

Barber v. Tumelty, ATL-L-002794-25 – Filed Limited Letter Response

From dTb33@pm.me <dTb33@pm.me>

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Date Wednesday, December 31st, 2025 at 7:23 PM

Counsel:

Please be advised that today I filed via New Jersey eCourts/JEDS a **unified PDF** containing the following documents in the above-captioned matter:

1. Plaintiff's Limited Letter Response to New Arguments Raised in Defendants' Reply Brief; and
2. Plaintiff's Certification of Service.

This email is sent as a courtesy copy only. Service has been effected via eCourts.

Regards,

Devon T. Barber
Plaintiff Pro Se
ATL-L-002794-25

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Barber Limited Letter Response and Service.pdf 331.95 KB

BARBER, DEVON TYLER, Plaintiff, Pro Se
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Atlantic City, New Jersey 08401
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SUPERIOR COURT OF NEW JERSEY

LAW DIVISION – ATLANTIC COUNTY

DEVON TYLER BARBER,

Plaintiff,

v.

JOHN W. TUMELTY, ESQ., and THE LAW
OFFICE OF JOHN W. TUMELTY,

Defendants.

DOCKET NO.: ATL-L-002794-25

Civil Action

**PLAINTIFF'S LIMITED
LETTER RESPONSE; TO NEW
ARGUMENTS RAISED IN
DEFENDANTS' REPLY BRIEF**

December 31, 2025

Hon. Sarah B. Johnson, J.S.C.
Atlantic County Superior Court

Re: *Barber v. Tumelty*, Civil Dkt. No. ATL-L-002794-25 – Reply to Motion to Dismiss

Dear Judge Johnson:

Plaintiff Devon T. Barber, appearing pro se, respectfully submits this limited response to Defendants' reply brief in support of their motion to dismiss. For the reasons set forth below, Defendants' motion should be denied. The Complaint pleads multiple independent causes of action that remain legally viable regardless of the disposition of the underlying criminal matter. Plaintiff does not oppose, should the Court deem it appropriate, narrowly tailored case-management measures—such as a stay limited to any discrete conviction-dependent malpractice theory—but dismissal, particularly dismissal with prejudice, is neither required nor appropriate under New Jersey law.

Under Rule 4:6-2(e), the Court must read the pleadings liberally, accept all well-pleaded facts as true, and afford Plaintiff all reasonable inferences. *Printing Mart–Morristown v. Sharp Elecs. Corp.*, 116 N.J. 739, 746–47 (1989). The Supreme Court has instructed that, on a motion to dismiss, courts must “search[] the complaint 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,” granting plaintiffs “every reasonable inference.” *Id.* at 746. Defendants have not carried their burden of demonstrating that Plaintiff could prove no set of facts in support of his claims.

I. Standard of Review (Rule 4:6-2(e))

Dismissal under Rule 4:6-2(e) is warranted only where, accepting the factual allegations as true and viewing them in the light most favorable to the plaintiff, the complaint fails to state any cognizable claim. *Printing Mart*, 116 N.J. at 746. At this stage, the Court does not resolve factual disputes, assess credibility, or weigh competing proofs. *Id.* All claims are evaluated on the pleadings alone, and if a cause of action is even suggested by the alleged facts, dismissal is improper. *Id.* at 746–47. Any asserted deficiencies are addressed through discovery or subsequent motion practice, not at the pleading stage.

II. Independent Claims Versus Conviction-Dependent Claims

Plaintiff’s Complaint alleges multiple forms of attorney misconduct that do not depend on proof of innocence or vacatur of any conviction.

A. Fee Retention and Breach of Contract

Claims alleging retention of unearned fees and failure to perform services promised under the engagement agreement arise from contract and quasi-contract principles. Such claims do not turn on the validity of the criminal outcome. In *Levinson v. D’Alfonso & Stein*, 320 N.J. Super. 312 (App. Div. 1999), the Appellate Division held that enforcement of express terms in a retainer agreement constitutes a breach-of-contract claim—not professional negligence—and does not require expert testimony or an affidavit of merit. *Id.* at 319–21. The court reversed dismissal, emphasizing that the claim was “not merely a professional negligence claim” but a classic contract action. *Id.* at 320.

Similarly, *Charles A. Manganaro Consulting Eng’rs, Inc. v. Carneys Point Twp. Sewerage Auth.*, 344 N.J. Super. 343 (App. Div. 2001), confirms that the Affidavit of Merit statute applies only to claims seeking damages for deviation from professional standards and does not insulate professionals from contract-based or fee-related disputes. *Id.* at 348–50. Plaintiff’s fee and contract claims therefore stand independent of any criminal adjudication.

B. Non-Performance and Negligence

Plaintiff alleges that Defendants failed to perform agreed-upon legal services, including failure to file motions, pursue detention review, investigate readily available information, and otherwise act on Plaintiff’s behalf. New Jersey law recognizes that an attorney’s negligence may cause actual injury even where the client is guilty. *Cortez v. Gindhart*, 435 N.J. Super. 589, 604–06 (App. Div. 2014). Such claims do not necessarily depend on invalidation of the conviction and may proceed where concrete injury is alleged.

C. Breach of Fiduciary Duty

Allegations of abandonment, non-communication, and financial self-interest implicate fiduciary duties distinct from ordinary malpractice. Attorneys owe clients duties of loyalty, diligence, and candor at all times. *Levinson*, 320 N.J. Super. at 320–21. Where a plaintiff alleges conduct such as abandonment or retention of fees without performance, those claims **may be analytically distinct from professional-negligence claims and do not necessarily require proof of innocence.**

D. Abandonment

New Jersey law does not permit an attorney to abandon a client without reasonable cause and without taking steps to protect the client’s interests. In *Gilles v. Wiley, Malehorn & Sirota*, 345 N.J. Super. 119 (App. Div. 2001), the Appellate Division reversed summary judgment where an attorney’s withdrawal left the client unprotected, reaffirming that abandonment may constitute a breach of duty. *Id.* at 130–33. Allegations of abandonment therefore state an independent basis for relief.

E. Consumer Fraud and Entrepreneurial Conduct

Plaintiff's Consumer Fraud Act claim is directed at alleged misrepresentations and fee-related conduct occurring in the entrepreneurial aspects of Defendants' practice. Such statutory claims do not require proof of innocence and are analytically distinct from malpractice claims based on legal judgment or strategy.

F. Damages Independent of Innocence

Plaintiff seeks damages for economic loss, emotional distress (including PTSD), pre-adjudication liberty harms, and reputational injury. New Jersey law permits recovery for actual injury proximately caused by attorney misconduct, including non-economic harm, without requiring proof of actual innocence. *Cortez*, 435 N.J. Super. at 604–06.

III. Defendants' Authorities Do Not Bar Plaintiff's Claims

Defendants argue that Plaintiff's claims must be dismissed because Plaintiff has not obtained post-conviction relief. However, Defendants' reply does not cite **McKnight v. Office of the Public Defender**, 197 N.J. 180 (2008), or **Rogers v. Cape May County Office of the Public Defender**, 208 N.J. 414 (2011)—the New Jersey Supreme Court decisions that address the scope and operation of the exoneration doctrine in the context of criminal-malpractice claims.

Those decisions address the **accrual and ripeness of conviction-dependent criminal-malpractice claims** for statute-of-limitations purposes. They do not establish a categorical rule requiring dismissal of all civil claims arising from an attorney's representation of a criminal defendant, nor do they bar independent claims sounding in contract, fiduciary duty, restitution, or statutory causes of action.

Consistent with that framework, the Appellate Division has explained that an attorney's misconduct may cause **compensable injury even where the client remains convicted**, and that such injury is analytically distinct from proof of actual innocence. *Cortez v. Gindhart*, 435 N.J. Super. 589, 604–06 (App. Div. 2014). As *Cortez* makes clear, the existence of a conviction does not, standing alone, negate the possibility of civil injury caused by attorney non-performance or abandonment.

Defendants' reply seeks dismissal based on the absence of post-conviction relief without engaging the governing Supreme Court framework or addressing the distinction between conviction-dependent malpractice theories and independent civil claims. That position is unsupported by New Jersey law and does not warrant dismissal at the pleading stage.

IV. Plaintiff's PCR Petition Is Not a Civil Bar

Plaintiff's pending post-conviction relief petition does not merge with, waive, or extinguish civil remedies. At most, the existence of PCR proceedings may inform case-management sequencing. Plaintiff does not oppose a narrowly tailored stay of any discrete claim that truly requires exoneration; however, the PCR petition is not a basis for dismissal of independent claims.

V. Conclusion

For the foregoing reasons, Defendants' motion to dismiss should be denied. Plaintiff's independent claims for breach of contract, breach of fiduciary duty, unjust enrichment, statutory violations, and related damages are well pleaded and not subject to dismissal under Rule 4:6-2(e). Any limited conviction-dependent theory may, if necessary, be addressed through case-management rather than dismissal. Plaintiff expressly preserves all claims and categories of damages, including emotional distress, loss of liberty, reputational harm, and economic loss, none of which depend on proof of innocence.

Respectfully submitted,

/s/ Devon T. Barber
Devon Tyler Barber, Plaintiff Pro Se
Dated: December 31, 2025

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DOCKET NO.: ATL-L-002794-25

Civil Action

CERTIFICATION OF SERVICE

(R. 1:5-2)

I, Devon Tyler Barber, certify as follows:

1. I am the Plaintiff in the above-captioned matter, appearing pro se.
2. On this date, I filed the foregoing **Plaintiff's Limited Letter Response to New Arguments Raised in Defendants' Reply Brief** via the New Jersey eCourts/JEDS system.
3. Service was effected the same day via eCourts and electronic mail upon counsel for Defendants at the following addresses:

• **David J. Gittines, Esq. (Bar ID No. 021422005)**

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Hackensack, New Jersey 07601

Attorneys for Defendants
John W. Tumelty, Esq. and
The Law Office of John W. Tumelty

I certify that the foregoing statements are true. I am aware that if any statement is willfully false, I am subject to punishment.

Date: December 31, 2025

/s/ Devon T. Barber
Devon Tyler Barber, Plaintiff Pro Se.

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