

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

SHARLEEN PFEIFFER-ANDERSON,
Personal Representative of the Probate
Estate of B.P., Deceased,

Court of Appeals of New Mexico
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Ramon J. Maestas
Chief Clerk

Plaintiff-Appellee,

v.

No. A-1-CA-40583

THE EVANGELICAL LUTHERAN GOOD
SAMARITAN SOCIETY d/b/a GOOD
SAMARITAN SOCIETY -- MANZANO
DEL SOL VILLAGE; SANFORD HEALTH
FOUNDATION; LISA MEYER, Administrator;
and GAYLENE MONTEZ, Director of Nursing,

Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Joshua A. Allison, District Court Judge

Harvey and Foote Law Firm, LLC
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Albuquerque, NM

for Appellee

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for Appellants

1 **MEMORANDUM OPINION**

2 **BUSTAMANTE, Judge, retired, sitting by designation.**

3 {1} Defendants Evangelical Lutheran Good Samaritan Society (Evangelical
4 Lutheran), Sanford Health Foundation, Lisa Meyer, and Gaylene Montez appeal the
5 district court’s order that granted in part and denied in part Defendants’ motion to
6 compel arbitration. Defendants argue that the district court erred in determining that
7 Plaintiff Sharleen Pfeiffer-Anderson, the personal representative of the estate of
8 B.P., specifically challenged the arbitrability provision in their arbitration
9 agreement, and that Plaintiff’s common law sexual assault claims are not subject to
10 arbitration. We affirm.

11 **BACKGROUND**

12 {2} This case arises from a claim for personal injuries filed by B.P.’s estate against
13 a nursing home operated by Evangelical Lutheran. According to the first amended
14 complaint, B.P. was a resident at the nursing home for eight years. Toward the end
15 of her stay, B.P. suffered a fall and was a victim of a sexual assault perpetrated by
16 another resident of the facility. The first amended complaint alleged that both
17 incidents occurred because of the nursing home’s negligent failure to follow and
18 comply with applicable standards of care for nursing homes.

19 {3} As part of B.P.’s admission paperwork to the nursing home, Plaintiff, as the
20 lawful agent for B.P., entered into an agreement titled, “Resolution of Legal

1 Disputes” (the Arbitration Agreement) on B.P.’s behalf. B.P. passed away and
2 Plaintiff, in her capacity as the personal representative of B.P.’s estate, filed suit on
3 behalf of the estate. Defendants moved to stay the action and compel arbitration
4 based on the Arbitration Agreement. Defendants further argued that the Arbitration
5 Agreement contained an arbitrability provision that delegated gateway issues of
6 arbitrability to an arbitrator. Plaintiff responded arguing that the Arbitration
7 Agreement was unenforceable because it was substantively and procedurally
8 unconscionable. Plaintiff’s response stated that she “specifically challenges the
9 ‘delegation clause’ on the same basis that she challenges the broader arbitration
10 clause, as the procedurally unconscionable circumstances surrounding its signing . . .
11 render it unenforceable.” She also argued that her claims regarding sexual assault
12 were not within the scope of the Arbitration Agreement.

13 {4} After reviewing the parties’ briefing and holding a hearing, the district court
14 granted in part and denied in part Defendants’ motion. The district court determined
15 that Plaintiff’s procedural unconscionability arguments were sufficiently specific to
16 attack the arbitrability provision. The district court then determined that the sexual
17 assault claim was not arbitrable.¹ Finally, it declined to stay the matter regarding the
18 nonarbitrable claim. Defendant appeals.

¹Defendants note that the district court incorrectly referred to the alleged “sexual battery claims.” Plaintiff’s first amended complaint referenced a sexual

1 **DISCUSSION**

2 **I. Plaintiff Specifically Challenged the Arbitrability Provision**

3 {5} “Arbitration agreements are a species of contract, subject to the principles of
4 New Mexico contract law.” *Hunt v. Rio at Rust Ctr., LLC*, 2021-NMCA-043, ¶ 12,
5 495 P.3d 634 (internal quotation marks and citation omitted). “Accordingly, we
6 apply New Mexico contract law in the interpretation and construction of the
7 arbitration agreement.” *Id.* (alterations, internal quotation marks, and citation
8 omitted). We address Defendants’ arguments, applying a de novo standard of
9 review. *See Cordova v. World Fin. Corp. of N.M.*, 2009-NMSC-021, ¶ 11, 146 N.M.
10 256, 208 P.3d 901 (“We apply a de novo standard of review to a district court’s
11 denial of a motion to compel arbitration. Similarly, whether the parties have agreed
12 to arbitrate presents a question of law, and we review the applicability and
13 construction of a contractual provision requiring arbitration de novo.” (internal
14 quotation marks and citations omitted)).

15 {6} “[G]ateway questions of arbitrability typically involve matters of a kind that
16 contracting parties would likely have expected a court to decide, such as the validity
17 of an arbitration provision, the scope of an arbitration provision, or whether an
18 arbitration agreement covers a particular controversy.” *Felts v. CLK Mgmt., Inc.*,

assault. We ignore the mistake as a simple typographical error. *See Jaramillo v. Gonzales*, 2002-NMCA-072, ¶ 31, 132 N.M. 459, 50 P.3d 554.

1 2011-NMCA-062, ¶ 17, 149 N.M. 681, 254 P.3d 124 (alteration, internal quotation
2 marks, and citation omitted), *aff'd on other grounds*, Nos. 33,011, 33,013, dec.
3 (N.M. Aug. 23, 2012) (nonprecedential). “The general rule is that the arbitrability of
4 a particular dispute is a threshold issue to be decided by the district court unless there
5 is clear and unmistakable evidence that the parties decided otherwise under the terms
6 of their arbitration agreement.” *Hunt*, 2021-NMCA-043, ¶ 13 (emphasis, internal
7 quotation marks, and citation omitted). Nevertheless, “even if there is a clear and
8 unmistakable intent to arbitrate, a court may still consider a challenge to the
9 delegation clause in an arbitration agreement” if a party “specifically challenge[s]
10 the delegation provision.” *Juarez v. Thi of N.M. at Sunset Villa, LLC*, 2022-NMCA-
11 056, ¶ 22, 517 P.3d 918 (internal quotation marks omitted); *see id.* (determining that
12 a district court must consider “(1) [W]as there a clear and unmistakable agreement
13 to arbitrate arbitrability? and (2) did the challenger mount a ‘specific challenge’ to
14 that agreement” to determine gateway questions of arbitrability? (alterations,
15 internal quotation marks, and citation omitted)).

16 {7} Because the parties agree there was a clear and unmistakable agreement to
17 arbitrate gateway issues of arbitrability, we turn to whether the district court erred in
18 determining Plaintiff mounted a specific challenge to the arbitrability provision.

19 {8} Plaintiff sufficiently challenged the delegation provision in the Arbitration
20 Agreement. In Plaintiff’s response to Defendants motion to compel arbitration, she

1 argued that the Arbitration Agreement was both substantively and procedurally
2 unconscionable. Plaintiff argued it was substantively unconscionable because it does
3 not meet federal regulations regarding nursing homes and arbitration, and that “the
4 arbitration clause requires the parties to share the cost of arbitration.” Plaintiff
5 argued that it was procedurally unconscionable because the circumstances
6 surrounding her signing the Arbitration Agreement demonstrated that she did not
7 have a real choice in signing the Arbitration Agreement. For example, Plaintiff was
8 worried about her mother and concerned that if she did not sign the documents they
9 would not admit her mother; she did not understand the terms of the Arbitration
10 Agreement; the employees did not review the paperwork with her or offer her time
11 to review it; and Plaintiff was unfamiliar with arbitration. This argument was based
12 on Plaintiff’s affidavit where she also stated, “I would have never signed this
13 [A]rbitration [A]greement had I known it would mean that it would cost so much
14 money to have this case heard, that it would mean we couldn’t go to court, or that it
15 would have included something as terrible as the rape of my mother.” Plaintiff also
16 asserted that she “specifically challenges the ‘delegation clause’ on the same basis
17 that she challenges the broader arbitration clause, as the procedurally
18 unconscionable circumstances surrounding its signing were the same as outlined in
19 her attached affidavit, and equally render it unenforceable.”

1 {9} We agree with the district court that Plaintiff sufficiently challenged the
2 delegation provision to the Arbitration Agreement based on her failure to
3 comprehend arbitration and her statements that she would not have agreed to
4 arbitration had she known how expensive the proceedings would be. Plaintiff further
5 stated that she would not have agreed to arbitration disputes concerning the sexual
6 assault of her mother. The circumstances here are similar to those in *Clay v. N.M.*
7 *Title Loans, Inc.*, 2012-NMCA-102, ¶ 13, 288 P.3d 888, wherein the plaintiff argued
8 there was fraud in the inducement based on alleged misrepresentation by the lender
9 of neutrality of the two organizations identified to administer the arbitration
10 proceedings and the fact that the two organizations had stopped administering
11 arbitration of collections. It is also similar to *Felts*, wherein the plaintiff’s arguments
12 that class action ban rendered both the arbitration agreement and the delegation
13 clause unconscionable and that the company selected to perform the arbitration had
14 ceased its consumer arbitration business were sufficient to specifically challenge the
15 arbitrability provision. 2011-NMCA-062, ¶ 30.

16 {10} *Juarez* is not controlling on our inquiry because there the plaintiff argued the
17 arbitration agreement was procedurally unconscionable based on her affidavit
18 stating, “[The p]laintiff did not read the paperwork, was not asked to review the
19 paperwork, felt as if she had no choice but to sign, and was on medication at the time
20 of signing.” 2022-NMCA-056, ¶ 7. She then stated, “[The p]laintiff also challenges

1 this ‘delegation clause’ under the same grounds she challenges the ‘Agreement.’”
2 *Id.* (internal quotation marks omitted). This Court determined that the plaintiff did
3 not sufficiently challenge the delegation provision because the delegation clause
4 itself was not attacked. *Id.* ¶¶ 37, 38. Again, *Juarez* is distinct from this case in which
5 Plaintiff specifically argued about the unconscionability of the cost of arbitration and
6 arbitrating claims regarding the sexual assault of B.P.

7 **II. Plaintiff’s Claims Related to the Sexual Assault of B.P. Are Not Within**
8 **the Scope of the Arbitration Agreement**

9 {11} Defendants next argue that the district court erred in concluding the
10 Arbitration Agreement did not include Plaintiff’s claims regarding the sexual assault
11 of B.P. The issue on appeal centers on whether Plaintiff’s claim related to the sexual
12 assault of B.P. is subject to the Arbitration Agreement. A court cannot compel
13 arbitration in the absence of an enforceable agreement to arbitrate. *Alexander v.*
14 *Calton & Assocs., Inc.*, 2005-NMCA-034, ¶ 9, 137 N.M. 293, 110 P.3d 509. We
15 decide this issue as a matter of contract. *See Clay*, 2012-NMCA-102, ¶ 14 (“[The
16 general] rule is that arbitration is a matter of contract and a party cannot be required
17 to submit to arbitration any dispute which he has not agreed so to submit.” (internal
18 quotation marks and citation omitted)). In doing so, we seek to fulfill the intent of
19 the parties and look to the plain meaning of the contractual language when possible.
20 *Id.* ¶¶ 14, 20; *Santa Fe Technologies, Inc. v. Argus Networks, Inc.*, 2002-NMCA-
21 030, ¶ 52, 131 N.M. 772, 42 P.3d 1221. We review de novo the district court’s denial

1 of the motion to compel arbitration on Plaintiff’s claims based on the sexual assault
2 of B.P. *See Cordova*, 2009-NMSC-021, ¶ 11.

3 {12} “We construe ambiguities in a contract against the drafter to protect the rights
4 of the party who did not draft it.” *Heye v. Am. Golf Corp.*, 2003-NMCA-138, ¶ 14,
5 134 N.M. 558, 80 P.3d 495. Arbitration clauses drafted with broad strokes require
6 broad interpretation. *Santa Fe Technologies, Inc.*, 2002-NMCA-030, ¶ 55. “When
7 parties voluntarily contract to arbitrate their grievances, an order to arbitrate the
8 particular grievance should not be denied unless it may be said with positive
9 assurance that the arbitration clause is not susceptible of an interpretation that covers
10 the asserted dispute.” *Horne v. Los Alamos Nat’l Sec., L.L.C.*, 2013-NMSC-004,
11 ¶ 46, 296 P.3d 478 (alteration, internal quotation marks, and citation omitted); *see*
12 *Heimann v. Kinder-Morgan CO2 Co., L.P.*, 2006-NMCA-127, ¶ 7, 140 N.M. 552,
13 144 P.3d 111 (“[A]mbiguity in arbitration clauses should be resolved to favor
14 arbitration.”).

15 {13} Despite these canons of construction, our prior cases dealing with broadly
16 worded arbitration clauses have required some relationship between the dispute at
17 issue and the general substance of the underlying agreement. *See Clay*, 2012-
18 NMCA-102, ¶ 14 (“In order to fall within the scope of the arbitration clause, the
19 claims at issue must bear a ‘reasonable relationship’ to the contract in which the
20 arbitration clause is found.” (citation omitted)); *Santa Fe Technologies, Inc.*, 2002-

1 NMCA-030, ¶ 52. Although the arbitration provision we examined in *Clay*—by its
2 terms—applied only to matters that arose from or were related to the underlying
3 agreement, we were nonetheless persuaded that “even the most broadly[] worded
4 arbitration agreements still have limits founded in general principles of contract
5 law,” and that courts should “refuse to interpret any arbitration agreement as
6 applying to outrageous torts that are unforeseeable to a reasonable consumer in the
7 context of normal business dealings.” 2012-NMCA-102, ¶¶ 18, 22-23 (internal
8 quotation marks and citation omitted). Thus, a party to even the most general
9 arbitration agreement “may be assumed to have intended to arbitrate issues that are
10 closely related to those governed by the agreement itself, but not those that are
11 unrelated to the agreement, out of the context of the agreement, or outrageous and
12 unforeseeable.” *Id.* ¶ 20.

13 {14} Plaintiff made a claim of negligence against Defendants that included B.P.
14 suffering injuries and harm based on the “sexual assault by a male resident.” The list
15 of claims covered by the Arbitration Agreement is as follows:

16 A. Resident’s Rights. *Any legal controversy, dispute, disagreement*
17 *or claim arising between the Parties* hereto after the execution of this
18 Admission Agreement in which Resident, or a person acting on his or
19 her behalf, *alleges a violation of any right granted Resident under law*
20 *or contract shall be settled exclusively by binding arbitration* as set
21 forth in Section C. below. This provision shall not limit in any way the
22 Resident’s right to file formal or informal grievances with the Facility
23 or the state or federal government.

1 B. All Other Disputes. *Any, legal controversy, dispute, disagreement*
2 *or claim of any kind arising out of, or related to this Admission*
3 *Agreement, or the breach thereof, or, related to the care of stay at the*
4 *Facility, shall be settled exclusively by binding arbitration as set forth*
5 *in [S]ection C. below. This arbitration clause is meant to apply to all*
6 *controversies, disputes, disagreements or claims including, but not*
7 *limited to, all breach of contract claims, all negligence and malpractice*
8 *claims, all tort claims and all allegations of fraud concerning entering*
9 *into or canceling this Admission Agreement.* This arbitration provision
10 binds all parties whose claims may arise out of or relate to treatment or
11 service provided by the center including any spouse or heirs of the
12 Resident.

13 There is no question that the parties had a valid, enforceable arbitration clause that
14 was broad in scope and contained in the Arbitration Agreement. As we noted above,
15 although a broad arbitration clause requires a broad interpretation as to its scope,
16 “the claims at issue must bear a ‘reasonable relationship’ to the contract in which the
17 arbitration clause is found.” *Id.* ¶ 14; *Santa Fe Technologies, Inc.*, 2002-NMCA-
18 030, ¶¶ 52, 55. “A party may be assumed to have intended to arbitrate issues that are
19 closely related to those governed by the agreement itself, but not those that are
20 unrelated to the agreement, out of the context of the agreement, or outrageous and
21 unforeseeable.” *Clay*, 2012-NMCA-102, ¶ 20.

22 {15} We agree with the district court that “even if B.P. agreed to arbitrate certain
23 claims concerning her residency and care, it is not reasonable . . . to conclude that
24 she intended to give up a right to a jury trial concerning her alleged sexual assault
25 by another resident. To do so would be contrary to the parties’ intentions and would
26 allow the arbitration of unforeseeable events.” *See Castillo v. Arrieta*, 2016-NMCA-

1 040, ¶ 12, 368 P.3d 1249 (noting with approval a Tenth Circuit opinion stating that
2 if “two small business owners execute a sales contract including a general arbitration
3 clause, and one assaults the other, it is elementary that the sales contract did not
4 require the victim to arbitrate the tort claim because the tort claim is not related to
5 the sales contract” (alterations, internal quotation marks, and citation omitted)).


6 {16} Defendants attempt to differentiate the facts here from *Clay* because the
7 agreement at issue in that case “did not expressly include torts, and the question
8 became whether such torts ‘arise from or relate to’ the parties’ agreement.” The
9 agreement in *Clay* did in fact include “disputes based upon contract, tort, consumer
10 rights, fraud and other intentional torts.” 2012-NMCA-102, ¶ 17 (emphasis, internal
11 quotation marks, and citation omitted). Thus, the Arbitration Agreement’s inclusion
12 of language relating to torts is not dispositive on the issue. Defendants also argue
13 that the “arising out of or relating to” language included in the arbitration agreement
14 in the *Clay* matter is also different than the language in the Arbitration Agreement.
15 Again, the difference is not dispositive because we stated that “even the most
16 broadly[] worded arbitration agreements still have limits founded in general
17 principles of contract law,” and that courts should “refuse to interpret any arbitration
18 agreement as applying to outrageous torts that are unforeseeable to a reasonable
19 consumer in the context of normal business dealings.” *Clay*, 2012-NMCA-102,
20 ¶¶ 18, 22-23 (internal quotation marks and citation omitted). We therefore conclude

1 that the Arbitration Agreement's arbitration requirement does not apply to Plaintiff's
2 claims relating to the sexual assault of B.P.


3 **CONCLUSION**

4 {17} For the reasons stated herein, we affirm the district court.

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

6 
7 _____
8 **MICHAEL D. BUSTAMANTE, Judge,**
9 **retired, Sitting by designation**

9 **WE CONCUR:**

10 
11 _____
12 **J. MILES HANISEE, Judge**

12 
13 _____
14 **KRISTINA BOGARDUS, Judge**