cates*, No. 01-13-00856-CV, 2015 WL 4747215, at *5 (Tex. App.—Houston [1st Dist.] Aug. 11, 2015, no pet.) (mem. op.) ("[D]etermination of whether a written instrument constitutes a contract or not requires a construction of the instrument, and is therefore addressed to the court and not the jury." (quoting *Success Motivation Inst., Inc. v. Jamieson Film Co.*, 473 S.W.2d 275, 280 (Tex. App.—Waco 1971, no writ))). A valid contract requires: (1) an offer; (2) acceptance of the offer in strict compliance with its terms; (3) a meeting of the minds as to both the contract's subject matter and its essential and

material terms; (4) each party's consent to the contract's terms; (5) intent that the contract be mutual and binding; and (6) consideration. *Grisham v. Bird*, No. 05-19-00400-CV, 2020 WL 1502774, at *4 (Tex. App.—Dallas Mar. 30, 2020, no pet.) (mem. op.). An enforceable contract must address all of its essential and material terms with enough detail to allow a court to both determine the rights and responsibilities of the parties and confirm both sides intended to be contractually bound. *Id.*

In the trial court, SMU did not argue that the 1996 Articles lacked any of these essential elements. Rather, SMU explained that it was "aware of no court ever holding that an entity's articles of incorporation represent a contract by and between the filing entity and some external entity like [the Conference], who is neither a shareholder nor a member of SMU." We have found that no Texas appellate court has addressed the precise issue before us—whether the corporate documents of a nonprofit educational institution formed by a parental entity constitute a contract. Nevertheless, Texas courts have long held that a corporation's governing documents, such as articles of incorporation, are a contract both between the members or shareholders themselves and between the corporation on one side and individual members or shareholders on the other. *See High Rd. on Dawson v. Benevolent & Protective Ord. of Elks of the U.S., Inc.*, 608 S.W.3d 869, 880 (Tex. App.—Houston [14th Dist.] 2020, pet. denied) (bylaws of an association, whether incorporated or not, are a contract between individual members and between corporation and

members); *Shanken v. Lee Wolfman, Inc.*, 370 S.W.2d 197, 200 (Tex. App.—Houston 1963, writ ref'd n.r.e.) ("The law is well settled that both the charter of a corporation and the Business Corporation Act become a part of the contract between the shareholders.") *Overland Auto. Co. v. Cleveland*, 250 S.W. 453, 455 (Tex. App.—Dallas 1923, writ dism'd w.o.j.) ("The stockholders and the corporation between themselves must abide by the articles of association and the by-laws."). This rule recognizes the reality that the ownership and control of a corporation "often lie in different hands." *See* 5 WILLIAM M. FLETCHER ET AL., FLETCHER CYCLOPEDIA CORPS. § 2096.10. SMU may not have members, but its governing documents prior to 2019 provided that *it did have an owner*. From the time of SMU's founding to the adoption of the 2019 Amendments, the Conference was SMU's corporate parent. Under Article XII and similar provisions in earlier governing documents, SMU was established as an educational institution to be "forever owned, maintained, and controlled by" the Conference. *See, e.g.*, *SMU v. Clayton*, 176 S.W.2d 749, 749 (Tex. 1943) ("Southern Methodist University is incorporated under the laws of Texas as an institution of higher education. It is owned and maintained by the Methodist Church and is governed by a board of trustees elected by subordinate bodies of the church.").

In the trial court, SMU argued that a nonprofit corporation cannot be owned by anyone. Although SMU does not reurge that argument on appeal, it makes a similar argument: that the Conference has no vested rights in the 1996 Articles. We

reject both arguments. Section 22.151 of the TBOC authorizes a nonprofit corporation to "issue a certificate, card, or other instrument evidencing membership rights, voting rights, or *ownership rights* as authorized by the certificate of formation or bylaws." *See id.* § 22.151 (emphasis added). Similarly, § 22.257 authorizes a nonprofit corporation to adopt a "plan of exchange" pursuant to Chapter 10 of the TBOC. *See id.* § 22.257(a). Chapter 10 authorizes an "interest exchange," which is defined as "the acquisition of an ownership or membership interest in a domestic entity" not including "a merger or conversion." *See id.* §§ 10.051 (authorizing interest exchanges), 1.002(41) (defining "interest exchange"). In enacting the TBOC, the Legislature clearly contemplated that nonprofit corporations could have owners. Therefore, as SMU's corporate parent, the Conference was entitled to, and did, reserve control rights in SMU's articles of incorporation. *See* TEX. BUS. ORGS. CODE ANN. § 22.207. We will construe those rights under contract principles in the same manner as we would the rights of members or shareholders suing a corporation for breach of its charter. *See High Rd. on Dawson*, 608 S.W.3d at 880; *Shanken*, 370 S.W.2d at 200; *Overland Auto. Co.*, 250 S.W. at 455.

The Conference attached the 1996 Articles to its second amended petition and asserted that they "represent a legally binding contract between SMU and [the Conference]."[19] The 1996 Articles bear the signature of Dr. Gerald Turner, SMU's

[19] Alternatively, the Conference asserted that it was a third-party beneficiary of the 1996 Articles. Because we conclude that the 1996 Articles constituted a valid contract between the Conference and SMU, we need not reach the third-party-beneficiary issue.

President. Article II of the 1996 Articles amended a provision of SMU's prior articles of incorporation relating to Board members' term limits. Article III then provides that:

> Each such amendment made by these [1996 Articles] has been effected in conformity with the provisions of the Texas Non-Profit Corporation Act and such [1996 Articles] were affirmatively authorized and approved by an authorized agency of the [Conference] in accordance with Article XII of the Articles of Incorporation of [SMU], w[ere] duly adopted at a meeting of the Board of Trustees held on May 20, 1994, and received the vote of the majority of the Board of Trustees in office, there being no members having voting rights in respect thereof.

This article sets forth the historical facts of the 1996 Articles' adoption. As such, it is similar to recitals contained in other contracts. *See AmeriPath, Inc. v. Hebert*, 447 S.W.3d 319, 331 (Tex. App.—Dallas 2014, pet. denied) (explaining that a recital is preliminary statement in a contract or deed explaining the reasons for entering into it or the background of the transaction, showing the existence of particular facts). We may look to recitals to determine the proper construction of the contract and the parties' intent. *Id.* Article II shows that SMU proposed an amendment, the Conference approved it, and SMU adopted it. For the purposes of Rule 91a, this is sufficient to show that there was an offer, acceptance, meeting of the minds, and mutual assent.

The 1996 Articles also assigned the parties' rights and responsibilities. Along with the Conference's right to approve any amendments to the articles, it also had the right to elect members to SMU's Board of Trustees, to fill any vacancies, and to remove trustees for cause. The Board, on the other hand, had the right to "create an

executive committee and any other committees necessary and convenient for the conduct of [SMU's] business and affairs." The Board also had the right to adopt bylaws for SMU's governance and the right to control SMU's real property, subject to the Conference's approval only if SMU intended to convey the property to another party. These provisions are sufficient to establish mutual obligations and hence adequate consideration. *See Tex. Gas Utils. Co. v. Barrett*, 460 S.W.2d 409, 412 (Tex. 1970) ("[W]here no other consideration is shown, mutual obligations by the parties to the agreement will furnish a sufficient consideration to constitute a binding contract.").

We conclude that the Conference's pleadings sufficiently alleged that the 1996 Articles constitute a binding contract between the Conference and SMU, and the trial court erred to the extent it granted dismissal on this ground.

2. Pleading Defects

SMU next argues that the Conference's contract claims were properly dismissed due to defects in the Conference's pleadings. Specifically, SMU asserts that the Conference failed to plead that (1) the 1996 Articles were supported by adequate consideration and (2) the Conference performed its obligations consistent with its fiduciary duties to SMU.[20] On appeal, SMU argues that we must affirm

[20] In the trial court, the Conference responded by arguing that pleading defects were properly a matter to be resolved by special exception, not a Rule 91a motion to dismiss. *See Royale*, 2019 WL 4126600, at *4 ("[Rule 91a] is not a substitute for special exception practice under rule 91 or summary judgment practice under rule 166a, both of which come with protective features against summary dispositions on the merits."). The Conference has abandoned that argument on appeal.

because the Conference failed to address either of these grounds for dismissal. *See Buholtz*, 2019 WL 3940973, at *3 (appellant must challenge every potential ground on which the trial court could have granted dismissal under Rule 91a).

Waiver. We first address SMU's waiver argument. Under our briefing rules, an appellant "must state concisely all issues or points presented for review." TEX. R. APP. P. 38.1(f). "The statement of an issue or point will be treated as covering every subsidiary question that is fairly included." *Id.* We must construe briefs "reasonably, yet liberally, so that the right to appellate review is not lost by waiver." *Perry v. Cohen*, 272 S.W.3d 585, 587 (Tex. 2008) (per curiam). We should "reach the merits of an appeal whenever reasonably possible." *Id.*

The Conference stated its third issue as follows: "Whether the trial court reversibly erred in granting SMU's Rule 91a motion to dismiss the Conference's breach of contract claim because the Conference pled credible facts giving rise to a viable claim under applicable law?" In the arguments section of its brief related to this issue, the Conference listed the elements required for contract formation and provided record citations supporting the elements. The Conference argued that its pleaded facts "are credible and, when taken as true, establish the requisite elements of a contract."

Construing the Conference's brief liberally, we conclude that it adequately addressed the pleading-defect grounds asserted by SMU. A party's argument that it pleaded everything it was required to plead necessarily includes a subsidiary

argument that the party was not required to plead anything else. *See* TEX. R. APP. P. 38.1(f). Implicit in the Conference's argument that it adequately pleaded "the requisite elements of a contract" is a rejection of SMU's position that it should have pleaded two additional elements. We therefore decline to affirm on the basis that the Conference failed to address every potential ground for dismissal. We now turn to the merits of this issue—i.e., whether the Conference was in fact required to plead those additional elements.

Consideration. In its live pleadings, the Conference did not allege that the 1996 Articles were supported by adequate consideration. SMU sought dismissal on this ground and cited *Beddingfield v. Beddingfield* in support. No. 10-15-00344-CV, 2018 WL 6378553, at *3–4 (Tex. App.—Waco Dec. 5, 2018, pet. denied) (mem. op.). In *Beddingfield*, the plaintiff oddly alleged that a certain act by the defendant constituted both the offer to form a contract and the breach of that same contract. *See id.* at *3. The court affirmed the trial court's Rule 91a dismissal, explaining that even if the plaintiff's allegations were taken as true, the defendant would have "breached a not-yet-formed unilateral contract." *Id.* Although the court did discuss consideration as an element of a valid contract, it did not base its ruling on the plaintiff's failure to plead that element. *See id.* at *3–4. *Beddingfield* is inapposite.

SMU offers no other authority, nor have we found any, that Texas law requires a plaintiff to plead consideration in a breach-of-contract claim. On the contrary, courts have generally held that a plaintiff is not required to plead consideration when

suing on a written contract. *See Kuhn, Collins & Rash v. Reynolds*, 614 S.W.2d 854, 858 (Tex. App.—Texarkana 1981, writ ref'd n.r.e.); *Hayes v. Bouligny*, 420 S.W.2d 800, 802 (Tex. App.—Corpus Christi–Edinburg 1967, no writ). In *Reynolds*, the court held that a plaintiff does not need to allege consideration because lack or failure of consideration is generally a defensive matter. *Reynolds*, 614 S.W.2d at 858. The court explained: "In a suit on a written contract only the contract needs to be plead [*sic*]. The burden is on a defendant to deny under oath and then prove lack of consideration." *Id.*; *see* TEX. R. CIV. P. 93 (requiring defenses of lack or failure of consideration, among others, to be verified). The *Hayes* court reached the same conclusion under a different rationale. "Since a written contract imports a consideration it is not necessary to plead consideration." *Hayes*, 420 S.W.2d at 802. We agree with both rationales and conclude that a plaintiff who sues on a written contract is not required to plead consideration. To the extent the trial court based its dismissal of the Conference's breach-of-contract claim on this ground, we conclude it erred.

Performance. In its second amended petition, the Conference alleged that it "performed its duties under the 1996 Articles." SMU argues that this was insufficient and the Conference was required to plead not merely that it performed its contractual duties but did so *in compliance with its fiduciary duties* to SMU. SMU derives this pleading requirement from three distinct lines of cases. The first line of cases holds that substantial or excessive control by one entity over another is a factor that may

support the imposition of a fiduciary duty. *See, e.g.*, *Tenn.-La. Oil Co. v. Cain*, 400 S.W.2d 318, 325 (Tex. 1966). The second line of cases holds that a plaintiff who seeks specific performance of a contract must plead and prove that it was ready, willing, and able to perform under the contract. *See, e.g.*, *Archer v. Tregellas*, 566 S.W.3d 281, 287 n.8 (Tex. 2018). And the third line of cases holds that, where a party owes both contractual and fiduciary duties to another, its "contractual rights must be exercised in a manner consistent with fiduciary duties." *See CBIF Ltd. P'ship v. TGI Friday's Inc.*, No. 05-15-00157-CV, 2017 WL 1455407, at *15 (Tex. App.—Dallas Apr. 21, 2017, pet. denied) (mem. op.). Relying on the first line of cases, SMU argues that under the Conference's own theory of the case, it owed SMU fiduciary duties because it alleged that the 1996 Articles entitle it to control SMU. Based on the second line of cases, SMU argues that the Conference was required to plead that it performed under the 1996 Articles because the Conference seeks specific performance in this lawsuit. And based on the third line of cases, SMU argues that the Conference was required to plead that its performance under the 1996 Articles was in compliance with its fiduciary duties to SMU.

We reject the last argument. Our opinion in *CBIF* was not based on a pleading defect. The relevant issue in that case was whether the trial evidence was legally sufficient to support the jury's verdict that the defendant breached its fiduciary duty to the plaintiff. *See id.* The defendant argued that the evidence was insufficient as a matter of law because its complained-of conduct complied with the parties' contract.

See id. We rejected that argument, explaining that "contractual rights do not 'operate to the exclusion of fiduciary duties.'" *See id.* (quoting *Fleming v. Kinney ex rel. Shelton*, 395 S.W.3d 917, 924 (Tex. App.—Houston [14th Dist.] 2013, pet. denied)). The rule from *CBIF* is simply this: where contractual and fiduciary duties overlap, a defendant cannot breach the latter and avoid liability for that breach merely because it did not breach the former. *See id.* That is a defensive matter.

Plaintiffs are generally required to plead the elements of their own claims. When a plaintiff requests specific performance, it must plead that it was ready, willing, and able to perform because that is an essential element of the remedy the plaintiff seeks. *See DiGiuseppe v. Lawler*, 269 S.W.3d 588, 595 (Tex. 2008). It may well be that a plaintiff who seeks specific performance is not entitled to that remedy because it previously breached a fiduciary duty to the defendant. But that is an issue the defendant would have to raise. Our rules generally do not require plaintiffs to anticipate and negate defenses in their pleadings. *See City of Houston v. Socony Mobil Oil Co.*, 421 S.W.2d 427, 431 (Tex. App.—Houston [1st Dist.] 1967, writ ref'd n.r.e.) ("It is not incumbent upon the plaintiff to incorporate in his pleading allegations which negative the affirmative defense.").

We conclude the Conference was not required to plead that it complied with its fiduciary duties[21] to SMU in order to maintain its breach-of-contract claim and to obtain specific performance and the trial court erred to the extent it held otherwise.

3. Damages

SMU's next ground for dismissal is that the Conference could not have suffered damages from SMU's purported breach. The Conference argues that it was not required to plead and prove damages because it sought specific performance instead. We agree with the Conference.

Specific performance is an equitable remedy that may be awarded upon a showing of breach of contract. *See DiGiuseppe*, 269 S.W.3d at 593; *Stafford v. S. Vanity Mag., Inc.*, 231 S.W.3d 530, 535 (Tex. App.—Dallas 2007, pet. denied). Specific performance is not a separate cause of action, but rather an equitable remedy used as a substitute for monetary damages when such damages would not be adequate. *Stafford*, 231 S.W.3d at 535. A contract will not be specifically enforced if there is an adequate remedy at law. *Id.* However, specific performance may be awarded when the personal property has a "special, peculiar, or unique value or character." *Id.* For example, specific performance is available in a suit for breach of a stock purchase agreement when the corporation is closely held and the stock has no market value. *See id.* (citing *Miga v. Jensen*, 96 S.W.3d 207, 217 (Tex. 2002));

[21] Our conclusion should not be read to imply that the Conference did in fact owe fiduciary duties to SMU.

see also, e.g., *Bendalin v. Delgado*, 406 S.W.2d 897, 900 (Tex. 1966) (plaintiff could seek specific performance to enforce stock purchase agreement where corporation was closely held and stock had no market value).

In its second amended petition, the Conference asserted that it suffered irreparable harm by SMU's breach of the 1996 Articles. The Conference alleged its resulting loss of "all of its valuable rights provided in the 1996 Articles" could not "be fully compensated by an award of actual damages." Accordingly, the Conference requested that the trial court enter an order "requiring SMU to specifically perform all executory obligations" under the 1996 Articles.

We conclude that these statements were sufficient to state a request for specific performance as an alternative to actual damages and the trial court erred to the extent it dismissed the Conference's breach-of-contract claim on this ground.

4. Summary

We conclude the Conference adequately pleaded a claim for breach of contract and entitlement to the remedy of specific performance. We sustain the Conference's third issue and reverse the trial court's judgment as to this claim.

C. Breach of Fiduciary Duty

In its fourth issue, the Conference asserts that the trial court erred in dismissing the Conference's claim for breach of fiduciary duty. SMU argues that dismissal was appropriate because the Conference's pleadings failed to allege facts

sufficient to show SMU owed any fiduciary duties to the Conference. We agree with SMU.

To prevail on a claim for breach of fiduciary duty, the plaintiff must show that (1) it enjoyed a fiduciary relationship with the defendant, (2) the defendant breached its fiduciary duty, and (3) the breach injured the plaintiff or benefitted the defendant. *Jones v. Blume*, 196 S.W.3d 440, 447 (Tex. App.—Dallas 2006, pet. denied). A fiduciary relationship may be formal or informal. *Id*. Fiduciary duties arise as a matter of law in certain formal relationships, such as attorney–client, principal–agent, partnership, and trustee relationships. *Id.*; *Smith v. Deneve*, 285 S.W.3d 904, 911 (Tex. App.—Dallas 2009, no pet.).

Fiduciary duties may also arise out of informal relationships involving a high degree of trust and confidence, whether the relationship is a moral, social, domestic, or purely personal one. *Jones*, 196 S.W.3d at 447; *Mims-Brown v. Brown*, 428 S.W.3d 366, 376 (Tex. App.—Dallas 2014, no pet.) (citing *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 177 (Tex. 1997)). However, not every relationship involving a high degree of trust and confidence rises to the stature of a fiduciary relationship. *Schlumberger Tech. Corp.*, 959 S.W.2d at 176–77. In order to give full force to contracts, Texas courts do not lightly create fiduciary relationships. *Id.* "Accordingly, while a fiduciary or confidential relationship may arise from the circumstances of a particular case, to impose such a relationship in a

business transaction, the relationship must exist prior to, and apart from, the agreement made the basis of the suit." *Id.*

Here, the Conference asserts that SMU owes it fiduciary duties arising from: (1) the 1922 Deed conveying SMU's campus property, which the Conference asserts created a trust relationship between the parties; and (2) SMU's January 1924 Board resolution, in which SMU made an election under what is now § 2.102 of the TBOC. We address each claim in turn.

1. The 1922 Deed

The parties dispute whether the 1922 Deed creates a trust relationship between the parties. The construction of a trust is a question of law. *See Paschall v. Bank of Am., N.A.*, 260 S.W.3d 707, 710 (Tex. App.—Dallas 2008, no pet.). To determine whether an instrument creates trust relationship, we consider the settlor's intent according to the four corners of the instrument. *Id.* If the language of the instrument is unambiguous, we need not construe the instrument because it speaks for itself. *Id.*

The property conveyed under the 1922 Deed included the Daniels Tract and the Armstrong Tract. The Daniels tract was previously owned by two families who conveyed it via warranty deed to individuals named as trustees for the Conference. The Armstrong tract was previously owned by Alice Armstrong, who conveyed it via deed of gift to SMU's Board of Trustees. In 1914, SMU conveyed the Armstrong tract to the Educational Commission of the Conference. Thus, by 1917, the Conference had title to both tracts. In May 1922, the Conference met in Hot Springs,

Arkansas, and determined that "it is proper and desirable that the legal title to [the two tracts] should be vested in" SMU's Board of Trustees. To that end, the Conference resolved that its Educational Commission "is hereby authorized and directed to convey to [SMU's Trustees] and their successors said two tracts of land[.]" The Conference resolved that the form of the 1922 Deed "is approved and when executed by the members of said Educational Commission or a majority of them, the legal title to said land shall be vested in [SMU's Trustees], subject to the authority of the [Conference]." Over the next month, individual members of the Educational Committee executed the 1922 Deed, thus conveying the two tracts to SMU's Trustees and their successors

> for the use of said [SMU] and its successors forever to be used, held, maintained and disposed of for educational purposes *according to the Discipline and usages of the Methodist Episcopal Church South as from time to time shall be authorized and determined by the General Conference of said Church.*

(Emphasis added).

The Conference asserts that the italicized language in the previous sentence creates a trust relationship. The Conference further argues that because the deed conveyed merely "legal title" to the campus, the Conference retained a beneficial interest in the campus. SMU argues that the plain language of the deed indicates an intent that SMU's Trustees hold the campus property in trust for the benefit of SMU, not the Conference. We agree with SMU. A person owns an "equitable interest" in property by virtue of an equitable title or claim on equitable grounds, such as the

interest held by a trust beneficiary. *Longoria v. Lasater*, 292 S.W.3d 156, 165 (Tex. App.—San Antonio 2009, pet. denied). On the other hand, a "legal interest" is an interest recognized by law, such as legal title. *Id.* "Equitable title" is a title that indicates a beneficial interest in property and that gives the holder the right to acquire formal legal title. *Id.* "Legal title" is a title that evidences apparent ownership but does not necessarily signify full and complete title or a beneficial interest. *Id.*

The 1922 Deed conveys the two tracts to SMU's Trustees "for the use of" SMU. Language in a deed conveying property "for the use of" a person or class of persons is generally construed as expressing an intent to create a trust in which that person or class of persons is the beneficiary. *See Merriman v. Russell*, 39 Tex. 278, 282 (1873); *see also* RESTATEMENT (THIRD) OF TRUSTS § 13, cmt. b (2003) (phrases such as "for the use of B" and "for the benefit of B" indicate that the settlor intends the property be held in trust for B). Therefore, the unitalicized portion of the above language expresses that the campus property is to be held in trust for SMU, not the Conference. Conversely, the italicized language above imposes a limitation on how the conveyed property is to be used by the grantee and is therefore a restrictive covenant. *See Voice of Cornerstone Church Corp. v. Pizza Prop. Partners*, 160 S.W.3d 657, 668 (Tex. App.—Austin 2005, no pet.) (considering whether use of property for church purposes violated deed restriction limiting property to commercial or industrial use); *Tarrant Appraisal Dist. v. Colonial Country Club*, 767 S.W.2d 230, 235 (Tex. App.—Fort Worth 1989, writ denied) (construing deed

restriction that restricted the use of land for recreational purposes). The Conference cites no authority, nor have we found any, supporting its position that a deed conveying property subject to a use restriction automatically creates a trust relationship between the grantor and grantee.

We conclude that the 1922 Deed conveyed legal and equitable title to SMU, did not create a trust relationship between SMU and the Conference, and therefore cannot support the imposition of fiduciary duties on SMU.

2. The Conference's "Chapter 81" Election

The Conference next contends that a trust relationship exists by virtue of a resolution made by SMU's Board of Trustees in 1924, in which SMU made its "Chapter 81" election. "Chapter 81" refers to the 1923 Act under which, as we previously discussed, the Legislature enacted the predecessor to § 22.207 of the TBOC. *See* Act of March 19, 1923, 38th Leg., R.S., ch. 81, § 1, 1923 Tex. Gen. Laws 171, *codified at* TEX. REV. CIV. STAT. ANN. art. 1408 (Vernon 1925), *repealed and recodified at* TEX. REV. CIV. STAT. ANN. art. 1396–2.14, § B *by* Act of April 27, 1959, 56th Leg., R.S., ch. 162, 1959 Tex. Gen. Laws 294 (current version at TEX. BUS. ORGS. CODE ANN. § 22.207(a)). In the same Act, the Legislature enacted what is now § 2.102 of the TBOC. *See* TEX. BUS. ORGS. CODE ANN. § 2.102. As originally enacted, the statute read:

> Any religious, charitable, educational, or eleemosynary institution so organized under the laws of this State may acquire, own, hold, mortgage, and dispose of and invest its funds in property, real and personal in furtherance of the purposes of its organization, within the

> State of Texas, for the use and benefit of, under the discretion of and in trust for such electing, controlling, and parent body; provided that this Act shall not apply to corporations organized for pecuniary benefit, and provided further that any such board or association heretofore incorporated may accept the benefits of this Act by filing with the Secretary of State its written acceptance thereof, duly executed by a majority of its board of trustees, within one year from the passage of this Act.

See Act of March 19, 1923, 38th Leg., R.S., ch. 81, § 2, 1923 Tex. Gen. Laws 171. On January 24, 1924, SMU's Board of Trustees adopted a resolution stating that the Board "does hereby accept the benefits of said Act in accordance with the terms thereof." SMU filed this resolution with the Secretary of State on March 15, 1924.

The Conference argues that SMU, accepting of the benefits of the Act in writing—i.e., its "Chapter 81 election"— placed its property in trust for the use and benefit of the Conference. We disagree. Chapter 81 was enacted at a time when corporate ownership of land was statutorily restricted. *See Campbell v. Hood*, 35 S.W.2d 93, 94 (Tex. Comm'n App. 1931, holding approved) ("For many years it has been the established policy of our state to prohibit corporations, with certain exceptions, from acquiring land."). Corporations could own land only when authorized by statute. *See id.* (citing TEX. REV. CIV. STAT. ANN. art. 1359 (Vernon 1925) (authorizing corporate ownership of land "necessary to enable such corporation to do business in this State")). Thus, when the Legislature enacted Chapter 81, authorizing religious groups to establish nonprofit corporations, it included a section governing the authority of such corporations to hold land in trust for their corporate parents. That authority is what is referred to by the phrase

"benefits of this Act."[22] Contrary to the Conference's argument, nothing in the statutory text suggests that the status of property already held by a nonprofit corporation would change by virtue of accepting such benefits.

Nothing in the Conference's pleadings or the documents attached to them under Rule 59 suggest that SMU took any steps to exercise its authority under Chapter 81 to place its campus property in trust for the Conference. Indeed, both before and after SMU made its Chapter 81 election, its charter provided that "[t]he real estate of the corporation shall be subject to the control of the Board of Trustees."[23] Although the Board's right to convey the campus property by sale or lease was subject to approval by the Conference, there is no provision in the charter suggesting that the property was held by SMU for the Conference's benefit.

We conclude that SMU's Chapter 81 election in 1924 did not transform the status of the property conveyed by the 1922 Deed into a trust and therefore could not form the basis of a claim for breach of fiduciary duty.

3. Summary

We conclude the Conference's pleadings failed to state facts sufficient to show a fiduciary relationship existed between itself and SMU. We overrule the

[22] Indeed, when the Legislature reorganized the entire Code two years later, it removed the requirement to file an election with the Secretary of State. *See* TEX. REV. CIV. STAT. ANN. art. 1409 (Vernon 1925), current version at TEX. BUS. ORGS. CODE ANN. § 2.102. In other words, the filing requirement was in place for two years, after which the "benefits of this Act" became self-executing—nonprofit corporations could own land in trust for their corporate parents without expressly making the election in writing. *See id.*

[23] This language was included in SMU's 1921 Charter, and it remained substantially unchanged through subsequent revisions to SMU's governing documents. *See supra*, n.3 (same provision in 1996 Articles).

Conference's fourth issue and affirm the trial court's dismissal of the Conference's claim for breach of fiduciary duty.

D. Promissory Estoppel

In its fifth issue, the Conference asserts that the trial court erred in dismissing its alternative claim for promissory estoppel. Although promissory estoppel is normally a counter-defensive theory, it is an available cause of action to a promisee who relied to his detriment on an otherwise unenforceable promise. *Blackstone Med., Inc. v. Phoenix Surgicals, L.L.C.*, 470 S.W.3d 636, 655 (Tex. App.—Dallas 2015, no pet.). Generally, promissory estoppel is a viable alternative to breach of contract. *Id.* The promissory-estoppel doctrine presumes that no contract exists. *Id.* Although promissory estoppel is not applicable to a promise covered by a valid contract between the parties, promissory estoppel will apply to a promise outside a contract. *Id.*

As we have determined that the 1996 Articles constitute a valid contract between the Conference and SMU, the issue of whether the Conference stated a valid claim for promissory estoppel is moot. Therefore, we affirm the trial court's order dismissing this claim.

E. TBOC § 4.007 Claim

In its sixth issue, the Conference complains that the trial court erred in granting summary judgment on its claim under TBOC § 4.007. We note at the outset that this appears to be an issue of first impression as we have found no other Texas

appellate cases construing § 4.007 or its predecessor statute.[24] We are not without guidance, however. Several other statutes are substantially similar, and in some cases nearly identical, to § 4.007. Where necessary, we look to them for guidance. *See Sultan v. Mathew*, 178 S.W.3d 747, 749 (Tex. 2005) (cases addressing similar language in different statutes are instructive).

Section 4.007 of the TBOC provides, in relevant part, that:

> (a) A person may recover damages, court costs, and reasonable attorney's fees if the person incurs a loss and:
>
> (1) the loss is caused by a:
>
> (A) forged filing instrument[25]; or
>
> (B) filed filing instrument that constitutes an offense under Section 4.008; or
>
> (2) the person reasonably relies on:
>
> (A) a false statement of material fact in a filed filing instrument; or
>
> (B) the omission in a filed filing instrument of a material fact required by this code to be included in the instrument.

[24] The predecessor to TBOC § 4.007 was § 2.08 of the Texas Revised Limited Partnership Act. *See* Act of April 14, 1987 (S.B. 563), 70th Leg., R.S., ch. 49, § 1, 1987 Tex. Gen. Laws 92–121 (expired Jan. 1, 2010). Thus, civil liability for filing a false instrument with the Secretary of State attached only in the case of limited partnerships. In 2003, the Legislature extended that liability to all other entity types when it codified the various entity acts into a single code. *See* House Comm. On Bus. & Indus., Bill Analysis, Tex. H.B. 1156, 78th R.S. (2003) ("The bill would change some liability provisions for entities. One change would extend the civil remedy for filing a false or misleading document with the Secretary of State to include all entity types under the new code.")

[25] The TBOC defines a "filing instrument" as "an instrument, document, consent, or statement that is required or authorized by this code to be filed by or for an entity with the filing officer in accordance with Chapter 4." TEX. BUS. ORGS. CODE ANN. § 1.002(23). There is no dispute that SMU's certificate of amendment is a filing instrument.

TEX. BUS. ORGS. CODE. ANN. § 4.007(a). The Conference pleaded its claim under § 4.007(a)(1)(B), which incorporates elements from the criminal offense in § 4.008. Section 4.008 makes it a Class A misdemeanor for a person to "sign[] or direct[] the filing of a filing instrument that the person knows is materially false with intent that the filing instrument be delivered on behalf of an entity to the secretary of state for filing." *Id.* § 4.008(a). The offense is enhanced to a state-jail felony if "the actor's intent is to defraud or harm another." *Id.* § 4.008(b).

We discern from the statutory text that the elements of a § 4.007(a)(1)(B) claim are: (1) the defendant signs or directs the filing of a filing instrument; (2) the instrument is materially false; (3) the defendant knows the instrument is materially false; (4) the defendant intends that (a) the instrument be delivered to the Secretary of State on behalf of the filing entity or (b) to defraud or harm another; and (5) the filed instrument causes the plaintiff to suffer a loss. *Id.* §§ 4.007(a)(1)(B), 4.008(a). To show entitlement to summary judgment, SMU had to conclusively negate one of these elements or conclusively prove every element of an affirmative defense. *Ward*, 443 S.W.3d at 342.

In its live pleading before summary judgment, the Conference alleged that SMU and Paul Ward violated § 4.007 by filing a certificate of amendment with the Secretary of State that contained the following statements:

Statement of Approval

> The amendments to the certificate of formation have been approved in the manner required by the Texas Business Organizations Code and by the governing documents of the entity.
>
> . . . .
>
> The [2019 Amendments] were authorized and approved by the Board of Trustees of [SMU] who were elected by the [Conference]. No additional authorization or approval by the [Conference] has been provided as none is required or permitted pursuant to Section 22.107(a) of the [TBOC]. Based on the foregoing and on the advice of independent legal counsel, the undersigned certifies that this Certificate of Amendment is in accordance with the [TBOC] and [SMU's] Restated Articles of Incorporation.

The Conference alleged that these statements were materially false because SMU did not comply with its governing documents and the Conference's prior approval was required under the 1996 Articles. As evidence of SMU's knowledge of the falsity, the Conference relied on the following statement from the 1996 Articles:

> The amendment set forth in Article Two above was affirmatively authorized and approved by an authorized agency of the [Conference] at a meeting held on May 9, 1995 in accordance with Article XII of the Restated Articles of Incorporation of Southern Methodist University[.]

The Conference pointed out that the 1996 Articles were signed by SMU's president, Dr. Gerald Turner, who continued as SMU's president through the passing of the 2019 Amendments. Therefore, the argument posits, SMU knew it was false to say that the 2019 Amendments had been approved in the manner required by SMU's governing documents because SMU's president knew that the Conference had approval power over any amendments and had been denied the opportunity to give its approval.

SMU moved for summary judgment on this claim on three grounds: (1) the Conference suffered no damages as a result of the filing; (2) the above statements were legal opinions and thus could not form the basis of a § 4.007 claim; and (3) the statements were true because 1996 Articles elsewhere provide that the Conference could delegate its approval power over amendments to another entity and had in fact delegated it to SMU. The trial court granted summary judgment against the Conference on this claim without stating which of these three grounds it relied on. We address each ground in turn.

1. Damages

In the first ground, SMU argues that § 4.007 requires proof of a pecuniary loss and that the Conference's claimed losses—of a controlling interest in a nonprofit corporation, of equitable title to real property, of charitable donations, and attorney's fees—were either nonpecuniary or not a loss the Conference suffered. We construe this as an attack on the fifth element of a § 4.007 claim—that the filing instrument caused the plaintiff to suffer a loss.

As a threshold matter, we disagree with SMU's contention that § 4.007 requires proof of a pecuniary loss. When the Legislature creates a statutory cause of action, we look to the statute itself to determine what remedies are available to the plaintiff. *See In re Xerox Corp.*, 555 S.W.3d 518, 527 (Tex. 2018) (orig. proceeding) (plain language of statute authorized civil penalty, as distinguished from damages); *In re Nalle Plastics Fam. Ltd. P'ship*, 406 S.W.3d 168, 171 (Tex. 2013) (orig.

proceeding) (phrase "actual damages" precluded recovery of attorney's fees); *Azar Nut Co. v. Caille*, 734 S.W.2d 667, 668 (Tex. 1987) (phrase "reasonable damages" in workers' compensation statute allowed award of punitive damages). Here, the statute authorizes recovery of "damages" if the plaintiff has suffered a "loss." *See* TEX. BUS. ORGS. CODE ANN. § 4.007(a). It contains no limitation on the type of damages that may be recovered or losses that must be incurred to trigger its application. Absent clear legislative intent to the contrary, we cannot construe § 4.007 to limit the types of damages that a plaintiff may recover. *Lee v. City of Houston*, 807 S.W.2d 290, 294–95 (Tex. 1991) ("A court may not judicially amend a statute and add words that are not implicitly contained in the language of the statute.").

Our conclusion is bolstered by § 4.008, the plain language of which provides further insight into the Legislature's intent. Under § 4.008, a person commits a Class A misdemeanor by filing an instrument the person knows is materially false if the person intends that the instrument be delivered for filing, and the offense is elevated to a state-jail felony if the person's intent is to defraud or harm another. TEX. BUS. ORGS. CODE ANN. § 4.008. The Penal Code definition for harm[26] is "anything reasonably regarded as loss, disadvantage, or injury, including harm to another person in whose welfare the person affected is interested." TEX. PENAL CODE ANN.

[26] The definitions in Title 1 of the Penal Code apply to offenses in other codes. *See* TEX. PENAL CODE ANN. § 1.003 ("The provisions of [Penal Code] Titles 1, 2, and 3 apply to offenses defined by other laws, unless the statute defining the offense provides otherwise[.]").

§ 1.007(a)(25). The Legislature thus recognized that the filing of false instruments can cause more than just financial harm. *See Halay v. State*, No. 03-07-00327-CR, 2008 WL 5424095, at *1 (Tex. App.—Austin Dec. 31, 2008, no pet.) (mem. op., not designated for publication) (concluding that offense of filing a false financial instrument under § 37.101, the language of which is substantially similar to TBOC § 4.008, did not require showing of intent to cause only financial harm because statutory definition of harm included emotional harm and aggravation).

Seelbach, which SMU relies on for its position, is inapposite. The issue there was whether the plaintiff suffered actual damages as a result of the defendant's interference with the plaintiff's real property. *See Seelbach v. Clubb*, 7 S.W.3d 749, 759 (Tex. App.—Texarkana 1999, pet. denied). The court concluded that the plaintiff failed to show a pecuniary loss because none of his evidence of damages comported with the proper measure of damages available under the cause of action he asserted. *See id.* at 759–60. SMU relies on this statement in the *Seelbach* court's analysis: "[T]o recover actual damages, the plaintiff must prove that he suffered an actual pecuniary loss by reason of the defendant's wrong." *Id.* at 760. This statement must be understood not as a general legal proposition, but in light of the type of claim at issue in *Seelbach*, which was indeed pecuniary.[27] Under Texas law,

[27] We note that the *Seelbach* court cited Texas Jurisprudence, Third Edition – Damages § 9 as the source of the quote. *See* 28 TEX. JUR. 3d Damages § 9. In turn, the encyclopedia authors cited our opinion in *R. G. McClung Cotton Co. v. Cotton Concentration Co.* for the proposition. *See* 479 S.W.2d 733, 737 (Tex. App.—Dallas 1972, writ ref'd n.r.e.). There, we said that the "general principle of damages is compensation to plaintiff for his actual loss resulting from defendant's wrong." We did not use the word "pecuniary" in

compensatory damages provide a pecuniary remedy for both pecuniary and non-pecuniary losses. *See Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill, Inc.*, 434 S.W.3d 142, 153 (Tex. 2014). To require evidence of pecuniary losses in all cases merely because the remedy is pecuniary would be to "confuse the character of the *harm* with that of the *remedy*." *See id.* at 152–53 (emphasis in original).

We conclude that a plaintiff asserting a claim under TBOC § 4.007(a)(1)(B) is not limited in recovery of its damages to pecuniary losses. The Conference provided more than a scintilla of evidence that it incurred a loss as a result of SMU filing the certificate of amendment, namely its controlling interest in SMU. The Conference thus showed it was entitled to damages under § 4.007. We now consider whether summary judgment was appropriate as to each category of "damages" at issue. We have already determined *supra*, at Section (C), that the Conference has no legal or equitable title to the SMU campus under its claim of fiduciary duty and therefore affirm summary judgment on that theory of recovery. We address the remaining three in turn.

Loss of Controlling Interest. SMU argues that the Conference cannot recover damages for loss of its controlling interest in SMU because a person cannot have a monetary interest in a nonprofit organization. *See* TEX. BUS. ORGS. CODE

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that sentence or elsewhere in the opinion. *See generally id.* The encyclopedia authors may have added the word based on the next sentence of the opinion, in which we "appl[ied] this principle to claims" of the type at issue in the case, which were certainly pecuniary. *See id.* at 737 (discussing the measure of damages for a decline in market value of 8,485 bales of cotton during the period of delay by the defendant in weighing and sampling the cotton).

ANN. § 22.053 (providing that no dividends may be paid to or income distributed to a nonprofit organization's members, directors, or officers). We disagree. That a person with an interest in a nonprofit is barred from collecting dividends or distributions does not render the interest valueless. An ownership interest in a nonprofit corporation can be exchanged, even if the corporation has no members. *See id.* § 22.257 (providing that a nonprofit corporation may create a plan of exchange, subject to board approval if the corporation has no members); *see also id.* § 1.002(41) (defining "interest exchange" as "the acquisition of an ownership or membership interest in a domestic entity" under chapter 10 of the TBOC). We see nothing in the TBOC that prohibits payment of money for an ownership interest in a nonprofit. *See id.* §§ 10.051–.052 (listing requirements for a plan of exchange, including any terms and conditions of the exchange). We conclude the trial court erred to the extent it granted summary judgment on this theory of damages.

Loss of Charitable Donations. SMU's sole argument against the Conference's alleged loss of charitable donations is that the claim is speculative. However, SMU's motion for summary judgment never put that issue before the trial court. In the motion, SMU argued only that the Conference was precluded as a matter of law from recovering monetary damages ostensibly because a person cannot have a financial interest in a nonprofit. The Conference responded that SMU misconstrued § 4.007 and misstated the law on damages. The Conference then explained that it had, in fact, suffered damages and supported that assertion with the declaration of

Bishop Gary Mueller, who testified that SMU's attempted dissociation from the Conference will have adverse effects, including loss of charitable donations.[28] Thus, the issue before the trial court was whether the damages alleged by the Conference were precluded as a matter of law, not whether there was sufficient evidence to support them.

To be sure, questions of statutory interpretation are appropriate for summary judgment. *See City of Dallas v. Cornerstone Bank, N.A.*, 879 S.W.2d 264, 269 (Tex. App.—Dallas 1994, no writ). But the nonmovant does not need to respond with evidence creating a fact issue if there are deficiencies in the movant's own proof or legal theories that defeat the movant's right to judgment as a matter of law. *Stovall & Assocs., P.C. v. Hibbs Fin. Ctr., Ltd.*, 409 S.W.3d 790, 795 (Tex. App.—Dallas 2013, no pet.). Here, SMU moved for summary judgment on a legal theory that was, as we concluded above, incorrect. Therefore, the Conference was not required to present evidence to defeat this ground, and it is immaterial whether the evidence it did submit was speculative. We conclude the trial court erred to the extent it granted summary judgment on this theory of damages.

[28] Specifically, Bishop Mueller stated: "If the Certificate of Amendment is allowed to stand, the Conference will be losing an important platform that helps facilitate financial support for the Conference." SMU objected to this assertion under Rules of Evidence 602 and 701, arguing that the Bishop lacked foundation and personal knowledge to opine as to the speculative future loss of donations and that the Bishop was offering expert testimony that he was unqualified to give as a lay witness. In granting summary judgment, the trial court did not rule on SMU's objections. On appeal, SMU does not challenge the trial court's failure to rule on its objections.

Loss of Charitable Mission. Bishop Mueller also testified in his declaration that the 2019 Amendments prevented the Conference "from having a direct impact on SMU as a means of furthering Christian education." Unlike the Conference's other damages theories, this one cannot be determined without violating the neutral-principles doctrine. *See Masterson*, 422 S.W.3d at 608. A jury considering how much money to award a religious institution for the loss or deprivation of its Christian mission would necessarily have to hear evidence touching on ecclesiastical matters. *See El Pescador Church, Inc. v. Ferrero*, 594 S.W.3d 645, 657–58 (Tex. App.—El Paso 2019, no pet.) (claim for damages resulting from alleged conversion of tithe and other church funds could not be resolved under neutral principles methodology). We conclude the trial court had no jurisdiction to consider this theory of damages.

Attorney's Fees. SMU argues that attorney's fees are not in themselves a compensable "loss" and the Conference thus cannot recover attorney's fees absent showing entitlement to monetary damages. We need not consider whether TBOC § 4.007 entitles a plaintiff to an award of attorney's fees independently of a showing of some other monetary loss. Because the Conference has offered some evidence of a loss and entitlement to damages, it may also recoup its attorney's fees. We conclude the trial court erred to the extent it granted summary judgment on this theory of recovery.

2. Statements of Opinion

SMU's next ground for summary judgment on the Conference's § 4.007 claim is that the complained-of statements in the certificate of amendment were statements of opinion, not fact. We construe this as an attack on the second element of a § 4.007 claim—that the filing instrument is materially false.

SMU cites *Transport Insurance Co. v. Faircloth* for the proposition that "[a]n actionable representation is one concerning a material fact; a pure expression of opinion will not support an action for fraud." 898 S.W.2d 269, 276 (Tex. 1995). SMU argues that its statements in the certificate of amendment—to the effect that the amendments had been approved in a manner consistent with SMU's organizational documents—were mere legal opinions and therefore could not form the basis for a § 4.007 claim, which requires misrepresentations of *fact*. We disagree that the rule from *Faircloth* applies and, even if it does, we conclude there are fact issues regarding SMU's characterization that preclude summary judgment.

The rule from *Faircloth* applies to actions like negligent misrepresentation and fraud. *See id.*; *see also Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 337 (Tex. 2011). The elements of fraud are:

> (1) that a material representation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the speaker made the representation with the intent that the other party should act upon it; (5) the party acted in reliance on the representation; and (6) the party thereby suffered injury.

Italian Cowboy Partners, 341 S.W.3d at 337. In this context, material means that "a reasonable person would attach importance to and would be induced to act on the information in determining his choice of actions in the transaction in question." *Id.* "Pure expressions of opinion are not representations of material fact, and thus cannot provide a basis for a fraud claim." *Id.* at 337–38. "Whether a statement is an actionable statement of 'fact' or merely one of 'opinion' often depends on the circumstances in which a statement is made." *Id.* at 338 (quoting *Faircloth*, 898 S.W.2d at 276). Special or one-sided knowledge may support the conclusion that a statement is one of fact, not opinion, and the comparative levels of the speaker's and the hearer's knowledge are relevant considerations in determining the nature of the statement. *Id.*

Section 4.007 of the TBOC does not fit neatly into this rubric. A claim under TBOC § 4.007(a)(1)(B)—which incorporates elements of the criminal offense in § 4.008—is not akin to a fraud claim because it does not require proof of the plaintiff's justifiable reliance on a materially false statement by the defendant. *See* TEX. BUS. ORGS. CODE ANN. §§ 4.007(a)(1)(B), 4.008. Rather, the statement's falsity must be material to decision-making process of the person it is aimed at, the Secretary of State. *See id.* § 4.008 ("A person commits an offense if the person signs or directs the filing of a filing instrument that the person knows is materially false *with intent that the filing instrument be delivered on behalf of an entity to the secretary of state for filing*." (emphasis added)). The reason pure expressions of

opinion are not representations of material fact, and thus not actionable in fraud, is because one is not justified in relying on a pure expression of opinion. *See Italian Cowboy Partners*, 341 S.W.3d at 337–38. That rationale does not apply to a TBOC filing because the Secretary of State's reliance on a statement cannot turn on whether the statement is fact or opinion. If the instrument is free of formal defects, the filing of it is a ministerial task. *See Gordon v. Lake*, 356 S.W.2d 138, 141 (Tex. 1962); *see also* 1 TEX. ADMIN. CODE § 79.21 (providing that the Secretary of State will determine whether the filing meets minimum statutory requirements but will *not* verify whether the entity has complied with governing documents, whether a material misrepresentation has been made, or whether the person signing the document was authorized to do so). If the instrument contains every statement the TBOC requires of it, the Secretary of State must file it without considering whether the statement is one of opinion or fact, or even whether it is true or false. And, as the Conference points out, an instrument is effective on filing (unless it contains certain statements not applicable here) and must be accepted as prima facie evidence of the facts it contains. *See* TEX. BUS. ORGS. CODE ANN. §§ 4.005 (providing that courts, public offices, and official bodies "shall accept" a filed instrument "as prima facie evidence of the facts stated" therein); 4.051 (instrument effective on filing unless delayed pursuant to § 4.052).

Here, the statements at issue are that the 2019 Amendments were "approved in the manner required by . . . the governing documents of [SMU]" and the certificate

of amendment was "in accordance with" the 1996 Articles. These statements are required to be in a certificate of amendment. *See id.* § 3.053 ("A certificate of amendment for a filing entity must state . . . that the amendment or amendments have been approved in the manner required by this code and the governing documents of the entity . . . ."). Whether these statements were pure expressions of opinion or statements of fact was immaterial to the outcome—the Secretary of State filed the certificate of amendment and the 2019 Amendments became effective immediately. At that point, the harm to the Conference was complete; the rights it had under the 1996 Articles were lost. To excuse SMU's conduct merely because the above statements were legal opinions would be to undermine the Legislature's intent in enacting §§ 4.007 and 4.008. For these reasons, we conclude that the rule precluding fraud liability for pure expressions of opinion does not apply to a claim under TBOC § 4.007(a)(1)(B).

Even if we were to apply the rule in this context, however, the outcome would not change because SMU failed to conclusively establish that the above statements were pure expressions of opinion. "[T]here are exceptions to the rule that opinions cannot support an action for fraud." *Italian Cowboy Partners*, 341 S.W.3d at 338. For example, when an opinion is based on past or present facts, the speaker's special knowledge establishes a basis for fraud. *Id.* "When a speaker purports to have special knowledge of the facts, or does have superior knowledge of the facts—for example, when the facts underlying the opinion are not equally available to both parties—a

party may maintain a fraud action." *Id.* at 338 (quoting *Matis v. Golden*, 228 S.W.3d 301, 307 (Tex. App.—Waco 2007, no pet.)); *see also Faircloth* 898 S.W.2d at 277. Moreover, "every [opinion] statement explicitly affirms one fact: that the speaker actually holds the stated belief." *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175, 184 (2015) (considering whether purported legal opinion was actionable as an untrue statement of material fact under federal securities fraud statute); *see also* RESTATEMENT (SECOND) OF TORTS § 539 (1965) ("A statement of opinion . . . may, if reasonable to do so, be interpreted by [the recipient] as an implied statement . . . that the facts known to the maker are not incompatible with his opinion.").

Here, the certificate of amendment states that it was approved by the Board of Trustees and "[n]o additional authorization or approval by the [Conference] has been provided as none is required or permitted pursuant to Section 22.107(a) of the [TBOC]." This statement conflicts with Article XII of the 1996 Articles, which provides: "No amendment to these Articles of Incorporation shall ever be made unless the same shall have been first affirmatively authorized and approved by the [Conference], or by some authorized agency of said [Conference]." SMU's statement in 2019 that no additional authorization or approval was needed could only be true if Article XII had no legal effect. Although that may have been an opinion SMU held when it filed the certificate of amendment, its failure to state that opinion amounted to a material omission. As between itself and the Secretary of State, SMU

had special knowledge of a past or present fact that, if explicitly stated, may have affected whether the Secretary of State would accept the certificate of amendment for filing. *See Italian Cowboy Partners*, 341 S.W.3d at 338. Furthermore, there was some evidence that SMU's stated opinion was in conflict with its belief. The Conference provided evidence that prior amendments explicitly stated that they were approved by the Conference.[29] Most recently, the 1996 Articles were signed by SMU's president, Dr. Turner, who remained SMU's president at the time the 2019 Amendments were adopted by the SMU's Board of Trustees. Turner's knowledge of the approval requirement is imputed to SMU, *see Grant Thornton LLP v. Prospect High Income Fund*, 314 S.W.3d 913, 924 (Tex. 2010), and offers some evidence that SMU did not believe its statement that further approval was not required. We conclude that, even if pure expressions of opinion are not actionable under TBOC § 4.007(a)(1)(B), there was some evidence SMU had special knowledge of facts at odds with, or did not believe, its opinion that the Conference's approval the 2019 Amendments was not required.

[29] SMU notes that on at least two prior occasions, amendments to SMU's articles of incorporation or its charter were made without approval by the Conference. SMU argues that the Conference's prior acts of authorization in other instances does not mean that "such authorization is required under the 1996 Articles, much less permitted under current Texas law." We reject the argument. As we concluded in Section A above, Article XII of the 1996 Articles is a lawful provision and an acceptable way for the Conference to control SMU's Board of Trustees pursuant to TBOC § 22.207. Thus the situation is the opposite of what SMU claims: the fact that the Conference has occasionally *not* given its authorization for amendments to SMU's charter and articles of incorporation does not mean that such authorization is *not* required under the 1996 Articles or permitted under Texas law.

For the foregoing reasons, we conclude that the trial court erred to the extent it granted summary judgment as to the Conference's § 4.007 claim on this ground.

3. Delegation of Authority to SMU

In its third and final ground for summary judgment on the Conference's TBOC § 4.007 claim, SMU asserts that it had authority to amend the 1996 Articles because that authority was granted to it by the Conference. As with the previous ground, we construe this as an attack on the second element of a § 4.007 claim—that the filing instrument is materially false.

SMU offers no evidence of any explicit grant of authority. Rather, SMU posits: "When the Conference elected SMU's Board on July 14, 2016, at a time when Texas law exclusively vested such authority in the SMU Board, *see* TBOC § 22.107(a), the Conference delegated, under Article XI of the 1996 Articles, to the SMU Board the authority to approve future amendments." (internal record citations omitted). The Conference responds that SMU's interpretation of the 1996 Articles is incorrect and the Conference has never delegated its approval power over amendments to SMU. We agree with the Conference.

Section 22.107 of the TBOC provides that a corporation with no members or no members with voting rights may amend its articles of incorporation "at a meeting of the board of directors on receiving the vote of directors required by Section 22.164." TEX. BUS. ORGS. CODE ANN. § 22.107(a). In turn, § 22.164 provides that an amendment to the corporation's articles is a "fundamental action" requiring a

majority vote of the directors in office if the corporation has no members and no members with voting rights. *See id.* § 22.164(a), (b)(3). However, as we concluded *supra*, at Section (A), § 22.207(a) authorizes a religious organization like the Conference to control SMU's Board of Directors and Article XII of the 1996 Articles is a lawful way of exerting such control. Thus, although § 22.107(a) authorizes a nonprofit corporation's board of directors to act unilaterally to amend its articles of incorporation, that authority may be limited if the corporation was organized under § 22.207 and its articles of incorporation provide for some means of control over its board of directors by the religious organization that created it.

Additionally, contrary to SMU's argument, there were no changes in the law between 1996 and 2019 that affect our conclusion. As we noted previously, § 22.207 was originally enacted in 1923 and recodified under the TNPCA in 1959. *See* Act of March 19, 1923, 38th Leg., R.S., ch. 81, 1923 Tex. Gen. Laws 171, *codified at* TEX. REV. CIV. STAT. ANN. art. 1408 (Vernon 1925), *repealed and recodified at* TEX. REV. CIV. STAT. ANN. art. 1396–2.14, § B *by* Act of April 27, 1959, 56th Leg., R.S., ch. 162, 1959 Tex. Gen. Laws 294 (current version at TEX. BUS. ORGS. CODE ANN. § 22.207(a)). The modern version of § 22.107 was also enacted in the TNPCA.[30] As originally enacted, the statute provided: "Amendments to the articles of incorporation may be made in the following manner: . . . (2) Where there are no

[30] Prior to 1959, the power to amend a nonprofit corporation's charter was generally vested in the corporation's members. *See Toole v. Christ Church, Houston*, 141 S.W.2d 720, 725 (Tex. App.—Galveston 1940, writ ref'd).

members, or no members having voting rights, an amendment shall be adopted at a meeting of the board of directors upon receiving the vote of a majority of the directors in office." *See* Act of April 27, 1959, 56th Leg., R.S., ch. 162, 1959 Tex. Gen. Laws 300, *codified at* TEX. REV. CIV. STAT. ANN. art. 1396–4.02, § A(2), *current version at* TEX. BUS. ORGS. CODE ANN. §§ 22.107(a), 22.164(b)(3). Therefore, at least since 1959, Texas law has provided both that an organization like the Conference may control the board of directors of a nonprofit corporation like SMU *and* that the board of directors of a nonprofit corporation like SMU may amend its certificate of incorporation by a majority vote of the directors in office.

We conclude that SMU failed to conclusively establish that the Conference delegated to SMU the Conference's authority of approval over amendments to the 1996 Articles and the trial court erred to the extent it granted summary judgment on the Conference's TBOC § 4.007 claim on this ground.

4. Summary

The Conference asserted a claim under § 4.007(a)(1)(B) against SMU. SMU moved for summary judgment on the second and fifth elements of the claim. Because SMU failed to conclusively negate these elements, SMU was not entitled to summary judgment on the § 4.007 claim. Therefore, we sustain the Conference's sixth issue and reverse the trial court's grant of summary judgment on the TBOC § 4.007 claim.

F. Declaratory Judgment

Having resolved the issues involving contractual and statutory interpretation, we now return to the Conference's first issue: whether the trial court erred in dismissing the Conference's declaratory-judgment claims (a), (b), (c), and (f). We will also address the Conference's seventh and eighth issues: whether the trial court erred in granting summary judgment against, and failing to grant summary judgment in favor of, the Conference on its declaratory judgment claims (d) and (e).

The Uniform Declaratory Judgments Act (UDJA) provides:

> A person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

TEX. CIV. PRAC. & REM. CODE ANN. § 37.004(a). The purpose of the UDJA is "to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." *Id.* § 37.002(b). It is "remedial" and "is to be liberally construed." *Id.* The UDJA cannot be used to obtain an advisory opinion, which Texas courts lack subject-matter jurisdiction to give. *Transcon. Realty Invs., Inc. v. Orix Cap. Mkts., LLC*, 353 S.W.3d 241, 244 (Tex. App.—Dallas 2011, pet. denied). Declaratory judgment is appropriate only when a real controversy exists between the parties and the entire controversy may be determined by the judicial declaration. *Id.*

Here, SMU sought dismissal of the Conference's UDJA claims only on the ground that the Conference lacked standing under TBOC § 20.002 to assert any claim premised on the SMU Board's *ultra vires* conduct. As we explained in Section (A), *supra*, TBOC § 20.002 bars the Conference's claims only if they are based solely on the SMU Board's *ultra vires* acts. Conversely, if the Conference's claims are based on the breach of some separate legal duty, then § 20.002 does not apply. The Conference's claims for declaratory judgment are based on three such violations: breach of contract, breach of fiduciary duty, and violation of TBOC § 4.007. Specifically, the Conference's second amended petition seeks the following declarations:

> (a) The 1996 Articles are the effective Articles of Incorporation of SMU, and all actions taken by SMU or its representatives in violation of such articles are void;
>
> (b) The [2019 Amendments] are void, and any actions taken by SMU or its representatives based upon such articles are similarly void;
>
> (c) [The Conference] retains all its rights, and its long-standing and permanent relationship with SMU, guaranteed by SMU'S governing documents;
>
> (d) [The Conference] retains a beneficial interest in the assets of SMU held in trust for [the Conference] by the SMU Trustees in perpetuity;
>
> (e) The SMU Trustees owe fiduciary duties to [the Conference]; [and]
>
> (f) Any amendments to the 1996 Articles must comply with all terms of the 1996 Articles including, but not limited to, the requirement that any such amendment to the 1996 Articles must first be authorized and approved by [the Conference.]

In its February 2020 Order, the trial court dismissed the Conference's requests for declarations (a), (b), (c), and (f) to the extent they asserted *ultra vires* claims. In its May 6, 2020 Order, the trial dismissed the same four declaratory-judgment claims without limitation. In the same order, the trial court also dismissed the Conference's claims for breach of contract and breach of fiduciary duty but denied SMU's motion as to the Conference's § 4.007 claim.

We previously concluded that the Conference viably pleaded that the 1996 Articles constitute a contract between itself and SMU. Accordingly, the Conference was entitled to a judicial declaration of its rights under the 1996 Articles. The Conference was also entitled to a declaration as to the legality of the 2019 Amendments. As the Conference points out, *ultra vires* acts are those beyond a corporation's powers or beyond the authority of its officers and directors. *See* TEX. BUS. ORGS. CODE ANN. § 20.002(b). At common law, *ultra vires* acts were not void, but voidable. *See Moody*, 411 S.W.2d at 585. But the doctrine does not apply to a corporation's illegal acts, which are always void. *See Lewis v. Davis*, 199 S.W.2d 146, 148–49 (Tex. 1947) (illegal contracts void); *Staacke v. Routledge*, 241 S.W. 994, 998 (Tex. 1922) (explaining difference between *ultra vires* and illegal acts); *see also* 7A FLETCHER CYC. CORPS. § 3582 (distinguishing *ultra vires* contracts from illegal contracts). Here, the Conference asserted a claim under TBOC § 4.007(a)(1)(B), which incorporates the criminal statute in § 4.008. If the Conference pleaded a viable claim under § 4.007, as the trial court determined that

it did by declining to dismiss that claim, then it follows that the Conference could seek a declaration that SMU's filing of the 2019 Amendments was void. We conclude the trial court erred in dismissing the Conference's declaratory-judgment claims (a), (b), (c), and (f).

The Conference also argues that the trial court erred in granting summary judgment as to its remaining claims for declaratory judgment. We have already determined that neither the 1922 Deed nor SMU's Chapter 81 election created a trust relationship between the parties, no fiduciary duties arose as a result, and the Conference did not retain a beneficial interest in SMU's campus. We therefore conclude the trial court did not err in granting summary judgment as to declaratory-judgment claims (d) and (e).

Summary

We partially sustain the Conference's first issue, reverse the trial court's judgment dismissing the Conference's claims for declaratory judgment (a), (b), (c), and (f), and remand those claims to the trial court for further proceedings. We overrule the Conference's seventh and eighth issues, affirm the trial court's denial of the Conference's motion for summary judgment on its claims for declaratory judgment (d) and (e), and affirm the trial court's grant of SMU's motion for summary judgment on those claims.

III. BISHOP JONES'S ISSUE

In his sole issue, Bishop Jones contends that the trial court erred in dismissing his claims for lack of standing. SMU responds that TBOC § 20.002 bars Bishop Jones's claims. We agree with SMU.

Unlike the Conference, Bishop Jones has no control rights under the 1996 Articles and no other agreement with SMU. Therefore, Bishop Jones's claims against SMU arise solely from the SMU Board's *ultra vires* conduct. As we previously explained, § 20.002(b) validates the actions of a corporate board and a claim under § 20.002(c) cannot be used to avoid such actions unless the claim is by a member or shareholder of the corporation and complies with subsection (d). *See* TEX. BUS. ORGS. CODE ANN. § 20.002. As Bishop Jones is not a member, he cannot seek to avoid the Board's actions.

We further reject Bishop Jones's argument that SMU judicially admitted he has standing to sue under § 20.002(c). The relevant "admission" was made in the January 21, 2020 hearing on SMU's first motion to dismiss. There, SMU's counsel responded to a question by the trial court about whom § 20.002 authorizes to challenge the actions of a corporate board. SMU's counsel responded that a board member, as a representative of the corporation, may challenge the action under 20.002(c)(2). At the time, Bishop Jones had not yet intervened in the lawsuit. The Court's question and counsel's response were thus about the proper interpretation of the word "member" as used in § 20.002. A party "may not judicially admit a question

of law." *Skyline Com., Inc. v. ISC Acquisition Corp.*, No. 05-17-00028-CV, 2018 WL 4039863, at *5 (Tex. App.—Dallas Aug. 23, 2018, pet. denied) (mem. op.). We conclude counsel's statement was not a judicial admission.

We overrule Bishop Jones's sole issue and affirm the trial court's dismissal of his claims.

CONCLUSION

We conclude that the Conference, as SMU's controlling parental entity, had standing to challenge the 2019 Amendments under the 1996 Articles, which are lawful provisions pursuant to § 22.207. We further conclude the trial court erred in granting summary judgment on the Conference's TBOC § 4.007 claim and in dismissing the Conference's claims for breach of contract and declaratory-judgment claims (a), (b), (c), and (f).

We partially sustain the Conference's first and third issues and conclude the trial court erred in dismissing the Conference's claim for breach of contract and for declaratory judgment asserted in paragraph 64, subparagraphs (a), (b), (c), and (f) of the Conference's second amended petition. We also sustain the Conference's sixth issue and conclude the trial court erred in granting summary judgment against the Conference on its claim under § 4.007 of the TBOC. In all other respects, we affirm the trial court's judgment.

We remand this cause to the trial court for further proceedings consistent with this opinion.

/Bonnie Lee Goldstein/
BONNIE LEE GOLDSTEIN
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

SOUTH CENTRAL JURISDICTIONAL CONFERENCE OF THE UNITED METHODIST CHURCH AND BISHOP SCOTT JONES, Appellants

No. 05-21-00151-CV V.

SOUTHERN METHODIST UNIVERSITY, Appellee

On Appeal from the 162nd Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-19-19359.
Opinion delivered by Justice Goldstein. Justices Partida-Kipness and Reichek participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED** in part and **REVERSED** in part. We **REVERSE** that portion of the trial court's May 6, 2020 Order dismissing appellant SOUTH CENTRAL JURISDICTIONAL CONFERENCE OF THE UNITED METHODIST CHURCH's (the Conference's) claims for breach of contract and for declaratory judgment as stated in subparagraphs 64(a), (b), (c), and (f) of the Conference's second amended petition. We further **REVERSE** that portion of the trial court's February 8, 2021 order granting summary judgment on the Conference's claim under Tex. Bus. Orgs. Code Ann. § 4.007. In all other respects, the trial court's judgment is **AFFIRMED**. We **REMAND** this cause to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that appellants SOUTH CENTRAL JURISDICTIONAL CONFERENCE OF THE UNITED METHODIST CHURCH AND BISHOP SCOTT JONES recover their costs of this appeal from appellee SOUTHERN METHODIST UNIVERSITY.

Judgment entered this 26th day of July 2023.