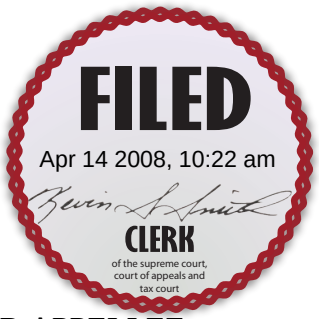

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IN THE
COURT OF APPEALS OF INDIANA

RUSSELL DENNIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 41A05-0705-CV-250
	)	
EDDIE EGBERT, DR. CLINTON BRANINE, DR. V. BEN KENDRICK, ORAN H. HEUCK, and VIRGIL R. WORRELL,	)	
	)	
Appellees-Plaintiffs.	)	

APPEAL FROM THE JOHNSON SUPERIOR COURT
The Honorable Kim VanValer, Judge
The Honorable Thomas Carroll, Special Judge
Cause No. 41D03-0605-PL-00032

APRIL 14, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Cross-Claim Defendant/Appellant Russell Dennis, Jr. appeals the trial court's order granting the Cross-Claimants'/Appellees' motion for an order for removal of Dennis from the premises of Heritage Baptist University. The Cross-Claimants/Appellees consist of Indiana Baptist College d/b/a Heritage Baptist University, Heritage Baptist University Board of Trustees, Eddie Egbert, Dr. Clinton L. Branine, Dr. V. Ben Kendrick, Oran H. Heuck and Virgil R. Worrell, individually and as members of the Heritage Baptist University Board of Trustees.

We affirm.

ISSUES

I. We first address Appellees' claim that Dennis waived his argument on appeal. Determining that the issue is not waived, we turn to the parties' remaining issues.

Dennis presents one issue for our review, which we restate as:

II. Whether the vote to remove Dennis as President of Heritage Baptist University was proper.

Appellees present one additional issue, which we restate as:

III. Whether Appellees are entitled to appellate attorney fees.

FACTS AND PROCEDURAL HISTORY

The underlying lawsuit in this action was commenced by a bank seeking direction from the trial court as to who had the legal right to access the bank accounts of Heritage Baptist University and to use the funds contained in those accounts. The bank had received conflicting information from Dennis and the trustees of Heritage Baptist

University as to who could properly access the accounts. Although that question was resolved and is not at issue in this appeal, a second issue remained. At the time of filing their answer to the bank's complaint, Appellees filed a cross-claim against Dennis. This cross-claim sought a declaratory judgment for, among several things, the enforcement of a vote of the university's trustees removing Dennis from the office of President of Heritage Baptist University in April 2006. In July 2006, the trial court ruled that the vote of the trustees to remove Dennis as President of the university was not proper. Subsequently, the trustees again voted to remove Dennis from office on December 28, 2006. In January 2007, Appellees filed with the court their motion for an order for removal of Dennis from the premises of Heritage Baptist University by the sheriff of Johnson County because Dennis had refused to abide by the December 2006 vote of the trustees to remove him from office. Following a hearing on Appellees' motion on January 29, 2007, the trial court issued an order granting the motion on April 18, 2007. It is from the grant of this motion that Dennis now appeals.

DISCUSSION AND DECISION

I. WAIVER

Initially, we address Appellees' argument that Dennis has waived his argument on appeal regarding the propriety of the trustees' vote of December 28, 2006 removing him as President of Heritage Baptist University. Appellees claim that Dennis has waived this argument because he failed to present the argument to the trial court either in pleadings or at the hearing on Appellees' motion.

Generally, a party waives appellate review of an issue or argument if that party did not present the issue or argument to the trial court. *Grathwohl v. Garrity*, 871 N.E.2d 297, 302 (Ind. Ct. App. 2007). "This rule protects the integrity of the trial court, which should not be found to have erred as to an issue or argument that it never had an opportunity to consider." *Nance v. Miami Sand & Gravel, LLC*, 825 N.E.2d 826, 834 (Ind. Ct. App. 2005), *trans. denied*. However, we prefer to decide a case upon the merits whenever possible. *Kelly v. Levandoski*, 825 N.E.2d 850, 856 (Ind. Ct. App. 2005), *trans. denied*. The rule that parties will be held to trial court theories by the appellate court does not mean that no new argument may be advanced; rather, it means that substantive questions independent in character and not within the issues presented to the trial court shall not be raised for the first time on appeal. *Dedelow v. Pucalik*, 801 N.E.2d 178, 183-84 (Ind. Ct. App. 2003). We are mindful that this allowance should be strictly applied. *See id*. at 184.

Here, Dennis argues to this Court that the trustees' December 28, 2006 vote removing him from office was invalid because the board of trustees had only eight members at the time of the vote rather than the nine called for in the university's articles of incorporation. Our review of the materials on appeal discloses that the university's articles of incorporation were discussed at length at the hearing on Appellees' motion, including the number of trustees required by the articles. In addition, in his closing argument, counsel for Dennis mentioned the lack of a trustee at the time the vote was taken. Moreover, the substantive question is whether the vote to remove Dennis from office was proper, and the argument raised by Dennis in the instant appeal is included

within that issue. Thus, our stringent examination of the materials on appeal, together with our preference to decide cases on the merits, leads us to conclude that Dennis' argument on appeal was not waived.

II. PROPRIETY OF VOTE

The parties agree as to the standard of review that we should apply in this instance. The articles of incorporation and by-laws of a non-profit corporation constitute a contract between the state and the corporation, the corporation and its members, and among the members themselves. *Heritage Lake Property Owners Ass'n, Inc. v. York*, 859 N.E.2d 763, 765 (Ind. Ct. App. 2007). When construing corporate organizational documents, the courts apply the general rules of contract interpretation. *Id*. Construction of the terms of a written contract is a pure question of law, and we conduct a *de novo* review of the trial court's conclusions pertaining thereto. *Park Hoover Village Condominium Ass'n, Inc. v. Ardsley/Park Hoover Ltd. Partnership*, 766 N.E.2d 13, 17 (Ind. Ct. App. 2002), *reh'g denied*. We will read the contract as a whole and attempt to construe the language of the contract in such a way so as not to render any words, phrases or terms ineffective or meaningless. *Trustcorp Mortg. Co. v. Metro Mortg. Co., Inc.*, 867 N.E.2d 203, 213 (Ind. Ct. App. 2007), *reh'g denied*. To that end, we attempt to interpret a contract so as to harmonize its provisions rather than place them in conflict. *State Farm Mut. Auto. Ins. Co. v. Cox*, 873 N.E.2d 124, 127 (Ind. Ct. App. 2007).

Dennis contends that the trial court erred in determining that the trustees' vote of December 28, 2006 was a proper vote to remove him from office of the president of the university. In particular, Dennis argues that because one of the nine trustee positions was

vacant at the time of the meeting and vote of December 28, 2006 when the trustees voted to remove him from office, the board of trustees was incapable of the action it took on that day.

In resolving this issue, we observe that the university is a nonprofit corporation governed by the Indiana Nonprofit Corporation Act of 1991, which is codified at Ind. Code § 23-17-1-1, *et seq.* In accordance with the Act, a nonprofit corporation must adopt bylaws. *See* Ind. Code § 23-17-3-8(a). The bylaws may contain any provision for regulating the affairs of the corporation **that is not inconsistent with any law or the articles of incorporation**. *See* Ind. Code § 23-17-3-8(b).

Here, the university had adopted both bylaws and articles of incorporation. The university's bylaws and articles of incorporation are in conflict with regard to the number of votes required for the removal of the president, who is an officer of the board of directors or, as they are referred to in this case, board of trustees. Appellees assert and Dennis concedes that in such a situation the articles of incorporation control, pursuant to Ind. Code § 23-17-3-8(b). We agree. Thus, pursuant to the articles of incorporation, the president of the university, as a director, may be removed by a majority vote of the voting members.[1]

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[1] The university's articles of incorporation state: "Members, Directors and Officers shall be elected and hold offices as set forth in the By-laws, *subject, however, to recall at any time without cause or recourse by a majority vote of the voting members*. All vacancies in offices shall be filled by a majority vote of the Board of Directors." Article IX of Articles of Incorporation, Appellees' Appendix at 509 (emphasis supplied). *See also* Ind. Code §§ 23-17-12-9 and 10 (regarding removal of director by vote of majority of directors).

Dennis next takes issue with the discrepancy between the bylaws and the articles of incorporation concerning the required number of trustees for the board of trustees. He avers that the conflict between the articles and the bylaws renders any action by the board of trustees invalid, and, alternatively, that even if the provision in the articles of incorporation is adhered to for the required number of trustees, not enough trustees were present for the vote. We will address each argument in turn.

The university's bylaws state that the board of trustees should consist of no less than five (5) and no more than nine (9) members. *See* Article VII, Section 1 of the Heritage Baptist University Bylaws, Appellant's Appendix at 71. At the time of the vote removing Dennis as President, the articles of incorporation of Heritage Baptist University required a minimum of nine (9) directors and a maximum of twenty-five (25). *See* Article VI Sections A and C, Articles of Amendment of Articles of Incorporation, Appellees' Appendix at 513. Although earlier recognizing the supremacy of the articles of incorporation in relation to the bylaws pursuant to Ind. Code § 23-17-3-8(b), Dennis now urges that the conflict between the articles and the bylaws on this provision cannot be resolved. Therefore, he posits, the trustees' December vote is invalid.

Dennis is apparently disturbed by the language used in the provision of the articles of incorporation setting forth the required number of directors/trustees. Article VI of the articles of incorporation of Heritage Baptist University states:

> The initial Board of Directors is composed of five (5) members. If the exact number of Directors is not stated, the minimum number shall be [nine (9)] and the maximum number shall be [twenty-five (25)]. Provided, however, that *the exact number of directors shall be prescribed from time to time in the By-Laws of the Corporation*: AND PROVIDED FURTHER

> THAT UNDER NO CIRCUMSTANCES SHALL THE MINIMUM NUMBER BE LESS THAN THREE (3).

Appellees' Appendix at 507 (emphasis supplied).[2] Dennis claims an irresolvable conflict because the articles, as evidenced by the italicized language in the above paragraph, direct that the bylaws state an exact number of directors, which they fail to do. He maintains that due to the failure of the bylaws to state the exact number of directors as charged by the articles of incorporation, the board of trustees is unable to take any action.

In keeping with Dennis' reasoning, everything the trustees have done for years would be invalid based on the simple fact that the exact number of directors is not set out in the bylaws. This result is unreasonable. Dennis concentrates on the language of Article VI, *supra*, calling for the bylaws to state the exact number of directors while he ignores other, important, language. For instance, the provision states that if the exact number of directors is not stated, the minimum number shall be nine. Moreover, the provision states that the bylaws will prescribe the exact number of directors "from time to time," leading us to believe that this is not an absolute requirement. Additionally, in capital letters, the provision admonishes that under no circumstances shall there be less than three trustees.

Further, Dennis' rationale ignores Ind. Code § 23-17-3-8(b). Again we look to Ind. Code § 23-17-3-8(b), which states that the bylaws of a nonprofit corporation may contain any provision that is not inconsistent with the articles of incorporation. Here, we

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[2] The bracketed numbers reflect the amendment to the articles of incorporation in 1978 in which the minimum and maximum number of directors/trustees were increased from five (5) and fifteen (15), respectively.

have the *lack* of a provision in the bylaws rather than an *inconsistent* provision. This lack of a provision is even more innocuous than an inconsistent provision and does not, as Dennis claims, nullify the provision contained in the articles of incorporation. Rather, the articles still control pursuant to Ind. Code § 23-17-3-8(b). Thus, pursuant to this provision in the articles of incorporation, the board of trustees was properly functioning with the required minimum number of trustees.

Of the nine available trustee positions, only eight were filled at the time of the vote regarding Dennis' removal as president. Dennis argues that due to the one vacancy on the board, the board could not conduct any business.

Due to a vacancy that had not yet been filled, there were eight trustees on the board at the time of the December vote. Although this is one less trustee than required by the university's articles of incorporation, it was merely a temporary vacancy. A board of directors can still function and take action as a board even when members are missing. The statutory provisions regarding the meetings and actions of the board of directors of nonprofit corporations provide for just such a contingency:

> Except as otherwise provided in this article, articles of incorporation, or bylaws, a quorum of a board of directors consists of a majority of the directors in office immediately before a meeting begins. Articles of incorporation or bylaws may not authorize a quorum of fewer than the greater of the following:
> (1) One-third (1/3) of the number of directors in office.
> (2) Two (2) directors.

Ind. Code § 23-17-15-5(a).

Here, the university's bylaws state that one-half (1/2) of the members of the board of trustees constitutes a quorum. *See* Article VII, Section 1.4 of the Heritage Baptist

University Bylaws, Appellant's Appendix at 72. The university's articles of incorporation, on the other hand, do not contain a provision concerning the number of directors needed to comprise a quorum. However, under either the bylaws or Ind. Code § 23-17-15-5(a), the eight trustees present and voting at the December 28, 2006 meeting of the university's board of trustees constitutes a quorum that can take action on behalf of the full board. Therefore, the action of the board of trustees on December 28, 2006 was proper. Moreover, as stated previously, the majority vote of voting members of the board of trustees was sufficient to remove Dennis from office of president of the university.

III. ATTORNEY FEES

In their brief, Appellees request an award of damages and/or attorney fees pursuant to Indiana Appellate Rule 66. Appellate Rule 66(E) provides that a court "may assess damages if an appeal …. is frivolous or in bad faith. Damages shall be in the Court's discretion and may include attorneys' fees." However, we must use extreme restraint in awarding damages under this rule because of the potential chilling effect upon the exercise of the right to appeal. *In re Estate of Carnes*, 866 N.E.2d 260, 267 (Ind. Ct. App. 2007). An award of damages under this rule requires a substantial showing, which is something more egregious than a mere lack of merit. *Id*. Rather, this Court's discretion to award attorney fees under this rule is limited to instances when an appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay. *Inland Steel Co. v. Pavlinac*, 865 N.E.2d 690, 704 (Ind. Ct. App. 2007).

Claims for appellate attorney fees have been classified into two categories: substantive bad faith claims and procedural bad faith claims. *Taflinger Farm v. Uhl*, 815

N.E.2d 1015, 1019 (Ind. Ct. App. 2004). Substantive bad faith occurs when the appellant's arguments are void of all plausibility. *Id*. To prevail on a procedural bad faith claim, the party must show that the appellant flagrantly disregarded the form and content requirements of the appellate rules, omitted and misstated relevant facts appearing in the record, and filed briefs written in a manner calculated to require the maximum expenditure of time by both the opposing party and the appellate court. *Carnes*, 866 N.E.2d at 267.

Appellees contend that Dennis has engaged in substantive bad faith because his argument has been waived and because it contradicts the statutory provisions of the Indiana Nonprofit Corporation Act and the university's articles of incorporation. We have previously determined in this opinion that Dennis' argument was not waived. Further, although we hold against him today, Dennis did not put forth arguments utterly devoid of all plausibility, and there is no allegation that he deliberately presented implausible arguments. "Substantive bad faith 'implies the conscious doing of a wrong because of dishonest purpose or moral obliquity.'" *Id*. at 269 (*quoting Wallace v. Rosen*, 765 N.E.2d 192, 201 (Ind. Ct. App. 2002)). We find no substantive bad faith here.

Appellees additionally claim that Dennis' failure to comply with Appellate Rule 50 constitutes procedural bad faith. Specifically, Appellees allege that Dennis' appendix fails to comply with Appellate Rule 50 due to his failure to include a transcript and copy of the university's articles of incorporation in his appendix. Although Dennis is accused of failing to include these items in his appendix, there is no allegation or showing that he "flagrantly disregarded" the appellate rules. Although we caution Dennis' counsel to

include the proper documents in any future appeals, we conclude that Dennis' failure to include these items in his appendix does not amount to procedural bad faith in the present case.

CONCLUSION

Based upon the foregoing discussion and authorities, we conclude that Dennis did not waive his appellate argument because the issue he raised was included within the substantive question on appeal. Further, based upon the university's articles of incorporation and the Indiana Nonprofit Corporation Act, the vote of the board of trustees on December 28, 2006 to remove Dennis from the office of the president of the university was proper. Finally, Appellees failed to make a showing that Dennis engaged in either substantive bad faith or procedural bad faith.

Affirmed.

SHARPNACK, J., and FRIEDLANDER, J., concur.