

**Affirmed and Opinion Filed May 14, 2018**



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

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**No. 05-17-00174-CV**

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**JOHN LEONARD MARKL AND DEBRA KAY MARKL, Appellants  
V.  
ETHEL MAUDETTE LEAKE, Appellee**

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**On Appeal from the 397th Judicial District Court  
Grayson County, Texas  
Trial Court Cause No. CV-15-0126**

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**MEMORANDUM OPINION**

**Before Justices Francis, Brown, and Stoddart  
Opinion by Justice Francis**

After Ethel Maudette Leake ended a ten-year affair with John Leonard Markl, John and his wife, Debra, sued her for various causes of action, including breach of fiduciary duty. At the close of the Markls' evidence in the ensuing jury trial, the trial court granted Ethel's motion for directed verdict on the claim. On appeal, the Markls contend the ruling was error. We affirm.

John had been married to Debra for several years when he met Ethel in 2004 at the restaurant where she worked. The two became friends. John helped her repair the windshield on her car and then began doing work on her house. While working on her house, the two began an affair.

Shortly after, Ethel quit her job at the restaurant for a lower-paying job, and John put her on his company's payroll so she could "make ends meet." During the course of their ten-year

relationship, they tried to conceive a child, discussed buying property together, traveled together, and shared intimate details of their lives. Ethel made him the beneficiary in her will, and both took out life insurance policies for the benefit of the other.

By 2008, John had made significant repairs and upgrades to Ethel's house and a second house she inherited from her mother. John testified he spent about \$50,000 making repairs to both houses. As they planned a "more permanent relationship," he said they began referring to Ethel's house as "our house" and planned to live there together. According to John, Ethel knew she was not paying for his work because he had an interest in the property and said more than a dozen times that if they ended their relationship, he would get back his investment. He explained that Ethel kept the property in her name only so Debra could not "attach herself to it in any way" once the marriage ended.

Although John agreed he would leave Debra at some point and marry Ethel, John was reluctant to end his marriage because Debra "hadn't done anything wrong" and Ethel "was just too much drama." In July 2011, John left Debra and moved in with Ethel after Ethel gave him an ultimatum but because he was so upset and distraught and felt guilty, he went back to his wife after three days. John said he realized at that point, Ethel wanted money and security and the "satisfaction . . . of getting a married man to leave his wife for her."

While John testified he and Ethel's relationship was based on "trust," he also said Ethel threatened to tell Debra about their relationship "if she didn't get what she wanted." John said they "fought a lot" and often talked about ending their relationship, but they made up because of "this stalemate" dating back to early in the relationship: "If I wanted out, she was going to tell my wife everything and I was going to lose her, and lose my wife, and my wife was going to take me for everything I had. And if she wanted out, I'd tell her, okay, fine, but we've got to settle up on the property." He said their threats to each other "pretty much put a - - blanket on the fire."

In 2013, John was renting the house Ethel inherited from her mother to store some of his belongings. John's nephew needed help, and John arranged for him to move into the house. John paid the rent, which he gave to Ethel. In May 2014, Ethel began an affair with John's nephew (whom she subsequently married). John became suspicious, but Ethel denied his accusations. John and Ethel's relationship came to an end in October 2014 when Ethel accused John of assault. She told police he broke down her door and attacked her. John said he broke in to prevent her from committing suicide, which he said she had attempted on many other occasions. Ethel's sister-in-law arrived during the incident, and Ethel left with her and called the police. John went home and told his wife and "briefly explained what happened." John was ultimately charged with four felonies. He pleaded guilty to burglary with intent to commit assault, and the remaining charges were dismissed.

Two months after the breakup, the Markls sued Ethel for breach of fiduciary duty, arguing that Ethel's breach deprived them of the community funds invested in Ethel's property. They also alleged fraud, conversion, and promissory estoppel. Ethel denied the allegations, raised affirmative defenses, and counterclaimed for assault, negligence, and intentional infliction of emotional distress.

At trial, the Markls wanted the return of the investment on the two houses that John made improvements on. After they presented their case, Ethel moved for a directed verdict on their claims. The trial court granted the motion as to the breach of fiduciary duty claim, saying there was "no authority that somebody in an extramarital relationship" in Texas has a valid claim for breach of fiduciary duty. The jury subsequently found against the Markls on their claims for fraud, promissory estoppel, and conversion. In addition, the jury found John assaulted Ethel but awarded zero damages. The Markls appealed, challenging only the trial court's ruling to direct a verdict on their breach of fiduciary duty claim.

A court may direct a verdict if no evidence of probative force raises a fact issue on the material questions in the suit. *See Szczepanik v. First S. Trust Co.*, 883 S.W.2d 648, 649 (Tex. 1994) (per curiam). We review a trial court’s decision to grant a motion for a directed verdict under the legal sufficiency standard of review. *Helping Hands Home Care, Inc. v. Home Health of Tarrant Cnty., Inc.*, 393 S.W.3d 492, 515 (Tex. App.—Dallas 2013, pet. denied); *see City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005). We credit evidence favoring the non-movant if reasonable jurors could and disregard contrary evidence unless reasonable jurors could not. *City of Keller*, 168 S.W.3d at 827. 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. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750–51 (Tex. 2003).

A viable breach of fiduciary duty claim requires the following proof: (1) a fiduciary relationship between the plaintiff and the defendant, (2) a breach of the fiduciary duty to the plaintiff, and (3) injury to the plaintiff (or benefit to the defendant) as a result of the breach. *Flagstar Bank, FSB v. Walker*, 451 S.W.3d 490, 499 (Tex. App.—Dallas 2014, no pet.). The dispositive issue here is whether there was a fiduciary relationship between John and Ethel.

A fiduciary relationship exists when “the parties are under a duty to act for or give advice for the benefit of another upon matters within the scope of the relationship.” *Tex. Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 507 (Tex. 1980). Fiduciary duties may arise from formal and informal relationships. Formal fiduciary relationships, such as attorney-client, partnership, and trust relationships, arise as a matter of law. *See Crim Truck & Tractor v. Navistar Int’l Transp. Corp.*, 823 S.W.2d 591, 594 (Tex. 1992), *superseded by statute on other grounds as noted in Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 225–26 (Tex. 2002). The

Markls do not assert a “formal relationship;” rather, they argue an informal fiduciary relationship existed between John and Ethel.

Informal relationships, termed “confidential relationships,” may arise “where one person trusts in and relies upon another, whether the relation is a moral, social, domestic, or merely personal one.” *Id.* A confidential relationship exists in those cases in which influence has been acquired and abused and confidence has been extended and betrayed. *Moore*, 595 S.W.2d at 507. Whether a fiduciary relationship exists depends on the circumstances and is “determined from the actualities of the relationship between the parties.” *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962). The mere fact that one party to a relationship subjectively trusts the other does not indicate the existence of a fiduciary relationship. *Smith v. Deneve*, 285 S.W.3d 904, 911 (Tex. App.—Dallas 2009, no pet.). “The problem is one of equity” and the circumstances giving rise to the confidential relationship “are not subject to hard and fast lines.” *Moore*, 595 S.W.2d at 507.

But a fiduciary relationship is an extraordinary one and will not be created lightly. *Smith*, 285 S.W.3d at 911. Not every relationship involving a high degree of trust and confidence rises to the stature of a fiduciary relationship. *Meyer v. Cathey*, 167 S.W.3d 327, 330 (Tex. 2005). The law simply does not protect just any relationship between people:

Fiduciary law protects only those important social and economic interactions of high trust and confidence that create an implicit dependency and peculiar vulnerability of the beneficiary to the fiduciary. While placing ordinary trust and confidence in others may create contractual or tortious obligations, only high trust and confidence reposed within the context of the types of important social and economic relations contemplated above will give rise to fiduciary obligations. . . . Relationships, not individuals, are the prime concern of fiduciary law.

Leonard I. Rotman, *Fiduciary Law’s “Holy Grail”: Reconciling Theory and Practice in Fiduciary Jurisprudence*, 91 B.U. L. Rev. 921, 933 (2011). The fiduciary character of a relationship is determined by looking at both the degree of dependence and vulnerability that exists within it, and the value of the interaction to the society at large. *Id.* at 934. Although we recognize the existence

of a confidential relationship is ordinarily a question of fact, when the issue is one of no evidence, it becomes a question of law. *Crim Truck*, 823 S.W.2d at 594.

In this case, the Markls want to use fiduciary law to recoup money John spent on making repairs to the property of a woman with whom he had a ten-year clandestine relationship. The Markls argue there is no Texas case precluding as a matter of law an extramarital affair from rising to the level of a fiduciary relationship. At the same time, they direct us to no cases where such a relationship has been recognized as fiduciary in nature. They do, however, acknowledge *In re R.O.*, No. 03-04-00506-CV, 2005 WL 910231 (Tex. App.—Austin Apr. 21, 2005, no pet.) (mem. op.), which involves the question of whether a fiduciary duty existed between two people involved in an extramarital affair.

A man and woman, both married to other people, were involved in a four-year affair. *In re R.O.*, 2005 WL 910231 at \*1. During that time, she continued having sexual relations with her husband. She became pregnant. She did not tell her husband she doubted he was the father, and he treated the child as his own. The woman ultimately demanded child support from her former lover, who was a lawyer. *Id.* The man made the payments until he believed the statute of limitations ran on any parentage action involving a child with a presumed father. *Id.* at \*2. The woman then told the man's wife about their affair, that she believed he was the father of R.O., and about the payments he previously made. A suit to establish paternity was filed, and the man raised the statute of limitations as a defense. *Id.* As relevant here, the woman responded he was estopped based on an alleged confidential relationship that imposed on the man a duty to disclose the statute of limitations. *Id.* at \*7.

The appeals court affirmed the trial court's summary judgment in the man's favor. The court concluded that even if the woman believed her "illicit relationship" with the child's father was "one of mutual trust and confidence, her subjective trust is insufficient to transform their

dealing—which involved each acting in his or her respective best interest—into a fiduciary or confidential relationship entitled to legal protection.” *Id.* at 8. Additionally, the court noted the relationship was “anything but one of confidence and trust,” and set out the various evidence of discord and lack of trust. *Id.*

Here, the Markls attempt to distinguish *R.O.* by arguing they produced “significantly greater evidence” of a long-time, confidential relationship based on trust as shown by the facts set out above. They argue John’s relationship with Ethel was analogous to a marriage. Although a husband-wife relationship may give rise to fiduciary duties, a romantic relationship is not the equivalent.

In a case out of this Court, *Smith v. Deneve*, the couple lived together for fourteen years. During that time, they moved into a house that was titled only in the girlfriend’s name. A boat was also titled only in her name. After they separated, the boyfriend sued for divorce, but the trial court concluded there was no informal marriage. *Smith*, 285 S.W.3d at 208. He also sought a constructive trust based on a fiduciary relationship, relying on evidence of their longstanding cohabitation, their joint bank account with right of survivorship, a shared auto insurance policy, and the sharing of expenses. *Id.* at 911. We concluded this evidence failed to raise a fact issue as to the existence of a fiduciary relationship, explaining that although he adduced evidence of a longstanding personal relationship with Deneve, he adduced no evidence that he was accustomed to being guided by her judgment and advice, that she ever gave him financial advice, or that she otherwise assumed the role of a fiduciary toward him. *Id.* at 912.

Similarly here, no evidence shows John was accustomed to being guided by Ethel’s judgment or advice or that she ever gave him financial advice or assumed the role of a fiduciary toward him. To the contrary, John provided Ethel with financial advice and support. Even though Ethel testified John could trust her and believe what she told him, that evidence does not elevate

the status of their relationship into a fiduciary one. Moreover, as in *R.O.*, although John argues their relationship was “based upon trust,” he described the stalemate dating “clear back to early in the relationship.” If John wanted out of the relationship, Ethel would tell his wife and he would lose both women; if Ethel wanted out of the relationship, she had to “settle up on the property.” Thus, the evidence shows each was acting in his or her own interest.

Whether John and Ethel’s relationship contained aspects similar to a marriage is unavailing because, in this case, John was married—to Debra. Recognizing John and Ethel’s relationship as fiduciary in character, under the circumstances here, would make light of the very notion of the concepts of trust and confidence. Considering the evidence in the light most favorable to the Markls, we conclude this case does not present any evidence of justifiable trust and confidence as will create an informal fiduciary relationship. We overrule the sole issue.

We affirm the trial court’s judgment.

/Molly Francis/  
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MOLLY FRANCIS  
JUSTICE

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

**JUDGMENT**

JOHN LEONARD MARKL AND DEBRA  
KAY MARKL, Appellants

No. 05-17-00174-CV      V.

ETHEL MAUDETTE LEAKE, Appellee

On Appeal from the 397th Judicial District  
Court, Grayson County, Texas  
Trial Court Cause No. CV-15-0126.  
Opinion delivered by Justice Francis;  
Justices Brown and Stoddart participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is  
**AFFIRMED.**

It is **ORDERED** that appellee ETHEL MAUDETTE LEAKE recover her costs of this  
appeal from appellants JOHN LEONARD MARKL AND DEBRA KAY MARKL.

Judgment entered May 14, 2018.