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IN THE SUPREME COURT OF THE STATE OF FLORIDA

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

RECEIVED, 01/19/2023 04:46:20 PM, Clerk, Supreme Court

ALBERTA S. ELLISON,

Petitioner,

v.

RANDY WILLOUGHBY,

Respondent.

# PETITIONER'S REPLY BRIEF ON THE MERITS

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

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## JURISDICTION

Plaintiff argues this Court should discharge jurisdiction because the question the Second District certified to be of great public importance is not really important. Plaintiff argues the issues presented here have never been and will never again be seen. This is the same argument Plaintiff presented in his answer brief on jurisdiction, which was rejected by the Court in accepting jurisdiction. Plaintiff has presented nothing to suggest the Court overlooked or misapprehended anything in accepting jurisdiction or why it should reconsider its prior decision. Plaintiff's argument also is belied by amici appearing on both sides to address the issues raised by the certified question.

The Second District certified the question "[b]ecause allocation of liability in settlements of tort and bad faith actions is a significant and recurring concern to the citizens of Florida." *Ellison v. Willoughby*, 326 So. 3d 214, 224 (Fla. 2d DCA 2021). The Second District's holding, however, will have even broader implications given it will preclude application of section 768.041 where settling and non-settling defendants are sued for the same damages, but not sued as joint tortfeasors on the same claim. This would allow

double recovery of damages and defeat the very purpose of the statute.

## 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 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). The legislature enacted setoff statutes to carry out this public policy against double recovery. "The purpose of the setoff statutes is to prevent a windfall to a plaintiff by way of double recovery." *Addison*, 240 So. 3d at 764.

#### A. Ellison Is Entitled To A Setoff Of the 21st Century Settlement Under Sections 768.041(2) and 46.015(2), Florida Statutes.

Section 768.041(2) provides:

> At trial, if any defendant shows the court that the plaintiff, or any person lawfully on her or his behalf, has delivered a release or covenant not to sue to any person, firm, or corporation in partial satisfaction of 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). Section 46.015(2) contains the nearly identical language and requires a setoff under the same circumstances.[1]

The Second District below stated 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 erroneously concluded decisions of this Court require ignoring the plain and unambiguous text and denying Ellison's request for a setoff because Ellison and 21st Century were not joint tortfeasors sued on the same claim:

> [O]ur supreme court has declared that section 768.041(2) "presupposes the existence of multiple defendants *jointly and severally liable for the same damages*." . . . Mrs. Ellison indisputably was not a joint tortfeasor with 21st Century. Thus according to Mr. Willoughby, section 768.041(2) does not entitle Mrs. Ellison to a setoff in the

[1] Given the language of the statutes is identical in all material respects, the discussion below and in the initial brief as to section 768.041 applies equally to section 46.015.

> amount of the 21st Century settlement. And under the foregoing precedent, Mr. Willoughby is correct.
>
> . . . 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." [T]hese principles do not apply where a plaintiff's claim against a settling codefendant "was not and could not be asserted against the [nonsettling] codefendants [sic]." . . . 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.

*Id.* at 219-20 (citations omitted).

The cases the Second District relied on for its erroneous conclusion addressed how setoff statutes apply between joint tortfeasors in light of joint and several liability being eliminated by section 768.81(3), Florida Statutes. *D'Angelo v. Fitzmaurice*, 863 So. 2d 311 (Fla. 2003); *Gouty v. Schnepel*, 795 So. 2d 959 (Fla. 2001); *Wells v. Tallahassee Mem'l Reg'l Med. Ctr., Inc.*, 659 So. 2d 249 (Fla. 1995). As discussed at length in Ellison's initial merits brief, 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 as requiring a setoff in this case. *Grobman v. Posey*, 863 So. 2d 1230 (Fla. 4th DCA 2003); *Escadote I Corp. v. Ocean Three Ltd. P'ship*, 211 So. 3d 1059 (Fla. 3d DCA 2016).

Plaintiff's supporting amicus, Florida Justice Association ("FJA"), concedes this point and that Plaintiff's argument to the contrary is incorrect: "[T]he defendant and the settling third party need *not* be joint tortfeasors [[f]or section 768.041(2) to apply]; rather, they need only be jointly liable for the *same damages*" and "[a] defendant and a settling third party need not be joint tortfeasors to be jointly liable for the same damages." (FJA Brf. 16, 17)[2] FJA tries to walk around the Second District's error by asserting the Second District did not hold and Plaintiff's position has never been that setoffs can only apply between tortfeasors who

[2] Given FJA's concession that the settling and non-settling defendants need not be joint tortfeasors, its following references to "jointly liable" would be more accurately stated as "each liable," i.e., "they need only be [each] liable for the *same damages*."

are jointly and severally liable on the same claims. (FJA Brf. 2, 16-17) FJA's attempt to argue around the Second District's erroneous ruling falls flat when the express language of the opinion (set forth above) is reviewed. Likewise, FJA's assertions that Plaintiff never made the erroneous argument that led to the Second District's erroneous opinion, recounted in the opinion itself, is belied by Plaintiff's briefs. (*See, e.g.*, Resp. Brf. at 21-34, 35)[3]

It also seems self-evident that the 21st Century settlement was "in partial satisfaction of the damages sued for" in the claim against Ellison. Plaintiff sued 21st Century for statutory bad faith under section 624.155. (R.46-53) In 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

[3] Plaintiff argues to this Court, incorrectly as conceded by FJA, that "a non-settling defendant is only entitled to a setoff for a settlement with a prior co-defendant *if* (1) the settling defendant was jointly and severally liable with the non-settling defendant, *and* (2) . . . ." (Resp. Brf. 25-26; *id.* 21, 29-30, 35)

Crash." (R.43-53) On this point, the Second District got it right: "Mrs. Ellison showed that Mr. Willoughby delivered a release to 21st Century in partial satisfaction of the damages he sued for in this lawsuit" against Ellison. *Ellison*, 326 So. 3d at 219 (internal quotes omitted).

Willoughby and FJA also diverge on this point. FJA concedes that "[s]ome damages may be the same," but argues "[a] defendant tortfeasor is entitled to set off only those amounts paid to plaintiff by a UM carrier (in settlement or via judgment) that are 'in partial satisfaction of the damages' for which the torfeasor is sued." (FJA Br. 10, 12-13) As FJA also acknowledges, this Court has held that the damages recoverable in a bad faith action against a UM insurer include "any damages in excess of the [UM] policy limits for the injuries arising from the automobile accident" and that a determination of the full extent of the insured's damages caused by the accident determined on the UM claim is binding between the parties as the damages recoverable on the bad faith claim. (FJA Br. 8, quoting *Fridman v. Safeco Ins. Co.*, 185 So. 3d 1214, 1222, 1228 (Fla. 2016)); *see also 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" and the amount so determined on the UM claim is binding between the parties as to damages recoverable on the bad faith claim).

Surely, the amount of damages caused by the tortfeasor in the accident would not be binding as to damages recoverable on the bad faith claim, as this Court in *Fridman* and the Fourth District in *Paton* held, unless they were the same "damages sued for." Willoughby's argument to the contrary should be rejected. Moreover, the fact that Plaintiff could recover elements of damages against 21st Century in addition to the damages sued for against Ellison does not mean the same damages are not involved as Plaintiff argues, but rather leads to the issue of the amount of the setoff that should be allowed.

The final issue presented is the amount of the setoff that should have been allowed here. It is undisputed that the settlement agreement between Willoughby and 21st Century did not apportion or allocate any amount of the $4 million between the UM and bad faith claims or any elements or categories of damages recoverable under either of those claims. (Resp. Br. 34; FJA Br. 11) As such, the

rule established by this Court in *Dionese v. City of W. Palm Beach*, 500 So. 2d 1347, 1350 (Fla. 1987), applies: "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." *See also Liberty Mut. Ins. Co. v. Wolfson*, 299 So. 3d 28, 33-34 (Fla. 4th DCA 2020); *Addison*, 240 So. 3d at 762-68; *Cornerstone SMR, Inc. v. Bank of America, N.A.*, 163 So. 3d 565, 569-71 (Fla. 4th DCA 2015); *Nauman v. Eason*, 572 So. 2d 982, 983-85 (Fla. 1st DCA 1991).

Plaintiff admits the 21st Century settlement does not allocate any portion of the $4 million between claims or elements of damages. (Resp. Br. 34) But Plaintiff argues this does not matter because section 768.041(2) itself does not apply based on his argument that a setoff is allowed only if the settling and non-settling defendants are jointly and severally liable for the identical damages. (Resp. Br. 34-36) As discussed above and in Ellison's initial brief, however, Plaintiff's predicate argument is wrong and, thus, his attempt to avoid the *Dionese* rule fails. Moreover, the fact that Plaintiff could recover elements of damages against 21st Century in addition to the damages sued for against Ellison does

not mean the same damages are not involved. Rather, it is this fact that actually requires application of the *Dionese* rule in the first place because the settlement with 21st Century did not allocate amounts between any elements of damages. To the contrary, it provided "[a]ll sums set forth herein constitute damages on account of personal injuries or sickness" for tax purposes. (R.2177)

For its part, FJA admits that the settlement was in partial satisfaction for at least some of the "damages sued for" against Ellison, but asserts a setoff was properly denied because Ellison failed to a carry her purported burden of proof of establishing how much of the unallocated settlement was in partial satisfaction of the "damages sued for" against Ellison. (FJA Br. 10-15) Of course, FJA's argument wholly ignores this Court's *Dionese* rule, which requires the entire amount of the settlement be set off against the verdict because the settlement agreement contained no allocation between the elements of damages. No proof beyond the undifferentiated settlement agreement itself, which was attached to Ellison's motion for setoff and never objected to or disputed by Plaintiff, was required to be presented by Ellison. (R2170-83) *See Addison*, 240 So. 3d at 768 (courts are not to delve into the scope of

undifferentiated settlement agreements for purposes of making setoff determinations, but rather such agreements require a setoff of the entire amount of the settlement).

Finally, both Plaintiff and FJA seem to suggest that the setoff was properly denied because Ellison did not present evidence of the settlement and release "at trial." As an initial matter, this argument is being raised for the first time in this Court, was not raised in the trial court or Second District, and, as such, should not be considered by this Court. Moreover, the argument is without merit. Despite the "at trial" language in the statutes, the statutes also prohibit any evidence of settlement or dismissal of a defendant at trial, which "admits no exceptions, and violation . . . is reversible error." *See Holmes v. Area Glass, Inc.*, 117 So. 3d 492, 494 (Fla. 1st DCA 2013) (citing *Saleeby v. Rocky Elson Constr., Inc.*, 3 So. 3d 1078, 1086 (Fla. 2009)); *see also* §§ 768.041(3); 46.015(3). In reconciling these provisions, trial courts should "defer claims of setoff predicated upon settlement as unripe until such time as liability has been found, but before judgment is rendered." *American Prime Title Servs., LLC v. Wang*, 317 So. 3d 1183, 1186-87 (Fla. 3d DCA 2021) (citing numerous cases, including *Dionese*, in

which setoffs for settlements were first addressed by post-trial motions and hearings). Accordingly, Ellison properly raised this issue in her pre-trial motion for setoff and post-trial memorandum in support of the motion, having asserted the setoff defense in her answer. (R.2170-83, 3170-75, 98-102)

**B. Ellison Properly Preserved Her Right To Setoff.**

In point I.B. of his brief, Plaintiff incorrectly asserts Ellison did not preserve an argument for setoff under section 768.041 because she cited only section 768.76, Florida Statutes, in her motion for setoff. To begin with, an issue is preserved for appeal even where a party does not cite a specific statutory provision or any authority directly on point to support the argument as long as the party's argument is clear. *See Williams v. State*, 414 So. 2d 509, 512 (Fla. 1982) (legal argument preserved even though counsel did not cite specific laws or use "magic words"); *State v. Wynn*, 948 So. 2d 945, 947 (Fla. 5th DCA 2007) (argument preserved even though state never cited to any case directly on point); *Baskin v. State*, 898 So. 2d 266, 267 (Fla. 2d DCA 2005) (error preserved even though party did not cite specific rule or any case authority); *see also Wilson Ins. Serv. v. West Am. Ins. Co.*, 608 So. 2d 857, 858 (Fla. 4th DCA 1992)

(reversing denial of costs despite party citing to the wrong statute in its motion for costs filed in trial court).

Ellison's position on setoff was clear in her motion – she was entitled to a setoff of the 21st Century settlement because Plaintiff cannot be compensated for the same damages twice under Florida law. (R.2170-72, 3170-75) In making that argument, Ellison not only cited section 768.76, but also relied on case law that applied all three setoff statutes, including sections 768.041 and 46.015. (R.3170-75) Moreover, Plaintiff necessarily understood this given he presented argument against a setoff under section 768.041 as well. (R.3168, SR.17279) Accordingly, the Second District correctly found "the propriety of setoff under section 768.041(2) is preserved for review" in this case. *Ellison*, 326 So. 3d at 218-19.

### C. Ellison Is Also Entitled To A Setoff Under Section 768.76, Florida Statutes.

The Second District erred in finding the 21st Century settlement proceeds did not constitute similar "benefits" (similar to automobile accident insurance benefits) so as to be a collateral source subject to setoff per section 768.76(1) and (2)(a)2. The bad faith damages paid per the settlement arose from 21st Century's

breach of its obligations to pay UM benefits under the automobile insurance contract. The amounts paid to settle the UM and bad faith claims were "benefits" derived from the contractual claim arising from the automobile insurance policy. *See QBE Ins. Corp. v. Chalfonte Cono. Apt. Ass'n*, 94 So. 3d 541, 548-49 (Fla. 2012) ("Florida contract law does recognize an implied covenant of good faith and fair dealing in every contract," and section 624.155 is a codification of that covenant); *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").

Moreover, the 21st Century settlement agreement 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 of "collateral sources" in section 768.76(2)(a)4.

Accordingly, if the Court reaches this issue, it should hold the $4 million 21st Century settlement was a "collateral source" that should have been set off from the verdict under section 768.76(1) to effectuate the admitted purpose of the statute of avoiding double recovery by a plaintiff, answering the certified question in the affirmative in this regard.

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

Ellison "loaned" the jointly owned car to her husband, who was driving it at the time of the accident. This was stipulated in the case by virtue of Ellison's admission to the allegation in the complaint that she was vicariously liable for her husband's negligence in driving the car by virtue of the dangerous instrumentality doctrine, which requires the driver be driving with the permission of the owner. (R.45, 99, 4301) *Richbell v. Toussaint*, 221 So. 3d 76, 768 (Fla. 4th DCA 2017) 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 id.* at 767 ("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").

Because the 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. *See Richbell*, 221 So. 3d at 767-68. As discussed in Ellison's initial brief, the holding to the contrary in *Ortiz v. Regalado*, 113 So. 3d 57 (Fla. 2d DCA 2013), improperly incorporated concepts of title and ownership as to the permissive user into an unarticulated definition of the term "loans" as used in the statute, is contrary to 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,

and is legally erroneous. 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.

Contrary to Plaintiff's contention, insurance was referenced no fewer than six times during voir dire and the venire was told, multiple times, that insurance would pay for the damages caused by a driver in an automobile accident. (R.3390, 3408, 3421, 3418, 3450) That is precisely what Florida law prohibits, regardless of whether the references to insurance are deliberate or inadvertent and regardless of who makes the references heard by the jurors deciding the case. (IB at 49-51) (citing cases).

The effect of these references to insurance cannot be minimized as Plaintiff attempts to do. Ellison included direct quotes from the statements made by several members of the venire, in which the individuals plainly said insurance companies have to pay for the damage you do and insurance companies are the ones with

the money. (R.3418, 3450) These were not mere passing or isolated references to "insurance," but rather they were references to insurance paying for the damages awarded. They were made in the context and manner that makes the reference particularly prejudicial – when the suggestion relates to whether an adverse judgment would be paid by the defendant or the defendant's insurer. *Nicaise v. Gagnon*, 597 So. 2d 305, 306-07 (Fla. 4th DCA 1992).

Plaintiff's suggestion that Ellison did not preserve this issue because she did not immediately object every time insurance was mentioned is likewise incorrect. Ellison made her objection to the reference to insurance clear during voir dire, objecting the first two times insurance was mentioned, again when Plaintiff completed his voir dire with Ellison pointing out that insurance had been raised two more times, and again before the jury was sworn. (R.3391-92, 3410, 3447, 3496)[4] There is no question the trial court was on

[4] Plaintiff suggests Ellison withdrew her objections (Resp. Br. 2), but Ellison withdrew only an objection to Plaintiff's question regarding whether there was a concern about a verdict affecting insurance premiums given relevant case law, but not the objections to the

notice that Ellison believed the venire had been unfairly influenced and Ellison was unfairly prejudiced by these references such that the venire should be stricken. *See Franqui v. State*, 804 So. 2d 1185, 1192 (Fla. 2001) (the purpose of preservation is "to place the trial judge on notice that an error may have occurred and provide him or her with the opportunity to correct the error at an early stage of the proceedings"). Ellison was not required to exacerbate the prejudice by repeatedly objecting to every reference to insurance. *See Webb v. Priest*, 413 So.2d 43, 46 (Fla. 3d DCA 1982) (party not required "to renew objection each time in what would have been an obviously futile gesture"). Ellison thus adequately preserved the issue for review.

Finally, Plaintiff cannot show, and has not attempted to show, that the trial court's error in overruling Ellison's objections to the repeated, prejudicial references to insurance during voir dire and denying her motion for mistrial (to strike the venire) could not have contributed to the verdict. *See Special v. W. Boca Med. Ctr.*, 160 So.

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remainder of the discussion and references to insurance that occurred. (R.3495-97, SR.17253-57)

3d 1251, 1265 (Fla. 2014). Accordingly, this Court should hold the Second District erred in affirming the trial court's denial of Ellison's motions for mistrial and new trial and remand for a new trial.

## CONCLUSION

Ellison requests the Court answer the certified question in the affirmative and grant the relief requested in her initial brief.

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 January 19, 2023:

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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 4,000 words).

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