Corrections to this opinion/decision not affecting the outcome, at the Court's discretion, can occur up to the time of publication with NM Compilation Commission. The Court will ensure that the electronic version of this opinion/decision is updated accordingly in Odyssey.

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Court of Appeals of New Mexico
Filed 7/23/2026 12:23 PM
Mark Reynolds

BARBARA NEISWENDER,

Plaintiff-Appellee,

v. **No. A-1-CA-41757**

RELIABLE CHEVROLET (NM), LLC,

Defendant-Appellant,

and

OLD UNITED CASUALTY COMPANY,

Defendant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Benjamin Chavez, District Court Judge

Shekter Law, PC
Jamison Shekter
Albuquerque, NM

for Appellee

Holland & Hart LLP
Larry J. Montaño
Olga Serafimova
Santa Fe, NM

for Appellant

MEMORANDUM OPINION

ATTREP, Judge.

{1} Defendant Reliable Chevrolet (NM), LLC (Dealer) appeals the district court's denial of its motion to compel arbitration, arguing the district court erred in (1) concluding that several contractual terms in an arbitration agreement between Dealer and Plaintiff Barbara Neiswender (Buyer) were substantively unconscionable, and (2) determining that the substantively unconscionable terms could not be severed from the arbitration agreement. We affirm.

BACKGROUND

{2} Buyer and Dealer executed a two-page "Buyer's Order Agreement and Bill of Sale" (the Agreement), in which Buyer agreed to purchase a used vehicle from Dealer. According to Buyer, Dealer made various misrepresentations concerning the vehicle's condition and wrongfully attempted to repossess the vehicle. Buyer filed a complaint against Dealer and its auto dealer surety bond provider in district court, alleging violations of the Uniform Commercial Code (UCC), Article 9, NMSA 1978 §§ 55-9-101 to -809 (2001, as amended through 2023), and the Unfair Practices Act (UPA), NMSA 1978, §§ 57-12-1 to -27 (1967, as amended through 2025), along with claims for harassment, invasion of privacy, intentional infliction of emotional distress, negligence, fraudulent misrepresentation, and punitive damages.

{3} Dealer moved to compel arbitration pursuant to an arbitration clause in the Agreement. Buyer opposed the motion, arguing that the arbitration agreement formed between the parties was substantively unconscionable and therefore unenforceable. As relevant to our resolution of this appeal, Buyer's claim of substantive unconscionability in the arbitration agreement relied on two additional provisions of the Agreement.[1] First is what we label the "damages limitation" provision:

> DEALER IS NOT LIABLE FOR INCIDENTAL, CONSEQUENTIAL OR PUNITIVE DAMAGES ARISING OUT OF THIS SALE OR THE USE OF THIS VEHICLE, INCLUDING BUT NOT LIMITED TO LOSS OF USE, LOSS OF TIME, INCONVENIENCE, TRANSPORTATION, RENTAL, LOSS OF EARNINGS OR PROFITS, OR ANY COMMERCIAL LOSS.

Second is what we label the "attorney fee" provision:

> Buyer is liable for attorney's fees incurred by Dealer in enforcing this agreement.

---

[1]Buyer additionally relied on a third provision of the Agreement—limiting the authority of Dealer's sales representatives to make binding representations regarding used vehicle history—which the district court also ruled was substantively unconscionable. Because, as discussed below, we affirm the district court's denial of the motion to compel based on the substantive unconscionability of the damages limitation and attorney fee provisions, we decline to address Dealer's claims of error with respect to this third provision. *See Prieskorn v. Maloof*, 1999-NMCA-132, ¶¶ 17-18, 128 N.M. 226, 991 P.2d 511 (declining to reach an issue where its resolution, even if in the appellant's favor, would not alter the outcome of the appeal).

{4} The district court ruled that the arbitration agreement was "unfairly and unreasonably one-sided" and therefore "substantively unconscionable on its face." Following an evidentiary hearing, the district court determined that Dealer had failed to meet its burden of "present[ing] evidence justifying that the [arbitration] agreement is fair and reasonable" notwithstanding its facial one-sidedness. The district court further determined that the substantively unconscionable provisions were "central to the arbitration scheme" and could not be severed. The district court accordingly denied the motion to compel arbitration, and Dealer appeals.

DISCUSSION

I. Standard of Review and Applicable Law

{5} "We apply a de novo standard of review to a district court's denial of a motion to compel arbitration." *Cordova v. World Fin. Corp. of N.M.*, 2009-NMSC-021, ¶ 11, 146 N.M. 256, 208 P.3d 901. "Questions regarding substantive unconscionability present questions of law that are also reviewed de novo." *Peavy ex rel. Peavy v. Skilled Healthcare Grp., Inc.*, 2020-NMSC-010, ¶ 9, 470 P.3d 218. Notwithstanding our de novo review, it remains the appellant's burden to persuade us that the district court erred—not the appellee's burden to persuade us that it did not. *See, e.g., Farmers, Inc. v. Dal Mach. & Fabricating, Inc.*, 1990-NMSC-100, ¶ 8, 111 N.M. 6, 800 P.2d 1063 (stating that a trial court's actions are presumed to be correct and that an appellant "must affirmatively demonstrate" the trial court erred); *Lozano v. GTE Lenkurt, Inc.*, 1996-NMCA-074, ¶ 30, 122 N.M. 103, 920 P.2d 1057 (providing that an "answer brief need not specifically answer each assignment of error made by appellant" and the failure of an answer brief to do so is not in itself grounds for reversal).

{6} "Arbitration agreements are a species of contract subject to generally applicable contract law, including unconscionability." *Peavy*, 2020-NMSC-010, ¶ 12. "Unconscionability is an affirmative defense to contract enforcement, . . . which allows courts to render unenforceable an agreement that is unreasonably favorable to one party while precluding a meaningful choice of the other party." *Id.* ¶ 10 (internal quotation marks and citations omitted). Although "[t]he party alleging unconscionability bears the burden of proving that a contract is unenforceable on that basis," they do "not have to make any particular evidentiary showing, but rather can persuade the factfinder by analyzing the contract on its face." *Id.* (internal quotation marks and citation omitted). In *Peavy*, our Supreme Court articulated a two-step test for assessing whether an arbitration agreement is substantively unconscionable. *Id.* ¶¶ 20-21. "First, ... [t]he court should look to the face of the arbitration agreement to determine the legality and fairness of the contract terms themselves." *Id.* ¶ 20 (internal quotation marks and citation omitted). "Second, if the court determines the arbitration agreement is facially one-sided, the court should allow the drafting party to present evidence that justifies the agreement is fair and reasonable, such that enforcement of the agreement would not be substantively unconscionable." *Id.* ¶ 21; *see also Martinez v. Melloy Bros., Inc.*, 2026-NMCA-018, ¶ 20, 584 P.3d 1147 ("[W]e understand *Peavy* to require that the party seeking arbitration be given an opportunity to make a showing as to an agreement's fairness and reasonableness in the event the district court determines that the agreement is one-sided."), *cert. denied*, 2025-NMCERT-011 (S-1-SC-41148). If no such evidence is adduced, substantive unconscionability will be found. *See id.* ¶ 31. The question then becomes whether the unconscionable terms are severable from the arbitration agreement such that arbitration should be compelled, notwithstanding the determination of unconscionability. *See Padilla v. State Farm Mut. Auto. Ins. Co.*, 2003-NMSC-011, ¶ 15, 133 N.M. 661, 68 P.3d 901 (explaining that once a contractual term has been determined to be unconscionable, the court "may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result" (internal quotation marks and citation omitted)).

{7} With respect to arbitration agreements contained "within a broader contract," like the one at issue here, our "analysis for unconscionability [of the arbitration agreement] must contemplate the contract as a whole, not merely the arbitration language." *Rojas v. Reliable Chevrolet (NM), LLC*, 2024-NMCA-003, ¶ 10, 539 P.3d 1253. Consequently, any contractual "term[] that would be employed as part of arbitration [is] logically considered to be part of the arbitration agreement." *Martinez*, 2026-NMCA-018, ¶ 25. Our Court previously has held that a damages limitation contained within a purchase agreement identical to the one at issue here, *see Rojas*, 2024-NMCA-003, ¶¶ 4, 10, as well as damages limitation and time-to-sue provisions appearing in a similar agreement, *see Martinez*, 2026-NMCA-018, ¶¶ 4-5, 25, meet this standard. Dealer does not dispute that the damages limitation and attorney fee provisions at issue in this case would similarly "be employed as part of arbitration." *See Martinez*, 2026-NMCA-018, ¶ 25. We accordingly proceed with considering whether these provisions are unconscionable, and, if so, whether they are severable from the arbitration agreement.

II. We Are Not Persuaded the District Court Erred in Concluding That the Damages Limitation and Attorney Fee Provisions Are Substantively Unconscionable

{8} Dealer does not contest that the damages limitation[2] and attorney fee provisions are one-sided, but instead argues that the district court erred in

---

[2]We limit our analysis of the damages limitation provision to incidental and consequential damages. Dealer argues on appeal that this Court's decision in *Rojas* renders erroneous the district court's ruling that the punitive damages limitation is substantively unconscionable. *See* 2024-NMCA-003, ¶ 20 (holding that a punitive damages limitation, identical to the one at issue in this case, did not affect the availability of treble damages under the UPA and therefore was not unconscionable on this basis). Buyer does not argue against Dealer's interpretation of *Rojas* or its applicability to the punitive damages limitation in this case. *See generally Delta Automatic Sys., Inc. v. Bingham*, 1999-NMCA-029, ¶ 31, 126 N.M. 717, 974 P.2d 1174 (explaining that "[t]his Court has no duty to search the record or research the law to 'defend' in a civil case a party that fails to defend itself on an issue"). Instead,

determining the terms were facially unconscionable under step one of *Peavy* based on a showing of "one-sidedness alone." Building on this supposition, Dealer argues the district court impermissibly shifted the burden to Dealer to establish that the terms were fair and reasonable under *Peavy* step two.[3] We disagree.

{9} Before the district court, Buyer argued, inter alia, that the arbitration agreement was "unconscionable as unreasonably one-sided," identifying both the damages limitation provision and the attorney fee provision as "evidenc[e of] the unfair one-sidedness of the contract." Dealer did not dispute that these provisions were facially one-sided. The district court in turn described the unilateral nature of each term as follows:

> [T]he [A]greement precludes [Buyer] from recovering "incidental, consequential or punitive damages arising out of th[e] sale or the use of th[e] vehicle." The [A]greement does not similarly preclude [D]ealer from recovering such damages.

Buyer contends that *Rojas* was wrongly decided. Buyer does so, however, without discussing why this Court ought to disregard the vital principles of stare decisis. *See Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶¶ 33-34, 125 N.M. 721, 965 P.2d 305 (discussing the importance of stare decisis and the "special justification," in light of enumerated factors, necessary to depart from prior precedent (internal quotation marks and citation omitted)). We therefore decline to revisit *Rojas* and restrict our analysis of the damages limitation provision to the limitation of incidental and consequential damages.

[3]To the extent Dealer argues that the *Peavy* framework itself improperly shifts the burden away from the party asserting unconscionability, this Court rejected a similar argument in *Martinez*—concluding that *Peavy*'s "two-step analysis simply ensures that the arbitration proponent has an opportunity to rebut a prima facie showing that the contract is facially one-sided." *See Martinez*, 2026-NMCA-018, ¶ 20 n.3.

> . . .
>
> [T]he [A]greement makes [Buyer] liable for attorney's fees should [D]ealer seek to enforce the [A]greement. The [A]greement does not similarly make [D]ealer liable for attorney's fees.

The district court then explained it was "required to consider the practical consequences of the arbitration agreement's terms" and determined that "[u]nder the arbitration agreement's terms, [Buyer] faces more restrictions and must comply with more requirements in order to be entitled to relief." *See Dalton v. Santander Consumer USA, Inc.*, 2016-NMSC-035, ¶ 8, 385 P.3d 619 ("Substantive unconscionability requires courts to examine the terms on the face of the contract and to consider the practical consequences of those terms."). The district court ultimately ruled the arbitration agreement was "unfairly and unreasonably one-sided" under *Peavy* step one.

{10} The district court's *Peavy* step one determination appears consistent with this Court's precedent involving damages limitation provisions identical to the one at issue here. In *Rojas*, for example, this Court concluded that, because "the plain and unambiguous terms of [the arbitration agreement] disclaim[ed] . . . incidental, consequential, [and] punitive damages only on the dealer's part," while providing the buyer with "no protection against such damages," the agreement was "facially one-sided and unilateral," requiring this Court to "proceed to the second step [of *Peavy*]." *Rojas*, 2024-NMCA-003, ¶ 11. Similarly, in *Martinez,* this Court upheld the district court's ruling that the arbitration agreement was "unfairly and unreasonably one-sided" under *Peavy* step one where the court determined "the damages limitation 'limits [the buyers'] ability to collect incidental, consequential and punitive damages[, but the dealer] is not so limited.'" *Martinez*, 2026-NMCA-018, ¶¶ 8, 35. In light of this precedent, we are not persuaded the district court incorrectly determined that the provisions at issue here—which provided Buyer with "no protection" from liability for damages or attorney fees while limiting Dealer's liability, *see Rojas*, 2024-NMCA-003, ¶ 11—were "unfairly and unreasonably one-sided," rendering the arbitration agreement "substantively unconscionable on its face" under *Peavy* step one. *See Peavy*, 2020-NMSC-010, ¶¶ 10, 21 (providing that the nondrafting party "does not have to make any particular evidentiary showing, but rather can persuade the [district court] by analyzing the contract on its face," and that the nondrafting party's initial burden is met where the court "determines the arbitration agreement is facially one-sided" (internal quotation marks and citation omitted)).

{11} We thus proceed to Dealer's claims of error concerning *Peavy* step two. Following an evidentiary hearing at which Dealer presented the testimony of two of its employees, the district court determined that "[Dealer] has not carried its burden of demonstrating that the facially unconscionable provisions of the arbitration agreement are fair and reasonable." Dealer first contends this ruling was erroneous because "[Buyer] presented no argument or evidence" that the damages limitation or attorney fee provisions were "unfair or unreasonable in the context of the vehicle sales prices charged by [Dealer]." In so doing, Dealer misplaces the burden under the second step of *Peavy*, which, as discussed, "allow[s] *the drafting party* to present evidence that justifies the agreement is fair and reasonable." *Id.* ¶ 21 (emphasis added); *see also Martinez*, 2026-NMCA-018, ¶ 20 (same).

{12} As far as the adequacy of its own evidentiary showing, Dealer's arguments are both undeveloped and unpersuasive. Dealer points to testimony that it "sells approximately 250 vehicles each month," arguing this "translates into 3000 individuals each year who could potentially claim" various incidental and consequential losses. Dealer implies that the arbitration agreement's one-sided terms are therefore necessary to protect Dealer from "potential boundless economic damages." Apart from being entirely speculative, this argument is contradicted by Dealer's own employee's testimony that it is only sued "several times a year." *See Peavy*, 2020-NMSC-010, ¶ 28 (concluding that the evidence "fail[ed] to justify" the one-sidedness of an arbitration agreement where the drafting party "merely speculated" as to the costs avoided by the agreement). Moreover, Dealer's focus on the number of vehicles sold does nothing to explain how the district court's rationale concerning *Peavy* step two amounted to error. The district court observed that Dealer had not "provided testimony explaining how only limiting [D]ealer's liability (not

[Buyer's]) is fair and reasonable," and concluded that Dealer had not justified the one-sidedness of the arbitration agreement because "the reasons set forth by [Dealer] . . . are primarily self-serving." *See Cordova*, 2009-NMSC-021, ¶ 32 (concluding that the drafting party's "self-serving arbitration scheme" was "so unfairly and unreasonably one-sided that it [was] substantively unconscionable").

{13} Dealer advances no specific challenge to this reasoning by the district court, providing us with little basis for setting aside the court's determination that the arbitration agreement is "not fair and reasonable under the circumstances of this case." *See Peavy*, 2020-NMSC-010, ¶ 31 (explaining that where the drafting party "failed to present evidence justifying the one-sidedness of the [arbitration agreement] as fair and reasonable," "the [a]greement is substantively unconscionable"); *see also Farmers, Inc.*, 1990-NMSC-100, ¶ 8 (placing the burden on the appellant to establish error). Instead, Dealer focuses on Buyer's argument that the damages limitation and attorney fee provisions are substantively unconscionable because they are contrary to public policy set by the Legislature in the UPA, which permits statutory damages and attorney fees for successful claimants, *see* § 57-12-10(B), (C). Dealer contends that the damages limitation and attorney fee provisions should be upheld because, consistent with *Rojas*, it is possible to construe these terms narrowly to avoid a conflict with the UPA. *See Rojas*, 2024-NMCA-003, ¶ 18 (explaining that ambiguous contract terms, as well as exculpatory provisions, should be "interpret[ed] . . . in a narrow manner to protect the rights of the nondrafting party"). Even if Dealer is correct that these provisions could be so construed, this provides no basis for reversal. As Dealer acknowledges, the district court did not base its substantive unconscionability ruling on a determination that the damages limitation and attorney fee provisions would restrict recovery available under the UPA. Dealer's argument in this regard thus fails to persuade us that the district court erred in concluding the damages limitation and attorney fee provisions are unfair and unreasonable, at least with respect to non-UPA claims.

{14} Dealer otherwise argues that New Mexico's "lemon law," NMSA 1978, § 57-16A-3.1(B) (2003), and the UCC, § 55-2-719(3), sanction the damages limitation provision. With respect to the "lemon law," Dealer provides no citation to the record where it raised this issue below; based on our review of the record, it appears this issue was not preserved and we decline to review it. *See Crutchfield v. N.M. Dep't of Tax'n & Revenue*, 2005-NMCA-022, ¶ 14, 137 N.M. 26, 106 P.3d 1273 ("[O]n appeal, the party must specifically point out where, in the record, the party invoked the court's ruling on the issue. Absent that citation to the record or any obvious preservation, we will not consider the issue."). As for the UCC, Dealer argues—in a single sentence in its brief in chief—that "[a]s this Court recognized in *Rojas*, the [l]imitation of [d]amages is also permitted under the UCC." While it is true that *Rojas* made this point, this Court ultimately did not resolve the issue of whether the waiver of incidental and consequential damages was unconscionable because the buyer in that case did not raise the issue. *See* 2024-NMCA-003, ¶ 12. Given this, and in the absence of a more developed argument pertaining to the UCC, Dealer fails to persuade us of error. *See Corona v. Corona*, 2014-NMCA-071, ¶ 28, 329 P.3d 701 ("This Court has no duty to review an argument that is not adequately developed.").

{15} We accordingly affirm the district court's ruling that the damages limitation and attorney fee provisions are substantively unconscionable.[4]

---

[4]Because we affirm on this basis, we do not consider whether it would be appropriate to affirm on any of the other grounds for substantive unconscionability raised by Buyer on appeal. *See Freeman v. Fairchild*, 2018-NMSC-023, ¶ 30, 416 P.3d 264 (providing that "an appellate court may affirm a district court ruling on a ground not relied upon by the district court if (1) reliance on the new ground would not be unfair to the appellant, and (2) there is substantial evidence to support the ground on which the appellate court relies" (text only) (citation omitted)). We, nevertheless, observe that this Court recently affirmed the denial of a motion to compel arbitration on one of these grounds. *See Nodine v. Reliable Chevrolet (NM), LLC*, A-1-CA-42272, mem. op. ¶¶ 8-21 (N.M. Ct. App. Mar. 31, 2026) (nonprecedential) (holding a time-to-sue provision, identical to the one at issue in this case, to be substantively unconscionable and non-severable from the arbitration agreement). Buyer briefly raised below, and again argues on appeal, the substantive unconscionability of the time-to-sue provision in the Agreement. While Dealer addressed this issue on the merits below, it did not substantively respond to this argument on appeal. *See generally Delta Automatic Sys.*, 1999-NMCA-029, ¶ 31 (providing that when an appellant does not respond to arguments made in an answer brief, "such a failure to respond constitutes a concession on the matter").

III. We Are Not Persuaded the District Court Erred in Determining That the Unconscionable Damages Limitation and Attorney Fee Provisions Cannot Be Severed

{16} Finally, Dealer challenges the district court's determination that the unconscionable provisions could not be severed from the arbitration agreement. In conducting this analysis, we bear in mind this Court's instruction in *Rojas* to construe the arbitration scheme to include all terms "logically . . . employed as a part of arbitration." 2024-NMCA-003, ¶ 10. In light of *Rojas*, we must "evaluate whether the provisions that make up the arbitration agreement [can] reasonably be severed while leaving the parties' agreement intact." *Martinez*, 2026-NMCA-018, ¶ 32; *see also Fiser v. Dell Comput. Corp.*, 2008-NMSC-046, ¶ 24, 144 N.M. 464, 188 P.3d 1215 (concluding that a provision banning class actions could not be severed where it was "part of the arbitration provision and [was] central to the mechanism for resolving the dispute between the parties"). If they cannot, the arbitration agreement must be struck down "in its entirety to avoid a type of judicial surgery that inevitably would remove provisions that were central to the original mechanisms for resolving disputes between the parties." *Cordova*, 2009-NMSC-021, ¶ 40.

{17} In support of its contention that the district court erred in its severability ruling, Dealer asserts that the damages limitation and attorney fee provisions "do not affect the dispute resolution mechanism agreed to by the parties," because "they merely determine what damages and costs are recoverable by each party, irrespective of the forum." This contention, however, overlooks that the damages limitation and attorney fee provisions make up the arbitration scheme in this case, *see Rojas*, 2024-NMCA-003, ¶ 10, and disregards whether these unconscionable terms can reasonably be severed while leaving the arbitration agreement intact, *see Martinez*, 2026-NMCA-018, ¶ 32. The Agreement in this case mandates that all claims be resolved through arbitration and the damages limitation and attorney fee provisions impact the remedies available to the parties. Given this and in the absence of a reasoned basis to the contrary, we conclude that the district court's decision that the damages limitation and attorney fee provisions are "central to the arbitration scheme and cannot be severed" was proper. *See Rivera v. Am. Gen. Fin. Servs., Inc.*, 2011-NMSC-033, ¶ 56, 150 N.M. 398, 259 P.3d 803 (explaining that courts "will not perform judicial surgery by rewriting a contract that is laced with unenforceable terms that were central to the original mechanism for resolving disputes between the parties" (text only) (citation omitted)); *see also Farmers, Inc.*, 1990-NMSC-100, ¶ 8 (placing the burden on the appellant to establish error).

CONCLUSION

{18} For the forgoing reasons, we affirm the district court's order denying Dealer's motion to compel arbitration.

{19} **IT IS SO ORDERED.**

JENNIFER L. ATTREP, Judge

WE CONCUR:

J. MILES HANISEE, Judge

MEGAN P. DUFFY, Judge