IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

RICHARD JAMES GONZAGOWSKI,

Plaintiff-Petitioner/Cross-Respondent,

v. **Case No. S-1-SC-38872**

STEAMATIC OF ALBUQUERQUE, INC., now d/b/a STEAMATIC OF ALBUQUERQUE & SANTA FE, INC., and GEB, INC.,

Defendants-Respondents/Cross-Petitioners,

and

ALLSTATE INDEMNITY COMPANY and GERARD BECKER,

Defendants.

PETITIONER RICHARD GONZAGOWSKI'S REPLY BRIEF

Court of Appeals No. A-1-CA-37321

Petitioner/Cross-Respondent Requests Oral Argument

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Statement of Compliance

Counsel for Plaintiff-Petitioner Richard Gonzagowski states that this Reply Brief complies with the limitations of Rule 12-502(D)(3) NMRA in that this Brief is double-spaced, uses 14-point Times New Roman Typeface, and the body of the Brief contains 4,377 words as determined by Word Office 365.

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Summary of Gonzagowski's Argument

There are fundamental errors in COA's Opinion and Steamatic's arguments:

First, the Opinion does not deal directly with the issue here, the collateral source rule. Payment by Allstate, Gonzagowski's insurer, is a collateral source payment; unaffiliated tortfeasor Steamatic does not benefit from insurance Gonzagowski purchased. *Sunnyland Farms v. Central New Mexico Electric Co-Op.*, 2013-NMSC-017, ¶48.

Second, it is *only* where multiple tortfeasors or contract obligors are "*jointly and severally*" liable for plaintiff's *entire* damages that one receives credit for what the other pays. *Payne v. Hall*, 2006-NMSC-029 ¶11, 139 N.M. 659. Defendants here are not jointly and severally liable. When COA's Opinion holds Steamatic gets credit for what Allstate paid on the contract claim, COA is incorrectly treating tortfeasor Steamatic as jointly and severally liable with contract breacher Allstate.

The Opinion and Steamatic also fail to recognize joint and several liability is abolished in New Mexico for tortfeasors, with certain inapplicable exceptions. NMSA §41-3A-1.

Third, joint and several liability was abolished and *replaced by* proportionate fault among tortfeasors. NMSA §41-3A-1. Proportionate fault does not apply to contract breacher Allstate. *Allsup's v. North River Ins. Co.*, 1999-NMSC-006, ¶23, 127 N.M. 1. There are situations where *either* joint and several tort liability *or*

proportionate fault may apply, but not both. The COA Opinion correctly allows the proportionate fault finding, i.e. $2 million is Steamatic's 80% proportionate fault. The COA Opinion and Steamatic incorrectly apply *both* 80% proportionate fault *and* whatever Allstate paid (as though joint and several liability applies) to reduce Steamatic's liability.

Point I: The Trial Court Properly Ruled Payment by Allstate, Gonzagowski's Insurer, Is a Collateral Source Payment. Tortfeasor Steamatic is Not Entitled to An Offset.

New Mexico law does not permit the reduction of Steamatic's liability which Steamatic requests and the COA Opinion requires. Steamatic's responsibility to pay all damages it caused Richard Gonzagowski is not reduced because a collateral source paid some of the same damages.

Steamatic does not contest the relevant facts set out by Gonzagowski: Steamatic and Allstate are unaffiliated; they are neither joint tortfeasors nor joint contract obligors; the Jury found Steamatic is liable for $2 million, 80% of Gonzagowski's $2.5 million damages; and Allstate is not liable for any of the damages Steamatic caused. **[*See* BIC pp. 3, 28-29; 11RP2795-97]**

Gonzagowski sees this as a collateral source case. More importantly, the Trial Court sees this as a collateral source case:

> ". . . I agree that the Collateral Source Rule precludes an offset that Steamatic is at least implicitly arguing for and negates consideration of double recovery. . . [T]hat's the law and that's what this Court is going to

> apply, is the Collateral Source Rule. In that regard, **the amount of settlement with Allstate is irrelevant.**" **[3-8-18 6Tr.52:7-24** bold added]

The collateral source rule applies when any source unaffiliated with tortfeasor pays part of the same damages for which tortfeasor is also liable. *Sunnyland*, 2013-NMSC-017, ¶48. Allstate's payment to its insured, for Allstate's insurance contract liability to Gonzagowski, is a collateral source payment. The Court of Appeals and Steamatic say no, Allstate's payment is a credit against the $2 million Judgment against Steamatic.

The collateral source rule is an exception to the general rule against duplicate damages. Why doesn't that exception apply here? The COA Opinion and Steamatic do not address that question. Instead the Opinion and Steamatic try to figure out how to use Allstate's payment, for its independent contract liability, to reduce the Final Amended Judgment entered against Steamatic for its tort liability.

What is the nature of the Final Amended Judgment entered against Steamatic? It is a proportionate fault Judgment against tortfeasor Steamatic for tortfeasor's 80% proportionate fault. No one contests that.

What does New Mexico law say about proportionate fault judgments? NMSA §41-3A-1 sets out the rule on proportionate fault:

> "A. In any cause of action to which the doctrine of comparative fault applies, the doctrine imposing joint and several liability upon two or more wrongdoers whose conduct proximately caused an injury to any plaintiff is abolished except as otherwise provided hereafter. The liability of any such defendants shall be several."

When tortfeasors are severally liable, each tortfeasor is liable for its proportionate fault and does not get credit for what another party paid:

> "E. No defendant who is severally liable shall be entitled to . . . reduce the dollar damages determined by the factfinder to be owed by the defendant to the plaintiff . . . by any amount the plaintiff has recovered from any other person whose fault may have also proximately caused injury to the plaintiff."

Several liability, and the resulting proportionate "fault", apportions *fault* among *tortfeasors, not* between negligence and contract breach. *Scott v. Rizzo*, 1981-NMSC-021, ¶20, 96 N.M. 682; *Allsup's v. North River Ins. Co.*, 1999-NMSC-006, ¶23.

Setting aside the fact that proportionate fault does not apply to Allstate, applying NMSA §41-3A-1 here, Steamatic is not entitled to reduce the $2 million damages determined by the Jury to be owed by Steamatic to Gonzagowski by any amount Gonzagowski has recovered from Allstate. Tortfeasor Steamatic has to pay its 80% proportionate fault of Gonzagowski's damages, $2 million, regardless of what Allstate paid. That 80% is Steamatic's responsibility. Steamatic's liability is not reduced by what Allstate paid (or for the erroneous Judgment against Allstate).

The COA Opinion and Steamatic disregard the collateral source rule and NMSA §41-3A-1 and try to see what theory can be used to give Steamatic credit for payment by Allstate to Gonzagowski (COA Opinion), or for the erroneous

Judgment against Allstate (Steamatic's position), for Allstate's independent breach of insurance contract.

"Joint and several liability" is the *only* situation where tortfeasor gets credit for what another party paid. '"Joint and several liability' is a term that is used most often in tort law and denotes the kind of liability imposed against multiple actors who, for public policy reasons, are held liable to a victim for all of a victim's damages." *Economy Rentals, Inc. v. Garcia*, 1991-NMSC-092, ¶44, 112 N.M. 748. "Under the theory of joint and several liability, each tortfeasor is liable for the entire injury, regardless of proportional fault. . ." *Payne v. Hall*, 2006-NMSC-029 ¶11.

"Joint and several" liability does not apply here because:

1. Under the definition of "joint and several liability", which is set out in *Economy Rentals,* 1991-NMSC-092 ¶43-44 and *Payne*, 2006-NMSC-029 ¶11, Steamatic and Allstate are not "jointly and severally" liable; *and*
2. Steamatic is liable in tort while Allstate is liable in contract so "joint and several liability" does not apply for that reason; *and*
3. "Joint and several liability" is abolished in New Mexico for tortfeasors with certain inapplicable exceptions. NMSA §41-3A-1; *Scott v. Rizzo*, 1981-NMSC-021, ¶20. Steamatic is a tortfeasor so "joint and several liability" is abolished for Steamatic; *and*

4. Not only is joint and several liability for tortfeasors abolished but it is replaced by proportionate fault. NMSA §41-3A-1. The COA Opinion and Steamatic take a Judgment that is already correctly reduced by proportionate fault, to $2 million, and then attempt to reduce it further by incorrectly applying joint and several liability principles to give Steamatic credit for Allstate's independent contract liability payment. That is a double reduction of Steamatic's liability. Proportionate liability *or* joint and several liability can apply in appropriate situations, not both. The $2 million Final Amended Judgment against Steamatic is correct. Further reduction of that Judgment is contrary to New Mexico law.

The Jury determined Steamatic is an independent contractor[1], not Allstate's agent, which means:

> "Allstate is not liable for Steamatic's acts or for any damages that you [the Jury] attribute to Steamatic's work." **[11RP2795 Q.2]**

There is no vicarious liability here. The Jury's Answers establish that Steamatic and Allstate are unaffiliated. Compensation Gonzagowski received from Allstate

[1] There is a typographical error in Steamatic's Answer Brief, page 1. We assume Steamatic meant to say the Jury found ". . . Steamatic *was* an independent contractor."

"does not operate to reduce damages recoverable from a wrongdoer", Steamatic. *Sunnyland,* 2013-NMSC-017, ¶48.

This Court has already answered Steamatic's arguments against the collateral source rule. Steamatic argues Gonzagowski is trying "to arrogate to himself a $750,000 windfall." **[Steamatic AB p. 16]** Steamatic's position is this Court should give Steamatic a $750,000 "windfall" instead. However, as *McConal v. Commercial Aviation Ins. Co.,* 1990-NMSC-093, ¶35, 110 N.M. 697 states, if there is a "windfall", the injured person should benefit; a tortfeasor like Steamatic should not "be relieved of its full responsibility for its wrongdoing."

The fundamental principle of tort law - wrongdoers are fully responsible for all damages they cause - underlies the collateral source rule. The Jury determined Steamatic's negligent failure to remove mold contamination from Gonzagowski's home caused $2 million damages to Gonzagowski and determined Allstate was not liable for any of the damages Steamatic caused. **[11RP2796-7 Q. 2, 6-7, 9, 11].**

Steamatic argues it should receive a $750,000 setoff because otherwise Gonzagowski collects more than damages awarded. **[Steamatic AB p. 7]** The collateral source rule allows plaintiffs to collect more than damages "awarded". *Sunnyland,* 2013-NMSC-017 ¶47. The rule allowed McConal to recover $105,000 even though damages awarded were $65,000. *McConal,* 1990-NMSC-093.

Steamatic requests a setoff because, it argues, even if its liability is reduced, Gonzagowski will receive full compensation and "Gonzagowski is entitled to nothing more." **[Steamatic AB p. 5]** "Yet an injured person may usually recover in full from a wrongdoer regardless of anything he may get from a 'collateral source' unconnected with the wrongdoer." *McConal*, 1990-NMSC-093, ¶19, quoting *Hudson v. Lazarus,* 217 F.2d 344, 346 (D.C.Cir. 1954).

Neither Steamatic nor COA's Opinion explain why tortfeasor Steamatic should be relieved of its obligation to pay the full $2 million damages it caused. Neither explain why tortfeasor Steamatic should benefit from insurance Gonzagowski purchased. The only explanation either gives for why the collateral source rule is inapplicable is the incorrect assertion that "the collateral source rule is limited to prejudgment settlements . . ." **[Steamatic AB p.12, 4, 9]**

Steamatic and COA's Opinion ignore language in *Sanchez v. Clayton* 1994-NMSC-064, 117 N.M. 761 that the collateral source rule applies if defendants are neither joint tortfeasors nor joint obligors on a contract, focusing instead on the word "prejudgment". However, the collateral source rule does *not* depend on when compensation is paid. *Sanchez* mentioned "prejudgment" because it was important in that situation that total damages had been determined. That allowed Justice Ransom to calculate plaintiffs had not recovered 50/750th of their damages from

settling defendant, so they could recover that from the other jointly and severally liable tortfeasor.

The rule applies whether collateral source pays "before or after rendition of judgment. . ." *Taylor v. American Fabritech,* 132 S.W.3d 613 (Tex.Appl. 2004). Steamatic notes cases where payment happened to be before judgment. None of those cases hold that *when* settlement occurs is a factor in applying the collateral source rule. The only case mentioning that is *Preferred Builders v. Ghaffari,* NMCA 3/31/11, an unpublished, non-precedential decision, a fact Steamatic should have noted. Rule 12-405D NMRA. That case mistakenly says *Sanchez* "limits" the rule to prejudgment settlements when *Sanchez* actually says the rule "applies" to prejudgment settlements. The Court of Appeals held, in *Preferred Builders*, that unless defendants are joint tortfeasors, judgment is *not* offset because the "settlement represent[s] a collateral source and may not be used to reduce the liability . . ." of non-settling tortfeasor.

Steamatic cites *Broda v. Dziwura,* 689 S.E.2d319, 321 (Ga. 2010). **[AB p.10]** The Court there held "tortfeasor cannot diminish the amount of his liability by pleading payments made to the plaintiff under the terms of a contract between plaintiff and a third party who [is] not a joint tortfeasor."

Policies underlying the collateral source rule - tortfeasor must pay all damages it causes and does not benefit from insurance plaintiff purchased - apply

equally whether collateral source pays before or after judgment. (Incidentally, Allstate's payment was pre-Amended Judgment). A party's status does not change from being unaffiliated to being affiliated depending on *when* settlement happens.

Steamatic's argument completely misstates *Sunnyland.* **[Steamatic AB p. 9]** In *Sunnyland,* tortfeasor settled with subrogated carrier and took an assignment. Then *tortfeasor* requested an offset, asserting subrogation rights. This Court was not determining whether a collateral source (like Allstate) was blameless, as Steamatic mistakenly argues. Rather it determined *tortfeasor* (like Steamatic) was not blameless and was not entitled to an offset. *Sunnyland* did *not* ". . . confine the collateral source rule to prejudgment settlements." **[Steamatic AB p. 9]**

Steamatic argues the collateral source rule is limited to prejudgment settlements because those are "voluntary." **[Steamatic AB p. 10]** The Trial Court held Allstate's settlement was ". . . as voluntary as any other settlement." **[3-8-18 6Tr.51:15]**

Steamatic also misses the mark on adverse effects of the COA Opinion on subrogation rights. If the Opinion stands, District Courts will be required to reduce judgments against tortfeasors by whatever collateral sources pay, radically affecting subrogation rights. [***See* Gonzagowski BIC pp. 34-37**]

Point II: Steamatic Does Not Get an Offset, to Reduce Its Responsibility for Damages, for Allstate's Payment or for the Invalid Judgment against Allstate Which the Trial Court Corrected.

As discussed above, even apart from the collateral source rule, Steamatic does not get credit for what Allstate paid its insured or for the invalid Judgment against Allstate. The Jury was instructed by Special Verdict Question 9 to:

> "compare the negligence of Steamatic with the negligence of Richard Gonzagowski in failing to mitigate his damages and find a percentage that each party's conduct contributed to Richard Gonzagowski's damages." **[11RP2796 Q.9]**

The Jury's Answers on the negligence claim establish Steamatic is responsible for 80% of Gonzagowski's $2.5 million damages, i.e., $2 million. **[11RP2796 Q.9]** Yet in its Answer Brief (and its Cross-Petition Brief in Chief), Steamatic *never* mentions that **the Jury found Steamatic liable for 80% of Gonzagowski's damages**. It does not matter what anyone else paid – Steamatic is liable for its 80% fault.

Steamatic and the COA Opinion rely heavily on *Sanchez v. Clayton,* 1994-NMSC-064 for their incorrect contention that Steamatic is entitled to an offset. In *Sanchez,* Justice Ransom analyzes four different situations and explains, for each of those situations, whether or not a party gets credit for what another paid. Justice Ransom's analysis confirms the collateral source rule applies here, as it did in *McConal,* and Steamatic is not entitled to an offset.

First situation: Justice Ransom explains that if multiple tortfeasors are "jointly and severally" liable for the entire amount of plaintiff's damages, as defendants were in *Sanchez,* non-settling tortfeasor gets full credit for what the jointly and severally liable settling tortfeasor paid:

> "with respect to tortfeasors who are **jointly and severally liable**, a settlement with one tortfeasor reduces the claim against other tortfeasors in the amount of the consideration paid. . ."

Sanchez, 1994-NMSC-064 ¶6, bold added. In *Sanchez,* non-settling defendant got credit for what settling defendant paid. The rule against double recovery applied in *Sanchez* because defendants were jointly and severally liable tortfeasors, both liable for plaintiffs' entire damages.

For the reasons set out above, pp. 5-6, the rule on joint and several liability is inapplicable here. The fundamental error in Steamatic's argument, and COA's Opinion, is that Steamatic and COA treat Defendants as if they are jointly and severally liable even though Steamatic and Allstate are *not* "jointly and severally" liable. The entire premise of Steamatic's argument, and of the COA Opinion, is factually and legally incorrect.

The basis of Steamatic's argument and COA's Opinion is the one-satisfaction rule. **[Steamatic AB pp. 7-8; COA ¶¶6, 9]** The collateral source rule is an exception to the one-satisfaction rule. The one-satisfaction rule only applies when defendants are jointly and severally liable for the entire damages. In the

cases the COA Opinion and Steamatic cite on the one-satisfaction rule, defendants were "jointly and severally" liable. The Court in *Watts v. Laurent,* 774 F.2d 168, 180 (7th Cir. 1985), cited by Steamatic **[AB p.8]**, noted that was "a classic case for imposing joint and several liability."

Second situation: Justice Ransom's analysis continues:

> "**Conversely**, a party's liability for **proportionate fault is unaffected** by the injured party's settlement with others who are severally liable for their own proportionate fault. Wilson v. Galt, 100 N.M. 227, 232, 668 P.2d 1104, 1109 (Ct.App.), cert. denied, 100 N.M. 192, 668 P.2d 308 (1983)."

Sanchez, 1994-NMSC-064 ¶6, bold added. In proportionate fault cases, non-settling tortfeasor does *not* get credit for another's settlement.

Third situation: Since Steamatic is not a contract obligor, Justice Ransom's discussion "[r]egarding joint contract liability", *Sanchez,* 1994-NMSC-064 ¶6, does not apply here.

Fourth situation: Discussing *McConal,* 110 N.M. 697, Justice Ransom says:

> "we understand McConal to hold that the collateral source rule applies to the prejudgment settlement of a claim involving **neither a joint tortfeasor nor a joint obligor under a contract**."

Sanchez, 1994-NMSC-064 ¶10, bold added. This fourth situation Justice Ransom discusses is what applies here. This case is like *McConal* – Allstate and Steamatic are neither joint tortfeasors nor joint contract obligors. Therefore the collateral source rule applies here. *Sanchez,* 1994-NMSC-064 ¶10. Justice Ransom's

analysis supports the Trial Court's decision in our case - tortfeasor Steamatic does not get credit for settlement of a claim involving contract breacher Allstate.

What *is* the basis of Steamatic's argument for why it should get a $750,000 offset for the invalid Judgment against Allstate? Steamatic's argument is that ". . . unlike *McConal,* as recognized in *Sanchez,* Allstate and Steamatic were joint wrongdoers that were held liable for common damages." **[Steamatic AB p. 11, 1]** Steamatic's argument is completely wrong.

First, Allstate and Steamatic were not "joint wrongdoers". "Allstate is *independently* liable to Gonzagowski for its *own* wrongdoing." **[Steamatic AB p.15** italics in original**]** Defendants here are not jointly and severally liable. Allstate and Steamatic are neither joint tortfeasors nor joint contract obligors.

Furthermore, our search of New Mexico law finds no Supreme Court case which uses the term "joint wrongdoer". The only Court of Appeals case using the term "joint wrongdoers" concerned separate punitive damage awards against a principal and agent.

Second, Defendants here are both liable "for a *portion*" of Plaintiff's damages **[Steamatic AB p. 1** italics added**]**, not for his entire damages. For joint and several liability to apply, the offending parties must both be liable for plaintiff's *entire* damages, not just for "common damages".

Our search of New Mexico law finds no Supreme Court case which uses the term "common damages". The only Court of Appeals case using the term "common damages", other than COA's Opinion here, is an irrelevant dissent in a class action. *O'Hare v. Valley Utilities, Inc.,* 1976-NMCA-004, 89 N.M. 105.

Steamatic's arguments, using terms which have no legal meaning, are devoid of legal significance.

Steamatic also contends that "[a]ccording to Gonzagowski, a jointly liable codefendant becomes a collateral source by mere virtue of paying the judgment against it." **[Steamatic AB p. 4]** That is a classic strawman argument, distorting Gonzagowski's position in an extreme way. The Allstate insurance Gonzagowski purchased, unaffiliated with Steamatic, is a collateral source. **[11RP2795 Q.2]**

How *did* Steamatic arrive at its argument? Steamatic argues that ". . . *regardless of what the jury found,* the judgments reflect that defendants are jointly liable for common damages." **[Steamatic AB p. 1** italics added] The Jury expressly found Defendants are *not* jointly liable. **[11RP2795 Q.2]** Steamatic has to disregard what the Jury found to arrive at its faulty argument. Its argument has no relevance to the facts of this case.

Steamatic argues "Gonzagowski labors mightily to establish that Allstate and Steamatic are unaffiliated. . . *Defendants' relationship to one another is irrelevant."* **[Steamatic AB p. 13-14** italics added, citations to BIC omitted]

Steamatic is wrong - **Defendants' relationship to one another** is not only relevant, it **is determinative**. The collateral source rule applies to payment by any source *unaffiliated* with tortfeasor. *Sunnyland,* 2013-NMSC-017 ¶48. Steamatic has to disregard New Mexico law to arrive at its faulty argument. (Incidentally, Gonzagowski did not have to "labor mightily" – the fact that Allstate and Steamatic are unaffiliated is established by the Jury's Verdict.)

Point III: The Erroneous Judgment, Which Trial Court Corrected, is Not the Immutable Law of the Case. Furthermore, that Doctrine is Not Used to Perpetuate Error.

The initial Judgment against Allstate for $750,000 was based on Question 12 which Steamatic, Gonzagowski and Trial Court all agree was erroneous. Steamatic, in its briefing, acknowledges:

> "[a]ll concerned agree that the trial court erred by allowing the jury to allocate common damages between negligence and breach of contract theories of liability[.]" **[COA fn.2]**

As Judge Campbell stated, **"[t]he bottom line is, that Question Number 12 is an erroneous question and it needs to be tossed out." [3-8-18 6Tr.48:12-13]**

Steamatic argues the erroneous Judgment is the "immutable" law of the case. **[Steamatic AB p. 3, 16; BIC p. 17-18]** Steamatic's argument is essentially this: even though Steamatic knows that initial Judgment, based on improperly comparing Steamatic's negligence to Allstate's contract breach, was in error and even though the Trial Court corrected it, Steamatic argues this Court must use that

invalid Judgment to reduce damages for which the Jury found Steamatic liable, by $750,000, because that is the "immutable" law of the case.

Steamatic argued against Question 12 at trial:

> **"I've never heard of the concept of allocating as between a comparative fault case and a breach of contract case." [7-21-17 5Tr.10:19]**
>
> **"I don't think it makes sense, because . . . it still invokes this fundamental concept that you're allocating fault between a tort claim and a breach of contract claim." [7-21-17 5Tr.13:22]**

On Steamatic's and Gonzagowski's Motions to Amend the initial Judgment, the Trial Court agreed with Steamatic's trial position and "threw out" Question 12:

> "So we're applying the jury's finding of $2.5 million of compensatory damages, and then with respect to Steamatic, we're looking at Question Number 9. Question Number 9 tells us everything we need to know in order to figure out the total amount of damages to be contained in the Judgment for the Plaintiff and against Steamatic. . .
>
> **[T]he judgment as it was originally entered with respect to Allstate is in error, because I used Question Number 12, now I'm throwing out Question Number 12,** it's [a] moot point because Allstate has settled out of the case." **[3-8-18 6Tr. 50:23-51:12** Bold added]

The Trial Court entered Amended Final Judgment against Steamatic for 80% of Gonzagowski's damages. Steamatic argues the erroneous Judgment cannot be changed, it is "immutable". However, Trial Courts have jurisdiction "to alter, amend, or reconsider a final judgment" including invalid judgments. Rule 1-059E

NMRA and Committee Commentary. Furthermore, "immutable" or not, the invalid Judgment against Allstate is irrelevant to Steamatic's liability.

Tomlinson v. Weatherford, 2017-NMCA-055, ¶28, cites *Tome Land & Improvement Co. v. Silva*, 1973-NMSC-120, ¶18, 86 N.M. 87 for the rule "**ignoring as surplusage an erroneous finding that was clearly immaterial and irrelevant.**" Quoting *Rosen v. Lantis*, 1997-NMCA-033, ¶ 21, 123 N.M. 231, *Tomlinson* holds:

> **"[F]indings without legal consequence may be treated as surplusage and disregarded** in that action and in subsequent litigation." Bold added.

Ramos v. Rodriguez, 1994-NMCA-110, ¶15, 118 N.M. 534, disregarded jury's allocation of a negligence percentage as "merely surplusage" which was "improper, immaterial or devoid of legal significance". The Trial Court here properly disregarded the 30% allocation in Question 12 because it is "devoid of legal significance."

Even if we assume that an erroneous initial judgment, which the Trial Court has corrected, could be the law of the case, that doctrine **"will not be used to uphold a clearly erroneous decision."** *Trujillo v. City of Albuquerque,* 1998-NMSC-031, ¶41, 125 N.M. 721.

Declining "to adhere immutably to the law of the case. . .", *Reese v. State,* 1987-NMSC-110, ¶¶ 4,6, 106 N.M. 505 held:

> "when we conclude that a former decision is erroneous, and we still have the opportunity to correct it . . . **we should apply the law of the land rather than the law of the case**" (Bold added).

Quoting *Farmers' State Bank v Clayton Nat'l. Bank,* 31 N.M. 344, 355-56 (NMSC 1925).

The law of the case doctrine is not applied to perpetuate clearly erroneous decisions. *State v. Breit,* 1996-NMSC-067 ¶12, 122 N.M. 655. When there is an erroneous ruling, it is the "law of the land", not the "law of the case", which Courts follow. The Trial Court determined the initial Judgment was in error. The Trial Court properly followed the law of the land – the collateral source rule – rather than perpetuate its initial error. **[3-8-18 6Tr.52:13-22]**

Steamatic argues "[n]o party ever challenged. . ." the Allstate Judgment. **[Steamatic AB p. 2, 11]** Gonzagowski and Steamatic both objected to Question 12. **[7-21-17 5Tr. 10:19, 13:22, 15:5]** Gonzagowski challenged the Allstate Judgment before and after it was entered. **[11RP2808-25; 12RP3031-43]** Those challenges led the Trial Court to enter a proper Amended Final Judgment. **[13RP3282-84]**

Steamatic argues the invalid Judgment is "immutable" because Gonzagowski and Allstate settled the contract claim. Steamatic argues Gonzagowski should "have mounted a direct challenge through post-trial and appellate avenues of relief" instead of settling. **[Steamatic AB p.18]** The settlement, and Satisfaction of Judgment as to Allstate, discharged *Allstate's* independent contract liability. It did not discharge Steamatic's tort obligation and

has no bearing on Steamatic's responsibility to pay the $2 million damages Steamatic negligently caused Richard Gonzagowski to suffer.

Conclusion

Why would this Court give legal effect to a Judgment which everyone involved – Steamatic, Gonzagowski and Trial Court – agree was an error which was corrected below? The only reason Steamatic and the COA Opinion give is to prevent Gonzagowski from receiving partial duplicate recovery. However, for over 30 years, it has been New Mexico law that "[i]f a plaintiff is compensated for his or her injuries by any source unaffiliated with the defendant, the defendant must *still* pay damages, even if this means that the plaintiff recovers twice." *Sunnyland*, 2013-NMSC-017, ¶48, emphasis in original; *McConal,* 1990-NMSC-093 ¶17, 29, 33. The Court of Appeals Opinion, which Steamatic asks this Court to substantially follow, is an outlier, contrary to this Court's decisions.

For reasons set out in this Reply Brief, and in his Brief in Chief, Richard Gonzagowski respectfully asks this Court to reverse the Court of Appeals decision and affirm the Amended Final Judgment the District Court entered.

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Certificate of Service

I certify that on the 8th day of April, 2022, I filed the foregoing pleading electronically through the tylerhost.net system, which caused all counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing, and emailed the above pleading to the following attorneys for Defendants-Respondents/Cross-Petitioners Steamatic, at the e-mail addresses indicated, on the date of filing:

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