STATE OF MICHIGAN

COURT OF APPEALS

ZIGMOND CHIROPRACTIC, P.C.,

Plaintiff/Counter Defendant-Appellant,

and

NEUROSCIENCE, P.C.,

Plaintiff-Appellant,

and

QV MEDICAL, P.C.,

Plaintiff,

and

BORIS ZIGMOND, JON KENT ETHRIDGE, and AK BACK TO HEALTH,

Appellants,

v

AAA MICHIGAN AUTOMOBILE INSURANCE ASSOCIATION, d/b/a AAA MICHIGAN,

Defendant/Counter Plaintiff-Appellee.

UNPUBLISHED
August 7, 2012

No. 300286
Wayne Circuit Court
LC No. 07-720446-NF

Before: MURRAY, P.J., and FORT HOOD and BORRELLO, JJ.

PER CURIAM.

Plaintiff/counter defendant, Zigmond Chiropractic, P.C., plaintiff Neuroscience, P.C., and appellants Boris Zigmond, Jon Kent Ethridge, and AK Back to Health, appeal as of right a trial court judgment in favor of defendant/counter plaintiff, AAA Michigan, setting aside Zigmond

Chiropractic's fraudulent transfers, entered August 26, 2010, in this judgment collection action. For the reasons set forth in this opinion, we affirm in part, reverse in part, and remand to the trial court for the purpose of dismissing Ethridge from the judgment.

I. FACTS.

Boris Zigmond[1] was the sole shareholder of Zigmond Chiropractic, which opened in 2006 and provided services primarily to car accident victims. Boris Zigmond received a majority of his income from insurance claims. In 2007, plaintiffs Zigmond Chiropractic, Neuroscience, and QV Medical, P.C. sued a number of insurance companies for nonpayment of claims. All of the named insurance companies refused to tender payment to Boris Zigmond and filed counterclaims against Zigmond Chiropractic. As a result of the loss of most of its income from insurance claims, Zigmond Chiropractic stopped seeing patients. Zigmond Chiropractic continued to exist as a legal entity to collect on accounts receivable. After Zigmond Chiropractic stopped treating patients, Boris Zigmond opened AK Back to Health, another chiropractic office, in the same building as Zigmond Chiropractic.

Defendant was one of the insurance companies against which plaintiffs brought suit for nonpayment of claims. Plaintiffs filed suit on July 31, 2007, for services rendered to patient Gus Bolden. On September 20, 2007, defendant counterclaimed against Zigmond Chiropractic for unjust enrichment, asserting that (1) defendant had already paid benefits to Zigmond Chiropractic for services rendered to Bolden, (2) Zigmond Chiropractic fraudulently billed defendant for services not rendered, including those outside the scope of chiropractic care, (3) certain charges far exceeded reasonable and customary amounts, (4) certain services were not reasonable or necessary for Bolden's care, and (5) Zigmond Chiropractic knew, when it accepted payment from defendant, that it was not entitled to such funds. Defendant filed an amended counterclaim on June 26, 2008. Instead of unjust enrichment, defendant's amended counterclaim alleged: (1) practice outside the scope of chiropractic care, (2) referrals outside the scope of chiropractic care, (3) prescriptions outside the scope of chiropractic care, (4) referrals and prescriptions in violation of the Michigan Public Health Code, (5) fraud, (6) civil conspiracy, and (7) payment under mistake of fact. Defendant also specified that the amount it had paid in benefits to Zigmond Chiropractic for services rendered to Boldon was $17,496.97.

Zigmond Chiropractic stipulated that certain services that had been rendered were outside the scope of chiropractic care, and the trial court granted defendant's motion for partial summary disposition with respect to those services on April 13, 2009. The court entered judgment against Zigmond Chiropractic for $10,713.33, leaving $6,783.64 in dispute on defendant's counterclaim. Citing health reasons, Boris Zigmond failed to appear at the May 26, 2009, trial on the remaining issues, so the trial court, noting Boris Zigmond's repeated failure to show up at court when

[1] For purposes of clarity, we refer to Boris Zigmond using both his first and last names.

required, entered a default judgment against Zigmond Chiropractic for the outstanding $6,783.64 in dispute.[2]

When defendant proceeded to collect on these judgments, it found that Boris Zigmond was not forthcoming during his creditor's examinations and noticed suspicious transactions when reviewing Zigmond Chiropractic's financial records. Based on these findings, on April 9, 2010, defendant moved to set aside fraudulent transfers, pierce the corporate veil to reach Boris Zigmond's personal assets, and compel answers and production of documents at Boris Zigmond's creditor's examinations. The trial court entered a stipulated order on July 14, 2010, prohibiting defendant from attempting to pierce the corporate veil in post-judgment proceedings, but allowing defendant to proceed under the Uniform Fraudulent Transfer Act (UFTA), MCL 566.31 *et seq*. A trial on the issue of fraudulent transfers was held on July 29, 2010. At the conclusion of the trial, the court found that Zigmond Chiropractic made fraudulent transfers to Boris Zigmond individually and also made transfers to Ethridge and AK Back to Health without consideration. On August 26, 2010, the trial court entered judgment setting aside Zigmond Chiropractic's fraudulent transfers, which held Boris Zigmond, Ethridge, and AK Back to Health liable for the full judgment amount of $53,789.57. This appeal ensued.

II. LAW AND ANALYSIS.

Appellants first argue that the trial court erred in failing to determine whether defendant owed Zigmond Chiropractic any money on outstanding insurance claims and use that amount to setoff the amount of the judgment against Zigmond Chiropractic.

Although this Court has the power to review issues not raised in the trial court to prevent a miscarriage of justice, an issue not timely raised in the trial court is generally waived on appeal. *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008). Zigmond Chiropractic did not raise the issue of double recovery, or request use of a setoff analysis in the trial court. Therefore, this issue was not preserved. *Id*. Additionally, we agree with defendant's contention that this argument is an attack on the amount of the underlying money judgment against Zigmond Chiropractic. If Zigmond Chiropractic wanted to challenge that judgment, it needed to have done so when that judgment was rendered, not during collection proceedings. See MCR 7.204(A)(1) (an appeal as of right must be taken within 21 days after the entry of judgment).

Regardless, we find the trial court did not err in failing to engage in a setoff analysis before entering judgment. Whether the trial court was required to engage in a setoff analysis under the UFTA involves a question of statutory interpretation that we review de novo. *Krohn v Home-Owners Ins Co*, 490 Mich 145, 155; 802 NW2d 281 (2011).

[2] Zigmond Chiropractic's counsel was present at trial and submitted to the trial court a doctor's excuse ordering bed rest for Boris Zigmond because of chest pain. This was the third time that Boris Zigmond had presented the trial court with a doctor's excuse rather than appear for trial. The trial court found that Boris Zigmond's failure to appear in court when so ordered demonstrated intentional and willful conduct to avoid a trial.

Appellants cite no legal basis for their contention that the trial court should have engaged in a setoff analysis before setting aside Zigmond Chiropractic's fraudulent transfers pursuant to the UFTA. They recite only case law to the effect that double recovery is repugnant in the workers' compensation law context. However, Michigan's Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*., explicitly provides for coordination of benefits so that an employee may not recover from the employer any money to which he is entitled that he is already receiving via another source, such as another insurance provider. See *Rangel v Ralston Purina Co*, 248 Mich App 128, 137; 638 NW2d 187 (2001) ("the intent of the Legislature in promulgating § 354 was to prohibit an employee's double recovery for one wage loss"); MCL 418.354. Nothing in the UFTA requires a court to engage in a similar setoff analysis. See MCL 566.31 *et seq.* Accordingly, appellants are not entitled to relief on this issue.

Appellants next argue that the trial court erred in failing to attribute any or all of Zigmond Chiropractic's insolvency to defendant's failure to pay insurance claims to Zigmond Chiropractic during the time defendant was pursuing its fraudulent transfer action. Review of a trial court's underlying factual findings is for clear error. *Ross v Auto Club Group*, 481 Mich 1, 7; 748 NW2d 552 (2008); MCR 2.613(C). "A finding is "clearly erroneous" [if] although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010) (citation and quotation omitted).

We first note that appellants fail to provide any meaningful analysis in support of this aspect of their argument. See *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 499; 668 NW2d 402 (2003) ("[a]n appellant may not merely announce its position or assert an error and leave it to this Court to discover and rationalize the basis for its claims, unravel or elaborate its argument, or search for authority for its position"). Accordingly, appellants have abandoned their argument that defendant's failure to pay insurance claims to Zigmond Chiropractic was a cause of the company's insolvency. Moreover, even if we were to address this issue, we find from our review of the record that Zigmond Chiropractic provided no evidence at trial that defendant's withholding of payments on insurance claims contributed to Zigmond Chiropractic's insolvency. Instead, Boris Zigmond made a generalized assertion that various insurance companies were resisting payment on Zigmond Chiropractic's claims. Further, if the insurance companies were withholding payment on Zigmond Chiropractic's claims for services, but those services were outside the scope of chiropractic care, as they were here, it would not be the insurance companies that contributed to Zigmond Chiropractic's insolvency but the fault of the company itself.

The record, as it stands, supports the trial court's findings that Zigmond Chiropractic's transfers to Boris Zigmond, Ethridge, and AK Back to Health caused the company's insolvency. Bank records showed that Zigmond Chiropractic made many payments for Boris Zigmond's personal use, including tens of thousands of dollars in rent, mortgage, and utility payments for his personal residences, lease payments on up to four cars at any given time in both Michigan and Florida, where Boris Zigmond owns a condominium, over $15,000 for his daughter's private-school tuition, and many large payments to high-end retail stores. Zigmond Chiropractic also wrote checks made payable to "cash" and in excess of $100,000 to Ethridge over the course of four years. Although Boris Zigmond said these were payments on a loan he received from Ethridge, no record of any loan could be produced, and the payment amounts varied greatly and

were timed irregularly. Finally, Zigmond Chiropractic made some weekly payments to Dr. Newman Kopald for services rendered at AK Back to Health instead of AK Back to Health paying Kopald directly. Zigmond Chiropractic also paid AK Back to Health $3,000, which Boris Zigmond said at trial was for a copy machine, but testified at a deposition was for a "professional service or something," and no copy machine was listed as an asset of Zigmond Chiropractic. On this record, we are not left with a "definite and firm" conviction that the trial court clearly erred when it found that the transfers to Boris Zigmond, Ethridge, and AK Back to Health were the cause of Zigmond Chiropractic's insolvency. *In re Mason*, 486 Mich at 152.

Next, appellants argue that the trial court erred in entering a judgment because the court failed to provide any analysis of "reasonable equivalent value." Appellants' fail to include any reference to this aspect of their argument in their questions presented. An issue not raised in the statement of questions presented will generally not be addressed by this Court on appeal. See *VanderWerp v Plainfield Charter Twp*, 278 Mich App 624, 633; 752 NW2d 479 (2008). Regardless, appellants' argument is devoid of merit.

Appellants claim the trial court failed to consider whether Zigmond Chiropractic's payments to Boris Zigmond individually were made in exchange for reasonably equivalent value. The UFTA provides several circumstances in which a transfer may be fraudulent, and the trial court cited two such provisions. The first, MCL 566.34(1)(a), addresses transfers made either before or after a creditor's claim arises, and provides in relevant part:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation in either of the following:
>
> > (a) With actual intent to hinder, delay, or defraud any creditor of the debtor.

MCL 566.34(2) lists various "badges of fraud" that the court can consider in determining actual intent under 566.34(1)(a):

> (a) The transfer or obligation was to an insider.
>
> (b) The debtor retained possession or control of the property transferred after the transfer.
>
> (c) The transfer or obligation was disclosed or concealed.
>
> (d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.
>
> (e) The transfer was of substantially all of the debtor's assets.
>
> (f) The debtor absconded.
>
> (g) The debtor removed or concealed assets.

> (h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.
>
> (i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.
>
> (j) The transfer occurred shortly before or shortly after a substantial debt was incurred.
>
> (k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

The second provision the trial court cited before reaching its legal conclusions was MCL 566.35(1), which pertains only to transfers made after a creditor's claim arises; that portion of the statute provides:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

Appellants contend that the trial court was required to analyze whether transfers made to Boris Zigmond were for a reasonably equivalent value pursuant to MCL 566.35(1).[3] However, MCL 566.34(1)(a) permits a finding that a transfer is fraudulent, regardless of reasonably equivalent value, if the transfer was made with intent to hinder, delay, or defraud the creditor. It appears this is the provision under which the trial court found Zigmond Chiropractic's transfers to Boris Zigmond individually were fraudulent.

The record supports the court's finding; several of MCL 566.34(2)'s "badges of fraud" were present in this case. Boris Zigmond was the sole shareholder of, and practitioner at, Zigmond Chiropractic, making him an "insider" under MCL 566.34(2)(a). See MCL 566.31(g) (defining "insider," in part as, a director, officer, or person in control of the debtor corporation, or a managing agent of the debtor). Zigmond Chiropractic was also being sued by multiple insurance companies as early as the summer of 2007, only a year after Boris Zigmond formed the business and before many of the questionable transfers were made which is relevant when determining whether there was intent to defraud pursuant to MCL 566.34(2)(d). The transfers also made Zigmond Chiropractic insolvent, a relevant factor under MCL 566.34(2)(i). Under

[3] The trial court mentioned reasonably equivalent value only in its discussion of the transfers made to Jon Kent Ethridge and AK Back to Health, indicating it found these transfers fraudulent under MCL 566.35(1).

these circumstances, it was not erroneous for the trial court to conclude that the transfers were made with actual intent to hinder, delay, or defraud Zigmond Chiropractic's creditors under MCL 566.34(1)(a). Accordingly, the court was not, as appellants claim, obligated to analyze whether the transfers made to Boris Zigmond individually were in exchange for reasonably equivalent value.

Appellants also claim that MCL 566.33(1) requires a trial court to analyze reasonably equivalent value. MCL 566.33 states:

> (1) Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied. Value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person.
>
> (2) For the purposes of sections 4(a)(2) and 5, a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement.
>
> (3) A transfer is made for present value if the exchange between the debtor and the transferee is intended by them to be contemporaneous and is in fact substantially contemporaneous.

As is apparent upon a reading of the statute, MCL 566.33 merely defines what a transfer for value is; the provision imposes no obligation on a trial court to analyze reasonably equivalent value with respect to every transfer in question. Thus, appellants' argument is unavailing.

Appellants next argue that Ethridge was denied due process when the trial court entered judgment against him.

A trial court's conclusions of law are reviewed de novo. *Trader v Comerica Bank*, 293 Mich App 210, 215; 809 NW2d 429 (2011).

Defendant concedes on appeal that remand is warranted to amend the judgment setting aside fraudulent transfers to remove Ethridge. Judgment against Ethridge was not a remedy contemplated by defendant; Ethridge was not a party to the lawsuit, and there is no indication in the record that he had any notice that a judgment was ever entered at all in these proceedings, let alone against him personally. Accordingly, he had no opportunity to defend himself and was, therefore, deprived of due process. See *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 213; 761 NW2d 293 (2008) (holding that procedural due process requires notice and an opportunity to be heard before an impartial trier of fact).

Finally, appellants present several incoherent and undeveloped arguments wherein they claim that the trial court erred when it: (1) allowed defendant to counterclaim under the UFTA before judgment was rendered against Zigmond Chiropractic; (2) considered events that took place before defendant's counterclaim arose; and (3) considered suits brought by insurance

companies besides defendant. Appellants' fail to present a cognizable argument or any meaningful analysis in support of this aspect of their appeal and they fail to cite any legal authority in support of their position. See *Wiley*, 257 Mich App at 499 ("[a]n appellant may not merely announce its position or assert an error and leave it to this Court to discover and rationalize the basis for its claims, unravel or elaborate its argument, or search for authority for its position"). Nevertheless, appellants' arguments are devoid of all merit.

First, with respect to appellants' contention that the trial court erred in allowing defendant to file a counterclaim before a judgment was entered against Zigmond Chiropractic, the UFTA does not require a pre-existing judgment to commence a claim to set aside a fraudulent transfer. Specifically, the UFTA provides creditors with a remedy against debtors who make fraudulent transfers. See MCL 566.37. A "creditor" is one who has a "claim" under the Act. MCL 566.31(d). The UFTA defines a "claim" as "a right to payment, *whether or not the right is reduced to judgment*, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured" (emphasis added). Accordingly, defendant did not need to secure a judgment against Zigmond Chiropractic before defendant first filed a counterclaim in September 2007.

Second, the UFTA does not preclude a trial court from considering acts that occurred before defendant filed its initial counterclaim in September 2007. The UFTA provides that a transfer is fraudulent regardless of "whether the creditor's claim arose before or *after the transfer* was made or the obligation was incurred. . . ." MCL 566.34(1) (emphasis add). Accordingly, given that a trial court can set aside a transfer that occurred before a creditor's claim arose, the court can look to events that transpired before the claim arose to determine whether the transfer was fraudulent. The trial court did not err in doing so in this case.

Third and finally, with respect to the trial court's consideration that other creditors had brought counterclaims against Zigmond Chiropractic, appellants fail to cite any provision of the Act that precludes a court from considering whether a debtor was sued by another creditor. Moreover, MCL 566.34(2) provides that, in determining whether a transfer was made with fraudulent intent, a trial court may consider whether "before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit." Therefore, in this case, the trial court did not err when it considered that other insurance companies had filed counterclaims against Zigmond Chiropractic.

Affirmed in part, reversed in part, and remanded to the trial court for the purpose of removing Ethridge from the judgment as a liable party. We do not retain jurisdiction. Costs are awarded to defendant. MCR 7.219.

/s/ Christopher M. Murray
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello