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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

REPLY BRIEF OF PETITIONER

Oral Argument Requested

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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).** Specific references to amicus curiae, the Academy of Florida Trial Lawyers, are designated as "AMICUS CURIAE."

STATEMENT OF THE CASE AND FACTS

The statement of the case and facts has been provided for the Court on pages 2-4 of Petitioner's Initial Brief.

SUMMARY OF ARGUMENT

The primary argument advanced by the Respondents in arguing that the Respondents are legally to recover uninsured motorist benefits from Petitioner is that "legal entitlement" is triggered by the ability to secure a judgment against the uninsured motorist carrier. More specifically, the Respondents argue that this Court's opinion in Allstate Ins. Co. v. Boyton, 486 So. 2d 552 (Fla. 1986), holds that an insured is "legally entitled to recover" UM benefits if the claim against the tortfeasor could be reduced to judgment in a court of law. The Respondents further argue that because the sovereign immunity doctrine does not preclude the claimants from obtaining a judgment against the Sarasota County School Board, that they are legally entitled to recover UM benefits.

The foregoing argument is based upon a gross misinterpretation of the Boynton decision. The Bovnton decision clearly sets forth: (1) all substantive defenses of the tortfeasor are available to the UM carrier; (2) in order to be "legally entitled to recover" UM benefits, the insured must have the ability to secure an enforceable judgment against the tortfeasor.

In the case at bar, the Respondents have the ability to secure an unlimited judgment against the tortfeasor. However, the sovereign immunity doctrine and Florida Statute § 768.28

precludes the enforcement of that judgment beyond the statutory limitations imposed by Florida Statute § 768.28 ($100,000 per person/$200,000 per accident). Hence, a judgment secured agains the Sarasota County School Board is unenforceable with respect to the portion of the judgment that exceeds $200,000. Because the School Board's liability insurance carrier has satisfied the limited liability of the School Board pursuant to Florida Statute § 768.28, the Respondents do not have the ability to secure an enforceable judgment against the Sarasota County School Board. Accordingly, Bovnton precludes the claimants' entitlement to uninsured motorist benefits.

The second major contention of the Respondents is that 'denial of UM benefits in the present case is contrary to public policy. This argument is contradicted by the holdings of this Court in Bovnton. Furthermore, this argument ignores the fact that the policy provision in question tracks language contained in the Florida uninsured motorist statute. Obviously, a UM policy provision which is based upon language contained in the uninsured motorist statute cannot be inconsistent and/or contrary to the legislative intent of the UM statute.

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.

A. Respondents' contention that Respondents' ability to obtain a non-enforceable judgment constitutes legal entitlement to recover damages.

The primary argument relied upon by the Respondents is that phrase "legally entitled to recover" has been interpreted by this Court in Allstate Ins. Co. v. Bovnton, 486 So. 2d 552 (Fla. 1986), to mean only that "the insured must have a claim against the tortfeasor which could be reduced to judgment in a court of la[illegible] In conjunction with the foregoing argument, the Respondents point out that the sovereign immunity defense is distinguishable from the substantive defense asserted in Bovnton in that the worker's compensation defense was an absolute bar to recovery rather than a partial or limited bar to recovery as is the case with the sovereign immunity defense. Respondents also attempt to distinguish Simon v.

1/ In asserting this argument, Respondents apparently concede that Petitioner can assert all substantive defenses of an insured motorist (including the sovereign immunity defense).

Allstate Ins. Co., 496 So. 2d 878 (Fla. 4th DCA 1986) (uninsured motorist carrier permitted to assert substantive defense of interfamily immunity), and Gelaro v. State Farm Mut. Auto. Ins. Co., 502 So. 2d 497 (Fla. 1st DCA 1987) (uninsured motorist carrier permitted to assert substantive defense of parental immunity), on the same grounds.

In arguing that the ability to simply obtain a judgment is dispositive of whether an insured is "legally entitled to recover" damages, the Respondents grossly misconstrue this Court's holdings in Boynton. In Boynton, this Court clearly held that a uninsured motorist carrier "effectually stands in the uninsured motorist's shoes and can raise and assert any defense that the uninsured motorist could urge." Allstate Ins. Co. v. Boynton, 486 So. 2d 552, 557 (Fla. 1986) [emphasis added]. The opinion does not limit the carrier's assertion of the tortfeasor's substantive defenses to those which constitute complete bars to recovery.

The Boynton opinion also makes it very clear that it is the ability to secure an enforceable judgment which controls the question as to whether the insured has satisfied the contractual and statutory requirement that he or she be "legally entitled to recover" damages. Specifically, this Court held:

> In other words, UM 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 policy holder 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 against the tortfeasor.

Id. at 577.

Petitioner concedes that in the present case the Respondents are not barred by the sovereign immunity doctrine from obtaining a judgment in excess of $200,000.00, the statutory limit of Florida Statute § 768.28. However, the portion of the judgment that exceeds $200,000.00 is not enforceable. More simply, the insured cannot require or compel payment of the judgment in excess of the statutory limitations of Florida Statute § 768.28 ($100,000.00 per person; $200,000.00 per occurrence). There is no legal entitlement to the recovery of damages with respect to the portion of the judgment that is not enforceable,

B. Respondents' reliance upon Stack v. State Farm Mut. Auto, Ins. Co., in attempting to distinguish the sovereign immunity defense, is misplaced.

In arguing that the holdings of Bovnton are inapplicable to the present case, and that because the sovereign immunity defense is a "qualified immunity," the claimants are legally entitled to recover uninsured motorist benefits, the Respondents and Amicus Curiae rely upon Stack v. State Farm

Auto. Ins. Co., 507 So. 2d 617 (Fla. 3d DCA 1987). The Stack decision does not support Respondents' contentions. The only proposition supported by **Stack** is that the uninsured motorist carrier can assert the worker's compensation immunity only if the claim can actually be asserted by the uninsured motorist. More specifically, in Stack the Third District Court of Appeal permitted an insured to assert a claim for uninsured motorist benefits despite the fact the uninsured motorist carrier claimed that the tortfeasor was insulated from liability by the worker's compensation immunity.

The court permitted the insured to pursue an uninsured motorist claim because the insured alleged "gross negligence" on the part of a fellow employee who allegedly caused his injury, a claim for which immunity does not attach. It is important to note that although the court decided the case in favor of the insured, the opinion does not in any way indicate that the uninsured motorist carrier was precluded from asserting worker's compensation immunity as a substantive defense (i.e., it can litigate the issue of whether or not the fellow employee was guilty of gross negligence). Hence, although the case was decided in favor of the insured, the case does not support the proposition that an uninsured motorist carrier can only assert absolute substantive defenses.

C. Respondents' contentions that a denial of UM benefits is contrary to public policy.

Respondents and Amicus Curiae argue that permitting Petitioner to successfully assert the sovereign immunity defense is incompatible with public policy. The case primarily relied upon by the claimants in asserting this argument is Brown v. Progressive Mut. Ins. Co., 249 So. 2d 429 (Fla. 1971). In conjunction with this argument, the Respondents argue that the present case is distinguishable from that of Boynton, in which this Court permitted the UM carrier to successfully rely upon the worker's compensation immunity.

First and foremost, it should be pointed out that the "legally entitled to recover" language contained in Petitioner's policy tracks the language contained in the Florida uninsured motorist statute, Florida Statute § 627.727. The 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:"

Florida Statute § 627.727(1) states as follows:

> No motor vehicle liability insurance policy shall be delivered or issued for delivery in this state with respect to any specifically insured or identified motor vehicle registered or principal1 garaged in this state unless uninsured motor vehicle

> coverage is provided therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom.

In view of the fact that the provision relied by Petitioner tracks the language contained in the Florida uninsured motorist statute, it is illogical to argue the enforcement of the "legally entitled to recover" provision is inconsistent with public policy, and/or contrary to the legislative intent of the uninsured motorist statute. Furthermore, in deciding Boynton, this Court clearly recognized the enforceability of the "legally entitled to recover" language, even in situations where the enforcement of the provision results in the denial of UM benefits. Specifically, this Court held:

> 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.

Allstate V. Boynton, 486 So. 2d 552, 559 (Fla. 1986).

There is no reason to distinguish the policy considerations present in the Boynton decision from the policy considerations present in the case at bar. As the Respondents

point out in their answer briefs, Petitioner concedes that the Respondents' damages exceed the amount of their recovery from the tortfeasor's liability insurer. In that respect, Petitioner concedes that the Respondents have not achieved a full recovery of their damages through their settlement with the tortfeasor's liability carrier.

These facts are analogous to the claimants' recovery in Boynton. The plaintiff in Boynton did not achieve a full recovery through the receipt and/or availability of worker's compensation benefits. The worker's compensation statute does not provide for the recovery of damages for mental pain and suffering. Further, the worker's compensation statute does not entitle an injured worker to one hundred percent of his lost wages. Fla. Stat. 440.15. Accordingly, there is no reason to distinguish the holdings of Boynton from the present case. In both Boynton and the case at bar, the denial of UM benefits will result in a partial recovery of the insureds' damages. There is no reason to distinguish the applicability and enforceability of the substantive defense of sovereign immunity from the availability and applicability of the substantive defense of worker's compensation immunity. Further, there are no public policy considerations that distinguish the applicability or enforceability of the substantive defenses.

The claimants' reliance upon Brown v. Progressive Mut. Ins. Co., 249 So. 2d 429 (Fla. 1971), to suggest that the

"legally entitled to recover" provision of the Petitioner's policy is not enforceable is misplaced. This Court has clearly recognized the enforceability of the foregoing provision in Allstate Ins. Co. v. Boynton, 486 So. 2d 552 (Fla. 1986).

D. Respondents' arguments pertaining to the availability of a claims bill.

1. Respondents' contention that "legally entitled to recover" included the ability to seek a claims bill.

Respondents and Amicus Curiae have asserted in the alternative that the tortfeasor's defense of sovereign immunity is qualified due to the tortfeasor's ability under Florida Statute § 768.28 to subsequently seek a claims bill. Respondents and Amicus Curiae argue that the statutory authorization to seek a legislative claims bill demonstrates there is no absolute cap on damages; and, because there is no such cap Respondents are therefore "legally entitled to recover" under the uninsured motorist statute. Respondents' argument is flawed in two respects. First, Respondents incorrectly consider the phrase "legally entitled to recover" equivalent to the phrase "legally entitled to a judgment." Second, Respondents' argument presumes that the statutory authorization to seek a claims bill necessarily creates a legal entitlement.

"Legally entitled to recover" is not equivalent to "legally entitled to a judgment." Numerous Florida cases demonstrate that a plaintiff may receive a judgment for damages in excess of those damages pursuant to the expressly limited liability available under Florida Statute § 768.28. See, e.g., Gerard v, Department of Transp., 472 So. 2d 1170 (Fla. 1985). However, the entitlement to recover from the sovereign extends only as far as liability is available under Florida Statute 768.28; there simply is no legal entitlement to recovery in excess of that liability available under the statute. This Court's discussion of the speculative quality of a claims bill in Gerard v. Department of Transp., supra, illustrates Respondents' error in equating "legally entitled to recover" with "legally entitled to a judgment."

In Gerard, this Court noted that even if a plaintiff received a judgment reflecting liability in excess of that available under the sovereign immunity statute, that judgment would not mean that the liability of the sovereign had been conclusively established. Id. at 1173. This Court noted that the legislature would conduct its own independent hearing to determine whether public funds should be expended. Id. This Court further noted that even after such a hearing, the legislature might, in its discretion, nonetheless decline to grant plaintiff any relief. Id. Whether a state representative will sponsor a claims bills is a non-judicial

matter between a citizen and the representative. Id., Shaw, J., dissenting.

Respondents clearly would have been legally entitled to a judgment. However, that judgment would create no legal entitlement to recovery in excess of the limited liability available under Florida Statute § 768.28. Respondents' legal entitlement to a judgment is therefore inherently unable to serve as the basis for any legal entitlement to recovery in excess of the liabilty available under Florida Statute § 768.28.

The ability to seek a claims bill under Florida Statute § 768.28 creates no legal entitlement sufficient to create continuing liability upon the exhaustion of the liability available under the statute. The mere possibility of obtaining a claims bill is too remote or speculative to create any legal entitlement. A claims bill is a non-judicial process completely divorced from any judicial allocation of liability pursuant to Florida Statute § 768.28. whatever remedy may subsequently become available through a claims bill exists only as a subsequent act of legislative grace; the opportunity to recover from a sovereign under a theory of tort liability simply ceases to exist upon the exhaustion of the limited liability provided by the sovereign immunity statute.

2. Respondents' contention that a claims bill serves as a means to satisfy an excess judgment against the sovereign.

Respondents and Amicus Curiae have sought to circumvent the uninsured motorist statute requiring a legal entitlement to recover by attempting to equate the statutory availability of a claims bill as no more remote or speculative than the availability of recovery from a private individual after that individual's liability insurance has been exhausted. According to this argument, a claims bill serves as a means to satisfy an excess judgment against a governmental entity who remains liable upon the exhaustion of the statutory liability just as a private individual remains personally liable for damages in excess of his liability limits. Respondents and Amicus Curiae thus argue that the instant case is merely one in which Respondents have an uncollectable judgment for which uninsured motorist coverage has been purchased.

Respondents' attempts to analogize the liability of the sovereign in the instant case to that of a private individual incorrectly characterizes the limited waiver of sovereign immunity available under Florida Statute § 768.28. The satisfaction of a private individual's liability insurance does not extinguish that individual's personal liability. Conversely, absolute sovereign immunity attaches upon the exhaustion of the limited liability available under Florida Statute § 768.28. That is, upon recovery of those sums available under the statute, the sovereign no longer remains liable, unlike an individual for whom personal liability

remains upon the exhaustion of the underlying liability insurance.

Moreover, the means of obtaining recovery from private individuals for judgments in excess of their ability to pay is a judicial remedy. Conversely, the remedy available for recovery in excess of those damages reflecting the limit of liability available through Florida Statute § 768.28 is a legislative remedy. See, e.g., Berek v. Metropolitan Dade Cty., 796 So. 2d 756 (Fla. 3d DCA 1981). Thus, a judgment rendered against a sovereign in excess of the liability limits available under Florida Statute § 768.28 is inherently unenforceable. As such, the judgment rendered in the absence of liability simply serves to provide a figure which those who may subsequently choose to seek a claims bill may submit to the legislature. Gerard v. Dept. Of Transp. at 1173. The judgment against the sovereign does not indicate liability in excess of that under the sovereign immunity statute. The judgment only reflects a figure which may or may not be presented to the legislature and which the legislature may or may not, in its sole discretion, reject entirely. Id.

E. Non-Florida UM decisions relied upon by Respondents.

1. Karlson v. City of Oklahoma City

Respondents consider the holding of Karlson v. City of Oklahoma City, 711 P.2d 72 (Ok. 1985), dispositive of the

instant case. Respondents correctly point out that Karlson dealt with facts very similar to the instant case. However, Karlson, while factually similar to the instant case, relies upon reasoning which this Court has rejected.

In Karlson, plaintiffs sought uninsured motorist benefits from an uninsured motorist carrier who asserted the tortfeasor's defense of sovereign immunity. A statute waived sovereign immunity from liability indicated by a specified amount of damages. The trial court granted summary judgment to the carrier. The Karlson court reversed. Id. at 75.

The Karlson court held that the plaintiff could recover from his uninsured motorist carrier despite sovereign immunity. Id. The Karlson court did not predicate its holding upon the availability of a limited waiver of sovereign immunity. Instead, the Karlson court interpreted the phrase "legally entitled to recover" to mean only that the insured must be able to establish fault on the part of the uninsured motorist which gives rise to damages and prove the extent of those damages. Id. at 74, 75. The Karlson court further stated "Whether the tortfeasor's inability to make full compensation results from lack of sufficient insurance, insolvency, or for other reason, is irrelevant, (Emphasis supplied). Id. at 75.

Karlson employs reasoning specifically rejected by this Court in Allstate Ins. Co. v. Boynton. Boynton at 556.

According to this Court in Bovnton, the phrase "legally entitled to recover" incorporates the carrier's ability to assert **all** the substantive defenses available to the tortfeasor. **Id.** The interpretation given by the Karlson court to the phrase "legally entitled to recover**had also been used by the court below in Bovnton (Bovnton **v.** Allstate **Ins.** Co., 443 So. 2d **427** (Fla. 5th DCA 1984). This Court in Boynton carefully and explicitly examined the requirements of the phrase "legally entitled to recover" and rejected the reasoning of **the** court below (and therefore the reasoning of **Karlson)** when **stating** that **all** substantive defenses would be available to the carrier that would have been available to the tortfeasor.

Moreover, Karlson specifically stated that the reasons for the tortfeasor's inability to make full compensation are irrelevant. Thus, according to the reasoning of Karlson, immunities which prevented full compensation from the tortfeasor would not prevent recovery from the uninsured motorist carrier. Thus, Karlson implicitly rejected worker's compensation immunity, parent/child immunity, and spousal immunity. Florida courts have expressly recognized the validity of all the foregoing immunities **as** asserted by the uninsured motorist carrier as a substantive defense available to the tortfeasor. **See,** e.g., Allstate Ins. Co. v. Bovnton, **supra;** Gelaro v, State Farm Mut. Auto. Ins. Co., supra; Simon v, Allstate Ins. Co., **supra**.

2. State Farm Mut. Auto. Ins. Co. v. Braun.

Respondent BOURKE also cites State Farm Mut. Auto. Ins. Co. v. Braun, 793 P.2d 253 (Mont. 1990). In Braun, the court interpreted the phrase "legally entitled to collect [i.e., recover]" to mean that the insured must have a cause of action against the tortfeasor and must be able to establish fault and the existence of damages. Id. at 254. Moreover, the court relied upon the reasonable expectations of an insured regarding the scope of coverage. Id. at 255. Finally, the Braun court stated "whether the tortfeasor's inability to make full compensation results from the lack of sufficient insurance, insolvency, or for other reason, is irrelevant." Id.

Braun clearly relies upon the same reasoning rejected by this Court in Boynton. In Braun, unlike in Boynton, the carrier's ability to assert substantive defenses available to the tortfreasor is not incorporated into the phrase "legally entitled to collect [i.e., recover]." In consequence, the tortfeasor's reasons for failing to make full compensation are irrelevant to the issue of uninsured motorist coverage in Braun.

Furthermore, Braun apparently relies upon the doctrine of reasonable expectations. Florida courts have not adopted the doctrine of reasonable expectations. Under Florida law, courts have no power to simply create coverage out of the whole cloth when none exists on the fact of an insurance contract. See Pastori v. Commercial Union Ins. Co., 473 so. 2d 40 (Fla. 3d

DCA 1985); see also Haenal v. United States Fid. & Guar. Co., 88 So. 2d 888 (Fla. 1956).

3. Young v. Greater Portland Transp. Dist.

Respondent BOURKE also cites Young v. Greater Portland Transp. Dist., 535 A.2d 417 (Me. 1987). Young specifically dealt with the application of the statute of limitations to a contract action. Id. at 419. As this Court stated in Boynton, procedural defenses such as a statute of limitations may not necessarily be available to the uninsured motorist carrier; in Boynton this Court distinguished Sahloff v. Western Casualty & Sur. Co., 171 N.W. 2d 914 (Wis. 1969), in which the court held that a tort statute of limitations would not bar an action against an uninsured motorist carrier when the suit was brought before the statute of limitations for contract actions expired because uninsured motorist action arose in contract. Boynton at 558. Thus, Young addresses procedural issues not before the Court in the instant case.

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.

The school bus at issue is not an uninsured motor vehicle because the per person limits of the liability coverage

afforded the school bus are identical to the per person uninsured motorist coverage at issue. In Shelby Mut. Ins. Co. of Shelby, Ohio v. Smith, 556 So. 2d 393 (Fla. 1990), this Court recently considered the issue of whether an insured is entitled to uninsured motorist benefits in situations where the insured's uninsured motorist coverage does not exceed the tortfeasor's limits of liability coverage. This Court held that in order to obtain uninsured motorist benefits, the tortfeasor's liability limits must be less than the injured person's limits of applicable uninsured motorist coverage. Id. at 396. Respondents and Amicus Curiae argue that the limits of insurance coverage at issue should be compared in the aggregate and not on a per person basis.

Under Florida law, only Respondent REEVES, the driver of the vehicle, is entitled to stack uninsured motorist coverage. See, e.g., Hurtado v. Florida Farm Bureau Casualty Co., 557 So. 2d 612 (Fla. 3d DCA 1990). Thus, Respondent REEVES has available coverage of $200,000 ($100,000 per person for each of his two vehicles). Respondents FOCO, BOURKE, and VOSS, as Class II insureds, may not stack. See, e.g., Id. at 613. The available uninsured motorist coverage for Respondents BOURKE, FOCO, and VOSS is $100,000 per vehicle and $300,000 per accident. Clearly, the per person and per accident limits of Respondents BOURKE, FOCO, and VOSS are less than the per person limits of the School Board policy ($200,000 per person), and

the per person limits under Respondent REEVES' uninsured motorist policy are less than the per person limits of the liability policy of the School Board. Thus, according to the reasoning of this Court in Shelby Mut. Ins. Co. of Shelby, Ohio v. Smith, the school bus was not an uninsured motor vehicle pursuant to Florida Statute § 627.727(3)(b).

Arguments based on Universal Underwriters Ins. Co. v. Morrison, 574 So. 2d 1063 (Fla. 1990), are not available in the instant case. As noted by the court below in Michigan Millers Mut. Ins. Co. v, Bourke, 581 So. 2d at 1366, the argument made by the parties in Universal Underwriters was not offered nor present in the record before the court. Thus, Respondents and Amicus Curiae cannot avail themselves of these arguments provided only in the form of supplemental authority to the court below.

Should this Court choose to recognize the availability of Universal Underwriters, the policy endorsement at issue in Universal underwriters, which is virtually identical to the policy in the instant case, precludes the availability of uninsured motorist benefits under Petitioner's insurance policy. The relevant policy provision in the instant policy, like that in Universal Underwriters, states the following:

> . . . [T]he definition of "uninsured motor vehicle [is a vehicle]:
>
> . . . .

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

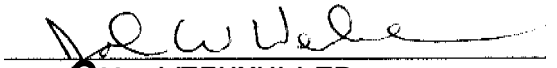
See Universal Underwriters at 1065.

The language of this endorsement offers greater uninsured motorist coverage than that required by Florida Statute § 627.727. However, that uninsured motorist coverage is predicated upon the amount an insured is "legally entitled to recover" as damages. In the instant case, the liability policy at the time of the accident provided a limit that was greater than the amount Respondents were legally entitled to recover as damages. Thus, the endorsement to the policy does not serve to provide uninsured motorist benefits because the liability policy of the School Board was not less than the amount Respondents are legally entitled to recover as damages. In consequence, the school bus was not an uninsured motor vehicle under either Shelby or Universal Underwriters.

CONCLUSION

The policy provision relied upon by Petitioner in denying UM benefits to the Respondents is valid and enforceable. As a matter of law, the Respondents are not entitled to uninsured motorist benefits because they have already recovered everything they were "legally entitled to recover" from the School Board's insurance carrier. Additionally, as a matter of law, the tortfeasor's motor vehicle does not constitute an uninsured motor vehicle pursuant to Florida Statute § 627.727. Petitioner respectfully requests this Court to enter an Orderr quashing the decision of the Second District Court of Appeal and remanding this case for further proceedings in accord with this Court's Order.

BUTLER, BURNETTE & PAPPAS



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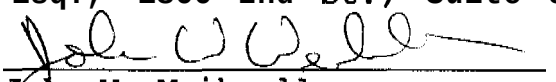
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States Mail this 15 day of October, 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.



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