IN THE SUPREME COURT OF FLORIDA

ENOCK PLANCHER, as Personal Representative of the Estate of ERECK MICHAEL PLANCHER II,

Petitioner,

v.

UCF ATHLETICS ASSOCIATION, INC., et al.

Respondents,
_____/

Case Nos. SC13-1872
SC13-1874
(Consolidated)

L.T. Case No. 5D11-2710

RESPONSE OF RESPONDENTS, UCF ATHLETICS ASSOCIATION, INC., AND GREAT AMERICAN ASSURANCE COMPANY, TO PETITIONER'S MOTION FOR REHEARING

Respondents, UCF Athletics Association, Inc. ("UCFAA"), and Great American Assurance Company ("Great American"), file this Response to Petitioner's Motion for Rehearing. Petitioner asks this Court to rehear his argument that UCFAA's liability insurer should be responsible for the entire $10 million verdict against UCFAA despite UCFAA's entitlement to limited sovereign immunity and the judgment's $200,000 cap. The Court rejected this point, correctly ruling that "this argument is without any merit." Opinion at 9, n.4. Petitioner's Motion should be denied.

At the outset, it bears emphasis that Petitioner's Motion violates Florida Rule of Appellate Procedure 9.330(a). "Motions for rehearing may only be used to apprise a court of 'the points of law or fact that the court has overlooked or misapprehended.'" *Brennan v. State*, 754 So. 2d 1, 6 n.4 (Fla. 1999) (quoting Fla. R. App. P. 9.330(a)). Petitioner's Motion is nothing more than a re-argument of the argument made in his merits briefs. Indeed, the Motion is longer than the argument on this same point in Petitioner's initial brief. Moreover, the treatment of the authorities on which the Motion relies is inaccurate, if not disingenuous.

On the merits, Petitioner argues "the Court has overlooked or misapprehended Section 768.28(5), Florida Statutes, and its own decision in *Michigan Millers Mutual Insurance Company v. Bourke*, 607 So. 2d 418, 422 (Fla. 1992)." Motion at 1-2. It is difficult to comprehend how that could be the case, given that Petitioner relied principally on both authorities in his briefs. In addition, it is clear that neither supports Petitioner's argument.

Petitioner argues that, under section 768.28(5), "the State remains fully liable for the torts it causes," and that "[t]he Court has misapprehended the operation of the sovereign immunity statute by confusing ***liability*** with ***collectibility***." Motion at 3 (emphasis in original). Respondents suggest that it is Petitioner who is confused regarding the statute.

Section 768.28(5), Florida Statutes (2007), clearly states:

> *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 . . . 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*.

§ 768.28(5), Fla. Stat. (emphasis added). It further provides:

> [T]he state or any 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 . . . .*

Id. (emphasis added). The statute thus makes clear that *liability* is capped at $200,000, regardless of whether an agency or subdivision obtains insurance. Hence, it is clear that the Court correctly read section 768.28(5). *See also Berek v. Metro. Dade County*, 422 So. 2d 838, 840-41 (Fla. 1982) (ruling that section 768.28(5) "recognize[s] that the judgment and post-judgment assessments to be entered of record should upon motion of the plaintiff be the full amount of actual damages suffered, costs, and post-judgment interest and *not the amount of the defendant's liability*." (emphasis added)).

Similarly, Petitioner is incorrect in declaring that "[s]ection 768.28(5) expressly provides that an insurer may be required to pay a judgment in excess of the amount collectible from the State." Motion at 3. Petitioner relies upon the statute's language that it does not prohibit settlements above the statutory limit, but

this language simply permits sovereign insureds and their insurers to *choose* to settle claims above the cap "without further action by the Legislature." *Id.* Such settlements may make sense as a matter of business, or when the applicability of sovereign immunity is challenged or in doubt, but nothing in section 768.28(5) requires them under any circumstances. Petitioner goes so far as to say that the Court's decision "prohibits such a payment," that this portion of the statute "will be rendered a nullity," and that "liability insurance in excess of the cap would be entirely illusory" under the Court's decision. *Id.* at 4. These declarations—made without explanation or support—are illogical, unfounded, and untrue, as the statutory language itself demonstrates.

Petitioner's discussion of *Michigan Millers* is likewise off base. That case involved a first-party claim by insureds against their insurer for uninsured motorist coverage. This Court held that the insurer could not be relieved of its first-party coverage obligation to its insureds simply because the third-party tortfeasor had sovereign immunity. Here, however, Great American is not defending a claim brought by its own insured, and Great American is not trying to avoid a coverage obligation based on a third party's sovereign immunity. To the contrary, Great American seeks to fulfill its contractual obligation by providing liability coverage to the extent of its insured's liability, and no more.

Petitioner's arguments continue to reflect a fundamental misunderstanding regarding liability coverage. A liability insurer's obligations are derived from, and limited by, its insured's liability. This Court recognized that legal principle when it quoted *Stuyvesant Insurance Company v. Bournazian*, 342 So. 2d 471 (Fla. 1976). Opinion at 9, n.4. There, this Court acknowledged "the legal principle that the liability of the insurers . . . is derivative only, representing a responsibility to pay an amount first determined to be owed by another," stating in the accompanying footnote that "[t]he fact that an injured person may proceed directly against the insurer as a third party beneficiary of the insurance contract . . . , *in no way elevates the carrier's responsibility to pay amounts for which the insured himself would not have been liable.*" 342 So. 2d at 472 & n.3 (emphasis added).

Contrary to Petitioner's contention, this language from *Stuyvesant* is not based on "law that has long been superseded by statute." Motion at 2. It is based on the fundamental principle of insurance law that a liability insurer cannot be liable for an amount of damages greater than that for which its insured is liable, because an insurer obligates itself by contract to pay sums that its insured is legally obligated to pay, and to defend against such claims, and no more.

Similarly, Petitioner continues to draw erroneous conclusions when he argues that the Court's decision "overlooks" that sovereign immunity is intended only to protect the state's treasury. *Id.* at 6. Petitioner's argument is no different

than the waiver argument the Legislature expressly rejected when it made clear in section 768.28(5) that insurance above the caps is not a waiver of the statutory limits. Furthermore, Petitioner ignores that the availability of sovereign immunity, along with factors such as the cost of providing a defense against claims that may or may not invoke sovereign immunity, are all taken into account when an insurer chooses whether to issue a liability policy to a sovereignly immune entity. And the uncertain availability of sovereign immunity also explains why UCFAA chose to protect itself from challenges to that immunity—such as that by Petitioner in this case—by purchasing insurance.

In sum, the Court's ruling is consistent with *Stuyvesant* and the fundamental notion that a liability insurer's obligation cannot exceed its insured's liability. The Court correctly rejected Petitioner's contrary argument. Accordingly, the Court should deny Petitioner's Motion for Rehearing.

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CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2015, a true and correct copy of the foregoing was served by e-mail through the e-portal on: Stacy D. Blank, Esq. (stacy.blank@hklaw.com; joann.loyola@hklaw.com), Holland & Knight, LLP, 100 North Tampa Street, Suite 4100, Tampa, Florida 33602; Christopher V. Carlyle, Esq. (served@appellatelawfirm.com), The Carlyle Building, 1950 Laurel Manor Drive, Suite 130, The Villages, FL 32162; and C. Steven Yerrid, Esq. (syerrid@yerridlaw.com; csullivan@yerridlaw.com), The Yerrid Law Firm, P.A., 101 East Kennedy Blvd., Suite 3910, Tampa, FL 33602.

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