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SUPREME COURT OF FLORIDA

MICHIGAN MILLERS MUTUAL INSURANCE COMPANY,

Petitioner,

vs.

DAWN BOURKE, et al.,

Respondents.

CASE NO. 78221

District Court of Appeal, 2nd District - No. 90-01401 90-01409

BRIEF OF THE AMICUS CURIAE, THE ACADEMY OF FLORIDA TRIAL LAWYERS

ON CERTIFIED QUESTION FROM THE DISTRICT COURT OF APPEAL, SECOND DISTRICT

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STATEMENT OF THE CASE AND FACTS

The Academy of Florida Trial Lawyers (AFTL), amicus curiae, accepts petitioner's statement of the case and facts.

SUMMARY OF THE ARGUMENT

I.

AFTL agrees with the position of respondents that uninsured motorist coverage is available to them as insureds under the policy of insurance issued to respondent Reeves by petitioner Michigan Millers. The district court below correctly decided that respondents are "legally entitled to recover" from the governmental tortfeasor on the basis that §768.28(5), Fla.Stat. (1987), authorizes respondents to reduce their claim against the governmental entity to a money judgment in an amount exceeding the statutory sovereign immunity limit of $100,000/$200,000. Since respondents can seek satisfaction of the judgment in excess of the statutory limit through a legislative claims bill, the immunity defense available derivatively to the uninsured motorist carrier is not absolute and respondents thus are "legally entitled to recover."

The waiver of sovereign immunity imposes liability upon governmental entities to the same extent as private persons, and governmental entities, therefore, should be treated no differently than private individuals for uninsured motorist coverage purposes. In the case of both governmental entities and private individuals, the injured party may reduce to judgment his claim for the full amount of the damages sustained. Governmental entities have limited the collectibility of judgments against them by a statutory damage cap while private persons in effect have restricted their responsibility by the amount of liability insurance purchased. In

the case of a judgment against a governmental entity, the judgment creditor may seek relief through a claims bills in excess of the statutory limit, while the holder of a judgment against a private individual may execute upon his judgment in excess of the liability insurance limits available. In neither case are the prospects of recovery certain and uninsured motorist coverage remains the most viable source of compensation available to Florida motorists.

AFTL submits that the certified question should be answered in the negative in the broadest possible sense to prohibit uninsured motorist insurance carriers from asserting tortfeasors' substantive defenses which are not absolute.

II.

AFTL respectfully urges the court to reconsider its decision in Shelby Mutual Insurance Co. v. Smith, 556 So.2d 393 (Fla. 1990), in recognition of the 1989 legislative amendments to the uninsured motorist statute which clarified the 1984 amendments reviewed in that case.

In the alternative, AFTL submits that the court should decline to address the merits of petitioner's second point. The parties having treated respondents collectively in the trial court, the district court properly compared in the aggregate the uninsured motorist coverage available to respondents with the total amount of liability coverage received for the purpose of determining whether the school bus was an "uninsured motor vehicle" pursuant to §627.727(3)(b), Fla.Stat. (1987). If the coverages should have been compared on a "per person" basis as petitioner contends, only

the actual amount of liability coverage received by each respondent should be considered. Petitioner has not made that information available as part of the record in this case, and the court, AFTL submits, should approve the decision below and decline to address this issue.

ARGUMENT

I.

THE COURT SHOULD ANSWER THE CERTIFIED QUESTION AS FOLLOWS:

AN UNINSURED MOTORIST INSURANCE CARRIER CANNOT ASSERT A TORTFEASOR'S SUBSTANTIVE IMMUNITY DEFENSE WHEN THE IMMUNITY IS NOT ABSOLUTE AND THE CLAIMANTS HAVE A CLAIM AGAINST THE TORTFEASOR WHICH CAN BE REDUCED TO JUDGMENT AND WHERE THERE EXISTS NO OTHER SOURCE OF INDEMNIFICATION FOR THE CLAIMANTS.

AF'TL adopts respondents' argument on this point and urges the court to answer the certified question in the negative by holding that an uninsured motorist carrier cannot assert a tortfeasor's substantive immunity defense when the immunity is not absolute and the claimants have a claim against the tortfeasar which can be reduced to a money judgment.

This court's seminal decision in Allstate Insurance Co. v. Boynton, 486 So.2d 552 (Fla. 1986), authorizes insurers to assert the same substantive defenses available to the tortfeasor. If the defense available to the tortfeasor, however, includes an immunity defense which is not absolute, the uninsured motorist carrier in turn should not enjoy a complete and absolute defense to the uninsured motorist claim. This point is best illustrated by Bovnton and the subsequent decision by the District Court of Appeal, Third District, in Stack v. State Farm Mutual Automobile Insurance Co., 507 So.2d 617 (Fla. 3d DCA 1987), rev. den., 515 So.2d 230 (Fla. 1987). This court in Boynton held that workers' compensation immunity precluded the injured party from recovering

uninsured motorist benefits for an accident caused by the simple negligence of a fellow employee. In Stack, the court was confronted with another employment related accident to which Boynton would have applied except that the fellow employee in that case had been accused of "gross negligence," a statutory exception to workers' compensation immunity. See §440.11(1), Fla.Stat. The district court in that case correctly reasoned that since the fellow employee was not immune from liability for gross negligence, the immunity defense available under the Boynton facts was not absolute and the injured party was "legally entitled to recover." Similarly, the sovereign immunity defense available to the uninsuredmotorist insurance carrier at bar is not absolute because a claims bill may be sought by respondents for damages exceeding the statutory limit. The district court thus correctly held that respondents were "legally entitled to recover" their damages from the tortfeasor and were entitled to uninsured motorist coverage.

The argument advanced by petitioner that respondents are not "legally entitled to recover" above the limits of the school board's liability insurance coverage, if accepted by this court, will apply to accidents caused by the operation of all state and local government vehicles, not just those government vehicles carrying liability insurance. For example, assume that an intoxicated government employee operates a government motor vehicle in the course and scope of employment and negligently causes an accident which renders a young wage earner with a wife and two children paraplegic and totally and permanently disabled. Assume

further that the wage earner has uninsured motorist coverage of $400,000. Under Michigan Millers' position, if the governmental agency's $100,000 statutory limit is paid, no uninsured motorist coverage is available to the wage earner because he would have recovered from the government all that he was "legally entitled to recover" and any further recovery must be obtained from a claims bill rather than from his uninsured motorist coverage. The burden of compensating the victim thus shifts from the uninsured motorist insurance carrier who collected the premium and provided coverage to the taxpayers through the claims bill process or by public assistance programs. A negative answer to the certified question will prevent this inequitable result.

An analysis of the district court's rationale and the principles applicable to the waiver of sovereign immunity lead to the conclusion that governmental entities should be treated the same as private individuals for uninsured motorists coverage. The district court recognized that the sovereign immunity monetary limitation of $100,000/$200,000 is not absolute since a judgment may be obtained against the governmental entity in excess of the statutory limit with the judgment subject to payment, in whole or in part, by legislative claims bill. §768.28(5), Fla.Stat. (1987). In response, Michigan Millers argues that the prospects of recovering under a claims bill are statistically so remote as to give rise to speculation. See Brief of Petitioner at 17. Those prospects, however, are no more remote or speculative than recovering from a private individual under similar circumstances.

By capping governmental liability (subject to a claims bill) at $100,000/$200,000, the legislature recognized the obvious distinction between governmental entities and private individuals, but, as a practical matter, private motorists and those vicariously responsible for their negligence cap their own liability by the policy limits of insurance they purchase. While private motorists remain personally responsible for damages in excess of their liability insurance limits, satisfaction of judgments in excess of insurance limits against individuals may occur less frequently than satisfaction of excess judgments against governmental entities through the claims bill process.

The waiver of sovereign immunity imposes governmental liability to the same extent as private individuals which "effectively means that the identical existing duties for private persons apply to governmental entities." Trianon Park Condominium Association, Inc. v. City of Hialeah, 468 So.2d 912, 917 (Fla. 1985). Providing uninsured motorist coverage under the circumstances presented at bar produces a result which treats governmental entities the same as private individuals and places the injured party in the same position as though the tortfeasor, whether governmental or private, carried the same amount of insurance coverage as that available to the insured. See Dewberry v. Auto-Owners Insurance Co., 363 So.2d 1077 (Fla. 1978).

In Bovnton and the family immunity cases cited by

petitioner,[1] the immunity of the tortfeasors remains absolute and no judgment against them may be obtained.[2] On the other hand, a party injured by the negligent operation of a government vehicle, while limited by statute in the amount recoverable directly from the governmental agency, may nonetheless reduce his claim to judgment. Whether the judgment is collectible by claims bill or otherwise is immaterial. As long as the injured person may sue the tortfeasor and reduce his claim for damages to a money judgment, the tortfeasor's immunity defense claimed derivatively by the uninsured motorist insurance carrier is not absolute.

Private tortfeasors are answerable to judgments for the full amount of the plaintiff's damages. If the judgment becomes uncollectible due to insurance limits, insolvency or other reasons, the judgment creditor must resort to his uninsured motorist coverage as the alternative method of compensation. AFTL submits that no justification has been offered to treat governmental entities under similar circumstances differently from private individuals for uninsured motorist coverage purposes.

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[1]Gelaro v. State Farm Mutual Automobile Insurance Co., 502 So.2d 497 (Fla. 1st DCA 1987) (parental immunity); Simon v. Allstate Insurance Co., 496 So.2d 878 (Fla. 4th DCA 1986) (interspousal immunity).

[2]An injured spouse may maintain a cause of action against the deceased negligent spouse's estate but only up to the limits of the liability insurance coverage available, and damages in excess of the deceased spouse's insurance cannot be reduced to judgment. Sturiano v. Brooks, 523 So.2d 1126 (Fla. 1988). Similarly, a child may recover damages caused by the parent's negligence but only to the extent of the negligent parent's liability insurance coverage. Ard v. Ard, 414 So.2d 1066 (Fla. 1982).

The fact that the uninsured tortfeasor enjoys sovereign immunity has never been an impediment to recovery of uninsured motorist coverage in Florida. Before the enactment of the statutes waiving sovereign immunity, victims of the negligent operation of uninsured government vehicles were authorized to collect uninsured motorist benefits, and policy provisions excluding "government vehicles" from the definition of uninsured motor vehicle were declared invalid. Johns v. Libertv Mutual Fire Insurance Co., 337 So.2d 830 (Fla. 2d DCA 1976), cert. den., 348 So.2d 949 (Fla. 1977). Compare Gabriel v. Travelers Indemnity Co., 515 So.2d 1322 (Fla. 3d DCA 1987), rev. den., 525 So.2d 878 (Fla. 1988) (disagreeing with Johns to the extent it holds that a certificate of self-insurance is required to establish governmental financial responsibility).[3] The enactment of our current sovereign immunity waiver statute placed certain limits on recovery against governmental agencies and political subdivisions but "claimants remain free to seek legislative relief bills, as they did during days of complete sovereign immunity." Gerard v. Department of Transportation, 472 So.2d 1170, 1172 (Fla. 1985), quoting Getton v. Jacksonville Electric Authoritv, 399 So.2d 396, 397 (Fla. 1st DCA 1981). If complete sovereign immunity did not act as a bar to recovery of uninsured motorist coverage benefits, surely a limited waiver of sovereign immunity should not change that result.

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[3]The insurance policy issued by Michigan Millers to Reeves included an invalid governmental vehicle exclusion. See Petitioner's Appendix, tab 2, page 5.

Consumers often feel helpless in waging their seemingly never-ending battle with insurance companies to whom they regularly and faithfully pay their premiums but who repeatedly resist payment of claims based upon what the public perceives as mere technicalities. Consumer frustrations are heightened in the case of automobile liability insurance coverage which the state mandates that Florida motorists purchase. Uninsured motorist coverage, while not mandatory, frequently is carried by Florida motorists in recognition of the numerous uninsured and underinsured drivers traveling the public highways of this state.

Uninsured motorist coverage represents "the only meaningful protection available to Floridians who daily are subjected to misguided missiles on the highways of this state.. .." Ferrigno v. Progressive American Insurance Co., 426 So.2d 1218, 1219 (Fla. 4th DCA 1983). For this reason, the remedial uninsured motorist statute should be liberally construed to provide the broadest possible protection to Florida motorists. Salas v. Liberty Mutual Fire Insurance Co., 272 So.2d 1 (Fla. 1972). In interpreting the statute, courts should acknowledge that the uninsured motorist law was enacted for the benefit and protection of injured persons and not for the benefit of the insurance companies or motorists who inflict the damage. Brawn v. Progressive Mutual Insurance Co., 249 So.2d 429 (Fla. 1971). With these principles in mind, courts should remain vigilant to protect Floridians from insurance company attempts to limit the applicability of uninsured motorist coverage and to further whittle

away the benefits legislatively conferred upon victims of the negligence of uninsured motorists. Salas v. Liberty Mutual Fire Insurance Co., supra.

11.

THE COURT SHOULD RECEDE FROM SHELBY MUTUAL INSURANCE CO. V. SMITH, OR, IN THE ALTERNATIVE, DECLINE TO ADDRESS PETITIONER'S SECOND POINT.

Petitioner contends that the Sarasota County school bus whose negligent operation caused the accident in question failed to meet the statutory definition of "uninsured motor vehicle," arguing that the uninsured motorist coverage available to each respondent was less than the tortfeasor's liability coverage. See §627.727(3)(b), Fla.Stat. (1987). In Shelby Mutual Insurance Co. v. Smith, 556 So.2d 393 (Fla. 1990), the court held that the statutory definition of "uninsured motor vehicle," requiring that the insured's uninsured motorist coverage exceed the tortfeasor's liability coverage, was not altered by the 1984 "excess over" amendment to §627.727(1), eliminating the setoff of liability coverage against uninsured motorist coverage. See §627.727(1), Fla.Stat. (Supp. 1984). Recognizing that the court may consider subsequent legislation to determine the intent of a previously enacted statute, Palma Del Mar Condominium Association #5 of St. Petersburg, Inc. v. Commercial Laundries of West Florida, Inc., 16 F.L.W. S495 (Fla. August 15, 1991), AFTL mast respectfully urges the court to accept Justice Shaw's invitation to recede from Shelby Mutual in light of the 1989 legislative clarification of the 1984

amendments to the uninsured motorist statute.[4] See Prudential Property and Casualty Insurance Co. v. Kalesa, 573 So.2d 838 (Fla. 1991) (Shaw, J., dissenting).

AFTL adopts the respondents' argument on the merits of this point and notes that the district court properly compared on an aggregate basis the uninsured motorist coverage available to respondents with the total liability coverage they received from the school board's insurance carrier. In the initial declaratory

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[4]The 1989 legislature changed the statutory definition of "uninsured motor vehicle" to require simply that the damages (rather than the uninsured motorist coverage) sustained by the person legally entitled to recover exceed the bodily injury liability limits of the tortfeasor. Ch. 89-243, §1, Laws of Florida. The legislative history presents the following analysis:

> I. SUMMARY
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> The bill clarifies the definition of uninsured motor vehicle....
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> A. PRESENT SITUATION
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> ....
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> Presently, *Shelby Mutual* v. *Smith, 527* So.2d 830 (Fla. 4th DCA 1988), and *USF & G* v. *Woolard*, 523 So.2d 798 (Fla. 1st DCA 1988), conflict and the Shelby court cited some analyses which concluded that while the Legislature had intended to create excess coverage, the Legislature should amend s. 627.727(3)(b) to clear up an ambiguity in the law.
>
> ....
>
> B. EFFECT OF PROPOSED CHANGES
>
> The bill amends s. 627.727(3)(b), to clear up the definition of uninsured motor vehicle.

Prudential Property and Casualty Insurance Co. v. Kalesa, 573 So.2d 838, 839 (Fla. 1989), quoting Staff of Fla.H.R.Comm. on Ins., CS for HB 332 (1989) Staff Analysis 1-2 (May 2, 1989) (emphasis the court's).

judgment action filed by petitioner, respondents were treated collectively (Petitioner's Appendix, tab 6, ¶¶ 8-9), and the district court was thus justified in declining to make the comparison on an individual basis as argued by petitioner.

If the liability coverage should be compared to the uninsured motorist coverage on a "per person" basis, only the actual amount of the school board's liability coverage recovered by each respondent should be considered. Jones v. Travelers Indemnity Co, 368 So.2d 1289 (Fla. 1979). Using the "per person" analysis proposed by Michigan Millers, the school bus does not qualify as an "uninsured motor vehicle" because the uninsured motorist coverage available to respondents Foco, Bourke and Voss on a per person basis ($100,000) is less than the school board's per person liability limit ($200,000), while Reeves' UM coverage ($200,000) equals the per person limit of liability coverage. Recognizing, however, that multiple claims may exhaust limited liability coverage, resulting in some or all claimants receiving less than the per person limits of coverage, Jones requires that the comparison of liability coverage with uninsured motorist coverage be made utilizing the actual amount of liability coverage received. For example, if respondent Foco recovered only $75,000 of the school board's liability coverage, her UM coverage ($100,000) would exceed the liability coverage available to her ($75,000) satisfying the statutory definition of "uninsured motor vehicle."

The record below and before this court does not reflect the specific amount of each respondent's recovery from the school board's liability insurance carrier. Since four claims were filed by respondents against limited liability coverage ($325,000), the record suggests that some and perhaps all respondents received less than the available uninsured motorist coverage ($200,000 available to Reeves and $100,000 available to each of the other respondents) and thus satisfied the statutory definition of "uninsured motor vehicle."

An accurate and comprehensive record of the proceedings in the lower court is essential to fair and effective appellate review. Haist v. Scarp, 366 So.2d 402 (1978). A judgment cannot be reversed on the basis of facts not presented to the trial court and therefore not made a part of the record on appeal. Patterson v. Weathers, 476 So.2d 1294 (Fla. 5th DCA 1985). Since the relevant facts necessary to decide this issue are not included in the record on appeal, AFTL respectfully suggests that this court decline to address this point and approve the decision of the district court.

CONCLUSION

Uninsured motorist insurance carriers should not be entitled to assert a tortfeasor's substantive defense of sovereign immunity or other similar immunities when the immunity is not absolute and the claimants have a claim against the tortfeasor which can be reduced to judgment. The certified question should be answered in the negative and the decision of the district court approved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to John W. Weihmuller, Esquire, Bayport Plaza - Suite 1100, 6200 Courtney Campbell Causeway, Tampa, Florida 33607-1458; Lewis F. Collins, Jr., Esquire, Post Office Box 3979, Sarasota, Florida 34230 and to Peter S. Branning, Esquire, and Susan J. Silverman, Esquire, 1800 2nd Street, Suite 855, Sarasota, Florida 34236 by mail this 6th day of September, 1991.

Louis K. Rosenbloum

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