Reversed and Remanded and Memorandum Opinion filed June 15, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00019-CV

THOMAS SWONKE AND CHRISTOPHER GOODRICH, Appellants

V.

FIRST COLONY COMMUNITY SERVICES ASSOCIATION, INC., Appellee

On Appeal from the 400th District Court
Fort Bend County, Texas
Trial Court Cause No. 07-CV-160602

MEMORANDUM OPINION

Thomas Swonke and Christopher Goodrich, collectively "appellants," appeal from the grant of a plea to the jurisdiction, and in the alternative, motion for summary judgment, in their lawsuit against First Colony Community Services Association, Inc. ("the Association"). The Association is a homeowners' association of which appellants are members. In their lawsuit, appellants asserted improprieties in the Association's board of directors election in December 2007 and requested declaratory and injunctive relief. In its combined motion and plea, the Association asserted that appellants lacked standing to

maintain their claims and that those claims were without merit as a matter of law. We reverse the trial court's judgment and remand for further proceedings in accordance with this opinion.

I. Background[1]

The Association is a nonprofit corporation homeowners' association for the First Colony subdivision in Sugar Land, Texas. The subdivision's developer, Sugar Land Properties, Inc., is listed as the sole "Class B" member in the Association's bylaws, and the "Class A" membership consists of residential and business property owners within the subdivision. As "Declarant" under the bylaws, Sugar Land Properties retained considerable control over operation of the Association until such time as its status as Class B member was revoked under conditions set forth in the bylaws. Among the rights invested in the Declarant by the bylaws was the right to unilaterally amend the bylaws, "so long as no substantive rights of any existing [subdivision] Owner [were] adversely affected."

The bylaws further provided for an annual election to fill seats on the board of directors. Specifically, each year the existing board of directors was required to appoint a "Nominating Committee" to consider applications from persons seeking positions as directors. The committee would then nominate applicants to appear on the election ballot at the annual meeting of members. Other nominations could also be made "from the floor" at the meeting.

On August 23, 2007, the board of directors appointed appellant Goodrich to serve on the nominating committee. Incumbent director Rod Craig was appointed as committee chair, five additional Association members were also appointed to the committee, and two alternates were named as well. Also on August 23, a "Proposed Timeline" was prepared which included a date of October 15, 2007 for interviewing candidates, but no time of day

[1] This background section is offered only as a brief overview of the facts and not an exhaustive recitation of the voluminous and often conflicting factual allegations in this case.

or place was specified for the proposed meeting. Appellant Swonke applied to be a candidate for the board in the December 6, 2007 election. No meeting of the nominating committee took place on October 15. In the evening of October 18, 2007, chairman Craig sent an email to committee members stating that the committee would meet at 7:45 on October 20. This was the only meeting of the nominating committee appointed in August 2007. In his affidavit, appellant Goodrich acknowledged having received Craig's email notification, but he stated that he did not attend the meeting. In all, only Craig and three of the six other committee members attended the meeting. Neither alternate attended the meeting. The committee did not select Swonke as a nominee.

Appellants Swonke and Goodrich then filed the present lawsuit against the Association, alleging principally that (1) the wrong nominating committee met to consider director applications for the December 2007 election; and (2) the committee meeting was improperly convened, in part because notice was not proper. Specifically as to the proper nominating committee for consideration of candidates for the December 2007 meeting, appellants point out that under the bylaws, the nominating committee must be appointed "not less than thirty (30) days prior to each annual meeting of the Members to serve from the close of such annual meeting until the close of the next annual meeting, and such appointment shall be announced at each such annual meeting." Appellants asserted that under this provision, the proper nominating committee would have been one nominated prior to the December 2006 annual meeting, to serve from the close of that meeting until the close of the 2007 meeting. Thus, according to appellants, the committee appointed in August 2007 had no authority to consider nominations for the 2007 meeting.

Regarding the allegedly improper meeting notice, appellants asserted that (1) the only notice was via email; (2) only three of six members, other than chairman Craig, attended the meeting; and (3) no written waiver of notice was submitted by the nonattending members. Appellants further asserted that prior to the filing of the lawsuit, the board of directors was informed of the problems with the nominating committee by

both Goodrich and a member of the board, Myatt Hancock, but nothing was done to cure the improprieties.

Appellants filed their Original Petition prior to the December 2007 election. The pleading incorporated an application for a temporary restraining order, temporary injunction, and permanent injunction as well as a request for a declaratory judgment, essentially in an attempt to prevent the Association from moving forward with the election. After a hearing on the request for a temporary injunction, the trial court denied the application. The December 2007 election then went forward, and Swonke was neither nominated from the floor nor elected to the board of directors. Appellants thereafter filed a motion for summary judgment in which they made the above accusations and requested a declaration that (1) the December 2007 election was void; (2) the three directors elected at that meeting were therefore not legally elected to the board; (3) "[a]ny actions taken or votes casts by" those three individuals were void; and (4) the presence of those individuals at board meetings should not be counted for purposes of determining whether a quorum existed at those meetings. Appellants further requested court costs and attorney's fees.

In response to appellants' lawsuit, the Association filed a combined plea to the jurisdiction and motion for summary judgment. In the plea, the Association asserted that appellants lacked standing to bring their claims because they did not have a justiciable interest in the matters alleged and had not been personally aggrieved. In its motion for summary judgment, the Association asserted, among other things, that in 1994, Sugar Land Properties, as Declarant under the bylaws, had amended the bylaws to permit ad-hoc appointment of the nominating committee as opposed to appointment of an annual standing committee to begin service at the close of each annual meeting. Specifically, the Association claimed that the Declarant amended the bylaws through action by the 1994 board of directors. Furthermore, the Association alleged that the ad hoc procedure had been the practice since 1994, and no objections had been made until the 2007 complaints which culminated in the present lawsuit. The Association further maintained that the

amendment did not affect anyone's substantive rights and urged the court to not interfere in the inner workings of the nominating committee.

As stated above, the trial court granted the Association's combined plea to the jurisdiction and motion for summary judgment and denied appellants' motion for summary judgment. The court also awarded attorney's fees to the Association in the amount of $20,000. We will begin by addressing the jurisdictional argument raised below by the Association (standing) as well as the jurisdictional argument it raises for the first time on appeal (mootness). We will then consider the merits of the Association's motion for summary judgment, which the trial court granted, and appellants' motion for summary judgment, which the trial court denied. Lastly, we will consider whether the trial court properly awarded attorney's fees to the Association.

II. Jurisdiction

A. Plea to the Jurisdiction—Standing

In their third issue, appellants contend that the trial court erred in granting the Association's plea to the jurisdiction. As stated above, in its plea to the jurisdiction, the Association asserted that appellants did not have standing because they did not have a justiciable interest in the matters alleged and had not been personally aggrieved by any alleged actions of the Association. Standing is a constitutional prerequisite for a party to bring a lawsuit. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993). A court has no jurisdiction over a claim pursued by a plaintiff who lacks standing to assert the claim. *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304 (Tex. 2008). When a plaintiff lacks standing, the proper disposition is to dismiss the lawsuit. *Id*. The test for standing requires that there be a real controversy between the parties which will actually be determined by the judicial declaration sought. *See Nootsie, Ltd. v. Williamson County Appraisal Dist.*, 925 S.W.2d 659, 661 (Tex. 1996). "A plaintiff has standing when [he or she] is personally aggrieved, regardless of whether [he or she] is acting with legal authority . . . ." *Id*. (emphasis omitted). Without breach of a legal right belonging to the

plaintiff, no cause of action can accrue to his benefit. *See Nobles v. Marcus*, 533 S.W.2d 923, 927 (Tex. 1976). "The issue of standing focuses on whether a party has a sufficient relationship with the lawsuit so as to have a 'justiciable interest' in its outcome . . . ." *Austin Nursing Center, Inc. v. Lovato*, 171 S.W.3d 845, 848 (Tex. 2005). For a controversy to be justiciable, there must be a real controversy between the parties that will actually be resolved by the judicial relief sought. *State Bar of Texas v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994).

We review a trial court's ruling on a plea to the jurisdiction de novo. *State Dep't of Highways & Pub. Transp. v. Gonzalez*, 82 S.W.3d 322, 327 (Tex. 2002). In such a review, we must determine whether facts have been alleged that affirmatively demonstrate jurisdiction. *City of Waco v. Lopez*, 259 S.W.3d 147, 150 (Tex. 2008). In doing so, we construe the pleadings liberally in favor of the plaintiff, and any fact questions regarding jurisdiction will prevent us from affirming the trial court's order. *Id.*

Appellants contend that as members of the Association and as "aggrieved parties with respect to the 2007 election proceedings," they have standing to bring this lawsuit. More specifically, appellants maintain that they were personally aggrieved by the fact that Swonke was denied consideration of his board of directors candidacy by the proper nominating committee and at a properly noticed committee meeting, and Goodrich was denied proper notice of the sole meeting of the committee to which he was appointed. We agree with appellants that the facts as alleged were sufficient to demonstrate that they were personally aggrieved. As members of the association, they have standing to complain that the nominating committee meeting was not conducted pursuant to the bylaws and that they were denied roles in the governance of the association in violation of the bylaws. *Cf. Swain v. Wiley College*, 74 S.W.3d 143, 148-50 (Tex. App.—Texarkana 2002, no pet.) (holding that college president did not have standing to complain regarding violation of bylaws respecting meeting of board of trustees because he was neither a member of the nonprofit corporation nor a voting member of its board of trustees); *Stolow v. Greg*

Manning Auctions, Inc., 258 F. Supp. 2d 236, 249-50 (S.D.N.Y. 2003) (holding that plaintiff lacked standing to bring suit for violations of association's bylaws because he was not a member of the association).

B. Appellate Argument—Mootness

For the first time on appeal, the Association argues that the trial court lacked subject matter jurisdiction because the relief appellants requested in their original petition has become moot. Mootness is a threshold issue in determining subject matter jurisdiction. *See Speer v. Presbyterian Children's Home & Serv. Agency*, 847 S.W.2d 227, 229 (Tex. 1993). The purpose of the mootness doctrine is to prevent courts from rendering advisory opinions, in violation of article II, section 1 of the Texas Constitution. Tex. Const. art. II, § 1; *Valley Baptist Med. Ctr. v. Gonzalez*, 33 S.W.3d 821, 822 (Tex. 2000). An issue may become moot when a party seeks a ruling on some matter which, when rendered, would not have any practical legal effect on a then-existing controversy. *In re H&R Block Financial Advisors, Inc.*, 262 S.W.3d 896, 900 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding).

The Association specifically points out that the 2007 board of directors election "has long since passed," and appellants never filed an amended petition requesting different relief in light of that fact. In their original petition, appellants requested specific declaratory and injunctive relief premised largely on the fact that the contested election had not yet occurred. For example, appellants requested declarations stating that the nominating committee appointed on August 23, 2007, should not begin serving until December 6, 2007 (at the close of the December members' meeting), and that the nominations already made by that committee for the December 2007 election were "invalid, illegal, and void." The Association contends that because all of the relief appellants requested in their petition had been rendered moot by the holding of the election, the trial court was without jurisdiction to consider the merits of appellants' claims.

In response, appellants point out that in their motion for summary judgment, they requested additional relief, relief which recognized that the contested elections had by then taken place. For example, appellants requested that the trial court declare that the December 2007 election was "invalid, illegal, and void," and that any action taken or votes cast by individuals elected to the board in that election were "invalid, illegal, and void." Appellants contend that because they included these requests for relief in their motion, presented evidence in support, and the Association did not raise the alleged pleading deficiency in response to the motion, the requested relief was tried by consent. *See* Tex. R. Civ. P. 67 ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."). We agree. The Texas Supreme Court has held that issues raised in the summary judgment context can be tried by consent. *Roark v. Stallworth Oil and Gas, Inc.*, 813 S.W.2d 492, 495 (Tex. 1991). Courts, including this one, have also indicated that requests for particular relief can also be tried by consent. *See, e.g., Pickelner v. Adler*, 229 S.W.3d 516, 523 (Tex. App.—Houston [14th Dist.] 2007, pet. denied); *City of Houston v. Harris County Outdoor Advertising Ass'n*, 879 S.W.2d 322, 336 (Tex. App.—Houston [14th Dist.] 1994, writ denied). Because appellants clearly requested post-election relief in the motion for summary judgment, and the Association responded to the motion without objecting to the alleged lack of a proper pleading, we find that appellants' requests for relief were tried by consent. Therefore, the mootness doctrine does not bar appellants' claims.[2]

[2] The Association additionally argued in its brief that any actions of the 2007 nominating committee allegedly taken in violation of the bylaws were merely voidable and not void, and as such, the Association ratified those actions by defending against appellants' lawsuit. Ratification is an affirmative defense on the merits. *See Swank v. Cunningham*, 258 S.W.3d 647, 670 n.7 (Tex. App.—Eastland 2008, pet. denied). Success or failure on this defense does not affect subject matter jurisdiction on appellants' claims.

The trial court had subject matter jurisdiction over the claims raised by appellants. Because the trial court erred in granting the Association's plea to the jurisdiction, we sustain appellants' third issue.

III. The Association's Motion for Summary Judgment

In their second issue, appellants contend that the trial court erred in granting summary judgment favoring the Association. We analyze the grant of a traditional motion for summary judgment under well-established standards of review. *See generally* Tex. R. Civ. P. 166a; *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). Because summary judgment is a harsh remedy, a reviewing court will strictly construe procedural and substantive matters against the movant. *E.g., Tanksley v. CitiCapital Commercial Corp.*, 145 S.W.3d 760, 763 (Tex. App.—Dallas 2004, pet. denied). The movant bears the burden to show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c). We review the motion and the evidence de novo, taking as true all evidence favorable to the nonmovant, and indulging every reasonable inference and resolving any doubts in the nonmovant's favor. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). Where, as here, both sides filed motions seeking summary judgment on the same issue, and the trial court granted one while denying the other, we review both sides' summary judgment evidence, determine all questions presented, and, if the trial court erred, render the judgment the trial court should have rendered. *Id.* A summary judgment cannot be affirmed on grounds not expressly set out in the motion or response. *Stiles v. Resolution Trust Corp.*, 867 S.W.2d 24, 26 (Tex. 1993).

As discussed above, appellants' primary allegations in their pleadings were that (1) the nominating committee appointed on August 23, 2007 was the incorrect committee to consider director applications for the December 2007 election; and (2) the committee meeting was improperly convened. On appeal, the Association asserts that it was entitled to judgment as a matter of law because (1) the bylaws were amended in 1994, making the

August 23, 2007 committee the proper committee for considering applicants for the 2007 election; (2) the Association has followed the practice of appointing the nominating committee during the year prior to the election since 1994; and (3) appellants were not harmed and have no basis for recovery. We will discuss each purported ground in turn.[3]

A. Alleged 1994 Amendment

In their petition, appellants pointed out that the original bylaws of the Association required that the nominating committee must be appointed "not less than thirty (30) days prior to each annual meeting of the Members to serve from the close of such annual meeting until the close of the next annual meeting, and such appointment shall be announced at each such annual meeting." Appellants maintain that pursuant to this provision, the nominating committee for the 2007 election should have been appointed prior to the December 2006 annual meeting, and not over halfway through the 2007 fiscal year. Consequently, according to appellants, the committee appointed in August 2007 had no authority to consider nominations for the 2007 meeting; instead, such nominations should have been considered by the committee appointed prior to the 2006 annual meeting.

In its motion, the Association contended that the bylaws were amended in 1994. In support of this assertion, the Association attached testimony by Carl Favre from an earlier hearing on appellants' request for a temporary injunction. Favre identified himself as

[3] In its briefing, the Association suggests that in considering the motions for summary judgment, the trial court adopted the general disposition of courts to not interfere in the internal management of voluntary associations that we described in *Stevens v. Anatolian Shepherd Dog Club of America, Inc.*, 231 S.W.3d 71, 74-75 (Tex. App.—Houston [14th Dist.] pet. denied). Based on this general rule, the Association asserts that the proper standard for our review of the grant of summary judgment in this case is abuse of discretion. In *Stevens*, we employed an abuse of discretion standard in assessing whether the trial court properly declined to intervene in the inner workings of a voluntary association; however, the appeal in *Stevens* was from a final trial on the merits, not a grant of summary judgment. *Id*. at 76. As explained in the text above, the proper standard of review in an appeal from a summary judgment is de novo. *See Valence Operating Co.*, 164 S.W.3d at 661. The existence of this general rule of noninterference does not relieve the Association of its summary judgment burden to demonstrate entitlement to judgment as a matter of law. *See id*. Moreover, in the trial court, the Association raised this general rule only in response to appellants' seeking summary judgment based on the allegedly improper notice for the nominating committee meeting. Consequently, we will limit its consideration to that issue on appeal.

having been general counsel for Sugar Land Properties since 1987. He testified that in 1994, the Association's board of directors "adopted by resolution" a recommendation from a task force that the nominating committee should not be a "standing committee" but should "only serve on an ad-hoc basis during the annual election time, serving only for a specific year's selection process."[4] Favre understood this recommendation to mean that the committee should serve its function of finding qualified candidates "just before the annual meeting."[5] Favre stated that he could not remember whether Sugar Land Properties was still supposed to "sign off on resolutions and amendments" in 1994, but he believed it still had the ability to veto board action with which it did not agree. Favre indicated that he considered the board's adoption of the resolution to have amended the bylaws despite the fact that no "clarifying amendment to the bylaws" was subsequently recorded in the property records.[6] Favre further acknowledged, however, that in 1994, the only methods by which the bylaws could have been amended were (1) by Sugar Land Properties as Declarant, and (2) by majority vote of all property owners in the subdivision. When asked specifically whether it was in the Declarant's authority "to change the timing of when the committee was appointed," Favre replied: "I believe we could have and should have, and I think we did by this original issue."

Based on Favre's testimony, the Association contended that the Declarant acted through the board in amending the bylaws and that no special procedure was required for amendment. However, neither Favre's testimony nor the question of amendment is that straight forward. Although Favre stated a belief that board action was sufficient to amend the bylaws, he also acknowledged that only the Declarant or a majority of subdivision

[4] A document purporting to be recommendations from an "Organizational Task Force" for the Association was also attached to the motion. Likewise, a copy of a document entitled "Board of Directors Meeting Minutes," dated April 28, 1994, was also included. This latter document indicates that the board approved the recommendations of the task force on the listed date.

[5] Favre appeared to not remember the formation of the task force, and he stated that he "assumed" that the reason for the recommendation was because the committee could function adequately when formed only "during annual election time."

[6] An amendment was recorded in 2008 during the pendency of this litigation.

owners could amend the bylaws. He failed to explain how action by the board of directors could be interpreted as action by the Declarant. He did not assert that the Declarant directed the board to approve the task force's recommendation, otherwise expressed approval of this action in some way, or even knew about the board's action or the task force's recommendation. While it is conceivable that the Declarant exercised such control over the board that board action could be considered action by the Declarant, Favre's testimony does not conclusively establish this connection for summary judgment purposes. *See* Tex. R. Civ. P. 166a(c) ("A summary judgment may be based on uncontroverted testimonial evidence of an interested witness . . . if the evidence is clear, positive, direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted."); *Tex. Div.—Tranter, Inc. v. Carrozza*, 876 S.W.2d 312, 314 (Tex. 1994) ("[A witness's] subjective beliefs are no more than conclusions and are not competent summary judgment evidence.").

The summary judgment evidence propounded by the Association does not conclusively establish that the bylaws were amended in 1994 so as to make the August 23, 2007 committee the proper committee for considering applicants for the December 2007 election. The trial court erred if it based summary judgment on this ground.[7]

B. Established Practice Since 1994

In its appellate briefing, the Association further contends that because it followed the practice of appointing the nominating committee pursuant to the 1994 task force recommendations for twelve years without objection, this continuing practice "ratified the 1994 amendment" as a matter of law, citing *City of Hughes Springs v. Hughes Springs Volunteer Ambulance Serv., Inc.*, 223 S.W.3d 707, 714-15 (Tex. App.—Texarkana 2007, no pet.). In their reply brief, appellants argue that the Association waived its ratification

[7] Because our conclusion that the Association failed to prove that the bylaws were amended in 1994 does not rest on the Association's failure to initially record the alleged amendment with the county clerk's office, we need not consider the Association's contention on appeal that it properly recorded the alleged amendment in 2008.

argument by not making it below. We agree. In its motion for summary judgment, the Association referenced the purported following of the 1994 amendment only in support of the conclusion that such amendment had in fact been effectuated. It did not make this a separate basis for summary judgment and did not mention the doctrine of ratification either by name or through argument. A summary judgment cannot be affirmed on grounds not *expressly* set out in the motion or response. *Stiles*, 867 S.W.2d at 26; *see also Nexen Inc. v. Gulf Interstate Eng'g Co.*, 224 S.W.3d 412, 423 (Tex. App.—Houston [1st Dist.] 2006, no pet.) ("Summary judgment cannot be rendered on a basis that was not asserted in the movant's motion as a ground for summary judgment."). The trial court erred if it granted summary judgment on the basis of ratification.

C. Basis for Relief

In its motion, the Association additionally asserted that as a matter of law: "Plaintiffs have no basis to seek damages, costs, fees, a declaratory judgment and/or any other relief against Defendant." In support, the Association referenced the trial court to an order (attached as an exhibit to the motion) purporting to deny appellants' request for a temporary injunction. In this order, it is stated that "the amendment to the process of appointing the nominating committee does not affect the substantive rights of anyone, and the Court will not intervene in the inner workings of the Committee."[8] The attached order, however, was not signed by the trial judge. In fact, it appears from the record that the actual order that the judge signed denying the temporary injunction does not contain this language or any specific reason for the denial. Moreover, even if the signed order contained the language in question, it would constitute neither summary judgment argument nor evidence. *See generally* Tex. R. Civ. P. 166a(c) (listing types of summary

[8] The statement that amendment did not affect anyone's substantive rights appears to have related to the Association's argument that the bylaws permitted the Declarant to unilaterally amend them "so long as no substantive rights of any existing owner [were] adversely affected." However, as discussed in a prior section of this opinion, the Association failed to conclusively demonstrate that the Declarant did in fact amend the bylaws in regard to appointment of the nominating committee. Thus, at least this portion of the Association's basis for relief argument is without foundation.

judgment evidence). The Association did not make any other arguments or reference any other evidence in support of this ground for summary judgment. Accordingly, the trial court erred if it granted summary judgment on this ground.[9]

Because the Association failed to establish entitlement to judgment on any grounds raised in its motion, the trial court erred in granting summary judgment favoring the Association. Accordingly, we sustain appellants' second issue.

IV. Appellants' Motion for Summary Judgment

In their first issue, appellants contend that the trial court erred in denying their motion for summary judgment. In their motion, appellants contended that they established as a matter of law that (1) the Association failed to conduct the December 2007 election in accordance with the bylaws, and (2) notice of the nominating committee meeting was invalid, and there were no waivers of such notice pursuant to the bylaws. Utilizing the same summary judgment standards set forth above, we will address each ground for summary judgment in turn.

A. Violation of Bylaws

In their first ground, appellants argued that the Association violated the bylaws in the selection and operation of the nominating committee. Specifically, they asserted that under the bylaws, the nominating committee appointed in August 2007 was not the correct committee to consider candidate applications for the December 2007 board election. Instead, according to appellants, the bylaws in force during 2006 and 2007 required that the nominating committee be appointed before the 2006 annual meeting to serve from the end of that meeting until the 2007 annual meeting. Thus, the proper nominating committee to

[9] It is important to note that the Association's motion for summary judgment was a traditional motion, seeking judgment as a matter of law because the Association's evidence disproved at least one element in each of appellants' causes of action; it was not a no-evidence motion. *Compare* Tex. R. Civ. P. 166a(c) *with* Tex. R. Civ. P. 166a(i); *see also Grimes v. Reynolds*, 252 S.W.3d 554, 558 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (distinguishing between traditional and no-evidence motions for summary judgment).

consider candidates for the 2007 election would have been one appointed in 2006, not August 2007. In support of this ground for summary judgment, appellants presented the original Association bylaws as well as various affidavits and documents relating to the committee appointed in August 2007.

In response to this ground, the Association again contended that the bylaws were amended in 1994 when the board of directors voted to approve the amendments proposed by the task force. As discussed above, the Association presented evidence, principally in the form of hearing testimony from its general counsel, Carl Favre, suggesting that Sugar Land Properties, in its capacity as Declarant, operated through the board to amend the bylaws. According to Favre, the bylaws were amended in 1994 to change the time period for which each nominating committee was in existence such that the proper committee for the December 2007 election would have been appointed during 2007. In the above discussion of the Association's motion for summary judgment, we explained that Favre's testimony failed to *conclusively* demonstrate that the bylaws were in fact amended in 1994. However, in considering whether the trial court properly denied appellants' motion for summary judgment, we are, of course, mindful that the burden of proof respecting that motion was on appellants, not the Association. The Association could defeat the motion simply by presenting evidence raising a disputed issue of material fact. *See* Tex. R. Civ. P. 166a(c). In this context, evidence favorable to the Association, as non-movant, is to be taken as true, and every reasonable inference from that evidence must be indulged in the Association's favor. *See Valence Operating*, 164 S.W.3d at 661. Favre's testimony that he personally believed that amendment occurred is of little weight. However, it could be reasonably inferred from the Association's evidence that the amendment was in fact adopted by the Declarant through the board's action. Favre indicated that the Declarant had the power to amend the bylaws in 1994, but the board by itself did not. He further stated that in 1994, the Declarant still appointed the Board and retained "the ability to veto any action by the board [that] was not in the best interest of [the] development." Furthermore, both Favre's testimony and an affidavit by a board member indicated that the

board had followed the alleged 1994 amendment in appointing the nominating committee for at least certain elections and possibly for every election held since 1994. The statements made by Favre and the board member are ambiguous regarding the exact extent to which the alleged amendments have been followed and for what period of time. However, indulging every reasonable inference in the Association's favor, this evidence is sufficient to suggest that the board has followed the alleged amendments as though the bylaws had in fact been amended. Taken altogether, the evidence presented by the Association raises a fact issue as to whether amendment actually occurred in 1994. Thus, appellants were not entitled to summary judgment on the ground that the Association violated the original bylaws by having a committee appointed in August 2007 select candidates for the December 2007 election.

In their motion, appellants additionally contended that even if amendment occurred in 1994, the task force's recommendations did not actually amend the prior bylaws concerning the nominating committee but instead "affirm[ed]" the existing bylaws. We disagree. The task force recommended that the nominating ("Nominations") committee, as established in the original bylaws, "be disbanded" and reformed with "newly established responsibilities." This does not suggest that the recommendation was to affirm the prior bylaws governing the committee. Furthermore, the recommendations state that: "Nominating Committee should not be a standing committee but only serve on an ad-hoc basis during annual election time, serving only for a specific year's selection process." This sentence indeed suggests that the committee would be in existence only during "a specific year's selection process." Accordingly, appellants' argument that even if the 1994 recommendations amended the bylaws, they would not have changed the formation or operation of the nominating committee is without merit. The trial court did not err in denying appellants' motion for summary judgment on the ground that the wrong nominating committee considered board candidates for the December 2007 election.

B. Committee Meeting Notice

In their second ground, appellants contended that the ballot used for the December 2007 board of director's election was illegal because the candidates on that ballot were chosen at an invalidly called meeting of the nominating committee. More specifically, appellants contended that notice of the sole nominating committee meeting to consider candidates for that election was invalid and that there were no waivers of such notice submitted pursuant to the bylaws. In support of their contentions, appellants presented evidence that the only notice of the meeting was sent by email to committee members less than two days before the meeting and that no notice at all was sent to committee alternates. According to appellants, email was not a proper form of notice under either the Association's bylaws or applicable Texas law. Ultimately, of the seven members of the board and two alternates, four members (including the chairman) and no alternates attended the meeting. The members and alternates who failed to attend did not provide any waiver of notice. Appellant Goodrich stated in his affidavit that he informed the Association's board of directors regarding the improper notice prior to the December election. Similarly, in his affidavit, board of directors member Myatt Hancock stated that he sent a letter to the board on October 24, 2007, apprizing it of various procedural problems relating to the nominating committee.

In response to this ground, the Association principally urged the trial court to follow the general inclination of Texas courts to not interfere in the internal management of voluntary associations. *See Stevens v. Anatolian Shepherd Dog Club of Am., Inc.*, 231 S.W.3d 71, 74-75 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). On appeal, the Association further asserts that email was a proper form of notice. We will begin by addressing whether the general rule discussed in *Stevens* is applicable to appellants' claims; we will then consider whether email was an acceptable form of notice, and finally, whether appellants are entitled to a grant of summary judgment on this ground.

1. Applicability of General Rule

As we explained in *Stevens*, courts of this state generally "are not disposed to interfere with the internal management of a voluntary association," but will still do so "if a valuable right or property interest is at stake," or if the association in question fails to "accord their members something similar to due process." *Stevens*, 231 S.W.3d at 74-75. Additionally, for the rule to apply, the governing body of the association may not "substitute legislation for interpretation, overstep bounds of reason, common sense, or fairness, or contravene public policy or laws of the land in its interpretation and administration." *Id*. at 75.

The parties initially dispute whether the general rule can apply to the Association. Appellants assert that the general rule does not apply because the Association has not demonstrated that it is a "voluntary" organization as opposed to an organization for which membership was mandatory for people living in the First Colony subdivision. The Association does not dispute that membership for residents of the subdivision was mandatory, but instead, argues that because people could choose to either live or not live in the subdivision, membership was still voluntary. We do not need to resolve this dispute regarding the nature of the Association because even if the general rule of noninterference applies to the Association, the dispute at issue in this case is not the sort of internal management issue the general rule contemplates.

Appellants here assert that the Association violated its own bylaws and the laws of Texas pertaining to election of its governing body. The power of the nominating committee is not inconsequential in this regard. Under the original bylaws, the members of the committee were authorized to consider applications for board candidacy and determine which of the applicants would be placed on the printed ballot. The members could nominate as many or as few candidates as they chose, as long as they selected at least one candidate for each seat up for election. Additionally, board members apparently were authorized to determine for themselves the criteria to be used in accepting and rejecting

candidates for nomination. Although the bylaws also permitted nominations to be made "from the floor," it is beyond question that generally, it would be better to be on the printed ballot than to be a write-in candidate. Moreover, Goodrich's entitlement to participate in the committee's deliberations, and Swonke's interest in being considered for nomination at a properly noticed meeting of the committee, would appear to be valuable rights, particularly in light of the fact that they owned property in, and made their homes in, the subdivision governed to some extent by the Association. *See Stevens*, 231 S.W.3d at 74-75; *see also Chen v. Tseng*, No. 01-02-01005-CV, 2004 WL 35989, at *5 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (mem. op.) (affirming trial court's finding that alleged directors of incorporated religious group had not been lawfully elected at meeting called without written notice); *Scoville v. SpringPark Homeowner's Ass'n, Inc.*, 784 S.W.2d 498, 506 (Tex. App.—Dallas 1990, writ denied) (Ovard, J., dissenting) (discussing "unique interrelationship between a homeowners' association and its members" and noting that such associations have been analogized to "private government[s]"); *Owens Entm't Club v. Owens Cmty. Improvement Club*, 466 S.W.2d 70, 72 (Tex. Civ. App.—Eastland 1971, no writ) (holding that a club member's right to participate in the determination of what to do with a building that the club owned was a great enough interest to justify interference). Consequently, if the trial court determined to not address the merits of appellants' second ground for summary judgment based on the general rule of noninterference in voluntary associations, the trial court abused its discretion in so doing. *See Stevens*, 231 S.W.3d at 76 (holding that standard of review for trial court's application of general rule of noninterference is abuse of discretion).

2. Sufficiency of Notice

Turning to the substance of appellants' second ground for summary judgment, we first note that the Association acknowledged in its responses to appellants' requests for admissions that "notice of the [nominating committee] meeting was required to be sent to the actual members," but denied that notice was required to be sent to committee

alternates.[10] The issue before us then is not whether notice was necessary, but whether proper notice occurred in this case.[11] The Association contends, and appellants do not dispute, that the committee chairman, Rod Craig, sent notice by email less than two days before the meeting to all committee members. Although Goodrich acknowledged receipt of the notice, and four of seven committee members (including the chairman) apparently attended the meeting, the Association points to no evidence establishing that the other members not in attendance, or the two alternates, received actual notice of the meeting. The key dispute then is whether emailed notice of the meeting was sufficient notice under the bylaws or applicable Texas law.

In their motion, appellants pointed to two sections of the bylaws as potentially governing notice of nominating committee meetings.[12] The first occurs in Article III of the bylaws, titled: "Board of Directors: Number, Powers, Meetings." Section 5 under this article discusses the nomination of directors by the nominating committee as well as the formation of the committee itself by the board. Section 11 under Article III authorizes "[s]pecial meetings" of the board, with notice given by (1) personal delivery, (2) written notice by first class mail, (3) telephone communication or facsimile, or (4) telegram. Although the inclusion of the nominating committee rules in the Article dealing with the board of directors suggests that the committee could be considered a committee "of the board," it is unclear whether the rules governing specially-called board meetings were intended to apply to the committee. If such notice rules were applicable to the committee,

[10] Appellants interpret one of the Association's appellate arguments as suggesting that no notice was necessary. The argument in question, however, appears to assert only that the requirements for notice contained in a particular section of the bylaws did not apply, not that no notice at all was required.

[11] Appellants attached a copy of a document entitled "First Colony Community Association Policy Governance," which purported to set forth certain procedures for the nominating committee, including that it was required to "convene in September to review the submitted applications to determine which candidates shall be placed on the ballot." Thus, a meeting of the nominating committee appears to have been a requirement, and the Association does not contend otherwise.

[12] Appellants additionally argued that under the Texas laws governing operation of the Association, email was not an acceptable form of notice. Because of our resolution of the issue under the bylaws, we need not consider the statutory argument.

then emailed notice was clearly not sufficient as it was not included in the exclusive list of methods for notice.

The other section upon which appellants relied, and the one on which they primarily focused, is contained in Article VI and reads in pertinent part as follows:

> Article VI
>
> Miscellaneous
>
> . . . .
>
> Section 5. Notices. Unless otherwise provided in these By-Laws, all notices, demands, bills, statements, or other communications made or given under these By-Laws shall be in writing and shall be deemed to have been duly given if delivered personally or if sent by U.S. mail, first class postage prepaid, or by facsimile:
>
> (a) Member Notice. If to a Member, at the address which the Member has designated in writing and filed with the Secretary, or if no such address has been designated, at the address of the Tract or Residential Unit of such Owner . . . .

Appellants contended that if the board of directors meeting notice provisions did not apply to notice of nominating committee meetings then this "catch-all" provision applied.

The Association argues first that Article VI, Section 5 does not govern nominating committee notice because it provides only methods for notice or other communications if such notice is otherwise specifically required by another section of the bylaws. We do not read the section so narrowly. The section states that it covers notices or other communications "made or given under these ByLaws" unless rules for such notice or communication are "otherwise provided"; it does not negate the possibility that there may be notices and communications that are not explicitly spelled out but nonetheless are required for proper operation of the Association under the bylaws. Indeed, the section seems designed as a "catch-all" provision that should be referenced any time notice or other communication needs to be made in governance of the Association and for which

specific rules are not already set forth. As such, the section would cover notice for nominating committee meetings in the event that such meetings are not covered by the provisions for specially-called meetings of the board in Article III, Section 11.

Second, the Association argues that although the description of notice methods in the section specifies that notice must be "in writing," it does not specifically exclude email as a proper method for transmitting written notice. Again, we disagree. The section indicates that notice "shall be deemed to have been duly given if delivered personally or if sent by U.S. mail . . . or by facsimile." The section then details the address to be used for delivery. The specificity of the section with regard to how and where notice is delivered indicates that it was intended to be exclusive of other methods. Therefore, if Article VI, Section 5 governed notice of the nominating committee meeting, then email was not an acceptable method for such notice.

Although there is some uncertainty in the bylaws as to whether notice of the nominating committee was governed by the rules applicable to specially-called board meetings contained in Article III, Section 11 or the catch-all notice provision in Article VI, Section 5, under either section, email is not an acceptable form of notice. Because the evidence established that the only notice provided of the committee meeting was by email, notice was not properly provided.

3. Is Summary Judgment Warranted?

On appeal, appellants contend that the holding of a meeting in the absence of proper notice under the bylaws invalidated any action taken at that meeting. *See Chen*, 2004 WL 35989, at *5 (affirming trial court's finding that alleged directors of incorporated religious group had not been lawfully elected at meeting called without written notice); *Been v. Producers Ass'n of San Antonio, Inc.*, 352 S.W.2d 292, 293 (Tex. Civ. App.—San Antonio 1961, no writ) (affirming temporary injunction reversing removal of directors at improperly noticed meeting where directors had not waived their rights under the bylaws); 7 C.J.S. Associations § 18 (2004) ("Failure to give proper notice will render the

proceedings at a meeting invalid."). However, we decline to grant summary judgment on this ground at this time for two reasons. First, as the appellants recognized in their motion, the relevance of whether the committee meeting was properly noticed turns on whether the committee in question was the appropriate committee for considering candidates for the December 2007 election. Since, as explained above, a fact issue exists as to this antecedent question, it would be premature to decide the dependent issue of notice. Second, even if summary judgment could be granted on this ground, appellants failed to establish as a matter of law that the proper remedy was the relief that they requested in their motion. Accordingly, we overrule appellants' first issue.[13]

V. Attorney's Fees

In their fourth issue, appellants contend that the trial court erred in awarding attorney's fees to the Association because appellants' arguments were well-founded and, indeed, "completely meritorious." The award of attorney's fees was clearly premised on the grant of summary judgment favoring the Association. Because we reverse the trial court's grant of summary judgment, the award of attorney's fees is without a supporting basis. *See, e.g., Allen v. Allen*, 280 S.W.3d 366, 383-84 (Tex. App.—Amarillo 2008, pet. denied). Consequently, we also reverse the award of attorney's fees to the Association. Appellants' fourth issue is sustained.

[13] In their motion for summary judgment, appellants additionally argued that the ballot used in the December 2007 election was defective on its face and therefore invalid. Appellants appear to have abandoned this ground on appeal.

We reverse the trial court's judgment in its entirety and remand for further proceedings in accordance with this opinion.

/s/ Adele Hedges
Chief Justice

Panel consists of Chief Justice Hedges, Justice Anderson, and Senior Justice Mirabal.[14]

[14] Senior Justice Margaret Garner Mirabal sitting by assignment.