

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

THE MOORE CHARITABLE FOUNDATION,

Appellants,

-against-

NO. 15

PJT PARTNERS,

Respondents.

20 Eagle Street
Albany, New York
February 9, 2022

Before:

ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN

Appearances:

STEPHEN SHACKELFORD, JR., ESQ.
SUSMAN GODFREY LLP
Attorney for Appellants
1301 Avenue of the Americas
32nd Floor
New York, NY 10019

AIDAN SYNNOTT, ESQ.
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
Attorney for Respondents
1285 Avenue of the Americas
New York, NY 10019

Cheryl Odom
Official Court Transcriber



1 JUDGE GARCIA: The next case on the calendar is
2 Moore Charitable Foundation v. PJT Partners.

3 Counsel?

4 MR. SHACKELFORD: Good afternoon, Your Honors.
5 And may it please the court, Stephen Shackelford for the
6 Foundation and Kendall JMAC. I'd ask to reserve two
7 minutes for rebuttal, please?

8 JUDGE GARCIA: Yes, you have it.

9 MR. SHACKELFORD: Thank you. The key issue today
10 before the court is whether to endorse what I would call
11 the first fraud free rule. That's effectively respondent's
12 position and the First Department's position.

13 Under that rule, even if, as we alleged here, an
14 employer knows that his employee has dangerous propensities
15 and the employer still sends that employee out into the
16 world to try to recruit new customers or new participants
17 in their deals, the employer has no liability for harm
18 caused by that employ - - - by that employee if the harm is
19 done to potential customers who happen to not to have
20 transacted with the - - - with the company in the past.

21 JUDGE CANNATARO: Counsel, I - - - I know what
22 you say what the employer knew, the - - - the drinking, the
23 trading, and the - - - the fee, the lie about the fee. I'm
24 - - - I'm a little hazy on when the employer knew about
25 those things, especially the drinking and the trading. Can



1 you - - - can you just illuminate that a little bit?

2 MR. SHACKELFORD: Of course, Your Honor. We
3 allege that the - - - that the drinking and the obsessive
4 trading went on at all relevant times.

5 JUDGE CANNATARO: And when did the employer have
6 knowledge of it, or - - - or is this a constructive
7 knowledge; he should have known about it?

8 MR. SHACKELFORD: Well, we allege that he both
9 either - - - that the employer either knew or should have
10 known, and we don't limit it as to time. We allege that
11 the employee factually was coming into work after lunch,
12 having drank ten to fifteen alcoholic beverages. And that
13 alone, a jury could infer that the company knew about it
14 because how can you really - - - how can you show up for
15 work that inebriated, go into meetings inebriated, as we
16 allege - - -

17 JUDGE CANNATARO: And I real - - - I realize we
18 don't have a record here because this - - - this happened
19 at the pleadings stage. But do you know how long that had
20 been going on prior to the - - - the fraud?

21 MR. SHACKELFORD: Many months is - - - is my
22 understanding, and we allege at all relevant times.

23 JUDGE CANNATARO: Many months. Okay.

24 MR. SHACKELFORD: I mean, the - - - the - - -
25 obviously, the record is what is alleged in the pleadings,



1 which is all relevant times. And we have reason to
2 believe, from having spoken to the employee, that it had
3 gone on for quite some time.

4 JUDGE WILSON: Do you think that level of
5 drinking, even if it had gone on continuously, in and of
6 itself would be enough for the pleadings standard?

7 MR. SHACKELFORD: If you - - - if we were to
8 ignore the other allegations, Your Honor - - -

9 JUDGE WILSON: Yeah.

10 MR. SHACKELFORD: - - - I do think for a - - - an
11 employee in this particular position, entrusted with very
12 high-level financial responsibilities, entrusted by the
13 employer to deal specifically with clients and
14 counterparties in these transactions, permitted by the
15 employer to send out invoices and - - - and - - - and take
16 fees, and we think that level of drinking by itself would
17 be enough to - - - to carry a negligent supervision and
18 negligent retention claim on these particular facts for
19 this kind of an employee in this business. It's - - -

20 JUDGE CANNATARO: Well, where the conduct is in
21 some, you know, intentionally tortious act, I could maybe
22 understand notice regarding that he might not be performing
23 his job up to acceptable standards. But I'm not sure I
24 understand the nexus between either the drinking or the
25 obsessive trading and the propensity to commit a tortious



1 act. How - - - how - - - how do we get there?

2 MR. SHACKELFORD: So Your Honor, it's - - - it is
3 a combination here. And I - - - I don't want the court to
4 forget about the lie, the bald-faced lie - - -

5 JUDGE CANNATARO: No, I'm not forgetting.

6 MR. SHACKELFORD: I think that - - - we - - - we
7 believe that is enough by itself, and we allege that they
8 knew it was a lie and chose not to - - - not to proceed
9 with any further action with the employee. But the
10 drinking and, effectively, the obsessive online trading, a
11 gambling problem in some ways, it might not be a problem
12 for, you know, a warehouse worker.

13 But for someone in this position, I mean, through
14 common sense, a juror or we can see this is exactly why,
15 for instance, in positions of - - - that require discretion
16 in the government, like for access to secret or top-secret
17 clearance, drinking and gambling problems are absolutely
18 red flags that you can't put them in that position.

19 JUDGE CANNATARO: They are red flags. I mean,
20 that's - - - that's exactly what I've been calling it for
21 weeks. Those are red flags. But then the next question I
22 ask myself, red flags of what? And you know, since the
23 notice requirement generally tends to notice of propensity
24 to commit some act, I - - - I then ask myself, well, does -
25 - - does excessive drinking put you on notice that they



1 could commit this tortious act? I'm just not sure about
2 that.

3 MR. SHACKELFORD: So again, ignoring the lies
4 about the fee, obsessive drinking - - - excessive drinking
5 and obsessive trading, the natural outgrowth of that is
6 someone loses a lot of money. They're irresponsible.
7 They're in a lot of personal trouble. And yet - - -

8 JUDGE TROUTMAN: But unless you're clear that
9 they are losing money, that they're in debt, the creditors
10 are calling, is the fact that you're spending your money
11 that way sufficient alone, without complaints from others?

12 MR. SHACKELFORD: It - - - it's a - - - it's a
13 fair question as to whether they had to have - - - whether
14 they would have had knowledge that he was losing his money.
15 But coming into your job, as a high-powered person in
16 charge of the secondaries business, very drunk every
17 afternoon and spending most of your time trading
18 speculative options on a personal account, when you're
19 supposed to be a responsible financial employee of the - -
20 - of the firm - - -

21 JUDGE TROUTMAN: The motion process here, what's
22 the standard with respect to - - - that - - - that would
23 apply? Does - - - does that even matter, applying the
24 standard with respect to the court's consideration on the
25 motion?



1 MR. SHACKELFORD: So that's a - - - that's a
2 great question, Your Honor. The pleadings standard,
3 because this is at the motion to dismiss stage, is
4 accepting facts alleged as true and giving the pleading a
5 liberal construction and affording the plaintiff the
6 benefit of every possible favorable inference.

7 So at this stage, we don't know whether they were
8 talking internally about how irresponsible he was, what - -
9 - you know, this might - - - guy might be trouble. We
10 should keep - - - we should really figure out what's going
11 on with him. He - - - maybe he shouldn't be in front of a
12 client at this point. Maybe we should make sure we
13 control.

14 I mean, that evidence may exist. We don't know
15 if it exists yet. At this stage, given what we are able to
16 allege, having spoken to Mr. Caspersen and others, we
17 believe it's sufficient that a jury could infer, at the end
18 of the day, if this is all the evidence we ever have, that
19 they must have known this person was a real danger to
20 commit this kind of tort, to commit fraud.

21 JUDGE RIVERA: Let me ask you this, Counsel. I'm
22 on the screen. Hello.

23 MR. SHACKELFORD: Hi.

24 JUDGE RIVERA: So beyond the - - - yes, good
25 afternoon. Beyond the - - - the inference that they must



1 have known, which is act - - - right, an inference of
2 actual knowledge, I want to stick with this question about
3 the constructive knowledge: they should have known. I
4 know your adversary argues that that's not the standard.
5 But let's just stay with it because it struck me that your
6 pleading was suggesting not only constructive notice but
7 also that there was inquiry notice, right, that - - - that
8 they were on notice, at a minimum, that they should have
9 now inquired, which is, I think, what you were somewhat
10 referring to.

11 So I just want to clarify if that is your
12 argumentation regarding how we should interpret this
13 pleading, the - - - the fair and reasonable inferences to
14 be drawn from the pleading.

15 MR. SHACKELFORD: Thank you, Your Honor. I - - -
16 I believe we are - - - we should be able to get all three
17 inferences. We should be able to get the inferences that
18 they knew about the drinking, the trading, and that they
19 were lied to about a missing eight million dollars in a
20 very bald-faced way.

21 We should be able to get the inferences that if
22 somehow they didn't know they were being lied to, they
23 should have known they were being lied to, constructive
24 notice. And we should get the inference at the pleadings
25 stage that they were, at the very least, under a duty to



1 further inquire, given his coming to work drunk - - -
2 drunk, visibly drunk, given - - - and given the fact that
3 he lied to them about the - - -

4 JUDGE RIVERA: And now, so on that third one,
5 this is following up somewhat on - - - on Judge Cannataro's
6 point. Does that inquiry, what you're calling that duty,
7 extend to trying to identify whether or not, look, this
8 guy's just negligent; he's going to do a bad job, or this
9 person is actually going to go out and commit fraud and
10 steal from clients, potential clients, from us? So what -
11 - - what is the - - - the - - - the scope of that? Where
12 does the inquiry sort of end?

13 MR. SHACKELFORD: So at the very least, for the
14 lie that he told about the missing eight million dollars -
15 - -

16 JUDGE RIVERA: Um-hum. Um-hum.

17 MR. SHACKELFORD: - - - that inquiry leads to the
18 idea of we have a very dishonest person here, who's lying
19 to us about large sums of money. And that puts them on
20 inquiry that they should have looked into what actually
21 happened with the money. And the facts are if they look
22 into what happened to the money, my client would have never
23 been defrauded. That happened in September they asked that
24 question and got lied to. My client was defrauded in
25 November.



1 As for the other matters, the - - - the - - - the
2 drinking and the obsessive trading, again, if they had
3 inquired into it - - - they were under a duty to inquire
4 into it, at the - - - into it at the very least. They
5 would have discovered not just that he was acting
6 negligently but that he was doing things that were going to
7 potentially harm their current or prospective clients. So
8 - - -

9 JUDGE GARCIA: Counsel - - - Counsel, on that
10 point - - - and your red light's on, but just a last
11 question. There is an alternate finding by the Appellate
12 Division about the complaint failing to allege that this
13 was a cust - - - you were a customer of - - - of the
14 defendants. My question isn't so much about the substance
15 of that finding but a procedural issue.

16 So you could read the Appellate Division to be
17 saying, although that argument was raised in a reply brief,
18 I believe, and the - - - the trial court never got to it.
19 But they were finding an exception. If we disagree with
20 that, what happens? That there is no preservation
21 exception that applies here and we can't reach the issue,
22 what happens?

23 MR. SHACKELFORD: If you disagree with them
24 having reached the issue?

25 JUDGE GARCIA: Yeah, if we disagree that this is



1 - - - there's an exception to preservation that would allow
2 us to reach the issue.

3 MR. SHACKELFORD: Well, I think in that case,
4 Your Honor, you would have to vacate that decision by the
5 Appellate Division as to having - - - they improperly
6 reached the issue.

7 JUDGE GARCIA: But how do you square Hecker with
8 that, where we found that they have interests of justice
9 power we don't have, so they're not constrained by the same
10 preservation rules?

11 MR. SHACKELFORD: Well, I think, Your Honor,
12 given that they reached that issue and we appealed it, I
13 mean, it would be a - - - a bizarre circumstance where the
14 dagger through our heart was something that they should not
15 have reached and they reached it, and we properly preserved
16 it for this court.

17 JUDGE GARCIA: And that was Judge Smith's
18 argument in concurring in Hecker. But it seems a difficult
19 one. I mean, assuming just for the sake of this argument
20 that we disagree on preservation exception, it seems to me
21 that would be a Hecker problem for you.

22 MR. SHACKELFORD: Well, Your Honor, we - - - to
23 be honest, we didn't brief this. It wasn't raised, and I'd
24 ask for the chance to brief it if this is something the
25 court is considering working on. It was not something



1 raised by our adversary.

2 JUDGE GARCIA: Thank you.

3 Counsel?

4 MR. SHACKELFORD: Thank you.

5 MR. SYNNOTT: Thank you, Your Honor. This court
6 has never endorsed a duty to investigate employees who are
7 dealing with strangers. That's what - - -

8 JUDGE CANNATARO: Well, Counsel, can - - - can we
9 pick up on - - - on the last point that Judge Garcia made?
10 Should we even be reviewing that issue, considering that
11 the Supreme Court declined to - - - to entertain it? And
12 the Appellate Division, you know, they don't give us a lot
13 to go on, but they seem to have thought that some exception
14 applied. But we are free to disagree with that. And what
15 happens if we disagree with it?

16 MR. SYNNOTT: If you disagree with that, I think
17 you still affirm because of what happened here. The
18 Appellate Division found that Mr. Caspersen was not acting
19 within his actual or apparent authority here. The
20 Appellate Division found that he wasn't acting in the
21 course of his employment.

22 What - - - what the plaintiffs here are asking
23 you to do is to impose a duty on anybody who gives an
24 employee a phone or email access, to fully investigate
25 them, or otherwise, they're liable to - - -



1 JUDGE GARCIA: But I think what Judge Cannataro's
2 asking you is, can we reach the issue at all?

3 MR. SYNNOTT: Absolutely, Your Honor. The
4 Appellate Division legitimately reached the issue. That
5 issue was act - - - whether they could reach it was
6 actually briefed in the court below. And there are cases
7 that make clear that - - - that the court has the
8 jurisdiction to do it where it's a pure question of law.

9 JUDGE CANNATARO: But as Judge Garcia pointed out
10 to you - - - I'm sorry to go back and forth like that. But
11 as Judge Garcia pointed out, the Appellate Division has
12 powers, has jurisdictional powers that we don't.
13 Specifically, they could have reached that issue in the
14 interests of justice, which we don't have the power to
15 review. So I'm just - - -

16 MR. SYNNOTT: If you don't have the power to - -
17 -

18 JUDGE CANNATARO: - - - questioning your absolute
19 statement.

20 MR. SYNNOTT: Well, if you don't have the power
21 to review it, then the decision of the Appellate Division
22 should stand, where it does have the power to reach that
23 decision, right? And further, just as a matter of
24 interest, that issue was raised not really in our reply
25 brief in the court below but in the opinion from Judge



1 Ramos in the Heffernan case that the plaintiffs chose to
2 submit with their brief, which squarely addressed that
3 issue and squarely found no duty where the - - - the
4 plaintiff was not an actual customer.

5 JUDGE WILSON: So could I ask you, then - - -
6 sorry. Over here. Could - - - could I ask you to address
7 the substance of that issue, the customer issue?

8 MR. SYNNOTT: Absolutely. This court has always
9 been reluctant to impose - - - to impose a duty to protect
10 against economic harm. The key case on point is the
11 Madison case, the Finlandia case, where the court found
12 that in the absence of injury to person or property, there
13 was no duty to protect others against pure economic harm in
14 the absence of a contractual relationship.

15 And the court in that case examined all of the
16 cases on this point from the Court of Appeals and found
17 that in every other case, there was a contractual
18 relationship between the parties. That view is consistent
19 with the restatement of torts on economic liability. And
20 the concerns expressed by the court in Madison are also
21 consistent with that opinion.

22 Those concerns are that if you impose economic
23 injury liability in the absence of a special relationship
24 or personal injury or property damage, you are vastly
25 expanding the liability of all parties to an insurer-like



1 liability for anybody who does business with them. And the
2 court refused to do that in the Madison Avenue case.

3 Now, in that - - - that issue was barely touched
4 on by Moore here. They only talk about it in their reply
5 brief. And they say, don't worry; customers of Park Hill
6 and PJT are very sophisticated; they won't cause great
7 liability. But there's a problem with that argument.
8 First, we're not - - -

9 JUDGE CANNATARO: Well, Counsel, before you get
10 to - - - I'm sorry. Before you get to that other argument,
11 the plaintiffs in Finlandia were not - - - you know, and -
12 - - and I think, at some point, you maybe should talk about
13 the nature of the relationship that's being - - - at least
14 being alleged or that existed. But the plaintiffs in
15 Finlandia were people in the neighborhood, in the area, who
16 were affected by the wall collapsing or whatever it was.

17 These people allege that at least from their
18 perspective, that they were entering into a direct
19 relationship with PJT or were about to. And I - - - I
20 wonder - - - and I - - - I hear you say, you know, and I
21 acknowledge that you say that we've never really recognized
22 that duty before. But it is a different kind of duty than
23 the one that was analyzed in Finlandia.

24 MR. SYNNOTT: Absolutely. It's, in fact, to
25 impose a greater duty, because here, the plaintiffs



1 voluntarily decided to do business with Caspersen, whereas
2 in the Finlandia case, the - - - the plaintiffs were
3 affected by a falling crane. That was the issue in the
4 case - - -

5 JUDGE CANNATARO: Sorry about that.

6 MR. SYNNOTT: - - - which caused substantial
7 property and personal damage, as well as financial harm to
8 many. And the court found that there was no duty to
9 protect those third parties against - - - against economic
10 harm in the absence of property damage or personal injury.

11 Here, Caspersen went to the plaintiffs with an
12 offer that stinks of fraud. I mean, it's in the record.
13 It's at page 70-A. What Caspersen says to his - - -

14 JUDGE RIVERA: But Counsel, I'm - - - Counsel,
15 I'm going to interrupt you. I'm on the screen. The only
16 way he could do that is because he was an employee, and he
17 had this other deal that he had - - - that he had attempted
18 to close on with the employ - - - for his employer. So the
19 only reason he is in this position to commit the fraud is
20 because of this employer-employee relationship. And isn't
21 that what the plaintiffs are relying on, that this is an
22 employee, and don't they see him as the employee coming to
23 them on behalf of the employer?

24 MR. SYNNOTT: What the plaintiffs, I think, are
25 trying to say is, even though, as the courts below found,



1 he was not acting within the scope of his actual or
2 apparent authority - - - he was not acting for the benefit
3 of his employer - - - you should still hold the employer
4 liable for anything he might do, just because he has a
5 phone or an email address.

6 And in this case, what he did was he wrote to his
7 friend, it was great to see you last weekend. I've
8 structured a new investment that may be of interest. I am
9 investing personally, and I thought this might be a good
10 fit for Moore - - -

11 JUDGE RIVERA: But - - - but of course - - - but
12 how else would he say that? Because that was his job, for
13 him to set up those deals and to look for other deal - - -
14 I mean, they brought him in to develop this book of work,
15 right? I mean, I'm - - - I'm finding it a little
16 confusing. I get your point about acting outside of
17 whatever would be for the benefit of the employer. But
18 still, he is cloaked with the authority of the employer
19 when he is doing this, and it's pursuant to a deal that he
20 actually did do for his employer, for the benefit of his
21 employer.

22 MR. SYNNOTT: Well - - -

23 JUDGE RIVERA: You can't say it's wholly - - -
24 wholly for his own benefit, in the truest sense. Some of
25 this work is built for the benefit of the employer. Yes,



1 the fraud, of course, is not for the benefit of the
2 employer, no doubt.

3 MR. SYNNOTT: But the - - - the Appellate
4 Division has already decided that issue. And - - - and the
5 plaintiffs have not appealed that decision. The Appellate
6 Division actually did conclude that this was not within the
7 scope of his actual or apparent authority. The Appellate
8 division said, specifically, his actual authority was to do
9 something different.

10 Further, the "something different," the actual
11 repurchase of the private equity interests in - - - in
12 Irving Place, had already been achieved and was publicly
13 disclosed. What Caspersen did was go to his friend and
14 offer a risk-free fifteen percent loan.

15 Now, plaintiffs quibble with my description of
16 that as risk-free in their reply brief, but I didn't call
17 it risk-free. They did. Paragraph 41 of their complaint
18 says that what Caspersen did was offer an investment with a
19 fifteen percent risk-free return. That's not something
20 that PJT does. And further - - -

21 JUDGE RIVERA: But again, we're at the motion to
22 dismiss stage, and we have to draw all the reasonable
23 inferences from the complaint, right? And I - - -

24 MR. SYNNOTT: You have to draw - - -

25 JUDGE RIVERA: It's - - - it's - - - it's very



1 hard to see how the complaint doesn't get past the hump of
2 simply stating that, indeed, he was doing this, using the
3 fact that he was employed by this particular employer, to
4 indeed pursue this kind of client base. I mean, he's hired
5 to get all the connections he has to bring in more money
6 and to close several deals. I mean, that - - - that - - -
7 that's what he's hired to do.

8 MR. SYNNOTT: He's hired to do a specific kind of
9 deal, which the Appellate Division has already determined
10 that this was not. And that issue is not on appeal. So I
11 think this court is bound by the conclusion of the
12 Appellate Division that this was not within his actual
13 authority or his apparent authority. And as a matter of
14 law, the court has to decide - - -

15 JUDGE WILSON: That can't be - - - that can't be
16 a factual finding because this was on a motion to dismiss,
17 so that would be a legal conclusion by the Appellate
18 Division, which we would be free to review.

19 MR. SYNNOTT: But the - - - that - - - that issue
20 is not on appeal. The - - - the Appellate Division
21 determined that this was not within the scope of his
22 authority. They don't argue otherwise. What they say is,
23 in addition to an actual authority or apparent authority or
24 vicarious liability theory, you should impose a duty on any
25 employer that gives an employee a phone or an email



1 address, even though they are enticing people to enter into
2 deals that are risk-free at fifteen percent, that are not
3 within the scope of their authority. That's the duty - - -

4 JUDGE CANNATARO: Counsel - - -

5 MR. SYNNOTT: - - - they ask you to impose.

6 JUDGE CANNATARO: It's - - - it's conceded that
7 there's - - - I think it's conceded that there's no
8 respondeat superior liability here. But a tort has been
9 recognized in New York for negligent supervision, direct
10 negligence between your client and - - - and the plaintiff.
11 And my understanding of the way the - - - the duty arises
12 in that tort is - - - and this goes to a question that
13 Judge Rivera asked you a moment ago - - - is that it either
14 takes place on the premises of - - - of the - - - of the
15 defendant or that it involves the use of defendant's
16 chattel. And I think that's what she means by apparent
17 authority.

18 He's sending out letters on company letterhead.
19 He's sending emails through the company email. And he's
20 making it all look very legit and saying, you know, do this
21 amazing investment, as you - - - as you say, too good to be
22 true, actually. But he's making it look very much like the
23 business of - - - of your company. And the only question
24 we have to decide here is, should you have known about
25 that?



1 MR. SYNNOTT: Well, no. With respect, I think
2 what you have to decide is whether there is a legal duty to
3 the plaintiff in this situation.

4 JUDGE CANNATARO: Fair enough.

5 MR. SYNNOTT: Foreseeability is not the basis for
6 a duty under - - -

7 JUDGE CANNATARO: Fair enough.

8 MR. SYNNOTT: - - - New York law, based on the
9 Finlandia case.

10 JUDGE CANNATARO: So - - -

11 MR. SYNNOTT: You have to decide whether to
12 extend liability to third parties who do business with an
13 employee who offers them something that's not within the
14 scope of his authority and - - -

15 JUDGE CANNATARO: And I think that - - -

16 MR. SYNNOTT: - - - (audio interference) laws.

17 JUDGE CANNATARO: I think that pertains to the
18 nature of the relationship. So what is the nature of the
19 relationship vis-a-vis either the plaintiff or the
20 defendant?

21 MR. SYNNOTT: And there's no relationship between
22 plaintiff and the defendant here. This was somebody they
23 had not done business with, who had no history with the
24 company, who had no relationship with the company, who
25 hadn't been involved in prior transactions. He was



1 approached by his friend, who happened to work there, and
2 offered a deal that doesn't look anything like what the
3 company did. It was a loan at fifteen percent. That's a
4 deal that does not exist.

5 JUDGE GARCIA: Thank you, Counsel.

6 Rebuttal, Counsel?

7 MR. SYNNOTT: Thank you.

8 MR. SHACKELFORD: Thank you, Your Honor. I just
9 - - - as a factual matter, we certainly have alleged and I
10 think it would be true that if Mr. Caspersen brought in
11 Moore Capital or the Moore Foundation to participate in a
12 deal, a legitimate deal, PJT would have been thrilled.
13 They are in a - - - within a narrow class of private equity
14 fund, Moore Capital, who they reached out to originally,
15 and people and institutions with enough money to buy a
16 limited partnership interest or otherwise participate in
17 these deals.

18 We alleged it. In our reply brief, we pointed
19 the court to all the allegations. So this is not about - -
20 -

21 JUDGE RIVERA: Well, Counsel, just to clarify, I
22 think this is also where you're going. I think your point
23 is it - - - it can't be what they're saying because, of
24 course, the - - - the - - - he couldn't have kept the
25 money. I mean, there's just no way that he could have kept



1 the money if it was a lawful deal, right? That's - - -
2 isn't that your point? So it does fall within what they
3 anticipated he would be doing, not the - - -

4 MR. SHACKELFORD: Right.

5 JUDGE RIVERA: - - - fraud but the reaching out
6 to potential clients.

7 MR. SHACKELFORD: Right. The reaching out to
8 potential clients, that part of it is a legitimate part of
9 his deal, and these are potential clients, potential LPs
10 and potential private equity funds.

11 JUDGE SINGAS: But Counselor, wasn't it just his
12 friend that he was reaching out to? How can you say
13 emphatically that it was a potential client and that he
14 wouldn't have kept the money himself to pay off whatever
15 debts he had? How are we so certain of that?

16 MR. SHACKELFORD: It is possible that the
17 friendship - - - they're - - - the - - - the - - - the
18 defendants allege that the friendship played a role. But
19 they do say specifically in one of their footnotes in their
20 opposition brief that the friendship is actually irrelevant
21 to the legal issues before the court.

22 JUDGE CANNATARO: Counsel, can I just ask why
23 isn't this Heffernan? Why - - -

24 MR. SHACKELFORD: Why isn't this Heffernan?

25 JUDGE CANNATARO: Yeah. I mean, it's a Ponzi



1 scheme, just - - - just like there was in Heffernan. The
2 person's going out, asking people for money from his - - -
3 from his company chair. And - - - and with respect to the
4 direct negligence claim, the First Department said, there
5 as well, there was no duty.

6 MR. SHACKELFORD: Well, at least in that case, to
7 distinguish it, those plaintiffs were specifically told,
8 I'm getting you in on a deal you have no right to do. They
9 were effectively told by the wrongdoer, you can't be a
10 client for this kind of deal, but I'm going to get you in
11 the back door for it. So that's one factual distinction.
12 But Your Honor, honestly, if they were with - - -

13 JUDGE CANNATARO: Isn't that - - - that's a lot
14 like the here's this deal; it's - - - it's so amazing
15 you're never going to believe it, but I'm offering it to
16 you.

17 MR. SHACKELFORD: No, but our client thought they
18 were - - - putting aside that, I think, in this day and
19 age, people can understand occasionally private equity
20 firms get - - - get in on too good to be true or very, very
21 favorable deals in the hopes of - - - of turning up future
22 business from them, which is exactly what this looked like.
23 In the email, he says, I can talk to you about why this
24 deal is structured as it is for relationship reasons. So
25 that's a factual issue, Your Honor, that I think we can at



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

least get to a jury, if not summary judgment. We can see what they were saying internally.

On - - - if - - - if I - - - I know the red light is on. The only other thing I wanted to tell the court is there are a number of cases about this nexus and how it's a factual issue between the types of behavior and propensity, in cases like Chenango, and Chichester, and T.W. You know, Chenango, it was that the person had exposed the adult diaper, and they found that was sufficient to have seen a propensity for sexual assault.

So it's - - - it doesn't have to be the exact same kind of prior misconduct. We would put on expert evidence about the - - - the - - - the propensity of people who get very drunk and - - - and trade and lose a lot of money to commit frauds or other thefts. Thank you, Your Honors.

JUDGE GARCIA: Thank you, Counsel.

(Court is adjourned)



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

I, Cheryl Odom, certify that the foregoing transcript of proceedings in the Court of Appeals of The Moore Charitable Foundation v. PJT Partners, No. 15 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 7227 North 16th Street
Suite 207
Phoenix, AZ 85020

Date: February 16, 2022

