SUPREME COURT OF FLORIDA

CASE NO.: SC21-1580

ALBERTA S. ELLISON,

Petitioner,

v.

RANDY WILLOUGHBY,

Respondent.
_____/

AMICUS BRIEF OF
FLORIDA DEFENSE LAWYERS ASSOCIATION
IN SUPPORT OF PETITIONER

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PRELIMINARY STATEMENT

This amicus curiae brief is submitted by the Florida Defense Lawyers Association ("FDLA") in support of the Petitioner Alberta S. Ellison.

STATEMENT OF IDENTITY AND INTEREST

The FDLA is a statewide organization of civil defense attorneys formed in 1967, and it has over 1,200 members. Its goal is to "support and work for the improvement of the adversary system of jurisprudence in our courts." To this end, the FDLA maintains an active amicus curiae committee through which members donate their time and skills to submit briefs in cases pending in state and federal appellate courts. The FDLA has actively participated in amicus briefing in numerous cases which involve significant legal issues that impact the interests of the defense bar or the fair administration of justice statewide, many of which concern tort, litigation, and insurance issues.

This case has statewide impact as it addresses whether a defendant is entitled to a setoff of proceeds of an extracontractual liability settlement agreement involving a co-defendant. The Second District certified the issue as a question of great public importance. See Ellison v. Willoughby, 326 So. 3d 214 (Fla. 2d DCA 2021) ("Willoughby II").

The FDLA is uniquely situated to provide this Court with input as its members are those representing defendants in this very situation across the state. This Court's decision will dictate the ultimate amount defendants are liable for. The FDLA's members regularly advise their clients as to their exposure in cases and actively litigate these issues.

SUMMARY OF THE ARGUMENT

Two principles are at odds in this proceeding: the prevention of "a windfall to a plaintiff by way of double recovery," and the concept that a tortfeasor should not benefit from an injured party's foresight to purchase uninsured motorist coverage. Willoughby II, 326 So. 3d at 219; see also Respess v. Carter, 585 So. 2d 987, 988 (Fla. 5th DCA 1991) ("The broad issue presented is whether a tortfeasor should gain the benefit of proceeds from UM coverage of an insurance policy, the premium for which was paid by the injured party."); Robert C. Weill, Gone With The Windfall: Limiting Past Medical Expenses To Paid, Not Billed, Charges, 23 Trial Advoc. Q. at *8 (2004) (This case "cuts to the heart of the conflict between the compensatory purpose of our tort system (i.e., making plaintiffs whole) and the policy that tortfeasors should bear the full burden of losses caused by their tortious conduct.").

Declining to apply the plain language of section 768.041(2), Florida Statutes, the Second District Court of Appeal interpreted the Court's precedent to allow Randy Willoughby to recover the same damages twice—once from his UM insurer, 21st Century Insurance, and again from defendant, Roberta Ellison. Willoughby II, 326 So. 3d at 217. This Court should answer the certified question in the affirmative and quash the Second District's opinion. In doing so, this Court should clarify its precedent, and follow the higher legal authority—section 768.041, Florida Statutes. State v. Poole, 292 So. 3d 694, 713 (Fla. 2020).

ARGUMENT

I. THIS COURT SHOULD ANSWER THE CERTIFIED QUESTION IN THE AFFIRMATIVE AND QUASH THE SECOND DISTRICT'S OPINION.

"It has long been established as a fundamental principle of Florida law that the measure of compensatory damages in a tort case is limited to the actual damages sustained by the aggrieved party." Dial v. Calusa Palms Master Ass'n, Inc., 337 So. 3d 1229, 1231 (Fla. 2022) (Polston, J., concurring) (citing Goble v. Frohman, 901 So. 2d 830, 834 (Fla. 2005) (Bell, J., specially concurring)). Limiting compensatory damages to this extent "restore[s] the injured party to the position it would have been in had the

wrong not been committed." Nordyne, Inc. v. Fla. Mobile Home Supply, Inc., 625 So. 2d 1283, 1286 (Fla. 1st DCA 1993). Accord Mercury Motors Express, Inc. v. Smith, 393 So. 2d 545, 547 (Fla. 1981) ("The objective of compensatory damages is to make the injured party whole to the extent that it is possible to measure his [or her] injury in terms of money.").

This objective is satisfied when an injured plaintiff, like Willoughby, is compensated fully for injuries sustained in a single accident. MCI Worldcom Network Servs., Inc. v. Mastec, Inc., 995 So. 2d 221, 223 (Fla. 2008) ("A plaintiff . . . is not entitled to recover compensatory damages in excess of the amount which represents the loss actually inflicted by the action of the defendant."); Board of Educ. Of McDowell County v. Zando, Martin & Milstead, Inc., 390 S.E.2d 796, 808 (W.Va. 1990) ("An injured person is entitled to one full compensation for his injuries, and a double recovery for the same injury is against public policy. This, a plaintiff who has recovered for his damages should have no basis to complain because a defendant benefitted from a setoff.") (citing Eberle v. Brenner, 505 N.E.2d 691, 693 (Ill. App. 3d 1987)). Yet, the Second District's opinion permits Willoughby to reap additional recovery in excess of his total damages—a dangerous precedent that this Court should reject.

The plain language of section 768.041, Florida Statutes, provides in pertinent part:

> At trial, if any defendant shows the court that the plaintiff, or any person lawfully on her or his behalf, has delivered a release or covenant not to sue to any person, firm, or corporation in partial satisfaction of the damages sued for, the court shall set off this amount from the amount of any judgment to which the plaintiff would be otherwise entitled at the time of rendering judgment and enter judgment accordingly.

§ 768.041(2), Fla. Stat. See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 56 (2012). The plain text does not mention joint tortfeasors or otherwise limit its application.

"This statute is designed to prevent a double recovery for a single injury." Hess v. Walton, 898 So. 2d 1046, 1051 n.5 (Fla. 2d DCA 2005). See generally Gen. Tel. Co. v. EEOC, 446 U.S. 318, 333 (1980) ("It also goes without saying that the courts can and should preclude double recovery by an individual."); Montage Grp., Ltd. v. Athle-Tech Comput. Sys., 889 So. 2d 180, 199 (Fla. 2d DCA 2004) ("A double recovery based on the same element of damages is prohibited."). Indeed, double recovery is against public policy. Fence Wholesalers of Am., Inc. v. Beneficial Commercial Corp., 465 So. 2d 570, 571 (Fla. 4th DCA 1985) ("Such double recovery is unlawful because repugnant to public policy.").

It is irrefutable that Ellison and 21st Century were sued for the same damages—Respondent's personal injuries. As set forth below, 21st Century's payment necessarily was for those personal injuries. See § 627.727(10), Fla. Stat. The plain and unambiguous language of section 768.041(2), Florida Statutes, requires a setoff.

A. SETOFF IS APPROPRIATE BECAUSE THE SETTLED AND RELEASED DAMAGES IN THIS CASE OVERLAP COMPLETELY WITH THE TORTFEASOR'S LIABILITY

Florida courts have often struggled with the interplay between an uninsured motorist claim and the later first-party bad faith lawsuit. See, e.g., Geico Gen. Ins. Co. v. Bottini, 93 So. 3d 476, 477 (Fla. 2d DCA 2012); Safeco Ins. Co. v. Fridman, 117 So. 3d 16, 18 (Fla. 5th DCA 2013). Nevertheless,

> Florida, by statute, imposes a duty on insurers to settle their policyholders' claims in good faith. Fla. Stat. § 624.155. If a UM insurer fails to settle a legitimate claim within the statutory time limit, its policyholder may obtain, through two lawsuits, two sets of damages: one for breach of contract up to the policy maximum and another for bad faith for the full amount of the policyholder's injury ("statutory damages").

Bottini v. GEICO, 859 F.3d 987, 988 (11th Cir. 2017). Those statutory damages include: "the total amount of the claimant's damages, including the amount in excess of the policy limits. . . . The total amount of the claimant's damages is recoverable whether caused by an insurer or by a third-party

tortfeasor." § 627.727(10), Fla. Stat. See also State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 60-61 (Fla. 1995).

By the plain text of section 627.727, Florida Statutes, 21st Century's settlement payment and release were not simply for UM benefits. Instead, the excess amount was a payment towards the "total amount of the claimant's damages." This wholly overlapped and duplicated the jury's award against Ellison.

This is further demonstrated by the fact that the jury verdict form would have been the exact same if 21st Century was present at trial or not. There would have been lines for the jury to award past medical expenses, future medical expenses, past pain and suffering, and future pain and suffering. See, e.g., State Farm Mut. Auto. Ins. Co. v. Vega, 753 So. 2d 738, 740 (Fla. 3d DCA 2000). Permanency is also required to be proven to recover noneconomic damages. See, e.g., Geico Gen. Ins. Co. v. Cirillo-Meijer, 50 So. 3d 681, 684 (Fla. 4th DCA 2010); Somoza v. Allstate Indem. Co., 929 So. 2d 702, 705 (Fla. 3d DCA 2006). See generally Allstate Ins. Co. v. Morales, 533 So. 2d 952, 953 (Fla. 5th DCA 1988) ("Because UM coverage under section 627.727(1) (1983) was intended to be the mirror image of the tortfeasor's liability insurance coverage, it follows that the two types of coverage necessarily encompass the same items of damages.").

The uninsured motorist carrier steps into the shoes of the tortfeasor for purposes of the action and can assert the defenses of the tortfeasor. Diaz-Hernandez v. State Farm Fire & Cas. Co., 19 So. 3d 996, 999 (Fla. 3d DCA 2009). Yet, the carrier and tortfeasor are not joint tortfeasors. Their actions did not combine to produce a single injury. D'Amario v. Ford Motor Co., 806 So. 2d 424, 435 n.12 (Fla. 2001) ("Joint tortfeasors are usually defined as two or more negligent entities whose conduct combines to produce a single injury."); Jackson v. York Hannover Nursing Ctrs., 876 So. 2d 8, 12 (Fla. 5th DCA 2004). Only one actor—the tortfeasor—caused the single injury.[1]

Thus, this amount should have been setoff under section 768.041, Florida Statutes. The subject judgment should be reduced by 21st Century's settlement and payment. Willoughby received a substantial windfall and double recovery.

[1] An insurance carrier generally is not liable for negligence. Campbell v. Gov't Empls. Ins. Co., 306 So. 2d 525, 530 (Fla. 1974); King v. Nat'l Sec. Fire & Cas. Co., 656 So. 2d 1338, 1339 (Fla. 4th DCA 1995) ("[T]he well-established law in Florida that only allows an insured to sue an insurer for bad faith and not simple negligence."). But see Harvey v. GEICO Gen. Ins. Co., 259 So. 3d 1, 19-21 (Fla. 2018) (Canady, J., dissenting).

B. THIS COURT SHOULD CLARIFY ITS PRECEDENT SO THAT THE HIGHER AUTHORITY—THE STATUTE—PREVAILS.

Instead of applying the plain text of section 768.041, Florida Statutes, the Court in Willoughby II disregarded the obvious duplication of damages and focused on an isolated phrase in D'Angelo v. Fitzmaurice, 863 So. 2d 311, 314 (Fla. 2003)—"Florida law regarding setoffs is found in sections 46.015(2), 768.041(2), and 768.31(5), Florida Statutes (1997). Each of these statutes presupposes the existence of multiple defendants jointly and severally liable for the same damages." It found that Ellison was not entitled to a setoff because she was not a joint tortfeasor with 21st Century. This conclusion misconstrues the Court's precedent, and causes severe consequences for defendants and insurance companies compelled to pay losses multiple times.

Notably, D'Angelo involved joint tortfeasors; it was the very reason this Court was discussing the implications thereof. The Second District's opinion ignores the context of the opinion and expands this Court's analysis to unintended bounds—where the defendants are not joint tortfeasors, but are liable for the same damages. As noted, the instant case does not involve joint tortfeasors but rather one tortfeasor and an insurer who "stands in the shoes" of that tortfeasor. Diaz-Hernandez, 19 So. 3d at 999.

The language of section 768.041, Florida Statutes, itself rejects the Second District's narrow interpretation. The words "joint tortfeasors" are absent from the statute. Had the Legislature wanted to allow a setoff only for "joint tortfeasors," it would have said so. Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984); Fla. Resch. Inst. for Equine Nurturing, Dev. & Saf., Inc. v. Dillon, 247 So. 3d 538, 543 (Fla. 4th DCA 2018). Indeed, the Second District's opinion effectively added the phrase to the statute and morphed the "Release or covenant not to sue" statute into section 768.31(5), Florida Statutes, titled "Contribution among tortfeasors." See Art. II, § 3, Fla. Const.; Fla. Dep't of Rev. v. Fla. Mun. Power Agency, 789 So. 2d 320, 324 (Fla. 2001) ("Under fundamental principles of separation of powers, courts cannot judicially alter the wording of statutes where the legislature clearly has not done so. A court's function is to interpret statutes as they are written and give effect to each word in the statute.") (footnote omitted)).

Remarkably, Justice Anstead's special concurrence in Wells v. Tallahassee Mem'l Reg'l Med. Ctr., 659 So. 2d 249, 255 (Fla. 1995) forecasted this situation. He explained that, despite enactment of section 768.81, there were still instances where the statutory framework set forth in sections 46.015, 768.31, and 768.041 would apply. Id. at 256. And this is one of them.

This Court should clarify its precedent to ensure that the higher authority—section 768.041, Florida Statutes—prevails. State v. Poole, 292 So. 3d 694, 713 (Fla. 2020). This Court's "job is to apply that law correctly to the case before" it. Id. That precedent must yield here. Id.

II. PRECLUDING A SETOFF WOULD PERMIT DOUBLE RECOVERY FOR A SINGLE LOSS

The consequence of condoning double recoveries cannot be overstated, particularly in the context of insuring risks. Requiring Ellison or Ellison's liability insurer to pay for "essentially the same items of damages" would have severe adverse consequences on insurer and insureds alike. Zando, 390 S.E.2d at 807.

A. INSURANCE ASSUMES THAT A CLAIMANT RECOVERS THE TOTAL VALUE OF A CLAIMED LOSS ONCE

If a plaintiff "is entitled to one, but only one, complete satisfaction for his injury," an insurer's or defendant's corresponding payment should be equally fixed. Id. at 803. At its core, insurance is the assumption of risk for consideration. "Where an insurer runs no risk, equity does not consider him entitled to a premium." Mut. Assur. Soc. v. Watts' Ex'r, 14 U.S. 279, 285 (1816).

Insurers quantify risks using predictive actuarial models, which "take into account all known loss exposure" and contemplate that an insurer will

be required to pay a predicted total per claimed loss. See generally Arad v. Caduceus Self Ins. Fund, Inc., 585 So. 2d 1000, 1003 (Fla. 4th DCA 1991) ("[P]remiums will be set by experts in the field of insurance and they would be appropriate to cover whatever potential expenses might be incurred by that company."). If defendants and insurers pay for the same loss more than once, the analyses lose all meaning.[2] The effect would be felt by the public as the increased risks means increased premiums.

This consequence would be most pronounced for carriers who find themselves providing both UM insurance for injured plaintiffs and liability insurance for defendant tortfeasors. See, e.g., Geico Gen. Ins. Co. v. Paton, 150 So. 3d 804 (Fla. 4th DCA 2014) (GEICO insured both the injured party and tortfeasor). For example, if 21st Century were also Ellison's liability carrier, 21st Century would potentially be compelled to pay twice for the same loss and damages. This runs afoul of first principles of the law and basic insurance tenets. And it would convert 21st Century's settlement into a gratuitous payment.

[2] Not to mention "the cost of insurance is not simply the cost of a claim; rather, there are administrative expenses regardless of claims experience and these are loaded into the premium calculation," all of which will increase as risks become more uncertain. Arad, 585 So. 2d at 1004.

B. THE SECOND DISTRICT'S DECISION WILL ENCOURAGE LITIGATION AND TRIALS

One thing is certain—the Second District's opinion has created an almost $4 million windfall for Willoughby. Other parties and attorneys will see this substantial windfall and will be encouraged to try to obtain an extracontractual settlement with the uninsured motorist carrier at the expense of the tortfeasor. These parties will not release the tortfeasor and will force those claims to go to trial. This will ensure they can recover twice for the very same damages. "The potential prejudice to a non-settling party and the perverse incentives that a double recovery would create . . . is obvious." Philip Morris USA Inc. v. Gore, 47 Fla. L. Weekly D867 (Fla. 4th DCA April 13, 2022).

Data compiled by the Office of the State Courts Administrator's Summary Reporting System of Florida shows that in the year 2020 approximately 163,334 civil cases were filed in Florida's circuit courts. Of those, 37,022 were auto negligence claims. A subsequent study reveals that in just the first six months of 2021 approximately 92,619 circuit civil cases were filed. 17,526 of these were auto negligence claims. This is a daunting reminder of Florida's heavily litigious judicial landscape, destined to worsen if a majority of these cases go to trial to obtain that double recovery.

In any event, it will promote unnecessary litigation and discourage settlements with the tortfeasor.

CONCLUSION

This Court should answer the certified question in the affirmative and quash the Second District's opinion. This would prevent double recovery, which is against public policy, and would foreclose a substantial $4 million windfall. It would apply the law as written by our Legislature.

WHEREFORE, the FLORIDA DEFENSE LAWYERS ASSOCIATION respectfully requests this Court to answer the certified question in the affirmative and quash the Second District's opinion.

/s/ Kansas R. Gooden **KANSAS R. GOODEN** Florida Bar No.: 058707 kgooden@boydjen.com BOYD & JENERETTE, PA 11767 S. Dixie Hwy., #274 Miami, FL 33156 Tel: (305) 537-1238 ***Chair of the FDLA's Amicus Committee***	*/s/ Patrick M. Chidnese* **PATRICK M. CHIDNESE** Florida Bar No.: 89783 patrick@bcflalaw.com **FRIEDA C. LINDROTH** Florida Bar No.: 1032336 frieda@bcflalaw.com Bickford & Chidnese, LLP 307 S. Willow Ave., Suite 100 Tampa, FL 33606
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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been served via e-mail to: **Brent Steinberg, Esq.,** and **Daniel Greene, Esq.,** Swope Rodante, P.A., 1234 East Fifth Avenue, Tampa, FL 33605, (Appeals@swopelaw.com; Eservice@swopelaw.com); **Paul L. Nettleton, Esq.,** and **Jeffrey A. Cohen, Esq.,** Carlton Fields, P.A., 100 SE Second Street, Ste. 4200, Miami, Florida 33131; (pnettleton@carltonfields.com; jacohen@carltonfields.com; dwasham@cartlonfields.com); and **James B. Thompson, Jr., Esq,** and **Troy Holland, Esq.,** Thompson Miller, P.A., 400 Carillon Pkwy Ste 220, Saint Petersburg, FL 33716, (tmservice@tm2law.com); **Brandon G. Cathey, Esq.,** Cathey & Miles, P.A., 76 4th Street N., Unit 2005, Saint Petersburg, FL 33731, (brandon@catheymiles.com); on this 1st day of August, 2022.

/s/ Kansas R. Gooden
KANSAS R. GOODEN

CERTIFICATION OF COMPLIANCE

In accordance with Florida Rule of Appellate Procedure Rule 9.370, the undersigned counsel hereby certifies that this reply complies with the font and word requirements of the Rule: Arial 14-point font and does not exceed 5,000 words.

/s/ Kansas R. Gooden
KANSAS R. GOODEN