Phantom Drivers – The Evidence Needed to Show One Caused Your Accident

BY STEVEN D. STRANG & QUINN M. SCHMIEGE

You are alone, driving down a four-lane road at night. Suddenly a maroon SUV heading in the opposite direction veers into your lane, coming at you head-on. You swerve, lose control of your vehicle and hit a tree. Your car is totaled, and you are hurt. The maroon SUV never stopped. When the police and EMT arrive, you report that you had no choice — you needed to swerve to avoid a head-on collision.

The police never find the maroon SUV. There are no marks on your car because the SUV never hit you, and there are no marks on the road. You assume that you are fully insured for the accident through the uninsured motorist (UM) coverage in your car insurance policy; after all, weren't you in an accident caused by another driver, so there is no other insurance available to pay for the damage?

You call your insurance agent and explain what happened, and there is a long, uncomfortable pause on the other end of the phone. She tells you that there may be a problem because your policy requires that there be "independent corroborative evidence" of another, "phantom" driver to recover UM benefits and there doesn't appear to be anything to support your story apart from your statements.

Luckily you are a lawyer, so you do some digging and find the Ohio Supreme Court's ruling in *Smith v. Erie Ins. Co.,* 148 Ohio St. 3d. 192, 2016-Ohio-7742, which suggests that your statements made after the accident may be enough.

In *Smith,* the plaintiff claimed he was driving his pickup truck south on Plasterbed Road in Ottawa County, Ohio, when a northbound vehicle crossed over the center-line, causing him to swerve off the road and into several small trees. Mr. Smith claimed that the vehicles did not hit each other and the other vehicle fled the scene. Immediately following the accident Mr. Smith called 9-1-1 and reported that a dark SUV caused the accident. An Ohio State Highway Patrol officer responded to the scene and took Mr. Smith's report, which noted that Mr. Smith "swerved to avoid an unknown northbound vehicle that was left of center." The officer's report relied exclusively upon Mr. Smith's statements along with pictures and a diagram, both created by the officer.

Mr. Smith went to the emergency room and later received physical therapy. Both the medical and therapy records noted that Mr. Smith said that his injuries were a result of an accident caused by another vehicle forcing him off the road.

There were no witnesses to the accident and the other driver was never identified. There was no physical evidence to support Mr. Smith's claim that another vehicle veered into his lane.

The Ohio Supreme Court noted that the policy language at issue mirrored the requirement in R.C. 3937.18(B), Ohio's UM statute, and found that the insured's testimony could be considered "independent corroborative evidence" if that testimony was supported by additional evidence.

Mr. Smith filed a claim with Erie Insurance Company for UM benefits and was denied coverage, so he filed a declaratory judgment action against the company. The policy stated, in pertinent part:

> "Uninsured motor vehicle" means "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 [the insured] seeking recovery does not constitute independent corroborative evidence, unless the testimony is supported by additional evidence.*

(Boldface sic; emphasis added).

The trial court granted summary judgment in Erie's favor, pointing to the policy language necessitating "independent corroborative evidence" separate from Mr. Smith's testimony that the unidentified driver caused the accident and finding that there was none.

The Sixth District Court of Appeals reversed, finding that the policy language could be interpreted two ways: one where the "additional evidence" would require independent, third party evidence not derived from the insured, or a second where the "additional evidence" could consist of evidence *based* on testimony of the insured. As the Sixth District believed it possible to interpret the policy language in more than one manner, it found it to be ambiguous and construed it liberally in favor of the insured. The Sixth District found that the decision conflicted with the Twelfth District's decision in *Brown v. Philadelphia Indemn. Ins. Co.,* 12th Dist. Warren No. CA2010-10-094, 2011-Ohio-2217, where the Twelfth District found that the evidence Brown presented in opposition to Philadelphia's summary judgment motion merely relied upon Brown's account of the incident and could not constitute additional evidence. The Sixth District sua sponte certified a conflict with *Brown.*

The question presented to the Ohio Supreme Court was whether (1) the policy language was ambiguous and the statements of the insured could serve as "independent corroborative evidence," or (2) clear that the "additional evidence" must be independent of, and not derived from, the insured's testimony. The Court agreed with the Sixth District and remanded the case to the trial court.

The Ohio Supreme Court noted that the policy language at issue mirrored the requirement in R.C. 3937.18(B), Ohio's UM statute, and found that the insured's testimony could be considered

"independent corroborative evidence" if that testimony was supported by additional evidence. The Ohio Supreme Court clarified that the policy does not say "additional testimony" or "independent third-party testimony."

In describing possible sources of additional corroborative evidence, the Ohio Supreme Court listed: "[A] police report that describes a straight, dry roadway and that references no impairment of the driver and no finding of excessive speed could provide additional evidence that supports the insured's testimony. A transcript of the insured's conversation with 9-1-1 operator immediately following the accident — when the insured was in peril — could provide additional evidence supporting the insured's testimony. Statements made to a police officer — for which an insured could face criminal liability if they were knowingly false, *see* R.C. 2917.32(A)(3) and (C) — could constitute evidence that supports the testimony of the insured."

Justices Kennedy, O'Donnell and French dissented. Justice Kennedy interpreted the contract language "[T]estimony of [the insured] seeking recovery does not constitute independent corroborative evidence, unless the testimony is supported by additional evidence" to mean that the insured's testimony could not by itself constitute independent corroborative evidence. As such, Justice Kennedy wrote that the insured's testimony "repackaged" in some other form like a medical or police report could not be "independent corroborative evidence."

So what does this mean for your accident?

It sounds like your statements made to the police right after the accident would be sufficient to constitute independent corroborative evidence assuming your policy language is similar. But every case may not be as clear-cut. What if the insured cites statements made several weeks after the accident? In other words, is there a temporal requirement to statements corroborating a phantom driver? The *Smith* decision suggests that there may be — the Supreme Court specifically states that a "transcript of an insured's conversation with a 9-1-1 operator immediately following the accident — when the insured was in peril," may suffice. That the decision specifically notes the statement was "immediately" after the accident and that the insured was "in peril" suggests that corroborating statements by the insured may have a similar trustworthiness weight as Ohio Evid. R. 803(1), the present sense impression exception to the hearsay rule, which gives credence to a description of an event "made while the declarant was perceiving the event or condition, or immediately thereafter," or Ohio Evid. R. 803(2), the excited utterance exception to the hearsay exclusion, which allows statements "made while the declarant was under the stress of excitement caused by the event or condition."

The *Smith* decision provides some clarity as to what an insured needs to provide "independent corroborative evidence" of a phantom driver. The decision is still new, so there is little case law providing further clarification — we expect that case law will continue to refine the ruling.

Steven Strang is the Insurance Practice Group Manager and a Partner at Gallagher Sharp. Steven is a Certified Insurance Coverage Law Specialist by the Ohio State Bar Association. He has been a CMBA member since 2008. He can be reached at SStrang@GallagherSharp.com.

Quinn Schmiege is an Associate in Gallagher Sharp's Columbus Office. Quinn focuses her practice on general litigation, business, and insurance defense and coverage claims. She can be reached at QSchmiege@GallagherSharp.com.