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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1937-21

HARRY KUSKIN 2008
IRREVOCABLE TRUST by
SUSAN DWORKIN, TRUSTEE,
ANNA KUSKIN 2008
IRREVOCABLE TRUST by
SUSAN DWORKIN, TRUSTEE,
and RICHARD KUSKIN,
GRANTOR,

Plaintiffs-Appellants,

v.

PNC FINANCIAL GROUP, INC.,
PNC BANK, PNC WEALTH
MANAGEMENT, and
STEVEN DWORKIN,

Defendants-Respondents,

and

PNC BANK, N.A.,

Third-Party Plaintiff,

v.

SUSAN DWORKIN,

Third-Party Defendant.

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Argued April 19, 2023 – Decided July 24, 2023

Before Judges Vernoia, Firko and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Docket No. L-0383-17.

Lawrence N. Lavigne argued the cause for appellants (Lawrence N. Lavigne, Esq., LLC, attorney; Lawrence N. Lavigne, of counsel and on the briefs; Jignesh J. Shah, on the briefs).

John O. Lukanski argued the cause for respondents PNC Financial Group, Inc., PNC Bank, N.A., and PNC Wealth Management (Reed Smith LLP, attorneys; John O. Lukanski, David G. Murphy, and Brian A. Sutherland (Reed Smith LLP) of the California and the New York bars, admitted pro hac vice, of counsel and on the brief).

PER CURIAM

Plaintiffs Harry Kuskin 2008 Irrevocable Trust (HKIT) and Anna Kuskin 2008 Irrevocable Trust (AKIT), through their trustee, Susan Dworkin (Susan),[1] Richard Kuskin (Richard), and Susan, individually, challenge two Law Division orders granting summary judgment to defendants PNC Financial Group, Inc.,

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[1] Because Susan and Steven share a surname, we refer to them by their first names, intending no disrespect. We similarly refer to Richard Kuskin by his first name to distinguish him from his children.

PNC Bank, and PNC Wealth Management (collectively PNC) and dismissing their motion for partial summary judgment. Before us, plaintiffs contend the court erred in determining PNC was immune under the Uniform Fiduciaries Law (UFL), N.J.S.A. 3B:14-52 to -61, from liability arising out of Steven Dworkin's (Steven) fiduciary misconduct while serving as trustee to the HKIT and AKIT. They also argue PNC breached a duty of care it owed to the trusts as its customers and aided and abetted Steven's misappropriation of the trust funds. Finally, they maintain that if the matter is reversed and remanded, their motion for partial summary judgment should be reinstated and deemed granted with respect to certain of PNC's third-party claims against Susan.

PNC maintains it is immune from liability for Steven's fiduciary misconduct and plaintiffs' tort claims fail in any event because those claims are barred by the economic loss doctrine and plaintiffs failed to establish PNC owed them a duty of care. Alternatively, they contend plaintiffs' claims should be dismissed as preempted by the Uniform Commercial Code (U.C.C.) and time-barred and because Susan, as replacement trustee for Steven, failed to mitigate the trusts' losses.

We have carefully considered the parties' contentions and conclude plaintiffs' claims sounding in negligence and breach of fiduciary duty necessarily fail as a matter of law, as the competent evidence in the record does not establish PNC owed them a duty to monitor the trust accounts, investigate Steven's transactions, and disclose suspicious activity. In addition, we reject plaintiffs' aiding and abetting claim. Although that could end our appellate review, we nevertheless address PNC's immunity under the UFL and conclude that even if PNC was not entitled to summary judgment as a matter of law with respect to plaintiffs' substantive claims, it is immune from liability under the UFL. We accordingly affirm.

I.

We derive the following facts from the summary judgment record and view them in the light most favorable to plaintiffs. See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). In 2008, Richard established the HKIT and AKIT for the benefit of his two children, Harry and Anna, and named Steven, his brother-in-law, as trustee. The trust agreements granted Steven, as trustee, broad authority and management discretion, specifically authorizing him to borrow money "upon terms and for periods [he] deem[ed] advisable" and "[t]o make any loans on commercially reasonable terms." The agreements also provided, "loans to any person having an interest in the income or principal of the property held by the Trustee may, in the Trustee's discretion, be made on whatever terms the Trustee deems advisable."

Pursuant to this authority, Steven opened a deposit account for each trust with PNC and executed "account agreement[s] for personal checking, savings and money market accounts" (account agreements). The account agreements required the trusts to monitor "each transaction" as they received notice of it and to "independently maintain[] accurate records of" the accounts' activity. The agreements also included the following language:

> Fiduciary or Agency Accounts
>
> Any individual acting as an attorney-in-fact, agent, guardian, personal representative, trustee, custodian, or some other fiduciary capacity (collectively, an "agent") must be designated by us as such on our records. If this individual is not so designated, it will be assumed by us that you have no agent appointed.
>
> <u>The Bank is authorized to follow the direction of your agent regarding your Account until it receives written notice that the agency or fiduciary relationship has been terminated and has had reasonable time to act upon that notice.</u>
>
> <u>We will not be liable to you in any way if your agent misapplies any of the funds from your Account.</u> We have the right to review and retain a copy of any power of attorney, agency agreement, trust agreement, court order, or other document that has established the agency or other fiduciary relationship.

[(emphasis omitted from title) (emphasis added).]

From July 2012 to July 2014, in his capacity as trustee, Steven made four withdrawals from each of the trusts' deposit accounts for loans to Foreign Tire Sales (FTS), a company wholly owned by Richard and the trusts. The loans totaled $5.7 million and were repaid with interest, with the exception of loans made in June 2014, which were repaid without interest.

In April 2014, at Richard's direction, Steven opened an investment management account for each trust, also with PNC, and transferred approximately $5.5 million from each of the trusts' deposit accounts into the investment management accounts. Steven almost immediately thereafter transferred approximately $800,000 back to the deposit accounts—approximately $400,000 to each deposit account. Additionally, shortly after establishing the investment management accounts, Steven approached PNC's wealth management team, which consisted of an investment advisor, relationship manager, fiduciary specialist, and senior banking advisor, and requested a $2.5 million line of credit using the trusts' assets as collateral. Steven intended to use the line of credit for the benefit of Auto Toy Store (ATS), a company in which he was a partner.[2] Unlike FTS, the trusts did not have an ownership interest in ATS.

Steven represented to PNC's wealth management team that he sought a "line of credit because he was looking to either supplement or replace dealer floor plans he was currently using for his business, [ATS]." According to Melinda Smith, the senior banking advisor on PNC's wealth management team, Steven informed the wealth management team that his current dealer floor plan, which served as a financing source for him to purchase and sell "exotic cars," had an "exorbitant interest rate."[3] Steven further explained:

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[2] It is unclear from the record whether Steven sought the line of credit on behalf of the trusts, as trustee, himself, or ATS, as its principal. Plaintiffs contend the line of credit was for ATS and Steven personally, while PNC argues Steven requested a line of credit on behalf of the trusts. The parties do not dispute, however, that the line of credit would be secured by the trusts' assets and used by ATS to secure a favorable interest rate on a dealer floor plan. In light of our standard of review, see Brill, 142 N.J. at 540, we accept plaintiffs' factual contention that Steven requested the line of credit for ATS and himself personally.

[3] We have explained:

> [F]loor plan financing is simply a lending arrangement between a lender and the dealer on the dealer's inventory pursuant to which the lender advances to the dealer the money the dealer requires to purchase new cars from the manufacturer, the lender taking back a security interest in the cars and the dealer obligated,

> [I]t was a win/win, meaning he would not have to pay as much from the dealer floor plan; he could pay the trust the interest, a payable, receivable situation, so the trust would be receiving the benefit of the interest paid for the money that was borrowed and he wouldn't have to pay whatever rate he was paying from the floor plan.

PNC's wealth management team hosted a "whiteboarding session" to consider Steven's request, which it also sent to PNC's legal department for review. Through its investigation, PNC discovered Steven had a prior felony conviction,[4] and it therefore declined to receive or review a formal loan application on his request. Upon PNC's denial to entertain his request, Steven began transferring funds from the trusts' deposit accounts to ATS, which was also a PNC customer, withdrawing over $2.2 million between April 2014 and June 2015.

Specifically, from April through October 2014, Steven issued ten checks totaling $740,000 either payable to ATS (nine checks) or cash (one check).

> upon sale of each car to the customer, to repay the lender the amount allocated by the security agreement to that particular vehicle.
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> [State v. Damiano, 322 N.J. Super. 22, 34 (App. Div. 1999).]

[4] In 1990, Steven pled guilty to federal crimes involving interstate transport of pharmaceuticals.

Some, but not all, of the deposit tickets used to deposit these checks into ATS's account described the transaction as a "loan." Notably, these transactions were contemporaneous with the trusts' loans to FTS in June 2014.

From January through February 2015, Steven withdrew $575,000 and deposited those funds into ATS's account via cash transfers. Some of the deposit tickets used to deposit these funds into ATS's account again described them as "loan[s]." From March through June 2015, Steven withdrew $961,000 via online transfers to ATS. In total, ATS repaid $1,165,000, leaving an outstanding balance of $1,111,000.

Eleven days after Steven's first withdrawal from the deposit accounts, in April 2014, Chris White, PNC Wealth Management's Senior Vice President, Market Trust Director, emailed Nancy Stroud, the Vice President, Anti-Money Laundering Compliance Manager, with the subject line "Steven Dworkin." In reference to the trusts' investment management accounts, he stated: "I spoke with Florida's Managing Director . . . and Florida has made a business decision to retain this business due to the underlying circumstances [we] discussed earlier today. Can we 'elevate' this client in our ongoing surveillance process as we discussed this morning?" Stroud then instructed team members to set up "a monthly review for the next [six] months" and "continue to monitor the account and reach out . . . if [they] see anything out of the ordinary with the transactions."

In February 2015, PNC personnel met with Richard to discuss the investment management accounts. According to Richard, PNC assured him "the accounts were in good shape and there was nothing to worry about" and did not inform him that Steven had transferred funds from the investment management accounts to deposit accounts.

According to Susan, in July 2015, Steven confessed he misappropriated money from the trusts. She immediately informed Steven she wanted a divorce. Steven then resigned as trustee and, per the terms of the trust agreements, Susan replaced him. Plaintiffs then filed a complaint, which they later amended, against Steven and PNC, alleging negligence, breach of contract, aiding and abetting, and breach of fiduciary duty against PNC.

After the court denied PNC's Rule 4:6-2(e) motion to dismiss for failure to state a claim, PNC filed an answer and crossclaims against Steven for contribution, common law indemnification, and contractual indemnification. Steven defaulted and both plaintiffs and PNC obtained default judgments against him.[5] In response to plaintiffs' amended complaint, PNC filed counterclaims and a third-party complaint against Susan, alleging she "opportunistically secured benefits for herself personally," by way of her marital settlement agreement with Steven, "to the detriment of Steven's creditors and the beneficiaries of the [t]rusts."

After discovery, PNC moved for summary judgment and argued it was immune from liability for Steven's misconduct under the UFL, the parties' relationship was governed by the account agreements, and there was no special relationship between the parties that established PNC's duty to monitor the deposit accounts and disclose suspicious activity. Plaintiffs also moved for partial summary judgment. After considering the parties' submissions and oral arguments, the court entered orders granting PNC's motion for summary judgment, dismissing plaintiffs' complaint, and denying plaintiffs' motion for partial summary judgment, and dismissing PNC's counterclaims and third-party complaint against Susan as moot.

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[5] Steven was indicted in Broward County, Florida, for first-degree grand theft arising out of his misappropriation of the trusts' funds and pled guilty to certain offenses, the specificity of which are undisclosed in the record. Richard also sued Steven in a separate Law Division action involving a series of unrelated promissory notes and obtained a judgment for $900,000, which he domesticated in Florida.

Relying on Lembo v. Marchese, 242 N.J. 477, 496 (2020), the court explained the UFL "provides a bank with a limited immunity from liability for failing to take notice of and action on the breach of a fiduciary's obligation" and thus "a bank's liability depends on whether the bank acted in bad faith in the face of a fiduciary's breach of his obligations." Against those standards, the court concluded "[t]he undisputed facts of this matter show a complete dearth of any fact that PNC had any reason to suspect, never mind know, that Steven was acting outside of his authority." Accordingly, the court determined PNC was entitled to UFL immunity and could "not be sued under a common law negligence type action for failure to exercise due care."

Alternatively, the court concluded plaintiffs' tort claims were barred by the economic loss doctrine, as those claims were "based on the fact that the relationship between the parties was governed by contract," and it found "no basis to find a separate duty outside that contract." The court also found plaintiffs failed to allege any breach of the account agreements or wrongdoing on PNC's behalf to support claims for constructive trust or unjust enrichment.[6]

[6] Plaintiffs do not contest the court's dismissal of their breach of contract claim and we deem any such challenge to that part of the court's August 11, 2021 order waived. See Santiago v. N.Y. & N.J. Port Auth., 429 N.J. Super. 150, 154 n.2 (App. Div. 2012).

Finally, the court dismissed plaintiffs' aiding and abetting claim after it determined there was "a complete absence of evidence in this case that PNC knew Steven was breaching his duty, and a complete lack of any proofs that PNC gave any assistance or encouragement to him to do so." This appeal followed.

II.

In ruling on a summary judgment motion, a trial court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill, 142 N.J. at 540. "[A] court should deny a summary judgment motion only where the party opposing the motion has come forward with evidence that creates a 'genuine issue as to any material fact challenged.'" Id. at 529 (emphasis omitted). To determine whether there is a genuine issue of material fact, "[t]he essence of the inquiry . . . is 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Id. at 536 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986)).

While a court must view the evidence in the light most favorable to the non-movant, "[c]ompetent opposition requires 'competent evidential material' beyond mere 'speculation' and 'fanciful arguments.'" Cortez v. Gindhart, 435 N.J. Super. 589, 605 (App. Div. 2014) (quoting Hoffman v. Asseenontv.Com, Inc., 404 N.J. Super. 415, 426 (App. Div. 2009)). A motion for summary judgment will not be defeated by bare conclusions lacking factual support, Petersen v. Twp. of Raritan, 418 N.J. Super. 125, 132 (App. Div. 2011), self-serving statements, Heyert v. Taddese, 431 N.J. Super. 388, 414 (App. Div. 2013), or disputed facts "of an insubstantial nature," Pressler & Verniero, Current N.J. Court Rules, cmt 2.2 on R. 4:46-2 (2023).

Additionally, "[t]he motion court must analyze the record in light of the substantive standard and burden of proof that a factfinder would apply in the event that the case were tried." Globe Motor Co. v. Igdalev, 225 N.J. 469, 480 (2016). Thus, "neither the motion court nor an appellate court can ignore the elements of the cause of action or the evidential standard governing the cause of action." Ibid. (quoting Bhagat v. Bhagat, 217 N.J. 22, 40 (2014)). An appellate court reviews a grant of summary judgment de novo, using the same standard as the trial court. Turner v. Wong, 363 N.J. Super. 186, 198-99 (App. Div. 2003).

III.

As a threshold matter, we would be remiss if we ignored plaintiffs' failure to support material assertions in their appellate brief with accurate citations to the record contrary to Rule 2:6-2(a)(5). That Rule requires appellants to include in their briefs a "concise statement of the facts material to the issues on appeal supported by references to the appendix and transcript." See also Spinks v. Township of Clinton, 402 N.J. Super. 465, 474 (App. Div. 2008) ("[I]t is [the party's] responsibility to refer [the court] to specific parts of the record to support their argument."). Plaintiffs' failure to provide citations to the record in certain instances, as well as its provision of incorrect or imprecise citations in others, significantly impeded our appellate review. Despite this procedural infirmity, we address plaintiffs' arguments on the merits.

As the Court succinctly stated in Lembo, "the UFL does not provide an affirmative cause of action," nor does it "displace, subsume, or supplement common law claims." 242 N.J. at 493, 496. Accordingly, before addressing PNC's immunity under the UFL, we must first determine whether plaintiffs have satisfied their burden to establish their substantive causes of action withstand summary judgment scrutiny. As noted, plaintiffs contend the court erroneously dismissed their common law negligence, breach of fiduciary duty, and aiding and abetting claims.[7]

After careful consideration, we are satisfied the summary judgment record is devoid of any genuine and material questions of fact precluding summary judgment with respect to those claims and the court therefore properly granted PNC's application. Alternatively, we are satisfied, even if PNC was not entitled to judgment as a matter of law on plaintiffs' substantive causes of action, it is immune from liability under New Jersey Title Ins. Co. v. Caputo, 163 N.J. 143 (2000). We first discuss plaintiffs' substantive causes of action and then turn to their arguments with respect to UFL immunity.

A.

Plaintiffs argue the court erred in dismissing their claims against PNC for negligence and breach of fiduciary duty because "the trusts had a special relationship with PNC giving rise to a duty PNC breached by failing to inform the trusts' beneficiaries or [Richard] that [Steven] was transferring money belonging to the trusts to his personal and business accounts." They specifically

[7] Plaintiffs did not plead any cause of action under the U.C.C., which "provides a comprehensive framework for allocating and apportioning the risks of handling checks." City Check Cashing, Inc. v. Mfrs. Hanover Tr. Co., 166 N.J. 49, 57 (2001).

contend PNC owed them a duty because they were PNC's customers. Consequently, plaintiffs assert they alleged facts to support a common law negligence claim and PNC is therefore joint and severally liable for Steven's misconduct. We disagree with all these arguments.

A plaintiff bears the burden to prove negligence, which is never presumed. Khan v. Singh, 200 N.J. 82, 91 (2009). In order to establish PNC's negligence, plaintiffs must establish: "(1) a duty of care, (2) breach of that duty, (3) actual and proximate causation, and (4) damages." Jersey Cent. Power & Light Co. v. Melcar Util. Co., 212 N.J. 576, 594 (2013).

"The question of whether a duty exists is a matter of law to be decided by the court." City Check Cashing, Inc., 166 N.J. at 59. A tort remedy does not arise from a contractual relationship unless the breaching party has an independent duty imposed by law. Saltiel v. GSI Consultants, Inc., 170 N.J. 297, 316 (2001). Additionally, "absent a contractual duty, a bank has no obligation to manage, supervise, control or monitor the financial activity of its debtor-depositor and is not liable to its depositor in negligence for failing to uncover a major theft." Wolens v. Morgan Stanley Smith Barney, LLC, 449 N.J. Super. 1, 10 (App. Div. 2017) (quoting Globe Motor Car Co. v. First Fidelity Bank, N.A., 273 N.J. Super. 388, 395 (Law Div. 1993)).

In City Check Cashing, Inc., our Supreme Court observed, "outside of the scheme provided by the U.C.C.," courts have generally "recognized tort liability of a financial institution where a special relationship has been established from which a duty can be deemed to flow." 166 N.J. at 59. Relying on Cumis Inc. Soc'y, Inc. v. Windsor Bank & Trust Co., 736 F.Supp. 1226, 1233 (D. Conn. 1990), the Court further noted such a relationship may be "fiduciary, confidential, contractual[,] or legal." City Check Cashing, Inc., 166 N.J. at 59-60. According to the Court, such a special relationship is "created by agreement, undertaking, or contact that gives rise to a duty," which "are distinct concepts." Id. at 62.

The Court further explained:

> An agreement is essentially a meeting of the minds between two or more parties on a given proposition. Black's Law Dictionary 44 (6th ed.1991). An undertaking is the willing assumption of an obligation by one party with respect to another or a pledge to take or refrain from taking particular action. Id. at 1060. A contact is the loosest of the three terms, defined as the "establishment of communication with someone." Webster's Ninth New Collegiate Dictionary 282 (9th ed.1984). Both an agreement and an undertaking will give rise to a duty with respect to the subject agreed upon or undertaken.
>
> [City Check Cashing, Inc., 166 N.J. at 62.]

Additionally, the "contact" must clearly imply that the bank incurred an obligation to the plaintiffs. Ibid.

Here, plaintiffs contend PNC breached a duty it owed them to monitor the deposit accounts, investigate Steven's transactions on behalf of the trusts, and disclose suspicious activity. Plaintiffs have not identified any authority, either in our case law or the parties' contractual relationship, that imposes such a duty on PNC, instead relying on conclusory statements that they were owed such a duty as PNC's customers. Being a bank's customer alone, however, does not create a fiduciary relationship requiring the bank to monitor the customer's account and disclose suspicious activity. United Jersey Bank v. Kensey, 306 N.J. Super. 540, 552 (App. Div. 1997); Globe Motor Car Co., 273 N.J. Super. at 393-95.

First, plaintiffs do not identify any contractual language that obligates PNC to monitor the deposit accounts and disclose suspicious activity. To the contrary, the parties' relationship with respect to the deposit accounts was governed by the account agreements, which alleviated PNC of liability if Steven, as the trusts' agent, "misapplie[d] any of the funds from [their] [a]ccount[s]" and authorized PNC to follow Steven's direction.

Plaintiffs also failed to establish the existence of any independent tort duty under City Check Cashing, Inc. As noted, such a duty arises when the bank has a special relationship with the plaintiffs established through agreement, undertaking, or contact. City Check Cashing, Inc., 166 N.J. at 62. The parties did not establish such a relationship here, however, as there is no evidence in the record of a "meeting of the minds" with respect to PNC's duty to monitor the deposit accounts, PNC never willingly assumed an obligation to investigate Steven's transactions and disclose suspicious activity to the trusts, and plaintiffs have not identified any contact between PNC and the trusts that would clearly imply it incurred such an obligation. See ibid. Although emails provided in the record suggest PNC internally decided to monitor the investment management accounts, we are satisfied such evidence is insufficient to establish PNC undertook to also monitor the deposit accounts, investigate transactions from those accounts, and disclose suspicious activity to the beneficiaries.

Additionally, the record does not support the conclusion that PNC and the trusts entered into either a confidential or fiduciary relationship. A confidential relationship exists where "the relations between the parties are of such a character of trust and confidence as to render it reasonably certain that the one party occupied a dominant position over the other and that consequently they did not deal on terms and conditions of equality." Estate of Ostlund v. Ostlund, 391 N.J. Super. 390, 402 (App. Div. 2007) (quoting Blake v. Brennan, 1 N.J. Super. 446, 454 (Ch. Div. 1948)). The essentials of a confidential relationship are "a reposed confidence and the dominant and controlling position of the beneficiary of the transaction," and it must be "certain that the parties do not deal on equal terms." Ibid. (quoting Stroming v. Stroming, 12 N.J. Super. 217, 224 (App. Div. 1951)).

Similarly, "[t]he essence of a fiduciary relationship is that one party places trust and confidence in another who is in a dominant or superior position." F.G. v. MacDonell, 150 N.J. 550, 563 (1997). "A fiduciary relationship arises between two persons when one person is under a duty to act for or give advice for the benefit of another on matters within the scope of their relationship." Ibid. (citing Restatement (Second) of Torts § 874 cmt. a (1979)). We have explained, "the relationship between a bank and a depositor is that of a debtor and a creditor," T&C Leasing, Inc. v. Wachovia Bank, N.A., 421 N.J. Super. 221, 228 (App. Div. 2011), and "[t]he virtually unanimous rule is that creditor-debtor relationships rarely give rise to a fiduciary duty," United Jersey Bank, 306 N.J. Super. at 552. There is thus "no presumed fiduciary relationship between a bank and its customer." Ibid.

Here, the record is devoid of any evidence plaintiffs reposed their trust and confidence in PNC to monitor the deposit accounts or that PNC ever maintained a "dominant and controlling position" over them. Ostlund, 391 N.J. Super. at 402. To the contrary, plaintiffs retained access to the deposit accounts at all relevant times and the account agreements specifically obligated the trusts to independently monitor their deposit accounts for suspicious activity. Similarly, plaintiffs have failed to identify any provisions of the account agreements, or other communications, through which PNC agreed to act for the benefit of the trusts. See F.G., 150 N.J. at 563. Simply put, there is no evidence in the record that PNC ever informed plaintiffs it would monitor Steven's activities and disclose its suspicions, should any arise.

Plaintiffs rely upon several cases that stand for the proposition that banks do not owe a duty to non-customers. Those cases do not, as plaintiffs appear to argue, suggest that banks automatically owe a duty to monitor their customers' transactions. In fact, the cases plaintiffs rely upon suggest banks only owe their customers those duties that arise from either the parties' banking agreements or independent communications which create an affirmative obligation on behalf of the bank. See City Check Cashing, Inc., 166 N.J. at 62 (explaining a duty arises through "agreement, undertaking or contact"); Pennsylvania Nat. Turf

Club, Inc. v. Bank of West Jersey, 158 N.J. Super. 196, 203 (App. Div. 1978) (concluding the record did not contain "evidence of any agreement, undertaking or contact between plaintiff and defendant from which any special duty can be derived"); Pereira v. United Jersey Bank, 201 B.R. 644, 671 (S.D.N.Y 1996) (finding the absence of any "agreement, undertaking, or contract . . . which would give rise to a special duty on behalf of the" bank); FMC Corp. v. Fleet Bank, 641 N.Y.S.2d 225, 16 (1st Dept. 1996) (rejecting the plaintiff's claim a special relationship existed because the relationship was "transient and noncontractual"). Here, although there is a customer agreement between PNC and the trusts, we reiterate that plaintiffs have failed to identify any provisions within that agreement giving rise to the duties they seek to impose on PNC.

Finally, we have explained "[t]he principal factors shaping the duty to disclose 'have been the difference in bargaining power' between the parties 'and the difference in access to information.'" United Jersey Bank, 306 N.J. Super. at 561 (quoting Strawn v. Canuso, 140 N.J. 43, 59 (1995)); see also Weiland v. Turkelson, 38 N.J. Super. 239, 246 (App. Div. 1955) ("[T]here is no obligation to disclose matters of which the other party has actual or constructive knowledge or as to which the information or means of acquiring information of the two parties is equal."). We are satisfied neither factor is present here, as plaintiffs do not contend PNC at any time prevented them from monitoring their accounts and independently discovering Steven's misappropriation of the trust funds.

In sum, we discern no basis to impose liability on PNC. Accordingly, the court properly dismissed plaintiffs' claims sounding in negligence and breach of fiduciary duty.[8] See Pennsylvania Nat. Turf Club, Inc., 158 N.J. Super. at 203 ("[A] fundamental requisite for tort liability is the existence of a duty owing from defendant to plaintiff.").

B.

Plaintiffs also argue the court erroneously dismissed their aiding and abetting fraud claim because "PNC knowingly ignored [Steven]'s actions in order to retain his business and thereby substantially assisted [Steven] in defrauding the trusts." Again, we disagree.

A party seeking to impose liability for aiding and abetting fraud must establish the following elements:

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[8] We note the court did not address plaintiffs' argument raised below that PNC owed them a duty of care as PNC's customers, as the court instead relied upon the economic loss doctrine to dismiss plaintiffs' tort claims alternatively to its conclusion PNC was immune under the UFL. This distinction is inconsequential to our disposition. See Green Knight Capital, LLC v. Calderon, 469 N.J. Super. 390, 393 n. 1 (App. Div. 2021) ("An appellate court is 'free to affirm the trial court's decision on grounds different from those relied upon by the trial court.'" (quoting State v. Heisler, 422 N.J. Super. 399, 416 (App. Div. 2011))).

> (1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; [and] (3) the defendant must knowingly and substantially assist the principal violation.
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> [State, Dep't of Treasury ex rel. McCormac v. Qwest Commc'ns Int'l, Inc., 387 N.J. Super. 469, 483-84 (App. Div. 2006) (quoting Tarr v. Ciasulli, 181 N.J. 70, 84 (2004)).]

Liability for aiding and abetting "is found in cases where one party 'knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself.'" Id. at 481 (quoting Judson v. Peoples Bank Tr. & Co., 25 N.J. 17, 29 (1957)). "[T]he mere common plan, design or even express agreement is not enough for liability in itself, and there must be acts of a tortious character in carrying it into execution." Id. at 483 (citing Restatement (Second) of Torts § 876(b) cmt. d (Am. Law Inst. 1979)). Aiding and abetting liability focuses on "whether a defendant knowingly gave 'substantial assistance' to someone engaged in wrongful conduct, not on whether the defendant agreed to join the wrongful conduct." Podias v. Mairs, 394 N.J. Super. 338, 353 (App. Div. 2007) (quoting Halberstam v. Welch, 705 F.2d 472, 478 (D.C. Cir. 1983)).

As a threshold matter, we note plaintiffs failed to support their arguments with respect to their aiding and abetting claims with any citation to evidence in the record or legal authority. As we have explained, "[a] motion for summary judgment will not be defeated by bare conclusions lacking factual support." Worthy v. Kennedy Health Sys., 446 N.J. Super. 71, 85 (App. Div. 2016).

In any event, the competent evidence in the record does not support a conclusion PNC was "generally aware of [its] role as part of an overall illegal or tortious activity," or that it "knowingly and substantially assist[ed] the principal violation." McCormac, 387 N.J. Super. at 483-84. Even were we to accept plaintiffs' arguments related to PNC's immunity under the UFL that PNC should have suspected Steven was using the trust funds inconsistently with his authority under the trust agreements, there is simply no evidence in the record that PNC was "generally aware" Steven was misappropriating trust funds. Plaintiffs have therefore failed to "come forward with evidence that creates a genuine issue" with respect to whether PNC aided and abetted Steven's misappropriation, see Brill, 142 N.J. at 529, and the court properly granted PNC summary judgment on that claim.

C.

With respect to whether PNC qualified for UFL immunity, plaintiffs argue "the trial court's grant of summary judgment was erroneous because there are numerous genuine issues of material fact that need[ed] to be adjudicated" and the court's conclusion that PNC qualified for immunity was erroneous as a matter of law under Caputo, 163 N.J. at 157. They specifically assert PNC knew Steven requested a line of credit "to fund ATS" using "the trust assets as collateral," Steven "began withdrawing trusts' assets" after PNC denied his request, and, despite its monitoring of the investment management accounts, PNC allowed Steven's withdrawals. According to plaintiffs, based on these facts a reasonable jury could conclude PNC turned a "blind eye" towards Steven's actions and "recklessly disregarded all known facts which should have alerted a reasonable financial institution that [Steven] was stealing the [trust] funds."

PNC maintains it is immune under the UFL because the "evidence contains no compelling and obvious facts suggesting" it should have discovered Steven's fiduciary misconduct. Specifically, PNC contends it had no reason to suspect Steven's loans to ATS were commercially unreasonable, its monitoring of the trusts' accounts therefore would not have raised suspicion, and the emails plaintiffs rely upon establish only that PNC monitored the investment management accounts, as opposed to the deposit accounts from which Steven withdrew funds. PNC similarly notes the loans to ATS were consistent with Steven's business proposal and otherwise resembled prior loans made to FTS from the deposit accounts.

N.J.S.A. 3B:14-57, which addresses a bank's liability for checks drawn by a fiduciary upon a principal's account or a fiduciary account, provides in pertinent part:

> If a check is drawn upon the account of his principal in a bank by a fiduciary who is empowered to draw checks upon his principal's account, the bank is authorized to pay the check without being liable to the principal, unless the bank pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in drawing the check, or with knowledge of facts that its action in paying the check amounts to bad faith.
>
> [N.J.S.A. 3B:14-57.]

Our Supreme Court has explained the purpose of the UFA, the UFL's predecessor, "was 'to relieve banks of their common-law duty of inquiring into the propriety of each transaction conducted by a fiduciary and to prevent banks and others who typically deal with fiduciaries from being held liable for a fiduciary's breach of duty.'" Lembo, 242 N.J. at 481 (quoting C.J.S. Banks and Banking § 362 (2020)). "The Legislature evidently decided that a bank could not feasibly shadow the activities of fiduciaries to ensure they were acting in good faith on behalf of their principals." Id. at 487-88. "The Legislature intended the UFA to cover situations involving a bank's transactions with a person it 'knows to be a fiduciary' when there are 'questions relating to notice of the breach of fiduciary obligations.'" Id. at 488 (quoting Sponsor's Statement to S. 71 5 (L. 1927, c. 30)). The UFA therefore "relieved banks of the then-prevailing, 'impracticable' common law duty of inquiry in connection with a bank's dealings with a fiduciary by setting forth an actual knowledge or bad faith standard for determining notice." Ibid.

Against that historical backdrop, "[t]he UFL confers a limited immunity on a bank, unless the bank acts in bad faith or has actual knowledge of a fiduciary breach." Id. at 481. In other words, "'a bank would be immune from liability in honoring a fiduciary's check' unless" the party challenging the bank's immunity establishes "that the bank acted with actual knowledge of the breach of a fiduciary's obligations or with knowledge of facts establishing that its actions amounted to bad faith." Id. at 493 (quoting Caputo, 163 N.J. at 149).

In Caputo, our Supreme Court "define[d] . . . the standard of bad faith found in the [UFL]." 163 N.J. at 145. In that case, an attorney represented purchasers in real estate transactions, received funds from the buyers' mortgagelenders for the purpose of paying off the sellers' mortgages, and placed those funds in a trust account at the defendant bank. Ibid. The bank's branch manager and assistant branch manager personally authorized fifty-two checks drawn by the attorney on the trust account and made payable to himself even though they knew his trust account contained client funds, he often gambled in Atlantic City casinos, and that he deposited most of the checks into his business account and made frequent ATM withdrawals from that account in Atlantic City. Id. at 147-48. The managers also admitted they had discussed closing the trust and business accounts due to the attorney's withdrawals at Atlantic City casinos and because he failed to open sub-accounts for his clients. Id. at 148.

The plaintiff title insurer sued the attorney and the bank after it discovered the attorney embezzled over $290,000 from the trust account. Id. at 145-46. The plaintiff argued the bank acted in bad faith, as it knew the attorney's use of the trust account funds breached his fiduciary duties. Id. at 146. The Court deemed these facts sufficient to defeat the bank's summary judgment motion, holding a jury could find the bank "recklessly disregarded or was purposefully oblivious to facts suggesting impropriety by Caputo." Id. at 156.

As the Court explained, under the UFL, bad faith "denotes a reckless disregard or purposeful obliviousness of the known facts suggesting impropriety by the fiduciary." Id. at 155. Bad faith on the part of a bank "is not established by negligent or careless conduct or by vague suspicion." Ibid. "However, where facts suggesting fiduciary misconduct are compelling and obvious, it is bad faith to remain passive and not inquire further." Id. at 155-56. The bad faith determination "will necessarily be fact sensitive." Id. at 156. "The test for good or bad faith is a subjective one to be determined by the trier of fact unless only one inference from the evidence is possible." Ibid.

Here, considering plaintiffs' contentions under our standard of review and the standards enunciated in Lembo and Caputo, for purpose of comprehensive appellate review of the issues, we determine whether plaintiffs have presented evidential materials sufficient to permit a rational factfinder to conclude PNC remained passive in the face of compelling and obvious facts that Steven's activity constituted fiduciary misconduct. We are satisfied the competent evidential materials before us are insufficient to support such a conclusion, as the trust agreements authorized Steven to loan trust funds on commercially reasonable terms and the record does not contain evidence of compelling and obvious facts before PNC that Steven's transfers to ATS were commercially unreasonable. Plaintiffs have therefore failed to "come forward with evidence that creates a genuine issue" with respect to whether PNC had actual knowledge of Steven's fiduciary misconduct or acted in bad faith. See Brill, 142 N.J. at 529.

First, we reject plaintiffs' contention that PNC acted in bad faith because it allowed Steven, in his capacity as trustee, to transfer funds to ATS after PNC denied his request for a line of credit for ATS's benefit using the trust funds as collateral. As noted, PNC denied Steven a line of credit due to misgivings about his prior felony conviction, not because it doubted the propriety of the proposed transaction. Further, the parties do not dispute that PNC never accepted an application to review Steven's request, and the record is devoid of evidence that any PNC employee ever passed upon the commercial reasonableness of Steven's request in light of his conviction.

We are similarly unpersuaded that Steven's line of credit request in conjunction with PNC's knowledge of his unrelated, decades old felony conviction rendered it "compelling and obvious" to PNC that Steven was acting outside of his fiduciary authority, especially in light of PNC's commercial relationship with Steven since he opened the deposit accounts on behalf of the trusts in 2012. Unlike in Caputo, where the bank employees knew the fiduciary gambled and withdrew funds from his business account in Atlantic City casinos, 163 N.J. at 147-48, there are no allegations that any PNC employee had reason to suspect Steven acted inconsistently with his fiduciary authority between 2012 and April 2014, notwithstanding his unrelated conviction.

In fact, the only competent evidence in the record that PNC employees ever suspected Steven of malfeasance showed only that PNC's wealth management team elevated its monitoring after it denied his request for a line of credit. We note, notwithstanding extensive discovery, the record before us does not contain evidence illuminating PNC's decision to monitor the investment management accounts. Even were we to accept, however, that PNC's monitoring evinced its suspicion related to fiduciary misconduct and that PNC was put on notice of Steven's transfers from the deposit accounts by way of its monitoring of the investment accounts, any investigation of the deposit accounts would only have revealed facially appropriate transfers to ATS, which were consistent with Steven's fiduciary authority and previous transfers from the deposit accounts to FTS.

As noted, PNC denied Steven's request for a line of credit and he began transferring funds to ATS in April 2014. Prior to that time, also in his capacity as trustee, Steven loaned money from the deposit accounts to FTS, which had repaid those loans with interest. In June 2014, Steven transferred $700,000 from the deposit accounts to FTS in a similar manner to which he loaned money to

ATS. Plaintiffs do not contend PNC had any reason to believe the loans to FTS were commercially unreasonable. Additionally, many of the deposit slips used to deposit checks into ATS's account listed "loan" on them and ATS began repaying the trusts in December 2014. In light of the facts that the transfers to ATS resembled those to FTS, many of the transfers were designated as loans, and ATS repaid a portion of the loans, we reject plaintiffs' argument that the transfers to ATS were clearly inconsistent with Steven's fiduciary authority.

We acknowledge the loans to ATS were distinct from those to FTS in that there is no evidence in the record that ATS ever paid the trusts interests on those loans. Even assuming PNC monitored the deposit accounts, however, plaintiffs have failed to identify at what point PNC should have recognized the loans to ATS were commercially unreasonable due to ATS's failure to pay interest, instead contending the transfers to ATS were clearly commercially unreasonable from the outset. In essence, plaintiffs argue PNC should have monitored the deposit agreements based on the one-time transfer of funds from the investment management accounts to the deposit accounts, and then investigated the transactions with ATS to determine, based on the trust agreements, whether they were commercially unreasonable.

We are satisfied imposing such a burden on PNC would be contrary to Caputo. Unlike in Caputo, where the attorney's transactions facially led the bank employees to believe he was using client funds to gamble in Atlantic City casinos, 163 N.J. at 147-48, Steven's transactions on behalf of the trusts were not inherently suspicious. Rather, we observe the fact that PNC would need to monitor the deposit accounts, investigate the transactions with ATS, compare those transactions with the loans to FTS, and assess the transactions within the context of Steven's authority under the trust agreements to discover he was acting inconsistently with his fiduciary authority suggests his misconduct was not "compelling and obvious," as was the fiduciary's in Caputo. See also Koss Corporation v. Park Bank, 922 N.W.2d 20, 36 (Wis. 2019) (concluding the bank's failure to abide by its internal policies did not constitute bad faith under the UFA absent "evidence that any Park Bank employee had knowledge of compelling and obvious facts that suggested impropriety . . . that the employee willfully failed to further investigate because of a deliberate desire to evade knowledge of . . . misconduct . . . "); Nations Title Insurance of New York, Inc. v. Bertram, 746 N.E.2d 1145, 1156 (Ohio Ct. App. 2000) (explaining "[w]hile the circumstances surrounding the escrow account might have been suspicious and [the bank]'s actions could have constituted negligence, they were not so cogent or obvious that [its] failure to investigate [the defendant]'s actions was a deliberate evasion of knowledge . . .").

We recognize the test for bad faith is subjective and left to the trier of fact "unless only one inference from the evidence is possible." Caputo, 163 N.J. at 156. Here, however, the record simply does not contain evidence of compelling and obvious facts before PNC that Steven's transactions on behalf of the trusts were commercially unreasonable, let alone that PNC recklessly disregarded or was purposefully oblivious to such facts. Therefore, even viewing the record in the light most favorable to plaintiffs, the competent evidential materials presented do not permit a rational factfinder to infer PNC's failure to investigate and disclose Steven's transactions constituted bad faith under the UFL. See Caputo, 163 N.J. at 155-56. Stated differently, we are satisfied the motion record failed to establish genuine issues of material fact as to whether PNC qualified for UFL immunity under the heightened standard described in Caputo.

In light of our disposition, we need not address plaintiffs' arguments with respect to reinstating their motion for partial summary judgment. We also need not determine whether plaintiffs' claims are alternatively precluded by the economic loss doctrine, preempted by the U.C.C., or time-barred. To the extent we have not specifically addressed any of plaintiffs' arguments, it is because we have concluded they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

CLERK OF THE APPELLATE DIVISION