

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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TERRY J. NOSAN DECLARATION OF TRUST DATED 1/15/93, HOROWITZ INVESTMENTS, LLC, JUDITH R. SCHRAM REVOCABLE LIVING TRUST U/A/D 6/1/95, AS AMENDED, AMSTER FAMILY TRUST, STEPHEN KATZ and AUDREY FINE, JOINT TENANTS WITH RIGHT OF SURVIVORSHIP, RICHARD A. KATZ and ANDREA L. KATZ, JOINT TENANTS WITH RIGHTS OF SURVIVORSHIP, LAURA K. ADLER, BREWSTER & HASTINGS, LLC, STEVEN I. VICTOR REVOCABLE TRUST U/A/D 6/26/84, OBRON FAMILY I, LLC, DAVID R. VICTOR REVOCABLE TRUST U/A/D 3/29/00, DAVID J. SPARROW FAMILY TRUST, DAVID KAHAN REVOCABLE LIVING TRUST DATED 8/7/1981, AS AMENDED, LAURYAN INVESTMENTS, LLC, MICJAY, LLC, HENRY SHEVITZ TRUST U/A/D 5/3/77, LOUIS GLAZIER, STEVEN FRIEDMAN, and NORMAN D. KATZ TRUST, U/A/D 4/18/85,

UNPUBLISHED  
June 17, 2014

Plaintiffs-Appellants,

V

GS CLEANTECH CORPORATION,  
GREENSHIFT CORPORATION, GREEN  
PLAINS COMMODITIES, LLC, and YA  
GLOBAL INVESTMENTS, LP,

Defendants-Appellees.

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No. 311420  
Lenawee Circuit Court  
LC No. 11-004292-CK

TERRY J. NOSAN DECLARATION OF TRUST DATED 1/15/93, HOROWITZ INVESTMENTS, LLC, JUDITH R. SCHRAM REVOCABLE LIVING TRUST U/A/D 6/1/95, AS AMENDED, AMSTER FAMILY TRUST, STEPHEN KATZ

and AUDREY FINE, JOINT TENANTS WITH RIGHT OF SURVIVORSHIP, RICHARD A. KATZ and ANDREA L. KATZ, JOINT TENANTS WITH RIGHTS OF SURVIVORSHIP, LAURA K. ADLER, BREWSTER & HASTINGS, LLC, STEVEN I. VICTOR REVOCABLE TRUST U/A/D 6/26/84, OBRON FAMILY I, LLC, DAVID R. VICTOR REVOCABLE TRUST U/A/D 3/29/00, DAVID J. SPARROW FAMILY TRUST, DAVID KAHAN REVOCABLE LIVING TRUST DATED 8/7/1981, AS AMENDED, LAURYAN INVESTMENTS, LLC, MICJAY, LLC, HENRY SHEVITZ TRUST U/A/D 5/3/77, LOUIS GLAZIER, STEVEN FRIEDMAN, and NORMAN D. KATZ TRUST, U/A/D 4/18/85,

Plaintiffs/Counter-Defendants-  
Appellants,

v

GS COES (YORKVILLE I), LLC,

Defendant/Counter-Plaintiff-  
Appellee,

and

YA GLOBAL INVESTMENTS, LP,

Intervenor-Appellee.

Docket No. 311421  
Lenawee Circuit Court  
LC No. 11-004069-CK

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Before: WILDER, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

In Docket No. 311420, plaintiffs appeal as of right the order dismissing plaintiffs' complaint against defendants CleanTech Corporation, GreenShift Corporation, Green Plains Commodities, LLC, and YA Global Investments, LP, on the grounds of res judicata and collateral estoppel. In Docket No. 311421, plaintiffs/counter-defendants appeal as of right the order dismissing plaintiffs' complaint against defendant/counter-plaintiff GS Coes (Yorkville I), LLC ("GSCO"), and intervenor YA Global Investments, LP. We affirm.

#### FACTS AND PROCEDURAL HISTORY

CleanTech and its guarantors, GSCO (a wholly owned subsidiary of CleanTech) and GreenShift (the parent company of CleanTech) borrowed money from YA Global Investments for working capital purposes and to finance the construction of various facilities for the purpose of extracting corn oil to supply to Biofuels Industry Group, LLC (“BIG”) for use in bio-fuels. The borrowed funds were used for start up costs, to purchase and install machinery and equipment, and to develop the intellectual property relating to corn oil extraction. CleanTech owned the intellectual property and the guarantors owned the machinery and equipment. YA Global had a first priority security lien in all of the assets of CleanTech, GSCO, and GreenShift.

In the summer of 2008, CleanTech needed additional funds to complete the project. BIG’s success was dependent upon Clean Tech’s operation of the corn extraction facilities and, therefore, Clean Tech and its guarantors sought financial assistance from the BIG investors. Seventeen of the nineteen plaintiffs are direct investors in BIG. In conjunction with their loan<sup>1</sup> to Clean Tech, each plaintiff executed a Subordination Agreement and a Guaranty Agreement, and Clean Tech executed a Subordinate Secured Promissory Note.

Pursuant to the subordination agreement between YA Global and each individual plaintiff, each plaintiff (referred to as “New Lender” in the agreement) acknowledged that “it is a requirement of the YA Loans that the Bridge Loan Obligations be subordinated to the YA Loans,” and that “the New Lender has agreed to subordinate the Bridge Loan Obligation to the YA Loans.” Each plaintiff agreed that:

1. Any and all obligations and liabilities of the Obligor, or any of their affiliates, to New Lender, and any and all documents entered into in connection therewith (collectively, the “Subordinated Indebtedness,”) shall be and hereby are subordinated and except as set forth in Paragraph 2 below, the payment thereof is deferred until the full and final payment in cash of the YA Loans, including any post-petition interest.

2. Except as expressly set forth in this Paragraph, the Obligor shall not be permitted to pay, and New Lender shall not be permitted to receive, any payments (whether regularly scheduled payments or otherwise) on the Subordinated Indebtedness, unless or until the YA Loans have been paid in full and all commitments by YA to make loans have been terminated, or YA consents to the such payment in writing, which consent may be withheld by YA in its sole and exclusive discretion. Notwithstanding the foregoing, provided that GS COES is current on all of its payments to YA under the GS Coes Credit Agreement, and no other event of default has occurred under the GS COES Credit Agreement, the Borrower may make payments under the Bridge Loan Document to the New Lender in an amount equal to the greater of (i) the ordinary course, monthly interest and principal payments due under the Bridge Loan Documents or (ii) \$100,000. Further, the Borrower may make prepayments of the Bridge Loan Obligations in accordance with the provisions of the Bridge Loan Documents,

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<sup>1</sup> The loan is referred to as a “bridge loan.”

provided that the source of funds for such prepayments is limited to either (x) the Net Cash Flow (as described below) received by the New Lender from the New Facilities (as defined below) in accordance with, and subject to the provisions of Paragraph 3 below, or (y) the proceeds of a third party equity transaction entered into by the Borrower upon terms and conditions acceptable to YA in all respects, as determined by YA in its sole and exclusive discretion.

3. From and after an event of default under the Bridge Loan Documents and/or the YA Loans, and as its sole remedy in any such event of default, the New Lender shall be permitted to receive the net cash flow after costs and expenses from corn oil extraction sales (the "Net Cash Flow") from the following facilities: (a) with respect to GS COES' fourth corn oil extraction facility ("Riga"), one-hundred percent (100%) of the Net Cash Flow from such facility, and (b) with respect to GS COES' fifth corn oil extraction facility ("Albion"), (i) prior to commissioning of Riga, one hundred percent (100%) of the Net Cash Flow from such facility, and (ii) after the commissioning of Riga, and subject to the prior payment to, and receipt by, YA of a payment equal to fifty percent (50%) of the Net Cash Flow from such facility, the New Lender may receive the other fifty percent (50%) of the Net Cash Flow from such facility. If notwithstanding the express provisions of Paragraph 3(b)(ii) above, the New Lender receives payments under paragraph 3(b)(ii) above prior to YA's receipt of its payment of fifty percent (50%) of the Net Cash Flow from Albion under Paragraph 3(b)(ii) above, then the New Lender will hold any such payments in trust, and pay over to YA all such payments until YA has received its fifty percent (50%) share. The Borrower shall be entitled to pledge the Net Cash Flow from Riga and Albion (collectively referred to herein as the New Facilities) to the New Lender as collateral for the Subordinated Indebtedness. Except as provided for in the immediately preceding sentence, the Subordinated Indebtedness is and shall remain UNSECURED, and New Lender shall not file any lien or security interest pertaining to such Subordinated Indebtedness except for New Lender's subordinate security interest in the Net Cash Flow of the New Facilities. For the avoidance of any doubt, the YA liens shall, in any event, be senior to any interest of New Lender irrespective of the time of execution, delivery or issuance of any thereof or the filing or recoding for perfection of any thereof or the filing of any financing statement or continuation statement relating to any thereof. Subject to the terms and conditions of, and provided that YA has the right to do so under, the GS COES Credit Agreement, and the documents related thereto, including, without limitation, that certain Bailee and Waiver Agreement dated June 30, 2008 b and between YA and Global Ethanol, LLC, YA may in its sole and exclusive discretion realize upon the collateral that is subject to the YA Liens at any time, including without limitation, any and all of the Obligor's equipment located at the New Facilities and used for corn oil extraction, and YA shall be entitled to apply the proceeds thereof in reduction of the YA Loans, subject only to the right of the New Lender conferred hereby to receive payments out of the Net Cash Flow from the New Facilities.

4. Except and until the YA Loans are paid in full, and all commitments by YA to make further loans have been terminated, New Lender will not take any action of any kind to accelerate, collect, demand or enforce payment of the Subordinated Indebtedness except as provided in Section 3 above.

The guaranty agreement<sup>2</sup> between CleanTech, its guarantors, and each individual plaintiff, was executed by GSCO (by CleanTech as the managing member of GSCO), and by GreenShift Corporation. The agreement provided in pertinent part:

Until and unless converted into Preferred Stock, as provided for in the SPA [Stock Purchase Agreement], repayment of the Note shall be guaranteed by a pledge of the net cash flows from Guarantor's corn oil extraction sales from Riga and Albion subject to the terms and conditions of that certain Subordination Agreement of even date herewith by and between Senior Lender and Subordinate Lender (which cash flows shall be referred to herein as the "Collateral").

On May 18, 2010, plaintiffs filed a complaint in Oakland Circuit Court against GSCO and CleanTech ("Nosan I") for breach of the promissory notes and the Guaranty Agreements. On September 23, 2010, plaintiffs filed a first amended complaint and proceeded solely against GSCO on the guaranty agreements. YA Global was an intervenor in that case. The case was transferred to Lenawee Circuit Court on April 1, 2011. On September 15, 2011, plaintiffs sought leave to amend to bring CleanTech back into the case and to add claims against YA Global and Green Plains Commodities LLC ("Green Plains") for violation of plaintiffs' claimed security interest after learning that GSCO had sold the corn oil extraction equipment at the Riga facility to Green Plains and that all of the proceeds from the sale went to YA Global. The trial court granted in part and denied in part plaintiffs' motion for leave to amend the complaint:

I mean, when you get down to a security interest in my opinion, and I think that whether or not the plaintiffs have a secured interest at all is what is at issue. I can't find where the borrower ever signed a document that gives a security interest to any of the plaintiffs anywhere, let alone in your claim for cash flow.

As I understand it, security interest is only created if it is signed, and I can't really see where that happened here. And so that having been said, my order – I would sign the order disallowing GS CleanTech back in, but allowing plaintiff to add a claim regarding a breach of contract regarding the sale of the facility.

Plaintiffs never filed an amended complaint. They moved for summary disposition pursuant to MCR 2.116(C)(10), and GSCO and YA Global requested summary disposition pursuant to MCR 2.116(D)(2). GSCO and YA Global asserted that plaintiffs' loans were unsecured and subordinate to YA Global's loans and that plaintiffs and CleanTech signed no security agreement

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<sup>2</sup> Kevin Kreisler, the Chief Executive Officer of CleanTech, signed the agreement as the managing member of GSCO and also as the Chief Executive Officer of GreenShift Corporation.

for the bridge loan. They also presented the affidavit of Troy Rillo, the senior managing director of Yorkville Advisors, LLC, which managed YA Global. Rillo averred in part:

12. Guarantor GS COLES sold the corn oil extraction machinery and equipment in February 2011 to GreenPlains Commodities LLC (“GreenPlains”). In February 2011, Borrower negotiated a license agreement that provided for the payment of a royalty for the use of intellectual property relating to the extraction of corn oil.

13. YA Global agreed to release its security interest in the machinery and equipment that was sold. YA Global retained its security interest in the intellectual property, and continues to have a security interest in the license agreement and royalty payments stream. Secured Creditor has not, and did not here, allow any other creditor to take a security interest in that intellectual property.

\* \* \*

16. Guarantors have not made, and will not make, any corn oil extraction sales from the Riga facility since the date of the sale to GreenPlains. Therefore, they have not had and will not have any “Net Cash Flows” from such sales.

17. Borrower and guarantors still owe YA Global over \$30,000,000.

Following a hearing on February 27, 2012, the trial court issued a written opinion on April 16, 2012. The court denied plaintiff’s motion for summary disposition against GSCO and motion to dismiss YA Global. The court ordered that “Plaintiffs do not have a security interest from Defendant or GS CleanTech Corporation” and that “Plaintiffs’ loans are subordinate to YA Global’s loans, and that YA Global has a superior interest over Plaintiff’s claimed loans.” The court further ordered that no “Net Cash Flow” exists.”

In the meantime, plaintiff had filed a second action on December 9, 2011 (“Nosan II”) containing the same claims based on the same purported facts set forth in their motion to amend their complaint in Nosan I. On July 2, 2012, the court heard GSCO’s motion for entry of final order and/or for summary disposition in Nosan I, and also heard the motions for summary disposition on the grounds of res judicata and collateral estoppel that were brought by Clean Tech, GreenShift, and Green Plains in Nosan II. In dismissing plaintiffs’ complaint in Nosan I with prejudice, the trial court reiterated its former ruling:

I think I was very clear, however, that there was no security interest owed to Nosan in the first case against GS COES. There was no net cash flow available to pay Nosan any of the money that was lent. The corn oil extraction equipment was sold, and that the only remedy left to Nosan was that provided for in Section 3 of the Subordination Agreement.

With regard to Nosan II, the court granted summary disposition to the defendants and explained its reasoning as follows:

Plaintiff[s] assert[] that they have a security interest in the net cash flow. I have ruled that there was no security interest owed to Nosan in the first case against CS COES or GS COES. There is no net cash flow available to pay Nosan the remaining debt because the corn oil extraction equipment was sold, and that was the only remedy available in the Subordination Agreement.

\* \* \*

The Court finds that plaintiffs' claim – claims are barred by res judicata. \* \* Plaintiff argues that they are not the same parties as the first suit. However, all of the defendants argue, and it is apparent that even though they may not be the same parties, they are in privity with the parties in the first suit, and they cannot claim or their claim is barred. Plaintiffs seem to want to take another bite of the apple, thereby reiterating their claims and issues that have been decided, claiming clearly that all relevant documents are before the Court, everything is the same and, as such, should have, could've been resolved in the first action as a whole.

Plaintiffs' claims are barred by collateral estoppel. . . . Although there was argument relative to a valid final judgment in the first case, Michigan law allows a motion for summary disposition to act as a final order for the purposes of collateral estoppel.

Plaintiffs were offered a full and fair opportunity to litigate their claims regarding the security interest and related allegations. I have ruled that there was no security interest, and the decision is tied into the substance of plaintiffs' claims in multiple parts of the Complaint. There is no requirement for mutuality of parties.

As far as the Subordination Agreement is concerned, in the event of default, the party, the plaintiffs' sole remedy is the net cash flow from the corn extraction sales.

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For a valid claim for civil conspiracy, there would've had to have been a concerted action to a more purpose – more persons to unaccomp – to accomplish an unlawful purpose to plaintiffs' damages. I can find no facts to support that the defendants concerted together for unlawful purpose. Again, no security interest for which to conspire against plaintiffs.

Docket No. 311421 (Nosan I)

I

Plaintiffs argue that the trial court erred by granting summary disposition in favor of defendant GSCO on the ground that plaintiffs did not have an enforceable security agreement because the guaranty agreement was not signed by CleanTech. This Court reviews de novo a

trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). The proper interpretation of a contract is a question of law that we also review de novo. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008).

The goal of contract interpretation is to read the document as a whole and apply the plain language used in order to honor the intent of the parties. *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 529; 740 NW2d 503 (2007). "Contracts must be construed so as to give effect to every word or phrase as far as practicable," *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003), and terms used in a contract must be read in context, *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 516; 773 NW2d 758 (2009). If the language is clear and unambiguous, the contract must be interpreted and enforced as written. *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999).

The guaranty agreements in this case specifically state:

[R]epayment of the Note shall be guaranteed by a pledge of the net cash flows from the Guarantor's corn oil extraction sales from Riga and Albion subject to the terms and conditions of that certain Subordination Agreement of even date by and between Senior Lender and Subordinate Lender . . .

And the subordination agreement signed by each plaintiff specifically states:

The Borrower shall be entitled to pledge the Net Cash Flow from Riga and Albion (collectively referred to herein as the "New Facilities") to the New Lender as collateral for the Subordinated Indebtedness. Except as provided for in the immediately preceding sentence, the Subordinated Indebtedness is and shall remain UNSECURED[.]

Thus, while the guaranty agreement and the subordination agreement provide that the borrower was permitted *to pledge* the net cash flows from the corn oil extraction sales from the Riga and Albion facilities, the trial court properly found that the borrower (CleanTech) never signed any document that granted a security interest to plaintiffs in any collateral, including net cash flows. CleanTech signed neither the subordination agreement nor the guaranty agreement. Under New Jersey law,<sup>3</sup> a security interest must be signed by the debtor in order to be effective. NJ Stat Ann 12A:9-203. The guaranty agreement and subordination agreement between YA Global and plaintiffs were limited to the understanding that CleanTech was *authorized* to pledge the net cash flow.

Further, even assuming that a security interest did exist, the evidence presented revealed that no net cash flow existed. The definition of "Net Cash Flow" as defined in the subordination agreement provides that net cash flow can only be realized after the payment of costs and

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<sup>3</sup> Pursuant to the documents governing the transactions in this case, New Jersey law controls any disputes arising from the transactions.

expenses of the facilities. Defendants presented evidence that at the time of the sale of the Riga corn oil extraction equipment, money remained due for the expenses incurred in connection with the construction and operation of the Riga and Albion facilities, and that the costs and expenses exceeded the amount of any sales of corn oil during the period that GSCO owned the equipment. The evidence clearly revealed that GSCO received no net cash flow.<sup>4</sup> The trial court properly granted summary disposition in favor of defendants.

## II

Plaintiffs argue that the trial court erred by finding that YA Global had priority over plaintiffs with regard to the net cash flow. They contend that YA Global subordinated its right to the cash flow to plaintiffs in the subordination agreement. We disagree.

The subordination agreement states that “Any and all obligations and liabilities of the Obligors, or any of their affiliates, to New Lender, and any and all documents entered into in connection therewith (collectively, the “Subordinated Indebtedness,”) shall be and hereby are subordinated. The subordination agreement clearly identifies the pledge of “Net Cash Flow” from the Riga and Albion facilities as collateral “for the *Subordinated Indebtedness*.” The agreement states that plaintiffs “shall not file any lien or security interest pertaining to such Subordinate Indebtedness except for New Lender’s *subordinate* security interest in the Net Cash Flow of the New Facilities. [Emphasis added.] The agreement specifically reiterated that, “For the avoidance of any doubt, the YA Liens shall, in any event, be senior to any interest of New Lender . . . .” Under the plain language of the subordination agreement plaintiffs’ interest in the net cash flow was subordinate to YA Global’s interest in the net cash flow. *Frankenmuth Mut Ins*, 460 Mich at 111.

Docket No. 311420 (Nosan II)

## III

Plaintiffs argue that the trial court erred in granting summary disposition in favor of defendants on the grounds of res judicata and collateral estoppel because Nosan I did not involve any claims against defendants CleanTech, YA Global, and Green Plains and, therefore, did not involve the same parties as Nosan II. This Court reviews de novo whether a trial court properly applied the doctrine of res judicata. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007).

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<sup>4</sup> Plaintiffs contend that the trial court decided defendants’ motion for summary disposition without allowing plaintiffs to conduct discovery regarding the collateral that was the subject of the security agreement. However, plaintiff’s argument is based on affidavits that were prepared after the trial court made its ruling on the motion for summary disposition and these affidavits are not properly before this Court. Further, *plaintiffs* moved for summary disposition on February 6, 2012, arguing that judgment as a matter of law was warranted because there were no genuine issues of material fact before the court. We therefore decline to address this issue.

“The doctrine of res judicata is intended to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication, that is, to foster the finality of litigation.” *Begin v Mich Bell Tel Co*, 284 Mich App 581, 598; 773 NW2d 271 (2009), overruled on other grounds 494 Mich 10; 831 NW2d 849 (2013). Consequently, res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical. A second action is barred when (1) the first action was decided on the merits,<sup>5</sup> (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies. Michigan courts have broadly applied the doctrine of res judicata. They have barred, not only claims already litigated, but every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not. *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999).

Parties are privies if one party’s interest is “so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert.” *Adair v State*, 470 Mich 105, 122; 680 NW2d 386 (2004). Privity requires “both a substantial identity of interests and a working functional relationship in which the interest of the nonparty are presented and protected by the party in the litigation.” Here, plaintiffs’ own evidence reveals the privity between Greenshift, CleanTech, and GSCO. GreenShift owns 100% of CleanTech. All of GreenShift’s intellectual properties, contracts, and assets relating to the operations of the biofuels production and sales are owned by CleanTech. CleanTech directly owned 100% of GSCO. YA Global is the secured lender of the collateral owned by CleanTech and/or GSCO in which plaintiffs’ claimed to possess a security interest. Green Plains purchased the corn oil extraction equipment at the Riga facility and allegedly violated plaintiffs’ security interest. These relationships are sufficient to establish privity for res judicata to apply. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 420; 733 NW2d 755 (2007). Because this ground for dismissal was proper, we need not address the court’s alternate conclusion that collateral estoppel also barred plaintiffs’ second cause of action.<sup>6</sup>

Affirmed.

/s/ Kurtis T. Wilder  
/s/ E. Thomas Fitzgerald  
/s/ Jane E. Markey

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<sup>5</sup> A trial court’s grant of summary disposition is considered a final decision on the merits. The *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 510; 686 NW2d 770 (2004).

<sup>6</sup> Nonetheless, plaintiff’s argument that collateral estoppel does not apply because the parties in the two actions are different is misplaced because “lack of mutuality of estoppel does not preclude the use of collateral estoppel when it is asserted defensively to prevent a party from relitigating an issue that such party has already had a full and fair opportunity to litigate in a prior suit.” *Monat v State Farm Ins Co*, 469 Mich 679, 691-692; 677 NW2d 843 (2004).