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

2 **MICHAEL HEGERTY, as Personal**
3 **Representative of the ESTATE OF**
4 **JOAN E. HEGERTY, Deceased,**

5 Plaintiff-Appellee,

6 v.

No. 34,846

7 **SKILLED HEALTHCARE, LLC,**
8 **ST. CATHERINE HEALTHCARE, and**
9 **REHABILITATION, LLC,**

10 Defendants-Appellants,

11 **and**

12 **JIMMY MELTON,**
13 **and DOES 1 through 5,**

14 Defendants.

15 **APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY**

16 **David K. Thomson, District Judge**

17 Guebert Bruckner, P.C.
18 Terry R. Guebert
19 Christopher J. DeLara
20 Albuquerque, NM

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10 **MEMORANDUM OPINION**

11 **GARCIA, Judge.**

12 {1} In this case we address the question of whether the district court erred in ruling
13 that the arbitration clause exception for small claims was substantively
14 unconscionable as a matter of law and supported granting summary judgment.
15 Michael Hegerty, as personal representative of the estate of his mother, Joan Hegerty,
16 (Appellee) brought suit against Skilled Healthcare, LLC, St. Catherine Healthcare and
17 Rehabilitation, LLC (St. Catherine), and others (collectively Appellants) alleging
18 wrongful death. Appellants moved to compel arbitration in compliance with the
19 arbitration agreement (Arbitration Agreement) included in Ms. Hegerty's admission
20 paperwork to St. Catherine. Appellee filed a motion for summary judgment arguing
21 that the arbitration clause was substantively unconscionable. The district court agreed

1 with Appellee and granted summary judgment. We reverse in accordance with our
2 Supreme Court's recent decision in *Dalton v. Santander Consumer USA, Inc.*,
3 2016-NMSC-035, 385 P.3d 619 and remand for further proceedings. In addition, we
4 conclude that the district court did not err in refusing to apply a recent Tenth Circuit
5 decision addressing whether substantive unconscionability is preempted in the present
6 arbitration case by federal law.

7 **BACKGROUND**

8 {2} Ms. Hegerty was admitted to St. Catherine for rehabilitation and therapy
9 services on or about November 22, 2011. Upon admission to the facility, her son,
10 Michael Hegerty, signed admission paperwork on her behalf as her representative. The
11 paperwork included the challenged Arbitration Agreement.

12 {3} Under the terms of the Arbitration Agreement, Ms. Hegerty, including her
13 qualified authorized representative, and St. Catherine agreed to “resolve by
14 arbitration” any “[d]ispute between them that arises concerning [Ms. Hegerty].” The
15 term “dispute” is defined in the Arbitration Agreement as:

16 [A]ll disputed claims that the [f]acility and [the r]esident may have
17 against each other associated with this Arbitration Agreement[,] the
18 relationship created by the Admission Agreement[,] and/or the provision
19 of services under the Admission Agreement, including all disputed
20 claims arising out of or related to treatment or services provided by [the
21 f]acility to [the r]esident, including . . . whether any services . . .
22 provided by [the f]acility to [the r]esident were unnecessary,
23 unauthorized, or were improperly, negligently, or incompletely rendered.

1 A [d]ispute for purposes of this Arbitration Agreement also means and
2 includes disputed claims brought by the [fa]cility against the [r]esident
3 for collection.

4 The Arbitration Agreement excepted from arbitration “claims for monetary damages
5 that fall within the jurisdictional limit of the New Mexico metropolitan, magistrate[,]
6 or other small claims court[s].” The Arbitration Agreement also excepted “claims
7 related to the eviction, transfer[,] or discharge of [the r]esident that are subject to a
8 federal or state administrative hearing process.” Ms. Hegerty was transferred from St.
9 Catherine to a hospital on December 17, 2011, less than a month after her admission
10 to St. Catherine. Approximately two months later, Ms. Hegerty died.

11 {4} In May 2014, Appellee filed a wrongful death suit arising out of Ms. Hegerty’s
12 care at St. Catherine. Appellants moved to compel arbitration based upon the
13 Arbitration Agreement and also relied on the provisions of the Federal Arbitration Act
14 (FAA), 9 U.S.C. §§ 2, 4 (2012). Appellee’s response argued that a valid agreement
15 requiring arbitration did not exist as the Arbitration Agreement was substantively
16 unconscionable. On December 1, 2014, the district court issued an order on
17 Appellant’s motion to compel arbitration. The district court ruled that there was
18 sufficient evidence to establish that the Arbitration Agreement was a valid contract but
19 that the FAA did not preempt New Mexico state law on “the standard for substantive
20 unconscionability.” The order also ruled that the arbitration provision was

1 “substantively unconscionable on its face because it provides [St. Catherine] with a
2 judicial forum to litigate its most likely and beneficial claims while subjecting resident
3 to arbitration . . . for the claims most likely to be pursued by the resident.”¹ Finally,
4 the district court ruled that although the arbitration provision was facially
5 unconscionable, this Court’s decision in *Bargman v. Skilled Healthcare Grp., Inc.*,
6 2013-NMCA-006, 292 P.3d 1, required that an evidentiary hearing be held to allow
7 Appellants an opportunity to present evidence tending to show that the “collections
8 exclusion within the arbitration provision is not unreasonable or unfairly one-sided
9 such that enforcement of it is substantively unconscionable.” However, the case was
10 transferred to a different district court judge before the evidentiary hearing was held.

11 {5} Appellee then filed a motion for summary judgment arguing that the Arbitration
12 Agreement was substantively unconscionable as a matter of law. As an exhibit to this
13 motion, Appellee attached a related ruling entered in another New Mexico case from

13 ¹The court cited, in support of its ruling, New Mexico cases in which arbitration
14 clauses have been the central issue including: *Strausberg v. Laurel Healthcare*
15 *Providers, LLC*, 2013-NMSC-032, 304 P.3d 409; *Figueroa v. THI of N.M. at Casa*
16 *Arena Blanca, LLC*, 2013-NMCA-077, 306 P.3d 480; *Ruppelt v. Laurel Healthcare*
17 *Providers, LLC*, 2013-NMCA-014, 293 P.3d 902; *Cecil ex rel. Cecil v. Skilled*
18 *Healthcare Group, Inc.*, No. 32,433, mem. op. (N.M. Ct. App. May 29, 2014) (non-
19 precedential); *Strausberg v. Laurel Healthcare Providers, LLC*, No. 29,238 mem. op.
20 (N.M. Ct. App. Sept. 11, 2013) (non-precedential); *Griego v. St. John Healthcare &*
21 *Rehab. Ctr., LLC*, No. 31,777 mem. op. (N.M. Ct. App. Apr. 22, 2013) (non-
22 precedential).

1 the same district, *John v. Skilled Healthcare, LLC, et al.*, D-101-CV-2013-0226,²
2 finding a nearly identical arbitration agreement substantively unconscionable and
3 granting summary judgment. On May 6, 2015, following a hearing and supplemental
4 briefing by the parties on the issue, the district court issued an order granting
5 Appellee's motion for summary judgment.³ The district court's order relied on this
6 Court's previous decision in *Dalton v. Santander Consumer USA, Inc.*,
7 2015-NMCA-030, 345 P.3d 1086, *rev'd*, 2016-NMSC-035, as well as the other
8 district court's order in *John*. The district court's order also rejected Appellants'
9 argument that an evidentiary hearing was necessary under this Court's decision in
10 *Bargman*, 2013-NMCA-006. This appeal followed. On appeal, we requested that the
11 parties submit supplemental briefing following the filing of our Supreme Court's
12 recent decision in *Dalton*, 2016-NMSC-035, entered after the original briefing
13 deadlines had expired.

14 **DISCUSSION**

16 ²The *John v. Rehab. Ctr. of Albuquerque et al.*, No. 34,561 mem. op. (N.M. Ct.
17 App. Feb 15, 2017) (non-precedential) case was also appealed to this Court and was
18 combined with this case for the purpose of oral argument only.

18 ³We read the district court's summary judgment order to be based upon the
19 small claims exception and not the other arbitration exception addressing the transfer
20 or eviction of residents.

1 {6} On appeal, Appellants make two arguments. Appellants argue that, pursuant to
2 *Bargman*, the district court erred in denying them an evidentiary hearing on the factual
3 issues required for determining whether a contract provision is substantively
4 unconscionable. Defendant also contends that the district court erred in failing to
5 consider recent Tenth Circuit authority addressing unconscionable contract provisions
6 and the FAA.

7 {7} The denial of a motion to compel arbitration and the issue of unconscionability
8 of a contract are reviewed by this Court de novo. *Cordova v. World Fin. Corp. of*
9 *N.M.*, 2009-NMSC-021, ¶ 11, 146 N.M. 256, 208 P.3d 901. We also review the
10 interpretation of statutes, including the FAA, as well as federal preemption, de novo.
11 *Strausberg*, 2013-NMSC-032, ¶ 25; *Hadrych v. Hadrych*, 2007-NMCA-001, ¶ 5, 140
12 N.M. 829, 149 P.3d 593. In light of our Supreme Court's recent precedent established
13 in *Dalton*, we reverse and remand this matter to the district court for further
14 proceedings.

15 **I. The Small Claims Exception to Arbitration is Not Substantively**
16 **Unconscionable as a Matter of Law**

17 {8} The doctrine of unconscionability may be analyzed for both procedural and
18 substantive unconscionability. *Cordova*, 2009-NMSC-021, ¶ 21. The only question
19 presented in this case is whether the small claims exception in the Arbitration
20 Agreement is substantively unconscionable. When the terms of a contract are

1 “unreasonably favorable to one party while precluding a meaningful choice of the
2 other party[,]” courts may render a contract or portions of a contract unenforceable
3 under the equitable doctrine of unconscionability. *Id.* Because unconscionability is an
4 affirmative defense to contract enforcement, the party claiming that defense bears the
5 burden of proving that a contract, or a portion thereof, should be voided as
6 unconscionable. *Strausberg*, 2013-NMSC-032, ¶¶ 24, 39, 48. The burden of proving
7 unconscionability refers only to “the burden of persuasion, i.e., the burden to persuade
8 the fact[.]finder[.]” *Id.* ¶ 24. The party bearing this burden need not make any
9 “particular evidentiary showing and can instead persuade the fact[.]finder that the
10 terms of the contract are substantively unconscionable by analyzing the contract on
11 its face.” *Dalton*, 2016-NMSC-035, ¶ 8. Once a facial threshold of unconscionability
12 has been met by the moving party, the opposing party is then allowed to present
13 evidence tending to show that the arbitration exclusion “is not [unreasonable] or
14 unfairly one-sided such that enforcement of it is substantively unconscionable.”
15 *Bargman*, 2013-NMCA-006, ¶ 24.

16 {9} Substantive unconscionability concerns the “legality and fairness of the contract
17 terms themselves.” *Cordova*, 2009-NMSC-021, ¶ 22. “Contract provisions that
18 unreasonably benefit one party over another are substantively unconscionable.” *Id.* ¶
19 25. Our Supreme Court has found substantive unconscionability where the drafter of

1 an arbitration agreement created “unilateral carve-outs that explicitly exempted any
2 judicial remedies [the drafting party] was likely to need from mandatory arbitration
3 while providing no such exemption for the [other party].” *Dalton*, 2016-NMSC-035,
4 ¶ 10. This Court held two arbitration provisions in contracts in the health care industry
5 to be unconscionable where the facilities excepted from arbitration collection and
6 eviction proceedings. See *Figueroa*, 2013-NMCA-077, ¶ 1; *Ruppelt*,
7 2013-NMCA-014, ¶ 1. This Court reasoned that the arbitration provisions in both
8 cases were unfairly one-sided and substantively unconscionable. *Figueroa*,
9 2013-NMCA-077, ¶ 1; *Ruppelt*, 2013-NMCA-014, ¶ 1. However, this Court has never
10 professed a “bright-line, inflexible rule that excepting from arbitration any claim most
11 likely to be pursued by [the provision’s] drafter will void the arbitration clause as
12 substantively unconscionable.” *Bargman*, 2013-NMCA-006, ¶ 17. Instead, each case
13 should be examined individually. *Id.*

14 {10} Recently, our Supreme Court held that an arbitration agreement that contained
15 a bilateral exception from arbitration for small claims of less than \$10,000 was neither
16 grossly unfair nor unreasonably one-sided on its face. *Dalton*, 2016-NMSC-035, ¶ 1.
17 In *Dalton*, the plaintiff purchased two cars under separate sales contracts that allowed
18 either party to compel arbitration of any claim or dispute arising out of the contracts
19 that exceeded the jurisdiction of a small claims court—which at the time in New

1 Mexico was \$10,000. *Id.* ¶ 2. The plaintiff later filed a complaint related to the
2 circumstances under which she purchased the vehicles. *Id.* ¶ 4. In response, the
3 defendant filed a motion to compel arbitration that the plaintiff opposed—arguing in
4 part that the arbitration clause was substantively unconscionable. *Id.* ¶ 5. The district
5 court agreed with the plaintiff, as did this Court. *See Dalton*, 2015-NMCA-030, ¶ 2.
6 Our Supreme Court reversed and held that the arbitration provision as drafted and its
7 carve-outs did not “unambiguously benefit the drafting party alone[.]” *Dalton*,
8 2016-NMSC-035, ¶ 20. Furthermore, our Supreme Court was not persuaded that the
9 exception allowing both parties access to small claims proceedings, “even if one party
10 is substantially more likely to bring [a] small claims action[], is at all unfair.” *Id.* ¶ 21.

11 {11} In light of our Supreme Court’s decision in *Dalton*, we conclude that the small
12 claims exception in the Arbitration Agreement is not substantively unconscionable.
13 Here, the language in the Arbitration Agreement is nearly identical to the small claims
14 exception in *Dalton*. The Arbitration Agreement states that a dispute subject to
15 arbitration “does not include claims for monetary damages that fall within the
16 jurisdictional limit of the New Mexico metropolitan, magistrate, or other small claims
17 court[s].” The district court found that because the small claims exception “provide[d]
18 Appellants] with a judicial forum to litigate its most likely and beneficial claims while
19 subjecting residents to arbitration . . . for the claims most likely to be pursued by the

1 resident[,]” the Arbitration Agreement was “substantively unconscionable on its face.”
2 However, *Dalton* disagreed and held that such a small claims exception is not
3 substantively unconscionable on its face. 2016-NMSC-035, ¶ 21. The mere fact that
4 a party is more likely to bring a small claims action to resolve smaller disputes, does
5 not support a legal determination that the provision is unfair. *Id.* Our Supreme Court
6 reasoned that there are “legitimate, neutral reasons . . . to exclude small claims actions
7 from arbitration, including streamlined pretrial and discovery rules, . . . and the cost-
8 effectiveness of small claims actions compared to arbitration.” *Id.* (internal quotation
9 marks and citations omitted). As such, we recognize *Dalton* to hold that this type of
10 bilateral small claims exception to arbitration is not substantively unconscionable. *See*
11 *State ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, ¶ 20, 135 N.M. 375, 89
12 P.3d 47 (stating that this Court is bound by our Supreme Court precedent); *State v.*
13 *Wilson*, 1994-NMSC-009, ¶ 5, 116 N.M. 793, 867 P.2d 1175. Accordingly, we reverse
14 the grant of summary judgment by the district court.

15 **II. Substantive Unconscionability Defense Not Preempted by Federal Law**

16 {12} Under the FAA, an arbitration agreement is not enforceable where “grounds .
17 . . exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2.
18 “Agreements to arbitrate may accordingly ‘be invalidated by generally applicable
19 contract defenses, such as fraud, duress, or unconscionability.’ ” *Rivera v. Am. Gen.*

1 *Fin. Servs., Inc.*, 2011-NMSC-033, ¶ 17, 150 N.M. 398, 259 P.3d 803 (citing *Rent-A-*
2 *Center, West, Inc. v. Jackson*, 561 U.S. 63, 66 (2010)).

3 {13} Appellants argue that a recent federal decision issued by the Tenth Circuit Court
4 of Appeals determined that our state courts are applying the unconscionability
5 doctrine based on an impermissible “perceived inferiority of arbitration to litigation
6 as a means of vindicating one’s rights.” *THI of N.M. at Hobbs Ctr., LLC v. Patton*,
7 741 F.3d 1162, 1169 (10th Cir. 2014). Appellants contend that because our Supreme
8 Court has not addressed the merits of the *Patton* decision, we are not foreclosed from
9 deciding that the district court erred in rejecting *Patton’s* analysis on the issue of
10 substantive unconscionability.

11 {14} However, our Supreme Court has held that New Mexico courts may invalidate
12 arbitration agreements through the “generally applicable contract [defense]” of
13 unconscionability without violation of the FAA. *See Strausberg*, 2013-NMSC-032,
14 ¶ 52 (internal quotation marks and citation omitted); *Rivera*, 2011-NMSC-033, ¶ 17.
15 Although our Supreme Court has yet to consider the analysis in *Patton*, we regard
16 *Rivera* and other New Mexico case law as decisive on this issue because this Court is
17 bound by existing Supreme Court precedent, as is the district court. *See State v.*
18 *Dopslaf*, 2015-NMCA-098, ¶ 11, 356 P.3d 559 (“[A]ppeals in this Court are governed
19 by the decision of the New Mexico Supreme Court including decisions involving

1 federal law[.]” (internal quotation marks and citation omitted)); *see also Dunning v.*
2 *Buending*, 2011-NMCA-010, ¶ 11, 149 N.M. 260, 247 P.3d 1145 (stating that the
3 Court of Appeals is bound by New Mexico Supreme Court precedent even when
4 aspects of that precedent have been rejected by other authorities).

5 {15} Accordingly, we conclude that the district court did not err in rejecting
6 Appellants’ argument that *Patton* must be applied to the analysis of whether the
7 arbitration exception at issue in this case is substantively unconscionable pursuant to
8 the FAA.

9 **CONCLUSION**

10 {16} For the foregoing reasons, we uphold the district court’s rejection of federal
11 preemption, reverse the district court’s summary judgment ruling regarding the
12 substantive unconscionability of the small claims exception in the Arbitration
13 Agreement, and remand this matter to the district court for further proceedings.

14 {17} **IT IS SO ORDERED.**

15
16

TIMOTHY L. GARCIA, Judge

1 **WE CONCUR:**

2

3 **JAMES J. WECHSLER, Judge**

4

5 **J. MILES HANISEE, Judge**