Opinion issued July 26, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00262-CV

THE NIGERIAN FOUNDATION, Appellant

V.

BEDFORD UMEZULIKE, KENNY EFUNPO, EMAIDO HAILEY, OLA JOSEPH, AND TOBIAS OGU, Appellees

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On Appeal from the 295th District Court
Harris County, Texas
Trial Court Case No. 2016-58037

MEMORANDUM OPINION

The board of directors of the Nigerian Foundation sued the executive officers of the Foundation, seeking a declaratory judgment that the board of directors was the governing body of the Foundation according to the Texas Business Organizations Code and the Foundation's governing documents. The trial court

found, however, that the Foundation had enacted two conflicting governing documents, and both the board of directors and the executive officers had authority to govern the Foundation under one governing document but not the other. Instead of granting the Foundation's request for declaratory judgment, the trial court terminated all directors and executive officers and ordered the Foundation to conduct a special election to elect a new board of directors. The Foundation appealed from the trial court's final judgment ordering the special election. We affirm.

BACKGROUND

The Nigerian Foundation is a charitable organization in the greater Houston area that promotes the welfare of people of Nigerian descent. The Foundation began in 1982 and was formally incorporated in 1989. Although the exact date is disputed,[1] at some point in the 1980s the Foundation adopted a set of bylaws for the organization, which was called a charter (the "1989 Charter"). The 1989 Charter:

- allowed all people of Nigerian descent to become members, provided they pay annual dues;
- called for a general meeting every two months but allowed for a special meeting to be called through a petition signed by one-tenth of all members;

[1] The Foundation repeatedly argues that its charter was adopted in 1982, and not 1989; however, the Foundation has not pointed us to any evidence in the record establishing the date the charter was adopted, and the exact date of its adoption is not relevant to the outcome of this appeal. Therefore, we retain the trial court's description of this document as the "1989 Charter."

- provided for nine elected directors and four appointed directors, and authorized the removal of a director by a vote of two-thirds of the Foundation members present at a meeting;

- provided for eight elected executive officers, including a president, vice-president, general secretary, financial secretary, and treasurer, but did not specify a removal procedure for the executive officers; and

- required a motion to alter, amend, or repeal the charter to be made by the board of directors or the president in a petition signed by at least ten members, and required a vote of two-thirds of the members present in a general meeting to pass.

Over the years, the Foundation suffered from mismanagement by executive officers—several Foundation presidents embezzled from the organization. In 2013, a committee was appointed to draft a new set of bylaws, which the committee called a constitution, in response to this mismanagement. According to the meeting minutes, this constitution was adopted by unanimous vote in 2013; no action was taken at that meeting to repeal any previous bylaws. The 2013 Constitution:

- still allowed all people of Nigerian descent to become members, subject to approval by the board of directors and payment of annual membership dues;

- provided for a 15-member board of directors who were to be nominated and approved by the board and could be removed by a two-thirds majority vote of the eligible members of the board; and

- initially, did not provide for any executive officers.

The 2013 Constitution was later amended to add executive officers, including a president, vice-president, general secretary, and finance officer, who were to be

elected by a simple majority of eligible members and who could be removed from office by the same process as a director.

Disagreements between the board of directors and executive officers ensued. Each side accused the other of financial irregularities involving the Foundation's funds. Bedford Umezulike, who was elected president of the Foundation in 2015, claimed that the directors were mismanaging funds—he had discovered an overdue $3,868 phone bill in the Foundation's name, a director's personal debit card allowing that director to withdraw money from Foundation's bank account, the Foundation's name on a director's personal office lease, and a separate bank account using the Foundation's tax ID number. Umezulike claimed that the board of directors denied the executive officers access to the Foundation's operating account, and that, as a result, the finance secretary could not provide a full financial report for the organization. The board of directors, in turn, claimed that the executive officers opened a separate bank account without the board's authorization and deposited proceeds from the Foundation's Nigerian Independence Day event into that separate account instead of into the Foundation's operating account.

After the executive officers failed to respond to the board's requests to address the issue of the unauthorized bank account and missing proceeds, the board of directors dissolved all executive officers and terminated the current officers from their positions; the board of directors notified the executive officers of this action in

a letter dated December 11, 2015. The executive officers refused to resign, and instead called a special meeting of the membership in January 2016, by a petition of six members, who were one-tenth of all members at that time, in accordance with the 1989 Charter. At the meeting, Umezulike, who had been president before the board voted to dissolve the executive officers, detailed the financial irregularities by the board of directors, and the members present concluded there was no wrongdoing by the executive officers and instead voted to dissolve the board of directors and reinstate the executive officers.

This lawsuit followed. The Foundation, through the board of directors, sued the executive officers, seeking: (1) a declaratory judgment that the board of directors is the governing body of the Foundation; (2) damages for conversion of public funds, breach of fiduciary duty, breach of contract, and trademark infringement; and (3) a restraining order to enjoin the executive officers from acting on behalf of the Foundation.

After a bench trial, the trial court made the following findings of fact:

- before October 2013, the Foundation had been governed by the 1989 Charter;
- in October 2013, the general membership voted to adopt the 2013 Constitution but did not alter, amend, or repeal the 1989 Charter, which was required by the 1989 Charter;
- the 1989 Charter and 2013 Constitution were "inconsistent on a number of important matters";

- in December 2015 the board of directors purported to terminate the executive officers, and in January 2016 the membership purported to terminate the board of directors; and

- "[b]ecause of the conflict between the governing documents[,] neither of these actions can be seen as an action of [the Foundation]."

Based on these findings of fact, the trial court entered the following conclusions of law:

- neither the 1989 Charter nor the 2013 Constitution had been revoked or altered by the other, both governing documents had "been 'ratified' by the membership," and, as such, both governing documents were in place and in effect; and

- the two governing documents conflicted with each other regarding the leadership of the Foundation.

Because of this conflict in the governing documents, the trial court, under its conclusions of law, declared all executive officers and directors immediately terminated and ordered the Foundation to hold a special meeting to elect a new board of directors. The trial court gave specific instructions as to how the meeting was to be announced, who could attend, and how the election was to be conducted. The trial court appointed Emaido Hailey, a defendant who had been dismissed from the lawsuit after the trial court determined there was no evidence to support a cause of action against her, to conduct the special election. The trial court ordered the new board, after the directors had been elected, to conduct a meeting, elect a chair of the board, select a banking institution to use for the Foundation's operating account, and appoint one director to lead a committee to write a new set of bylaws for the

Foundation. The trial court gave additional, specific instructions as to how the membership must go about adopting the new bylaws. The trial court copied these instructions from its findings of fact and conclusions of law into its final judgment. The trial court denied all other relief for the Foundation.

The Foundation filed an emergency motion to modify or stay enforcement of the final judgment, objecting to the trial court's appointment of Hailey to conduct the special election. The trial court granted the motion in part, and ordered Emeka Ozurumba, the founding president of the Foundation, to conduct the special election instead. The Foundation filed another emergency motion to modify or stay enforcement of the final judgment, claiming conflicts of interest among candidates in the special election. Ozurumba asked to be recused and not to conduct the special election, noting the conflict and confusion still existing among the directors and executive officers, and the trial court granted his request.

Finally, the trial court appointed JoAnn Storey, a local attorney with no apparent connection to the Foundation, as a special master to conduct the special election. Storey spent several hours familiarizing herself with the case, conducted the special election among the members, and filed her bill for professional services rendered with the trial court. The trial court ordered Raymond Sowemimo and Robert Irabor, two directors, to pay one-half of Storey's fee and the executive

officers collectively to pay the other half. The trial court specifically ordered that each side was to pay the fee personally and not from the funds of the Foundation.

The Foundation, through the board of directors, now appeals.

DISCUSSION

In four points of error, the Foundation argues the trial court erred: (1) in not declaring that the board of directors has the authority to govern the Foundation; (2) in many of its findings of fact and conclusions of law; (3) in appointing a special master; and (4) in ordering two directors to pay the special master fees. We conclude the Foundation has not demonstrated any reversible error and affirm the trial court's final judgment and challenged orders.

I. Findings of fact and conclusions of law; declaratory judgment

In its first point of error, the Foundation asks this court to render the declaratory judgment it claims the trial court should have rendered: that the board of directors has the authority to govern the Foundation. This declaration, the Foundation argues, is a straightforward application of the 2013 Constitution and the Business Organizations Code. *See* TEX. BUS. ORGS. CODE § 22.201 ("[T]he affairs of a [nonprofit] corporation are managed by a board of directors."). In a second, related point of error, the Foundation contends that many of the trial court's findings of fact are wrong and that most of these findings were based on the trial court's erroneous finding that the 1989 Charter was still in effect and had not been repealed.

The erroneous findings of fact, the Foundation argues, led the trial court to erroneous conclusions of law, and so the trial court did not render the correct declaratory judgment.

A. Applicable law

The Uniform Declaratory Judgments Act generally permits a person to obtain a declaration of rights, status, or other legal relations under a statute, contract, or other instrument. TEX. CIV. PRAC. & REM. CODE § 37.004(a). In a declaratory judgment action, the party seeking the declaration bears the burden of establishing its entitlement to the requested declaratory judgment. *Alanis v. US Bank Nat'l Ass'n*, 489 S.W.3d 485, 500 (Tex. App.—Houston [1st Dist.] 2015, pet. denied). We review declaratory judgments under the same standards as other judgments and decrees and look to the procedure used to resolve the issue at trial to determine the appropriate appellate standard of review. TEX. CIV. PRAC. & REM. CODE § 37.010; *Solar Soccer Club v. Prince of Peace Lutheran Church of Carrollton*, 234 S.W.3d 814, 820 (Tex. App.—Dallas 2007, pet. denied). When the trial court enters a declaratory judgment after a bench trial, an appellate court applies a sufficiency of the evidence review to the trial court's factual findings and reviews its conclusions of law de novo. *Van Dam v. Lewis*, 307 S.W.3d 336, 339 (Tex. App.—San Antonio 2009, no pet.).

B. Standard of review

In an appeal from a bench trial, the trial court's findings of fact are reviewable for legal and factual sufficiency of the evidence by the same standards that are applied in reviewing the evidence supporting a jury's findings. *Nguyen v. Yovan*, 317 S.W.3d 261, 269–70 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). The trial court, as the factfinder in a bench trial, is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *McKeehan v. Wilmington Sav. Fund Soc'y, FSB*, 554 S.W.3d 692, 698 (Tex. App.—Houston [1st Dist.] 2018, no pet.). Thus, the trial court may choose to believe one witness and disbelieve another. *Id.* It is the factfinder's role to resolve conflicts in the evidence, and we may not substitute our judgment for that of the fact finder. *Id.*

When a party challenges the legal sufficiency of an adverse finding on an issue on which it had the burden of proof at trial, the party must show on appeal that the evidence establishes, as a matter of law, all vital facts in support of the issue. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (per curiam). When we consider a legal-sufficiency challenge, we first examine the record for evidence that supports the finding, while ignoring all evidence to the contrary. *Id.* We indulge every reasonable inference in support of the challenged finding. *Gunn v. McCoy*, 554 S.W.3d 645, 658 (Tex. 2018). If there is no evidence to support the finding, we will then examine the entire record to determine whether the contrary proposition is

established as a matter of law. *Dow Chem.*, 46 S.W.3d at 241. We must uphold the factfinder's verdict if more than a scintilla of evidence supports the judgment. *W & T Offshore, Inc. v. Fredieu*, 610 S.W.3d 884, 898 (Tex. 2020). We will sustain a challenge to the legal sufficiency of the evidence only if: (1) there is a complete lack of evidence of a vital fact; (2) rules of law or evidence bar the court from giving weight to the only evidence offered to prove a vital fact; (3) there is no more than a scintilla of evidence offered to prove a vital fact; or (4) the opposite of the vital fact is conclusively established. *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 903 (Tex. 2004).

When a party attacks the factual sufficiency of an adverse finding on an issue on which it had the burden of proof at trial, the party must show on appeal that the adverse finding is against the great weight and preponderance of the evidence. *Dow Chem.*, 46 S.W.3d at 242. We must consider and weigh all the evidence and can set aside a verdict only if the evidence is so weak or if the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. *Id.*

We review the trial court's conclusions of law de novo. *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 793–94 (Tex. 2002). We are not bound by the trial court's legal conclusions, but the conclusions of law will be upheld on appeal if the judgment can be sustained on any legal theory supported by the evidence.

Nguyen, 317 S.W.3d at 267. Incorrect conclusions of law will not require reversal if the controlling findings of fact will support a correct legal theory. *Id.*

C. Reporter's record

Texas Rule of Appellate Procedure 34.6(c)(1) requires an appellant who requests a partial reporter's record to include a statement of points or issues to be presented on appeal; the appellant is then limited to those points or issues. TEX. R. APP. P. 34.6(c)(1); *Garcia v. Sasson*, 516 S.W.3d 585, 590 (Tex. App.—Houston [1st Dist.] 2017, no pet.). The points or issues should be described with some particularity; a general notice of an appellant's stated points or issues is insufficient to satisfy Rule 34.6(c)(1)'s requirements. *Garcia*, 516 S.W.3d at 590.

When an appellant properly requests a partial reporter's record under Rule 34.6(c), we must presume that the partial reporter's record constitutes the entire record for purposes of reviewing the stated points or issues. TEX. R. APP. P. 34.6(c)(4); *Garcia*, 516 S.W.3d at 590. This presumption applies even if the statement includes a point or issue complaining of the legal or factual insufficiency of the evidence to support a specific factual finding identified in that point or issue. *Garcia*, 516 S.W.3d at 590. But nothing in Rule 34.6(c) relieves an appellant of its ultimate burden to bring forth a record showing reversible error. *Garcia*, 516 S.W.3d at 590; *see also Christiansen v. Prezelski*, 782 S.W.2d 842, 843 (Tex. 1990) (per curiam) (stating that appellant bears burden to provide sufficient record to show trial

court's error). If properly complied with, Rule 34.6(c) prevents the application of the general presumption that any missing portions of the record support the trial court's judgment; instead, we presume that the partial record includes all portions of the record relevant to the stated points or issues on appeal. *See* TEX. R. APP. P. 34.6(c)(4); *Bennett v. Cochran*, 96 S.W.3d 227, 230 (Tex. 2002) (per curiam) (providing that, absent complete record on appeal, court of appeals must presume that omitted items support trial court's judgment). Thus, in the absence of a statement of appellant's issues to be presented on appeal, we must presume that the omitted portions of the record are relevant and support the trial court's judgment. *Garcia*, 516 S.W.3d at 591.

D. Analysis

1. Reporter's record

The reporter's record before us is not a complete record of the bench trial. Rather, it consists only of excerpts of direct testimony as requested by the Foundation. The record does not include a copy of the Foundation's request for the reporter's record, nor does it include a statement of points or issues filed separately under Rule 34.6(c). *See Furr's Supermarkets, Inc. v. Bethune*, 53 S.W.3d 375, 377 (Tex. 2001) (providing that statement of issues in separate notice was sufficient to invoke presumption that partial reporter's record constituted entire record for purpose of reviewing stated issue). Thus, we must presume that any omitted portions

of the record are relevant and would support the trial court's final judgment. *See Garcia*, 516 S.W.3d at 591.

2. Findings of fact

The Foundation's brief does not specify whether the Foundation is seeking a legal- or factual-sufficiency review of the trial court's findings of fact, but we conclude that under either standard, there is no reversible error.

When we consider a legal-sufficiency challenge, we first examine the record for evidence that supports the finding, while ignoring all evidence to the contrary and indulging every reasonable inference in support of the challenged finding. *Dow Chem.*, 46 S.W.3d at 241; *Gunn*, 554 S.W.3d at 658.

Even if we were not required to presume that the omitted portions of the record support the trial court's findings, evidence in the partial record supports the trial court's finding that the 1989 Charter was in effect and had been ratified by the membership. The executive officers introduced into evidence a copy of the 1989 Charter, which requires a petition to alter, amend, or repeal the charter to be signed by at least ten registered members in good standing and receive a two-thirds majority vote of the members present in a general meeting to pass. The Foundation introduced a copy of the October 5, 2013, meeting minutes during which the 11 members present unanimously voted to adopt the 2013 Constitution, but the minutes do not indicate that any vote was taken to repeal the 1989 Charter or any other earlier

bylaws that may have been in effect. The executive officers also introduced into evidence a 2015 letter from the IRS providing "all the copies [they] have available" of information relating to the Foundation, which includes a copy of the articles of incorporation and the 1989 Charter but not the 2013 Constitution, and the executive officers introduced minutes from a February 6, 2016, general membership meeting at which 18 of the 30 members present voted to "formally vacate the 2013 Constitution" because that document "was never submitted to the IRS." While the Foundation argues the vote at the February 6 meeting is proof that the executive officers recognized the 2013 Constitution was the governing document immediately before the meeting, the vote could also be consistent with a belief that the 2013 Constitution was not properly enacted. Because there is more than a scintilla of evidence to support the trial court's finding that the 1989 Charter had never been repealed, was still in effect, and had been ratified by the membership, we must uphold this finding. *See W & T Offshore*, 610 S.W.3d at 898.

When we consider a factual-sufficiency challenge, we must consider and weigh all the evidence, and the party challenging the finding must show it is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. *Dow Chem.*, 46 S.W.3d at 242.

Again, even if we were not required to presume that the omitted portions of the record support the trial court's judgment, a review of the evidence in the partial

record does not demonstrate that the trial court's finding that the 1989 Charter was in effect and had been ratified by the membership is against the great weight and preponderance of the available evidence. Not only does the evidence discussed above support the trial court's finding, the evidence to which the Foundation points as conclusive of the 2013 Constitution being the sole effective, governing document is anything but. For example, the Foundation argues that Bedford Umezulike, an executive officer, testified that the 2013 Constitution was in effect when he was elected president of the Foundation in 2015. But the testimony to which the Foundation cites, given by Umezulike on direct examination, does no such thing:

> Q. Okay. When you were sworn in, in 2015 as executive president, were you provided a copy of the 2013 constitution?
>
> A. There was some document given to me. Yes, that's correct.
>
> Q. Okay. And I know you read the document.
>
> A. I read the document. And I said that it is a draft. Because you submitted it and everybody complained, including my response to this [Exhibit] 22 till you get me.
>
> THE COURT: I'm sorry. What was the question, again?
>
> COUNSEL: I said: Did you read, actually, I said: Read the constitution.
>
> THE COURT: Exhibit No. 20—you read Exhibit No.—
>
> THE WITNESS: Yes, I read it.
>
> THE COURT: Thank you.
>
> Q. (BY COUNSEL) Did you understand it?
>
> A. I understood it, yes.

Similarly, the Foundation argues that Umezulike testified that the board of directors had the authority to remove him from office later that year. Again, in the testimony to which the Foundation cites, given by Umezulike on direct examination, Umezulike does not make that assertion:

> Q. (BY COUNSEL) My question is—my question is: Did you understand that the board of directors had the authority to remove you as president of the Foundation?
>
> A. Membership elected me. It's a membership organization. I knew—that's not my understanding.
>
> Q. (BY COUNSEL) Why don't you understand it?
>
> A. That's not my understanding.
>
> Q. Okay. Do you remember testifying in the [215th] and in the 295th court?
>
> A. Yes, sir.
>
> Q. Okay.
>
> A. Yes, yes.
>
> Q. Did—was this question asked to you in those courts?
>
> A. I recall, yes.
>
> Q. And do you recall what your answer then was?
>
> A. I just agreed that—as I agreed right now, what I read, yes. According to this document [the 2013 Constitution], that's what it says.
>
> Q. Yes. And you did not dispute then, the authority of the board to remove you, did you?
>
> A. I never said the board has the authority. I said according to this document that is what it says. I agree with this is what it states right here.

This equivocal testimony does not contradict the trial court's finding that the 1989 Charter was in effect. Nor does it support the Foundation's claim that the 2013 Constitution was the only governing document in effect. This is true particularly in light of the fact that this testimony was elicited on the Foundation's direct examination and no cross-examinations were included in the record, and in light of our presumption that the omitted portions of the record support the trial court's judgment.

Similarly, the Foundation claims that Kenny Efunpo, an executive officer, testified that both he and Umezulike were sworn into office under the 2013 Constitution. However, in the testimony to which the Foundation cites, Efunpo only admits that he was present in a meeting with the Foundation's attorney and several others to discuss the 2013 Constitution. Efunpo introduced a copy of the 2013 Constitution into evidence. But Efunpo's testimony and his introduction of the 2013 Constitution also do not contradict the trial court's finding that the 1989 Charter was still in effect; rather, they merely offer some support for the Foundation's claim that the 2013 Constitution was in effect.

The Foundation also argues, without citation to the record, that at trial there was "unanimous testimony from all the witnesses" that the 2013 Constitution was the governing document and that all of the Foundation's witnesses testified the 1989 Charter was not in effect and had been repealed. Not only has the Foundation not

provided citations to the relevant portions of the record to support these assertions, *see* TEX. R. APP. P. 38.1(i), but in light of the equivocal testimony that was available for our review and our presumption that the omitted portions of the record support the trial court's judgment, we cannot say the trial court's finding that the 1989 Charter was in effect is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. *See Dow Chem.*, 46 S.W.3d at 242.

Under either a legal- or factual-sufficiency review, the Foundation has not met its burden to establish a reversible error in the trial court's findings of fact. *See id.* at 241–42.

3. Conclusions of law

Having concluded there is no reversible error in the trial court's findings of fact, we next consider the trial court's conclusions of law. We review the trial court's conclusions of law de novo. *BMC Software Belg.*, 83 S.W.3d at 793–94.

The trial court concluded that the 1989 Charter and the 2013 Constitution were both in effect and in conflict regarding leadership of the Foundation. Because of this conflict, the trial court did not grant the declaratory judgment the Foundation sought—the trial court did not declare the board of directors the governing body of the Foundation.

The 1989 Charter states the Foundation may not have more than 13 directors, and that a director, at either the board of directors' or members' initiative, may be

removed by a two-thirds vote of the members present. The Charter is silent as to removal of officers. The 2013 Constitution states that a director or officer may be removed for cause, including violation of the 2013 Constitution, by a two-thirds majority vote of the eligible members of the board of directors. The Foundation's December 11, 2015, letter to the executive officers stated that the board of directors had resolved to dissolve the executive committee, and the letter ordered the officers to cease and desist from acting as officers of the Foundation. Assuming there had been a two-thirds majority vote by the board of directors to take this action, it would be consistent with the 2013 Constitution but not the 1989 Charter because the charter does not authorize the removal of executive officers. The minutes of the January 9, 2016, special/emergency meeting indicate that 21 out of 23 members present voted to dissolve the board of directors and reinstate the executive officers. This action would be consistent with the 1989 Charter but not the 2013 Constitution because the constitution only allows for removal by the board of directors.

The Foundation argues that the trial court should have declared the board of directors the governing body of the Foundation in accordance with the 2013 Constitution and Section 22.201 of the Business Organizations Code. *See* TEX. BUS. ORGS. CODE § 22.201 ("[T]he the affairs of a [nonprofit] corporation are managed by a board of directors."). Both the 1989 Charter and the 2013 Constitution provide that the board of directors governs the Foundation. However, because of the trial

court's finding that the 1989 Charter was still in effect and that the board of directors had been dissolved under it, the trial court could not declare that this particular board of directors that brought the lawsuit had the authority to govern the Foundation.

Based on this record, we cannot say, as a matter of law, that the trial court's conclusions that the governing documents conflicted regarding the Foundation's leadership and that both the board of directors' and officers' removals conflicted with one of the documents were erroneous. The Foundation has not met its burden of establishing its entitlement to the requested declaratory judgment. *See Alanis*, 489 S.W.3d at 500. Thus, we affirm the trial court's refusal to declare the board of directors the governing body of the Foundation.

The dissent argues that the trial court erred in concluding both governing documents were in effect and that the trial court should have determined which document controlled over the other. But we are limited to considering only the arguments raised in the parties' briefs on appeal.[2] *See San Jacinto River Auth. v. Duke*, 783 S.W.2d 209, 209 (Tex. 1990) (per curiam); *see also Ridge Nat. Res., L.L.C. v. Double Eagle Royalty, L.P.*, 564 S.W.3d 105, 125 (Tex. App.—El Paso 2018, no pet.) ("Our power of review in civil cases is constrained by what arguments

[2] We agree with the dissenting opinion that the Foundation properly challenged the trial court's findings and conclusions that both the 1989 Charter and the 2013 Constitution were operative, but we disagree that the Foundation's challenge gives us license to reverse the trial court based on an argument the Foundation has not made.

appear in the parties' briefs.") (quoting *Hogg v. Lynch, Chappell & Alsup, P.C.*, 553 S.W.3d 55, 65 (Tex. App.—El Paso 2018, no pet.)). The Foundation only appealed the sufficiency of the evidence to support the trial court's finding that both governing documents were in effect, and there is legally and factually sufficient evidence to support that finding. We are not free to make the arguments for a party, *see Ridge Nat. Res.*, 564 S.W.3d at 126, and we must only apply the proper standard of review to the points of error actually raised, which we did. The dissent has not found fault with our analysis or conclusion, but only argued that the trial court should have analyzed the issue differently.

The dissent also argues the trial court erred in granting more relief than was requested. Again, we are bound by the arguments raised by the parties, *Duke*, 783 S.W.2d at 209; *Ridge Nat. Res.*, 564 S.W.3d at 126, and no party raised this argument.

The dissent has raised different, and perhaps better, arguments the Foundation could have used to try to reverse the trial court's judgment, but we must not raise arguments for the parties. *Owings v. Kelly*, No. 07-20-00115-CV, 2020 WL 6588610, at *2 (Tex. App.—Amarillo Nov. 10, 2020, no pet.) (mem. op.) ("[I]t is not our job to develop arguments for the litigants . . . or figure out ways which may lead to a better ending for them. Instead, we are 'constrained by what arguments

appear in the parties' briefs.'") (citation omitted) (quoting *Ridge Nat. Res.*, 564 S.W.3d at 125).

Further, the dissent's view ignores the facts of this case: the board of directors purported to terminate the executive officers of the Foundation, but then the executive officers, with a vote by the membership, purported to terminate the board of directors. On the incomplete record before us, neither side conclusively established its entitlement to a declaratory judgment that it had the sole, legitimate authority to govern the Foundation or conclusively established the other side lacked the authority to govern. Additionally, we must presume the missing portion of the record supports the trial court's judgment. *Bennett*, 96 S.W.3d at 230. Rather than leaving the Foundation with no valid governing document or governing body, the trial court ordered the election of a new governing body and drafting of a new governing document. The Foundation has not met its burden on appeal to show reversible error in the trial court's judgment. *See* TEX. R. APP. P. 44.1(a) (no judgment may be reversed on appeal unless error complained of probably caused rendition of improper judgment or probably prevented appellant from properly presenting case to court of appeals); *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 667 (Tex. 2009) (complaining party bears burden of showing harmful error on appeal to obtain reversal).

4. Judicial nonintervention

Although not stated as a separate point of error, the Foundation also complains that the trial court's final judgment ordering a special election was an "improper attempt to micro-manage the affairs" of the Foundation. The Foundation cites two cases for the proposition that courts should not interfere with the internal management of voluntary associations, *Harden v. Colonial Country Club*, 634 S.W.2d 56, 60 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.) and *Dickey v. Club Corp. of Am.*, 12 S.W.3d 172, 176 (Tex. App.—Dallas 2000, pet. denied), but the Foundation does not acknowledge the fact that it first sought judicial intervention by bringing this lawsuit.

Further, the cases to which the Foundation cites are inapposite. In both cases, an individual member of a voluntary association, who had agreed to abide by the association's bylaws, sued the association, trying to invalidate its bylaws; in both cases, each court held that it would not interfere with an association's ability to make or interpret its own bylaws as those bylaws applied to individual members, "so long as [the association's actions] are not illegal, not against some public property, [and] not arbitrary, capricious, or fraudulent." *Harden*, 634 S.W.2d at 60; *see also Dickey*, 12 S.W.3d at 176.

This is not a case of an individual member suing a voluntary association seeking judicial intervention to overrule validly adopted organizational bylaws.

Instead, the Foundation brought this lawsuit seeking a declaratory judgment to construe the Foundation's bylaws. The Foundation obviously believed the trial court had jurisdiction to grant that declaratory judgment. *See* TEX. CIV. PRAC. & REM. CODE § 37.004(a) (authorizing declaratory judgment determining question of construction arising under contract); *High Rd. on Dawson v. Benevolent & Protective Order of Elks of the United States of Am., Inc.*, 608 S.W.3d 869, 880 (Tex. App.—Houston [14th Dist.] 2020, pet. denied) (explaining that voluntary association's bylaws are contract between association and its members).

The trial court concluded that it could not grant the declaratory judgment the Foundation sought because there were two sets of valid bylaws for the Foundation; apparently the parties were at an impasse. Rather than leave the Foundation with no resolution, the court ordered new bylaws to be drafted. Although unusual, this action was within the equitable power of the court. Where there is no adequate remedy at law, a trial court has power to act in equity. *See Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407, 423 (Tex. 2011). "The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies." *Hausman v. Hausman*, 199 S.W.3d 38, 42 (Tex. App.—San Antonio 2006, no pet.); *see also Castillo*, 279 S.W.3d at 665 ("Equitable rules by necessity are flexible and adaptable.").

Further, to the extent the Foundation intended this objection to the trial court's final judgment to be a point of error on appeal, the error was not preserved because the Foundation did not timely present this argument to the trial court "with sufficient specificity to make the trial court aware of the complaint." *See* TEX. R. APP. P. 33.1; *Peoples Club of Nigeria v. Okpara*, No. 14-17-00099-CV, 2018 WL 4515924, at *5 (Tex. App.—Houston [14th Dist.] Sept. 20, 2018, no pet.) (mem. op.) (overruling judicial nonintervention issue because it was not raised in trial court). Although the Foundation argued in its motion for new trial that the trial court's final judgment "contravenes settled statutory and case law" holding that a "trial court may NOT [sic] interfere in the internal management of a corporation," the Foundation did not specifically mention the judicial nonintervention doctrine or identify any statute or case law explaining it.

The dissent contends the trial court erred by interfering with the affairs of the Foundation. Again, while the dissent raises a good argument, we may not reverse a trial court's judgment in the absence of properly preserved error. *See USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 505 (Tex. 2018).

We overrule the Foundation's first and second points of error.

II. Whether the trial court erred in appointing a special master

The trial court in its final judgment, having concluded that both the 1989 Charter and 2013 Constitution were in effect and conflicting on critical matters,

terminated all executive officers and directors and ordered a member of the Foundation to conduct a special election among the membership in which the members would elect a new board of directors. The trial court eventually appointed JoAnn Storey, a local attorney, as a special master to conduct the special election. The Foundation contends that the trial court erred in appointing the special master to conduct the election because the case was not exceptional and there was no good cause, as required by Texas Rule of Civil Procedure 171.

A. Applicable law and standard of review

Parties to a lawsuit may consent to the appointment of a special master, or a court may appoint a special master "in exceptional cases, for good cause." TEX. R. CIV. P. 171; *see also Simpson v. Canales*, 806 S.W.2d 802, 806–12 (Tex. 1991) (orig. proceeding) (explaining historical role of masters and outlining requirements for appointing masters in Texas). While the "'exceptional cases/good cause' criterion of Rule 171 is not susceptible of precise definition," the Supreme Court has said the requirement cannot be met "merely by showing that a case is complicated or time-consuming, or that the court is busy." *Simpson,* 806 S.W.2d at 811. But the appointment of a special master lies within the trial court's discretion and will not be reversed absent a clear abuse of discretion. *Id.*

A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner without reference to any guiding rules or principles. *Bowie Mem'l Hosp. v.*

Wright, 79 S.W.3d 48, 52 (Tex. 2002) (per curiam). We may not reverse for an abuse of discretion merely because we disagree with the trial court's decision; we must affirm so long as the decision is within the trial court's discretionary authority. *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 226 (Tex. 1991). The party claiming an abuse of discretion has the burden on appeal to show it. *City of Houston v. Woods*, 138 S.W.3d 574, 580 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

B. Analysis

The Foundation argues that there was no good cause to appoint a special master and the case is not exceptional. The trial court could have determined there was good cause to appoint a special master because (1) the judge could not have conducted the special election herself; (2) the Foundation opposed the first person the trial court appointed to conduct the election; and (3) the second person the trial court appointed asked to be recused. Likewise, the trial court could have determined this case was exceptional in that there was no clear path forward once the trial court determined there were two effective, conflicting governing documents and two different factions within the Foundation claiming leadership under each.

The Foundation argues that it objected to the trial court's initial appointment of Hailey to conduct the election, but the trial court replaced Hailey with Storey, a neutral third party who conducted the special election; the Foundation's objection to Hailey is moot.

The trial court's appointment of a special master as a neutral third party to conduct the special election may well have been the best solution, or at least the Foundation has not met its burden to show the trial court abused its discretion in appointing a special master. *See Simpson*, 806 S.W.2d at 811; *Woods*, 138 S.W.3d at 580. Therefore, the trial court did not abuse its discretion in appointing a special master to conduct a special election for the Foundation.

We overrule the Foundation's third point of error.

III. Special master fees

Finally, the Foundation contends the trial court erred in ordering two directors, Raymond Sowemimo and Robert Irabor, to pay the plaintiff's half of the special master fee. The Foundation mischaracterizes the court's order as imposing sanctions on Sowemimo and Irabor and as piercing the corporate veil to hold individual directors liable for the Foundation's costs. These individual directors, the Foundation argues, were not parties to the lawsuit, and so the trial court had no authority to order them to pay.

A. Applicable law and standard of review

Texas Rule of Civil Procedure 171 requires a trial court, when a special master is appointed, to award the master "reasonable compensation" that is "to be taxed as costs of suit." TEX. R. CIV. P. 171. The awarding of a master's fees and expenses is within the discretion of the trial court and will not be reversed unless the appellant

can show a clear abuse of discretion. *Tex. Bank & Tr. Co. v. Moore*, 595 S.W.2d 502, 511 (Tex. 1980); *In re Pendragon Transp. LLC*, 423 S.W.3d 537, 541 (Tex. App.—Dallas 2014, no pet.) (orig. proceeding) (applying abuse of discretion standard to order award of master's fees).

A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner without reference to any guiding rules or principles. *Wright*, 79 S.W.3d at 52. We may not reverse for an abuse of discretion merely because we disagree with the trial court's decision; we must affirm so long as the decision is within the trial court's discretionary authority. *Beaumont Bank*, 806 S.W.2d at 226. The party claiming an abuse of discretion has the burden on appeal to show it. *Woods*, 138 S.W.3d at 580.

B. Analysis

The trial court split the special master fee equally between the Foundation—represented by the board of directors—and the executive officers, but the trial court ordered the Foundation's portion of the fee "to be paid equally by Raymond Sowemimo and Robert Ira[b]or and NOT from the funds of The Nigerian Foundation" and the executive officers' portion of the fee "to be paid by each of the [executive officers] equally and NOT from the funds of The Nigerian Foundation."

Both the executive officers and the directors claimed to represent the Foundation and claimed authority to act on its behalf. The Foundation—which is a

charitable nonprofit organization—receives its funding, at least in part, by annual member dues and corporate donations. The executive officers claimed the lawsuit has depleted the Foundation's funds, and the Foundation could not afford any additional litigation expenses. Based on these facts, we cannot say the trial court abused its discretion in equally dividing the special master fee between the board of directors and the executive officers. *See Tex. Bank & Tr.*, 595 S.W.2d at 511; *In re Pendragon Transp.*, 423 S.W.3d at 541.

Sowemimo and Irabor individually were not parties to the suit, but they served on the board of directors, and the suit initially was brought by the Foundation "by and through the Chairman of its Board of Directors, Raymond Sowemimo, and acting pursuant to an existing resolution of its Board of Directors." The trial court's order offers no explanation as to why only those two directors, and not the full board of directors, were required to pay the special master fees. The record does not include a full list of the directors who were serving on the board when the relevant events took place, nor has the Foundation argued that any other directors should also contribute to paying the special master fee. Thus, we have no basis to further defray the costs to Sowemimo and Irabor by ordering any other directors to share in paying the fee.

The Foundation has not demonstrated that the trial court trial court abused its discretion in equally dividing the special master fee between the board of directors

and the executive officers. *See Woods*, 138 S.W.3d at 580. Therefore, the Foundation's fourth point of error is overruled.

CONCLUSION

The trial court's judgment is affirmed.

Gordon Goodman
Justice

Panel consists of Justices Goodman, Rivas-Molloy, and Farris.

Justice Farris, dissenting.