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

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

LEONARD BROWN,	:	
Plaintiff-Appellant,	:	CASE NO. CA2010-10-094
	:	O P I N I O N
- vs -		5/9/2011
	:	
PHILADELPHIA INDEMNITY INSURANCE COMPANY, et al.,	:	
	:	
Defendants-Appellees.		
	:	

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 09CV75624

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

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

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

RINGLAND, J.

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

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

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

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

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

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

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

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

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

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

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

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

{¶11} "***

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

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

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

{¶15} "The facts of the 'accident' or intentional act must be proved by independent corroborative evidence, other than the testimony of the 'insured' making a claim under this or similar coverage, unless such testimony is supported by additional evidence."

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

{¶17} "(B) For purposes of any uninsured motorist coverage included in a policy of insurance, an 'uninsured motorist' is the owner or operator of a motor vehicle if any of the following conditions applies:

{¶18} "***

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

{¶20} R.C. 3937.18(B)(3) derives from *Girgis v. State Farm Mut. Auto. Ins. Co.*, 75 Ohio St.3d 302, 1996-Ohio-111, wherein the court held that "R.C. 3937.18 and public policy preclude contract provisions in insurance policies from requiring physical contact as an absolute prerequisite to recovery under the uninsured motorist coverage provision[,]" id. at paragraph one of the syllabus, and that "[t]he test to be applied in cases where an unidentified driver's negligence causes injury is the corroborative evidence test, which allows the claim to go forward if there is independent third-party testimony that the negligence of an unidentified vehicle was a proximate cause of the accident[,]" id. at paragraph two of the syllabus.

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

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

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

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

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

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

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

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

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

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

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

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

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

{¶31} Judgment affirmed.

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