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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: SC21-1580
L. T. NO.: 2D19-1961; 13-CA-8277

ALBERTA S. ELLISON,

Petitioner,

vs.

RANDY WILLOUGHBY,

Respondent.
_______________________________ /

RESPONDENT'S BRIEF ON JURISDICTION

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

Respectfully submitted by:

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STATEMENT OF THE ISSUES

If the Court grants review, Respondent does not intend to raise any issues on cross-review.

PRELIMINARY STATEMENT

Petitioner, Alberta Ellison, will be referred to as "Petitioner." Respondent, Randy Willoughby, will be referred to as "Respondent." Citations to Petitioner's brief on jurisdiction will be cited as "Petitioner's brief, [page #]."

As an initial matter, Respondent would note that most of Petitioner's jurisdictional brief argues the merits of the Second District's opinion. This is improper. See Fla. R. App. P. 9.120(d) (stating that a petitioner's brief on jurisdiction should be "limited solely to the issue of the supreme court's jurisdiction."). As such, this brief does not seek to respond to the merits-based arguments contained in Petitioner's brief and will instead focus solely on this Court's jurisdiction.

STATEMENT OF THE CASE AND FACTS

The Second District accurately recounts the factual and procedural background in its October 13, 2021 opinion, which is

attached in the appendix to Petitioner's brief on jurisdiction. See Ellison v. Willoughby, 326 So. 3d 214, 217-18 (Fla. 2d DCA 2021).

ARGUMENT

Petitioner asks this Court to exercise its discretionary jurisdiction to review the Second District's holding that Petitioner is not entitled to a setoff from the final judgment entered against her for amounts paid by Respondent's uninsured motorist carrier in settlement of a first-party bad faith claim brought under section 624.155, Florida Statutes. Petitioner cites two bases to invoke this Court's jurisdiction: 1) a certified question of great public importance, and 2) an express and direct conflict with decisions of other district courts of appeal.

As to the first basis, of course this Court *may* accept jurisdiction to review the questioned certified by the Second District to be of great public importance. See Fla. R. App. P. 9.030(a)(2)(A)(v). However, the Court should decline to do so because the issue presented in this case – while important to the individual parties – is not one of great public importance.

As to the second basis, this Court does not have conflict jurisdiction to review the Second District's decision because it does

not expressly and directly conflict with Grobman v. Posey, 863 So. 2d 1230 (Fla. 4th DCA 2003) or Escadote I Corp. v. Ocean Three Ltd. P'ship, 211 So. 3d 1059 (Fla. 3d DCA 2016).

Accordingly, the Court should deny the petition.

I. This Court should decline to exercise its discretionary jurisdiction to review the certified question because the issue is not one of great public importance.

Petitioner asks this court to invoke its discretionary jurisdiction to answer the following question certified by the Second District to be of great public importance:

> 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?[1]

Respondent agrees this Court has the discretion to exercise its jurisdiction to review the certified question. However, the Court should decline to do so. Despite Petitioner's (and the Second

[1] In her jurisdictional brief, Petitioner appears to abandon her argument that the settlement payment made by Respondent's uninsured motorist carrier constitutes a collateral source within the meaning of section 768.76. Rather, Petitioner has limited her request of this court to answer the first part of the Second District's certified question: whether the payment is subject to setoff under section 768.041(2).

District's) characterization, the certified question does not present an issue of great public importance to the citizens of Florida; rather, the issue is one of the utmost rarity and "requires consideration of a narrow issue with very unique facts." Dade County Prop. Appraiser v. Lisboa, 737 So. 2d 1078 (Fla. 1999); see also State v. Sowell, 734 So. 2d 421, 422 (Fla. 1999) (dismissing petition where "the actual legal question deal[t] with an extremely narrow principle of law, and, as phrased, d[id] not present an issue of 'great public importance.'").

In her brief, Petitioner asserts the issue of setoffs of first-party bad faith settlements with uninsured motorist carriers is of "significant" and "recurring" concern to the citizens of Florida. However, as both parties conceded in the court below, despite the nearly 40-year history of Florida's first-party bad faith statute,[2] this setoff issue has *never* been raised in a reported Florida decision. See Ellison, 326 So. 3d at 218. The lack of a single case even tangentially discussing setoff of first-party bad faith settlements demonstrates that this issue is unequivocally *not* "significant" to the citizens of Florida, let alone "recurring." Petitioner's claim that the Second

[2] See § 624.155, Fla. Stat. (1982).

District's decision will have "broader-ranging implications than identified in the certified question" is pure ipse dixit. Petitioner's brief, p.5.

Accordingly, this Court should decline to exercise its discretionary jurisdiction to answer the certified question of alleged "great public importance."

II. This Court does not have jurisdiction to review the Second District's decision under Rule 9.030(a)(2)(A)(iv) because the decision does not expressly and directly conflict with Grobman v. Posey or Escadote I Corp. v. Ocean Three Ltd. P'ship.

On pages 11-13 of her jurisdictional brief, Petitioner argues the Second District's decision expressly and directly conflicts with the Fourth District's decision in Grobman v. Posey, 863 So. 2d 1230 (2003) and the Third District's decision in Escadote I Corp. v. Ocean Three Ltd. P'ship, 211 So. 3d 1059 (2016). As explained below, this argument is without merit.

This Court's "express and direct conflict" jurisdiction "is a strict standard that requires either the announcement of a conflicting rule of law or the application of a rule of law in a manner that results in a conflicting outcome despite substantially the same controlling facts." Kartsonis v. State, 319 So. 3d 622, 623 (Fla. 2021) (internal

quotations and citations omitted). "[W]here the district court decisions alleged to be in conflict are materially distinguishable," this court has no discretion to review the decision because it lacks jurisdiction. Id. Here, the Second District's determination that first-party bad faith settlements with an uninsured motorist carrier are not subject to setoff does not conflict with any rule of law announced in either Grobman or Escadote; nor does the Second District's decision deal with "substantially the same controlling facts."

First, and perhaps most importantly, neither Grobman nor Escadote considered whether a payment from an injured party's uninsured motorist carrier in settlement of a first-party bad faith claim should be subject to setoff under section 768.041(2). Indeed, neither Grobman nor Escadote even involved an uninsured motorist carrier *or* an insurance bad faith settlement.

In Grobman, the Fourth District held a settlement payment by a party alleged to be both vicariously and derivatively liable for the conduct of the underlying tortfeasor was properly subject to setoff under sections 46.015 and 768.041. 863 So. 2d at 1237. Here, Respondent's uninsured motorist carrier was neither vicariously nor derivatively liable for the conduct of the underlying tortfeasor. See

Ellison, 326 So. 3d at 219 (citing Respess v. Carter, 585 So. 2d 987, 990 (Fla. 5th DCA 1991)) ("[A] UM carrier is neither a tortfeasor nor an insurer thereof.") Accordingly, the rule of law announced in Grobman does not conflict with the Second District's decision; and regardless, to the extent there is any overlap, the cases are materially distinguishable. Again, Grobman did *not* involve an uninsured motorist carrier, let alone a first-party bad faith settlement. Accordingly, even if there were conflict between Grobman and the Second District's decision (and there is not), any conflict is not "express and direct." In turn, this court does not have conflict jurisdiction to review the Second District's decision based on Grobman.

Escadote likewise did not announce any rule of law addressing setoff of first-party bad faith settlements. In Escadote, the court held an injured party's settlement of claims which could not be asserted against the non-settling defendant were *not* subject to setoff. 211 So. 3d at 1062. Thus, to the extent the principles announced in Escadote inform the issue in this case, Escadote *supports* the Second District's decision – it does not conflict with it. See Ellison, 326 So. 3d at 220 ("As in Escadote, Mr. Willoughby's claims against 21st Century were

‘not and could not be asserted against’ Mrs. Ellison, and the settlement included elements of damages that were not part of Mr. Willoughby's claim against Mrs. Ellison.”).

Accordingly, the Court may summarily reject Petitioner’s attempt to conjure a conflict between the Second District’s decision and the decisions of the Fourth and Third District in Grobman and Escadote.

CONCLUSION

For these reasons, the Court should deny Petitioner’s petition for discretionary review of the Second District’s decision.

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 **Christine R. Davis**, pnettleton@carltonfields.com, dwasham@carltonfields.com, cdavis@carltonfields.com, and sdouglas@carltonfields.com, Carlton Fields, P.A., 100 SE Second Street, Ste. 4200, Miami, Florida 33131; and **James B. Thompson, Jr.**, and **Troy Holland**, GTMService@gtmlegal.com, Goodis Thompson Miller, P.A., 150 2nd Avenue North, Ste. 1500, St. Petersburg, Florida 33701, on this **22nd** day of **December, 2021**.

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