[Cite as *Jackson v. State Farm*, 2015-Ohio-1131.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
PIKE COUNTY

RONALD D. JACKSON, et al.,	:	
	:	Case No. 14CA850
Plaintiffs-Appellants,	:	
	:	
vs.	:	
	:	DECISION AND JUDGMENT
STATE FARM MUTUAL	:	ENTRY
AUTOMOBILE INSURANCE	:	
COMPANY,	:	
	:	
Defendant-Appellee.	:	**Released: 03/19/15**

APPEARANCES:

Michael P. McNamee and Gregory B. O'Connor, McNamee & McNamee, PLL, Beavercreek, Ohio, and D. Dale Seif, Jr., Dale Seif & Associates, Waverly, Ohio, for Appellants.

David E. Williamson, Lindhorst & Dreidame Co., L.P.A., Cincinnati, Ohio, for Appellee.

McFarland, A.J.

{¶1} Appellants Ronald D. Jackson and Debra S. Jackson appeal the April 15, 2014 decision and April 30, 2014 final judgment entry of the Pike County Court of Common Pleas, granting summary judgment to Appellee State Farm Mutual Automobile Insurance Company and denying Appellants' motion for partial summary judgment. Having reviewed the

record and the pertinent law, we reverse the judgment of the trial court and remand this matter for further proceedings consistent with this opinion.

FACTS

{¶2} This lawsuit arises from a motor vehicle accident which occurred near the intersection of S.R. 124 and Lapperell Road in Pike County, Ohio. On November 12, 2010, Appellant Ronald Jackson was operating his pickup truck on S.R. 124 with three passengers: Alvin Wilburn, Amber Yinger, and Angela Ison. Appellant, Wilburn, and Ison often picked up junk in the community and sold it for scrap value.

{¶3} Appellant testified on the accident date that he picked up Wilburn and Ison. Ison was speaking to Amber Yinger over the phone, who needed a ride for herself and her two children. Appellant testified they first picked up the children and took them to their father's house. Because there was not enough room in Appellant's truck, they made two separate trips. After they dropped off the children, they returned and picked up Yinger, planning to take her to her home on Fairview Road in Peebles, Ohio. Usually when Appellant took Yinger to her home, he took Lapperell Road.

{¶4} Appellant testified he was on S.R. 124 headed towards Lapperell Road. He was traveling 45-50 miles per hour, and the speed limit was 55. Appellant testified he planned to take S.R. 124 to Dry Bone Road to get the

junk, and then go from Dry Bone Road to Fairview Road to take Yinger home. His plan was to veer left and continue up S.R. 124 because he was going too fast to take the curve on Lapperell Road. Appellant testified he was not sure where a red dump truck came from, but it was suddenly in the intersection where S.R. 124 and Lapperell Road split. Appellant had the right of way. Appellant was "probably" 100 feet back from the intersection. Appellant testified he never saw the truck approach the stop sign or stop at the sign on Lapperell Road.

{¶5} Appellant testified the red truck caused him to crash. When Appellant saw the truck in the intersection, he applied his brakes and hit loose gravel. Appellant was approximately 100 feet away when he first applied the brakes. He pumped the brakes another time, lost control of his vehicle, and eventually struck a guardrail. The record indicates Appellant, Alvin Wilburn, and Amber Yinger sustained serious injuries.

{¶6} Appellant and his wife filed a complaint in the Pike County Court of Common Pleas against State Farm Mutual Automobile Insurance Company alleging permanent personal injuries, pain and suffering, and medical expenses past and future, due to the negligence of an unidentified

driver.[1] Appellant Debra Jackson's claim was for loss of consortium. Appellants alleged they were legally entitled to recover damages pursuant to the uninsured motorist coverage of their State Farm policy, and also alleged State Farm failed to exercise good faith in its handling of Appellants' claims.

{¶7} Appellee filed a timely answer denying uninsured motorist coverage, in part, because independent corroborative evidence did not exist to prove Ronald Jackson's injuries were proximately caused by the unidentified driver. The parties later filed an agreed motion to transfer deposition transcripts, which the trial court granted.[2] Essentially, Alvin Wilburn testified he has no memory of how the accident occurred or, specifically, that a red truck was involved. Likewise, Amber Yinger denied ever seeing a red truck prior to the accident's occurrence.

{¶8} Additional discovery took place. On February 27, 2014, Appellants filed a motion for partial summary judgment. In their motion, they argued the testimony of Angela Ison served as independent corroborative evidence that the unidentified driver of a red truck caused the

[1] We observe the complaint was filed on November 13, 2012. This would seemingly be just outside of the two-year limitations' period for the filing of personal injury claims, pursuant to R.C. 2305.10. The record does not indicate why a late filing, if any, was permitted and the limitations period was not raised as an affirmative defense in the answer. The failure to raise the statute of limitations in an answer fatally waives the defense. *Shury v. Greenway*, 8th Dist. Cuyahoga No. 100344, 2014-Ohio-1629, ¶ 22.

[2] The joint motion, filed pursuant to Civ.R. 32, which provides that when another action involving the same subject matter has been brought between the same parties, representatives, or successors in interest, all depositions lawfully taken in the one action may be used in the other as if originally taken, was based on the fact that Ronald Jackson and his three passengers had been previously deposed about their recollection of accident facts in a personal injury action filed by Amber Yinger. That action captioned *Amber L. Yinger, v. Ronald D. Jackson, et al.*, was assigned Pike County Common Pleas Case Number 2011 CIV422.

accident. On February 28, 2014, Appellee filed a motion for summary judgment. On March 4, 2014, Appellants filed a reply memorandum to Appellee's motion for summary judgment. On March 24, 2014, Appellee filed a memorandum in opposition to Appellants' motion for partial summary judgment.

{¶9} On April 15, 2014, the trial court issued its decision granting State Farm's motion for summary judgment and denying the Jacksons' motion for partial summary judgment. The trial court dismissed all claims in Appellants' complaint. On April 30, 2014, the trial court filed a final judgment entry incorporating its April 15, 2014 decision on the motions. This timely appeal followed.

ASSIGNMENT OF ERROR

I. "THE TRIAL COURT ERRED AS A MATTER OF LAW IN ITS GRANTING THE DEFENDANT'S/APPELLEE'S MOTION FOR SUMMARY JUDGMENT."

A. STANDARD OF REVIEW

{¶10} Initially, we note that appellate courts conduct a de novo review of trial court summary judgment decisions. See, e.g., *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Accordingly, an appellate court must independently review the record to determine if summary judgment is appropriate and need not defer to the trial court's

decision. See *Brown v. Scioto Bd. of Commrs.*, 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (1993); *Morehead v. Conley*, 75 Ohio App.3d 409, 411-12, 599 N.E.2d 786 (1991). Thus, to determine whether a trial court properly granted a summary judgment motion, an appellate court must review the Civ.R. 56 summary judgment standard, as well as the applicable law.

Civ.R. 56(C) provides, in relevant part, as follows:

> "* * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor."

{¶11} Pursuant to Civ.R. 56, a trial court may not award summary judgment unless the evidence demonstrates that: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and after viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. See, e.g., *Vahila v. Hall*, 77 Ohio St.3d 421, 429-30, 674 N.E.2d 1164 (1997).

B. LEGAL ANALYSIS

{¶12} In Appellants' motion for summary judgment, they argued entitlement to the uninsured motorist coverage of their State Farm policy because, as alleged, a red truck pulled out in front of Ronald Jackson, causing him to wreck and causing his injuries. Appellants assert that based on the facts of this case, the trial court's decision denying their motion for partial summary judgment and granting Appellee's motion for summary judgment was ill-founded and not supported by law. R.C. 3937.18(B)(3) defines an uninsured motorist as the owner or operator of a motor vehicle that:

> "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."

{¶13} The State Farm policy covering Appellant Ronald Jackson defines an uninsured motorist as follows:

> "the owner or operator of * * * a motor vehicle, who remains unidentified but independent corroborative evidence exists to prove that the bodily injury was proximately caused by the intentional or negligent actions in the operator of a motor vehicle by the unidentified operator of the motor vehicle. The testimony of an insured seeking recovery shall not constitute independent corroborative evidence, unless the testimony is supported by additional evidence."

{¶14} Appellants contend as the State Farm policy and R.C. 3937.18(B)(3) require, Appellant's testimony suffices as independent corroborative evidence as it is supported by additional evidence in the form of Angela Ison's testimony, the hospital records, the property damage, and the police reports. Appellants conclude Jackson's claim created numerous issues of material fact that should have been submitted to a jury. However, Appellee responds that Appellants are unable to produce any independent corroborative evidence that the driver of a red truck was negligent, or that the negligence of the driver of a red truck proximately caused the accident. Appellee contends that Appellants ask the Court to ignore the requirement that they prove proximate cause, and argues that they just need to prove

"additional evidence" to support their claim. Appellee concludes the additional evidence Appellants offer, Ison's testimony, the hospital records, the property damage reports and police reports, do not strengthen or confirm the uninsured motorist coverage claim.

{¶15} In *Girgis v. State Farm Mut. Auto Ins. Co.*, 75 Ohio St.3d 302, 1996-Ohio-111, 662 N.E.2d 280, paragraph one of the syllabus, the Supreme Court of Ohio held both 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. *Neal v. Farmers Ins. Co. Inc.*, 10th Dist. Franklin No. 03AP-1078, 2004-Ohio-2574, ¶ 9. In lieu of the strict physical contact requirement, the court substituted a corroborative evidence test. *Smith v. Neff*, 10th Dist. Franklin No. 01AP-249, 2002-Ohio-207, *2. In *Girgis*, at paragraph two of the syllabus, the Court specifically held that the 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. The court explained the requirement of independent corroborative evidence of proximate cause eliminates the arbitrary "physical contact" requirement and its potential for

abuse as an obstacle to the filing of legitimate claims. *Forrest v. Daimler Chrysler Corp.,* 9th Dist. Summit No. 20806, 2002-Ohio-1974, *3. An independent witness must verify not only the existence of another vehicle but also that the driver of the other vehicle proximately caused the accident in question. *Musaelyants v. Allstate Ins. Co.,* 45 Ohio App.3d 251, 762 N.E.2d 459 (8th Dist. 2001). In order for an appellant to survive the motion for summary judgment, he or she must be able to show the existence of evidence, specifically independent third-party testimony that corroborates an appellant's version of the events of an accident. *Gayheart v. Doe,* 143 Ohio App.3d 692, 2001-Ohio-2520, 758 N.E.2d 1162 (4th Dist.), ¶ 12.

{¶16} "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." *Brown v. Philadelphia Indem. Ins. Co.,* 12th Dist. Warren No. CA2010-10-094, 2011-Ohio-2217, ¶ 21 (Citations omitted.) *Muncy v. American Select Ins. Co.,* 129 Ohio App.3d 1, 6-7, 716 N.E.2d 1171 (1998). 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." *Brown, supra,* quoting 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, 716 N.E.2d 1171, the term "additional evidence" is synonymous with the term "corroborative evidence." *Brown, supra*, at ¶ 22.

{¶17} Again, Appellant's testimony indicates when he was approximately 100 feet from the intersection of S.R. 124 and Lapperell Road, he observed the red truck "out in the intersection." Upon seeing the truck, he applied his brakes and his vehicle slid on the gravel on the roadway. Appellant testified he slid, let off the brakes, stopped sliding, again applied the brakes, and slid into the guardrail.

Ison's testimony as corroborative evidence.

{¶18} Appellee argues Ison's testimony pinpoints the cause of the accident to be Appellant's failure to control his truck in the loose gravel on the roadway before a truck pulled out of the intersection of the road. Our de novo review requires we carefully examine Ison's testimony. The trial court held:

> "In considering Angela Ison's deposition testimony, the Court finds that, although portions of that deposition testimony corroborates the existence of a truck near the intersection of State Route 124 and Lapperell Road at the time of the accident, the deposition provides no corroboration for the Plaintiff's position that negligent operation of such truck by an unidentified driver was a proximate cause of bodily injury to the Plaintiff."

{¶19} We agree with the trial court that Ison's testimony corroborates the existence of the red truck in the intersection of S.R. 124 and Lapperell Road. We must further consider the issue of whether or not the red truck proximately caused the motor vehicle accident. Ison testified in her deposition as follows:

Q: All right. Tell me what happened- - what you recall happening as far as the accident.

A: We were going down 124, and at the fish hatchery there, there was a truck. But we hit some gravel there. He was deciding whether he was coming out or not. We hit the gravel and it sent us into a glide.

* * *

Q: Based upon what you saw, Angela, were it not for the red truck, do you think Ron would have ever gone off the roadway?

Mr. Campbell: Objection.

A: I'm not sure. I'm really not sure. I can't answer yes or no.

* * *

{¶20} Ison was next questioned about her statement given to the Ohio State Highway Patrol following the accident. The statement was marked as "Exhibit 1" to her deposition. Ison testified her statement was accurate and

identified her signature at the bottom of it. She testified there was nothing she would change in the statement.[3]

* * *

{¶21} Ison further testified as follows:

Q: Okay. What caused Mr. Jackson, if you know, to go through the intersection and strike the guardrail?

A: There was lots of gravel here (indicating).

* * *

Q: - -How far back he was? Why is it that you feel that it was loose gravel that caused him to ultimately strike the guardrail?

A: Because I felt us glide, like hydroplane, and there was no water, and I seen the gravel too.

Q: Okay. Did he appear to be braking as he hit the gravel?

A: Uh-huh.

Q: That's a yes?

A: Yes.

* * *

Q: All right. And why is it that you believe that, somehow, the red dump truck contributed to this accident occurring?

A: That's what I remember….

* * *

[3] Later in her deposition Ison reviewed her statement again and verified that "hitting the brakes, hitting the gravel, and the red truck pulling out" were accurate.

Q: So in your statement that counsel showed you, when you say a red truck pulled out in front of- - "We hit the brakes to keep from hitting the truck. We hit the loose gravel." What happened first, Ron hitting the loose gravel or the red truck pulling out in front of you?

A: I believe the loose gravel.

* * *

Ison further testified:

Q: * * * Do you know if Ron applied his brakes before he reached the gravel, or was it after he had approached- -

A: I'm not sure.

Q: - -where the gravel was?

A: I'm not sure.

{¶22} Later in her deposition, Ison reviewed photographs, Exhibit 3 and Exhibit 4. Ison testified regarding the location of the gravel as follows:

Q: Ma'am, I'm going to hand you one of the photos taken by, I believe, the highway patrol that actually shows 124 as you're approaching that split in the roadway. Take a look at that. Am I accurate in indicating that would be, quite frankly, the path that you guys would have taken as you approached, right?

A: Yes.

Q: Do you see any loose gravel in that photograph?

A: No.

Q: This gravel you speak of would have been back before that?

A: Yes.

Q: And once he hit the gravel, it's my understanding he continued to slide all the way to the guardrail?

A: Uh huh.

Q: That's a yes?

A: Yes. It felt that way.

Q: Okay. So it's fair to say that based on the roadway we see in Exhibit 2, which is approaching that split, at that point in the road that's depicted in this photograph, the truck would have been sliding all the way up to where we see the ambulance positioned where the guardrail is, correct?

A: Yes.

Q: So, certainly, there was no gravel within the intersection itself, true?

A: True.

* * *

Q: So it's fair to say this gravel is quite some distance away from where the road splits?

A: Yes.

{¶23} When the facts surrounding the issue of proximate cause are disputed or convoluted, the issue of proximate cause is best left for the trier of fact. *Kemerer v. Antwerp Bd. of Edn.*, 105 Ohio App.3d 792, 664 N.E.2d 1380 (3rd Dist. 1995). However, where no facts are alleged justifying any reasonable inference that the acts or failure of the defendant constitute proximate cause of the injury there is nothing for the jury, and, as a matter of

law, judgment must be given for the defendant. *Case v. Miami Chevrolet Co.*, 38 Ohio App. 41, 45-46, 175 N.E. 224, 225-226 (1930). The Supreme Court of Ohio, in *Piqua v. Morris,* 98 Ohio St. 42, 120 N.E. 300 (1918), defined proximate cause in paragraph one of the syllabus:

> "The proximate cause of a result is that which in a natural and continued sequence contributes to produce the result, without which it would not have happened. The fact that some other cause concurred with the negligence of a defendant in producing an injury, does not relieve him from liability unless it is shown such other cause would have produced the injury independently of defendant's negligence." See, also, *Valentine v. PPG Industries, Inc.,* 158 Ohio App.3d, 821 N.E.2d 580 (4th Dist. 2004), quoting *Aiken v. Indus. Comm.,* 143 Ohio St. 113, 117, 53 N.E.2d 1018 (1944).

{¶24} In *Armour & Co., v. Ott,* 117 Ohio St. 252, 257, 158 N.E. 189, 191 (1927), the Supreme Court of Ohio approved of the following definition for remote cause: " * * * an injury that could not have been foreseen or reasonably anticipated as the probable result of an act of negligence * * *." "No liability can result to a party, '[e]ven if negligence of a party is a cause of injury to another,' if the cause is a remote one." *Kemerer, supra,* quoting *Tanzi v. N.Y. Cent. Rd. Co.,* 155 Ohio St. 149, 159, 98 N.E.2d 39, 44 (1951).

{¶25} This court previously considered the issue of the satisfaction of the corroborative evidence test in *Mosley v. Personal Serv. Ins. Co.,* 4th Dist. Pike No. 08CA779, 2009-Ohio-419. There, Mosley filed suit against her insurer after the insurer denied her claim for uninsured motorist

coverage. The underlying facts demonstrated Mosley was involved in an automobile accident also on State Route 124 in Pike County when she encountered a van driving the opposite direction on her side of the road. To avoid a collision, Mosley swerved, lost control of her vehicle, and hit a telephone pole. The van never stopped and Mosley could not identify the driver or the van.

{¶26} Mosley submitted a claim with her insurer for uninsured motorist coverage. The claim was denied due to Mosley's inability to provide independent corroborative evidence that her injuries were proximately caused by the negligence of the unidentified driver. When the case eventually proceeded to trial, Mosley testified about the accident. She also offered the testimony of two local firefighters who responded to the scene and testified that a van later drove through the scene at a high rate of speed and nearly struck persons directing traffic. At the conclusion of the case, the insurer moved for a directed verdict which the trial court denied. The jury returned a verdict in Mosley's favor. The insurer appealed, assigning as error that Mosley did not satisfy the corroborative evidence test.

{¶27} The insurer argued that the evidence Mosley presented did not corroborate her claim, but consisted of speculation that the van Mosely saw and the van which later was driven through the scene were the same van.

The insurer pointed out that the descriptions of the van given by Mosley and one of the firefighters were not exact. However, we found they were similar enough. We did not agree with the insurer that they should not be considered as evidence supporting Mosley's claim. We concluded that it was the jury's job to consider the evidence, along with Mosley's testimony, and determine if she was entitled to the uninsured motorist benefits. Because reasonable minds could reach different conclusions about the case, we noted a directed verdict was not appropriate. As such, we could not say the trial court erred in denying the motion for directed verdict. We overruled the insurer's sole assignment of error.

{¶28} In reviewing Ison's deposition testimony, we cannot agree with the trial court that her testimony provides no corroboration for Appellants' contention that negligent operation of the red truck by an unidentified driver was a proximate cause of bodily injury to Ronald Jackson. There are many factors to consider, including: Appellant's speed as he approached the intersection; his speed for conditions; his knowledge of the roadway; his intentions as he approached the roadway; and his precise reaction when he encountered the truck, among others. Appellant testified he first saw the truck when it was in the intersection whereas Ison testified she first saw it "coming up to the intersection." Appellant testified the gravel was in the

intersection while Ison acknowledged that the photographic evidence showed no gravel in the intersection. We find in construing the evidence that reasonable minds could come to more than one conclusion about the proximate cause or causes of the motor vehicle accident. As such, we find the trial court erred in granting Appellee's motion for summary judgment and in denying Appellants' motion for partial summary judgment.

Additional corroborative evidence.

{¶29} Appellants also asserted Ronald Jackson's medical records, the proof of damage to his vehicle, and the crash report of the accident provide additional evidence to support his claim. However, having found the trial court erred because there were genuine issues of material fact raised by the deposition testimony of Appellant and Angela Ison, our consideration of the relevance and admissibility of the medical records, damage report, and crash reports is rendered moot. As such, we need not consider this argument.

CONCLUSION

{¶30} Upon our de novo review of the facts and circumstances, we find there were genuine issues of material fact and Appellee was not entitled to summary judgment as a matter of law. For the foregoing reasons, we sustain Appellants' assignment of error and reverse the judgment of the trial court. This case is remanded for proceedings consistent with this opinion.

JUDGMENT REVERSED AND REMANDED FOR FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. Costs assessed to Appellee.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pike County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J. & Abele, J.: Concur in Judgment Only.

For the Court,

BY: _____
Matthew W. McFarland,
Administrative Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.