IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC21-1580
L.T. CASE NO. 2D19-1961

ALBERTA S. ELLISON,

Petitioner,

v.

RANDY WILLOUGHBY,

Respondent.

PETITIONER'S INITIAL BRIEF ON THE MERITS

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

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STATEMENT OF THE CASE

This case involves an appeal from a final judgment following a jury verdict awarding $30,101,599 to Respondent, Randy Willoughby ("Plaintiff"), who was injured in an automobile accident. (R.43-45, 3086-87, 3186-91)[1] The verdict was rendered against Petitioner, Alberta Ellison ("Ellison"). Ellison was sued as a vicariously liable co-owner of the vehicle negligently driven by her husband in the accident. (*Id.*)

Ellison timely filed post-trial motions in which she sought relief from the verdict. Relevant here, Ellison argued that she was entitled to a setoff for a $4 million settlement Plaintiff received from his insurance company for the same damages Plaintiff sought and obtained in the verdict against Ellison. (R.2170-72, 3170-75) Ellison also argued that the damages cap required by section 324.021, Florida Statutes, should apply to any final judgment entered against her, as an innocent owner of the vehicle involved in the accident. (R.3114-29) And Ellison argued she was entitled to a new

[1] The record on appeal will be cited a "R.[page number]". All emphasis is supplied unless otherwise noted.

trial because the verdict was tainted by the discussion of insurance that permeated voir dire. (*Id.*) The trial court denied Ellison's post-trial motions and entered final judgment. (R.3182-83)

Ellison appealed the final judgment to the Second District Court of Appeal, raising, *inter alia*, the three issues mentioned above. (R.3186-91) The Second District affirmed on all issues, and certified the following question of great public importance to this Court on the setoff issue:

> Is a settlement payment made by an uninsured motorist insurer to settle a first-party bad faith claim subject to setoff under section 768.041(2) or a collateral source within the meaning of section 768.76?

Ellison v. Willoughby, 326 So. 3d 214 (Fla. 2d DCA 2021).

Ellison petitioned this Court for review. This Court accepted jurisdiction by order of January 25, 2022.

STATEMENT OF THE FACTS

A. Plaintiff's lawsuit and settlement of his bad faith claim against his UM insurer.

Plaintiff was a passenger in a motor vehicle when a vehicle driven by Ellison's husband collided into Plaintiff's vehicle. (R.3692) Plaintiff sued Ellison, asserting that she was vicariously liable for

her husband's negligence because she was a co-owner of the vehicle. (R.43-45) Ellison did not dispute her vicarious liability for the accident, although she asserted that any damages awarded to Plaintiff should be capped in accordance with section 324.021, Florida Statutes. (R.99, 2240-41, 3127-28) The case proceeded to a jury trial against Ellison only on the issue of Plaintiff's damages.

Plaintiff also sued his uninsured motorist ("UM") insurer, 21st Century Centennial Insurance Company ("21st Century"), for $10,000 in UM benefits and for statutory bad faith under section 624.155, Florida Statutes (2012). (R.46-52) By the bad faith claim, Plaintiff sought recovery of "the total amount of his damages pursuant to section 627.727(10), Florida Statutes, <u>including all damages suffered as a result of the Crash</u>." (R.51) Thus, by his bad faith claim, Plaintiff sought recovery of the <u>same damages</u> from 21st Century that he sought from Ellison – "all damages suffered as a result of the Crash." (R.43-53)

Before trial, Plaintiff settled his claims against 21st Century in return for payment of $4 million. (R.2174-83) Consistent with

settled law,[2] that $4 million provided Plaintiff with "compensation for all injuries Mr. Willoughby suffered" as a result of the automobile accident. (R.3172, citing *Willoughby v. Agency for Health Care Admin.*, 212 So. 3d 516, 521 (Fla. 2d DCA 2017)).

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. (R.2174-83) That said, the parties acknowledged that no portion of the settlement attributable to the UM claim could have exceeded the $10,000 UM policy limit. *Ellison*, 326 So. 3d at 218; *see also Willoughby*, 212 So. 3d at 520 (recounting Plaintiff stipulated in that case that $3.99 million of the $4 million settlement was to settle Plaintiff's bad faith claim).

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[2] *See GEICO Gen. Ins. Co. v. Paton*, 150 So. 3d 804, 806 (Fla. 4th DCA 2014) ("damages in a first-party bad faith case [arising from a UM claim] include the total amount of the plaintiff's damages that were caused by the original third-party tortfeasor"); *Willoughby v. Agency for Health Care Admin.*, 212 So. 3d 516, 521 (Fla. 2d DCA 2017) ("[d]amages in first-party bad faith actions [arising from UM claims] are to include the total amount of a claimant's damages, including any amount in excess of the claimant's policy limits without regard to whether the damages were caused by the insurance company") (quoting *Fridman v. Safeco Ins. Co.*, 185 So. 3d 1214, 1223 (Fla. 2016)) (emphasis by court).

B. Discussion of the role of insurance in paying damages resulting from accidents during voir dire.

During voir dire, Plaintiff's counsel asked a member of the venire if she was concerned that her insurance premiums would increase because of the number of lawsuits brought on behalf of injured persons – "not just the person who's getting sued's premiums . . . but the other people that are insured too." (R.3390) The potential juror responded that Plaintiff's counsel was putting that thought in her head, but she would not be thinking about the cost of insurance going up if she sat on the jury. (R.3390-91) Ellison objected to the reference to insurance because it suggested that Ellison had insurance that would pay any damages award and moved for a mistrial. (R.3391-93) The court took the motion under advisement. (R.3393)

The unfair prejudice to Ellison was sealed when, a couple minutes later, an insurance claims adjuster on the venire, in the presence of the entire venire, said that "most of the time, in this kind of situation, the insurance is going to pick it up anyway, if I'm not mistaken." (R.3408) Ellison again objected, asserting that the statement tainted the panel. (R.3410) The court again reserved

ruling, saying: "We'll see. Could be cumulative." (R.3411) A couple minutes later, when another member of the venire expressed concern about the possibility of being vicariously liable for his children driving his cars, the insurance adjuster on the venire advised him to purchase an umbrella policy. (R.3421)

Another member of the venire said that he understood that the owner of a vehicle could be responsible for injuries caused by another person driving that vehicle because "they have insurance and they're the ones with the money." (R.3418) Yet another member of the venire said in the presence of the venire that "your insurance company has to pay for the damage you do." (R.3450)

Before the jury was sworn, Ellison renewed her objections and motion for mistrial arising from these references to insurance, asserting that, not only was each individual statement prejudicial, but the cumulative effect of the discussion tainted the jury. (R.3495-97) The court denied the motion. (R.3497-98)

C. The jury's verdict and Ellison's post-trial motions.

The jury returned a verdict against Ellison in the amount of $30,101,599. (R.3086-87)

Ellison moved to set off against the verdict the $4 million that 21st Century had paid to settle Plaintiff's claims against it. (R.2170-72, 3170-75) Ellison explained that the Second District had already determined that the $4 million that 21st Century paid to settle Plaintiff's claims provided compensation for all injuries Plaintiff suffered in the accident. (R.3172 (citing *Willoughby*, 212 So. 3d at 521)) Ellison asserted, therefore, that she was entitled to a setoff of the $4 million because it was paid to compensate Plaintiff for the same damages awarded by the jury against Ellison. (R.3172-75) The trial court denied Ellison's motion for setoff, citing cases relied on by Plaintiff that hold UM benefits paid under a policy providing UM coverage cannot be set off. (R.3182-83)

In a motion for new trial, Ellison renewed her objection to the references to insurance during voir dire and argued that those references pervaded the trial and prejudicially influenced the verdict. (R.3114-29) Finally, in her post-trial motion, Ellison preserved her argument that the damages cap required by section 324.021, Florida Statutes, should apply to any final judgment entered against her. (*Id.*) The trial court denied all Ellison's post-trial motions. (R.3182-83)

D. The Second District's decision.

The Second District Court of Appeal affirmed on all issues, but only discussed the setoff issue in its opinion. *Ellison*, 326 So. 3d at 217-24. As to the setoff issue, the Second District recognized that the purpose of section 768.041(2), Florida Statutes, "is to prevent a windfall to a plaintiff by way of double recovery," and that the statute requires setoff "if any defendant shows ... that the plaintiff ... has delivered a release or covenant not to sue to any person, firm, or corporation in partial satisfaction of the damages sued for." *Ellison*, 326 So. 3d at 219 (quoting § 768.041(2)). The court found that "[t]his text is plain and unambiguous," and stated:

> if we were writing on a blank slate, the analysis would end here. We would hold that section 768.041(2) required the trial court to set off the 21st Century settlement proceeds because Mrs. Ellison "show[ed] that" Mr. Willoughby "delivered a release" to 21st Century in "partial satisfaction" of the damages he "sued for" in this lawsuit.

Id.

Nevertheless, the Second District concluded that precedents from this Court prevented it from applying the plain and unambiguous text of section 768.041(2) and further rejected Ellison's other arguments for a setoff, including for setoff under

section 768.76. *Id.* at 219-24. The Second District then certified the following question of great public importance to this Court:

> Is a settlement payment made by an uninsured motorist insurer to settle a first-party bad faith claim subject to setoff under section 768.041(2) or a collateral source within the meaning of section 768.76?

Ellison, 326 So. 3d at 224.

SUMMARY OF ARGUMENT

I. Ellison is entitled to a setoff of the $4 million paid by 21st Century to settle Plaintiff's claims against it. The Florida legislature enacted statutes for the express purpose of preventing plaintiffs from receiving a windfall based upon a double recovery for the same damages. The Second District acknowledged these statutes, and stated that the plain and unambiguous text of one of them, section 768.041(2), Florida Statutes, required a setoff. Nonetheless, the court concluded that decisions by this Court precluded application of the statute in this case. The Second District was wrong.

The cases from this Court that were discussed by the Second District addressed how setoff statutes apply between joint tortfeasors in light of joint and several liability being eliminated by section 768.81(3), Florida Statutes. Those decisions are inapposite because, in each, the settling and non-settling defendants were joint tortfeasors but not sued for the same damages, while in this case Ellison and 21st Century were not joint tortfeasors but were sued for the same damages. Two other district courts have recognized this distinction, and those cases fully support Ellison's interpretation of the statutes and would require a setoff in this case.

The Second District also incorrectly held that that a setoff under section 768.76 was not available because the 21st Century settlement proceeds did not fit within the definition of "collateral sources" in that statute. The court only considered a single definition of "collateral sources" contained in the statute, and overlooked the other definitions also contained therein—two of which also apply to the 21st Century settlement proceeds here. Further, the court's holding that the settlement proceeds do not fit the definition "collateral sources" in section 768.76(2)(a)2. was premised on the court's own narrow and erroneous definition of the term "benefits" within that definition.

Accordingly, this Court should answer the certified question in the affirmative and quash the Second District's opinion with instructions to reverse the judgment with directions to the trial court to set off the $4 million 21st Century settlement against the verdict in entering any new judgment against Ellison on remand.

II. Any judgment against Ellison should be limited in accordance with section 324.021(9)(b)3, Florida Statutes, because she is merely an innocent owner of the vehicle involved in the accident and vicariously liable only by operation of law, not fault,

under the dangerous instrumentality doctrine. The Second District's previous decision in *Ortiz v. Regalado*, 113 So. 3d 57 (Fla. 2d DCA 2013), upon which the court presumably relied below, incorrectly held that section 324.021 does not apply where the negligent driver is a co-owner of the vehicle. Because the *Ortiz* decision is based upon a flawed interpretation of the text of the statute, and is contrary to the legislature's express purpose in enacting the statute, this Court should disapprove *Ortiz* and the decision below, and direct that any judgment entered against Ellison on remand be capped consistent with the statute.

III. Ellison is entitled to a new trial based on the repeated and pernicious references to insurance during voir dire. This is not a case where insurance was mentioned in passing. To the contrary, insurance was mentioned multiple times during voir dire, 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. These are precisely the type of unfairly prejudicial references that require a new trial.

ARGUMENT

I. THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT ELLISON WAS NOT ENTITLED TO A SETOFF OF THE AMOUNTS PAID BY 21ST CENTURY IN SETTLEMENT OF PLAINTIFF'S CLAIMS AGAINST IT.

A. Standard of review.

A trial court's ruling on a motion to determine setoff is reviewed de novo. *See Rasinski v. McCoy*, 227 So. 3d 201, 204 (Fla. 5th DCA 2017). "[N]o deference is given to the judgment of the lower court[]" because the issue of an appropriate setoff presents a "pure question[] of law." *D'Angelo v. Fitzmaurice*, 863 So. 2d 311, 314 (Fla. 2003).

B. The Plain Language Of The Setoff Statutes Required That The 21st Century Settlement Be Set Off From The Verdict In Entering Judgment Against Ellison.

Under Florida law, a party is not permitted to recover for the same damages more than once. *Addison Constr. Corp. v. Vecellio*, 240 So. 3d 757, 762-63 (Fla. 4th DCA 2018); *see also Grace & Naeem Uddin, Inc. v. Singer Architects, Inc.*, 278 So. 3d 89, 94 (Fla. 4th DCA 2019) (same). "This is true even when co-defendants are held liable for the same injury under different theories of liability."

Anderson v. Vander Meiden ex rel. Duggan, 56 So. 3d 830, 833 (Fla. 2d DCA 2011) (quotation omitted).

The legislature has adopted a number of statutes to carry out this policy against double recovery, including sections 768.041(2), 46.015(2), and 768.76(1), Florida Statutes. All of these statutes provide for setoffs for collateral recoveries. *Addison Constr.*, 240 So. 3d at 764. "The purpose of the setoff statutes is to prevent a windfall to a plaintiff by way of double recovery." *Id.*; *Hess v. Walton*, 898 So. 2d 1046, 1051 n.5 (Fla. 2d DCA 2005) (section 768.041 "is designed to prevent a double recovery for a single injury"); *Acadia Partners, L.P. v. Tompkins*, 759 So. 2d 732, 739 (Fla. 5th DCA 2000) ("the purpose of the setoff provision contained in section 46.015(2) is to prevent an award of double damages"); *Cooperative Leasing, Inc. v. Johnson*, 872 So. 2d 956, 959 (Fla. 2d DCA 2004) (intent of section 768.76 is to prevent plaintiffs from receiving a windfall by being compensated twice for the same damages).

Section 768.041(2) provides:

> [I]f 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 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(2), Fla. Stat. (2018). Section 46.015(2) contains the nearly identical language and requires the same setoff.

Similarly, in adopting section 768.76(1), the legislature abrogated the common law collateral source damages rule, such that "trial courts must reduce awards 'by the total of all amounts which have been paid for the benefit of the claimant, or which are available to the claimant, from all collateral sources'" in order to "prevent plaintiffs from receiving windfalls." *Joerg v. State Farm Mut. Auto. Ins. Co.*, 176 So. 3d 1247, 1249 (Fla. 2015). Section 768.76 thus provides that, in any action in which liability is determined and in which damages are awarded to compensate the claimant, "the court shall reduce the amount of such award by the total of all amounts which have been paid for the benefit of the claimant, or which are otherwise available to the claimant, from all collateral sources." § 768.76(1), Fla. Stat. (2018). "Collateral sources" include "automobile accident insurance that provides

health benefits or income disability coverage; and any other similar insurance benefits," "[a]ny contract or agreement of any . . . corporation to provide, pay for, or reimburse the costs of hospital, medical, dental, or other health care services," and '[a]ny contractual . . . plan provided . . . by any . . . system intended to provide wages during a period of disability." § 768.76(2)(a), Fla. Stat.

As such, when a settlement recovery by a plaintiff includes partial satisfaction for the damages sued for, the plain language of these statutes require the settlement amount be set off against a verdict in entering judgment against a non-settling defendant. *Addison Constr.*, 240 So. 3d at 764; *see also Ham v. Portfolio Recovery Associates, LLC*, 308 So. 3d 942, 946 (Fla. 2020) ("In interpreting the statute, we follow the 'supremacy-of-text principle'—namely, the principle that '[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.'") (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012)).

Here, Plaintiff sued his UM insurer, 21st Century, for the $10,000 in UM benefits available under the policy and for statutory

bad faith under section 624.155. (R.46-53) As damages under his bad faith claim, Plaintiff sought recovery of "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) Thus, under his bad faith claim, Plaintiff sought recovery of the same damages from 21st Century that he sought from Ellison – "all damages suffered as a result of the Crash." (R.43-53)

Plaintiff settled his UM and bad faith claims against 21st Century in return for payment of $4 million, (R.2174-83), and that $4 million settlement provided Plaintiff with "compensation for all injuries Mr. Willoughby suffered." *Willoughby*, 212 So. 3d at 521. As noted above, the settlement was entirely undifferentiated and did not allocate any part of the $4 million to any particular claim or element of damages. Accordingly, Ellison is entitled to a setoff for the full amount of Plaintiff's settlement with 21st Century, the trial court erred in denying Ellison's motion for that setoff, and the Second District erred in affirming the trial court's ruling in this regard. *See Addison Constr.*, 240 So. 3d at 764; *Grobman v. Posey*, 863 So. 2d 1230, 1237 (Fla. 4th DCA 2003) (where same damages were sought against settling defendant and non-settling defendant,

who were not joint tortfeasors, entirety of undifferentiated settlement amount from settling defendant was required to be set off against award against non-settling defendant); *City of Jacksonville v. Outlaw*, 538 So. 2d 1360, 1361-62 (Fla. 1st DCA 1989) (similar holding); *see also Dionese v. City of W. Palm Beach*, 500 So. 2d 1347, 1350 (Fla. 1987) ("The only proper method of ensuring against duplicate recoveries in an undifferentiated lump sum settlement situation is to set-off the total settlement funds against the total jury award.").

C. No Decision From This Court Required The District Court To Ignore The Plain Language Of The Text Of Section 768.041 And Disregard The Legislature's Intention To Prohibit Windfalls.

The Second District seemingly wanted to agree with the analysis above. It recognized that the plain text of section 768.041 entitled Ellison to a setoff to prevent double recovery and a windfall to Plaintiff. Nevertheless, the Second District held that, because Ellison and 21st Century were not joint tortfeasors sued on the same claims, the court was required to ignore not only the plain and unambiguous text of the statute but also the legislature's clear intent because decisions of this Court purportedly required it to do

so. Not only are there no such decisions from this Court, but decisions from other district courts demonstrate that a setoff was required here. As such, this Court should quash the Second District's decision.

1. This Court's decisions in *D'Angelo*, *Wells*, and *Gouty* arose under completely different circumstances and are inapplicable to this case.

As the Second District Court recognized, the text of section 768.041(2) is "plain and unambiguous" and, on its face, "required the trial court to set off the 21st Century settlement proceeds because Mrs. Ellison 'show[ed] that' Mr. Willoughby 'delivered a release' to 21st Century in 'partial satisfaction' of the damages he 'sued for' in this lawsuit." *Ellison*, 326 So. 3d at 219. Nevertheless, the Second District concluded that decisions of this Court required it and the trial court to ignore the plain meaning of the statute and deny Ellison's request for a setoff. This was error.

The principle case relied on by the Second District was *D'Angelo v. Fitzmaurice*, 863 So. 2d 311 (Fla. 2003), which the Second District quoted for the proposition that application of the three setoff statutes "presupposes the existence of multiple defendants jointly and severally liable for the same damages."

Ellison, 326 So. 3d at 219 (quoting *D'Angelo*, 863 So. 2d at 314 (citing *Wells v. Tallahassee Mem'l Reg'l Med. Ctr., Inc.*, 659 So. 2d 249, 253 (Fla. 1995))). The court's reliance on *D'Angelo* was misplaced. In the first instance, aside from the quoted sentence being *dicta*, this Court did not say that all of the setoff statutes applied only between jointly and severally liable tortfeasors sued or suable on the same claims.[3]

D'Angelo was one of a trilogy of cases from this Court that addressed the elimination of joint and several liability by section 768.81(3) and how that interplayed with setoff statutes when a setoff was sought by a non-settling joint tortfeasor for a settlement between the plaintiff and a settling joint tortfeasor. *Id.*; *see also Wells*, 659 So. 2d 249; *Gouty v. Schnepel*, 795 So. 2d 959 (Fla. 2001). These cases decided how to apply setoff statutes to "a case tried under section 768.81(3)," *see Wells,* 659 So. 2d at 250 (certified question), which statute eliminated joint and several

[3] Of course, one of the statutes mentioned in *D'Angelo* but not implicated in the present case, section 768.31 (contribution among joint tortfeasors), would apply only to joint tortfeasors by virtue of the text of the statute itself.

liability between joint tortfeasors (for non-economic damages at the time of the decisions). *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993).[4]

In *Wells*, this Court held that a non-settling joint tortfeasor was not entitled to a setoff for a settlement payment made by a settling joint tortfeasor for non-economic damages because the amount paid in settlement could not be for the same damages that the non-settling joint tortfeasor was sued for because, pursuant to section 768.81(3), each joint tortfeasor was liable only for the non-economic damages that each caused. 659 So. 2d at 252-53. In specifically addressing section 768.041 in this context, the Court in *Wells* held:

> Under section 768.041, a setoff is made "in partial satisfaction of the damages sued for." *Id.* Because a party is only liable for noneconomic damages in proportion to the percentage of fault by which that party contributed to the accident, . . . a plaintiff cannot sue one party for the noneconomic damages caused by another party. Therefore, section 768.041 does not apply to noneconomic damages.

Id. at 253. Both *D'Angelo*, 863 So. 2d at 318-19, and *Gouty*, 795 So. 2d at 965-66, are consistent with this decision: they reaffirmed the

[4] The current version of section 768.81(3) eliminates joint and several liability between joint tortfeasors as to all damages.

Wells analysis in addressing setoffs sought by non-settling joint tortfeasors for settlements by settling joint tortfeasors where section 768.81(3) had eliminated joint and several liability for non-economic damages.

It is in this context—how the setoff statutes apply as between joint tortfeasors under section 768.81 given the elimination of joint and several liability by that statute—that the single line of *dicta* in *D'Angelo* relied on by the Second District must be understood. Indeed, the statement in *D'Angelo* that the setoff statutes presuppose the existence of multiple defendants jointly and severally liable for the same damages was directly followed by a sentence that put the comment in just that context: "After these [setoff] statutes were first enacted, the Legislature enacted section 768.81 . . . , [which] eliminates joint and several liability." 863 So. 2d at 314.

The Court in *Wells* likewise explained the context of the original statement later quoted in *D'Angelo*:

> Under section 768.81(3), each defendant is solely responsible for his or her share of noneconomic damages. The setoff provisions, which were enacted before 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.

659 So. 2d at 252-53.

In other words, not only does nothing in the plain language of the setoff statutes provide that only joint tortfeasors are entitled to seek a setoff, but nothing in the holding of *D'Angelo*, or in *Wells* and *Gouty*, do either. The Second District read something into the cases that simply wasn't there. Indeed, the Court in *Gouty* even explained—consistent with Ellison's argument here—that "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," 795 So. 2d at 965, as opposed to "joint" tortfeasors.[5]

Thus, *D'Angelo*, *Wells*, and *Gouty* do not apply here because Ellison and 21st Century were not joint tortfeasors to which section 768.81(3) would preclude the same damages being sued for against joint tortfeasors. Because the 21st Century settlement proceeds

[5] While it is certainly true that, prior to the elimination of joint and several liability by section 768.81(3), the setoff statutes were most often applied as between parties that were jointly and severally liable for the same damages on the same claims, that does not limit the application of sections 768.041 and 46.015 to joint tortfeasors being sued on the same claims.

were paid "in partial satisfaction of the [same] damages sued for" in this case against Ellison,[6] the plain and unambiguous text of section 768.041 "required the trial court to set off the 21st Century settlement." *Ellison*, 326 So. 3d at 219. Accordingly, the Second District's decision should be quashed and the trial court should be directed on remand to set off the $4 million settlement amount from the verdict in entering any new final judgment against Ellison.

2. Decisions from other district courts correctly applying the setoff statutes demonstrate that the party seeking a setoff need not be a joint tortfeasors with the settling party sued on the same claim as the settling party.

The Second District's decision in this case is not only incorrect, but it is an outlier. It is directly contrary to decisions of the Third and Fourth District Courts of Appeal, which recognize that a party seeking a setoff need not be a joint tortfeasor with and sued on the same claim as the party or person/entity who paid the plaintiff in partial satisfaction of the damages sued for.

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[6] Indeed, as mentioned above, in a UM bad faith case, the damages sued for against the UM insurer include all damages caused by the tortfeasor in the accident. *Paton*, 150 So. 3d at 806; *see also Willoughby*, 212 So. 3d at 521 (citing *Fridman*, 185 So. 3d at 1223).

The Fourth District's decision in *Grobman v. Posey*, 863 So. 2d 1230 (Fla. 4th DCA 2003), is on point and demonstrates the proper application of the setoff statutes in a case where the settling defendants and the non-settling defendants are not joint tortfeasors subject to apportionment of fault and are not sued on the same claims. In that case, plaintiff sued a number of defendants for injuries sustained due to medical malpractice during a surgery. *Id.* at 1232. The plaintiff also sued her own HMO insurer, Prudential, for vicarious liability for the health care providers and for negligent credentialing of the health care providers, seeking the same personal injury damages as sought against the health care providers. *Id.* at 1222-23. Prudential settled with the plaintiff for $1.25 million in an undifferentiated settlement that did not allocate any amounts between causes of action or between economic and non-economic damages. *Id.* at 1233. The claims against the doctor and hospital proceeded to trial, where the jury returned a verdict for the plaintiff of more than $5.5 million. *Id.* The non-settling defendants sought a setoff for the amount Prudential paid in settlement, which was denied by the trial court. *Id.*

The Fourth District reversed. The court held that the question of entitlement to setoff turned on whether Prudential was a party defendant to which the apportionment requirement of section 768.81(3) applied. *Id.* With regard to *D'Angelo*, *Gouty*, and *Wells*, the court held that "[c]rucial to the trilogy of [these] section 768.81 settlement cases is the assumption that section 768.81(3) applies to the claim against the settling defendant" because, "[i]n cases to which it applies, section 768.81 'eliminates joint and several liability for noneconomic damages.' *D'Angelo*, 863 So. 2d at 314." *Id.* at 1234. Because Prudential was not a joint tortfeasor with the non-settling defendants to which section 768.81(3) would apply and, so, Prudential could not be placed on the verdict form under *Fabre* for an allocation of fault and damages, the court held that the line of cases ending with *D'Angelo* were inapplicable and the setoff issue was controlled solely by the provisions of the setoff statutes, which required a setoff of the entire unallocated settlement:

> Because neither . . . claim against Prudential was subject to apportionment under section 768.81(3), the trilogy of section 768.81 settlement cases ending with *D'Angelo* does not control. Instead, the setoff issue is governed by sections 46.015 and 768.041. . . , which require a complete setoff as to the amounts received from Prudential.

Id. at 1237 (citation omitted).

The same analysis applies in this case. Here, Ellison and 21st Century were not joint tortfeasors. As such, section 768.81(3) had no application to the claims asserted against them by Plaintiff and their respective liabilities for the damages sought were not subject to allocation under that statute. Nevertheless, just as in *Grobman*, the damages sought against each of them were the same – the personal injury damages resulting from the tortious conduct of the tortfeasor. Accordingly, sections 768.041 and 46.015 apply and require a complete setoff as to the amount of 21st Century's settlement with Plaintiff. *See also J.R. Brooks & Son, Inc. v. Quiroz*, 707 So. 2d 861, 863 (Fla. 3d DCA 1998).

The Third District's opinion in *Escadote I Corp. v. Ocean Three Ltd. P'ship*, 211 So. 3d 1059 (Fla. 3d DCA 2016), also supports Ellison's argument here that section 768.041 can apply as between parties that were not joint tortfeasors and were sued on different claims but for the same damages. In *Escadote*, plaintiff sued the developer, the general contractor, and the condominium association for damages to its condominium unit caused by water intrusion and

mold infestation. *Id.* at 1060-61. A statutory claim that included a right to statutory fees under section 718.303, Florida Statute, was asserted against only the association. *Id.* at 1061. The plaintiff settled his claim against the association for a total payment of $375,000, but the settlement agreement expressly allocated only $500 toward the damages sought (the same damages sought against the developer and contractor) and the remaining $374,500 to the attorneys' fees claim uniquely asserted against the association. *Id.* The trial court granted the non-settling developer's and contractor's motion for a setoff of the entire $375,000 settlement.

On appeal, the Third District recognized that section 768.041(2) applied, notwithstanding the association was not a joint tortfeasor with the developer and contractor and the same claims were not asserted against each of them, but held that "the settlement recovery sought to be set off must be 'in partial satisfaction of the damages sued for.'" *Id.* at 1062 (quoting the statute). While referring to the same claims asserted against jointly and severally liable defendants in its discussion of the case law, which included discussion of cases involving joint tortfeasors, the

court repeatedly emphasized that it is the "same damages" that is controlling as to application of the setoff statutes. *Id.* (discussing *Wells*, *D'Angelo*, and *Gouty*, which did involve joint tortfeasors) (emphasis by court); *see also id.* at 1063 (discussing *Devlin v. McMannis*, 231 So. 2d 194 (Fla. 1970) (where joint tortfeasors are sued on the same cause of action, only "the damage or damage elements recoverable . . . against [the other] joint tort-feasor" are subject to setoff under section 768.041)).

The *Escadote* court also acknowledged the rule that, where a settlement recovery is not apportioned in the settlement agreement, the entire settlement amount of an undifferentiated settlement recovery is allowed as a setoff, *id.* (citing *Dionese v. City of West Palm Beach*, 500 So. 2d 1347 (Fla. 1987)), but noted that the settlement in the case before it did allocate the settlement recovery between the damages sought and the attorneys' fees sought. *Id.* Accordingly, the court held that, while section 768.041 applied and allowed for a setoff to the verdict against the non-settling defendants, the setoff was limited to the $500 allocated in the settlement agreement to the damages sought against the non-settling defendants and did not apply to the portion of the

settlement allocated to the statutory fees sought only against the association:

> [T]here was no overlapping or duplicate recovery beyond the $500.00 allocated to the compensatory damages, and no windfall inherent in the recovery of legal fees by Escadote against the Association on the Association's unique statutory obligation to pay attorney's fees. We reverse the order granting the defendants' motion for a collateral setoff of $375,000.00, and remand for entry of an order granting that motion to the limited extent of $500.00.

Id. at 1065.

As the foregoing demonstrates, *Escadote* calls for reversal of the trial court's order denying Ellison's motion for setoff in this case, not affirmance as the Second District wrote in its opinion. Although the Third District discussed setoff law by reference to cases involving joint tortfeasors, and so used phrases referencing the "same claims" against "joint tortfeasors" in places, the entire opinion is addressed to the requirement of an identity of damages sued for.

Of course, in this case, the 21st Century settlement was entirely undifferentiated and did not allocate any part of the $4 million to any particular claim or element of damages. Thus, as the Second District recognized in its opinion, under the rule recognized

in *Escadote* and established by this Court in *Dionese*, the entire amount of the settlement is properly set off in this case. 326 So. 3d at 220-21. Accordingly, this Court should answer the certified question in the affirmative and quash the decision of the Second District, directing that the trial court set off the entire $4 million 21st Century settlement in entering any new judgment against Ellison.

D. Section 768.76, Florida Statutes, Also Requires A Setoff In This Case.

The Court need not address section 768.76 if it agrees with Ellison that she was entitled to a setoff pursuant to section 768.041. If this Court reaches the setoff issue under section 768.76, however, it should rule that, contrary to the Second District's conclusion, this statute also requires a setoff in this case.

1. "UM bad faith damages" as "collateral sources."

Section 768.76(1) provides that, in any action in which liability is determined and in which damages are awarded to compensate the claimant for losses sustained, "the court shall reduce the amount of such award by the total of all amounts which have been paid for the benefit of the claimant, or which are otherwise available

to the claimant, from all collateral sources." "Collateral sources" is defined in the statute to include: (1) "automobile accident insurance that provides health benefits or income disability coverage; and any other similar insurance benefits"; (2) "[a]ny contract or agreement of any . . . corporation to provide, pay for, or reimburse the costs of hospital, medical, dental, or other health care services"; and (3) "[a]ny contractual . . . plan provided . . . by any . . . system intended to provide wages during a period of disability." § 768.76(2)(a), Fla. Stat.

The Second District held that a setoff for the proceeds of the 21st Century settlement was not available under section 768.76(1) because those settlement proceeds did not qualify as "collateral sources" under the first definition quoted above. 326 So. 3d at 221-24. The court, however, overlooked the other definitions of "collateral sources" set forth in section 768.76(2)(a). Either of the other two definitions quoted above also apply to the 21st Century settlement proceeds here.

Specifically, the 21st Century settlement agreement with Plaintiff is a "contract or agreement" by which 21st Century, a "corporation," agreed "to provide, pay for, or reimburse the costs of

hospital, medical, . . . or other health care services." Thus, the settlement proceeds come within the definition of "collateral sources" in section 768.76(2)(a)3. Likewise, the settlement agreement can be viewed as a "contractual . . . plan provided . . . by any . . . system [21st Century and the other entities making the payments under the settlement agreement] intended to provide wages during a period of disability" within the definition in section 768.76(2)(a)4.

Moreover, the Second District erroneously concluded that the 21st Century settlement proceeds do not fall within the "collateral sources" definition of "automobile accident insurance that provides health benefits or income disability coverage; and any other similar insurance benefits" in section 768.76(2)(a)2. This conclusion was premised on the court's own definition of "benefits" being limited to amounts due under an insurance policy and within the policy limit. 326 So. 3d at 222. But, since the purpose of the statute "is to prevent windfalls to plaintiffs," *id.* at 220-21—which is what would occur here should this Court affirm the reasoning of the Second District—this Court should apply a definition that accomplishes the

purpose of the statute, such as that applied in *Willoughby* to "third-party benefits" in the statute there involved. *Id.* at 223.[7]

The Second District also erroneously concluded that "bad faith damages" are like punitive damages and extra-contractual such that they do not qualify as "benefits." This analysis overlooks the fact that, in Florida, a bad faith claim is considered a contractual claim under the policy. *See Allstate Ins. Co. v. Regar*, 942 So. 2d 969, 972 (Fla. 2d DCA 2006) ("[t]he duty of good faith is a contractual duty, and an action for its breach is governed by contract law") (citing cases, including *Gov't Employees Ins. Co. v. Grounds*, 332 So. 2d 13, 14 (Fla. 1976)). That the damages recoverable in a UM bad faith action—damages for the personal injuries caused by the tortfeasor—are characterized as being in the nature of a "penalty" is only because they are not caused by the bad

[7] The Second District's statement that section 768.76(2)(a) "provides a narrower, more specific definition of 'benefits,'" 326 So. 3d at 223, is incorrect given section 768.76(2)(a) provides no definition of "benefits"—as the court had acknowledged when it developed its own definition. *Id.* at 322. There is also nothing in *Progressive Select Ins. Co. v. Fla. Hosp. Med Ctr.*, 260 So. 3d 219 (Fla. 2018), that supports the Second District's definition, as this Court merely distinguished "benefits" from "expenses and losses," and did so in an entirely different context.

faith conduct. *See State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 60-62 (Fla. 1995) (citation omitted).[8] But the damages recoverable in such an action, whether by judgment or settlement, are surely "benefits" that derive from the contract and the insurer's breach of the contract in bad faith – they wouldn't be available absent the insurance contract.

2. Setoffs for future medical expenses and non-economic damages.

In what appears to be *dicta* in the Second District's opinion, the court suggested that, because setoffs are not available against awards for future medical expenses or non-economic damages under section 768.76, Ellison is not entitled to a setoff for the amounts paid that could have been allocated to such damages (despite no such allocation existing in the 21st Century settlement

[8] The Second District references the dissent in *Harvey v. GEICO Gen. Ins. Co.*, 259 So. 3d 1 (Fla. 2018), which involved a common law third-party bad faith claim. 326 So. 3d at 220. Taking the analysis of then-Chief Justice Canady's dissent into account, however, it is notable that he characterizes the damages awarded in excess of the policy limits in a bad faith case as converting the policy into one with higher limits, *Harvey*, 259 So. 3d at 15 (Canady, C.J., dissenting), which would also mean bad faith damages fall within the Second District's unreasonably restrictive and narrow definition of "benefits."

with Plaintiff). 326 So. 3d at 221. This discussion by the Second District misapprehends the applicable law and none of the cases it cited support this notion. Accordingly, the Court should disapprove this discussion in the Second District's opinion to avoid mischief in future cases.

The Second District stated that future medical expenses "are not subject to setoff under section 768.76(1)," citing *Allstate Ins. Co. v. Rudnick*, 761 So. 2d 289, 293 (Fla. 2000), and *Joerg v. State Farm Mut. Auto. Ins. Co.*, 176 So. 3d 1247, 1249 (Fla. 2015). 326 So. 3d at 221. The court misinterpreted those two cases. In *Rudnick*, this Court held that benefits that were available in the future under personal injury protection and medical payment coverages, but <u>not yet paid or owed</u>, could not be set off against an award of future medical expenses, but benefits that had been already paid or were currently owed could be used as a setoff under section 768.76(1). 761 So. 2d at 290-93 (interpreting "otherwise available to the claimant" in section 768.76(1) and holding "that the term 'available' within the meaning of section 768.76(1) includes only those benefits that have already been paid or that are presently due and owing, rather than those benefits potentially payable in the future"); *see*

also Joerg, 176 So. 3d at 1249 (addressing rule that benefits that may be available in the future under Medicare, but have not been paid, cannot be set off against an award of future medical expenses).

The concepts discussed in *Runick* and *Joerg* do not apply here because 21st Century not only owed the $4 million upon entering the settlement agreement, but also already paid the $4 million. Under these circumstances, a setoff was required. *See Olson v. N. Cole Const., Inc.*, 681 So. 2d 799, 800 (Fla. 2d DCA 1996) (where the Second District calculated a setoff to be applied in that case against past and future medical expenses awarded by the jury).

The Second District also erroneously stated in its opinion that non-economic damages "are not subject to setoff under section 768.76," citing *Olson* and *Wells*. In *Olson*, however, the court merely applied *Wells* as discussed above, holding that, given the joint tortfeasors in that case were liable only for the non-economic damages caused by their respective percentages of fault under section 768.81(3), a setoff for non-economic damages was not available, i.e., there was no double recovery or windfall to plaintiff. 681 So. 2d at 799-800. As discussed above, *Wells* and *Olson* (on

this point) are inapplicable here because Ellison and 21st Century were not joint tortfeasors, the allocation of fault and damages provisions of section 768.81(3) were not applicable here, and Plaintiff is being paid twice for the same damages.

II. SECTION 324.021, FLORIDA STATUTES, APPLIES TO THIS CASE AND REQUIRES THAT ANY JUDGMENT ENTERED AGAINST ELLISON BE CAPPED CONSISTENT WITH ITS TERMS.

A. Standard Of Review.

Questions of statutory interpretation are reviewed de novo. *Lopez v. Hall*, 233 So. 3d 451, 453 (Fla. 2018).

B. The Cap On Damages Set Forth In Section 324.021 Applies In This Case Because Ellison Was An Innocent Owner Held Vicariously Liable Under The Dangerous Instrumentality Doctrine For The Negligence Of Another.

Section 324.021(9)(b)3, Florida Statutes (2012), provides in relevant part:

> Notwithstanding any other provision of the Florida Statutes or existing case law:
>
> * * *
>
> 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 and up to $300,000 per incident for bodily injury and up to $50,000 for property damage. If the permissive user of

> the motor vehicle is uninsured or has any insurance with limits less than $500,000 combined property damage and bodily injury liability, the owner shall be liable for up to an additional $500,000 in economic damages only arising out of the use of the motor vehicle. . . . The additional specified liability of the owner for economic damages shall be reduced by amounts actually recovered from the permissive user and from any insurance or self-insurance covering the permissive user. . . .

Section 324.021(9)(b) was enacted by the legislature in order to limit vicarious liability of innocent vehicle owners and shift responsibility to those whose negligence in operating the vehicles actually caused the damages arising out of motor vehicle accidents. *Lewis v. Enter. Leasing Co.*, 912 So. 2d 349, 351 (Fla. 3d DCA 2005); *see also Sontay v. Avis Rent-A-Car Sys., Inc.*, 872 So. 2d 316, 319 (Fla. 4th DCA 2004) (finding the "statute's purpose of shifting liability from those without fault to those with fault is a legitimate legislative goal"); *Enter. Leasing Co. S. Cent. v. Hughes*, 833 So. 2d 832, 839 (Fla. 1st DCA 2002) (by section 324.021(9)(b), the legislature sought to shift some of the responsibility for damages due to the operation of the motor vehicle from the owner of a motor vehicle to the operator of the vehicle). The legislative history could not be clearer on this point:

> Section 28 amends s. 324.021, F.S., relating to the financial responsibility of an operator or owner of a motor vehicle. This section limits damages awardable under Florida's common law dangerous instrumentality doctrine, which currently allows a motor vehicle owner to be held liable for injuries caused by the negligence of ***anyone entrusted to use the motor vehicle. This section limits the vicarious liability of a motor vehicle owner.***

Fla. H.R. Comm. on Judiciary HB 775 (1999), Staff Analysis (final June 2, 1999) at 18.[9] Moreover, the legislature intended by this statute to achieve the following goals:

- Enhance substantial fairness by reducing payments by innocent parties; [and]

- Encourage personal responsibility by shifting emphasis from compensation based primarily upon loss toward responsibility based upon fault.

Id. at 21.

There is no exception in the statute or even hinted at in its legislative history for innocent owners who happen to be co-owners of the vehicle with the negligent operator of the vehicle. Rather, the

[9] The quoted language is referring specifically to section 324.021(9)(b)1. and 2. concerning owners of leased vehicles, but 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. *Id.*

legislative history indicates that the intent of the statute is to limit vicarious liability of any innocent owner who could otherwise be held liable under the dangerous instrumentality doctrine for the "negligence of anyone entrusted to use the motor vehicle." *Id.* at 18.

As such, in this case, any judgment entered against Ellison should be limited in accordance with section 324.021(b)(b)3, given she is merely the innocent owner of the vehicle sued for vicarious liability based on the dangerous instrumentality doctrine due to the negligence of her husband, who was driving the vehicle with Ellison's permission.[10] The Second District erred in rejecting Ellison's argument in this regard.

C. The Second District's Decision In *Ortiz* That Section 324.021 Does Not Apply To Co-Owners Is Incorrect.

Although the Second District did not expressly address this issue in its opinion, it can be presumed that the court followed its

[10] Here, because the permissive user, Ellison's husband, had less than $500,000 in combined property damage and bodily injury coverage (R.3131-32), any judgment entered against Ellison can be for no more than $600,000. *See De Los Santos v. Brink*, 167 So. 3d 519, 520 (Fla. 5th DCA 2015) (reversing judgment and remanding for entry of an amended judgment reflecting limits of liability pursuant to section 324.021).

previous decision in *Ortiz v. Regalado*, 113 So. 3d 57, 60-61 (Fla. 2d DCA 2013), in which the court held that the damage cap set forth in section 324.021(9)(b)3 does not apply where the vicariously liable party is a co-owner of the vehicle with the negligent operator of the vehicle. *Ortiz*, however, was wrongfully decided and should be disapproved by this Court.

In *Ortiz*, plaintiffs were injured in an automobile accident and sued the driver of the vehicle with whom the plaintiffs collided for negligence, and the driver's father, who was a co-owner of the vehicle with the driver, under the dangerous instrumentality doctrine. 113 So. 3d at 58-59. The jury found in favor of plaintiffs and the trial court entered judgment against the driver and the driver's father. *Id.* at 59. On appeal, the driver's father argued that the judgment against him should be limited by the cap in section 324.021(9)(b)3. *Id.* at 59-60.

The Second District held that 324.021(9)(b)3 was inapplicable because the statute "unequivocally states that it operates to protect an owner who 'loans' his or her vehicle" and the driver's father did not loan the vehicle to the driver because the driver "had just as much right to use it as did [the driver's father]." *Id.* at 60. The

court's holding was premised on a definition of the word "loan" as used in the statute, and because the statute provided no definition of its own, the court purportedly utilized a "dictionary" definition of the term. *Id.* at 60-61. Then, without citing the dictionary from which it obtained its definition (and after rejecting use of the definition provided by *Black's Law Dictionary*), the court concluded that "[a]n owner of an object can only loan that object to another who has no legal right to the object," and thus the driver's father did not "loan" the vehicle to the driver because they were co-owners of the vehicle. *Id.*[11]

Nevertheless, *Ortiz* recognized that "vicarious liability is of major concern to the citizens of Florida," and as such, certified a question of great public importance to this Court. That certified question asked whether section 324.021(9)(b)3 limits the amount of damages one co-owner must pay when another co-owner operates their jointly owned vehicle negligently and damages a third party.

[11] In a footnote, the court cited a statute that defined "loans" in relation to "title" concepts for a completely different purpose that has no application to section 324.021, where no similar definition was included by the legislature. *Id.* at 60. n.4.

Id. at 61. No party in *Ortiz* sought review of that certified question, and the question remains unanswered. Respectfully, Ellison suggests that this Court should answer that question now and disapprove *Ortiz*.

As noted above, in *Ham v. Portfolio Recovery Associates, LLC*, 308 So. 3d 942, 946–47 (Fla. 2020), this Court recently reiterated that it follows "the 'supremacy-of-text principle'—namely, the principle that '[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.'" (quotation omitted). This Court further explained "'every word employed in [a legal text] is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it." *Id.* at 946-47 (quotation omitted). "This requires a methodical and consistent approach involving 'faithful reliance upon the natural or reasonable meanings of language' and 'choosing always a meaning that the text will sensibly bear by the fair use of language.'" *Id.* at 947 (quotation omitted). "When a word in a statute is not expressly defined, it is appropriate to refer to dictionary definitions . . . in order to ascertain the plain and ordinary meaning of the word." *Sanders v.*

State, 35 So. 3d 864, 871 (Fla. 2010) (cleaned up, quotations omitted).

In *Ortiz*, the Second District purported to utilize a "dictionary meaning" of the word "loan." 113 So. 3d at 61. The court, however, never actually defined the word "loan," nor did the court identify the dictionary from which it took its unarticulated definition. Rather, the court simply determined what, in its view, the word "loan" did not include – holding "[a]n owner of an object can only loan that object to another who has no legal right to the object," thus, effectively finding that a "loan" can never occur to a permissive user of an object that has a legal right, title, or interest in the object. In so ruling, the court erred. Multiple dictionaries define "loan" in such a manner that co-ownership of the item loaned is entirely immaterial to the concept.

One such dictionary is *Black's Law Dictionary*, which defined "loan" as a "grant of something for temporary use." *Id.* at 60 (citing Black's Law Dictionary 954 (8th ed. 2004)). As noted, *Ortiz* rejected this definition, or, at least found that implicit in the definition was the idea that a co-owner cannot grant the right to use an object to another co-owner because they each already have a right to the

object. However, the court provided no authority supporting that view, and that limitation is not expressly contained in the *Black's Law Dictionary* definition or other well-known dictionaries. *See, e.g.*, *Richbell v. Toussaint*, 221 So. 3d 76, 767 (Fla. 4th DCA 2017) ("to loan is to give temporary control of property to another without relinquishing ownership with the intent that you regain control over the property") (citing *Loan, Random House Dictionary of the English Language* (1967)). *See also* Oxford English Dictionary, https://www.lexico.com/synonyms/loan (providing that a synonym of "loan" is to "let someone have the use of").

Furthermore, even recognizing that the act of "loaning" an object equates to the "grant" of temporary use of the object, *see* https://www.merriam-webster.com/dictionary/loan, the word "grant" does not require the grantor to have title over the object and the grantee to not have title. Rather, to "grant" is "to consent" or "allow fulfillment." https://www.merriam-webster.com/dictionary/grant. To "grant" is also "to agree or accede to." https://www.dictionary.com/browse/grant. Under these definitions, co-owners can "loan" an object to each other as they consent or agree to use of the object by the other.

The Second District unarticulated definition of "loan" in *Ortiz* is also wrong because the court did not consider the fact that, for some objects, like an automobile, it is often the case that two people cannot use it at the same time. Suppose John and Mary co-own a car. If John wants to use the car to drive to the store on one side of town, and Mary wants to use the car to drive to the park on the other side of town, those two things cannot happen simultaneously. One of the co-owners must consent, grant permission, or loan to the other the use the car to go to one of the destinations. If Mary agrees to allow John to use the car to go to the beach, no one would say Mary was misusing the English language if she told a friend she couldn't drive to the park because she "loaned the car to John"—use of the word "loan" in this context is a natural or reasonable meaning of the language. *See Ham*, 308 So. 3d at 946–47.

Simply put, there is nothing in the concept of the term "loan" that precludes its use to describe one co-owner allowing another co-owner to use the object of co-ownership at a particular period of time. Similarly, looked at from the opposite perspective, in common parlance, if a non-owner permissive user of a car allows yet another non-owner to use the car, it surely can be said that the first non-

owner "loaned" the car to the second non-owner without doing violence to the term, even though neither party has an ownership interest in the car.

In the present case, Ellison had "loaned" the jointly owned car to her husband, who was driving it at the time of the accident. That is, Ellison "g[a]ve temporary control of [the car] to [her husband] without relinquishing ownership with the intent that [she] would regain control over the [car]" at a later point in time. *See Richbell*, 221 So. 3d at 767. Because the sole claim against Ellison was based on her vicarious liability under Florida's dangerous instrumentality doctrine, and her husband was a permissive user of the car at the time of the accident, the plain language of section 324.021(9)(b)3 caps Ellison's vicarious liability per its terms. *Id.* at 767-68.

Finally, Ellison submits that the narrow unarticulated definition of the term "loans" and the focus on co-ownership by the negligent operator in *Ortiz* does not account for the legislature's intent in enacting the statute: to shift responsibility for damages arising out of motor vehicle accidents from innocent owners of vehicles to those at fault for the accident. This purpose is thwarted

if an innocent co-owner is not protected by the statute. To the extent there are competing definitions of the term "loan" so as to create an ambiguity, the Court should utilize a definition that best comports with the legislature's stated intent.

Accordingly, this Court should quash the Second District's decision with instructions to remand the case to the trial court with directions to apply the statutory cap in section 324.021 to any new judgment entered against Ellison.

III. ELLISON IS ENTITLED TO A NEW TRIAL BECAUSE THE REPEATED REFERENCES TO INSURANCE DURING VOIR DIRE IMPROPERLY TAINTED THE JURY AND THE VERDICT.

A. Standard Of Review.

A trial court's ruling on a motion for mistrial or a motion for new trial is reviewed for an abuse of discretion. *Brown v. Estate of Stuckey*, 749 So. 2d 490, 497-98 (Fla. 1999).

B. The References To Insurance During Voir Dire Require A New Trial.

Nearly 70 years ago, this Court announced it was committed to the rule that "evidence of insurance carried by a defendant is not properly to be considered by the jury because that body might be influenced . . . to arrive at an excessive amount through sympathy

for the injured party and the thought that the burden would not have to be met" by the defendant. *Carls Mkts., Inc. v. Meyer*, 69 So. 2d 789, 793 (Fla. 1953). Consistent with this Court's decision, the First District soon thereafter had occasion to address the injection of the subject of insurance at a trial:

> The injection by either party to a cause, whether deliberate or inadvertent, of any such improper influence in a jury trial is a distinct disservice to the administration of justices, and lawyers, as officers of the courts, and the courts, on their own motion if need be, must be ever vigilant to see that no such influence creeps into the proceedings in even the slightest degree and subverts the noble purpose of our court system to provide 'justice under law.'
>
> The injection of such an influence makes the task of an appellate court an impossible one. No one on earth can tell with certainty the full effect of that influence upon a juror's mind. In a case of evidence of insurance, for instance, who can tell whether a juror might not have a stronger prejudice against the defendant than against an insurance company? Then, again, who can tell whether a judge's instruction to disregard a mention of insurance would not serve to emphasize the fact of insurance rather than to eliminate it from his mind? <u>The only acceptable answer to this problem is for the bench and bar religiously to keep every improper influence of every nature from coming before a jury, lest such influence act as a festering sore and result in a miscarriage of justice</u>.

Pensacola Transit Co. v. Denton, 119 So. 2d 296, 298 (Fla. 1st DCA 1960). The courts of this state have maintained this commitment though the present and, as such, the injection of insurance into a case, whether deliberate or inadvertent, is improper and creates grounds for a mistrial. *See, e.g.*, *id.*; *Harrison v. Gregory*, 221 So. 3d 1273, 1276 (Fla. 5th DCA 2017); *Nicaise v. Gagnon*, 597 So. 2d 305, 306-07 (Fla. 4th DCA 1992).

In this case, there was more than one passing mention of insurance; it was mentioned over and over, along with direct statements that insurance would pay for Plaintiff's damages. (R.3390, 3408, 3421, 3418, 3450) One venireperson said, in these situations, the insurance company "is going to pick it up anyway." (R.3408). Others said that "your insurance company has to pay for the damage you do," and an owner of the vehicle is responsible for damages to another even if they were not driving because "they have insurance and they're the ones with the money." (R.3418, 3450).

These statements were far worse than the one statement that in part led to a new trial in *Harrison* that an insurance company took a vehicle to a storage facility. 221 So. 3d at 1276. Here, the

statements about insurance permeated voir dire, and directly placed into the minds of the jurors who decided this case that an insurance company would be paying any damages awarded. *See Nicaise*, 597 So. 2d at 306-07 (affirming order granting new trial because, "[b]y telling the jury that it need not concern itself whether the Defendant Gagnon will satisfy the judgment out of his own pocket, Plaintiff's counsel planted in the minds of the jurors the seed of insurance just as surely as if he had mentioned it directly").

The unfair prejudice to Ellison caused by these repeated references to insurance is manifest and is demonstrated by the astronomic size of the verdict. Surely, Plaintiff cannot prove that there is no reasonable possibility that the error contributed to the verdict and, as such, a new trial is required. *Special v. W. Boca Med. Ctr.*, 160 So. 3d 1251, 1253, 1256-57 (Fla. 2014); *see also Harrison*, 221 So. 3d at 1278 (*Special* harmless error test applied to denial of a motion for mistrial based on an improper reference to insurance and an improper closing argument). Accordingly, this Court should hold that the Second District erred in affirming the trial court's denial of Ellison's motion for new trial and remand for a new trial.

CONCLUSION

Based on the foregoing discussion and authorities, Ellison requests that this Court answer the certified question in the affirmative and quash the Second District's decision. Ellison requests that the Court direct that Plaintiff's $4 million settlement with 21st Century that compensated Plaintiff for the same damages compensated by the jury's verdict returned against Ellison be set off from the verdict in entering any new judgment against Ellison. Ellison also requests that the Court direct that any new judgment entered against Ellison be capped at no more $600,000 pursuant to section 324.021(9)(b)3, Florida Statutes. Alternatively, Ellison requests that the Court direct that a new trial be granted because the verdict was tainted by the references to insurance during voir dire.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via electronic mail on the following using the Court's ePortal system on July 20, 2022:

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.045 (Bookman Old Style 14-point font) and the word count requirements of Florida Rule of Appellate Procedure 9.210.

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