

STATE OF MICHIGAN  
IN THE SUPREME COURT

RICHARD JAMES,  
Plaintiff,

and

SAFECO INSURANCE COMPANY OF  
AMERICA,

Plaintiff-Appellee,

v

STATE FARM FIRE AND CASUALTY  
COMPANY,

Defendant-Appellant,

and

AUTO CLUB GROUP INSURANCE  
COMPANY,

Defendant

and

DAVID GASOWSKI,

Defendant-Appellee.

Supreme Court Docket No. 130460

COA Docket No. 262805

St. Clair County Circuit Court  
Case No. 03-2466-NZ  
Hon. Peter E. Deegan

JON R. GARRETT (P25777)  
JOHN C. STEVENSON (P53506)  
Attorneys for Plaintiff James  
535 Griswold Street, Suite 1212  
Detroit, MI 48226  
(313) 961-1885

JAMES T. MELLON (P23876)  
NICHOLAS J. LeFEVRE (P62897)  
Attorney for David Gasowski  
2301 W. Big Beaver Road, Suite 500  
Troy, Michigan 48084  
(248) 649-1330

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

CHARLES TRICKEY III (P21566)  
Attorney for Auto Club Group  
75 North Main Street, Suite 300  
Mt. Clemens, MI 48043  
(586) 465-8203

ROBERT L. MOTT JR. (P27942)  
Attorney for State Farm  
27777 Franklin Road, Suite 1100  
Southfield, MI 48034  
(248) 356-8590

**DEFENDANT-APPELLEE DAVID GASOWSKI'S BRIEF IN OPPOSITION TO  
DEFENDANT-APPELLANT, STATE FARM FIRE AND CASUALTY COMPANY'S  
APPLICATION FOR LEAVE TO APPEAL**

- PROOF OF SERVICE -

**FILED**

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**I. TABLE OF CONTENTS**

I. Table of Contents ..... i

II. Index of Authorities ..... ii

III. Counter-Statement Identifying the Judgement or Order  
Appealed from and Indicating the Relief Sought ..... 1

IV. Counter-Statement of Questions Involved ..... 2

V. Counter-Statement of Material Proceedings and Facts ..... 4

VI. Standard of Review ..... 10

VII. Argument in Opposition ..... 11

    A. Introduction ..... 11

    B. Whether State Farm's Application for Leave to Appeal Persuasively  
Shows That the Questions Presented Involve Legal Principles of  
Major Significance to the State's Jurisprudence? ..... 11

    C. Whether the "Release and Settlement Agreement" Precludes  
Application of Collateral Estoppel When the "Release and  
Settlement Agreement" Does Not Explicitly or Implicitly Provide for  
Any Waiver of Collateral Estoppel, When the Clear Requirements  
and Intent of the "Release and Settlement Agreement" Were Met  
Through a Motion for Summary Disposition That Is Equivalent to a  
Trial on the Merits, and When State Farm Waived Any Reliance on  
the "Release and Settlement Agreement?" ..... 12

    D. Whether the Court of Appeals Erred in Affirming the Decision of  
the Trial Court When it Granted Summary Disposition Based on  
Collateral Estoppel to Mr. Gasowski and Safeco after it Properly  
Determined That the Issue of Who Was the Driver of the Jet Ski at  
the Time of the Accident on August 31, 2002 Had Been Actually  
Litigated and Determined by a Valid and Final Judgment, the Same  
Parties Had a Full and Fair Opportunity to Litigate the Issue, There  
Is Mutuality of Estoppel, and that State Farm Raised No Valid  
Defenses to the Application of Collateral Estoppel? ..... 14

VIII. Conclusion & Request for Relief ..... 24

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## II. INDEX OF AUTHORITIES

### A. Case Law

<u>Alcona v Wolverine Environmental Protection</u> , 233 Mich App 238; 590 NW2d 586 (1998) .....	10
<u>Burkhardt v Bailey</u> , 260 Mich App 636; 680 NW2d 453 (2004) .....	14
<u>Cain v Waste Management</u> , 472 Mich 236; 697 NW2d 130 (2005) .....	13
<u>Capital Mortgage Corp v Coopers &amp; Lybrand</u> , 142 Mich App 531; 369 NW2d 922 (1985) .....	14, 17
<u>City of Detroit v Nortown Theatre</u> , 116 Mich App 386; 323 NW2d 411 (1982) .....	15, 17
<u>Federal Insurance Company v X-Rite</u> , 748 F Supp 1223 (WD Mich 1990) .....	19
<u>Howell v Vito's Trucking and Excavating Company</u> , 386 Mich 37; 191 NW2d 313 (1971) .....	18
<u>Keywell &amp; Rosenfeld v Bithel</u> , 254 Mich App 300; 657 NW2d 759 (2002) .....	16
<u>Klapp v United Ins Group Agency</u> , 468 Mich 459; 663 NW2d 447 (2003) .....	14
<u>Maiden v Rozwood</u> , 461 Mich 109; 597 NW2d 817 (1999) .....	10
<u>Meridian Mutual Insurance Company v Mason-Dixon Lines</u> , 242 Mich App 645, 648; 620 NW2d 310 (2000) .....	15
<u>Minicuci v Scientific Data Management</u> , 243 Mich App 28; 620 NW2d 657 (2000) .....	10
<u>Monat v State Farm Ins</u> , 469 Mich 679; 677 NW2d 657 (2000) .....	10, 16, 19, 20
<u>The Mable Cleary Trust v The Edward-Marlah Muzyl Trust</u> , 262 Mich App 486; 686 NW2d 770 (2004) .....	14, 17

II. INDEX OF AUTHORITIES (CONTINUED)

**B. Court Rules**

MCR 2.116(C)(7) ..... 10  
MCR 2.117 ..... 15  
MCR 7.302(B) ..... 10, 11

**C. Other Authority**

American Heritage Dictionary of the English Language (2000) ..... 14  
Black's Law Dictionary ..... 13, 21  
Oxford English Dictionary (1989) ..... 14  
Restatement (Second) of Judgments, §28 ..... 19  
Restatement (Second) of Judgments, §29 ..... 19, 20

**III. COUNTER-STATEMENT IDENTIFYING  
THE JUDGEMENT OR ORDER APPEALED FROM  
AND INDICATING THE RELIEF SOUGHT**

The jurisdictional summary stated in Appellant State Farm Fire and Casualty Company's ("State Farm") brief is complete and correct. Further, Appellee David Gasowski ("Mr. Gasowski") asks that this Honorable Court deny State Farm's application, an enter an order reflecting such.

**IV. COUNTER-STATEMENT OF QUESTIONS INVOLVED**

- A. WHETHER STATE FARM'S APPLICATION FOR LEAVE TO APPEAL PERSUASIVELY SHOWS THAT THE QUESTIONS PRESENTED INVOLVE LEGAL PRINCIPLES OF MAJOR SIGNIFICANCE TO THE STATE'S JURISPRUDENCE?

The St. Clair County Circuit Court did not answer this question.

The Court of Appeals did not answer this question.

Appellant State Farm did not answer this question.

Appellee David Gasowski answers: "No."

Appellee Safeco answers: "No."

- B. WHETHER THE "RELEASE AND SETTLEMENT AGREEMENT" PRECLUDES APPLICATION OF COLLATERAL ESTOPPEL WHEN THE "RELEASE AND SETTLEMENT AGREEMENT" DOES NOT EXPLICITLY OR IMPLICITLY PROVIDE FOR ANY WAIVER OF COLLATERAL ESTOPPEL, WHEN THE CLEAR REQUIREMENTS AND INTENT OF THE "RELEASE AND SETTLEMENT AGREEMENT" WERE MET THROUGH A MOTION FOR SUMMARY DISPOSITION THAT IS EQUIVALENT TO A TRIAL ON THE MERITS, AND WHEN STATE FARM WAIVED ANY RELIANCE ON THE "RELEASE AND SETTLEMENT AGREEMENT?"

The St. Clair County Circuit Court did not answer this question.

The Court of Appeals did not answer this question.

Appellant State Farm answers: "Yes."

Appellee David Gasowski answers: "No."

Appellee Safeco answers: "No."

- C. WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING THE DECISION OF THE TRIAL COURT WHEN IT GRANTED SUMMARY DISPOSITION BASED ON COLLATERAL ESTOPPEL TO MR. GASOWSKI AND SAFECO AFTER IT PROPERLY DETERMINED THAT THE ISSUE OF WHO WAS THE DRIVER OF THE JET SKI AT THE TIME OF THE ACCIDENT ON AUGUST 31, 2002 HAD BEEN ACTUALLY LITIGATED AND DETERMINED BY A VALID AND FINAL JUDGMENT, THE SAME PARTIES HAD A FULL AND FAIR OPPORTUNITY TO LITIGATE THE ISSUE, THERE IS MUTUALITY OF ESTOPPEL, AND THAT STATE FARM RAISED NO VALID DEFENSES TO APPLICATION OF COLLATERAL ESTOPPEL?

The St. Clair County Circuit Court did not answer this question.

The Court of Appeals did not answer this question.

Appellant State Farm answers: "Yes."

Appellee David Gasowski answers: "No."

Appellee Safeco answers: "No."

## V. COUNTER-STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

### **A. Background**

This Application arises out of two orders that were entered in James v State Farm, St. Clair County Circuit Court Case No. 03-2466-NZ ("declaratory action"), that granted summary disposition to Mr. Gasowski and Safeco, and the Court of Appeals decision affirming that grant.

The declaratory action arose out of Gasowski v James, St. Clair County Circuit Court Case No. 03-0101-NO ("underlying action"), that was settled after a finding by the St. Clair County Circuit that Richard James ("Mr. James") was the driver of the jet ski from which Mr. Gasowski was thrown and ultimately injured.

### **B. The Underlying Action**

The underlying action was filed on January 10, 2003. The action alleged that Mr. James and Mario Silvestri ("Mr. Silvestri") negligently injured Mr. Gasowski while the three were riding jet skis on August 31, 2002. The central question in the underlying action was the identity of the driver of the jet ski at the time of the accident. Of all the parties in both the underlying and declaratory actions, not one, other than State Farm, believed that anyone other than Mr. James was the driver of the jet ski at the time of the accident.

State Farm assumed the defense of Mr. James and Mr. Silvestri in the underlying action by hiring attorney Timothy Egerer ("Mr. Egerer"). Mr. Egerer is a well respected attorney, and has an established history of defending State Farm insureds. When State Farm wrongfully decided to terminate its defense of Mr. James, Eric Smith took over the representation of Mr. James. (**Exhibit 1**). Despite its decision to cut off Mr. James' defense, Mr. Egerer continued his defense of Mr. Silvestri. (**Exhibit 2**).

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With Mr. Egerer representing Mr. Silvestri, and Mr. Smith representing Mr. James, litigation in the underlying case continued. Depositions were taken, and motions were filed and heard.

On April 1, 2004, Mr. Gasowski filed a motion for summary disposition as to liability only against Mr. James and Mr. Silvestri. The motion was premised on materials that were gathered during Mr. Egerer's representation of Mr. Silvestri and Mr. James - a defense that was directed by State Farm. Unsurprisingly, Mr. Gasowski's motion was vigorously opposed; in fact, Mr. James and Mr. Silvestri each filed their own counter-motion for summary disposition.

The court heard oral arguments on the dueling motions for summary disposition on June 14, 2004. (**Exhibit 3**). The Court granted Mr. Gasowski's motion for summary disposition, and denied Mr. James and Mr. Silvestri's cross-motions, after finding that Mr. James was the driver of the jet ski at the time of the accident (**Exhibit 3, Exhibit 4**).

Neither Mr. James nor Mr. Silvestri challenged the court's finding that Mr. James was the driver of the jet ski at the time of the accident. No motion for reconsideration was filed, and interlocutory appeal was not sought. In fact, Mr. James and Mr. Silvestri each filed pre-trial statements which reiterated the findings of the court. (**Exhibit 5, Exhibit 6**).

In his pre-trial statement, Mr. James stated that "plaintiff, David Gasowski, was a rear seat passenger at the time that this accident occurred" (**Exhibit 5**). For his part, Mr. Silvestri stated that "Richard James, with the Plaintiff, David Gasowski, as a rear-seat passenger, was operating the second jet ski." (**Exhibit 6**).

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### C. Settlement of the Underlying Action

Trial in the underlying action was set to begin on November 30, 2004. Before trial could begin, however, the underlying action was settled, and, on November 17, 2004, the underlying action was dismissed with prejudice and without costs. (**Exhibit 7**). In connection with dismissal, the parties executed a "Release and Settlement Agreement." (the "Agreement"). (**Exhibit 8**)

The Agreement was drafted by Mr. Egerer (who, as noted above, had a long-standing history with Stat Farm), and was executed by all the parties. (**Exhibit 8**). The Agreement released Mr. James and Mr. Silvestri<sup>1</sup>, and provided for the filing of a declaratory action (**Exhibit 8**). Ultimately, the purpose of the declaratory action was to sort out the respective obligations of the insurers - State Farm, Safeco Insurance Company of America ("Safeco"), and Auto Club Insurance Group ("Auto Club") - involved in the underlying action. (**Exhibit 8**).

### D. The Declaratory Action

The declaratory action was filed on September 29, 2003. Beyond sorting out the competing positions of the insurers, the declaratory action was framed to resolve the same question as that present in the underlying action: who was the driver of the jet ski at the time of the accident.

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<sup>1</sup> In pertinent part, the Agreement stated that:

"The undersigned further declare that the terms of this Release and Settlement Agreement have been completely read and fully understood and voluntarily accepted for the purpose of making a full and final compromise, adjustment and settlement of any and all tort claims, disputed or otherwise, on account of the damages above mentioned and for the express purpose of precluding forever any additional tort claims arising out of the aforesaid personal watercraft/jet ski accident which forms the basis of the primary lawsuit. (**Exhibit 8** at 4).

The declaratory action was litigated with the interests of State Farm, Safeco, and Auto Club being represented. Mr. Gasowski's interests were also represented. The declaratory action was pending for approximately 17 months, during which time the parties engaged in discovery and numerous motions were filed and decided. The issue of collateral estoppel was raised between counsel on several occasions, and by the court during pre-trial conferences on August 25, 2004 and November 23, 2004. Counsel for State Farm never raised the Agreement as any kind of bar to application of collateral estoppel, or took any steps to preclude the parties from raising collateral estoppel.

**E. Mr. Gasowski's "Motion for Summary Disposition Based on Collateral Estoppel"**

In February 2005, Mr. Gasowski filed his "Motion for Summary Disposition Based on Collateral Estoppel" in the declaratory action. (**Exhibit 9**). The motion sought judicial recognition of the fact that the issue of who was driving the jet ski at the time of the accident had already been resolved in the underlying action, and that collateral estoppel should bar relitigation of that issue in the declaratory action. Both Safeco and Auto Club concurred in the motion. (**Exhibit 10**, and **Exhibit 12** at 10-11).

State Farm filed a response to the motion. Its arguments in opposition to the motion mirror the arguments twice made to the Court of Appeals and now to this court. (**Exhibit 11**). State Farm did not argue that the Agreement barred collateral estoppel, or that the parties in any way agreed to waive collateral estoppel, in its response to Mr. Gasowski's motion. (**Exhibit 11**).

Oral argument on Mr. Gasowski's motion for summary disposition was heard on April 11, 2005. (**Exhibit 12**). Attorneys for State Farm, Safeco, Auto Club, and Mr. Gasowski were present. State Farm argued that the Agreement barred collateral estoppel for the first time at oral argument, and then, only as an afterthought. (**Exhibit**

12). After allowing each party an opportunity for oral argument, the court ruled, in pertinent part, that:

This Court recognizes at the time of the jet ski, jet ski accident, just two people were involved and both were injured. One was the driver and one was the passenger. In Case Number 03-0101 [the underlying action], Gasowski versus James, this Court rules 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.

(Exhibit 12 at 19).

Following the court's grant of summary disposition to Mr. Gasowski, the "Order Granting David Gasowski's Motion for Summary Disposition Based on Collateral Estoppel" was entered on April 26, 2005 (Exhibit 13), and the "Order Granting Plaintiff Safeco Insurance Company of America's Motion for Summary Disposition Based Upon Collateral Estoppel" was entered on April 29, 2005 (Exhibit 14).

#### F. The Appeal

On May 17, 2005, approximately two weeks after the trial court's decision on Mr. Gasowski's motion, State Farm filed a Claim of Appeal from the orders granting summary disposition to Mr. Gasowski and State Farm. State Farm untimely submitted its brief, and forfeited its right to oral argument.

On appeal, State Farm raised three arguments: 1) that the parties waived collateral estoppel in the Agreement, 2) that application of collateral estoppel was erroneous because State Farm was neither a party nor a privy in the underlying action, and 3) that application of collateral estoppel was somehow prejudicial. The trial court rejected these arguments, and the Court of Appeals did the same.

In a well-reasoned, unpublished opinion issued on November 8, 2005, the Court of Appeals found that State Farm itself waived any issues regarding the Agreement (Exhibit 15 at 3), that - after *de novo* review - State Farm was a party to the underlying

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action and that collateral estoppel did apply (**Exhibit 15** at 4), and that State Farm presented no evidence as to how application of collateral estoppel would be prejudicial. (**Exhibit 15** at 4).

**G. State Farm's "Motion for Reconsideration or Rehearing" of the Court of Appeals Opinion**

On November 29, 2005, State Farm filed its "Motion for Reconsideration and/or Rehearing" seeking relief from the Court of Appeals' opinion. The motion was opposed by Mr. Gasowski and Safeco. Mr. Gasowski's response pointed out the fact that State Farm's motion merely reiterated the same arguments it made in its appeal. (**Exhibit 16**). In an order dated December 22, 2005, the Court of Appeals denied State Farm's motion. (**Exhibit 17**).

**H. State Farm's "Application for Leave to Appeal"**

On February 2, 2006, the last day on which an application for leave to appeal could be filed, State Farm filed the instant "Application for Leave to Appeal." Its application failed to identify the grounds for the application as required by MCR 7.302(B), and, again, did no more than reiterate the same arguments it made to the trial court, on appeal, and in its motion for reconsideration. Mr. Gasowski now makes his timely response to the instant application.

## VII. STANDARD OF REVIEW

The standard of review provided in State Farm's application is neither complete nor correct. Because this is an application for leave to appeal, State Farm must persuasively show that the questions presented should be reviewed by this Court. MCR 7.302(B) provides, in pertinent part, that:

**(B) Grounds.** The application must show that

(1) the issue involves a substantial question as to the validity of a legislative act;

(2) the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity;

(3) the issue involves legal principles of major significance to the state's jurisprudence[.]

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If this were not an application for leave to appeal, the court would review *de novo* a trial court's decision on a motion for summary disposition applying collateral estoppel. Monat v State Farm Ins Co, 469 Mich 679, 683; 677 NW2d 679 (2004); Maiden v Rozwood, 461 Mich 109, 118; 597 NW2d 817 (1999); Minicucci v Scientific Data Management, 243 Mich App 28, 34; 620 NW2d 657 (2000).

Further, a motion for summary disposition based on collateral estoppel is brought under MCR 2.116(C)(7). In determining whether summary disposition was appropriate, the court must review all affidavits, pleadings, and other documentary evidence presented in a light most-favorable to the non-moving party. Alcona v Wolverine Environmental Protection, 233 Mich App 238, 245-246; 590 NW2d 586 (1998).

## VIII. ARGUMENT IN OPPOSITION

### A. INTRODUCTION

At the outset, it should be noted that State Farm's application does not show that there are any substantial questions as to the validity of any legislative acts. It does not show that there are any issues of significant public interest. It does not show that there are any legal principles of major significance to the state's jurisprudence. Simply put, there is little purpose to the instant application other than to harass, prejudice, and otherwise needlessly draw out a case that has gone on for far too long.

Further, the declaratory action at the heart of this application existed for one purpose: to resolve the question of who was the driver of the jet ski at the time of the accident on August 31, 2002. By way of summary disposition, the trial court found that the issue was resolved in the underlying case of, and, via application of collateral estoppel, imported that decision into the declaratory action. The Court of Appeals found that the trial court did not err, and, on State Farm's motion for reconsideration, remained steadfast in that conclusion.

Now, for the fourth time, State Farm makes the same arguments to this Court that have been rejected time and time again. State Farm's arguments should be once more rejected, and its application for leave to appeal should be denied.

### B. **WHETHER STATE FARM'S APPLICATION FOR LEAVE TO APPEAL PERSUASIVELY SHOWS THAT THE QUESTIONS PRESENTED INVOLVE LEGAL PRINCIPLES OF MAJOR SIGNIFICANCE TO THE STATE'S JURISPRUDENCE?**

In reviewing State Farm's application one thing should be strikingly clear: it does not state - neither explicitly nor implicitly, and certainly not persuasively - the grounds on which it is brought. MCR 7.302(B) requires, in pertinent part, that:

**(B) Grounds.** The application must show that

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- (1) the issue involves a substantial question as to the validity of a legislative act;
- (2) the issue has significant public interest and the cases is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity;
- (3) the issue involves legal principles of major significance to the state's jurisprudence[.]

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Here, there are no questions regarding a legislative act and no questions of significant public interest. At best, the instant application can only be brought on the grounds that it "involves legal principles of major significance to the state's jurisprudence." MCR 7.302(B)(3).

Despite the mandate of MCR 7.302(B) that "[t]he application must show" its grounds, State Farm expends not one word as to how this application involves principles of any significance to the state's jurisprudence, let alone major significance. The application - and the underlying and declaratory actions on which it is based - involve simple determinations of fact, and the uncomplicated application of settled law concerning collateral estoppel. Simply put, this case would add nothing new to this state's jurisprudence if leave were granted. Consequently, the instant application should be denied.

**C. WHETHER THE "RELEASE AND SETTLEMENT AGREEMENT" PRECLUDES APPLICATION OF COLLATERAL ESTOPPEL WHEN THE "RELEASE AND SETTLEMENT AGREEMENT" DOES NOT EXPLICITLY OR IMPLICITLY PROVIDE FOR ANY WAIVER OF COLLATERAL ESTOPPEL, WHEN THE CLEAR REQUIREMENTS AND INTENT OF THE "RELEASE AND SETTLEMENT AGREEMENT" WERE MET THROUGH A MOTION FOR SUMMARY DISPOSITION THAT IS EQUIVALENT TO A TRIAL ON THE MERITS, AND WHEN STATE FARM WAIVED ANY RELIANCE ON THE "RELEASE AND SETTLEMENT AGREEMENT?"**

In order to make its argument that the parties agreed to waive the issue of collateral estoppel, State Farm has had to twist not only the language but the intent of the Agreement.

State Farm argues that the Agreement "expresses, among other things, the parties' collective intent to litigate anew the issue of the jet ski driver's identity," and "explicitly contemplates the possibility that a jury could find Richard James to be the driver of the jet ski." Contrary to State Farm's belief, the Agreement does not express any such "collective intent to litigate anew" or contemplate any jury trial.

Despite State Farm's singular, unshared view of the Agreement, the Agreement was, in fact, executed in order to fix the liability of the respective insurers implicated in the underlying action - an Agreement that was made in light of a \$700,000 case evaluation award in Mr. Gasowski's favor. The clear, and binding, language of the Agreement evinces no intent to waive collateral estoppel.

In its application, State Farm argues that the parties agreed to "litigate" the issue of who was the driver of the jet ski at the time of the accident in this action. State Farm attempts to turn the parties agreement to "litigate" into something much more. In order to highlight the untenable nature of State Farm's argument, reference to a dictionary is appropriate.<sup>2</sup>

At most, the Agreement contemplated only "litigation." "Litigation" is defined as "[t]he process of carrying on a lawsuit," and "[a] lawsuit itself." Black's Law Dictionary (1999). Further, the verb "litigate" means "to contest at law," "to dispute, contest (a point,

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<sup>2</sup> As stated by the Michigan Supreme Court in Cain v Waste Management, 472 Mich 236, 247; 697 NW2d 130 (2005), "[w]hen determining the common meaning of a word or phrase, consulting a dictionary is appropriate."

etc.)," and "[t]o engage in legal proceedings." Oxford English Dictionary (1989); American Heritage Dictionary of the English Language (2000).

State Farm cannot in good faith deny that litigation<sup>3</sup> took place in the declaratory action - litigation that spread out over approximately two years, and cannot avoid the clear, and binding, language of the Agreement. See, Burkhardt v Bailey, 260 Mich App 636; 680 NW2d 453 (2004) (holding, in part, that a clear contract must be enforced according to its terms).

Ultimately, State Farm's interpretation of litigation flies in the face of the common meaning of litigation, and ignores the proceedings in the declaratory action. The declaratory action had been pending for almost two years before Mr. Gasowski's motion for summary disposition raised the issue of collateral estoppel issue. State Farm apparently believes that those two years were something other than litigation, but cannot explain how those years constituted anything other than litigation. Further, State Farm also fails to explain how the filing of a motion for summary disposition is not litigation, when a ruling on summary disposition is the procedural equivalent of a trial on the merits. See, The Mable Cleary Trust v The Edward-Marlah Muzyl Trust, 262 Mich App 486; 686 NW2d 770 (2004); Capital Mortgage Corporation v Coopers & Lybrand, 142

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<sup>3</sup> Assuming that the dispute between State Farm and the remaining parties regarding the meaning of the term "litigation" might lead to determination that the term "litigation" was truly ambiguous, any ambiguity would have be decided against the drafter of the Agreement - in this case, State Farm. See, Klapp v United Ins Group Agency, 468 Mich 459; 663 NW2d 447 (2003).

Here, The Agreement was drafted by Timothy Egerer, the attorney assigned by State Farm to represent the interests of Richard James (Mr. James) and Mario Silvestri ("Mr. Silvestri") in the underlying action, but who, after State Farm wrongfully withdrew the defense of Mr. James, represented Mr. Silvestri only. Consequently, any ambiguity would have to be construed against State Farm. Id.

Mich App 531, 536; 369 NW2d 922 (1985); City of Detroit v Nortown Theatre, Inc, 116 Mich Ap 386, 392; 323 NW2d 411 (1982).

Moreover, it is unclear how the parties "waived" collateral estoppel. There is no language in the Agreement, or anywhere else, regarding waiver of any defense - let alone waiver of collateral estoppel. In fact, the issue of collateral estoppel was raised by the court itself in pre-trial conferences on August 25, 2004 and November 23, 2004. On both occasions, counsel for State Farm made no mention of the Agreement. Any argument regarding the Agreement was not raised until the end of the April 11, 2005 hearing on Mr. Gasowski's motion. Clearly, State Farm failed to raise or support its own argument, and now seeks relief from this court to correct that mistake.

Additionally, State Farm takes great issue with the Court of Appeals characterization of the Agreement as an affirmative defense. State Farm's umbrage is misplaced, as it is merely attempting to get a fourth opportunity to litigate issues regarding the Agreement. As the Court of Appeals clearly understood: once the issue of the Agreement became known, State Farm should have asserted the Agreement as an affirmative defense - specifically, as an affirmative defense against any invocation of collateral estoppel. (**Exhibit 16** at 3). By not asserting the Agreement, or, at the most, not asserting the Agreement in a timely manner, State Farm waived any defense it had with regard to the Agreement. See, MCR 2.117; Meridian Mutual Insurance Company v Mason-Dixon Lines, 242 Mich App 645, 648; 620 NW2d 310 (2000).

In short, the letter and spirit of the Agreement was met when Mr. Gasowski filed his "Motion for Summary Disposition Based on Collateral Estoppel," and that Agreement did not provide for, and does not operate, to bar the invocation of collateral estoppel.

**D. WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING THE DECISION OF THE TRIAL COURT WHEN IT GRANTED SUMMARY DISPOSITION BASED ON COLLATERAL ESTOPPEL TO MR. GASOWSKI AND SAFECO AFTER IT PROPERLY DETERMINED THAT THE ISSUE OF WHO WAS THE DRIVER OF THE JET SKI AT THE TIME OF THE ACCIDENT ON AUGUST 31, 2002 HAD BEEN ACTUALLY LITIGATED AND DETERMINED BY A VALID AND FINAL JUDGMENT, THE SAME PARTIES HAD A FULL AND FAIR OPPORTUNITY TO LITIGATE THE ISSUE, THERE IS MUTUALITY OF ESTOPPEL, AND THAT STATE FARM RAISED NO VALID DEFENSES TO THE APPLICATION OF COLLATERAL ESTOPPEL?**

On April 11, 2005, the trial court found that the elements of collateral estoppel were present, and that the finding in the underlying action that Mr. James was the driver of the jet ski at the time of the accident worked to bind State Farm in the declaratory action. Like the trial court, the Court of Appeals also found, pursuant to a *de novo* review, that the elements of collateral estoppel were present, and affirmed the trial court's decision. The trial court and the Court of Appeals were correct.

The doctrine of collateral estoppel is intended to relieve parties of the costs and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication. Monat v State Farm Ins Co, 469 Mich 679, 692; 677 NW2d 843 (2004). Ultimately, collateral estoppel seeks to avoid double litigation of a single issue with inconsistent factual determinations. Keywell & Rosenfeld v Bithel, 254 Mich App 300, 342; 657 NW2d 759 (2002). Here, the danger of "inconsistent factual determinations" is acute. In the underlying action, the trial court found that Mr. James was the driver of the jet ski at the time of the accident. State Farm asks that it be allowed to relitigate the issue, and allow for the possibility that Mr. James may not be found to be the driver of the jet ski at the time of the accident. Clearly, the later scenario would be inconsistent with the court's findings - let alone the ultimate disposition of the underlying action.

Three elements must be satisfied in order for collateral estoppel to apply: 1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment, 2) the same parties must have had a full and fair opportunity to litigate the issue, and 3) there must be mutuality of estoppel. Id. at 684. As correctly determined by the trial court, these three elements were satisfied and collateral estoppel applied to the declaratory action. Each of these elements will be discussed in turn below.

1. **The First Element of Collateral Estoppel Was/Is Satisfied: The Issue of Who Was the Driver of the Jet Ski at the Time of the Accident on August 31, 2002 Had Been Actually Litigated and Determined by a Valid and Final Judgment**

In the underlying action, the issue of collateral estoppel turned on resolution of one issue: who was the driver of the jet ski at the time of the accident. Three separate motions for summary disposition were filed in order to resolve this issue. This issue was the "question of fact essential to the judgment," and resolution of that issue was essential in determining whether or not Mr. James was negligent. The net result of the hearing, at which counsel for all parties were present, was that Mr. James was found to be the driver of the jet ski. (**Exhibit 3, Exhibit 4**).

Because a summary disposition ruling is the procedural equivalent of a trial on the merits, The Mable Cleary Trust, supra; Capital Mortgage Corporation, supra; City of Detroit, supra, the trial court's findings, made via summary disposition, satisfied the "actually litigated" portion of the first element of collateral estoppel. The fact that no party, including State Farm, challenged the findings - e.g. by way of a motion for reconsideration, motion for relief from judgment, interlocutory appeal, or otherwise - clearly shows that the court's findings constituted a "valid and final judgment" on that issue.

Because the question of who was driving the jet ski was a question of fact essential to the judgment, because the question was actually litigated, and because the question was determined by a valid and final judgment, the trial court's finding in the underlying action that Mr. James was the driver of the jet ski at the time of the accident satisfies the first element of collateral estoppel.

**2. The Second Element of Collateral Estoppel Was/Is Satisfied: The Same Parties Had a Full and Fair Opportunity to Litigate the Issue, of Who Was the Driver of the Jet Ski at the Time of the Accident on August 31, 2002**

Under the "same parties" portion of the second element, only parties to the former judgment or their privies may take advantage or be bound by it. Howell v Vito's Trucking and Excavating Company, 386 Mich 37, 43; 191 NW2d 313 (1971).

Mr. Gasowski sought to invoke collateral estoppel against State Farm in the declaratory action. Mr. Gasowski was a party in the underlying action, and was a party in the declaratory action.

Despite the fact that it was not a named party in the underlying action, State Farm was, in fact, a party to the underlying action. State Farm's party status is derived from its relationship to the underlying action, i.e. its direct interest in the subject matter, its right to make a defense, its right to control proceedings, and its right to appeal from any judgment. See, Howell, *supra*<sup>4</sup>.

Because State Farm provided a defense to both Mr. James and Mr. Silvestri in the underlying action, State Farm was more than interested in the underlying action. Not only did it control the defense of Mr. James and Mr. Silvestri, it also controlled the

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<sup>4</sup> Howell defined a "party" as "one who is directly interested in the subject matter, and had a right to make defense, or to control the proceedings, and appeal from the judgment." The Court of Appeals adopted the same view in its November 8, 2005 opinion. (**Exhibit 16** at 4).

proceedings. See, Federal Insurance Company v X-Rite, 748 F Supp 1223 (WD Mich 1990) (applying Michigan law). Without its approval, the underlying action would not have settled.

In the trial court, State Farm argued that it was not a party. In the Court of Appeals, State Farm argued, using the same arguments as it did in the trial court, that it was not a party. Despite these arguments, both the trial court and the Court of Appeals found that State Farm was, in fact, a party. State Farm has offered nothing to this court, other than the same worn arguments, that would warrant any other conclusion.

Consequently, State Farm was a party in the underlying action, and is a party in the declaratory action; the "same parties" aspect of the second element of collateral estoppel is satisfied.

As to the second aspect of the second element, whether the "same parties" had a "full and fair opportunity to litigate," this inquiry turns on the factors set out in Restatement (Second) of Judgments.<sup>5</sup> It must be remembered that the decision as to whether a party has had a full and fair chance to litigate an issue will necessarily rest on the trial court's sense of justice and equity. See, Monat, *supra*, at 684.

Here, application of the §28 factors weigh in favor of a finding that State Farm had a "full and fair opportunity" to litigate the issue of who was the driver of the jet ski at the time of the accident. Application of the §28 factors reveals that State Farm could have sought review of the court's finding, the issue was one of fact, there are no differences between the quality, extensiveness, or jurisdictional allocation between the

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<sup>5</sup> In Monat, the Supreme Court directed that courts should look to the factors set forth in §28 and §29 of the Restatement (Second) of Judgments to determine whether a party has had a "full and fair" opportunity to litigate an issue. *Id.* at 683.

underlying and instant actions, there are no differences in the burden of persuasion, and there are no clear and convincing needs for a new determination of the issue.

Further, application of the §29 factors support the same conclusion. No incompatibility would result from applying collateral estoppel, there are no advantages in forum that would favor one party over another, joinder was not possible, the court's finding in the underlying action would not be inconsistent with the instant action, the court's finding was not the production of collusion or compromise, there is no prejudice to the parties in the instant action or danger that the instant action will be complicated, the issue is one of fact, and there are no other compelling circumstances that would make relitigation appropriate. Consequently, State Farm had a "full and fair opportunity" to litigate the issue, and has fulfilled the second aspect of the second element of collateral estoppel.

Because Mr. Gasowski and State Farm were parties in the underlying action, and because both Mr. Gasowski and State Farm had a full and fair opportunity to litigate the issue of who was the driver of the jet ski at the time of the accident, the second element of collateral estoppel is satisfied.

**3. The Third Element of Collateral Estoppel Was/Is Satisfied: Mutuality of Estoppel Is Not Required**

Mutuality of estoppel requires that in order for a party to estop an adversary from relitigating an issue that party must have been a party, or in privy to a party, in the previous action. Monat, supra. In other words, mutuality of estoppel requires that the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him. Id. at 684-685. Where, however, collateral estoppel is being asserted defensively against a party who has already had a full and fair opportunity to litigate the issue, mutuality of estoppel is not required. Id. at 695.

At the outset, it should be noted that the Court of Appeals found that Mr. Gasowski's use of collateral estoppel was defensive<sup>6</sup>, and that mutuality of estoppel was not required.

However, to the extent that Mr. Gasowski's use of collateral estoppel can be viewed as offensive<sup>7</sup>, mutuality of estoppel is present. Just as State Farm is bound by the findings of the court in the underlying action, Mr. Gasowski is equally bound to those findings. Had Mr. James not been found to be the driver of the jet ski in the underlying action, Mr. Gasowski would have been determined to be to the driver. In that circumstance, Mr. Gasowski would have been equally bound by that determination.

Consequently, both State Farm and Mr. Gasowski were equally bound by the trial court's determination regarding the identity of the driver of the jet ski, and the third, and final, element of collateral estoppel is satisfied.

4. **State Farm Raised No Valid Defenses to the Application of Collateral Estoppel**

In its response to Mr. Gasowski's motion for summary disposition, State Farm raised two affirmative defenses against application of collateral estoppel: 1) that it would be prejudiced if it were not allowed to relitigate the issue, and 2) that, by operation of the Agreement, the parties waived collateral estoppel. These same arguments were repeated in its brief on appeal and in its "Motion for Reconsideration and/or Rehearing." Both arguments were rejected by the trial court and the Court of Appeals. While the

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<sup>6</sup> Defensive collateral estoppel is defined as "[e]stoppel asserted by a defendant to prevent a plaintiff from relitigating an issue previously decided against the plaintiff and for another defendant." Black's Law Dictionary (1999).

<sup>7</sup> Offensive collateral estoppel is defined as "[e]stoppel asserted by a plaintiff to prevent a defendant from relitigating an issue previously decided against the defendant and for another plaintiff." Black's Law Dictionary (1999).

second argument was discussed and resolved above, the first argument begs for a response.

State Farm argues that the "long-standing relationships among the parties to the underlying action" taints the finding in the underlying action. State Farm argues that because "the three gentlemen involved in this accident are friends," that because "Mr. Silvestri has known Mr. James and Mr. Gasowski since elementary school," and that because "Mr. James is, himself, familiar with the insurance industry and issues of coverage" there is evidence that Mr. James, Mr. Silvestri, and Mr. Gasowski colluded to commit insurance fraud, and that they essentially hoodwinked the court in the underlying action.

State Farm has pursued this tack since the beginning of its involvement with the underlying action, and continues it, for the fourth time now. State Farm believes that its attacks, which would be considered defamatory in any other context, will by made true by repetition.

This argument was properly dismissed outright by the trial court. The Court of Appeals also dismissed this argument, noting that "State Farm has failed to produce any authority in support its claims of collusion and prejudice," and that "State Farm offers nothing more than conjecture and speculation of collusion." (**Exhibit 16** at 4).

State Farm continues to offer "nothing more than conjecture and speculation" in the instant application. There is nothing, other than its lone belief, that someone other than Mr. James was the driver of the jet ski at the time of the accident. Despite its incredible effort, State Farm cannot avoid the fact that Mr. James, Mr. Silvestri, Mr. Gasowski, Safeco, and Auto Club all point to Mr. James as the driver of the jet ski at the time of the accident, and that the trial court, in making its findings in the underlying

action, weighed the evidence and found that the information it was presented was credible. Simply put, State Farm can point to nothing more than its own opinions to support its theory.

MELLON, MCCARTHY & PRIES, P.C. 2301 WEST BIG BEAVER, SUITE 500 TROY, MICHIGAN 48064-3328 (248) 649-1330

**VIII. CONCLUSION & REQUEST FOR RELIEF**

It should be clear that State Farm has not presented any issues that have not been presented - and definitely and correctly resolved - before. Further, State Farm has not even attempted to demonstrate how any of its issues would have any significant impact on the jurisprudence of the State. For these reasons, Mr. Gasowski respectfully requests that this Honorable Court deny State Farm's "Application for Leave to Appeal," and enter an order reflecting such.

MELLON, McCARTHY & PRIES, P.C.

BY: 

JAMES T. MELLON (P23876)  
NICHOLAS J. LeFEVRE (P62897)  
Attorneys for David Gasowski

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