IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MICHAEL and BRENDA OSBORNE, individually and as a marital community,	)	NO. 65569-8-I
	)	DIVISION ONE
Appellants,	)	
v.	)	
FARMERS INSURANCE COMPANY OF WASHINGTON, a domestic insurer,	)	UNPUBLISHED OPINION
	)	FILED: August 15, 2011
Respondent.	)	

Lau, J. — Michael and Brenda Osborne were involved in a car accident on April 16, 2009, which they allege occurred when a vehicle forced them off the road. Farmer's denied their subsequent underinsured motorist (UIM) claim on the ground that there was no independent evidence corroborating this "phantom vehicle" as required by the insurance policy and RCW 48.22.030(8). The Osbornes filed a complaint, alleging breach of contract. On appeal, the Osbornes argue that the trial court erred in refusing to consider their statements to the police officer at the scene of the accident as excited utterances and in granting Farmer's motion for summary judgment. Because the

Osbornes cite to no admissible evidence corroborating their phantom vehicle claim and because their statements are inadmissible hearsay and inadmissible as corroborative evidence, we affirm.

FACTS

On April 21, 2009, Michael Osborne and his wife, Brenda Osborne,[1] reported to Farmers that they had been involved in a motor vehicle accident on April 16, 2009. Michael Osborne had a Farmers' personal auto policy that provided UIM coverage. Both of the Osbornes claimed to have been injured in the April 16 accident, and each submitted a UIM claim under the policy.

According to the recorded statements to Farmers' adjusters, the accident occurred while Brenda was driving her Farmers' insured Subaru. The Osbornes claimed the accident occurred when another vehicle came toward their Subaru, at least partially on the Osbornes' side of the road and that Brenda swerved off the road to avoid colliding with this other vehicle. Both of the Osbornes stated that there was no physical contact between the Osborne vehicle and the alleged second vehicle. Neither of the Osbornes submitted or identified any physical evidence to support their assertion that another vehicle was involved in the accident. In addition, neither of the Osbornes identified any independent witness to the accident.

Deputy Brian Morgan of the Skagit County Sheriff's Department was on routine patrol when he saw the accident scene. Brenda told him that a second vehicle had

[1] For clarity, we refer to each of the Osbornes by their first names.

been involved in the accident, but he did not see any physical evidence of a second vehicle. There were no skid marks or yaw marks, which are indicative of a sudden avoidance maneuver. Deputy Morgan saw no other vehicle near the scene. He testified that it was "certainly a good possibility" that the accident occurred when Brenda had simply continued driving straight ahead when the road curved. Deputy Morgan also stated that neither of the Osbornes had identified any witness to corroborate their claim that a second vehicle was involved. He noted that both of the Osbornes were very calm throughout his interaction with them.[2]

The policy provides that where the UIM insured alleges a second vehicle was involved in an accident but there was no physical contact between the insured vehicle and the alleged second vehicle, the "facts of the accident must also be verified by someone other than you or another person having an underinsured motorist claim from the same accident" in order for the insured to pursue a UIM bodily injury claim. The same requirement of independent corroboration is contained in the policy's UIM property damage coverage. Farmers denied their claim because the Osbornes had not provided any independent corroborating evidence of the accident.

On October 7, 2009, the Osbornes filed suit against Farmers. In their amended complaint, which pleaded a breach of contract cause of action, they alleged that they were both injured in the April 16, 2009 accident and asserted that an "unknown motorist who fled the scene without providing identification" was at fault for the accident. The

[2] Deputy Morgan also testified that Brenda had slurred speech and he thought she might have had a "diminished capacity." Brenda took a portable breath test (PBT) and "no alcohol was indicated on the PBT test."

Osbornes also alleged that they were entitled to UIM "bodily injury" and "property damage" benefits under the policy.

On April 19, 2010, Farmers moved for summary judgment, arguing that the absence of independent corroborating evidence of the phantom vehicle precluded the Osbornes, as a matter of law, from establishing breach of the insurance contract. The Osbornes opposed summary judgment, relying on (1) their own declarations; (2) a Spanish-language declaration from the Osbornes' neighbor, Hugo Valencia; and (3) a declaration of Jessica Arreguin, plaintiffs' counsel's legal assistant, purporting to be a translation of Valencia's Spanish language declaration. The Arreguin declaration was not a certified translation.[3] The declaration also contained hearsay statements regarding what the Osbornes had purportedly told Deputy Morgan.

Farmers moved to strike the Valencia declaration on the grounds of hearsay and because it contained expert testimony absent proper foundation. The trial court granted Farmers' motion striking the portions of Valencia's declaration recounting what the Osbornes had told him "as containing inadmissible hearsay," the court further struck "[a]ll testimony regarding what either of the Osbornes told Deputy Morgan regarding how the accident occurred . . . as inadmissible hearsay." Finally, the court struck one sentence[4] of Valencia's declaration as containing expert testimony that lacked foundation as to Valencia's expertise. The Osbornes do not assign error to this

[3] The Osbornes later submitted a certified translation of the Valencia declaration.

[4] "The tracks and markings showed that [Mrs. Osborne] did make a hard right turn off the road."

part of the ruling.

After a court ruling on May 17, 2010—"There isn't independent corroborating evidence of a phantom vehicle in this . . . circumstance"—an order was entered on June 10, 2010, granting Farmers' summary judgment motion dismissing all of the Osbornes' claims. RP (May 17, 2010) at 27. The Osbornes appeal.

ANALYSIS

The Osbornes argue that the trial court erred in refusing to consider their statements to Deputy Morgan at the scene of the accident as excited utterances and in granting Farmers' motion for summary judgment. We address the excited utterance question first.

Excited Utterances

The Osbornes concede that their statements to Deputy Morgan are hearsay since they were out of court statements offered for the truth of the matter asserted. ER 801(c). But the Osbornes contend that they fall under the hearsay exception for excited utterances. ER 803(a)(2). An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." ER 803(a)(2).

For a statement to qualify as an excited utterance, three conditions must be satisfied. First, a startling event or condition must have occurred. Second, the statement must have been made while the declarant was under stress of the excitement of the startling event or condition. Third, the statement must relate to the startling event or condition. State v. Chapin, 118 Wn.2d 681, 686, 826 P.2d 194 (1992). This court reviews evidentiary rulings made in

connection with a summary judgment ruling de novo. Ross v. Bennett, 148 Wn. App. 40, 45, 203 P.3d 383 (2008); Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

Here, the critical issue is whether the statement satisfies the second element, which requires the declarant to be under the stress of the excitement of the startling event when the statement is made. Thus, to be admissible, the Osbornes "must demonstrate . . . that [their] statement was a spontaneous or instinctive utterance of thought and not the product of premeditation, reflection, or design." Burmeister v. State Farm Ins. Co., 92 Wn. App. 359, 966 P.2d 921 (1998). The second element "constitutes the essence of the rule" and "the key to the second element is spontaneity." Chapin, 118 Wn.2d at 687-88. Evidence that the declarant has calmed down before making a statement tends to negate a finding of spontaneity. State v. Ramires, 109 Wn. App. 749, 37 P.3d 343 (2002). A declarant's own statement is insufficient to establish the elements of the exited utterance exception. See Burmeister, 92 Wn. App. at 371. Here, Deputy Morgan testified in his deposition that he happened to be driving by the scene of the accident but that neither Osborne flagged him down as he approached the scene. He testified, "[T]hey were just sort of standing there calmly." He described his arrival at the scene, stating:

> They sort—I think I was expecting them to maybe wave me down or—I remember almost having the impression that this must have happened awhile ago because—are they are just here collecting their vehicle or whatever. So I was sort of surprised by their lack of more of a response, maybe. They were sort of standing there not really that excited about it.

When he stopped and spoke to the Osbornes about the accident, they were both calm. He even described Michael as "[v]ery

calm." And neither of the Osbornes indicated a need for, or requested, medical treatment. Rather, they asked that Deputy Morgan give them a ride to their home in Sedro-Woolley. In light of this testimony, the Osbornes cannot establish the second element of the excited utterance exception—that the declarant was under stress of the excitement of the startling event or condition. Accordingly, the trial court did not err in refusing to consider the Osbornes' hearsay statements at the accident scene.

Breach of Contract/Coverage

The Osbornes next argue that the trial court erred in dismissing their breach of contract claim on summary judgment because there were sufficient facts from which a jury could infer that a phantom vehicle caused the accident. Farmers counters that there is no independent evidence of a phantom vehicle and therefore, as a matter of law, there is no coverage under the insurance policy and RCW 48.22.030(8).

When reviewing a summary judgment order, we engage in the same inquiry as the trial court, viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party. Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). The nonmoving party may not rely on mere allegations, denials, opinions, or conclusory statements but must set forth specific admissible facts to show there is a genuine issue for trial. Int'l Ultimate Inc. v. St. Paul Fire & Marine Ins. Co., 122 Wn. App. 736, 744, 87 P.3d 774 (2004); CR 56(e). Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Jones, 146 Wn.2d at 300–01.

The policy's UIM coverage policy provided:

> This coverage applies to property damage arising from an accident with a hit-and-run or phantom vehicle which does not make physical contact with you or your insured car or your insured vehicle, provided that:
>
> a) The facts of the accident can be verified by someone other than you or another person having an underinsured motorist claim from the same accident, and
>
> b) you or someone on your behalf reports the accident to the police within seventy-two hours.

(Emphasis added.) The definition of "UIM" also provides, in part:

> When there is no physical contact, the facts of the accident must be reported to the police within 72 hours of the accident. The facts of the accident must also be verified by someone other than you or another person having an underinsured motorist claim from the same accident.

These provisions are consistent with RCW 48.22.030(8), which provides:

> (8) For the purposes of this chapter, a "phantom vehicle" shall mean a motor vehicle which causes 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 'must tend to verify the claimant's version of the facts;' it 'is something which leads an 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.'" Burmeister, 92 Wn. App. at 371 (internal quotation marks omitted) (quoting Gerken v. Mut. of Enumclaw Ins. Co., 74 Wn. App. 220, 225-26, 872 P.2d 1108 (1994))

Here, there is no corroborating evidence that a second vehicle was involved. Deputy Morgan saw no vehicles leaving the area as he approached. He saw no skid marks or yaw marks from any attempt by

Brenda to stop their car, or avoid a sudden obstacle, as it left the road. He thought that there was "certainly a good possibility" that "Ms. Osborne may have simply kept going straight when the road turned."

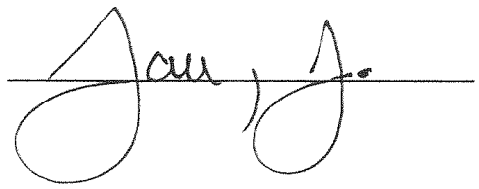
And the Osborne's have pointed to no other admissible evidence that would corroborate their claim that a phantom vehicle was involved. Instead, the Osborne's argue that Valencia saw their tire tracks and said they left the road at a "sharp" angle. But the trial court struck Valencia's declaration, stating, "The tracks and markings showed that [Mrs. Osborne] did make a hard right turn off the road" and the Osbornes do not assign error to that decision.[5] The Osbornes nevertheless contend that oncoming vehicles were out of site as they approached the accident site and would have been pushed into their lane of travel and that the Osbornes veered right dramatically[6] and accelerated out of their lane. But these contentions are unsupported by citations to the record. And our review of the record reveals no support for them. We therefore decline to consider them further. See Bohn v. Cody, 119 Wn.2d 357, 368, 832 P.2d 71 (1992) (appellate court will not consider inadequately briefed argument); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (argument unsupported by citation to the record or authority will not be

[5] In their reply brief, the Osbornes argue that the trial court erred in striking this portion of the Valencia declaration. But "[a]n issue raised and argued for the first time in a reply brief is too late to warrant consideration." Cowiche Canyon, 118 Wn.2d at 809.

[6] The Osbornes cite to Brenda's own declaration in support of this contention. But Brenda's declaration does not constitute independent corroborating evidence as required by the policy and RCW 48.22.030(8).

considered); RAP 10.3(a)(6).

Because the Osborne's have cited to no admissible corroborating evidence of their phantom vehicle allegations and because Deputy Morgan testified that he saw no evidence of such a vehicle, the trial court properly dismissed their claim on summary judgment. We affirm.



WE CONCUR: