IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

HARLEY JOHN, and
CHRISTINA PARKETT,

Plaintiffs/Appellees,

vs. N.M. Ct. App. No. 34,561

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

Defendants/Appellants,

and

THE STATE OF NEW MEXICO,
NEW MEXICO DEPARTMENT OF
TRANSPORTATION,

Defendant.

Appeal from the First Judicial District
Santa Fe County, New Mexico
The Honorable Sarah M. Singleton

REPLY BRIEF

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.,
Ellen Thorne Skrak
Valerie Denton
Jocelyn Drennan
P.O. Box 1888
Albuquerque, NM 87103
Telephone: (505) 765-5900
Facsimile: (505) 768-7395
Counsel for Appellants

TABLE OF CONTENTS

Statement of Compliance with Type-Volume Limitations: The body of the attached reply brief exceeds the 15-page limit set forth in Rule 12-213(F)(2) NMRA. As required by Rule 12-213(G) NMRA, we certify that this brief complies with Rule 12-213(F)(3) NMRA, in that the brief is proportionately spaced and the body of the brief contains 3,848 words. This brief was prepared and the word count determined using Microsoft Word 2010.

TABLE OF AUTHORITIES

NEW MEXICO CASES

CASES FROM OTHER JURISDICTIONS

OTHER AUTHORITIES

Overview

Less can be more. But not for an answer brief. Having won below, in their Amended Answer Brief ("AAB") Plaintiffs rely almost entirely on the arguments that they made in their district court briefing. As a result, while Plaintiffs contend that the district court correctly ruled on the waiver, federal preemption, and substantive unconscionability issues, they make little to no effort to address Defendants' arguments in the Brief in Chief ("BIC") as to why the court erred in analyzing the issues as it did. Where Plaintiffs make an effort to defend the rulings, what they say does not provide a basis to affirm. In further developing those points, Defendants address the rulings in the order in which they did in their brief in chief, thereby potentially streamlining the analysis.

Argument

1. The District Court Erred in Ruling that Plaintiffs Had Not Waived Their Substantive Unconscionability Defense and that Defendants Were Not Prejudiced As a Result. Plaintiffs Arguments Do Not Show Otherwise.

Midway through their arguments on the waiver issue, Plaintiffs argue that waiver law different from that cited by Defendants applies to the analysis of whether Plaintiffs waived their substantive unconscionability defense. Which law applies is material to determining the outcome of the issue. At the outset, then, Defendants explain why Plaintiffs' arguments regarding which waiver law applies lack merit. After doing so, Defendants explain why Plaintiffs' remaining

arguments as to why they did not waive their substantive unconscionability defense and why Defendants were not prejudiced by the defense also lack merit.

It is easy to understand why, in seeking to avoid a determination that through their litigation conduct they waived their substantive unconscionability defense, Plaintiffs latched onto the waiver cases that they argue apply. The cases hold that a party may challenge the validity of an arbitration agreement at any point in the proceedings up until the arbitration hearing begins. (AAB at 18-19.) But a challenge to the validity of an arbitration agreement is not the same as a challenge to the enforceability of an arbitration agreement, see Strausberg v. Laurel Healthcare Providers, LLC, 2013-NMSC-032, ¶¶ 42-43, 304 P.3d 409, and, in the district court, Plaintiffs never argued that one of the elements for the formation of a valid arbitration agreement was not met (cf. RP 94; Tr. 7/1/14; RP 157; Tr. 9/15/14; RP 193). The cases therefore do not apply. Instead, those cited by Defendants (BIC at 14) do. The fact that the cases, Talley v. Security Service Corporation, 1983-NMSC-046, 99 N.M. 702, and Cooper v. Albuquerque City Commission, 1974-NMSC-006, 85 N.M. 786, do not address arbitration or unconscionability does not make the waiver principles set forth in them inapplicable (cf. AAB at 18). The principles are generally applicable ones, see, e.g., 31 C.J.S. Estoppel and Waiver § 95, at 429-31 (2008), as shown by the fact

that this Court relied on the very same cases in previously analyzing the waiver issue (see Notice Proposed Summary Disposition (filed 6/2/15) at 3).

With the correct law in mind, the analysis narrows. Notably, Plaintiffs do not deny that they had the right to argue substantive unconscionability as of the time that they filed their response to Defendants' motion to compel arbitration and that they knew it. (Cf. BIC at 4, 14-15 with AAB at 17-20.)[1] Two of the three elements for finding waiver, therefore, are met. Talley, 1983-NMSC-046, ¶ 18. In

---

[1] Elsewhere Plaintiffs argue that Defendants failed to disclose adverse substantive unconscionability case law in their motion to compel arbitration and that the Court should sanction Defendants by dismissing the appeal. (AAB at 20-22.) Notably, Plaintiffs do not argue that Defendants' alleged failure provides an excuse for why they did not argue substantive unconscionability in their response. Notably as well, Plaintiffs do not cite any authority that would support or justify sanctioning Defendants by dismissal for their alleged failure to disclose substantive unconscionability cases in which the Rodey Law Firm was involved. Finding such authority would be no easy task. The case upon which Plaintiffs relied in raising the affirmative defense of unconscionability, Strausberg, 2013-NMSC-032 (RP 96), makes clear that they bore the burden on the issue, id. ¶ 43. Moreover, with the exception of the defendants in Bargman v. Skilled Healthcare Group, Inc., 2013-NMCA-006, ¶¶ 22-24, 292 P.3d 42, who sought to present evidence, the defendants in the appellate cases cited by Plaintiffs did not present evidence to justify collections or small claims arbitration exceptions in the arbitration agreements at issue. Cf. Ruppelt v. Laurel Healthcare Providers, LLC, 2013-NMCA-014, ¶ 17, 293 P.3d 902; Griego v. St. John's Healthcare & Rehabilitation Ctr., LLC, No. 31,777, Mem. Op. ¶¶ 30-32 (N.M. Ct. App. April 22, 2013) (non-precedential); Cecil v. Skilled Healthcare Group, Inc., No. 32,433, Mem. Op. ¶ 10 (N.M. Ct. App. May 29, 2014) (non-precedential); see also Jackson Constr., Inc. v. Smith, 2012-NMCA-033, ¶ 11, 277 P.3d 470 (district court decisions non-binding precedent). The distinction is key to the substantive unconscionability analysis and makes cases in which the defendants did not proffer evidence non-controlling for purposes of the analysis in this case in which Defendants, whose arguments are founded on Bargman, did offer evidence. (BIC at 27-25); infra at 11-16.

analyzing the arguments that Plaintiffs do make, then, the focus belongs on whether the third element is met – i.e., whether from Plaintiffs' litigation conduct it reasonably can be inferred that they intended to waive the defense. See id.; see also Cooper, 1974-NMSC-006, ¶ 28.

Plaintiffs make two arguments aimed at persuading the Court that the element is not met. Scant as they are, Plaintiffs' arguments are short on the substance that matters to the analysis.

Plaintiffs first argue that they "always maintained" that the Arbitration Agreement was "unconscionable," citing their response to Defendants' motion to compel arbitration and their motion for summary judgment. (AAB at 17.) Against that backdrop, considering that Plaintiffs admit that they argued only procedural unconscionability in their response to Defendants' motion to compel arbitration (id. at 2), Plaintiffs' position has to be that a party may generally assert the defense of unconscionability and develop the defense of substantive unconscionability if and when the party chooses to do so.

But that is not what the law calls for. Instead, when a party has a defense to enforcement of an arbitration agreement, the party must raise and develop the defense in response to a motion to compel arbitration. (BIC at 14-15; see also id. at 4 (reflecting that in quoting Strausberg, 2013-NMSC-032 in their response, Plaintiffs recognized the differences between procedural and substantive

unconscionability).) Plaintiffs cite no authority to the contrary. (AAB at 17-20.) Presumably none exists. In re Adoption Doe, 1984-NMSC-024, ¶ 2, 100 N.M. 764; see also 28 Am. Jur. 2d Estoppel and Waiver § 192, at 658 (2011) ("[O]ne cannot prevent waiver by a private mental reservation contrary to an intent to waive, when a party's actions clearly indicate an intent to waive."). Moreover, as Defendants explained and Plaintiffs do not refute, in filing the response that they did, Plaintiffs gave every appearance that they had made a deliberate decision not to argue substantive unconscionability. (See BIC at 4-5, 14-16.) It therefore can be said that Plaintiffs waived the defense as of the filing of their response.

Seeking to prevent that from occurring, in their second argument, Plaintiffs deny that their counsel "indicated" that they would not argue substantive conscionability and suggest that the district court agreed with them that the evidentiary hearing would address only procedural unconscionability, citing to the first status hearing and the court's decision on their motion for summary judgment. (AAB at 17.) Considering Plaintiffs' ensuing argument that no evidentiary hearing on the alleged substantive unconscionability was necessary because of substantive unconscionability determinations in other cases (id. at 18), Plaintiffs' position has to be that their counsel could say what he did at the first status hearing without waiving the defense because the issue was one that the court properly could decide as a matter of law.

That does not prove to be correct. Procedurally, in echoing the district court, Plaintiffs do not accurately depict what occurred during the two status hearings. (Cf. BIC at 6, 8-10, 16-18.) Substantively, Plaintiffs do not accurately depict the law that existed at the time. Bargman had been decided by the time the first status hearing occurred (Tr. 7/1/14), and the opinion made clear that there was no controlling precedent which held that an arbitration exception per se rendered an arbitration agreement substantively unconscionable. 2013-NMCA-006, ¶ 17. Bargman also made clear that a defendant could seek to counter an argument that an arbitration exception made an arbitration agreement substantively unconscionable by making a substantive conscionability showing regarding the exception. Id. ¶¶ 17-18, 22, 24. Plaintiffs do not argue that their counsel was unaware of Bargman at the time of the first status hearing. (AAB at 17-20.) That consideration, coupled with the other ones that Defendants raised (BIC at 16-17), makes it reasonable to infer that through the statements that he made during the first status hearing (AAB at 3-4) Plaintiffs' counsel confirmed that Plaintiffs did not intend to pursue a substantive unconscionability defense in this case. Plaintiffs therefore can be said to have waived the defense of substantive unconscionability as of the first status hearing, which occurred months before Plaintiffs filed their summary judgment motion raising the issue (RP 157).

In their lack of prejudice argument, Plaintiffs argue that Defendants cannot show that they were prejudiced by the district court's decision not to hold an evidentiary hearing because in their summary judgment response Defendants presented evidence which was insufficient as a matter of law to show that the Arbitration Agreement was not substantively unconscionable. (AAB at 19-20.) Plaintiffs' argument misses the prejudice point that Defendants made. That is, the court's substantive unconscionability analysis turned upon Plaintiffs' substantive unconscionability arguments, which were informed by Plaintiffs' incorrect view of the applicable law. (Cf. BIC at 19-20.) As a result, the court deemed the evidence insufficient as a matter of law and cancelled the evidentiary hearing at which Defendants sought to further develop their substantive conscionability showing. (See id.) The error therefore was not a harmless one; it was outcome determinative.

2. The District Court Erred in Ruling that Plaintiffs' Substantive Unconscionability Defense Was Not Preempted Under Federal Law. Plaintiffs' Arguments Do Not Show Otherwise.

Short as it is, Plaintiffs' argument on the federal preemption issue is filled with errors. The three paragraphs upon which Plaintiffs rely do not withstand scrutiny as a result. Defendants address the paragraphs sequentially.

In the first paragraph, Plaintiffs misstate Defendants' argument and misframe the analysis called for by the argument. Defendants did not argue that

THI of New Mexico at Hobbs Center, LLC v. Patton, 741 F.3d 1162 (10th Cir. 2014), requires "the Court to compel arbitration . . . based on federal preemption." (AAB at 22.) Defendants argued that Patton shows that federal law preempts Plaintiff's substantive unconscionability defense. (BIC at 20-27.) The argument does not call for analysis of whether the Tenth Circuit's views on a matter of New Mexico statutory or procedural law are binding or controlling on a state court. (Cf. AAB at 22 (citing Moongate Water Co. and Sundial Press).) It calls for analysis of whether the Tenth Circuit's views on a matter of federal law show that this State's substantive unconscionability law conflicts with federal arbitration law which would result in federal law becoming the controlling authority and, in turn, preemption of Plaintiffs' substantive unconscionability defense. (BIC at 20-27.)

In the second paragraph, Plaintiffs cite to a passage in Figueroa v. THI of New Mexico at Casa Arena, LLC in which this Court disagreed with federal District Court Judge Hansen's conclusion in Patton that arbitration exceptions did not make the arbitration agreement at issue in both cases substantively unconscionable. (AAB at 22-23.) In doing so, Plaintiffs invite the Court to infer that it already has rejected the Patton preemption analysis. That does not prove to be so. Review of the Figueroa passage and the underlying Patton decision shows that neither one addresses the Patton preemption analysis. Cf. Figueroa, 2013-NMCA-077, ¶ 5 n.1, 306 P.3d 480; THI of N.M. at Hobbs Center, LLC v. Patton,

No. Civ. 11-537, 2012 U.S. Dist. Lexis 5252, at *49-*66 (D.N.M. Jan. 3, 2012), aff'd sub nom. by Fundamental Admin. Servs., LLC v. Patton, No. 12-2014, 2012 U.S. App. Lexis 24795 (10th Cir. Dec. 3, 2012). Understandably so; federal preemption did not become an issue in Patton until after Figueroa was filed. See Patton, 741 F.3d at 1164-65.

In the third paragraph, Plaintiffs rely on a California Court of Appeals criticism of Patton as "too simplistic" (AAB at 23). The criticism, see Malone v. Superior Court, 226 Cal. App. 4th 1551, 1568 n.15 (Cal. Ct. App. 2014), does not help Plaintiffs. For one thing, it is dicta. See id. 1551, 1559, 1563-68. Moreover, in the footnote passage where the criticism appears, the court focuses on the Tenth Circuit's statement that in a case involving a one-sided arbitration agreement, "the only way in which the arrangement can be deemed unfair or unconscionable is by assuming the inferiority of arbitration to litigation." Id. at 1568 n.15 (internal citation omitted). After doing so, the court posits that other aspects of an agreement, apart from one-sidedness, could make the agreement unfair or unconscionable in practice. Id. Be that as it may, in this case Plaintiffs did not advance such an argument regarding the Arbitration Agreement; they relied only on the presumed difference between the parties' arbitration obligations and litigation rights (RP 157; RP 193), which makes the rationale in Patton applicable to this case. Moreover, if anything, the footnote passage in Malone aligns with

Bargman in that it recognizes that the practical effect of the terms of an arbitration agreement should be considered in determining whether the agreement is substantively unconscionable. Bargman, 2013-NMCA-006, ¶¶ 17, 22-24.

In the third paragraph Plaintiffs also assert that Patton is "contrary to clear New Mexico precedent." (AAB at 23.) Plaintiffs do not cite any New Mexico authority that Patton is contrary to. (AAB at 23.) They cannot; this Court and the New Mexico Supreme Court have yet to address the impact of Patton on New Mexico's substantive unconscionability law. (BIC at 26-27.)

Plaintiffs' parting assertion in the third paragraph – i.e., "Patton mischaracterizes the reason that arbitration provisions such as the provision in this matter are invalid" (AAB at 23) – is not supported by the ensuing argument upon which they rely (id. at 23-26). Only a passage that Plaintiffs quote from this Court's memorandum decision in Strausberg v. Laurel Healthcare Providers, LLC, No. 29,238, Mem. Op. (N.M. Ct. App. Sept. 11, 2013) (non-precedential), expresses the reason why this Court, in following the New Mexico Supreme Court, has deemed analogous arbitration agreements substantively unconscionable, starting with Figueroa. (See id. at 25-26.) The reason is the same one that the Tenth Circuit pinpointed in examining in the substantive unconscionability holding in Figueroa – i.e., the perceived unfairness of residents having to arbitrate their most likely claims unlike the defendant facility. See Patton, 741 F.3d at 1168-69.

The Tenth Circuit's analysis therefore is precisely on point, as is its conclusion that the FAA preempts the holding because it is premised on the notion that arbitration provides an inferior means of dispute resolution.

3. The District Court Erred in Ruling that the Arbitration Agreement is Substantively Unconscionable as a Matter of Law Given Defendants' Efforts to Make a Substantive Conscionability Showing. Plaintiffs' Arguments Do Not Show Otherwise.

The analysis of the substantive unconscionability issue turns upon whether or not the court applied the appropriate analytical standard to the record before it. The parties agree that the court applied the "most likely claims" standard. What they disagree about is whether the court erred in doing so. Out of the three arguments Plaintiffs make that implicate the disagreement (AAB, Arguments I, II, & VI), it makes sense to focus on the third one first. It most clearly sets forth Plaintiffs' position on the analytical standard that applies; the other two arguments fail if Plaintiffs' position on the applicable analytical standard is incorrect.

For the district court's decision to apply the most likely claims standard to be correct, Plaintiffs have to get past the substantive conscionability holding in Bargman – i.e., that when a defendant seeks to rebut the presumption that an arbitration exception for a claim that the defendant is most likely to pursue makes an arbitration agreement substantively unconscionable, the appropriate analytical standard is whether the defendant has shown that there is a reasonable or fair

justification for the exception. (See BIC at 28-31.) To that end, Plaintiffs reprise their argument that that the Strausberg trilogy[2] shows that the New Mexico Supreme Court has "modified" the law underlying the holding (see AAB at 23-24), making the holding "moot" and "inapplicable" (id. at 26). More specifically, Plaintiffs argue that Bargman post-dated Strausberg I which placed the burden of proving that an arbitration agreement was not unconscionable on the defendant; that in Strausberg II the Supreme Court reversed that holding and placed the burden of proving unconscionability on the plaintiff; and that Strausberg III shows that the plaintiff may meet that burden by pointing to a presumptively one-sided arbitration exception upon which the agreement becomes unenforceable as a matter of law. (Id. at 24-26.)

Reading the Strausberg trilogy in that way is the same as saying that New Mexico now has a bright-line, inflexible rule that an arbitration exception renders an arbitration agreement per se substantively unconscionable. But in fact that is not so. By restoring the burden of proof on a plaintiff who asserts the affirmative defense of substantive unconscionability in Strausberg II, the Supreme Court did not overrule the substantive conscionability holding in Bargman. The burden of proof holding, in a case in which a defendant seeks to make a substantive

---

[2] "Strausberg trilogy" denotes: Strausberg v. Laurel Healthcare Providers, LLC, 2012-NMCA-006, 269 P.3d 914 ("Strausberg I"); 2013-NMSC-032, 304 P.3d 409 ("Strausberg II"); and No. 29,238, Mem. Op. (N.M. Ct. App. Sept. 11, 2013) ("Strausberg III") (non-precedential).

conscionability showing, signifies nothing more than the plaintiff bears the ultimate burden of persuasion. Cf. Strausberg II, 2013-NMSC-032, ¶ 24 ("[W]e use the terms 'burden of persuasion' and 'burden of proof' interchangeably; both terms refer to the party who must persuade the factfinder in order to prevail."). That understanding is confirmed by the considerations that Defendants raised (BIC at 33-34 n.3) – including post-Strausberg III decisions by this Court in which it applied the substantive conscionability holding in Bargman, see Dalton v. Santander Consumer USA, Inc., 2015-NMCA-030, ¶ 27, 345 P.3d 1086, cert. granted, 2015-NMCERT-003, 346 P.3d 1163, Cecil, No. 32,433, Mem. Op. – which show that the holding remains operative and pertinent to the analysis of whether or not an arbitration exception makes an arbitration agreement substantively unconscionable. As a result, an observation that this Court made in Bargman remains as apt today as it did at the time of the underlying proceedings. None of the controlling precedent "lays down a bright-line, inflexible rule that excepting from arbitration any claim most likely to be pursued by the defendant drafter will void the arbitration clause as substantively unconscionable." 2013-NMCA-006, ¶ 17.

The line of appellate cases upon which Plaintiffs rely in arguing that the Arbitration Agreement is substantively unconscionable as a matter of law (AAB, Argument II) does not show otherwise. For all of the details that they include

regarding cases involving analogous arbitration agreements (AAB at 12-17), Plaintiffs leave out the ones which clarify that the analysis of whether an arbitration exception makes an arbitration agreement substantively unconscionable differs depending upon whether the defendant seeks to make a substantive conscionability showing regarding the exception. (Cf. BIC at 28-32); accord Cecil, No. 32,433, Mem. Op. ¶ 10 ("[W]e reject [d]efendants' argument that there may be some reasonable justification for the small claims exemption, such as arbitration being unfeasible in small claims matters because paying the arbitrators would make the process cost-prohibitive. Defendants did not present [such] evidence below . . . . See Bargman, 2013-NMCA-006, ¶ 17 ('It is noteworthy that in none of the foregoing cases [Figueroa and Ruppelt] 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.')."); supra p. 3, n.1 (Griego). See also Dalton, 2015-NMCA-030, ¶ 27 (Plaintiffs fail to address the case, analysis in which makes the distinction crystal clear). It is only when a defendant does not seek to show that there is a reasonable or fair justification for a presumptively one-sided arbitration exception that the presumption becomes dispositive as a matter of law. (BIC at 31-32.) This was not such a case. (Cf. BIC at 11.)

It follows that the only undisputed material fact upon which Plaintiffs relied – i.e., the language of the Arbitration Agreement containing the arbitration exceptions (RP 158, ¶ 3; RP 178) – did not entitle Plaintiffs to judgment as a matter of law on the ground that the small claims arbitration exception made the agreement substantively unconscionable as a matter of law. (AAB, Argument I.) Instead, faced with the evidence Defendants proffered in seeking to make a substantive conscionability showing (RP 185-86, 188-92), the district court had to adjust its analysis accordingly. (BIC at 30-31.) Plaintiffs do not argue that the court did so. (AAB at 9-11.)

Instead, Plaintiffs argue that Defendants presented evidence which was insufficient to show that the agreement was not substantively unconscionable based on precedent. (AAB at 11.) That is not correct. The district court based its substantive unconscionability determination on Cecil (RP 214), where, absent any evidence supporting the defendants' justification for the small claims exception, this Court treated the most likely claims standard as outcome determinative as a matter of law. See Cecil, No. 32,433, Mem. Op. ¶¶ 8, 10. Judged against that inapplicable standard, the district court erroneously deemed the evidence insufficient because it did not address the perceived inequality in the parties' litigation rights. (RP 214.) Because the court did not apply the correct legal standard, it cannot be said that the evidence was insufficient as a matter of law to

withstand Plaintiffs' summary judgment motion and, for that matter, insufficient to warrant an evidentiary hearing to resolve whether Plaintiffs could meet their burden of persuasion on a fully-developed evidentiary record. See Strausberg II, 2013-NMSC-032, ¶ 24. In Bargman this Court did not rule out the possibility that a substantive conscionability showing like the one Defendants sought to make regarding the small claims arbitration exception could enable an arbitration agreement to survive a substantive unconscionability challenge of the sort made by Plaintiffs. (BIC at 34-35.) Defendants therefore should have been afforded that opportunity which they were due under the analytical standard that applies to this case.

Conclusion

For the reasons explained in Defendants' brief in chief and reply brief, the district court's ruling on the waiver issue and, if reached, its ruling(s) on the federal preemption and substantive unconscionability issues should be reversed.

Respectfully submitted,

RODEY, DICKASON, SLOAN,
AKIN & ROBB, P.A.,
Ellen Thorne Skrak
Valerie Denton
Jocelyn Drennan
P.O. Box 1888
Albuquerque, NM 87103
Telephone: (505) 765-5900
Facsimile: (505) 768-7395
Counsel for Appellants

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing response was served by first class mail upon the following counsel of record

Terry R. Guebert
Christopher J. DeLara
David C. Odegard
Guebert Bruckner, P.C.
P.O. Box 93880
Albuquerque, NM 87199-3880
Counsel for Plaintiffs

Stephen S. Hamilton
Alexia Constantaras
Montgomery & Andrews, P.A.
P.O. Box 2307
Santa Fe, NM 87504-2307
Counsel for Defendant State of New Mexico Department of Transportation

this 12th of day May 2016.

RODEY, DICKASON, SLOAN,
AKIN & ROBB, P.A.

By _____
Jocelyn Drennan