In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-05-330 CV

JAMES G. GORDON and LISA K. GORDON, Appellants

V.

GEORGE DAVID GORDON, JR., Appellee

On Appeal from the 9th District Court
Montgomery County, Texas
Trial Cause No. 03-01-00006-CV

MEMORANDUM OPINION

Plaintiffs, James G. Gordon ("Greg") and his wife, Lisa, (hereafter referred to as "plaintiffs" or "appellants") appeal a take nothing judgment rendered against them following a bench trial.[1] We affirm in part, reverse in part, and remand for a new trial.

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[1]Although a jury was empaneled and heard a portion of the testimony, the parties entered into a mid-trial agreement to dismiss the jury and permit the trial court to act as ultimate factfinder.

Plaintiffs initially sued Greg's brother, George David Gordon, Jr. ("David"), David Covey, and SGD Holdings, Ltd. ("SGD"). The record indicates that just prior to commencement of trial; SGD filed bankruptcy proceedings in the State of Delaware. SGD's bankruptcy resulted in an automatic stay which abated any further proceedings against it. *See In re Sw. Bell Tel. Co.*, 35 S.W.3d 602, 604 (Tex. 2000).[2] A mid-trial agreement between the parties also resulted in plaintiffs nonsuiting defendant David Covey. Therefore, the remaining defendant, in whose favor judgment was ultimately rendered, was David Gordon.

The appellate record is quite extensive, with the reporter's record numbering thirty-two volumes, much of which consists of voluminous exhibits that were admitted en masse. This case was tried to the judge in a relatively rapid manner, with the vast majority of hundreds of exhibits and deposition transcripts being pre-admitted and admitted by agreement without specific review of them during direct or cross-examination of the several witnesses. Plaintiffs proceeded to trial on multiple causes of action and theories of liability. Closing arguments were allowed in written form and consisted of more than one hundred pages, with multiple references to documentary evidence. While the trial court filed findings of fact and conclusions of law, the findings of fact number only twelve and are broad evidentiary statements that do not correspond to the ultimate and controlling issues of each

[2] Under such circumstances, entry of a severance order is not required for the proceedings to continue against the remaining defendants. *In re Sw. Bell Tel. Co.*, 35 S.W.3d at 604.

cause of action pled. *See generally* TEX. R. CIV. P. 296; *Limbaugh v. Limbaugh*, 71 S.W.3d 1, 6 (Tex. App.--Waco 2002, no pet.). There are only four conclusions of law, none of which coordinates with the various causes of action tried to the court. As a complete reporter's record appears in the appellate record, the findings of fact are not conclusive on this court and are reviewed for legal and factual sufficiency of the evidence. *See City of Beaumont v. Spivey*, 1 S.W.3d 385, 392 (Tex. App.--Beaumont 1999, pet. denied); *Stephenson v. Perlitz*, 537 S.W.2d 287, 289 (Tex. Civ. App.--Beaumont 1976, writ ref'd n.r.e.). We have carefully examined the entire record in light of the individual elements of the causes of action asserted by plaintiffs in twenty-one issues raised on appeal.

FACTS

Greg Gordon and David Gordon are brothers. David is an attorney who specializes in the area of corporate law ("mergers and acquisitions"), tax law, and securities, which also includes having represented clients before the Securities and Exchange Commission. Prior to events that spawned the instant litigation, plaintiffs had been, from 1994 to 1999, the owners and operators of a retail jewelry business, Con-Tex Silver Imports, Inc. ("Con-Tex"), located in Conroe, Texas. Either in December of 1998, or March or April of 1999, David initiated conversations with Greg and Lisa regarding a plan to convert Con-Tex into a publicly-traded corporation. Plaintiffs eventually agreed to allow David to take their business public after being assured they could maintain control of the newly formed

corporation, as they had built Con-Tex up to a value estimated at more than one million dollars. The agreement, as structured by David, provided for plaintiffs to transfer complete ownership of Con-Tex to a publicly-traded "shell"[3] corporation, in exchange for 75 million shares in the new corporation. This would result in plaintiffs becoming "super majority" shareholders in the new corporation and allow them to sell a sufficient number of shares to recover their investment while maintaining their majority shareholder position. Greg testified that David instructed Lisa and Greg to continue doing what they had been doing, selling jewelry. Through a series of transactions in 1999, Con-Tex was merged into a publicly-traded corporation.

Prior to this time, David had ongoing dealings with various individuals and corporate entities with whom he was engaged in multiple mergers and acquisitions, "trading or selling shells," that included but was not limited to Universal Funding, Inc. and International Internet. International Internet was a public corporation in which David was a shareholder and acted as its legal counsel. David testified that International Internet wanted to spin-off one of its privately held corporate entities, Goldonline.com ("Goldonline"), into a publicly traded company but that the principals reportedly did not want to run the operations of the

[3]A "shell" corporation is a legal entity that has been created but which has little or no assets and is usually not active. BLACK'S LAW DICTIONARY 368 (8th ed. 2004).

company. David testified that he suggested that his brother, Greg, operate the company.[4] David had incorporated Goldonline in February 1999, its only asset was a rudimentary website that International Internet had previously purchased. International Internet found a "shell" corporation, Transun International Airways, Inc. ("Transun"), that had public trading rights. David represented Universal Funding in the purchase of the majority of stock in Transun and held shares in his name as trustee. International Internet spun-off Goldonline into Transun in the first week of June 1999. Then, on or about June 10, 1999, the reverse acquisition occurred between Transun and Con-Tex. On that same day, Transun changed its name to Goldonline International, Inc. Goldonline International, Inc. subsequently changed its name to SGD Holdings, Ltd. on January 24, 2001.

David testified that approximately fifty percent of his legal business in and around 1999 consisted of mergers and acquisitions. David had various individuals either employed by him or officing with him, involved in the preparation of documentation necessary for "trading or selling shells," including the purchase and sale of stock and other corporate transactions and governmental filings associated with the merger, acquisition and operations of various corporate entities, as well as issuing press releases. These persons were also

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[4]This testimony is countered by the fact that Jesse Clayton was initially named as president and sole director of the corporation until he suffered a debilitating stroke. It was not until afterwards, when Clayton was physically unable to work, that David named Greg as president and sole director of Goldonline.

utilized in the business plan to take Con-Tex public, namely: Susan Willis, David's paralegal; Jesse Clayton, a nonlawyer that utilized David's law office space and who reportedly provided contract labor for David including drafting documentation for David and his clients for these "shell deals," as well as someone who was often named as an officer and director of the shell corporations;[5] and, Jim Ross, an accountant employed by David, who prepared governmental filings for the SEC and the IRS. David admitted he reviewed the work of these nonlawyers who worked in his law office.

The legal documentation drafted by David and the nonlawyers under his supervision regarding the formation, operation, and merger of the various corporate entities involved in this matter, including the purchase and sale of stock associated with this shell deal, is replete with errors. The initial stock purchase agreement that was to initiate the business plan to take Con-Tex public was flawed in several ways. It incorrectly recited that Greg Gordon was the sole shareholder of Con-Tex, it incorrectly recited the number of shares of Con-Tex owned by Greg, it provided that Greg would receive only five hundred shares of Transun instead of 75 million shares in exchange for his interest in Con-Tex, and it refers to numerous attached exhibits, none of which are actually attached. David later claimed that the written stock purchase agreement document was so flawed it did not even reflect the actual agreement with

[5]Jesse Clayton acted as president of Transun and after the reverse acquisition of Con -Tex, continued to act as president of Goldonline until his stroke, after which Greg Gordon acted as president.

Greg. Instead, David claimed they operated under an oral agreement. According to David, Susan Willis drafted the Certificate of Amendment of Certificate of Incorporation of Goldonline that allegedly evidenced and authorized the controversial one for six reverse split in the stock of the corporation. The certificate of amendment failed to mention Goldonline in the body of the resolution but instead, named two other unrelated corporate names. David insisted that Jesse Clayton was solely responsible for drafting many, if not all, of the transactional documents in the early stages of the Con-Tex and Transun merger, including but not limited to the mistake-ridden Stock Purchase Agreement.[6] During the initial phases of the "shell deal" involving Con-Tex, Jesse Clayton suffered a debilitating stroke which rendered him unable to continue to work. Clayton's untimely illness, combined with an August 1999 telephone call from the FBI to David regarding a SEC investigation into the "shell" corporation, Transun, appears to have disrupted the timing of events and issuance of documentation with regard to this particular "shell deal" and eventually led both to the filing for bankruptcy protection by the originating corporate entities and to the filing of this lawsuit.

The record indicates that following the merger of Con-Tex into the newly formed publicly-traded corporation in 1999, Greg was issued and became entitled to 75 million shares of SGD stock. Because of Greg's status as an insider, his stock certificates were

[6]In the Bankruptcy Court Examiner's Report admitted as Plaintiffs' Exhibit 14, David Gordon stated to the examiner that he prepared a draft of the Stock Purchase Agreement but could not remember what further involvement he had in the transaction.

issued with a restrictive legend, prohibiting their unrestricted transfer.[7] Upon the anniversary date of the closing of the sale of Con-Tex, Greg and Lisa communicated their desire to David to begin selling the maximum number of shares of stock allowed by law. The unrefuted evidence shows that despite the expiration of the holding period provided by SEC regulations and Greg's and Lisa's growing frustration, David continued to advise Greg and Lisa that they were legally prohibited from selling or otherwise trading any of their shares of stock. In 2002, when Greg refused to sign the annual audit letter and the annual "10-K" report to the SEC, a majority of the Board of Directors removed him as president of SGD. Greg and Lisa were both subsequently terminated from their employment with Con-Tex. Greg and Lisa were never allowed or otherwise able to sell any shares of SGD stock before the company filed bankruptcy. Greg and Lisa filed the instant action on January 2, 2003.

CLAIMS AND ISSUES

Greg's and Lisa's causes of action include breach of fiduciary duty, breach of confidential relationship, common law fraud, constructive fraud and fraudulent concealment, negligent misrepresentation, negligence and gross negligence, statutory fraud, fraudulent conversion, conspiracy, violation of the Texas Securities Act, securities fraud under the

[7]The trial court took judicial notice of Rule 144 of the Securities & Exchange Commission, 17 C.F.R., section 230.144, which mandates a one-year holding period for insiders and thereafter, provides for a limited number of shares of insider stock that can be sold on a periodic basis.

Texas Business and Commerce Code, and a request for declaratory judgment and specific performance.[8] The trial court issued separate findings of fact and conclusions of law. Plaintiffs raise nineteen issues for review complaining of the propriety of certain findings of fact or conclusions of law, one issue complaining of the trial court's failure to grant a new trial in light of newly discovered evidence, and one issue complaining of the trial court's refusal to admit an item of evidence. For convenience, we will group some of the appellate issues together for discussion. We will also address the appellate issues in no particular order. We begin with several anomalous issues.

Issue six complains of the trial court's failure to grant appellants a new trial. Appellants moved for a new trial based upon newly discovered evidence, which the trial court denied. A party seeking a new trial on the ground of newly discovered evidence must satisfy the trial court that: (1) the evidence has come to his knowledge since the trial; (2) it was not owing to the want of due diligence that the evidence did not come to his attention

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[8] In their written objections to David's proposed findings of fact and conclusions of law, plaintiffs requested that their request for "declaratory judgment and specific performance" be deleted from the proposed findings "because the Gordons did not seek such relief against Defendant G. David Gordon, Jr., at the trial." Additionally, at oral argument, plaintiffs' counsel graciously conceded that appellate issues sixteen and seventeen, involving statutory securities fraud and violation of state securities fraud statutes, had no merit. We therefore omit those issues from our review. *See Lundstrom v. United Services Auto. Ass'n-CIC*, 192 S.W.3d 78, 86 (Tex. App.--Houston [14th Dist.] 2006, pet. denied) (relying on *Bates v. Dallas Indep. Sch. Dist.*, 952 S.W.2d 543, 550 (Tex. App.--Dallas 1997, writ denied) for the proposition that an appellate court may refuse to consider an issue conceded by a party at oral argument).

sooner; (3) the evidence is not cumulative; and (4) the evidence is so material that it would probably produce a different result if a new trial were granted. *Jackson v. Van Winkle*, 660 S.W.2d 807, 809 (Tex. 1983); *Johnson v. Legacy Bank of Texas*, 167 S.W.3d 643, 645-46 (Tex. App.--Dallas 2005, no pet.). "Whether to grant a motion for new trial is within the sound discretion of the trial court and, absent abuse of such discretion, the trial court's decision will not be disturbed on appeal." *Johnson*, 167 S.W.3d at 646.

The alleged newly discovered evidence consists of a letter dated August 3, 2004, written by David to his mother, Darla Gordon. Greg contends the letter contains an "admission" by David: "that Greg Gordon could rely on [David's] advice, because [David] was Greg's brother and because he was SGD's counsel." The letter was written six months before the trial commenced. More importantly, the letter is written in the form of a reply to a prior letter from David's mother and appears to attempt to respond to certain words, phrases, or sentences taken out of context from prior conversations between David and his mother. David's letter consists of almost five pages of single-spaced text. The one small portion to which Greg directs our attention does not clearly indicate David was admitting to having been personal counsel for Greg and Lisa, or that David was indicating that any advice he had provided to Greg was solely in David's capacity as Greg's brother or Greg's personal attorney. Taken in its entirety, David's letter is highly self-serving. Having considered all of the evidence elicited at the trial, as well as Darla's testimony at the motion for new trial

hearing, the trial court may have concluded that David's letter was not material and that nothing it contained would probably lead to a different result upon retrial. *See Jackson*, 660 S.W.2d at 809. From the record presented, we cannot say the trial court abused its discretion in denying Greg's new trial motion. Issue six is overruled.

In issue one, appellants complain that an oral statement of the judge made on the record during the trial is in direct contradiction to separate findings of fact issued by the trial court, specifically Finding of Fact Number Eight. During the trial of the case, the judge made the following colloquy on the record:

> [David] was legal counsel for [plaintiffs] up until the point in time that he accomplished exactly what he said, which was to get the company to go public. [David] became General Counsel then for the corporation. His representation to [plaintiffs] ended that moment, because he became a shareholder, he became a director, and then the duties and the obligations and the fiduciary relationship altered.

In Finding of Fact Number Eight, the trial court stated, in part, that "Plaintiff's [sic] failed to prove that defendant G. David Gordon, Jr. acted as Plaintiffs' personal attorney rather than counsel for the various corporations that Plaintiff's [sic] was [sic] a share holder, officer and director." Generally, "[o]ral statements by the judge on the record will not be accepted as findings of fact." *In re E.A.S.*, 123 S.W.3d 565, 569 (Tex. App.--El Paso 2003, pet. denied); *Tate v. Tate*, 55 S.W.3d 1, 7 n.4 (Tex. App.--El Paso 2000, no pet.). Appellants make no complaint to this court on appeal that the trial court's statements in any way misled them or otherwise caused them to withhold an offer of other evidence of the attorney-client

relationship that they might have otherwise offered at trial. The judge's statements were made in an exchange with counsel during presentation of plaintiffs' case in chief. The court was not announcing any findings on any issue being tried before it when it made the statements. Because the trial court issued separate findings of fact and conclusions of law, the trial court's statements made during the presentation of the evidence are given no effect on the judgment. *Tate*, 55 S.W.3d at 7 n.4. Issue one is overruled.

SUFFICIENCY ISSUES

STANDARDS OF REVIEW

Findings of fact entered in a case tried to the court have the same force and dignity as a jury's answers to jury questions. *Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991). The trial court's findings of fact are reviewable for legal and factual sufficiency of the evidence to support them by the same standards that are applied in reviewing evidence supporting a jury's answer. *See Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996); *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994).

A legal sufficiency challenge may only be sustained when: (1) the record discloses a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence establishes conclusively the opposite of a vital fact. *Uniroyal Goodrich Tire Co. v. Martinez*,

977 S.W.2d 328, 334 (Tex. 1998). In determining whether there is legally sufficient evidence to support the finding under review, we must consider evidence favorable to the finding if a reasonable factfinder could, and disregard evidence contrary to the finding unless a reasonable factfinder could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). "Anything more than a scintilla of evidence is legally sufficient to support the finding." *Cont'l Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 450 (Tex. 1996); *Leitch v. Hornsby*, 935 S.W.2d 114, 118 (Tex. 1996). More than a scintilla of evidence exists if the evidence furnishes some reasonable basis for differing conclusions by reasonable minds about the existence of a vital fact. *Rocor Int'l, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 77 S.W.3d 253, 262 (Tex. 2002).

When a party attacks the factual sufficiency of an adverse finding on an issue on which he has the burden of proof, he must demonstrate on appeal that the adverse finding is against the great weight and preponderance of the evidence. *Croucher*, 660 S.W.2d 55, 58 (Tex. 1983). The court of appeals must consider and weigh all of the evidence and can set aside a verdict only if the evidence is so weak or if the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. *See Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986). In doing so, the court of appeals must "detail the evidence relevant to the issue" and "state in what regard the contrary evidence greatly

outweighs the evidence in support of the verdict." *Dow Chemical Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001) (quoting *Pool,* 715 S.W.2d at 635).

We review conclusions of law de novo, and the standard of review is whether they are correct. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002); *Material P'ships, Inc. v. Ventura*, 102 S.W.3d 252, 257 (Tex. App.--Houston [14th Dist.] 2003, pet. denied). We will uphold conclusions of law on appeal if the judgment can be sustained on any legal theory supported by the evidence. *Material P'ships*, 102 S.W.3d at 257. As such, any incorrect conclusions of law will not require reversal if the controlling findings of fact support the judgment under a correct legal theory. *Id.*

APPLICATION

Issue seven reads, "Was the trial court's finding, that the Gordons failed to meet their burden to support any of their alleged causes of action . . . , so contrary to the overwhelming (or great) weight and preponderance of the evidence as to be clearly wrong and manifestly unjust?" The trial court's Finding of Fact Number Five makes the broad statement, "Plaintiffs failed to meet their burden to support any of their alleged causes of action." This rather global issue is attached to three separate groups of issues discussed in appellants' brief. It does not contain distinct argument and authorities independent of the other appellate issues. As such, it is subsumed within each separate issue and therefore, issue seven is

sustained only to the extent a separate appellate issue is sustained and issue seven is overruled to the extent a separate appellate issue is overruled.

ATTORNEY-CLIENT RELATIONSHIP

Issues one through five include "great weight" challenges to the factual sufficiency of the court's finding that appellants failed to prove an attorney-client relationship or an otherwise resulting formal fiduciary relationship. The law is well-settled that an attorney-client relationship is a contractual relationship in which an attorney agrees to render professional services for a client, and the relationship may be established either expressly or impliedly from the conduct of the parties. *Mellon Serv. Co. v. Touche Ross & Co.*, 17 S.W.3d 432, 437 (Tex. App.--Houston [1st Dist.] 2000, no pet.); *Vinson & Elkins v. Moran*, 946 S.W.2d 381, 405 (Tex. App.--Houston [14th Dist.] 1997, writ dism'd by agr.); *Byrd v. Woodruff*, 891 S.W.2d 689, 700 (Tex. App.--Dallas 1994, writ dism'd by agr.). To establish the relationship, the parties must explicitly or by their conduct manifest an intention to create it. *See Parker v. Carnahan*, 772 S.W.2d 151, 156 (Tex. App.--Texarkana 1989, writ denied). To determine if there was an agreement or meeting of the minds one must use objective standards of what the parties said and did and not look to their subjective states of mind. *Bright v. Addison*, 171 S.W.3d 588, 596 (Tex. App.--Dallas 2005, pet. dism'd).

It is not disputed that there was no written contract establishing a formal attorney-client relationship. The record shows that Greg and David shared a close relationship as

brothers and had previously been business partners. Additionally, David had represented Greg and Lisa as their attorney in the past and held a power of attorney for Greg. Greg, Lisa, and Greg's and David's parents, Darla and George David Gordon, Sr., all testified that they were under the impression that David was representing Greg and Lisa throughout the transaction as their personal attorney. Greg and Lisa also stated that David represented to them that he would coordinate the preparation of all of the documentation necessary to take their company public. David, on the other hand, testified that he was only entitled to a finder's fee for merging the two companies and raising capital within the newly formed public corporation. At various times before and during the period of time at issue, David represented other corporations involved in the merger and acquisition of shell corporations, some of which were wholly or only partly involved with the merger and acquisition of Con-Tex.

David confirmed that he initiated the discussions with Greg and Lisa concerning the proposal to take their company public and insuring they would be super-majority shareholders in order to maintain control of the new corporation. David also admitted to further discussions with Lisa about transferring her shares in Con-Tex to Greg to facilitate the plan to take Con-Tex public. David admitted that he reached an agreement with Greg and Lisa that Greg would be issued 75 million shares to equal seventy percent ownership of the new corporation. David testified while he negotiated a fee for his services in the amount of

ten percent of Greg's shares during a discussion between David, Greg, Lisa and George Gordon, Sr., it was a finder's fee and not an attorney's fee. Nevertheless, David disclaimed any responsibility in the representation of Greg in his sale of shares in Con-Tex to Transun, the very first activity in initiating the plan to take Con-Tex public. David further testified that while he normally makes his attorney's fees by drafting the documentation for these "shell deals," David denied drafting any of the documents involved in the Con-Tex/Transun merger and stock offerings. Notably, the only evidence introduced at trial showed that nonlawyers, either employed by David or who shared David's law office space, actually prepared drafts of the documents for David's review. David refused, though, to accept responsibility for the work of Jesse Clayton and Susan Willis for the faulty draftsmanship of the documents used in the transactions at issue. At appellants' request, the trial court took judicial notice of an order of the bankruptcy court that found no attorney-client relationship existed between David and Greg with respect to this transaction.

When a party challenges a finding regarding an issue upon which that party had the burden of proof, the appellant must demonstrate on appeal that the adverse finding is against the great weight and preponderance of the evidence. *Dow Chem. Co.*, 46 S.W.3d at 242. "The court of appeals must consider and weigh all of the evidence, and can set aside a verdict only if the evidence is so weak or if the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust." *Id.* "In reviewing the

evidence, we accord due deference to the trial court, which, as the trier of fact presented with conflicting testimony, is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Akers v. Stevenson,* 54 S.W.3d 880, 884 (Tex. App.--Beaumont 2001, pet. denied) (citing *McGalliard v. Kuhlmann,* 722 S.W.2d 694, 697 (Tex.1986)). The court, as trier of fact, is free to believe one witness and disbelieve others, and the court may resolve inconsistencies in a witness's testimony. *Id.*. "We may not substitute our opinion for that of the trier of fact." *Transmission Exch. Inc. v. Long*, 821 S.W.2d 265, 271 (Tex. App.--Houston [1st Dist.] 1991, writ denied).

In reviewing the evidence, while there is assuredly some evidence of an attorney-client relationship, we cannot say that the evidence supporting the finding of no relationship is so weak or the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and manifestly unjust. Therefore, issues one and two are overruled as they pertain to the trial court's finding that appellants failed to prove an attorney-client relationship existed between appellants and David. Likewise, in view of the court's finding that no attorney-client relationship existed, issues three, four, and five are overruled in part as they pertain to a formal fiduciary relationship, as the trial court could have found that no formal fiduciary relationship existed between the parties as a matter of law.

Further related to this finding is issue ten in which appellants complain of the trial court's failure to find for them on their claims of negligence and gross negligence with

respect to their ownership of shares in SGD. In their pleadings, plaintiffs assert these claims in the form of legal malpractice for alleged misrepresentations involving 1) the attributes of Transun, 2) the potential financial return and percentage of ownership they would receive in exchange for their stock in Con-Tex, and 3) the effects of a one for six reverse stock split on plaintiffs' ownership interest in SGD. Generally, to recover on a claim of legal malpractice, a plaintiff must prove, among other things, that the attorney owed the plaintiff a duty and that he breached that duty. *Greathouse v. McConnell*, 982 S.W.2d 165, 172 (Tex. App.--Houston [1st Dist.] 1998, pet. denied). In a legal malpractice claim based on negligence, the focus is whether the attorney provided bad legal advice or otherwise improperly represented the client. *See Aiken v. Hancock*, 115 S.W.3d 26, 28 (Tex. App.--San Antonio 2003, pet. denied) (citing *Greathouse*, 982 S.W.2d at 172). Because the trial court could reasonably find that appellants failed to prove an attorney-client relationship existed between appellants and David, the trial court could also reasonably find that appellant failed to prove the existence of any duty to give sound legal advice. Issue ten is overruled.

FIDUCIARY RELATIONSHIP

Plaintiffs, in issues one through five, also complain of the trial court's failure to find an informal fiduciary relationship existed between David and plaintiffs. Additionally, issues thirteen through fifteen and issue eighteen complain of the trial court's failure to find David fraudulently misrepresented, or omitted to disclose, certain material facts to plaintiffs. As

the existence of an informal fiduciary relationship implicates these issues, we include them in our analysis.

At common law, the word "fraud" refers to an act, omission, or concealment in breach of a legal duty, trust, or confidence justly imposed, when the breach causes injury to another or the taking of an undue and unconscientious advantage. *See Russell v. Indus. Transp. Co.*, 113 Tex. 441, 258 S.W. 462, 463 (1924); *Flanary v. Mills*, 150 S.W.3d 785, 795 (Tex. App.--Austin 2004, pet. denied). One such "legal duty" is imposed when a fiduciary relationship has been established. A fiduciary relationship is said to exist when one person has a duty to act for or give advice for the benefit of another within the scope of the relation. *Kline v. O'Quinn*, 874 S.W.2d 776, 786 (Tex. App.--Houston [14th Dist.] 1994, writ denied). In a fiduciary relationship, one person "binds himself to subvert his own interest to those of his principal." *Walker v. Fed. Kemper Life Assur. Co.*, 828 S.W.2d 442, 452 (Tex. App.--San Antonio 1992, writ denied).

The specific kinds of relationship in which these higher standards apply may be determined as a matter of law or as a matter of fact. As a matter of law, attorneys owe fiduciary duties to their clients, partners in a general partnership owe each other fiduciary duties, and general partners in a limited partnership owe fiduciary duties to the limited partners. *See Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962); *Brazosport Bank of Tex. v. Oak Park Townhouses*, 889 S.W.2d 676, 683 (Tex. App.--Houston [14th Dist.] 1994, writ

denied). As a matter of fact, a fiduciary duty may be found if evidence establishes that one has placed special confidence in another where the latter is bound, in equity and good conscience, to act in good faith and with due regard to the interests of the other; or when special confidence is reposed in one who, thereby, obtains a resulting superiority of position and influence. *See, e.g., Consol. Gas & Equip. Co. of Am. v. Thompson*, 405 S.W.2d 333, 336-37 (Tex. 1966); *Thigpen*, 363 S.W.2d at 253; *Peckham v. Johnson*, 98 S.W.2d 408, 416 (Tex. Civ. App.--Fort Worth 1936), *aff'd*, 132 Tex. 148, 120 S.W.2d 786 (1938). Thus, fiduciary relationships may arise "from moral, social, domestic or purely personal relationships." *Thigpen*, 363 S.W.2d at 253. However, to establish this "confidential" or "informal" fiduciary relationship, a party must show that the special relationship of trust and confidence existed prior to, and apart from, any purported agreement made the basis of the current suit. *See Associated Indem. Corp.*, 964 S.W.2d at 288; *Schlumberger Tech. Corp.*, 959 S.W.2d at 177. A family relationship, while it is considered as a factor, does not, by itself, establish a fiduciary relationship. *See Tex. Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 508 (Tex. 1980). An informal fiduciary relationship may be found to exist when proof indicates that "'influence has been acquired and abused, in which confidence has been reposed and betrayed.'" *Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 594 (Tex. 1992) (quoting *Tex. Bank & Trust Co.*, 595 S.W.2d at 507).

If a relationship between parties is a fiduciary relationship, as a matter of fact or of law, the law imputes to the relationship additional and higher duties, and their breach may constitute actionable fraud as well. *See Chien v. Chen*, 759 S.W.2d 484, 495 (Tex. App.--Austin 1988, no writ). This includes a general duty of full disclosure regarding matters affecting the principal's interests and a general prohibition against the fiduciary's use of the relationship to benefit his personal interest, except with full knowledge and consent of the principal. *Id.*

We now determine whether an informal or confidential fiduciary relationship, that arises from a moral, social, domestic, or merely personal relationship where one person trusts in and relies upon another, existed between appellants and David. *See Crim Truck & Tractor*, 823 S.W.2d at 594. The determination of the existence of a confidential relationship is normally for the trier of fact. *Hoggett v. Brown*, 971 S.W.2d 472, 488 (Tex. App.--Houston [14th Dist.] 1997, pet. denied). Appellants complain that the trial court's failure to find such an informal or confidential fiduciary relationship is so against the great weight and preponderance of the evidence as to be manifestly unjust.

The record before us does not present an arms-length business transaction, where each party relies on the other to simply perform the terms of a contract. Instead, the record shows that Greg and David shared a close relationship and had previously been business partners. The record also demonstrates that David had previously provided legal representation to Greg

and Lisa and held a power of attorney on Greg's behalf with regard to other legal representation. Additionally, David was known and respected by his brother and sister-in-law as an attorney who successfully specialized in mergers and acquisitions. Greg and his father, himself a practicing attorney, both testified that the subject of taking Con-Tex public first arose during the Christmas holidays of 1998. While disputing the exact time and circumstance that the subject arose, David admitted that it was he who initiated the discussions with Greg and Lisa regarding taking Con-Tex public. There was testimony that David visited with Greg and Lisa about their company whenever he came to Conroe, even prior to the discussions to take their company public. David, using his knowledge and training in the law and experience acquired through years of trading and selling shells, identified the opportunity and purposefully sought the confidence of plaintiffs to utilize the assets of Con-Tex, even if it be for mutual gain. Greg and Lisa both testified that David told each of them that he was going to act as their attorney and prepare the documents concerning the transaction. Greg added that David instructed Lisa and him that during the process of accomplishing their objective, they were to continue doing what they had been doing, selling jewelry. However, soon after the stock purchase agreement was signed to begin the process of taking Con-Tex public, Jesse Clayton, then acting as president and sole director of Goldonline (the public corporate entity created by the reverse acquisition of Con-Tex by Transun) suffered a debilitating stroke. Because Clayton was unable to work, David decided

to substitute Greg as president and sole director of Goldonline. David would later admit that he never explained to Greg what his responsibilities would be with respect to managing the publicly traded company. William Dark, a trusted family friend and eventually a director of SGD, testified that while Greg was the designated figurehead of the company, the de facto person running the company was David. Greg stated that in the beginning, he neither realized the responsibilities associated with the office of an executive officer of a public corporation nor did he receive advice necessary to properly exercise his authority as president. In fact, he testified that his day to day duties and responsibilities never really changed from that of selling jewelry. The record is replete with incidents where David would have documents prepared and faxed to Greg for his signature without Greg having any understanding of what he was signing. In other instances David would simply sign Greg's name as president of the corporation. During trial and in the issued findings and conclusions, much attention and criticism was directed at Greg for his role as president, director, and majority stockholder of SGD, as well as his failure to act on his own behalf despite his titles allowing him such authority. However, the record evidence revealed that it was Greg's attempt to educate himself and exercise such authority that eventually led to his separation from the corporate entities and the loss of his and his wife's jewelry business and investment.

Lisa Gordon provided compelling testimony on the issue of an informal fiduciary relationship. She and her mother-in-law, Darla, originally started Con-Tex and had worked

hard to build up the company. Greg came into the company later and the business continued to grow. At the time the idea of taking Con-Tex public arose, Lisa and Greg were equal owners of the stock. Lisa testified that David spoke with her and advised her that it would be necessary for her to transfer her shares in Con-Tex to Greg to avoid claims of nepotism after the reverse acquisition into the newly formed public corporation. Lisa testified that David emphatically stated that he would protect Greg and her and that David would be their attorney. Convinced by David's representations that as her brother-in-law who was trained in the law and specialized in these types of transactions, he would protect her interests, Lisa acquiesced and surrendered all her interest in the company which she had worked to build.[9] She relied upon David to represent her best interests.

After the reverse acquisition, David continued to advise Greg and Lisa regarding the SEC restrictions on the ability of insiders to sell shares of stock in a public corporation. In the initial discussions to obtain Greg's and Lisa's participation in this shell deal, David represented to Greg and Lisa that after the first year following the merger, they would be able to sell up to one million dollars of stock and then a certain percentage every three months thereafter. Lisa asserted that she and Greg trusted David and relied upon him to advise them

[9]In our review of the record, we have found no documentary evidence that this transfer was ever accomplished.

correctly because they were depending on him as their lawyer. Lisa testified, "I thought he knew what he was talking about because he was the SEC lawyer, not me."

The record shows that in the Autumn of 2000, Greg and Lisa desired to build a home. David told them that SEC regulations prohibited them from selling any stock at that time, but David promised to position Greg and Lisa so that they could begin selling their stock on the open market. About every six months, Greg and Lisa spoke to David about selling stock but he kept putting them off, advising them that SEC regulations prohibited any sale of stock by them. In 2001, David promised Lisa, in the presence of his mother, that by Christmas of that year, Greg and Lisa would be able to sell at least $500,000 worth of their stock on the open market. However, at Christmas, David maintained once again that they could not sell their shares because of SEC regulations. David never allowed Greg and Lisa to sell any of their stock before the company filed bankruptcy. David never refuted this testimony.

After a review of all of the evidence in this matter, we hold that the trial court's finding that plaintiffs' failed to prove an informal or confidential fiduciary relationship between themselves and David is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Therefore, the trial court erred in failing to find an informal fiduciary relationship.

Appellants further complain that the trial court erred when it found: (1) that David did not make actionable negligent misrepresentations to appellants and that appellants failed to

meet their burden of proof to support any of their causes of action; (2) that appellants failed to present any credible evidence that they--in their individual capacity--reasonably relied upon or were misled by any statement or action of David; and (3) that David did not knowingly make any material, false, or fraudulent statements to induce appellants to enter into any transactions with SGD. Appellants claim the trial court's findings and conclusions are so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. In Finding of Fact Number Five, the trial court found that appellants failed to meet their burden to support *any* of their alleged causes of action. More specifically, the trial court found that appellants presented no credible evidence that they, in their individual capacities, reasonably relied upon or were misled by any statement or action of David. The trial court additionally found that David did not knowingly make any material, false, or fraudulent statements to induce appellants to enter into any transactions. In its Conclusion of Law Number One, the trial court found that there was not sufficient credible evidence that David made negligent misrepresentations with respect to the appellants' shares or that he otherwise engaged in any other conduct that was a producing cause of actual damages to appellants.

"Negligent misrepresentation" is proven by evidence of the following: (1) a representation is made by the defendant to the plaintiff in the course of the defendant's business, or in a transaction in which the defendant has a pecuniary interest; (2) the defendant

supplies false information for the guidance of others in their business; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and (4) the plaintiff suffers pecuniary loss by justifiably relying on the representation. *See E.R. DuPuis Concrete Co. v. Penn Mut. Life Ins. Co.*, 137 S.W.3d 311, 321 (Tex. App.--Beaumont 2004, no pet.) (citing *Fed. Land Bank Ass'n v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991)). Professionals may owe a duty to a nonclient when the professional knows a nonclient will rely on a misrepresentation made to the nonclient and the professional intends for the nonclient to rely on the misrepresentation. *See McCamish, Martin, Brown & Loeffler v. F. E. Appling Interests*, 991 S.W.2d 787, 792-93 (Tex. 1999). The duty owed by the professional to the nonclient under a negligent misrepresentation action is not based on the privity of their relationship, for example, an attorney-client relationship. *Id.* at 792. A cause of action for negligent misrepresentation does not require proof of knowledge of the falsity or reckless disregard of the truth or falsity of the representation at the time it was made, but only a failure to exercise reasonable care in obtaining or communicating the information. *Compare Johnson*, 73 S.W.3d at 211 n.45 (elements of common law fraud require actor's knowledge or reckless disregard), *with Fed. Land Bank Ass'n,* 825 S.W.2d at 442.

Texas has adopted section 552 of the Restatement (Second) of Torts concerning the theory of negligent misrepresentation, specifically applying to lawyers. *McCamish,* 991 S.W.2d at 791 (citing RESTATEMENT (SECOND) OF TORTS § 552 (1977) (addressing the issue

in the context of misrepresentations by a law firm)). This theory permits plaintiffs who are not parties to a contract to recover from the contracting parties:

> Under the tort of negligent misrepresentation, liability is not based on the breach of duty a professional owes his or her clients or others in privity, but on an independent duty to the nonclient based on the professional's manifest awareness of the nonclient's reliance on the misrepresentation and the professional's intention that the nonclient so rely.

Id. at 792. Accordingly, in *McCamish,* lack of privity between the parties did not preclude a cause of action for negligent misrepresentation brought by a nonclient against the law firm. *Id.* at 795. Nevertheless, the prong of justifiable reliance limits liability "to situations in which the attorney who provides the information is aware of the nonclient and intends that the nonclient rely on the information." *Id.* at 794. In other words, the cause of action is available only when information is transferred to a known party for a known purpose.

Appellants complain in this lawsuit that David had physical possession of their stock certificates in SGD and would not allow them access to the certificates or allow them to sell any of their shares. Yet, the trial court was critical of Greg in that he was president, director, and super-majority shareholder of SGD. The trial court also criticized Greg for his knowledge that Olde Monmouth was the transfer agent for SGD but that Greg failed to act on his own behalf to have the transfer agent issue his shares directly to him. David testified and documentary evidence showed that David instructed Olde Monmouth to issue and deliver Greg's shares in the corporation to David, "for me to hold until they could be sold at the

proper time." There was conflicting testimony from David, he stated he did not have possession of the share certificates but then admitted he did have the share certificates. In any case, the record shows that the shares were issued with a restrictive legend, prohibiting their unrestricted transfer. Both appellants testified that David represented to them that they would be able to sell a certain number of shares or a certain value of their total shares after an initial one-year waiting period because of their insider status. The court took judicial notice of the specific SEC regulation regarding insider trading. As set forth hereinbefore, it is not refuted that, despite the plain wording of the regulation, after the one-year holding period had expired, David continuously advised Greg and Lisa that SEC regulations would not allow them to sell any of their shares. David knew his brother and sister-in-law would rely upon his representations and not attempt to sell any SGD shares on the open market. At no time were plaintiffs able to sell any shares before the corporation filed bankruptcy.

Record evidence showed that just prior to the acquisition and merger with Con-Tex, there was no active trading in the shares of Transun on the open market. Apparently, when "trading and selling shells," press releases are issued and circulated with favorable descriptions of the mergers and acquisitions of the corporate entities to stimulate trading in the market and to increase the price of the new shares. Immediately after the press release regarding the Con-Tex merger and acquisition was publicized, trading in the public corporation suddenly began on the open market at approximately fifty cents per share.

Shortly after the merger with Con-Tex, the publicly traded company offered a private placement of shares and there were a number of investors who subscribed and purchased shares in the corporation for twenty-five cents per share. These investors were individuals and entities controlled by individuals who regularly participated with David in "trading and selling shells." However, following Clayton's debilitating stroke in late June 1999, share certificates were not issued promptly to these purchasers. To compound things further, in July or August 1999, David received a phone call from the FBI informing him of an SEC investigation into the new activity in Transun. By that time, stock prices had fallen to five or six cents per share and the company had still not issued the share certificates to those purchasers who had originally purchased the shares for twenty-five cents. To avoid further problems, David reportedly approached the initial subscribers and proposed a reverse stock split and a new subscription agreement to issue shares to them on a post-split basis.[10] But, David was not able to determine the number to use for the reverse split until the stock prices bottomed out.

David testified he had a different agreement with Greg from the other investors. Allegedly, they reached an oral agreement that Greg would still be issued 75 million shares pending the outcome of the SEC investigation. If the SEC investigation proved to have no claims against Transun, Greg's shares would then be subjected to the reverse split. Greg

[10]No written agreement was ever prepared to document this alleged agreement.

asserted that the first time David discussed with him that his shares needed to be subjected to the reverse split was in February 2002. At that time, David allegedly told Greg that since the SEC investigation had found no fault with Transun, there was no reason not to subject Greg's 75 million shares to the reverse split. In a letter dated October 25, 2002, David, as counsel for SGD, instructed Olde Monmouth to subject Greg's shares to the reverse stock split. Regardless of the propriety of the decision or procedures utilized to attempt to subject Greg's shares to the reverse stock split, it is at least circumstantial evidence that David never intended for Greg and Lisa to be able to sell any of their stock until that issue was resolved.

David further admitted that he approached Terry Washburn, an independent director of Goldonline appointed in the summer of 2000, and received approval from Washburn to instruct Olde Monmouth to place a freeze on Greg's stock to prohibit him from selling or otherwise transferring any of his shares in the corporation. Therefore, while the court was critical of Greg for not instructing Olde Monmouth to reissue his shares directly to him, any such attempt would have been ineffective. David never disclosed this to Greg or Lisa but rather, always maintained that they were prohibited from selling their stock because of SEC regulations. Testimony from Washburn opined that if Greg had been given access to his shares and sold them when he initially wanted to, the price of the shares would have "plummeted."

While Greg was not allowed to sell or trade his shares, David and those associated with him in "trading and selling shells," who purchased shares and warrants in the initial offering in 1999, were freely transferring shares for their own purposes. David, using shares allegedly issued in the names of his father and mother, repeatedly had certificates reissued and transferred tens of thousands of shares in numerous transactions from and after November 1999. Richard Clark transferred shares in 2000. Lakewood Development and Mark White reportedly sold 4.5 million and 150,000 shares, respectively, in 2001. Brian John actively transferred his shares through at least October 2002. Plaintiffs introduced evidence at trial of SGD's stock ledger and the transfer agent's records evidencing the various stock transactions of these individuals from and after the initial offering in 1999.

Considering all of the record-evidence, we conclude the trial court's findings that "Plaintiffs presented no credible evidence that Defendant G. David Gordon, Jr. . . . breached a duty owed by virtue of a confidential relationship with Defendant G. David Gordon, Jr. . . . [and] did not breach [] any legal, fiduciary duty . . . owed to Plaintiffs," that there was not sufficient credible evidence that David made negligent misrepresentations that was a producing cause of actual damages to appellants and, that appellants failed to present any credible evidence that appellants – in their individual capacity – reasonably relied upon or were misled by any statement or action of David are so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. *Golden Eagle*

Archery, Inc. v. Jackson, 116 S.W.3d 751, 761-62 (Tex. 2003); *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). We sustain issues four, five, and seven insofar as they pertain to appellants' claim for breach of informal fiduciary duty and breach of confidential relationship.

The final element in a breach of fiduciary duty action is "the defendant's breach must result in injury to the plaintiff, or benefit to the defendant." *Punts*, 137 S.W.3d at 891. Generally, breach of fiduciary duty is an independent tort that will support the award of actual damages. *See Manges v. Guerra*, 673 S.W.2d 180, 184 (Tex. 1984); *Kahn v. Seely*, 980 S.W.2d 794, 799 (Tex. App.--San Antonio 1998, pet. denied); *see also* COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES: BUSINESS, CONSUMER, INSURANCE, EMPLOYMENT PCJ 110.18 (2006). A plaintiff may also recover exemplary damages in an action for breach of fiduciary duty, if the breach is intentional. *See Int'l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 583-84 (Tex. 1963); *Brosseau v. Ranzau*, 81 S.W.3d 381, 396 (Tex. App.--Beaumont 2002, pet. denied).

Related to this damage element are issues eight and nine, which ask for evidentiary review of the trial court's finding and conclusion that Greg was in a position to have prevented the damages he alleged and that Greg's failure to act on his behalf in certain circumstances "was the proximate cause of his own fate." Conclusion of Law Number Four reads as follows:

> Finally, the Court concludes that there is sufficient evidence that the Plaintiff, G. Gordon, had the ownership, the authority and power as director, as majority stock owner, and corporate officer to prevent the damages for which he claims he suffered. In many ways, the Plaintiff's failure to act on his own behalf was the proximate cause of his own fate. The Court concludes that this action filed by Plaintiff's [sic] as individuals is an attempt to circumvent the estoppel of a derivative shareholder action which may or may not be valid.

Conclusions of law are to be the court's statement of the legal principles it applied to the facts to resolve the case. *See Dallas Morning News Co. v. Bd. of Trustees of Dallas Indep. Sch. Dist.,* 861 S.W.2d 532, 536 (Tex. App.--Dallas 1993, writ denied). The nearest legal principle associated with these statements would be a failure to mitigate damages. However, the failure to mitigate damages is an affirmative defense. *See Taylor Foundry Co. v. Wichita Falls Grain Co.*, 51 S.W.3d 766, 774 (Tex. App.--Fort Worth 2001, no pet.). The affirmative defense of failure to mitigate damages was not pled. Instead, the statements are more akin to findings of fact and thus, will be treated accordingly. When findings of fact are included among the trial court's conclusions of law, we review them as findings of fact. *See Lewis v. Dallas Soundstage, Inc.*, 167 S.W.3d 906, 912 (Tex. App.--Dallas 2005, no pet.).

As discussed earlier, plaintiffs approached David periodically after the one-year anniversary date requesting that they be permitted to sell some amount of their shares in the corporation, but David repeatedly represented to them that they were not permitted to sell any shares because of SEC regulations. Plaintiffs' Exhibit 14, a copy of SGD's stock chart, and Plaintiffs' Exhibit 97, both admitted without objection, are Excel spreadsheets, and both

list the price of SGD's shares at various dates and further evidence that David and other persons associated with David "trading and selling shells" traded and sold SGD shares on the open market. In correlation to the SEC rule addressing insider trading, Plaintiffs' Exhibits 265 and 278, Form 10k government filings, were admitted to evidence the number of shares of SGD outstanding as of September 10, 2000, the date on which plaintiffs were legally able to sell or transfer shares in the corporation owned by them. The SGD stock chart indicates that David personally transferred a large number of shares to various individuals and corporate entities, and the record contains evidence indicating David's relationship to some of the individuals and corporate entities listed as receiving those shares. David's appellate brief fails to direct our attention to nor have we found any record-evidence explaining his extensive trading of SGD shares a mere two months after issuance that continued through the next two years, without restriction, while at the same time David advised Greg and Lisa that they were prohibited from selling any of their shares by SEC regulations.

Pertinent to the discussion here is the trial court's finding of fact that, "[p]laintiffs knew Olde Monmouth was the transfer agent for their shares and that shares that were not restricted were freely transferable and subject to sale by them at their election. At all times Plaintiffs were entitled to take action on behalf of themselves and their own interests." Background evidence, however, appears to contradict this finding. As previously discussed, it appears that just prior to Transun's acquisition of Con-Tex, Transun's shares were not

trading. Immediately after the issuance of a favorable press release regarding the Transun/Con-Tex merger and acquisition, trading began on the open market at approximately fifty cents per share. Plaintiffs' pleadings are sufficient to support a claim for damages for loss of profits proximately caused by violation of a fiduciary duty and may be considered by the trier of fact in any retrial of the causes remanded. Exemplary damages, if appropriate, may also be considered. Issues one through five, eight, nine, thirteen through fifteen, and eighteen through twenty are sustained.

In issue eleven, appellants complain that the trial court's finding that the one-for-six reverse stock split did not affect their majority position in SGD is against the great weight of the evidence. However, the trial court took judicial notice of the federal bankruptcy court's ruling in the separate action, *James Gregory Gordon and Lisa Kay Gordon v. SGD Holdings, Ltd.*, adversary proceeding number 05-04063, dated May 6, 2005, which states that at all times relevant to the determination of the issue, "Greg has owned 75 million shares of SGD and continues to own 75 million shares of SGD to this date." Additionally, the bankruptcy judge ruled that not only is Greg entitled to the 75 million shares of SGD, but that "there is no affirmative defense or equitable reason why Greg should not be entitled to assert that ownership." As the bankruptcy court essentially ruled that no reverse stock split of Greg's shares ever occurred, issue eleven is moot and we overrule same.

In issue twelve, appellants complain that the trial court erred in its Conclusion of Law Number One (vi) that "[t]here is not sufficient credible testimony or documentary evidence that Defendant, G. David Gordon, Jr. . . . (vi) converted or otherwise exercised dominion or control over Plaintiffs' shares[.]" No legal principle seems to be associated with this statement and therefore, we treat this as a finding of fact which coincides with Finding of Fact Number Ten, wherein the trial court found:

> Defendant G. David Gordon, Jr. did not have the authority to on [sic], dominion, or control over Plaintiffs' share certificates in SGD. At all times Plaintiffs knew Olde Monmouth was the transfer agent for their shares and that shares that were not restricted were freely transferable and subject to sale by them at their election. At all times Plaintiffs were entitled to take action on behalf of themselves and their own interests. Defendant G. David Gordon, Jr. did not have the authority to prevent them from doing so.

"Conversion is defined as the wrongful exercise of dominion and control over another's property in denial of or inconsistent with his rights." *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 391 (Tex. 1997). Certainly, shares of stock can be converted. *See, e.g., Earthman's Inc. v. Earthman*, 526 S.W.2d 192, 204 (Tex. Civ. App.--Houston [1st Dist.] 1975, no writ).

The record shows that David testified and documentary evidence showed that David instructed Olde Monmouth to issue and deliver Greg's shares in the corporation to David "to hold until they could be sold at the proper time." David further testified that he told the bankruptcy examiner that he was in possession of Greg's share certificates. Finally, Plaintiffs introduced a letter from October 2002, from David to Olde Monmouth, instructing

it to cancel Greg's original share certificates and issue new certificates subjecting Greg's shares to the reverse split. David admitted that Olde Monmouth would have required the original certificates before it would have been able to cancel and issue new certificates, providing further evidence that David was, at all times, in possession of Greg's certificates. While the trial court found that plaintiffs knew that the shares that were not restricted were freely transferable and subject to sale by them at their election, the record shows that Greg's share certificates contained a restrictive legend and therefore, plaintiffs were not freely transferable or subject to sale by them. Finally, to prohibit Greg from taking action directly with the transfer agent to exercise control over his shares of stock, David testified that he contacted Olde Monmouth and put a freeze upon Greg's stock at some time after August 2000, to prohibit Greg from selling or otherwise exchanging his shares. While appellants demanded return of the original certificates or otherwise attempted to have the transfer agent issue new certificates to Greg, the certificates were not released or otherwise reissued. As a result of David's actions, appellants were never able to sell any shares of their stock in the corporation before it filed for bankruptcy protection. Evidence introduced to the court showed the value of the stock at various dates from the date Greg's share certificates were initially issued through the date the corporation filed bankruptcy.

Considering all of the record evidence, we conclude the trial court's Finding of Fact Number Ten and Conclusion of Law Number One (vi), and Finding of Fact Number Five,

to the extent it pertains to the cause of action for conversion, are so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. *See Golden Eagle Archery,* 116 S.W.3d at 761-62; *Cain,* 709 S.W.2d at 176. Issue twelve is sustained.

Finally, issue twenty-one complains of the failure to admit a recording of a conversation with Jesse Clayton. The recording was marked as Plaintiffs' Exhibit 193, and was objected to by David's counsel on grounds of hearsay. Plaintiffs' counsel argued that since Clayton had been shown to be David's agent, Clayton's statements on the recording, which were purported to directly contradict David's position and prior deposition testimony on certain issues, were not hearsay. Texas Rules of Evidence 801(e)(2)(D) provides that an out-of-court statement by a party's agent offered against the party is not hearsay. However, the rule also requires that the agent's statement must concern a matter within the scope of the agency or employment and must be made during the existence of the agency or employment relationship. TEX. R. EVID. 801(e)(2)(D) . In the instant case, the only testimony presented as to Clayton's relationship with David was that David employed Clayton as a "contract laborer" that rented office space from David. Plaintiffs failed to show that the statements by Clayton related to matters within the scope of Clayton's employment, if any, by David. *See Handel v. Long Trusts*, 757 S.W.2d 848, 851 (Tex. App.--Texarkana 1988, no writ). Issue twenty-one is overruled.

In conclusion, we restate our rulings on the appellate issues presented: we overrule issues six, seven in part, ten, eleven, sixteen, seventeen, and twenty-one. We sustain issues one through five, as they pertain to breach of informal fiduciary relationship, eight, nine, twelve (conversion), thirteen through fifteen (alternative cause of action for negligent misrepresentation between professional and nonclient), and issue eighteen (common law fraud based on evidence of fiduciary duty). Issues nineteen (actual damages) and twenty (exemplary damages) are recoverable in a breach of fiduciary duty action. *See Kahn*, 980 S.W.2d at 799 (actual damages); *Int'l Bankers Life Ins.*, 368 S.W.2d at 583-84; *Brosseau*, 81 S.W.3d at 396 (exemplary damages). We remand to the trial court the actions for breach of informal fiduciary duty, conversion, negligent misrepresentation, common law fraud based on evidence of a fiduciary duty, and the appropriate measure of damages, if properly proven. We therefore affirm the trial court's judgment in part and reverse and remand in part.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

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CHARLES KREGER
Justice

Submitted on October 5, 2006
Opinion Delivered July 31, 2008

Before McKeithen, C.J., Kreger and Horton, JJ.

DISSENTING OPINION

The majority concludes that the trial court's refusal to find favorably on Greg's breach of informal fiduciary relationship is contrary to the overwhelming great weight and preponderance of the evidence. In my opinion, the majority's opinion does not reflect that it conducted the required factual sufficiency review of the evidence. *See Dow Chemical Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001) (reversing where court of appeals did not conduct a proper factual-sufficiency review).

As discussed in the majority's opinion, this case involved extensive trial and deposition testimony and numerous exhibits. The great majority of the testimony concerns the transactions to take Greg's privately held corporation public and focuses on Greg's assertion that David's conduct caused Greg to retain his shares instead of selling them at a time when he would have realized a gain. Greg and Lisa, the plaintiffs, pled multiple theories of recovery. The trial court, on conflicting testimony, resolved the controlling fact issues in David's favor, and entered a judgment that plaintiffs recover nothing.

In determining whether to impose a fiduciary duty based upon an informal fiduciary relationship, the length of the parties' prior relationship is an important factor. *Harris v. Sentry Title Co., Inc.*, 715 F.2d 941, 948 (5th Cir.1983), *cert. denied*, 467 U.S. 1226, 104 S.Ct. 2679, 81 L.Ed.2d 874 (1984) (holding that the evidence was insufficient to show "that the parties had a long-standing fiduciary or confidential, trusting relationship unrelated to the

subject transaction" to show a constructive trust, a type of judicially imposed fiduciary relationship); *Lee v. Hasson*, No. 14-05-00004-CV, 2007 WL 236899, at *9 (Tex. App.–Houston [14th Dist.] Jan. 30, 2007, pet. denied) ("The length of the relationship is another important factor[.]"). With respect to their prior business relationship, Greg's brief fails to provide any record cites to establish that a long-standing prior business relationship existed to justify this court's creation of such a relationship. *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 177 (Tex. 1997) ("[W]hile a fiduciary or confidential relationship may arise from the circumstances of a particular case, to impose such a relationship in a business transaction, the relationship must exist prior to, and apart from, the agreement made the basis of the suit."). Texas Rule of Appellate Procedure 38.1(h) provides that the appellant's brief "must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record."

In this case, the trial court found the evidence insufficient to support the imposition of an informal fiduciary relationship. I would not sift through the voluminous record looking for the evidence of the parties' prior business relationship in order to overrule the decision by the trial court; instead, I would hold that Greg failed to establish that the trial court committed error. While the majority's opinion makes a general reference to the existence of prior business transactions, it does not provide any relevant details, nor does it explain how the evidence demonstrates that these prior transactions reasonably led Greg to expect

that David would only represent Greg's interests in this transaction. In my opinion, the majority's discussion of Greg and David's prior business history is not sufficient to meet its duties under *Francis*, under which we are required, before setting aside a verdict based on a greater weight and preponderance argument, to "'detail the evidence relevant to the issue' and 'state in what regard the contrary evidence greatly outweighs the evidence in support of the verdict.'" *Francis*, 46 S.W.3d at 242 (citing *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986)).

Here, the evidence concerning whether David breached any duty by recommending that Greg not sell his shares was also a disputed issue. While Greg did not sell at a time when he might have received a favorable price, there was evidence during the time in question of governmental investigations into the legality of the corporate transactions creating SGD. In the face of these investigations, the trial court may have concluded that David did not breach a duty to Greg by advising him to hold rather than to sell his stock.

The majority's opinion also does not sufficiently address the appropriate inferences to be drawn from Greg's knowledge that David acted as SGD's corporate attorney from its inception. Therefore, it is reasonable to infer that Greg knew, at the times material to the issues here, that David was bound to act in the corporation's best interest. In my opinion, the trial court could have reasonably concluded that Greg could not reasonably rely on David to place Greg's personal interests above those of SGD's.

While evidence of a close family relationship can support a favorable finding to impose an informal fiduciary duty, the evidence that Greg and David had such a close relationship to allow a court to impose an informal fiduciary duty was a disputed fact. *See Tex. Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 508 (Tex. 1980) (holding that a familial relationship itself cannot establish a fiduciary relationship). Where the evidence concerning the existence of an informal fiduciary relationship is in conflict, the issue is a question of fact. *Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp*., 823 S.W.2d 591, 594 (Tex. 1992). Evidence showing that "one businessman trusts another, and relies upon his promise to perform a contract, does not rise to a confidential relationship." *Id*. at 594.

Where a trial court drew reasonable inferences from the evidence, an appeals court cannot substitute its own opinion in place of the trial court's. *City of Keller v. Wilson*, 168 S.W.3d 802, 821-22 (Tex. 2005). Because the trial court drew reasonable conclusions from disputed facts, I would affirm the trial court's judgment. Because the majority does not, I respectfully dissent.

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HOLLIS HORTON
Justice

Dissent Delivered
July 31, 2008