NUMBER 13-18-00619-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

DEBRA V. BENGE, **Appellant,**

v.

MARGARET THOMAS, INDIVIDUALLY, AS INDEPENDENT EXECUTOR OF THE ESTATE OF ANNE FRIAR THOMAS, AS TRUSTEE OF THE THOMAS FAMILY 2012 TRUST, THOMAS RANCH OIL & GAS JOINT VENTURE D/B/A O&G ROCKS, HAROLD JOE ADAMS, JR., INDIVIDUALLY, AS PARTNER AND MANAGER OF O&G, AS A MANAGER OF AFT PROPERTY MANAGEMENT LLC, HAROLD JOE ADAMS, JR. LLC, AS MANAGER AND GENERAL PARTNER OF O&G, AND JUSTIN G. ROBERTS & DWAYNE A. WHITLEY, AS INDEPENDENT CO-EXECUTORS OF THE ESTATE OF MARGARET A. THOMAS, **Appellees.**

On appeal from the County Court of De Witt County, Texas.

MEMORANDUM OPINION

Before Justices Hinojosa, Perkes, and Tijerina Memorandum Opinion by Justice Tijerina

Appellant Debra V. Benge appeals the trial court's summary judgment in favor of appellees, Margaret Thomas (Missi), individually, as Independent Executor of the Estate of Anne Friar Thomas, as Trustee of the Thomas Family 2012 Trust (the 2012 Trust); Thomas Ranch Oil & Gas Joint Venture d/b/a O&G Rocks (O&G); Harold Joe Adams, Jr. (Adams), individually, as partner and manager of O&G, as a manager of AFT Property Management LLC (AFT Property); Harold Joe Adams, Jr. LLC (HJA), as manager and general partner of O&G; and Justin G. Roberts and Dwayne A. Whitley, as Independent Co-Executors of the Estate of Margaret A. Thomas.[1] By what we construe and renumber as nine issues, Benge contends that (1) the trial court erred in excluding her expert's testimony (issue one), granting summary judgment in favor of Missi on her breach of fiduciary duty claim (issue two) and failure to account claim (issue three), granting

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[1] Under rule of appellate procedure 7.1(a)(1), a civil appeal may proceed upon the death of the either party. TEX. R. APP. 7 .1(a)(1) ("If a party to a civil case dies after the trial court renders judgment but before the case has been finally disposed of on appeal, the appeal may be perfected, and the appellate court will proceed to adjudicate the appeal as if all parties were alive."); *see also Casillas v. Cano*, 79 S.W.3d 587, 590 (Tex. App.—Corpus Christi–Edinburg 2002, no pet.) ("[A] deceased party may be represented by an executor, an administrator or an heir."). "The decedent party's name may be used on all papers." TEX. R. APP. P. 7.1 (a)(1). Furthermore, upon suggestion of death, the defendant may be represented by the administrator or executor or heir, and the suit shall proceed against such administrator or executor or heir. TEX. R. CIV. P. 152; *Casillas*, 79 S.W.3d at 590 ("[A] deceased party may be represented by an executor, an administrator or an heir."). Appellees filed a suggestion of Missi's death in this Court, and Justin G. Roberts and Dwayne A. Whitley, as Independent Co-Executors of the Estate of Margaret A. Thomas now represent Missi. The parties agree that we may proceed with this appeal as if Missi were alive under rule 7.1. *See* TEX. R. APP. P. 7.1.

appellees' pleas to the jurisdiction on her derivative claims (issue four), awarding attorney's fees to Missi (issues five through seven), dismissing her exemplary damages claims against Missi (issue eight), and (2) we should "strike the trial court's findings of fact and conclusions of law that omit the start dates for the post-judgment interest calculation" (issue nine). We affirm.

I. BACKGROUND

In 2011, Anne, a wealthy rancher, established O&G, a general partnership with Adams and her daughter, Missi. On June 26, 2012, Anne created AFT Property, a Texas limited liability company, and she appointed herself, Adams, and Jack Andrew Carson, her lawyer, as managers. Anne was AFT Property's sole owner and member. Shortly thereafter, Anne created AFT Minerals, Ltd. (AFT Minerals), a Texas limited partnership, with Anne being the sole limited partner and AFT Property being the sole general partner.

On July 23, 2012, Anne executed the 2012 Trust appointing herself and Missi as co-trustees. Anne then gave the 2012 Trust approximately $3 million in AFT Minerals' limited-partnership interests; thus, making the 2012 Trust a limited partner of AFT Minerals with a 66.389% interest along with Anne who owned the remaining percentage.[2] Subsequently, Anne sold her percentage in AFT Minerals to O&G, making O&G and 2012 Trust limited partners of AFT Minerals, while AFT Property remained the general partner. During Anne's life, AFT Minerals loaned money to O&G.

Anne died on March 30, 2015. Upon her death, Anne designated Missi to serve as sole trustee and income beneficiary of the 2012 Trust and designated Benge and Dinah Voelkel, her only grandchildren and Missi's only children, as remainder beneficiaries of

[2] According to Benge's pleadings, Anne's estate owns a 1% interest in AFT Property.

the 2012 Trust. Missi was also the sole independent executor of Anne's estate.[3] At the time of this suit, Missi had become the sole manager of AFT Property. In addition to being the trustee of the 2012 Trust, Missi was also the sole beneficiary and trustee of the Missi Thomas Trust.

On May 10, 2016, Benge filed suit against Missi for removal of Missi as the executor of Anne's estate and for declaratory judgment and request for disclosure. Benge accused Missi of having "conflicts of interest that preclude her from serving as independent executor of [Anne's] estate." Benge claimed that "[r]ather than avoiding these conflicts, [Missi] knowingly engaged in numerous self-dealing transactions that have benefitted her personally at the expense of [Anne's] Estate," and that Missi "engaged in gross misconduct and gross mismanagement in the performance of her duties as independent executor." Benge stated that Voelkel and Adams, among others, both "acting individually," were "nominal defendants." Missi filed a general denial requesting attorney's fees. Voelkel filed a general denial, stating that "as named as a Nominal Defendant in the Plaintiff's Original Petition for Declaratory Judgment, and Request for Disclosure (the "Petition") filed in this Court, by [Benge]" she denied "all of the allegations contained in the Petition and demand[ed] that [Benge] be required to prove the allegations of the Petition in accordance with law." Adams filed a general denial.

Benge amended her petition adding, among other defendants, O&G, acting in its individual capacity; AFT Minerals, acting in its individual capacity; AFT Property, acting in its individual capacity; and Adams as owner, partner, and manager of O&G, acting as a

[3] Voelkel, Missi's other daughter, has filed a brief in this matter supporting appellees' arguments and challenging Benge's appellate arguments. However, Benge did not allege any causes of action against Voelkel in the trial court.

manager of AFT Property, and as manager and general partner of O&G.[4] On November 21, 2016, Missi filed a motion to transfer and consolidate Benge's suit against her in her capacity as trustee with Benge's suit against her as executor of Anne's estate. The trial court granted the motion on December 14, 2016.

Benge filed her third amended petition adding, among other things, claims for declaratory relief and breach of fiduciary duty against Missi in her capacity as trustee of the 2012 Trust, acting as the owner and manager of the Friar Thomas Ranch Partnership (Ranch Partnership), acting as an owner and partner of O&G, acting as a manager of AFT Property; Adams; HJA, as manager and general partner of O&G and the Ranch Partnership; O&G; AFT Minerals; and AFT Property.[5] Benge also brought derivative claims on behalf of the 2012 Trust, AFT Minerals, and AFT Property against Missi, O&G, Adams, and HJA, "jointly and severally, each acting in their respective individual capacities" for what she claimed constituted improper transactions.[6]

Specifically, Benge sought damages on behalf of the 2012 Trust for Missi's alleged breaches of her fiduciary duties as trustee. Benge claimed that Missi breached her fiduciary duties in her capacity as trustee when she, among other things, failed to maintain

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[4] On March 23, 2018, O&G filed a motion for partial summary judgment arguing that Benge failed to "identify any individual claims that she holds against this O&G, and the fact she could not identify any instance where O&G conspired with or participated with any other Defendant that would give rise to any such claims as to the breach of a fiduciary duty that may, have been owed to her, she cannot identify any of the elements she must establish to collect exemplary damages." In addition, O&G argued that Benge's claims in her individual capacity against it were barred by the applicable statute of limitations. The trial court granted O&G's motion.

O&G has filed a brief in this matter; however, Benge does not challenge the trial court's rulings on her individual claims against O&G.

[5] Ranch Properties is not an appellee in this cause.

[6] Adams and HJA have also filed a brief in this matter. Benge does not challenge the trial court's judgment as to her claims against them individually.

an accounting of the 2012 Trust, "knowingly participated [with Adams] in . . . distributions" of "millions of dollars in loans and/or capital contributions to O&G" from AFT Minerals, and along with Adams "as the managers of [AFT Property], refused to make periodic distributions of profits to AFT Minerals' limited partners." Benge accused the parties of, among other things, deriving "a profit from a breach of fiduciary duty because they have either engaged in or knowingly participated in the self-dealing transactions," breaching "their fiduciary duty of loyalty because they engaged in the self-dealing transactions," engaging "in impermissible self-dealing because they engaged in the self-dealing transactions," and breaching "their fiduciary duty to make trust/estate property productive because they engaged in the self-dealing transactions." Benge did not specifically set out how the parties engaged in self-dealing and instead stated that the parties had engaged in self-dealing "as set out above" in other portions of her third amended petition. Apparently, Benge's complaints of self-dealing stem from her belief that Missi improperly allowed AFT Minerals to loan money to O&G and that Missi did not distribute income from AFT Minerals to the 2012 Trust as required.

In her third amended petition, Benge claimed that she had "standing to sue derivatively on behalf of the [(1)] 2012 Trust because Missi, the sole trustee cannot sue herself. . . . [and (2)] the managers of AFT Property . . . and AFT Minerals because Missi and Adams, the sole managers of AFT Property . . . cannot sue themselves." In summary, Benge alleged, in pertinent part, that her suit was

> a legal proceeding to remove [Missi] as executor, to force her to disgorge any executor's commissions that she has taken, and for damages for breach of fiduciary duty. Adams, O&G . . . and Ranch Partnership have knowingly participated in Missi's breaches of fiduciary [duty] and are consequently jointly and severally liable with Missi. Plaintiff originally brought two lawsuits against Missi. One was against her in her capacity as

> trustee of the 2012 Trust, the other was against her in her capacity as Independent Executor of the [Anne's] Estate. Over Plaintiff's objection, this Court consolidated these two cases into the present case. In light of this consolidation, Plaintiff is filing these pleadings.

Adams, HJA, Missi, and O&G each filed separate pleas to the jurisdiction arguing that Benge did not have standing to assert any derivative claims against them because Benge is merely a remainder beneficiary of the 2012 Trust and has no interest in AFT Minerals and AFT Property.[7] Voelkel filed a response stating that she supported the arguments made by appellees in their pleas to the jurisdiction.

Specifically, in her plea, Missi argued that because Benge is not a limited partner or general partner of AFT Minerals, she lacked standing to bring the claims on behalf of AFT Minerals. *See* TEX. BUS. ORGS. CODE ANN. § 153.402 (setting out, among other things, that only a limited partner may bring a derivative claim on behalf of a limited partnership). Next, Missi argued that Benge lacked standing to bring a derivative claim on behalf of AFT Property because Benge is "not a member of [ATF Property,] a limited liability company [, and she] cannot bring a derivative suit on behalf of the company." *See id*. § 101.452. Missi argued that Benge lacked standing to sue on behalf of the 2012 Trust because she "is not a current income beneficiary of the 2012 Trust. Rather, when Missi (the sole income beneficiary) dies, any assets remaining in the 2012 Trust will pass to a trust for the benefit of [Benge], and a trust for the benefit of Missi's other daughter, Dinah Voelkel." Missi also argued that Benge lacked standing to file a derivative claim on behalf of the 2012 Trust because "even if [her] allegations are taken as true, there will still be

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[7] On appeal, regarding Adams, HJA, and O&G, Benge only challenges the trial court's judgment insofar that it granted their pleas to the jurisdiction on her derivative claims. Benge also challenges the trial court's grant of Missi's plea to the jurisdiction on her derivative claims, and she challenges the trial court's judgment in favor of Missi on her breach of fiduciary duty claim and her failure to account claim.

sufficient assets to fund the 2012 Trust, and [her] derivative interest is in no way harmed." Adams, HJA, and O&G made similar arguments. O&G also argued that Benge's alleged injuries were not ripe. Additionally, Adams and HJA argued that Benge had no standing to sue on behalf of AFT Minerals because the complained-of loans from AFT Minerals to O&G were made during Anne's lifetime. In addition, Adams and HJA argued that the 2012 Trust authorized Missi as trustee "to invest in general or limited partnerships, corporations or other business entities in which the Trustee may individually hold an interest."

Benge responded that she has standing "to sue [Missi] on behalf of the 2012 Trust because Missi, the trustee, 'cannot or will not enforce the cause of action' she has against third parties," and she had standing to sue Adams, HJA, Missi, and O&G on behalf of AFT Minerals and AFT Property because of her status as a beneficiary of 2012 Trust. Finally, Benge claimed that as a *vested* remainder beneficiary as opposed to a *contingent* remainder beneficiary, she has standing to sue Adams, HJA, Missi, and O&G on behalf of the 2012 Trust. Benge made no other argument supporting a conclusion that she has standing to sue on behalf of the 2012 Trust, AFT Property, or AFT Minerals.

On July 5, 2017, the trial court granted Missi's, plea to the jurisdiction and dismissed Benge's derivative claims against Missi in Benge's third amended petition. The trial court granted Adams's and HJA's plea to the jurisdiction on July 5, 2017, and it dismissed Benge's derivative claims that she brought against them on behalf of AFT Minerals, AFT Property, and, the 2012 Trust in her third amended petition. The trial court granted O&G's plea to the jurisdiction on July 11, 2017, and it dismissed Benge's derivative claims on behalf of AFT Minerals, AFT Property, and the 2012 Trust that she filed against O&G. The dismissals left, among other claims, Benge's claim for declaratory

relief and various claims of breach of fiduciary duty on the basis that, including among other things, Missi failed to provide an accounting.[8]

On November 11, 2017, Benge filed a petition for writ of mandamus with our Court contending that the trial court abused its discretion by granting the pleas to the jurisdiction filed by Adams, HJA, and O&G and dismissing her derivative claims brought on behalf of the 2012 Trust. *See In re Benge*, No. 13-17-00616-CV, 2018 WL 1062899, at *1 (Tex. App.—Corpus Christi–Edinburg Feb. 27, 2018, orig. proceeding) (mem. op.). Our Court denied Benge's petition concluding that "[b]ased on the record and briefing presented here, [Benge had] not shown that the trial court abused its discretion in dismissing [her] derivative claims." *See id*.

On March 12, 2018, Missi filed a motion for no evidence and traditional partial summary judgment on Benge's claim of breach of fiduciary duty by a failure to account. In her motion, Missi challenged each element of Benge's cause of action and claimed that "there is no evidence that Missi has failed to maintain fiduciary accounting records for the 2012 Trust." Benge responded.[9] The trial court granted Missi's motion for no evidence and traditional partial summary judgment.

On April 13, 2018, the trial court sustained many of Missi's special exceptions to Benge's third amended petition and ordered Benge to replead those portions of her petition. On June 6, 2018, Benge filed her fifth amended petition, her live pleading,

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[8] As this is a memorandum opinion, we need not discuss Benge's other remaining claims as they are not relevant to Benge's appellate complaints and were all eventually disposed of in the trial court. *See* TEX. R. APP. P. 47.1.

[9] Appellees filed numerous pleas to the jurisdiction and motions for partial summary judgment on Benge's other claims not at issue in this appeal, which Benge answered. We need not discuss these various motions and responses as Benge does not appeal from any of the trial court's rulings on those motions. *See id*.

requesting declaratory relief and that a constructive trust be established regarding the Missi Thomas Trust. Benge also alleged, in pertinent part, that Missi breached her fiduciary duty as trustee of the 2012 Trust, in relevant part, by failing to protect and preserve the trust property, enforce claims against third parties, and "place the interests of [Benge] before the interests of herself or non-beneficiaries." Apparently, Benge's breach of fiduciary duty claims against Missi stemmed from her belief that Missi "failed to ensure that the assets of AFT Minerals were properly invested," allowed "only distributions . . . from AFT Minerals to its limited partners [that] were pass-through distributions of funds necessary to pay income taxes" instead of paying the limited partners a pro rata share of the income, and she made a profit "by allowing millions of dollars to be taken and/or loaned (at 2% interest) to her company, O&G." Benge claimed that as trustee of the 2012 Trust, Missi had a duty to sue AFT Minerals for income distributions and should have "ensured that AFT Minerals' assets were properly invested," which Benge claimed Missi failed to do by allowing low interest loans from AFT Minerals to O&G thus losing income that should have been distributed to the 2012 Trust. Benge sought actual damages, exemplary damages, and attorney's fees.

On June 29, 2018, Missi filed a motion for traditional and no evidence partial summary judgment arguing that "[t]here is no evidence of breach or damages to support [Benge's] breach of fiduciary duty claims against Missi as trustee of the 2012 Trust." In her traditional motion for partial summary judgment, Missi argued that Benge "take nothing on her breach of fiduciary duty claims against Missi, as trustee" and denied there was evidence to support Benge's claims that Missi failed to "demand distributions from AFT Minerals, or file suit against AFT Minerals to force such distributions" arguing that

"the trustee has wide discretion in bringing claims against third parties, and the limited partners of AFT Minerals would not be able to enforce a demand for distributions of profit." Missi also attached evidence supporting her arguments as part of her motion for traditional partial summary judgment.

Benge responded to Missi's motion attaching, among other things, the deposition of her expert witness, Bruce Wallace. The trial court granted Missi's objections to Wallace's testimony on the basis that he was not qualified to testify as an expert, and it excluded Wallace's testimony.

In a series of orders, the trial court granted appellees' various motions for no evidence and traditional partial summary judgment dismissing, among other things which are not pertinent to our analysis, Benge's claims for breach of fiduciary duty. In addition, Benge nonsuited her claim for declaratory relief and for constructive trust regarding the Missi Thomas Trust. Once the trial court disposed of all of Benge's claims, it held a hearing on the parties' claims for attorney's fees pursuant to the Uniform Declaratory Judgment Act (UDJA) for Benge's power of appointment claim relating to the Missi Thomas Trust and pursuant to the trust code for Benge's breach of fiduciary duty claim. After hearing the evidence and arguments of the parties, the trial court awarded Missi attorney's fees in the amount of $9,015 for Missi's defense of Benge's power of appointment claim brought pursuant to the UDJA. The trial court awarded Missi $314,756.25 for her defense of Benge's breach of fiduciary duty claim brought pursuant to the trust code. Benge requested findings of fact and conclusions of law, which the trial court issued. This appeal followed.

II. EXCLUSION OF WALLACE'S TESTIMONY

By her first issue, Benge contends that the trial court improperly excluded evidence from Wallace on the basis that he was not qualified. Specifically, Benge claims that the trial court failed to consider a document in the record showing that Wallace is qualified to testify (the "qualifying document").[10] *See Lance v. Robinson*, 543 S.W.3d 723, 732 (Tex. 2018).

Citing *Lance v. Robinson*, Benge argues that once a document is filed, the trial court must consider it as part of the summary judgment record, and here, the trial court erred by failing to do so. *See id*. Appellees respond that the trial court did not err because the record in this case is voluminous, and Benge did not cite or mention the qualifying document in her responses to their motions for summary judgment.

In *Lance*, the defendants argued that evidence and exhibits of deeds relevant to the disputed issues were not part of the summary judgment file because the plaintiffs had failed to attach those documents to their motion for summary judgment. *Id*. The *Lance* court, in the context of a motion for traditional summary judgment, disagreed that the

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[10] The qualifying document states:

> Wallace will provide opinion testimony, based on his knowledge, training, education, experience, and expertise, regarding the existence, application, and fulfillment of all relevant fiduciary duties at issue in this case, and the standards of care and duties, as established by the Agreements and the usual and customary standards for the management of Estates and Trusts that are applicable to beneficiaries, trustees, executors, and other interested parties. In addition, Mr. Wallace will provide testimony on the actions and decisions of an Executor in the usual and customary course of conduct based on provisions of the Estates Code and Texas Trust Code (including any amendments), which provisions were specifically incorporated into the Last Will and Testament of Anne Friar Thomas (the "Will).
>
> Based on his many years of administering trusts and estates, Mr. Wallace will provide testimony with regard to the duties and responsibilities of Margaret Thomas as Independent Executrix ("Executrix") of the Estate of Anne Friar Thomas (the "Estate"), including her obligation to meet the standards of such basic fiduciary duties as the duty of loyalty, duty of care, duty of impartiality, duty to fully disclose material information, duty of good faith and duty of fair dealing.

The qualifying document does not mention that Wallace is qualified to or will testify regarding damages.

deeds and exhibits were not part of the summary judgment file because (1) the trial court admitted them into evidence at a temporary injunction hearing, and the court reporter filed the exhibits with the clerk of the court that day; (2) the movants expressly "'referenced and specified' the injunction-hearing transcript and exhibits 'as evidence in support of'" their motion for summary judgment; and (3) "[a]t the summary-judgment hearing, the trial court judge had the temporary-injunction transcript—including the deeds and other exhibits—in front of him, reviewed the deeds, and discussed them with counsel, including the [defendant's] counsel, who never raised this issue or otherwise objected on the ground that the [plaintiffs] had not re-filed the deeds as attachments to their summary-judgment motion." *Id*. at 732–33. The *Lance* court held that under those circumstances the deeds and exhibits were on file pursuant to summary judgment rules, and the trial court properly considered them. *Id*. at 733.

Here, in response to appellees' various motions for summary judgment, Benge offered Wallace's testimony to support her assertion that questions of fact existed precluding summary judgment. Benge did not attach anything establishing Wallace's qualifications in her responses to the motions for summary judgment. Appellees filed objections to Wallace's testimony. Benge did not inform the trial court that the qualifying document had been previously filed and that it supposedly established his qualifications. The trial court granted appellees' objections to Wallace's testimony. Benge did not object to the trial court's ruling.

On appeal, Benge claims for the first time that the trial court should have considered the qualifying document which was attached as Exhibit B to a motion to transfer and consolidate Benge's causes of action in the trial court filed by Missi in

November 2016, two years prior to the summary judgment proceedings. Exhibit B is Benge's response to disclosures, which includes the qualifying document.

As set out in *Lance*, a trial court can consider all documents and exhibits on file at the time a traditional motion for summary judgment has been filed. *See id*. at 732–33; *Guthrie v. Suiter*, 934 S.W.2d 820, 826 (Tex. App.—Houston [1st Dist.] 1996, no writ) (citing *Rogers v. Ricane Enters., Inc*., 772 S.W.2d 76, 81 (Tex. 1989)); *see also Haley v. Beneficial Fin. I Inc.*, No. 13-18-00058-CV, 2019 WL 2709015, at *4 (Tex. App.—Corpus Christi–Edinburg June 28, 2019, no pet.) (mem. op.) (citing *Lance*, we held that "affidavits filed with an answer are not summary judgment evidence unless they are also attached to the summary judgment response or incorporated in the response by express reference"); *see also Weisberg v. London*, No. 13-02-00659-CV, 2004 WL 1932748, at *6 (Tex. App.—Corpus Christi–Edinburg Aug. 31, 2004, no pet.) (mem. op.) ("When considering a summary-judgment motion, the trial court may judicially notice documents that are part of its record in the case at issue, since they are already on file and available for the court's consideration."). However, the issue here is whether the trial court was required to consider a document that Benge did not mention or cite in her responses to appellees' motions for summary judgment or during the summary judgment proceedings.

In *Haley*, citing *Lance*, we held that "affidavits filed with an answer are not summary judgment evidence unless they are also attached to the summary judgment response or incorporated in the response by express reference." 2019 WL 2709015, at *4. Here, it is undisputed that Benge did not attach the qualifying document to her summary judgment pleadings and did not incorporate it by reference.

The summary judgment rules require for a party to "specifically identify the

supporting proof *on file* that it seeks to have considered by the trial court." *See Arredondo v. Rodriguez*, 198 S.W.3d 236, 238–39 (Tex. App.—San Antonio 2006, no pet.) (emphasis added); *Blake v. Intco Invs. of Tex., Inc*., 123 S.W.3d 521, 525 (Tex. App.—San Antonio 2003, no pet.) ("Although the nonmovant is not required to 'needlessly duplicate evidence already found in the court's file,' she is required to ensure that the evidence is properly before the trial court for its consideration in ruling on the motion for summary judgment."); *see also Lance*, 543 S.W.3d at 733 (considering, among other things, that the summary judgment movant expressly "referenced and specified" the documents as evidence in support of their motion for summary judgment); *Hobson v. Francis*, No. 02-18-00180-CV, 2019 WL 2635562, at *4 (Tex. App.—Fort Worth June 27, 2019, no pet.) (mem. op.) ("The 'entire record' does not mean everything on file with the trial court, though: we are 'limited to the summary judgment proof produced in the response' and are 'not free to search the entire record, including materials not cited to . . . the trial court.'"). In *Lance*, the trial court reviewed the documents and discussed them with counsel during the summary judgment hearing because the movants cited and referenced those documents in their motion. 543 S.W.3d at 733. The movants in *Lance* provided transcripts to the trial court of the hearing where the trial court had admitted those documents, and the trial court discussed those transcripts and documents with counsel during summary judgment proceedings. *Id*. The movant in *Lance* simply failed to re-file the complained-of documents as attachments to the movant's motion for summary judgment. *Id*.

Here, in contrast, in her responses and during the summary judgment proceedings, Benge did not mention the qualifying document, cite the record wherein the qualifying

document was located, or inform the trial court that the qualifying document existed. Thus, in this case, Benge did not merely fail to re-file the qualifying document; she failed to attach it to her responses and to inform the trial court of its existence.

It appears that Benge requests, without any supporting authority, that we conclude that the trial court should have sua sponte located the qualifying document and then considered it when it ruled on appellees' objections to Wallace's testimony even though she did not cite or mention it to the trial court.[11] However, "[i]n the absence of any guidance from the non-movant where the evidence can be found, the trial court is not required to sift through [a] voluminous [record] in search of evidence to support the non-movant's argument that a fact issue exists." *Nguyen v. Allstate Ins. Co.*, 404 S.W.3d 770, 776 (Tex. App.—Dallas 2013, pet. denied) (quoting *Arredondo*, 198 S.W.3d at 238); *see Rogers*, 772 S.W.2d at 81 (stating that "a general reference to a voluminous record which does not direct the trial court and parties to the evidence on which [the party] relies is insufficient" when the party asked the trial court to consider "whatever may have been 'on file'").

Here the qualifying document was attached as an exhibit to a motion filed by Missi in 2016, while Benge's first response to any of appellees' motions for partial summary judgment, which does not even reference Wallace, was filed in November 2017. Benge did not mention Wallace in her responses to motions for summary judgment until two years after the qualifying document had been filed by Missi. Benge first mentioned Wallace when she filed responses to Missi's traditional and no evidence motion for

[11] We note that Benge does not specifically argue that under *Lance*, a summary judgment party no longer has a burden to cite the evidence it relies upon to support its arguments or provide substantive argument to that effect.

summary judgment on July 18 and 20, 2018 and after thousands of pages of various pleadings and documents had been filed in the trial court since 2016. And, again, as previously stated, Benge did not reference or mention the qualifying document to the trial court even after appellees filed their objections to Wallace's testimony.

In sum, Benge did not mention the qualifying document to the trial court in her summary judgment pleadings or at a summary judgment proceeding, the trial court did not review the qualifying document at any summary judgment proceeding, and none of the attorneys discussed the qualifying document with the trial court during any of the summary judgment proceedings. Accordingly, under these circumstances, we conclude the trial court did not abuse its discretion when it did not consider the qualifying document and granted appellees' objections to Wallace. *See Lance*, 543 S.W.3d at 733. We overrule Benge's first issue.

III. CLAIMS AGAINST MISSI

By her second issue, Benge challenges the trial court's summary judgment on her breach of fiduciary duty claim. By her third issue, Benge argues that the trial court improperly granted Missi's motion for no evidence and traditional summary judgment on her failure to account claim.

A. Standards of Review

A party may move for summary judgment on the ground that no evidence exists of one or more essential elements of a claim on which the adverse party bears the burden of proof at trial. TEX. R. CIV. P. 166a(i); *Timpte Inds., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009). Once the motion is filed, the burden shifts to the non-movant to produce evidence raising a genuine issue of material fact on the elements specified in the motion.

TEX. R. CIV. P. 166a(i); *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006). If the respondent brings forth more than a scintilla of probative evidence to raise a genuine issue of material fact, summary judgment is improper. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003). More than a scintilla of evidence exists when the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions," while less than a scintilla exists when the evidence is "so weak as to do no more than create mere surmise or suspicion." *Id*.; *Reynosa v. Huff*, 21 S.W.3d 510, 512 (Tex. App.—San Antonio 2000, no pet.). "When reviewing a no-evidence summary judgment, we 'review the evidence presented by the motion and response in the light most favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not.'" *Timpte Inds., Inc.*, 286 S.W.3d at 310.

In a traditional motion for summary judgment, the movant has the burden of showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a; *Nixon v. Mr. Prop. Mgmt. Co*., 690 S.W.2d 546, 548 (Tex. 1985). If the movant's motion and summary judgment proof facially establish a right to judgment as a matter of law, the burden shifts to the non-movant to raise a material fact issue sufficient to defeat summary judgment. *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995). A defendant seeking a traditional motion for summary judgment must either conclusively disprove at least one element of each of the plaintiff's causes of action or plead and conclusively establish each essential element of an affirmative defense. *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995) (per curiam). We review a summary judgment de novo to determine whether a party's right to prevail is

established as a matter of law. *Dickey v. Club Corp. of Am*., 12 S.W.3d 172, 175 (Tex. App.—Dallas 2000, pet. denied).

B. Breach of Fiduciary Duty

The elements of a breach of fiduciary claim are (1) a fiduciary relationship, (2) a breach of duty, (3) causation, and (4) damages. *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 220 (Tex. 2017). In her motion for no evidence summary judgment, Missi challenged the breach and damages elements of Benge's breach of fiduciary duty claim. *See id*. In her traditional motion for summary judgment, Missi claimed that no genuine issue of material fact existed as to those elements and that she was entitled to judgment as a matter of law because Benge's claims related to AFT Minerals and not to the 2012 Trust. *See id*.

Benge filed suit against Missi for breach of fiduciary duty in her capacity as trustee of the 2012 Trust arguing that "due to Missi's actions and inactions, AFT Minerals has been harmed" which "in turn harmed the 2012 Trust." Missi filed a combined no evidence and traditional motion for summary judgment. Missi filed the no evidence motion on the basis that there is no evidence that she breached her fiduciary duty and no evidence of damages. Missi filed her motion for traditional summary judgment arguing that Benge's complaints concerned AFT Minerals' transactions and in her capacity as trustee Missi owed no fiduciary duty to AFT Minerals.

In response to Missi's motion for traditional summary judgment incorporated by reference into her response to Missi's motion for no evidence summary judgment, Benge supported her assertion that the 2012 Trust suffered damages and the amount of

damages on Wallace's testimony only.[12] However, the trial court excluded this evidence. Thus, Benge provided no evidence supporting her claim for damages.

In addition, the evidence that Benge produced to support her claim that Missi breached her fiduciary duty to the 2012 Trust relates to transactions made by AFT Minerals' general partner, AFT Property. On appeal, Benge claims that Missi breached her fiduciary duty in her capacity as trustee of the 2012 Trust because she should have prevented AFT Minerals from making advances to O&G and should have properly invested AFT Minerals' assets;[13] however, as shown by the summary judgment evidence, AFT Property as general partner had the authority to make these decisions. The evidence establishes as a matter of law that the 2012 Trust as a limited partner had no decision-making rights regarding AFT Minerals' assets. Benge's complaints all involve alleged damages to AFT Minerals and not to Benge herself. Thus, AFT Minerals would have had to bring these claims and not Missi in her capacity as trustee or Benge as a remainder beneficiary. *See Hall v. Douglas*, 380 S.W.3d 860, 873 (Tex. App.—Dallas 2012, no pet.) ("[C]laims for "a diminution in value of partnership interests or a share of partnership income" may be asserted only by the partnership itself."); *see also Adam v. Harris*, 564

[12] Specifically, in her response to Missi's motion for traditional summary judgment, Benge, citing only Wallace's testimony, stated, while discussing breach, that "[a]lso during this time (through the present date), AFT Minerals' assets were imprudently invested, losing millions in lost-investment opportunity" and "the trust estate of the 2012 Trust was damage[d]."

[13] Benge baldly asserts, without any supporting evidence, that "O&G Rocks misappropriated money from AFT Minerals when Missi and Adams were managers of AFT Property . . . and when they solely controlled O&G Rocks." Benge cites a (1) document wherein Adams was removed as a manager of AFT Property and Missi became the sole manager, (2) the signature page of a promissory note from O&G promising to pay AFT $2,178,918.12 plus interest, and (3) Missi's testimony that she signed the promissory note as the owner of O&G and the general partner of AFT. However, this evidence does not support a finding that O&G misappropriated money from the 2012 Trust. Moreover, Benge does not explain how these transactions would be considered a breach of fiduciary duty to the 2012 Trust by Missi in her capacity as trustee or how they caused damages to the 2012 Trust.

S.W.2d 152, 156–57 (Tex. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.) ("A clear line exists between actions of a trustee and those of an officer of a corporation owned wholly or in part by the trust, even where the same person 'wears both hats.'"). Therefore, we further conclude that the trial court properly determined that as a matter of law Missi owed no fiduciary duty to AFT Minerals in her capacity as trustee of the 2012 Trust.[14] Accordingly, because Benge failed to raise a question of fact on each element of her breach of fiduciary duty claim, the trial court properly granted Missi's no evidence and traditional motion for summary judgment. We overrule Benge's second issue.

C. Failure to Maintain Records

By her third issue, Benge contends that "[t]he trial court erred in granting the partial summary judgment on [her] claim on failure to maintain trust records." In the trial court, Benge argued that Missi owed a duty to "maintain records of all transactions relating to the 2012 Trust." Specifically, Benge claimed, without citation to authority, that Missi had a duty to keep records of AFT Minerals' transactions pursuant to her role as trustee of the 2012 Trust. In her brief, Benge explains this issue as follows: "[Benge] only challenged whether Missi maintained proper trust-accounting records. [Benge] did not challenge Missi's motion regarding trust income distributions or the 2012 Trust accounting. As a result, she only responded with evidence that raised a fact issue concerning whether Missi maintained proper trust-accounting records."[15] Benge then maintains she bases this

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[14] Benge claims that Missi breached her duty to avoid conflicts because she served in various capacities including the following: (1) trustee of the 2012 Trust; (2) limited partner owner of AFT Property Management; and (3) owner of O&G. However, Benge cites no authority and we find none that Missi's above-listed roles were per se conflicting, and Benge cites to no evidence that Missi's roles were conflicting.

[15] Missi provided a document in her summary judgment evidence attached to her motion for traditional summary judgment, which is purported to be a statutory accounting of the 2012 Trust. Benge

issue on evidence that Missi failed to keep records of transactions made by AFT Minerals, and she then complains that "Missi testified that more than $2 million in advances were made by AFT Minerals . . . to O&G Rocks without any promissory notes or security agreements."

Benge cites *Corpus Christi Bank & Trust v. Roberts*, stating that "[a] trustee is charged with the duty of maintaining an accurate account of all of the transactions relating to the trust property." 587 S.W.2d 173, 181 (Tex. App.—Corpus Christi‑Edinburg 1979), *aff'd*, 597 S.W.2d 752 (Tex. 1980). However, the *Roberts* court clarified that pursuant to the Texas Trust Code, the trustee is bound by the statutory accounting requirements and has a duty to follow those requirements.[16] *Id*. The statute requires that the trustee maintain records of the following:

> (1) all trust property that has come to the trustee's knowledge or into the trustee's possession and that has not been previously listed or inventoried as property of the trust;
>
> (2) a complete account of receipts, disbursements, and other transactions regarding the trust property for the period covered by the account, including their source and nature, with receipts of principal and income shown separately;
>
> (3) a listing of all property being administered, with an adequate description of each asset;
>
> (4) the cash balance on hand and the name and location of the depository where the balance is kept; and
>
> (5) all known liabilities owed by the trust.

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does not challenge that this document properly accounts for the 2012 Trust's assets, liabilities, income, and disbursements.

[16] The Texas Trust Code is found within the Texas Property Code. *See* TEX. PROP. CODE ANN. § 111.001 et seq.

TEX. PROP. CODE ANN. § 113.152.

Here, Benge is not complaining of Missi's failure to perform any of the above-listed duties or of Missi's noncompliance with above-listed statutorily required maintenance of accounting records for the 2012 Trust. Benge does not complain about a lack of records of transactions involving the 2012 Trust, and she does not claim that Missi failed to maintain records of transactions in her capacity as trustee of the 2012 Trust. Instead, without supporting authority, she complains that Missi's duties of maintaining accounting records in her capacity as trustee encompassed a duty to also provide an accounting of AFT Minerals' transactions and that Missi failed to maintain records of those transactions.

In addition, in her response to Missi's motion for no evidence summary judgment, Benge did not provide legal authority to support her argument that as the remainder beneficiary of the 2012 Trust, she is entitled to request or demand an accounting of AFT Minerals. In her brief, Benge does not adequately explain with citation to proper authority why Missi in her capacity as trustee of the 2012 Trust had a duty to maintain records of AFT Minerals' transactions or how Missi failed to keep adequate records of the advances made by AFT Minerals to O&G. We are, therefore, unable to discern with certainty Benge's appellate complaint. We construe her argument as being that she raised a question of fact on her failure to maintain records claim by providing evidence that AFT Minerals made loans to O&G and Missi in her capacity as owner of AFT Property did not invest AFT Minerals' assets properly. Thus, under our understanding of Benge's claim, her complaints only concern Missi's accounting of records that relate to AFT Minerals' transactions and loans from AFT Minerals to O&G in her capacity as the owner of AFT Property. Benge does not adequately explain the connection between an accounting of

these records and Missi's duty as trustee to make an accounting of the 2012 Trust under the trust code.[17]

Moreover, as part of the agreements, as set up by Anne, AFT Property's limited partners, including the 2012 Trust, were not guaranteed any distributions from AFT Minerals and owned no interest in AFT Minerals' assets. Thus, to the extent that Benge argues that Missi had a duty to maintain records of AFT Minerals' transactions because AFT Minerals is a trust asset, we conclude that argument is without merit. Therefore, without more, we are unable to conclude that Missi had a duty in her capacity as trustee of the 2012 Trust to make an accounting of AFT Minerals' transactions to Benge and that Benge in her capacity as a remainder beneficiary of the 2012 Trust can demand such an accounting of AFT Minerals' transactions.

Furthermore, in her motion for traditional summary judgment, Missi argued that as a matter of law, Benge has no standing to request an accounting of AFT Minerals' finances. We agree. As a limited partner, the 2012 Trust would not have standing to sue "for injuries to the partnership that merely diminish the value of that partner's interest." *Hodges v. Rajpal*, 459 S.W.3d 237, 249 (Tex. App.—Dallas 2015, no pet.). Therefore, even assuming without deciding that AFT Minerals somehow suffered injuries as Benge

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[17] On appeal, Benge cites the following: (1) a document which grants the 2012 Trust a limited partnership interest in AFT Minerals; (2) a document entitled history of loans from AFT Minerals to O&G; (3) an email discussing the loans from AFT to O&G and how Missi planned to pay them; (4) the first page of the "THOMAS FAMILY 2012 TRUST FIRST ACCOUNTING" from the period of July 23, 2012 to February 29, 2016 showing that the 2012 Trust "has 66.3189% limited partnership interest in AFT Minerals"; (5) one page of Missi's deposition testimony where she testified that the 2012 Trust is a limited partner of AFT Minerals owning "66 %"; (6) another page of Missi's testimony where she testified that there were no notes concerning cash advances from AFT Minerals to O&G; (7) deposition testimony of Andy Carson, the previous manager of AFT Minerals, who testified that loans from AFT Minerals to O&G were done "without any paperwork"; and (8) the trial court's order granting partial summary judgment. However, Benge does not explain how this evidence has any bearing on whether Missi failed to maintain trust records for the 2012 Trust.

claims, AFT Property is the general partner of AFT Minerals, and under settled authority, it would have standing to bring suit. *See id*. ("[T]he right of recovery belongs to the general partnership, 'even though the economic impact of the alleged wrongdoing may bring about reduced earnings, salary or bonus.'"). Benge cites no authority, and we find none, supporting a conclusion that the 2012 Trust as a limited partner has standing to sue for an accounting of AFT Minerals[18] or that Benge as a remainder beneficiary of the 2012 Trust has standing to bring suit for an accounting of AFT Minerals' transactions under these circumstances. *See id*.

Accordingly, we conclude that the trial court properly granted Missi's motion for no evidence and traditional summary judgment on Benge's failure to maintain trust records claim. We overrule Benge's third issue.

IV. DERIVATIVE CLAIMS

By her fourth issue, Benge contends that the trial court improperly granted appellees' pleas to the jurisdiction because she has standing to sue Missi, O&G, Adams, and HJA on behalf of the 2012 Trust.[19] By a sub-issue to her fourth issue, Benge argues that the trial court should have denied appellees' pleas to the jurisdiction because she has standing to sue "third parties."

A. Standard of Review

The purpose of a plea to the jurisdiction is to "defeat a cause of action without regard to whether the claims asserted have merit." *Bland Indep. Sch. Dist. v. Blue*, 34

[18] Under this theory, Benge would be bringing a derivative suit on behalf of the 2012 Trust against AFT Minerals, an issue we discuss below, and not an individual claim against Missi as trustee.

[19] Benge does not clearly state that she wishes to appeal the trial court's grant of appellees' pleas to the jurisdiction insofar as it dismissed her derivative claims on behalf of AFT Minerals and AFT Property.

S.W.3d 547, 554 (Tex. 2000). A challenge to the trial court's subject matter jurisdiction is a question of law that we review de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). The plaintiff first bears the burden to plead facts establishing jurisdiction. *Id*. We will, when necessary, consider relevant evidence submitted by the parties to resolve the jurisdictional dispute. *Id*. at 227 (citing *Bland Indep. Sch. Dist.*, 34 S.W.3d at 555). However, we will consider only the evidence relevant to the jurisdictional question. *Bland Indep. Sch. Dist.*, 34 S.W.3d at 555. "[I]f the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issues, the trial court rules on the plea to the jurisdiction as a matter of law." *Miranda*, 133 S.W.3d at 228. We take as true all evidence favorable to the non-movant and indulge every reasonable inference and resolve any doubts in favor of the non-movant. *City of Waco v. Kirwan*, 298 S.W.3d 618, 622 (Tex. 2009).

B. Applicable Law

Whether a party has standing to pursue a cause of action is a question of law that we review de novo. *Rupert v. McCurdy*, 141 S.W.3d 334, 338–39 (Tex. App.—Dallas 2004, no pet.). We review the trial court's findings of fact for legal and factual sufficiency. *Id*.

> In Texas, the standing doctrine requires that there be (1) "a real controversy between the parties," that (2) "will be actually determined by the judicial declaration sought." Implicit in these requirements is that litigants are "properly situated to be entitled to [a] judicial determination." Without standing, a court lacks subject matter jurisdiction to hear the case. Thus, the issue of standing may be raised for the first time on appeal.

Austin Nursing Ctr., Inc. v. Lovato, 171 S.W.3d 845, 849 (Tex. 2005) (internal citations omitted). As the plaintiff, Benge had the burden to show she has standing. *See Williams v. Lara*, 52 S.W.3d 171, 178 (Tex. 2001).

C. Standing to Sue Missi in her Capacity as Trustee on Behalf of the 2012 Trust

First, Benge argues that "Missi as, the sole trustee cannot sue herself," and as an interested person under the trust code, she has standing to sue on behalf of the 2012 Trust. Specifically, Benge claims on appeal that she was an "interested person" under the trust code because, as we understand her argument, she had a *vested* remainder interest in the 2012 Trust. In the trial court, Benge made two arguments regarding why she had standing: (1) Missi cannot sue herself; and (2) she is a *vested* remainder beneficiary as opposed to a *contingent* remainder beneficiary. Benge did not specifically argue in the trial court that she is an "interested person" under the trust code.

An "interested person" is a "trustee, beneficiary, or any other person having an interest in or a claim against the trust or any person who is affected by the administration of the trust." TEX. PROP. CODE ANN. § 111.004(7). Any interested person may bring an action against the trustee under § 115.001. *Id*. § 115.001. Section 115.001 sets out "district court has original and exclusive jurisdiction over all proceedings by or against a trustee and all proceedings concerning trusts" and provides a non-exhaustive list of those proceedings as follows:

(1) construe a trust instrument;

(2) determine the law applicable to a trust instrument;

(3) appoint or remove a trustee;

(4) determine the powers, responsibilities, duties, and liability of a trustee;

(5) ascertain beneficiaries;

(6) make determinations of fact affecting the administration, distribution, or duration of a trust;

(7) determine a question arising in the administration or distribution of a trust;

(8) relieve a trustee from any or all of the duties, limitations, and restrictions otherwise existing under the terms of the trust instrument or of this subtitle;

(9) require an accounting by a trustee, review trustee fees, and settle interim or final accounts; and

(10) surcharge a trustee.

Id. § 115.011.

Thus, an interested person may bring a claim for any of the above-listed matters against *a trustee*. *See id*. However, § 115.011 does not address whether a beneficiary with either a vested or contingent interest may bring a *derivative suit* on behalf of the trust against the trustee, and Benge did not argue in the trial court that she had standing because she is an interested beneficiary. *See id*.

On appeal, Benge explains her derivative claim against Missi as follows: "The 'matter involved' was Missi's breaches of trust that damaged the trust estate. The 'particular purpose' of Debra's lawsuit was to hold Missi accountable for damages to the trust estate." Although not stated in this section of Benge's brief specifically, as we understand Benge's arguments, she is suing Missi on behalf of the 2012 Trust because Missi breached a fiduciary duty by refusing to sue third parties. We have concluded that Benge's breach of fiduciary claims against Missi were properly dismissed by the trial court, and Benge has not adequately explained how she has standing to sue Missi derivatively on behalf of the 2012 Trust for claims that we have concluded have no merit.

In the trial court, Benge stated that she had standing to sue Missi on behalf of the 2012 Trust solely on the basis that she claimed to be a vested remainder beneficiary. She

stated that her derivative claim was brought because Missi refused to bring a cause of action against third parties; therefore, according to Benge, she had to sue Missi in order to bring those claims on behalf of the 2012 Trust.

1. Contingent Remainder Beneficiary

Section 115.011 explicitly states, "Contingent beneficiaries designated as a class are not necessary parties to an action under Section 115.001." *Id.*; *see also id*. § 115.001. Section 115.011 explains that "necessary parties" to an action under § 115.001 are those beneficiaries of the trust "designated by name," "a person who is actually receiving distributions from the trust estate at the time the action is filed," and the trustee serving at the time the action is filed. *Id*. § 115.011(b)(2), (3), (4). In addition, in *Berry v. Berry*, this Court held that a contingent remainder beneficiary seeking relief individually did not have standing to sue the trustee because a contingent remainder beneficiary is not a necessary party, and we upheld the trial court's summary judgment dismissing the contingent remainder beneficiary's individual claim against the trustee. No. 13-18-00169-CV, 2020 WL 1060576, at *4 (Tex. App.—Corpus Christi–Edinburg Mar. 5, 2020, no pet.) (mem. op.) (citing *Davis v. First National Bank of Waco*, 161 S.W.2d 467, 472 (Tex. 1942) (noting that the court held that "[a]n expectant heir has no present interest or right in property that he may subsequently inherit and consequently he cannot maintain a suit for the enforcement or adjudication of a right in the property"; *Davis v. Davis*, 734 S.W.2d 707, 709–10 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.) (explaining that the potential beneficiary "did not have standing to sue based on his claim that he is a potential beneficiary of trust assets" and "[o]ne cannot maintain a suit for the enforcement or adjudication of a right in property that he expects to inherit, because he has no present

right or interest in the property”))). We conclude that Benge is a contingent remainder beneficiary as further explained below.

Here, the 2012 Trust states, in relevant part, the following:

> Upon the death of Margaret Anne Thomas, the Trustee shall divide the Trust into as many equal shares as there are children of the Margaret Anne Thomas then living, and children of Margaret Anne Thomas then deceased who have descendants then living. Each share set aside for a child then living shall be held and administered as a child’s trust.

It is undisputed that Anne directed that, upon her death, the 2012 Trust was for the benefit of Missi as the sole beneficiary for her life. It is also undisputed that Benge is a remainder beneficiary of the trust. *See In re Townley Bypass Unified Credit Tr.*, 252 S.W.3d 715, 717 (Tex. App.—Texarkana 2008, pet. denied) (“A remainder interest occurs when a possessory interest in property (often a life estate) is given to one person, with a subsequent taking of the estate in another person.”).

In *Jensen v. Cunningham*, this Court held that similar language as that in the 2012 Trust created a class gift to beneficiaries and did not create a vested interest to named beneficiaries until the death of the testator, at which time the interest vested. *See* 596 S.W.2d 266, 269 (Tex. App.—Corpus Christi–Edinburg 1980, no writ). In *Jensen*, the will creating a trust stated the following:

> Upon the death of [my spouse or my death if my spouse predeceases me] the Trustee shall divide the corpus of the Trust Estate into two equal shares and shall deliver such shares in fee as follows:
>
> (1) One share to be divided equally between my daughter, MARGARET MILDRED DANIELS PRINGLE CUNNINGHAM, and my following named grandchildren *who are then surviving* . . . .

Id. (emphasis added). The grandchildren were then each listed by their names. *Id*. We explained that “where a devise is made to two or more persons as a class, and one or

more die before the testator, the surviving legatee or legatees take the testator's entire devise, including such part as by the will was bequeathed to the legatee who predeceased the testator." *Id*. at 270. We made it clear that the legatee must be alive when the testator dies in order to collect his or her interest in the trust. *See id*. In other words, when the instrument creates a class gift, the legatee merely has a contingent remainder interest because the legatee is entitled to the devise only if the legatee is alive when the testator dies. *See id*. Thus, when an instrument directs that a class gift vest upon the death of the living beneficiary, the instrument creates a contingent interest, and the class gift recipients have a contingent remainder interest until the contingent event occurs, i.e., the class gift recipients survive the death of the beneficiary. *See Guilliams v. Koonsman*, 279 S.W.2d 579, 582 (1955) ("While it has been said that 'The law favors the vesting of estates at the earliest possible period, and will not construe a remainder as contingent where it can reasonably be taken as vested', nevertheless, when the will makes survival a condition precedent to the vesting of the remainder, it must be held to be contingent.") (internal citation omitted).

Here, the trust directed that, upon Missi's death, the trustee should divide the 2012 Trust into as many equal shares as necessary for the benefit of Missi's *living* children. Thus, Anne created a contingent remainder interest to the 2012 Trust in favor of Benge and Voelkel because the remainder of the trust corpus would vest in them only if each were living when Missi died. *See Jensen,* 596 S.W.2d at 269–70; *Pickering v. Miles*, 477 S.W.2d 267, 270 (Tex. 1972) (concluding that a remainder interest was made contingent "by the words 'that are living at his death'"); *Guilliams*, 279 S.W.2d at 582. In other words, the 2012 Trust made the survival of the grandchildren, Benge and Voelkel, a condition

precedent to the vesting of the remainder and created a contingent remainder interest. *See Pickering*, 477 S.W.2d at 270 ("Where the will makes the survival of the life tenant a condition precedent to the vesting of the remainder, the remainder is said to be contingent."). Accordingly, Benge's argument that she is a vested remainder beneficiary of the 2012 Trust is without merit, and we conclude that she is a contingent remainder beneficiary of the 2012 Trust.[20] *See Berry*, 2020 WL 1060576, at *4.

Benge made no other argument in the trial court and makes no other argument on appeal supporting a conclusion that she has standing to bring a derivative claim on behalf of the 2012 Trust. *See* TEX. PROP. CODE ANN. § 115.011; *see also id*. § 115.001. Thus, having concluded that Benge is a contingent remainder beneficiary with no standing and that her breach of fiduciary claims are meritless, we are unable to reverse the trial court's granting of Missi's plea to the jurisdiction on this basis.

2. *In re Benge*

In addition, in *In re Benge*, 2018 WL 1062899, at *1 we cited *In re XTO Energy Inc*., 471 S.W.3d 126, 131 (Tex. App.—Dallas 2015, no pet.), among other cases, stating that generally beneficiaries cannot bring derivative suits on behalf of the trust and concluded that the trial court in this case did not err in dismissing Benge's derivative claims. *See Jacobs v. Jacobs*, 448 S.W.3d 626, 630 (Tex. App.—Houston [14th Dist.] 2014, no pet.) ("The 'law of the case' doctrine is defined as that principle under which questions of law decided on appeal to a court of last resort will govern the case throughout

[20] Benge also argues that to the extent that this Court in our previous denial of her petition for mandamus considered her "interest in the 2012 Trust as expectant or contingent, with Missi's death in January 2018, the remainder beneficiaries' interests [, including hers] are no longer expectant." Benge does not provide any substantive legal argument for her argument with citation to appropriate authority. *See* TEX. R. APP. P. 38.1(i). Thus, we will not reverse the trial court's judgment on this basis as it is inadequately briefed. *See id*.

its subsequent stages.”). In *Berry*, we noted as an exception to this general rule, a “beneficiary [may] step into the trustee’s shoes and maintain a suit on the Trust’s behalf when “the trustee’s refusal to bring suit [against a third party on behalf of the trust is] wrongful.” *Berry*, 2020 WL 1060576, at *5. Here, Benge has not shown that Missi’s acts of not suing AFT Property, O&G, and AFT Minerals was a result of wrongful conduct. *See id*. Therefore, Benge has not shown that she has standing to sue Missi derivatively on behalf of the 2012 Trust on this basis. *See id*.

3. Summary

Because Benge does not have standing to bring her derivative claims on behalf of the 2012 Trust against Missi, the trial court lacks subject matter jurisdiction to hear them.[21] *See Austin Nursing Ctr., Inc.*, 171 S.W.3d at 849. Accordingly, the trial court properly

[21] A beneficiary cannot sue on behalf of the trust simply because the trustee refuses to do so. *See In re XTO Energy Inc.*, 471 S.W.3d 126, 131 (Tex. App.—Dallas 2015, no pet.) (explaining that “a beneficiary may not bring a cause of action on behalf of the trust merely because the trustee has declined to do so” because “[t]o allow such an action would render the trustee’s authority to manage litigation on behalf of the trust illusory”); *see also Berry v. Berry*, No. 13-18-00169-CV, 2020 WL 1060576, at *5 (Tex. App.—Corpus Christi–Edinburg Mar. 5, 2020, no pet.) (mem. op.) (agreeing with *XTO* and stating, “a beneficiary may not bring a cause of action on behalf of the trust merely because the trustee has declined to do so”).

granted Missi's plea to the jurisdiction.[22] We overrule Benge's fourth issue.[23]

D. Standing to Sue "Third Parties"

Next, as a sub-issue to her fourth issue, Benge contends she had standing to sue "third parties" on behalf of Missi in her capacity as trustee. Here is the extent of Benge's argument in her brief:

> Debra also pleaded that she had standing and capacity to sue on behalf of the 2012 Trust "because Missi as, the sole trustee cannot sue herself." Debra identified Missi's numerous conflicts of interest based on her positions with the entities involved.
>
> While a trustee is generally the party to pursue lawsuits on behalf of a trust, it is well established that a beneficiary can sue a third party on behalf of a trust when a trustee fails, refuses, or has a conflict that prevents her from taking action. *Interfirst Bank-Houston, N.A. v. Quintana Petroleum Corp.*, 699 S.W.2d 864, 874 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.); *Grinnell v. Munson*, 137 S.W.3d 706, 714 (Tex. App.—San Antonio 2004, no pet.); *In re Estate of Webb*, 266 S.W.3d 544, 552 (Tex. App.—Fort Worth 2008, pet. denied).

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[22] In our earlier opinion denying mandamus relief, we cited the following cases with the following parentheticals:

> *Davis v. First Nat'l Bank of Waco*, 161 S.W.2d 467, 472 (Tex. 1942) ("An expectant heir has no present interest or right in property that he may subsequently inherit and consequently he cannot maintain a suit for the enforcement or adjudication of a right in the property."); *In re XTO Energy, Inc.*, 471 S.W.3d 126, 137 (Tex. App.—Dallas 2015, orig. proceeding) (stating that "we have found no Texas case authority allowing a trust beneficiary to sue a trustee derivatively on behalf of a trust"); *Moon v. Lesikar*, 230 S.W.3d 800, 802–06 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (affirming trial court's ruling that plaintiff, who was "contingent beneficiary" of family trust "lacked standing to complain about the [trust's sale of stock] because she had no interest in it at the time of the sale"); *Davis v. Davis*, 734 S.W.2d 707, 709–10 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.) (concluding that appellant "did not have standing to sue based on his claim that he is a potential beneficiary of trust assets" and explaining that "[o]ne cannot maintain a suit for the enforcement or adjudication of a right in property that he expects to inherit, because he has no present right or interest in the property").

In re Benge, No. 13-17-00616-CV, 2018 WL 1062899, at *1 (Tex. App.—Corpus Christi–Edinburg Feb. 27, 2018, no pet., orig. proceeding) (mem. op.).

[23] Benge argues that if we sustain her fourth issue, we must also sustain her sub-issue to her fourth issue arguing that we must reverse the trial court's grant of appellees' pleas to the jurisdiction on her derivative claims for exemplary damages. However, as we have overruled Benge's fourth issue, we need not address her sub-issue to her fourth issue, and we overrule it. *See* TEX. R. APP. P. 47.1.

> Missi, of course, could not sue herself as trustee for her own breaches of fiduciary duty. *See State Farm Mut. Auto. Ins. v. Perkins*, 216 S.W.3d 396, 401 (Tex. App.—Eastland 2006, no pet.) (a person cannot sue himself). Missi's ownership of O&G Rocks and manager of AFT Property Management further placed her in a position of having to sue herself for the damages to the trust caused by the loans to O&G Rocks. *Accordingly, Debra had derivative standing to sue O&G Rocks, Adams, and Adams LLC on behalf of Missi as trustee*.

(Emphasis added).

We are not required or even allowed to formulate arguments for appellants. *See Canton-Carter v. Baylor Coll. of Med.*, 271 S.W.3d 928, 932 (Tex. App.—Houston [14th Dist.] 2008, no pet.). And here, we are unable to address this sub-issue without making the argument for Benge, which we refuse to do. *See id*. Accordingly, we conclude that this sub-issue is inadequately briefed. *See* TEX. R. APP. P. 38.1(i). Moreover, we have thoroughly explained above why Benge has no standing to bring her derivative claims on behalf of the 2012 Trust. We overrule Benge's sub-issue to her fourth issue.

V. ATTORNEY'S FEES

By her fifth through ninth issues, Benge challenges the trial court's award of attorney's fees to Missi under the UDJA and under the trust code.

A. Applicable Law and Standard of Review

"Texas adheres to the American Rule with respect to attorney's fees; thus, litigants may recover attorney's fees only if specifically provided for by statute or contract." *Epps v. Fowler*, 351 S.W.3d 862, 865 (Tex. 2011). Here, Benge sought relief pursuant to the UDJA for her power of appointment claim and under the trust code for her breach of fiduciary duty claim; therefore, the trial court based its attorney's fees awards to Missi on those claims.

A trial court may award costs and reasonable and necessary attorney's fees that

are equitable and just in any UDJA proceeding. *Feldman v. KPMG LLP*, 438 S.W.3d 678, 685 (Tex. App.—Houston [1st Dist.] 2014, no pet.); *Marsh v. Frost Nat'l Bank*, 129 S.W.3d 174, 180 (Tex. App.—Corpus Christi–Edinburg 2004, pet. denied). The UDJA provides that the trial court has discretion when awarding attorney's fees. *Feldman*, 438 S.W.3d at 685. The attorney's fees awarded must "be reasonable and necessary," which are matters of fact and "equitable and just," which are matters of law. *Id*. (citing *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998)). "Unreasonable fees cannot be awarded, even if the court believed them just, but the court may conclude that it is not equitable or just to award even reasonable and necessary fees." *Id*. The UDJA does not require that the award of attorney's fees be based on a finding that the party "substantially prevailed." *Id*. (citing *Barshop v. Medina Cnty. Underground Water Conservation Dist*., 925 S.W.2d 618, 637 (Tex. 1996)). "Instead, a trial court may award attorney's fees to a non-prevailing party as are equitable and just." *Id*. (citing *State Farm Lloyds v. C.M.W*., 53 S.W.3d 877, 894 (Tex. App.—Dallas 2001, pet. denied)). In summary, the UDJA's "attorney's fees provision grants the trial court broad discretion to (i) afford all parties the opportunity to request fees; (ii) decline to award fees; and (iii) allow an award only when reasonable, necessary, equitable, and just." *Id*.

The Texas Trust Code provides that "[i]n any proceeding under this code the court may make such award of costs and reasonable and necessary attorney's fees as may seem equitable and just." TEX. PROP. CODE ANN. § 114.064; *Marsh*, 129 S.W.3d at 180. The trial court has sound discretion to grant or deny an award of attorney's fees to a trustee under § 114.064, and absent a clear showing that the trial court abused its discretion, we will not reverse the trial court's judgment. *See Lee v. Lee*, 47 S.W.3d 767,

793–94 (Tex. App.—Houston [14th Dist.] 2001, pet. denied); *Lyco Acquisition 1984 Ltd. P'ship v. First Nat'l Bank of Amarillo*, 860 S.W.2d 117, 121 (Tex. App.—Amarillo 1993, writ denied).

B. Trust Code

By her fifth issue, Benge contends that the trial court's award of attorney's fees to Missi under the trust code was not equitable and just. In her brief, Benge argues that "it was inequitable and unjust to award Missi trial or appellate fees and costs against" her under the trust code. Benge cites and discusses the factual background and holdings in other cases where appellate courts have reversed the award of attorney's fees under the trust code. Benge states that those cases support reversal; however, she does not state how these cases apply to the facts here.

Instead, Benge claims that pursuant to the two cases she cited, she is entitled to reversal of the attorney's fees award because the evidence in the trial court established the following: (1) "According to Missi, she and Debra had been in conflict 'in the decades' before Anne died"; (2) "Missi took care of her company, O&G Rocks, at the expense of the 2012 Trust and its beneficiaries"; (3) "Missi admitted that she was not concerned about whether the second note was fair to AFT Minerals"; (4) "Missi admitted she had no concerns about the amounts of money that O&G Rocks misappropriated from AFT Minerals"; (5) "Missi did not avoid plainly conflicting positions"; (6) "Missi's actions caused damage to the 2012 Trust"; (7) "Missi refused to pursue third parties who harmed the trust, forcing Debra to do so"; (8) "Debra acted in good faith in challenging serious breaches of fiduciary duty and incurred significant attorney's fees that the trial court found to be reasonable and necessary to pursue Missi"; and (9) "an award of fees against Debra

in this context is punitive." Benge concludes this section of her brief by stating, "Accordingly, Debra challenges the award of attorney's fees and costs in the Final Judgment and in FoF 10, 12-16 and CoL 5, 8, 12, 14-17," and "[t]his Court should reverse the award of attorney's fees and costs against Debra and order that any fees or costs Missi charged to the 2012 Trust should be reimbursed to the trust." This is the extent of Benge's legal analysis.

Rule 38.1(i) requires that an appellate brief contain "a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(i). "To comply with Rule 38.1, appellants must provide such a discussion of the facts and the authorities relied upon to maintain the point at issue." *Lowry v. Tarbox*, 537 S.W.3d 599, 619 (Tex. App.—San Antonio 2017, pet. denied) (citing *Tesoro Petroleum Corp. v. Nabors Drilling USA, Inc.*, 106 S.W.3d 118, 128 (Tex. App.—Houston [1st Dist.] 2002, pet. denied)). "This is not done by merely uttering brief conclusory statements, unsupported by legal citations." *Id*. "When appellants fail to discuss the evidence supporting their claim or *apply the law to the facts*, they present nothing for review." *Id*. at 620 (emphasis added) (citing *Bolling v. Farmers Branch Indep. Sch. Dist*., 315 S.W.3d 893, 895–96 (Tex. App.—Dallas 2010, no pet.)). An appellate issue is waived by failure to offer argument, provide appropriate record citations, or *a substantive analysis*. *Id*.

Benge has not provided a substantive legal argument applying the legal authorities she cited to the facts of this case. *See* TEX. R. APP. P. 38.1(i). Benge merely recites unsubstantiated facts, some of which the trial court rejected, without explaining how the cases she cited apply in this situation. Benge has failed to provide any substantive

analysis applying the appropriate legal authority to the facts of her case in such a manner as to demonstrate that the trial court committed reversible error when it awarded attorney's fees pursuant to the trust code to Missi. We are prohibited from making Benge's argument for her, and we refuse to do so. We have no duty to read the cases cited in Benge's brief to ascertain how those cases apply here without any guidance from Benge, and we are prohibited from researching the law and then fashioning a legal argument for her when she has failed to do so. *See Canton-Carter*, 271 S.W.3d at 932; *see also Atkinson v. Sunchase IV Homeowners Ass'n, Inc.*, No. 13-17-00691-CV, 2020 WL 2079093, at *2 (Tex. App.—Corpus Christi–Edinburg Apr. 30, 2020, no pet.) (mem. op.). Accordingly, we overrule Benge's fifth issue.

C. UDJA

By her sixth issue, Benge argues that the only basis for an award of attorney's fees was removed because her nonsuit of her UDJA "extinguished the power-of-appointment claim" rendering that claim moot. As a sub-issue to her sixth issue, Benge further argues that she did not seek relief pursuant to the UDJA.

1. Pertinent Facts

In her pleadings, Benge explained that she had filed suit against Missi "for constructive trust, a declaratory judgment [pursuant to the UDJA], and/or damages" due to "Missi's attempt to disinherit her and her descendants" in order to "void Missi's purported exercise of the power of appointment" in the Missi Thomas Trust. As we understand it, Benge sued Missi claiming that Missi breached her fiduciary duty to her when Missi exercised her power of appointment as donee/trustee of the Missi Thomas Trust and "disinherited" Benge and her descendants in an act of "revenge." In her live

pleading, Benge sought the following:

> that, pursuant to Chapter 37 of the Texas Civil Practice & Remedies Code, the Court declare: (1) that a constructive trust should be imposed for the benefit of Plaintiff over the assets subject to Missi's power of appointment; and (2) that Missi's exercise of the power of appointment be null, void, and of no force and effect.

Missi filed a motion for summary judgment seeking dismissal of Benge's power of appointment claims on the basis that Benge had no standing because she is not a named beneficiary of the Missi Thomas Trust, and Benge responded. However, the day before the hearing on the matter, Benge filed a notice of nonsuit of her power of appointment claims. On July 30, 2018, the trial court held a summary judgment hearing on Benge's power of appointment claims where Missi announced that she was ready to proceed on the summary judgment, presented argument that Texas case law and the rules of civil procedure prevented Benge's partial nonsuit and that Missi would be entitled to attorney's fees. The trial court informed Benge that she could not nonsuit the claims for attorney's fees. Subsequently, the trial court held a hearing on Missi and Benge's claims for attorney's fees. The trial court awarded attorney's fees to Missi, and it denied Benge's request for attorney's fees.

2. Effect of the Nonsuit on the Award of Attorney's Fees

Benge first argues that because she nonsuited her claims her power of appointment claim was rendered moot, and therefore, the trial court had no discretion to award attorney's fees to Missi pursuant to the UDJA.

"In Texas, plaintiffs may nonsuit at any time before introducing all of their evidence other than rebuttal evidence" and a court order is not required. *Epps*, 351 S.W.3d at 868 (citing TEX. R. CIV. P. 162). "A nonsuit terminates a case 'from the moment the motion is

filed.'" *Id*. However, "a nonsuit does not affect any pending claim for affirmative relief or motion for attorney's fees or sanctions. *Id*. "Rule 162 permits the trial court to hold hearings and enter orders affecting costs, attorney's fees, and sanctions, even after notice of nonsuit is filed, while the court retains plenary power." *Univ. of Tex. Med. Branch at Galveston v. Estate of Blackmon ex rel. Shultz*, 195 S.W.3d 98, 101 (Tex. 2006) (per curiam). "Thus, the trial court has discretion to defer signing an order of dismissal so that it can 'allow a reasonable amount of time' for holding hearings on these matters which are 'collateral to the merits of the underlying case.'" *Id*. "Although the Rule permits motions for costs, attorney's fees, and sanctions to remain viable in the trial court, it does not forestall the nonsuit's effect of rendering the merits of the case moot." *Id*.

Here, although Benge nonsuited her power of appointment claim brought pursuant to the UDJA thus rendering the merits of her cause of action moot, as set out above, Rule 162 permits the trial court to hold hearings and enter orders affecting attorney's fees even after notice of nonsuit is filed, while the court retains plenary power. *Id*. It is undisputed that the trial court had plenary power when it awarded attorney's fees pursuant to the UDJA.[24] Thus, although Benge's power of appointment claim was moot, Missi's claim for attorney's fees remained viable, and the trial court did not abuse its discretion by awarding them to her. *See id*. We overrule Benge's sixth issue.

3. Validity of Benge's UDJA Claim

Next, by a sub-issue to her sixth issue, Benge argues that she did not seek

[24] In her brief in support of nonsuit, Benge stated the following: "Debra does not dispute that Missi may pursue her claim for attorney fees relating to the nonsuited claims." In her brief, Benge does not direct us to anywhere in the record where she informed the trial court that her nonsuit barred its award of attorney's fees to Missi prior to its awarding them pursuant to the UDJA.

declaratory relief pursuant to the UDJA, and the trial court merely interpreted her pleadings in such a way as a ruse to award Missi attorney's fees. Benge implies that her UDJA claim was invalid as a matter of law because she did not properly invoke it.

"Pleadings are to be liberally construed in favor of the pleader, particularly when the complaining party has not filed any special exceptions." *Spiers v. Maples*, 970 S.W.2d 166, 168–69 (Tex. App.—Fort Worth 1998, no pet.) (citing *Boyles v. Kerr*, 855 S.W.2d 593, 601 (Tex. 1993) (op. on reh'g); *Crockett v. Bell*, 909 S.W.2d 70, 72 (Tex. App.—Houston [14th Dist.] 1995, no writ)). "Rule 45 of the Texas Rules of Civil Procedure requires that pleadings give fair notice of the claim . . . asserted. The purpose of the fair notice requirement is to provide the opposing party with enough information to prepare a defense or answer to the defense asserted." *Id*. at 169.

In her fifth amended petition, in a section entitled "DECLARATORY RELIEF – CONSTRUCTIVE TRUST REGARDING MISSI'S EXERCISE OF TESTAMENTARY POWER OF APPOINTMENT," Benge stated the following:

> Declaratory Relief: Plaintiff therefore PRAYS that, pursuant to Chapter 37 of the Texas Civil Practice & Remedies Code, the Court declare: (1) that a constructive trust should be imposed for the benefit of Plaintiff over the assets subject to Missi's power of appointment; and (2) that Missi's exercise of the power of appointment be null, void, and of no force and effect.

Benge further sought the award of attorney's fees for her power of appointment claim pursuant to the UDJA. In her motion for no evidence and traditional partial summary judgment, Missi stated that Benge was requesting "a declaratory judgment under Chapter 37 of the Texas Civil Practice & Remedies Code" and asserted that "the Court may award costs and reasonable and necessary attorneys' fees [that were] equitable and just." Benge responded to Missi's motion, and she did not deny that she sought relief pursuant

to the UDJA. Instead, Benge stated that she had amended her pleadings, asking the trial court to "declare Missi's purported exercise of the power of appointment void." Benge included a section in her response entitled, "A constructive trust or *declaratory relief* would be appropriate." (Emphasis added). In that section, Benge argued that a constructive trust was the appropriate remedy, but she also stated that if the trial court did not impose a constructive trust, "this Court could reach the same result by declaring Missi's purported exercise of the power appointment void."

Construing her pleadings liberally as required, Benge sought declarations pursuant to the UDJA that Missi's exercise of her power of appointment was null, void, and of no force and effect as an alternative to her claim for a constructive trust. Benge cites no authority and we find none requiring that the trial court reject her pleadings sua sponte under these circumstances. Moreover, the trial court and the parties, including Benge, proceeded as if her claims under the UDJA were valid. We reject Benge's argument and conclude that Benge's pleadings adequately invoked the UDJA. We overrule Benge's sub-issue to her sixth issue.

D. Benge's Attorney's Fees

By her seventh issue, Benge contends that the trial court should have awarded attorney's fees to her pursuant to the trust code. Benge does not provide legal argument with citation to appropriate authority supporting a conclusion that under the trust code, the trial court erred in not awarding Benge her attorney's fees. *See* TEX. R. APP. P. 38.1(i). Therefore, because this issue is inadequately briefed, we overrule it.

VI. EXEMPLARY DAMAGES CLAIMS

By her eighth issue, Benge contends that the trial court erred by dismissing her

exemplary damages claims against Missi. Benge states, “if this Court reverses on the breach-of-fiduciary-duty and actual damages claims, [her] exemplary-damages claim against Missi, individually, for her actions as trustee of the 2012 Trust should also be reinstated.” Thus, Benge’s eighth issue depends on a conclusion that the trial court erred when it granted Miss’s motion for summary judgment on Benge’s breach of fiduciary duty claim. However, we have concluded that the summary judgment was proper. Accordingly, this issue is not dispositive of this appeal, and we need not address it. *See* TEX. R. APP. P. 47.1.

VII. INTEREST

By her ninth issue, Benge contends that the trial court’s findings of fact regarding the start date of the interest on attorney’s fees conflict with the judgment. Benge states, “The Final Judgment contains beginning dates for the post-judgment interest awards”; however “[t]he FoF 16 and CoL 15 and 16 . . . do not contain a start date for computing post-judgment interest.” Benge requests that we strike these findings. However, Benge does not explain with citation to authority and substantive legal analysis why there is a conflict between the judgment and findings. *See* TEX. R. APP. P. 38.1(i). She does not provide any legal analysis to support her claim that a conflict exists because the judgment contains beginning dates for post-judgment interest and the findings do not contain a start date for computing post-judgment awards. *See id*. Benge merely baldly asserts that there is a conflict. We therefore decline to strike these findings, and we overrule Benge’s ninth issue.

VIII. CONCLUSION

We affirm the trial court’s judgment.

JAIME TIJERINA
Justice

Delivered and filed the
27th day of August, 2020.