

STATE OF MICHIGAN
COURT OF APPEALS

CHIAMP & ASSOCIATES, P.C.,

Plaintiff/Counterdefendant-
Appellee,

v

PAUL W. SMITH,

Defendant/Counterplaintiff-
Appellant.

UNPUBLISHED

July 1, 2014

No. 313495

Wayne Circuit Court

LC No. 11-014430-CK

Before: DONOFRIO, P.J., and CAVANAGH and JANSEN, JJ.

PER CURIAM.

Defendant appeals by right the trial court's grant of summary disposition in favor of plaintiff. He also challenges the trial court's denial of his motion to amend. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

"This Court reviews de novo a trial court's ruling on a motion for summary disposition." *Anzaldúa v Neogen Corp*, 292 Mich App 626, 629; 808 NW2d 804 (2011). A trial court's decision whether to permit a party to amend its pleadings is reviewed for an abuse of discretion, which occurs "only when the trial court's decision is outside the range of reasonable and principled outcomes." *In re Kostin*, 278 Mich App 47, 51; 748 NW2d 583 (2008).

Defendant first argues that the trial court erred when it granted plaintiff's motion for summary disposition with respect to defendant's counter-claim for legal malpractice. We disagree.

The trial court granted plaintiff's motion for summary disposition of the counter-claim pursuant to MCR 2.116(C)(6) and (C)(7). A motion for summary disposition may be based on the ground that "[a]nother action has been initiated between the same parties involving the same claim." MCR 2.116(C)(6); *Valeo Switches & Detection Systems, Inc v Emcom, Inc*, 272 Mich App 309, 311; 725 NW2d 364 (2006). This subrule "does not operate where another suit between the same parties involving the same claims is no longer pending at the time the motion is decided." *Fast Air, Inc v Knight*, 235 Mich App 541, 545; 599 NW2d 489 (1999). On September 2, 2011, the trial court dismissed defendant's original complaint for malpractice on the ground that the statute of limitations had run. The order granting plaintiff's motion for summary disposition of the counter-claim in this case was entered on May 1, 2012.

This Court did not affirm the order of September 2, 2011, order until January 29, 2013. *Smith v Chiamp & Assoc, PC*, unpublished opinion per curiam of the Court of Appeals, issued January 29, 2013 (Docket No. 306225). An action is “pending” for the purposes of MCR 2.116(C)(6) while it remains on appeal to this Court. *Darin v Haven*, 175 Mich App 144, 151; 437 NW2d 349 (1989). Because another action “between the same parties involving the same claim” was pending at the time plaintiff’s motion for summary disposition of the counter-claim was decided, summary disposition of defendant’s counter-claim for legal malpractice was proper under MCR 2.116(C)(6).

Defendant next argues that the trial court abused its discretion when it denied his motion to amend the “counter-complaint”¹ and erred when it granted plaintiff’s motion for summary disposition of its breach of contract and quantum meruit claims. We agree.

Plaintiff moved for summary disposition of its breach of contract and quantum meruit claims under MCR 2.116(C)(7) and (C)(10), and the trial court granted the motion but did not specify the subrule under which it did so.² A motion for summary disposition may be brought on the ground that an action is barred by res judicata or collateral estoppel. MCR 2.116(C)(7); *Alcona Co v Wolverine Environmental Production, Inc*, 233 Mich App 238, 246; 590 NW2d 586 (1998). The doctrine of res judicata prevents multiple suits that litigate the same cause of action by barring a second, subsequent action when “(1) the prior action was decided on the merits, (2)

¹ The parties and the trial court have used the term “counter-complaint,” which is not a recognized pleading under the Michigan Court Rules. A pleading, for the purposes of MCR 2.118(A)(2), includes only “(1) a complaint, (2) a cross-claim, (3) a counterclaim, (4) a third-party complaint, (5) an answer to a complaint, cross-claim, counterclaim, or third-party complaint, and (6) a reply to an answer. No other form of pleading is allowed.” MCR 2.110(A); see also *Lignons v Crittenton Hosp*, 490 Mich 61, 81; 803 NW2d 271 (2011). Both parties and the trial court were aware that defendant intended to use recoupment as a defense and not as an affirmative claim. Because a “counter-complaint” is not a pleading, and recoupment is a defense rather than a claim, the analysis will proceed as if defendant had moved to amend his answer to plaintiff’s complaint. Leniency in this regard is consistent with the principles that “[c]ourts are not bound by the labels that parties attach to their claims,” *Buhalis v Trinity Continuing Care Services*, 296 Mich App 685, 691; 822 NW2d 254 (2012), and that permission to amend a pleading “shall be freely given when justice so requires,” MCR 2.118(A)(2); *Wormsbacher v Seaver Title Co*, 284 Mich App 1, 8; 772 NW2d 827 (2009).

² If a party moves for summary disposition under multiple subrules and the trial court rules on the motion without specifying the subrule under which it decides an issue and considers documentary evidence beyond the pleadings, this Court reviews the decision as if it were based on MCR 2.116(C)(10). *Cuddington v United Health Services, Inc*, 298 Mich App 264, 270; 826 NW2d 519 (2012). Here, because there was no indication that the trial court considered evidence other than the pleadings, and the majority of the discussion at the hearing focused on the legal issue of whether defendant was entitled to use the recoupment doctrine as a defense, the trial court’s decision to grant summary disposition of plaintiff’s breach of contract claim will be reviewed as if made under MCR 2.116(C)(7).

both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first.” *Adair v State*, 470 Mich 105, 121; 680 NW2d 386 (2004).

Res judicata is not applicable to plaintiff’s motion for summary disposition of its own claims because the doctrine cannot bar a defendant’s ability to use a particular defense; rather, res judicata serves only to bar claims. As this Court explained in *Braxton v Litchalk*, 55 Mich App 708, 717-718; 223 NW2d 316 (1974):

[R]es judicata bars a subsequent suit between the same parties or their privies when the same cause of action is raised in a subsequent suit, and when the facts or evidence essential to the maintenance of both actions are identical. On the other hand, collateral estoppel will bar the relitigation of issues previously decided in the first action when the parties to the second action are the same; where the second suit is a different cause of action, the bar is conclusive only as to issues actually litigated in the first suit.

Thus, whereas res judicata is concerned with the entire action, collateral estoppel precludes the relitigation of individual issues between the same parties. *VanVorous v Burmeister*, 262 Mich App 467, 479; 687 NW2d 132 (2004). Generally, the use of collateral estoppel requires three elements to be satisfied: “(1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full and fair opportunity to litigate the issue; and (3) there must be mutuality of estoppel.” *Holton v Ward*, 303 Mich App 718, 731; ___ NW2d ___ (2014); see also *Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 677 NW2d 843 (2004).

“The defense of recoupment refers to a defendant’s right, in the same action, to cut down the plaintiff’s demand, either because the plaintiff has not complied with some cross obligation of the contract on which he or she sues or because the plaintiff has violated some legal duty in the making or performance of that contract.” *Mudge v Macomb Co*, 458 Mich 87, 106; 580 NW2d 845 (1998) (internal quotations omitted). Thus, “[r]ecoupment is, in effect, a counterclaim or cross action for damages.” *McCoig Materials, LLC v Galui Const, Inc*, 295 Mich App 684, 694; 818 NW2d 410 (2012). “[A] claim for recoupment must be premised on the same contract or transaction . . . raised in the plaintiff’s complaint, and the defendant must prove that the plaintiff is in breach of the contract from which the defendant seeks recoupment.” *Id.* at 698 (emphasis deleted). “[T]he expiration of a limitation period does not foreclose a recoupment defense as long as the plaintiff’s action is timely.” *Mudge*, 458 Mich at 107; see also *Warner v Sullivan*, 249 Mich 469, 471; 229 NW 484 (1930).

The notion that the statute of limitations cannot bar a counter-claim (as opposed to a recoupment defense) is set forth in MCL 600.5823, which states that “[t]o the extent of the amount established as [the] plaintiff’s claim[,] the periods of limitations prescribed in this chapter do not bar a claim made by way of counterclaim unless the counterclaim was barred at

the time the plaintiff's claim accrued.”³ Consistent with that rule, recoupment does not permit the defendant to recover damages beyond those the plaintiff alleges. *McCoig Materials, LLC*, 295 Mich App at 696.

The trial court denied defendant's motion to amend his answer⁴ to assert a recoupment defense because “the substance” of the proposed recoupment defense was similar to that of defendant's counter-claim for legal malpractice. While dismissal of defendant's counter-claim was warranted under MCR 2.116(C)(6), as discussed previously, the trial court abused its discretion when it denied defendant's motion to amend his answer and erred by granting summary disposition in favor of plaintiff on its breach of contract and quantum meruit claims because the statute of limitations for legal malpractice actions did not bar the recoupment defense, *Mudge*, 458 Mich at 107, and plaintiff failed to satisfy the elements of collateral estoppel. None of the facts essential to defendant's recoupment defense was “actually litigated and determined by a valid and final judgment” in defendant's ill-fated original malpractice action, nor was there a “full and fair opportunity to litigate the issue[s],” *Holton*, 303 Mich App at 731, because the action was time-barred and dismissed under MCR 2.116(C)(7).

That defendant cannot be collaterally estopped from raising a recoupment defense follows logically from the rule that statutes of limitations do not apply to either recoupment defenses, *Mudge*, 458 Mich at 107, or counter-claims, MCL 600.5823. These rules necessarily create situations in which facts were not “actually litigated and determined by a valid and final judgment” in the first action, due to the expiration of the limitations period, but are expressly permitted to be litigated in the second action. Applying collateral estoppel to bar defendant's recoupment defense in this case would have the consequence of depriving defendant of the opportunity to defend himself against plaintiff's subsequent claims,⁵ and there is no evidence that the Legislature intended such a result. “[A] statute should be construed to avoid absurd results that are manifestly inconsistent with legislative intent.” *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 674; 760 NW2d 565 (2008).

The trial court's permission to amend a pleading “shall be freely given when justice so requires.” MCR 2.118(A)(2); *Wormsbacher v Seaver Title Co*, 284 Mich App 1, 8; 772 NW2d

³ The statute of limitations for legal malpractice actions is two years, beginning on the last day of the attorney's representation. MCL 600.5805(6); MCL 600.5838(1); *Kloian v Schwartz*, 272 Mich App 232, 237; 725 NW2d 671 (2006).

⁴ See note 1.

⁵ Put another way, two individuals, each of whom must defend himself or herself against the charge that he or she failed to compensate a professional for fees incurred, but only one of whom inadvertently filed a time-barred malpractice action, would seem to receive disparate treatment for no principled reason. The individual who filed the time-barred action, were plaintiff's argument accepted, would be estopped from introducing facts to defend himself; the individual who did not file an original malpractice action could file a counter-claim or assert a recoupment defense notwithstanding the limitations period for malpractice actions. See MCL 600.5823 (counter-claim); *Mudge*, 458 Mich at 107 (recoupment defense).

827 (2009). “Because a court should freely grant leave to amend . . . when justice so requires, a motion to amend should ordinarily be denied only for particularized reasons.” *Id.* “Reasons that justify denying leave to amend include undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the defendant, or futility.” *Id.* The trial court “must specify one of the [*Wormsbacher*] reasons in its denial, and a failure to do so constitutes error requiring a reversal unless such amendment would be futile.” *Dampier v Wayne Co*, 233 Mich App 714, 733-734; 592 NW2d 809 (1999).

In the present case, the trial court did not specify its reasons for denying defendant’s motion to amend the answer, but its comments indicate a concern that an amendment was potentially futile. “An amendment would be futile if it is legally insufficient on its face, and the addition of allegations that merely restate those allegations already made is futile.” *Wormsbacher*, 284 Mich App at 8-9. An amendment to the answer to state a recoupment defense would not have been legally insufficient on its face because, while defendant’s counter-claim for affirmative relief was barred by MCR 2.116(C)(6), the recoupment defense was not, meaning that granting the motion to amend would have allowed defendant to state a valid defense. Because the trial court did not cite a valid “particularized reason[.]” for denying defendant’s motion to amend his answer, it abused its discretion by doing so. *Id.* at 8.

Defendant argues that, if *res judicata* prohibits him from using a recoupment defense, then *res judicata* should likewise bar plaintiff’s breach of contract and quantum meruit claims because plaintiff failed to state a counter-claim, in defendant’s original malpractice action, for breach of contract and quantum meruit. In Michigan, a party who files a counter-claim must join every claim the party has against an opposing party that arises out of the transaction or occurrence that is the subject matter of the action and does not require the participation of third parties over whom the court cannot acquire jurisdiction. MCR 2.203(A); *Chen v Wayne State Univ*, 284 Mich App 172, 195; 771 NW2d 820 (2009). However, a party is not required to file a counter-claim. *Salem Industries, Inc v Mooney Process Equip Co*, 175 Mich App 213, 215-216; 437 NW2d 641 (1988). “Since [MCR 2.203(E)] is permissive, as opposed to compulsory, it allows a party the option to maintain its counterclaim in a separate independent action.” *Id.*

Defendant urges this Court to overrule the Michigan Supreme Court’s opinion in *Ternes Steel Co v Ladney*, 364 Mich 614, 619; 111 NW2d 859 (1961), which held:

[W]hen a litigant’s right to affirmative relief is independent of a cause of action asserted against him and it is relied upon only as a defense to that action, he is barred from seeking affirmative relief thereon in a subsequent proceeding. But if he does not rely upon his claim as a defense to the first action, or as a counterclaim thereto, he is not barred from subsequently maintaining his action for affirmative relief in an independent suit.

This Court is “bound by the rule of stare decisis to follow the decisions of our Supreme Court.” *Duncan v State*, 300 Mich App 176, 193; 832 NW2d 761 (2013) (citation omitted). Notwithstanding the rule of stare decisis, *Ternes*, which was decided in 1961, predated the

former court rule from which MCR 2.203 is derived;⁶ thus, MCR 2.203 and the case law interpreting it are more persuasive than *Ternes* on the question whether plaintiff was obligated to file a counter-claim in defendant's original malpractice action.

We affirm the trial court's grant of summary disposition in favor of plaintiff with respect to defendant's counter-claim for legal malpractice. We reverse the trial court's order granting plaintiff's motion for summary disposition of its breach of contract and quantum meruit claims, as well as the order denying defendant's motion to amend his answer to assert a recoupment defense. We remand with instructions to grant defendant's motion to amend the answer.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Pat M. Donofrio
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen

⁶ See former GCR 1963, 203.