[Cite as *Rose v. Garfield Hts.*, 2005-Ohio-4165.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NOS. 85420 & 85426

RONALD ROSE, ET AL.,	:	
	:	
Plaintiffs-Appellants/	:	
Cross-Appellees	:	
	:	
vs.	:	
	:	
THE CITY OF GARFIELD HEIGHTS,	:	JOURNAL ENTRY
	:	and
NATIONWIDE INSURANCE COMPANY,	:	OPINION
	:	
Defendant-Appellant/	:	
Cross-Appellee	:	
	:	
CLARENDON NATIONAL INSURANCE COMPANY,	:	
	:	
Defendant-Appellee/	:	
Cross-Appellant	:	
DATE OF ANNOUNCEMENT OF DECISION	:	AUGUST 11, 2005
CHARACTER OF PROCEEDING:	:	Civil appeals from
	:	Common Pleas Court
	:	Case No. 512994
JUDGMENT	:	REVERSED AND REMANDED.
DATE OF JOURNALIZATION	:	

APPEARANCES:

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MICHAEL J. CORRIGAN, J.:

{¶ 1} Appellants/cross-appellees Ronald and Nikki Rose (collectively referred to as the "Roses") and appellant/cross-appellee Nationwide Mutual Insurance Company ("Nationwide") appeal the trial court's decision granting summary judgment to appellee/cross-appellant Clarendon National Insurance Company ("Clarendon"). Clarendon cross-appeals the trial court's finding that UM/UIM coverage arose by operation of law.

I. FACTS

{¶ 2} Ronald Rose was struck by an unidentified motorist while, in the course and scope of his employment with the City of Garfield Heights as a police officer, he exited his cruiser to pick up debris along the road. The unidentified motorist drove off without assisting Ronald Rose. Ronald Rose fell to the ground, lost consciousness, and returned to his cruiser to call dispatch for

help when he regained consciousness. Lieutenant Wolske responded to the dispatch call and observed that Ronald Rose's uniform was dirty and the left side of his head and his left hand wrist appeared swollen. Lt. Wolske then drove Ronald Rose to the emergency room, where he was treated for blunt head trauma, multiple contusions, and traumatic microhematuria (blood in his urine). Lt. Wolske also returned to the scene of the "hit and run," but was unable to find any traces of vehicle debris or any other traces of the vehicle that struck Ronald Rose. Lt. Wolske prepared a memo to the police chief describing the accident and concluding that Ronald Rose was struck by an unidentified motorist.

{¶ 3} Ronald Rose made a claim under his personal auto policy with Nationwide for UM coverage. Nationwide paid Ronald Rose the full $50,000 UM policy limits. After realizing that the City of Garfield Heights had an auto liability policy through Clarendon and that Ronald Rose might have a claim for UM coverage, the Roses filed a complaint against Clarendon and the City of Garfield Heights. Nationwide was also named as a defendant for the purposes of filing their cross-claim against Clarendon for their pro rata share of the UM payments.

{¶ 4} The Roses filed a motion for summary judgment, arguing that because Clarendon failed to offer UM/UIM coverage to the City of Garfield Heights, UM/UIM coverage arose by operation of law. Clarendon filed its own motion for summary judgment, arguing that even if UM/UIM coverage arises by operation of law, the Roses are

not entitled to any UM/UIM coverage because the "hit and run" accident by an unidentified motorist was not supported by independent corroborative evidence other than Ronald Rose's own recitation of the event. The trial court, while finding that UM/UIM coverage arose by operation of law, granted Clarendon's motion for summary judgment, finding that Ronald Rose's own affidavit and police report contained no independent corroborative evidence sufficient to meet the evidentiary threshold requirement to make a UM claim pursuant to R.C. 3937.18(D)(2). As a result, the trial court found Nationwide's motion for summary judgment (i.e., the cross-claim for indemnification and/or contribution) to be moot. The Roses and Nationwide now appeal and Clarendon cross-appeals.

II. THE ROSES' AND NATIONWIDE'S APPEAL

{¶ 5} Although the Roses cite three assignments of error, the gravamen of their appeal argues that the trial court erred in granting Clarendon's motion for summary judgment. They argue that Ronald Rose's affidavit of the accident was corroborated by independent evidence, such as the medical records, Lt. Wolske's report, and the report of Nationwide's claims adjuster, sufficient to meet the evidentiary threshold under R.C. 3937.18(D)(2). There is merit to the Roses' argument.

{¶ 6} R.C. 3937.18(D)(2) provided as follows:

{¶ 7} "For the purposes of this section, a motor vehicle shall be deemed uninsured in either of the following circumstances:

{¶ 8} "***

{¶ 9} "(2) the identity of the owner and operator of the motor vehicle 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 this division, the testimony of any insured seeking recovery from the insurer shall not constitute independent corroborative evidence, unless the testimony is supported by additional evidence."

{¶ 10} This evidentiary threshold requirement – "independent corroborative evidence" – was met by the Roses by way of medical records and Lt. Wolske's report (at least as much to create a genuine issue of material fact). The 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. While the stated purpose of this requirement is to avoid fraudulent claims when there is an unidentified motorist, it cannot be construed in such a way as to require eyewitnesses. Just like the Second District Court of Appeals held in *Connell v. United Servs. Automobile Ass'n.*, Montgomery App. No. 20282, 2004-Ohio-2726, ¶16, where "additional physical evidence in the form of the insured party's injured foot was sufficient evidence from which a jury could have inferred that the insured party was injured as he had claimed," the medical records detailing Ronald Rose's injuries

constitute "additional physical evidence." In *Connell*, the insurance policy was similar to Nationwide's policy and Clarendon's policy, as well as the language in R.C. 3739.18(D)(2). The insurer in *Connell* argued that upon the authority of *Girgis v. State Farm Mut. Auto. Ins. Co.*, 75 Ohio St.3d 302, 1996-Ohio-111, 662 N.E.2d 280:

{¶ 11} "[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."

{¶ 12} The *Connell* court explained that *Girgis* 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. Thus, under *Girgis*, 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. However, unlike *Girgis*, the insurer in *Connell* had a much broader test in its policy it offered to the insured. The policy accepts the testimony of the covered person, apart from any "independent corroborative evidence," if the covered person's testimony "is

supported by additional evidence." The insured's policy in *Connell* provided as follows:

{¶ 13} "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." 2004-Ohio-2726 at ¶10.

{¶ 14} As held by *Connell*, "[t]his reference to additional evidence reads back into the equation the probative value of the injury itself which *Girgis* had effectively read out." Id. at ¶16.

{¶ 15} Likewise, the Clarendon policy issued to the City of Garfield Heights provides as follows:

{¶ 16} "[t]he 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."

{¶ 17} Because the Clarendon policy mirrors R.C. 3739.18(D)(2) and the language in the *Connell* policy and the Roses met the evidentiary threshold requirement of "independent corroborative evidence," the trial court's decision granting summary judgment to Clarendon is reversed. In addition, we reverse the trial court's finding that Nationwide's motion for summary judgment against Clarendon is moot. The entire matter is remanded to the trial court for further proceedings.

III. CLARENDON'S CROSS-APPEAL

{¶ 18} Clarendon filed a notice of cross-appeal, citing as its sole cross-assignment of error that the trial court erred in finding that UM/UIM coverage arose by operation of law. In particular, Clarendon asserts that the insured, the City of Garfield Heights, is a political subdivision to which Ohio law does not require proof of financial responsibility. However, Clarendon's assertion is without merit.

{¶ 19} Although the City of Garfield Heights is not *required* under R.C. 4509.71 to provide proof of financial responsibility for the vehicles they own or operate, once the City of Garfield Heights *elects* to provide such proof of financial responsibility, the insurer *must* offer UM/UIM coverage to its insured in accordance with R.C. 3937.18. Here, the City of Garfield Heights elected to purchase an automobile insurance policy through Clarendon. This election should have cued Clarendon to offer UM/UIM coverage to the City of Garfield Heights. Because Clarendon failed to offer such coverage, the trial court properly found that such coverage arose by operation of law. Clarendon's sole cross-assignment of error is thus, overruled.

Judgment reversed and remanded.

This cause is reversed and remanded for proceedings consistent with this opinion.

It is, therefore, ordered that said plaintiffs-appellants/cross-appellees recover of said defendant-appellee/cross-appellant their costs herein taxed.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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

MICHAEL J. CORRIGAN
JUDGE

KENNETH A. ROCCO, J., CONCURS.

ANN DYKE, P.J., DISSENTS WITH SEPARATE OPINION.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R.22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 85420 & 85426

RONALD ROSE, ET AL.	:	
	:	
Plaintiffs-Appellants/ Cross-Appellees	:	
	:	D I S S E N T I N G
-vs-	:	O P I N I O N
	:	
THE CITY OF GARFIELD HEIGHTS,	:	
	:	
NATIONWIDE INSURANCE COMPANY,	:	
	:	
Defendant-Appellant/ Cross-Appellee	:	
	:	
CLARENDON NATIONAL INSURANCE COMPANY,	:	
	:	
Defendant-Appellee/ Cross-Appellant	:	

DATE OF ANNOUNCEMENT
OF DECISION: AUGUST 11, 2005

DYKE, P.J., DISSENTING:

{¶ 20} I respectfully dissent and would conclude that UM/UIM coverage under the Clarendon policy did not arise by operation of the law. Accordingly, I would affirm the trial court's granting of summary judgment albeit on alternative grounds and, as UM/UIM coverage did not exist for the Plaintiffs under the Clarendon policy, I would find Plaintiffs' and Nationwide's assignments of error moot.

{¶ 21} The version of R.C. 3937.18 in effect on October 1, 2000, was enacted by S.B. 267. Thus, S.B. 267 governs our determination of Plaintiffs' UM/UIM coverage under the Clarendon policy. It states:

{¶ 22} "(A) No automobile liability or motor vehicle liability policy of insurance insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless both of the following coverages are offered to persons insured under the policy due to bodily injury or death suffered by such insureds:

{¶ 23} "(1) Uninsured motorist coverage * * *.

{¶ 24} "(2) Underinsured motorist coverage * * *."

{¶ 25} In accordance with R.C. 3937.18, in the instant matter, UM/UIM coverage arises by operation of law only if Clarendon had a duty to offer such coverage to the City. Clarendon only had a duty to offer UM/UIM coverage if the Clarendon policy constituted an "automobile liability or motor vehicle liability policy of insurance."

{¶ 26} H.B. 261 amended R.C. 3937.18 to include a definition of "automobile liability or motor vehicle liability policy of insurance." R.C. 3937.18(L) specifically defined "automobile liability or motor vehicle policy of insurance" as either of the following:

{¶ 27} "(1) Any policy of insurance that serves as proof of financial responsibility, as proof of financial responsibility is defined by division (K) of section 4509.01 of the Revised Code, for

owners or operators of the motor vehicles specifically identified in the policy of insurance;

{¶ 28} "(2) Any umbrella liability policy of insurance written as excess over one or more policies described in division (L)(1) of this section."

{¶ 29} It is undisputed that the Clarendon policy was not an umbrella policy.[1] Accordingly, we must determine whether the Clarendon policy "serve[d] as proof of financial responsibility." R.C. 3937.18(L)(1).

{¶ 30} R.C. 4509.01(K) defines "proof of financial responsibility" as:

{¶ 31} "(K) 'Proof of financial responsibility' means proof of ability to respond in damages for liability, on account of accidents occurring subsequent to the effective date of such proof, arising out of the ownership, maintenance, or use of a motor vehicle in the amount of twelve thousand five hundred dollars because of bodily injury to or death of one person in any one accident, in the amount of twenty-five thousand dollars because of bodily injury to or death of two or more persons in any one accident, and in the amount of seven thousand five hundred dollars because of injury to property of others in any one accident."

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[1]In the instant action, the parties stipulated that the Clarendon Umbrella Policy provides UM/UIM coverage in this case for an additional One Million Dollars ($1,000,000) if the court determines that the Clarendon auto policy provides UM/UIM coverage by operation of law. Thus, for matters of determining coverage, the umbrella policy is not applicable.

{¶ 32} However, R.C. 4509.01(K) is inapplicable to the instant matter pursuant to 4509.71, which states:

{¶ 33} "Sections 4509.01 to 4509.79, except section 4509.06, of the Revised Code do not apply to any motor vehicle owned and operated by the United States, this state, any political subdivision of this state, any municipal corporation therein or any private volunteer fire company serving a political subdivision of the state. Section 4509.06 of the Revised Code does not apply to any vehicle owned and operated by any publicly owned urban transportation system."

{¶ 34} R.C. 4509.71 expressly excludes political subdivisions and municipal corporations from the mandates of the financial responsibility laws of Ohio. In other words, Ohio law does not require such entities to provide proof of financial responsibility for the vehicles they own and/or operate. Accordingly, as municipalities are not required to prove financial responsibility, the Clarendon policy issued to the City did not serve as "proof of financial responsibility." Since the Clarendon policy did not serve as "proof of financial responsibility," then it was not an "automobile liability or motor vehicle policy of insurance." See *Russell v. Heritage Mut. Ins. Co. v. Jones*, Hamilton App. No. C-030868, 2004-Ohio-5851, citing *De Uzhca v. Derham*, Montgomery App. No. 19106, 2002-Ohio-1814. Consequently, as the Clarendon policy was not an automobile liability policy of insurance as required by R.C. 3937.18, Clarendon was not required to offer UM/UIM insurance

coverage to the City and such coverage did not arise by operation of law. See *Acree v. CNA Ins. Cos.*, Hamilton App. No. C-020710, 2003-Ohio-3043; *Gilcreast-Hill v. Ohio Farmers Ins. Co.*, Summit App. No. 20983, 2002-Ohio-4524.

{¶ 35} The majority maintains that "Although the City of Garfield Heights is not *required* under R.C. 4509.71 to provide proof of financial responsibility for the vehicles they own or operate, once the City of Garfield Heights *elects* to provide such proof of financial responsibility, the insurer *must* offer UM/UIM coverage to its insured in accordance with R.C. 3937.18." This argument completely ignores the plain language of the applicable statutes prescribed by the legislature and is not based on any legal principle.

{¶ 36} Moreover, it is irrelevant that the City was insured under the Clarendon policy for accidents caused by their insureds. The language used by the General Assembly in R.C. 4509.71, which concerns political subdivisions and municipalities, should be interpreted with the purpose of the law fully in mind. See *Gulla v. Reynolds* (1949), 151 Ohio St. 147, 159, 151 Ohio St. 147, 39 Ohio Op. 2, 85 N.E.2d 116 (J. Matthias, dissent). The financial responsibility laws were enacted to protect individuals from financially irresponsible drivers. Id. As government entities are not financially irresponsible drivers, R.C. 4509.71 expressly states that the financial responsibility laws do not apply to government entities. Hence, if a city elects to obtain insurance,

it is to protect itself financially, not to meet the mandates of a law inapplicable to it.

{¶ 37} Accordingly, by electing to obtain insurance to protect itself financially, the City of Garfield Heights did not change the fact that the Clarendon insurance policy did not "serve as proof of financial responsibility." An insurance policy that does not serve as proof of financial responsibility is not an "automobile liability or motor vehicle policy of insurance" and thus, is not subject to the mandates of R.C. 3937.18. Accordingly, I would affirm the trial court's granting of summary judgment on behalf of Clarendon but instead find that Clarendon did not have a duty to offer the City UM/UIM coverage and such coverage did not arise by operation of law. Furthermore, because UM/UIM coverage for the Plaintiffs did not exist under the Clarendon policy, I would find Plaintiffs' and Nationwide's assignments of error moot.