S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

GRAND RIVER ENTERPRISES SIX NATIONS, LTD., Plaintiff-Appellant,	UNPUBLISHED January 23, 2018
v DEPARTMENT OF TREASURY, NICK A. KHOURI, and DOUGLAS MILLER, Defendants-Appellees.	No. 335170 Court of Claims LC No. 15-000245-MZ

Before: MURPHY, P.J., and SAWYER and BECKERING, JJ.

PER CURIAM.

Plaintiff Grand River Enterprises Six Nations, Ltd (Grand River), a Canadian manufacturer of tobacco products, appeals as of right the opinion and order issued by the Court of Claims granting summary disposition in favor of defendants Department of Treasury (the Department), Nick A. Khouri, and Douglas Miller on the basis of res judicata arising out of an earlier administrative proceeding. We reverse and remand for further proceedings.

I. UNDERLYING STATUTORY PROVISIONS

To give context, perspective, and clarity to the substantive and procedural facts of this case, we begin with a discussion of the underlying law.

A. NONPARTICIPATING MANUFACTURERS OF TOBACCO PRODUCTS

The Legislature enacted MCL 445.2051 and MCL 445.2052 in 1999, and MCL 445.2052 currently provides in part:

> (1) Any tobacco product manufacturer selling cigarettes to consumers within the state (whether directly or through a distributor, retailer, or similar intermediary or intermediaries) after the date of enactment of this act shall do 1 of the following:

> (a) Become a participating manufacturer and generally perform its financial obligations under the master settlement agreement.[[1]]
>
> (b) Place into a qualified escrow fund the following amounts (as such amounts are adjusted for inflation): . . . .[[2]]

The escrow fund deposits mandated by MCL 445.2052(1)(b) for NPMs "shall be made in quarterly installments following the quarter in which sales took place." MCL 445.2052(2). "A tobacco product manufacturer that places funds into escrow pursuant to [MCL 445.2052(1)(b)] shall receive the interest or other appreciation on the funds as earned." MCL 445.2052(4). And MCL 445.2052(4)(a) through (c) provide the circumstances in which the funds will be released from escrow.[3] "Each tobacco product manufacturer that elects to place funds into escrow pursuant to [MCL 445.2052(1)(b)] shall on a quarterly and annual basis certify to the department of treasury that it is in compliance with this section." MCL 445.2052(5). The various penalties for failing to place funds into escrow are set forth in MCL 445.2052(5)(a) through (c), indicating that "[t]he attorney general may bring a civil action on behalf of the state against any tobacco product manufacturer that fails to place into escrow the funds required under this section."

We now shift our attention to the Tobacco Products Tax Act (TPTA), MCL 205.421 *et seq*., which contains provisions related to MCL 445.2051 and MCL 445.2052. MCL 205.426c provides, in pertinent part, as follows:

> (1) A nonparticipating manufacturer [NPM] shall by April 30 of each year certify to the department that it is not a participant in the master settlement agreement and that it has performed its obligation to establish a qualified escrow account and deposited funds into that account under 1999 PA 244, MCL 445.2051 to 445.2052.
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> (2) The certification of compliance shall be on a form prescribed by the department, shall contain all of the information requested on the form, and shall include a list of all brand names of cigarettes sold by the nonparticipating

[1] The "master settlement agreement" pertains to "the settlement agreement (and related documents) entered into on November 23, 1998, and incorporated into a consent decree and final judgment entered into on December 7, 1998, in Kelley Ex Rel. Michigan v Philip Morris Incorporated, et al., Ingham County circuit court, docket no. 96-84281CZ." MCL 445.2051(f).

[2] A tobacco product manufacturer that is not a participating manufacturer under MCL 445.2052(1)(a) and instead chooses to place funds into escrow under MCL 445.2052(1)(b) is known as a "nonparticipating manufacturer" (NPM). MCL 205.426d(15)(b). Grand River was an NPM.

[3] For example, escrowed funds can be used "[t]o pay a judgment or settlement on any released claim brought against the tobacco product manufacturer by the state or any releasing party located or residing in the state." MCL 445.2052(4)(a).

> manufacturer for consumption in this state during the calendar year immediately preceding the certification date.
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> * * *
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> (6) A nonparticipating manufacturer that has not provided the certification of compliance required by this section shall not make a sale of cigarettes in this state or a sale within or outside this state to any person for sale, distribution, or consumption in this state.

In order to sell cigarettes in Michigan, an NPM is required to submit certain information to the Department, including a statement of the NPM's intention to comply with the statutory escrow obligations, and it must pay an equity assessment. MCL 205.426d(1) through (4). An NPM "that does not provide the information required . . . or pay the equity assessment required by this section shall not make a sale of cigarettes in this state to any person for sale, distribution, or consumption in this state." MCL 205.426d(7). And MCL 205.426d(9) provides:

> The department shall maintain and regularly update a list of nonparticipating manufacturers that have complied with the requirements of this section. The department shall publish the list on its website and provide a copy of the list to a person upon request.

The list referenced in the above provision is known as the NPM Directory. The duty under MCL 205.426d(9) to "regularly update" the NPM Directory would indicate that the Department has the authority to remove an NPM from the NPM Directory when there has been a compliance failure.

B. TOBACCO MANUFACTURER'S LICENSE

Under the TPTA, and speaking more broadly in terms of manufacturers engaging in the sale of cigarettes in Michigan, "a person shall not . . . sell a tobacco product as a manufacturer . . . in this state unless licensed to do so." MCL 205.423(1). Obtaining the required license entails the submission of an application and the payment of a fee. MCL 205.423(2). And MCL 205.424(1) provides:

> [E]ach license issued under section 3 shall expire on the June 30 next succeeding the date of issuance unless revoked by the department, unless the business for which the license was issued changes ownership, or unless the holder of the license removes the business from the location covered by the license. Upon expiration of the license, revocation of the license, change of ownership of the business, or removal of the business from the location covered by the license, the holder of the license immediately shall return the license to the department. . . The holder of each license may renew that license for another 1-year period by filing an application accompanied by the applicable fee with the department before the expiration date of that license.

Pursuant to the TPTA, "[t]he department may suspend, revoke, or refuse to issue or renew a license . . . for failure to comply with this act or for any other good cause." MCL 205.425(1). A

person is not permitted to sell tobacco products during a period of revocation or suspension, or until a license is renewed. *Id.* MCL 205.425 further provides:

> (3) Before the department suspends, revokes, or refuses to renew a license under this act, the department shall notify the person of its intent to hold a hearing before a representative of the commissioner for purposes of determining whether to suspend, revoke, or refuse to renew a license at least 14 days before the scheduled hearing date.
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> (4) A person aggrieved by the suspension, revocation, or refusal to issue or renew a license may apply to the revenue division of the department for a hearing within 20 days after notice of the suspension, revocation, or refusal to issue or renew the license. A hearing shall be had in the same manner provided in section 21 of 1941 PA 122, MCL 205.21. The decision in case of suspension, revocation, or refusal to renew shall be issued within 45 days of receipt of the request for hearing.

As reflected above, there are rules applicable to becoming and remaining a recognized NPM in Michigan, and there are rules that govern obtaining and maintaining a tobacco manufacturer's license in this state. With this backdrop, we now turn our attention to the events that transpired in this case.

II. HISTORY OF THE CASE

Grand River had a Michigan tobacco manufacturer's license that expired on June 30, 2015, with Grand River failing to timely seek renewal of the license before the June 30, 2015 deadline. See MCL 205.424(1). At the time that Grand River's license was in effect, it was also listed on the NPM Directory. See MCL 205.426d(9). Subsequently, the Department issued a general notice indicating that, effective August 31, 2015, "Grand River . . . is being removed as an approved NPM in Michigan." Stated otherwise, the Department removed Grand River from the NPM Directory, which apparently was not directly communicated to Grand River. In August 2015, Grand River submitted an application and an amended application to renew its tobacco manufacturer's license. In response, in early September 2015, the Department informed Grand River that it was treating Grand River's renewal application as an application for initial licensure because of the missed renewal deadline. For a variety of reasons, the Department denied the application for a tobacco manufacturer's license.[4] The correspondence from the Department to Grand River conveying the denial determination noted that Grand River had stated in the application that its tobacco products had not been sold in Michigan in 2014, yet the Department had information to the contrary. The Department asserted, in part, "that the required escrow payments and/or taxes or assessment relating to those [2014] cigarette sales were not made by Grand River." The Department informed Grand River that if it disagreed with the decision to

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[4] The primary reasons advanced by the Department for denying the license application concerned the criminal history of a Grand River owner/operator and Grand River's alleged failure to fully disclose that history in the application.

deny the tobacco manufacturer's license application, Grand River could request a hearing, which had to be sought within 20 days.

Within a couple of weeks, Grand River sent correspondence to the Department contesting both the denial of a tobacco manufacturer's license and the removal of Grand River from the NPM Directory. In December 2015, an administrative hearing before a referee was conducted on Grand River's challenge. Grand River, having unilaterally come to the conclusion that the issue concerning its removal from the NPM Directory could not be resolved by the referee as it fell outside of her authority or jurisdiction, chose not to pursue that issue at the hearing, focusing instead on the licensing issue.[5] The hearing referee issued a recommended decision to uphold the denial of a tobacco manufacturer's license for Grand River, and the referee made no mention whatsoever of the NPM Directory. The referee did indicate that she had no reason to dispute the Department's contention that Grand River had failed to make required escrow payments in 2013 and 2014. However, the hearing referee couched that determination as one of several bases, and not a primary one, to uphold the denial of a tobacco manufacturer's license.[6] In April 2016, the Department issued a final decision and order, adopting the referee's recommendation. Grand River did not exercise its right to appeal that ruling to the circuit court. Instead, Grand River filed the instant original action in the Court of Claims, alleging that defendants violated its due process rights by removing it from the NPM Directory absent prior notice and an opportunity to be heard. Grand River requested an order directing defendants to place it back on the NPM Directory and enjoining defendants from removing Grand River from the NPM Directory. Eventually, Grand River filed a motion for summary disposition under MCR 2.116(C)(10), arguing that there was no genuine issue of material fact that defendants had deprived Grand River of a protected property interest–its listing on the NPM Directory–without notice and an opportunity to be heard. Defendants responded by claiming that res judicata barred the lawsuit, as the issue concerning Grand River's removal from the NPM Directory was or could have been litigated in the administrative proceeding.[7] The Court of Claims agreed with defendants,

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[5] Prior to the administrative hearing, Grand River filed suit in federal district court against defendants with respect to the issue of Grand River's removal from the NPM Directory. Grand River voluntarily dismissed the suit, claiming that it did so after the federal court indicated that it might decline to exercise jurisdiction under principles of comity.

[6] In the referee's recommendation, she noted that, as to escrow payments, Grand River had argued that there was a separate mechanism to address escrow disputes via an enforcement civil action, which was not undertaken, that the Department had not requested escrow information or given notice of any deficiency, and that the license application did not mention any escrow requirements.

[7] Defendants had previously filed a motion for summary disposition, arguing collateral estoppel and that Grand River had failed to exhaust administrative remedies. Grand River countered that the issue regarding removal from the NPM Directory was outside the scope of administrative review and that said issue was not litigated by the hearing referee, so collateral estoppel would not apply. The Court of Claims rejected both of defendants' arguments, observing that defendants had failed to show that an administrative remedy existed as to the NPM-related issue and that the issue was never actually litigated in the administrative proceeding.

ordering summary disposition in their favor under MCR 2.116(I)(2). The Court of Claims reasoned and explained:

> Plaintiff claims that it was denied due process, in short, because it was never afforded a hearing at which it could challenge its removal from the NPM directory. However, Plaintiff was afforded a hearing–a hearing it requested–and it expressly placed into issue the removal from the NPM directory. Thus, Plaintiff had an opportunity to be heard and the NPM issue could have been decided before the hearing referee. Plaintiff has not advanced any argument, nor has this Court conceived of any, as to why it would have been inappropriate for the referee to hear and decide the NPM removal issue, particularly when Plaintiff expressly requested that the removal from the NPM directory be decided at the hearing. In so concluding, the Court is mindful that the referee's decision in the prior case only mentioned the licensing issue. However, even assuming Plaintiff was not given the opportunity by the referee to argue that the NPM removal was improper, any issue Plaintiff could raise with regard to the referee's decision as to the NPM issue would not be properly before this Court. Indeed, such an issue would instead be a challenge to the referee's decision. A challenge to the referee's decision should be heard in accordance with the appropriate procedures for appealing the referee's decision, not as an original action in this Court. . . . . [H]ad Plaintiff attempted to challenge any aspect of the administrative decision, such a challenge would need to be heard on appeal of that decision, not in an original action filed in this Court. Thus, to the extent there could even be a challenge to the referee's decision for failing to render a conclusion on the NPM issue in this case, this Court would lack jurisdiction over a challenge to the administrative decision.

Grand River now appeals as of right.

III. ANALYSIS

A. STANDARD OF REVIEW AND SUMMARY DISPOSITION TEST

"This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The application of res judicata is a question of law that is likewise reviewed de novo. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999). With respect to summary disposition premised on res judicata, this Court in *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008), observed:

> Under MCR 2.116(C)(7) (claim barred by prior judgment, i.e., res judicata), this Court must consider not only the pleadings, but also any affidavits, depositions, admissions, or other documentary evidence filed or submitted by the parties. The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. This Court must consider the documentary evidence in a light most favorable to the nonmoving party. If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth

> in MCR 2.116(C)(7) is a question of law for the court to decide. If a factual dispute exists, however, summary disposition is not appropriate. [Citations omitted.[8]]

B. DOCTRINE OF RES JUDICATA

In *Richards v Tibaldi*, 272 Mich App 522, 530-531; 726 NW2d 770 (2006), this Court examined the doctrine of res judicata, explaining:

> In general, res judicata bars a subsequent action between the same parties when the facts or evidence essential to the action is identical to that essential to a prior action. The purposes of res judicata are to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication. Res judicata requires that (1) the prior action was decided on the merits, (2) the decree in the prior action was a final decision, (3) the matter contested in the second case was *or could have been resolved* in the first, and (4) both actions involved the same parties or their privies. The burden of establishing the applicability of res judicata is on the party asserting the doctrine. [Citations omitted; emphasis added.]

Res judicata is "applicable to administrative decisions (1) that are adjudicatory in nature, (2) when a method of appeal is provided, and (3) when it is clear that the Legislature intended to make the decision final absent an appeal." *William Beaumont Hosp v Wass*, 315 Mich App 392, 399; 889 NW2d 745 (2016) (quotation marks omitted). There is no dispute that the administrative hearing conducted by the referee in this case was adjudicatory in nature. The crux of this appeal concerns whether Grand River's claim regarding its removal from the NPM Directory could have been resolved in the administrative hearing. If a tribunal in the initial forum lacked authority to resolve a claim that was not raised at that time but was then alleged in a second suit involving the same parties or their privies, res judicata does not bar the subsequent litigation. See *Stoudemire v Stoudemire*, 248 Mich App 325, 334; 639 NW2d 274 (2001).

C. DISCUSSION AND RESOLUTION

Grand River devotes a great deal of time in its appellate brief arguing that a tobacco manufacturer can be on the NPM Directory, yet not have a tobacco manufacturer's license, pointing to another tobacco manufacturer that is in such a posture. The reason for this argument is to support Grand River's contention that issues pertaining to the NPM Directory are separate and distinct from issues regarding tobacco manufacturer licenses. Grand River maintains that defendants and the Court of Claims conflated those matters. Grand River asserts that there is simply no authority, statutory or otherwise, for a hearing referee in an administrative proceeding to resolve an NPM-related dispute. Defendants argue that Grand River "had the opportunity to

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[8] MCR 2.116(I)(2), upon which the Court of Claims relied in granting summary disposition, provides that "[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party."

be heard and the NPM Directory issue could have been expressly decided before the hearing referee." Defendants further contend that "denial of the license was not separate from the issue of whether [Grand River] could continue to be listed on the NPM Directory." Defendants additionally maintain that Grand River's decision not to pursue the matter in front of the referee regarding removal from the NPM Directory, after first indicating that it intended to challenge the removal, did not mean that the referee lacked the authority to address the issue. And, according to defendants, assuming that the referee failed to give Grand River the opportunity to argue its removal from the NPM Directory, Grand River's recourse was to pursue a circuit court appeal from the Department's ultimate ruling, which was not done. Finally, defendants contend that Grand River's removal from the NPM Directory was effectively decided in the administrative proceeding "when the referee determined that [Grand River] was not entitled to a license for failure to make escrow payments required by law."[9]

The Court of Claims determined that the issue concerning placement on the NPM Directory could have been addressed and decided by the hearing referee and that Grand River had not advanced any argument, nor could the Court of Claims conceive of any argument, with respect to "why it would have been inappropriate for the referee to hear and decide the NPM removal issue." The statement by the Court of Claims that Grand River had not advanced a supporting argument is not entirely accurate, as Grand River's position all along had been that adjudication of the issue concerning removal from the NPM Directory was not within the scope of the hearing referee's administrative authority. Indeed, the Court of Claims appeared to have accepted that argument when it denied defendants' motion for summary disposition relative to exhaustion of administrative remedies. The Court of Claims also ruled that if the hearing referee failed to give Grand River an opportunity to argue the NPM-related issue, Grand River's recourse was to file a circuit court appeal, not file an original action in the Court of Claims. As indicated earlier, the issue regarding the NPM Directory was not addressed in the administrative hearing because Grand River chose not to pursue the matter, not because the referee declined, refused, or forgot to address the issue.

MCL 205.425(4) provides that "[a] person aggrieved by the suspension, revocation, or refusal to issue or renew *a license* may apply to the revenue division of the department for a hearing[.]" (Emphasis added.) The plain and unambiguous language of this statute indicates that the scope of the hearing solely encompasses licenses, not matters concerning placement on the NPM Directory.[10] Moreover, MCL 445.2052(5) authorizes the Attorney General to commence "a civil action" when an NPM fails to make the required escrow payments, thereby suggesting

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[9] The parties also present arguments regarding the merits or substance of Grand River's suit; however, we can only examine the question whether res judicata was correctly applied and are not at liberty to take on the role of a trial court.

[10] We review de novo issues of statutory construction, with the goal being to discern the intent of the Legislature as based on the plain language of the statute being examined, and if the language is unambiguous, the Legislature must have intended the meaning clearly expressed, requiring us to enforce the statute as written. *Kemp v Farm Bureau Gen Ins Co of Mich*, 500 Mich 245, 252; 901 NW2d 534 (2017).

that the Legislature contemplated original actions as the mechanism by which to adjudicate NPM-related disputes, not administrative proceedings. Accordingly, we hold that resolution of a dispute concerning whether a manufacturer of tobacco products was properly removed from the NPM Directory falls within the authority of a court and not an administrative officer or tribunal. Therefore, res judicata did not preclude Grand River's action. However, our ruling does not necessarily mean that the administrative hearing has no relevance.

"Collateral estoppel bars relitigation of an issue in a new action arising between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding." *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006). Unlike res judicata, which precludes relitigation of claims, see *Bennett v Mackinac Bridge Auth*, 289 Mich App 616, 629; 808 NW2d 471 (2010) (stating that res judicata is also known as claim preclusion), collateral estoppel prevents relitigation of issues, *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001) (stating that collateral estoppel or issue preclusion bars relitigation of an issue), which presumes the existence of an issue in the second proceeding that was present in the first proceeding. As with res judicata, the doctrine of collateral estoppel applies to administrative proceedings that are adjudicatory in nature. *Wass*, 315 Mich App at 399.

Here, if required escrow payments were not made by Grand River, it would not be in compliance with NPM requirements, thereby providing a basis for defendants to remove Grand River from the NPM Directory. MCL 205.426d(9) ("The department shall maintain and regularly update a list of nonparticipating manufacturers that have complied with the requirements of this section."). Although the hearing referee observed that she had no reason to dispute the Department's contention that Grand River had failed to make required escrow payments in 2013 and 2014, it is not clear that the referee was making a specific factual finding on the matter or that the issue was "actually" litigated, given Grand River's position that it was not going to pursue NPM-related issues, such as whether funds were escrowed, in the administrative hearing. Furthermore, it is not apparent to us that the payment of escrow funds had any relevancy to the licensing issue being addressed by the referee. Accordingly, we cannot conclude that collateral estoppel applies to the issue of whether Grand River made required escrow payments.

Next, there is the whole underlying question whether a tobacco manufacturer that lacks a tobacco manufacturer's license can still be on the NPM Directory. If the answer to that question is "no," then resolution of the actually-litigated licensing issue in the administrative proceeding has a bearing on the issue concerning removal from the NPM Directory, such that under the doctrine of collateral estoppel, the Court of Claims would have to conclude that Grand River is not entitled to be on the NPM Directory as a matter of law because Grand River had and has no license. If the answer is "yes," the lawsuit must be permitted to continue. Therefore, as viewed through the lens of collateral estoppel, we remand this case to the Court of Claims to determine, minimally, whether Grand River could remain on the NPM Directory, even though its license lapsed and its application for a new license was not granted in the administrative proceeding, which issue was actually litigated and not appealed.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. Having fully prevailed on appeal, taxable costs are awarded to Grand River under MCR 7.219.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Jane M. Beckering