

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  
 v. : Appellate District  
 :  
 CITY OF DAYTON, :  
 :  
 Defendant-Appellee, :  
 :  
 and :  
 :  
 STATE FARM MUTUAL AUTOMOBILE :  
 INSURANCE COMPANY, :  
 :  
 Defendant-Appellant.

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APPELLEES' MOTION FOR RECONSIDERATION

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## I. INTRODUCTION

Appellees ask this Court to reconsider its majority decision interpreting Ohio's Uninsured Motorist Statute to reject coverage in this case. The majority overruled both the Trial Court and Second District Court of Appeals' decisions that applied the plain meaning of the language chosen by the General Assembly. In reversing the lower rulings, the majority: 1. Admittedly declined to apply the plain and unambiguous meaning of the statute's words; 2. Expanded political subdivision employee immunity in order to find the words the General Assembly chose redundant; 3. Implicitly overturned longstanding precedent requiring that insurance provisions be liberally construed in favor of coverage; and 4. Used this Court's precedent in *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* (1999), 85 Ohio St.3d 660, 710 N.E.2d 1116 to liberally construe insurance provisions against coverage.

Appellees understand that this Court grants reconsideration only sparingly, and for good reason. However, the majority's opinion is based on an incorrect legal statement that government employees are always immune. Because the basis for the majority's decision is erroneous, Appellees respectfully request that the Court reconsider its decision and affirm the Second District Court of Appeals' decision.

## II. THE UNAMBIGUOUS MEANING OF THE WORD "OPERATOR" IN R.C. 3937.18 RENDERS THE VEHICLE UNINSURED.

The crux of the majority's opinion involves its interpretation of the word "operator" in R.C. 3937.18(K)(2) to mean both "driver" and "owner." R.C. 3937.18 provides that:

(K) An uninsured motor vehicle does not include a land motor vehicle:\*\*\*

2. Owned by a 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.

The majority does not deny that if “operator” refers to the driver of the motor vehicle that Dayton’s vehicle in this case is uninsured, as the driver was immune. Moreover, the majority’s opinion acknowledges that the plain and unambiguous meaning of “operator” of a motor vehicle is driver. In fact, the majority’s opinion uses the word “operator” as a synonym for “driver” and recognizes that the word “operator” is separate and distinct from “owner”. The majority’s opinion stated “[c]onsequently, we interpret R.C. 3937.18(K)(2) to apply to emergency vehicles when both the owner and operator/driver are afforded statutory immunity under R.C. Chapter 2744 or other situations in which both the owner and operator are immune from liability.” (Decision at pg. 9).<sup>1</sup>

In concluding that “operator” means driver and owner the majority relies on an incorrect legal statement. The majority held that “because the employee is always immune, there is no need to refer to the immunity of only the employee/driver in Section (K)(2). Therefore, applying the immunity language in (K)(2) only to the employee/driver would be redundant because the employee/driver is always immune.” (Decision at pg. 9). The employee operator, however, is not always immune. R.C. 2744.03(A)(6) provides that a government employee is not immune when he or she is: 1. acting outside the scope of

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<sup>1</sup> While the Court did not need to look beyond the plain meaning of the words chosen by the legislature, the later amendment of the statute specifically shows that the majority’s interpretation of legislative intent is wrong. The majority held that the General Assembly intended “operator” to mean both the owner and driver, and that both the owner and driver needed to be immune for the vehicle to be uninsured. However, R.C. 3937.18 was later amended to provide coverage if either the owner or operator were immune: “[f]or purposes of any uninsured motorist coverage included in a policy of insurance, an “uninsured motorist” is the owner or operator of a motor vehicle if any of the following conditions applies:\*\*\*(5)The owner or operator has immunity under Chapter 2744 of the Revised Code.” 149 v S 97 Eff. 10/31/2001. The General Assembly’s amendment made its intent clear that the operator’s immunity alone was enough for coverage to apply.

employment or official responsibility; 2. acting with malicious purpose; 3. acting in bad faith; (4) acting in a wanton or reckless manner; and (5) when civil liability is expressly imposed by statute. Because a government employee is not always immune, using the plain meaning of “operator” does not create a redundancy. Rather, it serves to distinguish between employees who are acting within the scope of employment and who are merely negligent from those whose actions are reckless or otherwise more culpable. For this reason alone, this Court should reverse its decision.

### **III. DAYTON IS NOT SELF-INSURED PURSUANT TO OHIO’S FINANCIAL RESPONSIBILITY LAW.**

The majority also mistakenly relies upon R.C. 2744.08 as a financial responsibility law to find that Dayton is self-insured pursuant to R.C. 3937.18(K)(3). R.C. 3937.18(K)(3) only excludes uninsured motorist coverage for: “(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 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 2007).<sup>2</sup> R.C. 4509.72(A), Ohio’s financial responsibility law, requires proof of financial responsibility, ownership of 25 or more vehicles registered in the state, and a certificate of self-insurance from the registrar of motor vehicles before the

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<sup>2</sup> The court looked at the 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 (8<sup>th</sup> 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.*

entity “may qualify as a self-insurer.” Unlike R.C. Chapter 4509, R.C. 2744.08 does not require any proof of financial responsibility, it merely allows political subdivisions to set aside funds to cover judgments. Because it does not require proof of financial responsibility, R.C. 2744.08 is not a financial responsibility law. Therefore, the majority’s opinion should be reversed for this additional reason.

#### **IV. INSURANCE PROVISIONS SHOULD NOT BE LIBERALLY CONSTRUED TO EXCLUDE COVERAGE.**

Not only does the plain language require coverage, but this Court is required to construe any ambiguities in favor of coverage. The statutory language is almost identical to the language used in the actual insurance contract that the insured sought coverage from in this suit.<sup>3</sup> This Court has long held that “[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.

Instead of liberally construing in favor of coverage, the majority declined to follow the plain language, and liberally construed the provisions against coverage. The Court even cited *Scott-Ponzer v. Liberty Mut. Fire Ins. Co.* (1999), 85 Ohio St.3d 660, 664 to justify the liberal construction stating that it is “reasonable that Dayton is considered the

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<sup>3</sup>The insurance policy provides 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.” (Appellant’s Appendix pg. A-60) Likewise, the policy provides that: “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 similar law.” (Appellant’s Appendix at pg. A-60)

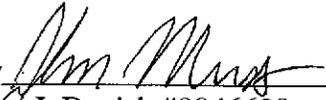
'operator' of the vehicle [under R.C. 3937.18(K)(2)] because a political subdivision acts only through its employees." (Decision at pg. 9). However, the *Scott-Pontzer* case involved ambiguous provisions in an insurance policy that this Court construed, as it was required to, liberally in favor of coverage. The underlying doctrine behind *Scott-Pontzer* is the requirement that ambiguous terms in an insurance policy be construed in favor of coverage. That doctrine is inapplicable here to exclude coverage. Moreover, had the General Assembly intended "operator" to refer to the political subdivision that owned the vehicle it would not have used both owned and operated separately in the statute, indicating two distinct meanings. R.C. 3937.18(K)(2) separately uses the terms "owner" and "operator," stating that a motor vehicle is not uninsured if it is "owned by a 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." (Emphasis added.) Had the General Assembly intended "operator" to refer to the owner it would not have chosen two distinct words with two distinct meanings.

## V. CONCLUSION

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

Respectfully submitted,

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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 2nd day of June 2008 to:

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