

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD JAMES,

Plaintiff,

and

SAFECO INSURANCE CO.,

Plaintiff-Appellee,

v

STATE FARM FIRE & CASUALTY CO.,

Defendant/Cross-Defendant-
Appellant,

and

DAVID GASOWSKI,

Defendant/Cross-Plaintiff-Appellee,

and

MARIO SYLVESTRI and AUTO CLUB GROUP
INS CO.,

Defendants.

UNPUBLISHED
November 8, 2005

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

Before: Cooper, P.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

State Farm Fire & Casualty Co. (State Farm) appeals as of right the order granting Safeco Insurance Co. (Safeco) and David Gasowski summary disposition. We affirm.

On August 31, 2002, Gasowski, Mario Sylvestri, and Richard James were jet skiing on the Middle Channel near Harson's Island. James and Gasowski took a ride on Sylvestri's jet ski, and after losing control, they collided with a bridge. State Farm insured Sylvestri at the time of the accident.

Gasowski brought a tort action against James and Sylvestri.¹ James submitted the claim to State Farm for tender of a defense and for indemnification. While State Farm initially agreed to provide coverage to James under a reservation of rights, it later retracted its coverage, citing the fact that James was not the driver of the jet ski and, therefore, was not an “insured” covered by its policy.² The trial court heard cross-motions for summary disposition and concluded, based on an admission by James, that there was no question of fact that he was the driver of the jet ski at the time of the accident. Accordingly, the trial court granted Gasowski’s motion for summary disposition with respect to the issue of negligence. Shortly before the matter was set for trial, the parties agreed on a settlement, and the action was dismissed with prejudice.

James then filed this declaratory action against State Farm, Sylvestri, and Gasowski, seeking a judgment that, as the driver of the jet ski, he was an insured under the subject insurance policy and that State Farm was contractually obligated to defend and indemnify him in the first tort action. Following a grant of leave to intervene, Safeco, James’ insurer, filed its complaint, alleging that State Farm wrongfully rescinded its coverage because James, as the driver of the jet ski, was insured under the State Farm policy. Auto Club Group Insurance Co. (Auto Club Group), which issued a homeowners policy of insurance to James, was brought into the action as a named defendant in Safeco’s complaint. Auto Club Group filed an answer, agreeing with all the substantive allegations of Safeco’s complaint.

Gasowski moved for summary disposition under MCR 2.116(C)(7) and (C)(10), arguing that the essential question in both the first tort action and the present declaratory action centered on who was the driver of the jet ski at the time of the accident. Pointing out that the court resolved that issue in the previous case by finding that James was the driver, Gasowski argued that the doctrine of collateral estoppel prohibited relitigation of that question.

State Farm responded to Gasowski and Safeco’s motions, admitting that the preeminent issue in the litigation was the identity of the driver of the jet ski, but denying that consideration of the issue was collaterally estopped because it was not a party to the underlying action. State Farm also asserted that it would be prejudiced if denied the opportunity to litigate the issue because it was likely that James’ admission in the previous action was the result of collusion between James, Gasowski, and Sylvestri, who had been friends since elementary school.

In ruling on the motion, the trial court noted that despite its claim that it was not party to the first tort action, State Farm provided a defense to both Sylvestri and James in that action. Furthermore, the trial court noted that State Farm was a party to the settlement agreement, indicating that they had a direct interest in the outcome of the underlying action. The court then concluded, based on its prior ruling, that because James was the driver of the jet ski in the personal injury accident that occurred on August 31, 2002, the doctrine of collateral estoppel

¹ *Gasowski v James*, St. Clair Circuit Court Case No. 03-0101-NO.

² The subject insurance policy states that “insured” means: “any other person while using your watercraft if its use it within the scope of your consent.”

applied. The trial court, therefore, granted Safeco's and Gasowski's motions for summary disposition.

On appeal, State Farm first argues that the trial court erred in granting summary disposition because the parties, including Safeco and Gasowski, entered a release and settlement agreement in connection with the first tort action, and it was a condition of that agreement that there would be a determination in this declaratory action of the identity of the jet ski driver.

Under MCR 2.111(F), an affirmative defense must be raised in a responsive pleading or by motion as provided by the court rules or it is deemed waived. James first filed this declaratory action on September 29, 2003, requesting a declaratory judgment that he was the driver. State Farm filed affirmative defenses in response to the complaint but failed to raise the affirmative defense of a prior release. Safeco then filed its complaint on August 20, 2004. State Farm filed affirmative defenses in response to that complaint on September 8, 2004, but again failed to raise the affirmative defense of a prior release.

We recognize that the release was not executed until after State Farm filed its second affirmative defense pleading. However, in each of its pleadings State Farm expressly reserved the right to amend its affirmative defenses after further discovery. Yet, State Farm failed to do so, and its failure to raise the release issue until the summary disposition hearing was in contravention of MCR 2.118(A). That court rule provides that a party may move to amend its affirmative defenses, but that amendment must be filed in writing. MCR 2.118(A)(2) and (A)(4). Here, State Farm's attempt to raise the defense was not presented in writing.

And while failure to properly plead an affirmative defense may be excused on the basis that support for the defense was only later discovered, the defense must nevertheless be asserted within a reasonable time after discovering it and the delay in assertion of the defense must not unfairly prejudice the opposing party. *Meridian Mut Ins Co v Mason-Dixon Lines, Inc*, 242 Mich App 645, 648; 620 NW2d 310 (2000). Here, the defense was not asserted within a reasonable time after discovering it. A representative of State Farm signed the release on September 30, 2004, but State Farm failed to bring it to the attention of the court until the April 11, 2005 hearing on summary disposition. Notably, State Farm filed a written motion in opposition to summary disposition on March 14, 2005, but failed to raise the issue of the release. Therefore, we decline to address this issue.

State Farm also argues that the trial court erred in granting summary disposition because it was not a party to the underlying action. According to State Farm, while it controlled whether a defense was provided to James by providing the funds to pay for the representation, it did not control the litigation or the defenses asserted because no attorney-client relationship existed between State Farm and the attorney representing James. We conclude that the elements of collateral estoppel were satisfied.

Generally, application of collateral estoppel requires (1) that a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) that the same parties had a full and fair opportunity to litigate the issue, and (3) mutuality of estoppel. *Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 667 NW2d 843 (2004); see Restatement Judgments, 2d, § 27, p 250. Here, a question of fact essential to the judgment—the identity of the jet ski driver—was actually litigated and determined by a valid and final judgment. An

action resolved on summary disposition is a determination on the merits and can trigger applicability of the doctrine of collateral estoppel on relitigation. *Detroit v Qualls*, 434 Mich 340, 357; 454 NW2d 374 (1990).

The doctrine only applies if the same parties or their privies were involved in the prior litigation and in the present litigation. *Apcoa, Inc v Dep't of Treasury*, 212 Mich App 114, 120; 536 NW2d 785 (1995). “A party is one who is directly interested in the subject matter and has a right to defend or to control the proceedings and to appeal from the judgment. A person is in privity to a party if, after the judgment, the person has an interest in the matter affected by the judgment through one of the parties, such as by inheritance, succession, or purchase.” *Husted v Auto-Owners Ins Co*, 213 Mich App 547, 556; 540 NW2d 743 (1995). Concomitant to the same party requirement is mutuality of estoppel. Mutuality of estoppel also exists if the party seeking to prevent relitigation of an issue was a party, or in privity with a party, in the first action. *Monat, supra* at 684-685.

Although State Farm was not a named party in the first tort action, mutuality need not be shown and the doctrine of collateral estoppel is applicable when, State Farm, a defendant in the present declaratory action, and James, a defendant in the first tort action, had a relationship such that the liability of State Farm is entirely dependent on the culpability of James in the first action. See *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 347; 657 NW2d 759 (2002). And while defense counsel’s loyalty was to James, and the relationship between State Farm and the defense counsel did not rise to the level of an attorney-client relationship, State Farm had the type of relationship with James and the defense counsel that gave it a direct interest in the subject matter such that it is bound by the prior judgment. *Atlanta Int’l Ins Co v Bell*, 438 Mich 512, 519; 475 NW2d 294 (1991). “[L]iability insurance policies typically include provisions that both obligate the insurer to provide the insured with a defense and entitle the insurer to control the defense . . . [;] the insurer has both a “duty” and a “right” in regard to the defense of the insured’ It has been appropriately recognized that [defense counsel] occupies a fiduciary relationship to the insured, as well as to the insurance company” *Id.*, quoting Keeton & Widiss, *Insurance Law*, pp 822, 835-836. Accordingly, we conclude that the trial court properly determined that the doctrine of collateral estoppel applied to the facts of this declaratory action.

State Farm also argues that the trial court erred in granting summary disposition because State Farm would be prejudiced if denied the opportunity to litigate the issue because it was likely that James’ admission was the result of collusion between James, Gasowski, and Sylvestri. However, State Farm has failed to provide any authority in support of its claims of collusion and prejudice. It is insufficient for an appellant to merely announce its position and then leave it to this Court to discover and rationalize the basis for its argument or search for authority to support or reject its position. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Moreover, State Farm offers nothing more than conjecture and speculation of collusion, which is insufficient to create a question of fact for the jury. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 192-193; 540 NW2d 297 (1995).

For the reasons stated we affirm the decision of the trial court.

/s/ Jessica R. Cooper
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello