NUMBER 13-15-00496-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

BRENDA W. HUGHES, Appellant,

v.

DAN A. HUGHES, Appellee.

On appeal from the 36th District Court of Bee County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Rodriguez and Benavides
Memorandum Opinion by Justice Benavides

This is an appeal from a final divorce decree of the marriage of appellant Brenda W. Hughes (Brenda) and appellee Dan A. Hughes, Sr. (Dan).[1] By four issues, Brenda asserts that: (1) the trial court erred in granting Dan's motion for partial summary judgment; (2) the trial court erred in partially granting Dan's motion for directed verdict; (3)

[1] Dan's counsel notified this Court that during the pendency of this appeal, Dan passed away.

the trial court erred in its submission of the jury charge; and (4) the evidence is legally insufficient to support the jury's verdict. We affirm in part and reverse and render in part.

I. BACKGROUND

Dan and Brenda wed in 2003—his and her third marriage. Dan was a well-known and affluent member of the Beeville community, having made his wealth in the oil and gas business beginning in the early 1960s. Brenda is a San Antonio-native who met Dan socially in Beeville through a mutual acquaintance. At the time of trial, Dan was eighty-six years old, and Brenda was fifty-seven.

A. Pre-Marital Agreement

Shortly before their marriage, Dan and Brenda executed a twenty-eight-page premarital agreement. Among the stipulations in this agreement was that "no community property will be created during their marriage." Furthermore, the agreement stated that the parties would have the option to "acquire assets together in their joint names" and if such joint acquisition takes place, "they will each own an undivided interest in the jointly acquired assets as their respective sole and separate property in an amount equal to the percentage of their respective contributions toward the purchase of the assets." Lastly, the agreement stated the following:

> Any property that is held by title, as in a deed, in a certificate, or by account name, may not be effectively transferred to the party claiming it as a gift unless, in fact, the deed, certificate, or account is transferred by name to the party claiming the gift.

Slightly more than three years into their marriage, Dan and Brenda signed a "Ratification and Amendment of Premarital Agreement." (collectively "the premarital agreement" unless otherwise stated). In this new agreement, Dan and Brenda confirmed and ratified the original premarital agreement and agreed to amend the original premarital

agreement, so that in the event that their marriage is dissolved, Brenda would be entitled to receive and own in fee simple, as her sole and separate property: (1) the couple's homestead located on Business Highway 181 North in Beeville; (2) all "tangible personal property" located inside of the homestead; (3) approximately 1,711 acres of land in Bee County, commonly known as Charco Ranch; (4) cash or property having a value of $10 million as of the date of the dissolution of marriage; and (5) "such assets and property interests, if any, which Dan might give to Brenda by gifts, inter vivos transfers, testamentary transfers, non-testamentary transfers, survivorship agreements, or other written agreements in addition to those amounts" of the aforementioned property.

B. The Divorce Proceedings

In the months leading up to the filing of their divorce, Dan attempted to conduct some estate planning on his vast estate in preparation for his death. According to Dan, this required Brenda's consent to make some of those plans regarding his property. The couple was unable to reach an agreement regarding Dan's separate property, so Dan filed a declaratory judgment action to interpret the premarital agreement. In his pleading, Dan alleged that Brenda "improperly claim[ed] full or partial ownership interests in assets purchased entirely with [Dan's] separate funds . . . in excess of $30,000,000.00." On January 8, 2015—after Brenda unsuccessfully attempted to file for divorce in Bexar County—Dan filed for divorce in Bee County. The declaratory action and the divorce action were consolidated.

Before trial, the trial court granted Dan's motion for partial summary judgment and held that pursuant to the premarital agreement, Dan owned "an undivided interest in jointly acquired assets, including, but not limited to, jointly titled real property and joint brokerage accounts, as his sole and separate property in an amount equal to the percentage of his contribution toward the purchase of said assets." A jury was asked to determine the remaining issues of the divorce proceeding, including: (1) the characterization of the marital estate; (2) any money owed to Brenda pursuant to the premarital agreement; (3) whether Brenda committed fraud with respect to Dan's separate property; and (4) whether Brenda breached her fiduciary duty to Dan.

Dan hired certified booking account and forensic accounting expert Scott Turner to investigate Dan's finances and trace the character of all of the property at issue in this case. Turner prepared various tracing reports regarding Dan and Brenda's assets, reports which were admitted into evidence during the trial. Turner testified that the first asset he analyzed was Danville, LLC (Danville). Danville is a limited liability company that owned various condominium units in Beeville. Dan and Brenda were member-managers of Danville. According to Turner, Dan was credited with contributing more than $7 million in capital contributions to Danville while Brenda contributed nothing. Turner's next report concerned an analysis of the source of funds used to buy jointly-titled property. These jointly-titled assets included: (1) various pieces of real estate located in Texas, Colorado, and Montana; (2) Danville; (3) various accounts known as JM Texas Land Funds; (4) four bank accounts from First National Bank; and (5) four brokerage accounts. With the exception of real estate in Colorado, Aransas County, one land fund account, and three bank accounts, Turner concluded that all of these assets were Dan's separate property.

Turner testified that he also analyzed bank records, deeds, and other documents to prepare a report supporting Dan's allegation that Brenda committed fraud. According to Turner, from April of 2012 through June of 2013, Brenda made more than thirty money transfers ranging from $50,000 to $150,000 from Dan and Brenda's joint account to Brenda's personal account at Prosperity Bank or to an account belonging to Dog & Bee, LLC.[2] Turner testified that Dan had zero interest in Dog & Bee, LLC and that Brenda was the sole member of that company. Turner also discovered that Brenda transferred money from the joint bank account to Kel-Lee Properties, a company owned by Brenda and Kelly, Brenda's daughter from a previous marriage. During her testimony, Brenda confirmed Turner's conclusions by testifying that she would transfer money from the joint account to either her personal account, the Dog & Bee, LLC account, or the Kel-Lee Properties account "depending on what the situation was."

After the conclusion of evidence, the trial court granted a directed verdict on several pieces of property, deeming those properties to be Dan's separate property, including: (1) Farish I Ranch in Bee County; (2) Stringfellow Ranch in Edwards County; (3) 29 Albatross in Aransas County; (4) mineral interests in Bee County, less the 1,711.01 acres of property known as Charco Ranch; (5) Danville; (6) fifty-percent of the Charco Ranch First National Bank account; (7) fifty-percent of the Trail Creek First National Bank account; (8) fifty-percent of the Real Estate First National Bank account; (9) the Herndon Plant Oakley account ending in 3538; (10) the JP Morgan account ending in 4394; (11) the Morgan Stanley account ending in 325; (12) the Goldman Sachs account ending in 671-0; and (13) one fifty-two carat diamond necklace valued at $160,000.

[2] The record shows that Dog & Bee, LLC was a short-lived restaurant in Beeville.

The jury made the following findings with regard to the value and characterization of the remainder of the marital estate:

Property	Gift to Brenda (yes or no)	Husband's Separate Property	Wife's Separate Property
1. Trail Creek Ranch, Montana	No	100%	0%
2. 170 Village Walk, Avondale, Colorado	No	100%	0%
3. 115 Dickerson Road, Bee County	No	100%	0%
4. JM Texas Land Fund No. 1	No	100%	0%
5. JM Texas Land Fund No. 2	No	100%	0%
6. JM Texas Land Fund No. 3	No	100%	0%
7. JM Texas Land Fund No. 4	No	70%	30%
8. JM Texas Land Fund No. 6	No	100%	0%
9. JM Texas Land Fund No. 7	No	100%	0%
10. FNB 9557 Joint Acct.	No	50%	50%
11. Brenda W. Hughes' interest in Kel-Lee Properties, LLC	No	50%	50%
12. Note receivable from Kel-Lee Properties LLC	No	50%	50%
13. The parties' interest in 105 Marion Drive, Rockport	No	50%	50%
14. Prosperity Bank acct. #5073	No	50%	50%
15. Herndon Plant Oakley acct. #577	Yes	0%	100%
16. Herndon Plant Oakley acct. #9290	Yes	0%	100%
17. Herndon Plant Oakley acct. #6943	Yes	0%	100%
18. Note Receivable from sale of 3138 N. Airport Rd.	No	50%	50%

19. Dog & Bee LLC	No	50%	50%

The jury also found that among the cash and assets owned by Brenda in the jury's answers to the value and characterization of the marital estate, $1,536,053.85 should be considered "as part of the $10,000,000.00 described in [the premarital agreement]." Furthermore, the jury found that Brenda committed fraud with regard to Dan's separate property and that Dan was entitled to compensation of $2,393,206.90 in damages. Lastly, the jury found that Brenda failed to comply with her fiduciary duty owed to Dan and that Dan was entitled to $2,393,206.90 in damages. This appeal followed.

II. SUMMARY JUDGMENT

By her first issue, Brenda asserts that the trial court erred by granting Dan's motion for partial summary judgment.

A. Standard of Review

We review a grant of summary judgment de novo. *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015). A party moving for traditional summary judgment has the burden to prove that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Id.*

B. Discussion

Dan sought partial summary judgment on his declaratory judgment claim regarding the interpretation of language in the premarital agreement. Specifically, Dan sought a declaration as a matter of law that: (1) Dan and Brenda own an undivided interest in jointly acquired assets as their respective sole and separate property in an amount equal to the percentage of their respective contributions toward the purchase of said assets; and (2) Brenda was estopped and barred from making any claim "of any kind at any time to any

of [Dan's] separate property or to any property designated as belonging to [Dan's] separate estate."

In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument. *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). To achieve this objective, courts should examine and consider *the entire writing* in an effort to harmonize and give effect to *all the provisions* of the contract so that none will be rendered meaningless. *Id.* (emphasis in original). No single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument. *Id.* Whether a contract is ambiguous is a question of law for the court to decide by looking at the contract as a whole in light of the circumstances present when the contract was entered. *Id.* A contract, however, is ambiguous when its meaning is uncertain and doubtful or it is reasonably susceptible to more than one meaning. *Id.* Only where a contract is first determined to be ambiguous may the courts consider the parties' interpretations and admit extraneous evidence to determine the true meaning of the instrument. *Kelley-Coppedge, Inc. v. Highlands Ins. Co.*, 908 S.W.2d 462, 464 (Tex. 1998). Finally, when a contract contains an ambiguity, the granting of a motion for summary judgment is improper because the interpretation of the instrument becomes a fact issue. *Coker*, 650 S.W.2d at 394.

In support of his argument in favor of partial summary judgment, Dan argues that the unambiguous language of paragraphs 7.1 and 18.4 of the original premarital agreement controls. The relevant language of each paragraph is as follows:

7.1 Joint Acquisition of Assets

> The parties will have the option, but not the obligation, to acquire assets together in their joint names. If the parties jointly acquire assets following their marriage, they will each own an undivided interest in the jointly acquired assets as their respective sole and separate property in an amount equal to the percentage of their respective contributions toward the purchase of the assets. If the parties jointly acquire assets, and to the extent legal title to any or all of the assets can be perfected in their joint names, such as title to an automobile, boat, or real property, they will obtain title in their joint names. However, even though title to an asset acquired by the parties is held in their joint names, the percentage of ownership of such an asset will be controlled by the provisions of this article, and the taking of title in their joint names may not be interpreted to mean that each party has an undivided 50 percent ownership interest in jointly acquired assets. . . . Jointly acquired property may not be deemed to be community property but instead will constitute each party's separate property in proportion to that party's contribution to the purchase price; provided, however, that if there are no records verifying the amount of each party's contribution toward the purchase of an asset, each party will own an undivided 50 percent interest in that asset. If the evidence of title reflects both parties' names, the parties will own that property as joint tenants with right of survivorship.
>
> . . . .
>
> *18.4 Enforceability*
>
> This agreement may be enforced by suit in law or equity by either of the parties . . . . Each party agrees that, by signing this agreement and accepting any benefit whatsoever under it, he or she is estopped and barred from making any claim of any kind at any time to any separate property or the separate estate of the other party or to any property described in this agreement as being the separate property of the other party. Each party waives his or her right to make claims to any separate property of the other party or to any property designated as belonging to the separate estate of the other party, whether the property is acquired before or after this agreement is signed.

In her defense, Brenda asserts that Article III, paragraph B.5 of the amended premarital agreement amended the two paragraphs quoted above from the original premarital agreement. That paragraph states as follows:

> B. Obligations of Dan Upon Dissolution of Marriage. Any provision of the Premarital Agreement or this Ratification and Amendment Agreement to the contrary notwithstanding, in the event of the dissolution of the marriage by court order or by the death of Dan, Dan hereby agrees that in either event, Brenda shall be entitled to receive and to own, in fee simple, as her sole and separate property, either by reason of transfer incident to the dissolution of the marriage by court order or by testamentary, non-testamentary or survivorship agreements by reason of Dan's death, the following:
>
> . . . .
>
> 5. Such assets and property interests, if any, which Dan might give to Brenda by gifts, inter vivos transfers, testamentary transfers, non-testamentary transfers, survivorship agreements, or other written agreements in addition to those amounts provided in Paragraphs B.1 through B.4 of this Article III; provided, however, it is expressly agreed by the parties that Dan is under no obligation to make any provisions for Brenda other than those provided for in Paragraphs B.1 through B.4 of this Article III.

In reading the relevant portions of the premarital agreement together, we hold that the language of the premarital agreements unambiguously state as a matter of law that: (1) any jointly acquired assets by Dan and Brenda would be "own[ed in] an undivided interest . . . as their respective sole and separate property in an amount equal to the percentage of their respective contributions toward the purchase of the assets"; (2) "the taking of title in their joint names may not be interpreted to mean that each party has an undivided 50 percent ownership interest in jointly acquired assets"; and (3) jointly acquired property may not be deemed to be community property but instead will constitute each party's separate property in proportion to that party's contribution to the purchase price, and if there are no records verifying the amount of each party's contribution toward the purchase of an asset, each party will own an undivided 50 percent interest in that asset. Furthermore, Brenda is entitled to own as her sole and separate property any assets and property interests that Dan gives to Brenda by "gifts, inter vivos transfers, testamentary transfers, non-testamentary transfers, survivorship agreements, or other written

agreements." Nothing in this language amends or contradicts the unambiguous provisions of Paragraph 7.1 of the original premarital agreement. Lastly, because we hold that the language of the premarital agreement is unambiguous, the trial court did not abuse its discretion is sustaining Dan's objections to consider any evidence outside of the agreement in construing the agreement. *See Kelley-Coppedge, Inc.*, 908 S.W.2d at 464. Accordingly, we disagree with Brenda, agree with Dan's interpretation, and conclude the trial court's non-dispositive, pre-trial ruling was not erroneous.

We overrule Brenda's first issue.

III. DIRECTED VERDICT

By her second issue, Brenda asserts that the trial court erred by granting Dan's motion to direct a verdict regarding the characterization of various marital assets.

A. Standard of Review

We review a trial court's decision to grant a directed verdict under the legal sufficiency standard of review. *See Mikob Props. Inc. v. Joachim*, 468 S.W.3d 587, 594 (Tex. App.—Dallas 2015, pet. denied). When reviewing a directed verdict, we consider all the evidence in a light most favorable to the nonmovant, and we resolve all reasonable inferences that arise from the evidence admitted at the trial in the nonmovant's favor. *Id.* In conducting a legal sufficiency review, we will sustain a legal sufficiency point if the record reveals the following: (a) the complete absence of a vital fact; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; or (d) the evidence establishes conclusively the opposite of the vital fact. *Playboy Enters., Inc.*

v. Editorial Caballero, S.A. de C.V., 202 S.W.3d 250, 263–64 (Tex. App.—Corpus Christi 2006, pet. denied) (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 807 (Tex. 2005).

B. Discussion

Brenda challenges the trial court's directed verdict on the following pieces of property:

1. Real Property

First, Brenda asserts that the evidence is legally insufficient to establish that Farish I Ranch is one-hundred percent Dan's property because the evidence offered to prove that fact "is no more than a mere scintilla and that the evidence conclusively establishes that the Farish I Ranch is, at a minimum, fifty percent Brenda's separate property" based on Brenda's own testimony.

The record shows that Farish I Ranch was purchased by two payments out of Dan's separate property. On October 2, 2009, Dan A. Hughes Company made a $300,000 earnest money contract deposit for the Farish I Ranch. Next, on November 3, 2009, Dan Hughes directed that $6,552,323.67 from his Morgan Stanley account ending in 5703 be wired to Bedgood Title Company for the purchase of the Farish I Ranch. Under Paragraph 7.1 of the premarital agreement, Dan conclusively established that one-hundred percent of the consideration paid on Farish I Ranch came out of his separate property, and no contributions were made out of Brenda's separate property. The only evidence put forth by Brenda is her own testimony stating that Dan orally told her after purchasing the Farish I Ranch that it would "make [her] ranch bigger," which, according to Brenda, makes it a transfer of separate property by gift from Dan to Brenda under Article III B.5 of the premarital agreement. Three elements are necessary to establish the existence of a gift:

(1) intent to make a gift; (2) delivery of the property, and (3) acceptance of the property. *Grimsley v. Grimsley*, 632 S.W.2d 174, 177 (Tex. App.—Corpus Christi 1982, no writ). Based on these elements, Brenda's testimony regarding an ambiguous and fleeting comment by Dan is legally insufficient to create a genuine issue of material fact that Farish I Ranch was a gift under Article III B.5 because such testimony is no more than a mere scintilla to prove-up the existence of a gift. *See Grimsley*, 632 S.W.2d at 177.

Second, Brenda asserts that the evidence is legally insufficient to support the trial court's directed verdict that Stringfellow Ranch was one-hundred percent Dan's separate property. The record shows that an earnest money check totaling $25,000 was issued out of Dan's separate bank account from First National Bank for Stringfellow Ranch, followed by a wire transfer from Dan's separate account at First National Bank totaling $1,273,317.72. Scott Turner, Dan's expert, testified that he could not clearly identify a .97 percent interest of the Stringfellow Ranch, and allocated that percentage of ownership to Brenda. However, Turner testified that his conclusion was not based on evidence that Brenda contributed .97 percent of her separate property to Stringfellow Ranch, but rather it was based on an absence of evidence. In support of her argument, Brenda directs us to her own conclusory testimony that she understood the Stringfellow Ranch to be a gift from Dan as well. Examining all of the evidence in the light most favorable to Brenda, we nonetheless conclude that the evidence is legally sufficient to support the trial court's directed verdict that the Stringfellow Ranch was one-hundred percent Dan's separate property, or that Dan did not gift the property to Brenda.

Next, Brenda challenges the trial court's directed verdict on the characterization of the 29 Albatross home in Aransas County. The record shows that a $786,759.10 check was issued from the Dan A. Hughes Company toward the purchase of the 29 Albatross property. Turner testified that 99.67 percent of the 29 Albatross property was acquired with Dan's separate property, but could not identify the source of the remaining .33 percent of the purchase. The record shows, however, that nothing in his analysis indicated that any of the funds used to purchase the 29 Albatross property came from Brenda's separate property. Furthermore, Brenda testified that all jointly-held real estate was paid for by Dan's separate property, but argues that this property was at least fifty percent her separate property because Dan told her after purchasing the Albatross property that it would be hers because she "picked it out without [him]." After reviewing all of the evidence in the light most favorable to Brenda, we conclude that the evidence was legally sufficient for the trial court to grant Dan's directed verdict rendering the property one-hundred percent his separate property.

Fourth, Brenda challenges the trial court's directed verdict that 2,184.16 acres of the 3,895.17 total acres of mineral estate in Bee County were Dan's separate property. The record conclusively shows that the 3,895.17-acre mineral estate in Bee County was purchased with Dan's separate property of $50,000 in earnest money and $2,519,651.49 for the remaining balance of the property. The 1,711.01-acre surface estate known as Charco Ranch was located within the 3,895.17-acre mineral estate. Charco Ranch's 1,711.01-acre surface estate was acquired by a separate deed. The premarital agreement in this case granted Brenda Charco Ranch upon the couple's divorce. The parties disputed, however, whether the provision granting Brenda Charco Ranch included the

associated mineral estate. The trial court granted a directed verdict that the entire mineral estate was Dan's separate property less the 1,711.01 mineral estate beneath Charco Ranch. After reviewing all of the evidence in the light most favorable to Brenda, we conclude that the evidence was legally sufficient for the trial court to grant Dan's directed verdict rendering the 3,895.17-acre mineral estate, less the 1,1711.01 mineral estate beneath the Charco Ranch, one-hundred percent Dan's separate property.

Fifth, Brenda challenges the trial court's directed verdict that Danville was owned by Dan as his separate property. The record shows that Danville was a limited liability company that owned various condominium units in Beeville in which Dan and Brenda were member-managers. According to Turner, Dan contributed more than $7 million in capital to Danville while Brenda contributed nothing. Furthermore, the company agreement states that distributions of Danville "shall be made to [Dan] until the aggregate amount of all such distributions is equal to the amount of all capital contributions made by [Dan] to [Danville] as of date of any such distribution." Turner testified that there is more money "owed to Dan in the value of the [Danville property] . . . so effectively I would say he owns it." After reviewing all of the evidence in the light most favorable to Brenda, we conclude that the evidence was legally sufficient for the trial court to grant Dan's directed verdict that Dan owned one-hundred percent of Danville.

2. Brokerage Accounts

Next, Brenda challenges the trial court's directed verdict with regard to the separate-property characterization of four brokerage accounts, one each at Goldman Sachs, Herndon Plant Oakley, JP Morgan, and Morgan Stanley. Turner testified that all of the deposits into each of these four brokerage accounts were traced to Dan's separate

property accounts and that none of the contributions came from Brenda's separate property. After reviewing all of the evidence in the light most favorable to Brenda, we conclude that the evidence was legally sufficient for the trial court to grant a directed verdict that each of the four brokerage accounts were Dan's separate property.

3. Diamond Necklace

Last, Brenda challenges the trial court's directed verdict that a Royal Gem of Israel diamond necklace purchased by Brenda was one-hundred percent Dan's separate property. Brenda testified that she purchased a fifty-two-carat diamond necklace from Royal Gem of Israel, a jewelry dealer. Turner's tracing report uncovered a $154,000 transfer to the Royal Gem of Israel from Brenda's Herndon Plant Oakley account ending in 6943-1. Turner traced the funds located in the Herndon Plant Oakley 6943-1 account directly to a Goldman Sachs account that was funded by Dan's separate property. In making its ruling, the trial court denied Dan's motion for directed verdict on the Herndon Plant Oakley 6943-1 account but granted a directed verdict with regard to the diamond necklace. The jury eventually determined that the Herndon Plant Oakley 6943-1 account was a gift from Dan to Brenda, and thus was, Brenda's one-hundred percent separate property. Dan does not challenge the jury's finding on appeal. Therefore, because the record conclusively shows that Brenda purchased the necklace with funds from an account that the jury ultimately determined was Brenda's separate property, the evidence is legally insufficient to support the trial court's directed verdict. Instead, we conclude that the necklace is one-hundred percent Brenda's separate property in light of the jury's verdict on the Herndon Plant Oakley 6943-1 account.

4. Summary

We overrule Brenda's second issue challenging the trial court's granting of Dan's motion for directed verdict with regard to all of the real property at issue and the brokerage accounts at issue. We sustain Brenda's second issue to the extent it challenges the trial court's granting of Dan's motion for directed verdict solely with regard to the 52-carat diamond necklace.

IV. JURY CHARGE

By her third issue, Brenda asserts that the trial court committed jury charge error.

A. Standard of Review

We review an allegation of jury charge error for an abuse of discretion. *See Tex. Dep't of Human Servs. v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990). A trial court abuses it discretion if its acts are arbitrary, unreasonable, or without consideration of guiding principles. *Walker v. Gutierrez*, 111 S.W.3d 56, 62 (Tex. 2003). Finally, error in the jury charge is reversible only if, in the light of the entire record, it was reasonably calculated to and probably did cause the rendition of an improper judgment. *Reinhart v. Young*, 906 S.W.2d 471, 473 (Tex. 1995).

B. Discussion

Brenda contends that the trial court abused its discretion by submitting jury questions one, four, five, six, seven, eight, and nine. We will address each in turn.

1. Jury Question Number One

Question one asked jurors to determine whether the remaining property at issue of the marital estate was Dan's gift to Brenda and what percentage, if any, the property was Dan or Brenda's separate property. On appeal, Brenda complains that the trial court failed

to instruct jurors that any finding of a gift from Dan to Brenda resulted in the gift becoming Brenda's sole and separate property under the premarital agreement. Dan responds that Brenda failed to preserve error on this jury question. We agree with Dan.

Rule of civil procedure 278 states that a trial court's "failure to submit a definition or instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or instruction has been requested in writing and tendered by the party complaining of the judgment." TEX. R. CIV. P. 278. The record reveals that Brenda did not request a substantially correct definition or instruction with regard to her complaints as to question one. Therefore, such error, if any, is waived and not preserved for our review. *See id.*

2. Jury Questions Four and Five

Next, Brenda complains about questions four and five. Question four asked jurors whether the cash and assets owned in question one, other than the residence at 5156 Business Highway 181 North in Beeville, Charco Ranch, and all gifts found in question one, should be considered as part of the $10 million described in the premarital agreement. Question five then asked what amount should be considered if the jury answered question four in the affirmative.

With regard to question four, Dan also argued to the trial court and now on appeal that question four concerned an impermissible question of contract interpretation outside the jury's role as a fact finder. We agree. Brenda argues that the question is based upon an affirmative defense of offset that Dan did not properly plead. In response to Brenda's failure-to-plead argument, Dan asserts that the arguments are waived. We agree with Dan. Rule 274 of civil procedure expressly states that "any complaint as to a question,

definition, or instruction, on account of any defect, omission, or fault in pleading, is waived unless specifically included in the objections." TEX. R. CIV. P. 274. Brenda failed to raise the affirmative defense objection below at the charge conference, and such argument is now waived on appeal.

With regard to Brenda's first argument, the record presents a question of fact as what was to be considered with regard to Brenda's rights under the premarital agreement. For example, Dan testified that he was aware of the $10 million payout to Brenda under the premarital agreement, but he made several transfers to Brenda's checking account, Morgan Stanley account, and accounts at Herdon Oakley Plant not as gifts, but rather as part of the $10 million that she was entitled to in the case of Dan's death or their divorce. This testimony thus created a fact issue as to what Brenda was to receive under the premarital agreement. We further note that this fact question does not disturb our holding in our analysis of Brenda's first issue that the language of the premarital agreement is unambiguous. Accordingly, we hold that the trial court's inclusion of questions four and five, which was premised on an affirmative finding in question four, was not an abuse of discretion. *See Tex. Dep't of Human Servs.*, 802 S.W.2d at 649.

3. Questions Six and Seven and Eight and Nine

Next, Brenda complains about questions six and seven, and eight and nine. Question six asks the jury whether Brenda committed fraud with respect to Dan's separate property. Question seven then asks, what sum of money, if paid now in cash, would fairly and reasonably compensate Dan's separate estate for the damages, if any, resulting from Brenda's fraud.

On appeal, Brenda argues that such inquiries in questions six and seven were immaterial because it was in "sum and substance" a breach of fiduciary question and should not have been submitted to the jury. At the charge conference, however, Brenda objected to question six on the grounds that it was "overbroad" and "does not make a specific inquiry of conduct which could result in liability on the part of [Brenda]," and with regard to question seven, Brenda objected that the way the question was asked was an impermissible comment on the evidence. Brenda's objections made on appeal with regard to questions six and seven do not comport with those made below and are thus waived. *See* TEX. R. CIV. P. 274.

Question eight asked jurors to find whether Brenda complied with her fiduciary duty to Dan. Question nine asks what sum of money, if paid now in cash, would fairly and reasonably compensate Dan's separate estate for damages resulting from Brenda's breach of fiduciary duty. At the charge conference, Brenda objected that the definition of fiduciary duty was improper in this context and, further, that question eight did not "identify the transactions which are inquired about to be a breach of fiduciary duty in question." Specifically, Brenda requested a definition from the Texas Pattern Jury Charge book as it related to a breach of duty by a trustee sale that was less "onerous" as the one proposed in the charge.

Dan responded to the objection by claiming that Brenda's proposed instruction is to be "used when the trustee of an expressed trust is being sued," which would be inapplicable here. The definition used by the trial court in question eight tracks the exact language of pattern jury charge 104.2, entitled "Question and Instruction—Breach of Fiduciary Duty with Burden on Fiduciary." *See Texas Pattern Jury Charges—Business,*

Consumer, Insurance, & Employment, Committee on Pattern Jury Charges of the State Bar of Texas, PJC 104.2 (2010). The commentary for this particular question and instruction advises to submit this question "whether the duty is based on a formal or an informal relationship, when the fiduciary bears the burden of proof." *Id.* A fiduciary duty exists between spouses. *See Solares v. Solares*, 232 S.W.3d 873, 881 (Tex. App.—Dallas 2007, no pet.). Assuming without deciding that submitting question eight to the jury was error, we nevertheless could not conclude that such charge was reasonably calculated to or probably caused the rendition of an improper judgment because the amount of damages awarded to Dan under the breach of fiduciary duty claim is the same compensation as the amount of damages awarded in the actual fraud claim. Furthermore, Dan recovered this amount only once rather than twice in the judgment. *See Reinhart v. Young*, 906 S.W.2d 471, 473 (Tex. 1995). Moreover, as to question nine, we hold that the trial court did not abuse its discretion in submitting question eight to the jury, and Brenda's objections to question nine on appeal do not comport with those raised at the trial court and are thus waived. *See* TEX. R. CIV. P. 274.

4. Summary

We conclude that the trial court did not abuse its discretion by submitting the challenged charge questions in this case and overrule Brenda's third issue.

V. THE JURY'S VERDICT

By her fourth issue, Brenda challenges the legal sufficiency of the evidence regarding several jury findings.

A. Standard of Review

In reviewing the legal sufficiency of the evidence, we view the evidence in the light favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *Playboy Enters., Inc.*, 202 S.W.3d at 263 (citing *City of Keller*, 168 S.W.3d at 807). In conducting a legal sufficiency review, we will sustain a legal sufficiency point if the record reveals the following: (a) the complete absence of a vital fact; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; or (d) the evidence establishes conclusively the opposite of the vital fact. *Id.* When the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence. *Jelinek v. Casas*, 328 S.W.3d 526, 532 (Tex. 2010).

B. Discussion

Brenda challenges the jury's answers to several questions, and we will address each argument in turn.

1. Answers to Question One

a. Real Property

Brenda first argues that the evidence is legally insufficient to establish that Trail Creek Ranch in Montana was one-hundred percent Dan's separate property despite being jointly titled in Dan's name and Brenda's name because the evidence supporting such finding is no more than a mere scintilla. Turner's forensic tracing report presented documentary evidence, including: the warranty deed; the settlement statement; earnest

money payment of $300,000; and the balance of funds payment of $8,232,525.18 related to the purchase of the Trail Creek Ranch. The record shows that the payments for the ranch all derived from Dan's separate property. As we have already held, under the premarital agreement in this case, jointly acquired property may not be deemed to be community property but instead will constitute each party's separate property in proportion to that party's contribution to the purchase price. Accordingly, we conclude the evidence was legally sufficient to support the jury's verdict that Trail Creek Ranch was one-hundred percent Dan's separate property.

Brenda next challenges the jury's finding that the Village Walk Condominium in Colorado, jointly titled in Dan's name and Brenda's name, was one-hundred percent Dan's separate property. With regard to this property, the evidence shows that the Village Walk Condominium was purchased with money from the sale of a previous condominium that was purchased with Dan's separate property. Dan then paid $500,000 in earnest money and another $3,925,272.13 from his separate property to acquire this condominium. Accordingly, we conclude that the evidence is legally sufficient to support the jury's verdict that the Village Walk Condominium was Dan's separate property.

Brenda then challenges the jury's finding that the property at 115 Dickerson Road[3] in Bee County, jointly titled in Dan's name and Brenda's name, was one-hundred percent Dan's separate property. With regard to this property, the evidence shows that an earnest money deposit of $1,000 and a payment at closing of $144,291.59 was made toward the property out of Dan's separate property, specifically, from the Dan A. Hughes Company

[3] Throughout trial and briefing before this Court, the parties refer to the property as "115 Dickerson Road." However, the documentary evidence attached to Scott Turner's tracing report identifies the property's location at 1115 Dickerson Road. For consistency, we will refer to the property as "115 Dickerson Road," but we note the discrepancy.

account. Accordingly, the evidence is legally sufficient to support the jury's finding on this property.

Lastly, Brenda challenges the jury's finding that the house on Marion Drive in Rockport, Texas was fifty percent Dan's separate property and fifty percent Brenda's separate property. Brenda testified that she purchased the Marion Drive house for her sister in the amount of $250,000. According to Brenda, she gifted $80,000 of the purchase price to her sister. Of the total purchase price for the Marion Drive home, Brenda testified that she believed that she "pulled money" from her Herndon Oakley Plant account to purchase the house. Turner testified that the Marion Drive property listed Brenda as the sole owner of the property and valued at $233,640 and did not trace the source of the funds used to purchase the house. Despite these facts, Turner testified that Brenda had no funds or assets entering into the marriage, and he saw "no indication of any other funds coming in during the course of the marriage." Accordingly, after viewing the evidence in the light favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not, the evidence is legally sufficient to find that Dan and Brenda owned the Marion Drive property in equal fifty percent separate property interests.

b. Land Funds

Brenda challenges the jury's findings that JM Land Funds Numbers 1, 2, 3, 6, and Opportunity Land Fund Number 7 were one-hundred percent Dan's separate property and JM Land Fund Number 4 was seventy percent Dan's separate property. Turner's forensic accounting report showed that the jury's findings corresponded with the percentage of contribution to the funds with Dan's separate property.

First, Turner testified that with regard to JM Land Fund Number 1, two separate capital contributions of $150,000 were made to the fund from Dan's separate property and none from Brenda's separate property. Accordingly, we find the jury's finding with regard to JM Land Fund Number 1 legally sufficient. With regard to JM Land Fund Number 2, the evidence showed that Dan made four capital contributions totaling $306,816.00 out of his separate property, while Brenda contributed none of her separate property. Accordingly, the jury's finding with regard to the characterization of JM Land Fund Number 2 is legally sufficient. Next, with regard to JM Land Fund Number 3, Turner's forensic accounting report revealed that it was funded by $300,000 of Dan's separate property. Accordingly, the jury's finding with regard to the characterization of JM Land Fund Number 3 is legally sufficient. Next, the forensic account record shows that JM Texas Land Fund Number 4 was funded by seventy percent of Dan's separate property and thirty percent of Brenda's separate property. Accordingly, the jury's finding on JM Land Fund Number 4 is legally sufficient. Next, Turner's forensic accounting report shows that Dan made an initial capital contribution of $500,000 to JM Land Fund Number 6, and later reinvested income of $42,733.00 from his separate property into the fund. Therefore, the jury's finding on JM Land Fund Number 6 is legally sufficient. Finally, Turner's forensic accounting report showed that Dan contributed $500,000 of his separate property into Opportunity Land Fund Number 7 and that Brenda contributed no separate property. As a result, the jury's finding on Opportunity Land Fund Number 7 is legally sufficient.

c. Note Receivable from Kel-Lee Properties, LLC

Next, Brenda challenges the jury's finding that the note receivable from Kel-Lee Properties, LLC was fifty percent Dan's separate property is legally insufficient because

Brenda and her daughter were the sole members of Kel-Lee Properties, LLC. Turner's forensic accounting report shows that while Dan had no legal ownership or association with Kel-Lee Properties, LLC, its operations were financed entirely by Dan's separate property. During her testimony, Brenda admitted that money "that started out as [Dan's] separate property money wound up purchasing some properties in the name of Kel-Lee [Properties, LLC] . . . ." Turner testified that Kel-Lee Properties LLC's 2013 tax return showed that Brenda loaned Kel-Lee Properties LLC $1,868,164.00. Turner classified this loan as an asset "controlled by Brenda in which [Dan] has no interest," but, according to Turner, the money that was loaned to Kel-Lee Properties was traced from Dan's sole separate property. After viewing this evidence in the light favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not, we conclude that the jury's finding regarding the ownership and characterization of the note receivable to Kel-Lee Properties, LLC is legally sufficient.

d. Prosperity Bank Account

Brenda next argues that the evidence is legally insufficient to establish that the Prosperity Bank account is fifty percent Dan's separate property because Dan judicially admitted that any assets acquired with money from the couple's joint account at First National Bank could be treated as a gift. We disagree.

Brenda specifically points to the following testimony by Dan:

> Q. Ok and anything that she bought for herself with money out of that joint account to transfer to [the Prosperity Bank account] is not a gift?
>
> A. Well, it's okay with me as her gift. I didn't give it to her.

Dan's testimony clearly contradicts itself and his position. The law states that when a party's testimony contradicts its own position, courts treat them as quasi-admissions

rather than conclusive evidence against the admitter. *See Mendoza v. Fid. and Guar. Ins. Underwriters, Inc.*, 606 S.W.2d 692, 694 (Tex. 1980). Instead, the weight to be given to such quasi-admissions is left to the jury. *See id.*

Here, the evidence is legally sufficient to supports the jury's finding that funds in the First National Bank joint account were owned equally by the parties. The evidence is also legally sufficient to support the finding that the funds that flowed from the FNB joint account to the Prosperity Bank account maintained those ownership interests and that characterization.

e. Note from 3138 North Airport Road

Brenda next argues that the evidence is legally insufficient to establish that the note from 3138 North Airport Road is fifty percent Dan's separate property because the evidence conclusively shows that the North Airport property was purchased by Kel-Lee Properties, LLC and sold with the note receivable for $209,950.00 owed to Kel-Lee Properties, LLC. Furthermore, Brenda argues that she and her daughter are the only members of Kel-Lee Properties, LLC and the monies used to fund this transaction came from Brenda's Prosperity Bank account. For the reasoning discussed in Parts V.B(1)(C) and (D) of this opinion regarding the tracing evidence of Kel-Lee Properties, LLC and the Prosperity Bank account, we conclude that the evidence is legally sufficient to support the jury's finding that this property is fifty percent Dan's separate property and fifty percent Brenda's separate property.

f. Dog & Bee, LLC

Brenda's last challenge to the jury's finding under question one attacks the jury's finding that Dan owned Dog & Bee, LLC as fifty percent separate property because the evidence conclusively shows that Dog & Bee, LLC is one-hundred percent Brenda's separate property. Furthermore, Brenda again refers to Dan's testimony regarding the Prosperity Bank account as further evidence that the money used to fund Dog & Bee, LLC was a gift from Dan to Brenda. Turner's tracing report shows that the money used to fund Dog & Bee, LLC flowed from the joint account at First National Bank to the Prosperity Bank Account to Kel-Lee Properties, LLC, which then funded Dog & Bee, LLC. Based upon the reasoning discussed in Part V B(1)(C) and (D) regarding the tracing evidence of Kel-Lee Properties, LLC and the Prosperity Bank account, we conclude that the evidence is legally sufficient to support the jury's finding that Dog & Bee, LLC is fifty percent Dan's separate property and fifty percent Brenda's separate property.

2. Answer to Questions Four and Five

Brenda also argues that the jury's answers to question four and five of the jury charge were legally insufficient to be considered as part of the $10 million payout as described in the premarital agreement.

Question four was submitted to the jury to answer a disputed question of whether any other marital estate property, except the residence on Business Highway 181 North, Charco Ranch, and all of the gifts found by the jury in question one as dictated by the premarital agreement, should be considered as part of the $10 million cash and property payout included in the premarital agreement. Dan's expert, Turner, put forth evidence that based upon his review, certain pieces of property that were not gifts should be credited

toward the $10 million cash and property payout of the premarital agreement, including: (1) $2,064,583 in real estate; (2) $952,586.01 in cash and investments; (3) $525,042.90 in Dog & Bee, LLC equipment; as well as the $1,868,164 loan from Brenda to Kel-Lee Properties, LLC. Furthermore, as discussed above, the evidence was legally sufficient to support the jury's finding that Brenda owned: (1) thirty percent of JM Texas Land Fund Number 4; (2) fifty percent of the joint account at First National Bank; (3) fifty percent of the interest in Kel-Lee Properties, LLC; (4) fifty percent of the note receivable from Kel-Lee Properties, LLC; (5) fifty percent of the Marion Drive property; (5) fifty percent of the Prosperity Bank account; (6) fifty percent of the note receivable from the sale of the Airport Road property; and (7) fifty percent of Dog & Bee, LLC.

Thus, after viewing this evidence in the light favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not, the evidence is legally sufficient for the jury to find that: (1) these various pieces of property and cash were not gifts; (2) Brenda had partial ownership interest in these items; and (3) $1,536,053.85 should be considered as part of the $10 million cash and property payout.

3. Answers to Questions Six and Seven

Next, Brenda attacks the jury's verdict with regard to questions six and seven in the charge. Question six asked the jury whether Brenda committed actual fraud with respect to Dan's separate property, and question seven asked for an amount of damages if question six was found in the affirmative.

The jury was instructed pursuant the pattern jury charge on actual fraud by a spouse against the separate estate as follows:

> A spouse commits fraud if that spouse transfers separate property of the other spouse or expends separate funds of the other spouse for the primary purpose of depriving the other spouse of the use and enjoyment of that property or those funds. Such fraud involves dishonesty of purpose or intent to deceive.

The record shows that Brenda testified she believed that when she moved money from the couple's joint account to her sole account that she became "100 percent owner of that money." Turner outlined Brenda's self-admitted transfers by Brenda to her sole account or the Dog & Bee, LLC account by examining handwritten checks drawn from the couple's joint bank account in the following amounts over the course of slightly more than three years:

- $100,000 on March 6, 2012;
- $50,000 on April 2, 2012;
- $150,000 on April 19, 2012;
- $50,000 on June 1, 2012;
- $50,000 on June 7, 2012;
- $50,000 on June 8, 2012;
- $50,000 on July 5, 2012;
- $150,000 on August 13, 2012;
- $50,000 on September 4, 2012;
- $200,000 on October 9, 2012;
- $100,000 on October 25, 2012;
- $50,000 on October 30, 2012;
- $150,000 on November 9, 2012;
- $125,000 on December 3, 2012;

- $150,000 on December 18, 2012;
- $100,000 on January 7,2013;
- $50,000 on February 15, 2013;
- $50,000 on March 22, 2013;
- $100,000 on March 26, 2013;
- $50,000 on April 25, 2013;
- $75,000 on May 17, 2013;
- $50,000 on June 5, 2013;
- $50,000 on June 13, 2013;
- $100,000 on June 27, 2013;
- $50,000 on July 2, 2013;
- $50,000 on July 26, 2013;
- $75,000 on August 19, 2013;
- $50,000 on August 20, 2013;
- $50,000 on August 28, 2013;
- $80,000 on September 20, 2013;
- $100,000 on October 4, 2013;
- $50,000 on October 24, 2013;
- $150,000 on December 23, 2013;
- $50,000 on February 26, 2014;
- $50,000 on March 17, 2014;
- $50,000 on March 31, 2015;
- $150,000 on May 5, 2014; and

- $50,000 on June 18, 2014.

Turner testified that based on his accounting, over the course of eight years, Dan deposited $19,014,574.82 of his separate property into the couple's joint account. Of that money, $9,293,742.80 was spent on the couple's "joint expenditures," $0 for Dan's sole benefit, and $10,162,085.72, less $55,631.62 of Brenda's funds, or $10,106,454.40 for Brenda's benefit. Turner further testified that Dan told him that the purpose of the transferring of funds was to fund the $10 million payout under the premarital agreement not for her separate property.

After viewing this evidence in the light favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not, the evidence is legally sufficient for the jury to find that: (1) Brenda committed actual fraud with respect to Dan's separate property; and (2) the $2,393,206.90 award of fraud damages was within the range of evidence presented at trial. *See Gulf States Utils. Co. v. Low*, 79 S.W.3d 561, 566 (Tex. 2002) ("In determining damages, the jury has discretion to award damages within the range of evidence presented at trial.").

4. Answers to Questions Eight and Nine

Finally, Brenda attacks the jury's verdict as legally insufficient with regard to questions eight and nine. Question eight asks whether Brenda breached a fiduciary duty to Dan, and question nine asks what amount of damages would compensate Dan if question eight is found in the affirmative.

Brenda argues that the evidence is legally insufficient to support the jury's verdict as to question eight on the basis that she and Dan did not owe each other a fiduciary duty because no community property was created during the marriage under the premarital agreement. In support of this argument, Brenda cites *Knight v. Knight*, which held that "a fiduciary duty exists between a husband and a wife as to the community property controlled by each spouse." 301 S.W.3d 723 (Tex. App.—Houston [14th Dist.] 2009, no pet.). While we recognize the holding in *Knight* and other cases that a fiduciary duty exists between spouses with regard to their community estate, we do not read those cases so narrowly as to foreclose that spouses do not owe other fiduciary duties to one another by virtue of their marital relationship. The Texas Supreme Court appears to take a similar view by observing in non-divorce case the vibrant and fluid nature of the marital relationship:

> [T]he marital relationship between spouses is a fiduciary relationship. That special relationship is of course more than the sum of discrete actions taken by one spouse toward another. . . . The effect of that conduct on the special relationship of trust and confidence between spouses may continue and change over time.

Ditta v. Conte, 298 S.W.3d 187, 191 (Tex. 2009).

Accordingly, we decline to adopt Brenda's argument. Here, a fiduciary relationship was nevertheless created by Brenda's "special relationship of trust and confidence" as Dan's spouse and joint account holder, regardless of the separate character of the property. As a result, we adopt the evidence and analysis discussed in Part V.3 of this

opinion to support our conclusion that legally sufficient evidence supported the jury's finding of a breach of fiduciary duty by Brenda to Dan and its subsequent damages award.[4]

5. Summary

Having held that the evidence is legally sufficient to support the jury's verdict in this case, we overrule Brenda's fourth issue.

VI. CONCLUSION

We reverse the trial court's directed verdict awarding the fifty-two-carat diamond necklace purchased from the Royal Gem of Israel as Dan's separate property and render judgment that the necklace is Brenda's separate property. We affirm the remainder of the judgment.

GINA M. BENAVIDES,
Justice

Delivered and filed the
20th day of April, 2017.

[4] Dan notes in his briefing—and we confirmed by our review of the judgment—that the damages figures awarded by the jury for actual fraud and breach of fiduciary duty are identical ($2,393,206.90). The final judgment reflects that Dan recovered only once for these damages awards, not twice.