

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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GYRO DESIGN GROUP, L.L.C.,

Plaintiff/Counterdefendant-  
Appellee,

V

LAWRENCE R. O'GRADY,

Defendant/Counterplaintiff-  
Appellant.

UNPUBLISHED  
December 13, 2002

No. 234192  
Wayne Circuit Court  
LC No. 00-032543-CK

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Before: Griffin, P.J., and White and Murray, JJ.

PER CURIAM.

Defendant Lawrence R. O'Grady appeals as of right from a trial court order granting summary disposition pursuant to MCR 2.116(C)(7) in favor of plaintiff Gyro Design Group, LLC (Gyro Design), on defendant's counterclaim alleging breach of contract, violation of the Michigan sales representatives' commissions act (SRCA), MCL 600.2961, and unjust enrichment. We affirm in part and reverse in part.

I

Defendant O'Grady, a consultant in the field of interactive product development, was employed as a commissioned sales representative/consultant for a company called AKA Detroit from July 1998 until February 1999. In November 1999, AKA Detroit and another company, Davis Design Group, merged to form plaintiff Gyro Design. Gyro Design took over defendant's AKA Detroit accounts and continued his employment. During the next several months, Gyro Design and O'Grady had a series of disagreements, culminating in the termination of O'Grady's employment on March 30, 2000. Defendant filed an administrative complaint with the Michigan Department of Consumer and Industry Services,<sup>1</sup> Wage and Hour Division, alleging violations of the wages and fringe benefits act (WFBA), MCL 408. 471 *et seq.* He sought compensation for unpaid commissions and vacation and sick pay.

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<sup>1</sup> Formerly known as the Department of Labor.

On July 27, 2000, the Wage and Hour Division issued its determination order finding that Gyro Design owed defendant \$53,502.34 as of March 31, 2000. In rendering this determination, the Wage and Hour Division only considered commissions that were “earned,” meaning Gyro Design had actually received payment from the customer, during the period of November 1999 to March 31, 2000. The determination order noted that there were several outstanding projects, not included in the final award, that were not completed and for which revenues and commissions attributable to defendant had not yet been collected. Thus, immediately after the first determination order was issued, defendant filed a second complaint with the Wage and Hour Division to collect his commissions for any additional post-March 31, 2000, customer payments received by Gyro Design.

After the first Wage and Hour Division determination was made and before the second, Gyro Design filed the instant lawsuit against defendant, alleging violation of the uniform trade secrets act, MCL 445.1901 *et seq.*, common law conversion, statutory conversion, and unjust enrichment. Defendant counterclaimed alleging breach of contract, violation of the SRCA, and unjust enrichment. Gyro Design thereafter filed a motion for summary disposition under MCR 2.116(C)(7), arguing that defendant’s counterclaim should be dismissed in its entirety for the reason that the claims alleged therein were barred by the doctrine of collateral estoppel. Citing *Minicuci v Scientific Management, Inc.*, 243 Mich App 28; 620 NW2d 657 (2000), Gyro Design maintained that defendant was collaterally estopped from relitigating his counterclaim because the same issues were raised in the administrative hearing before the Wage and Hour Division. In addition, plaintiff argued that the pursuit of an administrative remedy precluded the initiation of any other claim based on the same facts. Following a hearing, the trial court agreed with plaintiff and, relying on *Minicuci* and also the principle that “once plaintiff chose to seek the administrative remedy [under the WFBA], plaintiff had to pursue the remedy exclusively,” it granted Gyro Design’s motion for summary disposition. Defendant now appeals.

## II

Whether collateral estoppel bars a particular claim is a question of law that this Court reviews de novo. *Minicuci, supra* at 34. If collateral estoppel applies, then summary disposition is appropriate pursuant to MCR 2.116(C)(7). *Id.* at 36, n 5. We review a trial court’s decision on a motion for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Alcona Co v Wolverine Environmental Production, Inc.*, 233 Mich App 238, 245; 590 NW2d 586 (1998). A court reviewing a motion pursuant to MCR 2.116(C)(7) may consider all affidavits, pleadings, and other documentary evidence, construing them in the light most favorable to the nonmoving party. *Id.* at 246; *Barrow v Pritchard*, 235 Mich App 478, 480; 597 NW2d 853 (1999).

On appeal, defendant claims that the trial court erred by finding the doctrine of collateral estoppel barred his counterclaim. Generally,

“Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding.” *Porter v Royal Oak*, 214 Mich App 478, 485; 542 NW2d 905 (1995). Generally, mutuality of estoppel is a necessary element of collateral estoppel. *Nummer v Dept of Treasury*, 448 Mich 534, 542;

533 NW2d 250 (1995). Collateral estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him. *Howell v Vito's Trucking & Excavating Co*, 386 Mich 37, 43; 191 NW2d 313 (1971). [*Barrow, supra* at 480-481.]

When a party is seeking to preclude relitigation on the basis of an administrative decision, three additional requirements must be satisfied: the administrative determination must have been adjudicatory in nature and provide a right to appeal, and the Legislature must have intended to make the decision final absent an appeal. *Minicuci, supra* at 33-34, quoting *Nummer, supra* at 541-542.

In *Minicuci, supra*, the plaintiff brought an action against his former employer alleging breach of contract and violation of the SRCA with respect to sales commissions the defendant allegedly owed to the plaintiff. Before bringing his action in circuit court, the plaintiff had filed a claim under the WFBA with the Michigan Department of Labor, seeking the same unpaid sales commissions. The department issued a determination order against the plaintiff, concluding that no further wages were due to him for the period in question. The plaintiff timely appealed the determination, but then moved that his appeal be withdrawn or dismissed without prejudice. A subsequent department order granted the plaintiff's motion to dismiss, but ordered the dismissal with prejudice. The plaintiff did not seek the allowed judicial review of the order of dismissal, but instead filed an action in circuit court alleging, among other claims, breach of contract and violation of the SRCA. The circuit court granted summary disposition for the defendant, ruling that the plaintiff had the option to elect either the wage act's administrative remedy or other relief available at common law, but that once the plaintiff chose to seek the administrative remedy, he had to pursue that remedy exclusively.

On appeal, this Court held that collateral estoppel precluded the claims raised in the plaintiff's action; thus, the trial court correctly granted summary disposition for the defendant, albeit for the wrong reason. The *Minicuci* Court explained in pertinent part:

Plaintiff contends that the trial court erred in granting defendant summary disposition because the court relied on the *Murphy* [*v Sears, Roebuck & Co*, 190 Mich App 384, 388; 476 NW2d 639 (1991)] Court's nonbinding statement in dicta that "once an employee chooses to pursue the administrative remedy, that remedy must be utilized exclusively." *Id.*; see *Faulkner v Flowers*, 206 Mich App 562, 566; 522 NW2d 700 (1994) (recognizing the quoted statement as dicta). We note that although defendant's brief on appeal urges that we decline consideration of claim preclusion issues, defendant invokes the cited *Murphy* dicta as the proper basis for our affirmation of the trial court's grant of summary disposition. While neither the trial court nor the *Murphy* opinion dicta expressly considered the doctrines of claim preclusion, we find that collateral estoppel represents the doctrine correctly applied in and controlling of the outcome of the instant case, and the basis for the *Murphy* Court's suggestion that "once an employee chooses to pursue the administrative remedy, that remedy must be utilized exclusively, including an appeal to the circuit court." *Murphy, supra* at 388.

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While plaintiff denies that his wage act administrative claim is related to his instant breach of contract count and his claim under MCL 600.2961(4) and (5); MSA 27A.2961(4) and (5), plaintiff ignores that all three claims allege and seek reimbursement for defendant's wrongful retention of commissions owed plaintiff. Plaintiff's wage act claim asserted defendant's nonpayment of approximately \$11,000 in commissions, bonuses, and illegal deductions. Plaintiff's instant complaint likewise alleges that when he left defendant's employ, defendant intentionally and unreasonably failed to provide plaintiff more than \$10,000 in unpaid commissions and unauthorized deductions. *The department's initial "Determination Order" expressly "determined that no wages are due" for the period plaintiff alleged defendant's nonpayment. Accordingly, the department clearly determined the fact essential to the instant action whether defendant unlawfully failed to provide plaintiff any outstanding commissions. . . .*

Every indication exists that plaintiff's alleged entitlement to unpaid commissions was "actually litigated and determined by a valid and final judgment." *Nummer, supra at 542*, quoting *Storey v Meijer, Inc*, 431 Mich 368, 373, n 3; 429 NW2d 169 (1988). . . .

. . . Neither plaintiff's wish for a dismissal without prejudice nor the extent of plaintiff's knowledge concerning the referee's conclusion to enter an order of dismissal with prejudice alters the fact that both the administrative claim and the instant claims sought plaintiff's entitlement to commissions and that the referee's order dismissing plaintiff's administrative claim constitutes a final adjudication on the merits. . . . Furthermore, we observe that "an *unappealed* [administrative agency's] determination . . . that plaintiff is not entitled to 'back pay' . . . operates as collateral estoppel to the subsequent maintenance of a suit in circuit court to recover the same reimbursement as 'damages' for breach of contract" when the "questions of fact necessary for determination of 'damages' by the circuit court . . . would be identical to questions of fact already determined by the [administrative agency] in concluding 'back pay' was improper." *Senior Accountants, Analysts & Appraisers Ass'n v Detroit*, 399 Mich 449, 453, 457-459; 249 NW2d 121 (1976) . . . [*Id.* at 33-37 (emphasis in original and added).]

The *Minicuci* Court determined that the remaining requirements of collateral estoppel had been met, *id.* at 37-41, and thus concluded that

Once the issue of defendant's liability for these commissions proceeded to an adverse administrative adjudication on the merits, . . . collateral estoppel precluded plaintiff's subsequent resort to the circuit court except through the wage act's direct appeal provision. MCL 408.481(9); MSA 17.277(11)(9). Our failure under the instant circumstances to apply collateral estoppel would sanction multiplicity of litigation and the absolutely unnecessary waste of precious judicial resources. [*Id.* at 41.]

On the basis of *Minicuci*, the trial court in the instant case concluded that defendant was precluded from pursuing his counterclaim in circuit court. However, on appeal, defendant contends that the trial court misconstrued *Minicuci* and erred when it dismissed his counterclaim.

We agree with defendant and thus reverse in part the trial court's grant of summary disposition to plaintiff.

As defendant points out, this Court has held that where the Legislature has provided an aggrieved employee with two statutory avenues of redress for the same conduct and each avenue provides for different, though overlapping remedies, the employee is not precluded from concurrently pursuing both. In *Faulkner v Flowers*, 206 Mich App 562; 522 NW2d 700 (1994), this Court held that two employees who were terminated for reporting wage and fringe benefit violations could pursue a cause of action under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.*, even though the plaintiffs had already initiated a pending WFBA administrative proceeding. The *Faulkner* Court explained:

[H]ere, the wage and fringe benefits act and the WPA provide differing remedies and encompass differing, but not conflicting, goals.

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We hold that the Legislature has provided overlapping remedies for an employee whose employment is terminated for reporting wage and fringe benefits violations. We find it within the legislative intent for a plaintiff to pursue a WPA cause of action even though that plaintiff has already initiated a wage and fringe benefits act administrative proceeding. The WPA provides remedies not available in the wage and fringe benefits act, cf. MCL 408.483(2); MSA 17.277(13)(2) with MCL 15.364; MSA 17.428(4); see also *Tyrna [v Adamo, Inc]*, 159 Mich App 592; 407 NW2d 47 (1987)], *supra* at 600. There are no conflicts between the remedies provided, and the goals of the two statutes are complementary. [*Id.* at 568-569.]

Notably, as acknowledged in *Minicuci*, *supra* at 32-33, the *Faulkner* Court dismissed as nonbinding dicta precedent indicating that once an employee chooses to pursue the administrative remedy provided by the WFBA, that remedy must be utilized exclusively, including an appeal to the circuit court. *Id.* at 566-567. Thus, the *Faulkner* Court concluded that the plaintiffs therein did not have to exhaust their administrative remedies under the WFBA simply because they had filed that claim first. Rather, the employees could concurrently pursue their administrative complaint for violation of the WFBA and a civil action for violation of the WPA. Cf. *Tyrna*, *supra* (a plaintiff need not exhaust administrative remedies and can concurrently pursue an administrative claim for violation of MIOSHA and a civil claim for violation of the WPA).

Where a civil complaint is based not on a separate statutory scheme but on a common-law remedy, such as breach of contract, unjust enrichment or conversion, this Court has likewise held that a claimant need not exhaust the administrative remedies outlined in the WFBA. See *Cork v Applebee's Inc*, 239 Mich App 311, 318-319; 608 NW2d 62 (2000).<sup>2</sup> Further, where a

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<sup>2</sup> The *Cork* Court did hold, however, that the WFBA requires a plaintiff to seek redress for violations of the WFBA through the Department of Labor before seeking a remedy in the circuit court. Thus, a claim filed in circuit court, insofar as it alleges a violation of the WFBA, must be dismissed if the plaintiff has not exhausted his administrative remedies.

plaintiff seeks enforcement of a common-law right, the statutory administrative remedy is cumulative, rather than exclusive, and such common-law claims may properly be brought in the circuit court. *Id.*

Defendant's counterclaim filed in the instant case alleges both common-law and SRCA claims. To the extent it pleads the latter statutory claim, we conclude, like *Faulkner*, that the Legislature has, in implementing the WFBA and the SRCA, provided overlapping remedies to sales representatives who suffer from identical employer misconduct (failure to timely pay commissions). Although, as the trial court noted, the remedies under the WFBA are similar to those provided in the SRCA in certain respects, i.e., payment of wages due, exemplary damages of twice the amount due, and attorney fees and court costs,<sup>3</sup> the SRCA provides additional and different remedies as well, including the requirement that "commissions that become due after the termination date shall be paid within 45 days after the date on which the commission became due," MCL 600.2961(4), resultant "[a]ctual damages caused by the failure to pay the commissions when due," MCL 600.2961(5)(a), and an amount due equaling "2 times the amount of the commissions due but not paid . . . or \$100,000.00, whichever is less" if the failure to pay commissions is intentional. MCL 600.2961(5)(b). Significantly, neither the WFBA nor the SRCA mandates that the aggrieved employee must only pursue one claim in one arena. In fact, the subsequently adopted SRCA expressly provides that it "does not affect the rights of a principal or sales representative that are otherwise provided by law." MCL 600.2961(9).

The SRCA was enacted in 1992 to provide special protection to sales representatives with the Legislature's expressed public policy to provide significant protections for a sales person to collect his or her commissions. *Howting-Robinson Associates, Inc v Bryan Custom Plastics*, 65 F Supp 2d 610 (ED Mich, 1999). The legislative history reveals that this law is

an attempt by Michigan lawmakers to compensate sales agents for goodwill and other assets lost that would be difficult to quantify in a dispute. Thus, rather than requiring the harmed agents to resort to costly litigation to provide the detailed accounting necessary to ascertain all relevant damages, the legislature simply chose to assess those additional damages by requiring a principal who intentionally fails to pay commissions due to remit two times that amount to the agent. [*M & C Corp v Erwin Behr GmbH & Co, KG*, 87 F3d 844, 850 (CA 6, 1996).]

To effect that end, the Legislature included heavy penalties against violating principals to ensure that sales representatives in Michigan are paid the full commissions to which they are entitled, especially when those commissions fall after the termination of the employment relationship. *Walters v Bloomfield Hills Furniture*, 228 Mich App 160; 577 NW2d 206 (1998). These remedies are different than those available to sales representatives under the WFBA, yet are complimentary to the common goal of both statutes. Thus, as in *Faulkner, supra*, defendant's filing of an administrative complaint for violation of the WFBA in the instant case did not divest the circuit court of jurisdiction to consider his counterclaim.

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<sup>3</sup> See MCL 408.488 and MCL 600.2961(4)-(6).

## II

It remains to be determined exactly how and to what extent the doctrine of collateral estoppel affects defendant's counterclaim.

As previously noted, unlike *res judicata*, which entirely bars the relitigation of claims, collateral estoppel precludes the relitigation of issues. *Barrow, supra*. Collateral estoppel applies when the issues in question were actually and necessarily litigated in a prior proceeding, between the same parties, and were judicially determined. *Id.*; *Nummer, supra*.

Defendant concedes that the WFBA administrative determination order concluding that Gyro Design failed to pay defendant the commissions earned between November 1999 and March 30, 2000, has a collateral estoppel effect on his current civil claims. The issue of liability for these commissions was actually litigated and judicially determined by the Wage and Hour Division.

However, defendant maintains that to the extent his counterclaim raises issues not included and decided within the parameters of the earlier WFBA administrative determination order, it is not barred by collateral estoppel. Defendant argues that there is a critical difference between this case and *Minicuci*:

In *Minicuci*, the Wage & Hour's Division concluded that the employer did not owe Plaintiff any commissions. This finding was fatal to the plaintiff's SRCA claim because liability for commissions is a necessary predicate to success on a SRCA claim. Collateral estoppel barred the plaintiff in *Minicuci* from re-litigating whether he was entitled to commissions. Summary disposition was thus appropriate. In the case at hand, the Wage & Hour Division concluded favorably that Plaintiff's employer owes him \$53,502.34 in commissions between November 1999 and March 30, 2000. Thus, O'Grady has established one of the necessary elements to succeed on his SRCA claim, and he must be given his day in court to litigate the remaining issues on his SRCA claim.

In the case at bar, the Wage and Hour Division's determination order *avored* defendant. The division found that Gyro Design owed defendant commissions earned during his employment. This fact allows defendant to continue with his counterclaim alleging SRCA violations and common-law causes of action in the circuit court. While the Wage and Hour Division's determination established that Gyro Design did not pay defendant \$53,502.34 in commissions from November 1999 through March 31, 2000, there has been no actually litigated, judicial determination regarding (1) whether defendant is owed commissions after March 31, 2000; (2) whether forty-five days have elapsed since the commissions were owing; (3) whether Gyro Design's failure to pay the commissions was intentional under MCL 600.2961(4) and (5); and (4) whether Gyro Design is liable under the common-law theories set forth in defendant's counterclaim. Collateral estoppel does not apply to any of these issues because they were never considered in the WFBA administrative claim.

Consequently, we conclude that the trial court erred to the extent it granted summary disposition pursuant to MCR 2.116(C)(7) in favor of Gyro Design with regard to defendant's counterclaims set forth above. Although, under the doctrine of collateral estoppel, the parties are

precluded from relitigating the issue whether Gyro Design is liable to defendant for \$53,502.34 in commissions from November 1999 through March 31, 2000, this prior administrative determination does not preclude consideration of defendant's distinguishable counterclaim in circuit court. Moreover, defendant may pursue his counterclaim concurrently with the WFBA administrative proceeding. *Faulkner, supra*.

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

/s/ Richard Allen Griffin  
/s/ Helene N. White  
/s/ Christopher M. Murray