

STATE OF MICHIGAN
COURT OF APPEALS

QUICK-SAV FOOD STORES, LTD., and
ROBERT EASTMAN,

UNPUBLISHED
January 19, 2010

Plaintiffs-Appellants/Cross-
Appellees,

v

ESTATE OF KENNETH H. MATTIS, Deceased,
and DENNIS MATTIS,

Defendants-Appellees/Cross-
Appellants.

No. 285414
Genesee Circuit Court
LC No. 05-082671-CK

Before: Wilder, P.J., and O’Connell and Talbot, JJ.

PER CURIAM.

This is the second interlocutory appeal in this case. In a prior appeal, this Court reversed the trial court’s order denying defendant Kenneth H. Mattis’s¹ motion for summary disposition with respect to plaintiffs’ contract and statutory liability claims. *Quick-Sav Food Stores, LTD v Mattis*, unpublished opinion per curiam of the Court of Appeals, issued January 10, 2008 (Docket No. 272785) (“*Quick-Sav I*”). On remand, defendant Dennis Mattis moved to dismiss all claims against him on the basis of this Court’s decision in *Quick-Sav I*, and plaintiffs moved to file a second amended complaint to allege additional claims against both Kenneth and Dennis and against additional parties. The trial court denied Dennis’s motion to dismiss and granted plaintiffs’ motion to file a second amended complaint against Dennis, but denied plaintiffs’ motion to file a second amended complaint against Kenneth or additional parties. Plaintiffs now appeal by leave granted, challenging the trial court’s denial of their motion to amend to add new claims against Kenneth or additional parties. Defendants cross appeal, challenging the trial court’s decisions denying Dennis’s motion to dismiss and allowing plaintiffs to file a second amended complaint against Dennis. We affirm in part, reverse in part, and remand.

¹ Defendant Kenneth Mattis died while this appeal was pending. His estate has been substituted as a party defendant in his place.

Plaintiffs argue that the trial court erred in denying their motion to amend to add additional claims against Kenneth. Plaintiffs contend that the trial court erroneously believed that it did not have discretion to allow an amended complaint against Kenneth because of this Court's decision in *Quick-Sav I*. Although we agree that the trial court erred to the extent that it found that this Court's decision in *Quick-Sav I* precluded plaintiffs from asserting new claims against Kenneth in an amended complaint, we conclude that the trial court reached the right result in denying leave to amend with respect to each claim, with the exception of the proposed claim by plaintiff Quick-Sav Food Stores, Ltd. ("Quick-Sav"), under the Uniform Fraudulent Transfer Act (UFTA), MCL 566.31 *et seq.* Thus, with respect to Kenneth, we affirm the trial court's order in part and remand to allow Quick-Sav to file an amended complaint alleging a claim under the UFTA.

We review a trial court's decision to grant or deny a motion to amend pleadings for an abuse of discretion. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53; 684 NW2d 320 (2004). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). A trial court's application of a legal doctrine, such as res judicata or the law of the case doctrine, is reviewed de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008); *Kashen v Hoffman*, 278 Mich App 466, 470; 751 NW2d 520 (2008).

Where summary disposition is granted to a party under MCR 2.116(C)(8), (9), or (10), the trial court shall give the nonprevailing party an opportunity to amend the pleadings, as provided by MCR 2.118, "unless the evidence then before the court shows that amendment would not be justified." MCR 2.116(I)(5). "[A] motion to amend should ordinarily be denied only for particularized reasons, including undue delay, bad faith or a dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or futility." *PT Today, Inc v Comm'r of the Office of Financial & Ins Services*, 270 Mich App 110, 143; 715 NW2d 398 (2006). The trial court must specifically state its reasons for denying a motion to amend, but the failure to do so will not require reversal if the amendment would be futile. *Id.* "[T]his Court will not reverse a trial court's order if it reached the right result for the wrong reason." *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 470; 628 NW2d 577 (2001).

The trial court erred to the extent that it relied on the doctrine of res judicata to conclude that this Court's decision in *Quick-Sav I* precluded an amended complaint alleging new claims against Kenneth as a matter of law. The doctrine of res judicata is generally applied to prevent multiple lawsuits litigating the same cause of action. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 418; 733 NW2d 755 (2007). It is broadly applied to prevent any claim arising from a transaction that the parties, in the exercise of reasonable diligence, could have raised, but did not, in the first case. *Id.* However, the doctrine does not apply to an interlocutory appeal. *Andrews v Donnelly (After Remand)*, 220 Mich App 206, 209-211; 559 NW2d 68 (1996).

Because the instant case involved a prior interlocutory appeal, the doctrine of res judicata does not apply. It is immaterial that this Court's decision in *Quick-Sav I* did not specifically include an order of remand to the trial court. Defendants' reliance on *People v Kennedy*, 384 Mich 339, 343; 183 NW2d 297 (1971), is misplaced because, unlike that case, this case does not involve circumstances where the trial court had nothing left to do after the appeal. Indeed, an

interlocutory appeal does not completely divest a trial court of jurisdiction to act. See 5 Am Jur 2d, Appellate Review, § 387, p 174 (one exception to the general rule that an appeal transfers jurisdiction of a matter to an appellate court is an interlocutory appeal); see also the discussion of this Court's limited jurisdiction in an interlocutory appeal in *Bass v Combs*, 238 Mich App 16, 24-25; 604 NW2d 727 (1999), overruled in part on other grounds in *Dimmitt & Owens Financial, Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618; 752 NW2d 37 (2008).

Nonetheless, “the trial court is bound to strictly comply with the law of the case, as established by the appellate court, ‘according to its true intent and meaning.’” *Kasben, supra* at 470, quoting *People v Blue*, 178 Mich App 537, 539; 444 NW2d 226 (1989).² This Court's prior decision in *Quick-Sav I* establishes that plaintiffs cannot maintain an action against Kenneth for director liability under the Business Corporation Act (BCA), MCL 450.1101 *et seq.*, because the applicable limitations period prescribed in MCL 450.1554 has expired. The decision in *Quick-Sav I* also precludes a breach of contract claim against Kenneth based on the February 1998 settlement agreement, because that agreement “merely provided that the corporate entity, Woodland, would hold the corporate entity, plaintiff Quick-Sav, harmless for any environmental contamination.” *Quick-Sav I, supra*, slip op at 2. Thus, the BCA and contract claims alleged in counts I and II of plaintiffs' proposed second amended complaint are barred by the law of the case doctrine with respect to Kenneth.

However, the remaining counts alleged against Kenneth in the proposed second amended complaint were not addressed in *Quick-Sav I* and, therefore, are not barred by the law of the case doctrine. The material question is whether those claims are futile. *PT Today, Inc, supra* at 143. “An amendment would be futile if (1) ignoring the substantive merits of the claim, it is legally insufficient on its face; (2) it merely restates allegations already made; or (3) it adds a claim over which the court lacks jurisdiction.” *Id.* (internal citations omitted). A complaint generally need only be specific enough to reasonably inform an adverse party of the nature of the claim, *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997), but “[c]onclusory statements, unsupported by factual allegations, are insufficient to state a cause of action.” *Churella v Pioneer State Mut Ins Co*, 258 Mich App 260, 272; 671 NW2d 125 (2003). Further, a fraud claim must be pleaded with particularity. *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 414; 751 NW2d 443 (2008).

² The law of the case doctrine also applies to limit an appellate court in a subsequent appeal, but this is considered a discretionary rule of practice. *City of Kalamazoo v Dep't of Corrections*, 229 Mich App 132, 135-136; 580 NW2d 475 (1998). Under the doctrine, “‘if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same.’” *Id.* at 135, quoting *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981). The doctrine “applies only to questions actually decided in the prior decision and to those questions necessary to the court's prior determination.” *Id.* “The rule applies without regard to the correctness of the prior determination.” *Id.*

Although the trial court did not directly address whether the remaining claims would be futile with respect to Kenneth, we consider this issue because defendants raise futility as an alternative ground for affirmance. See *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994). Furthermore, the trial court ruled adversely to defendants on this issue, at least implicitly, when it decided to allow the added counts with respect to Dennis. Because the proposed new claims against Kenneth and Dennis are similar, and Dennis has cross-appealed the trial court's decision to allow the added claims against him, we will consider defendants' arguments collectively in this appeal.

Initially, we agree that plaintiffs cannot maintain a breach of contract claim against Dennis for the same reasons that this Court concluded in *Quick-Sav I* that such a claim may not be maintained against Kenneth. Like Kenneth, Dennis was not a party to the February 1998 settlement agreement. Further, Dennis's argument that plaintiffs may not maintain an action against him for director's liability under the BCA is moot, because the trial court did not allow plaintiffs to include such a claim in their second amended complaint.

We now turn to plaintiffs' proposed count III against Kenneth and Dennis in their second amended complaint, which is labeled "alter ego/piercing the corporate veil." We agree with defendants that the gravamen of the claim is a BCA claim that would be futile for plaintiffs to pursue against either of them. A court is not bound by a plaintiff's choice of labels for an action because this would emphasize form over substance. *Johnston v City of Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989). "The gravamen of an action is determined by reading the claim as a whole." *Belleville v Hanby*, 152 Mich App 548, 551; 394 NW2d 412 (1986).

Consideration of this claim requires that we examine the interplay between the statutory relief available to a creditor of a corporation seeking to enforce an alleged unliquidated contractual liability, such as *Quick-Sav* here, and common-law or equitable principles. "[W]here comprehensive legislation prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions, the Legislature will be found to have intended that the statute supersede and replace the common law dealing with the subject matter." *Millross v Plum Hollow Golf Club*, 429 Mich 178, 183; 413 NW2d 17 (1987). Here, the BCA contains a comprehensive scheme for dissolution of a corporation. MCL 450.1551, in addition to providing for director liability, which was at issue in *Quick-Sav I*, also provides for shareholder liability:

A shareholder who accepts or receives a share dividend or distribution with knowledge of facts indicating it is contrary to this act, or any restriction in the articles of incorporation, is liable to the corporation for the amount accepted or received in excess of the shareholders share of the amount that lawfully could have been distributed. [MCL 450.1551(3).]

Claims for both director and shareholder liability are subject to the same period of limitations. MCL 450.1554.

The BCA also allows creditors to make claims against the dissolving corporation. MCL 450.1842a, a corporate survival statute, contains the exclusive remedy for creditors who have no pending claim against a dissolving corporation at the time of the dissolution. *Gilliam v Hi-Temp Products, Inc*, 260 Mich App 98, 112-113; 677 NW2d 856 (2003). It is "part of a legislative

scheme intended to avoid the consequences of corporate dissolution at common-law,” in which the corporation, upon dissolution, essentially ceased to exist. *Id.* at 112. Under the BCA, existing or contingent claims may be brought against the dissolving corporation within the time limits provided in MCL 450.1842a. *Id.* at 113.

Here, in accordance with this Court’s prior decision in *Quick-Sav I* that any BCA claim based on director liability is time-barred, it follows that any claim based on shareholder liability, which is subject to the same limitations period, is also time-barred with respect to both Kenneth and Dennis. Further, considering plaintiffs’ allegation in their proposed second amended complaint that they received actual notice of the dissolution from Woodland on October 13, 2005, Quick-Sav may not pursue a claim against Woodland because it failed to timely bring an action against Woodland, even assuming that the six-month notice provision in MCL 440.1842a(4) for known claimants applies to Quick-Sav.³

By comparison, an “alter ego” or “piercing the corporate veil” theory of liability is an equitable doctrine applied in a derivative manner to target a nondebtor. See *RDM Holdings, LTD v Continental Plastics Co*, 281 Mich App 678, 709; 762 NW2d 529 (2008), and *United States v Clawson Medical Rehabilitation & Pain Care Ctr, PC*, 722 F Supp 1468, 1471 (ED Mich, 1989). Although a corporation’s separate existence from its shareholders is generally respected in Michigan, “[w]hen this fiction is invoked to subvert justice, it is ignored by the courts.” *Wells v Firestone Tire & Rubber Co*, 421 Mich 641, 650; 364 NW2d 670 (1984). The doctrine is traditionally applied to protect corporate creditors or outsiders in those circumstances where a corporate entity is used to avoid legal obligations. *Id.* at 650-651. Where invoked against a shareholder, the statute of limitations for a cause of action against the corporation will be applied to the shareholder. *Belleville, supra* at 552. To pierce the corporate veil, three elements must generally be shown: “First, the corporate entity must be a mere instrumentality of another entity or individual. Second, the corporate entity must be used to commit a fraud or wrong. Third, there must have been an unjust loss or injury to the plaintiff.” *Nogueras v Maisel & Assoc of Michigan*, 142 Mich App 71, 86; 369 NW2d 492 (1985).

Here, the proposed “alter ego/piercing the corporate veil” count, on its face, encompasses a variety of contractual, statutory, and fraudulent activities by substituting Kenneth and Dennis in place of Woodland. Paragraph 39 alleges that the settlement agreement entered into by Woodland was actually entered into by Kenneth and Dennis, because they owned and maintained Woodland for their own benefit and gain and dissolved it unjustly. Paragraphs 37 and 38 speak to the dissolution of Woodland without adequate provision for its obligations. Paragraph 40(b) alleges that Kenneth and Dennis defrauded Quick-Sav through the consideration for the contract, with no intent to perform it. We note that this latter allegation suggests that plaintiffs are pursuing a theory of fraud by inducement, although they improperly attempt to treat Kenneth and Dennis as actual parties to the settlement agreement. The relevant contracting parties are Quick-Sav and Woodland, despite whether there exists a basis for piercing Woodland’s corporate veil for the purpose of holding Kenneth and Dennis personally liable for the corporate debt. In any

³ Plaintiffs abandoned their effort to add Woodland as a party defendant in the trial court.

event, “[f]raud in the inducement occurs where a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon.” *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995). It “renders a contract voidable at the option of the defrauded party.” *Id.* at 640. Here, however, plaintiffs are attempting to enforce the settlement agreement, not void it. The alleged injustice relates to the dissolution of Woodland, without adequate provision for it to pay its alleged unliquidated contractual liability.

Because the BCA prescribes in detail a creditor’s rights against a shareholder, director, and corporation with respect to the dissolution, we conclude that Quick-Sav cannot satisfy the requirement of unjust loss for purposes of piercing the corporate veil. Although there may be extraordinary cases that justify a court in exercising equitable jurisdiction in contravention of a statute, *Wikman v City of Novi*, 413 Mich 617, 648; 322 NW2d 103 (1982), the BCA provides an adequate remedy for an alleged creditor, such as Quick-Sav, seeking to recover for alleged unliquidated contractual liability. See also *Devillers v Auto Club Ins Ass’n*, 473 Mich 562, 590-591; 702 NW2d 539 (2005) (equitable powers are reserved for unusual circumstances, and cannot be used to “trump an unambiguous and constitutionally valid statutory enactment”). Therefore, despite whether it could be said that the BCA statutory scheme was intended to preclude a court from applying equity, we conclude that plaintiffs’ count III is futile, because the pleaded claim is legally insufficient on its face. *PT Today, supra* at 143.

We also conclude that proposed count IV, which seeks to impose a constructive trust on alleged distributions taken by Kenneth and Dennis upon Quick-Sav’s dissolution, standing alone, is legally insufficient to state a claim. A constructive trust is not itself a cause of action, but rather an equitable remedy. See *Kammer Asphalt Paving Co, Inc v East China Twp Schools*, 443 Mich 176, 188; 504 NW2d 635 (1993). And while count V is labeled “unjust enrichment,” it is predicated on the dissolution of Woodland, without notice to its “known obligees” or provision to pay its obligations. We agree with defendants that the gravamen of this count is a BCA claim. The allegations are legally insufficient to present the type of inequity that warrants the law to imply a contract to prevent unjust enrichment. See *Sweet Air Investment, Inc v Kenney*, 275 Mich App 492, 504; 739 NW2 656 (2007); *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 328; 657 NW2d 759 (2002).

Proposed count VI of the second amended complaint is a claim for silent fraud, which is committed where facts are suppressed and there exists a legal or equitable duty to make the disclosure. *Hord v Environmental Research Institute of Michigan (After Remand)*, 463 Mich 399, 412; 617 NW2d 543 (2000). Also essential to such a claim is that the plaintiff establishes reliance on the silence. *Lumber Village, Inc v Siegler*, 135 Mich App 685, 700; 355 NW2d 654 (1984). A claim of fraud must be pleaded with particularity. *Cooper, supra* at 414. Here, the silent fraud claim does not address the element of reliance, and the alleged basis of the “duty” to provide notice to Quick-Sav is not specified. Regardless, there is nothing to indicate that the alleged duty is based on anything other than a statutory duty arising under the BCA. Examined as a whole, with due regard to plaintiffs’ “alter ego” theory of liability in their proposed amendment, we agree with defendants that the silent fraud claim is futile because it demonstrates nothing more than a BCA claim.

But we disagree with defendants’ argument that count VII of the proposed second amended complaint, which is based on the UFTA, also implicates the BCA. A claim under the

UFTA cannot proceed unless the transferor is liable to the creditor. *Mather Investors, LLC v Larson*, 271 Mich App 254, 259; 720 NW2d 575 (2006). But “[r]elief under the UFTA determines only the creditor’s right to fraudulently transferred property.” *Estes, supra* at 587. Under the UFTA, a transfer may be voided to the extent necessary to satisfy the claim. MCL 566.37(1)(a). In lieu of voiding the transfer, MCL 566.38(2)(a) authorizes a monetary judgment for the value of the asset transferred, subject to certain adjustments, against the “first transferee of the asset or the person for whose benefit the transfer was made.” See also *Mather Investors, supra* at 256. The relationship between individuals to a corporate transferee may bring the individuals into the “person for whose benefit the transfer was made” provision in MCL 566.38(2)(a). See *Eagle Pacific Ins Co v Christensen Motor Yacht Corp*, 85 Wash App 695, 705; 934 P2d 715 (1997), *aff’d* 135 Wash 2d 894 (1998) (in UFTA action, shareholder of transferees constituted person benefited by disputed transfer).

Therefore, although relief might be limited under the UFTA to transferred assets or the value thereof, defendants have not shown that the UFTA claim is futile with respect to either Kenneth or Dennis. Although the minutes from Woodland’s July 27, 2000, board of directors’ meeting, which plaintiffs incorporated into their proposed second amended complaint to establish a transfer, indicates only that the “sale” of certain businesses to Kenneth H. Mattis, Inc. (“Mattis Inc.”), was approved, we are not persuaded that the allegations as a whole are legally insufficient for the alleged creditor, Quick-Sav, to state a UFTA claim against Kenneth and Dennis. We decline to consider the evidence offered by defendants on appeal to show that no transfer actually occurred. Enlargement of the record on appeal is not permitted, *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990), and our review is limited to the facial sufficiency of the proposed amendment. *PT Today, Inc, supra* at 143. While there is merit to plaintiffs’ argument that the relevant limitations period for a UFTA action is contained in MCL 566.39(a), we express no opinion with respect to the timeliness of the UFTA claim with respect to Kenneth or Dennis, inasmuch as that issue was not presented to the trial court. Our review is limited to issues presented to the trial court. See *City of Riverview v Sibley Limestone*, 270 Mich App 627, 633 n 4; 716 NW2d 615 (2006).

In sum, we hold that defendants have failed to show that Quick-Sav’s UFTA claim is futile on its face, as it applies to both Kenneth and Dennis. Therefore, we reverse in part the trial court’s decision denying plaintiffs’ motion to amend with respect to Kenneth, such that Quick-Sav shall be permitted to pursue a UFTA claim against Kenneth, but we affirm the trial court’s denial of plaintiffs’ motion to amend with respect to all other proposed claims against Kenneth. We likewise affirm in part the trial court’s decision to allow the second amended complaint against Dennis with respect to Quick-Sav’s UFTA claim against Dennis, but reverse the trial court’s decision to allow plaintiffs to proceed against Dennis with respect to counts I, III, IV, V, and VI in the proposed second amended complaint.

We next consider plaintiffs’ claim that the trial court erred in denying their motion to add Mattis Inc. and NMC Convenience Stores, Inc. (“NMC”), as party defendants so that they could pursue claims of direct fraud against them. With respect to NMC, we note that plaintiffs’ proposed second amended complaint alleges that NMC was dissolved in 2004. Even assuming that plaintiffs could proceed against NMC, we conclude that plaintiffs’ failure to demonstrate a direct fraud claim against NMC is fatal to their argument on appeal. Fraud must be pleaded with particularity. *Cooper, supra* at 414. But considering that Mattis Inc. is the alleged transferee

underlying Quick-Sav's UFTA claim, we find merit to plaintiffs' argument that the trial court abused its discretion in not allowing Mattis Inc. to be added as a party defendant with respect to this claim.

Although the trial court's stated reason for denying the motion was its belief that a separate lawsuit could have been filed against Mattis Inc., mere delay does not warrant a denial of a motion to amend. *Weymers, supra* at 659. Although the trial court indicated that it did not have this same concern with respect to Dennis because it had ordered a stay of proceedings during Kenneth's appeal, and Dennis had already been named as a defendant in the action, the effect of the trial court's decision was to allow the UFTA action to proceed against Dennis without a party essential for complete relief. See MCR 2.205(A); cf. *Mather Investors, supra* at 259-260 (transferor would be necessary party unless transferee's liability was already determined). Therefore, while we express no opinion with respect to the timeliness of Quick-Sav's UFTA claim against Mattis Inc., given the trial court's reasons for its decision to allow a UFTA claim to be added against Dennis, but not Mattis Inc., the trial court abused its discretion by not allowing Mattis Inc. to be added as a party. Because defendants have not shown that the claim is futile, we find no alternative basis for affirmance on this ground. Therefore, we also reverse the trial court's decision denying an amendment to allow Quick-Sav to allege a UFTA count against Mattis Inc.⁴

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Peter D. O'Connell
/s/ Michael J. Talbot

⁴ Because plaintiffs do not address their claim of successor liability against Mattis Inc. in count VIII of the proposed second amended complaint, we consider this issue abandoned. "It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court." *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).