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IN THE SUPREME COURT OF FLORIDA

MICHIGAN MILLERS MUTUAL INSURANCE COMPANY, Petitioner, v. DAWN BOURKE, et al., Respondents.	)	Case No. 78221 District Court of Appeal, 2ND District - No. 90-01401 90-01409

BRIEF OF PETITIONER

Oral Argument Reauested

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PREFACE

This brief refers to MICHIGAN MILLERS MUTUAL INSURANCE COMPANY as "Petitioner." References to all Respondents are designated "Respondents." Specific references to DAWN BOURKE, KARL and NATALEE VOSS as Personal Representatives of the Estate of LEISA VOSS, REBECCA REEVES as Personal Representative of the Estate of B. ALLEN REEVES, and MICHELE FOCO are designated as "Respondent (NAME)."

References to the Appendix use the following farm: (App.1).

STATEMENT OF THE CASE AND FACTS

This is a petition for review of the decision of the Second District Court of Appeal of the State of Florida in Michigan Millers Mut. Ins. Co. v. Bourke, 16 F.L.W. D1529 (Fla. 2d DCA June 7, 1991) (App. 1), which passed upon a question certified to be of great public importance:

> **WHETHER AN UNINSURED MOTORIST INSURANCE CARRIER CAN ASSERT A TORTFEASOR'S SUBSTANTIVE DEFENSE OF SOVEREIGN IMMUNITY 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?**

The unfortunate incident giving rise to this action occurred on April 7, 1988, when Respondents were involved in a motor vehicle accident with a Sarasota County school bus. The accident resulted in the death of Respondents VOSS and REEVES, and injuries to Respondents BOURKE and FOCO. The vehicle Respondents were riding in at the time of the accident was owned by Respondent REEVES and insured by Petitioner pursuant to policy #7750-36-27 (App. 2). The policy provided uninsured motorist coverage in the amount of $100,000 per person and $300,000 per occurrence. The policy insured two vehicles.

Subsequent to the occurrence of the accident, Respondents asserted tort claims against the Sarasota County School Board

and claims for uninsured motorist benefits against Petitioner. The liability insurance carrier for the Sarasota County School Board settled the Respondents' claim against the Sarasota County School Board for $325,000, the limits of the liability policy.[1/] (App. 3, 4) Petitioner denied Respondents' claim for uninsured motorist benefits, asserting that the policy did not provide coverage for Respondents' claim.

Petitioner subsequently filed a Complaint for Declaratory Judgment against Respondents seeking to resolve the dispute concerning the availability of uninsured motorist benefits under the policy. (App. 5) Respondents then filed Complaints for Declaratory Judgment (App. 6) and for bad faith incident to Petitioner's denial of coverage.[2/] (App. 8) Both Petitioner and Respondents filed Motions for Summary Judgment (App. 9, 10) and supporting memoranda (App. 11, 12, 13) discussing: 1) whether Respondents were "legally entitled to recover" uninsured motorist benefits under the policy, and 2) whether

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1/ The Respondents received $325,000, the full policy limits of the liability insurance policy held by the School Board. Prior to the date of the accident, the Legislature had repealed laws requiring an automatic waiver of sovereign immunity up to the limits of liability insurance possessed by the sovereign; the Sarasota County School Board possessed liability only as provided by Fla. Stat. § 768.28 (as admitted by Respondent BOURKE in attorney Collins' letter of July 7, 1988; see App. 3). Respondents received $125,000 in excess of the express liability limit designated in Fla. Stat. § 768.28.

2/ The Second District Court of Appeal has stayed Respondents' bad faith claim. Michigan Millers Mut. Ins. Co. v. Bourke, 16 F.L.W. D1814 (Fla. 2d DCA July 10, 1991). (App. 7)

the Sarasota County school bus was an "uninsured motor vehicle" under the policy.

By Order of the trial court dated April 18, 1990, the court granted Summary Judgment on behalf of Respondents and denied Summary Judgment on behalf of Petitioner, holding that Respondents were "legally entitled to recover" uninsured motorist benefits under the policy and that the Sarasota County school bus was an uninsured motor vehicle. (App. 14) Petitioner appealed to the Second District Court of Appeal.3/ (App. 16) On June 7, 1991, the Second District Court of Appeal affirmed the judgment of the trial court. (App. 1) Petitioner sought review by this Court on June 27, 1991.

3/ Petitioner erroneously filed its appeal as a petition for writ of certiorari. The Second District Court of Appeal entered an order on May 25, 1990 consolidating the cases below and designating Petitioner's writ of certiorari as an appeal. (App. 15)

SUMMARY OF ARGUMENT

The Petitioner's policy and Fla. Stat. § 627.727 (1987) limit an insured's recovery of uninsured motorist benefits to damages the insured is "legally entitled to recover" from the uninsured motorist. In determining the scope and meaning of the term "legally entitled to recover," this Court, as well as lower courts, have held that an uninsured motorist carrier can assert whatever substantive defenses or immunities that would be available to the uninsured motorist. More simply, an uninsured motorist carrier "pays only if the tortfeasor would have to pay, if the claim were made directly against the tortfeasor." Allstate Ins. Co. v. Boynton, 486 So. 2d 552 (Fla. 1986).

In the present case, the uninsured motorist carrier is the Sarasota County School Board, an entity protected by the sovereign immunity doctrine. The Florida Sovereign Immunity Doctrine and Fla. Stat. § 768.28 (1987) limit any recovery against the Sarasota County School Board to $100,000 per person/$200,000 per accident. The Sarasota County School Board's liability insurance carrier has paid the claimants over $200,000, thereby satisfying the Sarasota County School Board's limited liability pursuant to Fla. Stat. § 768.28.

The Respondents are not entitled to uninsured motorist benefits because they have already recovered all of the damages they are "legally entitled to recover" from the Sarasota County

School Board (the uninsured motorist). The Sarasota County School Board cannot be forced to pay the Respondents' damages exceeding $200,000. Accordingly, Petitioner is not obligated to pay Respondents' uninsured motorist benefits in excess of the funds the Respondents have already received.

Respondents' opportunity to seek a claims bill does not distinguish Boynton or constitute legal entitlement to recovery. There is no legal entitlement to a claims bill. The possibility of a gratuitous recovery under a claims bill is purely speculative. Furthermore, a claims bill violates the constitutional prescription against impairment of contract by creating substantive rights that retroactively determine the benefits available under the contract between Petitioner and Respondents.

In addition, Respondents are not entitled to uninsured motorist benefits under the policy because the Sarasota County school bus does not constitute an uninsured motor vehicle pursuant to Fla. Stat. §627.727(3)(b)(1987). Subsection (3)(b) indicates that the comparison between applicable liability coverage and applicable uninsured motorist coverage should be conducted on a per person basis. Because Respondents' per person uninsured motorist coverage is at least equal to the per person liability coverage of the Sarasota County School Board, the Sarasota County school bus is not an uninsured motor vehicle under Fla. Stat. § 627.727(3)(b)(1987).

ARGUMENT

I. RESPONDENTS ARE NOT ENTITLED TO UNINSURED MOTORIST BENEFITS BECAUSE FLORIDA STATUTE § 627.727 AND PETITIONER's UNINSURED MOTORIST POLICY LIMIT RESPONDENTS' 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[4/]

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

The State of Florida, its agencies and subdivisions possess complete sovereign immunity from tort actions except to the expressly limited extent of liability provided in Fla. Stat. § 768.28 (1987). See, e.g., Cauley v. City of Jacksonville, 403 So. 2d 379 (Fla. 1981). Subsection (5) of Fla. Stat. § 768.28 (1987) states in pertinent part:

> The state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances . . . . Neither the state nor its agencies or subdivisions shall be liable to pay a claim

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4/ While Petitioner's issue statement does not track the language of the question certified below, this Court has the discretion to restate the issues in the decision before it. See, e.g., Fitzgibbon v. Government Employees Ins. Co., 16 F.L.W. S472 (Fla. July 3, 1991). Petitioner respectfully submits that the language of Petitioner's issue statement more fully encompasses the issues of the question certified below.

> or a judgment by any one person which exceeds the sum of $100,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of $200,000. However, a judgment or judgments may be claimed and rendered in excess of $100,000 or $200,000, as the case may be; and that portion of the judgment that exceeds these amounts may be reported to the legislature, but may be paid in part or in whole only by further act of the Legislature . . . .

A common law duty of care governs the operation of motor vehicles by the employees of a state subdivision, and the limited waiver of sovereign immunity described in Fla. Stat. § 768.28 permits actions against state subdivisions for violations of that duty of care. See, e.g., Trianon Park Condominium Ass'n, Inc. v. City of Hialeah, 468 So. 2d 912 (Fla. 1985). Petitioner recognizes that, pursuant to Fla. Stat. § 768.28, Respondents may bring suit against the Sarasota County School Board (the tortfeasor in the instant case).

Florida Statute § 627.727(1) (1987) and the Petitioner's uninsured motorist policy (App. 2) limit Respondents' recovery of uninsured motorist benefits to damages Respondents are "legally entitled to recover" from the tortfeasor. Florida Statute § 627.727(1) (1987) states in pertinent part:

> No motor vehicle liability insurance policy shall be delivered . . . unless uninsured motorist vehicle coverage is provided . . .

> for the protection of persons . . . who are legally entitled to recover damages from . . . uninsured motor vehicles . . . .

Petitioner's policy states:

> We will pay damages which "insured" is legally entitled to recover from the "owner or operator" of an "uninsured motor vehicle" because of "bodily injury:"
>
> 1. Sustained by an insured"
>
> 2. Caused by an accident.
>
> The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the "uninsured motor vehicle."

(Emphasis added).

Under Florida law, Respondents are not legally entitled to recover from the tortfeasor in excess of the expressly limited liability provided in Fla. Stat. § 768.28. The School Board's insurance carrier has paid the Respondents $325,000, satisfying the Sarasota County School Board's expressly limited liability under Fla. Stat. § 768.28. Respondents are therefore unable to recover uninsured motorist benefits under the policy because Petitioner may assert the tortfeasor's substantive defense of sovereign immunity. This Court's holding in Allstate Ins. Co. v, Boynton, 486 So. 2d 552 (Fla. 1986), unequivocally supports Petitioner's position.5/

5/ The decision of the Second District Court of Appeal in the instant case is in conflict with the Boynton decision. Arguably, the Second District Court of Appeal should have certified the coverage issue pursuant to Fla.R.App.P. 9.030(a)(2)(A)(vi). See, e.g., Hoffman v. Jones, 280 So. 2d 431 (Fla. 1978).

In Boynton, plaintiff, while working at his job, received injuries after a co-employee struck plaintiff with a car. Plaintiff sought to recover under his uninsured motorist insurance policy for those injuries. Plaintiff's uninsured motorist carrier argued that plaintiff was not entitled to uninsured motorist benefits. Plaintiff's uninsured motorist carrier pointed out that the policy limited the plaintiff's recovery to damages plaintiff was legally entitled to recover from the tortfeasor; because the worker's compensation immunity barred the plaintiff's recovery from the tortfeasor, the plaintiff was not entitled to uninsured motorist benefits. The First District Court of Appeal rejected the uninsured motorist carrier's argument, concluding that the uninsured motorist carrier could not assert the worker's compensation immunity as a substantive defense. This Court quashed the decision of the district court and remanded the case. Id. at 559.

This Court conducted a thorough analysis of the effect of the operative phrase "legally entitled to recover" upon the ability to recover uninsured motorist benefits. In determining that plaintiff was not legally entitled to recover uninsured motorist benefits, the court considered the meaning of the phrase "legally entitled to recover'' in view of the historical antecedents of uninsured motorist insurance. This Court then held that an uninsured motorist insurer could assert all the substantive defenses of the tortfeasor. Id. at 556. The court

further observed that insurers pay claims to insureds in consideration of the insurer's contractual subrogation rights and such payment properly reflects the tortfeasor's right to assert substantive defenses in any action by the insurer against the tortfeasor. Id. at 558. This Court then considered the role of uninsured motorist coverage as a source of indemnification in view of the insurer's right to assert all of the tortfeasor's substantive defenses (through the insurer's subrogation rights). Id.

This Court expressly rejected the lower court's construction of the phrase **legallyentitled to recover.'' Id. at 556. According ta this Court, the phrase **legallyentitled to recover" meant that the insured must be able to establish the fault of the uninsured motorist giving rise to the damages and the extent of those damages as stated by the lower court. However, this Court also concluded that, in addition, the insurer has the right to assert all substantive defenses available to the tortfeasor. Id.

This Court explained that the historical antecedents of uninsured motorist coverage demonstrate the insurer's ability to invoke all substantive defenses of the tortfeasor, noting that uninsured motorist coverage arose to replace unsatisfied judgment insurance. Id., citing A. Widiss, A Guide to Uninsured Motorist Coverage, § 1.9 (1969) ("Widiss"). Unsatisfied judgment insurance required that the insured be

unable to collect a claim reduced to a judgment from the negligent party. Id., citing Widiss. Uninsured motorist coverage eliminated the prerequisite that the insured obtain a judgment against an uninsured motorist. Id., citing Widiss. This Court noted that the streamlined procedure provided by uninsured motorist coverage did not expand the scope of unsatisfied judgment coverage which it replaced. Id. at 557. Thus, this Court concluded:

> It seems unlikely that the [insurance] companies would deliberately relinquish valid substantive defenses when it was wholly unnecessary to do so to achieve the goal of protecting against financially irresponsible motorists.

Id.

This Court further held that Florida Statute § 627.727 does not demonstrate "any legislative intent to expand UM coverage beyond that contemplated by the insurance industry developed endorsement." Id. Thus:

> [t]he carrier effectively stands in the uninsured motorist's shoes and can raise and assert any defense that the uninsured motorist could urge. In other words, uninsured motorist coverage is a limited form of third party coverage inuring to the limited benefit of the tortfeasor to provide a source of financial responsibility if the policyholder is entitled under the law to recover from the tortfeasor . . . . With UM coverage, the carrier pays only if the tortfeasor would have to pay, if the claim were made directly aaainst the tortfeasor.

(Emphasis supplied). Id.

Furthermore, this Court observed that an uninsured motorist insurer is subrogated to sums paid to the insured under the policy. Id. at 558. The carrier may bring suit against the uninsured motorist to recover those sums paid under the policy to its insured. Id. This Court noted that forcing the insurer to pay claims to its insured when the substantive defenses of the tortfeasor would bar the insurer from a judgment against the tortfeasor would jeopardize the insurer's subrogation rights. Id.

This Court's decision in Boynton clearly holds that the purpose of uninsured motorist coverage is only to provide a source of financial responsibility in situations where a tortfeasor does not have liability insurance to pay a judgment. Id. at 558, 559. In order to be entitled to uninsured motorist benefits, Boynton requires that the claimant be able to secure a judgment and enforce the payment of that judgment. Id. at 555. Once again, this Court specifically stated: "With uninsured motorist coverage the carrier pays only if the tortfeasor would have to pay if the claim were made directly against the tortfeasor." Id. at 557.

Because of the sovereign immunity defense in the instant case, the tortfeasor (Sarasota County School Board) would only "have to pay" the Respondents $200,000 if the claim were made

directly against it. Hence, the most Petitioner could have been required to pay is $200,000. Because the Sarasota County School Board's liability insurance carrier has already paid the claimants over $200,000, the Respondents have already received everything they are legally entitled to receive. Hence, Respondents are not entitled to uninsured motorist benefits from Petitioner.

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

Respondents contend that the holdings of Bavnton are inapplicable because of their ability to seek a claims bill. More simply, Respondents argue that because of their ability to ask the State Legislature for money to compensate their damages, sovereign immunity is somehow not absolute. This contention does not accurately reflect the character of sovereign immunity.

Sovereign immunity does not merely prevent the recovery of damages in compensation for established liability; sovereign immunity is immunity from liability itself. Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979); see also Cauley v. City of Jacksonville, 403 So. 2d at 381, 382. Obviously, no right to recovery exists in the absence of liability. Respondents' attempts to impose sovereign liability in excess of that provided by statute misstates the plain

import and effect of sovereign immunity. See, e.g., Id. Once the liability available through the waiver of sovereign immunity pursuant to Fla. Stat. § 768.28 has been satisfied, no liability exists which would entitle Respondents to recovery. Id.

Furthermore, the opportunity to seek a claims bill does not qualify the statutory waiver of sovereign immunity. "Before a waiver of sovereign immunity, one suffering injuries at the hand of the state could always petition for legislative relief by means of a claims bill." Cauley v. City of Jacksonville, 403 So. 2d at 381. A petition for legislative relief by means of a claims bill remains the only redress for discretionary sovereign functions giving rise to damages. Cf. Kaisner v. Kolb, 543 So. 2d 732 (Fla. 1989). Here, if the sovereign had performed a discretionary function alleged to have given rise to Respondents' damages, Respondents' attempts to impute a "qualified" immunity to the sovereign would fail; the non-judicial remedy of legislative relief by means of a claims bill would provide the only available remedy.

Upon satisfaction of the statutory liability pursuant to the waiver of sovereign immunity under Fla. Stat. § 768.28, there is no difference between sovereign immunity for discretionary or operational functions. In consequence, this Court should recognize that the immunity present upon the satisfaction of statutory liability under Fla. Stat. § 768.28

is identical to the absolute immunity reserved for discretionary functions for which no statutory waiver exists. Cf. Id.; see also Trianon Park Condo. Ass'n, Inc. v. City of Hialeah, 468 So. 2d 912 (Fla. 1985); Caulev v. City of Jacksonville, 403 So. 2d at 384.

The substantive defense of sovereign immunity limits Petitioner's exposure to circumstances in which the tortfeasor failed to fully indemnify Respondents pursuant to the limits of liability expressed in Fla. Stat. § 768.28. In the instant case, the Sarasota County School Board fully indemnified Respondents pursuant to the statutory liability of the Sarasota County School Board. Hence, the holding of Boynton dictates that Respondents cannot maintain a claim for uninsured motorist benefits under their policy.

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

The opportunity to seek a claims bill does not constitute legal entitlement to recovery. Black's Law Dictionary, 5th Ed. (1979), defines "entitlement" as "right to benefits, income or property which may not be abridged without due process.'' While a claimant is legally entitled to recovery on a judgment upon proving liability and damages in a court of law, there is no legal entitlement to a claims bill. Despite evidence of liability and damages, the Legislature may in its discretion

decline to grant relief through a claims bill. The availability of benefits through a legislative claims bill is thus not a "right to benefits" sufficient to create the entitlement inherent in the phrase "legally entitled to recover."

The speculative quality of legislative claims bills[6] also jeopardizes the Petitioner's subrogation rights; in Boynton, this Court deemed impermissible the infringement of an uninsured motorist insurer's subrogation rights. The availability of a claims bill as "an act of grace from the Legislature" in hopes of subsequently obtaining a legislatively enacted, substantive right of relief is inherently different than the availability of present judicial remedies to enforce present substantive rights of relief. Cf. Pan-Am Tobacco v. Department of Corrections, 471 So. 2d 4 (Fla. 1984). The natural consequence of Respondents' contention that the availability to seek a claims bill creates only a conditional waiver of liability under Fla. Stat. § 768.28 would require

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[6] "Although the total dollar amount sought for legislative claims bills generally has been increasing over the last thirty years because of inflation and the increase in the number of million dollar tort verdicts, the number of claims bills filed has been decreasing. In 1957, there were 68 claims bills filed of which 35 passed. In 1967, there were 61 claims bills filed of which 30 passed. In 1977, there were 60 claims bills filed of which 18 passed. In 1987, there were 24 claims bills filed of which 8 passed." Kahn, Legislative Claims Bills - A Practical Guide to a Potent(ial) Remedy, 62 Fla. B. J. 4:23. (1988)

that the courts of this State recognize causes of action predicated upon the pure speculation that the Florida Legislature will subsequently enact legislation creating the substantive right asserted as the basis for the cause of action pleaded. Of course, courts may not entertain such speculative causes of action.

Even if this Court characterizes the opportunity to seek a claims bill as sufficiently conditioning the statutory waiver of sovereign immunity under Boynton, this Court should recognize that the opportunity to seek a claims bill does not constitute recovery of damages from the "owner or operator" of the uninsured motor vehicle.

A legislative claims bill does not provide additional recovery against a sovereign by legislative allocation of the sovereign's monies. Instead, claims bills typically supply awards of monies withheld from allocation to the sovereign. See Kahn, Legislative Claim Bills - A Practical Guide to a Potent(ial) Remedy, 62 Fla. B. J. 4:23 (1988). Hence, a claims bill constitutes recovery from the Florida Legislature, not recovery from the tortfeasor. Thus, in the absence of the legislative ability to order payment from the tortfeasor, legal entitlement to recovery from the uninsured motorist does not exist.

Should this Court consider that legislative withholding of funds is equivalent to collection of monies from the

tortfeasor, then this Court should recognize that the terms of the settlement reached between the Sarasota County School Board and Respondents demonstrate the inability of Respondents to obtain this gratuitous remedy.

The Sarasota County School Board predicated the settlement between Respondents and the Sarasota County School Board upon the condition that Respondents obtain any subsequent relief through a claims bill specifically from general funds of the State and not from local school board funds or from funds due the Sarasota School Board from the State Treasury. (See App. 4) The settlement clearly indicates the intent of the Sarasota County School Board to avoid any subsequent legislatively imposed "liability" by further waiver of the Sarasota County School Board's sovereign immunity through a claims bill which could allocate monies from the Sarasota County School Board.

Moreover, construing the policy in the instant case as incorporating a claims bill violates the constitutional prescription against impairment of contract by creating substantive rights that retroactively determine the benefits available under the contract. See Art. I, § 10, Fla. Const. Both Florida Statute § 627.727 and the policy use the phrase "legally entitled to recover" in reference to a present judici 1 remedy. The statutory language and the language of the policy refer to judicial remedies in place upon the execution of the contract for uninsured motorist insurance,

Where parties enter into an insurance contract on a subject described by statute, the statutory description becomes a part of that contract. Citizens' Ins. Co. v. Barnes, 98 Fla. 933, 124 So. 722 (1929); see also Standard Accident Ins. Co. v. Gavin, 184 So. 2d 229 (Fla. 1st DCA 1966), cert. dismissed, 196 So. 2d 440 (Fla. 1967). The uninsured motorist contract between Petitioner and Respondents thus incorporates statutes in place upon the execution of the contract for insurance.

This principle, however, cannot support the proposition that Petitioner must anticipate that subsesuent substantive legislative enactments will be retroactively incorporated into the policy. The statute in effect when an insurance policy is issued governs the rights arising under that contract. State Farm Mut. Auto. Ins. Co. v, Gant, 478 So. 2d 25 (Fla. 1985); Poole v. Travelers Ins. Co., 130 Fla. 806, 179 So. 138 (1937). A subsequent claims bill cannot dissolve a vested right of constitutional magnitude. See Robbins v. Robbins, 360 So. 2d 10 (Fla. 2d DCA 1978).

The remedy sought through a claims bill under the statute is neither procedural nor remedial; instead, the claims bill provides an opportunity to obtain additional substantive rights through further legislative waiver of sovereign immunity from liability for torts, Cf. L. Ross, Inc, v. R. W. Roberts Const. Co,, Inc., 481 So. 2d 484 (Fla. 1986). A claims bill pursuant to Florida Statute § 768.28 thus does not implement a

judicially fashioned remedy. Gerard v. Department of Transp., 472 So. 2d 1170 (Fla. 1985). Instead, a claims bill pursuant to the statute provides the Legislature with the opportunity to create additional substantive rights that retroactively determine the benefits available under the contract between Petitioner and Respondents.

In L. Ross, Inc. v. R. W. Roberts Const. Co., Inc., 481 So. 2d at 485, this Court approved Judge Cowart's reasoning from the Fifth District Court of Appeal:

> . [D]amages always follow the [substantive] right . . . any change in a substantive right normally changes the amount of damages resulting from a breach of that substantive right. Therefore, it cannot be reasoned that a statutory change that affects and changes the measure of damages is merely "remedial" and thus, procedural, and, therefore, is not a change in the substantive law giving the substantive right which is the basis for the damages.

Id. at 485, citing L. Ross, Inc. v. R. W. Roberts Const. Co., Inc., 466 So. 2d 1096 (Fla. 5th DCA 1985). The additional substantive rights available through a claims bill, by subsequently removing the substantive defenses of the tortfeasor available to Petitioner at the time the parties executed the contract of insurance, impairs the obligation of the insurance contract between Petitioner and Respondents in violation of Article I, § 10 of the Florida Constitution.

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

After demonstrating that the historical antecedents of uninsured motorist insurance enabled the insurer to assert all the substantive defenses of the tortfeasor, the Boynton court also considered the role of uninsured motorist insurance in providing indemnification to the insured. In Boynton, plaintiff possessed a source of indemnification in workers compensation benefits. The court noted that the benefits available under workers compensation law achieved the social goal of protecting the worker sought through the workers compensation law. Id. at 559.

In the instant case, the waiver of sovereign immunity from liability far torts provides indemnification to persons injured to the extent of the liability provided by statute. In consequence, Respondents have received indemnification for their injuries pursuant to Fla. Stat. § 768.28. Moreover, as in Boynton, society's goal of protecting its citizens against excessive raids on the public treasury and the disruption of administration of government absent sovereign immunity are achieved through the expressly limited waiver of sovereign immunity from liability for torts pursuant to Fla. Stat. § 768.28. Cf. State Road Dept. of Florida v. Tharp, 146 Fla.

745, 1 So. 2d 868 (1941); Spangler v. Florida State Turnpike Auth., 106 So. 2d 421 (Fla. 1958).

In Cauley v. City of Jacksonville, 403 So. 2d at 387, this Court recognized that the liability limits of Fla. Stat. § 768.28 did not violate constitutional provisions of due process, equal protection or guaranty of redress for injury. This Court observed:

> . . . [W]e hold that the statute [Fla. Stat. § 768.281 clearly relates to a permissible legislative objective and is not a discriminatory, arbitrary, nor oppressive in its application. The statute does not violate the right to due process, jury trial, access to courts, or the separation of powers rule. It provides a fair means of recovery against governmental entities for the negligent acts of their employees and officials.

Thus, the indemnification for the sovereign's limited liability provides to Respondents constitutionally satisfactory redress in the instant case.

Upon consideration of the insurer's right through subrogation to assert all of the substantive defenses available to the tortfeasor, this Court in Boynton rejected the view of uninsured motorist coverage as a broader source of indemnification, stating:

> Absent a clear statement of intent from the Legislature that it considers the benefits of broader UM coverage to outweigh the

> detriment, we will not disturb its clear and unambiguous statement that coverage exists only when the insured is legally entitled to recover from the tortfeasor.

Subsequent Florida case law indicates that only in the absence of a substantive defense available to the tortfeasor will a court invoke public policy considerations to characterize uninsured motorist coverage as a source of indemnification to the insured. ***See,*** e.g., Newton v. Auto Owners Ins, Co., 560 So. 2d 1310 (Fla. 1st DCA 1990).

Thus, according to the application of this Court's holding in Boynton by the Newton court, an insurer's contractually bargained-for subrogation rights enable the insurer to assert the substantive defenses of the tortfeasor should any substantive defenses be available to the tortfeasor. This Court's holding in Boynton demonstrates that the absence of a clear legislative intent to expand uninsured motorist coverage beyond the scope of coverage demonstrated by the historical antecedents of uninsured motorist coverage in conjunction with the indemnification available to and recovered by Respondents, and the tortfeasors substantive defense of sovereign immunity in the instant case requires that this Court reverse the decision of the Second District Court of Appeal and grant summary judgment to Petitioner.

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

Subsequent Florida cases have affirmed the right of an uninsured motorist insurer to assert substantive immunity defenses. In Simon V. Allstate Ins. Co., 496 So. 2d 878 (Fla. 4th DCA 1986), the court relied on the reasoning of the Bovnton court to hold that appellant was not legally entitled to recover uninsured motorist benefits because of interspousal immunity. Id. at 879. In so doing, the Simon court noted that the insurer "stands in the uninsured motorist's shoes and can raise any defense that the uninsured motorist could urge." Id. In Gelaro v, State Farm Mut. Auto. Ins, Co., 502 So. 2d 497 (Fla. 1st DCA 1987), the court also relied upon Boynton as authority for the proposition that an uninsured motorist insurer has the right to assert the substantive defense of parental immunity.

Both Simon and Gelaro further demonstrate an uninsured motorist insurer's right to assert all of the substantive defenses of the tortfeasor. Moreover, no other source of indemnity existed in Simon and Geraro such as that available in Bovnton and in the instant case. Despite the absence of any other source of indemnity, both the Simon and Gelaro courts nontheless recognized the insurer's ability to assert all of the substantive defenses of the tortfeasor. Thus, Simon and

Gelaro implicitly stand far the Newton proposition that consideration of uninsured motorist benefits as a source of indemnification may only take place in the absence of any substantive defenses available to the tortfeasor and asserted by the insurer.

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

Other jurisdictions have ruled in accord with Bovnton that an uninsured motorist insurer may assert all of the substantive defenses available to the tortfeasor. In Sayan v. United Services Auto. Ass'n, 43 Wash. App. 148, 716 P.2d 895 (1986), a soldier received injuries while in the course of duty. A statute precluded recovery for soldiers injured on duty. The soldier sought uninsured motorist benefits from his insurer. The Sayan court, like Florida courts, recognized that the phrase "legally entitled to recover" permitted the insurer to stand in the shoes of the uninsured motorist tortfeasor and assert the substantive defense of sovereign immunity. Id. at 900.

The Savan court further noted "no evidence that the legislature intended for the victim of an uninsured motorist to receive compensation that he could not obtain even were the negligent driver in compliance with the financial

responsibility statutes." Id. The Savan court also observed that:

> Fundamentally, . . . modern uninsured motorist coverage provides a motorist who carries a standard automobile liability policy and who suffers personal injuries by reason of the negligence of an uninsured motorist rights against his own insurance company co-extensive with those he would have had against the uninsured tortfeasor.

Id. at 922, quoting P. Pretzel, Uninsured Motorists, § 1. at 5 (1972). In noting the absence of legislative intent to provide broader uninsured motorist coverage than that co-extensive with the insured's rights against the tortfeasor, the Savan court stated "We shall not invoke public policy to override an otherwise proper contract even though its terms may be harsh . . . ." Id. at 923.

The reasoning of the Savan court is consistent with that of the Florida Supreme Court in Boynton. As in Boynton, Savan recognizes the right of the insurer to assert the substantive defenses of the tortfeasor. Moreover, the Savan court explicitly recognized sovereign immunity as a substantive defense of the tortfeasor to which the insurer was subrogated.

The Supreme Court of Ohio in York v. State Farm Fire & Casualty Co., 64 Ohio St. 2d 199, 414 N.E.2d 423 (1980), also recognized the right of an uninsured motorist insurer to assert the tortfeasor's substantive defense of sovereign immunity. In

York, plaintiff received injuries from a municipal fire truck. A statute precluded recovery from persons injured by a fire truck in the course of its duties. Plaintiff sought uninsured motorist benefits from his insurer.

The court reasoned that an Ohio uninsured motorist statute similar to Fla. Stat. § 627.727 employing the phrase "legally entitled to recover" as a prerequisite for uninsured motorist benefits did not mandate that the insurer confer uninsured motorist benefits because "the city was never legally liable." Id. at 425. The York court further noted that an uninsured motorist insurance policy and the Ohio statute were not implicated because the city lacked liability due to immunity. Id. at 426.

Respondents consider Karlson v. City of Oklahoma City, 711 P.2d 72 (Okla. 1985), as dispositive of this case. In Karlson, plaintiff sued the City of Oklahoma City for injuries arising out of a collision with a police vehicle. Plaintiff sought to recover under his uninsured motorist insurance policy; the insurer sought to assert the tortfeasor's substantive defense of sovereign immunity from liability upon the satisfaction of expressly limited statutory liability. The Karlson court held that plaintiff could recover uninsured motorist benefits. Id. at 73.

The court identified the question raised on appeal as whether or not the insured was "legally entitled to recover"

from the sovereign. Id. at 74. The Karlson court determined that the phrase "legally entitled to recover" meant only that the insured must be able to establish fault on behalf of the uninsured motorist giving rise to damages and prove the extent of those damages. Id. at 74, 75. Thus, the holding of Karlson does not stand for the proposition that the tortfeasor's substantive defense of sovereign immunity from liability upon the satisfaction of expressly limited statutory liability was unavailable, but only for the proposition that sovereign immunity was unavailable to the insurer since the insurer could not assert any of the substantive defenses of the uninsured tortfeasor.

By completely denying the insurer's right to assert the substantive defenses of the tortfeasor, the Karlson definition of "legally entitled to recover" directly contradicts this Court's construction in Boynton of the phrase "legally entitled to recover." See also 55 A.L.R. 4th 806 (1987). As this Court held in Boynton, an insurer has the right to assert all of the substantive defenses of the tortfeasor. Boynton at 556. In consequence, Karlson is neither dispositive nor persuasive in the instant case because Karlson relies upon a limited construction of the phrase "legally entitled to recover**which this Court expressly rejected in Boynton. This Court need only rely upon its own precedent to similarly reject the limited construction of the phrase "legally entitled to recover" by the Oklahoma Supreme Court in Karlson.

II. THE SCHOOL BOARD'S MOTOR VEHICLE IS NOT AN UNINSURED MOTOR VEHICLE PURSUANT TO FLORIDA STATUTE § 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.7/

The Sarasota County school bus does not constitute an uninsured motor vehicle pursuant to Fla. Stat. § 627.727 (1987). As a result, Respondents are not entitled to uninsured motorist benefits.

Petitioner acknowledges that if coverage exists the aggregate amount of coverage to all insureds is $400,000. The policy provides uninsured motorist coverage in the amount of $100,000 per person and $300,000 per accident. Two vehicles are insured under the policy. Only Respondent REEVES is entitled to stack the coverages.

Accordingly, the amount of uninsured motorist coverage available to Respondent FOCO is $100,000 per person and $300,000 per accident. The amount available to Respondent BOURKE is $100,000 per person and $300,000 per accident. The

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7/ The certified question upon which the decision of the Second District Court of Appeal passed did not incorporate this issue. See Michigan Millers Mut. Ins. Co. v. Bourke, 16 F.L.W. D1529 (Fla. 2d DCA June 7, 1991). The review of this Court, however, extends to the decision of the district court, rather than a question upon which the district court passed. Hillsborough Ass'n for Retarded Citizens, Inc. v. City of Temple Terrace, 332 So. 2d 610 (Fla. 1976); see also, Rupp v. Jackson, 238 So. 2d 86 (Fla. 1970). Thus, this Court may also consider this issue contained within the decision below.

amount available to Respondent VOSS is $100,000 per person and $300,000 per accident. The amount available to Respondent REEVES is $200,000 per person ($100,000 per person for each vehicle). The amount available through the liability insurance carrier of the Sarasota County School Board is $200,000 per person and $325,000 per occurrence.

Florida Statute § 627.727(3) at the time of the accident stated:

> For the purpose of this coverage the term "uninsured motor vehicle" shall, subject to the terms and conditions of such coverage, be deemed to include an insured motor vehicle when the liability insurer thereof:
>
> . . . .
>
> (b) Has provided limits of bodily injury liability for its insured which are less than limits applicable to the injured person provided under uninsured motorist coverage applicable to the injured person.

Respondents have taken the position that, under Fla. Stat. § 627.727, in ascertaining whether the bodily injury liability limits of the tortfeasor's vehicle "are less than the limits applicable to the injured person provided under uninsured motorist coverage applicable to the injured person," a comparison should be made between the liability limits of the tortfeasor's vehicle and the aggregate amount of uninsured motorist coverage applicable to all injured persons.

Respondents' contention is inconsistent with the plain language of Fla. Stat. § 627.727(3)(b) (1987). Florida Statute

§ 627.727(3) indicates that the comparison between applicable liability coverage and applicable uninsured motorist coverage should be conducted on a per person basis. See Tucker v. Government Employees Ins. Co., 288 So. 2d 238 (Fla. 1973). Subsection (b) of the statute specifically refers to "limits applicable to the injured person provided under uninsured motorist coverage applicable to the injured person." (Emphasis supplied). Thus, because Respondents' per person uninsured motorist coverage is at least equal to the per person liability coverage of the Sarasota County School Board, the Sarasota County school bus is not an uninsured motor vehicle under Fla. Stat. § 627.727(3)(b)(1987).

CONCLUSION

For the foregoing reasons Petitioner respectfully requests this Court to enter an Order quashing the decision of the Second District Court of Appeal and remanding this case for further proceedings in accord with this Court's Order.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States Mail this 13 day of August, 1991, to Lewis F. Collins, Jr., Esq., P.O. Box 3979, Sarasota, FL 34230; and Peter S. Branning, Esq., 1800 2nd St., Suite 855, Sarasota, FL 34236.

John W. Weihmuller

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