

STATE OF MICHIGAN  
IN THE SUPREME COURT

RICHARD JAMES,

Plaintiff,

and

SAFECO INSURANCE CO.,

Plaintiff-Appellee,

v

STATE FARM FIRE & CASUALTY CO.,

Defendant/Cross-Defendant-  
Appellant,

and

DAVID GASOWSKI,

Defendant/Cross-Plaintiff-Appellee,

and

MARIO SYLVESTRI and AUTO CLUB GROUP  
INS CO.,

Defendants.

UNPUBLISHED  
November 8, 2005

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*Rec*

*12/22/05*

No. 262805  
St. Clair Circuit Court  
LC No. 03-002466-NZ

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(248) 356-8590

LARRY W. HOSKINS (P27771)  
LAW OFFICES OF LARRY W. HOSKINS  
Attorney for Plaintiff-Appellee Safeco  
30 Oak Hollow Street, Suite 265  
Southfield, MI 48034  
(248) 353-5160

JAMES T. MELLON (P23876)  
MELLON, McCARTHY & PRIES, P.C.  
Attorneys for Defendant-Appellee David  
Gasowski  
2301 W. Big Beaver Road, Suite 500  
Troy, MI 48084  
(248) 649-1330

CHARLES TRICKEY III (P21566)  
SCHOOLMASTER, HOM, KILLEEN,  
SIEFER, & ARENE  
Attorneys for Defendant Auto Club Group  
75 North Main Street, Suite 300  
Mt. Clemens, MI 48043  
(586) 465-8203

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CORBIN R. DAVIS  
CLERK  
MICHIGAN SUPREME COURT

Patrick, Johnson &  
Mott, P.C.  
27777 Franklin Road  
1100 American Center  
Southfield, MI 48034  
Tel 248 356-8590  
Fax 248 356-7934

*130460*  
*APL*  
*2/18*  
*29027*

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**BASIS OF JURISDICTION OF THE SUPREME COURT AND STATEMENT  
REGARDING ORDERS APPEALED FROM AND THE RELIEF SOUGHT**

This is an Application for Leave to Appeal:

- a) Order Granting David Gasowski's Motion for Summary Disposition Based on Collateral Estoppel (dated April 26, 2005, **Appendix "A"**); and
- b) Order Granting Plaintiff Safeco Insurance Company of America's Motion for Summary Disposition Based upon Collateral Estoppel (dated April 29, 2005, (**Appendix "B"**)).
- c) the November 8, 2005 Order of the Michigan Court of Appeals, affirming the decision of the trial court.<sup>1</sup> (COA Docket No. 262805, **Appendix "M"**).

The Defendant-Appellant makes this Application for Leave to Appeal pursuant to MCR 7.302, and has filed the Application on February 2, 2006. Jurisdiction of this Court is based upon MCR 7.301(A)(2).

On the basis of the arguments set forth below, the Defendant-Appellant requests that this Honorable Court grant its Application for Leave to Appeal and submits that the trial court and Court of Appeals' respective orders should be vacated and the matter remanded to the trial court for further proceedings.

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<sup>1</sup>State Farm filed a Motion for Reconsideration and/or Rehearing in connection with the Court of Appeals' ruling, which was denied on December 22, 2005. (Order Denying Motion for Reconsideration and/or Rehearing, dated December 22, 2005, **Appendix "N"**).

STATEMENT OF QUESTIONS INVOLVED

- I. WHETHER THE APPELLEES WAIVED THE ISSUE OF COLLATERAL ESTOPPEL (UPON WHICH THE SUBJECT MOTIONS FOR SUMMARY DISPOSITION WERE GRANTED) BASED UPON THE RELEASE AND SETTLEMENT AGREEMENT EXECUTED BY THE APPELLEES, WHICH SPECIFICALLY PROVIDES THAT THE ISSUE OF WHO WAS DRIVING THE JET SKI AT THE TIME THE AUGUST 31, 2002 ACCIDENT OCCURRED WOULD BE LITIGATED IN A FUTURE PROCEEDING?

The Appellees answer, "No."

The Defendant-Appellant answers, "Yes."

The St. Clair County Circuit Court answers, "No."

- II. WHETHER THE TRIAL COURT ERRED IN GRANTING THE APPELLEES' MOTIONS FOR SUMMARY DISPOSITION BASED UPON COLLATERAL ESTOPPEL WHEN IT IS EVIDENT THAT THE DEFENDANT-APPELLANT WAS NEITHER A PARTY, NOR IN PRIVITY WITH A PARTY, TO THE UNDERLYING ACTION?

The Appellees answer, "No."

The Defendant-Appellant answers, "Yes."

The St. Clair County Circuit Court answers, "No."

- III. WHETHER THE TRIAL COURT ERRED IN GRANTING THE APPELLEES' MOTIONS FOR SUMMARY DISPOSITION BASED UPON COLLATERAL ESTOPPEL, PARTICULARLY SINCE THE DEFENDANT-APPELLANT WILL SUFFER CLEAR PREJUDICE IF IT IS NOT PERMITTED TO LITIGATE THE ISSUE OF WHO WAS DRIVING THE JET SKI AT THE TIME THE AUGUST 31, 2002 ACCIDENT OCCURRED?

The Appellees answer, "No."

The Defendant-Appellant answers, "Yes."

The St. Clair County Circuit Court answers, "No."

- IV. WHETHER THE COURT OF APPEALS ERRED WHEN IT DETERMINED THAT THE "RELEASE AND SETTLEMENT AGREEMENT" CONSTITUTED A TRUE RELEASE IN THE CONTEXT OF SAFECO'S CLAIMS AGAINST THE DEFENDANT-APPELLANT?

The Appellees answer, "No."

The Defendant-Appellant answers, "Yes."

The Michigan Court of Appeals Answers, "No".

## GROUNDS FOR REVIEW

On November 8, 2005, the Court of Appeals entered its Opinion and Order, affirming the trial court's grant of summary disposition on the basis of collateral estoppel in favor of Safeco Insurance Company ("Safeco")<sup>2</sup> and David Gasowski (collectively, the "Appellees").<sup>3</sup> In doing so, it rejected the Defendant, State Farm Fire and Casualty Company's ("State Farm"), argument that the Appellees intentionally and voluntarily abandoned a collateral estoppel offense, or any other similar argument, when they settled the underlying litigation.<sup>4</sup> In fact, as discussed in greater detail below, the Release and Settlement Agreement entered into in connection with that action specifically contemplates litigation, *in this action* (i.e., the Declaratory Action), of the jet ski driver's identity at the time the accident occurred.

According to the Court of Appeals, State Farm "failed to raise the affirmative defense of a prior release", and, as a result, it waived the opportunity to rely upon the document as a defense to the Appellees' motions for summary disposition. Slip Op. at \*3. By virtue of its ruling, it also appears that the Court has opined:

- a. State Farm, in some fashion, admitted the establishment of Richard James and Safeco Insurance Company's prima facie case, but, nevertheless, championed the Release and Settlement Agreement as a means to preclude the relief requested in the Complaints; and
- b. The Release and Settlement Agreement at issue in this action effectively operated as an "abandonment of a claim" on the part of Richard James and/or Safeco Insurance Company, such that State Farm was compelled to raise the document as an affirmative defense to the litigation pursuant to MCR

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<sup>2</sup>Evidenced by the lower court record, Safeco issued a boat owners policy of insurance to Richard James and, ultimately, pursued this action on behalf of its insured. *See* Safeco's Complaint for Declaratory Relief, ¶ 11, filed August 20, 2004. Mr. James remained a party to the litigation, however, as an interested party defendant. *See* Stipulation and Order Dismissing Plaintiff Richard James' Claims and Adding Richard James as an Interested Party Defendant, entered, entered on February 28, 2005.

<sup>3</sup>The Court's Opinion and Order is attached hereto as **Appendix "A"**.

<sup>4</sup>Gasowski v James, et al., St. Clair County Circuit Court Case No. 03-0101-NO.

2.111(F)(3).

State Farm, however, respectfully disagrees. The Release and Settlement Agreement executed by the parties in the underlying action is not the "typical" release contemplated by the Court Rules. In fact, the document is not a shield protecting the Company from any liability for the actions alleged or relief requested in Mr. James and/or Safeco's Complaints. It extinguished neither Mr. James and/or Safeco's claims in, nor State Farm's defenses to, the above-captioned action. Rather, the Release and Settlement Agreement fixed the amount of damages to be paid to Mr. Gasowski as a result of the jet ski accident and extinguished the underlying litigation.

As articulated before the trial court and the Court of Appeals, the document expresses, among other things, the parties' collective intent to litigate anew the issue of the jet ski driver's identity in the captioned action in order to determine the carriers ultimately responsible for payment of the funds owed to Mr. Gasowski and in what ratio. Furthermore, the document explicitly contemplates the possibility that a jury could find Richard James to be the driver of the jet ski (as had been determined in the underlying action), thereby requiring State Farm, as well as the other insurers, to pay additional monies to Mr. Gasowski as a result of the accident. Accordingly, another and different disposition of State Farm's appeal from the trial court's orders granting summary disposition, dated April 26 and 29, 2005, respectively, would have resulted if the above-described palpable errors had not occurred.

State Farm, therefore, appeals to the discretion of this Honorable Court, pursuant to MCR 7.302, and requests that it grant the instant Application for Leave to Appeal, or, in the alternative, enter an order (1) vacating its determination that State Farm is precluded from relying upon the Release and Settlement Agreement, which contemplates that the parties will relitigate the jet ski driver's identity; and (2) remanding this action to the trial court for further proceedings to accomplish that objective, including trial.

State Farm will clearly suffer substantial harm should this not occur. Furthermore, this Court's consideration of the issues raised in this Application would benefit the judicial system, as well as maintain the integrity of the parties' expressed intent.

## INTRODUCTION

The captioned suit represents the second of three actions brought with regard to an accident that occurred near Harson's Island on August 31, 2002, when three longtime friends (Mario Sylvestri, Richard James, and David Gasowski) were operating personal watercrafts.<sup>5</sup> The liability in each action is dependent, primarily, upon resolution of the following issue:

Who was driving/operating the jet ski upon which David Gasowski and Richard James were riding at the time the watercraft struck a bridge on August 31, 2002? Gasowski or James?

The Plaintiff-Appellee, Safeco Insurance Company of America ("Safeco"), and the Defendant-Appellee, David Gasowski (collectively, the "Appellees"), attempt to seize upon a resolution reached between the parties in the underlying litigation and use it as a sword in this action, thereby precluding State Farm from litigating this issue.<sup>6</sup> However, the Appellees' attempts to rely

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<sup>5</sup>As discussed in greater detail below, Richard James and David Gasowski were both riding on the same jet ski when it collided with a bridge. Mr. Gasowski sustained severe injuries in the accident and, ultimately, brought suit against Mr. James and Mr. Sylvestri in the action entitled, Gasowski v James, et al., St. Clair County Circuit Court Case No. 03-0101-NO. (See Motion for Summary Disposition Hearing Tr, dated April 11, 2005, p 12, **Appendix "C"**). This action is, hereafter, referred to as, "the underlying litigation".

Thereafter, on September 31, 2003, Mr. James commenced this action (the second suit), seeking a declaratory judgment that the Defendant-Appellant, State Farm Fire and Casualty Company ("State Farm"), has a duty to defend and indemnify him in the underlying litigation. Id. The Plaintiff-Appellee, Safeco Insurance Company of America (Mr. James' boaters insurance carrier), intervened in the action since it paid for an attorney to defend Mr. James in the underlying litigation after State Farm ceased payment for his defense (Id. at 13) based upon its belief that Mr. James was not operating the jet ski at the time the accident occurred. This suit has been referred to by the parties as the "Declaratory Action".

David Gasowski commenced the third action against State Farm, attempting to set forth a breach of contract action and various tort claims for injuries he allegedly sustained because State Farm terminated payments for Mr. James' defense in the underlying litigation. This action, entitled, Gasowski v State Farm, St. Clair Circuit Court Case No. 04-002812-CZ, has recently been resolved and dismissed by the parties.

<sup>6</sup>As discussed below, Mr. Gasowski and Safeco filed motions for summary disposition based upon collateral estoppel (Safeco by concurrence). During the oral arguments convened to address

upon the doctrine of collateral estoppel in the captioned action are misplaced.

In fact, despite the Appellees' machinations, it is evident that collateral estoppel does not apply to bar litigation of the issue in this action. Significantly, the Appellees cannot meet their burden in establishing that State Farm was a party to the underlying litigation entitled David Gasowski v Richard James, et al. (St. Clair County Circuit Court Case No. 03-0101-NO) in order for this doctrine to apply. Furthermore, it appears that any previous "determination" of the identity of the jet ski driver may have been affected by long-standing relationships among the individual parties to these actions, and, as a result, obvious prejudice would result if State Farm were precluded from litigating the above-referenced issue.

Furthermore, and perhaps of greatest importance, it is significant to recognize that the Appellees intentionally and voluntarily abandoned a collateral estoppel offense, or any other similar argument, when they settled the underlying litigation. In fact, the Release and Settlement Agreement entered into in connection with that action specifically contemplates litigation, *in this action* (i.e., the Declaratory Action), of the jet ski driver's identity at the time the accident occurred. (Release and Settlement Agreement, **Appendix "D"**).

The trial court, therefore, erred when it granted the subject Motions for Summary Disposition and determined that State Farm was collaterally estopped from litigating the identity of the jet ski driver. Accordingly, State Farm pursues this appeal.

## STATEMENT OF FACTS

### **(Factual Background)**

As noted above, the captioned litigation stems from a watercraft accident that occurred on August 31, 2002. The accident occurred when a jet ski, owned by the co-Defendant, Mario Silvestri, collided with a bridge located on the Middle Channel near Harson's Island. At the time the accident

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the motions, the Defendant, Auto Club Group Insurance, concurred in the motions. While benefitting from the trial court's rulings, it did not file a separate order concerning the motions. *See, contra*, **Appendices "A" and "B"**.

occurred, Mr. Silvestri had been enjoying a day on the water with his elementary school friends, Richard James and David Gasowski. (M. Silvestri Dep., dated March 4, 2004, pp 5-6, **Appendix “E”**).

The preeminent issue to be resolved in this litigation, which involves the Safeco’s claim for damages allegedly resulting from State Farm’s purported “wrongful withdrawal” of a defense for Richard James in the underlying litigation, surrounds the identity of the person driving/operating the jet ski at the time the accident occurred. Specifically, in the underlying action entitled David Gasowski v Richard James, et al. (St. Clair County Circuit Court Case No. 03-0101-NO (the “underlying action”)), State Farm determined that it was no longer responsible to financially provide for the defense of Mr. James based upon evidence indicating that Mr. Gasowski, as opposed to Mr. James, was operating the jet ski at the time of the accident.

Following the accident, statements were secured from numerous witnesses and on multiple occasions. (Statements, **Appendix “F”**). Based upon statements given by witnesses at the scene, including the co-Defendants Silvestri and James, the St. Clair County Sheriff’s Department prepared an Official Boating Accident Report that identified Mr. Gasowski as the operator of the jet ski. (Official Boating Accident Report, **Appendix “G”**).

Nevertheless, after commencement of the underlying action, Mr. James, modified his version of events and stated during his deposition and in response to requests for admissions that he was driving the jet ski at the time the accident occurred. (R. James Dep., dated March 4, 2004, p 8, **Appendix “H”**; James’ Answers to Request for Admissions, **Appendix “I”**). In addition, while Mr. Silvestri admitted in the underlying litigation that, “immediately prior to the accident the jet ski was being driven by Richard James”, he also admitted that, because he was approximately 100 feet ahead of the jet ski carrying Mr. James and Mr. Gasowski, he “has no direct knowledge of David Gasowski or Richard James just prior to or at the time of the accident.” (Silvestri’s Answers to Second Request for Admissions, **Appendix “J”**).

Based upon those “admissions” and depositions of Mr. James and Mr. Silvestri, lasting approximately 30 minutes and 15 minutes, respectively, Mr. Gasowski sought summary disposition

in the underlying litigation. After listening to the arguments of counsel with regard to the Motion for Summary Disposition filed in connection with that action, the trial court granted the Motion in favor of Mr. Gasowski, stating, “. . .Because the Defendant James has already admitted his negligence, summary disposition is proper on that issue. . . .” (June 14, 2004 hearing transcript (St. Clair County Circuit Court Case No. 03-0101-NO), p. 17, **Appendix “K”**). An order encapsulating the trial court’s ruling was entered on June 14, 2004. (**Appendix “L”**).

Thereafter, in October of 2004, the parties to the underlying litigation entered into a Release and Settlement Agreement, thereby resolving that action. (**Appendix “D”**). Among other terms encompassed within the document, the parties specifically agreed as follows:

\* \* \*

2. If it is determined in the Declaratory Action that Richard W. James was the driver of the jet ski at the time of the August 31, 2002 occurrence, following the entry of a final order, then Plaintiff shall receive an additional One Hundred Thousand and 00/100 (\$100,000.00) Dollars to be paid equally by each of the three Insurers, to wit: Thirty Three Thousand Three Hundred Thirty Three and 00/100 (\$33,333.00) Dollars within ten (10) days of the issuance of the final Order.
3. However, if it is determined in the Declaratory Action that Richard W. James was not the driver of the jet ski at the time of the August 31, 2002 occurrence, then Plaintiff shall not receive any further monies from the Defendants or their Insurers. (Id. at p. 4).

#### **(Procedural History)**

As previously noted, Mr. James commenced the captioned action, naming, among others, State Farm and David Gasowski. In filing the action, Mr. James sought a declaratory judgment that State Farm was required to defend and indemnify him in the underlying litigation because he was operating the jet ski with it’s owner’s (Mario Sylvestri’s) permission. (*See* Motion for Summary Disposition Hearing Tr, dated April 11, 2005, p 12, **Appendix “C”**).

Although State Farm filed an answer to Mr. James’ complaint on November 26, 2003, Mr. Gasowski was dismissed from the action on January 8, 2004, because Mr. James failed to serve him

with a copy of the complaint. Id. Thereafter, however, the trial court granted Mr. James' Motion to File a First-Amended Complaint on March 15, 2004, which served only to reinstate Mr. Gasowski as a defendant to the action. Id. at p 13. According to the trial court, Mr. Gasowski was reinstated ". . .solely for the purpose of litigating the question of fact as to who was driving the jet ski at the time of the accident." Id. See also, Id. at p 15.

On February 7, 2005, Mr. Gasowski filed a Motion for Summary Disposition based upon the doctrine of collateral estoppel. Id. at p 14. Specifically, Mr. Gasowski asserted that the identity of the individual operating the jet ski at the time of the accident was previously determined in the underlying litigation. Id. Safeco filed a concurrence with the Motion on February 24, 2005.

State Farm responded in opposition to the Motions on March 14, 2005, in which it asserted that it was not barred from litigating the identity of the driver since it was not a party to the underlying action – it merely paid for a defense on behalf of Mr. James (for a period of time) and Mr. Sylvestri. State Farm additionally asserted that the resolution of the underlying litigation likely resulted from collusion between the long-time friends and parties to that action, and to use that resolution, barring it from litigating the identity of the driver, would cause State Farm extreme prejudice.

Furthermore, State Farm made executed copies of the Release and Settlement Agreement available to the trial court for review at the hearing on the Motions for Summary Disposition and argued that that document alone precluded the relief sought by the Appellees. Rather, the Release and Settlement Agreement specifically contemplated that ". . .there would be a determination of who the driver was in connection with the accident that underlies these claims in this declaratory judgment action." Id. at p 10.

After listening to the arguments of the parties, the trial court granted the Motions for Summary Disposition, stating as follows:

. . .This Court recognizes at the time of the jet ski, jet ski accident just, just two people were involved and both were injures. One was the driver and one was the passenger. In Case Number 03-0101, Gasowski versus James, this Court ruled that Gasowski was not the driver. This Court finds that the Doctrine of Collateral Estoppel

applies in this case, in the case of James versus State Farm. Id. at 16.

Orders reflecting the trial court's determination were entered on April 26 and 29, 2005. *See* **Appendices "A" and "B"**.

Thereafter, on November 8, 2005, the Court of Appeals entered its opinion and order upholding the trial courts rulings. (**Appendix "M"**). It further denied State Farm's Motion for Reconsideration and/or Rehearing on December 22, 2005. (**Appendix "N"**).

### STANDARD OF REVIEW

The Appellees brought their Motions for Summary Disposition based upon collateral estoppel pursuant to MCR 2.116(C)(7) and (C)(10). *See* County of Alcona v Wolverine Environmental Protection, Inc, 233 Mich App 238; 246 NW2d 586 (1998). To evaluate a motion for summary disposition brought pursuant to MCR 2.116(C)(7), courts may consider all affidavits, pleadings, and other documentary evidence, construing them in the light most favorable to the non-moving party. Id.

However, given the facts and circumstances of this case, the motions should have been reviewed under the same standard and test as that applicable to MCR 2.116(C)(10), and, therefore, should not have been granted unless no factual development could provide a basis for recovery. *See* Gracey v Wayne County Clerk, 213 Mich App 412, 415; 540 NW2d 710 (1995). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual sufficiency of the complaint. Maiden v Rozwood, 461 Mich 109; 597 NW2d 817, 823 (1999). In evaluating a motion under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. MCR 2.116(G)(5); Maiden, 597 NW2d at 824.

Courts presented with a motion for summary disposition under MCR 2.116(C)(7)(10) must give benefit of reasonable doubt to the nonmoving party and must determine whether a record might be developed that would leave open a factual issue on which reasonable minds could differ. All factual inferences are to be drawn in favor of the nonmoving party before summary disposition may

be granted. Before granting summary disposition, the court must be satisfied that it is impossible for the claim asserted to be supported by evidence at trial. Mt. Carmel Mercy Hospital v Allstate Ins Co, 194 Mich App 580; 478 NW2d 849 (1992).

### LAW AND ARGUMENT

**I. THE APPELLEES WAIVED THE ISSUE OF COLLATERAL ESTOPPEL (UPON WHICH THE SUBJECT MOTIONS FOR SUMMARY DISPOSITION WERE GRANTED) BASED UPON THE RELEASE AND SETTLEMENT AGREEMENT EXECUTED BY THE APPELLEES, WHICH SPECIFICALLY PROVIDES THAT THE ISSUE OF WHO WAS DRIVING THE JET SKI AT THE TIME THE AUGUST 31, 2002 ACCIDENT OCCURRED WOULD BE LITIGATED IN A FUTURE PROCEEDING.**

The trial court granted summary disposition in the underlying litigation, allegedly determining the identity of the jet ski driver on June 14, 2004. (**Appendix “L”**). In resolution of that action, the parties entered into a Release and Settlement Agreement three months later (October 20, 2004). (**Appendix “D”**). Notwithstanding the trial court’s previous ruling, the parties voluntarily consented that the identity of the jet ski driver would be litigated in *this* action (i.e., the Declaratory Action) when they agreed to the following terms:

\* \* \*

2. If it is determined in the Declaratory Action that Richard W. James was the driver of the jet ski at the time of the August 31, 2002 occurrence, following the entry of a final order, then Plaintiff shall receive an additional One Hundred Thousand and 00/100 (\$100,000.00) Dollars to be paid equally by each of the three Insurers, to wit: Thirty Three Thousand Three Hundred Thirty Three and 00/100 (\$33,333.00) Dollars within ten (10) days of the issuance of the final Order.
3. However, if it is determined in the Declaratory Action that Richard W. James was not the driver of the jet ski at the time of the August 31, 2002 occurrence, then Plaintiff shall not receive any further monies from the Defendants or their Insurers. (Id. at p 4).

As the parties waived any collateral estoppel argument by virtue of this Agreement, the trial court should have denied the Appellees’ Motions for Summary Disposition.

Waiver is the intentional relinquishment or abandonment of a known right. Greathouse v

Rhodes, 242 Mich App 221; 618 NW2d 106, 112, n 5 (2000). See also Moore v First Security Cas Co, 224 Mich App 370; 568 NW2d 841, 844 (1997); South Macomb Disposal Authority v Michigan Municipal Risk Management Authority, 207 Mich App 475; 526 NW2d 3, 4 (1994). Consequently, "one may waive a known right by acts which indicate an intention to relinquish the right, or by neglecting and failing to act as to induce a belief that the waiver was intentional and purposeful." Book Furniture Co v Chance, 352 Mich 521; 90 NW2d 651 (1958).

The Appellees' argument that State Farm was presented with an "opportunity" to litigate the driver identity issue in the captioned action by defending a collateral estoppel motion is, to put it charitably, a sham. For example, Safeco contended at the hearing held in connection with the subject Motions:

. . .and the agreement, all it says is we're going to litigate the issue. That's what we're doing here today, your Honor, we're litigating the issue today - . . . - arguing and, and establishing that it's collateral estoppel. (See Motion for Summary Disposition Hearing Tr, dated April 11, 2005, pp 11-12, **Appendix "C"**).

Not only does such an argument render the express language of the Release and Settlement Agreement superfluous and nugatory, but it also calls into question whether the Agreement was actually entered into in good faith. In fact, accepting the Appellees' argument would obviate the need for any discussion in the Agreement as to Mr. Gasowski's entitlement if Mr. James was ultimately determined not to be the driver of the jet ski (*see* Release and Settlement Agreement, p 4, ¶ 3, **Appendix "D"**). Rather, the respective insurers should have expected to pay an additional \$33,333.00 and included that amount in the base settlement figure.

Furthermore, the Appellees overlook the fact that Mr. Gasowski was reinstated as a defendant in this litigation to ". . .solely for the purposes of litigating the question of fact as to who was driving the jet ski at the time of the accident." (*See* Motion for Summary Disposition Hearing Tr, dated April 11, 2005, pp 15, **Appendix "C"**). State Farm submits that merely filing a dispositive motion on the basis of collateral estoppel does not fulfill that purpose.

The Appellees have previously raised two arguments in response to the Release and Settlement Agreement relied upon by State Farm:

1. The Appellees did not waive application of the doctrine of collateral estoppel by entering into the Release since the document does not specifically address waiver and/or collateral estoppel; and
2. State Farm had an opportunity to litigate the identity of the jet ski driver in the underlying action.

To put it charitably, however, the Appellees' arguments are, at best, myopic and ignore the basic provisions of the Release and Settlement Agreement.

Citing Celina Mut Ins Co v Citizens Ins Co of America, 133 Mich App 655; 349 NW2d 547 (1984), the Appellee, Safeco Insurance Company of America ("Safeco"), attempts to characterize the subject document as a tool which was used merely ". . .to lock in a settlement value. . .". (*See* Safeco's Brief on Appeal, p 4). However, Safeco relies upon Celina, *supra*, much like a drunk relies upon a lamppost; more for physical support than for illumination. It is evident from the Release and Settlement Agreement that the parties agreed to do more than just put a value on Mr. Gasowski's alleged damages: they agreed to litigate the identity of the jet ski driver **again** in this action (i.e., the Declaratory Action), irrespective of the determination of the driver's identity made in the underlying action. In fact, Mr. Gasowski's entitlement to an additional \$100,000.00 in proceeds was, pursuant to the Release, dependent upon this new determination. (Release and Settlement Agreement, p. 4, **Appendix "D"**).

While the Release does not specifically state, ". . .the doctrine of collateral estoppel is waived" (or similar language to that effect), that "deficiency" is of little import as the Release demonstrates that the parties to the underlying litigation "plainly intended" that the issue surrounding the jet ski driver's identity would be determined anew in this action. *See, Celina*, 133 Mich App at 658. The Appellees bemoan that this may lead to an "inconsistent factual determination" (*see* Safeco Insurance Company of America's Brief on Appeal, p. 6; *see also* David Gasowski's Brief on Appeal, p. 10).; however, they accepted the risk of that circumstance when the Release and Settlement Agreement was executed.

Furthermore, the Appellees' contention that State Farm had an opportunity to litigate the identity of the driver in the underlying action is nothing more than a transparent attempt to obfuscate

the requirements of the Settlement Agreement and Release. What is paramount in conjunction with this action is whether State Farm had an opportunity to litigate the identity of the jet ski driver in this case, not what occurred in the underlying action.

The Michigan appellate courts have routinely recognized that "[i]n interpreting a contract, [a court's] obligation is to determine the intent of the contracting parties." Quality Products & Concepts Co v Nagel Precision, Inc, 469 Mich. 362, 375; 666 NW2d 251 (2003). "If the language of the contract is unambiguous, we construe and enforce the contract as written." Id. A "contract is ambiguous when its provisions are capable of conflicting interpretations." Klapp v United Ins Group Agency, Inc, 468 Mich. 459, 467; 663 NW2d 447 (2003). "[C]ourts must ... give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." Id. at 468.

In this action (i.e., the Declaratory Action), State Farm was not permitted to litigate the identity of the jet ski driver at the time the accident occurred. Rather, State Farm was called upon to defend the Appellees' Motions for Summary Disposition Based Upon Collateral Estoppel and litigate why it should not be bound by the trial court's ruling in the underlying action. Such tactics, however, clearly render the above-quoted paragraphs two and three of the Release and Settlement Agreement mere surplusage and/or nugatory since, if it were known and/or anticipated that the jet ski driver's identity would be "determined" based upon the judgment entered in the underlying action, it was unnecessary to include these paragraphs in the Agreement. In fact, if that was the intent expressed by the Release and Settlement Agreement, the Declaratory Action could have been resolved without requiring the Appellees to file motions for summary disposition, raising the issue of collateral estoppel.<sup>7</sup>

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<sup>7</sup>State Farm's waiver argument was raised and addressed before the trial court; however, Mr. Gasowski suggests that State Farm has waived this argument. Nevertheless, it is evident that this issue is ripe and suitable for this Court to consider, even if the trial court did not. It is well-settled under Michigan law that an appellate court may address an issue not decided below if it involves a question of law for which all the necessary facts were presented at the trial court. *See, e.g., Breighner v Michigan High School Athletic Ass'n*, 244 Mich App 567, 579; 662 NW2d 413 (2003)

Based upon the above arguments, alone, the trial court clearly erred in granting the Appellees' Motions for Summary Disposition. Affirming the trial court's rulings will only perpetuate that error.

**II. THE TRIAL COURT ERRED IN GRANTING THE APPELLEES' MOTIONS FOR SUMMARY DISPOSITION BASED UPON COLLATERAL ESTOPPEL WHEN IT IS EVIDENT THAT THE DEFENDANT-APPELLANT WAS NEITHER A PARTY, NOR IN PRIVITY WITH A PARTY, TO THE UNDERLYING ACTION.**

**A. General Law Regarding Collateral Estoppel.**

Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when: (1) the previous proceeding culminated in a valid final judgment; (2) and the issue was actually and necessarily determined in that prior proceeding. People v Gates, 434 Mich 146, 154; 452 NW2d 627; cert den 497 US 1004; 110 S Ct 3238; 111 L Ed 2d 749 (1990); McMichael v McMichael, 217 Mich App 723; 552 NW2d 688, 690 (1996). Collateral estoppel is a flexible rule intended to relieve parties of multiple litigation, conserve judicial resources, and encourage reliance on adjudication. Detroit v Qualls, 434 Mich 340, 357 n 30; 454 NW2d 374, reh den 434 Mich 1213 (1990).

In applying collateral estoppel, however, courts must strike a balance between the rights of litigants to their days in court and the need to eliminate repetitious litigation. Howell v Vito's Trucking Co, 386 Mich 37, 48; 191 NW2d 313 (1971). Even when otherwise applicable, collateral estoppel will be qualified or rejected if its use would contravene an overriding public policy or result in manifest injustice. Storey v Meijer, Inc, 431 Mich 368, 377 n 9; 429 NW2d 169 (1988); Horn v Dep't of Corrections, 216 Mich App 58, 64; 548 NW2d 660 (1996); People v Schneider, 171 Mich App 82, 87; 429 NW2d 845 (1988), lv den 432 Mich 929 (1989).

Moreover, an analogous to the present situation, the simultaneous submission of an issue to

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and Thomas v City of New Baltimore, 254 Mich App 196, 209; 657 NW2d 530 (2002). Specifically, the question of what constitutes a waiver is a question of law to be determined by a court. *See, e.g.,* MacInnes v MacInnes, 260 Mich App 280, 283; 677 NW2d 889 (2004).

multiple fact finders in a single proceeding does not constitute relitigation to which estoppel applies. Lumley v UM Board of Regents, 215 Mich App 125, 133; 544 NW2d 692 (1996).

In the subsequent action, the ultimate issue to be concluded must be the same as that involved in the first action. Detroit v Qualls, 434 Mich at 357; People v Schneider, 171 Mich App at 86. The issues must be identical, and not merely similar. Eaton Co Rd Comm'rs v Schultz, 205 Mich App 371, 376; 521 NW2d 847 (1994). In addition, the common ultimate issues must have been both actually and necessarily litigated. Qualls, supra.

To be actually litigated, a question must be put into issue by the pleadings, submitted to the trier of fact, and determined by the trier. VanDeventer v Michigan National Bank, 172 Mich App 456, 463; 432 NW2d 338 (1988), lv den 432 Mich 907 (1989). The parties must have had a full and fair opportunity to litigate the issues in the first action. Gates, 434 Mich at 156-157; Kowatch v Kowatch, 179 Mich App 163, 168; 445 NW2d 808 (1989). Collateral estoppel cannot be based on questions which might have been litigated but were not. McCoy v Cooke, 165 Mich App 662, 666; 419 NW2d 44 (1988), lv den 430 Mich 897 (1988).

To be necessarily determined in the first action, the issue must have been essential to the resulting judgment. Qualls, 434 Mich at 357; Gates, 434 Mich at 158. Thus, findings of fact on which the judgment did not depend cannot support collateral estoppel. Eaton Co Rd Comm'rs, 205 Mich App at 377. Collateral estoppel applies only when the basis of the prior judgment can be clearly, definitely and unequivocally ascertained.

Perhaps of greatest importance to the instant motion pending before the court, it is critical that the parties in the second action must be the same as or privy to the parties in the first action in order for collateral estoppel to apply. Gates, 434 Mich at 155-156; APCOA, Inc v Dep't of Treasury, 212 Mich App 114, 120; 536 NW2d 785 (1995). A party is one who is **“directly interested in the subject matter, and had a right to make defense, or to control the proceedings, and to appeal from the judgment.”** Duncan v State Hwy Comm'n, 147 Mich App 267, 271; 382 NW2d 762 (1985). (Emphasis added). A person is in privity to a party if, after judgment has been rendered, that person “has acquired an interest in the subject matter affected by the judgment through or under one

of the parties, as by inheritance, succession, or purchase.” *Id.* See, also, Husted v Auto-Owners Ins Co, 213 Mich App 547, 556; 540 Nw2d 743 (1995).

Concomitant to the identity of parties requirement, mutuality of estoppel is usually a necessary element of collateral estoppel. Nummer v Dep't of Treasury, 448 Mich 534, 542; 533 NW2d 350, reh den 449 Mich 1204 (1995), cert den 116 S Ct 418; 133 L Ed 2d 335 (1995); Schneider, 171 Mich App at 86. Mutuality of estoppel exists if both litigants in the second action are bound by the judgment rendered in the first action. Stolaruk Corp v Dep't of Transportation, 114 Mich App 357, 362; 319 NW2d 581 (1982).<sup>8</sup>

**B. State Farm Was Not a Party to the Underlying Action.**

Although a necessary requirement for collateral estoppel to apply in this action, the Appellees cannot establish that State Farm was a party to the underlying litigation. On this basis alone, the Motions for Summary Disposition should have been denied by the trial court.

Significantly, as discussed above, a party is one who is “**directly interested in the subject matter, and had a right to make defense, or to control the proceedings, and to appeal from the judgment.**” Duncan, 147 Mich App at 271 (Emphasis added). While State Farm controlled whether a defense was provided to Mr. James in the underlying action at its own expense, it is evident that State Farm did not control the litigation and/or Mr. James’ defenses thereto. In fact, no attorney-client relationship existed between State Farm and the attorney representing Mr. James (Timothy Egerer). Case law is clear that the insured is the client to whom an attorney is obligated in such circumstances, rather than the insurer. See, e.g., Atlanta International Ins Co v Bell, 438 Mich 512;

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<sup>8</sup>There are some exceptions to the mutuality requirement, applied only to a defensive use of collateral estoppel, which do not appear to be present in this action. Knoblauch v Kenyon, 163 Mich App 712, 720; 415 NW2d 286 (1987). The exceptions include when the defendant in the second action and the defendant in the first action had a relationship such that the liability of the second defendant is entirely dependent on the culpability of the defendant exonerated in the first action, such as indemnitor/indemnitee or master/servant, Couch v Schultz, 176 Mich App 167, 170-171; 439 NW2d 296 (1989), and when a malpractice claim is dependant on an issue already adversely resolved against the plaintiff, Alterman v Provizier, Eisenberg, Lichtenstein & Pearlman, PC, 195 Mich App 422, 425-427; 491 NW2d 868 (1992).

475 NW2d 294 (1991); Michigan Millers Mut Ins Co v Bronson Plating Co, 197 Mich App 482; 196 NW2d 373, aff'd on other grounds 445 Mich 558 (1994), overruled on other grounds Wilke v Auto-Owners Ins Co, 469 Mich 41; 664 NW2d 776 (2003).

Because the Appellees cannot establish this requisite element in order to invoke the doctrine of collateral estoppel, the Motions for Summary Disposition should have been denied by the trial court. The trial court erred when it failed to do so.

**III. THE TRIAL COURT ERRED IN GRANTING THE APPELLEES' MOTIONS FOR SUMMARY DISPOSITION BASED UPON COLLATERAL ESTOPPEL, PARTICULARLY SINCE THE DEFENDANT-APPELLANT WILL SUFFER CLEAR PREJUDICE IF IT IS NOT PERMITTED TO LITIGATE THE ISSUE OF WHO WAS DRIVING THE JET SKI AT THE TIME THE AUGUST 31, 2002 ACCIDENT OCCURRED.**

Based upon the evidence garnered concerning the August 31, 2002 accident, including the conflicting statements given concerning the incident, any prior determination of the identity of the jet ski driver may have been affected by long-standing relationships among the parties to the underlying action. As noted above, the three gentlemen involved in this incident are friends; in fact, Mr. Silvestri has known Mr. James and Mr. Gasowski since elementary school. (M. Silvestri Dep, dated March 4, 2004, pp 5-6, **Appendix "E"**). Mr. James is, himself, familiar with the insurance industry and issues of coverage, having worked for SAFECO from 1993 to 2000. (R. James Dep, dated March 4, 2004, pp 24-25, **Appendix "H"**). Thereafter, Mr. James obtained employment with AAA (*Id.* at pp 23, 25), which voluntarily became part of these proceedings and participated in the settlement of the underlying action.

Clearly, State Farm would be prejudiced if it were bound by any determination concerning the identity of the jet ski driver from the underlying action, particularly when it appears that that action was nothing more than mere pretense. Notwithstanding this issue, State Farm submits that whether there was any collusion between Messrs. Gasowski, James, and Silvestri is, itself, a question to be submitted to the jury for determination, thereby precluding entry of summary disposition.

**IV. THE COURT OF APPEALS ERRED WHEN IT DETERMINED THAT THE “RELEASE AND SETTLEMENT AGREEMENT” CONSTITUTED A TRUE RELEASE IN THE CONTEXT OF SAFECO’S CLAIMS AGAINST THE DEFENDANT-APPELLANT.**

**A. By Relying Upon the Release and Settlement Agreement to Oppose the Appellees’ Motions for Summary Disposition, State Farm Has Not Raised an Affirmative Defense.**

Pursuant to MCR 2.111(F)(3), affirmative defenses must be raised in the responsive pleading, unless they previously have been raised in a motion for summary disposition before the filing of a responsive pleading. MCR 2.111(F)(2)(a). The failure to raise an affirmative defense as required by MCR 2.111(F) constitutes a waiver of that affirmative defense. *See Stanke v State Farm Mut Automobile Ins Co*, 200 Mich App 307, 312; 503 NW2d 758 (1993); *Campbell v St John Hosp*, 434 Mich 608, 616; 455 NW2d 695 (1990).

In considering what formulates an affirmative defense, this Court aptly recognized:

. . . An affirmative defense is a defense that does not controvert the plaintiff’s establishing a prima facie case, but that otherwise denies relief to the plaintiff. *Campbell, supra*. In other words, it is a matter that accepts the plaintiff’s allegation as true and even admits the establishment of the plaintiff’s prima facie case, but that denies that the plaintiff is entitled to recover on the claim for some reason not disclosed in the plaintiff’s pleadings. See 2 Martin, Dean & Webster, Michigan Court Rules Practice, p. 192. For example, the running of the statute of limitations is an affirmative defense. MCR 2.111(F)(3)(a). Thus, although the plaintiff may very well have a valid claim and is able to establish a prima facie case, the defendant, as an affirmative matter, may nevertheless establish that the plaintiff is not entitled to prevail on the claim because the defendant can show that the period of limitation has expired and, therefore, the suit is untimely.

*Stanke*, 200 Mich App at 760-61. *See also Cole v Ladbroke Racing Michigan, Inc.*, 241 Mich App 1, 9; 614 NW2d 169 (2000).

Although titled a “release”, the Release and Settlement Agreement relied upon by State Farm when opposing the Appellees’ Motions for Summary Disposition does not qualify as an affirmative defense to the captioned action. In fact, as previously recognized by this Court:

[1] language is not dispositive of the issue. If something walks like a duck, quacks like a duck and swims, covering it with chicken feathers will not make it into a chicken. *Boyd v Layher*, 170 Mich App 93,

99; 427 NW2d 593 (1988).

Significantly, the Release and Settlement Agreement does not “controvert [Mr. James and/or Safeco’s] establishing a prima facie case<sup>9</sup>” (Stanke, 200 Mich App at 760) or expressly deny the relief sought in the Complaints filed by Mr. James and/or Safeco in this action (e.g., demanding that State Farm provide a defense and indemnify Mr. James in the underlying tort action, as well as order the reimbursement of any costs and attorney fees incurred by Safeco in defending Mr. James in that action). *See* Safeco’s Complaint, p. 5. *See also* Mr. James’ Complaint, pp. 3-4.<sup>10</sup> Perhaps the result in this action would be different if Mr. James and/or Safeco affirmatively alleged in their respective Complaints that State Farm was barred from challenging the action by virtue of collateral estoppel. However, all of the Complaints filed in this action are devoid of any such allegations.

Furthermore, as evidenced by the following, the Release and Settlement Agreement contemplates that Mr. James and/or Safeco will establish a prima facie case and discusses the carriers’ additional responsibility, if any, to Mr. Gasowski dependent upon a jury’s verdict in the captioned action<sup>11</sup>:

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2. If it is determined in the Declaratory Action that Richard W. James was the driver of the jet ski at the time of the August 31, 2002 occurrence, following the entry of a final order, then Plaintiff shall receive an additional One Hundred Thousand

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<sup>9</sup> “[A] prima facie case means, and means no more than, evidence sufficient to justify, but not to compel, an inference of liability, if the jury so finds.” Stewart v Rudner, 349 Mich 459, 474; 84 NW2d 816 (1957), quoting McDaniel v Atlantic Coast Line Railway, 190 NC 474, 475; 130 SE 208 (1925). Similarly, Black’s Law Dictionary (6<sup>th</sup> ed.), has defined “prima facie case” as one which “consists of sufficient evidence in the type of case to get plaintiff past a motion for directed verdict in a jury case or motion to dismiss in a nonjury case; it is the evidence necessary to require defendant to proceed with his case.” (Citations omitted).

<sup>10</sup>The parties also demanded the same of the Defendant, Auto Club Group Insurance Company, which issued a homeowners insurance policy to Mr. Gasowski.

<sup>11</sup>In commencing this action, Mr. James demanded a trial by jury and Safeco reiterated that demand when filing its Complaint. *See* Mr. James’ Complaint and Demand for Jury Trial and Safeco’s Complaint for Declaratory Relief.

and 00/100 (\$100,000.00) Dollars to be paid equally by each of the three Insurers, to wit: Thirty Three Thousand Three Hundred Thirty Three and 00/100 (\$33,333.00) Dollars within ten (10) days of the issuance of the final Order.

3. However, if it is determined in the Declaratory Action that Richard W. James was not the driver of the jet ski at the time of the August 31, 2002 occurrence, then Plaintiff shall not receive any further monies from the Defendants or their Insurers. (See State Farm's Brief on Appeal, Appendix "D", p. 4).

It is evident that, notwithstanding the trial court's previous ruling concerning the jet ski driver's identity, the parties voluntarily consented that the issue would be litigated in this action (i.e., the Declaratory Action). As the parties waived any collateral estoppel argument by virtue of this Agreement, the trial court should have denied the Appellees' Motions for Summary Disposition. See Greathouse v Rhodes, 242 Mich App 221; 618 NW2d 106, 112, n 5 (2000). See also Moore v First Security Cas Co, 224 Mich App 370; 568 NW2d 841, 844 (1997); South Macomb Disposal Authority v Michigan Municipal Risk Management Authority, 207 Mich App 475; 526 NW2d 3, 4 (1994).

Unfortunately, however, it appears that this Court committed palpable error by becoming focused upon the title of the parties' agreement, rather than the substance of the document. It is evident that a different disposition of State Farm's appeal would result but for this error, and justice requires that this error not be perpetuated.

**B. The Agreement Relied Upon by State Farm in Opposing the Appellees' Motions for Summary Disposition Fails to Fulfill the Definition of a Release When Considered in the Context of the Captioned Litigation.**

As discussed by this Court in Matics v Fodor, docket nos. 209671 and 210440, an unpublished opinion of the Court issued on April 2, 1999:

Black's Law Dictionary (6<sup>th</sup> ed.) defines "release" in part as an "[a]bandonment of claim to party against whom it exists, and is a surrender of a cause of action and may be gratuitous or for consideration," citing Melo v National Fuse & Powder Co, 267 F Supp 611, 612 (D Colo 1967), and also as the "giving up or abandoning of a claim or right to personal against whom claim exists or against whom right is to be exercised," citing Adder v Holman & Moody, Inc, 288 NC 484, 219 SE2d 190, 195 (1975); see also Larkin v Otsego Memorial Hospital Ass'n, 207 Mich App 391, 393; 525

NW2d 475 (1994).

A release extinguishes a cause of action. Larkin, 207 Mich App at 393.

In this case, neither Mr. James nor Safeco have abandoned any claim against State Farm at issue in this cause of action by executing the Release and Settlement Agreement. Accordingly, this document does not operate to bar them from the relief that they have requested in their Complaints. Again, perhaps State Farm would have been required to raise the affirmative defense of release in this action if Mr. James and/or Safeco affirmatively alleged in their respective Complaints that State Farm was barred from challenging the action by virtue of collateral estoppel. However, all of the Complaints filed in this action are devoid of any such allegations.

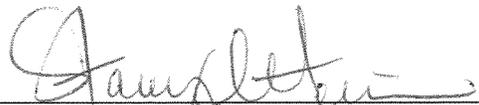
**RELIEF REQUESTED**

Therefore, based upon the foregoing argument and analysis, the Defendant-Appellant, State Farm Fire and Casualty Company, respectfully requests that this Honorable Court grant its Application for Leave to Appeal, or, in the alternative, enter an order:

- A. Vacating the trial court's orders of summary disposition, dated April 26 and 29, 2005, respectively;
- B. Remanding this action to the trial court for further proceedings, including trial; and
- C. Awarding State Farm all other relief to which it is entitled, including its costs and attorney fees incurred in pursuing this appeal.

Respectfully submitted,

**PATRICK, JOHNSON & MOTT, P.C.**

BY: 

**ROBERT L. MOTT, JR. (P27942)**  
**STACEY L. HEINONEN (P55635)**  
Attorneys for Defendant State Farm  
27777 Franklin Road, Suite 1100  
Southfield, MI 48034  
(248) 356-8590

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