

IN THE SUPREME COURT OF OHIO

WESTERN ROGERS, :  
: Appellee, :  
: Case Nos. 07-0549 and 07-0684 :  
- v - :  
: On Appeal From the Montgomery :  
CITY OF DAYTON, et al., : County Court of Appeals, :  
: Second Appellate District :  
Appellant. :

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MERIT BRIEF OF APPELLANT  
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

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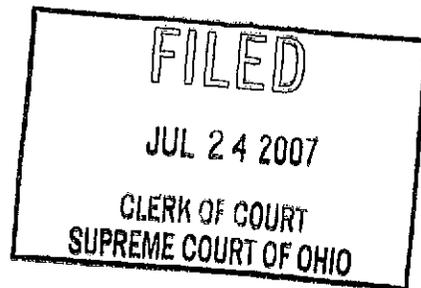


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## STATEMENT OF FACTS

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 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 they are 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 City'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.

On January 17, 2005, State Farm filed its Motion for Reconsideration and the Court denied the Motion for Reconsideration on March 23, 2006.

State Farm filed its Notice of Appeal with the Montgomery County Court of Common Pleas on May 4, 2006.

The Second District Court of Appeals issued its Opinion and Final Entry in favor of the City of Dayton on February 16, 2007. In a two-to-one Decision, the majority found that the City of Dayton was uninsured because it did not comply with R.C. §4509.72(A), since it did not obtain a Certificate of Self-Insurance issued by the Registrar.

State Farm filed a Motion to Certify a Conflict to the Supreme Court of Ohio on February 23, 2007. 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.

On March 27, 2007, State Farm filed a Notice of Appeal to The Ohio Supreme Court. A Memorandum in Support of Jurisdiction was filed on March 27, 2007.

On June 6, 2007, the Supreme Court determined a conflict existed and further, accepted the Discretionary Appeal for review and ordered both cases consolidated.

ARGUMENT

CERTIFIED CONFLICT QUESTION:

**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 R.C. CHAPTER 4509?**

ANSWER AND PROPOSITION OF LAW NO. 1:

**YES. 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 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 concluded the City of Dayton 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 claimed the City has less than 25 motor vehicles or that the City was not able to demonstrate it was responsible to pay claims and judgments against it. In fact, the Trial Court took judicial notice of the same. Instead, the majority of the lower court chose to construe "financial responsibility law" as meaning *only* 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, R.C. §4509 is not called the "Financial Responsibility Law." (It is commonly referred to as the "Financial Responsibility Act.") 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 . . .

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 Appellate 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.

Rogers v. City of Dayton, 2<sup>nd</sup> Dist. No. 21593,  
2007 Ohio 673 at ¶39.

As previously noted, the Financial Responsibility Act of R.C. §4509 is not the only financial responsibility law in the state. For instance, 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, 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 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 bills and property damage paid by the tortfeasor's insurer or 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 there would be no uninsured motorist coverage (the City is self-insured), there would be no payments to subrogate and therefore the subrogation provision is inapplicable.

If the Legislature decided to make all city-owned vehicles uninsured as a matter of public policy, it could have done so through statute. It knew how to bar subrogation claims pursuant to 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 R.C. §3937.18.

In Martin v. Midwestern Group Ins. Co. (1994), 70 Ohio St.3d 478, the Court ruled that no limitation or exclusion of UM coverage would be valid unless expressly authorized by 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 (1) uninsured motorist coverage applied despite any applicable immunity; and (2) no reduction or exclusion of UM coverage was allowed unless expressly authorized by R.C. §3937.18, that in 1996 Jennings v. City of Dayton (1996), 114 Ohio App. 3d 144, was decided. 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 R.C. §3937.18 did not have 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 since being self-insured was not an exclusion under R.C. §3937.18.

The Jennings 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. Applying the Martin decision, *supra*, Jennings decided the exclusion for government vehicles constituted a reduction in UM coverage which was not expressly authorized by R.C. §3937.18, and therefore the policy language was unenforceable as a matter of law.

Such exclusions of governmental entities, seemingly motivated by issues of immunity and confidence in the government's ability to pay, have the effect of limiting coverage, in conflict with the terms of the statute. Because American States' exclusion of government vehicles substantially undermines the protection afforded by the uninsured motorist statute, we hold that it is void as against public policy.

Jennings, *supra*, at 151.

The Court also ruled that the City of Dayton was self-insured and that:

. . . self-insured vehicles are ‘uninsured’ for purposes of R.C. 3937.18. Thus, American States' exclusion of self-insured vehicles fails to provide the full protection mandated by the uninsured motorist statute, and is accordingly unenforceable.  
Jennings, *supra*, at 151.

In 1997, the Legislature responded to Martin, Jennings and other cases by amending R.C. §3937.18 pursuant to H.B. 261. The Legislature generally precluded coverage for accidents involving government-owned vehicles, unless an emergency vehicle immunity under R.C. Chapter 2744 applied. Further, in an apparent response to Jennings, the Legislature eliminated self-insured motor vehicles from the roster of uninsured motor vehicles. 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.

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. Instead, it included the self-insured language and also carved out an exception to what constituted an uninsured motor vehicle. 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.

The inclusion of R.C. §3937.18(K)(3) also provided an additional exclusion to uninsured motor vehicles. It is axiomatic that while a city employee is immune for his or her negligence, the city remains liable for personal injuries sustained by its employee’s negligence.

The City of Dayton would like this Court to consider the “operator” to be Earl Moreo, its *employee*. It is uncontroverted that Moreo was working in the course and scope of his employment at the time his negligence caused the accident at issue. For the Uninsured Motorist Statute to make sense, the “operator” of a motor vehicle owned by a political subdivision must be the City of Dayton, or otherwise the statutory provision is faulty for two reasons.

First of all, the immunity language would be superfluous in all negligence cases, because municipal employees always have immunity for negligence while driving unless they are acting “manifestly outside the scope of” their employment or responsibilities or are acting in bad faith, with malicious purpose or in a wanton or reckless manner. Ohio Revised Code §2744.03(A)(6)(a) and (b).

Secondly, the “operator” of the motor vehicle was the City of Dayton, as the City can act only through its employees. This reasoning could be found in the Supreme Court case, Scott-Pontzer v. Liberty Mut. Fire Ins. Co. (1999), 85 Ohio St.3d 660. In that case, the word “you” was determined to reference not only the corporation, but the corporation’s employees:

. . . It would be reasonable to conclude that ‘you,’ while referring to Superior Dairy, also includes Superior’s employees, since a corporation can act only by and through real live persons. It would be nonsensical to limit protection solely to the corporate entity, since a corporation, itself, cannot occupy an automobile, suffer bodily injury or death, or operate a motor vehicle. Here, naming the corporation as the insured is meaningless unless the coverage extends to some person or persons – including to the corporation’s employees.

*Id.* at p. 664.

Even though Scott-Pontzer was overruled by Westfield Ins. Co. v. Galatis (2003), 100 Ohio St.3d 216, the concept that a corporation can act only through its employees was not disturbed. Galatis specifically permitted the corporate designation of “you” to continue to apply

to an employee of the corporation as long as the employee was within the course and scope of his employment. It is undisputed that Earl Moreo was in the course and scope of his employment with the City of Dayton at the time of this accident. The City of Dayton, as the operator of the motor vehicle, does not have an immunity for the negligence of its employee.

An argument similar to that made by the City of Dayton was made in a Franklin County Court of Appeals case captioned Holt v. Almendarez, (Dec. 10, 1998), 10<sup>th</sup> Dist. No. 98AP-422, 1998 Ohio App. LEXIS 5944. In that case, the Dublin Board of Education had liability insurance coverage but argued that since its employee was immune from liability, the Board of Education was also immune from liability. The Almendarez court found that since the Board of Education was clearly not immune, it could not rely upon the definition of what constituted an uninsured motor vehicle found in R.C. §3937.18. It cited the Trial Court's findings:

. . . In the case at bar, the Board is not immune from liability for the actions of its employees. R.C. 2744.03(B). Likewise, the employee tortfeasor's immunity does not bar the Plaintiff from recovering from the Board. Therefore, the tortfeasor employee's immunity from liability does not in turn trigger the Plaintiff's UM coverage because the tortfeasor's employer, the Board, is still liable for the acts of its employees performed during the scope of their employment. *Id.* The rule of law in Ohio that tortfeasor immunity acts to trigger the availability of UM coverage is the exception, and not the rule. Again, under Ohio law, immunity has been held to trigger UM coverage, but only when said immunity completely bars an injured policy holder's recovery. Therefore, the Plaintiff's UM coverage is not available and the Board may not deduct said coverage from any award rendered in this case.

*Id.* at \*4-5.

Since the City of Dayton is responsible for the actions of its employees within the course and scope of their employment, the only appropriate reading of the statute is to find that the City

of Dayton must also be considered the operator of the vehicle. Therefore, the City vehicle is not an uninsured vehicle pursuant to R.C. §3937.18(K)(2).

**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 of 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. It is State Farm's position that the City maintains a self-insurance program consistent with Ohio law. However, if this Court chooses to believe that the City has not maintained a self-insurance program consistent with the letter of Ohio law, it certainly can find that the City of Dayton is self-insured in the practical sense. Self-insurance "in the practical sense" refers to an entity that continues to bear the risk of loss for liability claims but has not become a self-insurer in the legal sense as contemplated by Ohio's motor vehicle licensing and registration laws. Dorsey v. Federal Ins. Co. (2003), 154 Ohio App. 3d 568, 2003 Ohio 5144 ¶20. Since the City of Dayton annually sets aside unencumbered funds to pay for settlements and judgments arising from the negligent conduct of its employees, the City certainly is self-insured in the practical sense. Being self-insured in the practical sense is the same as being self-insured as it would apply to R.C. 3937.18. Dorsey, supra, at ¶25.

**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:

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

\* \* \* \*

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

(See Appendix, p. A-60)

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, pursuant to 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

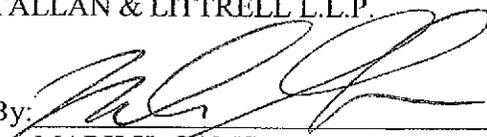
This case ultimately is about who should pay for injuries caused the victim by the negligence of the City's employee. The City chose not to purchase liability insurance, and to instead establish a self-insurance program to pay judgments on its own. However, the City desires to force the injured victim's own insurance company to pay for the injuries caused by the City employee by claiming it is uninsured, not self-insured. The City wants to avoid paying for liability insurance and to avoid paying for claims made by victims who have purchased insurance. However, Ohio law does not permit the City to have it both ways.

The City of Dayton is self-insured within the meaning of the financial responsibility law of Ohio as well as self-insured in the practical sense. In 1996, the City claimed it was self-insured so it could shift liability from where it belonged to the insurer of the injured victim. In 2007, without changing the way it does business, it now claims to be uninsured and not self-insured so as to accomplish the same thing -- shift responsibility from where it belongs (the principal of the tortfeasor), to the insurer of the victim. The City of Dayton claims it drives without insurance and is not self-insured, yet the state of Ohio requires all motorists to have a policy of insurance or to be self-insured. This ruse should be stopped and the City of Dayton should be made responsible for its negligence.

Further, it is clear that the State Farm policy specifically excludes vehicles owned by cities such as Dayton who are self-insurers under Ohio's financial responsibility laws.

Respectfully submitted,

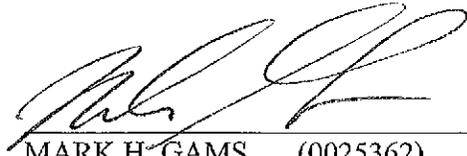
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By: 

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**PROOF OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing Merit Brief was served upon Patrick J. Bonfield, John J. Danish and John Musto, 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 24 day of July, 2007.



---

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

mhg\118465\pl\28lt

# APPENDIX

IN THE SUPREME COURT OF OHIO

WESTERN ROGERS,

- v -

CITY OF DAYTON, et al.,

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

Court of Appeals  
Case No. 021593

07 - 0549

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NOTICE OF APPEAL OF APPELLANT  
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

---

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FILED  
MAR 27 2007  
MARICIA J. MENDEL, CLERK  
SUPREME COURT OF OHIO

Appellant State Farm Mutual Automobile Insurance Company hereby gives Notice of its Appeal to the Supreme Court of Ohio from the Judgment of the Montgomery County Court of Appeals, Second Appellate District, entered in Case No. 21593, on February 16, 2007, styled Western Rogers v. City of Dayton, et al.

This is a discretionary appeal that raises an issue of public or great general interest.

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 Appeal 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.

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

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MONTGOMERY CO., OHIO

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

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WESTERN ROGERS	:	
<i>Plaintiff-Appellant</i>	:	C.A. CASE NO. 21593
v.	:	T.C. NO. 04 CV 2716
CITY OF DAYTON, et al.	:	(Civil Appeal from Common Pleas Court)
<i>Defendants-Appellees</i>	:	

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

A-3

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THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT

A-4



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MONTGOMERY CO., OHIO

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

WESTERN ROGERS	:	
Plaintiff-Appellant	:	C.A. CASE NO. 21583
v.	:	T.C. NO. 04 CV 2716
CITY OF DAYTON, et al.	:	(Civil Appeal from Common Pleas Court)
Defendants-Appellees	:	

**OPINION**

Rendered on the 16<sup>th</sup> 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

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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.

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.

||

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. 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,

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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M. Jason Founds  
Hon. Jeffrey E. Froelich



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IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

WESTERN ROGERS,	:	Case No. 04-2716
Plaintiff,	:	(Judge Jeffrey E. Froelich)
v.	:	DECISION, ORDER, AND ENTRY
	:	GRANTING IN PART AND
CITY OF DAYTON, et al.,	:	DENYING IN PART PLAINTIFF'S
	:	MOTION FOR SUMMARY
Defendants.	:	JUDGMENT, GRANTING MR.
	:	MOREO AND THE CITY OF
	:	DAYTON'S MOTION FOR
	:	PARTIAL SUMMARY JUDGMENT,
	:	DENYING STATE FARM MUTUAL
	:	AUTOMOBILE INSURANCE
	:	COMPANY'S MOTION FOR
	:	SUMMARY JUDGMENT, AND
	:	DENYING STATE FARM MUTUAL
	:	AUTOMOBILE INSURANCE
	:	COMPANY'S 56(F) MOTION

I. FACTS

Earl Moreo, III, a traffic signal electrician for the City of Dayton, was dispatched to the intersection of Emerson and Salem Avenues in the City of 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. Mr. Rogers was covered by a policy of insurance issued by State Farm Insurance Company that provided uninsured motorist coverage.

Mr. Rogers filed a Complaint against the City of Dayton, Mr. Moreo, and State Farm arguing that the City and Mr. Moreo are liable for his injuries, and that State Farm is also monetarily responsible to pay for his injuries since Mr. Moreo and the City are 'uninsured motorists' pursuant to his State Farm policy.

Each party has filed a Motion for Summary Judgment. (1) Mr. Rogers argues (a) that there is no dispute regarding liability and that the City should be held liable, and (b) that since Mr. Moreo is immune and the City is uninsured, State Farm is required to pay for his injuries. (2) Mr. Moreo and the City argue that they are entitled to declaratory relief as a matter of law because (a) they are not responsible for Mr. Rogers' injuries, and (b) Mr. Moreo is immune from liability, and the City is uninsured; the City also argues that it is entitled to a set-off for all moneys paid by State Farm. (3) State Farm contends that the City is self-insured and not 'uninsured' under Mr. Moreo's policy and therefore it (State Farm) is not liable for the payment under the uninsured provisions of the policy.

## II. STANDARD OF REVIEW

Summary judgment is proper pursuant to Civ. R. 56(C) when:

- (1) No genuine issue to any material fact remains to be litigated;
- (2) the moving party is entitled to judgment as a matter of law; and
- (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

*Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327. "The burden of demonstrating that no genuine issue exists as to any material fact falls upon the moving party requesting a summary judgment." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. Civ. R. 56(C)

places a duty upon the trial court to consider all appropriate materials before ruling on a motion for summary judgment and to view the facts in a light most favorable to the non-moving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 360.

The moving party cannot discharge its initial burden simply by making a conclusory assertion that the non-moving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some *evidence* of the type listed in Civ. R. 56(C) which affirmatively demonstrates that the non-moving party has no evidence to support the non-moving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293.

After adequate time for discovery and upon a motion for summary judgment which meets the test of *Dresher* and *Harless*, *supra*, an entry of summary judgment is appropriate if the party against whom summary judgment is sought fails to make a showing on an element to that party's case on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 324. *Murphy*, 65 Ohio St.3d at 360. In opposing a summary judgment motion, the non-moving party may not rest upon the mere allegations or denials of its pleadings, but must set forth specific facts showing that there is a genuine issue for trial. *Reynoldsburg Motor Sales v. Columbus* (1972), 32 Ohio App.2d 271, 274. In showing that there is a genuine issue for trial, only disputes over facts that might affect the outcome of the suit (i.e., 'material' facts) may preclude summary judgment. *Anderson v. Liberty Lobby* (1986), 477 U.S. 242, 248.

Summary judgment must be denied where a genuine issue of material fact exists, where competing inferences may be drawn from undisputed underlying evidence, or where the facts present are uncertain or indefinite. *Duke v. Sanymetal Products Co., Inc.* (1972), 31 Ohio

App.2d 78, 81. All doubts or conflicts in the evidence must be construed most strongly in favor of the party against whom judgment is sought. *Morris v. Ohio Casualty Insurance Co.* (1988), 35 Ohio St.3d 45, 47. It is with this standard of review that a motion for summary judgment must be considered.

### III. LAW AND ANALYSIS

A. Are the City and/or Earl Moreo legally responsible as a matter of law for the injuries of Western Rogers?

The Plaintiff argues that Earl Moreo's u-turn constituted negligence per se, and that Earl Moreo, as well as the City, his employer, are legally responsible for that negligence. Mr. Rogers contends that a u-turn is a failure to yield the right-of-way which constitutes negligence as a matter of law.

Neither of the Defendants addresses Mr. Roger's motion directly. However, Mr. Moreo supplied the Court with an affidavit which states that: "...I was dispatched to Emerson Avenue and Salem Avenue to check the operation of a traffic signal. Upon arrival at the intersection I did not observe any malfunction with the traffic signals in the northwest direction of travel. Pursuant to standard operating procedure, I prepared to turn around and check the traffic signals in the southeast lanes of travel. I pulled over to the east curb lane with the vehicle's hazard lights and vehicle flashers operating. I stopped, checked the vehicle traffic in both lanes of travel, checked my mirrors, and then began to execute a u-turn. As I began to execute the u-turn I was struck by another vehicle. I did not see the vehicle that struck me when I checked the traffic before I executed the turn...To my knowledge it is not illegal to execute a u-turn in the City of Dayton or in the State of Ohio. At the time of the accident I [sic] not acting in bad faith,

nor was I acting with a malicious purpose.”

Mr. Rogers submitted an un-authenticated police report, which does not fall within the types of evidence that may be considered under Civ. R. 56(C). However, even if the contents of the police report were to be considered, that would not add any significant information that is not already before the Court.

The Plaintiff suggests that the facts of the accident are not controlling since anyone executing a u-turn is failing to yield the right-of-way and is negligent per se, and cites *Bennett v. Krauss* (1956), 100 Ohio App. 495. Although *Bennett* involved failure to yield the right-of-way under R.C. 4511.44 (which does not appear to apply in this case), *Myer v. Shepherd* (Dec. 18, 1997), Licking App. No. 97CA83, appears to stand for the proposition that a failure to yield to a preferred driver is negligence per se.

However, that case begs the question of who is the ‘preferred driver’ in a particular scenario. Mr. Moreo was not charged with a violation of any law, and there is no evidence before the Court other than Mr. Moreo’s own statement that he executed a u-turn, to support a potential failure to yield right-of-way violation. Plaintiff has not met its burden of establishing that Mr. Moreo was negligent or that he was negligent per se.

B. If Mr. Morco and/or the City are held legally responsible for the injuries of Western Rogers, who should be held financially responsible for Mr. Rogers’ injuries?

Generally, the person who is found to have negligently caused injury to another is solely financially responsible. However, Mr. Rogers argues that if Mr. Moreo is immune and the City is uninsured, then State Farm is responsible for payment to him (its own insured) under the terms of his uninsured motorist coverage.

1. Mr. Moreo-Immunity

Mr. Moreo argues that he cannot be held financially responsible for Mr. Rogers' injuries because he is immune as an employee of the City.

The undisputed facts are that Mr. Moreo was acting within the scope of his employment when the accident occurred. A municipal employee who is acting in the course of his employment is immune unless his actions are done maliciously, with bad faith, in a wanton and reckless manner, or civil liability is imposed by the Code. R.C. 2744.03(A). Mr. Moreo has supplied an affidavit indicating that he was acting within the scope of his employment and that his actions were not made with a malicious purpose, or in a wanton and reckless manner. The Plaintiff does not make any allegations in his Complaint that Mr. Moreo's conduct was anything other than negligent; additionally, he did not offer any evidence to rebut that presented by Mr. Moreo.

There are no genuine issues of material fact regarding this issue. Mr. Moreo is entitled to immunity as a matter of law.

2. City of Dayton-Uninsured

The City contends that it is not insured, and that financial responsibility for Mr. Rogers' injuries falls on State Farm under its UM coverage. Whether it is insured or not, the City is still legally and financially responsible for the negligence of its employees occurring in the course of their employment (but, see *C, infra*).

State Farm argues that the City is 'self-insured' not 'uninsured' and, therefore, under both the Revised Code and the terms of the policy, the City is exclusively financially responsible for

the injuries of Mr. Rogers.

R.C. 3937.18(K) (2000), which was in effect at the time of the renewal of the policy and therefore applicable in this case (*Ross v. Farmers Ins. Group* (1998), 82 Ohio St.3d 281, 287), states, in pertinent part, that: "... 'uninsured motor vehicle' [does] not include any of the following motor vehicles: (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."

Similarly, the uninsured motorist portion of the State Farm policy states that "[a]n uninsured motor vehicle does not include a land motor vehicle: ... (3) owned or operated by a self-insurer under any motor vehicle responsibility law, a motor carrier law or any similar law; (4) owned by any government or any of its political subdivisions or agencies unless the operator of the land motor vehicle has an immunity under Chapter 2744 of the Ohio Revised Code..." Policy at p. 13.

a. Immunity

It has previously been determined that Mr. Moreo, the operator of the vehicle, is immune under Chapter 2744 of the Revised Code. Therefore, the motor vehicle that allegedly caused the accident does not fall under R.C. 3937.18(K)(2) and is not excluded from the definition of an 'uninsured' vehicle (i.e. it could be an uninsured vehicle.)

b. Self-insured

The question of whether the City is 'uninsured' also depends on whether the City is self-insured within the meaning of the financial responsibility law since R.C. 3937.18(K)(3) excludes from the definition of 'uninsured', a vehicle that is "self insured within the meaning of the financial responsibility law..." Likewise, the policy language states that an automobile is not uninsured if it is owned or operated by a person self-insured under the financial responsibility law. R.C. 4509.72---Ohio's financial responsibility law---sets forth the requirements for a self-insurer. It states that "[t]he 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. 4509.71 exempts the City from this requirement, as well as all of the financial responsibility law.

State Farm argues that the City is self-insured because the City submitted an affidavit that states it "maintained no policies of insurance covering the motor vehicle Earl Moreo was driving when the accident occurred." State Farm also cites *Safe Auto Insurance Co. v. Corson* (2004), 155 Ohio App.3d 736, 2004-Ohio-249, discretionary appeal not allowed, 102 Ohio St.3d 1483, 2004-Ohio-3069, in support of its argument that the City is self-insured.

In *Corson*, the court held that "self-insurance is the retention of risk of loss by the one bearing the original risk under the law or contract. An entity may be self-insured in a practical sense for the purposes of UM/ UIM law." *Id.* The Court was concerned that the City could have it "both ways" by not purchasing insurance, and also avoiding paying claims out of its own pocket when an insurance policy would arguably cover the damage. If this is true (and to an

extent, it is), it is because of a policy decision of the legislature which prevents the usual cross-claim of an uninsured carrier against the tort-feasor; of course, even this 'protection' is only to the extent of the available uninsured coverage [e.g. if damages were \$250,000 and UM coverage were \$100,000, the insurance company would pay \$100,000 (and normally sue the city for subrogation/contribution, but that is prohibited by R.C. 2744.05) and the City would pay the remaining \$150,000.]

As explained in *Fahnbulleh v. Strahan* (1995), 73 Ohio St.2d 666, 669, "the legislature may enact statutes to limit suits if it does so in a rational manner calculated to advance a legitimate state interest." This is true even when a grant of immunity "impairs one individual's right to seek redress in a court of law, and thus treats some people harshly." *Id.* The fact is that the legislature granted immunity to the driver, and exempted the municipality from the financial responsibility law and from subrogation/ contribution claims.

The City maintains no policies of insurance and therefore is, literally, 'uninsured.' The City does not have a certificate of self-insurance documenting that it is self insured under R.C. 4509.72 and, as a matter of law, it is exempt from the financial responsibility laws. Therefore, the City is not 'self-insured' "within the meaning of the financial responsibility law."

#### C. Offset

The City also asks for summary judgment on the issue of whether the City is entitled to an offset for any uninsured motorist benefits Mr. Rogers receives from State Farm. R.C. 2744.05(B) provides that "[i]f 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." See e.g., *Cincinnati Ins. Co. v. City of Dayton* (July 26, 1995), Montgomery App. No. 15108. The City is entitled to a deduction from any award levied against it to the extent that Mr. Rogers receives uninsured motorist benefits from State Farm. The purpose of R.C. 2744.05 is to place the financial burden on the insurance company and not the City. *Galanos v. Cleveland* (1994), 70 Ohio St.3d 220, 221.

D. Civ.R. 56(F)

State Farm has asked that the Court grant it additional time for discovery if the Court finds that the City is uninsured. State Farm has provided no affidavits, as required by the Rule, explaining why this is necessary. Further, given the Court's analysis of the distinctions among 'uninsured', 'self-insured', 'legal responsibility', and 'financial responsibility', there is no reason for additional discovery on this issue.

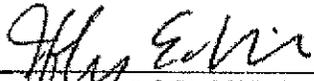
IV. CONCLUSION

The City has stated that it does not have insurance coverage for its or Mr. Moreo's actions; that means it is uninsured. Such lack of insurance does not mean that the Defendants are self-insured, or the definitions in the policy and the Revised Code would have no meaning since every Defendant without insurance would be "self-insured." Moreover, the statute and the policy provide that an "uninsured vehicle" includes one owned by a municipality when its driver has immunity.

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(1) The Plaintiff's Motions for Summary Judgment is DENIED insofar as it requests that Mr. Moreo and the City be held legally liable; it is GRANTED to the extent that State Farm is held financially responsible to the limits of its uninsurance coverage if the City and/or Moreo are found legally responsible for the Plaintiff's injuries. (2) Defendant, Moreo's Motion for Summary Judgment is GRANTED insofar as he is immune from liability; the City's Motion for Summary Judgment is GRANTED insofar as it is found to be "uninsured". (3) State Farm's Motion for Summary Judgment is DENIED; State Farm's Civ. R. 56(F) Motion is DENIED.

SO ORDERED:

  
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 JEFFREY E. FROELICH, JUDGE

Copies of this Decision, Order and Entry were forwarded to all parties listed below by ordinary mail this filing date.

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*In the Common Pleas Court of Montgomery County, Ohio*

<b>WESTERN ROGERS,</b>	:	<b>Case No. 04-2716</b>
<b>Plaintiff,</b>	:	<b>(Judge Jeffrey E. Froelich)</b>
<b>v.</b>	:	<b>DECISION, ORDER AND ENTRY</b>
<b>CITY OF DAYTON, et al.</b>	:	<b>DENYING DEFENDANT, STATE FARM</b>
<b>Defendants.</b>	:	<b>MUTUAL AUTOMOBILE INSURANCE</b>
	:	<b>COMPANY'S MOTION FOR</b>
	:	<b>RECONSIDERATION OF THE COURT'S</b>
	:	<b>APRIL 25, 2005, DENIAL OF MOTION</b>
	:	<b>FOR SUMMARY JUDGMENT</b>
	:	

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The Court previously denied State Farm's Motion for Summary Judgment finding that "[t]he City maintains no policies of insurance and therefore is, literally, 'uninsured.' The City does not have a certificate of self-insurance documenting that it is self-insured under R.C. 4509.72 and, as a matter of law, it is exempt from the financial responsibility laws. The Court finds that the City is not 'self-insured' within the meaning of the financial responsibility law." State Farm argues that it is entitled to reconsideration of the Court's

decision based upon new facts and law that were not previously submitted for the Court's review. It contends that "the City actually maintains a self-insurance program as permitted by the Ohio Revised Code, and is, in reality, self-insured..."

### I. STANDARD OF REVIEW

A motion for reconsideration may be made only as to an interlocutory order. *Pitts v. Ohio Dept. of Transp.* (1981), 67 Ohio St.2d 378, 379. Civil Rule 54(B) provides the court with the discretion to revise a decision which resolves one or more but less than all of the claims: "When more than one claim for relief is presented in an action whether as a claim, counterclaim, cross-claim, or third-party claim, and whether arising out of the same or separate transactions, or when multiple parties are involved, the court may enter final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay. In the absence of a determination that there is no just reason for delay, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties, shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Civ. R. 54(B).

### II. LAW AND ANALYSIS

#### A. The Court's April 25, 2005 decision

The decision held: (1) that Western Rogers did not meet his burden of establishing

that Mr. Moreo was negligent as a matter of law; (2) that Mr. Moreo was entitled to personal immunity for his actions; (3) that the City qualifies as "uninsured" since it is not self-insured "within the meaning of the financial responsibility law;" (4) that the City is entitled to an offset for any uninsured motorist benefits paid by State Farm; and (5) that there was no need to grant a Civ.R. 56(F) request for additional discovery. State Farm only requests reconsideration of the decision finding that the City was uninsured.

It is undisputed that the City does not carry automobile insurance policies and thus is, literally, uninsured. However, the Revised Code and the policy have their own definitions. State Farm argues that the City is self-insured, rather than uninsured, because it sets aside funds to pay for settlements and judgments.

The statutory law in effect on the date of issue of each new policy is the law to be applied. *Ross v. Farmers Ins. Group of Cos.*, 82 Ohio St.3d 281, 1998-Ohio-381. R.C. 3937.18(K)(2000), as it was in effect at the time of the renewal of the Plaintiff's uninsured motorist policy, states that an: "... 'uninsured motor vehicle' [does] not include any of the following motor vehicles: (1) a motor vehicle that has applicable liability coverage in the policy under which the uninsured and underinsured motorist coverages are provided; (2) [a] motor vehicle owned by a political subdivision unless the operator of that motor vehicle has 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.” (Emphasis added.) R.C. 3938.18(K)(1) is not applicable in this case. R.C. 3937.18(K)(2) states that ‘uninsured’ does not include the City’s vehicle unless the operator has immunity under Chapter 2744. The negative pregnant of this provision is that the vehicle is ‘uninsured’ if the operator has immunity; the Court previously found the operator (Mr. Moreo) was entitled to immunity under Chapter 2744. Therefore, the vehicle was ‘uninsured’ as defined by R.C. 3937.18(K)(2).

R.C. 3937.18(K)(3) provides that ‘uninsured’ does not include a self-insured vehicle within the meaning of the financial responsibility laws of the state. R.C. 4509.72 of Ohio’s Financial Responsibility Act defines “self-insured” as: “(A) [a]ny 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. (B) 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...” The City does not have such a certificate, and is, as a matter of law, exempt from the F.R.A. pursuant to R.C. 4509.71.

Based on these facts, the Court previously found that the City was uninsured by the literal definition of insurance, as well as the definitions of R.C. 3937.18(K)(2) and (3).

B. A “self-insurance program” is not the same as “self-insured within the meaning of the Financial Responsibility Act.”

State Farm argues that the City is ‘self-insured’ and, thus, not ‘uninsured.’ R.C. 2744.08(A) states that:“(A)(2)(a)...[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....(B) The ...establishment and maintenance of a self-insurance program, by a political subdivision does not constitute a waiver of any immunity or defense of the political subdivision or its employees..."

The parties have stipulated that the City appropriates unencumbered funds for payments of claims and judgments, that the city manager submits a recommended appropriation for payment of claims and judgments to the City Commission, and that the Revised Code of General Ordinances permits the City to reserve funds using non-exclusive factors. From these facts, State Farm concludes that the City is a 'self-insured entity' under its policy.

The generalized "self-insurance program" described in R.C. 2744.08 does not qualify as "self-insured within the meaning of the financial responsibility law of the state" (3937.18(K)(3)) because it does not meet any of the requirements of the financial responsibility law. No showing of the number of City automobiles has been made (although the court will take judicial notice that the number probably exceeds twenty-five), no certificate of self-insurance has been issued, and there has been no showing of financial ability to pay. A political subdivision can institute a general "self-insurance program" under R.C. 2744.08, without being "self-insured within the meaning of the financial

responsibility law." Chapter 2744 deals with political subdivision tort liability and allows a political subdivision to set aside funds to pay for judgments or settlements in all such cases. It is not limited to motor vehicle accidents, was not created for that purpose and is not a "motor carrier law or any similar law."

State Farm's position would result in a situation where the City is uninsured pursuant to R.C. 3937.18(K)(2), but self-insured pursuant to R.C. 3938.18(K)(3). Even if this inconsistency were ignored, self-insurance under R.C. 3937.18(K)(3) must be "within the meaning of the financial responsibility laws," from which the City is specifically exempt pursuant to R.C. 4509.71. Moreover, the explicit language of the "self-insurance program" statute, R.C. 2744.08, states that the City does not waive a defense (in this case an exemption from the Financial Responsibility Act) by instituting a "self-insurance program."

C. The City is not self-insured under the language of the State Farm policy.

State Farm places considerable emphasis on the language of its policy, rather than the statutory law arguing that the City is self-insured. State Farm's argument is that the "State Farm policy at issue in this case does not provide uninsured motorist coverage in this case because the plaintiff is legally entitled to collect, if at all, from a self-insured entity." State Farm argues that Ohio law permits the creation of a self-insurance program for a political subdivision, that there are facts showing that the City has such a self-insurance program in place, and that this new information demonstrates that the City is a "self-insured

entity.”

The law requires the offering of uninsured motorist coverage. R.C. 3937.18. Any policy restrictions on UM coverage have to comply with the statute's purpose. *State Farm Auto Ins. Co. v. Alexander* (1992), 62 Ohio St.3d 397, 399-400. “The purpose of uninsured motorist coverage and its mandatory offering is to protect persons from losses which because of the tortfeasor's lack of liability coverage, would otherwise go uncompensated.” *Schaefer v. Allstate Ins. Co.*, 76 Ohio St.3d 553, 555; 1996-Ohio-368.

An automobile insurance policy may not reduce uninsured motorist coverage to persons injured in a motor vehicle accident. *Alexander*, supra at 400; any policy restrictions that vary from the statute requirements and purpose are therefore unenforceable. *Schaefer*, supra at 555; *Sexton v. State Farm Mut. Auto Ins. Co.* (1982), 69 Ohio St.2d 431, 433; *Shay v. Shay*, Sixth Dist. No. F-05-008, 2005-Ohio-5874. R.C. 3937.18 “is the metric by which all exclusions of UM/UIM coverage must be measured.” *State Auto. Ins. v. Pasquale*, 103 Ohio App.3d 381, 2005-Ohio-4897, disc. appeal allowed, 2006-Ohio-665, citing *Martin v. Midwestern Group Ins. Co.*, 70 Ohio St.3d 478, 481, 1994-Ohio-407. Therefore, to the extent the policy attempts to define ‘insured’ or ‘uninsured’ differently or more narrowly than the statute, it is unenforceable.

State Farm's policy says that it will pay damages for bodily injury an insured is legally entitled to collect from the owner or driver of an uninsured motor vehicle. It specifies that “[a]n uninsured motor vehicle does not include a land motor vehicle: owned

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

While the language of the policy is not identical to the language of the statute, it is substantially similar. If the policy were ambiguous and reasonably susceptible to different interpretations, it must be construed liberally in favor of the insured and against the insurer. *State Farm Auto Ins. v. Rose* (1991), 61 Ohio St.3d 81, 2005-Ohio-4323, ¶9; *Westfield Insurance Co. v. Ellis*, Trumbull App. No. 2003-T-0093, 2004-Ohio-4393, ¶34. The language of the policy is clear and unambiguous. In order to be excluded from the policy’s uninsured motorist coverage, the vehicle must be owned or operated by an entity who is self-insured “either under any motor vehicle financial responsibility law, a motor carrier law or any similar law.” As stated above, the City is not self-insured under Ohio’s motor vehicle financial responsibility law.

Neither does R.C. 2744.08, which outlines the ability of a political subdivision to institute a “self-insurance program” for potential tort liability, qualify as either a “motor carrier law or any similar law” as described by the policy. “Motor carrier” means an individual, partnership or corporation engaged in the transportation of goods or persons. R.C. 4503.60(A). See, also, for example, R.C. 4921.01 et seq., R.C. 4923.01 et seq., O.A.C. 4901-5-01, 4901:2-15-15-01, 4901:2-17-01, as further illustrations that neither the City nor Mr. Mateo was similar to a motor carrier.

D. The City is uninsured.

R.C. 3937.18(K)(3) provides one definition of 'uninsured motor vehicle' as being a vehicle that is self-insured within the meaning of the financial responsibility law. It is true that R.C. 4509.71 exempts any vehicle owned by the City from the requirements of R.C. 4509.01 to 4509.79 (the Financial Responsibility Act). *Safe Auto Ins. Co. v. Corson*, 155 Ohio App.3d 736, 2004-Ohio-249. ¶31. But the fact remains that the City does not have insurance.

'Insurance' by definition means something more than the ability to pay, or undeclared self-insurance. The "uninsured millionaire" discussed at ¶¶11,12 of *Corson* who did not file a certificate pursuant to the F.R.A is still uninsured and the UM carrier for a party injured by him or her would be liable to its injured insured. This is not to say that this UM (Uninsured Motorist or Uninsured Millionaire) could "blithely [continue]...down the road uninsured..." *Id.* at ¶11; the UM would still be liable to the injured party's UM carrier which paid its insured; however, the injured party, who has paid a premium for UM coverage would not have to pursue and attempt to collect from an entity which does not have insurance.

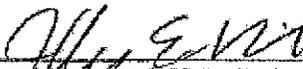
III. CONCLUSION

The Augean stables of uninsured motorist law in Ohio are perhaps better suited for the hermeneutic abilities of an appellate court. At this level, Ockham's razor leads to the conclusion that the City is uninsured because (1) it does not have insurance, and/or (2) its

motor vehicle has immunity under R.C. Chapter 2744 and/or (3) it is not self-insured within the meaning of the financial responsibility laws..

Defendant. State Farm's, Motion to Reconsider Trial Court's Decision of April 25, 2005, Decision is DENIED.

SO ORDERED:

  
JEFFREY E. FROELICH, JUDGE

Copies of this Decision, Order and Entry were forwarded to all parties listed below by ordinary mail this filing date.

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City of Dayton and Earl H. Moreo, III

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(614) 228-5151

Attorney for Defendant, State Farm Insurance Company

HOLLY J. HUNT

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Attorney for Jim Petro, Ohio Attorney General

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IN THE SUPREME COURT OF OHIO

WESTERN ROGERS,

Case No. 07-0549

07-0684

-v-

On Appeal from the Montgomery  
County Court of Appeals, Second  
Appellate District, Case No. 21593

CITY OF DAYTON, et al.,

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

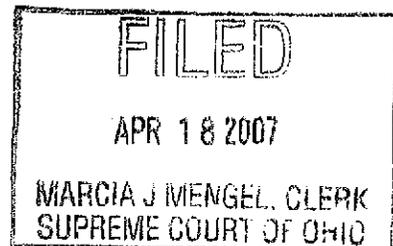
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Attorney for Appellant State Farm  
Mutual Automobile Insurance Company

Attorneys for Appellee City of Dayton



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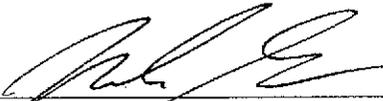
**NOTICE OF CERTIFIED CONFLICT SUBMITTED BY APPELLANT,  
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY**

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 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:   
MARK H. GAMS (0025362)  
Attorney for Appellant, State Farm  
Mutual Automobile Insurance Company  
471 East Broad Street, 19th Floor  
Columbus, Ohio 43215-3872  
(614) 228-5151 FAX: (614) 228-0032  
mgams@ggptl.com

**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

mbg\118465\pl\ kb

# State Farm Insurance Companies®



Newark Operations Center  
1440 Granville Road  
Newark, OH 43093-0001

## CERTIFICATE

I, the undersigned, do hereby certify that I am custodian of the records pertaining to the issuance of policies by the Scioto Division of State Farm Mutual Automobile Insurance Company of Bloomington, Illinois.

I further certify that the attached policy, number 811 6208-F09-35C, is a copy of the policy issued to WESTERN ROGERS of 4050 SALEM AVE DAYTON OH 45416-1719 based on our available records.

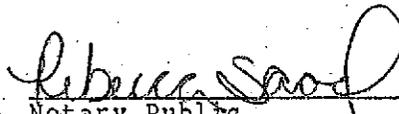
The policy was in effect on the loss date of April 22, 2002.

  
\_\_\_\_\_  
Mary Ellen Price  
Auto Underwriting Superintendent

State of Ohio

County of Licking

Subscribed and sworn to before me this 16 day of November, 2004.

  
\_\_\_\_\_  
Notary Public

My Commission Expires:



REBECCA SAAD  
NOTARY PUBLIC, STATE OF OHIO  
MY COMMISSION EXPIRES DECEMBER 3, 2007

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**DECLARATIONS PAGE**

<b>POLICY NUMBER</b> 811 6208-F09-35C	Policy Period from DEC 05 2001 to JUN 09 2002
--	---

**NAMED INSURED**

35-2230-22DU  
ROGERS, WESTERN  
4050 SALEM AVE  
DAYTON OH 45416-1719

**DO NOT PAY PREMIUMS SHOWN ON THIS PAGE.  
SEPARATE STATEMENT ENCLOSED IF AMOUNT DUE.**

**AGENT**  
TOM MCBRIDE  
1450 EAST DAVID ROAD  
SUITE 1B  
KETTERING, OH 45429-5769

PHONE: (937)435-2414



YEAR	MAKE	MODEL	BODY STYLE	VEHICLE ID NUMBER	CLASS
2002	CHEVROLET	M CARLO	2DR	2G1WX15K729199474	2A30402

SYMBOLS	COVERAGES	PREMIUMS
	See policy for coverage details.	2002 CHEVROLET
A	Bodily Injury/Property Damage Liability Limits of Liability-Coverage A-Bodily Injury Each Person, Each Accident \$100,000 \$300,000	\$89.62
	Limits of Liability-Coverage A-Property Damage Each Accident \$100,000	
C	Medical Payments Limit of Liability-Coverage C Each Person \$25,000	\$13.49
D100	\$100 Deductible Comprehensive	\$41.35
G250	\$250 Deductible Collision	\$129.41
H	Emergency Road Service	\$1.84
U	Uninsured Motor Vehicle Limits of Liability-U Each Person, Each Accident \$100,000 \$300,000	\$22.08

**Total premium for this policy period: \$297.82 This is not a bill!**

**IMPORTANT MESSAGES**

Your policy consists of this declarations page, the policy booklet - form 9835.7, and any endorsements that apply, including those issued to you with any subsequent renewal notice.

Replaced policy number 8116208-35B.

Your total current 6 month premium for DEC 09 2001 to JUN 09 2002 is \$291.66.

Guarantee period JUN 09 2001 to JUN 09 2003 subject to conditions 4 and 5.

**EXCEPTIONS AND ENDORSEMENTS (See individual endorsement for details)**

FINANCED- NUVELL CREDIT CORP. PO BOX 7199, LITTLE ROCK AR 72223-7199.  
6935 AMENDMENT OF DEFINED WORDS, COVERAGES AND CONDITIONS.

A-47

Agent: TOM MCBRIDE  
Telephone: (937)435-2414  
Prepared DEC 10 2001 2230-507

A-48

# YOUR STATE FARM



# CAR POLICY

## IMPORTANT NOTICE

Any application for the insurance provided by this policy, including any warranty made by the applicant, is made a part of this policy.

### WARNING

IF YOU PLAN TO DRIVE AN AUTOMOBILE IN MEXICO, BE SURE TO SECURE COVERAGE IN A MEXICAN INSURANCE COMPANY AND AVOID POSSIBLE JAIL DETENTION, AUTOMOBILE IMPOUNDMENT AND OTHER COMPLICATIONS IN THE EVENT OF AN ACCIDENT.

Ohio  
Policy Form 9835.7

- 5 Reporting a Claim — Insured's Duties — What to do if *you* have an accident, claim or are sued  
 3 Defined Words  
 4 Declarations Continued  
 5 When and Where Your Coverage Applies  
 5 Financed Vehicles — Coverage for Creditor

### Coverages

- 7 **A — Liability** — When there is damage to others.  
 10 **C — Medical Payments** — When there are medical and funeral expenses.  
 13 **U — Uninsured Motor Vehicle** — When the other car or driver is not insured or is underinsured.  
 16 **U1 — Uninsured Motor Vehicle Property Damage** — When the other car or driver is not insured and there is *property damage*.  
 18 **D — Comprehensive** — When *your car* is damaged except by collision or upset. Any deductible amount is shown by the number beside "D" on the declarations page.  
 18 **F — Collision — 80%** — When *your car* is damaged by collision or upset.  
 18 **G — Collision** — When *your car* is damaged by collision or upset. The deductible is shown by the number beside "G" on the declarations page.  
 19 **H — Emergency Road Service** — When *your car* breaks down or needs a tow.  
 19 **R — Car Rental Expense** — When *you* need to rent a *car* because of damage to *your car*.  
 19 **R1 — Car Rental and Travel Expenses** — When *you* need to rent a *car* and pay extra travel expenses because of damage to *your car*.  
 20 **R2 — Car Rental and Travel Expenses** — When *you* need to rent a *car* and pay extra travel expenses because of damage to *your car*.  
 23 **S — Death, Dismemberment and Loss of Sight** — Pays for death of or certain injuries to *persons* named.  
 23 **T — Total Disability** — Pays *weekly indemnity* to *persons* named.  
 24 **Z — Loss of Earnings** — Pays loss of *weekly earnings* to *persons* named.

### Conditions

- 25 1. Policy Changes  
 25 2. Suit Against Us  
 25 3. Our Right To Recover Our Payments  
 26 4. Cancellation  
 27 5. Renewal  
 27 6. Change of Residence  
 27 7. Premium  
 27 8. Concealment or Fraud

- 28 **Mutual Conditions**

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY  
BLOOMINGTON, ILLINOIS  
A MUTUAL COMPANY  
DEFINED WORDS

WHICH ARE USED IN SEVERAL PARTS OF THE POLICY

We define some words to shorten the policy. This makes it easier to read and understand. Defined words are printed in boldface italics. *You* can pick them out easily.

**Bodily Injury** - means bodily injury to a *person* and sickness, disease or death which results from it.

**Car** - means a land motor vehicle with four or more wheels, which is designed for use mainly on public roads. It does not include:

1. any vehicle while located for use as a dwelling or other premises; or
2. a truck-tractor designed to pull a trailer or semitrailer.

**Car Business** - means a business or job where the purpose is to sell, lease, repair, service, transport, store or park land motor vehicles or trailers.

**Insured** - means the *person, persons* or organization defined as *insureds* in the specific coverage.

**Loss** - defined in sections IV. and V.

**Newly Acquired Car** - means a *replacement car* or an *additional car*.

**Replacement Car** - means a *car* purchased by or leased to *you* or *your spouse* to replace *your car*. This policy will only provide coverage for the *replacement car* if *you* or *your spouse*:

1. tell us about it within 30 days after its delivery to *you* or *your spouse*; and
2. pay us any added amount due.

**Additional Car** - means an added *car* purchased by or leased to *you* or *your spouse*. This policy will only provide coverage for the *additional car* if:

1. it is a *private passenger car* and we insure all other *private passenger cars*; or
2. it is other than a *private passenger car* and we insure all *cars*

owned by *you* or *your spouse* on the date of its delivery to *you* or *your spouse*.

This policy provides coverage for the *additional car* only until the earlier of:

1. 12:01 a.m. on the 31st day after the delivery of the *car* to *you* or *your spouse*; or

2. the effective date and time of a policy issued by us or any other company that describes the *car* on its declarations page.

*You* or *your spouse* may apply for a policy that will provide coverage beyond the 30th day for the *additional car*. Such policy will be issued only if both *you* and the vehicle are eligible for coverage at the time of application.

If a *newly acquired car* is not otherwise afforded comprehensive or collision coverage by this or any other policy, this policy will provide the comprehensive or collision coverage not otherwise provided for the *newly acquired car*. If such coverage is provided by this paragraph, it will apply only until 12:01 A.M. Standard Time at the address shown on the declarations page on the sixth day after the delivery of the *car* to *you* or *your spouse*. Any comprehensive or collision coverage provided by this paragraph is subject to a deductible of \$500.

**Non-Owned Car** - means a *car* not owned, registered or leased by:

1. *you, your spouse*;
2. any *relative* unless at the time of the accident or loss:
  - a. the *car* currently is or has within the last 30 days been insured for liability coverage; and
  - b. the driver is an insured who does not own or lease the *car*;
3. any other *person* residing in the same household as *you, your spouse* or any *relative*; or
4. an employer of *you, your spouse* or any *relative*.

**Non-owned car** does not include a:

1. rented *car* while it is used in connection with the *insured's* employment or business; or
2. *car* which has been operated or rented by or in the possession of an *insured* during any part of each of the last 21 or more consecutive days. If the *insured* is an *insured* under one or more other car policies issued by us, the 21 day limit is increased by an additional 21 days for each such additional policy.

A *non-owned car* must be a *car* in the lawful possession of the *person* operating it.

*Occupying* - means in, on, entering or alighting from.

*Person* - means a human being.

*Private Passenger Car* - means a *car*:

1. with four wheels;
2. of the private passenger or station wagon type; and
3. designed solely to carry *persons* and their luggage.

*Relative* - means a *person* related to *you* or *your spouse* by blood, marriage or adoption who resides primarily with *you*. It includes *your* unmarried and unemancipated child away at school.

*Spouse* - means *your* husband or wife who resides primarily with *you*.

*Temporary Substitute Car* - means a *car* not owned by *you* or *your spouse*, if it replaces *your car* for a short time. Its use has to be with the consent of the owner. *Your car* has to be out of use due to its breakdown, repair, servicing, damage or loss. A *temporary substitute car* is not considered a *non-owned car*.

*Utility Vehicle* - means a motor vehicle with:

1. a pickup, panel or van body; and
2. a Gross Vehicle Weight of 10,000 pounds or less.

*You* or *Your* - means the named insured or named insureds shown on the declarations page.

*Your Car* - means the *car* or the vehicle described on the declarations page.

## DECLARATIONS CONTINUED

We, the State Farm Mutual Automobile Insurance Company, agree to insure *you* according to the terms of this policy based:

1. on *your* payment of premium for the coverages *you* chose; and
2. in reliance on *your* statements in these declarations.

*You* agree, by acceptance of this policy that:

1. the statements in these declarations are *your* statements and are true; and
2. we insure *you* on the basis *your* statements are true; and
3. any application for the insurance provided by this policy, including any warranty made by *you*, is a part of this policy; and
4. this policy contains all of the agreements between *you* and us or any of our agents.

Unless otherwise stated in the exceptions space on the declarations page, *your* statements are:

1. Ownership. *You* are the sole owner of *your car*.
2. License History. Neither *you* nor any member of *your* household within the past 3 years has had a license to drive or vehicle registration suspended, revoked or refused.
3. Driving Record History. *Your* responses on the application as to whether *you*, any member of *your* household, or any regular driver has had an accident or sustained a loss or has been fined, convicted or forfeited bail for traffic violations, are accurate.
4. Use. *Your car* is used for pleasure and business.

All statements in the application for insurance and in the declarations are warranties. This policy shall be void from its inception if any warranty made by *you* is found to be false.

## WHEN AND WHERE COVERAGE APPLIES

### When Coverage Applies

The coverages *you* chose apply to accidents and losses that take place during the policy period.

The policy period is shown under "Policy Period" on the declarations page and is for successive periods of six months each for which *you* pay the renewal premium. Payments must be made on or before the end of the current policy period. The policy period begins and ends at 12:01 A.M. Standard Time at the address shown on the declarations page.

### Where Coverage Applies

The coverages *you* chose apply:

1. in the United States of America, its territories and possessions or Canada; or
2. while the insured vehicle is being shipped between their ports.

The liability, medical payments and physical damage coverages also apply in Mexico within 50 miles of the United States border. A physical damage coverage loss in Mexico is determined on the basis of cost at the nearest United States point.

Death, dismemberment and loss of sight, total disability and loss of earnings coverages apply anywhere in the world.

## FINANCED VEHICLES

If a creditor is shown in the declarations, we may pay any comprehensive or collision loss to:

1. *you* and, if unpaid, the repairer; or
2. *you* and such creditor, as its interest may appear, when we find it is not practical to repair *your car*; or
3. the creditor, as to its interest, if *your car* has been repossessed.

When we pay the creditor for loss for which *you* are not covered, we are entitled to the creditor's right of recovery against *you* to the extent of our payment. Our right of recovery shall not impair the creditor's right to recover the full amount of its claim.

The coverage for the creditor's interest only is valid until we terminate it. We will not terminate such coverage because of:

1. any act or negligence of the owner or borrower; or
2. a change in the ownership or interest unknown to us, unless the creditor knew of it and failed to tell us within 10 days; or
3. an error in the description of the vehicle.

The date of termination of the creditor's interest will be at least 10 days after the date we mail the termination notice.

## REPORTING A CLAIM — INSURED'S DUTIES

### 1. Notice to Us of an Accident or Loss

The *insured* must give us or one of our agents written notice of the accident or loss as soon as reasonably possible. The notice must give us:

- a. *your* name; and
- b. the names and addresses of all *persons* involved; and
- c. the hour, date, place and facts of the accident or loss; and
- d. the names and addresses of witnesses.

### 2. Notice to Us of Claim or Suit

If a claim or suit is made against an *insured*, that *insured* must at once send us every demand, notice or claim made and every summons or legal process received.

### 3. Other Duties Under the Physical Damage Coverages

When there is a loss, *you* or the owner of the property also shall:

- a. make a prompt report to the police when the loss is the result of theft or larceny.

- b. protect the damaged vehicle. We will pay any reasonable expense incurred to do it.
  - c. show us the damage, when we ask.
  - d. provide all records, receipts and invoices, or certified copies of them. We may make copies.
  - e. answer questions under oath when asked by anyone we name, as often as we reasonably ask, and sign copies of the answers.
4. **Other Duties Under Medical Payments, Uninsured Motor Vehicle, Uninsured Motor Vehicle Property Damage, Death, Dismemberment and Loss of Sight, Total Disability and Loss of Earnings Coverages**

Any *person* who suffers a *bodily injury* which results in a medical payments coverage claim must notify us of the claim in writing as soon as reasonably possible after the *person's* first examination or treatment resulting from the *bodily injury*. Another *person* may give us the required notice on behalf of the injured *person*.

The *person* making claim also shall:

- a. under the medical payments, uninsured motor vehicle, death, dismemberment and loss of sight, total disability and loss of earnings coverages:
  - (1) give us all the details about the death, injury, treatment and other information we need to determine the amount payable.
  - (2) be examined by physicians chosen and paid by us as often as we reasonably may require. A copy of the report will be sent to the *person* upon written request. The *person*, or his or her legal representative if the *person* is dead or unable to act, shall authorize us to obtain all medical reports and records.

- (3) answer questions under oath when asked by anyone we name, as often as we reasonably ask, and sign copies of the answers.
- b. under the uninsured-motor vehicle coverage:
  - (1) report a "hit-and-run" accident to the police within 24 hours and to us within 30 days.
  - (2) let us see the insured *car* the *person occupied* in the accident.
  - (3) send us at once a copy of all suit papers if the *person* sues the party liable for the accident for damages.
- c. under the death, dismemberment and loss of sight, total disability and loss of earnings coverages, give us proof of claim on forms we furnish.
- d. under uninsured motor vehicle property damage coverage:
  - (1) report the accident to us within 30 days.
  - (2) send us at once a copy of all suit papers when the party liable for the accident is sued for these damages.

5. **Insured's Duty to Cooperate With Us**

The *insured* shall cooperate with us and, when asked, assist us in:

- a. making settlements;
  - b. securing and giving evidence;
  - c. attending, and getting witnesses to attend, hearings and trials.
- The *insured* shall not, except at his or her own cost, voluntarily:
- a. make any payment or assume any obligation to others; or
  - b. incur any expense, other than for first aid to others.

## SECTION I — LIABILITY — COVERAGE A

You have this coverage if "A" appears in the "Coverages" space on the declarations page.

We will:

1. pay damages which an *insured* becomes legally liable to pay because of:
  - a. *bodily injury* to others, and
  - b. damage to or destruction of property including loss of its use, caused by accident resulting from the ownership, maintenance or use of *your car*; and
2. defend any suit against an *insured* for such damages with attorneys hired and paid by us. We will not defend any suit after we have paid the applicable limit of our liability for the accident which is the basis of the lawsuit.

In addition to the limits of liability, we will pay for an *insured* any costs listed below resulting from such accident.

1. Court costs of any suit for damages.
2. Interest on damages owed by the *insured* due to a judgment and accruing:
  - a. after the judgment, and until we pay, offer or deposit in court, the amount due under this coverage; or
  - b. before the judgment, where owed by law, but only on that part of the judgment we pay.
3. Premiums or costs of bonds:
  - a. to secure the release of an *insured's* property attached under a court order. The amount of the bond we pay for shall not be more than our limit of liability; and
  - b. required to appeal a decision in a suit for damages if we have not paid our limit of liability that applies to the suit; and
  - c. up to \$250 for each bail bond needed because of an accident or traffic violation.We have no duty to furnish or apply for any bonds.
4. Expense incurred by an *insured*:
  - a. for loss of wages or salary up to \$35 per day if we ask the *insured* to attend the trial of a civil suit.
  - b. for first aid to others at the time of the accident.

c. at our request.

We have the right to investigate, negotiate and settle any claim or suit.

### Coverage for the Use of Other Cars

The liability coverage extends to the use, by an *insured*, of a *newly acquired car*, a *temporary substitute car* or a *non-owned car*.

### Who Is an Insured

When we refer to *your car*, a *newly acquired car* or a *temporary substitute car*, *insured* means:

1. *you*;
2. *your spouse*;
3. the *relatives* of the first *person* named in the declarations;
4. any other *person* while using such a *car* if its use is within the scope of consent of *you* or *your spouse*; and
5. any other *person* or organization liable for the use of such a *car* by one of the above *insureds*.

When we refer to a *non-owned car*, *insured* means:

1. the first *person* named in the declarations;
2. his or her *spouse*;
3. their *relatives*; and
4. any *person* or organization which does not own or hire the *car* but is liable for its use by one of the above *persons*.

### THERE IS NO COVERAGE FOR NON-OWNED CARS:

1. IF THE DECLARATIONS STATE THE "USE" OF *YOUR CAR* IS OTHER THAN "PLEASURE AND BUSINESS"; OR
2. WHILE:
  - a. BEING REPAIRED, SERVICED OR USED BY ANY *PERSON* WHILE THAT *PERSON* IS WORKING IN ANY *CAR BUSINESS*; OR
  - b. USED IN ANY OTHER BUSINESS OR OCCUPATION. This does not apply to a *private passenger car* driven or occupied by the first *person* named in the declarations, his or her *spouse* or their *relatives*.

### Trailer Coverage

1. Trailers designed to be pulled by a *private passenger car* or a *utility vehicle*, except those trailers in 2.a. below, are covered while owned or used by an *insured*.

Farm implements and farm wagons are considered trailers while pulled on public roads by a *car* we insure for liability.

These trailers are not described in the declarations and no extra premium is charged.

2. The following trailers are covered only if described on the declarations page and extra premium is paid:
  - a. those trailers designed to be pulled by a *private passenger car* or a *utility vehicle*:
    - (1) if designed to carry *persons*; or
    - (2) while used with a motor vehicle whose use is shown as "commercial" on the declarations page (trailers used only for pleasure use are covered even if not described and no extra premium paid); or
    - (3) while used as premises for office, store or display purposes; or
  - b. any trailer not designed for use with a *private passenger car* or a *utility vehicle*.

THERE IS NO COVERAGE WHEN A TRAILER IS USED WITH A MOTOR VEHICLE OWNED OR HIRED BY YOU WHICH WE DO NOT INSURE FOR LIABILITY COVERAGE.

### Limits of Liability

The amount of bodily injury liability coverage is shown on the declarations page under "Limits of Liability - Coverage A - Bodily Injury, Each Person, Each Accident". Under "Each Person" is the amount of coverage for all damages arising out of and due to *bodily injury* to one *person*. "*Bodily injury* to one *person*" includes all injury and damages to others arising out of and resulting from this *bodily injury*. Under "Each Accident" is the total amount of coverage, subject to the amount shown under "Each Person", for all such damages arising out of and due to *bodily injury* to two or more *persons* in the same accident.

The amount of property damage liability coverage is shown on the declarations page under "Limits of Liability - Coverage A - Property Damage, Each Accident".

We will pay damages for which an *insured* is legally liable up to these amounts.

The limits of liability are not increased because more than one *person* or organization may be an *insured*.

A motor vehicle and attached trailer are one vehicle. Therefore, the limits are not increased.

When two or more motor vehicles are insured under this section the limits apply separately to each.

The liability coverage shall be excess over and shall not pay again any medical expenses paid under the medical payments coverage.

### When Coverage A Does Not Apply

In addition to the limitations of coverage in "Who Is an Insured" and "Trailer Coverage":

THERE IS NO COVERAGE:

1. WHILE ANY VEHICLE INSURED UNDER THIS SECTION IS:
  - a. RENTED TO OTHERS.
  - b. USED TO CARRY *PERSONS* FOR A CHARGE. This does not apply to the use on a share expense basis of:
    - (1) a *private passenger car*; or
    - (2) a *utility vehicle*, if all passengers are riding in that area of the vehicle designed by the manufacturer of the vehicle for carrying passengers.
  - c. BEING REPAIRED, SERVICED OR USED BY ANY *PERSON* EMPLOYED OR ENGAGED IN ANY WAY IN A *CAR BUSINESS*. This does not apply to:
    - (1) *you* or *your spouse*;
    - (2) any *relative*;
    - (3) any resident of *your* household; or
    - (4) any agent, employee or partner of *you*, *your spouse*, any *relative* or such resident.

This coverage is excess for (3) and (4) above

2. FOR ANY *BODILY INJURY* TO:
  - a. A FELLOW EMPLOYEE WHILE ON THE JOB AND ARISING FROM THE MAINTENANCE OR USE OF A VEHICLE BY AN OTHER EMPLOYEE IN THE EMPLOYER'S BUSINESS. *You* and *you spouse* are covered for such injury to a fellow employee.
  - b. ANY EMPLOYEE OF AN *INSUREE* ARISING OUT OF HIS OR HER EMPLOYMENT. This does not apply to a household employee who is not covered or required to be covered under any worker's compensation insurance.

- c. ANY *INSURED* OR ANY MEMBER OF AN *INSURED'S* FAMILY RESIDING IN THE *INSURED'S* HOUSEHOLD.
3. FOR:
- a. THE UNITED STATES OF AMERICA OR ANY OF ITS AGENCIES; OR
  - b. ANY *PERSON* WHO IS AN EMPLOYEE OF THE UNITED STATES OF AMERICA OR ANY OF ITS AGENCIES, IF THE PROVISIONS OF THE FEDERAL TORT CLAIMS ACT APPLY.
4. FOR ANY DAMAGES TO PROPERTY OWNED BY, RENTED TO, IN THE CHARGE OF OR TRANSPORTED BY AN *INSURED*. But coverage applies to a rented:
- a. residence; or
  - b. private garage damaged by a *car* we insure.
5. FOR ANY OBLIGATION OF AN *INSURED*, OR HIS OR HER INSURER, UNDER ANY TYPE OF WORKER'S COMPENSATION OR DISABILITY OR SIMILAR LAW.
6. FOR LIABILITY ASSUMED BY THE *INSURED* UNDER ANY CONTRACT OR AGREEMENT.
7. WHILE *YOUR CAR* OR A *NEWLY ACQUIRED CAR* IS SUBJECT TO ANY LIEN OR SALES AGREEMENT NOT SHOWN IN THE DECLARATIONS. This does not apply to *you*.

**If There Is Other Liability Coverage**

**1. Policies Issued by Us to You, Your Spouse or Any Relative**

If two or more vehicle liability policies issued by us to *you*, *your spouse* or any *relative* apply to the same accident, the total limits of liability under all such policies shall not exceed that of the policy with the highest limit of liability.

**2. Other Liability Coverage Available From Other Sources**

Subject to item 1, if other vehicle liability coverage applies, we are liable only for our share of the damages. Our share is the per cent that the limit of liability of this policy bears to the total of all

vehicle liability coverage applicable to the accident.

**3. Temporary Substitute Car, Non-Owned Car, Trailer**

If a *temporary substitute car*, a *non-owned car* or a trailer designed for use with a *private passenger car* or *utility vehicle*:

- a. has other vehicle liability coverage on it; or
- b. is self-insured under any motor vehicle financial responsibility law, a motor carrier law or any similar law,

then this coverage is excess over such insurance or self-insurance.

**4. Newly Acquired Car**

THIS COVERAGE DOES NOT APPLY IF THERE IS OTHER VEHICLE LIABILITY COVERAGE ON A *NEWLY ACQUIRED CAR*.

**Motor Vehicle Compulsory Insurance Law or Financial Responsibility Law**

**1. Out-of-State Coverage**

If an *insured* under the liability coverage is in another state or Canada and, as a non-resident, becomes subject to its motor vehicle compulsory insurance, financial responsibility or similar law:

- a. the policy will be interpreted to give the coverage required by the law; and
- b. the coverage so given replaces any coverage in this policy to the extent required by the law for the *insured's* operation, maintenance or use of a *car* insured under this policy.

Any coverage so extended shall be reduced to the extent other coverage applies to the accident. In no event shall a *person* collect more than once.

**2. Financial Responsibility Law**

When certified under any law as proof of future financial responsibility, and while required during the policy period, this policy shall comply with such law to the extent required. The *insured* agrees to repay us for any payment we would not have had to make under the terms of this policy except for this agreement.

## SECTION II — MEDICAL PAYMENTS — COVERAGE C

You have this coverage if "C" appears in the "Coverages" space on the declarations page.

### MEDICAL EXPENSES

We will pay reasonable medical expenses incurred, for *bodily injury* caused by accident, for services furnished within three years of the date of the accident. These expenses are for necessary medical, surgical, X-ray, dental, ambulance, hospital, professional nursing and funeral services, eyeglasses, hearing aids and prosthetic devices.

These incurred expenses must be:

1. for:
  - a. services performed, or
  - b. medical supplies, medication or drugs prescribedby a medical provider licensed by the state to provide the specific medical services; and
2. for funeral services.

### REASONABLE MEDICAL EXPENSES DO NOT INCLUDE EXPENSES:

1. FOR TREATMENT, SERVICES, PRODUCTS OR PROCEDURES THAT ARE:
  - a. EXPERIMENTAL IN NATURE, FOR RESEARCH, OR NOT PRIMARILY DESIGNED TO SERVE A MEDICAL PURPOSE; OR
  - b. NOT COMMONLY AND CUSTOMARILY RECOGNIZED THROUGHOUT THE MEDICAL PROFESSION AND WITHIN THE UNITED STATES AS APPROPRIATE FOR THE TREATMENT OF THE *BODILY INJURY*; OR
2. INCURRED FOR:
  - a. THE USE OF THERMOGRAPHY OR OTHER RELATED PROCEDURES OF A SIMILAR NATURE; OR
  - b. THE PURCHASE OR RENTAL OF EQUIPMENT NOT PRIMARILY DESIGNED TO SERVE A MEDICAL PURPOSE.

We have the right to make or obtain a utilization review of the medical expenses and services to determine if they are reasonable and necessary for the *bodily injury* sustained.

The *bodily injury* must be discovered and treated within one year of the date of the accident.

### Persons for Whom Medical Expenses are Payable

We will pay medical expenses for *bodily injury* sustained by:

1. a. the first *person* named in the declarations;
- b. his or her *spouse*; and
- c. their *relatives*.

These *persons* have to sustain the *bodily injury*:

- a. while they operate or *occupy* a vehicle covered under the liability section; or
- b. through being struck as a *pedestrian* by a motor vehicle or trailer.

A *pedestrian* means a *person* not an occupant of a motor vehicle or trailer.

2. any other *person* while *occupying*:
  - a. a vehicle covered under the liability coverage, except a *non-owned car*. Such vehicle has to be used by a *person* who is insured under the liability coverage; or
  - b. a *non-owned car*. The *bodily injury* has to result from such *car's* operation or occupancy by the first *person* named in the declarations, his or her *spouse* or their *relatives*.

### Deciding Amount

The amount due under this coverage shall be decided by agreement between the *person* making claim and us. If there is no agreement, the amount due shall be decided by arbitration upon written request of the *person* making claim or us. Each party shall select a competent and impartial arbitrator. These two shall select a third one. If unable to agree on the third one within 30 days, either party may request a judge of a court of record in the county in which the arbitration is pending to select a third one. The written decision of any two arbitrators shall be binding on us, the *person* making claim, any assignee of the *person* making claim and any *person* or organization with whom the *person* making claim expressly or impliedly contracts for the rendition of medical services. The arbitrators' decision shall be limited to whether or not the medical expenses were reasonable and necessary, with the amount due being equal to the reasonable and necessary medical expenses only. The arbitrators shall not award punitive damages or other noncompensatory damages.

The cost of the arbitrator and any expert witness shall be paid by the party who hired them. The cost of the third arbitrator and other expenses of arbitration shall be shared equally by both parties.

The arbitration shall take place in the county in which the *person* making claim resides unless the parties agree to another place. State court rules governing procedure and admission of evidence shall be used.

#### Payment of Medical Expenses.

We may pay the injured *person* or any *person* or organization performing the services.

#### DEATH

We will pay, in addition to medical expenses, \$1,000 because of the death of:

1. the first *person* named in the declarations; or
2. that *person's spouse*.

The death has to:

1. be the direct result of the *bodily injury* and no other cause; and
2. be due to accident while *occupying* or through being struck by a motor vehicle or trailer; and
3. occur within 90 days of the accident.

The \$1,000 shall be paid:

1. to the surviving *spouse*; or, if none,
2. at our option to a parent or guardian or the deceased *person's estate*.

The amount payable is increased to \$2,000, if at the time of the accident, such deceased *person* was using the vehicle's complete restraint system as recommended by the vehicle's manufacturer.

#### Limit of Liability

Medical Expenses. The amount of coverage for medical expenses, including funeral services, is shown on the declarations page under "Limit of Liability - Coverage C - Each Person". If the amount shown is \$3,000 or more, the most we pay for funeral services is \$3,000 per *person*.

Death. The total amount we pay for a death under all policies is the maximum amount payable under one policy for a death.

#### Two or More Vehicles

1. A motor vehicle and attached trailer are one vehicle as respects limits.

2. When two or more motor vehicles are insured under this section the limits apply separately to each.

#### If There Are Other Medical Payments Coverages

##### 1. Non-Duplication

No *person* for whom medical expenses are payable under this coverage shall recover more than once for the same medical expense under this or similar vehicle insurance.

##### 2. Policies Issued by Us to You, Your Spouse or Relatives

If two or more policies issued by us to *you, your spouse* or *your relatives* provide vehicle medical payments coverage and apply to the same *bodily injury* sustained:

- a. while *occupying a non-owned car, a temporary substitute car*; or
- b. as a *pedestrian*.

the total limits of liability under all such policies shall not exceed that of the policy with the highest limit of liability.

##### 3. Subject to items 1 and 2 above:

- a. if a *temporary substitute car, a non-owned car* or a trailer has other vehicle medical payments coverage on it, or
- b. if other vehicle medical payments coverage applies to *bodily injury* sustained by a *pedestrian*.

this coverage is excess.

##### 4. THIS COVERAGE DOES NOT APPLY IF THERE IS OTHER VEHICLE MEDICAL PAYMENTS COVERAGE ON A NEWLY ACQUIRED CAR.

#### What Is Not Covered

THERE IS NO COVERAGE:

1. WHILE A *NON-OWNED CAR* IS USED:
  - a. BY ANY *PERSON* EMPLOYED OR ENGAGED IN ANY WAY IN A *CAR BUSINESS*; OR
  - b. IN ANY OTHER BUSINESS OR JOB. This does not apply when the first *person* named in the declarations, his or her *spouse* or any *relative* is operating or *occupying a private passenger car*.
2. WHILE *OCCUPYING* OR THROUGH BEING STRUCK BY ANY MOTOR VEHICLE OR TRAILER:

- a. DESIGNED MAINLY FOR USE OFF PUBLIC ROADS WHILE OFF PUBLIC ROADS; OR
  - b. LOCATED FOR USE AS A RESIDENCE OR PREMISES; OR
  - c. THAT RUNS ON RAILS OR CRAWLER-TREADS.
3. FOR **BODILY INJURY** DUE TO WAR OF ANY KIND.
  4. FOR MEDICAL EXPENSES FOR **BODILY INJURY**:
    - a. SUSTAINED WHILE **OCCUPYING** OR THROUGH BEING STRUCK BY A VEHICLE OWNED BY **YOU, YOUR SPOUSE, OR ANY RELATIVE**, WHICH IS NOT INSURED UNDER THIS COVERAGE; OR
    - b. TO THE EXTENT WORKER'S COMPENSATION BENEFITS ARE REQUIRED TO BE PAYABLE; OR
    - c. SUSTAINED BY ANY **PERSON**, other than the first *person* named in the declarations, his or her *spouse* or their *relatives*, WHILE **OCCUPYING A VEHICLE**:
      - (1) RENTED TO OTHERS; OR
      - (2) USED TO CARRY **PERSONS** FOR A CHARGE. This does not apply to a *private passenger car* used on a share expense basis.
  5. WHILE **YOUR CAR** OR A **NEWLY ACQUIRED CAR** IS SUBJECT TO ANY LIEN OR SALES AGREEMENT NOT SHOWN IN THE DECLARATIONS. This does not apply to *you*.

SECTION III — UNINSURED MOTOR VEHICLE — COVERAGE U AND  
UNINSURED MOTOR VEHICLE PROPERTY DAMAGE — COVERAGE U1

UNINSURED MOTOR VEHICLE — COVER-  
AGE U

You have this coverage if "U" appears in the "Coverages" space on the declarations page.

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
2. would have been legally entitled to collect except for the fact that the owner or driver of the *uninsured motor vehicle* has an immunity under Chapter 2744 of the Ohio Revised Code or a diplomatic immunity.

The *bodily injury* must be sustained by an *insured* and caused by accident arising out of the operation, maintenance or use of an *uninsured motor vehicle*.

THERE IS NO COVERAGE UNTIL THE LIMITS OF LIABILITY OF ALL BODILY INJURY LIABILITY BONDS AND POLICIES THAT APPLY HAVE BEEN USED UP BY PAYMENT OF JUDGMENTS OR SETTLEMENTS

*Uninsured Motor Vehicle* — means:

1. a land motor vehicle, the ownership, maintenance or use of which is:
  - a. not insured or bonded for bodily injury liability at the time of the accident; or
  - b. insured or bonded for bodily injury liability at the time of the accident; but
    - (1) the limits of liability are less than required by the financial responsibility act of the state where *your car* is mainly garaged; or
    - (2) the limits of liability:
      - (a) are less than the limits *you* carry for uninsured motor vehicle coverage under this policy; or
      - (b) have been reduced by payments to *persons* other than an *insured* to an amount less than the limits *you* carry for uninsured motor vehicle coverage under this policy; or
    - (3) the insuring company denies coverage or is or becomes insolvent; or
2. a land motor vehicle whose owner and operator remain unidentified but independent corroborative evidence exists to prove that the *bodily injury* was proximately caused by the

unidentified operator of the land motor vehicle. The testimony of an *insured* seeking recovery shall not constitute independent corroborative evidence, unless the testimony is supported by additional evidence.

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

1. insured under the liability coverage of this policy;
2. owned by, furnished to, or available for the regular use of *you*, *your spouse* or any *relative*;
3. owned or operated by a self-insurer under any motor vehicle financial responsibility law, a motor carrier law or any similar law;
4. owned by any government or any of its political subdivisions or agencies unless the operator of the land motor vehicle has an immunity under Chapter 2744 of the Ohio Revised Code;
5. designed for use mainly off public roads except while on public roads; or
6. while located for use as premises.

Who Is an Insured

*Insured* — means the *person* or *persons* covered by uninsured motor vehicle coverage.

This is:

1. the first *person* named in the declarations;
2. his or her *spouse*;
3. their *relatives*; and
4. any other *person* while *occupying*:
  - a. *your car*, a *temporary substitute car*, a *newly acquired car* or a trailer attached to such *car*. Such vehicle has to be used within the scope of the consent of *you* or *your spouse*; or
  - b. a *car* not owned by *you*, *your spouse* or any *relative*, or a trailer attached to such a *car*. It has to be driven by the first *person* named in the declarations or that *person's spouse* and within the scope of the owner's consent.

Such other *person occupying* a vehicle used to carry *persons* for a charge is not an *insured*.

5. any *person* entitled to recover damages because of *bodily injury* to an *insured* under 1 through 4 above.

### Deciding Fault and Amount

Two questions must be decided by agreement between the *insured* and us:

1. Does the owner or driver of the *uninsured motor vehicle* legally owe the *insured* damages; and
2. If so, in what amount?

If there is no agreement, then:

1. If both parties consent, these questions shall be decided by arbitration as follows:

Each party shall select a competent and impartial arbitrator. These two shall select a third one. The written decision of any two of the three arbitrators shall be binding on each party. If the two selected arbitrators are unable to agree on a third one within 30 days, the *insured* shall proceed as provided in item 2 below.

The cost of the arbitrator and any expert witness shall be paid by the party who hired them. The cost of the third arbitrator and other expenses of arbitration shall be shared equally by both parties.

The arbitration shall take place in the county in which the *insured* resides unless the parties agree to another place. State court rules governing procedure and admission of evidence shall be used; or

2. If either party does not consent to arbitrate these questions or if the arbitrators selected by each party cannot agree on the third arbitrator, the *insured* shall:
  - a. file a lawsuit in the proper court against the owner or driver of the *uninsured motor vehicle* and us, or if such owner or driver is unknown, against us; and
  - b. upon filing, immediately give us copies of the summons and complaints filed by the *insured* in that action; and
  - c. secure a judgment in that action. The judgment must be the final result of an actual trial and an appeal, if an appeal is taken.
3. If the *insured* files suit against the owner or driver of the *uninsured motor vehicle*, we have the right to defend on the issues of the legal liability of and the damages owed by such owner or driver.

We are not bound by any judgment against any *person* or organization obtained without our written consent.

### Payment of Any Amount Due

We will pay any amount due:

1. to the *insured*;
2. to a parent or guardian if the *insured* is a minor or an incompetent *person*;
3. to the surviving *spouse*; or
4. at our option, to a *person* authorized by law to receive such payment.

### Limits of Liability

1. The amount of coverage is shown on the declarations page under "Limits of Liability - U- Each Person, Each Accident". Under "Each Person" is the amount of coverage for all damages arising out of and due to *bodily injury* to one *person*. "*Bodily injury* to one *person*" includes all injury and damages to others arising out of and resulting from this *bodily injury*. Under "Each Accident" is the total amount of coverage, subject to the amount shown under "Each Person", for all such damages arising out of and due to *bodily injury* to two or more *persons* in the same accident.
2. Any payment made to a *person* under this coverage shall reduce any amount payable to that *person* under the *bodily injury* liability coverage.
3. The limits of liability are not increased because:
  - a. more than one vehicle is insured under this policy; or
  - b. more than one *person* is insured at the time of the accident.
4. The maximum total amount payable to all *insureds* under this coverage is the difference between the "each accident" limits of liability of this coverage and the amount paid to all *insureds* by or for any *person* or organization who is or may be held legally liable for the *bodily injury*.

Subject to the above, the most we pay for all damages arising out of and due to *bodily injury* to one *person* is the lesser of:

1. the difference between the "each person" limits of liability of this coverage, and the amount paid for that *bodily injury* by or for any *person* or organization who is or may be held legally liable for the *bodily injury*; or

2. the difference between the amount of damages for such *bodily injury*, and the amount paid for that *bodily injury* by or for any *person* or organization who is or who may be held legally liable for the *bodily injury*.

#### When Coverage U Does Not Apply

##### THERE IS NO COVERAGE:

1. FOR ANY *INSURED* WHO, WITHOUT OUR WRITTEN CONSENT, SETTLES WITH ANY *PERSON* OR ORGANIZATION WHO MAY BE LIABLE FOR THE *BODILY INJURY*.
2. FOR *BODILY INJURY* TO AN *INSURED*:
  - a. WHILE OPERATING OR *OCCUPYING* A MOTOR VEHICLE OWNED OR LEASED BY, FURNISHED TO, OR AVAILABLE FOR THE REGULAR USE OF *YOU, YOUR SPOUSE* OR ANY *RELATIVE* IF IT IS NOT INSURED FOR THIS COVERAGE UNDER THIS POLICY.
  - b. THROUGH BEING STRUCK BY A MOTOR VEHICLE OWNED OR LEASED BY, FURNISHED TO, OR AVAILABLE FOR THE REGULAR USE OF *YOU, YOUR SPOUSE* OR ANY *RELATIVE*.
  - c. WHILE THE *INSURED* IS OPERATING OR *OCCUPYING* A MOTOR VEHICLE WITHOUT A REASONABLE BELIEF THAT THE *INSURED* IS ENTITLED TO DO SO, PROVIDED THAT UNDER NO CIRCUMSTANCES WILL AN *INSURED* WHOSE LICENSE HAS BEEN SUSPENDED, REVOKED, OR NEVER ISSUED, BE HELD TO HAVE A REASONABLE BELIEF THAT THE *INSURED* IS ENTITLED TO OPERATE A MOTOR VEHICLE.
  - d. WHEN THE *BODILY INJURY* IS CAUSED BY A MOTOR VEHICLE OPERATED BY ANY *PERSON* WHO IS SPECIFICALLY EXCLUDED FROM THE COVERAGE PROVIDED BY SECTION I — LIABILITY — COVERAGE A OF THIS POLICY.
3. TO THE EXTENT IT BENEFITS:
  - a. ANY WORKER'S COMPENSATION OR DISABILITY BENEFITS INSURANCE COMPANY.
  - b. A SELF-INSURER UNDER ANY WORKER'S COMPENSATION, OR DISABILITY BENEFITS OR SIMILAR LAW.
  - c. ANY GOVERNMENTAL BODY OR AGENCY.

#### 4. FOR PUNITIVE OR EXEMPLARY DAMAGES.

#### If There Is Other Uninsured Motor Vehicle Coverage

1. Any and all stacking of uninsured motor vehicle coverage is precluded.
2. If Other Policies Issued By Us To You, Your Spouse or Any Relative Apply

Subject to 1 above, if two or more motor vehicle liability policies issued by us to *you, your spouse* or any *relative* providing uninsured motor vehicle coverage apply to the same accident, the total limits of liability under all such policies shall not exceed that of the policy with the highest limit of liability.

#### 3. If Any Other Policies Apply

Subject to 1 and 2 above:

- a. If the *insured* sustains *bodily injury* as a pedestrian and other uninsured motor vehicle coverage applies or is injured while *occupying your car*, and *your car* is described on the declarations page of another policy providing uninsured motor vehicle coverage:

- (1) the total limits of liability under all coverages that apply shall not exceed that of the coverage with the highest limit of liability; and

- (2) we are liable only for our share. Our share is that per cent of the damages that our limit of liability determined in 1 above bears to the total sum of that limit of liability and the limits of liability of all other coverages that apply.

- b. If the *insured* sustains *bodily injury* while *occupying* a vehicle that is:

- (1) not described on the declarations page of; or

- (2) driven by a *person* who is not an insured under,

another policy providing uninsured motor vehicle coverage:

- (1) the total limits of liability under all uninsured motor vehicle coverages that apply shall not exceed that of the coverage with the highest limit of liability; and

- (2) we are liable only for our share. Our share is that per cent of the damages that our limit of liability determined in 1 above bears to the total sum of that limit of liability and the limits of liability of all

other uninsured motor vehicle coverages that apply.

- c. If the *insured* sustains *bodily injury* while *occupying* a vehicle not owned by *you* and such vehicle is described on the declarations page of another policy providing uninsured motor vehicle coverage, or its driver is an insured on another policy, this coverage applies:

- (1) as excess to any uninsured motor vehicle coverage which applies to the vehicle or its driver as primary coverage; but
- (2) only in the amount by which it exceeds the primary coverage.

If coverage under more than one policy applies as excess:

- (1) the total limit of liability shall not exceed the difference between the limit of liability of the coverage that applies as primary and the highest limit of liability of any one of the coverages that applies as excess; and
- (2) we are liable only for our share. Our share is that per cent of the damages that our limit of liability determined in 1 above bears to the total sum of our applicable limit of liability and the limits of liability of all other uninsured motor vehicle coverages that apply as excess to the accident.

#### UNINSURED MOTOR VEHICLE PROPERTY DAMAGE - COVERAGE U1

*You* have this coverage if "U1" appears in the "Coverages" space on the declarations page. The deductible amount is shown on the declarations page by the number beside "U1."

We will pay damages for *property damage* you are legally entitled to collect from the owner or driver of an *uninsured motor vehicle*, but only the amount of such damages in excess of the deductible amount. The *property damage* must be caused by accident arising out of the operation, maintenance or use of an *uninsured motor vehicle*.

**Property Damage** - means damage to, or the destruction of, *your car* or a *newly acquired car*. IT DOES NOT INCLUDE LOSS OF USE OF SUCH VEHICLE.

*Uninsured motor vehicle* under coverage U1 means:

A land motor vehicle, which strikes *your car* or a *newly acquired car* and the ownership, maintenance or use of which is:

1. not insured or bonded for property damage liability at the time of the accident; or
2. insured or bonded for property damage liability at the time of the accident, but
  - a. the limit of liability for *property damage* is less than required by the financial responsibility act of the state where *your car* is mainly garaged; or
  - b. the insuring company denies coverage or is or becomes insolvent.

The owner or operator of the *uninsured motor vehicle* must be identified.

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

1. insured under the liability coverage of this policy;
2. furnished for the regular use of *you*, *your spouse* or any *relative*;
3. owned or operated by a self-insurer under any motor vehicle financial responsibility law, a motor carrier law or any similar law;
4. owned by any government or any of its political subdivisions or agencies;
5. designed for use mainly off public roads except while on public roads; or
6. while located for use as premises.

#### Payment of Any Amount Due

We will pay any amount due:

1. to *you*; or
2. at our option, to a *person* authorized by law to receive such payment.

#### Limits of Liability

1. The limit of our liability for *property damage* is the lowest of:
  - a. \$7,500;
  - b. the actual cash value; or
  - c. the cost of repair or replacement.

Actual cash value is determined by the market value, age and condition of the vehicle at the time the accident occurred. The deductible amount that applies is then subtracted.

The cost of repair or replacement is based upon one of the following:

- a. the cost of repair or replacement agreed upon by *you* and us;

- b. a competitive bid approved by us; or
- c. an estimate written based upon the prevailing competitive price. The prevailing competitive price means prices charged by a majority of the repair market in the area where the *car* is to be repaired as determined by a survey made by us. If *you* ask, we will identify some facilities that will perform the repairs at the prevailing competitive price. We will include in the estimate parts sufficient to restore the vehicle to its pre-loss condition. Such parts may include either parts furnished by the vehicle's manufacturer or parts from other sources including non-original equipment manufacturers.

If the repair or replacement results in betterment, *you* must pay for the amount of betterment.

The deductible amount that applies is then subtracted.

- 2. Any amount payable under this coverage shall be reduced by any amount paid or payable to or for the *insured*:
  - a. by or for any *person* or organization who is or may be held legally liable for the *property damage*;

- b. under any policy of vehicle liability insurance; or
- c. under any property or physical damage insurance.

#### When Coverage U1 Does Not Apply

- 1. THERE IS NO COVERAGE IF *YOU* SETTLE WITHOUT OUR WRITTEN CONSENT WITH ANY *PERSON* OR ORGANIZATION WHO MAY BE LIABLE FOR THE *PROPERTY DAMAGE*.
- 2. THERE IS NO COVERAGE FOR THE FIRST \$250 OF *PROPERTY DAMAGE* RESULTING FROM EACH ACCIDENT.

#### If There Is Other Coverage

- 1. If any other coverage applies to the *property damage*, this coverage applies as excess, but only in the amount by which it exceeds that other coverage.
- 2. THIS COVERAGE DOES NOT APPLY IF THERE IS OTHER UNINSURED MOTOR VEHICLE PROPERTY DAMAGE COVERAGE ON A *NEWLY ACQUIRED CAR*.

## SECTION IV — PHYSICAL DAMAGE COVERAGES

**Loss** — means, when used in this section, each direct and accidental loss of, or damage to:

1. *your car*;
2. its equipment which is common to the use of *your car* as a vehicle;
3. clothes and luggage insured; and
4. a detachable living quarters attached or removed from *your car* for storage. Detachable living quarters includes its body and items securely fixed in place as a permanent part of the body. **You** must have told us about the living quarters before the *loss* and paid any extra premium needed.

**COMPREHENSIVE — COVERAGE D.** **You** have this coverage if "D" appears in the "Coverages" space on the declarations page. If a deductible applies the amount is shown by the number beside "D".

1. **Loss to Your Car.** We will pay for *loss to your car* EXCEPT **LOSS BY COLLISION** but only for the amount of each such *loss* in excess of the deductible amount, if any.

Breakage of glass, or *loss* caused by missiles, falling objects, fire, theft, larceny, explosion, earthquake, windstorm, hail, water, flood, malicious mischief or vandalism, riot or civil commotion, is payable under this coverage. *Loss* due to hitting or being hit by a bird or an animal is payable under this coverage.

2. We will repay *you* for transportation costs if *your car* is stolen. We will pay up to \$16 per day for the period that begins 48 hours after *you* tell us of the theft. The period ends when we offer to pay for *loss*.

**COLLISION — 80% — COVERAGE F.** **You** have this coverage if "F" appears in the "Coverages" space on the declarations page.

We will pay 80% of the first \$250 and 100% over that amount of *loss to your car* caused by *collision*. If the *collision* is with another motor vehicle insured by us, we will pay 100% of the *loss*.

**COLLISION — COVERAGE G.** **You** have this coverage if "G" appears in the "Coverages" space on the declarations page. The deductible amount is shown by the number beside "G".

We will pay for *loss to your car* caused by *collision* but only for the amount of each such *loss* in excess of the deductible amount. If the *collision* is with another motor vehicle insured with us, *you* do not pay *your* deductible if it is \$100 or less as we pay it.

**Collision** — means *your car* upset or hit or was hit by a vehicle or other object.

**Clothes and Luggage — Comprehensive and Collision Coverages**

We will pay for *loss* to clothes and luggage owned by the first *person* named in the declarations, his or her *spouse*, and their *relatives*. These items have to be in or on *your car*. *Your car* has to be covered under this policy for:

1. Comprehensive, and the *loss* caused by fire, lightning, flood, falling objects, explosion, earthquake, or theft. If the *loss* is due to theft **YOUR ENTIRE CAR MUST HAVE BEEN STOLEN**; or

2. Collision, and the *loss* caused by *collision*.

We will pay up to \$200 for *loss* to clothes and luggage in excess of any deductible amount shown for comprehensive or collision. \$200 is the most we will pay in any one occurrence even though more than one *person* has a *loss*. This coverage is excess over any other coverage.

**Limit of Liability — Comprehensive and Collision Coverages**

The limit of our liability for *loss* to property or any part of it is the lower of:

1. the actual cash value; or
2. the cost of repair or replacement.

Actual cash value is determined by the market value, age and condition at the time the *loss* occurred. Any deductible amount that applies is then subtracted.

The cost of repair or replacement is based upon one of the following:

1. the cost of repair or replacement agreed upon by *you* and us;
2. a competitive bid approved by us; or
3. an estimate written based upon the prevailing competitive price. The prevailing competitive price means prices charged by a majority of the repair market in the area where the *car* is to be repaired as determined by a survey made by us. If *you* ask, we will identify some facilities that will perform the repairs at the prevailing competitive price. We will include in the estimate parts sufficient to restore the vehicle to its pre-loss condition. Such parts may include either parts furnished by the vehicle's manufacturer or parts from other sources including non-original equipment manufacturers.

Any deductible amount that applies is then subtracted.

### Settlement of Loss -- Comprehensive and Collision Coverages

We have the right to settle a *loss* with *you* or the owner of the property in one of the following ways:

1. pay the agreed upon actual cash value of the property at the time of the *loss* in exchange for the damaged property. If the owner and we cannot agree on the actual cash value, either party may demand an appraisal as described below. If the owner keeps the damaged property, we will deduct its value after the *loss* from our payment. The damaged property cannot be abandoned to us;
2. pay to:
  - a. repair the damaged property or part, or
  - b. replace the property or part.

If the repair or replacement results in betterment, *you* must pay for the amount of betterment; or

3. return the stolen property and pay for any damage due to the theft.

Appraisal under item 1 above shall be conducted according to the following procedure. Each party shall select an appraiser. These two shall select a third appraiser. The written decision of any two appraisers shall be binding. The cost of the appraiser shall be paid by the party who hired him or her. The cost of the third appraiser and other appraisal expenses shall be shared equally by both parties. We do not waive any of our rights by agreeing to an appraisal. We have the right to move the damaged property, at our expense, to reduce storage costs during the appraisal process.

The Settlement of Loss provision for comprehensive and collision coverages incorporates the Limit of Liability provision of those coverages.

If we can pay the *loss* under either comprehensive or collision, we will pay under the coverage where *you* collect the most.

When there is *loss* to *your car*, clothes and luggage in the same occurrence, any deductible will be applied first to the *loss* to *your car*. *You* pay only one deductible.

**EMERGENCY ROAD SERVICE -- COVERAGE H.** *You* have this coverage if "H" appears in the "Coverages" space on the declarations page.

We will pay the fair cost *you* incur for *your car* for:

1. mechanical labor up to one hour at the place of its breakdown;

2. towing to the nearest place where the necessary repairs can be made during regular business hours if it will not run;
3. towing it out if it is stuck on or immediately next to a public highway;
4. delivery of gas, oil, loaned battery, or change of tire. **WE DO NOT PAY FOR THE COST OF THESE ITEMS.**

**CAR RENTAL EXPENSE -- COVERAGE R.** *You* have this coverage if "R" appears in the "Coverages" space on the declarations page.

We will repay *you* up to \$10 per day when *you* rent a *car* from a car rental agency or garage due to a *loss* to *your car* which would be payable under coverage D, F or G, starting:

1. when it cannot run due to the *loss*; or
2. if it can run, when *you* leave it at the shop for agreed repairs;

and ending when:

1. it has been repaired or replaced, or
2. we offer to pay for the *loss*, or
3. *you* incur 30 days rent,

whichever comes first.

Any car rent payable under Coverage R is **REDUCED TO THE EXTENT IT IS PAYABLE UNDER COMPREHENSIVE.**

**CAR RENTAL AND TRAVEL EXPENSES -- COVERAGE R1.** *You* have this coverage if "R1" appears in the "Coverages" space on the declarations page.

1. **Car Rental Expense.** We will:

- a. pay *you* up to \$16 of the daily rental charge when *you* rent a *car* from a car rental agency or garage; or
- b. pay *you* \$10 for each complete 24 hour period that *your car* is not drivable if *you* choose to not rent a *car*. *You* must report to us the period of time that *your car* was not drivable.

We will pay only if *your car* is not drivable because of a *loss* which would be payable under coverage D, F or G.

This applies during a period starting:

- a. when *your car* cannot run due to the *loss*; or
- b. if *your car* can run, when *you* leave it at the shop for agreed repairs;

and ending:

- a. when it has been repaired or replaced, or
  - b. (1) when we offer to pay for the *loss*, if *your car* is repairable, or
  - (2) five days after we offer to pay for the *loss*, if:
    - (a) *your car* was stolen and not recovered, or
    - (b) we declare it a total loss,
- whichever comes first.

Any car rent payable under this coverage is **REDUCED TO THE EXTENT IT IS PAYABLE UNDER COMPREHENSIVE**

2. **Travel Expenses.** If *your car* cannot run due to a *loss* which would be payable under coverage D, F or G more than 50 miles from home, we will repay *you* for expenses incurred by *you*, *your spouse* and any *relative* for:
  - a. Commercial transportation fares to continue to *your* destination or home,
  - b. Extra meals and lodging needed when the *loss* to *your car* causes a delay enroute. The expenses must be incurred between the time of the *loss* and *your* arrival at *your* destination or home or by the end of the fifth day, whichever occurs first.
  - c. Meals, lodging and commercial transportation fares incurred by *you*, or a *person* *you* choose to drive *your car* from the place of repair to *your* destination or home.
3. **Rental Car - Repayment of Deductible Amount Expense.** We will repay the expense of any deductible amount *you* are required to pay the owner under comprehensive or collision coverage in effect on a substitute *car* rented from a car rental agency or garage.

**Total Amount of Expenses Payable - Coverage R1**

1. The most we will pay for the total of the "Car Rental Expense" and "Rental Car - Repayment of Deductible Amount Expense" incurred in any one occurrence is \$400.
2. The most we will pay for "Travel Expenses" incurred by all *persons* in any one occurrence is \$400.

**CAR RENTAL AND TRAVEL EXPENSES - COVERAGE R2**

Coverage R2 is provided by this policy if "R2" appears in the "Coverages" space on the declarations page.

**1. Car Rental Expense.**

- a. We will:
  - (1) pay 80% of the rental charge when *you* rent a *car* from a car rental agency or garage. "Rental charge" means the daily rental rate plus charges for mileage and related taxes; or
  - (2) pay *you* \$10 for each complete 24-hour period that *your car* is not drivable if *you* choose to not rent a *car*. *You* must report to us the period of time that *your car* was not drivable.

We will pay only if *your car* is not drivable because of a *loss* which would be payable under coverage D, F or G.
- b. Payment will be made for a period that:
  - (1) starts:
    - (a) when *your car* is not drivable due to the *loss*; or
    - (b) if *your car* is drivable, when *you* leave it at the shop for agreed repairs; and
  - (2) ends:
    - (a) when *your car* has been repaired or replaced; or
    - (b) when we offer to pay for the *loss*, if *your car* is repairable but *you* choose to delay repairs; or
    - (c) five days after we offer to pay for the *loss* if:
      - (i) *your car* was stolen and not recovered; or
      - (ii) we declare that *your car* is a total loss;

whichever comes first.

Any car rent payable under this coverage is **REDUCED TO THE EXTENT THAT PAYMENT IS MADE UNDER COMPREHENSIVE COVERAGE.**

2. **Travel Expenses.** If *your car* is not drivable due to a *loss* which occurs more than 50 miles from home and which would be payable under coverage D, F or G, we will pay *you* for expenses incurred by *you*, *your spouse* and any *relative* for:
  - a. commercial transportation fares to continue to *your* destination or home;

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- b. extra meals and lodging needed when the *loss* to *your car* causes a delay enroute. The expenses must be incurred between the time of the *loss* and *your* arrival at *your* destination or home or by the end of the fifth day, whichever occurs first; and
- c. meals, lodging and commercial transportation fares incurred by *you* or a *person* *you* choose to drive *your car* from the place of repair to *your* destination or home.

**3. Rental Car - Repayment of Deductible Amount Expense.** We will pay the expense of any deductible amount *you* are required to pay the owner under comprehensive or collision coverage in effect on a substitute *car* rented from a car rental agency or garage.

**Total Amount of Expenses Payable - Coverage R2**

1. The most we will pay for "Car Rental Expense" incurred in any one occurrence is \$500.
2. The most we will pay for "Travel Expenses" incurred by all *persons* in any one occurrence is \$400.
3. The most we will pay for "Rental Car - Repayment of Deductible Amount Expense" incurred in any one occurrence is \$400.

**Trailer Coverage**

**1. Owned Trailer**

*Your* trailer is covered:

- a. when it is described on the declarations page of the policy; and
- b. for the coverages shown as applying to it.

**2. Non-Owned Trailer or Detachable Living Quarters**

Any physical damage coverage in force on *your car* applies to a non-owned:

- a. trailer, if it is designed for use with a *private passenger car*, or
- b. detachable living quarters unit

used by the first *person* named in the declarations, his or her *spouse* or their *relatives*.

The most we will pay under the comprehensive or collision coverage for a *loss* to such non-owned trailer or unit is \$500.

A non-owned trailer or detachable living quarters unit is one that:

a. is not owned by or registered in the name of:

- (1) *you, your spouse, any relative;*
- (2) any other *person* residing in the same household as *you, your spouse* or any *relative;* or
- (3) an employer of *you, your spouse* or any *relative;* and

b. has not been used or rented by or in the possession of *you, your spouse* or any *relative* during any part of each of the last 21 or more consecutive days. If *you* are insured by one or more other car policies issued by us, the 21 day limit is increased by an additional 21 days for each such additional policy; and

c. is not rented and used in connection with the employment or business of *you, your spouse* or any *relative.*

**Coverage for the Use of Other Cars**

The coverages in this section *you* have on *your car* extend to a *loss* to a *newly acquired car, a temporary substitute car* or a *non-owned car.* These coverages extend to a *non-owned car* while it is driven by or in the custody of an *insured.*

*Insured* - as used in this provision means:

1. the first *person* named in the declarations;
2. his or her *spouse;* or
3. their *relatives.*

**When Coverages D, F, G, H, R, RI and R2 Do Not Apply**

THERE IS NO COVERAGE FOR:

1. A *NON-OWNED CAR:*
  - a. IF THE DECLARATIONS STATE THE "USE" OF *YOUR CAR* IS OTHER THAN PLEASURE AND BUSINESS;
  - b. WHILE BEING REPAIRED, SERVICED OR USED BY ANY *PERSON* WHILE THAT *PERSON* IS WORKING IN ANY *CAR BUSINESS;* OR
  - c. WHILE USED IN ANY OTHER BUSINESS OR OCCUPATION. This does not apply to a *private passenger car* driven or occupied by the first *person* named in the declarations, his or her *spouse* or their *relatives.*
2. ANY VEHICLE WHILE:
  - a. RENTED TO OTHERS;

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- b. USED TO CARRY *PERSONS* FOR A CHARGE. This does not apply to the use on a share expense basis; OR
  - c. SUBJECT TO ANY LIEN, LEASE OR SALES AGREEMENT NOT SHOWN IN THE DECLARATIONS.
3. LOSS TO ANY VEHICLE DUE TO:
- a. TAKING BY ANY GOVERNMENTAL AUTHORITY;
  - b. WAR OF ANY KIND;
  - c. AND LIMITED TO WEAR AND TEAR, FREEZING, MECHANICAL OR ELECTRICAL BREAKDOWN OR FAILURE. This does not apply when the *loss* is the result of a theft covered by this policy. Nor does it apply to emergency road service; OR
  - d. CONVERSION, EMBEZZLEMENT OR SECRETION BY ANY *PERSON* WHO HAS THE VEHICLE DUE TO ANY LIEN, RENTAL OR SALES AGREEMENT.
4. TIRES unless:
- a. stolen, or damaged by fire or vandalism; or
  - b. other *loss* covered by this section happens at the same time.
5. TAPES OR DISCS FOR RECORDING OR REPRODUCING SOUND.
6. ANY LASER OR RADAR DETECTOR.

## If There Is Other Coverage

### 1. Policies Issued by Us to You

If two or more vehicle policies issued by us to *you* apply to the same *loss* or occurrence, we will pay under the policy with the highest limit.

### 2. Coverage Available From Other Sources

Subject to item 1, if other coverage applies to the *loss* or expenses, we will pay only our share. Our share is that per cent the limit of liability of this policy bears to the total of all coverage that applies.

### 3. Temporary Substitute Car, Non-Owned Car or Trailer

If a *temporary substitute car*, a *non-owned car* or trailer designed for use with a *private passenger car* has other coverage on it, then this coverage is excess.

### 4. Newly Acquired Car

THIS INSURANCE DOES NOT APPLY IF THERE IS SIMILAR COVERAGE ON A *NEWLY ACQUIRED CAR*.

### No Benefit to Bailee

These coverages shall not benefit any carrier or other bailee for hire liable for *loss*.

### Two Or More Vehicles

If two or more of *your cars* are insured for the same coverage, the coverage applies separately to each.

**SECTION V — DEATH, DISMEMBERMENT AND LOSS OF SIGHT — COVERAGE S,  
TOTAL DISABILITY — COVERAGE T AND LOSS OF EARNINGS — COVERAGE Z**

**DEATH, DISMEMBERMENT AND LOSS OF SIGHT — COVERAGE S**

If "S" is shown in the "Coverages" space on the declarations page each *insured* has the coverage.

We will pay the amount shown in the schedule that applies for death, or *loss*, caused by accident. The *insured* has to be *occupying* or be struck by a land motor vehicle or trailer. The death or *loss* must be the direct result of the accident and not due to any other cause. The death or *loss* must occur within 90 days of the accident.

*Insured* — means a *person* listed under "Persons Insured — Coverage S" on the declarations page.

*Loss* — means the loss of:

1. the foot or hand, cut off through or above the ankle or wrist; or
2. the whole thumb or finger; or
3. all sight.

**The Most We Pay**

The most we will pay because of the death of, or *loss* to, the *insured*, except as provided below, is shown under "Amount" next to his or her name on the declarations page.

The amount shown in the schedule for death or *loss* is doubled for an *insured* who, at the time of the accident, is using the vehicle's complete restraint system as recommended by the vehicle's manufacturer.

If the *insured* dies as a result of this accident, any payment made or due for *loss* reduces the amount of the death payment.

**SCHEDULE**

	If amount under S in the declarations is:	
	\$ 5,000	\$10,000
Death	\$ 5,000	\$10,000
<i>Loss</i> of:		
hands; feet; sight of eyes; one hand & one foot; or one hand or one foot & sight of one eye	5,000	10,000
one hand or one foot; or sight of one eye	2,500	5,000
thumb & finger on one hand; or three fingers	1,500	3,000
any two fingers	1,000	2,000

**Payment of Any Amount Due**

We will pay any amount due:

1. to the *insured*;
2. to a parent or guardian if the *insured* is a minor or an incompetent *person*;
3. to the surviving *spouse*; or
4. at our option, to any *person* or organization authorized by law to receive such payment.

Any payment made is to its extent a complete discharge of our obligations. We are not responsible for the way the money is used.

**Autopsy**

We have the right to have an autopsy made where it is not forbidden by law.

**TOTAL DISABILITY — COVERAGE T**

If "T" is shown in the "Coverages" space on the declarations page each *insured* has the coverage.

We will pay the *insured* *weekly indemnity* because of his or her continuous *total disability*. The *total disability* must:

1. result directly and independently of all other causes from *bodily injury* caused by accident, while *occupying* or through being struck by a land motor vehicle or trailer;
2. start within 20 days from the date of the accident, and
3. be for seven or more consecutive days.

*Insured* — means a *person* shown under "Persons Insured — Coverage T" on the declarations page.

*Total Disability* — under coverage T means:

1. during the first year from the start of the *insured's* disability, the *insured* is continuously unable to work in his or her occupation; and
2. after the first year, the *insured* is continuously unable to work in a gainful occupation for which he or she is reasonably fitted by education, training or experience.

*Weekly Indemnity* — means the amount we pay for each week the *insured* sustains *total disability*. It is the lower of:

1. the amount shown on the declarations page for the *insured*, or

- two-thirds of the *insured's* average weekly earnings on the date of the accident. Average weekly earnings is the *insured's* total earnings for the 52 weeks just prior to the date of the accident, divided by 52.

#### Limits of Liability

The maximum number of weeks for which we will pay *weekly indemnity* to an *insured* is 260 weeks of continuous *total disability* due to one accident.

#### Payment of Any Amount Due

Subject to proof of continued *total disability*, when we ask for it, *weekly indemnity* is payable to an *insured* every four weeks.

#### Death During Total Disability

The time limitation for death under coverage S, when an *insured* under both coverages S and T sustains death during a period of continuous *total disability*, is extended to one year from the date of accident.

#### If There Is Other Coverage

If an *insured* is also an *insured* under Total Disability - Coverage T of another policy issued by us, then the amount payable under this coverage is reduced to the extent of any amount paid under the other policy. We will return premium paid for such duplication of benefits.

#### LOSS OF EARNINGS - COVERAGE Z

If "Z" is shown in the "Coverages" space on the declarations page each *insured* has the coverage.

We will pay the *insured* 85% of his or her loss of *weekly earnings*. The loss has to be due to continuous *total disability* that is:

- the direct result of *bodily injury* caused by accident,
- while *occupying* or through being struck by a land motor vehicle or trailer.

#### When Total Disability Applies

The *insured's total disability* must be for a period of at least 30 consecutive days starting within 20 days after the accident. We will not pay for the first seven days of the 30 day period.

Payments owed will be paid every two weeks. Proof of continued *total disability* must be given to us when we ask for it.

#### Limits of Liability

We will pay up to \$250 for each full work week of *total disability* and pro rata for less than a week. Subject to the limit per week, we will pay up to \$15,000 total for all loss of earnings due to any one accident.

#### Definitions

*Insured* - means a *person* shown under "Persons Insured - Coverage Z" on the declarations page.

*Total Disability* - under coverage Z means the *insured*, while living, is not able to do the usual work or any other work for which he or she is reasonably fitted by education, training or experience.

*Weekly Earnings* - means all earnings for the *insured's* services before any deductions. When *weekly earnings* cannot be determined on a weekly basis an average will be used. The average is the total earnings for the 52 weeks just prior to the accident divided by 52.

#### When Coverages S, T and Z Do Not Apply

THESE COVERAGES DO NOT APPLY TO:

- AN *INSURED* WHILE ON THE JOB, OPERATING, *OCCUPYING*, LOADING OR UNLOADING:
  - AN EMERGENCY VEHICLE; OR
  - A VEHICLE USED IN THE *INSURED'S* BUSINESS OR JOB.  
But 1.b. does not apply if the vehicle is:
    - a *private passenger car* or school bus; or
    - of the pickup or van type, with a Gross Vehicle Weight of 10,000 pounds or less, while not used for delivery.
- AN *INSURED* WHILE:
  - ON THE JOB IN ANY *CAR BUSINESS*; OR
  - OCCUPYING* ANY:
    - VEHICLE WHILE BEING USED IN A RACE; OR
    - MILITARY VEHICLE.
- AN *INSURED* WHILE *OCCUPYING* OR THROUGH BEING STRUCK BY A MOTOR VEHICLE OR TRAILER:
  - THAT RUNS ON RAILS OR CRAWLER-TREADS;

- b. DESIGNED FOR USE MAINLY OFF PUBLIC ROADS WHILE OFF PUBLIC ROADS; OR
  - c. LOCATED FOR USE AS PREMISES.
4. THE DEATH OF, LOSS TO OR TOTAL DISABILITY OF AN *INSURED* DUE TO:
- a. DISEASE except pus forming infection due to *bodily injury* received in the accident; or
  - b. SUICIDE OR ATTEMPTED SUICIDE WHILE SANE OR INSANE; OR
  - c. WAR OF ANY KIND.

## CONDITIONS

### 1. Policy Changes

a. **Policy Terms.** The terms of this policy may be changed or waived only by:

- (1) an endorsement signed by one of our executive officers; or
- (2) the revision of this policy form to give broader coverage without an extra charge. If any coverage *you* carry is changed to give broader coverage, we will give *you* the broader coverage without the issuance of a new policy as of the date we make the change effective.

b. **Change of Interest.** No change of interest in this policy is effective unless we consent in writing. However, if *you* die, we will protect as named insured, except under death, dismemberment and loss of sight, total disability and loss of earnings coverages:

- (1) *your* surviving spouse;
- (2) any *person* with proper custody of *your* car, a newly acquired car or a temporary substitute car until a legal representative is qualified; and then
- (3) the legal representative while acting within the scope of his or her duties.

Policy notice requirements are met by mailing the notice to the deceased named insured's last known address.

c. **Consent of Beneficiary.** Consent of the beneficiary under death, dismemberment and loss of sight coverage is not needed to cancel or change the policy.

d. **Joint and Individual Interests.** When there are two or more named insureds, each acts for all to cancel or change the policy.

### 2. Suit Against Us

There is no right of action against us:

a. until all the terms of this policy have been met; and

b. under the liability coverage, until the amount of damages an *insured* is legally liable to pay has been finally determined by:

- (1) judgment after actual trial, and appeal if any; or
- (2) agreement between the *insured*, the claimant and us.

Bankruptcy or insolvency of the *insured* or his or her estate shall not relieve us of our obligations.

c. under medical payments, uninsured motor vehicle; uninsured motor vehicle property damage; any physical damage, death, dismemberment and loss of sight, total disability and loss of earnings coverages, until 30 days after we get the *insured's* notice of accident or loss.

d. under uninsured motor vehicle coverage unless such action is commenced within two years after the date of the accident. However, if the insurer of the owner or operator of the *uninsured motor vehicle* is declared insolvent, the two year period begins on the date the *insured* receives notice of the insolvency.

### 3. Our Right to Recover Our Payments

a. Death, dismemberment and loss of sight, total disability and loss of earnings coverage payments are not recoverable by us.

b. Under medical payments coverage:

(1) we are subrogated to the extent of our payments to the right of recovery the injured *person* has against any party liable for the *bodily injury*.

(2) if the *person* to or for whom we have made payment has not recovered from any party liable for the *bodily injury*, he or she shall:

- (a) not hurt our rights to recover;
- (b) keep these rights in trust for us;

- (c) execute any legal papers we need; and
- (d) when we ask, take action through our representative to recover our payments.
- (3) if the *person* to or for whom we make payment recovers from any party liable for the *bodily injury*, that *person* shall hold in trust for us the proceeds of the recovery, and reimburse us to the extent of our payment.

c. Under uninsured motor vehicle coverage:

- (1) we are subrogated to the extent of our payments to the proceeds of any settlement the injured *person* recovers from any party liable for the *bodily injury*.
- (2) if the *person* to or for whom we have made payment has not recovered from the party at fault, he or she shall:
  - (a) keep these rights in trust for us;
  - (b) execute any legal papers we need; and
  - (c) when we ask, take action through our representative to recover our payments.

We are to be repaid our payments, costs and fees of collection out of any recovery.

d. Under uninsured motor vehicle property damage coverage:

- (1) we are subrogated to the extent of our payments to the proceeds of any settlement *you* recover from any party liable for the *property damage*.
- (2) if *you* or the *person* to or for whom we have made payment has not recovered from the party at fault, he or she shall:
  - (a) keep these rights in trust for us;
  - (b) execute any legal papers we need; and
  - (c) when we ask, take action through our representative to recover our payments.

We are to be repaid our payments, costs and fees of collection out of any recovery.

e. Under all other coverages, the right of recovery of any party we pay passes to us. Such party shall:

- (1) not hurt our rights to recover; and

- (2) help us get our money back.

#### 4. Cancellation

**How You May Cancel.** *You* may cancel *your* policy by notifying us in writing of the date to cancel, which must be later than the date *you* mail or deliver it to us. We may waive these requirements by confirming the date and time of cancellation to *you* in writing.

**How and When We May Cancel.** Within 89 days of the policy effective date we may cancel this policy by written notice, mailed to *you*. After the policy has been in force for more than 89 days, we agree that the liability, medical payments and uninsured motor vehicle coverages will not be canceled except for one of the following reasons:

- a. *you* have made a material misrepresentation to us in obtaining or renewing this policy or in the filing of a claim;
- b. *you*, *your spouse* or any *relative* has lost driving privileges by the suspension, revocation or expiration of his or her drivers license. If the *person* who lost driving privileges is other than *you* or the principal operator, we will not cancel this policy during the two-year Guarantee Period shown on the declarations page. However, we have the right to exclude such *person* from the coverage provided by this policy anytime during the two-year Guarantee Period shown on the declarations page by mailing notice to *you* at least 30 days before the exclusion is effective.
- c. *you* fail to pay the premium when due; or
- d. *you* move to, or change *your car's* registration to, a state or country where we are not authorized to write coverage.

However, the above limitations on our right to cancel do not apply if a company we own or manage expresses a willingness to issue another policy.

If we mail a notice of cancellation to *you* during the first 89 days following the policy effective date, the cancellation notice will be mailed to *you* at least 10 days before the cancellation date.

After the policy has been in force for more than 89 days, any notice of cancellation will be mailed to *you* at least:

- a. 10 days before the cancellation date if the cancellation:

- (1) is because *you* did not pay the premium; or

(2) affects only coverages other than liability, medical payments or uninsured motor vehicle coverages.

- b. 30 days before the cancellation effective date if the cancellation is because of any other reason.

The mailing of the notice shall be sufficient proof of notice.

**Return of Unearned Premium.** If *you* cancel, premium may be earned on a short rate basis. If we cancel, premium will be earned on a pro-rata basis and any unearned premium will be returned prior to the cancellation effective date.

#### 5. Renewal

If this policy provides liability, medical payments or uninsured motor vehicle coverage, we will renew such coverages for a sufficient number of policy periods to provide coverage during the two-year Guarantee Period shown on the declarations page.

It is agreed that the renewal premium will be based upon the rates in effect, the coverages carried, the applicable limits of liability, deductibles and other elements that affect the premium that apply at the time of renewal.

Other elements that may affect *your* premium include, but are not limited to:

- a. drivers of *your car* and their ages and marital status;
- b. *your car* and its use;
- c. eligibility for discounts or other premium credits;
- d. applicability of a surcharge based either on accident history, or on other factors.

A notice of our intention to not renew will be mailed to *your* last known address at least 30 days before the end of the current policy period. The mailing of it shall be sufficient proof of notice. If a two-year Guarantee Period is shown on the declarations page, the policy will not be terminated prior to the end of that period.

These agreements to renew are void if:

- a. *you* fail to pay the premium when due; or
- b. the policy is canceled according to condition 4. Cancellation.

#### 6. Change of Residence

When we receive notice that the location of principal garaging of the vehicle described on the declarations page has been changed, we have the right to recalculate the premium based on the coverages and rates applicable in the new location. When the change of location is from one state to another and *you* are a risk still acceptable to us at the time *you* notify us of the change, we shall replace this policy with the policy form currently in use in the new state of garaging. The word "state" means one of the United States of America, the District of Columbia or a province of Canada.

#### 7. Premium

The premium for this policy may vary based upon the purchase of other insurance from one of the State Farm affiliated companies.

#### 8. Concealment or Fraud

There is no coverage under this policy if *you* or any other *person* insured under this policy has made false statements with the intent to conceal or misrepresent any material fact or circumstance in connection with any claim under this policy.

## MUTUAL CONDITIONS

1. **Membership.** The membership fees set out in this policy, which are in addition to the premiums, are not returnable but entitle the first insured named in the declarations to insure one vehicle for any applicable coverage, and to insurance for any other coverage for which said fees were paid so long as:

- a. this company continues to write such coverages;
- b. the vehicle to be insured meets the eligibility requirements of the company; and
- c. the insured remains a risk desirable to the company.

While this policy is in force, the first insured named in the declarations is entitled to vote at all meetings

of members and to receive dividends the Board of Directors in its discretion may declare in accordance with reasonable classifications and groupings of policyholders established by such Board.

2. **No Contingent Liability.** This policy is non-assessable.

3. **Annual Meeting.** The annual meeting of the members of the company shall be held at its home office at Bloomington, Illinois, on the second Monday of June at the hour of 10:00 A.M., unless the Board of Directors shall elect to change the time and place of such meeting, in which case, but not otherwise, due notice shall be mailed each member at the address disclosed in this policy at least 10 days prior thereto.

In Witness Whereof, the State Farm Mutual Automobile Insurance Company has caused this policy to be signed by its President and Secretary at Bloomington, Illinois.

*Laura P. Sullivan*

SECRETARY

*Edward D. Rust, Jr.*

PRESIDENT

## 6935 AMENDATORY ENDORSEMENT

This endorsement is a part of *your* policy. Except for the changes it makes, all other terms of the policy remain the same and apply to this endorsement. It is effective at the same time as *your* policy unless a different effective date is specified by us in writing.

In consideration of the premium charged, it is agreed that *your* policy is changed as follows:

### 1. DEFINED WORDS

The definition of *insured* is changed to read:

*Insured* - means the *person, persons* or organization defined as *insureds* in the specific coverage. If the information *you* have provided State Farm is incorrect or incomplete, or changes during the policy period, State Farm may decrease or increase the premium during the policy period as set out in the provision titled **Premium** of the Conditions section of this policy.

### 2. SECTION I - LIABILITY - COVERAGE A

a. Item 4a under the sentence that reads "In addition to the limits of liability, we will pay for an *insured* any costs listed below resulting from such accident." is changed to read:

4. Expenses incurred by an *insured*:

a. for loss of wages or salary up to \$100 per day if we ask the *insured* to attend the trial of a civil suit.

b. The provision titled **Trailer Coverage** is changed to read:

#### Trailer Coverage

The liability coverage extends to the ownership, maintenance or use, by an *insured*, of:

1. trailers designed to be pulled by a *private passenger car* or a *utility vehicle*, except those trailers in 2.a. below.

Farm implements and farm wagons are considered trailers while pulled on public roads by a *car* we insure for liability.

These trailers are not described in the declarations and no extra premium is charged.

2. the following trailers only if they are described on the declarations page and extra premium is paid:

a. trailers designed to be pulled by a *private passenger car* or a *utility vehicle*:

(1) if designed to carry *persons*; or

(2) while used with a motor vehicle whose use is shown as "commercial" on the declarations page (trailers used only for pleasure use are covered even if not described and no extra premium paid); or

(3) while used as premises for office, store or display purposes; or

b. trailers not designed to be pulled by a *private passenger car* or a *utility vehicle*.

When we refer to trailer coverage, *insured* means:

1. *you*;

2. *your spouse*;

3. the *relatives* of the first *person* named in the declarations;

4. any other *person* while using *your car*, a *newly acquired car* or a *temporary substitute car*; if its use is within the scope of consent of *you* or *your spouse*; and

5. any other *person* or organization liable for the use of a covered trailer by one of the above *insureds*.

**THERE IS NO COVERAGE WHEN A TRAILER IS USED WITH A MOTOR VEHICLE THAT IS NOT COVERED UNDER THE LIABILITY COVERAGE OF THIS POLICY.**

### 3. SECTION II - MEDICAL PAYMENTS - COVERAGE C

#### MEDICAL EXPENSES

a. The paragraph that reads:

These incurred expenses must be:

1. for:

a. services performed, or

b. medical supplies, medication or drugs prescribed

by a medical provider licensed by the state to provide the specific medical services; and

2. for funeral services.

is deleted.

b. The following is added:

Expenses are reasonable only if they are consistent with the usual fees charged by the majority of similar medical providers in the geographical area in which the expenses were incurred for the specific medical service.

Services are necessary only if the services are rendered by a medical provider within the legally authorized scope of the provider's practice and are essential in achieving maximum medical improvement for the *bodily injury* sustained in the accident.

4. SECTION III - UNINSURED MOTOR VEHICLE - COVERAGE U AND UNINSURED MOTOR VEHICLE PROPERTY DAMAGE - COVERAGE UI

a. Item 1 of the paragraph beginning "An *uninsured motor vehicle* does not include a land motor vehicle:" is changed to read:

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

1. that has applicable liability coverage in the policy under which the uninsured motor vehicle coverage is provided;

b. The following is added to the provision titled *Deciding Fault and Amount*:

Subject to item 3c of *Our Right to Recover Our Payments* under *CONDITIONS*, any demand for arbitration will be barred unless the written demand for arbitration is made within two years after the date of the accident.

Subject to item 3c of *Our Right to Recover Our Payments* under *CONDITIONS*, any suit filed against us will be barred unless the suit is filed before the later of:

1. 60 days after we refuse to consent to a written demand for arbitration; or
2. two years after the date of the accident. However:
  - a. for any claim involving a motor vehicle insured for

bodily injury liability at the time of the accident, but the limits of liability are less than the limits for uninsured motor vehicle coverage under this policy, the two year period begins on the date the *insured*, with our consent, settles with the bodily injury liability insurer or on the date we advance payment to the *insured*;

b. if the insurer of the owner or operator of the *uninsured motor vehicle* is declared insolvent, the two year period begins on the date the *insured* receives notice of the insolvency.

c. Items 1 and 2a of *When Coverage U Does Not Apply* are changed to read:

THERE IS NO COVERAGE:

1. FOR ANY *INSURED*, IF THAT *INSURED* OR HIS OR HER PERSONAL REPRESENTATIVE SETTLES WITH ANY PERSON OR ORGANIZATION WHO MAY BE LIABLE FOR THE *BODILY INJURY* WITHOUT OUR WRITTEN CONSENT.

2. FOR *BODILY INJURY* TO AN *INSURED*:

a. WHILE OPERATING OR OCCUPYING A MOTOR VEHICLE OWNED OR LEASED BY YOU, YOUR SPOUSE OR ANY RELATIVE IF IT IS NOT INSURED FOR THIS COVERAGE UNDER THIS POLICY.

d. Item 2b of *When Coverage U Does Not Apply* is deleted.

5. SECTION IV - PHYSICAL DAMAGE COVERAGES

a. The following is added to *COMPREHENSIVE - COVERAGE D* and *COLLISION - COVERAGE G*:

If we offer to pay for the repair of damaged windshield glass instead of the replacement of the windshield and you agree to have such repair made, we will pay the full cost of repairing the windshield glass regardless of your deductible.

b. The following is added to *EMERGENCY ROAD SERVICE - COVERAGE H*:

We will pay the fair cost you incur for your car for locksmith services, up to

one hour, to open *your car* if *your key* is lost, stolen or locked inside *your car*. We will pay only the cost of labor.

## 6. CONDITIONS

a. Item a, **Policy Terms**, of condition 1, **Policy Changes**, is changed to read:

a. **Policy Terms**. The terms of this policy may be changed or waived only by:

- (1) an endorsement issued by us; or
- (2) the revision of this policy form to give broader coverage without an extra charge. If any coverage *you* carry is changed to give broader coverage, we will give *you* the broader coverage without the issuance of a new policy as of the date we make the change effective.

b. Item d of condition 2, **Suit Against Us**, is changed to read:

d. under uninsured motor vehicle coverage unless, subject to item 3c of **Our Right to Recover Our Payments under CONDITIONS**, the suit is filed before the later of:

- (1) 60 days after we refuse to consent to a written demand for arbitration; or
- (2) two years after the date of the accident. However:

(a) for any claim involving a motor vehicle insured for bodily injury liability at the time of the accident, but the limits of liability are less than the limits for uninsured motor vehicle coverage under this policy, the two year period begins on the date the *insured*, with our consent, settles with the bodily injury liability insurer or on the date we advance payment to the *insured*;

(b) if the insurer of the owner or operator of the *uninsured motor vehicle* is declared insolvent, the two year period begins on the date the *insured* receives notice of the insolvency.

c. Condition 5, **Renewal**, is changed to read:

### Renewal

If this policy provides liability, medical payments or uninsured motor vehicle coverage, we will renew such coverages for a sufficient number of policy periods to provide coverage during the two-year Guarantee Period shown on the declarations page. We may amend the provisions and conditions of those coverages any time during the initial two-year Guarantee Period or any subsequent Guarantee Period.

It is agreed that the renewal premium will be based upon the rates in effect, the coverages carried, the applicable limits of liability, deductibles and other elements that affect the premium that apply at the time of renewal.

Other elements that may affect *your* premium include, but are not limited to:

- a. drivers of *your car* and their ages and marital status;
- b. *your car* and its use;
- c. eligibility for discounts or other premium credits;
- d. applicability of a surcharge based either on accident history, or on other factors.

A notice of our intention to not renew will be mailed to *your* last known address at least 30 days before the end of the Guarantee Period. The mailing of it shall be sufficient proof of notice. The policy will not be terminated prior to the end of the two-year Guarantee Period shown on the declarations page. At the end of the current Guarantee Period, a subsequent Guarantee Period may be provided.

These agreements to renew are void if:

- a. *you* fail to pay the premium when due; or
- b. the policy is canceled according to condition 4. Cancellation.

d. The condition **Change of Residence** is deleted.

e. The condition **Premium** is changed to read:

### Premium

The premium for this policy may vary based upon the purchase of other insurance from one of the State Farm affiliated companies.

The premium for this policy is based on information State Farm has received from *you* or other sources. If the information is incorrect or incomplete, or changes during the policy period, *you* must inform State Farm of any changes regarding the following:

1. *your car*, or its use, including annual mileage;
2. the *persons* who regularly drive *your car*, including newly licensed family members;
3. *your* marital status; or

4. the location where *your car* is principally garaged.

*You* agree that if this information or any other information used to determine the premium is incorrect or incomplete, or changes during the policy period, we may decrease or increase the premium during the policy period based upon the corrected, completed or changed information. *You* agree that if the premium is decreased or increased during the policy period, State Farm will refund or credit to *you* any decrease in premium and *you* will pay for any increase in premium.

*Edward J. Rust, Jr.*  
Chief Executive Officer

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**Desiree Holt et al., Plaintiffs-Appellees, v. Antonio Almendarez et al., Defendants-Appellants, American Family Insurance et al., Defendants-Appellees.**

**No. 98AP-422**

**COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY**

*1998 Ohio App. LEXIS 5944*

**December 10, 1998, Rendered**

**PRIOR HISTORY:** [\*1] APPEAL from the Franklin County Court of Common Pleas.

**DISPOSITION:** *Judgment affirmed.*

**COUNSEL:** Jami S. Oliver and Robert D. Erney, for plaintiffs-appellees.

John C. Cahill, for defendants-appellants.

Frost & Maddox Co., L.P.A., and Mark S. Maddox, for defendants-appellees.

**JUDGES:** MASON, J. YOUNG and TYACK, JJ., concur.

**OPINIONBY:** MASON

**OPINION:**

(REGULAR CALENDAR)

OPINION

MASON, J.

On September 6, 1996, plaintiff-appellee, Desiree Holt, stopped at an intersection behind a truck owned by defendant-appellant, Dublin City Schools, and operated by defendant-appellant, Antonio Almendarez, an employee of defendant-appellant, Dublin City Schools Board of Education. At the intersection, Almendarez realized that he had pulled out too far into the intersection and put his truck into reverse, backing up into Holt's automobile. Minor damage was done to Holt's automobile and no injuries were reported at the scene. As a result of this accident, Holt and her husband filed a lawsuit against Almendarez; Dublin City Schools; Steve Anderson, Superintendent; and Dublin City Schools Board of

Education (hereinafter referred to collectively as "Board of Education").

At the time of the accident, Holt [\*2] was insured by defendant-appellee, American Family Insurance, who was subsequently added as a defendant. On November 17, 1997, the Board of Education filed a motion for summary judgment, arguing that Holt was entitled to receive uninsured motorist coverage from American Family and, as such, pursuant to *R.C. 2744.05(B)*, the Board of Education would be entitled to deduct those benefits from any award rendered in this case. This motion was denied. On or about February 6, 1998, the Board of Education filed a second motion for summary judgment, which was also denied. The trial court awarded Holt \$ 5,000 in compensatory damages and found that American Family's medical payment coverage was triggered by the accident. Thus, the Board of Education was entitled to receive credit for any medical payments made. However, the trial court found that American Family's uninsured motorist coverage was not triggered by the accident. Furthermore, the trial court found that the Board of Education was not immune and, as such, found that there was no other insurance which would be deducted before the Board of Education paid the damage award. The Board of Education appealed the decision of the Franklin County [\*3] Court of Common Pleas granting summary judgment to Holt and American Family, assigning the following errors:

"1. The trial court committed reversible error when it denied the Board of Education's original motion for summary judgment.

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"2. The trial court committed reversible error when it denied the Board of Education's second motion for summary judgment.

"3. The trial court failed to find that American Family Insurance had an uninsured motorist obligation to the Plaintiffs as a result of the September 6, 1996 automobile accident.

"4. The trial court failed to find that the Plaintiff was entitled to receive uninsured motorist coverage benefits from American Family Insurance as a result of the September 6, 1996 automobile accident.

"5. The trial court erroneously concluded that the board of education's cross-claim in declaratory judgment failed to state a claim upon which relief could be granted.

"6. The trial court failed to deduct the uninsured motorist coverage in American Family Insurance's policy from the award rendered in this case.

"7. The trial court's finding that the board of education has [\*4] the primary payment obligation when the Plaintiff are entitled to receive insurance benefits from another source was improper.

"8. The trial court's finding that American Family Insurance had no uninsured motorist payment obligation to the Plaintiff was improper."

The Board of Education's assignments of error are inter-related and the dispositive issue can be summarized as follows: Is Holt entitled to collect uninsured motorist benefits from her insurance company, American Family?

If Holt is entitled to collect uninsured motorist benefits, then *R.C. 2744.05(B)* requires that all insurance be exhausted before the political subdivision must pay. However, if Holt is not entitled to collect uninsured motorist benefits, then there would be no other collateral source of insurance and the Board of Education must pay the judgment rendered.

In awarding summary judgment to Holt, the trial court made the following findings:

" \*\*\* In the case at bar, the Board is not immune from liability for the actions of its employees. *R.C. 2744.03(B)*. Likewise, the employee tortfeasor's immunity does not bar the Plaintiff from recovering from the Board. Therefore, the tortfeasor [\*5] employee's immunity from liability does not in turn trigger the Plaintiff's UM coverage because the tortfeasor's employer, the Board, is still liable for the acts of its employees performed during the scope of their employment. *Id.* The rule of law in Ohio that tortfeasor immunity acts to trigger the availability of UM coverage is the exception, and not the rule. Again, under Ohio law, immunity has been held to trigger UM coverage, but only when said immunity completely bars an injured policy holder's recovery. Therefore, the Plaintiff's UM coverage is not available and the Board may not deduct said coverage from any award rendered in this case."

When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court. *Jones v. Shelly Co. (1995)*, 106 Ohio App. 3d 440, 445, 666 N.E.2d 316. Summary judgment is appropriate upon a demonstration that: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom [\*6] the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co. (1978)*, 54 Ohio St. 2d 64, 375 N.E.2d 46.

It is undisputed that, in the case at bar, the Board of Education is a political subdivision pursuant to *R.C. 2744.01(F)*. It is also undisputed that Almandarez was

acting within the scope and course of his employment at the time of the accident and, as such, is immune from liability pursuant to *R.C. 2744.03(6)*. The Board of Education stipulated that Dublin City Schools and their employees have a \$ 2,000,000 liability insurance policy with Nationwide Insurance. The Board of Education does not claim any statutory or common-law immunity for itself, but claims that the immunity granted to Almendarez triggers the uninsured motorist coverage of Holt's insurance policy. We disagree.

Political subdivisions are provided general immunity pursuant to *R.C. 2744.02(A)*, unless the facts of a claim come under one of five exceptions contained in *R.C. 2744.02(B)*. In the case at bar, the relevant section is *R.C. 2744.02(B)(1)*, which provides:

"Except as otherwise provided in this division, political [\*7] subdivisions are liable for injury, death, or loss to persons or property caused by the negligent operation of any motor vehicle by their employees upon the public roads, highways, or streets when the employees are engaged within the scope of their employment and authority. \*\*\* "

In addition to the general immunity provided to political subdivisions, *R.C. 2744.03* bestows certain additional defenses and immunities on the political subdivision and its employees. Relevant to this appeal is *R.C. 2744.03(A)(5)*, which states:

"The political subdivision is immune from liability if the injury, death, or loss to persons or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources, unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton and reckless manner."

There have been no allegations that Almendarez acted with malicious purpose, in bad faith or in a wanton and reckless manner. Accordingly, in order for this defense to apply, the Board of Education must establish that the act of driving the truck [\*8] involved an exercise of judgment. In a factually analogous case, this court has held that the legislature could not have intended that the operational act of a school bus driver in deciding whether

or not to pass a bicycle rider would constitute discretionary acts for which immunity is provided. *Siders v. Reynoldsburg School Dist. (1994)*, 99 Ohio App. 3d 173, 650 N.E.2d 150.

Therefore, after a review of the record and applicable statutes, we find that, while Almendarez is immune from liability, there is no statutory authority for the Board of Education to claim immunity based solely on the immunity of Almendarez. Accordingly, the Board of Education's citation to *R.C. 3937.18*, which provides that an insurer must pay uninsured motorist coverage to an insured where the tortfeasor is immune, is not applicable to the case at bar because the Board of Education is not immune.

The basic purpose of the uninsured motorist statute, *R.C. 3937.18*, is to protect persons injured in an automobile accident from uncompensated losses because a tortfeasor lacked liability coverage. *York v. State Farm Fire & Cas. Co. (1980)*, 64 Ohio St. 2d 199, 202, 414 N.E.2d 423. *R.C. 3937.18* provides, in pertinent [\*9] part:

"No automobile liability or motor vehicle liability policy of insurance insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless both of the following coverages are provided to persons insured under the policy for loss due to bodily injury or death suffered by such persons:

"(1) Uninsured motorist coverage, which shall be in an amount of coverage equivalent to the automobile liability or motor vehicle liability coverage and shall provide protection for bodily injury or death  
\*\*\*

"For purposes of division (A)(1) of this section, a person is legally entitled to recover damages if he is able to prove the elements of his claim that are necessary to recover damages from the owner or operator of the uninsured motor vehicle. The

fact that the owner or operator of the uninsured motor vehicle has an immunity, whether based upon a statute or the common law, that could be raised as a defense [\*10] in an action brought against him by the person insured under uninsured motorist coverage does not affect the insured person's right to recover under his uninsured motorist coverage."

The phrase, "legally entitled to recover," means the insured must be able to prove the elements of his or her claim. *Sumwalt v. Allstate Ins. Co.* (1984), 12 Ohio St. 3d 294, 466 N.E.2d 544. Holt would only be legally entitled to recover uninsured motorist benefits if she was injured by an uninsured motorist. We have found that the Board of Education is not immune from liability. Further, the Board of Education stipulated that it holds an insurance policy with Nationwide for \$ 2,000,000. Consequently, the Board of Education's arguments must fail.

The Board of Education further argues that the provisions of *R.C. 2744.05(B)*, are applicable to the case at bar. We disagree.

*R.C. 2744.05(B)* provides, in pertinent part:

"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 [\*11] 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. \*\*\* "

The Supreme Court has noted that this statute serves two purposes: (1) to conserve the financial resources of political subdivisions by limiting their tort liability; and (2) to permit injured persons who have no source of reimbursement for their damages to recover for a tort committed by a political subdivision. *Menefee v. Queen City Metro* (1990), 49 Ohio St. 3d 27, 29, 550 N.E.2d 181. Further, the court has stated that the purpose and language of *R.C. 2744.05(B)* evinces a legislative intent to place the financial burden on the insurer and not the political subdivision. *Galanos v. Cleveland* (1994), 70 Ohio St. 3d 220, 221, 638 N.E.2d 530.

However, because Holt is not legally entitled to receive uninsured motorist benefits because the Board of Education is not immune from liability and is covered by liability insurance, *R.C. 2744.05(B)* is not applicable to the case at bar.

We find that summary judgment was properly granted, [\*12] as there is no genuine issues of material fact and reasonable minds can reach but one conclusion. The Board of Education is not entitled to use the provisions of *R.C. 2744.05(B)* because there is no other insurance to which Holt is legally entitled to receive.

The Board of Education's assignments of error are not well-taken and are overruled. The judgment of the trial court is affirmed.

*Judgment affirmed.*

YOUNG and TYACK, JJ., concur.

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**WESTERN ROGERS, Plaintiff-Appellant v. CITY OF DAYTON, et al., Defendants-Appellees**

C.A. CASE NO. 21593

**COURT OF APPEALS OF OHIO, SECOND APPELLATE DISTRICT,  
MONTGOMERY COUNTY**

*2007 Ohio 673; 2007 Ohio App. LEXIS 600*

**February 16, 2007, Rendered**

**SUBSEQUENT HISTORY:** Certification granted by *Rogers v. Dayton, 2007 Ohio 2632, 2007 Ohio LEXIS 1433 (Ohio, June 6, 2007)*

Discretionary appeal allowed by *Rogers v. Dayton, 2007 Ohio 2632, 2007 Ohio LEXIS 1410 (Ohio, June 6, 2007)*

**COUNSEL:** PATRICK J. BONFIELD, and JOHN J. DANISH, and JOHN C. MUSTO, Dayton, Ohio, Attorneys for Defendants-Appellees City of Dayton and Earl Moreo.

MARK H. GAMS, and M. JASON FOUNDS, Columbus, Ohio, Attorneys for Defendant-Appellant State Farm Mutual Automobile Insurance Company.

**JUDGES:** FAIN, J. WOLFF, P.J., concurs. DONOVAN, J., dissenting.

**OPINION BY: FAIN**

**OPINION**

FAIN, J.

[\*P1] 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 re-

sponsible, [\*2] and subrogation is not permitted against a municipality.

[\*P2] 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

[\*P3] 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.

[\*P4] 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 [\*3] 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.

[\*P5] The trial court granted Rogers's motions for summary judgment, holding that State Farm would be

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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.

[\*P6] State Farm moved for reconsideration of the [\*\*4] 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

[\*P7] State Farm asserts four assignments of error, as follows:

[\*P8] "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.

[\*P9] "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.

[\*P10] "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.

[\*P11] "THE TRIAL COURT ERRED IN HOLDING THAT THE CITY OF DAYTON IS NOT SELF-INSURED UNDER THE LANGUAGE OF THE STATE FARM POLICY."

[\*P12] [\*\*5] 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, P 35*.

[\*P13] 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 [\*\*6] 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.

[\*P14] 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, 803 N.E.2d 863, P 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 [\*\*7] 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 Safe 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."

[\*P15] In our view, the General Assembly has clearly commanded a different [\*\*8] result. *R.C. 4509.72(A)* provides as follows:

[\*P16] "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."

[\*P17] 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.

[\*P18] 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:

[\*P19] "(K) As used in this section, 'uninsured motor vehicle' and 'underinsured motor vehicle' do not include any of the following motor vehicles:

[\*P20] " \*\*\*

[\*P21] "(3) A motor vehicle self-insured within the meaning of the financial responsibility law of the state in which the motor vehicle is registered."

[\*P22] Because the motor vehicle the [\*\*9] 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.

[\*P23] *R.C. 2744.05(B)* provides as follows:

[\*P24] "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."

[\*P25] 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*, [\*\*10] 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 [\*\*11] 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.

[\*P26] State Farm's assignments of error are overruled.

III

[\*P27] All of State Farm's assignments of error having been overruled, the judgment of the trial court is Affirmed.

WOLFF, P.J., concurs.

DISSENT BY: DONOVAN

DISSENT

DONOVAN, J., dissenting:

[\*P28] I disagree.

[\*P29] 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 [\*\*12] 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.

[\*P30] 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 [\*\*13] 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.

[\*P31] "'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.

[\*P32] 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 [\*\*14] 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 . . . ."

[\*P33] 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).

[\*P34] The trial court held and the majority concurs that being self-insured in this "practical sense" does not necessarily mean that the City [\*\*15] 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, 21 Ohio B. 331, 487 N.E.2d 310, 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.*

[\*P35] 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)* [\*\*16] . "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.

[\*P36] 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 [\*\*17] 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.

[\*P37] 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 [\*\*18] is financially responsible and qualified to receive a certificate of self-insurance.

[\*P38] 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 [\*\*19] 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.

[\*P39] 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.

[\*P40] The City of [\*\*20] Dayton argues that our prior decisions in *Jennings v. City of Dayton (1996)*, 114 Ohio App.3d 144, 682 N.E.2d 1070, and *Anderson v. Nationwide Ins. Co. (Sept. 19, 1997)*, Montgomery App. No. 16309, 1997 Ohio App. LEXIS 4199, 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* [\*\*21], 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.

[\*P41] 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 [\*\*22] 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, 550 N.E.2d 181). 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 Day-

ton is self-insured. Therefore, the provisions of R.C. 2744.05(B) are inapplicable.

[\*P42] 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 [\*\*23] of the trial court.

§ 9.83. Liability insurance for state and local officers or employees for motor vehicle, aircraft or watercraft accidents; vehicle liability fund

(A) The state and any political subdivision may procure a policy or policies of insurance insuring its officers and employees against liability for injury, death, or loss to person or property that arises out of the operation of an automobile, truck, motor vehicle with auxiliary equipment, self-propelling equipment or trailer, aircraft, or watercraft by the officers or employees while engaged in the course of their employment or official responsibilities for the state or the political subdivision. The state is authorized to expend funds to pay judgments that are rendered in any court against its officers or employees and that result from such operation, and is authorized to expend funds to compromise claims for liability against its officers or employees that result from such operation. No insurer shall deny coverage under such a policy, and the state shall not refuse to pay judgments or compromise claims, on the ground that an automobile, truck, motor vehicle with auxiliary equipment, self-propelling equipment or trailer, aircraft, or watercraft was not being used in the course of an officer's or employee's employment or official responsibilities for the state or a political subdivision unless the officer or employee who was operating an automobile, truck, motor vehicle with auxiliary equipment, or self-propelling equipment or trailer is convicted of a violation of section 124.71 of the Revised Code as a result of the same events.

(B) Funds shall be reserved as necessary, in the exercise of sound and prudent actuarial judgment, to cover potential expense, fees, damage, loss, or other liability. The superintendent of insurance may recommend or, if the state requests of the superintendent, shall recommend, a specific amount for any period of time that, in the superintendent's opinion, represents such a judgment.

(C) Nothing in this section shall be construed to require the department of administrative services to purchase liability insurance for all state vehicles in a single policy of insurance or to cover all state vehicles under a single plan of self-insurance.

(D) Insurance procured by the state pursuant to this section shall be procured as provided in section 125.03 of the Revised Code.

(E) For purposes of liability insurance procured under this section to cover the operation of a motor vehicle by a prisoner for whom the insurance is procured, "employee" includes a prisoner in the custody of the department of rehabilitation and correction who is enrolled in a work program that is established by the department pursuant to section 5145.16 of the Revised Code and in which the prisoner is required to operate a motor vehicle, as defined in section 4509.01 of the Revised Code, and who is engaged in the operation of a motor vehicle in the course of the work program.

(F) There is hereby created in the state treasury the vehicle liability fund. All contributions collected by the director of administrative services under division (I) of this section shall be deposited into the fund. The fund shall be used to provide insurance and self-insurance for the state under this section. All investment earnings of the fund shall be credited to it.

(G) The director of administrative services, through the office of risk management, shall operate the vehicle liability fund on an actuarially sound basis.

(H) Reserves shall be maintained in the vehicle liability fund in any amount that is necessary and adequate, in the exercise of sound and prudent actuarial judgment, to cover potential liability claims, expenses, fees, or damages. Money in the fund may be applied to the payment of liability claims that are filed against the state in the court of claims and determined in the manner provided in Chapter 2743. of the Revised Code. The director of administrative services may procure the services of a qualified actuarial firm for the purpose

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of recommending the specific amount of money that is required to maintain adequate reserves for a specified period of time.

(I) The director of administrative services shall collect from each state agency or any participating state body its contribution to the vehicle liability fund for the purpose of purchasing insurance or administering self-insurance programs for coverage authorized under this section. The amount of the contribution shall be determined by the director, with the approval of the director of budget and management. It shall be based upon actuarial assumptions and the relative risk and loss experience of each state agency or participating state body. The amount of the contribution also shall include a reasonable sum to cover administrative costs of the department of administrative services.

**History:**

127 v 667 (Eff 9-17-57); 133 v H 521 (Eff 11-17-69); 136 v H 1406 (Eff 4-14-76); 138 v S 76 (Eff 3-13-80); 138 v H 736 (Eff 10-16-80); 138 v S 76, § 4 (Eff 12-31-85); 141 v H 176, § 6 (Eff 11-20-85); 142 v S 308 (Eff 3-14-89); 147 v S 111. Eff 3-17-98; 150 v H 95, § 1, eff. 9-26-03.

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§ 2744.03. Defenses or immunities of subdivision and employee

(A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

(1) The political subdivision is immune from liability if the employee involved was engaged in the performance of a judicial, quasi-judicial, prosecutorial, legislative, or quasi-legislative function.

(2) The political subdivision is immune from liability if the conduct of the employee involved, other than negligent conduct, that gave rise to the claim of liability was required by law or authorized by law, or if the conduct of the employee involved that gave rise to the claim of liability was necessary or essential to the exercise of powers of the political subdivision or employee.

(3) The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.

(4) The political subdivision is immune from liability if the action or failure to act by the political subdivision or employee involved that gave rise to the claim of liability resulted in injury or death to a person who had been convicted of or pleaded guilty to a criminal offense and who, at the time of the injury or death, was serving any portion of the person's sentence by performing community service work for or in the political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, or resulted in injury or death to a child who was found to be a delinquent child and who, at the time of the injury or death, was performing community service or community work for or in a political subdivision in accordance with the order of a juvenile court entered pursuant to section 2152.19 or 2152.20 of the Revised Code, and if, at the time of the person's or child's injury or death, the person or child was covered for purposes of Chapter 4123. of the Revised Code in connection with the community service or community work for or in the political subdivision.

(5) The political subdivision is immune from liability if the injury, death, or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.

(6) In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division or sections 3314.07 and 3746.24 of the Revised Code, the employee is immune from liability unless one of the following applies:

(a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;

(b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;

(c) Civil liability is expressly imposed upon the employee by a section of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon an employee, because that section provides for a criminal penalty, because of a general authorization in

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that section that an employee may sue and be sued, or because the section uses the term "shall" in a provision pertaining to an employee.

(7) The political subdivision, and an employee who is a county prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a political subdivision, an assistant of any such person, or a judge of a court of this state is entitled to any defense or immunity available at common law or established by the Revised Code.

(B) Any immunity or defense conferred upon, or referred to in connection with, an employee by division (A)(6) or (7) of this section does not affect or limit any liability of a political subdivision for an act or omission of the employee as provided in section 2744.02 of the Revised Code.

**HISTORY:** 141 v H 176 (Eff 11-20-85); 141 v S 297 (Eff 4-30-86); ♦ 145 v S 221 (Eff 9-28-94); ♦ 146 v H 350 (Eff 1-27-97); ♦ 147 v H 215 (Eff 6-30-97); ♦ 149 v S 108, § 2.01 (Eff 7-6-2001); ♦ 148 v S 179, § 3 (Eff 1-1-2002); ♦ 149 v S 108, § 2.03 (Eff 1-1-2002); ♦ 149 v S 106. Eff 4-9-2003.

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## § 2744.05. Limitations on damages awarded

Notwithstanding any other provisions of the Revised Code or rules of a court to the contrary, in an action against a political subdivision to recover damages for injury, death, or loss to person or property caused by an act or omission in connection with a governmental or proprietary function:

(A) Punitive or exemplary damages shall not be awarded.

(B) (1) 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 those benefits.

The amount of the benefits shall be deducted from an award against a political subdivision under division (B)(1) of this section regardless of whether the claimant may be under an obligation to pay back the benefits upon recovery, in whole or in part, for the claim. A claimant whose benefits have been deducted from an award under division (B)(1) of this section is not considered fully compensated and shall not be required to reimburse a subrogated claim for benefits deducted from an award pursuant to division (B)(1) of this section.

(2) Nothing in division (B)(1) of this section shall be construed to do either of the following:

(a) Limit the rights of a beneficiary under a life insurance policy or the rights of sureties under fidelity or surety bonds;

(b) Prohibit the department of job and family services from recovering from the political subdivision, pursuant to section 5101.58 of the Revised Code, the cost of medical assistance benefits provided under Chapter 5107., 5111., or 5115. of the Revised Code.

(C) (1) There shall not be any limitation on compensatory damages that represent the actual loss of the person who is awarded the damages. However, except in wrongful death actions brought pursuant to Chapter 2125. of the Revised Code, damages that arise from the same cause of action, transaction or occurrence, or series of transactions or occurrences and that do not represent the actual loss of the person who is awarded the damages shall not exceed two hundred fifty thousand dollars in favor of any one person. The limitation on damages that do not represent the actual loss of the person who is awarded the damages provided in this division does not apply to court costs that are awarded to a plaintiff, or to interest on a judgment rendered in favor of a plaintiff, in an action against a political subdivision.

(2) As used in this division, "the actual loss of the person who is awarded the damages" includes all of the following:

(a) All wages, salaries, or other compensation lost by the person injured as a result of the injury, including wages, salaries, or other compensation lost as of the date of a judgment and future expected lost earnings of the person injured;

(b) All expenditures of the person injured or another person on behalf of the person injured for medical care or treatment, for rehabilitation services, or for other care, treatment, services, products, or accommodations that were necessary because of the injury;

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(c) All expenditures to be incurred in the future, as determined by the court, by the person injured or another person on behalf of the person injured for medical care or treatment, for rehabilitation services, or for other care, treatment, services, products, or accommodations that will be necessary because of the injury;

(d) All expenditures of a person whose property was injured or destroyed or of another person on behalf of the person whose property was injured or destroyed in order to repair or replace the property that was injured or destroyed;

(e) All expenditures of the person injured or of the person whose property was injured or destroyed or of another person on behalf of the person injured or of the person whose property was injured or destroyed in relation to the actual preparation or presentation of the claim involved;

(f) Any other expenditures of the person injured or of the person whose property was injured or destroyed or of another person on behalf of the person injured or of the person whose property was injured or destroyed that the court determines represent an actual loss experienced because of the personal or property injury or property loss.

"The actual loss of the person who is awarded the damages" does not include any fees paid or owed to an attorney for any services rendered in relation to a personal or property injury or property loss, and does not include any damages awarded for pain and suffering, for the loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education of the person injured, for mental anguish, or for any other intangible loss.

**HISTORY:** 141 v H 176 (Eff 11-20-85); ♦ 146 v H 350 (Eff 1-27-97); ♦ 147 v H 215 (Eff 9-29-97); ♦ 148 v H 471 (Eff 7-1-2000); ♦ 149 v S 108, § 2.01 (Eff 7-6-2001); ♦ 149 v S 106. Eff 4-9-2003.

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§ 2744.08 Liability insurance; self-insurance programs; waiver of immunity.

(A)(1) A political subdivision may use public funds to secure insurance with respect 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 insurance may be at the limits, for the circumstances, and subject to the terms and conditions, that are determined by the political subdivision in its discretion.

The insurance may be for the period of time that is set forth in specifications for competitive bids or, when competitive bidding is not required, for the period of time that is mutually agreed upon by the political subdivision and insurance company. The period of time does not have to be, but can be, limited to the fiscal cycle under which the political subdivision is funded and operates.

(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. If it so chooses, the political subdivision may contract with any person, other political subdivision, or regional council of governments for purposes of the administration of such a program.

(b) Political subdivisions that have established self-insurance programs relative to their and their employees' potential liability as described in division (A)(2)(a) of this section may mutually agree that their self-insurance programs will be jointly administered in a specified manner.

(B) The purchase of liability insurance, or the establishment and maintenance of a self-insurance program, by a political subdivision does not constitute a waiver of any immunity or defense of the political subdivision or its employees, except that the political subdivision may specifically waive any immunity or defense to which it or its employees may be entitled if a provision to that effect is specifically included in the policy of insurance or in a written plan of operation of the self-insurance program, or, if any, the legislative enactment of the political subdivision authorizing the purchase of the insurance or the establishment and maintenance of the self-insurance program. Such a specific waiver shall be only to the extent of the insurance or self-insurance program coverage.

(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.

**HISTORY:** HISTORY

: 141 v H 176 (Eff 11-20-85); 141 v H 875. Eff 6-7-86.

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§ 3937.18 Mandatory offering of uninsured and underinsured motorist coverage.

(A) No automobile liability or motor vehicle liability policy of insurance insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless both of the following coverages are offered to persons insured under the policy for loss due to bodily injury or death suffered by such insureds:

(1) Uninsured motorist coverage, which shall be in an amount of coverage equivalent to the automobile liability or motor vehicle liability coverage and shall provide protection for bodily injury, sickness, or disease, including death under provisions approved by the superintendent of insurance, for the protection of insureds thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, suffered by any person insured under the policy.

For purposes of division (A)(1) of this section, an insured is legally entitled to recover damages if the insured is able to prove the elements of the insured's claim that are necessary to recover damages from the owner or operator of the uninsured motor vehicle. The fact that the owner or operator of the uninsured motor vehicle has an immunity under Chapter 2744. of the Revised Code or a diplomatic immunity that could be raised as a defense in an action brought against the owner or operator by the insured does not affect the insured's right to recover under uninsured motorist coverage. However, any other type of statutory or common law immunity that may be a defense for the owner or operator of an uninsured motor vehicle shall also be a defense to an action brought by the insured to recover under uninsured motorist coverage.

(2) Underinsured motorist coverage, which shall be in an amount of coverage equivalent to the automobile liability or motor vehicle liability coverage and shall provide protection for insureds thereunder against loss for bodily injury, sickness, or disease, including death, suffered by any person insured under the policy, where the limits of coverage available for payment to the insured under all bodily injury liability bonds and insurance policies covering persons liable to the insured are less than the limits for the insured's uninsured motorist coverage. Underinsured motorist coverage is not and shall not be excess insurance to other applicable liability coverages, and shall be provided only to afford the insured an amount of protection not greater than that which would be available under the insured's uninsured motorist coverage if the person or persons liable were uninsured at the time of the accident. The policy limits of the underinsured motorist coverage shall be reduced by those amounts available for payment under all applicable bodily injury liability bonds and insurance policies covering persons liable to the insured.

(B) Coverages offered under division (A) of this section shall be written for the same limits of liability. No change shall be made in the limits of one of these coverages without an equivalent change in the limits of the other coverage.

(C) A named insured or applicant may reject or accept both coverages as offered under division (A) of this section, or may alternatively select both such coverages in accordance with a schedule of limits approved by the superintendent. The schedule of limits approved by the superintendent may permit a named insured or applicant to select uninsured and underinsured motorists coverages with limits on such coverages that are less than the limit of liability coverage provided by the automobile liability or motor vehicle liability policy of insurance under which the coverages are provided, but the limits shall be no less than the limits set forth in section 4509.20 of the Revised Code for bodily injury or death. A named insured's or applicant's rejection of both coverages as offered under division (A) of this section, or a named insured's or applicant's selection of such coverages in accordance with

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the schedule of limits approved by the superintendent, shall be in writing and shall be signed by the named insured or applicant. A named insured's or applicant's written, signed rejection of both coverages as offered under division (A) of this section, or a named insured's or applicant's written, signed selection of such coverages in accordance with the schedule of limits approved by the superintendent, shall be effective on the day signed, shall create a presumption of an offer of coverages consistent with division (A) of this section, and shall be binding on all other named insureds, insureds, or applicants.

Unless a named insured or applicant requests such coverages in writing, such coverages need not be provided in or made supplemental to a policy renewal or replacement policy where a named insured or applicant has rejected such coverages in connection with a policy previously issued to the named insured or applicant by the same insurer. If a named insured or applicant has selected such coverages in connection with a policy previously issued to the named insured or applicant by the same insurer, with limits in accordance with the schedule of limits approved by the superintendent, such coverages need not be provided with limits in excess of the limits of liability previously issued for such coverages, unless a named insured or applicant requests in writing higher limits of liability for such coverages.

(D) For the purpose of this section, a motor vehicle shall be deemed uninsured in either of the following circumstances:

(1) The liability insurer denies coverage or is or becomes the subject of insolvency proceedings in any jurisdiction;

(2) The identity of the owner and operator of the motor vehicle cannot be determined, but independent corroborative evidence exists to prove that the bodily injury, sickness, disease, or death of the insured was proximately caused by the negligence or intentional actions of the unidentified operator of the motor vehicle. For purposes of this division, the testimony of any insured seeking recovery from the insurer shall not constitute independent corroborative evidence, unless the testimony is supported by additional evidence.

(E) In the event of payment to any person under the coverages offered under this section and subject to the terms and conditions of such coverages, the insurer making such payment to the extent thereof is entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury or death for which such payment is made, including any amount recoverable from an insurer which is or becomes the subject of insolvency proceedings, through such proceedings or in any other lawful manner. No insurer shall attempt to recover any amount against the insured of an insurer which is or becomes the subject of insolvency proceedings, to the extent of those rights against such insurer which such insured assigns to the paying insurer.

(F) The coverages offered under this section shall not be made subject to an exclusion or reduction in amount because of any workers' compensation benefits payable as a result of the same injury or death.

(G) Any automobile liability or motor vehicle liability policy of insurance that includes coverages offered under division (A) of this section or selected in accordance with division (C) of this section may, without regard to any premiums involved, include terms and conditions that preclude any and all stacking of such coverages, including but not limited to:

(1) Interfamily stacking, which is the aggregating of the limits of such coverages by the same person or two or more persons, whether family members or not, who are not members of the same household;

(2) Intrafamily stacking, which is the aggregating of the limits of such coverages purchased

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by the same person or two or more family members of the same household.

(H) Any automobile liability or motor vehicle liability policy of insurance that includes coverages offered under division (A) of this section or selected in accordance with division (C) of this section and that provides a limit of coverage for payment for damages for bodily injury, including death, sustained by any one person in any one automobile accident, may, notwithstanding Chapter 2125. of the Revised Code, include terms and conditions to the effect that all claims resulting from or arising out of any one person's bodily injury, including death, shall collectively be subject to the limit of the policy applicable to bodily injury, including death, sustained by one person, and, for the purpose of such policy limit shall constitute a single claim. Any such policy limit shall be enforceable regardless of the number of insureds, claims made, vehicles or premiums shown in the declarations or policy, or vehicles involved in the accident.

(I) Nothing in this section shall prohibit the inclusion of underinsured motorist coverage in any uninsured motorist coverage provided in compliance with this section.

(J) The coverages offered under division (A) of this section or selected in accordance with division (C) of this section may include terms and conditions that preclude coverage for bodily injury or death suffered by an insured under any of the following circumstances:

(1) While the insured is operating or occupying a motor vehicle owned by, furnished to, or available for the regular use of a named insured, a spouse, or a resident relative of a named insured, if the motor vehicle is not specifically identified in the policy under which a claim is made, or is not a newly acquired or replacement motor vehicle covered under the terms of the policy under which the uninsured and underinsured motorist coverages are provided;

(2) While the insured is operating or occupying a motor vehicle without a reasonable belief that the insured is entitled to do so, provided that under no circumstances will an insured whose license has been suspended, revoked, or never issued, be held to have a reasonable belief that the insured is entitled to operate a motor vehicle;

(3) When the bodily injury or death is caused by a motor vehicle operated by any person who is specifically excluded from coverage for bodily injury liability in the policy under which the uninsured and underinsured motorist coverages are provided.

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

(1) A motor vehicle that has applicable liability coverage in the policy under which the uninsured and underinsured motorist coverages are provided;

(2) A motor vehicle owned by, furnished to, or available for the regular use of a named insured, a spouse, or a resident relative of a named insured;

(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.

(L) As used in this section, "automobile liability or motor vehicle liability policy of insurance" means either of the following:

(1) Any policy of insurance that serves as proof of financial responsibility, as proof of

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financial responsibility is defined by division (K) of section 4509.01 of the Revised Code, for owners or operators of the motor vehicles specifically identified in the policy of insurance;

(2) Any umbrella liability policy of insurance.

**HISTORY:** 131 v 965 (Eff 9-15-65); 132 v H 1 (Eff 2-21-67); 133 v H 620 (Eff 10-1-70); 136 v S 25 (Eff 11-26-75); 136 v S 545 (Eff 1-17-77); 138 v H 22 (Eff 6-25-80); 139 v H 489 (Eff 6-23-82); 141 v S 249 (Eff 10-14-86); 142 v H 1 (Eff 1-5-88); 145 v S 20 (Eff 10-20-94); 147 v H 261. Eff 9-3-97.

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ORC Ann. 3937.18

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TITLE XXXIX [39] INSURANCE  
CHAPTER 3937: CASUALTY INSURANCE; MOTOR VEHICLE INSURANCE

ORC Ann. **3937.18** (Anderson 2000)

§ **3937.18** Mandatory offering of uninsured and underinsured motorist coverage.

(A) No automobile liability or motor vehicle liability policy of insurance insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless both of the following coverages are offered to persons insured under the policy due to bodily injury or death suffered by such insureds:

(1) Uninsured motorist coverage, which shall be in an amount of coverage equivalent to the automobile liability or motor vehicle liability coverage and shall provide protection for bodily injury, sickness, or disease, including death under provisions approved by the superintendent of insurance, for the protection of insureds thereunder who are legally entitled to recover from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, suffered by any person insured under the policy.

For purposes of division (A)(1) of this section, an insured is legally entitled to recover if the insured is able to prove the elements of the insured's claim that are necessary to recover from the owner or operator of the uninsured motor vehicle. The fact that the owner or operator of the uninsured motor vehicle has an immunity under Chapter 2744. of the Revised Code or a diplomatic immunity that could be raised as a defense in an action brought against the owner or operator by the insured does not affect the insured's right to recover under uninsured motorist coverage. However, any other type of statutory or common law immunity that may be a defense for the owner or operator of an uninsured motor vehicle shall also be a defense to an action brought by the insured to recover under uninsured motorist coverage.

(2) Underinsured motorist coverage, which shall be in an amount of coverage equivalent to the automobile liability or motor vehicle liability coverage and shall provide protection for insureds thereunder for bodily injury, sickness, or disease, including death, suffered by any person insured under the policy, where the limits of coverage available for payment to the insured under all bodily injury liability bonds and insurance policies covering persons liable to the insured are less than the limits for the insured's uninsured motorist coverage. Underinsured motorist coverage is not and shall not be excess insurance to other applicable liability coverages, and shall be provided only to afford the insured an amount of protection not greater than that which would be available under the insured's uninsured motorist coverage if the person or persons liable were uninsured at the time of the accident. The policy limits of the underinsured motorist coverage shall be reduced by those amounts available for payment under all applicable bodily injury liability bonds and insurance policies covering persons liable to the insured.

(B) Coverages offered under division (A) of this section shall be written for the same limits of liability. No change shall be made in the limits of one of these coverages without an

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equivalent change in the limits of the other coverage.

(C) A named insured or applicant may reject or accept both coverages as offered under division (A) of this section, or may alternatively select both such coverages in accordance with a schedule of limits approved by the superintendent. The schedule of limits approved by the superintendent may permit a named insured or applicant to select uninsured and underinsured motorists coverages with limits on such coverages that are less than the limit of liability coverage provided by the automobile liability or motor vehicle liability policy of insurance under which the coverages are provided, but the limits shall be no less than the limits set forth in section 4509.20 of the Revised Code for bodily injury or death. A named insured's or applicant's rejection of both coverages as offered under division (A) of this section, or a named insured's or applicant's selection of such coverages in accordance with the schedule of limits approved by the superintendent, shall be in writing and shall be signed by the named insured or applicant. A named insured's or applicant's written, signed rejection of both coverages as offered under division (A) of this section, or a named insured's or applicant's written, signed selection of such coverages in accordance with the schedule of limits approved by the superintendent, shall be effective on the day signed, shall create a presumption of an offer of coverages consistent with division (A) of this section, and shall be binding on all other named insureds, insureds, or applicants.

Unless a named insured or applicant requests such coverages in writing, such coverages need not be provided in or made supplemental to a policy renewal or a new or replacement policy that provides continuing coverage to the named insured or applicant where a named insured or applicant has rejected such coverages in connection with a policy previously issued to the named insured or applicant by the same insurer or affiliate of that insurer. If a named insured or applicant has selected such coverages in connection with a policy previously issued to the named insured or applicant by the same insurer or affiliate of that insurer, with limits in accordance with the schedule of limits approved by the superintendent, such coverages need not be provided with limits in excess of the limits of liability previously issued for such coverages, unless a named insured or applicant requests in writing higher limits of liability for such coverages.

(D) For the purpose of this section, a motor vehicle shall be deemed uninsured in either of the following circumstances:

(1) The liability insurer denies coverage or is or becomes the subject of insolvency proceedings in any jurisdiction;

(2) The identity of the owner and operator of the motor vehicle cannot be determined, but independent corroborative evidence exists to prove that the bodily injury, sickness, disease, or death of the insured was proximately caused by the negligence or intentional actions of the unidentified operator of the motor vehicle. For purposes of this division, the testimony of any insured seeking recovery from the insurer shall not constitute independent corroborative evidence, unless the testimony is supported by additional evidence.

(E) In the event of payment to any person under the coverages offered under this section and subject to the terms and conditions of such coverages, the insurer making such payment to the extent thereof is entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury or death for which such payment is made, including any amount recoverable from an insurer which is or becomes the subject of insolvency proceedings, through such proceedings or in any other lawful manner. No insurer shall attempt to recover any amount against the insured of an insurer which is or becomes the subject of insolvency proceedings, to the extent of those rights against such insurer which such insured assigns to the paying insurer.

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(F) The coverages offered under this section shall not be made subject to an exclusion or reduction in amount because of any workers' compensation benefits payable as a result of the same injury or death.

(G) Any automobile liability or motor vehicle liability policy of insurance that includes coverages offered under division (A) of this section or selected in accordance with division (C) of this section may, without regard to any premiums involved, include terms and conditions that preclude any and all stacking of such coverages, including but not limited to:

(1) Interfamily stacking, which is the aggregating of the limits of such coverages by the same person or two or more persons, whether family members or not, who are not members of the same household;

(2) Intrafamily stacking, which is the aggregating of the limits of such coverages purchased by the same person or two or more family members of the same household.

(H) Any automobile liability or motor vehicle liability policy of insurance that includes coverages offered under division (A) of this section or selected in accordance with division (C) of this section and that provides a limit of coverage for payment for damages for bodily injury, including death, sustained by any one person in any one automobile accident, may, notwithstanding Chapter 2125. of the Revised Code, include terms and conditions to the effect that all claims resulting from or arising out of any one person's bodily injury, including death, shall collectively be subject to the limit of the policy applicable to bodily injury, including death, sustained by one person, and, for the purpose of such policy limit shall constitute a single claim. Any such policy limit shall be enforceable regardless of the number of insureds, claims made, vehicles or premiums shown in the declarations or policy, or vehicles involved in the accident.

(I) Nothing in this section shall prohibit the inclusion of underinsured motorist coverage in any uninsured motorist coverage provided in compliance with this section.

(J) The coverages offered under division (A) of this section or selected in accordance with division (C) of this section may include terms and conditions that preclude coverage for bodily injury or death suffered by an insured under any of the following circumstances:

(1) While the insured is operating or occupying a motor vehicle owned by, furnished to, or available for the regular use of a named insured, a spouse, or a resident relative of a named insured, if the motor vehicle is not specifically identified in the policy under which a claim is made, or is not a newly acquired or replacement motor vehicle covered under the terms of the policy under which the uninsured and underinsured motorist coverages are provided;

(2) While the insured is operating or occupying a motor vehicle without a reasonable belief that the insured is entitled to do so, provided that under no circumstances will an insured whose license has been suspended, revoked, or never issued, be held to have a reasonable belief that the insured is entitled to operate a motor vehicle;

(3) When the bodily injury or death is caused by a motor vehicle operated by any person who is specifically excluded from coverage for bodily injury liability in the policy under which the uninsured and underinsured motorist coverages are provided.

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

(1) A motor vehicle that has applicable liability coverage in the policy under which the uninsured and underinsured motorist coverages are provided;

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(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.

(L) As used in this section, "automobile liability or motor vehicle liability policy of insurance" means either of the following:

(1) Any policy of insurance that serves as proof of financial responsibility, as proof of financial responsibility is defined by division (K) of section 4509.01 of the Revised Code, for owners or operators of the motor vehicles specifically identified in the policy of insurance;

(2) Any umbrella liability policy of insurance written as excess over one or more policies described in division (L)(1) of this section.

**HISTORY: HISTORY**

: 131 v 965 (Eff 9-15-65); 132 v H 1 (Eff 2-21-67); 133 v H 620 (Eff 10-1-70); 136 v S 25 (Eff 11-26-75); 136 v S 545 (Eff 1-17-77); 138 v H 22 (Eff 6-25-80); 139 v H 489 (Eff 6-23-82); 141 v S 249 (Eff 10-14-86); 142 v H 1 (Eff 1-5-88); 145 v S 20 (Eff 10-20-94); 147 v H 261 (Eff 9-3-97); 148 v S 57 (Eff 11-2-99); 148 v S 267. Eff 9-21-2000.

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§ 4509.71. Exemption of certain owners of motor vehicles

Sections 4509.01 to 4509.79, except section 4509.06, of the Revised Code do not apply to any motor vehicle 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. Section 4509.06 of the Revised Code does not apply to any vehicle owned and operated by any publicly owned urban transportation system.

**HISTORY:** GC § 6298-91; 124 v 563(584); Bureau of Code Revision, 10-1-53; 125 v 381 (Eff 10-15-53); 139 v S 331. Eff 5-21-82.

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§ 4509.72. Requirements for self-insurer

(A) 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.

(B) 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.

A certificate may be issued authorizing a person to act as a self-insurer for either property damage or bodily injury liability, or both.

(C) Upon not less than five days' notice and a hearing pursuant to such notice, the registrar may cancel a certificate of self-insurance upon failure to pay any judgment within thirty days after such judgment has become final or upon other proof that such person is no longer of sufficient financial ability to pay judgments against him.

**HISTORY:** GC § 6298-92; 124 v 563(585); Bureau of Code Revision. Eff 10-1-53.

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## DAYTON MUNICIPAL CODE

## DIVISION 9. LIMITATIONS OF LIABILITY

**Sec. 36.201. Definitions.**

For purposes of §§ 36.201 through 36.209, the following words and phrases shall have the following meanings ascribed to them respectively:

*Action in tort.* Claims, demands, actions, or suits based upon negligence, errors and omissions, nuisance, malpractice, intentional tort, products' liability, strict liability, and includes, but is not limited to the following theories of recovery: false arrest, false imprisonment, wrongful eviction, wrongful detention, malicious prosecution, discrimination, humiliation, invasion of privacy, libel, slander, defamation of character, false light, piracy and infringement of copyright or of property, erroneous service of civil or criminal papers, violation of civil rights, assault and battery, disparagement of property, inverse condemnation, and also includes, but is not limited to, claims, demands, actions, or suits, wherein the injuries include property damage, bodily injury, mental injury, mental anguish, emotional distress, shock, sickness, disease, disability, loss of wages, and loss of earning capacity, and also includes wrongful death and survival-type actions.

*Nonstatutory basis.* Based upon case-made law.

*Occurrence.* An accident or happening or event or a continuous or repeated exposure to conditions which results in personal injury, or damage to property. All such exposure to substantially the same general conditions existing at or emanating from one location shall be deemed one occurrence.

*Public employee.* Any employee, officer, official, whether elected or appointed, including any judicial officer, clerk of court, or employee thereof, and any paid or unpaid employee, representative, or agent of the city, whether or not identifiable by name.

*Statutory basis.* Based upon any enacted law, whether state, federal, or municipal, whether or not the law is expressed as a statute, ordinance, code, rule, regulation, or directive.

(Ord. 27141, passed 1-30-85)

**Sec. 36.202. Application.**

(A) All actions in tort against public employees, while acting in the scope of their authority, and the city for death, personal injury, or property damage shall be subject to the provisions of this division.

(B) All statutory and nonstatutory law, substantive or procedural, concerning claims against the city or public employee shall continue with full force and effect except as otherwise provided by this law.

(C) In the event any provisions of this law shall be determined to be unconstitutional, ultra vires or otherwise unenforceable as a matter of law, the remaining provisions shall to the extent possible continue with full force and effect.

(Ord. 27141, passed 1-30-85)

**Sec. 36.203. Payments of claims and judgments; partial payments; priority of payments.**

Subject to the limitations imposed by the provisions of § 36.205, the payments of claims, and judgments, approved for payment in accordance with the Charter or the Code, where the city or a

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public employee is or may be liable, shall be limited to available, unencumbered funds that have been specifically appropriated on an annual basis for payment of claims and judgments. Partial payments of claims or judgments may be made over successive years from funds subsequently appropriated. Priority of payment of carried over claims shall be given based on the date of the occurrence giving rise to liability. Priority of payment of carry over judgments shall be given to the filing date of the judgment.

(Ord. 27141, passed 1-30-85)

#### **Sec. 36.204. Appropriation for payment of claims and judgments.**

The City Manager shall annually submit to the City Commission a recommended appropriation for payment of claims and judgments. In making such recommendation, the following nonexclusive information may be considered:

- (A) The past judgments and claims payments by the city;
- (B) The monetary risk of all litigation against the city;
- (C) The reasonable value of known unasserted claims and litigation;
- (D) Necessary reserves to promote financial stability of the city;
- (E) Priorities of city service delivery;
- (F) Projected expansion or contraction of city income;
- (G) Comparative data relative to payment of claims and judgments of the eight most populous cities of the state;
- (H) Unsatisfied judgments and claims approved for payment in previous years; and
- (I) Overall financial stability of the city.

(Ord. 27141, passed 1-30-85)

#### **Sec. 36.205. Limitation of liability.**

The amount of damages recoverable against the city and any public employee for death, personal injury, or property damage arising out of a single occurrence, or sequence of occurrences shall be limited as follows:

- (A) When the city or public employee has insurance coverage for an occurrence or sequence of occurrences, payment of claims and judgments in which the city or a public employee is or may be liable and obligated to pay may be made to the extent insurance proceeds or insurance indemnification is available and payable, in addition to any deductibles or self-insurance retention required by applicable insurance contracts.
- (B) When the city or public employee has no insurance coverage relative to an occurrence or sequence of occurrences the extent to which the city and public employee are obligated to pay damages shall be as follows:
  - (1) When the city and public employee is or may be, jointly or severally, liable for actions in tort under R.C. § 723.01 and § 701.02, or other statute, or combination of statutory and nonstatutory basis, a sum not in excess of \$250,000.00 per person and \$500,000.00 per occurrence, provided unencumbered funds are available and have been appropriated for such payment;
  - (2) When the city or public employee is or may be, jointly or severally, liable for