No. 15-1419

IN THE
SUPREME COURT OF OHIO

Scott L. Smith, *et al.*,
Plaintiffs-Appellees
v.
Erie Insurance Company,
Defendant-Appellant

APPEAL FROM THE COURT OF APPEALS
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY, OHIO
CASE NO. OT-15-005

MERIT BRIEF OF AMICUS CURIAE OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS IN SUPPORT OF APPELLANT ERIE INSURANCE COMPANY

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Ohio Association of Civil Trial Attorneys ("OACTA") is an organization of attorneys, corporate executives, and managers who devote a substantial portion of their time to the defense of civil lawsuits and the management of claims against individuals, corporations, and governmental entities.

OACTA's membership is composed of trial lawyers and lawyers that are frequently called upon to litigate first party insurance claims involving single car accidents similar to the accident at issue in the case at bar. As trial lawyers, OACTA's membership has an interest in maintaining the integrity of Ohio's civil justice system, and to assist in combatting fraudulent claims.

OACTA has chosen to participate in this appeal because its members frequently litigate factually similar cases, and it is concerned that if the independent corroborative evidence test is diluted by allowing litigants to repackage their own testimony, Ohio will re-open the door to fraudulent claims.

I. STATEMENT OF THE CASE AND FACTS

Plaintiff, Scott L. Smith, was involved in a single-vehicle accident in Ottawa County, Ohio. (Joint Stipulation at ¶ 1.) Mr. Smith alleges that he was driving southbound on Plasterbed Road when a northbound vehicle on Plasterbed Road went left of center, entering Mr. Smith's lane of travel. (*Id.*) Mr. Smith alleges that to avoid a collision he swerved his vehicle off of the right side of the road and struck several trees. (*Id.*).

Mr. Smith's vehicle did not make actual physical contact with the claimed northbound vehicle. (*Id.* at ¶ 2.) There was no physical evidence collected or documented at the scene confirming the claimed northbound vehicle's existence. (*Id.*) Mr. Smith has not been able to

locate the northbound vehicle or identify its owner or operator. (*Id.* at ¶ 3.) There are also no identifiable witnesses to the accident. (*Id.* at ¶ 4.)

Following the accident, Mr. Smith discussed the accident with a 9-1-1 operator, an investigating Ohio State Highway Patrol ("OSHP") officer, and various medical practitioners. (*Id.* at ¶ 5.) In each instance, Mr. Smith described his version of the circumstances leading to the accident – that he swerved his vehicle off of the road to avoid a collision with another vehicle which had crossed the center line and entered his lane of travel. (*Id*.)

On the date of the accident, Mr. Smith was a named insured on a policy of automobile insurance issued by Erie Insurance Company ("Erie"). (Joint Stipulation at ¶ 6.) In pertinent part, the Erie policy provision regarding uninsured or underinsured motorist coverage reads 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.

Id. Mr. Smith presented a claim for uninsured motorist ("UM") benefits and Erie denied the claim. *Id*. at ¶¶ 7-8.

Mr. Smith filed a lawsuit in the trial court seeking UM coverage under the Erie policy. (Jurisdictional Memorandum at 4.) In support of his claim, Mr. Smith only offered his own statements from the 9-1-1 call, the OSHP traffic crash report, and his medical records. *Id.* at 4. Erie filed a motion for summary judgment arguing that it was entitled to judgment on all claims because Mr. Smith failed to produce "independent third party testimony" necessary to prevail in

a claim for uninsured motorist benefits under the terms of the Erie policy and Ohio law. *Smith v. Erie Ins. Co*, 6th Dist. No. OT-15-005, 2015-Ohio-3078 ¶ 3. Mr. Smith opposed the motion and filed his own cross-motion for summary judgment arguing that he was entitled to judgment because he submitted "additional evidence" as required by the Erie policy. *Id*. at ¶ 4. The trial court concluded that the evidence submitted by Mr. Smith did not constitute independent corroborative evidence because the contents of each piece of evidence stemmed from statements given by Mr. Smith. The trial court granted judgment for Erie. *Id*. at ¶ 5.

Mr. Smith appealed to the Ohio Sixth District Court of Appeals asserting that the trial court erred by determining that the 9-1-1 transcript/audio recording, the OSHP traffic crash report and scene photographs, and the medical records did not constitute "additional evidence" to support his testimony and establish the accident was caused by an uninsured motor vehicle. *Smith* at ¶ 12. Erie argued that the "additional evidence" must be independent, third party evidence not derived from the insured. The Sixth District concluded that the Erie policy language was ambiguous because it was subject to more than one interpretation. *Id*. at ¶ 32. The Sixth District construed the policy language in favor of the insured. *Id*. at ¶ 33.

Erie filed a discretionary appeal with this Court. Erie also sought to certify a conflict. (8/28/15 Notice of Certified Conflict). On December 2, 2015, this Court determined that a conflict existed. (See, Entry, December 2, 2015, Case No. 2015-1419).

II. ARGUMENT

Appellant's 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. The History of the Independent Corroborative Evidence Test is Founded on Prevention of Fraudulent Insurance Claims

OACTA supports appellant Erie's proposition of law, and urges this Court to reverse the Court of Appeals. OACTA is concerned that allowing an insured to move forward on repackaged statements in different venues defeats the purpose of the independent corroborative evidence test, and re-opens the door to fraud upon insurers, and upon Ohio Courts.

"[T]he corroborative evidence test we propound requires independent third-party testimony specifically to protect insurance companies from fraud." *Girgis v. State Farm Mut. Auto. Ins. Co.*, 75 Ohio St.3d 302, 307, 662 N.E.2d 280 (1996). The circumstances surrounding *Girgis* required this Court to create a test that would strike a balance between preventing fraudulent insurance claims and prohibiting legitimate insurance claims solely because no physical contact occurred. *Girgis* at 306. The independent corroborative evidence test created this balance. This Court found that "public policy considerations should and do require the substitution [in insurance policies] of the corroborative evidence test for the physical contact requirement." *Id*. at 307. "Because we remain committed to the underlying policy of preventing fraud, we adopt the corroborative evidence rule which prevents fraud[.]" *Id*. at 306. This Court was committed to preventing fraud when it created the independent corroborative evidence test and we urge the court to remain committed to preventing fraudulent insurance claims today.

The Ohio General Assembly codified the independent corroborative evidence test in R.C. 3937.18(B)(3)[1], the language of which tracks the independent corroborative evidence test set forth in *Girgis*. On April 30, 1997, the bill was presented to the Ohio House of Representatives. See 1997 OH Sub. H.B. 261, Third Consideration, available at http://www.ohiochannel.org/MediaLibrary/Media.aspx?fileId=112535, Ohio House Session (April 30, 1997) 12:07:11 (accessed January 19, 2015). The representatives who supported the bill narrowed in on the issue of fraud. During deliberations, Representative Don Mottley advocated for the bill to pass as written, which he said required the insured to show some other evidence, absent his own testimony, to prevent fraud. Rep. Mottley defined corroborating evidence as evidence that bolsters the credibility of the complaining witness, including a skid mark or any physical evidence, and noted that there is an increased opportunity for fraud where the complaining witness has no evidence to bolster his own statements that he was run off the road. *Id.* at 12:43:55-12:44:35. Further, Representative Jay Hottinger also stated that the "main intent is to safeguard against fraud." *Id*. at 12:46:44.

In codifying the *Girgis* decision, it is one element that can be used to prevent fraudulent claims for uninsured/underinsured motorist coverage. *Id.* at 12:47:20. Rep. Hottinger said that in the absence of corroborative evidence, it is difficult to see how an insured's own testimony is clear and convincing. *Id*. at 12:47:34.

Historically, the creation of the independent corroborative evidence test shows that both this Court and the General Assembly meant to prevent fraudulent insurance claims, and both this court and the General Assembly were clear that the insured's testimony is not enough to cross

[1] 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 threshold requirement of being "independent." If this court allows the Appellee in this case to present his repackaged statements as "additional evidence," the *Girgis* test will be diluted and Ohio will re-open the door to fraudulent insurance claims.

B. Ohio Courts Consistently Find that the Independent Corroborative Evidence Test and R.C. 3937.18(B)(3) Were Created and Codified to Prevent Fraudulent Insurance Claims

Ohio courts continue to follow the clear message in *Girgis* and from the General Assembly that the underlying policy for the independent corroborative evidence test is to prevent fraudulent insurance claims. The test is not only designed to prevent insurance fraud, but necessary to prevent fraud on the Court for cases in litigation.

"In re-affirming its commitment to preventing fraudulent claims, the court replaced the physical contact prerequisite with a corroborative evidence requirement, which 'allow[s] an insured to prove through independent third-party testimony that an unidentified vehicle was a proximate cause of the accident for which the insured seeks recovery.'" *Forrest v. Daimler Chrysler*, 9th Dist. Summit No. 20806, 2002-Ohio-1974, citing *Girgis* at 307.

"These cases generally arise when the claim of a responsible unidentified vehicle is made by the driver of the automobile who has a policy for uninsured motorist coverage and claims his wreck was caused by veering to avoid the offending and unidentified vehicle who did not stop. At times, the testimony of the driver is corroborated by another passenger in the vehicle or by other persons who observed what took place. Often the only testimony is that of the driver of the wrecked vehicle or a related passenger. There exists a possibility of fraud in that a 'phantom' vehicle may be 'manufactured' in order to recover for the driver's own negligence in causing the accident. *Smith, et al. v. Robert M. Neff, Inc.*, 10th Dist. Franklin No. 01AP-249, 2002-Ohio-207.

Perhaps most directly on point is *Brown v. Philadelphia Indem. Ins. Co.,* 12th Dist. Warren No. CA2010-10-094, 2011-Ohio-2217. In *Brown, supra,* the certified conflict case, the Twelfth District Court of Appeals held that the evidence the claimant presented did not constitute independent corroborative/additional evidence. The policy at issue in *Brown* is similar to the Erie policy at issue here. *Id.* at ¶15. Also, as in this case, the insured in *Brown* was the source of all of the "evidence" submitted to the Court. *Id.* at ¶23.

The Twelfth District correctly found that "[w]hen 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 course other than the insured's testimony." (Citation omitted.) Id. at ¶ 27. (Italics in original).

In *Rose v. City of Garfield Heights*, 2005-Ohio-4165, 970 N.E.2d 464 (8th Dist.), the court found that, although the independent corroborative evidence test does not require eyewitnesses, the stated purpose of the test is to avoid fraudulent claims.

This court should find, as several other Ohio courts have found before, that the purpose of the independent corroborative evidence test and R.C. 3937.18(B)(3) is to protect insurance companies, and the integrity of Ohio's civil justice system, and prevent fraudulent claims.

C. The Pedestrian Cases Analyzing the Independent Corroborative Evidence Test Support "Additional Evidence" as Being Synonymous with "Independent Corroborative Evidence" Because the Courts Look to Objective Medical Evidence and Not Just the Insured's Repackaged Statements

The courts in *Rose, supra,* and *Connell v. United Serv. Automobile Assn.,* 2d Dist. Montgomery No. 20282, 2004-Ohio-2726, also recognize that the independent corroborative evidence test serves to prevent fraud and that "additional evidence" is exactly that: additional. The test for independent corroborative evidence is the same in pedestrian v. phantom vehicle

cases and single car phantom vehicle cases. But typically, the corroborative evidence available in pedestrian cases is distinguishable from that available in single car accident cases.

In *Connell, supra,* the plaintiff alleged that while he was crossing a street, he was struck by a vehicle and suffered injuries to his left foot. *Connell* at ¶ 2. According to the plaintiff, the driver sped away and was not identified. *Id*. There were no witnesses to this incident and no police report was filed. *Id*. The plaintiff made a claim for UM coverage. *Id*. at ¶ 3. The plaintiff's insurance policy provided, in relevant part, that "[w]e 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." *Id*. at ¶ 10. The court found that "additional evidence" can be considered "physical evidence" and that evidence of the injuries to the plaintiff's foot is physical evidence from which a jury might infer that the plaintiff was injured in the accident as he claims he was." *Id*. at ¶ 18. The court found that the plaintiff's testimony along with the evidence of his injuries as "additional evidence" was enough to trigger UM/UIM coverage in the plaintiff's insurance policy. *Id*. at ¶ 27.

Thus, in addition to the insured's own statements, there was additional objective evidence consistent with the injury as described by the claimant. This additional evidence supported the claim that he was struck by a hit-and-run vehicle.

In *Rose, supra,* the plaintiff was a police officer who, in the course of his employment, exited his cruiser to pick up debris from the road. *Rose* at ¶ 2. The plaintiff alleged that he was struck by an unidentified motorist, who drove off without assisting the plaintiff. *Id*. The plaintiff fell to the ground, lost consciousness, and when he regained consciousness returned to his cruiser to call for help. *Id*. The responding officer arrived and observed that the plaintiff's uniform was dirty and that the left side of his head and his left wrist appeared swollen. *Id*. The

responding officer prepared a memo to the police chief describing the accident. *Id*. The plaintiff made a claim for UM coverage. *Id*. at ¶ 3.

The insurance policy provided, in relevant part, that "the testimony of any insured seeking recovery from the insurer shall not constitute independent corroborative evidence, unless the testimony is supported by additional evidence." *Id*. at ¶ 9. The court found that the plaintiff satisfied this requirement through his medical records, which showed his physical injuries, and the responding officer's report, which corroborated that the plaintiff appeared injured and that his uniform was dirty. *Id*. at ¶ 10.

Once again, the insured's own claims of injury by a hit-and-run driver were supported and corroborated by injuries consistent with the claim.

The courts in *Connell* and *Rose* were mindful that "additional evidence" does not mean the insured's repackaged testimony. Both courts accepted the medical evidence consistent with pedestrian/car contact as "additional evidence." The plaintiffs' in *Rose* and *Connell* suffered injuries that their doctors could testify were consistent with being hit by a vehicle. This testimony supplemented and corroborated the plaintiffs' version of the facts. The plaintiffs in these cases did not rely on their repackaged statements to their doctors. Instead, they relied on objective evidence from the medical records that showed their injuries were consistent with being hit by a vehicle to corroborate their claim.

By contrast, plaintiffs in vehicles who claim they were run off the road by a phantom vehicle cannot use the same type of medical evidence to corroborate their phantom vehicle claim. A doctor cannot distinguish injuries caused by an accident involving a phantom vehicle and those caused by a single car accident initiated by the plaintiff himself. The very nature of

the injuries in single car accidents – whether caused by a phantom vehicle or otherwise – cannot corroborate the claim as in a typical pedestrian hit-and-run case.

Thus, while both *Connell* and *Rose* support the underlying basis of fraud prevention, because the injuries provide additional, independent corroborative evidence, both are distinguishable. In single-car accident cases, the same evidence is unavailable, and fraud on the insurer and the Court are very much at issue.

D. The Independent Corroborative Evidence Test and R.C. 3937.18(B)(3) Balance the Interests of Insureds and Insurance Companies, but Allowing "Repackaged" Statements as "Additional Evidence" Will Re-Open the Door to Potentially Fraudulent Claims.

By creating the independent corroborative evidence test and codifying it in R.C. 3937.18(B)(3), this Court and the General Assembly sought to close the door on fraudulent first-party car accident claims. Once these cases reach litigation, Ohio courts should not allow an insured's "repackaged" statements to constitute "additional evidence" because it re-opens the door to potentially fraudulent claims. "Repackaged" statements, without more, do not constitute "additional evidence" simply because they are repeated in a different forum.

The independent corroborative evidence test struck a workable balance between fraud and fairness, which this Court should not disturb. The Court's decision in *Girgis* "ameliorate[d] the harsh effect" of the physical contact requirement, which lessened the burden on the plaintiff. But, the court balanced this holding with the independent corroborative evidence test, by requiring the plaintiff to prove his or her claim "through independent third party testimony that an unidentified vehicle was a proximate cause of the accident for which the insured seeks recovery." *Girgis*, 75 Ohio St.3d at 307. The court even acknowledged that its holding would lead to an increase in the filing of claims, but it also noted that the independent corroborative

evidence test, which requires independent third party testimony, was created specifically to protect insurance companies from fraud.

The Ohio General Assembly codified the independent corroborative evidence test in *Girgis*, when it passed R.C. 3937.18(B)(3). The *Girgis* test requires a plaintiff to have independent third party testimony to prove his or her claim. Just like this Court found in *Girgis*, the General Assembly balanced the insured's interests of testifying on his own behalf with the insurance companies' interests of requiring some "additional evidence" in support of the insured's testimony.

The discussion in the House of Representatives confirms that the main intent of the statute was to prevent fraud. The General Assembly did not intend the phrase "additional evidence" to include the insured's repackaged statements if its intent was to prevent fraudulent claims.

The dissent in *Girgis* found that corroboration would accomplish little to prevent fraud if a claimant, so inclined, would bolster his fraudulent claim with sham eyewitnesses or manufactured corroborative evidence. *Girgis*, 75 Ohio St.3d at 311. The dissent's view of the independent corroborative evidence test will become reality if this court allows an insured to present his or her repackaged statements as "additional evidence."

There is a high potential for fraudulent claims if, for example, an insured was texting while driving and ran into a tree, fell asleep at the wheel, or took his eyes off of the road to reach for something in the backseat. Just as an insured with a legitimate claim can do, the insured in these examples is able to tell his version of the facts to the 9-1-1 operator, investigating police officer, and treating physicians. Any insured can tell and re-tell a story and an insured's "repackaged" statement is not the "additional evidence" contemplated by the court in *Girgis* or

the legislature that passed R.C. 3937.18. The difference between an insured with a legitimate claim and an insured with a potentially fraudulent claim is that true independent, "additional" evidence – skid marks on the road, debris or paint from the other car, or independent eyewitnesses – cannot be manufactured without extreme effort.

If the court allows Appellee to go forward with his testimony and present the 911 call, police report, and medical records as "additional evidence" in support of his testimony, then any insured who drives off the road can make a UM claim and support it merely by re-telling their story to anyone who will listen. This would re-open the door to fraudulent claims closed by this Court in *Girgis* and later nailed shut by the General Assembly. Ohio's civil justice system is better served by maintaining the balance created by this Court in *Girgis*.

III. CONCLUSION

The Court should reverse the Sixth District Court of Appeals, and preserve the independent corroborative evidence test as this Court and the General Assembly intended.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Amicus Curiae Ohio Association of Civil Trial Attorneys in Support of Appellant Erie Insurance Company was served via e-mail pursuant to S.Ct.Prac.R. 3.11(B)(1) this 16th day of February, 2016 to:

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