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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **NINA R. STRAUSBERG,**

3 Plaintiff-Appellant,

4 **v.**

No. 29,238

5 **LAUREL HEALTHCARE PROVIDERS,**
6 **LLC, and ARBOR BROOK, LLC, d/b/a**
7 **ARBOR BROOK HEALTHCARE,**

8 Defendants-Appellees,

9 **LISA S. NOYA BURNETT, M.D. and**
10 **THE FOUR HUMOURS HEALTHCARE, LLC,**

11 Defendants.

12 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**
13 **Clay P. Campbell, District Judge**

14 Harvey Law Firm, LLC

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18 for Appellant

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1 Albuquerque, NM

2 for Appellees

3 **MEMORANDUM OPINION**

4 **VIGIL, Judge.**

5 {1} This case is before us on remand from our Supreme Court to consider “whether
6 the district court erred by granting Defendants’ motion to compel arbitration and by
7 dismissing Plaintiff’s case.” *Strausberg v. Laurel Healthcare Providers, LLC*
8 (*Strausberg II*), 2013-NMSC-032, ¶ 59, 304 P.3d 409. Because we conclude that the
9 arbitration agreement is substantively unconscionable and thus unenforceable, we
10 reverse and remand.

11 **I. BACKGROUND**

12 {2} Despite signing a mandatory arbitration agreement prior to her admission for
13 treatment, Plaintiff Nina Strausberg brought suit against Arbor Brook Healthcare
14 nursing home and others alleging negligence. Defendants moved to compel
15 arbitration and to dismiss Plaintiff’s case. Plaintiff responded that the arbitration
16 agreement is unenforceable because it is procedurally and substantively
17 unconscionable. The district court granted Defendants’ motion and Plaintiff appealed.
18 We reversed, holding that the district court erroneously shifted the burden to Plaintiff
19 to prove that the arbitration agreement is unconscionable. *Strausberg v. Laurel*

1 *Healthcare Providers, LLC (Strausberg I)*, 2012-NMCA-006, ¶¶ 20-21, 269 P.3d 914,
2 *rev'd by Strausberg II*, 2013-NMSC-032, ¶ 3. Our Supreme Court reversed, holding
3 that because unconscionability is an affirmative defense and federal law requires
4 arbitration agreements to be treated the same as other contracts, the party asserting
5 unconscionability has the burden of proving that the contract is unenforceable.
6 *Strausberg II*, 2013-NMSC-032, ¶ 3. On remand, we now consider whether the
7 district court erred in granting Defendants' motion to compel arbitration and to
8 dismiss Plaintiff's case, despite Plaintiff's procedural and substantive
9 unconscionability arguments.

10 **II. DISCUSSION**

11 {3} Plaintiff challenges the enforceability of the arbitration agreement, arguing that
12 “(1) the circumstances surrounding [the arbitration agreement’s] signing render it
13 procedurally unconscionable . . . ; and (2) the arbitration agreement’s reservation of
14 certain types of disputes renders it substantively unconscionable[.]” Because we
15 conclude that the substantive unconscionability of the arbitration agreement is
16 apparent on its face, we do not address Plaintiff’s procedural unconscionability
17 argument. *See Figueroa v. THI of N.M.*, 2013-NMCA-077, ¶ 23, ___ P.3d ___
18 (“[W]here an agreement is so one-sided that the substantive unconscionability is
19 apparent on the face of the contract, analysis of the procedural unconscionability of

1 the formation of the contract is unnecessary to establish that the contract is
2 unconscionable.”).

3 {4} “We review de novo any grant of a motion to compel arbitration.” *AFSCME*
4 *v. City of Albuquerque*, 2013-NMCA-049, ¶ 7, 299 P.3d 441, *cert. granted*, 2013-
5 NMCERT-004, 301 P.3d 859. Similarly, “[w]e review whether a contract is
6 unconscionable as a matter of law.” *Cordova v. World Fin. Corp. of N.M.*, 2009-
7 NMSC-021, ¶ 11, 146 N.M. 256, 208 P.3d 901.

8 {5} “Substantive unconscionability concerns the legality and fairness of the contract
9 terms themselves. . . . The substantive analysis focuses on such issues as whether the
10 contract terms are commercially reasonable and fair, the purpose and effect of the
11 terms, the one-sidedness of the terms, and other similar public policy concerns.” *Id.*
12 ¶ 22. “Contract provisions that unreasonably benefit one party over another are
13 substantively unconscionable.” *Id.* ¶ 25.

14 {6} The arbitration agreement at issue here requires arbitration of “any and all
15 disputes associated with this Arbitration Agreement and the relationship created by
16 the Admission Agreement and/or the provision of services under the Admission
17 Agreement (including, without limitation, class action or similar proceedings; claims
18 for negligent care against Facility; claims against Facility or any of its employees,
19 managers or members).” The arbitration agreement also provides that “[the]

1 Arbitration Agreement shall not apply to disputes pertaining to collections or
2 discharge of residents.”

3 {7} Plaintiff asserts that “[t]he agreement as written requires that residents give up
4 their rights to sue in court for the vast majority of suits they could bring, while the
5 facility retains the right to pursue in court the only types of suit that it would bring
6 against the resident. As such, it is truly one-sided for the vast majority of disputes
7 between the parties, and is unenforceable as substantively unconscionable under
8 *Cordova*.” See *id.* ¶ 32. We recently addressed a similar substantive
9 unconscionability argument in *Ruppelt v. Laurel Healthcare Providers LLC*, 2013-
10 NMCA-014, ¶¶ 10-18, 293 P.3d 902 and *Figueroa*, 2013-NMCA-077, ¶ 30.
11 Defendants respond that the arbitration agreement is not substantively unconscionable
12 because the language in the arbitration agreement that creates an exception to the
13 arbitration requirement is applicable to both parties.

14 {8} As with *Ruppelt* and *Figueroa*, the arbitration agreement here requires
15 arbitration of the vast majority of claims that would be brought by the patient while
16 excluding those disputes that would almost exclusively be pursued by the nursing
17 home. Although the exception language facially appears neutral, it is meaningless in
18 practice. See *Ruppelt*, 2013-NMCA-014, ¶ 15 (“Common sense dictates that claims
19 relating to collection of fees and discharge of residents are the types of remedies that

1 a nursing home, not its resident, is most likely to pursue.”). The availability to
2 Defendants of a choice of whether to litigate or arbitrate their claims where Plaintiff
3 has no such options establishes substantive unconscionability of the arbitration
4 agreement. *See Figueroa*, 2013-NMCA-077, ¶ 30 (“While we agree that arbitration
5 obligations do not have to be completely equal, and that parties may freely enter into
6 reasonable agreements to exempt certain claims from arbitration, we refuse to enforce
7 an agreement where the drafter unreasonably reserved the vast majority of his claims
8 for the courts, while subjecting the weaker party to arbitration on essentially all of the
9 claims that party is likely to bring.”). As a result, we conclude that the district court
10 erred in concluding that the arbitration agreement is enforceable.

11 **III. CONCLUSION**

12 {9} The order of the district court is reversed.

13 {10} **IT IS SO ORDERED.**

14

15

MICHAEL E. VIGIL, Judge

16 **WE CONCUR:**

17

18 **JAMES J. WECHSLER, Judge**

1

2 **MICHAEL D. BUSTAMANTE, Judge**