

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

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

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FILED

SEP 18 2007

CO-CLERK

ST. CLAIR COUNTY CIRCUIT COURT

NOTICE OF HEARING

130460(62)

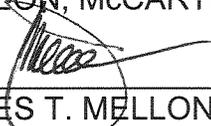
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TO: ALL ATTORNEYS OF RECORD

The attached motion is set for hearing on September 24, 2007. There will be no oral argument.

MELLON, McCARTHY & PRIES, P.C.



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Dated: September 11, 2007

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

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**DEFENDANT-APPELLEE DAVID GASOWSKI'S MOTION TO ENLARGE RECORD
ON APPEAL OR, IN THE ALTERNATIVE, TO STRIKE STATE FARM FIRE AND
CASUALTY COMPANY'S "SUPPLEMENTAL BRIEF"**

- PROOF OF SERVICE -

NOW COMES Defendant-Appellee, DAVID GASOWSKI ("Mr. Gasowski"), by and through his attorneys, MELLON, MCCARTHY & PRIES, P.C., and, pursuant to MCR 7.313 and 7.316, hereby moves this Honorable Court to Enlarge Record on Appeal Strike or, in the Alternative, to Strike State Farm Fire and Casualty Company's ("State Farm") "Supplemental Brief" as follows:

1. On June 15, 2007, this Court ordered the parties to submit Briefs addressing the following issues: (1) whether State Farm, by failing to plead release as an affirmative defense in this declaratory relief action, waived its right to oppose plaintiffs' attempt to invoke offensive collateral estoppel as inconsistent with the terms of the parties' release and settlement agreement in the negligence action;(2) whether, for purposes of collateral estoppel, the identity of the jet-ski driver was actually litigated and determined by a final judgment in the negligence action; (3) whether, for purposes of collateral estoppel, State Farm was a party, or in privity with a party, to the negligence action; (4) how should an insurer proceed when it believes its insured is committing fraud to invoke coverage, and does that depend on whether the insurer learns of the conflict of interest during the course of the litigation; and (5) if an adverse judgment procured by fraud of the insured is entered, whether the insurer is estopped from contesting liability.

2. On August 10, 2007, State Farm filed its "Supplemental Brief on Appeal."

3. To its "Supplemental Brief on Appeal," State Farm attached, as Exhibits B and C, limited excerpts from transcripts of testimony taken in Mr. Gasowski's criminal trial, St. Clair County Case Number 02M3615SD, which resulted in Mr. Gasowski being acquitted.

4. The Reporter's Certificate indicates that the transcript of the criminal trial was prepared on May 25, 2004. **(Exhibit A)**.

5. State Farm had the transcript of the criminal case in its possession for over three years.

6. The criminal transcript was never made a part of the lower court or appellate court record in this case.

7. Despite requests to State Farm, the transcript of the criminal trial was never provided to Mr. Gasowski or his counsel prior to the filing of State Farm's Brief.

8. After State Farm filed its "Supplemental Brief on Appeal" attaching only limited portions of the criminal transcript, State Farm finally provided a complete copy of the transcript to Mr. Gasowski's counsel.

9. State Farm presented this Court with only a limited portion of the testimony of two witnesses at the criminal trial, Deputies Joseph and Johnson. Even the important cross-examination admissions of these witnesses were omitted.

10. In total, State Farm attached only **5 pages out of the 474 total pages**¹ which make up the complete transcript.

11. State Farm failed to present the complete testimony of Deputies Joseph and Johnson. Deputy Johnson indicated on cross examination that he failed to secure life vests and failed to test the key to the jet-ski after such was located by Mr. James. **(Exhibit B)**. Mr. James had the life vest with the jet-ski key indicating he was the driver of the jet-ski and not Mr. Gasowski.

¹ Because of the length of the entire transcript, Mr. Gasowski does not attach all of it to this motion. However, should the Court grant this motion, the entire transcript should be produced at State Farm's expense.

12. It is clear that Mr. James has consistently maintained the position that he was the driver, as evidenced by his written statement, made contemporaneously at the accident scene, which states "**driving** on Sea Doo, hit bridge." (**Exhibit C**). This statement was previously attached to Mr. Gasowski's Response to State Farm's Application for Leave to Appeal as Exhibit 11(B). Mr. James also authored three subsequent statements refuting Deputy Johnson's report and clearly stating that he was the driver. (**Exhibit D**).

13. State Farm also failed to present this Honorable Court with the testimony of David Smith, Ph.D who was qualified as an expert at the criminal trial. (**Exhibit E**).

14. As the attached portions of testimony indicate, Dr. Smith was clear and unequivocal in his opinion, based upon a thorough reconstruction of the accident, that Mr. Gasowski could not have been the driver of the jet-ski. (**Id**).

15. State Farm likewise failed to present this Honorable Court with the testimony of Mr. James (**Exhibit F**), Mr. Silvestri (**Exhibit G**), and Mr. Gasowski (**Exhibit H**), all of which clearly indicate that Mr. James was driving the jet-ski at the time of the accident.

16. After the filing of State Farm's "Supplemental Brief," counsel for Mr. Gasowski contacted counsel for Mr. James and State Farm, to seek concurrence in filing the complete criminal transcript.

17. Counsel for Mr. James agreed that the complete transcript should be produced in fairness to this Court.

18. Counsel for State Farm disagreed and in fact objected to the complete criminal transcript being produced to this Court.

19. This Court's analysis should be on the basis of all relevant testimony, not the snippets provided by State Farm.

20. The Michigan Court Rules are to be construed "to secure the just, speedy, and economical determination of every action and to avoid the consequences of error that does not affect the substantial rights of the parties." MCR 1.105.

21. Pursuant to MCR 7.316, this Court may, at any time "permit the transcript or record to be amended by correcting errors **or adding matters which should have been included.**" MCR 7.316(A)(4).

22. In this case, a complete transcript of the criminal proceedings should have been included, instead of State Farm's limited portion.

23. Therefore, this Court should order that the complete transcript of the criminal trial be produced to the Court at State Farm's expense.

24. Alternatively, State Farm's "Supplemental Brief" should be stricken for the inclusion of the criminal transcript which was not part of the proceedings below. Kent Co Aeronautic Bd v Dep't State Police, 239 Mich App 563, 579-80; 609 NW2d 593 (2000).

WHEREFORE, for these reasons, Mr. Gasowski respectfully requests that this Honorable Court grant his motion and enlarge the record on appeal to include complete transcripts of the criminal proceedings and order that State Farm pay the costs of such filing or, alternatively, strike State Farm's Brief, and enter an order reflecting such.

MELLON, MCCARTHY & PRIES, P.C.

BY: 

JAMES T. MELLON (P23876)
Attorney for David Gasowski

Dated: September 11, 2007

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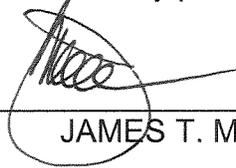
AFFIDAVIT OF COUNSEL IN SUPPORT OF MOTION

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

STATE OF MICHIGAN)
) ss
COUNTY OF OAKLAND)

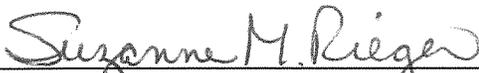
James T. Mellon, being first duly sworn, deposes and says:

- 1. I am counsel for Defendant/Appellee David Gasowski in this matter.
- 2. I have read the foregoing Motion to Enlarge Record on Appeal or, in the Alternative, to Strike State Farm Fire and Casualty Company's "Supplemental Brief" and the statements of fact contained therein are true based on my personal knowledge.



 JAMES T. MELLON

Subscribed and sworn to before me
this 11th day of September, 2007



 Notary Public, State of Michigan, County of MACOMB
 My commission expires 8/17/2010
 Acting in the County of OAKLAND

SUZANNE M. RIEGER
 NOTARY PUBLIC, STATE OF MI
 COUNTY OF MACOMB
 MY COMMISSION EXPIRES Aug 17, 2010
 ACTING IN COUNTY OF OAKLAND

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PROOF OF SERVICE

SUZANNE M. RIEGER, says that she is employed by the Law Offices of Mellon, McCarthy & Pries, P.C., and that on the 11th day of September, 2007, she complied with the Michigan Court Rules with respect to service of Defendant-Appellee David Gasowski's Motion to Enlarge Record on Appeal or, in the Alternative, to Strike State Farm Fire and Casualty Company's "Supplemental Brief," Notice of Hearing, Affidavit of Counsel in Support of Motion, and Proof of Service, by enclosing same in envelopes addressed as follows, and depositing same, sealed, in the United States Mail with first class postage affixed thereon:

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