Supreme Court of Ohio Clerk of Court - Filed February 16, 2016 - Case No. 2015-1419

S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S

IN THE SUPREME COURT OF OHIO

S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S

Scott L. Smith, *et al.*,	:	Case No. 2015-1419
Plaintiffs-Appellees,	:	On Appeal from the Ottawa County Court of Appeals, Sixth Appellate District
vs.	:	
Erie Insurance Company,	:	Court of Appeals Case No. OT-15-005
Defendant-Appellant.	:	

S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S

MERIT BRIEF OF DEFENDANT-APPELLANT ERIE INSURANCE COMPANY

S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S-S

Steven P. Collier (0031113)
Steven R. Smith (0031778)
Janine T. Avila (0055853)
Connelly & Collier LLP
405 Madison Avenue, Suite 2300
Toledo, Ohio 43604
Telephone: (419) 243-2100
Fax: (419) 243-7119
Email: scollier@cc-attorneys.com
ssmith@cc-attorneys.com
javila@cc-attorneys.com

Attorneys for Plaintiffs-Appellees
Scott L. Smith and Dawn M. Smith

D. Casey Talbott (0046767)
Mark W. Sandretto (0079536)
Lindsey K. Ohlman (0092289)
EASTMAN & SMITH LTD.
One SeaGate, 24th Floor
P.O. Box 10032
Toledo, Ohio 43699-0032
Telephone: (419) 241-6000
Fax: (419) 247-1777
Email: dctalbott@eastmansmith.com
mwsandretto@eastmansmith.com
lkohlman@eastmansmith.com

Attorneys for Defendant-Appellant
Erie Insurance Company

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF FACTS 1

ARGUMENT 4

Proposition of Law: The mere repackaging of an insured's own statements – e.g., in a 9-1-1 call, a crash report, and medical records – does not constitute "independent corroborative evidence" so as to state a claim under R.C. 3937.18(B)(3) and/or insurance policy provisions tracking this statute. 4

A. Introduction 4

B. The Supreme Court of Ohio adopted the corroborative evidence test in *Girgis v. State Farm Mutual Automobile Insurance Company*, which the Ohio General Assembly incorporated into Ohio's uninsured motorist statute. 6

C. When interpreting an insurance policy provision, courts are tasked with considering the policy as a whole, reading the provision in context, and interpreting the words in the policy consistent with the clear intent of the parties. 8

D. The Smiths' interpretation of "additional evidence" in a manner that allows an insured to self-corroborate his own testimony by merely repeating it to third parties is an unreasonable interpretation of the Erie Policy. 9

E. The Twelfth District Court of Appeals correctly analyzed the policy provision as a whole and found that evidence derived solely from the insured's testimony is not independent corroborative evidence. 11

F. The Sixth District's interpretation of the "additional evidence" language of the Erie Policy and R.C. 3937.18(B)(3) undermines *Girgis* and renders the independent corroborative evidence requirement meaningless. 14

G. The cases relied upon by the Sixth District are clearly distinguishable. 16

CONCLUSION 18

PROOF OF SERVICE 19

APPENDIX

Appx. Page

Notice of Certified Conflict of Defendant-Appellant Erie Insurance Company (Aug. 28, 2015) 001

Notice of Appeal of Defendant-Appellant Erie Insurance Company (Sept. 11, 2015) 030

Decision and Judgment of the Ottawa County Court of Appeals Sixth Appellate District (July 31, 2015) 032

Decision and Judgment of the Ottawa County Court of Common Pleas (Nov. 14, 2014) 050

Ohio Revised Code § 3937.18 054

TABLE OF AUTHORITIES

Page(s)

Cases

Brown v. Philadelphia Indem. Ins. Co., 12th Dist. Warren No. CA2010-10-094, 2011-Ohio-2217 ..... 3, 4, 10, 11, 13, 14, 18

Combs v. Allstate Ins. Co., 10th Dist. Franklin No. 99AP-822, 2000 Ohio App. Lexis 2861 (June 29, 2000) 7

Connell v. United Servs. Auto. Assn., 2nd Dist. Montgomery No. 20282, 2004-Ohio-2726 ..... 16 17, 18

Craig v. Midwest Indemn. Co., 2nd Dist. Champaign No. 96-CA-18, 1997 Ohio App. Lexis 2060 (May 16, 1997) 7

Girgis v. State Farm Mut. Auto. Ins. Co., 75 Ohio St.3d 302, 662 N.E.2d 280 (1996) 4, 5, 6, 7, 9, 15, 16

Honzell v. Nationwide Ins. Co., 10th Dist. Franklin No. 11AP-998, 2012-Ohio-6154 10

Ingram v. State Farm Ins. Co., 6th Dist. Lucas No. L-09-1201, 2010-Ohio-1599 16

Jackson v. State Farm Mut. Auto. Ins. Co., 4th Dist. Pike No. 14CA850, 2015-Ohio-1131 10

Laboy v. Grange Indemn. Ins. Co., 144 Ohio St.3d 234, 2015-Ohio-3308, ¶8, 41 N.E.3d 1224 ..... 8, 9, 15

Muncy v. Am. Select Ins. Co., 129 Ohio App.3d 1, 716 N.E.2d 1171 (10th Dist. 1998) 10

Rose v. City of Garfield Heights, 8th Dist. Cuyahoga Nos. 85420 & 85426, 2005-Ohio-4165 ..... 16, 17, 18

Sauers v. Crews, 140 Ohio St.3d 314, 2014-Ohio-3655, 18 N.E.3d 410 9

Smith v. Erie Ins. Co., 144 Ohio St.3d 1406, 2015-Ohio-4947, 41 N.E.3d 445 4

Smith v. Erie Ins. Co., 2015-Ohio-3078, 36 N.E.3d 214, (6th Dist.) 3, 5, 16

State ex rel. Toledo Edison Co. v. Clyde, 76 Ohio St.3d 508, 668 N.E.2d 498 (1996) 9

State v. Porterfield, 106 Ohio St.3d 5, 2005-Ohio-3095, 829 N.E.2d 690 9

Travelers Indemnity Co. v. Reddick, 37 Ohio St.2d 119, 308 N.E.2d 454 (1974) 6

Westfield Ins. Co. v. Galatis, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶11, 797 N.E.2d 1256 ..... 8, 9

Willford v. Allstate Indemn. Co., 10th Dist. Franklin No. 97APE05-657, 1997 Ohio App. Lexis 5130 (Nov. 10, 1997) 7

Statutes

Civ.R. 54(B) 3

R.C. 3937.18 5

R.C. 3937.18(B)(3) 4, 5, 7, 9, 12, 13, 14, 15, 18

R.C. 3937.18(D)(2) 5

STATEMENT OF FACTS

Plaintiff-Appellant Scott L. Smith was involved in a single-vehicle accident during the late evening hours of July 25, 2011 in Portage Township, Ottawa County, Ohio. (Joint Stipulation of Facts, at ¶1.) Mr. Smith claimed that he was proceeding southbound on CR0034 aka Plasterbed Road, approaching the intersection of TR 0264 aka Schiew Road, when a northbound vehicle on Plasterbed Road went left of center, entering Mr. Smith's lane of travel, and that in order to avoid a collision Mr. Smith swerved his vehicle off of the right side of the roadway where it struck several trees. (*Id.*)

The Smith vehicle did not come into actual physical contact with the claimed northbound vehicle, and there is no physical evidence confirming the vehicle's existence. (*Id.* at ¶2.) Further, Mr. Smith was not able to locate the claimed northbound vehicle and/or to identify its owner or operator; and other than Mr. Smith, there were no identifiable witnesses to the accident. (*Id.* at ¶¶ 3 and 4.)

Following the accident Mr. Smith discussed the accident with: (1) a 9-1-1 operator; (2) an investigating officer of the Ohio State Highway Patrol; and (3) various medical practitioners; in each of these instances, Mr. Smith described the circumstances he claims led to the accident – that is, that he had swerved his vehicle off of the roadway in order to avoid a collision with another vehicle which had crossed the centerline and entered into his lane of travel. (*Id.* at ¶5.)

As of the date of the accident, Mr. Smith was a named-insured under a policy of automobile insurance issued by Defendant-Appellant Erie Insurance Company ("Erie") – specifically, Policy No. Q12-6304152 (hereafter "the Erie Policy"). In pertinent part, the Erie Policy states as follows (bold-face in original):

> **"Uninsured motor vehicle"** means a **"motor vehicle:"**
>
> * * *
>
> 3. which is a hit-and-run **"motor vehicle."** The identity of the driver and owner of the hit-and-run vehicle must be unknown and there must be independent corroborative evidence that the negligence or intentional acts of the driver of the hit-and-run vehicle caused the bodily injury. Testimony of **"anyone we protect"** seeking recovery does not constitute independent corroborative evidence, unless the testimony is supported by additional evidence.

(Joint Stipulation of Facts, at ¶6.)

Mr. Smith presented a claim for uninsured motorist ("UM") benefits under the Erie Policy, submitting in support of this claim his own "testimony," plus copies of: 1) the 9-1-1 transcript/audio recording; 2) the OSHP Crash Report/scene photographs; and 3) various medical reports; Erie denied Mr. Smith's claim, for want of independent corroborative evidence. (*Id.* at ¶5, 7, and 8.)

The Smiths thereafter sued Erie, alleging three claims: (1) breach of contract due to Erie's denial of the Smiths' claim for UM benefits under the Erie Policy; (2) declaratory judgment regarding UM coverage under the Erie Policy; and (3) bad faith by Erie in denying the Smiths' claim for UM benefits. (See Complaint generally.)

Following the filing of Erie's Answer, the parties filed a Joint Stipulation of Facts (see Joint Stipulation, filed on May 3, 2013), and submitted cross-motions for summary judgment regarding the first and second claims of the Smiths' Complaint.[1]

After hearing oral arguments, the trial court granted Erie's motion for summary judgment and denied the Smiths'. (See Nov. 14, 2014 Decision and Judgment Entry.) In reaching its decision, the trial court relied heavily on the Twelfth District Court of Appeals' decision and analysis in *Brown v. Philadelphia Indem. Ins. Co.,* 12th Dist. Warren No. CA2010-10-094, 2011-Ohio-2217, a factually analogous claim, and concluded that the 9-1-1 recording, the crash report, and Mr. Smith's medical records did not suffice so as to state a claim, since they were not "independent corroborative evidence"; rather, they all originated from Mr. Smith himself, and "[n]one of these are independent." (*Id.* at p.4.) The trial court later re-issued the same Decision and Judgment Entry, adding Civ.R. 54(B) language, finding "[t]here is no just reason for delay." (See Feb. 11, 2015 Decision and Judgment Entry Nunc Pro Tunc, at p. 4.)

On appeal, the Sixth District Court of Appeals reversed, holding that the Erie Policy was "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." (*Smith v. Erie Ins. Co.,* 2015-Ohio-3078, 36 N.E.3d 214, ¶¶30, 33 (6th Dist.).) In doing so, the Sixth District acknowledged that its decision was in direct conflict with the Twelfth District's decision in *Brown*, wherein the court

[1] See Erie's Summary Judgment Brief, filed on May 3, 2013; the Smiths' Cross-Motion for Summary Judgment, filed on May 24, 2013; Erie's Memorandum in Opposition to the Smiths' Cross-Motion for Summary Judgment, filed on June 12, 2013; and the Smiths' Reply Memorandum in Support of their Motion for Summary Judgment, filed on June 21, 2013.

determined that an insured's own, repackaged statements do not and cannot suffice to state a claim under a substantively analogous policy provision, since there is simply nothing "independent" or "corroborative" about such statements. *Brown, supra,* at ¶28. Accordingly, the Sixth District *sua sponte* certified the following question to this Court, for its consideration:

> Whether the policy language is ambiguous, leading to an interpretation in favor of the insured that any evidence apart from the insured's testimony, either derived from the insured's testimony or not, is sufficient to constitute 'additional evidence' under the policy, or whether the policy is unambiguous and the 'additional evidence' must be independent of, and not derived from, the insured's testimony?

Erie filed with this Court both a Notice of Appeal of the Sixth District's Decision and a Notice of Certified Conflict. (August 28, 2015 Notice of Certified Conflict.) On December 2, 2015, this Court determined that a conflict existed and ordered the parties to brief the issue set forth in the Sixth District's Decision and Judgment. (*Smith v. Erie Ins. Co.*, 144 Ohio St.3d 1406, 2015-Ohio-4947, 41 N.E.3d 445.)

ARGUMENT

Proposition of Law: ***The mere repackaging of an insured's own statements – e.g., in a 9-1-1 call, a crash report, and medical records – does not constitute "independent corroborative evidence" so as to state a claim under R.C. 3937.18(B)(3) and/or insurance policy provisions tracking this statute.***

A. Introduction

This case threatens to undermine the balance between insureds' rights to UM benefits and preventing fraud in single vehicle accident cases. In *Girgis v. State Farm Mut. Auto. Ins. Co.*, 75 Ohio St.3d 302, 662 N.E.2d 280 (1996), this Court balanced those interests by (i) precluding a policy of insurance containing UM coverage from requiring actual physical contact between vehicles as an absolute prerequisite to recovery under the policy; and (ii) establishing the

"corroborative evidence test" to require independent third party testimony that the negligence of an unidentified vehicle was the proximate cause of the accident. *Id.* at 305-06.

Shortly after *Girgis* was decided, the General Assembly adopted the independent corroborative evidence requirement in R.C. 3937.18 for purposes of determining whether a "phantom vehicle" is uninsured for purposes of UM coverage.[2] The state's automobile insurers, including Erie, thereafter followed suit, and enacted policy provisions which track the state statute and incorporate the independent corroborative evidence requirement.

In the instant case, the insured/claimant contends that the actions of a phantom vehicle caused him to run his own vehicle off of the road, and into some trees. The claim is not supported by any independent corroborative evidence; rather, the insured/claimant seeks to "independently corroborate" his claim by repackaging in three separate forms his *own* statements, as made to others.

So the dispositive issue appears to be: Notwithstanding an absolute want of independent corroborative evidence, can an insured/claimant satisfy the state statute/tracking policy provisions by simply repackaging his or her own statements? In the case at bar, the Sixth District answered this question "yes," holding that repackaged statements suffice, as "additional evidence," so as to state a claim. *See Smith v. Erie Ins. Co.*, 2015-Ohio-3078, 36 N.E.3d 214 (6th Dist.). In doing so, the Sixth District in essence determined that the independent corroborative evidence test does not in fact require independent corroborative evidence, thereby defeating the purpose of the test.

---

[2] The 122nd General Assembly originally codified the *Girgis* test under R.C. 3937.18(D)(2). The 124th General Assembly reorganized R.C. 3937.18 and the *Girgis* test was moved to R.C. 3937.18(B)(3), effective on October 31, 2001. For purposes of this brief, the statute will only be referred to as R.C. 3937.18(B)(3).

The Sixth District's decision threatens to undermine *Girgis*, does not give the state statute/tracking policy provisions their intended effect, and seemingly, would result in the state statute/tracking policy provisions basically imploding upon themselves.

In light of the above, the Sixth District's decision should be reversed.

B. The Supreme Court of Ohio adopted the corroborative evidence test in *Girgis v. State Farm Mutual Automobile Insurance Company*, which the Ohio General Assembly incorporated into Ohio's uninsured motorist statute.

The critical issue in this case is the application of the independent corroborative evidence requirement, which traces its roots to this Court's decision in *Girgis v. State Farm Mut. Auto. Ins. Co.*, 75 Ohio St.3d 302, 662 N.E.2d 280 (1996). Historically, to recover under the uninsured motorist coverage of an insurance policy, physical contact with an unidentified vehicle was required. *Id.* at 304. In *Girgis*, this Court rejected the physical contact requirement, holding that public policy precludes insurance contract provisions from requiring actual physical contact between vehicles as an absolute prerequisite to recovery. *Id.* at 305. The Court noted that the obvious underlying purpose behind requiring physical contact was to provide an objective standard of corroboration of the existence of a phantom vehicle in an effort to prevent the filing of fraudulent claims, but expressed concern that the physical contact requirement often left insureds with legitimate claims deprived of any recovery, even when independent third-party testimony was available, solely because no physical contact occurred. *Id.* at 306, quoting *Travelers Indemnity Co. v. Reddick*, 37 Ohio St.2d 119, 124, 308 N.E.2d 454, 457 (1974). To balance the interests of insureds against those of insurers, the Court developed the "corroborative evidence test," which "applie[s] in cases where an unidentified driver's negligence causes injury" and "allows a claim to go forward if there is independent third party testimony that the negligence of an unidentified vehicle was a proximate cause of the accident." *Id.* at 305. The

Court explained that the corroborative evidence test "requires independent third-party testimony specifically to protect insurance companies" against the risk of fraudulent claims. *Id.* at 306-307. (Emphasis added.)[3]

In response to *Girgis*, in 1997 the General Assembly enacted R.C. 3937.18(B)(3) which states in pertinent part as follows:

> 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.** (Emphasis added.)

[3] Following *Girgis*, Ohio's appellate courts rendered a number of decisions confirming the need for truly "independent corroborative" evidence in support of a phantom vehicle claim. *See, e.g., Combs v. Allstate Ins. Co.,* 10th Dist. Franklin No. 99AP-822, 2000 Ohio App. Lexis 2861 (June 29, 2000) (affirming summary judgment for the insurer since the evidence proffered by the claimant – specifically, the testimony of the investigating officer, a physician, and the claimant's spouse – did not constitute independent corroborative evidence, as such evidence was based entirely upon statements made by the claimant himself); *Willford v. Allstate Indemn. Co.,* 10th Dist. Franklin No. 97APE05-657, 1997 Ohio App. Lexis 5130 (Nov. 10, 1997) (affirming summary judgment for the insurer since the evidence proffered by the claimant – specifically, the crash report and an affidavit of the investigating officer – did not constitute independent third party testimony, as such evidence was merely repetitive of the claimant's own statements); and *Craig v. Midwest Indemn. Co.,* 2nd Dist. Champaign No. 96-CA-18, 1997 Ohio App. Lexis 2060 (May 16, 1997) (affirming a directed verdict for the insurer since the evidence proffered by the claimant – specifically, the crash report, certain medical records, and the testimony of the investigating officers, a witness who arrived upon the scene following the accident, and the responding emergency personnel – did not constitute the type of independent third party testimony or evidence contemplated by *Girgis* but, rather, "consisted solely of repetition of statements made by the [claimants]").

As noted above, the state's automobile insurers, including Erie, thereafter followed suit, and enacted policy provisions which track the language of the statute.

C. When interpreting an insurance policy provision, courts are tasked with considering the policy as a whole, reading the provision in context, and interpreting the words in the policy consistent with the clear intent of the parties.

A court's primary duty when interpreting an insurance contract is to "examine the insurance contract as a whole and presume that the intent of the parties is reflected in the language used in the policy," and "to then give effect to the intent of the parties to the agreement". *See, e.g., Westfield Ins. Co. v. Galatis,* 100 Ohio St.3d 216, 219, 2003-Ohio-5849, ¶11, 797 N.E.2d 1256, 1261. This Court recently explained in *Laboy v. Grange Indemn. Ins. Co.*, 144 Ohio St.3d 234, 236, 2015-Ohio-3308, ¶8, 41 N.E.3d 1224, 1227:

> An insurance policy is a contract whose interpretation is a matter of law. **The fundamental goal when interpreting an insurance policy is to ascertain the intent of the parties from a reading of the policy in its entirety and to settle upon a reasonable interpretation of any disputed terms in a manner designed to give the contract its intended effect.** Words and phrases must be given their plain and ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument. (Emphasis added.)

Since courts must examine insurance policies as a whole to ascertain the parties' intent, it follows that courts must also consider the context of a policy provision in determining whether it is ambiguous. *Sauers v. Crews*, 140 Ohio St.3d 314, 318, 2014-Ohio-3655, ¶14, 18 N.E.3d 410, 413. *See also State v. Porterfield,* 106 Ohio St.3d 5, 7, 2005-Ohio-3095, ¶12, 829 N.E.2d 690, 693 ("[p]arsing individual words is useful only within a context.").

When confronted with allegations of ambiguity, a court is to "objectively and thoroughly examine the writing to attempt to ascertain its meaning." *Westfield, supra*, at ¶11. Rules for construing ambiguous language should be employed "only when a definitive meaning proves elusive." *Porterfield* at ¶11. Although ambiguity in a contractual provision is construed liberally in favor of the insured, this rule does not apply if doing so would lead to an unreasonable interpretation of the words of the policy. *Laboy* at ¶9. *See also Westfield,* at ¶13. This is particularly important where, as here, an insurance policy contains language that is required by, or tracks, a state statute. "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, 668 N.E.2d 498, 504 (1996).

D. The Smiths' interpretation of "additional evidence" in a manner that allows an insured to self-corroborate his own testimony by merely repeating it to third parties is an unreasonable interpretation of the Erie Policy.

It is clear from *Girgis,* R.C. 3937.18(B)(3), and the Erie Policy that an insured's own testimony does not and cannot provide the requisite independent corroboration. Specifically, the statute provides that the insured's own testimony does not constitute independent corroborative evidence unless it is supported by "additional evidence." The statute does not repeat what was stated just prior to the final clause, but it can logically be inferred that since "independent corroborative evidence" must exist and the testimony of the insured is <u>not</u> independent corroborative evidence, that the additional evidence needed to support the testimony of the insured must be both "independent" and "corroborative." Stated differently, the "additional evidence" language in the final clause refers back to the phrase "independent corroborative

evidence" that immediately precedes it. Because it tracks the language of the statute, the same is true of the Erie Policy.

That the "additional evidence" required must be both "independent" and "corroborative" is supported by a number of Ohio appellate courts that have analyzed the issue. The word "additional" means "coming by way of addition" or "added" or "further." *Brown v. Philadelphia Indemn. Ins. Co.*, 12th Dist. Warren No. CA2010-10-094, 2011-Ohio-2217, ¶22, quoting Webster's Third New International Dictionary (1993). "Corroborative" evidence is defined as "evidence which supplements evidence that has already been given and which tends to strengthen or confirm it. It is additional evidence, of a different character, to the same point." *Muncy v. Am. Select Ins. Co.*, 129 Ohio App.3d 1, 6-7, 716 N.E.2d 1171, 1175 (10th Dist. 1998). Thus, "additional evidence" is synonymous with "corroborative evidence." *Id.* at 7. *See, e.g., Jackson v. State Farm Mut. Auto. Ins. Co.*, 4th Dist. Pike No. 14CA850, 2015-Ohio-1131, ¶16. Corroborative evidence is "independent" if it comes "from another source," meaning "a source other than the insured seeking coverage." *Honzell v. Nationwide Ins. Co.*, 10th Dist. Franklin No. 11AP-998, 2012-Ohio-6154. ¶13. *See, e.g., Jackson, supra*, at ¶15 ("In order for an [insured] to survive a motion for summary judgment, he or she must be able to show the existence of evidence, specifically independent third-party testimony that corroborates an [insured]'s version of the events of an accident.").

In the instant case, no "independent corroborative evidence" exists – rather, the Smiths acknowledge that there were no identifiable witnesses to the accident, and that they were not able to locate the claimed northbound vehicle and/or to identify its purported owner or operator (Joint Stipulation, at ¶¶ 3 and 4); further, the Smiths acknowledge that the Smith vehicle did not come into actual physical contact with the other claimed vehicle, and that there was no physical evidence collected or documented at the scene (*e.g.,* debris and/or skid marks, etc.) confirming the vehicle's existence (Joint Stipulation, at ¶ 2).

The Smiths nevertheless proffered as corroborative evidence Mr. Smith's 9-1-1 call, the crash report, and certain of Mr. Smith's medical records. (Joint Stipulation, at ¶5.) None of this "evidence" is "independent," nor does it "corroborate" anything. Rather, in each instance the proffered evidence merely repackages the statements Mr. Smith made to third parties. Mr. Smith's repackaged statements merely establish that he described the accident in a similar manner on three separate occasions, and do absolutely nothing to "strengthen" Mr. Smith's contention that a second vehicle was involved in and caused the accident. Accordingly, this evidence fails to corroborate Mr. Smith's testimony and fails to satisfy the independent corroborative evidence requirement.

E. The Twelfth District Court of Appeals correctly analyzed the policy provision as a whole and found that evidence derived solely from the insured's testimony is not independent corroborative evidence.

In *Brown,* the certified conflict case, the Twelfth District Court of Appeals held that the evidence the claimant presented did not constitute independent corroborative/additional evidence. *Brown v. Philadelphia Indemn. Ins. Co.*, 12th Dist. Warren No. CA2010-10-094, 2011-Ohio-2217. The facts are analogous – specifically, the claimant in *Brown* contended that he observed the headlights of an oncoming vehicle driving left of center and thus coming directly

at him, and that he therefore swerved his vehicle to the right in order to avoid a collision, resulting in a single vehicle accident. *Id.* at ¶2. The involved policy provision is substantively analogous to R.C. 3937.18(B)(3) and the Erie Policy. *Id.* at ¶15. As in the case at bar, the claimant himself was the originating source of each and every item of "evidence" (specifically, the related crash report, certain medical records, and an affidavit from his treating physician) the claimant submitted in support of his claim. *Id.* at ¶23.

The trial court granted the insurer's motion for summary judgment, holding that the claimant failed to provide "independent corroborative evidence" that an unidentified or phantom vehicle was the proximate cause of his injuries, and had thus failed to establish the existence of a genuine issue of material fact as to whether the unidentified vehicle was an "uninsured motor vehicle" under the insuring policy. *Id.* at ¶4.

On appeal, the claimant argued that he had in fact provided independent corroborative evidence – specifically, by virtue of the related crash report, certain medical records, and an affidavit from his treating physician. *Id.* at ¶23.

The appellate court affirmed the trial court's decision, holding that the evidence claimant presented "merely repackaged the statements [the claimant] made to the police who investigated the incident or to his treating physicians." *Id.* at ¶28. In most pertinent part, the appellate court held as follows:

> [The claimant] failed to present either independent corroborative evidence or additional evidence to support his claim that an unidentified vehicle had run him off the road, thereby causing injury, as required under terms of the uninsured motorist coverage in the [insuring] policy.***
>
> Instead, **the evidence he presented merely repackaged the statements he made to the police who investigated the incident or to his treating physician. Since the police and [the claimant's] physician were merely relying on [the claimant's] account of the incident, the evidence [the claimant] presented in opposition to [the insurer's] summary judgment motion cannot constitute additional evidence.** *Id.* at ¶¶27-28. (Emphasis added.)

Brown properly emphasized the importance of the words "independent" and "corroborative," both of which appear in R.C. 3937.18(B)(3) and the Erie Policy:

> Neither *Girgis*, R.C. 3937.18, nor [the] policy defines the terms "independent corroborative evidence" or "additional evidence." "Corroborative evidence" is evidence that "supplements evidence that has already been given and which tends to strengthen or confirm it[;] [i]t is additional evidence, of a different character, to the same point.'" (Citations omitted.) "Independent," as used in the term "independent corroborative evidence," means corroborative evidence from a source other than the insured who is claiming that his injuries were caused by an unidentified vehicle. (Citation omitted.) Courts have held that testimony from an insured's treating physician that is based entirely upon statements made by the insured to the physician do not qualify as independent corroborating evidence. (Citation omitted.) Likewise, courts have held that a police report that contains an officer's statements that merely repeat what the insured has told the officer about an occurrence for which the insured is seeking coverage are not independent corroborative evidence. (Citations omitted.)

Brown at ¶21.

Brown also acknowledged the import of reading the contractual provision as a whole, and in context:

> The term "additional evidence" is synonymous with the term "corroborative evidence." (Citation omitted, defining

> corroborating evidence as "additional evidence, of a different character, to the same point.") **Moreover, the term "additional evidence" must be read in conjunction with the other parts of the clause.** (Citation omitted.) **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.** (Citation omitted.) *Id.* at ¶27. (Italics in original, emphasis added.)

Brown correctly gave both "independent corroborative evidence" and "additional evidence" meaning in a reasonable interpretation when viewing this language in its totality and context. *Id.* The Twelfth District correctly held that a mere repackaging of an insured's own statements does not constitute "independent corroborative evidence" so as to state a claim under R.C. 3937.18(B)(3) or insurance policy provisions that closely track the language of the statute.

The Twelfth District acted in accordance with its duty and correctly applied the law of contract construction by reading the applicable provision of the insuring agreement as a whole, then giving effect to the clear intent of the provision – that is, to allow a phantom vehicle claim to proceed only in the event that the insured is able to provide independent corroborative evidence originating from a source other than the insured's own statements. Since the insured in *Brown* did not present independent corroborative/additional evidence that his injuries were caused by an unidentified vehicle but, rather, merely repackaged the statements that he had made to other persons, the court determined that the claim failed to state a claim.

F. The Sixth District's interpretation of the "additional evidence" language of the Erie Policy and R.C. 3937.18(B)(3) undermines *Girgis* and renders the independent corroborative evidence requirement meaningless.

The Sixth District Court of Appeals failed to appropriately consider the context in which the Erie Policy provision was used and ignored the underlying purpose of the independent

corroborative evidence requirement. As a result, the Sixth District found the Erie Policy to be ambiguous and, contrary to this Court's directive in *Laboy*, construed the Erie Policy liberally in favor of Mr. Smith, despite the fact that doing so leads to an unreasonable interpretation of the independent corroborative evidence requirement, not intended by the *Girgis* Court, the General Assembly, or the state's insurers, including Erie.

Girgis specifically stated that it was adopting the corroborative evidence test because it requires independent corroborative testimony, which would serve the purpose of protecting insurance companies from fraudulent claims. *Girgis* at 306-307. The following year, the General Assembly amended Ohio's UM statute to incorporate the Court's decision in *Girgis*. In order to provide UM coverage in accordance with R.C. 3937.18(B)(3), the state's automobile insurers, including Erie, added policy provisions tracking the language of the statute. Given the underlying purpose of the corroborative evidence test, the Erie Policy is susceptible of only one reasonable interpretation: that the "additional evidence" required to support the testimony of the insured must be both independent and corroborative. In other words, the evidence must not be derived solely from the insured's testimony and must add something further, so as to confirm or strengthen it.

The Sixth District read the term "additional evidence" in a vacuum, without considering the context of the provision as a whole, and held that it was sufficient for an insured to corroborate his own testimony by repeating his own account of an accident to third parties. As such, the Sixth District's interpretation of the Erie Policy clearly ignores the underlying purpose of the independent corroborative evidence requirement and renders it meaningless by failing to require additional evidence, independent of the insured's testimony, that serves to corroborate it. This holding is not only contrary to the intent of *Girgis*, the General Assembly, and the Erie Policy provision, but also promotes the filing of fraudulent insurance claims, which is exactly the issue the corroborative evidence test was intended to combat.

As such, the Sixth District Court of Appeals' decision should be reversed.

G. The cases relied upon by the Sixth District are clearly distinguishable.

The Sixth District addressed the three cases the Smiths primarily relied on in their underlying briefing – *Ingram v. State Farm Ins. Co.,* 6th Dist. Lucas No. L-09-1201, 2010-Ohio-1599, *Rose v. City of Garfield Heights*, 8th Dist. Cuyahoga Nos. 85420 & 85426, 2005-Ohio-4165, and *Connell v. United Servs. Auto. Assn.,* 2nd Dist. Montgomery No. 20282, 2004-Ohio-2726. The Sixth District acknowledged that their decision in *Ingram* "is distinguishable from this case," because the claimant presented the independent corroborative testimony of a passenger in his vehicle who: (1) heard the claimant warn that a second vehicle was about to collide with the claimant's vehicle; (2) felt and heard the impact with the second vehicle; and (3) overheard the claimant's post-impact conversation with the second involved driver. *Smith v. Erie Ins. Co.,* 2015-Ohio-3078, ¶19, 36 N.E.3d 214, 218 (6th Dist.). In the instant case, there is no such independent corroborative evidence.

Rose and *Connell,* the decisions upon which the Sixth District appears to have placed the greatest emphasis, are distinguishable as well, since both involved pedestrians whose physical injuries were deemed to be of probative value, since otherwise the injuries arose without plausible explanation. In *Rose*, an unidentified motorist allegedly struck a city police officer as the officer was attempting to pick-up debris along the roadway, before speeding off and leaving the injured and unconscious officer in the road. *Rose* at ¶2. Upon regaining consciousness, the officer returned to his cruiser, and called dispatch; a second officer then responded to the scene, finding that the officer's uniform was "dirty and the left side of his head and left wrist appeared swollen". *Id.* Rose later presented a claim for UM benefits which was denied by his insurer, following which Rose filed a formal lawsuit which was dismissed by the trial court for want of independent corroborative evidence. *Id.* at ¶4. On appeal, the Eighth District reversed, holding that the totality of Rose's evidence constituted additional evidence that was sufficient to meet the evidentiary requirement under the independent corroborative evidence requirement set forth by the Ohio statute and the involved insurance policy, thereby creating a genuine issue of material fact as to whether the collision was caused by the unidentified motorist. *Id.* at ¶17. Most notably, the Eight District declared that "the medical records showed that [Rose] suffered a physical injury, and [the investigating officer] was able to corroborate that [Rose] appeared injured and his uniform appeared dirty." *Id.* at ¶10.

In *Connell*, the claimant was a pedestrian who alleged to have suffered injuries to his left foot when an unidentified driver allegedly struck him while he was crossing a roadway. *Connell* at ¶2. Connell filed suit, seeking UM benefits, but his claim was dismissed by the trial court for want of independent corroborative evidence. *Id.* at ¶11. On appeal, the Second District reversed,

holding that Connell's deposition testimony coupled with medical evidence of the injury he suffered sufficed so as to state a claim. *Id.* at ¶27.

Both *Rose* and *Connell* involve pedestrians whose physical injuries were deemed to be of probative value, since otherwise the injuries arose without plausible explanation. In *Brown* and the case at bar, however, the claimed injuries are of no such value, since they are merely consistent with having been potentially caused by a single vehicle accident, regardless whether the accident was caused by a phantom vehicle.

CONCLUSION

This Court adopted the corroborative evidence test specifically to protect insurance companies against the risk of fraudulent claims. In response, the General Assembly enacted R.C. 3937.18(B)(3) and the state's automobile insurers, including Erie, enacted policy provisions which track the language of the statute. In interpreting the Erie Policy, the Sixth District failed to give effect to the clear intent of the provision – that is, to allow a phantom vehicle claim to proceed only in the event that an insured is able to provide independent corroborative evidence originating from a source other than the insured's own statements. The Smiths do not and cannot proffer independent corroborative evidence as contemplated by the Erie Policy and Ohio law; rather, each item of "evidence" the Smiths submit – specifically, the 9-1-1 call, the crash report, and certain of Mr. Smith's medical records – merely "repackages" Mr. Smith's own statements with respect to how the involved accident purportedly occurred. This evidence is not "independent," nor is it "corroborative" of anything and, accordingly, the proffered evidence fails to satisfy the independent corroborative evidence requirement. The Sixth District's ruling to the contrary upsets the established balance between an insured's right to UM benefits and

protecting insurance companies from fraudulent claims. Therefore, the judgment of the Sixth District Court of Appeals should be reversed.

Respectfully submitted,

EASTMAN & SMITH LTD.

/s/ D. Casey Talbott

D. Casey Talbott (0046767)
Mark W. Sandretto (0079536)
Lindsey K. Ohlman (0092289)
EASTMAN & SMITH LTD.
One SeaGate, 24th Floor
P.O. Box 10032
Toledo, Ohio 43699-0032
Telephone: (419) 241-6000
Fax: (419) 247-1777
Email: dctalbott@eastmansmith.com
mwsandretto@eastmansmith.com
lkohlman@eastmansmith.com

Attorneys for Defendant-Appellant
Erie Insurance Company

PROOF OF SERVICE

A copy of the foregoing **Merit Brief of Defendant-Appellant Erie Insurance Company** was served electronically on this 16th day of February, 2016, to: **Steven P. Collier/Steven R. Smith/Janine T. Avila**, Connelly & Collier LLP, 405 Madison Avenue, Suite 2300, Toledo, Ohio 43604, Attorneys for Plaintiffs-Appellees.

/s/ D. Casey Talbott
Attorneys for Defendant-Appellant
Erie Insurance Company

IN THE SUPREME COURT OF OHIO

Scott L. Smith, *et al.*,	:	On Appeal from the Ottawa County Court of Appeals, Sixth District
Plaintiffs-Appellees	:	Court of Appeals Case No. OT-15-005
vs.	:	15-1419
Erie Insurance Company,	:	
Defendant-Appellant		

NOTICE OF CERTIFIED CONFLICT OF DEFENDANT-APPELLANT ERIE INSURANCE COMPANY

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

Attorneys for Defendant-Appellant
Erie Insurance Company

Steven P. Collier (0031113)
Steven R. Smith (0031778)
Janine T. Avila (0055853)
Connelly, Jackson & Collier LLP
405 Madison Avenue, Suite 2300
Toledo, Ohio 43604
Telephone: (419) 243-2100
Fax: (419) 243-7119
Email: scollier@cjc-law.com
ssmith@cjc-law.com
javila@cjc-law.com

Attorneys for Plaintiffs-Appellees
Scott L. Smith and Dawn M. Smith

FILED
AUG 28 2015
CLERK OF COURT
SUPREME COURT OF OHIO

3189842.1

Pursuant to S.Ct.Prac.R. 8.01, Defendant-Appellant Erie Insurance Company gives notice that, on July 31, 2015, the Sixth District Court of Appeals issued its Decision and Judgment in Case No. 15-OT-005 (attached as Exhibit A) *sua sponte* certifying the following question with regard to the uninsured motorist provision in an auto insurance policy:

"Whether the policy language is ambiguous, leading to an interpretation in favor of the insured that any evidence apart from the insured's testimony, either derived from the insured's testimony or not, is sufficient to constitute 'additional evidence' under the policy, or whether the policy is unambiguous and the 'additional evidence' must be independent of, and not derived from, the insured's testimony?"

The conflict case is *Brown v. Philadelphia Indemn. Ins. Co.*, 12th Dist. Warren No. CA2010-10-094, 2011-Ohio-2217 (attached as Exhibit B).

Pursuant to S.Ct.Prac.R. 8.01(B), copies of the underlying decision *sua sponte* certifying the conflict and the conflict case are attached.

Respectfully submitted,

EASTMAN & SMITH LTD.

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

Attorney for Defendant-Appellant
Erie Insurance Company

PROOF OF SERVICE

A copy of the foregoing Notice of Certified Conflict of Defendant-Appellant Erie Insurance Company was mailed this 27th day of August, 2015, to: Steven P. Collier/Steven R. Smith/Janine T. Avila, Connelly, Jackson & Collier LLP, 405 Madison Avenue, Suite 2300, Toledo, Ohio 43604, Attorneys for Plaintiffs-Appellees.

Attorney for Defendant-Appellant
Erie Insurance Company

3189642.1

FILED
COURT OF APPEALS

JUL 31 2015

GARY A. KOHLI, CLERK OF COURTS
OTTAWA COUNTY, OHIO

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

Scott L. Smith, et al.

Appellants

v.

Erie Insurance Company

Appellee

Court of Appeals No. OT-15-005

Trial Court No. 12CV236

DECISION AND JUDGMENT

Decided: JUL 31 2015

*****

Steven P. Collier, Steven R. Smith and Janine T. Avila, for appellants.

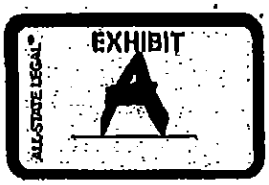
D. Casey Talbott and Jeffrey M. Stopar, for appellee.

*****

YARBROUGH, P.J.

I. Introduction

(¶ 1) Appellants, Scott and Dawn Smith, appeal the judgment of the Ottawa County Court of Common Pleas, granting summary judgment in favor of appellee, Erie Insurance Company. For the following reasons, we reverse.



A. Facts and Procedural Background

(¶ 2) The facts relevant to our disposition of this appeal were stipulated before the trial court, in relevant part, as follows:

1. Plaintiff Scott L. Smith ("Mr. Smith") was involved in a single-vehicle accident during the late evening hours of Monday, July 25, 2011 in Portage Township, Ottawa County, Ohio. Mr. Smith claims that he was proceeding southbound on CR0034 aka Plasterbed Road, approaching the intersection of TR0264 aka Schlew Road, when a northbound vehicle on Plasterbed Road went left of center, entering Mr. Smith's lane of travel, and that in order to avoid a collision Mr. Smith swerved his vehicle off of the right side of the roadway where it struck several trees. The parties stipulate and agree that the above is and should be considered Mr. Smith's "testimony" for the purpose of this action.

2. The Smith vehicle did not come into actual physical contact with the claimed northbound vehicle (which Mr. Smith describes as a dark-colored sport utility vehicle); further, there was no physical evidence collected or documented at the scene (e.g. debris and/or skid marks, etc.) [confirming] the vehicle's existence.

3. Mr. Smith has not been able to locate the claimed northbound vehicle and/or to identify its owner or operator.

4. Other than Mr. Smith, there are no identifiable witnesses to the accident.

5. Following the accident, Mr. Smith discussed this matter with: 1) a 9-1-1 operator; 2) an investigating officer of the Ohio State Highway Patrol ("OSHP"); and 3) various medical practitioners. In each of these instances, Mr. Smith described the circumstances leading up to the accident in terms similar to those set forth in paragraph 1, above – that is, that he had swerved his vehicle off of the roadway in order to avoid a collision with another vehicle which had crossed the centerline and thereby entered his vehicle's lane of travel. [The parties attached copies of the 9-1-1 transcript, the OSHP crash report/scene photographs, and Mr. Smith's medical reports to the stipulation of facts].

6. As of the date of the accident, Mr. Smith was a named-insured under a policy of automobile insurance issued by Erie Insurance Company ("Erie") – specifically, Policy No. Q12-6304152, and hereafter "the Erie Policy" * * *. In most pertinent part, the Erie Policy states as follows:

> "Uninsured motor vehicle" means a "motor vehicle:"
>
> * * *
>
> 3. which is a hit-and-run "motor vehicle." The identity of the driver and owner of the hit-and-run vehicle must be unknown and there must be independent corroborative evidence that the negligence or intentional acts

of the driver of the hit-and-run vehicle caused the bodily injury. Testimony of "anyone we protect" seeking recovery does not constitute independent corroborative evidence, unless the testimony is supported by additional evidence.

7. Mr. Smith has presented a claim for uninsured motorist benefits under the Erie Policy.

8. Erie has denied Mr. Smith's claim.

{¶ 3} Following Erie's denial of Mr. Smith's claim, appellants filed this action alleging, inter alia, breach of contract. Thereafter, on May 3, 2013, Erie filed a motion for summary judgment, arguing that it was entitled to summary judgment on all of appellants' claims because appellants failed to proffer the "independent third party testimony" that was necessary to prevail in a claim for uninsured motorist benefits under the terms of the Erie Policy and applicable Ohio law.

{¶ 4} In response to Erie's motion for summary judgment, appellants, on May 24, 2013, filed their own motion for summary judgment, in which they opposed Erie's motion and argued that they were entitled to judgment because they submitted sufficient "additional evidence," as required under the terms of the Erie Policy, to establish that the July 25, 2011 accident was caused by the driver of the unidentified motor vehicle.

{¶ 5} On November 14, 2014, the trial court issued its decision on the cross-motions for summary judgment, concluding that the evidence submitted by appellants did not constitute *independent* corroborative evidence insofar as the contents of each piece of

evidence stemmed from statements given by Mr. Smith himself. Consequently, the trial court granted Erie's motion for summary judgment and denied appellants' motion for summary judgment. Appellants' timely appeal followed.

B. Assignment of Error

(¶ 6) On appeal, appellants assert one assignment of error:

> Assignment of Error No. 1: The Trial Court erred by granting Erie's motion for summary judgment, and denying Smiths' motion for summary judgment, by determining, as a matter of law, that the 911 transcript/audio recording, the OSHP Crash Report/Scene Photographs, and the medical records did not constitute "additional evidence" to support Mr. Smith's testimony and establish the accident was caused by an uninsured motor vehicle.

II. Analysis

(¶ 7) In appellants' sole assignment of error, they argue that the trial court erred in granting Erie's motion for summary judgment and denying their motion for summary judgment.

(¶ 8) We review the court's decision on summary judgment de novo, applying the same standard as the trial court, *Jensen v. AdChoice, Inc.*, 6th Dist. Lucas No. L-14-1014, 2014-Ohio-5590, ¶ 11, citing *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). Under Civ.R. 56(C), summary judgment is appropriate where (1) there is no genuine issue as to any material fact, (2) the

moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion, and viewing the evidence in the light most favorable to the non-moving party, that conclusion is adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

(¶ 9) When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). When a properly supported motion for summary judgment is filed, an adverse party may not rest on mere allegations or denials in the pleadings, but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery*, 11 Ohio St.3d 75, 79, 463 N.E.2d 1246 (1984).

(¶ 10) The issue we must resolve in this case is whether appellants were required to submit *independent, third-party* evidence in order to establish their entitlement to uninsured motorist benefits under the Erie Policy and applicable Ohio law.

(¶ 11) Relevant to our examination of this issue, R.C. 3937.18 states, in pertinent part:

> (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.

{¶ 12} In their appellate brief, appellants argue that the evidence they presented to the trial court in the form of Mr. Smith's testimony, the 9-1-1 transcript, the OSHP crash report/scene photographs, and Mr. Smith's medical reports, was sufficient to establish the existence of the unidentified motorist and entitled them to uninsured motorist benefits under the Erie Policy. Thus, appellants contend that Erie breached the terms of the Erie Policy by denying their claim for uninsured motorist benefits. In support of their argument, appellants cite our prior decision in *Ingram v. State Farm Ins. Co.*, 6th Dist. Lucas No. L-09-1201, 2010-Ohio-1599.

{¶ 13} In *Ingram*, we reversed the decision of the Lucas County Court of Common Pleas, which granted summary judgment to State Farm Mutual Automobile Insurance Company and Safe Auto Insurance Company on Ingram's claim for uninsured motorist benefits. In that case, Ingram was operating an automobile owned by Thelma Stovall, who was a passenger in the vehicle at the time of the accident. *Id.* at ¶ 2. While stopped

at a red light, Stovall's vehicle was struck by a sport utility vehicle (SUV). Following the impact, the driver of the SUV fled the scene and was never identified.

(¶ 14) Eventually, Ingram submitted an insurance claim regarding the accident under his policy with Safe Auto. He also sought to recover under Stovall's policy with State Farm. Following denial of coverage by both insurance companies, Ingram filed suit seeking compensatory damages. *Id.* at ¶ 4. The insurance companies subsequently filed motions for summary judgment, the same being granted by the trial court. *Id.*

(¶ 15) On appeal, Ingram argued that he was entitled to uninsured motorist benefits under the insurance policies, both of which included uninsured motorist coverage provisions similar to those contained in the Erie Policy. In particular, the State Farm policy defined an uninsured motor vehicle as:

> * * * a land motor vehicle whose owner and operator remain unidentified but independent corroborative evidence exists to prove that the bodily injury was proximately caused by the unidentified operator of the land motor vehicle. The testimony of an insured seeking recovery shall not constitute independent corroborative evidence, unless the testimony is supported by additional evidence. *Id.* at ¶ 11.

(¶ 16) In support of their position that Ingram was not entitled to uninsured motorist benefits, State Farm and Safe Auto argued that Ingram failed to produce "independent corroborative evidence" to show that his injuries were proximately caused

by the negligence of the unidentified hit-and-run driver. *Ingram*, 6th Dist. Lucas No. L-09-1201, 2010-Ohio-1599, at ¶ 17.

(¶ 17) At the outset of our analysis of the parties' arguments, we noted: "[T]here is no requirement in appellees' policies, R.C. 3937.18, or [*Girgis v. State Farm Mut. Auto. Ins. Co.*, 75 Ohio St.3d 302, 662 N.E.2d 280 (1996)] that the 'additional evidence' needed to support the insured's testimony be eyewitness testimony." *Id.* at ¶ 18. We went on to examine the evidence submitted by Ingram in opposition to summary judgment, which included, inter alia, Stovall's deposition testimony wherein he stated that Ingram was

> driving him home because [Stovall] had had too much to drink. He testified that he did not see the SUV crash into his car because he was looking down at the time. He testified that he heard [Ingram] warn him that a car was about to collide with them and that he felt the impact of the collision. He then heard [Ingram] tell someone to pull over and that another voice responded, "I'm pulling over." *Id.* at ¶ 19.

(¶ 18) In addition to Stovall's deposition testimony, Ingram submitted a copy of his medical records and the police report that was taken at the scene of the accident. Ultimately, we concluded that the foregoing evidence was sufficient to establish that Ingram's injuries were caused by a hit-and-run driver. *Id.* at ¶ 21.

(¶ 19) Appellants, pointing to our decision in *Ingram*, contend that the evidence submitted in this case constituted sufficient independent corroborative evidence of the

existence of a hit-and-run driver. However, we find that *Ingram* is distinguishable from this case in light of the third-party deposition testimony submitted in opposition to summary judgment in that case. Appellants have produced no such evidence in this case. Nonetheless, appellants cite two additional decisions, *Connell v. United Servs. Auto. Assn.*, 2d Dist. Montgomery No. 20282, 2004-Ohio-2726, and *Rose v. City of Garfield Hts.*, 8th Dist. Cuyahoga Nos. 85420 and 85426, 2005-Ohio-4165, 970 N.E.2d 464, that they contend are "even more factually similar, since they do not involve the testimony of a passenger or a third person."

{¶ 20} In *Connell*, a breach of contract action was brought by Thomas Connell, who suffered injuries to his left foot when he was struck by an unidentified driver. Connell was covered by an auto policy provided by United Services Automobile Association (USAA), which contained uninsured/underinsured motorist coverage. Relevant here, the USAA policy provided: "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." *Connell* at ¶ 10.

{¶ 21} Following the accident, Connell filed a claim for uninsured motorist benefits with USAA. USAA denied Connell's claim because it found that Connell could not provide independent corroborative evidence of the facts of the accident. Thereafter, Connell brought a breach of contract action against USAA. USAA eventually filed a motion for summary judgment, which the trial court ultimately granted.

{¶ 22} On appeal, Connell argued that the trial court erred when it granted USAA's motion for summary judgment. The Second District agreed, pointing to USAA's provision for uninsured motorist benefits where the insured can produce "additional evidence" to supplement the insured's testimony. *Connell*, 2d Dist. Montgomery No. 20282, 2004-Ohio-2726, at ¶ 18. The court found that this policy provision was satisfied by Connell's deposition testimony coupled with medical evidence of the injury he suffered. *Id.* at ¶ 27.

{¶ 23} Likewise, in *Rose*, *supra*, the Eighth District found that a Garfield Heights police officer, Ronald Rose, produced sufficient "additional evidence" to meet the evidentiary requirement under the independent corroborative evidence test under R.C. 3937.18 and the relevant policy language. In that case, Rose was struck by an unidentified motorist while picking up debris from the side of the road. Rose lost consciousness as a result of the collision. Once he awakened, Rose radioed into dispatch for help, and another officer, Lieutenant Wolske, responded to the scene. Upon arrival, Wolske noticed that Rose's uniform was dirty and his head and left wrist were swollen. *Rose*, 8th Dist. Cuyahoga Nos. 85420 and 85426, 2005-Ohio-4165, 970 N.E.2d 464, at ¶ 2. Wolske transported Rose to the hospital, where Rose was diagnosed with injuries including "blunt head trauma, multiple contusions, and traumatic microhematuria (blood in his urine)." *Id.* Wolske returned to the scene of the collision, but no evidence of the unidentified vehicle was discovered.

(¶ 24) Rose, who was on-duty at the time of the collision, eventually filed a complaint against Garfield Heights and its auto insurance carrier, Clarendon National Insurance Company, for uninsured motorist benefits under the Clarendon auto insurance policy.

(¶ 25) Following preliminary discovery, Rose filed a motion for summary judgment, arguing that he was entitled to uninsured motorist benefits under the Clarendon policy, which provided, in relevant part: "The 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." *Rose* at ¶ 16.

(¶ 26) Clarendon also filed a motion for summary judgment, arguing that Rose was not entitled to uninsured motorist benefits because the collision was not supported by independent corroborative evidence. The trial court ultimately denied Rose's motion for summary judgment and granted Clarendon's motion for summary judgment, finding that Rose failed to present independent corroborative evidence to support his claim for uninsured motorist benefits. *Id.* at ¶ 4.

(¶ 27) On appeal, Rose argued that the trial court erred in granting summary judgment to Clarendon where the evidence he presented, which included his medical records, Wolske's report, and the report of a Nationwide Insurance Company claims adjuster, constituted additional evidence that was sufficient to meet the evidentiary requirement under the independent corroborative evidence test under R.C. 3937.18. The

Eighth District agreed, finding that Rose's submission of the foregoing evidence created a genuine issue of material fact as to whether the collision was caused by the unidentified motorist. *Id.* at ¶ 10. In so holding, the court noted that "[t]he 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." *Id.*

(¶ 28) Having reviewed the facts of *Connell* and *Rose*, we agree with appellants that these cases are analogous to the case sub judice. Indeed, the policy language in *Connell* and *Rose* is very similar to the language contained in the Erie Policy. Specifically, all of these policies provide for uninsured motorist benefits where the facts of the accident are established by independent corroborative evidence consisting of the insured's testimony and "additional evidence." Moreover, the evidence presented in *Connell* consisted entirely of Connell's testimony and the medical records derived therefrom.

(¶ 29) Notwithstanding the authority cited by appellants in support of their assignment of error, Erie insists that the trial court appropriately granted its motion for summary judgment under the authority of *Brown v. Philadelphia Indemn. Ins. Co.*, 12th Dist. Warren No. CA2010-10-094, 2011-Ohio-2217. In *Brown*, the Twelfth District held that the "additional evidence" submitted by an insured in order to support a claim for uninsured motorist benefits "must come from a source other than the insured's testimony." *Id.* at ¶ 27. In its decision, the court examined the evidence presented by Brown, including a police report of the accident, his medical records, and an affidavit

from his treating physician. The court found that the foregoing evidence did not constitute independent corroborative evidence or additional evidence that Brown's injuries were caused by an unidentified vehicle as required by the underlying insurance policy, which was similar to the Erie Policy. Rather, the court determined that Brown "merely repackaged the statements he made to the police who investigated the incident or to his treating physician." *Id.* at ¶ 28. Because the aforementioned evidence was based exclusively on Brown's account of the incident, it was not "independent" or "additional" as required by the insurance policy. *Id.*

(¶ 30) Upon examination of the Erie Policy and the case law cited by the parties in the present case, we find that the uninsured motorist provision within the Erie Policy is susceptible of at least two interpretations: one in which the "additional evidence" must be independent, third party evidence not derived from the insured (Erie's interpretation), 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 (appellants' interpretation). As noted above, the policy in the present case provides, in relevant part:

> The identity of the driver and owner of the hit-and-run vehicle must be unknown and there must be independent corroborative evidence that the negligence or intentional acts of the driver of the hit-and-run vehicle caused the bodily injury. Testimony of "anyone we protect" seeking recovery does

not constitute independent corroborative evidence, unless the testimony is supported by additional evidence.

(¶ 31) Notably, "additional evidence" is not expressly defined by the policy, nor does the policy state that the "additional evidence" must derive from a third party independent of the insured, as Erie suggests. Under Erie's interpretation, the policy provisions at issue in *Ingram*, *Connell*, *Rose*, *Brown*, and the present case could simply read "The identity of the driver and owner of the hit-and-run vehicle must be unknown and there must be independent corroborative evidence that the negligence or intentional acts of the driver of the hit-and-run vehicle caused the bodily injury." Indeed, the second sentence including the term "additional evidence" seems redundant under Erie's interpretation since the usage of the phrase "independent corroborative evidence" in the first sentence conveys the need for third party evidence. *See Honzell v. Nationwide Ins. Co.*, 10th Dist. Franklin No. 11AP-998, 2012-Ohio-6154, ¶ 13 (concluding that "corroborative evidence is 'independent' if it comes from a source other than the insured seeking coverage"); *Brown* at ¶ 22 (concluding that "the term 'additional evidence' is synonymous with the term 'corroborative evidence'"); *Jackson v. State Farm Auto. Ins. Co.*, 4th Dist. Pike No. 14CA850, 2015-Ohio-1131, ¶ 16 (citing *Brown* for the proposition that "additional evidence" is equivalent to "corroborative evidence").

(¶ 32) Having concluded that the Erie Policy is susceptible of more than one reasonable interpretation, we find that it is ambiguous regarding the evidentiary requirements for uninsured motorist benefits. *Hacker v. Dickman*, 75 Ohio St.3d 118,

119-20, 661 N.E.2d 1005 (1996) ("It is only when a provision in a policy is susceptible of more than one reasonable interpretation that an ambiguity exists in which the provision must be resolved in favor of the insured."). It is well-settled that "[w]here provisions of a contract of insurance are reasonably susceptible of more than one interpretation, they will be construed strictly against the insurer and liberally in favor of the insured." *King v. Nationwide Ins. Co.*, 35 Ohio St.3d 208, 519 N.E.2d 1380 (1988), syllabus.

{¶ 33} Because we must construe the uninsured motorist provision of the Erie Policy in appellants' favor, we find that the trial court erred in granting Erie's motion for summary judgment. Accordingly, appellants' sole assignment of error is well-taken.

III. Conclusion

{¶ 34} For the foregoing reasons, the judgment of the Ottawa County Court of Common Pleas is reversed. This matter is remanded to the trial court for further proceedings consistent with this decision. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

{¶ 35} We recognize that that our decision in this case is in conflict with the decision of the Twelfth District Court of Appeals in *Brown v. Philadelphia Indemn. Ins. Co.*, 12th Dist. Warren No. CA2010-10-094, 2011-Ohio-2217. Therefore, pursuant to Ohio Constitution, Article IV, Section 3(B)(4), we sua sponte certify a conflict to the Supreme Court of Ohio for review and final determination. The subject of the conflict is the uninsured motorist provision in an auto insurance policy, which states that the testimony of an insured seeking recovery of uninsured motorist benefits does not

constitute independent corroborative evidence as required by the policy, unless the testimony is supported by additional evidence. The question to be resolved is whether the policy language is ambiguous leading to an interpretation in favor of the insured that any evidence apart from the insured's testimony, either derived from the insured's testimony or not, is sufficient to constitute "additional evidence" under the policy, or whether the policy is unambiguous and the "additional evidence" must be independent of, and not derived from, the insured's testimony.

(¶ 36) The parties are directed to S.Ct.Prac.R. 7.01 and 7.08 for further proceedings.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____ JUDGE

Arlene Singer, J. _____ JUDGE

Stephen A. Yarbrough, P.J. _____ JUDGE
CONCUR.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.

[Cite as *Brown v. Philadelphia Indemn. Ins. Co.*, 2011-Ohio-2217.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

LEONARD BROWN,	:	
Plaintiff-Appellant,	:	CASE NO. CA2010-10-094
	:	OPINION
- vs -	:	6/9/2011
	:	
PHILADELPHIA INDEMNITY INSURANCE COMPANY, et al.,	:	
	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 09CV76624

Clements, Mahin & Cohen, L.P.A., Co., Edward Cohen, Paul A. Lewandowski, 35 East 7th Street, Suite 710, Cincinnati, Ohio 45202, for plaintiff-appellant

Reminger Co., L.P.A., Carrie Masters, Robert W. Hojnoski, 525 Vine Street, Suite 1700, Cincinnati, Ohio 45202, for defendant-appellee, Philadelphia Indemnity Insurance Co.

Freund, Freeze & Arnold, Gordon D. Arnold, One Dayton Centre, Suite 1800, 1 South Main Street, Dayton, Ohio 45402, for defendant-appellee, State Farm Mutual Insurance Co.

RINGLAND, J.

(¶1) Plaintiff-appellant, Leonard Brown, appeals from the decision of the Warren County Court of Common Pleas granting summary judgment in favor of defendant-appellee, Philadelphia Indemnity Insurance Company, on Brown's claim for

uninsured motorist coverage under his former employer's automobile insurance policy with Philadelphia. We affirm the trial court's decision to grant summary judgment in favor of Philadelphia.

(¶2) Brown was employed by Mels, LLC, to transport mentally disabled adults to and from a work site so they could perform janitorial services under his supervision. On May 11, 2007, Brown reported to work in Fairfield, Ohio and was told by his supervisor to take one of the fleet vans used by Mels' employees. Brown picked up his clients, supervised their work, and then dropped them off at their homes. After dropping off his last client, Brown was travelling on State Route 63 in Warren County to return the van to Mels. As he crested a hill, he saw the headlights of a vehicle driving left-of-center coming directly toward him. Brown instinctively swerved the van to the right in order to avoid a head-on collision. The next thing Brown remembers was waking up in the emergency room.

(¶3) Brown filed a complaint against Mels' insurer, Philadelphia, in the Warren County Court of Common Pleas, alleging that he was entitled to uninsured motorist coverage under Mels' automobile insurance policy with Philadelphia. Philadelphia moved for summary judgment on Brown's claim on the grounds that (1) the Ohio Bureau of Motor Vehicles' records show that the van Brown was driving at the time of the incident was not owned by Mels and thus was not a covered automobile under the uninsured motorist provision of Mels' automobile insurance policy with Philadelphia, and therefore Brown was not entitled to recover uninsured motorist benefits under the policy; and (2) the unidentified or "phantom" vehicle that allegedly forced Brown's van off the road did not qualify as an "uninsured motor vehicle" under the policy, because Brown failed to present "independent corroborative evidence" to support his contention that his injuries were caused by an unidentified vehicle that forced his van off the road.

{¶4} The trial court refused to grant summary judgment to Philadelphia on the issue of the van's ownership, because the only evidence that Philadelphia submitted in support of its argument on this issue was an uncertified copy of a BMV record that Philadelphia failed "to incorporate *** by reference in a properly framed affidavit" as required by Civ.R. 56(C), and therefore the only evidence on the ownership issue properly before the court was the Philadelphia policy's "Schedule of Autos You Own" that listed the van as being one of the vehicle's owned by Mels. Nevertheless, the trial court granted summary judgment to Philadelphia on the ground that Brown failed to provide "independent corroborative evidence" that an unidentified or "phantom" vehicle was the proximate cause of his injuries, and thus failed to establish the existence of a genuine issue of material fact on whether the unidentified vehicle is an "uninsured motor vehicle" under the Philadelphia policy.

{¶5} Brown now appeals, assigning the following as error:

{¶6} "THE TRIAL COURT ERRED IN GRANTING DEFENDANT-PHILADELPHIA'S MOTION FOR SUMMARY JUDGMENT SINCE THERE EXISTS A GENUINE ISSUE OF MATERIAL FACT."

{¶7} Brown argues the trial court erred in granting summary judgment to Philadelphia on his claim that he is entitled to uninsured motorist coverage under Mels' automobile insurance policy with Philadelphia. We disagree.

{¶8} "An appellate court reviews a lower court's decision to grant summary judgment de novo. *Doe v. Shaffer*, 90 Ohio St.3d 388, 390, 2000-Ohio-186. Summary judgment is proper when there is no genuine issue of material fact remaining for trial, the moving party is entitled to judgment as a matter of law, and reasonable minds can only come to a conclusion adverse to the nonmoving party, construing the evidence most strongly in that party's favor. See Civ.R. 56(C); *Harless v. Willis Day Warehousing*

Co. (1978), 54 Ohio St.2d 64, 66. The movant bears the initial burden of informing the court of the basis for the motion and demonstrating the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. Once this burden is met, the nonmovant has a reciprocal burden to set forth specific facts showing a genuine issue for trial. Id." *Ohio Valley Associated Builders & Contractors v. Repler Elec., Inc.*, Butler App. Nos. CA2010-08-217, CA2010-08-219, 2011-Ohio-160, ¶11.

{¶9} The uninsured motorist coverage provision in the Philadelphia policy states in pertinent part:

{¶10} "3. 'Uninsured motor vehicle' means a land motor vehicle:

{¶11} "***

{¶12} "c. That is a hit-and-run vehicle and neither the operator nor owner can be identified. The vehicle must either:

{¶13} "(1) Hit an 'insured', a covered 'auto' or a vehicle an 'insured' is 'occupying'; or

{¶14} "(2) Cause 'bodily injury' to an 'insured' without hitting an 'insured', a covered 'auto' or a vehicle an 'insured' is 'occupying'.

{¶15} "The 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 supported by additional evidence."

{¶16} This language closely tracks the language in R.C. 3937.18(B)(3), which states:

{¶17} "(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:

{¶18} "***

{¶19} "(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."

{¶20} R.C. 3937.18(B)(3) derives from *Girgis v. State Farm Mut. Auto. Ins. Co.*, 76 Ohio St.3d 302, 1996-Ohio-111, wherein the court held that "R.C. 3937.18 and public policy preclude contract provisions in insurance policies from requiring physical contact as an absolute prerequisite to recovery under the uninsured motorist coverage provision[.]" Id. at paragraph one of the syllabus, and that "[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 unidentified vehicle was a proximate cause of the accident[.]" Id. at paragraph two of the syllabus.

{¶21} Neither *Girgis*, R.C. 3937.18, nor Philadelphia's policy defines the terms "independent corroborative evidence" or "additional evidence." "Corroborative evidence" is evidence that "supplements evidence that has already been given and which tends to strengthen or confirm it[;] [i]t is additional evidence, of a different character, to the same point.'" (Citations omitted.) *Munoy v. American Select Ins. Co.* (1998), 129 Ohio App.3d 1, 6-7. "Independent," as used in the term "independent corroborative evidence," means corroborative evidence from a source other than the insured who is claiming that his injuries were caused by an unidentified vehicle. See *Hassan v. Progressive Ins. Co.* (2001), 142 Ohio App.3d 671, 675. Courts have held

that testimony from an insured's treating physician that is based entirely upon statements made by the insured to the physician do not qualify as *independent* corroborating evidence. See *Combs v. Allstate Ins. Co.* (June 29, 2000), Franklin App. No. 99AP-822, *3. Likewise, courts have held that a police report that contains an officer's statements that merely repeat what the insured has told the officer about an occurrence for which the insured is seeking coverage are not *independent* corroborative evidence. See *Gayheart v. Doe*, 143 Ohio App.3d 692, 696, 2001-Ohio-2520, discussing *Williford v. Allstate Indemn. Co.* (Nov. 10, 1997), Franklin App. No. 97APE05-657.

{¶22} The common, ordinary meaning of the word "additional," as used in the term "additional evidence," is "coming by way of addition" or "added" or "further." Webster's Third New International Dictionary (1993) 24. Moreover, as the term "corroborative evidence" has been defined as meaning, among other things, "additional evidence," see *Muncy* at 7, the term "additional evidence" is synonymous with the term "corroborative evidence."

{¶23} Brown contends that under the terms of the uninsured motorist coverage of the Philadelphia policy, an insured can prove the facts of the accident by presenting *either* independent corroborative evidence, *or* the insured's testimony along with "additional evidence." He asserts that he presented such additional evidence by presenting the police report of the accident, his medical records, and an affidavit from his treating physician, and therefore, the trial court erred by finding that the unidentified vehicle that ran him off the road was not an "uninsured vehicle" under the Philadelphia policy. Brown cites several cases in support of his claim that the evidence he presented was sufficient to constitute "additional evidence" under the terms of the Philadelphia's policy, but each of those cases is distinguishable from this one.

{¶24} For instance, in *State v. Connell*, Montgomery App. No. 20282, 2004-Ohio-2726, the plaintiff, Thomas Connell, sustained injuries to his left foot when he was struck by an automobile while crossing a street. The driver sped away and was never identified. The Second District Court of Appeals reversed a trial court's decision granting summary judgment to the insurer on the basis that Connell had failed to present independent corroborating evidence that he was struck and injured by an unidentified vehicle. The court found that the uninsured motorist coverage of the policy in question, which was similar to the language in the policy in this case, allowed coverage in instances where the insured presented *either* independent corroborative evidence *or* additional evidence to support Connell's claim that his injuries were caused by an unidentified vehicle. Id. at ¶16-18. The court concluded that Connell's medical evidence of the injuries to his foot constituted "additional evidence," as set forth in the policy because it was "physical evidence from which a jury might infer that Connell was injured in the accident as he claims he was." Id.at ¶18.

{¶25} Likewise, in *Rose v. Garfield Heights*, Cuyahoga App. Nos. 85420, 85426, 2005-Ohio-4165, which also involved an uninsured motorist provision similar to the one in this case, the court noted that the plaintiff, Ronald Rose, presented additional evidence to support his claim that he had been struck and injured by an unidentified vehicle by presenting his medical records showing he suffered physical injury as a result of being struck by an unidentified vehicle *and* the report of the police officer who investigated the accident, who stated that at the time of the incident, Rose appeared to have been injured and his uniform appeared to be dirty. Id. at ¶10.

{¶26} Finally, in *Ingram v. State Farm Insur. Co.*, Lucas County App. No. L-09-1201, 2010-Ohio-1599, the plaintiff, Robert Ingram, also presented independent corroborative evidence that his vehicle had been struck by an unidentified vehicle driven

by a person who initially had told Ingram that he would pull over, but then sped off, instead. Specifically, Ingram presented the deposition testimony of his passenger who testified that while she did not actually see the unidentified vehicle collide with the vehicle in which she and Ingram were traveling because she was looking down at the time, she heard Ingram warn her that a car was about to collide with them, she felt the impact of the collision, and she heard Ingram tell someone to pull over and then heard another voice respond, "I'm pulling over." See Id. at ¶19.

{¶27} By contrast, Brown failed to present either independent corroborative evidence or additional evidence to support his claim that an unidentified vehicle had run him off the road, thereby causing him injury, as required under terms of the uninsured motorist coverage in the Philadelphia policy. The term "additional evidence" is synonymous with the term "corroborative evidence." See *Muncy*, 129 Ohio App.3d at 6-7 (defining corroborating evidence as "additional evidence, of a different character, to the same point"). Moreover, the term "additional evidence" must be read in conjunction with the other parts of the clause. See *Foster Wheeler Envirosponse, Inc. v. Franklin Cty. Convention Auth.*, 78 Ohio St.3d 353, 361-362, 1997-Ohio-202. 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. See *Hassan*, 142 Ohio App.3d at 675.

{¶28} As Philadelphia points out, Brown did not present "additional evidence" that his injuries were caused by an unidentified vehicle. Instead, the evidence he presented merely repackaged the statements he made to the police who investigated the incident or to his treating physician. Since the police and Brown's physician were merely relying on Brown's account of the incident, the evidence Brown presented in

opposition to Philadelphia's summary judgment motion cannot constitute additional evidence. See, e.g., *Hassan*, 142 Ohio App.3d at 675; *Combs*, Franklin App. No. 99AP-822 at *3; and *Gayheart v. Doe*, 143 Ohio App.3d 692, 696, 2001-Ohio-2520, discussing *Willford*, Franklin App. No. 97APE05-657. Since Brown failed to offer either independent corroborative evidence or additional evidence in support of his contention that his injuries were caused by an unidentified vehicle, the trial court properly granted summary judgment to Philadelphia on his claim for uninsured motorist coverage.

{¶29} Lastly, in light of our decision to affirm the trial court's grant of summary judgment to Philadelphia on the basis that Brown failed to present either independent corroborative evidence or additional evidence in support of his claim that his injuries were proximately caused by an unidentified vehicle, we need not determine whether Philadelphia was entitled to summary judgment on the alternative basis that Brown was not entitled to uninsured motorist coverage under the Philadelphia policy since Meis did not own the van that Brown was driving at the time of the incident.

{¶30} Brown's sole assignment of error is overruled.

{¶31} Judgment affirmed.

POWELL, P.J., and HENDRICKSON, J., concur.

IN THE SUPREME COURT OF OHIO

Scott L. Smith, *et al.*,	:	Case No. 15-1502
Plaintiffs-Appellees,	:	On Appeal from the Ottawa County Court of Appeals, Sixth District
vs.	:	Court of Appeals Case No. OT-15-005
Erie Insurance Company,	:	
Defendant-Appellant.		

NOTICE OF APPEAL OF DEFENDANT-APPELLANT ERIE INSURANCE COMPANY

Steven P. Collier (0031113)
Steven R. Smith (0031778)
Janine T. Avila (0055853)
Connelly, Jackson & Collier LLP
405 Madison Avenue, Suite 2300,
Toledo, Ohio 43604
Telephone: (419) 243-2100
Fax: (419) 243-7119
Email: scollier@cjc-law.com
ssmith@cjc-law.com
javila@cjc-law.com

Attorneys for Plaintiffs-Appellees
Scott L. Smith and Dawn M. Smith

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

Attorneys for Defendant-Appellant
Erie Insurance Company

FILED
SEP 11 2015
CLERK OF COURT
SUPREME COURT OF OHIO

3216777.1

Defendant-Appellant Erie Insurance Company hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Ottawa County Court of Appeals, Sixth Appellate District, entered in *Smith v. Erie Ins. Co.*, 6th Dist. Ottawa No. 15-OT-005, 2015-Ohio-3078 on July 31, 2015.

This case is one of public or great general interest.

Respectfully submitted,

EASTMAN & SMITH LTD.

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

Attorney for Defendant-Appellant
Erie Insurance Company

PROOF OF SERVICE

A copy of the foregoing Notice of Appeal of Defendant-Appellant Erie Insurance Company was mailed this 11th day of September, 2015, to: Steven P. Collier/Steven R. Smith/Janine T. Avila, Connelly, Jackson & Collier LLP, 405 Madison Avenue, Suite 2300, Toledo, Ohio 43604, Attorneys for Plaintiffs-Appellees.

Attorney for Defendant-Appellant
Erie Insurance Company

3216777.1

FILED
COURT OF APPEALS

JUL 31 2015

GARY A. KOHLI, CLERK OF COURTS
OTTAWA COUNTY, OHIO

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

Scott L. Smith, et al.	Court of Appeals No. OT-15-005
Appellants	Trial Court No. 12CV236
v.	
Erie Insurance Company	DECISION AND JUDGMENT
Appellee	Decided: JUL 31 2015

*****

Steven P. Collier, Steven R. Smith and Janine T. Avila, for appellants.

D. Casey Talbott and Jeffrey M. Stopar, for appellee.

*****

YARBROUGH, P.J.

I. Introduction

{¶ 1} Appellants, Scott and Dawn Smith, appeal the judgment of the Ottawa County Court of Common Pleas, granting summary judgment in favor of appellee, Erie Insurance Company. For the following reasons, we reverse.

A. Facts and Procedural Background

{¶ 2} The facts relevant to our disposition of this appeal were stipulated before the trial court, in relevant part, as follows:

1. Plaintiff Scott L. Smith ("Mr. Smith") was involved in a single-vehicle accident during the late evening hours of Monday, July 25, 2011 in Portage Township, Ottawa County, Ohio. Mr. Smith claims that he was proceeding southbound on CR0034 aka Plasterbed Road, approaching the intersection of TR0264 aka Schlew Road, when a northbound vehicle on Plasterbed Road went left of center, entering Mr. Smith's lane of travel, and that in order to avoid a collision Mr. Smith swerved his vehicle off of the right side of the roadway where it struck several trees. The parties stipulate and agree that the above is and should be considered Mr. Smith's "testimony" for the purpose of this action.

2. The Smith vehicle did not come into actual physical contact with the claimed northbound vehicle (which Mr. Smith describes as a dark-colored sport utility vehicle); further, there was no physical evidence collected or documented at the scene (e.g. debris and/or skid marks, etc.) [confirming] the vehicle's existence.

3. Mr. Smith has not been able to locate the claimed northbound vehicle and/or to identify its owner or operator.

4. Other than Mr. Smith, there are no identifiable witnesses to the accident.

5. Following the accident, Mr. Smith discussed this matter with: 1) a 9-1-1 operator; 2) an investigating officer of the Ohio State Highway Patrol ("OSHP"); and 3) various medical practitioners. In each of these instances, Mr. Smith described the circumstances leading up to the accident in terms similar to those set forth in paragraph 1, above – that is, that he had swerved his vehicle off of the roadway in order to avoid a collision with another vehicle which had crossed the centerline and thereby entered his vehicle's lane of travel. [The parties attached copies of the 9-1-1 transcript, the OSHP crash report/scene photographs, and Mr. Smith's medical reports to the stipulation of facts].

6. As of the date of the accident, Mr. Smith was a named-insured under a policy of automobile insurance issued by Erie Insurance Company ("Erie") – specifically, Policy No. Q12-6304152, and hereafter "the Erie Policy" * * *. In most pertinent part, the Erie Policy states as follows:

> "Uninsured motor vehicle" means a "motor vehicle:"
>
> * * *
>
> 3. which is a hit-and-run "motor vehicle." The identity of the driver and owner of the hit-and-run vehicle must be unknown and there must be independent corroborative evidence that the negligence or intentional acts

of the driver of the hit-and-run vehicle caused the bodily injury. Testimony of "anyone we protect" seeking recovery does not constitute independent corroborative evidence, unless the testimony is supported by additional evidence.

7. Mr. Smith has presented a claim for uninsured motorist benefits under the Erie Policy.

8. Erie has denied Mr. Smith's claim.

{¶ 3} Following Erie's denial of Mr. Smith's claim, appellants filed this action alleging, inter alia, breach of contract. Thereafter, on May 3, 2013, Erie filed a motion for summary judgment, arguing that it was entitled to summary judgment on all of appellants' claims because appellants failed to proffer the "independent third party testimony" that was necessary to prevail in a claim for uninsured motorist benefits under the terms of the Erie Policy and applicable Ohio law.

{¶ 4} In response to Erie's motion for summary judgment, appellants, on May 24, 2013, filed their own motion for summary judgment, in which they opposed Erie's motion and argued that they were entitled to judgment because they submitted sufficient "additional evidence," as required under the terms of the Erie Policy, to establish that the July 25, 2011 accident was caused by the driver of the unidentified motor vehicle.

{¶ 5} On November 14, 2014, the trial court issued its decision on the cross-motions for summary judgment, concluding that the evidence submitted by appellants did not constitute *independent* corroborative evidence insofar as the contents of each piece of

evidence stemmed from statements given by Mr. Smith himself. Consequently, the trial court granted Erie's motion for summary judgment and denied appellants' motion for summary judgment. Appellants' timely appeal followed.

B. Assignment of Error

{¶ 6} On appeal, appellants assert one assignment of error:

> Assignment of Error No. 1: The Trial Court erred by granting Erie's motion for summary judgment, and denying Smiths' motion for summary judgment, by determining, as a matter of law, that the 911 transcript/audio recording, the OSHP Crash Report/Scene Photographs, and the medical records did not constitute "additional evidence" to support Mr. Smith's testimony and establish the accident was caused by an uninsured motor vehicle.

II. Analysis

{¶ 7} In appellants' sole assignment of error, they argue that the trial court erred in granting Erie's motion for summary judgment and denying their motion for summary judgment.

{¶ 8} We review the court's decision on summary judgment de novo, applying the same standard as the trial court. *Jensen v. AdChoice, Inc.*, 6th Dist. Lucas No. L-14-1014, 2014-Ohio-5590, ¶ 11, citing *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). Under Civ.R. 56(C), summary judgment is appropriate where (1) there is no genuine issue as to any material fact, (2) the

moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion, and viewing the evidence in the light most favorable to the non-moving party, that conclusion is adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

{¶ 9} When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). When a properly supported motion for summary judgment is filed, an adverse party may not rest on mere allegations or denials in the pleadings, but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery*, 11 Ohio St.3d 75, 79, 463 N.E.2d 1246 (1984).

{¶ 10} The issue we must resolve in this case is whether appellants were required to submit *independent, third-party* evidence in order to establish their entitlement to uninsured motorist benefits under the Erie Policy and applicable Ohio law.

{¶ 11} Relevant to our examination of this issue, R.C. 3937.18 states, in pertinent part:

> (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.

{¶ 12} In their appellate brief, appellants argue that the evidence they presented to the trial court in the form of Mr. Smith's testimony, the 9-1-1 transcript, the OSHP crash report/scene photographs, and Mr. Smith's medical reports, was sufficient to establish the existence of the unidentified motorist and entitled them to uninsured motorist benefits under the Erie Policy. Thus, appellants contend that Erie breached the terms of the Erie Policy by denying their claim for uninsured motorist benefits. In support of their argument, appellants cite our prior decision in *Ingram v. State Farm Ins. Co.*, 6th Dist. Lucas No. L-09-1201, 2010-Ohio-1599.

{¶ 13} In *Ingram*, we reversed the decision of the Lucas County Court of Common Pleas, which granted summary judgment to State Farm Mutual Automobile Insurance Company and Safe Auto Insurance Company on Ingram's claim for uninsured motorist benefits. In that case, Ingram was operating an automobile owned by Thelma Stovall, who was a passenger in the vehicle at the time of the accident. *Id.* at ¶ 2. While stopped

at a red light, Stovall's vehicle was struck by a sport utility vehicle (SUV). Following the impact, the driver of the SUV fled the scene and was never identified.

{¶ 14} Eventually, Ingram submitted an insurance claim regarding the accident under his policy with Safe Auto. He also sought to recover under Stovall's policy with State Farm. Following denial of coverage by both insurance companies, Ingram filed suit seeking compensatory damages. *Id.* at ¶ 4. The insurance companies subsequently filed motions for summary judgment, the same being granted by the trial court. *Id.*

{¶ 15} On appeal, Ingram argued that he was entitled to uninsured motorist benefits under the insurance policies, both of which included uninsured motorist coverage provisions similar to those contained in the Erie Policy. In particular, the State Farm policy defined an uninsured motor vehicle as:

> * * * a land motor vehicle whose owner and operator remain unidentified but independent corroborative evidence exists to prove that the bodily injury was proximately caused by the unidentified operator of the land motor vehicle. The testimony of an insured seeking recovery shall not constitute independent corroborative evidence, unless the testimony is supported by additional evidence. *Id.* at ¶ 11.

{¶ 16} In support of their position that Ingram was not entitled to uninsured motorist benefits, State Farm and Safe Auto argued that Ingram failed to produce "independent corroborative evidence" to show that his injuries were proximately caused

by the negligence of the unidentified hit-and-run driver. *Ingram*, 6th Dist. Lucas No. L-09-1201, 2010-Ohio-1599, at ¶ 17.

{¶ 17} At the outset of our analysis of the parties' arguments, we noted: "[T]here is no requirement in appellees' policies, R.C. 3937.18, or [*Girgis v. State Farm Mut. Auto. Ins. Co.*, 75 Ohio St.3d 302, 662 N.E.2d 280 (1996)] that the 'additional evidence' needed to support the insured's testimony be eyewitness testimony." *Id.* at ¶ 18. We went on to examine the evidence submitted by Ingram in opposition to summary judgment, which included, inter alia, Stovall's deposition testimony wherein he stated that Ingram was

> driving him home because [Stovall] had had too much to drink. He testified that he did not see the SUV crash into his car because he was looking down at the time. He testified that he heard [Ingram] warn him that a car was about to collide with them and that he felt the impact of the collision. He then heard [Ingram] tell someone to pull over and that another voice responded, "I'm pulling over." *Id.* at ¶ 19.

{¶ 18} In addition to Stovall's deposition testimony, Ingram submitted a copy of his medical records and the police report that was taken at the scene of the accident. Ultimately, we concluded that the foregoing evidence was sufficient to establish that Ingram's injuries were caused by a hit-and-run driver. *Id.* at ¶ 21.

{¶ 19} Appellants, pointing to our decision in *Ingram*, contend that the evidence submitted in this case constituted sufficient independent corroborative evidence of the

existence of a hit-and-run driver. However, we find that *Ingram* is distinguishable from this case in light of the third-party deposition testimony submitted in opposition to summary judgment in that case. Appellants have produced no such evidence in this case. Nonetheless, appellants cite two additional decisions, *Connell v. United Servs. Auto. Assn.*, 2d Dist. Montgomery No. 20282, 2004-Ohio-2726, and *Rose v. City of Garfield Hts.*, 8th Dist. Cuyahoga Nos. 85420 and 85426, 2005-Ohio-4165, 970 N.E.2d 464, that they contend are "even more factually similar, since they do not involve the testimony of a passenger or a third person."

{¶ 20} In *Connell*, a breach of contract action was brought by Thomas Connell, who suffered injuries to his left foot when he was struck by an unidentified driver. Connell was covered by an auto policy provided by United Services Automobile Association (USAA), which contained uninsured/underinsured motorist coverage. Relevant here, the USAA policy provided: "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." *Connell* at ¶ 10.

{¶ 21} Following the accident, Connell filed a claim for uninsured motorist benefits with USAA. USAA denied Connell's claim because it found that Connell could not provide independent corroborative evidence of the facts of the accident. Thereafter, Connell brought a breach of contract action against USAA. USAA eventually filed a motion for summary judgment, which the trial court ultimately granted.

{¶ 22} On appeal, Connell argued that the trial court erred when it granted USAA's motion for summary judgment. The Second District agreed, pointing to USAA's provision for uninsured motorist benefits where the insured can produce "additional evidence" to supplement the insured's testimony. *Connell*, 2d Dist. Montgomery No. 20282, 2004-Ohio-2726, at ¶ 18. The court found that this policy provision was satisfied by Connell's deposition testimony coupled with medical evidence of the injury he suffered. *Id.* at ¶ 27.

{¶ 23} Likewise, in *Rose*, *supra*, the Eighth District found that a Garfield Heights police officer, Ronald Rose, produced sufficient "additional evidence" to meet the evidentiary requirement under the independent corroborative evidence test under R.C. 3937.18 and the relevant policy language. In that case, Rose was struck by an unidentified motorist while picking up debris from the side of the road. Rose lost consciousness as a result of the collision. Once he awakened, Rose radioed into dispatch for help, and another officer, Lieutenant Wolske, responded to the scene. Upon arrival, Wolske noticed that Rose's uniform was dirty and his head and left wrist were swollen. *Rose*, 8th Dist. Cuyahoga Nos. 85420 and 85426, 2005-Ohio-4165, 970 N.E.2d 464, at ¶ 2. Wolske transported Rose to the hospital, where Rose was diagnosed with injuries including "blunt head trauma, multiple contusions, and traumatic microhematuria (blood in his urine)." *Id.* Wolske returned to the scene of the collision, but no evidence of the unidentified vehicle was discovered.

{¶ 24} Rose, who was on-duty at the time of the collision, eventually filed a complaint against Garfield Heights and its auto insurance carrier, Clarendon National Insurance Company, for uninsured motorist benefits under the Clarendon auto insurance policy.

{¶ 25} Following preliminary discovery, Rose filed a motion for summary judgment, arguing that he was entitled to uninsured motorist benefits under the Clarendon policy, which provided, in relevant part: "The 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." *Rose* at ¶ 16.

{¶ 26} Clarendon also filed a motion for summary judgment, arguing that Rose was not entitled to uninsured motorist benefits because the collision was not supported by independent corroborative evidence. The trial court ultimately denied Rose's motion for summary judgment and granted Clarendon's motion for summary judgment, finding that Rose failed to present independent corroborative evidence to support his claim for uninsured motorist benefits. *Id.* at ¶ 4.

{¶ 27} On appeal, Rose argued that the trial court erred in granting summary judgment to Clarendon where the evidence he presented, which included his medical records, Wolske's report, and the report of a Nationwide Insurance Company claims adjuster, constituted additional evidence that was sufficient to meet the evidentiary requirement under the independent corroborative evidence test under R.C. 3937.18. The

Eighth District agreed, finding that Rose's submission of the foregoing evidence created a genuine issue of material fact as to whether the collision was caused by the unidentified motorist. *Id.* at ¶ 10. In so holding, the court noted that "[t]he 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." *Id.*

{¶ 28} Having reviewed the facts of *Connell* and *Rose*, we agree with appellants that these cases are analogous to the case sub judice. Indeed, the policy language in *Connell* and *Rose* is very similar to the language contained in the Erie Policy. Specifically, all of these policies provide for uninsured motorist benefits where the facts of the accident are established by independent corroborative evidence consisting of the insured's testimony and "additional evidence." Moreover, the evidence presented in *Connell* consisted entirely of Connell's testimony and the medical records derived therefrom.

{¶ 29} Notwithstanding the authority cited by appellants in support of their assignment of error, Erie insists that the trial court appropriately granted its motion for summary judgment under the authority of *Brown v. Philadelphia Indemn. Ins. Co.*; 12th Dist. Warren No. CA2010-10-094, 2011-Ohio-2217. In *Brown*, the Twelfth District held that the "additional evidence" submitted by an insured in order to support a claim for uninsured motorist benefits "must come from a source other than the insured's testimony." *Id.* at ¶ 27. In its decision, the court examined the evidence presented by Brown, including a police report of the accident, his medical records, and an affidavit

from his treating physician. The court found that the foregoing evidence did not constitute independent corroborative evidence or additional evidence that Brown's injuries were caused by an unidentified vehicle as required by the underlying insurance policy, which was similar to the Erie Policy. Rather, the court determined that Brown "merely repackaged the statements he made to the police who investigated the incident or to his treating physician." *Id.* at ¶ 28. Because the aforementioned evidence was based exclusively on Brown's account of the incident, it was not "independent" or "additional" as required by the insurance policy. *Id.*

(¶ 30) Upon examination of the Erie Policy and the case law cited by the parties in the present case, we find that the uninsured motorist provision within the Erie Policy is susceptible of at least two interpretations; one in which the "additional evidence" must be independent, third party evidence not derived from the insured (Erie's interpretation), 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 (appellants' interpretation). As noted above, the policy in the present case provides, in relevant part:

> The identity of the driver and owner of the hit-and-run vehicle must be unknown and there must be independent corroborative evidence that the negligence or intentional acts of the driver of the hit-and-run vehicle caused the bodily injury. Testimony of "anyone we protect" seeking recovery does

not constitute independent corroborative evidence, unless the testimony is supported by additional evidence.

{¶ 31} Notably, "additional evidence" is not expressly defined by the policy, nor does the policy state that the "additional evidence" must derive from a third party independent of the insured, as Erie suggests. Under Erie's interpretation, the policy provisions at issue in *Ingram*, *Connell*, *Rose*, *Brown*, and the present case could simply read "The identity of the driver and owner of the hit-and-run vehicle must be unknown and there must be independent corroborative evidence that the negligence or intentional acts of the driver of the hit-and-run vehicle caused the bodily injury." Indeed, the second sentence including the term "additional evidence" seems redundant under Erie's interpretation since the usage of the phrase "independent corroborative evidence" in the first sentence conveys the need for third party evidence. *See Honzell v. Nationwide Ins. Co.*, 10th Dist. Franklin No. 11AP-998, 2012-Ohio-6154, ¶ 13 (concluding that "corroborative evidence is 'independent' if it comes from a source other than the insured seeking coverage"); *Brown* at ¶ 22 (concluding that "the term 'additional evidence' is synonymous with the term 'corroborative evidence'"); *Jackson v. State Farm Auto. Ins. Co.*, 4th Dist. Pike No. 14CA850, 2015-Ohio-1131, ¶ 16 (citing *Brown* for the proposition that "additional evidence" is equivalent to "corroborative evidence").

{¶ 32} Having concluded that the Erie Policy is susceptible of more than one reasonable interpretation, we find that it is ambiguous regarding the evidentiary requirements for uninsured motorist benefits. *Hacker v. Dickman*, 75 Ohio St.3d 118,

119-20, 661 N.E.2d 1005 (1996) ("It is only when a provision in a policy is susceptible of more than one reasonable interpretation that an ambiguity exists in which the provision must be resolved in favor of the insured."). It is well-settled that "[w]here provisions of a contract of insurance are reasonably susceptible of more than one interpretation, they will be construed strictly against the insurer and liberally in favor of the insured." *King v. Nationwide Ins. Co.*, 35 Ohio St.3d 208, 519 N.E.2d 1380 (1988), syllabus.

{¶ 33} Because we must construe the uninsured motorist provision of the Erie Policy in appellants' favor, we find that the trial court erred in granting Erie's motion for summary judgment. Accordingly, appellants' sole assignment of error is well-taken.

III. Conclusion

{¶ 34} For the foregoing reasons, the judgment of the Ottawa County Court of Common Pleas is reversed. This matter is remanded to the trial court for further proceedings consistent with this decision. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

{¶ 35} We recognize that that our decision in this case is in conflict with the decision of the Twelfth District Court of Appeals in *Brown v. Philadelphia Indemn. Ins. Co.*, 12th Dist. Warren No. CA2010-10-094, 2011-Ohio-2217. Therefore, pursuant to Ohio Constitution, Article IV, Section 3(B)(4), we sua sponte certify a conflict to the Supreme Court of Ohio for review and final determination. The subject of the conflict is the uninsured motorist provision in an auto insurance policy, which states that the testimony of an insured seeking recovery of uninsured motorist benefits does not

constitute independent corroborative evidence as required by the policy, unless the testimony is supported by additional evidence. The question to be resolved is whether the policy language is ambiguous leading to an interpretation in favor of the insured that any evidence apart from the insured's testimony, either derived from the insured's testimony or not, is sufficient to constitute "additional evidence" under the policy, or whether the policy is unambiguous and the "additional evidence" must be independent of, and not derived from, the insured's testimony.

{¶ 36} The parties are directed to S.Ct.Prac.R. 7.01 and 7.08 for further proceedings.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. JUDGE

Arlene Singer, J. JUDGE

Stephen A. Yarbrough, P.J. JUDGE
CONCUR.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.

OTTAWA COUNTY COMMON PLEAS COURT

NOTICE OF FILING

DATE ENTRY WAS FILED: 07/31/2015 DATE: 07/31/2015

In accordance with the holding in Atkinson V Grumman (1988) 37 Ohio St 3d 80, the Clerk of Courts shall serve notice of the entry of any final appealable order or judgment, within three (3) days of the entry, upon every Party who is not in default to appear.

This notice shall serve only as a notification of the filing and journalizing of an order or judgment entry and is NOT a determination of whether the same is a final appealable Order of Judgment.

YOU ARE HEREBY NOTIFIED THAT ON THE ABOVE DATE A JUDGMENT ENTRY WAS FILED THAT MAY BE AN APPEALABLE ORDER.

CAPTION: SMITH, SCOTT, ET AL
vs.
ERIE, INSURANCE COMPANY

CASE NUMBER: 2015-OT-005 E

PARTY: Erie INSURANCE COMPANY

GARY A. KOHLI
CLERK OF COURTS

by joan randall
JOAN RANDALL

FILED
COMMON PLEAS COURT
2014 NOV 14 AM 9 06
GARY A. KOHLI
CLERK OF COURTS
OTTAWA COUNTY, OHIO

IN THE COMMON PLEAS COURT OF OTTAWA COUNTY, OHIO

Scott Smith,	)	Case No. 12CV236
Plaintiff,	)	Judge Bruce Winters
v.	)	
Erie Insurance	)	DECISION AND JUDGMENT ENTRY
Defendant.	)	

This cause comes before this Court upon a Motion for Summary Judgment filed by Defendant and a Motion for Summary Judgment filed by Plaintiff.

Facts

The parties entered into a Joint Stipulation of Facts as follows:

Scott L. Smith ("Smith") was involved in a single-vehicle accident on July 25, 2011. Smith claims that he was southbound on Plasterbed Rd. approaching the intersection of Schlew Rd. when a vehicle northbound on Plasterbed Rd. went left of center, entering Smith's lane of travel. In order to avoid a collision, Smith swerved his vehicle off the right side of the road where it struck several trees. Smith's vehicle did not come into contact with the northbound vehicle. There was no physical evidence collected or documented at the scene to confirm the northbound vehicle's existence. Smith has not been able to locate the northbound vehicle and/or its operator. There were no other witnesses to the accident. Smith discussed the matter with a 9-1-1 operator, an officer

VOL 0753 PG 195
JOURNALIZED

from the Ohio State Highway Patrol and various medical practitioners and described the circumstances leading to the accident as stated above.

Smith was a named insured on a policy of automobile insurance issued by Erie Insurance Company ("Erie"). The policy states in pertinent part,

> "Uninsured motor vehicle" means a "motor vehicle"
> * * *
> which is a hit-and-run "motor vehicle." The identity of the driver and the owner of the hit-and-run vehicle must be unknown and there must be independent corroborative evidence that the negligence of intentional acts of the driver of the hit-and-run vehicle caused the bodily injury. Testimony of "anyone we protect" seeking recovery does not constitute independent corroborative evidence, unless the testimony is supported by additional evidence.

Smith present a claim for uninsured motorist benefits under the Erie policy. Erie has denied Smith's claim.

<u>Motion for Summary Judgment</u>
<u>Standard of Review</u>

Civ.R. 56(C) provides that before summary judgment may be granted, the court must determine that (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. <u>Osborne v. Lyles</u> (1992), 63 Ohio St. 3d 326.

In reviewing a motion for summary judgment, the court must construe the evidence and all reasonable inferences drawn therefrom in a light most favorable to the

VOL 0753 PG 196
JOURNALIZED

party opposing the motion. Morris v. Ohio Cas. Ins. Co. (1988), 35 Ohio St. 3d 45; Harless v. Willis Day Warehousing (1978), 54 Ohio St. 2d 64.

The burden of establishing that no genuine issues to any material fact remain to be litigated is on the party moving for summary judgment. Turner v. Turner (1993), 67 Ohio St. 3d 337; Fyffe v. Jeno's Inc. (1991), 59 Ohio St. 3d 115, 120.

Once a party moves for summary judgment and has supported his or her motion by sufficient and acceptable evidence, the party opposing the motion has a reciprocal burden to respond by affidavit or as provided in Civ.R. 56(C), setting forth specific facts explaining that a genuine issue of material fact exists for trial. Jackson v. Alert Fire & Safety Equip., Inc. (1991), 58 Ohio St. 3d 48,52; Mitseff v. Wheeler (1988), 38 Ohio St. 3d 112, 115.

R.C. 3739.18 provides,

> 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.

The Supreme Court of Ohio set forth the corroborative-evidence test. Girgis v. State Farm Mut. Auto. Ins. Co. (1996), 75 Ohio St.3d 302. The Girgis test states that a "claim [may]

VOL 0753 PG 197
JOURNALIZED

go forward if there is independent third-party testimony that the negligence of an unidentified vehicle was a proximate cause of the accident." Id. "corroborative evidence" is defined as evidence that "supplements evidence that has already been given and which tends to strengthen or confirm it. It is additional evidence, or a different character, to the same point." England v. Grange Mut. Cas. Co. (Dec. 23, 1997), 10th Dist. No. 97APE07-894, unreported. Corroborative evidence is "independent" if it comes from "another source."

Courts have held that testimony from an insured's treating physician that is based entirely upon statements made by the insured to the physician do not qualify as *independent* corroborating evidence. Brown v. Philadelphia Indemnity Ins. Co. (May 9, 2011), 12th Dist. No. CA2010-10-094. Likewise, courts have held that a police report that contains an officer's statements that merely repeat what the insured has told the officer about an occurrence for which the insured is seeking coverage are not *independent* corroborative evidence. Id.

In the present case, the Erie policy requires independent corroborative evidence. The evidence that Plaintiff submits to satisfy this requirement is Plaintiff's 9-1-1 call, the crash report and Plaintiff's medical records. None of these are independent. Thus, there is no issue of fact yet to be litigated and Defendant is entitled to Judgment.

It is therefore ORDERED, ADJUDGED and DECREED that Defendant's Motion for Summary Judgment is GRANTED. Plaintiff's Motion for Summary Judgment is DENIED.

Judge

VOL 0153 PG 198
JOURNALIZED

ORC Ann. 3937.18

Current with Legislation passed by the 131st General Assembly and filed with the Secretary of State through file 45 (SB 223).

Page's Ohio Revised Code Annotated > *Title 39: Insurance* > *Chapter 3937: Casualty Insurance; Motor Vehicle Insurance*

§ 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;

(2) Intrafamily stacking, which is the aggregating of the limits of such coverages purchased by the same person or two or more family members of the same household.

(G) Any policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages and that provides a limit of coverage for payment of damages for bodily injury, including death, sustained by any one person in any one automobile accident, may, notwithstanding Chapter 2125. of the Revised Code, include terms and conditions to the effect that all claims resulting from or arising out of any one person's bodily injury, including death, shall collectively be subject to the limit of the policy applicable to bodily injury, including death, sustained by one person, and, for the purpose of such policy limit shall constitute a single claim. Any such policy limit shall be enforceable regardless of the number of insureds, claims made, vehicles or premiums shown in the declarations or policy, or vehicles involved in the accident.

(H) Any policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages may include terms and conditions requiring that, so long as the insured has not prejudiced the insurer's subrogation rights, each claim or suit for uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages be made or brought within three years after the date of the accident causing the bodily injury, sickness, disease, or death, or within one year after the liability insurer for the owner or operator of the motor vehicle liable to the insured has become the subject of insolvency proceedings in any state, whichever is later.

(I) Any policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages may, subject to *section 3937.46 of the Revised Code*, include terms and conditions that preclude coverage for bodily injury or death suffered by an insured under specified circumstances, including but not limited to any of the following circumstances:

(1) While the insured is operating or occupying a motor vehicle owned by, furnished to, or available for the regular use of a named insured, a spouse, or a resident relative of a named insured, if the motor vehicle is not specifically identified in the policy under which a claim is made, or is not a newly acquired or replacement motor vehicle covered under the terms of the policy under which the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages are provided;

(2) While the insured is operating or occupying a motor vehicle without a reasonable belief that the insured is entitled to do so, provided that under no circumstances will an insured whose license has been suspended, revoked, or never issued, be held to have a reasonable belief that the insured is entitled to operate a motor vehicle;

(3) When the bodily injury or death is caused by a motor vehicle operated by any person who is specifically excluded from coverage for bodily injury liability in the policy under which the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages are provided;

(4) While any employee, officer, director, partner, trustee, member, executor, administrator, or beneficiary of the named insured, or any relative of any such person, is operating or occupying a motor vehicle, unless the employee, officer, director, partner, trustee, member, executor, administrator, beneficiary, or relative is operating or occupying a motor vehicle for which uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages are provided in the policy;

(5) When the person actually suffering the bodily injury, sickness, disease, or death is not an insured under the policy.

(J) In the event of payment to any person under the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages, and subject to the terms and conditions of that coverage, the insurer making such payment is entitled, to the extent of the payment, to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of that person against any person or organization legally responsible for the bodily injury or death for which the payment is made, including any amount recoverable from an insurer that is or becomes the subject of insolvency proceedings, through such proceedings or in any other lawful manner. No insurer shall attempt to recover any amount against the insured of an insurer that is or becomes the subject of insolvency proceedings, to the extent of those rights against the insurer that the insured assigns to the paying insurer.

(K) Nothing in this section shall prohibit the inclusion of underinsured motorist coverage in any uninsured motorist coverage included in a policy of insurance.

(L) The superintendent of insurance shall study the market availability of, and competition for, uninsured and underinsured motorist coverages in this state and shall, from time to time, prepare status reports containing the superintendent's findings and any recommendations. The first status report shall be prepared not later than two years after October 31, 2001. To assist in preparing these status reports, the superintendent may require insurers and rating organizations operating in this state to collect pertinent data and to submit that data to the superintendent.

The superintendent shall submit a copy of each status report to the governor, the speaker of the house of representatives, the president of the senate, and the chairpersons of the committees of the general assembly having primary jurisdiction over issues relating to automobile insurance.

History

131 v 965 (Eff 9-15-65); 132 v H 1 (Eff 2-21-67); 133 v H 620 (Eff 10-1-70); 136 v S 25 (Eff 11-26-75); 136 v S 545 (Eff 1-17-77); 138 v H 22 (Eff 6-25-80); 139 v H 489 (Eff 6-23-82); 141 v S 249 (Eff 10-14-86); 142 v H 1 (Eff 1-5-88); *145 v S 20* (Eff 10-20-94); *147 v H 261* (Eff 9-3-97); *148 v S 57* (Eff 11-2-99); *148 v S 267* (Eff 9-21-2000); *149 v S 97*, Eff 10-31-2001; *2012 HB 278*, § 1, eff. Mar. 22, 2013.

Page's Ohio Revised Code Annotated
Copyright © 2016 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved.