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COURT OF APPEALS

STATE OF NEW YORK

THE MOORE CHARITABLE FOUNDATION,

Appellant,

-against-

No. 52

PJT PARTNERS, INC.,

Respondent.

20 Eagle Street
Albany, New York
May 17, 2023

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUSTICE NANCY E. SMITH

Appearances:

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1 CHIEF JUDGE WILSON: Before we begin, I wanted to
2 welcome and extend our deep gratitude to our colleague
3 Justice Nancy Smith for filling in today. Thank you.

4 MR. SHACKELFORD: Good afternoon. Stephen
5 Shackelford for the plaintiffs, The Moore Charitable
6 Foundation and Kendall JMAC. Could I please reserve two
7 minutes for rebuttal?

8 CHIEF JUDGE WILSON: Yes.

9 MR. SHACKELFORD: May it please the court. I
10 want to start with a simple but important point. What you
11 saw in the briefing from PJT, and you likely will hear some
12 in argument today, are references to things like the risk-
13 free return, other reasons why PJT believes that
14 plaintiffs, my clients, should have seen this coming. They
15 should have known they were being defrauded.

16 I want to make sure I emphasize: all of those
17 arguments have nothing to do with the two legal issues
18 before the court today, the first of which is a purely
19 legal issue, which is the extent of the duty that PJT owes
20 to non-negligently supervise Mr. Caspersen, and the second
21 issue is the adequacy of the pleading, whether we've
22 sufficiently pled that the - - - that PJT had knowledge,
23 knew, or should have known of the dangerous propensities of
24 Mr. Caspersen to potentially defraud potential clients such
25 as - - - such as the plaintiffs in this case. Neither one

1 of those has anything to do with the reasonableness of
2 plaintiff's reliance on Mr. Caspersen's representations.
3 That's an issue that's not before the court.

4 The two issues - - - I'll start with the second
5 one which is what the court was very interested in when we
6 were here a little over a year ago, which is the - - - what
7 did we allege that at the pleading stage fairly indicates
8 that PJT knew or should have known of the dangerous
9 propensities of Mr. Caspersen to potentially defraud
10 clients or potential clients.

11 We allege four things, and we allege that PJT
12 knew all four things. One, PJT knew that Mr. Caspersen, a
13 high-ranking executive who PJT sent out into the world to
14 be a one-on-one contact with potential clients and
15 potential limited partners, knew that he - - - that there
16 was a missing eight million dollar fee, and he told a bald-
17 faced lie to explain why it hadn't come in.

18 JUDGE GARCIA: But did they know it was a bald-
19 faced lie? He told them it hadn't come in yet, right?

20 MR. SHACKELFORD: Well, he told them it hadn't
21 come for a specific reason. And we allege that they knew
22 it was lie because it was an obvious lie. He told them
23 that it had not come in because there was a stub closing on
24 the deal.

25 JUSTICE SMITH: But isn't it normal on a stub

1 closing you get some of the money, some of the fee, and
2 then after the stub closing, you get the rest of it, right?

3 MR. SHACKELFORD: Exactly, Your Honor. And we
4 allege - - -

5 JUSTICE SMITH: So that's what you're alleging
6 that that's why they should have known, not just because he
7 said that the fur - - - if they'd inquired further, that
8 they might - - -

9 MR. SHACKELFORD: Well, they - - - they - - - we
10 allege they would have known that was a lie because they
11 would have known that most of the fee would have come in.
12 And they also would have known that - - -

13 JUDGE GARCIA: I mean, I - - - well, many of us
14 have practiced, and you don't get a fee and, you know,
15 sometimes you get a, you know, an email or a call from a
16 CFO, your firm, or - - - you know, fee hasn't come in.
17 What - - - and a lawyer or, in this case, this person says,
18 you know, it's delayed. What is the firm supposed to do at
19 that point?

20 MR. SHACKELFORD: Well, Your Honor, it'd be one
21 thing if - - - if Mr. Caspersen had just said it's delayed
22 and given no - - - no explanation. But as we allege, and
23 as must be accepted as true at the pleading stage, what he
24 told them was it hasn't come in yet, because it's - - -
25 there's a stub closing, and none of the fee will come in

1 until the stub - - -

2 JUDGE CANNATARO: Just to be entirely accurate
3 about that, you - - - what you're really saying is - - - is
4 what Judge Smith said, that they should have known that
5 that was an impossibility or - - - or a lie, not that they
6 actually do, because there are stub closings, and sometimes
7 fees are delayed. It's just that your allegation here - -
8 - or your - - - yes, the allegation in your complaint is
9 that because he told such an easily revealable falsehood,
10 that they should have known that something was amiss,
11 right?

12 MR. SHACKELFORD: I mean, technically, Your
13 Honor, we allege in paragraph 35 that they knew or should
14 have known that it was a lie. Now, obviously, at the
15 pleading stage, we can't get inside their head. But we do
16 allege that they knew it was lie because the people he was
17 reporting this to knew there was no stub closing on the
18 deal, because there wasn't, and knew that even if there
19 were a stub closing, part of the fee would have come in.

20 JUDGE CANNATARO: Does it matter who he told that
21 lie to? In other words, could it have been a person who
22 wasn't very familiar with the deal, just was, you know, in
23 the accounts receivable department or something like that?

24 MR. SHACKELFORD: Well, theoretically, Your
25 Honor, that's a possibility. Of course, we don't allege

1 that he told someone who didn't know what was going on with
2 the deal, and someone in the accounts receivable department
3 at PJT would - - - at least we're entitled to the
4 inference, they would know how these stub closings worked.

5 JUDGE CANNATARO: So it's enough for the pleading
6 stage just to say.

7 MR. SHACKELFORD: And it's just one of four, Your
8 Honor. I mean - - -

9 JUDGE CANNATARO: Well, what - - - what are the
10 other ones?

11 MR. SHACKELFORD: The other four, number two is
12 that when the fee came in, it came in from his personal
13 account that he had disguised. It did not come in from the
14 client's actual account. And we allege - - - and this is
15 in paragraph 47 - - - that PJT either did not discern that
16 the funds had arrived from the wrong account negligently or
17 did detect the anomaly but ignored it. It's a big red flag
18 if you get money from - - - 8.1 million dollars and you
19 know it didn't come from the right account. So that's the
20 second big red flag, and we - - - we allege that they knew
21 that it came from the wrong account.

22 The third big red flag is that Mr. Caspersen, we
23 allege, before the fraud occurred, consistently came into
24 work completely drunk, having drank ten to fifteen
25 alcoholic beverages over lunch, over long lunches, and he

1 went to meetings completely drunk - - -

2 JUSTICE SMITH: Does that in any way infer that
3 he would do what he did? I mean, it just - - - he's drunk.
4 But that doesn't mean that he's got a propensity to commit
5 fraud, correct?

6 MR. SHACKELFORD: Well, Your Honor, by itself, we
7 would argue that it still does inf - - - at least at the
8 pleading stage you can infer a propensity for a high-
9 ranking executive who was sent out to deal one-on-one with
10 prospective clients and current clients, that it does
11 indicate a propensity to commit fraud.

12 JUDGE SINGAS: Wait, wait.

13 MR. SHACKELFORD: And I would just point to the
14 U.S. - - -

15 JUDGE SINGAS: Are you arguing that someone who
16 has a substance abuse issue or some kind of alcohol
17 dependency issue is automatically subject to criminality
18 because of that disorder? Is that what you just said?

19 MR. SHACKELFORD: Your Honor, I think it depends
20 on the circumstances and the position. I will point out
21 that the U.S. government - - -

22 JUDGE SINGAS: High-ranking substance abuser.

23 MR. SHACKELFORD: The U.S. government, for
24 instance, if it's putting someone in a position of trust to
25 see classified documents, for instance, that's one thing

1 they look at. And that can disqualify you from getting a
2 position of - - - of high trust.

3 JUDGE SINGAS: Doesn't mean you're selling
4 secrets to Russia, does it?

5 MR. SHACKELFORD: It doesn't, but it means that
6 there is a risk. There is a propensity for that to happen.
7 Same thing with a gambling problem which, in effect, is
8 what we alleged Mr. Caspersen had. He gambled on options.
9 He gambled per - - - on personal security trades.

10 JUDGE CANNATARO: So your answer to Judge Singas'
11 question, I think, is yes, then. If someone has a
12 substance abuse issue, that's evidence of propensity to
13 commit fraud?

14 MR. SHACKELFORD: If someone has a serious enough
15 substance abuse issue and their position is that they deal
16 one-on-one with large amounts of money with prospective
17 clients or current clients, then it at least raises a risk
18 that requires the - - - the employer to look into it.

19 To be clear, we have all four.

20 JUSTICE SMITH: That's what I was just - - -

21 MR. SHACKELFORD: So - - -

22 JUSTICE SMITH: - - - going to ask you. So do
23 you think if you just had the alcohol issue and the - - -
24 his personal gambling issue, do you think that that would
25 pass muster, or do you total it up?

1 MR. SHACKELFORD: Respectfully, Your Honor, I - -
2 - I do think so. If you look at, for instance, the U.S.
3 government, the U.S. government would not put someone with
4 those very serious problems - - -

5 JUSTICE SMITH: Well, we're not looking at the
6 U.S. government.

7 MR. SHACKELFORD: Well, I think this is a
8 sophisticated financial - - - financial institution with
9 obligations for senior executives. I think that would also
10 - - - those two things would be sufficient.

11 JUDGE RIVERA: Well, the - - - the gambling issue
12 certain - - - the alcohol abuse, certainly that - - - that
13 might be of a different caliber if it stood on its own.
14 But the gambling issue - - - although, again, someone who
15 needs help and - - - but nevertheless, it does, perhaps, as
16 you say, raise at a minimum a red flag to inquire.

17 MR. SHACKELFORD: To which - - - yes, Your Honor,
18 to inquire or at least to better supervise. I mean, to be
19 clear, number one, we have all four of these at the
20 pleading stage. And discovery will show what they were
21 aware of.

22 JUDGE TROUTMAN: And you - - - you are
23 emphasizing that it's at the pleading stage for what
24 reason?

25 MR. SHACKELFORD: Well, at the pleading stage,

1 Your Honor - - - well, we've pled four different things
2 which, in combination, certainly give rise to the inference
3 that - - - that PJT knew or was on notice of these
4 dangerous propensities.

5 JUDGE TROUTMAN: And how - - - at the pleading
6 stage, how is this to be considered by the court when the
7 motion is made since it's a 3211?

8 MR. SHACKELFORD: Yes, Your Honor. Well, we are
9 entitled to the - - - to all reasonable inferences, and
10 we're entitled to acceptance of all of our allegations are
11 true, whereas at the discovery phase, if we get past the
12 pleading stage, we may well see in discovery that they had
13 internal records of this. They may have policies, for
14 instance, that say if someone has a substance abuse problem
15 we have to watch them more closely.

16 JUDGE GARCIA: Counsel, can we just - - - I see
17 your light is on, but with the Chief Judge's permission, if
18 we could just explore the other issue a bit. One thing I'm
19 struggling with is if we go the way you want and you get
20 that result here, where does this stop, right? And the
21 Appellate Division seems to have put in this rule - - - in
22 its ruling that because, you know, this person - - - you
23 weren't a client of the firm, right, there is no duty. And
24 so to get at that issue a little bit, I'd like to ask you
25 about a case. They rely on a case called Gottlieb v.

1 Sullivan & Cromwell, right?

2 MR. SHACKELFORD: Yes, Your Honor.

3 JUDGE GARCIA: Law firm employees, insider
4 trading, get sued by someone in the market who's injured,
5 supposedly by that - - - that trading. And the Second
6 Department, I think it is in that case, says plaintiff was
7 not a client of the defendant with the result that, in the
8 absence of privity, the defendant owed no duty.

9 If we go the way you ask us to, if we rule that
10 way, would this no longer be good law, *Gottlieb v. Sullivan*
11 & *Cromwell*?

12 MR. SHACKELFORD: *Gottlieb* would still be good
13 law because the rule we're asking for is for prospective
14 customers who deal with the tortfeasor in connection with
15 his employment. In *Gottlieb* - - -

16 JUSTICE SMITH: I would assume that you're saying
17 that what you - - - what you're expecting is if there's - -
18 - there's some type of nexus between the employer and the
19 prospective client, or even if it's not a prospective
20 client, to - - - to the injured person.

21 MR. SHACKELFORD: Yes, Your Honor. Some nexus
22 between the injured person, the employee, and the
23 employee's job.

24 JUDGE GARCIA: What's the nexus?

25 MR. SHACKELFORD: Here, the nexus was the reason

1 why Mr. Caspersen initially - - -

2 JUDGE GARCIA: What's the rule if we do this?

3 MR. SHACKELFORD: So the - - - I have two
4 different answers for that, Your Honor. One, the rule we
5 espoused and we - - - we argued for is for a prospective
6 customer who deals with the employee in connection with
7 that employee's employment or who deals with the employee
8 because of his employment.

9 JUDGE GARCIA: Let's say employee of a brokerage
10 firm and is running a Ponzi scheme. And you know, I'm an
11 employee of Jones Brokerage, and come on and let's - - -
12 you know, you can invest your money. It's a completely
13 separate Ponzi scheme going out and trying to find small,
14 you know, investors that they can take advantage of, and
15 Jones is a big brokerage house that is, you know, pretty
16 much institutional clients. That case.

17 MR. SHACKELFORD: So if - - - if I understand
18 Your Honor, if - - - if - - - if the brokerage firm has
19 sent that employee out into the - - -

20 JUDGE GARCIA: Oh, no one's sending them.
21 They're sitting in their office, and they're - - - you
22 know, they're a broker and they're sitting in their office.
23 They have institutional clients they're servicing. But
24 they're going out and they're recruiting investors to
25 invest in this fund, which doesn't exist, a Ponzi scheme,

1 but they're answering their phone in their office, and
2 they're - - - maybe they're using their email or they're
3 using their office phone.

4 MR. SHACKELFORD: So yes, Your Honor. That - - -
5 that - - - this - - - the rule on those facts would cover
6 that circumstance because that employee has been authorized
7 by the employer to reach out to prospective customers,
8 which is part of his job, but he uses part of - - - he
9 reaches out to prospective customers acting as though he
10 was doing it for the benefit of his employer, but he's
11 actually running a side Ponzi scheme.

12 JUDGE CANNATARO: This might be the same question
13 just asked a different way. But if - - - if the defendant,
14 the brokerage in this hypothetical, has no idea that the
15 plaintiff is out there, that this person is doing their
16 Ponzi scheme independently, is - - - is that still a
17 prospective customer under your definition of that term?

18 MR. SHACKELFORD: It - - - it depends on who he
19 approaches as a prospective customer. If he - - - if he's
20 approaching - - - let's say it's an institutional brokerage
21 that only deals with companies, and he's approaching
22 individuals and saying - - - and it's - - - it's not part
23 of his job at all. Then, theoretically, in that
24 circumstance - - -

25 JUDGE CANNATARO: Well, let's say that it's this

1 brokerage, the - - - the plaintiff - - - the defendant in
2 this case, and your entity, the - - - the plaintiff in this
3 case.

4 MR. SHACKELFORD: Well, in - - - in this case,
5 the - - - the initial approach - - - and this is at page
6 11, note 7 of PJT's brief - - - the initial approach was
7 made to Moore Capital, and Moore Capital was obviously a
8 legitimate prospective customer of PJT, both as a
9 prospective private equity company that could come in and
10 do a secondary transaction, and as a prospective limited
11 partner to come in and participate in the secondary
12 transaction.

13 JUDGE GARCIA: So it would extend to someone who
14 under the business model of the brokerage could be a
15 prospective customer?

16 MR. SHACKELFORD: It - - - it would extend at
17 least that far, Your Honor. But there's one other way I'd
18 like to propose it. In the trial court, we also asked for
19 respondeat superior claim. It was thrown out, but the
20 trial court found that Mr. Caspersen had been acting within
21 his scope of employment, but respondeat superior did not
22 apply because he was acting for purely personal reasons.

23 There's a lot of case law in scope of employment.
24 It's a two-part test is how the parties approached it in
25 briefing below. Certainly in a case where an employee is

1 acting within his scope of his employment but for purely
2 personal purposes, you can't have respondeat superior. But
3 the employer has a responsibility to non-negligently
4 supervise an employee whenever they're acting within the
5 scope of their employment.

6 JUDGE RIVERA: What was your fourth allegation?

7 MR. SHACKELFORD: Fourth allegation, Your Honor,
8 it was the - - - it was the drinking. It was the trading.
9 It was the - - - it was the - - -

10 JUDGE CANNATARO: Stub closing?

11 MR. SHACKELFORD: - - - the stub closing. And it
12 was the fact that the money came from a personal account,
13 not from a legitimate account. Thank you.

14 JUDGE RIVERA: All right. So the drinking was
15 the fourth. Thank you.

16 MR. SHACKELFORD: Thank you.

17 MR. SYNNOTT: Good afternoon, Your Honors. Aidan
18 Synnott from Paul, Weiss for the respondents.

19 There are actually three legal issues here. The
20 first was one that was raised by Judge Garcia in the
21 argument the last time around. There's a Hecker problem
22 with this case. The Appellate Division decided this case
23 on two independent grounds. One was that there was no duty
24 to the plaintiff here. That is an issue that was not
25 preserved in the trial court, and the Appellate Division

1 reached it in an exercise of its discretion.

2 JUSTICE SMITH: Well, how - - - why do you say
3 they - - - they reached it in the exercise of their
4 discretion? Is there anything that could have been done?
5 Isn't that really just a - - - a question of law?

6 MR. SYNNOTT: But it's an issue of law that was
7 not reached by the trial court and not preserved in the
8 trial court. The Appellate Department reached it out of
9 the exercise of its own discretion. And under Hecker - - -

10 CHIEF JUDGE WILSON: They didn't - - - you didn't
11 say that, right?

12 MR. SYNNOTT: I'm sorry?

13 CHIEF JUDGE WILSON: They didn't say that's why -
14 - - how they were reaching it.

15 MR. SYNNOTT: No, they said that it was an issue
16 presented on the papers, that it was not decided by the
17 trial court, and they were going to reach it themselves.
18 They didn't have to.

19 JUDGE TROUTMAN: And in their department, they
20 had a rule that there had to be a pre-existing
21 relationship. So what could have been offered by the
22 plaintiff in response to that?

23 MR. SYNNOTT: Well, the plaintiff did actually
24 brief that issue, right, because we did raise it in our
25 reply brief in the lower court and we raised it on appeal

1 in the Appellate Division. Plaintiff's answer was there
2 was enough of a relationship here. The Appellate Division
3 decided that was not true. It did that in the exercise of
4 its discretion. So under Hecker, this court does not have
5 the power to reach that issue.

6 JUDGE TROUTMAN: So you assumed that - - - you -
7 - - you acknowledge they didn't say they were exercising
8 their interest of justice jurisdiction, correct?

9 MR. SYNNOTT: They did not use those words. But
10 many of the cases decided under Hecker don't use those
11 words either.

12 JUDGE TROUTMAN: And there are exceptions to the
13 preservation rule, though. Are there not?

14 MR. SYNNOTT: There are some exceptions. I don't
15 think there's one that applies here.

16 JUDGE TROUTMAN: And if there are no countersteps
17 that one could have made, that is one exception. You
18 simply say it doesn't apply here.

19 MR. SYNNOTT: I don't think it applies here.

20 JUDGE TROUTMAN: Okay.

21 MR. SYNNOTT: No.

22 JUDGE GARCIA: But if the rule that they're
23 asking for is, at least in part, from what I heard, that
24 the duty would extend to a prospective - - - a prospective
25 client within the ambit of their type of business, isn't

1 that something you could respond to?

2 MR. SYNNOTT: I - - - I think we could have
3 responded - - -

4 JUDGE GARCIA: All right.

5 MR. SYNNOTT: - - - certainly, and I can respond
6 here. I mean, I think the law from this court is clear.
7 If the damage is purely economic, there is no duty to
8 somebody unless you have a special relationship.

9 And here, there was no relationship whatsoever.
10 The only connection here was between Caspersen and his
11 friend who he reached out to. He offered a transaction
12 which was not the kind of transaction his employer offered.
13 He did not take money for the employer. He took money for
14 his special purpose vehicle which he created. That's the
15 same vehicle, by the way, which paid the fee to PJT, which
16 my friend here says was suspicious when it came to PJT.

17 But the fact is, it had a name of the entity for
18 the supposed transaction. It was an Irving Place entity.
19 And PJT had never been paid by Irving Place before because
20 this was the fee for the deal. There was no way for it to
21 know that the fee was coming from an account that didn't
22 belong to the entity in question.

23 CHIEF JUDGE WILSON: Well, that sounds sort of
24 facty to me, right?

25 MR. SYNNOTT: Well, I think it's - - - it relates



1 to whether they were on notice. I - - - I think for - - -
2 to finish on the duty point, I think this court's decision
3 in Madison is clear that unless there's a special
4 relationship, there is no recovery for an economic damage.
5 And there was no relationship between PJT and Moore
6 Capital, and certainly no relationship between PJT and the
7 charity that made the investment.

8 To go to the question of whether - - - whether we
9 were on notice of what Caspersen had done - - - which is a
10 legal issue; these are elements of the claim. It's not a
11 facty issue. You have to prove - - - you have to plead
12 facts that show that we knew he was likely to commit fraud.
13 And the complaint doesn't do that.

14 Just to take them in turn: that he was drinking
15 at work. First of all, the complaint is very vague in
16 whether anybody knew that. But second, there are a lot of
17 honest drunks out there and a lot of sober crooks. It
18 tells you nothing about whether somebody is likely to take
19 - - -

20 JUDGE RIVERA: Yeah, but his argument was
21 standing alone it might not.

22 MR. SYNNOTT: I'm going to take all four.

23 JUDGE RIVERA: But it's all of these together.
24 So why don't we work from that position.

25 MR. SYNNOTT: I'm going to take all four.



1 There's also no allegation that anybody at PJT actually
2 knew he was gambling. The allegation in the complaint is
3 he checked his BlackBerry or his phone obsessively.
4 Everybody I work with does that. There's no evidence that
5 anybody knew what he was checking.

6 Third, he said that we knew the fee - - - or we
7 should have known the fee was stolen. That's not what the
8 complaint alleges. I put together a list of the
9 allegations about the fee. In paragraph 20 - - -

10 JUDGE TROUTMAN: Does it matter that the case was
11 at the pleading stage and how it was to be viewed in the
12 light most favorable to? Does that matter at all?

13 MR. SYNNOTT: I don't think it matters on this
14 issue, that the requirement is to plead facts that show we
15 knew he had a propensity to steal. If we didn't know what
16 he was doing, we couldn't have known he had a propensity to
17 steal. And here, it's even worse because what they want to
18 do is make inferences that he was committing a fraud on
19 customers from the fact that he engaged in other kinds of
20 risky behavior like drinking and gambling - - -

21 JUDGE RIVERA: So - - - so - - -

22 MR. SYNNOTT: - - - which we should have known
23 about.

24 JUDGE RIVERA: So your position at the pleading
25 stage is that any complaint that alleges that the defendant

1 knew or should have known would be, on its face,
2 insufficient?

3 MR. SYNNOTT: Yes. That is a legal conclusion.

4 JUDGE RIVERA: Every complaint?

5 MR. SYNNOTT: Every complaint that says that
6 would be insufficient. And we cite many, many cases that
7 say that you have to plead facts that show we knew or
8 should have known.

9 JUDGE RIVERA: But if he says he comes in
10 consistently drunk at lunch, drunk at other times, goes to
11 meetings drunk, it was obvious to everyone, those are all
12 factual assertions.

13 MR. SYNNOTT: I - - - I agree.

14 JUDGE RIVERA: You - - - you on the jury might
15 not agree that gets you to knowledge, but they're factual
16 assertions.

17 MR. SYNNOTT: That might be enough to allege that
18 he drank. I don't think that alleging he drank - - -

19 JUDGE RIVERA: But they were aware that he was
20 drunk.

21 MR. SYNNOTT: It might be enough for that. That
22 is not a sufficient pleading to indicate that he was
23 dishonest as I think we agree.

24 JUDGE RIVERA: Yes, but again, he's got more than
25 one, right?

1 MR. SYNNOTT: So let's talk about the allegations
2 about the fee. Paragraph 28 says he was able to take it
3 without detection. Paragraph 29 says we failed to detect.
4 Paragraph 39 said that the failure to detect the fraud was
5 negligent. Paragraph 49 says PJT negligently failed to
6 discover the theft of the other fee. All of that says - -
7 - the facts say we didn't know what he was doing. So we
8 did not - - -

9 JUSTICE SMITH: But should you have known?

10 MR. SYNNOTT: That - - - should we have known? I
11 don't think that counts. I think the case law requires you
12 to know of facts from which you should have concluded he
13 was likely to commit fraud.

14 JUDGE CANNATARO: That's probably what the case
15 law requires at the summary judgment stage. But is it not
16 sufficient to allege in a pleading that he committed this -
17 - - let's stick with the stub fee, just because to me,
18 that's the most damning of the allegations, that he - - -
19 he told a patently incredible lie and they failed to pick
20 up on it. And doesn't that get you through for pleadings?
21 And if it's not, what - - - what should they have said?

22 MR. SYNNOTT: I think if he had said that to the
23 CEO of Park Hill or PJT, maybe that would be enough.
24 That's not what the complaint alleges. The complaint
25 alleges - - - says the back office people came to him and

1 asked, as back office people do, when is the fee coming in.
2 And let's talk about the timing here. The - - - the
3 transaction in Irving Place closed - - -

4 JUDGE RIVERA: Then doesn't that beg the question
5 whether, as a legal conclusion, that that fact would have
6 been enough to put you on notice because - - -

7 MR. SYNNOTT: I don't - - -

8 JUDGE RIVERA: - - - you don't really know the
9 hierarchy and how it works in the office.

10 MR. SYNNOTT: I know what back office people are.
11 I mean, we have them at law firms all the time. I get
12 questions all the time, as I think you did when you were in
13 private practice, about when is the fee coming in.

14 CHIEF JUDGE WILSON: Yeah, but I would have to
15 say that I would rely on my back office people at Cravath
16 to see that a transaction was irregular. A check came - -
17 - I wouldn't even see the check.

18 MR. SYNNOTT: Well, but you - - -

19 CHIEF JUDGE WILSON: You know what I'm saying?
20 Again, as Judge Rivera was pointing out, these are really
21 kind of fact issues about how this business ran, who the
22 particular people were that this information went to, and
23 what their responsibilities were, none of which we know.

24 MR. SYNNOTT: Well, we do know what the
25 allegations in the complaint are. The complaint says back

1 office people. We know what back office people are.

2 CHIEF JUDGE WILSON: Well, I don't know what they
3 are. I don't know what their responsibilities at this
4 company were as opposed to the CEOs. I would doubt the CEO
5 is getting the checks.

6 MR. SYNNOTT: I'm sure the CEO is not getting the
7 checks. But the CEO might - - -

8 CHIEF JUDGE WILSON: Or the wire transfers - - -

9 MR. SYNNOTT: - - - understand whether there was
10 a backup transaction, Your Honor.

11 And also, let's just focus on the timing. The
12 transaction closed in August. The inquiry from the back
13 office people came, I think, in October. And the fee was
14 paid in November from an account with an Irving Place name.
15 That is not sufficient to put somebody on notice that one
16 of their partners is stealing from the firm. That's what
17 happens at every firm all the time. I get ques - - - I
18 would be a hero if all my clients paid their fees within
19 three months.

20 JUDGE TROUTMAN: I want to go back to the Hecker
21 issue. Isn't this case different from Hecker? In Hecker,
22 the issue wasn't raised at the trial level, and there was
23 no preservation exception offered by the court. Isn't that
24 different from this case?

25 MR. SYNNOTT: I don't think so. I mean, we

1 raised the issue when replying in the trial court. They
2 argue that was too late.

3 JUDGE TROUTMAN: But - - - but in the court's
4 ruling, the court said it was ruling as a matter of law as
5 opposed to - - - as opposed to saying - - - as opposed to
6 saying that the court was rendering a decision based on the
7 - - - the - - - I'm sorry. In - - - in this case, the
8 court said that it was basing its decision on a
9 preservation exception.

10 MR. SYNNOTT: I don't think that's quite exact.

11 JUDGE TROUTMAN: Not in the interest of justice.
12 It did not say interest of justice.

13 MR. SYNNOTT: It didn't say either.

14 JUDGE TROUTMAN: Correct.

15 MR. SYNNOTT: They decided to reach - - -

16 JUSTICE SMITH: No, it focused on law - - - on
17 the law.

18 JUDGE GARCIA: It's in the law.

19 MR. SYNNOTT: Right.

20 JUSTICE SMITH: They said there's nothing in the
21 law, which would make it - - - which would take the
22 interest of justice out of that. It would be an exception
23 because there was nothing anyone could have done that would
24 change that.

25 MR. SYNNOTT: But that's not that different in -

1 - - than Hecker where the court decided to interpret a
2 provision in the statute which had not been argued, even.

3 CHIEF JUDGE WILSON: There's something, though,
4 that - - - wouldn't you agree, that seems a little unfair
5 about this in that you raise an issue in your reply - - -
6 legal issue in your reply brief. Supreme Court says, I'm
7 not going to consider that. The Appellate Division
8 considers it, says on the law, you win, and then we're
9 disabled on your theory from being able to - - - to review
10 that.

11 MR. SYNNOTT: Well, that's exactly what Judge
12 Smith said in his - - -

13 CHIEF JUDGE WILSON: That's a - - -

14 MR. SYNNOTT: - - - dissent in Hecker or
15 suggesting Hecker should be overruled. But the court did
16 not accept his invitation there. And in at least two cases
17 since Hecker, the court has applied exactly the same rule.
18 So the court could, I suppose, look at the Hecker rule and
19 decide whether it makes sense. I think Your Honor, in a
20 dissent, said that it would require a legislation to change
21 the rule. But if Hecker applies, you can't reach this
22 issue.

23 JUDGE TROUTMAN: But the court could decide if
24 there is no - - - if it wasn't raised, either whether there
25 was an exception - - - if there was a preservation



1 exception that was offered. If there wasn't, this court
2 could conclude that it was the interest of justice and
3 still be consistent with Hecker.

4 MR. SYNNOTT: I don't think this court has the
5 power to decide the case in the interest of justice.

6 JUDGE TROUTMAN: No, certainly not in the
7 interest of justice. That is reserved only to the
8 Appellate Division.

9 MR. SYNNOTT: Right.

10 JUDGE TROUTMAN: We're to - - - in this
11 particular instance, they invoked it.

12 MR. SYNNOTT: They did.

13 JUDGE TROUTMAN: They - - - they did not invoke
14 interest of justice. They invoked the - - - an exception
15 to the preservation rule. Certainly, if they said interest
16 of justice, you're right. There's no review here.

17 MR. SYNNOTT: But I think that's what they were
18 doing. They didn't need to raise the issue.

19 JUDGE TROUTMAN: You think that is what they were
20 doing.

21 MR. SYNNOTT: I - - - I do.

22 JUDGE TROUTMAN: They did not say so. That's - -
23 - that's the point.

24 MR. SYNNOTT: And they did not need to reach the
25 issue to decide the case because they also decided the

1 pleadings were not sufficient to put PJT on notice.

2 CHIEF JUDGE WILSON: Yep. Correct.

3 JUDGE GARCIA: I think the way I was thinking
4 about this last time - - - you remind me in the - - - in
5 the Hecker issue, is one, we're not bound by their
6 characterization of which power they've exercised, and two,
7 if we disagree with the exception, all that leaves is
8 interest of justice. And I think that's what those other
9 cases, Hecker and other cases - - -

10 JUDGE TROUTMAN: Um-hum.

11 JUDGE GARCIA: - - - discuss. So if we disagree
12 with their exception under the law, then it is an
13 unreserved issue. And then their decision has to be
14 considered interest of justice by us no matter how they've
15 characterized it.

16 MR. SYNNOTT: I think that's right.

17 CHIEF JUDGE WILSON: Thank you.

18 MR. SYNNOTT: Thank you.

19 JUDGE TROUTMAN: Counsel, what do you say to the
20 Hecker issue?

21 MR. SHACKELFORD: Your Honor, I - - - the first
22 thing I say is I - - - I do think Hecker should at least be
23 trimmed significantly, but I don't think you have to do
24 that in this case to - - - to decide this case in favor of
25 - - - of plaintiffs. I think Your Honor made the right - -

1 - one of the many different ways you can decide the case,
2 which is that it was not the interest of justice. It was a
3 different preservation exception that - - - that was being
4 used for - - -

5 JUDGE GARCIA: What if we disagree with that?

6 JUDGE CANNATARO: But if we disagree with that -
7 - - if we disagree that - - - with their applica - - - of
8 whatever interests - - - whatever preservation exception
9 they thought applied, all we're left with, since we can't
10 go back and replay the tape and go into their
11 deliberations, we must assume that they - - - they it was
12 the interest of justice that was - - - that was being used,
13 that we have no other way of looking at it from this
14 perspective.

15 MR. SHACKELFORD: But even - - - so even in cases
16 where you have found that it must have been interest of
17 justice and you've said we can't review that specific legal
18 ruling, you've still found in cases like Feinberg and Brown
19 that you do still have to review the ultimate corrective
20 action. And here, the ultimate action was to dismiss the
21 entire case. And as you did in Brown, you wrote the only
22 question properly before this court is whether the
23 dismissal of the complaint was proper. And here that's - -
24 -

25 JUDGE TROUTMAN: Did they say that they were

1 exercising interest of justice, the Appellate Division?

2 MR. SHACKELFORD: In this case?

3 JUDGE TROUTMAN: Correct.

4 MR. SHACKELFORD: No, Your Honor; they did not.

5 JUDGE TROUTMAN: And with respect to an - - - a
6 preservation exception, did their ruling support that
7 instead? Ultimately, I understand. We can say that they
8 made a mistake. But if unlike in Hecker, wasn't raised, no
9 exception offered, then one could come to the conclusion
10 that it is, in fact, the interest of justice because that's
11 the only way one could have reached it. But here, it's
12 different from Hecker, correct?

13 MR. SHACKELFORD: I think so. Yes, Your Honor.
14 I - - - I - - - here you have the - - - the fact that it is
15 a pure legal issue that, at least under the First Appellate
16 Division's - - - arguably under the Appellate Division's
17 precedence, there was no way to decide it other than how
18 they decided it. That's an argument. But one other point
19 I - - - I want - - -

20 JUDGE CANNATARO: But are we arguing an expansion
21 of their articulation of what the duty is right here?
22 Isn't that what you're advocating for? They said the only
23 people who are - - - could come within the ambit of the
24 duty are clients, customers, whatever they called them.
25 And now you're saying no, it's - - - it's broader than

1 that. So it seems to me as if there was a legal - - -
2 there was some - - - some argument that could have been
3 made below on this issue had Supreme Court decided to take
4 it up.

5 MR. SHACKELFORD: But here's the other - - - the
6 other point, Your Honor. I've not seen a Hecker decision
7 that - - - where the - - - where the alleged failure to
8 preserve was a failure to - - - was of some making an
9 argument in a reply brief. Because as we know, if you make
10 an argument for the first time in a reply brief, the trial
11 court has the power to say I'm going to entertain it. I'm
12 just going to give the other side a chance to address it at
13 argument or with a surreply. Here they - - - they
14 presented it. And in the case you guys - - -

15 JUDGE CANNATARO: It seems to me that'd be the
16 argument for why the exception can't apply because there
17 were countersteps that could have been taken, but the - - -
18 the court didn't give them an opportunity to do that.

19 MR. SHACKELFORD: But instead, Your Honor, the -
20 - - in Henry v. New Jersey Transit that you decided two - -
21 - two months ago, you said that - - - that only if it was
22 presented in a trial court - - - at the trial court level.
23 If you raise a specific argument in the Supreme Court and
24 ask the court to conduct the analysis in the first
25 instance, you avoid the Hecker problem. That happened

1 here.

2 The reason why the trial court chose not to deal
3 with that argument was be - - - is that - - - it had
4 sufficient other legal grounds to dispose of the case, no
5 different than if the - - - the defendants had raised this
6 argument in their opening motion to dismiss brief and had
7 gone all the way through and properly briefed it and the
8 court had nevertheless said I'm going to dismiss the
9 negligent supervision claim because you didn't sufficiently
10 allege propen - - - you know, knowledge of propensity to
11 commit this sort of a - - - an action.

12 So here, they raise this in the trial court. It
13 would be even more unfair than Hecker for the court there -
14 - - where the court there could have given us a chance to
15 brief it but said I don't even have to get to that, even
16 though I was asked to, because I have an entirely
17 independent ground - - - legal grounds. Then it was fully
18 briefed in the Appellate Division. That would be an
19 expansion of Hecker I don't think the court has - - -

20 JUDGE RIVERA: Well, I kind of like that, but
21 don't you not - - - aren't you aware of that after the
22 decision of the trial court?

23 MR. SHACKELFORD: Well, Your Honor - - -

24 JUDGE RIVERA: Where's the opportunity? You mean
25 if - - - if - - - if they had decided on that - - - on that



1 issue, you would have said, well, wait a minute. We didn't
2 get a chance to brief it. We'd like to reargue it. Can
3 you give us a chance for reconsideration? We want to put
4 in papers on it.

5 MR. SHACKELFORD: If the court had ruled on that.

6 JUDGE RIVERA: Yes.

7 MR. SHACKELFORD: If the court had decide - - -
8 but the court wasn't obliged to rule on that because the
9 court had an independent legal grounds for making the same
10 ruling that the defendants were asking for.

11 So this was presented to the trial court. The
12 trial court had the opportunity, if they wanted to address
13 that legal issue, to ask us to brief it. But the trial
14 courts didn't - - -

15 JUDGE GARCIA: So any issue raised in a reply
16 brief would, in your view, without any exception being
17 necessary, be preserved for appellate review.

18 MR. SHACKELFORD: No, Your Honor.

19 JUDGE GARCIA: So what's the distinction?

20 MR. SHACKELFORD: If an issue was raised in a
21 reply brief and the court decides it in favor of the party
22 raising it in the reply brief - - -

23 JUDGE GARCIA: No. No, no, no. At the trial
24 court - - - I thought your point was they raised this in a
25 reply brief.

1 MR. SHACKELFORD: Right.

2 JUDGE GARCIA: Right? And the trial court just
3 didn't address it. But you think that's unfair because it
4 was raised and the trial court had it before it goes up to
5 the - - - and those are the facts here, right? It was
6 raised in their reply.

7 MR. SHACKELFORD: It was raised in their reply.
8 Yes, Your Honor.

9 JUDGE GARCIA: So now I think you're saying
10 that's preserved for appellate review because otherwise it
11 would be unfair.

12 MR. SHACKELFORD: It - - - it's not - - - it's
13 not un - - - in a case where the trial court has the
14 opportunity to give us a chance to address - - -

15 JUDGE GARCIA: It was raised in the reply brief.

16 MR. SHACKELFORD: It was raised in the reply
17 brief, but the reason why the trial court didn't do that
18 was because it wasn't going to - - - it didn't have to
19 entertain that. It had a separate legal - - -

20 JUSTICE SMITH: Well, let's - - - what - - - what
21 would you have said? I mean, if it's appellate - - - the
22 First Department - - - Appellate Division in the First
23 Department said this is just a question of law, correct?
24 So that - - - what - - -

25 JUDGE GARCIA: But wouldn't you have said your

1 new rule about this is like a - - -

2 MR. SHACKELFORD: Prospective - - -

3 JUDGE GARCIA: - - - it's a prospective client
4 within the ambit of the professional mandate of the firm?

5 MR. SHACKELFORD: We would have made the same
6 argument that we made in front of the Appellate Division
7 that we made up - - - up here.

8 JUDGE RIVERA: But - - - but I thought legal
9 countersteps don't include mere legal arguments, which is
10 what you would have done.

11 MR. SHACKELFORD: I'm sorry. I - - - I missed
12 that, Your Honor.

13 JUDGE RIVERA: Well, the - - - the point about
14 the legal countersteps doesn't include just pure legal
15 argument because you can make that at any point, like
16 you're saying, at the AD.

17 MR. SHACKELFORD: You - - - you can theoretically
18 make additional legal arguments at any point along the
19 process.

20 JUDGE TROUTMAN: But if the - - - the controlling
21 precedent in the First Department is there's no
22 relationship.

23 MR. SHACKELFORD: Yeah, you have to privity, yes,
24 Your Honor. If that's the controlling precedent, then it's
25 a fruitless exercise.

1 My only point is it - - - it - - - it would
2 create a new - - - it would create a strange incentive for
3 the trial court. The trial court is presented with a new
4 argument on reply. It doesn't have to reach it because if
5 it was going to go the same way based on one - - - a
6 different legal argument that was already made - - - that's
7 even worse than Hecker. In Hecker, it was not argued at
8 all in the trial court. And in the Henry v. New Jersey
9 Transit, the key there was it's not a Hecker problem if it
10 was presented to the trial court and asked to be reviewed.
11 And here it was presented, asked to be reviewed - - -

12 JUDGE GARCIA: Wasn't Henry about a change in the
13 law? As I'm trying to start to remember Henry, wasn't that
14 a change in the law?

15 MR. SHACKELFORD: I - - - I don't remember the
16 exact - - - what Henry - - - I'm referring to the way that
17 the rule was announced. I don't honestly, Your Honor,
18 remember - - -

19 JUDGE GARCIA: I think the issue was raising it
20 in the trial court when the law had changed. So what did
21 you have to raise in the trial court to preserve an issue
22 that was later, I think, decided - - -

23 JUDGE RIVERA: It was a Supreme Court decision.

24 MR. SHACKELFORD: It was a Supreme Court
25 decision.

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JUDGE RIVERA: It was a Supreme Court decision.

JUDGE GARCIA: - - - to change in the rule.

MR. SHACKELFORD: Right, okay. But there are - -
- there are multiple cases that articulate the rule the
same way, Your Honor. But I - - - if there's any other
questions, thank you - - - thank you for time.

JUDGE RIVERA: Wise choice.

(Court is adjourned)

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C E R T I F I C A T I O N

I, Heidi Jolliff, certify that the foregoing transcript of proceedings in the Court of Appeals of The Moore Charitable Foundation v. PJT Partners, No. 52 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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