IN THE NEW MEXICO SUPREME COURT

**BEVERLY PEAVY, Deceased by
THE PERSONAL REPRESENTATIVE
OF THE WRONGFUL DEATH ESTATE,
KEITH PEAVY,**

Plaintiff/Respondent,

v. **No. S-1-SC-37370**

**SKILLED HEALTHCARE GROUP,
INC., SKILLED HEALTHCARE, LLC,
THE REHABILITATION CENTER OF
ALBUQUERQUE, LLC, and
PATRICIA WALKER, LPN,**

Defendants/Petitioners.

UNOPPOSED MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF

Pursuant to Rule 12-320(A) NMRA, the New Mexico Trial Lawyers Association (NMTLA) and the American Association for Justice (AAJ) move this Court for leave to file an *Amici Curiae* Brief in the above-entitled action in support of Plaintiff/Respondent. The proposed Brief is attached to this motion. As grounds for this motion, NMTLA and AAJ assert that the Associations and their members have a serious interest in the subject matter of this action, and that their brief may aid the Court in the resolution of the questions raised herein. More particularly, movants assert:

1. NMTLA is a voluntary membership organization. Its general members spend the majority of their time actively engaged in trial practice on behalf of plaintiffs who are physically and/or economically injured.

2. AAJ is a voluntary national bar association whose trial lawyer members primarily represent plaintiffs in personal injury actions, consumer and employee rights cases, and in civil rights litigation, including in New Mexico courts.

3. On behalf of their members, and the clients they represent, NMTLA and AAJ seek to be heard on issues of public importance which affect the rights of injured plaintiffs.

3. The movants wish to be heard in this matter because it involves the application of the unconscionability doctrine in an arbitration context, an area in which both the members of NMTLA and AAJ and their clients have an ongoing interest.

4. Counsel for the parties have indicated they do not oppose this Motion.

WHEREFORE, AAJ and NMTLA request leave to file their *Amici Curiae* Brief, submitted contemporaneously herewith, supporting the position of Plaintiff-Appellee.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Unopposed Motion for Leave to File *Amici Curiae* Brief** was electronically filed in the Supreme Court of the State of New Mexico's electronic filing system, which in turn caused all counsel of record to be electronically served, on this 18th day of June, 2019.

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IN THE NEW MEXICO SUPREME COURT

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SKILLED HEALTHCARE GROUP, INC., SKILLED HEALTHCARE, LLC, THE REHABILITATION CENTER OF ALBUQUERQUE, LLC, and PATRICIA WALKER, LPN,

Defendants/Petitioners.

On a Writ of Certiorari to
The New Mexico Court of Appeals

BRIEF OF THE NEW MEXICO TRIAL LAWYERS ASSOCIATION (NMTLA) AND AMERICAN ASSOCIATION FOR JUSTICE (AAJ), *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-RESPONDENT

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NMTLA AND AAJ *AMICUS* BRIEF

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court granted certiorari to consider important questions of New Mexico law. *See* Order Granting Review filed 2/22/19 at 2. Amicus understands the overarching issue to be what must be shown by a defendant to avoid a finding of substantive unconscionability where there exists an allegedly one-sided carve-out in an arbitration provision.[1]

Plaintiff/Respondent (Plaintiff) is correct that the arbitration provision at issue here cannot stand because it is not bilateral – despite pretextual language indicating otherwise – and because the proof offered by Defendants/Petitioners (Defendants) below was insufficient to establish bilateralism. *See* **[Answer Brief (AB) at 4-17]**. Amicus agrees with Plaintiff that the arbitration provision is substantively unconscionable and unenforceable. *See* **[AB at 2-4]**. Amicus writes separately to explain in more detail why Defendants have it wrong about what a defendant needs to prove to avoid a finding of substantive unconscionability where the arbitration provision contains a carve-out for claims that only the defendant is most likely to pursue.

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[1] Pursuant to Rule 12-320(D)(1), NMRA, counsel for all parties of record were given timely notice of NMTLA's intent to file this Amicus Brief. In addition, pursuant to Rule 12-320(C), counsel for Amicus states that no counsel for a party authored the brief in whole or in part, and that no counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief.

Defendants contend that this Court must rule that "a defendant could justify such an exception by presenting law or evidence tending to show that it is reasonable or fair to except the claim from arbitration." *See* **[Petitioners' Brief-in-Chief (BIC) at 1].** That claim is demonstrably incorrect because New Mexico law, as expressed most clearly in *Dalton v. Santander Consumer USA, Inc.*, 2016-NMSC-035, 385 P.3d 619, requires a defendant to do more than simply articulate a purported business reason for an allegedly one-sided carve-out. Rather, the defendant must show that the carve-out provides real-life benefits to both the consumer and the defendant business. *See* Argument, *infra.*

ARGUMENT

I. DEFENDANTS MISCONTRUE *DALTON*

This Court in *Dalton* reversed the court of appeals' affirmance of the trial court's determination that the arbitration provision at issue was substantively unconscionable. 2016-NMSC-035. At issue was a facially bilateral carve-out for claims that could be brought in small claims court. *See* 2016-NMSC-035, ¶¶ 17-24. This Court held that this carve-out did not render the arbitration provision substantively unconscionable, and thus unenforceable, because "[b]oth parties benefit from the economy and efficiency of a small claims court when either party has a claim worth less than $10,000." *Id.* ¶ 22. Accordingly, this Court concluded

that the "small claims carve-out" was "not substantively unconscionable" and thus the defendant was within its rights to enforce its arbitration provision.[2] *Id.* ¶ 24.

The evidence and law considered by this Court in *Dalton* further demonstrates that the critical question is whether the allegedly one-sided carve-out is, as applied, bilaterally beneficial. Evidence proffered by the defendant in *Dalton* demonstrated that "private arbitration organizations also recognize the importance of bilateral small claims carve-outs in consumer contracts as a matter of basic fairness." *Dalton*, 2016-NMSC-035, ¶ 21. Evidence that showed "New Mexico public policy favors economical and efficient judicial proceedings" was also found to be convincing. *Id.* ¶ 22. As for applicable law, this Court in *Dalton* noted that the small claims carve-out did "not unambiguously benefit the drafting party alone, unlike the clauses discussed in *Padilla, Cordova* and *Rivera*." *Id.* ¶ 20, *citing Padilla v. State Farm Mutual Automobile Insurance Company*, 2003-NMSC-011, 133 N.M. 661; *Cordova v. World Finance Corporation of New Mexico*, 2009-NMSC-021, 146 N.M. 256; *Rivera v. American General Financial Services, Inc.*, 2011-NMSC-033, 150 N.M. 398.

[2] Although the Court in *Dalton* also considered a second carve-out contained in the defendant's arbitration provision – one for self-help remedies – the Court determined that this carve-out was procedural in nature and was, therefore, "irrelevant to the question of substantive unconscionability." The Court then focused exclusively on the small claims carve-out. *See Dalton*, 2016-NMSC-035, ¶ 16.

Here, as Plaintiff demonstrates in her Answer Brief, the collections carve-out unambiguously benefits the drafting party alone, namely Defendants here, and thus is on all-fours with the arbitration provisions ruled substantively unconscionable in *Padilla*, *Cordova* and *Rivera*. *See* **[AB at 2-4]**. Perhaps out of excessive caution, the trial court here provided Defendants an opportunity to proffer evidence – as the defendant successfully did in *Dalton* – to show that the collections carve-out was, in practical application, bilaterally beneficial. As Plaintiff demonstrates in her Answer Brief, Defendants failed to offer any compelling proof. *See* **[AB at 4-11]**. Indeed, Defendants did not even try to establish that the collections carve-out was bilaterally beneficial. The proof it offered below, and its arguments here – that evidence exists of a legitimate business reason for the collections carve-out – categorically misses the mark.

II. DEFENDANTS MISCONTRUE *BARGMAN*

Defendants, in essence, argue that the court of appeals' opinion in *Bargman v. Skilled Healthcare Group, Inc.*, 2013-NMCA-006, 292 P.3d 1, *cert. quashed* 369 P.3d 373, modifies this Court's rulings in *Dalton*. Defendants are wrong for several reasons. First, the court of appeals, as a lower court cannot modify this Court's pronouncements of law. Second, even if the Court of Appeals had such authority, *Bargman* preceded *Dalton* by three years, and could not have altered this Court's later ruling in *Dalton.* Third, to the extent that Defendants are urging this Court to opt for resolving any tension between *Bargman* and *Dalton* by favoring

Defendants' reading of *Bargman*, this Court must reject that approach where the two cases can be appropriately harmonized. *See e.g. Daddow v. Carlsbad Municipal School District*, 1995-NMSC-032, ¶ 9, 120 N.M. 97 ("Harmonizing *Monell* and *Will*, we see that if an entity is a local governing body with specific discretionary powers and duties, it is not a true 'arm of the state' and is not entitled to the state's Eleventh Amendment protections.").

Bargman dealt with the same arbitration provision, and same one-sided collections carve-out, as present here. *See* 2013-NMCA-006, ¶ 4. In the interim between the *Bargman* trial court's refusal to enforce the defendants' arbitration scheme due to substantive unconscionability and the court of appeals' subsequent consideration of this refusal, two relevant decisions were decided: *Figueroa v. THI of New Mexico at Casa Arena Blanca LLC*, 2013-NMCA-077, 306 P.3d 480, *cert. denied* 297 P.3d 332, *cert. denied*, 569 U.S. 1004 (2013), and *Ruppelt v. Laurel Heathcare Providers, LLC*, 2013-NMCA-014, 293 P.3d 902, *cert. denied* 299 P.3d 422. Both *Figueroa* and *Ruppelt* also affirmed the substantive unconscionability and unenforceability of substantially similar arbitration provisions as present here, due, at least in part, to the same one-sided collections carve-out. *See Figueroa*, 2013-NMCA-077, ¶ 2; *Ruppelt*, 2013-NMCA-014, ¶ 3. Based on those decisions, the court of appeals in *Bargman*, in an opinion authored by Judge Sutin, remanded the matter to the trial court.

Because 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, and also because it is unclear that the district court would have considered evidence . . . [w]e agree with [defendant] that, under the circumstances in this case, remand is in order for the purpose of allowing [defendant] 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.

2013-NMCA-006, ¶¶ 23-24.

The *Bargman* opinion nowhere suggested that the defendant should prevail on remand if it could show a legitimate business reason for its collections carve-out. Rather, it noted that in *Figueroa* and *Ruppelt* the defendant had not tried to offer evidence justifying the carve-out. *See* 2013-NMCA-006, ¶ 17. As expressly stated by Judge Sutin, the defendant, under the particular circumstances present in *Bargman*, was to be given the chance to show that "the collections exclusion is not unreasonably or unfairly ***one-sided***," *see id.* ¶ 24, not as Defendant now urges, to show any articulable business reason justifying the exclusion. Thus, construing *Bargman* as urged by Defendant misconstrues *Bargman* and does violence to *Dalton*.

III. IT WOULD EFFECTIVELY NULLIFY NEW MEXICO'S ONE-SIDEDNESS DOCTRINE TO ALLOW A DEFENDANT TO AVOID A FINDING OF SUBSTANTIVE UNCONSCIONABILITY BY THE MERE ARTICULATION OF SOME BUSINESS RATIONALE FOR THE CARVE-OUT

The rationale behind the one-sidedness doctrine is simple. It is grossly unfair and unreasonable for the drafter of the arbitration provision to preserve for

itself the option of litigating in court for the claims it is most likely to bring, while eliminating this option for the consumer with the claims the consumer is most likely to bring. This rationale is plainly expressed in *Dalton*, where this Court explained that substantive unconscionability is demonstrated where the drafter "reserve[es] . . . the exclusive option of seeking its preferred remedies through litigation" or, put another way, where the drafter "retained the right to obtain through the judicial system the only remedies it was likely to need, while forcing the [consumer] to arbitrate any claim she may have." 2016-NMSC-035, ¶¶ 9-10, *citing Cordova*, 2009-NMSC-021, ¶ 20 and *Rivera*, 2011-NMSC-033, ¶ 53 (quotation marks and editorial parenthesis omitted).

This rationale also underlies the one-sidedness doctrine as applied by the Fifth Circuit, as well as other courts.[3] *See Iberia Credit Bureau, Inc. v. Cingular*

[3] The Tenth Circuit, in *THI of New Mexico at Hobbs Center, LLC v. Patton*, 741 F.3d 1162 (10th Cir. 2014), misunderstood this rationale. The *THI* opinion, authored by Judge Hartz, surmised that New Mexico's one-sidedness doctrine is necessarily predicated on an unspoken assumption in this Court's jurisprudence that "arbitration is an inferior means of dispute resolution," 741 F.3d at 1169, when that is not the case. This Court's jurisprudence in this area is expressly based on sound principles of contract law applicable to all cases including those involving carve-out arbitration clauses, and thus is not in conflict with United States Supreme Court precedent as *Patton* tries to suggest. On that basis, *Patton* is an outlier and was wrongly decided. *See Iberia Credit Bureau, Wireless LLC*, 379 F.3d 159 (5th Cir. 2004); *Taylor v. Butler*, 142 S.W.3d 277 (Tenn. 2004). Moreover, this Court wisely adheres to its own view of Supreme Court doctrine until something clearly contrary is expressed by that Court. *See State v. Cardenas-Alvarez*, 2001-NMSC-017, ¶ 58, 130 N.M. 386, (Serna, C.J., concurring) ("[W]here the issue has not been explicitly resolved by the Supreme Court, we are not bound . . . by the Tenth Circuit's interpretation of Supreme Court precedent.").

Wireless LLC, 379 F.3d 159, 170 (5th Cir. 2004) (surveying cases, noting that opinions that apply the one-sidedness doctrine "do not necessarily express the impermissible view that arbitration is inferior to litigation, for a choice of remedies is better than being limited to one forum"); *Taylor v. Butler*, 142 S.W.3d 277, 285 (Tenn. 2004) (surveying cases, noting that the rationale behind the one-sidedness doctrine is that "the contracting party is denied any opportunity for meaningful choice" between arbitration or court).[4] *See also Ting v. AT&T*, 319 F.3d 1126, 1149 (9th Cir. 2003) ("Although parties are free to contract for asymmetrical remedies and arbitration clauses of varying scope, the doctrine of unconscionability limits the extent to which a stronger party may, through a contract of adhesion, impose the arbitration forum on the weaker party without accepting that forum for itself.") (citation, quotation marks and ellipses omitted).

Allowing the drafter to evade the one-sidedness doctrine simply by articulating a purportedly legitimate business reason for the one-sided carve-out would effectively nullify the one-sidedness doctrine. Businesses will presumably always have an articulable justification. Otherwise, why would the carve-out exist in the first place?[5] But such an articulable business reason does not address the

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[4] *Taylor* was cited favorably by this Court in *Cordova*. *See* 2009-NMSC-021, ¶ 29.

[5] Here, Defendant argues that it has not to date taken advantage of the one-sided collections carve-out and proceeded in court in a collections action against one of its residents. *See* **[BIC at 22-23]**. But this argument does nothing to address the

one-sided effect of the carve-out, nor the rationale behind the one-sidedness doctrine. It follows that the analysis proposed by Defendant in this appeal should be rejected.

CONCLUSION

For the foregoing reasons and those put forward by Plaintiff, the decision of the court of appeals should be AFFIRMED.

Respectfully submitted,

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one-sided nature of the carve-out, or the rationale behind it. Moreover, this "evidence" begs the question: why does Defendant insist on the collections carve-out in its arbitration provision if it never plans to use it?

CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2019, I electronically filed the foregoing Amicus Curiae Brief through the Court's File and Serve system, which will cause service on all counsel of record and also emailed the document to counsel listed below.

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