IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

SHERRI CORUM, AS PERSONAL REPRESENTATIVE OF THE WRONGFUL DEATH BENEFICIARIES OF MARY JO HEBERT, DECEASED,

Plaintiff/Appellee,

Ct. App. No. 28,314

vs.

ROSWELL SENIOR LIVING, LLC, D/B/A ROSWELL SENIOR LIVING COMMUNITY A/K/A LA VILLA, SUNWEST MANAGEMENT, INC., et al.,

Defendants/Appellants.

On Appeal from the First Judicial District Court
Santa Fe County, New Mexico
The Honorable James Hall, Presiding

BRIEF IN RESPONSE TO AMICUS CURIAE AARP

KELEHER & McLEOD, P.A.
Thomas C. Bird
Spring V. Schofield
Kathleen M. Wilson
Post Office Box AA
Albuquerque, New Mexico 87102
(505) 346-4646

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

New Mexico Cases:

Other Jurisdictions:

Statutes and Rules:

The Defendants/Appellants (collectively "La Villa") respectfully respond to the Amicus Curiae Brief of AARP in support of Plaintiff/Appellee as follows:

I. INTRODUCTION

The District Court decided the order currently on appeal solely on the basis of its interpretation of the New Mexico Uniform Health Care Decisions Act ("NMUHCDA"), NMSA 1978, § 24-7A-5 (1997). [R.P. at 245-248] This appeal therefore presents a purely legal issue. *Cerrillos Gravel Prods., Inc., v. Bd. Of County Comm'rs*, 2004-NMCA-096, ¶ 4, 136 N.M. 247, 96 P.3d 1167. The Amicus Curiae Brief submitted by AARP in support of Plaintiff/Appellee ("Amicus Brief") does not, however, address the NMUCHDA or the scope of authority it grants to health-care surrogates. Rather, the Amicus Brief focuses on alleged nationwide problems with arbitration agreements in long term care settings and asks this Court to make a finding of procedural and substantive unconscionability based on the abstract proposition that arbitration agreements should not be utilized in these settings. [AMB 10-20] The Amicus Brief therefore presses points not addressed by the District Court, based on facts outside the record, in an appeal concerning a question of statutory interpretation the Amicus Brief does not address.

II. ARGUMENTS

A. The Court Should Decline to Legislate.

The essential problem in the Amicus Brief is that it presents a broad policy argument, resting on sources outside the record, in an attempt to establish a blanket prohibition against arbitration agreements in settings like this case. New Mexico has a recognized policy favoring arbitration, AARP's position concerns a question the district court declined to address, and AARP apparently has nothing to say about the issue this appeal does present. The Court should therefore disregard AARP's brief.

If the Court decides to consider AARP's brief, it should reject the arguments it contains. In support of its position, AARP cites various editorials and articles, which argue against the use of arbitration agreements in the long term care setting. AARP has promoted federal legislation which would make a pre-dispute arbitration clause between a long-term care facility and a resident or resident's representative unenforceable. [AMB 4-5] Its Amicus Brief appears to be a similar "lobbying" effort, misdirected at a judicial body.

The Amicus Brief ignores the existing policy context. It is undeniable New Mexico favors arbitration as a forum for dispute resolution. *Spaw-Glass Constr. Servs., Inc. v. Vista De Santa Fe, Inc.*, 114 N.M. 557, 558, 844 P.2d 807, 808 (1992) (noting that arbitration is a form of dispute resolution highly favored in

New Mexico). In the context of this appeal, AARP's plea for a blanket finding of unconscionability for all arbitration agreements related to a specific industry is an improper request for this Court to make a broad policy decision, without the facts of this case. *See State v. Vallejos,* 1997-NMSC-40, ¶ 21, 123 N.M. 739, 945 P.2d 957 (noting that it exceeds the proper function of the judiciary to pass judgment on "policy decisions constitutionally delegated to the legislative and executive branches of the government"). "[I]t is the particular domain of the legislature, as the voice of the people, to make public policy." *Torres v. State*, 119 N.M. 609, 612, 894 P.2d 386, 389 (1995); *see also* N.M. Const. art III, § 1.

AARP asks this Court to decree a policy change contrary to the stated legislative policy supporting arbitration. *See Fernandez v. Farmers Inc. Co. of Ariz.,* 115 N.M. 622, 625, 857 P.2d 22, 25 (1993). The policy change requested by AARP is, similarly, unsupported by, and contrary to, prior judicial decisions. *See, e.g., Spaw-Glass,* 114 N.M. at 558, *Fernandez*, 115 N.M. at 625. This appeal presents a discrete legal issue regarding statutory construction. AARP's argument for a policy change is improper and should not be considered by the Court.

B. The Amicus Brief Combines Issues Of Procedural And Substantive Unconscionability Not Properly Before This Court.

AARP makes a sweeping generalization regarding admissions to any long-term care facility and declares the "circumstances that usually exist ... make it impossible for residents and their family members to make informed decisions ...."

[AMB 10] Because of the "usual circumstances" surrounding the admission to a long-term care facility, AARP asserts the process "hardly produces an agreement voluntarily entered into by two parties of near or equal bargaining power or in an arms length transaction." [AMB 13-14] AARP then asserts, without reference to the arbitration agreement in this matter or any authority, that arbitration "usually is extremely expensive for consumers," that there is a limited basis for appeal from arbitration, and that "arbitrators may have a bias toward facilities that are 'repeat players.'" [AMB 15-16]

AARP has conflated issues of procedural unconscionability with issues of substantive unconscionability. Under New Mexico law, these are two separate and distinct inquiries. *See Guthmann v. La Vida Llena*, 103 N.M. 506, 510, 709 P.2d 675, 679 (1985). AARP has not shown that the Agreement at issue in this case fails to satisfy the tests for either procedural or substantive unconscionability.

1. There Is No Evidence To Establish Procedural Unconscionability In This Case.

Significantly, AARP does not address the facts of this case, urging this Court instead to implement a blanket finding of procedural unconscionability for any arbitration agreement related to any admission to a long term care facility. Procedural unconscionability is, however, a fact specific inquiry related to the circumstances surrounding the execution of a particular contract. *See Guthmann,* 103 N.M. at 510; *Fiser v. Dell Computer Corp.,* 2008-NMSC-46, ¶ 20, 188 P.3d

1215. Without any evidence to support a finding of procedural unconscionability in this case, AARP's broad assertions about the facts present in other cases is irrelevant.

AARP urges that, in some cases, the need to find placement in a long term care facility may arise quickly and impair the ability to consider all alternatives. [AMB 11] There is no evidence in this case that Mr. Hebert was subjected to high pressure tactics, unable to understand the admission agreement, or unable to consider other long term care facilities in the area. [RP 81-182] *Guthmann*, 103 N.M. at 510 ("Factors to be considered [in evaluating procedural unconscionability] include the use of sharp practices or high pressure tactics and the relative education, sophistication or wealth of the parties, as well as the relative scarcity of the subject matter of the contract.") Plaintiff/Appellee ("Ms. Corum") bore the burden of establishing procedural unconscionability and presented no evidence supporting a finding of unconscionability. *See Guthmann*, 103 N.M. at 509. AARP may not ask this Court to speculate or assume facts not in the record in order to meet Ms. Corum's burden. *See Fikes v. Furst,* 2003-NMSC-033, ¶ 24, 134 N.M. 602, 81 P.3d 545.

In addition to lacking any factual support, many of AARP's amicus positions were never asserted in the proceedings below. Ms. Corum's response to the motion to enforce arbitration in the district court did not, for instance, assert

that there were additional expenses related to arbitration, did not present any facts regarding the circumstances surrounding the execution of the arbitration agreement in this case, did not assert that an arbitrator may have an unfair bias toward La Villa, did not allege that Ms. Corum would be without the option of selecting a panel of arbitrators, and did not allege that Ms. Corum lacked knowledge related to her selection of an arbitrator. [RP 212-214] The principle of "right for any reason" does not apply in cases, such as this, where factual issues are raised for the first time on appeal. *See, e.g., Paz v. Tijerina,* 2007-NMCA-109, ¶ 25, 142 N.M. 391, 165 P.3d 1167 (noting the "right for any reason" rule should not be applied on a fact dependent basis not raised below, when the district court's rulings were based on legal argument and the district court made no findings) (*citing Cockrell v. Cockrell,* 117 N.M. 321, 323, 871 P.2d 977, 979 (1994) (stating that fact issues will not be originally determined on appeal)). La Villa had no opportunity to challenge or respond to these "facts," and the district court had no opportunity to consider them. *See id.* They may not be legitimately relied upon as supporting affirmance.

Additionally, this Court may not consider or address arguments raised for the first time by amicus curiae. *Whittington v. State Dept. of Public Safety,* 2002-NMSC-10, ¶ 3, 132 N.M. 169, 45 P.3d 889. "Amicus must accept the case on the issues as raised by the parties, and cannot assume functions of a party." *Id., citing*

to State ex rel. Castillo Crop. V. N.M. State Tax Comm'n, 79 N.M. 357, 362, 443 P.2d 850, 855 (1968)).

AARP's assertion of procedural unconscionability in this case lacks support of any kind in the record. AARP's participation as amicus may not properly be subverted to the task of providing a factual record Ms. Corum failed to supply.

2. There Is No Evidence To Establish Substantive Unconscionability In This Case.

AARP makes broad allegations of substantive unconscionability without citing either the record in this case or any other authority. [AMB 15] Indeed, although AARP's arguments include allegations ranging from the high expense of arbitration, to the limited basis for appealing an arbitrator's decision, to allegedly biased arbitrators, there is not a single record or legal citation to support these allegations. [AMB 15-16] This court should not consider these allegations because they were not made in the district court and are made now without any cited authority. *Cockrell*, 117 N.M. at 323; *ITT Educational Services, Inc. v. Taxation and Revenue Dep't,* 1998-NMCA-78, ¶ 16, 125 N.M. 244, 959 P.2d 969 (noting this court will not review issues raised in appellate briefs that are unsupported by cited authority) (internal citations omitted).

A finding of substantive unconscionability requires a showing that the terms of the arbitration agreement are illegal, contrary to public policy, or grossly unfair.

Fiser, 2008-NMSC-46, ¶ 20. Nothing in the record supports the conclusion that the arbitration agreement in this matter was substantatively unconscionable.

C. The Authorities Relied On By AARP Do Not Support A Blanket Prohibition Against Arbitration Agreements In The Long Term Care Setting.

The cases cited by AARP do not support its position that a blanket prohibition against arbitration agreements in long-term care settings is warranted. Rather, in each case cited by AARP where a court found procedural unconscionability, the court made it clear the finding was based on an examination of the specific facts in the case. *See, e.g., Howell v. NHC Healthcare-Fort Sanders, Inc.,* 109 S.W.3d 731, 732 (Tenn. App. 2003) (finding procedural unconscionability where nursing home representative did not hand agreement to resident's husband, who could not read or write, but explained the agreement to him without explaining that the right to a jury trial would be given up); *Raiteri v. NHC Healthcare,* 2003 Tenn. App. LEXIS 957, *26 (Tenn. App. 2003) (finding arbitration agreement was unenforceable based on specific features of the agreement, the competency of the resident at the time of admission, and the husband's lack of authority to execute documents on the resident's behalf); *Small v. HCF of Perrysburg, Inc.*, 823 N.E.2d 19, 24 (Ct. App. Ohio 2004) (finding procedural unconscionability based on an affidavit from resident's representative documenting stress and time pressures when agreement was signed); *Prieto v.*

Healthcare and Retirement Corp, 919 So.2d 531, 533 (Fla. Ct. App. 2005) (finding procedural and substantive unconscionability based on deposition testimony that resident representative was told all documents had to be executed before her father arrived at facility while he was en route to facility and on specific substantive limitations contrary to state statutory rights); *Romano v. Manor Care, Inc.,* 861 So.2d 59, 62-63 (Fla. Ct. App. 2003) (finding of unconscionability based on specific language of arbitration agreement, which limited state statutory rights, and circumstances surrounding execution of agreement).

Just as each of the above courts examined the specific facts of the case before them, the courts also noted and distinguished the facts from other cases in which an arbitration agreement was upheld. *See Howell* 109 S.W.3d at 734 *citing to Buraczynski v. Eyring,* 919 S.W.2d 314, 321 (Tenn. 1996); *Raiteri*, 2003 Tenn. App. LEXIS 957, **17-18. Indeed, AARP cites other cases in which arbitration agreements in a long term care facility setting have been upheld. [AMB 19] *citing Vicksburg Partners, L.P., v. Stephens*, 911 So.2d 507 (Miss. 2005); *Broughsville v. OHECC, LLC,* 2005 Ohio App. LEXIS 6070 (Ohio. App. 2005). The *Vicksburg* opinion noted that alleged factual circumstances "predicated on exigency and need for immediate healthcare ... where the agreement at issue might require the patient to choose between forever waiving available remedies in a judicial forum, or forgoing necessary medical treatment" would have to be decided when those

particular facts were actually before the court. 911 So.2d at 525. The *Vicksburg* court denounced the notion that arbitration agreements were inherently unconscionable, emphasizing that "[a]rbitration is about choice of forum — period." *Id.*

The cases cited by AARP stand for the proposition that a court may not make a finding of procedural or substantive unconscionability without an examination of the specific facts and agreement in each case. There was no evidence provided to either the district court or this court to support a finding of unconscionability.

D. A Blanket Prohibition Against Arbitration Agreements In The Long Term Care Setting Would Be Preempted By The FAA.

AARP advocates a blanket prohibition against arbitration agreements in the long term care setting. Ms. Corum does not dispute the Federal Arbitration Act ("FAA") applies to the arbitration agreement in this matter. [AB 28-31] The FAA mandates the enforceability and validity of arbitration agreements, "save upon such grounds as exist at law or in equity for the revocation of *any* contract." 9 U.S.C. §2 (emphasis added). Thus, under the FAA, state laws which govern contracts generally are applicable to arbitration agreements. However, a "state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport requirement of §2." *Perry v. Thomas*, 482 U.S. 483, 492, n.9 (1987); *see also Rainbow Healthcare Center, Inc. v. Crutcher*, 2008 U.S.

Dist.Lexis. 6705, *24 (N.D.Ok. 2008)(holding Oklahoma statute which prohibited arbitration agreements in connection with admission to nursing home was preempted by the FAA). The blanket prohibition against arbitration agreements in long-term care settings AARP advocates as amicus is foreclosed by the preemptive effect of the FAA.

III. CONCLUSION

For the reasons stated above, the Court should reject AARP's argument condemning arbitration agreements in long-term care settings as an abstraction, in a vacuum. AARP's Amicus Brief is an invitation to legislate. The Court should reverse the judgment of the District Court and remand this case with directions to enter an order to arbitrate Ms. Corum's claims.

Respectfully submitted,

KELEHER & McLEOD, P.A.

By: Spring V. Schofield
Thomas C. Bird
Spring V. Schofield
Kathleen M. Wilson
Post Office Box AA
Albuquerque, New Mexico 87103
(505) 346-4646
(505) 346-1370 (fax)
Attorneys for Defendants/Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Brief in Response to Amicus Curiae AARP was mailed on November 13, 2008, to the following individual:

Dusti Harvey, Esq.
Harvey Law Firm, LLC
201 Broadway SE
Albuquerque, New Mexico 87102

Spring V. Schofield for
Thomas C. Bird

56158