

IN THE SUPREME COURT OF OHIO

WESTERN ROGERS,

- v -

CITY OF DAYTON, et al.,

07-0549

On Appeal From the Montgomery  
County Court of Appeals,  
Second Appellate District

Court of Appeals Case No. 21593

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MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT  
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

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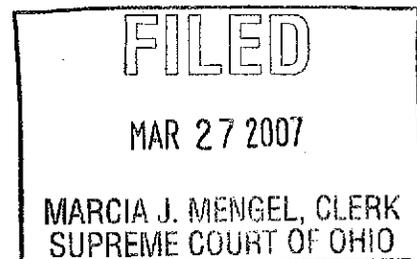


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**EXPLANATION OF WHY THIS CASE RAISES AN ISSUE OF  
PUBLIC OR GREAT GENERAL INTEREST**

Motor vehicle accidents occur every day. It would not be difficult to conceive that each day, at least one of those motor vehicle accidents involves the negligence of an employee of a municipality or a political subdivision. Pursuant to Ohio Revised Code §2744, political municipalities or political subdivisions are liable for the negligence of its employees unless the employee was on an emergency run, be it the police, fire department or emergency medical services.<sup>1</sup>

Pursuant to the aforementioned statute, municipalities and political subdivisions across the state have paid monetary damages for their liability subject to the limitations imposed by Ohio Revised Code §2744. Now, however, the City of Dayton has attempted to thwart the purpose of R.C. §2744 by claiming it is uninsured and not self-insured. The City of Dayton wants the victims of its negligence to seek compensation from their insurers through uninsured motorist coverage before it must spend one cent out of its coffers, which hold funds specifically earmarked for the negligence of its employees.

If the City of Dayton is permitted to flout Ohio law and consciously decide to be uninsured, then virtually every municipality and political subdivision in all 88 counties in the state of Ohio could follow suit, creating an explosion in uninsured motorist claims never before seen in this state. Not only would this result in the expected rise in premium rates, but it also could result in limiting the availability of uninsured motorist coverage to each citizen in the state of Ohio. Since the offering of uninsured motorist coverage is no longer mandatory,<sup>2</sup> insurers may have second thoughts about offering such coverage in Ohio after analyzing their exposure

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<sup>1</sup> Ohio Revised Code §2744.02(B).

<sup>2</sup> Ohio Revised Code §3937.18(A).

from the hundreds, if not thousands, of municipalities and political subdivisions throughout the state of Ohio for which they now must accept financial liability.

The majority opinion in the Second District Court of Appeals Decision in the instant case specifically disagreed with the prior holding of the First District Court of Appeals in Safe Auto Ins. Co. v. Corson (2004), 155 Ohio App. 3d 736, 2004-Ohio-249. Discretionary appeal not allowed by Safe Auto Ins. Co. v. Corson (2004), 102 Ohio St.3d 1483, 2004-Ohio-3069. Corson held that the City was liable because it had no immunity pursuant to O.R.C. §2744 and further, that it was self-insured in a practical sense and not uninsured or underinsured for the purpose of Ohio Uninsured Motorist Law. Id., at 741, ¶27. State Farm has filed a Motion to Certify a Conflict with the Second District Court of Appeals on February 23, 2007. To date, the Appellate Court has not rendered a Decision on that Motion.

In summary, the entire uninsured motorist landscape will once again undertake drastic change if the instant appellate decision is permitted to stand. As it also is in conflict with a previous First District Court of Appeals Decision, it is respectfully suggested this Court should accept this important case for review and eliminate any confusion which may exist by conflicting appellate decisions.<sup>3</sup>

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<sup>3</sup> A similar case between Appellant and Appellee currently is pending in the Second District Court of Appeals in the case of *Elaine Hunter v. City of Dayton* (Second District Court of Appeals Appellate Case No. 021680). Oral argument was held on March 16, 2007.

## STATEMENT OF FACTS AND STATEMENT OF THE CASE

Western Rogers brought suit against Appellee City of Dayton and Defendant Earl Moreo, III, on April 20, 2004, to recover for injuries Rogers sustained in an automobile accident that occurred on April 22, 2002. Defendant Moreo was a City of Dayton employee acting within the course and scope of his employment at the time of the accident. Rogers alleged Defendant Moreo was negligent and his negligence was the proximate cause of the accident and Rogers' resulting injuries. Rogers further alleged the City of Dayton was liable for Defendant Moreo's negligence.

On September 23, 2004, Rogers filed his First Amended Complaint, asserting an additional claim for UM/UIM coverage against Appellant State Farm Mutual Automobile Insurance Company ("State Farm"), which insured Western Rogers at the time of the accident.

It was stipulated between Appellant and Appellee that the City of Dayton does not maintain a policy of liability insurance with an insurance company. Instead, the City of Dayton maintains a self-insurance program pursuant to O.R.C. §2744.08(A) and Dayton Municipal Code Sections 36.203 and 36.204. The City of Dayton stipulated it annually appropriates unencumbered funds for payment of claims and judgments against the City arising out of the negligence of its employees.

Appellant argued the City of Dayton was self-insured within the meaning of the financial responsibility law of the state of Ohio. Further, if not self-insured within the meaning of the financial responsibility law of the state of Ohio, it was self-insured in the practical sense. Further, it argued public policy dictated that municipalities pay the damages for which it is liable and that policy is borne out by the legislative history regarding the Uninsured Motorist Statute.

The City of Dayton and State Farm filed Cross-Motions for Summary Judgment and on May 18, 2005, the Trial Court granted the Appellant's Motion for Summary Judgment and held that the City was uninsured because it owned no policies of liability insurance and did not procure a Certificate of Self-Insurance documenting that it was self-insured pursuant to Ohio Revised Code §4509.72.

The Second District Court of Appeals issued its Opinion and Final Entry in favor of the City of Dayton on February 16, 2007.

It is from the above Decision that State Farm now brings this appeal.

**ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

**PROPOSITION OF LAW NO. 1:**

**A MUNICIPALITY OR POLITICAL SUBDIVISION THAT CHOOSES TO BE SELF-INSURED FOR THE LIABILITY OF ITS EMPLOYEES IS ALSO SELF-INSURED WITHIN THE MEANING OF THE FINANCIAL RESPONSIBILITY LAW OF THE STATE OF OHIO AND THEREFORE NOT UNINSURED PURSUANT TO O.R.C. §3937.18.**

The version of Ohio's Uninsured Motorist Statute which has been discussed in the lower court is the Senate Bill 267 version of §3937.18(K), which provides as follows:

(K) As used in this section, 'uninsured motor vehicle' and 'underinsured motor vehicle' do not include any of the following motor vehicles:

- (1) \* \* \*
- (2) A motor vehicle owned by a political subdivision, unless the operator of the motor vehicle has an immunity under Chapter 2744. of the Revised Code that could be raised as a defense in an action brought against the operator by the insured.
- (3) A motor vehicle self-insured within the meaning of the financial responsibility law of the state in which the motor vehicle is registered.

The City of Dayton has argued that it is not self-insured because it has not complied with Ohio's Financial Responsibility Act, §4509.72. Specifically, §4509.72(A) states as follows:

Any person in whose name more than twenty-five motor vehicles are registered in this state may qualify as a self-insurer by obtaining a certificate of self-insurance issued by the registrar of motor vehicles as provided in division (B) of this section.

The lower court, as well as the City of Dayton, concluded the City was not self-insured within the meaning of the financial responsibility law of Ohio because it did not have a piece of paper from the Registrar's Office. Neither the City of Dayton nor the lower court has as much as

intimated that the City of Dayton has less than 25 motor vehicles or not able to demonstrate it was responsible to pay claims and judgments against it. Instead, the majority of the lower court chose to construe “financial responsibility law” as meaning only O.R.C. §4509, and further interpreting the words “within the meaning” of the financial responsibility law of the state as synonymous with “pursuant to the letter” of the financial responsibility law of the state.

First of all, O.R.C. §4509 is not called “the Financial Responsibility Law.” It is just one of many statutes that addresses self-insurance and financial responsibility. Further, the City of Dayton is exempt from complying with §4509.72:

Sections 4509.01 to 4509.79, except section 4509.06, of the Revised Code do not apply to any motor vehicles owned and operated by the United States, this state, any political subdivision of this state, any municipal corporation therein or any private volunteer fire company serving a political subdivision of the state . . .

O.R.C. §4509.71.

Therefore, how can the City of Dayton argue it is not self-insured pursuant to a statute to which its compliance is specifically excluded? Logic dictates that the City cannot be excluded. As Judge Donovan noted in her dissent:

The only thing preventing the City of Dayton from having a Certificate of Self-Insurance under the FRA is that the City has not requested such a Certificate. Once again, it is understandable why the City has not requested a Certificate – it is unnecessary because the City is exempt from the FRA. However the fact that the City did not request a Certificate that it was not legally obligated to request does not mean that the City is not self-insured *within the meaning* and spirit of the financial responsibility law. On the contrary, I would find that the City’s practice of annually setting aside funds to pay tort judgments constitutes being self-insured and financially responsible within the meaning and purpose of the financial responsibility law. To hold otherwise would allow the City of Dayton to use the fact that it is presumed financially responsible under the FRA to act financially irresponsible in situations where its employees are involved in automobile accidents.

Opinion, at page 13; Rogers v. City of Dayton, (Exhibit A); 2<sup>nd</sup> Dist. No. 21593, 2007 Ohio 673 at ¶39.

As previously noted, the Financial Responsibility Act of O.R.C. §4509 is not the only financial responsibility law in the state. For instance, O.R.C. §9.83 specifically sets forth that a state or any political subdivision may procure an insurance policy *or create a vehicle liability fund* to cover claims against its officers and employees for liability for injury, death or loss to person or property that arises from the operation of an automobile, a truck, etc.

In addition, O.R.C. §2744.08(A) permits a municipality to either secure liability insurance or be a self-insured entity (or both). The City of Dayton does not maintain liability insurance, but instead maintains a self-insurance program pursuant to O.R.C. §2744.08(A)(2), which provides:

(2) (a) Regardless of whether a political subdivision procures a policy or policies of liability insurance pursuant to division (A)(1) of this section or otherwise, ***the political subdivision may establish and maintain a self-insurance program relative to its and its employees' potential liability in damages in civil actions for injury, death, or loss to persons or property allegedly caused by an act or omission of the political subdivision or any of its employees in connection with a governmental or proprietary function. The political subdivision may reserve such funds as it deems appropriate in a special fund that may be established pursuant to an ordinance or resolution of the political subdivision*** and not subject to section 5705.12 of the Revised Code. The political subdivision may allocate the costs of insurance or a self-insurance program, or both, among the funds or accounts in the subdivision's treasury on the basis of relative exposure and loss experience.

\* \* \* \*

(C) The authorizations for political subdivisions to secure insurance and to establish and maintain self-insurance programs in this section are in addition to any other authority to secure insurance or to establish and maintain self-insurance programs that is granted pursuant to the Revised Code or the constitution of this state, and they are not in derogation of any other authorization.

(Emphasis added.)

Consistent with the above-cited provisions of the Ohio Revised Code, the Dayton Municipal Code provides that judgments on personal injury claims are limited to funds that have

been specifically appropriated on an annual basis for payment of claims and judgments. (Section 36.203.) Section 36.204 requires the City Manager to annually submit to the City Commission a recommended appropriation for payment of claims and judgments. Id.

The indisputable evidence demonstrates the City is self-insured within the meaning of the financial responsibility law of the state of Ohio. The City is trying to escape its statutory liability by arguing that while it is self-insured, it has not obtained a Certificate of Self-Insurance and therefore it is self-insured only if its victim does not carry uninsured motorist coverage.

The majority in the lower court decision begrudgingly accepted the City's argument, stating the Ohio Legislature may have intended to place insurers ahead of municipalities when it came time to pay for the negligence of a city employee. It based its position on Ohio Revised Code §2744.05, which bars subrogation by an insurer against a municipality. It is respectfully submitted that there was a flaw in this position.

In a typical accident between an insured tortfeasor and a State Farm insured, the insured could choose to have his or her medical payments paid by State Farm and the property damage paid by State Farm. The insured could not, however, request uninsured motorist coverage because the tortfeasor would be insured or self-insured. If the tortfeasor was a City of Dayton employee, the only potential coverages for which State Farm would be barred from subrogating against the City would be medical payments and property damage. Since the insured would not be covered under uninsured motorist coverage, there would be no payments to subrogate and therefore the subrogation provision is inapplicable.

If the public policy of the Legislature was to make all accidents involving city-owned vehicles uninsured motorist claims, it would have done so through statute. It knew how to bar

subrogation claims pursuant to O.R.C. §2744.05(B), but it did not state that for purposes of the Uninsured Motorist Statute, a municipality is not to be considered self-insured.

In fact, legislative history demonstrates the Ohio Assembly specifically desired that self-insured entities such as the City of Dayton not be considered uninsured pursuant to O.R.C. §3937.18.

In Martin v. Midwestern Group Ins. Co. (1994), 70 Ohio St.3d 478, this Court ruled that no limitation or exclusion of UM coverage would be valid unless expressly authorized by O.R.C. §3937.18.

The rationale of *Alexander* is not limited to the analyzed exclusion. Instead, this court made clear that ***R.C. 3937.18 is the yardstick by which all exclusions of uninsured motorist coverage must be measured.*** Under *Alexander*, the statute mandates coverage if (1) the claimant is an insured under a policy which provides uninsured motorist coverage; (2) the claimant was injured by an uninsured motorist; and (3) the claim is recognized by Ohio tort law.

Martin v. Midwestern Group Ins. Co., *supra*, at 481. (Emphasis added.)

It was against this legal backdrop where no reduction or exclusion of UM coverage was allowed unless expressly authorized by O.R.C. §3937.18, that in 1996 Jennings v. City of Dayton (1996), 114 Ohio App. 3d 144, was decided. In Jennings, the court noted the legal environment revealed: “a strong policy trend toward expanding the coverage provided under the rubric of uninsured motorist insurance.” Id. at 147.

Defendant American States Insurance had policy language excluding uninsured motorist coverage for government vehicles and excluding uninsured motorist coverage for self-insured vehicles. At the time Jennings was decided, the applicable version of O.R.C. §3937.18 did not include exclusionary language for self-insurers. Therefore, the City of Dayton *argued that it was self-insured*, because at that time being self-insured would make it uninsured. Strictly because

the Second District Court of Appeals observed the trend of the Supreme Court to define self-insurers as uninsured and to enlarge uninsured motorist protection, the City was found to be a self-insured, and thus uninsured, pursuant to the statute in effect in 1996. Applying the Martin holding, the Supreme Court decided the exclusion for government vehicles constituted a reduction in UM coverage which was not expressly authorized by R.C. §3937.18, so the exclusion was unenforceable as a matter of law.

In 1997, the Legislature responded to Jennings and other cases by amending O.R.C. §3937.18 pursuant to H.B. 261. The Legislature authorized insurers to generally preclude coverage for accidents involving government-owned vehicles, unless an emergency vehicle immunity under R.C. Chapter 2744 applied. The new statutory language stated that for purposes of UM coverage, an “uninsured motor vehicle” no longer included:

(3) A motor vehicle owned by a political subdivision, unless the operator of the motor vehicle has an immunity under Chapter 2744. of the Revised Code that could be raised as a defense in an action brought against the operator by the insured;

(4) A motor vehicle self-insured within the meaning of the financial responsibility law of the state in which the motor vehicle is registered.

O.R.C. §3937.18(K)(3) and (4), as amended by H.B. 261 effective September 3, 1997.

If the Legislature intended the result in Jennings to be undisturbed, it would not have specifically included self-insured language *for the first time*, one year after Jennings was decided. Public policy, as demonstrated through legislative intent, dictates that the City of Dayton be considered a self-insured entity and therefore not an uninsured motorist.

**PROPOSITION OF LAW NO. 2:**

**THE CITY OF DAYTON, BY ANNUALLY APPROPRIATING UNENCUMBERED FUNDS FOR PAYMENT OF CLAIMS AND JUDGMENTS ARISING FROM THE NEGLIGENCE OF ITS EMPLOYEES, IS SELF-INSURED IN A PRACTICAL SENSE AND CANNOT BE CONSIDERED UNINSURED.**

The City of Dayton annually sets aside unencumbered funds to pay for settlements and judgments arising from the negligent conduct by its employees. The City has set aside a fund to meet its losses instead of purchasing a policy which would insure against those losses. The City, therefore, is self-insured.

The First District Court of Appeals considered an identical situation in Safe Auto Ins. Co. v. Corson, supra. In that case, an employee of the City of Cincinnati negligently injured the Plaintiff, who was insured by Safe Auto and whose policy included UM/UIM coverage. The City argued that it was uninsured and not self-insured, and therefore Safe Auto was required to pay the Plaintiff UM coverage up to its policy limits before the City was required to pay anything to the Plaintiff for the injuries inflicted through the negligence of the City employee. The trial court granted summary judgment in favor of Safe Auto, and the City appealed. The First District also rejected the City's arguments, holding:

[¶23] Self-insurance is the retention of the risk of loss by the one bearing the original risk under the law or contract. *Physicians Ins. Co. v. Grandview Hospital & Medical Center* (1988), 44 Ohio App. 3d 157, 542 N.E.2d 706.

[¶24] An entity may be self-insured in a practical sense for the purposes of UM/UIM law. *Grange Mut. Cas. Co. v. Refiners Transport and Terminal Corp.* (1986), 21 Ohio St.3d 47, 21 Ohio B. 331, 487 N.E.2d 310.

[¶25] Corson now argues that the city was not required to purchase insurance. She is correct. A political subdivision may use public funds to contract for insurance to cover its and its officers'

potential liability. R.C. 9.83. It may also establish and maintain a self-insurance program. *Id.* But the city admitted that it paid all judgments and settlements arising out of the negligence of its police officers from its own funds. This was self-insurance in the practical sense.

[¶26] Had the city purchased insurance from an independent company, Safe Auto's UM/UIM coverage would not have applied. The city wants to avoid purchasing liability insurance, but wants also to avoid paying claims out of its own pockets when an insurance policy would arguably cover the damage. The city cannot have it both ways.

[¶27] Because the city owned the officer's vehicle, because this was not an action against the officer, and because the city was self-insured in a practical sense, the officer's vehicle was not uninsured or underinsured for the purposes of UM/UIM law.

*Id.*, at 23-27.

Under Ohio law governing the financial responsibility of municipalities and under Ohio case law, the City of Dayton is self-insured. The City maintains a self-insurance program consistent with O.R.C. §2744.08. The City also is self-insured "in the practical sense" under Ohio case law.

**PROPOSITION OF LAW NO. 3:**

**A MOTOR VEHICLE OWNED BY THE CITY OF DAYTON IS SELF-INSURED UNDER THE FINANCIAL RESPONSIBILITY LAW OF OHIO AND THEREFORE DOES NOT QUALIFY AS AN UNINSURED MOTOR VEHICLE PURSUANT TO THE LANGUAGE OF THE STATE FARM UNINSURED MOTORIST POLICY.**

The State Farm policy excluded vehicles owned or operated by self-insurers from its definition of “uninsured motor vehicle.” The policy specifically provided:

We will pay damages for *bodily injury* an insured:

1. Is legally entitled to collect from the owner or driver of an *uninsured motor vehicle*; or

\* \* \* \*

An *uninsured motor vehicle* does not include a land motor vehicle:

2. owned or operated by a self-insurer under any motor vehicle financial responsibility law, a motor carrier law or any similar law;

As the City previously has admitted it complies with the self-insuring statutes contained in Ohio Revised Code §2744.08 and Dayton Municipal Code §36.203, et. seq., the motor vehicle owned by the City of Dayton clearly is not an uninsured motor vehicle pursuant to the language of the State Farm policy. The vehicle is owned by a self-insurer under O.R.C. §2744.08(A)(2)(a) and Dayton Municipal Code §36.203, et. seq. If this Court were to believe that the financial responsibility of law of Ohio is in fact the “Financial Responsibility Act,” then the State Farm language still excludes the motor vehicle owned by the City of Dayton because of the aforementioned *similar laws*.

It should be noted Appellant does not believe the Court must look to the policy of insurance because having found the City of Dayton to be self-insured, there is no need to review the uninsured motorist policy language. However, the exclusionary language is yet another reason why the City is not an uninsured motorist.

## CONCLUSION

This case raises an issue of public or great general interest because of the confusion which will surround the uninsured motorist landscape by conflicting opinions from the First and Second Districts on whether any municipality or political subdivision in the 88 counties of the state of Ohio is insured or uninsured for the negligence of its employees on non-emergency runs. If the hundreds, if not thousands, of municipalities and political subdivisions throughout the state are permitted to be deemed uninsured and not liable for the negligence of its employees, premiums for uninsured motorist coverage likely will skyrocket in price or worse, insurers may no longer offer uninsured motorist coverage due to the substantial increase in potential claims.

This Court should accept jurisdiction to clarify that the City of Dayton is self-insured pursuant to Ohio Revised Code §3937.18, as it is self-insured within the meaning of the financial responsibility law of Ohio, and because it is self-insured in the practical sense.

Further, it is clear that the State Farm policy specifically excludes vehicles owned by cities such as Dayton who are self-insurer under Ohio Revised Code §2744.08(A)(2)(a) and Dayton Municipal Code §36.203, et. seq.

Respectfully submitted,

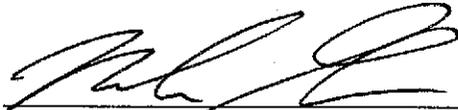
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing Memorandum in Support of Jurisdiction was served upon John Musto, Patrick J. Bonfield and John J. Danish, Attorneys for the City of Dayton, 101 West Third Street, P.O. Box 22, Dayton, Ohio 45401 by regular U.S. Mail, postage prepaid this 27<sup>th</sup> day of March, 2007.



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**APPENDIX**



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COURT OF APPEALS  
MONTGOMERY CO., OHIO

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

WESTERN ROGERS

Plaintiff-Appellant

v.

CITY OF DAYTON, et al.

Defendants-Appellees

C.A. CASE NO. 21593

T.C. NO. 04 CV 2716

(Civil Appeal from  
Common Pleas Court)

**OPINION**

Rendered on the 16<sup>th</sup> day of February, 2007.

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FAIN, J.

This is a dispute over who is primarily liable for injuries incurred by Western Rogers as a result of a motor vehicle collision caused by the negligence of an employee of the City

THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT

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of Dayton. State Farm Mutual Automobile Insurance Company, the underwriter of a policy of uninsured/underinsured motorist insurance issued to Rogers, contends that because the City of Dayton is self-insured, in a "practical sense," its liability is excluded from the scope of the uninsured/underinsured motorist coverage. This would leave the City of Dayton responsible for damages. The City of Dayton contends that it is not self-insured, so that its liability is not excluded from the scope of the uninsured/underinsured motorist coverage, with the result that State Farm is responsible, and subrogation is not permitted against a municipality.

The City of Dayton obtained summary judgment in its favor, from which State Farm appeals. We agree with the trial court that the City of Dayton is not, as a matter of law, self-insured. Therefore, the judgment of the trial court is Affirmed.

In April, 2002, Earl Moreo, III, a traffic signal electrician employed by the City of Dayton, was dispatched to the intersection of Emerson and Salem Avenues in Dayton. After checking the operation of a traffic signal, he began to execute a U-turn and struck an automobile owned and operated by Western Rogers. Rogers had an automobile insurance policy issued by State Farm. The insurance policy provided for uninsured motorist coverage.

Rogers brought this action against the City of Dayton and Moreo. Rogers alleges that the City of Dayton and Moreo are liable for his injuries, and that State Farm is also monetarily responsible to pay for his injuries within the limits of his uninsured/underinsured motorist ("UM/UIM") policy provisions. All four of the parties filed motions for summary

THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT

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judgment. State Farm moved for summary judgment on the ground that Rogers was not entitled to uninsured motorist benefits under his State Farm policy, because the City of Dayton is a self-insured entity, not an uninsured entity. Moreo and the City moved for partial summary judgment on the grounds that they are immune from liability, the City is uninsured for purposes of determining Rogers's entitlement to UM/UIM benefits under R.C. 3937.18, and they are entitled to an offset for any UM/UIM benefits Rogers was entitled to receive from State Farm.

The trial court granted Rogers's motions for summary judgment, holding that State Farm would be held financially responsible to the limits of its uninsured motorist coverage if the City of Dayton and/or Moreo were found legally responsible for Rogers's injuries. The trial court granted Moreo's motion for summary judgment, holding that Moreo is immune from liability under Chapter 2744 of the Revised Code. The trial court granted the City of Dayton's motion for summary judgment, holding that the City is "uninsured" for purposes of the uninsured motorist policy. The trial court denied State Farm's motion for summary judgment.

State Farm moved for reconsideration of the trial court decision relating to the motions for summary judgment. The trial court denied State Farm's motion for reconsideration. Thereafter, the trial court entered an order finding no just reason for delay. State Farm appeals from the summary judgment rendered against it.

II

State Farm asserts four assignments of error, as follows:

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"THE TRIAL COURT ERRED IN DENYING APPELLANT STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT AND GRANTING APPELLEE CITY OF DAYTON'S MOTION FOR SUMMARY JUDGMENT.

"THE TRIAL COURT ERRED IN HOLDING THAT THE CITY OF DAYTON WAS NOT A SELF-INSURED ENTITY UNDER OHIO LAW, AND, CONSEQUENTLY, THAT THE PLAINTIFF WAS ENTITLED TO UM/UIM COVERAGE UNDER HIS STATE FARM POLICY OF INSURANCE.

"THE TRIAL COURT ERRED BY CONSIDERING ONLY WHETHER THE CITY OF DAYTON WAS SELF-INSURED UNDER THE OHIO FINANCIAL RESPONSIBILITY ACT AND NOT CONSIDERING WHETHER THE CITY WAS SELF-INSURED UNDER OTHER OHIO STATUTES AND OHIO COMMON LAW GOVERNING FINANCIAL RESPONSIBILITY.

"THE TRIAL COURT ERRED IN HOLDING THAT THE CITY OF DAYTON IS NOT SELF-INSURED UNDER THE LANGUAGE OF THE STATE FARM POLICY."

We will address State Farm's four assignments of error together because they all turn upon whether the City of Dayton is self-insured for purposes of the insurance policy and R.C. 3937.18. "Appellate review of a decision by a trial court granting summary judgment is de novo." *Cox v. Kettering Medical Center*, Montgomery App. No. 20614, 2005-Ohio-5003, ¶35.

This appeal relates to an action commenced by a plaintiff, Rogers, seeking to recover damages flowing from an automobile accident allegedly caused by the negligence of an employee of the City of Dayton, Moreo. "[P]olitical subdivisions are liable for injury,

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death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority." R.C. 2744.02(B)(1). It is undisputed that Moreo was engaged within the scope of his employment and authority. Pursuant to R.C. 2744.03(A), an employee of the City of Dayton has immunity from liability in a civil action brought to recover damages for injury to persons allegedly caused by any act or omission in connection with a governmental function. Therefore, Moreo arguably is immune from liability to Rogers. Unlike its employee, however, the City of Dayton does not have immunity from Rogers's action. See R.C. 2744.02(B)(1), 2744.03(A). Thus, the question becomes who should pay for damages resulting from Moreo's alleged negligence arising in the course of his employment with the City.

State Farm makes the straightforward argument that the City should pay the damages, because the alleged negligence of the City's employee caused Rogers's injuries, the City has not articulated any basis on which the City should be granted immunity, and the City has not shown that it is unable to pay damages to Rogers. This approach was eloquently endorsed by Judge Painter in *Safe Auto Ins. Co. v. Corson*, 155 Ohio App.3d 736, 2004-Ohio-249, ¶15-13: "Corson owned an insurance policy with Safe Auto. The policy included uninsured-motorist and underinsured-motorist ('UM/UIM') coverage. Responsible people buy UM/UIM coverage to protect themselves against irresponsible drivers who do not have any insurance or enough insurance. . . . But the city did not buy insurance to cover these damages. Neither did it comply with the rules to be a 'self-insurer' under the UM/UIM statutes. It simply chose to pay damages or judgments out of the city coffers, which is perfectly proper. The city somehow concocted the theory that someone else

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should pay. That someone else was Safe Auto. This was evidently because Safe Auto was the only insurance company involved. But why should Sate Auto—the insurance company for the *innocent* driver—pay damages the city of Cincinnati owes? . . . [T]he city of Cincinnati was not required to follow the self-insurance certification methods prescribed by the financial responsibility law. Because it was presumed to be responsible, it did not have to file papers with the state guaranteeing that it was able to pay damages. The city was allowed to pay out of city coffers. Somehow, the city interpreted this to mean that it was uninsured, unself-insured, and unliable. The city's argument is that, by not complying with a law it does not have to comply with, it can escape paying what it owes."

In our view, the General Assembly has clearly commanded a different result. R.C. 4509.72(A) provides as follows:

"Any person in whose name more than twenty-five motor vehicles are registered in this state may qualify as a self-insurer by obtaining a certificate of self-insurance issued by the registrar of motor vehicles as provided in division (B) of this section."

Because the City of Dayton owns more than 25 motor vehicles, it could obtain a certificate of self-insurance, and thereby qualify as a self-insurer under Ohio Revised Code Chapter 4509, entitled "Financial Responsibility." It did not do so.

At the relevant time, which the parties recognize is the most recent renewal of State Farm's UM/UIM policy preceding the accident, R.C. 3937.18(K)(3) defined "uninsured motor vehicle" as follows:

"(K) As used in this section, 'uninsured motor vehicle' and 'underinsured motor vehicle' do not include any of the following motor vehicles:

" \*\*\*

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"(3) A motor vehicle self-insured within the meaning of the financial responsibility law of the state in which the motor vehicle is registered."

Because the motor vehicle the operation of which caused Rogers's injuries was not self-insured within the meaning of the financial responsibility law of Ohio, R.C. Chapter 4509, it was not excluded from the definition of an uninsured motor vehicle, within the plain meaning of R.C. 3937.18(K)(3). Consequently, as the trial court held, Rogers's injury was within the scope of State Farm's uninsured motor vehicle coverage.

R.C. 2744.05(B) provides as follows:

"If a claimant receives or is entitled to receive benefits for injuries or loss allegedly incurred from a policy or policies of insurance or any other source, the benefits shall be disclosed to the Court, and the amount of benefits shall be deducted from any award against a political subdivision recovered by the claimant. No insurer or other person is entitled to bring an action under a subrogation provision in an insurance or other contract against a political subdivision with respect to such benefits."

It is the collateral source rule clearly set forth in R.C. 2744.05(B) that establishes the result to which Judge Painter took offense in *Safe Auto Ins. Co. v. Corson*, supra, because it shifts the financial responsibility from a municipality that has employed an immune tortfeasor to the insurance carrier that has provided uninsured motorist coverage to the tort victim, while charging the tort victim a premium for that coverage. Without endorsing the reasoning, we can imagine the Ohio General Assembly having decided, as a matter of policy, that it is preferable to impose the financial harm resulting from a motor vehicle tort upon a commercial insurance carrier, who has received a premium for uninsured motorist coverage, as opposed to either: (1) the tort victim; (2) the municipal employee who was

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acting within the scope of duties for which immunity is provided under R.C. 2744.02; or (3) the municipality that employed the tortfeasor. In short, the General Assembly appears to have adopted a schedule of preference for who should bear the harm of a tort caused by a municipal employee acting within the scope of his immunity as follows: (1) an insurance carrier providing uninsured motorist coverage to the victim, if there is one; (2) the municipality; and (3) the tort victim. The General Assembly has obviously found public policy in favor of immunity for the municipal employee, and has decided that of the three other potential bearers of the loss, the tort victim is the least able to sustain the loss, the municipality is the next least able to sustain the loss, and the insurance carrier is in the best position to sustain the loss. While we might not agree with this schedule of preference, we do not find it to be irrational.

State Farm's assignments of error are overruled.

III

All of State Farm's assignments of error having been overruled, the judgment of the trial court is Affirmed.

.....

WOLFF, P.J., concurs.

DONOVAN, J., dissenting:

I disagree.

Judge Painter's approach is consistent with the purpose behind UM/UIM coverage.

"The purpose of UM/UIM coverage is to protect persons from losses which, because of the tortfeasor's lack of liability coverage, would otherwise go uncompensated." 58 Ohio

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Jurisprudence 3d (2005) 435-36, Insurance, Section 999. It is undisputed that, despite Moreo's immunity from liability, the City is liable for damages arising from Moreo's negligent acts within the course of his employment with the City. Also, there has been no argument that the City is unable to pay such damages. Thus, it appears that the City of Dayton is able to compensate Plaintiff for his damages and there does not appear to be any risk of Plaintiff going uncompensated due to a lack of liability coverage on the part of the City of Dayton. Therefore, forcing State Farm to pay damages to Plaintiff does not appear to fit within the purpose of UM/UIM coverage.

The trial court and majority reject Judge Painter's common sense approach and find that the City was uninsured within the meaning of the uninsured motorist statute and State Farm's insurance policy with Mr. Rogers. Pursuant to the version of R.C. 3937.18(K) applicable to the present dispute, a motor vehicle is excluded from the definition of "uninsured motor vehicle" where the motor vehicle is *self-insured within the meaning of the financial responsibility law* of the state in which the motor vehicle is registered. The insurance policy between Plaintiff and State Farm provides a similar exclusion from the definition of uninsured motor vehicle. State Farm argues that the City of Dayton's motor vehicle is excluded from the definition of uninsured motor vehicle because the City of Dayton is self-insured. On the other hand, the City of Dayton argues that it is not self-insured within the meaning of the financial responsibility law of Ohio.

"Self-insurance' is the retention of the risk of loss by the one bearing the original risk under the law or contract. It is the practice of setting aside a fund to meet losses instead of insuring against such through insurance, self-insurance being the antithesis of insurance, for while insurance shifts the risk of loss from the insured to the insurer, the self-

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insurer retains the risk of loss imposed by law or contract." 57 Ohio Jurisprudence 3d (2005) 317, Insurance, Section 247. The City concedes that it is self-insured in the sense that it does not purchase automobile insurance and it does set aside certain monetary amounts each year in its budget for the payment of claims against the City.

The City's decision not to purchase insurance is perfectly acceptable. R.C. 2744.08(A)(2)(a) provides that a "political subdivision may establish and maintain a self-insurance program relative to its and its employees' potential liability in damages in civil actions for injury, death, or loss to persons or property allegedly caused by an act or omission of the political subdivision or any of its employees in connection with a governmental or proprietary function. The political subdivision may reserve such funds as it deems appropriate in a special fund that may be established pursuant to an ordinance or resolution of the political subdivision . . . ."

The City of Dayton's self-insurance program is provided for in its Municipal Code. Pursuant to Sec. 36.203 of the Dayton Municipal Code, judgments on personal injury claims are limited to funds that have been "specifically appropriated on an annual basis for payment of claims and judgments." Further, Sec. 36.204 requires the City Manager to submit annually to the City Commission a recommended appropriation for payment of claims and judgments. In determining the amount of funds to be appropriated, the City Manager and Commission may consider the list of non-exclusive information set forth in Sec. 36.204(A)-(I).

The trial court held and the majority concurs that being self-insured in this "practical sense" does not necessarily mean that the City is self-insured in the relevant, legal sense. State Farm disagrees, arguing that the Supreme Court's holding in *Grange Mut. Cas. Co.*

*v. Refiners Transport & Terminal Corp.* (1986), 21 Ohio St.3d 47, supports a finding that the City is self-insured rather than uninsured for purposes of R.C. 3937.18(K) and the insurance policy. The City responds that whether it is self-insured in the practical sense is irrelevant, because the inquiry necessitated by R.C. 3937.18(K) and the insurance policy is whether the City is self-insured *within the meaning of the financial responsibility law*. The City contends that the motor vehicle driven by Moreo cannot be considered self-insured within the meaning of the financial responsibility law of Ohio, because the City does not have a certificate of self-insurance under Ohio's Financial Responsibility Act ("FRA"), Chapter 4509.01, et seq.

Under the FRA, "[a]ny person in whose name more than twenty-five vehicles are registered in this state may qualify as a self-insurer by obtaining a certificate of self-insurance issued by the registrar of motor vehicles . . . ." R.C. 4509.72(A). "The registrar shall issue a certificate of self-insurance upon the application of any such person who is of sufficient financial ability to pay judgments against him." R.C. 4509.72(B). In sum, the registrar is required to issue a certificate of self-insurance to any person who has more than twenty-five vehicles registered in Ohio, is financially able to pay judgments against him, and requests the certificate. It is undisputed that the City of Dayton is exempt from the FRA. R.C. 4509.71. It is similarly undisputed that the City of Dayton does not have a certificate of self-insurance issued by the registrar. The City argues that these two uncontested facts are sufficient to resolve this appeal in its favor because the lack of a certificate of self-insurance prevents State Farm from establishing that the City is *self-insured within the meaning of the financial responsibility law*. I disagree.

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The relevant inquiry under R.C. 3937.18(K)(3) is not whether the City of Dayton has a certificate of self-insurance and is in fact self-insured under the FRA. Indeed, the City would have no reason to request a certificate of self-insurance where the City is exempt from the very law that requires a person to obtain the certificate of self-insurance. Rather, the relevant question is whether the City is self-insured *within the meaning of* the FRA. Thus, the key inquiry is whether the City meets the requirements for a certificate of self-insurance. A review of the statutory requirements reveals that the City does meet the relevant requirements.

Pursuant to R.C. 4509.72(B), the registrar *must* issue a certificate of self-insurance to any person who has more than twenty-five vehicles registered in Ohio, requests the certificate, and is financially able to pay judgments against him. It is undisputed that the City has more than twenty-five vehicles registered in Ohio. Moreover, it is undisputed that the City is financially able to pay judgments against it. Indeed, the City concedes that it sets aside certain funds each year to pay judgments against it. Moreover, the City's exemption from the FRA is based on the presumption given to a political subdivision of the state that the subdivision is financially responsible. Thus, I would conclude that the City is financially responsible and qualified to receive a certificate of self-insurance.

The presumption in R.C. 4509.71 that the City of Dayton is financially responsible is supported by the City's Municipal Code. "Proof of financial responsibility" is defined by statute as "proof of ability to respond in damages for liability, on account of accidents occurring subsequent to the effective date of such proof, arising out of the ownership, maintenance, or use of a motor vehicle in the amount of twelve thousand five hundred dollars because of bodily injury to or death of one person in any one accident, . . . ." R.C.

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4509.01(K). The City of Dayton has created a limitation of its liability relating to damages recoverable in an action against the city for personal injury or property damage arising out of a single occurrence, or sequence of occurrences, in a tort action. The limitation is a sum not in excess of \$250,000 per person and \$500,000 per occurrence. Dayton Municipal Code, Sec. 36.205(B)(2). The City of Dayton, through its Municipal Code, clearly contemplated paying judgments in amounts equal to or exceeding the \$12,500 that is required under the FRA to show proof of financial responsibility. In short, the City of Dayton is financially responsible *within the meaning* and purpose of the FRA.

The only thing preventing the City of Dayton from having a certificate of self-insurance under the FRA is that the City has not requested such a certificate. Once again, it is understandable why the City has not requested a certificate—it is unnecessary because the City is exempt from the FRA. However, the fact that the City did not request a certificate that it was not legally obligated to request does not mean that the City is not self-insured *within the meaning* and spirit of the financial responsibility law. On the contrary, I would find that the City's practice of annually setting aside funds to pay tort judgments constitutes being self-insured and financially responsible within the meaning and purpose of the financial responsibility law. To hold otherwise would allow the City of Dayton to use the fact that it is presumed financially responsible under the FRA to act financially irresponsible in situations where its employees are involved in automobile accidents.

The City of Dayton argues that our prior decisions in *Jennings v. City of Dayton* (1996), 114 Ohio App.3d 144, and *Anderson v. Nationwide Ins. Co.* (Sept. 19, 1997), Montgomery App. No. 16309, require us to find that the City of Dayton is uninsured. I disagree. In *Jennings*, the plaintiff was injured in an accident with a motor vehicle owned

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by the City of Dayton and driven by a city employee. At the time of the accident, the City of Dayton was not covered by a motor vehicle liability insurance policy. Rather, the City was self-insured under the provisions of R.C. 2744.08(A)(2)(a). Based on a review of the caselaw, we found that "the trend in the Supreme Court and in this court is to define self-insurers as uninsured and to maximize the uninsured motorist protection afforded to insured persons." *Jennings*, 114 Ohio App.3d at 148. Consequently, we held that "self-insurance' is the legal equivalent of no insurance for purposes of the distribution of uninsured motorist benefits in accordance with R.C. 3937.18." *Id.* at 150. Our holding was based on a reading of the 1996 version of R.C. 3937.18, which did not include an exclusion for "self-insurers." Subsequent to our decisions in *Jennings* and *Anderson*, however, the General Assembly revised R.C. 3937.18, providing for an exclusion of self-insurers from the definition of uninsured motor vehicle. Therefore, *Jennings* and *Anderson* are inapposite.

Finally, the City of Dayton argues that the public policy behind R.C. 2744.05(B) supports a finding that the City of Dayton is uninsured. R.C. 2744.05(B) provides that "if a claimant receives or is entitled to receive benefits for injuries or loss allegedly incurred from a policy or policies of insurance or any other source, the benefits shall be disclosed to the court, and the amount of the benefits shall be deducted from any award against a political subdivision recovered by that claimant. No insurer or other person is entitled to bring an action under a subrogation provision in an insurance or other contract against a political subdivision with respect to such benefits." According to the City of Dayton, R.C. 2744.05(B) serves two purposes: "1. To 'conserve the fiscal resources of political subdivisions by limiting their tort liability'; and 2. To 'permit injured persons who have no

resource of reimbursement for their damages, to recover for a tort committed by [a] political subdivision." Appellee's Brief, p. 13 (quoting *Menefee v. Queen City Metro* (1990), 49 Ohio St.3d 27, 29). The City of Dayton's reliance on R.C. 2744.05(B) is misplaced. R.C. 2744.05(B), by its own terms, is confined to situations where the claimant is entitled to benefits under his or her insurance policy. In the present case, Plaintiff is not entitled to uninsured motorist benefits under his insurance policy with State Farm, because the City of Dayton is self-insured. Therefore, the provisions of R.C. 2744.05(B) are inapplicable.

I would conclude that the trial court erred in holding that the motor vehicle driven by Moreo was uninsured. In choosing to be self-insured for the purposes of the FRA, the City obligated itself to pay. I would sustain State Farm's assignments of error and would reverse the judgment of the trial court.

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SECOND APPELLATE DISTRICT

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IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

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WESTERN ROGERS :

*Plaintiff-Appellant* :

C.A. CASE NO. 21593

v. :

T.C. NO. 04 CV 2716

CITY OF DAYTON, et al. :

(Civil Appeal from  
Common Pleas Court)

*Defendants-Appellees* :

FINAL ENTRY

Pursuant to the opinion of this court rendered on the 16th day  
of February, 2007, the judgment of the trial court is ***Affirmed***.

Costs to be paid as stated in App.R. 24.

WILLIAM H. WOLFF, JR., Presiding Judge

MIKE FAIN, Judge

\_\_\_\_\_  
MARY E. DONOVAN, Judge

THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT

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THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT

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