COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-14-00294-CV

W.W. COLLINS, JR. — APPELLANT

V.

KAPPA SIGMA FRATERNITY AND PHILIP L. THAMES — APPELLEES

FROM THE 96TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 096-203806-04

MEMORANDUM OPINION[1]

I. INTRODUCTION

Appellant W.W. Collins, Jr. ("Collins") appeals the trial court's order granting summary judgment in favor of Appellees Kappa Sigma Fraternity and Philip L. Thames ("Fraternity" or "Defendants") and order dismissing Defendants'

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

promissory estoppel claim for lack of jurisdiction. In six issues, Collins argues that the judicial non-intervention doctrine is precluded in this case and that the trial court erred by granting summary judgment based upon the doctrine; that there exist fact issues regarding his claims of breach of fiduciary duty, breach of contract, defamation, and participatory liability; that the trial court abused its discretion by sustaining the Fraternity's objections to his summary judgment evidence while denying his objections to its summary judgment evidence; that the trial court erred by dismissing his promissory estoppel claim; that the trial court abused its discretion by limiting discovery; and that the trial court erred by overruling his objections to the form of the Fraternity's discovery objections. We will affirm in part and reverse and remand in part.

II. BACKGROUND

Collins sued the Fraternity after being expelled in January 2003. This case has thus far resulted in an extensive record and has been seen by this court twice in different fashion. Once, this court has seen this case through a direct appeal. *Collins v. Kappa Sigma Fraternity*, No. 02-09-00305-CV, 2010 WL 1633416, at *1 (Tex. App.—Fort Worth Apr. 22, 2010, pet. denied). Another time, this court has seen this case via application for writ of mandamus. *In re Collins*, No. 02-12-00429-CV, 2013 WL 174801, at *1 (Tex. App.—Fort Worth Jan. 17, 2013, orig. proceeding). This current appeal involves the trial court's granting of the Fraternity's traditional and no-evidence motion for summary judgment and its dismissal of Collins's promissory estoppel claim.

A. Parties to this Litigation

1. The Fraternity

The Fraternity is an unincorporated membership association that was founded in 1869 at the University of Virginia. It has approximately 158,000 alumni members; roughly 215 undergraduate and alumni chapters located at colleges and universities in the United States and Canada; and is governed by a five-member "Supreme Executive Committee." Every odd year, the Fraternity holds a national convention called a "Grand Conclave." The members of the Supreme Executive Committee are elected at these Grand Conclaves. The Fraternity is an Appellee and is a defendant in this case.

2. Collins

While attending the University of Texas, Collins joined the Fraternity on March 14, 1965. During his time as an alumni member, Collins served as alumnus advisor to the Fraternity's chapter at Texas Christian University; served as a board member and trustee of the Texas Kappa Sigma Educational Foundation; and received numerous Fraternity-related awards, including Alumnus Advisor of the Year and Tau Man of the Year. Collins is the Appellant in this case and is the plaintiff in the suit below.

3. Thames

Philip L. Thames is a Fraternity member, an Appellee, and a defendant in the lawsuit. Thames's involvement in the events leading to this suit is described further below.

B. Significant Entities and Events

1. The Supreme Executive Committee

At the time of the events leading to this lawsuit, the Supreme Executive Committee was comprised of alumni members Thomas P. Bishop, Kevin S. Kaplan, Donal L. McClamroch, Jr., Ronald J. Webb, and E.L. (Bill) Betz, Jr. The Supreme Executive Committee served as the tribunal that heard the Fraternity's charges against Collins which led to his expulsion. The Supreme Executive Committee voted to expel Collins from the Fraternity on January 18, 2003. That expulsion was the impetus of this lawsuit.

2. The Virginia Property

In 1965, the Fraternity acquired a contract right to purchase certain real property in Albemarle County, Virginia. The Fraternity planned to use the property, which was about seventeen acres in size and contained various improvements, as the Fraternity's permanent headquarters and as a "perpetual memorial" to the Fraternity.

3. The Foundation

In 1966, the Fraternity formed a non-stock corporation, Kappa Sigma Fraternity, Inc., a/k/a Kappa Sigma Memorial Foundation, to hold legal title to the Virginia Property. The Fraternity assigned its contract to purchase the Virginia Property to the Foundation, and the Foundation acquired legal title to the property. The Foundation is governed by a five-member Board of Directors "elected by the vote of the members of the corporation at the [biennial] meeting

of the corporation to be held every odd numbered calendar year." *Kappa Sigma Fraternity, Inc. v. Kappa Sigma Fraternity*, 266 Va. 455, 460, 587 S.E.2d 701, 704 (2003).

4. The Virginia Lawsuit

In April 2001, and after various disputes between the Foundation and the Fraternity regarding the Virginia Property, the Foundation listed the Virginia Property for sale, seeking a price of $6,500,000. In response, the Fraternity, along with three alumni—Bishop, Kaplan, and Betz—sued the Foundation seeking, among other things, declaratory and injunctive relief forbidding the Foundation from selling the Virginia Property. After lengthy court proceedings, the Supreme Court of Virginia ultimately entered final judgment in favor of the Foundation. *See Kappa Sigma*, 266 Va. at 471, 587 S.E.2d at 711. The parties to this lawsuit dispute the level of Collins's involvement in the Virginia Lawsuit, but both parties agree that Collins sided with the Foundation and that members of the Supreme Executive Committee, which served as the tribunal to expel Collins, sided with the Fraternity.

5. The Fraternity's Resolution

The Fraternity alleges that prior to the Virginia Lawsuit, it unanimously passed a resolution opposing the sale of the Virginia Property. The parties to this lawsuit dispute the content of the resolution and when the resolution was passed. The parties also dispute the resolution's relationship to any attempted sale of the Virginia Property by the Foundation.

6. The Fort Worth Lawsuit

In 1996, after Collins had served almost twenty years as alumnus advisor to the Fraternity's Texas Christian University Chapter, the Fraternity removed Collins as alumnus advisor. Collins's removal prompted many of the prominent alumni of that chapter and other chapters to write letters of disapproval to the Fraternity. Early the next year, Richard F. Walsh and The Fort Worth, Texas Alumni Chapter filed suit against the Fraternity and one of its officers for allegedly failing to follow proper procedures in removing Collins. Collins later intervened as petitioner. The Fort Worth Lawsuit was later nonsuited due to mootness because Collins's term as alumnus advisor expired.

7. The Demand Letter

Shortly after the Fort Worth Lawsuit was nonsuited, Collins and two other Fort Worth alumni, Field Lange and Norman Darwin, received a demand letter dated November 21, 1997. The Demand Letter was signed by several officers of the Fraternity, including Thames, Kaplan, and Betz. The letter expressed that these officers were "upset[] that [Collins] refused to accept the decision made by [the Fraternity]" and characterized the Fort Worth Lawsuit against the Fraternity as "reprehensible." The letter also expressed that "[p]erhaps the most disturbing aspect of [the Fort Worth Lawsuit] is that the [Fraternity] . . . incurred an enormous cost." The letter demanded that Collins, Lange, and Darwin pay $200,000 to the Fraternity for its alleged financial loss in defending itself in the Fort Worth Lawsuit. The letter referred to this demand as Collins's, Lange's, and

Darwin's "last chance." The letter further demanded that if these three did not pay the amount demanded, then they should tender their immediate resignation from the Fraternity. Both Collins and Darwin responded that they would not pay the alleged financial loss.

8. The Austin Lawsuit

In 2001, the Fraternity's Tau Chapter at The University of Texas and the Texas Kappa Sigma Educational Foundation, Inc. sued the Fraternity, Kaplan, Bishop, Betz, Thames, and other members for allegedly wrongfully revoking the Tau Chapter's charter. Both parties agree that the Austin Lawsuit was nonsuited by agreement. Collins contends that as part of the agreement to nonsuit the Austin Lawsuit, the named plaintiffs promised to not seek retribution against the chapter, the Educational Foundation, its board, or any of the members of these entities. At the time of this alleged promise, Collins was a member of the Educational Foundation's board and a member of the Tau Chapter.

9. The Houston Lawsuit

The exact nature of the Houston Lawsuit is not clear from the record, but according to Collins, this lawsuit represents another example wherein at least one member of the Supreme Executive Committee—Bishop—can be seen as being adverse to Collins prior to his expulsion.

10. TCU Hazing Investigation

In January 2002, the Fraternity, through member Thames, conducted an investigation regarding alleged hazing violations at the TCU Chapter but initially

found no evidence of hazing violations. Later, in April 2002, the TCU Chapter informed the Fraternity that it had statements from individuals alleging hazing at the TCU Chapter. The Fraternity suspended the TCU Chapter and reopened its hazing investigation. The Fraternity also requested information from Jeff Chauvin, Patrick McGlinchey, and Richard Colvin, who were then officers of the TCU Chapter.

Collins acknowledges that in April 2002 he received a telephone call from Colvin and McGlinchey regarding the hazing allegations. Collins pleaded in this case that he advised Colvin and McGlinchey to contact Jeff Kearney, a TCU Chapter alumnus and criminal attorney. According to Collins's summary judgment evidence, Kearney told Colvin and McGlinchey to not cooperate with the TCU Chapter nor the Fraternity because of a potential criminal investigation into the individual members of the TCU Chapter.

In his report regarding the TCU Hazing Investigation, Thames acknowledged that individual members would not cooperate with his investigation. And because he wished to "[n]ot . . . complicate the situation for any individuals involved," Thames "modified [the Fraternity's] request for information so that only the chapter was required to provide [information about the hazing allegations]."

11. Collins's Expulsion Trial

On December 18, 2002, Fraternity Executive Director Mitchell B. Wilson sent a letter to Kaplan alleging that Collins had violated the Fraternity's

Constitution, By-Laws, and Rules in three different ways. First, Wilson claimed that Collins had instructed certain members "not to cooperate in the [TCU] hazing investigation, not to communicate with 'national' because 'national' could not be trusted with anything, and not to trust [Thames]." Second, Wilson claimed that Collins had violated the Fraternity's allegedly unanimous decision to oppose the Foundation's attempts to sell the Virginia Property. Third, Wilson claimed that Collins's involvement in the Fort Worth Lawsuit was the result of Collins's "failure to comply with orders emanating from" the Supreme Executive Committee.

The same day that Wilson filed these charges, Kaplan, serving as "Worthy Grand Procurator," notified Collins of the charges by certified mail. In Kaplan's notice, he also notified Collins that "the Supreme Executive Committee [would] conduct a trial on these charges at its next meeting, January 18, 2003, in San Diego, California." The notice informed Collins that he had the right to appear in person to present his defense or that he would be allowed to submit his defense in writing so long as the written defense was received five days prior to the meeting.

On December 23, 2002, Kaplan filed an investigative report with the Supreme Executive Committee concerning the charges against Collins. According to the report, Kaplan had reviewed all "minutes and other documents supporting the charges, as well as additional statements from reputable brothers regarding [Collins's] conduct," and had determined that there was "ample evidence to warrant and support the charges."

On January 10, 2003, Collins sent an eleven-page letter to Kaplan. In his letter, Collins stated that he had not received reasonable notice of the charges against him. Specifically, Collins said that the charges were overly broad and that the charges lacked specificity sufficient for him to be able to properly prepare a defense. Collins's letter further stated that he had not received copies of all the documents that pertained to him and the charges. Collins went on to state that he was not being given a reasonable opportunity to be heard because he was not in a position to attend a trial of the charges against him in San Diego.

With the caveat that he did not wish to waive his objections to notice and an opportunity to be heard, Collins then gave a several-paged, detailed defense to the charges against him. Collins also attached the supporting affidavits of McGlinchey, Richard G. Miller, and Walsh.

Despite Collins's objections, on January 18, 2003, the Supreme Executive Committee held a hearing in San Diego regarding the charges against Collins. At the beginning of the hearing, McClamroch recused himself, citing that he had been directly involved in one of the lawsuits which served as the basis of one of the charges against Collins. According to the minutes regarding the hearing, Kaplan read the charges against Collins, noted Collins's procedural objections, asserted that due process had been afforded, and then asked if any member wanted to offer a statement in support of Collins. At that time, Lange asserted that Collins was unable to attend because he was tending to his father, who had just undergone long-scheduled and serious eye surgery. The notes also state

that "while [Collins's] extensive written defense assert[s that] the trial should not be held, there was no request for a postponement due to any medical situation in [Collins's] family or any other reason."

At the close of the hearing, the four remaining members of the Supreme Executive Committee voted unanimously to expel Collins from the Fraternity. Specifically, the Supreme Executive Committee found that Collins had violated the Fraternity's hazing policy and had participated in conduct unbecoming a member.

12. "The Star and Crescent"

After the expulsion hearing, the Fraternity published the minutes of Collins's expulsion trial in "The Star and Crescent," a Fraternity publication. Collins alleges in this lawsuit that the publishing of his expulsion trial in this publication defamed him.

C. Members Somehow Involved in This Suit or Overall Dispute

1. Thames

As mentioned above, Thames is a named defendant in this lawsuit. Thames was a signatory to the Demand Letter to Collins, Darwin, and Lange seeking reimbursement to the Fraternity for its costs defending the Fort Worth Lawsuit. Thames allegedly made false statements at Collins's expulsion trial about Collins not returning or answering calls, and it is Collins's contention that these false statements had the intended effect of ensuring a unanimous vote by the Supreme Executive Committee to expel him. Collins also claims these

statements were libel per se. Thames was the District Grand Master who conducted the investigation into the TCU Hazing Investigation. By Collins's account, Thames never contacted him regarding the TCU Hazing Investigation. Thames was a named defendant in the Austin Lawsuit.

2. Bishop

Thomas P. Bishop is a Fraternity member who was a member of the Supreme Executive Committee that heard the charges against and voted to expel Collins from the Fraternity. Bishop was also a co-petitioner in the Fraternity's Virginia Lawsuit against the Foundation. Further, Bishop was a named defendant in the Austin Lawsuit.

3. Kaplan

Kevin S. Kaplan is a Fraternity member who was a member of the Supreme Executive Committee that heard the charges against and voted to expel Collins from the Fraternity. Kaplan served, in his duties as Worthy Grand Procurator, as prosecutor during those proceedings. Kaplan was also a co-petitioner in the Fraternity's Virginia Lawsuit against the Foundation. Kaplan was a named defendant in the Austin Lawsuit. Kaplan was a signatory to the Demand Letter to Collins, Darwin, and Lange seeking reimbursement to the Fraternity for its costs defending the Fort Worth Lawsuit. According to deposition testimony, Kaplan was admittedly upset with Collins over the Fort Worth Lawsuit. Specifically, Kaplan testified that what "bothered [him] quite a bit" and "the thing that really stuck out in [his] mind on this particular charge was the $150,000

in . . . legal fees the [F]raternity had to pay to defend a suit like that." It was Kaplan, serving as Worthy Grand Procurator, who called for the investigation of Collins regarding the TCU Hazing Investigation. In his review of the charges against Collins, Kaplan alleged to have witnessed Collins actively participating in the Virginia Lawsuit.

4. Betz

E.L. Betz, Jr. is a Fraternity member who was a member of the Supreme Executive Committee that heard the charges against and voted to expel Collins from the Fraternity. Betz was also a co-petitioner in the Fraternity's Virginia Lawsuit against the Foundation. Betz was a signatory to the Demand Letter to Collins, Darwin, and Lange seeking reimbursement to the Fraternity for its costs defending the Fort Worth Lawsuit. And Betz was a named defendant in the Austin Lawsuit.

5. McClamroch

Donald L. McClamroch is a Fraternity member who was a member of the Supreme Executive Committee and Worthy Grand Master of Ceremonies at the time the charges against Collins were heard, but McClamroch recused himself from the expulsion tribunal. McClamroch's stated reason for recusing himself was that he was a named defendant in a lawsuit in which Collins was involved. Collins's petition in this case alleges that McClamroch's statement "was a false statement [that McClamroch] failed or refused to correct." Collins alleges that this false statement was made knowing it "would or could cause severe

prejudice" towards him as the tribunal sat. Collins alleges and has provided summary judgment evidence that McClamroch was involved in a hazing incident unrelated to the one in which Collins was charged with having covered up. Collins further alleges that McClamroch was not disciplined for his involvement in this separate hazing incident.

6. Webb

Ron Webb is a Fraternity member who was a member of the Supreme Executive Committee that heard the charges against and voted to expel Collins from the Fraternity. Prior to casting his vote, Webb inquired of the gathered members whether anyone had heard from Collins regarding the charges and trial against him. Allegedly, in response to Webb's inquiry, Thames told everyone available that he had attempted to call Collins but that Collins never answered or returned his calls. Collins denies ever having received a single call from Thames in the five years prior to him being expelled. After Thames's statement, Webb allegedly made a comment that Collins was disrespectful toward Thames by not returning his calls.

7. Lange

Theodore "Ted" F. Lange is a Fraternity member who, allegedly along with Collins, told two members of the TCU Chapter to not cooperate with the Fraternity's TCU Hazing Investigation. Lange was president of the Fort Worth Chapter of the Fraternity which voted to file the Fort Worth Lawsuit against the Fraternity. Lange was a named member in the Demand Letter wherein the

Fraternity demanded repayment of costs associated with the Fort Worth Lawsuit. At Collins's expulsion trial, Lange spoke on behalf of Collins and told the Supreme Executive Committee that Collins's absence was due to the fact that he was attending his father's long-scheduled and serious eye surgery. Lange was implicated in the TCU Hazing Investigation and its alleged cover-up. The record indicates that Lange has never been brought up on Fraternity charges related to his alleged attempts to thwart the Fraternity's TCU Hazing Investigation, his involvement in the Fort Worth Lawsuit, or his refusal to submit to the Demand Letter.

8. Miller

Richard G. Miller is a now-deceased Fraternity member who was trustee and president of the Foundation at the time of the Virginia Lawsuit. In a deposition pertaining to that lawsuit, Miller is alleged to have made comments indicating that Collins was heavily involved and wished to extend the lawsuit "beyond eternity" so that he could "depose everybody . . . in the [F]raternity." Miller is also alleged to have stated that Collins was the person who hired a real estate agent to list the Virginia Property for sale. This alleged testimony served in part as a basis for the Fraternity's allegation that Collins had committed conduct unbecoming of a Fraternity member. Collins attached an affidavit by Miller to his response to the Fraternity's allegations. In his affidavit, Miller averred that Collins did not seek a real estate agent to list the Virginia Property; that he did not state that Collins wanted to extend the Virginia Lawsuit; nor did

anyone, including Collins, attempt to sell the Virginia Property after the Fraternity's Resolution.

9. Walsh

Richard F. Walsh is a Fraternity member and was a named plaintiff in the Fort Worth Lawsuit. Collins attached Walsh's affidavit to his response to the charges which brought about his expulsion. In his affidavit, Walsh averred that Collins had no control over Walsh's decision to sue the Fraternity in the Fort Worth Lawsuit. The record indicates that Walsh has not received any disciplinary action from the Fraternity for his decision to file suit.

10. Darwin

Norman Darwin is a Fraternity member and an attorney. Darwin represented the Fort Worth Chapter in the Fort Worth Lawsuit against the Fraternity. He also represented Collins in the Fort Worth Lawsuit once Collins intervened. Darwin was a named person in the Fraternity's Demand Letter as being responsible for incurring a $200,000 legal expense upon the Fraternity. Darwin, along with Collins, responded to the Demand Letter, refusing to pay the Fraternity's demands. The record indicates that the Fraternity has not sought to expel or bring formal disciplinary action against Darwin.

11. Jeffries

Cole Jeffries is a Fraternity member and a Florida attorney who was assigned by Kaplan to investigate the alleged hazing in the TCU Hazing Investigation. According to Collins, Jeffries never spoke to him about his alleged

involvement in the alleged hazing cover-up that resulted in the Fort Worth Hazing Investigation.

D. This Case

After being expelled from the Fraternity and after the minutes of the expulsion trial were published in "The Star and Crescent," Collins filed this suit against the Fraternity and Thames. According to his third amended petition, Collins's live pleading at the time the trial court entered summary judgment, Collins alleged claims of wrongful expulsion, breach of fiduciary duty, breach of contract, defamation, and promissory estoppel against the Fraternity, and he alleged claims of participatory liability and defamation—libel per se—against Thames.

In the Defendants' traditional and no-evidence motion for summary judgment, the Defendants alleged that all of Collins's claims failed as a matter of law based on the doctrine of judicial non-intervention. The Defendants alternatively argued that no evidence existed to support certain elements of Collins's breach of contract, defamation, and participatory liability claims. Further, the Defendants argued that the exemplary damages that Collins sought under his tort claims failed as a matter of law. In a separate motion, the Defendants motioned the trial court to dismiss Collins's promissory estoppel claim, arguing that Collins had failed to demonstrate a promise upon which he could have relied to his detriment. The trial court granted this motion.

In his response to the Defendants' summary judgment motion, Collins argued, among many arguments, that the Fraternity had failed to provide him with due process when they expelled him. Thus, according to Collins, at a minimum, genuine issues of material fact existed as to whether the judicial non-intervention doctrine applied in this case and, at most, the doctrine is precluded in this case. Specifically, Collins argued that he "was not given a fair trial before a fair, impartial, and unbiased tribunal" when the Supreme Executive Committee held its hearing to expel him. Collins also alleged evidence of the elements of each of his claims that the Defendants claimed were not supported by evidence.

The trial court granted the Defendants' motion for traditional and no-evidence summary judgment. In its order, the trial court did not indicate its legal reasons for granting summary judgment. This appeal followed.

III. DISCUSSION

A. Summary Judgment Standards of Review

1. No-Evidence Summary Judgment Review

After an adequate time for discovery, the party without the burden of proof may, without presenting evidence, move for summary judgment on the ground that there is no evidence to support an essential element of the nonmovant's claim or defense. Tex. R. Civ. P. 166a(i). The motion must specifically state the elements for which there are no evidence. *Id.*; *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009). The trial court must grant the motion unless the nonmovant produces summary judgment evidence that raises a genuine issue of

material fact. *See* Tex. R. Civ. P. 166a(i) & cmt.; *Hamilton v. Wilson*, 249 S.W.3d 425, 426 (Tex. 2008).

When reviewing a no-evidence summary judgment, we examine the entire record in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion. *Sudan v. Sudan*, 199 S.W.3d 291, 292 (Tex. 2006). We review a no-evidence summary judgment for evidence that would enable reasonable and fair-minded jurors to differ in their conclusions. *Hamilton*, 249 S.W.3d at 426 (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005)). We credit evidence favorable to the nonmovant if reasonable jurors could, and we disregard evidence contrary to the nonmovant unless reasonable jurors could not. *Timpte Indus.*, 286 S.W.3d at 310 (quoting *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006)). If the nonmovant brings forward more than a scintilla of probative evidence that raises a genuine issue of material fact, then a no-evidence summary judgment is not proper. *Smith v. O'Donnell*, 288 S.W.3d 417, 424 (Tex. 2009); *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003), *cert. denied*, 541 U.S. 1030 (2004).

2. Traditional Summary Judgment Review

In a traditional summary judgment case, the issue on appeal is whether the movant met the summary judgment burden by establishing that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Mann Frankfort Stein & Lipp Advisors, Inc. v.*

Fielding, 289 S.W.3d 844, 848 (Tex. 2009). We review a traditional summary judgment de novo. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010).

We take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *20801, Inc. v. Parker*, 249 S.W.3d 392, 399 (Tex. 2008); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). We consider the evidence presented in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if reasonable jurors could and disregarding evidence contrary to the nonmovant unless reasonable jurors could not. *Mann Frankfort*, 289 S.W.3d at 848. We must consider whether reasonable and fair-minded jurors could differ in their conclusions in light of all of the evidence presented. *See Wal-Mart Stores, Inc. v. Spates*, 186 S.W.3d 566, 568 (Tex. 2006); *City of Keller v. Wilson*, 168 S.W.3d 802, 822–24 (Tex. 2005). If uncontroverted evidence is from an interested witness, it does nothing more than raise a fact issue unless it is clear, positive, and direct; otherwise credible and free from contradictions and inconsistencies; and could have been readily controverted. *Morrison v. Christie*, 266 S.W.3d 89, 92 (Tex. App.—Fort Worth 2008, no pet.) (citing Tex. R. Civ. P. 166a(c); *Trico Techs. Corp. v. Montiel*, 949 S.W.2d 308, 310 (Tex. 1997)).

The summary judgment will be affirmed only if the record establishes that the movant has conclusively proved all essential elements of the movant's cause

of action or defense as a matter of law. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979).

A defendant who conclusively negates at least one essential element of a cause of action is entitled to summary judgment on that claim. *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 508 (Tex. 2010), *cert. denied*, 562 U.S. 1180 (2011). Once the defendant produces sufficient evidence to establish the right to summary judgment, the burden shifts to the plaintiff to come forward with competent controverting evidence that raises a fact issue. *Van v. Peña*, 990 S.W.2d 751, 753 (Tex. 1999).

B. The Judicial Non-Intervention Doctrine

In his first issue, among his many arguments, Collins makes the principle argument that the trial court erred by granting summary judgment in favor of the Fraternity because he presented evidence that, at a very minimum, creates genuine issues of material fact regarding whether the Fraternity afforded him a "fair trial before an impartial tribunal" when the Supreme Executive Committee expelled him from the Fraternity. Thus, according to Collins, the judicial non-intervention doctrine that the Fraternity relies upon as its defense to all of Collins's claims does not apply.

The Fraternity responds with the assertion, as it did in the trial court below, that because Collins was given notice and an opportunity to be heard in accordance with the Fraternity's By-Laws, the judicial non-intervention doctrine dictates that courts should not interfere with the Fraternity's governance of its

members and thus the trial court properly granted the Fraternity's summary judgment motion predicated on this doctrine. We agree with Collins that there exist genuine issues of material fact as to whether he received a fair trial before an impartial tribunal.

Traditionally, courts are not disposed to interfere with the internal management of a voluntary association. *Harden v. Colonial Country Club*, 634 S.W.2d 56, 59 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.). By becoming a member, a person subjects himself, within legal limits, to the organization's power to make and administer its rules, including rules regarding membership in the association. *See id.*; *see also Anambra State Cmty. in Houston, Inc. v. Ulasi*, 412 S.W.3d 786, 792 (Tex. App.—Houston [14th Dist.] 2013, no pet.). Despite this general rule, Texas courts "will interfere in the inner dealings of a private association if a valuable right or property interest is at stake or if the association fails to give its members something similar to due process." *Anambra State*, 412 S.W.3d at 792. Fundamental to the requirements of due process is the opportunity to be heard before a fair and impartial tribunal of some nature, composed of neutral and detached persons. *See, e.g.*, *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 625 (1955).

The Fraternity presented evidence that it followed the strict guidelines of its own By-Laws when it provided Collins with the requisite notice and when it allowed him to provide his own defense, a defense that Collins did submit by way of his eleven-page letter detailing his position regarding the Fraternity's charges.

The Fraternity claimed in its summary judgment motion that this established that the judicial non-intervention doctrine applies in this case.

But in his response to the Fraternity's summary judgment motion, Collins provided evidence that the members on the Supreme Executive Committee that heard and expelled Collins had longstanding grievances against him. Collins provided competent summary judgment evidence that three of the four members of the Committee who voted to expel him had been on the opposite side of Collins in numerous lawsuits over the years.

Indeed, Bishop was a plaintiff in the Virginia Lawsuit, he was a named defendant in the Austin Lawsuit, and he was present during hearings regarding the Houston Lawsuit. In each of these lawsuits, Bishop was positioned opposite of Collins. Kaplan was a plaintiff in the Virginia Lawsuit, and he was a named defendant in the Austin Lawsuit. None of the parties in this case dispute that these positions were inapposite to Collins. And just like Bishop and Kaplan, Betz was a plaintiff in the Virginia Lawsuit and a named defendant in the Austin Lawsuit.

In addition to these lawsuits, Collins provided other evidence that the tribunal's members had longstanding grievances against him. Kaplan and Betz were both signatories to the Fraternity's Demand Letter, and Collins provided deposition testimony by Kaplan wherein Kaplan specifically stated that he was upset with Collins over the debt incurred by the Fraternity in defending itself in the Fort Worth Lawsuit. And it was Kaplan who brought the official charges

against Collins. Furthermore, Collins presented summary judgment evidence that Betz, the only voting member who was not involved in previous litigation, made disparaging remarks about Collins prior to the Supreme Executive Committee casting its votes to expel Collins.

Evidence of longstanding grievances against Collins was not the only evidence Collins provided that the Supreme Executive Committee—including members who were involved in similar positions to his in the Virginia and Fort Worth Lawsuits—had a bias against him. Collins provided evidence that other Fraternity members had not been expelled for conduct similar to that alleged of Collins. Collins provided further evidence that other Fraternity members participated in the same alleged conduct of informing TCU members not to participate in the TCU Hazing Investigation. Specifically, Collins provided evidence that another member admittedly informed other members not to cooperate with the Fraternity's investigation but that he was not expelled. Collins also provided evidence that unlike other investigations, his version of what transpired in the TCU Hazing Investigation was not investigated when similarly situated members in other chapters were given an opportunity to be heard.

Collins provided further evidence that the Supreme Executive Committee purposely held its expulsion trial at a time when Collins could not attend, knowing that another meeting would be occurring within a month in a location more convenient to Collins. At the very least, a reasonable inference is that the

Supreme Executive Committee wanted to take swift action to expel Collins when he would not be able to attend.

Collins provided evidence that at a minimum creates a genuine issue of material fact as to whether Thames made a false statement before the Supreme Executive Committee that Collins would not return calls when a Fraternity member inquired whether Collins was available for the tribunal. And he provided evidence that Kaplan and the Supreme Executive Committee kept information from him that would have assisted Collins in preparing his written response to the Fraternity's charges. Collins also provided evidence that the one member of the tribunal who abstained from voting, McClamroch, provided a false reason for doing so and that his reason inferred improper conduct on the part of Collins.

The Fraternity responds to Collins's evidence by claiming, for the first time on appeal, that evidence of mere bias is not sufficient to overcome the application of the judicial non-intervention doctrine. Citing *Blodgett v. University Club*, the Fraternity claims that Texas courts cannot interfere with the Fraternity's decision to expel Collins "simply because Collins alleges that the [Supreme Executive Committee] was biased against him." 930 A.2d 210, 230 (D.C. 2007). We conclude that the Fraternity's reliance on *Blodgett* is misplaced.

In *Blodgett*, the plaintiff "offer[ed] nothing but conclusory allegations to support his claim" that the tribunal dismissing him from an association had failed to provide him with an impartial tribunal. *Id.* at 227. As the *Blodgett* court noted, Blodgett had only claimed that one of nine voting tribunal members had a "pre-

determined" notion towards Blodgett's removal. Furthermore, the association that expelled Blodgett had provided summary judgment evidence that even if the one allegedly biased member of the tribunal had been removed, the association still had the required seven votes necessary to remove Blodgett. *Id.* at 227–28. Moreover, as the *Blodgett* court explained, Blodgett could not say that the entire process was tainted by unfairness given that two members of the tribunal had voted not to expel him. *Id*.

Standing in stark contrast to *Blodgett* is the Supreme Court of Illinois's decision *Van Daele v. Vinci*. 282 N.E.2d 728, 731 (Ill.), *cert. denied*, 409 U.S. 1007 (1972). In *Van Daele*, expelled members of an association brought suit alleging wrongful expulsion. The members who were expelled presented evidence that a majority of the members of the expelling tribunal "were involved in the events [giving] rise to the charges" for which the members were expelled. *Id.* at 731. Specifically, members of the tribunal were involved in a lawsuit against the expelled members of the association. Furthermore, there was evidence that the "charges [against the expelled members] were initiated against them by [members of] the Board." *Id*. While acknowledging the judicial non-intervention doctrine, the *Van Daele* court held that the expelled members had been denied "essential rights" because they had not been afforded "a hearing before a fair and impartial tribunal." *Id.* at 732. The *Van Daele* court further said,

> While agreeing that the Board did follow the procedure set out in the bylaws for disciplinary hearings, we cannot find the [Board's] final contention persuasive. There are too many factors indicating that

> the proceedings were in fact not good faith disciplinary hearings, but in reality, an attempt to silence and censure dissident members of the association.

Id. at 731.

Here, much like in *Van Daele*, when taking the evidence in the light most favorable to Collins, the nonmovant, as well as the reasonable inferences from that evidence, we conclude that there exist genuine issues of material fact concerning whether Collins had the opportunity to be heard before a fair and impartial tribunal in the proceedings to expel him. Indeed, Collins brought forth evidence that the proceedings were not done in good faith but in reality were an attempt by the Supreme Executive Committee to punish and remove Collins from the Fraternity because of the members' longstanding grievances against him. We hold that the trial court erred by granting the Defendants' motion for summary judgment predicated on the judicial non-intervention doctrine, and we sustain Collins's first issue.

C. Collins's Other Claims

1. Breach of Fiduciary Duty

In part of his second issue, Collins argues that the trial court erred by granting summary judgment in favor of the Fraternity on his breach of fiduciary duty claim. In its summary judgment motion, the Fraternity argued that Collins could not establish a fiduciary relationship between himself and the Fraternity as a matter of law and that Collins had failed to provide any evidence to each of the elements of his claim. In his response, Collins argued that he had created

genuine issues of material fact as to each of the elements of his claim. We agree with Collins that summary judgment was improper regarding his breach of fiduciary duty claim.

"The elements of a breach of fiduciary duty claim are: (1) a fiduciary relationship between the plaintiff and defendant, (2) a breach by the defendant of his fiduciary duty to the plaintiff, and (3) an injury to the plaintiff or benefit to the defendant as a result of the defendant's breach." *Lundy v. Masson*, 260 S.W.3d 482, 501 (Tex. App.—Houston [14th Dist.] 2008, pet. denied).

As to a fiduciary relationship, Collins argues that an informal fiduciary relationship existed between himself and the Fraternity and that he provided evidence that at the very least demonstrated genuine issues of material fact that such a relationship existed. Thus, according to Collins, the trial court erred by granting summary judgment based upon the Fraternity's claim that no fiduciary duty existed as a matter of law. We agree.

Fiduciary duties may arise from formal and informal relationships and may be created by contract. *Cotten v. Weatherford Bancshares, Inc.*, 187 S.W.3d 687, 698 (Tex. App.—Fort Worth 2006, pet. denied) *disapproved on other grounds by Ritchie v. Rupe*, 443 S.W.3d 856, 866 (Tex. 2014). Fiduciary duties arise as a matter of law in certain formal relationships, including attorney-client and trustee relationships. *Meyer v. Cathey*, 167 S.W.3d 327, 330–31 (Tex. 2005). But an informal fiduciary duty may arise from a moral, social, domestic, or purely personal relationship of trust and confidence, and these types of

relationships are generally called a confidential relationship. *Hubbard v. Shankle*, 138 S.W.3d 474, 483 (Tex. App.—Fort Worth 2004, pet. denied). A confidential relationship exists where influence has been acquired and abused and confidence has been extended and betrayed. *Cotten*, 187 S.W.3d at 698. The existence of a confidential relationship is ordinarily a question of fact. *Id.*

Collins provided summary judgment evidence that the Fraternity is obligated to collect dues from members and to prepare budgets and detailed quarterly statements, as well as annual statements, showing the Fraternity's financial condition. Collins also provided evidence that the Fraternity is required to disclose these records to members. Thus, Collins provided evidence that the Fraternity owes a financial responsibility and accounting to its members, of which he is one.

Collins further provided evidence that members rely upon the Fraternity's demands and orders dictating how a member is to behave in order to maintain good standing within the Fraternity. And Collins provided evidence that members are subject to suspension or expulsion by the Fraternity and that the Fraternity has established rules regarding notice and an opportunity to be heard. As discussed above, Collins provided evidence that these rules were not properly followed.

Collins further provided evidence that the Fraternity deems itself as owing a fiduciary duty to its members and chapters. Moreover, Collins provided the trial court with evidence that as a member for more than thirty-five years and as an

alumnus advisor for roughly twenty years, he was expected to trust and obey the orders of those in authority over him in the Fraternity.

Because an informal fiduciary duty is generally a question of fact and because Collins provided evidence that a confidential relationship existed between the Fraternity and its members and that this relationship between himself and the Fraternity had been abused and betrayed, the Fraternity's no-evidence summary judgment concerning this element of Collins's breach of fiduciary duty claim was precluded. Thus, it was error for the trial court to grant the Fraternity's no-evidence summary judgment motion predicated on its claim that no fiduciary duty existed as a matter of law. *See Cotten*, 187 S.W.3d at 698.

Regarding a breach of the fiduciary duty, Collins provided summary judgment evidence that the Fraternity may have breached this duty when, as detailed above, he provided evidence that the Fraternity failed to provide him with something akin to due process in the manner in which, and more specifically by whom, the trial to expel him was conducted.

Regarding damages, Collins provided summary judgment evidence that he was injured by the Fraternity's actions when it published the outcome of the Fraternity's trial to expel him in the Fraternity's publication. Collins also provided summary judgment evidence that he had lost several thousand dollars in the value of his membership in the Fraternity for over thirty-five years.

The Fraternity argues that Collins failed to provide evidence of specific damages and that his evidence is conclusory. *See Lindley v. McKnight*, 349

S.W.3d 113, 126 (Tex. App.—Fort Worth 2011, no pet.) ("Conclusory statements are not proper summary judgment proof. . . . A conclusory statement is one that does not provide the underlying facts to support the conclusion."). We disagree. Collins provided summary judgment evidence of specific amounts of dues that he owed as a member for more than thirty-five years, specific amounts that he owed as an alumni advisor for over twenty years, and specific amounts that he was required to pay to join the Fraternity and be bonded as an alumni advisor.

We conclude that the trial court erred by granting the Fraternity's no-evidence motion for summary judgment regarding Collins's breach of fiduciary duty claim because, at a minimum, Collins provided evidence to each of the elements of his claim. *See Lundy*, 260 S.W.3d at 501. We sustain this portion of Collins's second issue.

2. Breach of Contract

In part of his second issue, Collins argues that the trial court erred by granting the Fraternity's no-evidence summary judgment motion regarding his breach of contract claim. Collins argues that he provided summary judgment evidence supporting each of these claims and that the Fraternity has not provided evidence otherwise. We agree.

The elements of a breach of contract claim are (1) the existence of a valid contract, (2) performance or tendered performance by the plaintiff, (3) breach of the contract by the defendant, and (4) resulting damages to the plaintiff. *Rice v. Metro. Life Ins. Co.*, 324 S.W.3d 660, 666 (Tex. App.—Fort Worth 2010, no pet.).

In its no-evidence summary judgment motion, the Fraternity argued that Collins failed to provide evidence that the Fraternity breached its obligations under the Constitution, By-Laws, and Regulations and that he had not provided evidence that it breached "any other alleged contract." The Fraternity also argued that as a matter of law, it complied with its Constitution, By-Laws, and Regulations. The Fraternity also argued that Collins failed to provide any evidence of damages.

In his response and as detailed above regarding the judicial non-intervention doctrine, Collins provided competent summary judgment evidence that the Fraternity failed to provide him with an unbiased tribunal when it expelled him. And as discussed regarding his breach of fiduciary duty claim, Collins provided competent summary judgment evidence of damages. We sustain this portion of Collins's second issue and hold that the trial court erred by granting the Fraternity's no-evidence summary judgment motion regarding Collins's breach of contract claim.

3. Defamation

In part of his second issue, Collins argues that the trial court erred by granting the Fraternity's and Thames's no-evidence summary judgment motion pertaining to his defamation claims. Collins further argues that he presented evidence that defeated the Fraternity's affirmative defense of qualified privilege.

a. Collins's Defamation Claim Against the Fraternity

As to the Fraternity, Collins pleaded that the Fraternity defamed him "in one or more ways" when members of the Supreme Executive Committee read aloud the Fraternity's charges against him prior to voting to expel him. Collins specifically pleaded that the charges "left a clear impression to a reasonable person that Collins had engaged in hazing." In its summary judgment motion, the Fraternity claimed that Collins provided no evidence that the Fraternity had published a defamatory statement regarding Collins, that Collins provided no evidence that the Fraternity had acted with negligence regarding the truth of the statement, and that Collins provided no evidence that he had suffered damages. The Fraternity also claimed that its statements regarding Collins were privileged because the statements were made "during the course of the disciplinary process that resulted in Collins's expulsion."

Collins responded that the Fraternity made "trumped-up" and "false" statements about him at the expulsion trial and that the Fraternity failed to provide evidence of its affirmative defense that its statements were protected by qualified immunity.

Defamation is a false statement about a person, published to a third party without legal excuse, which damages the person's reputation. *Moore v. Waldrop*, 166 S.W.3d 380, 384 (Tex. App.—Waco 2005, no pet.). In a claim for defamation per se, "[t]he words are so obviously hurtful that they require no proof that they caused injury in order for them to be actionable." *Columbia Valley Reg'l*

Med. Ctr. v. Bannert, 112 S.W.3d 193, 199 (Tex. App.—Corpus Christi 2003, no pet.). "For a defamatory oral statement to constitute slander *per se*, it must fall within one of four categories: (1) imputation of a crime, (2) imputation of a loathsome disease, (3) injury to a person's office, business, profession, or calling, and (4) imputation of sexual misconduct." *Gray v. HEB Food Store # 4*, 941 S.W.2d 327, 329 (Tex. App.—Corpus Christi 1997, writ denied). The first category, which is at issue here, is met by a statement that "unambiguously and falsely imputes criminal conduct to" a party. *Id.*

Regarding Collins's claim that the Fraternity committed defamation per se, Collins provided competent summary judgment evidence that the charges against him, which ostensibly served as the basis for his expulsion, were read aloud before an audience and the tribunal at the January 18, 2003 expulsion trial. Included in these charges was the statement that Collins violated and attempted to conceal "violations" of the Fraternity's "Hazing Policy." As Collins points out, engaging in or failing to report hazing is a crime. Tex. Educ. Code Ann. § 37.152(a)(4) (West Supp. 2016). Collins also provided competent summary judgment evidence that the Fraternity knew that these statements were false. Thus, Collins provided more than a scintilla of evidence that when viewed in a light most favorable to him as the non-movant, demonstrates that the Fraternity unambiguously and falsely imputed criminal conduct upon him. *See Gray*, 941 S.W.2d at 329. Thus, the trial court erred by granting the Fraternity's no-evidence summary judgment motion that Collins had failed to establish evidence

of his defamation per se claim against the Fraternity. We sustain this portion of Collins's second issue.

b. Qualified Privilege

As to the Fraternity's summary judgment claim that it was protected in making these statements by the affirmative defense of qualified privilege, we agree with Collins that there exist genuine issues of material fact regarding the Fraternity's defense.

A conditional or qualified privilege arises out of the circumstances in which the allegedly false statement is published in a lawful manner for a lawful purpose. *Minyard Food Stores, Inc. v. Goodman*, 50 S.W.3d 131, 139–40 (Tex. App.—Fort Worth 2001), *rev'd in part on other grounds*, 80 S.W.3d 573 (Tex. 2002). This privilege applies to bona fide statements made under circumstances where the author believes that the public has an important interest in a particular subject matter requiring publication, or where the author believes that a person having a common interest in a particular subject matter is entitled to know the information. *Id.* A conditional or qualified privilege is defeated, however, when the privilege is abused, such as when the person making the defamatory statement knows the statement is false or acts for some purpose other than protecting the privileged interest. *Id.*

Here, Collins provided more than a scintilla of competent summary judgment evidence that the Fraternity knew that the statements against him were false. He also provided evidence that the Fraternity made the statements for a

purpose other than protecting a privileged interest. *See id.* Thus, summary judgment predicated on the Fraternity's assertion of qualified privilege was improper. We sustain this portion of Collins's second issue.

c. Collins's Defamation Claim against Thames

As to Thames, Collins pleaded that Thames defamed him per se by stating before the tribunal and the audience that he had called Collins "but [Collins] doesn't return my calls."

Thames moved for summary judgment alleging that Collins provided no evidence that Thames's statement was defamatory, that Collins provided no evidence that Thames had acted with negligence regarding the truth of his statement, and that Collins suffered no damages as a result of the statement.

In his response, Collins argued that Thames's statement injured his "profession or occupation, in that Collins is a member of a profession or occupation that involves maintaining appropriate, ethical communications with clients, professional associates, and others," and thus Thames's statement was defamation per se. On appeal, Collins argues that Thames's statement impugned his reputation before the tribunal. But this was not an argument that Collins brought before the trial court, and thus it is not subject to our review.

We conclude that Thames's statement is not defamation per se in the context in which Collins pleaded his claim. As a general rule, a statement will typically be classified as defamatory per se if it injures a person in his office, profession, or occupation. *Hancock v. Variyam*, 400 S.W.3d 59, 64 (Tex. 2013).

With regard to a statement concerning a person's profession or occupation, "[t]he proper inquiry is whether a defamatory statement accuses a professional of lacking a peculiar or unique skill that is necessary for the proper conduct of the profession." *Id.* at 67 (citing Restatement (Second) of Torts § 573 cmts. c, e (1977)).

There is nothing intrinsically defamatory about Thames's statement. The comment does not speak about Collins's profession or occupation and in no way signals that he lacks a peculiar or unique skill that is necessary to his profession. *See id.* at 67. Indeed, Thames's statement does not even reference Collins's occupation, nor was it made in a setting in which Collins's profession was at issue. And we do not believe that a person of ordinary intelligence would interpret Thames's statement in a way that tends to injure Collins's reputation—there is nothing to indicate that a failure to return calls is a peculiar or unique trait necessary to Collins's profession. *See* Tex. Civ. Prac. & Rem. Code § 73.001; *Hancock*, 400 S.W.3d at 66–67 (holding that statements that doctor lacked veracity and dealt in half-truths not defamatory per se because they did not injure him in his profession as physician; trait of truthfulness not peculiar or unique to being a physician). We overrule this portion of Collins's second issue and affirm the trial court's grant of Thames's no-evidence summary judgment pertaining to Collins's defamation per se claim against Thames.

4. Participatory Liability

In part of his second issue, Collins argues that the trial court erred by granting summary judgment regarding his participatory liability claims as to Thames. We agree.

Collins alleged in his petition that Thames was derivatively responsible for the acts of the Fraternity. Collins urged three theories of participatory liability as to Thames: assisting or encouraging, assisting and participating, and conspiracy. In its motion for summary judgment, the Fraternity and Thames argued that Collins's claims of assisting or encouraging and assisting and participating failed because Collins's "tort claims asserted against [the Fraternity] fail as a matter of law." To the extent that we have already sustained Collins's arguments that his individual tort claims against the Fraternity should have survived summary judgment, we sustain Collins's argument in this portion of his issue as to his assisting or encouraging and his assisting and participating claims against Thames.

The Fraternity and Thames also argued that there was no evidence regarding certain elements of Collins's conspiracy claim against Thames. Specifically, it was argued that Collins failed to produce evidence that Thames had a "meeting of the minds" with the Fraternity, that he had produced no evidence that the Fraternity had committed a tort or wrongful act, and that Collins had failed to produce evidence of damages. Because we have already held that Collins's claims mentioned above should have survived summary judgment, the

only remaining issue that we need to address in this argument is whether Collins produced evidence of a "meeting of the minds."

Civil conspiracy is a derivative claim because a defendant's liability depends upon its participation in some underlying tort for which the plaintiff seeks to hold the defendant liable. *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996) (op. on reh'g). The required elements of a civil conspiracy are (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as a proximate result. *Thomas v. Collins*, 960 S.W.2d 106, 112–13 (Tex. App.—Houston [1st Dist.] 1997, pet. denied) (setting out elements of civil conspiracy).

As mentioned above, the defendant's no-evidence summary judgment motion attacked the third element, the "meeting of the minds." In his response, Collins provided evidence that Thames had participated in the Demand Letter calling upon Collins to resign, that Thames had participated in the expulsion trial by making comments that Collins had not returned his calls, and that Thames had conducted his hazing investigation into Collins differently than he had other members. A reasonable inference from this evidence is that Thames had a "meeting of the minds" with the other members of the Supreme Executive Committee to expel Collins. In sum, Collins provided more than a scintilla of evidence that the Fraternity and Thames had conspired to wrongfully expel Collins; thus, the trial court erred by granting the Fraternity and Thames's no-

evidence summary judgment motion regarding Collins's civil conspiracy claim. We sustain this portion of Collins's second issue.

5. Exemplary Damages

In the remainder of his second issue, Collins argues that the trial court erred by granting summary judgment in the Fraternity's favor regarding his claim for exemplary damages. The Fraternity moved for summary judgment based on the argument that "because all of Collins's tort claims fail as a matter of law, Collins's exemplary damages claim also fails as a matter of law." Collins responded that at a minimum, there existed a genuine issue of material fact as to each of the elements of the claims that the Fraternity challenged in its motion. Saving for our holding that the trial court was correct in granting summary judgment pertaining to Collins's claim of defamation per se against Thames, we agree. We sustain the remainder of Collins's second issue.

D. The Trial Court's Summary Judgment Evidence Rulings

In his third issue, Collins argues that the trial court abused its discretion by sustaining certain objections made by the Fraternity to Collins's summary judgment evidence and that the trial court abused its discretion by overruling certain objections made by Collins to the Fraternity's summary judgment evidence.

Because this evidence is related to issues that this court has decided in Collins's favor, we need not address this issue. Tex. R. App. P. 47.1; *Reynolds v. Murphy*, 188 S.W.3d 252, 259 (Tex. App.—Fort Worth 2006, pet. denied) (op.

on reh'g), *cert. denied*, 549 U.S. 1281 (2007); *see Duncan-Hubert v. Mitchell*, 310 S.W.3d 92, 100 (Tex. App.—Dallas 2010, pet. denied) ("We need not address the remaining summary judgment evidence or [Appellee's] objections thereto. [Appellant's] two issues are decided in her favor."). We decline to address Collins's third issue.

E. Dismissal of Collins's Promissory Estoppel Claim

In his fourth issue, Collins argues that the trial court erred by granting the Fraternity's motion to dismiss his promissory estoppel claim for want of jurisdiction. We agree.

A motion to dismiss based on a lack of subject-matter jurisdiction is functionally equivalent to a plea to the jurisdiction challenging the trial court's authority to determine the subject matter of a cause of action. *See State v. Holland*, 221 S.W.3d 639, 642 (Tex. 2007); *Lacy v. Bassett*, 132 S.W.3d 119, 122 (Tex. App.—Houston [14th Dist.] 2004, no pet.). We review the record de novo to determine whether the trial court had subject-matter jurisdiction. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998); *Lacy*, 132 S.W.3d at 122.

Generally, a plaintiff bears the burden to plead facts affirmatively demonstrating subject-matter jurisdiction. *Holland*, 221 S.W.3d at 642. A plea to the jurisdiction can challenge either the sufficiency of the plaintiff's pleadings or the existence of jurisdictional facts. *Tex. Dep't. of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226–27 (Tex. 2004). When a plea attacks the pleadings, the

issue turns on whether the pleader has alleged sufficient facts to demonstrate subject-matter jurisdiction. *Id.* In such cases, we construe the pleadings liberally in the plaintiff's favor and look for the pleader's intent. *See City of Waco v. Lopez*, 259 S.W.3d 147, 150 (Tex. 2008). When a plea to the jurisdiction challenges the plaintiff's pleadings and not the existence of jurisdictional facts, we assume the facts pleaded to be true. *See Westbrook v. Penley*, 231 S.W.3d 389, 405 (Tex. 2007). Furthermore, we generally may not assess the merit of the plaintiff's claims. *See Cty. of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002). When a plea to the jurisdiction challenges the existence of jurisdictional facts, a court may consider evidence in addressing the jurisdictional issues. *Miranda*, 133 S.W.3d at 227. If the evidence reveals a question of fact on the jurisdictional issue, the trial court cannot grant the plea and the issue must be resolved by a factfinder. *Id.* at 227–28.

The elements of promissory estoppel are (1) a promise, (2) foreseeability of reliance on the promise by the promisor, and (3) substantial detrimental reliance by the promisee. *English v. Fischer*, 660 S.W.2d 521, 524 (Tex. 1983); *Rice v. Metro. Life Ins. Co.*, 324 S.W.3d 660, 673 (Tex. App.—Fort Worth 2010, no pet.).

Here, Collins pleaded that in connection with the Austin Lawsuit, the Fraternity had promised that it would not seek retribution against the Tau Chapter, the Texas Kappa Sigma Educational Foundation, that foundation's Board of Trustees, or any of its respective members if the plaintiffs in that case

would dismiss their claims with prejudice. Collins pleaded that he relied on this promise to not seek retribution and that the Fraternity knew or should have known that he would. And Collins pleaded that the Fraternity's trial to expel him was conducted weeks after the Austin Lawsuit was dismissed. In essence, Collins pleaded that despite their promise to not seek retribution for the Austin Lawsuit, the Fraternity did just that by expelling him. In support of his pleadings, Collins offered his own affidavit which states facts consistent with these pleadings. Collins also pointed to evidence in his response to the Fraternity's motion to dismiss that the Fraternity specifically stated in its findings after the expulsion trial that Collins had been expelled in part because he had appeared as "a director or trustee of a corporate entity that sued the Fraternity." Collins averred that the Austin Lawsuit was the only lawsuit in which he served in that capacity against the Fraternity.

In its motion, and now on appeal, the Fraternity argues that the promise made involved in the lawsuit was only made to the Tau Chapter and the Texas Kappa Sigma Educational Foundation. The Fraternity also points out that the named plaintiffs in the Austin Lawsuit were only the Tau Chapter and the Texas Kappa Sigma Educational Foundation. Thus, according to the Fraternity, Collins as an individual could not have relied on the promise and thus lacks standing to bring what the Fraternity deems a derivative claim.

The Fraternity's argument, however, ignores the standard that both the trial court and this court are to apply in determining the jurisdictional question. In this

setting, the issue of Collins's standing turns on whether he alleged sufficient facts to demonstrate subject-matter jurisdiction or he created a genuine issue of material fact concerning jurisdiction. Collins did both. He pleaded that the promise was made to him and that he provided facts that at a minimum create a fact question as to whether the promise was made to him. Thus, the trial court erred in granting the Fraternity's motion to dismiss. We sustain Collins's fourth issue and reverse the trial court's order granting dismissal of Collins's promissory estoppel claim for lack of jurisdiction.

F. Time Limitation on Certain Discovery Matters

In part of his fifth issue, Collins argues that the trial court abused its discretion by sustaining the Fraternity's "beyond the scope" and "overly broad" objections to Collins's written discovery. Collins contends that the trial court set a default "relevant time period" as "Jan. 1, 2002 to the present." In support of his argument, Collins provides several examples of where the trial court sustained the Fraternity's objections in part and provided the limiting language "'relevant time period' from January 1, 2002 to present."

The Fraternity argues, however, that the trial court did not set such a default limitation and provides several examples of the trial court having overruled their objections and allowing Collins to discover evidence outside of this time period. Thus, we agree with the Fraternity that the record belies Collins's position that a global time limitation was imposed by the trial court.

We do agree with Collins that in most of the instances in which Collins points to in the record, the trial court's time limitation was improperly arbitrary. *See In re Collins*, No. 02-12-00429-CV, 2013 WL 174801, at *2 (Tex. App.—Fort Worth Jan. 17, 2013, orig. proceeding) (mem. op.) (Livingston, C.J., dissenting) ("Because the charges relate to actions that took place in 1996 . . . . I would grant relator's request to redefine the relevant discovery period beginning January 1, 1996 forward.").

Collins specifically complains about the trial court's having sustained in part the Fraternity's objections to requests "Nos. 24 and 51-53." These requests move for the production of evidence relating to his breach of fiduciary duty claim. Evidence of a fiduciary duty would inherently span a broader scope of time than from January 1, 2002, to the present—a time period ostensibly related to his expulsion trial and having little to do with Collins's breach of fiduciary duty claim, the informal nature of which Collins pleaded predated his expulsion. Indeed, Collins joined the Fraternity in 1965 and became an Alumnus Advisor in 1976. Furthermore, as Collins points out, the Fraternity brought Collins up on expulsion charges for conduct that allegedly occurred in 1996.

As Chief Justice Livingston said in her dissenting opinion in the mandamus related to this cause, "it seems incongruent to limit discovery to 2002 to present." *Id.* Thus, we sustain this portion of issue number five and hold that the trial court abused its discretion related to requests "Nos. 24 and 51-53." We remand this

portion of Collins's appeal to the trial court, and we leave to the trial court the task of providing a proper and reasonable timeframe to these requests.

Furthermore, we hold that Collins's argument to request No. 12 is moot because it pertains to his defamation per se claim against Thames, a claim that we have held herein is unsustainable as a matter of law. We decline to sift through the record and address other instances that Collins has not specifically nor sufficiently addressed.[2]

In the remainder of his fifth issue, Collins argues that the trial court erred by denying his motion to compel deposition after the Fraternity's attorneys ordered the deponents not to answer roughly 250 questions. As Collins points out, these questions sought information about the identity of the person who prepared the charges against him in the expulsion trial, the questions sought

[2]In one statement within his second issue, and without citing any authority regarding the possible issues related to the production requests, Collins states that the trial court erred when it sustained the Fraternity's objections to his requests for "documents seeking information about the Fraternity's finances." Collins, in footnotes, then points this court to the clerk's record regarding his requests Nos. 53 and 81–95 and the trial court's ruling regarding them. This court's cursory review of these requests and the trial court's ruling do not indicate that these requests were given the timeframe by the trial court that serves as Collins's overall issue. And Collins does not provide any argument nor citation to authority that the trial court abused its discretion by sustaining the Fraternity's objections to these requests. The Texas Rules of Appellate Procedure require that an appellant's brief contain "a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." Tex. R. App. P. 38.1(i). When the appellate issues are unsupported by argument or lack citation to the record or legal authority, nothing is presented for review. *Republic Underwriters Ins. Co. v. Mex-Tex, Inc.*, 150 S.W.3d 423, 427 (Tex. 2004). Collins has failed to present an argument for our review concerning requests Nos. 53 and 81–95.

information directly related to his breach of fiduciary duty and breach of contract claims; the questions inquired as to how other Fraternity members were treated under similar circumstances to those alleged against Collins, and the questions sought information about the identity of persons who may have knowledge that the charges against him were merely a pretext and retaliatory in nature. *See Giffin v. Smith*, 688 S.W.2d 112, 113 (Tex. 1985) ("[T]he identity and location of persons having knowledge of relevant facts can never be protected from discovery.").

We conclude that the trial court abused its discretion by denying Collins's motion to compel answers to these deposition questions. *In re K.L. & J. Ltd. P'ship*, 336 S.W.3d 286, 291, 294 (Tex. App.—San Antonio 2010, orig. proceeding) (holding that trial court abused discretion by not compelling answers to deposition question where the "questions [were] relevant and reasonabl[y] calculated to lead to the discovery of admissible evidence."). We sustain this remaining portion of Collins's fifth issue.

G. The Fraternity's Objections to Other Discovery

In his sixth issue, Collins argues that the trial court erred by sustaining the Fraternity's "boilerplate" objections to request Nos. 13–17, 20, 23, 25–30, 35–36, 48–52, 55, and 58–59. Specifically, Collins argues that the Fraternity "flatly refused to produce any documents or explain with specificity why Collins's discovery requests were deficient."

The Fraternity counters that the objections were specific and that they were proper because the requests "sought information beyond the scope of discovery by, among other things, seeking documents beyond those relating to the process that resulted in Collins's expulsion." The Fraternity also argues that these requests sought privileged information. We agree with Collins that the trial court abused its discretion by sustaining the Fraternity's objections to these requests.

Generally, the scope of discovery is a matter devoted to the trial court's discretion. *In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex. 2003) (orig. proceeding). But a trial court may not improperly restrict the scope of discovery. *Lindsey v. O'Neill*, 689 S.W.2d 400, 401 (Tex. 1985) (orig. proceeding). And as a general rule, a party objecting to discovery must present some evidence necessary to support its objections. *See* Tex. R. Civ. P. 193.4(a), 199.6. *See, e.g.*, *In re Alford Chevrolet–Geo*, 997 S.W.2d 173, 181 (Tex. 1999) (orig. proceeding) ("A party resisting discovery . . . cannot simply make conclusory allegations that the requested discovery is unduly burdensome or unnecessarily harassing. The party must produce some evidence supporting its request for a protective order."); *see also Indep. Insulating Glass/Southwest, Inc. v. Street*, 722 S.W.2d 798, 802 (Tex. App.—Fort Worth 1987, orig. proceeding) ("Any party who seeks to exclude matters from discovery on grounds that the requested information is unduly burdensome, costly or harassing to produce, has the affirmative duty to plead and prove the work necessary to comply with discovery.").

Moreover, there is no presumption that documents are privileged, and the party seeking to resist discovery bears the burden of pleading and proving an applicable privilege. *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 223, 225 (Tex. 2004) (orig. proceeding); *Weisel Enters., Inc. v. Curry*, 718 S.W.2d 56, 58 (Tex. 1986) (orig. proceeding). To meet its burden, the party seeking to assert a privilege must make a prima facie showing of the applicability of a privilege by first asserting the privilege. *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d at 223. "Asserting a Privilege" is governed by Texas Rule of Civil Procedure 193.3. Tex. R. Civ. P. 193.3.

In this case, without presenting evidence, the Fraternity objected to these requests on the grounds of overbreadth and relevance. The Fraternity also objected on the grounds that the requests sought "documents beyond those relating to the process that resulted in Collins's expulsion from [the Fraternity]." On appeal, the Fraternity argues that these requests were overly broad and now also argues that some of the information sought is privileged. In doing so, the Fraternity states, like it did in the trial court, that the scope of this case is merely addressing Collins's expulsion trial. But Collins's wrongful expulsion is only one of his several claims, and some of the information Collins seeks is directly related to his legal position that he was expelled by a biased tribunal as retribution rather than by a proper expulsion. Collins is also seeking discoverable evidence relating to a possible informal fiduciary relationship and a possible contract between himself and the Fraternity, as well as a promise made to him by the

Fraternity that he would not be retaliated against for previous litigation. The Fraternity did not provide any evidence otherwise and we conclude that the trial court erred by sustaining the Fraternity's objections to these requests. We sustain Collins's sixth issue.

IV. CONCLUSION

Having overruled Collins's issue related to his claim against Thames for defamation per se and having declined to address those discovery issues that Collins failed to brief, we affirm the trial court's order granting summary judgment on these issues only and we reverse the remainder of the trial court's summary judgment order. We also reverse the trial court's separate order granting the Fraternity's motion to dismiss Collins's promissory estoppel claim. Thus, we remand this case back to the trial court for proceedings consistent with this opinion.

/s/ Bill Meier
BILL MEIER
JUSTICE

PANEL: MEIER and SUDDERTH, JJ.; and CHARLES BLEIL (Senior Justice, Retired, Sitting by Assignment).

SUDDERTH, J., concurs without opinion.

DELIVERED: January 19, 2017