

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

Scott L. Smith, et al.

Court of Appeals No. OT-15-005

Appellants

Trial Court No. 12CV236

v.

Erie Insurance Company

DECISION AND JUDGMENT

Appellee

Decided: July 31, 2015

* * * * *

Steven P. Collier, Steven R. Smith and Janine T. Avila, for appellants.

D. Casey Talbott and Jeffrey M. Stopar, for appellee.

* * * * *

YARBROUGH, P.J.

I. Introduction

{¶ 1} Appellants, Scott and Dawn Smith, appeal the judgment of the Ottawa County Court of Common Pleas, granting summary judgment in favor of appellee, Erie Insurance Company. For the following reasons, we reverse.

A. Facts and Procedural Background

{¶ 2} The facts relevant to our disposition of this appeal were stipulated before the trial court, in relevant part, as follows:

1. Plaintiff Scott L. Smith (“Mr. Smith”) was involved in a single-vehicle accident during the late evening hours of Monday, July 25, 2011 in Portage Township, Ottawa County, Ohio. Mr. Smith claims that he was proceeding southbound on CR0034 aka Plasterbed Road, approaching the intersection of TR0264 aka Schiew Road, when a northbound vehicle on Plasterbed Road went left of center, entering Mr. Smith’s lane of travel, and that in order to avoid a collision Mr. Smith swerved his vehicle off of the right side of the roadway where it struck several trees. The parties stipulate and agree that the above is and should be considered Mr. Smith’s “testimony” for the purpose of this action.

2. The Smith vehicle did not come into actual physical contact with the claimed northbound vehicle (which Mr. Smith describes as a dark-colored sport utility vehicle); further, there was no physical evidence collected or documented at the scene (e.g. debris and/or skid marks, etc.) [confirming] the vehicle’s existence.

3. Mr. Smith has not been able to locate the claimed northbound vehicle and/or to identify its owner or operator.

4. Other than Mr. Smith, there are no identifiable witnesses to the accident.

5. Following the accident, Mr. Smith discussed this matter with: 1) a 9-1-1 operator; 2) an investigating officer of the Ohio State Highway Patrol (“OSHP”); and 3) various medical practitioners. In each of these instances, Mr. Smith described the circumstances leading up to the accident in terms similar to those set forth in paragraph 1, above – that is, that he had swerved his vehicle off of the roadway in order to avoid a collision with another vehicle which had crossed the centerline and thereby entered his vehicle’s lane of travel. [The parties attached copies of the 9-1-1 transcript, the OSHP crash report/scene photographs, and Mr. Smith’s medical reports to the stipulation of facts].

6. As of the date of the accident, Mr. Smith was a named-insured under a policy of automobile insurance issued by Erie Insurance Company (“Erie”) – specifically, Policy No. Q12-6304152, and hereafter “the Erie Policy” * * *. In most pertinent part, the Erie Policy states as follows:

“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.

7. Mr. Smith has presented a claim for uninsured motorist benefits under the Erie Policy.

8. Erie has denied Mr. Smith’s claim.

{¶ 3} Following Erie’s denial of Mr. Smith’s claim, appellants filed this action alleging, inter alia, breach of contract. Thereafter, on May 3, 2013, Erie filed a motion for summary judgment, arguing that it was entitled to summary judgment on all of appellants’ claims because appellants failed to proffer the “independent third party testimony” that was necessary to prevail in a claim for uninsured motorist benefits under the terms of the Erie Policy and applicable Ohio law.

{¶ 4} In response to Erie’s motion for summary judgment, appellants, on May 24, 2013, filed their own motion for summary judgment, in which they opposed Erie’s motion and argued that they were entitled to judgment because they submitted sufficient “additional evidence,” as required under the terms of the Erie Policy, to establish that the July 25, 2011 accident was caused by the driver of the unidentified motor vehicle.

{¶ 5} On November 14, 2014, the trial court issued its decision on the cross-motions for summary judgment, concluding that the evidence submitted by appellants did not constitute *independent* corroborative evidence insofar as the contents of each piece of

evidence stemmed from statements given by Mr. Smith himself. Consequently, the trial court granted Erie's motion for summary judgment and denied appellants' motion for summary judgment. Appellants' timely appeal followed.

B. Assignment of Error

{¶ 6} On appeal, appellants assert one assignment of error:

Assignment of Error No. 1: The Trial Court erred by granting Erie's motion for summary judgment, and denying Smiths' motion for summary judgment, by determining, as a matter of law, that the 911 transcript/audio recording, the OSHP Crash Report/Scene Photographs, and the medical records did not constitute "additional evidence" to support Mr. Smith's testimony and establish the accident was caused by an uninsured motor vehicle.

II. Analysis

{¶ 7} In appellants' sole assignment of error, they argue that the trial court erred in granting Erie's motion for summary judgment and denying their motion for summary judgment.

{¶ 8} We review the court's decision on summary judgment de novo, applying the same standard as the trial court. *Jensen v. AdChoice, Inc.*, 6th Dist. Lucas No. L-14-1014, 2014-Ohio-5590, ¶ 11, citing *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). Under Civ.R. 56(C), summary judgment is appropriate where (1) there is no genuine issue as to any material fact, (2) the

moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion, and viewing the evidence in the light most favorable to the non-moving party, that conclusion is adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

{¶ 9} When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). When a properly supported motion for summary judgment is filed, an adverse party may not rest on mere allegations or denials in the pleadings, but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery*, 11 Ohio St.3d 75, 79, 463 N.E.2d 1246 (1984).

{¶ 10} The issue we must resolve in this case is whether appellants were required to submit *independent, third-party* evidence in order to establish their entitlement to uninsured motorist benefits under the Erie Policy and applicable Ohio law.

{¶ 11} Relevant to our examination of this issue, R.C. 3937.18 states, in pertinent part:

(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:

* * *

(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.

{¶ 12} In their appellate brief, appellants argue that the evidence they presented to the trial court in the form of Mr. Smith's testimony, the 9-1-1 transcript, the OSHP crash report/scene photographs, and Mr. Smith's medical reports, was sufficient to establish the existence of the unidentified motorist and entitled them to uninsured motorist benefits under the Erie Policy. Thus, appellants contend that Erie breached the terms of the Erie Policy by denying their claim for uninsured motorist benefits. In support of their argument, appellants cite our prior decision in *Ingram v. State Farm Ins. Co.*, 6th Dist. Lucas No. L-09-1201, 2010-Ohio-1599.

{¶ 13} In *Ingram*, we reversed the decision of the Lucas County Court of Common Pleas, which granted summary judgment to State Farm Mutual Automobile Insurance Company and Safe Auto Insurance Company on Ingram's claim for uninsured motorist benefits. In that case, Ingram was operating an automobile owned by Thelma Stovall, who was a passenger in the vehicle at the time of the accident. *Id.* at ¶ 2. While stopped

at a red light, Stovall's vehicle was struck by a sport utility vehicle (SUV). Following the impact, the driver of the SUV fled the scene and was never identified.

{¶ 14} Eventually, Ingram submitted an insurance claim regarding the accident under his policy with Safe Auto. He also sought to recover under Stovall's policy with State Farm. Following denial of coverage by both insurance companies, Ingram filed suit seeking compensatory damages. *Id.* at ¶ 4. The insurance companies subsequently filed motions for summary judgment, the same being granted by the trial court. *Id.*

{¶ 15} On appeal, Ingram argued that he was entitled to uninsured motorist benefits under the insurance policies, both of which included uninsured motorist coverage provisions similar to those contained in the Erie Policy. In particular, the State Farm policy defined an uninsured motor vehicle as:

* * * a land motor vehicle whose owner and operator remain unidentified but independent corroborative evidence exists to prove that the bodily injury was proximately caused by the unidentified operator of the land motor vehicle. The testimony of an insured seeking recovery shall not constitute independent corroborative evidence, unless the testimony is supported by additional evidence. *Id.* at ¶ 11.

{¶ 16} In support of their position that Ingram was not entitled to uninsured motorist benefits, State Farm and Safe Auto argued that Ingram failed to produce "independent corroborative evidence" to show that his injuries were proximately caused

by the negligence of the unidentified hit-and-run driver. *Ingram*, 6th Dist. Lucas No. L-09-1201, 2010-Ohio-1599, at ¶ 17.

{¶ 17} At the outset of our analysis of the parties' arguments, we noted: "[T]here is no requirement in appellees' policies, R.C. 3937.18, or [*Girgis v. State Farm Mut. Auto. Ins. Co.*, 75 Ohio St.3d 302, 662 N.E.2d 280 (1996)] that the 'additional evidence' needed to support the insured's testimony be eyewitness testimony." *Id.* at ¶ 18. We went on to examine the evidence submitted by Ingram in opposition to summary judgment, which included, inter alia, Stovall's deposition testimony wherein he stated that Ingram was

driving him home because [Stovall] had had too much to drink. He testified that he did not see the SUV crash into his car because he was looking down at the time. He testified that he heard [Ingram] warn him that a car was about to collide with them and that he felt the impact of the collision. He then heard [Ingram] tell someone to pull over and that another voice responded, "I'm pulling over." *Id.* at ¶ 19.

{¶ 18} In addition to Stovall's deposition testimony, Ingram submitted a copy of his medical records and the police report that was taken at the scene of the accident. Ultimately, we concluded that the foregoing evidence was sufficient to establish that Ingram's injuries were caused by a hit-and-run driver. *Id.* at ¶ 21.

{¶ 19} Appellants, pointing to our decision in *Ingram*, contend that the evidence submitted in this case constituted sufficient independent corroborative evidence of the

existence of a hit-and-run driver. However, we find that *Ingram* is distinguishable from this case in light of the third-party deposition testimony submitted in opposition to summary judgment in that case. Appellants have produced no such evidence in this case. Nonetheless, appellants cite two additional decisions, *Connell v. United Servs. Auto. Assn.*, 2d Dist. Montgomery No. 20282, 2004-Ohio-2726, and *Rose v. City of Garfield Hts.*, 8th Dist. Cuyahoga Nos. 85420 and 85426, 2005-Ohio-4165, 970 N.E.2d 464, that they contend are “even more factually similar, since they do not involve the testimony of a passenger or a third person.”

{¶ 20} In *Connell*, a breach of contract action was brought by Thomas Connell, who suffered injuries to his left foot when he was struck by an unidentified driver. Connell was covered by an auto policy provided by United Services Automobile Association (USAA), which contained uninsured/underinsured motorist coverage. Relevant here, the USAA policy provided: “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.” *Connell* at ¶ 10.

{¶ 21} Following the accident, Connell filed a claim for uninsured motorist benefits with USAA. USAA denied Connell’s claim because it found that Connell could not provide independent corroborative evidence of the facts of the accident. Thereafter, Connell brought a breach of contract action against USAA. USAA eventually filed a motion for summary judgment, which the trial court ultimately granted.

{¶ 22} On appeal, Connell argued that the trial court erred when it granted USAA’s motion for summary judgment. The Second District agreed, pointing to USAA’s provision for uninsured motorist benefits where the insured can produce “additional evidence” to supplement the insured’s testimony. *Connell*, 2d Dist. Montgomery No. 20282, 2004-Ohio-2726, at ¶ 18. The court found that this policy provision was satisfied by Connell’s deposition testimony coupled with medical evidence of the injury he suffered. *Id.* at ¶ 27.

{¶ 23} Likewise, in *Rose, supra*, the Eighth District found that a Garfield Heights police officer, Ronald Rose, produced sufficient “additional evidence” to meet the evidentiary requirement under the independent corroborative evidence test under R.C. 3937.18 and the relevant policy language. In that case, Rose was struck by an unidentified motorist while picking up debris from the side of the road. Rose lost consciousness as a result of the collision. Once he awakened, Rose radioed into dispatch for help, and another officer, Lieutenant Wolske, responded to the scene. Upon arrival, Wolske noticed that Rose’s uniform was dirty and his head and left wrist were swollen. *Rose*, 8th Dist. Cuyahoga Nos. 85420 and 85426, 2005-Ohio-4165, 970 N.E.2d 464, at ¶ 2. Wolske transported Rose to the hospital, where Rose was diagnosed with injuries including “blunt head trauma, multiple contusions, and traumatic microhematuria (blood in his urine).” *Id.* Wolske returned to the scene of the collision, but no evidence of the unidentified vehicle was discovered.

{¶ 24} Rose, who was on-duty at the time of the collision, eventually filed a complaint against Garfield Heights and its auto insurance carrier, Clarendon National Insurance Company, for uninsured motorist benefits under the Clarendon auto insurance policy.

{¶ 25} Following preliminary discovery, Rose filed a motion for summary judgment, arguing that he was entitled to uninsured motorist benefits under the Clarendon policy, which provided, in relevant part: “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 unsupported by additional evidence.” *Rose* at ¶ 16.

{¶ 26} Clarendon also filed a motion for summary judgment, arguing that Rose was not entitled to uninsured motorist benefits because the collision was not supported by independent corroborative evidence. The trial court ultimately denied Rose’s motion for summary judgment and granted Clarendon’s motion for summary judgment, finding that Rose failed to present independent corroborative evidence to support his claim for uninsured motorist benefits. *Id.* at ¶ 4.

{¶ 27} On appeal, Rose argued that the trial court erred in granting summary judgment to Clarendon where the evidence he presented, which included his medical records, Wolske’s report, and the report of a Nationwide Insurance Company claims adjuster, constituted additional evidence that was sufficient to meet the evidentiary requirement under the independent corroborative evidence test under R.C. 3937.18. The

Eighth District agreed, finding that Rose’s submission of the foregoing evidence created a genuine issue of material fact as to whether the collision was caused by the unidentified motorist. *Id.* at ¶ 10. In so holding, the court noted that “[t]he medical records showed that Ronald Rose suffered a physical injury, and Lt. Wolske was able to corroborate that Ronald Rose appeared injured and his uniform appeared dirty.” *Id.*

{¶ 28} 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.

{¶ 29} Notwithstanding the authority cited by appellants in support of their assignment of error, Erie insists that the trial court appropriately granted its motion for summary judgment under the authority of *Brown v. Philadelphia Indemn. Ins. Co.*, 12th Dist. Warren No. CA2010-10-094, 2011-Ohio-2217. In *Brown*, the Twelfth District held that the “additional evidence” submitted by an insured in order to support a claim for uninsured motorist benefits “must come from a source other than the insured’s testimony.” *Id.* at ¶ 27. In its decision, the court examined the evidence presented by Brown, including a police report of the accident, his medical records, and an affidavit

from his treating physician. The court found that the foregoing evidence did not constitute independent corroborative evidence or additional evidence that Brown's injuries were caused by an unidentified vehicle as required by the underlying insurance policy, which was similar to the Erie Policy. Rather, the court determined that Brown "merely repackaged the statements he made to the police who investigated the incident or to his treating physician." *Id.* at ¶ 28. Because the aforementioned evidence was based exclusively on Brown's account of the incident, it was not "independent" or "additional" as required by the insurance policy. *Id.*

{¶ 30} Upon examination of the Erie Policy and the case law cited by the parties in the present case, 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). As noted above, the policy in the present case provides, in relevant part:

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.

{¶ 31} 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. Under Erie’s interpretation, the policy provisions at issue in *Ingram, Connell, Rose, Brown*, and the present case could simply read “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.” Indeed, the second sentence including the term “additional evidence” seems redundant under Erie’s interpretation since the usage of the phrase “independent corroborative evidence” in the first sentence conveys the need for third party evidence. See *Honzell v. Nationwide Ins. Co.*, 10th Dist. Franklin No. 11AP-998, 2012-Ohio-6154, ¶ 13 (concluding that “corroborative evidence is ‘independent’ if it comes from a source other than the insured seeking coverage”); *Brown* at ¶ 22 (concluding that “the term ‘additional evidence’ is synonymous with the term ‘corroborative evidence’”); *Jackson v. State Farm Auto. Ins. Co.*, 4th Dist. Pike No. 14CA850, 2015-Ohio-1131, ¶ 16 (citing *Brown* for the proposition that “additional evidence” is equivalent to “corroborative evidence”).

{¶ 32} Having concluded that the Erie Policy is susceptible of more than one reasonable interpretation, we find that it is ambiguous regarding the evidentiary requirements for uninsured motorist benefits. *Hacker v. Dickman*, 75 Ohio St.3d 118,

119-20, 661 N.E.2d 1005 (1996) (“It is only when a provision in a policy is susceptible of more than one reasonable interpretation that an ambiguity exists in which the provision must be resolved in favor of the insured.”). It is well-settled that “[w]here 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, 519 N.E.2d 1380 (1988), syllabus.

{¶ 33} Because we must construe the uninsured motorist provision of the Erie Policy in appellants’ favor, we find that the trial court erred in granting Erie’s motion for summary judgment. Accordingly, appellants’ sole assignment of error is well-taken.

III. Conclusion

{¶ 34} For the foregoing reasons, the judgment of the Ottawa County Court of Common Pleas is reversed. This matter is remanded to the trial court for further proceedings consistent with this decision. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

{¶ 35} We recognize that that our decision in this case is in conflict with the decision of the Twelfth District Court of Appeals in *Brown v. Philadelphia Indemn. Ins. Co.*, 12th Dist. Warren No. CA2010-10-094, 2011-Ohio-2217. Therefore, pursuant to Ohio Constitution, Article IV, Section 3(B)(4), we sua sponte certify a conflict to the Supreme Court of Ohio for review and final determination. 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.

{¶ 36} The parties are directed to S.Ct.Prac.R. 7.01 and 7.08 for further proceedings.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See also 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Stephen A. Yarbrough, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.