

WHO CAN YOU TRUST?
THE SCOPE OF AN INFORMAL FIDUCIARY DUTY IN TEXAS

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I. INTRODUCTION

It is well-settled that the duty one owes to some people is higher than he owes to others, but who qualifies for a higher duty? Since its establishment, the Texas Supreme Court has analyzed relationships between individuals and entities to determine whether it is sufficient to require this heightened duty.¹ A fiduciary duty encompasses a range of obligations wherein the fiduciary must act in the principal's best interest.² The term "fiduciary" is derived from the civil law and contemplates fair dealing and good faith, rather than a legal obligation, as the basis of the transaction.³ A fiduciary relationship walks the fine line between a business owner protecting his own interests in an arms-length transaction and those relationships of "justifiable trust and confidence."⁴ Thus, fiduciary relationships relax the care and vigilance that a person ordinarily needs to exercise to protect himself.⁵

The type of relationship affects the analysis of whether that relationship is sufficient to create a fiduciary relationship but not the consequences of such a relationship. Regardless of whether a fiduciary duty arises formally or

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¹ See *Erskine v. De La Baum*, 3 Tex. 406, 416–17 (1848).

² *Fiduciary Duty*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY DESK EDITION (2012).

³ *Tex. Bank & Tr. Co. v. Moore*, 595 S.W.2d 502, 507 (Tex. 1980) (citing *Kinzbach Tool Co., Inc. v. Corbett-Wallace Corp.*, 160 S.W.2d 509 (Tex. 1942)).

⁴ *Thigpen v. Locke*, 363 S.W.2d 247, 252–53 (Tex. 1962).

⁵ *R.R. St. & Co. v. Pilgrim Enters.*, 81 S.W.3d 276, 306 (Tex. App.—Houston [1st Dist.] 2001), rev'd in part on other grounds, 166 S.W.3d 232 (Tex. 2005) (discussed in unpublished portion of the opinion).

informally, that relationship status has the same effect on the parties.⁶ A fiduciary duty can create liability where otherwise there would be none.⁷

Courts analyze formal fiduciary relationships by set rules and determine whether it exists as a matter of law.⁸ The courts typically recognize a formal fiduciary relationship by the roles the parties play to one another.⁹ For instance, some commonly recognized formal fiduciary duties include an attorney to their client and a business partner to their partner.¹⁰

Conversely, the informal fiduciary doctrine's authority is solely in equity, and courts closely scrutinize the parties' relationship.¹¹ An informal fiduciary relationship is considered on a case-by-case basis and is generally a fact question, "except in limited circumstances."¹² Whether such a relationship exists is "determined from the actualities of the relationship between the persons involved."¹³ Texas courts expressly state that they do not create the relationship lightly.¹⁴

The general rule is that an informal fiduciary relationship "exists where a special confidence is reposed in another who in equity and in good conscience is bound to act in good faith and with due regard to the interest of the one reposing confidence."¹⁵ The court also describes this relationship as one in which influence has been acquired and abused.¹⁶ Traditionally, the Texas Supreme Court limited the doctrine within the fact-finder's analysis by imposing context-specific requirements that the relationship must satisfy.¹⁷

Despite decades of precedent, Texas courts created confusion and uncertainty by adopting new doctrines that mimicked the formal fiduciary

⁶Ferrara v. Nutt, 555 S.W.3d 227, 243 (Tex. App.—Houston [1st Dist.] 2018, no pet.).

⁷See, e.g., Cardiac Perfusion Servs., Inc. v. Hughes, 436 S.W.3d 790, 791 (Tex. 2014).

⁸Hogget v. Brown, 971 S.W.2d 472, 487 (Tex. App.—Houston [14th Dist.] 1997, pet. denied).

⁹*Id.* at 487–88.

¹⁰*Id.* at 487.

¹¹Tex. Bank and Tr. Co. v. Moore, 595 S.W.2d 502, 508 (Tex. 1980).

¹²Ferrara v. Nutt, 555 S.W.3d 227, 244 (Tex. App.—Houston [1st Dist.] 2018, no pet.); Suntech Processing Sys., L.L.C. v. Sun Commc'ns. Inc., 2000 WL 1780236, at *6 (Tex. App.—Dallas Dec. 5, 2000, pet. denied).

¹³Thigpen v. Locke, 363 S.W.2d 247, 253 (Tex. 1962).

¹⁴Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171, 176–77 (Tex. 1997); see *Tex. Bank and Tr. Co.*, 595 S.W.2d at 508.

¹⁵*Tex. Bank and Tr. Co.*, 595 S.W.2d at 507.

¹⁶Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp., 823 S.W.2d 591, 594 (Tex. 1992).

¹⁷See, e.g., Meyer v. Cathey, 167 S.W.3d 327, 330 (Tex. 2005).

duty analysis. Through the 1990s and early 2000s, Texas lower courts expanded the relationships that qualified as a fiduciary duty by accepting the parties' roles as sufficient facts, before considering the "actualities of the relationship."¹⁸

Then, in 2014, the Texas Supreme Court went to the opposite extreme and adopted a much stricter analysis.¹⁹ The *Ritchie* opinion renders most evidence insufficient to survive a no-evidence motion for summary judgment, thus lowering the chances that a court will impose the duty.²⁰ Additionally, the court was unclear in what, precisely, it decided, which has caused much confusion among lower courts—many have refused to find an informal fiduciary duty even in appropriate circumstances.²¹ Therefore, the doctrine is further restricted beyond the circumstances expressly disapproved of in its opinion.

This comment will analyze the informal fiduciary doctrine's history that led up to the *Ritchie* decision, explain how the *Ritchie* opinion changed the appropriate analysis for determining if the parties' relationship is sufficient to impose an informal fiduciary duty, describe the current state of Texas fiduciary law as a result of that decision, and lay out the proper analysis that courts should apply to future cases.

II. HISTORICALLY, A FACT-FINDER DETERMINED WHETHER AN INFORMAL DUTY EXISTED BASED ON THE PARTIES' ACTUAL RELATIONSHIP.

The following Texas Supreme Court cases demonstrate the long history of following a specific informal fiduciary duty analysis. Typically, the court analyzed a particular relationship through a few fundamental standards, then

¹⁸ See *Allen v. Devon Energy Holdings, L.L.C.*, 367 S.W.3d 355, 394 (Tex. App.—Houston [1st Dist.] 2012, pet. granted, judgment vacated w.r.m.).

¹⁹ See *Ritchie v. Rupe*, 443 S.W.3d 856, 891–92 (Tex. 2014).

²⁰ See, e.g., *id.*

²¹ Compare *Armstrong v. Armstrong*, 570 S.W.3d 783, 791 (Tex. App.—El Paso 2018, pet. denied) (deciding there was no fiduciary duty as a matter of law between brothers), with *Shearer v. Shearer*, No. 12-14-00302-CV, 2016 WL 3050094, at *7 (Tex. App.—Tyler, May 27, 2016, no pet.) (mem. op., not designed for publication) (holding there is a fact question as to whether the step-mother owed a fiduciary duty to step-son for his father's medical care).

ultimately refused to impose a heightened duty on the defendant.²² Nevertheless, the court has also provided guidance on sufficient relationships; as in one often-cited opinion, it followed its regular analysis and imposed the duty.²³

A. The plaintiff must justifiably rely on the defendant.

The first rule for analysis is that a plaintiff's subjective trust in the defendant is insufficient to create an informal fiduciary duty.²⁴ Courts and commentators commonly attribute this rule to *Thigpen v. Locke*, which demonstrates the court's recurrent hesitancy to impose a duty.²⁵ In *Thigpen*, the court refused to find an informal fiduciary relationship between a grocery store owner and his "trust officer" at a local bank.²⁶

The court began by analyzing the facets of the parties' relationship.²⁷ The Grocer and Banker were close friends, and they saw each other frequently, decidedly beyond what is typical of a Banker with those who are simply his clients.²⁸ Over the years, Banker regularly helped Grocer with his finances—Banker helped Grocer get several loans, personally guaranteed a loan with the bank, and personally loaned Grocer several thousand dollars.²⁹

Then, Banker convinced Grocer to incorporate the store together.³⁰ Banker and his son handled the "business side" of the store.³¹ Banker continued to loan Grocer and the corporation money and urged Grocer not to file bankruptcy, even after Grocer accumulated an insurmountable debt.³² The next year, Banker presented documents to Grocer to sign and claimed that the documents were leases to pay off the debt.³³ The signature lines fit

²² See *Meyer v. Cathey*, 167 S.W.3d 327, 330–31 (Tex. 2005); *Associated Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 287–88 (Tex. 1998); *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962).

²³ See *Tex. Bank & Tr. Co. v. Moore*, 595 S.W.2d 502, 507–09 (Tex. 1980).

²⁴ *Thigpen*, 363 S.W.2d at 253.

²⁵ See generally *id.* at 247.

²⁶ See generally *id.*

²⁷ *Id.* at 249.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

the stated description as they were marked “Lessor” and “Lessee”; however, the documents were deeds of absolute sale.³⁴

Despite the length and depth of their relationship and apparent misstatements, the court concluded that Grocer’s reliance on Banker was insufficient to justify creating a fiduciary relationship.³⁵ It reasoned that “[b]usinessmen generally do trust one another, and their dealings are frequently characterized by cordiality of the kind testified to here.”³⁶ The court quoted *Pope v. Garrett* for its prominent rationale of another equitable doctrine, saying, “a constructive trust does not arise on every moral wrong and that it cannot correct every injustice. It must be used with caution”³⁷ Thus, despite the parties’ friendship, the court did not find facts to suggest justified reliance beyond the plaintiff’s subjective feelings.³⁸ Therefore, this relationship was insufficient to overcome the principle that parties to a contract have an obligation to protect themselves.³⁹

B. The personal nature of the relationship is an important factor when one gains because the other trusted in them.

The second standard goes to the heart of why this doctrine exists. It recognizes and seeks to correct the moral issue with one taking advantage of a vulnerable person by abusing their trust. In *Texas Bank & Trust Co. v. Moore*, a 90-year-old aunt was hospitalized after an injury and remained hospitalized until her death six years later.⁴⁰ During this time, Aunt was severely incapacitated, her hearing and eyesight were impaired, and she reached a state of confusion.⁴¹ Because of her ailments, Nephew controlled Aunt’s financial affairs.⁴² Through his roles as Aunt’s power of attorney and a co-owner on her bank accounts, Nephew transferred money to himself and wrote checks on Aunt’s accounts.⁴³

³⁴ *Id.* at 249–50.

³⁵ *Id.* at 253.

³⁶ *Id.*

³⁷ *Id.* (citing *Pope v. Garrett*, 211 S.W.2d 559, 562 (Tex. 1948)).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ 595 S.W.2d 502, 505 (Tex. 1980).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

In its analysis, the court compared the case before it to *Johnson v. Peckham* to find that in equity, the conduct owed between these parties was a much higher standard than the standard of the market place.⁴⁴ In *Johnson*, the parties were business partners, so their conduct was “measured by the standards of the finer loyalties exacted by courts of equity,” which could not be “whittled down by exceptions.”⁴⁵ Therefore, despite the partners’ strained relationship, the heightened standard applied.⁴⁶

Regardless of whether Aunt’s trust could be characterized as subjective, the court found a fiduciary duty because, in equity, no exception should allow this instance of abused trust to go unrecognized. The court recognized that their familial relationship and Nephew’s assistance to Aunt did not, standing alone, establish a fiduciary relationship.⁴⁷ However, if it rejected a heightened duty under these circumstances, that would “establish an exception to the accepted rule that where trust is reposed and substantial benefits gained equity will recognize that the beneficiary in such transactions is a fiduciary, and as such is under the fiducial obligation of establishing the fairness of the transaction to [the] principal.”⁴⁸ The court did not tolerate this injustice.⁴⁹

C. If the dispute involves a business transaction, then the plaintiff must show a special relationship apart from the contested transaction.

The Texas Supreme Court is procedurally stricter in a corporate context because its analysis includes a second requirement. That is, even if the plaintiff’s trust is more than merely subjective, “the special relationship of trust and confidence must exist prior to, and apart from, the agreement made the basis of the suit.”⁵⁰

The court applied this business transaction rule in its 1998 opinion, which analyzed the relationship between a surety and a contractor in a construction case.⁵¹ Contractor was required by law to secure bonds to guarantee its

⁴⁴ *Id.* at 508 (citing *Johnson v. Peckham*, 120 S.W.2d 786, 788 (Tex. 1938)).

⁴⁵ *Id.* (citing *Johnson v. Peckham*, 120 S.W.2d 786, 788 (Tex. 1938)).

⁴⁶ *Id.* (citing *Johnson v. Peckham*, 120 S.W.2d 786, 788 (Tex. 1938)).

⁴⁷ *Id.*

⁴⁸ *Id.* at 508–09.

⁴⁹ *See id.*

⁵⁰ *Associated Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 288 (Tex. 1998).

⁵¹ *See id.* at 278.

obligations and did so through its Surety.⁵² Contractor agreed to lay a concrete pipeline, but shortly after beginning the construction, it expressed its concern about the environmental feasibility of the project as directed; however, Surety ordered Contractor to continue.⁵³ After installation, a pressure test revealed several leaks, and after repairs, even more leaks were found.⁵⁴ Then, Surety fully settled with the owner without notifying Contractor.⁵⁵ Surety and Owner's settlement agreement did not purport to affect Contractor's rights to claims against Owner.⁵⁶

Contractor argued that Surety's actions induced Contractor to trust and rely on Surety.⁵⁷ Contractor did not have "merely subjective trust" in Surety and pointed to evidence of Surety's contractual indemnity agreement and Surety's conduct when it investigated Owner's claim.⁵⁸

The court found that the relationship was insufficient to impose an informal fiduciary relationship under a different requirement than stated in *Thigpen*.⁵⁹ The court noted that it does not create this duty lightly, and "[t]o impose an informal fiduciary duty in a business transaction, the special relationship of trust and confidence must exist prior to, and apart from, the agreement made the basis of the suit."⁶⁰ The court explained that the evidence was insufficient because the indemnity agreement was "an arms-length transaction entered into for the parties' mutual benefit," and the parties did not have any prior dealings that justified a special relationship.⁶¹ Therefore, Contractor could not recover for a breach of fiduciary duty.⁶²

⁵² *Id.*

⁵³ *Id.* at 278–79.

⁵⁴ *Id.* at 279.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 287.

⁵⁸ *Id.* at 288.

⁵⁹ *See id.*

⁶⁰ *Id.* (citing *Transp. Ins. Co. v. Faircloth*, 898 S.W.2d 269, 280 (Tex. 1995)).

⁶¹ *Id.*

⁶² *Id.*

D. Earlier arms-length transactions cannot establish a basis for a preexisting relationship.

In a 2005 opinion, *Meyer v. Cathey*, the court clarified the prior relationship requirement for parties engaged in a business transaction. It held that even the relationship between long-term business partners who demonstrated a close friendship was still insufficient to create an informal fiduciary relationship.⁶³

The lower courts found that a preexisting relationship existed between the parties because they had worked together on other projects for three years before the disputed project.⁶⁴ During that time, one party, Meyer, was in charge of all the financial and business decisions.⁶⁵ The other party, Cathey, considered Meyer a friend, and they ate lunch together every day for four years.⁶⁶

Nevertheless, the court held that this relationship was insufficient as a matter of law to qualify as a preexisting relationship between the parties.⁶⁷ It determined that the basis for a fiduciary relationship could not be established by earlier projects that were arms-length transactions entered into for the parties' mutual benefit.⁶⁸ The court reasoned that everything else demonstrated merely subjective trust.⁶⁹ So, Cathey could not establish the preexisting relationship element of the business transaction requirement.⁷⁰ Therefore, Cathey could not recover on a breach of fiduciary duty claim.⁷¹

E. Texas lower courts recognized doctrines that broadened the scope of the informal fiduciary duty doctrine.

Despite the Texas Supreme Court's apparent reluctance to find a fiduciary duty, the appellate courts were willing to impose the duty through doctrines

⁶³ *Meyer v. Cathey*, 167 S.W.3d 327, 330 (Tex. 2005).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 331.

⁶⁸ *Id.* (citing *Associated Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 288 (Tex. 1998)).

⁶⁹ *See id.* (citing *Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 595 (Tex. 1992)).

⁷⁰ *See id.*

⁷¹ *Id.*

that other states recognized.⁷² For years, the Supreme Court did not comment on the opinions that approved of the new doctrines.⁷³ So, practically, the fiduciary duty doctrine in Texas was expanded without clear boundaries, and parties were often uncertain of what law the courts would apply to their facts.

1. The Dallas Court of Appeals

The “special facts doctrine” was adopted by the Dallas Court of Appeals in the 1985 opinion, *Miller v. Miller*, for corporations.⁷⁴ This doctrine created duties on the officer to a stockholder in transactions between them.⁷⁵ In *Miller*, the Dallas court used this doctrine to recognize a fact issue in determining whether an informal fiduciary exists.⁷⁶

The Dallas court expanded the doctrine in succeeding opinions. Three years later, the court decided that the analysis to determine when shareholders in a corporation owed a duty to one another was a fact question depending on the circumstances that exist in the relationship.⁷⁷ In 2000, this court went so far as holding that the mere involvement of shareholders in a limited liability company is sufficient to present a fact question.⁷⁸

2. The Houston Court of Appeals

In March of 2012, the First District Houston Court of Appeals extended *Miller*’s “special facts doctrine” in the regularly cited opinion, *Allen v. Devon Energy*.⁷⁹ At that time, the Houston court explained that the Texas Supreme Court had not adopted the rule, but it also had not disturbed the *Miller* holding, which numerous other courts adopted.⁸⁰ The *Allen* court admitted that it pushed the doctrine further than *Miller*, and explained that this

⁷² See *Allen v. Devon Energy Holdings, L.L.C.*, 367 S.W.3d 355, 394 n.49 (Tex. App.—Houston [1st Dist.] 2012, judgment vacated w.r.m.).

⁷³ See *id.* at 394 n.50.

⁷⁴ 700 S.W.2d 941, 946 (Tex. App.—Dallas 1985, writ ref’d n.r.e.).

⁷⁵ *Id.* at 945–46.

⁷⁶ *Allen*, 367 S.W.3d at 394 (adopting the “special facts doctrine”).

⁷⁷ *Kaspar v. Thorne*, 755 S.W.2d 151, 155–56 (Tex. App.—Dallas 1988, no writ).

⁷⁸ See *Suntech Processing Sys., L.L.C. v. Sun Commc’ns. Inc.*, No. 05-99-00213-CV, 2000 WL 1780236, at *7 (Tex. App.—Dallas Dec. 5, 2000, pet. denied).

⁷⁹ 367 S.W.3d at 394; see Robin Gibbs & Angus J. Dodson, *Corporate Fiduciary Duties*, 68 THE ADVOC. (TEXAS) 13, 15–16 (2014).

⁸⁰ *Allen*, 367 S.W.3d. at 394 n.50.

extension established more predictability for corporate affairs.⁸¹ The *Allen* extension intentionally shifted the application from analyzing a fact issue to recognizing a formal fiduciary relationship.⁸²

The court defined the “special facts doctrine” to impose a fiduciary duty when the alleged-fiduciary has a legal right of control and exercises it through his status to purchase or redeem a minority shareholder’s interest if the redemption’s result is that the majority owner increases his interest.⁸³

In *Allen*, a partner at a law firm left the practice to become an entrepreneur.⁸⁴ Over a decade later, this court held that Entrepreneur owed a former partner a fiduciary duty under the “special facts doctrine” when he redeemed an interest in his limited liability company from the former partner to resell two years later for a substantial gain.⁸⁵ The court reasoned that based on the Entrepreneur’s role as majority owner alone was sufficient evidence to impose on Entrepreneur a heightened duty toward the minority shareholder.⁸⁶

3. The San Antonio Court of Appeals

Legal commentators have noted the San Antonio Court of Appeals for imposing a fiduciary duty in a corporate context based solely on the transaction in dispute.⁸⁷ Shortly before *Ritchie*, in October 2012, the San Antonio Court of Appeals considered whether the former full owner of a limited liability company owed an informal fiduciary duty to the purchaser of a controlling interest in *Vejara v. Levior*.⁸⁸ The record did not reflect any prior or special relationship between the parties other than the disputed lease.⁸⁹ Nevertheless, this court found that the former owner owed a duty to

⁸¹ See *id.* at 394.

⁸² See *id.*

⁸³ See *id.* at 395–96.

⁸⁴ *Id.* at 366.

⁸⁵ *Id.* at 394–96.

⁸⁶ See *id.* at 395–96.

⁸⁷ See JP Haskins, Comment, *Whose Harm Is It Anyway?—The Feasibility of Direct Claims By Minority Shareholders Following Cash-Out Mergers in Texas Corporations*, 68 BAYLOR L. REV. 564, 590 (2016).

⁸⁸ See No. 04-11-00595-CV, 2012 WL 5354681, at *5 (Tex. App.—San Antonio Oct. 31, 2012, pet. denied) (mem. op.).

⁸⁹ Gibbs & Dodson, *supra* note 79, at 16.

the new owner.⁹⁰ The court held that evidence of a previous owner's control, intimate knowledge of the company's affairs and plans, and her refusal to turn over access and control to the new owner was sufficient to impose this duty.⁹¹

III. *RITCHIE V. RUPE* CHANGED THE ANALYSIS FRAMEWORK.

In June 2014, the Texas Supreme Court delivered its most recent opinion discussing an informal fiduciary duty. Seemingly in disapproval of the recent appellate court expansions to the doctrine, the opinion changed the proper analysis by standardizing an initial threshold question at summary judgment rather than merely a question for the fact-finders.

Historically, the court determined whether the relationship was sufficient to impose a heightened duty as a fact question, considering all of the facets of that specific relationship.⁹² In contrast, the analysis in *Ritchie* determines whether the relationship is insufficient because of the parties' roles.⁹³ The analysis is particularly significant because the court refused to find any possibility of a fiduciary duty in a context that involved a familial relationship in a business transaction. Therefore, the opinion is directly on point for the majority of circumstances in which litigants claim this doctrine.

In this case, Rupe, a minority shareholder in a closely held corporation, sued the majority shareholders, who also comprised the board of directors.⁹⁴ Rupe was related to the defendants by marriage.⁹⁵ Rupe alleged that the defendants engaged in oppressive actions and breached fiduciary duties to Rupe directly by refusing to buy her shares or meet with prospective outside buyers.⁹⁶ The court recognized, however, that the defendants' actions did not harm the company or violate any of their affirmative duties.⁹⁷

⁹⁰ *Vejara*, 2012 WL 5354681, at *5.

⁹¹ *Id.*

⁹² *See, e.g.*, *Tex. Bank and Tr. Co. v. Moore*, 595 S.W.2d 502, 508 (Tex. 1980).

⁹³ *See Ritchie v. Rupe*, 443 S.W.3d 856, 888–90 (Tex. 2014).

⁹⁴ *Id.* at 860.

⁹⁵ *Ritchie v. Rupe*, No. 05-08-00615-CV, 2016 WL 145581, *5 (Tex. App.—Dallas Jan. 12, 2016, pet. denied).

⁹⁶ *Ritchie*, 443 S.W.3d at 860 (Tex. 2014).

⁹⁷ *Id.* at 871.

While *Ritchie* is considered the most recent state supreme court case on informal fiduciary duty in Texas,⁹⁸ the court's introduction expressly claims that it does not reach the breach of fiduciary duty claim and remands the case to determine this issue.⁹⁹ However, to determine if it would recognize a claim for oppression, the court analyzed whether the majority shareholders could owe any duty to minority shareholders.¹⁰⁰ The following several sections of the opinion thoroughly and systematically rejected every possible ground for finding a duty in the context of this case or that of any other commonly used oppressive tactic.¹⁰¹

Ultimately, the court found no ground for or compelling reason to create a duty, thus denying the possibility for any claims.¹⁰² On remand, the minority shareholder was ultimately left without any possible cause of action when the Dallas Court of Appeals followed the obvious suggestions from the Texas Supreme Court and found no evidence of a confidential relationship as a matter of law.¹⁰³

A. The Ritchie opinion used harsh language to convey the court's preference to restrict the informal fiduciary duty doctrine.

The court expressly compared its reasoning for refusing to recognize a duty not to act "oppressively" with an informal fiduciary duty.¹⁰⁴ It explained that "[i]mposing on directors and officers a common-law duty not to act 'oppressively' against individual shareholders is the equivalent of, or at least

⁹⁸ See, e.g., BYRON F. EGAN, *EGAN ON ENTITIES: CORPORATIONS, PARTNERSHIPS, AND LIMITED LIABILITY COMPANIES IN TEXAS* 101–03 (2d ed. 2018); Ladd A. Hirsch & Jason Fulton, *Current Issues and Trends in Business Divorce Litigation*, 70 *THE ADVOC. (TEXAS)* 268, 274 (2015); Kathryn E. Allen, *Hot Topics in Litigation Involving Business Fiduciaries*, in *STATE BAR OF TEX., 8TH ANNUAL BUS. DISPUTES*, at 1–2 (2016).

⁹⁹ *Ritchie*, 443 S.W.3d at 860.

¹⁰⁰ *Id.* at 868–69 (reasoning that "[s]ince the statute permits a receivership only for the 'oppressive' actions of those who are duty-bound to act according to their 'uncontaminated business judgment for the sole benefit of the corporation,' the meaning of 'oppressive' must accommodate the exercise of that business judgment. In other words, because a director is duty-bound to exercise business judgment for the sole benefit of the corporation, and not for the benefit of individual shareholders, we cannot construe the term 'oppressive' in a manner that ignores that duty").

¹⁰¹ See *id.* at 877–93.

¹⁰² *Id.* at 891.

¹⁰³ *Ritchie v. Rupe*, No. 05-08-00615-CV, 2016 WL 145581, *6 (Tex. App.—Dallas Jan. 12, 2016, pet. denied).

¹⁰⁴ *Ritchie*, 443 S.W.3d at 890.

closely akin to, imposing on directors and officers a fiduciary duty to individual shareholders.”¹⁰⁵

Next, the Court quoted strong language to make it clear that it does not think any courts should ever recognize a fiduciary duty in the corporate context. The court unambiguously stated its disapproval, saying, “[w]e have not previously recognized a formal fiduciary duty to individual shareholders, and we believe that better judgment counsels against doing so.”¹⁰⁶

The court elaborated on its criticizing statement with a footnote that quoted the Delaware Journal of Corporate Law.¹⁰⁷ The quoted portion begins with the definitive message, “[t]he very idea that a corporation has a fiduciary duty to individual shareholders is troubling.”¹⁰⁸ It notes that a corporation acts through its directors, officers, employees, and agents, all of whom have an obligation to act in the best interest of the corporation.¹⁰⁹ So, it reasoned, the decision that is in the best interest of the corporation may conflict with the best interest of an individual shareholder who is transacting business with the corporation.¹¹⁰ The quoted portion ends by decisively stating, “[t]here is *no reason* to impose a fiduciary obligation on these actors to act in the best interests of an individual shareholder when that shareholder proposes a course of conduct not in the best interests of the corporation.”¹¹¹

The original passage in the Delaware Journal of Corporate Law evidences the court’s intention to restrict the informal fiduciary duty doctrine in Texas corporate law. The cited passage includes a footnote explaining its authors’ opinion that the “special facts doctrine” should not be extended to scenarios where a corporation is involved in purchasing minority shares.¹¹² The described scenario is precisely that which was before the court in *Ritchie*.¹¹³

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 890 n.62 (citing Mark J. Loewenstein & William K.S. Wang, *The Corporation as Insider Trader*, 30 DEL. J. CORP. L. 45, 52 (2005)).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *See id.*

¹¹¹ *Id.* (emphasis added).

¹¹² Loewenstein & Wang, *supra* note 107, at 52 n.29 (explaining that the “special facts doctrine” imposes a duty on corporate officers to disclose some information to its shareholders during a stock transfer transaction between them).

¹¹³ *See Ritchie*, 443 S.W.3d at 860.

The new *Ritchie* analysis, like *Allen*, is more similar to finding a formal fiduciary duty. The court used definitive language such as there is “no reason to impose” such obligations and the “very idea” was troubling.¹¹⁴ This theory cuts off the analysis before it considers any of the “actualities of the relationship,” determines that no reliance could be justified, and denies a heightened obligation with very little scrutiny.¹¹⁵

B. The Dallas Court of Appeals had to contradict its prior settled analysis to reach the desired result in Ritchie on remand.

The Dallas Court of Appeals abruptly went against its minority shareholder precedent in 2016, when it resolved the issue “expressly avoided” from the Supreme Court in *Ritchie v. Rupe*. Before this decision, the Dallas court generally allowed the fact-finders to decide if the relationship met the stated requirements. As set forth above, the fundamental benchmarks to establish a sufficient relationship, were: (a) the plaintiff must justifiably rely on the defendant; and (b) in a business transaction, the special relationship of trust and confidence must exist prior to, and apart from, the agreement made the basis of the suit.¹¹⁶ Further, this court was a forerunner in establishing doctrines that find a set of facts are sufficient to create an informal fiduciary duty, such as the “special facts doctrine.”¹¹⁷

Nevertheless, the Dallas court suddenly became much more critical of relationships before even allowing the question to reach the factfinder. On remand, the Dallas court found no evidence of a relationship of trust and confidence between Rupe and her relatives-by-marriage.¹¹⁸ Instead of analyzing Rupe’s relationship with each defendant to determine whether any relationship met the standards as set in the prior cases, the court analyzed each relationship for sufficiency of the evidence.¹¹⁹

¹¹⁴*Id.* at 890 n.62.

¹¹⁵*See supra* Part I.

¹¹⁶*E.g.*, *Kaspar v. Thorne*, 755 S.W.2d 151, 155 (Tex. App.—Dallas 1988, no writ.); *Schoellkopf v. Pledger*, 739 S.W.2d 914, 920 (Tex. App.—Dallas 1987), *rev’d on other grounds*, 762 S.W.2d 145 (Tex. 1988); *Supra* Part II.

¹¹⁷*E.g.*, *Miller v. Miller*, 700 S.W.2d 941, 946 (Tex. App.—Dallas 1985, writ ref’d n.r.e.).

¹¹⁸*Ritchie v. Rupe*, No. 05-08-00615-CV, 2016 WL 145581, at *7 (Tex. App.—Dallas Jan. 12, 2016, pet. denied) (mem. op., not designated for publication).

¹¹⁹*Id.* at *3–5.

C. Ritchie's analysis applies to most entities.

The analysis pronounced in *Ritchie* applies within all business relationships that do not necessitate a formal fiduciary duty. Although *Ritchie* analyzed a closely-held corporation, the court expressly established that this analysis is not unique to that structure.¹²⁰

Courts should apply the new analysis to all types of entities outside of partnerships. Partners owe a formal fiduciary duty to each other directly, as well as to their entity.¹²¹ However, Texas courts do not automatically recognize this relationship between members of a limited liability company.¹²² Therefore, like corporations and closely-held corporations, an informal fiduciary duty analysis must be conducted on limited liability companies.

IV. TEXAS LOWER COURTS HAVE REACTED WITH INCOMPATIBLE OPINIONS SINCE *RITCHIE V. RUPE*.

Since the *Ritchie* decision, many appellate courts have delivered opinions that conflict with both pre-*Ritchie* precedent as well as their post-*Ritchie* decisions. These opinions create uncertainty for all litigants. Many districts that had very liberal precedents have, without comment, gone against it.¹²³ These courts often established a much higher standard than has ever been required by their district or the supreme court.¹²⁴ In one district, and within one year, the court delivered two opinions that contradict each other by allowing a justification for the duty to be sufficient in one case, but not in the other.¹²⁵ The Supreme Court continues to deny review of these cases, only furthering the confusion.

¹²⁰*Ritchie*, 443 S.W.3d at 867.

¹²¹*Allen*, 367 S.W.3d at 391–92.

¹²²*Id.* at 392 (noting that limited liability companies are substantially similar to partnerships, and courts in many jurisdictions have recognized a fiduciary duty between members of a limited liability company on that basis).

¹²³*See, e.g.*, *E-Learning L.L.C. v. AT&T Corp.*, 517 S.W.3d 849, 861 (Tex. App.—San Antonio 2017, no pet.).

¹²⁴*See, e.g.*, *Armstrong v. Armstrong*, 570 S.W.3d 783, 790–91 (Tex. App.—El Paso 2018, pet. denied).

¹²⁵*Contrast* *Collins v. Kappa Sigma Fraternity*, No. 02-14-00294-CV, 2017 WL 218286, at *11–12 (Tex. App.—Fort Worth Jan. 19, 2017, pet. denied) (mem. op., not designated for publication) (finding sufficient evidence of a fiduciary duty because the principal had to trust the fiduciary and owed monetary obligations to the fiduciary); and *Robbins v. Robbins*, 550 S.W.3d

A. Many appellate courts have gone against their prior liberal holdings to now require a higher standard than the Texas Supreme Court requires.

Recent judgments seem to suggest that there are no situations left that could survive a motion for summary judgment, even in the most liberal districts. Houston and El Paso courts were once considered very lenient in this area of law and easily found evidence of a duty between parties.¹²⁶ However, recent cases show that these districts now require more than the state supreme court's precedent and refuse to find a fiduciary duty in what would otherwise seem to be the most obvious of circumstances.¹²⁷ The following cases show the courts disregarded a fifteen-year-long close, personal friendship, and one taking advantage of his brother when he was obviously vulnerable. These facts are much more justified of a special confidence than many of the cases that survived before them.

In *Ferrara v. Nutt*, the Buyer and the Seller lived in the same neighborhood, were friends for around fifteen years, visited each other's businesses nearly every day, and the Buyer's purported intent for participating in the disputed transaction was to benefit the Seller's children.¹²⁸ Buyer even testified that he considered Seller's children to be like his own.¹²⁹

Despite that the *Ferrara* facts are precisely those previously described as sufficient to satisfy the corporate context rule under the pre-*Ritchie* analysis, this court declined to impose the "extraordinary" fiduciary duty.¹³⁰ The Houston court acknowledged the parties had a personal friendship but found that the relationship was insufficient to impose the duty because Buyer did not establish that he had been accustomed to Seller's judgment and advice guiding him.¹³¹

846, 855 (Tex. App.—Fort Worth 2018, no pet.) (refusing to find sufficient evidence of a fiduciary duty despite that the principal had to trust the fiduciary and owed monetary obligations to the fiduciary).

¹²⁶ See *Allen*, 367 S.W.3d at 393.

¹²⁷ See, e.g., *Ferrara v. Nutt*, 555 S.W.3d 227, 244 (Tex. App.—Houston [1st Dist.] 2018, no pet.).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

El Paso's recent opinion likewise created confusion because it required an unprecedentedly high bar when it found no evidence of a fiduciary duty between brothers, despite that one took advantage of the other's vulnerability and trust.¹³² One brother, Paul, was depressed and going through a divorce.¹³³ The other brother, Cole, claimed he was concerned about their immediate family losing their property.¹³⁴ Cole convinced Paul to convey his interest to Cole by saying that he, Cole, would protect it for now and would later convey that interest back to Paul for no consideration.¹³⁵ Paul claimed that he did not remember signing any transfer documents but that he would have signed whatever Cole gave him.¹³⁶

This court determined that these facts only amounted to Paul's subjective trust.¹³⁷ It disregarded the unique facets of their relationship or level of trust Paul may have had in his brother Cole.¹³⁸ Just as Jacob tricked Esau out of his family property, learning that a brother has deceived you is something different entirely than a typical business transaction turning out unfavorably.¹³⁹ Nevertheless, the court reasoned that one's subjective trust is per se insufficient to transform the family relationship into a fiduciary relationship.¹⁴⁰ Thus, the court held their relationship did not create a fiduciary duty as a matter of law.¹⁴¹

¹³² Compare *Armstrong v. Armstrong*, 570 S.W.3d 783, 791 (Tex. App. □ El Paso 2018, pet. denied), with *Tex. Bank & Tr. Co. v. Moore*, 595 S.W.2d 502, 508–09 (Tex. 1980) (holding a familial relationship does not “establish an exception to the accepted rule that where trust is reposed and substantial benefits gained equity will recognize that the beneficiary in such transactions is a fiduciary, and as such is under the fiducial obligation of establishing the fairness of the transaction to his principal”).

¹³³ *Armstrong*, 570 S.W.3d at 786.

¹³⁴ *Id.* at 786.

¹³⁵ *Id.* at 786–87.

¹³⁶ *Id.* at 786.

¹³⁷ *Id.* at 791.

¹³⁸ *Id.*

¹³⁹ See *Genesis* 25:19–34.

¹⁴⁰ *Armstrong*, 570 S.W.3d at 791.

¹⁴¹ *Id.*

B. The San Antonio Court of Appeals attempted to apply old precedent to the new analysis.

Despite the San Antonio appellate court's previously liberal application of the informal fiduciary duty doctrine, commentators have recently noted it for reaching the correct conclusion in its 2017 opinion for *E-Learning, L.L.C. v. AT&T Corp.*¹⁴² In this case, AT&T refused to pay BDG for its services.¹⁴³ BDG and AT&T did business together for many years and developed a course of business whereby BDG dealt exclusively with one person, Analisa Bishop.¹⁴⁴ Bishop was an AT&T project manager who had the authority to make decisions for AT&T.¹⁴⁵

This court conducted a *Ritchie* analysis instead of the analysis applied in earlier Texas Supreme Court and San Antonio Court of Appeals' opinions. The court cited the 2005 Supreme Court of Texas case, *Meyer*, as authority for its reasoning that the relationship was insufficient as a matter of law because it was purely a business relationship with no evidence that BDG relied on Bishop for moral, financial, or personal support or guidance.¹⁴⁶

However, *Meyer* posed a rule for determining the issue of whether a preexisting relationship existed, a factor within the fact issue of an informal fiduciary duty.¹⁴⁷ *Meyer* did not prevent the court from analyzing a relationship as a fact issue.¹⁴⁸ Nevertheless, the San Antonio court determined that the case presented no evidence of an informal fiduciary duty.¹⁴⁹

C. Within one year, the Fort Worth Court of Appeals filed opinions that directly contradicted itself.

The Fort Worth Court of Appeals delivered opinions that are inconsistent with its other post-*Ritchie* precedent. Within one year, this court found

¹⁴²See, e.g., 1 KNOX D. NUNNALLY & RONALD G. FRANKLIN, TEX. PRAC. GUIDE TORTS § 1:223 (Oct. 2019).

¹⁴³*E-Learning L.L.C. v. AT&T Corp.*, 517 S.W.3d 849, 853 (Tex. App.—San Antonio 2017, no pet.).

¹⁴⁴*Id.*

¹⁴⁵*Id.*

¹⁴⁶*Id.* at 861 (citing *Meyer v. Cathey*, 167 S.W.3d 327 (Tex. 2005)).

¹⁴⁷167 S.W.3d 327, 331 (Tex. 2005).

¹⁴⁸See *E-Learning L.L.C.*, 517 S.W.3d at 861 (resolving a fact question concerning the parties' relationship).

¹⁴⁹*Id.*

sufficient evidence for one plaintiff to survive a motion for summary judgment when he presented evidence of monetary obligations but held that argument amounted to no evidence in the next case.¹⁵⁰

In 2017, Collins successfully survived a no-evidence motion for summary judgment with evidence that as a long-time alumna member of his fraternity, it owed him an informal fiduciary duty.¹⁵¹ Collins argued that members trust and obey the orders of those in authority in the organization, and he owed the fraternity monetary obligations.¹⁵²

However, in 2018, the same court found that an ex-wife presented no evidence to qualify for a heightened duty from her ex-husband, despite that she trusted him to make good on the monetary obligations he owed her.¹⁵³ The Robbinses decided in their divorce to not sell their home until their children finished high school, and after that time, each spouse would take half of its value.¹⁵⁴ During the ex-husband's occupancy, the house was damaged in a fire and fell into irreparable disarray.¹⁵⁵ The ex-husband then spent all of the insurance money on illegal drugs.¹⁵⁶

The ex-wife was unsuccessful using Collins' argument. The ex-wife contended that until they sold the home, she had to trust her ex-husband not to commit waste on the property so she would receive the value anticipated in their divorce agreement.¹⁵⁷ This court reasoned that the parties originally owed one another a duty as spouses; however, the relationship did not continue in the required manner of trust and confidence after their divorce.¹⁵⁸ Therefore, the court held the ex-husband did not owe a heightened duty.¹⁵⁹

¹⁵⁰Collins v. Kappa Sigma Fraternity, No. 02-14-00294-CV, 2017 WL 218286, at *12 (Tex. App.—Fort Worth Jan. 19, 2017, pet. denied) (mem. op., not designated for publication); Robbins v. Robbins, 550 S.W.3d 846, 854–55 (Tex. App.—Fort Worth 2018, no pet.).

¹⁵¹Collins, 2017 WL 218286, at *12.

¹⁵²Id. at *11.

¹⁵³Robbins, 550 S.W.3d at 854–55.

¹⁵⁴Id. at 855.

¹⁵⁵Id. at 849.

¹⁵⁶Id.

¹⁵⁷Id. at 855.

¹⁵⁸Id. at 854–55.

¹⁵⁹Id. at 855.

V. THE PROPER ANALYSIS FOR FUTURE CASES DEPENDS ON WHETHER IT ARISES OUT OF A CORPORATE CONTEXT.

Despite the havoc in many Texas appellate courts, others began a line of cases with proper reasoning and accurate results determining whether a fiduciary duty exists. For the new analysis, the first step divides cases into two distinct categories. The split depends on whether the dispute arises out of a business transaction, regardless of the parties' relationship. For the first category, which resolves disputes that arise out of a corporate relationship, the *Ritchie* analysis should be used as a threshold issue to determine sufficiency as a matter of law. The second category—a catch-all to resolve disputes that do not arise out of a corporate transaction—keeps the pre-*Ritchie* framework, and analyzes that particular relationship as a fact question.

A. *The Ritchie sufficiency of the evidence standard applies in disputes that arise out of a business transaction.*

The post-*Ritchie* corporate relationship analysis requires the claimant to survive an additional point of review. Before the claimant can argue its relationship with the opposing party meets all of the fact-finding requirements, the claimant must present evidence of facts that have an adequate basis in law to avoid being poured out. The courts have yet to determine what evidence will survive this phase. However, it is clear that any obligations the opposing party owes to other people or entities in the disputed transaction will severely cut against, if not completely negate, the potential for that defendant to also owe a heightened duty to the claimant.

In 2017, the Fifth Circuit demonstrated a clear understanding of the current state of Texas fiduciary duties in a corporate context in *Jacked Up, L.L.C. v. Sara Lee Corp.* Jacked Up's founder and sole owner met some Sara Lee employees at a trade show and discussed creating a line of drinks.¹⁶⁰ The companies, represented by counsel, then negotiated a contract to develop and sell energy drinks.¹⁶¹ In response to Jacked Up's concerns, Sara Lee represented that it was not selling its business, and the companies executed an agreement.¹⁶² However, the following month, Sara Lee sold its beverage

¹⁶⁰Jacked Up, L.L.C. v. Sara Lee Corp., 854 F.3d 797, 802 (5th Cir. 2017).

¹⁶¹*Id.*

¹⁶²*Id.* at 803.

division to the J.M. Smucker Company.¹⁶³ Smucker decided not to assume the Jacked Up agreement, and Sara Lee terminated its contract with Jacked Up at Smucker's request.¹⁶⁴

Jacked Up claimed that the termination was a breach of a heightened relationship for three reasons. First, Jacked Up asserted that Sara Lee was a dominant party.¹⁶⁵ Second, Jacked Up claimed its collaborative efforts to develop the products and the joint marketing efforts with Sara Lee should create the relationship.¹⁶⁶ Third, Jacked Up pointed to Sara Lee's representations of a long-term deal.¹⁶⁷

The court granted summary judgment against Jacked Up, recognizing that Texas "does not recognize a fiduciary relationship lightly," "especially in the commercial context."¹⁶⁸ The general rule in Texas is that agreements that are "arms-length transactions are entered into for the parties' mutual benefit, and thus do not establish a basis for a fiduciary relationship."¹⁶⁹ Therefore, because counsel represented the two entities, it did not need to address whether Sara Lee was a dominant party.¹⁷⁰ Additionally, the court found that collaboration and representations "do not transform an arm's length transaction into a fiduciary relationship."¹⁷¹ Therefore, this court held that Jacked Up failed to present sufficient evidence of an informal fiduciary relationship to withstand summary judgment.¹⁷²

B. Ritchie did not change the analysis for disputes that do not arise out of a corporate transaction.

Ritchie did not address the analysis for conflicts outside of the corporate context. Therefore, the analysis is the same as it always was. The particular relationship should be considered based on its facts and determine whether

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 802–03.

¹⁶⁵ *Id.* at 809.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* (first quoting *Lundy v. Masson*, 260 S.W.3d 482, 501 (Tex. App.—Houston [14th Dist.] 2008, pet. denied); then quoting *Willis v. Donnelly*, 199 S.W.3d 262, 278 (Tex. 2006)).

¹⁶⁹ *Id.* (citing *Meyer v. Cathey*, 167 S.W.3d 327, 331 (Tex. 2005)).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* (citing *Wellox, Inc. v. Accenture, LLP*, 788 F. Supp. 2d 523, 545 (S.D. Tex. 2011)).

¹⁷² *Id.* at 809–10.

the plaintiff was justified in its reliance on the defendant and if the defendant shackled itself by acquiring and abusing another's trust.¹⁷³

One of the few cases to correctly analyze a non-corporate relationship is a 2016 case out of the appellate court in Tyler, *Shearer v. Shearer*.¹⁷⁴ In this case, Wife married Son's Father but later divorced and continued to cohabit.¹⁷⁵ The following year, Father became terminally ill, and hospital officials informed Wife that only Son had the authority to consent to care as Father's closest available relative.¹⁷⁶

The court held that Wife owed Son a fiduciary duty because she abused his trust, although she could not have met any of the other stated requirements.¹⁷⁷ The family was not close, and Wife successfully showed that Son's trust was purely subjective.¹⁷⁸ However, Wife knew about Son's many personal hardships, and during the crises, Wife acquired Son's trust, perpetuated it throughout Father's treatment, and therefore, Wife's failure to inform Son of her decision to sign a DNR abused Son's trust at the critical time.¹⁷⁹ These facts were sufficient to create a fiduciary relationship on Wife.¹⁸⁰

VI. CONCLUSION

Ritchie's practical effect is that defendants have the significant assurance that the harsh consequences from a finding that they owe a heightened duty will not impede its business litigation. Before *Ritchie*, the momentum of the Texas Supreme Court case law was to allow the claimant to present the question to the jury and then, at the fact-finding stage, to apply several stated requirements that would limit the duty.

¹⁷³ See *Crim Truck & Tractor v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 594 (Tex. 1992); see also *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962); *Tex. Bank & Tr. Co. v. Moore*, 595 S.W.2d 502, 508 (Tex. 1980).

¹⁷⁴ No. 12-14-00302-CV, 2016 WL 3050094, at *2 (Tex. App.—Tyler May 27, 2016, no pet.) (mem. op., not designated for publication).

¹⁷⁵ *Id.* at *1.

¹⁷⁶ *Id.* at *1–2.

¹⁷⁷ *Id.* at *7.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

However, the *Ritchie* opinion heightened the standard for creating an informal fiduciary duty in a corporate context by considering whether the parties' relationship is sufficient to withstand summary judgment. To survive summary judgment, the claimant should present sufficient evidence to meet all of the fact-finding requirements and show that the opposing party does not owe any other conflicting duties. Thus, courts often resolve the issue of whether an informal fiduciary duty exists early and as a matter of law—rather than by a jury at trial. Further, the reduced probability of a large verdict may convince litigants to avoid litigation altogether, with all of the expenses that attend it.