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IN THE SUPREME COURT OF FLORIDA

MICHIGAN MILLERS MUTUAL INSURANCE COMPANY,

Petitioner,

vs.

DAWN BOURRE, et al.,

Respondent.

CASE NO.: 78221

District Court of Appeal
Second District Nos: 90-01401
90-01409

RESPONDENT'S, MICHELLE FOCO'S, ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES

OTHER AUTHORITIES

INTRODUCTION

This brief is submitted on behalf of Respondent, MICHELLE FOCO. She will be referred to as FOCO or Respondent, except where the Respondents are referred to collectively as Respondents, where appropriate. The Petitioner will be referred to as either Petitioner or as MICHIGAN MILLERS. References to the documents contained in the Petitioner's Appendix will be as (P. App.) followed by a number. References to the documents contained in the Respondent's, FOCO'S, Appendix will be as (R. App.) followed by a number. References to the Brief of Petitioner will be as (BP.) followed by a number. References to the Record on Appeal as it appears before this court will be as (R.) followed by a number. Unless otherwise indicated, all emphasis has been supplied by counsel.

STATEMENT OF THE CASE

References to the Statement of the Case set forth in the Statement of the Case and Facts in Petitioner's Brief (BP. 2 - 4) are accurate and adopted by the Respondent, FOCO, herein, with the following additions:

The trial court's order granting Respondents' partial motion for summary judgment determined that there was uninsured motorist coverage. It reserved jurisdiction to determine the amount of coverage and entitlement to attorneys fees. (P. App. 14). Subsequent to this order, the parties agreed that if uninsured motorist coverage exists, the aggregate available amount is $400,000.00. Michigan Millers Mutual Insurance Company v. Bourke, et al., 16 F.L.W. D1529, 1530 (Fla. 2d DCA 1991), opinion filed June 7, 1991; (P. App. 1); (R. 62).

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SUMMARY OF ARGUMENT

The trial court and the Second District Court of Appeal correctly determined that the Respondents are "legally entitled to recover" uninsured motorist benefits. The Petitioner must not be permitted to avoid its obligation to pay benefits under its contract by asserting the defense of sovereign immunity. Sec. 768.28 waives the state's immunity for liability and simply puts a cap on the amount of damages recoverable from the sovereign to protect the public treasury. Allowing MICHIGAN MILLERS to benefit from the cap would have no positive effect on the public treasury.

The immunity sought to be asserted by MICHIGAN MILLERS as a defense to payment is very different than the absolute immunities discussed in Allstate Insurance Company V. Boynton, 486 So.2d 552 (Fla. 1986) (workers compensation immunity), Simon v. Allstate Insurance Company, 496 So.2d 878 (Fla. 4th DCA 1986) (interspousal immunity), and Gelaro v. State Farm Mutual Automobile Insurance Company, 502 So.2d 497 (Fla. 1st DCA 1987) (parent - child immunity). In those cases, the claimants did not have a cause of action against the tortfeasor. The policy reasons for the denial of recovery in those cases (family harmony) are not present here. In this case, the Respondents did have a cause of action that could have been reduced to judgment in a court of law. The opportunity to seek a claims bill further distinguishes this case from those involving different immunities. Other jurisdictions have reached the same result as the courts in this case when interpreting sovereign immunity statutes and uninsured motorist coverage.

The decisions of the trial and appellate courts fully comport with the public policy in Florida to favor full uninsured motorist coverage. The uninsured motorist carrier should not be permitted to hide behind sovereign immunity where the School Board, a governmental entity, was undisputedly underinsured and the insureds contracted for uninsured motorist coverage. The legislative purpose in enacting sovereign immunity statutes is to protect the public from "profligate encroachments on the public treasury." Berek v. Metropolitan Dade County, 396 So.2d 756 (Fla. 3d DCA 1981). MICHIGAN MILLERS is a private entity. Any liability it incurs for the payment of benefits to its insureds pursuant to contract has no effect on the public treasury. Therefore it is not entitled to benefit from sovereign immunity protections. Jaar v. University of Miami, 474 So.2d 239 (FLa. 3d DCA 1985).

The Respondents' REEVES, contracted for and paid premiums for valuable coverage to insure against the risk of being hit by an underinsured vehicle. In so doing, they shifted this risk to the insurer. The contract should be construed to effect the intentions of the parties and the purpose of the uninsured motorist act, which is to protect persons injured by a motorist who cannot make whole the insured. The statute and the policy providing such coverage is to be liberally construedto provide protection to the Respondents.

The Petitioner has failed to demonstrate any error in the trial and appellate courts in their finding that the school bus was an uninsured motor vehicle. The amount of coverage available under the MICHIGAN MILLERS policy is $400,000. The amount of liability

coverage available from the School Board was $325,000. Even if the court uses a "per person" analysis of the available coverages as opposed to looking at the aggregate amounts, the amount of liability insurance actually available to each Respondent must be used to compare to the available uninsured motorist coverage. Jones v. Travelers Indemnity Company of Rhode Island, 368 So.2d 1289 (Fla. 1979). There is no evidence in the record even suggesting that any Respondent received an amount equal to the available per person uninsured motorist limit.

In conclusion, both lower courts were correct in finding that the Respondents were legally entitled to recover uninsured motorist benefits. The school bus was properly found to have been an "uninsured motor vehicle" within the meaning of Sec. 627.727 (3)(b).

POINTS ON APPEAL

The Table of Contents in Petitioner's Brief lists the issues it addresses as follows:

I. RESPONDENTS ARE NOT ENTITLED TO UNINSURED MOTORIST BENEFITS BECAUSE FLORIDA STATUTE SECTION *627.727* AND PETITIONER'S UNINSURED MOTORIST POLICY LIMIT RESPONDNETS' RECOVERY TO DAMAGES THE RESPONDENTS ARE LEGALLY ENTITLED TO RECOVER FROM THE UNINSURED MOTORIST, WHO HAS ALREADY PAID ITS LIMIT OF LIABILITY PURSUANT TO THE SOVEREIGN IMMUNITY DOCTRINE

A. Allstate Ins. Co. V. Boynton supports Petitioner's right to assert the tortfeasor's substantive defense of sovereign immunity

B. The opportunity to seek a claims bill does not distinguish the sovereign immunity doctrine from other substantive immunities

C. The opportunity to seek a claims bill does not render Respondents "legally entitled to recover" from an uninsured tortfeasor

D. The legislative intent expressed in Fla. Stat. Sec. 627.727 does not expand uninsured motorist coverage beyond the coverage contractually afforded by the insurance policy

E. Florida recognizes the right of an uninsured motorist insurer to assert other substantive immunities of tortfeasors

F. Other jurisdictions recognize the right of an uninsured motorist carrier to assert the tortfeasor's substantive defense of sovereign immunity

II. THE SCHOOL BOARD'S MOTOR VEHICLE IS NOT AN UNINSURED MOTOR VEHICLE PURSUANT TO FLORIDA STATUTE SECTION 627.727 BECAUSE THE PER PERSON LIMIT OF COVERAGE PROVIDED BY THE TORTFEASOR'S INSURANCE POLICY DOES NOT EXCEED THE APPLICABLE PER PERSON COVERAGE PROVIDED BY THE UNINSURED MOTORIST INSURANCE POLICY

(BP. i - ii).

The Respondent restates the main issue in Point I as follows, as it more closely tracks the language of the question certified below:

POINT I

DID THE TRIAL COURT AND APPELLATE COURT CORRECTLY HOLD THAT AN UNINSURED MOTORIST CARRIER CANNOT ASSERT A TORTFEASOR'S SOVEREIGN IMMUNITY DEFENSE WHEN THE IMMUNITY IS NOT ABSOLUTE AND THE CLAIMANTS HAVE A CAUSE OF ACTION AGAINST THE TORTFEASOR WHICH CAN BE REDUCED TO JUDGMENT?

The Respondent, FOCO, feels that the arguments contained in Points IA, B, E, and F of Petitioner's Brief are so intertwined that she prefers to respond to them in one point, and restates the issue as follows:

A.

DID THE LOWER COURTS CORRECTLY DETERMINE THAT ALLSTATE INSURANCE COMPANY v. BOYNTON AND THE OTHER CASES INVOLVING ABSOLUTE IMMUNITIES ARE DISTINGUISHABLE AND NOT APPLICABLE TO THE FACTS OF THIS CASE?

The Respondent, FOCO, will next address the arguments contained in Point IC of Petitioner's Brief, but restates the issue as follows:

B.

DID THE LOWER COURTS CORRECTLY DETERMINE THAT THE RESPONDENTS ARE "LEGALLY ENTITLED TO RECOVER" THEIR DAMAGES FROM THE TORTFEASOR, AND THEREFORE ARE ENTITLED TO UNINSURED MOTORIST COVERAGE FROM MICHIGAN MILLERS FOR ANY DEFICIENCY?

The arguments contained in Point ID of Petitioner's Brief are based upon what MICHIGAN MILLERS perceives are the basic policies behind the waiver of sovereign immunity statute and the uninsured motorist statute. The Respondent, FOCO, will respond to these arguments in Point IC, stated as follows:

C.

DO THE HOLDINGS OF THE TRIAL AND APPELLATE COURTS COMPORT WITH THE LEGISLATIVE PURPOSES BEHIND THE ENACTMENTS OF THE WAIVER OF SOVEREIGN IMMUNITY STATUTE AND THE UNINSURED MOTORIST STATUTE?

The **Respondent restates the issue contained in Point** II as **follows:**

POINT II

DID THE TRIAL COURT AND **APPELLATE** COURT CORRECTLY HOLD THAT **THE** SCHOOL BOARD'S VEHICLE WAS AN "UNINSURED MOTOR VEHICLE" WITHIN THE MEANING OF SECTION 627.727(3)(b), FLA. STAT., WHEN THE AGGREGATE AMOUNT OF MICHIGAN **MILLERS'** AVAILABLE UNINSURED MOTORIST COVERAGE IS $400,000 AND THE SCHOOL BOARD'S AVAILABLE LIABILITY COVERAGE **WAS** $325,000?

POINT I

ARGUMENT

THE TRIAL AND APPELLATE COURTS CORRECTLY HELD THAT AN UNINSURED MOTORIST CARRIER CANNOT ASSERT A TORTFEASOR'S SOVEREIGN IMMUNITY DEFENSE WHEN THE IMMUNITY IS NOT ABSOLUTE AND THE CLAIMANTS HAVE A CAUSE OF ACTION AGAINST THE TORTFEASOR WHICH CAN BE REDUCED TO JUDGMENT.

In determining whether the uninsured motorist carrier can avoid payment of uninsured motorist benefits by asserting a sovereign immunity defense, it is important to keep in mind several general principles of insurance and contract law.

In construing language of an insurance policy, the court must apply the construction most favorable to the insured. Where two interpretations may fairly be given to the language of an insurance policy, the one providing greater indemnity will be given. O'Dwyer v. Manchester Insurance Company, 303 So.2d 347 (Fla. 3d DCA 1974).

Likewise, it is important to remember, in determining whether there is coverage, that uninsured motorist coverage is a benefit that the Respondent, REEVES, consciously elected to protect himself and others for the injuries suffered at the hands of an uninsured or underinsured negligent tortfeasor. In so electing, he paid a premium for the coverage. In so electing, he also shifted the risk of loss caused by an uninsured motorist to the insurer. There is no basis for allowing MICHIGAN MILLERS to avoid the oligation of its contract after the insured duly paid the premiums.

"Insurance" requires two elements: 1) a contract; 2) whereby one undertakes to indemnify another upon determinable

contingencies. Sec. 624.02, Fla. Stat.; Hillsborough County Hospital and Welfare Board v, Taylor, 546 So.2d 1055 (Fla. 1989). A necessary element of insurance is the distribution of risk. It has been defined as contractual security against possible anticipated loss with the shifting of risk from one party to another. Southeast Title and Insurance Company v. Collins, 226 So.2d 247 (Fla. 4th DCA 1969). A private concern, MICHIGAN MILLERS, was paid a premium to assume certain risks. It should not be allowed to shift the risk back to the insureds.

Keeping the above principles in mind, the Respondent, FOCO, will now respond to the specific arguments addressed by MICHIGAN MILLERS Brief.

A.

THE LOWER COURTS CORRECTLY DETERMINED THAT ALLSTATE v. BOYNTON AND THE OTHER CASES INVOLVING ABSOLUTE IMMUNITIES ARE DISTINGUISHABLE AND NOT APPLICABLE TO THE FACTS OF THIS CASE.

MICHIGAN MILLERS argues that this Court's decision in Allstate Insurance Company v. Bovnton, 486 So.2d 552 (Fla. 1986) unequivocally supports its position that it may assert the tortfeasor's defense of sovereign immunity. The Boynton case does not apply to the facts of the case presently before this Court.

The Second District Court of Appeals decision more than adequately addresses this issue and distinguishes the Bovnton case. MICHIGAN MILLERS argument basically states that Bovnton can be used to support the assertion of any substantive defense regardless of which one it is. The Second District reasoned that you have to

look at the type of substantive defense involved. In Boynton, the absolute immunity of workers' compensation law was involved. The court in that case properly found that the public policy of the workers compensation law was achieved, which is to protect the worker for injuries sustained from a co-worker driving an uninsured vehicle. Clearly, the law provided a source of indemnification for the worker under these circumstances, that source being the workers compensation law. This source of indemnification bears a rational relationship to the needs of the injured worker, as the amount available is tied to factors such as the injured party's medical expenses and wages.

Unlike the Bovnton situation, the injured parties in this case had no other source of indemnification which is tied in any way to the injured parties needs. The state's sovereign immunity cap on damages is applied across the board with no relationship to the needs of the injured parties. The state's sovereign immunity is not absolute, as is the workers compensation immunity. In addition, as in Boynton, the court considered the public policy of the uninsured motorist statute, which is to protect persons who are injured or damaged by other motorists who in turn are not insured and cannot make whole the injured party. The statute is designed for protection of injured persons, not for the benefit of insurance companies or motorists who cause damage to others. Michigan Millers Mutual Insurance Company v. Bourke, 16 F.L.W. D1529, 1531 (Fla. 2d DCA 1991).

Although a source of indemnification is limited in the

sovereign immunity situation, this limitation is not intended to prevent a claim against the sovereign. The statute specifically anticipates claims against the sovereign, and a judgment is available against it. The limited immunity has a policy of merely limiting the impact of the claim upon the citizens of the State. This policy was not intended to prevent citizens of the state to insure themselves through private insurance companies for those portions of valid claims that may not exceed the damage cap of sovereign immunity.

In a footnote in its brief, MICHIGAN MILLERS suggests that the lower court's decision in this case conflicts with Boynton. (BP. 9). The District Court was correct in not certifying a conflict in this case. "Conflict" has been said to exist when "two decisions are wholly irreconcilable", or are so out of harmony as to generate confusion and instability among the precedents. See, e.g., Kyle v. Kyle, 139 So.2d 885 (Fla. 1962). The conflict must be expressed in the opinion and must directly conflict with other Florida appellate decisions. Jenkins v. State, 385 So.2d 1356 (Fla. 1980). If the two cases are distinguishable in controlling factual elements or if the points of law settled by the two cases are not the same, then no conflict can arise. Kyle v. Kyle, supra.

This case arose from materially different facts than did Boynton. The cases involve points of law based upon two different statutes covering two distinct and different immunities. Clearly there is no conflict.

Unlike in Boynton, which involved the exclusive remedy of the

workers compensation law, this case involves a tortfeasor who was subject to a lawsuit. The claim against the tortfeasor in this case could have been reduced to judgment in a court of law. Clearly, the School Board was not immune from suit or liability.

Both Boynton and the appellate decision in this case consider the policy reasons behind the respective immunities. The purpose of the workers compensation act was to reduce litigation in the workplace. The decision clearly recognizes and supports that policy. In the present case, no such policy reason exists to allow the limitied sovereign immunity defense to avoid the payment of an uninsured motorist claim by a private insurance carrier. The two cases are in harmony.

MICHIGAN MILLERS argues that if the Respondents' position is adopted, it would jeopardize the insurer's subrogation rights. (BP. 13). This argument is totally without merit. In the context of this lawsuit, subrogation is not a right of value. Before the claimants settle a dispute with a tortfeasor in an uninsured motorist situation, they inform the uninsured motorist carrier of the potential settlement. They request the permission of the uninsured motorist carrier to accept the settlement. If and when the uninsured motorist carrier allows the claimants to settle, it waives its right of subrogation. In this case, that is precisely what occurred. The Record reveals that MICHIGAN MILLERS had no objection to the Respondents' settlement of their claims against the School Board. (R. 5 of Bourke's appendix p. 18-20). MICHIGAN MILLERS specifically waived their rights to subrogate when they

allowed the Respondents to recover the School Board's policy limits and release the School Board from futher liability. Thus, the right of subrogation in circumstances such as these, has no practical importance.

The Second District Court of Appeal in this case was not the first Florida appellate court to look at the important distinction between absolute immunities and qualified immunities. The Third District Court of Appeal was confronted with this distinction in a case requiring interpretation of both the workers compensation statute and the uninsured motorist statute. In Stack v. State Farm Mutual Automobile Insurance Company, 507 So.2d 617 (Fla. 3d DCA 1987), a work-related injury occurred. However, there was an allegation of "gross negligence" against a fellow employee. Stack, a police officer, was a passenger in a police vehicle which was being driven by a fellow employee while they were in the course and scope of their employment. It was alleged that the driver of the police vehicle was grossly negligent. Stack asserted a claim for uninsured motorist benefits against his carrier, State Farm.

The Third DCA distinguished Boynton, by discussing the differences between absolute and qualified immunities. Where a claim comes within the provisions of the workers' compensation act, the liability imposed by that act is the injured employee's sole remedy. However, when a fellow employee is involved, the immunity is only qualified and not absolute, since it is not available to an employee who is grossly negligent. Therefore, the court found that Stack was legally entitled to recover against his uninsured

motorist policy. The court rejected the position of State Farm that there was no coverage, stating that it was "...beyond the court's purview to insulate the insurer from the unusual risk as a matter of public policy." Stack, supra, 507 So.2d 617, 619 (Fla. 3d DCA 1987).

The Stack case is totally consistent with the Second DCA decision in the subject case. Since the tortfeasor is not absolutely immune in this case by virtue of the waiver of sovereign immunity, Boynton does not apply to preclude uninsured motorist coverage.

A. Widiss, a legal scholar and commentator on uninsured motorist law, is quoted extensively both in the Boynton decision and in the Petitioner's brief. See, e.g., Boynton, 486 So.2d at 556, 557, 558, 559; (BP. 11, 12). While his articles may not be of precedential value to this Court, his expertise in the area of uninsured motorist law certainly makes them persuasive. In Boynton, Widiss is quoted as saying:

> "To the extent that there is a strong interest in protecting the insurance company's right of subrogation following the payment of a claim, there is a persuasive reason why the existence of an immunity from liability should mean that the insurer will not be liable under the policy. On the other hand, to the extent that the objective of providing indemnification is a stronger policy in this context, the technicality of whether the tortfeasor is immune from litigation assumes a much smaller degree of importance...."

Boynton, supra, 486 So.2d at 558.

Widiss wrote another treatise, subsequent to the one quoted

above, in 1983, entitled ''Uninsured Motorist Coverage: Observations on Litigating over When a Claimant is 'Legally Entitled to Recover' ", *68* Iowa L. Rev. 397 (1983). (R. **App. 2**). In it, he states as follows:

> "...There are several reasons why the existence of tort immunity or **other** limitation on the insured's rights against the tortfeasor should not preclude claims under uninsured motorist **coverage** on the ground that the insured would not be legally entitled to recover from the tortfeasor. First, as Dean Prosser observed, 'such immunity does not mean that conduct which would amount to a tort on the part of other defendants is not still equally tortious in character, but merely that for protection of the particular defendant, or of interests which he represents, he is given absolution from liability.' In other words, the immunity absolves only the defendant from liability. **The insurance coverage** has no relation to the tortfeasor, and, therefore, the tort immunity should have no effect on whether the insurance company indemnifies the insured.
>
> "Second, it is inappropriate to resolve this issue as a problem in semantics: that is, in terms of whether the claimant is 'legally entitled.' It is preferable to decide whether there is a persuasive reason why the existence of an immunity from tort liability for the uninsured motorist should mean that the insurer will not be liable under the uninsured motorist policy. The problem should be resolved by balancing the public policy interests. The uninsured motorist insurance statutes, which require the coverage either to be offered with or included in all motor vehicle or automobile liability insurance policies, reflect a strong public policy in favor of providing indemnification for persons who are injured by uninsured motorists. Whether the tortfeasor is immune from

> litigation, therefore, is usually a matter of little or no sisnificance in regard to the obligation of the insurer to provide indemnification to the injured Person. The important fact is that no compensation is available from the tortfeasor....
>
> "Third, the value of the various tort immunities is currently undergoing re-examination by the courts. For example, the charitable immunity is gradually being abolished by judicial decisions. The beginnings of similar trends in regard to other tort immunities also can be discerned. It seems evident that there is increasing concern for providing compensation to injured persons. Determining the rights of an insured under the uninsured motorist coverge in terms of whether the tortfeasor was negligent, without regard to a tort immunity, is consistent with this trend."

Widiss, Uninsured Motorist Coverage: Observations on Litigating over When a Claimant Is "Legally Entitled to Recover" (1983), 68 Iowa L. Rev. 397, 426 - 427; emphasis added; citations omitted.

MICHIGAN MILLERS, in Point IE of its Brief, discusses other immunities, including intra-family immunity and inter-spousal immunity, which uninsured motorist carriers have been allowed to assert. (BP. 25 - 26). Suffice it to say that the Second DCA opinion below clearly and correctly found that these cases, as in Boynton, also involve absolute immunities. 16 F.L.W. D1529, 1530 (Fla. 2d DCA 1991).

Specifically, in Simon v. Allstate Insurance Company, 496 So.2d 878 (Fla. 4th DCA 1986), uninsured motorist benefits were denied when a wife tried to collect under the family's policy for injuries that she sustained when her husband negligently caused her

damage. The court stated that since the wife couldn't sue her husband, the wife could not obtain benefits by alleging that he was uninsured because of the interspousal immunity doctrine. This case involved an absolute immunity, and the result is entirely consistent with the decisions in Boynton and the Second DCA decision in this case.

Likewise, Gelaro v. State Farm Mutual Automobile Insurance Company, 502 So.2d **497 (Fla.** 1st DCA 1987), involved a child who sustained injuries as a result of the mother's negligence. The child attemptedto get uninsured motorist benefits, but wasn't able to because of the intrafamily immunity doctrine. This case also involved an absolute immunity, and the result is also consistent with Boynton and the Second DCA decision in this case.

The results in the Simon and Gelaro cases comport with the policy reasons behind the family immunity doctrines which are to prevent litigation between family members and thereby preserve family harmony and unity.

In Point IF of its Brief, MICHIGAN MILLERS seeks to bolster its position by arguingthatcases in other jurisdictions recognize the right of an uninsured motorist carrier to **assert** a sovereign immunity defense. A close review of these cases reveal that they are distinguishable in that they involve different statutes affording different degrees of immunity. Furthermore, the Respondent's research reveals several cases which support the decisions of the lower courts herein.

MICHIGAN MILLERS first cites to the case of Sayan v. United

Services Automobile Association, 716 P.2d 895 (Wash. App. 1986). (BP. 26 - 27). This case interpreted a federal law which precluded recovery by a member of the armed forces who suffers injuries in the course of activity incident to his military service. The law granted an absolute immunity from suit. Thus, even if the negligent driver in that case had insurance, the Plaintiff would have been unable to recover it because of the absolute immunity. This case is entirely consistent with the opinions below and with Boynton.

MICHIGAN MILLERS next cites the case of York v. State Farm Fire & Casualty Company, 414 N.E.2d 423 (Ohio 1980). Although on its face, this case may appear to support the Petitioner's position, a close review of it reveals that it, too, is interpreting a statute which provides an absolute immunity from suit. The Ohio statute involved in that case provided for nonliability of firemen for negligence if "engaged in duty at a fire, or while proceeding toward a place where a fire is in progress or is believed to be in progress, or in answering any other emergency alarm." Sec. 701.02, 701.02(B) R.C.; (R. App. 1). Just as in Savan, supra, even if the negligent fireman had insurance, the Plaintiff couldn't recover it because the statute absolutely absolves him from negligence if he is engaged in exercising his duties as a fireman. There was a total lack of liability in York due to immunity, unlike the present situation where the School Board's liability is uncontested. Another distinction in the Ohio law is that there is no provision in their

law for a claims bill. (R. App. 1).

MICHIGAN MILLERS fails to inform the court that the Ohio courts have distinguished York, supra, in other situations involving immunities, and have come up with the opposite result. For example, in Sumwalt v. Allstate Insurance Company, 466 N.E.2d 544 (Ohio 1984), an uninsured motorist claim was allowed to proceed even though the tortfeasor had a child-parent immunity. The court found that the immunity did not affect the insured's right to recover uninsured motorists benefits from her insurer. Likewise, in Karam v. Allstate Insurance Company, 500 N.E.2d 358 (Ohio App. 1985), the court found that a right to recover under the uninsured motorist provision of an automobile liability policy is not affected by the existence of parent-child immunity defense, which is personal to the tortfeasor and cannot be raised by the insurer.

MICHIGAN MILLERS recognizes that the Supreme Court of Oklahoma has resolved the issue of whether a plaintiff is entitled to uninsured motorist coverage when the tortfeasor has a sovereign immunity defense in favor of the Respondents' position. (BP. 28 - 29). It attempts to distinguish that case by arguing that the way "legally entitled to recover" is construed by the Oklahoma court is different than the way that term is construed by the Florida Supreme Court in Boynton. Therefore, it concludes, the Oklahoma case is not persuasive in the instant case. The Respondent, FOCO, strongly disagrees with this interpretation for the following reasons.

The Oklahoma case referred to is Karlson v. City of Oklahoma

City, 711 P.2d 72 (Okla. 1985). It is factually on point. In Karlson, the Plaintiffs sued the City of Oklahoma City for damages for injuries and wrongful death arising out of an automobile accident. The tortfeasor was a city police vehicle. Like Florida, Oklahoma has a statute limiting the liability of governmental tortfeasors. The Oklahoma statute waived sovereign immunity of the city for up to $50,000 for any claimant or up to $300,000 for any number of claims arising out of a single occurrence. Like the subject case, the limits available from the tortfeasor were insufficient to compensate the Plaintiffs for all their losses. The uninsured motorist carrier was brought into the case and, like MICHIGAN MILLERS, argued that the Plaintiffs were not "legally entitled to recover" damages against the city in excess of the maximum amount of the City's liability under the Tort Claims Act, and therefore, could not recover under the policy. In holding that the insured may recover from his insurer, the Supreme Court of Oklahoma stated:

> "When the insured and Allstate entered into their contract, they contemplated a situation where Allstate might be required to pay for injuries caused by some tort-feasor where that tortfeasor was not able to make full compensation for those injuries. Whether the tortfeasor's inability to make full compensation results from lack of sufficient insurance, insolvency, or for other reason, is irrelevant.
>
> "The intention of the parties at the time of their contracting was that Allstate, not its insured, would assume the risk that the insured might suffer a loss for which a

> tortfeasor could not make compensation. Our holding here merely gives effect to that intent.
>
> "In summary, we hold that in a situation where the liability of a tortfeasor is limited by the Political Subdivisions Tort Claims Act, to an amount which will not compensate an insured for all his proven losses suffered in an automobile accident, that insured may recover from his insurer through the uninsured/underinsured motorist provisions of his automobile liability insurance, according to the terms thereof."

Id. at 75.

The Karlson case is the case most similar, both factually and legally, to the case at bar. It involves the same type of sovereign immunity statute, imposing a cap on damages recoverable from the sovereign. It also involves an uninsured motorist carrier relying upon the same policy language, i.e. "legally entitled to recover". It involves a situation where the recovery from the city was insufficient to compensate the injured parties for their losses. There is virtually no factual distinction between the two cases.

The Oklahoma court, and the Florida courts in this case, relied upon the purpose of the uninsured/underinsured motorist provisions of the policy, which is to indemnify the insured party should he be unable to recover fully from the motorist causing the injuries. Both states also rested their decisions on the basic principles of contract law. All contracts should be construed so as to effect the intentions of the parties. Both states considered the fact that the insurer assumed a risk that the insured might

suffer a loss for which a tortfeasor could not make compensation, for whatever reason. Florida and Oklahoma have both given effect to that intent. Both states recognize that when provisions in policies of insurance are capable of being construed in two ways, that interpretation should be placed on such provisions which is most favorable to the insured.

Other states have also reached the same conclusion as Florida and Oklahoma in applying statutes which limit damages. See, e.g., State Farm Mutual Automobile Insurance Company v. Estate of Braun, 793 P.2d 253 (Mont. 1990), where the Supreme Court of Montana refused to allow the uninsured motorist carrier to assert Canada's wrongful death damages limitation to avoid paying benefits, and State Farm Mutual Automobile Insurance Company v. Baldwin, 470 So.2d 1230 (Ala. 1985), answering a question certified by the Eleventh Circuit Court of Appeals in State Farm Mutual Automobile Insurance Company v. Baldwin, 764 F.2d 773 (11th Cir. 1985), where the Supreme Court of Alabama refused to allow the uninsured motorist carrier to assert governmental immunity to avoid paying benefits.

MICHIGAN MILLERS argues that the opportunity to seek a claims bill does not distinguish sovereign immunity from other substantive immunities. The basis for this argument is that "sovereign immunity is immunity from liability itself." This assertion is patently untrue. The School Board was not immune from liability for the negligence of its employee. Claims against the School Board for negligence of a school bus driver involve operational

level, not planning level, functions. Brantly v. Dade County School Board, 493 So.2d 471 (Fla. 3d DCA 1986). The statute itself, by its terms waives immunity for liability. Therefore, a right of recovery exists; it is just limited to an amount less than the injuries suffered in this case, This is no different than a situation involving a tortfeasor with a liability policy affording coverage of $100,000 per person and $200,000 per accident.

Workers compensation law, intra-family immunities and the like do not provide for a claims bill as a source of redress. This is another factor to distinguish the sovereign immunity statute from the other immunities addressed in Petitioner's Brief. Not only can the claimants bring an action against the tortfeasor and reduce their damages to judgment, they can also report any deficiency to the state legislature and may be paid by further act of the legislature. The opportunity for a claims bill is just another reason why the immunity is not absolute.

The lower courts correctly interpreted the foregoing citations and statutes so as to give effect to the intention of the parties and to prevent a windfall to the insurer.

B.

THE LOWER COURTS CORRECTLY DETERMINED THAT THE RESPONDENTS ARE "LEGALLY ENTITLED TO RECOVER" THEIR DAMAGES FROM THE TORT-FEASOR AND THEREFORE ARE ENTITLED TO UNINSURED MOTORIST COVERAGE FROM MICHIGAN MILLERS FOR ANY DEFICIENCY.

Florida law has defined "legally entitled to recover" as meaning that an insured must have a claim against a tortfeasor

which could be reduced to judgment in a court of law. Newton v. Auto-Owners Insurance Company, 560 So.2d 1310 (Fla. 1st DCA 1990). There is no argument in this case that the Respondents had the ability to secure a judgment against the tortfeasor in a court of law.

The policy language at issue in this case is the same as in the Newton case, and states unequivocally that the respective insurer will pay damages for bodily injury sustained by its insured in an accident involving an uninsured motor vehicle, when the insured is "legally entitled to recover" from the owner or operator of the uninsured motor vehicle.

In Newton, it was undisputed that the plaintiffs sustained bodily injuries in an accident with an uninsured motorist. It was also undisputed that they had a claim for damages against the uninsured tortfeasor which could be reduced to judgment in a court of law. The uninsured motorist carrier defended the claim on the ground that the claimants hadn't sustained a permanent injury and failed to meet the threshold requirements of Sec. 627.737(2) and therefore could not sustain a claim under the uninsured motorist coverage of the policy. The court viewed the critical question in the case as follows:

> "... the critical question in this case is whether the insurance carriers should be bound by the language of their contracts with the insureds, or whether they should be afforded the exemption from tort liability available under the provisions of sections 627.727(7) and 627.737(2)."

Newton, supra, 560 So.2d 1310, 1311 (Fla. 1st DCA 1990).

In holding that the claimants were "legally entitled to recover", the court opted to hold the insurer to the terms of the agreement, recognizing that the terms of a contract should be construed strictly against the party drafting the agreement, and that policy language should be construed liberally in favor of the insured, and stricly against the insurer so as to effect the dominant purpose of payment.

MICHIGAN MILLERS argues, in Point IC of its Brief, that the right to seek a claims bill does not constitute legal entitlement to recovery because it is speculative. This argument misses the mark. A statutory immunity might be relevant to the issue of the right to enforce payment or collect payment. However, it does not affect the legal entitlement to recovery. The fact that the sovereign immunity statute provides for a right to seek redress through a claims bill does not effect legal entitlement based upon liability of the state. Under *768.28*, liability of the sovereign is to the same extent as liability of another person. The only distinction is in the liability of the sovereign for payment. A judgment might exist for more than $200,000, but the state will not have to pay more than that. MICHIGAN MILLERS confuses the concepts of immunity vs. cap on damages. It fails to recognize that the sovereign has liability to the same extent as any other person.

There is no impairment of contract as argued by MICHIGAN MILLERS, in that it was or should have been aware of the Florida

laws in effect at the time of the issuance of the policy. Thus, it was charged with the knowledge that if an insured was injured by a governmental tortfeasor acting on an operational level, a statutory authorization existed for the insured to request additional monies from the legislature, if the injuries were severe. The opportunity to ask for a claims bill was the law in Florida at the time the contract was entered into. As stated by MICHIGAN MILLERS, upon the execution of the insurance contract, the statutes in place at that time are thereby incorporated. (BP. 20). The right to request a claims bill was part of the statutory scheme at the time of contracting, and therefore was or should have been taken into consideration by MICHIGAN MILLERS.

MICHIGAN MILLERS is required to pay damages for the injuries sustained by the Respondents, as they are "legally entitled to recover" the benefits. The claim against the School Board could have been reduced to judgment in a court of law.

C.

THE HOLDINGS OF THE TRIAL AND APPELLATE COURTS COMPORT WITH THE LEGISLATIVE PURPOSES BEHIND THE ENACTMENTS OF THE WAIVER OF SOVEREIGN IMMUNITY STATUTE AND THE UNINSURED MOTORIST STATUTE.

MICHIGAN MILLERS argues that the purpose of uninsured motorist coverage is to provide coverage when the insured is legally entitled to recover from the tortfeasor and provides a source of indemnification to the insured when there is no substantive defense available to the tortfeasor. (BP. 23 - 24). MICHIGAN MILLERS also argues that the waiver of sovereign immunity statute is to provide

indemnification to persons injured to the "extent of the liability provided by statute." (BP. 22).

This argument either overlooks or ignores the true purpose and policy behind the enactment of Sec. 768.28, Fla. Stat. The purpose of the statute waiving sovereign immunity was to waive that immunity which prevented recovery for breaches of existing common law duties of care. Trianon Park Condominium Association, Inc. v. City of Hialeah, 468 So.2d 912 (Fla. 1985). The statute was designed to enhance recovery where previously there was none. Prohibition against recovery for governmental negligence was harsh and resulted in considerable injustice.

This purpose must be viewed together with the imposition of a dollar cap on the recovery. By enacting the cap, the Legislature recognized that to require local governments to protect themselves against full liability could impose too heavy a financial burden on local taxpayers. Jetton v. Jacksonville Electric Authority, 399 So.2d 396 (Fla. 1st DCA 1981). The provision limiting tort claim recovery is in accordance with the policy of protecting the public against profligate encroachments on taxpayers' monies. Berek V. Metropolitan Dade County, 396 So.2d 756 (Fla. 3d DCA 1981).

> "The enactment in 1973 of Section 768.28(5) was a legislative declaration that the countervailing public policy of allowing citizens injured by the tortious action or inaction of the state to sue for the recovery of damages outweighed the state's interest in not being discommoded by litigation. But at the same time the Legislature permitted the state to be sued, it chose to continue to protect against profligate encroachments on the public treasury by limiting

> the waiver of sovereign immunity to a specified dollar amount, ***$50,000.***"

Berek, supra, 396 So.2d 756, ***758*** (Fla. 3d DCA 1981).

The limited waiver of sovereign immunity exists for the benefit of the people of Florida. It is designed to keep the public treasury intact for the benefit of the population at the expense of partially denying payment of meritorious claims, which could endanger the ability of the state to keep its finances intact for the benefit of the public as a whole.

Keeping in mind the legislative purpose of protecting the public from profligate encroachments on **the** public treasury, it is clear that MICHIGAN MILLERS should not be able to benefit from the sovereign immunity protections afforded governmental entities. MICHIGAN MILLERS is a private entity engaged in the business of providing insurance policies. Any liability it incurs for the payment of benefits to its insureds has absolutely no effect on the public treasury. Moreover, that liability is offset by the premiums collected.

This case is analagous to the case of Jaar v. University of Miami, **474** So.2d 239 (Fla. **3d** DCA 1989). This was a complex medical malpractice action involving negligence of several governmental agencies, including a county hospital and its agents. The University of Miami was also a defendant. A jury verdict was obtained for $2,000,000. The state agency involved soughtto limit its liability to the amount contained in the sovereign immunity statute. **The** University of Miami, a private educational institution, also sought to limit its liability because its

agents/physicians had a relationship with the sovereign hospital. In refusing to afford the University the protection of the sovereign immunity statute, the court recognized that the legislative purpose in enacting the sovereign immunity statutes is to protect the public from "profligate encroachments on the public treasury." Jaar, supra, 474 So.2d at 245. Any liability the University incurred due to the negligence of its employees has no effect on the public treasury. Thus, the University was not entitled to benefit from the sovereign immunity protections.

Clearly, the purposes behind the legislative enactment of 768.28 would not be fulfilled if MICHIGAN MILLERS is allowed to hide behind the protection afforded to governmental agencies.

Likewise, the purpose of uninsured motorist coverage is to compensate the insured for a deficiency in the tortfeasor's personal liability insurance coverage. Dewberry v. Auto-Owners Insurance Company, 363 So.2d 1077 (Fla. 1978). The public policy underlying the uninsured motorist statute is to provide uniform and specific insurance benefits to members of the public to cover damages for bodily injuries caused by the negligence of uninsured or underinsured motorists. Ellsworth v. Insurance Company of North America, 508 So.2d 395 (Fla. 1st DCA 1987).

The uninsured motorist statute is designed to protect persons who are injured by a motorist who cannot make whole the insured, as opposed to protecting the insurance carrier or the uninsured or underinsured motorist. State Farm Mutual Automobile Insurance Comsanv v. Diem, 358 So.2d 39 (Fla. 3d DCA 1978). To accomplish

its purpose, the uninsured motorist statute must be broadly and liberally construed to afford the public the same protection it would have had if the uninsured motorist had been insured to the extent as the insured himself. Brown v. Progressive Mutual Insurance Company, 249 So.2d 429 (Fla. 1971).

Applying the principles above to this case, several things become apparent. The purpose of Sec. 768.28 of protecting the public treasury from heavy financial burdens would not be met if MICHIGAN MILLERS is allowed to benefit from the fortuitous circumstance that the accident was caused by an employee of a political subdivision of the State of Florida. While so benefitting, MICHIGAN MILLERS non-payment would have no favorable effect whatsoever on the public treasury.

Likewise, the purpose of Sec. 627.727 of compensating insureds for a deficiency in the tortfeasor's personal liability insurance coverage would not be met if MICHIGAN MILLERS position were adopted by this Court. Instead, MICHIGAN MILLERS would be allowed to benefit from accepting premiums for uninsured motorist coverage and yet still leave its insureds uncompensated for their damages. This result would protect the insurance carrier when the statute was designed to protect persons injured by uninsured motorists.

MICHIGAN MILLERS argues that coverage cannot be extended by the courts beyond that provided by the policy. (BP. 24). This argument does not recognize that if there is an ambiguity in the policy, or a contradiction of public policy, then the courts are authorized to interpret the policy. Any ambiguity will be

construed against the company. Fireman's Fund Insurance Company v. Vordermeier, 415 So.2d 1347 (Fla. 4th DCA 1982). Where terms of an insurance contract are susceptible of two reasonable constructions, that interpretation which will sustain coverage for insured will be adopted. Tropical Park Inc. v. United States Fidelity and Guaranty Company, 357 So.2d 253 (FLa. 3d DCA 1978). Particularly with respect to the uninsured motorist statute, coverage must be construed so as to effectuate the policy in favor of providing uninsured motorist protection. Hartford Accident and Indemnity Company V. Sheffield, 375 So.2d 598 (Fla. 3d DCA 1979).

The focus should not be placed on the relationship between the insurer and the tortfeasor, but rather on the contractual relationship between the insured and the insurer.

POINT II

THE TRIAL COURT AND APPELLATE COURT CORRECTLY HELD THAT THE SCHOOL BOARD'S VEHICLE WAS AN "UNINSURED MOTOR VEHICLE" WITHIN THE MEANING OF SECTION 627.727 (3)(b), FLA. STAT., WHEN THE AGGREGATE AMOUNT OF MICHIGAN MILLERS' AVAILABLE UNINSURED MOTORIST COVERAGE IS $400,000 AND THE SCHOOL BOARD'S AVAILABLE LIABILITY COVERAGE WAS $325,000.

The Respondent, FOCO, does not dispute that this Court's review extends to the entire decision of the district court, rather than the question on which it had passed. Rupp v. Jackson, 238 So.2d 86 (Fla. 1970).

MICHIGAN MILLERS argues that the school bus is not an uninsured motor vehicle pursuant to Sec. 627.727(3)(b), because it's uninsured motorist coverage of $100,000 per person, $300,000 per accident is less than the School Board's liability limits of $325,000.

There is no dispute that the aggregate amount of coverage available to the Respondents is $400,000. (BP. 30). The Second District Court of Appeal stated:

> "Because $400,000 is greater than $325,000, we hold that the school board's vehicle involved in the accident is an "uninsured motor vehicle" under section 627.727 (3)(b)."

Michigan Millers Mutual Insurance Company V. Bourke, et al., 16 F.L.W. D1529, D1530 (Fla. 2d DCA 1991).

The governing statute defines an uninsured vehicle as one which has provided bodily injury limits for its insured which are less than the limits applicable to the injured person provided

under uninsured motorist coverage applicable to the injured person. Therefore, it is clear that the Second District Court of Appeal was correct in holding that the school bus was an uninsured vehicle, as $325,000 is less than $400,000.

The basis of the Petitioner's argument that the school bus was not an "uninsured motor vehicle" is that instead of looking at the aggregate limits, the comparison between liability and uninsured motorist coverages should be made on a "per person" basis, The Petitioner cites only one case in support of its argument and that case doesn't address the issue raised in this case. In Tucker v. Government Employees Insurance Company, 288 So.2d 238 (Fla. 1973), the court was confronted with an issue of the validity of an exclusion in a policy seeking to prevent stacking. The court held that the minor daughter of the named insured was entitled to stack the coverage provided for two vehicles notwithstanding a policy provision against stacking.

There are cases which do represent circumstances similar to this accident. The Second District Court of Appeal properly relied upon them in this cause. This accident involved four victims in one vehicle. The available liability coverage of $325,000 was divided up among the victims. In this situation, the amount of liability insurance actually available to the injured person is used to determine the availability of uninsured motor vehicle coverage. Where benefits are partially exhausted by payment of claims to others, the concept of "available benefits" under the uninsured motorist statute means that which is actually available

to the insured from the liability carrier. State Farm Mutual Automobile Insurance Company v. Diem, 358 So.2d 39 (Fla. 3d DCA 1978).

The facts in Diem are similar to those in this case. The named insured was driving his vehicle with his wife and two others as passengers. All four occupants suffered injuries when hit by an underinsured vehicle. The uninsured motorist policy provided limits of $15,000 per person, $30,000 per accident. The liability policy provided $10,000/$20,000 limits. The two passengers settled with the tortfeasor for $16,000. As a result, only $4,000 was actually available from the liability carrier to the plaintiffs. The negligent motorist was, therefore, underinsured. "Available benefits must mean that which is actually available to the insured herein from the underinsured's liability carrier." Id. at 41. Accord, Jones v. Travelers Indemnity Company of Rhode Island, 368 So.2d 1289 (Fla. 1979), United States Fidelity Guaranty Comsanv v. Curry, 395 So.2d 530 (Fla. 1981), Dewberrv v. Auto-Owners Insurance Company, 363 So.2d 1077 (Fla. 1978).

The burden is on the Petitioner to furnish to the appellate court a record sufficient for the appellate court to resolve the issues raised by the appellant on appeal. Jones v. Jones, 361 So.2d 798 (Fla. 1st DCA 1978). The Petitioner has failed to demonstrate any error by an appropriate record, and therefore the judgments below must be affirmed as to the finding that the School Board's vehicle is an uninsured motor vehicle. If the lower courts' conclusions can be supported on any theory, they must be

affirmed. Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1980).

MICHIGAN MILLERS argues that the per person limit of coverage provided by the tortfeasor's policy is at least equal to the per person uninsured motorist coverage, and therefore an uninsured motor vehicle was not involved. (BP. 32). However, no cases are cited by MICHIGAN MILLERS to support this construction of the statute. MICHIGAN MILLERS offers no record evidence to show that the amount of liability coverage actually available to each insured is at least equal to the amount available through the uninsured motorist provisions.

To determine if uninsured motorist coverage comes into play, it must be determined how much liability coverage was "actually available" to the individual claimants. In this case, MICHIGAN MILLERS is unable to demonstrate that the liability coverage actually available to the individual claimants is equal or greater than the uninsured motorist coverage available.

As additional support for the Respondent's position that the school bus is an uninsured motor vehicle, the court needs only to look at the definition of an uninsured motor vehicle as provided in the policy itself, and its endorsement. See P. App. 2. The policy provides that an uninsured motor vehicle is one:

> "to which a bodily injury liability bond policy applies at the time of the accident but its limit for bodily injury liability is not enough to pay the full amount the 'insured' is legally entitled to recover as damages."

(P. App. 2).

This court has held that the uninsured motorist statute sets forth minimum uninsured motorist protection which has to be offered to purchasers of automobile liability insurance. This does not preclude insurers from offering greater coverage than that required by statute. Universal Underwriters Insurance Company v. Morrison, 574 So.2d 1063 (Fla. 1990). Once damages were claimed in excess of the liability insurance available, uninsured motorist coverage is required, regardless of what the uninsured motorist coverage is compared to the liability coverage. All that the policy definition requires is that the damages the insureds are entitled to are as a result of the negligence of the tortfeasor. The Second District Court of Appeals in this case declined to apply the Universal Underwriters decision because the argument hadn't been made below, nor was it present in the record at that level. However, the entire policy is presently before this court (P. App. 2).

The lower courts were correct in determining that the school bus was an "uninsured motor vehicle" within the meaning of Sec. 627.727(3)(b).

CONCLUSION

Based upon the foregoing arguments and citations of authority, the Respondent, MICHELLE FOCO, requests that, if the court accepts jurisdiction in this cause, it answer the certified question in the negative.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. Mail this 6th day of September, 1991, to JOHN W. WEIHMULLER, ESQ., Bayport Plaza, Suite 1100, 6200 Courtney Campbell Causeway, Tampa, Florida 33607-1458, LEWIS F. COLLINS, JR., ESQ., P.O. Box 3979, Sarasota, Florida 34230, and LOUIS K. ROSENBLOUM, ESQ., P.O. Box 12308, Pensacola, Florida 32581.

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