

NEW JERSEY
LAWYERS' FUND
FOR CLIENT PROTECTION

Comments, Explanations and Annotations
by Kenneth F. Irek

“... 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.

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created by Kenneth F. Irek for
clarification and indexing.

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 ...”

Legal Question:

1. Does committing a criminal act in the performance of their official duties, by a person covered by Rule 1:28-1(f) New Jersey Lawyers' Fund for Client Protection:

Rule 1:28 -1(f) Immunity. The Board of Trustees, Director and Counsel, Deputy Counsel, Secretary and all staff personnel shall be absolutely immune from suit, whether legal or equitable in nature, for any conduct in the performance of their official duties.

negate the absolute immunity conferred upon them?

Discussion:

Michael T. McCormick misrepresented in a certified Civil Action complaint, filed against Kenneth Irek, that Irek was representing Zontan and Cathleen Szatmary, claimants against the NJLFCP, which he knew or should have known, was not true. All the elements necessary for False Swearing, N.J. Stat. § 2C:28-2 False swearing, are present. The question is whether “conduct in the performance of their official duties”, includes conduct that could be considered “criminal”?

Section: 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.

Civil Complaint filed on December 29, 1994, certified and signed on December 21, 1994, by Michael T. McCormick, Deputy Counsel for the New Jersey Lawyers' Fund for Client Protection, states false statements that directly contradict the evidence collected by the NJLFCP, and in his possession, that Kenneth F Irek was representing Zontan and Cathleen Szatmary:

NEW JERSEY LAWYERS' FUND
FOR
CLIENT PROTECTION.

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RICHARD J. HUGHES JUSTICE COMPLEX
CN-961

TRENTON, NJ 08625-0961

BILLING: (609) 292-8079

CLAIMS: (609) 292-8008

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ASSISTANT TREASURER
FRANK C. FARR

STREET ADDRESS FOR DELIVERIES:
25 W. MARKET STREET

FAX (609) 394-3637

December 21, 1994

Mercer County Clerk
P.O. Box 8068
Trenton, New Jersey 08625

**Re: New Jersey Lawyers' Fund for Client Protection
v. Kenneth Irek; CPF-520**

Dear Clerk:

Enclosed for filing is the original and two copies of a Complaint in the above matter. Kindly file and return a filed copy of the Complaint to me in the envelope provided.

As a Committee of the Supreme Court, the Fund is exempt from fees in this regard.

Thank you.

Sincerely,

Handwritten signature of Michael T. McCormick in cursive script.
Michael T. McCormick

enclosures
MM/1

FEE PAID
() ACCOUNT () CHECK
() CASH () NO FEE
() MONEY ORDER
ENTERED

DEC 29 1994

ALBERT E. DRIVER, JR.
COUNTY CLERK
DEPUTY CLERK/SUP. CT.
1994 DEC 29 AM 8:01
RECEIVED & FILED
MERCER COUNTY
CLERKS OFFICE

New Jersey Lawyers' Fund for _____
Client Protection AMOUNT _____
Richard J. Hughes Justice Complex OVER _____
CN-961 BY: _____
Trenton, NJ 08625
Michael T. McCormick, Deputy Counsel
(609) 984-7179

NEW JERSEY LAWYERS' FUND FOR : SUPERIOR COURT OF NEW JERSEY
CLIENT PROTECTION : LAW DIVISION
Plaintiff : MERCER COUNTY
v. : DOCKET NO. L-5664-94
KENNETH IREK : Civil Action
Defendant : COMPLAINT

The plaintiff, New Jersey Lawyers' Fund for Client Protection, an entity established by the Supreme Court of New Jersey under R. 1:28-1, et seq., Richard J. Hughes Justice Complex, CN-961, Trenton, New Jersey 08625, complaining against the defendant says:

1. The plaintiff was established to reimburse clients for losses caused by the dishonest conduct of members of the Bar of New Jersey.
2. Defendant maintained offices for the practice of law at 41 Highway 34, Colts Neck, New Jersey 07722.
3. Defendant was disbarred from the practice of law on May 11, 1993.
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,

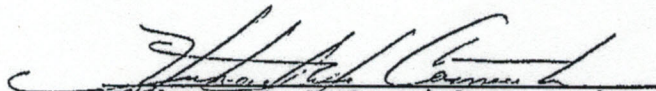
in escrow in connection with a real estate transaction.

5. The individuals named in paragraph four of this complaint filed a claim with plaintiff on account of the dishonest conduct of the defendant.

6. Pursuant to R. 1:28-1, et seq., of the Rules Governing the courts of New Jersey, the plaintiff has paid the claim of the Claimants named in paragraph four and has received an assignment of all their rights, claims and interest against the defendant.

7. To date, defendant has not reimbursed the plaintiff for any of the monies paid on his behalf.

WHEREFORE, plaintiff demands judgment against the defendant for damages in the amount of FIVE THOUSAND DOLLARS (\$5,000.00) plus interest from the date of Complaint and costs of suit.


Michael T. McCormick
Deputy Counsel
Attorney for Plaintiff


Dated: December 21, 1994

CERTIFICATION

I hereby certify pursuant to R. 4:5-1 that, to my knowledge, the matter in controversy is not the subject of any action pending in any court nor is there any pending arbitration proceeding, nor is any such action or arbitration contemplated. I further certify that there are no other parties who should be joined in this

action.

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
wilfully false, I am subject to punishment.


Michael T. McCormick
Deputy Counsel
Attorney for Plaintiff

Dated: December 21, 1994

Michael T. McCormick's false swearing on the Civil Complaint, is also a violation of New Jersey Rule of Professional Conduct 8.4 Misconduct:

RPC 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of the Code of Judicial Conduct or other law;
- (g) engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap where the conduct is intended or likely to cause harm.

Conclusion:

Rule 1:28 -1(f) Immunity, provides absolute immunity from suit, whether legal or equitable, to the Board of Trustees, Director and Counsel, Deputy Counsel, Secretary and all staff personnel, for any conduct in the performance of their official duties. Unlawful, criminal conduct is not conduct in the performance of their official duties, and should not be protected by absolute immunity. Even if there are more fundamental and important reasons for providing judicial-type personnel, immunity from suit, any judgment, order, ruling, administrative action that results from the actual illegal conduct of an immune party, should be considered void ab initio, because it was a "fraud on the court". Especially in this case, where the false statements made by McCormick, are directly related to the NJLFCP's Subject Matter Jurisdiction over the defendant, Irek, justice and due process necessitate voiding any adverse actions against Irek.

Suggested Revisions to Existing Procedure(s):

In matters involving judicial personnel's, "absolute immunity from suit", a limited exception should be available to allow suit, where a judicial proceeding was materially affected, to the detriment of the opposing party, by knowingly false and fraudulent statements made by the immune party.

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. On November 1, 2022, Chief Justice Stuart Rabner signed an Order denying certification to the New Jersey Supreme Court.