IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

ARTHUR ARGUEDAS, BARBARA ARGUEDAS and HELEN BRANSFORD,

Plaintiffs-Appellants,

v.

No. A-1-CA-35,699

GARRETT SEAWRIGHT, et al.,

Defendants-Appellees.

APPELLANTS' REPLY BRIEF

On Appeal from the First Judicial District Court, County of Santa Fe
Hon. Sarah M. Singleton, No. D-0101-CV-2013-01293

Submitted By:

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STATEMENT OF COMPLIANCE

Counsel undersigned hereby certifies that the body of Appellants' Reply Brief is done in proportionally-spaced Times 14-point font style and contains 4,399 words including headings, footnotes, quotations and all other text except the cover page, table of contents, table of authorities, signature block and certificate of service.

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Defendant's Answer Brief is noteworthy for its failure to directly address or distinguish the relevant New Mexico authorities cited by Plaintiffs in their Brief-In-Chief on the issues presented here. Instead, Defendant raises affirmative defenses for the first time in his Answer Brief which, were never raised in the trial court—and to which Plaintiffs had no opportunity to respond below or in their Brief-In-Chief.

First, Defendant argues that no person, including these individual Plaintiffs, can have standing to assert a UPA claim for statutory damages under Section 57-12-10 without alleging that a UPA violation proximately caused some "concrete injury," *i.e.*, a specific loss of money or property.

Second, Defendant argues Plaintiffs "voluntarily dismissed" their individual UPA claims thereby divesting this Court of jurisdiction over this appeal.

Third, Defendant argues that Plaintiffs "procedurally defaulted" under New Mexico's Declaratory Judgment Act [NMSA 1978, Section 44-6-12] by failing to notify the New Mexico Attorney General of their challenge to the constitutionality of applying conflicting interpretations to the definitionally identical language in Section 57-12-10(B) [liberal] and Section 57-12-10(E) [strict]. None of these arguments were raised below.

Defendant's new arguments are partially based on two recent U.S. Supreme Court holdings interpreting "federal standing" and "injury"—which limit federal jurisdiction under Article III, Section 2, U.S. Constitution. *See Spokeo, Inc. v.*

Robins, 136 S.Ct. 1540 (2016) (concrete injury); *Microsoft Corp. v. Baker*, 137 S.Ct. 1702 (2017) [*Baker*] (voluntary dismissal). These cases are inapposite. Both cases contravene New Mexico jurisprudence and common law.

Further, by invocating *Spokeo* to argue that Plaintiffs lack standing to assert a claim for statutory damages under Section 57-12-10(B) based on Plaintiffs' failure to allege "concrete" economic loss [actual damages], Defendant is asking this Court to overrule the Supreme Court's holding in *Page & Wirtz Const. Co. v. Solomon*, 1990-NMSC-063, ¶¶ 21-23, 110 N.M. 206, 794 P.2d 349.

This Court is bound by the Supreme Court's holding in *Page & Wirtz* which is directly on point, cannot be distinguished by Defendant and is contrary to Defendant's new argument. *Aguilera v. Palm Harbor Homes, Inc.*, 2002-NMSC-029, ¶ 6, 132 N.M. 715, 54 P.3d 993 ("[T]he Court of Appeals…remains bound by Supreme Court precedent."); *Padilla v. State Farm Mut. Auto. Ins. Co.*, 2003-NMSC-011, ¶5, 133 N.M. 661, 68 P.3d 901. Defendant's federal standing argument proves all the more strongly why this Court must certify this case to the Supreme Court.

A. Supplemental Procedural Summary

In reply to these new arguments and defenses raised for the first time on appeal, Plaintiffs supplement their Procedural Summary. Defendant now argues that Plaintiffs voluntarily dismissed their individual UPA claims. The transcript of the March 28, 2016 hearing disproves this new contention.

During this hearing defense counsel asked the trial court to dismiss Plaintiffs' Complaint based on the lack of any damages in order to allow an immediate appeal under Rule 1-054(B)(2). **3-28-16 Tr. 3-5** (defense counsel asking for dismissal with prejudice as to Defendant under Rule 1-054(B)(2); trial court responding a dismissal as to Defendant would be a final, appealable order; defense counsel acknowledging Defendant's desire to appeal as well as Plaintiffs' desire to appeal adverse ruling on statutory damages for class members because Plaintiffs' counsel "is not here for $100 or $300 statutory [damages] claim on behalf of [Plaintiffs]").

During the hearing, Plaintiffs' counsel stated he had already expended "900 hours" preparing and litigating the issues presented in the case. **3-28-16 Tr. 27-28**. Thus, defense counsel and the trial court understood that prosecuting Plaintiffs' individual UPA claim[s] for statutory damages would be economically impractical. *Id*. Plaintiffs' counsel could not expect to recover fees sufficient to pay for more than 1,000 hours that would have to be expended to obtain a $100/$300 recovery. **3-28-16 Tr. 4-5**, **27-28**.

Therefore, Plaintiffs' counsel specifically asked the trial court to allow Plaintiffs to take an interlocutory appeal on the class damages issue—or grant defense counsel's request for a dismissal under Rule 1-054(B)(2) to allow an immediate appeal. **3-28-16 Tr. 38-39** ("Your Honor, I think that under these circumstances, without waiving anything that could be waived by asking you to

do this, there are basically one of two ways you could go. You could deny the motion in part and ***then certify the statutory damages question to the Court of Appeals*** based on ***apparent*** conflict between the two Court of Appeals' holdings or you can go ahead and dismiss the case. I think that ***given the urgency of this***, because ***we've already been three years down the line in this case***, I think in the interest of judicial economy…But I think in the interest of judicial economy, the Court should probably ***accept Mr. Guebert's suggestion*** and dismiss the case." (emphasis added)).

The trial court then suggested the following ruling to the parties: "If I say, well, I believe that a [class] claim has been stated that would show a deceptive trade practice. For practical purposes, ***that finding is meaningless without a finding that the class members are entitled to statutory damages***. And I find as a matter of law they are not entitled to statutory damages ***and, therefore, am dismissing the case***? What do you think?...Do you [Mr. Guebert] think that would work?…[MR. GUEBERT]: It would probably work, although then we would appeal the whole thing. I mean, we could appeal parts of it, I suspect. I suspect that would work. ***The idea is to do exactly what you're trying to do which is to get it up***. THE COURT: Right. Right." **3-28-16 Tr. 39** (emphasis added).

The trial court then directed the parties to submit forms of order to reflect this ruling. **3-28-16 Tr. 39-40**. Defense counsel asked that he be allowed to

submit Defendant's form of order after production of a transcript of the hearing. *Id*. The ensuing negotiations between counsel were not made a part of the Record. However, written documentation confirms that there were numerous versions of the proposed order exchanged between counsel before final agreement. As part of the negotiations, Plaintiffs' counsel agreed to withdraw Plaintiffs' Second Motion To Amend Complaint filed on May 10, 2016. **10**-RP **2286-87**.

On May 9, 2016 at 1:39 p.m., defense counsel emailed Plaintiffs' counsel a proposed form of order. *See* Plaintiffs' Amended Motion to Supplement The Record With Exhibits ["Plaintiffs' Amended Motion"], Exhibit 1. At 2:18 p.m., Plaintiffs' counsel responded by email stating he could not concur with Defendant's order because it "would preclude Plaintiffs from any appeal." *See* Plaintiffs' Amended Motion, Exhibit 2. Plaintiffs' counsel submitted a revised order removing the problematic language and inserting language about "judicial economy" as the basis for the order. *Id*. At 3:05 p.m., the trial court *sua sponte* entered a revised version of an order previously submitted by Defendant while noting Plaintiffs' objections to that form of order. **10-RP 2255-56.**

On May 10, 2016, at 9:56 a.m., the trial court emailed the parties advising that she had entered her own revised Order. In that email, the trial court also informed the parties that if they wished to amend her revised Order they should submit an Amended Order. *See* Plaintiffs' Amended Motion, Exhibit 3. At 9:44

a.m., defense counsel sent an email to the trial court stating that Plaintiffs' counsel had withdrawn the Motion to Amend and the parties were "working on an Order that would resolve the case completely for purposes of appeal pursuant to [the trial court's] oral ruling of March 28, 2016." *See* Plaintiffs' Amended Motion, Exhibit 4. At 12:37 p.m., defense counsel emailed a draft of an amended order containing language stating Plaintiffs were agreeing to a "voluntary dismissal" of their individual UPA claim[s]. *See* Plaintiffs' Amended Motion, Exhibit 5. At 1:32 p.m., Plaintiffs' counsel responded stating he could not agree to the "voluntary dismissal" language in Defendant's order because it would preclude an appeal. *See* Plaintiffs' Amended Motion, Exhibit 6.

On May 11, 2016 at 5:39 a.m., Plaintiffs' counsel sent an email suggesting that judicial economy be stated as the basis for the dismissal since he had asked the trial court for an interlocutory appeal or dismissal during the hearing based on judicial economy. Plaintiffs' counsel also noted it was unlikely the trial court would award attorney fees for the hours already expended based on an individual UPA award "worth less than $1,000." *See* Plaintiffs' Amended Motion, Exhibit 7. At 5:41 a.m., Plaintiffs' counsel emailed a revised form of order to defense counsel including judicial economy as its basis. *See* Plaintiffs' Amended Motion, Exhibit 8. At 11:07 a.m., defense counsel emailed stating Plaintiffs' form of order was still unacceptable and demanding that Plaintiffs concur in Defendant's May 9 form of order. *See* Plaintiffs' Amended Motion, Exhibit 9. At 1:24 p.m.,

Plaintiffs' counsel emailed stating Plaintiffs would agree to Defendant's May 9 form of order with one change—removal of the phrase "and at Plaintiffs' request" included as a basis for the dismissal. *See* Plaintiffs' Amended Motion, Exhibit 10. At 4:06 p.m., defense counsel emailed Plaintiffs' counsel stating Defendant would concur with this deletion and would submit an attached copy of the amended order to the trial court upon approval by Plaintiffs' counsel. *See* Plaintiffs' Amended Motion, Exhibit 11.

On May 12, 2016 at 6:10 a.m., Plaintiffs' counsel emailed his approval of this form of order. *See* Plaintiffs' Amended Motion, Exhibit 12. At 10:00 a.m., the trial court entered its Amended Order pursuant to the stipulation of counsel. **10-RP 2288-89.**

B. Plaintiffs Did Not Voluntarily Dismiss Any Of Their Claims

Whether an order is appealable presents a question of law which this Court reviews *de novo*. *Baca v. Los Lunas Cmty. Programs,* 2011–NMCA–008, ¶ 7, 149 N.M. 198, 246 P.3d 1070. The Rules of Appellate Procedure are liberally construed so that appeals may be decided on their merits. *Aken v. Plains Elec. Gen. & Transmission Co-op, Inc.*, 2002-NMSC-021, ¶10, 132 N.M. 401, 49 P.3d 662; *Danzer v. Prof'l Insurors, Inc.,* 1984-NMSC-046, ¶ 3, 101 N.M. 178, 679 P.2d 1276.

A stipulated order of dismissal is not a voluntary dismissal precluding appeal when entered after a trial court's ruling has effectively precluded a

plaintiff's recovery and would result in a trial involving a "needless waste of scarce judicial resources, a needless waste of the jury's time, and a needless waste of time and expense by the parties and their counsel." *Kysar v. BP Am. Prod. Co.,* 2012–NMCA–036, ¶ 16, 273 P.3d 867; *Id.* ¶14 (quoting *Ward v. Broadwell,* 1 N.M. 75, 90–91 (1854)) ("[W]here a party has been compelled to abandon his case in consequence of an adverse decision of the court, to which he excepts, upon a vital point in his cause, we are by no means prepared to concede that his action was voluntary."); *Rancho del Villacito Condos., Inc. v. Weisfeld,* 1995-NMSC-076, ¶9, 121 N.M. 52, 908 P.2d 745 [*Weisfeld*] ("[Plaintiff] counters that other jurisdictions have allowed for an exception to this rule if the plaintiff's consent to dismissal is not completely voluntary. This exception applies when an adverse ruling by the trial court would effectively preclude recovery by the plaintiff or is completely dispositive of the case. *See, e.g., Wimberly v. Parrish,* 253 N.C. 536, 117 S.E.2d 472, 474 (1960) (holding, when 'a judge intimates an opinion on the law which lies at the foundation of the action, adverse to the plaintiff, or excludes evidence offered by the plaintiff which is material and necessary to make out his case, he may submit to a nonsuit and appeal').").

Defendant's argument, raised for the first time on appeal, is disingenuous at best. At worst, it smacks of "sandbagging and gamesmanship" which this Court will not encourage. *State v. Nguyen,* 2008–NMCA–073, ¶22, 144 N.M. 197, 185

P.3d 368. As shown above, both parties and the trial court understood, and were in agreement, that their mutual objective was to provide a path for an appeal of this dispositive issue to preserve judicial resources. **3-28-16 Tr. 27-28, 38-39**.

The trial court found that Plaintiffs' Amended Complaint did state valid *class* claims for violations of the UPA. **3-28-16 Tr. 38-39**. However, the trial court concluded "this finding is meaningless without a finding that the class members are entitled to statutory damages." ***Id.* at 39**. Thus, the trial court's ruling effectively precluded Plaintiffs' recovery by rejecting the legal theory underlying Plaintiffs' UPA class claims. The trial court, and the parties, understood that this adverse ruling was dispositive of the critical issue in the case. **3-28-16 Tr. 3-5, 27-28, 38-39**.

The trial court and counsel also recognized that Plaintiffs' purpose in agreeing to the Stipulated Amended Order was to preserve Plaintiffs' right to an immediate appeal of this dispositive issue. ***Id***. The trial court approved this stipulation to allow Plaintiffs to appeal and thereby avoid the waste of judicial resources that would result from years of additional litigation over individual UPA claims worth less than $1,000. ***Id***. Therefore, Plaintiffs' consent to the Stipulated Amended Order was not "voluntary" and falls within the exception recognized by this Court in *Kysar* and the Supreme Court in *Weisfeld*.

C. Plaintiffs' Appeal Is Not Procedurally Defective For Failure To Notify The Attorney General

Defendant argues for the first time on appeal that Plaintiffs were required under the Declaratory Judgment Act [DJA], NMSA 1978, Section 44-6-12, to notify the Attorney General of their challenge to the constitutionality of Section 57-12-10(E). First, this is an affirmative defense Defendant was required to raise in the trial court under Rule 1-012(B). Having failed to do so, Defendant waived this affirmative defense. *Mundy & Mundy, Inc. v. Adams*, 1979-NMSC-084, ¶ 15, 93 N.M. 534, 602 P.2d. 1021.

Second, Defendant provides this Court with no citation to the record showing that Plaintiffs ever requested declaratory relief or even cited the DJA. Defendant essentially asks this Court to interpret Plaintiffs' Amended Complaint as requesting declaratory relief when no such claim was asserted. This Court reviews the trial court's decision to dismiss for failure to state a claim *de novo* and resolves all doubts and inferences in favor of the sufficiency of the complaint. *Delfino v. Griffo,* 2011–NMSC–015, ¶ 9, 150 N.M. 97, 257 P.3d 917.

Resolving all inferences in their favor, Plaintiffs were not required to comply with Section 44-6-12 of the DJA because they never sought declaratory relief. *Cf. Lazo v. Board of County Com'rs of Bernalillo County*, 1984-NMSC-111, ¶¶ 10-11, 102 N.M. 35, 690 P.2d. 1029 (Section 44-6-12 applies "when declaratory relief is sought").

D. Plaintiffs Did Not Waive Their Constitutional Claim

As already shown in their Brief-In-Chief, Plaintiffs raised the issue of equal protection and rational basis numerous times. **BIC 4-9, 13-18, 20-21, 24-28, 34-40, 44-45.** Defendant fails to show how Plaintiffs waived this argument.

E. The Trial Court's Strict Construction Of Section 57-12-10(E) Was Contrary To The UPA's Purpose And Public Policy

Defendant's argument ignores the public policy underlying the UPA which is the foundation for Plaintiffs' argument that there is no rational basis for strictly interpreting Section 57-12-10(E) when the Supreme Court applied a liberal interpretation to Section 57-12-10(B), despite definitionally indistinguishable language in each conditioning recovery on some showing of "loss of money or property," *i.e.*, actual damages. *Cf. Page & Wirtz*, 1990-NMSC-063, ¶¶ 22-23; *Lohman v. Daimler-Chrysler Corp.*, 2007-NMCA-100, ¶¶ 44, 47, 142 N.M. 437, 166 P.3d 1091.

Defendant argues the Supreme Court's holding in *Page & Wirtz* [¶¶ 22-23] is irrelevant to the public policy underlying the UPA class remedy. Defendant cites no authority to support this contention. In *Lohman*, the issue was whether the trial court erred in failing to dismiss plaintiff's UPA *class* claims. *Id.*, ¶¶ 1, 44, 47. This Court relied on *Page & Wirtz* as establishing a public policy that the UPA did not require plaintiff to prove that he, or any of his putative class members had suffered economic losses. *Id.*

Defendant also argues that this Court's holding in *Lohman* was solely about the viability of the named plaintiff's individual UPA claim. The language in *Lohman* disproves this assertion. *Id*., ¶ 47 ("Even if Plaintiff fails ultimately to prove that he ***and his putative class members have suffered economic losses***, ***they*** may nevertheless seek the statutory $100 minimum." (emphasis added)). *Lohman* also held the public policy and "remedial purpose" of the UPA, "as a consumer protection measure, is also consistent with the broadest possible application." *Id*., ¶ 25.

"To determine legislative intent, we look not only to the language used in the statute, but also to the purpose to be achieved and the wrong to be remedied." *Jolley v. Associated Elec. & Gas Ins. Servs., Ltd.,* 2010–NMSC–029, , 148 N.M. 436, 237 P.3d 738). Interpreting Section 57-12-10(E) so as to defeat its effectiveness as a device for remedying widespread, institutional deceptive practices is erroneous.

Defendant's argument ignores altogether the importance given to the UPA class remedy in *Fiser v. Dell Computer Corp*., 2008-NMSC-046, ¶¶ 13-14, 144 N.M. 464, 188 P.3d 1215, which Defendant never mentions. In *Fiser*, the Court stated the opportunity for UPA class relief, and its importance to consumer rights "is enshrined in the fundamental policy of New Mexico." *Id*. The UPA class remedy must be interpreted in light of this importance to fundamental policy.

Any interpretation of the UPA's class remedy must account for its singular place in our fundamental public policy.

The trial court erred in ignoring the Supreme Court's holding in *Fiser* and strictly construing Section 57-12-10(E). Defendant relies on the "beguiling simplicity" of strict construction to justify a result that is unreasonable and contrary to the remedial purpose of the UPA—and its broadest possible application. *Cf. State v. Strauch,* 2015-NMSC-009, ¶ 13, 345 P.3d 317; *Lohman*, 2007-NMCA-100, ¶ 25.

Defendant's strict construction argument rests on the assumption that the remedial purpose of the UPA in general, and Section 57-12-10(E) in particular, is to provide for the recovery of economic losses. However, deception is the evil the UPA was enacted to address. *Floersheim v. F.T.C.*, 411 F.2d 874, 878 (9th Cir.1969) ("Deception itself is the evil the [FTC] statute is designed to prevent."); *In Re International Harvester Co.,* 104 F.T.C. 949, 1056-57 (1984) ("Our deception analysis thus focuses on risk of consumer harm, and actual injury need not be shown."); *State ex rel. King v. B&B Investment Group, Inc.*, 2014-NMSC-024, ¶¶ 26, 34, 329 P.3d 658 ("The UPA does not require a subjective, individualized showing of detriment.").

The object of the UPA is to prevent deceptive sales practices rather than to redress actual injury. *Page & Wirtz*, 2007-NMCA-100, ¶¶ 22-23; *Lohman*, 2007-NMCA-100, ¶ 47. Defendant does not dispute that the trial court's strict

interpretation of Section 57-12-10(E) nullifies the UPA class remedy as an effective device for protecting consumer rights against widespread, institutional sales abuses as stated in *Fiser*. Thus, the trial court's strict interpretation erroneously defeats the public policy purpose and intended function of the UPA class remedy. *Fiser*, 2008-NMSC-046, ¶¶ 13-14; *Baker v. Hedsrom*, 2013-NMSC-043, ¶ 21, 309 P.3d 1047 ("We will not construe a statute to defeat [its] intended purpose.").

F. Defendant's "Benefit" Argument Is Frivolous

In the trial court, Defendant argued that Plaintiffs had received a "benefit" from the deceptive sales practices he, and all other New Mexico State Farm agents, systematically employed. Defendant's benefit argument is based on the *Jordan* retroactive reformation mandate. *Jordan v. Allstate Ins. Co.*, 2010-NMSC-051, ¶¶ 20-25, 149 N.M. 162, 245 P.3d 1214. Plaintiffs received a "benefit" from the admitted violations of the UPA since Plaintiffs, and all their class members, were entitled to retroactive reformation of their non-complying State Farm MFRA policies. This argument is absurd.

First, Defendant ignores the basic nature of the insurance policy as an "aleatory" contract. Under an aleatory contract, State Farm's performance [retroactive reformation] was "conditional on the happening of a fortuitous event." *Jackson Nat. Life Ins. Co. v. Receconi*, 1992-NMSC-019, ¶ 21, 113 N.M. 403, 827 P.2d. 118.

State Farm's duty to perform [or retroactively reform] was independent from the payment of premiums by Plaintiffs or any of the class members in the absence of covered losses. Without a fortuitous "occurrence" [a UM loss], State Farm's independent duty to reform any relevant policies never arose. *Roberts Oil Co., Inc. v. Transamerica Ins. Co.*, 1992-NMSC-032, ¶ 32, 113 N.M. 745, 833 P.2d 222. Plaintiffs and the class members never suffered a covered loss. Therefore, retroactive reformation could never occur with respect to any of the relevant policies. The aleatory nature of these policies renders retroactive reformation meaningless.

In a recent New Mexico federal district court case, Judge Parker was presented with this precise argument, *i.e.*, that retroactive reformation constituted a "benefit" to policyholders who never suffered a UM loss. Judge Parker dismissed this argument summarily, finding that the "benefit" of retroactive reformation for policyholders who never suffered a UM loss was worth "a big fat zero." *Casados v. Safeco Ins. Co.*, 2015 WL 11089527 *12 (D.N.M. 2015) (quoting *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir.2004)) ("Notwithstanding the parties' arguments to the contrary, the Court finds that the Settlement Agreement provides the Subclass A Policy Reformation Members with 'a big fat zero.'").

G. Defendant Knew About *Montaño*'s Premium Disclosure Rule

Defendant's alternative argument is that he could not "see over the horizon" to anticipate the holding in *Jordan* to know that, after May 20, 2004, he had a duty to disclose UM premiums whenever *offering* stacked UM coverages under an MFRA policy. This is a feckless argument.

First, Defendant ignores the obvious distinction between *Montaño* and *Jordan*. In *Montaño*, the Supreme Court set out a rule mandating the disclosure of UM premiums during every *offering* of stacked UM coverage. *Montaño v. Allstate Indem. Co.,* 2004-NMSC-020, ¶ 20, 135 N.M. 681, 92 P.3d 1255. In *Jordan*, the Supreme Court set out "for the first time the technical rules" for obtaining a valid *rejection* of UM coverage. *Jordan*, 2010-NMSC-051, ¶¶ 22-25.

The insurance industry itself made these "technical requirements for a valid [UM] rejection" necessary because, even after *Montaño*, "insurers continue[d] to offer UM/UIM coverage in ways that are not conducive to allowing the insured to make a realistically informed choice." *Id.* ¶ 20. The institutional refusal to follow *Montaño*'s clear mandate is the crux of Plaintiffs' UPA claims in this case.

Plaintiffs alleged that, as an historic practice among all State Farm agents, Defendant sold Plaintiffs separate UM policies on each car they insured since 1992, *i.e.*, all UM coverages sold were "stacked." **BIC 3**, **1-RP 50, ¶ 119, 57, ¶ 146; 2-RP 314, 326, 334; 7-RP 1601, ¶ 67; 9-RP 1885-86**. Defendant never

disputed the fact that each separate UM policy he sold after May 20, 2004 provided stacked UM coverage.

The UPA's "knowingly" standard, which Defendant fails to cite, is whether the seller knew, or should have known through the exercise of reasonable diligence, that a statement or omission would tend to deceive a consumer. *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, ¶¶ 16-17, 112 N.M. 97, 811 P.2d 1308. Plaintiffs alleged that, after *Montaño* [¶ 20], Defendant[s] knew, or should have known through the exercise of reasonable professional diligence, that the relevant UM premiums were material to every offering of UM coverage and that failing to disclose UM premiums would tend to deceive Plaintiffs by preventing them from being able to make realistically informed choices about whether to buy or reject UM coverage. **1-RP 35-47; 7-RP 1594-98, 1605-06**.

H. Defendant's Federal Authorities Are Inapposite Here

Defendant is doing more than asking this Court to rule that class members are not allowed to recover statutory damages under Section 57-12-10(E). Defendant is also asking this Court to rule that Plaintiffs, as individuals, have no standing to recover statutory damages under Section 57-12-10(B) because Plaintiffs have not alleged specific economic loss, *i.e.*, actual damages.

Defendant's attack on individual awards of statutory damages, in the absence of any proof of "loss of money or property," is based on the U.S. Supreme Court's *Spokeo* Opinion. Defendant's reliance on *Spokeo*'s federal

standing holding is misplaced. First, unlike federal courts, state courts are not constrained by the limited jurisdiction imposed on federal courts by Article III, Section 2 of the U.S. Constitution. Second, federal courts do not presume that the Congress intended for the common law to apply when interpreting a statute. Third, because state courts have common law authority, they possess significantly greater power than a federal court to interpret statutes in order to further public policy. Fourth, federal courts interpret statutes under a legal framework different than that found in our state court jurisprudence. *San Juan Agr. Water Users Ass'n. v. KNME-TV,* 2011-NMSC-011, ¶¶ 37-40, 257 P.3d 884; *see also Nat'l Trust for Historic Preservation v. City of Albuquerque,* 1994-NMCA-057, ¶¶ 8-10, 117 N.M. 590, 874 P.2d 798 ("The [U.S. Supreme Court] test does not control here because it was developed to assist in the interpretation of *federal* statutes. Different considerations arise when state courts decide matters of state law. One difference is obvious. As Plaintiffs note in their brief-in-chief, the fourth factor, which invokes federalism, has no application when a state court is interpreting state law. A second difference is more subtle but also fundamental. Federal courts have very limited authority beyond that conferred by statute or the Constitution…A state court, in contrast, may look beyond legislative intent in exercising common-law authority to recognize a private cause of action." (citations omitted) (emphasis in original)).

Finally, Defendant ignores the positive, binding precedent of the New Mexico Supreme Court in *Page & Wirtz* where our Supreme Court decided that, despite the literal interpretation Defendant urges here, no showing of actual damages is required to recover statutory damages under Section 57-12-10(B). *Page & Wirtz*, 1990-NMSC-063, ¶¶ 21-23. This Court is bound to follow the holding *Page & Wirtz* holding regardless of Defendant's different rationale. *Padilla*, 2003-NMSC-011, ¶ 5.

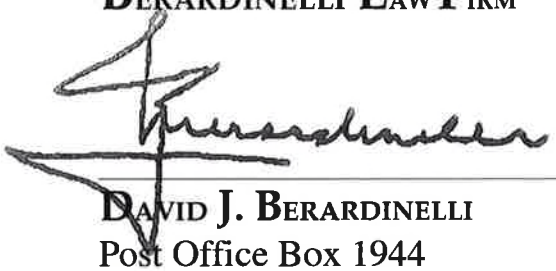
Defendant's reliance on *Baker* is also misplaced. In *Baker* there was no question that the named plaintiffs moved to voluntarily dismiss their individual claims. *Baker*, 137 S.Ct. at 1704. As shown above, that did not happen here. Plaintiffs expressly refused to agree to any language indicating that the dismissal was "voluntary" in the Amended Order—and Defendant knows this. Nor does *Baker* overrule New Mexico law providing an exception to the voluntary dismissal rule where the trial court's pretrial ruling effectively precludes plaintiff's recovery. *Kysar*, 2012–NMCA–036, ¶14.

I. Conclusion

This Court should certify this case to the Supreme Court upon the issue presented. Alternatively, this Court should reverse the trial court and remand for further proceedings.

Respectfully submitted,

BERARDINELLI LAW FIRM



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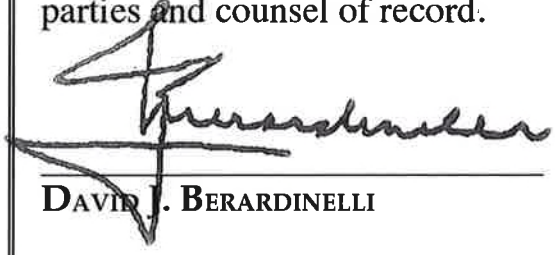
I hereby certify that on September 20, 2017, I caused a true and correct copy of this Reply Brief to be served electronically, via the Tyler Host System employed by the New Mexico Court of Appeals, upon all parties and counsel of record.



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