

NOTICE  
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2016 IL App (5th) 140364-U

NOTICE  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

NO. 5-14-0364

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

PROGRESSIVE NORTHERN INSURANCE	)	Appeal from the
COMPANY,	)	Circuit Court of
	)	St. Clair County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 13-MR-385
	)	
JOSEPH SINOVIC and LINDSEY SINOVIC,	)	Honorable
	)	Richard A. Aguirre,
Defendants-Appellants.	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.  
Justices Chapman and Cates concurred in the judgment.

**ORDER**

¶ 1 *Held:* In a bench trial regarding defendants' claim for uninsured motorist insurance coverage for injuries allegedly sustained in a hit and run accident, declarant's out-of-court statements made shortly after the accident were admissible under the excited utterance exception to hearsay.

¶ 2 Defendants, Joseph Sinovic and Lindsey Sinovic, appeal from the trial court's ruling that defendants did not present sufficient evidence to establish there was contact between defendants' vehicle and an unidentified hit and run vehicle such that there was insurance coverage pursuant to the uninsured hit and run provision of defendants' automobile insurance policy. Defendants also contend the trial court erred in excluding

the testimony of a witness on the basis of hearsay, as it should have been admitted pursuant to the excited utterance exception to the hearsay rule. We reverse and remand.

¶ 3 BACKGROUND

¶ 4 On or about February 17, 2011, plaintiff, Progressive Northern Insurance Company, and defendant, Joseph Sinovic, entered into an automobile insurance contract, Illinois auto policy No. 11608799-1, effective from March 15, 2011, to September 15, 2011. A 2005 Ford Escape was maintained as a covered vehicle under the policy.

¶ 5 Defendant, Lindsey Sinovic, who is defendant Joseph Sinovic's daughter, was involved in an automobile accident while driving the 2005 Ford Escape eastbound on Interstate 70 in St. Louis, Missouri, on the afternoon of August 17, 2011. Defendants made a claim for uninsured motorist coverage under the policy for injuries sustained by Lindsey in the accident, which defendants alleged involved a hit and run motor vehicle.

¶ 6 The parties stipulated and agreed that the policy only provided uninsured motorist coverage to defendants if there was actual physical contact between the insured vehicle operated by Lindsey and the other vehicle. The parties further agreed that defendants bore the burden of establishing actual contact by a preponderance of the evidence.

¶ 7 After the trial court denied plaintiff's motion for summary judgment, the matter proceeded to a bench trial to determine whether there was actual physical contact between defendants' vehicle and the alleged hit and run vehicle to establish insurance coverage. The record before us indicates there are conflicting accounts as to whether Lindsey believed there was actual contact. Because this issue is not relevant for purposes of this appeal, it need not be addressed.

¶ 8 At trial, the defense called Lindsey as the only witness to the accident. Lindsey testified that prior to the accident, she was driving the 2005 Ford Escape in the middle-left lane of four eastbound lanes on Interstate 70 in St. Louis, Missouri. Lindsey indicated that she observed a dark green vehicle approximately one-half car length ahead of her in the lane to her right. She testified that the dark green vehicle began to "veer into [her] lane" and then her "wheel jerked and [her] car skidded [to the left]."

¶ 9 Lindsey testified that after her wheel jerked, her car skidded for approximately 75 to 100 yards. Lindsey stated her car "started to spin and hit the median on [her] passenger side, and then it flipped and landed on the driver's side." Lindsey further testified she did not purposefully drive her car into the lane that was to the left of her at any time around the time the accident occurred, and asserted the dark green vehicle did not stop at the scene of the accident. Lindsey also testified her car was in good working order, she had never had any issues with her vehicle's steering in the past, and she believed "the other car did hit [her]."

¶ 10 Lindsey then testified that after the accident, a woman named Sabrina approached her after finding her phone which was thrown from her car. Lindsey testified that Sabrina appeared worried and concerned about her and asked whom she needed to call. Lindsey testified she told Sabrina she wanted to call her mother, Kathy Sinovic, and Sabrina helped her do so.

¶ 11 Since defendants did not produce Sabrina as a witness, plaintiff's counsel objected to questions concerning Sabrina's out-of-court statements based on hearsay. However, the trial court permitted Lindsey to testify regarding Sabrina's alleged initial

statements subject to the objection to determine whether the excited utterance exception to hearsay was satisfied. After Lindsey testified that Sabrina asked her whom she needed to call, the court sustained plaintiff counsel's hearsay objection as to any further out-of-court statements made by Sabrina, noting it was "past any excited utterance here."

¶ 12 Lindsey's mother, Kathy Sinovic, was the only other witness defendants called at trial. Kathy testified that she spoke to Lindsey after the accident while Lindsey was in the ambulance, and described Lindsey as upset and incoherent. Kathy further testified that Lindsey told her she had felt something hit her car, and there "was a car that had cut her off." Plaintiff's counsel objected to Kathy Sinovic's testimony regarding the out-of-court statements made to her over the phone by Sabrina, who was not procured as a witness at trial. Defendants argued Kathy Sinovic's testimony concerning Sabrina's statements were admissible under the excited utterance exception to hearsay.

¶ 13 The trial court determined defendants did not meet their burden of establishing Sabrina was still under excitement at the time any statements were made to Kathy Sinovic or that the statements were sufficiently sudden to be admissible under the excited utterance exception to hearsay. The trial court did not allow testimony from Kathy concerning her conversation with Sabrina, and also found there was not sufficient evidence of contact between defendants' vehicle and the alleged hit and run vehicle such that defendants' insurance coverage applied.

¶ 14 A Rule 23 order was filed in this court on July 15, 2015. Subsequently, plaintiff filed a petition for rehearing. We now grant said petition, withdraw the prior order, and file this order in its stead.

¶ 15

## ANALYSIS

¶ 16 Defendants raise two issues on appeal. First, defendants allege the trial court's finding that there was no contact between defendants' vehicle and the unidentified hit and run vehicle was against the manifest weight of the evidence, as Lindsey had proven such contact by a preponderance of the evidence. Because we remand this cause to the trial court for the reason that follows, we need not address this issue.

¶ 17 Defendants next allege the trial court erred when it excluded from evidence testimony of Lindsey's mother, Kathy Sinovic, concerning alleged out-of-court statements made by Sabrina to Kathy Sinovic over the phone soon after the accident. Defendants contend such statements should have been permitted under the excited utterance exception to hearsay. For the following reasons, we agree with defendants and reverse the trial court's finding that Kathy Sinovic's testimony was not admissible under the excited utterance exception to hearsay. We further find that Lindsey's testimony regarding Sabrina's out-of-court statements is admissible under the excited utterance exception to hearsay.

¶ 18 Evidentiary rulings are within the sound discretion of the trial court and will not be reversed unless the trial court has abused that discretion. *People v. Caffey*, 205 Ill. 2d 52, 89, 792 N.E.2d 1163, 1188 (2001). An abuse of discretion will be found only where the trial court's ruling is arbitrary or fanciful, or where no reasonable person would take the view adopted by the trial court. *Caffey*, 205 Ill. 2d at 89, 792 N.E.2d at 1188.

¶ 19 An excited utterance is a "[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," and is not excluded by the rule against hearsay. Ill. R. Evid. 803(2) (eff. Jan. 1, 2011). Our supreme court has explained the standards regarding the admissibility of hearsay under the excited utterance exception as follows:

"For a hearsay statement to be admissible under the spontaneous declaration exception, (1) there must be an occurrence sufficiently startling to produce a spontaneous and unreflecting statement, (2) there must be an absence of time for the declarant to fabricate the statement, and (3) the statement must relate to the circumstances of the occurrence." *People v. Williams*, 193 Ill. 2d 306, 352, 739 N.E.2d 455, 479 (2000).

¶ 20 In determining whether a statement is admissible under the excited utterance exception, courts employ a totality of circumstances analysis. *Williams*, 193 Ill. 2d at 352, 739 N.E.2d at 479. "This analysis involves the consideration of several factors, including time, 'the nature of the event, the mental and physical condition of the declarant, and the presence or absence of self-interest.' " *Williams*, 193 Ill. 2d at 352, 739 N.E.2d at 479 (quoting *People v. House*, 141 Ill. 2d 323, 382, 566 N.E.2d 259, 285 (1990)).

¶ 21 In the instant case, Lindsey testified that Sabrina, the unavailable witness, approached her soon after the accident after finding her phone, which had been thrown from her car. In relevant part, Lindsey testified as follows:

"Q. [By defendants' counsel:] How long after the accident and you getting out of the car did you speak to Sabrina?

A. Right away. She came up to me. She had found my phone which was thrown from my car. She found it on the side of the highway, and she came up to me and said-[.]"

¶ 22 Plaintiff's counsel objected to any out-of-court statements made by Sabrina on the basis of hearsay, and the court sustained plaintiff's objection. Lindsey then testified further regarding her encounter with Sabrina:

"Q. [By defendants' counsel:] Now then, Sabrina spoke to you, correct?

A. Yes.

Q. [By defendants' counsel:] How did she appear when she was speaking to you?

A. Concerned. She was worried about who I needed to call right away.

Q. [By defendants' counsel:] Did she help you call your mother?

A. Yes. She tried from my phone. At this time I don't remember if she did contact my mom from my phone, but I know it was pretty beat up, and so she started using her cell phone. And I don't know if she used my phone just to get my mom's phone number out of there or if she actually called my mom. I don't know at that point.

\* \* \*

Q. [By defendants' counsel:] The—this lady, did she appear nervous or anxious?

A. I guess—I guess like worried. She seemed like really worried.

Q. [By defendants' counsel:] Did she—what was the first thing she said to you when you saw her?"

¶ 23 Plaintiff's counsel then objected on the basis of hearsay, and the court allowed Lindsey to answer the question subject to the statement being an excited utterance exception to the hearsay rule:

"Q. [By defendants' counsel:] What did she say to you?

A. She said, who do you need to call right away, and I just remember saying my mom, my mom. And I—and I'm guessing she found my mom under 'Mom' in my phone.

Q. [By defendants' counsel:] Did she say anything to you about what she saw?"

¶ 24 Plaintiff's counsel again objected to this question on the basis of hearsay, and the court sustained the objection. Specifically, the court noted "we're past any excited utterance here." When defendants later called Lindsey's mother, Kathy Sinovic, as a witness, the court excluded from evidence Kathy's testimony concerning the out-of-court statements made by Sabrina to Kathy over the phone.

¶ 25 After careful review of the record, we find that Sabrina's statements satisfy the three prongs for what constitutes an excited utterance exception to the hearsay rule. First, Lindsey's accident was a sufficiently startling event. Lindsey testified Sabrina approached her after the accident "[r]ight away" and that Sabrina had found Lindsey's phone that was thrown from her vehicle. Thus, even if Sabrina did not witness the accident itself, she did witness the aftermath of the accident. Lindsey further testified



that Sabrina then assisted Lindsey in contacting her mother, and appeared worried and concerned about Lindsey. Given this testimony, we find Sabrina did not have time to reflect on her actions, as she was reacting to a traumatic set of circumstances. Thus, the first of three prongs for what constitutes an excited utterance has been satisfied.

¶ 26 We also find that Sabrina's statements satisfy the second and third prongs for what constitutes an excited utterance, as there was no time for Sabrina to fabricate her statements made to Lindsey and Kathy Sinovic and the statements related to the circumstances of Lindsey's accident. As noted above, Sabrina approached Lindsey after finding Lindsey's phone soon after the accident. Lindsey testified that Sabrina approached her after the accident "[r]ight away." Thereafter, Sabrina asked Lindsey who she needed to call, and subsequently helped Lindsey call her mother, Kathy Sinovic. Accordingly, Sabrina's statements satisfy the second and third prongs for what constitutes an excited utterance, and all three prongs have been satisfied.

¶ 27 The trial court concluded that Sabrina's statements to Kathy Sinovic did not meet the "sudden" requirement of the excited utterance exception to hearsay. Plaintiff asserts the trial court properly excluded Kathy Sinovic's testimony as hearsay. We disagree.

¶ 28 The period of time that may pass without affecting the admissibility of a statement varies greatly. *People v. Sutton*, 233 Ill. 2d 89, 107, 908 N.E.2d 50, 62 (2009). The critical inquiry with regard to time is " ' "whether the statement was made while the excitement of the event predominated." ' " *Sutton*, 233 Ill. 2d at 107, 908 N.E.2d at 62 (quoting *People v. Smith*, 152 Ill. 2d 229, 260, 604 N.E.2d 858, 871 (1992), quoting M.

Graham, Cleary & Graham's Handbook of Illinois Evidence, § 803.3, at 627 (5th ed. 1990)).

¶ 29 Here, Sabrina's statements to Kathy Sinovic were made soon after Lindsey's automobile accident occurred and concerned the accident itself. After considering the totality of the circumstances, we find the trial court abused its discretion in not admitting Kathy's testimony regarding Sabrina's out-of-court statements. Sabrina's statements were made in the excitement of the accident, and we conclude the nature of the event supports a finding that Sabrina's statements were admissible under the excited utterance exception to hearsay. Accordingly, we reverse the trial court's finding that Sabrina's statements were not admissible pursuant to the excited utterance exception to hearsay.

¶ 30 **CONCLUSION**

¶ 31 For the reasons stated herein, we reverse and remand this cause to the trial court with directions to admit Lindsey and Kathy Sinovic's statements regarding their conversations with Sabrina pursuant to the excited utterance exception to hearsay and conduct further proceedings in accordance with this order.

¶ 32 Reversed and remanded with directions.