

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

JANET BUTLER,

Plaintiff,

v.

Case No. 03-2415-JWL

**STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,**

Defendant.

MEMORANDUM AND ORDER

Plaintiff Janet Butler filed suit against defendant State Farm Mutual Automobile Insurance Company claiming that defendant breached its contract of insurance with plaintiff. This matter is presently before the court on plaintiff's motion for partial summary judgment as to liability (doc. #29) and defendant's motion for summary judgment (doc. #35). Both motions for summary judgment are denied. The court finds that issues of material fact remain regarding the alleged negligence of the driver of the phantom vehicle and the comparative negligence of plaintiff. Also, although the court finds that excited utterances testified to by a disinterested witness meet the evidentiary requirements of the Kansas uninsured motorist statute, the court is not prepared to rule on the admissibility of plaintiff's purported excited utterances without a *limine* hearing.

I. FACTS¹

The following facts are uncontroverted. On October 4, 2001 plaintiff, Janet Butler, formerly known as Janet Buck, was traveling eastbound on I-70. Plaintiff lost control of her vehicle as she steered to the right because a semi-truck passed her on her left causing a draft. The semi-truck's steering wheels were on the center line. There was no physical contact between plaintiff or her vehicle and the semi-truck, and the identity of the semi-truck driver or owner is unknown. Deputy Sheriff Barbara Smith, formerly known as Barbara Wheeler, arrived at the scene of the accident approximately five minutes after the accident was reported. Plaintiff explained how the accident happened to Deputy Smith.

On October 4, 2001, a contract of insurance between plaintiff and defendant existed. The insurance policy included coverage for bodily injuries arising out of an accident with an uninsured motor vehicle, which includes a "phantom" land motor vehicle. The parties have stipulated that a phantom land motor vehicle is a vehicle whose owner or driver remains unknown, that caused bodily injury to the insured, and that does not strike either the insured or the vehicle that the insured is occupying.

Plaintiff filed a claim for benefits because of the actions of an uninsured motorist that was denied by defendant. Plaintiff then filed her complaint in the current action.

¹Additional facts will be provided as they relate to specific issues.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if the moving party demonstrates that there is “no genuine issue as to any material fact” and that it is “entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). In applying this standard, the court views the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Spaulding v. United Transp. Union*, 279 F.3d 901, 904 (10th Cir. 2002). A fact is “material” if, under the applicable substantive law, it is “essential to the proper disposition of the claim.” *Wright ex rel. Trust Co. of Kansas v. Abbott Laboratories, Inc.*, 259 F.3d 1226, 1231-32 (10th Cir. 2001) (citing *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998)). An issue of fact is “genuine” if “there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way.” *Adler*, 144 F.3d at 670 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

The moving party bears the initial burden of demonstrating an absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *Spaulding*, 279 F.3d at 904 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)). In attempting to meet that standard, a movant that does not bear the ultimate burden of persuasion at trial need not negate the other party's claim; rather, the movant need simply point out to the court a lack of evidence for the other party on an essential element of that party's claim. *Adams v. American Guarantee & Liability Ins. Co.*, 233 F.3d 1242, 1246 (10th Cir. 2000) (citing *Adler*, 144 F.3d at 671).

Once the movant has met this initial burden, the burden shifts to the nonmoving party to “set forth specific facts showing that there is a genuine issue for trial.” *Spaulding*, 279 F.3d at

904 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)); *Anderson*, 477 U.S. at 256; *Celotex*, 477 U.S. at 324. The nonmoving party may not simply rest upon its pleadings to satisfy its burden. *Anderson*, 477 U.S. at 256; accord *Eck v. Parke, Davis & Co.*, 256 F.3d 1013, 1017 (10th Cir. 2001). Rather, the nonmoving party must “set forth specific facts that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant.” *Mitchell v. City of Moore, Oklahoma*, 218 F.3d 1190, 1197-98 (10th Cir. 2000) (quoting *Adler*, 144 F.3d at 671). To accomplish this, the facts “must be identified by reference to an affidavit, a deposition transcript or a specific exhibit incorporated therein.” *Adams*, 233 F.3d at 1246.

Finally, the court notes that summary judgment is not a “disfavored procedural shortcut;” rather, it is an important procedure “designed to secure the just, speedy and inexpensive determination of every action.” *Celotex*, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

III. ANALYSIS

Plaintiff seeks to recover under her insurance policy for an accident that she claims was caused solely by the negligence of the driver of a phantom vehicle with which she did not have physical contact. In their motions for summary judgment the parties dispute whether the driver of the phantom vehicle was negligent or if plaintiff was negligent; whether an excited utterance offered by a disinterested witness is sufficient evidence to keep plaintiff’s claim from falling within an exclusion allowed by the Kansas uninsured motorist statute; and whether the statements made to Deputy Smith are excited utterances.

The plaintiff’s State Farm policy provides, in relevant part:

We will pay damages for bodily injury an insured is legally entitled to collect from the owner of an uninsured motor vehicle....The facts of the accident must be proven by *reliable competent evidence from a disinterested witness* not making claim under this policy. (emphasis added)

This language is adopted from the “phantom vehicle” language contained in the Kansas uninsured motorist statute, which states that “an insurer may provide for the exclusion or limitation of coverage”:

when there is no evidence of physical contact with the uninsured motor vehicle and when there is not *reliable competent evidence* to prove the facts of the accident *from a disinterested witness* not making claim under the policy.

K.S.A. 40-284(e)(3) (emphasis added).

A. *NEGLIGENCE*

Plaintiff seeks to establish the liability for the negligence of the phantom motorist through her sworn declaration. She alleges that a semi-truck passed her in the left lane at excessive speed; that when the truck passed her, it was so close that she had to edge her vehicle to the right to avoid a collision; she felt the draft from the semi-truck pull the rear of her vehicle to the left; she lost control of her vehicle as the semi-truck passed on the left and as she tried to move her vehicle away from the dividing line; and that she lost control of her vehicle because of the proximity of the semi-truck, the draft it caused, and her attempt to avoid the collision.

Defendant does not dispute plaintiff’s allegations but instead argues that plaintiff has failed to prove that the driver of the phantom vehicle was negligent, and that plaintiff was

negligent in losing control of her vehicle, which would either diminish or bar her automobile negligence claim. Defendant also argues that the phantom vehicle exclusion to plaintiff's policy should be applied.

The court finds that summary judgment is not appropriate regarding the alleged negligence of the driver of the unidentified vehicle nor the alleged comparative negligence of plaintiff. Under Kansas law, "[g]enerally, drivers have a duty to operate their motor vehicles in the same manner as a prudent driver would do and whether they have done so is ordinarily a question of fact to be determined by the jury in light of all the evidence." *Hammig v. Ford*, 246 Kan. 70, 72 (1990)(quoting *Drennan v. Penn. Casualty Co.*, 162 Kan. 286, 288 (1947)). The absence or presence of negligence may be resolved on summary judgment when the facts present only one reasonable conclusion. *Lay v. Kansas Dep't of Transp.*, 23 Kan.App.2d 211, 215 (1996).

In this case there remain questions of material fact. A jury could find that the accident was not caused by the negligence of the driver of the unidentified vehicle when he or she passed the plaintiff. If it did so find, however, a reasonable jury also could find that plaintiff was negligent in losing control of her vehicle when passed by the semi-truck, and therefore a jury may limit or bar plaintiff's recovery.

B. RELIABLE COMPETENT EVIDENCE FROM A DISINTERESTED WITNESS

Plaintiff argues that the statements she made to Deputy Smith within five minutes of her accident being reported, which she argues are excited utterances, are "reliable competent evidence" from a disinterested witness. The court finds that excited utterances offered by

a disinterested witness would satisfy the evidentiary requirements of the Kansas uninsured motorist statute set out in K.S.A. 40-284(e)(3).

The court begins its analysis with an examination of the plain meaning of the language in K.S.A. 40-284(e)(3), and also considers the public policy behind uninsured motorist insurance as set out by the Kansas courts. *See Cannon v. Farmers Insurance Co*, 274 Kan. 166, 169-70 (2002) (examining the public policy behind the Kansas uninsured motorist statute while interpreting a permissible exclusion of mandatory uninsured motorist coverage); *GT, Kansas, L.L.C. v. Riley County Register of Deeds*, 271 Kan. 311, 316 (2001) (when construing a statute words are given their ordinary meaning). Both the plain meaning of the words in the statute and the public policy behind the statute support allowing excited utterances as competent reliable evidence from a disinterested witness. T h e

Kansas uninsured motorist statute calls for “reliable competent evidence to prove the facts of the accident from a disinterested witness not making claim under the policy”. K.S.A. 40-284(e)(3). The dictionary defines “evidence” as “something legally submitted to a competent tribunal as a means of ascertaining the truth of any alleged matter of fact under investigation before it.” Webster’s Third New International Dictionary 788 (1986). Black’s Law Dictionary defines “evidence” as “[a]ny series of proof, or probative matter, legally presented at the trial of an issue, by the act of the parties and through the medium of witnesses, records, documents, exhibits, concrete objects, etc., for the purpose of inducing belief in the minds of the court or jury as to their contention.” Black’s Law Dictionary 555 (6th ed. 1990).

An excited utterance, as defined by Federal Rule of Evidence 803(2), is admissible for the purpose of proving a matter in court and therefore is “evidence” as defined by the plain meaning of the word. If the Kansas legislature wanted independent proof, it could have written the uninsured motorist statute to exclude excited utterances. *See e.g. Scruggs v. State Farm Mutual Auto Ins. Co.*, 62 P.3d 989, 993 (Ariz. 2003) (Arizona uninsured motorist statute required in pertinent part that to establish coverage “the corroborating testimony, fact or evidence be ‘additional ... to the insured's representation of the accident.’” (quoting A.R.S. § 20-259.01(M))).

The public policy behind uninsured motorist coverage also supports an interpretation of the statute that allows the use of excited utterances. The purpose of uninsured motorist coverage is to fill the gap between compulsory insurance legislation mandated by the State of Kansas and motor vehicle financial responsibility. *Cannon*, 274 Kan. at 169. The statutory mandate is remedial in nature, and therefore, it is to be liberally construed to provide broad coverage:

The uninsured and underinsured motorist statutes are remedial in nature. They should be liberally construed to provide a broad protection to the insured against all damages resulting from bodily injuries sustained by the insured that are caused by an automobile accident and arise out of the ownership, maintenance, or use of the insured motor vehicle, where those damages are caused by the acts of an uninsured or underinsured motorist.

Id. at 169 (quoting *Rich v. Farm Bur. Mut. Ins. Co.*, 250 Kan. 209(1992)). Allowing the use of excited utterances is in accord with the legislative intent of providing broad coverage.

Also, “[t]he recognized purpose of uninsured motorist statutes allowing insurance companies to write exclusion for accidents where no physical contact occurs is the prevention of fraudulent claims.” *Clements v. U.S. Fid. and Guar. Co., Inc.*, 243 Kan. 124, 127 (1998).

Excited utterances have the indicia of reliability that serve the intent of preventing fraud.² The Supreme Court has elaborated as follows:

[t]he basis for the "excited utterance" exception ... is that such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation, and that therefore the circumstances surrounding the making of the statement provide sufficient assurance that the statement is trustworthy and that cross-examination would be superfluous.

Idaho v. Wright, 497 U.S. 805, 820 (1990); see, e.g., 6 Wigmore on Evidence, §§ 1745-1764 (Chadbourn rev. 1976); 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 803(2)[01] (1988); Advisory Committee's Note on Fed. Rule Evid. 803(2), 28 U.S.C.App., p. 778.

Here, Deputy Smith is a disinterested witness (unlike say plaintiff's spouse or dependent child, perhaps). See *Caboni v. General Motors Corp.*, 2000 U.S. Dist. WL 1449883, at *3 (E.D. La. Sept. 27, 2000) (finding that a disinterested witness need not be an eyewitness noting that in a criminal case where the burden of proof is beyond a reasonable doubt circumstantial evidence can be the grounds for conviction); *Mesa-Toney v. Mazda*

² While *Nationwide Insurance v. Williams*, 858 P.2d 516 (Wash. App. 1993), cited by plaintiff, is not exactly on point, the court finds its discussion regarding the trustworthiness of excited utterances to be persuasive.

Motor of America., 1998 U.S. Dist. WL 812391 (E.D. La. Nov. 18, 1998)(same). She has not made a claim under plaintiff’s State Farm Insurance policy, is not related to plaintiff by blood or marriage, and has no pecuniary interest in the outcome of the case. By contrast, if plaintiff herself, or through her spouse or dependent child, tried to provide testimony of what plaintiff said immediately following the accident, that would not be “evidence from a disinterested witness.”

Deputy Smith is presenting evidence of the statements of plaintiff. If the statements are “excited utterances”, then, by definition they are reliable and competent. If the deputy purported to testify as to what plaintiff told her after the excitement wore off, then it would not be reliable or competent, and it also would not be “evidence.” It would be inadmissible hearsay.

Defendant argues that plaintiff’s excited utterances do not meet the evidentiary requirements of the Kansas uninsured motorist statute, citing *Al-Fatlawy v. Doe*, 2000 WL 325201 (Tenn. App. March 29, 2000) as support. The facts here, however, can be distinguished from those in *Al-Fatlawy*. In *Al-Fatlawy*, the plaintiff sought to prove his case by hearsay statements that did not come within an exception to the hearsay rule. Those statements, unlike excited utterances, did not have the circumstantial guarantees of trustworthiness.³

³ For the same reasons that the court is not persuaded by *Al-Fatlawy*, the court is not persuaded by *Clements v. United State Fidelity and Guaranty Co., Inc.*, 243 Kan. 124 (1988).

Here the prospect of the combination of evidence that has circumstantial guarantees of trustworthiness which is offered by a disinterested witness causes plaintiff's case to survive summary judgment. If the statements she made to Deputy Smith, as testified to by Deputy Smith, are excited utterances, then plaintiff has satisfied the statutory requirement.

C. ADMISSIBILITY OF DEPUTY SMITH'S TESTIMONY

Under Federal Rule of Evidence 803(2), the excited utterance exception, statements made outside of court are not hearsay when "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

There is no precise amount of time between the event and the statement beyond which the statement cannot qualify as an excited utterance. "[T]he standard of measurement is the duration of the state of excitement." Fed. R. Evid. 803(2) advisory committee's note. "[T]he character of the transaction or event will largely determine the significance of the time factor." *Id.* Thus, in deciding whether a statement qualifies as an excited utterance, the court may take into account the nature of the stressful event, the age of the declarant, and other factors indicating the declarant was still under the stress of the incident when he or she made the statement. *U.S. v. King*, 2000 WL 1028228, *4 (10th Cir. July 26, 2000)

Reversing the judgment on other grounds, the court in *Garcia v. Watkins*, 604 F.2d 1297 (10th Cir. 1979), where the declarant passenger's father was killed when their automobile went off the road, held that it was apparently error to exclude an "excited utterance" statement that the defendant had forced the automobile off the road on the basis of the passenger's age and the fact that there was a delay of more than one hour in making the

statement. The court reasoned that a lapse of time does not necessarily negate the existence of an emotional state. Moreover, the lower court had made a distinction between whether the emotional excitement was caused by the father's death or by the accident, but the appellate court reasoned that there was no such distinction under the facts. The court concluded that, these and other relevant factors were to be considered on retrial.

Here, plaintiff claims that her statements to Deputy Smith fall within the excited utterance hearsay exception. Plaintiff argues that she was involved in an accident, a startling event;⁴ that her statements to Deputy Smith were made within minutes of the accident, while she was still under the stress and excitement caused by the event as evidenced by shaking while she responded to Deputy Smith's question regarding the accident; and that the statement related to the accident.

The court agrees that plaintiff's statements to Deputy Smith could qualify as an excited utterance if her declaration describes events accurately. In *Garcia*, the court found that there could be an excited utterance where an hour had passed since the accident and the declarant was still under the stress and excitement of the accident. Here, plaintiff made her statement to Deputy Smith within five minutes of the accident, and there is evidence that she was still under the stress and excitement of the accident as seen in her physical act of shaking. Also, plaintiff's statements related to the cause of her excitement, the accident.

⁴ In her sworn declaration, plaintiff states that her vehicle stuck a concrete culvert and went airborne for 35-40 feet before landing, and that the vehicle then slid another 150 feet before striking a barbed wire fence and coming to a stop. When the vehicle came to a stop, the doors on the vehicle were jammed and plaintiff was trapped inside her vehicle.

The court, however, takes note that the affidavit of Deputy Smith does not indicate whether or not plaintiff was under the stress and excitement of the accident at the time plaintiff made her statements. The court is not prepared to rule on the admissibility of those statements on the present record. For this reason, the court will conduct a *limine* hearing before determining whether or not plaintiff's statements to Deputy Smith qualify as excited utterances.

The court, however, rejects plaintiff's argument that Deputy Smith's testimony falls within the residual exception to the hearsay rule set out in Federal Rule of Evidence 807.

Rule 807 states that:

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Plaintiff argues that there are circumstantial guarantees of trustworthiness because Deputy Smith remembered what plaintiff told her, and because Deputy Smith is a law enforcement officer sworn to uphold the laws of the state. That, alone, is not enough to bring otherwise inadmissible statements within the residual exception.

"It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances." S. Rep. No. 93-1277, at 36 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7066. Accordingly, the party offering the

evidence bears a heavy burden of presenting the trial court with sufficient indicia of trustworthiness. *U.S. v. Trujillo*, 136 F.3d 1388, 1395-96 (10th Cir. 1998). A suggestion of trustworthiness cannot suffice. *U.S. v. Harrison*, 296 F.3d 994, 1006 (10th Cir. 2002).

Here, plaintiff effectively argues why the court should consider Deputy Smith a trustworthy witness, but plaintiff fails to argue why plaintiff's statements have the circumstantial guarantees of trustworthiness outside of the arguments she made for their admission as an excited utterance under Rule 803(2). It would do the court little good for Deputy Smith to accurately repeat statements that themselves were untrue.

Also, plaintiff argues that the statements to Deputy Smith were made immediately following the accident, and while plaintiff was still under the stress and excitement from the accident. If this is in fact true, plaintiff's statements will qualify as an excited utterance under Rule 803(2), but if plaintiff's allegations are not true she offers no alternative basis for circumstantial guarantees of trustworthiness.

For the above reasons, the court finds that plaintiff's statements to Deputy Smith are possibly admissible as excited utterances, but that they are not admissible under Rule 807. If she is to pass the "reliable competent evidence for a disinterested witness" test, it will have to be upon a finding of admissibility under Federal Rule of Evidence 803(2).

IV. CONCLUSION

The court denies both parties' motions for summary judgment. The court finds that issues of material fact remain regarding the alleged negligence of the driver of the phantom

vehicle and the comparative negligence of plaintiff. Also, the court finds that while excited utterances offered by a disinterested witness would meet the evidentiary requirements of the Kansas uninsured motorist statute so that plaintiff's claim would not come within an exclusion, the court is not prepared to rule on the admissibility of plaintiff's statements to Deputy Smith without a *limine* hearing.

IT IS THEREFORE ORDERED BY THE COURT THAT plaintiff's motion for partial summary judgement as to liability (doc. #29) and defendant's motion for summary judgement (doc. #35) are denied.

IT IS FURTHER ORDERED that a *limine* hearing is scheduled for Friday, November 12, 2004 at 1:30 P.M.; trial to the jury is hereby set to commence on Tuesday, November 16, 2004, at 10:30 A.M.

IT IS SO ORDERED this 29th day of September, 2004.

s/ John W. Lungstrum
John W. Lungstrum
United States District Judge