[Cite as *Rogers v. Dayton*, 2007-Ohio-673.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

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

Rendered on the 16th day of February, 2007.

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FAIN, J.

{¶ 1} 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.

{¶ 2} 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

{¶ 3} 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.

{¶ 4} 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.

{¶ 5} 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.

{¶ 6} 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.

II

{¶ 7} State Farm asserts four assignments of error, as follows:

{¶ 8} "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.

{¶ 9} "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.

{¶ 10} "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.

{¶ 11} "THE TRIAL COURT ERRED IN HOLDING THAT THE CITY OF DAYTON IS NOT SELF-INSURED UNDER THE LANGUAGE OF THE STATE FARM POLICY."

{¶ 12} 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.

{¶ 13} 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.

{¶ 14} 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."

{¶ 15} In our view, the General Assembly has clearly commanded a different result. R.C. 4509.72(A) provides as follows:

{¶ 16} "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."

{¶ 17} 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.

{¶ 18} 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:

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

{¶ 20} " ***

{¶ 21} "(3) A motor vehicle self-insured within the meaning of the financial responsibility law of the state in which the motor vehicle is registered."

{¶ 22} 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.

{¶ 23} R.C. 2744.05(B) provides as follows:

{¶ 24} "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."

{¶ 25} 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.

{¶ 26} State Farm's assignments of error are overruled.

III

{¶ 27} All of State Farm's assignments of error having been overruled, the judgment of the trial court is Affirmed.

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WOLFF, P.J., concurs.

DONOVAN, J., dissenting:

{¶ 28} I disagree.

{¶ 29} 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.

{¶ 30} 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.

{¶ 31} "'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.

{¶ 32} 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 . . . ."

{¶ 33} 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).

{¶ 34} 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.

{¶ 35} 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.

{¶ 36} 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.

{¶ 37} 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.

{¶ 38} 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.

{¶ 39} 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.

{¶ 40} 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.

{¶ 41} 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.

{¶ 42} 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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