

IN THE SUPREME COURT OF OHIO

WESTERN ROGERS : Case No. 07-0549
 :
 : Appellate Case No. 21593
vs. :
 :
CITY OF DAYTON, OHIO, et al., :
 :

**APPELLEE CITY OF DAYTON'S MEMORANDUM IN OPPOSITION TO
JURISDICTION**

Patrick J. Bonfield (#0015796)
Director of Law
John J. Danish (#0046639)
Deputy Law Director
John C. Musto (#0071512)
Assistant City Attorney
101 W. Third St.
P.O. Box 22
Dayton, OH 45401
Phone (937) 333-4100
Facsimile (937) 333-3628
Counsel for Defendants-Appellees

Mark H. Gams (#0039995)
GALLAGHER, GAMS,
PRYOR, TALLAN & LITTRELL
471 East Broad St., 19th Fl.
Columbus, OH 43215-3872
(614) 228-5151 Fax (614) 228-0032
mgams@ggptl.com
Counsel for Appellant,
State Farm Mutual Automobile
Insurance Company

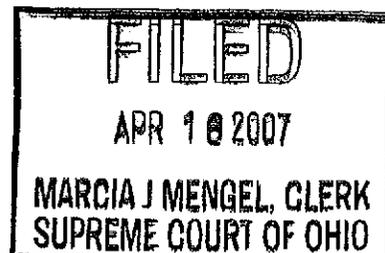


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I. LEAVE TO APPEAL SHOULD NOT BE GRANTED

This case involves an automobile accident between a City of Dayton vehicle driven by a City employee and a vehicle insured with an uninsured/underinsured motorist policy (“UIM Policy”) by the Appellant. The Trial Court granted the Dayton employee immunity under R.C. Chapter 2744, which the Appellant has not appealed. The Appellant sought to exclude coverage under the UIM Policy based upon the self-insurance exclusion in the Uninsured Motorist Statute (“UIM Statute”) and a similar exclusion in the UIM Policy. The Trial Court and the Second District Court of Appeals held that under the plain meaning of both Ohio’s UIM Statute and the UIM Policy that the Dayton vehicle was not excluded from coverage. The Courts held that because Dayton did not have a policy of insurance and Dayton was not self-insured pursuant to Ohio’s Financial Responsibility Law that the exclusion did not apply. This holding places the financial burden of the accident on Appellant. This is because Dayton is entitled to set-off damages awarded against it in tort against Appellant’s insurance policy and the Political Subdivision Tort Liability Act prohibits Appellant from bringing a subrogation claim against an Ohio political subdivision such as Dayton.

Appellant argues that it is unfair to place the financial burden of the accident on the insurance company. However, this result is consistent with the purpose and public policy of Ohio Political Subdivision Tort Liability Act. This Court found that two of the main purposes of the Act are: 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.” *Menefee v. Queen City Metro*, 49 Ohio St.3d 27, 29, 550 N.E.2d 181 (1990).

This Court also stated that the “purpose and language of R.C. 2744.05 evinces a legislative intent to place the [financial] burden on the [insurer] and not the City.” *Galanos v. Cleveland*, 70 Ohio St.3d 220, 221, 638 N.E.2d 530 (1994).

Appellant also argues that the self-insurance exclusion applies because Dayton reserves funds to try and cover judgments rendered against it and is therefore self-insured in the practical sense or under some statute other than Ohio’s Financial Responsibility Law. However, both the UIM Statute and the UIM Policy only exclude coverage for vehicles that are self-insured under Ohio’s Financial Responsibility Law. Self-insurance in a practical sense is a concept that only applies to entities that are not self-insured in a legal sense, i.e. not self-insured under Ohio’s Financial Responsibility Law. Moreover, in order to be deemed self-insured under Ohio’s Financial Responsibility Law an entity must have a certificate of self-insurance. Dayton does not have a certificate of self-insurance and is exempted from the provisions of the law.

Not only is the Dayton vehicle not excluded from coverage, but both the UIM Policy and the UIM Statute specifically require coverage where, as here, the vehicle is owned by a political subdivision and the operator of the vehicle is immune under R.C. Chapter 2744. As such, this Appeal lacks merit and this Court should not accept jurisdiction of this matter.

II. PROPOSITION OF LAW NO. 1

For their first proposition of law, Appellant argues that this Court should extend the exclusionary language in the UIM Statute to preclude coverage for any municipality that maintains a fund to cover claims and judgments rendered against it. Appellant’s argument requires this Court to ignore the plain meaning of the statute and rewrite it. R.C.

§3937.18(K)(3) only excludes a motor vehicle that is “self-insured within the meaning of the financial responsibility law of the state.” Ohio’s Financial Responsibility Law is codified in R.C. Chapter 4509, the Financial Responsibility Act.

Appellant concedes that Dayton is not self-insured pursuant to Ohio’s Financial Responsibility Law, as Dayton does not have a certificate of self-insurance pursuant to the Financial Responsibility Act. Rather, Appellant asks this Court to look beyond Ohio’s Financial Responsibility Law, and to rewrite the UIM Statute to exclude coverage for a political subdivision that maintains a reserve that is allowed by R.C. §2744.08. R.C. §2744.08 is part of the Political Subdivision Tort Liability Act and allows political subdivisions to maintain a general reserve in which to pay out tort claims and/or to purchase insurance. However, maintaining a reserve as described in R.C. §2744.08 does not qualify as “self-insured within the meaning of the financial responsibility law of the state” because it does not meet any of the requirements of the financial responsibility law. No showing of the number of automobiles is required, no certificate of self-insurance is issued, and no showing of financial ability to pay is required.

Not only is Dayton not excluded under the statute, but the statute specifically mandates coverage, where, as here, a political subdivision owns the vehicle and the operator is entitled to immunity under R.C. Chapter 2744. R.C. §3937.18 specifically provides that a vehicle is uninsured where the vehicle is owned by a political subdivision and the “operator has an immunity under Chapter 2744 of the Revised Code.” R.C. 3937.18(K)(2). As such, Appellant’s proposition of law is erroneous and this Court should refuse jurisdiction.

III. PROPOSITION OF LAW NUMBER 2

Appellant's second proposition of law requires this Court to extend the exclusion under R.C. §3937.18 to include "self-insurers in a practical sense." An entity that is "self-insured in a practical sense" by definition does not meet the requirements to be deemed self-insured under Ohio's Financial Responsibility Law. *Grange Mut. Cas. Co. v. Refiners Transport & Terminal Corp.* 21 Ohio St.3d 47, 49, 487 N.E.2d 319, 313 (1986)(Finding that "self-insurer in the practical sense" was not a "self-insurer in the legal sense.") The First District Court of Appeals in *Safe Auto Ins. Co. v. Corson*, 155 Ohio App. 3d 736 (2004) was the first and only court to apply this exception and imply that "self-insured in the practical sense" is the equivalent of "self-insured within the meaning of the financial responsibility law of the State." The phrase "self-insured in the practical sense" was first coined by Chief Justice Celebrezze of this Court in *Grange Mut. Cas. Co. v. Refiners Transport & Terminal Corp.*, 21 Ohio St.2d 47, 49, 487 N.E.2d 310, 313 (1986).

In *Grange Mut. Cas. Co.*, this Court held that the offer and rejection requirements of the uninsured motorist law did not apply to either self-insurers or financially responsible bond principals. *Id. at syllabus*. The issue was whether a private company that complied with the financial responsibility law via a mechanism other than insurance or a 4509.72 certificate of self-insurance had to in effect "offer" itself uninsured motorist coverage. The company had purchased a financial responsibility bond to comply with the financial responsibility law. *Id.* at 49. The case predates both the Political Subdivision Tort Liability Act (R.C. Chapter 2744) and the version of the UIM Statute at issue in this case. *Grange Mut. Cas. Co.* and its progeny do not hold that a self-insured in a practical sense is

a “self-insured within the meaning of the financial responsibility law of the state.” By contrast, these cases hold that a “self-insured in a practical sense” is by definition not a self-insured in the legal sense. *Id.*

Further, the concept of “self-insured in the practical sense” does not logically apply in this context. “Self-insured in the practical sense” was defined to include any entity that “retains the ultimate risk of loss.” *See Grange Mut. Cas. Co., supra.* To hold that motor vehicles that are “self-insured in a practical sense” are excluded from UIM coverage would make the coverage meaningless. Every individual driving without insurance is “self-insured in the practical sense” as the individual would retain the ultimate risk of loss. *See Grange, supra.*

Finally, “self-insured in a practical sense” does not apply to a political subdivision like the City of Dayton. A self-insured in the practical sense bears the entire risk of loss. *Grange Mut. Cas. Co., supra* at 49. A political subdivision does not bear the entire risk of loss because of the operation of R.C. Chapter 2744. R.C. Chapter 2744 shifts the risk of loss by requiring the plaintiff’s insurers to assume the risk of damages caused by the political subdivision to the extent of coverage. Therefore, because Dayton, as a matter of law, does not retain the risk of loss, it cannot be “self-insured in the practical sense.” This proposition of law is likewise unsound and does not warrant this Court’s accepting jurisdiction.

IV. PROPOSITION OF LAW NO. 3

For its Third Proposition of Law, Appellant argues that the UIM policy excludes coverage. Appellant claims that the following UIM Policy exclusion applies: “a land motor vehicle: 2. owned or operated by a self-insurer under any motor vehicle financial

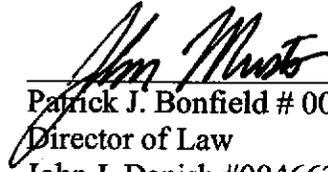
responsibility law, a motor carrier law or any similar law.” Appellant argues that under this definition that Dayton’s maintenance of a judgment reserve that is authorized by R.C. 2744.08 eliminates coverage, because R.C. §2744.08 is somehow a motor vehicle financial responsibility law, a motor carrier law or similar law. As discussed above, R.C. §2744.08 is not a financial responsibility, motor vehicle or otherwise. R.C. §2744.08 is part of the political subdivision tort liability act and allows political subdivisions to buy insurance, set aside reserves to cover tort liability or do both. Moreover, R.C. §2744.08 is not a motor carrier law or any similar law. “Motor Carrier” is defined in the Revised Code as an individual, partnership or corporation engaged in the transportation of goods or persons.” *See R.C. §4503.60*. The City of Dayton is not a motor carrier and R.C. §2744.08 is not a motor carrier law or similar law that would allow exclusion. As such, this exclusion does not apply.

Not only does the policy not exclude coverage, but specific language in the policy mandates coverage, where, as here, the vehicle is owned by a political subdivision and the operator is immune from liability under R.C. Chapter 2744. Therefore, Appellant’s proposition of law is flawed and this Court should decline jurisdiction in this matter.

V. CONCLUSION

For the foregoing reasons, Dayton respectfully requests that this Court not grant jurisdiction over this matter and let the Second District Court of Appeal’s decision stand.

Respectfully submitted,



Patrick J. Bonfield # 0015796

Director of Law

John J. Danish #0046639

Deputy Law Director

John C. Musto #0071512

Assistant City Attorney

101 West Third Street

P.O. Box 22

Dayton, Ohio 45401

(937) 333-4100

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by ordinary U.S. Mail, postage prepaid, to Mark H. Gams, Esq., 471 E. Broad St., 19th Fl., Columbus, OH 43215 this 12th day of April 2007.



John C. Musto

Assistant City Attorney