IN THE SUPREME COURT OF OHIO

WESTERN ROGERS,	:	Case Nos. 07-0549 and 07-0684
Plaintiff-Appellee,	:	On Appeal from the Montgomery County Court of Appeals, Second Appellate District
v.	:	
CITY OF DAYTON,	:	
Defendant-Appellee,	:	
and	:	
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	:	
Defendant-Appellant.	:	

MERIT BRIEF OF APPELLEES, CITY OF DAYTON AND EARL MOREO

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I. STATEMENT OF THE FACTS

This case arises out of an automobile accident between an immune City of Dayton employee and Appellant's insured. The dispute involves who should pay for the damages under Ohio law, the taxpayers of the City of Dayton or the Plaintiff's insurance carrier.

A. ACCIDENT

On April 22, 2002, Plaintiff and Mr. Moreo were involved in an automobile accident in Dayton, Ohio. At the time of the accident, Mr. Moreo was acting in the course and scope of his employment with the City of Dayton. The relevant facts of the accident are not in dispute. Plaintiff's vehicle and Mr. Moreo's vehicle collided when Mr. Moreo attempted to make a u-turn. (Plaintiff's First Amended Complaint,¶¶1-5; City of Dayton's Answer, ¶¶ 1-2, 6). Plaintiff subsequently brought suit against Dayton and Mr. Moreo, and later amended the Complaint to bring a claim against the Appellant for UIM coverage.

B. THE UIM POLICY

Appellant provided insurance coverage to Plaintiff and his vehicle. (See Declaration Page and Policy ("Policy") Appellant's Appendix Pg. A-47). The Appellant's Policy provided uninsured/underinsured motorist ("UM/UIM"), medical bill payment, liability, and comprehensive collision coverage. *Id.* Appellant's Insurance Policy specifically provides that:

> An uninsured motor vehicle does not include a land motor vehicle:
>
> 3. Owned or operated by any 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 motor vehicle has an immunity under Chapter 2744 of the Ohio Revised Code."**

(Appellants Appx. at A-60). (Emphasis Added).

C. CITY OF DAYTON

Dayton owned the motor vehicle that Mr. Moreo drove. (Affidavit of Earl Moreo ("Moreo Aff.") ¶6, (Appellee's Appendix at pg. A-1). The vehicle was not covered by any policy or policies of insurance. (Affidavit of Pete Hager ("Hager Aff.") ¶4, Appellees' Appx. pg. A-3). Dayton does not carry any policy or policies of liability insurance or a certificate of self-insurance. (*Id.*) Every year Dayton sets aside money to try and cover any judgments rendered against it pursuant to its own City Ordinance. (See Stipulation of Parties). Dayton sets aside the money pursuant to R.C.G.O §§ 36.201, 202 and 203, which were enacted on January 30, 1985. (See Copy of Dayton R.C.G.O. §§ 36.201, 202, and 203 attached to Appellant's Appx. pg. A-107).

D. LAWSUIT

1. TRIAL COURT

The instant lawsuit was filed against Dayton, Mr. Moreo and the Appellant. After the parties fully briefed cross-motions for summary judgment, the Trial Court found that Mr. Moreo was immune from liability pursuant to R.C. Chapter 2744 as an employee of a political subdivision acting within the scope and course of his employment. (Decision, Order and Entry Granting Defendant City of Dayton Partial Summary Judgment pg. 6, Appellant's Appx. pg. A-20). The Trial Court also determined that Mr. Moreo's motor vehicle was an uninsured motor vehicle and not excluded under R.C. 3937.18 (K)(3). Specifically, the Trial Court found the motor vehicle was not self-insured within the

meaning of Ohio's financial responsibility law because in order to be a self-insured under Ohio's financial responsibility law an entity is required to have a certificate of self-insurance, which Dayton does not have. (Appx. at pgs. A-27-28). The Trial Court also rejected Appellant's argument that Dayton was self-insured in the practical sense, finding that the plain language of the statute only excluded entities that are "self-insured within the meaning of the Ohio's financial responsibility law." (Appellant's Appx. at pg. A-28).

Subsequently, Appellant filed a Motion for Reconsideration, introducing a Stipulation that Dayton sets aside money every year to attempt to cover judgments rendered against it. Appellant also argued that while the statutory exclusion may not apply to Dayton, that the broader policy exclusion applied to Dayton. The Court rejected this argument finding that to the extent that the policy attempted to define insured or uninsured more narrowly than the statute, it was unenforceable. (Appellant's Appx. pg. A-38). The Trial Court also noted that the language in the policy still did not exclude coverage, as Dayton was not self-insured under the state's motor vehicle financial responsibility law, motor carrier law, or similar law. (Appellant's Appx. pg. A-39).

2. COURT OF APPEALS

Appellant appealed the Trial Court's Decision to the Second District Court of Appeals. Appellant argued that although the motor vehicle was not self-insured under Ohio's financial responsibility law codified in R.C. Chapter 4509, that the motor vehicle was self-insured in the practical sense, and therefore excluded from coverage under R.C. 3937.18(K)(3) or the policy language. The Second District Court of Appeals rejected the Appellant's argument, finding:

> Because the motor vehicle the operation of which caused Roger'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, Roger's injury was within the scope of State Farm's uninsured motor vehicle coverage.

(Appellant's Appx. at pg. A-11). The Second District Court of Appeals also noted that as a matter of public policy the Ohio General Assembly intended to place 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." (Appellant's Appx. at pg. A-12).

II. ARGUMENT

CERTIFIED CONFLICT QUESTION:

UNDER R.C. 3937.18(K)(3) 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?

PROPOSITION OF LAW NO. 1:

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

APPELLEES' ANSWER TO CERTIFIED CONFLICT QUESTION AND PROPOSITION OF LAW NO. 1

A. THE PLAIN MEANING OF THE STATUTE, THE CONSISTENT INTERPRETATION OF ALL SECTIONS OF THE STATUE, AND PUBLIC POLICY ALL REQUIRE THIS COURT TO AFFIRM THE LOWER COURT'S DECISION.

This matter comes to this Court on a certification of conflict between the Second District Court of Appeals decision in this matter, and the First District Court of Appeal's decision in *Safe Auto Ins. Co. v. Corson* (2004), 155 Ohio App.3d 736. The conflict revolves around the meaning R.C. 3937.18(K)(3), specifically whether the Dayton motor vehicle is "self-insured within the meaning of the financial responsibility laws of the state." Ohio's financial responsibility law is codified in R.C. Chapter 4509, and requires that a motor vehicle have a certificate of self-insurance in order to be deemed self-insured. Because Dayton does not have a certificate of self-insurance, the motor vehicle is not deemed self-insured under Ohio's financial responsibility law.

Moreover, the common definition of a "financial responsibility law" is a law requiring the owner or operator of a motor vehicle to possess and have proof of minimal levels of insurance. The other statutes that Appellant claims to be financial responsibility laws do not require any proof of minimal insurance or financial responsibility and are not financial responsibility laws. Instead, these statutes merely outline the ability of a political subdivision to set aside funds to cover judgments rendered against them. In addition, Appellant's interpretation of R.C. 3937.18(K)(3) would create an impermissible internal conflict with R.C. 3937.18(K)(2), which holds that motor vehicles owned by political subdivisions and driven by immune operators are uninsured for the purposes of R.C. 3937.18.

Finally, the plain meaning of the statute is consistent with the policy behind the uninsured motorist statute and the Political Subdivision Tort Liability Act, R.C. Chapter 2744. This Court has noted on numerous occasions that the General Assembly through the plain language of R.C. Chapter 2744 made a conscious choice to shift the financial

responsibility for torts committed by political subdivisions from the taxpayers to insurance carriers.

1. R.C. 3937.18(K)(3) ONLY EXCLUDES MOTOR VEHICLES THAT ARE SELF-INSURED WITHIN THE MEANING OF THE FINANCIAL RESPONSIBILITY LAW OF THE STATE.

Appellant asks this Court to ignore the plain language of R.C. 3937(K)(3) and rewrite it to broaden the exclusion beyond motor vehicles that are "self-insured within the meaning of the financial responsibility law." However, the primary rule of statutory construction requires a reviewing court to apply a statute as it is written by using the plain meaning of the words the legislature chose. *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.* (1996), 74 Ohio St.3d 543, 545, 1996 Ohio 291, 660 N.E.2d 463. An unambiguous statute must be applied in a manner consistent with the plain meaning of the statutory language, and a court cannot simply ignore or add words. *State ex rel. Burrows v. Indus. Comm.* (1997), 78 Ohio St.3d 78, 81, 1997 Ohio 310, 676 N.E.2d 519.

Ohio's UIM Statute in effect at the time of the Appellant's insurance contract, R.C. 3937.18, as amended by Senate Bill 267, provided 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.

(emphasis added).

Ohio Courts have long held that "Ohio's financial responsibility law is codified in Chapter 4509 of the Ohio Revised Code," which is aptly titled "Financial Responsibility." *Dazell-Milstein v. Midwestern Indemnity Company*, 1986 Ohio App. LEXIS 8631 at *10

(Cuyahoga Cty. Oct. 9, 1986); see also *Grange Mutual Casualty Co. v. Refiners Transport and Terminal Corp.* (1986), 21 Ohio St. 3d 47, 49, 487 N.E.2d 310. Moreover, the plain meaning of the term financial responsibility law is a law "requiring an owner and/or operator of a motor vehicle to possess and have proof of minimum levels of insurance." *Garcia v. Vanguard Car Rental*, 2007 U.S. Dist. LEXIS 20569 at *22 (Middle Dist. Fl. March 5, 2007).[1]

In *Grange, supra*, this Court specifically held that an entity must have a certificate of self-insurance pursuant to R.C. 4509.72 in order to be deemed "self-insured in a legal sense" under Ohio's financial responsibility law. *Grange, supra* at pg. 49. R.C. 4509.72 sets forth the following requirements to be deemed self-insured: 1. Entity must show proof of ownership of 25 or more motor vehicles; 2. Entity must give proof of financial responsibility, and 3. Entity must obtain a certificate of self-insurance from the registrar of motor vehicles.

Here, the plain meaning of the statutory language only excludes motor vehicles self insured under Ohio's financial responsibility law. Ohio's financial responsibility law defines a self-insured as one who has a certificate of self-insurance. *R.C. 4509.72* It is undisputed that Dayton does not have a policy of insurance covering the motor vehicle and that Dayton does not have a certificate of self-insurance. As such, the motor vehicle is not "self-insured in a legal sense" under Ohio's financial responsibility law.

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[1] The court looked at Black's Law Dictionary definition of the term "financial responsibility act" as "[a] state statute conditioning licensing and registration of motor vehicles on proof of insurance or other financial accountability." Black's Law Dictionary at 663 (8th Edition, 1994). It also looked at the definition of "financial responsibility clause" as "[a] provision in automobile insurance policy stating that the insured has at least the minimum amount of liability insurance coverage required by the state's financial responsibility law." *Id.*

Realizing this problem, Appellant asks this Court to look beyond Ohio's financial responsibility law, and to rewrite the UIM Statute to exclude coverage for a political subdivision that maintains a reserve that is allowed by R.C. 9.83, 2744.08 or Dayton's local ordinances. However, R.C. 9.83, 2744.08 and the local Dayton ordinances merely allow Dayton to maintain a general reserve with which to pay out tort claims and/or purchase insurance. R.C. 9.83, 2744.08 and Dayton's local ordinances are not financial responsibility laws because they do not condition the license or registration of motor vehicles based upon financial responsibility. Moreover, these statutes do not meet any of the requirements of Ohio's financial responsibility law. There is no showing of the number of automobiles owned, there is no certificate of self-insurance, and there is no showing of financial ability to pay. Further, Dayton's local ordinances, being local municipal ordinances, cannot be considered to be the "financial responsibility laws of the state." As such, R.C. 3937.18(K)(3)'s self-insurance exclusion does not apply.

2. R.C. 3937.18(K)(2) MANDATES COVERAGE

In addition to being at odds with the plain meaning of the statute, Appellant's interpretation of R.C. 3937.18(K)(3) would create an internal conflict with R.C. 3937.18(K)(2). This Court has repeatedly held that statutes should be construed so as to give full force and effect to each provision and avoid interpretations that result in a conflict of the provisions. *Johnson's Markets, Inc. v. City of New Carlisle* (1991), 58 Ohio St.3d 28, 35, 567 N.E.2d 1018.

The express language of R.C. 3937.18(K)(2) holds that a motor vehicle owned by a political subdivision and driven by an immune operator is uninsured for the purposes of the UIM statute:

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

2. Owned by any government or any of its political subdivisions, **unless the operator of the motor vehicle has an immunity under Chapter 2744 of the Ohio Revised Code that could be raised as a defense in an action brought against the operator by the insured.**

R.C 3937.18 (emphasis added).

Here, it is uncontested that the motor vehicle was owned by the City of Dayton and operated by City of Dayton employee Earl Moreo at the time of the accident. Moreover, as a result of the accident the Plaintiff sued Mr. Moreo, and the Trial Court granted Mr. Moreo immunity under Chapter 2744, which has not been challenged. Therefore, pursuant to R.C. 3937.18(K)(2) the motor vehicle was an uninsured motor vehicle.

In order to avoid this result, Appellant argues that the City of Dayton should be deemed the operator of the motor vehicle or the statute should be rewritten to require both the owner and operator of the vehicle to be immune. Appellant cites the dubious precedent of *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* (1999), 85 Ohio St. 3d 660 and an unpublished decision of the 10th Dist. Court of Appeals in *Holt v. Almendarez*, (10th Dist. Dec. 10, 1998), 1998 Ohio App. LEXIS 5944 for the proposition that the word "operator" means both the owner and operator. The *Holt* case is inapposite because it involved a political subdivision whose motor vehicle was actually covered by an insurance policy. Likewise, even if *Scott-Pontzer* were still good law, the decision was irrelevant to the determination of "operator" in this instance. The plain meaning of the term operator of a motor vehicle under Ohio law is "[a] person who drives or is in actual physical control of a vehicle, trackless trolley, or street car." See R.C. 4511.01(Y). In addition, if the General Assembly had meant operator to mean owner, it would not have used both the words

owner and operator separately in the statute. R.C. 3937.18(K)(3) specifically references both the owner and operator stating "A motor vehicle **owned** by a political subdivision, unless the **operator** of the motor vehicle has an immunity under R.C. Chapter 2744." Moreover, had the General Assembly intended to require that both the owner and the operator be immune before uninsured motorist coverage applied it could have done so. Instead, the General Assembly chose to only require immunity for the operator. As such, the motor vehicle is not excluded from coverage for this additional reason.

3. COVERAGE IS CONSISTENT WITH THE PUBLIC POLICY BEHIND R.C. CHAPTER 2744

The crux of the First District Court of Appeal's holding in *Corson* is that it is patently unfair for the victim's insurance carrier to pay for the damages caused by a City employee. The First District scoffed at the "absurdity" of a victim being able to collect under his uninsured motorist policy in an accident caused by a millionaire driving a car without insurance or a certificate of self-insurance. *Safe Auto*, supra at 738. However, there is no doubt that uninsured motorist coverage would apply in such an instance. The difference between the political subdivision and the millionaire is that the General Assembly has both exempted the City from the financial responsibility laws and specifically prohibited insurance carriers from bringing a subrogation claim against the political subdivision to recover the funds it paid its insured. The Second District Court of Appeals correctly noted in its decision below that it is the "collateral source rule clearly set off 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." (Appellants Appx. pg. A-11).

R.C. 2744.05 provides:

> 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 the governmental or proprietary function:
>
> ***
>
> (B) 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...

This Court has repeatedly held that both the plain language of the statute and the legislative intent behind R.C. 2744.05 require this result. This Court specifically noted that 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." *Menefee v. Queen City Metro* (1990), 49 Ohio St.3d 27, 29, 550 N.E.2d 181. This Court stated that the "purpose and language of R.C. 2744.05 evinces a legislative intent to place the [financial] burden on the [insurer] and not the City." *Galanos v. Cleveland* (1994), 70 Ohio St.3d 220, 221, 638 N.E.2d 530. This Court stated in *Menefee* that the ultimate payers are either the taxpayers of the political subdivision or the premium payers of insurance companies, and the legislature chose the latter. *Menefee, supra* at 183.

Here, the City does not have a policy of insurance and is not deemed self-insured under the financial responsibility law. Uninsured motorist benefits, like all other collateral

benefits are subject to offset pursuant to R.C. 2744.05(B)(1). Any contrary holding is in conflict with R.C. 2744.05's provision that the set-off applies "[n]otwithstanding any other provisions of the Revised Code or rules of court to the contrary." Appellant cannot avoid payment of collateral sources specifically provided by the legislature. To do so would create a singular exception for uninsured motorist benefits from the otherwise broad offset provision of the immunity statute. If the legislature intended such a result, it could have easily exempted uninsured/underinsured motorist benefits from R.C. 2744.05. As the legislature did not, the uninsured motorist benefits are subject to set-off.

PROPOSITION OF LAW NO. 2

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

APPELLEES' RESPONSE TO PROPOSITION OF LAW NO. 2

B. R.C. 3937.18(K)(3) DOES NOT EXCLUDE MOTOR VEHICLES THAT ARE SELF-INSURED IN THE PRACTICAL SENSE.

Appellant argues that while Dayton may not be self-insured within the meaning of Ohio's financial responsibility law, that Dayton is still excluded because it is self-insured in the practical sense. Appellant cites *Safe Auto Ins. Co. v. Corson* (2004), 155 Ohio App.3d 736 for this proposition. However, this Court has specifically held that self-insured in the practical sense applies by definition only to entities that are not self-insured in the legal sense under Ohio's financial responsibility laws. In addition, adopting *Corson's* holding would render UM/UIM coverage unenforceable as anyone driving without insurance would be self-insured in the practical sense. Finally, the concept of self-insured in the practical sense applies only to entities that bear the entire risk of loss.

Pursuant to R.C. Chapter 2744, a political subdivision does not bear the entire risk of loss, as it may set off damages against any applicable insurance policy or other collateral source.

1. THIS COURT HAS SPECIFICALLY HELD THAT A SELF-INSURED IN A PRACTICAL SENSE IS NOT SELF-INSURED IN A LEGAL SENSE UNDER OHIO'S FINANCIAL RESPONSIBILITY LAW.

Appellant asks this Court to rewrite the UIM statute and broaden the exclusion to include an entity that is "self-insured in the practical sense." However, an entity that is "self-insured in a practical sense," by definition does not meet the requirements to be deemed self-insured under Ohio's financial responsibility law. *Grange Mut. Cas. Co. v. Refiners Transport & Terminal Corp.* (1986), 21 Ohio St.3d 47, 49, 487 N.E.2d 319, 313 (Finding that "self-insurer in the practical sense" was not a "self-insurer in the legal sense.") The *Corson* Court was the first and only court to apply this exception to determine that "self-insured in the practical sense" is the equivalent of "self-insured within the meaning of the financial responsibility law of the State."

The phrase "self-insured in the practical sense" was first coined by Chief Justice Celebrezze in *Grange Mut. Cas. Co. v. Refiners Transport & Terminal Corp.* (1986), 21 Ohio St.2d 47, 49, 487 N.E.2d 310, 313. In *Grange Mut. Cas. Co.,* this Court held that the offer and rejection requirements of the uninsured motorist law did not apply to either self-insurers or financially responsible bond principals. *Id. at syllabus*. The issue was whether a private company that complied with the financial responsibility law via a mechanism other than insurance or a certificate of self-insurance had to in effect "offer" itself uninsured motorist coverage. The company had purchased a financial responsibility bond to comply with the financial responsibility law, but did not have a certificate of self-insurance. *Id.* at 49, 3112. The case predates both the Political Subdivision Tort Liability

Act (R.C. Chapter 2744) and the version of the UIM Statute at issue in this case. *Grange Mut. Cas. Co.* and its progeny do not hold that a self-insured in a practical sense is a "self-insured within the meaning of the financial responsibility of the state." By contrast, these cases hold that a "self-insured in a practical sense" is by definition **not** a self-insured in the legal sense under Ohio's financial responsibility law because the entity does not have a certificate of self-insurance. *Id.* (emphasis added). As such, this concept cannot be applied to rewrite the statute and broaden the exclusion.

2. EXCLUDING SELF-INSURERS IN THE PRACTICAL SENSE FROM COVERAGE WOULD RENDER UM/UIM COVERAGE MEANINGLESS AS EVERYONE DRIVING WITHOUT INSURANCE IS SELF-INSURED IN THE PRACTICAL SENSE.

Not only does self-insured in the practical sense by definition mean uninsured under Ohio's financial responsibility law, but the concept of "self-insured in the practical sense" does not logically apply to exclude UIM coverage. "Self-insured in the practical sense" was defined to include any entity that "retains the ultimate risk of loss." *See Grange Mut. Cas. Co., supra.* To hold that motor vehicles that are "self-insured in a practical sense" are excluded from UIM coverage would make the coverage meaningless. Every individual driving without insurance is "self-insured in the practical sense" as the individual would retain the ultimate risk of loss. *See Grange, supra.* Such an interpretation is contrary to the very purpose of UIM coverage.

3. THE CONCEPT OF SELF INSURED IN A PRACTICAL SENSE DOES NOT APPLY TO POLITICAL SUBDIVISIONS.

Finally, "self-insured in a practical sense" does not apply to a political subdivision like the City of Dayton. A self-insured in the practical sense bears the entire risk of loss. *Grange Mut. Cas. Co., supra* at 49. A political subdivision does not bear the entire risk of loss because of the operation of R.C. Chapter 2744. R.C. Chapter 2744 shifts the risk of loss by requiring the plaintiff's insurers to assume the risk of damages caused by the political subdivision to the extent of coverage. Therefore, because Dayton, as a matter of law, does not retain the entire risk of loss, it cannot be "self-insured in the practical sense."

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.

APPELLEES' RESPONSE TO PROPOSITION OF LAW NO. 3

C. THE MOTOR VEHICLE IS NOT SELF-INSURED UNDER OHIO'S FINANCIAL RESPONSIBILITY LAWS AND APPELLANT'S UIM POLICY DOES NOT EXCLUDE COVERAGE.

As stated in Section A, above, the motor vehicle was not self-insured pursuant to Ohio's financial responsibility law, and therefore not excluded. Moreover, at the time that the UIM policy was enacted, UIM coverage was mandatory under Ohio law and insurers could not enforce restrictions that varied from the statute. Not only is Appellant prevented from enforcing broader exclusions to coverage, but the policy exclusions as written do not exclude coverage. In addition, under Ohio's long established laws of contract

construction, any ambiguity in the policy exclusions must be interpreted narrowly and in favor of coverage. As such, the coverage applies for these additional reasons.

1. APPELLANT'S POLICY EXCLUSIONS CANNOT AND DO NOT EXCLUDE COVERAGE.

Appellant argues that the motor vehicle is excluded from coverage pursuant to the terms of its policy. At the time of Appellant's policy, uninsured motorist coverage was mandated by statute and an automobile insurance policy could not reduce coverage or broaden exclusions beyond those enumerated in the uninsured motorist statute. *State Farm Auto Ins., Co. v. Alexander* (1992), 62 Ohio St.3d 397, 399-400, 583 N.E.2d 309, 311-312.

Here, not only does Ohio law prohibit Appellant from enforcing broader UIM exclusions in its policy, but the plain meaning of the policy exclusions do not exclude coverage. Appellant's policy limits the self-insurance exclusion to an entity deemed self-insured under a "motor vehicle financial responsibility law, motor carrier law or similar law":

An 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.

(Appellant's Appx. at pg. A-60). As stated above, the motor vehicle is not self-insured under Ohio's motor vehicle financial responsibility law because none of the requirements necessary for a self-insurer under R.C. Chapter 4509 have been met. Moreover, Dayton is not a motor carrier as a "Motor carrier" is defined by the Revised code as "an individual, partnership, or corporation engaged in the transportation of goods or persons. R.C. 4503.60(A). R.C. 9.83 and 2744.08 are not motor vehicle financial responsibility laws, motor carrier laws, or similar laws, as they merely outline the ability of a political

subdivision to set aside funds to cover potential tort liability. In addition, "similar law" is an inherently ambiguous term that courts are required to strictly interpret in favor of coverage. *Home Indemn. Co. v. Plymouth* (1945), 146 Ohio St 96, 64 N.E.2d 248; and *Univ. Cincinnati v. Arkwright Mut. Ins. Co.*, 51 F.3rd 1277, 1280 (6th Cir. 1995); (see Section 2, below). As such, the policy terms do not exclude coverage.

2. CONTRACT RULES OF CONSTRUCTION FAVOR COVERAGE.

"[W]here provisions of a contract of insurance are reasonably susceptible of more than one interpretation, they will be construed strictly against the insurer and liberally in favor of the insured." *Csulik v. Nationwide Mut. Ins. Co.* (2000), 88 Ohio St.3d 17, 519 N.E.2d 90. In addition, any exclusions, exceptions, qualifications or exemptions from coverage are to be read narrowly in favor of coverage. *Home Indemn. Co. v. Plymouth* (1945), 146 Ohio St. 96, 64 N.E.2d 248. "Any reasonable interpretation of an insurance policy that results in coverage for the insured must be adopted." *Univ. Cincinnati v. Arkwright Mut. Ins. Co.*, 51 F.3d 1277, 1280 (6th Cir 1995)(summarizing Ohio insurance law).

Here, this Court is required to narrowly construe any exclusion and adopt any reasonable interpretation of an insurance policy that results in coverage. Moreover, adopting Appellant's construction of the self-insurance exclusion would create an ambiguity in the insurance policy language. Appellant's policy states that:

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

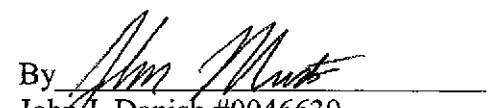
(UIM Policy at pg. 13). The City of Dayton owned the vehicle and it was operated by Mr. Moreo at the time of the accident. Plaintiff sued Mr. Moreo and the Trial Court granted him immunity under R.C. Chapter 2744. Applying Appellant's construction would result in a conflict in the policy provisions, finding the motor vehicle self-insured pursuant to Section 3 (self-insured exclusion) and uninsured pursuant to Section 4(owned by a political subdivision and driven by immune operator) (Appellant's Appendix pg. A-60). Therefore, pursuant to the plain language of the policy, and the rules of construction, this Court should affirm the Second District Court of Appeal's Decision finding that the motor vehicle was not excluded from coverage.

III. CONCLUSION

For the foregoing reasons, Defendants-Appellees, City of Dayton and Earl Moreo, respectfully request that this Court uphold the Second District Court of Appeal's Decision.

Respectfully submitted,

PATRICK J. BONFIELD # 0015796
DIRECTOR OF LAW



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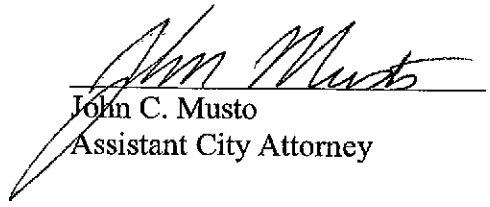
CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by ordinary U.S. Mail, postage prepaid this 21st day of August 2007 to:

Mark H. Gams, Esq.
Jason Founds, Esq.
471 East Broad St., 19th Floor
Columbus, OH 43215-3872
Attorneys for Defendant-Appellant,
State Farm Mutual Automobile Insurance Co.



John C. Musto
Assistant City Attorney

APPENDIX

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

WESTERN ROGERS,	:	CASE NO. O4-CV-2716
Plaintiff	:	Judge: Jeffery E. Froelich
v.	:	
CITY OF DAYTON, et al.,	:	**AFFIDAVIT OF EARL MOREO**
Defendants.		

STATE OF OHIO)
) ss:
COUNTY OF MONTGOMERY)

Earl Moreo III, after being duly cautioned and sworn, states the following:

1. I have personal knowledge of all information contained in this affidavit and I am competent to testify to all of the facts contained in this affidavit and to testify to all matters stated herein.

2. On April 22, 2002, I was employed by the City of Dayton as a Traffic Signal Electrician. On that date I was dispatched to Emerson Avenue and Salem Avenue to check the operation of a traffic signal.

3. Upon arrival at the intersection I did not observe any malfunction with the traffic signals in the northwest direction of travel. Pursuant standard operating procedure, I prepared to turn around and check the traffic signals in the southeast lanes of travel.

4. 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 the both lanes of travel, checked my mirrors, and then began to execute a u-turn.

5. 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 traffic before I executed the turn.

6. At the time of the accident I was driving a City of Dayton vehicle and I was performing tasks that were within the scope and course of my employment with the City.

7. To my knowledge it is not illegal to execute a u-turn in the City of Dayton or in the State of Ohio.

8. At the time of the accident I not acting in bad faith, nor was I acting with a malicious purpose.

9. I was not cited by the Dayton Police Department as a result of this incident.

Further affiant sayeth naught.

Earl Moreo III

Sworn to before me, a Notary Public in and for the State of Ohio, and subscribed in the presence by the said Earl Moreo III this 6th day of December 2004.

Notary Public

JOHN C. MUSTO, Attorney at Law
Notary Public, State of Ohio
My Commission has no expiration date.
Section 147.03 O. R. C.

A-2

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

WESTERN ROGERS,	:	CASE NO. O4-CV-2716
Plaintiff	:	Judge: Jeffery E. Froelich
v.	:	
CITY OF DAYTON, et al.,	:	**AFFIDAVIT OF PETER HAGER**
Defendants.		

STATE OF OHIO)
) ss:
COUNTY OF MONTGOMERY)

Peter Hager, after being duly cautioned and sworn, states the following:

1. I have personal knowledge of all information contained in this affidavit and I am competent to testify to all of the facts contained in this affidavit and to testify to all matters stated herein.

2. I am currently employed as a Purchasing Agent for the City of Dayton and have been so employed for over eight years

3. I am familiar with the operations of the City of Dayton and the existence of insurance policies which may cover employees of the City of Dayton involved in automobile accidents.

4. On April 22, 2002, the City of Dayton maintained no policies of insurance covering the motor vehicle Earl Moreo was driving when the accident occurred.

Further affiant sayeth naught.

Peter Hager

Sworn to before me, a Notary Public in and for the State of Ohio, and subscribed in the presence by the said Pete Hager this 9th day of December 2004.

Notary Public

JOHN C. MUSTO, Attorney at Law
Notary Public, State of Ohio
My Commission has no expiration date.
Section 147.03 O. R. C.