

STATE OF MICHIGAN
COURT OF APPEALS

EAST MUSKEGON ROOFING & SHEET
METAL CO,

UNPUBLISHED
February 16, 2006

Plaintiff-Appellant,

v

GERALD H. HOLWERDA, GERALD H.
HOLWERDA II and ROGER J. DECKER,

No. 256591
Kent Circuit Court
LC No. 03-006369-CK

Defendant-Appellee.

Before: Whitbeck, C.J., and Bandstra and Markey, JJ.

PER CURIAM.

Plaintiff appeals by right from the trial court's order granting summary disposition in defendants' favor pursuant to MCR 2.116(I)(2). Plaintiff failed to join the three defendants named in the present case in a prior action filed in Muskegon Circuit Court against the Holwerda-Huizinga Company (Holwerda-Huizinga), of which defendants were officers or employees. The trial court reasoned that the court rules required plaintiff to join the three defendants in the prior action and because plaintiff did not do so, defendants were entitled to judgment in their favor. We conclude that principles of *res judicata* govern whether the failure to join a party in a prior action bars subsequent litigation, not the court rules governing joinder. We reverse because *res judicata* does not bar plaintiff's claims against defendants.

Gerber Products Company (Gerber) hired Holwerda-Huizinga to perform construction work at its manufacturing facility. Neither party disputes that Holwerda-Huizinga subcontracted most of the work to be performed to plaintiff. Plaintiff performed the work but Holwerda-Huizinga disputed the amount it owed plaintiff. Plaintiff sued Holwerda-Huizinga in Muskegon Circuit Court for breach of contract and received a default judgment in its favor. Subsequently, plaintiff filed the instant action against defendants alleging defendants violated the Michigan Builder's Trust Fund Act (MBTFA), MCL 570.151, *et seq.*, by not paying money owed to plaintiff but which Gerber paid to defendants.

Plaintiff filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that when defendants received the funds from Gerber for the work plaintiff performed, they became trustees of that money under the MBTFA. Plaintiff asserted that Holwerda-Huizinga only paid it \$14,000 and that defendants were personally liable for the remainder of the judgment according to *People v Brown*, 239 Mich App 735, 739-740; 610 NW2d 234 (2000).

Defendants argued that pursuant to MCR 2.203(A) (compulsory joinder of claims) and MCR 2.205 (necessary joinder of parties), they were entitled to summary disposition because plaintiff failed to join them in the Muskegon action. Defendants asserted that the subject matter of this action had already been adjudicated and should not be again. Defendants also argued that plaintiff was not entitled to summary disposition because plaintiff did not properly perform the Gerber work and therefore was not entitled to any compensation from defendants.

The trial court did not articulate upon which court rule it was relying, but stated that “joinder was mandatory,” and granted defendants summary disposition.

We review de novo all issues presented as questions of law. See *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998) (the granting or denying summary disposition), *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999) (the application of res judicata), and *Auto Club v General Motors*, 217 Mich App 594, 598; 552 NW2d 523 (1996) (the interpretation and application of the court rules). We hold that res judicata, not the court rules, was the proper analytical tool for deciding whether plaintiff was estopped from filing a subsequent suit against defendants.

MCR 2.205(A) governs necessary joinder of parties and provides:

Subject to the provisions of subrule (B) and MCR 3.501, persons having such interests in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief must be made parties and aligned as plaintiffs or defendants in accordance with their respective interests.

The key inquiry under MCR 2.205(A) is whether a party’s presence was necessary to render complete relief. See, e.g., *Gordon Food Service, Inc v Grand Rapids Material Handling Co*, 183 Mich App 241, 243; 454 NW2d 137 (1989), and *Williams & Works, Inc v Springfield Corp*, 76 Mich App 541, 550; 257 NW2d 160 (1977).

Here, regardless of in what capacity each defendant served Holwerda-Huizinga, their presence was not necessary for plaintiff to obtain a judgment in the prior action against the company. Defendants potential individual liability under MCL 570.151, as plaintiff alleged in the instant action, is a separate claim. Moreover, a corporation is a separate entity from its shareholders, even when one person owns all the corporate stock. *Environair, Inc v Steelcase, Inc*, 190 Mich App 289, 292; 475 NW2d 366 (1991).

MCR 2.203(A) governs compulsory joinder of claims and provides:

In a pleading that states a claim against an opposing party, the pleader must join every claim that the pleader has against that opposing party at the time of serving the pleading, if it arises out of the transaction or occurrence that is the subject matter of the action and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction.

The key portion of this rule for our present inquiry is that “the pleader must join every claim that the pleader has against *that* opposing party” Here, the opposing party in the first case was Holwerda-Huizinga, and, in that action, plaintiff brought the claims it had against *that* party. In

the present case, plaintiff is bringing suit against defendants in their individual capacities. Therefore, it was not necessary for plaintiff to join the present claims in that prior suit.

The staff commentary, however, notes that MCR 2.203(A) was amended on June 1, 1999, to “facilitate operation of the common law doctrine of res judicata” Before the rule was modified, a party was required to object to an opposing party’s failure to join other claims that may have arisen from the same transaction with the same parties. *Rogers v Colonial S & L*, 405 Mich 607, 618; 275 NW2d 499 (1979). Under the former MCR 2.203(A)(2), if an opposing party did not object to the failure to join a claim, the claims not brought in the previous suit could still be litigated in a subsequent action. But this portion of the rule was abolished for the specific purpose of facilitating the operation of the doctrine of res judicata. More specifically, res judicata broadly operates to bar claims raised in a subsequent case when those claims arose out of the same transaction that the parties, exercising reasonable diligence, could have litigated in a prior action but did not. *Peterson Novelties, Inc v City of Berkeley*, 259 Mich App 1, 11; 672 NW2d 351 (2003). Thus, under the current court rules, whether Holwerda-Huizinga objected to the failure to join defendants in the prior action is irrelevant to whether the doctrine of res judicata bars subsequent actions against the parties to the prior action or their privies. Although the *effect* of not complying with MCR 2.203(A) in an action may be to bar a subsequent claim against a party or privy, it is the doctrine of res judicata that does so, not the court rule.

The doctrine of res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical. *Sewell v Clean Cut Management, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001). “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.” *Peterson Novelties, supra* at 10.

Here, requirements one and two are satisfied because a default judgment was entered in plaintiff’s favor against Holwerda-Huizinga in the prior action. A default judgment constitutes a final determination on the merits and is just as conclusive an adjudication and binding upon the parties as an action which has been rendered following contested proceedings. *Schwartz v Flint*, 187 Mich App 191, 194; 466 NW2d 357 (1991). In addition, the third requirement is also satisfied because the prior action was based on the same facts alleged by plaintiff in this case and could have been resolved in the prior litigation in Muskegon. The critical inquiry is whether defendants, individually, were the same parties or privies of Holwerda-Huizinga.

When a party and nonparty are private entities, “a privy includes a person so identified in interest with another that he represents the same legal right, such as a principal to an agent, a master to a servant, or an indemnitor to an indemnitee.” *Peterson Novelties, supra* at 12-13. Perfect identity of interests is not required, “only a ‘substantial identity of interests’ that are adequately presented and protected by the first litigant.” *Adair v State*, 470 Mich 105, 122; 680 NW2d 386 (2004). So, finding a nonparty is a privy of a prior litigant requires that there exist both a substantial identity of interests and a functioning or working relationship so that the interests of the nonparty are represented and protected by the party to the litigation. *Phinisee v Rogers*, 229 Mich App 547, 553-554; 582 NW2d 852 (1998).

In *Wildfong v Fireman’s Fund Ins Co*, 181 Mich App 110; 448 NW2d 722 (1989), the plaintiffs filed an action on behalf of their company against its insurance company. The action

was later settled at the direction of the plaintiffs who later filed a separate action against the insurer in their individual capacity alleging similar claims. *Id.* at 112. The trial court granted the defendants' motion for summary disposition based on res judicata. *Id.* at 113. The plaintiffs argued on appeal that the trial court erred because the first action was brought in the name of the corporation and settled by the plaintiffs in their corporate, not individual capacities, permitting the plaintiffs to maintain the second action in their individual capacities. *Id.* at 114-115. The *Wildfong* Court affirmed the trial court because in each case the plaintiffs "were asserting and protecting their individual rights." *Id.* at 116. The *Wildfong* Court quoted our Supreme Court in *Howell v Vito's Trucking and Excavating Co*, 386 Mich 37; 191 NW2d 313 (1971):

"Where a person brings an action or is sued in his individual right, a judgment rendered for or against him is not operative under the doctrine of res judicata in a subsequent action brought by or against the same person in a representative capacity. Similarly, a judgment rendered in an action in which one of the parties appears in a representative capacity is not operative under the doctrine of res judicata in a subsequent action involving the same party in his individual right. These rules have been denied application, however, where a party to one action in his individual capacity and to another action in his representative capacity is in each case asserting or protecting his individual rights." [*Id.* at 45, quoting 46 Am Jur 2d, Judgments, § 525, p 678.]

Here, the parties do not dispute that defendants were not named as parties in the earlier litigation. More importantly though, even if they had been named as representative members of Holwerda-Huizinga in that lawsuit, plaintiff's claim in this case asserts defendants' *individual* liability. As discussed below, an action under the MBTFA may be maintained against individual officers or employees of a contractor that have violated the act. Defendants' potential individual liability also demonstrates that their private interests were not represented in the breach of contract action against their company.

Although the MBTFA is a criminal statute that does not expressly provide a civil remedy, our Supreme Court has long recognized a civil cause of action for its violation. This Court explained in *DiPonio Co v Rosati Co*, 246 Mich App 43, 48; 631 NW2d 59 (2001):

The builders' trust fund act is a penal statute that does not expressly provide a civil cause of action. However, our Supreme Court has long recognized a civil cause of action for violation of the provisions of the act. In *B F Farnell Co v Monahan*, 377 Mich 552, 555; 141 NW2d 58 (1966), the Court cited the longstanding principle that "[w]hen a statute provides a beneficial right but no civil remedy for its securance, [sic] the common law on its own hook provides a remedy, thus fulfilling law's pledge of no wrong without a remedy." The Court therefore recognized a "common-law remedy" in favor of those aggrieved by a contractor or subcontractor's violation of the act. *Id.* at 557. The Court has twice reaffirmed that decision. *In re Certified Question*, 411 Mich 727, 732; 311 NW2d

731 (1981); *National Bank of Detroit v Eames & Brown, Inc*, 396 Mich 611, 620-621; 242 NW2d 412 (1976).^[1]

The MBTFA imposes a trust on funds paid to contractors and subcontractors for products and services provided under construction contracts. MCL 570.151. An individual officer of a contractor or subcontractor on a construction project may be found liable for the diversion of contract funds contrary to the provisions of the MBTFA. In *Brown, supra*, this Court opined:

[I]t is beyond question that a corporate employee or official is personally liable for all tortious or criminal acts *in which he participates*, regardless of whether he was acting on his own behalf or on behalf of the corporation. This rule of law has been used by this Court to extend criminal liability to corporate employees when they, *personally*, caused their corporation to act unlawfully. [*Id.* at 739-740 (citations omitted); Emphasis added.]

The parties do not dispute that each defendant named in plaintiff's complaint was a "corporate employee" in some capacity of Holwerda-Huizinga. Accordingly, each defendant may be individually liable under the MBTFA if they *personally* participated in the misappropriation of money held in trust for plaintiff. But in plaintiff's earlier action for breach of contract against defendants' company, the issue of defendants' individual liability under the MBTFA was not presented. Accordingly, a substantial identity of interests did not exist between defendants and their company such that defendants' interests were adequately represented and protected by the company in the prior action. *Phinisee, supra* at 553-554. Although the corporation's liability is limited to its assets, a personal judgment against an officer or employee could be satisfied from any assets of the officer or employee subject to execution. Therefore, we find the exception stated in *Howell, supra* at 45, does not apply to the present case. We hold that plaintiff's claims against defendants are not barred by res judicata because defendants are not privies of the Holwerda-Huizinga Company. *Id.*; *Peterson Novelties, supra* at 12-13.

We decline to reach the parties' remaining issues because the trial court has not yet addressed them. "Appellate review is limited to issues actually decided by the trial court." *Allen v Keatings*, 205 Mich App 560, 564-565; 517 NW2d 830 (1994).

We reverse and remand for further proceedings. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Richard A. Bandstra
/s/ Jane E. Markey

¹ As noted in *DiPonio, supra* at 48, n 4, "*In re Certified Question, supra* at 732, recognized the right to bring a civil cause of action under the act but limited that cause of action to private construction contracts."