STATE OF MICHIGAN
IN THE SUPREME COURT

RICHARD JAMES,
Plaintiff,
and

SAFECO INSURANCE COMPANY OF AMERICA,
Plaintiff-Appellee,
vs.

STATE FARM FIRE AND CASUALTY COMPANY,
Defendant-Appellant,
and

AUTO CLUB GROUP INSURANCE and MARIO SLYVESTRI,
Defendants,
and

DAVID GASOWSKI,
Defendant-Appellee.

Supreme Court Docket No. 130460

COA Docket No. 262805

St. Clair County Circuit Court
Case No. 03-002466-NZ
Hon. Peter E. Deegan

130460

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FILED
MAR - 1 2006
CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

PLAINTIFF-APPELLEE SAFECO INSURANCE COMPANY OF AMERICA'S BRIEF IN OPPOSITION TO DEFENDANT-APPELLANT, STATE FARM FIRE AND CASUALTY COMPANY'S APPLICATION FOR LEAVE TO APPEAL
PROOF OF SERVICE

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BASIS OF JURISDICTION AND THE RELIEF SOUGHT

The jurisdictional summary stated in Appellant State Farm Fire and Casualty Company's ("State Farm") brief is complete and correct. Furthermore, Appellee, Safeco Insurance Company of America, asks that this Honorable Court deny State Farm's Application for Leave to Appeal.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. 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.

The Appellant did not answer this question.

The Appellees answer: "No."

II. WHETHER THE "RELEASE & SETTLEMENT AGREEMENT" PRECLUDES APPLICATION OF COLLATERAL ESTOPPEL WHEN ITS LANGUAGE DOES NOT PLAINLY EXPRESS AN INTENT TO WAIVE AND WHEN STATE FARM WAIVED ANY RELIANCE ON THE RELEASE BY FAILING TO PLEAD AN APPROPRIATE AFFIRMATIVE DEFENSE?

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

The Court of Appeals answers: "No."

The Apellees answer: "No."

The Appellant answers: "Yes."

III. WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING THE DECISION OF THE TRIAL COURT WHEN IT GRANTED THE APPELLEES' MOTION FOR SUMMARY DISPOSITION BASED UPON COLLATERAL ESTOPPEL WHEN IT IS EVIDENT THAT THE DEFENDANT-APPELLANT WAS IN PRIVITY WITH A PARTY TO THE UNDERLYING ACTION?

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

The Court of Appeals answers: "No."

The Apellees answer: "No."

The Appellant answers: "Yes."

I. INTRODUCTION AND COUNTER STATEMENT OF FACTS

This Declaratory Judgment Action became necessary because of the events that took place related to the St. Clair County Circuit Court case of Gasowski v. James & Silvestri, Case No. 03-0101-NO ("underlying action"), and it is because of that case that this case must end with the same result.

The underlying action was filed on January 10, 2003. The action alleged that Richard James ("Mr. James") and Mario Silvestri ("Mr. Silvestri") negligently injured David Gasowski ("Mr. Gasowski") while the three were riding Jet Skis on August 31, 2002. The central question was whether Mr. James was the driver of the Jet Ski upon which he and Mr. Gasowski were riding.

Initially, State Farm Fire & Casualty Company ("State Farm") assumed the defense of Mr. James and Mr. Silvestri by hiring Attorney Timothy Egerer ("Mr. Egerer"). Mr. Egerer has an established history of defending State Farm insureds. On June 23, 2003, however, Eric Smith ("Mr. Smith"), retained by Safeco Insurance Company of America ("Safeco"), began representation of Mr. James (**EXHIBIT A**). The change occurred because State Farm decided to terminate its defense of Mr. James.

The underlying case proceeded with Mr. Smith representing Mr. James while Mr. Egerer represented Mr. Silvestri. Substantial discovery, including the depositions of Mr. James and Mr. Silvestri, was performed, and several motions were filed and heard.

On April 1, 2004, Mr. Gasowski filed a motion for partial summary disposition to decide the issue of liability only against Mr. James and Mr. Silvestri. The motion was grounded not only on the admissions made by Mr. James and Mr. Silvestri while they were both being represented by Mr. Egerer, but also on their depositions. Mr. Gasowski's motion was opposed by Mr. Egerer, the State Farm retained and paid

attorney representing Mr. Silvestri. Mr. Silvestri filed a cross motion for summary disposition alleging that the limited duty rule in recreational activity cases applied to this Jet Ski case.

On June 14, 2004, the Honorable Peter E. Deegan heard oral arguments on the dueling motions for summary disposition, (**EXHIBIT B**). The Court concluded that Mr. James was the driver of the Jet Ski; as a consequence, the Court granted Mr. Gasowski's motion for summary disposition. (**EXHIBITS B & C**). Mr. James and Mr. Silvestri's cross-motions were denied (**EXHIBIT C**).

Mr. Silvestri did not appeal Judge Deegan's summary disposition rulings. In fact, Mr. James and Mr. Silvestri each filed pre-trial statements which reiterated those findings (**EXHIBITS D & E**). Specifically, Mr. James stated that "plaintiff, David Gasowski, was a rear seat passenger at the time that this accident occurred" (**EXHIBIT D**), and Mr. Silvestri stated that "Richard James, with the Plaintiff, David Gasowski, as a rear-seat passenger, was operating the second jet ski." (**EXHIBIT E**).

Shortly before trial, the parties agreed on a settlement. Therefore, on November 17, 2004, the underlying action was dismissed with prejudice and without costs. (**EXHIBIT F**).

The Declaratory Judgment Action which is the subject of this appeal was originally filed on September 29, 2003. The purpose of this action was to sort out the respective obligations of the insurers who contributed to the settlement of the underlying action. For its part, State Farm has disputed the identity of the driver of the Jet Ski – despite the fact that the Trial Court in the underlying action determined that Mr. James was the driver of the Jet Ski. It is on account of State Farm's impermissible attempts to

re-litigate this decided issue that the motion for summary disposition was filed by Defendant-Appellee David Gasowski. This Plaintiff-Appellee did file a Concurrence in David Gasowski's motion for summary disposition, a copy is attached as **EXHIBIT G**.

This Plaintiff-Appellee hereby adopts and accepts as true the Counter Statement of Material Proceedings and Facts which has been previously filed with this Honorable Court by Appellee David Gasowski.

II. 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 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[.]
>
> ***

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 predicated on collateral estoppel is brought under MCR 2.116(C)(7). County of Alcona v. Wolverine Environmental

Protection, Inc., 233 Mich App 238, 246; 590 NW2d 586 (1998). To evaluate a motion for summary disposition under MCR 2.116(C)(7), the Court may consider all affidavits, pleadings, and other documentary evidence, construing them in the light most favorable to the non-moving party. Id.

A motion for summary disposition brought under MCR 2.116(C)(10) examines a claim's factual sufficiency. Maiden v. Rozwood, 461 Mich 109, 119; 597 NW2d 817 (1999). To evaluate a motion for summary disposition under MCR 2.116(C)(10), the Court should consider the pleadings, affidavits, depositions, admissions, and other documentary evidence in a light most favorable to the non-moving party. Id. at 119-120. The adverse party must set forth specific facts showing that a genuine issue exists for trial, without merely resting upon the mere allegations or denials in the pleadings. Id. at 120. The moving party is entitled to judgment as a matter of law where the proffered evidence fails to establish a genuine issue of material fact. Id.

III. ARGUMENT

In this Declaratory Judgment Action, there is but one issue: who was the driver of the Jet Ski at the time of the accident. Notwithstanding State Farm's fervent conviction that the issue is still open, this very issue was conclusively determined by the Trial Court in the underlying action – a determination that appropriately and necessarily binds State Farm in this action.

For the reasons discussed in detail hereafter, the Trial Court's finding in the underlying action that Richard James was the driver of the Jet Ski binds State Farm in this action, and, as a consequence, summary disposition in favor of the Plaintiff-

Appellee was appropriate. The Court of Appeals has agreed and affirmed the Trial Court.

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?

In reviewing State Farm's application it is very clear that it does not state, 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
> (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[.]
>
> ***

Here, there are no questions regarding a legislative act and no questions of significant public interest. The only possible reason for bringing the Appeal is that it is 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 completely fails to show 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.

B. WHETHER THE "RELEASE & SETTLEMENT AGREEMENT" PRECLUDES APPLICATION OF COLLATERAL ESTOPPEL WHEN ITS LANGUAGE DOES NOT PLAINLY EXPRESS AN INTENT TO WAIVE AND WHEN STATE FARM WAIVED ANY RELIANCE ON THE RELEASE BY FAILING TO PLEAD AN APPROPRIATE AFFIRMATIVE DEFENSE?

The Release and Settlement Agreement (the Agreement) was co-signed by State Farm, AAA, and Safeco for the sole purpose to settle the underlying case. The Agreement, together with the Gasowski summary disposition decision, effectively determined that at least one of the insurance companies would be liable for damages, but any combination of the insurance companies could be exposed to a percentage of the liability. The Declaratory Judgment Action, which was unresolved at the signing of the Agreement, would determine precisely which company(ies) actually owed. State Farm, AAA, and Safeco signed the Agreement to lock in a settlement value that all three companies agreed was acceptable.

To support its waiver claim, Defendant-Appellant relies on cases which do nothing more than state the legal definition of waiver. Plaintiff-Appellee agrees that 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). It may also be true that "one may waive a known right by acts which indicate an intention to relinquish the right...." Book Furniture Co. v. Chance, 352 Mich 521, 90 NW2d 651 (1958). However, "[t]he language of a stipulation may not be construed to effect the waiver of a right not plainly intended to be relinquished." Celina Mut. Ins. Co. v. Citizens Ins. Co. of America, 133 Mich App 655, 658, 349 NW2d 547, 549 (1984).

Celina Mut. Ins. involved a settlement agreement between two insurance companies. The agreement there stated that the settlement amount would include prejudgment interest, but was silent about which insurance carrier was individually responsible to pay the entire interest amount. Because of that silence, the court reasoned that there was no plain intent of either carrier to waive its right to require the other to pay pro rata interest. Id.

The facts here are analogous. The settlement agreement in Celina Mut. Ins. did not plainly, nor directly address the waiver of the right that ultimately became the subject of the litigation. Similarly, the Agreement here makes no mention of a collateral estoppel waiver. At no time did Safeco ever suggest that the Agreement would act as such a waiver. In fact, on August 25, 2004, after the Gasowski summary disposition was decided, State Farm, AAA, and Safeco attended a pre-trial conference before Judge Deegan. At that conference, in Judge Deegan's chambers, Safeco stated its intention to assert collateral estoppel in the Declaratory Judgment Action. State Farm replied, stating that collateral estoppel did not apply and declared its intention to re-litigate the issue in the Declaratory Judgment Action to determine who actually drove the Jet Ski.

As State Farm points out in its Appellate Brief, the Agreement states, in pertinent part:

> 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.

The Declaratory Judgment Action, based upon the collateral estoppel doctrine, determined that Mr. James was the driver of the Jet Ski by way of a motion for summary disposition. This motion for summary disposition complied with the terms of the Agreement; i.e., the issue was "litigated" by way of a motion for summary disposition. The Declaratory Action afforded State Farm an opportunity to litigate and present its best case as to why it believed Mr. James was not the driver of the Jet Ski. The Circuit Court simply disagreed. When it signed the Release in the underlying case, State Farm knew that Safeco would be arguing collateral estoppel. By signing the Release, State Farm simply took a chance that they could defeat the motion for summary disposition on collateral estoppel. To put it charitably, State Farm gambled and lost.

Accordingly, the facts presented and the holding of Celina Mut. Ins. compel this Court to find that the plain intent of the Agreement did not waive Safeco's right to assert collateral estoppel.

C. WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING THE DECISION OF THE TRIAL COURT WHEN IT GRANTED THE APPELLEES' MOTION FOR SUMMARY DISPOSITION BASED UPON COLLATERAL ESTOPPEL WHEN IT IS EVIDENT THAT THE DEFENDANT-APPELLANT WAS IN PRIVITY WITH A PARTY TO THE UNDERLYING ACTION?

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). In short, collateral estoppel seeks to

avoid double litigation of a single issue with inconsistent factual determinations.[1] Keywell & Rosenfeld v. Bithel, 254 Mich App 300, 342; 657 NW2d 759 (2002).

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.

1. The first element – a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment – is satisfied

In the underlying action, the Court heard oral arguments on motions for summary disposition. These hotly-contested motions were all designed to answer "a question of fact essential to the judgment:" whether or not Mr. James negligently caused Mr. Gasowski's injuries. In order to reach that issue, it was necessary to make a determination as to who was driving the Jet Ski; after all, the issue of Mr. James' negligence turned on whether or not he was driving the Jet Ski. The result of the hearing on the motions for summary disposition, at which counsel for all parties were present, was that Mr. James was found to be the driver of the Jet Ski (**EXHIBITS B & C**).

Because a summary disposition ruling is the procedural equivalent of a trial on the merits, 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

[1] It is important to note that the danger of "inconsistent factual determination" is acute. In the underlying action, the Court found that Mr. James was the driver of the Jet ski at the time of the accident, and it was on this basis that Mr. James was found to be negligent. To allow relitigation of the issue would be to 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, and, therefore, was not negligent. Clearly, the later scenario would be inconsistent with the Court's findings in the underlying action.

Mich App 531, 536; 369 NW2d 922 (1985); City of Detroit v. Nortown Theatre, Inc., 116 Mich App 386, 392; 323 NW2d 411 (1982), the Court's findings made at summary disposition satisfies the "actually litigated" portion of the first element. The fact that no party 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 findings that Mr. James was the driver of the Jet Ski at the time of the accident satisfies the first element of collateral estoppel. Attention can now be turned to the second element of collateral estoppel.

2. The second element – the same parties must have had a full and fair opportunity to litigate the issue – is satisfied

Under the "same parties" aspect 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).

Here, Mr. Gasowski and Safeco Insurance Company seek to invoke collateral estoppel against State Farm. Mr. Gasowski was a party in the underlying action, and was a party in the instant action. Similarly, Safeco and State Farm were parties in the underlying action[2], and are parties in the instant action. Consequently, Mr. Gasowski, Safeco and State Farm fulfill the "same parties" aspect of this element.

[2] 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 (party being defined as "one

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.[3]

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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 same is also true of Safeco.

[3] As stated in Monat, 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. In pertinent part, §28 provides that:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> (1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action; or
>
> (2) The issue is one of law ***; or
>
> (3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or
>
> (4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action; or
>
> (5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

§29 goes on to provide, in pertinent part, that:

> A party precluded from relitigating an issue with an opposing party, in accordance with . . . §28, is also precluded from doing so with another person unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to re-litigate the issue. The circumstances to which considerations should be given include those enumerated in §28 and also whether:
>
> (1) Treating the issue as conclusively determined would be incompatible with an applicable scheme of administering the remedies in the actions involved;
>
> (2) The forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and could likely result in the issue being differently determined;
>
> (3) The person seeking to invoke favorable preclusion, or to avoid unfavorable preclusion, could have affected joinder in the first action between himself and his present adversary;
>
> (4) The determination relied on was preclusive was itself inconsistent with another determination of the same issue;
>
> (5) The prior determination may have been affected by relationships among the parties to the first action that are not present in the subsequent action, or apparently was based on a compromise verdict or finding;
>
> (6) Treating the issue as conclusively determined may complicate determination of issues in the subsequent action or prejudice the interests of another party thereto;

It is worth noting 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 Courts' 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 as to the identity of the driver of the Jet Ski at the time of the accident.

State Farm could have sought review of the Trial Court's findings, the issue was one of fact, there are no differences between the quality, extensiveness, or jurisdictional allocation between the 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 findings 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 re-litigation appropriate. Consequently, State Farm had a "full and fair opportunity" to litigate the issue, and has fulfilled the second aspect of this element.

Because Mr. Gasowski, Safeco and State Farm were parties in the underlying action, and because Mr. Gasowski, Safeco and State Farm had a full and fair

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(7) The issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based;

(8) Other compelling circumstances make it appropriate that the party be permitted to re-litigate the issue.

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. Attention can now be turned to the third, and final, element of collateral estoppel.

3. The third element – mutuality of estoppel – is satisfied

Mutuality of estoppel requires that in order for a party to estop an adversary from re-litigating 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 it is not clear whether the present use of collateral estoppel is offensive or defensive.[4] To the extent that it is defensive, mutuality of estoppel is not required.[5] To the extent that it is offensive, however, mutuality of estoppel must be satisfied.

Here, mutuality of estoppel is satisfied. Mr. Gasowski, Safeco and State Farm were parties in the underlying action, and were parties in the instant action. Just as State Farm is bound by the findings of the Court in the underlying action, Mr. Gasowski and Safeco are equally bound to those findings. Had Mr. James not been found to be the driver of the Jet Ski in the underlying action, both Mr. Gasowski and Safeco would

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[4] 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." Blacks Law Dictionary (1999). 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." Id.

[5] Where 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. Monat, supra, at 695.

have been bound by the finding. Consequently, the third, and final, element of collateral estoppel is satisfied.

Of note, State Farm inappropriately relies on two cases, in particular, to support its position on this point. In quoting Duncan v. State Hwy Comm'n, 147 Mich App 267, 382 NW2d 762 (1985) and Husted v. Auto-Owners Ins. Co., 213 Mich App 547, 540 NW2d 743 (1995), State Farm fails to account for the factual distinction between those cases and the present case. In Duncan and Husted, the parties to which State Farm tries to compare itself were not in privy in the appellate action because they were, in fact, relieved of liability altogether in the first action. A directed verdict was entered, in the first action, in favor of the defendant in Duncan and the lower court ruled in the Husted defendant's favor, relieving that defendant of liability.

The first action here, the summary disposition ruling, did not relieve State Farm of liability. Actually, the summary disposition ruling bound State Farm to provide coverage under Mr. Silvestri's insurance policy. Accordingly, the facts of this case are distinguishable from the facts in Duncan and Husted, two cases upon which State Farm places heavy reliance.

IV. RELIEF REQUESTED

For the above reasons, it is clear that collateral estoppel prohibits re-litigation of the controlling issue: who was the driver of the Jet Ski at the time of the accident. It is also clear that as a result of the binding effect of the Trial Court's prior determination, the instant Declaratory Judgment Action presents no genuine issue of material fact.

Consequently, Plaintiff-Appellee, Safeco Insurance Company of America, respectfully requests that this Honorable Court affirm the Trial Court's granting of it's Motion for Summary Disposition Based on Collateral Estoppel, and order that the

findings of the Trial Court as to negligence and the identity of the driver of the Jet ski made by the Trial Court in Gasowski v. James, Case No. 03-0101-NO, bind State Farm in this Declaratory Judgment Action, and, further, order that as a result of the binding effect of that finding, there is no genuine issue of material fact for trial.

Respectfully Submitted,

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Dated: February 27, 2006