Fourth Court of Appeals
San Antonio, Texas

OPINION

No. 04-19-00332-CV

Lee B. **WHEELER**, Trustee of the L&P Children's Trust and Nancy Wheeler Plumlee,
Appellants

v.

SAN MIGUEL ELECTRIC COOPERATIVE, INC.,
Appellee

From the 36th Judicial District Court, McMullen County, Texas
Trial Court No. M-17-0027-CV-A
Honorable Starr Boldrick Bauer, Judge Presiding

Opinion by: Patricia O. Alvarez, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Patricia O. Alvarez, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: July 1, 2020

AFFIRMED

This case centers on whether a 1954 lease (the Lease) to strip mine lignite is still valid. The Wheelers sought a declaratory judgment that the Lease was invalid. San Miguel counterclaimed for breach of the Lease. The trial court construed a Partition Agreement that affected the lands covered by the Lease, determined that the Lease was valid, and directed a verdict against the Wheelers' claims. A jury determined the Wheelers breached the Lease and awarded San Miguel $16,000 in actual damages. The trial court rendered judgment on the verdict, and the Wheelers appeal. We affirm the trial court's judgment.

BACKGROUND

A. San Miguel Ranch Coal, Lignite Lease

Clifton and Nora Wheeler, the grandparents of appellants Lee B. Wheeler and Nancy Wheeler Plumlee, owned more than 30,000 acres of land in south Texas. Their holdings included the surface and mineral estates for approximately 2,210 acres of land in McMullen County—the San Miguel Ranch. In 1954, Clifton and Nora executed the Lease—a coal, lignite, and mineral lease covering the San Miguel Ranch—and in 1978, San Miguel Electric Cooperative, Inc. succeeded as lessee. The Lease was for "only the coal, lignite and other minerals (except oil or gas) down to a depth of 350 feet below the surface and no further." Even if no minerals were produced, the Lease would "remain in force so long as the [delay] rentals hereinafter provided for are paid."

B. Partition Agreement

When Clifton Sr. died, his interests passed to Nora, and when Nora died, her will transferred the entire surface and mineral estates for the Ranch to her devisees: one-third each to her two then-living children (i.e., Clifton C. Wheeler Jr. and Evelyn Wheeler Swenson), and one-ninth each to her three grandchildren (i.e., Katie Wheeler Leon, Clifton Charles Wheeler, and Forrest H. Wheeler) from her predeceased child. In 1986, Nora's devisees agreed to partition the surface rights of several properties, including the San Miguel Ranch, and they executed the Partition Agreement. Through subsequent conveyances, Nancy Wheeler Plumlee acquired the entire surface estate of the San Miguel Ranch.

C. Pipeline Easement Across the Ranch

In 2012, Lee B. Wheeler, as Trustee of the L&P Children's Trust, and Nancy Wheeler Plumlee granted DCP Sand Hills, LLC an easement to lay a pipeline across parts of the Ranch.

The parts of the Ranch the pipeline crossed were parts San Miguel intended to strip mine, and the pipeline would prevent San Miguel from mining under or near the pipeline.

D. Trial Court Litigation

In 2017, the Wheelers sued San Miguel seeking a declaration that the Lease was invalid for two reasons. First, under the Partition Agreement, the coal and lignite remained with the surface estates, and since Nancy Wheeler Plumlee had acquired all of the Ranch's surface estate, she owned 100% of the coal and lignite interests—by virtue of her ownership of the entire surface estate. Second, the Lease expired because San Miguel did not properly pay the delay rentals as specified in the Lease.

San Miguel counterclaimed for breach of the Lease, and it moved for partial summary judgment on the construction of the Partition Agreement.

The trial court agreed with San Miguel's construction and granted its motion. The case proceeded to trial, and after the Wheelers rested, the trial court granted San Miguel's motion for a directed verdict against all the Wheelers' claims against San Miguel. The only issue remaining for the jury was San Miguel's counterclaim for breach of the Lease. The jury found the Wheelers breached the Lease and found actual damages of $16,000. The trial court rendered judgment on the jury's verdict, and it denied the Wheelers' motion for new trial.

E. Arguments on Appeal

In five issues, the Wheelers contend the trial court erred when it did the following:

1. misconstrued the Partition Agreement, granted partial summary judgment for San Miguel, and failed to find that the coal lease was invalid;
2. granted San Miguel's Rule 248 motion and struck some of the Wheelers' causes of action;
3. struck two jurors for cause;

4. granted a directed verdict for San Miguel that ordered the Wheelers take nothing on their declaratory judgment claims; and
5. rendered judgment on the jury's findings that the Wheelers breached the Lease.

The Wheelers ask this court to reverse the trial court's judgment and remand the cause for a new trial. San Miguel rebuts each of the Wheelers' arguments, insists the trial court did not err as the Wheelers argue, and asks this court to affirm the trial court's judgment. We address each of the issues in turn, beginning with the construction of the Partition Agreement.

PARTITION AGREEMENT

Before trial, San Miguel moved for partial summary judgment on the construction of the Partition Agreement. San Miguel argued that the trial court could conclude, as a matter of law, that the Partition Agreement expressly excluded the parties' respective mineral interests, including coal and lignite, from any change by the Partition Agreement, and the parties owned the same undivided interests in the mineral estate—including the coal and lignite—as they did before the Partition Agreement was executed.

The trial court granted San Miguel's motion and concluded that after the partition, "each party to the Partition Agreement still owned the same undivided interest in the 'coal' and 'lignite' . . . as they owned before the execution of the Partition Agreement."

In their first issue, the Wheelers argue the trial court erred in granting partial summary judgment for San Miguel for three reasons: (1) the Partition Agreement is ambiguous, (2) the surface destruction test applies, and (3) there is a fact question on the parties' intent in executing the Partition Agreement.

San Miguel responds that the Lease is valid because the Partition Agreement clearly and unambiguously excludes coal and lignite from the partitioning; the surface destruction test does

not apply; and the parties' mineral rights, including to the coal and lignite, were completely unaffected by the Partition Agreement.

We begin with the standard of review and applicable law.

A. Standard of Review

"We review grants of summary judgment de novo." *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 219 (Tex. 2017) (citing *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015)). In our review, "we take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor." *Cantey Hanger*, 467 S.W.3d at 481 (quoting *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005)).

"A party moving for traditional summary judgment meets its burden by proving that there is no genuine issue of material fact and it is entitled to judgment as a matter of law." *Parker*, 514 S.W.3d at 220 (citing TEX. R. CIV. P. 166a(c)); *accord Cmty. Health Sys. Prof'l Servs. Corp. v. Hansen*, 525 S.W.3d 671, 681 (Tex. 2017). "An issue is conclusively established 'if reasonable minds could not differ about the conclusion to be drawn from the facts in the record.'" *Hansen*, 525 S.W.3d at 681 (quoting *Childs v. Haussecker*, 974 S.W.2d 31, 44 (Tex. 1998)).

B. Contract Construction

"The question of whether a contract is ambiguous is a question of law for the court." *ConocoPhillips Co. v. Koopmann*, 547 S.W.3d 858, 874 (Tex. 2018) (citing *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996)). Although parties may offer conflicting interpretations of a contract, their differing views, of themselves, do not create an ambiguity. *See URI, Inc. v. Kleberg Cty.*, 543 S.W.3d 755, 763 (Tex. 2018) ("A contract is not ambiguous merely because the parties disagree about its meaning . . . ."). "If the written instrument is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and

the court will construe the contract as a matter of law." *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983); *accord Piranha Partners v. Neuhoff*, 596 S.W.3d 740, 744 (Tex. 2020).

C. Partition Agreement Provisions

The Partition Agreement identifies the parties to it, describes how the lands will be partitioned, and states how the partitioned lands will become the respective party's separate property. Most significantly for this appeal, it also contains provisions that address the disposition of the mineral interests.

In paragraph 1, labelled "Recitals," subparagraph H states as follows:

> The parties hereto desire to partition and/or exchange the surface estate in the above-described property and desire to except the oil, gas and mineral estate in the property from such partition and exchange, so that each party will still own the same undivided interest in the oil, gas and mineral estate in such property as each party owned prior to the execution of this Deed.

In paragraph 2, labelled "Partition of Surface Estate Only," the terms make each party's partitioned property their separate property "but subject to the provisions hereinafter contained with respect to the oil, gas and mineral estate in the property."

In paragraph 3, labelled "Exception of Oil, Gas and Minerals," the Partition Agreement states as follows:

> There is excepted from the partition contained in Paragraph 2. hereof, and not conveyed or partitioned thereby, all of the oil, gas and minerals (as hereinafter defined) in, on, under and which may be produced and mined from the property . . . .
>
> "Oil, gas and minerals" for all purposes of this partition is defined to include oil, gas and minerals of every kind and character . . . including, but not limited to, coal, lignite, zinc, lead, iron, copper, uranium, and other fissionable minerals, and materials, and other hard minerals of unusual value (but excluding sand, gravel, caliche, rock, stone, and similar mineral properties considered part of the surface estate).
>
> It is agreed that the ownership of the oil, gas and mineral [sic] shall not be affected by this partition but shall remain the same after the execution of this partition as it was prior to the execution hereof.

We read these provisions in light of the entire Partition Agreement, but the parties do not point to, and we have not found, any other provisions in the Partition Agreement that alter the meaning of the plain language of the excerpts given above.

D. Partition Agreement Not Ambiguous

In their first issue, the Wheelers argue the trial court could not have construed the Partition Agreement as it did because the Partition Agreement is ambiguous, the surface destruction test applies to keep the coal and lignite with the surface estate, and the trial court failed to apply the intended effect of the Partition Agreement and its use of an exception versus a reservation.

But the Partition Agreement's plain language readily disposes of each of the Wheelers' arguments. First, the Partition Agreement is not susceptible to more than one reasonable interpretation—it is not ambiguous. When the Partition Agreement was executed, the Nora Wheeler devisees owned undivided interests in the entire San Miguel Ranch, both the surface and mineral estates.

Although coal and lignite are generally part of the surface estate when those minerals are within 200 feet of the surface, *see Reed v. Wylie* (*Reed II*), 597 S.W.2d 743, 747–48 (Tex. 1980), the general rule does not apply if the conveyance severing the mineral estate affirmatively states a contrary intent, *see Reed v. Wylie* (*Reed I*), 554 S.W.2d 169, 172 (Tex. 1977) (applying the general rule that a mineral that will be removed by a method that will destroy the surface is not conveyed or reserved as part of the mineral estate "[u]nless the contrary intention is affirmatively and fairly expressed").

Here, the Partition Agreement expressly excludes the mineral estate from being partitioned with the corresponding partitioned surface estates. It expressly "except[s] from the partition . . . all of the oil, gas and minerals (as hereinafter defined)." Paragraph 3 expressly includes coal and lignite in the mineral estate: "'Oil, gas and minerals' for all purposes of this partition . . . include[s]

. . . coal [and] lignite." Finally, the Partition Agreement states that the mineral estate is unchanged by the partition: "[T]he ownership of the oil, gas and mineral[s] shall not be affected by this partition but shall remain the same after the execution of this partition as it was prior to the execution hereof."

Before and after the partition, the Nora Wheeler devisees owned undivided interests in the entire mineral estate—which expressly included the coal and lignite—and the minerals were expressly excluded from the partitioned surface estates. The Lease's language is clear, specific, and capable of only one reasonable interpretation: the coal and lignite are part of the mineral estate, which was and is owned by the Nora Wheeler devisees and their successors.

E. Surface Destruction Test

The Wheelers argue the surface destruction test makes the coal and lignite part of the surface estate, and because Nancy Wheeler Plumlee now owns all of the surface estate of the San Miguel Ranch, she owns all the coal and lignite.

As briefly noted above, a mineral that lies within 200 feet of the surface is part of the surface estate and is not reserved or conveyed with the mineral estate *unless* the conveyance states otherwise. *See Reed I*, 554 S.W.2d at 172 (applying the general rule "[u]nless the contrary intention is affirmatively and fairly expressed").

Here, the Partition Agreement expressly includes the coal and lignite in the mineral estate; the surface destruction test does not apply. *See id.*

F. Fact Question Remains

The Wheelers admit that coal and lignite were defined as part of the mineral estate. But they insist that because "this was an exception rather than a reservation, this shows that the parties did not intend that the coal be severed from ownership of the surface."

Notwithstanding their argument, the Partition Agreement's language expressly states the opposite. It includes coal and lignite in the mineral estate and clearly states that the mineral estate is not affected or altered by the partitioning. The Partition Agreement's plain language does not leave any remaining genuine issue of material fact. *See Parker*, 514 S.W.3d at 220.

G. Partition Agreement Construction

The Partition Agreement is unambiguous: it includes coal and lignite in the mineral estate and it did not disturb the preexisting mineral estate interests. Under the proper construction of the Partition Agreement, Nancy Wheeler Plumlee does not own 100% of the coal and lignite *based on* her ownership of the entire surface estate. We overrule the Wheelers' first issue.

RULE 248 MOTION

In their second issue, the Wheelers argue the trial court erred in granting San Miguel's motion to dismiss some of their claims under a Rule 248 motion. We begin by reciting the Rule.

A. Rule 248

Rule 248's plain language is very brief:

> When a jury has been demanded, questions of law, motions, exceptions to pleadings, and other unresolved pending matters shall, as far as practicable, be heard and determined by the court before the trial commences, and jurors shall be summoned to appear on the day so designated.

TEX. R. CIV. P. 248; *see Mickens v. Longhorn DFW Moving, Inc.*, 264 S.W.3d 875, 880 (Tex. App.—Dallas 2008, pet. denied). The plain language does not contain any notice or evidentiary standards requirements. *See* TEX. R. CIV. P. 248. Nevertheless, the rule authorizes a trial court to decide, by pretrial order, matters such as questions of law. *See Mickens*, 264 S.W.3d at 880 (noting "it is not error for the trial court to determine [questions of law] by pretrial order").

B. Additional Background

Before trial, San Miguel filed its Rule 248 motion which sought to dismiss some of the Wheelers' claims. The motion argued that several of the Wheelers' claims should not go to the jury because the trial court could dismiss them as a matter of law.

At the hearing on the Rule 248 motion, the Wheelers did not object to lack of notice or unfair surprise, object to the trial court's not allowing them to present additional evidence, move for a continuance before the motion was heard, or object to the trial court hearing the motion. They did not get a ruling on any putative objection to being able to present evidence or file an offer of proof. Instead, the Wheelers argued the merits of the claims in their second amended petition:

- the Lease lacked mutuality,
- the Lease breached the implied covenant of reasonable development,
- the Lease lacked consideration,
- the "Rule of Accommodation,"
- "Alienation of Lands,"
- inverse condemnation,
- unreasonable time to develop the Lease,
- rescission, and
- the consideration for the Lease was not properly paid.

They insisted that fact questions remained, and asked that their claims be decided by the jury.

The trial court heard the parties' arguments, reviewed the 1954 lease, and then implicitly granted San Miguel's Rule 248 motion and dismissed all of the Wheelers' remaining claims except whether the delay rentals had been properly paid.[1]

We review the properly briefed complaints, but we begin with those that were not.

[1] After the trial court ruled on the Rule 248 motion, the Wheelers re-urged a previous motion for continuance. The previous motion was based on the Wheelers' desire to abate the trial until a related trial had concluded. The trial court denied the re-urged motion.

C. Waived Complaints

In their brief, for the first six claims listed above, the Wheelers do not explain how the trial court erred by dismissing the claims or provide any authorities to support their general contentions. *Contra* TEX. R. APP. P. 38.1(i) (requiring "clear and concise argument for the contentions made, with appropriate citations to authorities and to the record"); *Canton-Carter v. Baylor Coll. of Med.*, 271 S.W.3d 928, 931 (Tex. App.—Houston [14th Dist.] 2008, no pet.) ("Failure to cite legal authority or to provide substantive analysis of the legal issues presented results in waiver of the complaint."). The Wheelers did not properly brief the issues to present them for appellate review; they have waived any complaint about the trial court's dismissing these six claims, *see* TEX. R. APP. P. 38.1(i); *Canton-Carter*, 271 S.W.3d at 931.

D. Unreasonable Time to Develop, Rescission Claims

The trial court also dismissed the Wheelers' claims that San Miguel "waited an unreasonable amount of time to develop the lease," and their claim for rescission—which was based on their unreasonable time argument. The Wheelers argue that if a contract does not fix a time for performance, a reasonable time is implied, and what constitutes a reasonable time period is a question of fact. *See, e.g.*, *Hewlett-Packard Co. v. Benchmark Elecs., Inc.*, 142 S.W.3d 554, 563 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (noting, in construing a contract's terms on when payments were to be made to a vendor for assembling computer motherboards, that "when a contract is silent regarding the date for an action to be taken, the courts will construe the contract as requiring such action be taken within a reasonable time").

But here, the trial court heard San Miguel's Rule 248 motion and the parties' arguments regarding the Lease. *See* TEX. R. CIV. P. 248; *Mickens*, 264 S.W.3d at 880. The Lease was on file with the trial court (from, inter alia, the Wheelers' original petition), the parties discussed the Lease's terms with the court, and the trial court could determine, as a matter of law, whether the

Lease was ambiguous. If it was not, the trial court could construe the Lease's terms as a matter of law. *See Coker*, 650 S.W.2d at 393 ("If the written instrument is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and the court will construe the contract as a matter of law."); *accord Piranha Partners*, 596 S.W.3d at 744.

Contrary to the Wheelers' argument, the Lease expressly states its duration: "this lease shall remain in force so long as the rentals hereinafter provided for are paid and/or so long as the coal, lignite [are produced]." Further, the Lease expressly states that it "shall not be forfeited for any failure to prosecute mining operations on the [property]."

Under Texas law, these lease terms are enforceable. *See Dall. Power & Light Co. v. Cleghorn*, 623 S.W.2d 310, 311–12 (Tex. 1981) (construing a lease where "[n]o primary term was specified in which the lessees were to explore and develop the leases" and rejecting a challenge to the lease duration terms because "[t]he provisions excluding the remedy of forfeiture, and those stating that title shall not revert to the lessor so long as delay rentals are paid, are readily capable of being given their plain meaning and intent"); *Weed v. Brazos Elec. Power Co-op., Inc.*, 574 S.W.2d 570, 572 (Tex. App.—San Antonio 1978, writ ref'd n.r.e.). The trial court could have properly concluded as a matter of law that the Wheeler's "unreasonable time" argument was inapt and provided no basis to grant rescission. *See Cleghorn*, 623 S.W.2d at 311–12.

In their brief, the Wheelers complain that the trial court could not grant the Rule 248 motion without the parties presenting evidence, but they cite no authorities to support that assertion, and the plain language of the rule does not include any such requirement. *See* TEX. R. CIV. P. 248; *cf. Rodriguez v. JPMorgan Chase Bank, N.A.*, No. 04-14-00342-CV, 2015 WL 3772110, at *6–7 (Tex. App.—San Antonio June 17, 2015, pet. denied) (mem. op.).

Further, they argue that the pleadings are not evidence, but they do not expressly argue that the Lease was not properly admitted, nor did they object at the hearing that the Lease could not be

considered. *Cf.* TEX. R. APP. P. 33.1(a)(1); *Richard Nugent & CAO, Inc. v. Estate of Ellickson*, 543 S.W.3d 243, 260 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (noting that a timely objection "adequately preserved the evidentiary issue for appeal"). To the contrary, the parties and the trial court freely discussed the terms of the Lease without any party's objection. *Cf. Rodriguez*, 2015 WL 3772110, at *6–7.

We conclude the trial court properly dismissed the unreasonable time to develop and rescission claims as a matter of law.

STRIKING TWO JURORS

In their third issue, the Wheelers argue the trial court erred in striking two prospective jurors[2] without a request from any party. They contend the trial court erred because the two jurors "stated they could be fair and impartial and decide the case solely on the evidence" and the trial court did not give the Wheelers a chance to rehabilitate the two jurors. San Miguel contends there was either conclusive evidence of the stricken jurors' statutory disqualification, or the trial court acted within its discretion in striking the two jurors.

A. Background

During voir dire, jurors 5 and 6, sisters-in-law, each stated they would try to be fair and decide the case solely on the evidence, but both admitted biases against San Miguel.

When Juror 5 was asked about her friendship with the Wheelers, she said "My friendship with them wouldn't affect [my decision]." But later Juror 5 admitted "[my] business relationship

[2] Although we could refer to the stricken individuals as veniremembers, *see* VENIREMEMBER, Black's Law Dictionary (11th ed. 2019) ("A prospective juror; a member of a jury panel."), for brevity and to be consistent with the briefs, we refer to them as jurors. *See generally Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 747 n.6 (Tex. 2006) ("We refer to persons assigned to a court but not yet selected on a jury as 'jurors,' as this term is generally the one used in court rules.").

[with a San Miguel employee] would affect my decision. . . . I'm not so sure I can be impartial. . . . I can try."

When Juror 6 was asked if she "could consider the evidence and render a verdict only on the evidence," she replied "Yes, sir." But when she was asked whether she felt "that if you're—if this is a foot race that you might be leaning a little bit ahead before we even start in favor of the Wheeler family," she replied "Yes. I definitely—when I was at the meeting with [San Miguel], I got pretty angry and bitter towards them, yes. I would say I have a bias."

B. Basis to Strike Jurors

"A person is disqualified to serve as a petit juror in a particular case if [that person] . . . has a bias or prejudice in favor of or against a party in the case." *See* TEX. GOV'T CODE ANN. § 62.105; *accord Shepherd v. Ledford*, 962 S.W.2d 28, 34 (Tex. 1998); *In re M.G.N.*, 491 S.W.3d 386, 393 (Tex. App.—San Antonio 2016, pet. denied). If the evidence conclusively establishes the person cannot decide impartially, the trial court must dismiss the juror. *See Shepherd*, 962 S.W.2d at 34; *In re M.G.N.*, 491 S.W.3d at 393. If the evidence does not conclusively establish that the person has a bias or prejudice, then to determine whether the person can decide impartially, the trial court must exercise its discretion. *Cortez ex rel. Estate of Puentes v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87, 93 (Tex. 2005) ("[T]rial courts exercise discretion in deciding whether to strike veniremembers for cause when bias or prejudice is not established as a matter of law, and there is error only if that discretion is abused.").

In reviewing the trial court's decision to strike a juror for other than conclusive evidence, we view all the evidence in the light most favorable to the trial court's ruling and we will not reverse its decision absent an abuse of discretion. *See Jordan v. Sava, Inc.*, 222 S.W.3d 840, 845 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *In re M.G.N.*, 491 S.W.3d at 393.

C. Discussion

The Wheelers complain that they had no chance to rehabilitate jurors 5 and 6, but they did not object when then jurors were struck, and they failed to preserve a claim of error. *See* TEX. R. APP. P. 33.1(a)(1) (error preservation). The Wheelers also complain that the trial court struck the jurors "without the request by either party," but they cite no authority that prohibits a trial court from acting sua sponte to dismiss a disqualified juror. *Cf.* TEX. GOV'T CODE ANN. 62.105; *Shepherd*, 962 S.W.2d at 34.

To the contrary, the trial court must dismiss a disqualified juror. *See Shepherd*, 962 S.W.2d at 34; *In re M.G.N.*, 491 S.W.3d at 393. Here, jurors 5 and 6 both stated they would try to decide impartially, but Juror 5 said "[my] business relationship [with a San Miguel employee] would affect my decision. . . . I'm not so sure I can be impartial," and Juror 6 admitted she "got pretty angry and bitter towards [San Miguel and she acknowledged] I would say I have a bias."

Although San Miguel argues the evidence conclusively establishes bias and prejudice, there is some evidence from each of the two jurors that they could be fair and impartial. *Cf. Cortez*, 159 S.W.3d at 93. However, we "afford great deference to the trial court's evaluation of a juror because 'trial judges are present in the courtroom and are in the best position to evaluate the sincerity and attitude' of the juror." *In re M.G.N.*, 491 S.W.3d at 393 (quoting *Murff v. Pass*, 249 S.W.3d 407, 411 (Tex. 2008)).

Here, the trial court was in the best position to determine whether either juror could be fair and impartial. *See Murff*, 249 S.W.3d at 411 ("Because trial judges are present in the courtroom and are in the best position to evaluate the sincerity and attitude of individual panel members, they are given wide latitude . . . in determining whether a panel member is impermissibly partial . . . ." (citation omitted)); *accord Cortez*, 159 S.W.3d at 93.

Viewing the evidence in the light most favorable to the trial court's ruling, we conclude there was evidence to support the trial court's decision to strike jurors 5 and 6, and the trial court did not abuse its discretion. *See In re M.G.N.*, 491 S.W.3d at 393 (quoting *Jordan*, 222 S.W.3d at 845). We overrule the Wheeler's third issue.

DIRECTED VERDICT ON DELAY RENTALS PAYMENTS

In their fourth issue, the Wheelers argue the trial court erred in directing a verdict on whether the delay rentals were properly paid.

A. Background

The parties agree that the coal and lignite lease is a "no term" lease that remains in effect, even if no minerals are produced, "so long as the rentals hereinafter provided are paid." They dispute whether San Miguel properly paid the delay rentals.

In their brief, the Wheelers assert that San Miguel failed to jointly pay two or more persons entitled to rentals in the years 2013–2018, but they do not cite evidence from the trial record showing that San Miguel should have paid two parties jointly.

At trial, Lee B. Wheeler testified that after his father (Clifton C. Wheeler Jr.) died, San Miguel did not deposit or tender for deposit delay rental payments to the depository bank identified in the Lease. When the Wheelers questioned San Miguel's agent (Mr. Burris), he admitted he did not know of any delay rentals payments prior to 1979, but the trial court interjected that the statute of limitations had run on those payments and they were not at issue.

After the Wheelers presented their evidence, San Miguel moved for a directed verdict on the delay rentals payment claim on two grounds. First, that the Wheelers presented no evidence that San Miguel failed to properly pay any delay rental payment. Second, that the statute of limitations had run and the delay rentals claim was barred because the first allegedly improper

payment was made in January 2013, following the death of Clifton C. Wheeler Jr. in September 2012, and the Wheelers did not file their suit until more than four years later—on June 5, 2017.

The trial court granted the motion and directed a verdict on the Wheelers' delay rentals payment claim in favor of San Miguel.

B. Directed Verdict, Standard of Review

"A directed verdict is proper if . . . the evidence conclusively proves a fact that establishes a party's right to judgment as a matter of law [or] the evidence offered on a cause of action is insufficient to raise an issue of fact." *Cortez ex rel. Estate of Puentes v. HCCI-San Antonio, Inc.*, 131 S.W.3d 113, 120 (Tex. App.—San Antonio 2004), *aff'd*, 159 S.W.3d 87 (Tex. 2005). We review a directed verdict under a legal sufficiency standard. *See City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005); *Flying J Inc. v. Meda, Inc.*, 373 S.W.3d 680, 685 (Tex. App.—San Antonio 2012, no pet.). "[W]e examine the evidence in the light most favorable to the person suffering an adverse judgment and decide whether there is any evidence of probative value to raise an issue of material fact on the question presented." *Exxon Corp. v. Emerald Oil & Gas Co.*, 348 S.W.3d 194, 217 (Tex. 2011).

C. Discussion

The Wheelers contend the trial court erred in granting a directed verdict against their delay rentals payment claim because they presented some evidence that San Miguel did not properly make some of the payments. They offer three examples of allegedly improper payments. First, San Miguel did not deposit the payments in a bank as required. Second, San Miguel did not change the payments after Clifton C. Wheeler Jr. died. And third, San Miguel did not jointly pay two or more persons who were entitled to payments. None of the Wheelers' arguments are meritorious.

At trial, San Miguel presented evidence that it had properly paid the Wheelers since San Miguel became the lessee, and it argued that the Wheelers presented no evidence that San Miguel

failed to properly pay the delay rental payments. Referring to paragraph IV of the Lease for its provision that all sums payable under the Lease were to be deposited in the First National Bank of Pleasanton, Lee B. Wheeler testified that, after his father's death, San Miguel did not deposit funds in the bank as required.

But paragraph IX of the Lease provides an option for the lessee:

> All payments or tenders of rental hereunder may be made by lessee's checks or drafts mailed to lessor at lessor's last known post office address, or delivered to said lessor or mailed or delivered to the depository bank, or banks, hereunder on or before the date required for the payment of same hereunder . . . . Notwithstanding the death[,] disability[,] or minority of the lessor, or his successors in interest, the payment or tender of rentals in the manner provided above shall be binding on the heirs, devisees, executors and administrators of such person.

San Miguel presented evidence that it tendered delay rentals payments to Clifton C. Wheeler Jr. before his death at the address that he instructed San Miguel to use. San Miguel also presented evidence that, after Clifton C. Wheeler Jr.'s death, it continued to send delay rental payments to the same address—which complied with the Lease's terms in paragraph IX:

> [N]o change in ownership of the land or assignment of rentals and other payments due hereunder and of royalties from minerals extracted or removed shall be binding upon lessee or his assigns until he or his assignee has been furnished with the recorded, written transfer of assignment or a certified copy thereof.

The Wheelers' evidence that San Miguel did not issue any jointly payable checks is no evidence that San Miguel did not properly pay the delay rentals. The Lease provides a joint payment option to the lessee; it is permissive, not mandatory, and any evidence that San Miguel did not issue jointly payable checks does not raise a genuine issue of material fact.

The Wheelers also argue that San Miguel admitted it could not prove it made any delay rental payments before 1979. But at trial, the trial court corrected the Wheelers' attorney to note that any claim of a failure by San Miguel's predecessor-in-interest to make payments was not at issue.

Considering the evidence in the light most favorable to the Wheelers, and making reasonable inferences in their favor, we nevertheless necessarily conclude the Wheelers failed to raise a fact issue.

Even if the trial court had impliedly found that the Wheelers raised a fact issue on San Miguel's alleged failure to properly pay the delay rentals, it could have granted the directed verdict on the limitations ground. The conclusively established evidence shows the Wheelers knew not later than January 2013 that San Miguel was making the delay rental payments to the same address Clifton C. Wheeler Jr. gave before he died. Thus, the Wheelers' June 5, 2017 suit was time-barred. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.004 (statute of limitation); *Clark v. ConocoPhillips Co.*, 465 S.W.3d 720, 728 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

We overrule the Wheelers' fourth issue.

JURY VERDICT ON SAN MIGUEL'S COUNTERCLAIM

In their fifth issue, the Wheelers argue the evidence was legally and factually insufficient to support the jury's finding that the Wheelers breached the Lease with San Miguel. But they failed to properly brief the issue. *See* TEX. R. APP. P. 38.1(i) (requiring "clear and concise argument for the contentions made, with appropriate citations to authorities and to the record"); *Canton-Carter v. Baylor Coll. of Med.*, 271 S.W.3d 928, 931 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

The Wheelers failed to identify any element of San Miguel's breach of contract claim for which there was no or insufficient evidence. Further, they did not (1) explain how the jury could not have found that the Wheelers breached the Lease or (2) provide any authorities to support their contentions. *Contra* TEX. R. APP. P. 38.1(i) (requiring "clear and concise argument for the contentions made, with appropriate citations to authorities and to the record"); *Canton-Carter*, 271 S.W.3d at 931 ("Failure to cite legal authority or to provide substantive analysis of the legal issues

presented results in waiver of the complaint."). Therefore, the Wheelers waived any complaint about the jury's findings on San Miguel's counterclaim. *See* TEX. R. APP. P. 38.1(i); *Canton-Carter*, 271 S.W.3d at 931.

CONCLUSION

The trial court properly construed the Partition Agreement and found that the coal and lignite lease was valid. It properly granted San Miguel's Rule 248 motion, and it acted within its discretion to strike the two jurors. It properly granted the directed verdict, and the Wheelers waived their fifth issue. Having overruled the Wheelers' issues, we affirm the trial court's judgment.

Patricia O. Alvarez, Justice