IN THE NEW MEXICO SUPREME COURT

LINDA GARCIA,

Plaintiff-Appellee and Respondent,

v.

No. S-1-SC-40157
Ct. App. No. A-1-CA-38005

ALLSTATE FIRE AND
CASUALTY INSURANCE COMPANY,

Defendant-Appellee and Petitioner.

On Petition for Writ of Certiorari to the New Mexico Court of Appeals
Appeal from the Ninth Judicial District Court, County of Curry
The Honorable Fred T. Van Soelen
Dist. Ct. No. D-9050CV02017-00480

REPLY BRIEF OF ALLSTATE FIRE AND CASUALTY INSURANCE COMPANY

MODRALL, SPERLING, ROEHL, HARRIS & SISK, PA
Jennifer A. Noya
Shannon N. Nairn
Post Office Box 2168
Bank of America Centre, Suite 1000
500 Fourth Street, N.W.
Albuquerque, New Mexico 87103-2168
Telephone: (505) 848-1800

Attorneys for Defendant-Appellee Allstate Fire and Casualty Insurance Company

TABLE OF CONTENTS

Page

CERTIFICATE OF COMPLIANCE

As required by Rule 12-318(G), we certify that this Reply Brief complies with the type-volume limitation of Rules 12-318(F)(2)–(3) NMRA. The body of the Reply Brief does not exceed 15 pages or 4,400 words. According to Microsoft Office Word, the body of the Reply Brief, as defined by Rule 12-318(F)(1), contains 3,613 words.

TABLE OF AUTHORITIES

Page(s)

New Mexico Cases

Other Cases

Statutes

INTRODUCTION

The district court found that Linda Garcia knowingly and intelligently rejected Allstate's meaningful offer of stacked UM coverage when she completed Allstate's Selection/Rejection Form, and that Allstate's offer of UM coverage satisfied all the requirements of *Jordan v. Allstate Insurance Co.*, 2010-NMSC-051, ¶ 18, 149 N.M. 162, 245 P.3d 1214. **[RP 275–76]** The Court of Appeals did not disturb in any respect the trial court's findings as to Allstate's compliance with *Jordan*, and Garcia does not show that the trial court's findings were clearly erroneous.

Instead, the Court of Appeals ignored what information Garcia reviewed before she declined stacked coverage, and the court found an "ambiguity" in the depiction of premiums in the declarations page of the policy Allstate issued to Garcia *after* she chose non-stacked coverage. The court's analysis is a throwback to the "ambiguity" analysis of *Lopez v. Foundation Reserve Insurance Co.*, 1982-NMSC-034, 98 N.M. 166, 646 P.2d 1230, and its progeny, which analysis this Court rejected by charting a "new course" and "new approach" in *Montano v. Allstate Indemnity Co.*, 2004-NMSC-020, ¶ 17, 135 N.M. 681, 92 P.3d 1255. The issue posed by Allstate's petition is narrow and legal: Did the Court of Appeals apply the wrong standard?

There is no doubt that New Mexico statutes and public policy, like those of most states, favors UM coverage as a necessary protection for those injured by

culpable motorists who are uninsured or underinsured. **[NMTLA AmB 3-5]** Those statutes and public policies are not at stake: Allstate provided UM coverage to Garcia and paid her UM policy limits according to what she knowingly and intelligently selected. The issue here is whether the UM coverage under the two-vehicle policy was stacked or non-stacked. New Mexico's UM statute does not address stacking, and the test for whether coverage is stacked or non-stacked is one that this Court has developed as a matter of public policy through decades of precedent that culminated in the "knowing waiver" test of *Montano* and *Ullman v. Safeway Insurance Co.*, 2023-NMSC-030, 539 P.3d 668.

That knowing-waiver test cured the problems New Mexico courts and litigants experienced under the *Lopez* "ambiguity" analysis. By looking solely to whether the insured knowingly and intelligently rejected stacked coverage, the *Montano-Ullman* test can be applied in a straightforward manner and eliminates the raft of post-hoc litigation over attempts to obtain stacked coverage that the insured did not choose and did not pay for. *See Montano*, 2004-NMSC-020, ¶ 21. The test also upholds New Mexico's principles of freedom of contract in a manner fully consistent with New Mexico's UM laws and public policy. The Court should uphold the *Montano-Ullman* test and affirm the district court's grant of summary judgment for Allstate.

ARGUMENT

I. The Court should uphold the district court's application of the *Montano-Ullman* knowing-waiver test.

A. As the Court recognized in *Ullman*, *Montano*'s knowing-waiver test replaced any focus on whether multiple premiums were charged under a multivehicle policy.

This Court made clear in *Montano* and *Ullman* that its model for UM stacking is one of informed decision making by the insured in the context of a free market for coverage. *Montano* abrogated the prior approach of looking at whether the policy's anti-stacking clause or premium structure was ambiguous, and instead imposed a simple requirement capable of sure, straightforward application: the sole requirement to avoid stacking is for the insurer to obtain the insured's written rejection of stacking. *Montano*, 2004-NMSC-020, ¶ 18. Premium cost issues are left "to the market to resolve." *Id.* ¶ 21. To the extent a policy's declarations page shows how the premium is shared among the vehicles insured under a multivehicle policy, it provides the insured with *more* information about the cost of insuring the vehicles.

The Court of Appeals turned this Court's approach on its head. Despite Garcia's execution of a written rejection of stacking, the Court of Appeals held that the insurance contract "is ambiguous as to whether multiple premiums were charged," and therefore Garcia could stack her coverages. *Garcia v. Allstate Fire & Cas. Ins. Co.*, 2024-NMCA-010, ¶ 26, 541 P.3d 162. The court did not say that the Selection/Rejection Form was ambiguous in its description of stacking, even though

that form—not the subsequent description of premiums in a policy declarations page—was the basis of the insured's informed decision making. The Court of Appeals' return to the "ambiguity" analysis that this Court abandoned in *Montano* thus ignores how real decisions are made in a functioning market and requires insurers to give customers what they did not choose and did not pay for. The Court of Appeals' analysis ignores this Court's affirmation in *Ullman* that *Montano* "addressed the requirements an insurer must meet should it seek to preclude the stacking of coverages in a *multivehicle* policy for which an insured pays *multiple premiums*." *Ullman*, 2023-NMSC-030, ¶ 76 (cleaned up; emphasis added). *Ullman* disposes of any suggestion that multiple premiums creates stacked coverage, regardless of what the insured expressly selects or rejects.

Amicus New Mexico Trial Lawyers Association admits that Allstate "denied stacked coverage based on the insured's 'choices' at the time the policy was purchased." **[NMTLA AmB 1]** That is correct, and that is how it should be—under *Montano* and in a functioning market for coverage. NMTLA's assertion that Allstate undertook, "at the time the policy was purchased, … to confuse and misleading the insured causing unknowing and uninformed selections and rejections of coverage" **[NMTLA AmB 1]** has nothing to do with *post hoc* premium descriptions or the basis of the Court of Appeals' opinion below. Neither the Court of Appeals nor the trial court found fault with the Selection/Rejection Form that Garcia executed.

For its part, Garcia's Answer Brief misapprehends the significance of this Court's statements in *Montano* as to antistacking clauses. **[AB 8–10]** It is correct that this Court recognized in *Montano* that decades of litigation over supposedly ambiguous policy clauses that barred stacking rendered such provisions practically ineffective. *Montano*, 2004-NMSC-020, ¶ 21. That was *not* because non-stacked coverage is improper, but because the policy-clause method of effectuating it was too fraught with "ambiguity" challenges in post-accident coverage litigation. The Court's resolution in *Montano* was not to look at the policy that was ultimately issued, but to look at whether the insured separately—and before issuance of the policy—knowingly and intelligently waived stacking.

Garcia's Answer Brief tries to have it both ways, arguing that *Montano* adopted a new waiver-based approach but also maintained its prior focus on how premiums were charged or depicted—in other words, whether there was a single premium or multiple premiums. **[AB 10-19]** But that argument fails on legal *and* factual grounds: it does not account for the Court's recent decision in *Ullman* or the specific facts of this case.

Finally, amicus NMTLA introduces on appeal an argument that Garcia has not made: that New Mexico's UM statute requires the sale of UM coverage on a per-vehicle basis, not a per-policy basis. **[NMTLA AmB 8–15]** But this Court "will not consider new issues presented for the first time on appeal through amicus briefs."

Richardson v. Carnegie Library Rest., Inc., 1988-NMSC-084, ¶ 14, 107 N.M. 688, 763 P.2d 1153 (citing *St. Vincent Hosp. v. Salazar*, 1980-NMSC-124, ¶ 9, 95 N.M. 147, 619 P.2d 823), *overruled on other grounds*, *Trujillo v. City of Albuquerque*, 1998-NMSC-031, 125 N.M. 721, 965 P.2d 305. There is no evidence that NMTLA's issue even concerned Garcia, i.e., that Garcia preferred UM coverage for one vehicle but not the other. NMTLA's concern that a hypothetical insured might be "coerced" into rejecting UM coverage entirely or choosing non-stacked coverage **[NMTLA AmB 11–12]** must await a case where the parties raise it and the facts support it.

In any event, the same argument was advanced by plaintiffs in *Ullman* but the Court rejected it, explaining that the plaintiffs "had cited no such authority for the claim that [the insurer] was required to offer per-vehicle coverage," and "*Montano* established no such requirement." *Ullman*, 2023-NMSC-030, ¶¶ 75–76. While this Court remanded the issue in *Ullman* to allow further briefing, NMTLA here offers no further authority for its asserted requirement of a per-vehicle offer. *Montano* still established no such requirement, nor did *Jordan* address the issue. **[*See* NMTLA AmB 11]** NMTLA argues that "the phrase '**any motor vehicle**'" in NMSA 1978, § 66-5-301(A) "indicates that the relevant unit of analysis is the number vehicles, not the number of policies." **[NMTLA AmB 10]** But that statute does not address the form of the offer of coverage at all, much less require that UM coverage be offered vehicle by vehicle.

B. The Court of Appeals' focus on the description of premiums was erroneous as a matter of law.

As to the legal test, this Court explained last year that the *Montano* knowing-waiver analysis applies even if an insured "pays multiple premiums." *Ullman*, 2023-NMSC-030, ¶ 76, 539 P.3d 668. That was not a change from *Montano*, because, contrary to Garcia's suggestion, *Montano* referred to "the charging of multiple premiums" as what *had been* the test, not what it would be moving forward. **[AB 9–10** (quoting *Montano*, 2004-NMSC-020, ¶ 9)**]** Garcia's attempt to portray this as a question of which test "provide[s] more protection, not less" **[AB 11]** is a reductivist approach that ignores what the Court actually said in *Montano* and *Ullman*. It also ignores that the *Montano-Ullman* test provides full protection for insureds by focusing on what they see when they make a coverage decision. The prior test did not offer "more protection" simply because there were more avenues to litigate around the consequences of a knowing and intelligent selection of non-stacked coverage.[1]

---

[1] Garcia's argument as to the prospective-only application of *Montano* **[AB 17–19]** assumes its own conclusion by relying on the Court's application of prior law to prove prospective law. Garcia argues that in *Montano* "[t]his Court decided the case against Allstate because it could not determine that Allstate clearly charged only a single premium." **[BIC 18]** That is correct, but the prevailing law at the time focused on the multiple-premium issue. *Ullman* made clear that, under *Montano*, an insurer could "preclude the stacking of coverages in a *multivehicle* policy for which an insured pays *multiple premiums*." *Ullman*, 2023-NMSC-030, ¶ 76 (cleaned up; emphasis added).

In light of the new course charted by *Montano* in 2004, Garcia misplaces reliance on *prior* cases that involved "policies that do not clearly charge a single premium." **[AB 13]** As Allstate pointed out in its Brief in Chief, *Rodriguez v. Windsor Insurance Co.*, 1994-NMSC-075, 118 N.M. 127, 879 P.2d 759, was one such case, and it was part of the abandoned "ambiguity" analysis. **[BIC 10, 15–16]** Garcia simply relies on outdated precedent in arguing that "[t]he standard is whether the policy 'clearly' only charges one premium." **[AB 15]**

Finally, Garcia erroneously argues that the issue of multiple premiums is part of the knowing-waiver analysis under *Jordan*. **[AB 16–17]** As explained in Allstate's Brief in Chief and as correctly applied by the district court, the four requirements of *Jordan* have to do with the circumstances in which the insured "make[s] a realistically informed choice." *Jordan*, 2010-NMSC-051, ¶ 20. As a temporal and causal matter, Garcia made her choice based on the information in the Selection/Rejection Form, not the policy declarations page she received *after* she made her choice. Nor did that page create an "ambiguity" as to stacking after Garcia explicitly rejected stacking.

C. Garcia misstates the facts surrounding Allstate's offer of stacked and non-stacked UM coverages because she made her decision based on a quoted single premium.

As to the facts, when Garcia selected non-stacked coverage and rejected stacking, she did so based on the *single premiums* Allstate offered for both vehicles

to be insured under the multivehicle policy, and Garcia selected the lower *single premium* offered for non-stacked coverage. Garcia's argument that this is a "multiple premium" case is not based on what she looked at when she chose non-stacked coverage, but instead on the fact that the declarations page in the policy later issued to her that showed how the premium was shared between the two vehicles. **[AB 15–16, 19–20]** That does not make the policy a multiple-premium policy in any material respect. Nor did it override the decision Garcia made to *reject stacked coverage* and create a new, contrary "reasonable expectation" that she was receiving what she rejected and did not pay for. Indeed, the record is bereft of any evidence that Garcia read the policy when she received it, saw the sharing of premiums on the declarations page, and thought she was now receiving what she had already rejected explicitly.

Garcia's argument that the declarations page was "a powerful suggestion" of stacking is simply untenable and bereft of support. **[AB 16]** Nor was Allstate "quoting multiple per-vehicle premiums in the policy declarations" **[AB 20]**, because the "quoting" of premiums took place when Allstate offered the coverage, not after it issued the policy and described the premium. *See, e.g.*, *Blvd. RE Holdings, LLC v. Mix on Ins. Agency, Inc.*, 2022 WL 950820, at *9 (E.D. Mo. Mar. 30, 2022) (distinguishing "documents such as insurance quotes or declarations pages" and recognizing that a "quote" was "an abbreviated description of the policy on offer"), *aff'd*, 74 F.4th 905 (8th Cir. 2023).

Moreover, *Montano*'s abandonment of looking at later-issued policy clauses also militates in favor of no longer looking to the description of premiums in the later-issued policy. The question is—and should be—whether *Jordan*'s requirements were met when the insured selected non-stacked coverage. That provides more—and *clearer*—protection for insureds because it focuses on what was before the insureds when they chose non-stacked or stacked coverage, not what was in the policy they ultimately received. It also is consistent with *Montano*'s concern with both "increasingly complex insurance contracts *and pricing strategies*," *Montano*, 2004-NMSC-020, ¶ 17 (emphasis added), because neither anti-stacking clauses nor premium structures would henceforth drive the proper analysis.

Indeed, it may be argued that any additional information offered in the declarations page has a pro-consumer function because it allows the insured to understand how insuring multiple vehicles of different types and ages affects the ultimate premium charged. It is simply not accurate for Garcia to claim that "Allstate declared to Linda Garcia she *had paid* separated premiums on each of her two vehicles" **[AB 21]**, given that Garcia does not argue that she could have elected to insure any one of the two vehicles at the dollar amount indicated in the declarations page's breakdown. But, in face of a knowing and intelligent waiver of stacking, any such post-selection information does not bear on what an insured may reasonably

expect under a policy. **[*Cf.* AB 11]** Focusing on the text of the declarations page merely resurrects the litigation-fostering aspects of prior law that this Court sought to avoid in *Montano*.

II. The district court correctly concluded that Allstate complied with all of the *Jordan* requirements for an insured's effective rejection of stacked UM coverage.

Three points are clear with respect to whether Garcia knowingly and intelligently waived stacking of UM coverage. First, the inquiry is determined by the four-part *Jordan* test. *Jordan*, 2010-NMSC-051, ¶ 22. **[AB 23]** Second, the district court held that Allstate's offer satisfied the *Jordan* test, and the Court of Appeals did not question that finding, even as an alternative ground for reversal. *Indeed, Garcia does not even address the district court's findings, much less try to show that the district court was clearly erroneous.* **[AB 24–31]** Third, to comply with *Jordan*, "insurers need not set out a matrix of all stacking possibilities in their offers of UM/UIM coverage to adequately inform insured of the potential effects of stacking." *Ullman*, 2023-NMSC-030, ¶ 43.

Garcia argues that Allstate did not comply with *Jordan* because (1) it did not make a meaningful offer of UM coverage; (2) it did not make a meaningful disclosure of the costs of the various levels of coverage offered; (3) as a result of those two circumstances Garcia did not execute a knowing or intelligent waiver; and (4) Allstate did not incorporate Garcia's rejection of stacked coverage into the

policy. **[AB 24-30]** Garcia does not respond to the district court's holdings on the *Jordan* requirements or even to Allstate's treatment of them in its Brief in Chief. **[BIC 21–26]**

A. Allstate offered UM coverage in a meaningful way.

As Allstate anticipated, Garcia's sole argument is that Allstate stated the policy limits and explained stacking, but it "did not state the dollar amount of coverage available under the stacked versus unstacked options." **[AB 24–27]** Given that the policy limits were $25,000/$50,000/$25,000 and this was a two-vehicle policy, Allstate merely did not do simple math for Garcia and "calculate" that the stacked-coverage limit would be twice that number, i.e., $50,000/$100,000/$50,000, or that, for a pedestrian, the non-stacked "highest limit … for any one vehicle" would be $25,000/$50,000/$25,000. **[AB 25]** There is no evidence that an average purchase of automobile insurance would not understand the simple explanation in the Selection/Rejection Form that under stacked coverage "the applicable limits for each motor vehicle shown … are added together (stacked) to determine the total amount of available coverage." **[RP 52]** Nor is there any evidence or precedent supporting Garcia's new argument on appeal—not asserted below—that Garcia, or a "reasonable insured," would not understand the common expression $25,000/$50,000/$25,000 as meaning coverage per person, per accident, and for property damage. **[AB 26]** Nor is the applicability or function of such a "split limit"

expression even at issue in this case: the question concerns stacking of all three portions of the split limits.

An insurer need not lay out such simple math or create a table linking those amounts to the offered premiums, as this would be the very "matrix of all stacking possibilities in their offers of UM/UIM coverage" that this Court held "insurers need not set out … to adequately inform insured of the potential effects of stacking." *Ullman*, 2023-NMSC-030, ¶ 43. Contrary to Garcia's suggestion, this holding of *Ullman* was not a "going forward" prospective-only principle. **[AB 25]** And this case, which involved a multivehicle policy covering only two vehicles, is not one that calls for further explanation, because the *only* options were stacked coverage for two vehicles, non-stacked covered for those two vehicles, or no UM coverage at all.

B. Allstate informed Garcia about premium costs.

It is not clear why Garcia contends Allstate failed to explain premium costs in its Selection/Rejection Form. **[AB 26]** Allstate's form explained that, for her two-car policy, Garcia could choose stacked coverage for a premium of $168.05, unstacked coverage for a premium of $89.13, or no UM coverage at all. **[RP 54–55]** Garcia asserts without support that the premium increase she experienced when she added her Dodge Neon to the policy "suggested … a corresponding increase in benefits" **[AB 26–27]**, but she does not respond to Allstate's explanation that Garcia's premiums increased because she chose not to re-enroll in Allstate's

"ePolicy" program and therefore was no longer eligible for the "eSmart" discount. **[RP 103, 989–98]**

C. Garcia's rejection of stacked coverage was knowingly and intelligently made.

Garcia's argument as to the third *Jordan* prong wholly derivative of her arguments as to the first two prongs regarding disclosure of the amount of coverage and cost. **[AB 27–28]** Garcia argues about what "Allstate could have told Linda Garcia" **[AB 28]**, but *any* disclosure is inherently subject to arguments that the insurer could have said more or said it differently. The Selection/Rejection Form explained what stacking was and what the premium difference would be. **[RP 52-56]** Garcia's argument that Allstate should have explained that "the selection of unstacked coverage was the rejection of $25,000 of UIMBI coverage" **[AB 28]** is a rhetorical flourish as to the negative consequences of not stacking, but there is no justification for requiring insurers to explain the meaning of stacking or not stacking in both affirmative *and* negative ways.

D. Garcia's selection of non-stacked UM coverage was clearly incorporated into her policy.

Finally, Garcia argues that Allstate failed to comply with the fourth *Jordan* requirement that the insurer incorporate in the policy the insured's choice to reject stacked coverage. **[AB 29–30]** Her arguments are merely a restatement of her arguments as to the prior prongs. Contrary to her contention, Allstate's policy was

not "downright misleading." **[AB 30]** *For each insured vehicle*, the declarations page of the policy plainly stated that the coverage was non-stacked: "Uninsured Motorists Insurance Bodily Injury limits of insured vehicles may not be stacked." **[RP 16]** Additionally, the Supplement to the Policy Declarations reiterated that Garcia has "selected **non-stacked** Uninsured Motorists Insurance for Bodily Injury limits **equal to** your policy's Bodily Injury Liability Insurance limits of $25,000/$50,000." **[RP 19]** Given that the policy described what Garcia had selected, it was not, as Garcia argues, rendered "misleading" by the fact that it did "not use the words 'reject,' 'rejected,' 'rejection,' or the like." **[AB 30]**

The district court found that "all other requirements under New Mexico law were implemented by Allstate and therefore, Allstate is entitled to judgment as a matter of law." **[RP 276]** The Court of Appeals did not suggest anything to the contrary, even as an argument in the alternative to its premium analysis. Garcia has not shown that the district court's findings were clearly erroneous, and this Court should uphold those findings and judgment for Allstate.

CONCLUSION

The Court should reverse the ruling of the Court of Appeals and reinstate the district court's grant of summary judgment for Allstate on the ground that Garcia knowingly chose non-stacked UM coverage.

Respectfully submitted,

MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.

By: */s/ Jennifer A. Noya*

Jennifer A. Noya
Shannon N. Nairn
500 Fourth Street NW, Suite 1000
Post Office Box 2168
Albuquerque, New Mexico 87103-2168
Telephone: 505.848.1800
Attorney for Appellant Allstate.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on this 10th day of June, 2024, we filed the foregoing electronically through the court's electronic filing system, which caused the following parties or counsel to be served by electronic means, as more fully reflected in the Notice of Electronic Filing and also served via email to:

Mark S. Sweetman, Esq.
P.O. Box 397
Clovis, NM 88102-0397
(575) 762.5400
(575) 762.5221 (fax)
sweetmanlaw@suddenlink.net
Attorney for Plaintiff-Appellee Linda Garcia

MODRALL, SPERLING, ROEHL, HARRIS
& SISK, P.A.

By: */s/ Jennifer A. Noya*
Jennifer A. Noya