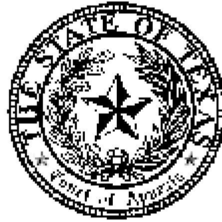
Affirmed and Opinion filed August 2, 2001.



In The

Fourteenth Court of Appeals

NO. 14-00-00055-CV

CAROLYN HOWARD MCALLISTER, Appellant

V.

CHARLES OMAN, Appellee

On Appeal from the 127th District Court
Harris County, Texas
Trial Court Cause No. 97-55901

O P I N I O N

Following a jury trial, in which a jury found that appellant, Carolyn Howard McAllister ("McAllister"), breached a fiduciary duty owed to appellee, Charles Oman ("Oman"), McAllister appeals, complaining that the trial court erred in submitting a question on the existence of and breach of a fiduciary duty because there was no evidence to support such a submission.[1] Additionally. McAllister contends that the trial court

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[1] Appellant also complains on appeal that the fiduciary duty question was defective as submitted. Specifically, appellant contends that the question was defective because it needed to include another question inquiring into whether a formal relationship existed. Thus, appellant is objecting to an omitted question. In order to preserve error on an omitted question, Texas Rule of Civil Procedure 278 requires that appellant at

should have granted her motion for judgment notwithstanding the verdict. We affirm.

I. Background

The record in the case indicates that Oman's and McAllister's working relationship began in 1984, when Oman hired McAllister as a regional manager for Vogue Properties Inc. ("Vogue") in Fort Worth, Texas. In 1992 Oman, through Vogue, invested in Houston Training School ("Houston Training"). As part of this investment, Oman loaned $50,000.00 to several of his employees, including McAllister, giving them a personal interest in Houston Training. Moreover, Oman had an option to purchase the remaining outstanding shares of stock in Houston Training of which McAllister would receive a percentage. Oman's stated purpose for including McAllister in this investment in Houston Training was to help those who had "served well and done well" with Vogue. The record reveals that Oman entrusted McAllister with the management of Houston Training. While at Houston Training, McAllister, in addition to being a co-shareholder with Oman, held several positions with Houston Training culminating in her being appointed President of Houston Training and becoming the majority shareholder. In obtaining this position, the record is clear that a practice existed whereby McAllister failed to notify Oman and other shareholders of meetings. In these meetings, stock in Houston Training, of which Oman claimed an interest, was sold to McAllister, McAllister was appointed President of Houston Training, and assets of Houston Training, previously given to Oman, were sold to a relative

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least object to the omitted question. *See* TEX. R. CIV. P. 278. Additionally, the Texas Supreme Court in *State Department of Highways & Public Transportation v. Payne*, established that appellant's objection does not have to follow the technical requirements of the Texas Rules of Civil Procedure regarding the jury charge, so long as the objection made the trial court aware of the complaint, timely and plainly, and the objecting party obtained a ruling. 838 S.W.2d 235, 241(Tex. 1992). Appellant has failed to preserve error even under the more liberal standard enunciated in *Payne*. *See Alaniz v. Jones & Neuse, Inc.*, 907 S.W.2d 450 (Tex. 1995) (holding that *Payne* mandates a common sense application of the rules regarding the charge in order to effectuate the purpose of those rules). Appellant's sole objection regarding the question on the existence of a fiduciary relationship was that no evidence came out at trial to support the submission of such a question. We hold that such objection fails to inform the trial court that a question was omitted from the trial court's charge. Accordingly, appellant has failed to preserve error to complain on appeal of an omitted question.

of another shareholder. In addition to failing to provide notice of meetings McAllister failed to pay dividends to Oman.

II. Discussion

A. Standard of Review

A motion for judgment notwithstanding the verdict should be granted when the evidence is conclusive and one party is entitled to judgment as a matter of law. *Mancorp, Inc. v. Culpepper*, 802 S.W.2d 226, 227–28 (Tex. 1990). In reviewing the denial of a motion for judgment notwithstanding the verdict, we review the evidence in the light most favorable to the jury findings, considering only the evidence and inferences that support them, and disregarding all evidence and inferences to the contrary. *Navarette v. Temple Indep. Sch. Dist.*, 706 S.W.2d 308, 309 (Tex. 1986). If there is more than a scintilla of evidence to support the findings, the motion for judgment notwithstanding the verdict was properly denied. *Mancorp*, 802 S.W.2d at 228.

B. Jury Finding on the Existence of a Fiduciary Relationship

There are two types of fiduciary relationships, 1) those that arise as a matter of law—a formal fiduciary relationship, and 2) those that arise as a result of a confidential relationship—an informal fiduciary relationship. *Hoggett v. Brown*, 971 S.W.2d 472, 487 (Tex. App.—Houston [14th Dist.] 1997, no writ). A confidential relationship is one "where one person trusts in and relies upon another, whether the relation is moral, social, domestic or merely personal." *Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 593–94 (Tex. 1992).

In the present case, no formal fiduciary relationship arose as a matter of law between Oman and McAllister as a result of their positions as co-shareholders in a closely held corporation. As a matter of law, co-shareholders in a closely held corporation do not owe a fiduciary duty to one another. *Hoggett*, 971 S.W.2d at 488; *Kasper v. Thorne*, 755 S.W.2d 151, 155 (Tex. App.—Dallas 1988, no writ). Instead, whether such a duty exists

depends on the circumstances. *Hoggett*, 971 S.W.2d at 488; *Kasper*, 755 S.W.2d at 155. For example, the existence of a confidential relationship would support a fiduciary duty. *Hoggett*, 971 S.W.2d at 488; *Kasper*, 755 S.W.2d at 155. Accordingly, our inquiry will focus on whether the evidence is sufficient to support a finding that an informal fiduciary relationship existed between Oman and McAllister.

The supreme court has cautioned that although fiduciary relationships are based upon trust, not all relationships involving a high level of trust and confidence require that the parties act with good faith and with due regard to the interests of the one reposing confidence. *Schlumberger Technology Corp. v. Swanson*, 959 S.W.2d 171, 177–78 (Tex. 1997). However, when influence has been acquired and abused, or when one personally gains from the trust and confidence reposed by another, a fiduciary relationship is likely to exist. *Moore*, 595 S.W.2d at 507-08; *see Crim Truck*, 823 S.W.2d at 594; *Hoggett*, 971 S.W.2d at 488.

The record reflects that there existed a long-standing business relationship between Oman and McAllister; a relationship that appears to be better described as a mentor/mentee relationship rather than an employer/employee relationship. In fact, McAllister readily concedes that Oman played an active role in training her how to run a vocational school and how to create the critical paperwork necessary in a government-funded vocational program. This relationship culminated in Oman placing McAllister in charge of Houston Training, and advancing $50,000.00 to McAllister, allowing her to gain a personal interest in Houston Training. Clearly, McAllister personally gained from the trust and confidence placed in her by Oman. McAllister believes that *Hoggett v. Brown* requires us to find that a fiduciary duty owed by McAllister to Oman, did not exist as a matter of law. We decline to do so. While the law enunciated in *Hoggett v. Brown* is clearly controlling on the issue before us, the particular facts of the case are distinguishable. In our present case, McAllister and Oman had a much more developed relationship than that of employer/employee. McAllister worked closely with Oman beginning in 1984, when she learned how to manage a vocational school. When Oman invested in Houston Training,

he not only chose McAllister to manage the school, but advanced his own money to her, allowing her to obtain a personal interest in Houston Training. In *Hoggett v. Brown*, however, the court describes a relationship existing between the two men as being a short and troubled one. 971 S.W.2d at 488. Brown's entry into the business was conducted at arms-length, with each party represented by counsel. *Id.* There were numerous disputes between Brown and Hoggett concerning the nature of Brown's financial contributions to the company. *Id.* at 488–89. Additionally, Hoggett was suspicious and mistrustful of Brown's motives toward the company. *Id.* at 489. It is not surprising that the court in *Hoggett* found that, in such an atmosphere, there could be no confidential relationship giving rise to a duty to disclose. *Id.* Viewing the evidence in the light most favorable to support the verdict, we find adequate evidence to affirm the finding that a fiduciary relationship existed.

C. Jury Finding on the Breach of a Fiduciary Duty

Having determined that there was sufficient evidence to support the jury's finding that a fiduciary relationship existed between McAllister and Oman, we must next determine whether the evidence supports a finding that McAllister breached a fiduciary duty owed to Oman.

Again, if there is more than a scintilla of evidence to support the jury finding that McAllister breached a fiduciary duty owing to Oman, the motion for judgment notwithstanding the verdict was properly denied. *See Mancorp*, 802 S.W.2d at 228.

The record reflects, and McAllister admits, that she had a duty to pay Oman dividends, to provide Oman with financial documents regarding Houston Training, and to provide notice of shareholder and board meetings. While there is some dispute on whether Oman ever received financial documents regarding Houston Training, there is no dispute that Oman was never paid any dividends, and never given notice regarding shareholder and board meetings. Additionally, the record reflects that, at these meetings Oman's stock was transferred to McAllister, that McAllister was voted as President of Houston Training,

and that property, previously given to Oman, was sold to a family member of another shareholder. Clearly, there is more than a scintilla of evidence to support the jury's finding that McAllister breached a fiduciary duty owing to Oman. Accordingly, the trial court did not err in overruling McAllister's motion for judgment notwithstanding the verdict.

The judgment of the trial court is affirmed.

/s/ Paul C. Murphy
Senior Chief Justice

Judgment rendered and Opinion filed August 2, 2001.

Panel consists of Justices Edelman, Frost, and Murphy.[**]

Do Not Publish TEX. R. APP. P. 47.3(b).

[**] Senior Chief Justice Paul C. Murphy sitting by assignment.