FIDUCIARY DUTIES FOR EMPLOYEES IN TEXAS: A MOVING CONCEPT

Written & Presented by:
TYRONE L. HAYNES, *Houston*
Steele Law Group

HOWARD L. STEELE, JR., *Houston*
Steele Law Group

Co-Author:
SHREEDHAR R. PATEL[1]

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CHAPTER 7

[1] Howard Steele is board certified in labor and employment law and has an L.L.M. in intellectual property law and has been a "Texas Super Lawyer" every year since 2007. He regularly represents both employers and employees in the transition of executives from one employer to another.

Tyrone L. Haynes is an associate at Steele Law Group, PLLC. He previously clerked for Judge Stephen Wm. Smith of the U.S. District Court for the Southern District of Texas, and for Judge E. Scott Frost of the U.S. District Court for the Northern District of Texas. He also interned for Judge Jennifer Walker Elrod of the U.S. Court of Appeals for the 5th Circuit.

Shreedhar R. Patel is an associate with the Steele Law Group, PLLC. He is a 2010 graduate of the Tulane University Law School and former law clerk for Judge Rebecca F. Doherty of the U.S. District Court for the Western District of Louisiana.

TYRONE L. HAYNES

2703 Skyview Cove Court
Houston, TX 77047
(409) 767-0525
t.lamar.haynes@gmail.com

EXPERIENCE

Houston, TX

Steele Law Group, PLLC
Associate, Mar. 2014–Present

- Provide advice and counsel to companies on labor and employment, data privacy, legal compliance, and litigation. Conduct investigations for clients to determine strengths and weaknesses of cases or provide strategy to prevent litigation. Lead litigation efforts, from drafting answers, interviewing witnesses, recommending litigation strategy, conducting research, conducting discovery, drafting motions, and second chairing cases at trial.
- Successfully represented a dentist's office before the Texas Workforce Commission on an unpaid wage dispute.
- Negotiated and drafted a severance agreement for a high-level human resource executive transitioning from a large multinational corporation based in Germany.
- Negotiated and drafted settlement agreements in a wage dispute and personal injury case.
- Two main areas of concentration: commercial litigation and employment and labor.

U.S. District Court for the Southern District of Texas Houston, TX
Law Clerk to Judge Stephen Wm. Smith, Sept. 2012–Aug. 2013

- Managed over 80 cases, conducted legal research, prepared memoranda, drafted orders and opinions, assisted during courtroom proceedings, and performed other necessary administrative duties.
- Notably, I drafted an order denying an FBI search warrant application, which called for the hacking and surreptitious installation of spyware onto a computer. The opinion dealt with an issue of first impression in the federal courts, was the subject of a panel conference at Yale Law School, and caused the Dept. of Justice to propose a change to the Federal Rules of Criminal Procedure.
- Provided research and writing assistance updating Ch. 5 of the *ERISA Survey of Federal Circuits* (2014 ed.).
- Created visual presentation used during keynote address at Berkley University's 6th Annual Privacy Law Scholar's Conference.

U.S. District Court for the Northern District of Texas Abilene, TX
Law Clerk to Judge E. Scott Frost, Aug. 2011–Aug. 2012

- Managed over 70 cases, conducted legal research, prepared memoranda, drafted orders and opinions, assisted during courtroom proceedings, and performed other necessary administrative duties.

Office of the Harris County Attorney Houston, TX
Assistant County Attorney, Apr.–Jul. 2011
Intern (Appellate Litigation), Aug.–Sept. 2010

- Worked directly for the executive officers. Drafted and edited County Attorney opinions. Conducted complex legal research and prepared memoranda regarding the Port of Houston Authority's duty to comply with certain statutory audit requirements.

U.S. Court of Appeals for the Fifth Circuit Houston, TX
Intern to Judge Jennifer Walker Elrod, Sept.–Dec. 2010

- Researched and edited draft appellate opinions. Drafted memoranda of law. Participated in conference after oral argument.

Dwight E. Jefferson, P.L.L.C. Houston, TX
Law Clerk, Jun. 2009–Dec. 2010

- Researched and drafted pleadings, motions, discovery responses, memoranda of law and appellate briefs, including in cases involving federal jurisdiction, personal injury, commercial law, breach of contract, admiralty seizure, and civil rights. Most notably, I drafted a Motion to Dismiss, which resulted in the dismissal of a multi-million dollar breach of contract claim.

Univ. of Texas School of Law, Access to Justice Program Beaumont, TX
Law Clerk to Director of Litigation at Lonestar Legal Aid, May–Aug. 2008

- One of two students selected to represent my law school in program.
- Researched and drafted dispositive motion in Social Security benefits case involving issue of first impression.

PUBLICATIONS

- Howard Steele & Tyrone L. Haynes, *Fiduciary Duties for Employees in Texas: A Moving Concept*, 68 THE ADVOCATE 38 (2014).

EDUCATION

Texas Southern University, Thurgood Marshall School of Law Houston, TX

Juris Doctor, *Magna Cum Laude*, Dec. 2010

- Rank: Top 15%
- GPA: 3.46, 2L-3L; Overall GPA: 3.26
- Dean's List 2008–2010
- CALI Award, Highest Grade in Evidence
- Full-tuition Academic Scholarship 2007–2008
- Merit Scholarship 2008–2010
- 2nd Place TMSL Scholarship Writing Competition
- Paul F. Tu Scholarship for Excellence in Evidence
- Vice-President, Black Law Students Association
- Research Assistant, Commercial Law

Lamar University, College of Business Beaumont, TX

Bachelor of Business Administration, Marketing, May 2007

- President, Alpha Phi Alpha, Fraternity, Inc.
- Member, Alumni Advisory Board
- Historian, Student Government Association
- Senator-at-Large, Student Government Association

BAR ADMISSIONS

- Texas, May 2011

AWARDS

- BLSA Outstanding Leadership Award
- A. Maceo Smith Leadership Award
- Class 4A Tex. Basketball Champion (2001)

INTERESTS

- Graphic design
- Photography
- Sci-fi films and books
- Collecting vinyl records

HOWARD L. STEELE, JR.
FOUNDING PARTNER
Email: hsteele@steele-law-group.com

PRACTICE AREAS:

- Board Certified, Labor & Employment Law by the Texas Board of Legal Specialization (since 2001)

- Recognized as a Texas "Super Lawyer" by *Texas Monthly* Magazine and the *Texas Lawyer* (since 2006)

- Recognized as one of the best labor & employment attorneys in Houston by *H Magazine*

- Trade Secrets/Restrictive Covenants

- Appellate Litigation

- Complex and other business litigation

Howard L. Steele Jr., is a founding partner of the firm. He also serves as an adjunct professor of law at the University of Houston Law Center. Prior to forming Steele Law Group, he practiced in the labor & employment and litigation sections of the Houston office of Seyfarth Shaw and was a partner at Caldwell & Clinton, PLLC.

Mr. Steele also served as law clerk to United States District Judge Melinda Harmon in the Southern District of Texas, Houston Division and as briefing attorney to Justice Sam Nuchia of the First Court of Appeals in Houston. During law school, he was an articles editor for the Houston Journal of International Law.

Mr. Steele is the author of numerous articles, on topics including: Employment Contracts, Trade Secrets, Non-Competition Law, Technology Law, and Fiduciary Duty Law. Mr. Steele has also delivered numerous speeches and presentations on these topics. Mr. Steele also regularly delivers presentations providing guidance to human resource departments for companies of all sizes.

Mr. Steele has a broad range of litigation experience with a particular emphasis in employment law and litigation. Mr. Steele's practice includes defense of employment discrimination cases under Title

VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Texas Commission on Human Rights Act, the Texas Labor Code, as well as other statutory and common law claims. He has also prosecuted employer claims of Internet defamation.

His litigation experience also includes technology/internet litigation, intellectual property litigation, drug-testing litigation, insurance coverage litigation, and commercial litigation.

Education

- L.L.M. (Intellectual Property Law), University of Houston

Law Center - J.D., University of Houston Law Center - B.A.,

Baylor University, B.A., UT-Dallas

Admissions and Affiliations

- Texas, Fifth Circuit Court of Appeals, all federal district courts in Texas -

Houston and Federal Bar Associations, American Inns of Court, MENSA. -

Member of Labor and Employment Section of State Bar of Texas

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FIDUCIARY DUTIES FOR EMPLOYEES IN TEXAS:

For centuries, courts have required trustees to serve with the same devotion that they serve their own interests. This duty of loyalty, coupled with the hammer of restitution of any ill-gotten gain, has defined a very special relationship in the law: the fiduciary relationship. As Justice Cardozo famously penned in *Meinhard v. Salmon*, "[a] trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."[2] As time has passed, however, courts have created different standards and remedies for different fiduciaries. There are numerous theories that attempt to unify the concept of fiduciary law, *i.e.*, economic, anti-economic, contractual, property based, unjust enrichment, reliance, unequal relationship, and power and discretion.[3] In the end, however, there is no clear map that creates a simplistic black and white test for practitioners and judges in this equitable forest. Thus, the question for practitioners is when does an employee become a "fiduciary," and thus, require the "punctilio of an honor" to the employer?

The legal concept of fiduciary relationships first developed in England's courts of chancery.[4] These courts of equity traditionally resolved matters involving breach of trust or confidence.[5] During this period, the courts had not yet adopted the term "fiduciary." Indeed, the case law from the period describes fiduciary obligations with language typically used in trust matters.

As the chancery courts became more sophisticated, however, "a standard technical vocabulary [gained] recognition."[6] As a result, the word "trust" became a narrowly defined term of art, which excluded the concept of fiduciary relationships. This created quite a quandary for late-eighteenth and early-nineteenth century practitioners, who were left to argue a branch of trust law, without using the term "trust." Against this backdrop, the term "fiduciary" "was adopted to describe [those] situations which fell short of the now strictly-defined trust."[7]

I. THE HISTORY OF "FIDUCIARY" IN TEXAS

In 1942, the Supreme Court of Texas waded into the murky water that is fiduciary law. The Court explained:

> The term "fiduciary" is derived from the civil law. It is impossible to give a definition of the term that is comprehensive enough to cover all cases. Generally speaking, it applies to any person who occupies a position of peculiar confidence towards another. It refers to integrity and fidelity. It contemplates fair dealing and good faith, rather than legal obligation, as the basis of the transaction. The term includes those informal relations which exist whenever one party trusts and relies upon another, as well as technical fiduciary relations.[8]

Even today, fiduciary law is not a "one size fits all" concept. This broad, all-encompassing definition has been re-used over the years by the Texas Supreme Court and the lower courts of appeals. As the 14th Court of Appeals has stated:

> There are two types of fiduciary relationships -- a formal fiduciary relationship that arises as a matter of law such as principal/agent or partners, and an informal fiduciary relationship arising from a confidential relationship "where one person trusts in and relies upon another, whether the relation is moral social, domestic or merely personal.[9]

II. EMPLOYMENT CONTRACTS AND FIDUCIARY DUTY

In Texas, we are an "at-will" employment state, which generally means an employer can fire an employee for any reason that is not illegal. We attorneys are expensive; generally, for good reason. Employers, therefore, hire good counsel to create agreements to properly take advantage of this construct. The general employment agreement (paid for by the employer) understandably attempts to provide as many restrictions on the employee as possible, with as few obligations on the client employer as possible. These contracts generally have a broad merger clause that prevents any pre or post negotiation parole evidence. The contracts generally have a provision that prevents the dissemination of the

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[2] *Meinhard v. Salmon*, 249 N.Y. 458, 464 (N.Y. 1928).

[3] For an excellent discussion on why courts have not been able to unify a fiduciary law concept, s*ee generally* Judge Easterbrook and Daniel Fischel, *Contract and Fiduciary Law*, 36 J.L. & ECON., 425 (Apr. 1993).

[4] L.S. Sealy, *Fiduciary Relationships*, 1962 CAMBRIDGE L.J. 69, 69-72 (1962).

[5] *Id*. at 69-70 ("[T]he broad general principle applied was that if a confidence is reposed, and the confidence is abused, a court of equity shall give relief.")

[6] *Id*. at 70.

[7] *Id*. at 72.

[8] *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 138 Tex. 565, 571 (Tex. 1942).

[9] *Hoggett v. Brown*, 971 S.W.2d 472, 487 (Tex. App.—Houston [14th] Dist. 1997, pet. denied) (citations omitted).

employer's intellectual property (*i.e.*, trade secrets) and even items not intellectual property such as "confidential or proprietary information." Many times there are also "moon-lighting" clauses that prevent an employee from working for anyone else while employed. The practical reality of employment is that the employer has more leverage and can better afford the transaction cost of creating a document that puts it in a position of power. An employee (especially in this economy) is not one that can drive a hard bargain on the big stack of documents it receives on the first day of employment.[10]

III. EMPLOYEES GENERALLY ARE NOT FIDUCIARIES

A fiduciary relationship is an extraordinary one and will not be lightly created.[11] Texas does not generally recognize a formal fiduciary duty between employers and employees.[12] *See Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 201 (Tex. 2002) ("an employee does not owe an absolute duty of loyalty to his or her employer"; "an employer's right to demand and receive loyalty must be tempered by society's legitimate interest in encouraging competition . . ."); *Hoggett v. Brown*, 971 S.W.2d 472, 487 (Tex. App.—Houston [14th Dist.] 1997, *pet. denied*) (no formal fiduciary relationship exists between an employer and an employee); *Pruitt v. United Chester Indus., Inc.*, 2000 Tex. App. LEXIS 5767, 8 (Tex. App.—Dallas Aug. 28, 2000, *pet. denied*) ("Texas does not generally recognize a fiduciary duty between employers and employees.").

"There are, however, certain limitations on the conduct of an employee who plans to compete with his employer. He may not appropriate his employer's trade secrets. He may not solicit his employer's customers while still working for his employer . . ., and he may not carry away certain information, such as lists of customers . . .. Of course, such a person may not act for his future interests at the expense of his employer by using the employer's funds or employees for personal gain or by a course of conduct designed to hurt the employer."[13] If an agent, while employed by his principal, uses his position to gain a business opportunity belonging to the employer, such conduct constitutes an actionable wrong.[14] An employee "may not act for his future interest at the expense of his employer . . . by a course of conduct designed to hurt the employer."[15]

A fiduciary relationship, however, does not preclude the fiduciary from preparing for a future competing business venture; nor do such preparations necessarily constitute a breach of fiduciary duties.[16] An at-will employee may properly plan to compete with his employer, and may take active steps to do so while still employed.[17] The employee has no general duty to disclose his plans and may secretly join with other employees in the endeavor without violating any duty to the employer.[18]

Absent special circumstances, once an employee resigns, he may actively compete with his former employer.[19] In Texas, to resign from one's employment and go into business in competition with one's former employer is, under ordinary circumstances, a constitutional right.[20] There is nothing legally wrong in engaging in such competition or in preparing to

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[10] *See supra* n. 2 (explaining why transaction costs best explain why certain obligations are imposed).

[11] *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 177 (Tex. 1997).

[12] A fiduciary duty applies only to an individual "who occupies a position of peculiar confidence towards another. It refers to integrity and fidelity. It contemplates fair dealing and good faith, rather than legal obligation as the basis of the transaction." *Johnson*, 73 S.W.3d at 199 (citations omitted). The Texas Supreme Court has determined an employer does not owe a duty of good faith and fair dealing to its employee. *City of Midland v. O'Bryant*, 18 S.W.3d 209, 216 (Tex. 2000); *Schlumberger*, 959 S.W.2d at 177 (declining to impose fiduciary duty in contractual relationship); *Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 595-96 (Tex. 1992) (forty-year business relationship was insufficient to create a fiduciary relationship); *Kardell v. Union Bankers Ins. Co.*, 2002 Tex. App. LEXIS 5760, 21-22 (Tex. App.—Dallas Aug. 8, 2002, no pet.).

[13] *Johnson*, 73 S.W.3d at 202 (Tex. 2002); *Bray v. Squires*, 702 S.W.2d 266, 270 (Tex. App.—Houston [1st Dist.] 1985, no writ).

[14] *Id.*

[15] *Navigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277, 284 (5th Cir. 2007) (*quoting Johnson*, 73 S.W.3d at 202).

[16] *Id.*; *Ameristar Jet Charter, Inc. v. Cobbs*, 184 S.W.3d 369, 374 (Tex.App.-Dallas 2006, no pet.) (no breach of fiduciary duty when an employee formed a competing business while still employed but did not actually compete with the employer until he resigned); *Abetter Trucking Co. v. Arizpe*, 113 S.W.3d 503, 510 (Tex.App.--Houston [1st Dist.] 2003, no pet.) ("An at-will employee may properly plan to compete with his employer, and may take active steps to do so while still employed. The employee has no general duty to disclose his plans and may secretly join with other employees in the endeavor without violating any duty to the employer." (citation omitted)); *see id.* at 511 ("To form his own company, Arizpe had to incorporate or otherwise establish a business entity, obtain permits, and obtain insurance. These were permissible preparations to compete, not breaches of fiduciary duty.").

[17] *Augat, Inc. v. Aegis, Inc.*, 409 Mass. 165, 172, 565 N.E.2d 415, 419 (Mass. 1991) (quoted in *Johnson*, 73 S.W.3d at 201).

[18] *Id.*

[19] *Id.*

[20] *Abetter Trucking Co. v. Arizpe*, 113 S.W.3d 503, 510-511 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

compete before the employment terminates. Moreover, the possibility of crippling, or even destroying, a competitor is inherent in a competitive market.[21] An employer who wishes to restrict the post-employment competitive activities of a key employee may seek to accomplish that goal through a non-competition agreement.[22]

Courts have been, and should be, careful in defining the scope of the fiduciary obligations an employee owes when acting as the employer's agent in the pursuit of business opportunities.[23] This is because an employer's right to demand and receive loyalty must be tempered by society's legitimate interest in encouraging competition.[24] The tension between the obligations of a fiduciary and his rights as a potential competitor reflects two conflicting public policies: one that seeks to protect a business from unfair competition, and the other that favors free competition in the economic sphere.[25] If the former is carried to its extreme, it deprives a person of the right to earn a living; conversely, the latter right, if unchecked, could make a mockery of the fiduciary concept, with its concomitants of loyalty and fair play.[26]

IV. FIDUCIARY DUTIES IN CLOSE CORPORATIONS AFTER *RITCHIE V. RUPE*

There is some overlap between shareholders and employees. This is especially true with closely held corporations, where a minority shareholder is also an employee. In those instances, employment contracts or shareholder agreements are important for creating specific protections for the shareholder/employee, and for defining the specifics of the employee-employer relationship. This holds true to an even greater degree in closely held corporations in Texas after last summer's landmark decision in *Ritchie v. Rupe*. Indeed, the Texas Supreme Court handed down a majority opinion refusing to recognize a common law cause of action for "shareholder oppression." *Ritchie v. Rupe*, 443 S.W.3d 856 (Tex. 2014) Common law "shareholder oppression" was a cause of action previously used to curb oppressive behavior by a majority shareholder to the detriment of a minority shareholder/employee by the creation of a purported duty. In addition to abolishing a common law cause of action for shareholder oppression, the Texas Supreme Court made it clear that it has never recognized a formal fiduciary duty between a majority and minority shareholder in a closely held corporation. *Id. at* 890; *see also Cardiac Perfusion Servs., Inc. v. Hughes*, 436 S.W.3d 790, 781 n.1 (Tex. 2014) (following the analysis of *Richie v. Rupe*).

While the holding in *Ritchie v. Rupe* changes the landscape of the minority shareholder versus majority shareholder dispute paradigm, the opinion also delves into fiduciary duty law. *Ritchie*, 443 S.W.3d at 868-69. In the opinion, the majority makes it clear that notwithstanding any common law fiduciary duties, fiduciary duties can be created through negotiated terms in a contract (in the *Ritchie* case through shareholder agreements, creating a fiduciary duty where one normally would not exist between shareholders). Moreover, the Court made clear it was "reluctant to permit courts to interfere with the freely negotiated terms of a private contract, or to insert into such a contract rights or obligations that the parties could have bargained for but did not." *Id.* at 891. (citing *Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 646 (Tex. 1996)).

Under Texas Law, an employer may contract—through employment agreement, shareholder agreement, or otherwise—with an employee creating a contractual fiduciary relationship, or specific terms of employment, as a particular covenants and promises in an agreement. *See* TEX. BUS. ORGS. CODE §§ 2.101(5), 21.101(a)(4), 21.714(b)(9). Negotiating fiduciary protections into a shareholder agreement or employment agreement is even more important if the employee is a shareholder. Because as the *Ritchie* court noted, "a minority shareholder's loss of employment with a closely held corporation can be particularly harmful because a job and its salary are often the sole means by which shareholders receive a return on their investment in a corporation." *Ritchie*, 443 S.W.3d at 885. The *Ritchie* opinion highlights the need for well-negotiated employment agreements, and well-negotiated shareholder agreements, to ensure proper delineation of fiduciary duties and employment terms, to protect the company or individual. Thus, before negotiating these complex agreements, it is of utmost importance to retain counsel with sufficient knowledge of these recent developments, and their practical effect fiduciary duty law.

V. CONTORT

Contort[27] analysis is a muddy area, devoid of bright line rules or easy answers as to what conduct

[21] *Id.*
[22] *Augat, Inc.*, 565 N.E.2d at 419.
[23] *Johnson*, 73 S.W.3d at 201.
[24] *Id.*
[25] *Id.*
[26] *Id.*

[27] See Erin Hopkins, 9 HOUSTON LAWYER 16, 20 (2011) for a nice synopsis of contort analysis. The framework for a proper "contort" analysis requires a court to look at the source of the duty and determine if it is from contract or imposed by law. The court must also analyze the type of injury and determine if it is an economic loss that is part of the subject of the contract or a physical harm.

constitutes a tort, and what a breach of contract. The acts of a party may breach duties in tort or contract alone, or simultaneously in both.[28] A contractual obligation does not generally give rise to a fiduciary duty.[29]

If there is a contract that deals with the subject matter the employer is suing over, which also contains a broad merger clause, the contort analysis should generally foreclose a breach of fiduciary claim (absent extraordinary facts). That is, if the parties have contracted for the scope of the employment duty; neither party should claim that it should receive more protection than bargained for beyond the four corners of the contract.

VI. TRADE SECRET VS. CONFIDENTIAL

A "trade secret" is intellectual property, and thus, a very special type of "confidential or proprietary" information.[30] To be a trade secret, information must rise to a "formula, pattern, device or compilation of information which is used in one's business and presents an opportunity to obtain an advantage over competitors who do not know or use it."[31]

"Confidential" is simply a designation imposed by the employer on its property. It does not create intellectual property. It generally is not a protectable interest (other than firing the employee for violating the employment policy). Although one can find "loose language" in various opinions seemingly protecting "confidential information," if one "peels back the onion," all of these opinions rely on the Texas Supreme Court's decisions in *Altai* or *Hyde Corp. v. Huffines*[32] (both defining a trade secret).[33]

Thus, unless an employee has misappropriated a trade secret, or maybe a customer list (only some customer lists are trade secrets),[34] then the Texas Supreme Court says there is no claim for breach of fiduciary duty with generic "confidential" business information.[35] Otherwise, the breach of fiduciary duty claim could be used like intentional infliction of emotional distress had been used for so many years. It could be raised when the employer had no ability to enforce a noncompete or make a misappropriation of trade secrets claim. This is why it is so very important for an outgoing executive to engage counsel well before they ever resign. In practice, it is much easier to argue to the judge the words on the four corners of the document, than to have the client, unguided, create "black hat facts."

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[28] *Southwestern Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 495 (Tex. 1991); *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986); *Airborne Freight Corp. v. C. R. Lee Enters, Inc*., 847 S.W.2d 289, 293 (Tex. App.—El Paso 1992, writ denied).

[29] *Johnson*, 73 S.W.3d at 196; *Thomason v. Collins & Aikman Floorcoverings*, Inc., 2004 Tex. App. LEXIS 2823, 10-11 (Tex. App.—San Antonio Mar. 31, 2004, pet. denied) ("because Thomason's claims for breach of fiduciary duty and for breach of duty of good faith and fair dealing are based on C&A's alleged failure to pay him commissions, summary judgment on these claims was proper.") *see also Stauffacher v. Coadum Capital Fund 1, LLC*, 344 S.W.3d 584, 591 (Tex. App.—Houston [14th Dist.] 2011, pet. denied); *Fish v. Tex. Legislative Serv., P'ship*, 2012 Tex. App. LEXIS 749, 46 (Tex. App.—Austin Jan. 27, 2012, no pet.); *Villanueva v. Gonzalez*, 123 S.W.3d 461, 467 (Tex. App.—San Antonio 2003, no pet.); *Classical Vacations, Inc. v. Air France*, 2003 Tex. App. LEXIS 3160, 6-7 (Tex. App.—Houston [1st Dist.] Apr. 10, 2003, no pet.).

[30] *See Stewart & Stevenson Servs. v. Serv-Tech*, 879 S.W.2d 89, 99 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (refusing to recognize a cause of action for misappropriating confidential business information that does not rise to a the level of trade secret); *APRM, Inc. v. Hartnett*, No. 01-01-00831-CV, 2002 WL 1435995, at *3 (Tex. App.—Houston [1st Dist.] July 3, 2002, no pet.) ("Not all confidential information is secret . . .").

[31] *Computer Assocs. Int'l v. Altai, Inc.*, 918 S.W.2d 453, 455 (Tex. 1996).

[32] *Hyde Corp. v. Huffines*, 158 Tex. 566, 575 (Tex. 1958). ("One who discloses or uses another's trade secrets, without a privilege to do so, is liable to the other if (a) he discovers the secret by improper means, or (b) his disclosure or use constitutes a breach of confidence reposed in him by the other in disclosing the secret to him. * * *." (*quoting* Restatement (Second) of Torts § 757)); *see also Gen. Universal Sys., Inc. v. Lee*, 379 F.3d 131, 150 (5th Cir. 2004) (*citing In re Bass*, 113 S.W.3d 735, 739-40 (Tex. 2003)); *T-N-T Motorsports, Inc. v. Hennessey Motorsports, Inc*., 965 S.W.2d 18, 22 (Tex. App.—Houston [1st Dist.] 1998, pet. dism'd).

[33] *SP Midtown, Ltd. v. Urban Storage, L.P*., No. 14-07-00717-CV, 2008 WL 1991747, at *5 n. 5 (Tex. App.—Houston [14 Dist.] 2008, pet. denied) (mem. op.) ("In its brief, Space Place argues the common law tort of misappropriation does not solely depend on the existence of a trade secret. Essentially, Space Place argues a claim of misappropriation of confidential information can survive even if the information does not constitute a trade secret. We disagree. There is no cause of action for misappropriation of confidential information that is not either secret, or at least substantially secret."); *Bluebonnet Petroleum, Inc. v. Kolkhorst Petroleum Co.*, No. 14-07-00380-CV, 2008 WL 4527709, at *5 (Tex. App.—Houston [14 Dist.] 2008, pet. denied) (mem. op.) ("The issue, therefore, is whether the mere identity of the potential accounts with which Robinson was working when he left Bluebonnet is a trade secret, or even merely proprietary information accorded similar protection. To decide whether the information qualifies as a trade secret we must consult the six factors listed above."); TEX. JUR. Trademark § 54 ("There is no cause of action for misappropriation of confidential information that is not either secret or at least substantially secret.").

[34] *See Sharma v. Vinmar Int'l, Ltd*., 231 S.W.3d 405, 425 & n. 14 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (collecting cases).

[35] *See supra* n. 11, 12.

VII. GREAT! LET'S GO KILL OURSELVES A WITCH! THE TRIAL[36]

Notwithstanding the hyper technical nuances of the law, at bottom, judges and jurors want to know who the good guy and the bad guy are. If you are not careful, merely having a breach of fiduciary duty claim survive summary judgment could get a lot of testimony and evidence in trial that will make your client look really bad to the jurors (even if there is not a viable breach of fiduciary duty claim that can survive a directed verdict, JNOV, or appeal). Whether a fiduciary duty exists is a question of law.[37]

Before an attorney should ever take a case, they should look at the "down and dirty" jury charge, as well as the elements of the claim and burden of proof, to determine the map for the inevitable presentation to the jury or judge. Knowing the questions before the "final exam" is given always ensures that you ask the right questions in discovery and present the right issues to the fact finder. Pretty much every case that is won or lost (among equally talented lawyers) is based on the application of the facts to the jury charge. With regard to fiduciary duty, this is even more important due to incredibly varying standards.[38]

For example, if the fiduciary relationship is created by contract, PJC 104.2 is completely inappropriate. If the employment agreement lays out or modifies the fiduciary duties, the contract terms must be in the jury charge.[39]

A final pitch for an outstanding resource provided to attorneys. The Texas Bar CLE Library is available for a fraction of what we all provide for online research through Westlaw and Lexis.[40] Every year there are outstanding programs on fiduciary duty. With a simple click of the mouse, you can be updated by very bright practitioners on the current state of this rapidly moving concept.

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[36] OZ: "Fine, you want to come, come. We'll all go, it will be a big party." China Doll: "Great! Let's go kill ourselves a witch!." OZ THE GREAT AND POWERFUL, s*ee* http://www.youtube.com/watch?v=7TGQewuMGB4.

[37] *Nat'l Plan Adm'rs, Inc. v. Nat'l Health Ins. Co*., 235 S.W.3d 695, 700 (Tex. 2007).

[38] For an excellent discussion of the Texas Pattern Jury Charge and fiduciary duty, *see* Joyce W. Moore, *Fiduciary Litigation, Jury Charge Checklist*, State Bar of Texas, Trial of a Fiduciary Litigation Case (2009).

[39] *Sterling Trust Co. v. Adderly*, 168 S.W.3d 835, 846-47 (Tex. 2005) (trial court's failure to include contractual modifications to fiduciary duty rendered "breach" question overly broad and thus, defective); *see generally* Joyce W. Moore, *Fiduciary Litigation, Jury Charge Checklist* at 1-2.

[40] *See* http://www.texasbarcle.com/CLE/OLHOME.ASP.