

**FILED**  
NOV 27 2006  
MARCIA J. MENGEL, CLERK  
SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO

Ron Rose, et al.,

Plaintiffs-Appellees

v.

City of Garfield Heights, et al.,; Clarendon  
National Insurance Company,

Defendant/Appellant

Case No.: 2005-1828

**MOTION OF APPELLEES RONALD AND  
NIKKI ROSE FOR  
RECONDISERATION/CLARIFICATION**

Now come plaintiffs/appellees, and pursuant to S.Ct. Prac. R. XI § 2, respectfully request this court for an order of reconsideration and/or clarification of paragraph 2 of this court's decision issued on November 15, 2006, which states as follows:

The court orders that the opinion of the court of appeals may not be cited as authority except by the parties inter se.

Appellees respectfully request this court reconsider and/or clarify the specific sections of the court of appeals decision to which this order applies. Appellees request an order that only section III and the dissenting opinion of the court of appeals decision *may not be cited* as authority except by the parties inter se, because only those portions of the opinion pertained to the Proposition of Law No. II accepted and reviewed by this court. Appellees request that sections I and II of the court of appeals decision, the court's holding regarding independent corroborative evidence in unidentified uninsured motorist cases, *may be cited* as authority by persons and courts other than the parties inter se because this court chose not to accept appellant's Proposition of Law No. I pertaining to that issue.

In its opinion, the Eighth District Court of Appeals affirmed the trial court's decision that there was uninsured motorist coverage by operation of law from the Clarendon Insurance policy issued to the City of Garfield Heights. The court of appeals also held that plaintiffs-appellees met the independent corroborative evidence standard for recovery in unidentified/uninsured motorist cases that was set forth in former R.C. 3937.18(D)(2), (attached as Exhibit 1). That language of the former uninsured motorist statute has been preserved in a different section of the present statute. See R.C. 3937.18(B)(3), (attached as Exhibit 2).

Following the decision of the court of appeals, Clarendon appealed both the independent corroborative evidence issue (Proposition of Law No. I), and the UM coverage by operation of law issue, (Proposition of Law No. II) to this court. On December 28, 2005, this court accepted *only* Clarendon's appeal on Proposition of Law No. II, UM coverage by operation of law; but did not accept Clarendon's appeal regarding the court of appeals holding on independent corroborative evidence in unidentified motorist cases set forth in Proposition of Law No. I, (attached as Exhibit 3.)

The parties then briefed the issues related to Proposition of Law No. II, UM operation of law coverage in the Clarendon policy to this court, and argued the case on September 20, 2006. Following submission of the case, this court ruled that Clarendon's appeal of Proposition of Law No. II, the UM coverage by operation of law issue, was improvidently accepted. Since this court did not accept Clarendon's appeal on the issue of independent corroborative evidence in unidentified motorist cases (Proposition of Law No. I), the decision of the court of appeals set forth in sections I and II of its opinion, should be permitted to be cited as authority by other courts and persons, as it may serve as precedent with respect to the independent corroborative evidence issue. (Copy of Opinion attached hereto as Exhibit 4.)

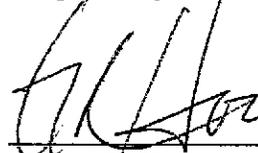
The language construed by the court of appeals in former section R.C. 3937.18(D)(2) still exists in the present UM statute, 3937.18(B)(3), and is present in most every insurance policy issued in the State of Ohio. The court of appeals decision on the independent corroborative evidence issue not accepted for review by this court, contributes to the development of the law on this issue in accordance with Rule 5 of the Supreme Court Rules for the Reporting of Opinions.

### CONCLUSIONS

For the reasons cited herein, plaintiffs/appellees Ronald and Nikki Rose respectfully request this court to reconsider and clarify paragraph 2 of its holding dismissing Clarendon's appeal as follows:

The court orders that the opinion of the court of appeals set forth in section III and the dissenting opinion may not be cited as authority except by the parties inter se. The opinion of the court of appeals set forth in sections I and II of its opinion may be cited as authority by other persons and courts in Ohio.

Respectfully submitted,



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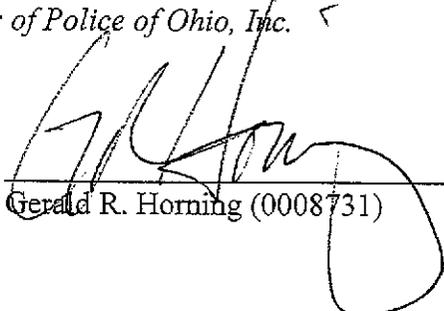
**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing was served upon the following by Regular U.S. Mail, postage prepaid on this 27 day of November, 2006:

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BALDWIN'S OHIO REVISED CODE ANNOTATED  
TITLE XXXIX. INSURANCE  
CHAPTER 3937. CASUALTY INSURANCE; MOTOR VEHICLE INSURANCE  
MOTOR VEHICLE INSURANCE

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3937.18 UNINSURED AND UNDERINSURED MOTORIST COVERAGE

(A) No automobile liability or motor vehicle liability policy of insurance insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless both of the following coverages are offered to persons insured under the policy due to bodily injury or death suffered by such insureds:

(1) Uninsured motorist coverage, which shall be in an amount of coverage equivalent to the automobile liability or motor vehicle liability coverage and shall provide protection for bodily injury, sickness, or disease, including death under provisions approved by the superintendent of insurance, for the protection of insureds thereunder who are legally entitled to recover from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, suffered by any person insured under the policy.

For purposes of division (A) (1) of this section, an insured is legally entitled to recover if the insured is able to prove the elements of the insured's claim that are necessary to recover from the owner or operator of the uninsured motor vehicle. The fact that the owner or operator of the uninsured motor vehicle has an immunity under Chapter 2744. of the Revised Code or a diplomatic immunity that could be raised as a defense in an action brought against the owner or operator by the insured does not affect the insured's right to recover under uninsured motorist coverage. However, any other type of statutory or common law immunity that may be a defense for the owner or operator of an uninsured motor vehicle shall also be a defense to an action brought by the insured to recover under uninsured motorist coverage.

(2) Underinsured motorist coverage, which shall be in an amount of coverage equivalent to the automobile liability or motor vehicle liability coverage and shall provide protection for insureds thereunder for bodily injury, sickness, or disease, including death, suffered by any person insured under the policy, where the limits of coverage available for payment to the insured under all bodily injury liability bonds and insurance policies covering persons liable to the insured are less than the limits for the insured's uninsured motorist coverage. Underinsured motorist coverage is not and shall not be excess insurance to other applicable liability coverages, and shall be provided only to afford the insured an amount of protection not greater than that which would be available under the insured's uninsured motorist coverage if the person or persons liable were uninsured at the time of the accident. The policy limits of the underinsured motorist coverage shall be reduced by those amounts available for payment under all applicable bodily injury liability bonds and insurance policies covering persons liable to the insured.

(B) Coverages offered under division (A) of this section shall be written for the same limits of liability. No change shall be made in the limits of one of these coverages without an equivalent change in the limits of the other coverage.

(C) A named insured or applicant may reject or accept both coverages as offered under division (A) of this section, or may alternatively select both such coverages in accordance with a schedule of limits approved by the superintendent. The schedule of limits approved by the superintendent may permit a named insured or applicant to select uninsured and underinsured motorists coverages with limits on such coverages that are less than the limit of liability coverage provided by the automobile liability or motor vehicle liability policy of insurance under which the coverages are provided, but the limits shall be no less than the limits set forth in section 4509.20 of the Revised Code for bodily injury or death. A named insured's or applicant's rejection of both coverages as offered under division (A) of this section, or a named insured's or applicant's selection of such coverages in accordance with the schedule of limits approved by the superintendent, shall be in writing and shall be signed by the named insured or applicant. A named insured's or applicant's written, signed rejection of both coverages as offered under division (A) of this section, or a named insured's or applicant's written, signed selection of such coverages in accordance with the schedule of limits approved by the superintendent, shall be effective on the day signed, shall create a presumption of an offer of coverages consistent with division (A) of this section, and shall be binding on all other named insureds, insureds, or applicants.

Unless a named insured or applicant requests such coverages in writing, such coverages need not be provided in or made supplemental to a policy renewal or a new or replacement policy that provides continuing coverage to the named insured or applicant where a named insured or applicant has rejected such coverages in connection with a policy previously issued to the named insured or applicant by the same insurer or affiliate of that insurer. If a named insured or applicant has selected such coverages in connection with a policy previously issued to the named insured or applicant by the same insurer or affiliate of that insurer, with limits in accordance with the schedule of limits approved by the superintendent, such coverages need not be provided with limits in excess of the limits of liability previously issued for such coverages, unless a named insured or applicant requests in writing higher limits of liability for such coverages.

(D) For the purpose of this section, a motor vehicle shall be deemed uninsured in either of the following circumstances:

(1) The liability insurer denies coverage or is or becomes the subject of insolvency proceedings in any jurisdiction;

(2) The identity of the owner and operator of the motor vehicle cannot be determined, but independent corroborative evidence exists to prove that the bodily injury, sickness, disease, or death of the insured was proximately caused by the negligence or intentional actions of the unidentified operator of the motor vehicle. For purposes of this division, the testimony of any insured seeking recovery from the insurer shall not constitute independent corroborative evidence, unless the testimony is supported by additional evidence.

(E) In the event of payment to any person under the coverages offered under this section and subject to the terms and conditions of such coverages, the insurer making such payment to the extent thereof is entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury or death for which such payment is made, including any amount recoverable

**§ 3937.18****Statutes & Session Law****TITLE [39] XXXIX INSURANCE****CHAPTER 3937: CASUALTY INSURANCE; MOTOR VEHICLE INSURANCE****3937.18 Uninsured and underinsured motorist coverage.****3937.18 Uninsured and underinsured motorist coverage.**

(A) Any policy of insurance delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state that insures against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle, may, but is not required to, include uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages.

Unless otherwise defined in the policy or any endorsement to the policy, "motor vehicle," for purposes of the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages, means a self-propelled vehicle designed for use and principally used on public roads, including an automobile, truck, semi-tractor, motorcycle, and bus. "Motor vehicle" also includes a motor home, provided the motor home is not stationary and is not being used as a temporary or permanent residence or office. "Motor vehicle" does not include a trolley, streetcar, trailer, railroad engine, railroad car, motorized bicycle, golf cart, off-road recreational vehicle, snowmobile, fork lift, aircraft, watercraft, construction equipment, farm tractor or other vehicle designed and principally used for agricultural purposes, mobile home, vehicle traveling on treads or rails, or any similar vehicle.

(B) For purposes of any uninsured motorist coverage included in a policy of insurance, an "uninsured motorist" is the owner or operator of a motor vehicle if any of the following conditions applies:

(1) There exists no bodily injury liability bond or insurance policy covering the owner's or operator's liability to the insured.

(2) The liability insurer denies coverage to the owner or operator, or is or becomes the subject of insolvency proceedings in any state.

(3) The identity of the owner or operator cannot be determined, but independent corroborative evidence exists to prove that the bodily injury, sickness, disease, or death of the insured was proximately caused by the negligence or intentional actions of the unidentified operator of the motor vehicle. For purposes of division (B)(3) of this section, the testimony of any insured seeking recovery from the insurer shall not constitute independent corroborative evidence, unless the testimony is supported by additional evidence.

(4) The owner or operator has diplomatic immunity.

(5) The owner or operator has immunity under Chapter 2744. of the Revised Code.

An "uninsured motorist" does not include the owner or operator of a motor vehicle that is self-insured within the meaning of the financial responsibility law of the state in which the motor vehicle is registered.

(C) If underinsured motorist coverage is included in a policy of insurance, the underinsured motorist coverage shall provide protection for insureds thereunder for bodily injury, sickness, or disease, including death, suffered by any insured under the policy, where the limits of coverage available for payment to the insured under all bodily injury liability bonds and insurance policies covering persons liable to the insured are less than the limits for the underinsured motorist coverage. Underinsured motorist coverage in this state is not and shall not be excess coverage to other applicable liability coverages, and shall only provide the insured an amount of protection not greater than that which would be available under the insured's uninsured motorist coverage if the person or persons liable to the insured were uninsured at the time of the accident. The policy limits of the underinsured motorist coverage shall be reduced by those amounts available for payment under all applicable bodily injury liability bonds and insurance policies covering persons liable to the insured. For purposes of underinsured motorist coverage, an "underinsured motorist" does not include the owner or operator of a motor vehicle that has applicable liability coverage in the policy under which the underinsured motorist coverage is provided.

(D) With respect to the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages included in a policy of insurance, an insured shall be required to prove all elements of the insured's claim that are necessary to recover from the owner or operator of the uninsured or underinsured motor vehicle.

(E) The uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages included in a policy of insurance shall not be subject to an exclusion or reduction in amount because of any workers' compensation benefits payable as a result of the same injury or death.

(F) Any policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages may, without regard to any premiums involved, include terms and conditions that preclude any and all stacking of such coverages, including but not limited to:

(1) Interfamily stacking, which is the aggregating of the limits of such coverages by the same person or two or more persons, whether family members or not, who are not members of the same household;

Clermont App. No. CA2004-08-061, 2005-Ohio-3907. Discretionary appeal accepted; cause held for the decisions in 2004-1771, *State v. Quinones*, Cuyahoga App. No. 83720, 2004-Ohio-4485, and 2004-1568, *State v. Foster*, Licking App. No. 03CA95, 2004-Ohio-4209; and briefing schedule stayed.

**2005-1754. Hoffman v. State Med. Bd. of Ohio.**

Franklin App. No. 04AP-839, 2005-Ohio-3682.

Pfeifer and Lanzinger, JJ., dissent.

**2005-1772. State v. Greitzer.**

Portage App. No. 2003-P-0110, 2005-Ohio-4037. Discretionary appeal accepted on Proposition of Law No. II; cause held for the decisions in 2004-1771, *State v. Quinones*, Cuyahoga App. No. 83720, 2004-Ohio-4485, and 2004-1568, *State v. Foster*, Licking App. No. 03CA95, 2004-Ohio-4209; and briefing schedule stayed.

**2005-1775. State v. McQueen.**

Cuyahoga App. No. 85330, 2005-Ohio-4013. Discretionary appeal accepted on Proposition of Law Nos. I, II, and III; cause held on Proposition of Law Nos. I and II for the decisions in 2004-1771, *State v. Quinones*, Cuyahoga App. No. 83720, 2004-Ohio-4485, and 2004-1568, *State v. Foster*, Licking App. No. 03CA95, 2004-Ohio-4209; cause held on Proposition of Law No. III for the decisions in 2004-1171, *State v. Mathias*, Cuyahoga App. No. 83311, 2004-Ohio-2982, and 2004-1267, *State v. Fair*, Cuyahoga App. No. 82278, 2004-Ohio-2971; and briefing schedule stayed.

**2005-1778. State v. Bailey.**

Clermont App. No. CA2005-04-024. Discretionary appeal accepted; cause held for the decisions in 2004-1771, *State v. Quinones*, Cuyahoga App. No. 83720, 2004-Ohio-4485, and 2004-1568, *State v. Foster*, Licking App. No. 03CA95, 2004-Ohio-4209; and briefing schedule stayed.

**2005-1780. State v. Cunningham.**

Cuyahoga App. No. 85342, 2005-Ohio-3840.

Resnick, Pfeifer and Lanzinger, JJ., dissent.

**2005-1828. Rose v. Garfield Hts.**

Cuyahoga App. Nos. 85420 and 85426, 2005-Ohio-4165. Discretionary appeal accepted on Proposition of Law No. II.

Resnick, Pfeifer and O'Donnell, JJ., dissent.



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        Under former R.C. 3937.18(D)(2) (currently R.C. 3937.18(B)(3)), an insured  
        must provide additional evidence (1) that is not solely dependent upon  
        statements made by the insured and (2) that is a different character from  
        statements made by the insured before the insured's testimony can fulfill R.C.  
        3937.18's independent corroborative evidence requirement.

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        Under former R.C. 3937.18, an insurer had no obligation to offer or provide  
        UM/UIM coverage in connection with the issuance of a policy to a municipal  
        entity because such policy did not constitute an "automobile liability or motor  
        vehicle policy of insurance" as defined by former R.C. 3927.18.

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AUG 22 2005

CA04085420

35353216



COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

CA04085420

NOS. 85420 & 85426



RONALD ROSE, ET AL., :

35137936

Plaintiffs-Appellants/ :  
Cross-Appellees :

CA04085426

vs. :



THE CITY OF GARFIELD HEIGHTS, :

JOURNAL ENTR. :

35137937

NATIONWIDE INSURANCE COMPANY, :

and  
OPINION

Defendant-Appellant/ :  
Cross-Appellee :

CLARENDON NATIONAL INSURANCE :  
COMPANY, :

Defendant-Appellee/ :  
Cross-Appellant :

DATE OF ANNOUNCEMENT :  
OF DECISION :

AUGUST 11, 2005

CHARACTER OF PROCEEDING: :

Civil appeals from  
Common Pleas Court  
Case No. 512994

JUDGMENT :

REVERSED AND REMANDED.

DATE OF JOURNALIZATION :

AUG 22 2005

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MICHAEL J. CORRIGAN, J.:

Appellants/cross-appellees Ronald and Nikki Rose (collectively referred to as the "Roses") and appellant/cross-appellee Nationwide Mutual Insurance Company ("Nationwide") appeal the trial court's decision granting summary judgment to appellee/cross-appellant Clarendon National Insurance Company ("Clarendon"). Clarendon cross-appeals the trial court's finding that UM/UIM coverage arose by operation of law.

#### I. FACTS

Ronald Rose was struck by an unidentified motorist while, in the course and scope of his employment with the City of Garfield Heights as a police officer, he exited his cruiser to pick up debris along the road. The unidentified motorist drove off without assisting Ronald Rose. Ronald Rose fell to the ground, lost consciousness, and returned to his cruiser to call dispatch for help when he regained consciousness. Lieutenant Wolske responded to the dispatch call and observed that Ronald Rose's uniform was dirty and the left side of his head and his left hand wrist appeared swollen. Lt. Wolske then drove Ronald Rose to the emergency room, where he was treated for blunt head trauma, multiple contusions, and traumatic microhematuria (blood in his urine). Lt. Wolske also returned to the scene of the "hit and run," but was unable to find any traces of vehicle debris or any other traces of the vehicle that struck Ronald Rose. Lt. Wolske

prepared a memo to the police chief describing the accident and concluding that Ronald Rose was struck by an unidentified motorist.

Ronald Rose made a claim under his personal auto policy with Nationwide for UM coverage. Nationwide paid Ronald Rose the full \$50,000 UM policy limits. After realizing that the City of Garfield Heights had an auto liability policy through Clarendon and that Ronald Rose might have a claim for UM coverage, the Roses filed a complaint against Clarendon and the City of Garfield Heights. Nationwide was also named as a defendant for the purposes of filing their cross-claim against Clarendon for their pro rata share of the UM payments.

The Roses filed a motion for summary judgment, arguing that because Clarendon failed to offer UM/UIM coverage to the City of Garfield Heights, UM/UIM coverage arose by operation of law. Clarendon filed its own motion for summary judgment, arguing that even if UM/UIM coverage arises by operation of law, the Roses are not entitled to any UM/UIM coverage because the "hit and run" accident by an unidentified motorist was not supported by independent corroborative evidence other than Ronald Rose's own recitation of the event. The trial court, while finding that UM/UIM coverage arose by operation of law, granted Clarendon's motion for summary judgment, finding that Ronald Rose's own affidavit and police report contained no independent corroborative evidence sufficient to meet the evidentiary threshold requirement

to make a UM claim pursuant to R.C. 3937.18(D)(2). As a result, the trial court found Nationwide's motion for summary judgment (i.e., the cross-claim for indemnification and/or contribution) to be moot. The Roses and Nationwide now appeal and Clarendon cross-appeals.

## II. THE ROSES' AND NATIONWIDE'S APPEAL

Although the Roses cite three assignments of error, the gravamen of their appeal argues that the trial court erred in granting Clarendon's motion for summary judgment. They argue that Ronald Rose's affidavit of the accident was corroborated by independent evidence, such as the medical records, Lt. Wolske's report, and the report of Nationwide's claims adjuster, sufficient to meet the evidentiary threshold under R.C. 3937.18(D)(2). There is merit to the Roses' argument.

R.C. 3937.18(D)(2) provided as follows:

"For the purposes of this section, a motor vehicle shall be deemed uninsured in either of the following circumstances:

\*\*\*\*

"(2) the identity of the owner and operator of the motor vehicle cannot be determined, but independent corroborative evidence exists to prove that the bodily injury, sickness, disease, or death of the insured was proximately caused by the negligence or intentional actions of the unidentified operator of the motor vehicle. For purposes of this division, the testimony of any

insured seeking recovery from the insurer shall not constitute independent corroborative evidence, unless the testimony is supported by additional evidence."

This evidentiary threshold requirement - "independent corroborative evidence" - was met by the Roses by way of medical records and Lt. Wolske's report (at least as much to create a genuine issue of material fact). The medical records showed that Ronald Rose suffered a physical injury and Lt. Wolske was able to corroborate that Ronald Rose appeared injured and his uniform appeared dirty. While the stated purpose of this requirement is to avoid fraudulent claims when there is an unidentified motorist, it cannot be construed in such a way as to require eyewitnesses. Just like the Second District Court of Appeals held in *Connell v. United Servs. Automobile Ass'n.*, Montgomery App. No. 20282, 2004-Ohio-2726, ¶16, where "additional physical evidence in the form of the insured party's injured foot was sufficient evidence from which a jury could have inferred that the insured party was injured as he had claimed," the medical records detailing Ronald Rose's injuries constitute "additional physical evidence." In *Connell*, the insurance policy was similar to Nationwide's policy and Clarendon's policy, as well as the language in R.C. 3739.18(D)(2). The insurer in *Connell* argued that upon the authority of *Girgis v. State Farm Mut. Auto. Ins. Co.*, 75 Ohio St.3d 302, 1996-Ohio-111, 662 N.E.2d 280:

"[t]he test to be applied in cases where an unidentified driver's negligence causes injury is the corroborative evidence test, which allows the claim to go forward if there is independent third-party testimony that the negligence of an uninsured vehicle was a proximate cause of the accident."

The *Connell* court explained that *Girgis* holds that evidence of the injury involved and the insured's own testimony concerning how the injury occurred, separately or together, are insufficient to prove the facts of a hit-and-run accident which is alleged to have proximately caused the injury for which UM/UIM coverage is otherwise available. Thus, under *Girgis*, evidence independent of both, in the form of independent third-party testimony which corroborates the facts of the accident, is required to trigger the coverage a policy of insurance provides. However, unlike *Girgis*, the insurer in *Connell* had a much broader test in its policy it offered to the insured. The policy accepts the testimony of the covered person, apart from any "independent corroborative evidence," if the covered person's testimony "is supported by additional evidence." The insured's policy in *Connell* provided as follows:

"The facts of the accident or intentional act must be proved. We will only accept independent corroborative evidence other than the testimony of a covered person making a claim under this

coverage unless such testimony is supported by additional evidence." 2004-Ohio-2726 at ¶10.

As held by Connell, "[t]his reference to additional evidence reads back into the equation the probative value of the injury itself which Girgis had effectively read out." Id. at ¶16.

Likewise, the Clarendon policy issued to the City of Garfield Heights provides as follows:

"[t]he facts of the 'accident' or intentional act must be proved by independent corroborative evidence, other than the testimony of the 'insured' making a claim under this or similar coverage, unless such testimony is unsupported by additional evidence."

Because the Clarendon policy mirrors R.C. 3739.18(D)(2) and the language in the Connell policy and the Roses met the evidentiary threshold requirement of "independent corroborative evidence," the trial court's decision granting summary judgment to Clarendon is reversed. In addition, we reverse the trial court's finding that Nationwide's motion for summary judgment against Clarendon is moot. The entire matter is remanded to the trial court for further proceedings.

### III. CLARENDON'S CROSS-APPEAL

Clarendon filed a notice of cross-appeal, citing as its sole cross-assignment of error that the trial court erred in finding that UM/UIM coverage arose by operation of law. In particular,

Clarendon asserts that the insured, the City of Garfield Heights, is a political subdivision to which Ohio law does not require proof of financial responsibility. However, Clarendon's assertion is without merit.

Although the City of Garfield Heights is not required under R.C. 4509.71 to provide proof of financial responsibility for the vehicles they own or operate, once the City of Garfield Heights elects to provide such proof of financial responsibility, the insurer must offer UM/UIM coverage to its insured in accordance with R.C. 3937.18. Here, the City of Garfield Heights elected to purchase an automobile insurance policy through Clarendon. This election should have cued Clarendon to offer UM/UIM coverage to the City of Garfield Heights. Because Clarendon failed to offer such coverage, the trial court properly found that such coverage arose by operation of law. Clarendon's sole cross-assignment of error is thus, overruled.

Judgment reversed and remanded.

This cause is reversed and remanded for proceedings consistent with this opinion.

It is, therefore, ordered that said plaintiffs-appellants/cross-appellees recover of said defendant-appellee/cross-appellant their costs herein taxed.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

*Michael J. Corrigan*  
MICHAEL J. CORRIGAN  
JUDGE

KENNETH A. ROCCO, J., CONCURS.

ANN DYKE, P.J., DISSENTS WITH SEPARATE OPINION.

ANNOUNCEMENT OF DECISION  
PER APP. R. 22(B), 22(D) AND 26(A)  
RECEIVED

AUG 11 2005

FILED AND JOURNALIZED  
PER APP. R. 22(E)

AUG 22 2005

GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY *[Signature]* DEP.

GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY *[Signature]* DEP.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R.22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNSEL  
FOR ALL PARTIES-COSTS TAXED

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 85420 & 85426

RONALD ROSE, ET AL. :

Plaintiffs-Appellants/ :  
Cross-Appellees :

-vs- :

THE CITY OF GARFIELD HEIGHTS, :

NATIONWIDE INSURANCE COMPANY, :

Defendant-Appellant/ :  
Cross-Appellee :

CLARENDON NATIONAL INSURANCE :  
COMPANY, :

Defendant-Appellee/ :  
Cross-Appellant :

D I S S E N T I N G  
O P I N I O N

DATE OF ANNOUNCEMENT  
OF DECISION:

AUGUST 11, 2005

DYKE, P.J., DISSENTING:

I respectfully dissent and would conclude that UM/UIM coverage under the Clarendon policy did not arise by operation of the law. Accordingly, I would affirm the trial court's granting of summary judgment albeit on alternative grounds and, as UM/UIM coverage did not exist for the Plaintiffs under the Clarendon policy, I would find Plaintiffs' and Nationwide's assignments of error moot.

The version of R.C. 3937.18 in effect on October 1, 2000, was enacted by S.B. 267. Thus, S.B. 267 governs our determination of Plaintiffs' UM/UIM coverage under the Clarendon policy. It states:

"(A) No automobile liability or motor vehicle liability policy of insurance insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless both of the following coverages are offered to persons insured under the policy due to bodily injury or death suffered by such insureds:

"(1) Uninsured motorist coverage \* \* \*.

"(2) Underinsured motorist coverage \* \* \*."

In accordance with R.C. 3937.18, in the instant matter, UM/UIM coverage arises by operation of law only if Clarendon had a duty to offer such coverage to the City. Clarendon only had a duty to offer UM/UIM coverage if the Clarendon policy constituted an "automobile liability or motor vehicle liability policy of insurance."

H.B. 261 amended R.C. 3937.18 to include a definition of "automobile liability or motor vehicle liability policy of insurance." R.C. 3937.18(L) specifically defined "automobile

liability or motor vehicle policy of insurance" as either of the following:

"(1) Any policy of insurance that serves as proof of financial responsibility, as proof of financial responsibility is defined by division (K) of section 4509.01 of the Revised Code, for owners or operators of the motor vehicles specifically identified in the policy of insurance;

"(2) Any umbrella liability policy of insurance written as excess over one or more policies described in division (L)(1) of this section."

It is undisputed that the Clarendon policy was not an umbrella policy.<sup>1</sup> Accordingly, we must determine whether the Clarendon policy "serve[d] as proof of financial responsibility." R.C. 3937.18(L)(1).

R.C. 4509.01(K) defines "proof of financial responsibility" as:

"(K) 'Proof of financial responsibility' means proof of ability to respond in damages for liability, on account of accidents occurring subsequent to the effective date of such proof, arising out of the ownership, maintenance, or use of a motor

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<sup>1</sup>In the instant action, the parties stipulated that the Clarendon Umbrella Policy provides UM/UIM coverage in this case for an additional One Million Dollars (\$1,000,000) if the court determines that the Clarendon auto policy provides UM/UIM coverage by operation of law. Thus, for matters of determining coverage, the umbrella policy is not applicable.

vehicle in the amount of twelve thousand five hundred dollars because of bodily injury to or death of one person in any one accident, in the amount of twenty-five thousand dollars because of bodily injury to or death of two or more persons in any one accident, and in the amount of seven thousand five hundred dollars because of injury to property of others in any one accident."

However, R.C. 4509.01(K) is inapplicable to the instant matter pursuant to 4509.71, which states:

"Sections 4509.01 to 4509.79, except section 4509.06, of the Revised Code do not apply to any motor vehicle owned and operated by the United States, this state, any political subdivision of this state, any municipal corporation therein or any private volunteer fire company serving a political subdivision of the state. Section 4509.06 of the Revised Code does not apply to any vehicle owned and operated by any publicly owned urban transportation system."

R.C. 4509.71 expressly excludes political subdivisions and municipal corporations from the mandates of the financial responsibility laws of Ohio. In other words, Ohio law does not require such entities to provide proof of financial responsibility for the vehicles they own and/or operate. Accordingly, as municipalities are not required to prove financial responsibility, the Clarendon policy issued to the City did not serve as "proof of financial responsibility." Since the Clarendon policy did not serve as "proof of financial responsibility," then it was not an

"automobile liability or motor vehicle policy of insurance." See *Russell v. Heritage Mut. Ins. Co. v. Jones*, Hamilton App. No. C-030868, 2004-Ohio-5851, citing *De Uzhca v. Derham*, Montgomery App. No. 19106, 2002-Ohio-1814. Consequently, as the Clarendon policy was not an automobile liability policy of insurance as required by R.C. 3937.18, Clarendon was not required to offer UM/UIM insurance coverage to the City and such coverage did not arise by operation of law. See *Acree v. CNA Ins. Cos.*, Hamilton App. No. C-020710, 2003-Ohio-3043; *Gilcreast-Hill v. Ohio Farmers Ins. Co.*, Summit App. No. 20983, 2002-Ohio-4524.

The majority maintains that "Although the City of Garfield Heights is not required under R.C. 4509.71 to provide proof of financial responsibility for the vehicles they own or operate, once the City of Garfield Heights elects to provide such proof of financial responsibility, the insurer must offer UM/UIM coverage to its insured in accordance with R.C. 3937.18." This argument completely ignores the plain language of the applicable statutes prescribed by the legislature and is not based on any legal principle.

Moreover, it is irrelevant that the City was insured under the Clarendon policy for accidents caused by their insureds. The language used by the General Assembly in R.C. 4509.71, which concerns political subdivisions and municipalities, should be interpreted with the purpose of the law fully in mind. See *Gulla*

v. Reynolds (1949), 151 Ohio St. 147, 159, 151 Ohio St. 147, 39 Ohio Op. 2, 85 N.E.2d 116 (J. Matthias, dissent). The financial responsibility laws were enacted to protect individuals from financially irresponsible drivers. Id. As government entities are not financially irresponsible drivers, R.C. 4509.71 expressly states that the financial responsibility laws do not apply to government entities. Hence, if a city elects to obtain insurance, it is to protect itself financially, not to meet the mandates of a law inapplicable to it.

Accordingly, by electing to obtain insurance to protect itself financially, the City of Garfield Heights did not change the fact that the Clarendon insurance policy did not "serve as proof of financial responsibility." An insurance policy that does not serve as proof of financial responsibility is not an "automobile liability or motor vehicle policy of insurance" and thus, is not subject to the mandates of R.C. 3937.18. Accordingly, I would affirm the trial court's granting of summary judgment on behalf of Clarendon but instead find that Clarendon did not have a duty to offer the City UM/UIM coverage and such coverage did not arise by operation of law. Furthermore, because UM/UIM coverage for the Plaintiffs did not exist under the Clarendon policy, I would find Plaintiffs' and Nationwide's assignments of error moot.



Case: 2006 2157

Docket: 583870

Date Filed: 11/27/06

Description: Request for extension of time to file response

**Clerk's Office  
Scanning Cover Sheet**



**Memorandum In Support of Motion**

Relator filed his Complaint for Mandamus on Tuesday November 21, 2006 two days before the Thanksgiving holiday. The Court was closed for the holiday weekend on Thursday, Friday, Saturday and Sunday November 23, 24, 25 and 26, 2006. Eleven Respondents are required to be served with a summons and copy of the Complaint.

Court officials telephoned the City Attorney for Girard advising him of the filing and he in turn notified counsel for the Respondents. Respondent's counsel immediately returned the call to Ms. Jo Ella Jones of the Supreme Court who informed counsel that the Court had sustained Relator's motion for emergency and expedited treatment and that Respondents had three days to file a response.

Counsel for Respondent informed the Court official that he was in New York City for the holiday and had plane tickets to return to his office on Tuesday, November 28, 2006. He asked when the three day order for a response became effective but was advised that she was not sure whether the three days commenced when the last respondent was served or whether it began at the time that the Court made the order.

Because of the uncertainty of the due date of the Respondents response, the required service of summons on 11 named respondents, the conflicting Thanksgiving Day holiday, and Respondents counsel being on vacation until November 28, 2006, Respondents respectfully request an extended additional time certain on which Respondents response is required to be filed.

Respectfully Submitted,



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**Attorney for Respondents**

**Certificate of Service**

A copy of the above Motion and Memorandum was served on Relator's Counsel John B. Juhasy 1330 Market St., Youngstown, Ohio 44512-5610 this 27<sup>th</sup> day of November, 2006 by regular U.S. Mail.

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Frank R. Bodor