ORIGINAL

IN THE SUPREME COURT OF OHIO

SCOTT L. SMITH, et al.,	:	
	:	
Plaintiffs-Appellees,	:	Case No. 15-1419
	:	
v.	:	
	:	On Appeal from the Ottawa County
ERIE INSURANCE COMPANY,	:	Court of Appeals,
	:	Sixth Appellate District
Defendant-Appellant.	:	(C.A. No. OT-15-005)

MERIT BRIEF OF AMICUS CURIAE OHIO INSURANCE INSTITUTE IN SUPPORT OF APPELLANT ERIE INSURANCE COMPANY

Thomas E. Szykowny (0014603)
Michael Thomas (0000947)
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street, P.O. Box 1008
Columbus, OH 43216-1008
Tel: (614) 464-5671
Fax: (614) 719-4990
teszykowny@vorys.com
mrthomas@vorys.com

Attorneys for Amicus Curiae
Ohio Insurance Institute

D. Casey Talbott (0046767)
EASTMAN & SMITH LTD.
One SeaGate, 24th Floor
P.O. Box 10032
Toledo, OH 43699-0032
Tel: (419) 241-6000
Fax: (419) 247-1777
dctalbott@eastmansmith.com

Attorneys for Defendant-Appellant
Erie Insurance Company

Steven P. Collier (0031113)
Steven R. Smith (0031778)
Janine T. Avila (0055853)
CONNELLY & COLLIER LLP
405 Madison Avenue, Suite 2300
Toledo, OH 43604
Tel: (419) 243-2100
Fax: (419) 243-7119
scollier@cjc-law.com

Attorneys for Plaintiffs-Appellees
Scott and Dawn Smith

FILED
FEB 16 2016
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

STATEMENT OF INTEREST OF AMICUS CURIAE 1

1. The ruling by the Court of Appeals discards the safeguards against fraudulent uninsured motorist claims that were adopted nearly twenty years ago to replace the traditional "physical impact requirement" 2

   a. The Ohio Supreme Court and the Ohio General Assembly each adopted the corroborative evidence test to prevent fraudulent uninsured motorist claims 2

   b. The trial court rejected Mr. Smith's claim for uninsured motorist benefits because there was no independent corroborative evidence that another vehicle caused his accident, as required by his insurance policy 3

   c. The Court of Appeals eliminated the safeguards against fraud that are provided by the corroborative evidence test 4

2. The ruling by the Court of Appeals is based on a hyper-technical "ambiguity" that ignores the purpose of the policy language and the intentions of the parties 5

3. The ruling by the Court of Appeals construes policy language against the insurer even though the General Assembly, not the insurer, is responsible for its purported "ambiguity" 5

STATEMENT OF FACTS 6

1. Mr. Smith filed an uncorroborated claim for injuries he attributed to an unknown "phantom vehicle" 6

2. Erie and the trial court denied coverage because Mr. Smith's insurance policy requires independent corroboration when an insured blames an unknown vehicle for an accident 7

3. The Court of Appeals reversed the trial court and certified a conflict after finding that the corroborative evidence test is "ambiguous" as to whether it requires independent corroborative evidence 7

ARGUMENT 9

Certified Conflict Issue 9

When an automobile insurance policy provides that testimony of an insured seeking uninsured motorist benefits is not independent corroborative evidence that an unidentified vehicle caused an accident unless it is supported by "additional evidence," is the policy language ambiguous, such that evidence that merely recounts the insured's own testimony is sufficient "additional evidence"? 9

A. The Court of Appeals incorrectly found that the corroborative evidence test can be satisfied by evidence that does not independently corroborate the insured's testimony 9

1. The Supreme Court of Ohio adopted the corroborative evidence test twenty years ago specifically to prevent fraudulent claims for uninsured motorist coverage 9

2. The Ohio General Assembly enacted the corroborative evidence test for uninsured motorist claims one year later by amending R.C. 3937.18 10

3. The ruling below is at odds with decisions in which Ohio appellate courts have overwhelmingly recognized that an insured's statements cannot independently corroborate the insured's own statements 12

a. The corroborative evidence test is not satisfied by evidence that does not independently corroborate an insured's testimony 12

b. The corroborative evidence test is not satisfied by police reports and medical records that merely recite the insured's own statements 13

c. The certified conflict case properly held that an insured's testimony cannot be independently corroborated by recitations of the insured's own statements 14

B. The Court of Appeals erroneously found that the Erie insurance policy provision is ambiguous 15

1. The Court of Appeals did not consider the purpose or context of the insurance provision incorporating the corroborative evidence test 15

2. An insurance policy provision is not "ambiguous" when there is only one reasonable interpretation consistent with its purpose and the intentions of the parties 15

3. The provisions of the Erie insurance policy that incorporate the corroborative evidence test are not ambiguous 17

C. The Court of Appeals improperly held that ambiguous language in an insurance policy provision must be strictly construed against the insurer even though the General Assembly has required insurers to include the provision in uninsured motorist policies 18

CONCLUSION 19

CERTIFICATE OF SERVICE 20

TABLE OF AUTHORITIES

Cases

Bobier v. National Cas. Co., 143 Ohio St. 215 (1944) 16

Brown v. Philadelphia Indemnity Ins. Co., 12th App. Dist. No. CA2010-10-094, 2011 Ohio 2217, *appeal denied*, 2011 Ohio 5129 ..... 8, 14

Cincinnati Gas & Electric Co. v. Hartford Steam Boiler Inspection and Insurance Co., S.D. Ohio No. 1:06-CV-331, 2008 U.S. Dist. Lexis 29569 16

Combs v. Allstate Ins. Co., 10th App. Dist. No 99AP-822, 2000 Ohio App. Lexis 2861 13

Connell v. United Services Auto. Assn., 2d App. Dist. No. 20282, 2004 Ohio 2726 13

Employers' Liab. Assur. Corp. v. Roehm, 99 Ohio St. 343 (1919) 15

Fuller v. Allstate Ins. Co., 10th App. Dist. No. 11AP-1014, 2012 Ohio 3705 12

Girgis v. State Farm Mutual Automobile Insurance Co., 75 Ohio St. 3d 302, 1996 Ohio 111 ..... passim

Gomolka v. State Auto. Mut. Ins. Co., 70 Ohio St. 2d 166 (1982) 17

Hamilton Ins. Serv. Inc. v. Nationwide Ins. Co., 86 Ohio St. 3d 270 (1999) 15

Honzell v. Nationwide Insurance Co., 10th App. Dist. No. 11AP-998, 2012 Ohio 6154 ..... 12, 13

Jackson v. State Farm Mut. Auto. Ins. Co., 4th App. Dist. No. 14-CA-850, 2015 Ohio 1131 12

Kelly v. Med. Life Ins. Co., 31 Ohio St. 3d 130 (1987) 15

King v. Nationwide Ins. Co., 35 Ohio St. 3d 208 (1988) 6

Laboy v. Grange Indemn. Ins. Co., 144 Ohio St. 3d 234, 2015 Ohio 3308 16

Lager v. Miller-Gonzalez, 120 Ohio St. 3d 47, 2008 Ohio 4838 17

Sauer v. Crews, 140 Ohio St. 3d 314, 2014 Ohio 3655 17

Shifrin v. Forest City Enterprises, Inc., 64 Ohio St. 3d 635 (1992) 15

State ex rel. Toledo Edison Co. v. Clyde, 76 Ohio St. 3d 508, 1996 Ohio 376 18

State v. Porterfield, 106 Ohio St. 3d 5, 2005 Ohio 3095 16

Travelers Indemnity Co. v. Reddick, 37 Ohio St. 2d 119 (1974) 2, 9

Westfield Insurance Co. v. Galatis, 100 Ohio St. 3d 216, 2003 Ohio 5849 17

Willford v. Allstate Indemn. Co., 10th App. Dist. No. 97-APE05-657, 1997 Ohio App. Lexis 5130 13

Winningham v. Sexton, 820 F.Supp. 338 (S.D. Ohio 1993), *affirmed*, 42 F.3d 981 (6th Cir. 1994) 16

Statutes

R.C. 3937.18 ..... 3, 10

R.C. 3937.18(B)(3) ..... passim

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae Ohio Insurance Institute ("OII") has been the professional trade association for property and casualty insurance companies in Ohio for almost fifty years, and its predecessor was originally chartered here in 1938. OII's members include dozens of domestic insurers, foreign insurance companies, and reinsurers. It provides a wide range of services to the public, as well as to the media and government officials, in three primary areas: education and research, legislative and regulatory affairs, and public information.

OII therefore monitors Ohio legislative and judicial proceedings that affect Ohio insurance law, and it has participated as an amicus in several landmark insurance cases decided by this Court. OII is uniquely qualified to provide the Court with a broad historical perspective on the principles of insurance law governing this appeal, including the corroborative evidence test, and with practical insight into the potential consequences of the Court's ruling for insureds and insurers.

OII has chosen to participate in this appeal because the importance of the certified conflict extends far beyond the immediate parties. OII and its members are particularly concerned about the ruling below for three reasons. First, it eliminates safeguards against fraudulent uninsured motorist claims that this Court and the General Assembly adopted nearly twenty years ago, when the corroborative evidence test replaced the traditional physical impact requirement. In addition, it purports to find ambiguity in insurance policy language even though the proposed "alternative" meaning would defeat the intentions of the parties and the purpose of the statute that is the source of the language. Finally, this appeal is also important to OII and its members because the Court of Appeals strictly construed the purportedly ambiguous policy

language against the insurer, even though the policy language tracks the statutory language and the General Assembly, rather than the insurer, is responsible for drafting that language.

1. The ruling by the Court of Appeals discards the safeguards against fraudulent uninsured motorist claims that were adopted nearly twenty years ago to replace the traditional "physical impact requirement."

a. The Ohio Supreme Court and the Ohio General Assembly each adopted the corroborative evidence test to prevent fraudulent uninsured motorist claims.

First, OII and its members are particularly interested in this appeal because the Court of Appeals' decision attempts to undo a public policy decision that the Supreme Court of Ohio and the Ohio General Assembly made twenty years ago, when they each adopted the corroborative evidence test for uninsured motorist claims involving unidentified "phantom vehicles." *See Girgis v. State Farm Mutual Automobile Insurance Co.*, 75 Ohio St. 3d 302, 1996 Ohio 111; R.C. 3937.18(B)(3).

The *Girgis* Court held on public policy grounds that automobile insurance policies could no longer require physical contact with another vehicle as a prerequisite to uninsured motorist coverage. However, it also recognized the important function that the physical contact requirement had previously performed: to provide an "objective standard of corroboration" when an insured claims that an unidentified vehicle caused an accident, and thereby "to prevent the filing of fraudulent claims" for injuries that were actually caused by the insured's own negligence. 75 Ohio St. 3d at 306, *quoting Travelers Indemnity Co. v. Reddick*, 37 Ohio St. 2d 119, 124 (1974). The *Girgis* Court therefore replaced the former physical contact requirement with the "corroborative evidence test," which "requires independent third-party testimony" that another vehicle caused an insured's injury "specifically to protect insurance companies from fraud." 75 Ohio St. 3d at 307.

The Ohio General Assembly codified this corroborative evidence test as a subsection of Ohio's uninsured and underinsured motorist statute, R.C. 3937.18, the following year. As a result, insurers who offer uninsured motorist coverage in Ohio must cover injuries attributed to an unknown negligent driver if, and only if, there is independent corroborative evidence that another vehicle caused the injuries. R.C. 3937.18(B)(3).

b. The trial court rejected Mr. Smith's claim for uninsured motorist benefits because there was no independent corroborative evidence that another vehicle caused his accident, as required by his insurance policy.

Appellee Scott L. Smith was injured when his automobile left the roadway one night and struck a tree. He claimed that he had swerved to avoid an approaching unidentified motor vehicle and sought coverage under the uninsured motorist provisions of his automobile insurance policy, which he had obtained from appellant Erie Insurance Company. There were no other witnesses to the accident, and no one else saw the other vehicle in the area; there were also no skid marks, yaw marks, or any other evidence that the other vehicle actually existed, that it crossed the center line, or that Mr. Smith had to take evasive action to avoid a collision.

The uninsured motorist provisions of the Erie insurance policy closely track the language of R.C. 3937.18(B)(3) by requiring "independent corroborative evidence" that an insured's injuries were caused by an unidentified negligent motorist, and by specifying that the insured's own testimony is not sufficient unless it is supported by "additional evidence." Mr. Smith claims in this lawsuit that his own statements – in which he described his version of the accident to a 911 operator, to an investigating state trooper, and to medical treatment providers – constitute "additional evidence" that independently corroborate his testimony and entitle him to uninsured motorist benefits.

The trial court disagreed and held that the 911 transcript, the police report, and the medical records are not independent corroborative evidence of Mr. Smith's description of the accident because they simply recount his own self-serving statements. Accordingly, the trial court granted summary judgment to Erie.

c. The Court of Appeals eliminated the safeguards against fraud that are provided by the corroborative evidence test.

The Court of Appeals reversed the trial court. It held that the insurance policy is "ambiguous" as to whether an insured's own statements to others can constitute independent corroboration of the insured's claim, or whether independent corroboration of the claim must come from a source other than the insured. The Court of Appeals accordingly concluded that Mr. Smith's own statements were sufficient.

OII and its members are concerned because this ruling eliminates the important protection against insurance fraud that this Court and the General Assembly put in place when they replaced the "physical impact" requirement with the corroborative evidence test. The uninsured motorist provisions of Erie's insurance policy incorporate the corroborative evidence test, as required by R.C. 3937.18(B)(3), to prevent insureds from obtaining insurance benefits by falsely blaming injuries caused by their own negligence on imaginary "phantom vehicles."

In this case, there is no independent corroborative evidence that another motorist caused Mr. Smith to drive off the roadway and into a tree. All of the evidence offered by Mr. Smith to support his account of the accident – his statements to a 911 operator, to a state trooper, and to medical personnel – are merely his own, uncorroborated statements. The ruling by the Court of Appeals eviscerates the corroborative evidence test and defeats its purpose by eliminating the requirement of independent corroborative evidence, and thereby attempts to overrule the public policy determination previously made by this Court and by the General Assembly.

2. The ruling by the Court of Appeals is based on a hyper-technical "ambiguity" that ignores the purpose of the policy language and the intentions of the parties.

Second, OII and its members are also interested in this appeal for a separate reason. The ruling below purports to find an "ambiguity" in an insurance policy provision that closely tracks the language of R.C. 3937.18(B)(3), and then uses that "ambiguity" to defeat the purpose of the statute, creating coverage for uncorroborated claims that Erie and the policyholders neither intended nor expected. The language used in the policy and the statute is not ambiguous; it requires independent corroborative evidence of this type of claim and then reiterates that the insured's own statements are insufficient without additional evidence.

English grammar and usage permit truncated references to phrases that are repeated in a sentence, and the truncated references are not ambiguous when read in context. Here, the Court of Appeals found that the policy language is ambiguous because it uses the shorthand reference "additional evidence" to refer back to the "independent corroborative evidence" mentioned six words earlier, instead of repeating that phrase twice in the same sentence. It is undisputed that the sole purpose of the corroborative evidence test is to prevent fraudulent claims, but the Court of Appeals found ambiguity as to whether it requires the type of evidence that prevents fraud. This Court has repeatedly held that courts cannot invent "ambiguities" in policy language with alternative interpretations that are inconsistent with the purpose of the policy provision and the intentions of the parties.

3. The ruling by the Court of Appeals construes policy language against the insurer even though the General Assembly, not the insurer, is responsible for its purported "ambiguity."

Third, OII is concerned about the portion of the Court of Appeals' ruling holding that the purportedly "ambiguous" insurance policy language should be construed strictly against Erie. Even if the policy language in this case was ambiguous, the rule of strict construction applies

when the insurer drafts the policy language and is therefore responsible for the ambiguity, *King v. Nationwide Ins. Co.*, 35 Ohio St. 3d 208, syllabus (1988), and the policy language at issue here simply tracks the General Assembly's language in R.C. 3937.18(B)(3). Both provide that uninsured motorist insurance covers injuries attributed to unidentified motorists only if there is "independent corroborative evidence," and both reiterate that an insured's own testimony is not sufficient "unless the testimony is supported by additional evidence."

Erie's uninsured motorist policy provisions must comply with the language of the uninsured motorist statute, and any ambiguity in that language was created by the General Assembly, not by Erie. It is illogical and unfair to strictly construe policy language against the insurer in these circumstances. OII is also extremely interested in this issue.

STATEMENT OF FACTS

1. Mr. Smith filed an uncorroborated claim for injuries he attributed to an unknown "phantom vehicle."

All facts relevant to the certified conflict issue were stipulated by the parties below. Appellee Scott L. Smith was injured in a single-vehicle accident when his automobile went off the right side of the roadway late one night and struck a tree. He claimed that he drove off the road to avoid a collision with an approaching vehicle that crossed the center line into his lane, but there were no witnesses or any other evidence supporting his explanation of the accident.

Mr. Smith contends that his description of the accident is "corroborated" by his own statements describing the accident. First, he told a 911 telephone operator that an unidentified vehicle "come [sic] around the corner into my lane, head-on, and I went into the woods." (Joint Stipulation of Facts, May 3, 2013, Exhibit A, at 1.) Second, he told the State Police trooper who investigated his accident that he "swerved right to avoid striking" an unknown vehicle. (*Id.*,

Exhibit B, at 4.) Third, he told a medical provider who treated him after the accident that he "turned to avoid [an] oncoming vehicle." (*Id.*, Exhibit C, at 1, 3.)

2. Erie and the trial court denied coverage because Mr. Smith's insurance policy requires independent corroboration when an insured blames an unknown vehicle for an accident.

Mr. Smith is a named insured under a policy of automobile insurance issued by appellant Erie Insurance Company. Pursuant to R.C. 3937.18(B)(3), Erie's policy provides uninsured motorist coverage for injuries caused by an unidentified motor vehicle only if there is "independent corroborative evidence" that the unknown vehicle negligently or intentionally caused the accident, and further specifies that an insured's own testimony "does not constitute independent corroborative evidence, unless the testimony is supported by additional evidence." (*Id.*, Exhibit C.)

Erie denied Mr. Smith's claim for insurance benefits because there is no independent corroborative evidence that his injuries were caused by a negligent unidentified motorist rather than by his own negligence. He filed this lawsuit for uninsured motorist insurance benefits, but the trial court granted summary judgment to Erie. It held that the evidence Mr. Smith offered to support his version of the accident – the 911 transcript, police report, and medical records – merely repeated his own statements and thus did not provide "independent corroborative evidence" of those statements.

3. The Court of Appeals reversed the trial court and certified a conflict after finding that the corroborative evidence test is "ambiguous" as to whether it requires independent corroborative evidence.

The Court of Appeals reversed the trial court's judgment on the grounds that the uninsured motorist provision of the Erie insurance policy is "susceptible" of two possible interpretations: (1) that it requires additional evidence independently corroborating the insured's account of the accident, or (2) that any additional evidence is sufficient even if it consists solely

of the insured's own uncorroborated statements. 2015 Ohio 3078, at ¶ 30. The Court of Appeals held that this "ambiguity" must be strictly construed against Erie, even though the Ohio General Assembly is the source of the "ambiguous" language, not Erie. 2015 Ohio 3078, at ¶ 32.

The Court of Appeals sua sponte certified a conflict between its ruling and the earlier ruling in *Brown v. Philadelphia Indemnity Ins. Co.*, 12th App. Dist. No. CA2010-10-094, 2011 Ohio 2217, *appeal denied*, 2011 Ohio 5129, in which the Twelfth District Court of Appeals held that an insured's own statements to police and medical providers are not "independent corroborative evidence" of his testimony and thus do not support his uninsured motorist claim against an unknown vehicle. The Supreme Court of Ohio agreed that a conflict exists and exercised jurisdiction over this appeal. 144 Ohio St. 3d 1406, 2015 Ohio 4947.

ARGUMENT

Certified Conflict Issue:

> **When an automobile insurance policy provides that testimony of an insured seeking uninsured motorist benefits is not independent corroborative evidence that an unidentified vehicle caused an accident unless it is supported by "additional evidence," is the policy language ambiguous, such that evidence that merely recounts the insured's own testimony is sufficient "additional evidence"?**

A. The Court of Appeals incorrectly found that the corroborative evidence test can be satisfied by evidence that does not independently corroborate the insured's testimony.

1. The Supreme Court of Ohio adopted the corroborative evidence test twenty years ago specifically to prevent fraudulent claims for uninsured motorist coverage.

Although not required by Ohio law, it has long been the practice of automobile insurance companies in Ohio to offer coverage for injuries caused by the negligence of unidentified motorists. *Girgis v. State Farm Mut. Auto. Ins. Co.*, 75 Ohio St. 3d 302, 306, 1996 Ohio 111. This coverage was limited historically to accidents in which a hit-and-run vehicle actually came into physical contact with the insured's vehicle, in order "to prevent the filing of fraudulent claims" in which an insured blames an imaginary "phantom vehicle" for an accident that was actually caused by the insured's own negligence. *Travelers Indemnity Co. v. Reddick*, 37 Ohio St. 2d 119, 124 (1974).

This Court later acknowledged "the injustice of prohibiting legitimate claims solely because no physical contact occurred," but it "remain[ed] committed to the underlying policy of preventing fraud." *Girgis*, *supra*, 75 Ohio St. 3d at 306. Accordingly, it replaced the physical contact requirement with the "corroborative evidence test," which prevents fraudulent uninsured motorist claims by requiring testimony or other evidence that independently corroborates an insured's claim that an unidentified vehicle caused an accident:

> [T]he test that ought 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 <u>if there is independent third party testimony</u> that the negligence of an unidentified vehicle was a proximate cause of the accident.
>
> * * * *
>
> This [test] will . . . allow an insured to <u>prove through independent third party testimony</u> that an unidentified vehicle was a proximate cause of the accident. . . .
>
> [T]he corroborative evidence test we propound <u>requires independent third-party testimony</u> specifically to protect insurance companies from fraud.

75 Ohio St. 3d at 305, 307 (emphasis added). This Court has not addressed this corroborative evidence test since it decided *Girgis*.

2. The Ohio General Assembly enacted the corroborative evidence test for uninsured motorist claims one year later by amending R.C. 3937.18.

If the ruling in *Girgis* had ended the matter, automobile insurance companies that offer uninsured motorist coverage in Ohio could have simply replaced the physical contact requirement with a policy provision requiring "independent third party testimony" that an unidentified motorist caused an accident. However, the General Assembly paraphrased the *Girgis* corroborative evidence test when it amended the uninsured motorist statute, R.C. 3937.18, the following year. Both the *Girgis* opinion and the amended statute require independent corroborative evidence, and both specify that an insured's own statements are not independent corroborative evidence. However, *Girgis* simply states that there must be "independent third party testimony," while the statute goes on to reiterate that an insured's own statements are not independent corroborative evidence unless there is "additional evidence" corroborating the claim:

> (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:
>
> * * *
>
> (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.

R.C. 3937.18(B)(3). Both the judicial and the legislative statements of the corroborative evidence test specify that an insured's own statements, standing alone, are not independent corroboration of the insured's claim.

Ohio insurers who offer uninsured motorist insurance must provide coverage in the circumstances described in R.C. 3937.18(B)(3), *i.e.*, when there is "independent corroborative evidence" that the insured's injuries were caused by an unidentified negligent motorist rather than by the insured's own negligence. The statute further provides that the testimony of the insured is not independent corroborative evidence unless it is supported by "additional evidence," without reiterating the tautological fact that only evidence independent of the insured's own testimony can provide independent corroboration of that testimony. The General Assembly's use of the phrase "additional evidence" in the final clause of R.C. 3937.18(B)(3) can only be understood in this context as a shorthand reference to the "independent corroborative evidence" it had mentioned in the same sentence just six words earlier. After all, it was attempting to codify the *Girgis* corroborative evidence test, not to render it meaningless by eliminating the requirement for independent corroboration.

3. The ruling below is at odds with decisions in which Ohio appellate courts have overwhelmingly recognized that an insured's statements cannot independently corroborate the insured's own statements.

a. The corroborative evidence test is not satisfied by evidence that does not independently corroborate an insured's testimony.

Virtually all of the Ohio appellate courts that have addressed this issue have recognized that "additional evidence" cannot independently corroborate an insured's own testimony unless it is independent of the insured's testimony, as this Court held in *Girgis*, *supra*. The corroborative evidence test would otherwise provide no protection against fraudulent claims, which is its sole purpose. Consistent with normal English usage, these courts have held that additional corroborative evidence must "come[] from a source other than the insured seeking coverage." *Honzell v. Nationwide Insurance Co.*, 10th App. Dist. No. 11AP-998, 2012 Ohio 6154, at ¶ 13. *See, e.g.*, *Jackson v. State Farm Mut. Auto. Ins. Co.*, 4th App. Dist. No. 14-CA-850, 2015 Ohio 1131, at ¶ 15 (there must be "independent third-party testimony that corroborates [insured]'s version of the events of an accident" allegedly caused by an unidentified vehicle); *Fuller v. Allstate Ins. Co.*, 10th App. Dist. No. 11AP-1014, 2012 Ohio 3705, at ¶ 11 ("corroborative evidence is independent if it comes from a source other than the insured who is seeking coverage").

In this case, Mr. Smith's additional "corroborative" evidence consists of his own statements to a 911 operator, a police officer, and medical personnel, which were later repeated (and attributed to him) in their records. These self-serving statements do not independently corroborate Mr. Smith's testimony that an unknown vehicle caused his injuries and thus do not satisfy the corroborative evidence test.

b. The corroborative evidence test is not satisfied by reports and records that merely recite the insured's own statements.

In similar cases, other Ohio appellate courts have held that police reports are not "corroborative evidence" of an insured's statements when they merely repeat the insured's own statements. *See Honzell*, *supra*, 2012 Ohio 6154, at ¶ 18 ("what the insured told the officer . . . is not independent corroborative evidence" of the insured's uninsured motorist claim; a police report does not provide independent corroboration unless it consists of "the officer's firsthand observation"); *Willford v. Allstate Indemn. Co.*, 10th App. Dist. No. 97-APE05-657, 1997 Ohio App. Lexis 5130, at *5-*6 (when the insured's accident report consists of "a repetition of statements [the insured] himself made to the investigating officer, not the observations of third parties," it is "no more corroborative than testimony plaintiff might give at trial").

For the same reason, other Ohio appellate courts have also held that medical reports are not "corroborative evidence" of an insured's claim unless they consist of independent third-party evidence, rather than the insured's own statements. *See, e.g.*, *Combs v. Allstate Ins. Co.*, 10th App. Dist. No 99AP-822, 2000 Ohio App. Lexis 2861, at *8-*9 (where testimony of the plaintiff's physician is "based entirely upon statements made by the plaintiff during the course of her treatment" and "is not the product of the physician's personal observation," it "[o]bviously . . . does not provide independent corroborative evidence"). *Compare Connell v. United Services Auto. Assn.*, 2d App. Dist. No. 20282, 2004 Ohio 2726, at ¶ 18, where objective medical evidence of the insured's physical injuries independently corroborated his version of the accident.

c. The certified conflict case properly held that an insured's testimony cannot be independently corroborated by recitations of the insured's own statements.

In the certified conflict case, *Brown v. Philadelphia Indemnity Ins. Co.*, 12th App. Dist. No. CA2010-10-094, 2011 Ohio 2217, *appeal denied*, 2011 Ohio 5129, the Twelfth District Court of Appeals followed this earlier case law and held that an accident report and medical records were not independent corroborative evidence of an insured's uninsured motorist claim because they merely repeated the insured's own statement that a "phantom" vehicle had caused his injuries. As in the present case, the insurance policy provision "closely track[ed] the language in R.C. 3937.18(B)(3)." 2011 Ohio 2217, at ¶ 16. The Court concluded:

> When read in context, the term "additional evidence" clearly requires that the evidence be additional to or independent from that already provided by the insured's testimony. In other words, the "additional evidence" must come from a source other than the insured's testimony. . . . Instead, the evidence he presented merely repackaged the statements he made to the police who investigated the accident or to his treating physician. . . . [T]he police and Brown's physician were merely relying on Brown's account of the accident. . . .

2011 Ohio 2217, at ¶¶ 27-28.

The Twelfth District Court of Appeals correctly recognized in *Brown* that the corroborative evidence test requires independent corroborative evidence, and that it cannot perform its function of preventing fraudulent uninsured motorist claims if it can be satisfied by the insured's own self-serving statements. The conflicting ruling in the present case by the Sixth Appellate District Court of Appeals should be reversed.

B. The Court of Appeals erroneously found that the Erie insurance policy provision is ambiguous.

1. The Court of Appeals did not consider the purpose or context of the insurance provision incorporating the corroborative evidence test.

The Court of Appeals held in this case that the language used in R.C. 3937.18(B)(3) and in the parties' insurance policy to describe the corroborative evidence test is "susceptible of at least two interpretations; one in which the 'additional evidence' must be independent third party evidence not derived from the insured . . . and another in which the 'additional evidence' may consist of items of evidence, such as medical records and police reports, that are based on the testimony of the insured." 2015 Ohio 3078, at ¶ 30. But the second interpretation requires no independent corroboration of the insured's testimony, and it therefore defeats the purpose of the provision, the intentions of the parties, and the public policy reasons that the corroborative evidence test was adopted by this Court in *Girgis*, *supra*, and by the Ohio General Assembly in R.C. 3937.18(B)(3).

2. An insurance policy provision is not "ambiguous" when there is only one reasonable interpretation consistent with its purpose and the intentions of the parties.

The rules that Ohio courts use to determine the legal rights and obligations of parties under insurance policies have a single objective: to effectuate the intent of the insured and the insurer. *See, e.g., Hamilton Ins. Serv. Inc. v. Nationwide Ins. Co.*, 86 Ohio St. 3d 270, 273 (1999); *Employers' Liab. Assur. Corp. v. Roehm*, 99 Ohio St. 343, syllabus (1919). The intent of the parties is presumed to be expressed by the language used in a policy. *Kelly v. Med. Life Ins. Co.*, 31 Ohio St. 3d 130, syllabus paragraph one (1987). If the intent of the parties cannot be ascertained from the words that are used, a court must consider the insurance policy as a whole and any other evidence of their intent. *Shifrin v. Forest City Enterprises, Inc.*, 64 Ohio St. 3d 635 (1992). *See Cincinnati Gas & Electric Co. v. Hartford Steam Boiler Inspection and*

Insurance Co., S.D. Ohio No. 1:06-CV-331, 2008 U.S. Dist. Lexis 29569, at *20) ("Plaintiff misreads Ohio law in its argument that once an ambiguity is determined in an insurance exclusion, the Court must immediately construe the provision against the drafting insurance company").

"By its very nature the English language contains a certain amount of ambiguity.... Still, the difficulties experienced in attempting to be precise when using the English language do not mean that the courts should automatically find contracts or statutes to be ambiguous." *Winningham v. Sexton*, 820 F.Supp. 338, 341 (S.D. Ohio 1993), *affirmed*, 42 F.3d 981 (6th Cir. 1994). The intended meaning of a word always depends upon its context, including the surrounding circumstances and the purpose for which it is used; "[p]arsing individual words is useful only within a context." *State v. Porterfield*, 106 Ohio St. 3d 5, 2005 Ohio 3095, at ¶ 11. Accordingly, words must be "construed in light of the subject matter with which the parties are dealing and purpose to be accomplished." *Bobier v. National Cas. Co.*, 143 Ohio St. 215, syllabus paragraph one (1944). *See Laboy v. Grange Indemn. Ins. Co.*, 144 Ohio St. 3d 234, 237, 2015 Ohio 3308, at ¶ 10 ("[i]f a reasonable interpretation of the [insurance policy] language exists, then we should give the [policy] its intended legal effect").

The Court of Appeals in the present case made the same error that this Court warned against in *State v. Porterfield*, *supra*, 106 Ohio St. 3d at 5, 7, 2005 Ohio 3095, at ¶ 11:

> Some courts have reasoned that when multiple readings are possible, the provision is ambiguous.... The problem with this approach is that it results in courts reading ambiguities into provisions, which creates confusion and uncertainty. When confronted with allegations of ambiguity, a court is to objectively and thoroughly examine the writing to attempt to ascertain its meaning.... Only when a definitive meaning proves elusive should rules for construing ambiguous language be employed. Otherwise, allegations of ambiguity become self-fulfilling....

See also Westfield Insurance Co. v. Galatis, 100 Ohio St. 3d 216, 228, 2003 Ohio 5849, at ¶ 49 (holding that an earlier decision, finding that the word "you" in the parties' insurance policy was ambiguous, was wrongly decided because "the intention of the parties was ignored").

3. The provisions of the Erie insurance policy that incorporate the corroborative evidence test are not ambiguous.

Ohio appellate courts have regularly followed this Court's directive that the intentions of the parties to an insurance policy must trump abstract linguistic semantics, but the Court of Appeals in this case did not. "Although ambiguous provisions in an insurance policy must be construed strictly . . . it is equally well settled that a court cannot create ambiguity in a contract where there is none." *Lager v. Miller-Gonzalez*, 120 Ohio St. 3d 47, 2008 Ohio 4838, at ¶ 16. Courts must interpret words and phrases in an insurance policy "consistent with the apparent object and plain intent of the parties." *Gomolka v. State Auto. Mut. Ins. Co.*, 70 Ohio St. 2d 166, 167-68 (1982). As this Court explained in *Sauer v. Crews*, 140 Ohio St. 3d 314, 2014 Ohio 3655, at ¶ 14:

> Since courts must examine the insurance policy as a whole to determine the parties' intentions, it follows that courts must also examine the policy as a whole when determining whether a word or phrase of the policy is ambiguous. We accordingly hold that in determining whether an insurance policy provision is ambiguous, a court must consider the context in which the provision is used.

The intention of the parties and the context of the Erie insurance policy provision are not in dispute; they wanted to include uninsured motorist coverage in compliance with the corroborative evidence test adopted by *Girgis*, *supra*, and mandated by R.C. 3937.18(B)(3). The Court of Appeals erred in failing to recognize that the language in the Erie policy has only one reasonable interpretation in this context – to require independent corroborative evidence. The policy therefore is not ambiguous as to whether independent corroborative evidence is required.

C. The Court of Appeals improperly held that ambiguous language in an insurance policy provision must be strictly construed against the insurer even though the General Assembly has required insurers to include the provision in uninsured motorist policies.

After the Court of Appeals erroneously concluded that the provision of Mr. Smith's insurance policy adopting the corroborative evidence test is ambiguous, it "strictly construed" this purported ambiguity against Erie. But insurers have included the R.C. 3937.18(B)(3) corroborative evidence test in their uninsured motorist policy provisions for nearly twenty years. If this statutory corroborative evidence test is "ambiguous," the General Assembly is responsible, not Erie.

As explained above, the language used in the statute (and therefore in the insurance policy) is not ambiguous; it is susceptible of only one reasonable interpretation in the context of its history and purpose. But even if it were ambiguous, this language should not be strictly construed against Erie because it merely tracks the Ohio General Assembly's statutory language. If Erie had used different language, it would face lawsuits complaining that it did not comply with the statute. Erie and other insurers who follow the statutory language in their uninsured motorist policy provisions are not responsible for any ambiguity in that language, and it should not be strictly construed against them.

In any event, the statutory language is not ambiguous, for the same reasons that the policy language is not ambiguous. "When a statute is susceptible of more than one interpretation, courts seek to interpret the statutory provision in a manner that most readily furthers the legislative purpose as reflected in the wording used in the legislation." *State ex rel. Toledo Edison Co. v. Clyde*, 76 Ohio St. 3d 508, 513, 1996 Ohio 376. In this case the legislative purpose was indisputably to require independent corroborative evidence, and the statute therefore is not susceptible of any interpretation that would eliminate the need for independent

corroborative evidence. When a statutory provision is not ambiguous, policy language incorporating that statutory provision is not ambiguous. At the very least, it should not be strictly construed against the insurer, and the ruling below should also be reversed on this ground.

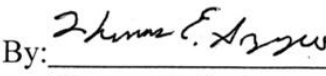
CONCLUSION

Amicus curiae Ohio Insurance Institute supports appellant Erie Insurance Company in asking this Court to resolve the certified conflict by reversing the ruling below.

An insured's own statements are not "additional" evidence corroborating the insured's claim that he drove off the roadway to avoid an unidentified vehicle. The ruling by the Court of Appeals so distorts the corroborative evidence test that it would no longer require independent corroborative evidence and thus would no longer provide the protection against potential fraud that it was created to provide. The Court of Appeals reached that result by finding that the policy language is "ambiguous," despite its obvious intention to cover injuries attributed to an unidentified motorist only if there is independent corroborative evidence. Finally, the Court of Appeals construed that "ambiguous" policy language against Erie, even though it tracks the language that the General Assembly used to describe required uninsured motorist coverage in R.C. 3937.18(B)(3).

OII and its members are extremely concerned about each of these three holdings, which would profoundly affect Ohio insurance law without regard to their practical consequences for insurers and insureds. OII urges the Court to reverse the decision below.

Respectfully submitted,

By: 

Thomas E. Szykowny (0014603)
Michael Thomas (0000947)
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street, P.O. Box 1008
Columbus, OH 43216-1008
Tel: (614) 464-5671
Fax: (614) 719-4990
teszykowny@vorys.com
mrthomas@vorys.com

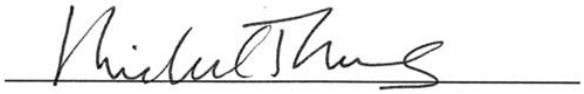
Attorneys for Amicus Curiae Ohio Insurance Institute

CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Amici Curiae Ohio Insurance Institute in Support of Appellant Erie Insurance Company was served via U.S. mail on this 16th day of February, 2016 to:

D. Casey Talbott
EASTMAN & SMITH LTD.
One SeaGate, 24th Floor
P.O. Box 10032
Toledo, OH 43699-0032
Tel: (419) 241-6000
Fax: (419) 247-1777
dctalbott@eastmansmith.com

Attorneys for Defendant-Appellant Erie Insurance Company

Steven P. Collier (0031113)
Steven R. Smith (0031778)
Janine T. Avila (0055853)
CONNELLY & COLLIER LLP
405 Madison Avenue, Suite 2300
Toledo, OH 43604
Tel: (419) 243-2100
Fax: (419) 243-7119
scollier@cjc-law.com

Attorneys for Plaintiffs-Appellees Scott and Dawn Smith