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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 BRIEF ON JURISDICTION

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

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STATEMENT OF THE ISSUES

The issues on which this Court's jurisdiction is invoked include the following question certified by the Second District as one 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?

An additional issue on which this Court's jurisdiction is invoked is:

> WHETHER THE SECOND DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THE FOURTH DISTRICT IN *GROBMAN V. POSEY*, 863 SO. 2D 1230 (FLA. 4TH DCA 2003), AND THE THIRD DISTRICT IN *ESCADOTE I CORP. V. OCEAN THREE LTD. P'SHIP,* 211 SO. 3D 1059 (FLA. 3D DCA 2016).

If the Court grants review, other issues independent of the issues on which jurisdiction is invoked that Petitioner may raise are:

> WHETHER A NEW TRIAL IS REQUIRED BECAUSE THE REPEATED REFERENCES TO INSURANCE DURING VOIR DIRE IMPROPERLY TAINTED THE JURY AND THE VERDICT.
>
> WHETHER ANY JUDGMENT ENTERED AGAINST ELLISON SHOULD BE CAPPED IN ACCORDANCE WITH SECTION 324.021, FLORIDA STATUTES.

STATEMENT OF THE CASE AND FACTS

A. Review Sought on Certified Question and Conflict Asserted.

A jury returned a $30 million verdict for Respondent, Randy Willoughby ("Plaintiff"), against Petitioner, Alberta S. Ellison ("Ellison"). Thereafter, Ellison sought to set off a $4 million settlement Plaintiff recovered from his uninsured motorist ("UM") insurer on a bad faith claim, by which Plaintiff sought the same damages sought and awarded against Ellison. The trial court denied Ellison's motion for setoff and the Second District affirmed, but certified a question of great public importance as to whether a setoff should be provided under the plain and unambiguous text of section 768.041(2) or under section 768.76(1). *Ellison v. Willoughby*, No. 2D19-1961, 2021 WL 4760122 (Fla. 2d DCA Oct. 13, 2021). As discussed below, the Second District decision conflicts with decisions of the Fourth District and the Third District as to whether a setoff should be allowed where the settling party and non-settling party are sued for the same damages but are not "joint tortfeasors" sued on the "same claim." Accordingly, this Court has jurisdiction under article V, section 3(b)(3) and (4), of the Florida Constitution.

B. The Facts and Course of Proceedings.

Plaintiff sustained serious injuries when a truck driven by Ellison's husband T-boned an automobile in which Plaintiff was a passenger. Plaintiff sued Mr. Ellison for negligence and Mrs. Ellison—the co-owner of the truck—under vicarious liability principles. In the same complaint, Plaintiff asserted claims against his UM insurer, 21st Century Centennial Insurance Company, for UM benefits and bad faith damages pursuant to sections 624.155 and 627.727(10), Florida Statutes (2013). *Id.* at *1.

Plaintiff and 21st Century later settled and Plaintiff released 21st Century from all claims "which were or could have been asserted in the [l]awsuit, including all claims related to the [a]ccident or the [p]olicy." As consideration, 21st Century paid $4 million to Plaintiff. The settlement agreement provides that all sums payable constitute damages on account of personal injuries or sickness, but it does not otherwise differentiate categories of damage to which the settlement funds are attributable. Plaintiff dismissed his claims against 21st Century with prejudice and dropped his negligence claim against Mr. Ellison. *Id.*

Ellison admitted liability and the case went to trial on Plaintiff's damages. The jury awarded Plaintiff $30,101,599. Ellison filed post-trial motions in which she sought various relief, including a $4 million setoff for the 21st Century settlement. The trial court denied Ellison's motion for setoff and Ellison appealed. *Id.* at *1-2.

In addressing the setoff issue, the Second District <u>correctly</u> concluded:

> "[T]he purpose of [section 768.041(2)] is to prevent a windfall to a plaintiff by way of double recovery." Section 768.041(2) 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*." § 768.041(2) (emphasis added). This text is plain and unambiguous, and 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. at *3 (citation omitted).

The Second District, however, went on to hold that precedents from this Court prevented it from applying the plain and unambiguous text of section 768.041(2). Despite the same damages being sought against both 21st Century and Ellison, the Second

District held that this Court's precedents allowed a setoff under section 768.041(2) only if the same damages were sought against "joint tortfeasors" sued on the "same claims," although such language is found nowhere in the statute. *Id.* at *3-4. In addition, the Second District held that a setoff under section 768.76(1) was not available because the settlement proceeds did not fall within the definition of "collateral sources" in section 768.76(2)(a). *Id.* at *4-7. The Second District went on to certify the question identified above as one of great public importance because the allocation of liability in settlements of tort and bad faith actions is a significant and recurring concern to the citizens of Florida. *Id.* at *7.

ARGUMENT

I. THIS COURT SHOULD GRANT REVIEW TO ANSWER THE CERTIFIED QUESTION AND RESOLVE CONFLICTS BETWEEN THE DISTRICT COURTS AS TO WHETHER SECTION 768.041 REQUIRES A SETOFF WHEN A PLAINTIFF RECOVERS IN A SETTLEMENT AN AMOUNT FOR DAMAGES SOUGHT AGAINST A NON-SETTLING DEFENDANT EVEN WHERE THE SETTLING AND NON-SETTLING DEFENDANTS ARE NOT JOINT TORTFEASORS SUED ON THE SAME CLAIM.

This Court should accept jurisdiction to address the certified question because, as discussed below, the Second District admittedly failed to apply the plain and unambiguous text of section 768.041(2), justifying its decision by misinterpreting this Court's precedents and the decisions of other district courts. Moreover, as the Second District noted in certifying the question, the allocation of liability in settlements of tort and bad faith actions and attendant setoff principles are significant and recurring concerns to citizens of Florida and should be addressed by this Court. *Id.*

The Second District's holding will have broader-ranging implications than identified in the certified question, which referred to the settlement of UM bad faith claims. The Second District's

holding will preclude application of the plain meaning of section 768.041 to allow for a setoff where settling and non-settling defendants are sued for the same damages, but are not sued as joint tortfeasors on the same claim. This would allow plaintiffs to obtain double recovery of damages and defeat the very purpose of the statute.

Where "the words of [the] statute are unambiguous," the courts are to resort to "one, cardinal canon [of construction] before all others"—that is, courts are to "presume that a legislature says in a statute what it means and means in a statute what it says there." *Page v. Deutsche Bank Tr. Co. Americas*, 308 So. 3d 953, 958 (Fla. 2020) (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). "First and foremost, [courts] must examine the actual language used . . . . If that language is clear, unambiguous, and addresses the matter in issue, then [the courts'] task is at an end." *Advisory Op. to Governor re Implementation of Amend. 4*, 288 So. 3d 1070, 1078 (Fla. 2020) (internal quotes and citations omitted). In such circumstances, there is no room for supplemental common law rules. *R.R. v. New Life Community Church of CMA, Inc.*, 303 So. 3d 916, 923 (Fla. 2020); *see also Ham v. Portfolio Recovery*

Associates, LLC, 308 So. 3d 942, 946-47 (Fla. 2020) (citing, *inter alia*, Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation Of Legal Texts* (2012)).

In this case, the Second District eschewed these rules of statutory construction in interpreting section 768.041. The court recognized that the text of section 768.041 is “plain and unambiguous” and required the $4 million settlement be set off from the verdict returned against Ellison. However, the Second District then misinterpreted this Court’s precedents as limiting setoffs to joint tortfeasors being sued on the same claim, notwithstanding the absence of any such language in the statute. Based on the misinterpretation of this Court’s precedents, the Second District held that the requested setoff was properly denied. This Court should accept jurisdiction to correct the Second District’s failure to apply proper rules of statutory construction and to maintain uniformity in the case law concerning the proper interpretation of section 768.041.

A. Setoff Under Section 768.041.

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.

As the Second District correctly concluded (with an incorrect caveat), "this text is plain and unambiguous" and "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." *Ellison* at *3.

Despite concluding that the plain and unambiguous text of section 768.041(2) required a setoff here, the Second District then misinterpreted a trilogy of decisions from this Court that the Second District believed required it to ignore the plain meaning of the statute and deny Ellison's request for a setoff: *D'Angelo v. Fitzmaurice*, 863 So. 2d 311 (Fla. 2003), *Wells v. Tallahassee Mem'l Reg'l Med. Ctr., Inc.*, 659 So. 2d 249 (Fla. 1995), and *Gouty v. Schnepel*, 795 So. 2d 959 (Fla. 2001). This trilogy of cases

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.

This trilogy of cases decided how to apply setoff statutes to "a case tried under section 768.81(3)," *Wells,* 659 So. 2d at 250 (certified question), which statute eliminated joint and several liability between joint tortfeasors (for non-economic damages at the time of the decisions).[1] *See Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993). 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 for which the non-settling joint tortfeasor was sued in that each joint tortfeasor was liable only for the non-economic damages each caused under section 768.81(3). 659 So. 2d at 252-53. In

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

specifically addressing section 768.041 in this context, the Court 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, *Fabre*, 623 So. 2d at 1185, 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. *D'Angelo* and *Gouty* merely reaffirmed this analysis and holding.

The holdings in *D'Angelo*, *Gouty*, and *Wells* have no application in this case because Ellison and 21st Century were not joint tortfeasors from whom section 768.81(3) would preclude Plaintiff seeking the same damages, and because the 21st Century settlement proceeds were paid "in partial satisfaction of the [same] damages sued for" in this case against both 21st Century and Ellison. *See Willoughby v. Agency for Health Care Admin.*, 212 So. 3d 516, 521 (Fla. 2d DCA 2017) ("[t]he settlement compensated Mr. Willoughby for damages he sustained in the automobile accident" and "provided compensation for all injuries Mr. Willoughby suffered" in the accident). Indeed, it is well established that, in a

UM bad faith case, the damages sued for against the UM insurer include all damages caused by the tortfeasor in the accident. *GEICO Gen. Ins. Co. v. Paton*, 150 So. 3d 804, 806 (Fla. 4th DCA 2014); *see also Willoughby*, 212 So. 3d at 521 (quoting *Fridman v. Safeco Ins. Co.*, 185 So. 3d 1214, 1223 (Fla. 2016)). Thus, Plaintiff's settlement with 21st Century compensated him for the same damages for which Ellison (the vicariously liable tortfeasor here) was sued by Plaintiff. *Id.* As such, the plain and unambiguous text of 768.041 "required the trial court to set off the 21st Century settlement." *Ellison* at *3.

B. Conflict with Fourth District and Third District Decisions.

The Second District's decision here is in direct and express conflict with the Fourth District's decision in *Grobman v. Posey*, 863 So. 2d 1230 (Fla. 4th DCA 2003). In *Grobman*, the court held that non-settling defendants were entitled to a setoff under section 768.041 for the full amount paid by the settling defendants to the plaintiff because the settling defendants and the non-settling defendants were not joint tortfeasors subject to apportionment of fault under section 768.81(3) and *Fabre*. *Id.* at 1231, 1237. For the

same reason, the court held that the trilogy of cases from this Court addressing setoffs in section 768.81 settlement cases – *D'Angelo, Gouty,* and *Wells* – were inapplicable to the setoff issue, contrary to the holding of the Second District in this case. *Id.* at 1234-37.

The Second District's decision here is also in express and direct conflict with the Third District's decision in *Escadote I Corp. v. Ocean Three Ltd. P'ship*, 211 So. 3d 1059 (Fla. 3d DCA 2016). Although the *Escadote* court discussed setoff law by reference to cases involving joint tortfeasors, and so used phrases referencing the "same claims" against "joint tortfeasors" in places, the holding in the case is addressed to the requirement of an <u>identity of damages</u> for the setoff statute to apply. The Third District held that section 768.041 <u>did apply</u> as between parties that were <u>not joint tortfeasors</u> and were sued on <u>different claims</u>, but the setoff was limited to the amount allocated in the settlement agreement to the damages that were sought against the non-settling defendants. 211

So. 3d at 1065.[2] This is directly contrary to the holding of the Second District in this case.

This Court should accept review to eliminate this conflict between the holding of the Second District in this case and the holdings of the Fourth District in *Grobman* and the Third District in *Escadote*. The Fourth District and Third District both correctly held that the text of section 768.041(2) requires focus on whether the same damages were sought against the settling and non-settling defendants. In contrast, the Second District admittedly disregarded the text of the statute and held that a setoff was available under section 768.041 only if the settling and non-settling defendants were joint tortfeasors sued on the same claim, despite the absence of any such language in the statute.

[2] Where, as in the present case, a settlement recovery is not apportioned in the settlement agreement, the entire settlement amount of an undifferentiated settlement is to be set off. *Id.* at 1063 (citing *Dionese v. City of West Palm Beach*, 500 So. 2d 1347 (Fla. 1987)).

CONCLUSION

Based on the foregoing, Ellison requests that this Court exercise its discretion to review the Second District's decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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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 (less than 2,500 words).

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APPENDIX

2021 WL 4760122
District Court of Appeal of Florida, Second District.

Alberta S. ELLISON, Appellant,
v.
Randy WILLOUGHBY, Appellee.

No. 2D19-1961
|
October 13, 2021

Synopsis

Background: Automobile passenger brought action against co-owner of truck for injuries sustained in collision. Following a jury trial, the Circuit Court, 13th Judicial Circuit, Hillsborough County, Ralph C. Stoddard, J., awarded passenger $30,101,599 after co-owner admitted liability. Co-owner subsequently filed posttrial motions seeking a $4 million setoff attributable to settlement with passenger's uninsured motorist (UM) insurer. The Circuit Court, Stoddard, J., 2019 WL 6723357, denied posttrial motion. Co-owner appealed.

Holdings: The District Court of Appeal, Labrit, J., held that:

[1] co-owner was not entitled to setoff of settlement amount under statute governing release or covenant not to sue;

[2] portion of settlement amount allocable to UM benefits was not subject to setoff under statute governing collateral sources of indemnity;

[3] as a matter of first impression, portion of settlement amount allocable to bad faith damages was not subject to setoff under statute governing collateral sources of indemnity;

[4] fact that some portion of passenger's settlement on bad faith claim was available to satisfy Medicaid lien did not render the settlement proceeds collateral sources subject to setoff; and

[5] extent to which passenger received "windfall" in settlement and jury damages award was not grounds for setoff.

Affirmed and question certified.

Procedural Posture(s): On Appeal; Other.

West Headnotes (15)

[1] **Appeal and Error** Set-Off, Counterclaim, and Cross-Claim

A trial court's ruling on a motion to determine setoff is reviewed de novo.

[2] **Appeal and Error** Amount of recovery or extent of relief

Co-owner of truck involved in collision that injured automobile passenger properly preserved for appeal claim that jury damages award amount should be set off by amount of settlement with passenger's uninsured motorist (UM) insurer; although co-owner never specifically cited relevant statute below, issue of setoff was thoroughly litigated in the trial court, and both the parties and the trial court relied on case law analyzing setoff of uninsured motorist settlements under statute. Fla. Stat. Ann. § 768.041(2).

[3] **Pleading** Nature and requisites of issue
Pleading Objections to evidence as not within issues
Process Necessity and Use in Judicial Proceedings

Generally, an issue that has not been framed by the pleadings, noticed for hearing, or litigated by the parties is not a proper issue for the court's determination; however, a party need not cite the exact cases on point to the trial court in order to preserve a claim, so long as its objection is sufficiently precise that it fairly apprised the trial

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court of the relief sought and the grounds therefor.

[4] **Damages** Reparation by wrongdoer

The purpose of statute requiring 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 is to prevent a windfall to a plaintiff by way of double recovery. Fla. Stat. Ann. § 768.041(2).

[5] **Insurance** Construction and Effect of Settlement or Release

Co-owner of truck involved in collision that injured automobile passenger was not entitled to a setoff of settlement amount awarded to passenger from passenger's uninsured motorist (UM) insurer under statute governing release or covenant not to sue; co-owner was not a joint tortfeasor with insurer, settlement funds applied only to passenger's claims against insurer for breach of contract and bad faith refusal to settle, which were not and could not be asserted against co-owner, and settlement amount was considered separate from damages, and thus, denial of setoff did not result in a "windfall" to passenger. Fla. Stat. Ann. § 768.041(2).

[6] **Damages** Reparation by wrongdoer

Where settlement recovery is not apportioned between (a) claims for which codefendants are jointly and severally liable with settling codefendant, and (b) claims which were only asserted against settling codefendant, entire amount of undifferentiated recovery is allowable as setoff; however, these principles do not apply where a plaintiff's claim against a settling codefendant was not and could not be asserted against nonsettling codefendants.

[7] **Appeal and Error** Necessity of formal judgment or order

On review of a trial court decision, the decision itself is primarily what matters, not the reasoning used.

[8] **Insurance** Allocation of settlement amounts

Portion of settlement amount awarded to automobile passenger injured in collision allocable to his claim for uninsured motorist (UM) benefits under insurance policy was not subject to setoff under statute governing collateral sources of indemnity; statute specifically excluded collateral sources for which a subrogation or reimbursement right existed, and UM insurer had a subrogation claim against co-owner of truck involved in collision for the amount of UM benefits paid to passenger, and thus, they were excluded under statute. Fla. Stat. Ann. § 768.76(1).

[9] **Damages** Reduction of loss by insurance

Uninsured motorist (UM) payments are not collateral sources to be deducted from a jury verdict under the collateral source rule; the underlying principle is that the cautious insured should not be penalized for obtaining uninsured motorist insurance and, by the same token, it would be unfair for the tortfeasor to benefit by the insured's payment of the insurance premium or by the insurer's statutorily mandated payments on behalf of the tortfeasor. Fla. Stat.

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Ann. § 768.76(1).

[10] **Insurance**Allocation of settlement amounts

Portion of settlement amount awarded to automobile passenger injured in collision allocable to passenger's claim for bad faith damages against passenger's uninsured motorist (UM) insurer was not subject to setoff under the collateral source rule; punitive, extra-contractual damages, such as passenger's settlement award for bad faith damages, were not a payment of "benefits." Fla. Stat. Ann. § 768.76(1), (2)(a)(2).

[11] **Insurance**Coverage--Automobile Insurance

"Benefits" in the automobile casualty insurance context traditionally means the amount an insurer must pay on account of an insured's injuries that fall within the scope and limits of coverage.

[12] **Insurance**Punitive or multiple damages
InsuranceBad faith in general

Bad faith damages against an insurance company are considered a punitive, extracontractual award, because bad faith claims punish the insurer's failure to fulfill its obligations to the insured.

[13] **Insurance**Construction and Effect of Settlement or Release

Fact that some portion of injured automobile passenger's settlement with uninsured motorist (UM) insurer on bad faith claim was available to satisfy Medicaid lien did not render the settlement proceeds collateral sources subject to setoff under the collateral source rule; statute governing collateral sources of indemnity provided a narrower, more specific definition of "benefits" and sources thereof than Medicaid lien statute, and co-owner of truck involved in collision made no attempt to show what portion of insurance settlement was attributable to past medical expenses or any other category of damages. Fla. Stat. Ann. §§ 409.910(6), 768.76(1).

[14] **Damages**Reduction of loss by insurance

Extent to which injured automobile passenger's settlement award with his uninsured motorist (UM) insurer and jury-awarded damages amount constituted a "windfall" to passenger was not grounds for setoff under the collateral source rule; ingenuity of passenger's counsel in inducing insurer to agree to settlement was not reason for co-owner of truck involved in collision to benefit from that ingenuity, such that her amount of damages payable to passenger should be reduced. Fla. Stat. Ann. § 768.76(1).

[15] **Damages**Matter of mitigation; collateral source rule in general
DamagesReduction of loss by insurance

Underlying principle of collateral source rule is that it is better for wronged plaintiff to receive potential windfall than for tort-feasor to be relieved of responsibility for wrong, particularly in case of uninsured motorist insurance since insured procured insurance. Fla. Stat. Ann. § 768.76(1).

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Appeal from the Circuit Court for Hillsborough County; Ralph C. Stoddard, Judge.

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BY ORDER OF THE COURT:

***1** Upon consideration of appellant's motion for rehearing and clarification, rehearing en banc, and certification filed on June 25, 2021,

IT IS ORDERED that the motion is granted to the extent that the opinion dated June 11, 2021, is withdrawn and the attached opinion is substituted therefor. Because full relief has been granted by the panel's ruling on the motion for rehearing, the motion for rehearing en banc is denied as moot. The motion for certification is also denied.

No further motions for rehearing will be entertained in this appeal.

Opinion

LABRIT, Judge.

How can a trial court apply a statute meant to prevent plaintiff windfalls when higher court precedent authorizes double recovery in all but the "perfect" case? It can't. Because we too are bound by higher precedent, we affirm the trial court's decision denying the defendant's request to set off $4 million in settlement proceeds against the $30 million jury verdict. And we certify a question of great public importance. We also affirm the four other issues raised on appeal without discussion.

Factual and Procedural Background

Mr. Willoughby sustained serious injuries when a truck driven by Mr. Ellison T-boned an automobile in which Mr. Willoughby was a passenger. Mr. Willoughby sued Mr. Ellison for negligence and Mrs. Ellison—the co-owner of Mr. Ellison's truck—under vicarious liability principles. In the same complaint, Mr. Willoughby asserted claims against his uninsured motorist (UM) insurer, 21st Century Centennial Insurance Company, for UM benefits and bad faith damages pursuant to sections 624.155 and 627.727(10), Florida Statutes (2013).

Two years later, Mr. Willoughby and 21st Century executed a settlement agreement and agreed to release each other from all claims "which were or could have been asserted in the [l]awsuit, including all claims related to the [a]ccident or the [p]olicy." As consideration, 21st Century agreed to pay $4 million to Mr. Willoughby and his counsel.[1] The settlement agreement recites that the $1.735 million payable to Mr. Willoughby "constituted damages on account of personal injuries or sickness, within the meaning of [s]ection 104(a)(2) of the Internal Revenue Code," but it does not otherwise differentiate categories of damage to which the settlement funds are attributable. No other person, firm, or corporation was released by the settlement agreement, and Mr. Willoughby reserved all claims and causes of action against the Ellisons. Shortly after the settlement agreement was executed, Mr. Willoughby dismissed his claims against 21st Century with prejudice and dropped his negligence claim against Mr. Ellison.

[1] 21st Century agreed to remit $2.265 million to the trust account of Mr. Willoughby's counsel upon execution of the settlement agreement and to pay the balance of the settlement proceeds to Mr. Willoughby in periodic payments over a number of years.

After four more years of litigation, Mrs. Ellison admitted liability and stipulated that Mr. Willoughby's past medical expenses were $147,020. The case then went to trial to determine Mr. Willoughby's remaining damages. After a week-long trial, a jury awarded Mr. Willoughby a total of $30,101,599 for future medical expenses, past and future lost earnings, and past and future pain and suffering.

***2** Mrs. Ellison filed posttrial motions in which she sought various relief, including a $4 million setoff attributable to the 21st Century settlement. Although she apparently conceded that Florida case law did not permit a setoff for $10,000 in UM benefits (the policy limits of the 21st Century UM policy), Mrs. Ellison argued that the remaining $3.99 million was subject to setoff under section 768.76, Florida Statutes (2019), as a collateral

source.

At the hearing on Mrs. Ellison's posttrial motions, the parties acknowledged that the question of whether the remaining $3.99 million was subject to setoff was one of first impression. Mrs. Ellison argued that the 21st Century settlement compensated Mr. Willoughby for economic damages, which were included within the amounts awarded by the jury verdict, and that the settlement amount should be set off to prevent a windfall to Mr. Willoughby. Mr. Willoughby maintained that the settlement amount was not subject to setoff because (1) 21st Century and Mrs. Ellison were not joint tortfeasors and (2) UM settlement awards are generally not considered collateral sources. The trial court denied Mrs. Ellison's motion for setoff, reasoning that "[t]he law is clear that an underinsured tortfeasor is not entitled to a setoff for payments made by plaintiff's own UM insurer" and relying on *Hughes v. Enterprise Leasing Co.*, 831 So. 2d 1240 (Fla. 1st DCA 2002); *Terri Van Winkle, P.A. v. Johnston*, 813 So. 2d 1065 (Fla. 1st DCA 2002); *Hernandez v. Gisonni*, 657 So. 2d 33 (Fla. 4th DCA 1995); *Economy Fire & Casualty Co. v. Obenland*, 629 So. 2d 265 (Fla. 2d DCA 1993); and *Respess v. Carter*, 585 So. 2d 987 (Fla. 5th DCA 1991).

Analysis

[1]A trial court's ruling on a motion to determine setoff is reviewed de novo. *See, e.g.*, *Addison Constr. Corp. v. Vecellio*, 240 So. 3d 757, 764 (Fla. 4th DCA 2018) (citing *D'Angelo v. Fitzmaurice*, 863 So. 2d 311, 314 (Fla. 2003)). Mrs. Ellison argues that the trial court erred by denying her motion to set off the 21st Century settlement proceeds under sections 768.041(2) and 768.76(1). We disagree.

1. Setoff under Section 768.041(2)

[2] [3]We first address Mr. Willoughby's argument that Mrs. Ellison did not preserve a claim for setoff under section 768.041(2). Generally, "[a]n issue that has not been framed by the pleadings, noticed for hearing, or litigated by the parties is not a proper issue for the court's determination." *Derouin v. Universal Am. Mortg. Co.*, 254 So. 3d 595, 601 (Fla. 2d DCA 2018). However, "[a] party need not cite the exact cases on point to the trial court in order to preserve a claim, so long as its objection is sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefor." *Lincare Holdings Inc. v. Ford*, 307 So. 3d 905, 912 (Fla. 2d DCA 2020) (cleaned up).

While Mrs. Ellison never specifically cited section 768.041(2) below, this issue was thoroughly litigated in the trial court, and both the parties and the trial court relied on case law analyzing setoff of UM settlements under both sections 768.041(2) and 768.76(1). *See, e.g.*, *Hughes*, 831 So. 2d at 1240–41 (analyzing setoff under sections 768.041(2) and 768.76(1)); *Terri Van Winkle, P.A.*, 813 So. 2d at 1066–67 (same); *Respess*, 585 So. 2d at 989 (analyzing setoff under the collateral source rule and section 768.041). Accordingly, the propriety of setoff under section 768.041(2) is preserved for review.

3** [4]Turning to the merits, "[t]he purpose of [section 768.041(2)] is to prevent a windfall to a plaintiff by way of double recovery." *Addison*, 240 So. 3d at 764. Section 768.041(2) 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*." § 768.041(2) (emphasis added). This text is plain and unambiguous, and 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. However, our supreme court has declared that section 768.041(2) "presupposes the existence of multiple defendants *jointly and severally liable for the same damages*." *D'Angelo*, 863 So. 2d at 314 (emphasis added) (citing *Wells v. Tallahassee Mem'l Reg'l Med. Ctr., Inc.*, 659 So. 2d 249, 253 (Fla. 1995)). The *D'Angelo* court explained 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." *Id.* at 316–17 (emphasis added) (quoting *Gouty v. Schnepel*, 795 So. 2d 959, 965 (Fla. 2001)). The district courts have followed this precedent. For instance, the Third and Fourth Districts have held that if "settlement funds are applicable to a claim asserted only against the settling co-defendant [sic], the non-settling [sic] co-defendants [sic] are not eligible for a set-off [sic] in the amount of the settlement." *Escadote I Corp. v. Ocean Three Ltd. P'ship*, 211 So. 3d 1059, 1062 (Fla. 3d DCA 2016); *accord Addison*, 240 So. 3d at 764.

[5]Mr. Willoughby argues that the 21st Century settlement funds applied only to the claims he asserted against 21st Century (breach of contract for failure to pay UM benefits

and bad faith refusal to settle), which were not asserted against Mrs. Ellison. Mrs. Ellison indisputably was not a joint tortfeasor with 21st Century. *See, e.g.*, *Respess*, 585 So. 2d at 990 ("[A] UM carrier is 'neither a tortfeasor nor an insurer thereof.' "). Thus according to Mr. Willoughby, section 768.041(2) does not entitle Mrs. Ellison to a setoff in the amount of the 21st Century settlement. And under the foregoing precedent, Mr. Willoughby is correct.

[6]Nonetheless, Mrs. Ellison contends that the entire amount of the 21st Century settlement should be set off because the settlement does not apportion amounts attributable to the UM benefits claim (i.e., damages attributable to Mr. Willoughby's injuries) and damages attributable to the bad faith claim. It is true that where "a settlement recovery is not apportioned between (a) claims for which co-defendants [sic] are jointly and severally liable with the settling co-defendant[ ] [sic] and (b) claims which were only asserted against the settling co-defendant [sic], the entire amount of the undifferentiated recovery is allowable as a set-off." *Escadote*, 211 So. 3d at 1063 (citing *Dionese v. City of West Palm Beach*, 500 So. 2d 1347, 1351 (Fla. 1987)). But as the Third District explained in *Escadote*, these principles do not apply where a plaintiff's claim against a settling codefendant "was not and could not be asserted against the [nonsettling] co-defendants [sic]." *Id.* (noting that plaintiff's claim against settling codefendant "included an element of damages that was not a part of" the claim against nonsettling defendants). 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.[2]

[2] In *Escadote*, the lion's share of the settlement amount was attributable to the plaintiff's statutory attorney fee claim against the settling codefendant, which was a claim "unique to" the plaintiff's claim against the settling defendant. *Escadote*, 211 So. 3d at 1061, 1061 n.3. Similarly here, a significant portion of the settlement amount apparently was attributed to Mr. Willoughby's statutory attorney's fee claim against 21st Century, which was unique to his bad faith claim against 21st Century.

***4** [7]Mrs. Ellison also argues that denial of setoff results in a windfall to Mr. Willoughby. However, our supreme court rejected this argument in *D'Angelo*, explaining:

> Settlement dollars are not synonymous with damages but merely a contractual estimate of the settling tortfeasor's liability; they include not only damages but also the value of avoiding the risk and expense of trial. Given these components of a settlement, there is no conceptual inconsistency in allowing a plaintiff to recover more from a settlement or partial settlement than he could receive as damages.

D'Angelo, 863 So. 2d at 318 (cleaned up). Faced with the very real risk of having the obviously inadequate $10,000 UM policy be converted into a "limitless policy" via Mr. Willoughby's bad faith claim, 21st Century chose to quantify and resolve its liability by settling with Mr. Willoughby. *See* *Harvey v. GEICO Gen. Ins. Co.*, 259 So. 3d 1, 20 (Fla. 2018) (Canady, C.J., dissenting). *D'Angelo* teaches us that Mrs. Ellison's windfall argument is unavailing under these circumstances. Against this precedential backdrop, we are bound to conclude that the trial court properly denied setoff under section 768.041(2) and case law interpreting that statute.[3]

[3] Although the trial court did not rely on the above-discussed case law to deny setoff, it was bound by those decisions. *See* *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992). And we are bound to affirm since "the decision of the trial court is primarily what matters, not the reasoning used." *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979).

2. Setoff under Section 768.76(1)

Setoff under section 768.76(1) is likewise unavailable because the 21st Century settlement proceeds do not fall within the statutory definition of "collateral sources" set forth in section 768.76(2)a. At common law, "the damages aspect of the collateral source rule prevented the reduction of damages by collateral sources available to the plaintiff. This rule rested on the principle that a tortfeasor should not benefit from the collateral sources available to the plaintiff." *Joerg v. State Farm Mut. Auto. Ins. Co.*, 176 So. 3d 1247, 1249 (Fla. 2015)

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(citations omitted). The legislature abrogated the common law rule by enacting section 768.76(1), the purpose of which—like the purpose of section 768.041—is to prevent windfalls to plaintiffs; section 768.76(1) also aims to reduce insurance costs. *See id.*

Section 768.76(1) applies to actions where "liability is admitted or determined by the trier of fact and in which damages are awarded to compensate the claimant for losses sustained." § 768.76(1). In such actions, section 768.76(1) mandates setoff of "all amounts which have been paid for the benefit of the claimant ... from all collateral sources." *Id.* In relevant part, "collateral sources" are defined as "payments made to the claimant ... by or pursuant to," among other things, "automobile accident insurance" and "other similar insurance." § 768.76(2)(a)22.

The question, then, is whether the 21st Century settlement proceeds are payments from a "collateral source" within the meaning of section 768.76(2)a. In the settlement agreement, Mr. Willoughby released 21st Century from all claims "related to the [a]ccident or the [p]olicy." At the outset, we note that although the parties and the trial court seemingly divided the settlement funds into two categories—assigning $10,000 to UM benefits and $3.99 million to bad faith damages—neither party attempted to allocate the settlement funds to particular categories of damage, such as past or future medical expenses. Accordingly, the trial court wasn't faced with (and we do not decide) the question of whether any portion of the settlement proceeds constituted payments for future medical expenses, which are not subject to setoff under section 768.76(1). *See Allstate Ins. Co. v. Rudnick*, 761 So. 2d 289, 293 (Fla. 2000) (holding that 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 ("Additionally, this Court has determined that section 768.76 does not allow reductions for *future* medical expenses.").

***5** [8] [9]Whatever portion of the settlement is allocable to Mr. Willoughby's claim for UM benefits under the 21st Century policy is not subject to setoff. For starters, subsection 768.76(1) provides that "there shall be no reduction for collateral sources for which a subrogation or reimbursement right exists." Here of course, 21st Century has a subrogation claim against the Ellisons for the amount of UM benefits it paid to Mr. Willoughby on account of his injuries caused by the crash. *See* § 627.727(6); *Metro. Cas. Ins. Co. v. Tepper*, 2 So. 3d 209, 214 (Fla. 2009). Thus, to whatever extent the settlement payments are subject to subrogation, they are not collateral sources because they are excluded by section 768.76(1). Furthermore, as the trial court noted, the case law is clear that "uninsured motorist payments are not collateral sources to be deducted from the jury verdict." *Obenland*, 629 So. 2d at 267 (citing *Int'l Sales-Rentals Leasing Co. v. Nearhoof*, 263 So. 2d 569 (Fla. 1972)); *accord Respess*, 585 So. 2d at 989 ("[T]he general rule ... is that a joint tortfeasor is not entitled to setoff for amounts paid by a UM carrier to the injured party."); *see also Hughes*, 831 So. 2d at 1241 (holding that the trial court erred reversibly by reducing the damages award by "the amount of UM benefits" that plaintiff received in a settlement with the UM insurer). The underlying principle is that "[t]he cautious insured should not be penalized for obtaining UM insurance and, by the same token, it would be unfair for the tortfeasor to benefit by the insured's payment of the UM insurance premium or by the UM insurer's statutorily mandated payments on behalf of the tortfeasor." *Obenland*, 629 So. 2d at 267.

[10]Moving on to whatever portion of the settlement is allocable to Mr. Willoughby's claim for bad faith damages, the above-cited cases (upon which the trial court relied to deny setoff) involved settlements for UM benefits within the applicable policy limits. We have uncovered no case law addressing the question of whether extracontractual damages paid to a first-party claimant on a UM bad faith claim are subject to setoff. By statutory definition, "collateral sources" means "payments made to the claimant ... pursuant to ... automobile accident insurance that provides health *benefits* or income disability coverage; and any other similar insurance *benefits*." § 768.76(2)(a)22 (emphasis added). An extracontractual payment on a bad faith claim does not appear to meet this definition because it is not a payment of "benefits."

[11] [12]"Benefits" in the automobile casualty insurance context traditionally means the amount an insurer must pay on account of an insured's injuries that fall within the scope and limits of coverage. *See, e.g.*, *Progressive Select Ins. Co. v. Fla. Hosp. Med. Ctr.*, 260 So. 3d 219, 224 (Fla. 2018) (distinguishing insurance "benefits" from a claimant's "expenses and losses" and explaining how "expenses and losses" differ from "benefits" recoverable under a PIP policy). Damages recoverable on a UM bad faith claim include the claimant's "damages" that fall within the policy limits (i.e., benefits), but—by statutory mandate—bad faith damages also include an "amount in excess of the policy limits." §§ 627.727(10), 624.155(8); *see Fridman v. Safeco Ins. Co. of Ill.*,

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185 So. 3d 1214, 1221 (Fla. 2016). And as our supreme court has explained, bad faith damages are considered a "punitive, extracontractual award" because bad faith claims punish the insurer's failure to fulfill its obligations to the insured. *Harvey*, 259 So. 3d at 13, 15 (Canady, C.J., dissenting); *see* *Fridman*, 185 So. 3d at 1223 (explaining that bad faith damages under section 627.727(10) "are, in substance, a penalty"). Because punitive, extracontractual damages—like bad faith damages—are not "benefits," we conclude that the portion of the settlement allocable to bad faith damages is not subject to setoff.

a. Distribution of the Settlement Proceeds Under the Settlement Agreement and Mrs. Ellison's Reliance on Willoughby v. Agency for Health Care Admin.

[13]The settlement agreement recites that the $1.735 million payable to Mr. Willoughby "constitute[s] damages on account of personal injuries or sickness, within the meaning of Section 104(a)(2) of the Internal Revenue Code." For the reasons discussed above and to the extent the payments to Mr. Willoughby are viewed as compensation for past medical expenses (as opposed to future medical expenses), they are not "collateral sources" as defined by section 768.76(2)a. Likewise, the $2.265 million payment to the trust account of Mr. Willoughby's counsel does not appear to fall within any definition of "collateral sources" in section 768.76(2)a; instead, some or all of that payment appears subject to offset as an amount Mr. Willoughby paid to secure his right to the 21st Century settlement. *See* § 768.76(1) (stating that collateral source "reduction shall be offset to the extent of any amount which has been paid ... by, or on behalf of, the claimant ... to secure her or his right to any collateral source benefit which the claimant is receiving as a result of his or her injury").[4]

4 Our record does not reveal to whom the $2.265 million was distributed from the trust account, and neither party has argued that Mr. Willoughby's counsel's ultimate receipt of some or all of these funds affects the setoff analysis.

***6** Like she did in the trial court, Mrs. Ellison relies on our decision in *Willoughby v. Agency for Health Care Admin.*, 212 So. 3d 516 (Fla. 2d DCA 2017), to argue that the entirety of the 21st Century settlement proceeds are collateral sources within the meaning of 768.76(1). In *Willoughby*, the Agency for Health Care Administration (AHCA) sought to impose a Medicaid lien against the proceeds of the 21st Century settlement to collect approximately $148,000 in medical expenses that Mr. Willoughby incurred (and Medicaid paid) in connection with the injuries he suffered in the crash with Mr. Ellison. *Id.* at 519–20. Mr. Willoughby argued that "no part of the bad faith recovery could be allocated to his medical expenses," maintaining that "bad faith damages were exclusively a punishment for failure to settle an insurance claim properly." *Id.* at 520–21. We rejected this argument, reasoning that the settlement agreement characterized the amounts payable to Mr. Willoughby as "damages on account of personal injuries or sickness" and "[d]amages in first-party bad faith actions are to include *the total amount of a claimant's damages*." *Id.* at 521 (quoting *Fridman*, 185 So. 3d at 1223).

Section 409.910(6), Florida Statutes (2015)—upon which AHCA relied to support its lien—applies to "third-party benefits" including those "received from any causes of action, suits, claims ... and demands that accrue to the [Medicaid] recipient ... related to any covered injury, illness or necessary medical care ... for which Medicaid paid." *Willoughby*, 212 So. 3d at 521 (cleaned up). Applying this statutory text, we concluded that "the bad faith portion of the settlement was available to satisfy the lien." *Id.* In so concluding, we explicitly recognized that, since "not all personal injury damages are for medical expenses," AHCA could not "recoup its Medicaid lien from settlement proceeds allocable to nonmedical expenses damages." *Id.* at 522–23. We also held that the Medicaid lien did not attach to future medical expenses and was limited to past medical expenses. *Id.* at 524–25. Because Mr. Willoughby and AHCA stipulated that "Mr. Willoughby recovered less than $147,019.61 for past medical expenses" in the 21st Century settlement, we remanded for further consideration of the amount of the lien to be imposed against that portion of the settlement proceeds. *Id.* at 525–26.

Willoughby does not support Mrs. Ellison's contention that the 21st Century settlement proceeds are a collateral source within the meaning of section 768.76(2)a. That some portion of the proceeds (in an amount less than $148,000) fell within the definitional ambit of section 409.910(6) has no bearing on whether the proceeds meet the definitional criteria of section 768.76(2)a—which provides a narrower, more specific definition of

"benefits" and sources thereof than section 409.910(6). And to the extent *Willoughby* aligns with the holdings of *Rudnick* and *Joerg* by excluding future medical expense payments for lien and offset purposes respectively, *Willoughby* undermines Mrs. Ellison's argument that the entire 21st Century settlement proceeds are a collateral source.[5]

5 Given that the amounts payable to Mr. Willoughby are structured as periodic payments to be made over the next several decades, there is at least some question as to whether and to what extent those payments are for future medical expenses. Likewise, there is an obvious question as to whether and to what extent those payments include noneconomic damages, which *Willoughby* recognized were not subject to AHCA's lien and which are not subject to setoff under section 768.76(1). *See* *id.* at 522–23; *Olson v. N. Cole Const., Inc.*, 681 So. 2d 799, 800 (Fla. 2d DCA 1996).

Lastly, while Mrs. Ellison was not a party to (and is not bound by) the AHCA-Willoughby stipulation that the 21st Century settlement covered less than $148,000 of Mr. Willoughby's past medical expenses, Mrs. Ellison stipulated in *this* action that Mr. Willoughby's past medical expenses were $147,020. And she has made no attempt to show what portion of the settlement is attributable to those past medical expenses *or* any other category of damages. As discussed above, this is likely fatal to her ability to establish that some or all of the settlement proceeds are subject to offset under supreme court precedent interpreting section 768.76(1). In short, *Willoughby* does not alter our conclusion that the 21st Century settlement proceeds are not collateral sources subject to offset under section 768.76(1).

***7** [14] [15]Mrs. Ellison again urges that, unless the judgment is reduced by the entire $4 million settlement amount, Mr. Willoughby will receive a windfall. To the extent this is true, it is out of our hands. As this court and others have recognized, the underlying principle of the collateral source rule " 'is that it is better for the wronged plaintiff to receive a potential windfall than for a tortfeasor to be relieved of responsibility for the wrong,' particularly in the case of UM insurance since the insured procured the insurance." *Obenland*, 629 So. 2d at 267 (quoting *Respess*, 585 So. 2d at 990); *accord Terri Van Winkle, P.A.*, 813 So. 2d at 1069 (Ervin, J., concurring). Here, Mr. Willoughby's counsel was "ingenious" in inducing 21st Century to agree to the settlement (which resolved 21st Century's potentially "limitless" liability under a $10,000 UM policy), and we cannot discern in either the statutory text or the existing case law any reason why "that ingenuity should accrue to the benefit of" Mrs. Ellison. *Respess*, 585 So. 2d at 990; *see* *Harvey*, 259 So. 3d at 20 (Canady, C.J., dissenting).

Conclusion

As discussed above, this case features a question of first impression. Because allocation of liability in settlements of tort and bad faith actions is a significant and recurring concern to the citizens of Florida, we certify the following question as one 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?

Affirmed and question certified.

CASANUEVA and LaROSE, JJ., Concur.

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