

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO.:

STATE OF NEW JERSEY,  
  
Plaintiff-Respondent,  
  
v.

HARLIN AYALA AND \$445.00, ET  
AL. IN US CURRENCY,  
  
Defendant-Appellant.

**CIVIL ACTION**

ON INTERLOCUTORY APPEAL FROM A DENIAL  
OF MOTION TO PROCEED NUNC PRO TUNC  
AND MOTION TO DISMISS

SAT BELOW:  
Hon. Mary K. Costello, P.J.S.C.  
Civil.

Docket No. HUD-L-1712-16

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**BRIEF ON BEHALF OF DEFENDANT-APPELLANT JERMAINE MITCHELL AND  
APPENDIX**

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## SUMMARY OF ARGUMENT

This case involves a practice whereby the Hudson County Prosecutor's Office improperly joins entirely unrelated defendants - people who do not know each other, who were arrested on different days, in different cities, for different conduct - in one civil forfeiture proceeding in order to meet the amount in controversy of \$15,000 required for hearing in the Law Division of the Superior Court.

This obvious violation of the rule of permissive joinder undermines the division of labor within the Superior Court between the Law Division and the Special Civil Part and results in inefficiency for the court. It also deprives defendants of their due process rights, often forcing them, as in this case, to pay more to defend the action than the State seeks to seize.

The interest of justice requires interlocutory review here. The trial court judge improperly denied Mr. Mitchell's motion for nunc pro tunc to submit his motion to dismiss, in spite of good cause shown, thus making a default judgment inevitable. In spite of this denial, the court then reached the merits of the motion to dismiss and applied the wrong standard for joinder in denying it. To prevent the injustice that would result either from Mr. Mitchell receiving a default judgment or from Mr. Mitchell being forced to defend an improperly-filed claim on the merits, this Court should grant leave to appeal.

**STATEMENT OF FACTS AND PROCEDURAL HISTORY**<sup>1</sup>

Jermaine Mitchell was arrested on April 8, 2016, in Jersey City, New Jersey. At that time, members of the Jersey City Police Department seized \$171 from him. He has been incarcerated at the Hudson County Correctional Facility since then.

On April 28, 2016, the Hudson County Prosecutor's Office filed the instant action pursuant to N.J.S.A. 2C:64-1, et seq. in Superior Court. On May 2, 2016, a notice of the action titled State of New Jersey v. Harlin Ayala and \$445 et. als. in U.S. Currency, Docket No. HUD-L-1712-16, was prepared, to be served on Mr. Mitchell at the Hudson County Correctional Facility. See Da7.

The Notice informed Mr. Mitchell:

If you do not file and serve a written answer or motion within thirty-five (35) days, the court may enter a judgment against you for the relief plaintiff demands, plus interest and costs of suit. If judgment is entered against you, the Sheriff may seize your money, wages or property to pay all or part of the judgment.

[Id.]

With respect to representation, the notice told Mr. Mitchell:

If you cannot afford an attorney, you may call the Legal Services Office in the county where you live. A list of these offices is provided. If you do not have an attorney and

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<sup>1</sup> For clarity and for the convenience of the Court, the statement of facts and procedural history have been combined here.

are not eligible for free legal assistance, you may obtain a referral to an attorney by calling one of the Lawyer Referral Services.

[Id.]

The list attached to the notice referred Mr. Mitchell to two organizations in Hudson County and ten additional statewide organizations. See Da27-30. Not one of these organizations provides representation to clients in civil forfeiture matters, and the document is out of date by several years.<sup>2</sup> Legal Services of New Jersey/Northeast New Jersey Legal Services, the only organization whose focus could even conceivably include individual representation in forfeiture cases, does not provide representation to clients in forfeiture cases as a categorical matter. See Da32. Of the remaining nine organizations, eight explicitly do not represent individuals in these cases,<sup>3</sup> and one,

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<sup>2</sup> For example, the list includes The Project Freedom Fund, an organization that has been defunct since 2012, when it was the subject of a \$2.2 million judgment for fraudulently pretending to provide legal services. See Press Release, New Jersey Office of the Attorney General, New Jersey Division of Consumer Affairs Obtains Judgment Permanently Shutting Down Bogus Legal Services Provider, Accused of Exploiting Destitute Prisoners and Their Families, Oct. 16, 2012, <http://www.nj.gov/oag/newsreleases12/pr20121016a.html>. It also includes a military legal services program at Fort Monmouth; the Fort closed in 2011. See Bob Considine, Fort Monmouth Closes Its Gates For Good, THE STAR LEDGER, Sept. 14, 2011, [http://www.nj.com/news/index.ssf/2011/09/fort\\_monmouth\\_closes\\_gates\\_for.html](http://www.nj.com/news/index.ssf/2011/09/fort_monmouth_closes_gates_for.html).

<sup>3</sup> Three organizations, Community Health Law Project, Disability Rights New Jersey, and New Jersey Protection and Advocacy, Inc., focus on health and disability law; Education Law Center focuses on education law; Legal Center for Defense of Life, Inc. litigates "Pro Life Related Issues"; the New Jersey Department

Urban Law Institute, includes no website and a phone number that rings, unanswered, in spite of a notation that it provides "[s]ervices . . . 24 hours a day." Da28.

The notice also informed Mr. Mitchell that each defendant must submit a \$175 filing fee in order to defend the action on the merits with an answer or responding motion. See Da7.

The complaint seeks amounts ranging from \$95 to \$3,164 from twenty defendants. In the case of six of those defendants, including Mr. Mitchell, the amount seized was less than \$175. See Da8 (naming as defendants, inter alia, Emanuel Bell and \$105.00, Ismail Eljacifi and \$105.00, Joshua L. Espada and \$111.00, Tyrone Johnson and \$95.00, Maris McDuffy and \$127.00, and Jermaine Mitchell and \$171.00).

The complaint does not allege that the defendants were involved in any common scheme, worked together, or coordinated their behavior in any way. Indeed, the complaint contains no allegations that the defendants even knew each other. The defendants' property was seized over the course of several months, as early as January 21, 2016, and as late as April 13, 2016. Their property was seized in different towns, including

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of the Treasury is not a legal services organization; the National Legal Aid & Defender Association does not provide individual representation; and the Pro Bono Partnership, whose website is listed incorrectly on the notice, does not handle litigation or individual matters, instead providing "free business and transactional legal services to nonprofits," see <https://www.probonopartner.org/>.

Bayonne, Union City, and Jersey City. See Da10-15 at Count One, Count Three, and Count Five. Though most defendants were charged with controlled dangerous substances offenses, those charges differ from defendant to defendant, and only five of the defendants appear to have received conspiracy charges. See id. at Count One, Count Twelve, and Count Thirteen. Mr. Mitchell was not charged with conspiracy, nor does the complaint contain any allegations that he conspired with any other named defendant.

The defendant named in the caption, Harlin Ayala, had \$445.00 seized on March 24, 2016, in Union City, New Jersey. See Da13 at Count Three. There is no allegation that Mr. Ayala and Mr. Mitchell knew each other or were working together toward any shared goal or in any way at all.

Mr. Mitchell received the complaint sometime in the week of May 8, 2016. See Da4 at ¶ 8. He spoke to his public defender about the matter, and the Hudson County Office of the Public Defender referred the case to the ACLU-NJ by forwarding the complaint against Mr. Mitchell, which the ACLU-NJ received on June 14, 2016. See id. at ¶ 9. Undersigned counsel met with Mr. Mitchell to discuss the case on June 20, 2016, and on July 11, 2016, the ACLU-NJ received a retainer signed by Mr. Mitchell. See id. at ¶ 10. On July 20, 2016, the ACLU-NJ, on behalf of Mr. Mitchell, filed a motion to appear nunc pro tunc, see Da1-32,

because the 35-day period had elapsed.<sup>4</sup> The ACLU-NJ also submitted a motion to dismiss on Mr. Mitchell's behalf. See Da33. The motions were returned on July 25, 2016, for failure to pay an additional \$50 fee to file the Motion to Dismiss. See Da50-51. The ACLU-NJ received the return on July 26, 2016, and on July 27, 2016, the ACLU-NJ re-filed the motions with the additional fee, ultimately paying \$225 in filing fees.

On August 19, 2016, Judge Mary K. Costello, P.J.S.C., denied both motions on the merits. See Da48; Da49. The trial court denied the motion to proceed nunc pro tunc for "lack of good cause shown," Da48, and denied the motion to dismiss on the ground that "forfeiture action is [sic] of a similar nature and with a common question of law such that joinder is permissible and in the interest of judicial economy." Da49.

#### ARGUMENT

##### **I. LEAVE TO APPEAL MUST BE GRANTED IN THE INTEREST OF JUSTICE.**

Rule 2:2-4 allows this Court to grant leave to appeal from the trial court's interlocutory order if the interests of justice so demand. Here, unless leave to appeal is granted at this interlocutory stage, Mr. Mitchell will suffer a default

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<sup>4</sup> Assuming Mr. Mitchell received the complaint on May 8, 2016, a fact that is difficult to discern because Mr. Mitchell was incarcerated at the time and does not know the exact day he received it, the 35-day period would have elapsed on June 12, 2016, before the ACLU-NJ was informed of the matter.

judgment. Because the trial court has denied his motion for nunc pro tunc filing, there can be no hearing on the merits.

***A. Leave To Appeal the Order Denying Nunc Pro Tunc Filing is in The Interest of Justice.***

Mr. Mitchell was incarcerated when he received the complaint in this action informing him that if he could not afford counsel, he could seek representation from the organizations described above, which do not provide representation in forfeiture cases.

In spite of this misleading advice, and in spite of his impaired ability to defend the action because of his incarceration, Mr. Mitchell nevertheless identified counsel to represent him, the ACLU-NJ. After diligently meeting with counsel and signing a retainer, Mr. Mitchell, through counsel, filed a motion to proceed nunc pro tunc and a motion to dismiss on July 20, 2016, slightly more than one month after the time to file had lapsed.

Without any opposition to nunc pro tunc filing from the Prosecutor's Office, the plaintiff in the civil forfeiture case, or any showing of prejudice, the trial court sua sponte denied the motion for lack of good cause shown.

That decision was in error. Though "[c]ourts in this state have not defined good cause in the context of entering a judgment nunc pro tunc," In re W.R. ex rel. S.W., 412 N.J. Super. 275, 281 (Law Div. 2009), surely where an incarcerated

defendant is affirmatively misled by the service of the complaint as to where to seek free legal counsel, a short delay in finding counsel would constitute good cause. There is no evidence that Mr. Mitchell acted in a bad faith or dilatory manner; instead, he made diligent, and ultimately successful, efforts to obtain counsel. His desire to be represented by counsel before he responded was entirely reasonable; Justice Albin, for example, has acknowledged "the assumption, accepted by our courts, that it is highly unlikely a pro se defendant will represent himself as effectively as a lawyer, who brings his training, experience, and detachment to the task." State v. Davenport, 177 N.J. 288, 312 (2003) (Albin, J., dissenting).

Moreover, the delay worked no prejudice on the Prosecutor's Office, which had not moved for default judgment at the time Mr. Mitchell's motions were filed.<sup>5</sup>

The necessary consequence of the denial of nunc pro tunc status is a default judgment - without being allowed to file nunc pro tunc, Mr. Mitchell will be out of time. The denial thus forecloses a hearing on the merits for Mr. Mitchell. Such a result flies in the face of the strong preference in New Jersey courts for decisions on the merits. See, e.g., Kent Motor Cars, Inc. v. Reynolds and Reynolds, Co., 207 N.J. 428, 447 (2011)

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<sup>5</sup> Mr. Mitchell does not concede that had a motion for default or a default judgment been filed at the time he moved to dismiss, the Prosecutor's Office would have been prejudiced, he simply notes that even this step had not been taken.

(noting the Court's "general preference for addressing disputes on the merits"); cf. 10 James W. Moore, et al., Moore's Federal Practice § 55.20[2][c] (3d ed. 1997).

That preference is reflected in the liberal standard that governs vacating default judgments; as the New Jersey Supreme Court has explained, "[a] court should view the opening of default judgments with great liberality, and should tolerate every reasonable ground for indulgence to the end that a just result is reached . . . [a]ll doubts . . . should be resolved in favor of the parties seeking relief." Mancini v. Eds ex rel. N.J. Auto. Full Ins. Underwriting Ass'n, 132 N.J. 330, 334 (1993) (quotation marks and internal alterations omitted).

The trial court thus failed to afford Mr. Mitchell the benefit of the doubt in his motion to respond on the merits six weeks late - a delay caused by seeking counsel - that courts traditionally would have afforded him even after the additional procedural hurdle of a default judgment.

Though it is possible that the trial court will enter a default judgment that Mr. Mitchell could move to vacate, there is no reason to believe that the trial court, having already considered and rejected his argument in favor of a merits decision in the nunc pro tunc context, would subsequently accept that argument in support of a motion to vacate a default

judgment. Moreover, such a result would further delay Mr. Mitchell's opportunity for a hearing on the merits.

As the New Jersey Supreme Court has recognized, "[t]he Appellate Division has . . . granted review of interlocutory orders that actually or effectively dismiss a party's claims or defenses." Brundage v. Estate of Carambio, 195 N.J. 575, 599 (2008) (citing Fid. Union Bank v. Hyman, 214 N.J. Super. 177, 179 (App. Div. 1986); Hamilton v. Letellier Constr. Co., 156 N.J. Super. 336, 337 (App. Div. 1978)). The nunc pro tunc order effectively (and the motion to dismiss order, discussed below, actually) dismisses Mr. Mitchell's defense, articulated in the motion to dismiss, that his participation in the action violates the rules of joinder and his right to due process.

The interest of justice therefore requires that leave to appeal be granted. For these reasons, not only should leave to appeal the nunc pro tunc motion be granted, but the motion itself should also be granted, and this Court should hear the motion to dismiss on the merits.

***B. Leave to Appeal the Order Denying the Motion to Dismiss is in the Interest of Justice***

The interest of justice favors granting interlocutory leave to appeal the motion to dismiss here for several reasons.

First, interlocutory review is appropriate where "there is the possibility of 'some grave damage or injustice' resulting from the trial court's order." Brundage, 195 N.J. at 599

(quoting Romano v. Maglio, 41 N.J. Super. 561, 567 (App. Div. 1956)). This is particularly so for "issues of constitutional magnitude." Id. at 600 (citing Bd. Of Educ. V. Caffiero, 173 N.J. Super. 204, 206-08 (App. Div. 1980)).

In the absence of appellate review, Mr. Mitchell's state and federal constitutional due process rights will be violated. Allowing this action to go forward to default judgment would allow the Prosecutor's Office to take \$171 from Mr. Mitchell through an action where the filing fee to defend was \$175. Such a system does not comport with due process, whose "fundamental requirement . . . is the opportunity to be heard at a meaningful time and in a meaningful manner." Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (quotation marks omitted). Requiring a person to pay more than is at stake in any action before the merits of his case can be heard is the antithesis of a meaningful manner for a merits hearing.

Second, interlocutory review is appropriate where "the appeal, if sustained, will terminate the litigation and thus very substantially conserve the time and expense of the litigants and the courts." Id. at 599. If the appeal of the denial of the motion to dismiss is sustained, the case will be dismissed, thus terminating the litigation and conserving Mr. Mitchell's and the courts' resources. As the New Jersey Supreme Court has explained, "leave to appeal may be appropriate if it

will resolve a fundamental procedural issue and thereby prevent the court and the parties from embarking on an improper or unnecessary course of litigation." Id.

The question presented in the motion to dismiss - the propriety of joining entirely unrelated defendants to meet the amount in controversy requirement for the Law Division of the Superior Court - is a quintessential "fundamental procedural issue." The standard the trial court applied, that the cases contain a "common issue of law," is only part of the joinder standard. The standard for permissive joinder, articulated in R. 4:29-1, and discussed further below, provides that "[a]ll persons may . . . be joined as defendants jointly . . . if the right to relief asserted . . . against the defendants arises out of or in respect of the same transaction, occurrence, or series of transactions or occurrences and involves any question of law or fact common to all of them." (emphasis added). The trial court did not even consider whether the claims arose from "the same transaction, occurrence, or series of transactions or occurrences," a threshold question for permissive joinder. The observation that the claims involve a common issue of law does not resolve that question. Review by the Appellate Division is necessary to ensure that the question of what constitutes proper joinder is resolved, a question that meaningfully affects the rights of all forfeiture defendants in Hudson County.

For the foregoing reasons, the interest of justice requires that interlocutory leave to appeal be granted.

**II. THE COMPLAINT SHOULD BE DISMISSED BECAUSE JOINDER WAS IMPROPER, AND TRIAL IN THE LAW DIVISION OF THE SUPERIOR COURT VIOLATES MR. MITCHELL'S DUE PROCESS RIGHTS.**

Rule 4:37-2(a) provides that "[f]or failure of the plaintiff . . . to comply with these rules . . . the court in its discretion may on defendant's motion dismiss an action or any claim against the defendant." Dismissal of the claim against Mr. Mitchell is appropriate under R. 4:37-2(a) because he was improperly joined under R. 4:29-1.

***A. The Claim Against Mr. Mitchell Does Not Arise Out of The Same Transaction, Occurrence, or Series of Transactions or Occurrences As Do The Claims Against the Other Defendants.***

Rule 4:29-1, which governs permissive joinder, provides that "[a]ll persons may . . . be joined as defendants jointly . . . if the right to relief asserted . . . against the defendants arises out of or in respect of the same transaction, occurrence, or series of transactions or occurrences and involves any question of law or fact common to all of them."

The trial court ignored the initial requirement and addressed only the second requirement, finding that the cases involved a common question of law. Because the test in R. 4:29-1 is conjunctive, the trial court's analysis was insufficient, as discussed further below.

Indeed, joinder here did not meet the initial requirement, according to which parties may be joined only if the right to relief arises "out of or in respect to the same transaction, occurrence, or series of transactions or occurrences." To meet that standard, parties' actions must be "so causally connected or closely allied or related in character or purpose as to constitute components or links in the same evolving complex of events." Neil v. Klein, 141 N.J. Super. 394, 408 (App. Div. 1976). The Klein court explained that joinder is appropriate where there has been "wrongdoing by multiple defendants that is pursuant to a common purpose or part of a single scheme." Id. (citing Galler v. Slurzberg, 22 N.J. Super. 477, 493 (App. Div. 1952), where the court allowed joinder because the multiple defendants had been in a conspiracy to destroy the plaintiff's business).

Once the threshold determination that the claims against the parties have arisen out of the same transaction or occurrence or series of transactions or occurrences is met, New Jersey courts interpret the joinder rule broadly, observing that its objective is:

(1) to foster the virtually unrestricted joinder of persons interested in any capacity in the same claim, whether as plaintiffs or defendants, and (2) to license the joinder of multiple claims, by or against multiple parties, where the claims have the requisite common origin and the necessary common issue of law or fact.

[Rendine v. Pantzer, 141 N.J. 292, 308  
(1995).]

Nevertheless, the same transaction or occurrence threshold must still be met. Courts have refused to allow joinder where the relationship among the claims against various defendants "is based on ties so tenuous and inconsequential that they cannot be said to arise from the same series of transactions." Klein, 141 N.J. Super. at 410.

In Klein, a group of inmates in county detention facilities sued sheriffs, wardens, and county officials in all twenty-one counties in the state. The trial court dismissed the action for all counties but one on the ground that the counties were improperly joined, and the Appellate Division affirmed. The Appellate Division reasoned that "[a]lthough there are several statutes which all county administrators must obey, the conditions in each county's institutions are peculiar to that county," Klein, 141 N.J. Super. at 410, and joinder would not "serve the causes of judicial economy and fairness to the parties, which, after all, are the policies behind R. 4:29-1." Id.

The joinder here was patently impermissible, as the claims against the defendants do not arise out of the same transaction or occurrence or series of transactions or occurrences. The State does not allege that the defendants' conduct was in

pursuit of a common purpose or part of a single scheme, and there are no allegations that would support a claim that defendants worked together in any way, or even that they knew each other. The only thing Mr. Mitchell shares in common with the defendants is that the Hudson County Prosecutor has a separate claim on each of their property.

Finding that there is a "common question of law" does not resolve the joinder question. For example, consider an individual plaintiff who joins five completely unrelated defendants because she has independent tort claims against each of them - for example, five personal injury claims arising out of five completely unrelated car accidents. Though the question of law - whether there was a breach of duty by each defendant - would be common, joinder would nevertheless be improper, because the claims did not arise out of the same transaction or occurrence or series of transactions or occurrences. Joinder is inappropriate for the same reason here - though, phrased abstractly, the question of whether property was "utilized in furtherance of an unlawful activity" or was the "proceeds of illegal activities" under N.J.S.A. 2C:64-1(a)(1) and (a)(3) is a "common question of law," joinder is nevertheless inappropriate because the actions did not arise out of the same transaction or occurrence or series of transactions or occurrences.

***B. The Joinder of Defendants Here Does Not Advance Efficiency and Justice, The Dual Purposes of Joinder.***

As New Jersey courts have explained, joinder is permitted where the R. 4:29-1 requirements are met, which they were not here, and "so long as the trial will be just and convenient." Klein, 141 N.J. Super. at 408. Thus, even if the Court concludes that the R. 4:29-1 requirements were met, joinder in this case is inappropriate because it does not improve convenience for the Court, and it produces the profoundly unjust outcome of denying rational litigants the opportunity to defend the action on the merits.

1. Joinder does not improve efficiency for the Court.

The reason a common question of law is insufficient for joinder is that if the various claims in dispute have no common factual origin, they do not lend themselves to joint resolution. In this case, for example, the single complaint against Mr. Mitchell and nineteen other defendants includes twenty actions requiring entirely different proofs. Because all of the property described in the complaint is currency, rather than prima facie contraband, in order to seize it the State must prove, with respect to each item to be seized, "a direct causal relationship between the use of the property and the unlawful activity" alleged. See, e.g., N.J.S.A. 2C:64-1(a)(1) and (a)(3); State v.

One 1986 Subaru, 120 N.J. 310, 320 (1990); State v. One 1988 Honda Prelude, 252 N.J. Super. 312, 316 (App. Div. 1991).

Thus, the State must show, with respect to Mr. Ayala, a direct causal relationship between the \$445 seized from him in Union City on March 24, 2016, and the criminal activity of the controlled dangerous substances charges he received. It must also show, with respect to Mr. Mitchell, the direct causal relationship between the \$171 seized from him on April 8, 2016, in Jersey City, and the criminal activity of the controlled dangerous substances charges he received. The State has alleged no facts that would suggest that any proofs are common to the allegations against Mr. Mitchell and Mr. Ayala or any of the other eighteen defendants.

The only possible efficiency the court could gain as a result of this improper joinder practice is that because the joined action presents an inappropriately high barrier to defending on the merits,<sup>6</sup> defendants are more likely to default, reducing the system cost imposed by a decision on the merits. But making decisions on those merits is the very reason courts operate, and in recognition of that fact, courts have traditionally disfavored default judgments: "a default judgment

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<sup>6</sup> As discussed more fully below, while the filing fee to enter an appearance to answer a claim in the Special Civil Part is \$15, see N.J.S.A. 22A:2-37.1, it costs \$175 (at a minimum) to defend an action in the Law Division. The latter amount is greater than the amount the State seeks to seize from Mr. Mitchell.

is based on only one side's presentation of the evidence without due consideration to any countervailing evidence or point of view, and, thus, may not be a fair resolution of the dispute." Nowosleska v. Steele, 400 N.J. Super. 297, 303 (App. Div. 2008). Thus, a practice that encourages defendants to default does not create efficiency that benefits the Court.

Moreover, this mode of joinder undermines the efficiency the courts recognized in establishing the Special Civil Part as a forum for cases seeking legal relief "when the amount in controversy does not exceed \$15,000." R. 6:1-2. The Comment to Rule 6:1-1 explains that when the county district courts were abolished in 1983, the Special Civil Part was established "[b]ecause . . . of the utility of maintaining a court of limited monetary jurisdiction with expedited procedures." R. 6:1-1 Comment. The efficiency gained by establishing the Special Civil Part is lost if parties can file cases that in fact seek less than \$15,000 in the Law Division of the Superior Court rather than in the Special Civil Part.

The only efficiency gained through this improper joinder is efficiency for the State, which must pay only one filing fee and file only one action. Joinder is designed to serve efficient administration of the courts, not efficient prosecution by the State, but even if the State's efficiency interest were cognizable, it would nevertheless have to yield to the

defendants' due process interests. See State v. One 1990 Honda Accord, 154 N.J. 373, 393 (1998) ("Doubtless, the right to trial by jury will be an inconvenience to the State when it seeks to forfeit innocent property. Mere inconvenience, however, cannot justify the denial of a constitutional right.").

2. Joinder would work an injustice against Mr. Mitchell and the other defendants.

The State seized \$171 from Mr. Mitchell, less than the \$175 he would have to pay to defend the case on the merits. If the complaint had been brought in the Special Civil Part, the fee to enter an appearance to answer would have been \$15. See N.J.S.A. 22A:2-37.1. Six other defendants in this action also have less at stake than the cost to answer the complaint in the Law Division. In establishing the Special Civil Part for cases involving smaller amounts of money, the courts established a forum where the cost of defending the action bears a relationship to the amount at stake. Here, the cost of defending the action is entirely untethered from that amount.

No rational defendant would pay \$175 to recover \$171. Though the disincentive to litigate is particularly obvious for defendants who literally have less at stake in the action than the amount it would cost to respond, it is nevertheless the case that it would also likely not be worthwhile for Mr. Banks or Mr. Hill, who would be defending their claims to \$202 and \$239, respectively, to pay the fee to defend the action on the merits.

The judiciary has already determined that litigants need not pay \$175 to defend actions for such small amounts: it has established the Special Civil Part precisely to handle these matters.

By circumventing that system through improper joinder, the State is able to seize amounts less than \$175 with total impunity from having to make its case on the merits. Such an outcome is the antithesis of due process: it precludes the trial on the merits that would ensure a just outcome for defendants.

***C. Courts Have Dismissed Actions For Improper Joinder.***

Upon a finding of improper joinder, courts may dismiss or sever the claims against the improperly joined parties. See, e.g., Klein, 141 N.J. Super. at 400, 412; cf. Sabolsky v. Budzanoski, 457 F.2d 1245, 1249 (3d Cir. 1972).

Here, severance would result in twenty separate trials, all involving significantly less than the \$15,000 amount-in-controversy requirement. If defendants were forced to defend these actions in the Law Division of the Superior Court, the concerns identified above regarding the relationship between the cost of defending the action and the amount at stake would remain. Such a result would undermine the court structure established by R. 6:1-2 and would put defendants in an untenable position, and so Mr. Mitchell asks that the Court dismiss the action against him.

**D. Forcing Mr. Mitchell to Defend the Action in the Superior Court Violates Due Process and Fundamental Fairness.**

Requiring Mr. Mitchell to pay more to defend an action than is at stake would deprive him of his right to due process under Article I, Paragraph 1 of the New Jersey Constitution and under the Fourteenth Amendment to the United States Constitution. As the United States Supreme Court has made clear:

[D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. Early in our jurisprudence, this Court voiced the doctrine that "wherever one is assailed in his person or his property, there he may defend," . . . Although "many controversies have raged about the cryptic and abstract words of the Due Process Clause . . . there can be no doubt that at a minimum it requires that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for a hearing appropriate to the nature of the case."

[Boddie v. Connecticut, 401 U.S. 371, 377 (1971) (quoting Windsor v. McVeigh, 93 U.S. 274, 277 (1876) and Mullane v. Central Hanover Tr. Co., 339 U.S. 306 (1950))].

A forum where the cost to defend is more than the amount the defendant stands to lose clearly does not provide the defendant with an "opportunity for a hearing appropriate to the nature of the case." See also, e.g., Mathews, 424 U.S. at 333 ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.")

(quotation marks omitted). It would also violate New Jersey's doctrine of fundamental fairness, which safeguards residents from against unjust and arbitrary governmental action. Oberhand v. Director, Div. of Taxation, 193 N.J. 558, 578 (2008) (Albin, J., concurring) (quoting Doe v. Poritz, 42 N.J. 1, 108 (1995) (Handler, J., dissenting)).

### **CONCLUSION**

Mr. Mitchell was joined improperly, and such joinder has resulted in injustice to him. For the foregoing reasons, interlocutory leave to appeal the motion denying nunc pro tunc filing and denying the motion to dismiss should be granted, those motions granted, and the complaint against him dismissed.

Respectfully submitted,

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