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.	:	

REPLY BRIEF OF APPELLANT STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

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LAW AND ARGUMENT

APPELLANT'S RESPONSE TO APPELLEE'S ANSWER TO CERTIFIED CONFLICT QUESTION AND PROPOSITION OF LAW NO. 1:

The City Of Dayton Is Self-Insured Within The Meaning Of Ohio's Financial Responsibility Law.

While Appellee wishes this Court to give statutory wording its plain meaning, it ignores the fact that Ohio Revised Code §3937.18(K)(3) deems a vehicle not uninsured if it is 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). Assuming, *arguendo*, that the Financial Responsibility Law referenced in the aforementioned statute is the Financial Responsibility Act as codified by R.C. §4509.72, the City of Dayton still is statutorily self-insured within the meaning of R.C. §3937.18(K)(3).

The requirements for a self-insurer in Ohio are as follows: The entity must have more than 25 motor vehicles registered in the state and show sufficient financial ability to pay judgments against it. If it can prove both of these, the Registrar of motor vehicles can issue a certificate of self-insurance. (R.C. §4509.72.) The City of Dayton rests its entire argument on the fact it did not obtain the piece of paper required to be self-insured. The fact of the matter is it was not required to obtain that piece of paper pursuant to R.C. §4509.71, which specifically exempts city municipalities such as the City of Dayton from the requirements of R.C. §4509.72. Although the City of Dayton cannot comply to the letter of the Financial Responsibility Act, it does comply *within the meaning* of the Financial Responsibility Act.

If the Legislature intended municipal vehicles to be considered uninsured, it would specifically, *and without condition*, have excluded the same in the uninsured motorist statute.

The Legislature did not make such an exclusion and therefore the City of Dayton is self-insured pursuant to R.C. §3937.18(K)(3).

Appellee argues the only financial responsibility law is in fact codified in Ohio Revised Code §4509.71. However, Ohio Revised Code §9.83 specifically is entitled "**Liability Insurance for State and Local Officers or Employees for a Motor Vehicle, Aircraft or Watercraft Accidents; Vehicle Liability Program.**" The statute specifically authorizes and explains how a political subdivision can procure a policy of liability insurance or be self-insured. This section, combined with R.C. §2744.08 (Self-Insurance Law provisions), demonstrates that Ohio has more than one financial responsibility *law* which in fact applies to the negligence of political subdivision motor vehicles. Dayton does not claim it failed to comply with these and other self-insurance provisions, and that is yet another reason it is self-insured under R.C. §3937.18(K)(3).

The Governmental Immunity Clause Found In R.C. §3937.18(K)(2) Can Only Be Interpreted To Require The Municipality To Be Immune.

In order for R.C. §3937.18(K)(2) to make sense, the immunity has to apply to both the driver and the City of Dayton. The City of Dayton is not liable for injury caused by the negligent operation of a motor vehicle by its employee if the employee is a police officer or fireman responding to an emergency call (without willful or wanton misconduct). R.C. §2744.02(B). Since the driver/employee for all practical purposes is always immune, the language of R.C. §3937.18(K)(2) essentially would be superfluous after "owned by any government or any of its political subdivisions" if the Court accepts Appellee's interpretation. If the Legislature intended a government vehicle to be considered uninsured under all circumstances, it would have crafted the statute to state:

> An 'uninsured motor vehicle' and 'underinsured motor vehicle' do not include any of the following vehicles:
>
> * * *
>
> 2) a motor vehicle owned by a political subdivision.

Instead, it carved out the exception for emergency vehicles found in R.C. §2744. A municipality can act only through its employees. Hence it is clear the Legislature intended a City of Dayton vehicle to not be considered uninsured unless the *City of Dayton* had an immunity, such as the Emergency Run Immunity found in §2744.02(B).

Finding The City Of Dayton To Be Self-Insured Or Otherwise Not Uninsured Is Not Against Public Policy.

The City of Dayton and the majority of the lower court insist that the anti-subrogation statute found in R.C. §2744.05 is somehow dispositive of the legislative intent regarding whether the City of Dayton should be responsible for its own debts. However, this case is not about subrogation. State Farm has no right of subrogation for uninsured motorist coverage because uninsured motorist coverage arises only when the tortfeasor is uninsured. Here, the City of Dayton is self-insured, specifically excluded from being uninsured pursuant to R.C. §3937.18(K)(2), or self-insured in the practical sense. Under any of the aforementioned scenarios, uninsured motorist coverage does not arise.

It is interesting to note that the City of Dayton now argues it is the public policy of the state that it not be considered self-insured, when just 11 years ago, the City of Dayton argued it was in fact self-insured. Jennings v. City of Dayton (1996), 114 Ohio App. 3d 144. Public policy should dictate a city should not be able to argue it is self-insured when it believes it can escape liability under one version of the uninsured motorist statute and then not self-insured when it believes it could escape liability under another version of an uninsured motorist statute.

APPELLANT'S REPLY TO APPELLEE'S RESPONSE TO PROPOSITION OF LAW NO. 2:

If the City of Dayton is not self-insured within the meaning of the Financial Responsibility Law of Ohio, it is self-insured in the practical sense. As the City of Dayton stated in its Merit Brief, self-insured in the practical sense is by definition not self-insured in the legal sense under Ohio's Financial Responsibility Law because the entity does not have a certificate of self-insurance. Grange Mut. Cas. Co. v. Refiners Transport and Terminal Corp. (1986), 21 Ohio St.3d 47, 48.

Although Appellant believes the City of Dayton was self-insured within the meaning of the Financial Responsibility Law of Ohio, this Court can alternatively choose to find the City of Dayton self-insured in the practical sense. The City of Dayton still retains the ultimate risk of loss in this case and unlike the average driver, sets aside funds to pay for its negligence. Unlike the average driver, Dayton has its City Manager present to its government the amount of money it believes will be necessary to cover damages resulting from motor vehicle accidents each year. If that is not self-insured in the legal sense, it must be self-insured in the practical sense. That the City of Dayton is entitled to statutory setoffs for certain damages does not mean it does not bear the ultimate risk of loss.

APPELLANT'S REPLY TO APPELLEE'S RESPONSE TO PROPOSITION OF LAW NO. 3:

State Farm's policy does exclude uninsured motorist coverage for vehicles owned or operated by a self-insurer. If this Court believes Appellee's vehicle is uninsured pursuant to R.C. §3937.18, then Appellant concedes that under the S.B. 267 version of §3937.18, uninsured motorist coverage is not excluded. However, for the reasons stated in its Merit Brief and in this Reply Brief, the Appellant believes coverages would also be excluded under the insurance policy. If this Court finds Appellee's vehicle not to be uninsured under R.C. §3937.18, then interpretation of the insurance policy language is unnecessary because coverage would not be triggered.

It should also be noted that in the case of Elaine Hunter, et al. v. City of Dayton, et al., Case Nos. 2007-0815 and 2007-0816, and in all other cases which may come before this Court in the future, the version of R.C. §3937.18 will be that as amended by S.B. 97, which permits exclusionary insurance policy language to be broader than that found in the statute. Snyder v. Am. Family Ins. Co. 114 Ohio St.3d 239, 2007 – Ohio – 4004. The Hunter case is being held for decision in the instant case.

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 employer of the employee tortfeasor), to the insurer of the victim.

The Ohio Legislature did not intend this result or it would have exempted all political subdivision vehicles *without exception*. Instead, it chose to make uninsured only those vehicles owned by a political subdivision that had diplomatic immunity or emergency run immunity.

Therefore, this Court should reverse the decision of the lower court and hold that a political subdivision cannot claim uninsured status to escape liability for damages which it is legally responsible to pay.

Respectfully submitted,

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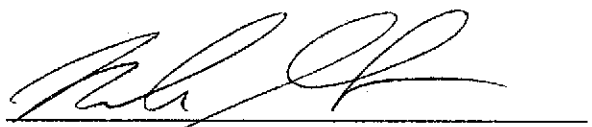
PROOF OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Reply 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 11 day of September, 2007.



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