

AFFIRM; and Opinion Filed November 27, 2018.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-17-01227-CV

**CANDLE MEADOW HOMEOWNERS ASSOCIATION, Appellant
V.
SAIDRICK JACKSON, WILLIAM FREEMON AND CEDRIC DODD, Appellees**

**On Appeal from the 191st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-15-04272**

MEMORANDUM OPINION

**Before Justices Lang-Miers, Fillmore, and Myers
Opinion by Justice Fillmore**

Pursuant to Texas Rule of Civil Procedure 12, a party to a lawsuit may, by filing a sworn written motion stating he believes the suit is being prosecuted without authority, cause the attorney to be cited to appear before the court and show his authority to act. TEX. R. CIV. P. 12. After the Candle Meadow Homeowners Association (the HOA) filed this lawsuit, appellees Saidrick Jackson, William Freemon, and Cedric Dodd, who are all former members of the HOA's Board of Directors (the Board), filed an amended motion to show authority pursuant to rule 12, asserting the Board never voted to authorize Jeffrey Sandberg, the HOA's attorney, to file this lawsuit. The trial court granted appellees' amended motion and struck the HOA's pleadings. *See id.* In this appeal, the HOA asserts the trial court erred by granting appellees' amended motion to show authority because there was evidence the Board voted to authorize Sandberg to file suit and, after

the lawsuit was filed, the members of the Board were provided information about the litigation and never instructed Sandberg to dismiss it. We affirm the trial court's order.

Background

Effective October 2013, Iva Hughes, Morgan Sims, Lynn Poole, Glenn Brown, and Nicole Nelson were elected as the five members of the Board. Michael Osborne subsequently "replaced a Board member who had resigned."¹ After becoming concerned that appellees, who were former members of the Board, had improperly used funds belonging to the HOA, the Board voted in May 2014 to hire Sandberg as its new counsel. In part, Sandberg was tasked with investigating whether there was proper documentation to support certain expenditures made by appellees using the HOA's funds.

On April 6, 2015, Hughes, who was the president of the Board, emailed Sandberg that all members of the Board had voted "to start lawsuit" against appellees. Hughes did not copy any of the other Board members on the email. Sandberg filed suit on behalf of the HOA on April 14, 2015, asserting claims against appellees for breach of fiduciary duty, conversion, and fraud and seeking to recover actual damages and attorney's fees.

On March 24, 2017, appellees filed a motion pursuant to rule 12 requesting Sandberg show authority to act on behalf of the HOA. Appellees filed an amended motion on May 22, 2017. Both the original and amended motions were supported by Jackson's affidavit, in which he stated the Candle Meadow subdivision was governed by the Declaration of Candle Meadow; the Declaration provided the HOA, a non-profit Texas corporation, would manage and administer the subdivision; and the HOA was managed by the Board. Appellees alleged they learned through discovery that the Board had not voted to authorize Sandberg to file the lawsuit.

¹ Osborne apparently replaced Sims. The record does not reflect the exact date Osborne became a member of the Board.

At the hearing on appellees' amended motion, Nelson testified the Board did not vote to authorize Sandberg to file the lawsuit. According to Nelson, the Board was aware that Sandberg was "reviewing the allegations" that ultimately formed the basis of the lawsuit and discussed filing a lawsuit. However, at the time the lawsuit was filed, Hughes had "ceased communication with the remaining Board members," the Board was not receiving information from Hughes, and they were not aware the lawsuit was being filed. Nelson conceded that, during her deposition, she testified the Board voted to authorize Sandberg to file the lawsuit, but explained that due to "a lot of word playing semantics" that she "called out" to appellees' counsel, appellees' counsel instructed her to answer yes or no to the question. Her "yes" answer meant that "we did discuss it and we talked about it, but as to us actually having a Board member [sic] or an executive session that [Hughes] was present at, that did not happen."

Brown agreed that, prior to the lawsuit being filed, the Board discussed potential claims against members of the prior Board. However, after his work schedule changed, he missed the majority of the Board meetings in 2015. At the meetings Brown attended, he did not vote to authorize Sandberg to file the lawsuit. Further, he did not receive notice of a meeting in which the filing of the lawsuit was on the agenda and was not aware of a meeting that was held to authorize Sandberg to file the lawsuit.

Poole testified that, if there was a Board meeting to discuss the filing of the lawsuit, there would be an agenda that listed the lawsuit as one of the topics. To Poole's knowledge, there was no agenda that listed authorizing Sandberg to file the lawsuit as a topic of discussion and no meeting took place at which authorizing Sandberg to file the lawsuit was discussed. Before the lawsuit was filed, Poole did not vote to authorize Sandberg to file the lawsuit.

Nelson and Poole acknowledged they were aware of the lawsuit after it was filed. Further, after the lawsuit was filed, Nelson, Poole, Brown, and Osborne participated in a conference call

with Sandberg to learn “what the case was about.” On May 12, 2015, Poole sent an email to Sandberg asking for an update on the status of the lawsuit and requesting that Sandberg “share information by Group Email” so that Hughes would not have to “remember all the details of the meeting” with Sandberg. Brown and Poole agreed that the Board never instructed Sandberg to dismiss the lawsuit.

Hughes testified that, before the lawsuit was filed, the Board held a meeting and voted to authorize Sandberg to file the lawsuit. Hughes recalled that all Board members were present other than Brown, and they “all voted to do it.” Hughes could not recall the date of the meeting and did not have any minutes of the meeting reflecting the vote had been taken, but testified it was Nelson’s responsibility, as the secretary, to keep minutes of the meeting. After the meeting, Hughes sent the email to Sandberg authorizing him to file the lawsuit. According to Hughes, it was an “oversight” not to copy the other Board members on the email to Sandberg. After the lawsuit was filed, members of the Board received a copy of the petition as well as updates about the status of the lawsuit and did not complain that the Board had not voted to authorize Sandberg to file the lawsuit.

The trial court granted appellees’ amended motion to show authority and struck the HOA’s pleadings.

Analysis

In one issue, the HOA complains the trial court erred by granting the amended motion to show authority because the evidence established that, prior to the filing of the lawsuit, the Board voted to authorize Sandberg to file the lawsuit and, after the lawsuit was filed, the Board received information about the status of the lawsuit and never instructed Sandberg to dismiss it.

Standard of Review

We review the trial court’s granting of a rule 12 motion for abuse of discretion. *R.H. v. Smith*, 339 S.W.3d 756, 762 (Tex. App.—Dallas 2011, no pet.) (citing *Urbish v. 127th Judicial*

Dist. Court, 708 S.W.2d 429, 432 (Tex. 1986) (orig. proceeding)). We defer to the trial court on factual findings and review legal conclusions de novo.² *Air Park-Dallas Zoning Committee v. Crow-Billingsley Airpark, Ltd.*, 109 S.W.3d 900, 907 (Tex. App.—Dallas 2003, no pet.). A trial court abuses its discretion when it acts arbitrarily or unreasonably, without reference to guiding rules or principles, *In re Old Am. Cty. Mut. Fire Ins. Co.*, No. 13-13-00644-CV, 2014 WL 1633098, at *6 (Tex. App.—Corpus Christi–Edinburg Apr. 23, 2014, orig. proceeding) (mem. op.) (citing *Iloff v. Iloff*, 339 S.W.3d 74, 78 (Tex. 2011)), or fails to correctly analyze or apply the law, *Patton Children’s Trust v. Hamlin*, No. 07-07-0488-CV, 2008 WL 3863475, at *3 (Tex. App.—Amarillo Aug. 20, 2008, no pet.) (memo. op.); *see also Iloff*, 339 S.W.3d at 78.

Rule 12

Any party to a lawsuit may file a motion asserting the lawsuit is being prosecuted or defended without authority. TEX. R. CIV. P. 12. “The main purpose behind the rule is that a person is entitled to know which person or party in fact authorized the suit.” *Boudreau v. Fed. Trust Bank*, 115 S.W.3d 740, 742 (Tex. App.—Dallas 2003, pet. denied); *see also Angelina Cty. v. McFarland*, 374 S.W.2d 417, 423 (Tex. 1964). The challenged attorney has the burden of proof to show sufficient authority to represent the client. TEX. R. CIV. P. 12; *Boudreau*, 115 S.W.3d at 741. When resolving a motion brought pursuant to rule 12, “the trial court considers and weighs the evidence presented at the hearing.” *In re Sassin*, 511 S.W.3d 121, 125 (Tex. App.—El Paso 2014, orig. proceeding). If the challenged attorney does not meet his burden of proof, the trial court is required to (1) bar the challenged attorney from appearing in the case and (2) strike the pleadings

² Relying on *Penny v. El Patio, LLC*, 466 S.W.3d 914, 918 n.2 (Tex. App.—Austin 2015, pet. denied), and *State v. Evangelical Lutheran Good Samaritan Society*, 981 S.W.2d 509, 511 (Tex. App.—Austin 1998, no pet.), the HOA argues the appropriate standard of review is de novo. In those cases, our sister court noted that whether the attorney had shown authority under rule 12 was a legal conclusion subject to de novo review. *Penny*, 466 S.W.3d at 918 n.2; *Evangelical Lutheran Good Samaritan Soc.*, 981 S.W.2d at 511. As set out above, under the abuse of discretion standard, we review the trial court’s legal conclusions de novo. *See Air Park-Dallas Zoning Committee v. Crow-Billingsley Airpark, Ltd.*, 109 S.W.3d 900, 907 (Tex. App.—Dallas 2003, no pet.). However, to the extent the trial court was required to resolve factual issues in determining whether Sandberg demonstrated authority to file the lawsuit, we defer to the trial court’s findings. *See id.*; *In re Guardianship of Benavides*, 403 S.W.3d 370, 374 (Tex. App.—San Antonio 2013, pet. denied) (citing *City of Dallas v. Vanesko*, 189 S.W.3d 769, 771 (Tex. 2006)).

if an authorized person does not appear. TEX. R. CIV. P. 12; *see also In re Salazar*, 315 S.W.3d 279, 283 (Tex. App.—Fort Worth 2010, orig. proceeding) (concluding requirements of rule 12 are mandatory).

Authority to File Lawsuit

The HOA first contends the evidence established the Board voted to authorize Sandberg to file the lawsuit. The HOA specifically argues Hughes testified a vote occurred and the email Hughes sent on April 6, 2015, which was the only contemporaneous written record, stated all Board members had voted to authorize Sandberg to file the lawsuit.

Unless otherwise provided in a corporation’s certification of formation, the affairs of a non-profit corporation are managed by a board of directors. TEX. BUS. ORGS. CODE ANN. §§ 22.201–.202.³ An act of the Board is an act of the majority of the directors present in person or by proxy at a meeting in which a quorum is present, unless the act of a greater number is required by the certificate of formation or the bylaws of the corporation. *Id.* § 22.214. Generally, an officer of the corporation may not authorize the pursuit of litigation without a delegation of authority from the board of directors. *See Square 67 Dev. Corp. v. Red Oak State Bank*, 559 S.W.2d 136, 138 (Tex. App.—Waco 1977, writ ref’d n.r.e.) (concluding corporation’s president was “not authorized to employ an attorney to conduct litigation for the company absent express authority or implied authority . . . set forth in the bylaws or by proper action of the board of directors”); *see also Nolana Open MRI Ctr., Inc. v. Pechero*, No. 13-13-00552-CV, 2015 WL 601916, at *9 (Tex. App.—Corpus Christi–Edinburg Feb. 12, 2015, no pet.) (mem. op.) (noting that generally “pursuit of

³ As a non-profit corporation, the HOA is governed by Chapter 22 of the business and commerce code. *See* TEX. BUS. ORGS. CODE ANN. §§ 22.201–.409.

litigation is not considered to fall within the parameters of the ordinary course of business so as to authorize one member of a corporation to direct the action of filing suit or appeal”).⁴

Typically, an attorney satisfies his burden to establish his authority by presenting evidence that the client retained him to provide representation in the case. *In re Sassin*, 511 S.W.3d at 125; *see also Boudreau*, 115 S.W.3d at 742. Here, Sandberg relied on Hughes’s testimony that the Board voted to authorize Sandberg to file the lawsuit and the email from Hughes authorizing the filing of the lawsuit. However, there was no evidence the Board delegated to Hughes the power to authorize the filing of the lawsuit. Further, Nelson, Poole, and Brown, who collectively comprised a majority of the directors, testified the Board did not vote to authorize Sandberg to file the lawsuit. By granting the amended motion to show authority, the trial court necessarily found Nelson’s, Poole’s, and Brown’s testimony was credible, and we must defer to the trial court’s factual determination. *See Air Park-Dallas Zoning Committee*, 109 S.W.3d at 907.

Finally, pursuant to the Texas Residential Property Owners Protection Act, *see* TEX. PROP. CODE ANN. §§ 209.001–.016,⁵ the meetings of the Board were required to be open to the members of the HOA, *see id.* § 209.0051(c); *see also id.* §§ 551.0015–.002 (mandating that certain property owners’ associations are subject to open meeting requirements). The members of the HOA were entitled to notice of the general subject of each meeting, including any matter to be brought up for deliberation in executive session. *See id.* § 209.0051(e). Further, the Board was required to keep a record of each meeting in the form of minutes of the meeting. *See id.* § 209.0051(d). There was no evidence, such as a notice of a meeting, an agenda, or minutes from a meeting, that the Board ever considered authorizing Sandberg to file the lawsuit.

⁴ *See also Seacoast, Inc. v. LaCouture*, No. 03-00-00178-CV, 2000 WL 1862668, at *3 n.5 (Tex. App.—Austin Dec. 21, 2000, pet. denied) (not designated for publication) (noting general rule is corporation must authorize hiring of attorney by resolution or other action of board of directors).

⁵ The HOA does not dispute it is subject to the Texas Residential Property Owners Protection Act.

On this record, we cannot conclude the trial court abused its discretion by determining Sandberg failed to carry his burden to show he had authority to file the lawsuit.

Ratification

The HOA also contends the Board members received a copy of the petition after it was filed and received updates on the status of the lawsuit, but never instructed Sandberg to dismiss the lawsuit. We construe this argument to be that the Board ratified Hughes's conduct in authorizing Sandberg to file the lawsuit.

A doctrine of agency law, ratification is a common law doctrine that binds a person to another's unauthorized act if the person who is arguably bound (1) indicates approval by act, word, or conduct, (2) with full knowledge of the facts of the earlier act, and (3) with the intent to validate the earlier act. *Neese v. Lyon*, 479 S.W.3d 368, 384 (Tex. App.—Dallas 2015, no pet.); *Samson Exploration, LLC v. T.S. Reed Props., Inc.*, 521 S.W.3d 26, 37 (Tex. App.—Beaumont 2015), *aff'd*, 521 S.W.3d 766 (Tex. 2017). “A party ratifies an agreement when—after learning all of the material facts—he confirms or adopts an earlier act that did not then legally bind him and that he could have repudiated.” *Neese*, 479 S.W.3d at 384; *see also Land Title Co. of Dallas, Inc. v. F.M. Stigler, Inc.*, 609 S.W.2d 754, 756 (Tex. 1980) (noting critical factor in determining whether principal ratified an unauthorized act by agent is principal's knowledge of transaction and his actions in light of such knowledge); *Remedy Intelligent Staff, Inc. v. Drake All. Corp.*, No. 14-16-00241-CV, 2017 WL 4440484, at *8 (Tex. App.—Houston [14th Dist.] Oct. 5, 2017, no pet.) (mem. op.).

The board of directors of a non-profit corporation may ratify an act or contract of a corporation which they could have initially authorized. *See Bowers Steel, Inc. v. Debrooke*, 557

S.W.2d 369, 371–72 (Tex. App.—San Antonio 1977, no writ).⁶ However, there was no evidence that the Board voted to ratify Hughes’s conduct in authorizing Sandberg to file the lawsuit. Further, there was no evidence of any procedure other than a vote by which the Board could expressly ratify Hughes’s conduct or that any such procedure was followed.⁷

The HOA argues that, while the Board members received a copy of the petition after it was filed and received periodic updates about the litigation, the Board did not instruct Sandberg to dismiss the lawsuit. Although the HOA apparently contends the Board ratified Hughes’s conduct by acquiescence, *see Neese*, 479 S.W.3d at 384 (noting principal can by conduct ratify agent’s act); *Gen. Dynamics v. Torres*, 915 S.W.2d 45, 50 (Tex. App.—El Paso 1995, writ denied), ratification by any means is effective only when all of the material facts have been disclosed to the board of directors. *Torres*, 915 S.W.2d at 50; *see also Neese*, 479 S.W.3d at 384. The record reflects Hughes was not communicating with the other Board members about the lawsuit, and there was no evidence of the facts disclosed to the Board members either in the conference call with Sandberg or in the periodic updates about the lawsuit that would establish the Board was apprised of all material facts pertaining to the lawsuit. On this record, we cannot conclude the trial court abused its discretion by finding Sandberg failed to meet his burden of establishing the Board ratified Hughes’s conduct.

⁶ *See also Seale v. Jasper Hosp. Dist.* No. 09-95-231-CV, 1997 WL 606857, at *2 (Tex. App.—Beaumont Oct. 2, 1997, pet. denied) (not designated for publication) (noting appellees filed minutes of meeting of appellees’ boards of directors “in which both parties’ boards of directors in effect ratified and reauthorized the questioned attorneys’ authority to represent” appellees).

⁷ *See Terrace Heights Owners Ass’n, Inc. v. Corn*, No. 05-92-02073-CV, 1993 WL 268912, at *3 (Tex. App.—Dallas July 19, 1993, writ denied) (not designated for publication) (concluding attorney failed to establish authority based on theory homeowners’ association ratified agent’s conduct because “[n]o evidence in this record specifies what material facts, if any, were disclosed to the board; further, no evidence explains what procedure the board would have followed to ratify the actions and whether or not the required procedure was followed”).

We resolve the HOA's sole issue against it and affirm the trial court's judgment.

/Robert M. Fillmore/

ROBERT M. FILLMORE
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

CANDLE MEADOW HOMEOWNERS
ASSOCIATION, Appellant

No. 05-17-01227-CV V.

SAIDRICK JACKSON, WILLIAM
FREEMON AND CEDRIC DODD,
Appellees

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Court, Dallas County, Texas,
Trial Court Cause No. DC-15-04272.
Opinion delivered by Justice Fillmore,
Justices Lang-Miers and Myers
participating.

In accordance with this Court's opinion of this date, the order of the trial court granting appellees Saidrick Jackson, William Freemon, and Cedric Dodd's amended motion to show authority pursuant to Texas Rule of Civil Procedure 12 is **AFFIRMED**.

It is **ORDERED** that appellees Saidrick Jackson, William, Freemon, and Cedric Dodd recover their costs of this appeal from appellant Candle Meadow Homeowners Association.

Judgment entered this 27th day of November, 2018.