STATE OF MICHIGAN

COURT OF APPEALS

FRED S. FINDLING and FINDLING LAW FIRM, P.L.C.,	UNPUBLISHED August 13, 2009
Plaintiffs-Appellees,	
v	No. 283397 Wayne Circuit Court
J. EDWARD KLOIAN,	LC No. 07-728565-CK
Defendant-Appellant.	

Before: Stephens, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

In this action to recover attorney fees and costs, defendant appeals by right the trial court's judgment awarding plaintiffs damages, interest, and costs of $46,240.91, after the court granted plaintiffs' motion for summary disposition. We vacate and remand for entry of an order transferring venue to Washtenaw County.

Plaintiffs' claims arise of out an attorney fee agreement executed in January 2000, pursuant to which plaintiff Fred Findling and his law firm Findling Law Firm, P.L.C., represented defendant in a bankruptcy proceeding. The agreement required defendant to pay a retainer of $10,000 and to pay additional attorney fees at a specified hourly rate. Plaintiffs filed this action in Wayne County in October 2007, seeking recovery of sums allegedly owed by defendant for legal representation under theories of account stated, unjust enrichment, breach of contract, and misrepresentation. At a hearing on December 20, 2007, the trial court denied defendant's motion for a change of venue to Washtenaw County and granted plaintiffs' motion for summary disposition based on its determination that the amount sought by plaintiffs was clearly owed.[1] The court thereafter denied defendant's motion for reconsideration.

On appeal, defendant argues that the trial court erred by entertaining plaintiff's motion for summary disposition on December 20, 2007, because he was never properly served with the

[1] Although plaintiffs had also moved for entry of a default judgment, it expressly declined to proceed with that motion, thereby abandoning that motion. Cf. *People v Riley*, 88 Mich App 727, 731; 279 NW2d 303 (1979).

summons and complaint, and also because he received insufficient notice of the motion and the hearing and therefore could not prepare a response. We note that the trial court did not rule on whether defendant was properly served with the summons and complaint, notwithstanding the fact that defendant presented affidavits contradicting the process server's averment that he had left the summons and complaint at defendant's home on November 11, 2007, after speaking with an individual who identified himself as defendant. In general, an issue is not properly preserved for appeal unless it was presented to and decided by the trial court. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). But a party should not be punished for a trial court's failure to rule on an issue that was properly raised. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). Moreover, this Court may overlook preservation requirements to prevent manifest injustice, to consider an issue necessary to a proper determination of the case, or to consider a question of law for which the necessary facts have been presented. *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002). Because defendant presented this issue to the trial court, we will consider it on appeal.

"Service-of-process rules are intended to satisfy the due process requirement that a defendant be informed of the pendency of an action by the best means available, by methods reasonably calculated to give a defendant actual notice of the proceeding and an opportunity to be heard and to present objections or defenses." *Hill v Frawley*, 155 Mich App 611, 613; 400 NW2d 328 (1986). In Michigan, process may be served on an individual by "delivering a summons and a copy of the complaint to the defendant personally." MCR 2.105(A). But "[a]n action shall not be dismissed for improper service of process unless the service failed to inform the defendant of the action within the time provided in these rules for service." MCR 2.105(J)(3). The pertinent time for applying the latter rule is the time limit for the expiration of a summons in MCR 2.102(D), which is "91 days after the date the complaint is filed." See *Hill*, *supra* at 613. Under MCR 2.102(E)(1), "[o]n the expiration of the summons as provided in subrule (D), the action is deemed dismissed without prejudice as to a defendant who has not been served with process as provided in these rules, unless the defendant has submitted to the court's jurisdiction." A party who enters a general appearance and contests the cause of action on the merits waives any service-of-process objections. *In re Gordon Estate*, 222 Mich App 148, 158; 564 NW2d 497 (1997). Here, defendant's own affidavit indicated that he received notice of the summons and complaint within 91 days, and defendant was represented by counsel who entered a general appearance, without objecting to the trial court's jurisdiction. Therefore, defendant has not shown any basis for relief based on improper service of process.

The more significant issue raised by defendant is whether the December 20, 2007, motion hearing was held prematurely. Defendant's affidavit, if believed, indicates that he did not obtain a copy of the complaint until the beginning of December 2007, contrary to the process server's averment that he left the complaint at defendant's home on November 11, 2007. Under MCR 2.116(B)(2), a hearing on a motion for summary disposition "brought by a party asserting a claim shall not take place until at least 28 days after the opposing party was served with the pleading stating the claim." This time limit governs plaintiffs who wish to move for immediate summary disposition upon filing a complaint. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 391-392; 651 NW2d 756 (2002). But procedural defects are generally subject to the harmless error rule. See *In re Utrera*, 281 Mich App 1, 14; 761 NW2d 253 (2008); *Detroit v Volunteers of America*, 169 Mich App 465, 472-473; 426 NW2d 743 (1988). After reviewing the record in this case, we are satisfied that any failure to satisfy the 28-day period prescribed by

MCR 2.116(B)(2) was harmless. Defendant has not demonstrated that he was prejudiced by any failure to comply with the 28-day requirement, and we will not presume prejudice merely from the fact that the hearing may have been held before the expiration of the 28-day period.

Defendant's reliance on former Judge (now Justice) CORRIGAN's concurring opinion in *Haji v Prevention Ins Agency, Inc*, 196 Mich App 84, 89-99; 492 NW2d 460 (1992), is misplaced because the instant case does not involve a trial court's decision to sua sponte grant summary disposition. Rather, it involves a circumstance in which defendant had actual notice of the motion before it was heard on December 20, 2007. Furthermore, even when a trial court sua sponte considers a motion for summary disposition, as is permitted under MCR 2.116(I)(1), due process concerns are alleviated by providing an opportunity for the nonmoving party to move for reconsideration. See *Boulton v Fenton Twp*, 272 Mich App 456, 462-463; 726 NW2d 733 (2006). The record indicates that defendant actually obtained a copy of the complaint, retained counsel, was able to respond to plaintiffs' motion, and had the opportunity to move for reconsideration after the trial court's adverse ruling. We do not disturb the trial court's summary disposition decision solely on the basis of the alleged violation of MCR 2.116(B)(2).

Defendant's additional arguments that he was not timely served with the motion for summary disposition at least 21 days before the hearing of December 20, 2007, and that he did not receive sufficient notice of the date of the hearing, contrary to MCR 2.116(G)(1)(a)(i) and MCR 2.119(C)(1), are not preserved for appeal because they were not presented to the trial court. A litigant's failure to raise an issue in the trial court generally precludes appellate review absent a miscarriage of justice. *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008). Considering defendant's failure to show prejudice, we find no miscarriage of justice warranting consideration of these unpreserved arguments.

With respect to defendant's claim regarding his competency, we note that the specific question raised by defendant's counsel at the hearing of December 20, 2007, was whether defendant or the guardian ad litem appointed to represent him in the bankruptcy proceeding was the legally proper person to serve with the summons and complaint. Because defendant does not address this specific issue on appeal, we consider it abandoned. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). Further, defendant's newly raised argument in his reply brief—namely, that the trial court should have either referred this case for a hearing on his competency or appointed a guardian ad litem to represent him pursuant to MCR 2.201(E) and *Redding v Redding*, 214 Mich App 639; 543 NW2d 75 (1995)—is not properly before this Court. "[R]aising an issue for the first time in a reply brief is not sufficient to present the issue for appeal." *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003); see also MCR 7.212(G).

In any event, MCR 2.201(E) only governs the appointment of a guardian ad litem for a person who has already been adjudged legally incompetent. *Redding*, *supra* at 644. And while a court appropriately may refer a matter to the probate court for a determination regarding possible guardianship when it questions the competency of an adult, *id.* at 643, there is not indication here that the trial court questioned defendant's competency. The fact that defendant was previously adjudged incompetent by a federal bankruptcy court, alone, is enough to require a state court in a different proceeding to sua sponte take steps to appoint a guardian for the defendant. Indeed, guardianships can be limited to particular tasks. See MCL 700.5306(3). Defendant's newly

raised argument does not demonstrate the type of miscarriage of justice that warrants appellate relief. *Walters*, *supra* at 387-388.

We next consider defendant's challenges to the trial court's order granting plaintiffs' motion for summary disposition. Plaintiffs moved for summary disposition under MCR 2.116(C)(7), (9), and (10). The trial court did not indicate under which subrule it was granting plaintiffs' motion, but stated that it was adopting plaintiffs' reasoning and commented that "there's no question of fact here. The money is clearly owed." We review a trial court's grant or denial of a motion for summary disposition de novo. *Al-Shimmari v Detroit Medical Ctr*, 477 Mich 280, 287; 731 NW2d 29 (2007). Upon de novo review in this case, we conclude that the trial court erred by granting plaintiffs' motion.

Although a motion under MCR 2.116(C)(9) may be raised at any time, MCR 2.116(D)(4), such a motion is intended to test the legal sufficiency of a defense based on the pleadings alone. MCR 2.116(G)(5); *Slater v Ann Arbor Pub Schools Bd of Ed*, 250 Mich App 419, 425; 648 NW2d 205 (2002). Even a mere denial of liability is a valid defense. *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 48; 457 NW2d 637 (1990). "Summary disposition under MCR 2.116(C)(9) is proper when the defendant's pleadings are so clearly untenable that as a matter of law no factual development could possibly deny the plaintiff's right to recovery." *Slater*, *supra* at 425-426. In this case, defendant had not yet filed any pleading at the time plaintiffs moved for summary disposition under MCR 2.116(C)(9). Therefore, MCR 2.116(C)(9) was not applicable. To the extent that the trial court adopted plaintiffs' argument based on MCR 2.116(C)(9), it erred as a matter of law.

The grounds for a motion under MCR 2.116(C)(7) must be raised in a party's responsive pleading, unless the grounds are stated in a motion filed under MCR 2.116 "prior to the party's first responsive pleading." MCR 2.116(D)(2). Summary disposition may be granted under MCR 2.116(C)(7) if a claim is barred because of . . . prior judgment . . . statute of limitations . . . or other disposition of the claim before commencement of the action." The following standards are applicable to a motion under MCR 2.116(C)(7):

> The moving party may support its motion for summary disposition under MCR 2.116(C)(7) with "affidavits, depositions, admissions, or other documentary evidence," the substance of which would be admissible at trial. "The contents of the complaint are accepted as true unless contradicted by the evidence provided." [*Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008) (citations omitted).]

In this case, before defendant filed any pleading, plaintiffs attempted to anticipate possible defenses or claims that defendant might raise and asserted that any such claim or defense would be barred by res judicata or collateral estoppel. We review a trial court's application of a preclusion doctrine de novo as a question of law. *Minicuci v Scientific Data Mgt, Inc*, 243 Mich App 28, 34; 620 NW2d 657 (2000). The doctrine of res judicata "bars a subsequent action between the same parties when the evidence or essential facts are identical." *Sewell v Clean Cut Mgt, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001). The doctrine of collateral estoppel bars "relitigation of an issue in a subsequent, different cause of action between the same parties or their privies when the prior proceeding culminated in a valid final

judgment and the issue was actually and necessarily determined in the prior proceeding." *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001).

Here, plaintiffs anticipated that defendant would argue legal malpractice, either as a defense to the claim for attorney fees or as a counterclaim, and asserted that any claim or defense of legal malpractice would be barred by res judicata or collateral estoppel because a prior malpractice action was previously dismissed by the trial court in a separate action.[2] Relying on *In re Boddy*, 950 F2d 334 (CA 6, 1991), plaintiffs also suggested that the proceedings in defendant's bankruptcy case affected his ability to defend against their claim for breach of contract.

However, defendant pleaded no claim of legal malpractice in a responsive pleading, nor did he raise such a claim in a motion under MCR 2.116 filed before any responsive pleading. Accordingly, plaintiffs' attempt to establish under MCR 2.116(C)(7) that defendant's "claim" was "barred" was premature and misplaced. Moreover, even assuming that the motion was not premature, plaintiffs did not support their motion with documentary evidence. Ordinarily, when considering a defendant's motion under MCR 2.116(C)(7), the court accepts the allegations in the plaintiff's complaint as true unless contradicted by evidence. *Odom*, *supra* at 466. In order to merit summary disposition under MCR 2.116(C)(7), a court must be able to conclude that the pleadings or other documentary evidence reveal no genuine issue of material fact. *Holmes v Michigan Capital Medical Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000). Here, plaintiffs were the moving parties and where no responsive pleading had even been filed. We conclude that documentary evidence was necessary to support plaintiffs' assertion under MCR 2.116(C)(7) that defendant's anticipated defenses were barred by prior judgment.

Nonetheless, we do not find plaintiffs' failure to provide documentary evidence dispositive of whether the trial court had an evidentiary basis for applying the doctrine of res judicata or collateral estoppel. Having presided over the prior legal malpractice action, the trial court could properly take notice of its earlier dismissal of that action. "[A] circuit judge may take judicial notice of the files and records of the court in which he sits." *Knowlton v City of Port Huron*, 355 Mich 448, 452; 94 NW2d 824 (1959); see also *People v Sinclair*, 387 Mich 91, 103; 194 NW2d 878 (1972), and MRE 201. It is apparent from the trial court's comments that it

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[2] There are circumstances where any attorney may lose the right to recover attorney fees based on unprofessional conduct. See *Rippey v Wilson*, 280 Mich 233, 245; 273 NW 552 (1937). An equitable "recoupment" defense to a contract permits a defendant to reduce a plaintiff's demand because the plaintiff did not comply with a cross-obligation or breached a legal duty in performing the contract. *Mudge v Macomb Co*, 458 Mich 87, 106; 580 NW2d 845 (1998). By contrast, the focus of a malpractice claim is on the client's injury caused by the attorney's negligence. See *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 25; 436 NW2d 70 (1989). "The right to claim malpractice is both a defense to an action to recover for professional services and a predicate for a counterclaim, and if used for either purpose, that is, either by way of defense or recoupment, it destroys the vitality of the claim, if it is later sought to be used in an independent action." *Kossover v Trattler*, 104 Misc 2d 424, 428; 428 NYS2d 402 (1980), aff'd 82 AD2d 610; 442 NYS2d 554 (1981).

was aware of its prior dismissal of defendant's legal malpractice action when ruling on plaintiffs' motion for summary disposition.

Ultimately, however, it is unnecessary to reach any issue concerning whether defendant was barred from asserting a defense based on legal malpractice. We also find it unnecessary to consider the statute of limitations issues raised by plaintiffs as part of their motion under MCR 2.116(C)(10). Regardless of whether defendant was barred from asserting legal malpractice or some other defense, or from asserting the appropriate statute of limitations, reversal is required because plaintiffs failed to show that they were entitled to judgment as a matter of law under MCR 2.116(C)(10).

A motion under MCR 2.116(C)(10) tests the factual support for a claim, and should be granted only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Healing Place at North Oakland Medical Ctr v Allstate Ins Co*, 277 Mich App 51, 55-56; 744 NW2d 174 (2007). Unlike a motion brought under MCR 2.116(C)(7), a motion brought pursuant to MCR 2.116(C)(10) must be supported by affidavits or other documentary evidence. MCR 2.116(G)(4); *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

The record reveals that plaintiffs made allegations regarding an earlier award of $45,000 in attorney fees that they received in the bankruptcy proceeding but were required to return based on *Lamie v United States Trustee*, 540 US 526; 124 S Ct 1023; 157 L Ed 2d 1024 (2004). In *Lamie*, the Supreme Court held that 11 USC 330(a)(1) does not authorize compensation awards to a debtor's attorney from estate funds in a chapter 7 bankruptcy case unless the attorney is employed by the trustee. But aside from the fact that the instant case does not involve a compensation award under 11 USC 330(a)(1), and no documents from the bankruptcy proceeding were filed in support of plaintiffs' motion, the record lacks admissible evidence to support plaintiffs' specific claim at the hearing of December 20, 2007, that they were owed a total of $46,240.91. We note that this amount is inconsistent with both the allegation in plaintiffs' motion that the amount due was $68,478.47, and with an earlier conclusory affidavit filed with the complaint, which indicated that the amount owed was $45,647.22. The trial court accepted plaintiffs' claim for the lesser sum of $46,240.91 without requiring any supporting evidence.

It was incumbent on plaintiffs, as the parties moving for summary disposition and having the burden of proving the amount due, to meet their initial burden under MCR 2.116(G)(4) of specifically identifying the issues on which they believed there was no genuine issue of material fact and filing supportive materials. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). "Opinions, conclusionary denials, unsworn averments, and inadmissible hearsay do not satisfy the court rule; disputed fact (or the lack of it) must be established by admissible evidence." *SSC Assoc Ltd Partnership v Gen Retirement Sys*, 192 Mich App 360, 364; 480 NW2d 275 (1991). Because plaintiffs did not satisfy their initial obligation to support their motion with admissible evidence, the trial court erred by granting the motion. We therefore reverse the judgment for plaintiffs and remand for further proceedings. We express no opinion regarding any possible defenses or counterclaims that defendant might pursue on remand.

Defendant also argues that the trial court erred by denying his motion for a change of venue to Washtenaw County. Under MCL 600.1645, "[n]o order, judgment, or decree shall be

void or voidable solely on the ground that there was improper venue." But because we have concluded that the trial court erred by granting plaintiffs' motion for summary disposition, we will also consider defendant's venue argument. See MCL 600.1645.

"Venue is controlled by statute in Michigan." *Dimmitt & Owens Financial, Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618, 624; 752 NW2d 37 (2008). It is determined at the time the lawsuit is filed, and is not normally defeated by later events. *Shiroka v Farm Bureau Gen Ins Co*, 276 Mich App 98, 104; 740 NW2d 316 (2007). This Court reviews a trial court's ruling on a motion to change venue for clear error, but issues involving statutory construction are reviewed de novo. *Provider Creditors Committee v United American Health Care Corp*, 275 Mich App 90, 94; 738 NW2d 770 (2007). Where a defendant challenges venue, the plaintiff has the burden of establishing proper venue. *Id.* "The choice of venue must be based on fact, not mere speculation." *Id*.

In denying defendant's motion for change of venue, the trial court concluded that venue was proper in Wayne County because the alleged debt owed by defendant to plaintiffs arose out of a prior malpractice case that defendant filed against plaintiffs in the Wayne Circuit Court. The trial court's decision is factually incorrect because the debt alleged by plaintiffs arose from plaintiffs' representation of defendant in his bankruptcy case. Further, the trial court failed to specify the particular venue statute that it applied in reaching its decision that venue was proper in Wayne County. Because plaintiffs' breach of contract claim does not involve a claim for personal injury, property damage, or wrongful death, we agree that venue for the breach of contract claim is governed by MCL 600.1621, and not MCL 600.1629. *Ferguson v Pioneer State Mut Ins Co*, 273 Mich App 47, 51; 731 NW2d 94 (2006).

But because plaintiffs also alleged additional claims of account stated, unjust enrichment, and fraudulent misrepresentation, "venue is proper in any county in which either cause of action, if sued upon separately, could have been commenced and tried, subject to separation and change as provided by court rule." MCL 600.1641(1); see also *Providers Creditor Committee*, *supra* at 96. Here, the only claim that arguably falls within the scope of MCL 600.1649 is the fraudulent misrepresentation claim. As support for this claim, plaintiffs alleged that they entered into the attorney-fee agreement based on defendant's allegedly false representation that they would be compensated for their services, and suffered damages in the form of not being compensated for the services they provided and having to file the instant lawsuit.

A court is not bound by a party's choice of labels for an action because this would exalt form over substance. *Johnston v Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989). Fraud in the inducement is a special kind of fraud extraneous to the contract. *Huron Tool & Engineering Co v Precision Consulting Services, Inc*, 209 Mich App 365, 373; 532 NW2d 541 (1995). It arises where "the ability of one party to negotiate fair terms and make an informed decision is undermined by the other party's fraudulent behavior." *Id.* It does not apply to misrepresentations that themselves constitute contract terms later breached by a party. *Id*. at 375.

Because plaintiffs' fraudulent misrepresentation claim, in substance, is factually indistinguishable from their breach of contact claim, we conclude that MCL 600.1621 applies to each claim. Venue was proper in Washtenaw County because, according to allegations in plaintiffs' own complaint, defendant resided in Washtenaw County. MCL 600.1621(a). The trial court erred by finding that venue was proper in Wayne County. Because a transfer of venue

is mandatory when venue is improper and the defendant has sought a change in venue before filing an answer, and because plaintiffs abandoned their motion for a default judgment, we remand for entry of an order transferring venue to Washtenaw County. MCL 600.1651; MCR 2.223(A)(1); MCR 2.221(A); see also *Miller v Allied Signal, Inc*, 235 Mich App 710, 716; 599 NW2d 110 (1999).

We decline to address plaintiffs' contention that defendant should be estopped from presenting any venue argument because he filed two prior malpractice actions in Wayne County. Although an appellee may argue alternative grounds for affirmance without filing a cross appeal, *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994), the trial court did not rule on this issue, and considering plaintiffs' failure to properly present their argument with citations to supporting authority, we deem it abandoned. *Prince*, *supra* at 197; see also MCR 7.212(C)(7) and (D).

Because the trial court committed error requiring reversal by granting plaintiffs' motion for summary disposition and denying defendant's motion for a change of venue, it is unnecessary to consider the remaining arguments raised by the parties on appeal.

Vacated and remanded for entry of an order transferring venue to Washtenaw County. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder