SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-002657-22

RODNEY KELLY

PLAINTIFF

Vs.

JAMES H. KOSTOPOLIS; ODISE A. CARR; CLERK#3; JENN; AND THE OFFICE OF THE SHERIFF OF BURLINGTON COUNTY

DEFENDANTS

CIVIL ACTION

ON APPEAL FROM
SUPERIOR COURT,
CHANCERY DIVISION
CAMDEN COUNTY

Judge Sherri L. Schweitzer, P. J. Ch.

Sat Below:
Docket No: CAM-L-727-23

# BRIEF FOR PLAINTIFF, RODNEY KELLY

Rodney Kelly, Pro Se
Plaintiff/Appellant
P.O. Box 3116
Willingboro Nj 08046
rodneykelly.kelly252@gmail.com

October 18, 2023

## TABLE OF CONTENTS

## TABLE OF JUDGMENTS, ORDERS, AND RULINGS

**Table of Contents for Complaint in Lieu of Prerogative Writs and Civil Rights Action, Motion for Stay and Adjournment Motion to Amend Complaint, For Removal of Improperly Filed Documents; To Correct; Reopen; For Change of Venue and Division; For Disqualification and Relief From Judgment & Exhibits**

# TABLE OF APPENDIX

## Volume I

## Volume II

## Volume III

## Volume IV

## Volume IV

# TABLE OF AUTHORITIES

## Constitutional Authorities



## Rules

**Statutes**



**Supreme Court of the United States**



**Third Circuit**



**New Jersey Cases**

**Other Authorities**

## I. PRELIMINARY STATEMENT

The matter is of substantial importance, Plaintiff is asserting a Constitutional and Statutory challenge to the defendants conduct in refusing to grant two adjournments on request (at least three times) and said conduct is likely to reoccur in the future, and capable of evading review, the Court should proceed to address the merits of the plaintiff's claim that the Chancery Division decision violated plaintiffs right to pursue his NJCRA and NJLAD claims in the Law Division and deprived him of his choice of forum. The Chancery Division's Judge's conduct was contrary to the common law, N.J. Const., Art I, . N.J. Const., Art VI, § V, ¶ 4., R. 1:13-4, R. 4:3-1, R. 4:69-1, N.J.S. 10:6-2 and the First and Fourteenth Amendments of the United States Constitution. Plaintiffs' appeal challenges the Chancery Division Judge's findings under both the Prerogative Writ Law and the NJCRA, and the denial of the motions for stay, adjournment, order to show cause and to amend complaint. The Appellate Division should reverse the Chancery Division's orders, denying the motions, determining that the Complaint was "Moot" and awarding him attorney fees. Plaintiff maintains that defendants "violated his constitutional and statutory rights and are therefore liable" under N.J.S.A. 10:6–2. Plaintiff prays that the court reach his challenges to the findings of the Chancery Division (Trial Court). An issue presented by this appeal is whether a party who brings an action under the Civil Rights Act that results in a change in defendant's conduct may qualify as a "prevailing party" even though the action is dismissed as moot rather than being concluded by a judgment in plaintiffs favor. Plaintiff contends that he is entitled to an award of attorney's fees and costs pursuant to N.J.S.A. 10:6–2(f) because his action in lieu of prerogative writs and civil rights action was a "catalyst" for the cessation of conduct alleged to violate the Civil Rights Act and that he qualifies as a prevailing party entitled to an award of attorney's fees.

## II. PROCEDURAL HISTORY

On March 7th , 2023, plaintiff filed a verified complaint in lieu of prerogative writs Pa 27-29 pursuant to R.4:69-1 and asserting claims for relief under N.J.S. 10:6-2.

On March 7th , 2023, plaintiff filed a Motion For Stay (Pa 108-110, Pa 41-43, Pa 44-100) pursuant to R. 4:69-3 Pa 39-40 and For Adjournment of Real Estate Sale pursuant to N.J.S. 2A:17-36 and Common Law (Wells Fargo Home Mortg. v. Stull Pa 317-322).

On March 8th , 2023, plaintiff filed a Motion For Order to Show Cause. (Pa 15-18, Pa 19-21, Pa 41-43, Pa 44-100).

On March 9th , 2023, Judge Jeanne T. Cover, A.J.S.C. issued a track assignment notice under BUR L -000494 23 and an Order to transfer this matter to Camden County for venue and disposition based on the conflict-of-interest Pa 12. [1]

On March 15th , 2023, plaintiff filed a statement of reasons for Oral Argument pursuant to Rule 1:6-2(d) (Pa 129-134).

On March 21, 2023, Counsel Daniel Gee of Malamut & Associates, LLC filed a Letter in opposition to plaintiffs Complaint and Motions (Pa 145).

On March 23, 2023, Chancery Division Judge Sherrif issued an order dismissing plaintiffs complaint as "Moot" (Pa 13).

On March 23, 2023, Chancery Division uploaded to eCourts the following:

ORDER SHOW CAUSE-Denied by Judge SCHWEITZER, SHERRI, L re: MOTION FOR ORDER TO SHOW CAUSE HEARING [LCV2023858930].

On March 23, 2023, Chancery Division uploaded to eCourts the following:

---

[1] Transcript Volume 1T (March 22, 2023)

"ORDER TO STAY CASE-Denied by Judge SCHWEITZER, SHERRI, L re: MOTION TO STAY CASE [LCV2023858570]."

On April 21, 2023, plaintiff filed a Motion to Amend Complaint, Removal of Improperly Filed Documents, to Correct, Reopen, Change of Venue And Division, Disqualification, and for Relief From Judgment (Pa 101-107, Pa 111-128)

On May 04, 2023, plaintiff filed a Notice of Appeal with the Appellate Division.

On May 05, 2023, Counsel Daniel Gee of Malamut & Associates, LLC filed a Letter in opposition to plaintiffs Motion to Amend Complaint, Removal of Improperly Filed Documents, to Correct, Reopen, Change of Venue And Division, Disqualification, and for Relief From Judgment on behalf of the defendants (Pa 146).

## III. STATEMENT OF FACTS

1. Bankers Trust Co. of Calif., N.A. v. Delgado, 346 N.J. Super. 103, 787 A.2d 195 (App.Div.2001) held that the statutes relating to the adjournment of sheriff sales, N.J.S.A. 2A:17-36 2 (Pa 165) and N.J.S.A. 2A:61-5, 3 do not provide the sheriffs of this State with the discretion to deny an adjournment when requested.
2. In Wells Fargo Home Mortgage Inc v. Sheriff of Warren County, Respondent (2005) the appellate division found that the Legislature has provided that a sheriff is entitled to be compensated for the pain and trouble caused by an adjournment of a sale. N.J.S.A. 22A:4-8. N.J.S.A. 2A:17-36 2 and N.J.S.A. 2A:61-5,3 have been understood as providing the parties with the vested right to two adjournments from a sheriff without court intervention. The appellate division emphatically stated that a sheriff does not have the power to refuse an adjournment and that it cannot add nothing further to what was said in Bankers Trust except to simply state what a logical reading of N.J.S.A.

2A:17-36 and the Fair Foreclosure Act clearly demonstrates-adjournments of sales help borrowers because every adjournment presents an opportunity for the borrower to save his or her home.

3. On or about January 11th, 2023, defendant Sheriff James H. Kostopolis granted two adjournments without incident to white citizens acting under KML Group, P.C. in relation to Docket No. F-015290-12 without incident.
4. On or about January 12th, 2023, Plaintiff a disabled African American visited the Office of the Sheriff of Burlington County seeking adjournments in relation to Docket No. F-015290-12.
5. Plaintiff provided defendant Clerk #3 the December 1st, 2017, order (Pa 1-10) in Docket No. F-15290-12 vacating and setting aside the Sheriff's Sale and any deed recorded in the matter as void ab initio.
6. Defendant Clerk #3 interfered with plaintiffs rights by stating that plaintiff had no more adjournments, that Plaintiff had used all his adjournments and refused to grant plaintiff adjournment request contrary to his civil right under N.J.S.A. 2A:17-36 (Pa 165). At this point, plaintiff was deprived of a right at the point defendants denied plaintiff request and statutory right for adjournments and denied the plaintiff free exercise of the right without any interruption.
7. On or about February 21st , 2023, Plaintiff a disabled African American visited the Office of the Sheriff of Burlington County seeking adjournments in relation to Docket No. F-015290-12. Plaintiff again, provided defendant Clerk #3 the December 1st, 2017, order (Pa 1-10) in Docket No. F-15290-12 vacating and setting aside the Sheriff's Sale and any deed recorded in the matter as void ab initio. Defendant Clerk #3 again responded by stating that plaintiff had no more adjournments, that Plaintiff had used all his adjournments and refused to grant plaintiff adjournment request contrary to his civil right under N.J.S.A. 2A:17-36 (Pa 165). At this point,

plaintiff was deprived of a right at the point defendants denied plaintiff request and statutory right for adjournments and denied the plaintiff free exercise of the right without any interruption.

8. On or about March 01, 2023, Plaintiff visited the Office of the Sheriff of Burlington County seeking adjournments. Plaintiff provided defendant Clerk #3 the December 1st, 2017, order (Pa 1-10) in Docket No. F-15290-12 vacating and setting aside the Sheriff's Sale and any deed recorded in the matter as void ab initio. Defendant Clerk #3 responded by stating that plaintiff had no more adjournments, that Plaintiff had used all his adjournments and refused to grant plaintiff adjournment request contrary to his civil right under N.J.S.A. 2A:17-36 (Pa 165). At this point, plaintiff was deprived of a right at the point defendants denied plaintiff request and statutory right for adjournments and denied the plaintiff free exercise of the right without any interruption.
9. On March 7th, 2023, Plaintiff filed a Notice of Tort Claim with the Burlington County Risk Management Office alleging common law torts (Pa 25-26).
10. On March 7th, 2023, Plaintiff filed a Complaint in Lieu of Prerogative Writs under R. 4:69-1 and Action Permitted under N.J.S. 10:6-1, 2 (Pa 27-29), a motion for stay (Pa 108-110) and order to show cause (Pa 15-18, Pa 19-21) under R.4:69-3 supported by certification (Pa 39-40), and with brief seeking relief by way of stay, restraint or otherwise as the interest of justice required.
11. On March 21, 2023, Counsel Gee submitted a letter (Pa 145) which stated:

    *"I wanted to make Your Honor aware of certain facts pertaining to this matter prior to tomorrow's conference. Subsequent to plaintiff's filing, I had the opportunity to discuss the matter with Sheriff Kostopolis' staff and it was determined that the Plaintiff's request to have the March 16, 2023, Sheriff's Sale on his property adjourned would be granted."*

12. On March 22, 2023, during Oral Argument Defense Counsel Gee stated:

    *"Mr. Gee: Mr. Kelly filed his action in the beginning* (1T Line 9) *of March. Once I received it, I reviewed it with the 10 Sheriff's Office, and it was decided that in light of 11 the fact that the sheriff had voided the prior* – (1T Line 12) *excuse me, the Court had voided the prior Judgment of* (1T Line 13) *Foreclosure, in 2017, and entered a new Judgment of 14 Foreclosure under the same foreclosure docket number it* (1T Line 15) *would -- Mr. Kelly would be entitled to his two* (1T Line

16) *statutory adjournments. And that is why the sheriff* (1T Line 17) *granted those adjournments.* (1T Line 18) *I believe, both Your Honor and Mr. Kelly* (1T Line 19) *accurately stated that if he is seeking adjournments* (1T Line 20) *beyond the two that he is afforded under statute he* (1T Line 21) *must do so by motion to the Court in the action in* (1T Line 22) *which the Sheriff's Office is not a party to. Mr. Kelly is accurate that, back in December of 2017, Judge Fiamingo did void the previously entered Judgment of Foreclosure based upon an improper legal description in the Sheriff's Deed which undid that* (1T Line 24).

13. The March 23, 2023, Chancery Division order (Pa 13) inappropriately provides that "Plaintiffs complaint is dismissed as Moot".

14. The order (Pa 13) provides no notice with regard to Plaintiff's Rule 4:69-3 Motion to Law Division for Stay and Adjournments (Pa 108-110) and Certification (Pa 39-40) attached to the complaint and constituting part of the Complaint.

15. The March 23, 2023, Chancery Division order (Pa 13) makes no reference to the motion or orders to show cause.

16. Plaintiff was charged $50.00 for the motion (Pa 108-110), and $50.00 for each order to show cause (Pa 15-21).

17. On May 5, 2023, Gee submitted a letter (Pa 146) which stated:

*"Plaintiff filed a complaint seeking a Court Order directing the Burlington County Sheriff to grant Plaintiff the two statutory adjournments afforded to homeowners under N.J.S.A. 2A:17-36. After the filing, but before the status conference held on March 22, 2023, the Sheriff's Office granted the relief sought by Plaintiff. The adjournments were granted on March 13, 2023. Although Plaintiff denies receiving the notice of the adjournments prior to the March 2, 2023, conference, he did acknowledge on the record that the adjournments had been granted. Based upon the granting of the adjournments, Your Honor dismissed Plaintiff's complaint as moot. Plaintiff now seeks relief from the Court, after his complaint was dismissed as moot, seeking to file an Amended Complaint to raise additional claims of racial bias and civil rights violations in connection with the Sheriffs Office's original denial of his request for statutory adjournments. The Defendants' objection to the current motion is the same as it was to Plaintiff's initial filing, that being, that Plaintiff received the relief sought in his original complaint. When the Defendants granted Plaintiff his two (2) statutory adjournments to the Sheriffs sale on his property, all claim that Plaintiff had against the Defendants were extinguished."*

18. Plaintiff submitted NJ Records request for a copy of an order changing venue from the Law Division to the Chancery Division. The Superior Court Clerk's Office replied:

> "A search has been conducted within the Judiciary case jacket systems, based on the information provided above. However, no records related to an Order transferring your case from the Camden County Law Division to the Camden County Chancery. Also, there does not appear to be any Camden County Chancery Division matter associated to your name. As such, no records can be provided at this time." (Pa 14)

19. N.J. Const. Article VI. Judicial Section V P. 4 (Pa 160-163).

*"Prerogative writs are superseded and, in lieu thereof, review, hearing and relief shall be afforded in the Superior Court, on terms and in the manner provided by rules of the Supreme Court, as of right, except in criminal causes where such review shall be discretionary."*

20. "In almost all prerogative writ proceedings, the public interest is directly involved, and factual disputes are generally closely interwoven with legal issues. It is generally felt, therefore, that no substantial invasion of the principle of trial by jury of legal disputes involving private rights would ensue from rendering all issues in prerogative writ proceedings triable by the court. This view was incorporated in the revision of the Judiciary Article contained within the proposed revised Constitution of 1944, wherein, in Article V, Section VII, paragraph 4, it was expressly provided that determinations of questions of fact arising in prerogative writ proceedings might be made by the court without a jury.[2]"

21. Rule 1:13-4-Transfer of Actions (a) (Pa 180-186) On Motion. Subject to the right to be prosecuted by indictment, if any court is without jurisdiction of the subject matter of an action or issue therein or if there has been an inability to serve a party without whom the action cannot proceed as provided by R. 4:28-1, it shall, on motion or on its own initiative, order the action, with the record and all papers on file, transferred to the proper court or administrative agency, if any, in the State. The action shall then be proceeded upon as if it had been originally commenced in that court or agency. (b) After Appeal. If any action transferrable under paragraph (a) because of lack of jurisdiction over the subject matter is appealed without having been transferred, the appellate court may decide the appeal and direct the appropriate judgment or decision to be entered in the court or agency to which the action should have been transferred.

22. Rule 4:3-1. Divisions of Court; Commencement and Transfer of Actions (a) Where Instituted (Pa 187-191).

(1) Chancery Division-General Equity. Actions in which the plaintiff's primary right or the principal relief sought is equitable in nature, except as otherwise provided by subparagraphs (2)

---

[2] http://www.njstatelib.org/slic_files/searchable_publications/constitution/constitutionv4/NJConst4n625.html

and (3), shall be filed and heard in the Chancery Division, General Equity, even though legal relief is demanded in addition or alternative to equitable relief.

(5) Law Division. All actions in the Superior Court except those encompassed by subparagraphs (1), (2), (3), and (4) herein shall be filed and heard in the Law Division, Civil Part or the Law Division, Special Civil Part.

23. Rule 4:69-1 (Pa 195-197) States:

*"Actions in Superior Court, Law Division Review, hearing and relief heretofore available by prerogative writs and not available under R. 2:2-3 or R. 8:2 shall be afforded by an action in the Law Division, Civil Part, of the Superior Court. The complaint shall bear the designation "In Lieu of Prerogative Writs".*

24. Rule 4:69-3 (Pa 195-197) States:

*"Motion to Law Division for Stay Upon or after the filing of the complaint, the plaintiff may, by order to show cause or motion supported by affidavit, and with briefs, apply for ad interim relief by way of stay, restraint or otherwise as the interest of justice requires, which relief may be granted by the court with or without terms. When necessary, temporary relief may be granted without notice in accordance with R. 4:52-1."*

25. Rule 4:69-4 (Pa 195-197) States:

*"Filing and Management for Actions in Lieu of Prerogative Writs The filing of the complaint shall be accompanied by a certification that all necessary transcripts of local agency proceedings in the cause have been ordered. All actions in lieu of prerogative writs will be assigned to Track IV. Within 30 days after joinder and in order to expedite the disposition of the action the managing judge shall conduct a conference, in person or by telephone, with all parties to determine the factual and legal disputes, to mark exhibits and to establish a briefing schedule. The scope and time to complete discovery, if any, will be determined at the case management conference and memorialized in the case management order. At least five days in advance of the conference, each party shall submit to the managing judge a statement of factual and legal issues and an exhibit list."*

26. Rule 5:1 - Cognizability of Actions; Scope and Applicability of Rules states:

*"Rule 5:1-1. Scope and Applicability of Rules The rules in Part V shall govern family actions. All family actions shall also be governed by the rules in Part I insofar as applicable. Civil family actions shall also be governed by the rules in Part IV insofar as applicable and except as otherwise provided by the rules in Part V. Criminal and quasi-criminal family actions shall also be governed by the rules in Part III insofar as applicable except as otherwise provided by the rules in Part V. Juvenile delinquency actions shall be governed by the rules in Part III insofar as applicable and except as otherwise provided by the rules in Part V."*

27. N.J. Stat. § 2A:17-36 (Pa 165) states:

*Notwithstanding any other law or court rule to the contrary, a sheriff or other officer selling real estate by virtue of an execution may make five adjournments of the sale, two at the request of the lender , two at the request of the debtor, and one if both the lender and debtor agree to an adjournment, and no more, to any time, not exceeding 30 calendar days for each adjournment. However, a court of competent jurisdiction may, for cause, order further adjournments.*

28. N.J. Stat. § 10:6-2 Actions permitted under the "New Jersey Civil Rights Act" (Pa 175-176) states:

"a. If a person, whether or not acting under color of law, subjects or causes to be subjected any other person to the deprivation of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State, the Attorney General may bring a civil action for damages and for injunctive or other appropriate relief. The civil action shall be brought in the name of the State and may be brought on behalf of the injured party. If the Attorney General proceeds with and prevails in an action brought pursuant to this subsection, the court shall order the distribution of any award of damages to the injured party and shall award reasonable attorney's fees and costs to the Attorney General. The penalty provided in subsection e. of this section shall be applicable to a violation of this subsection. b.If a person, whether or not acting under color of law, interferes or attempts to interfere by threats, intimidation or coercion with the exercise or enjoyment by any other person of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State, the Attorney General may bring a civil action for damages and for injunctive or other appropriate relief. The civil action shall be brought in the name of the State and may be brought on behalf of the injured party. If the Attorney General proceeds with and prevails in an action brought pursuant to this subsection, the court shall order the distribution of any award of damages to the injured party and shall award reasonable attorney's fees and costs to the Attorney General. The penalty provided in subsection e. of this section shall be applicable to a violation of this subsection. c.Any person who has been deprived of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State, or whose exercise or enjoyment of those substantive rights, privileges or immunities has been interfered with or attempted to be interfered with, by threats, intimidation or coercion by a person acting under color of law, may bring a civil action for damages and for injunctive or other appropriate relief. The penalty provided in subsection e. of this section shall be applicable to a violation of this subsection. d.An action brought pursuant to this act may be filed in Superior Court. Upon application of any party, a jury trial shall be directed. e.Any person who deprives, interferes or attempts to interfere by threats, intimidation or coercion with the exercise or enjoyment by any other person of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State is liable for a civil penalty for each violation. The court or jury, as the case may be, shall determine the appropriate amount of the penalty. Any money collected by the court in payment of a civil penalty shall be conveyed to the State Treasurer for deposit into the State General Fund. f. In addition to any damages, civil penalty, injunction or other appropriate relief awarded in an action brought pursuant to subsection c. of this section, the court may award the prevailing party reasonable attorney's fees and costs."

29. N.J.S.A. 2C:30-5 (Pa 172). Findings, declarations relative to deprivation of civil rights by public officials states:

"The Legislature finds and declares that: a. Public confidence in the institutions of government is undermined when an official engages in any form of misconduct involving the official's office. b. Such misconduct, and the corresponding damage to the public confidence, impairs the ability of government to function properly, fosters mistrust and engenders disrespect for government and public servants. c. A particular concern arises when a law enforcement official, duly entrusted to protect the public safety and impartially enforce the laws, abuses that trust by unlawfully depriving persons of their civil rights, especially in the context of racial profiling. d. It is important to ensure that law enforcement officers are prohibited from using racial characteristics or color, either alone or in conjunction with other composite characteristics such as a generalized vehicle description or the age of the driver or passengers, as the basis for initiating an investigative stop. e. Existing laws must be amended to provide a greater deterrent to this type of conduct, as well as to enhance other provisions of the law targeting official misconduct. f. Accordingly, it is in the public interest to strengthen our laws that define and punish acts of official misconduct by members of law enforcement and other public servants. L.2003,c.31,s.1."

30. N.J.S.A. 2C:30-7 (Pa 174). Crime of pattern of official misconduct

*"3. a. A person commits the crime of pattern of official misconduct if he commits two or more acts that violate the provisions of N.J.S.2C:30-2 or section 2 of P.L.2003, c.31 (C.2C:30-6). It shall not be a defense that the violations were not part of a common plan or scheme, or did not have similar methods of commission. b.Pattern of official misconduct is a crime of the second degree if one of the acts committed by the defendant is a first or second degree crime; otherwise, it is a crime of the third degree, provided, however, that the presumption of nonimprisonment set forth in subsection e. of N.J.S.2C:44-1 for persons who have not previously been convicted of an offense shall not apply. Notwithstanding the provisions of N.J.S.2C:1-8 or any other law, a conviction of pattern of official misconduct shall not merge with a conviction of official misconduct, official deprivation of civil rights, or any other criminal offense, nor shall such other conviction merge with a conviction under this section, and the court shall impose separate sentences upon each violation of N.J.S.2C:30-2 and sections 2 and 3 of P.L.2003, c.31 (C.2C:30-6 and C.2C:30-7). L.2003,c.31,s.3."*

## IV. ARGUMENT

### A. The Trial Court (Chancery Division) abused its discretion and Erred because it was Not the Appropriate Forum; and lacked Cognizability over the Action in Lieu of Prerogative Writs under N.J. Const. Art. VI, § II, par. 3, N.J. Ct. R. 4:69-1 [1T]

Plaintiff reserved his right to question the sufficiency of the evidence to support the Chancery Division findings and hereby raises an issue as to venue and procedural due process with

respect to Rule 1:13-4 (Pa 180-186), R. 4:3-1 (Pa 187-191), R. 4:69 (Pa 195-197) and common law which gives exclusive cognizability over actions in lieu of prerogative writs to the Law Division, where Plaintiff sought to compel the exercise of a ministerial duty to grant adjournments on request. Instead of the request being granted when made, the defendants refused, interfered, and compelled Plaintiff to file civil action in the Law Division in which the plaintiff's primary right or the principal relief sought was statutory in nature and legal relief was demanded under R. 4:69 (Pa 195-197) in addition or alternative to N.J.S. 10:6-2 (Pa 175-176) relief. Plaintiff maintains that the Chancery Division Judge was without jurisdiction of the subject matter of his action in lieu of prerogative writs and civil rights claims, and that the Chancery Division Judge failed to order the action, with the record and all papers on file, transferred to the Law Division as required by Rule 1:13-4 (Pa 180-186). The action was not proceeded upon as if it had been commenced in the Law division in accords with Rule 1:13-4.

> Here, R. 1:13-4(a) authorizes transfer from a court lacking subject matter jurisdiction to any court having such jurisdiction "in order to avoid dismissal of the action on jurisdictional grounds." Current N.J. Court Rules, comment 1.1 on R. 1:13-4(a); see also Brookview Gardens, Inc. v. Borough of Bergenfield, 4 N.J. Tax 625 (Tax 1982), aff'd, 6 N.J. Tax 253 (App. Div. 1983) (Court transferred complaint to county board since taxpayer was required under R. 8:2(c) to first exhaust his remedies before the board prior to seeking relief in the Tax Court). Under these facts, transfer to the county board is proper given the court's lack of jurisdiction of the subject tax appeal. The board is therefore instructed to accept plaintiff's complaint as if it had been received on March 14, 2013. Plaintiff shall be responsible for all the applicable statutes and rules relating to the payment of filing fee s to the board as well as those rules relating to the processing of the petition of appeal." PAGE 5

Plaintiffs action in lieu of prerogative writs and civil rights claims (Pa 27-29) are not encompassed by subparagraphs (1), (2), (3), and (4) of R. 4:3-1. The Court stated in Morris the following:

> *"Judge Sarkisian also transferred the matter from the Chancery Division to the Law Division pursuant to Rule 4:69-1 because "despite being framed as an action*

> *to enforce the requirements, [p]laintiff effectively seeks to compel the exercise of a ministerial duty, as set forth in the ordinance, by compelling [the City] to enforce the residency requirements. Therefore, this is an action in lieu of prerogative writ[s]." Citing from Morris v. DeMarco DOCKET NO. A-1380-17T1 (App. Div. Jun. 27, 2019)* (Pa 397-402) *Admittedly, jurisdiction over subject matter may not be conferred by consent or be waived and lack of such jurisdiction may be raised or noted at any time. R. 4:6-7; State v. Bruneel, supra; Tracey v. Tracey, supra; McKeeby v. Arthur,7 N.J. 174, 181 (1951). However, the court rules contain liberal provisions for transfers of actions among courts where subject matter jurisdiction is involved. R. 1: 13-4. Linder v. Linder, 126 N.J. Super. 466, 473 (App. Div. 1974)*

Plaintiff argues that the Superior Court may deal with proper division under its constitutional authority to "make rules governing * * *, subject to law, the practice and procedure in all such courts." (N.J. Const. Art. VI, § II, par. 3]) The incidental matter of proper Division plainly falls within the area of practice and procedure. Plaintiff argues that the Chancery Division proceeded without Subject Matter jurisdiction, therefore was not neutral, infringed upon his procedural and substantive due process, and that the atmosphere was fraught with the potential for prejudice.

> *A court can raise the issue of jurisdiction sua sponte as a court cannot entertain a case when it lacks subject matter jurisdiction. Prime Accounting Dep't. v. Twp. of Carney's Point, 421 N.J. Super. 199, 212 (App. Div. 2 011) (citing Peper v. Princeton Univ. Bd. of Trs., 77 N.J. 55, 65-66 (1978)). See also R. 4:6–7 ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the matter ...") Lall v. Shivani 448 N.J. Super. 38 (App. Div. 2016) Preliminarily, we note our concern with the trial court's approach. We perceive no legitimate reason to "throw the law aside" in an effort to achieve a practical solution. Notwithstanding the best of motives, a judge's role is circumscribed by the law. A judge is not free to do whatever he or she thinks is best for a defendant, or a crime victim, without reference to controlling legal principles. To do so is to depart from his or her proper role as a judge. State v. Gilchrist, 381 N.J. Super. 138, 143 (App. Div. 2005)*

Thus, based on the foregoing reasons and facts one (1) through twenty-eight (28), the court should reverse because the Chancery Division was not the appropriate forum; and lacked cognizability over the action in lieu of prerogative writs under N.J. Const. Art. VI, § II, Par. 3, N.J. Ct. R. 4:3 and N.J. Ct. R. 4:69.

### i. This Matter of is of Constitutional Magnitude

Plaintiff contends that the matter is of constitutional magnitude because the venue is addressed under the constitutional authority to "make rules governing *, subject to law, the practice and procedure in all such courts." (N.J. Const. Art. VI, § II, par. 3.) (Pa 160-163)

> *The New Jersey Constitution declares "[t]he Superior Court shall have original general jurisdiction throughout the State in all causes." N.J. Const., art. VI, § III, ¶ 2. Thus, the Superior Court is no different than most state courts, which "are invested with general jurisdiction that provides expansive authority to resolve myriad controversies brought before them." Thompson v. City of Atlantic City, 190 N.J. 359, 378-79 (2007) (citing Turner v. Bank of N. America , 4 U.S. 8, 11, (4 Dall.), 1 L. Ed. 718, 719 (1799) (noting that subject matter jurisdiction is presumed for courts of general jurisdiction unless proved otherwise)). The determination of whether subject matter jurisdiction exists is a legal question, which we review de novo. Santiago v. N.Y. & N.J. Port Auth., 429 N.J. Super. 150, 156, 57 A.3d 54 (App. Div. 2012). Americare Emergency Med. Serv. v. City of Orange Twp. 463 N.J. Super. 562 (App. Div. 2020)*

Plaintiff argues that the Chancery Division venue was improper and adjudication of his action in lieu of prerogative writs by the Presiding General Equity Judge in the Chancery Division was improper, pro se abuse and an abuse of discretion.

> "The 1947 Constitution recognized the doctrine by providing: Subject to the rules of the Supreme Court, the Law Division and the Chancery Division shall each exercise the powers and functions of the other division when the ends of justice so require, and legal and equitable relief should be granted in any cause so that all matters in controversy between the parties may be completely determined. [ N.J. Const. art. VI, § 3, ¶ 4.]" Olds v. Donnelly, 150 N.J. 424, 696 A.2d 633 (N.J. 1997)

Rule 4:3-1 (Pa 187-191) clearly pertains to actions in which a plaintiff's p primary right or the principal relief sought is equitable in nature, while plaintiff sought legal relief not equitable relief. Rule 4:3-1(5) (Pa 187-191) clearly provides that all actions in the Superior Court except those encompassed by subparagraphs (1), (2), (3), and (4) herein shall be filed and heard in the Law Division, Civil Part or the Law Division, Special Civil Part. Even if the plaintiff had sought equitable relief, the Law Division could have adjudicated equitable issues and granted equitable

relief. Plaintiffs action was properly labeled in the Law Division by the plaintiff. The defendants did not move to transfer within 10 days after the pleadings were closed and the Law Division on its own motion did not transfer the cause at or before the pretrial conference, and no motion to transfer was made. Further, Plaintiff was not given any notice of a change in divisions.

> *"It is apparent, therefore, that the Law Division can adjudicate equitable issues and grant equitable relief not only in actions which, though primarily legal, involve equitable issues, but also in certain actions which are primarily or wholly equitable. This is so, for example, if the action is improperly labeled in the Law Division by the plaintiff, but the defendant does not move to transfer within 10 days after the pleadings are closed and the court on its own motion does not transfer the cause at or before the pretrial conference, or if a motion to transfer is made but denied by the court. This is also so in cases such as the one before us, where the action was transferred to the Law Division from the Chancery Division on the mistaken belief that the issues were principally legal. In similar circumstances the Chancery Division may adjudicate legal issues and grant legal relief." O'Neill v. Vreeland, 6 N.J. 158, 167 (N.J. 1951)* In Lyn-Anna Properties, the Court focused on the issue of whether the Chancery Division could have ancillary jurisdiction over legal claims and, therefore, decide those ancillary legal claims by way of a bench trial. The Court answered that question affirmatively. However, it was noted that this rule vesting the Chancery Division with jurisdiction over ancillary legal issues is not to be mistaken to grant a Chancery Division judge jurisdiction over all matters before it simply because it was originally vested with jurisdiction. Lyn-Anna Properties, id. at 330, 678 A.2d 683. The rule of Lyn-Anna Properties is that the Chancery Division has ancillary jurisdiction over legal issues to the extent that those issues are "`incidental or essential to the determination of some equitable question.'" Ibid. (citations omitted). When faced with claims that seek both legal and equitable remedies, the Chancery Division judge must "consider the nature of the underlying controversy as well as the remedial relief sought." Id. at 331, 678 A.2d 683. If the court concludes that the "predominant" relief being sought by the complainant is equitable in nature, and if there are ancillary legal issues presented that are "incidental or essential" to the court's determination of that equitable issue, then the Chancery Division judge may decide those ancillary legal issues by way of a bench trial, even if all of the issues in equity have been resolved. The court, however, may not retain jurisdiction over legal issues that are neither incidental nor essential to the predominant equitable remedy being sought. In such cases, the legal claims should be severed and transferred to the Law Division so that the parties may have the benefit of a jury trial as to those legal issues. We must evaluate the trial judge's decision against this legal backdrop. Ward v. Merrimack Mut. Fire Ins. Co., 312 N.J. Super. 162, 166 (App. Div. 1998)

Plaintiff contends that actions in lieu of prerogative writs and civil rights actions are not encompassed in subparagraphs (1), (2), (3) and (4). Rule 4:3-3(a) states a change of venue can be ordered for various reasons, including "substantial doubt" that a fair trial may be had in a given location. Plaintiff argues that there is no order (Pa 14) transferring the Law Division matter to the Chancery Division and that the Law Division matter could not be tried fairly in the Chancery Division as a result of judicial bias and prejudice. That unordered assignment of the matter to the Chancery Division or adjudication by the General Equity Presiding Judge was improper under N.J. Const. Art. VI, § II, par. 3 (Pa 160-163), R. 1:13-4 (Pa 180-186), R. 4:3-1(a)(1) (Pa 187-191), R. 4:3-1(5) (Pa 187-191) and R. 4:69-1 (Pa 195-197). Plaintiff contends that the Chancery Division Order was improperly submitted into the court record because the document had no legitimate basis in rule or law and must be removed pursuant to R. 1:38-8 - Removing from the Court File Documents Improperly Submitted to Court.

> *"[T]he appropriate forum for the commencement of a specific claim is established by the Rules of Court." Solondz v. Kornmehl, 317 N.J. Super. 16, 19, 721 A.2d 16 (App. Div. 1998). Rule 5:1-2, "Actions Cognizable," governs which actions are cognizable in the Chancery Division, Kopec v. Moers 470 N.J. Super. 133 (App. Div. 2022) Townsend v. Great Adventure 178 N.J. Super. 508 (App. Div. 1981)* ***We hold that an improper disposition of this case was made in the Law Division.*** *R. 1:13-4(a) provides as follows:" Subject to the right to be prosecuted by indictment, if any court is without jurisdiction of the subject matter of an action or issue therein or if there has been an inability to serve a party without whom the action cannot proceed as provided by R. 4:28-1, it shall, on motion or on its own initiative, order the action, with the record and all papers on file, transferred to the proper court, or administrative agency, if any, in the State. The action shall then be proceeded upon as if it had been originally commenced in that court or agency. This rule did not provide for transfers from a court to an administrative agency when the Law Division action was started, but was amended, effective September 11, 1978, to allow such transfers. See Kaczmarek v. New Jersey Turnpike Auth., 77 N.J. 329, 344 (1978). The rule as amended is applicable here because when Great Adventure obtained summary judgment the amendment had been adopted. See Feuchtbaum v. Constantini, 59 N.J. 167, 172 (1971). The rule thus requires that the court on its own initiative transfer the action to an appropriate administrative agency if the court is without subject matter jurisdiction of the action. When his complaint was filed in the Law Division appellant maintained that he could assert a civil action*

*against Great Adventure if Great Adventure was not responsible to him for benefits payable under the Workers' Compensation Act. Clearly, he should have simultaneously filed a petition in the Division of Workers' Compensation since he was alert to the possibility that such a claim might be appropriate. Thus, even though appellant filed in the wrong forum his complaint against Great Adventure should have been transferred, not dismissed. This is particularly true because a dismissal caused his claim to be barred without an adjudication on the merits, certainly a result not to be favored since his claim, though in the wrong forum, was timely brought. See Galligan v. Westfield Centre Service, Inc., 82 N.J. 188 (1980); Kaczmarek v. New Jersey Turnpike Auth., 77 N.J. 329 (1978). R. 1:13-4(a) was not brought to the attention of the trial judge nor cited by appellant on this appeal, but in the interests of justice we have raised it ourselves. Rosa v. United Jersey Bank 167 N.J. Super. 482 (App. Div. 1979) ◦ "Ordinarily, if a court is without subject matter jurisdiction, it shall on motion or its own initiative order the action transferred to the proper court, there to be proceeded upon as if it had been originally commenced in that court. R. 1:13-4(a). If such action is appealed without having been transferred, the appellate court may decide the appeal and direct the appropriate judgment to be entered in the court to which the action should have been transferred. R. 1:13-4(b). However, we choose not to do so in light of the limited proceedings below, the essenti al thrust of the defense being the lack of jurisdiction and not the merits of the controversy. " The Chancery Division does not have jurisdiction to order the beneficiary change. Jurisdiction is in the administrative agency, PERS. See N.J.S.A. 43:15A-17. Thus, the motion judge should have transferred that issue by authority of R. 1:13-4(a) to PERS for determination. See, e.g., Kaczmarek v. New Jersey Tpk. Auth., 77 N.J. 329 , 343-44, 390 A.2d 597 (1978); Theodore v. Dover Bd. of Educ., 183 N.J. Super. 407 , 413, 444 A.2d 60 (App.Div. 1982). See also Abbott v. Burke, 100 N.J. 269 , 301, 495 A.2d 376 (1985)." National Transfer v. N.J. D.E.P 347 N.J. Super. 401 (App. Div. 2002 If a challenge to the action or inaction of a state administrative agency is brought in a trial court, that court has the responsibility to transfer the matter to this court on the motion of a party or "on its own initiative." R. 1:13-4(a). If a trial court fails to transfer a challenge to state agency action to this court and instead decides the merits, we may exercise our original jurisdiction on appeal from the judgment and review the underlying agency action as if the challenging party had appealed directly to his court." Pascucci v. Vagott 71 N.J. 40 (N.J. 1976) Holding that ordinarily "there should be expeditious adjudication of all matters in controversy between the parties at one time and place" Pascucci v. Vagott 71 N.J. 40 (N.J. 1976) it would have been preferable for it to transfer the cause rather than to dismiss the action. R. 1:13-4(a); see Central R.R. v. Neeld, supra, 26 N.J. 172 at 184. Nevertheless, we exercise our discretion under the rule and decide the appeal. R. 1:13-4(b)." In Perretti, supra, the Appellate Division explained that the entire controversy doctrine and the summary action are complementary despite the appearance that they are in conflict. "To be sure, under then-prevailing practice perceptions, defendants had every opportunity to preserve the civil rights and tort claims by filing a timely, separate Law Division action seeking the relief claimed. But it was also, even then, well within the authority of the trial court, if not the trial*

> *court's obligation under R. 1:13-4(a), to sever and transfer those causes of action instead of dismissing them. See Ran-Dav's, supra, 243 N.J. Super. at 237-38 n. 3, 579 A.2d 316. In the light of the entire controversy cases of 1995, it is now clearer than ever that, where litigants have discharged their entire controversy obligations by raising all related causes of action in a single proceeding, the trial court is obliged to assume a proactive management role in such matters, by, for example, severing or joining claims, staying or accelerating their consideration, and retaining or transferring jurisdiction." Karatz v. Scheidemantel 226 N.J. Super. 468 (App. Div. 1988) We first conclude that the Law Division judge had no jurisdiction to entertain the matter and should have transferred it to the Appellate Division. See R. 2:2-3(a)(2); R. 1:13-4(a); Johnson v. N.J. State Parole Bd., 131 N.J. Super. 513 (App.Div. 1974), certif. den. 67 N.J. 94 (1975)." Selobyt v. Keough-Dwyer Corr. Fac 375 N.J. Super. 91 (App. Div. 2005) Accordingly, we transfer this matter to the Law Division, for further proceedings under R. 4:69-1, actions in lieu of prerogative writs, see R. 1:13-4(a), and dismiss Selobyt's appeal pending in the Appellate Division."*

Thus, based on the foregoing reasons and facts one (1) through thirty (30), the court should reverse because venue is a privilege protected by N.J. Const. Article I "rights and privileges" (Pa 157-159) and the "privileges and immunities clause" of the United States Constitution, U.S. Const. Art. IV, § 2 and U.S. Const. Amend. XIV.

### ii. Chancery Division Venue Defects Constituted Trial Error Which Requires Vacatur Of The Chancery Division Order filed in this Law Division Docket [1T]

Plaintiff contends that division defects necessarily constitute trial error. The remedy for a trial in the wrong division is a trial in the right division. Retrial is the remedy for every analogous constitutional trial error—including errors in the composition of the jury—and is the one prescribed by historical practice and this Court's precedents. A contrary rule, which would grant factually guilty defendants a windfall preclusive judgment for venue errors, lacks textual, precedential, or logical justification. The Appellate Division should vacate the Chancery Division Order (Pa 13) and assign the matter to a Law Division Judge outside of Camden County in light of the obvious appearance of impropriety.

> Judges must avoid actual conflicts of interest as well as the appearance of impropriety in order "to promote confidence in the integrity and impartiality of the Judiciary." DeNike v. Cupo, 196 N.J. 502, 507 (2008) (Pa 365-380).

Rule 4:3-2 (Pa 187-191) provides venue "shall be laid in the county in which the cause of action arose, or in which any party to the action resides at the time of its commencement, or in which the summons was served on a nonresident defendant." Rule 4:3-3(a)(2) (Pa 187-191) states the Assignment Judge may order a change of venue "if there is a substantial doubt that a fair and impartial trial can be had in the county where venue is laid."

Thus, based on the foregoing reasons and facts one (1) through thirty (30), the court should reverse because the chancery division venue defects constituted trial error which requires vacatur of the chancery division order filed in the law division docket.

### iii. Chancery Division abuse its discretion and Erred because Venue Is A Privilege Protected By N.J. Const. Article I Rights And Privileges And The Privileges And Immunities Clause Of The United States Constitution, U.S. Const. Art. Iv, § 2 And U.S. Const. Amend. XIV [1T]

Rule 4:3-3(a) [Pa] states that a change of venue can be ordered for various reasons, including a "substantial doubt" that a fair trial may be had in a given location. Plaintiff argues there was no basis for the Chancery Division to adjudicate the matter. Venue is a matter of practice and procedure under State v. Greco, 29 N.J. 94 , 104 (1959) [Pa], therefore Plaintiff argues that the Trial Court failed to comply with N.J. Ct. R. 4:69-1 [Pa] in turn violated his Procedural Due Process and Equal Protection under the law guaranteed by N.J. Const. Art. I [Pa] and denied him equal benefits of all laws and proceedings under 42 U.S.C. 1981 (a) [Pa].

> *"Venue "involves no more and no less than a personal privilege which may be lost by failure to assert it seasonably, by formal submission in a cause or by submission through conduct." 56 Am. Jur., Venue, sec. 40, pp. 44-45. Cf. Freeman v. Bee Machine Co., 319 U.S. 448, 454, 63 S.Ct. 1146, 87 L.Ed. 1509 , 1514 (1943), rehearing denied 320 U.S. 809, 64 S.Ct. 27, 88 L.Ed. 489 (1942). Compare Wildes v. Mairs, 6 N.J.L. 320 ( Sup. Ct. 1796); Thorn v. Langue, 122 N.J.L. 342, 346 ( Sup. Ct. 1939)."*

Thus, based on the foregoing reasons and facts one (1) through thirty (30), the court should reverse because the right to choose venue is a privilege protected by N.J. Const. Article I "rights and privileges" and the "privileges and immunities clause" of the United States Constitution, U.S. Const. Art. IV, § 2 And U.S. Const. Amend. XIV.

**iv. The Chancery Division Judge Was Without Subject Matter Jurisdiction To Hear And Determine The Controversy At Law Thus Erred And Abused Her Discretion. [1T]**

Plaintiff maintains that the Law Division is and was the proper forum. Plaintiff argues that Actions in Lieu of Prerogative Writs and Civil Rights Actions are not enumerated in R. 4:3-1 subparagraphs (1),(2),(3), and (4) (Pa 187-191).

> Rule 4:3-1. Divisions of Court; Commencement and Transfer of Actions (5) Law Division (Pa 187-191). All actions in the Superior Court except those encompassed by subparagraphs (1), (2), (3), and (4) herein shall be filed and heard in the Law Division, Civil Part or the Law Division, Special Civil Part [Pa]. "The Chancery Division must not become clogged or burdened with the weight of actions properly cognizable in the Law Division. [ Id., 128 N.J. Super. at 497 .] Citing Chiacchio v. Chiacchio, 198 N.J. Super. 1, 486 A.2d 335 (App. Div. 1984) (Pa 344-347) Proceedings in lieu of prerogative writs other than those to which R. 2:2-3(a) (2) is applicable are, in any event, cognizable in the Law Division rather than the Chancery Division. R. 4:69-1. Citing Equitable Life Mort. v. N.J. Div. of Taxation, 151 N.J. Super. 232, 376 A.2d 966 (App. Div. 1977) (Pa 348-353) "Plaintiff's original counsel misfiled this complaint in the Chancery Division as a prerogative writ action with additional counts for damages. However, the case should have been filed in the Law Division despite the fact that plaintiff was seeking injunctive relief in her prerogative writ count. The matter will be transferred to the Law Division and provided with a Law Division docket number." Citing Fay v. Medford Township Council, 30 A.3d 367, 423 N.J. Super. 81 (Ch. Div. 2011) ( Pa 336-343) The issue of subject matter jurisdiction "involves merely a threshold determination as to whether the Court is legally authorized to decide the question presented. If the answer to this question is in the negative, consideration of the cause is 'wholly and immediately foreclosed.'" Gilbert v. Gladden, 87 N.J. 275, 280-281 (1981), quoting Baker v. Carr, 369 U.S. 186, 198 (1962). Jurisdiction is defined as: ... the right to adjudicate concerning the subject matter in the given case. To constitute this, there are three essentials: First. The court must have cognizance of the class of cases to which the one to be adjudged belongs. Second. The proper parties must be present. Third. The point decided must be, in substance and effect, within the issue. That a court cannot go out of its appointed sphere and that its action is void with respect to persons who are strangers to its proceedings, are propositions

established by a multitude of authorities. Munday v. Vail, 34 N.J.L. 418, (1871) (emphasis added). See also, Housing Authority of the City of Newark v. West, 69 N.J. 293, 299 (1976), citing Sbrolla v. Hess, 133 N.J.L. 71 (Sup. Ct. 1945). See N.J. Div. of Child Prot. & Permanency v. M.H. (In re M.S.H.), No. A-2687-19, at *13 (App. Div. Apr. 28, 2021) ("As defendant correctly notes, subject matter jurisdiction "can be raised at any time, even on appeal." Pressler & Verniero, Current N.J. Court Rules, cmt. 2.1 on R. 4:6-2 (2021); see also R. 4:6-7. We therefore consider defendant's jurisdictional argument, recognizing the trial judge, Division, and law guardian were not afforded the opportunity to directly address defendant's newly-minted contentions."); see also Rule 4:6-2 and 4:6-7.

Thus, based on the foregoing reasons and facts one (1) through thirty (30), the court should reverse because the chancery division judge was without jurisdiction to hear and determine the controversy at law.

### v. Chancery Division Judge Was Not Competent To Adjudicate The Action In Lieu Of Prerogative Writs And Erred And Abused Discretion In Doing So. [1T]

The Chancery Division Judge recognized the defendants deprivation or interference with Plaintiffs rights and their failure to carry out their ministerial duty to Plaintiff when she stated:

> THE COURT: However, you are entitled to a statutory adjournment. You're entitled to two as a right. And there was -- something happened, and it was not granted prior to the lockout or the removal -- it was granted. [1T Lines 16- 19, Pg. 16]

> *"The writ is now sought because it is said that N.J.S.A.54:7-1, et seq., is repugnant to the due process and equal protection clauses in the federal constitution. Prosecutor sought to raise these questions in a Chancery proceeding, but failed because they were cognizable only at law. The opinion of the Court of Errors and Appeals holding that the Court of Chancery could not entertain the questions raised as to validity of the apportionment proceeding in question was filed January 25th, 1940. Luckenbach Terminals v. North Bergen Township, 125 N.J. Eq. 562; Luckenbach Terminals v. Township of North Bergen et al.,127 Id. 93. The court of chancery was not competent to adjudicate the claim. San Giacomo v. Oraton Investment Co. 143 A. 329 (N.J. 1928) Richeimer v. Fischbein 149 A. 26 (N.J. 1930)*

Plaintiffs Complaint [Pa 27-29] clearly states on line 5:

> *"plaintiff Kelly demands the performance of a ministerial act or duty under N.J.S.A. 2A:17-36 pursuant to Rule 4:69. Defendants have only ministerial obligations under N.J.S.A. 2A:17-36. See Wells Fargo Home Mortg. V. Stull, 378 N.J. Super.*

> *449, 876 A.2d 298 (App. Div. 2005)…. compliance with the statutory provision is mandatory." W.S. Frey Company, Inc. v. Health 158 N.J. 321 (N.J. 1999).*

The Appellate Division emphasized the Legislatures intent in enacting the Fair Foreclosure Act in Wells Fargo Home Mortg. v. Stull,

> *"we emphasize the Legislature's intent in enacting the Fair Foreclosure Act: The Legislature hereby finds and declares it to be the public policy of this State that homeowners should be given every opportunity to pay their home mortgages, and thus keep their homes; and that lenders will be benefited when residential mortgage debtors cure their defaults and return defaulted residential loans to performing status. [ N.J.S.A. 2A:50-54.] Wells Fargo Home Mortg. v. Stull, 378 N.J. Super. 449, 455 (App. Div. 2005)* (Pa 317-322)

Because the Sheriff defendants had denied plaintiffs request for adjournments on more than one occasion, the plaintiff listed as one of his injuries in his original complaint, that he was being denied every opportunity consistent with the legislatures intent and public policy as emphasized by the Appellate Division. Plaintiff submitted a copy of *Wells Fargo Home Mortg. v. Stull* (Pa 317-322) to the Trial Court. The Chancery Division judge demonstrated incompetence with respect to the legislative intent and the defendants obligations to their ministerial duties, statutory duty and the accrual of civil rights claims when she stated:

> THE COURT: *"However, you are entitled to a statutory adjournment. You're entitled to two as a right. And there was –something happened, and it was not granted prior to the locket or the removal – it was granted. "So, any ministerial action or ….still -- was done before any lockout or any deprivation of your rights. Therefore, sir, in your action in lieu of prerogative risk there is absolutely -- you are not denied your statutory adjournments. You -- any action. [1T Lines 15- 25Pg. 16] "you have or claim that you were denied the opportunity to pay your mortgage is a claim that is to be brought against the mortgage company, not the Sheriff's Department. They are not parties to that private transaction. They are not participants in that private action. So, sir, any and all claims -- further claims you have for statutory adjournments or further delays are to be brought under the foreclosure action, not against the Sheriff's Department. They are simply not parties to that matter."* [1T Lines 1- 11, Pg. 17]

It is here, the Chancery Division Judge confused the nature of the action before the Court by adopting a portion of Counsel Gee's tactical maneuver of focusing on a Foreclosure action not

before the Chancery Division (Camden Vicinage) which prompted the request made to the defendants for adjournments. Plaintiff did not sue the Sheriff's Office over a private mortgage transaction as wrongly implied by the Chancery Division Judge. Plaintiffs complaint clearly demonstrates suit was filed because the defendants had refused on more than one occasion to grant his adjournments request when they had absolutely no right to refuse either time.

> *As of today the sheriff is still possessed of all his common law powers as a police officer which are specifically set forth at some length in 1 Blackstone [*]344; 1 Chitty's Criminal Law [*]25. See the notes in Elmer's Digest, page 452. There is nothing in the statutes abolishing these common law duties of the sheriff, so I have come to the conclusion that he still has the primal power as a police and peace officer in the county, where necessary, to arrest any one on a criminal charge. State v. Winne, 12 N.J. 152, 185-86 (N.J. 1953) II The Duties of a Policeman Every police officer has an inherent duty to obey the law and to enforce it. That duty is essential to the preservation of a free society. Its absence makes the law enforcer lawless, permitting violence, oppression and injustice. Thus, in State v. Cohen, supra, the court said: A police officer has the recognized duty to use all reasonable means to enforce the laws applicable to his jurisdiction, and to apprehend violators. . . . A police officer may not himself violate the laws he is sworn to enforce applicable in his jurisdiction . . ., and such officer is criminally responsible under a charge of misconduct in office when either he himself commits, or he solicits others to commit, the crimes which defendant attempted to persuade the meter collectors and repairman to execute. Such acts, carried to a conclusion, would be criminal per se, and we perceive a clear duty incumbent upon a police officer not to act in such a manner. [ 32 N.J. at 9-10] Driscoll v. Burlington Bristol Bridge Co. Inc., 8 N.J. 433 (1952), held that public officers have a duty "to serve the public with the highest fidelity . . . to be diligent and conscientious, to exercise their discretion not arbitrarily but reasonably, . . . to display good faith, honesty and integrity, . . . to be impervious to corrupting influences. . . ." Id. at 474-476. State v. Stevens, 203 N.J. Super. 59, 65-66 (Law Div. 1984)* (Pa 323-327)

On one hand the Chancery Division acknowledges they refused but, on the other hand, promotes that the granting of adjournments after compelling plaintiff to file suit or seek judicial relief somehow stops the accrual of the violations of the NJCRA (N.J.S.A. 10:6-2) (Pa 175-176). Plaintiff maintains that the Chancery Division Judge was not competent enough to properly interpret the rules pertaining to actions of in lieu of prerogative writs, nor the Civil Rights Acts. Plaintiff maintains that the denial of his statutory right on more than one occasion in turn denied

his State Constitutional right to be free from harassment, discrimination, and retaliation. Plaintiff maintains that the Law Against Discrimination also secures the same rights under statutory law, and that these State laws were ignored by the Chancery Division Judge, demonstrating that she relied on irrelevant factors in her decision.

Thus, based on the foregoing reasons and facts one (1) through thirty (30), the court should reverse because chancery division judge was not competent to adjudicate the action in lieu of prerogative writs.

### vi. Chancery Division (Trial Court) Abused its Discretion and Erred when it Failed To Transfer This Action In Lieu of Prerogative Writs Back To The Law Division Which Constituted Reversible Error [1T]

Plaintiff argues that the Chancery Division's failure to transfer this action in lieu and civil rights action back to a Law Division Judge is a reversible error.

> *"The failure to grant a change of venue, initially because the trial court applied the wrong test for such a motion, is reversible error under the standard established.in State v. Williams, 93 N.J. 39 (1983) The majority's comments concerning the enhanced standard of review are problematic because even under conventional standards of review the guilt conviction here should be reversed. The failure to grant a change of venue, initially because the trial court applied the wrong test for such a motion, is reversible error under the standard established in State v. Williams, 93 N.J. 39 (1983). Further, the prosecutor's egregious misconduct should be reversible error under the dictates of the majority's opinion in State v. Ramseur, supra, 106 N.J. at 320-24. Thus, I am strongly of the view that under a conventional standard of review the errors mentioned herein were sufficiently prejudicial to warrant reversal" State v. Koedatich 112 N.J. 225 (N.J. 1988) common law rules governing venue have been long superseded by the Rules of Court. [Pa] Winberry v. Salisbury, 5 N.J. 240, 245-46, cert. denied, 340 U.S. 877, 71 S. Ct. 123, 95 L. Ed. 638 (1950) (recognizing that, under the New Jersey Constitution, the Supreme Court is vested with plenary authority over rules governing the courts in this state)." State v. Defazio DOCKET NO. A-2700-13T3 (App. Div. Jul. 22, 2014)*

Plaintiffs complaint proposed amended complaint (Pa 30-33) and he moving papers filed and attached demonstrate that the Burlington County Sheriff's Office defendants denied Plaintiff's multiple in person request for adjournments on February 21, 2023, and his written request filed in

person March 1st, 2023. Opposing Counsel Gee's letter dated March 21, 2023 (Pa 145), clearly demonstrates that the defendant Kostopolis deprived and interfered with Plaintiffs N.J. Const. Art. I right to be free from harassment and discrimination, his N.J. Stat. § 2A:17-36 statutory right (Pa 165) and had no intentions to grant the adjournments upon Plaintiffs request until Counsel Gee suggested by explanation to him that Plaintiff was entitled to two adjournments. Opposing Counsel Gee clearly stated facts on the record demonstrating the defendant Kostopolis had refused to adjourn on February 21st, 2023, and March 1st, 2023, request for adjournments and therefore defendant Kostopolis is liable under N.J.S. 10:6-2 (Pa 175-176). Plaintiff maintains that the deprivation of his civil rights accrued January 2023, February 21st, 2023, and March 1st, 2023.

> The New Jersey Civil Rights Act, N.J.S.A. 10:6-1 to - 2, includes a provision that authorizes a court to award "the prevailing party" reasonable attorney's fees and costs, N.J.S.A. 10:6-2(f). The issue presented by this appeal is whether a party who brings an action under the Civil Rights Act that results in a change in defendant's conduct may qualify as a "prevailing party" even though the action is dismissed as moot rather than being concluded by a judgment in plaintiffs favor. We conclude that a party who brings an action that is shown to have been a "catalyst" for the cessation of conduct alleged to violate the Civil Rights Act may qualify as a prevailing party entitled to an award of attorney's fees." D. Russo, Inc. v. Township of Union 417 N.J. Super. 384 (App. Div. 2010) "We have recognized two types of claims under the [NJCRA]: first, a claim for when one is 'deprived of a right,' and second, a claim for when one's 'rights are interfered with by threats, intimidation, coercion or force.'" Trumpson, 431 N.J Super. at 181-82. (quoting Felicioni v. Admin. Office of Courts, 404 N.J. Super. 382, 400 (App. Div. 2008)). However, "[i]nterference with a right need not actually result in actual deprivation of the right." Id. at 182. Here, there is no dispute that plaintiff serving as a Weingarten representative for Rosado constitutes a protected activity under N.J.S.A. 34:13A-5.4(a)(1), with underpinnings in the First Amendment. See Hernandez, 149 N.J. at 75. Thus, interference or attempted interference with the exercise of that right by retaliation constitutes "threats, intimidation or coercion" cognizable under N.J.S.A. 10:6-2(c) Hernandez v. Hudson Cnty. DOCKET NO. A-1683-18T4 (App. Div. Jul. 15, 2020) Tumpson v. Farina 218 N.J. 450 (N.J. 2014) The court found that defendants Hoboken and the City Clerk "violated Plaintiffs' substantive right under the referendum laws and are therefore liable" under N.J.S.A. 10:6–2(c) of the New Jersey Civil Rights Act. The court also found that plaintiffs were entitled to an award of attorney's fees and costs pursuant to N.J.S.A. 10:6–2(f), an amount that was later determined to be $69,564.18."

The Chancery Division Judge was notified by the pleadings from both sides that Plaintiff did not receive direct notice of the adjournments from the defendant Kostopolis or the Burlington County Sheriff's Office until after the filing of a suit (subsequent thereto) i.e., after Plaintiff's payment of service of process fees, and court fees. Thus, the defendants ultimately took a position to force plaintiff to have to submit fees to the Trial Court to obtain adjournments in direct contradiction to his right under N.J. Stat. § 2A:17-36 (Pa 165) and the Chancery Division judge has condoned this practice. Counsel Gee's admission to the Trial Court (Chancery Division) demonstrated he had to advise the defendants to do their ministerial duty under N.J. Stat. § 2A:17-36 (Pa 165) owed to Plaintiff, after the defendants refused on more than one occasion prior to civil action.

Thus, based on the foregoing reasons and facts one (1) through thirty (30), the court should reverse because the trial court failed to transfer this action in lieu of prerogative writs back to the law division which constituted reversible error.

**vii. The Chancery Division Judge (Trial Court) Abused Its Discretion And Erred By Usings Its Powers To Nullify Civil Rights Legislation As Moot On The Basis Of Defendants Acts Of Retaliation Against Plaintiffs Civil Action And When It Failed To Comply With Or Enforce Legislation At N.J.S. 10:6-2 Because Plaintiff's Complaint Invoked The NJCRA And Was Not "Moot"; [1T]**

The Trial Court did not provide any notice to Plaintiff, nor a copy of an order transferring divisions. During the only hearing held, the Trial Court did not inform me that I was attending a hearing in the chancery division. The Trial Court (Chancery Division) granted equitable relief to the named defendants by not adjudicating the claims brought under the NJ Civil Rights Act (Pa 175-176) as they were set forth in the complaint (Pa 27-29). It appears that the Trial Court adopted or agreed with the defendant's position that plaintiff's civil rights claims were extinguished by defendants decision to finally grant adjournments after compelling plaintiff to file a civil action in

order to obtain relief for the deprivation of his civil rights by their (the defendants) prior refusal(s) without authority to do so. Plaintiff was in fact instructed by the Trial Court to appeal. The Trial Court's instruction was memorialized in the transcripts (1T) of the hearing. Based on the trial court's position as to the merits, Plaintiff argued that the order dismissing his complaint as "Moot" to be a final judgment or order.

> *"Defendants initially argue that the issues before this Court are moot because the ordinance challenged in the referendum petition was put to a vote. The mootness argument fails because plaintiffs still contend that they are entitled to attorney's fees as the prevailing party on their civil-rights claim, see N.J.S.A. 10:6–2(f), despite the placement of the ordinance on the ballot. See Transamerica Ins. Co. v. Nat'l Roofing, Inc., 108 N.J. 59, 64, 527 A.2d 864 (1987) (noting that a matter is moot when there is no issue left to adjudicate)." The New Jersey Civil Rights Act, N.J.S.A. 10:6-1 to -2, includes a provision that authorizes a court to award "the prevailing party" reasonable attorney's fees and costs, N.J.S.A. 10:6-2(f). The issue presented by this appeal is whether a party who brings an action under the Civil Rights Act that results in a change in defendant's conduct may qualify as a "prevailing party" even though the action is dismissed as moot rather than being concluded by a judgment in plaintiffs favor. We conclude that a party who brings an action that is shown to have been a "catalyst" for the cessation of conduct alleged to violate the Civil Rights Act may qualify as a prevailing party entitled to an award of attorney's fees." D. Russo, Inc. v. Township of Union 417 N.J. Super. 384 (App. Div. 2010)*

The plaintiff's action in lieu of prerogative writs and civil rights complaint was not filed in the Chancery Division. Plaintiff did not seek equitable relief. The action in lieu of prerogative writs did not belong before the Chancery Division. This matter is not cognizable in the Chancery Division under R. 4:3 - Divisions; Venue; Transfer of Actions (Pa 187-191). Thus, the Chancery Division was without the effect of jurisdiction to dismiss Plaintiff's "Complaint as Moot" under R. 4:69-1 and R. 4:3-1(5) (Pa 187-191) and it is also without jurisdiction to make further determinations. The plaintiffs proposed amended complaint has set forth claims under the NJCRA (Pa 175-176) and the NJLAD at N.J.S.A. 10:5-1 et seq. Plaintiff brought claims under the NJCRA (Pa 175-176). The Chancery Division abused its discretion when it failed to adjudicate plaintiffs'

claims under the NJCRA (Pa 175-176).

> "The requirement of the mandatory joinder of claims has evolved continually since the adoption of the 1947 Constitution. In Steiner v. Stein, 2 N.J. 367 , 66 A.2d 719 (1949), the Court recognized that to administer justice efficiently, the Chancery Division should adjudicate legal issues, even if related equitable issues have already been determined. Id. at 378, 66 A.2d 719; see also Tumarkin v. Friedman, 17 N.J. Super. 20 , 24, 85 A.2d 304 (App.Div. 1951) Olds v. Donnelly, 150 N.J. 424, 432 (N.J. 1997)" Whenever a case comes on for trial in either of the trial divisions of the Superior Court it shall be disposed of on its merits as the nature of the case may require. The shuttling of cases from law to equity and back again without affording a party a hearing on the merits of his case constituted one of the principal evils of our former judicial system which the Constitution of 1947 and Rule 3:40-3 were designed to obviate (see Comment on the Tentative Draft of Rule 3:40-3). It was never intended and it is not to be countenanced that the elimination of this shuttling from one court to another would be accomplished by depriving a plaintiff of his day in court. Accordingly, it is clear that the plaintiff here was entitled to have his case heard when it came on for trial in the Law Division. O'Neill v. Vreeland, 6 N.J. 158, 169 (N.J. 1951)"

Plaintiff also has common law claims which he has not yet included in the proposed amended complaints as a result of the failure of the Burlington County Risk Management Office or the Insurance agent's failure to reply to the timely filed Notice of Tort Claim (Pa 25-26). The Chancery Division Judge and Counsel Gee failed to address the fact that 1) the Sheriff's Office had no authority to refuse the January and February 2023 request for adjournment; 2) the Sheriff's Office had no authority to refuse the March 2023 request for adjournment; and 3) the plaintiff requested adjournments in February 2023, before filing his March 1, 2023, third request (Pa 22-24) made in writing, addressed to the defendants. These facts were asserted in the moving papers attached to the original Complaint (Pa 27-29).

> "In matters of statutory interpretation, our review is de novo." Verry v. Franklin Fire Dist. No. 1, 230 N.J. 285, 294 (2017) (citing Saccone v. Bd. of Trs. of Police &Firemen's Ret. Sys., 219 N.J. 369, 380 (2014)). We apply well-known principles and tenets of statutory construction to guide our review. "When we interpret a statute, we strive to effectuate the Legislature's intent." Finkelman v. Nat'l Football League, 236 N.J. 280, 289 (2019) (citing Cashin v. Bello, 223 N.J. 328, 335 (2015); DiProspero v. Penn, 183 N.J. 477, 492 (2005)); see also Correa v. Grossi, 458 N.J.Super. 571, 579 (App. Div. 2019) ("[O]ur basic rules of statutory interpretation

recognize that not every statute is clear, and in case of ambiguity, our guiding light is the Legislature's intent."). "[T]he best indicator of that intent is the statutory language," which should be given its "ordinary meaning and significance." DiProspero, 183 N.J. at 492 (first citing Frugis v. Bracigliano, 177 N.J. 250, 280 (2003), then citing Lane v. Holderman, 23 N.J. 304, 313 (1957)). "We construe the words of a statute 'in context with related provisions so as to give sense to the legislation as a whole.'" Spade v. Select Comfort Corp., 232 N.J. 504, 515 (2018) (quoting N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 570 (2017)). "If the plain language leads to a clear and unambiguous result, then [the] interpretative process is over." Finkelman, 236 N.J. at 289 (alteration in original) (quoting Johnson v. Roselle EZ Quick LLC, 226 N.J. 370, 386 (2016)). "The Court 'may turn to extrinsic evidence [of legislative intent], "including legislative history [and] committee reports"' when the statutory language is ambiguous." Ibid. (alterations in original) (quoting DiProspero, 183 N.J. at 492-93). "Such ambiguity can arise when a statute 'is subject to varying plausible interpretations,' or when literal interpretation of the statute would lead to a result that is inherently absurd or at odds with either public policy or the overarching statutory scheme of which it is a part." Id. at 289-90 (quoting Cashin, 223 N.J. at 336). A court may "draw inferences based on the statute's overall structure and composition and may consider the entire legislative scheme of which [the statute] is a part." MasTec Renewables Constr. Co. v. SunLight Gen. Mercer Solar, LLC, 462 N.J.Super. 297, 318 (App. Div.) (alteration in original) (quoting State v. Twiggs, 233 N.J. 513, 532 (2018)), certif. denied, 244 N.J. 243 (2020). "[W]hen we are faced with ambiguity in a statute, we should consider the legislative intent animating the entire statutory scheme of which the specific provision is a part." Correa, 458 N.J.Super. at 579-80. "[S]tatutes that deal with the same matter or subject should be read in pari materia and construed together as a unitary and harmonious whole." MasTec Renewables, 462 N.J.Super. at 318 (alteration in original) (quoting Nw. Bergen Cnty. Utils. Auth. v. Donovan, 226 N.J. 432, 444 (2016)). "A court must make every effort to avoid rendering any part of a statute inoperative, superfluous or meaningless." Ibid. (citing Jersey Cent. Power &Light Co. v. Melcar Util. Co., 212 N.J. 576, 587 (2013)). Linden Democratic Comm. v. City of Linden, No. A-1759-19, 7-9 (App. Div. Aug. 17, 2021)

Thus, based on the foregoing reasons and facts one (1) through thirty (30), the court should reverse because the trial court failed to comply with, properly interpret or enforce legislation at N.J.S. 10:6-2 (Pa 175-176).

### viii. The Chancery Division Judge (Trial Court) Abused Its Discretion And Erred When It Failed To Respect To Plaintiff's Choice Of Forum because it Was Entitled To Preferential Consideration

Plaintiff has a right to choose his forum, the Trial Court's management actions in this case

made great effort to interfere with that right.

> "Stated another way, the plaintiff's choice of forum is "entitled to preferential consideration." Tatham v. Tatham 429 N.J. Super. 502 (App. Div. 2013) Generally, however, the plaintiff has a choice of any forum where there is appropriate jurisdiction over the defendant. American Employers' Insurance v. Elf Atochem North America, Inc. 280 N.J. Super. 601 (App. Div. 1995) Therefore, venue provisions should be construed most favorably for the plaintiff, and as long as the initial selection of a forum is not inconsistent with these rules, only the strongest showing of inconvenience to the defendant should deprive a plaintiff of his legal right to have the action tried in the county of his choice. Doyley v. Schroeter 191 N.J. Super. 120 (Law Div. 1983) Accordingly the plaintiff had the right to lay the venue in the county of her residence, and the court will not change the venue on the ground of inconvenience, upon any nice balancing of circumstances of mere accommodation to the parties; over these, the legal right of the plaintiff must prevail. Simanton v. Moore, 65 N.J.L. 530; Tonkin v. Hankinson 185 A. 532 (N.J.1936) "Ordinarily, a plaintiff's choice of forum will be honored by a court that has jurisdiction over a case. Indeed, there is a strong presumption in favor of retaining jurisdiction where the plaintiff is a resident who has chosen his [or her] home forum." Yousef v. Gen. Dynamics Corp., 205 N.J. 543, 557 (2011) Pasono v. Liberty Mut. Ins. Co. DOCKET NO. A-2801-12T3 (App. Div. Feb. 28, 2014)

Plaintiff has a right under the New Jersey State Constitution and the NJLAD to be free from harassment and interference with his constitutional and statutory rights. Plaintiff is entitled to relief under NJCRA (Pa 175-176) and the NJLAD (Pa 212-262). This case is about harassment, discrimination, deprivation, and interference with Constitutional [N.J. Const. Art. I] and Statutory rights [N.J.S.A. 2A:17-36, N.J.S.A. 10:5-1 et seq.]. It is a matter at law. Furthermore, Counsel Gee argued below that "All requests for additional adjournments made under N.J.S.A. 2A:17-36 must be made in the original foreclosure action", the Trial Court adopted this incorrect notion as well when it stated:

> "So, sir, any and all claims -- further claims [1T Line 8] you have for statutory adjournments or further delays [1T Line 9] are to be brought under the foreclosure action, not [1T Line 10] against the Sheriff's Department. They are simply not [1T Line 11] parties to that matter." [Citing 1T Pg. 16-17.]

Plaintiff argues in opposition that the Trial Court here demonstrated that it was not neutral as its statutory interpretation is not supported by N.J.S.A. 2A:17-36 (Pa 165) nor the supporting

case law discussing the Statute. The Trial Court and Counsel Gee failed to provide a supporting citation for this arbitrary, capricious, and irrational position, thus it is a novel argument at best and frivolous at the very least. N.J.S.A. 2A:17-36 (Pa 165) clearly states: **a court of competent jurisdiction may, for cause, order further adjournments**.

> *"Bankers Trust* held that the statutes relating to the adjournment of sheriff sales, N.J.S.A. 2A:17-36 and N.J.S.A. 2A:61-5, as considered in a context indistinguishable from the present matter, do not provide the sheriffs of this State with the discretion to deny an adjournment when requested either by the judgment creditor or with the mutual consent of the parties. While it is true that N.J.S.A. 2A:17-36 states that a sheriff may permit two adjournments of the sale "and no more," the statute further states that "a court of competent jurisdiction" may order, "for cause," other adjournments. As a result, these statutes have been understood as providing the parties with the vested right to two adjournments from a sheriff without court intervention. Thereafter, the power to make a substantive ruling on an adjournment request resides solely with the court. *Wells Fargo Home Mortg. v. Stull*, 378 N.J. Super. 449, 453-54 (App. Div. 2005)" (Pa 317-322)

Counsel Gee further argued in his May 5, 2023, letter (Pa 146) without merit or supporting case law:

> "After the filing, but before the status conference held on March 22, 2023, the Sheriff's Office granted the relief sought by Plaintiff." "When the Defendants granted Plaintiff his two (2) statutory adjournments to the Sheriff's sale on his property, all claims that Plaintiff had against the Defendants were extinguished.
>
> Thus, based on the foregoing reasons and facts one (1) through thirty (30), the court should reverse because plaintiff's choice of forum was entitled to preferential consideration.

**ix. The Chancery Division Judge (Trial Court) Erred And Abused Its Discretion as to the Accrual of a Civil Rights Claim and erroneously rendered Civil Rights Complaint (Claims) as Moot Because Defendants Granting Of Denied Adjournment Request Was done In Retaliation For Plaintiff's Resort To Legal Process In Response To The Unlawful Refusals To Multiple Adjournment Request(s) was a clear Violation Of The First Amendment And N.J. Const. Art. I Guarantee Free Access To The Courts and the deprivation of a right does not extinguish simply because the right is respected by defendants after they are sued for depriving the rights [1T]**

Plaintiff in opposition to arguments made by Counsel Gee and adopted by the Trial Court that the defendants granting of prior made and denied adjournment request(s) in retaliation for a citizen's (plaintiff's) resort to legal process in response to the underlying refusals to multiple adjournment request(s) without authority to refuse is a violation of the First Amendment and N.J. Const. Art. I guarantee free access to the courts. It's clear the Trial Court failed to acknowledge when a claim under the NJCRA (10:6-2 - Actions permitted under the "New Jersey Civil Rights Act.") (Pa 175-176 ) or NJLAD (N.J.S.A. 10:5-1 et seq.) (Pa 212-262) accrues, and that the deprivation of a right does not extinguish simply because the right is respected by defendants after they are sued for depriving the rights under *Tumpson* (Pa 388-391), *Kumar* (Pa 403-412), *Perez* (Pa 434-442), *Kennedy Realty Co., Mensinger* (Pa 443-446), *Kadonsky, Bd. of County Comm'rs,* as cited below.

> "Defendants twice exercised their statutory right to an adjournment of the sale date." Wells Fargo Bank v. Carrano, DOCKET NO. A-2019-19T4, 3 (App. Div. Dec. 30, 2020) *"Under Section 1983, federal courts have found that a plaintiff is deprived of a right at the point a government official denies a plaintiff a permit or other authorization to exercise a right, even though judicial relief is later secured, and the plaintiff freely exercises the right without any interruption. Judicial relief does not extinguish the earlier deprivation." Tumpson v. Farina 218 N.J. 450 (N.J. 2014) Kumar v. 3 Piscataway Twp. Council No. A-0227-21 (App. Div. Aug. 23, 2022) A § 1983 claim accrues "when the plaintiff knows or has reason to know of the injury which is the basis of his action." Singleton v. City of New York, 632 F.2d 185, 191 (2d Cir. 1980). The CRA protects against the deprivation of or interference with civil rights by a person or entity "acting under color of law." N.J.S.A. 10:6-2; see Perez v. adjouragami, LLC, 218 N.J. 202, 217 (2014). Although state law determines the limitations period, federal law governs the accrual of a § 1983 action. Ibid. Generally, "a § 1983 cause of action begins to accrue when the plaintiff knows, or has reason to know, of the injury on which the action is based." Ibid.; see also 3085 Kennedy Realty Co. v. Tax Assessor of Jersey City, 287 N.J. Super. 318, 323-24 (App. Div. 1996) (§ 1983 claim accrues when a plaintiff knows or should know about a violation of his or her constitutional rights). Smith v. Mensinger, 293 F.3d 641, 653 (3d Cir. 2002) (holding that "falsifying misconduct reports in retaliation for an inmate's resort to legal process is a violation of the First Amendment's guarantee of free access to the courts."). Kadonsky v. N.J. Dep't of Corr. DOCKET NO. A-1399-12T4 (App. Div. Oct. 30, 2015)* (Pa 459-470) *Here, Stomel claimed that his First Amendment right to free*

> *speech was violated when he was removed as municipal public defender in retaliation for reporting the extortion attempt, cooperating with investigators, and testifying at Caruso's corruption trial. The City conceded that the speech at issue involved matters of public concern and, therefore, it fell under the First Amendment's protection. Citing Stomel v. City of Camden 192 N.J. 137 (N.J. 2007) See, e.g., Bd. of County Comm'rs v. Umbehr, 518 U.S. 668 , 675, 116 S.Ct. 2342, 2347, 135 L.Ed.2d 843, 852 (1996)* (Pa 471-481)

Thus, based on the foregoing reasons and facts one (1) through thirty (30), the court should reverse because the deprivation of a right does not extinguish simply because the right is respected by defendants after they are sued for depriving the rights.

**x. Trial Court's Irrationally Decided That Plaintiffs Civil Rights Were Not Violation Because He Was Granted Adjournments <u>Prior To Being Removed</u>, Locked Out, And Belongings Stored And Said Decision Was Arbitrary, Capricious, Error And An Abuse Of Discretion Because The Interference Or Deprivation Of His Right To Adjournments Upon Request Was Not Extinguished By Granting The Denied Request After Civil Action In Response To The Denials and said decision follows the Trial Court's acknowledgment that request were in fact refused prior to civil action [1T]**

Despite the clear decisions made in the civil rights related cases cited above the Trial Court's irrationally decided that Plaintiffs civil rights were not violated because he was granted adjournments <u>prior to being removed</u>, locked out, and belongings stored.

> "Therefore, we review a court's denial of an adjournment request under the abuse of discretion standard. See Smith, supra, 17 N.J. Super. at 131, 133-34. However, a court's decision to grant or deny an adjournment request is not unfettered. "Judicial discretion is not unbounded and it is not the personal predilection of the particular judge." State v. Madan, 366 N.J. Super. 98, 109 (App. Div. 2004), see Crimmins v. City of Hoboken DOCKET NO. A-2895-12T4 (App. Div. Apr. 6, 2015)

Plaintiff argues the deprivation or interference with his rights to adjournments is pendant or reliant on whether or not he was <u>removed</u>, locked out, and belongings stored, and that this position was unreasonable, arbitrary, and capricious. The Trial stated on the record the following:

> MR. KELLY: "I should have gotten them without going this far and having the Court to intervene." [1T Line 23-24, Pg. 7]

> THE COURT: "I'm not answering any questions right now for you, sir. I asked you question. I was hoping just to get a simple answer. And it was you did received your statutory adjournment; is that correct? MR. KELLY: After the fact of the suit was filed. THE COURT: So, yes. [1T Line 16-22, Pg. 7] "Okay. I didn't intervene" [1T, Line 24, Pgs. 7-8] "Okay. All right. Thank you. I had an opportunity to review the paperwork and listen to the arguments made. Mr. Kelly, your arguments are clearly directed towards the plaintiffs in the underlying foreclosure matter. The sheriff's department performed the ministerial act of granting the statutory adjournment as they are required to. I do not understand and/or unable to understand what, if any, damage there is. You got your adjournment. And that was granted to you." [1T, Lines 16-24, Pg. 14] "You were granted that adjournment and you were provided that prior to being removed, locked out, and your belongings stored. You were provided that before -- before any action was taken. Therefore, there could be no deprivation of any of your rights. You were provided the information and given an adjournment all the way until -- until May 11, 2023. [1T Lines 4-9, pg. 15] "Any further adjournment requests or challenges to the foreclosure action belonged under the foreclosure docket. Not -- the sheriff is not a party to that; has nothing to do with that. You have [1T Line 14absolutely no claim against the Sheriff's Department with respect to a foreclosure -- a private foreclosure action. Therefore, there is no viable claim under your action in lieu of prerogative writ. There is no damage presented. And there is no claim for this Court to proceed. Therefore, I will be signing an order dismissing your action. You can appeal me, sir." [1T Lines 11-22, Pg. 16]

Thus, based on the foregoing reasons and facts one (1) through thirty (30), the court should reverse because the interference or deprivation of his civil right to adjournments upon request was not extinguished by the defendants granting the denied request after civil action in response to the denials, where said Trial Court decision follows the same trial court's acknowledgment that request were in fact refused prior to civil action.

### xi. Because Of Lack Of Jurisdiction Over The Subject Matter Is Appealed Without Having Been Transferred, The Appellate Court May Decide The Appeal as a Result of the Chancery Division Judge Error and Abuse of Discretion

Plaintiff filed motions following the inappropriate dismissal, however, the Trial Court (Chancery Division) found that it lacked jurisdiction to hear the motions as a result of the filing of the notice of appeal.

Subject-matter jurisdiction cannot be forfeited or waived and should be considered

when fairly in doubt. Arbaugh v. Y & H Corp., 546 U.S. 500, 514, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006) (citing United States v. Cotton, 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002))." The principle is well established that a court cannot hear a case as to which it lacks subject matter jurisdiction even though all parties thereto desire an adjudication on the merits. State v. Osborn, 32 N.J. 117 , 122 (1960); Abbott v. Beth Israel Cemetery Ass'n of Woodbridge, 13 N.J. 528 , 537 (1953); Peterson v. Falzarano, 6 N.J. 447 , 454 (1951). Such jurisdiction must be granted to the court by the Constitution or by valid legislation, as it "cannot be vested by agreement of the parties." Id. Likewise, subject matter jurisdiction cannot be conferred by waiver resulting from a party's failure to interpose a timely objection to the assumption of jurisdiction. Lay Faculty Ass'n of Regional Secondary Schools of Archdiocese of Newark v. Roman Catholic Archdiocese of Newark, 122 N.J. Super. 260, supplemented 124 N.J. Super. 369 (App.Div. 1973), cert. den. 64 N.J. 153 (1973). Objection to jurisdiction of the court over the subject matter is effective whenever made. McKeeby v. Arthur, 7 N.J. 174 (1951)" Whether the Division has subject matter jurisdiction over a claim is a question of law, which this court reviews de novo. Marconi v. United Airlines, 460 N.J. Super. 330, 337 (App. Div. 2019) Anesthesia Assocs. of Morristown v. Weinstein Supply Corp. DOCKET NO. A-5033-18T4 (App. Div. Oct. 7, 2020) We begin our discussion with the parties' dispute concerning the Law Division's subject matter jurisdiction. Indisputably, "a court cannot hear a case as to which it lacks subject matter jurisdiction." Peper v. Princeton Univ. Bd. of Trs., 77 N.J. 55, 65 (1978). Subject matter jurisdiction "must be granted to the court by the Constitution or by valid legislation." Id. at 66. Even if a state court is granted broad general jurisdiction, it has no subject matter jurisdiction over claims "Congress intended . . . to fall within the exclusive jurisdiction of the federal courts." Nat'l State Bank of Elizabeth v. Gonzalez, 266 N.J. Super. 614, 621 (App. Div. 1993) (emphasis omitted), appeal dismissed 137 N.J. 304.

It is Plaintiffs position that the Chancery Division Judge lacked subject matter jurisdiction to adjudicate the complaint in lieu of prerogative writs and said interception of the action in lieu of prerogative writs was in violation of N.J. Const., Art. VI, § V, ¶ 4., (Pa 160-163), R. 4:3-1-Divisions of Court; Commencement and Transfer of Actions (Pa 187-191) and R. 4:69-1-Actions in Superior Court, Law Division (Pa 195-197).

*"See Prado v. State, 186 N.J. 413, 422, 895 A.2d 1154 (2006) (noting that R. 2:2–3(a)(2) vests the Appellate Division with exclusive jurisdiction of an appeal of a final State administrative agency decision). See also R.1:13–4(a) (allowing transfer of action from court that lacks jurisdiction to the proper court); R. 1:13–4(b) ("If any action transferable under paragraph (a) because of lack of jurisdiction over the subject matter is appealed without having been transferred, the appellate court may decide the appeal ...."). Wisniewski v. Murphy, 454 N.J. Super. 508, 186 A.3d*

*321 (App. Div. 2018) An appeal is not moot if "a party still 8 A-0749-21 suffers from the adverse consequences . . . caused by [the prior] proceeding." Ibid. (alterations in original) (quoting N.J. Div. of Youth & Fam. Servs. v. A.P., 408 N.J. Super. 252, 262 (App. Div. 2009)). Even if an action becomes technically moot for want of an effective remedy, "courts may still decide a case when its issues are of 'great public importance,' or are 'capable of repetition,' 'yet [will] evade review.'" In re Civ. Commitment of C.M., 458 N.J. Super. 563, 568 (App. Div. 2019) (alteration in original) (citations omitted) (first quoting Oxfeld v. N.J. State Bd. of Educ., 68 N.J. 301, 303 (1975); then quoting In re Conroy, 98 N.J. 321, 342 (1985); and then quoting In re J.I.S. Indus. Serv. Co. Landfill, 110 N.J. 101, 104 (1988)). In Mony Life Insurance Co. v. Paramus Parkway Building, Ltd., 364 N.J. Super. 92 (App. Div. 2003), a case involving a commercial mortgage foreclosure action, we determined that "the mere fact that defendant paid off the mortgage does not extinguish its right to challenge the judgment." Id. at 101. We declined to dismiss the appeal as moot because the defendant claimed, "the principal indebtedness was miscalculated" and the defendant had, in fact, paid the pay-off amount "under protest and without waiver of any of [its] rights and/or remedies." Id. at 99, 101 (alteration in original). Thus, we determined "unresolved issues yet exist as to the final judgment" that remained unaffected by the satisfaction of the mortgage. Id. at 101."*

Thus, based on the foregoing reasons and facts one (1) through thirty (30), the court should decide this matter because the chancery division lacked jurisdiction over the subject matter, the matter was appealed without having been transferred.

### xii. Chancery Division Judge (Trial Court) Adjudication Of Action In Lieu of Prerogative Writs Was Error, Actual Prejudice, and an abuse of discretion.

Plaintiff contends that it was not necessary for him to prove actual prejudice in the Trial Court, however, plaintiff argues that actual prejudice is found with the Chancery Division Judge's misconduct in adjudicating an action in lieu and civil rights actions that is not cognizable in her division for the benefit of the opposing parties. The Chancery Division Judge abused her discretion by addressing the merits and again when she allowed the Defendants to obtain relief in an improper division and an improper venue. This matter properly belonged to the Law Division, Civil Part of the appropriate vicinage.

Under Rule 1:12-1(g) (Pa 178-179), a judge "shall be disqualified . . . and shall not sit in any matter," when "there is any . . . reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so." Pursuant to Rule 1:12-2, "[a]ny party, on motion made to the judge before trial or argument and stating the reasons therefor, may seek that judge's disqualification." The disposition of such a "motion is, at least in the first instance, entrusted to the 'sound discretion' of the trial judge whose recusal is sought." Panitch v. Panitch, 339 N.J. Super. 63, 66 (App. Div. 2001) (quoting Magill v. Casel, 238 N.J. Super. 57, 63 (App. Div. 1990)). **It is well settled that "[l]itigants ought not have to face a judge where there is reasonable question of impartiality**." Id. at 67 (quoting Alexander v. Primerica Holdings, Inc., 10 F.3d 155, 162 (3d Cir. 1993)). Notably, "Canon 3(C)(1) of the Code of Judicial Conduct provides that **'[a] judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned**.'" DeNike v. Cupo, 196 N.J. 502, 516 (2008) (alteration in original). **Under both Canon 3(C)(1) and Rule 1:12-1(g), "'it is not necessary to prove actual prejudice on the part of the court' to establish an appearance of impropriety; an 'objectively reasonable' belief that the proceedings were unfair is sufficient**." Id. at 517 (quoting State v. Marshall, 148 N.J. 89, 279 (1997)).To assess whether recusal is required, "[i]n DeNike, the Court stated the key question that must be answered when **a claim is made challenging a judge's impartiality is, '[w]ould a reasonable, fully informed person have doubts about the judge's impartiality?**'" P.M. v. N.P., 441 N.J. Super. 127, 145 (App. Div. 2015) (second alteration in original) (quoting DeNike, 196 N.J. at 517. See also In re Advisory Letter No. 7-11 of the Supreme Court Advisory Comm., 213 N.J. 63, 73 (2013) (finding that "the overarching objective of the Code of Judicial Conduct is to maintain public confidence in the integrity of the judiciary."). However, "DeNike does not set forth any bright-line rules." State v. Dalal, 221 N.J. 601, 607 (2015). Instead, "the standard calls for an individualized consideration of the facts in a given case." Ibid. **RULE 3.6 Bias and Prejudice** (A) **A judge shall be impartial** and shall not discriminate because of race, creed, color, sex, gender identity or expression, religion/religious practices or observances, national origin/nationality, ancestry, language, ethnicity, **disability or perceived disability**, atypical hereditary cellular or blood trait, genetic information, status as a veteran or disabled veteran of, or liability for service in, the Armed Forces of the United States, age, affectional or sexual orientation, marital status, civil union status, domestic partnership status, socioeconomic status or political affiliation. (B) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice on the bases specified in Rule 3.6(A), against parties, witnesses, counsel or others. This section does not preclude legitimate advocacy when the listed bases are issues in or relevant to the proceeding. (C) **A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice or harassment on the bases specified in Rule 3.6 (A), and shall not permit court staff, court officials or others subject to the judge's direction and control to do so**. This section does not preclude reference to the listed bases when they are issues in or relevant to the

> proceeding. COMMENT: [1] The prohibited bases in this rule are primarily drawn from the Law Against Discrimination, N.J.S.A. 10:5-1, et seq. [2] Examples of manifestations of bias or prejudice include but are not limited to epithets, slurs, demeaning nicknames, negative stereotyping, attempted humor based on stereotypes, threatening, intimidating, or hostile acts, suggestions of connections between race, ethnicity, or nationality and crime and irrelevant references to personal characteristics. Even facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media and others an appearance of bias or prejudice. **A judge must avoid conduct that may reasonably be perceived as prejudiced or biased**. [3] **Harassment is verbal or physical conduct that denigrates or shows hostility or aversion toward a person on prohibited bases listed in Rule 3.6(A)**. RULE 3.7 Ensuring the Right to Be Heard **A judge shall accord to every person who is legally interested in a proceeding, or to that person's lawyer, the right to be heard according to law or court rule**. COMMENT: A judge may make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard. (Pa 200-211)

Thus, based on the foregoing reasons and facts one (1) through thirty (30), the Court should reverse because the Chancery Division Judge (Trial Court) adjudication of the action in lieu of prerogative writs was error, actual prejudice, and an abuse of discretion.

### xiii. Improper Division Adjudication was Prejudicial and Harassment under Rule 3.6(A). [1T]

In addition, Plaintiff argues that the improper division adjudication infringed on right to meaningful access to the courts, procedural and substantive due process, and equal protection under the law.

> "The Court is not inclined to address the merits of Plaintiffs' allegations regarding any breach of fiduciary duty by Defendant as Trustee of the Trusts because, as Defendant's motion illustrates, Plaintiffs seek relief in an improper division and an improper venue. This matter properly belongs in the Chancery Division, Probate Part of the appropriate vicinage." Cestone v. Cestone DOCKET No. C-81-19 (Ch. Div. May. 14, 2019) [Pa]

Thus, based on the foregoing reasons and facts one (1) through thirty (30), the Court should reverse the trial courts improper division adjudication was prejudicial and harassment under Rule 3.6(A)

### xiv. The Trial Court Abused Its Discretion And Erred When It Failed To Liberally Grant Plaintiff's Motion To Amend Contrary To The Interest Of Justice

Plaintiff argues that the Trial Court should have decided the motion to amend on the merits and then proceeded to defendants 'opposition. The Trial Court also failed to consider the factual situation existing at the time [the] motion was made.

> *"According to the judge, because the complaint was dismissed "there's nothing left to amend." In our view, however, the judge should have decided the motion to amend on the merits and then proceeded to defendants' "cross-motion" to dismiss the complaint. As noted, however, the cross-motion was improperly filed. Brooks v. Twp. of Tabernacle No. A-1132-20 (App. Div. Jul. 22, 2022) Motions for leave to amend should be granted liberally, but the decision "always rests in the [judge's] sound discretion." Notte, 185 N.J. at 501 (quoting Kernan v. One Washington Park Urban Renewal Assocs., 154 N.J. 437, 456-57 (1998)). Although motions for leave to amend should be decided "without consideration of the ultimate merits of the amendment," the judge must consider "the factual situation existing at the time [the] motion is made." Ibid. (quoting Interchange State Bank, 303 N.J. Super. at 256). Prospect Rehab. v. Squitieri 392 N.J. Super. 157 (App. Div. 2007) "Motions for leave to amend should be liberally granted. Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 501 (2006); see also R. 4:9-1 (if a motion to amend is submitted more than ninety days after a responsive pleading is filed, "a party may amend a pleading . . . by leave of court which shall be freely given in the interest of justice."). A motion to amend a pleading is addressed to the trial court's sound discretion. N.J. Dep't of Envtl. Prot. v. Dimant, 418 N.J. Super. 530, 547 (App. Div.), certif. granted, 2 08 N.J. 381 (2011). However, the judge may consider whether the amendment would be futile even if permitted. Notte, supra, 185 N.J. at 501. ... leave to amend under Rule 4:9-1 is to be liberally granted, Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 501 (2006) Source: Ossa v. Kalyana Mitra L.L.C. DOCKET NO. A-3915-14T1 (App. Div. Oct. 7, 2016)*

Thus, based on the foregoing reasons and facts one (1) through thirty (30), the Court should reverse because the Trial Court failed to liberally grant plaintiff's motion to amend contrary to the interest of justice.

## CONCLUSION

The Trial Court abused its discretion by dismissing the complaint as moot because it failed to adjudicate the claims under the civil rights act. Plaintiffs is entitled to an award of attorney's fees and costs pursuant to N.J.S.A. 10:6–2(f). Plaintiff brought an action that is shown to have been a "catalyst" for the cessation of the defendants conduct in refusing to grant adjournments to him upon request, to which Plaintiff alleged to also violate the Civil Rights Act and therefore plaintiff qualifies as a prevailing party entitled to an award of attorney's fees. The Trial Court erred and abused it discretion and the Appellate Division should reverse in the interest of justice.

10-18-2023

Rodney Kelly, Plaintiff
Pro Se Appellant

Malamut & Associates LLC
ATTORNEYS AT LAW

**Daniel Gee**
dgee@malamutlaw.com
Phone: 856.424.1808
Fax: 856.424.2032
*Member of the NJ Bar*

November 27, 2023

**Via eCourts**
Denise L. Koury, Case Manager
Appellate Division
Richard J. Hughes Justice Complex
P.O. Box 006
Trenton, New Jersey 08625-0006

Re: Rodney Kelly v. James Kostopolis, et al
Docket No. A-2657-22/ CAM-L-727-23

Judge Below: Sherri L. Schweitzer, P.J. Ch.

Dear Ms. Koury:

This office represents the interests of Respondents, James Kostopolis, Odise, A. Carr, "Clerk #3 Jenn" and the Office of the Burlington County Sheriff, in this matter. Pursuant to R. 2:6-4(a) and R. 2:6-2(b), please accept this letter brief in lieu of a more formal filing in opposition to appeal Appellant, Rodney Kelly.

## Table of Contents

## TABLE OF JUDGMENTS

| | |
|---|---|
| March 23, 2023, Order Dismissing Plaintiff's Complaint | (Ra.12) |
| March 22, 2023, Transcript of Hearing | (Ra.11) |

## I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

The matter currently before the Court grows out of a long and tortured foreclosure litigation, docketed at F-015290-12, and pertaining to Appellant's primary residence located at 9 Spindletop Lane, Willingboro, Burlington County, New Jersey 08046. The history of that litigation is both relevant and necessary for the Court to understand what transpired in this matter.

On March 17, 2006, Appellant executed a note to FGC Commercial Mortgage Finance dba Fremont Mortgage in the amount of $151,920.00. To secure this Note, Appellant executed a Mortgage of even date covering his residence. On June 1, 2011, Appellant defaulted under the terms of this Mortgage. On January 23, 2102, Fremont assigned the Mortgage to Wells Fargo Bank ("Wells Fargo"). On July 31, 2012, Wells Fargo filed a foreclosure complaint. Appellant contested the foreclosure at every stage, and it wasn't until

February 26, 2015, that Wells Fargo secured a final judgment in Foreclosure (Ra 1).

After the entry of final judgment, Appellant continued to engage in motion practice seeking to set aside the judgment. This was unsuccessful. On July 30, 2015, a Sheriff's sale was conducted, and Wells Fargo was the successful bidder. Prior to the July 30, 2015, sale, Appellant requested, and received his two (2) statutory adjournments pursuant to N.J.S.A. 2A:17-36 on May 28, 2015 and June 11 ,2015. (Ra 2). On August 10, 2015, The Burlington County Sheriff issued a Sheriff's Deed. Even after the issuance of the Sheriff's Deed, Appellant continued to engage in motion practice seeking to set aside the prior judgment. This was again unsuccessful. After securing the Sheriff's Deed, it is unclear what Wells Fargo did with the property. However, in 2017, Wells Fargo discovered that the legal description attached to the original mortgage was to another property and Wells Fargo moved to vacate the Sheriff's sale and final judgment of foreclosure on October 31, 2017. On December 1, 2017, the Court entered an Order voiding the Sheriff's sale and vacating the final judgment in the matter (Ra 3).

After the vacation of the final judgment in foreclosure, Wells Fargo instituted a separate suit in the Burlington County Chancery Division, to quiet title. This suit resulted in the Court entering an Order for Summary Judgement

permitting the legal description of the property to be amended to reflect the correct metes and bounds description identified by Wells Fargo. (Ra 4). Wells Fargo thereafter filed a Certification as to the Property Description in the Foreclosure litigation to correctly reflect the legal description of the property in that action. (Ra 5). Once the legal description of the property was corrected, Wells Fargo thereafter requested, and received, a second Final Judgement in Foreclosure under Docket No. F-015290-12 on August 4, 2020. (Ra 6).

After securing the second Final Judgmment in Foreclosure, Wells Fargo was able to secure a Sheriffs Sale date of January 16, 2023. On that date, Wells Fargo requested two (2) statutory adjournments under N.J.S.A. 2A:17-36. (Ra 7). The new date for the Sheriffs sale was set for March 16, 2023. (Ra 7).

On or around March 1, 2023, Appellant delivered to the Burlington County Sheriff's Office a written request for statutory adjournments under N.J.S.A. 2A:17-36. Since Appellant had previously received his statutory adjournments under the Foreclosure docket number prior to the 2015 Sheriffs sale on the property, his request for additional adjournments was denied. He was advised that any further adjournments would have to be granted by the Court.

On March 8, 2023, Appellant filed a Verified Complaint and Order to Show Cause in Burlington County seeking relief under N.J.S.A. 2A:17-36. On

March 9, 2023, the matter was transferred to Camden County by Court Order (Ra 8). The matter was assigned to the Honorable Sherri L. Schweitzer, P.J.Ch. Judge Schweitzer scheduled an initial conference in the matter for March 22, 2023.

Prior to March 22, 2023, conference, the Burlington County Sheriff's Office granted Appellant's adjournment requests. Appellant was notified directly by the Sheriff's Office as well as by the undersigned. (Ra 9). The date of the Sheriff's sale was moved to May 11, 2023.

On March 21, 2023, correspondence was filed with the Court advising that the relief sought by Appellant was granted. (Ra 10). On March 22, 2023, a conference was held with the Court, Appellant, and counsel for Respondent. (The transcript of this conference is attached at Ra 11). At the conclusion of this conference, Judge Schweitzer dismissed Appellant's complaint as moot. (Ra 12). This appeal followed.

## II. LEGAL ARGUMENT

### THE TRIAL JUDGE DID NOT LACK THE AUTHORITY TO DECIDE THE MATTER AS CHANCERY DIVISION IS THE PROPER FORUM TO ADJUDICATE RIGHTS UNDER THE FORECLOSURE STATUTES

In his brief, Appellant appears to be arguing that Judge Schweitzer, the Presiding Judge in the Chancery Division of the Camden County Superior Court, did not have the authority to address his complaints because his complaint was

a complaint in lieu of prerogative writ, and such actions must be determined in the Law Division. Actions in lieu of prerogative writs are governed by Rule 4:69. "Thus R. 4:69 governs challenges to **municipal action**." Pressler & Verniero, Current N.J. Court Rules, comment 1 on R. 4:69 (2012). (Emphasis added). Appellant's complaint is not one challenging an action by a municipal body, rather it is an action seeking to enforce a right to adjournments under New Jersey's Foreclosure statutes. The fact that Appellant has labeled his complaint as one in lieu of prerogative writ does not, in fact, make it one. "It is not the label placed on the action that is pivotal but the nature of the legal inquiry." Couri v. Gardner, 173 N.J. 328, 340 (2002); see also Hill Int'l, Inc v. Atl. City Bd. Of Educ., 438 N.J. Super 562, 594 (App. Div. 2014) (directing the trial court on remand to "consider the actual substance of [the plaintiff's] allegations…rather than simply accepting the [plaintiff's] label"; Zoning Bd. Of Adjustment of Green Brook v. Datchko, 142 N.J. Super. 501, 508 (App. Div. 1976) (finding a plaintiff's "characterization" or "designation of the nature of an action" does not determine the plaintiff's substantive rights).

Appellant, in his Complaint, is clearly invoking his rights to statutory adjournments under N.J.S.A. 2A:17-36. There is no challenge to any municipal or state action that would bring this matter to the Court's attention as a

prerogative writ action. As such, the matter was properly before Judge Schweitzer and the Chancery Division.

## THE RELIEF SOUGHT BY APPELLANT IN HIS COMPLAINT HAD BEEN GRANTED PRIOR TO THE FIRST CONFERENCE CONDUCTED BY THE COURT AND AS SUCH, THE JUDGE'S DISMISSAL OF THE ACTION AS MOOT WAS PROPER

Appellant filed his Verified Complaint and Order to Show Cause with the Court on March 8, 2023. The matter was transferred to Camden County by Court Order on March 9, 2023. The matter was assigned to the Presiding Judge of the Chancery Division, Judge Schweitzer. Judge Schweitzer scheduled an initial conference on the matter for March 22, 2023. On March 13, 2023, correspondence was sent to Appellant advising him that the statutory adjournments that he sought had been granted. The Sheriffs Sale was adjourned to May 11, 2023. Judge Schweitzer was advised of these facts prior to the March 22, 2023, conference. At the conference with the Court, Appellant acknowledged that he received the adjournments he was seeking. Upon learning these facts, Judge Schweitzer dismissed Appellant's complaint as moot.

"Mootness is a threshold justiciability determination rooted in the notion that judicial power is to be exercised only when a party is immediately threatened with harm." Betancourt v. Trinitas Hospital, 415 N.J. Super. 301 (App. Div. 2010), citing, Jackson v. Dep't of Corr., 335 N.J. Super. 227, 231 (App. Div. 2000), certif. denied, 167 N.J. 630 (2001). "A case is technically

moot when the original issue presented has been resolved, at least concerning the parties who initialed the litigation." Id. at 311, citing DeVesa v Dorsey, 134 N.J. 420, 428 (1993) (Pollack, J. concurring) (citing Oxfeld v. N.J. State Bd. Of Educ., 68 N.J. 301, 303 (1975)). "To restate 'an issue is "moot" when the decision sought in a matter, when rendered, can have no practical effect on the existing controversy'". Id. at 311, citing Greenfield v. N.J. Dep't of Corr., 382 N.J. Super. 254, 257-58, (quoting N.Y. S. & W. R. Corp. v. State Dep't of Treasury, Div. of Taxation, 6 N.J. Tax 575, 582 (Tax Ct. 1984), aff'd 204 N.J. Super, 560 (App. Div. 1985).

By providing Appellant with the statutory adjournments, he sought in his Complaint, Respondent provided the relief that Appellant was seeking. Since this relief was provided prior to the March 22, 2023, conference, Judge Schweitzer was well within her authority to dismiss Plaintiff's Complaint.

## III. CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court deny the appeal of Appellant in this matter.

Respectfully submitted,

*/s/ Daniel Gee*
Daniel Gee, Esq.
For the Firm

RODNEY KELLY

PLAINTIFF

Vs.

JAMES KOSTOPOLIS, ODISE A. CARR; CLERK #3; JENN and the OFFICE OF THE BURLINGTON COUNTY SHERIFF;

DEFENDANTS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2657-22

CIVIL ACTION

ON APPEAL FROM
SUPERIOR COURT,
CHANCERY DIVISION
CAMDEN COUNTY

Honorable Sherri L. Schweitzer, J.S.C.

Sat Below:
Docket No: CAM-L-727-23

# PLAINTIFF RODNEY KELLY'S REPLY BRIEF IN SUPPORT OF APPEAL

Rodney Kelly, PAG
9 Spindletop Lane
Willingboro Nj 08046
rodneykelly.kelly252@gmail.com

Dated: December 07, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

**Other Authorities**

## I. PRELIMINARY STATEMENT

Plaintiff Rodney Kelly hereby submits this reply brief in support of his appeal and in opposition to the Respondents brief(s) filed herein by Counsel Gee on behalf of his clients, the Office of the Sheriff of Burlington County. The issue presented by this appeal is similar to D. Russo, Inc. v. Township of Union, 417 N.J. Super. 384, 9 A.3d 1089 (App. Div. 2010) and bottoms down to whether Plaintiff who brought an action under N.J.S.A. 10:6-2 and R. 4:69 that resulted in a change in the defendant's conduct may qualify as a "prevailing party" even though the action was dismissed as moot rather than being concluded by a judgment in plaintiffs favor. In D. Russo this Court concluded that a party who brings an action that is shown to have been a "catalyst" for the cessation of conduct alleged to violate the Civil Rights Act may qualify as a prevailing party entitled to an award of attorney's fees. Because this matter concerns the deprivation and interference with civil rights it is a matter of public interest. Because this Court has already determined in D. Russo, Inc. v. Township of Union that a cessation of conduct alleged to violate the Civil Rights Act may qualify as the prevailing party entitled to an award of attorney's fees in 2010, and that the Trial Court disregarded that qualification and status with respect to Plaintiff nearly 14 years after D. Russo, dismissed his complaint as "moot" and failed to adjudicate his causes of action under the New Jersey Civil Right Act makes this a matter of substantial importance, and a matter capable of repetition that may evade review.

## II. FACTS AND PROCEDURAL HISTORY

Plaintiff hereby re-states to facts One through Thirty (Pb1-30, P. 3-30) and the procedural history (Section II, Pb, P.2.) set forth within the appellant brief as though fully incorporated herein by reference.

## III. ARGUMENT

### A. PLAINTIFF STILL SUFFERS FROM THE ADVERSE CONSEQUENCES CAUSED BY THE PRIOR PROCEEDING; CIVIL RIGHTS IS A MATTER OF PUBLIC INTEREST; DEFENDANTS MISREPRESENT THE RELIEF SOUGHT IN THE COMPLAINT PURSUANT TO R. 4:69 AND N.J.S.A. 10:6-1-2 WITH RELIEF SOUGHT BY PLAINTIFFS MOTIONS PURSUANT TO R. 4:69-3 and N.J.S.A. 2A:17-36; DEFENDANT'S CHANGE IN CONDUCT DID NOT MOOT THE CIVIL RIGHTS CLAIMS; THE CHANCERY DIVISION ORDER DOES NOT ADDRESS PLAINTIFFS MOTIONS; APPELLANT'S CASE IS NOT MOOT BECAUSE IT IMPLICATES HIS CONSTITUTIONAL RIGHT TO BE FREE FROM DISCRIMINATION; TO EQUAL PROTECTION AND NJLAD RIGHT TO BE FREE FROM HARRASMENT AND N.J.S.A. 2A:17-36 RIGHT TO ADJOURNMENT UPON REQUEST; PLAINTIFF IS ENTITLED TO ATTORNEY'S FEES AS THE PREVAILING PARTY ON HIS CIVIL RIGHTS CLAIM

Defendants through Counsel argued (at Db8) a change in their conduct where they state: "*By providing Appellant with the statutory adjournments, he sought in his Complaint, Respondent provided the relief the Appellant was seeking. Since this relief was provided prior to the March 22, 2023, conference, Judge Schweitzer was within her authority to dismiss Plaintiffs Complaint.*" The right to be free from discrimination is firmly supported by the Fourteenth Amendment to the United States Constitution and the protections of Article I, paragraphs 1 and 5 of the New Jersey Constitution of 1947. To be sure, "[t]he eradication of the 'cancer of discrimination' has long been one of our State's highest priorities." Dixon v. Rutgers, The State University of N.J.,110 N.J. 432, 451, 541 A.2d 1046 (1988). State v. Soto, 324 N.J. Super. 66, 83 (Law Div. 1996) N.J.S.A. 2A:17-36 is legislation that grants a civil right cognizable under the New Jersey Civil Rights Act (N.J.S.A. 10:6-1,2). "The "right" provided by the act is statutory and not recognized at common law." Beneficial Fin. Co. Atlantic City v. Swaggerty, 170 N.J. Super. 398, 402 (App. Div. 1979) " It is well settled that private causes of action may be predicated on a statutory violation. " Peoples National Bank of N.J. v. Fowler, 73 N.J. 88, 102 (N.J. 1977). "As we held in C.S., the statutory right to pursue a "civil action" is a right to a proceeding which falls within the jurisdiction of the trial court, rather than this court.

Id. at 342-43. While the federal statute has been revised and recodified in the time since we decided C.S., the operative provisions which create the state court remedy remain essentially the same for purposes of deciding where this dispute should be heard. Hasbrouck Heights B.O.E. v. W.J, 358 N.J. Super. 8, 12 (App. Div. 2003)

Plaintiffs civil rights was deprived and interfered with until after the filing and serving of complaint. Plaintiff made multiple requests in person and a request in writing and was denied or refused adjournments each time. "It is not the label placed on the action that is pivotal but the nature of the legal inquiry." Couri v. Gardner, 173 N.J. 328, 340 (2002). [A] reviewing court 'searches 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, opportunity being given to amend if necessary.' At this preliminary stage of the litigation the Court is not concerned with the ability of plaintiffs to prove the allegation contained in the complaint. For purposes of analysis plaintiffs are entitled to every reasonable inference of fact. The examination of a complaint's allegations of fact required by the aforestated principles should be one that is at once painstaking and undertaken with a generous and hospitable approach. [Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989) (internal citations omitted).] Blum v. Twp. of Lakewood, DOCKET NO. A-1962-17T1, 14-15 (App. Div. Jan. 7, 2020). The nature of the legal inquiry as to the Plaintiffs Complaint is the deprivation of his civil rights by the defendants acting under color of New Jersey Law. The Defendants opposing letter-brief, like its arguments before the Chancery Division fail to address N.J.S.A. 10:6-2. "The interest of our courts is in the protection of the civil rights of our citizens, through enforcement of state and federal constitutions and civil rights statutes, not the opposite. Our Constitution requires the exercise of these concerns. " Bung's Bar & Grille, Inc. v. Township Council, 206 N.J. Super. 432, 459 (Law Div. 1985) "We may decline to dismiss a matter on mootness grounds in order to address an important matter of public interest. Reilly v. AAA Mid–Atl. Ins. Co. of N.J., 194 N.J. 474, 484,

946 A.2d 564 (2008). Protecting the civil rights of New Jersey citizens is surely a matter of public interest. Indeed, there is no "public interest" in depriving a class of New Jersey residents their constitutional rights while appellate review is pursued. See, e.g., Scott v. Roberts, 612 F.3d 1279, 1297 (11th Cir.2010) ( "[T]he public, when the state is a party asserting harm, has no interest in enforcing an unconstitutional law."). On the contrary, granting a stay would simply allow the State to continue to violate the equal protection rights of New Jersey same-sex couples, which can hardly be considered a public interest. Cf. Armstrong v. O'Connell, 416 F.Supp. 1325, 1331 (E.D.Wis.1976). In addition, the question to be addressed involves not only Monek's private interests, but also an issue of some public importance, i.e. when the public may properly be called upon to reimburse a police officer for attorney fees incurred in defense of criminal charges brought against the officer. See Pressler, Current N.J. Court Rules, comment 7 on R. 4:69-6(c) (2002) (noting that enlargement is appropriate where the case presents "an important public rather than a private interest which requires adjudication or clarification."). Ptl. Monek v. Borough of S. River, 354 N.J. Super. 442, 449-50 (App. Div. 2002) However, because plaintiffs still contend, they are entitled to attorney's fees as the prevailing party on their civil rights claim, the matter is not moot. Kumar v. Piscataway Twp. Council No. A-0227-21 (App. Div. Aug. 23, 2022) Buckhannon dismissed this fear noting that "so long as the plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case." 532 U.S. at 608-09,121 S.Ct. at 1842, 149 L.Ed.2d at 865-66. Mason v. City of Hoboken 196 N.J. 51 (N.J. 2008) "Under the New Jersey Civil Rights Act, N.J.S.A. 10:6-1 to -2, the party alleging a claim must show a violation of a substantive right or that someone "acting under color of law" interfered with or attempted to interfere with a substantive right. N.J.S.A. 10:6-2(c). " State v. Quaker Valley Farms, LLC, 235 N.J. 37, 64 (N.J. 2018) " we conclude appellant's case is not moot because it implicates his constitutional right to liberty." In re Civil Commitment of B.V., DOCKET NO. A-4248-13T2, 5 (App. Div. Mar. 4, 2016) The mootness argument fails because plaintiffs still contend

that they are entitled to attorney's fees as the prevailing party on their civil-rights claim, see N.J.S.A. 10:6–2(f), despite the placement of the ordinance on the ballot. See Transamerica Ins. Co. v. Nat'l Roofing, Inc., 108 N.J. 59, 64, 527 A.2d 864 (1987) (noting that a matter is moot when there is no issue left to adjudicate). " The New Jersey Civil Rights Act, N.J.S.A. 10:6-1 to -2, includes a provision that authorizes a court to award "the prevailing party" reasonable attorney's fees and costs, N.J.S.A. 10:6-2(f). The issue presented by this appeal is whether a party who brings an action under the Civil Rights Act that results in a change in defendant's conduct may qualify as a "prevailing party" even though the action is dismissed as moot rather than being concluded by a judgment in plaintiffs favor. We conclude that a party who brings an action that is shown to have been a "catalyst" for the cessation of conduct alleged to violate the Civil Rights Act may qualify as a prevailing party entitled to an award of attorney's fees." D. Russo, Inc. v. Township of Union 417 N.J. Super. 384 (App. Div. 2010) The Civil Rights Act specifically authorizes the award of counsel fees and costs to a prevailing party under Section 1983. 42 U.S.C. § 1988(b) ("In any action or proceeding to enforce a provision of [certain sections of the Civil Rights Act, including Section 1983], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs[.]"). As a matter of policy, the scope of counsel fees recoverable under the Civil Rights Act is purposefully broad. That is intentionally so in order "to ensure effective access to the judicial process for persons with civil rights claims, and to encourage litigation to enforce the provisions of the civil rights acts and constitutional civil rights provisions." Hernandez v. Kalinowski, 146 F.3d 196 , 199 (3d Cir. 1998). For that reason, "under [Section 1988], fees for preparing a motion requesting costs and fees, or `fees on fees,' are recoverable." Ibid. (citations omitted); see also Hensley v. Eckerhart, 461 U.S. 424 , 433 n. 7, 103 S.Ct. 1933, 1939 n. 7, 76 L.Ed.2d 40, 50 n. 7 (1983) (explaining that "Congress intended that `the standards for awarding fees [under Section 1988] be generally the same as under the fee provisions of the 1964 Civil Rights Act.'" (quoting S.Rep. No. 94-1011, at 4 (1976),

U.S. Code Cong. Admin.News 1976, p. 5912)). The manner in which a reasonable counsel fee is to be determined is well-settled. As a threshold matter, "[a] plaintiff must be a `prevailing party' to recover an attorney's fee under § 1988." Hensley, supra, 461 U.S. at 433, 103 S.Ct. at 1939, 76 L.Ed.2d at 50 (footnote omitted). "[P]laintiffs may be considered `prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." Ibid. (citation, quotation marks and footnote omitted). Once it is determined that the plaintiff is a "prevailing party," a two-factor computation determines the "lodestar", that is "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." Ibid. This calculation is critical because it "provides an objective basis on which to make an initial estimate of the value of a lawyer's services." Ibid. R.M. v. Supreme Court of New Jersey, 190 N.J. 1, 9-10 (N.J. 2007) "It should also be noted that we have not accepted the contention that fee awards in § 1983 damages cases should be modeled upon the contingent-fee arrangements used in personal injury litigation. "[W]e reject the notion that a civil rights action for damages constitutes nothing more than a private tort suit benefiting only the individual plaintiffs whose rights were violated. Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms." Riverside v. Rivera, 477 U.S. 561, 574, 106 S.Ct. 2686, 2694, 91 L.Ed.2d 466 (1986). Szczepanski v. Newcomb Med. Center, 141 N.J. 346, 357 (N.J. 1995) See also, Lynch v. Household Finance Corporation, 405 U.S. 538, 92 S.Ct. 113, 31 L.Ed.2d 424 (1972) in which the court stated: "Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a `personal' right, whether the `property' in question be a welfare check, a home or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized." 405 U.S. at 552, [

92 S.Ct. 113]. State v. One, 154 N.J. Super. 326, 337 (App. Div. 1977) "And, if we were to allow their attempts to vindicate their liberty rights to be short-circuited through a broad view of mootness, courts similarly disposed would likely never reach the merits of such disputes. In other words, to endorse the trial judge's disposition, we would be creating a scenario by which those in breach could simply discharge a wrongly held individual before the day of reckoning without consequence. Although it is appropriate in many cases to reserve judicial resources for actual controversies, Cinque v. N.J. Dep't of Corr., 261 N.J. Super. 242, 243, 618 A.2d 868 (App. Div. 1993) ; Anderson v. Sills, 143 N.J. Super. 432, 437, 363 A.2d 381 (Ch. Div. 1976), important rights like those appellants would have honored through their trial court motions should not be diluted or simply ignored because their pursuit of a legal remedy could not keep pace with the ongoing circumstances. In re C.M., 458 N.J. Super. 563, 569-70 (App. Div. 2019) "Accordingly, for limitations purposes, a "discrete retaliatory or discriminatory act occur[s] on the day that it `happen[s].'" Id. at 110, 122 S.Ct. at 2070, 153 L.Ed.2d at 120." Roa v. Roa, 200 N.J. 555, 567 (N.J. 2010)

As such, the action in lieu of prerogative writs and civil rights complaint was not properly before Judge Schweitzer and the Chancery Division.

**B. JURISDICTION OF THE COURT IS IMPLICATED; THE UNAUTHORIZED TRANSFER WAS RETALIATORY; PLAINTIFF CHALLENGED CHANCERY DIVISION JURISDICTION BELOW; SUPERIOR COURT OF NEW JERSEY RECORDS DEMONSTRATE THAT THERE WAS NO ORDER TRANSFERRING THIS LAW DIVISION MATTER TO THE CHANCERY DIVISION JUDGE; CHANCERY DIVISION JUDGE FAILED TO COMPLY WITH THE CLEAR MANDATES OF R. 1:13-4, R. 4:3-1 AND R. 4:3-4; PLAINTIFFS' QUESTIONS RAISED ON APPEAL GO TO THE JURISDICTION OF THE CHANCERY DIVISION JUDGE OR CONCERN MATTERS OF GREAT PUBLIC IMPORTANCE.**

Defendants argue by way of Letter-brief filed by Counsel Gee that the matter was assigned to the Honorable Sherri L. Schweitzer, P.J. Ch. (at Db4). Plaintiffs appendix ( at Pa 14) demonstrates this argument was without merit. Rule 1:13-4. Transfer of Actions (a) On Motion. Subject to the right

to be prosecuted by indictment, if any court is without jurisdiction of the subject matter of an action or issue therein or if there has been an inability to serve a party without whom the action cannot proceed as provided by R. 4:28-1, it shall, on motion or on its own initiative, order the action, with the record and all papers on file, transferred to the proper court or administrative agency, if any, in the State. The action shall then be proceeded upon as if it had been originally commenced in that court or agency." The September 12, 2023, letter from Michelle M. Smith, Esq. Clerk of the Superior Court of New Jersey clearly states:

> THE COURT: *"Specifically, you appear to be requesting records/information related to CAM-L-00727-23, specifically related to a "copy of the order from the Camden County Court House, transferring....from the Law Division to the Chancery Division,"....* (Para. 1)*"A search has been conducted within the judiciary case jacket systems, based on the information provided above. However, no records related to an Order transferring your case from the Camden County Law Division t the Camden County Chancery. Also there does not appear to be any Camden County Chancery Division matter associated to your name."* (Para. 3)

Defendants did not submit an order of transfer to support their argument. The Camden Vicinage did not file an order of transfer from the Law Division (Camden) to the Chancery Division (Camden) in triplicate in accords with R. 4:3-1-Divisions of Court; Commencement and Transfer of Actions, nor in general. Defendants did not make a Motion to Transfer Between Law and Chancery Division within 10 days after expiration of the time prescribed by R. 4:6-1 for the service of the last permissible responsive pleading in accord with R. 4:3-1. Defendants failed to submit an order of transfer pursuant to paragraphs (a) and (b) of R. 4:3-4-Transfer and Removal of Actions. According to the Clerk of the Superior Courts of New Jersey there is no order of transfer pursuant to paragraphs (a) and (b) of 4:3-4-Transfer and Removal of Actions filed with the clerk of the court transferring the action from the Law Division to the Chancery Division or Chancery Division Presiding Judge. This matter was transferred out of Burlington County because of the conflict of interest. Plaintiff concludes that the transfer to Camden County where defense counsel resides or operates his place of business, was simply the Burlington Vicinage transferring the existing Conflict of Interest that

existed in Burlington County to the Camden County Vicinage. Plaintiff was not given notice of a transfer from the Law Division to the Chancery Division of his action in lieu of prerogative writs and civil rights complaint. Defendant's change in conduct from repeatedly refusing to grant adjournments upon request to granting adjournments after being sued did not moot the case. "[A]ppellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public importance." Nieder v. Royal Indemnity Ins. Co., 62 N.J. 229, 234 (1973) Seidman & Pincus, LLC v. Abrahamsen, DOCKET NO. A-1740-16T3, 20-21 (App. Div. Oct. 4, 2018) "Because the question does not relate to jurisdiction or constitute a matter of great public importance, we decline to reach this issue on appeal." Seidman & Pincus, LLC v. Abrahamsen, DOCKET NO. A-1740-16T3, 21 (App. Div. Oct. 4, 2018) See Kluczyk v. Tropicana Prods., Inc., 368 N.J. Super. 479, 493 (App. Div. 2004) (holding that a retaliatory discharge in violation of the NJLAD can occur if the employee is subjected to retaliation for complaining of unlawful harassment even if harassment is not established).

As such, the action in lieu of prerogative writs and civil rights complaint was not proper before Judge Schweitzer and the Chancery Division.

### C. DEFENDANTS ARGUMENT THAT THE COMPLAINT IS NOT ONE CHALLENGING AN ACTION BY MUNICIPAL BODY OR STATE ACTION IS CONTRARY TO N.J.S.A. 22A:4-17, N.J.S.A. 40A:1-1; N.J.S.A. 40A:5-22, N.J.S.A. 40A:9-94, N.J.S.A. 40A:9-105, 117 AND STEVENSON V. DEP'T OF LAW & PUB. SAFETY DOCKET NO. A-1390-17T4 (APP. DIV. OCT. 1, 2019); CASE LAW RECOGNIZES THE COUNTY SHERIFF AND HIS EMPLOYEES AS COUNTY (MUNICIPAL) EMPLOYEES

The Letter-Brief filed by defense Counsel Gee on behalf of his clients frivolously argues (at Db6): "*Appellant's complaint is not one challenging an action by a municipal body, rather it is an acting seeking to enforce a right to adjournments. "There is no challenge to any municipal or state action that would bring this matter to the Court's attention as a prerogative writ action."* This

argument is without merit in light of New Jersey Statutes and Case Law. It is obviously a frivolous argument as Counsel Gee cannot prove that the defendant Kostopolis (Sheriff) is not a State Officer. Counsel Gee cannot prove that the defendant Kostopolis, Odise A. Carr; Clerk #3 and Jenn are not County (Municipal) Employees. Counsel Gee cannot prove that the Office of the Sheriff of Burlington County is not a local unit. Counsel Gee cannot prove that the Office of the Sheriff of Burlington County is not a part of the Burlington County Government, which is a municipal body. "While the label "constitutional officer" is appropriately applied to the sheriff, it is meaningful only to the extent that the Constitution provides meaning. In fact, the Constitution does little more than to establish election as the means for becoming a sheriff, while limiting the term of office to three years. Arguably, the sheriff is a "State officer," as that term is used in Art. VII, § 3, par. 1 of the Constitution, so that he may be removed from office by impeachment. It has been so held in Shusted v. Coyle, 139 N.J. Super. 314 (Law Div. 1976), and in Doyle v. Warren Cty., 15 N.J. Misc. 434 (Circ.Ct. 1937). He is referred to in those cases as a "public officer in the state government." "He is referred to in those cases as a "public officer in the state government." In re Burlington Cty. Freeholders Bd., 188 N.J. Super. 343, 347-48 (Law Div. 1983) "N.J.S.A. 40A:1-1 defines "local unit" as "a county or municipality."" In re Burlington Cty. Freeholders Bd., 188 N.J. Super. 343, 350 (Law Div. 1983) "The sheriff is "an agent of the law" whose duties are defined by statute. Ritter v. Castellini, 173 N.J. Super. 509 , 513, 414 A.2d 614 (Law.Div. 1980). " Sears, Roebuck and Co. v. Braney, 265 N.J. Super. 362, 366 (App. Div. 1993) Under N.J.S.A. 22A:4-17, all monies received by the sheriff for services "shall be for the sole use of the county and shall be accounted for regularly to the county treasurer." The quarters in which the sheriff operates are supplied by the county and situate in the county. All of the funds necessary for the operation of his office are supplied by the county. N.J.S.A. 40A:9-105, 117. It is apparent that the sheriff's office is part of a "local unit," the county which that office serves. The Legislature may regulate the conduct of sheriffs and county governments. It may

provide investigative machinery for that purpose and has done so in adopting N.J.S.A. 40A:5-22. *In re Burlington Cty. Freeholders Bd.*, 188 N.J. Super. 343, 351 (Law Div. 1983) Nevertheless, and for purposes of completeness, we note that the County Sheriff "and his [or her] office are part of county government." In re Burlington County Bd. of Chosen Freeholders, 99 N.J. 90, 97 (1985) Stevenson v. Dep't of Law & Pub. Safety DOCKET NO. A-1390-17T4 (App. Div. Oct. 1, 2019) Actions in lie of prerogativew writs are governed by Rule 4:69. "Thus R. 4:69 governs challenges to municipal action." Pressler & Verniero, Current N.J. Court Rules, comment 1 on R. 4:69 (2012). "An action in lieu of prerogative writs is "'a comprehensive safeguard against official wrong.'"" Matula v. Twp. of Berkeley Heights, DOCKET NO. A-5705-12T1, 9 (App. Div. Aug. 21, 2015) "In addition to wrongful municipal action, actions in lieu of prerogative writs permit judicial intervention in cases of municipal inaction. See Mullen, supra, 428 N.J. Super. at 102. In the case of inaction, a plaintiff can challenge an official's failure to perform a public duty. Ibid. " Matula v. Twp. of Berkeley Heights, DOCKET NO. A-5705-12T1, 10 (App. Div. Aug. 21, 2015) "The enabling legislation pertaining to sheriffs is found in Laws of 1971, chapter 200, the preamble of which identifies the enactment as "[a]n Act covering county and municipal officers and employees * * *." Section B, entitled "Counties," contains the statutes concerning eligibility for the office of sheriff (codified at N.J.S.A. 40A:9-94); the sheriff's oath (N.J.S.A. 40A:9-96); the effect of the failure of the sheriff-elect to qualify (N.J.S.A. 40A:9-101); vacancy in the office of sheriff (N.J.S.A. 40A:9-102); bond and oath of appointee to fill vacancy in the office of sheriff (N.J.S.A. 40A:9-103); salary of sheriff in certain counties (N.J.S.A. 40A:9-104); expenses payable to sheriffs (N.J.S.A. 40A:9-105); uncollected fees credited to account of former sheriff (N.J.S.A. 40A:9-106); sheriff to deliver to his successor certain moneys and papers (N.J.S.A. 40A:9-107); prohibition on sheriff holding other civil office (N.J.S.A. 40A:9-108); amercement of sheriff or acting sheriff (N.J.S.A. 40A:9-109); court-designation of enforcement officer when amercement occurs (N.J.S.A. 40A:9-110); and bonds taken

by the sheriff (N.J.S.A. 40A:9-111). The legislature's system of referring to the office of sheriff lends support to the conclusion that the sheriff can indeed be — and is here — a part of the county government, a conclusion that is shared by the Attorney-General. See Op. Att'y Gen. No. 27 (September 23, 1955) at 260-62 (county sheriff and his employees should be regarded as county employees). App. of Burlington Cty. Bd. of Chosen Freeholders, 99 N.J. 90, 98-99 (N.J. 1985)

Plaintiff 's action in lieu and civil rights complaint challenged action and inaction by the defendants prior to the filing of suit and service of complaint and summons pursuant to R. 4:69 and N.J.S.A. 10:6-2. Burlington County is a Municipality. "An abuse of discretion arises when a decision is "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." Flagg v. Essex County Prosecutor, 171 N.J. 561, 571 (2002) (quoting Achacoso-Sanchez v. Immigration and Naturalizati" Seidman & Pincus, LLC v. Abrahamsen, DOCKET NO. A-1740-16T3, 13 (App. Div. Oct. 4, 2018)

As such, the action in lieu and civil rights complaint was not properly before Chancery Division Judge Schweitzer.

**D. DEFENDANTS MISREPRESENTATION BY WAY OF COUNSEL (at Db 5) THAT ADJOURNMENT LETTERS (RA 9) WERE DIRECTLY RECEIVED BY PLAINTIFF FROM THE DEFENDANT OFFICE OF THE SHERIFF OF BURLINGTON COUNTY AT THE TIME OF SAID REPRESENATION AMOUNTS A FRAUD UPON THE COURT AND OR FRAUD BY ADVERSE PARTY**

The fact that Plaintiff indisputably sought adjournments in person back in January 2023 taken in conjunction with the Defendants narrative set forth in their Statement of Facts and Procedural History (at Db 5) is dishonest, misleading or a misrepresentation of material fact. A fraud on the court occurs "where it can be demonstrated, clearly and convincingly, that a party has sentiently set-in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense." Aoude v. Mobil Oil Corp., 892 F.2d 1115 ,

1118 (1st Cir. 1989); Perna v. Elec. Data Sys. Corp., 916 F.Supp. 388 , 397 (D.N.J. 1995). Triffin v. Automatic Data Processing, Inc., 394 N.J. Super. 237, 251 (App. Div. 2007). In a reciprocal discipline matter, In re Shearin, 166 N.J. 558 (2001) (Shearin I) the attorney submitted false evidence, and counseled or assisted her client in conduct that she knew was illegal, criminal, or fraudulent. In re Khoudary, Docket No. DRB 12-325, 20 (N.J. Jun. 6, 2013) The filing by a lawyer of a false certification to induce a court to grant relief for his benefit is a fundamental breach of a lawyer's duty as an officer of the court. Such conduct diminishes public confidence in the legal profession and goes "to the heart of every attorney's obligation to uphold and honor the law." In re Schleimer, 78 N.J. 317 , 319 (1978) (one-year suspension for false swearing in a civil case). Respondent's behavior constituted misconduct under the Disciplinary Rules. DR 1-102(A)(3), (4), and (5) (engaging in illegal conduct that adversely reflects on a lawyer's fitness to practice law; engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; and engaging in conduct that is prejudicial to the administration of justice). Matter of Kushner, 101 N.J. 397, 401-2 (N.J. 1986).

The narrative advanced by Counsel on behalf of his clients in the instant action, amounts to fraud upon this Court and fraud by adverse party because it states:

> *"Prior to March 22, 2023, conference, the Burlington County Sheriff's Office granted Appellant's adjournment requests. Appellant was notified directly by the Sheriff's Office as well as by the undersigned. (Ra 9). On March 21, 2023, correspondence was filed with the Court advising that the relief sought by Appellant was granted. (Ra 10)."*

Plaintiff addressed the alleged direct notice from the defendant Sheriff's Office in his unopposed March 20, 2023, letter (Pa 136) to the Trial Court. Plaintiff, in fact did not receive actual notice of adjournment from the Sheriff's Office, directly, when Counsel Gee made such a representation to the Trial Court. Plaintiff attached a copy of the USPS Tracking for 70203160000175295954. (Pa 152) USPS Tracking Number 70203160000175295954 was provided by Counsel Gee to Plaintiff and the Trial Court on or about 3/20/23. Plaintiff searched the tracking number because he did not receive the hard copies via U.S. Mail. The search revealed that the items

had not been delivered (Pa 152) at the time the defendants and Counsel represented plaintiffs receipt of said documents. "We take judicial notice of the fact that the United States Postal Service ordinarily delivers mail within the State in less than four days. Consequently, appellant could have reasonably expected that mailing the hearing request four days before the statutory deadline would result in its receipt by the deadline." D.R. Horton, Inc. v. New Jersey Department of Environmental Protection 383 N.J. Super. 405 (App. Div. 2006). Furthermore, Plaintiff contends that Defendants' counsel as an officer of the Court, should know that the record demonstrates that Defendants' purported decision to discontinue their discriminatory denial of Plaintiff's Constitutional and Statutory rights to be free from retaliation, harassment and discrimination, to equal protection under the law, to equal benefit of all laws and proceedings and to two adjournments of the Sheriff Sale upon request pursuant to N.J.S.A. 2A:17-36 in like manner as was done for White Citizens (Pa 153), did not occur until after (and in response to) Plaintiff's filing of the complaint (Pa 27) with the Law Division on or about March 8, 2023 (Pa 27) wherein Plaintiff's N.J.S.A. 10:6-2 claims and other injuries set forth therein unjustly remain unadjudicated in its proper venue being the Law Division. In addition, Plaintiff filed a Notice of Tort Claim (Pa 26) on or about March 07, 2023, with the Burlington County Risk Management Office, identifying claims under Common Law, which to date, has not been responded too.

## CONCLUSION

For the foregoing reasons, Plaintiff respectfully movesthis Honorable Court to acknowledge that he is the prevailing party as a result of the defendants cessation of conduct entitled to attorney fees and enter an order reversing and vacating the Trial Court order.

Respectfully submitted,

Rodney Kelly, PAG

Dated:12/07/2023