

**IN THE SUPREME COURT OF FLORIDA**

**CASE NO.: SC21-1580**

ALBERTA S. ELLISON,

Petitioner,

vs.

L.T. Case Nos.: 2D19-1961  
13-CA-8277

RANDY WILLOUGHBY,

Respondent.

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**AMICUS BRIEF OF THE FLORIDA  
JUSTICE ASSOCIATION IN SUPPORT  
OF RESPONDENT**

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## **STATEMENT OF IDENTITY AND INTEREST**

The Florida Justice Association (FJA) is a voluntary, statewide association of approximately 3000 attorneys concentrating on litigation in all areas of the law. FJA members are pledged to preserve the American judicial system and to protect the right of access to courts. FJA members on the amicus committee work pro bono to address important issues bearing on the rights of injured persons.

The present case interests the FJA because the arguments presented by another amicus, the Florida Defense Lawyers Association (FDLA), are based on a flawed assumption about the nature of a first-party bad-faith UM action and overlook the plain text of sections 627.727(10), and 768.041(2), Florida Statutes.

## **SUMMARY OF ARGUMENT**

Ellison and her amicus, FDLA, assume, incorrectly, that a plaintiff's recovery from a first-party UM bad-faith action is a "double recovery" for the plaintiff's "same" or "single" injury resulting from a tortfeasor's wrongdoing. Section 627.727(10)'s text contradicts that assumption. The statute specifies four buckets of damages—three of which are neither caused by, nor recoverable from, a tortfeasor. The damages recoverable from a UM carrier under section 627.727(10)

are not the “same” as the damages recoverable from a tortfeasor in a tort action.

Ellison and FDLA also misapprehend which party bears the burden of proving a setoff. Section 768.041(2)’s text assigns that burden to the tortfeasor. The tortfeasor—not the plaintiff—must prove “[a]t trial” the amounts paid by a UM carrier that are “in partial satisfaction of the damages” for which the tortfeasor is sued. When a UM carrier pays an unallocated settlement, section 768.041(2) commands that the tortfeasor prove the portion of the settlement that compensates for the bucket #1 damages—the only one of the four buckets of bad-faith damages under section 627.727(10) that could possibly overlap with the damages owed by a tortfeasor.

Ellison’s and FDLA’s other arguments should carry no weight. Neither the Second District’s holding nor Willoughby’s position require a showing of *joint* tortfeasors for section 768.041(2) to apply. That statute, however, does require the defendant tortfeasor to prove that the UM carrier’s settlement was for the *same damages* for which the tortfeasor is liable to the plaintiff. Finally, FDLA’s policy arguments are for the legislature and misleadingly cite statistics to argue that Florida has a “litigious” landscape.

## ARGUMENT

**I. Ellison’s and FDLA’s assumption—a recovery from a first-party UM bad-faith action is a “double recovery” for the “same” or “single” injury resulting from a tortfeasor’s wrongdoing—is belied by section 627.727(10)’s text.**

Ellison’s and FDLA’s arguments are founded on their assumption that a plaintiff’s recovery from a first-party UM bad-faith action is a “double recovery” for the plaintiff’s “same” or “single” injury resulting from a tortfeasor’s wrongdoing. *E.g.*, Initial Br. 10 (arguing plaintiffs should be prevented “from receiving a windfall based upon a double recovery for the same damages.”); *id.* at 14 (arguing section 768.041(2), Florida Statutes, “is designed to prevent a double recovery for a single injury”) (internal quotations omitted); FDLA Br. 5 (same); *id.* at 4 (arguing it is “against public policy” for a plaintiff to receive a “double recovery for the same injury”) (internal quotations omitted); *id.* at 11 (“Precluding a setoff would permit double recovery for a single loss[.]”) (capitalization and emphasis altered). But neither Ellison nor FDLA has proven the assumption on which their arguments are built. In fact, this case does not entail a single injury; rather, there are two distinct injuries: (1) one caused

by the tortfeasor, and (2) the other caused by the UM insurer's bad faith.

Section 627.727(10)'s text exposes the flaw in the assumption upon which Ellison and FDLA base their arguments. Where, as here, a first-party bad-faith action is brought against an uninsured motorist (UM) carrier, section 627.727(10), Florida Statutes,<sup>1</sup> commands that the "recoverable" damages "shall include the total amount of the claimant's damages." The statute then specifies four buckets of damages "include[d]" in those "total" damages:

- (1) "the amount in excess of the policy limits,"
- (2) "any interest on unpaid benefits,"
- (3) "reasonable attorney's fees and costs," and
- (4) "any damages caused by a violation of a law of this state."

§ 627.727(10), Fla. Stat. The statute further instructs that a claimant may recover these damages in the first-party UM bad-faith action "whether caused by an insurer *or* by a third-party tortfeasor." *Id.* (emphasis added).

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<sup>1</sup> Neither the parties nor FDLA specify which version of this statute applies. The pertinent language in subsection 10 has remained unchanged since 1992. Ch. 92-318, § 79, Laws of Fla.

Ellison and FDLA assume that *all* the damages recoverable in a first-party UM bad-faith action must have been caused by—and may be recovered from—a *third-party tortfeasor*. But section 627.727(10)'s text undercuts that assumption. The statute contemplates that the damages recoverable in a UM bad-faith action could have been caused solely by the insurer, solely by the tortfeasor, or by both the insurer and the tortfeasor. *See id.* (authorizing the claimant to recover damages “whether caused by an insurer *or* by a third-party tortfeasor”) (emphasis added). Nor does section 627.727(10) purport to alter common-law rules on the types of damages recoverable from a *tortfeasor*. *Cf.* Antonin A. Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 52, at 318 (2012) (“[S]tatutes will not be interpreted as changing the common law unless they effect the change with clarity.”).

If one examines the four buckets of damages specified by section 627.727(10), one will conclude that at least some damages recoverable under that provision were caused (or likely caused) *solely* by the *insurer's bad faith* and may be recovered *only* from the *insurer* and *not from the tortfeasor*.

**Start with bucket #2:** “any interest on unpaid benefits.” § 627.727(10), Fla. Stat. Clearly, these “interest” damages are the result of the insurer’s delay in paying the UM benefits. It is difficult to fathom any set of facts under which a tortfeasor could have caused—much less be held responsible for—such damages. Neither Ellison nor FDLA cite any case where a tortfeasor has been held liable for interest on unpaid UM benefits.

**Next, consider bucket #3:** “reasonable attorney’s fees and costs.” *Id.* If a plaintiff recovers UM benefits in one suit, he may file a second suit against the insurer if he believes the insurer acted in bad faith. In that second bad-faith suit, section 627.727(10) authorizes the plaintiff to recover the attorney’s fees incurred in the first benefits suit. *Milling v. Travelers Home & Marine Ins. Co.*, 311 So. 3d 289, 293 (Fla. 2d DCA 2020) (holding a plaintiff’s fees incurred in seeking UM benefits may be recoverable as damages under sections 624.155(8) and 627.727(10), Florida Statutes).

Does a *tortfeasor* cause a plaintiff to incur attorney’s fees for the purpose of seeking UM benefits? No, of course not. No court has ever held otherwise. Neither Ellison nor FDLA argue the amounts that a UM carrier must pay a plaintiff for his attorney’s fees incurred in UM

benefits suit would be amounts for which a tortfeasor could be held liable in the plaintiff's tort suit. To the contrary, this Court follows the common-law American Rule under which "attorney's fees may only be awarded by a court pursuant to an entitling statute or an agreement of the parties." *Dade Cnty. v. Pena*, 664 So. 2d 959, 960 (Fla. 1995).

**Examine next bucket #4:** "any damages caused by a violation of a law of this state." § 627.727(10), Fla. Stat. This text, read naturally, refers to the multiple statutes specified in section 624.155(1)(a)—the same statute that is incorporated into section 627.727(10). *See id.* (referencing "an action brought under [section] 624.155"). The statutes listed in section 624.155(1)(a) are in chapters 626 and 627, and they regulate *solely* insurers, not tortfeasors. *See, e.g.*, § 626.9541(1)(i) (prohibiting unfair claim settlement practices).

What types of damages fall into bucket #4? One example is punitive damages. Insurers that violate the specified statutes in Chapter 626 and 627 may be liable for punitive damages. *See Howell-Demarest v. State Farm Mut. Auto. Ins. Co.*, 673 So. 2d 526, 528–29 (Fla. 4th DCA 1996); *see also State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995) (noting that, under section 627.727(10),

insurers are “subject to punitive damages for the willful or reckless refusal to pay a claim”).

A tortfeasor, however, obviously would not have to pay punitive damages resulting from an insurer’s violation of an insurance statute. Granted, it is plausible that section 627.727(10)’s reference to “damages caused by a violation of a law this state” could refer to a tortfeasor’s violation of a non-insurance law—like a traffic statute in Chapter 316. But one cannot assume that the section 627.727 damages paid by a UM carrier sued for bad faith would be for the tortfeasor’s violation of a traffic statute or some other law outside of the insurance statutes.

**Finally, look at bucket #1:** “the amount in excess of the policy limits.” § 627.727(10), Fla. Stat. This bucket refers to “any damages in excess of the [UM] policy limits for the injuries arising from the automobile accident.” *Fridman v. Safeco Ins. Co. of Ill.*, 185 So. 3d 1214, 1222 (Fla. 2016). This Court has characterized these damages to effectively serve as “a penalty for [an insurer’s] wrongful failure to pay a claim.” *Laforet*, 658 So. 2d at 61. Admittedly, this bucket is where one *could* find damages for which a UM insurer is liable that overlap with the damages for which a tortfeasor is liable.

In a typical case, a jury in the UM benefits suit determines the damages arising from the automobile accident and that determination is binding in the subsequent bad-faith case. *Cf. Fridman*, 185 So. 3d at 1224, 1228 (holding that: (i) an insured is entitled in the benefits suit to have the jury determine the UM carrier's liability and the "full extent" of damages; and (ii) the determination of damages from the benefits suit is binding in the subsequent bad-faith action). In such a typical case, a court may be able to determine with precision—based on the jury's verdict—which of bucket #1's damages overlap with the damages caused, and owed, by the tortfeasor.

But, as Willoughby explains, the instant case is not typical. Here, the plaintiff *settled* the UM claims with the insurer and then later tried the tort case against the tortfeasor. Answer Br. 12 (“[U]ndersigned counsel has been unable to identify a single case, other than this one, where the injured claimant settled a bad faith claim against his or her [UM] carrier before obtaining a judgment against the third-party tortfeasor.”). Thus, in this atypical case, there is no jury verdict from the corresponding UM benefits and bad-faith

cases that determines the categories or amounts of damages paid by the UM carrier.

So, what is a court to do in this rare case where the UM bad-faith case settled before the tort case against the tortfeasor was tried? The court must allocate the UM settlement amongst the various buckets of damages allowed by section 627.727(10). Critical for that allocation is properly assigning the burden of proof. Of course, the assignment of the burden of proof should be based, if possible, on what the legislature has directed in the statutes. The parties have not discussed this critical consideration. We do, next.

**II. By its plain text, section 768.041 assigns the tortfeasor—not the plaintiff—the burden of proving a plaintiff’s settlement of the first-party UM bad-faith action is “in partial satisfaction of damages” for which the tortfeasor has been held liable.**

As just discussed above, one cannot assume that *all* the damages recoverable from a UM insurer in a first-party bad-faith action are the same as, and completely congruent with, the damages recoverable from a tortfeasor in a tort suit arising out of the same automobile accident covered by the UM policy. Some damages may be the same, while others may not be.

Here, a plaintiff settled with a UM carrier and that settlement failed to allocate the amounts paid amongst specified buckets (## 1, 2, 3, and 4) and unspecified buckets of damages allowed under section 627.727(10). See Initial Br. 4 (“The settlement did not apportion or allocate any amount of the \$4 million to the UM claim or the bad faith claim or to any of the elements of the personal injury damages sued for under the bad faith claim.”). How then is a court to make this allocation? Fortunately, the legislature answered this question in section 768.041(2). It squarely placed the burden of proving the allocation on the *tortfeasor*.

Section 768.041(2) states in pertinent part, “*At trial, if any defendant shows the court that the plaintiff ... has delivered a release or covenant not to sue ... in partial satisfaction of the damages sued for, the court shall set off this amount from the amount of any judgment to which the plaintiff would be otherwise entitled ....*” § 768.041(2), Fla. Stat. (emphasis added).<sup>2</sup> We examine first the underlined language and then the italicized language.

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<sup>2</sup> The parties do not specify which version of section 768.041 applies, but this statute has not been amended since 1997.

“[T]he damages sued for,” read in context, signifies the damages for which the defendant (here, Ellison, the passive tortfeasor<sup>3</sup>) was sued. § 768.041(2), Fla. Stat. As explained *supra* § I, at 6–12, the damages for which the defendant tortfeasor is sued aren’t necessarily the same as the damages for which a UM carrier is answerable in a first-party bad-faith action. The damages in the tort action may overlap—but aren’t congruent—with the damages in the bad-faith action.

A defendant tortfeasor is entitled to set off only those amounts paid to the plaintiff by a UM carrier (in a settlement or via a judgment) that are “in partial satisfaction of the damages” for which the tortfeasor is sued. § 768.041(2), Fla. Stat. *Satisfaction* is “[t]he giving of something with the intention ... that it is to extinguish some existing legal or moral obligation.” *Black's Law Dictionary* (11th ed. 2019). Thus, to claim a setoff under section 768.041(2), a tortfeasor must prove that the UM carrier’s settlement was intended to extinguish the carrier’s obligation to pay the *same damages* for which the tortfeasor is obligated to pay. If the UM carrier’s settlement was

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<sup>3</sup>A *passive tortfeasor* is a person vicariously liable for another’s tort. See *JFK Med. Ctr., Inc. v. Price*, 647 So. 2d 833, 833 (Fla. 1994).

intended to extinguish the carrier's obligation to pay *other damages* for which the tortfeasor is *not* obligated to pay, then the tortfeasor is *not* entitled to a setoff.

Suppose, for example, that in exchange for a release, a UM carrier pays a plaintiff \$100,000 to settle all claims for damages sought by the plaintiff under section 627.727(10), and suppose further that \$75,000 of those damages are paid to settle the claims based on buckets ##2, 3, and 4 (interest on unpaid UM benefits, attorney's fees, and punitive damages for a violation of the insurance code). *See supra* § I, at 4–8 (discussing buckets ## 2, 3, and 4). Well, then, the defendant tortfeasor would not be entitled a setoff for \$75,000 of the \$100,000 UM settlement. At most, the tortfeasor would be entitled to a \$25,000 setoff against the verdict obtained by the plaintiff in the tort suit.

Now, we turn to the italicized language (“At trial, if any defendant shows the court ...”). § 768.041(2), Fla. Stat. That language clearly signals that the defendant—i.e., the tortfeasor being sued—bears the burden of proving, or showing to the court, that the defendant is entitled to a setoff. The plaintiff does not have to prove anything. *Cf. Anderson v. Vander Meiden ex rel. Duggan*, 56 So. 3d

830, 832 (Fla. 2d DCA 2011) (granting certiorari relief to a defendant denied discovery of settlements between the plaintiff and non-parties because, without such discovery, the defendant’s “affirmative defense of setoff [would] be eviscerated and he [would] be unable to meet the burden of proof required by sections 46.015(2) and 768.041(2)”).

The words “[a]t trial” indicate that the question of whether a settlement is a setoff under section 768.041(2)—and how a settlement should be allocated amongst various heads of damages—ordinarily is a question of fact. A “trial,” of course, involves “[a] formal judicial examination of evidence,” *Trial, Black's Law Dictionary* (11th ed. 2019), subject to the rigors of cross examination, credibility determinations, and the like. In other contexts, finders of fact routinely allocate settlements amongst various heads of damages. *See, e.g., Chamberlin v. Agency for Health Care Admin.*, 2021 WL 1567111, at \*2–\*9 (Fla. Div. Admin. Hrgs. April 15, 2021) (allocating settlement for purpose of a Medicaid lien).

Granted, another subsection in the same statute states that “[t]he fact of such a release or covenant not to sue ... shall not be made known to the jury.” § 768.041(3), Fla. Stat. Yet, subsection (2) states the required “show[ing]” “[a]t trial” for a setoff is to “the court.”

*Id.* § 768.041(2). Thus, read in the context of the whole statute,<sup>4</sup> section 768.041(2)'s "trial" to determine the setoff may be a bench trial or phase II jury trial that occurs after the jury renders its verdict on the tortfeasor's liability to the plaintiff.<sup>5</sup> Fla. R. Civ. P. 1.270(b) (authorizing court to order separate trials); Fla. Std. Jury Instr. (Civil) 503.1 (specifying a bifurcated procedure under which the jury hears evidence related to punitive damages only after it determines liability and compensatory damages).

In sum, to be entitled to a setoff based on a plaintiff's settlement with a UM carrier, section 768.041(2)'s text requires the defendant tortfeasor (not the plaintiff) to prove at a trial that the settlement was in partial satisfaction of the same damages for which the plaintiff sued the tortfeasor.

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<sup>4</sup> Scalia and Garner, *supra* p. 5, § 24 at 167–69 (whole-text canon).

<sup>5</sup> One of the FJA's core values is to uphold the right to a jury trial. *See* Fla. Const. Art. 1, § 22. In this case, the Court need not decide whether the trial to determine the amount of the setoff (if any) must be before a jury.

**III. A defendant seeking a setoff based on a plaintiff's settlement with a third party is not required to show that the defendant and the third party were joint tortfeasors.**

Ellison and the FDLA mischaracterize the Second District's holding and Willoughby's position as requiring a settling party and a non-settling party to be *joint tortfeasors*. Initial Br. 20, 23–24; FDLA Br. 9–10. This is not what the Second District held, and it is not what Willoughby or the FJA argue. For section 768.041(2) to apply, the defendant and the settling third party need *not* be joint tortfeasors; rather, they need only be jointly liable for the *same damages*. See *Ellison v. Willoughby*, 326 So. 3d 214, 220 (Fla. 2d DCA 2021) (“Mr. Willoughby’s claims against 21st Century were not and could not be asserted against Mrs. Ellison, and the settlement included elements of damages that were not part of Mr. Willoughby’s claim against Mrs. Ellison.”) (internal quotations omitted). Insofar as the Second District noted that “Mrs. Ellison indisputably was not a joint tortfeasor with 21st Century,” this does not amount to a holding that Ellison and 21st Century were required to be joint tortfeasors for section 768.041(2) to apply. *Id.* at 219. Rather, it is simply a fact supporting the point that Ellison and 21st Century are not jointly liable for the *same damages*.

A defendant and a settling third party need not be joint tortfeasors to be jointly liable for the same damages. For example, in *Grobman v. Posey*, 863 So. 2d 1230 (Fla. 4th DCA 2003), the settling party was vicariously liable for the non-settling defendant's negligence, i.e., they were not joint tortfeasors. *Id.* at 1232–33. Because a vicariously liable party and its negligent agent are “jointly liable for *all* of the harm that the primary actor has caused,” the court held that the non-settling tortfeasor was entitled to a setoff under section 768.041 as to the amounts received from the settling vicariously liable party. *Id.* at 1235–37. In this case, however, Ellison and the UM carrier do not share a relationship akin to a principal and an agent or another vicarious liability relationship.

In sum, a defendant seeking a setoff based on a plaintiff's settlement with a third party is not required to show that the defendant and the third party were joint tortfeasors. The Second District did not so hold, and Willoughby and the FJA do not contend any such requirement exists under section 768.041(2).

**IV. FDLA’s policy arguments are for the legislature, not this Court, and are based on misleading statistics.**

These days, we are all supposed to be textualists. *See generally* Remarks of Judge Diarmuid F. O’Scannlain, “*We Are All Textualists Now*”: *The Legacy of Justice Antonin Scalia*, 91 ST. JOHN’S L. REV. 303 (2017). If that is true, then the policy arguments like those appearing on pages 12 to 14 of FDLA’s amicus brief should not carry any weight in this Court. Such arguments are for the legislature—not this Court—to consider.

That said, FDLA’s legislative arguments are based on a misleading use of statistics. According to the Office of the State Courts Administrator’s Summary Reporting System of Florida—i.e., the same source cited by FDLA at page 13 of its brief—the number of circuit court filings has steadily *decreased* between fiscal years 2010–11 and 2020–21, even as Florida’s population has significantly *increased* during that same period. *See* Office of the State Courts Administrator, *2020–21 Annual Report* at 87 (2021)<sup>6</sup> (graphically

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<sup>6</sup> <https://www.flcourts.org/Publications-Statistics/Publications/Annual-Reports/2020-21-Annual-Report/Filing-Trends-FY-2010-11-to-FY-2020-21> (last visited Oct. 31, 2022).

demonstrating the steady decline in circuit court filings over the past ten years); United States Census Bureau, *Florida QuickFacts*,<sup>7</sup> (showing that Florida’s population has increased from 18,801,310 to 21,538,187 between the 2010 and 2020 censuses). FDLA’s characterization of “Florida’s heavily litigious judicial landscape” is not supported by the statistics it cites. *See* FDLA Br. 13.

### **CONCLUSION**

This Court should answer the certified question in the negative and affirm the holding of the Second District.

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<sup>7</sup> <https://www.census.gov/quickfacts/FL> (last visited Oct. 31, 2022).

## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing document complies with the word count limitation of Rule 9.210, Florida Rules of Appellate Procedure, in that it contains 3,706 words (including words in headings, footnotes, and quotations), according to the word-processing system used to prepare this document. This document also complies with the line spacing, type size, and typeface requirements of Rule 9.045, Florida Rules of Appellate Procedure.

/s/Bryan S. Gowdy  
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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion was filed with the Clerk of Court on October 31, 2022, via the Florida Courts E-Filing Portal and that a true and correct copy of the foregoing has been furnished via email to:

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