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IN THE SUPREME COURT OF FLORIDA

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MICHIGAN MILLERS MUTUAL INSURANCE COMPANY,

Petitioner,

vs.

DAWN BOURKE, MICHELE FOCO, THE ESTATE OF LEISA VOSS, and THE ESTATE OF B. ALLEN REEVES,

Respondents.
_____/

CASE NO. 78,221

Second District Court of Appeal Case Nos. 90-01401 90-01409

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BRIEF OF RESPONDENTS DAWN BOURKE; KARL AND NATALIE VOSS, AS PERSONAL REPRESENTATIVES OF THE ESTATE OF LEISA VOSS; AND REBECCA REEVES, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF B. ALLEN REEVES

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PREFACE

For purposes of this brief, the petitioner, Michigan Millers Mutual Insurance Company, the appellant below, will be referred to as Michigan Millers. Respondents, Dawn Bourke; Michele Foco; Karl and Natalie Voss, as the personal representatives of the Estate of Leisa Voss; and Rebecca Reeves, as personal representative of the Estate of B. Allen Reeves, defendants/counterplaintiffs below, will be referred to by individual name, or collectively, (for simplicity) as plaintiffs/respondents.

The appeal is interlocutory and no record was sent to the Second District. The Second District has compiled, numbered and forwarded to this Court a record, which consists of the parties' appendices. References to that record will be in the form of (R. 1). However, where the materials referred to are found in Michigan Millers' appendix, reference will be given to that appendix in the form af (App. 2, p. 1).

STATEMENT OF THE CASE

Plaintiffs/respondents Bourke, Voss and Reeves accept the Statement of the Case in Michigan Millers' brief with the following additions and clarifications:

Michigan Millers' arguments before both the trial court and the Second District Court of Appeal relied upon Shelby Mutual Insurance Co. of Shelby, Ohio v. Smith, 556 So.2d 393 (Fla. 1990). (R. 307, App. 11, p.14; see also Michigan Millers Mutual Insurance Co. v. Bourke, 581 So.2d 1365 (Fla. 2d DCA 1991).) During the appeal before the Second District, this Court issued an opinion in Universal Underwriters Insurance Co. v. Morrison, 574 So.2d 1063 (Fla. 1990), which plaintiffs/respondents supplied to the Second District by way of supplemental authority. Michigan Millers v. Bourke, supra. The Second District declined to consider the case because the argument had not been raised at the trial level. Id. at 1366, n. 1.

Michigan Millers did not argue any impairment of contractual rights by virtue of the legislative claims bills under section 768.28, Florida Statutes (1987), at the trial level or before the Second District. (Compare, App. 11 and Michigan Millers v. Bourke, supra.)

In its opinion, the Second District held that the school bus at issue was an "uninsured motor vehicle" pursuant to section 627.727(3)(b), Florida Statutes (1987), because the available UM insurance ($400,000) exceeded the School Board's available coverage of $325,000. Id. at 1366. Further, the Second District held public policy dictated:

> that Michigan Millers not be permitted to hide behind immunity where [plaintiffs/respondents] have contracted with it to provide UM coverage and the school board is in fact underinsured. Because the state's sovereign immunity is not absolute, and because of the fact that [plaintiffs/respondents] can reduce their damages to judgment, we hold that [plaintiffs/respondents] are 'legally entitled to recover' their damages from the tortfeasor, and therefore are entitled to UM coverage from the Michigan Millers policy for any deficiency.

Id., at 1368.

STATEMENT OF THE FACTS

The relevant facts are not in dispute. Accordingly, the plaintiffs/respondents adopt the recitation of facts from the Second District's opinion as follows:

> Leisa Voss, deceased, and Bourke and Foco were passengers in a vehicle driven by Allen Reeves, deceased, and owned by Allen and Rebecca Reeves. The Reeves vehicle with its passengers was in an accident in April of 1988, involving a vehicle owned by the School Board of Sarasota County. The driver of the school board's vehicle was negligent in causing the accident. As a result of the accident, Bourke and Foco were seriously injured and Voss and Reeves were killed.
>
> The school board had liability insurance at the time of the accident which provided coverage of ***$200,000*** per person and ***$325,000*** per accident. Michigan Millers admitted that these policy limits were less than the damages sustained by [plaintiffs/respondents.] Michigan Millers also admitted that the school board's employee was negligent in causing the accident.
>
> Michigan Millers had in effect at the time of the accident an insurance policy which named Allen and Rebecca Reeves as the named insureds. The policy insured two vehicles and provided uninsured motorist/bodily injury coverage for each vehicle in the amount of $100,000 per person and ***$300,000*** per accident. The parties have since agreed that if there is coverage, that the aggregate amount of uninsured motorist (UM) coverage available is $400,000. Because Reeves had another vehicle covered under the same policy, he was entitled to stack $100,000 onto the $300,000 occurrence limit.
>
> The school board's liability insurance carrier paid [plaintiffs/respondents] the school board's policy limits of ***$325,000.*** ...

Michigan Millers Insurance Co. v. Bourke, supra, 581 So.2d at 366-7.

In supplement to these facts, plaintiffs/respondents also state the following:

The policy at issue contained an endorsement redefining UM as:

> A. Sections 2. and 3. of the definition of **"uninsured** motor vehicle" **are** replaced by the fallowing:
>
> 2. To which a bodily injury liability bond or 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.

(**App.** 2, p.31 (Endorsement PP **924** (03-87)) This endorsement was part of the policy in effect at the time of the accident. ***(See*** list of endorsements, **App.** 2, p. 4.)

As correctly noted in the Second District's opinion, the parties have agreed that if there is coverage, the aggregate amount of uninsured motorist coverage (UM) available is $400,000. Michigan Millers Insurance Co. v. Bourke, supra.

ISSUES ON APPEAL

Michigan Millers states the issues on appeal as:

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.

A. Allstate Ins. Co. v. Bovnton supports Petitioner's right ta 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. § 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 § 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.

Plaintiffs/respondents prefer to restate the issues in the following question format, including, as Issue I, the Second District's certified question:

I. 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?

   A. WHETHER ALLSTATE INSURANCE CO. V. BOYNTON IS DISTINGUISHABLE FROM THE INSTANT CASE SINCE BOYNTON DEALT WITH AN ABSOLUTE IMMUNITY FROM SUIT AND NO SUCH ABSOLUTE IMMUNITY EXISTS HERE?

   B. WHAT IMPACT DOES THE OPPORTUNITY TO SEEK A CLAIMS BILL HAVE ON BOYNTON AND THE CASE AT HAND WHERE THE CLAIMS BILL PREVENTS FINDING AN ABSOLUTE CAP ON LIABILITY EXISTS?

   C. WHETHER THE PUBLIC POLICY EXPRESSED IN THE UM STATUTE, COUPLED WITH THE LANGUAGE IN THE POLICY AT HAND, CREATE COVERAGE FOR THE INSURED PLAINTIFFS/RESPONDENTS?

   D. WHETHER MICHIGAN MILLERS' CLAIM TO THE SUBSTANTIVE DEFENSES OF THE SCHOOL BOARD ENTITLES IT TO DENY UM COVERAGE?

   E. WHETHER THE AUTHORITY FROM OTHER STATES ON THIS ISSUE SUPPORTS THE INSURED PLAINTIFFS/RESPONDENTS' CLAIM FOR UM COVERAGE?

II. WHETHER THE SCHOOL BOARD'S MOTOR VEHICLE IS AN UNINSURED MOTOR VEHICLE UNDER THE DEFINITION IN THE POLICY AND UNDER THE CONTROLLING TERMS OF FLORIDA STATUTE SECTION 627.727?

SUMMARY OF ARGUMENT

B. Allen Reeves paid premiums to Michigan Millers for coverage in the event of an accident with an underinsured or uninsured motorist. Mr. Reeves' natural expectation was his coverage would provide benefits to him or his estate (as well as to other insureds) should they suffer an accident with an uninsured or underinsured tortfeasor who could not pay the entire amount of damages. Yet when that very contingency occurred and Mr. Reeves and one of his insured passengers were killed and two other insured passengers were seriously injured, Michigan Millers denied coverage. That denial was based on the assertion that the tortfeasor could not be forced to pay more than the $325,000 in insurance coverage that it carried at the time of the accident. Even while denying coverage on this basis, Michigan Millers admitted the $325,000 received from the tortfeasor's insurer was wholly inadequate to recompense the injured parties and the estates of the decedents for their damages.

The insurance contract at issue, like the controlling statute, provides that UM coverage operates far the protection of insured persons who are "legally entitled to recover" damages from the owners or operators of uninsured motor vehicles because of bodily injury or death.

The key to this case is whether the plaintiffs/respondents are "legally entitled to recover" damages from the tortfaasor School Board. "Legally entitled to recover" under Florida law simply means that the insureds have a claim against the tortfeasor which can be reduced to a judgment in a court of law. Allstate Insurance Co. v. Boynton, 486 So.2d 552, 555

(Fla. 1986); Newton v. Auto Owners Insurance Co., 560 So.2d 139 (Fla. 1st DCA) rev. den., 574 So.2d 139 (1990).

The plaintiffs/respondents had a claim which could be reduced to a judgment in any amount since Florida has waived sovereign immunity. See Trianon Park Condominium v. City of Hialeah, 468 So.2d 912 (Fla. 1985); section 768.28, Florida Statutes (1987) and section 234.03, Florida Statutes (1987). Under the governing statutes and case law, nothing prevented the plaintiffs/respondents from reducing their claim to a judgment in any amount.

Michigan Millers mistakenly relies upon cases where there was a total immunity from suit, such as the workers' compensation immunity. This total immunity prevented the insureds from reducing their claim to judgment. There is no contention that the School Board had total immunity from suit in this case which would have prevented or limited the ability of the respondents to reduce their claim to judgment. The cases involving total immunity are simply not controlling.

The Second District, in the opinion now before this Court, recognized that the plaintiffs/respondents had claims which could be reduced to a judgment and therefore they were "legally entitled to recover" from the School Board. UM coverage was therefore available to them under the contract. This decision is correct and is consistent with this Court's precedent.

Florida law has replaced sovereign immunity with a conditional cap on the amount of damages which the sovereign must pay. However, the statute does not preclude entry of a judgment in excess of the cap, it only provides that the sovereign need not pay any amount in excess of $100,000/$200,000. There are two exceptions to this

provisional cap: 1) the sovereign may pay up to the limits of available insurance; and 2) the legislature through a legislative claims bill may authorize payment of sums in excess of the cap. Thus, there are three limits of potential caps in this case: 1) $100,000/$200,000 (waiver of sovereign immunity); 2) $325,000 (School Board's available insurance); and 3) an unspecified cap, limited in payment only by the legislature. In this case, the initial cap of $100,000/$200,000 was exceeded in favor of settling for the $325,000 in available insurance. Plaintiffs/respondents still have a right to file a legislative claims bill. Thus, there is no absolute cap in place in this case and no absolute cap under the statute. Even if Michigan Millers is entitled to assert the substantive defenses of the limits of damages under the governing statutes, there is no absolute cap.

The Second District reached its decision primarily upon the public policy reasons previously expressed by this Court in Brown v. Progressive Mutual Insurance Co., 249 So.2d 429 (Fla. 1971). Brown held that the public policy was designed to protect and "make whole" the injured party and not to protect the insurance company or the tortfeasor. Based upon Brown, the Second District ruled that Michigan Millers could not deny coverage and could not assert the defense of the potential cap on the payment of damages as this violated the public policy of affording relief to the injured parties. If this Court accepts the Second District's rationale, then the issue of the potential cap on the payment of damages is not at issue.

The decision of the Second District is consistent with this Court's holding in Allstate Insurance Co. v. Boynton, supra, where

this Court recognized that substantive defenses which are compatible with the public policy are the only defenses available to the insurance company. Since the defense of a potential cap on the payment of damages operates only to protect the tortfeasor and the insurance company to the detriment of the injured party, it would violate public policy (and be incompatible with the purpose of the UM statute) to allow Michigan Millers to use this potential payment cap to escape its contractual obligation for UM coverage.

In a case precisely on point legally and factually, the Oklahoma Supreme Court found that UM coverage was available to the injured party despite a statutory limitation on damages where the sovereign was the tortfeasor. See Karlson v. City of Oklahoma City, 711 P.2d 72 (Okla. 1985).

The remaining issue is whether the school bus qualified as an uninsured vehicle. By stipulation, there is an aggregate amount of UM coverage in the amount of $400,000. The school bus had insurance coverage of $325,000. Michigan Millers argues the aggregate amount cannot be used, rather the per person amount available to the individual plaintiff/respondent is the relevant figure. Plaintiffs/respondents contend that the aggregate amount is the operative figure, and that even under Michigan Millers' erroneous view, the school bus is still an uninsured vehicle under the policy definition.

The insurance contract at issue defined an uninsured vehicle as including one which had insurance in an amount less than the damages suffered by the injured parties. The same definition was held to provide broader UM coverage than the statute. This Court held that under that definition, UM was available even where the

tortfeasor actually had more bodily injury insurance than the injured party had UM limits since the injured party's damages exceeded the tortfeasor's coverage. Universal Underwriters Insurance Company v. Morrison, 574 So.2d 1063 (Fla. 1990). Michigan Millers has admitted that the plaintiffs/respondents suffered damages in excess of the $325,000 of insurance benefits they received from the school bus's insurer. Thus, even under Michigan Millers' restricted analysis of which figures to use, the school bus was an uninsured vehicle under Morrison.

Further, under the controlling statute, the school bus was an uninsured vehicle since the aggregate amount of UM exceeded the amount of insurance coverage on the bus. The aggregate amount is the operative amount. See, cf., Tucker V. Government Employees Insurance Co., 288 So.2d 238 (Fla. 1973), a UM stacking case holding "such total coverage" is applicable to any insured motorists negligently injured; and cf., Holt v. State Automobile Mutual Insurance Co., 385 So.2d 1058 (Fla. 4th DCA 1980), holding the aggregate amount of total coverage was the "operable ceiling" to use in determining caverage.

The opinion of the trial court and the Second District in holding Michigan Millers owes its insureds the UM coverage they bargained for are both correct decisions. Plaintiffs/respondents request that this Court affirm the decision of the Second District.

ARGUMENT

I. WHETHER AN UNINSURED MOTORIST INSURANCE CARRIER CAN ASSERT A TORTFEASOR'S SUBSTANTIVE DEFENSE OF SOVEREIGN IMMUNITY WREN 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 governing statute provides that uninsured motorist coverage operates "for the protection of persons insured [under the policy] who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, [and] ... death...." § 627.727(1), Fla. Stat. (1987). The policy language Michigan Millers relies upon also contains the phrase "legally entitled to recover." (App. 2, p.10)

"Legally entitled to recover" has been defined in Florida as meaning "the insured must have a claim against the tortfeasor which could be reduced to judgment in a court of law." Allstate Insurance Co. v. Bovnton, 486 So.2d 552, 555 (Fla. 1986): Newton v. Auto-Owners Insuranee Co., 560 So.2d 1310, 1312 (Fla. 1st DCA 1990), rev. denied, 574 So.2d 139 (1990). As detailed below, since Florida has waived sovereign immunity for the type of bus accident at issue, the plaintiffs/respondents have a claim against the School Board tortfeasor which could be reduced to a judgment in a court of law.

In ruling on the legal issues within the framework of the statute, the trial court and the Second District Court of Appeal both correctly concluded that, as a matter of law, the plaintiffs/-respondents were "legally entitled to recover" damages from the

School Board under the language in their policy and under Florida law.

Michigan Millers relies upon section **768.28,** Florida Statutes (1987), for the proposition that sovereign immunity protected the School Board and, hence, Michigan Millers. The critical flaw with this theory is that section **768.28** waives the common law sovereign immunity for a governmental unit such as the School Board. See also section **234.03,** Florida Statutes (1987), stating a **school** board is liable for accidents arising out of the operation of school buses to the same extent as any entity under section **768.28,** Florida Statutes. These statutes may potentially limit the amount of damages the School Board (or any State subdivision) must pay, but they do not provide **"immunity"** to the School Board for liability in tort for damages to persons that they injure through the negligent acts of their employees. Thus, section **768.28** did not preclude the plaintiffs/respondents fram reducing their claim to a judgment against the School Board.

This Court, when it decided the bellwether case of Trianon Park Condominium v. City of Hialeah, **468** So.2d 912 (Fla. 1985), clarified the intent and meaning of the legislature in waiving common law sovereign immunity. Justice Overton wrote:

> The statute's sole purpose **was** to waive that immunity which prevented recovery for breaches of existing common law duties of care **...** This effectively means that the identical existing duties for private persons apply to governmental entities. (Emphasis added.)

Id. at 917.

When interpreting the uninsured motorist statute's language **"legally** entitled **to recover,"** this Court's declaration of the

purpose of the waiver of sovereign immunity becomes very important. This Court in Trianon specifically and definitively stated that the waiver was intended to make governmental entities (such as the School Board) liable for injuries to persons (such as these plaintiffs/respondents) in the same manner as if a private person were operating a private bus and **caused** the injuries. See also Avallone v. Board of County Commissioners of Citrus County, 493 So.2d 1002, 1005 (Fla. 1986), holding that once a government entity undertakes the obligation to operate a facility or assumes control of an operation, it assumes the common law duty to operate it in a non-negligent manner and is liable for any negligence as a result thereof.

The School Board **was not** immune from suit or liability and, therefore, the plaintiffs/respondents could have reduced their claim to a judgment. See, for example, Brantly v. Dade County School Board, 493 So.2d 471 (Fla. 3d DCA 1986). See also section 234.03, Florida Statutes (1987). Because of this, the plaintiffs/respondents are "legally entitled to recover" damages from the School Board, and, in fact, did recover those damages (although in an amount far less than the actual damages plaintiffs/respondents sustained).

What section 768.28, Florida Statutes (1987), does is to waive a previously existing total immunity from suit in certain cases and place a potential cap on the payment of those damages. The statute specifically provides:

> Neither the state nor its agencies or subdivisions shall be liable to pay a claim 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 these amounts and may be settled and paid pursuant to this act up to **$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. Notwithstanding the limited waiver of sovereign immunity provided herein, the state or an agency or subdivision thereof may agree, within the limits of insurance coverage provided, to settle a claim made or a judgment rendered against it without further action by the Legislature, but the state or agency or subdivision thereof shall not be deemed to have waived any defense of sovereign immunity or to have increased the limits of its liability as a result of its obtaining insurance coverage for tortious acts in excess of the $100,000 or $200,000 waiver provided above. (Emphasis added)

§ 768.28(5), Fla. Stat.

Nothing in this statute precludes the plaintiffs/respondents from reducing their claim to a judgment in an amount which would have fully compensated them, Section 768.28(5) states "a judgment or judgments may be claimed and rendered in excess of these amounts [$100,000/$200,000] and may be settled and paid pursuant to this act up to $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." This Court in Gerard v. Department of Transportation, 472 So.2d 1170 (Fla. 1985), held that section 768.28 permits entry of a judgment in excess of the statutory cap

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[1] Pursuant to Michigan Millers' organization of the issues, the legislative claim bill aspects are dealt with in more detail under Issue I(B).

on payment of damages. For example, plaintiffs/respondents could have sued the School Board and as a result received a judgment for $3,000,000. Nothing in section 768.28 prevents this. Under the Boynton **and** Newton definition the plaintiffs/respondents were, therefore, legally entitled to recover since they could reduce their claim to a judgment.

Whether plaintiffs/respondents could collect the excess over the $325,000 is irrelevant to the issue of **"legally** entitled to **recover"** since Boynton and Newton only require that the claim be one which can be reduced to judgment -- not collected." Assuming the plaintiffs/respondents had reduced their claim to this hypothetical judgment of $3,000,000, the School Board could pay its insurance benefits of $325,000, leaving plaintiffs/respondents with unpaid damages.

Michigan Millers in its brief quotes A. Widiss, **A** Guide to Uninsured Motorist Coverage, § 19 (1969), for the proposition UM coverage arose to replace unsatisfied judgment insurance. Precisely. That is, in fact, one reason why there is UM coverage in this case. If the plaintiffs/respondents had sued the School Board and received a judgment for $3,000,000, only $325,000 would have been paid (absent a legislative claims bill). This would leave a large "unsatisfied judgment." Since UM has its origins as insurance for "unsatisfied judgments," history dictates that UM coverage is available to compensate the plaintiffs/respondents. Since the refinement of UM, it is na longer necessary that

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[2] In fact, any requirement the judgment be collectible would be wholly inconsistent with the very purposes of UM. If the judgment were collectible, there would be no need for UM.

plaintiffs/respondents go through the unnecessary step of actually reducing their claim to an "unsatisfied judgment" so long as they can prove they could reduce their claim to a judgment. Boynton, at 556-57. As this Court noted: "Uninsured motorist coverage therefore arose in the context of providing a less cumbersome method far an insured to receive payment from the party with the ultimate financial responsibility, the insurer [as opposed to the] expense of a trial against the insured motorist..." Id., at 557.

Also, the statute allows a governmental entity the right to pay more than $100,000/$200,000 where, as here, there is insurance coverage. The statute provides for a provisional or conditional cap on the payment of damages which can itself be waived up to the limits of available insurance coverage. In other words, the amount of recovery available here is related to the amount of insurance coverage -- thus presenting the classic underinsured motorist case, the very situation for which UM coverage is designed to compensate plaintiffs/respondents.

This case merely presents the same situation as an underinsured motorist tortfeasor who has only $325,000 in insurance coverage but, by his negligence, creates damages in excess of that coverage. In such a case, Michigan Millers surely would not claim the tortfeasor was "immune" from suit because the available limits of the tortfeasor's insurance were $325,000 and damages exceeded that coverage. In fact, such a situation -- the classic underinsured motorist case -- is specifically dealtwith in section 627.727(3)(b). See discussion, infra.

In other words, sovereign immunity does not play a decisive role in this case; instead, this Court is presented with a third-

party tortfeasor, the School Board, whose insurance coverage of $325,000 was insufficient to pay the damages sustained by plaintiffs/respondents. The analogy is not to cases which deal with total immunity from suit, but rather to cases involving underinsured motorists whose available insurance is inadequate to compensate for the damage their negligence has caused.

It should also be noted that plaintiffs/respondents could seek legislative relief and receive even more than the $325,000 in coverage limits paid to plaintiffs/respondents. § 768.28(5), Fla. Stat. Plaintiffs/respondents' acceptance of the $325,000 settlement does not preclude them from seeking further compensation by means of a claims bill. See Gerard v. Department of Transportation, supra, holding plaintiff's acceptance of a settlement does not preclude him from seeking a claims bills from the legislature. However, plaintiffs/respondents must first exhaust all other remedies, such as seeking UM, before they pursue a legislative claims bill. See Kahn, "Legislative Claim Bills -- A Practical Guide to a Potent(ial) Remedy," The Florida Bar Journal, April, 1988, pages 23, 25. Therefore, even the $325,000 is not a definitive cap. This is dealt with in more detail under Issue I(B).

In denying coverage, Michigan Millers has taken the position that it has no liability to its insureds since the third-party tortfeasor (the School Board) has sovereign immunity. The obvious flaw in this reasoning is the fact the School Board was not immune from liability for the negligence of its employee. In support of this contention, Michigan Millers cites cases dealing with third-party tortfeasors who enjoy workers' compensation immunity, interspousal immunity and parent/child immunity. Michigan Millers

attempts to argue that since the carrier stands in the place of the insured, this immunity protects them from having to pay claims under their policy. All of the cases relied upon by Michigan Millers, however, deal with situations where the third-party tortfeasor is absolutely and totally immune from any liability, as opposed to this situation where there is a waiver of immunity and the School Board has actually paid damages of $325,000. Michigan Millers relies upon cases where the insured plaintiffs did **not** have a claim which could be reduced to judgment -- a **stark** contrast to the case at hand.

A. WHETHER ALLSTATE INSURANCE CO. v. BOYNTON IS DISTINGUISHABLE FROM THE INSTANT CASE SINCE BOYNTON DEALT WITH AN ABSOLUTE IMMUNITY FROM SUIT AND NO SUCH ABSOLUTE IMMUNITY EXISTS HERE?

Michigan Millers relies on the case of Allstate Insurance Co. v. Boynton, **supra**, which dealt with a situation where the third-party tortfeasor **was** totally immune from liability to Allstate's insured because of an asserted workers' compensation immunity. It must be remembered that this Court's specific holding in Bovnton does **not** apply to the **case** at hand. Bovnton simply **held:**

> [W]e also hold that the phrase 'legally entitled to recover' in the context of section 627.727(1) does not encompass claims where the uninsured tortfeasor is immune from liability because of the Workers' Compensation Law, Chapter 440; Florida Statutes.

Boynton, supra, 486 So.2d at 553-4.

Boynton is not in conflict with the opinion of the Second District in any way and, in fact, language in Boynton lends support to the Second District's ruling in this case.

In Bovnton, this Court held that the "plain meaning" of the phrase "legally entitled to recover" as used in section 627.717(1) "would appear to be that the insured must have a claim against the tortfeasor which could be reduced to judgment in a court of law." Boynton at 555. See also Newton v. Auto-Owners Insurance Ca., supra. In the instant case, as established under Issue I, the plaintiffs/respondents have a claim against the School Board which "could be reduced to judgment in a court of law" since sovereign immunity for negligent operation of a school bus has been waived. In Bovnton, the insured did not have a claim which could be reduced to judgment for the simple reason that Chapter 440 granted the tortfeasor absolute and total immunity from suit.

This Court utilized a two-prong test in Bovnton to determine whether or not uninsured motorist coverage would be available. The first prong of the test was whether the third-party tortfeasor had any insurance coverage which could provide compensation to the injured parties for the particular occurrence that caused those parties' damages. Id. at 553. In the case sub judice, the insurance policy on the vehicle owned by the School Board did provide coverage "for the particular occurrence that caused plaintiff's damages." The School Board's policy both could and did provide coverage. Therefore, the first prong of the test in Bovnton is met and accordingly there is coverage under the Michigan Millers policy for the plaintiffs/respondents.

The second prong of the test dealt with in Bovnton was whether the insureds could have a cause of action directly against the uninsured or underinsured tortfeasor. The court reasoned that since the tortfeasor was totally immune from liability because of the

immunity provided by Chapter 440, there could be no cause of action against the third-party tortfeasor and therefore no coverage. The cited provision of the Workers' Compensation Law provided total and absolute immunity;" this Court thus held that since Boynton could not sue his employer (the third-party tortfeasor) directly, he would not be able to collect under his uninsured/underinsured motorist coverage by viewing the employer as having insufficient insurance necessary to compensate him. This Court recognized the key was whether the insured had a claim "which could be reduced to judgment in a court of law." Bovnton at 555.

If this Court examines the second prong of its test in Bovnton, it is clear that the plaintiffs/respondents have again met the requirement and, therefore, should be provided uninsured motorist coverage under the Michigan Millers policy. It is clear that the plaintiffs/respondents could have "reduce[d] their claim to a judgment in a court of law" against the School Board and, therefore, coverage should be provided.

The Second District correctly recognized the distinction between the total immunity from suit in the Bovnton case and this case. Not only did the Second District recognize this distinction, it also recognized that the public policy arguments advanced by this Court in Bovnton support recovery for the plaintiffs/-respondents under these facts. The Second District quoted Boynton:

> It seems probable that in those states where the trend is to assure that a source of indemnification is available, the courts are likely to reject an argument as to the applicability of such tort immunities. However, it may not be appropriate to attempt

[3] § 440.11, Fla. Stat.

> to speak of all these immunities as an undivided group. For example, in a jurisdiction which affirms the importance of the interspousal immunity, the court might well be inclined to distinguish this type of case on the basis that the policy and goals underlying the establishment of this type of immunity are sufficiently important to warrant separate consideration and treatment.

Michigan Millers Mutual Insurance Co. v. Bourke, supra, at 1368, quoting Boynton, supra, 486 So.2d at 558-559 (quoting A. Widiss, A Guide to Uninsured Motorist Coverage § 2.27).[4]

By holding in Boynton that the UM carrier could raise the substantive defenses of the tortfeasor, this Court cited with approval the holding in Winner v. Ratzlaff, 211 Kan. 59, 505 P.2d 606, 610 (1973), which contained this qualification:

> ***In resisting the claim the insurer would have available to it, in addition to policy defenses compatible with the statute, the substantive defenses that would have been available to the uninsured motorist such as contributory negligence, etc.*** (Emphasis in original.)

Boynton, at 556. Thus, before the UM carrier can adopt the tortfeasor's defenses, the defenses must be "compatible with" the public policy behind the statute.

As noted in the Second District's opinion in this case:

> It is well established in Florida that the policy and purpose behind the uninsured motorist statute 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. Brown v. Progressive Mutual Insurance Co., 249 So.2d

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[4] See also discussion of this quote, infra, Issue I(C), pages 33-34, this brief, as used to refute Michigan Millers' position under their Issue I(D).

429 (Fla. 1971): Decker v. Great American Insurance Co., 392 So.2d 965 (Fla. 2d DCA 1980), review denied, 399 So.2d 1143 (1981).

Michigan Millers Insurance Co. v. Bourke, supra, at 1368.

The cap on payment of damages under section 768.28 is designed primarily to protect the sovereign; i.e., in this case, the "motorists who cause damage." Thus, to allaw that cap to preclude the injured plaintiffs/respondents from recovering the UM benefits for which they paid premiums is inconsistent with the public policy of "protecting injured persons." Since it is inconsistent with Florida's public policy, it is a defense which is not "compatible with the [UM] statute" and should not be applied to allow Michigan Millers to collect premiums from its insured and then escape its coverage obligation. To adopt Michigan Millers' position would be to subvert the very purpose the UM statute was designed to accomplish. Such a position would only serve to benefit the insurance company by protecting those who cause damage to others while leaving injured parties without adequate remedies as set forth in the case of Brown v. Progressive Mutual Ins. Co., supra, at 430.

In Bovnton, denying coverage did not offend the public policy behind UM for the simple and stated reason that "[i]n Florida a source of indemnification far a worker injured by a co-worker driving an uninsured vehicle is already available, i.e., the benefits of the Workers' Compensation Law. Society's goal of protecting the worker under this circumstance has been achieved." Bovnton, at 559.

Such is not the case at hand. Even Michigan Millers agrees the insured parties here, the plaintiffs/respondents, suffered losses exceeding the available insurance coverage of $325,000. Thus, unlike the Boynton case where workers' compensation was deemed to have made the insured whole, the insureds here have received only partial recovery. The plaintiffs/respondents in this case are in precisely the same position as if they were involved with an ordinary motorist whose insurance was insufficient to cover the damages caused by that motorist -- the very situation which UM is designed to cure.

Boynton is not controlling due to key factual distinctions,[5] and language in Boynton is consistent with the Second District's opinion. This Court may affirm the Second District's opinion as it is in harmony with Boynton.

B. WHAT IMPACT DOES THE OPPORTUNITY TO SEEK A CLAIMS BILL HAVE ON BOYNTON AND THE CASE AT HAND WHERE THE CLAIMS BILL PREVENTS FINDING AN ABSOLUTE CAP ON LIABILITY EXISTS?

For the first time, Michigan Millers argues that construing the policy at hand as incorporating a legislative claims bill would violate the constitutional prescription against impairment of contracts by creating substantive rights that retroactively determine the benefits available under the contract. (Michigan Millers' brief, p. 19) But the right to seek a legislative claims bill was the law at the time of the accident and during the time

[5] See Stack v. State Farm Mutual Automobile Insurance Co., 507 So.2d 617 (Fla. 3d DCA 1987) distinguishing Boynton by recognizing the difference between an absolute and a qualified immunity.

the policy was in effect; there is no "retroactive" change in the law or the contract.

The accident occurred on April 7, 1988 (App. 5, p. 1, ¶ 4) and the policy was in effect from February 11, 1988 to August 11, 1988. (App. 2, p. 3). The applicable law is the 1987 version of section 768.28, Florida Statutes, which contains a provision for a legislative claims bill in subsection 5.

The law in force in Florida at the time of the policy is part of the insurance contract. See, e.u., Empire State Insurance Co. v. Chafetz. 302 F.2d 828 (5th Cir. 1962). Since the legislative claims bill was law at the time of the policy, it is considered part of the policy and therefore there is no violation of the constitutional prescription against impairing contract rights retroactively.

Despite Michigan Millers' reference to a "subsequent substantive legislative enactment" which would be "incorporated into the policy," the fact is the law in place at the time of the execution of the policy allowed legislative claims bills. The fact no claim was made pursuant to this provision during the applicable policy periods does not make the pre-existing right to make such a claim a "retroactive" legislative enactment any more than any unexercised statutory right becomes a substantive retroactive legislative enactment upon the individual's election to use that right. For example, the plaintiffs/respondents had a statutory right to sue Michigan Millers for bad faith and this statute was in place when the insurance contract was formed. The fact plaintiffs/respondents did not elect to use this right until some

time after the formation of the contract did not make the election to use that right a retroactive impairment of the contract.

Michigan Millers claims the legislative claims bill is a retroactive enactment which removes substantive defenses "available to Petitioners at the time the parties executed the contract of insurance" (Michigan Millers' brief, page **21)** when, without dispute, the legislative claims bill process existed and was available to the parties at the time the parties executed the contract of insurance. No retroactive impairment of contractual rights has occurred.

Although recognizing the plaintiffs/respondents' argument that the legislative claims bill meant the $100,000/$200,000 cap on the payment of damages was only a potential cap, the Second District did not base its decision upon that rationale. Rather than decide the case on the basis of the legislative claims bill, the Second District based its decision on the fact plaintiffs/respondents had a claim which could be reduced to a judgment and upon the public policy concerns expressed by this Court in Brown. Thus, to a large degree, discussion of the legislative claims bill is unnecessaryto support the Second District's decision.

If this Court, like the Second District, accepts that Michigan Millers cannot claim the defense of the cap on payment of damages as a substantive defense because of **the** overriding public policy of making **"whole"** the insured injured party, then **the** analysis need not involve the legislative claims bill. The legislative claims bill only becomes relevant if this Court decides that Michigan Millers can assert the cap an payment of damages found in section **768.28** as a means of escaping their obligations to pay under the UM

provisions of their policy. In which case, the Court should recognize there are three layers of payment caps in section 768.28: 1) the $100,000/200,000 cap; 2) the limits of available insurance coverage which here was $325,000 and 3) the amount the legislature may grant the injured parties pursuant to the legislative claims bill.

The case has obviously passed the initial $100,000/200,000 cap since the tortfeasor's insurer and plaintiffs/respondents settled for $325,000. By settling for $325,000, the plaintiffs/respondents did not in any way forfeit their right to petition the legislature. See Gerard v. Department of Transportation, supra. Plaintiffs/-respondents must, however, exhaust their UM options prior to seeking relief through a legislative claims bill. See Kahn, "Legislative Claim Bills," supra, at 25. The plaintiffs/respondents have not limited themselves to the second layer of payment caps, i.e., available insurance proceeds, and, as a consequence, the third layer is involved wherein only the legislature can determine what that upper limit might be. The amount of a claim bill before the legislature is not determinative any more than the amount of a judgment against an uninsured motorist would be if section 768.28 were not involved.

Since the injured party must establish a claim which could be reduced to a judgment, the determinative factor is the injured party's ability to prove damages -- which plaintiffs/respondents can do here. The ability to seek a legislative claims bill means there is no absolute cap on damages. If there is no absolute cap for the sovereign, there is no absolute cap far Michigan Millers.

Although Michigan Millers now asserts that the "speculative quality of legislative claims bills ... also jeopardizes the Petitioner's subrogation rights, ..." (Initial brief at 17), Michigan Millers previously took a contrary view below. Counsel for Michigan Millers in a March 17, 1989 letter (R. 64; App. 4, p. 2), thought enough of the right to seek a legislative claims bill that he specifically protected that right in the settlement between the School Board and plaintiffs/respondents. (Id., ¶ 4) In a previous letter, Michigan Millers had also expressed its understanding that the release between the School Board and plaintiffs/respondents "would not affect [plaintiffs/respondents'] rights to pursue a claims bill with the state legislature." (R. 61) Based upon its understanding that the right to pursue a legislative claims bill had been preserved, Michigan Millers agreed to the settlement and release. (R. 61; R. 64; App. 4, p. 2)

Obviously Michigan Millers felt this right was of sufficient value to preserve it in the settlement stages and, in fact, apparently conditioned its approval of the settlement on preservation of the right to file a legislative claims bill. No doubt Michigan Millers sought to preserve the legislative claims bill sight as a means to protect its right to subrogation.[6] Once Michigan Millers pays UM to the plaintiffs/respondents, Michigan Millers, standing in the shoes of plaintiffs/respondents, could seek a legislative claims bills pursuant to its subrogation rights. See generally Allstate Insurance Co. v. Metropolitan Dade County,

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[6] If this is not so, then by agreeing to the settlement, Michigan Millers waived its right to seek subrogation. See Poco's brief, pages 14-15.

436 So.2d 976 (Fla. 3d DCA 1983) pet. for rev. den., 447 So.2d 885 (1984), holding a subrogee stands in the shoes of the subrogor and is entitled to all rights of its subrogor. This case also recognized a UM insurer could pursue subrogation against a county so long as the subrogation claim was timely filed under section 768.28(12).

Since Michigan Millers has either protected its subrogation rights by conditioning its approval of the settlement upon preservation of the legislative claims bill provision or waived the rights by agreeing to the settlement, Michigan Millers cannot claim a loss of subrogation rights as a basis for reversal.

The fact the legislature might reject any subrogation claim has no bearing on this issue since frequently the insurance company cannot collect its subrogation claims. *See* generally A. Widiss, Uninsured and Underinsured Motorist Insurance, § 7.6 at 268, and note 15, stating (with supporting data) that subrogation rights are generally of little practical importance since subrogation is rarely collected from the tortfeasor. See also discussion, infra, Issue I(C), pages 33-35, this brief.

The uninsured motorist policy and the uninsured motorist statute does not guarantee insurers the right of subrogation collection against the tortfeasor. All the policy provides is a right of subrogation. If a third-party tortfeasor has low limits and has no assets, there is nevertheless UM coverage because the insurance carrier has the right of subrogation although no ability to collect on its subrogated rights. Either Michigan Millers has not lost this right since it protected the right to seek a legislative claims provision; or, in agreeing to the settlement,

Michigan Millers waived any subrogation claim. Neither view grants Michigan Millers any credible basis to seek reversal on the basis af an injury to its subrogation rights.

Accordingly, under either the public policy analysis of the Second District or the analysis involving the legislative claims bill, Michigan Millers is liable for UM coverage.

C. WHETHER THE PUBLIC POLICY EXPRESSED IN THE UM STATUTE, COUPLED WITH THE LANGUAGE IN THE POLICY AT HAND, CREATE COVERAGE FOR THE INSURED PLAINTIFFS/RESPONDENTS?

The public policy of Florida, as reiterated by the Second District's opinion in this case and as recognized by this Court's opinion in Brown v. Progressive Mutual Insurance Co., supra, is to protect persons who are injured or damaged by other motorists who are either underinsured or not insured and cannot make "whole" the injured party. Michigan Millers Insurance Co. v. Bourke, supra, at 1368: Brown v. Progressive Mutual Insurance Co., supra, at 430.

Michigan Millers, in its Issue I(D), asserts that this policy must be set aside because the potential limits of recovery under section 768.28 were declared constitutional by this Court in Cauley v. City of Jacksonville, 403 So.2d 379 (Fla. 1981), and therefore plaintiffs/respondents presumably have been fully indemnified. However, Michigan Millers previously conceded the plaintiffs/respondents' damages exceeded their $325,000 recovery. (See Michigan Millers' Complaint for Declaratory Relief, App. 5, p. 2, ¶ 9: "The damages sustained by defendants (plaintiffs/respondents) collectively exceed $325,000.") Thus, at the simplest level of analysis, Michigan Millers in its own pleading conceded the plaintiffs/respondents have not been fully

compensated, or "made whole," since their damages exceed the limited recovery available to them through the School Board's insurer. In light of the undisputed fact that the plaintiffs/respondents have not been made **"whole"** by full compensation, in the context of public policy it hardly matters that this Court found the potential limits **of** liability under Section ***768.28*** to be constitutional.

This Court in Cauley recognized a valid legislative objective to the limits of liability in section ***768.28*** but held:

> It is important to note that, although section ***768.28*** imposes a **$50,000/$100,000** [now **$100,000/200,000**] ceiling on tort recovery against government in the judicial forum, the section specifically provides that one suffering injuries in ***excess*** of the ceiling may seek additional relief by petition to the legislature.

Cauley, at 387. Thus, contrary to Michigan Millers' implication, even Caulev did not opine the initial limits of recovery of **$50,000/$100,000** in section **768.28** provided a complete and adequate recovery.

Both the facts of this case and the case law recognize that plaintiffs/respondents have not received full indemnification for their injuries. In the language of this Court's Brown opinion, **the** School Board's insurance did not **and** cannot "make whole" the plaintiffs/respondents. The public policy has not been served by the available School Board insurance already provided to **the** plaintiffs/respondents -- any more than if the tortfeasor **was** an ordinary citizen who was underinsured.

Another key flaw in Michigan Millers' reasoning has already been touched upon under Issue I(A), that being that essence of the

public policy involved here is not to protect the tortfeasor (here the School Board) or the insurance company, but to protect the injured party. **Since** the cap on potential payment of damages exists primarily to protect the sovereign, i.e., the School Board, that cap cannot be extended to protect the insurance company under the very clear holding in Brown. Since this Court in Brown held that the public policy was not to protect the insurance company or the tartfeasor, application of the sovereign's cap to protect Michigan Millers would conflict with Brown.

Widiss, in his 1990 Uninsured and Underinsured Motorist Insurance treatise, addressed this situation and wrote: "Most tort immunities in the United States are predicated on rationales or public policies that were recognized to protect the tortfeasor and, therefore, should have no bearing on whether the immunity precludes compensation for insureds under an atherwise applicable uninsured motorist **coverage."** Widiss, Uninsured and Underinsured Motorist Insurance, Second Edition, § 7.14 at 302. Further, Widiss states **"...** [T]here is no compelling reason why the public interests which justify or support a tort immunity that forecloses a claim against a tortfeasor should also leave an innocent injured person with no right to **recover** uninsured motorist insurance benefits." **Id.**

Michigan Millers' argument that plaintiffs/respondents "have received indemnification..." (Michigan Millers' initial brief, page 22, emphasis in original) might have had some colorable appeal in the days of pure uninsured motorist's coverage. However, both under the terms of the policy at hand and under **the** controlling law, Florida provides UM for underinsured motorists. The policy provides for UM where the tortfeasor's vehicle has coverage but its limits

for bodily liability are not enough to pay the full amount the insured is damaged. (App. 2, p. 31) The controlling statute similarly provides that UM coverage exists where the vehicle has insurance, but is underinsured. See § 627.727 (3)(b). In other words, uninsured motorists coverage and underinsured motorist coverage have become synonymous terms. See generally Great American Insurance Co. v. Pappas, 345 So.2d 823, 824, n.1 (Fla. 4th DCA 1977). Accordingly, Michigan Millers' position that the plaintiffs/respondents received some indemnification does not afford Michigan Millers any relief from the judgment or the opinion of the Second District since even Michigan Millers admits the damages sustained by the plaintiffs/respondents exceed the amount recovered, making this an underinsured motorist case.

Michigan Millers makes a passing reference to subrogation rights in its initial brief in the context of the Newton case. As previously asserted under Issue I(C), supra, Michigan Millers has not lost the right to seek subrogation since Michigan Millers, in approving the settlement between the School Board and plaintiffs/respondents, preserved the right to a legislative claims bill. In the alternative, if preserving the right to a legislative claims bill does not preserve its right to subrogation, Michigan Millers has waived this right by agreeing to the settlement between the School Board and plaintiffs/respondents.

Further, while Boynton and Newton do recognize that the insurer's subrogation rights should be considered, this Court in Boynton also emphasized that a balancing of the interest of the injured party versus the insurance company's right to subrogation was appropriate. In a quote from A. Widiss, A Guide to Uninsured

Motorist Coverage, this Court in Boynton recognized that where the "objective of providing indemnification [to the injured party] 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, at 558, quoting Widiss at § 2.27; also quoted in the Second District's opinion in Michigan Millers, at 1368. (See discussion and full quote under Issue I(A).)

In other words, both Boynton and the Second District's opinion in this case implicitly recognize that where the jurisdiction's prevailing interest is in providing indemnification to the injured party, the insurance company's right to subrogation is lost in a direct contest between making whole the injured parties or protecting the insurance company. As previously indicated, UM scholar Widiss agrees with this view. "[I]mplementing the very significant public interests [behind UM] ... should clearly mean that an insured is entitled to uninsured motorist insurance benefits even though a tort immunity would foreclose a claim against the tortfeasor." Uninsured and Underinsured Motorist Insurance, supra, § 7.14 at 303; See also, Id., § 7.6 at 268 observing subrogation rights in UM have little real value to an insurance company.

Since this Court's opinion in Brown leaves no question but that the interest in making the injured party whole is paramount and superior to the insurance company's interest, any potential loss in subrogation rights falls to the overwhelming interest of the injured party. See Young v. Greater Portland Transit District, 535 A.2d 417, 420-21 (Me. 1987), allowing for UM coverage against defenses related to sovereign immunity and holding:

> We recognize that our holding could impair the subrogation rights granted to the insurer by section 2902(4), but the insures has other means available to it to protect those rights. In any event, subrogation rights are generally of little practical importance in this area of the law. 1 A, Widiss [First Edition] § 7.6 at 205.

The Second District[7] implicitly weighed these interests between a potential loss of subrogation and recovery for the injured parties. On the basis of both Boynton and Brown, the Second District correctly held that under the public policy of this state, the interest in making the injured party whole was the overriding interest. Accordingly, as held by the Second District, public policy as determined by this Court in Brown and the terms of the policy at issue combine to create UM coverage for the plaintiffs/respondents.

D. WHETHER MICHIGAN MILLERS' CLAIM TO THE SUBSTANTIVE DEFENSES OF THE SCHOOL BOARD ENTITLE IT TO DENY UM COVERAGE?

As previously established, the critical test is whether the injured party has a claim which could be reduced to a judgment. Boynton, supra; Newton, supra. Here, under the plain terms of section 768.28(5), the plaintiffs/respondents have a claim which can be reduced to a judgment in any amount; thus, there are no substantive defenses which preclude the plaintiffs/respondents from reducing their claim to a judgment in any amount.

Michigan Millers cites the cases of Simon v. Allstate Insurance Co., 496 So.2d 878 (Fla. 4th DCA 1986), and Gelaro v. State Farm Mutual Automobile Insurance Co., 502 So.2d 497 (Fla. 1st

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[7] The Second District did not decide the issue of whether Michigan Millers had preserved its subrogation rights by protecting the right to seek a legislative claims bill.

DCA 1987), in support of its position under its Issue I(E) that it owes no uninsured motorist coverage ta its insureds. The Simon case dealt with a situation where 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 held that since the wife could not sue the husband under the interspousal immunity doctrine, the wife could not obtain UM benefits. Again, this dealt with a situation where there was total and absolute immunity. In other words, the wife did not have a claim she could reduce to a judgment; therefore she was not legally entitled to recover under the Bovnton definition of "legally entitled to recover."

The Gelaro case dealt with a situation where a child tried to obtain uninsured motorist coverage as a result of injuries negligently inflicted by that child's mother. The court again stated that since there is interfamily immunity (which is total and absolute), the claim for uninsured motorist benefits does not lie. As in Simon, the case dealt with a situation in which the injured party did not have a claim which could be reduced to judgment.

Both Gelaro and Simon rely upon this Court's Boynton opinion. Accordingly, the Gelaro and Simon holdings that the UM carrier is entitled to the affirmative defenses of the tortfeasor must be viewed in the context of Boynton's recognition of the controlling public policy principle. In that regard, plaintiffs/respondents adopt and incorporate the public policy arguments advanced under Issue I(C). Bovnton, by incorporation and approval of Winner v. Ratzlaff, supra, recognized that the UM carrier's right to assert affirmative defenses of the tortfeasor is limited to those defenses

which are "compatible" with the UM statute. See Boynton at 556; Winner, supra, 505 P.2d at 610.

Allowing Michigan Millers to use the cap on the payment of potential damages to preclude payment to its own insureds would be incompatible with the public policy this Court announced in Brown v. Progressive Mutual Insurance Co., supra. Michigan Millers should not be allowed to use the cap on the payment of potential damages to escape its contractual obligation to indemnify its own insured.

It should also be remembered that in Simon, Boynton, and Gelaro, no judgment could be entered against the tortfeasor -- a substantive affirmative defense existed in each instance which precluded the injured party from having any claim which could be reduced to judgment. In the instant case, plaintiffs/respondents had a claim which could have been reduced to a judgment in amount. See § 768.28(5). While the School Board could disclaim payment for "that portion of the judgment that exceeds these amounts," the excess could be paid pursuant to the legislative claims bill provisions. Thus there simply is no absolute cap or substantive defense in this case which prevents entry of a judgment in an amount greater than $325,000.

There are no substantive defenses which preclude entry of a judgment and Michigan Millers cannot escape its obligation.

E. WHETHER THE AUTHORITY FROM OTHER STATES ON THIS ISSUE SUPPORTS THE INSURED PLAINTIFFS/RESPONDENTS' CLAIM FOR UM COVERAGE?

Other jurisdictions which have dealt with this issue have reached inconsistent results, although it appears that more cases are consistent with the Second District's opinion than with

Michigan Millers' position. See generally Annot., 55 ALR 4th 807 (1987) and cases cited therein; Karlson v. City of Oklahoma City, 711 P.2d 72, 74 (Okla. 1985); and cf., Young v. Greater Portland Transit District, supra, 535 A.2d 417; State Farm Mutual Automobile Insurance v. Braun, 793 P.2d 253 (Mont. 1990) (discussed below).

Karlson v. City of Oklahoma City, supra, is factually on point. In that case, the plaintiffs sued Oklahoma City for injuries and wrongful death arising out of an automobile collision involving a city police vehicle. Oklahoma has a statute similar to Florida's, waiving immunity of the City for up to $50,000 for any one claimant and up to $300,000 for a single occurrence. Because of this, the plaintiffs were only able to recover those sums from the City. After recovering these amounts, they made a claim under their underinsured motorist policy for coverage. Their carrier denied coverage because it (like Michigan Millers) felt that the words "legally entitled to recover" barred the plaintiffs from recovery under the policy. The Oklahoma Supreme Court, in rendering its decision, stated:

> 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 tort-feasor 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.

It is difficult to imagine a case more clearly on point both factually and legally. That case involved a situation where the insureds were in their own vehicle (insured by Allstate) when it collided with the City's vehicle. In this case, the insureds were in the Michigan Millers' insured's vehicle when it collided with the School Board's vehicle. In that case, there was a limitation on the payment of damages pursuant to a waiver of sovereign immunity by the City of Oklahoma City in the amount of $50,000 per person and $300,000 per accident. In this case, the waiver by the State on behalf of the School Board was for $100,000 per person and $200,000 per accident. In that case the $300,000 total limitation of liability was insufficient to compensate the injured parties for their injuries and deaths -- the exact same situation as in this case. In that case, the provision in question was the exact same language as Michigan Millers relies upon, i.e., "legally entitled to recover."

Michigan Millers attempts to distinguish Karlson on the basis that the Oklahoma court defined "legally entitled to recover" as requiring the injured party to show fault on the part of the tortfeasor and to prove the extent of damages. Karlson, supra, at 74-5. This is essentially the same definition as Florida's definition that "legally entitled to recover" requires the injured party to have a claim which can be reduced to a judgment. In order to have a claim which can be reduced to a judgment, the injured party in Florida (like the injured party in Oklahoma) must show fault on the tortfeasor's part and prove the extent of damages.

Thus the distinction Michigan Millers attempts to make is meaningless.

In analogous cases, Montana and Maine have found UM coverage exists. For example, in State Farm v. Braun, supra, 793 P.2d at 254-6, a Montana court held that a cap on the payment of damages under the applicable Canadian tort law was not analogous to the workers' compensation immunity and the cap did not preclude UM coverage under the "legally entitled to recover" standard. Relying on Karlson, the Montana court rejected the insurance company's argument that a cap on the tortfeasor's liability allowed it to escape UM coverage to the insured. The court also held to allow State Farm to take advantage of the Canadian cap on damages (which was, of course, available to the tortfeasor) "would negate the insured's reasonable expectation under its policy contract with the insurer. The insured could reasonably expect to recover the difference between what he could collect from the tortfeasor's policy and his proven damage, up to the policy limits purchase." Id., at 256.

In Young v. Greater Portland Transit District, supra, 535 A.2d at 419-21, the Maine court rejected a specific policy exclusion for a vehicle owned by a governmental entity because such an exclusion was inconsistent with the state's own UM statute. Further, the court did not allow the insurance company to use a statute of limitation defense available to the tortfeasor under Maine's law regarding suits against governmental entities. Despite the fact "the underlying action against the District [tortfeasor] is banned by the applicable statute of limitation," Young, at 420, the Maine court allowed the injured party to recover UM even though the

policy contained the "legally entitled to recover" standard. The court, in *so* holding, also acknowledged it was impairing the insurer's subrogation rights.

Michigan Millers' two out-of-state cases are distinguishable. For example, Michigan Millers itself admits the Ohio case of York v. State Farm, 414 N.E.2d 423 (Ohio 1980), dealt with a statute which "precluded recovery by a person injured by a fire truck in the performance of its duties." (Michigan Millers' Initial Brief at 28) York dealt with an absolute immunity, which is not part of the case at hand.

Savan v. USAA, 716 P.2d 895 (Wash. App. 1986), cited in Michigan Millers' brief, dealt with a statute which "precluded recovery by a member of the armed forces who suffers injuries 'in the course of activity incident to (military) service.'" In other words, both Savan and York dealt with absolute immunity from suit, which meant, in turn, that the injured parties did not have any claim which could be reduced to a judgment. Savan and York are fundamentally different from the case at hand.

While cases from other jurisdictions are not wholly consistent, the majority trend is toward providing UM coverage in similar situations.

II. WHETHER THE SCHOOL BOARD'S MOTOR VEHICLE IS AN UNINSURED MOTOR VEHICLE UNDER THE DEFINITION IN THE POLICY AND UNDER THE CONTROLLING TERMS OF FLORIDA STATUTE SECTION 627.727?

The relevant Florida Statute defines "uninsured motor vehicle" as including a motor vehicle which "has provided limits of bodily injury liability for its insured which are less than the limits applicable to the injured person provided under uninsured

motorist's coverage applicable to the injured person." § 627.727 (3)(b), Fla. Stat. (1987). The statute also provides that this definition is "subject to the terms and conditions of such coverage" in the policy. Id.

In the instant case, the applicable policy terms define an uninsured motor vehicle as a vehicle:

> 2. To which a bodily injury liability bond or policy applies at the time af the accident but its limits for bodily injury liability is not enough to pay the full amount the "insured" is legally entitled to recover as damages.

(App. 2, p. 31)

Where a policy offers broader coverage than that required by the statute, the coverage provided by the policy controls. See Universal Underwriters Insurance v. Morrison, 574 So.2d 1063, 1065 (Fla. 1990) in which the identical definition of an uninsured vehicle was at issue, and this Court held there is nothing which precludes insurance companies from offering greater coverage than that required by the statute. Accordingly, given that definition, this Court held that it did not matter that the tortfeasor's uninsured motorist coverage was less than the injured insured plaintiff's liability limits and that the injured plaintiff was still entitled to recover UM. In Morrison, the injured party had $20,000 available bodily injury coverage; the tortfeasor had $25,000 in available insurance. The injured party and the tortfeasor settled for $25,000. Nonetheless, given the policy definition, this Court allowed the injured party to collect UM. Thus under the Morrison holding, the school bus was definitely an uninsured motor vehicle (even under Michigan Millers' erroneous

analysis) since its insurance limits of $325,000 were less than the injuries suffered by the plaintiffs/respondents.

"Insured" in the policy at issue here, for purposes of UM, was defined to include the named insured, members of his/her family and any other person occupying the covered automobile. (App. 2, p.10). Thus, for purposes of the policy, **"insured"** included all of the individual plaintiffs/respondents in this case.

Michigan Millers admits in its pleadings that the plaintiffs/respondents' damages exceed the amount of recovery they have received. **(App. 5, p. 2, ¶ 9)** Further, Michigan Millers concedes that the aggregate UM available to the plaintiffs/-respondents is $400,000. (See Michigan Millers' brief, page 30)

Accordingly, plugging the facts of this case into the policy definition, the School Board's policy was "not enough to pay the full amount the **"insured"** [plaintiffs/respondents Bourke, Voss, Reeves, and Foco] [were] legally entitled to recover as damages." Under this Court's opinion in Morrison, the school bus is an uninsured vehicle according to the policy definition.

The Second District rejected plaintiffs/respondents' reliance upon Morrison because the Morrison policy terms argument was not offered in the trial court record. Michigan Millers, at 1366. However, with all due respect to the Second District, Morrison did not even exist until well after the briefs were filed in the Second District. An argument based upon Morrison could not reasonably have been made before either the trial court or the Second District since the case did not exist at those relevant times.

The controlling law in effect at the time of the hearing before the trial court and at the time of the briefing in this case

was Shelby Mutual Insurance Co. of Shelby, Ohio v. Smith, 556 So.2d 393 (Fla. 1990); Shelby, being the law at that point in time, was what was argued by both sides at the trial and district court levels. (See transcript hearing before trial court, Bourke's Appendix, item 9, Second District's Record, R.76-100) As reflected both in the trial court's transcript and the Second District's opinion, Michigan Millers relied upon the Shelby case to support its argument that the school bus was not an uninsured motorist vehicle. In turn, plaintiffs/respondents had argued Shelby did not preclude a determination that the school bus was an uninsured motorist vehicle since Shelby did not address whether the aggregate amount available under one policy could be used.

Shelby held that, based upon the statutory language, a claim for UM was not authorized when the tortfeasor's liability limits exceeded the limits of the uninsured motorist coverage. Thus, under Shelby, it was the statutory definition which was controlling, not the policy terms. Accordingly, the parties' arguments before the trial court focused on what Shelby required the parties to focus on -- the statutory definition.

Morrison, by holding policy language could expand the statutory definition of an uninsured motorist vehicle, modified the holding in Shelby. Decided on October 18, 1990, Morrison was not published until several months after the plaintiffs/respondents' July 26, 1990 brief had been filed. Morrison was sent to the Second District by supplemental authority once it was published. See Michigan Millers, at 1366, n. 1. In other words, plaintiffs/respondents raised the Morrison argument as soon as it was feasible to do so.

Accordingly, it would be unfair to deny the plaintiffs/respondents the benefit of this Court's holding in Morrison where the law changed during the appeal before the Second District, particularly where Morrison was raised by the plaintiffs/respondents upon that case's publication. Plaintiffs/respondents should not be held to a standard which would have required their counsel to anticipate that this Court would modify the holding in Shelby.

Further, under the so-called right for any reason doctrine, this Court may affirm the judgment below for any valid reason that appears in the record. See, e.g., In re Yohn's Estate, 238 So. 2d 290 (Fla. 1970). Certainly, as this Court has recognized in Cantor v. Davis, 489 So.2d 18, 20 (Fla. 1986), once this Court has jurisdiction, "it may, at its discretion, consider any issue affecting the case. Trushin v. State, 425 So.2d 1126 (Fla. 1982); Savoie v. State, 422 So.2d 308 (Fla. 1982); Negron v. State, 306 So.2d 104 (Fla. 1974)." Therefore, plaintiffs/respondents request this Court apply its holding in Morrison to the instant case.[8]

Beyond such technical arguments as to why this Court may, and in all fairness should, apply Morrison, the plaintiffs/respondents did raise below their claim that the school bus was an uninsured vehicle under the policy at issue, as well as under the statute. See their "Answer and Counterclaim for Declaratory Relief," which

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[8] Michigan Millers is hardly in a position to object since Michigan Millers is also raising issues for the first time at this appellate stage. For example, issues in its brief before this Court at Issues I(B) and (C) concerning the legislative claims bill were not raised by Michigan Millers at the trial level or in its initial petition for certiorari. (See transcript, R. 76-100; petition for writ of certiorari, R. 1-20.)

asserted the school bus "was an uninsured motor vehicle within terms and provisions of the policy of insurance issued by Counterdefendant [Michigan Millers] to B. ALLEN and REBECCA A. REEVES, which was in effect at the time of the above-referenced motor vehicle collision." (emphasis added) (App. 6, p. 3, ¶ 7.) A copy of the insurance policy was before the trial court. (See App. 5, ¶ 3.)

Not only does Morrison support plaintiffs/respondents' assertion that the school bus was an uninsured vehicle under the terms of the policy, in fact, the school bus was also an uninsured vehicle under the terms of the statute. As held by the Second District, the aggregate amount of coverage from Michigan Millers is $400,000. The amount of insurance on the school bus was $325,000. The governing statute, as quoted above, requires only that the insurance on the school bus be less than the coverage applicable to the injured parties under the UM coverage. § 627.727(3)(b), Fla. Stat. (1987).

Michigan Millers argues that the aggregate amount may not be considered,[9] rather only the UM available per person may be considered. Plaintiffs/respondents assert the aggregate amount of available UM coverage, $400,000, is the appropriate amount to consider.

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[9] Michigan Millers overlooks the fact that the $325,000 in the School Board's insurance was divided among the four plaintiffs/respondents. Thus, Michigan Millers wants to use an aggregate amount for the tortfeasor's insurance but not use a corresponding aggregate amount for UM. Under simple rules of fair play, if Michigan Millers is entitled to use the aggregate amount ($325,000) of the tortfeasor's insurance in one place in the equation, then the aggregate amount of UM ($400,000) should be used in the second part of the equation.

While Michigan Millers cites no case to show the aggregate $400,000 cannot be used, it does rely on Tucker v. Government Employees Insurance Co., 288 So.2d 238 (Fla. 1973). While Tucker is not directly on point, its spirit and intent is far more supportive of plaintiffs/respondents' position than Michigan Millers'. This Court in Tucker allowed an insured to stack coverage despite a policy exclusion to the contrary. In reaching this holding, this Court held:

> The total uninsured motorist coverage which the insured has purchased for himself and his family regardless of the number of vehicles covered by his auto liability policy inures to him or any member of his family when injured by an uninsured motorist. Moreover, according to Seller v. United States Fidelity & Guaranty Co. [185 So.2d 689,692 (Fla. 1966)] such total coverage is applicable to any uninsured motorist negligently injuring the insured or any member of his family covered thereby. (emphasis added)

Tucker, at 242.[10]

This Court recognized that in determining coverage, "such total coverage" provided to the insureds ("the insured..and his family" were the insureds in Tucker) is the determining factor. That is all plaintiffs/respondents are saying here: The "total coverage" available to the insureds is the determinative factor. Since this Court used this same analysis in Tucker, i.e., the "total coverage" available to the individual insured and other insureds under the policy, Tucker supports plaintiffs/respondents'

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[10] This is distinguishable from Shelby, where the stacking issue involved stacking two policies, not stacking vehicles insured under a single policy. The "stacking" referred to in Shelby was whether the insured's own UM coverage could be stacked upon the tortfeasor's liability coverage. See Shelby Mutual Insurance v. Smith, supra, 556. So.2d at 394.

position and is inconsistent with Michigan Millers' position that the "total coverage" may not be considered.

Not only does this Court's opinion in Tucker support the view that it is the aggregate amount which is determinative in UM coverage cases, a district court opinion also supports plaintiffs/respondents' view.

In Holt v. State Automobile Mutual Insurance Co., 385 So.2d 1058 (Fla. 4th DCA 1980), a father, mother and two children were in one vehicle when they were involved in an accident. There was one uninsured motorist policy available to them. The court held that if there had been no liability insurance available from the tortfeasor's insurance, the four insureds could have collected the total of their policy, i.e., $30,000. Id. at 1059. The court referred to this total sum available, the $30,000, as "the operable ceiling here." Id. at 1059-60. The "operable ceiling" or the total sum available in the instant appeal is the $400,000 amount which even Michigan Millers admits is available collectively to the plaintiffs/respondents. In Holt, ultimately the court held the plaintiffs could not recover from their uninsured motorists policy because the tortfeasor's liability insurer had paid them $30,000, or the total amount available to plaintiffs from their own policy. Since the bodily injury limits of the tortfeasor were equal to the $30,000 in uninsured motorists benefits, there was no uninsured vehicle. While in Holt, the "operable ceiling" available operated to defeat UM coverage, the opinion does hold it is the total amount available which is the key figure. Here, the total amount available is $400,000, or an amount in excess of the School Board's $325,000 limits.

Accordingly, under both the statutory language and the policy definitions, the school bus was an uninsured motorist vehicle. Michigan Millers cannot escape its contractual obligation to its insureds by asserting otherwise.

CONCLUSION

For the reasons asserted in this brief and by the Second District in its opinion, Michigan Millers owes UM benefits to its insureds. The law, the insurance contract and public policy all dictate that the plaintiffs/respondents should receive the coverage for which Mr. Reeves paid his premiums and the coverage which he logically and naturally assumed Michigan Millers would provide. Plaintiffs/respondents Dawn Bourke; Karl and Natalie Voss, as personal representatives of the estate of Leisa Voss; and Rebecca Reeves, as personal representative of the estate of B. Allen Reeves, request this Court to affirm the decision of the Second District and 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 instrument has been furnished by mail to: **JOHN W. WEIHMULLER, ESQUIRE**, Butler, Burnett & Pappas, Bayport Plaza, Suite 1100, 6200 Courtney Campbell Causeway, Tampa, Florida 33607-1458; **PETER S. BRANNING, ESQUIRE**, Peter S. Branning, P.A., 1800 Second Street, Suite 855, Sarasota, Florida 34236; and **LOUIS ROSENBLOUM, ESQUIRE**, Levin, Middlebrook, Mahie, Thomas, Mayes & Mitchell, P.A., Post Office Box 12308, Pensacola, Florida 32581, attorney for Amicus Curiae, this 20th day of September, 1991.

By: 

CLAIRE L. HAMNER
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