[Cite as *Connell v. United Services Auto. Assn.*, 2004-Ohio-2726.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

THOMAS B. CONNELL :

Plaintiff-Appellant : C.A. CASE NO. 20282

vs. : T.C. CASE NO. 02CV1294

UNITED SERVICES AUTOMOBILE ASSOCIATION, ET AL. : (Civil Appeal from Common Pleas Court)

Defendants-Appellees:

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O P I N I O N

Rendered on the 28th day of May, 2004.

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Thomas R. Schiff, 500 Lincoln Park Blvd., Suite 216, Kettering, Ohio 45429, Atty. Reg. No. 0039881
Attorney for Plaintiff-Appellant

James J. Heath, 8977 Columbia Road, Suite A, Loveland, Ohio 45140, Atty. Reg. No. 0041121
Attorney for Defendants-Appellees

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GRADY, J.

{¶1} This is an appeal from a summary judgment for the insurer on an insured's claim for breach of contract.

{¶2} Thomas Connell allegedly suffered injuries to his left foot on February 29, 2002, when he was struck by an automobile while crossing Wilkinson Street in Dayton. The driver sped away and was never identified. Connell obtained no statements from eyewitnesses and no police report was filed.

{¶3} Connell was covered by a policy of automobile

liability insurance issued by United Services Automobile Association ("USAA") when the accident occurred. The policy contains uninsured/underinsured motorist ("UM/UIM") coverage for Connell's benefit. Provisions of the policy pertinent to UM/UIM indemnification that Connell sought from USAA for his injuries state:

{¶4} "B. Uninsured motor vehicle means a land motor vehicle or trailer of any type:

{¶5} "3. That is a hit-and-run motor vehicle. This means a motor vehicle whose owner and operator cannot be identified and that hits, or is the proximate cause of bodily injury without hitting:

{¶6} "a. You or any family member;

{¶7} "b. A vehicle you or any family member are occupying; or

{¶8} "c. Your covered auto."

{¶9} This provision further states:

{¶10} "The facts of the accident or intentional act must be proved. We will only accept independent corroborative evidence other than the testimony of a covered person making a claim under this coverage unless such testimony is supported by additional evidence."

{¶11} USAA denied coverage because Connell could provide no testimony other than his own corroborating the facts of the accident. Connell commenced an action for breach of

contract. The trial court granted USAA's motion for summary judgment. Connell filed a timely notice of appeal.

{¶12} App.R. 16(A) requires appellants to include certain matters in an appellant's brief. Paragraph (3) provides for "[a] statement of the assignments of error presented for review, with reference to the place in the record where each error is reflected." The brief that Connell filed fails to set up an assignment of error. Nevertheless, from his argument we surmise that Connell complains that the trial court erred when it granted USAA's motion for summary judgment

{¶13} USAA's motion relied on the terms of its policy and the related authority of *Girgis v. State Farm Mut. Auto. Ins. Co.*, 75 Ohio St.3d 302, 1996-Ohio-111. The trial court relied on both when it granted summary judgment for USAA.

{¶14} In *Girgis*, the Supreme Court rejected evidence of "physical contact" as a condition for UM/UIM coverage available for injuries allegedly caused by unidentified hit-and-run drivers. The court had previously approved of the physical contact requirement as a reasonable measure to prevent fraud. See *Travelers Indmn. Co. v. Reddick* (1974), 37 Ohio St.2d 119. Instead, per *Girgis*, "[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 uninsured vehicle was a proximate cause of the accident." *Id.*,

paragraph two of the Syllabus.

{¶15} The *Girgis* test holds that evidence of the injury involved and the insured's own testimony concerning how the injury occurred, separately or together, are insufficient to prove the facts of a hit-and-run accident which is alleged to have proximately caused the injury for which UM/UIM coverage is otherwise available. Evidence independent of both, in the form of independent third-party testimony which corroborates the facts of the accident, is required to trigger the coverage a policy of insurance provides.

{¶16} The test employed in the USAA policy is broader than the *Girgis* test. It accepts the testimony of the covered person, apart from any "independent corroborative evidence," if the covered person's testimony "is supported by additional evidence." This reference to additional evidence reads back into the equation the probative value of the injury itself which *Girgis* had effectively read out.

{¶17} Insurance policies are contracts and, as such, the rights and duties of the parties are determined by the policy's terms, unless otherwise prohibited by law. *Westfield Insurance Co. v. Galatis*, 100 Ohio St. 3d 1548. On that rationale, 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. *King v. Nationwide Insurance Co.* (1988), 35 Ohio St.3d 208.

{¶18} USAA argues that *Girgis* requires more than Connell's uncorroborated testimony to show that his injury was caused by negligence of a hit-and-run driver. We agree. But the language that USAA employed in writing the policy expands the narrow *Girgis* requirement by also allowing unrestricted "additional evidence" of another kind that supports the insured's testimony. The policy specified additional evidence not, as the parties contend in their briefs, "additional testimony." Testimony is but one of several species of evidence. Physical evidence is another, and evidence of the injuries to Connell's foot is physical evidence from which a jury might infer that Connell was injured in the accident as he claims he was.

{¶19} USAA argues that, even on that standard, Connell's claim fails because he has no evidence of physical injury, apart from his own pronouncement that he was injured. USAA relies on a stipulation between the parties which states: "Plaintiff has no independent corroborating evidence of this occurrence at the scene."

{¶20} The sense of the stipulation is that Connell has no independent third-party testimony of an eyewitness to the accident concerning how it occurred, the *Girgis* requirement. It does not follow from the stipulation that Connell lacks any medical evidence additional to his own testimony that corroborates his claim.

{¶21} The parties also stipulated that ". . .plaintiff is claim(ing) a plantar fasciatus injury to his foot." In a

deposition taken on July 31, 2002, Connell testified that he met with a podiatrist, Dr. Dixie Dooley, approximately five days after the incident. USAA impeached this statement with a reference to medical records that show Connell didn't meet with Dr. Dooley until approximately 10 days after the incident.

{¶22} In his testimony, Connell described his injury as a tear of the "fibrous tissue of the arch," but did not relate Dr. Dooley's full diagnosis or prognosis. He does recall that during the first visit Dr. Dooley conducted an examination, took X-rays, scheduled an MRI, and prescribed Vioxx for pain relief. The MRI occurred about four weeks later. Connell recalls keeping several appointments with Dr. Dooley, but was unable to recall what was done during those visits.

{¶23} Connell testified that he began wearing a walking cast and seeing a physical therapist after the MRI. Counsel for USAA impeached this statement by referring to records that show Connell didn't begin physical therapy until almost six months after the incident.

{¶24} Connell last saw Dr. Dooley in August 2001. Connell testified that there is now an inherent weakness in his left foot due to the injury, which forces him to take Vioxx on occasion and wear orthopedic devices in his shoes. There are no copies of the records USAA's attorney used in their impeachment in the record.

{¶25} As a final point on this matter, we note that in

its filings in response to the court's pretrial orders USAA stated that it would offer copies of Connell's medical records in evidence. On that assurance, it is understandable that Connell offered none in response to USAA's motion for summary judgment relying on the standard in *Girgis,* which the terms of USAA's policy abandoned by adopting a more relaxed evidentiary standard.

{¶26} We reached a different result on much the same facts in *Craig v. Midwestern Indemnity Company* (May 16, 1997), Champaign App. No. 96-CA-16. There was one crucial difference, however. The policy in *Craig* imposed the physical contact requirement rejected in *Girgis*. Therefore, we applied the rule of *Girgis*, which limits the corroborative evidence required to independent third-party testimony. The provision of the USAA policy, as we have said, is broader than that, accepting the insured's own testimony if supported by "additional evidence."

{¶27} We conclude that Connell's testimony and evidence of the injury he suffered, if believed, is sufficient to trigger the promise of UM/UIM coverage in USAA's policy. Because USAA adopted a standard of proof broader than the *Girgis* standard when USAA drafted its policy, which is a contract to which the parties agreed, USAA cannot invoke the *Girgis* standard to deny coverage. And, while the terms of the USAA policy may be ambiguous with respect to the standard to be applied, the ambiguity must be construed in

favor of the policyholder, Connell, not USAA. Therefore, the trial court erred when it granted summary judgment to USAA on its motion.

{¶28} The assignment of error is sustained. The summary judgment for USAA will be reversed and the matter remanded for further proceedings on Connell's breach of contract claim.

FAIN, P.J. and WOLFF, J., concur.

Copies mailed to:

Thomas R. Schiff, Esq.
James J. Heath, Esq.
Hon. Dennis J. Langer