STATE OF MICHIGAN

COURT OF APPEALS

FRANK MONAT, Plaintiff-Appellee,	UNPUBLISHED February 15, 2002
V	No. 222690 Wayne Circuit Court
STATE FARM INSURANCE COMPANY, Defendant-Appellant.	LC No. 98-816391-CK

Before: Neff, P.J., and Wilder and Cooper, JJ.

WILDER, J. (*dissenting*.)

I respectfully dissent. The majority has mischaracterized both the significance of *Alterman v Proviser, Eisenberg, Lichenstein & Pearlman, PC*, 195 Mich App 422; 491 NW2d 868 (1992), and the import of the line of cases in which the mutuality requirement has been relaxed. In my view, *Braxton v Litchalk*, 55 Mich App 708; 223 NW2d 316 (1974), while not dispositive, supports defendant's claim that the mutuality requirement should be relaxed here and that plaintiff should be collaterally estopped from pursuing this cause of action.

In *Braxton, supra*, this Court stated:

> Referring to 31 ALR3d 1044, § 2(1), p 1052, the [Iowa Supreme Court in *Goolsby v Derby*, 189 NW2d 909 (Iowa, 1971)] noted two factors which should be considered in the course of deciding whether or not to apply collateral estoppel where there is no mutuality. First, it must be determined whether or not the party seeking to assert that claim is doing so offensively or defensively. Litchalk is asserting it defensively. Second, the court must determine whether or not the one against whom collateral estoppel is asserted had an opportunity to litigate the issue in the previous suit. *Id* at 722-723.

Each of the above criteria cited by this Court in *Braxton* is present in this case. First, defendant seeks to assert collateral estoppel defensively, not offensively. Second, plaintiff litigated the question of his injury in the third-party no fault action and the jury found not merely that he did not suffer a serious impairment of body function, but that he was not even injured.

In *Dearborn Heights School Dist No 7 v Wayne County MEA/NEA*, 233 Mich App 120, 124; 592 NW2d 408 (1998), this Court stated that "[t]he doctrine of collateral estoppel is

intended to relieve parties of multiple litigation, conserve judicial decisions, and, by *preventing inconsistent decisions*, encourage reliance on adjudication." (Emphasis added.) See also *Detroit v Qualls*, 434 Mich 340, 357 n 30; 454 NW2d 374 (1990), citing *Allen v McCurry*, 449 US 90, 94; 101 S Ct 411; 66 L Ed 2d 308 (1980). The majority's mischaracterization of defendant's assertion of collateral estoppel in this case as merely an attempt "to extend a line of cases which have held that a criminal defendant who has raised and obtained a ruling on the issue of ineffective assistance of counsel is collaterally estopped from subsequently asserting a civil claim of legal malpractice," *ante* at 2, fails to recognize the historical underpinnings of the well-established exceptions to the mutuality requirement, and the basis upon which exceptions to mutuality have been extended.

In *Lichan v American Universal Ins Co*, 435 Mich 408, 428 n 16; 459 NW2d 288 (1999), our Supreme Court noted that "[t]he Court of Appeals has recognized that there may be other situations [beyond those involving well-established exceptions] in which the mutuality requirement is relaxed." See also *Alterman*, *supra* at 425. The facts presented in the instant case constitute another situation to which the rule relaxing the mutuality requirement should be extended. Accordingly, I would reverse the trial court and "hold that plaintiff is collaterally estopped from relitigating the issue, even though the parties are not identical, no mutuality exists, and no traditional exceptions apply." *Id.* at 427.

/s/ Kurtis T. Wilder