COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

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| CENTRAL TEXAS WATER SUPPLY CORPORATION, | § | No. 08-20-00142-CV |
| Appellant, | § | Appeal from the |
| v. | § | 169th District Court District Court |
| KEMPNER WATER SUPPLY CORPORATION and CITY OF LAMPASAS, | § | of Bell County, Texas |
| | § | (TC# 302,699-C) |
| Appellees. | § | |

**OPINION**

On June 21, 2021, Appellant Central Texas Water Supply Corporation filed a motion for rehearing. The Court denies the motion for rehearing. The opinion and judgment of this Court issued June 4, 2021, is withdrawn and the following is the opinion of the Court. This case presents an appeal from a final summary judgment in favor of Kempner Water Supply Corporation (Kempner) and the City of Lampasas (Lampasas) in a case arising out of competing interpretations of two cost formulas included in a wholesale-water-supply contract between Central Texas Water

Supply Corporation (Central Texas) and Kempner.[1] The trial court denied Central Texas's motion for summary judgment and granted Kempner's and Lampasas's respective motions for summary judgment, awarding damages and attorneys' fees against Central Texas. We affirm.

## I. BACKGROUND[2]

### A. Factual History

Central Texas is a non-profit water-supply corporation incorporated under the laws of the State of Texas. Central Texas treats water taken from Stillhouse Hollow Reservoir in Bell County and delivers the treated water to its customers. Stillhouse Hollow Reservoir lies just west of Interstate 35, roughly halfway between Austin and Waco, and just south of U.S. 190 between Temple to the east and Killeen to the west.[3] Further to the west of Killeen is the City of Kempner, and further west from the City of Kempner is Lampasas. As far as can be determined on this record, Central Texas does not sell treated water directly to retail customers; instead, its customers are cities and other water-supply corporations in the Central Texas region. Kempner is one of Central Texas's customers, and its business relationship with Central Texas is governed by a 15-page Wholesale Water Supply Contract (the Kempner Contract). Kempner and Central Texas executed the Kempner Contract in 2005 and it covers an almost-80-year term. Although the contract was signed in 2005, Kempner and Central Texas had been doing business together for some time prior to that agreement. In fact, the Kempner Contract was part of a settlement between Kempner and

[1] This case was transferred to this Court from the Third Court of Appeals, our sister court in Austin, pursuant to the Texas Supreme Court's ongoing equalization efforts. We follow the precedent of the Third Court of Appeals to the extent it conflicts with our own. TEX. R. APP. P. 41.3.

[2] Our summary of the facts is taken from the affidavits, exhibits, deposition testimony, and other documents contained in our record. As we must, we take as true all evidence favorable to Central Texas, the nonmovant of both motions granted by the trial court. *See Cmty. Health Sys. Prof'l Servs. Corp. v. Hansen*, 525 S.W.3d 671, 680 (Tex. 2017).

[3] Stillhouse Hollow Lake, GOOGLE Maps, https://www.google.com/maps/place/Stillhouse+Hollow+Lake (last visited Dec. 21, 2021); TEX. R. EVID. 201(b); *Int'l-Great N. R. Co. v. Reagan*, 49 S.W.2d 414, 416 (Tex. 1932) (taking judicial notice of maps).

Central Texas regarding a dispute under their previous agreement.

*Intertwined Contracts*

Relative to this case, the business relationship between Kempner and Central Texas is intertwined with at least two other entities based on the operation of two other contracts. Since at least 1985, the Brazos River Authority, Lampasas, and Central Texas have purchased and supplied treated water from each other pursuant to a related contract (the BRA/Central Texas/Lampasas Contract). Lampasas purchases certain water rights in Stillhouse Hollow Reservoir from the Brazos River Authority and assigns those rights to Central Texas so that Central Texas can treat water and deliver it to Lampasas "under the terms of agreements between Lampasas, Central Texas and [Kempner]." Although not a party to the BRA/Central Texas/Lampasas Contract, Kempner is specifically mentioned therein because it is through Kempner's infrastructure that Lampasas ultimately receives treated water from Central Texas, presumably as a result of Kempner's geographic location directly between Stillhouse Hollow Reservoir and Lampasas.

Similarly, Lampasas is specifically mentioned in the Kempner Contract, although it also is not a party of that contract. And while the BRA/Central Texas/Lampasas Contract conveys Lampasas's water rights to Central Texas for the purpose of supplying treated water, the agreement does not address how Lampasas pays Central Texas for supplied water. That is because Lampasas does not actually pay Central Texas directly. Rather, payment obligations of Lampasas are arranged solely with Kempner, which are set forth in a separate contract between Lampasas and Kempner (the Lampasas/Kempner Contract). Instead of paying Central Texas directly, Lampasas pays to Kempner a portion of what Kempner pays to Central Texas, calculated as a proportional share of the amount of water Lampasas takes from Kempner. Essentially—and again, presumably due to its geographic location—Lampasas depends on two contracts to accomplish its goal of

receiving treated water, as follows: first, under the BRA/Central Texas/Lampasas Contract, it purchases raw-water rights from the Brazos River Authority and assigns them to Central Texas; second, under the Lampasas/Kempner Contract, it pays Kempner for treated water that Kempner purchases from Central Texas.

Unlike Lampasas's two contracts, the agreement between Kempner and Central Texas is captured entirely in their 15-page water supply contract signed in October 2005. Pursuant to the Kempner Contract, Central Texas is obligated to supply treated water to Kempner, and in turn, Kempner is obligated to pay a proportional share of costs incurred for Central Texas supplying the water. In general terms, the Kempner contract: (1) transfers certain water rights owned by Kempner in Stillhouse Hollow Reservoir to Central Texas; (2) it then requires Central Texas to treat a certain amount of raw water and deliver it to Kempner; and (3) it sets forth Kempner's payment obligations for Central Texas's services.

Among Kempner's payment obligations, the cost of treated water includes charges for operational/cost sharing, pricing for the volume of treated water sent to Kempner, and other required contributions and payments per contract terms. Those costs include, but are not limited to, a proportional share of the actual cost to produce, treat, and deliver water (Treated Water Costs), as well as a proportional share of the Operation and Maintenance expenses associated with treatment services (O&M Expenses).[4] To calculate such costs, the Kempner Contract relies on

[4] Although the provisions for the calculation of Treated Water Costs and O&M Expenses are the subject of the parties' current dispute, Kempner had—and in some cases still has—other payment obligations to Central Texas under the Kempner Contract. For example, Kempner was and is solely responsible for the cost of any modification or improvement to Central Texas's system that it requests, regardless of whether such modification or improvement also benefits other customers of Central Texas. As another example, Kempner was and is required to make a contribution to Central Texas's "Capital Investment Account" according to a formula explained in section 2.04 of the Kempner Contract. The funds in the Capital Investment Account can be used "to pay for capital improvements, as the Board [of Central Texas] may, in its discretion, from time-to-time deem necessary . . . ." Under another provision, Kempner was required to pay a fixed, monthly cash payment of $939 through July of 2018. And under yet another provision, Kempner was required to pay a monthly cash payment of $22,324 through August 2024, although that obligation ended early when Kempner purchased part of Central Texas's existing water-transmission system.

formulas with defined terms to calculate the payment obligations of Kempner.

*Construction of New Facilities*

In 2005, when Kempner and Central Texas entered into their agreement, Central Texas's existing facilities consisted of two plants occupying the same premises. Each plant contained vessels, equipment, filters, and other associated equipment. Almost exclusively, the parties referred to the existing facility as one plant. By a defined term, the Kempner contract identified these existing facilities as "the Water Treatment Plant."[5] In 2009, however, Central Texas began constructing a new water-treatment facility—the "Doc Curb Plant"—on a different property, which began operating in 2012. Initially, the Doc Curb Plant had a capacity to treat three million gallons of water per day.[6] But then, in 2017, Central Texas dug two wells on the Doc Curb Plant site, which increased the facility's daily treatment capacity to six-and-a-half million gallons. As a result of the operation of the Doc Curb Plant, Central Texas began distributing more water to more customers. And the increase in total number of customers had the effect of diluting Kempner's payment obligation.

In October of 2017—or five years after the Doc Curb Plant opened—Central Texas's general manager, Lee Kelley, sent Kempner a proposed modification, which would have altered the cost/sharing formulas used for calculating Kempner's share of production costs and operating expenses. Kelley suggested the parties alter the formula such that the denominator of the formula would use the volume of water delivered from the "existing plant," instead of the volume of water delivered to all of Central Texas's customers. Kempner, however, did not agree to the proposed

[5] For consistency with contract terms, we refer to Central Texas's water treatment facilities existing in 2005 as "the Water Treatment Plant."

[6] By comparison, at the time the Kempner Contract was signed, the Water Treatment Plant had the capacity to produce 14.35 million gallons of potable water per day.

change. According to Lee Kelley, he continued to negotiate with Kempner regarding the billing calculations for a period of time. In February of 2018, the issue was raised with the Central Texas board, and the board subsequently voted to begin billing Kempner by using only the volume of water delivered from the Water Treatment Plant—as opposed to the volume of water delivered to all Central Texas's customers—as the denominator in the formula used to calculate Kempner's share of Treated Water Costs and O&M Expenses.

Beginning with Kempner's bill of April 2018, which reflected water usage from the previous month (March 2018), Central Texas calculated Kempner's share of Production Costs and O&M Expenses using the volume of water delivered from the Water Treatment Plant as the denominator. Under protest, Kempner paid the April 2018 invoice in full; but from that point forward, Kempner paid only what it viewed as the appropriate portion of all subsequent invoices, that is, Kempner used the volume of water delivered to all of Central Texas's customers as the denominator in cost calculations.

**B. Procedural History**

Central Texas filed suit against Kempner on August 31, 2018, alleging not only that Kempner breached its contract, but also seeking a declaratory judgment on the proper interpretation of contract terms. Central Texas also sought damages and attorney's fees. Kempner answered, asserting a general denial, affirmative defenses, and counterclaims for breach of contract and similar declaratory relief. Thereafter, Lampasas filed a petition in intervention, claiming to have an interest in the dispute. Although Central Texas responded with a motion to strike Lampasas's petition in intervention, the trial court denied the motion.

On July 24, 2019, Central Texas filed a motion for summary judgment seeking (1) a judicial declaration construing sections 2.03 and 2.05 of the Kempner Contract; (2) a money judgment awarding the difference between the amount Kempner had paid and the amount Central Texas

alleged was due; (3) a take-nothing judgment against Kempner; and (4) a take-nothing judgment against Lampasas. In support of its motion, Central Texas included a copy of the Kempner Contract, an affidavit from Lee Kelley, and a summary of invoices and payments exchanged between the parties along with copies of supporting invoices, checks, and other documents. Kempner and Lampasas both responded substantively to Central Texas's motion for summary judgment, and they also filed objections to the affidavit of Lee Kelley. Additionally, as cross-motions, Kempner and Lampasas each filed competing motions for summary judgment. The trial court denied Central Texas's motion for summary judgment, and in doing so, it also struck the Kelley affidavit. The court also granted Kempner's and Lampasas's respective motions for summary judgment, awarding damages and attorneys' fees against Central Texas.[7]

This appeal followed.

## II. ISSUES ON APPEAL

Central Texas enumerates three issues in its statement of the issues presented, with the first having six sub-issues. However, the argument section of its brief does not follow the same structure. Because the Texas Rules of Appellate Procedure require a party's brief to "contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record[,]" we use the argument section of Central Texas's brief as a guide in addressing the challenges it properly raises. TEX. R. APP. P. 38.1(i). As a result, we construe Central Texas's brief as raising three distinct issues.

First, Central Texas challenges the trial court's final summary judgment order regarding

[7] In granting the respective cross motions for summary judgment of Kempner and Lampasas, the trial court ordered Central Texas to pay Kempner $31,760.21 in billed and paid overcharges and to credit to Kempner the overcharged and unpaid amount of $337,836.34. The damage amounts and the agreed attorney's fees are unchallenged here.

the proper interpretation of sections 2.03 and 2.05 of the Kempner Contract.[8] Second, Central Texas argues that the trial court erred in sustaining a number of Kempner's objections to two affidavits signed by Lee Kelley.[9] Finally, Central Texas argues the trial court erred in denying Central Texas's motion to Strike Lampasas's Petition in Intervention.[10] We address these issues in turn.

## III. DISCUSSION

### A. Issue One: Whether the trial court erred when construing the Kempner Contract

In its first issue, Central Texas argues the trial court erred in denying its motion for summary judgment, in granting Kempner's and Lampasas's motions, and in awarding damages against Central Texas. Specifically, Central Texas contends the trial court erred in construing section 2.03 and section 2.05 of the Kempner Contract.

#### 1. Standard of Review

We review the trial court's summary judgment de novo. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). A traditional summary judgment is proper when a movant establishes that no genuine issue of material fact exists, and that the movant is entitled to judgment as a matter of law. *See* TEX. R. CIV. P. 166(c); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985). In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true. *Nixon*, 690 S.W.2d at 548–49. Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor. *Id.* at 549. When parties file competing motions for summary judgment and

[8] This issue encompasses sub-issues 1(a), 1(c), and 1(d) as they are listed in Central Texas's list of issues presented.

[9] This issue is listed as sub-issue 1(b) in Central Texas's list of issues presented.

[10] This issue is listed as Issue 2 in Central Texas's list of issues presented.

the trial court grants one motion and denies the other, as is the case here, we consider the summary judgment evidence presented by both sides, determine all questions presented, and if we determine the trial court erred, we will render the judgment the trial court should have rendered. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). Although we review a ruling on summary judgment de novo, we do not consider evidence struck by the trial court unless the appellant shows that the trial court abused its discretion in excluding the evidence. *U.S. Fire Ins. Co. v. Lynd Co.*, 399 S.W.3d 206, 215 (Tex. App.—San Antonio 2012, pet. denied).

**2. Applicable Law**

Texas has a strong public policy favoring the freedom to contract, and courts must respect and enforce the terms of a contract the parties have agreed to unless there are compelling reasons not to do so. *Phila. Indem. Ins. Co. v. White*, 490 S.W.3d 468, 471 (Tex. 2016). In construing a written contract, a reviewing court's primary objective is to enforce the parties' intent as expressed within the four corners of the agreement. *See Piranha Partners v. Neuhoff*, 596 S.W.3d 740, 743 (Tex. 2020); *URI, Inc. v. Kleberg County*, 543 S.W.3d 755, 763 (Tex. 2018). Objective manifestations of intent control, not "what one side or the other alleges they intended to say but did not." *Gilbert Texas Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 127 (Tex. 2010). "Courts may not rewrite the parties' contract, nor should courts add to its language." *In re Davenport*, 522 S.W.3d 452, 457 (Tex. 2017). We consider the entire writing, attempting to harmonize and give effect to all provisions so that none will be rendered meaningless. *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). No provision by itself is given controlling effect; rather, each must be considered in the context of the instrument as a whole. *Moayedi v. Interstate 35/Chisam Rd., L.P.*, 438 S.W.3d 1, 7 (Tex. 2014).

Even still, "to home in on the meaning the parties intended," the Supreme Court of Texas

further instructs that "words must be construed in the context in which they are used." *URI*, 543 S.W.3d at 764. When doing so, the context of their use is not confined to the "two-dimensional contractual environs in which the words exist but may also encompass the circumstances present when the contract was entered." *Id.* (quoting *Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex. 1996)). This is so because "our quest is to determine, objectively, what an ordinary person using those words under the circumstances in which they are used would understand them to mean." *Id.* Consideration of surrounding circumstances, however, remains limited by the parol evidence rule, "which prohibits a party to an integrated written contract from presenting extrinsic evidence for the purpose of creating an ambiguity or to give the contract a meaning different from that which its language imports." *Id.* (quoting *Hansen*, 525 S.W.3d at 681). "Only where a contract is ambiguous may a court consider the parties' interpretation and admit extraneous evidence to determine the true meaning of the instrument." *Id.* at 764–65 (quoting *David J. Sacks, P.C. v. Haden*, 266 S.W.3d 447, 450 (Tex. 2008)).

As a threshold issue, we must first determine whether a contract is ambiguous, "considering its language as a whole in light of well-settled construction principles and the relevant surrounding circumstances." *Piranha Partners*, 596 S.W.3d at 743 (citing *URI*, 543 S.W.3d at 763). Whether a contract is ambiguous is a question of law that we decide de novo. *URI*, 543 S.W.3d at 763. A contract is not ambiguous if it can be given a clear and definite legal meaning and can be construed as a matter of law. *Gilbert Texas Constr.*, 327 S.W.3d at 133. That the parties advance differing interpretations of a contract does not make the contract ambiguous. *URI*, 543 S.W.3d at 763. "[N]o issue regarding the parties' intentions is raised *unless* the contract is ambiguous—and evidence of those intentions cannot be used to create an ambiguity." *Id.* at 765 (quoting *Nat'l Union Fire Ins. of Pittsburgh v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995)). We are instructed to remain

"[m]indful of our responsibility 'to honor the parties' agreement' without altering it." *Id.* at 767. As the *URI* court observed, a distinction remains "between extrinsic evidence that illuminates contract language and extrinsic evidence that adds to, alters, or contradicts the contract's text." *Id.* The Supreme Court of Texas illustrated the distinction as follows:

> In the same way that dictionary definitions, other statutes, and court decisions may inform the common, ordinary meaning of a statute's unambiguous language, circumstances surrounding the formation of a contract may inform the meaning of a contract's unambiguous language. But courts may not rely on evidence of surrounding circumstances to make the language say what it unambiguously does not say.

*First Bank v. Brumitt*, 519 S.W.3d 95, 110 (Tex. 2017) (internal citation omitted).

If we determine the Kempner Contract's meaning is ambiguous, we must remand for a jury to determine its meaning as a factual issue; but if we determine it is unambiguous, we will determine its meaning as a matter of law. *URI*, 543 S.W.3d at 766. In doing so, we will not consider any party's actual intent, but the intent that is expressed in the written document. *Wagner v. Apache Corp.*, 627 S.W.3d 277, 285 (Tex. 2021).

**3. The Two Contested Terms of the Kempner Contract**

The Kempner Contract sets forth payment obligations in section 2.03 (Treated Water Costs) and section 2.05 (O&M Expenses), which contain formulas for calculating proportional costs charged to Kempner. Central Texas contends the trial court erred when interpreting the formulas set forth in each section. Central Texas argues the clear intent of the contract, at the time of its execution, requires "Kempner to pay a proportional share of Treated Water Costs and O&M Expenses based upon the amount of water delivered to it from the Water Treatment Plant in the Existing System as a proportional share of the water delivered to all customers from the Water Treatment Plant." In other words, it argues, "[i]f three-fourths of the water treated at the Water Treatment Plant was delivered to Kempner in a given month, the Contract contemplates that

Kempner would pay three-fourths of the Treated Water Costs and three-fourths of the O&M Expenses for that month." It contends this method will ensure that "Kempner pays its proportional share of the costs of operation of the Water Treatment Plant and Existing System based upon the amount of treated water it received from the Water Treatment Plant." It argues the same limitation applies to both sections. ) Countering, Kempner argues that Central Texas asks this Court to rewrite the contract by adding words that were not otherwise included in the parties' agreement.

Given that sections 2.03 and 2.05 are at the heart of this dispute, we construe each section in turn.

**a. Section 2.03**

The parties advance competing interpretations of section 2.03 but neither assert it is ambiguous. As a threshold issue, we agree. Consequently, we are prohibited from reviewing extrinsic evidence "for the purpose of creating an ambiguity or to give the contract a meaning different from that which its language imports." *URI*, 543 S.W.3d at 764. Instead, we must interpret the plain meaning of the contractual terms. *Wagner*, 627 S.W.3d at 285. In doing so, we must construe words "in the context in which they are used," see *URI*, 543 S.W.3d at 764, and we "cannot interpret a contract to ignore clearly defined terms." *FPL Energy, LLC v. TXU Portfolio Mgmt. Co., L.P.*, 426 S.W.3d 59, 64 (Tex. 2014).

Section 2.03 consists of one paragraph with seven continuous sentences. Given section 2.03's length, we will consider each sentence individually, and where defined terms are included, we also reference those terms. Section 1.01 of the Kempner Contract provides a list of terms and phrases that shall be followed, "unless the context clearly shows otherwise." Here, as it happens, there are multiple times when a defined term is nested within another defined term, all occurring within a single sentence.

### *i. The first sentence*

> Payment of Treated Water Cost. [Kempner] agrees to pay Central Texas, on a monthly basis, the actual cost per thousand gallons of treated water it receives at the Point of Delivery, being the cost to produce, treat, and deliver said water to the Point of Delivery.

By its plain terms, the first sentence establishes that Kempner will: (1) pay to Central Texas (2) on a monthly basis (3) the cost to produce, treat, and deliver water to the Point of Delivery (as that term is specifically defined). Adding meaning to the first sentence, the term "Point of Delivery," is defined as follows:

> *"Point of Delivery"* means the point designated in this Contract or by subsequent agreement designating where water will be delivered by [Central Texas] to [Kempner]. At this time, Point of Delivery is the metered outlet at the Ivy Mountain Tank Site. If the Parties close under the Sales Agreement, the Point of Delivery will be changed to a metered inlet to be constructed on the State Highway 195 Pump Station Site in a location mutually agreed upon by [Central Texas] and [Kempner] as provided in Item No. 7 of Steven D. Kallman's Project Cost Estimate dated October 6, 2004. The Point of Delivery shall not be moved to the State Highway 195 Pump Station Site prior to closing under the Sales Agreement. . . . When treated water is deliverable to [Kempner] at the State Highway 195 Pump Station Site, water will be delivered by [Central Texas] to [Kempner] through the [Central Texas] meter and then into [Kempner's] System though an air gap into the 2.0 million gallon storage tank.

Based on the mandatory definition, the Point of Delivery described in section 2.03 was subject to change if the parties closed on a Sales Agreement that was being negotiated at the time, wherein Kempner would purchase a portion of Central Texas's system—including the Ivy Mountain Tank Site. If the parties closed under the sales agreement, the new Point of Delivery would be changed to a metered inlet to be constructed at what would be the new western-most part of the transmissions system still owned by Central Texas.

### *ii. The Second Sentence.*

Returning to section 2.03, the second sentence describes the items included in treated water costs, as follows:

> The cost of treated water shall be based upon the actual calculated costs for chemicals and Energy Costs, including energy costs associated with pumping raw water, energy costs incurred in running equipment in the Water Treatment Plant, and energy costs incurred in pumping treated water to the Point of Delivery.

Because "Energy Costs" and "Water Treatment Plant" are both defined terms, we must turn to section 1.01 for their meaning. And even so, other defined terms to include, "New Facilities" are included within the definition of "Energy Costs":

> *"Energy Costs"* means the amounts paid by [Central Texas] for electrical energy required to operate the Existing System only. Energy costs are limited to those energy costs associated with the withdrawal of water from Stillhouse, operating the existing Water Treatment Plant, and pumping water from the existing Water Treatment Plant at its current capacity via the high service pumps, same being included in the cost [Kempner] pays per 1,000 gallons of water per Section 2.03 Payment of Treated Water Cost. Energy Costs shall not include energy expenses for any New Facilities.

The definition of "Energy Costs" adds in three more definitions that must be referenced as follows:

> *"Existing System"* shall mean and include the existing water intake structure, the Water Treatment Plant at its current capacity, the existing storage facilities, pump stations and transmission mains, lighting, and all other facilities currently operated by [Central Texas].
>
> The definition of "Existing System" explicitly excluded "New Facilities".
>
> *"Water Treatment Plant"* means those existing facilities required to receive raw water, treat it, and deliver the treated water into the plant clearwell, including all vessels, mixing equipment, filters and chlorination equipment associated therewith."
>
> *"New Facilities"* means any new facilities constructed by [Central Texas] after the date of this Contract including, but not limited to, any new intake structure, new storage facilities, new pump stations, new transmission mains, a new plant or expansions at the location of the current Water Treatment Plant, [and] a new treatment plant at another location[.]

In short, "Energy Costs" were explicitly limited to those costs "associated with the withdrawal of water from Stillhouse, operating the existing Water Treatment Plant, and pumping water from the existing Water Treatment Plant at its current capacity via the high service pumps."

Also, the contract provided that "[e]nergy [c]osts shall not include energy expenses for any New Facilities." The "Existing System" was defined as "the existing water intake structure, the Water Treatment Plant at its current capacity, the existing storage facilities, pump stations and transmission mains, lighting, and all other facilities currently operated by [Central Texas]." The definition of that system explicitly excluded "New Facilities."

#### *iii. The Third Sentence*

In the third sentence, the parties agreed that Kempner's payment would be based on the volume of water passing through a meter at the Point of Delivery: "Payment will be based on the metered usage of treated water by [Kempner] at the Point of Delivery."

#### *iv. The Fourth Sentence*

The fourth sentence states:

> The production costs charged to [Kempner] will be prorated based on the annual number of gallons of treated water received by [Kempner] as a percentage of the total number of gallons of treated water received by all of Central Texas's customers.

Here, the parties agreed that Kempner's payment obligation would be based on a percentage of Central Texas's actual costs; and that percentage is found by dividing the amount of treated water Kempner receives by the amount of treated water received "by all of [Central Texas]'s customers." We determine that a plain reading of this fourth sentence, read in context, clearly sets up a fraction wherein the amount of treated water received by Kempner, as measured by the meter located at the Point of Delivery, is used as the numerator of the formula and the total amount of treated water received by "all of [Central Texas]'s customers" defines the denominator.

Notably, by the plain wording of the fourth sentence, the denominator of the formula is not set as the total amount of water produced by the Water Treatment Plant, nor is it the amount of water delivered to customers who are all serviced by that plant, nor those from certain facilities.

Also, the denominator is not limited to a specifically defined set of customers. Rather, customers are defined as "treated water received by all of [Central Texas]'s customers." Certainly, the parties could have agreed to use any of those defined limitations—or some other—when setting forth the denominator in the formula, but they did not. Instead, the production costs are prorated "as a percentage of the total number of gallons of treated water received by all of [Central Texas]'s customers."

#### *v. The Fifth, Sixth, and Seventh Sentences*

> Payment of production costs will be based upon actual costs billed monthly and then the actual production cost attributable to [Kempner] will be verified and corrected or revised, as necessary at the end of the fiscal year of [Central Texas]. [Kempner] will receive either a refund or a bill as a result of any such correction. Each refund or bill will be itemized and will contain such explanatory notes and backup invoices, receipts and documentation as may be required in order to support the annual correction.

The remaining three sentences of section 2.03 establish that Kempner would be billed monthly and that Central Texas would issue an end of fiscal year correction, if necessary, based upon annual numbers. Central Texas argues that the language of these three sentences shows that the parties intended Kempner to pay a percentage of Central Texas's actual costs directly proportional to the percentage of water it takes from the Water Treatment Plant. We disagree. This part of section 2.03 states that "[p]ayment of production costs will be based upon actual costs billed monthly and then the actual production cost attributable to [Kempner] will be verified and corrected or revised . . . ." This provision simply provides for an annual correction intended to check the monthly amounts paid by Kempner against the annual data. The language of this sentence mirrors the earlier parts of section 2.03, stating that Kempner's payment will be "based upon" Central Texas's actual costs (indicating that Central Texas's actual costs are a mere starting point); it also distinguishes Central Texas's actual costs from those that are "attributable to

[Kempner]."

In construing section 2.03 as a whole, Central Texas argues that because only one water treatment plant existed when the Kempner Contract was executed, the intent of the parties was to use the volume of water delivered to all of Central Texas's customers from the Water Treatment Plant as the denominator in the percentage fraction used to determine Kempner's share of costs under section 2.03. It argues the Water Treatment Plant was the only facility from which treated water could be delivered to Kempner or any other customer of Central Texas when the 2005 contract was executed. Thus, it contends, the full and clear intent of the parties was that Kempner would pay a proportional share of Treated Water Cost based upon the total amount of treated water delivered to Kempner from the Water Treatment Plant as a percentage of the total amount of water delivered to all customers of Central Texas from the Water Treatment Plant.

But our task is to determine the intent of the parties as it is expressed in the actual language of the contract, not what one party claims it intended but did not say. *Gilbert Texas Constr.*, 327 S.W.3d at 127. Nothing in the plain language of section 2.03 indicates the denominator of the formula would be limited to only customers of the existing facilities or to customers of the Water Treatment Plant only. Instead, section 2.03 provides that production costs will be prorated based on the annual number of gallons of treated water received by Kempner as a percentage of the total number of gallons of treated water received by "all of [Central Texas]'s customers." *See RSUI Indem. Co. v. The Lynd Co.*, 466 S.W.3d 113, 124 (Tex. 2015) (defining "all" to mean "the whole number, quantity, or amount" or "the whole of"). We are prohibited from construing undefined words to mean things they do not ordinarily mean. *Id.*

Furthermore, as evidenced by numerous other provisions within the contract, the parties clearly anticipated at least the possibility that new customers would be added over time. For

example, section 2.01(B) allowed Central Texas to add "new customers" located west of the Point of Delivery, provided that Central Texas did not create a transmission demand that would exceed the Water Treatment Plant's capacity or diminish the water delivery available to Kempner. There is also evidence that the parties anticipated at least the possibility that Central Texas would construct an additional plant in the future. For example, the Kempner Contract explicitly defines "New Facilities" as ". . . any new facilities constructed by [Central Texas] after the date of this Contract including, but not limited to, any new intake structure, new storage facilities, new pump stations, new transmission mains, a new plant or expansions at the location of the current Water Treatment Plant, a new treatment plant at another location, and improvements constructed after the date of this Contract . . . ." Other definitions in the Kempner Contract also referred to New Facilities, including the definitions of "Energy Costs," "Existing System," and "O&M Expenses." Also, Lee Kelley, Central Texas's general manager, testified that Central Texas's initial plans for the Doc Curb plant were made, but then abandoned, as early as the year 2000—five years before the Kempner Contract was signed.

Central Texas next argues that this interpretation of section 2.03, coupled with the change in circumstances (the addition of customers from the Doc Curb Plant) requires Central Texas's other customers to subsidize the water received by Kempner, in violation of Article III, § 52 of the Texas Constitution. Article III, § 52 of the Texas Constitution provides, in relevant part, as follows:

> . . . the Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company.

TEX. CONST. art. III, § 52(a).

Central Texas provides no authority, and we are not aware of any, which would cause us

to determine that its business transactions with individual customers are akin to those customers lending their credit or granting public money to each other. *See* TEX. R. APP. P. 38.1(i). Further, during oral argument, Central Texas stated that Kempner was the only one of its customers that had cost-sharing provisions such as section 2.03 in its contract; the remainder of Central Texas's customers pay a flat rate per thousand gallons of water received. Kempner also points out, and we agree, that Central Texas wholly failed to provide any evidence or support to the argument that cities were financially subsidizing Kempner by the plain wording of the contract at issue.

Finally, Central Texas argues that inclusion of all customers to the production cost denominator calculates a payment to be made by Kempner that "has no bearing on the actual Treated Water Costs." We disagree. Central Texas's actual cost to produce, treat, and deliver water is merely the starting point, or baseline, to which the percentage described in section 2.03 is applied. Per other terms, which are not at issue here, additional payments and contributions are required. Central Texas asks this court to add words or to strike language from section 2.03 based on the fact that new facilities were built which increased the number of customers served. This runs counter to our contract construction principles and ignores the fact that we may not rewrite the parties' contract, nor add to its language. *See In re Davenport*, 522 S.W.3d at 457.

**b. Section 2.05**

Section 2.05, which is far lengthier, reads in relevant part, as follows:

> Operation and Maintenance Expenses. [Kempner] will also pay monthly to [Central Texas] a percentage of the actual Operation and Maintenance Expenses (O&M) for the Existing System for the previous calendar month, pursuant to the separate cost accounting for Existing System components maintained by [Central Texas]. O&M is defined specifically in the definition section of this Contract. The percentage of O&M to be paid by [Kempner] shall be calculated by dividing the volume of treated water delivered to [Kempner] by the total volume of treated water delivered to all customers of [Central Texas] and multiplying by 100; PROVIDED, HOWEVER, that in the event the foregoing calculation results in a percentage of O&M to be paid by [Kempner] that is less than 42%, then [Kempner] shall pay exactly 42% of

O&M costs of the Existing System subject to adjustment . . .

The remainder of section 2.05 discusses a scenario where Kempner's normal 42% minimum O&M contribution might be reduced based upon factors not relevant to this discussion.

Although the parties again advance competing interpretations of section 2.05, neither assert it is ambiguous, and we agree. As a result, and as stated earlier, we must interpret the plain meaning of the contractual terms. *Wagner*, 627 S.W.3d at 285. In doing so, we must construe words "in the context in which they are used," see *URI*, 543 S.W.3d at 764, but we "cannot interpret a contract to ignore clearly defined terms." *FPL Energy*, 426 S.W.3d at 64.

O&M Expenses are defined as follows:

> . . . [A]ll direct costs and expenses incurred by [Central Texas] for general overhead expenses relating to the Existing System, specifically including reasonable amounts for: the total annual cost of salaries; all transportation costs; all office expenses; telephone charges; insurance premiums; all taxes, dues; equipment rentals; consumable and operating supplies except chemicals; accounting and legal fees; engineering fees, conferences, education and certification of employees, managers and Board members; non-capital repairs to the Existing System; maintenance supplies and equipment; independent contractor fees for non-capital repairs; SEP Retirement Account payments; TCEQ/EPA Monitoring Requirements and costs; and solid waste expenses.

The definition of O&M Expenses also includes a list of excluded costs and expenses.

Much of the same analysis from section 2.03 applies here. The introductory sentence of section 2.05 makes it abundantly clear that Kempner is only required to monthly pay, "a percentage of" Central Texas's O&M Expenses related to the Water Treatment Plant. Further details are then provided regarding the method of calculating the required percentage. Like section 2.03, this section helpfully includes a specifically worded formula used to find the percentage: "by dividing the volume of treated water delivered to [Kempner] by the total volume of treated water delivered to all customers of [Central Texas] and multiplying by 100 . . . .]" Like we did with regard to section 2.03, we interpret this formula according to its plain language and determine that

Kempner's payment obligation under this section should be found by dividing the volume of water it receives by the total volume of treated water delivered to all of Central Texas's customers.

Of particular interest in this section is the provision found after the formula, where the contract provides for a situation where Kempner might actually be required to pay more than its proportional share of the cost of O&M Expenses. In the event that Kempner's calculated share of O&M Expenses was lower than 42%, Kempner's payment obligation to Central Texas would be set at exactly 42%. This is an example where—this time to Central Texas's benefit—Kempner's payment obligation would not directly fall in line with the proportion of water it received in relation to Central Texas's other customers. This provision further demonstrates that this was a complicated, long-term agreement, made between sophisticated parties, each of whom was able to—and in fact did—insert provisions to protect against certain risks. Section 2.05 includes one example of a risk to Central Texas that it mitigated by setting a floor for Kempner's O&M Expense payment. When read in context with the entire agreement, it is not unreasonable to conclude the parties' intent was fully expressed within the agreement by the actual words chosen. *See Piranha Partners*, 596 S.W.3d at 743; *URI*, 543 S.W.3d at 763. In like manner, sections 2.03 and 2.05 both prescribe that the volume of water delivered to *all of Central Texas's customers* is used in the denominator of each formula, respectively, to calculate Kempner's payment obligations.

As a result of the foregoing, we overrule Central Texas's challenge to the interpretation of sections 2.03 and 2.05 and affirm the trial court's summary judgment rulings on those grounds.

**B. Issue Two: Whether the trial court erred in striking certain evidence**

As a sub-issue under the analysis of the trial court's summary judgment ruling, Central Texas argues the trial court erred in striking evidence and not considering it for the purposes of the summary judgment motions.

### 1. Standard of Review

Evidentiary rulings are reviewed for abuse of discretion. *U-Haul Int'l, Inc. v. Waldrip*, 380 S.W.3d 118, 132 (Tex. 2012); *DeAnder & Felhaber, LP v. Montgomery*, 615 S.W.3d 352, 356 (Tex. App.—El Paso 2020, pet. denied). A trial court abuses its discretion when it rules "without regard for any guiding rules or principles." *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 754 (Tex. 1995). "An appellate court must uphold the trial court's evidentiary ruling if there is any legitimate basis for the ruling." *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998). And an appellate court should not reverse a trial court for an erroneous evidentiary ruling unless the error probably caused the rendition of an improper judgment. *Id.* (citing TEX. R. APP. P. 44.1). In summary, and as we have said before, a party asserting that a trial court's evidentiary ruling should be reversed must show: (1) the trial court erred in admitting or striking evidence; (2) the error was regarding evidence that was controlling on a material issue dispositive of the case and was not cumulative; and (3) the error probably caused rendition of an improper judgment in the case. *See Hall v. Domino's Pizza, Inc.*, 410 S.W.3d 925, 929 (Tex. App.—El Paso 2013, pet. denied) (citing *Texas Dep't of Transp. v. Able*, 35 S.W.3d 608, 617 (Tex. 2000).

### 2. Analysis

During the litigation of this case, Kempner raised multiple objections to two affidavits filed by Central Texas and signed by its general manager, Lee Kelley. First, Kempner raised twelve objections to Lee Kelley's first affidavit, which was filed as an exhibit to Central Texas's motion for summary judgment. Second, as joined by Lampasas, Kempner raised two objections to Lee Kelley's second affidavit, which was filed in support of Central Texas's response to Kempner's and Lampasas's motions for summary judgment. Many of Kempner's objections are rooted in the best evidence rule and directed at instances in the affidavits where Kelley referred to or explained

provisions of the Kempner Contract. Many others were based on Kempner's allegation that the affidavits contained conclusory statements.

Here, although Central Texas contends the trial court erred in sustaining Kempner's objections to its evidence, it fails to identify how the error occurred with regard to evidence that was controlling on a material issue dispositive of the case that was not cumulative, nor does it explain how the error probably caused rendition of an improper judgment.[11] In failing to do so, Central Texas deprived Kempner of any meaningful opportunity to respond. Of note, Kempner raised this omission in its brief on the merits, but Central Texas still did not address these two requirements in its reply. As a result, even if we assume, without deciding, that the trial court ruled without regard for any guiding rules or principles in sustaining Kempner's objections, Central Texas's failure to even address whether such error probably caused an improper judgment would require us to perform our own independent review of the record, without the aid of proper briefing, to determine whether any error was reversible.

Furthermore, Central Texas lists the purposes of Lee Kelley's affidavit: (1) to prove up the Kempner Contract; (2) to establish that only one plant existed at the time the Kempner Contract was executed; (3) to establish that a New Facility came online in 2012; and (4) to calculate the difference between the amount billed by Central Texas and the amount paid by Kempner. None of these purposes appear to be disputed by Kempner, nor do any of them address the central issue in this appeal, which is the interpretation of unambiguous language in the Kempner Contract. Central Texas even concedes in its brief that, because "all parties agree that the [Kempner] Contract is unambiguous, . . . Kelley's incidental comments about the meaning of [contractual] terms is of no consequence and can readily be discarded." We determine that, even if the trial court erred in

[11] TEX. R. APP. P. 38.1

sustaining one or more of Kempner's objections, Central Texas has not even alleged—much less shown—how any error probably caused the rendition of an improper judgment in this case.[12]

Accordingly, we overrule Central Texas's second issue.

### C. Issue Three: Whether the trial court erred in denying Central Texas's Motion to Strike Lampasas's Petition in Intervention

Central Texas next argues that the trial court erred in denying its motion to strike Lampasas's petition to intervene.

#### 1. Standard of Review

A motion to strike an intervention is addressed to the sound discretion of the trial court. *Mendez v. Brewer*, 626 S.W.2d 498, 499 (Tex. 1982). As a result, we review the denial of a motion to strike an intervention for abuse of discretion. *See Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 657 (Tex. 1990).

#### 2. Applicable Law

Texas Rule of Civil Procedure 60 provides that "[a]ny party may intervene by filing a pleading, subject to being stricken out by the court for sufficient cause on the motion of any party." TEX. R. CIV. P. 60. The Supreme Court of Texas has held that a party with a justiciable interest in a pending suit may intervene under Rule 60 as a matter of right. *Nghiem v. Sajib*, 567 S.W.3d 718, 721 (Tex. 2019). Lampasas's standing to intervene turns on the same analysis—whether it has a justiciable interest in the outcome. *See Sneed v. Webre*, 465 S.W.3d 169, 180 (Tex. 2015). "The issue of standing focuses on whether a party has a sufficient relationship with the lawsuit so as to have a 'justiciable interest' in its outcome . . . ." *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 848 (Tex. 2005). Therefore, whether the trial court abused its discretion in denying Central Texas's motion to strike Lampasas's intervention turns on whether Lampasas has a justiciable

[12] TEX. R. APP. P 44.1(a)(1)

interest in this suit.

Lampasas argues it has a justiciable interest in this suit because its contract with Kempner and its contract with the Brazos River Authority and Central Texas are closely intertwined with the Kempner Contract, such that the result of this litigation will have a significant impact on Lampasas. We agree. A significant portion of the water that Central Texas delivers to Kempner goes on to Lampasas.[13] Accordingly, Kempner passes on to Lampasas a significant share of the Production Costs and O&M Expenses Kempner pays to Central Texas for that water. Although the relationship between Kempner and Lampasas is directly handled under a separate contract (the Lampasas/Kempner Contract), Central Texas is aware of the arrangement, as evidenced by the reference to Kempner in the BRA/CTW/Lampasas Contract, where Lampasas assigns some of its water rights to Central Texas so that Central Texas can treat the water and deliver it back to Lampasas, via Kempner. The Kempner Contract itself was part of a settlement of prior litigation between Kempner and Central Texas, a lawsuit in which Lampasas also successfully intervened. Finally, under the Lampasas/Kempner Contract, Lampasas requires Kempner to enforce its contract with Central Texas. All of these facts taken together show that Lampasas has a contractual relationship with Kempner which is impacted by the Production Costs and O&M Expenses assessed to Kempner for treated water that is supplied to Lampasas. Thus, we cannot say the trial court abused its discretion when it found that Lampasas had a justiciable interest in the outcome of the litigation. We need not decide whether the reference to Lampasas in the Kempner Contract raises Lampasas to the level of being a third-party beneficiary to the Kempner Contract.

Accordingly, we overrule Central Texas's third issue.

[13] Of the 7.68 million gallons per day that Kempner is entitled to receive from Central Texas, Lampasas is entitled to receive 4.84 million gallons per day, or approximately sixty-three percent (63%).

## IV. CONCLUSION

The trial court's judgment is affirmed in all respects.

GINA M. PALAFOX, Justice

March 31, 2022

Before Rodriguez, C.J., Palafox, and Alley, JJ.