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Gallagher Sharp Newsflash: Insured's Own Account of No-Contact Accident Corroborates UM Claim

On Wednesday, November 16, 2016, in a 4-3 decision, the Supreme Court of Ohio, resolved a certified conflict over the interpretation of an insurance policy that requires "independent corroborative evidence" that an unidentified vehicle has caused a no-contact motor vehicle accident. Specifically, in *Smith v. Erie Ins. Co.*, Slip Opinion No. 2016-Ohio-7742, ¶1, the Court held that the policy requirement could be met by "evidence derived from the insured's testimony."

In *Smith*, the insured claimed to have suffered injuries as the result of an accident occurring when he was forced to swerve off the road to avoid an oncoming vehicle that had crossed left of center. The vehicles did not make physical contact, and the other driver fled the scene.

The insurer denied the insured's claim for uninsured motorists ("UM") coverage under his policy, and the insured filed a declaratory judgment action against his insurer. The trial court granted summary judgment in favor of the insurer, finding the insured had failed to present independent corroborative evidence of an unidentified driver's negligence as required by the subject policy. Specifically, the policy stated that "testimony of [the insured] seeking recovery does not constitute independent corroborative evidence, unless the testimony is supported by additional evidence." Here, the insured's only evidence was medical records and the police report containing statements he made to his medical providers and to the police.

On appeal, the Sixth District Court of Appeals held that the undefined term, "additional evidence," was ambiguous as it could be interpreted to require either independent evidence or evidence derived from the insured's testimony. In construing the ambiguity against the insurer, the Sixth District found that medical records and police reports derived from the insured's testimony fulfilled the "additional evidence" requirement. The Sixth District sua sponte certified a conflict between its decision and that of the Twelfth District in *Brown v. Philadelphia Indemn. Ins. Co.*, 12th Dist. Warren No. CA2010-10-094, 2011-Ohio-2217, wherein the court reviewed similar policy language and found that medical records and police reports did not fulfill the additional evidence requirement because they merely repackaged the insured's statements.

On review, the Supreme Court of Ohio found in favor of the Sixth District's interpretation. Notably, the Court stated this particular policy language was "more generous" than that required by its earlier decision in *Girgis v. State Farm Mut. Auto. Ins. Co.*, 75 Ohio St.3d 302, 662 N.E.2d 280 (1996), wherein the Court declared a physical contact requirement void as against public policy, and stated where an unidentified driver's negligence causes injury, the claim can go forward if there is independent third-party testimony that the negligence of an unidentified vehicle was a proximate cause of the accident. *Smith* at ¶16, *citing Girgis* at paragraph two of the syllabus.

In her dissent, Justice Kennedy, joined by Justice O'Donnell and Justice French, disagreed with the majority's conclusion that the policy was ambiguous. She reasoned, "because an insured's

testimony can never be 'independent corroborative evidence,' it is a truism that the insured's testimony repackaged in a police or medical record cannot be 'independent corroborative evidence.'" *Id.* at ¶32. The dissent determined that it was unreasonable to conclude that an insured's repackaged testimony is sufficient to satisfy the additional evidence requirement. *See id.* at ¶34.

A full copy of the Supreme Court of Ohio's opinion may be found at https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2016/2016-Ohio-7742.pdf.

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