

PLAINTIFF'S APPELLATE BRIEF

Kenneth Frank Irek, *Plaintiff*

v.

New Jersey Lawyers' Fund
For Client Protection, *Defendant*

and

The Supreme Court of New Jersey, *Defendant*

Appeal Docket No. A-001384-20

Filed June 21, 2021

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P L A I N T I F F - A P P E L L A N T ' S B R I E F

KENNETH FRANK IREK,

Plaintiff-Appellant

v.

NEW JERSEY LAWYERS' FUND FOR
CLIENT PROTECTION,

Defendant-Respondent

and

THE SUPREME COURT OF NEW JERSEY,

Defendant-Respondent.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-001384-20

CIVIL ACTION

On Appeal from a Final Order
of the Superior Court of New
Jersey, Law Division, Mercer
County, Dismissing the Verified
Complaint

Docket No. MER -L-2020-20

Sat Below:

Hon. Douglas H. Hurd, P.J. Cv.

PLAINTIFF'S BRIEF

ON BEHALF OF

PLAINTIFF-APPELLANT KENNETH FRANK IREK

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Plaintiff-Appellant

v.

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Defendant-Respondent

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PRELIMINARY STATEMENT

This is an appeal from the dismissal, with prejudice, of Plaintiff's Verified Complaint which sought to declare, void *ab initio*, a Default Judgment entered by the Superior Court of Mercer County, Law Division, on March 22, 1995. The Verified Complaint was based wholly upon records obtained by Plaintiff through Records Requests filed pursuant to N.J. Rules of Court, Rule 1:28-9, *et seq.*, and/or Rule 1:38-1, *et seq.* At all times, from the date of their creation, these documents were in the custody and control of Defendants. They include certified written statements and transcripts of sworn oral testimony of witnesses; letters; correspondence and board hearings of the District Ethics Committee, District IX; the Disciplinary Review Board; the New Jersey Lawyers' Fund for Client Protection; the Comprehensive Enforcement Program; the Office of Attorney Ethics; and the Mercer County Superior Court, all entities of the New Jersey Supreme Court. There is no genuine issue of material facts, only differing conclusions based upon them. The underlying set of facts would indicate a typical breach of real estate contract: The Plaintiff, Kenneth Frank Irek, was a New Jersey attorney admitted to the bar in 1981. In May of 1990, Irek advertised the sale of a vacant construction lot in Jackson, New Jersey, owned by Kirex Development Company, Inc., a New Jersey corporation ("Kirex"). Irek was the sole shareholder,

president, secretary, treasurer and director of Kirex. Zontan and Cathleen Szatmary decided to purchase the lot and retained a licensed New Jersey attorney, Dennis D. Poane, to represent them. A "Contract for Sale of Real Estate" was signed by the Szatmarys on 5/29/90, and by 'Kirex Development Co, Inc., by Kenneth Irek, President, Attest: Kenneth Irek Secretary', on 6/6/90. Cathleen Szatmary gave a \$5,000 check payable to "Kirex Dev. Co", dated May 29, 1990, to Irek as the initial deposit of the purchase price of \$35,000. Irek, acting in his official capacity as the President of Kirex Development Company, Inc., endorsed the check as "Kirex Development Co", and later deposited it into the Kirex business bank account. Dennis D. Poane, Esq, proceeded to prepare for closing with a series of correspondences back and forth with Fran Donahue, a Realtor friend of Irek, at the end of June and early July, 1990. On or about August, 1990, Irek became unavailable and the closing never took place and the deposit money was not returned. So far, the undisputed record indicates a classic breach of a New Jersey real estate contract, with adequate remedies at law and equity for the non-breaching party. But rather than bring suit for specific performance or monetary damages, Mr. Poane instructed his clients on how to utilized Mr. Irek's status as an active New Jersey attorney, and make a claim against him through the NJLFCP, for the reimbursement of their \$5,000 deposit. On

November 26, 1993, the Trustees of the NJLFCP, pursuant to R. 1:28-3, paid Mr. and Mrs. Szatmary \$5,000: "... arising from the dishonest conduct of their attorney, Kenneth Irek...", and received an assignment of all their rights, claims and interests against Kenneth Irek. Rule 1:28-3 is the sole authority for what was to be a 20-year odyssey to collect \$5,000 from Plaintiff by the NJLFCP. Plaintiff avers that the first section, 1:28-3(a), clearly describes all the necessary elements of 'Eligible Claims' that the Trustees may consider for payment, and that the following three elements were not present to create an Eligible Claim: 1) '...all claims resulting from the dishonest conduct of a member of the bar of this state...' and; 2) '...if the attorney was acting either as an attorney or fiduciary...' and; 3) '... the attorney has been suspended, disbarred or placed in disability inactive status.... Lacking the requisite conditions for an Eligible Claim, the Trustees had no legal authority to make a claim against Plaintiff and continue collection activities for 25 years. In addition, a thorough examination of the record is required to sort out the conclusions and opinions considered facts, verified facts ignored or misunderstood, and new meanings attributed to areas of well-settled New Jersey law, such as an escrow agent, a fiduciary, attorney-client relationships and agency law, corporations, default judgments, assignments, and trust accounts.

PROCEDURAL HISTORY

On or about February 27, 1991, Zontan and Cathleen Szatmary filed an Attorney Grievance Form with the District IX Ethics Committee stating that they did not receive back the \$5,000 down payment they paid to Kirex Development Co., for the purchase of a lot that did not close. (Pa194)

On April 12, 1991, Cathleen D. Szatmary and Zontan J Szatmary filed a written Statement of Claim with the New Jersey Lawyers' Fund for Client Protection, stating that they lost Five Thousand dollars (\$5,000) from Kenneth Irek (Plaintiff), based on a Fiduciary Relationship [escrow agent]. (Pa196)

On May 11, 1993, Chief Justice Robert N. Wilentz signed an Order that permanently disbarred Kenneth F. Irek and restrained and enjoined him from practicing law in New Jersey. (Pa131)

On November 26, 1993, the Trustees of the NJLFCP paid to Zontan and Cathleen D. Szatmary the sum of \$5,000, 'arising from the dishonest conduct of their attorney, Kenneth Irek ...'., and received a signed 'Release, Assignment and Subrogation Agreement from the Szatmarys. (Pa133)

On December 29, 1994, the New Jersey Lawyers' Fund for Client Protection, filed a Civil Complaint in the Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-5664-94, demanding Kenneth Irek reimburse the NJLFCP for the Five Thousand Dollars (\$5,000), paid on his behalf to the Szatmarys,

plus interests and costs of suit. Paragraph 4 of the NJLFCP Complaint states: "4. In or about August 1990, while representing Zontan and Cathleen Szatmary, defendant embezzled, misapplied and converted to his own use the sum of \$5,000.00 received by him on behalf of Mr. and Mrs. Szatmary as funds to be held, in a fiduciary capacity, in escrow in connection with a real estate transaction." (Pa153)

On March 22, 1995, the Superior Court of Mercer County, Law Division, entered a Five Thousand dollar (\$5,000) Default Judgment against Kenneth Frank Irek and in favor of the New Jersey Lawyers' Fund for Client Protection. (Pa161)

On November 9, 2020, Plaintiff filed a six-count Verified Complaint in the Superior Court of New Jersey, Mercer County, Law Division, claiming, inter alia, that Defendant, the New Jersey Lawyers' Fund for Client Protection, fraudulently obtained the above-described Default Judgment and to declare it void *ab initio*. (Pa1)

On November 27, 2020, Plaintiff filed a Motion for Injunctive Relief Temporary Restraints, preliminarily enjoining and restraining Defendants from, inter alia, continuing to engage in conduct related to compelling Plaintiff to reimburse the NJLFCP for the \$5,000 claim they had paid to the claimants (Szatmarys); intentionally threatening the arrest of Plaintiff; enforcing, continuing in effect or re-issuing all Bench Warrants

related to the facts herein stated, in the State of California and New Jersey; and enjoining and restraining Defendants and other persons acting in concert with them and at their direction, from publishing, republishing, distributing and redistributing false, disparaging, defamatory and malicious statements, including but not limited to, that Plaintiff engaged in dishonest conduct; misappropriated money; and embezzled, misapplied and converted to his own use the sum of \$5,000.00.

(Pa319)

On December 9, 2020, Defendants filed a Cross-Motion to Dismiss Plaintiff's Verified Complaint and deny injunctive relief, claiming, inter alia, lack of subject matter jurisdiction; failure to state a claim upon which relief can be granted; absolute immunity in law and equity; and no showing of irreparable harm or substantial hardship if injunction denied.

(Pa327)

On December 14, 2020, Plaintiff filed a Reply to Defendants' Cross-Motion, opposing dismissal of his Verified Complaint and Injunctive Relief. (Pa362)

On December 15, 2020, Defendants filed a request for leave of court to file a sur-reply. (Pa368)

On December 15, 2020, Plaintiff filed a response to Defendants' request to file a sur-reply. (Pa370)

On December 18, 2020, a telephonic oral argument was held for 34 minutes, before Judge Douglas H. Hurd, P. J. Cv. (1T 12/18/2020)(Transcript filed separately)

On December 21, 2020, Judge Hurd signed an Order granting Defendants' Cross-Claim to dismiss Plaintiff's Verified Complaint, with prejudice, for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted, and granting Defendants' objection to Plaintiff's Motion for Injunctive Relief. (Pa372)

It is from this Order that Plaintiff appeals.

On December 21, 2020, Judge Douglas H. Hurd put his motion decision on the record. (2T 12/21/2020)(Transcript filed separately)

On January 15, 2021, Plaintiff filed a Notice of Appeal of Judge Hurd's Order, claiming, inter alia, plain error because the record lacks evidence Plaintiff was acting as an attorney or fiduciary in the underlying personal contractual matter, that would authorize Defendants' to have subject matter jurisdiction over him. (Pa374)

STATEMENT OF FACTS

On or about May, 1990, Plaintiff, Kenneth Frank Irek (Irek) advertised in a local newspaper the sale of a vacant construction lot in Jackson, New Jersey. The lot was owned by Kirex Development Company, Inc. (Kirex), a New Jersey corporation, incorporated on April 30, 1986. Irek was the sole shareholder, president, secretary, treasurer and director of Kirex. Zontan Szatmary and his wife, Cathleen Szatmary, decided to purchase the lot and retained a licensed New Jersey attorney, Dennis D. Poane to represent them. A "Contract for Sale of Real Estate" was signed by 'Zontan Szatmary' and 'Cathleen Szatmary' on 5/29/90, and by 'Kirex Development Co, Inc., by Kenneth Irek, President, Attest: Kenneth Irek Secretary', on 6/6/90.

Cathleen Szatmary gave a \$5,000 check payable to "Kirex Dev. Co", dated May 29, 1990, to Irek as the initial deposit of the purchase price of \$35,000. Irek, acting in his official capacity as the President of Kirex Development Company, Inc., endorsed the check as "Kirex Development Co", and later deposited it into the Kirex business bank account. Dennis D. Poane, Esq, proceeded to prepare for closing with a series of correspondences back and forth with Fran Donahue, a Realtor friend of Irek, at the end of June and early July, 1990. On or about August, 1990, Irek became unavailable and the closing never took place and the \$5,000 was not returned.

On November 14, 1990, Dennis D. Poane sent a letter to Ronald Troppoli, Director Special Prosecution Unit, Monmouth County Prosecutors' Office, attaching documents pertaining to the preparation for the real estate closing, and stating he represented Zontan and Cathleen Szatmary, prospective purchasers of property from Kirex Development Company and: "We send this to you in accordance with my previous conversations believing that Mr. Irek may have absconded (sic) with the funds given in trust by my clients. ... I would appreciate your reviewing this matter with regard to the criminal aspects of the case. Upon your review of it, I would ask you to talk directly to my clients, Cathleen and Zontan Szatmary (Pa162) On April 12, 1991, Cathleen D. Szatmary and Zontan J Szatmary filed a written Statement of Claim with the New Jersey Lawyers' Fund for Client Protection, stating that they lost Five Thousand dollars (\$5,000) from Kenneth Irek (Plaintiff), based on a Fiduciary Relationship (escrow agent).

On or about February, 27, 1991, Zontan and Cathleen Szatmary filed an Attorney Grievance Form with the NJ District Ethics Committee, District IX Secretary, Walton W. Kingsbery, III, claiming Irek, acting as an attorney for Kirex Development Co., took their \$5,000 down payment.

On July 29, 1992, a District IX Ethics Committee hearing was held in Middletown, New Jersey, where sworn oral testimony was

taken from Cathleen Szatmary, the sole witness. The Hearing Panel Report concluded:

1) Irek (Respondent), is guilty of Count One, a violation of R.P.C. 1.15(b), in that he received money in a fiduciary capacity with the money placed in trust and failed to safeguard it and return it:

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive.

2) Irek is guilty of Count Three, a violation of R.P.C. 8.4(c) because he accepted the money, misrepresented that it would be placed in trust and held until closing and then absconded with the funds. His actions constituted misrepresentation, deceit, dishonesty and fraud upon Mr. and Mrs. Szatmary:

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

On December 28, 1992, the New Jersey Disciplinary Review Board sent their Conclusions and Recommendations to the NJ Supreme Court, In the Matter of Kenneth F. Irek, an Attorney at Law:

"Upon a de novo review of the record, the Board is satisfied that the DEC's conclusion that respondent acted unethically is fully supported by clear and convincing evidence. Respondent absconded with grievant's deposit monies, which grievants had entrusted to him for

safekeeping until closing of title not because respondent was the president of Kirex, but because he was an attorney. Although it is respondent's status as a member of the bar that required him to abide by the high standards expected of the profession, he was also acting as an attorney in the transaction, as Kirex' counsel. Disbarment is, therefore, the only appropriate sanction for his knowing misuse of escrow funds. In re Hollendonner, 102 N.J. 21 (1985). A six-member majority of the Board so recommends. One member would have imposed a two-year suspension, believing that the record did not clearly and convincingly demonstrate that respondent was acting as an attorney. Two members did not participate. The Board further recommends that respondent be required to reimburse the Ethics Financial Committee for administrative costs." [Signed by Raymond R. Trombadore, Chair, Disciplinary Review Board]

On May 11, 1993, Chief Justice Robert N. Wilentz signed an Order that permanently disbarred Kenneth F. Irek and restrained and enjoined him from practicing law in New Jersey.

On November 26, 1993, the Trustees of the Client Protection Fund paid to Zontan and Cathleen D. Szatmary the sum of \$5,000, "arising from the dishonest conduct of their attorney, Kenneth Irek ... ", and received a signed Release, Assignment and Subrogation Agreement from the Szatmarys.

On December 29, 1994, the New Jersey Lawyers' Fund for Client Protection, filed a Civil Complaint in the Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-5664-94, demanding Kenneth Irek reimburse the NJLFCP for the Five Thousand Dollars (\$5,000), paid on his behalf to the Szatmarys, plus interests and costs of suit. Paragraph 4 of the NJLFCP Complaint states: "4. In or about August 1990, while

representing Zontan and Cathleen Szatmary, defendant embezzled, misapplied and converted to his own use the sum of \$5,000.00 received by him on behalf of Mr. and Mrs. Szatmary as funds to be held, in a fiduciary capacity, in escrow in connection with a real estate transaction."

On March 22, 1995, Default Judgment (J 082161-95) was entered in favor of the New Jersey Lawyers' Fund for Client Protection, and against Kenneth Irek, in the sum of Five Thousand (\$5,000.00) Dollars, plus interest and costs of suit.

For the next twenty-six (26) years, and still continuing, the Defendant NJLFCP, attempted to recover the \$5,000 they paid the Szatmarys from Irek.

On or about April 24, 2000, the NJLFCP began efforts to enforce the Judgment through the NJ Comprehensive Enforcement Program, which the Supreme Court had recently expanded to include the NJLFCP.

Between 2000 and 2020, Defendants utilized other methods to compel Plaintiff to reimburse them for the \$5,000 claim paid to the Szatmarys, such as suspension of Plaintiff's driver license. Between at least 2004 and 2020, NJLFCP, through its employees, agents, directors, affiliates, and legal counsel, Defendant, NJLFCP, published multiple defamatory statements stating the Plaintiff, acting as a New Jersey attorney, engaged in "dishonest conduct".

Daniel R. Hendi, Director and Counsel to the Defendant NJLFCP, responding to a Record Request from Plaintiff, states that, inter alia: "**As there has been no activity in this account since May 2017, the balance in the account as of today remains \$2,500.**", showing that the Defendants still consider the Default Judgment active and their collection activities ongoing. (Pa315)

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED IN NOT FINDING THE DEFAULT JUDGMENT VOID AB INITIO BECAUSE THE NJLFCP ONLY HAD JURISDICTION OVER LAWYERS ACTING AS AN ATTORNEY OR FIDUCIARY. (Raised Below: Pa13)

A. The Trial Court committed plain error by not finding the Default Judgment void *ab initio*, because the NJLFCP did not have the elements required by Rule 1:28-3, to acquire subject matter jurisdiction over Plaintiff's personal business transactions, and Plaintiff's Verified Complaint should not have been dismissed.

The New Jersey Supreme Court derives its authority over New Jersey attorneys from Article VI of the New Jersey State Constitution:

"3. The Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted."

Lichter v. County of Monmouth, 114 N.J. Super.343 (1971); In re Li Volsi, 85 N.J. 576 (1981). Pursuant to this authority, The Lawyers' Fund for Client Protection ("Fund") was established by Rule 1:28: '...whose purpose is the reimbursement, to the extent and in the manner provided by these rules, of losses caused by the dishonest conduct of members of the bar of this State.'

(Pa91) GE Capital Mortg. Services, Inc. v. N.J. Title Ins. Co., 333 N.J. Super, 1 (App. Div. 2000).

The necessary elements of "eligible claims" that the Trustees may consider for payment, are contained in Rule 1:28-3. Payments of Claims, with the following excerpts relevant to this case:

"The Trustees may consider for payment all claims resulting from the dishonest conduct of a member of the bar of this state... if the attorney was acting either as an attorney or fiduciary, provided that: (1) Said conduct was engaged in while the attorney was a practicing member of the Bar of this State or admitted Pro Hac Vice in a matter pending in this State...

(Pa93). In summary, an eligible claim against Plaintiff must, inter alia, be a loss resulting from his dishonest conduct, arising out of an attorney-client relationship or fiduciary relationship, between the Szatmarys and Irek.

1. **Dishonest Conduct.** The phrase 'dishonest conduct' has a precise definition - The ABA Model Rules for Lawyers' Funds for Client Protection. Rule 10 states:

"A. The loss must be caused by the dishonest conduct of the lawyer and shall have arisen out of and by reason of a client-lawyer relationship or a fiduciary relationship between the lawyer and the claimant."

"C. As used in these Rules, "dishonest conduct" means wrongful acts committed by a lawyer in the nature of theft or embezzlement of money or the wrongful taking or conversion of money, property or other things of value..."

(Pa107)

"Comment: [4] Paragraph C must be read in light of Paragraph A. In focusing on dishonest conduct, it must be kept in mind that such conduct must occur within or as a result of a client-lawyer or fiduciary relationship in order to be compensable." (Pa108)

The following is a sampling of State claim requirements:

Connecticut - Sec. 2-69. Definition of Dishonest Conduct (a) As used in Sections 2-68 through 2-81, inclusive, "dishonest conduct" means wrongful acts committed by an attorney, in an attorney-client relationship or in a fiduciary capacity arising out of an attorney-client relationship, in the nature of theft or embezzlement of money or the wrongful taking or conversion of money, property, or other things of value, including, but not limited to refusal to refund unearned fees received in advance as required by Rule.

Texas - RULE 2. Eligibility for Application - Dishonest Conduct by Lawyer (A) The term "dishonest conduct" as used herein means wrongful acts committed by a lawyer in the manner of defalcation or embezzlement of money, or the wrongful taking or conversion of money or property including those instances

where an advance fee was not refunded when the contracted-for services were not rendered.

2. **Acting either as an Attorney or Fiduciary.** The term "acting either as an attorney or fiduciary", has a precise legal definition. While Rule 1:28 offers little guidance regarding definitions of the threshold requirements, every State and the District of Columbia have a type of Fund similar to New Jersey's Fund, that only apply to lawyers acting as lawyers or fiduciaries, usually based upon the ABA Model Rules for Lawyers' Funds for Client Protection. Rule 10 Eligible Claims, states:

"A. The loss must be caused by the dishonest conduct of the lawyer and shall have arisen out of and by reason of a client-lawyer relationship or a fiduciary relationship between the lawyer and the claimant." (Pa107)

The Comment to this section further explains the wording:

"Comment [1] Set forth in Paragraph A is the basic criteria for compensability of losses. An eligible claim must include: (1) a demonstrable loss; (2) caused by the dishonest conduct of a lawyer; and (3) within or arising out of a client-lawyer or fiduciary relationship. [2] Fiduciary relationships are included because lawyers traditionally serve in that capacity as executors, conservators and guardians ad litem. Rejection of claims based upon technical distinctions between this sort of service and a client-lawyer relationship would not serve the purpose or mission of the Fund."

[4] Paragraph C must be read in light of Paragraph A. In focusing on dishonest conduct, it must be kept in mind that such conduct must occur within or as a result of a client-lawyer or fiduciary relationship in order to be compensable. (Pa108)

The following is a sampling of State claim requirements (N.B. Pennsylvania defines "Escrow Agent"):

Alabama - (b) The loss was caused by the dishonest conduct of a lawyer acting either as an attorney or as a fiduciary in the matter in which the loss arose;

Alaska - (f) "Reimbursable losses" are only those losses of money, property or other things of value which meet all of the following tests: (1) The loss was caused by the dishonest conduct of a lawyer when (i) acting as a lawyer, or (ii) acting in a fiduciary capacity customary to the practice of law, such as administrator, executor, trustee of an express trust, guardian or conservator; or (iii) acting as an escrow holder or other fiduciary, having been designated as such by a client in the matter in which the loss arose or having been so appointed or selected as a result of the client-attorney relationship;

Arizona - A. The loss must be caused by the dishonest conduct of the lawyer and shall have arisen out of and by reason of a client-lawyer relationship or a fiduciary relationship between the lawyer and the claimant that is customary and related to the practice of law;

Arkansas - A. The loss must be caused by the dishonest conduct of the lawyer and shall have arisen out of and by reason of a lawyer-client relationship or a fiduciary relationship between the lawyer and the claimant;

California - (A) To qualify for reimbursement, an applicant must establish a loss of money or property that was received by an

active attorney who was acting as an attorney or in a fiduciary capacity customary to the practice of law, for instance as an administrator, executor, trustee of an express trust, guardian, or conservator;

Florida - (f) Reimbursable Loss. "Reimbursable loss" means a loss suffered by a claimant by reason of misappropriation, embezzlement, or other wrongful taking or conversion of money or other property by a member of The Florida Bar when acting: (1) as a lawyer; (2) in a fiduciary capacity customary to the practice of law as a lawyer for the claimant and related to the representation of the claimant as the claimant's lawyer; (3) as an escrow holder or other fiduciary having been designated as such by a client in the matter in which the loss arose or having been so appointed or selected as the result of a lawyer and client relationship;

Georgia - (a) The loss must be caused by the dishonest conduct of the lawyer and shall have arisen out of and because of a lawyer-client relationship, or a fiduciary relationship, between the lawyer and the claimant;

Illinois - (b) The loss arose out of or during the course of a lawyer-client relationship between the lawyer and the claimant related to a matter in this state, or a fiduciary relationship between the lawyer and the claimant that is related to the practice of law in this state;

North Carolina - (5) "Dishonest conduct" shall mean wrongful acts committed by an attorney against an applicant in the nature of embezzlement from the applicant or the wrongful taking or conversion of monies or other property of the applicant, which monies or other property were entrusted to the attorney by the applicant by reason of an attorney-client relationship between the attorney and the applicant or by reason of a fiduciary relationship between the attorney and the applicant customary to the practice of law;

Pennsylvania - (1) The loss was caused by the Dishonest Conduct of a Covered Attorney when acting: (i) as an attorney-at-law; (ii) in a fiduciary capacity customary to the practice of law, such as administrator, executor, trustee of an express trust, guardian or conservator; or (iii) as an escrow agent or other fiduciary, having been designated as such by a client in the matter in which the loss arose or having been so selected as a result of a client-attorney relationship.

The common requirement is that an attorney-client (or lawyer - client) relationship exists between the claimant and the attorney who caused the loss through dishonest conduct. An attorney-client relationship is a form of agency, and normally can only be established by the voluntary agreement of both parties. (Restatement (Third) of Agency)

The record in this case contains no clear and convincing evidence (except unsubstantiated conclusions, such as: NJLFCP Trustees, (Pa235); Michael T. McCormick on Complaint, (Pa153); Joanne M. Dietrich, NJLFCP Deputy Counsel, letter to CA DMV, (Pa159); and Ruby D. Cochran, NJLFCP Deputy Counsel, letter to CA DMV, (Pa142), that Kenneth Frank Irek was representing the Szatmarys as an attorney, but the record does contain undisputed evidence that Dennis D. Poane was representing the Szatmarys, not Irek, for example:

- 1) Statement of Claim "4. How long have you known Him/ Her [handwritten: *Never met him, Dealings only through real estate deal (escrow agent)*" (Pa197)
- 2) Transcript of the sworn oral testimony of Cathleen Szatmary "Q. And who represented you? A. Dennis Poane, Esq." (Pa211); "Q. Did you ever meet him? [Plaintiff] A. No Q. You never - A. I don't know what the man even looks like." (Pa228)
- 3) Letter from Dennis D. Poane to Ronald Troppoli, Monmouth County Prosecutor, Special Prosecutions Unit "As you may remember, we have converse several times with regard to the above-entitled matter, wherein I represented prospective purchasers of property, being Zontan and Cathleen Szatmary." (Pa163)

Notwithstanding that the Szatmarys state that their attorney was Dennis D. Poane in their Statement of Claim (Pa197), the NJLFCP

Trustee, Robert S. Feder paid the Szatmary's \$5,000 claim and stated in the Release, Assignment and Subrogation Agreement (Pa235) "The Trustees of the Client Protection Fund, pursuant to R. 1:28-3, having considered the claim of Zontan Szatmary and Cathleen D. Szatmary, arising from the dishonest conduct of their attorney, [*emphasis added*] Kenneth Irek, it is now mutually agreed: 1. The Client Protection Fund will pay to Zontan Szatmary and Cathleen D. Szatmary the sum of \$5,000 upon execution of this Agreement by all parties." The NJLFCP Trustee only had authority under R. 1:28-3 to consider for payment claims if the attorney was acting either as an attorney or fiduciary for the claimant. R. 1:28-4 states that the treasurer shall maintain the assets of the Fund in a separate account and shall disburse monies therefrom only upon the action of the trustees pursuant to these rules." The action of Trustee Feder, was not pursuant to Rule 1:28, since he misrepresented that Plaintiff was the Szatmary's attorney, when the Statement of Claim clearly states he was not, and an improper claim was paid that should be recovered. R. 1:28-4(c) provides said treasurer shall file a bond annually that could be used to reimburse the Fund for payment of this claim.

The NJLFCP Trustees' actions are limited to only those authorized by R. 1:28. They are entrusted with funds generated by the mandatory assessment of fees from active New Jersey

attorneys. Failure to pay the required fees, pursuant to R. 1:28-2, can result in being included on a list of those attorneys deemed ineligible to practice law in New Jersey by an Order of the Supreme Court. Therefore, the contributing attorneys have a right to review a "written finding of facts and conclusions of law", issued by Trustees, on every claim paid, to insure only "eligible" claims are paid. Plaintiff requested such a written finding in a Records Request to NJLFCP (Pa67), but was denied those records by Ruby Cochran, Deputy Counsel, claiming R. 1:28-9, did not allow disclosure. To ensure the mandates of R. 1:28 are followed, full disclosure of the Trustees' deliberations should be publically available to the plaintiff, to prevent "sole discretion" from becoming "carte blanche discretion".

POINT II

THE TRIAL COURT ERRED IN NOT DECLARING THE 1993 DISBARMENT ORDER RELIED ON BY THE NJLFCP AS A REQUIREMENT FOR AN ELIGIBLE CLAIM, TO BE VOID AB INITIO FOR LACK OF SUBJECT MATTER JURISDICTION.

(Raised Below: Pa16)

A. The Trial Court committed plain error by not finding the 1993 Disbarment Order of Plaintiff, void *ab initio*, because the undisputed record contains clear and convincing evidence that the Supreme Court lacked subject matter jurisdiction over

Plaintiff engaged in a personal business transaction, and the decision should be reversed.

Subject matter jurisdiction cannot be waived, Royster v. New Jersey State Police, 439 N.J. Super.554 (2015).

The New Jersey Supreme Court derives its authority over New Jersey attorneys from Article VI of the New Jersey State Constitution:

"3. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted."

Pursuant to this authority, The Lawyers' Fund for Client Protection ("Fund") was established by Rule 1:28: **"...whose purpose is the reimbursement, to the extent and in the manner provided by these rules, of losses caused by the dishonest conduct of members of the bar of this State."** (Pa91)

The necessary elements of "eligible claims" (losses) that the Trustees may consider for payment, are contained in Rule 1:28-3. Payments of Claims. One of the essential elements of an "Eligible Claim" under R 1:28-3(a)(2) is: **"on or after January 1, 1969, the attorney has been suspended, disbarred or placed in disability inactive status ..."**. In a letter dated May 14, 1993, from Defendant, NJLFCP to Plaintiff, Mr. Kenneth Irek, Roger S. Steffens, Deputy Counsel for NJLFCP, Defendant, stated that, inter alia:

"You have previously received a copy of the referenced claim. At the time we forwarded it to you the Fund lacked

jurisdiction to consider making an award to the claimant due to the fact that you had not been disciplined. Recent action by the Supreme Court in your case has conferred jurisdiction upon the Fund to consider claims against you...".

A copy of the Disbarment Order of Kenneth F. Irek, signed by Justice Wilentz on May 11, 1993, was attached, stating the Disciplinary Review Board filed a report with the Court recommending that Kenneth F. Irek be disbarred for the knowing misappropriation of escrow funds [emphasis added] in violation of RPC 1.15(b) and RPC 8-4(c), and:

"... and good cause appearing; ORDERED that KENNETH F. IREK be and hereby is permanently restrained and enjoined from practicing law...". (Pa233)

RPC 1.15(b) and RPC 8.4(c)(Pa130), are rules of professional conduct promulgated by the Supreme Court pursuant to their New Jersey Constitutional jurisdiction over the admission to the practice of law and the discipline of persons admitted.

The Supreme Court's responsibility in attorney disciplinary matters is to conduct an independent review of the record to determine whether the charges have been proved by clear and convincing evidence. R. 1:20-16(c) states: **"De Novo Review. Supreme Court review shall be de novo on the record."**

There were no findings of fact and conclusions of law evidencing a De Novo review by the NJ Supreme Court, other than accepting the recommendations of the Disciplinary Review Board in their

filed report. (Pa126) The Decision and Recommendation of the Disciplinary Review Board, decided December 28, 1992, concluded:

"Upon a de novo review of the record, the Board is satisfied that the DEC's conclusion that respondent acted unethically is fully supported by clear and convincing evidence. Respondent absconded with grievant's deposit monies, which grievants had entrusted to him for safekeeping until closing of title not because respondent was the president of Kirex, but because he was an attorney. Although it is respondent's status as a member of the bar that required him to abide by the high standards expected of the profession, he was also acting as an attorney in the transaction, as Kirex' counsel. Disbarment is, therefore, the only appropriate sanction for his knowing misuse of escrow funds. In re Hollendonner, 102 N.J. 21 (1985). A six-member majority of the Board so recommends. One member would have imposed a two-year suspension, believing that the record did not clearly and convincingly demonstrate that respondent was acting as an attorney. Two members did not participate. The Board further recommends that respondent be required to reimburse the Ethics Financial Committee for administrative costs." [Signed by Raymond R. Trombadore, Chair, Disciplinary Review Board] (Pa126)

The DRB added no new evidence to the record, only conclusions based upon the DEC record, leaving the DEC's record as the starting point and sole source of evidence resulting in the disbarment of Plaintiff. The DEC (formally known as the District IX Ethics Committee) record consists of three items, with only two items directly from the Szatmarys: A) the Attorney Grievance Form with attachments (Pa194); B) the transcript of the oral testimony of Cathleen D. Szatmary, with four attached exhibits (Pa206); and one item of conclusions: C) the Hearing Panel Report. (Pa309)

In analyzing the plain language of Zontan and Cathleen Szatmary's Attorney Grievance Form, received by Walton W. Kingsberry III, sometime before February 27, 1991, (Pa194) the following can be found:

1) Was the specific lawyer complained of [Kenneth F. Irek] your lawyer? No

2) The basis of our Complaint is that Mr. Irek was both an Officer of the Contracting Corp., Kirex Development Co., and an Attorney in dealing with us....

3) We believe Mr. Irek acted as an Attorney for Kirex Development Co., as well as an Official of that Company.

In analyzing the plain meaning of the transcript of Cathleen Szatmary's oral testimony on July 29, 1992, before the District IX Ethics Committee, (Pa206) the following can be found:

1) Plaintiff was the President of Kirex, and Kirex owned the real property being purchased by the Szatmarys;

2) The Szatmary's were represented by attorney Dennis Poane;

3) The \$5,000 deposit check was made payable to Kirex Dev. Co., and endorsed in ink by Plaintiff as President of Kirex as: 'Kirex Development Co.';

4) The Contract for Sale of Real Estate (P-1 exhibit), clause 5. states that: "5. DEPOSIT MONIES: All deposit monies will be held in trust by Kirex Development Co. located at Colts Neck, N.J. until Closing."

5) Cathleen Szatmary was not aware of any verbal discussions between her attorney, Dennis Poane, and Plaintiff with regard to the deposit being held in escrow;

6) Cathleen Szatmary spoke to Plaintiff only once and never met him;

7) Cathleen Szatmary testified that the liens and judgments would not have exceeded the total price of the lot and that Plaintiff "would have came (sic) out with some money";

In summary, applying New Jersey law to the direct oral and written testimony of Claimants, and using the "clear and convincing" quantum of evidence contained in R.1:20-6(c)(2)(B), results in the following:

- 1) Rule 1:28 does not apply to Plaintiff since the loss must be caused by the dishonest conduct of the lawyer and shall have arisen out of and by reason of a client-lawyer relationship or a fiduciary relationship between the lawyer and the claimant;
- 2) Plaintiff breached a real estate contract, a civil, not a criminal matter and that there were adequate remedies at law and equity for the Claimant, including specific performance and money damages;
- 3) Kirex was a New Jersey for-profit corporation and could not have a trust account;
- 4) Even if Plaintiff was acting as Kirex's attorney, New Jersey attorneys have no authority to control their client's bank accounts;
- 5) Claimant voluntarily made the \$5,000 deposit check to Kirex, and Kirex had no legal duty to hold it in trust for the Claimant;
- 6) A seller of real estate (or their attorney) has no fiduciary obligation to the buyer;

7) An attorney-client relationship is a voluntary form of agency and cannot be creatively imputed by the Claimant; (Restatement (Third) of Agency)

8) There is no credible evidence respondent was acting as Kirex's attorney;

9) RPC 1.15 (b) does not apply to Plaintiff because he did not receive funds in which a client or third person has an interest. Kirex received the deposit check, not Irek, and Irek acting as the President of Kirex, deposited the check into the corporation's business account, which is the normal business procedure. (If Irek was acting as an attorney, he would have no legal authority to sign his client's check and deposit into the client's bank account) There were no funds of a "client or third person", only funds paid to the potential seller. New Jersey corporate law, and corporate law in general, separates the owners of a corporation from the corporation itself, and treats them as distinct entities;

10) RPC 8.4(c) does not apply because there is no credible evidence that Plaintiff engaged in conduct involving:

a) dishonesty. Plaintiff proceeded through the normal steps involved in a New Jersey real estate closing until he breached the contract and was unavailable to close. Breach of contract is not a crime or even a tort. Punitive damages are generally not an available remedy. (Restatement (Second) of Contracts)

b) fraud. The record does not contain evidence of the five elements necessary for fraud in New Jersey: material misrepresentation of an existing fact, knowledge by the defendant of its falsity, an intention that the other party rely on it, reasonable reliance by the other party, and resulting damages.

c) deceit. The New Jersey Jury Charge 3.30E, Fraud - Deceit, explains that Plaintiff (in the instant case the "Claimant") sustained damages as a result of a misrepresentation made by the defendant (in the instant case, "Irek"). The evidence shows that Claimant never met Irek and only spoke to him once on the phone. Claimant's attorney, Dennis Poane was the person who instructed the claimants to write the deposit check to Kirex, since Irek was an attorney. Plaintiff made no false representations to claimants. Additionally, there is no evidence that Irek made any misrepresentations to Claimant's attorney. (Pa42)

d) misrepresentation. Plaintiff owned the property being sold, and the liens were less than the sale price. (Pa216) The Claimant's testimony lacks any evidence of misrepresentation.

Finally, an analysis of the Hearing Panel Report (Pa309) which was the basis for the Disciplinary Review Board's Report which was the basis for the Supreme Court's Disbarment Order, using the testimony of the Szatmarys, finds the following

allegations and conclusions were not established by "clear and convincing evidence":

- 1) **Kenneth Irek was the attorney for Kirex Development Company;**
- 2) **He engaged in conduct that which constituted dishonesty, fraud, deceit and misrepresentation by failing to safeguard the \$5,000.00 deposit, which was to have been held in the trust account of his development company, and by misappropriating the deposit belonging to the grievants.** The wording in the Contract For Sale of Real Estate refers to "held in trust by Kirex", not in a "trust account". Kirex had no trust account because regular NJ corporations have no fiduciary responsibility to their customers, and the Claimants were potential buyers to the seller, Kirex;
- 3) **"...he [Irek] received money in a fiduciary capacity with the money placed in trust and failed to safeguard it and return it."** "Fiduciary capacity" is not a term defined in the NJ RPC, but the general definition of "fiduciary", as found in the majority of explanations on the internet, refers to a person acting for a trust or an estate; an executor or trustee.
- 4) **"The panel finds defendant [emphasis added] guilty of Count Three, a violation of R.P.C. 8.4(c) because he accepted the money, misrepresented that it would be placed in trust and held until closing and then he absconded with the funds. His actions**

constitute misrepresentation, deceit, dishonesty and fraud upon Mr. and Mrs. Szatmary."

In summary, the claimant's evidence contained in the DEC record, showed Plaintiff's conduct was not regulated by the NJ RPC and that the NJ Supreme Court did not have subject matter jurisdiction to issue a Disbarment Order against Kenneth F. Irek. Chief Justice Wilentz's Disbarment Order that ostensibly conferred a required element of R. 1:28-3 that the attorney has been suspended, disbarred or placed in disability inactive status, was void *ab initio*, for lack of subject matter jurisdiction, thus the Defendant, NJLFCP, lacked a required element of R. 1:28, to consider a claim against Plaintiff. Therefore, the NJLFCP Board of Trustees' \$5,000 payment to the Szatmarys on November 26, 1993; "... **having considered the claim of Zontan Szatmary and Cathleen D. Szatmary, arising from the dishonest conduct of their attorney, Kenneth Irek...**", believing the Supreme Court disbarment of Plaintiff had conferred jurisdiction on them to consider claims against Plaintiff, was a payment in violation of the requirements of Rule 1:28, and, also, void *ab initio*.

POINT III

THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' CROSS-MOTION TO DISMISS PLAINTIFF'S VERIFIED COMPLAINT BECAUSE THE PLEADINGS CONTAIN UNDISPUTED FACTS SUPPORTING A CAUSE OF ACTION.

(Raised Below: 1T17-21)

A. The Trial Court's dismissal of Plaintiff's Verified Complaint was plain error because it contained undisputed evidence supporting the claim that the underlying Default Judgment was void *ab initio*, which is a claim upon which relief can be granted at any time, and should be reversed. Under R. 4:6-2(e), a complaint will be dismissed if it fails to state a claim upon which relief can be granted. "In considering a motion to dismiss under *Rule 4:6-2(e)*, courts search the allegations of the pleading in depth and with liberality to determine whether a cause of action is suggested by the facts." *Rosen v. Cont'l Airlines, Inc.*, 430 N.J. Super. 97, 101, 62 A.3d 321 (App. Div. 2013) (citation and internal quotation marks omitted). Every reasonable inference is accorded to the plaintiff. *Smith v. SBC Commc'ns, Inc.*, 178 N.J. 265, 282, 839 A.2d 850 (2004), *Bosland v. Warnock Dodge, Inc.*, 396 N.J. Super. 267 (2007). The standard governing the analysis of a motion to dismiss pursuant to R. 4:6-2(e) requires the complaint be examined 'in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an

obscure statement of claim, opportunity being given to amend if necessary. " Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746, 563 A.2d 31 (1989) (quoting Di Cristofaro v. Laurel Grove Mem'l Park, 43 N.J. Super. 244, 252, 128 A.2d 281 (App. Div. 1957)).

Plaintiff's Verified Complaint evidences that the on December 29, 1994, Michael T. McCormick, Deputy Counsel to Dependent, NJLFCP, filed a Civil Action Complaint against Kenneth Irek, Defendant in the Superior Court of New Jersey, Law Division, Mercer County. The Complaint stated, inter alia,

"In or about August 1990, while representing Zontan and Cathleen Szatmary, defendant embezzled, misapplied and converted to his own use the sum of \$5,000.00 received by him on behalf of Mr. and Mrs. Szatmary as funds to be held, in a fiduciary capacity, in escrow in connection with a real estate transaction."

NJLFCP had taken sworn statements from Zontan and Cathleen Szatmary that they were represented by their attorney, Michael Poane, Esq. Michael T. McCormick knew Kenneth Irek, was not representing Zontan and Cathleen Szatmary in that real estate transaction because Defendant, NJLFCP had access to the entire record of that matter. McCormick made material misrepresentations of existing facts, in his possession, which he ought to have known were false with the intention that the Mercer County Superior Court would rely on them and accept them as true and believe that the NJLFCP had jurisdiction over Irek's

conduct, pursuant to R. 1:28-3, and that the Court also had jurisdiction of the matter, which could be considered 'Fraud upon the Court. That is described as where a material misrepresentation has been made to the court, or by the court itself. The main requirement is that the impartiality of the court has been so disrupted that it can't perform its tasks without bias or prejudice. SEE Brocken v. Brocken, 2010 N.J. Super. Unpub. LEXIS 109. (2010)

There is no credible evidence that Kenneth Irek represented the Szatmarys as an attorney or as a fiduciary, nor is there credible evidence of any dishonest conduct by Kenneth Irek. Since the NJLFCP lacked jurisdiction over Irek, the Mercer County Superior Court lacked subject matter jurisdiction over the original 1994 legal proceeding, because the NJLFCP, an entity of the NJ Supreme Court, lacked subject matter jurisdiction to pay a claim against Kenneth Irek, and could not create jurisdiction where there was none.

Triffin v. Se. Pa Transp. Auth., 462 N.J. Super. 172 (App. Div. 2020):

A court must initially distinguish between claims based on the lack of subject matter jurisdiction and those based on the lack of personal jurisdiction. R. 4:6-2 identifies both as defenses that must be asserted in an answer or by timely motion to dismiss... The absence of subject matter jurisdiction, however, cannot be waived; it may be asserted at any other time, even on appeal. R. 4:6-7 empowers a court to dismiss whenever it appears by suggestion of the

parties or otherwise that the court lacks subject matter jurisdiction.

The Default Judgment entered March 22, 1995, has no legal effect because the court lacked subject matter jurisdiction, and is a complete nullity. All orders and actions stemming from that Default Judgment are void *ab initio*. The issue of subject matter jurisdiction may be raised at any time. Macysyn v. Hensler, 329 N.J. Super. 476 (2000); Restatement (Second) of Judgments.

Defendant's Board of Trustees, payed claimants Zontan and Cathleen Szatmary the sum of \$5,000.00, based upon the false statements that the claim arose from the dishonest conduct of their attorney, Kenneth Irek, but was not an "eligible claim" authorized by Rule 1:28, and cannot be enforced by an assignment of Claimants rights. Additionally, Defendant's original 1994 Complaint failed to state a cause of action, only that it paid \$5,000 to Claimants and Irek did not reimburse the NJLFCP for any of the monies. (Pa153) Defendants' Release, Assignment and Subrogation Agreement (Pa235) only assigns to the NJLFCP, all of rights, claims and interests against Kenneth Irek, that the Szatmarys may have. These might include an action for breach of contract or conversion, but an Assignment is not a cause of action by itself. The NJLFCP, while acting as a civil litigant, enjoys no special status and must follow the same Court rules as

any other party that does not exist as a "Committee of the Supreme Court of New Jersey, pursuant to R. 1:28-1, et seq." (Pa142)

A letter to Plaintiff dated April 18, 1995, from Michael T. McCormick states that:

"The Fund will retain local counsel, enter its judgment in California and thereafter pursue all available remedies to obtain satisfaction of its judgment." (Pa244)

This would have been the proper procedure, and would have afforded the Plaintiff the opportunity to contest the Judgment in a California court, but Defendants never instituted such an action. The NJLFCP has enforced other assignments and subrogation agreements with other parties, but always through an actual cause of action such as conversion. (1T15-19)

In summary, the Verified Complaint states a claim upon which relief can be granted, because it contains credible evidence that the 1995 Default Judgment was void *ab initio* for lack of subject matter jurisdiction by the NJLFCP, pursuant to R. 1:28-3.

Additionally, Plaintiff's Verified Complaint is based entirely on documents, sworn and unsworn, that comprise the entire record of this matter, that has been created and kept in complete control by Defendants. Plaintiff did not participate in any manner with the creation of the underlying records. He accepts as true the record as it stands, and does not dispute the facts therein. Plaintiff does dispute the incorrect legal conclusions

of New Jersey law, drawn from these undisputed records. Plaintiff instituted this civil action to have a Judicial determination, properly applying New Jersey law to the undisputed record.

Defendants aver in their Motion to Dismiss, that they are immune from tort liability and that the tort statute of limitations has run on the common law fraud, intentional infliction of mental duress, and libel-defamation claims. (Pa351) Notwithstanding these defenses, each cause of action contains the requisite elements and are viable on their face. A trial on the merits could conclude that the actions of Defendants are cognizable as violations of Plaintiff's Due Process protections, which are not affected by tort defenses. New Jersey is one of only a handful of States that allow Permanent Disbarment of New Jersey attorneys, without any recourse to reinstatement, ever. The procedure seems Constitutionally flawed because it allows for the deprivation of important property rights by non-judicial, untrained volunteer Ethics Committee members. A trial on the merits could decide that issue.

POINT IV

THE TRIAL COURT ERRED IN DENYING IREK'S MOTION FOR INJUNCTIVE RELIEF TO PREVENT IRREPARABLE HARM BY ARREST AND INCARCERATION.

(Raised Below: Pa364)

A. The Trial Court's Decision denying Plaintiff's claim for monetary injunctive relief based upon absolute immunity, does not affect the non-monetary injunctive claims and the denial of all the injunctive claims is plain error and should be reversed.

Crowe v. De Gioia, 90 N.J. 126 (1982) has been the standard authority for the evaluation of issuing preliminary injunctive relief since 1982. Four principles are considered:

The first is that a preliminary injunction should not issue except when necessary to prevent irreparable harm. Citizens Coach Co. v. Camden Horse R.R. Co., 29 N.J. Eq. 299, 303 (E. & A. 1878).

Subcarrier Commc'ns, Inc. V. Day, 299 N.J. Super, 634, 638 (App.Div. 1997). Harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages. In this case, Plaintiff's claims arise out of actions of Defendant, NJLFCP, beginning in 1995, to collect \$5,000 from Plaintiff, as reimbursement for a claim paid by them to a claimant, for the conduct of Plaintiff, during a real estate transaction. Based upon the facts set forth in the Verified Complaint, Defendants have caused the Mercer County Superior Court to issue an Order suspending Plaintiff's New Jersey Driver License. (Pal38) Defendants have caused the New Jersey Driver's License Forfeiture to be sent directly to the California Department of Motor Vehicles, requesting them to suspend or refuse to renew Plaintiff's California driver license. (Pal59) Defendant has caused the issuance of a Bench Warrant, dated March 23, 2015, sent to County of Los Angeles, stating:

'THEREFORE, we command you to take KENNETH F. IREK between the hours of 8:30 a.m. and 3:30 p.m. on Monday through Friday and safely and closely keep him in your custody in the common jail of the County of Los Angeles until he shall be brought before the Honorable William Anklowitz, J.S.C., Superior Court of New Jersey, Mercer County, or until said Court shall make Order to the contrary.' (Pa307) Defendant, in a letter sent to California Department of Motor Vehicles, dated October 22, 2004, Joanne M. Dietrich, Deputy Counsel to the Defendant, NJLFCP, stated, inter alia, **'The Fund exists as a Committee of the Supreme Court of New Jersey pursuant to R. 1:28-1 et seq. for the purpose of compensating the clients of disciplined attorney who misappropriated money from them. Kenneth Irek was such an attorney. His conduct while acting as a New Jersey lawyer, has resulted in claims with the Fund in the amount of \$5,000.00.'**

(Pa159) Immediate and irreparable harm could result if an Order is not issued enjoining and restraining Defendants from:

continuing to engage in conduct related to compelling Plaintiff to reimburse the NJLFCP for the \$5,000 claim they had paid to the claimants (Szatmarys); intentionally threatening the arrest of Plaintiff; intentionally inducing others to unlawfully cancel, remove or not renew any privileges or rights of Plaintiff; enforcing, continuing in effect or re-issuing all Bench Warrants related to the facts herein stated, in the State

of California; enforcing, continuing in effect or re-issuing all Bench Warrants related to the facts herein stated, in the State of New Jersey; enforcing, continuing in effect or re-issuing all Bench Warrants related to the facts herein stated, in any other State where they may have sent them; enforcing, continuing in effect or re-issuing New Jersey Driver's License Forfeiture; and defendants and other persons acting in concert with them and at their direction, from publishing, republishing, distributing and redistributing false, disparaging, defamatory and malicious statements, including but not limited to, that Plaintiff engaged in dishonest conduct, misappropriated money, and embezzled, and misapplied and converted to his own use the sum of \$5,000.00.

The first Crowe factor has been met because Plaintiff is subject to irreparable harm because his arrest and incarceration, along with the other listed actions, cannot adequately be remedied by monetary damages. Money is not an adequate substitute for freedom.

Additionally, Defendants have stated in their Motion that Plaintiff is prevented from receiving monetary damages in his Tort Counts because they are time-barred. Also, having the State of New Jersey without formal judicial proceedings, request the State of California to have Plaintiff's Driver License revoked or not renewed, is harm to the Plaintiff that cannot be compensated by a monetary reward, since Plaintiff can be

deprived of access to medical care, his job and other essential and important activities.

A second principle is that temporary relief should be withheld when the legal right underlying plaintiff's claim is unsettled. Citizens Coach Co. v. Camden Horse R.R. Co., *supra*, 29 N.J. Eq. at 304-05. It involves a fact-sensitive analysis that "requires a determination of whether the material facts are in dispute, and whether the applicable law is settled. SEE Waste Mgmt., 399 N.J. Super. at 528 (2008). Here, the record included clear and convincing evidence that Defendants' did not have subject matter jurisdiction over Plaintiff's conduct and could not be granted a valid judgment, which is a well settled legal doctrine.

A third rule is that a preliminary injunction should not issue where all material facts are controverted. Citizens Coach Co. v. Camden Horse R.R. Co., *supra*, 29 N.J. Eq. at 305-06 (1878). Thus, to prevail on an application for temporary relief, a plaintiff must make a preliminary showing of a reasonable probability of ultimate success on the merits. Ideal Laundry Co. v. Gugliemone, 107 N.J. Eq. 108, 115-16 (E. & A. 1930). That requirement is tempered by the principle that mere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the *status quo*. See Naylor v. Harkins, 11 N.J. 435 (1953).

Here, the third Crowe factor has been met because Counts One, Two and Three of Plaintiff's Complaint are premised upon lack of Subject Matter Jurisdiction, which has no time constraints and voids all ensuing actions based upon the void judgment or action. (Pa11;13;14) Counts Four, Five and Six are cognizable on the face of the Verified Complaint, as they contain the essential elements of their causes of action, and are capable of being sustained by adequate opposition to Defendants' defenses, or considered Due Process violations. (Pa17;18;20)

The final test in considering the granting of a preliminary injunction is the relative hardship to the parties in granting or denying relief. Isolantite Inc. v. United Elect. Radio & Mach. Workers, 130 N.J. Eq. 506, 515 (Ch.1941), mod. on other grounds, 132 N.J. Eq. 613 (E. & A. 1942).

Defendants' motion brief clearly states that they see no harm in continuing to violate Irek's rights: "As to the irreparable harm factor, Irek faces no harm via an ongoing violation of his rights." (Pa356) Defendants claim they "... would incur a substantial hardship because they would be concluded from enforcing their rights as litigants, namely satisfying the judgment that was lawfully obtained." (Pa358) But Defendants are not your ordinary litigants, as can be seen from their 25-year, unrelenting pursuit to collect \$5,000 from Plaintiff, by improperly utilizing their vast panoply of official powers to

coerce him into submission. (Plaintiff paid the Fund \$2,500 for fear of being arrested in California, Pa317) They can utilize the entire state of New Jersey's official resources to request forfeiture of their judgment debtor's important property rights, in states thousands of miles away, with no formal proceedings in that state; and to incarcerate their civil law opponents, for a civil money judgment. (See examples at Pa159;292;300)

It is improbable that the Defendants would incur a substantial hardship if temporally prevented from continuing to collect the sum allegedly still owed to the Fund of \$2,500.00 from Plaintiff, since the NJLFCP collects a mandatory annual assessment from most of the 98,774 lawyers licensed in New Jersey (NJLFCP First Quarter Report 04/13/2021), and if restrained from collecting \$2,500, it is unlikely to impede the continuing operation of the Fund.

Additionally, 25 years after Defendants fraudulently obtained the Default Judgment, they still ignore the clear and convincing evidence contained in the record and believe:

"The Judiciary Defendants are merely utilizing proper channels to satisfy the default judgment against Irek. Despite Irek's conclusory allegations to the contrary, he has not demonstrated that the judgment was improperly procured. The Judgment exists only because Irek - as an escrow agent on behalf of Kirex - misappropriated the Szatmarys' funds, which in turn resulted in the Szatmarys applying for and receiving an award from the Fund in that exact amount. The mere fact that he was not the Szatmarys' attorney does not negate the obvious that the Szatmarys'

deposit was held in escrow and Irek was the designated escrow agent when he absconded with their money.” (Pa356)

The Plaintiff's Motion for Injunctive Relief Temporary

Restraints meets all of the Crowe requirements for issuance:

- 1) it is necessary to prevent irreparable harm;
- 2) the lack of subject matter jurisdiction claims contained in the Verified Complaint are cognizable on their face;
- 3) all material facts, verified by the record, are uncontroverted and undisputed;
- 4) the Defendants will suffer little or no hardship by the granting of injunctive relief, whereas, if the motion is not granted, Plaintiff could be arrested and incarcerated, under the CEP; and continue to suffered damages and injury to his personal, business and professional reputation including suffering embarrassment, humiliation, anguish, loss of employability, and significant economic loss in the form of lost earnings and benefits, from Defendants' publishing, republishing, distributing and redistributing false, libelous, disparaging, defamatory and malicious statements, including but not limited to, that Plaintiff engaged in dishonest conduct; misappropriated money; and embezzled, misapplied and converted to his own use the sum of \$5,000.00.

Additionally, use of the Comprehensive Enforcement Program to collect civil judgments by the NJLFCP (Pa122) is in violation of

the New Jersey State Constitution, Article I Rights and Privileges, Paragraph 13, because the Default Judgment is founded upon a civil contract for reimbursement of \$5,000 pursuant to an assignment of the rights of Zontan and Cathleen and Szatmary. (Pa154)

Paragraph 13 states:

"13. No person shall be imprisoned for debt in any action, or on any judgment founded upon contract, unless in cases of fraud; nor shall any person be imprisoned for a militia fine in time of peace."

The Legislative History of the CEP, February 24, 1994, describes its purpose within its first 10 lines:

"The Legislature finds and declares that: a. The Judiciary routinely enters judgments, and court orders setting forth assessments, surcharges, fines and restitution against litigants pursuant to statutory law." and "d. The Judiciary has successfully developed a hearing officer program in child support enforcement and a pilot criminal enforcement court project... that have demonstrated significant increases in collection and compliance." (Pa266)

Clearly, the CEP was created to increase the collections of monies related to directly obtained Judiciary judgments, assessments, surcharges, fines and restitution; not civil judgments that have their own procedures for collections.

Defendants argue that the use of the CEP for issuing Bench Warrants is not for non-payment; it was for not appearing. A distinction without a difference. Ruby Cochran's oral argument statement:

"I also wanted to point out that Mr. Irek is, apparently, let's say confused about the comprehensive enforcement program. The comprehensive enforcement program does not allow for bench warrants to be issued or driving privileges to be suspended for nonpayment. There's no debtor's prison in New Jersey. What we have, however are multiple situations where Mr. Irek refused to appear at hearings

before hearing officers, or he could have appeared before a judge had he chosen to do so. And as a result of what appeared to be contempt of court, this comprehensive enforcement program does allow for the bench warrants to be issued and the driving privileges to be suspended. Those were approved. Those orders were approved and signed off on by the judge that was overseeing the comprehensive enforcement program in Mercer County for the Client Protection Fund. That was not for nonpayment. It was for not appearing." (1T21-10)

The ability to have Irek, a judgment-debtor, arrested and sent to New Jersey for a hearing, is not a normal remedy available to enforce civil judgments, but rather a remedy used in criminal matters:

"THEREFORE, we command you to take KENNETH F. IREK between the hours of 8:30 a.m. and 3:30 p.m. on Monday through Friday and safely and closely keep him in your custody in the common jail of the County of Los Angeles until he shall be brought before the Honorable William Anklowitz, J.S.C., Superior Court of New Jersey, Mercer County, or until said Court shall make Order to the contrary." (Pa307)

Use of the Comprehensive Enforcement Program is also a violation of Paragraph 8 of the New Jersey State Constitution:

"8. No person shall be held to answer for a criminal offense, unless on the presentment or indictment of a grand jury, except in cases of impeachment, or in cases now prosecuted without indictment, or arising in the army or navy or in the militia, when in actual service in time of war or public danger";

Defendants, an entity of the New Jersey Supreme Court, have published false and defamatory statements, claiming Plaintiff committed criminal acts, in violation of State and Federal Constitutional protections: "defendant embezzled, misapplied and

converted to his own use the sum of \$5,000.00". (Pa153)

Embezzlement is a crime of the third degree in New Jersey, 2C sec 20-11, and there is no clear and convincing evidence that Irek was held to answer on the presentment or indictment of a grand jury. Additionally, over a 17-year period, more than 40 letters were sent to Plaintiff regarding use of the arrest and incarceration powers of the CEP to enforce their civil default judgment (Pa289), which actually coerced Irek to send small payments totaling \$2,500, over that time period, for fear of arrest and incarceration, in violation of Irek's New Jersey and Federal Constitutional protections.

In summary, the authority of Defendants to utilize the CEP to enforce their Default Judgment elevates the civil matter to a criminal one, without the procedural protections afforded a defendant, such as a standard of proof of beyond a reasonable doubt; a trier of fact and law that is a qualified judicial official, such as a sitting judge, rather than untrained, volunteer attorneys, as are used in Attorney discipline matters under Rule 1:20. The probability of irreparable harm to the Plaintiff is greatly increased by Defendants' intentional disregard for the procedures required by New Jersey law to obtain a valid civil money judgment and to collect upon it.

POINT V

THE TRIAL COURT ERRED IN NOT ALLOWING THE DEFENDANTS' ANSWER TO BE FILED BEFORE DISMISSAL OF THE COMPLAINT.

(Raised Below: 1T17-21)

A. The Trial Court's Decision that it lacks subject matter jurisdiction over Plaintiff's claim is plain error: **"This Court has no jurisdictional power to review the Fund's discretion in awarding the Szatmarys \$5,000 or in the Fund's decision to seek and obtain default judgment and then collect."** (2T6-2)

Judge Hurd adopts Defendants' incorrect interpretation of Plaintiff's Complaint: **"Essentially, he challenges the Fund's discretionary decisions, including its determination to award \$5,000.00 to two claimants and its decision to recoup that award by way of obtaining a judgment against Irek."** (Pa332) Both the Court and Defendants rely on GE Capital Mortgage Servs., Inc. v N.J. Title Ins. Co., 333 N.J. Super. 1,5 (App. Div. 2000), for the proposition that the Court lacks subject matter jurisdiction over Plaintiffs claim under R. 1:28-3(b). GE Capital was a case brought against the Fund by a disappointed claimant and the Superior Court granted summary disposition in favor of the Fund, based upon R. 1:28-3(b), Consideration of Claims, which gives the Trustees sole discretion regarding "eligible claims".

"Under our State Constitution, the Supreme Court is vested with exclusive authority over the regulation of the Bar. N.J. Const. art. VI, § 2, P3; In re LiVolsi, 85 N.J. 576, 583, 428 A.2d 1268 (1981) (direct petition to Supreme Court). Pursuant to this authority, the Court created the Fund for the express purpose of reimbursing, to a certain extent, the losses caused by the dishonest conduct of members of the New Jersey bar. R. 1:28-1(a). Notably, though, the Court mandated that "[n]o claimant or any other person or organization shall have any right in the Fund as beneficiary or otherwise." R. 1:28-3(d). Rather, the Court directed it would be within the "sole discretion" of the seven trustees appointed to administer and operate the Fund to determine "which eligible claims merit reimbursement from the Fund and the amount, time, manner, conditions and order of payment of reimbursement." R. 1:28-3(b); see N.J. Lawyers' Fund v. First Fid. Bank, 303 N.J. Super. 208, 210-11, 696 A.2d 728 (App.Div.1997). Ibid p4

Reliance on GE Capital is misplaced because Plaintiff's Complaint is based upon R. 1:28-3(a), Eligible Claims, not R. 1:28-3(b), Consideration of Claims. As the titles suggest, part (a) contains the necessary requirements for an "Eligible Claim, while part (b) contains factors the Trustees shall consider in determining which eligible claims merit reimbursement:

"The trustees in their sole discretion [*emphasis added*] but on the affirmative vote of 4 of them shall determine which eligible claims merit reimbursement from the Fund and the amount, time, manner, conditions and order of payment of reimbursement. In making such determinations the trustees shall consider, among other appropriate factors, the following..."

Payment of "eligible claims" is contained in R. 1:28-3(a), which states, inter alia, that the Trustees may consider for payment all claims resulting from the dishonest conduct of a member of

the bar of this state... if the attorney was acting either as an attorney or fiduciary, and ... the attorney has been suspended, disbarred or placed in disability inactive status. [*emphasis added*] The requirements of R. 1:28-3(a) must be met before the Trustees can consider, in their sole discretion, which eligible claims [*emphasis added*] merit reimbursement from the fund.... GE Capital finds that the Supreme Court is the only proper forum for challenges [*emphasis added*] to Rule 1:28, since it was promulgated by the Supreme Court pursuant to its New Jersey Constitutional authority. It is clear that Plaintiff fully agrees with that holding, since the instant case asserts that the requirements of Rule 1:28-3(a) must be present for an "eligible claim" to be considered. The Supreme Court makes the rules and the Trustees follow the rules. The very first sentence states that the attorney must be acting either as an attorney or fiduciary. It is a condition precedent to the following provisions of R. 1:28-3.

B. The Superior Court is the proper forum to adjudicate this case. Judge Hurd's decision that the Superior Court does not have subject matter jurisdiction over the Plaintiff's claim (2T5-21) incorrectly categorizes this case as one disputing the Fund's discretion under R. 1:28-3(b), where the holding in GE Capital governs, while this case is actually a reply to the NJLFCP 1994 Complaint and subsequent Default Judgment entered

March 22, 1995, in this Court; " **This is an action brought by Plaintiff to declare, void ab initio, a fraudulently obtained Default Judgment entered by this Court on March 22, 1995, Docket No. MER L 005664-94; Judgment No. J 082161-95; and entered as a Lien on 3-31-1995.**" (Pa7) and "NJLFCP lacked subject matter jurisdiction over Kenneth Irek because he did not represent the Szatmarys as an attorney or as a fiduciary." (Pa10) This case began here and should end here. It is the proper forum for cases brought for or against the NJLFCP, and has been since its creation. See NJLFCP v. Pace, 374 N.J. Super 57 (2005); N.J. Lawyers' Fund for Client Prot. v. First Fidelity Bank, N.A., 303 N.J. Super. 208, App Div. (1997)

C. Allowing this case to proceed to a trial on the merits, could resolve important questions of law, such as: if Title 59 applies or does R. 1:28-1(f); were the Defendants' performing their official duties; were there violations of the Federal Fair Debt Collection Act; were there violations of the Interstate Driver License Compact; were there violations of Sister State judgment enforcement; were their violations of the NJ Constitution by using the Comprehensive Enforcement Program to incarcerate Plaintiff based upon non-payment of a civil default judgment; discovery could produce documents denied by the NJLFCP under R. 1:28-9, relating to the Trustees proper payment of the claim against Plaintiff; were the Defendants and others in

concert with Defendants and at Defendants' direction, improperly acting under color of law by publishing false written statements containing disparaging and defamatory statements that were intended to libel and defame Plaintiff, that deprived Plaintiff of rights and privileges protected by the Constitution of the United States; were Plaintiff's Due Process protections violated by use of untrained, non-judicial volunteers to deprive Plaintiff of his law license, a constitutionally protected property right; and other related issues, in violation of the New Jersey Constitution, Article I, Paragraph 13 of the NJ Constitution.

[Coincidentally, Daniel R. Hendi was Deputy Counsel for the Fund when the original Civil Complaint was filed on 12/21/1994; Senior Counsel for the Fund and on the brief for GE Capital, in 2000; and as current Director of the NJLFCP, sent Plaintiff a letter stating he still owed the Fund \$2,500, dated October 30, 2020].

CONCLUSION

Plaintiff therefore respectfully requests that this Court reverse the trial court's order granting Defendants' Cross-Motion to Dismiss Plaintiff's Verified Complaint, with prejudice and denying Plaintiff's Motion for Injunctive Relief, with prejudice; hold that the Default Judgment was void *ab initio*, because Plaintiff was not acting as an attorney or fiduciary, and the New Jersey Supreme Court and its entities lacked subject matter jurisdiction over Plaintiff while engaging in personal business transactions; and remand the matter for injunctive relief as requested in the underlying Motion, and determination of Plaintiff's amount of damages. If remanded for a trial on the merits, Plaintiff requests a jury trial.

Respectfully submitted,

Kenneth Frank Irek,
Plaintiff - Appellant, Pro Se
Dated: June 08, 2021