

>> ALL RISE.

>> SUPREME COURT OF FLORIDA IS
NOW IN SESSION.

PLEASE BE SEATED.

>> WELCOME BACK.

OUR NEXT CASE IS NUMBER 21-1580,
ELLISON V. WILLOUGHBY.

[AUDIO DIFFICULTY]

>> WE ARE REPRESENTING THE
PETITIONER, ALBERTA ELLISON.
EFFECTIVELY ASKING WAS
MS. ELLISON ENTITLED TO A
SELLOFF FOR A \$4 MILLION
SETTLEMENT THAT THE PLAINTIFF IN
THIS CASE ENTERED IN THIS AUTO
ACCIDENT CASE.

INITIALLY, THE SECOND DISTRICT
AGREED WITH OUR POSITION THAT
THE PLAIN TEXT OF 768.041
REQUIRED THE SETOFF HERE, BUT
THEN WENT ON TO FIND THAT
PRECEDENTS FROM THE COURT
REQUIRED IT TO IGNORE THAT
LANGUAGE.

AND BECAUSE MS. ELLISON AND THE
UM CARRIER, 21ST CENTURY HERE,
WERE NOT JOINT TORTFEASORS BEING
SUED.

THIS DESPITE THE FACT THAT THE
SETTLEMENT AGREEMENT COMPENSATED
THE PLAINTIFF FOR THE SAME
DAMAGES THAT MS. ELLISON WAS
BEING SUED FOR, AND THAT IS THE
DAMAGES, THE INJURIES AND
DAMAGES CAUSED BY THE CRASH.
BEFORE I GET INTO THE DETAILS,
YOUR HONOR, WE ALSO RAISED TWO
OTHER ISSUES OUTSIDE THE
CERTIFIED QUESTION IN OUR BRIEF
THAT WE HOPE THE COURT WILL LOOK
AT AS WELL.

THE FIRST IS WHETHER.

[APPLAUSE]

ELLISON WAS ENTITLED TO
APPLICATION OF THE VICARIOUS
LIABILITY STATUTORY CAP IN
34.021.

AND WE SUBMIT SHE WAS, WE'D ASK
THE COURT TO TAKE A LOOK AT THAT
QUESTION, SPECIFICALLY CERTIFIED
QUESTION THAT WAS PRESENTED IN
THE ORTIZ CASE, AN EARLIER CASE
FROM THE SECOND DISTRICT WHICH

NEVER MADE IT TO THIS COURT.
AND WE SUBMIT THAT THE FACT THAT
THEY WERE CO-OWNERS BETWEEN THE
DRIVER AND MS. ELLISON SHOULD
NOT MAKE A DIFFERENCE TO THAT
APPLICATION OF THAT STATUTE.

>> I'M SORRY TO INTERRUPT YOU.
BEFORE YOU GET INTO THE MERITS,
I WANT TO MAKE SURE YOU HAVE AN
OPPORTUNITY TO ADDRESS THE
PRESERVATION ISSUES.

LOOKING AT THE RECORD, IT SEEMS
LIKE EVERY TIME THAT YOUR CLIENT
RAISED THE SETOFF ISSUE IN FRONT
OF THE TRIAL COURT AND THIS WAS
MULTIPLE TIMES, IT EXPLICITLY
INVOKED 768.76 RATHER THAN THE
.41 OR 041.

THERE ARE, OBVIOUSLY, VERY
SUBSTANTIVELY VERY DIFFERENT
ARGUMENTS.

I UNDERSTAND SOME OF CASES THAT
WERE READ AND RELIED ON INVOKED
BOTH, BUT IT DOESN'T SEEM LIKE
THE TRIAL COURT REALLY HAD THE
.41 ISSUE BEFORE IT.

COULD YOU ADDRESS THAT?

>> YES, YOUR HONOR.

ACTUALLY, I THINK IT DID.

AND I AGREE, THE TRIAL COUNSEL
DID NOT CITE THE 7768.041 EITHER
IN THE ARGUMENTS OR IN THE
PAPERS.

HOWEVER, THE SUBSTANCE OF THE
ARGUMENT UNDER THAT SECTION WAS,
IN FACT, ADDRESSED BY COUNSEL IN
THE TRIAL COURT.

SPECIFICALLY, IT WAS PRESENTED
BY VIRTUE OF THE MOTION ALTHOUGH
CITING THE DIFFERENT STATUTE.
THE MOTION SAID THAT THEY WERE
GETTING A DOUBLE RECOVERY HERE,
AT THE DAMAGES WERE THE SAME AND
THAT, THEREFORE, UNDER THE LAW
THERE SHOULD BE A SETOFF HERE.

>> WELL, WHAT'S YOUR BEST CASE
FOR THE PROPOSITION THAT GIVEN
THE SUBSTANCE OF AN ARGUMENT IS
BEFORE US AND YET IT HAS NOT
BEEN EXPRESSLY INVOKED THAT WE
NONETHELESS FIND THAT IT HAS
BEEN PRESERVED?

BECAUSE I DON'T THINK THAT'S THE
STATE OF OUR LAW.

>> WELL, YOUR HONOR, IN WILLIAMS V. STATE WHICH WAS FROM THIS COURT, THE COURT SAID AN ARGUMENT WAS PRESERVED BY PRESENTING THE LEGAL PRINCIPLE TO THE TRIAL COURT ALTHOUGH THE CONFIDENT DID NOT CITE ANY SPECIFIC STATUTE.

>> GOT ANYTHING, GOT ANYTHING NOT INVOLVING A CRIMINAL CASE?

>> YES, YOUR HONOR.

WILSON V. WEST AMERICAN INSURANCE, THAT'S A FOURTH DISTRICT CASE.

IN THAT CASE THE APPELLANT WAS REQUESTING COSTS AS A PREVAILING PARTY, AND THE APPELLEE WAS ARGUING THAT WASN'T PRESERVED BECAUSE THEY CITED THE WRONG STATUTE FOR THE CAUSE IN THEIR MOTION.

AND COURT SAID, NO, THAT DOESN'T GET YOU THERE.

THEY PRESENTED THE ARGUMENT TO THE COURT, AND THEY'RE ENTITLED TO PROCEED WITH THAT.

AND THE SECOND DISTRICT DID ADDRESS THIS IN THE OPINION AND FOUND THAT IT WAS ADEQUATELY PRESERVED.

AND I'D REFER THE COURT SPECIFICALLY TO THE TRANSCRIPT OF THE POST-TRIAL HEARING ON THIS WHERE COUNSEL ARGUED AND SAID THE SUPPLEMENTAL RECORD AT 17.275 AND 76 WITH HE MADE THE VERY SUBSTANCE OF THE ARGUMENT ALTHOUGH HE DIDN'T CITE THE STATUTE THAT THIS WAS A DOUBLE DIP.

THAT THE PLAINTIFF HAD ARE RECOVERED THE SAME DAMAGES UNDER THIS SETTLEMENT AGREEMENT THAT HE HAD RECOVERED AGAINST MS. ELLISON IN THE CASE AND THAT, THEREFORE, THE LAW REQUIRED THAT THERE BE A SETOFF HERE.

AND THAT'S WHAT WE'RE ARGUING.

>> BUT, COUNSEL, BUT, COUNSEL, ISN'T THE TEST, THIS PRESERVATION REQUIREMENT IS ABOUT MAKING SURE THAT THE TRIAL COURT HAS REALLY HAD AN

OPPORTUNITY TO ADDRESS THE
ISSUE.

THAT IT'S BEEN BROUGHT TO THE
TRIAL COURT'S ATTENTION IN A WAY
THAT WOULD ENABLE THE TRIAL
COURT TO PROPERLY APPLY THE LAW.
AND IN THIS CONTEXT, THESE KIND
OF COMPLICATED STATUTORY SCHEMES
WHERE YOU'VE GOT TO KIND OF
WOUND YOUR WAY THROUGH THE
STATUTES AND SEE IF YOU CAN
CHECK BOX AND CHECK THE NEXT
BOX, SEE IF IT IS ACTUALLY
COVERED.

WE DON'T JUST HAVE A GENERAL
PRINCIPLE OF NO DOUBLE DIPPING,
OKAY?

THAT'S NOT A GENERAL PRINCIPLE.
MAYBE IT SHOULD BE, BUT THAT'S
NOT WHAT WE HAVE GOT.

IT'S GOT TO FALL WITHIN THE
PROVISIONS OF THE STATUTE.
IT'S JUST -- I'M HAVING A HARD
TIME SEEING HOW BASED ON WHAT
I'VE SEEN HERE WE CAN SAY THAT
THE TRIAL COURT WAS ADEQUATELY
APPRAISED OF THE ISSUE SO THAT
THE TRIAL COURT COULD DEAL WITH
IT PROPERLY.

>> YES, YOUR HONOR.

AGAIN, WE ARGUED THE VERY
PRINCIPLE THAT WE'RE ARGUING
HERE UNDER THE STATUTE.

THE TRIAL COURT WENT OFF ON THIS
UM BENEFITS ISSUE WHICH CAN'T
CAN EVEN ADDRESS IT UNDER
768.76.

BUT I ALSO POINT OUT THAT THE
PLAINTIFFS WERE AWARE THAT THIS
WAS IN PLAY BECAUSE THEY
SPECIFICALLY ADDRESSED IT IN
THEIR RESPONSE TO THE MOTION IN
THE POST-TRIAL BRIEFINGS.

AND SPECIFICALLY, THAT'S AT PAGE
3168 OF THE RECORD.

THEY SPECIFICALLY ADDRESSED
768.041, ARGUED THAT WE COULD
NOT GET THE SETTLEMENT SET OFF
UNDER THAT BECAUSE THEY WEREN'T
JOINT TORTFEASORS, CITING --
THE VERY THING THEY'RE ARGUING
HERE.

>> YEAH, BUT YOU WERE THE ONE
ASKING FOR THE RELIEF.

AND EVERY TIME WHEN IT WAS BROUGHT UP BY THE OTHER SIDE, YOU IMMEDIATELY WENT BACK TO THE 768.76.

I DON'T MEAN YOU PERSONALLY, BUT YOUR SIDE.

SO, YOU KNOW, THE COURT -- AND THEY'RE VERY DIFFERENT, YOU KNOW?

THE DOUBLE DIPPING THING, THE SAME RATIONALE MAYBE FOR BOTH, BUT IT REALLY, IT DOESN'T SEEM LIKE THE COURT WOULD HAVE HAD ANY -- I MEAN, COURT WOULD HAVE HAD TO BASICALLY GO AND DO ITS OWN HOMEWORK AND MAKE YOUR ARGUMENT FOR YOU TO GIVE YOU RELIEF UNDER THE .041 STATUTE, IT SEEMS.

>> WELL, YOUR HONOR, AGAIN, I WOULD SAY, AS YOU MENTIONED ALREADY, THE CASES THAT WERE BEING CITED DID REFER TO THE ALL OF THE STATUTES.

COUNSEL FOR THE PLAINTIFF UNDERSTOOD THAT WE WERE ARGUING ESSENTIALLY UNDER ALL OF THE STATUTES.

AND THE PRINCIPLE OF NO DOUBLE DIPPING, IT'S THE SAME DAMAGES THAT ARE BEING RECOVERED IN THE SETTLEMENT AGREEMENT AS WELL AS AGAINST MS. ELLISON IN THE VERDICT WAS, ARGUED.

AND SO WE SUBMIT THAT UNDER THE CASE LAW THAT'S SUFFICIENT TO PRESERVE THE ISSUE.

>> SO, YOUR HONOR, IF I COULD GET INTO THE MERITS OF THE CERTIFIED QUESTION HERE, I'VE KIND OF ALREADY TALKED A LITTLE BIT ABOUT IT, BUT THE FACT IS THAT THE PLAINTIFF SUED HIS UM CARRIER, 21ST CENTURY HERE, FOR BAD FAITH.

AND AS PART OF THAT CLAIM, SPECIFICALLY REQUESTED RECOVERY FOR THE DAMAGES THAT WERE CAUSED BY THE CRASH.

DURING THE COURSE OF THE LITIGATION, THAT WAS SETTLED FOR \$4 MILLION, AND THE SECOND DISTRICT INITIALLY SAID THAT UNTIL SEEM THAT UNDER THE PLAIN

LANGUAGE OF THE STATUTE, THAT
ITOFF WOULD BE CONCERN THAT
SETOFF WOULD BE APPROPRIATE.
AND WHAT IT SAID WAS THE PLAIN
AND UNAMBIGUOUS TEXT REQUIRED
THE COURT TO SET OFF THE 21ST
CENTURY PROCEEDS BECAUSE
MRS. ELLISON SHOWED
MR. WILLOUGHBY DELIVERED A
RELEASE TO 21ST CENTURY IN
PARTIAL SATISFACTION OF THE
DAMAGES HE SUED FOR IN THIS
LAWSUIT.

NOW, DESPITE THAT RECOGNITION,
THE COURT WENT ON TO TO SAY, NO.
THE SUPREME COURT IN THIS
TRILOGY OF 768.81 CASES HAS SAID
YOU DON'T GET A SET ISOFF UNLESS
YOU'RE JOINTLY LIABLE FOR THE
SAME CLAIM WITH IDENTICAL
ELEMENTS OF DAMAGES.

BUT IN THOSE CASES WHAT THIS
COURT WAS DOING WAS DETERMINING
HOW DO THE SETOFF STATUTES APPLY
IN A JOINT AND SEVERAL IS
SCENARIO WHERE WE HAVE 768.81
WHICH IS ELIMINATED JOINT AND
SEVERAL LIABILITY.

AND THE WAY THE COURT ANALYZED
768.81 WAS THAT IT FOUND THAT
JOINT TORTFEASORS ARE NOW LIABLE
ONLY FOR THE DAMAGES THEY CAUSE
AND NOT FOR THE DAMAGES OF THE
OTHER JOINT TORTFEASORS.

SO AS A RESULT OF THAT ANALYSIS,
THE COURT HELD THAT THE SETOFF
STATUTES NO LONGER APPLY BETWEEN
JOINT TORTFEASORS TO THE EKH END
JOINT AND SEVERAL LIABILITY IS
ELIMINATED BECAUSE THE
SETTLEMENT AMOUNT PAID BY THE
SETTLING CONFIDENT COULD NOT BE
THE SAME AMOUNT AS FOR THE
NONSETTLING TORTFEASOR.

SO, AND I WOULD SUBMIT IF
THERE'S ONE THING THAT EVERYONE
AGREES WITH IN THIS CASE, IT IS
THAT MRS. ELLISON AND 21ST
CENTURY WERE NOT JOINT
TORTFEASORS.

AND SO 768.81 HAS NO APPLICATION
IN THIS CASE.

AND FOR THE SAME REASON, WELLS
GOWDY AND DeANGELO, THE THREE

CASES AT ISSUE, HAVE NO APPLICATION HERE.
IN THOSE CASES THE -- EXCUSE ME -- THE DEFENDANTS, THE SETTLING AND NONSETTLING DEFENDANTS WERE JOINT TORTFEASORS, BUT THEY WERE NOT SUED FOR THE SAME DAMAGES BASED ON THE APPLICATION OF 768.81 AS INTERPRETED BY THIS COURT INITIALLY IN WELLS, AND I WOULD SAY ALSO PROBABLY IN FAVRE. IN THIS CASE, HOWEVER, MRS. ELLISON AND 21ST CENTURY WERE NOT JOINT TORTFEASORS, BUT WERE SUED FOR THE SAME DAMAGES. AND THIS COURT, I WOULD SUBMIT, IN THE TRILOGY OF CASES WE'RE TALKING ABOUT DID NOT HOLD AS SECOND DISTRICT BELIEVED THAT A SETOFF IS ONLY AVAILABLE UNDER THE STATUTE FOR JOINT TORTFEASORS SUED ON THE SAME CLAIM.
CERTAINLY, THERE'S NOTHING IN THE STATUTE ITSELF THAT LIMITS IT TO JOINT TORTFEASORS SUED ON THE SAME CLAIM.
RATHER, THE FOCUS AS IT'S ALWAYS BEEN AND STILL IS, IS THIS THE SAME DAMAGES.
>> CAN I ASK YOU ABOUT THE BROADER CONTEXT?
>> I'M SORRY?
>> CAN I ASK YOU ABOUT THE BROADER CONTEXT OF THIS STATUTE? SO SECTION ONE TALKS ABOUT RELEASE OR DISCHARGE THE LIABILITY OF ANY OTHER TORTFEASOR WHO MAY BE LIABLE FOR THE SAME -- OR DEATH.
AND THEN IN THE TITLE FOR THIS BILL WHEN IT BECAME LAW, IT SAYS AN ACTIVE PERMIT OF RELEASING ONE TORTFEASOR WITHOUT ITS EFFECT BEING TO RELEASE ALL TORTFEASORS AND PROVIDING FOR SETOFF IN ACTIONS AGAINST OTHER TORTFEASORS.
SO IT SEEMS LIKE THERE'S MORE -- THE WHOLE IDEA THAT IF I JUST READ THE WORDS OF SECTION TWO IN ISOLATION, THAT THAT TELLS ME KIND OF THE PLAIN MEANING OF

THAT.

IT SEEMS LIKE IF I READ THIS WHOLE THING, IT'S NOT AS CLEAR AS WHAT YOU'RE SUGGESTING. THAT THE ONLY -- EVEN IF WE ASSUME THAT IT'S THE SAME DAMAGES WHICH IS, OBVIOUSLY, IN DISPUTE SINCE THE NATURE OF THE BAD FAITH THING IS DIFFERENT, BUT IT SEEMS LIKE IF WE READ THE WHOLE THING, IT'S NOT CLEAR THAT THE ONLY RELEVANT QUESTION IS THE DAMAGE ASSESSMENT.

>> WELL, YOUR HONOR, SUBSECTION ONE OF THE SETOFF STATUTE DEALS WITH A DIFFERENT REALLY ISSUE, AND THAT IS IF YOU RELEASE ONE TORTFEASOR, DOES IT RELEASE OTHER TORTFEASORS. AND THE STATUTE WAS PUT IN PLACE FOR THAT SECTION TO SAY, NO, IT BECAUSE NOT.

I DON'T THINK YOU CAN READ THAT PARTICULAR LANGUAGE, AND IT'S NOT JUST JOINT TORTFEASORS, IT'S ANY TORTFEASORS, IT WOULDN'T RELEASE THEM.

BECAUSE I THINK THERE WAS SOME PRIOR LAW THAT SUGGESTED YOU RELEASED A JOINT TO HAVE TORTFEASORS THAT SOMEHOW THAT COULD ARE RELEASE THE OTHER TORTFEASORS.

AND THE LEGISLATURE IN SUBSECTION ONE WAS ADDRESSING THAT TO AVOID THAT SITUATION. IN SUBSECTION TWO THOUGH, THERE'S NO REFERENCE TO JOINT TORTFEASORS AT ALL.

AND I WOULD SUBMIT THAT, CERTAINLY, THE COUNT -- I MEAN, THE LEGISLATURE COULD HAVE PUT IT MANY THERE, IF THAT'S WHAT THEY MEANT, BUT IT'S NOT THERE. IT SAYS ANY PARTY OR WHO SHOWS THAT IT'S THE SAME DAMAGES IS ENTITLED TO THAT SETOFF.

SO WE THINK IT'S VERY CLEAR THAT YOU DON'T HAVE TO BE A JOINT TORTFEASOR.

I'D REFER THE COURT TO THE POSEY CASE OUT OF THE FOURTH DISTRICT WHICH EXTENSIVELY ADDRESSED THIS VERY ISSUE.

IF YOU LOOKED AT WELLS, GOWDY,
DeANGELO, THE SETOFF STATUTES
AND CONCLUDED THAT WHERE YOU ARE
NOT JOINT TORTFEASORS, THAT THAT
THAT TRILOGY OF CASES IN 768.81
DO NOT APPLY AT ALL, AND YOU
LOOK SOLELY AT THE SETOFF
STATUTE ITSELF FOR DETERMINING
WHETHER OR NOT THE NONSETTLING
DEFENDANT IS ENTITLED TO THE A
SETOFF.

AND IN THAT CASE, THE COURT
FOUND THAT, YES, NONSETTLING
DEFENDANT WHO IS NOT THE JOINT
TORTFEASOR WAS ENTITLED TO A
SETOFF FOR THE ENTIRE AMOUNT OF
THE SETTLEMENT BECAUSE IT WAS
THE UNDIFFERENTIATED.

>> COUNSEL, I'M LOOKING AT THE
STATUTE HERE AND YOUR ARGUMENT
THAT WE LOOK AT SUBSECTION TWO
IN ISOLATION.

I'M JUST STRUGGLING WITH THAT.
BECAUSE ESSENTIAL TO SUBSECTION
TWO IS THE DELIVERY OF RELEASE
OR COVENANT NOT TO SUE, RIGHT?

>> CORRECT.

>> WELL, THAT SEEMS TO TAKE YOU
RIGHT BACK TO THE FIRST WORD OF
SUBSECTION ONE, RELEASE OF
COVENANT NOT TO SUE.

SO WHEN WE'RE LOOKING AT THAT IN
THE CONTEXT OF SUBSECTION TWO, I
DON'T KNOW WHY WE WOULDN'T LOOK
BACK TO SUBSECTION ONE.

I'M NOT -- DO YOU SEE WHAT I'M
SAYING?

>> NO, I UNDERSTAND, YOUR HONOR.
BUT A RELEASE IS A CONCEPT OR A
COVENANT NOT TO SUE AS A
CONCEPT, I DON'T THINK IT'S TIED
TO --

>> WELL, BUT IT'S IN THIS
CONTEXT HERE.

WHEN THEY'RE TALKING ABOUT IT,
IT JUST SEEMS TO BE YOU'VE GOT
TO LOOK AT THE WAY, THE WAY
THEY'VE TALKED ABOUT A RELEASE
OR COVENANT NOT TO I SUE, THAT'S
WHAT THEY'RE REFERRING TO.

AND WHEN WITH IT'S RELEASED TO A
COVER COVENANT NOT TO SUE AS TO
ONE TORTFEASOR AND THEN THE
REFERENCE TO ANY OTHER

TORTFEASOR, I JUST DON'T SEE HOW YOU CAN READ THAT SUBSEQUENT REFERENCE TO THAT THAT SAME PHRASE IN A WAY THAT IS DIVORCED FROM THE WAY IT IS USED IN THE PRECEDING SECTION.

>> WELL, YOUR HONOR, AGAIN, I DISAGREE WITH THAT, RESPECTFULLY.

BUT IF THEY WANTED TO APPLY SUBSECTION TWO TO ONLY JOINT TORTFEASORS, THEY COULD HAVE SAID THAT.

IT DOES NOT SAY THAT.

IT SAYS ANY DEFENDANT SHOWS THAT A PLAINTIFF GAVE A RELEASE IN PARTIAL SATISFACTION OF THE DAMAGES SUED FOR, THEY'RE ENTITLED TO A SETOFF.

THAT'S HOW IT READS.

IT DOESN'T LIMIT IT TO JOINT TORTFEASORS.

POSEY MADE THAT DETERMINATION.

THE THIRD DISTRICT, ACTUALLY, A FEW YEARS BEFORE THAT IN J.R.

BROOKS AND SONS MADE THE SAME DETERMINATION SAYING 768.81 AND

WELLS DO NOT APPLY AND,

THEREFORE, IF YOU'RE NOT JOINT TORTFEASORS, YOU JUST LOOK TO THE SETOFF STATUTES.

AND IF IT APPLIES, IT APPLIES, AND YOU GET THE SETOFF.

SO WE WOULD SUBMIT THAT'S THE SITUATION HERE.

>> NOW, CAN I ASK YOU THOUGH, SO YOU STARTED TO TALK ABOUT THE ISSUE OF AN UNDIFFERENT SHADED SETTLEMENT, THE WHOLE THING GOES OUT.

IS THAT TEXTUAL?

I MEAN, IT SEEMS LIKE HERE IT BECAUSE PUT THE OBLIGATION ON THE DEFENDANT TO SHOW THAT IT'S PARTIAL SATISFACTION, AND A SETOFF OF SUCH AMOUNT MEANING THE AMOUNT THAT'S IMPARTIAL SATISFACTION OF THE DAMAGES SUED FOR.

WE KNOW THAT HERE THE SETTLEMENT, IT'S UNDIFFERENTIATED, BUT IT COULD HAVE INCLUDED ALL KINDS OF OTHER CATEGORIES OF DAMAGES THAT

WOULDN'T BE THE SAME HERE.
SO WHY, WHY ISN'T THE BURDEN ON
THE DEFENDANT TO SHOW WHAT IN
THE SETTLEMENT WAS, YOU KNOW,
CORPS CONCERN CORRESPONDS TO THE
DAMAGES SUED FOR?

>> OKAY.

WELL, YOUR HONOR, THERE'S A
COUPLE THINGS HERE.

FIRST, WE LOOK AT THE SETTLEMENT
ITSELF.

THE SETTLEMENT ITSELF
SPECIFICALLY SAYS THAT THE
PLAINTIFF AND 21ST CENTURY
AGREED THAT ALL -- CONSTITUTE
DAMAGES ON ACCOUNT OF PERSONAL
INJURIES OR SICKNESS.

FOR ONLY PERSONAL INJURIES OR
SICKNESS ARE THE ONES CAUSED IN
THE ACCIDENT WHICH IS WHAT
MS. ELLISON WAS SUED FOR.

AND THEN EVEN IF YOU IGNORE THAT
LANGUAGE IN THE SETTLEMENT
ITSELF AND ASSUME THERE WERE
SOME OTHER ELEMENTS OF DAMAGES
FROM THE BAD FAITH THAT COULD
NOT BE SUED AGAINST THE
TORTFEASOR, IT STILL DOESN'T GET
YOU OUT OF THE SITUATION HERE
BECAUSE IT'S UNDIFFERENTIATED.

ST THE UNDISPUTED HERE THERE WAS
NO ALLOCATION OF THE \$4 MILLION
BETWEEN THE CLAIMS, ELEMENTS OF
DAMAGES AND SO FORTH.

SO THAT CALLS INTO PLACE THE
RULE THAT THIS COURT ESTABLISHED
IN DIONESE V. WEST PALM BEACH.
IN THAT CASE THE COURT HELD
WHERE THERE ARE ELEMENTS, CLAIMS
OR DAMAGES THAT ARE SUBJECT TO
SETOFF AND OTHER CLAIMS OR
DAMAGES THAT ARE NOT SUBJECT TO
SETOFF INCLUDED IN THE
SETTLEMENT AGREEMENT, UNLESS
THAT AGREEMENT ITSELF EXPRESSLY
ALLOCATES BETWEEN THOSE ELEMENTS
THAT THE ENTIRE AMOUNT OF THE
SETOFF --

>> WHAT ABOUT -- WELL, I
DON'T -- MY QUESTION WAS WHETHER
THAT'S TEXT-BASED.

BUT ALSO, WE ALSO SAID RIGHT
AFTER WE TALKED ABOUT THE
UNDIFFERENTIATED RULE, WE SAID

IF NECESSARY, THE SETTLEMENT CAN THEN BE ALLOCATED PROPORTIONALLY FOR EACH CAUSE OF ACTION TRIED, THUS PRESERVING THE DISTINCT NATURE OF THE SEPARATE CLAIMS WHICH WOULD SUGGEST THAT HERE YOU WOULD GET NOTHING SINCE, OBVIOUSLY, THE BAD FAITH CLAIM AND THE TORT CLAIM ARE TWO TOTALLY DIFFERENT THE CLAIMS.

>> THEY WERE TOTALLY DIFFERENT CLAIMS BUT FOR THE SAME DAMAGES AS SET FORTH IN THE SETTLEMENT ARE ITSELF.

AND IF THE BAD FAITH CLAIM HAD BEEN TRIED, THEN YOU COULD HAVE PERHAPS DONE THAT ALLOCATION ACCORDING TO WHATEVER THE JURY VERDICT WAS.

BUT WE DON'T GET TO THAT POINT BECAUSE THERE WAS A SETTLEMENT. AND THAT'S WHY IN DIONESE THE COURT SAID YOU GET THE ENTIRE AMOUNT OF THE SETTLEMENT WHERE IT'S NOT ALLOCATED.

RECOVERABLE UNDER THE STATUTE IN THE BAD FAITH CLAIM, THAT MIGHT HAVE BEEN A DIFFERENT SCENARIO HERE, BUT THEY DIDN'T DO THAT.

AND THEY ARE THE SAME DAMAGES -- I'M SORRY.

>> SORRY.

YOU CAN HAVE A COUPLE MINUTES TO ADDRESS --

>> I'M SORRY, YOUR HONOR, I DIDN'T REALIZE I WAS OVER.

>> NO, NO, NO, JUST WHATEVER --

TAKE A COUPLE OF MINUTES ON 768.76 SO THAT YOUR COLLEAGUE HERE CAN HAVE SOMETHING TO RESPOND TO, SINCE THAT'S OBVIOUSLY ANOTHER --

>> I'M SORRY, YOUR HONOR.

ARE YOU TALKING ABOUT THE STATUTORY CAP ISSUE?

>> NO, THE 768.76, THE SECOND HALF OF THE CERTIFIED QUESTION.

>> YOUR HONOR, WE WOULD RELY ON THE BRIEF FOR THAT.

WE THINK, ARGUABLY, IT FITS WITHIN THE ACCOUNT PLAN OR AGREEMENTS THAT ARE SET FORTH THERE.

BUT WE THINK IT'S CRYSTAL CLEAR

UNDER THE OTHER STATUTE.

>> OKAY.

YOU CAN HAVE TWO MINUTES FOR REBUTTAL.

>> THANK YOU.

>> MAY IT PLEASE THE COURT, MY NAME IS BRENT STEINBERG, AND IT'S MY PRIVILEGE TO REPRESENT THE PLAINTIFF, RANDY WILLOUGHBY. YOUR HONORS, THE TRIAL COURT PROPERLY CONDITIONED DEFENDANT'S MOTION FOR SETTLEMENT.

FIRST OF ALL, AS YOUR HONORS ALLUDED TO, IN THE TRIAL COURT DEFENDANT NEVER ARGUED THAT 768.041 ENTITLED THEM TO A SETOFF, SO THAT THE ISSUE HASN'T BEEN PRESERVED.

BUT EVEN IF IT WAS, UNDER THIS COURT'S PRECEDENT IT DOESN'T APPLY BECAUSE DEFENDANT AND 21ST CENTURY, THE UNINSURED MOTORIST CARRIER, WERE NOT JOINTLY LIABLE FOR THE SAME DAMAGES.

AND DEFENDANT'S ALSO NOT ENTITLED TO A SETOFF UNDER 768.76 WHICH IS THE COLLATERAL STATUTE.

QUITE SIMPLY, THE UNINSURED MOTORIST BAD FAITH CLAIM SETTLEMENT DOESN'T QUALIFY AS A COLLATERAL SOURCE, AND WE BRIEFED THAT FULLY.

I WON'T GET INTO THAT THE ISSUE UNLESS ONE OF YOUR HONORS HAS A QUESTION ON IT.

SO LET ME FIRST ADDRESS THIS PRESERVATION ISSUE.

AND THERE'S REALLY TWO SEPARATE PRESERVATION ISSUES HERE.

THE FIRST IS, AS WE SAID, THAT THE DEFENDANT NEVER ARGUED THAT THAT THEY WERE ENTITLED TO A SETOFF UNDER 041 IN THE TRIAL COURT.

THERE'S NO QUESTION THAT THEY ASKED FOR A SETOFF, BUT THEY ONLY EVER CHARACTERIZED IT AS ASKING FOR A SETOFF BECAUSE IT WAS A COLLATERAL SOURCE.

AND THAT'S KIND OF LIKE SAYING THAT SOMEONE OBJECTS TO EVIDENCE COMING IN BECAUSE IT'S HEARSAY.

AND LATER THEY WANT TO ARGUE

THAT THAT SERVICE THE
INADMISSIBLE FOR A DIFFERENT
REASON, UNDER 9403.

ALL THE COURTS WOULD SAY, YES,
YOU ASKED FOR THE RIGHT RELIEF,
THE ULTIMATE ARE RELIEF OF
KEEPING THE INFERENCE OUT, BUT
THE HEARSAY OBJECTION DOESN'T
PRESERVE THE 9403 OBJECTION.
THAT'S ESSENTIALLY THE OBJECTION
WE HAVE HERE.

THEY DIDN'T JUST FAIL TO CITE
THE CORRECT STATUTE, THEY NEVER
MADE THE ARGUMENT AT ALL THAT
THERE WAS A RELEASE THAT WAS
DELIVERED IN PARTIAL
SATISFACTION OF THE DAMAGES SUED
FOR.

SO THEY NEVER MADE THE ARGUMENT
UNTIL THEY GOT TO THE SECOND
DISTRICT COURT OF APPEALS IN THE
INITIAL BRIEF.

NOW, THE SECOND PRESERVATION
ISSUE IS IN THE PLAIN LANGUAGE
OF THE TEXT ITSELF IN 768.0 TO
41, SUBSECTION TWO.

AS YOUR HONORS ALLUDED TO,
LOOKING AT THAT LANGUAGE, IT
SAYS AT TRIAL, AT TRIAL IF THE
DEFENDANT SHOWS THAT, SHOWS THE
COURT, THE STATUTE SAID, IF THEY
SHOW THE COURT THAT THE
PLAINTIFF DELIVERED A RELEASE TO
A PERSON, HEN THEY GET A PARTIAL
SATISFACTION AND THAT SERVICE
THE IMPARTIAL SATISFACTION FOR
THE SAME DAMAGES SUED FOR, THEN
THEY GET A SETOFF TO THAT
EXTENT.

AGAIN IN THE TRIAL COURT
DEFENDANT NEVER ARGUED THAT SHE
WAS ENTITLED TO A SETOFF, MAKING
THAT ARGUMENT.

SO THE FIRST TIME THAT THEY
ARGUE 041 IS IN THE APPELLATE
COURT.

THAT IS NOT AT TRIAL.

THAT IS NOT -- NEVER AT THE
TRIAL COURT.

OF COURSE, IT'S OUR APPELLATE
COURT'S JOB TO CORRECT ERRORS
THE TRIAL COURTS MAKE.

AND YOUR HONORS ALLUDED TO THE
CASE LAW, THAT THE TRIAL COURT

HAS TO BE GIVEN A FAIR AND FULL OPPORTUNITY TO ADDRESS THE ISSUE HEAD ON.

HOW ARE WE GOING TO SAY THAT THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO GRANT A SETOFF UNDER 768.041 WHEN THE DEFENSE NEVER ASKED THE TRIAL COURT TO DO THAT?

SO IN OUR VIEW, THE ISSUE HAS NOT BEEN PRESERVED, THERE'S NO NEED FOR YOU TO GET TO THE MERITS ON 041.

IF YOU DO WANT TO GET TO THE MERITS, WE STILL PREVAIL.

I WANT TO CLARIFY ONE THING.

YOU KNOW, THERE WAS SOME DISCUSSION ABOUT THE JOINT TORTFEASOR AND, CERTAINLY, THE CASES THAT THIS COURT HAS PREVIOUSLY TALKED ABOUT WAS IN THE CONTEXT OF JOINT TORTFEASORS.

BUT I THINK WHAT'S MORE IMPORTANT THAN EVEN JOINT TORTFEASORS IS WHETHER OR NOT THERE'S JOINT LIABILITY.

OF COURSE, IF THEY'RE JOINT TORTFEASORS, THEY WOULD BE JOINTLY LIABLE FOR THE SAME DAMAGES.

BUT I ACKNOWLEDGE IN THE GROVEMAN SITUATION WHERE YOU'VE GOT A VICARIOUSLY LIABLE PARTY, IT WOULD MAKE SENSE TO APPLY A SETOFF EVEN IF THEY'RE NOT TECHNICALLY JOINT TORTFEASORS.

FOR INSTANCE, IF YOU HAVE AN EMPLOYER WHO SETTLES A CLAIM THAT THE EMPLOYEE -- ASSUMING, YOU KNOW, IT WAS VICARIOUS LIABILITY -- WOULD GET A SETOFF IF THE DEFENSE MAKES THE REQUISITE SHOWING UNDER THE STATUTE.

SO THE COURT'S FOCUS IN ALL OF THOSE CASES IS REALLY HAS THERE BEEN JOINT LIABILITY FOR THE SAME DAMAGES.

BEFORE WE GET MORE INTO THE WEEDS ON THAT --

>> WELL, THE PRECISE LANGUAGE IS MAY BE LIABLE FOR THE SAME TORT OR DEATH, RIGHT?

>> UNDER SUBSECTION ONE, YOUR HONOR?

>> YES.

>> YES.

THAT'S CORRECT.

AND THE VICARIOUS LIABILITY SITUATION, WHICH THIS IS NOT A VICARIOUS LIABILITY SITUATION, WE'VE GOT TWO SEPARATE SILOS HERE.

WE'VE GOT AN UNINSURED MOTORIST CARRIER ON ONE SIDE AND A TORTFEASOR ON THE OTHER. BUT WHEN YOU'RE IN THE SAME SILO, IT WOULD MAKE SENSE THAT THE EMPLOYER IS VICARIOUSLY LIABLE FOR THE SAME TORT OR DEATH AS THE EMPLOYEE WHO CAUSED OUT.

AND THAT'S WHY IN GROVEMAN THERE WAS A SETOFF.

THE DCA CASE.

BUT STEPPING BACK, LET'S JUST THINK ABOUT WHAT'S IT IS THAT THEY'RE ASKING FOR.

AND I WANT YOU TO ASSUME THAT WE'RE NOT TALKING ABOUT A \$30 MILLION VERDICT.

SAY IT WAS \$3 MILLION AND THE PLAINTIFF HAD ALREADY SETTLED THEIR UNINSURED MOTORIST BAD FAITH CLAIM FOR \$4 MILLION.

IN THAT SITUATION, WOULD THE DEFENDANT GET A SETOFF FOR THE ENTIRE AMOUNT AND BE ABLE TO TAX COSTS AGAINST THE PLAINTIFF AND PERHAPS EVEN RECOVER ATTORNEYS' FEES JUST BECAUSE THERE WAS A SEPARATE SETTLEMENT WITH AN UNINSURED MOTORIST CARRIER FOR \$4 MILLION WHEN THEY, IN FACT, CAUSED \$3 MILLION IN DAMAGES? THAT WOULDN'T SEEM FAIR AND EQUITABLE.

IT WOULD BE A MASSIVE WINDFALL TO THE DEFENDANT IN THAT SITUATION.

WELL, THAT'S ESSENTIALLY THE SITUATION --

>> WELL, I MEAN, YOU KNOW, I UNDERSTAND WHAT YOU'RE SAYING. BUT ON THE OTHER HAND, WHAT'S HAPPENING IN THE CLAIM AGAINST THE UNINSURED MOTORIST CARRIER,

OBVIOUSLY, IN SOME SENSE
DERIVATIVE OF WHAT THIS, WHAT
HAS HAPPENED IN THE CONTEXT OF
THE CASE AGAINST, BY THE
PLAINTIFF AGAINST THE
TORTFEASOR.

I -- AND THIS IS NOT REALLY AT
ISSUE HERE, BUT LET ME ASK YOU,
HELP ME UNDERSTAND THE RATIONALE
BEHIND THE LEGISLATIVE POLICY
THAT AWARDS, THAT AUTHORIZES A
BAD FAITH CLAIM AGAINST
UNINSURED MOTORIST THAT GOES
BEYOND THE ACTUAL AMOUNT OF THE,
ANY KIND OF DAMAGES THAT WERE
ATTRIBUTABLE TO THE FAILURE TO
PAY THE UNINSURED MOTORIST
CLAIM.

>> SURE.

>> IT'S VERY DIFFERENT THAN
ORDINARY -- BAD FAITH CLAIM
WHERE THERE'S THE RISK OF
CARRIER FAILED TO SETTLE THAT
THE POLICYHOLDER'S GOING TO BE
EXPOSED TO, YOU KNOW, DAMAGES
THAT EXCEED THE AMOUNT OF THE
COVERAGE.

BUT I'M TRYING TO UNDERSTAND HOW
THAT GETS TRANSLATED OVER INTO
THE UNINSURED MOTORIST CONTEXT.

>> SURE.

AND CERTAINLY TO SOME EXTENT I
AGREE WITH YOUR HONOR, BUT THE
DAMAGES THAT ARE RECOVERABLE ARE
DERIVATIVE, BUT IT IS A SEPARATE
CLAIM.

TO YOUR QUESTION, AND THIS IS
OUTSIDE THE BRIEFS, BUT LET ME
JUST TRY TO ADDRESS YOUR
QUESTION.

SO UNDER THE COMMON LAW SINCE
1938, WE HAD THIRD PARTY BAD
FAITH CLAIMS.

WE CAN'T HAVE FIRST PARTY.

THAT DIDN'T COME UNTIL 1982 WHEN
THE LEGISLATURE PASSED 624.155.

AND THERE WAS A SUPREME COURT
CASE CALLED McCLOUD THAT SAID,
ESSENTIALLY, THE DAMAGES THAT
WERE RECOVERABLE IN THAT CASE IF
THE UNENSURED MOTORIST CARRIER
ACTED IN BAD FAITH FOR ONLY,
ESSENTIALLY, THE CONSEQUENTIAL
DAMAGES, THE LEGISLATURE

ESSENTIALLY OVERRODE -- THE DAMAGES SHALL INCLUDE NOT ONLY THE DAMAGES CAUSED BY THE UNINSURED MOTORIST CARRIER, BUT ALSO THE DAMAGES CAUSED BY TORTFEASOR.

AND THIS BODY HAS A SAID THAT THAT WAS AN, IN EFFECT, A PENALTY.

MOST RECENTLY, A PENALTY FOR THE --

[INAUDIBLE]

TO SETTLE.

SO THAT WAS THE LEGISLATURE'S INTENT BEHIND THAT, WAS ESSENTIALLY TO OVERRIDE THE McCLOUD DECISION AND MAKE SURE THERE WERE SOME TEETH BECAUSE SOMETIMES THERE AREN'T ANY CONSEQUENTIAL DAMAGES, BUT THE LEGISLATURE WANTED THE UM CARRIER TO PAY THE DAMAGES THAT WERE CAUSED IF IT IS FOUND THAT THEY VIOLATED 6 --

[INAUDIBLE]

AND HERE THERE WAS A WRONGFUL, WE ALLEGED, A WRONGFUL DENIAL OF COVERAGE, AND THAT WAS WHAT WAS THE GENESIS OF THAT CLAIM.

BUT TO, BACK TO THE 041

ARGUMENT, SO THE FOCUS HAS ALWAYS BEEN, AND IT ACTUALLY STARTED IN THE DELVIN DECISION AND THEN WENT ON IN RHYMER, IN WELLS, GOWDY AND DeANGELO, AND IN ALL FIVE OF THOSE CASES THE COURT WAS FOCUSED ON WAS THERE JOINT LIABILITY FOR THE SAME DAMAGES.

ESSENTIALLY, THAT IS WHAT THE COURT INTERPRETED IMPARTIAL SATISFACTION THE DAMAGES SUED FOR MEANS, WHICH MAKES SENSE. IF IT'S GOING TO BE A PARTIAL SATISFACTION GIVEN, THERE HAD TO BE SOME SORT OF JOINT LIABILITY THERE, AND THERE HAD TO BE THE SAME DAMAGES.

AND -- I APOLOGIZE, YOUR HONOR. YOU KNOW, IT SEEMS FROM THE BRIEFING AT LEAST THAT THE DEFENSE AGREED WITH ME ON THAT POINT AND THAT OUR DISPUTE WAS ESSENTIALLY OVER WHETHER THERE

WAS JOINT LIABILITY IN WHETHER
OR NOT THE DAMAGES ARE THE SAME.
BUT BACK TO, JUSTICE CANADY,
YOUR QUESTION ABOUT THE
LEGISLATIVE INTENT, THE UM BAD
FAITH STATUTES MAKE CLEAR THAT
THE UM CARRIER SHOULDN'T GET A
SETOFF FOR AN AMOUNT PAID BY THE
UNDERINSURED TORTFEASOR.

WE HAVE 1551B1 SAYS WHEN THEY
FAIL TO ATTEMPT IN GOOD FAITH,
THEY'LL BE LIABLE FOR THE
DAMAGES PROVIDED BY STATUTE.
SUBSECTION FOUR.

[AUDIO DIFFICULTY]

CALCULATING THE AMOUNTS OF THAT
PENALTY, YOU DO UNDERSTAND AND
CONSIDER THE UNDERLYING PERSONAL
INJURY DAMAGES.

BUT THERE ARE OTHER BUCKETS OF
DAMAGES.

THERE'S ATTORNEYS' FEES AND
COSTS, PREIMPOSED JUDGMENT
INTEREST, CONSEQUENTIAL DAMAGES,
PERHAPS EVEN PUNITIVE DAMAGES.

AND MRS. ELLISON WOULD NEVER BE
LIABLE FOR ANY OF THOSE, SO THE
DAMAGES AREN'T THE SAME EITHER.

AND WE CITED MULTIPLE CASES
WHICH HELD THAT A SETOFF UNDER
041 1 IS NOT APPROPRIATE WHEN
THE DAMAGES, ALTHOUGH MAYBE
OVERLAPPING, WERE NOT
CO-EXTENSIVE.

THE DAMAGES WERE NOT IDENTICAL.
SO IF THEY'RE OVERLAPPING BUT
THEY'RE NOT, THEY'RE NOT THE
SAME DAMAGES, THEN THEY DON'T
GET A SETOFF.

NOW, IF YOU DISAGREE WITH ME
BOTH ON THE POINTS OF JOINT
LIABILITY AND THE DAMAGES BEING
THE SAME, THEN WE GET TO THE
APPORTIONMENT QUESTION IN THE
DIONESE CASE.

AND FIRST OF ALL, JUST TO
CLARIFY, EXCUSE ME, DIONESE WAS
A CASE AGAINST JOINT
TORTFEASORS.

SO THERE'S NO QUESTION THAT
THERE WAS JOINT LIABILITY WHICH
IS UNLIKE THE SITUATION WHERE
THE UNINSURED MOTORIST
CARRIER SHOULD NEVER BE JOINTLY

LIABLE WITH THE TORTFEASOR.
BUT IT'S ALSO DISTINGUISHABLE.
IT WAS A CASE ABOUT TWO
PLAINTIFFS.
THERE WAS A HUSBAND AND A WIFE.
THE WIFE HAD A CLAIM FOR HER
INJURIES, AND THE HUSBAND HAD A
CONSORTIUM CLAIM.
AND WHAT HAPPENED THERE WAS HAY
SETTLED WITH ONE DEFENDANT, AND
THEN THEY ALLEGEDLY MADE A
SECRET AGREEMENT AMONG
THEMSELVES ON HOW TO DIVVY UP
THE MONEY TO MAXIMIZE THEIR
RECOVERY FROM THE REMAINING
DEFENDANT AT TRIAL.
AND THE COURT SAYS THAT THAT'S
NOT BINDING.
THE SETTLING DEFENDANT WASN'T
PART OF THAT AGREEMENT, AND THE
SECRET ALLOCATION SHOULDN'T BE
BINDING ON THE NONSETTLING
PARTY.
THAT WOULDN'T BE FAIR.
SO WHAT THE COURT DID THERE IS
THEY ALLOCATED THE AWARD
PROPORTIONALLY MEANING THAT,
RUNS, IF THE WIFE HAD \$90,000 IN
DAMAGES AND THE HUSBAND HAD 10,
THEN THE FIRST IS THE ELEMENT
SHOULD HAVE ALSO BEEN SPLIT
90-10.
THE WELLS DECISION, MUCH LATER,
THE COURT SAID IT WOULD INVITE
COLLUSION TO ALLOW THE SET
SETTLING PARTIES TO CONTROL THE
ALLOCATION BETWEEN DIFFERENT
ELEMENTS OF DAMAGES.
THAT IS MORE AKIN TO THE
SITUATION WE HAVE HERE.
AND I'M PARAPHRASING WHAT THE
COURT SAID IN WELLS, BUT THE
COURT SAID THAT THE PLAINTIFF
WOULD SEEK TO MAXIMIZE THE
AMOUNT OF THEIR SETTLEMENT
APPORTIONED TO THE CLAIM WHERE
THERE'S NO JOINT LIABILITY ARE,
AND IT WOULD MAKE NO DIFFERENCE
TO THE SETTLING DEFENDANT WHO'S
GETTING OUT OF THE CASE, SO THEY
WOULD BE MORE LIKELY TO BE
AMENABLE TO THAT ALLOCATION
THAT'S PROPOSED.
AND PERHAPS THEY WOULD EVEN BE

ABLE TO SETTLE THE CASE OR SAVE
SOME MONEY ON SETTLEMENT IF THEY
AGREE TO THE PROPOSED
ALLOCATION.
AND ALL THAT MAKES SENSE.
AND --
>> BASICALLY, IT WOULD BE A SHAM
ALLOCATION.
>> IT COULD BE.
IT COULD BE.
LET'S PLAY THAT OUT.
LET'S SAY THAT I HAD AN
AGREEMENT WITH 21ST CENTURY THAT
ALL \$4 MILLION WOULD BE
ALLOCATED TO ATTORNEYS' FEES,
INTERESTS AND PUNITIVE DAMAGES,
NONE OF WHICH IS RECOVERABLE FOR
MS. ELLISON, SO THERE'D NEVER BE
JOINT LIABILITY FOR THAT.
WHY WOULD IT BE FAIR TO SAY THAT
MS. ELLISON WOULD BE BOUND TO
THAT ALLOCATION EVEN IF IT
APPEARED ON THE FACE OF
SETTLEMENT ITSELF?
IT WOULDN'T BE FAIR.
SHE DIDN'T HAVE THE OPPORTUNITY
TO OBJECT.
SHE WASN'T A PARTICIPANT IN THAT
SETTLEMENT AGREEMENT.
SO IF THE ALLOCATION AGREEMENT,
IF WE HAD ONE, WOULDN'T BE
BINDING ON MS. ELLISON, THEN WHY
SHOULD SHE GET AN AUTOMATIC
SETOFF FOR THE FULL AMOUNT JUST
BECAUSE WE DIDN'T HAVE AN
ALLOCATION AGREEMENT?
THAT DOESN'T MAKE SENSE.
PARTICULARLY IF YOU LOOK BACK AT
THE STATUTORY TEXT, IT SAYS AT
TRIAL IF ANY DEFENDANT SHOWS THE
COURT -- THE BURDEN IS ON THE
DEFENDANT THERE.
I DON'T HAVE, AS A PLAINTIFF, IS
HAVE TO DO ANYTHING.
THE DEFENDANT HAS TO MAKE THE
SHOWING.
THEY HAVE TO ASK THE TRIAL JUDGE
OR PERHAPS EVEN THE JURY TO
DETERMINE THE EXTENT OF THE
OVERLAP IF THERE WAS, IN FACT,
THERE WAS JOINT LIABILITY.
AND IF YOU GET PAST THE JOINT
LIABILITY AND DETERMINE AT LEAST
SOME OF THE DAMAGES WERE THE

SAME, THAT IS WHAT THE DEFENDANT'S BURDEN WAS. AND THEY SIMPLY CAN'T MEET THAT BURDEN BECAUSE THEY NEVER EVEN ASKED FOR A SETOFF UNDER 768.041 IN THE TRIAL COURT. SO THEY DIDN'T MEET THEIR BURDEN OF PROVING A DUPLICATION MEANING THAT THE TRIAL COURT WAS ENTIRELY CORRECT TO DENY SETOFF. ON 768.76, YOU KNOW, IF THE COURT IS APPLYING THE SUPREMACY OF THE TEXT PRINCIPLES, IT IS LOOKING AT THE TEXT, WHAT IS WRITTEN ON THE PAGE. IT IS NOT ACCEPTING THE DEFENDANT'S INVITATION TO TRY TO APPLY SOME BROADER INTENT TO PREVENT DOUBLE RECOVERIES. OF COURSE, THE STATUTES DON'T SAY ANYTIME THERE'S A DOUBLE RECOVERY THAT THE DEFENDANT GETS A SETOFF. THAT, WE HAVE TO APPLY THE TEXT AS IT'S THE WRITTEN. AND THE LEGISLATURE HASN'T DEFINED THE COLLATERAL SOURCE TO COVER AN UNINSURED MOTORIST'S BAD FAITH SETTLEMENT. THEY CLAIM IN THE BRIEFS UNDER, EXCUSE ME, THREE SEPARATE PROVISIONS, FIRST IS SUBSECTION 2A2 WHERE THEY SAY THAT CERTAIN FINES CONCERN CAN TYPES OF INSURANCE BENEFITS ARE COLLATERAL SOURCES. NOT ALL BENEFITS, JUST CERTAIN TYPES. AND THE DEFENDANT ARGUES IT APPLIES BECAUSE THE SETTLEMENT WAS DERIVED FROM THE PLAINTIFF'S UNINSURED MOTORIST POLICY. WELL, THE WORD DERIVE DOESN'T APPEAR IN THE STATUTE. THE QUESTION ISN'T WHETHER THE SETTLEMENT WAS DERIVED FROM AN INSURANCE BENEFIT WHICH IS RECOVERABLE. THE QUESTION IS WHETHER OR NOT THE PAYMENT WAS AN INSURANCE BENEFIT. AND THIS, BY DEFINITION, IS NOT AN INSURANCE BENEFIT. IT IS A STATUTORY PENALTY OVER

AND ABOVE WHAT THEY OWED UNDER THE POLICY.

IT IS EXTRA-CONTRACTUAL DAMAGES.

SO 2A2 DOES NOT APPLY.

2A3 IS ABOUT PAYMENTS TO PAY MEDICAL SERVICE OR AGREEMENT TO PAY MEDICAL SERVICES.

AND 2A4 IS AN AGREEMENT TO PROVIDE DISABILITY BENEFITS.

AND OUR SETTLEMENT WITH 21ST CENTURY WAS NEITHER OF THOSE.

21ST CENTURY DIDN'T AGREE TO PAY MEDICAL BENEFITS, THAT THEY DIDN'T AGREE TO PAY DISABILITY BENEFITS.

THEY WOULD NEVER BE LIABLE FOR, YOU KNOW, ESSENTIALLY HEALTH INSURANCE OR DISABILITY INSURANCE.

NOW, IT'S TRUE THAT THE PLAINTIFF COULD USE SOME OF THAT MONEY THAT HE RECOVERED TO PAY HIS OWN MEDICAL EXPENSES OR PERHAPS HE COULD HAVE PAID HIS OWN OR COMPENSATED HIM FOR HIS LOST WAGES, BUT 21ST CENTURY DIDN'T AGREE TO PAY THAT, AND THERE'S NO READING OF THE TEXT WHERE YOU CAN SAY THAT AN UNINSURED MOTORIST BAD FAITH SETTLEMENT QUALIFIES AS A COLLATERAL SOURCE.

>> -- ON THAT THOUGH TO DEFEAT, I MEAN, THERE'S A SENSE IN WHICH PART OF THE ARGUMENT IS THIS IS JUST COMPLETELY KIND OF CATEGORICALLY TALKING ABOUT DIFFERENT THINGS.

BUT TO THE EXTENT THAT YOU'RE LITERALLY, THAT YOU'RE RESPONDING TO THIS KIND OF LITERAL ARGUMENT THAT IT WAS, YOU KNOW, IT WAS AN AGREEMENT AND IT WAS, YOU KNOW, THE DAMAGES INCLUDED MEDICAL EXPENSES, IS IT, IS IT JUST THE FACT THAT THE SETTLEMENT AGREEMENT ITSELF DOESN'T SAY WE'RE GOING TO PAY YOU \$4 MILLION INCLUDING A MILLION DOLLARS FOR PAST MEDICALS? I MEAN, WOULD THAT FIT WITHIN THE STATUTE?

OR, YOU KNOW, HOW MUCH OF THE

ARGUMENT THINGS ON THE ABSENCE OF THOSE SPECIFIC WORDS IN THE AGREEMENT?

>> I THINK IT'S IMPORTANT TO REMEMBER THE CLAIM BEING SETTLED.

NOT SO MUCH DICTATED BY WHAT THE SETTLEMENT AGREEMENT SAID, BUT THE CLAIM WAS FOR UNINSURED MOTORIST BENEFITS AND BAD FAITH. THE UM BENEFITS AREN'T RECOVERABLE.

THAT'S NOT EVEN AN ISSUE WHICH IS BEFORE THE COURT, BUT THERE'S A CONTRACTUAL RIGHT OF SUBROGATION IN THE UM POLICY WHICH UNDER SUBSECTION ONE MEANS THAT THEY DON'T GET A SETOFF BECAUSE OF THE SUBROGATION RIGHT.

EVEN IF IT DID QUALIFY AS A COLLATERAL SOURCE.

SO WE'RE TALKING ABOUT THE UM BAD FAITH DAMAGES.

AND THE PAYMENT WAS JUST NOT A REIMBURSEMENT OR A PAYMENT OF MEDICAL EXPENSES.

AND JUST TO CLARIFY, WHEN WE SAY THAT SOMETHING IS ON ACCOUNT OF A PERSONAL PHYSICAL INJURY WHICH IS PUT MANY THERE FOR TAX PURPOSES, THAT IS NOT THE SAME THING AS SAYING IT IS A PAYMENT OF A MEDICAL EXPENSE.

IT WAS A SET ELEMENT OF A DISPUTED CLAIM FOR VIOLATION OF 624.1551B1.

SO IF YOU HAD THAT TYPE OF BROAD READING, THEN YOU COULD SAY THAT ANY SETTLEMENT COULD, IF IT WAS LATER USED TO PAY MEDICAL EXPENSES, WOULD QUALIFY AS A COLLATERAL SOURCE.

AND, OF COURSE, OUR COMMON LAW COLLATERAL SOURCE RULE STILL EXISTS, AND THE STATUTE OVERRIDES THE COMMON LAW.

AND THE COUNTS ALWAYS HAVE SAID THAT WE WILL NOT REALIZE THE STATUTE TO OVERRIDE THE COMMON IF LAW UNLESS THAT CHANGE HAS BEEN AFFECTED WITH CLARITY.

AND THIS DOES NOT, CLEARLY, OVERRIDE COLLATERAL SOURCE

COMMON LAW RULE IN THIS SITUATION.

>> YOU CAN HAVE 30 SECONDS TO FINISH UP.

>> WELL, FOR THOSE REASONS, I GUESS, YOUR HONORS, WE'D ASK THAT YOU AFFIRM UNLESS ONE OF YOU HAVE ADDITIONAL QUESTIONS. I'D BE HAPPY TO ANSWER.

OKAY.

THANK YOU VERY MUCH.

>> THANK YOU, YOUR HONOR.

FIRST OF ALL, ON THE PRESERVATION ISSUE, I POINT OUT ON THE MOTION TO DETERMINE COLLATERAL SOURCE SETOFF WHICH WAS FILED PRIOR TO TRIAL, IT SPECIFICALLY SAYS THAT 21ST CENTURY SETTLED WITH THE PLAINTIFF FOR A TOTAL OF \$4 MILLION PURSUANT TO THE SETTLEMENT AGREEMENT AND RELEASE WHICH IS ATTACHED TO THIS MOTION AND THAT ALL THE MONIES CONCERNED IN THE SETTLEMENT AGREEMENT INCLUDING I ALL BAD FAITH DAMAGES CONSTITUTE DAMAGES ON ACCOUNT OF PERSONAL INJURIES SUSTAINED BY PLAINTIFF IN THE MOTOR VEHICLE ACCIDENT AT ISSUE. THE SAME DAMAGES SOUGHT AGAINST MS. ELLISON.

THAT'S EXACTLY THE ARGUMENT UNDER 768.041.

IN THE, IN THE TRANSCRIPT IT SAYS ARGUMENT IS SIMPLY, THIS IS COUNSEL'S, DEFENSE COUNSELING. YOUR HONOR, THE SAME DAMAGES THAT WERE PAID FOR THE SAME.

IT'S A DOUBLE DIP, AS I SAID.

WE CAN TELL -- AND SAYS WE CAN'T FIND ANY CASE LAW ON THIS BECAUSE THERE WAS NO CASE LAW. WE CAN TELL YOU WHAT WE BELIEVE IS RIGHT.

IT WAS FOR THE PERSONAL INJURIES THAT HE RECEIVED IN THE CASE AND, THEREFORE, SHOULD BE SET OFF UNDER THE LAW.

THAT'S THE ARGUMENT.

COUNSEL -- OR PLAINTIFF'S COUNSEL IN THEIR RESPONSE TO THE MOTION SAID DEFENDANT IS NOT ENTITLED TO A SETOFF UNDER

768.041 EITHER BECAUSE 21ST
CENTURY WAS NOT A JOINT
TORTFEASOR CITING GOWDY.
SO THE VERY ARGUMENTS WERE
PRESENTED IN THE TRIAL COURT.
IN TERMS OF --

[AUDIO DIFFICULTY]

COUNSEL SUGGESTING THAT WE HAD
TO ACTUALLY PROVE THIS AT TRIAL
OR NOT, THAT'S WHAT THE BRIEFS
KIND OF SUGGEST.

I WOULD POINT OUT THAT THERE IS
A STIPULATION THAT WAS ENTERED
PRETRIAL THAT SAID THE SETOFFS
WOULD BE ADDRESSED POST-TRIAL,
AND THAT'S AT 2240 OF THE
RECORD.

IN TERMS OF THE SAME DAMAGES,
YOUR HONOR, YES, THERE ARE
DIFFERENT CLAIMS HERE.

BUT WHAT WE'RE TALKING ABOUT IS
THE EXACT SAME DAMAGES.

AND I POINT TO THREE THINGS
HERE; THE COMPLAINT, THE
STATUTE THAT WE TALKED ABOUT AND
THE CASE LAW INTERPRETING IT.

IN THE COMPLAINT THEY EXPRESSLY
REQUESTED RECOVERY IN THE BAD
FAITH CLAIM FOR THE DAMAGES
SUFFERED AS A RESULT OF THE
CRASH.

THE SAME DAMAGES SOUGHT
AGAINST MS. ELLISON.

THE STATUTE WHICH COUNSEL
MENTIONED, SUBSECTION 10, THE
LEGISLATURE SAID THAT THE
DAMAGES RECOVERABLE AGAINST A UM
INSURER IN AD BAD FAITH CASE ARE
ALL THE CLAIM CLAIMANTS DAMAGES.
SO IT'S THE NOT JUST A MEASURE
OF DAMAGES, IT IS THE DAMAGES
CAUSED BY THE TORTFEASOR WHICH
ARE MADE RECOVERABLE IN THE BAD
FAITH CASE.

AND THAT'S WHAT THE COURTS HAVE
SAID IN GEICO V. PATTON, THE
DAMAGES IN A FIRST PARTY BAD
FAITH CASE INCLUDE TOTAL AMOUNT
OF THE PLAINTIFF'S DAMAGES THAT
WERE CAUSED BY THE ORIGINAL
THIRD PARTY TORTFEASOR.

IT RELIED ON THIS COURT'S
DECISION IN STATE FARM V --

[INAUDIBLE]

WHICH ACKNOWLEDGED THAT WAS SAME
THING THAT THE LEGISLATURE
PROVIDED FOR.

PATTON WAS THEN APPROVED BY THIS
COURT IN THE SAFE CO. CASE WHERE
THE COUNT SAID YOU DON'T HAVE TO
PROVE IT PRICE.

ONCE YOU --

[AUDIO DIFFICULTY]

>> SORRY.

YOU'VE GOT TO FINISH UP.

YOU CAN TAKE 15 SECONDS TO --

>> ALL RIGHT.

THANK YOU, YOUR HONOR.

WE JUST ASK THAT THE COURT
ANSWER THE CERTIFIED QUESTION IN
THE AFFIRMATIVE AND INDICATE
THAT MS. ELLISON IS ENTITLED TO
THE \$4 MILLION SETTLEMENT.

THANK YOU, YOUR HONOR.

>> THANK YOU.