

NEW JERSEY
LAWYERS' FUND
FOR CLIENT PROTECTION

Comments, Explanations and Annotations
by Kenneth F. Irek

“... while representing Zontan and
Cathleen Szatmary,
defendant embezzled, misapplied
and converted”

Superior Court of New Jersey, Complaint,
Docket No. L-5664-94, Signed and Certified by
Michael T. McCormick, Deputy Counsel, that
the statements are true, Filed December 29,
1994.

Comments, Explanations and Annotations

Quote from the record:

“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.”

Legal Question:

Does a material misrepresentation of a present fact in a Civil Complaint, constitute a violation of N.J. Stat. § 2C:28-2, False swearing?

Discussion:

The basis of this crime is making a false statement under oath:

N.J. Stat. § 2C:28-2, False swearing

- a. False swearing. A person who makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of such a statement previously made, when he does not believe the statement to be true, is guilty of a crime of the fourth degree.
- b. Perjury provisions applicable. Subsections c. and d. of section 2C:28-1 apply to the present section.
- c. Inconsistent statements. Where the defendant made inconsistent statements under oath or equivalent affirmation, both having been made within the period of the statute of limitations, the prosecution may proceed by setting forth the inconsistent statements in a single count alleging in the alternative that one or the other was false and not believed by the defendant. In such case it shall not be necessary for the prosecution to prove which statement was false but only that one or the other was false and not believed by the defendant to be true.

The New Jersey Model Criminal Jury Charges regarding False Swearing:

2C:28-2a, False Swearing

(Defendant) is charged with false swearing in violation of a statute which provides in pertinent part as follows: A person who makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of such a statement previously made, when he does not believe the statement to be true, is guilty of a crime. Here, the State alleges that (defendant) committed false swearing by having [made] [subsequently sworn to the truth of] [subsequently affirmed] the following statement: [REFER TO STATEMENT] To find (defendant) guilty of false swearing, the State must prove the following elements beyond a reasonable doubt:

1. That (defendant) made a statement.
2. That he/she made the statement knowingly.

3. That the statement was false.
4. That (defendant) did not believe that the statement was true when he/she made it.
5. That the statement was made under oath or equivalent affirmation [OR, IF APPLICABLE, that (defendant) subsequently swore to, or affirmed, the truth of the previously made statement while under oath or equivalent affirmation].

First, the State must prove beyond a reasonable doubt that (defendant) made a statement. A statement means any representation, including a representation of opinion, belief, or other state of mind, only if the representation clearly relates to state of mind apart from or in addition to any facts which are the subject of the representation.

Second, the State must prove beyond a reasonable doubt that (defendant) made the statement knowingly. A person acts knowingly with respect to the nature of his/her conduct or the attendant circumstances if he/she is aware that his/her conduct is of that nature or that such circumstances exist, or he/she is aware of a high probability of their existence.

Knowledge is a condition of the mind. It cannot be seen. Often, it can only be determined by inference from conduct, words, or acts. A state of mind is rarely susceptible of direct proof, but must ordinarily be inferred from the facts. Therefore, it is not necessary that the state produce witnesses to testify that a defendant said that he/she knowingly did something. It is within your power to find that such proof has been furnished beyond a reasonable doubt by inferences which may arise from the nature of his/her acts and conduct, and from all that he/she said and did at the particular time and place, and from all the surrounding circumstances.

Third, the State must prove beyond a reasonable doubt that the statement was false.

Fourth, the State must prove beyond a reasonable doubt that (defendant) did not believe that the statement was true when he/she made it. (Defendant's) belief that the statement was not true may be established by proof of (defendant's) actual knowledge that the statement was untrue, or by proof of such facts from which it might reasonably be inferred that (defendant) did not believe that the statement was true. I have previously explained to you what the concept of "knowingly" means. There is no criminal liability, however, for inadvertent misstatements, such as (defendant's) misunderstanding of a statement or a question or an unconscious slip of the tongue.

Fifth, the State must prove beyond a reasonable doubt that the statement was given under oath or equivalent affirmation [OR, IF APPLICABLE, that defendant subsequently affirmed or swore to the truth of the previously made statement while under oath or equivalent affirmation]. Any device employed to demonstrate the special importance of the promise of honesty, that is, the seriousness of the demand for honesty, constitutes an oath or equivalent affirmation.

The State must prove each of these elements beyond a reasonable doubt. If the State has failed to prove each of these elements beyond a reasonable doubt, your verdict must be not guilty of this offense. If, on the other hand, the State has proven each of these elements beyond a reasonable doubt, your verdict must be guilty.

AFFIRMATIVE DEFENSE OF RETRACTION [WHERE APPLICABLE]

As part of his/her denial of guilt, (defendant) asserts that he/she retracted [attempted to retract] a falsification. If (defendant) retracted [attempted to retract] the false statement in

the course of the proceeding in which it was made before that proceeding ended, without having caused irreparable harm to anyone, he/she is not guilty of false swearing. To retract means to take back what was said; to recant. The State has the burden of proving beyond a reasonable doubt that (defendant) did not retract [attempt to retract] (his/her) false statement.

If the State has failed to prove beyond a reasonable doubt that (defendant) did not retract [attempt to retract] (his/her) statement during the course of the proceeding and before causing irreparable harm to anyone, (he/she) must be found not guilty of false swearing. However, if the State has proven beyond a reasonable doubt that (defendant) did not retract [attempt to retract] (his/her) false statement, and the other enumerated elements of the offense have also been proven beyond a reasonable doubt, you must return a verdict of guilty on this offense.

Does the False Swearing statute apply to the sworn statements made by Michael T. McCormick in the Civil Action Complaint, New Jersey Lawyers' Fund for Client Protection, Plaintiff, v.

Kenneth Irek, Defendant, Docket No. L-5664-94, filed December 29, 1994?

All 5 of the required elements must be present and able to be proved beyond a reasonable doubt.

Beginning with element 1; That (defendant) made a statement - the above-described Complaint is the "statement".

Element 2; That he/she made the statement knowingly. The written Complaint contains a "Certification", signed by Michael T. McCormick, Deputy Counsel, that states, inter alia: "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Element 3; That the statement was false. Michael T. McCormick was Deputy Counsel to the NJLFCP when Cathleen Szatmary filed a Statement of Claim with the Fund, received by the Fund on April 16, 1991, stating the attorney for her and her husband was Dennis D. Poane. As early as April 16, 1991, he knew or should have known Kenneth Irek was not the Szatmary's attorney.

Element 4; That (defendant) did not believe that the statement was true when he/she made it. Michael T. McCormick was Deputy Counsel to the Fund when Cathleen Szatmary and her husband filed the claim documents that were the basis for the Civil Complaint. These sworn documents clearly state that Dennis D. Poane was their attorney, and they are accompanied by letters from Dennis D. Poane, Esq., regarding the real estate closing, where he states he is representing the Szatmarys. Michael T. McCormick had to be familiar with these documents because information from them was used to prepare the Civil Complaint.

Element 5; That the statement was made under oath or equivalent affirmation. The Certification signed at the end of the Civil Complaint certifies that the statements are true and that if any of them are willfully false, he is subject to punishment, is an equivalent affirmation.

Conclusion:

All 5 elements of New Jersey statute 2C:28-2a, False Swearing, are present in the Civil Complaint signed by Michael T. McCormick.

Suggested Revisions to Existing Procedure(s):

None

Fact Summary:

In May of 1990, Plaintiff, Kenneth Frank Irek (Irek) advertised the sale of a vacant construction lot in Jackson, New Jersey, owned by his solely owned New Jersey corporation, Kirex Development Company, Inc. 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 both parties and Cathleen Szatmary made a \$5,000 check payable to "Kirex Dev. Co", dated May 29, 1990, 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 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. The liens and judgments that Poane knew of would not have exceeded the total purchase price of the lot. On or about August, 1990, Irek became unavailable and the closing never took place and the \$5,000 deposit was not returned. On February 27, 1991, the Szatmarys ("Claimants") filed an Attorney Grievance with the District IX Ethics Committee. On April 12, 1991, Claimants filed a written "Statement of Claim" with the NJLFCP, stating that they lost Five Thousand dollars from Kenneth Irek, based on a Fiduciary Relationship (escrow agent). On July 29, 1992, Cathleen Szatmary testified before the District IX Ethics Committee. 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 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. 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, 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, 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 NJLFCP. Twenty-five years later, 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*. 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. 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. On December 14, 2020, Plaintiff filed a Reply to Defendants' Cross-Motion, opposing dismissal of his Verified Complaint and Injunctive Relief. On December 15, 2020, Defendants filed a request for leave of court to file a sur-reply. On December 15, 2020, Plaintiff filed a response to Defendants' request to file a sur-reply. On December 18, 2020, a telephonic oral argument was held for 34 minutes, before Judge Douglas H. Hurd, P. J. Cv. 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. It is from this Order that Plaintiff appealed to the Superior Court, Appellate Division. On December 21, 2020, Judge Douglas H. Hurd put his motion decision on the record. On January 7, 2021, Plaintiff filed a Notice of Appeal of Judge Hurd's Order. On March 3, 2022, in-person oral argument was heard. On May 18, 2022, the Appellate Division's Per Curiam decision affirmed the Superior Court's dismissal of Irek's Verified Complaint and denial of injunctive relief. On May 18, 2022, Plaintiff filed a Notice of Petition for Certification with the Supreme Court of New Jersey. On June 15, 2022, Plaintiff filed a Petition for Certification with the Supreme Court of New Jersey.