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

DEVON TYLER BARBER, Plaintiff, vs. JOHN W. TUMELTY and THE LAW OFFICE OF JOHN W. TUMELTY, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: ATLANTIC COUNTY Docket No: ATL-L-2794-25 Civil Action **NOTICE OF MOTION TO DISMISS IN LIEU OF AN ANSWER**

TO: Devon Tyler Barber, Plaintiff *Pro Se*
325 E. Jimmie Leads Road, Suite 7-333
Galloway, NJ 08205

PLEASE TAKE NOTICE that, on **Friday, December 19, 2025** at 9:00 in the forenoon, or as soon thereafter as counsel may be heard, Defendants John W. Tumelty, Esq. and The Law Office of John W. Tumelty (together "Defendants"), shall move before the above-named Court, at the Atlantic County Courthouse in Atlantic City, NJ, for the dismissal of Plaintiff's First Amended Complaint against the Defendants.

PLEASE TAKE FURTHER NOTICE that in support of the foregoing motion, Defendant shall rely upon the brief and certification with exhibits submitted herewith and upon the oral argument of counsel.

PLEASE TAKE FURTHER NOTICE that a proposed form of Order is submitted herewith.

PLEASE TAKE FURTHER NOTICE that oral argument is hereby requested for this motion, if opposed.

DED:	N/A
Arbitration Date:	N/A
Trial Date:	N/A

Kaufman Dolowich LLP
Attorneys for Defendant John W. Tumelty, Esq. and The Law Office of John W. Tumelty

By: /s/ David J. Gittines
IRAM P. VALENTIN
DAVID J. GITTINES

DATED: November 24, 2025

KAUFMAN DOLOWICH LLP
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DEVON TYLER BARBER, Plaintiff, vs. JOHN W. TUMELTY and THE LAW OFFICE OF JOHN W. TUMELTY, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: ATLANTIC COUNTY Docket No: ATL-L-2794-25 Civil Action **ORDER**

This matter having been brought before the Court by motion of Kaufman Dolowich LLP, attorneys for Defendants John W. Tumelty, Esq. and The Law Office of John W. Tumelty (together "Defendants"), for the entry of an Order dismissing Plaintiff Devon Tyler Barber's ("Plaintiff") First Amended Complaint against them, and the Court having considered the motion papers and all opposition thereto, and having heard oral argument of counsel; and good cause having been shown,

IT IS on this _____ day of _____ 2025,

ORDERED that Plaintiff's First Amended Complaint against the Defendants is hereby dismissed.

_____
, J.S.C.

DEVON TYLER BARBER, Plaintiff, vs. JOHN W. TUMELTY and THE LAW OFFICE OF JOHN W. TUMELTY, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: ATLANTIC COUNTY Docket No: ATL-L-2794-25 Civil Action

DEFENDANTS JOHN W. TUMELTY, ESQ. AND THE LAW OFFICE OF JOHN W. TUMELTY' S BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S COMPLAINT IN LIEU OF AN ANSWER

KAUFMAN DOLOWICH LLP
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Of Counsel and On the Brief
David J. Gittines, Esq. (Attorney No. 02142-2005)

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PRELIMINARY STATEMENT

Defendants John W. Tumelty, Esq. and The law Office of John W. Tumelty (together, "Defendants") moves in lieu of an answer to dismiss the First Amended Complaint Plaintiff Devon Tyler Barber ("Plaintiff") pursuant to *R*. 4:6-2(e) for failure to state a claim upon which relief may be granted. Plaintiff has not yet received post-conviction relief for the underlying crime which serves as the basis for his legal malpractice claims against the Defendants. As such, Plaintiff's legal malpractice claims against the Defendants are not ripe and should be dismissed for failure to state a claim upon which relief may be granted.

Plaintiff asserts claims for legal malpractice, breach of fiduciary duty, fraud, negligent infliction of emotional distress, and violations of the NJ Consumer Fraud Act in his First Amended Complaint. (*See* Plaintiff's First Amended Complaint at Pg. 9, attached to the Certification of David J. Gittines, Esq. as Exhibit "A.") All of the claims relate Defendants' defense of Plaintiff in the underlying criminal matter during Plaintiff's 2022 criminal representation in *State v. Barber*, Indictment Nos. ATL-22-002292 & 002313. (*See id*.) All of the claims against the Defendants sound in legal malpractice. Plaintiff filed a Petition for Post-Conviction Relief with the courts on October 26, 2025. (*See id*. at Pg. 23) The Petition for Post-Conviction Relief is attached to Plaintiff's First Amended Complaint. (*See id*.)

In a legal malpractice action brought by criminal defendant against his own attorney, the "defendant has to be exonerated to the point of being able to show some injury caused by the alleged malpractice whether that relief is dismissal of the charges, acquittal on retrial, conviction of a lesser included offense or otherwise...." *McKnight v. Off. of Pub. Def.*, 197 N.J. 180, 182 (2008) (citations omitted). Although he has filed for post-conviction relief, Plaintiff has not yet received post-conviction relief or been exonerated for the charges in the underlying criminal

matter. As such, his legal malpractice claims are not ripe and should be dismissed pursuant to *R*. 4:6-2(e) for failure to state a claim upon which relief may be granted.

STANDARD OF REVIEW

It is well settled that "[a] motion to dismiss a complaint under *R*. 4:6-2(e) for failure to state a claim upon which relief can be granted must be evaluated in light of the legal sufficiency of the facts alleged in the complaint." *Donato v. Moldow*, 374 N.J. Super. 475, 482 (App. Div. 2005). Accordingly, a court must dismiss a plaintiff's complaint if the complaint fails to articulate a legal basis entitling plaintiff to relief. *Sickles v. Cabot Corp.*, 379 N.J. Super. 100, 106 (App. Div. 2005). Essentially, in opposition to a motion to dismiss, a plaintiff must set forth facts that "would constitute a valid cause of action." *Leon v. Rite Aid Corp.*, 340 N.J. Super. 462, 472 (App. Div. 2001). Moreover, while legitimate inferences are to be drawn in favor of a plaintiff, a court need not credit a complaint's bald assertions or legal conclusions when deciding a motion to dismiss. *Novack v. Cities Services Oil Co.*, 149 N.J. Super. 542, 546 n.1 (L. Div. 1977), *aff'd*, 159 N.J. Super. 400 (App. Div.), *cert. denied*, 78 N.J. 396 (1978). Dismissal is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted. *Id.*

Further, in "evaluating a motion to dismiss, courts consider the allegations in the complaint, exhibits attached to the complaint, **matters of public record**, and **documents that form the basis of a claim**." *Banco Popular N. Am. v. Gandhi*, 184 N.J. 161, 183 (2005) (emphasis added). Thus, the court may consider a document integral to the complaint, even if the document is not referred to in the complaint, in determining a motion to dismiss. *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997). Indeed, "[p]laintiffs cannot prevent a court from looking at the texts of the documents on which its claim is based by failing to attach or explicitly cite them." *Id.* Thus, the court must determine whether there is support for 'a cause of action in those

documents.'" *Banco Popular*, 184 N.J. at 183, *quoting Printing Mart-Morristown v. Sharp Elecs. Corp.,* 116 N.J. 739 (1989).

Plaintiff's First Amended Complaint against Defendants is premature because Plaintiff has failed to have his guilty plea in the underlying criminal action vacated as required before bring his legal malpractice claims against the Defendants. Accordingly, it is respectfully submitted that Plaintiff's First Amended Complaint against the Defendants should be dismissed pursuant to *R*. 4:6-2(e) for failure to state a claim upon which relief may be granted.

LEGAL ARGUMENT

POINT I

PLAINTIFF'S FAILURE TO HAVE HIS GUILTY PLEA VACATED PRECLUDES HIS LEGAL MALPRACTICE CLAIMS AGAINST THE DEFENDANTS.

Plaintiff's First Amended Complaint alleges that he received ineffective legal representation from Defendants while represented by him in the underlying criminal matter, *State v. Barber*, Indictment Nos. ATL-22-002292 & 002313, which allegedly caused Plaintiff plead guilty and be subject to an extended detention as a result. Plaintiff asserts claims for legal malpractice, breach of fiduciary duty, fraud, negligent infliction of emotional distress, and violations of the NJ Consumer Fraud Act in his First Amended Complaint. Such claims sound in legal malpractice. It appears that Plaintiff has filed contemporaneously for post-conviction relief and has not yet receive post-conviction relief or been otherwise exonerated of the underlying crime. Absent post-conviction relief, Plaintiff's legal malpractice claims against the Insured are premature and should be dismissed.

"A legal malpractice claim accrues upon a criminal defendant's exoneration, which 'might be vacation of a guilty plea and dismissal of the charges, entry of judgment on a lesser offense after spending substantial time in custody following conviction for a greater offense or any disposition more beneficial to the criminal defendant than the original judgment.'" *Atwell v. Off. of the Pub. Def., Vernon Estreicher*, 2017 WL 6493146, at *4 (D.N.J. Dec. 19, 2017) (*quoting McKnight*, 197 N.J. at 182.). "At its core, ripeness works 'to determine whether a party has brought an action prematurely ... and counsels' abstention until such a time as a dispute is sufficiently concrete to satisfy the constitutional and prudential requirements of the doctrine.'" *Plains All Am. Pipeline L.P. v. Cook*, 866 F.3d 534, 539 (3rd Cir. 2017) "Various concerns underpin it, including whether the parties are in a 'sufficiently adversarial posture,' whether the facts of the case are 'sufficiently developed,' and whether a party is 'genuinely aggrieved.'" *Id.*

Indeed, Plaintiff must show more than the mere vacation of the underlying guilty plea. The Supreme Court points to the three following types of exoneration: "The first is vacation of a guilty plea and dismissal of the charges" – vacation of the plea alone falls short. *Rogers v. Cape May Cnty. Off. of Pub. Def.*, 208 N.J. 414, 425 (2011), (*quoting McKnight*, *supra*, 197 N.J. at 189.) The second requires "entry of judgment on a lesser offense after spending substantial time in custody following conviction for a greater offense" or "conviction of a lesser included offense." *Id.* "Again, the mere grant of a new trial is insufficient." *Id.* The third is "acquittal on retrial," which suggests that a grant of a retrial without an actual acquittal will not satisfy the standard. *Id.*

Here, Plaintiff may have applied for post-conviction relief but he has failed establish that that his guilty plea has been exonerated as required above, that he obtained dismissal of the charges, or that there was an entry of a judgment of a lesser offense after spending substantial time in custody following his conviction of the offense to which he pleaded guilty. As such, Plaintiff's

instant complaint must be dismissed for lack of ripeness, as no legal malpractice cause of action has yet accrued.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that all of Plaintiff's claims against the Defendants should be dismissed for failure to state a claim upon which relief may be granted pursuant to *R*. 4:6-2(e).

Kaufman Dolowich LLP
Attorneys for Defendant John W. Tumelty, Esq. and The Law Office of John W. Tumelty

By: /s/ David J. Gittines
IRAM P. VALENTIN
DAVID J. GITTINES

DATED: November 24, 2025

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DEVON TYLER BARBER, Plaintiff, vs. JOHN W. TUMELTY and THE LAW OFFICE OF JOHN W. TUMELTY, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: ATLANTIC COUNTY Docket No: ATL-L-2794-25 Civil Action **CERTIFICATION OF SERVICE**

I, David J. Gittines, hereby certify as follows:

1. I am of counsel at the law firm of Kaufman Dolowich LLP.

2. On November 24, 2025, I caused to be eCourts filed the within Notice of Motion, Brief, Certifications with Exhibits and proposed Order with the above-named Court.

3. One (1) copy of the within motion papers were also sent by eCourts and regular mail to:

Devon Tyler Barber, Plaintiff *Pro Se*
325 E. Jimmie Leads Road, Suite 7-333
Galloway, NJ 08205

I hereby certify that all of 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.

/s/ David J. Gittines
DAVID J. GITTINES

Dated: November 24, 2025

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DEVON TYLER BARBER, Plaintiff, vs. JOHN W. TUMELTY and THE LAW OFFICE OF JOHN W. TUMELTY, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: ATLANTIC COUNTY Docket No: ATL-L-2794-25 Civil Action **CERTIFICATION OF COUNSEL**

I, David J. Gittines, Esq., of full age, hereby certify as follows:

1. I am an attorney at law of the state of New Jersey. I am of counsel with the law firm of Kaufman Dolowich LLP, attorneys for Defendants John W. Tumelty, Esq. and The Law Office of John W. Tumelty (together, "Defendants"). I am involved in the defense of this matter and am fully familiar with the facts herein. I submit this certification in support of Defendants' Motion to Dismiss.

2. Attached hereto as Exhibit "A" is a true and correct copy of Plaintiff's First Amended Complaint.

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, then I am subject to punishment by the Court.

Kaufman Dolowich LLP
Attorneys for Defendant John W. Tumelty, Esq. and The Law Office of John W. Tumelty

By: /s/ David J. Gittines
DAVID J. GITTINES

Dated: November 24 , 2025