

Affirmed and Majority and Dissenting Opinions filed August 31, 2020.



In The

Fourteenth Court of Appeals

NO. 14-18-00382-CV

THE HIGH ROAD ON DAWSON, Appellant

V.

**BENEVOLENT AND PROTECTIVE ORDER OF THE ELKS OF THE
UNITED STATES OF AMERICA, INC., Appellee**

**On Appeal from the 250th District Court
Travis County, Texas
Trial Court Cause No. D-1-GN-13-004213**

MAJORITY OPINION

In this dispute over the ownership of real and personal property, appellant The High Road on Dawson (“High Road”) challenges the final summary judgment in favor of appellee Benevolent and Protective Order of Elks of the United States of

America, Inc. (the “National Elks”). We affirm the final summary judgment of the trial court.¹

I. BACKGROUND

The National Elks is a national fraternal and charitable organization, comprised of approximately two thousand local lodges and eight hundred fifty thousand members throughout the United States. High Road, previously known as Austin Lodge No. 201, is a Texas non-profit corporation affiliated with the National Elks. The issues presented to us involve disputed ownership of real and personal property in Austin, Texas.

The National Elks is structured as a hierarchical organization, with legislative power vested in a national organization called the Grand Lodge. Based on its legislative power, the Grand Lodge issues charters to local lodges and is the organization that establishes membership rules, which are set forth in its Constitution and Statutes (also known as “Laws of the Order”). In 1891, the National Elks issued a charter to Austin Lodge No. #201, Benevolent and Protective Order of Elks of the United States of America (“Austin Lodge”). The National Elks’s Constitution and Laws of the Order require that all major decisions of local lodges be approved by the Grand Lodge, including any alteration, purchase, or disposition of real property.

In May of 1957, the Austin Lodge incorporated as “Austin Lodge No. 201, Benevolent and Protective Order of Elks of the United States of America.” The Articles of incorporation state Austin Lodge is “organized exclusively as a fraternal organization, as a non-profit corporation, and its activities shall be conducted for the

¹ The Texas Supreme Court ordered the Third Court of Appeals to transfer this appeal to the Fourteenth Court of Appeals. We must therefore decide the case in accordance with the precedent of the Third Court of Appeals if our decisions otherwise would have been inconsistent with that court’s precedent. *See* Tex. R. App. P. 41.3.

aforesaid purposes in such manner that no part of its net earnings will inure to the benefit of any member, director, trustee, officer or individual.” The Articles of Incorporation further state that the By-laws of the Austin Lodge shall define the duties of the directors, officers, and trustees. The Austin Lodge applied for and received approval from the Grand Lodge of its Articles of Incorporation.

The Austin Lodge also received approval from the Grand Lodge of its By-laws and Rules of Order, which were amended and approved as recently as January 2009. The By-Laws of the Austin Lodge are subordinate to the Grand Lodge’s Laws of the Order, as the Austin Lodge By-Laws provide that “any action, Statute or edict of the Grand Lodge altering these By-Laws, Rules of Order or House Rules shall have the effect of an amendment without any further action of this Lodge.” The Austin Lodge By-laws further provide that all proposed amendments to the Austin Lodge By-Laws, Rules of the Order or House Rules, in conflict with the Grand Lodge’s Laws of the Order, are void, and shall be declared out of order by the Exalted Ruler of the Austin Lodge.² Additionally, the Austin Lodge By-Laws do not take effect until approval by the Grand Lodge.

A. PURCHASE OF THE PROPERTY AT DAWSON ROAD

The land acquired under the 1957 and 1959 deeds is referred to as the “Dawson Road property.” Title to the Dawson Road property was held in two deeds. The first deed was dated April 8, 1957 (the “1957 deed”), and granted a 3.11 acre tract to “Robert Proctor, Forest Gathright, Henry Wendlandt, Jr., Joe Lundell and Roger Newhall as Trustees of Austin Lodge No. 201, B. P. O. E. of the City of the Austin.” Prior to purchasing the property, the Austin Lodge submitted an application to the Grand Lodge certifying that the National Elks’s Laws of the Order had been

² The Exalted Ruler is elected to lead the local lodge by the membership of that lodge. The Grand Lodge is led by the Grand Exalted Ruler.

complied with by members of the Austin Lodge for the purchase of the property. Funding for the purchase came from Austin Lodge's building fund, which was created by setting aside a portion of each member's dues. The purchase of the real property was approved by the National Elks.

After the Austin Lodge was incorporated, a second deed, dated August 4, 1959 (the "1959 deed"), granted a 0.65-acre tract to the "Benevolent and Protective Order of Elks, Inc., of Austin, Texas."

The Austin Lodge submitted several permits for approval to the Grand Lodge, seeking to construct a building on the land. In 1958, a clubhouse was constructed on the land. Between 1959 and 2013, the Austin Lodge filed a variety of applications to purchase and sell property pursuant to Grand Lodge rules.³

B. DISPUTE OVER THE AUSTIN LODGE

At the time of the election of the first female Exalted Ruler of the Austin Lodge in 2012, the conflict between the Austin Lodge and the Grand Lodge escalated, bringing scrutiny of the Austin Lodge by the Grand Lodge. In 2012, the Grand Lodge briefly suspended the charter of the Austin Lodge. On September 27, 2012, after reinstatement, the Austin Lodge was placed on probation.

On July 29, 2013, by executive order from its Grand Lodge, the National Elks revoked the charter of the Austin Lodge.⁴ The executive order revoking the charter of the Austin Lodge: (1) listed a litany of violations of the National Elks's Laws of

³ While the purchase and sale of other parcels are mentioned in the record, there is no dispute between the parties that the two deeds described herein govern all the real property at issue in the lawsuit and this appeal.

⁴ Executive Order No. 13-007 was issued by the Grand Exalted Ruler of the National Elks, Millard Pickering, pursuant to the National Elks's Constitution and Laws of the Order, with the consent of the majority of the Board of Grand Trustees, the concurrence of the State Sponsor and the Past Grand Exalted Ruler, Charles F. Williams, revoking the charter of the Austin Lodge.

the Order by the Austin Lodge, (2) appointed three trustees to take possession of the real and personal property possessed by the Austin Lodge, and (3) authorized the trustees to hire a local attorney to manage or liquidate the Dawson Road property. Members of the Austin Lodge exercised their rights under the National Elks's law and appealed the order of revocation, which stayed the enforcement of the revocation order and allowed the Austin Lodge to operate pending a decision by a Grand Justice, appointed to preside at a trial de novo of the Grand Forum.⁵

Although evidence was heard by an associate judge of the Grand Forum in October 2013, the trial was never concluded because the Austin Lodge withdrew its appeal on November 8, 2013, making the executive order of revocation final. The Austin Lodge, before withdrawing its appeal of the executive order of revocation, voted to disassociate from the National Elks. Sixty-three members of the total membership of four hundred thirty-three members voted to amend the Articles of Incorporation and Bylaws of the Austin Lodge and rename the corporation "The High Road on Dawson." (hereafter referred to as either "the Austin Lodge" or "High Road" as appropriate.) The purpose of the corporation was changed to general charitable purposes, deleting references to the National Elks and the Elks. On November 8, 2013, the Associate Justice of the Grand Forum issued a final order making the July 29, 2013, revocation of the Austin Lodge's charter final and conclusive, and reaffirming the authority of the three trustees named by the Grand Exalted Ruler to hold, manage, and conserve all of the Austin Lodge's real and personal property until a new lodge is formed or the Austin Lodge's charter is reinstated.

⁵ The Grand Forum is the judicial arm of the Grand Lodge.

C. LITIGATION IN DISTRICT COURT

On December 16, 2013, the National Elks filed suit, alleging causes of action against High Road for trespass to try title, conversion, unjust enrichment, breach of contract, breach of fiduciary duty, and violations of the Texas Theft Liability Act,⁶ and requesting a declaratory judgment, a permanent injunction, imposition of a constructive trust, damages, and attorney's fees and costs. The National Elks requested a judicial determination that the acquisition and use of the Dawson Road property and personal property, was acquired, used and maintained for the benefit of the National Elks, and asked the court to rule that the property, both real and personal, be held in an equitable trust by the Trustees for the use and benefit of the Austin Lodge members upon reinstatement or other alternatives provided for by section 9.170 of the National Elks's Laws of the Order.

High Road filed counterclaims for civil conspiracy and the breach of the duty of good faith and fair dealing, and requested a declaratory judgment, damages, and attorney's fees and costs. High Road contended it owned the property because the National Elks did not hold title or have possession of the property.

The National Elks filed its first motion for traditional summary judgment on its causes of action for trespass to try title, violations of the Texas Theft Liability Act, and conversion. The National Elks also filed a motion for traditional and no-evidence summary judgment on High Road's counterclaims.

On August 28, 2017, the trial court heard the following motions: the National Elks's amended motion for summary judgment, filed on July 25, 2016; the National Elks's traditional and no-evidence motion for summary judgment as to defendant's counterclaims, filed on October 4, 2016; and High Road's no-evidence motion for

⁶ Tex. Civ. Prac. & Rem. Code §§ 134.001–.005.

summary judgment and traditional motion for summary judgment, filed on October 5, 2016, together with supplemental motions. As to the National Elks's causes of action, the trial court:

1. Granted the National Elks summary judgment on its trespass to try title cause of action;
2. Denied High Road summary judgment on the National Elks's breach of contract and breach of fiduciary duty causes of action without stating a basis for the denials;
3. Denied High Road summary judgment on the National Elks's unjust-enrichment cause of action "due [to] an insufficient summary judgment record on the personal property in question";
4. Denied summary judgment for both the National Elks and High Road on conversion and violations of the Texas Theft Liability Act "due [to] an insufficient summary judgment record on the personal property in question"; and
5. Ruled the National Elks voluntarily withdrew its request for a Declaratory Judgment.

As to High Road's counterclaims, the trial court:

1. Granted the National Elks's summary judgment as to High Road's counterclaims for breach of the duty of good faith and fair dealing and civil conspiracy; and
2. Denied summary judgment on High Road's declaratory judgment.

The National Elks filed a Second Motion for Summary Judgment, which was heard on February 2, 2018. On March 21, 2018, the trial court signed a final summary judgment for the National Elks on its causes of action for trespass to try title, violations of the Texas Theft Liability Act, and breach of contract causes of action. The trial court denied High Road's motion for summary judgment, except that it granted High Road summary judgment against the National Elks's cause of action for breach of fiduciary duty. The National Elks voluntarily withdrew its causes of action for unjust enrichment and conversion. Both the National Elks and

High Road withdrew their requests for declaratory judgment. The trial court granted the National Elks summary judgment on High Road's counterclaims for breach of the duty of good faith and fair dealing and civil conspiracy and rendered judgment that High Road take nothing on its counterclaims.

The final judgment signed on March 21, 2018, awards National Elks: (1) actual damages for the Texas Theft Liability Act in the amount of \$45,159.06, (2) actual damages in the amount of \$288,540.94,⁷ without specifying which cause[s] of action for which such damages are awarded, and (3) attorney's fees and costs. In addition, the final judgment includes conclusions that the National Elks is the legal and rightful owner of the Dawson Road property, is entitled to possession of the Dawson Road property to the exclusion of High Road, and that High Road has no legal or equitable interest in the Dawson Road property. Finally, the final judgment awards the National Elks title to and possession of the Dawson Road real property, all personal property located at 700 Dawson Road that was in the facility on November 5, 2013, and actual damages.

High Road appeals the final judgment signed on March 21, 2018.

II. ISSUES PRESENTED

High Road presents the following issues on appeal:

- 1) Did the trial court reversibly err in granting motions for summary judgment in favor of the National Elks on its causes of action for trespass to try title, violations of the Texas Theft Liability Act, and breach of contract?

⁷ The trial court calculated the net actual damages of \$288,540.94 based upon the stipulation of the parties as to the value of Austin Lodge's bank account at the time of disassociation, as well as High Road's profit and loss statements submitted as summary judgment evidence. The trial court determined, and the parties agreed, High Road's net income from November 2013-December 2017 was \$333,700, and the value of the bank accounts was \$45,159.06. The trial court subtracted the value of the bank accounts from net income to determine net actual damages of \$288,540.94.

- 2) Did the trial court reversibly err in denying High Road's motions for summary judgment on the National Elks's causes of action for trespass to try title, violations of the Texas Theft Liability Act, and breach of contract?
- 3) Did the trial court reversibly err in granting the National Elks's motions for summary judgment against High Road's counterclaims for conspiracy and breach of the duty of good faith and fair dealing?
- 4) Did the trial court reversibly err in deferring to the National Elks's laws rather than applying neutral principles of Texas law, including principles of trust law?
- 5) Did the trial court reversibly err in awarding damages?
- 6) Depending upon the outcome of the appeal, should the award of legal costs be reversed and remanded for a redetermination?

III. STANDARD OF REVIEW

We review a summary judgment de novo. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). We consider all of the summary-judgment evidence in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if a reasonable factfinder could and disregarding contrary evidence unless a reasonable factfinder could not. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006).

When a party seeks summary judgment on no-evidence and traditional grounds, we generally review the no-evidence grounds first. *See PAS, Inc. v. Engel*, 350 S.W.3d 602, 607 (Tex. App.—Houston [14th Dist.] 2011, no pet.). To prevail on a no-evidence summary judgment, the movant must allege that no evidence exists to support one or more essential elements of a claim for which the non-movant bears the burden of proof at trial. *Id.* (citing Tex. R. Civ. P. 166a(i)). The motion must

specifically state the elements for which there is no evidence. *Id.* The non-movant must then present evidence raising a genuine issue of material fact on the challenged elements. *Id.* A fact issue exists when there is more than a scintilla of probative evidence. *Buck v. Palmer*, 381 S.W.3d 525, 527 (Tex. 2012) (per curiam). More than a scintilla of evidence is present when evidence rises to a level that would allow reasonable and fair-minded people to differ in their conclusions as to the existence of a vital fact. *Dworschak v. Transocean Offshore Deepwater Drilling, Inc.*, 352 S.W.3d 191, 196 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (citing *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004)).

The party moving for traditional summary judgment bears the burden of showing no genuine issue of material fact exists and it is entitled to judgment as a matter of law. *Mann Frankfort*, 289 S.W.3d at 848 (citing Tex. R. Civ. P. 166a(c)). The evidence raises a genuine issue of fact if reasonable and fair-minded jurors could differ in their conclusions in light of all of the summary judgment evidence. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007). Summary judgment for a defendant is proper only when the defendant negates at least one element of each of the plaintiff's theories of recovery or pleads and conclusively establishes each element of an affirmative defense. *Hilburn v. Storage Tr. Props., LP*, 586 S.W.3d 501, 506 (Tex. App.—Houston [14th Dist.] 2019, no pet.).

When both parties move for summary judgment and the trial court grants one motion and denies the other, the reviewing court should review both parties' summary judgment evidence and determine all questions presented. *Mann Frankfort*, 289 S.W.3d at 848. If the reviewing court finds error, the court should reverse the denial of the motion for summary judgment and render the judgment that the trial court should have rendered. *See Myrad Props., Inc. v. LaSalle Bank Nat'l Ass'n*, 300 S.W.3d 746, 753 (Tex. 2009).

IV. ANALYSIS

A. CAUSES OF ACTION FOR WHICH THE NATIONAL ELKS WAS GRANTED SUMMARY JUDGMENT

1. TRESPASS TO TRY TITLE

In its Second Amended Petition, the National Elks claims a beneficial and equitable title to the Dawson Road property. Generally, a trespass to try title claim is the exclusive method in Texas for adjudicating disputed claims of title to real property. *See* Tex. Prop. Code Ann. § 22.001(a) (“A trespass to try title action is the method of determining title to lands, tenements, or other real property.”); *see also* *Martin v. Amerman*, 133 S.W.3d 262, 267 (Tex. 2004). A plaintiff in a trespass to try title suit may recover on the strength of an equitable title as well as a legal one. *Cullins v. Foster*, 171 S.W. 3d 521, 533 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). “An owner of a superior equitable title may recover in a trespass to try title action if the record shows the equitable title is superior to the defendant’s bare legal title.” *Longoria v. Lasater*, 292 S.W.3d 156, 165 (Tex. App.—San Antonio 2009, pet. denied) (citing *Binford v. Snyder*, 144 Tex. 134, 189 S.W.2d 471, 474 (1945)). “The authorities fully sustain the proposition ‘that an action of trespass to try title, brought in the ordinary form, may be maintained on an equitable title. (citations omitted).’” *Old Nat’l Life Ins. Co. v. Jerusalem Lodge No. 67, Free & Accepted Masons*, 192 S.W.2d 921, 925 (Tex. Civ. App.—Waco 1945, writ ref’d n.r.e.). “‘Equitable title’ is a right, enforceable in equity, to have the legal title to real estate transferred to the owner of the right upon the performance of specified conditions.” *City of Houston v. Guthrie*, 332 S.W.3d 578, 588 (Tex. App.—Houston [1st Dist.] 2009, pet. denied); *see also* *Travis Cent. Appraisal Dist. v. Signature Flight Support Corp.*, 140 S.W.3d 833, 840 (Tex. App.—Austin 2004, no pet.) (“equitable title is defined as the present right to compel legal title”).

For example, in *District Grand Lodge No. 25 Grand United Order of Odd Fellows v. Jones*, 138 Tex. 537, 160 S.W.2d 915, 922–23 (Tex. [Comm’n Op.] 1942) (hereafter referenced as *Jones*), an opinion adopted by the Supreme Court of Texas, the court held in a trespass to try title action that equitable title vested in both the Odd Fellows Local Lodge and Grand Lodge, with said title in the former subject to forfeiture to the latter under its constitution and by-laws. In *Jerusalem Lodge No. 67*, a trespass to try title action, the court of civil appeals applied *Jones* to hold that Lilly of the Valley Lodge [local lodge] held title to the real property at issue as trustee for the Lilly of the Valley Grand Lodge. 192 S.W.2d at 926. As discussed below, we likewise conclude that the National Elks was entitled to summary judgment on its trespass to try title action because the record shows that under the National Elks’s Constitution and Laws of the Order, equitable title to the Dawson Road property vested in the National Elks when the charter of the Austin Lodge was terminated.

Further, the Laws of the Order establish the relationship between the Grand Lodge and the local lodges, whether incorporated or unincorporated.⁸ Accordingly, the National Elks’s Constitution and Laws of Order became part of the contract that the Austin Lodge entered into when it joined the National Elks. *See Jones*, 160 S.W.2d at 920. “It is generally held that the constitution and by-laws of a voluntary association, whether incorporated or not, are controlling as to its internal management.” *Jones*, 160 S.W.2d at 922. “Texas courts have recognized that an association’s bylaws constitute a contract between the parties.” *Monasco v. Gilmer Boating & Fishing Club*, 339 S.W.3d 828, 838 n.14 (Tex. App.—Texarkana 2011, no pet.). “In considering the constitution and by-laws of an association as a contract

⁸ Laws of the Order § 16.030, Opinion 2 (“All separate corporations, regardless of when organized, are subject to the provisions of this Section, and subject to all provisions of the Laws of the Order.”)

between the parties, the author of 7 C.J.S., Associations, § 11, p. 34, says, ‘The articles of association or constitution and the by-laws so agreed upon constitute a contract which the courts will enforce both as between the members themselves and as between the association on one side and the individual members on the other, and their rights and powers, and duties and liabilities, are measured accordingly.’” *Lundine v. McKinney*, 183 S.W.2d 265, 273 (Tex. Civ. App.—Eastland 1944, no writ). “By-laws adopted for the government of such organizations are regarded as the contract of the members with one another, and by these their individual rights as such members are to be determined in the conduct of the business affairs of the association.” *Gaines v. Farmer*, 55 Tex. Civ. App. 601, 606–07, 119 S.W. 874, 877 (Texarkana 1909, writ dism’d).

The National Elks’s Constitution and Laws of the Order, which the Austin Lodge agreed to obey, provide that upon revocation of the charter of the Austin Lodge, the Austin Lodge must surrender all real and personal property to the National Elks. Specifically, section 9.170 of the Statutes or Laws of Order provides:

Upon the final adjudication by the Courts of the Order, the revocation or suspension of a Dispensation or Charter, or the surrender of a Charter under the Laws of the Order shall be conclusive upon the Lodge and its Members. Property of the Lodge necessary to conduct the ceremonies prescribed by the Ritual, and its Dispensation or Charter, membership lists, books, papers, jewels, emblems, regalia and effects, must be surrendered on demand by the person or persons having custody thereof to the Grand Lodge, its agent or Trustees. Any Officer or Member, having custody of property, who shall refuse or fail to surrender same on demand, shall be expelled from the Order.

Upon such final adjudication, the Grand Exalted Ruler may appoint three Trustees to receive, hold, conserve, manage, or sell the Lodge property, retaining the proceeds therefrom, until such time as said Lodge may be reinstated or a new Charter granted in the same community. If the Lodge is reinstated or a new Charter is granted for a Lodge or Lodges with jurisdiction including a portion of the same

jurisdiction of the former Lodge, said Trustee, upon order of the Grand Exalted Ruler, shall transfer and deliver the title to all assets of the Lodge to the Lodge so reinstated or to the new Lodge or Lodges to which a Charter or Charters have been granted, in such proportions as determined by a majority of the Board of Grand Trustees with the approval of the Grand Exalted Ruler, and the three Trustees shall execute and deliver any and all necessary and proper deeds and instruments with the approval of the Grand Exalted Ruler endorsed thereon to vest full and complete title in the Lodge entitled thereto.⁹

The Grand Forum has issued an Opinion interpreting section 9.170 as follows:

Upon revocation, suspension, or voluntary surrender of a Charter, all Lodge assets must be surrendered to Trustees...appointed by the Grand Exalted Ruler. At the time a Lodge becomes Chartered, they expressly agree to abide by and act in accordance with the Constitution, Statutes, and Rules of the Order, including disposition of assets under Section 9.170. A Lodge exists pursuant to Grand Lodge Charter and all property and assets it acquires, real and personal, are held in constructive trust.

“The surrender of a charter, or the revocation and forfeiture or suspension of a dispensation or charter, when declared by the Grand Exalted Ruler, shall be conclusive upon the Lodge . . .”. Section 141 of the Rules of Order. Thus, section 9.170 and the opinion interpreting it are clear that the Austin Lodge had a contractual obligation to surrender its assets, including the Dawson Road property, when the Austin Lodge’s charter was revoked on July 29, 2013, and that such revocation vested equitable title to the Dawson Road property in the National Elks. Because equitable title to the Dawson Road property is vested in the National Lodge, the trial court properly granted the National Elks’s summary judgment on its trespass to try title action.

⁹ Section 9.170 is consistent with its predecessor, section 140-41 of the Rules of Order, in effect when the disputed property was acquired; section 140-41 provides: “Upon the surrender or revocation of the charter of a local lodge, all property of the local lodge “shall become the property of, and must be surrendered to, the Grand Lodge . . . on demand . . .”).

This conclusion is supported by *Jones*. See 160 S.W.2d 915. In *Jones*, former members of the Grand United Order of Odd Fellows filed a trespass to try title action relating to three plots of land in Port Arthur that had previously been purchased by members of former Port Arthur Lodge No. 7951 (the “Local Lodge”), with no contribution from the Odd Fellows Grand Lodge. *Id.* at 918. In each instance, however, the deed was executed to named members of Local Lodge as trustees of said Local Lodge and to their successors in trust for said lodge. *Id.*

One of the issues on appeal was whether legal or equitable title to real property vested in the Odd Fellows Grand Lodge when the Local Lodge became defunct. The *Jones* opinion held that equitable title vested in the Odd Fellows Grand Lodge because Article 10, of the constitution and by-laws of the Odd Fellows Grand Lodge, provided “all property, real, personal or mixed acquired by any subordinate lodge shall be held in trust for Grand Lodge by the subordinate lodge” and “when any subordinate lodge shall become defunct or cease to operate all property held in trust by it shall be taken over by Grand Lodge and the fee to all property held in the name of the subordinate lodge shall vest absolutely in Grand Lodge.” 160 S.W.2d at 541.

The *Jones* opinion rejected the Local Lodge’s argument that these provisions are contrary to public policy. *Id.* at 545. First, the provisions of the Odd Fellows Grand Lodge’s constitution and by-laws are consistent with the public policy stated in a Texas statute, although the Grand Lodge was not incorporated under that statute:

Therefore, if we have a statute on the question before us it follows that we have a statement of public policy with respect thereto, unless such statute unconstitutional. Art. 1403, R.S.1925, is such a statute. It is a part of Chapter 9, which relates to the incorporation of the grand lodges of the Masons, Odd Fellows and other orders organized for charitable or benevolent purposes and provides: “Upon the demise of any subordinate body so incorporated, all property and rights existing in such subordinate body shall pass to, and vest in, the grand body to

which it was attached, subject to the payment of all debts due by such subordinate body.”¹⁰

The defendants insist that statute cannot be regarded as a declaration of public policy in this case because it relates to beneficial orders that incorporate, whereas Grand Lodge was not incorporated. . . .

This statute plainly manifests the legislative intent that a fraternal benefit society already in being should be regarded as an entity and protected by law, although it should not incorporate, just as one that elected to incorporate would be.

Jones, 160 S.W.2d at 921.

Second, the *Jones* opinion held that article 1403 was constitutional, and did not violate due process:

In the very nature of things the membership in a fraternal benefit organization is ever shifting and changing because of death, voluntary withdrawals, forfeiture from failure to pay dues, and the like. Local lodges come into being, not as independent organizations existing solely for the benefit of their members, but as constituents of the larger organization, the grand lodge, organized for specific purposes, most of which can be accomplished only through subordinate bodies, the local lodges. They come into being to aid in the accomplishment of these purposes and then some of them pass away like their members before them. What is to become of their property? Departed members who contributed to its accumulation expected no interest in it. They have none. Membership in the lodge at the time of its death certainly should give the surviving member no individual interest in the lodge’s property because he joined charged with notice of the statute declaring that whatever he contributes to the local lodge should, in the event of its death, pass to and vest in the central state organization. The property so acquired by the local lodge becomes impressed with the group purpose of a fraternal benefit society. Upon demise of such lodge the way to keep it so impressed is certainly not by deeding it to the surviving

¹⁰ Although article 1403 of the Revised Civil Statutes has been repealed, the Texas Legislature enacted a successor statute that is almost identical to article 1403. It provides: “On the winding up and termination of a subordinate body attached to a grand body, all property and rights existing in the subordinate body pass to and vest in the grand body to which it was attached . . .”. Tex. Bus. Orgs. Code § 23.110(a).

members to enjoy according to their individual desires, but can be achieved only by giving it to the central state organization, the grand lodge, for disposition in accordance with its rules and the general law governing it.

Jones, 160 S.W.2d at 920; *see also Progressive Union of Tex. v. Indep. Union of Colored Laborers of Tex., Lodge No. 1*, 264 S.W.2d 765, 768 (Tex. Civ. App.—Galveston 1954, writ ref'd n.r.e) (“It is well settled that when a person ceases to be a member of a voluntary association, his interest in its funds and property ceases and the remaining members become jointly entitled thereto, and this rule applies where a number of members secede in a body and although they constitute a majority and organize a new association”).

Third, the *Jones* opinion recognized that “[e]very individual joining a fraternal order referred to in the statute and charged with notice of the principle therein stated must be regarded as having impliedly contracted with his fellow members and the local and grand lodge that whatever he contributes to property acquired by the local lodge will, upon demise of that body, become vested in the grand lodge.” 160 S.W.2d at 921. “Such implied contract does not appear adversely to affect the public welfare; it is not forbidden by law; certainly its consideration is not immoral.” *Id.*

Here, the Austin Lodge not only impliedly contracted, but expressly contracted under section 9.170 of the Laws of Order, that upon the revocation of its charter, it would surrender all its assets, including the Dawson Road property, to the National Elks. For the reasons discussed in *Jones*, this agreement is not against public policy.

Appellate decisions from other jurisdictions have similarly enforced provisions that require the turnover of property from a defunct lodge to its national organization. *See Grand Aerie, Fraternal Order of Eagles v. Nat'l Bank of*

Washington, Kent Branch, 124 P.2d 203, 205 (Wash. 1942) (“even though the property be held in the name of the corporation of the subordinate lodge, upon suspension or revocation the property becomes that of the Grand Lodge, if the [organization’s] constitution so provides”); *Phillips v. Widow’s Son Lodge No. 54*, 147 S.E. 193, 184 (Va. 1929) (action of members withdrawing from unincorporated lodge in transferring funds to themselves and to new lodge held without warrant of law, where constitution of grand lodge provided that, when lodge ceased to function, all its property vested in grand lodge in trust).

High Road argues that the National Elks does not have equitable title to the Dawson Road property because High Road holds legal title to the property, and for National Elks to establish equitable title, it must prove that it is the beneficiary of an irrevocable express trust that complies with sections 112.004 and 112.051(a) of the Texas Property Code. High Road asserts there is no such proof.

In support of this argument, High Road cites *Episcopal Diocese of Fort Worth v. Episcopal Church*, 602 S.W.3d 417 (Tex. 2020), in which the Texas Supreme Court: (1) recognized that it had previously held that “what happens to property following a religious entity’s disassociation from a hierarchical church is a nonecclesiastical issue to be determined based on the same neutral principles of law applicable to other entities, unless the entity’s affairs ‘have been ordered so that ecclesiastical decisions effectively determine the property issue’”; (2) held that “under the governing documents, the withdrawing faction is the Episcopal Diocese of Fort Worth,” and “the trial court properly granted summary judgment in the withdrawing faction’s favor.” The Episcopal Church (“TEC”) claimed ownership of the property under the “Dennis Canon”, which provides: “All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or

Congregation is located.” *Id.* Unlike the documents which govern the Austin Lodge, the governing documents in *Episcopal* provided that the Fort Worth Diocese, by a majority vote of its convention, can amend the Diocesan Constitution and Canons and convention rules.¹¹ In 1989, the Fort Worth Diocese repudiated and revoked any trust imposed by the Dennis Canon by amending its canons to expressly disclaim the existence of a trust for TEC’s benefit:

Property held by the Corporation for the use of a Parish, Mission or Diocesan School belongs beneficially to such Parish, Mission or Diocesan School only. No adverse claim to such beneficial interest by the Corporation, by the Diocese, or by The Episcopal Church of the United States of America is acknowledged, but rather is expressly denied.

Id. at 422. A settlor may revoke a trust “unless it is irrevocable by the express terms of the instrument creating it or of an instrument modifying it.” Tex. Prop. Code §112.001. The supreme court reaffirmed its holding in *Masterson* and *Episcopal* that “even assuming the Dennis Canon is a valid trust, it is revocable under Texas law because it was not made expressly irrevocable.”¹² *Id.* at 424. Based on the 1989 amendment [the governing document] the supreme court held that the that the Fort Worth Diocese and parishes in union with that faction hold equitable title to the disputed property under the Diocesan Trust. *Id.*

High Road attempts to rely on *Episcopal* to support two arguments: (1) there are no documents in the record that create an express trust in the National Elks over the Austin Lodge’s [now named High Road] property, and (2) even if there were

¹¹ The Fort Worth Diocese’s charters provide that (1) a majority vote of its convention can amend the Diocesan Constitution and Canons and convention rules; (2) a majority vote of the convention elects the Diocesan Bishop, officers of the diocese’s standing committee, and trustees of the Diocesan Corporation; and (3) a majority vote of the convention can admit, suspend, or restore a parish or mission to union with the Convention. *Id.* at 430.

¹² *Episcopal Diocese of Fort Worth v. Episcopal Church*, 422 S.W.3d 646, 653 (Tex. 2013); *Masterson v. Diocese of Nw. Tex.*, 422 S.W.3d 594, 613 (Tex. 2013).

such a trust, the Texas Property Code gave High Road the right to revoke the trust.

High Road's arguments wrongly assumes that equitable title to real property may only be obtained through the creation of an express trust that complies with the Property Code. Not so. It is well settled that equitable title is obtained through performance of a contract that requires transfer of the property. Performance by the vendee in a contract to convey real property vests the equitable title in him. *Magee v. Young*, 145 Tex. 485, 490, 198 S.W.2d 883, 886 (1946). "Equitable title' is a right, enforceable in equity, to have the legal title to real estate transferred to the owner of the right upon the performance of specified conditions." *Pine Forest Invs. Group, LLC v. Cty. of Bastrop, Tex.*, No. 03-16-00789-CV, 2018 WL 3077972, at *8 (Tex. App.—Austin June 22, 2018, pet. denied) (mem. op.) (quoting *Guthrie*, 332 S.W.3d at 588); *see also Neeley v. Intercity Mgmt. Corp.*, 623 S.W.2d 942, 950–51 (Tex. App.—Houston [1st Dist.] 1981, no writ) ("equitable title is an enforceable right to have legal title transferred to the holder of the equity," and "mere equitable right rises to the dignity of an equitable title when performance under the particular contract occurs"). As discussed above, under section 9.170 of the Rules of Order and the opinion interpreting it, the Austin Lodge had a contractual obligation to transfer its assets, including the Dawson Road property, when the National Elks performed the condition specified in section 9.170; namely, revoking the Austin Lodge's charter on July 29, 2013. Under well-established principles of Texas contract law, such revocation vested equitable title to the Dawson Road property in the National Elks.

In fact, in *Episcopal Diocese of Fort Worth*, the Texas Supreme Court recognized that lodges hold special status under the law, noting:

See Tex. Bus. Orgs. Code §§ 23.104(c) ("A subordinate body is subject to the jurisdiction and control of its respective grand body, and the warrant or charter of the subordinate body may be revoked by the grand

body.”), .110 (“On the winding up and termination of a subordinate body attached to a grand body, all property and rights existing in the subordinate body pass to and vest in the grand body to which it was attached, subject to the payment of any debt owed by the subordinate body.”). . . .

602 S.W.3d at 432, n.66. Thus, section 9.170 of the Rules of Order is consistent with Texas public policy as stated in sections 23.104 and 23.110 of the Business Organization Code.¹³ Further, the supreme court did not overrule *Jones*, but cited *Jones* for the proposition that “the constitution and by-laws of a voluntary association, whether incorporated or not, are controlling as to its internal management.”¹⁴ *Id.* at 430, n.54.

Finally, High Road, citing *Bullard v. Austin Real Estate Bd., Inc.*, 376 S.W.2d 870, 874 (Tex. Civ. App.—Austin 1964, writ ref’d n.r.e.), argues that the National Elks’s revocation of the Austin Lodge’s charter was ineffective because there is evidence that it was done in bad faith and denial of due process. However, Texas courts decline to intervene in internal disputes of a nonprofit association when a member does not exhaust the association’s internal remedies. *See, e.g., Juarez v. Tex. Ass’n of Sporting Officials El Paso Chapter*, 172 S.W.3d 274, 279–81 (Tex. App.—El Paso 2005, no pet.); *Bullard*, 376 S.W.2d at 877 (suit was premature because Bullard failed to exhaust his administrative remedies). “It is equally well settled that where an association under its rules expels a member, such member must resort to, and must exhaust, the remedies provided by the association itself, through its constitution and by-laws, before applying to a court of equity for relief.” *Brown*

¹³ National Elks does not argue on appeal that either Business Organizations Code section 24.104(c) or its predecessor statute directly applies to this case, and we express no opinion on that matter. Tex. Bus. Orgs. Code § 24.104(c) (“A subordinate body is subject to the jurisdiction and control of its respective grand body, and the warrant or charter of the subordinate body may be revoked by the grand body.”).

¹⁴ *Jones*, 160 S.W.2d at 922.

v. Harris Cty. Med. Soc., 194 S.W. 1179, 1181 (Tex. Civ. App.—Galveston 1917, no writ). High Road is not entitled to judicial intervention on “bad faith” or “due process” grounds because High Road did not exhaust its remedy of appeal of the order revoking the charter; although High Road commenced an appeal, it later filed a notice of dismissal and withdrew its appeal of the order, making the order conclusive.

High Road, however, argues that it is excused from exhausting its remedy of appeal of the revocation order under the laws of the National Elks because doing so allegedly would have been futile. As support, High Road cites *B & S Welding LLC Work Related Injury Plan v. Oliva-Barron*, 447 S.W.3d 425, 429 (Tex. App.—Dallas 2014, no pet.), which recognized that “a plaintiff may be excused from exhausting administrative remedies under ERISA if it would have been futile to do so.” But High Road cites no Texas authority indicating that a futility exception exists for the failure to exhaust the remedies provided for by a nonprofit association, such as the National Elks. In any event, High Road has not produced evidence that continuation of the appeal would have been futile, especially given that the Elks’s appeal panel was required to review the revocation order de novo. High Road claims in its reply brief that certain actions by Charles Williams, Glen Castlebury, and Millard Pickering demonstrate that continuing its appeal would have been futile, but the record does not show that any of these persons were serving on the panel that was hearing High Road’s appeal. The evidence here is not sufficient to raise that exception.

For these reasons, we conclude the trial court did not err in granting the National Elks’s motion for summary judgment on its trespass to try title action.

2. BREACH OF CONTRACT

High Road argues that the trial court erred by granting the National Elks’s

motion for summary judgment and denying High Road's motion for summary judgment on the National Elks's breach of contract cause of action.

The elements of a breach-of-contract action 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) damages sustained by the plaintiff as a result of the breach. *Roundville Partners, L.L.C. v. Jones*, 118 S.W.3d 73, 82 (Tex. App.—Austin 2003, pet. denied).

As discussed above, the Laws of the Order are valid enforceable contractual obligations between the National Elks and the Austin Lodge, now named High Road. It is undisputed that the Austin Lodge refused to surrender the assets of the Austin Lodge to the National Elks when the National Elks revoked the Austin Lodge's charter and demanded that such assets be transferred. That refusal constituted a breach of section 9.170 of the Rules of Order, under which the Austin Lodge agreed to operate.

In its reply brief, High Road "agrees that a contractual relationship existed," but argues that contractual relationship did not provide a basis for the National Elks to obtain ownership of the Austin Lodge's property. High Road asserts that nothing in the National Elks Constitution or its Rules of Order prohibited the Austin Lodge from disassociating from the National Elks. High Road argues that once the Austin Lodge (now named High Road) disassociated, it was no longer required to follow the National Elks Constitution or Laws of Order.

To the contrary, the means by which the Austin Lodge disassociated from the National Elks constituted a breach of the contractual obligations stated in the Rules of Order that it agreed to obey. The National Elks never approved High Road's amended By-Laws, amended Articles of Incorporation, or disassociation. When the Austin Lodge took actions to disassociate from the National Elks, it breached Article

XVII of its own By-Laws that prevented amendments to the By-Laws or Articles of Incorporation without the National Elks's approval. High Road also breached sections 16.020 and 17.050 of the Rules of Order, requiring the National Elks's approval before Articles of Incorporation or By-Laws may be amended. Further, the Austin Lodge's attempted amendments to disassociate were "in conflict with the Laws of the Order" as proscribed by the existing By-Laws and as such, they are "void." The Austin Lodge did not comply with its own 2009 By-Laws and, consequently, could not vote to disassociate and deprive the National Elks of equitable title to the Dawson Road property.

Accordingly, we conclude that the trial court did not err by granting the National Elks's motion for summary judgment and denying High Road's motion for summary judgment on the National Elks's breach of contract cause of action.

3. THEFT LIABILITY ACT

The National Elks also alleged that High Road violated the Texas Theft Liability Act by unlawfully taking personal property that rightfully belonged to the National Elks after the revocation of the charter. In a suit under the Theft Liability Act, a person who has sustained damages resulting from theft may recover the amount of actual damages found by the trier of fact, as well as court costs and reasonable and necessary attorney's fees. Tex. Civ. Prac. & Rem. Code §134.005(a), (b).

High Road argues that because there is no trust, and the property at issue belonged to High Road, not the National Elks, High Road is entitled to judgment as a matter of law on the action for violations of the Theft Liability Act. Because we have decided, as discussed above, that the National Elks is the rightful owner of the personal property associated with the former Austin Lodge, we conclude that the

court did not err in granting the motion for summary judgment in favor of the National Elks on its cause of action for violations of the Theft Liability Act.

B. SUMMARY JUDGMENT ON HIGH ROAD’S COUNTERCLAIMS

1. BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING

In Texas, courts have declined to impose an implied covenant of good faith and fair dealing in every contract; however, a duty of good faith and fair dealing may arise as a result of a special relationship between the parties. *Manges v. Guerra*, 673 S.W.2d 180, 183 (Tex. 1984); *see also English v. Fischer*, 660 S.W.2d 521, 524 (Tex. 1983) (Spears, J., concurring). This duty arises not out of contract but out of the special relationship and trust necessary to accomplish the goals of the undertaking or imposed by the courts because of an imbalance of bargaining power. *Id.* The Texas Supreme Court has declined to extend this theory beyond a few recognized special relationships. *Barrow-Shaver Res. Co., v. Carrizo Oil & Gas, Inc.*, 590 S.W.3d 471, 491 (Tex. 2019) (there is not an implied covenant of good faith and fair dealing in every contract) (*citing Zachry Constr. Corp. v. Port of Houston Auth. of Harris Cty.*, 449 S.W.3d 98, 116–17 (Tex. 2014) (acknowledging that Texas does not recognize a duty of good faith and fair dealing imposed in contractual obligations)); *Winters v. Houston Chronicle Publ’g Co.*, 795 S.W.2d 723, 724 n.2 (Tex. 1990) (pointing out that courts have declined to imply a duty of good faith and fair dealing into employment contracts); *see also Hux v. S. Methodist Univ.*, 819 F.3d 776, 781 (5th Cir. 2016) (recognizing that “Texas law does not impose a generalized contractual duty of good faith and fair dealing and, in fact, rejects it in almost all circumstances”).

We are unaware of any case in which a Texas court has ever applied the duty of good faith and fair dealing to private voluntary fraternal organizations. We conclude that the trial court did not err in granting the National Elks’s motion for

summary judgment as to High Road’s counterclaim for breach of the duty of good faith and fair dealing.

2. CIVIL CONSPIRACY

High Road asserted a counterclaim of civil conspiracy, alleging that the National Elks conspired with “Fred Adams, Al Malmsten, Chuck Williams, Bill Hart, Glen Castlebury and the other agents . . . to unlawfully appropriate High Road’s property.” The National Elks moved for traditional and no-evidence summary judgment on this counterclaim.

In Texas, civil conspiracy is a theory of vicarious liability and not an independent tort. *Agar Corp., Inc. v. Electro Cir. Int’l, LLC*, 580 S.W.3d 136, 142 (Tex. 2019). By pleading civil conspiracy, a plaintiff seeks to hold a defendant liable for an injury caused by a third party who has acted in combination with the defendant for a common purpose. *Id.* at 140. Although the National Elks and High Road brief civil conspiracy as if it were an independent tort, civil conspiracy must be asserted based on an underlying cause of action. *Id.*

High Road does not allege an underlying tort cause of action necessary to maintain a conspiracy cause of action that the National Elks “engaged in a conspiracy” to unlawfully appropriate its property. High Road only alleges a cause of action based on the National Elks’s breach of the duty of good faith and fair dealing against which the trial court correctly granted summary judgment. We conclude that the trial court did not err in granting the National Elks’s summary judgment on High Road ’s civil-conspiracy counterclaim.

3. BREACH OF CONTRACT

As discussed above, we conclude that the trial court did not err by denying High Road’s motion for summary judgment on the National Elks’s breach of

contract action.

4. DAMAGES

The judgment awards the National Elks: (1) actual damages for the Theft Liability Act in the amount of \$45,159.06, the stipulated amount of the bank accounts, and (2) attorney's fees through final judgment of \$95,000.00. These awards are supported by the "Agreed Stipulation Regarding Certain Evidence," which stipulates the value of the bank accounts in the same amount as that awarded by the trial court, \$45,159.06, and reasonable and necessary attorney's fees and costs of \$95,000.00.

The judgment additionally awards the National Elks actual damages in the amount of \$288,540.94. The trial court calculated the \$288,540.94 by subtracting the amount of the bank accounts (\$45,159.06) from High Road's \$333,700.00 of total income. Such award is supported by Exhibit 9, which was admitted without objection at the February 22, 2018 summary judgment hearing.

High Road argues that that the \$288,540.94 award of actual damages should be reversed for two reasons. First, High Road argues that the \$288,540.94 award includes "post-association dues" and that the National Elks has not shown that it is entitled to recover such dues. Regardless of the merit of this argument, our court may not consider it because the record does not show that High Road presented it to the trial court. Rule 166a(c) is clear: "Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal." Tex. R. Civ. P. 166a(c). "We will not reverse a summary judgment based on an argument that was not expressly presented to the trial court by written response or other document." *Connor v. Lost Creek Neighborhood Ass'n*, 03-19-00347-CV, 2020 WL 1223541, at *4 (Tex. App.—Austin Mar. 13, 2020, no pet.) (mem. op.) (quoting *TruStar Petroleum Corp. v. Eagle Oil & Gas Co.*, 323

S.W.3d 316, 321 (Tex. App.—Dallas 2010, no pet.)).

Second, High Road argues that the \$288,540.94 award should be reversed and rendered because it is entitled to summary judgment on the National Elks’s breach of contract action. As discussed above, we conclude that the National Elks is entitled to summary judgment on its breach of contract action.

In any event, the judgment does not specify the cause of action under which the trial court awarded the National Elks the \$288,540.94 of High Road’s net income or profits. Thus, the trial court may have intended to award the \$288,540.94 of High Road’s net income or profits based on all of the causes of action on which it granted the National Elks summary judgment, namely breach of contract, violations of the Theft Liability Act, and trespass to try title. As the dissent notes, the National Elks states in its appellee’s brief that the “the trial court properly awarded damages, attorney’s fees, and costs to [the National Elks] on [its Theft Liability Act] and breach-of-contract claims, and the judgment should be affirmed.” That the trial court awarded the National Elks the amount of the bank accounts (\$45,159.06) as actual damages based on the Theft Liability Act does not preclude the possibility that the trial court also intended to award the \$288,540.94 of actual damages based on the Theft Liability Act, given that the trial court intentionally did not specify which causes of action for which it made this award.

Because the judgment does not specify, the trial judge may have intended to award the \$288,540.94 for breach of contract, for violations of the Theft Liability Act, and for trespass to try title or for one or two of these three causes of actions. Rather than remanding to the trial court to obtain the judge’s thought processes regarding his award of the \$288,540.94, we will determine the judgment that can be rendered from the pleadings and the evidence. *See Gulf States Utils. Co. v. Low*, 79 S.W.3d 561, 566 (Tex. 2002). Where the prevailing party fails to elect between

alternative measures of damages, the court should utilize the findings affording the greater recovery and render judgment accordingly. *Birchfield v. Texarkana Mem'l Hosp.*, 747 S.W.2d 361, 367 (Tex. 1987).

The National Elks's second amended petition pleads for the recovery of damages it sustained because of High Road's theft. Under the Theft Liability Act, "[a] person who commits theft is liable for the damages resulting from the theft." Tex. Civ. Prac. & Rem. Code §134.003(a). A person commits theft "if he unlawfully appropriates property with intent to deprive the owner of property." Tex. Pen. Code § 31.03." "Deprive," as defined by the Texas Penal Code, means: "to withhold property from the owner permanently or for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner." Tex. Penal Code § 31.01(2). Thus, National Elks may recover the \$288,540.94 of net profits that High Road wrongfully withheld from the National Elks under the Theft Liability Act. *See Bailey v. State*, 885 S.W.2d 193, 198 (Tex. App.—Dallas 1994, pet. ref'd) (holding that intangible property such as a bank balance can be appropriated by the exercise of control over that property under Texas Penal Code § 31.01); *Coats v. State*, 712 S.W.2d 520, 523 (Tex. Crim. App. 1986) (en banc) (holding that money can be appropriated by acquiring or otherwise exercising control over property). Therefore, we conclude that the trial court's award of the \$288,540.94 of actual damages should be affirmed based on the trial court's grant of summary judgment on the National Elks's action for violations of the Theft Liability Act.

Further, damages available in a trespass to try title action include lost profits.¹⁵ Thus, the \$288,540.94 of High Road's net income or profits is potentially

¹⁵ *See* Tex. R. Civ. P. 783(f) (recognizing recoverability of "profits" in trespass-to-try-title actions); *see also Coinmach Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909, 921 (Tex. 2013); *Norman v. Giraldo*, No. 01-13-00334-CV, 2014 WL 2538558, at *3 (Tex. App.—Houston [1st Dist.] June 5, 2014, no pet.) (mem. op.).

recoverable under the National Elks's trespass to try title action.

We recognize that the National Elks did not plead for the recovery of income or profits for trespass to try title as required by Texas Rule of Civil Procedure 783(f)¹⁶ and that generally, “a party may not be granted relief in the absence of pleadings to support that relief.” *Cunningham v. Parkdale Bank*, 660 S.W.2d 810, 813 (Tex. 1983). But unpleaded claims or defenses that are tried by express or implied consent of the parties are treated as if they had been raised by the pleadings. *Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 495 (Tex. 1991). This rule also applies to issues raised in the motion for summary judgment. *Id.* Thus, the Texas Supreme Court has found trial by consent when a claim or defense was raised in the motion for summary judgment and the opposing party failed to object to the lack of pleading in the trial court. *See id; accord Godoy v. Wells Fargo Bank, N.A.*, 575 S.W.3d 531, 537 (Tex. 2019).

The record shows that the issue of whether the National Elks is entitled to recover the \$288,540.94 award of High Road's net income or profits under the trespass to try title action was tried by consent. In its second motion for summary judgment, the National Elks stated:

BPOE [the National Elks] has propounded discovery to HROD [High Road] to account for all income, revenue, profit, and loss for the use of the Real Property since HROD's trespass upon title on or around November 5, 2013. BPOE will timely supplement this Motion with the income, profit and loss from HROD's wrongful trespass upon title, resulting in its unjust enrichment from the use of the Real Property it did not own. Upon reconciliation of the benefits unlawfully derived by Defendant HROD, BPOE is entitled to an award of damages against HROD for the wrongful taking of BPOE's Real Property. BPOE will timely supplement this Motion with its damages for the

¹⁶ “The petition shall state: . . . (f) If rents and profits or damages are claimed, such facts as show the plaintiff to be entitled thereto and the amount thereof.” Tex. R. Civ. P. 783(f).

value of the loss of use of the Real Property since November 5, 2013. (emphasis added). We construe these statements as a request for the award of income and profit from High Road's "wrongful trespass upon title." The National Elks proved the amount of income and profit that High Road derived from its "wrongful trespass upon title" through its counsel's offer of evidence at the hearing of the second motion for summary judgment:

MR. EW BANK: That is correct. And so Exhibits -- Plaintiff's Exhibits 1, 2 and 9 are already in the summary judgment proof except for Exhibit 2, which is a recent stipulation. But we're offering Exhibits 1, 2 and 9.

THE COURT: Thank you, Counsel. 1, 2 and 9 are all admitted without objection on this summary judgment record.

MR. EW BANK: The reason why especially 9 is important, Your Honor, is because it establishes as a matter of law what our damages are for this second motion for summary judgment. We believe that -- and we have totaled up from the profit and loss statements provided by the defendant that their total net income for 2013 through the end of 2017 was 333,000 minus the 45,000 that was allocated to the bank accounts for a total net income that we're seeking for damages of \$288,000.

The National Elks's counsel did not limit his request for the award of the \$288,000 to any particular cause of action, but stated, without limitation, this is "what our damages are for this second motion for summary judgment." Thus, the National Elks requested the award of the \$288,000 under its trespass to try title action, because that action was part of the second motion for summary judgment. High Road tried this issue by consent because it did not object to the lack of a Rule 783(f) pleading for profits in its response to the second motion for summary judgment or at the summary judgment hearing or at any time before judgment. *See Roark*, 813 S.W.2d at 495.

The dissent argues that the issue of whether the National Elks was entitled to recover the \$288,540.94 under its trespass to try title action was not tried by consent because "[a]dmitting evidence of the unpleaded matter does not equate to trying the

matter by consent if that evidence also relates to the pleaded issues.”¹⁷ The dissent, however, overlooks that the National Elks did not just present evidence of lost profits of \$288,540.94, but, as discussed above, in its second motion for summary judgment, the National Elks requested an award of the income and profit from High Road’s “wrongful trespass upon title.” When, as here, a claim or defense was raised in the motion for summary judgment and the opposing party failed to object to the lack of pleading in the trial court, the Texas Supreme Court has held that claim or defense is tried by consent. *See Roark*, 813 S.W.2d at 495; *see also Godoy*, 575 S.W.3d at 537; *Roof Sys., Inc. v. Johns Manville Corp.*, 130 S.W.3d 430, 439 n.16 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (citing *Roark* as “recognizing rule that unpleaded claims tried by express or implied consent are treated as if raised by the pleadings should apply to issues raised in a motion for summary judgment”). Therefore, we conclude that the trial court’s award of the \$288,540.94 of actual damages should also be affirmed based on the trial court’s grant of summary judgment on the National Elks’s trespass to try title action.

The dissent further argues, “[b]ut, even if the parties had tried this issue by consent, the National Elks would be able to recover only the loss of expected profits from the use of the property, and thus the National Elks would not have been entitled to recover based on net income that High Road earned other than through the use of the Real Property. As discussed above, we may not consider this argument because the record does not show that High Road presented it to the trial court. “Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal.” Tex. R. Civ. P. 166a(c);

¹⁷ *Moneyhon v. Moneyhon*, 278 S.W.3d 874, 879 n.6 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

see also Connor, 2020 WL 1223541, at *4.

We overrule High Road’s issues as to the awards of actual damages.

C. ATTORNEY’S FEES AND COSTS

In its final issue, High Road argues the award of attorney’s fees and costs should be reversed because the National Elks was not entitled to summary judgment on either its breach of contract action or its Theft Liability Act action. Because we affirm the summary judgment on the Theft Liability Act action, under which attorney’s fees and costs are recoverable,¹⁸ we overrule this issue.

V. CONCLUSION

We affirm the final summary judgment of the trial court.

/s/ Margaret “Meg” Poissant
Justice

Panel consists of Chief Justice Frost and Justices Spain and Poissant (Frost, C.J., dissenting).

¹⁸ *See* Tex. Civ. Prac. & Rem. Code § 134.005(a), (b).