IN THE SUPREME COURT OF OHIO

Scott L. Smith, et al.	:	Case No. 2015-1419
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.	:	

MERIT BRIEF OF PLAINTIFFS-APPELLEES SCOTT L. SMITH AND DAWN M. SMITH

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I. STATEMENT OF THE FACTS

The facts in this case are set forth in a Joint Stipulation of Facts. Defendant-Appellant Erie Insurance Company ("Erie") has included those stipulated facts in its Merit Brief. Plaintiff-Appellee Scott Smith ("Mr. Smith") testified that he was run off the road by an approaching vehicle that entered his lane. (Joint Stipulation of Facts, ¶1). As a result, Mr. Smith was seriously injured. (*Id.*, ¶5). He immediately reported the incident to a 911 operator, the investigating officer of the Ohio State Highway Patrol and to medical providers who treated his injuries. (*Id.*).

Mr. Smith's Erie uninsured motorist ("UM") policy ("Erie Policy") stated in pertinent part:

> **"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.*, ¶6).

Erie has denied coverage asserting Mr. Smith has not satisfied the above-referenced provision in his UM policy because he has not submitted satisfactory "additional evidence." (*Id.*, ¶8).

The trial court agreed with Erie, but the Sixth District Court of Appeals reversed, holding that the phrase "additional evidence" was susceptible to at least two reasonable interpretations and adopting the insured's reasonable interpretation that the "additional evidence" may consist of items of evidence such as medical records and police reports. In reaching its decision, the Sixth District certified to this Court a conflict with the Twelfth District Court of Appeals' decision in

Brown v. Phila. Indem. Ins. Co., 12th Dist. Warren No. CA2010-10-094, 2011-Ohio-2217. In its Entry of December 2, 2015, this Court ordered the parties to brief the following issue:

> 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.

II. ARGUMENT

Proposition of Law: Evidence prepared by an independent third-party, even though it contains an insured's own statements, constitutes "additional evidence" which, when it supports the testimony of the insured, satisfies the independent corroborative evidence standard found in a UM Policy.

A. Introduction

Contrary to the arguments raised in Erie's Merit Brief and the Merit Briefs of Amici Curiae, this case is not about applying the ruling in *Girgis v. State Farm Mut. Auto. Ins. Co.*, 75 Ohio St.3d 302, 660 N.E.2d 280 (1996), or about the statutory interpretation of R.C. 3937.18. This case requires the interpretation of a provision in a UM policy according to long-established rules of construction. Mr. Smith argues for upholding settled rules of construction by giving undefined terms in the Erie Policy their common and ordinary meaning. See, *Fed. Ins. Co. v. Exec. Coach Luxury Travel, Inc.*, 128 Ohio St.3d 331, 2010-Ohio-6300, 944 N.E.2d 215. Erie's interpretation would gut this rule by allowing insurers to add language not found in the policy in order to deny coverage.

Erie's position would result in the classification of an entire group of insureds as unworthy of UM coverage, even though it collected a premium for such coverage, and even though these insureds suffered serious injuries caused by an uninsured driver. An Erie insured who is run off the road and injured by an unknown vehicle could not recover if he is unfortunate enough to be alone in his vehicle.

To justify this result, Erie and the Amici Curiae advance the goal of preventing insurance fraud, even though *no* evidence of fraud exists in this case. Nor does the record contain any evidence of fraud in the industry relating to the uninsured motorist context. Erie's position discounts evidence that is commonly accepted throughout the state based on the trustworthiness of excited utterances and truthfulness when talking to police officers and medical providers. Erie's position flies in the face of accepted jurisprudence which trusts juries to decide credibility and truthfulness. See, *Girgis* at p. 307 ("Further, we are confident that the jury system will be able to distinguish between legitimate cases and fraudulent ones, as they do in many other matters.") This Court should not sanction Erie's attempt to close the courthouse doors to Mr. and Mrs. Smith.

B. Summary of the argument

Erie refuses to acknowledge coverage for Mr. Smith under his UM policy. Erie argues the vehicle which ran Mr. Smith off the road was not an "uninsured motor vehicle" as defined by the Erie Policy. Erie asserts there is no "additional evidence" to support the testimony of Mr. Smith that the negligent acts of the driver of the uninsured vehicle caused the accident. The Smiths assert the "additional evidence" they have submitted satisfies the insurance policy's requirement as a matter of law. Therefore, the vehicle which ran Mr. Smith off the road is an "uninsured motor vehicle" as defined in the Erie Policy.

Prior to the current version of R.C. 3937.18, many UM policies required physical contact with the uninsured motor vehicle as a requirement for coverage. This Court ruled in *Girgis* that the physical contact requirement violated public policy. *Girgis* at 306, 307. Instead, the Court set forth the corroborative evidence test, which allowed coverage when there was no physical contact between the vehicles if there was independent third party testimony. Thereafter, the current version of R.C. 3937.18 was passed and superseded the *Girgis* case. Rather than adopting the independent third party testimony test, the statute used the phrase "independent corroborative evidence." The statute states that the testimony of an insured seeking recovery constitutes independent corroborative evidence if it is supported by additional evidence. So, in order to have independent corroborative evidence, there must be: (1) testimony of the insured and (2) additional evidence that supports the testimony of the insured. The Erie Policy, quoted previously, used similar language. Because both are present in this case, Mr. Smith is entitled to UM coverage.

C. Law applicable to UM policies

Since insurance policies are contracts of adhesion, courts long ago established rules of construction designed to protect insureds and maximize the coverage procured by them. Resolution of the issues presented requires the Court to interpret the terms of an insurance policy containing UM coverage. Accordingly, the Court must apply Ohio law as it relates to policy construction. In Ohio, "[a] policy of insurance is a contract and like any other contract is to be given a reasonable construction" gathered from the meaning of the language used. *Dealers Dairy Products Co. v. Royal Ins. Co.*, 170 Ohio St. 336, 164 N.E.2d 745 (1960) (paragraph one of the syllabus).

This Court stated in *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, and numerous other cases decided before *Galatis*, that the role of a court is to "give effect to the intent of the parties to the agreement." *Id*. at 219. A court does that by presuming the language in the policy reflects that intent and giving undefined terms their common, ordinary

meaning. "[Courts] look to the plain and ordinary meaning of the language used in the policy unless another meaning is clearly apparent from the contents of the policy." *Id.* What the insurer intended by its specific choice of words is of no consequence. Rather, the Court must determine "what the ordinary reader and purchaser would have understood [the words] to mean." *Andersen v. Highland House Co.*, 93 Ohio St.3d 547, 551, 757 N.E.2d 329 (2001).

Indeed, "it is well-settled that, 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 v. Nationwide Ins. Co.*, 35 Ohio St.3d 208, 211, 519 N.E.2d 1380 (1988) (citations omitted) (emphasis added). In order to defeat coverage, "the insurer must establish not merely that the policy is capable of the construction it favors, but rather that such an interpretation is the *only one* that can fairly be placed on the language in question." *Andersen v. Highland House Co.* at p. 49 (citations omitted) (emphasis added). It is not the responsibility of the insured to guess what will be covered or not based on "non-specific and generic words or phrases that could be construed in a variety of ways." *Id.* This Court should, therefore, construe any ambiguity in the Erie Policy in favor of the insured, Scott L. Smith.

Sauer v. Cruz, 140 Ohio St.3d 314, 2014-Ohio-3655, 18 N.E.3d 410 is instructive in this regard and *Sauer* supports the position of the Smiths. *Sauer* restates the core principles cited by the Smiths in this brief: words and phrases in an insurance policy must be given their commonly accepted meaning; and ambiguous provisions susceptible to more than one interpretation will be strictly construed against the insurer and liberally in favor of the insured. *Id.* at ¶10 and ¶11. This Court goes on to hold that ambiguity should be determined by examination of the overall context of the policy. *Id.* at ¶25.

In *Sauer*, the court determined a CGL policy did not cover injuries arising out of the use of an "auto" since "auto" was defined to include "a land motor vehicle, trailer, or semi-trailer." *Id.* at ¶17. The insured was arguing the trailer could be a vehicle designed for purposes other than the transportation of cargo, which would make it fit the definition of "mobile equipment" and, therefore, not fall under the definition of "auto." *Id.* at ¶18 and 19. This Court recognized that CGL policies are not designed to cover injuries arising out of the use of autos, and the fact that "trailer" was included in the "auto" definition negated any argument for ambiguity. *Id.*

Here, the Erie Policy was specifically designed to cover injuries caused by the negligence of drivers of uninsured motor vehicles. And, the Erie Policy included unknown "hit-and-run" motor vehicles within the definition of an uninsured motor vehicle. In looking at the overall context of the Erie Policy, and acknowledging its purpose, this Court can see the Smiths' interpretation is consistent with the Erie Policy as a whole.

D. The 911 transcript/audio recording, the OSHP crash report/scene photographs, and the medical records all constitute additional evidence to support Mr. Smith's testimony and establish the accident was caused by an uninsured motor vehicle.

As the Ohio law cited above makes clear, the language controlling Mr. Smith's uninsured motorist coverage is found in the Erie Policy. Erie wrongly looks to the *Girgis* decision of the Supreme Court of Ohio rather than its UM policy. Erie compounds this error by asserting that R.C. 3937.18(B) (3) codified *Girgis*. The Revised Code did not. The Erie Policy language also did not incorporate *Girgis*. As the Court can plainly see, the *Girgis* test of "independent third party testimony" is nowhere to be found in the above Revised Code section and is certainly not found in the language of the Erie Policy.

In *Girgis*, this Court was dealing with insurance policy provisions which violated public policy by requiring actual physical contact between vehicles as a prerequisite to recovery under UM

coverage. In striking down those provisions as against public policy, this Court held, "[t]he test that ought to be applied in cases where an unidentified driver's negligence causes injury is the corroborative evidence test, which allows the claim to go forward if there is independent third party testimony that the negligence of an unidentified vehicle was a proximate cause of the accident." *Girgis* at p. 305.

The *Girgis* holding has no applicability to the instant coverage dispute because Erie's Policy does not require "independent third party testimony" that the negligence of an unidentified vehicle was a proximate cause of the accident. Erie only requires "additional evidence" to support its insured's testimony.

Further, the Ohio Revised Code did not adopt this "independent third party testimony" requirement. R.C. 3937.18(B)(3) 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 (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) (emphasis added).

This statute clearly gives insurance companies much discretion to decide what additional evidence would be required in addition to the testimony of the insured. Erie could have required "independent third party testimony" or independent additional evidence if it wished, but it did not put such language in its policy. The policy language unambiguously states that Mr. Smith's

testimony shall become "independent corroborative evidence" if it is supported by "additional evidence," without any description of the nature or quantity of such additional evidence. The term "additional evidence" is not defined in the Erie Policy. Because the 911 transcript/audio recording, the OSHP Crash Report/Scene Photographs, and various medical reports all qualify as evidence, and are additional support for Mr. Smith's testimony, Mr. Smith has satisfied the requirement found in his Erie Policy that the accident was caused by an uninsured motor vehicle.

Erie likes to call the additional evidence submitted by Mr. Smith nothing more than "repackaged" testimony. Erie uses that phrase because the Twelfth District Court of Appeals used that term in *Brown.* Of course, Mr. Smith's additional evidence contains much more than "repackaged" testimony, including interaction with the 911 operator, observations of the investigating officer and the documentation of the injury. The insurance company, as the writer of the policy, could have required any type of additional evidence it felt necessary. If Erie had wanted to prohibit evidence originating from the insured (even if it was contained in a police report or medical record) it could have, but it did not.

Erie implies and assumes that Mr. Smith's statements are not credible. However, he had a duty (subject to criminal penalties) to be truthful to safety and police officers. Further, it is absurd to suggest Mr. Smith, a non-lawyer, had any comprehension of the law surrounding this issue, so as to concoct this story for the purpose of obtaining UM coverage.

Erie's Merit Brief mistakes the issue presented to this Court. According to it, the issue is whether the 911 recording, the police report, and the medical records constitute "independent corroborative evidence." (Merit Brief of Defendant-Appellant, Erie Insurance Company, p. 4). This is an incorrect statement of the issue and the policy language. The actual issue is whether they constitute "additional evidence." Erie's Merit Brief says the policy requires the additional evidence

to be "independent," but that term is not found in the policy with reference to the "additional evidence." The policy specifically states when additional evidence supports the insured's testimony, the insured's testimony becomes "independent corroborative evidence."

The misunderstanding of the issue is only the first indication of how Erie could lead this Court astray. Erie also contends that Mr. Smith's interpretation of the phrase "additional evidence" is not reasonable. An ambiguous term in an insurance policy is one that is subject to more than one reasonable definition. *Andersen v. Highland House Co.* at 549. Mr. Smith and the Sixth District Court of Appeals gave the term "additional evidence" a reasonable construction. Undefined terms are given their common or ordinary meaning. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d at 219. The adjective "additional" means "in addition to," "further," or "added." *Webster's II New College Dictionary*, 13 (2001), see also *Brown* at ¶22. Each piece of evidence (911 recording and transcript, police report and medical records) qualifies as additional admissible evidence. Each piece of evidence is the type of evidence that is routinely and properly admitted in civil cases under the Ohio Rules of Civil Procedure. In order to deny Mr. Smith the insurance coverage he purchased, Erie attempts to insert language not found in the policy to give the term a far more narrow meaning.

E. <u>The analysis and decision by the Sixth District Court of Appeals is correct.</u>

The Court of Appeals below correctly analyzed the coverage issue in this case. At least two other courts of appeals have issued decisions supportive of the Smiths' interpretation of the Erie Policy language. *Rose v. City of Garfield Heights*, 2005-Ohio-4165, 970 N.E.2d 464 (8th Dist.) and *Connell v. United Servs. Auto. Ass'n*, 2nd Dist. Montgomery No. 20282, 2004-Ohio-2726. Both *Connell* and *Rose* apply the rules of construction for insurance policies properly, where *Brown*

does not even mention those rules of construction. The Sixth District found both cases to be persuasive. The Court of Appeals stated:

> 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.

Decision and Judgment ¶ 28. The Court went on to state:

> ...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).

Decision and Judgment ¶30.

Further, the Court discounted Erie's argument based upon the common and ordinary meaning of the term "additional evidence." The Sixth District stated:

> 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."
>
> Indeed, the second sentence including the term 'additional evidence' seems redundant under Erie's interpretation...

Decision and Judgment ¶31.

Because the Erie Policy is susceptible to more than one reasonable interpretation, the Appellate Court found it to be ambiguous and construed it in favor of Mr. Smith. Therefore, the

Court of Appeals found that the Smiths were entitled to UM coverage under the Erie Policy. The Decision and Judgment from the Sixth District Court of Appeals correctly follows precedent from this Court regarding the interpretation of insurance contracts. See, *Galatis; Gomolka v. State Auto. Mut. Ins. Co.*, 70 Ohio St.2d 166, 167-68, 436 N.E.2d 1347 (1982); and *Lane v. Grange Mut. Cos.*, 45 Ohio St.3d 63, 65, 543 N.E.2d 488 (1989).

F. *Connell* and *Rose* are correctly decided and cannot be distinguished.

The *Connell* Court points out that the test employed by the USAA insurance policy in that case was broader than the *Girgis* test. *Connell*, 2004-Ohio-2727 at ¶16. Just like the Erie Policy language, the USAA policy in *Connell* accepted the testimony of the covered person as independent corroborative evidence, if the covered person's testimony "is supported by additional evidence." *Id.* The Court then held, "[T]his reference to additional evidence reads back into the equation the probative value of the injury itself which *Girgis* had effectively read out." *Id.*

The *Connell* Court continued: "A policy may impose a more relaxed standard for requiring coverage than the law otherwise provides. Any ambiguity in that regard must be construed strictly against the insurer and liberally in favor of the insured." *Id*. at ¶17 (Citations omitted). The *Connell* Court recognized that the USAA policy language in that case, like the Erie Policy language in this case, "expands the narrow *Girgis* requirement by also allowing unrestricted 'additional evidence' of another kind that supports the insured's testimony." *Id*. at ¶18. As in this case, the *Connell* Court stated, "The policy specified additional evidence not, * * * 'additional testimony.' Testimony is but one of several species of evidence. Physical evidence is another, and evidence of injuries to Connell's foot is physical evidence * * *." *Id.* In *Connell*, there was not even a police report, only the medical records existed, and this was found sufficient to be "additional evidence."

In *Rose*, the Eighth District Court of Appeals reached a similar conclusion. Rose was a police officer who was struck by an unidentified motorist while he was picking up debris along the road. *Rose*, 2004-Ohio-2726 at ¶2. Responders to the scene found Rose's uniform was dirty and his head and wrist appeared swollen. *Id.* The Court stated that the medical records and police report, when combined with Rose's own affidavit, were sufficient to constitute "independent corroborative evidence." *Id.* at ¶10. The Court in *Rose* referred to the medical records detailing the injuries as "additional physical evidence." *Id.* The Court of Appeals quoted extensively from the *Connell* case and found that the injured police officer, as the insured under the policy, satisfied the policy requirements that he was injured by the negligence of an uninsured motor vehicle. *Id*. at ¶¶10-12.

There is no question that the 911 call transcript/audio recording, OSHP Crash Report/Scene Photographs, and various medical records are evidence that would be admissible in the trial court. *Black's Law Dictionary* defines evidence as "any species of proof, or probative matter, legally presented at the trial of an issue, by the act of the parties and through the medium of witnesses, records, documents, concrete objects, etc. for the purpose of inducing belief in the minds of the court or jury as to their contention." *Black's Law Dictionary* 656 (4th Ed.1968). Evid.R. 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401. Evid.R. 402 makes clear that all relevant evidence is admissible, except as otherwise provided. The hearsay rules allow for the admission of all the evidence identified in Joint Exhibits A, B, and C of the Joint Stipulation of Facts. Evid.R. 402, Evid.R. 803. These exhibits establish Mr. Smith's physical injury, including abrasion/laceration and back injuries.

Further, with reference to the term "additional," *Black's Law Dictionary* states that "this term embraces the idea of joining or uniting one thing to another so as thereby to form one aggregate." *Black's Law Dictionary* 59 (4th Ed.1968). This is exactly the context used in the Erie Policy which unambiguously provides that Mr. Smith's testimony will constitute independent corroborative evidence, when it is joined by supportive "additional evidence." Together, Mr. Smith's testimony, the 911-call transcript/audio recording, the OSHP Crash Report/Scene Photographs, and various medical reports, when combined, satisfy Erie's definition of independent corroborative evidence.

Likewise, Erie appears to concede that in a pedestrian case (like *Ros*e and *Connell)* medical records and police reports do constitute "additional evidence." The inconsistency of Erie's argument is readily apparent. The language of the insurance policy has not changed, nor has the nature of the police reports and medical records in *Rose* and *Connell*. Namely, in those cases, the police report and medical records contained the "repackaged" testimony of the insured. But in each case, the courts did a proper insurance coverage analysis to reach the conclusion that medical records and police reports constitute "additional evidence." In *Rose* and *Connell,* the police reports and medical records were in addition to the insured's testimony and, together with it, satisfied the insurance company's standard of "independent corroborative evidence."

Erie claims *Rose* and *Connell* are distinguishable "since otherwise the injuries arose without plausible explanation." (Erie Merit Brief, p.17). But, of course, this is simply not true. There are other plausible explanations. The injuries in *Rose* and *Connell* could have easily been incurred in another context with the insureds blaming an unidentified motorist for their injuries. Erie's attempt to distinguish *Rose* and *Connell* from the instant case exposes the weakness in Erie's argument. If Erie can trust the medical records and police report in *Rose* and *Connell,*

there is no reason to distrust the same evidence to provide Mr. Smith the uninsured motorist coverage for which he is entitled. These cases demonstrate the inherent trustworthiness of an insured's testimony when supported by police observations and reports, and medical records.

By conceding that the medical records and police report could constitute "additional evidence" in a pedestrian case, Erie cannot backtrack and argue that the very same evidence would not constitute additional evidence in a motor-vehicle case. The policy does not support such a distinction. Again, if Erie had wished to limit such additional evidence to pedestrian cases, it could have so stated in its policy.

G. The *Honzell* case supports finding UM coverage in this case.

Erie's Merit Brief and the Merit Brief of Amicus Curiae Ohio Insurance Institute both cite the case of *Honzell v. Nationwide Ins. Co.*, 10th Dist. Franklin No. 11 AP-998, 2012-Ohio-6154 for support. Actually, the judgment by the Tenth District Court of Appeals supports the Smiths' claim for UM coverage. The Court of Appeals in *Honzell* reversed a trial court decision and found the insureds were entitled to UM coverage under their Nationwide policy. The definition of uninsured motor vehicle in that policy was essentially identical to the definition in the Erie Policy in this case. The Court of Appeals found that since the police report at issue in *Honzell* reflected the officer's firsthand observation of the damage to the insured's vehicle, and since the damage was consistent with the insured's description of the accident, the police report constitutes independent corroborative evidence.

In *Honzell*, the insureds were waiting to turn into a Kroger parking lot when they were allegedly struck from behind by another vehicle. The insureds pulled their vehicle into the parking lot, believing the other driver would follow, but the other vehicle fled the scene of the accident. The narrative by the officer in the police report repeated the insureds' description of

the accident. The police report also reflected the officer's firsthand observation of "non-functional damage" to the rear bumper. Similarly, the police report in the Joint Stipulation of Facts cites "functional damage" reflecting the investigating officer's firsthand observations of Mr. Smith's vehicle.

Although the Tenth District Court of Appeals analyzed the case using the independent corroborative evidence standard presumably favored by Erie, the result was the Court found the police report containing the officer's observations to satisfy this standard. The Smiths have argued that the police report only needs to be "additional evidence," and not, itself, independent corroborative evidence. But, even under the standard applied in *Honzell*, and supported by Erie, the police report in the instant case is sufficient, since it contains the firsthand observations of damage by the investigating officer.

H. The analysis contained in the *Brown* case is faulty.

The *Brown* decision goes off the tracks at the point where black-letter insurance coverage law is applied. The *Brown* case does not apply the insurance policy analysis established by this Court to its decision. Instead, it makes a critical mistake by stating that the phrase "independent corroborative evidence" is not defined in the policy. While not found in the definition section of the policy, it is defined in the policy at issue in *Brown*, and in the paragraph at issue here. The last sentence of paragraph 3 of the Erie Policy states:

> Testimony of 'anyone we protect' seeking recovery does not constitute independent corroborative evidence, unless the testimony is supported by additional evidence.

Joint Stipulation at ¶6. While this phrase is written in the negative, it can easily be translated positively. What it says is that the testimony of the insured will constitute "independent corroborative evidence," if the testimony is supported by "additional evidence."

The *Brown* court has incorrectly inserted a requirement for the additional evidence that is not found in the policy. The *Brown* court states that the additional evidence must be "independent from" the testimony of the insured. The effect of the *Brown* decision is to add a phrase to the policy which is not contained in the policy. According to *Brown*, the testimony of the insured has to be supported by "independent" additional evidence.

The *Brown* case also uses the phrase "corroborative evidence" as being synonymous to "additional evidence." While the definition of "additional" is not synonymous with "corroborative," even applying such standard supports Mr. Smith's claim to coverage. The 911 recording and transcript, the police report, and the medical records all corroborate his testimony. Nothing contained in those records is inconsistent with his testimony. The fact that they may also corroborate a single-car accident, as Erie seeks to imply to the Court, is of no consequence. According to Erie's own standard, the evidence is corroborative if it doesn't contradict the testimony of the insured.

In effect, Erie is asking this Court to rescue it from its own draftsmanship by inserting the term "independent from" into the policy. This Court should decline to rewrite the Erie Policy and should decline to follow *Brown*. If Erie had wanted the additional evidence to be from an independent or a third-party source, it could have so stated, but it did not.

I. The *Jackson* case does not support Erie's position.

Erie cites the case of *Jackson v. State Farm Mut. Auto. Ins. Co.*, 4th Dist. Pike No. 14CA850, 2015-Ohio-1131, as supportive of *Brown*. While the *Jackson* case quotes *Brown*, the *Jackson* court specifically refused to reach the question of whether medical records or the police report satisfied the "additional evidence" requirement in the policy. Therefore, the *Jackson* decision does not support Erie.

The *Jackson* court did not have to reach that issue because it found the testimony of a passenger satisfied the "additional evidence" requirement. The trial court had improperly discounted such testimony. The Court of Appeals in *Jackson* said the passenger's testimony created an issue of fact regarding causation. The *Jackson* court reversed the trial court's decision in favor of the insurance company. The testimony of a third-party witness (passenger) unquestionably satisfies the additional evidence requirement in the policy, and satisfies even the narrower "independent additional evidence" standard required by the *Brown* court. Since the *Jackson* court did not address the issue facing this Court, it is of no help to Erie.

III. CONCLUSION

This Court should affirm the decision of the Sixth District Court of Appeals and remand the case for trial regarding damages. The Proposition of Law set forth by Appellees Scott Smith and Dawn Smith should be adopted as the holding in this matter by this Court.

Respectfully submitted,

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Scott L. Smith and Dawn M. Smith

PROOF OF SERVICE

This is to certify that a copy of the foregoing *Merit Brief for Plaintiffs-Appellees Scott L. Smith and Dawn M. Smith* has been electronically filed with the Court on the 5th day of April, 2016. A copy of the foregoing has also been sent by ordinary U.S. Mail this 5th day of April, 2016 to:

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