IN THE SUPREME COURT OF OHIO

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

MERIT BRIEF OF AMICUS CURIAE OHIO ASSOCIATION FOR JUSTICE IN SUPPORT OF APPELLEE SCOTT L. SMITH

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Ohio Association for Justice ("OAJ") is a consortium of attorneys who represent individual plaintiffs in injury cases and other civil litigation in the State of Ohio. The members of OAJ are dedicated to protecting the rights of individuals in litigation and to uphold and defend the Constitution of the United States and the State of Ohio – in particular, the right to trial by jury.

In this regard, the OAJ and its members have a strong interest in allowing Ohio juries to decide whether the facts of a given case justify payment of damages (or not) in an uninsured motorist claim.

The lawyers of OAJ are dedicated to promote the administration of justice for the public good and to promote public confidence in the civil justice system. OAJ attorneys spend their professional lives seeking redress for individuals who are injured through another's carelessness. Like Appellant Erie Insurance Company, the OAJ also seeks to prevent fraudulent insurance claims, as such claims pollute the wellspring of civil justice for those injured Ohioans bringing meritorious claims.

As such, the OAJ believes that this Court should adopt rules of contract law consistent with its ruling in *Girgis v. State Farm Mut. Auto. Ins. Co.*, 75 Ohio St.3d 302, 1996-Ohio-111, 662 N.E.2d 280. In that seminal case, this Court struck down the physical contact requirement as an absolute pre-requisite for recovery in "no contact" uninsured motorist ("UM") claims. *Id.* at 305. The *Girgis* court replaced the physical contact requirement with the "corroborative evidence test" and to some extent that test was modified in the current version of R.C. 3937.18(B) (3). *Id*.

The UM provision in Erie Insurance Company's policy – which is at issue in this case – tracks R.C. 3937.18(B) (3) as well.

The OAJ implores this Court to adopt a plain meaning, common sense reading of the Erie Insurance UM policy. It indicates that the testimony of an insured seeking recovery from the insurer shall not constitute independent corroborative evidence unless the testimony is supported by "additional evidence."

Neither Erie's policy language nor the UM statute define the term "additional evidence." Likewise there is no policy language indicating that the additional evidence must wholly exclude the insured's statements. No policy language was included by Erie Insurance that precludes an investigating law enforcement officer's sworn testimony from being deemed as "additional evidence" simply because the officer (a) asked the insured what happened at the scene of a collision and (b) the insured responded.

The "additional evidence" that supports an insured's claim should be subject to the same tests of credibility upon which Ohio juries are routinely instructed. Since the independent corroborative evidence test is designed to eliminate payment of fraudulent claims, the Court must be careful not to fashion a test that would arbitrarily eliminate legitimate claims, as was the case in the days before *Girgis.* This Court, instead should, craft a rule of law that allows for a properly instructed jury to make a determination on a case-by-case basis as to whether or not an uninsured motorist claim is "fraudulent" or not, using the tests of truthfulness applied in daily life.[1]

This Court's interpretation of the Erie Insurance UM policy language should be guided with the stated objectives set forth in *Girgis* of allowing juries "to distinguish between legitimate cases and fraudulent ones, as they do in many other matters". *Girgis* at 307.

Accordingly, the OAJ respectfully requests that this Court uphold the ruling of the Sixth District Court of Appeals.

[1] See Ohio Jury Instruction CV Section 305.05 (Revised Aug. 2012).

STATEMENT OF FACTS

In the trial court, the parties stipulated to various facts. The stipulation was memorialized in a 10 paragraph document supplemented with joint exhibits A through D. From that lower court record, the facts show that Appellee Scott L. Smith was involved in a single vehicle crash on July 25, 2011 in his Chevrolet S-10 pickup truck. The records show that Appellee was southbound on Plasterbed Road (County Road 0034) approaching the intersection of Township Road 0264 when a northbound vehicle operated by an unidentified motorist went left of center into his occupied southbound lane, forcing him off the road into a cluster of trees.

At the scene of the crash, Appellee told the Ohio State Highway Patrol Officer Byron Crockett that the unidentified vehicle that turned on to Plasterbed Road went left of center after turning and that this action caused Appellee to swerve to avoid the unidentified vehicle. See Joint Exhibit B attached Stipulation. Appellee described the unidentified vehicle as a dark colored SUV. The collision happened just prior to 11:00 p.m. on a Monday night as Appellee was on his way to work. Appellee crashed his pickup truck into trees along the right side of Plasterbed Road, as he took evasive action to avoid a head-on crash.

Joint Exhibit A indicates Appellee called Ottawa County 911 to report the accident just prior to 11:00 p.m. He described the actions of the unidentified motorist as crossing over in to his lane head on. He told the 911 operator that he was injured and unable to get out of the vehicle because of the tree that he was up against. Trooper Crockett photographed Appellee's damaged vehicle next to a tree in the wooded area.

Trooper Crockett's report and photos in Exhibit B show that he viewed the scene of the crash, measured the paved roadway surfaces, performed an inventory of the Smith vehicle and thoroughly investigated all known facts surrounding this collision. He did not issue a citation to

Appellee. He listed under contributing circumstances "Box #14," which means Mr. Smith was swerving to avoid a vehicle. See Joint Exhibit B.

Appellee was taken by ambulance to Magruder Hospital in Port Clinton according to Joint Exhibit C. At the hospital, he gave a history of turning to avoid an oncoming car, and drove off the highway and into some trees. He hit is head upon impact and sustained back pain and other injuries. When giving history to his physical therapist on August 2, 2011, Appellee told her that he was involved in a car crash on his way to work when he was in a hit and run accident sending him in to a ditch. He later advised his neurosurgeon that he was driving his truck and swerved to avoid another vehicle that he crossed the midline skidding off the road into a ditch and hitting a tree. These statements to the medical professionals are memorialized in Joint Exhibit C of the Stipulation.

Appellee Scott Smith made a claim with his own insurer, Erie Insurance. He paid for UM coverage in the policy with Erie Insurance and it was in effect at the time of the crash. The Erie Insurance policy is attached as Exhibit D to the Joint Stipulation and states in pertinent part that:

> [U]ninsured motor vehicle that means a motor vehicle *** which is a hit and run motor vehicle. The identity of the driver and owner of the hit and run vehicle must unknown and there must 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.

Although many terms are defined in the policy, the term "additional evidence" is not defined. The Erie Insurance UM endorsement refers to "our promise" stating that Erie Insurance will pay damages "for bodily injury that anyone we protect or the legal representative of anyone we protect are legally entitled to recover from the owner and operator of an uninsured motor vehicle. The injuries must arise from a motor vehicle accident, arising from the use of an uninsured

motor vehicle and involve bodily injury to an insured." Through counsel, Appellee submitted his claim for UM benefits. Appellee's claim was denied by Erie Insurance.

STATEMENT OF THE CASE

Appellee and his wife filed suit against Erie Insurance in Ottawa County Common Pleas Court in 2012. After the Joint Stipulation of Facts was entered, both parties filed motions for summary judgment on the issue of whether the unidentified vehicle described by Appellee to police was operated by an "uninsured motorist." Erie claimed that the statements made to the 911 operator, the investigating police officer and the various doctors did not constitute "additional evidence" of independent corroboration. The trial court ruled that the evidence that plaintiff submitted (to satisfy the "additional evidence" requirement) was not "independent".

On appeal, the Sixth District Court of Appeals disagreed and reversed. The appellate court noted that the language in the Erie Insurance policy was susceptible of more than one reasonable interpretation and found it ambiguous regarding the evidentiary requirements for UM benefits. *Smith v. Erie Ins. Co.*, 2015-Ohio-3078, 36 N.E.3d 214, ¶ 31 (6th Dist.). The court noted the well-established principle of law that states where the provisions of a contract of insurance are "reasonably susceptible to more than one interpretation," such terms will be construed strictly against the insurer and liberally in favor of the insured. *Id.* at ¶ 32, citing *King v. Nationwide Ins. Co.*, 35 Ohio St.3d 208, 519 N.E.2d 1380 (1988).

The Court of Appeals remanded this matter back to the trial court for further proceedings consistent with its decision. However, the court recognized that its decision was in conflict with the decision of the Twelfth District Court of Appeals in *Brown v. Philadelphia Indemnity Ins.*, 12th Dist. Warren No. CA2010-10-094, 2011-Ohio-2217 and therefore certified a conflict.

This Court accepted the certified conflict in December 2015.

ARGUMENT – PROPOSITION OF LAW

Proposition of Law:

The term "additional evidence" as used in R.C. 3937.18(B)(3), or in an auto insurance policy tracking this section means, testimony or physical evidence elicited from, or produced by, a person other than the insured seeking benefits.

The fact that the other person's testimony or evidence is partially derived from an insured's statement shall not automatically preclude such evidence as being deemed "additional evidence" in conjunction with the "independent corroborating evidence" test used when a claim is made for damages caused by an unidentified motorist.

Since amendments have been made to R.C. 3937.18, it is no longer mandatory for insurers in Ohio to offer UM coverage to its customers. However, if the coverage is offered and an insured such as Appellee Scott Smith pays for such coverage, the insurance company's policy language must comply with R.C. 3937.18.

At issue in this case is the definition of an "uninsured motorist". The Erie Insurance policy provision being construed by this Court states that an "uninsured motorist" can be the owner/operator of a "hit and run" motor vehicle. The policy states that (1) the identity of the driver and owner of the hit and run vehicle must be unknown and (2) 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. The policy also states that (3) testimony of "anyone we protect" seeking recovery does not constitute independent corroborative evidence unless the testimony is supported by additional evidence. Erie's definitional section includes another requirement that (4) the "accident must be reported to the police or other proper governmental authority within 24 hours, or as soon as possible."

It is ironic that Erie Insurance Company – whose policy requires this reporting to the police within 24 hours – deems such reporting of an accident by an insured to be a mere "repackaging" of testimony by the insured.

As noted in the lower court, a review of R.C. 3937.18(B) is relevant to an examination of this issue. The legislative enactment states, in pertinent part, that "[f]or 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 apply:"

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

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

When this Court reviews the phrase "independent corroborative evidence" as used in the statute, it becomes patently clear that Appellee supported his claim with evidence that was both independent of him and corroborative of his account of how this serious one car crash occurred. The evidence included the stipulated testimony of a 911 dispatcher, a law enforcement officer investigating the crash and various treating physicians. These persons are all independent sources of information used to meet the requirement of Appellee to produce independent corroborative evidence to show that his injuries were proximately caused by the negligence of an unidentified operator of a motor vehicle.

As noted in the introduction, this Court set forth the "corroborative evidence" test in single vehicle crashes caused by the negligence of unidentified motorists whose identity cannot be

ascertained in *Girgis*, 75 Ohio St.3d 302, 1996-Ohio-111, 662 N.E.2d 280. The *Girgis* Court took pains to make certain that legitimate claims would not be dismissed arbitrarily. The test was designed to create a balance between legitimate claims that just happen to be unwitnessed and fraudulent claims which are clearly not legitimate. Nowhere in the language of *Girgis*, the Erie Insurance policy or R.C. 3937.18(B)(3) is there any "exclusionary rule" that prevents the "additional evidence" or independent corroborating evidence from being partially derived from an insured's own statement. The word "repackaging" which appears in the brief of Erie Insurance multiple times, is nowhere to be found in the Erie Insurance policy. Likewise, the term "repackaging" does not exist in the statute either.

Appellant Erie Insurance and two amicus briefs supporting its arguments, dedicate nearly all of their argument to the prevention of fraud. The question needs to be asked:

Is Erie Insurance accusing Appellee Scott Smith of insurance fraud?

It should be noted that fraud is an affirmative defense, one in which the defendant has the burden of proof. See Civ.R. 8(C). Furthermore, fraud must be pleaded with particularity if it is alleged. See Civ.R. 9(B). There is no evidence of fraud in the record before this Court.

A. The plain meaning doctrine supports Appellee's position that "additional evidence" means evidence from a person other than the insured.

An insured in Ohio must make certain threshold allegations to even characterize an unidentified motorist who causes an injury to be an "uninsured motorist." That threshold is the independent corroborative evidence test.

In evaluating the term "independent corroborative evidence," many examples demonstrate that the Sixth District Court of Appeals' ruling was correct.

A hypothetical example of an individual who does not meet the independent corroborative evidence test would be someone who behaves as follows: The individual goes to his/her insurance

agent's office claiming that another motorist ran the red light, hit the insured's car and fled the scene. The individual does not call 911, does not report the collision to the police, and does not seek any medical treatment for his/her injuries. The individual merely fills out a claim form at his/her insurance agent's office seeking UM benefits. Given these facts, the insured, even if not acting fraudulently, would not be able to satisfy the independent corroborative evidence test. This is because this individual would have no additional evidence to support his/her own testimony.

In contrast, Appellee behaved the way most motorists do following a traumatic collision with an unidentifiable vehicle: Appellee immediately called 911 to report the crash; he cooperated with the police investigation and told first responders and emergency physicians how his injuries were sustained in the crash.

According to Exhibit A, attached to the Stipulation of Facts, Appellee contacted 911 while he was trapped in his car. There can be no doubt that the testimony of the 911 operator would be admissible even if it was not subject of a stipulation. Evidence of "present sense impressions" are admissible pursuant to Ohio Rule of Evidence 803(1) as are "excited utterances" under Evid.R. 803(2).

Considerations used to determine whether an utterance qualifies as an "excited utterance" under Evid.R. 803(2) are: "(a) the lapse of time between the event and the declaration, (b) the mental and physical condition of the declarant, (c) the nature of the statement and (d) the influence of intervening circumstances." Evid.R. 803(2); *Miles v. General Tire and Rubber Co.*, 10 Ohio App.3d 186, 190, 460 N.E.2d 1377 (10th Dist. 1983). Ohio trial courts have admitted 911 tapes pursuant to this evidence rule (even when the declarant has been knocked unconscious) when supported by a conclusion that a declarant had not sufficiently regained faculties to fabricate a story. See, e.g., *State v. Melton*, 141 Ohio App.3d 713, 722, 753 N.E. 2d 241 (1st Dist. 2001).

Here, the 911 dispatcher has no relation to the policyholder and the call was immediately placed from the scene of the crash.

Another hypothetical proves the independent nature of this type of evidence. Suppose an individual with UM coverage called 911 immediately after a crash and stated that he was adjusting his radio and momentarily took his eyes off the road causing him to crash into a parked car or a tree. Assuming that the insured later claimed that an unidentified driver caused him to crash, any insurance carrier would use the 911 recording to rebut the insured's testimony.

In this case, Appellee told Erie Insurance that the "other driver" was not identifiable and this case involves an evaluation of that claim. The 911 recording confirmed the Appellee's statement. The 911 recording was not independent conflicting evidence but rather independent corroborative evidence. Appellee explained to the 911 operator that the unidentifiable motorist came "over into my lane as I was getting ready to make the corner and they come around the corner into my lane head on and I went in to the woods."

"'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.'" *Jackson v. State Farm Mutual Auto. Ins. Co.*, 4th Dist. Pike No. 14CA850, 2015-Ohio-1131, ¶ 16, quoting *Muncy v. American Select Ins. Co.*, 129 Ohio app.3d 1, 6-7, 716 N.E.2d 1171 (1998).[2] If the evidence is indeed "corroborative," to some extent it will repeat or overlap what the insured said. This is a phenomenon Erie Insurance calls "repackaging,"

[2] Even the conflict case *Brown v. Philadelphia Indemnity Ins. Co.*, 2011-Ohio-2217, utilizes this definition of corroborating evidence at ¶ 21. However, the *Brown* decision added to the insured's burden of proof ruling that "additional evidence" must also be wholly independent of the insured's testimony.

the statement of insured. However, the essence of corroboration involves double-checking a statement of a declarant.

Particularly troubling in Appellant's arguments is the concept that the police officer that investigated this crash is somehow not "independent." The idea that a sworn law enforcement officer -- such as the State Highway Patrol officer in this case -- will simply write a report based solely on what an insured said is just plain wrong. Police officers, by their very nature, are independent when it comes to ascertaining the facts surrounding a motor vehicle collision. That independent source of reliability is the reason that Erie Insurance requires its policyholders to contact the police within 24 hours. It is also why state law requires that "police" be contacted following a collision that causes serious injury. See R.C. 4549.02.

The Merit Brief of Amicus Curiae Ohio Insurance Institute incorrectly cites *Honzell v. Nationwide Ins. Co.*, 10th Dist. Franklin No. 11AP-998, 2012-Ohio-6154 regarding the role of a police report in a case like this. Contrary to what the Ohio Insurance Institute stated at page 13 of its brief, the court in *Honzell* stated that the insurance company's reliance on *Willford v. Allstate Indem. Co.*, 10th Dist. Franklin No. 97APE05-657, 1997 Ohio App. Lexis 5130 (Nov. 10, 1997), was misplaced. The *Honzell* court said that unlike the police report before the court in *Willford,* if a police report reflects the officer's first hand observation of the damage to appellant's vehicle, and that damage is consistent with appellant's description of the accident, then the independent corroborative evidence test is satisfied. *Honzell, supra* at ¶ 18, 19.

The *Honzell* court further stated that because at least a portion of the police report constitutes independent corroborative evidence the court decided that it need not address any of the other proffered independent third party evidence including medical records, etc. *Id.* at ¶ 19.

Specifically, the court found that the police report contained both the statements of the insureds as well as the officer's personal observations of the damages to the insureds' vehicle, noting,

> "This damage supports appellants' testimony regarding the circumstances of the alleged incident. This portion of the police report is independent corroborative evidence supporting appellants' contention that an unidentified driver struck the rear of their vehicle. Therefore, appellants have presented evidence that satisfies the threshold requirements for an uninsured motorist claim under the policy and R.C. 3937.18(B)(3). When all the evidence is construed in appellants' favor for purposes of summary judgment, this independent corroborative evidence creates a genuine issue of material fact regarding whether an unidentified driver proximately caused appellants' injuries.
>
> Honzel, *Id*. at ¶ 15.

In the case at bar, as in *Honzell*, there was an independent observation by the police officer who took photographs of Appellee's vehicle wedged against the trees. The police officer measured the road and all marks on it. The police officer described the scene of the crash in a manner that was completely consistent with Appellee's account to the 911 operator. It was consistent with Appellee's statement to the officer as to the manner in which the accident occurred. This constitutes corroborative evidence, by any measure of common sense.

Before this Court even considers Appellant's proposed proposition of law suggesting that a police officer's testimony is not "independent evidence," one must consider another hypothetical: Suppose a police officer had found evidence of damage to the left side of an insured's vehicle even though the insured said he was run off the right side of the road. Such physical evidence could be considered independent <u>conflicting</u> evidence. Also, suppose an insured gave multiple statements to police of how the crash occurred. For example, in one statement, an insured told police her crash was caused by an unidentified motorist and then, in another account, the insured says she has no idea how the crash occurred or that she fell asleep at the wheel. Under these facts, the police officer would undoubtedly be called as a witness to impeach the insured. Under these

circumstances too, the police officer would be deemed independent. The mere fact that the officer's report substantiates the account offered by the insured does not destroy the independence of that report or the officer who wrote it. This Court must rule that statements made by an insured to police officers who actually investigate the crash must be deemed independent, even if their testimony is in part derived from the insured's account of the crash.

In addition to the inherent reliability of the excited utterance to the 911 dispatch operator and the independent reliability of the investigating officer, statements made to medical professionals for the purpose of treatment or diagnosis are also vested with reliability. In this case, Appellee's treating emergency room physician, surgeon and physical therapist each describe a history of how Appellee's injuries occurred in this crash. Part of that history includes the fact that he was run off the road by an unidentified motorist.

Not every statement made to a physician is admissible as an exception to the hearsay rule under Rule 803(4) of the Ohio Rules of Evidence. Specifically, Evid.R. 803(4) states that the "following are not excluded by the hearsay rule, even though the declarant is available as a witness: *** (4) Statements made for the purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause of external source thereof insofar as reasonably pertinent to diagnosis or treatment." The Staff Notes to Evid.R. 803(4) add that there is an "assumption that a person will be truthful about his physical condition to a physician because of the risk of harmful treatment resulting from untruthful statements."

The cornerstone to admissibility under such rule is whether the statements are reasonably pertinent to diagnosis or treatment. See, e.g., *State v. Miller*, 43 Ohio App.3d 44, 539 N.E.2d 693 (1988). However, accounts of how an injury occurred are routinely given by injured patients to

physicians to assist the physician in making a diagnosis. The documents included in Joint Exhibit C are before this Court pursuant to stipulation. This Court need not rule on their ultimate admissibility at trial. Rather these materials enable the Court to determine whether they furnish even more independent corroborative evidence supports the claim that Appellee's injuries were caused by the actions of an unidentified motorist.

Certainly if the hospital records contained evidence that an insured was under the influence of alcoholic beverages or if the records stated said the insured dozed off at the wheel, then the insurance company would seek to have the doctor's statements deemed as independent and conflicting evidence. However, in this case, because Appellee Scott Smith told the truth multiple times, Erie Insurance argues that statements made to the physicians and therapists somehow lose their "independence" and are merely "repackaging" of the insured's statements.

The very test announced in *Girgis*, R.C. 3937.18(B)(3) and in the Erie Insurance policy presuppose no coverage unless there is independent corroborative evidence. By requiring such corroboration, the policyholder – who paid for this UM coverage – is in effect being impeached as soon as the claim is filed. Pursuant to Evid.R. 801, a statement is not hearsay if it is a prior statement by a witness, is consistent with the witness's testimony, and is offered to rebut an express or implied charge against the witness of recent fabrication or improper influence or motive. See Evid.R. 801(D)(1)(b).

Furthermore, both the Erie policy and the statute actually allow for a wider spectrum of what constitutes "independent corroborative evidence" than *Girgis*' "independent third party testimony" rule. Both the policy language and the statute refer, simply and plainly, to "additional evidence" and neither require additional "physical," "forensic," or "third party" testimony. The only limitation is that the "testimony" of the insured alone will not suffice.

The language chosen by General Assembly, mirrored in the policy, simply refers to "evidence," without any quantification or qualification. As such, no interpretation is necessary to glean its meaning.

The sources identified by Appellee are all "independent" and all "corroborate" his account of the collision. Their statements are "in addition" to Appellee's account. Using the plain meaning of the terms in the policy, Appellee has met his burden for UM coverage to exist.

B. <u>If the term "additional evidence" as used in the Erie Insurance policy is deemed ambiguous, then the ambiguity must be construed against the insurer and liberally in favor of the insured.</u>

In the case of *Connell v. United States Auto. Assn.*, 2nd Dist. Montgomery No. 20282, 2004-Ohio-2726, the court held that medical records and police reports constitute "additional evidence" and together with the insured's testimony satisfy the insurance company's standard of independent corroborative evidence. The *Connell* court noted that the USAA policy specified additional <u>evidence</u>, not additional testimony. *Id.* at ¶ 17, 18. The phrase used in the Erie Insurance policy under review by Court is "additional evidence." The word "additional" means in addition to or further or added. Webster's New College Dictionary 13 (2001). Each piece of evidence offered by Appellee – the 911 recording, the police report and medical records – qualifies as additional evidence.

As noted above, the OAJ asks this Court to hold that the phrase "additional evidence" should be given its common and ordinary meaning. However, <u>if</u> this Court determines the phrase "additional evidence" to be ambiguous, then OAJ respectfully requests that the Court affirm the ruling of the Sixth District Court of Appeals. An ambiguous term in an insurance policy is one that is subject to more than one reasonable definition. *Andersen v. Highland House Co.*, 93 Ohio St.3d 547, 549, 2001-Ohio-1607, 757 N.E.2d 329. "Where 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*, 35 Ohio St.3d 208, 519 N.E.2d 1380, syllabus.

In the Sixth District Court of Appeals' opinion in this matter, a unanimous court wrote the following:

> 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 evidence such as medical records and police reports that are based upon the testimony of the insured (Appellant's policyholders interpretation).

Smith, 2015-Ohio-3078, 36 N.E.3d 214, ¶ 30. The court explicitly noted that additional evidence was not defined by Erie Insurance in the policy it sold to Appellee.

It is not the role of this Court to rewrite the policy to protect Erie Insurance from its own words.

The court below felt that the second sentence of the definition including the phrase "additional evidence" seems redundant because the phrase "independent corroborative evidence" in the first sentence conveys the need for third party evidence.

The lower court also stated that "we find it is ambiguous regarding the evidentiary requirements for an uninsured motorist benefits." *Smith*, 2015-Ohio-3078, 36 N.E.3d 214, ¶ 32.

The OAJ respectfully posits that this Honorable Court should uphold the decision of the Sixth District Court of Appeals <u>if</u> the Court also determines that the Erie Insurance policy language is ambiguous.

C. Erie Insurance should not ask this Court to rewrite its uninsured motorist provisions by using words not already included in the policy.

As noted above, the phrase "not derived from the insured's own statement" does not appear in the Erie Insurance policy. Likewise the policy does not state that the "additional evidence" required to prove corroboration shall not be "repackaged" versions of the insured's testimony or other such similar words.

If this Court were to adopt the standard as being urged by Erie Insurance, the Court would be denying the benefit of the bargain to all Ohioans who purchased UM coverage. Their policies do not specifically state that the UM coverage is not afforded "unless the insured's accident is eye-witnessed by a wholly independent third party" (who testifies that an unidentified negligent motorist caused the collision). However that missing hypothetical language is what Erie Insurance is asking this Court to add to its UM policies. In fact, under the interpretation offered in Court by Erie Insurance, those injured policy holders do not even get the right to a trial to let a jury decide if they are telling the truth unless and until each has a) the bad fortune of having an unidentified driver cause an accident and b) the good fortune of having a witness who happens to see the collision.

This Court clearly stated in *Federal Ins. Co. v. Executive Coach* that it would not read words into a policy. 128 Ohio St.3d 331, 2010-Ohio-6300, 944 N.E.2d 215. In *Executive Coach*, this Court upheld the common ordinary use of the term "hired auto" and refused to adopt the insurance company's proposed definition of the term that included "control" over the vehicle. *Id.* at ¶ 9. The Court used ordinary dictionary definitions of "hire" and "permission" rather than read additional terms into the policy which would have led to an exclusion from coverage that is not specifically in the policy language. *Id*. at ¶ 11-12.

This case presents another opportunity for the Court to reaffirm the longstanding doctrine of contract law that words should be given their ordinary meaning in a contract. The term "additional evidence" should mean just that: evidence from someone other than the insured.

CONCLUSION

There are three possible options for this Court to consider in adjudicating this case. The first is that the term "additional evidence" as used in the Erie Insurance policy and in R.C. 3937.18 should be given its plain meaning and that the evidence submitted by Appellee Scott Smith (the 911 transcript, police report including the observations of the officer and photos and the medical records) constitutes additional evidence to satisfy the independent corroborative evidence requirement. Option number two is that the term "additional evidence" is ambiguous with regard to the evidentiary requirements for UM benefits. Option number three is that the term "additional evidence" is unambiguous and that any document in any way repeats the words of the insured shall not be considered "additional evidence." Erie argues that "additional evidence" as used in the policy unambiguously precludes the use of such "repackaged" statements which are in any way derived from the words of the insured.

Under options one and two, Appellee will prevail in this litigation. Erie Insurance prevails only under a strained definition of the term "additional evidence" utilizing words that are not written in its UM coverage promise.

In short, OAJ asks that this Court clarify the term "additional evidence" as set forth in OAJ's proposition of law. OAJ's position is that this clarification will not be opening the doors to fraudulent claims as claimed by Appellant and Amicus Ohio Institute of Insurance. By adopting a common sense plain meaning definition of "additional evidence," this Court will allow claimants

(such as Scott Smith) to get past only the first hurdle of obtaining recovery under the policy of UM coverage they purchased.

As in the case of *Neal v. Farmers Ins. of Columbus, Inc.*, 10th Dist. Franklin No. 03AP-1078, 2004-Ohio-2574, this Court should find that Appellee's evidence in the record:

> "raised a genuine issue of material fact so as to survive appellant's motion for summary judgment. Whether this independent corroborative evidence *proves* that the accident was proximately caused by the operator of the "phantom" truck, involving as it does, questions of weight and credibility, is a question of fact for the trier of fact."

(Emphasis sic.) *Id.* at ¶ 15.

If the lower court ruling stands, Appellee Scott Smith – and others similarly situated – will still have to go to court and prove to a jury by a preponderance of evidence that a negligent, unidentified motorist proximately caused their claimed injuries. The OAJ is confident that Ohio's civil justice system can root out fraudulent claims before a jury. This Court must safeguard our system of trial by jury as guaranteed in the Ohio Constitution, Article I, Section 5.

WHEREFORE, Amicus Curiae Ohio Association for Justice prays for an Order affirming the decision of the Sixth District Court of Appeals and remanding the case to the trial court for further proceedings.

Respectfully submitted,

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PROOF OF SERVICE

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