

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


2 **MARSHALL SCHROEDER,**

3 Plaintiff-Appellee,

4 v.

**No. A-1-CA-41430**

Court of Appeals of New Mexico  
Filed 10/17/2024 12:44 PM



Ramon J. Maestas  
Chief Clerk

5 **SOUTHWEST HOME INSPECTIONS,**  
6 **INC.,**

7 Defendant-Appellant.

8 **APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY**  
9 **Casey B. Fitch, District Court Judge**

10 Bradley Law Firm, LLC  
11 Joshua Bradley  
12 Smith Templeman Law Firm  
13 Christopher J. Templeman  
14 Albuquerque, NM

15 for Appellee

16 Jones, Skelton & Hochuli, P.L.C.  
17 John A. Klecan  
18 Phoenix, AZ

19 for Appellant

20 **MEMORANDUM OPINION**

21 **BLACK, Pro Tem Judge.**

22 {1} Defendant Southwest Home Inspections, Inc. (SWHI or Defendant) appeals  
23 from the district court's denial of its motion to compel arbitration. The district court  
24 found that the arbitration clause in the pre-purchase home inspection contract at issue

1 in this case was substantively unconscionable based on a clause limiting Plaintiff  
2 Marshall Schroeder's time for filing to one year, while not imposing a limit on  
3 SWHI. Finding the unconscionable clause central to the agreement to arbitrate, the  
4 court found it unnecessary to address the remaining claims of unconscionability, and  
5 found the arbitration agreement as a whole unconscionable. We affirm.

6 **BACKGROUND**

7 {2} SWHI is a home inspection company located in Silver City, New Mexico.  
8 Plaintiff contracted with SWHI to perform an inspection on his then-prospective  
9 home. The parties entered into a Residential Inspection Agreement (the Agreement)  
10 that provided, in relevant part:

11 **RESOLUTION OF DISPUTES**

12 Any controversy or claim arising out of or relating to this Agreement  
13 shall be resolved through **Small Claims Court** (or similar court of  
14 limited monetary jurisdiction) in the jurisdiction applicable to this  
15 Agreement. In the event that the amount in dispute exceeds the  
16 jurisdiction of the applicable **Small Claims Court**, the dispute shall be  
17 settled by **binding arbitration** administered by Construction Dispute  
18 Resolution Services, or if unavailable, Resolute Systems, before a  
19 single arbitrator using its Commercial Arbitration Rules. . . . Each party  
20 agrees to pay its own costs of arbitration.

21 Any legal action or proceeding shall be brought in the County in which  
22 the Property is located.

23 **ENFORCEMENT FEES AND COSTS**

24 Any party failing to follow the RESOLUTION OF DISPUTES process  
25 identified above, shall be liable **for all fees and costs** associated with  
26 compelling or enforcing compliance with the RESOLUTION OF  
27 DISPUTES process.

28 **TIME TO INITIATE ACTION**

29 Any action regarding or arising from the condition of the Property and  
30 the Inspection and/or the written report must be filed and initiated by

1 the Client no later than **one (1) year** following the date of the  
2 Inspection. Otherwise, the claim will be barred. If the matter is in  
3 arbitration, the arbitrator will be bound by the terms of this paragraph  
4 as a limitation on the arbitrator's ability to render an award in favor of  
5 the Client.

6 . . . .

7 **ENTIRE AGREEMENT AND SEVERABILITY OF**  
8 **PROVISIONS**

9 This Agreement contains the entire Agreement between the Client and  
10 the Inspector. This document supersedes any and all representations,  
11 both oral and written, among the parties. This Agreement may be  
12 modified, altered, or amended only in writing and having been signed  
13 by both the parties. Any provision of this Agreement which proves to  
14 be invalid, void, or illegal shall in no way affect, impair, or invalidate  
15 any other provision of this Agreement, and all such other provisions  
16 shall remain in full force and effect.

17 {3} SWHI inspected the home and prepared a report. In the report the roof was  
18 described as fair with minor damage. Based on the representations in the report  
19 Plaintiff purchased the home and asked for the minor concessions from the seller for  
20 the small issues that SWHI identified.

21 {4} After moving into the home, Plaintiff noticed water leaking into the home.  
22 Plaintiff had two roofers come out to evaluate the roof. He alleges he was told by  
23 these companies that the roof was compromised and had multiple soft spots, and that  
24 the leak damage appeared to have compromised the trusses. The contract required  
25 Plaintiff to contact SWHI to resolve any issues with the inspection. After  
26 unsatisfactory discussions with Mr. Gorum, the owner of SWHI, Plaintiff filed suit  
27 in district court seeking damages.

1 **Procedural history**

2 {5} In his lawsuit, Plaintiff alleged that SWHI’s inspection was substandard, and  
3 that it failed to disclose major issues with the home that should have been reported.  
4 SWHI filed a motion to compel arbitration. Plaintiff opposed the motion, contending  
5 the arbitration clause was substantively unconscionable and unenforceable because  
6 it (1) limited the consumer’s statute of limitations to one year, while imposing no  
7 limit on SWHI, (2) authorized an award of attorney’s fees and costs against a party  
8 who breached the Agreement’s resolution of disputes clause, and (3) deprived a  
9 consumer who prevailed on an unfair trade practices claim of a statutory entitlement  
10 to their attorney’s fees and costs by requiring each party to pay its own costs of  
11 arbitration (the “cost-sharing provision”).

12 {6} The district court denied the motion to compel arbitration. The district court  
13 held:

14 1. Defendant’s . . . arbitration clause is unreasonably favorable to  
15 one party, the Defendant, and, therefore unfairly unconscionable.

16 2. Defendant’s statute of limitations clause in the arbitration  
17 provision is substantively unconscionable because it limits Plaintiff’s  
18 time period to file a complaint to one year but Defendant is given four  
19 years to file.

20 3. Since this provision is central to the Defendant’s arbitration  
21 provision, the arbitration provision as a whole must be stricken.

22 4. Because the statute of limitations provision itself is  
23 unconscionable, [the district court] need not address the remainder of  
24 Plaintiff’s concerns about the arbitration provision.

1 **DISCUSSION**

2 **I. Standard of Review**

3 {7} This Court applies a de novo standard of review to a district court’s denial of  
4 a motion to compel arbitration. *Atlas Elec. Constr. Inc. v. Flintco, LLC*, 2024-  
5 NMCA-046, ¶ 4, 550 P.3d 881; *Lopez v. Transitional Hosp. of N.M., LLC*, 2023-  
6 NMCA-058, ¶ 4, 534 P.3d 1030. This standard specifically applies to claims of  
7 unconscionability. *Peavy ex rel. Peavy v. Skilled Healthcare Grp., Inc.*, 2020-  
8 NMSC-010, ¶ 9, 470 P.3d 218.

**II. The Time-to-Sue Provision in the Arbitration Contract Was Unconscionable**

9 {8} “The [L]egislature and the courts of New Mexico have expressed a strong  
10 policy preference for resolution of disputes by arbitration.” *United Tech. & Res., Inc.*  
11 *v. Dar Al Islam*, 1993-NMSC-005, ¶ 11, 115 N.M. 1, 846 P.2d 307 (internal  
12 quotation marks and citation omitted). “A court should thus not interfere with the  
13 bargain reached by the parties unless the court concludes that the policy favoring  
14 freedom of contract ought to give way to one of the well-defined equitable  
15 exceptions, such as unconscionability, mistake, fraud or illegality.” *Figueroa v. THI*  
16 *of N.M. at Casa Arena Blanca, LLC*, 2013-NMCA-077, ¶ 21, 306 P.3d 480 (internal  
17 quotation marks and citation omitted).

1 {9} “The substantive [unconscionability] analysis focuses on such issues as  
2 whether the contract terms are commercially reasonable and fair, the purpose and  
3 effect of the terms, the one-sidedness of the terms, and other similar public policy  
4 concerns.” *Atlas Elec. Constr. Inc.*, 2024-NMCA-046, ¶ 7 (internal quotation marks  
5 and citation omitted). “Substantive unconscionability concerns the legality and  
6 fairness of the contract terms themselves.” *Id.* (internal quotation marks and citation  
7 omitted).

8 {10} “Substantive unconscionability requires courts to examine the terms on the  
9 face of the contract and to consider the practical consequences of those terms.”  
10 *Dalton v. Santander*, 2016-NMSC-035, ¶ 8, 385 P.3d 619. “Courts may render a  
11 contract or portions of a contract unenforceable under the equitable doctrine of  
12 unconscionability when the terms are ‘unreasonably favorable to one party while  
13 precluding a meaningful choice of the other party.’” *Id.* ¶ 6 (quoting *Cordova v.*  
14 *World Fin. Corp. of N.M.*, 2009-NMSC-021, ¶ 21, 146 N.M. 256, 208 P.3d 901).

15 {11} The time-to-sue provision that is the subject of this appeal is unambiguously  
16 one-sided in that it requires only the consumer to bring their claim within one year  
17 of the inspection:

18 Any action regarding or arising from the condition of the Property and  
19 the Inspection and/or the written report must be filed and initiated by  
20 the Client no later than one (1) year following the date of the Inspection.  
21 Otherwise, the claim will be barred. If the matter is in arbitration, the  
22 arbitrator will be bound by the terms of this paragraph as a limitation  
23 on the arbitrator’s ability to render an award in favor of the Client.

1 Prior to the Supreme Court opinion in *Peavy*, that may have terminated our inquiry  
2 as it would focus only on the time the contract was made. *See Cordova*, 2009-  
3 NMSC-021, ¶ 39. Following *Peavy*, however, a more analytical approach is  
4 necessary. Once it is clear a provision is one-sided, “our only task is to determine  
5 whether [d]efendant presented sufficient evidence that the provision is fair and  
6 reasonable.” *Atlas Elec. Constr. Inc.*, 2024-NMCA-046, ¶ 10.

7 {12} While Defendant appears to have presented a preprinted contract form, there  
8 is no evidence Plaintiff attempted to revise or eliminate the time-to-sue language or  
9 complained that he was rushed to file, so procedural unconscionability need not be  
10 a consideration. That leaves us to consider the factors tendered by Defendant and  
11 determine whether the contract was “fair and reasonable” in the present context.

12 {13} Defendant notes initially that the most likely, if not the only, claim it would  
13 face would be for its fee. The district court brought up potential physical injury to  
14 an inspector or other forms of breach of contract, and Defendant had no answer.  
15 Defendant did not offer any other explanation of how the provision, one-sided on its  
16 face, nonetheless operated in a fair and reasonable manner. Thus, the district court  
17 correctly held the contract was not fair and reasonable.

18 **III. The Cost-Sharing Provision is Also Substantively Unconscionable**

19 {14} Plaintiff argues the cost-sharing language in the contract, providing that “each  
20 party agrees to pay its own costs of arbitration” is also unconscionable. Plaintiff

1 claims that this provision strips Plaintiff of his right to cost-shifting and attorney's  
2 fees under the Unfair Practices Act (UPA). The UPA states that a prevailing plaintiff  
3 under the UPA "shall" recover his attorney fees and costs of litigation. *See* NMSA  
4 1978, § 57-12-10(C) (2005) ("The court shall award attorney fees and costs to the  
5 party complaining of an unfair or deceptive trade practice or unconscionable trade  
6 practice if the party prevails."). The award of attorney fees and costs to a prevailing  
7 plaintiff encourages attorneys to represent victimized clients, even in small damages  
8 cases. *See Jones v. Gen. Motors Corp.*, 1998-NMCA-020, ¶ 25, 124 N.M. 606, 953  
9 P.2d 1104. The fee-shifting and cost-shifting in the UPA together allow consumers  
10 to pursue damages, no matter how small.

11 {15} Defendant does not rebut Plaintiff's claim that the cost-sharing provision in  
12 the arbitration agreement conflicts with the UPA's requirement for payment of costs  
13 and attorney's fees to a prevailing consumer. Because the statutory provision for  
14 costs and fees applies to the consumer, and not to the defendant, the arbitration  
15 provision is one-sided, harming the consumer. Defendant responds by arguing that  
16 the agreement is fair because the arbitrator can override the agreement's language  
17 and award attorney's fees and costs, regardless of what the agreement states. We are  
18 not persuaded by Defendant's contention that this provision is meaningless and that  
19 the agreement would operate in a fair and reasonable manner to allow an award of  
20 costs and attorney's fees should Plaintiff prevail on her UPA claim. We therefore



1 conclude that this provision is also unconscionable under New Mexico’s law of  
2 contracts. *See also Sanchez v. United Debt Couns.*, \_\_\_-NMSC-\_\_\_, ¶¶ 17, 23,  
3 \_\_\_ P.3d \_\_\_ (S-1-SC-39563, October 7, 2024) (holding the plaintiff properly raised  
4 a specific challenge of unconscionability by arguing that “the delegation clause is  
5 unconscionable under the UPA because it strips her of attorney’s fees and costs for  
6 successfully litigating gateway issues”).

#### 7 **IV. Severance**

8 {16} Although the district court’s ruling was based only on the time-to-sue  
9 provision, Plaintiff presents secondary unconscionability arguments, relating to  
10 attorney’s fee and costs. We have found one of these secondary provisions  
11 unconscionable. In *Cordova*, the Supreme Court recognized the difficulty of trying  
12 to excise multiple unconscionable clauses from an arbitration clause:

13 We are reluctant to try to draft an arbitration agreement the parties did  
14 not agree on. This is particularly so in light of the categorization in the  
15 agreements of specific kinds of access to the courts World Finance had  
16 insisted on for itself. As we concluded in *Fiser [v. Dell Computer*  
17 *Corp.]*, 2008-NMSC-046, ¶ 24, 144 N.M. 464, 188 P.3d 1215, we must  
18 strike down the arbitration clause in its entirety to avoid a type of  
19 judicial surgery that inevitably would remove provisions that were  
20 central to the original mechanisms for resolving disputes between the  
21 parties.

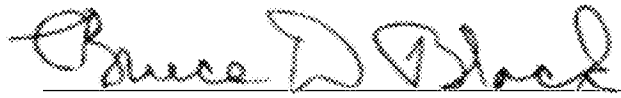
22 2009-NMSC-021, ¶ 40. Because the limitations on the consumer filing a claim,  
23 combined with the limitation on costs and attorney’s fees are together central to the

1 original mechanisms for resolving disputes between the parties, we agree with the  
2 district court that severance of these provisions is not an appropriate remedy.

3 **CONCLUSION**

4 {17} We affirm the district court decision.

5 {18} **IT IS SO ORDERED.**

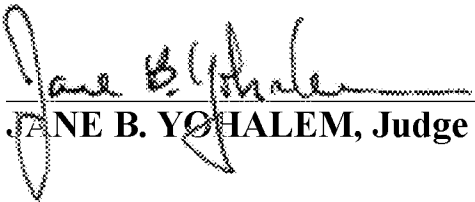
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7 **BRUCE D. BLACK, Judge Pro Tem**

8 **WE CONCUR:**

9 

10 **MEGAN P. DUFFY, Judge**

11 

12 **JANE B. YOCHALEM, Judge**