

Reversed and Rendered; Opinion Filed January 12, 2016.



In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-08-00615-CV

LEE C. RITCHIE, AS DIRECTOR OF RUPE INVESTMENT CORPORATION AND AS TRUSTEE FOR THE DALLAS GORDON RUPE TRUST, PAULA RUPE DENNARD, AS DIRECTOR OF RUPE INVESTMENT CORPORATION AND AS TRUSTEE FOR THE DALLAS GORDON RUPE TRUST AND AS TRUSTEE FOR THE PAULA DENNARD MANAGEMENT TRUST, DENNIS LUTES AS DIRECTOR OF RUPE INVESTMENT CORPORATION AND AS TRUSTEE FOR THE PAULA DENNARD MANAGEMENT TRUST, AND RUPE INVESTMENT CORPORATION, Appellants

V.

ANN CALDWELL RUPE, AS TRUSTEE FOR THE DALLAS GORDON RUPE, III 1995 FAMILY TRUST, Appellee

On Appeal from the 44th Judicial District Court
Dallas County, Texas
Trial Court Cause No. 06-06944

MEMORANDUM OPINION ON REMAND

Before Justices Lang-Miers, Stoddart, and Whitehill
Opinion by Justice Stoddart¹

This case is before us on remand from the Texas Supreme Court, *see Ritchie v. Rupe*, 443 S.W.3d 856, 892 (Tex. 2014) (*Ritchie II*), to resolve appellants' challenges to the jury's breach of fiduciary duty findings. *Id.* Specifically, the jury found that an informal fiduciary relationship

¹ Justices Jim Moseley and Kerry P. FitzGerald were members of the panel when our March 28, 2011 opinion issued. They have since retired.

existed between Rupe, on the one hand, and Dennard, Ritchie, and Lutes,² on the other hand. The jury also found Dennard, Ritchie, and Lutes breached the fiduciary duty. Dennard, Ritchie, and Lutes challenge the sufficiency of the evidence to support the findings that an informal fiduciary relationship existed and that the fiduciary duties were breached.

We conclude there is no evidence of a relationship of trust and confidence to support the finding of an informal fiduciary relationship. Thus, we need not address whether the duty was breached. Accordingly, we reverse the trial court's judgment and render judgment that Rupe take nothing.

BACKGROUND

This case involves a dispute between the shareholders of a closely held corporation, Rupe Investment Corporation (RIC). RIC's founder, Gordon Rupe, created a trust (Gordon's Trust) to hold his shares in the company for the benefit of his wife, his children (Dennard and Buddy), and Dennard's three children.

Before this dispute arose, the directors of the company were: Paula Dennard; Dennard's brother, Gordon Rupe III (Buddy); Lee Ritchie, the son of an early investor in RIC; and Dennis Lutes, an attorney whose clients include RIC, Dennard, and her family. Ritchie is president of RIC.

Dennard, Ritchie, and Lutes as co-trustees of three trusts owned approximately 72 percent of RIC's voting stock.³ Ritchie and his family owned ten percent of the shares directly,

² For convenience, we refer to the parties in the same manner as the supreme court's opinion. *Ritchie II*, 443 S.W.3d at 860–61. Except for a small percentage owned by Ritchie individually, the shares of RIC involved in this case are all held by the parties in their capacities as trustees of various trusts. We refer to the parties by name, meaning their trustee capacity. *See id.* at 861 n.3.

³ Dennard and Ritchie as co-trustees of Gordon's Trust owned 46.6% of the voting shares. Dennard and Ritchie also owned 7.4% of the shares as co-trustees of Ruby's Trust. (Ruby's trust was distributed to Dennard's children and Buddy's adopted daughter during the course of this litigation) Dennard and Lutes as co-trustees of Dennard's Trust owned 18% of the voting shares. *See Ritchie v. Rupe*, 339 S.W.3d 275, 281–82 (Tex. App.—Dallas 2011), *rev'd*, 443 S.W.3d 856 (Tex. 2014).

and Buddy owned the remaining eighteen percent directly.

In 1983, several years after Gordon's death, Buddy married his second wife, Ann Rupe, and in 1993 they had a son, Guy. Buddy and Rupe wanted their son to be added as a beneficiary of Gordon's Trust, but Dennard and her children refused. This created some friction between Rupe and Dennard. According to Rupe, Dennard treated Rupe "as an outsider" from the very beginning, and told her that she would "never get any money in this family." With Buddy's encouragement, Rupe considered filing a lawsuit to reform Gordon's Trust to add Guy as a beneficiary.

Before his death in 2002, Buddy placed his shares in RIC in a trust (Buddy's Trust) for the benefit of Rupe and Guy. Rupe succeeded Buddy as trustee of Buddy's Trust after his death.

In Rupe's view, Dennard, Ritchie, and Lutes immediately became "hostile" towards her and feared she would sue to reform Gordon's Trust for the benefit of her son. However, Ritchie, with Dennard's and Lutes's approval, offered to appoint Rupe to replace Buddy on RIC's board of directors, but only if she would agree not to file suit against Gordon's Trust. Rupe declined, and instead asked Ritchie if RIC would be interested in buying out her shares.

Rupe was dissatisfied with the offers for the shares in Buddy's Trust, and filed this lawsuit against RIC, Dennard, Ritchie, and Lutes, individually, as directors, and as trustees, for shareholder oppression and breach of informal fiduciary duties. The jury found for Rupe against Dennard, Ritchie, and Lutes on both claims and determined the fair market value of the shares in Buddy's Trust. The trial court ordered a buyout of the shares held in Buddy's Trust for the value determined by the jury.

On appeal, we reversed the determination of the fair market value of the shares, but affirmed the liability finding on shareholder oppression. *See Ritchie v. Rupe*, 339 S.W.3d 275, 281 (Tex. App.—Dallas 2011) (*Ritchie I*), *rev'd*, 443 S.W.3d 856 (Tex. 2014). We did not

address the informal fiduciary duty claim. The supreme court reversed our judgment on the shareholder oppression claim and remanded for us to consider the challenges to the informal fiduciary duty findings. *See Ritchie II*, 443 S.W.3d at 892.

STANDARD OF REVIEW

In a legal sufficiency challenge, we review the evidence in the light most favorable to the verdict, credit the favorable evidence if a reasonable juror could, and disregard the contrary evidence unless reasonable jurors could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005). A challenge to the legal sufficiency of the evidence will be sustained when, among other things, the evidence offered to establish a vital fact is no more than a scintilla. *Kroger Tex. Ltd. P'ship v. Suberu*, 216 S.W.3d 788, 793 (Tex. 2006). Evidence is more than a scintilla if it “rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.” *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004). However, evidence does not exceed a scintilla if it is so weak as to do no more than create a mere surmise or suspicion that the fact exists. *Serv. Corp. Intern. v. Guerra*, 348 S.W.3d 221, 228 (Tex. 2011).

ANALYSIS

A. Jury Charge

Question One asked the jury:

Did a relationship of trust and confidence exist between any of the below-named individuals and Ann Rupe, as Trustee for the Dallas Gordon Rupe, III 1995 Family Trust?

[1.] A relationship of trust and confidence existed if Ann Rupe, as Trustee for the Dallas Gordon Rupe, III 1995 Family Trust, justifiably placed trust and confidence in those named below to act in the Dallas Gordon Rupe, III 1995 Family Trust's best interest. Ann Rupe's subjective trust and feelings alone do not justify transforming arm's-length dealings into a relationship of trust and confidence.

[2.] A confidential relationship exists where influence has been acquired and abused, and confidence has been reposed and betrayed.

[3.] Co-shareholders in a closely held corporation typically do not owe fiduciary

duties to fellow shareholders. While corporate officers owe fiduciary duties to the corporation they serve, they do not generally owe fiduciary duties to individual shareholders unless a contract or confidential relationship exists between them in addition to the corporate relationship. For a majority shareholder to owe a fiduciary duty to minority shareholders, you must find that the majority shareholder dominates control over the business.

The jury answered “Yes” as to each of Dennard, Ritchie, and Lutes as co-trustees of their respective trusts.

Question Two was conditioned on an affirmative answer to Question One, and asked whether Dennard, Ritchie, and Lutes complied with their fiduciary duties. The jury found they did not. Because we conclude the evidence is insufficient to support the finding on Question One, we do not address the finding on Question Two.

Dennard, Ritchie, and Lutes contend on remand that the domination theory in the last sentence of the third instruction to Question One is merely a general statement of law and argue the supreme court’s decision in this case makes the instruction erroneous as a matter of law. Thus, they argue evidence of domination and control cannot support the jury’s answer to Question One. Alternatively, they contend the instruction imposed an additional requirement for finding a confidential relationship existed and the evidence is insufficient to support the finding under the other instructions.

Rupe responds that the domination instruction was submitted without objection and the sufficiency of the evidence must be reviewed by the charge as given to the jury. *See Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 715 (Tex. 2001) (stating assessment of evidence “must be made in light of the jury charge that the district court gave without objection” even if statement of law is not entirely correct). In this regard, we agree with Rupe.

The record indicates Dennard, Ritchie, and Lutes did not object to the instruction. Accordingly, we will review the sufficiency of the evidence under the charge given by the district court. *See Romero v. KPH Consol., Inc.*, 166 S.W.3d 212, 221 (Tex. 2005) (“The

sufficiency of the evidence must be measured by the jury charge when, as here, there has been no objection to it.”). We express no opinion about the merit of the instruction.

However, we reject Rupe’s additional argument that evidence of domination and control is sufficient by itself to support the jury’s answers to Question One. The jury was instructed that a relationship of trust and confidence existed if Rupe “justifiably placed trust and confidence” in Dennard, Ritchie, and Lutes to act in the best interest of Buddy’s Trust. *See* Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Business* PJC 104.1 (2014). They were also instructed that a confidential relationship exists where influence has been acquired and abused, and confidence has been reposed and betrayed. The instruction on domination and control would apply only to a majority shareholder.

There is no evidence that a single party owned a majority of the shares in the same capacity.⁴ But even if there were such evidence in addition to evidence of domination and control, the jury was still required to find whether there was a relationship of trust and confidence between Rupe and the majority shareholder. As to other minority shareholders, such as Ritchie and Lutes, the jury was required to find a relationship of trust and confidence regardless of evidence of domination and control by a majority shareholder. Under the charge as given by the district court, the domination theory was an additional requirement for the jury to find a relationship of trust and confidence. Therefore, evidence of domination and control alone will not support the jury’s answers to Question One.

B. Informal Fiduciary Relationships

The fiduciary duty alleged in this case is an informal fiduciary duty between Rupe and Dennard, Ritchie, and Lutes. Informal fiduciary relationships may “arise from ‘a moral, social, domestic, or purely personal relationship of trust and confidence.’” *Meyer v. Cathey*, 167 S.W.3d

⁴ At the time of trial, Dennard as a co-trustee of two different trusts owned 64.6% of the shares.

327, 331 (Tex. 2005) (quoting *Associated Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 287 (Tex. 1998)). Informal fiduciary duties are not owed in business transactions unless the special relationship of trust and confidence existed prior to, and apart from, the transaction(s) at issue in the case. *Id.* (quoting *Associated Indem.*, 964 S.W.2d at 288).

An informal fiduciary relationship exists “where, because of family relationship or otherwise, [one party] is in fact accustomed to be guided by the judgment or advice” of the other. *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962). “The existence of the fiduciary relationship is to be determined from the actualities of the relationship between the persons involved.” *Id.* “In order to give full force to contracts, we do not create such a relationship lightly.” *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 177 (Tex. 1997).

The Texas Supreme Court has held that a confidential relationship “exists where a special confidence is reposed in another who in equity and good conscience is bound to act in good faith and with due regard to the interest of the one reposing confidence.” *See Tex. Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 507 (Tex. 1980) (quoting *Lappas v. Barker*, 375 S.W.2d 248, 251 (Ky. 1964)). Thus, “[a] person is justified in placing confidence in the belief that another party will act in his or her best interest only where he or she is accustomed to being guided by the judgment or advice of the other party, and there exists a long association in a business relationship, as well as personal relationship.” *Hoggett v. Brown*, 971 S.W.2d 472, 488 (Tex. App.—Houston [14th Dist.] 1997, pet. denied). Confidential relationships may arise when the parties have dealt with each other in such a manner for a long period of time that one party is justified in expecting the other to act in its best interest. *Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667, 674 (Tex. 1998).

“[M]ere subjective trust alone is not enough to transform arms-length dealing into a fiduciary relationship.” *Thigpen*, 363 S.W.2d at 253. Rather, in order to establish the existence of an informal fiduciary relationship, the record must show that one of the parties actually relied on

the other “for moral, financial, or personal support or guidance.” *Trostle v. Trostle*, 77 S.W.3d 908, 915 (Tex. App.—Amarillo 2002, no pet.). An informal fiduciary relationship requires proof that, because of a close or special relationship, the plaintiff “is in fact accustomed to be guided by the judgment or advice” of the other. *Gregan v. Kelly*, 355 S.W.3d 223, 228 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (quoting *Thigpen*, 363 S.W.2d at 253).

C. Sufficiency of the Evidence

We look at the evidence in the light most favorable to the verdict. *See City of Keller*, 168 S.W.3d at 823.

Here, the evidence indicates that RIC is a closely-held family company. Rupe and Dennard are related only by marriage. (Rupe is Dennard’s sister-in-law) Dennard testified she loved her brother, Buddy, and loves Rupe and their son, Guy.

Ritchie is not related to Rupe, but Buddy named Ritchie as a successor co-trustee of Buddy’s trust with two other people in the event that Rupe could not serve as successor trustee. The trust instrument describes the successor co-trustees as Buddy’s “friends and advisors.” Buddy’s will named the same people as successor personal representatives should Rupe fail to serve. Lutes also is not related to Rupe, but did some legal work for Ann and Buddy.

Rupe did not know much about the company when Buddy died. She attended shareholder meetings with Buddy before his death, but not director’s meetings. After Buddy died, Rupe was concerned about her new responsibilities as trustee of Buddy’s Trust. She met with Ritchie at RIC’s office on September 30, 2002, a few days after Buddy’s funeral. Rupe requested the meeting because she “was naïve” and hoped Ritchie would explain “how they saw things would happen now that Buddy was gone.” The first thing Ritchie said to her at the meeting was, “You understand there’s nothing we can do for Guy.”

When she took over as trustee of Buddy’s Trust, Rupe was struggling with tax issues

related to Buddy's redemption of Class A stock. Ritchie testified that Rupe told him about her tax problems after Buddy's death, but he did not know the extent of the problems. In January 2003, Rupe asked Ritchie if the company would be interested in investing in her title business in Oregon. She also asked him about obtaining a loan from RIC secured by Buddy's Shares. Ritchie told Rupe it was against company policy to invest in any shareholder's business or to offer loans to shareholders. In February 2003, about five months after Buddy's death, Rupe asked Ritchie if RIC would be interested in buying Buddy's Shares.

Dennard

Rupe contends this evidence is sufficient to support the jury's finding of a relationship of trust and confidence. We disagree. The family relationship with Dennard is insufficient in itself to create a confidential relationship. *See Tex. Bank*, 595 S.W.2d at 508 (noting that, standing alone, neither existence of family relationship nor bestowing of benefits establishes fiduciary relationship). Rupe cites no other evidence, and we have found none, to support a finding that she justifiably placed trust and confidence in Dennard to act in the best interest of Buddy's Trust. Rupe herself testified she was treated as an outsider from the very beginning and when Rupe first met Dennard, Dennard said "you'll never get any money in this family." Rupe also testified that when she became pregnant with Guy, Dennard said to her, "You finally pulled it off." Rupe felt this was not meant as a compliment.

Ritchie

Nor does the evidence show a close personal relationship of trust and confidence between Rupe and Ritchie. Rupe testified she was naïve about the company and hoped that Ritchie would explain to her what was going to happen after Buddy's death, but this is nothing more than subjective trust that Ritchie would discuss the company with her. *See Thigpen*, 363 S.W.2d at 253 (evidence of subjective feelings alone insufficient to show confidential relationship).

Although Rupe told Ritchie about her tax problems, he told her the company would not invest in her business or make a loan to her. There is no evidence that she justifiably relied on Ritchie to act in the best interest of Buddy's Trust.

Lutes

There is also no evidence of a confidential relationship between Rupe and Lutes as shareholders. Lutes testified he performed some legal work for Rupe on specific matters, but did not explain what those matters were. There are no pleadings and no evidence that Lutes breached a formal fiduciary duty to Rupe as her attorney. Rather, the issue here is whether there is evidence of an informal relationship of trust and confidence. The jury was asked to determine if Lutes as a trustee was in a confidential relationship with Rupe. There is no evidence to support the finding that he was.

Rupe argues we should focus not on the strained relationship between Rupe and Dennard, Ritchie, and Lutes, but on evidence of "a longstanding personal and familial association between the shareholder trusts that would justify trust and confidence between the people who represent those shareholders (namely, the trustees)." She contends she is not the plaintiff in this case to whom a fiduciary duty is owed, she is merely the representative of the plaintiff, which is Buddy's Trust. This argument appears to assert that a relationship of trust and confidence existed between the trusts even if it did not exist between the trustees. We reject this argument for several reasons.

First, the jury was asked whether a confidential relationship existed between Rupe, as trustee for Buddy's Trust, and each of Dennard, Ritchie, and Lutes in their capacities as trustees.

Second, confidential relationships do not exist between trusts because a trust is not a separate legal entity. *See Huie v. DeShazo*, 922 S.W.2d 920, 926 (Tex. 1996) ("The term 'trust' refers not to a separate legal entity but rather to the *fiduciary relationship* governing the trustee

with respect to the trust property.”); *see also Ditta v. Conte*, 298 S.W.3d 187, 191 (Tex. 2009). The court in *Huie* explained that treating a trust rather than the trustee as an attorney’s client “is inconsistent with the law of trusts.” *Id.* The trustee holds legal title to property for the benefit of the beneficiaries under the terms of the trust agreement. *Dierschke v. Cent. Nat. Branch of First Nat. Bank at Lubbock*, 876 S.W.2d 377, 381 (Tex. App.—Austin 1994, no writ) (citing *Perfect Union Lodge No. 10, A.F. & A.M., of San Antonio v. Interfirst Bank of San Antonio, N.A.*, 748 S.W.2d 218, 220 (Tex. 1988)).

Third, Rupe in her capacity as trustee is the plaintiff in this case, not Buddy’s Trust. A trust is not an entity that can be a party to a lawsuit. *See Huie*, 922 S.W.2d at 926. The trustee is the proper party to sue or be sued regarding trust property because a trust is not a legal entity. *See Ray Malooly Trust v. Juhl*, 186 S.W.3d 568, 570 (Tex. 2006) (per curiam) (“The general rule in Texas (and elsewhere) has long been that suits against a trust must be brought against its legal representative, the trustee.”). Thus, Rupe was required to prove that a confidential relationship existed between her as trustee and any of Dennard, Ritchie, and Lutes in their capacities as trustees.

Even so, there is no evidence that Buddy, the only other trustee of Buddy’s Trust, justifiably placed trust and confidence in the other shareholders to act in the best interest of Buddy’s Trust. Indeed, when Buddy asked Dennard, the co-trustee of Gordon’s Trust, in 1997 if she agreed to assist in reforming the trust to include Buddy’s son, she and her children refused.

We conclude there is no evidence that Rupe had a relationship of trust and confidence with Dennard, Ritchie, and Lutes. Accordingly, no evidence supports the jury’s answer to Question One. Because there is no evidence of the existence of a fiduciary duty, we need not discuss the evidence regarding breach of the duty.

CONCLUSION

We conclude there is legally insufficient evidence to support the jury's finding of a confidential relationship between Rupe and Dennard, Ritchie, and Lutes. Accordingly, we reverse the trial court's judgment and render judgment that Rupe take nothing from Dennard, Ritchie, and Lutes.

/Craig Stoddart/
CRAIG STODDART
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

LEE C. RITCHIE, as Director of Rupe Investment Corporation and as Trustee for the Dallas Gordon Rupe Trust, PAULA RUPE DENNARD, as Director of Rupe Investment Corporation and as Trustee for the Dallas Gordon Rupe Trust and as Trustee for the Paula Dennard Management Trust, DENNIS LUTES as Director of Rupe Investment Corporation and as Trustee for the Paula Dennard Management Trust, and RUPE INVESTMENT CORPORATION, Appellants

On Appeal from the 44th Judicial District Court, Dallas County, Texas
Trial Court Cause No. 06-06944.
Opinion delivered by Justice Stoddart.
Justices Lang-Miers and Whitehill participating.

No. 05-08-00615-CV V.

ANN CALDWELL RUPE, as Trustee for the Dallas Gordon Rupe, III 1995 Family Trust, Appellee

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and judgment is **RENDERED** that:

Appellee Ann Caldwell Rupe, as Trustee for the Dallas Gordon Rupe, III 1995 Family Trust take nothing from appellants Lee C. Ritchie, as Director of Rupe Investment Corporation and as Trustee for the Dallas Gordon Rupe Trust, Paula Rupe Dennard, as Director of Rupe Investment Corporation and as Trustee for the Dallas Gordon Rupe Trust and as Trustee for the Paula Dennard Management Trust, Dennis Lutes as Director of Rupe Investment Corporation and as Trustee for the Paula Dennard Management Trust, and Rupe Investment Corporation.

It is **ORDERED** that appellants Lee C. Ritchie, as Director of Rupe Investment Corporation and as Trustee for the Dallas Gordon Rupe Trust, Paula Rupe Dennard, as Director of Rupe Investment Corporation and as Trustee for the Dallas Gordon Rupe Trust and as Trustee for the Paula Dennard Management Trust, Dennis Lutes as Director of Rupe Investment Corporation and as Trustee for the Paula Dennard Management Trust, and Rupe Investment

Corporation recover their costs of this appeal from appellee Ann Caldwell Rupe, as Trustee for the Dallas Gordon Rupe, III 1995 Family Trust.

Judgment entered this 12th day of January, 2016.