

IN THE SUPREME COURT OF OHIO

ELAINE HUNTER, et al.,

Plaintiffs-Appellees,

v.

CITY OF DAYTON, et al.,

Defendants-Appellants.

07-0816

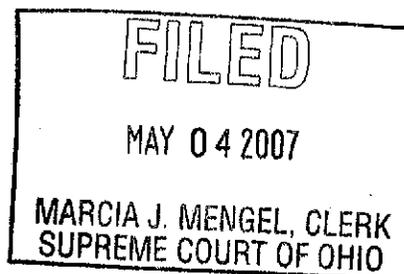
On Appeal from the Montgomery
County Court of Appeals, Second
Appellate District

Court of Appeals
Case No. 021680

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

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**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 17, 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,

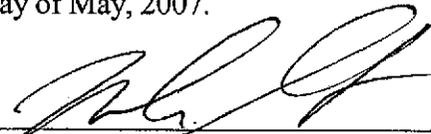
GALLAGHER, GAMS, PRYOR,
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By: 

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CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Certified Conflict was served upon Patrick J. Bonfield, Director of Law; John J. Danish, Deputy Director of Law; and Shanon M. Potts, Assistant City Attorney, Attorneys for Appellee City of Dayton, 101 West Third Street, P.O. Box 22, Dayton, Ohio 45401 by ordinary U.S. Mail service this 4 day of May, 2007.


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

FILED
COURT OF APPEALS
2007 APR 17 AM 10:45

GREGORY A. BRUSH
CLERK OF COURTS
MONTGOMERY CO. OHIO
38

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

ELAINE HUNTER, et al. :
Plaintiffs-Appellees : C.A. CASE NO. 21680
v. : T.C. NO. 05 CV 2420
CITY OF DAYTON, et al. :
Defendants-Appellants :

.....
DECISION AND ENTRY

Rendered on the 17th day of April, 2007.

.....
CARMINE M. GAROFALO, Atty. Reg. No. 0005818, 131 N. Ludlow Street, Suite 1400,
Dayton, Ohio 45402
Attorney for Plaintiffs-Appellees

MARK H. GAMS, Atty. Reg. No. 0025362, 471 East Broad Street, 19th Floor, Columbus,
Ohio 43215
Attorney for Plaintiff-Appellee State Farm Mutual Automobile Insurance Company

PATRICK J. BONFIELD, Atty. Reg. No. 0015796 and JOHN J. DANISH, Atty. Reg. No.
0046639 and SHANON M. POTTS, Atty. Reg. No. 0079531, 101 W. Third Street, P. O.
Box 22, Dayton, Ohio 45401
Attorneys for Defendant-Appellant City of Dayton

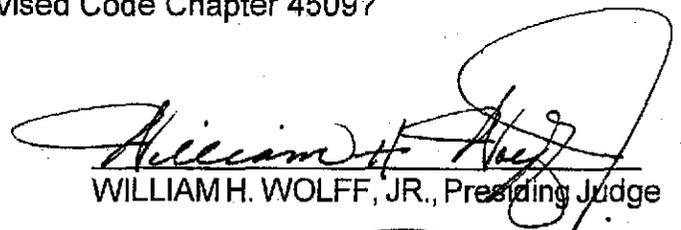
PER CURIAM:

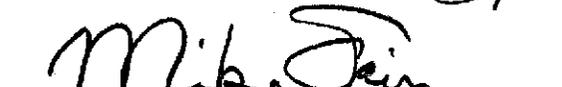
State Farm Mutual Automobile Insurance Company has moved for certification of a conflict between our opinion and judgment of March 23, 2007, and *Safe Auto Ins. Co. v. Corson* (2001), 155 Ohio App.3d 736, 2004-Ohio-249, rendered by the Court of Appeals for Hamilton County. The City of Dayton opposes certification.

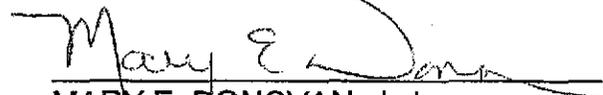
State Farm also moved for certification of *Rogers v. City of Dayton* (Montgomery App. No. 21593, 2007-Ohio-673 as being in conflict with *Corson*. The City also opposed that motion. Our opinion and judgment in this case was based on *Rogers* because the operative facts in these cases are on all fours.

The parties' contentions on the motion to certify are comparable to those advanced on the motion to certify in *Rogers*. We need not repeat these contentions or this court's comprehensive discussion in *Rogers*. As in *Rogers*, we SUSTAIN the motion to certify and certify the following question to the Supreme Court of Ohio:

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?


WILLIAM H. WOLFF, JR., Presiding Judge


MIKE FAIN, Judge


MARY E. DONOVAN, Judge

Copies mailed to:

Carmine M. Garofalo

Mark H. Gams

Patrick J. Bonfield

John J. Danish

Shanon M. Potts

Hon. Michael T. Hall, Administrative Judge



**FILED
COURT OF APPEALS**

2007 MAR 23 AM 8:10

**GREGORY A. BRUSH
CLERK OF COURTS
MONTGOMERY CO. OHIO
38**

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

ELAINE HUNTER, et al.	:	
Plaintiffs-Appellees	:	C.A. CASE NO. 21680
v.	:	T.C. NO. 05 CV 2420
CITY OF DAYTON, et al.	:	(Civil Appeal from Common Pleas Court)
Defendants-Appellants	:	

OPINION

Rendered on the 23rd day of March, 2007.

**CARMINE M. GAROFALO, Atty. Reg. No. 0005818, 131 N. Ludlow Street, Suite 1400,
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**MARK H. GAMS, Atty. Reg. No. 0025362, 471 East Broad Street, 19th Floor, Columbus,
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**PATRICK J. BONFIELD, Atty. Reg. No. 0015796 and JOHN J. DANISH, Atty. Reg. No.
0046639 and SHANON M. POTTS, Atty. Reg. No. 0079531, 101 W. Third Street, P. O.
Box 22, Dayton, Ohio 45401
Attorneys for Defendant-Appellant City of Dayton**

WOLFF, P.J.

The City of Dayton appeals from a decision, order, and entry of June 12, 2006.

which denied its motion for partial summary judgment wherein the City had sought a determination that it was uninsured. The same decision, order, and entry sustained a motion of State Farm Mutual Automobile Insurance Company for summary judgment that the City was self-insured. The City's notice of appeal does not mention the summary judgment in favor of State Farm. Similarly, the City's assignments of error assert error in the denial of its motion for partial summary judgment, but not in the granting of State Farm's motion for summary judgment.

Because both parties' motions sought a determination as to whether the City was self-insured, and because the City's notice of appeal referred to the decision, order, and judgment that decided both motions, we deem that the City has preserved for our review the question of whether the trial court properly determined that it was self-insured.

I.

The City has advanced three assignments of error that can be considered together

"1. THE TRIAL COURT ERRED IN DENYING APPELLANT CITY OF DAYTON'S MOTION FOR PARTIAL SUMMARY JUDGMENT.

"2. THE TRIAL COURT ERRED IN HOLDING THAT THE CITY OF DAYTON IS THE SELF-INSURED, RATHER THAN UNINSURED, OWNER OF THE VEHICLE DRIVEN BY MR. BLACK AT THE TIME OF THE ACCIDENT WHERE SAID VEHICLE WAS NOT COVERED UNDER ANY POLICY OR POLICIES OF INSURANCE.

"3. AS THE CITY OF DAYTON VEHICLE IS UNINSURED, THE TRIAL COURT ERRED IN HOLDING THAT STATE FARM'S INSURANCE POLICY IS NOT APPLICABLE TO THE PRESENT SITUATION."

The facts giving rise to this appeal are straightforward. Dion Black, a City employee

backed into a vehicle occupied by Lemuel and Elaine Hunter. At the time, Black was in the course of his employment and operating a City owned vehicle. The Hunters brought suit against the City and, alternatively, against State Farm, their insurance company, for uninsured motorists coverage. Eventually the City and State Farm filed motions for summary judgment, as described above, and the court determined that the City was self-insured. The trial court certified the summary judgment per Civ.R. 54(B).

II.

The trial court decided that Dayton was self-insured prior to our opinion in *Rogers v. Dayton* (Feb. 16, 2007), Montgomery App. No. 21593; 2007 WL 495787; 2007 Ohio 673. In *Rogers*, we affirmed a trial court determination, rendered on comparable facts, that the City was uninsured. The trial judge in this case acknowledged that his colleague - on "very similar...facts" - had concluded in *Rogers* that the City was uninsured.

Because we have determined in *Rogers* that the trial court properly determined that the City is uninsured, and because the operative facts in this case are on all fours with those in *Rogers*, we must sustain the City's assignment of error.

III.

The judgment that the City of Dayton is self-insured will be reversed, and the case will be remanded for further proceedings.

FAIN, J., concurs.

DONOVAN, J., concurring:

Although I dissented in *Rogers*, the doctrine of stare decisis dictates I concur in this judgment.

Copies mailed to:

Carmine M. Garofalo

Mark H. Gams

Patrick J. Bonfield

John J. Danish

Shanon M. Potts

Hon. Michael T. Hall, Administrative Judge

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).

155 Ohio App. 3d 736, *, 2004 Ohio 249, **;
803 N.E.2d 863, ***; 2004 Ohio App. LEXIS 236

[**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; *Matthews 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

155 Ohio App. 3d 736, *, 2004 Ohio 249, **,
803 N.E.2d 863, ***; 2004 Ohio App. LEXIS 236

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/UIIM 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/UIIM law.

VI. Another Irrelevancy

[**P28] The UM/UIIM 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.