

BARBER, DEVON TYLER, Plaintiff, *Pro Se*
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DEVON TYLER BARBER,
Plaintiff,

v.

JOHN W. TUMELTY and THE LAW
OFFICE OF JOHN W. TUMELTY,
Defendant(s).

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ATLANTIC COUNTY

DOCKET NO.: ATL-L-002794-25

Civil Action

**PLAINTIFF'S BRIEF IN
OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS PURSUANT
TO R. 4:6-2(e)**

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DISMISS PURSUANT TO R. 4:6-2(e)**

**Plaintiff, Devon Tyler Barber, respectfully submits this Brief in
Opposition to Defendants' Motion to Dismiss the First Amended
Complaint pursuant to Rule 4:6-2(e) of the New Jersey Court Rules.**

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I. PRELIMINARY STATEMENT

Defendants seek the extraordinary remedy of dismissing an extensively documented civil action at the pleading stage, contrary to the liberal standard mandated by **Rule 4:6-2(e)** and controlling New Jersey Supreme Court precedent. Their motion rests almost entirely on a misapplication of the **exoneration rule**, which—properly understood—applies **only** to malpractice claims that require proof that a criminal conviction would not have occurred but for counsel’s negligence.

Plaintiff’s **First Amended Complaint** sets forth **numerous independent causes of action**—including breach of contract, breach of fiduciary duty, consumer fraud, fraudulent inducement, retainer misconduct, and abandonment—that do **not** depend upon the invalidity of any conviction and, therefore, are not barred by the exoneration rule as articulated in **McKnight v. Office of the Public Defender**, 197 N.J. 180 (2008), and **Rogers v. Cape May County Office of the Public Defender**, 208 N.J. 414 (2011).

Under **Printing Mart–Morristown v. Sharp Elecs. Corp.**, 116 N.J. 739 (1989), **Green v. Morgan Props.**, 215 N.J. 431 (2013) and **Banco Popular N. Am. v. Gandi**, 184 N.J. 161 (2005), Plaintiff’s factual allegations must be accepted as true and all reasonable inferences drawn in his favor. When that standard is applied, dismissal is plainly inappropriate.

Even if any aspect of Plaintiff’s malpractice claims were premature, the proper remedy would be a **stay**, not dismissal of independent claims that stand entirely on their own. Plaintiff’s remaining causes of action must proceed.

II. PROCEDURAL HISTORY

Plaintiff filed his **First Amended Complaint** on **October 28, 2025**, supported by comprehensive exhibits documenting the underlying events, Defendants’ misconduct, and the resulting injuries. Plaintiff thereafter filed a **Certification of Damages and Injury** on **November 8, 2025**, and a **Supplemental Certification and Clarification** on **November 8, 2025**, further detailing factual matters relevant to this litigation.

Defendants moved to dismiss in lieu of an answer pursuant to **R. 4:6-2(e)**. This opposition is timely filed under **R. 1:6-3(a)**.

III. STATEMENT OF FACTS

Plaintiff incorporates and summarizes the facts set forth in:

- the **First Amended Complaint**,
- the **Certification of Damages and Injury**, and
- the **Supplemental Clarification**.

The underlying **July 2022** incident was a **civil wage dispute** misclassified as a criminal matter. Plaintiff suffered severe detention-hearing irregularities, including being muted and **unable to participate**. Plaintiff's family retained Defendant Tumelty, a self-advertised "**Certified Criminal Trial Attorney**," paying **\$5,000** for urgent legal action.

Tumelty **did not** file a detention-review motion, did **not** investigate, did **not** preserve exculpatory evidence, and did **not** communicate. Plaintiff remained confined for **108 days** under extremely harsh and unsafe conditions.

Plaintiff alleges:

- breach of contract (retainer)
- fiduciary-duty violations
- consumer fraud
- fraudulent inducement
- negligence
- **unjust enrichment**
- business, economic, emotional, reputational, and liberty harms

These claims do **not** depend on overturning his conviction.

IV. LEGAL ARGUMENT

POINT I DEFENDANTS' MOTION MUST BE DENIED BECAUSE RULE 4:6-2(e) REQUIRES ALL FACTS TO BE ACCEPTED AS TRUE AND DISMISSAL IS DISFAVORED.

The New Jersey Supreme Court has repeatedly emphasized that the standard under **R. 4:6-2(e)** is exceedingly liberal:

- A complaint should be dismissed **only in the rarest of circumstances**. **Printing Mart**, 116 N.J. at 772.
- On a **Rule 4:6-2(e)** motion, the Court must accept all well-pleaded allegations as true and give Plaintiff every reasonable inference. **Green v. Morgan Props.**, 215 N.J. 431, 452 (2013). The question is not whether Plaintiff will ultimately prevail, but whether a cause of action may be suggested by the facts. **Banco Popular N. Am. v. Gandi**, 184 N.J. 161, 166 (2005). Defendants improperly ask the Court to weigh facts, resolve disputes, and ignore pleaded allegations. This is prohibited at the dismissal stage.

POINT II THE EXONERATION RULE DOES NOT BAR PLAINTIFF'S INDEPENDENT CLAIMS.

Defendants misstate the exoneration rule as a blanket prohibition against civil claims by criminal defendants. That is not the law.

Under **McKnight**, the rule applies only when a malpractice claim “requires proof that the conviction would not have occurred but for counsel’s negligence.”

New Jersey’s exoneration jurisprudence, including **McKnight** and **Rogers**, applies only where the malpractice claim requires undermining the validity of the conviction itself and does not bar independent economic or contractual claims.

Here, Plaintiff asserts multiple claims that are **not tied to innocence**, including:

- retainer misconduct,
- fee fraud,
- abandonment,

- breach of fiduciary duty,
- consumer fraud,
- fraudulent inducement,
- failure to investigate pretrial,
- failure to communicate,
- failure to act on detention review.

Even if some aspect of malpractice were premature, the remedy is a **stay**, not dismissal of independent claims.

See **McKnight**, 197 N.J. at 194–95; **Rogers**, 208 N.J. at 428–31.

POINT III PLAINTIFF HAS ADEQUATELY PLED BREACH OF CONTRACT, FIDUCIARY DUTY, FRAUD, AND NEGLIGENCE CLAIMS.

New Jersey recognizes independent fiduciary-duty and contract claims against attorneys.

- **Baxt v. Liloia**, 155 N.J. 190 (1998) Attorneys owe fiduciary duties to their clients that exist independently of negligence or malpractice principles.”
- **Lash v. State** confirms that “the fiduciary duties of loyalty, honesty, and fidelity arise inherently from the attorney-client relationship,” and exist independent of any negligence standard. *169 N.J. 20, 34–35 (2001)*.
- **Baldasarre v. Butler**, holds that attorneys owe their clients the duty of “undivided loyalty,” and must avoid any conduct that compromises the client’s interests. *132 N.J. 278, 291–92 (1993)*.

Plaintiff alleges:

- misrepresentations,
- failure to communicate,
- abandonment,
- retainer breaches,
- violations of RPC 1.1, 1.3, and 1.4,
- self-dealing, and
- nonperformance of promised services.

These are independent and **fully actionable**.

POINT IV PLAINTIFF HAS STATED A VALID CFA CLAIM BASED ON DEFENDANTS' COMMERCIAL PRACTICES AND INDUCEMENTS.

Defendants falsely contend the CFA does not apply to attorneys. It does.

- **Blatterfein v. Larken Assocs.**, 323 N.J. Super. 167 (App. Div. 1999) – CFA applies to commercial aspects of professional services.
- **Cox v. Sears**, 138 N.J. 2 (1994) – misrepresentations inducing consumer transactions are actionable.
- **Gennari v. Weichert Co. Realtors**, 148 N.J. 582 (1997) – misrepresentations of qualifications or services are actionable.

Plaintiff's CFA allegations involve:

- advertising,
- inducement,
- misrepresentations about certification,
- promises of aggressive representation,
- promises to secure release,
- inducing a \$5,000 retainer.

These are **quintessential CFA violations**.

POINT V EVEN IF ANY PLEADING WERE DEFICIENT, RULE 4:9-1 REQUIRES LEAVE TO AMEND.

New Jersey has a **liberal amendment standard**.

Leave to amend must be “freely given in the interest of justice.”

Where a complaint can be cured by amendment, dismissal with prejudice is **improper**.

See **Printing Mart, Banco Popular, Green**.

If the Court finds any portion of the FAC unclear, Plaintiff respectfully requests leave to file a Second Amended Complaint.

V. CONCLUSION

For the foregoing reasons:

1. Defendants' **Motion to Dismiss** should be **DENIED** in its entirety;
2. Alternatively, any dismissal should be **without prejudice**, with leave to amend;
3. If the Court finds any malpractice claim premature, the appropriate remedy is a **stay**, not dismissal, and all independent claims must proceed.

Respectfully submitted,

Dated: 11/25/2025

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Civil Action

**CERTIFICATION OF PLAINTIFF IN
OPPOSITION TO MOTION TO DISMISS
(R. 1:4-4)**

I, Devon Tyler Barber, of full age, certify and declare as follows:

1. I am the Plaintiff in this matter. I submit this **Certification** in support of my **Opposition to Defendants' Motion to Dismiss**.
2. The factual allegations in my **First Amended Complaint**, my **Certification of Damages and Injury**, and my **Supplemental Clarification** are **true and correct to the best of my knowledge**, based on personal experience, my own records, and documents obtained from governmental and business entities.
3. In **July 2022**, I was the **victim** of a **civil wage dispute** that was misclassified as a criminal matter. At my initial detention hearing, I was **muted**, **unable to participate**, and my **evidence of residence, employment, and wages** was never presented.

4. My family retained Defendant **John W. Tumelty**, paid him **\$5,000**, and relied entirely on his representations that he would **investigate**, present the truth, and **file** the appropriate motions to secure my pre-trial release.
5. Defendant Tumelty did **not** file a detention-review motion, did **not** present exculpatory or mitigating evidence, did **not** preserve my iPhone or wage-communication evidence, and effectively abandoned me.
6. As a result of Defendants' **inaction** and abandonment—**not as a challenge to any conviction or adjudication**—Plaintiff remained detained for 108 days under exceptionally harsh conditions. During that confinement, Plaintiff was physically **assaulted** by correctional officers, placed in prolonged **solitary confinement**, repeatedly exposed to **bed-bug** and **scabies infestations**, and ultimately housed in a medical–mental-health protective-custody pod with severely **unstable inmates**. These conditions **caused** substantial **physical, psychological, and economic harm**, including lost wages, lost business opportunities, loss of housing stability, and **destruction** of personal property. These **injuries** arise independently of the validity of any conviction and are attributable solely to Defendants' **breaches of fiduciary duty, failures to act, misrepresentations, and commercial misrepresentations** in the marketing and provision of legal services.
7. These injuries were caused not by the subsequent plea disposition, but by Defendants' **pretrial inaction, misrepresentations, commercial misrepresentations** in the marketing and provision of legal services, **abandonment**, and **failure** to fulfill their **fiduciary, contractual, and professional duties**.

8. Plaintiff's claims for breach of contract, breach of fiduciary duty, consumer fraud, misrepresentation, commercial misrepresentation, retainer misconduct, and other independent harms arise entirely from Defendants' conduct and do not depend on overturning, undermining, or challenging the validity of any conviction.

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

Dated: 11/25/2025

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