Opinion issued December 29, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-21-00721-CV

SIANA OIL & GAS CO. LLC, Appellant

V.

WHITE OAK OPERATING COMPANY, LLC AND WHITE OAK RESOURCES VI, LLC, Appellees

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On Appeal from the 164th District Court
Harris County, Texas
Trial Court Case No. 2015-45224

MEMORANDUM OPINION

Appellant, Siana Oil and Gas Co. LLC ("Siana"), challenges the trial court's rendition of summary judgment in favor of appellees, White Oak Operating Company, LLC ("White Oak Operating") and White Oak Resources VI, LLC

("White Oak Resources") (collectively, "White Oak"), in White Oak's suit against Siana for breach of contract, a declaratory judgment, and injunctive relief. In four issues, Siana contends that the trial court erred in failing to strike White Oak's summary-judgment motion, striking certain documents of Siana's proffered experts, sustaining certain of evidentiary objections made by White Oak, and granting summary judgment in favor of White Oak.

We affirm in part and reverse and remand in part.

Background

This is the second appeal that we have heard in this case.[1] In the first appeal, Siana challenged the trial court's rendition of summary judgment in favor of White Oak, and this Court reversed the trial court's judgment and remanded the case to the trial court for further proceedings consistent with our opinion.[2]

In White Oak Operating's fourth amended petition and White Oak Resources's second amended petition in intervention, White Oak alleged that in

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1 *See Siana Oil & Gas Co. LLC v. White Oak Operating Co., LLC*, No. 01-18-00952-CV, 2020 WL 6140177, *1–6 (Tex. App.—Houston [1st Dist.] Oct. 20, 2020, no pet.) (mem. op.).

2 *See id.* at *6 (holding trial court erred in denying Siana's motion for extension of time to file summary-judgment response and reversing trial court's judgment). To the extent necessary, we take judicial notice of the appellate record filed in the first appeal in discussing the trial court proceedings in this case. *See Harris v. Kareh*, No. 01-18-00775-CV, 2020 WL 4516878, at *8 n.17 (Tex. App.—Houston [1st Dist.] Aug. 6, 2020, pet. denied) (mem. op.) ("An appellate court may take judicial notice of its own records in the same or related proceedings involving the same or nearly the same parties.").

2013, Siana, an oil and gas exploration and operating company, bought an approximately 44% working interest in the oil and gas properties on the South Callaghan Ranch in Webb County, Texas (the "South Callaghan properties") from certain Exxon/Mobil entities ("Mobil"). This acquisition included land subject to a Joint Operating Agreement ("JOA"),[3] which governed the rights and obligations of the operator and non-operator of the South Callaghan properties, including the expenses that the operator could charge to the non-operator, i.e., Siana, in joint interest billings.

According to White Oak, when Siana purchased Mobil's interest in the South Callaghan properties, PetroPoint Energy Operating, LLC ("PetroPoint") was the operator under the JOA. In May 2014, White Oak Resources bought PetroPoint's interest and became the operator of the South Callaghan properties. In August 2014, White Oak Resources became the operator of the South Callaghan properties under the JOA.

White Oak explained that the JOA required "Siana, as a non-operator," to "pay to White Oak [Resources]," as operator, "certain expenses for the[] wells within

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[3] "An operating agreement is a contract typical to the oil and gas industry whose function is to designate an operator, describe the scope of the operator's authority, provide for the allocation of costs and production among the parties to the agreement, and provide for recourse among the parties if one or more default in their obligations." *Seagull Energy E & P, Inc. v. Eland Energy, Inc.*, 207 S.W.3d 342, 344 n.1 (Tex. 2006) (internal quotations omitted).

thirty (30) days of receipt of the joint billing expenses." Specifically, the JOA required Siana to "pay a fixed rate of $1,400 per active well." "The fixed rate [wa]s adjusted on April 1 of each year by multiplying the rate currently in use, by the percentage increase or decrease recommended by [the Council of Petroleum Accountants Societies ("COPAS")] each year."

According to White Oak, when White Oak Resources took over as operator for the South Callaghan properties, it retained White Oak Operating to perform certain duties for White Oak Resources under a 2012 Contract Operating Agreement ("COA"). Under the COA, White Oak Operating performed the operator's day-to-day duties and services under the JOA.

White Oak further alleged that the wells that it operated under the JOA produced oil, natural gas liquids, and residue gas. And White Oak collected oil from the wells in tanks at or near the well site. In keeping with the JOA, White Oak Operating submitted joint interest billings to Siana for certain operating expenses. From August 2014 through November 2014, Siana paid the joint interest billings in full, sending a check payable to White Oak Operating each month.

In December 2014, Siana stopped paying the joint interest billings submitted by White Oak Operating. In May 2015, Siana proposed to reduce the fixed rate, as adjusted, under the JOA from $2,285.36 per well to $1,000 per well. But White Oak never accepted Siana's proposal.

White Oak eventually notified Siana that it was in default under the JOA, and in December 2014, White Oak began charging Siana's account on a monthly basis for operating expenses, totaling $2,700,605.14. By August 2015, Siana still had not paid White Oak for its share of the expenses owed under the JOA. Thus, White Oak brought a claim against Siana for breach of contract and sought a declaration of its rights under the JOA as well as attorney's fees and injunctive relief.

On October 21, 2016, the trial court signed an agreed docket control order that required the parties to designate all expert witnesses no later than November 28, 2016, file "all dispositive motions and pleas" and all amended and supplemental pleadings by January 13, 2017, and complete discovery by January 16, 2017.

On January 13, 2017, Siana filed an amended answer and amended counterclaim in which it generally denied the allegations in White Oak Operating's amended petition and White Oak Resource's amended petition in intervention. Siana also asserted the affirmative defenses of waiver and equitable estoppel.

In its amended counterclaim, Siana alleged that White Oak Resources "breached [an] [a]sset [a]greement by failing to obtain Siana's written consent to designate [White Oak Operating] as operator."[4] Siana also asserted that White Oak Resources breached implied covenants owed by a reasonably prudent operator by

[4] No party to this appeal has identified where or whether the asset agreement referred to by Siana can be found in the appellate record.

charging Siana "monthly operating expenses that exceed[ed] the value of the resources produced." Thus, Siana brought counterclaims against White Oak Resources for breach of contract and breach of implied covenants. Siana also alleged a claim against White Oak Resources for unjust enrichment, asserting that White Oak Resources was "unjustly enriched by using Siana's fixed expense to pay for the expenses of its other wells." And Siana alleged a counterclaim for civil conspiracy against White Oak, asserting that White Oak had engaged in a civil conspiracy "to maximize economic return for itself and to the detriment of Siana."

After this Court remanded the case to the trial court following the parties' first appeal, on August 20, 2021, the trial court signed an order resetting trial "for the two[-]week period beginning [November 29, 2021]." The order also provided that "[a]ll previous pre-trial deadlines remain[ed] in effect, unless changed by the [trial] court."

On October 12, 2021, White Oak filed a motion for summary judgment, asserting that it was entitled to judgment as a matter of law on its claims for breach of contract, a declaratory judgment, injunctive relief, and attorney's fees. White Oak also asserted that it was entitled to judgment as a matter of law on Siana's counterclaim for unjust enrichment, and there was no evidence to support Siana's counterclaims for unjust enrichment, breach of contract, breach of implied covenants, and civil conspiracy.

As to its claim for breach of contract, White Oak argued that it was entitled to judgment as a matter of law because a valid, enforceable agreement between the parties existed, White Oak performed all of its obligations under the JOA, Siana breached the JOA by failing to pay its proportionate share of expenses, and White Oak incurred damages. As White Oak explained, it and Siana were parties to the JOA, which was a "valid, enforceable agreement," and White Oak was a party to the COA, "under which White Oak Operating agreed to perform the day-to-day duties and services of the operator under the [JOA]." Under the COA, White Oak Resources gave White Oak Operating "the right to "pursue [the] [c]laims of [White Oak Resources] against third parties, with respect to the [South Callaghan properties] or any oil and gas from the [South Callaghan properties] and all production attributable thereto, including the employment or use of counsel for the prosecution or defense of litigation."

White Oak noted that Siana's president, Tom Ragsdale, conceded in his deposition "that White Oak [wa]s the operator under the [COA]." White Oak also explained that White Oak Resources did not "transfer[] or assign[] the operational duties and responsibilities under the [COA]." White Oak Resources "simply retained White Oak Operating to assist it in the day-to-day operations" of the South Callaghan properties and gave White Oak Operating "certain rights" under the JOA. According to White Oak, Siana waived any complaint about White Oak Operating

serving as operator under the JOA because Siana "wrote four checks to White Oak Operating for Siana's share of the joint interest billing" before it "stopped paying its bills." And by paying White Oak Operating, Siana ratified and consented to White Oak Operating's conduct.

White Oak argued that Siana had breached the JOA "by failing to pay its proportionate share of the expenses associated with the wells" because, as Ragsdale admitted in his deposition, the South Callaghan properties were "losing money," which was not a valid reason for nonpayment.

According to White Oak, it incurred "actual damages in the principal amount of $87,776.86"—the amount that Siana had failed to pay for White Oak's operation of the South Callaghan properties from December 2014 through August 2021. And White Oak was also entitled to contractual pre-judgment interest and post-judgment interest on that amount. Further, White Oak was entitled to recover reasonable and necessary attorney's fees of $432,274.24 "incurred in the prosecution" of its claim, as evidenced by the affidavit of their attorney, which White Oak attached to its summary-judgment motion. White Oak also sought a declaration of it rights under the JOA recognizing its lien and its right to foreclosure and a permanent injunction as to its lien in Siana's interest in the South Callaghan properties.[5]

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[5] In seeking the injunction, White Oak relied on the following provision of the JOA:

> Each party grants to the other parties hereto a lien upon any interest it now owns or hereafter acquires in [o]il and [g]as [l]eases and [o]il and

As to Siana's counterclaims, White Oak argued that it was entitled to judgment as a matter of law on Siana's counterclaim against White Oak Resources for unjust enrichment because there was an express contract—namely, the JOA—that covered the subject matter of Siana's unjust-enrichment counterclaim. White Oak also asserted that Siana had no evidence raising a fact issue on any of the elements of its counterclaims for unjust enrichment, breach of contract, breach of implied covenants, and civil conspiracy, and Siana had "no evidence that it ha[d] been damaged by White Oak's alleged actions."

To prove its damages, White Oak attached to its summary-judgment motion the declaration of Jeffrey Compton, a certified public accountant who was accredited in petroleum accounting by COPAS. Compton calculated the amount of Siana's unpaid joint interest billing interest expenses and offset that amount "by credits issued for proceeds received by White Oak from the sale of Siana's share of oil, natural gas liquids, and residue gas from March 2015 to July 2021" to reach the amount owed by Siana to White Oak for the operation of the South Callaghan

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> [g]as [i]nterests in the Contract Area, and a security interest and/or purchase money security interest in any interest it now owns or hereafter acquires in the personal property and fixtures on or used or obtained for use in connection therewith, to secure performance of all of its obligations under this agreement including but not limited to payment of expenses, interest and fees, the proper disbursement of all monies paid hereunder, the assignment or relinquishment of interest in [o]il and [g]as [l]eases as required hereunder, and the proper performance of operations hereunder.

properties from December 2014 through August 2021. Compton calculated the interest owed by Siana on its unpaid balance according to the rate of interest owed for the delinquent payment of joint billing expenses under the JOA.

In response to White Oak's summary-judgment motion, Siana asserted that White Oak was not entitled to judgment as a matter of law on its breach of contract claim against Siana because White Oak Operating was "not a party to the [JOA] and ha[d] no right[]" to seek its enforcement. Siana also argued that White Oak Resources's attempted assignment of its operational duties and responsibilities under the JOA to White Oak Operating "fail[ed] because the assignment required Siana's consent, which was never requested or received." And Siana asserted that it did not "waive[] its right to consent to the assignment of White Oak Resources's rights and responsibilities as operator to White Oak Operating," did not ratify the contract naming White Oak Operating as the operator, and did not consent to White Oak Operating serving as operator simply by writing checks to White Oak Operating. Further, Siana denied that it had breached the JOA, asserting that it instead acted "within its rights to invoke the renegotiation of the fixed rate[s]." Siana argued that White Oak had been the first to breach the JOA because it had failed to reduce the fixed rates, which made certain wells unprofitable.

As to White Oak's assertion that it was entitled to judgment as a matter of law on its claims against Siana for damages against Siana, Siana argued that fact issues

remained about the amount, if any, that Siana owed White Oak under the JOA because "[i]t appear[ed] Compton," the certified public accountant whose declaration White Oak had attached to its summary-judgment motion, "simply accepted the fixed rates stated in the [joint interest billings] without performing any analysis into whether" the fixed rates were "properly calculated pursuant to the annual COPAS recommendations for percentage increase or decrease" or "whether the specific wells listed in the joint interest billings were 'active wells' for which expenses could be charged." Siana also asserted that White Oak did not meet the elements required to establish that it was entitled to injunctive relief against Siana.

In response to White Oak's summary-judgment motion on Siana's counterclaims, Siana argued that its unjust enrichment claim against White Oak Resources was not barred by the existence of the JOA because the unjust enrichment claim was based on a claim for overpayment. As to White Oak's no-evidence assertions related to Siana's counterclaims for unjust enrichment, breach of contract, breach of implied covenants, and civil conspiracy, Siana asserted that White Oak had not challenged the specific elements of Siana's counterclaims and Siana had raised fact issues on its counterclaims.

Siana attached to its summary-judgment response the declaration of Rock Demarais, who attested that he was a certified public accountant with thirty-two years of experience as an independent oil and gas joint venture auditor. Attached as

an exhibit to Demarais's declaration was a memorandum that he had prepared addressing the "[c]hargeability of [r]ental [c]ompression [s]ervices under 1995 COPAS [f]ixed [f]ee [p]rovision." Siana also attached to its summary-judgment response a report prepared by Richard McKee (the "McKee report"), who stated that he had "conducted many joint interest audits," including review of joint operating agreements and joint interest billings "to identify and analyze expenditures recoverable under the relevant [o]perating [a]greement, addressing whether the operator under the fixed rate operating cost provision can directly charge the owner for rental compression costs."[6] And Siana attached to its summary-judgment response two affidavits executed by its president, Ragsdale, that addressed issues about Siana's rights under the JOA.

White Oak then moved to strike certain evidence attached to Siana's response to White Oak's summary-judgment motion, namely the declarations of Demarais and McKee[7] and the McKee report, because Siana had not identified any experts in its responses to White Oak's request for disclosures and had not designated any experts in accordance with the agreed docket control order's expert-designation

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[6] Siana also filed a first supplemental response to White Oak's summary-judgment motion, to which it attached the declaration of McKee.

[7] White Oak filed a first amended motion to strike in which it moved to strike the declaration of McKee, which Siana had attached to its first supplemental response to White Oak's summary-judgment motion.

deadline. White Oak asserted that once the deadline for expert designation had passed, "expert reports, testimony, and declarations from undesignated experts [were] inadmissible" as summary-judgment evidence. In addition to moving to strike certain summary-judgment evidence attached to Siana's response, White Oak objected to Ragsdale's affidavits, which Siana had attached to its summary-judgment response, asserting that certain paragraphs contained in the affidavits were conclusory.[8]

After White Oak filed its motion to strike, Siana moved to strike White Oak's summary-judgment motion in its entirety, arguing that the trial court should strike White Oak's motion because it asserted the same grounds as a summary-judgment motion filed in 2017 and was untimely.[9]

After a hearing, the trial court signed an order granting White Oak's motion to strike certain evidence attached to Siana's summary-judgment response, finding that Siana had "failed to timely designate" Demarais and McKee as experts and "the deadline to designate experts ha[d] passed." As a result, the trial court concluded that the declarations of Demarais and McKee and the McKee report were "inadmissible as summary[-]judgment evidence and w[ould] not be considered" by

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[8] White Oak also objected the declaration of Demarais and the McKee report. Siana filed a response to White Oak's motion to strike and objections.

[9] White Oak filed a response to Siana's motion to strike its summary-judgment motion.

the trial court in ruling on White Oak's summary-judgment motion. The trial court, in its order, also sustained White Oak's objections to certain paragraphs of Ragsdale's affidavits and concluded that such paragraphs would "not be considered by the [trial] [c]ourt as summary[-]judgment evidence."

In its final judgment, the trial court granted White Oak's summary-judgment motion on its claims against Siana and Siana's counterclaims against White Oak and declared the parties' rights as follows:

> a. White Oak has not transferred or assigned operational duties and responsibilities under the [JOA] and even if it had, Siana . . . ratified White Oak's service as operator under the [JOA] and is judicially estopped from taking any position to the contrary based on its conduct in this lawsuit.
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> b. Pursuant to . . . the [JOA], White Oak holds a valid and subsisting lien on Siana's interests in oil and gas leases and oil and gas interests in the contract area governed by the [JOA], which is described in Exhibit A to the [JOA], which is attached to and incorporated herein for all purposes. . . .
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> c. Under this lien, the [JOA], and at law, White Oak is entitled to 100% of Siana's interest in the oil, gas, and other minerals produced pursuant to the [JOA] . . . until the judgment is satisfied in full and Siana has paid its share of the operating expenses in full, including any future expenses accrued after final judgment is signed herein.
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> d. Pursuant to Siana's failure to pay its share of the joint interest billing expenses and the terms of the [JOA], all liens granted to White Oak by Siana in the [JOA] are hereby foreclosed.
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> e. By virtue of said lien, White Oak may prospectively take all steps and pursue all remedies under the [JOA] and Texas law to satisfy its lien and recover the outstanding indebtedness owed by Siana, including, but not limited to, the foreclosure and sale of Siana's

> oil and gas interests subject to the [JOA] and included within the contract area described in Exhibit A, the sale of which is expressly authorized by . . . the [JOA], of which any proceeds shall be applied to satisfy the amount of the indebtedness owed to White Oak as set out in this judgment.

The trial court also permanently enjoined Siana

> from taking its share of the production in kind from any wells operated pursuant to the [JOA] until th[e] judgment is satisfied in full and Siana has paid its share of the operating expenses in full, including any future expenses accrued after final judgment is signed herein. White Oak shall continue to receive Siana's share of the production in kind from any wells operated pursuant to the [JOA] until Siana's interest is sold at a foreclosure sale or this judgment and any future operating expenses are satisfied in full, whichever occurs first.

As to damages, the trial court awarded White Oak $87,776.86 in actual damages and $45,648.35 in pre-judgment interest. As to attorney's fees and expenses, the trial court awarded White Oak $432,274.24 through the final judgment, "plus an additional $10,000 in the event of an unsuccessful appeal by Siana to the Court of Appeals," and, if White Oak was to succeed in proceedings before the Texas Supreme Court, it was entitled to "an additional $15,000 for the petition for review stage in that court, an additional $45,000 at the merits briefing stage in that court, and an additional $25,000 through oral argument and completion of proceedings in that court." The trial court also found that the attorney's fees it awarded were "equitable and just." Finally, the trial court dismissed Siana's counterclaims against White Oak with prejudice, ordering that Siana take nothing on its counterclaims against White Oak.

Motion to Strike White Oak's Summary-Judgment Motion

In a portion of its first issue, Siana argues that the trial court erred in failing to grant its motion to strike White Oak's summary-judgment motion because White Oak filed the summary-judgment motion after the dispositive-motion deadline set forth in the trial court's agreed docket control order.

Because the record contains no signed order denying Siana's motion to strike, we first consider whether Siana preserved its complaint about its motion to strike for appellate review. To do so, we review the record to determine whether a denial of Siana's motion to strike is implied by the trial court's other rulings. *See* TEX. R. APP. P. 33.1(a) (to preserve complaint for appellate review, record must show that complaint was made to trial court by timely request, objection, or motion and that trial court "ruled on that request, objection, or motion, either expressly or implicitly"); *Bank of Am., N.A. v. Ochuwa*, No. 01-19-00368-CV, 2020 WL 5269416, at *3 (Tex. App.—Houston [1st Dist.] Sept. 3, 2020, no pet.) (mem. op.) (holding complaint about exclusion of plaintiff's business records was preserved where it was clear from context of discussion at trial between parties and trial court as to records' admissibility that, by rendering judgment in favor of defendant, trial court implicitly ruled records were inadmissible).

The reporter's record shows that at the hearing on White Oak's summary-judgment motion, the trial court stated that it would consider Siana's

motion to strike after the parties' arguments on the merits of the summary-judgment motion. But the hearing ended without further discussion by the trial court or the parties regarding Siana's motion to strike. After the hearing, Siana filed an emergency motion to set for submission or a hearing its motion to strike White Oak's summary-judgment motion. A few days later, and on the same date that the trial court signed its final judgment granting White Oak summary judgment, the trial court signed an order denying Siana's emergency motion, noting that Siana's "motion [to strike] was heard" by the trial court on the same date as White Oak's summary-judgment motion. These rulings by the trial court demonstrate that it considered Siana's motion to strike, and in granting White Oak summary judgment, it implicitly denied Siana's motion to strike. Thus, we conclude that this portion of Siana's first issue is preserved for appellate review. *See* TEX. R. APP. P. 33.1(a).

In considering the propriety of the trial court's implicit denial of Siana's motion to strike, we are mindful that trial courts have wide discretion in managing their dockets and enforcing scheduling orders, and they have the authority to change or modify a docket control order to prevent manifest injustice. *See Prince v. Nat'l Smart Healthcare Servs., Inc.*, No. 01-09-00916-CV, 2011 WL 1632165, at *3 (Tex. App.—Houston [1st Dist.] Apr. 28, 2011, no pet.) (mem. op.); *see also* TEX. R. CIV. P. 166; *Clanton v. Clark,* 639 S.W.2d 929, 931 (Tex. 1982) ("[T]he court is given wide discretion in managing its docket, and we will not interfere with the exercise

of that discretion absent a showing of clear abuse."). A trial court abuses its discretion when it acts without reference to any guiding rules or principles or in an arbitrary and unreasonable manner. *City of San Benito v. Rio Grande Valley Gas Co.*, 109 S.W.3d 750, 757 (Tex. 2003).

White Oak filed its summary-judgment motion after the dispositive-motion deadline set forth in the trial court's agreed docket control order but several weeks before the trial setting, and the trial court ruled on the summary-judgment motion a week before the case was set for trial. Notwithstanding the agreed docket control order, though, the trial court would have had the authority to rule on the same issues presented in White Oak's summary-judgment motion a week later, before proceeding with trial. *See JPMorgan Chase Bank, N.A. v. Orca Assets G.P., L.L.C.*, 546 S.W.3d 648, 653 (Tex. 2018) (explaining Texas Rule of Civil Procedure 166(g), which governs pretrial conferences, "authorizes trial courts to decide matters that, though ordinarily fact questions, have become questions of law because reasonable minds cannot differ on the outcome" (internal quotations omitted)); *Audubon Indem. Co. v. Custom Site–Prep, Inc.*, 358 S.W.3d 309, 319 (Tex. App.—Houston [1st Dist.] 2011, pet. denied): *Para-Chem S., Inc. v. Sandstone Prods. Inc.*, No. 01-06-01073-CV, 2009 WL 276507, at *17 (Tex. App.—Houston [1st Dist.] Feb. 5, 2009, pet. denied) (mem. op.); *see also* TEX. R. CIV. P. 166(g). Siana does not identify any harm that resulted from the timing of the trial court's ruling granting

White Oak summary judgment, and because the parties would have had to expend more resources in preparing for trial if the trial court had granted Siana's motion to strike and deferred its ruling by a week, the trial court's denial of Siana's motion to strike ostensibly worked to the parties' benefit. Accordingly, we hold that the trial court did not err in denying Siana's motion to strike White Oak's summary-judgment motion.

We overrule this portion of Siana's first issue.

Motion To Strike Declarations and Report of Undesignated Experts

In the remaining portion of Siana's first issue and in its second issue, Siana argues that the trial court erred in granting White Oak's motion to strike the declarations of Demarais and McKee and the McKee report, which were attached to Siana's summary-judgment response and first-supplemental summary-judgment response, because White Oak did not plead surprise or prejudice in its motion to strike[10] and the trial court, in denying Siana's motion to strike White Oak's summary-judgment motion and granting White Oak's motion to strike, unequally enforced the agreed docket control order.

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[10] Siana's statement of its issue misplaces the burden of proof as to pleading or proof of surprise or prejudice. Because Siana failed to timely designate its experts, Siana, and not White Oak, bore the burden to prove good cause or a lack of unfair surprise or prejudice. *See* TEX. R. CIV. P. 193.6(b); *Fort Brown Villas III Condo. Ass'n v. Gillenwater*, 285 S.W.3d 879, 881 (Tex. 2009) ("A party who fails to timely designate an expert has the burden of establishing good cause or a lack of unfair surprise or prejudice before the trial court may admit the evidence.").

We review a trial court's exclusion of an expert who has not been properly designated for an abuse of discretion. *See Fort Brown Villas III Condo. Ass'n v. Gillenwater*, 285 S.W.3d 879, 881 (Tex. 2009); *Sheller v. Corral Tran Singh, LLP*, 551 S.W.3d 357, 367 (Tex. App.—Houston [14th Dist.] 2018, pet. denied).

The trial court's October 21, 2016 agreed docket control order required Siana to serve its expert designations by November 28, 2016. Each designation had to include the information formally set out in Texas Rule of Civil Procedure 194.2(f),[11] namely,

> (1) the expert's name, address, and telephone number;
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> (2) the subject matter on which the expert will testify;
>
> (3) the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting such information;
>
> (4) if the expert is retained by, employed by, or otherwise subject to the control of the responding party:
>
> > (A) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or

[11] In 2020, the Texas Supreme Court amended Texas Rule of Civil Procedure 194, effective January 1, 2021. *See Cresson Interest, LLC v. Rooster*, No. 02-21-00366-CV, 2022 WL 3904968, at *2 n.3 (Tex. App.—Fort Worth Aug. 31, 2022, no pet.) (mem. op.) (noting recent amendment to Texas Rule of Civil Procedure 194). Provisions regarding expert disclosures are now found in Texas Rule of Civil Procedure 195.5(a). *See* TEX. R. CIV. P. 195.5(a). Because former Texas Rule of Civil Procedure 194.2 was in effect when the trial court signed the agreed docket control order, any citations to rule 194.2 in this opinion are to the former rule.

> prepared by or for the expert in anticipation of the expert's testimony; and
>
> (B) the expert's current resume and bibliography.

TEX. R. CIV. P. 194.2(f).

The agreed docket control order also declared that the "[f]ailure to timely respond [with an expert designation] w[ould] be governed by [Texas Rule of Civil Procedure] 193.6." Texas Rule of Civil Procedure 193.6 prohibits a party who does not timely provide a compliant expert designation from "introduc[ing] in[to] evidence the material or information that was not timely disclosed" unless the trial court "finds that (1) there was good cause for the failure to timely make, amend, or supplement the discovery response; or (2) the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties." TEX. R. CIV. P. 193.6(b); *see also Gillenwater*, 285 S.W.3d at 882 (Texas Rule of Civil Procedure 193.6 applies equally to both summary-judgment and trial proceedings); *Cunningham v. Columbia/St. David's Healthcare Sys., L.P.*, 185 S.W.3d 7, 13 (Tex. App.—Austin 2005, no pet.).

Siana did not move for leave to designate Demarais and McKee as experts after the deadline set forth in the trial court's agreed docket control order. And Siana did not show that it had provided White Oak with either the information required by Texas Rule of Civil Procedure 194.2(f) or an opportunity to depose Demarais or McKee. Siana merely stated, in its response to White Oak's motion to strike, that it

had provided the same documents authored by Demarais and McKee with a previously-filed summary-judgment response.

The discovery rules require complete responses "so as to promote responsible assessment of settlement and prevent trial by ambush." *Alvarado v. Farah Mfg. Co.*, 830 S.W.2d 911, 914 (Tex. 1992). Given Siana's failure to provide all the information required to properly designate Demarais and McKee as experts or the opportunity to depose them, the trial court could have reasonably concluded that Siana failed to satisfy its burden to prove a lack of unfair surprise. *See* TEX. R. CIV. PROC. 193.6(b). Thus, we hold that the trial court did not err in granting White Oaks' motion to strike the declarations of Demarais and McKee and the McKee report that Siana had attached to its summary-judgment response.[12]

We overrule the remainder of Siana's first issue and its second issue.

Evidentiary Objections

In its third issue, Siana argues that the trial court erred in sustaining White Oak's objections to certain paragraphs of the affidavits of Siana's president,

[12] Because Siana has not shown that the trial court erred in either denying Siana's motion to strike White Oak's summary-judgment motion or in granting White Oak's motion to strike the declarations of Demarais and McKee and the McKee report, it has likewise not shown that the trial court unequally enforced the agreed docket control order. We express no opinion about whether Siana's complaint that the trial court unequally enforced the agreed docket control order is cognizable. *See* TEX. R. APP. P. 47.1.

Ragsdale, because "[t]he paragraphs [were] not conclusory."[13] In a portion of its fourth issue, Siana argues that the trial court erred in granting White Oak summary judgment on its damages claim against Siana because the declaration of Compton, which White Oak attached to its summary-judgment motion, did not constitute competent summary-judgment evidence as it was conclusory.

We review a trial court's decision to admit or exclude summary-judgment evidence for an abuse of discretion. *Starwood Mgmt., LLC v. Swaim*, 530 S.W.3d 673, 678 (Tex. 2017); *Holland v. Mem'l Hermann Health Sys.*, 570 S.W.3d 887, 893–94 (Tex. App.—Houston [1st Dist.] 2018, no pet.). A trial court abuses its discretion if it acts without reference to any guiding rules or principles. *Carpenter v. Cimarron Hydrocarbons Corp.*, 98 S.W.3d 682, 687 (Tex. 2002). We will not reverse a trial court's erroneous evidentiary ruling unless the error probably caused the rendition of an improper judgment. *See* TEX. R. APP. P. 44.1(a)(1); *Interstate Northborough P'ship v. State*, 66 S.W.3d 213, 220 (Tex. 2001).

A party must present its summary-judgment evidence in a form that would be admissible at trial. *See* TEX. R. CIV. P. 166a(f); *Fortitude Energy, LLC v. Sooner Pipe LLC*, 564 S.W.3d 167, 178 (Tex. App.—Houston [1st Dist.] 2018, no pet.).

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13 Because we have concluded that the trial court did not err in striking the declarations and report of Siana's undesignated experts as untimely, we do not consider Siana's complaints about the trial court's other evidentiary rulings on the documents the undesignated experts authored. *See* TEX. R. APP. P. 47.1.

Texas law divides defects in summary-judgment affidavits into two categories: (1) defects in form and (2) defects in substance. *Coward v. H.E.B., Inc.*, No. 01-13-00773-CV, 2014 WL 3512800, at *2 (Tex. App.—Houston [1st Dist.] July 15, 2014, no pet.) (mem. op.). Defects in form, which include "objections to hearsay, lack of foundation, lack of personal knowledge, sham affidavit, statement of an interested witness that is not clear, positive direct, or free from contradiction, best evidence, self-serving statements, and unsubstantiated opinions," do not render the evidence legally insufficient. *UT Health Sci. Ctr.–Houston v. Carver*, No. 01-16-01010-CV, 2018 WL 1473897, at *5 (Tex. App.—Houston [1st Dist.] Mar. 27, 2018, no pet.) (mem. op.); *see also Youngstown Sheet & Tube Co. v. Penn*, 363 S.W.2d 230, 234 (Tex. 1962); *Wilson v. Gen. Motors Acceptance Corp.*, 897 S.W.2d 818, 822 (Tex. App.—Houston [1st Dist.] 1994, no writ); *see also Smiley Dental–Bear Creek, P.L.L.C. v. SMS Fin. LA, L.L.C.*, No. 01-18-00983-CV, --- S.W.3d ---, 2020 WL 4758472, at *3 (Tex. App.—Houston [1st Dist.] Aug. 18, 2020, no pet.) (mem. op.). Such evidence is competent but inadmissible. *See Mathis v. Bocell*, 982 S.W.2d 52, 60 (Tex. App.—Houston [1st Dist.] 1998, no pet.). Thus, to preserve a complaint about a defect in form for appeal, the complaining party must present its objections to the trial court and obtain a ruling on its objection. *See* TEX. R. CIV. P. 166a(f) ("Defects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with

opportunity, but refusal, to amend."); *see also Smiley Dental-Bear Creek*, 2020 WL 4758472, at *3 (failure to obtain ruling on objection to defect in form waives objection); *Brown v. Brown*, 145 S.W.3d 745, 751 (Tex. App.—Dallas 2004, pet. denied) (opposing party must be given opportunity to amend affidavit).

In contrast, defects in substance, such as statements in an affidavit that are irrelevant or conclusory, render the evidence legally insufficient. *Stewart v. Sanmina Tex. L.P.*, 156 S.W.3d 198, 207 (Tex. App.—Dallas 2005, no pet.); *see, e.g.*, *McMahan v. Greenwood*, 108 S.W.3d 467, 498 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (relevancy and conclusory objections); *Green v. Indus. Specialty Contractors, Inc.*, 1 S.W.3d 126, 130 (Tex. App.—Houston [1st Dist.] 1999, no pet) (conclusory objection). "Substantive defects are never waived" and may be raised for the first time on appeal because incompetent evidence "cannot be considered under any circumstances." *Mathis*, 982 S.W.2d at 60.

A "conclusory" statement is one that expresses "a factual inference without stating the underlying facts on which the inference is based." *La China v. Woodlands Operating Co., L.P.*, 417 S.W.3d 516, 520 (Tex. App.—Houston [14th Dist.] 2013, no pet.); *see also Arkoma Basin Expl. Co. v. FMF Assocs. 1990–A, Ltd.*, 249 S.W.3d 380, 389 n.32 (Tex. 2008); *LeBlanc v. Lamar State Coll.*, 232 S.W.3d 294, 301 (Tex. App.—Beaumont 2007, no pet.) ("Statements are conclusory if they fail to provide underlying facts to support their conclusions."). An affidavit is

conclusory if it states "a conclusion without any explanation" or asks the fact finder to "take [the affiant's] word for it." *Arkoma Basin Expl. Co.*, 249 S.W.3d at 389. Conclusory affidavits are not sufficient to raise fact issues precluding summary judgment because they are not credible or susceptible to being readily controverted. *La China*, 417 S.W.3d at 520.

As to the affidavits of Ragsdale, which White Oak objected to in the trial court, we recognize that an affidavit from a company officer claiming personal knowledge of the issue and of the company's records can be used as summary-judgment evidence. *See Del Mar Cap., Inc. v. Prosperity Bank*, No. 01-14-00028-CV, 2014 WL 5780302, at *4 (Tex. App.—Houston [1st Dist.] Nov. 6, 2014, no pet.); *Brown v. Mesa Distribs., Inc.*, 414 S.W.3d 279, 287 (Tex. App.—Houston [1st Dist.] 2013, no pet.). "However, such an affidavit is sufficient summary[-]judgment evidence only when it gives detailed accounts of the facts it attests to or when it provides supporting documents which tend to support the statements made." *Brown*, 414 S.W.3d at 287. These requirements stem from the rule that a summary judgment "may be based on uncontroverted testimonial evidence of an interested witness . . . if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted." TEX. R. CIV. P. 166a(c). Testimony "could have been readily controverted" when it "is of a nature which can be effectively countered by

opposing evidence." *Casso v. Brand*, 776 S.W.2d 551, 558 (Tex. 1989). In contrast, an affidavit that states only legal or factual conclusions without providing factual support is not proper summary-judgment evidence because it is not susceptible to being readily controverted. *Brown*, 414 S.W.3d at 287; *see also Frank's Int'l, Inc. v. Smith Int'l, Inc.*, 249 S.W.3d 557, 566 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (explaining conclusory statements and statements of subjective belief or intent without underlying facts cannot be countered and are incompetent summary-judgment evidence).

In challenging the trial court's rulings sustaining White Oak's objections and excluding from its consideration certain paragraphs of Ragsdale's affidavits, Siana does no more than quote the excluded paragraphs from the affidavits and then assert, without citation to relevant authority, that Ragsdale was qualified to testify or "had the requisite knowledge" about the paragraph's subject matter because he is Siana's president and owner. Texas Rule of Appellate Procedure 38.1(i) requires that an appellant's 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). "This is not done by merely uttering brief conclusory statements, unsupported by legal citations." *Tesoro Petroleum Corp. v. Nabors Drilling USA, Inc.*, 106 S.W.3d 118, 128 (Tex. App.—Houston [1st Dist.] 2002, pet. denied); *see also Barham v. Turner Constr. Co. of Tex.*, 803 S.W.2d 731, 740 (Tex. App.—Dallas 1990, writ

denied) (appellant bears burden of discussing his assertions of error). The failure to provide substantive analysis of an issue or cite appropriate authority waives a complaint on appeal. *Marin Real Estate Ptrs., L.P. v. Vogt*, 373 S.W.3d 57, 75 (Tex. App.—San Antonio 2011, no pet.); *Huey v. Huey*, 200 S.W.3d 851, 854 (Tex. App.—Dallas 2006, no pet.); *Cervantes-Peterson v. Tex. Dep't of Family & Protective Servs.*, 221 S.W.3d 244, 255 (Tex. App.—Houston [1st Dist.] 2006, no pet.). Because Siana has failed to provide this Court with appropriate argument, analysis, explanation, and support for its complaint that the trial court erred in sustaining White Oak's objections to certain paragraphs in Ragsdale's affidavits, we hold that Siana has waived its third issue due to inadequate briefing. *See* TEX. R. APP. P. 38.1(i); *M&E Endeavors LLC v. Air Voice Wireless LLC*, Nos. 01-18-00852-CV, 01-19-00180-CV, 2020 WL 5047902, at *7 (Tex. App.—Houston [1st Dist.] Aug. 17, 2020, no pet.) (mem. op.) ("The [appellate] briefing requirements are mandatory . . . .").

As to Siana's complaint that the trial court erred in granting White Oak summary judgment on its damages claim because the declaration of Compton was conclusory, we note that Compton's declaration was attached to White Oak's summary-judgment motion to prove the amount of damages caused by Siana's breach of the JOA. Siana asserts that Compton's declaration is conclusory because the exhibits referenced by Compton in his declaration were not actually attached to

the declaration. But Siana did not raise this objection and obtain a ruling on it in the trial court. *See* TEX. R. CIV. P. 166a(f); *see also Smiley Dental-Bear Creek*, 2020 WL 4758472, at *3. A party's failure to attach documents referenced in an affidavit is a defect in form, not a defect in substance.[14] *See Para-Chem S., Inc.*, 2009 WL 276507 at *15; *Mathis*, 982 S.W.2d at 60. Thus, we hold that Siana did not preserve for our review its complaint about the absence of the exhibits referenced in Compton's declaration.

Summary Judgment

In the remaining portion of its fourth issue, Siana argues that the trial court erred in granting White Oak summary judgment on its claims against Siana because White Oak's summary-judgment motion and the trial court's judgment "conflated" White Oak Operating and White Oak Resources, White Oak was not entitled to a

[14] Texas appellate courts are divided on this issue. Some appellate courts agree with this Court and have concluded that the failure to attach documents referenced in an affidavit is a defect of form, not one of substance. *See, e.g.*, *Sunsinger v. Perez*, 16 S.W.3d 496, 501 (Tex. App.—Beaumont 2000, pet. denied); *Martin v. Durden*, 965 S.W.2d 562, 565 (Tex. App.—Houston [14th Dist.] 1997, pet. denied); *Knetsch v. Gaitonde*, 898 S.W.2d 386, 389–90 (Tex. App.—San Antonio 1995, no writ). But other courts have held that the defect is one of substance. *See, e.g.*, *Olsen v. Comm'n for Lawyer Discipline*, 347 S.W.3d 876, 886 (Tex. App.—Dallas 2011, pet. denied); *Galindo v. Dean*, 69 S.W.3d 623, 627 (Tex. App.—Eastland 2002, no pet.); *Kleven v. Tex. Dep't of Crim. Justice–Inst. Div.*, 69 S.W.3d 341, 345 (Tex. App.—Texarkana 2002, no pet.); *Lee v. Lee*, 43 S.W.3d 636, 640 (Tex. App.—Fort Worth 2001, no pet.); *Rodriquez v. Tex. Farmers Ins. Co.*, 903 S.W.2d 499, 506 (Tex. App.—Amarillo 1995, writ denied); *Ceballos v. El Paso Health Care Sys.*, 881 S.W.2d 439, 445 (Tex. App.—El Paso 1994, writ denied).

permanent injunction, and there was insufficient evidence to support the trial court's award of "conditional appellate [attorney's] fees." In its fifth issue, Siana argues that the trial court erred in granting White Oak summary judgment on Siana's counterclaims against it because Siana's unjust enrichment claim was valid even though "there [was] an express contract between the parties," White Oak's summary-judgment motion was conclusory as to Siana's counterclaims, and Siana "raise[d] fact issues on its counterclaims."

We review a trial court's decision to grant summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). In conducting our review, we take as true all evidence favorable to the non-movant, and we indulge every reasonable inference and resolve any doubts in the non-movant's favor. *Valence Operating*, 164 S.W.3d at 661; *Knott*, 128 S.W.3d at 215. If a trial court grants summary judgment without specifying the grounds for granting the motion, we must uphold the trial court's judgment if any of the asserted grounds are meritorious. *Beverick v. Koch Power, Inc.*, 186 S.W.3d 145, 148 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

To prevail on a matter-of-law summary-judgment motion, a movant has the burden of establishing that it is entitled to judgment as a matter of law and there is no genuine issue of material fact. TEX. R. CIV. P. 166a(c); *Cathey v. Booth*, 900

S.W.2d 339, 341 (Tex. 1995). When a plaintiff moves for a matter-of-law summary judgment on its own claim, it must conclusively prove all essential elements of its cause of action. *Rhône–Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999). When a defendant moves for a matter-of-law summary judgment on the claims against it, it must either: (1) disprove at least one essential element of the plaintiff's cause of action, or (2) plead and conclusively establish each essential element of an affirmative defense, thereby defeating the plaintiff's cause of action. *See Cathey*, 900 S.W.2d at 34; *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995). Once the movant meets its burden, the burden shifts to the non-movant to raise a genuine issue of material fact precluding summary judgment. *See Siegler*, 899 S.W.2d at 197; *Transcont'l Ins. Co. v. Briggs Equip. Tr.*, 321 S.W.3d 685, 691 (Tex. App.—Houston [14th Dist.] 2010, no pet.). The evidence raises a genuine issue of fact if reasonable and fair-minded jurors could differ in their conclusions in light of all of the summary-judgment evidence. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007).

"A no-evidence summary judgment is essentially a pretrial directed verdict, and we apply the same legal sufficiency standard in reviewing a no-evidence summary judgment as we apply in reviewing a directed verdict." *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750–51 (Tex. 2003). To prevail on a no-evidence summary-judgment motion, the movant must establish that there is no evidence to

support an essential element of the non-movant's claim on which the non-movant would have the burden of proof at trial. *See* TEX. R. CIV. P. 166a(i); *Fort Worth Osteopathic Hosp., Inc. v. Reese*, 148 S.W.3d 94, 99 (Tex. 2004); *Hahn v. Love*, 321 S.W.3d 517, 523–24 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). The burden then shifts to the non-movant to present evidence raising a genuine issue of material fact as to each of the elements challenged in the motion. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006); *Hahn*, 321 S.W.3d at 524. A no-evidence summary-judgment may not be granted if the non-movant brings forth more than a scintilla of evidence to raise a genuine issue of material fact on the challenged elements in the motion. *See Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). 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." *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997) (internal quotations omitted). The trial court must grant a no-evidence summary-judgment motion if the movant asserts that there is no evidence of one or more specified elements of the non-movant's claim on which the non-movant would have the burden of proof at trial and the non-movant fails to file a timely response or fails to produce summary-judgment evidence raising a genuine issue of material fact on each challenged element. *See* TEX. R. CIV. P. 166a(i); *Lockett v. HB Zachry Co.*, 285 S.W.3d 63, 67 (Tex. App.—Houston [1st Dist.] 2009, no pet.).

A. Summary Judgment on White Oak's Claims

1. Breach-of-Contract Damages

Siana argues that the trial court erred in granting White Oak summary judgment as a matter of law on White Oak's claim for damages in the amount of $87,776.86 because the summary-judgment evidence "lacked several pieces of information necessary to the damages calculation." Specifically, Siana argues that fact issues remain on the amount of White Oak's damages because Compton did not address whether the fixed rates stated in the joint interest billings sent to Siana "were actually the proper fixed rates," did not confirm that the wells listed in the [joint interest billings] were "'active wells' for which expenses could be charged," and did not explain how the compressor rental charges listed in the joint interest billings were allowed under the JOA. Further, Siana argues that the amount of interest calculated by Compton was not conclusively proven because according to "the JOA, interest does not begin to accrue until [thirty] days after Siana's receipt of the [joint interest billing], but there [wa]s insufficient evidence proving when Siana received the various [joint interest billings]."

Siana made these same complaints in its summary-judgment response, but it did not move to exclude Compton's declaration as incompetent summary-judgment evidence or provide competent expert testimony about any purported error in Compton's calculations. *See* TEX. R. CIV. PROC. 702; *E.I. du Pont de Nemours &*

Co. v. Robinson, 923 S.W.2d 549, 557 (Tex. 1995); *see, e.g.*, *TXI Transp. Co. v. Hughes*, 306 S.W.3d 230, 235 (Tex. 2010) (explaining when party challenges reliability of expert testimony, courts are responsible for ensuring opinion comports with applicable professional standards). "[T]here is a distinction between challenges to an expert's scientific methodology and no evidence challenges where, on the face of the record, the evidence lacked probative value." *City of San Antonio v. Pollock*, 284 S.W.3d 809,817 (Tex. 2009)). "[W]hen a reliability challenge requires the [trial] court to evaluate the underlying methodology, technique, or foundational data used by the expert, an objection must be timely made so that the trial court has the opportunity to conduct this analysis." *Id.*; *see also Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 233 (Tex. 2004).

In questioning the foundational data that Compton used to calculate White Oak's damages, Siana challenges the reliability of Compton's opinion. *See Pollock*, 284 S.W.3d at 817. We cannot evaluate whether Compton used reliable information in calculating White Oak's damages without looking beyond what Compton said in his declaration, but Siana does not identify anything in the record that could raise a fact issue about Compton's calculations. *See Fallon v. MD Anderson Physicians Network*, 586 S.W.3d 58, 75 (Tex. App.—Houston [1st Dist.] 2019, pet. denied) (explaining generally, motions, arguments of counsel, and bare assertions are not evidence). Because Siana failed to properly object to the reliability of Compton's

calculations in the trial court, we hold that Siana did not preserve for appellate review its challenge to White Oak's summary-judgment evidence of damages. *See* TEX. R. APP. P. 33.1; *Pollock*, 284 S.W.3d at 817; *Coastal Transp. Co.*, 136 S.W.3d at 233.

Further, we note that White Oak's summary-judgment evidence of damages included the joint interest billings that Siana had not paid, the affidavit of a corporate representative, and the declaration of Compton in which he applied offsets and calculated interest owed under the terms of the JOA to calculate the total amount of damages owed by Siana. This type of evidence, when uncontroverted, as here, can prove damages as a matter of law. *See, e.g.*, *Sw. Pipe Servs., Inc. v. Sunbelt Rentals, Inc.*, No. 01-15-00124-CV, 2016 WL 888780, at *3 (Tex. App.—Houston [1st Dist.] Mar. 8, 2016, no pet.) (mem. op.) (defendant's outstanding invoices and affidavit of plaintiff's corporate collection manager setting forth total and stating that all lawful offsets, payments, and credits, if any, were applied or accounted for conclusively established amount of damages caused by defendant's breach of contract); *Triton 88, L.P. v. Star Elec., L.L.C.*, 411 S.W.3d 42, 56 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (plaintiff conclusively proved right to recover damages of $105,034.18 from defendant for defendant's breach of contract with evidence of unpaid invoices and affidavits of two corporate representatives showing that plaintiff provided electricity to defendant and calculating total amount that remained unpaid by defendant after offsetting payments). Siana has not pointed to any evidence or

legal authority showing that the trial court erred in concluding that White Oak conclusively proved the amount of its damages. Thus, we cannot say that the trial court erred in concluding that White Oak satisfied its summary-judgment burden in proving the amount of damages caused by Siana's breach of contract.

2. Capacity of White Oak Operating

Siana also argues that the trial court erred in granting White Oak summary judgment on its claim for breach of contract because White Oak Operating did not prove its right to assert a claim against Siana for breach of the JOA.

Whether a party is entitled to sue on a contract is a merits issue that does not affect a court's jurisdiction. *Nasr v. Owobu*, No. 01-20-00631-CV, 2022 WL 3649347, at *7 (Tex. App.—Houston [1st Dist.] Aug. 25, 2022, no pet.) (mem. op.); *Transcont'l Realty Inv'rs, Inc. v. Wicks*, 442 S.W.3d 676, 679 (Tex. App.—Dallas 2014, pet. denied). It is an issue of capacity, which must be raised by verified pleading in the trial court. *Nasr*, 2022 WL 3649347, at *7; *see also* TEX. R. CIV. P. 93(1)–(2) (requiring certain pleadings to be verified by affidavit, including pleadings alleging plaintiff does not have legal capacity to sue or is not entitled to recover in capacity in which it sues); *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 849 (Tex. 2005).

In Siana's amended answer, filed on January 13, 2017—the last date for amending or supplementing pleadings established in the trial court's agreed docket

control order—Siana did not assert lack of capacity as an affirmative defense against White Oak Operating. *See Fawcett v. Grosu*, 498 S.W.3d 650, 658–59 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) ("An amended [pleading] adds to or withdraws from that which was previously pleaded to correct or to plead [a] new matter, and completely replaces and supersedes the previous pleading."); *Elliot v. Methodist Hosp.*, 54 S.W.3d 789, 793–94 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) ("A . . . timely filed amended pleading supersedes all previous pleadings and becomes the controlling [pleading] . . . ."). On November 8, 2021, Siana filed a second amended answer in which it asserted that "White Oak Operating [wa]s not a proper party as it lack[ed] privity with [Siana]." Siana, though, did not verify that pleading or request leave to amend its answer after the deadline set by the trial court's agreed docket control order had passed. *See* TEX. R. CIV. P. 63 (pleadings, responses of pleas offered for filing after such time as may be ordered shall be filed only after obtaining leave of trial court). Thus, the January 13, 2017 amended answer, which is not verified and does not plead that White Oak Operating lacks the capacity to sue Siana, is Siana's live pleading. Because Siana's live pleading does not contain a verified denial challenging White Oak Operating's capacity, it has not preserved its complaint for appellate review.[15] *See Nasr*, 2022

[15] Because we have concluded that Siana did not preserve its argument that White Oak Operating lacked capacity to sue it, we need not address Siana's assertions, based

WL 3649347, at *7; *Nine Greenway Ltd. v. Heard, Goggan, Blair & Williams*, 875 S.W.2d 784, 787 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

3. Injunctive Relief

Siana further argues that the trial court erred in granting White Oak summary judgment as a matter of law on its claim for injunctive relief because White Oak did not show that it had a right to injunctive relief.

Injunctive relief is equitable in nature. *Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407, 423 (Tex. 2011). Before equitable relief can be granted, the party seeking it must show that no adequate remedy of law exists. *See id.*; *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 210 (Tex. 2002); *Cypress Creek EMS v. Dolcefino*, 548 S.W.3d 673, 690 (Tex. App.—Houston [1st Dist.] 2018, pet. denied). But in seeking injunctive relief, White Oak's summary-judgment motion does not allege or show the absence of an adequate remedy of law, as required to establish the equitable relief it sought.

A plaintiff moving for summary judgment on its own claim must conclusively prove all essential elements of its cause of action. *Steel*, 997 S.W.2d at 223; *see also McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 342 (Tex. 1993) ("[S]ummary judgments must stand or fall on their own merits . . . ."). Because

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on that same unpreserved argument, that White Oak Operating is not entitled to damages or attorney's fees. *See* TEX. R. APP. P. 47.1.

White Oak failed to establish all elements of its claim for injunctive relief as a matter of law, we hold that the trial court erred in granting White Oak summary judgment on its claim for injunctive relief.

4. Contingent Appellate Attorney's Fees

Siana next argues that the trial court erred in granting White Oak summary judgment as a matter of law on its claim for contingent appellate attorney's fees because insufficient evidence supported the trial court's award.

According to Siana, White Oak failed to present evidence to support the trial court's award of contingent appellate attorney's fees under the lodestar analysis described in *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 497–98 (Tex. 2019). But the lodestar analysis does not apply to calculate an award of contingent appellate attorney's fees. *Yowell v. Granite Operating Co.*, 620 S.W.3d 335, 355 (Tex. 2020). When the trial court awards contingent appellate attorney's fees in its judgment, "any appeal is still hypothetical" and "[t]here is no certainty regarding who will represent the appellee in the appellate courts, what counsel's hourly rate(s) will be, or what services will be necessary to ensure appropriate representation in light of the issues the appellant chooses to raise." *Id.* Contingent appellate attorney's fees "must be projected based on expert opinion testimony" about the services that the party "reasonably believes will be necessary to defend the appeal and a reasonable hourly rate for those services." *Id.*

In support of its request for conditional appellate attorney's fees, White Oak offered the affidavit of its counsel, Mike Seely, who testified about his general experience and his representation of White Oak. In forming his opinions, Seely explained that he considered the lodestar factors and the attorney's fees incurred by White Oak in the parties' first appeal, then offered his opinion on "a reasonable and customary charge" for his firm's services for any further appeals. Following *Yowell*, we conclude that this evidence, which was uncontroverted, is sufficient to support the trial court's award of contingent appellate attorney's fees to White Oak. *See id.*

Nevertheless, because we are reversing the trial court's ruling granting White Oak summary judgment on its claim for injunctive relief, we also reverse the trial court's award of contingent appellate attorney's fees. *See Prudential Ins. Co. v. Durante*, 443 S.W.3d 499, 515 (Tex. App.—El Paso 2014, pet. denied) (reversing and remanding appellate attorney fee award for redetermination because appellant partially successful on appeal). An appellee is not entitled to recover attorney's fees for work performed on any issue of the appeal where the appellant was successful. *Lynch v. Lynch*, 540 S.W.3d 107, 114 (Tex. App.—Houston [1st Dist.] 2017, pet. denied); *see also Chevron Phillips Chem. Co. L.P. v. Kingwood Crossroads, L.P.*, No. 09-14-00316-CV, 2017 WL 4182292, *10 (Tex. App.—Beaumont Sept. 21, 2017, no pet.) (mem. op.). If a party is entitled to attorney's fees from the adverse party on one claim but not another, the party claiming attorney's fees must segregate

the recoverable fees from the unrecoverable fees. *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 313 (Tex. 2006). Thus, we remand the issue of the amount of appellate attorney's fees for the trial court to determine the reasonable amount of appellate attorney's fees to be awarded to White Oak in light of Siana's partial success in this appeal. *See Smith v. Smith*, 757 S.W.2d 422, 426 (Tex. App.—Dallas 1988, writ denied).

B. Summary Judgment on Siana's Counterclaims

Siana argues that the trial court erred in granting White Oak summary judgment on its counterclaims for unjust enrichment, breach of contract, breach of implied covenants, civil conspiracy, and damages because White Oak's summary-judgment motion was conclusory and Siana's summary-judgment evidence raised fact issues on those counterclaims.

As to its counterclaim for unjust enrichment, Siana argues that the trial court erred in granting White Oak summary judgment because "Texas law is counter" to White Oak's "argument that unjust enrichment is unavailable when a valid, express contract governs the subject matter of the dispute." To support its assertion, Siana cites to authority, including the Texas Supreme Court's decision in *Southwest Electric Power Co. v. Burlington Northern Railroad*, observing that "in some circumstances, overpayments under a valid contract may give rise to a claim for restitution or unjust enrichment." 966 S.W.2d 467, 469 (Tex. 1998). But Siana

does not provide any analysis or argument about whether or how its own circumstances would permit recovery under an unjust enrichment theory. Texas Rule of Appellate Procedure 38.1(i) requires an appellant's brief to "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). Where an appellant fails to advance a viable argument on appeal with citations to appropriate authority, an appellate court is not required to independently review the record and applicable law to determine whether the alleged error occurred. *Happy Harbor Methodist Home, Inc. v. Cowins*, 903 S.W.2d 884, 886 (Tex. App.—Houston [1st Dist.] 1995, no writ). An appellant that fails to adequately brief a complaint waives its issue on appeal. *Washington v. Bank of N.Y.*, 362 S.W.3d 853, 854–55 (Tex. App.—Dallas 2012, no pet.); *see also Fredonia State Bank v. Gen. Am. Life Ins. Co.*, 881 S.W.2d 279, 284–85 (Tex. 1994). Thus, we hold that Siana waived its complaint about the trial court's granting of summary judgment on Siana's unjust enrichment counterclaim due to inadequate briefing.

Siana next argues that the trial court erred in granting White Oak summary judgment on no-evidence grounds because White Oak's no-evidence summary-judgment motion was conclusory. Siana does not identify any particular flaw as to any specific counterclaim challenged by White Oak in its summary-judgment motion. Our review of the record shows that, in asserting the

no-evidence grounds in its summary-judgment motion, White Oak identified the legal elements of each of Siana's counterclaims for which it asserted that Siana had no evidence. This was sufficient to give fair notice to Siana of the defects in its counterclaims and transfer to Siana the burden to raise a fact issue as to each element of its counterclaims. *See Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 311 (Tex. 2009).

In the remainder of its challenge to the trial court's granting of summary judgment in favor of White Oak on no-evidence grounds on Siana's counterclaims, Siana relies on the excluded evidence of its undesignated experts and excluded paragraphs of Ragsdale's affidavits, as well as its argument about White Oak Operating's alleged lack of capacity. Because we have already concluded that the trial court did not err in excluding such evidence and Siana did not preserve its complaint about White Oak Operating's alleged lack of capacity, we conclude that Siana's arguments do not support reversal of the trial court's granting of summary judgment in favor of White Oak on Siana's counterclaims based on no-evidence grounds.

For these reasons, we hold that the trial court did not err in granting White Oak summary judgment on its claims for breach of contract and attorney's fees, and we hold that the trial court did not err in granting White Oak summary judgment on

Siana's counterclaims against it. Further, we hold that the trial court erred in granting White Oak summary judgment on its claim for injunctive relief.

We sustain the portion of Siana's fourth issue challenging the trial court's ruling granting White Oak summary judgment on its claim for injunctive relief. We overrule the remainder of Siana's fourth issue and its fifth issue.

Conclusion

We reverse the portions of the trial court's judgment granting White Oak injunctive relief and awarding White Oak appellate attorney's fees and remand those portions of the case to the trial court for further proceedings consistent with this opinion. We affirm the remaining portions of the trial court's judgment. All pending motions are dismissed as moot.

Julie Countiss
Justice

Panel consists of Chief Justice Radack and Justices Countiss and Rivas-Molloy.