COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED
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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

HARLEY JOHN and
CHRISTINA PARKETT,
Plaintiffs/Appellees,

v. No. 34,561

THE REHABILITATION CENTER
OF ALBUQUERQUE, LLC, CATHY CORREA
and SKILLED HEALTHCARE, LLC,
Defendants/Appellants,

And

THE STATE OF NEW MEXICO and
NEW MEXICO DEPARTMENT OF
TRANSPORTATION,
Defendants.

PLAINTIFFS/APPELLEES' ANSWER BRIEF

ON APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE, STATE OF NEW MEXICO
THE HONORABLE SARAH M. SINGLETON DISTRICT JUDGE
DISTRICT COURT NO. D-101-CV-2013-02266

ORAL ARGUMENT REQUESTED

FILED BY:

Terry R. Guebert
Christopher J. DeLara
David C. Odegard
GUEBERT BRUCKNER P.C.
P.O. Box 93880
Albuquerque, NM 87199-3880
(505) 823-2300
Attorneys for Plaintiffs/Appellees

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This Answer Brief is in compliance with Rules 12-213F and 12-305, NMRA, in that the body of the brief, including footnotes, contains 5,962 words (word count function - Microsoft Office Word 2007) and it is typed in Times New Roman 14 font.

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INTRODUCTION

Defendants appeal the District Court's grant of summary judgment in favor of Plaintiffs and the Court's finding that the arbitration agreement at issue in this matter is substantively unconscionable. Defendants incorrectly claim that Plaintiffs waived the issue of substantive unconscionability, that they are entitled to an evidentiary hearing as to the issue of unconscionability, and that federal law preempts New Mexico state law in regard to arbitration. However, Defendants' arguments are without merit, ignore clear New Mexico precedent and fail to address or alert the court to the fact that the arbitration provision in this matter has been struck down by New Mexico courts in numerous prior cases.

As the District Court properly found, Plaintiffs did not waive the right to argue that the arbitration provision at issue is substantively unconscionable, federal law does not preempt New Mexico law in relation to the arbitration provision, and based on the facts actually presented by Defendants the arbitration provision is substantively unconscionable.

SUMMARY OF PROCEEDINGS

Plaintiffs Harley John and Christina Parkett filed suit against the State of New Mexico, New Mexico Department of Transportation, The Rehabilitation Center of Albuquerque, LLC, Cathy Correa and Skilled Healthcare, LLC, on August 26, 2013, in New Mexico First Judicial District, County of Santa Fe. [**RP000001**]

On October 2, 2013, Defendants The Rehabilitation Center of Albuquerque, LLC, Skilled Healthcare, LLC and Cathy Correa filed a Motion to Dismiss and to Compel Arbitration or, Alternatively, Motion to Stay Litigation and Compel Arbitration. **[RP000063]** Defendants attached The Rehabilitation Center of Albuquerque Admission Agreement as Exhibit A to their Motion. **[RP000070 – RP000075]**

Defendants' Motion to Dismiss omitted the numerous cases in which the language of the very arbitration agreement at issue was found to be substantively unconscionable by numerous courts as a matter of law. **[RP000063 – RP000093** and **RP000195 – RP000197]**

On November 13, 2013, Plaintiffs filed their Response to Defendants' Motion to Dismiss and Compel Arbitration, and argued that the Arbitration Agreement at issue was procedurally unconscionable. **[RP000094]**

On April 22, 2014, Judge Sarah M. Singleton sent a Notice of Hearing on Defendants' Motion to Dismiss setting the Motion for hearing on April 29, 2014. **[RP000136]**

On April 24, 2014, Defendants submitted an Unopposed Motion to Vacate the April 29, 2014 Hearing, and indicated "the Nursing Home Defendants believe that before an evidentiary hearing can take place, it is necessary to conduct limited discovery related only to the issues raised by the Nursing Home Defendants'

Motion, namely, that which involves the enforceability of the Arbitration Agreement including discovery related to Plaintiffs' argument that the Arbitration Agreement is procedurally unconscionable." **[RP000138 – RP000139]**

On April 25, 2014, the Court issued its Order, finding that the Court would allow "limited discovery related to the issues raised by the Nursing Home Defendants' Motion, namely, that which involves the enforceability of the Arbitration Agreement including discovery related to Plaintiffs' argument that the Arbitration Agreement is procedurally unconscionable." **[RP000142]**

On July 1, 2014, the Court had a hearing on the pending Motion to Dismiss, and made it clear that a hearing was only necessary on the issue of procedural unconscionability:

> THE COURT: *It's possible that no one will be making a procedural unconscionability argument. Are you going to?*
>
> MR. DELARA: *I believe so.*
>
> THE COURT: *Okay. Well that's what I would need the evidentiary hearing on. Or usually that's what I need them on. Or hold them on.*
>
> MS. DENTON: And I think, Your Honor, I think that that was one of the things that I wanted to, um, touch base with everyone here on this, in this status conference today, and we can come back to it after we figure out when to have the evidentiary hearing but I believe that the issue that, um, we're going to be dealing with at an evidentiary hearing is going to be procedural unconscionability as opposed to substantive

> unconscionability and I just wanted to be – so that we know what it is that we're conducting discovery on and what it is that we're going to be presenting, and to confirm that it is going to be just procedural unconscionability.
>
> MR. DELARA: Sure. I can agree with that.
>
> THE COURT: You can confirm that?
>
> MR. DELARA: I can.
>
> THE COURT: Okay.

[7-1-14 TR 12:13:00 – 12:14:05] (*emphasis* added).

Without abandoning their procedural unconscionability argument, on September 8, 2014, Plaintiffs filed their Motion for Summary Judgment Regarding Arbitration. **[RP000157 – 000165]** Within their Motion, Plaintiffs argued that the Arbitration Agreement at issue was substantively unconscionable as a matter of law. *Id.*

On September 19, 2014, the Court entered an Order allowing the parties to proceed with discovery "pertinent to Plaintiffs' claim that the Arbitration Agreement is procedurally and/or substantively unconscionable." **[RP000169]**

On December 1, 2014, Defendants filed their Response to Plaintiffs' Motion for Summary Judgment Regarding Arbitration. **[RP000178]** Attached to their Response, Defendants included the Affidavit of Juanita K. Correa, "the Administrator for the Rehabilitation Center of Albuquerque, L.L.C." **[RP000188]**

Mr. Correa's Affidavit included an "attached print-out from the "New Mexico Courts Case Lookup" website for the New Mexico State Judiciary." **[RP000188 – RP000192]**

Plaintiffs filed their Reply in Support of Motion for Summary Judgment on December 10, 2014. [**RP000193**]

On February 6, 2015, the Court entered its Decision on Plaintiffs' Motion for Summary Judgment Regarding Arbitration, and wrote, *inter alia*:

> Plaintiffs move for summary judgment on the grounds that this provision is comparable to numerous other provisions that have been declared substantively unconscionable by the courts in New Mexico. *See Figueroa v. THI of New Mexico at Casa Arena Blanca LLC,* 2013-NMCA-077, 306 P.3d 480, cert. denied, 2012-NMCERT-010, 297 P.3d 332 (affirming this Court's ruling that a comparable clause was substantively unconscionable); *Ruppelt v. Laurel Healthcare Providers, LLC,* 2013-NMCA-014, 293 P.3d 902, cert. denied, 2012-NMCERT-012, 299 P.3d 423 (similar cause was substantively unconscionable); *Griego v. St. John's Healthcare & Rehabilitation Center, LLC,* [No. 31,777, mem. op. (N.M. Ct. App. Apr. 22, 2013) (non-precedential),] 2014 WL 3039929 (N.M. App. 2014), *cert. quashed,* 311 P.3d 453 (same); *Bargman v. Skilled Healthcare Group, Inc.,* 2013-NMCA-006, 292 P.3d 1, cert. granted, 2012-NMCERT-012, 299 P.3d 423 (same); and *Strausberg v. Laurel Healthcare Providers, LLC,* 2012-NMCA-006, 269 P.3d 914 (*Strausberg I*), rev'd, 2013-NMSC-032 (*Strausberg II*), *on remand,* 2013 WL 5741413 (N.M.App. Sep. 11, 2013)(same). In *Cecil v. Skilled Healthcare Group, Inc.,* [No. 32,433, mem. op. (N.M. Ct. App. May 29, 2014) (non-precedential),] 2014 WL 3040860 (N.M. App. May 29, 2014), both the district court and the Court of

Appeals found that the exact language contained within the agreement at issue in this matter was substantively unconscionable. (Plaintiffs also cite to a number of district court cases in which this very clause was held to be unconscionable. See Reply at pp. 4-5). Given this overwhelming authority against its position, the Court is hard-pressed to understand Defendant's insistence that the clause should be enforced.

Despite the Court's belief that Defendant's position appears to be without precedential support, the Court will nevertheless review Defendant's argument. First Defendant argues that Plaintiff have waived the substantive unconscionability argument. This argument rests on the Plaintiffs' counsel's statement at early hearings that it was relying on procedural unconscionability and not substantive unconscionability. The statement was made in response to a question from the Court which was asked to elicit information that would allow the Court to schedule a hearing on the motion. Because the Court routinely holds hearings on procedural unconscionability but does not routinely hold hearings on substantive unconscionability, the question was intended to enable scheduling not to force Plaintiffs to elect. The response that was given has to be taken within the context of whether a hearing was needed. Plaintiff, like the Court, believed that no hearing was needed on a substantive unconscionability claim of the sort being raised. The Plaintiffs have always contended that the arbitration agreement was unconscionable.

Defendant's argument seems to be a variant of the claim that a litigant cannot play "fast and loose" by taking inconsistent positions. *Cf. Citizens Bank v. C & H Constr. & Paving Co.,* 1976-NMCA-063, ¶ 36, 89 N.M. 360, 552 P.2d 796. It is not inconsistent to contend that an agreement is at once both procedurally and substantively unconscionable. In addition, no prejudice has been shown from the fact that Plaintiffs have urged both forms of unconscionability. *See generally Keith v.*

ManorCare, Inc., 2009-NMCA-119, ¶ 41, 147 N.M.209, 218 P.3d 1257.

[RP000211 – RP000214]

The Court entered its Order Granting Plaintiffs' Motion for Summary Judgment Regarding Arbitration and Denying Defendant's Motion to Dismiss and to Compel Arbitration, or Alternatively, Motion to Stay Litigation and Compel Arbitration, on February 16, 2015. [**RP000215**]

Defendants filed their Notice of Appeal on February 25, 2015. [**RP000218**]

FACTS

A. Incident giving rise to Plaintiffs' Claims and suits filed.

1. On August 10, 2012 Plaintiffs were travelling on New Mexico State Road 371 near milepost 75.4, Plaintiffs lost control of the vehicle in which they were travelling, and as a result of the incident Plaintiff Harley John suffered a spinal injury that has left him a quadriplegic. **[RP000003]**

2. From October 19, 2012 until April 14, 2013, Plaintiff Harley John was a resident of Defendant The Rehabilitation Center of Albuquerque, LLC. **[RP000004]**

3. Plaintiffs allege that Defendants The Rehabilitation Center of Albuquerque, LLC, Cathy Correa and Skilled Healthcare, LLC were negligent in the care they provided to Plaintiff Harley John

4. Defendants assert that Plaintiff Harley John entered into a contract with The Rehabilitation Center of Albuquerque, LLC, on or about November 11, 2012 "which set forth the terms and conditions applicable to his admission to and residency[.]" [**RP000064**]

5. The residency agreement, entitled "Arbitration Agreement Between Resident and The Rehabilitation Center of Albuquerque" provides:

> 1. Agreement to Arbitrate All Disputes...
>
> The Resident and the Facility understand and agree that when they refer to Disputes in this Agreement they mean

> all disputed claims that the Facility and Resident may have against each other associated with this Arbitration Agreement, the relationship created by the Admission Agreement and/or the provision of services under the Admission Agreement, including all disputed claims arising out of or related to treatment or services provided by Facility to Resident, including disputed claims as to whether any services provided by Facility to Resident were unnecessary, unauthorized, or were improperly, negligently or incompetently rendered. A Dispute for purposes of this Arbitration Agreement also means and includes disputed claims brought by the Facility against the Resident for collection. *A Dispute for purposes of this Arbitration Agreement does not include claims for monetary damages that fall within the jurisdictional limit of the New Mexico metropolitan, magistrate or other small claims court. A Dispute for purposes of this Agreement also does not include claims related to the eviction transfer or discharge of Resident that are subject to a federal or state administrative hearing.*

[**RP000072**; and **RP000157 – RP0000166**] (*emphasis* added).

STANDARD OF REVIEW

A district court's grant of summary judgment is reviewed de novo. *See Encinias v. Whitener Law Firm, P.A.,* 2013-NMSC-045.

ARGUMENT

I. Plaintiff was Entitled to Summary Judgment as to the Arbitration Issue as a Matter of Law

Summary judgment, "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and

that the moving party is entitled to a judgment as a matter of law." Rule 1-056(C) NMRA. The moving party must first make a *prima facie* showing of entitlement to summary judgment. *Id.* If a *prima facie* case is made, the burden shifts to the party opposing summary judgment to demonstrate a genuine issue of material fact. *Spencer v. Health Force, Inc.,* 2005-NMSC-002, ¶ 7, 137 N.M. 64. At that stage, the nonmoving party may not rely upon its pleadings, but must make an affirmative showing that a material issue of fact is in dispute. *Oschwald v. Christie,* 1980-NMCA-136, ¶¶4–5, 95 N.M. 251.

Summary judgment is proper when the material facts are not in dispute and the only question to be resolved is the legal effect of the facts. *See Savinsky v. Bromley Group, Ltd.,* 1987-NMCA-078, ¶2, 106 N.M. 175. A party opposing summary judgment may not simply argue that facts might exist which would require trial on the merits, *Dow v. Chilili Co-op Ass'n,* 1986-NMSC-084, ¶ 13, 105 N.M. 52, and may not defeat summary judgment by attempting to create a sham issue of fact. *Rivera v. Trujillo,* 1999-NMCA-129, ¶ 9, 128 N.M. 106. Rather, the opponent must come forward and establish with admissible evidence that a genuine issue of fact exists. *Tinley v. Davis*, 1980-NMCA-047, ¶ 7, 94 N.M. 296.

> The purpose of a summary judgment proceeding is to expedite litigation by determining whether a party possesses competent evidence to support his pleadings so as to raise genuine issues of material fact and if not to dispose of the matters at that state of the proceeding.

Goffe v. Pharmaseal Labs., Inc., 1976-NMCA-123, ¶ 8, 90 N.M. 764, *rev'd on other grounds,* 1977-NMSC-071, 90 N.M. 753 (citing *Agnew v. Libby,* 1949-NMSC-004, 53 N.M. 56).

In this matter, the undisputed material facts show that Plaintiffs were entitled to summary judgment because the agreement at issue is substantively unconscionable as a matter of law. Although Defendants argue that they are entitled to an "evidentiary hearing" to present evidence regarding unconscionability, the Defendants actually did present evidence which was insufficient to show that the Arbitration Agreement was not substantively unconscionable based on existing New Mexico precedent. **[RP000070 – RP000075;** and **RP000188 – RP000192**]

In addition, the Court's ruling came after all briefing and the deadlines imposed by the Court to conduct discovery related to the issue of unconscionability. **[RP000138 – RP000141,** and **RP000169 –000170**]

II. The Agreement at Issue is Substantively Unconscionable as a Matter of Law

"[A] prerequisite to compelling arbitration is the existence of a valid agreement to arbitrate." *Salazar v. Citadel Communications Corp.,* 2004-NMSC-013, ¶ 8, 135 N.M. 447 (*citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 626 (1985); *Heye v. Am. Gold Corp.,* 2003-NMCA-138, ¶ 8, 134 N.M. 558). "To determine whether the agreement to arbitrate is valid, courts look to general state contract law[.]" *Salazar,* 2004-NMSC-013, ¶ 8

(*citing Perry v. Thomas,* 482 U.S. 483, 492 n. 9 (1987)).

Even under the Federal Arbitration Act, 9 U.S.C. §§ 1 – 16 (2000), "a legally enforceable contract is still a prerequisite for arbitration." *DeArmond v. Halliburton Energy Services, Inc.,* 2003-NMCA-148, ¶ 8, 134 N.M. 630 (*citing First Options, Inc. v. Kaplan,* 514 U.S. 938, 944–45 (1995); *AT&T Techs., Inc. v. Communications Workers of Am.,* 475 U.S. 643, 648 (1986); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 626 (1985); and *Dumais v. Am. Golf Corp.,* 299 F.3d 1216, 1220 (10th Cir. 2002)).

The agreement in this matter is substantively unconscionable as a matter of law pursuant to clear New Mexico precedent.

> Substantive unconscionability concerns the legality and fairness of the contract terms themselves.... The substantive analysis focuses on such issues as whether the contract terms are commercially reasonable and fair, the purpose and effect of the terms, the one-sidedness of the terms, and other similar public policy concerns....
>
> Contract provisions that unreasonably benefit one party over another are substantively unconscionable.

Cordova v. World Finance Corp. of New Mexico, 2009-NMSC-021, ¶¶ 22 and 25, 146 N.M. 256 (*citing Fiser v. Dell Computer Corp.,* 2008-NMSC-46, ¶ 20, 144 N.M. 464; and *Padilla v. State Farm Mut. Auto. Ins. Co.,* 2003-NMSC-11, ¶¶ 10 and 14, 133 N.M. 661).

New Mexico courts have overwhelmingly found that arbitration agreements with the provisions contained within the agreement at issue in this matter are

substantively unconscionable. In *Figueroa v. THI of New Mexico at Casa Arena Blanca LLC,* 2013-NMCA-077, Judge Singleton found that an arbitration agreement similar to the agreement in this matter was unconscionable. The agreement provided:

> The parties agree that guardianship proceedings, collection and eviction actions initiated by the Health Care Center, any dispute where the amount in controversy is less than Two Thousand Five Hundred Dollars ($2,500.00) will be excluded from binding arbitration and may be filed and litigated in any court which may have jurisdiction over the dispute.

Id., at ¶ 2. Judge Singleton opined:

> [R]eally this is not a mutual obligation…the nursing home has, for all practical purposes, excluded almost every kind of case it would bring against the resident or resident family from arbitration but has bound the resident in almost every instance where the resident and his or her family would be suing the nursing home, so I think the *Cordova* case would be applied in this context to find that the arbitration clause was unenforceable.

Id., at ¶ 5. This Court, affirming Judge Singleton, wrote:

> [U]nconscionability voids a contract when it is unfair and grossly unreasonable, even if otherwise legally enforceable under contract formation principles….
>
> [O]ur Supreme Court has spoken, and has explicitly stated that New Mexico courts will not enforce unfairly one-sided agreements under our equitable doctrine of unconscionability…. We conclude that the district court accurately applied the holdings of *Cordova* and *Rivera* to this case and appropriately concluded that the terms of this arbitration agreement were unfairly unreasonably one-sided and thereby, substantively unconscionable.

Id., at ¶¶ 34 and 35.

In *Ruppelt v. Laurel Healthcare Providers, LLC,* 2013-NMCA-014, this Court found an arbitration agreement that "stated, '[t]his [a]rbitration [a]greement shall not apply to disputes pertaining to collections or discharge of residents,'" was substantively unconscionable. The court wrote:

> Although the exemption provision is facially bilateral in the sense that it does not completely extinguish Plaintiff's right to access the courts, in effect this distinction from *Cordova* and *Rivera* is illusory. This Court recently addressed similar issues in *Figueroa*.... Common sense dictates that claims relating to collection of fees and discharge of residents are the types of remedies that a nursing home, not its resident, is most likely to pursue.... It provides Defendants with a judicial forum to litigate its most likely and beneficial claims while totally excluding access to the judicial system for claims regarding negligent care, the most likely claims to be pursued by a resident such as Plaintiff....
>
> As a result, we conclude that the Agreement is unfair and unreasonably one-sided. Therefore, it is not necessary for us to consider whether the provision was also procedurally unconscionable or supported by consideration.

Id., at ¶¶ 15, 16 and 18 (citations omitted).

In *Bargman v. Skilled Healthcare Group, Inc.*, 2013-NMCA-006, the district court denied a motion to compel arbitration when the agreement provided "[t]his Arbitration Agreement shall not apply to either [the nursing home] or the Resident in any disputes pertaining to collections or discharge of residents." *Id.*

¶ 4. This Court recognized its opinions in *Figueroa* and *Ruppelt,* and wrote "we determined that the arbitration agreement was unreasonably one-sided and substantively unconscionable." *Id.* ¶ 16. However, the court remanded the case "in order for the purpose of allowing [the nursing home] the opportunity to present evidence tending to show that the collections exclusion is not unreasonably or unfairly one-sided such that enforcement of it is substantively unconscionable." *Id.* ¶ 24. The Supreme Court granted certiorari on December 6, 2012 and quashed certiorari on October 15, 2015. *See* 2015 N.M. LEXIS 326 (N.M. Sup. Ct. Oct. 15, 2015).

In this matter, unlike in *Bargman,* Defendants actually presented evidence to the District Court in response to Plaintiffs' Motion for Summary Judgment, and after the District Court's discovery deadline related to the unconscionability of the arbitration agreement. **[RP000070 – RP000075; RP000188 – RP000192; RP000138 – RP000141,** and **RP000169 – 000170]**

In *Griego,* No. 31,777, mem. op., the district court found that an agreement which provided that it "shall not apply to disputes pertaining to collections or discharge of residents," was unenforceable. *Id.* at 4. This Court, citing *Figueroa, Ruppelt* and *Bargman*, agreed with the district court and found that "Defendants imposed an arbitration scheme that forced residents to submit their most likely claims to arbitration while reserving for themselves the right to litigate in a court of law the collections claims that they were most likely to bring." *Id.* at 19. This

Court found that based on the case law, "Defendants were on alert that they had the burden to bring forth evidence showing that the discharge and the collections exemptions were valid and enforceable," and because defendants produced no evidence they failed in their burden. *Id.* at 16.

In *Cecil v. Skilled Healthcare Group, Inc.,* No. 32,433, mem. op., both the district court and this Court found that the exact language contained within the agreement at issue in this matter was substantively unconscionable. The agreement in *Cecil* provided:

> A [d]ispute for purposes of [the agreement] does not include claims for monetary damages that fall within the jurisdictional limit of the New Mexico metropolitan, magistrate or other small claims court. A [d]ispute...also does not include claims related to the eviction, transfer or discharge of Resident that are subject to a federal or state administrative hearing process.

Id. at 3. This Court wrote:

> We see no principled distinction between the arbitration agreement in *Figueroa*, which exempted small claims below $2,500, and the exemption in this case, which allows claims under $10,000 to be exempted from arbitration. Arguably, the agreement here allows for even more of the types of small claims Defendants are most likely to bring, such as collection actions, to be exempted from arbitration while forcing "claims for loss of consortium, wrongful death, emotional distress, injunctive relief, or punitive damages"—claims the resident is most likely to bring—into arbitration....
>
> We therefore conclude that there is a sufficient basis to conclude that the small claims exemption, though facially bilateral, was intended to exempt claims

Defendants were most likely to bring against Plaintiff.

Id. at 6, 8 (quoting *Figueroa,* 2013-NMCA-077, ¶ 30, and *citing Ruppelt,* 2013-NMCA-014, ¶ 16).

Based on clear New Mexico precedent, the arbitration agreement in this matter is substantively unconscionable as a matter of law, and summary judgment in favor of Plaintiffs was appropriate.

III. Plaintiffs Did Not Waive the Issue of Unconscionability

Plaintiffs have always maintained that the arbitration agreement in this matter was unconscionable and invalid. [**RP000094 – RP000108;** and **RP000157 – RP000165**]

Defendants argue that counsel for Plaintiffs indicated that Plaintiffs would not argue the issue of substantive unconscionability in this matter. However, Defendants' assertion is incorrect. The Court and Plaintiffs have also stated that the evidentiary hearing scheduled by the Court would only address procedural unconscionability. [***See*** **7-1-2014 TR 12:13:00 – 12:14:05; RP000211 – RP000214**]

As set forth within Plaintiffs' Motion for Summary Judgment, "a prerequisite to compelling arbitration is the existence of a valid agreement to arbitrate." *Salazar,* 2004-NMSC-013, ¶ 8 (*citing Mitsubishi Motors Corp.,* 473 U.S. at 626; *Heye,* 2003-NMCA-138, ¶ 8). "To determine whether the agreement to arbitrate is valid, courts look to general state contract law[.]" *Salazar,* 2004-

NMSC-013, ¶ 8 (*citing Perry v. Thomas,* 482 U.S. 483, 492 n. 9).

No evidentiary hearing has ever been necessary regarding the substantive unconscionability of Defendants' arbitration agreement, because as New Mexico precedent shows, the agreement in this matter is substantively unconscionable as a matter of law. New Mexico courts have overwhelmingly found that arbitration agreements with the provisions contained within the agreement at issue in this matter are substantively unconscionable. *See Figueroa,* 2013-NMCA-077; *Ruppelt,* 2013-NMCA-014; *Bargman,* 2013-NMCA-006; *Griego v. St. John Healthcare & Rehabilitation Center, L.L.C.,* No. 31,777, mem. op., *cert. granted* 2013 N.M. LEXIS 322 (N.M., July 17, 2013), *cert. quashed* 2013 N.M. LEXIS 310 (N.M., Sept. 13, 2013); *Cecil v. Skilled Healthcare Group, Inc.,* No. 32,433, mem. op.; and *Strausberg v. Laurel Healthcare Providers, LLC,* No. 29,238, mem. op. (N.M. Ct. App. Sept. 11, 2013) (non-precedential).

Defendants cite to *Talley v. Sec. Serv. Corp.,* 1983-NMSC-046, 99 N.M. 702 and *Cooper v. Albuquerque City Comm'n,* 1974-NMSC-006, 85 N.M. 786, in support of their argument that Plaintiffs waived the issue of substantive unconscionability. However, neither *Talley* nor *Cooper* address arbitration or the issue of contractual unconscionability. Applicable New Mexico law regarding waiver in relation to arbitration shows that Defendants' waiver argument fails. A party may waive issues related to the validity of an arbitration agreement by voluntarily participating in arbitration. *See Eagle Laundry v. Fireman's Fund Ins.*

Co., 2002-NMCA-56, ¶ 16, 132 N.M. 276. However, a party may object to the validity of an arbitration agreement at any time as long as the issue is first raised "not later than the beginning of the arbitration hearing." NMSA 1978, § 44-7A-24(a)(5); *see also MBNA Bank Am. Bank, N.A. v. Giron*, No. 28,775, mem. op., at 9 (N.M. Ct. App. Jan. 7, 2010) (non-precedential) ("the ability to continue arguing that there was no agreement to arbitrate allowed by Section 44-7A-24(a)(5) is limited to those instances in which the party objects that there is no valid agreement to arbitrate before participating in the arbitration hearing." *Id., citing Alexander v. Calton & Assocs., Inc.,* 2005-NMCA-34, ¶ 15, 137 N.M. 293).

In *Alexander*, the court wrote:

> Under [§ 44-7A-24(a)(5)] a party may continue to argue that there is no agreement to arbitrate even after the arbitration is completed, so long as he preserves his objections before the hearing begins.

Id. Plaintiffs have always argued that the arbitration provision is unconscionable and invalid, and Defendants' waiver argument fails.

Defendants also argue that they have been prejudiced because an evidentiary hearing as allowed by *Bargman* was never held. However, Defendants prejudice argument fails because Defendants actually presented evidence to the Court in an attempt to show that the arbitration agreement was not unconscionable. The Defendants presented the arbitration agreement and an affidavit from Juanita Correa, the Administrator for Defendant The Rehabilitation Center of Albuquerque, L.L.C., which was insufficient to show that the Arbitration

Agreement was not substantively unconscionable based on existing New Mexico precedent. [**RP000070 – RP000075**; and **RP000188 – RP000192**]

In addition, the Court's ruling came after all briefing and the deadlines imposed by the Court to conduct discovery related to the issue of unconscionability. [**RP000138 – RP000141**, and **RP000169 –000170**]

Defendants presented evidence to the Court which was insufficient to overcome the overwhelming precedent establishing that the arbitration agreement was unconscionable.

IV. Defendants Had an Affirmative Duty to Advise the Court, and the Parties, of the Overwhelming Case Law Holding that the Arbitration Agreement at Issue in this Matter is Unconscionable and Unenforceable

Defendants filed their Motion to Dismiss and Compel Arbitration and Memorandum in Support thereof on October 2, 2013. [**RP000063 – RP00087**]

Missing from Defendants' Motion and Memorandum were the numerous prior cases in which the very agreement at issue was found to be unconscionable. According to the Court's docket, Defendants and their counsel in this matter have been involved in multiple cases in which the arbitration agreement at issue in this case has been declared invalid. However, Defendants failed to advise the District Court, or opposing counsel, of any of the cases finding the arbitration agreement invalid. *See Ruppelt,* 2013-NMCA-014 (in which Defendant Skilled was represented by the Rodey firm, and finding the arbitration agreement to be unconscionable and unenforceable); *Bargman,* 2013-NMCA-006 (in which

Defendant Skilled was represented by the Rodey firm, and finding the arbitration agreement was unconscionable pursuant to existing New Mexico case law, but allowing defendant to produce evidence that the agreement was not unconscionable); *Griego v. Skilled Healthcare, et al.,* No. 31,777, mem. op. (in which Defendant Skilled was represented by the Rodey firm, and finding the arbitration agreement to be unconscionable and unenforceable); and *Cecil v. Skilled Healthcare, et al.,* No. 32,433, mem. op. (in which Defendant Skilled was represented by the Rodey firm, and finding the arbitration agreement to be unconscionable and unenforceable).

Defendants also attached the affidavit of Juanita K. Correa in Response to Plaintiffs' Motion for Summary Judgment, along with an exhibit [**RP000178 – RP000192**], which purports to show that the arbitration agreement in this matter is not unconscionable. However, Defendants failed to advise the District Court, or Plaintiffs, that in two of the six referenced cases, the district court ruled on the validity of Defendants' arbitration provision and found that Defendants' arbitration provision was unconscionable. *See Dickens v. Skilled, et al.,* D-202-CV-2008-06039; and *Chavez v. Skilled, et al.,* D-202-CV-2009-03992. The Rodey firm, counsel for Defendants in this matter, was counsel of record in both of those cases. *See id.*

Defendants also failed to advise of numerous other cases, in which the Rodey firm was counsel for Defendant Skilled, in which Defendants' arbitration

provision was found to be unconscionable and unenforceable. *See Estate of Horner v. Skilled, et al.,* D-101-CV-2009-03257; *Herring v. Skilled, et al.,* D-202-CV-2009-11472; *Perea v. Skilled, et al.,* D-202-CV-2011-01077; *Wrobel v. Skilled, et al.,* D-202-CV-2011-03742; *Lopez v. Skilled, et al.,* D-202-CV-2011-03823; *Zarycsny v. Skilled, et al.,* D-202-CV-2011-11639; *Leyba v. Skilled, et al.,* D-202-CV-2012-03587; *Brunson v. Skilled, et al.,* D-202-CV-2013-01861; and *Finegan v. Skilled, et al,* D-101-CV-2013-01940.

Because Defendants attempted to conceal from the Court and Plaintiffs that their arbitration provision has been found unconscionable and unenforceable, the Court should dismiss this appeal.

V. Defendants' Reliance upon *Patton* is Misplaced, and New Mexico Case Law is Controlling

Defendants cite to *THI of New Mexico at Hobbs Center, LLC v. Patton,* 741 F.3d 1162 (10th Cir. 2014), and assert that the decision requires the Court to compel arbitration in this matter based on federal preemption. However, New Mexico state courts "are not bound by the analyses or conclusions reached in [ ] federal cases." *Moongate Water Co. v. Dona Ana Mut. Domestic Water Consumers Ass'n,* 2008-NMCA-143, ¶ 20, 145 N.M. 140. *See also Sundial Press v. City of Albuquerque,* 1992-NMCA-068, ¶ 8, 114 N.M. 236 ("[t]he reasoning of federal decisions…*if not in conflict with controlling New Mexico authority*, can be persuasive. However, we are not bound by these federal decisions." *Id.* (*citing Lowery v. Atterbury,* 1992-NMSC-001, 1992-NMSC-001) (*emphasis* added).

This Court was specifically aware of the *Patton* case, and Judge Browning's ruling in the underlying matter, and wrote:

> We note that Judge Browning of the United States District Court for the District of New Mexico ruled contrarily to Judge Singleton on an identical arbitration clause in a different case. *See THI of N.M. at Hobbs Ctr., LLC v. Patton,* Civ. No. 11-537 LH/CG, 2012 U.S. Dist. LEXIS 5252, 2012 WL 112216, at *21-22 (D.N.M. Jan. 3, 2012). Judge Browning concluded that the arbitration clause was not unconscionable and noted that even if it were, the court could have only stricken the exclusions portion and saved the parties' bilateral agreement to arbitrate all other claims. *See id.* For the reasons herein stated in this opinion, we agree with Judge Singleton's application of New Mexico law to this arbitration clause.

Figueroa, 2013-NMCA-077, ¶ 5 n. 1.

Patton, which one court has criticized as "too simplistic," is contrary to clear New Mexico authority, and should be disregarded. *See Malone v. Superior Ct.,* 226 Cal.App. 4th 1551 (2014). As set forth further below, *Patton* mischaracterizes the reason that arbitration provisions such as the provision in this matter are invalid, and the Court should look to New Mexico law.

VI. Defendants are not Entitled to an Evidentiary Hearing Regarding Unconscionability

Defendants argue, pursuant to *Bargman,* 2013-NMCA-006 that the District Court improperly granted summary judgment because Defendants are entitled to an evidentiary hearing related to the issue of unconscionability. However, their argument relies upon case law which has been modified by the New Mexico

Supreme Court. As the court in *Bargman* acknowledges, "at the time this matter was in the district court, *Rivera, Figueroa,* and *Ruppelt* had not been decided and the burden of proof was not all that clearly determined[.]" *Id.* ¶ 23. The court further wrote:

> It is noteworthy that in none of the foregoing cases did the defendant drafter of the arbitration provision offer evidence tending to prove that it was not unreasonable or unfair to except certain claims from arbitration even if they were claims most likely to be pursued by the defendant.

Id. ¶ 17.

Bargman, Figueroa, 2013-NMCA-077 and *Ruppelt,* 2013-NMCA-014 were all decided after the New Mexico Court of Appeals decision in *Strausberg v. Laurel Healthcare Providers, LLC,* 2012-NMCA-006 (hereinafter *Strausberg I), overruled by Strausberg v. Laurel Healthcare Providers, LLC,* 2013-NMSC-032 (hereinafter *Strausberg II*). In *Strausberg I,* the Court of Appeals wrote:

> A legally enforceable contract is a prerequisite to arbitration under the New Mexico Uniform Arbitration Act, and without such a contract, the parties will not be forced to arbitrate. The party who seeks to compel arbitration has the burden of proof to establish the existence of a valid agreement to arbitrate. Moreover, when the parties dispute the existence of a valid arbitration agreement, any presumption in favor of arbitration disappears.

Id. ¶ 15 (citations omitted). Hence, at the time that *Bargman* was decided, it was the nursing home defendant's burden to show that the arbitration agreement was

not unconscionable.

In *Strausberg II,* the Supreme Court overruled the Court of Appeals and wrote:

> We disagree [with the Court of Appeals] and hold that Plaintiff has the burden to prove that the arbitration agreement is unconscionable because unconscionability is an affirmative defense to contract enforcement, and under settled principles of New Mexico law, the party asserting an affirmative defense has the burden of proof.

Id. ¶ 3. The Court reversed the Court of Appeals and wrote, "Plaintiff has the burden to prove that the arbitration agreement is unenforceable on the ground that it is unconscionable. We remand to the Court of Appeals to determine whether the district court erred by granting Defendants' motion to compel arbitration and by dismissing Plaintiff's case." *Id.* ¶ 59.

Upon remand to the Court of Appeals, the court found that Plaintiff had met her burden of showing that the arbitration agreement was substantively unconscionable, and wrote "we conclude that the substantive unconscionability of the arbitration agreement is apparent on its face[.]" *Strausberg v. Laurel Healthcare Providers, LLC,* No. 29,238, mem. op. at 3 (hereinafter *Strausberg III*). The court further wrote,

> As with *Ruppelt* and *Figueroa,* the arbitration agreement here requires arbitration of the vast majority of claims that would be brought by the patient while excluding those disputes that would almost exclusively be pursued by the nursing home.... The availability to Defendants of a choice of whether to litigate or arbitrate their claims

> where Plaintiff has no such options establishes substantive unconscionability of the arbitration agreement.

Id. at 5. Pursuant to the *Strausberg* cases, Defendants are not entitled to an evidentiary hearing. As is evidenced by the courts' opinions, Plaintiff has the burden of showing unconscionability, and once Plaintiff has met that burden, the arbitration agreement is unenforceable as a matter of law. *See id.*

The Supreme Court granted certiorari in regard to *Bargman* on December 6, 2012, well in advance of the Court's opinion is *Strausberg II.* The Court ultimately quashed certiorari in *Bargman*, but *Bargman* has no relevance to this matter. The *Strausberg* cases show that the issue in *Bargman* is moot an inapplicable because Defendants no longer have the burden as to unconscionability, and Defendants in this matter are not entitled to an evidentiary hearing. In addition, as set forth herein, Defendants actually presented evidence in response to Plaintiffs' Motion for Summary Judgment after the District Court's discovery deadline, and that evidence was insufficient to rebut the showing that summary judgment was appropriate. [**RP000070 – RP000075; RP000188 – RP000192; RP000138 – RP000141,** and **RP000169 –000170**]

CONCLUSION

A valid agreement to arbitrate does not exist as a matter of law because the arbitration agreement is substantively unconscionable on its face and based on

clear New Mexico precedent. Despite that fact, Defendants presented evidence to the District Court after the District Court's discovery deadline, and the evidence presented did not alter the unconscionability of the agreement. As opined by the District Court, Defendants are not entitled to an evidentiary hearing, and Plaintiffs were entitled to summary judgment as a matter of law.

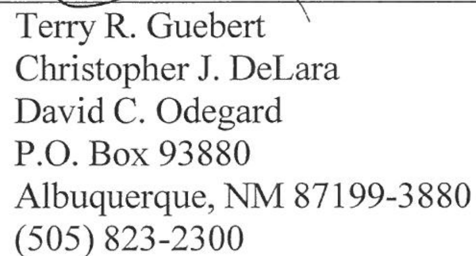
Plaintiffs did not waive the substantive unconscionability argument, and have always argued that the agreement was unconscionable.

REQUEST FOR ORAL ARGUMENT

Plaintiffs/Appellees believe that oral argument may be helpful for a full explanation of the issues. Hence, Plaintiffs/Appellees hereby request oral argument.

Respectfully submitted,

GUEBERT BRUCKNER P.C.



By ______________________

Terry R. Guebert
Christopher J. DeLara
David C. Odegard
P.O. Box 93880
Albuquerque, NM 87199-3880
(505) 823-2300
Attorneys for Plaintiffs/Appellees

This is to certify that a *copy* of the foregoing Plaintiff/ Appellees' Answer Brief was mailed to:

Ellen Thorne Skrak
Valerie Reighard Denton
Rodey, Dickason, Sloan, Akin & Robb, P.A.
P.O. Box 1888
Albuquerque, NM 87103
Attorneys for Defendants/Appellants The Rehabilitation Center of Albuquerque, Cathy Correa and Skilled Healthcare, LLC

Stephen S. Hamilton
Alexia Constantaras
Montgomery & Andrews, P.A.
P.O. Box 2307
Santa Fe, NM 87504-2307
(505) 982-3873
Attorneys for Defendants State of New Mexico and New Mexico Department of Transportation

and hand delivered to:

New Mexico Court of Appeals
2211 Tucker NE
Albuquerque, NM 87106

this 17th day of December, 2015.

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