STATE OF MICHIGAN

COURT OF APPEALS

DUNN COUNSEL PLC,

Plaintiff-Appellee,

v

TODD N. ZAPPONE, CARRIE M. ZAPPONE, and SCRAPCO, LLC,

Defendants-Appellants.

UNPUBLISHED
July 23, 2020

No. 350288
Oakland Circuit Court
LC No. 2016-155011-CB

Before: FORT HOOD, P.J., and JANSEN and TUKEL, JJ.

PER CURIAM.

Defendants appeal as of right the order denying their motion to dismiss brought under the doctrine of *forum non conveniens* and reinstating the October 4, 2017 judgment in favor of plaintiff. We affirm.

I. BACKGROUND

This is the second appeal in this case. Previously, this Court summarized the factual background as follows:

> The individual defendants are citizens of Ohio and were the subject of a civil-forfeiture case in the United States District Court for the Northern District of Ohio. The individual defendants traveled to Michigan to seek plaintiff's representation in the matter. After initially refusing, the firm's namesake, Stephen Dunn, agreed to represent defendants and the individual defendants entered into an "engagement agreement" with plaintiff. Dunn represented the individual defendants in the civil-forfeiture case and assisted them in establishing Scrapco, LLC. According to plaintiff, however, defendants failed to pay $60,570.74 in attorney fees incurred by this representation. Accordingly, Dunn withdrew as defendants' counsel and moved for a charging lien in the Ohio district court. While the charging-lien motion was pending in the Ohio district court, plaintiff also filed a breach-of-contract action against defendants in the circuit court for Oakland County, Michigan. Defendants filed a motion to dismiss the breach-of-contract

> claim, arguing that the circuit court lacked personal jurisdiction over them and that Michigan was an inconvenient forum. The circuit court denied defendants' motion to dismiss and granted plaintiff's motion for summary disposition, ultimately entering a judgment in plaintiff's favor for the requested amount plus interest and costs. [*Dunn Counsel, PLC v Zappone*, unpublished per curiam opinion of the Court of Appeals, issued January 22, 2019 (Docket No. 340790).]

In that appeal, defendants argued: (1) that the circuit court could not exercise personal jurisdiction over them; and (2) that the circuit court abused its discretion by denying their motion to dismiss by failing to properly address the doctrine of *forum non conveniens*. *Dunn Counsel PLC*, unpub op at 2, 4. This Court affirmed in part, vacated in part, and remanded the matter to the circuit court for further proceedings. *Id*. at 1. Specifically, this Court concluded that although the circuit court could exercise limited personal jurisdiction over defendants, it had failed to address defendants' *forum non conveniens* argument. This Court explained:

> Here, the circuit court received briefing on the issue from the parties, but defendants failed to appear for oral argument. At the hearing, the circuit court denied defendants' motion to dismiss under the doctrine of *forum non conveniens*, concluding that Michigan was a reasonably convenient forum. Yet, in reaching this conclusion, the circuit court did not address any of the *Cray* [*v General Motors Corp*, 389 Mich 382, 395-396; 207 NW2d 393 (1973)] factors. Thus, we must vacate the circuit court's order and remand this case for the circuit court to consider defendants' motion in light of the relevant *Cray* factors. See *Lease Acceptance Corp* [*v Adams*], 272 Mich App [209,] 228-229[; 724 NW2d 724 (2006)]. [*Dunn Counsel, PLC*, unpub op at 5.]

On remand, the circuit court entertained supplemental briefing. At the hearing on defendants' motion to dismiss, the parties argued consistently with their briefs, and the circuit court took the matter under advisement. The circuit court did articulate its decision on the record during a subsequent hearing held on July 31, 2019. The circuit court acknowledged that this Court had remanded this matter "for the sole purpose of [the circuit] court to consider factors set forth in *Cray* . . . relative to defendant's motion to dismissed based upon *forum non conveniens*." The circuit court first addressed the private interests of the litigants, and found:

> The first sub-factor is the availability of compulsory process for attendance of unwilling and the cost of obtaining the attendance of willing witnesses. Here, from what the court can discern, the only witnesses would be the parties to the case. Plaintiff has his office in Troy and both he and his office manage who would be testifying reside in the – the city of Troy.
>
> The defendants are located outside of Toledo, Ohio and this court does not find that the defendants would incur undue expense in appearing in court in Oakland County.
>
> The second factor – the second sub-factor under factor one is the ease of access to sources of proof. The sources of proof for this action are for collection of

> legal fees. Those proofs are located here in Oakland County, so this factor certainly would not preclude this court from considering jurisdiction.
>
> The next sub-factor is distance from the situs of the accident or incident which gave rise to the location, and this factor is inapplicable with respect to the subject matter of this case.
>
> The next sub-factor is enforceability of any judgment obtained. Any enforceability of a judgment obtained in this court would have to be domesticated and enforced in the state of Ohio, which is the residence of the – of the defendants, and this court does not see any issues with, if plaintiff – if this matter were to proceed to trial and plaintiff were to obtain a judgment against the defendants, that being a situation that that judgment could not be enforced.
>
> The next sub-factor is possible harassment of either party, and this court does not find that any possible harassment of either party exists in this matter.
>
> The next sub-factor is other practical problems which contribute to the ease, expense of expedition of the trial, and this court does not discern any other practical problems which contribute to this factor.
>
> The possibility of viewing the premises is not applicable in this matter.

The circuit court next addressed the second factor: matters of public interest. The circuit court found that there were no administrative difficulties that would preclude this matter from being tried in Michigan, and that Michigan law would govern this case. The circuit court noted,

> defendants sought out the plaintiff[ ] and came to Michigan to discuss entering into a retainer agreement with the plaintiff to proceed with legal actions against – that was being brought against the defendants in the state of Ohio and they did hire the plaintiff in the state of Michigan to perform those legal services for them, and a lot of the legal work which was performed was performed here in Michigan, including the preparation of pleadings, consultations and billings.

Finally, with respect to public interest, the circuit court found that the only people concerned by this case are the "plaintiff and his staff and the named defendants and the company representative, and as this court has previously indicated, that the defendants would not suffer undue expense in having to participate in the trial here."

The circuit court finally addressed the third factor, being the reasonable promptness in raising a plea of *forum non conveniens*. The circuit court found that defendants promptly raised *forum non conveniens* in their affirmative defenses filed in conjunction with their answer to the complaint, and subsequently filed a motion to dismiss arguing lack of personal jurisdiction and *forum non conveniens*. On the basis of the foregoing, the circuit court determined that jurisdiction was proper in Oakland County, and denied defendants' motion to dismiss under the doctrine of *forum non conveniens*. The circuit court determined that the judgment entered on October 4, 2017

that awarded plaintiff $63,219.71 would remain in effect. An order to this effect was entered on July 31, 2019. This appeal followed.

II. STANDARD OF REVIEW

A trial court's decision on a motion to dismiss brought under the doctrine of *forum non conveniens* is reviewed by this Court for an abuse of discretion. *Radeljak v Daimler Chrysler Corp*, 475 Mich 598, 603; 719 NW2d 40 (2006). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Id*.

III. ANALYSIS

Defendants argue on appeal that the circuit court abused its discretion when finding that the relevant factors enumerated in *Cray* favored Oakland County as a proper venue, thereby retaining Michigan jurisdiction denying their motion to dismiss. We disagree.

The doctrine of *forum non conveniens* "is not derived from statutes; rather, it is a common-law doctrine created by the courts[,]" *Radeljak*, 475 Mich at 604, which recognizes that a circuit court has discretion to decline to exercise its jurisdiction when doing so would be inappropriate. *Lease Acceptance Corp v Adams*, 272 Mich App 209, 226; 724 NW2d 724 (2006). Declining jurisdiction is appropriate "when convenience of the parties and ends of justice would be better served if [the] action were brought and tried in another forum." *Hernandez v Ford Motor Co*, 280 Mich App 545, 551; 760 NW2d 751 (2008) (internal citation and quotation marks omitted).

When a party moves to dismiss an action on the basis of *forum non conveniens*, the circuit court "must consider two things: (1) whether the forum is inconvenient and (2) whether a more appropriate forum exists." *Lease Acceptance Corp*, 272 Mich App at 226. In *Cray*, our Supreme Court set forth a list of balancing factors to be used when analyzing a plea of *forum non conveniens*:

> 1. The private interest of the litigant.
>
> a. Availability of compulsory process for attendance of unwilling and the cost of obtaining attendance of willing witnesses;
>
> b. Ease of access to sources of proof;
>
> c. Distance from the situs of the accident or incident which gave rise to the litigation;
>
> d. Enforceibility [sic] of any judgment obtained;
>
> e. Possible harassment of either party;
>
> f. Other practical problems which contribute to the ease, expense, and expedition of the trial;
>
> g. Possibility of viewing the premises.

2. Matters of public interest.

a. Administrative difficulties which may arise in an area which may not be present in the area of origin;

b. Consideration of the state law which must govern the case;

c. People who are concerned by the proceeding.

3. Reasonable promptness in raising the plea of *forum non conveniens*. [*Cray*, 389 Mich at 395-396.]

A plaintiff's chosen forum "is ordinarily accorded deference." *Anderson v Great Lakes Dredge & Dock Co*, 411 Mich 619, 628-629; 309 NW2d 539 (1981).

In reaching its decision, the circuit court first considered the private interest of the parties, and decided that factor weighed in the interest of Michigan jurisdiction. We agree. In this case, defendants came to Michigan to solicit plaintiff's representation: plaintiff is a law firm located in Oakland County. The witnesses identified by plaintiff either reside in Oakland County, are considered an "expert-in-law" that would presumably be compensated for their time, and defendants who have already availed themselves of this jurisdiction by soliciting representation in Oakland County. Defendants, who reside outside of Toledo, Ohio, have failed to explain how they would incur undue expense or be unable to attend any trial if made to defend this action in Michigan.

The circuit court also considered subfactor (b)–the ease of access to proof. This case is ultimately a collection action seeking attorney fees. The proofs required for plaintiff to prove its case consist of time logs and billing records, all of which are located in Oakland County. Regarding subfactor (c), there was no "accident" or "incident" giving rise to this action, so this subfactor is inapplicable.

Subfactor (d) concerns the enforceability of any judgment obtained by plaintiff. Indeed, plaintiff would be required to domesticate any judgment in Ohio in order to enforce it against defendants. Neither party has identified potential issues with future enforcement.

Subfactor (e), the harassment of either party, appears to be inapplicable where neither party has alleged harassment. Subfactor (f) concerns other practical problems that contribute to the ease, expense, or expedition of trial. Although defendants argue that this factor is best served by Ohio jurisdiction, they do not identify which practical problems require such a conclusion. Finally, subfactor (g), viewing the premises, is also an inapplicable consideration.

The circuit court next considered any matters of public interest, and again concluded that Michigan jurisdiction was appropriate. We agree. Defendants argue that there are administrative difficulties, specifically the ability to obtain records and depose and subpoena witnesses, that require Ohio jurisdiction. However, defendants fail to identify which records would be unavailable under Michigan jurisdiction, and which witnesses would be unable to be deposed.

Defendants also argue that Ohio law controls this matter, and therefore Ohio is the most appropriate forum. However, defendants are mistaken. This is a collection action, and where defendants came to Michigan to solicit legal representation and failed to pay agreed upon fees under the Engagement Agreement between the parties that was entered into in the State of Michigan, Michigan law controls. Also relevant to the public interest determination are the identities of any concerned parties. Here, the only people concerned with the outcome of this case are the parties themselves.

Finally, the circuit court considered the third factor, and concluded defendants raised a timely plea of *forum non conveniens* where defendants raised their plea in the answer to the complaint, and again in their motion to dismiss.

On the basis of the foregoing, we conclude that the circuit court did not abuse its discretion, after a thorough review of the *Cray* factors, in determining that Michigan jurisdiction was appropriate. Therefore, the circuit court did not err by denying defendants' motion to dismiss under the doctrine of *forum non conveniens*.

IV. ALTERNATIVE GROUNDS FOR RELIEF

As alternative grounds for relief, defendants argue that this Court should remand this matter back to the circuit court for an evidentiary hearing on whether plaintiff is obtaining "double recovery." As proof of plaintiff's alleged attempt at double recovery, defendants submit a November 22, 2019 order from the United States District Court for the Northern District of Ohio, Western Division (the District court), entering a judgment in favor of plaintiff for the same legal fees plaintiff seeks from defendants in the instant lawsuit. Plaintiff clarifies that *after* the Oakland Circuit Court's July 31, 2019 decision in the present case, and following a hearing on plaintiff's and other legal creditor's charging liens relating to the same representation at issue here, the District court entered an order providing that $140,000 be distributed to lienors, including $53,494 to plaintiff.

Although plaintiff's attempt to recover the same fees from the same parties in two separate venues at the same time is aggressive and potentially problematic, we cannot grant defendants the alternative relief they seek. First, defendants' request for a remand exceeds the scope of this Court's prior opinion which limited the circuit court's review to consideration of the *Cray* factors. *Dunn Counsel PLC*, unpub op at 5. Second, the order entering judgment in favor of plaintiff in the District court was entered four months after the judgment in the instant case was entered. Thus, the circuit court did not have an opportunity to address this issue before it was raised in this Court. Thus, this issue is unpreserved. See *George v Allstate Ins Co*, 329 Mich App 448, 453; 942 NW2d 628 (2019), where this Court reiterated that to preserve an issue for appellate review, it must be raised, addressed, and decided in the trial court. Not only is appellate review of unpreserved issues disfavored, *People v Frazier*, 478 Mich 231, 241; 733 NW2d 713 (2017), but "[t]his Court's review is limited to the record established by the trial court[.]" *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002). Here, there is no lower court record from which this Court can evaluate defendants' claim.

Finally, defendants have failed to submit any evidence that plaintiff has actually attempted to *collect* both judgments, thereby obtaining a double recovery. As of now any potential harm to

defendants is speculative in nature, and therefore this issue is not ripe for appellate review. See *King v Michigan State Police Department*, 303 Mich App 162, 188; 841 NW2d 914 (2013), where this Court reiterated that "a claim that rests on contingent future events is not ripe" for appellate review.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Kathleen Jansen
/s/ Jonathan Tukel