

IN THE SUPREME COURT OF FLORIDA
CASE NO.: SC21-1580
L.T. CASE NO.: 2D19-1961

ALBERTA S. ELLISON,

Petitioner,

vs.

RANDY WILLOUGHBY,

Respondent.

_____ /

RESPONDENT'S ANSWER BRIEF ON THE MERITS

On Discretionary Review From a Decision of
the Second District Court of Appeal

Respectfully submitted by:

BRENT G. STEINBERG
Florida Bar No.: 0085453
DANIEL L. GREENE
Florida Bar No. 1003266
JACOB M. SCHUSTER
Florida Bar No. 1030981
SWOPE, RODANTE P.A.
1234 E. 5th Avenue
Tampa, Florida 33605
Tel: (813) 273-0017
Fax: (813) 223-3678

Service of Court Documents:

Appeals@swopelaw.com
eservice@swopelaw.com

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RESPONSE TO STATEMENT OF CASE AND FACTS

Defendant's Statement of the Case and Facts contains inaccurate or misleading statements while simultaneously omitting or glossing over other facts that are critical to this appeal. Plaintiff now writes to remedy these issues.

A. Discussion of insurance during voir dire.

Defendant asserts that the topic of insurance "permeated voir dire" and that there were "direct statements that insurance would pay for Plaintiff's damages." IB.51-52. Those assertions are inaccurate.

Voir dire spanned almost the entire first day of trial. R.3202-3506 (indicating the proceedings spanned 9:21 a.m. to 5:50 p.m.). The Initial Brief cites four instances where the topic of insurance came up during Plaintiff's counsel's voir dire. The first was when a venireperson who is married to a medical provider (Ms. Greenwood) expressed a general concern about medical malpractice lawsuits causing healthcare costs to "skyrocket." R.3389. In follow up, Plaintiff's counsel asked whether she was concerned her insurance premiums would increase because of injured people, like the plaintiff, "bringing too many lawsuits or getting too much money." R.3390.

There was no contemporaneous objection. Although Defendant's counsel moved for mistrial a few minutes later (R.3392-93), he later withdrew any objection regarding the insurance premiums discussion, acknowledging that Plaintiff's counsel was permitted to inquire regarding that issue. R.3496-97, SR.17256.¹

The second mention of insurance was made by an insurance claim adjuster on the venire, Ms. Meinsen. She made the following statement:

PROSPECTIVE JUROR MEINSEN: My question would be, okay, so he's had a car accident. He's had a brain injury. Are we going to know the facts so that we can determine the financial responsibility of the defendant to the claimant -- to the plaintiff so we can make a decision on the financial side of it?

I mean, most of the time, in this kind of situation, the insurance is going to pick it up anyway, if I'm not mistaken. Maybe I'm wrong. But, you know, the damages, but will we know -- will it be broken down of what it's for [...] financially?

[PLAINTIFF'S COUNSEL]: The judge will tell you what the elements of damages are, and there's things you're familiar with like lost earnings, you know, can't work anymore or can't make as much. That's the kind of stuff you hear about all the time. Medical expenses, those kinds of things. Then there's another category of what we call noneconomic damages, which are things like pain,

¹ "SR.[page numbers]" refers to the Supplemental Record filed on March 2, 2020, pursuant to the Second District's order of February 20, 2020.

suffering, mental anguish, those kinds of things. You'll hear much more about all that.

But you're basically asked to figure out, as a group of appraisers, what dollar amount to put on these injuries; but you don't get to find out how much money anybody's got or anything like that.

PROSPECTIVE JUROR MEINSEN: **No. That's irrelevant anyway.**

R.3407-08 (emphasis added). Minutes later, Defendant's counsel objected. He acknowledged that Plaintiff's counsel "didn't do anything to provoke it" but argued Ms. Meinsen "said that the defense was going to pay, the insurance whatever monies were awarded" and that such commentary tainted the whole panel. R.3410. In response, Plaintiff's counsel argued that Ms. Meinsen expressed she was unsure about whether "the insurance is going to be paying for this" and, regardless, she did not make any distinction between health or automobile insurance. R.3411. Although Defendant's counsel did not expressly request that the venire be stricken, the court held it would not "flush" the entire venire based on Ms. Meinsen's statement, observing that "as you get closer to the end, you're going to get people that are willing to assess the damages." R.3411.

The third reference was another completely unprovoked comment by Ms. Meinsen, who suggested that another venireperson

(Mr. Leonhardt) buy an umbrella policy after he expressed concern about his potential liability for his children driving his cars. R.3421.

The fourth reference to insurance was made while Plaintiff's counsel was inquiring whether any of the prospective jurors had a problem with Florida law making the owner of the car responsible for the driver's damages. R.3414-15. In response, another venireperson, Mr. Price, offered the following commentary:

Well, if you're driving a car, even though it may be someone else's car, and you get a speeding ticket -- the driver gets the ticket. **I understand the law and how they're the owner of the car and they have insurance and they're the ones with the money, so** -- but is it right? I mean, it doesn't really matter what I think.

R.3418 (emphasis added). Thus, contrary to Defendant's statement in her Initial Brief (p.6), Mr. Price did *not* say the owner of a vehicle is responsible "because" the owner has insurance.

Defendant's counsel did not make any contemporaneous objections or motions in response to the third or fourth references to insurance. At the conclusion of Plaintiff's counsel's voir dire, however, Defendant's counsel said he was "re-raising" an objection "concerning the insurance issues." R.3447.

The Initial Brief also references a fifth statement regarding insurance that was made during voir dire (IB.6), but that statement was made in response to *Defendant's counsel's* question regarding whether the venireperson (Ms. Dunn) held bias against people who bring lawsuits. R.3450. Defendant's counsel never sought any relief in the trial court regarding Ms. Dunn's reference to insurance.

After the jury was selected but before it was sworn, Defendant "renewed" her motion for mistrial regarding "the insurance issue." R.3496. Although Defendant's counsel acknowledged there was nothing improper about the insurance premiums question, he said that issue was "compounded" by Ms. Meinsen's statements. R.3497. In response, the court stated:

Meinsen, she just was kind of volunteering that stuff, and I thought that [Plaintiff's counsel] didn't indulge her too much. It was unfortunate that it came up in the context of today's -- in context of today's world. It's very naive to assume that somebody out there on the jury is not going to suspect that there may be an insurance company behind all of this. The law still says we're not supposed to make it a center point of the voir dire; but if it leaks out and in the context of this particular voir dire, I don't think it was harmful. That's my call based on my totality of the circumstances listening to the voir dire. [. . .] I just don't think we've got a tainted panel.

R.3497. Thus, the court stated it had analyzed the issue and was denying Defendant's motion "for the reasons stated." R.3498.

Post-verdict, Defendant's motion for new trial (R.3117) and argument at the hearing (SR.17253-54) regarding voir dire focused only on Ms. Meinsen's comments. That motion was denied. SR.17257. The Second District affirmed that ruling without discussion. Ellison v. Willoughby, 326 So. 3d 214, 217 (Fla. 2d DCA 2021).

B. Evidence regarding Plaintiff's injuries and resulting impairments.

Defendant's Statement of Case and Facts omits any discussion of Plaintiff's injuries. Notwithstanding, Defendant claims that Plaintiff's verdict was "astronomic," suggesting the \$30 million verdict was attributed to the discussion of insurance during voir dire rather than the magnitude of Plaintiff's injuries and resulting damages. IB.52. The record evidence belies Defendant's assertions.

It was *undisputed* that as a result of the collision, Mr. Willoughby suffered a "very, very severe permanent brain injury" (R.4223), among other injuries. There is nothing medicine can do to "heal" or "fix" his brain injury. R.3592, 4193.

Mr. Willoughby was hospitalized for 75 days and required around-the-clock care for two years. R.3693-3731, 4397, 4741-17213. While Mr. Willoughby made significant strides in the third year following the collision, all the testifying doctors agreed Mr. Willoughby's recovery "plateaued" approximately three years after the collision. R.3592, 3819, 3824, 3928, 4193, 4222-26.

It was *undisputed* that "as a result of the brain injury, Mr. Willoughby continues to suffer from very significant cognitive, emotional, and behavioral problems." R.4225. For this reason, Mr. Willoughby cannot live independently and will forever require supervision to ensure he is not a danger to himself or others. R.3592, 3943-44, 4219-20. It was also *undisputed* that Mr. Willoughby will be unable to return to gainful employment. R.3929, 4083-45, 4235.

There is nothing in the record to suggest the jury award was based on anything other than Plaintiff's profound injuries and resulting losses. The trial court also found the damages award was supported by the evidence and "within the parameters of verdicts of this type of case," specifically noting the jury had no "dramatic outbursts," "tears" or "emotionally anything" when listening to Plaintiff's closing. R.3182; SR.17271-72. Even Defendant's counsel

agreed with the trial judge's comments that this trial "certainly was one of the crisper and cleaner trials that I've done" and that "there was little drama." SR.17252-53.

Defendant appealed the trial court's denial of her motion for new trial with respect to Plaintiff's future medical expenses and future noneconomic damages. The Second District affirmed the trial court's ruling without discussion. Ellison, 326 So. 3d at 217. Defendant has not challenged the Second District's affirmance on those issues, thereby waiving any challenge relating to the size of Plaintiff's damages award.

SUMMARY OF ARGUMENT

Plaintiff respectfully suggests the Court improvidently granted jurisdiction and should dismiss this proceeding. The issue regarding whether a tortfeasor is entitled to a setoff for a pre-trial settlement of a UM bad faith claim has never arisen in the 40 years since the UM bad faith remedy was created by the Legislature, and it is unlikely to ever arise again. Thus, the certified question does not present an issue of "great public importance."

If, however, the Court elects to retain jurisdiction, then it should only address the certified question. The Court should reject

Defendant's invitation to sit as a second-tier appellate court to review issues outside of the certified question which were not specifically addressed in the Second District's opinion.

The Court should also refrain from addressing Defendant's argument that the trial court erred by failing to grant her a setoff under section 768.041(2). Defendant never explicitly or implicitly requested a setoff pursuant to that section at the trial level, thereby failing to preserve the issue. This Court should decline to review an issue which the trial court did not have a full and adequate opportunity to consider.

If, however, the Court reaches the merits of the certified question, it should answer it in the negative and affirm the trial court's denial of Defendant's setoff. Section 768.041(2) does not entitle Defendant to a setoff because Defendant was neither jointly and severally liable with Plaintiff's UM carrier, nor sued for the identical damages. Likewise, section 768.76 does not entitle Defendant to a setoff because the UM bad faith damages recovery does not qualify as a "collateral source" as defined therein.

If the Court reaches the merits of the other two issues outside the certified question, it should affirm the trial court's and Second

District's rulings. Section 324.021(9)(b)3 does not cap Defendant's liability because the plain language of that statute does not limit the liability of a co-owner for another co-owner's negligence. Perhaps more importantly, no matter how the court construes the word "loan," there is no evidence Defendant loaned the vehicle to her husband prior to the collision. Thus, Defendant did not demonstrate that she "loaned a motor vehicle to [a] permissive user," as would be necessary to trigger section 324.021(9)(b)3's application.

Finally, the trial court did not abuse its discretion when denying Defendant's motion for new trial with respect to statements made during voir dire. An abuse of discretion cannot be shown unless there was *evidence* of liability insurance carried by the *defendant*. Here, there was neither *evidence* regarding insurance nor discussion of any insurance carried by *Defendant*.

Accordingly, if the Court retains jurisdiction, it should affirm on all issues.

ARGUMENT

I. THIS COURT SHOULD EXERCISE ITS DISCRETION TO DISCHARGE JURISDICTION OR, ALTERNATIVELY, SOLELY ADDRESS THE NARROW CERTIFIED QUESTION.

Plaintiff recognizes this Court already accepted jurisdiction to address the certified question. However, Plaintiff would be remiss if he did not ask the Court to reconsider that decision and exercise its discretion to discharge jurisdiction in this cause. See, e.g., Suzuki Motor Corp. v. Winckler, 2021 WL 3778726, at *1 (Fla. Aug. 26, 2021) and Walters v. Agency for Health Care Admin., 2021 WL 2562698, at *1 (Fla. June 23, 2021) (discharging jurisdiction and dismissing the proceeding after initially accepting jurisdiction to review a question certified as one of great public importance).

When a certified question “requires consideration of a narrow issue with very unique facts,” the question does *not* present an issue of “great public importance.” Dade Cnty. Prop. Appraiser v. Lisboa, 737 So. 2d 1078 (Fla. 1999); see also State v. Sowell, 734 So. 2d 421, 422 (Fla. 1999) (concluding “the actual legal question deals with an extremely narrow principle of law” and thus “does not present an issue of ‘great public importance’”). Such is the case here.

In the 40 years since the Legislature enacted Florida's first-party bad faith statute, section 624.155,² no court other than the court below has ever addressed the setoff issue presented in the certified question. See Ellison, 326 So. 3d at 218. The lack of a single case even tangentially addressing setoff of first-party bad faith settlements demonstrates this issue is unequivocally *not* significant to the citizens of Florida. In fact, undersigned 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 uninsured motorist ("UM") carrier before obtaining a judgment against the third-party tortfeasor. Clearly, this is not a recurring issue.

Thus, although the certified question may be important to the parties, that does not mean it qualifies as one of great public importance. See Vickery v. City of Pensacola, 342 So. 3d 249, 272 (Fla. 1st DCA 2022). As such, Plaintiff respectfully requests the Court exercise its discretion to discharge jurisdiction.

² See Ch. 82-243, § 9, Laws of Fla.

Alternatively, if the Court retains jurisdiction, it should refrain from addressing the other two issues outside the scope of the certified question: whether Defendant is entitled to a damages cap under section 324.021(9)(b)3 or a new trial based on what occurred during voir dire. The Second District affirmed the trial court's ruling on those issues without discussion. Ellison, 326 So. 3d at 217.

This Court typically declines to address issues outside the scope of the certified question, *especially* where the opinion on review did not specifically address them. *See, e.g., C.N. v. I.G.C.*, 316 So. 3d 287, 292 (Fla. 2021), Chames v. DeMayo, 972 So. 2d 850, 853 n.2 (Fla. 2007), McEnderfer v. Keefe, 921 So. 2d 597, 597 n.1 (Fla. 2006), and Major League Baseball v. Morsani, 790 So. 2d 1071, 1080 n.26 (Fla. 2001) (each declining to address questions outside the certified conflict which were not specifically addressed in the district court's opinion). This exercise of judicial restraint appropriately recognizes the district courts of appeal are intended to be courts of final appellate jurisdiction, and that this Court's function is *not* to serve as a second layer of appellate review. *See Ansin v. Thurston*, 101 So. 2d 808, 810 (Fla. 1958) (recognizing that the district courts of appeal "are courts primarily of final appellate jurisdiction and to allow such

courts to become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy”).

The Court should exercise the same restraint here and refrain from addressing the issues which the Second District rejected without discussion. Accordingly, if the Court retains jurisdiction to address the certified question, it should *only* address the certified question.

II. THE TRIAL COURT CORRECTLY CONCLUDED DEFENDANT IS NOT ENTITLED TO A SETOFF OF THE AMOUNTS PAID BY PLAINTIFF’S UM CARRIER.

A. The issue before this Court is whether Defendant is entitled to a setoff for the UM bad faith damages, not UM benefits.

As a preliminary matter, Plaintiff writes to clarify the precise issue before the Court. The certified question is narrowly focused on whether Defendant is entitled to a setoff under section 768.041 or section 768.76 for a “settlement payment made by an uninsured motorist insurer to settle a first-party bad faith claim.” Ellison, 326 So. 3d at 224. Thus, the issue presented by the certified question is

whether a tortfeasor is entitled to a setoff for a recovery of UM *bad faith damages*.

This Court is *not* being asked to decide whether a tortfeasor is entitled to a setoff for a recovery of UM *policy benefits*. The Court has expressly held section 768.041 does *not* authorize a trial court to grant a tortfeasor a setoff for “insurance benefits received as a result of carrying uninsured motorist coverage.” Int'l Sales-Rentals Leasing Co. v. Nearhoof, 263 So. 2d 569, 571 (Fla. 1972). It is also well established that section 768.76 does not entitle a tortfeasor to a setoff for UM benefits paid by the plaintiff's auto insurer. See Hughes v. Enter. Leasing Co., 831 So. 2d 1240, 1241 (Fla. 1st DCA 2002); Econ. Fire & Cas. Co. v. Obenland, 629 So. 2d 265, 267 (Fla. 2d DCA 1993); Respass v. Carter, 585 So. 2d 987, 990 (Fla. 5th DCA 1991).³

Defendant has not argued Nearhoof, Hughes, Obenland, or Respass were wrongly decided (or even cited them) in her Initial Brief. And although Defendant states she is seeking a \$4 million (rather than \$3.99 million) setoff, she has not expressly argued section 768.041 or section 768.76 entitle her to a setoff for the \$10,000 UM

³ Section 627.7372(2), Florida Statutes, repealed in 1993, was nearly identical to section 768.76(2).

benefits recovered by Plaintiff. See Hoskins v. State, 75 So. 3d 250, 257 (Fla. 2011) (holding an argument not raised in the initial brief is barred). Thus, this case does not present the question of whether this Court should overrule Nearhoof or find that *UM benefits* qualify as a “collateral source” under section 768.76.

Rather, the narrow issue before this Court is whether Defendant met her burden of demonstrating entitlement to a setoff under section 768.041 or section 768.76 for the \$3.99 million paid by Plaintiff’s UM carrier, 21st Century, to settle his UM bad faith claim. See Anderson v. Vander Meiden ex rel. Duggan, 56 So. 3d 830, 832 (Fla. 2d DCA 2011) (noting the defendant bears the burden of demonstrating entitlement to a setoff under section 768.041); Pate v. Renfro, 715 So. 2d 1094, 1099 (Fla. 1st DCA 1998) (“It is the burden of the party seeking the set-off to prove the existence of an actual duplication of benefits in fact.”).

B. Defendant never argued she was entitled to a setoff pursuant to section 768.041 in the trial court, thus failing to preserve that issue for appeal.

It is well established that “in order for an argument to be cognizable on appeal, it must be the *specific contention asserted as legal ground* for the objection, exception, or motion below.” Aills v.

Boemi, 29 So. 3d 1105, 1108 (Fla. 2010) (emphasis added, citations omitted); see also Brown v. State, 304 So. 3d 243, 264 n.8 (Fla. 2020) (noting that a specific evidentiary argument regarding the admissibility of certain testimony, although a variation on a general argument raised below, “is not preserved because [appellant] raised it for the first time in her initial brief”).

Likewise, this Court cannot grant a petitioner relief on an argument never raised in the trial court. See Sanchez v. Miami-Dade Cnty., 286 So. 3d 191, 195 (Fla. 2019) (“A litigant seeking to overturn a lower court’s judgment may not rely on one line of argument in the trial court and then pursue a different line of argument in the appellate courts A prerequisite for prevailing on an argument in this Court is that the same argument was presented in both the trial court and the district court.”).

Here, there is no question the *issue* of whether Defendant was entitled to a setoff for Plaintiff’s settlement with his UM carrier was presented to the trial court. However, it is equally clear that Defendant never raised section 768.041 as the *specific legal ground* for that setoff. Ellison, 326 So. 3d at 219 (“[Defendant] never specifically cited section 768.041(2) below”). To the contrary,

Defendant only argued she was entitled to a setoff because the \$4 million settlement qualified as a “collateral source” as defined in section 768.76. R.2170-72, 3115, 3170-75, SR.17250-84. Under this Court’s precedent, that was insufficient to preserve for review the issue of whether section 768.041 entitled Defendant to a setoff. See Aills, 29 So. 3d at 1108; Brown, 304 So. 3d at 264 n.8; Sanchez, 286 So. 3d at 195.

The Second District, however, found that Defendant’s failure to cite section 768.041(2) in the trial court was inconsequential because “the issue was thoroughly litigated in the trial court.” Ellison, 326 So. 3d at 219. This is inaccurate. The only issue that was “thoroughly litigated” was whether the \$4 million settlement qualified as a collateral source. And although Defendant cited case law which discussed whether section 768.041(2) entitled a party to a setoff from a UM settlement (R.2171, 3174),⁴ Defendant did *not* cite any such case for that proposition. Rather, Defendant only cited those cases to argue the settlement qualified as a collateral source under section

⁴See Int’l Sales-Rentals Leasing Co. v. Nearhoof, 263 So. 2d 569, 571 (Fla. 1972); Hughes v. Enter. Leasing Co., 831 So. 2d 1240, 1241 (Fla. 1st DCA 2002); Respass v. Carter, 585 So. 2d 987, 989 (Fla. 5th DCA 1991).

768.76. See R.2171, 3174. The fact that the cases also happened to discuss section 768.041(2) does not change the fact Defendant never raised section 768.041 – explicitly or implicitly – as a legal ground for the requested setoff.

In sum, Defendant cannot claim the trial court committed error by failing to grant her a setoff under section 768.041(2) when Defendant never requested such relief. See Brown, 304 So. 3d at 264 n.8; Sanchez, 286 So. 3d at 195. Because Defendant failed to properly preserve the issue of whether section 768.041(2) entitles her to a setoff, this Court should decline to answer that portion of the certified question or affirm the trial court’s denial of Defendant’s motion for setoff. See In re Beverly, 342 So. 2d 481, 489 (Fla. 1977) (“This Court should decline the review of questions which the trial court did not have a full and adequate opportunity to consider.”).

C. Section 768.041 does not apply because Defendant did not demonstrate “at trial” that Plaintiff “delivered a release” to his UM carrier “in partial satisfaction of damages sued for.”

Should the Court nonetheless elect to reach the merits of whether section 768.041 entitled Defendant to a setoff, it should affirm.

When quoting section 768.041(2) in her Initial Brief, Defendant consistently omits the first two words of the subsection. The subsection actually reads:

(2) *At trial*, if any defendant shows the court that the plaintiff, or any person lawfully on her or his behalf, has delivered a release or covenant not to sue to any person, firm, or corporation 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 at the time of rendering judgment and enter judgment accordingly.

§ 768.041, Fla. Stat. (emphasis added). Subsection (3) adds that the fact of such a release “shall not be made known to the jury.” Id.

Of course, this Court cannot ignore the words “at trial” in section 768.041(2) (as Defendant did in her Initial Brief). See State v. Miller, 227 So. 3d 562, 564 (Fla. 2017) (“This Court [] endeavors to give meaning to each word of a statute rather than treat any word as ‘mere surplusage’.”). Applying the plain language of the subsection, Defendant is not entitled to a setoff under section 768.041 because she failed to make the requisite showing “at trial.”

Again, at the trial level, Defendant never argued she was entitled to a setoff pursuant to section 768.041(2) or that Plaintiff “delivered a release or covenant not to sue to any person, firm, or corporation

in partial satisfaction of the damages sued for.” Rather, Defendant only sought to set off the \$4 million settlement with the UM carrier as a “collateral source” as defined by section 768.76. R.2170-72, 3115, 3170-75, SR.17250-84. On that basis alone, the Court should affirm.

But even if Defendant had attempted to make the requisite showing “at trial,” the Second District correctly concluded the release was not given to the UM carrier “in partial satisfaction of the damages sued for.” Ellison, 326 So. 3d at 219. As will be explained below, this Court has consistently construed “in partial satisfaction of the damages sued for” to refer *only* to situations where the settling co-defendant was jointly and severally liable with the non-settling co-defendant *and* sued for the identical damages. And here, because the UM carrier was neither jointly and severally liable with Defendant nor sued for the identical damages, Defendant is not entitled to a setoff under section 768.041(2).

i. Section 768.041(2) only applies where the settling co-defendant is jointly and severally liable and sued for the identical damages.

Five of this Court’s prior cases should guide its interpretation of section 768.041(2). First, in Devlin v. McMannis, 231 So. 2d 194

(Fla. 1970), this Court construed section 768.041(2) to “authorize[] to be set off from a judgment against one joint tort-feasor *only* the amount constituting a settlement for the damages or damage elements recoverable in the same cause of action against another joint tort-feasor.” Id. at 196 (emphasis added). The Court further explained that section 768.041(2)

must be interpreted so as to preserve the identity of the separate causes of action and the distinctive character of the damage element accruing under each such cause. The statute is designed, within the degree of specificity ascertainable under verdict and judgment procedures, to prevent duplicate or overlapping compensation for *identical damages*.

Id. (emphasis added). Finally, the Court observed that although the plaintiff may have been the “beneficial recipient[] of compensation awardable for different elements of damages accruing under another cause of action,” that did *not* entitle the non-settling defendant to a setoff under section 768.041. Id.

Next, in Safecare Health Corp. v. Rimer, 620 So. 2d 161 (Fla. 1993), the Court held a defendant in a wrongful death action was not entitled to a setoff from a prior settlement against a joint tortfeasor obtained before the injured claimant died (while the action was pending as a personal injury action). The Court explained that “the

wrongful death action in the instant case is not subject to a set-off because it involves *different rights of recovery and damages* from those involved in [the decedent's] personal injury action.” Id. at 164 (emphasis added).

Two years later, in Wells v. Tallahassee Memorial Regional Medical Center, Inc., 659 So. 2d 249 (Fla. 1995), this Court held a non-settling defendant was not entitled to setoff any sum paid by a settling defendant to resolve a claim for noneconomic damages. Under the version of section 768.81(3) in effect at the time, the doctrine of joint and several liability had been abrogated as to noneconomic damages but only limited as to economic damages. The Court explained that

the setoff provisions,⁵ which were enacted before section 768.81, presuppose the existence of multiple defendants jointly liable for the same damages. Consequently, the setoff provisions do not apply to noneconomic damages *for which defendants are only severally liable*.

Id. at 252-53 (emphasis added); see also McCalla v. E.C. Kenyon Const. Co., Inc., 183 So. 3d 1192 (Fla. 1st DCA 2016) (applying Wells to prohibit setoff because, although the damages recovered in the

⁵ This was shorthand for sections 46.015(2), 768.041(2), and 768.31(5), Fla. Stat. (1991). Wells, 659 So. 2d at 251.

settlement allegedly overlapped with the damages awarded by the jury, the settling defendant and non-settling defendant were not jointly and severally liable).

Next, in Gouty v. Schnepel, 795 So. 2d 959 (Fla. 2001), the Court declined to grant a setoff to a non-settling defendant who was found 100 percent liable where the settling codefendant was found not liable at trial. Citing Wells, the Court reiterated:

the applicability of the setoff statutes is predicated on the existence of *other tortfeasors who are liable for the same injury* as the settling party. The language of the setoff statutes does not suggest a different result in this case.

Id. at 965 (emphasis added). Thus, because the judgment against the non-settling defendant “was not based upon joint and several liability, but on [the non-settling defendant’s] percentage of fault,” the non-settling defendant “was not entitled to the benefit of a setoff from the award of economic damages.” Id. at 966.

Finally, in D'Angelo v. Fitzmaurice, 863 So. 2d 311 (Fla. 2003), this Court addressed whether a settling defendant was entitled to a setoff where the non-settling defendant had been strategically omitted from the verdict form. The Court explained that in Gouty, the settling defendant was “found not liable,” whereas in D'Angelo,

the settling defendant was “not found liable.” Id. at 317. That distinction was “not trivial;” a settling defendant “found not liable” cannot be considered a joint tortfeasor, whereas a settling defendant “not found liable” (because of the omission from the verdict form) may be considered a joint tortfeasor. Id. Thus, the Court held the non-settling defendant was entitled to a setoff for the economic damages “recovered from a settling tortfeasor for the same incident causing the injury where the settling tortfeasor was not included on the verdict form.” Id. at 319. However, the non-settling defendant was not entitled to a setoff for noneconomic damages because, as the Court once again observed, section 768.041(2) “presupposes the existence of multiple defendants jointly and severally liable for the same damages.” Id. at 314 (citing Wells, 659 So. 2d at 253).⁶

Synthesizing the holdings of these five cases together, the rule becomes clear: a non-settling defendant is only entitled to a setoff for a settlement with a prior co-defendant *if* (1) the settling defendant

⁶ The 2006 amendment to section 768.81(3) generally abrogated the doctrine of joint and several liability for both economic *and* non-economic damages, effectively superseding the holding of D’Angelo. See Port Charlotte HMA, LLC v. Suarez, 210 So. 3d 187, 191 (Fla. 2d DCA 2016).

was jointly and severally liable with the non-settling defendant, *and* (2) the plaintiff sued the settling defendant and non-settling defendant for the “identical damages.”⁷

For damages to be “identical,” all the elements of damage sought from the settling defendant and non-settling defendant must be the same. See Rimer, 620 So. 2d at 164 (denying setoff because the settlement involved “different rights of recovery and damages” than the remaining claim against the non-settling defendant); Devlin, 231 So. 2d at 196 (denying setoff because the claims were distinct and each “embrac[ed] distinctive damage elements”); Addison Constr., 240 So. 3d at 766-67 (denying setoff on fraud judgments because the complaint did not allege the defendants could be liable for fraud based on the actions of the settled defendants, but granting setoff on breach of contract judgment because the damages “sued for” were identical to those “sued for” against the settling defendants); Gordon v. Marvin M. Rosenberg, D.D.S., P.A., 654 So. 2d 643, 645 (Fla. 4th DCA 1995) (denying setoff to second dentist for settlement with first

⁷ See Addison Constr. Corp. v. Vecellio, 240 So. 3d 757, 767 (Fla. 4th DCA 2018) (“[W]hen making a setoff decision, it does not matter what the party was actually entitled to recover[;] instead, what matters is what the plaintiff sued for.”) (cleaned up).

dentist because second dentist allegedly exacerbated the harm caused by the first dentist, causing separate damages). In turn, a setoff is inappropriate when one has a “separate and distinct claim” involving “different elements of damages.” Gordon, 654 So. 2d at 645 (citing Rimer, 620 So. 2d 161).

Two cases from the Fourth District further illustrate this point. First, in Grobman v. Posey, 863 So. 2d 1230, 1237 (Fla. 4th DCA 2003), the Fourth District held the non-settling defendant was entitled to a setoff for a settlement payment made by a party alleged to be both vicariously and derivatively liable for the non-settling defendant’s negligence. Grobman’s holding makes sense because it was alleged the settling defendant was jointly liable “to the same extent as the primary actor.” Id. at 1235 (emphasis in original). Thus, although the complaint pled a different cause of action against the settling defendant (negligent credentialing) than the non-settling defendant (medical malpractice), the damages sought from the settling and non-settling defendants were completely identical.

One year later, the Fourth District denied a setoff where the claims pled against the settling and non-settling defendant did not seek the identical damages. In Osheroff v. Rauch Weaver Millsaps &

Co., 882 So. 2d 503 (Fla. 4th DCA 2004), a real estate broker sued the sellers and buyers after the broker was allegedly wrongfully denied a commission for a land deal. Following a jury trial, the sellers were found liable for breach of contract and the buyers were found liable for tortious interference. Id. at 504-05. Thereafter, the sellers settled and the buyers sought a setoff for the amount of the settlement. Id. at 505. The sellers argued they were entitled to a setoff because the jury awards “were all predicated on a single and identical economic injury, i.e., the loss of the real estate commission, and to deny setoff of the \$50,000 paid by the sellers would allow a double recovery.” Id. at 506. The Fourth District rejected that argument.

Applying Wells and D’Angelo, the Fourth District held section 768.041(2) did not apply for two reasons. First, the sellers were not jointly liable with the buyers. Osheroff, 882 So. 2d at 506. Second, although the damages recoverable under the cause of actions asserted against the sellers and buyers were “overlapping, they [were] not necessarily co-extensive,” and the buyers failed to demonstrate a duplication of damages. Id.; see also McCalla, 183 So. 3d at 1196 n.2 (citing Osheroff with approval for this proposition). Specifically,

the Osheroff court noted “the breach of contract claim against the sellers included a demand for attorney's fees, whereas the tortious interference claim against [the buyers] did not.” Osheroff, 882 So. 2d at 506. Thus, section 768.041(2) was inapplicable because of the different elements of “damages sued for” under the causes of action against the buyers and the sellers.

In sum, applying this Court’s precedent, section 768.041 would only apply to the UM bad faith settlement *if* Defendant demonstrated (1) the UM carrier was jointly and severally liable with Defendant, *and* (2) Plaintiff sued the UM carrier for the “identical damages” sought from Defendant. As explained below, neither requisite was met here.

ii. Defendant failed to demonstrate the UM carrier was jointly and severally liable or sued for the identical damages.

Because UM bad faith claims did not exist at common law, section 624.155 provides the exclusive remedy for an insurer’s refusal to settle a UM claim in good faith. See QBE Ins. Corp. v. Chalfonte Condo. Apartment Ass'n, Inc., 94 So. 3d 541, 548-49 (Fla. 2012). A UM carrier violates section 624.155(1)(b)1 by “[n]ot attempting in good faith to settle claims when, under all the

circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for her or his interests.” If that statutory violation is proven, then the injured claimant / insured is entitled to recover damages from the offending authorized insurer as provided in section 624.155(4), (5) and (8). However, a separate statute specifically addresses the damages recoverable when the offending authorized insurer is a *UM carrier*.

Section 627.727(10) provides:

(10) The damages recoverable from an uninsured motorist carrier in an action brought under s. 624.155 *shall include* the total amount of the claimant's damages, including the amount in excess of the policy limits, any interest on unpaid benefits, reasonable attorney's fees and costs, and any damages caused by a violation of a law of this state. The total amount of the claimant's damages is recoverable whether caused by an insurer or by a third-party tortfeasor.

(emphasis added).

No court has ever held that a UM carrier who violates section 624.155 is jointly and severally liable with the underinsured tortfeasor for the damages recoverable under section 624.155 and 627.727(10). Such a holding would contradict the plain language of the statutes. See State v. Chubbuck, 141 So. 3d 1163, 1170 (Fla. 2014) (“Courts should not construe unambiguous statutes in a

manner that would extend, modify, or limit their terms or the obvious implications as provided by the Legislature.”).

Section 624.155(4) provides that “upon adverse adjudication at trial or upon appeal, the authorized insurer *shall be liable for* damages, together with court costs and reasonable attorney’s fees incurred by the plaintiff.” Section 627.727(10) then adds that such damages “*shall include* the total amount of the claimant’s damages . . . whether caused by an insurer or by a third-party tortfeasor.” The Court should construe the “shall” in both statutes as mandatory according to its plain meaning. See Sanders v. City Of Orlando, 997 So. 2d 1089, 1095 (Fla. 2008), as revised on denial of reh'g (Dec. 18, 2008) (“The word ‘shall’ is mandatory in nature.”); State v. Goode, 830 So. 2d 817, 824 (Fla. 2002) (“[T]he word ‘shall’ should ordinarily be construed as mandatory according to its plain meaning”). Thus, if a UM carrier is found to have violated section 624.155, the payment of the statutory damages is mandatory.

Nothing in the statutes or cases interpreting them suggest a UM carrier guilty of violating section 624.155 should have its liability reduced by a payment made by the underinsured tortfeasor. To the contrary, this Court has observed that UM bad faith damages “are,

in substance, a penalty” for an insurer’s wrongful failure to pay a claim. Fridman v. Safeco Ins. Co. of Illinois, 185 So. 3d 1214, 1223 (Fla. 2016); State Farm Mut. Auto Ins. Co. v. Laforet, 658 So. 2d 55, 61 (Fla. 1995).

Thus, to effectuate the penal purpose of sections 624.155 and 627.727(10) as expressed by the plain language of the statutory text, a UM carrier is severally (but not jointly) liable with the tortfeasor. In turn, section 768.041(2) does not entitle the tortfeasor to a setoff for a settlement of the UM bad faith claim. See Wells, 659 So. 2d at 253 (holding section 768.041(2) inapplicable where the settling defendant was “only severally liable” with the non-settling defendant).

The damages sought to be recovered from the UM carrier were also not “identical” to the damages sought from Defendant. Rather, the UM bad faith claim was “separate and distinct” from the personal injury claim against Defendant and involved “different elements of damages.” Gordon, 654 So. 2d at 645 (citing Rimer, 620 So. 2d 161).

Notwithstanding, Defendant argues there was a complete duplication of damages because Plaintiff alleged he was “entitled to recover [from the UM carrier] the total amount of his damages pursuant to section 627.727(10), Florida Statutes, including all

damages suffered as a result of the Crash....” R.51, ¶ 46. However, as the complaint makes clear in paragraphs 46-48 (R.51-52), Plaintiff only sought to recover consequential damages and the statutory “penalty” for the UM carrier’s violation of section 624.155, not personal injury damages. It just so happens the *amount* of that penalty must include the “total amount of the claimant’s damages” suffered in the accident. See § 627.727(10), Fla. Stat. But the fact remains that Plaintiff was seeking recovery of “penalty” damages, *not* personal injury damages. See R.51-52.

Regardless, even if the damages recoverable from the UM carrier under section 627.727(10) and from Defendant are “overlapping, they are not necessarily co-extensive.” Osheroff, 882 So. 2d at 506. As in Osheroff, Plaintiff’s claim against the UM carrier included additional elements of damages (i.e., attorneys’ fees, costs, pre-judgment interest, post-judgment interest, and consequential damages incurred as a result of the UM carrier’s wrongful denial of coverage and bad faith refusal to settle) that were not sought from Defendant. See R.51-52. As such, it cannot be said the settlement was for the same “damages sued for” from Defendant. See id.; see also Rimer,

620 So. 2d at 164; Devlin, 231 So. 2d at 196; Gordon, 654 So. 2d at 645.

In light of the foregoing, Defendant did not meet her burden of demonstrating “at trial” that the UM carrier was jointly and severally liable with Defendant and that Plaintiff’s UM bad faith claim sought recovery of the identical damages sought from Defendant. It bears repeating that Defendant never even sought a setoff pursuant to section 768.041(2) at the trial level.

iii. Defendant is not entitled to a setoff simply because the settlement with the UM carrier was unallocated.

On pages 25 – 31 of her Initial Brief, Defendant argues she is entitled to a setoff of the entire \$4 million settlement because Plaintiff’s settlement agreement with his UM carrier “did not allocate any part of the \$4 million settlement to any particular claim or element of damages.” IB.17. Defendant’s argument is built upon the false premise that section 768.041(2) would apply to at least a portion of the recovery. But, as explained above, the UM carrier and Defendant would never be jointly and severally liable, and the UM bad faith damages were not “identical” to those sought from Defendant.

Moreover, the only claims Plaintiff brought against the UM carrier were for payment of the UM policy benefits (which is not subject to section 768.041(2) under Nearhoof) and for violation of section 624.155. Plaintiff, of course, did not make those same claims against Defendant. See Rimer, 620 So. 2d at 164 (denying setoff for different claims which involved “different rights of recovery and damages”); Gordon, 654 So. 2d at 645 (denying setoff where plaintiff had a “separate and distinct claim” involving “different elements of damages” against the settling defendant).

Therefore, it would have been inappropriate to attempt to apportion or allocate the settlement with the UM carrier. See Escadote I corp. v. Ocean Three Ltd. P'ship, 211 So. 3d 1059, 1064 (Fla. 3d DCA 2016) (noting “that apportionment of settlement funds is *only* appropriate when the settling parties have allocated the settlement between (a) claims for which co-defendants are jointly and severally liable with the settling co-defendant, and (b) claims which were only asserted against the settling co-defendant”) (emphasis added). Again, there are no claims for which Defendant would be jointly and severally liable with the UM carrier.

Thus, because section 768.041(2) would never apply to any portion of the settlement with the UM carrier, the fact that the UM bad faith settlement was not apportioned is of no legal significance.

D. Section 768.76 does not apply because UM bad faith damages are not a “collateral source” as defined therein.

On pages 31-35 of her Initial Brief, Defendant argues UM bad faith damages qualify as a “collateral source” as defined in three separate subsections: 768.76(2)(a)2., 3. and 4. But rather than ground her interpretation in the text *and context* of section 768.76, Defendant attempts to parse specific words to satisfy the purported broader legislative intent of prohibiting “plaintiffs from receiving windfalls.” IB.15, 32-34. This Court has recently rejected such purposivist-driven analysis in favor of textualism.

Indeed, this Court “adhere[s] to the ‘supremacy-of-text principle’: ‘The words of a governing text are of paramount concern, and what they convey, *in their context*, is what the text means.’ Advisory Opinion to Governor re Implementation of Amendment 4, The Voting Restoration Amendment, 288 So. 3d 1070, 1078 (Fla. 2020) (quoting Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 56 (2012)) (emphasis added). Further,

“it is a ‘fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from *the context* in which it is used.” Id. (emphasis added, quoting Textron Lycoming Reciprocating Engine Div., Avco Corp. v. United Auto., Aerospace, Agric. Implement Workers of Am., Int'l Union, 523 U.S. 653, 657 (1998)).

Additionally, this Court has previously held that because section 768.76 alters the common law collateral source rule, it must be “narrowly construed.” See Allstate Ins. Co. v. Rudnick, 761 So. 2d 289, 293 (Fla. 2000). Thus, this Court must not interpret section 768.76 as changing the common law unless the statutory text effects the change “with clarity.” See Peoples Gas Sys. v. Posen Constr., Inc., 322 So. 3d 604, 611 (Fla. 2021) (quoting Scalia & Garner, Reading Law at 318).

Bearing these fundamental principles in mind, we now turn to section 768.76, which states, in pertinent part, as follows:

(2) For purposes of this section:

(a) “Collateral sources” means any payments made to the claimant, or made on the claimant's behalf, by or pursuant to:

2. Any health, sickness, or income disability insurance;

automobile accident insurance that provides health benefits or income disability coverage; and any other similar insurance benefits, except life insurance benefits available to the claimant, whether purchased by her or him or provided by others.

3. Any contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the costs of hospital, medical, dental, or other health care services.

4. Any contractual or voluntary wage continuation plan provided by employers or by any other system intended to provide wages during a period of disability.

Applying the plain language of those subsections, Plaintiff's settlement agreement to resolve his UM bad faith claim does not qualify as a "collateral source." See Goble v. Frohman, 848 So. 2d 406, 409 (Fla. 2d DCA 2003), approved 901 So. 2d 830 (Fla. 2005) ("[A] settlement agreement with a codefendant hospital is not a 'collateral source' of indemnity"). Although Plaintiff could have used a portion of the settlement funds to pay for his medical expenses and offset his lost income, that does not transform the payment into a "collateral source" as defined in the statute. See Hurtado v. Desouza, 166 So. 3d 831, 837 (Fla. 4th DCA 2015) (holding unemployment benefits did not qualify as a collateral source under section 768.76(2)(a)1.-4.).

Subsections (2)(a)3. and 4. clearly refer to contracts *other than* an insurance policy (i.e., from a medical provider or employer) that provide health or disability benefits, not a settlement agreement to resolve a UM bad faith claim.⁸ See Goble v. Frohman, 901 So. 2d 830, 833 (Fla. 2005) (holding that contractual discounts negotiated by HMO with medical providers was a collateral source under section 768.76(2)(a)3). The Court should reject Defendant’s invitation to parse language and ignore context to reach a different conclusion.

As for subsection (2)(a)2, Defendant argues the UM bad faith settlement qualifies as “automobile accident insurance that provides health benefits or income disability coverage” or “any other similar insurance benefits” because a “bad faith claim is considered a contractual claim under the policy” (IB.34). This is incorrect.

Although bad faith claims are “ex contractu”⁹ (meaning “arising from a contract”),¹⁰ a UM bad faith claim is *not* a claim for breach of contract, nor does it seek recovery “insurance benefits.” A UM

⁸ Health and disability insurance policies are covered in section 768.76(2)(a)2.

⁹ See N. Am. Van Lines, Inc. v. Lexington Ins. Co., 678 So. 2d 1325, 1330 (Fla. 4th DCA 1996).

¹⁰ *Ex Contractu*, Black's Law Dictionary (11th ed. 2019).

carrier will never obligate itself *in the policy* to attempt to settle in good faith. Rather, that obligation is imposed *only* by section 624.155(1)(b)1. See Allstate Indem. Co. v. Ruiz, 899 So. 2d 1121, 1126 (Fla. 2005) (noting that section 624.155 “essentially extended the duty of an insurer to act in good faith and deal fairly in those instances where an insured seeks first-party coverage or benefits under a policy of insurance”). As such, a UM bad faith claim seeks to prove a violation of section 624.155(1)(b)1, not the insurance policy. See R.49-52.

Most importantly, when the UM carrier violates section 624.155, the damages owed in excess of the UM policy limits under section 627.727(10) are, by definition, “extracontractual” – as this Court recognized. Fridman, 185 So. 3d at 1221; Macola v. Gov't Employees Ins. Co., 953 So. 2d 451, 457 (Fla. 2006). No Florida court has ever classified extracontractual damages as an “insurance benefit.” The Second District correctly declined to do so. See Ellison, 326 So. 3d at 222 (“An extracontractual payment on a bad faith claim does not appear to meet” the definition of section 768.76(2)(a) “because it is not a payment of ‘benefits’”).

Thus, there is no authority supporting Defendant’s argument

that the \$3.99 million in UM bad faith damages paid by 21st Century qualifies as a collateral source under section 768.76(2)(a).

E. Because neither section 768.041 nor section 768.76 applies, the common law collateral source rule applies and prohibits a setoff.

Because neither section 768.041 nor section 768.76 applies, Defendant's alleged entitlement to a setoff is governed by the common law. Under the common law collateral source rule, when an injured plaintiff receives compensation from "a collateral source wholly independent of the defendant wrongdoer[, that payment] will not operate to lessen the damages otherwise due to the plaintiff from the defendant wrongdoer." Hartnett v. Riveron, 361 So. 2d 749, 751 (Fla. 3d DCA 1978); see also Respass, 585 So. 2d at 988-89 ("Simply stated, the [common law] collateral source doctrine allows an injured party to collect full damages, irrespective of coverage or payment for any element of the damages by any source other than the tortfeasor.") (internal citations omitted). If the common law collateral source rule did not exist, it

would permit a wrongdoer to benefit from a policy of insurance when there is no privity between his and the insurance company, and the policy was written for the benefit of the insured, not for the wrongdoer. If there must be a windfall, it is more just that the injured party profit,

rather than the wrongdoer be relieved of full responsibility for his wrongdoing.

Walker v. Hilliard, 329 So. 2d 44, 45 (Fla. 1st DCA 1976).

In this case, Plaintiff received compensation from his UM carrier – a party which was “wholly independent” of Defendant because Defendant was not in contractual privity with the UM carrier and the UM carrier owed Defendant no obligations. See Walker, 329 So. 2d at 45; Hartnett, 361 So. 2d at 751; Respass, 585 So. 2d at 988-89. In turn, the UM carrier’s payment of UM bad faith damages should not operate to lessen the damages otherwise due to Plaintiff from Defendant. Although this may result in a windfall to Plaintiff, “it is more just that the injured party profit” rather than Defendant be relieved of responsibility for the harm. Walker, 329 So. 2d at 45.

III. SECTION 324.021(9)(B)3 DOES NOT CAP DEFENDANT’S LIABILITY FOR PLAINTIFF’S DAMAGES.

A. The plain language of the statute does not cap a co-owner’s liability for damages caused by another co-owner’s negligence, as Ortiz and other courts have correctly decided.

Defendant stipulated she was vicariously liable for the negligence of her husband, the negligent driver. R.45 ¶13, 99 ¶13, 2993, 3074, 4248; see also Christensen v. Bowen, 140 So. 3d 498,

503-06 (Fla. 2014) (holding co-owner was vicariously liable for another co-owner's negligence because "vicarious liability arises from an identifiable property interest in a vehicle possessed by the person held to be vicariously liable which creates the right to exert some dominion and control over the vehicle"). That stipulation is binding on Defendant and this Court. See Gunn Plumbing, Inc. v. Dania Bank, 252 So. 2d 1, 4 (Fla. 1971). Thus, the only question with respect to Defendant's liability is whether Defendant met her burden of demonstrating entitlement to a cap on damages under section 324.021(9).

Section 324.021(9) reads, in pertinent part, as follows:

(a) *Owner*.--A person who holds the legal title of a motor vehicle;....

(b) *Owner/lessor*.--Notwithstanding any other provision of the Florida Statutes or existing case law:

3. The owner who is a natural person and ***loans a motor vehicle to any permissive user*** shall be liable for the operation of the vehicle or the acts of the operator in connection therewith only up to \$100,000 per person . . . for bodily injury . . . [and] up to an additional \$500,000 in economic damages only....

(emphasis added). Because section 324.021(9)(b)3 is in derogation of the common law dangerous instrumentality doctrine, this Court

must “presume that such a statute was not intended to alter the common law other than by what was clearly and plainly specified in the statute.” Ady v. American Honda Finance Corp., 675 So. 2d 577, 582 (Fla. 1996);¹¹ see also Peoples Gas Sys., 322 So. 3d at 611 (“[S]tatutes will not be interpreted as changing the common law unless they effect the change with clarity”).

Defendant argues that she, an “owner,” “loaned” her vehicle to her co-owner husband, a “permissive user.” This argument is not supported by the plain language of the statute or the case law construing it.

Considering the context, section 324.021(9)(b)3 has only one natural reading: to limit an owner’s liability when he or she grants permission to a nonowner to temporarily use the vehicle. Thus, Mr. Ellison was not “loaned” his own vehicle; as a co-owner (R.3034), he already had the legal right to use the vehicle without Mrs. Ellison lending it to him. See Christensen, 140 So. 3d at 503 (“A joint

¹¹ In Ady, this Court held the version of section 324.021(9)(b) in effect at that time, which required “the lessee to obtain insurance” with certain liability limits, was not met when the lessor obtained insurance with the same limits for the benefit of the lessee. 675 So. 2d at 581.

titleholder holds a joint tenancy interest in the vehicle and, accordingly, has the right to possess and use the vehicle.”). Likewise, Mr. Ellison was not a “permissive user” because he did not need anyone’s permission to use the vehicle – it was his vehicle.

Three cases from the district courts of appeal support this conclusion. First, in Ortiz v. Regalado, 113 So. 3d 57 (Fla. 2d DCA 2013), the Second District held section 324.021(9)(b)3 does not apply to limit the liability of a co-owner for another co-owner’s negligence. The court found the term “loans,” although undefined, to be unambiguous and held “[a]n owner of an object can only loan that object to another who has no legal right to the object.” Id. at 60. The court stated it was giving “loans” the “dictionary meaning” because it did not “find a clear intent of the legislature to give it a different meaning and apply it as between co-owners.” Id.

Although the Ortiz court did not expressly rely on a single dictionary, nothing about the court’s analysis contradicts the most common dictionary definitions of “loan.” For instance, Merriam Webster defines loan (the verb, not the noun) as “lend,” which is in turn defined as “to give for temporary use on condition that the same or its equivalent be returned.” Merriam-Webster’s Law Dictionary,

<https://www.merriam-webster.com/dictionary/loan> and <https://www.merriam-webster.com/dictionary/lend> (last visited October 17, 2022). Because a co-owner of a vehicle has no *legal* right to deprive another co-owner of use over the vehicle,¹² it logically follows that a co-owner does not have the right to “lend” his or her vehicle to another co-owner, as Ortiz concluded. Ortiz is directly on point, as Defendant acknowledges.

One year later, the Second District reaffirmed Ortiz in Youngblood v. Villanueva, 141 So. 3d 600 (Fla. 2d DCA 2014). There, the trial court applied the cap in section 324.021(9)(b)3 to a defendant who consigned his vehicle to a dealer. 141 So. 3d at 602. The Second District reversed, holding no “loan” occurred under the facts of the case and therefore, pursuant to Ortiz, section 324.021(9)(b)3 did not cap the owner’s liability. Id. at 603.

Then in 2017, the Fourth District, citing Ortiz and Youngblood with approval, reaffirmed that section 324.021(9)(b)3 does not limit the liability of a co-owner for the negligence of another co-owner. Richbell v. Toussaint, 221 So. 3d 764, 769 (Fla. 4th DCA 2017).

¹² See Christensen, 140 So. 3d at 503-06.

However, the court held section 324.021(9)(b)3 capped the liability of an owner who “loaned” the vehicle to a permissive user (not a co-owner) engaged in a “joint undertaking” with the owner at the time of the wreck. Id. More specifically, Richbell held a “loan” occurred because the owner made “a permissive grant of temporary use of the vehicle without transfer of title” to a nonowner, thereby rendering the case distinguishable from Ortiz. Id.

No court has called Ortiz into question in the 9 years since it was decided. Thus, the law is settled that section 324.021(9)(b)3 does not limit the liability of a co-owner for another co-owner’s negligence. See Madison at Soho II Condo. Ass'n, Inc. v. Devo Acquisition Enterprises, LLC, 198 So. 3d 1111, 1117 (Fla. 2d DCA 2016) (“[C]oncerns about maintaining settled law are strong when the question is one of statutory interpretation.”) (quoting Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007)). Presumably that is why the court below affirmed the trial court’s ruling on this issue without any discussion. Ellison, 326 So. 3d at 217.

Notwithstanding, Defendant focuses exclusively on the word “loan” to argue it is theoretically possible for a co-owner to loan

personal property to another co-owner. See IB.44-49. However, Defendant ignores the words which immediately follow “loan” – “to any permissive user.” This is improper. See Advisory Opinion, 288 So. 3d at 1079 (noting the “meaning of a word cannot be determined in isolation” but rather “must be drawn from the context in which it is used”).

Courts have consistently applied section 324.021(9)(b)3 to limit the liability of an owner who loans their vehicle to a non-owner. See Richbell, 221 So. 3d at 769; De Los Santos v. Brink, 167 So. 3d 519, 520 (Fla. 5th DCA 2015); Fischer v. Alessandrini, 907 So. 2d 569, 572 (Fla. 2d DCA 2005); Lynn v. Feldmeth, 849 So. 2d 481, 482 (Fla. 2d DCA 2003). Conversely, no court has ever applied section 324.021(9)(b)3 to limit the liability of an owner whose vehicle was operated by a co-owner. In fact, no Florida court has ever referred to an owner of personal property as a “permissive user” of that property. Thus, when “loan” and “to any permissive user” are read in concert, the meaning is clear – the Legislature limited the liability of an owner (or owners) who temporarily grant use of the vehicle to a non-owner.

Defendant also argues a co-owner must be able to “loan” another co-owner an automobile because two people may be unable

to use it at the same time. See IB.47. Defendant conflates the legal *right* to possession with actual possession. See Christensen, 140 So. 3d at 506 (“[T]he existence of the legal *right* to exercise control and the *actual* exercise of control are separate concepts, and the legal *right* to exercise control is the relevant inquiry for beneficial ownership.”). The fact that two people cannot simultaneously drive a vehicle does not mean Mr. Ellison, the co-owner, lacked the legal right to possess the vehicle without it being “loaned” by Defendant.

Defendant is effectively inviting this Court to rewrite section 324.021(9)(b)3 to limit the liability of an owner if an accident occurs while anyone other than that owner is driving the vehicle. The trouble for Defendant is that the statute does not say that; it *only* limits liability where an owner “loans a motor vehicle to any permissive user,” and this Court is prohibited from broadening the effect of the statute beyond its plain language. See Statler v. State, 2022 WL 7215337, at *4 (Fla. Oct. 13, 2022) (“We begin, as always, from the premise that in construing this statute, this Court must give the statutory language its plain and ordinary meaning, and is not at liberty to add words that were not placed there by the Legislature.”) (cleaned up). Although Defendant protests it would be unfair to leave

certain “innocent owners” exposed to unlimited vicarious liability while capping the liability of other owners, it is this Court’s “function to give the statute the effect its language suggests, however modest that may be.” Digital Realty Tr., Inc. v. Somers, 200 L. Ed. 2d 15 (2018) (citation omitted).

If the Legislature disagreed with Florida’s appellate courts’ construction of section 324.021(9)(b)3, it has had ample time to modify it. The Legislature, however, has declined to do so. See Madison at Soho II Condo. Ass'n, 198 So. 3d at 1117 (“When a court has interpreted a statute and the Legislature does nothing to suggest that the interpretation does not effectuate legislative intent, there is ordinarily no good reason to alter the interpretation.”) (cleaned up).

B. The legislative history of section 324.021(9)(b)3 is irrelevant; regardless, it does not support Defendant’s argument.

On pages 38-41 of her Initial Brief, Defendant argues the Court must broadly construe section 324.021(9)(b)3 to limit the liability of a co-owner for another co-owner’s negligence to comport with the legislative intent, as expressed through a House committee staff analysis. This is improper.

It is well established this Court will not “look behind the statute’s plain language for legislative intent” where the language of the statutory text is unambiguous. Daniels v. Florida Dept. of Health, 898 So. 2d 61, 64 (Fla. 2005). Moreover, this Court’s recent adoption of the “supremacy-of-the-text principle” makes clear it is not appropriate to rely upon “extraneous considerations” (like legislative history) because that could “result in the judicial imposition of meaning that the text cannot bear, either through expansion or contraction of the meaning carried by the text.” Advisory Opinion, 288 So. 3d at 1078; see also Kidwell Group, LLC v. Olympus Ins. Co., 2022 WL 2897749 at *2 n.4 (Fla. 5th DCA July 22, 2022) (“In short, legislative history is irrelevant to our analysis in this case because it is inconsistent with our application of the supremacy-of-text principle.”).

Even if there may be some occasion for this Court to consider legislative history, it should be particularly hesitant to rely upon a legislative committee staff analysis (which is what Defendant cites here). See Scalia & Garner, Reading Law at 376 (noting that committee reports “are drafted by committee staff and are not voted on (and rarely even read) by the committee members, much less by

the full house” and that “there is little reason to believe that the members of the committee reporting the bill hold views representative of the full chamber”).

Accordingly, Plaintiff submits the legislative history cited by Defendant is completely irrelevant to this proceeding. Instead, this Court should ascertain the purpose of the statute “only from the text itself.” Scalia & Garner, Reading Law at 33. That said, if the Court wishes to consider the legislative history of section 324.021(9)(b)3, it does not support Defendant’s argument.

Defendant claims the intention of section 324.021(9)(b)3 is to “limit the vicarious liability of any innocent owner.” IB.39. In support, Defendant quotes a House staff analysis discussing sections 324.021(9)(b)1. and 2., which limit the liability of long-term and short-term lessors. See IB.410 n.9. Defendant then quotes only a portion of a sentence from that analysis: “This section limits the vicarious liability of a motor vehicle owner.” IB.40. However, the sentence actually reads: “This section limits the vicarious liability of a motor vehicle owner or a rental company that rents or leases motor vehicles.” Fla. H.R. Comm. on Judiciary HB 775 (1999), Staff Analysis (June 2, 1999), at 18. Again, the context of this sentence

was a discussion of subsections (9)(b)1. and 2. – not subsection (9)(b)3. Thus, the staff analysis of this portion of the statute suggests the Legislature was seeking to limit the liability of “a motor vehicle owner . . . that rents or leases motor vehicles.”

Defendant also claims “the report goes on to state that subsection (9)(b)3 is added to apply the same vicarious liability limitations to non-leasing owners who are natural persons.” IB.40, n.9. This too is inaccurate. The staff analysis actually says that “Subsection (9)(b)3. is added to apply the same vicarious liability limitations to owners (who are natural persons) **who lend their motor vehicles to permissive users.**” Staff Analysis at 18 (emphasis added).

Thus, contrary to Defendant’s representations otherwise, the legislative history does *not* reveal an intention to cap the liability of “any innocent owner” who would otherwise be held vicariously liable for “the negligence of anyone entrusted to use the motor vehicle.” IB.40-41. Rather, the legislative history suggests the Legislature intended to cap the liability of (a) long-term and short-term lessors and (b) natural person owners who “loan” or “lend” their vehicle to a “permissive user” – just like the statute says.

C. There is no record evidence that Defendant “loaned” her motor vehicle to her co-owner husband.

Finally, even if the Court accepts Defendant’s construction of section 324.021(9)(b)3 and determines it is legally possible for a co-owner to “loan” a vehicle to another co-owner, that finding should have no bearing on the outcome of *this* case. That is because Defendant failed to present any evidence establishing Defendant granted Mr. Ellison access to the vehicle or gave him permission to drive it. In fact, the record is completely silent as to how Mr. Ellison acquired the vehicle on the date of the accident.

Defendant’s counsel elected not to call Defendant as a witness or otherwise proffer any evidence regarding Defendant’s purported “loan” of the vehicle to her husband. Defendant’s counsel also agreed to the verdict form without requesting any special interrogatory that would establish whether a “loan” occurred. R.3005-07, 3108-09. Thus, if Defendant wanted the jury to determine whether a “loan” occurred, Defendant not only failed to preserve that issue but also invited any error. See, e.g., Bachman v. Oliveros, 293 So. 3d 555, 559 (Fla. 5th DCA 2020).

Because Defendant never sought any factual determination of whether a “loan” occurred, the trial court only had available the following stipulated facts when ruling on Defendant’s post-trial motion to cap her liability: (1) Defendant was vicariously liable for her husband’s negligence, and (2) Defendant and Mr. Ellison co-owned the vehicle involved in the accident. R.45 ¶13, 99 ¶13, 2993, 3034, 3074, 4248. Those facts, standing alone, do not demonstrate Defendant “loaned” the vehicle to her husband under any construction of the word. And, of course, this Court is prohibited from making the factual determination of whether a loan occurred where neither the jury nor the trial court had the opportunity to do so. See, e.g., Naples Estates Ltd. P’ship v. Glasby, 331 So. 3d 863, 866-67 (Fla. 2d DCA 2021).

Thus, Defendant has clearly failed to establish the trial court erred by failing to cap her liability pursuant to section 324.021(9)(b)3. See Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150, 1152 (Fla. 1979) (“In appellate proceedings the decision of a trial court has the presumption of correctness and the burden is on the appellant to demonstrate error.”). On this basis alone, this Court must affirm the trial court’s ruling.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING DEFENDANT’S MOTION FOR NEW TRIAL BASED ON VENIREPERSON MEINSEN’S COMMENTS REGARDING INSURANCE.

Defendant claims the trial court abused its discretion by denying her motion for new trial based on certain statements regarding insurance made by venirepersons during voir dire. However, the “age-old rule” is that “*evidence of insurance carried by a defendant* is not properly to be considered by the jury.” Winters v. Harper, 322 So. 3d 192, 196 (Fla. 1st DCA 2021) (emphasis supplied by court) (quoting Carls Markets, Inc. v. Meyer, 69 So. 2d 789, 793 (Fla. 1953)). Here, there was neither any discussion of *Defendant’s* insurance nor any *evidence* regarding insurance of any kind. Thus, Defendant has not demonstrated any error much less an abuse of discretion.

Defendant claims “this is not a case where insurance was mentioned in passing” during voir dire, but rather that insurance was mentioned half a dozen times “with the venire being specifically and repeatedly told that insurance will pay for Plaintiff’s damages and that owners of vehicles can be held vicariously liable for injuries caused by others because they have insurance to pay for it.” IB.12.

Those claims are false. See p.1-6, *supra*.

Perhaps more importantly, Defendant only moved for mistrial and new trial regarding the two statements made by Ms. Meinsen, who was ultimately stricken for cause. R.3117, 3411, SR.17253-54. Defendant withdrew any objection to the discussion of insurance premiums during voir dire (R.3496-97, SR.17256) and failed to preserve any other objections regarding the allegedly improper comments made by Mr. Price or Ms. Dunn. R.3418, 3447, 3450, 3496. Thus, the question before this Court is whether the trial court abused its discretion in denying Defendant's motions for mistrial and new trial based on Ms. Meinsen's two isolated, unprovoked statements regarding insurance. See Gutierrez v. Vargas, 239 So. 3d 615, 621 (Fla. 2018) (holding a motion for new trial is reviewed for abuse of discretion); Salazar v. State, 991 So. 2d 364, 371 (Fla. 2008) (holding a motion for mistrial is reviewed for abuse of discretion).

On page 52 of her Initial Brief, Defendant argues this Court must reverse because Plaintiff "cannot prove that there is no reasonable possibility that the error contributed to the verdict," citing Special v. W. Boca Med. Ctr., 160 So. 3d 1251 (Fla. 2014). However, the harmless error standard would only apply if Defendant made

contemporaneous objections to Ms. Meinsen’s comments which were improperly overruled. See Ritchie v. State, 344 So. 3d 369, 379 (Fla. 2022). It does not apply when an allegedly improper comment is uttered by a venireperson or witness before the trial court rules on whether such comment is appropriate. See R.J. Reynolds Tobacco Co. v. Robinson, 216 So. 3d 674, 683 n.3 (Fla. 1st DCA 2017).

Here, the trial court could not have possibly erred by permitting the venireperson to comment about insurance, as the statements were unprovoked and Defendant did not contemporaneously object. Thus, harmless error plays no part in the Court’s analysis. See Ritchie, 344 So. 3d at 379. The only question is whether the trial court *abused its discretion* in denying Defendant’s motions for mistrial and new trial.

This is not one of those rare cases where “no reasonable person” could view the matter as the trial court did. See Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980). Defendant does not really argue otherwise. Instead, Defendant misstates what was said during voir dire and raises objections that were not preserved (including to a statement that Defendant’s counsel elicited himself). Because Defendant’s entire argument is based on a false premise –

that the references to insurance “permeated voir dire” and effectively told the jury the Defendant’s insurer would pay Plaintiff’s damages – the Court can summarily reject Defendant’s argument.

In any event, once focused solely on Ms. Meinsen’s statements, Defendant is effectively asking this Court to adopt a bright-line rule that if a venireperson speculates – through no fault of plaintiff’s counsel – that insurance exists in the world which may compensate injured people, then the trial court must strike the entire venire. That of course has never been, and should not be, the law in Florida. Even Defendant tacitly admits that “passing mentions of insurance” during voir dire would be insufficient to strike an entire panel. IB.51.

Notwithstanding, Defendant cites two cases – Harrison v. Gregory, 221 So. 3d 1273 (Fla. 5th DCA 2017) and Nicaise v. Gagnon, 597 So. 2d 305 (Fla. 4th DCA 1992) – to support her argument that reversal is required. Both cases support the opposite conclusion.

In Harrison, the Fifth District suggested the trial court has the discretion to deny a defendant’s motion for mistrial even if the plaintiff’s expert’s *testimony* suggests the *defendant* had liability insurance. 221 So. 3d at 1276. However, the improper testimony about insurance, in conjunction with other erroneously admitted

testimony and a prejudicial comment made by plaintiff's counsel during closing, constituted cumulative error warranting a new trial. Id. at 1276, 1278.

In Nicaise, during closing, plaintiff's counsel instructed the jury "not to worry whether the defendant will contribute a dime of money," thereby suggesting the *defendant* carried insurance. 597 So. 2d at 306-07. The Fourth District characterized that statement as "innocuous" and observed that "had we been the trial judge we doubt we would have granted the new trial." Id. at 306. However, the trial judge granted the defendant's motion for mistrial, and the Fourth District did not reverse for abuse of discretion.

Harrison and Nicaise suggest trial judges are vested with the discretion to grant *or deny* a motion for new trial when plaintiff's counsel elicits testimony or makes argument suggesting the defendant carries liability insurance. See also Winters, 322 So. 3d at 195-96 (holding the trial court properly denied a motion for new trial – even though the plaintiff's testimony referenced her own insurance and one of plaintiff's counsel's questions suggested the defendant may have insurance – because no *evidence* of insurance carried by a *defendant* was admitted). However, the trial court

cannot grant a new trial merely because the subject of insurance comes up during voir dire. The case of Sutton v. Gomez, 234 So. 2d 725 (Fla. 2d DCA 1970) is illustrative.

In Sutton, during voir dire, plaintiff's counsel asked a veniremen who worked for a life insurance company whether he owned stock in the casualty insurance industry. Id. at 726. The trial court ultimately granted the defendant's motion for new trial, finding the "injection of the idea of insurance during the jury trial in an action for damages was such as to raise a presumption that the jury was unduly influenced or prejudiced thereby." Id. On appeal, the Second District reversed.

The Second District found the plaintiff's line of inquiry was permissible and further reasoned:

[N]o exact dialogue of a voir dire examination of veniremen in a given case can be foreseen; and trial counsel, at such time, should not be held to precise propriety at the peril of suffering a mistrial. Here, it was a spontaneous question prompted by a prior spontaneous response, and even then only after 'insurance' had already, not improperly, been mentioned.

The trial judge's role during jury selection, given a permissible line of interrogation, is really only to evaluate the conduct of counsel as to good faith and propriety in pursuing the inquiry. We think the proper test to be applied in these matters, assuming of course the nature

and scope of the inquiry to be proper in the first instance, is *whether the sequence of questions and answers which follow are propounded and given in apparent good faith, giving due regard to all the circumstances, and whether such interrogation is fairly and reasonably calculated to satisfy the ultimate purpose of such inquiry.*

Id. at 727 (emphasis added).

Here, had there been *evidence* regarding *Defendant* carrying insurance, then the trial court would have had the *discretion* to grant Defendant a mistrial or new trial pursuant to Winters, Harrison and Nicaise. However, no such *evidence* was ever presented or elicited during trial. Ms. Meinsen's comments were made during voir dire and merely suggested that injured claimants *may* be entitled to recover insurance benefits of some kind. R.3411. As the trial court observed, it would be "very naïve" to assume that at least some of the jurors did not already realize that. R.3497.

Thus, under Sutton, the trial court would have abused its discretion to grant Defendant's motion for new trial. The objected-to comments were outside of Plaintiff's counsel's control, as they were volunteered by Ms. Meinsen and were not responsive to any question posed by Plaintiff's counsel. Even Defendant's counsel acknowledged that Plaintiff's counsel "didn't do anything to provoke" Ms. Meinsen,

and the trial court likewise said she was “just volunteering that stuff” and that Plaintiff’s counsel “didn’t indulge” the comments. R.3410, 3497. Certainly, there is nothing to suggest Plaintiff’s counsel was acting in bad faith or purposely elicited Ms. Meinsen’s comments regarding insurance. See Sutton, 234 So. 2d at 727; see also Harrison, 221 So. 3d at 1276 n.4 (noting that references to insurance made by two defense witnesses, outside the control of plaintiff’s counsel, did not warrant a new trial).

Accordingly, the trial court acted well within its discretion when it determined, “based on [the] totality of the circumstances listening to the voir dire,” that the panel had not been tainted by Ms. Meinsen’s comments. R.3497.

CONCLUSION

For the foregoing reasons, this Court should dismiss jurisdiction as improvidently granted or answer the Second District's certified question in the negative. Additionally, this Court should decline to address the two collateral issues raised by Defendant or affirm the Second District’s and trial court’s rulings on those issues.

Respectfully submitted on October 19, 2022, by:

/s/ **Brent Steinberg**

BRENT G. STEINBERG
Florida Bar No. 0085453
DANIEL L. GREENE
Florida Bar No. 1003266
JACOB M. SCHUSTER
Florida Bar No. 1030981
SWOPE, RODANTE P.A.
1234 East Fifth Avenue
Tampa, FL 33605
Tel: (813) 273-0017
Fax: (813) 233-3678
Appeals@swopelaw.com
Eservice@swopelaw.com
Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via e-mail to: **Paul L. Nettleton** and **Jeffrey A. Cohen**, pnettleton@carltonfields.com, jacohen@carltonfields.com, dwasham@carltonfields.com, and mnavarrete@carltonfields.com, Carlton Fields, P.A., 700 NW 1st Ave., Ste 1200, Miami, FL 33136; and **James B. Thompson, Jr.**, and **Troy Holland**, tmservice@tm2law.com, Thompson Miller, P.A., 400 Carillon Pkwy Ste 220, Saint Petersburg, FL 33716-1290, on this **19th** day of **October, 2022**.

/s/ **Brent Steinberg**

BRENT G. STEINBERG
Florida Bar No. 0085453

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the applicable font and word count limit requirements. This document complies with the word limit of Fla. R. App. P. 9.210(a)(2)(B) because this document contains 12,795 words, excluding the parts of the brief exempted by Fla. R. App. P. 9.045(e) and 9.210(a)(2)(E). This document complies with the typeface requirements of Fla. R. App. P. 9.045(b) because it has been prepared with Bookman Old Style 14-point font.

/s/ Brent Steinberg
BRENT STEINBERG
Florida Bar No.: 0085453