MYRON E. FUHRMANN and PERRI L. FUHRMANN, his wife, Plaintiffs-Appellants,

v.

NATHAN P. WOLF, ROSENBLUM, WOLF & LLOYD, PA., SAM FOX and IDA FOX, Defendants-Respondents.

No. A-6031-07T3.

Superior Court of New Jersey, Appellate Division.

Submitted October 27, 2009.
Decided November 19, 2009.

Myron E. Fuhrmann, appellant pro se and attorney for Perri L. Fuhrmann.

Wilson, Elser, Moskowitz, Edelman & Dicker, L.L.P., attorneys for respondents Nathan P. Wolf and Rosenblum, Wolf & Lloyd, PA (Robert A. Berns, of counsel; Adam S. Picinich, on the brief).

Methfessel & **Werbel**, attorneys for respondents Nathan P. Wolf and Rosenblum, Wolf & Lloyd, PA (Tracy B. Bussel, on the brief).[1] Baumann & Lynes, attorneys for respondents Sam Fox and Ida Fox (David A. Weglin, of counsel and on the brief).

Before Judges Carchman, Parrillo and Lihotz.

PER CURIAM

Plaintiffs Myron E. Fuhrmann and Perri L. Fuhrmann[2] appeal from a March 28, 2008 order of the Law Division dismissing their assault and malicious abuse of process action against defendants Nathan P. Wolf, Rosenblum, Wolf & Lloyd, PA, and a June 23, 2008 order dismissing the complaint as against defendants Sam and Ida Fox. In addition, plaintiffs appeal from an order denying their application to remove the court-appointed discovery master. As to all orders, we affirm.

The various causes of action asserted in this action arose as a result of events that transpired in another unrelated Law Division action — Fox v. Grinbaum, Superior Court, Law Division, Union County, Docket Number: UNN-L-0320-03 (the Fox action). To fully understand the context of the relevant facts here, we describe, in part, the facts of that case as well.

On January 28, 2003, defendants Ida Fox and Sam Fox filed a collection action in Union County against their daughter, Galina Grinbaum, and her husband Zinovy Grinbaum, seeking repayment of a $30,000 loan they had made to Galina. The Grinbaums filed a counterclaim seeking the repayment of approximately $13,000 from the Foxes. Defendant Wolf, then of Rosenbaum, Wolf & Lloyd, represented the Foxes. Fuhrmann represented the Grinbaums.

Prior to the filing of this action, on July 2, 2002, Fuhrmann and Galina visited Ida's mother, Asya Chatskaya, a ninety-one-year-old nursing home resident, who was partially blind and deaf. They left the visit with a newly-executed will from Chatskaya naming Galina as her sole beneficiary and granting Galina authority to make all of her funeral arrangements. Fuhrmann's wife, Perri, served as a witness to this will as did an individual identified as Maria Zakharenko.

Not surprisingly, on July 8, 2003, Wolf sent a letter to Fuhrmann advising that he wanted to take Perri's deposition unless she was willing to prepare a statement detailing what had occurred at the nursing home. Wolf believed that Chatskaya's new will had been improperly procured and that Galina's conduct on July 2, 2002, would reflect poorly on her credibility with respect to both the complaint and counterclaim. Perri never produced any statement.

At a hearing on July 18, 2003, before Judge Beglin, Wolf reiterated his representation that he might need to take Perri's deposition, but he was willing to accept the statement he had previously requested. Wolf had secured a certification from Ida Fox stating that the circumstances surrounding the signing of the will were material to the Fox action. Judge Beglin agreed, ruling that Perri was a fact witness, and Wolf was entitled to depose her if he so chose. Wolf subsequently asked Fuhrmann if he would voluntarily produce Perri for deposition, but Fuhrmann refused.

On August 18, 2003, Wolf hired a subpoena delivery service to serve a subpoena requiring Perri to appear for a deposition on

August 29, 2003. Unbeknownst to Wolf, the service improperly served the subpoena on Fuhrmann rather than Perri. On August 27, 2003, the day before the scheduled deposition, Fuhrmann advised Wolf that proper service had not been effectuated, and Perri would not appear at the deposition. According to Wolf, Fuhrmann took "glee" in transmitting that information.

Because of the September 2003 discovery deadlines in the Fox case, Wolf decided to personally serve Perri himself. At approximately noon the next day, following an aborted deposition of a heavily-medicated Galina, Wolf waited outside the Fuhrmann residence and then followed the couple when they drove off in a convertible with the top down. When Fuhrmann stopped at a traffic light on River Road in East Hanover, Wolf got out of his car, approached the vehicle and called out "Myron." Both Fuhrmann and Perri heard someone call out "Myron," but Fuhrmann claimed that he did not recognize Wolf and drove off when the light turned green. Perri later indicated that she was confused at this time, and her heart was pounding.

Wolf re-entered his car and followed as Fuhrmann turned into a cul-de-sac. Fuhrmann admitted that, at this point, he realized that it was Wolf who was following him, but he refused to stop because he was afraid of Wolf. Fuhrmann pulled into a second cul-de-sac and, rather than simply continuing to follow, Wolf stopped his car in the entrance to the cul-de-sac, got out and stood in the other lane blocking the road. Fuhrmann drove forward toward Wolf until Perri told him to "stop" before he "kill[ed] this guy."

According to Wolf, Fuhrmann stopped and asked Wolf what he was doing. Wolf approached the passenger side of the Fuhrmann vehicle and announced that he was "serving the subpoena for the deposition." Neither Fuhrmann nor Perri recalled any such conversation. Wolf then served Perri by reaching over the top of her rolled up-window and touching her on the head with the two- or three-page subpoena while stating, "The joke's on you. Tag." Wolf claimed that he made this statement because of Fuhrmann's earlier amusement when telling Wolf that Perri had not been properly served. Wolf dropped the subpoena into Perri's lap and then departed, leaving Perri frightened and crying. After a few minutes, Fuhrmann and Perri drove to the East Hanover police station to file a disorderly persons complaint against Wolf.[3]

According to Fuhrmann, Wolf had looked "menacing" as he approached the car and had "slammed" the two-page subpoena on Perri's head. Wolf denied striking Perri. Perri felt a "thump" and maintained that both the subpoena and Wolf's hand made contact with her head. Perri denied any injury when questioned by police but claimed that she began to feel pain in her neck one or two months later. She admitted that she had experienced similar pain "on and off throughout [her] life." Perri finally consulted a doctor regarding this pain approximately eighteen months later. She also consulted a psychiatrist on two occasions after the incident. Plaintiffs then filed a complaint on August 26, 2005, in the Superior Court of New Jersey, against defendants Wolf, his former firm Rosenblum, Wolf & Lloyd, PA[4] and his former clients Sam and Ida Fox, alleging that: (1) Wolf committed malicious abuse of process while acting under the color of state law and deprived plaintiffs of their state and federal civil rights; (2) Wolf's actions were undertaken to terrorize plaintiffs; (3) Wolf assaulted Perri Fuhrmann; (4) Wolf intentionally and maliciously touched Perri Fuhrmann; (5) Wolf falsely imprisoned plaintiffs; (6) Wolf intentionally inflicted emotional distress on plaintiffs; (7) Wolf's conduct was negligent and/or grossly negligent; and (8) Wolf's conduct violated 42 U.S.C.A. § 1983.

Following the filing of responsive pleadings, the trial judge, on December 11, 2006, entered a consent order appointing Kenneth Javerbaum, Esq. as discovery master and authorizing Javerbaum to resolve all discovery disputes between the parties. The order further provided that "all decisions of the discovery master shall be without prejudice, with the right of any party to appeal said decision by timely motion to this court within fifteen (15) days of the date of any such decision[.]" (Emphasis added).

Javerbaum entered an order on January 2, 2008, requiring plaintiffs to provide executed HIPAA authorizations and answers to supplemental interrogatories. He denied their requests for a complete copy of the file in the Fox action, more responsive answers to interrogatories propounded on Wolf and the Foxes, a list of Chatskaya's nursing home visitors and a re-deposition of Wolf's wife, Francine. Javerbaum granted plaintiffs' request for copies of any correspondence with one of Chatskaya's treating physicians, a copy of Wolf's insurance policies, a re-deposition of Ida Fox and a copy of any statement from Zakharenko.

Plaintiffs advised the judge by a January 16, 2008 letter that they were appealing the order, but they never filed a notice of motion or in any way formalized their appeal with certifications or other supporting documents. As a result, no motion was ever calendared, and the letter was placed in the court file.

The Wolf defendants moved for summary judgment, and a similar motion was forthcoming from the Fox defendants. Just prior to the filing of the Fox motion, plaintiffs deposed Wolf in the presence of Javerbaum. Following a short recess, Javerbaum placed the following on the record:

> We just took a break for ten or fifteen minutes and I mentioned to Mr. Wolf something about looking at his

> letterhead that was marked before and seeing that he had a Springfield address on it and commented about that. And I indicated, I thought his office was in Jersey City in earlier letterhead of his, when going through his file. . . .
>
> He told me he's no longer practicing in. . . Jersey City, but he's now with the firm of WolfBlock.
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> Now, I mentioned to him, and I want to put on the record, the lawyer who incorporated and did the partnership agreement for my law firm some years ago is a partner in WolfBlock. His name is Stuart Pachman. I didn't know at the time I took this assignment and I did not know and had no reason to know that Mr. Wolf was with WolfBlock until 10 or 15 minutes ago.
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> Mr. Pachman's representation of me and my firm is not a continuing one. It was a transactional one for the purpose of putting together a partnership agreement and incorporating our firm.
>
> I just feel the need to put that on the record for the sake of propriety and the full understanding of everybody else.

Thereafter, in letters to the court dated March 11, 2008 and March 18, 2008, Javerbaum confirmed that none of his decisions were made with any awareness of Wolf's connection to WolfBlock. He maintained that he had only learned for the first time at Wolf's deposition that Wolf had left his former firm, Rosenbaum, Wolf & Lloyd of Jersey City, and had been, since June 2005, a member of WolfBlock. Javerbaum submitted a letter from Pachman who clarified that he performed transactional work once for Javerbaum's firm in mid-2004 and then again between November 2006 and February 2007. Pachman indicated that he dealt only with Eric Kahn, a member of Javerbaum's firm, in connection with this work. He further noted that he had not thereafter been engaged by either Kahn or anyone else at Javerbaum's firm.

Thereafter, plaintiffs filed another motion to relieve Javerbaum as discovery master[5] based upon his dealings with WolfBlock. Plaintiffs also filed a motion appealing decisions Javerbaum made during Wolf's deposition.

The motion to relieve Javerbaum and vacate his decisions was denied; Wolf's motion for summary judgment was granted, and a subsequent motion for reconsideration was also denied. Thereafter, the motion judge granted the Fox summary judgment motion.

On appeal, plaintiffs assert that their constitutional rights were violated and their case prejudiced when the lower court declined to rule upon their January 16, 2008 letter appeal of Javerbaum's January 2, 2008 discovery rulings; Wolf's summary judgment should have been dismissed for failure to comply with Rule 1:6-6; the judge erred by refusing to remove the discovery master; and the judge erred in dismissing plaintiffs' action under 42 U.S.C.A. § 1983 because Wolf had committed malicious abuse of process while acting under color of law.

I.

We first address plaintiffs' claim that their rights were violated when the court did not honor his January 16, 2008 letter as an appeal of the discovery master's decision. To address this issue, we first look to the terms of the order appointing the discovery master. As we have noted, the order is specific as to the appellate procedure to be followed. Any party could appeal from Javerbaum's decisions "by timely motion to this court within fifteen (15) days of the date of any such decision[.]" (Emphasis added). By letter dated January 16, 2008, Fuhrmann, acting as counsel for himself and his wife, wrote to the judge advising that plaintiffs were appealing from five of Javerbaum's January 2, 2008 rulings. No notice of motion (with return date) was filed. No certifications were filed nor motion fees tendered. Apparently, the letter was filed in the case file with no further action. The record is devoid of any inquiry by plaintiffs as to the status of their appeal.

At the March 28, 2008, hearing, the following colloquy occurred between the court and Fuhrmann:

> THE COURT: Mr. Fuhrmann made reference to a motion that he had filed with regard to an order of Mr. Javerbaum, and I didn't have a record of any motion. We looked in the computer, we didn't have anything and we looked in our files and we found what I think Mr. Fuhrmann thinks is a motion, but it's not, it's a piece of correspondence that he wrote to the Court challenging a ruling of Mr. Javerbaum. It wasn't a motion, wasn't filed as a motion. It wasn't filed with the clerk and it wasn't given to me as a motion.

> . . . .
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> THE COURT: Well, . . . that letter . . . wasn't served on the defendants as a motion, so it wasn't responded to. So I'm not going to rule on that because it wasn't a motion.
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> Mr. Fuhrmann: Basically, I sent the letter in saying that I appealed his decision. I didn't know it had to be filed formally.
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> THE COURT: Well —
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> Mr. Fuhrmann: Maybe that's —
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> THE COURT: — you should have because that — that was Mr. Javerbaum's ruling. And my ruling [was] that if you appealed from one of his rulings, that you had to file a motion. So I'm —
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> Mr. Fuhrmann: Well, I know —
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> THE COURT: — I'm not going to . . . rule on it. And I believe that by virtue of the summary judgment motion filed by the defendant, that your case is going to be dismissed by summary judgment today before we're finished arguing all of this.

Plaintiffs now argue that they were denied due process when the lower court failed to rule upon their January 16, 2008 appeal.

Plaintiffs correctly note that, under Rule 1:5-6(b), litigants may file original motion papers directly with the judge or a member of the judge's staff in chambers for subsequent forwarding to the court clerk. Briefly stated, the letter was not a motion nor did it comply with the December 11, 2006 order.

The necessity to file a notice of motion is not a procedural nicety or trap designed to catch the unwary. It provides appropriate notice of the claims, the relief sought as well as ensuring an orderly mechanism for the court and the parties to resolve the issues in dispute. Letters addressed to the court do not serve the same purpose and are not only violative of the Rules of Court (and the order entered here) but have the potential to create havoc. We do note that plaintiffs were familiar with the correct procedure as they had appealed prior rulings by the discovery master and had utilized the proper procedure by filing a notice of motion consistent with the order. Finally, plaintiffs fail to demonstrate how the discovery master's discovery rulings prejudiced them.

We conclude that the judge did not err by refusing to consider plaintiffs' challenge to the discovery rulings.

II.

We next address plaintiffs' assertion that the judge erred by refusing to remove Javerbaum as discovery master because of a conflict of interest. Plaintiffs claim that Javerbaum's bias was evident from an ex parte conversation he had with Wolf and the inordinate delay in rendering decisions.

In denying plaintiffs' application to remove the discovery master, the judge said:

> So it seems to me that we have an inadvertent . . . representation by the law firm of the defendant, Mr. Wolf, who was with WolfBlock at the time, . . . of the Javerbaum firm for a short period of time on a corporate matter.
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> And in this particular instance, I failed to see either an appearance of impropriety or an actual impropriety. It is difficult to con[clude] that there could be any secrets or confidences that would be flowing through that conduit. . . .
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> . . . .
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> But as Mr. Pachman says, another officer of the court, he dealt only with one of Mr. Javerbaum's partners. Apparently the firm's conflict check didn't pick it up and that probably was because of the timing of the representation, just didn't pick it up.

> Mr. Javerbaum, obviously, did not know of the representation because he just found out at Mr. Wolf's deposition and immediately came back into the room and put it on the record. So Mr. Javerbaum could not have been tainted by this attenuated relationship, nor could any secrets of the
>
> WolfBlock firm have been transmitted to him. It's a totally different kind of representation done by different areas of a very large firm. . . .
>
> . . . .
>
> [T]here isn't anything here that would indicate to me that [Javerbaum's] appearance in this case as discovery master . . . placed him in a compromised position, in [a] biased position[,] or that there was an appearance of impropriety.
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> . . . .
>
> Mr. Javerbaum's law firm is paying WolfBlock for rendering services. Why that would cause him to favor Mr. Wolf over the other side, I don't know. I'm just having difficulty putting that one together. And, of course, there weren't any secrets or confidences that could have been exchanged. . . in this particular instance. And the Wolf law firm clearly doesn't have a continuing relationship with the Javerbaum firm as per Mr. Pachman's letter.
>
> So especially . . . with the difficulties that this case has had during the course of discovery that necessitated the appointment of a discovery master, it seems to me that it's folly to overturn Mr. Javerbaum's orders based on these circumstances.
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> . . . .
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> Mr. Javerbaum . . . discovered at the end of discovery . . . this unfortunate coincidence and that's wh[at] I call it an unfortunate coincidence. Do I wish that it hadn't happened? Sure, because it would have saved everybody a motion.
>
> . . . .
>
> But under the circumstances of this case, I'm not going to make th[e] finding [that disqualification was warranted and Javerbaum's orders have to be overturned].

Plaintiffs argue first that, contrary to the judge's findings, Javerbaum should have been removed as discovery master because of a conflict of interest. In plaintiffs' view, a discovery master must be held to the same standards as a judge. According to plaintiffs, since it was "undisputed" that Wolf had an attorney/client relationship with Javerbaum at the time Javerbaum was appointed discovery master and served as his "personal attorney," Javerbaum should have been removed. We disagree.

In support of their position that a discovery master must be held to the same standards as a judge, plaintiffs rely upon our decision in Deland v. Township of Berkeley, 361 N.J. Super. 1 (App. Div.), certif. denied, 179 N.J. 185 (2003). Deland involved an action to remove a Mount Laurel special master appointed to supervise the defendant's compliance with its Mount Laurel obligations and render opinions and issue recommendations to the court. We held that, in view of the sensitivity of Mount Laurel affordable-housing cases and the fact that a special master's advisory recommendations may be "highly influential" in some circumstances, special masters must be subject to substantially the same conflict-of-interest rules as judges. Id. at 12.

This was not Mount Laurel litigation; it was basically a tort action. Javerbaum's charge was narrow; he was to resolve the numerous discovery disputes that had arisen in this private matter. His decisions were not final but were readily appealable to the trial court.

Rule 1:12-1 provides, in pertinent part, that a judge must be disqualified if he or she "(e) is interested in the event of the action; or (f) when there is any other reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so." Likewise, Canon 2 of the Code of Judicial Conduct requires that a judge avoid both actual impropriety and the appearance of impropriety, while Canon 3C mandates that a judge must disqualify him or herself where, among other things, the judge has a personal bias concerning a party of a party's lawyer or has an interest that could be affected by the outcome of the proceeding. DeNike v. Cupo, 196 N.J. 502, 514 (2008) ("[J]udges must avoid acting in a biased way or in a manner that may be perceived as partial. To demand any less would invite questions about the impartiality of the

justice system and thereby threaten the integrity of our judicial process.") (internal quotations, citation, and editing marks omitted).

Javerbaum's firm's brief retention of Pachman to perform two discrete tasks did not require the removal of Javerbaum under Rule 1:12 or the Canons of Judicial Conduct. The period of overlap with Javerbaum's service in this case was brief. Wolf was not, as plaintiffs repeatedly assert, Javerbaum's "personal attorney." Neither Javerbaum nor Wolf had any knowledge of the transactions which were carried out by attorneys in other practice groups in each of their respective firms. There was no basis to conclude that Javerbaum withheld knowledge of this connection.

Plaintiffs nonetheless argue that Javerbaum's bias was revealed by the "ex parte discussion" he had with "his personal attorney" Wolf during a break in Wolf's deposition. According to plaintiffs, it is unclear what Javerbaum and Wolf actually discussed and highly likely that Javerbaum was giving advice to Wolf. However, plaintiffs' argument is based upon sheer speculation. Plaintiffs have no basis to suggest that Javerbaum and Wolf engaged in anything other than a brief conversation, the substance of which was immediately placed on the record by Javerbaum. Plaintiffs point to no specific event during the deposition that suggested bias or an improper relationship.

Lastly, plaintiffs argue that Wolf's status as Javerbaum's "personal attorney" formed the basis for Javerbaum's "inordinate" delay in rendering discovery decisions, and this delay denied them their right to a fair trial. However, as set forth above, not only was Wolf not Javerbaum's personal attorney, but Pachman's dealings with Kahn concluded by February 2007. Nothing in the record supports the supposition that the representation contributed to Javerbaum's failure to render his decisions until January 2008. Finally, plaintiffs have failed to identify any specific prejudice they suffered as a result of Javerbaum's delayed decisions. In fact, the discovery master ruled in plaintiffs' favor on a number of decisions. In sum, plaintiffs' arguments are without merit, and the judge did not err in denying plaintiffs' application to remove Javerbaum as discovery master.

III.

Plaintiffs next contend that the motion judge erred in dismissing their 42 U.S.C.A. § 1983 claims as Wolf had committed malicious abuse of process while acting under color of state law. We reject this contention.

Before addressing the merits of plaintiffs' claim, we consider the standards of summary judgment that inform both the motion judge and us on review as well as the elements of malicious abuse of process. Additionally, we consider the elements necessary to pursue a claim under 42 U.S.C.A. § 1983.

Pursuant to Rule 4:46-2, summary judgment shall only be granted in the absence of a genuine issue as to any material fact challenged and where the moving party is entitled to judgment as a matter of law. The Supreme Court has explained that

> a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.
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> [Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).]

The Brill Court emphasized that "when the evidence `is so one-sided that one party must prevail as a matter of law,' . . . the trial court should not hesitate to grant summary judgment." Ibid. (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986)).

Malicious abuse of process requires "`the improper, unwarranted and perverted use of process after it has been issued[.]'" Tedards v. Auty, 232 N.J. Super. 541, 549 (App. Div. 1989) (quoting Ash v. Cohn, 119 N.J.L. 54, 58 (E. & A. 1937)). The proofs presented must establish that the defendant had an "ulterior purpose" in securing the process as evidenced by his or her commission of "`further acts' which reveal a motive to coerce or oppress the plaintiff." Wozniak v. Pennella, 373 N.J. Super. 445, 461 (App. Div. 2004) (quoting Tedards, supra, 232 N.J. Super. at 550), certif. denied, 183 N.J. 212 (2005). In the event of a genuine issue as to whether a defendant's "further acts" were maliciously intended as an abuse of process, "the plaintiff may demonstrate that the defendant had secured issuance of the process without reason or probable cause as evidence that his ultimate intent was to use it for a purpose ulterior to the one for which it was designed." Tedards, supra, 232 N.J. Super. at 550.

Pursuant to 42 U.S.C.A. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .

The jurisdictional prerequisite that a defendant has acted "under color of state law" requires that the defendant "have exercised power `possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" West v. Atkins, 487 U.S. 42, 49, 108 S. Ct. 2250, 2255, 101 L. Ed. 2d 40, 49 (1988) (quoting United States v. Classic, 313 U.S. 299, 326, 61 S. Ct. 1031, 1043, 85 L. Ed. 1368, 1383 (1941)).

A defendant may be a state actor because he or she: (1) is a state official; (2) acted together with or obtained significant aid from state officials; or (3) engaged in conduct otherwise chargeable to the state. Lugar v. Edmondson Oil Co., 457 U.S. 922, 937, 102 S. Ct. 2744, 2754, 73 L. Ed. 2d 482, 495 (1982); see also United States v. Price, 383 U.S. 787, 794, 86 S. Ct. 1152, 1157, 16 L. Ed. 2d 267, 272 (1966) (holding that a private person may act "under color" of law if he or she is a "willful participant in joint activity with the State or its agents"). "[A] lawyer representing a client is not, by virtue of being an officer of the court, a state actor `under color of state law' within the meaning of § 1983." Polk County v. Dodson, 454 U.S. 312, 318, 102 S. Ct. 445, 450, 70 L. Ed. 2d 509, 516 (1981).

At the summary judgment hearing, the judge initially found that the matter of Chatskaya's will and "anything else that happened in" the Fox action was "utterly and completely irrelevant to this case." She then ruled that there was nothing in the record that could possibly support a cause of action for abuse of service of process. The judge noted that "[t]his was a deposition subpoena that Judge Ed Beglin ordered Mr. Wolf to serve[,]" and Fuhrmann was well-aware of this fact. In the judge's view, the issue of whether Perri should have been subpoenaed at all was irrelevant for purposes of this case in light of Judge Beglin's directive. The judge noted that Furhmann did not challenge Judge Beglin's directive that his wife be subject to a deposition subpoena.

She found that, nonetheless, Fuhrmann attempted to evade service, thereby precipitating the complained-of incident. She described Fuhrmann's conduct as inappropriate and unreasonable. As such, and because Wolf had to act to avoid an imminent discovery deadline, the judge was satisfied that "[t]here wasn't any unwarranted, perverted, improper service of a subpoena." The judge also rejected plaintiffs' further contention that Wolf had acted under color of state law and thereby deprived plaintiffs of their rights under 42 U.S.C.A. § 1983.

Plaintiffs contend that, in dismissing their section 1983 claim on the basis that Wolf was not a state actor, she failed to consider that Wolf had acted together with a state official. In this regard, plaintiffs point to the judge's finding that Judge Beglin "ordered" the service of the subpoena. That is an overstatement, as Judge Beglin authorized the service of the subpoena if Wolf chose to pursue it. There was no joint activity. Contrary to plaintiffs' representations, the use of a subpoena does not constitute joint action between the private attorney and the court to render the attorney a state actor. Barnard v. Young, 720 F.2d 1188, 1189 (10th Cir. 1983). In Barnard, the court observed:

> Plaintiff's allegation that the attorney acted under color of state law when he employed the device of a subpoena duces tecum does not rise to the level of acting together with or obtaining significant aid from state officials. Nor is the conduct otherwise chargeable to the state. Use of the court device of a subpoena duces tecum is no more joint action between the private attorney and the court than was the allegedly improper taking of a deposition in Skolnick v. Martin, 317 F.2d 855 (7th Cir. 1963).
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> [Id. at 1189.]

Under the facts presented here, Barnard reflects an appropriate view of the impact and lack of applicability of state action. See also Timson v. Weiner, 395 F. Supp. 1344, 1348-49 (S.D. Ohio 1975) (noting that an attorney was a state actor when empowered to subpoena on behalf of a state agency, which itself had the power to subpoena witnesses at its hearings; however, "[a] notice of the taking of depositions is the act of a party or his counsel, not the act of the state").

Plaintiffs rely on Parker v. Byrd & Weiser, 947 F. Supp. 245 (S.D. Miss. 1996), claiming that state action may be found here because Wolf allegedly made a misrepresentation to secure the authority to serve the subpoena on Perri. In Parker, id. at 250, the district court quoted McCartney v. First City Bank, 970 F.2d 45, 47 (5th Cir. 1992), wherein it was held that

> [i]f a state merely allows private litigants to use its courts, there is no state action within the meaning of § 1983

> unless "there is corruption of judicial power by the private litigant." Thus, a plaintiff could prevail if he could show that the "private defendants willfully participated in a joint action with a state official."
>
> [(Ibid. (citations omitted).]

The record does not bear out plaintiffs' contention that any misrepresentations were made to Judge Beglin by Wolf in order to secure the subpoena. More important, Perri was a witness to a will that may have been relevant to the dispute in the earlier action, and her knowledge of the execution of the will would have been discoverable.

We conclude that neither Wolf nor the Fox defendants were state actors that would support a claim under 42 U.S.C.A. § 1983. The judge properly dismissed those claims.

We make two additional observations. First, we reject as meritless plaintiffs' assertion that the Wolf defendants' motion for summary judgment should have been denied because they did not comply with Rule 1:6-6. Counsel actually relied on the factual contentions of other parties, which did comply with the rule. More significant, however, even if the presentation was less than pristine, we find no basis to overturn the orders granting summary judgment as plaintiffs' claims were without merit.

Finally and notably, plaintiffs have not briefed any issue with regard to the dismissal of the remaining counts of the complaint. Accordingly, any such issue are deemed waived. Sciarrotta v. Global Spectrum, 392 N.J. Super. 403, 405 (App. Div. 2007), rev'd on other grounds, 194 N.J. 345 (2008).

Affirmed.

[1] **Methfessel** & **Werbel** were retained by the Wolf defendants' malpractice carrier to defend against the negligence count of the complaint.

[2] Except where relevant, all references to Fuhrmann shall refer to Myron Fuhrmann.

[3] Wolf subsequently filed his own complaint against Fuhrmann. However, prior to trial, Fuhrmann and Wolf dismissed their complaints against each other, leaving only Perri's complaint against Wolf alleging assault. Following a bench trial on November 19, 2003, Wolf was found not guilty.

[4] As of June 2005, Wolf had joined WolfBlock, Schorr and SolisC-ohen, LLP ("WolfBlock").

[5] Plaintiffs had previously filed a motion to relieve Javerbaum based on the timeliness of his decisions. That motion was denied.