

STATE OF MICHIGAN  
COURT OF APPEALS

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TYROSH BROWN,

Plaintiff-Appellant,

v

FREDERICK A. NEUMARK and NEUMARK  
LAW OFFICES, P.C.,

Defendants-Appellees.

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UNPUBLISHED  
February 22, 2011

No. 295654  
Kent Circuit Court  
LC No. 09-008117-NM

Before: SERVITTO, P.J., and GLEICHER and SHAPIRO, JJ.

PER CURIAM.

Plaintiff claims an appeal from the dismissal without prejudice of his attorney malpractice case for non-service. We affirm.<sup>1</sup>

Defendant<sup>2</sup> represented plaintiff for purposes of the latter's claim of appeal from his 2004 criminal convictions of two counts of resisting or obstructing a police officer, MCL 750.81d. This Court affirmed the convictions. *People v Brown*, unpublished opinion per curiam of the Court of Appeals, issued December 15, 2005 (Docket No. 257547). The Supreme Court denied leave, for which plaintiff had applied *in propria persona*. *People v Brown*, 475 Mich 897; 716

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<sup>1</sup> We first note that, because the dismissal was without prejudice, did not address the merits of plaintiff's claim, or otherwise adjudicate the rights of the parties, it is arguable that the order below was not a final order and plaintiff should not have filed a claim of appeal. MCR 7.202; MCR 7.203. However, even if the order was not appealable by right, in the interest of judicial economy, we would nonetheless treat plaintiff's claim of appeal as an application for leave to appeal, grant leave, and address the substantive issues presented. *In re Investigative Subpoena re Homicide of Lance C Morton*, 258 Mich App 507, 508 n 2; 671 NW2d 570 (2003).

<sup>2</sup> In his brief on appeal, defendant Frederick Neumark makes no effort to distinguish himself from his codefendant, the business entity through which he practiced at the time relevant, and we likewise see no need to do so.

NW2d 274 (2006). A federal court denied a petition for a writ of habeas corpus. *Brown v Lafler* (ED Mich, August 19, 2009) (No. 07-11685).

Asserting failures of communication, cooperation, and zealous advocacy in the handling of his criminal claim of appeal, plaintiff filed this legal malpractice action, and a summons was issued. However, the record includes no indication that there was any attempt to serve process on defendant. The Kent Circuit Court, through its deputy clerk, issued an order dismissing the claim without prejudice for non-service, and a notice of dismissal.<sup>3</sup> The register of actions gives no indication that plaintiff ever sought to have the dismissal set aside. Instead, plaintiff claimed an appeal in this Court.

MCR 2.102(E)(1) directs that, where a defendant is not served within the time required, the cause of action is deemed dismissed without prejudice in connection with that defendant, unless the defendant has in fact submitted to the court's jurisdiction. Subrule (2) directs the clerk of the court to "enter an order dismissing the action as to a defendant who has not been served with process or submitted to the court's jurisdiction," and subrule (3) directs the clerk to issue notice of the entry of dismissal. But the latter two subrules also indicate that failures to enter an order of dismissal, or issue notice thereof, neither delay the onset of the dismissal nor otherwise weaken its legal effect.

MCR 2.102(F) in turn sets forth procedures for setting aside such a dismissal. Subrule (1) recognizes actual service as one ground for such action and subrule (2) recognizes the filing of proof of service, or a showing of good cause for a failure to file, as such grounds. Subrule (3) provides that such a motion must be filed within 28 days after notice of the order of dismissal was given, or, where such notice was not provided, promptly upon the plaintiff's learning of the dismissal. In this case, there is no indication that plaintiff availed himself of the avenues of MCR 2.102(F) for setting aside the dismissal.

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<sup>3</sup> The order, entitled only "Notice of Dismissal," was contained on the same form as the notice of dismissal. However, while the title of this document does not clearly state that it is an order of the court, it does plainly convey the relevant information to plaintiff, and he does not maintain that he did not recognize this document as dismissing his case.

On appeal, plaintiff continues to argue that his counsel provided ineffective assistance during his criminal appeal. However, plaintiff does not challenge the dismissal, or otherwise offer any ground upon which it might be set aside. He does not assert that service of process was served on defendant or that defendant otherwise submitted to the court's jurisdiction. Defendant continues to assert that he was not served with process and plaintiff has not shown that defendant stipulated, either below or at this Court, to set aside the dismissal. Accordingly, we find no error in the order dismissing plaintiff's claim.<sup>4</sup>

Affirmed.

/s/ Deborah A. Servitto  
/s/ Elizabeth L. Gleicher  
/s/ Douglas B. Shapiro

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<sup>4</sup> Thus, we need not discuss plaintiff's arguments concerning defendant's alleged malpractice. "As a general rule, an appellate court will not decide moot issues." *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998).