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ARGUMENT

I. The Smiths’ suggestion that phantom vehicle claims ought to be permitted to proceed to jury trial, even absent corroborative evidence, wholly subverts this Court’s decision in *Girgis*, and its progeny.

In their respective merit briefs, Appellees Smith and Amicus Curiae Ohio Association for Justice (“OAJ”) suggest that phantom vehicle claims ought to be left for jury determination. See, *e.g.*, Smith Merit Brief, at p. 3 (“Erie’s position flies in the face of accepted jurisprudence which trusts juries to decide credibility and truthfulness”), and OAJ Merit Brief, at p. 2: “This Court [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 test of truthfulness applied in daily life.”

This seeks not only to undermine the remaining protection to Ohio’s insurers, but to wholly subvert this Court’s decision in *Girgis v. State Farm Mut. Auto. Ins. Co.*, 75 Ohio St.3d 302, 662 N.E.2d 280 (1996), and its progeny.¹ In *Girgis*, the Court ruled that public policy precluded insurance contract provisions from requiring actual physical contact between vehicles as an absolute prerequisite to recovery. *Id.* at 305. Recognizing the significant risk and danger of fraud to the insurance industry, however, the Court then struck a reasoned, balanced approach – specifically, as it “remain[ed] committed to the underlying policy of preventing fraud,” the Court adopted the “corroborative evidence test” which “allows a claim to go forward if there is independent third party testimony that the negligence of an unidentified vehicle was a proximate cause of the accident.” *Id.* at 305. This test, the Court reasoned, “prevents fraud and avoids the

¹ By “progeny,” this includes R.C. 3937.18(B)(3), which statute was then tracked by the state’s insurers, including Appellant Erie Insurance Company (“Erie”).

injustice of prohibiting legitimate claims solely because no physical contact occurred.” *Id.* at 406.

According to *Girgis*, a phantom vehicle claim is permitted to proceed to jury trial if – but only if – the corroborative evidence test is satisfied; otherwise, the claim fails as a matter of law.

Doing away with this test, as the Smiths/OAJ suggest, would not only wholly subvert the Court’s decision in *Girgis*, but significantly undermine the interests of the state’s insurers. (In this regard, see the respective Merit Briefs of Amicus Curiae Ohio Association of Civil Trial Attorneys and Ohio Insurance Institute.)

II. The Smiths’ interpretation of the involved statute/policy provision eliminates any semblance of true “corroboration,” thereby rendering the corroborative evidence test basically meaningless, and flies in the face of common sense.

The Smiths and OAJ submit that a claimant’s self-serving statement should suffice so as to state a *prima facie* claim, as long as the statement is supported by any “additional evidence,” even assuming that this “evidence” consists solely of the claimant’s own, repackaged statement(s). In other words, these parties seek to do a basic “end-around” the corroborative evidence test, by eliminating the words “independent” and “corroborative” from the state statute/tracking policy provision(s).

Recall that in the case at bar, the Smiths proffer as “additional evidence” only Mr. Smith’s own self-serving statements, as repackaged in three separate forms.

Taking the Smiths' position to its logical extreme, a claimant could seemingly state a *prima facie* claim by: (1) writing on a napkin that another vehicle had run his vehicle off of the road, and then submitting the napkin as "additional evidence"; and/or (2) going into a local watering hole, buying a new-found friend a beer or soda, and saying "Hey, new friend, I need you to sign a statement for me, not that you witnessed another vehicle run mine off of the road, but just that I told you that another vehicle had run mine off of the road," and then submitting the friend's statement as "additional evidence".

In essence, that is all that the Smiths are offering here – specifically, Mr. Smith's own statements, repackaged in various forms. There is simply nothing "independent" or "corroborative" about this. And this is precisely what gave the Twelfth District Court of Appeals pause in the certified conflict case, *Brown v. Philadelphia Indem. Ins. Co.*, 12th Dist. Warren No. CA2010-10-094, 2011-Ohio-2217:

*** The evidence [the claimant] presented merely repackaged the statements he made to the police who investigated the incident or to his treating physician. Since the police and [the claimant's] physician were merely relying on [the claimant's] account of the incident, the evidence [the claimant] presented in opposition to [the insurer's] summary judgment motion cannot constitute additional evidence. *Id.* at ¶¶ 27-28.

When judges put on their robes, toward interpreting a statute/policy provision such as those involved in the case at bar, there is nothing, of course, that requires them to leave their common sense behind. And frankly, this is what the Smiths are asking the Court to do in this instance.

The clear, stated intent of *Girgis* was to allow phantom vehicle claims to proceed to jury trial if, but only if, a claimant's own self-serving statement was supported by corroborative evidence. The *Girgis* test was then codified by statute, and the language of this statute was then tracked by the state's insurers, including Erie.²

This Court should reiterate the clear intent of *Girgis* and the state statute/tracking policy provision(s) – that is, by virtue of the Court's reasoned, balanced approach, a claimant's own statement, repackaged in whatever form, does not and cannot suffice so as to state a *prima facie* claim; rather, in order to get to a jury, such statement must be supported by “additional evidence” which is both independent and corroborative.

Even assuming any claimed, technical ambiguity in the state statute/tracking policy provision, as the Smiths/OAJ suggest, the only reasonable interpretation of the statute/provision is consistent with the above-referenced intent – specifically, that a claimant's statement must be supported by independent, corroborative evidence. Anything short of this threatens to render the statute/provision basically meaningless, and to cause them to implode upon themselves.

Simply stated, the Smiths' interpretation is not reasonable, and flies in the face of common sense.

² The Smiths suggest that this Court shouldn't “rescue [Erie] from its own draftsmanship.” (Smith Merit Brief, p. 16.) But as Amicus Curiae Ohio Insurance Institute suggests, Erie didn't technically “draft” this provision; rather, it and the state's other insurers merely tracked the legislature's language. And OAJ contends or at least infers (OAJ Merit Brief, p. 6) that, assuming UM coverage is offered by insurers to insureds, then an insurer's policy language “must” comply with R.C. 3937.18. So in the event Erie had added language to its policy provision which sought to restrict/limit coverage required by statute, as the Smiths suggest, then the Smiths would likely be arguing that any such restriction/limitation is unenforceable.

CONCLUSION

In *Girgis*, this Court rejected the physical contact requirement in favor of the corroborative evidence test, thereby creating an objective balance, toward protecting the state's insureds and insurers. The legislature thereafter sought to codify the *Girgis* holding, and the state's insurers then followed suit, by enacting tracking policy provisions.

The intent of the statute/policy provision(s) is clear – that is, that the mere words of a claimant do not and cannot suffice so as to state a *prima facie* claim; rather, these words must be supported by independent corroborative evidence.

In the instant case, the Smiths seek to undue the *Girgis* balance, and to eliminate the remaining protection to insurers – specifically, they ask this Court to allow them to “independently corroborate” their own claim, by Mr. Smith merely repeating his statement to various persons, and then submitting his own, repackaged statements as requisite corroboration.

This undermines the Court's intent in *Girgis*, and threatens to render the state statute/tracking policy provisions meaningless.

The clear intent, and only reasonable interpretation, of the state statute/tracking policy provision(s) is that the claimant's own statement, repackaged in whatever form, does not and cannot suffice, so as to state a *prima facie* claim; there must be something additional here, and that something is independent corroborative evidence.

For the foregoing reasons, the judgment of the Sixth District Court of Appeals should be reversed.

Respectfully submitted,

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PROOF OF SERVICE

A copy of the foregoing **Reply Brief of Defendant-Appellant Erie Insurance Company** has been electronically filed with the Court on the 25th day of April, 2016, and served via email to: ssmith@cc-attorneys.com, **Steven R. Smith**, scollier@cc-attorneys.com, **Steven P. Collier**, javila@cc-attorneys.com, **Janine T. Avila**, Connelly & Collier LLP, 405 Madison Avenue, Suite 2300, Toledo, Ohio 43604, Attorneys for Plaintiffs-Appellees; teszykowny@vorys.com, **Thomas E. Szykowny**, mrthomas@vorys.com, **Michael R. Thomas**, Vorys, Sater, Seymour and Pease LLP, 52 East Gay Street, P.O. Box 1008, Columbus, Ohio 43216-1008, Attorneys for Amicus Curiae Ohio Insurance Company; kconnell@ffalaw.com, **Kevin C. Connell**, mlennen@ffalaw.com, **Margaret A. Lennen**, Freund, Freeze & Arnold, Fifth Third Center, 1 South Main Street, Suite 1800, Dayton, Ohio 45402-2017, Attorneys for

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