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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

Court of Appeals No. 65569-8
Skagit Superior Court No. 09-2-02051-8

Michael and Brenda OSBORNE
Plaintiffs/Appellees,

v.

FARMERS INSURANCE COMPANY
Defendant/Appellant.

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BRIEF OF APPELLANTS

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ORIGINAL

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 - m. **State v. Briscoeray** 95. Wn. App. 167, 974 P.2d 912 (Div.I, 1999); pp. 11, 12.
 - n. **State v. Griffith**, 45 Wn. App. 728, 727 P.2d 247 (1986). p.12
2. **Statutes & Rules**
 - a. **RCW 48.22.030**; p. 7.
 - b. **CR 56(c)**; p. 8.

I.
INTRODUCTION

This is a claim for Underinsured Motorist (UIM) benefits to compensate for a motor vehicle accident. Appellants Michael and Brenda Osborne come forward to argue whether the record contains sufficient evidence to corroborate the presence of an unknown or “phantom vehicle” at the scene of the accident.

II.
ASSIGNMENT OF ERROR

Mr. and Mrs. Osborne assign error to the granting of Summary Judgment dismissing their claim for lack of corroborating evidence; and to the partial grant of Farmers Insurance Company’s motion to strike certain portions of their evidentiary submissions.

III.
ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Whether circumstantial evidence raises a material issue of fact about the existence of a Phantom Vehicle.
2. Whether excited utterances raise a material issue of fact about the existence of a phantom vehicle.

III.
STATEMENT OF THE CASE

On April 16, 2010, Plaintiffs were taking a pleasure drive around Lake Cavanaugh near Mount Vernon, WA. Mr. Osborne was wearing a neck brace to recover from a previous injury. (CP 104) They expected

to return to Sedro Woolley later on and retrieve their daughter from school. (CP 104)

Approaching the bottom of a long curving hill, (CP 107; CP 115) they left the road suddenly and crashed into a tree. Both were injured. Skagit County Sheriff's Deputy Brian Morgan came upon them soon afterward. They said they had been run off the road by another vehicle which could still be in the area. (CP 46) Deputy Morgan declined to give chase and instead transported them home. He drew a sketch of the scene some days later which posited that they left the road because they simply failed to negotiate a turn. (CP 45-46)

The Osbornes later returned to the scene with a friend named Hugo Valencia. (CP 103; CP 156) With his help, they managed to extricate their immobilized car from the accident site. They presented claim to Farmers under the Uninsured/Underinsured (UIM) portion of their automobile insurance policy. Farmers denied the claim for lack of corroborating evidence and brought a motion for summary judgment on that basis in defense to Osborne's suit for coverage. In response, Plaintiff's set forth this additional evidence:

- a. they were driving on a semi-primitive road; (CP 102)
- b. approaching the scene of the accident, they slowed in response to a caution sign; (CP 103)
- c. they made a sudden, sharp right turn and left the road near a stand of trees: (CP 103)

- d. they crossed into the trees through an opening about two car lengths in width; (CP 107; CP 116)
- e. they travelled up over a mound and crashed into a tree head on; (CP 103)
- f. the collision left a mark visible from the road; (CP)
- g. the trees in the stand block the flank approach to the point of collision; (CP 103; CP 117)
- h. there is no evidence of tree scraping or brush damage on either side of the vehicle; (CP 125; CP 126; CP 127; CP 129; CP 130; CP 131; CP 132)
- i. the collision deployed the Osborne's airbags; (CP104; CP 133)
- j. the caution sign warned of water over the roadway; (CP 106; CP 112)
- k. there was water over the roadway, covering what would have been the opposite lane of approach to the point where the Osbornes left the road. (CP 102; CP 103)

IV. SUMMARY OF ARGUMENT

The presence of a phantom vehicle is corroborated by competent evidence and testimony other than that of the Osbornes. Summary judgment cannot be had without granting inferences requested by Farmers Insurance.

Plaintiffs' statements should also be taken as "excited utterances" for the purpose of considering this motion. Conclusory testimony by an investigating officer should not be substituted for that of the finder of fact.

V. ARGUMENT

1. **Whether circumstantial evidence raises a material issue of fact about the existence of a Phantom Vehicle.**

The central dispute is whether the Osbornes were forced off the road or simply drifted off into the woods and crashed. If the former, Appellants' have no claim; if the latter, Farmers is liable for compensation.

Farmers' authority to deny UIM coverage when no third party has been apprehended is provided by **RCW 48.22.030 (8)**:

"For the purposes of this chapter, a "phantom vehicle" shall mean a motor vehicle which caused bodily injury, death, or property damage to an insured and has no physical contact with the insured or the vehicle which the insured is occupying at the time of the accident if:

- (a) The facts of the accident can be corroborated by competent evidence other than the testimony of the insured or any person having an underinsured motorist claim resulting from the accident; and
- (b) The accident has been reported to the appropriate law enforcement agency within seventy-two hours of the accident."

“Corroborating evidence” means evidence that tends to strengthen or confirm the testimony of the insured and comes from a source which does not stand to benefit from proof of a phantom vehicle. **Gerken v. Mutual of Enumclaw Ins. Co.**, 74 Wn. App. 220 (Div. III, 1994). Corroboration “is something which leads and impartial and reasonable mind to believe that material testimony is true, testimony of some substantial fact or circumstance independent of a statement of a witness.” **Id.** citing **Farmers Insurance Exch. v. Colton**, 264 Or. 210,217, 504 P.2d 1041,1045 (1972). Corroborating evidence “must tend to verify the claimant’s version of the facts.” **Id.** Our courts liberally construe the UIM statute to meet the legislative goal, i.e., to provide broad protection against financially irresponsible motorists. **Nationwide Insurance v. Williams**, 71 Wn. App. 336,858 P. 2d 516, (Div.II, 1993).

An appellate court reviews a summary judgment order *de novo*, performing the same inquiry as the trial court. **Kruse v. Hemp**, 121 Wn.2d 715, 853 P.2d 1373 (1993). An interpretation of a statute rendered under summary judgment is reviewed *de novo*. **City of Pasco v. Pub. Employment Relations Comm'n**, 119 Wn.2d 504 , 507, 833 P.2d 381 (1992). A trial court's redaction of evidence in an affidavit supporting or opposing a motion for summary judgment is subject to *de novo* appellate review. **Folsom v. Burger King**, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

A moving party is entitled to summary judgment when there is no genuine issue as to any material fact, as demonstrated by the pleadings, affidavits, depositions, and admissions on file. **CR 56(c)**. The party seeking a summary judgment must therefore demonstrate, by uncontroverted facts, that no genuine issue of material fact exists.

Jacobsen v. State 84 Wn. 2d 104, 569 P. 2d 1152 (1977). If the moving party does not sustain that burden, summary judgment should not be entered, irrespective of whether the nonmoving party has submitted affidavits or other materials. **Preston v. Duncan** 55 Wn. 2d 678, 681, 349 P.2d 605. (1960) A summary judgment should be granted only if, after considering the material evidence and all reasonable inferences therefrom most favorably for the nonmoving party, the court concludes that reasonable people would reach only one conclusion from the evidence. **Jacobsen v. State**, supra. A trial is absolutely necessary if there is a genuine issue as to any material fact. **LaPlante v. State**, 85 Wn.2d 154, 158, 531 P.2d 299 (1975); **Morris v. McNicol**, 83 Wn.2d 491, 519 P.2d 7 (1974); **Preston v. Duncan**, supra, at 55 Wn.2d 681.

A court reviewing a summary judgment considers the facts and reasonable inferences therefrom most favorably toward the nonmoving party. **Stevens v. Centralia** 86 Wn. App. 145, 936 P.2d 1141 (Div. II, 1997). Conversely, reasonable inferences from the evidence are resolved against the moving party. **Folsom v. Burger King**, supra, at 135 Wn.2d 663. The reviewing court may not weigh credibility; rather,

all questions of credibility should be resolved in favor of the non-moving party. **Berry v. Crown Cork & Seal** 103 Wn. App. 312 (Div. I, 2000).

Applying those rules to the present case, Appellants begin by noting that Lake Cavanaugh Road comes out of a curve and then runs parallel to the two trees mentioned above. The Osbornes struck a third tree which forms a triangle with the other two. Hugo Valencia saw their tire tracks and said they left the road at a “sharp” angle. The photos depict heavy damage to the front of their vehicle, but none on either side. It’s therefore reasonable to infer then that Appellants made a hard right swerve off the road and entered the woods on forward momentum, rather than on a sideways skid.

Plaintiffs saw a caution sign warning of water over the roadway placed close to the accident scene. Cavanaugh Road was somewhat primitive and narrow. Brenda Osborne was carrying her injured husband. It’s reasonable to infer that she slowed her vehicle before turning off the road.

The damage to the vehicle and its resting place over a mound affords reasonable inference that the Osbornes had a heavy crash. It’s therefore reasonably follows that, after slowing down for the caution sign, Mrs. Osborne pushed on the accelerator to create the speed which generated a heavy impact.

Finally, the photos and testimony show us that vehicles approaching from the opposite direction descend a curving hill in a wooded area which flattens out near the accident site. At the bottom of this hill the right side of the road was underwater at the time in question.

Taken together, competent evidence other than the Osborne's direct testimony may be presented to a jury that shows:

1. the Osbornes were travelling on a country road;
2. they slowed as approached the bottom of a hill; where
3. oncoming vehicles descending the hill would have been out of site; and
4. these oncoming vehicles were pushed to the left by a natural obstruction;
5. Plaintiffs veered right dramatically, and
6. accelerated out of their lane of travel, plunging into the woods.

Reasonable persons could find that Brenda Osborne made the turn as a defensive maneuver to avoid a head on collision. The circumstantial evidence is substantial, as our cases require. Summary judgment is therefore precluded on this basis.

2. Whether excited utterances raise a material issue of fact about the existence of a phantom vehicle.

Appellants contend that their out of court statement to Deputy Morgan should be considered as well. Evidence of an insured's own out-

of-court, unsworn “excited utterances” can be used to corroborate the existence of a phantom vehicle. **Nationwide Insurance v. Williams**, supra. Hearsay qualifies as an excited utterance if the statement was made while the declarant was under the stress of excitement caused by a startling event or condition and the statement relates to the event or condition. **State v. Briscoeray** 95. Wn. App. 167, 974 P.2d 912 (Div.I, 1999).

In determining spontaneity, courts consider the time interval between the startling event and the statement and any other evidence showing an opportunity for the declarant to fabricate a story. **Id.** If a “calm period” has intervened, the declarant must be subjected to a stress that triggers an association with the original traumatic event sufficient to recreate the stress of the original trauma, thus causing a spontaneous exclamation. **State v. Owens**. The critical issue is whether the declarant was still under the influence of the startling event or condition to the extent that the statement could not have been the result of fabrication, intervening actions, or the exercise of choice or judgment. **Id.** An excited utterance can be prompted by a question which itself follows an exciting event, such as asking a crime victim what happened. **State v. Griffith**, 45 Wn. App. 728, 737, 727 P.2d 247 (1986).

In **Nationwide Insurance v. Williams**, plaintiff was injured in a hit and run accident. He hadn’t received medical treatment and was suffering from his injuries when he told the first person on the scene that

he had been in an accident caused by a phantom vehicle. Williams was permitted to offer the witnesses' statement to corroborate his UIM claim.

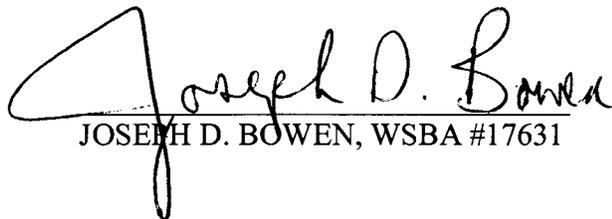
Similarly, the Osbornes were injured and had not received medical attention when Deputy Morgan appeared and received their statement. Michael Osborne was afraid that he had reinjured his previously fractured neck. Plaintiff's car was struck against a tree, its front bumper almost wrapped around the trunk. They believed the perpetrator was still in reach. They had left their vehicle to escape the airbags and look for help. In response to the Deputy's query, they said they had been run off the road. These were responses of crime victims, still under the stress and influence of the event. The statements may therefore be considered an excited utterance and admitted as corroborating evidence.

IV.

CONCLUSION

The circumstantial evidence presented raises a material issue of fact as to whether Appellants suffered injuries at the hands of a phantom driver. Their statements at the scene provide further corroborating evidence. Summary Judgment should therefore be denied.

DATED this 28th day of September, 2010.


JOSEPH D. BOWEN, WSBA #17631

PROOF OF SERVICE

I certify that on the 29th day of September, 2010, I mailed a true and correct copy of this document to be served on the following person(s):

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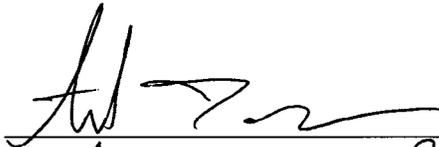
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