

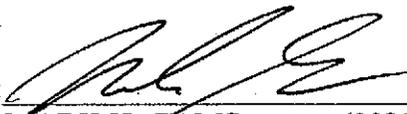
**NOTICE OF CERTIFIED CONFLICT SUBMITTED BY APPELLANT,
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY**

Now comes Appellant State Farm Mutual Automobile Insurance Company, pursuant to Rule IV of the Ohio Supreme Court Rules of Practice, and hereby gives notice that on April 11, 2007, the Court of Appeals for Montgomery County, Second Appellate District, issued an Order certifying its decision in the above-styled case to be in conflict with the following decision: *Safe Auto Ins. Co. v. Corson*, 155 Ohio App. 3d 736, 2004-Ohio-249, 803 N.E.2d 863, *appeal not accepted for review*, 102 Ohio St. 3d 1483, 2004-Ohio-3069, 810 N.E.2d 967.

Jurisdiction based upon such conflict is provided by Article IV, Section 3(B)(4) of the Ohio Constitution. A copy of the Court of Appeals Decision and Entry certifying a conflict and a copy of the conflicting Courts of Appeals opinions are attached for the Court's review.

Respectfully submitted,

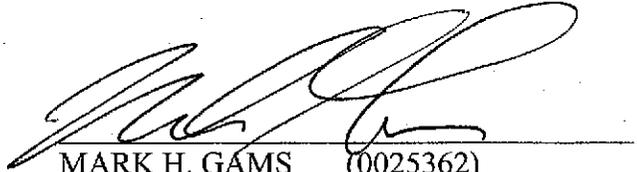
GALLAGHER, GAMS, PRYOR,
TALLAN & LITTRELL L.L.P.

By: 

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Notice of Certified Conflict 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 18 day of April, 2007.



MARK H. GAMS (0025362)
Attorney for Appellant, State Farm
Mutual Automobile Insurance Company

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IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

WESTERN ROGERS

Plaintiff-Appellee

v.

CITY OF DAYTON, et al.

Defendants-Appellants

Appellate Case No. 21593

Trial Ct. Case No. 04-CV-2716

DECISION AND ENTRY

April 11th, 2007

This matter is before us on a motion to certify a conflict, filed by defendant-appellant State Farm Mutual Automobile Ins. Co. (State Farm). The alleged conflict case is the decision of the First District Court of Appeals in *Safe Auto Ins. Co. v. Corson*, 155 Ohio App.3d 736, 2004-Ohio-249, 803 N.E.2d 863, appeal not accepted for review, 102 Ohio St.3d 1483, 2004-Ohio-3069, 810 N.E.2d 967.

We recently held that State Farm would be financially responsible, up to the limits of its uninsured motorists coverage, on an automobile insurance policy covering Western Rogers. See *Rogers v. City of Dayton*, Montgomery App. No. 21593, 2007-Ohio-673. In April, 2002, Rogers's automobile was stuck by a vehicle driven by Earl Moreo, III, who was an employee of the City of Dayton, Ohio (Dayton). *Id.* at ¶13.

After Rogers filed suit against Moreo, Dayton, and State Farm, the trial court granted summary judgment in Dayton's favor, finding that Dayton was "uninsured" for purposes of State Farm's uninsured motorists policy. The trial court also granted summary judgment

in favor of Rogers, and held that State Farm would be financially responsible up to the limits of its uninsured motorists coverage if Dayton or its employee were found to be legally responsible for Rogers's injuries. *Id.* at ¶5.

We subsequently affirmed the trial court. We noted that Dayton could have qualified as a self-insurer under the chapter of the Ohio Revised Code entitled "Financial Responsibility" (R.C. Chap. 4509). However, Dayton did not do so. *Id.* at ¶17. We then looked to the definition of "uninsured motor vehicle" in R.C. 3937.18, which stated that:

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

" * * *

"(3) A motor vehicle self-insured within the meaning of the financial responsibility law of the state in which the motor vehicle is registered." 2007-Ohio-673, at ¶19-21, quoting from R.C. 3937.18 as it existed after the enactment of S.B. 267, effective September 21, 2000.¹

We concluded in *Rogers* that:

"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." *Id.* at ¶22.

1

This statute and the current version of the uninsured motorists statute contain essentially the same pertinent wording as to self-insurance. Compare R.C. 3937.18(K)(3)(2000) with R.C. 3937.18(B)(5).

Our opinion also commented on the First District's prior decision in *Corson*, which involved similar facts and issues. In *Corson*, a police officer negligently merged with traffic and struck a vehicle operated by the plaintiff. Because the officer was not on an emergency call at the time, the City of Cincinnati was potentially liable for the damages. See 2004-Ohio-249, at ¶3. Like Dayton, Cincinnati had not purchased insurance and did not comply with the requirements to be designated a self-insurer. Instead, Cincinnati chose to pay judgments out of city coffers. *Id.* at ¶7.

The First District found that Cincinnati was self-insured in a "practical sense" because Cincinnati had paid all judgments and settlements arising from the negligence of its police officers from Cincinnati's own funds. Accordingly, the First District concluded that the city vehicle was not uninsured or underinsured for the purposes of UM/UIM law. *Id.* at ¶26. In this regard, the First District stressed that:

"Self-insurance is the retention of the risk of loss by one bearing the original risk under the law of contract. * * * An entity may be self-insured in a practical sense for purposes of UM/UIM law." *Id.* at ¶23.

In *Rogers*, we explicitly rejected *Corson's* approach, stating that the General Assembly had "clearly commanded a different result." *Rogers*, 2007-Ohio-673, at ¶15. Consequently, we held that State Farm would be required to pay up to the limits of its uninsured motorists coverage if Dayton and/or its employee were found legally responsible for the injuries to Rogers. *Id.* at ¶6 and 25-26. State Farm has now asked us to certify a conflict to the Ohio Supreme Court based on our disagreement with *Corson*.

Before we can certify a conflict, we must first find that our judgment conflicts:

"with the judgment of a court of appeals of another district and the asserted conflict *must* be 'upon the same question.' Second, the alleged conflict must be on a rule of law--not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals." *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 596, 1993-Ohio-223, 613 N.E.2d 1032 (emphasis in original).

Dayton contends that the motion to certify should be overruled. Dayton's first argument is that the facts of *Rogers* and *Corson* are distinguishable and that the actual holding in *Corson* does not conflict with our case. Dayton also contends that the discussion of "self-insured" in *Corson* was dictum and was unnecessary to the holding in the case.

Safe Auto was the uninsured motorists carrier in *Corson*. The First District concluded that it did not need to resort to the Safe Auto policy because the City of Cincinnati was "liable in the first instance." 2004-Ohio-249, at ¶15. This conclusion was based on Cincinnati's admission of the following facts: (1) a Cincinnati police officer negligently caused the accident; (2) the officer was acting in the scope of her employment; and (3) Cincinnati owned the vehicle involved in the accident, which was registered in the State of Ohio. *Id.* at ¶14. In light of Cincinnati's acknowledged liability, the First District concluded that discussion about self-insurance and Safe Auto's policy would be irrelevant. *Id.*

We disagree with this conclusion, since liability and financial responsibility are not necessarily the same thing. For example, a tortfeasor may be legally liable for an injury,

but may lack funds to pay a judgment. Furthermore, the First District's decision does not even mention the collateral source rule in R.C. 2744.05(B), which states that a claimant's insurance benefits must be deducted from any award recovered against a political subdivision. R.C. 2744.05(B) also prohibits insurers from filing subrogation actions against political subdivisions to recover benefits that have been paid.

We specifically discussed the collateral source rule in *Rogers*, noting that "It shifts the financial responsibility from a municipality that has employed an immune tortfeasor to the insurance carrier that has provided uninsured motorists coverage to the tort victim, while charging the tort victim a premium for that coverage." 2007-Ohio-673, at ¶25. Thus, R.C. 2744.05(B) specifically contemplates situations in which insurance policies are relevant, even though political subdivisions may be liable for an injury.

In any event, after deciding that Safe Auto's insurance policy was irrelevant, the First District went on to consider the policy and the issue of self-insurance. This was apparently perceived as a courtesy, since, in the court's own words, the parties had "made a fuss" about whether the insurance policy applied. *Corson*, 2004-Ohio-249, at ¶16. Nonetheless, the First District spent a considerable amount of time discussing these issues. *Id.* at ¶22-29.

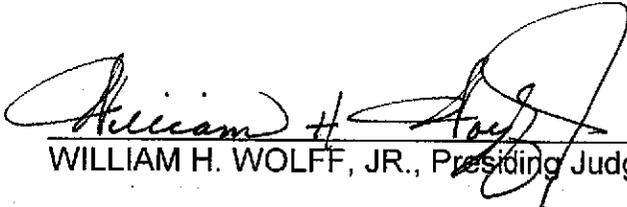
The First District's discussion of the "self-insured" issue could be dismissed as dictum that was unnecessary to the court's decision. However, because the discussion of this issue was a significant part of the First District's opinion, we can reasonably conclude that a conflict exists. The First District's resolution of the matter clearly indicates that future situations involving this subject will be resolved against political subdivisions that have

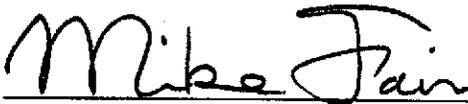
failed to obtain a certificate as a qualifying "self-insurer" under R.C. 4509.72. Compare *White v. Jackson* (Dec. 26, 1978), Franklin App. No. 78AP-169, 1978 WL 217282, *1, affirmed, *White v. Randolph* (1979), 59 Ohio St.2d 6, 391 N.E.2d 333 (certifying conflict where conflicting alleged dicta formed an important part of the opposing district's appellate court opinion).

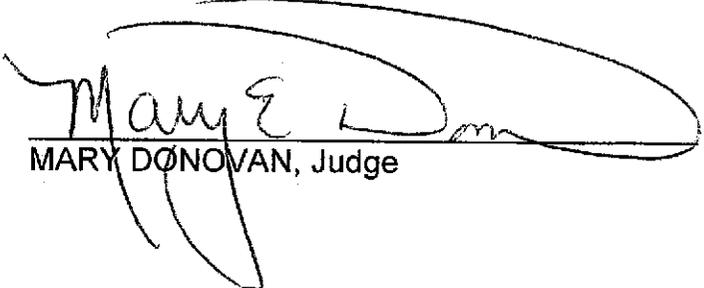
Having concluded that a conflict exists, we certify the following question to the Ohio Supreme Court for review and consideration:

Under R.C. 3937.18(K)(3)(2000), is a political subdivision "self-insured within the meaning of the financial responsibility law" of Ohio if the political subdivision has not qualified as a self-insurer under Ohio Revised Code Chapter 4509?

IT IS SO ORDERED.


WILLIAM H. WOLFF, JR., Presiding Judge


MIKE FAIN, Judge


MARY DONOVAN, Judge

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MONTGOMERY CO., OHIO

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

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	:	

OPINION

Rendered on the 16th day of February, 2007.

PATRICK J. BONFIELD, Atty. Reg. No. 0015796 and JOHN J. DANISH, Atty. Reg. No. 0046639 and JOHN C. MUSTO, Atty. Reg. No. 0071512, 101 W. Third St., P.O. Box 22, Dayton, Ohio 45401

Attorneys for Defendants-Appellees City of Dayton and Earl Moreo

MARK H. GAMS, Atty. Reg. No. 0025363 and M. JASON FOUNDS, Atty. Reg. No. 0069468, 471 E. Broad St., 19th Floor, Columbus, Ohio 43215

Attorneys for Defendant-Appellant State Farm Mutual Automobile Insurance Company

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

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.

I

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

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:

"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. 20814, 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,

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, ¶5-13: "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

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:

" ***

"(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

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

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-

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.

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.

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

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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LEXSEE 155 OHIO APP. 3D 736

SAFE AUTO INSURANCE CO., Plaintiff-Appellee, vs. JAMIE L. CORSON and
CITY OF CINCINNATI, Defendants-Appellants.

APPEAL NOS. C-030276, C-030311

COURT OF APPEALS OF OHIO, FIRST APPELLATE DISTRICT, HAMILTON
COUNTY*155 Ohio App. 3d 736; 2004 Ohio 249; 803 N.E.2d 863; 2004 Ohio App. LEXIS
236*

January 23, 2004, of Judgment Entry on Appeal

NOTICE: THESE ARE NOT OFFICIAL HEADNOTES OR SYLLABI AND ARE NEITHER APPROVED IN ADVANCE NOR ENDORSED BY THE COURT. PLEASE REVIEW THE CASE IN FULL.

SUBSEQUENT HISTORY: Discretionary appeal not allowed by *Safe Auto Ins. Co. v. Corson*, 2004 Ohio LEXIS 1481 (Ohio, June 23, 2004)

PRIOR HISTORY: Civil Appeal From: Hamilton County Court of Common Pleas. TRIAL NOS. A-0204044, A-0204083.

DISPOSITION: Affirmed.

HEADNOTES: INSURANCE - CIVIL MISCELLANEOUS

SYLLABUS: In a simple auto-accident case overdressed as a legal puzzle, the city of Cincinnati sought to avoid paying for damages resulting from an auto accident negligently caused by its own police officer: The city was liable for the damages, but when it tried to get the innocent party's insurance carrier to pay, summary judgment was appropriately entered in the insurer's favor, where the UM/UIM law in effect at the time did not include vehicles owned by political subdivisions if no immunity applied, and when the city was self-insured in a practical sense by paying judgments and settlements out of its own funds.

COUNSEL: Rothchild Law Offices and Eugene M. Rothchild, for Appellant Jamie L. Corson.

J. Rita McNeil, City Solicitor, Gloria Sigman, and Terrance A. Nestor, for Appellant City of Cincinnati.

Freund, Freeze & Arnold and Thomas B. Bruns, for Appellee.

JUDGES: MARK P. PAINTER, Judge. WINKLER, P.J., and GORMAN, J., concur.

OPINION BY: MARK P. PAINTER

OPINION: [***864] [*737]

MARK P. PAINTER, Judge.

[**P1] This is a simple auto-accident case overdressed as a legal puzzle. It's not. Uninsured-motorist law has had its share of twists and turns. The city of Cincinnati asks us to shape it into a pretzel. We decline.

[**P2] Plaintiffs-appellants Jamie Corson and the city of Cincinnati appeal the entry of summary judgment for defendant-appellee Safe Auto Insurance Company. We affirm.

I. A Simple Accident Becomes a Legal Conundrum

[**P3] Jamie Corson was involved in an accident with a city police vehicle in May 2001. Everyone agrees that the accident was caused by the officer's negligence in merging with traffic. Though not on an emergency call, the officer was acting in the scope of her employment at the time of the accident, so the city of Cincinnati is liable for the damages. n1 The city should have paid Corson's damages, and that would have been that. But no. The city refused to pay and pointed a finger at Safe Auto, Corson's insurance company.

n1 R.C. 2744.02(B)(1).

[**P4] Safe Auto, probably surprised at being involved at all, did not send Corson a check. Not satisfied that it should pay, it sued both Corson and the city in a declaratory-judgment action, seeking to have the court tell the city to pay up and to stop bothering Safe Auto. A day later, Corson sued Safe Auto--but not the city--for payment of her claim. Later, in her answer to Safe Auto's lawsuit, Corson finally included a claim against the city. Now that three parties to a two-party accident were in court, the trial court consolidated the cases.

II. To be or Not to be Responsible

Corson owned an insurance policy with Safe Auto. The policy included uninsured-motorist and underinsured-motorist ("UM/UIM") coverage.

[**P5] Responsible people buy UM/UIM coverage to protect themselves against irresponsible drivers who do not have any insurance or enough insurance. The city, claiming [*738] to be "uninsured," seeks to be held irresponsible and claims that Corson's insurance policy should pay for the damage the city caused.

[**P6] The city, just like every other entity, is liable for damages when its employees negligently injure someone else. n2 There is an exception if a police officer is on an emergency call, and then the city is immune. n3 That was not the case here--the officer was simply driving in traffic like everyone else. The law does exempt the city *employee* from individual liability, n4 on the very reasonable grounds that the employer--the city--must and will pay damages. In other words, the individual officer should not be sued, only the city.

n2 R.C. 2744.02(B)(1).

n3 R.C. 2744.02(B)(1)(a).

n4 R.C. 2744.03(A)(6).

[**P8] But the city did not buy insurance to cover these damages. Neither did it comply with the rules to be a "self-insurer" [***865] under the UM/UIM statutes. n5 It simply chose to pay damages or judgments out of the city coffers, which is perfectly proper.

n5 See R.C. 4509.72.

[**P9] The city somehow concocted the theory that someone else should pay. That someone else was Safe Auto. This was evidently because Safe Auto was the only insurance company involved. But why should

Safe Auto--the insurance company for the *innocent* driver--pay damages the city of Cincinnati owes?

[**P10] Safe Auto, perhaps as confused as is this court as to why it was even in this case, made many arguments. The one that the trial court bought was that the city was self-insured in practical fact. There is certainly caselaw to support that theory. n6 If the city was self-insured under the UM/UIM law, then even it admits that it had to pay the damages, and it could not claim to be uninsured. We do not disagree with this analysis, but we do not see why it is necessary.

n6 See *Grange Mut. Cas. Co. v. Refiners Transport & Terminal Corp.* (1986), 21 Ohio St.3d 47, 21 Ohio B. 331, 487 N.E.2d 310; *Mathews v. Regional Transit Authority* (Nov. 7, 1985), 8th Dist. No. 49406, 1985 Ohio App. LEXIS 9201.

[**P11] The city's argument--that it was "uninsured"--might be clever; but how that fact released it from liability for damages escapes us. If an uninsured millionaire had hit Corson, could the millionaire have simply said, "I'm uninsured so I don't have to pay--your own insurance has to pay for my negligence," and blithely continued down the road unsued?

[**P12] [*739] Now if that same millionaire had followed the statutory requirements to certify himself as a self-insurer, n7 he would no doubt have been liable for his actions. And the insurance company would not.

n7 See R.C. 4509.45 and 4509.72.

[**P13] But the city of Cincinnati was not required to follow the self-insurance certification methods prescribed by the financial responsibility law. n8 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 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.

n8 R.C. 4509.71.

III. Summary Judgment

[**P14] We review a grant of summary judgment de novo. n9 Summary judgment is appropriate only where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. n10 A court shall grant summary judgment where reasonable minds can come only to a conclusion adverse to the nonmoving party. n11

n9 *Doe v. Shaffer*, 90 Ohio St.3d 388, 2000 Ohio 186, 738 N.E.2d 1243.

n10 *Civ.R. 56(C)*.

n11 *Id.*

[**P15] There are no factual disputes in this case. The city admitted that the officer's negligence had caused the accident and that the officer was acting in the scope of her employment at that time. It also admitted that it owned the police vehicle involved in the accident, and that the vehicle was registered in Ohio. The only question that remains is whether Safe Auto was entitled to judgment as a matter of law. And of course it was.

IV. Safe Auto's Policy Did Not Apply

[**P16] Because the city was liable in the first instance, there was no need to resort [***866] to the Safe Auto policy at all. All the rest of the discussion in the city's brief is perhaps interesting, but mainly irrelevant. As Tweedledee said to Tweedledum, "If it was so, it might be; and if it were so, it would be; but as it isn't, it ain't. That's logic." n12

n12 Carroll, *Through the Looking Glass* (Easton Press ed. 1965) 65.

[**P17] [*740] But because Corson and the city make a fuss about whether the policy applied, we address their concerns.

[**P18] The Safe Auto UM/UIM coverage did not apply to any vehicle "owned or operated by a self-insurer within the meaning of any motor vehicle financial responsibility law, motor carrier law, or similar law." Therefore, if the city was self-insured, Safe Auto was not liable under the policy.

[**P19] The relevant UM/UIM provision in effect at the time of the insurance contract between Corson and Safe Auto was *R.C. 3937.18(K)*, as amended by Senate Bill 267. That provision stated that the terms "uninsured" and "underinsured" did not apply where the motor vehi-

cle was owned by a political subdivision, the operator was subject to immunity, and the action was brought against the *operator*. n13 It gave no such protection to political subdivisions--here, the operator was not sued. The law also excluded vehicles that were self-insured within the meaning of the financial responsibility law. n14

n13 *R.C. 3937.18(K)(2)*, as amended by S.B. No. 267.

n14 *R.C. 3937.18(K)(3)*, as amended by S.B. No. 267.

[**P20] The city admitted that it owned the vehicle involved in the accident. The immunity question is all that remains. The city and Corson claim that the officer had immunity here. Again, correct but irrelevant. n15 But the code gave--and still gives--immunity to a political subdivision *only* when the officer was responding to an emergency call. n16 This was not the case here.

n15 *R.C. 2744.03(A)(6)*.

n16 *R.C. 2744.02(B)(1)(a)*.

[**P21] Under the previous version of *R.C. 3937.18(B)*, the only way Safe Auto would be obligated to cover Corson's damages is if the city had immunity. But the city did not have immunity. The city was liable for the officer's negligence. The city was liable, whether or not it had insurance, because it was not immune unless the officer was on an emergency call.

[**P22] Because the city owned the officer's vehicle, and this case did not involve a suit against the operator of the vehicle, the Safe Auto policy simply did not apply, and did not need to apply, and summary judgment was appropriate.

V. Self-Insured

[**P23] But even if immunity did apply--which it clearly did not--the city was still a self-insurer in the practical sense, as the trial court held.

[**P24] [*741] Self-insurance is the retention of the risk of loss by the one bearing the original risk under the law or contract. n17 An entity may be self-insured in a practical sense for the purposes of UM/UIM law. n18

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n17 *Physicians Ins. Co. v. Grandview Hospital & Medical Center* (1988), 44 Ohio App. 3d 157, 542 N.E.2d 706.

n18 *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.

[**P25] Corson now argues that the city was not required to purchase insurance. She is correct. A political subdivision may [***867] use public funds to contract for insurance to cover its and its officers' potential liability. n19 It may also establish and maintain a self-insurance program. n20 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.

n19 *R.C. 9.83.*

n20 *Id.*

[**P26] 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.

[**P27] 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.

VI. Another Irrelevancy

[**P28] The UM/UIM coverage in the insurance contract excluded any motor vehicles owned by a governmental authority or agency. The city now argues that this exclusion was against public policy.

[**P29] Ohio courts have rejected exclusions of government vehicles from uninsured-motorist coverage as being against public policy. n21 These cases have voided the exclusion language based on an earlier version of *R.C. 3937.18(K)* that did not include the same definition of "uninsured motor vehicle" used in this case. But the same logic might apply where a government vehicle was not subject to immunity and was not self-insured.

N21 See *Watters v. Dairyland Ins. Co.* (1976), 50 Ohio App.2d 106, 361 N.E.2d 1068; *Jennings v. Dayton* (1996), 114 Ohio App.3d 144, 682 N.E.2d 1070; *Thompson v. Economy Fire & Cas. Co.* (Mar. 6, 1991), 4th Dist. No. 1697, 1991 Ohio App. LEXIS 910.

[**P30] [*742] We agree that Safe Auto's policy might pose a problem in certain fact scenarios. But such a scenario was not involved here, so we need not decide the public-policy issue in this case.

[**P31] Summary judgment was appropriate. We therefore overrule Corson's and the city's assignments of error and affirm the trial court's judgment.

Judgment affirmed.

WINKLER, P.J., and GORMAN, J., concur.