

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS**

**PROVIDENCE, SC.**

**SUPERIOR COURT**

**(FILED: June 3, 2016)**

**JOSEPH CAFFEY and OMNI  
DEVELOPMENT CORP.**

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**V.**

**C.A. No. PM 15-5649**

**CHRISTOPHER LEES**

**DECISION**

**LANPHEAR, J.** This matter is before the Court on Joseph Caffey and Omni Development Corporation’s (Petitioners) motion to vacate an arbitration award entered on December 2, 2015. Defendant Christopher Lees objects to Petitioners’ motion and moves to confirm the arbitration award. The arbitrator found that the Petitioners were liable to Mr. Lees for injuries suffered in a motor vehicle accident.

**I**

**Facts and Travel**

Mr. Lees was injured in a motor vehicle accident that occurred on May 28, 2011 in Seekonk, Massachusetts. A vehicle driven by Joseph Caffey struck the rear of the vehicle driven by Mr. Lees.

On February 11, 2014, the parties executed a binding arbitration agreement and agreed on the selection of the arbitrator. They also agreed that the minimum award to Mr. Lees would be \$9000 and that the maximum award would be \$160,000.

The two-day arbitration hearing began on November 25, 2014 and was concluded on February 4, 2015. The arbitrator issued his decision on December 2, 2015. He found that there

was no contributory negligence on the part of Mr. Lees, and he awarded Mr. Lees damages in the amount of \$190,860, plus interest and costs. Arbitration Award at 1. Petitioners filed a Petition to Vacate Arbitration Award on December 29, 2015. Mr. Lees filed an Objection on January 13, 2016. A hearing was conducted on April 21, 2016.

## II

### Standard of Review

The applicable statute enumerates the limited circumstances under which a court may vacate the award of an arbitrator. G.L. 1956 § 10-3-12 provides that:

“the court must make an order vacating the award upon the application of any party to the arbitration:

“(1) Where the award was procured by corruption, fraud or undue means.

“(2) Where there was evident partiality or corruption on the part of the arbitrators, or either of them.

“(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in hearing legally immaterial evidence, or refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been substantially prejudiced.

“(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.”

See also M.G.L.A. 251 § 12.

“Due to the public policy favoring the finality of arbitration awards, such awards enjoy a presumption of validity.” N. Providence School Committee v. N. Providence Federation of Teachers, Local 920, American Federation of Teachers, 945 A.2d 339, 344 (R.I. 2008) (quoting Pierce v. Rhode Island Hospital, 875 A.2d 424, 426 (R.I. 2005)). “[T]he authority of the Courts ‘to review an arbitral award is statutorily prescribed and is limited in nature.’” Buttie v. Norfolk

& Dedham Mutual Fire Insurance Co., 995 A.2d 546, 549 (R.I. 2010) (citing N. Providence School Committee, 945 A.2d at 344). “A matter submitted to arbitration is subject to a very narrow scope of review. Absent fraud, errors of law or fact are not sufficient grounds to set aside an award.” City of Lynn v. Thompson, 435 Mass. 54, 60, 754 N.E.2d 54, 61 (2001) (quoting Plymouth-Carver Regional Sch. Dist. v. J. Farmer & Co., 407 Mass. 1006, 1007, 553 N.E.2d 1284 (1990)). “Th[e] Court will overturn an arbitration award ‘only if the award was ‘irrational or if the arbitrator[s] manifestly disregarded the law.’” Wheeler v. Encompass Insurance Co., 66 A.3d 477, 481 (R.I. 2013) (citation omitted). “To preserve the integrity and efficacy of arbitration proceedings, judicial review of arbitration awards is extremely limited.” Berkshire Wilton Partners, LLC v. Bilray Demolition Co., 91 A.3d 830, 834-35 (R.I. 2014) (citing Aponik v. Lauricella, 844 A.2d 698, 704 (R.I. 2004)); see also Wheeler, 66 A.3d at 480.

Similarly, in Massachusetts, “a court may not vacate or modify that award, even if it were to agree that that arbitrator made an error of law or fact in considering the matter submitted to him for decision.” Trustees of Boston & Maine Corp. v. Massachusetts Bay Transp. Authority, 363 Mass. 386, 392, 294 N.E.2d 340, 344 (1973). See also Plymouth-Carver Regional School Dist., 407 Mass. at 1007, 553 N.E.2d at 1285, “[c]ourts inquire into an arbitration award only to determine if the arbitrator has exceeded the scope of his authority, or decided the matter based on ‘fraud, arbitrary conduct, or procedural irregularity in the hearings,’” (quoting Marino v. Tagaris, 395 Mass. 397, 400, 480 N.E.2d 286 (1985)). However, “judicial intervention is permitted where an award ‘was procured by corruption, fraud or other undue means.’” Superadio Ltd. Partnership v. Winstar Radio Productions, LLC., 446 Mass. 330, 334, 844 N.E.2d 246, 250 (2006) (quoting M.G.L.A. Ch. 251, § 12(a)(1)). Undue means has been defined by a United States Court of Appeals as “underhanded or conniving ways of procuring an award that are

similar to corruption or fraud, but do not precisely constitute either.” National Casualty Co. v. First State Ins. Group, 430 F.3d 492, 499 (1<sup>st</sup> Cir. 2005).

### **III**

#### **Analysis**

Petitioners argue that the Court should vacate the arbitration award. They assert that the award “[1]was procured by corruption, fraud or undue means; 2) there was evident partiality on the part of the arbitrator; 3) there is no indication that the arbitrator considered evidence offered at the hearing; 4) the arbitrator applied an impermissible/incorrect evidentiary standard; 5) the arbitrator so imperfectly executed his powers that a mutual, final, and definite award upon the subject matter submitted was not made.” Pet. to Vacate Arbitration Award at 1.

Mr. Lees argues that this Court lacks jurisdiction over the motion, as the arbitration agreement states that the arbitrator will apply Massachusetts law. Resp’t Ex. 1 at 2. Mr. Lees further argues that any mistakes of law or fact are insufficient grounds to vacate the award, and therefore, the Petition to Vacate Arbitration Award should be denied, and the petition to confirm should be granted.

### **A**

#### **Jurisdiction**

Mr. Lees first argues that this Court lacks jurisdiction as the parties, in the arbitration agreement, provided that jurisdiction would be pursuant to Massachusetts law. The last paragraph of the agreement provides that “this Agreement shall be governed by, construed and enforced in accordance with the laws of the State of Massachusetts.” Resp’t Ex. 1 at 2.

However, the agreement itself contemplates that Rhode Island could have jurisdiction over the present dispute. The agreement states that payment shall be made within thirty days of

the award “[i]n the absence of any petition filed pursuant to R.I.G.L. §10-3-1, *et seq.*, or similar statute.” Id. Reference to the possibility of a petition being filed pursuant to a Rhode Island statute indicates that the parties contemplated a Rhode Island court having jurisdiction over the present case. This Court therefore has subject matter jurisdiction. Additionally, as all parties are Rhode Island residents, there is no doubt that this Court has personal jurisdiction. Pet. to Vacate Arbitration Award at ¶¶ 1-3. This Court thus finds that it has jurisdiction over this Petition to Vacate Arbitration Award, pursuant to § 10-3-12.

## **B**

### **Mistake of Law**

Petitioners argue that the arbitrator applied an incorrect evidentiary standard when he made a ruling “based upon the totality of the circumstance.” Mem. in Supp. of Pet. to Vacate Arbitration Award at 6. Petitioners assert that the correct standard is that Mr. Lees (plaintiff in the underlying litigation) must prove liability and damages by a preponderance of the evidence.

Consideration of the “totality of the circumstances” has been applied by the courts as a standard of proof in certain criminal proceedings. See State v. Cosme, 57 A.3d 295 (R.I. 2012) (sufficiency of an affidavit seeking a search warrant); State v. Campbell, 691 A.2d 564 (R.I. 1997) (waiver of right against self-incrimination by a juvenile); State v. Kryla, 742 A.2d 1178 (R.I. 1999) (what is sufficient to establish probable cause for an arrest). This standard is rarely applied in our State’s civil liability jurisprudence. Rhode Island courts have long held that to prove liability in a civil proceeding, a plaintiff must “prove each element by a preponderance of the evidence, meaning that the trier of fact ‘must believe that the facts asserted by the proponent are more probably true than false.’” Narragansett Elec. Co. v. Carbone, 898 A.2d 87, 99-100 (R.I. 2006) (quoting Parker v. Parker, 103 R.I. 435, 442, 238 A.2d 57, 61 (1968)). Moreover,

while the arbitrator mentioned the phrase, the award does not hold that the burden of proof is based upon the totality of the circumstances. It is more likely that the arbitrator was merely attempting to say he considered everything, rather than enumerating each of the facts.

Notwithstanding the validity of Petitioners' argument, it is well-settled that a mistake of law is not sufficient to vacate the decision of an arbitrator. “[A] manifest disregard of the law requires something beyond and different from a mere error in the law or failure on the part of the arbitrator . . . to understand or apply the law.” Berkshire Wilton Partners, LLC, 91 A.3d at 836-37 (quoting City of East Providence v. International Association of Firefighters Local 850, 982 A.2d 1281, 1286 (R.I. 2009)); see also Jacinto v. Egan, 120 R.I. 907, 391 A.2d 1173 (1978) and Scott v. Commerce Ins. Co., 816 N.E.2d 1224, 62 Mass. App. Ct. 416 (Mass. App. Ct. 2004). This Court recognizes that “an arbitrator’s award will be upheld even if he or she makes a mistake or error in interpreting the law.” City of East Providence, 982 A.2d 1285 (quoting Pier House Inn, Inc. v. 421 Corporation, Inc., 812 A.2d 799, 803 (R.I. 2002)). A manifest disregard for the law occurs “where it is clear from the record that the arbitrator recognized the applicable law – and then ignored it.” McCarthy v. Citigroup Global Markets Inc., 463 F.3d 87, 91-92 (1<sup>st</sup> Cir. 2006) (quoting Advest, Inc. v. McCarthy, 914 F.2d 6, 9 (1<sup>st</sup> Cir. 1990)). This Court does not find the application of an incorrect evidentiary standard to constitute a “manifest disregard of the law.” See Berkshire Wilton Partners, LLC, 91 A.3d at 836-37, see also McCarthy, 463 F.3d at 91-92. As courts in both Rhode Island and Massachusetts have limited review of arbitration awards, this Court declines to overturn the award on this ground.

## C

### **Arbitrator Failed to Consider Evidence Offered at Hearing**

Petitioners argue that the arbitrator did “not identify the competing opinions of Dr. [Mark] Palumbo and it is unknown what evidence was relied upon in rendering his award.” Pet. to Vacate Arbitration Award at ¶ 50. Petitioners further contend this Court should vacate the award because the arbitrator failed to consider the evidence presented at the hearing. Specifically, Petitioners claim the arbitrator in his decision references a defense (contributory negligence) that was not actually raised in the underlying action, while failing to address the defense that actually was raised; namely, that “the accident was the result of an unforeseeable consequence of his medical condition, and thus there was no negligence on the part of the defendant.” *Id.* at ¶ 52. Additionally, Petitioners argue the arbitrator “made no finding with respect to the defense actually raised at the hearing.” *Id.*

Mr. Lees argues that an award “should be upheld so long as ‘each interested party has the opportunity to be heard and the arbitrator has considered all the relevant information in reaching his decision.’” Resp’t Obj. to Pet. to Vacate Arbitration Award at 5 (quoting Burns v. Segerson, 122 R.I. 123, 129, 404 A.2d 500, 501 (1979)). Mr. Lees further suggests that the arbitration agreement did not require the arbitrator to make findings of fact or to state the legal standard on which the arbitrator based his decision. Specifically, Mr. Lees argues, “[t]he arbitrator is not required to provide any more than what’s contained in his award. He addressed both liability and damages. He is requested to do no more.” Resp’t Third Resp. to Pet. to Vacate Arbitration Award at 5.<sup>1</sup>

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<sup>1</sup> The parties agreed on the selection of the arbitrator, and neither party requested that the arbitrator render findings of fact and conclusions of law. At hearing, the Court expressed its concern and inquired why no specifics were requested by either party.

Petitioners claim the arbitrator erred in his analysis of contributory negligence. Again, neither party requested findings of fact or conclusions of law. A recitation of the applicable legal standard and the evidence on which the arbitrator relied is beneficial to a court reviewing an arbitration award, but it is not mandated. Here, in considering whether the arbitrator “considered all the relevant information in reaching his decision,” Resp’t Obj. to Pet. to Vacate Arbitration Award at 5, the Court cannot infer or conclude the arbitrator failed.

## **D**

### **Testimony at Arbitration Hearing**

Petitioners contend the award should be vacated because it was “procured by corruption, fraud or undue means.” Pet. to Vacate Arbitration Award at 1. Mr. Lees counters that “Dr. Mark Palumbo [Mr. Lees’ treating physician] is extremely well respected in the medical and legal community,” and the apparent change in his conclusion that he was “not able to causally relate the recently performed operation to the incident of 05/28/11[,]” was simply the result of information already in his records being brought to his attention. Resp’t Obj. to Pet. to Vacate Arbitration Award at 2, Resp’t Second Resp. to Pet. to Vacation Arbitration Award at 4.

“A ‘fraud on the court’ occurs where ‘it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system’s ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party’s claim or defense.’” Wojcicki v. Caragher, 447 Mass. 200, 209-10, 849 N.E.2d 1258, 1266 (2006) (quoting Paternity of Cheryl, 434 Mass. 23, 35, 746 N.E.2d 488 (2001)).

This Court, while not finding “corruption [or] fraud” (see § 10-3-12) to have been committed by any of the parties, is highly concerned by the sequence of events regarding Dr.

Palumbo's testimony. Stephen Propatier, nurse practitioner for Dr. Palumbo (who had previously performed back surgery on Mr. Lees), examined Mr. Lees four days after the collision that gave rise to the underlying litigation. Pet. to Vacate Arbitration Award at ¶ 8. Mr. Propatier examined Mr. Lees again on July 27 and August 24, 2011. Id. at ¶¶ 10, 11. The report from the August 24, 2011 appointment indicated that Mr. Lees "denies any particular injury. He felt it occurred when he was walking on sand on the beach on a job. There is no focal injury." Id. at ¶ 13. Dr. Palumbo performed a second back surgery on September 19, 2011. Id. at ¶ 15. Approximately three months later, counsel for Mr. Lees sent Dr. Palumbo a letter inquiring as to whether the surgery was necessitated by injury "causally relating" to the accident. Id. at ¶ 17. Dr. Palumbo responded that he was "not able to causally relate the recently performed [ ] operation to the incident of 05/28/11." Id. at ¶ 17 (misnumbered second paragraph 17). As explained below, counsel for Petitioners did not become aware of this letter until June 2014.

Counsel for Mr. Lees offered an affidavit pursuant to G.L. 1956 § 9-19-27 signed by Dr. Palumbo on November 7, 2013. This affidavit was not disclosed to counsel for Petitioners until June 2014. Id. at ¶ 31. The affidavit stated that the accident "exacerbated and/or worsened" Mr. Lees' "condition" and that the "services rendered" were related to the accident in question. Id. at ¶ 32. Petitioners notified Mr. Lees that they intended to depose Dr. Palumbo pursuant to Gerstein v. Scotti, 626 A.2d 236 (R.I. 1993). Id. at ¶ 33. The affidavit was then withdrawn, and counsel offered an affidavit pursuant to M.G.L.A. 233 § 79G. This second affidavit, signed on August 4, 2014, stated a causal relationship between the accident and the surgery. Id. at ¶ 34. Petitioners objected to this affidavit, and the objection was sustained. Mr. Lees then submitted a third affidavit to the arbitrator. This third affidavit from Dr. Palumbo, dated December 30, 2014 – just over one month after the arbitration – states there was a causal connection between the

injury that necessitated the September 19, 2011 surgery and the collision in the underlying litigation. Id. at ¶ 36. While this third affidavit was provided to the arbitrator, counsel for Petitioners was not made aware of this affidavit until a February 4, 2015 meeting between the parties and the arbitrator. Id. at ¶ 37. The February meeting was convened to finish the arbitration that had begun November 25, 2014. Petitioners then took a deposition from Dr. Palumbo on June 26, 2015. Id. at ¶ 38. Petitioners discovered, in the course of this deposition, that Dr. Palumbo had previously found that there was no causal relationship between the accident and had communicated said finding to Mr. Lees' counsel on January 24, 2012 – three years earlier. Id. at ¶ 39.

The failure of Mr. Lees' counsel to apprise Petitioners' counsel that Dr. Palumbo had previously provided a medical opinion contrary to that advanced at the arbitration hearing was inappropriate. As noted above, the arbitration hearing began on November 25, 2014 and concluded on February 4, 2015. Disclosure was not until June 26, 2015. Had Petitioners been aware of the differing conclusions of Mr. Lees' treating physician (January 2012 – no causation/November 2013 – causation), Petitioners would have been able to present a stronger defense at the arbitration hearing. Alternatively, Petitioners may not have chosen to enter into an agreement to submit this dispute to arbitration at all.

Again, Dr. Palumbo's third and final affidavit was not disclosed to Petitioners until approximately one month after it was disclosed to the arbitrator. The affidavit should have been submitted to Petitioners when it was submitted to the arbitrator. Our Rules of Civil Procedure encourage disclosure of the opinions of testifying experts and discourage surprise. Specifically, Super. R. Civ. P. 33(c) "serves to prevent trial by ambush. The purpose of the rule 'is to enable litigants to prepare for trial free from the elements of surprise and concealment so that judgments

can rest upon the merits of the case rather than the skill and maneuvering of counsel.” Neri v. Nationwide Mut. Fire Ins. Co., 719 A.2d 1150, 1152 (R.I. 1998) (quoting Gormley v. Vartian, 121 R.I. 770, 775, 403 A.2d 256, 259 (1979)). While the rules require disclosure, common decency and fair play demand it.

Petitioners did not have the opportunity to rebut this affidavit and argue that it was inconsistent with the conclusion Dr. Palumbo first communicated to Mr. Lees’ counsel in January 2012, until the June 2015 deposition, during which Petitioners first became aware of Dr. Palumbo’s earlier conclusion. This was several months after the arbitration hearing concluded. Therefore, Petitioners did not have the opportunity to challenge the conclusions of Dr. Palumbo when such challenge would have been most effective, which would have been at the hearing. As noted above, our jurisprudence on discovery discourages this type of surprise at such a late stage in the proceedings. Discovery rules exist to “enable litigants to prepare for trial free from the elements of surprise and concealment.” See Neri, 719 A.2d at 1152; see also Gormley, 121 R.I. at 775, 403 A.2d at 259. Nevertheless, the Court cannot conclude that the arbitration award was “procured by corruption [or] fraud.”

## **E**

### **Undue Means**

Under both Massachusetts and Rhode Island law, judicial review of arbitration awards is limited. As noted above, there is a strong presumption in favor of an award’s validity. “Due to the public policy favoring the finality of arbitration awards, such awards enjoy a presumption of validity.” N. Providence School Committee, 945 A.2d at 344 (quoting Pierce, 875 A.2d at 426); see also Scott, 816 N.E.2d 1224, 62 Mass. App. Ct. 416; see also School Committee of Hanover v. Hanover Teachers Ass’n, 435 Mass. 736, 761 N.E.2d 918 (2002). However, in this case, there

is strong evidence that the award of the arbitrator “was procured by . . . undue means.” Sec. 10-3-12(1); see also M.G.L.A. 251 § 12(1). Massachusetts has defined undue means as “an underhanded, conniving, or unlawful manner similar to corruption or fraud as those terms are used in arbitration law and practice.” Superadio, 446 Mass. 330, 337, 844 N.E.2d 246, 252 (citing National Casualty Co., 430 F.3d at 499). In the latter case, the First Circuit defined undue means as “underhanded or conniving ways of procuring an award that are similar to corruption or fraud, but do not precisely constitute either.” National Casualty Co., 430 F.3d at 499 (citing PaineWebber Group, Inc. v. Zinsmeyer Trusts P’ship, 187 F.3d 988, 991 (8th Cir. 1999)).

As noted above, a mistake of law alone is not sufficient to vacate the award of an arbitrator. See Scott, 816 N.E.2d 1224, 62 Mass. App. Ct. 416; see also Jacinto, 120 R.I. 907, 391 A.2d 1173. However, in this case, the failure to disclose the expert’s prior, contrary findings taints the resultant proceedings and constitute undue means. “Refusing to consider pertinent and material evidence” is reason for a court to vacate an award. City of Bridgeport v. Kasper Group, Inc., 899 A.2d 523, 525 (Ct. 2006). Here, pertinent and material evidence was kept undisclosed. As critical information regarding the most important witness for Mr. Lees appears to have been concealed until months after the arbitration hearing, this Court concludes that the award “was procured by . . . other undue means,” Superadio, 844 N.E.2d at 250 (quoting M.G.L.A. Ch. 251, § 12(a)(1), see also § 10-3-12) and therefore should be vacated pursuant to the aforementioned statute.

## **IV**

### **Conclusion**

Accordingly, the Court grants Petitioners' motion to vacate the arbitration award and denies Mr. Lees' motion to confirm the award.

For the reasons stated above, this Court vacates the award dated December 2, 2015. The petition to confirm said award is denied. Counsel shall prepare the appropriate judgment for entry.



**RHODE ISLAND SUPERIOR COURT**

*Decision Addendum Sheet*

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**TITLE OF CASE:** Caffey v. Lees

**CASE NO:** PM 15-5649

**COURT:** Providence County Superior Court

**DATE DECISION FILED:** June 3, 2016

**JUSTICE/MAGISTRATE:** Lanphear, J.

**ATTORNEYS:**

**For Plaintiff:** George T. Gilson, Esq.

**For Defendant:** Ronald J. Resmini, Esq.