STATE OF RHODE ISLAND

[Filed: July 8, 2022]

NEWPORT, SC. **SUPERIOR COURT**

JAY LASKY	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. NC-2017-0433**
	:	
MSI BOAT CLUB, LLC,	:	
Defendant.	:	

DECISION

CARNES, J. Before this Court is Jay Lasky's (Plaintiff) Motion to Vacate an Arbitration Award that upheld a signed waiver, which ruled against Plaintiff and relieved MSI Boat Club, LLC, ((Defendant) from liability. Defendant filed a Cross-Motion to Confirm the Arbitration Award. Plaintiff contends that the decision (Arbitration Award) should be vacated because the arbitrator manifestly disregarded Federal Law that a violation of a United States Coast Guard (USCG) regulation cannot be waived and Rhode Island state law requiring strict construction of such a waiver. Defendant maintains that there are no grounds under either 9 U.S.C. § 10 or G.L. 1956 § 10-3-12 to support a claim that the arbitrator manifestly disregarded the law to warrant granting the Motion to Vacate the Arbitration Award. Jurisdiction is pursuant to G.L. 1956 §§ 28-9-14, 28-9-17 and 28-9-18.

I
Facts and Travel

Defendant owns and operates the Freedom Boat Club of Portsmouth (FBC). *See* Compl. ¶ 3. FBC is an organization that offers the use of powerboats and sailboats to its members on a reservation basis in exchange for membership fees. *See id.* At the time of the allegations that gave

rise to the current dispute, Plaintiff and Defendant were parties to a Membership Agreement. *See id.* ¶ 6; *see also* Pl.'s Mem. Supp. of Mot. to Vacate (Pl.'s Mem.) Ex. 2 (Arbitration Award), at 3; *see generally* Pl.'s Mem. Ex. 3 (FBC Membership Agreement). Incorporated into the Membership Agreement are Rules and Regulations of Membership. *See* FBC Membership Agreement, at 5-11. The arbitrator's interpretation of two paragraphs of the Rules and Regulations of Membership is at issue before the Court. *See* Arbitration Award, at 2-3. Paragraph 14 entitled, "INJURY AND DAMAGE TO PROPERTY" states:

> "Member recognizes that the operation of any boat is a specialized activity that requires training and experience and has both obvious and non-obvious dangers associated with it. Member acknowledges that many such dangers produce risk of injury to Member . . . regardless of the proper maintenance and condition of the boat. Accordingly, Member knowingly accepts sole and exclusive responsibility at all times for the safety of all persons and property on board the FBC boat, and all persons who may come in contact with the FBC boat, including Member, Member's passengers and the public in general. For purposes of personal injury claims, a Member is deemed automatically to be additional[ly] assured on FBC's Hull & Machinery and Protection & Indemnity policy(ies) subject to the Co-Assured Clause, and will be afforded the same coverage and protection afforded FBC under such an insurance policy. MEMBER ACKNOWLEDGES THAT FBC'S INSURANCE COVERAGE IS FOR THE MEMBER AND GUESTS ONLY WHILE THE MEMBER IS OPERATING (PILOTING) THE BOAT. INSURANCE COVERAGE DOES NOT APPLY IF ANY NON-MEMBER IS OPERATING A FBC INSURED BOAT DURING AN ACCIDENT. MEMBER AGREES TO RELEASE, INDEMNIFY, DEFEND AND HOLD FBC, ITS OFFICERS, DIRECTORS, EMPLOYEES AND AGENTS HARMLESS FROM AND AGAINST ALL CLAIMS, LOSS, DAMAGE, EXPENSE (INCLUDING REASONABLE ATTORNEY'S FEES AND COSTS AND EXPENSES OF LITIGATION) FOR INJURY OR LOSS OF ANY SORT INCLUDING BODILY INJURY, DEATH, PROPERTY DAMAGE OR OTHER LOSS OF ANY KIND OR NATURE WHETHER KNOWN OR UNKNOWN, FORESEEN OR UNFORESEEN, PATENT OR LATENT ARISING FROM OR RELATING TO THE USE OR OPERATION OF AN FBC BOAT IN VIOLATION OF THE MEMBERSHIP AGREEMENT OR

> THESE RULES AND REGULATIONS. THIS RELEASE AND INDEMNIFICATION OF FBC, ITS OFFICERS, DIRECTORS, EMPLOYEES AND AGENTS SHALL EXTEND TO ANY INJURY OCCASSIONED WHOLLY OR IN PART BY ANY ACT OR OMISSION OF FBC, ITS OFFICERS, DIRECTORS, EMPLOYEES AND AGENTS. . . ." *See* Arbitration Award, at 2; *see also* FBC Membership Agreement, at 7.

Paragraph 21 entitled, "LIMITATIONS ON WARRANTIES AND LIABILITY" states:

> "FBC makes no representations or warranties, express or implied, except those included in this Agreement. Member acknowledges that all watercraft provided by FBC are provided 'as is' without any warranties or representation of any kind, without limitation, warranty of merchantability or fitness for a particular purpose. In particular, without in any manner limiting the foregoing, FBC makes no representations or warranties as to the qualities, capacity, or other attributes of any of the watercraft the use of which will or may be furnished to Member pursuant to this Agreement and any such representations or warranties which may be made or upon which Member may rely are exclusively those of the manufacturers of said equipment. FBC shall not be responsible or liable at any time for loss or damage to personal property brought by Member, or any of Member's family, guests, invitees, or third party aboard FBC watercraft used by Member. FBC shall not be responsible or liable to Member for any defect, latent or other defects of any type of nature in any watercraft or any equipment, appliances, or apparatus utilized in connection with such watercraft, nor shall FBC be responsible or liable for any injury or damage caused by or resulting from any defect, act or omission in the construction, maintenance, operation, or use of any watercraft, or any equipment, fixtures, appliances, or apparatus utilized in connection with such watercraft. Member further acknowledges and agrees that Member is waiving and releasing any and all claims which Member could make against FBC, ITS PARENT AND AFFILIATED, or any officer, director, employee, MEMBER or agent of FBC for any personal injury or property damage arising for any defect, latent or otherwise, in any watercraft or any equipment, appliances, or apparatus utilized in connection with such watercraft." *See* Arbitration Award, at 2-3; *see also* FBC Membership Agreement, at 10-11.

With regard to the facts associated to Plaintiff's allegations and the two Motions before the Court, a review of the Arbitration Award is necessary to provide a thorough depiction of the events

that took place on June 12, 2017 since the Complaint was fashioned on Plaintiff's claims of Negligence and Res Ipsa Loquitur Negligence against the Defendant. *See generally* Compl.

On June 12, 2017, Plaintiff placed a reservation to use the sailboat named Wyld Thing (Wyld Thing) for a day of solo sailing on Narraganset Bay. *See* Arbitration Award, at 4. As of June 12, 2017, Plaintiff considered himself a competent and experienced sailor with thirty-plus years of experience in sailing.[1] *See id.* at 3. Based on this experience, Plaintiff testified he was familiar with the configuration and boating equipment of the Wyld Thing. *See id.* at 4. Furthermore, Plaintiff testified that before he left the dock, he knew or at least believed Wyld Thing's depth sounder, wind speed and direction indicator were not functioning. *See id.* Despite this knowledge, Plaintiff testified that he took Wyld Thing out for a day of sailing. *See id.*

On June 12, 2017 it was 80 degrees, sunny with very few clouds, light winds, and a calm sea state. *See id.* After motoring out of port into the channel, Plaintiff put the engine in neutral and began to raise the mainsail. *See id.* Plaintiff testified that Wyld Thing was pointing downwind as he was motoring, and he did not turn the vessel into the wind when he depowered the engine and raised the mainsail that filled with wind. *See id.* As Plaintiff was raising the mainsail, he noticed that the bottom sail slide, which attaches the mainsail to the mast, was missing and that it "appeared to be broken off." *See id.* at 4-5. Plaintiff continued to raise the mainsail and did not alert FBC as to the missing sail slide, nor did he attempt to repair or replace the sail slide by returning to port. *See id.* at 5. Rather, Plaintiff determined it was safe to sail with the missing sail slide. *See id.*

[1] The Arbitration Award included a more thorough background of Plaintiff's experience as a sailor including Plaintiff learning to sail from Sail Newport while in high school, Plaintiff owning and sailing a 24-foot sailboat for three to four years, Plaintiff previously sailing a 27-foot sailboat "dozens and dozens of time," and Plaintiff feeling comfortable and capable of sailing a boat under thirty feet and understanding the consequences should something go wrong. *See* Arbitration Award, at 3-4.

Plaintiff testified that twenty minutes after noticing the missing sail slide, the remaining sail slides began to break off, beginning at the bottom of the sail that caused the mainsail to come free from the groove in the mast known as the "luff track." *See id.* Plaintiff testified that he furled in the headsail to reduce power to the boat and then released the main halyard in order to lower the mainsail to facilitate pulling it down. *See id.* Next, Plaintiff left the cockpit and went onto the cabin housing to pull down the mainsail but was unable to do so as the lines were tangled in the boat's rigging. *See id.* Plaintiff alleged that he injured his left shoulder when he attempted to pull down the mainsail. *See id.*

Plaintiff testified that at this time, with the mainsail blowing about uncontrollably, he was in a desperate situation as the boat was rocking violently from side to side so that the rails were dipping into the water. *See id.* Plaintiff attempted to control the vessel by starting the engine so that he could try to direct the boat to shore. *See id.* Although Plaintiff was successful in turning the boat to shore, he stated the rocking motion continued so fiercely that he thought he "was going to die." *See id.* When the boat rocked so violently to cause the engine to stop, Plaintiff testified that he ran down below deck and searched for a life jacket to wear. *See id.* Plaintiff did not attempt to ascertain why the engine had ceased working, but rather he called the boat club and apprised Tim Hutchinson, the dock master, (Hutchinson) of the situation. *See id.* At this point, Plaintiff testified that he believed Wyld Thing was likely to capsize. *See id.*

Plaintiff testified that the Wyld Thing crashed into a mooring with a dinghy attached, which resulted in a loss of all momentum. *See id.* at 6. About this time, Hutchinson and Joe Palmieri, an employee of Brewster's Sakonnet Marina[2], (Palmieri) arrived in a fourteen-foot metal skiff and

[2] Brewster's Sakonnet Marina had a management agreement contract with Defendant to oversee FBC's day-to-day reservations and operations at its marina. *See* Arbitration Award, at 6.

safely rafted up to Wyld Thing. *See id.* Palmieri testified that the skiff had no problem motoring over to Wyld Thing, and the sea conditions were "not flat calm but it was maybe a foot or so of chop." *See id.* Palmieri testified that he observed Wyld Thing was tangled in a mooring line and was in no danger of capsizing or sinking. *See id.* Within a few minutes after boarding Wyld Thing, Hutchinson righted the overturned fuel tank and started the sailboat's outboard engine while Plaintiff was situated in the cockpit. *See id.* Palmieri observed Hutchinson pull down the mainsail to allow the sailboat to be motored back to the marina. *See id.*

Palmieri testified that at no time did Plaintiff report he needed medical attention or was otherwise injured. *See id.* Furthermore, per Plaintiff's testimony, upon returning to the marina dock, he did not report any injury to the staff at the marina, and he returned to his car to drive home. *See id.* Plaintiff testified that he called the Defendant's owner, Mr. Cromwell, that day and a couple days afterwards but Mr. Cromwell never got back to him. *See id.*

Two days after the incident on June 14, 2017, Plaintiff contacted his physician, Dr. Andrew Greene, (Dr. Greene) Orthopedic Surgeon with Brown University Orthopedics. *See id.* Dr. Greene had previously treated Plaintiff for left shoulder pain on October 19, 2010. Dr. Greene testified that he did not treat Plaintiff for left shoulder injury between 2010 and 2017. *See id.* However, Dr. Greene's physician assistant, Bryan Berlin, (P.A. Berlin) made a notation in Plaintiff's medical record on March 20, 2012 that Plaintiff's left shoulder "remains painful" and an MRI taken in March 2010 "showed evidence of partial thickness/rotator cuff tearing." *See id.* at 6-7. On June 14, 2017, Plaintiff saw P.A. Berlin and described the left shoulder pain from 2010 and March 2012, which "gradually got better with rest, but recently [Plaintiff] reports, it has been gradually worsening over the past couple of months." *See id.* at 7. Plaintiff continued that "he now notes

increasing pain since two weeks ago when sailing." *See id.* This feedback from the Plaintiff was documented in notes by P.A. Berlin. *See id.* P.A. Berlin prescribed physical therapy. *See id.*

On September 13, 2017, Dr. Greene treated Plaintiff for a rotator cuff tear, as evidenced by an MRI taken on June 26, 2017. *See id.* Dr. Greene performed rotator cuff surgery on Plaintiff's left shoulder on September 29, 2017 and determined Plaintiff had a full thickness rotator cuff tear of medium to large size. *See id.* Plaintiff continued seeking treatment with Brown University Orthopedics. *See id.* Per Dr. Greene's testimony, Plaintiff's medical file dated December 4, 2018 indicated Plaintiff has a five percent upper extremity impairment and three percent total body impairment.[3] *See id.* Additionally, on July 11, 2019, P.A. Berlin treated Plaintiff for increased left shoulder pain. *See id.* at 7-8. There is no record of Plaintiff continuing with physical therapy. *See id.* at 8.

On October 19, 2017, Plaintiff filed a Complaint against Defendant asserting Negligence and Res Ipsa Loquitur Negligence arising out of the use of the Wyld Thing on June 12, 2017. *See generally* Compl. Pursuant to the Membership Agreement, the Parties agreed to arbitration and the Parties agreed on the particular arbitrator. *See* FBC Membership Agreement ¶ 19; *see generally* Mot. to Stay; Order, July 24, 2018 (Van Couyghen, J.). An arbitration hearing was conducted from October 19, 2021 to October 21, 2021 before Arbitrator Hon. Frank J. Williams. *See* Arbitration Award, at 1. The issue presented at arbitration was the following: "Was the sailboat that Defendant . . . rented to Plaintiff . . . on June 12, 2017 defective and unseaworthy, and if so, did the defect and unseaworthiness proximately cause a left shoulder injury to [Plaintiff]." *Id.* at 1.

[3] The Arbitration Award contains Dr. Greene's detailed testimony on the grade modifier, how these percentages were determined and their impact on Plaintiff. *See* Arbitration Award, at 7.

At arbitration, Plaintiff claimed that the Wyld Thing was defective and unseaworthy, and this defect and unseaworthiness proximately caused a left shoulder injury to Plaintiff. *See id.* Additionally, Plaintiff contended that Defendant cannot assert a waiver of liability imposed by statutory provisions intended to protect both an individual and the public because to do so would be contrary to public policy. *See id.* at 11. Lastly, Plaintiff asserted that he sustained a left shoulder rotator cuff tear due to Defendant's negligence in maintaining Wyld Thing. *See id.* at 14.

Defendant requested that the arbitrator rule specifically on the issue "whether Plaintiff's Complaint is barred because Plaintiff has waived, released and agreed to indemnify Defendant from and against all claims arising out of Plaintiff's use of Defendant's vessel Wyld Thing pursuant to the FBC Rules and Regulations of Membership." *See id.* at 17. Specifically, Defendant contended that Paragraph 14 of the Membership Agreement is a clear and unequivocal agreement by Plaintiff to indemnify, defend and hold Defendant harmless for any act or omission relating to or arising out of the use of Defendant boats. *See id.* at 19. Additionally, Defendant maintained that Paragraph 21 clearly states that Defendant boats are chartered on an "as is" basis and expressly disclaims any express or implied warranties. *See id.* Defendant took the position that the language of these paragraphs is sufficiently clear and unambiguous and should bar any liability on the part of Defendant in accordance with maritime law. *See id.* Defendant sought a Motion for Judgment as a Matter of Law pursuant to Super R. Civ. P. 52(c) for the arbitrator to rule on the evidence provided by both parties at hearing and through their Post Arbitration Briefs. *See id.* at 17, 35.

Although Plaintiff did not specifically address Defendant's Rule 52(c) motion, Plaintiff argued in opposition of Defendant's assertion of waiver. *See id.* at 11-14, 38. Plaintiff made five key arguments against Defendant's assertion of waiver including: (1) exculpation clauses, such as waivers and releases from negligence, shall be narrowly construed and are disfavored by courts;

(2) waivers that violate federal law are not enforceable for public policy reasons; (3) Defendant's waiver is unenforceable because it is in violation of the insurance policy stipulated in Paragraph 14 of the Rules and Regulations; (4) Defendant's waiver is unenforceable since the parties have stipulated that Plaintiff did not violate the Rules and Regulations of Membership; and (5) Defendant's waiver is unenforceable since Plaintiff did not enter into a bareboat charter with Defendant. *See id.* at 38.

After reviewing each parties' position, the arbitrator issued the Arbitration Award finding that the pertinent exculpatory clauses, Paragraphs 14 and 21 of the Rules and Regulations of Membership, were clear and unambiguous, not inconsistent with public policy, and not indicative of an adhesion contract. *See id.* at 55. The arbitrator granted Defendant's Motion for Judgment as a Matter of Law. *See id.*

On June 10, 2022, the Parties appeared before the Court on the Formal and Special Cause Calendar to argue Plaintiff's Motion to Vacate Arbitration Award, Defendant's Objection to Plaintiff's Motion to Vacate, and Defendant's Motion to Confirm Arbitration Award. *See* Docket.

In support of his Motion to Vacate Arbitration Award, Plaintiff asserts that the arbitrator demonstrated a clear understanding of the law, but manifestly disregarded that law. *See* Pl.'s Mem. 4-7, 9-14. Plaintiff asks the Court to review *Torres v. Offshore Professional Tour, Inc.*, 629 So.2d 192 (Fla. Dist. Ct. App. 1993), *Waggoner v. Nags Head Water Sports, Inc.*, 141 F.3d 1162 (4th Cir. 1998), and *Brozyna v. Niagara Gorge Jetboating, Ltd.*, No. 10-CV-602-JTC, 2011 WL 4553100 (W.D.N.Y. Sept. 29, 2011) to find that USCG regulation violations are not waivable. *See* Pl.'s Mem. 9-14. Plaintiff also argues that the arbitrator failed to follow Rhode Island law that requires a strict construction of the waiver. *See* Tr.; *see also* Pl.'s Mem. 13-14. In conclusion,

Plaintiff asks the Court to remand the Arbitration Award to the arbitrator to correct the manifest disregard of the applicable law.

In support of its Objection to Plaintiff's Motion to Vacate Arbitration Award, Defendant contends that Plaintiff has not met his substantial burden to overcome the presumption of the arbitration award. *See* Def.'s Mem. 4-7, 13-14. Defendant asserts that the arbitrator's conclusion that the waiver provisions of the Membership Agreement were sufficiently specific was correct and not a manifest disregard of the law. *See id.* at 17-19. Additionally, Defendant argues that the USCG regulation violation is a complete red-herring as the USCG regulation violation had no connection to Plaintiff's injury, which the arbitrator did not overlook. *See id*. 13-17. Defendant concludes with asking the Court to find the arbitrator did not manifestly disregard the law, and to subsequently deny Plaintiff's Motion to Vacate Arbitration Award and grant Defendant's Motion to Confirm Arbitration Award.

II

STANDARD OF REVIEW

A

Standard for Vacatur under 9 U.S.C. § 10

The United States Supreme Court has recognized that there is a "national policy favoring arbitration with just the limited review needed to maintain [the] arbitration's essential virtue of resolving disputes straightaway." *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008). Notably, "any other reading opens the door to the full-bore legal and evidentiary appeals that can 'rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process' and bring arbitration theory to grief in post arbitration

process." *Id.* (quoting *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987, 998 (9th Cir. 2003)).

"On application for an order confirming the arbitration award, the court 'must grant' the order 'unless the award is vacated . . . as prescribed in [9 U.S.C. § 10].'" *Id.* at 587. 9 U.S.C. § 10 states:

> "In any of the following cases the United States court in and for the district wherein the award was made may 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 in 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 refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
> (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." 9 U.S.C. 10(a).

The United States Supreme Court has recognized the statutory emphasis on extreme arbitral conduct that would justify vacating the award if the arbitrator's conduct deviated from the parties' agreed-upon arbitration to constitute such a level of egregiousness. *See Hall Street Associates, L.L.C.*, 552 U.S. at 586. "While § 10 of the FAA provides the grounds upon which an arbitration award may be vacated, . . . the common law doctrine of manifest disregard of the law, which is not included in § 10, allows courts a very limited power to review arbitration awards outside of section 10." *Mountain Valley Property, Inc. v. Applied Risk Services, Inc.*, 863 F.3d 90, 94 (1st Cir. 2017) (citation omitted). *But see Hall Street Associates, L.L.C.*, 552 U.S. at 585-86 (casting doubt on the doctrine of manifest disregard of the law as a ground for vacatur).

However, "an FAA award cannot be overturned based on mere disagreement by the court with the [arbitrator] on a debatable issue." *Bangor Gas Co., LLC v. H.Q. Energy Services (U.S.) Inc.*, 695 F.3d 181, 187 (1st Cir. 2012). Importantly, "[t]he challenging party has the burden to establish 'substantially more than an erroneous conclusion of law or fact.'" *Patton v. Johnson*, C.A. No. 17-259WES, 2018 WL 3655785, at *5 (D.R.I. Aug. 2, 2018), *aff'd*, 915 F.3d 827 (1st Cir. 2019). Moreover, "[t]he standard by which courts review arbitration awards under the FAA is extremely deferential . . . [and] [a]rbitral awards are nearly impervious to judicial oversight." *Wendella Sightseeing Co., Inc. v. Blount Boats, Inc.*, C.A. No. 17-368 WES, 2018 WL 1620925, at *3 (D.R.I. Mar. 30, 2018).

B

Standard for Vacatur under § 10-3-12

"Rhode Island has a strong public policy in favor of the finality of arbitration awards." *Berkshire Wilton Partners, LLC v. Bilray Demolition Co., Inc.*, 91 A.3d 830, 834 (R.I. 2014). "To preserve the integrity and efficacy of arbitration proceedings, judicial review of arbitration awards is extremely limited." *Id.* at 834-35. "'[P]arties who have contractually agreed to accept arbitration as binding are not allowed to circumvent an award by coming to the courts and arguing that the arbitrators misconstrued the contract or misapplied the law.'" *Id.* at 835 (quoting *Prudential Property and Casualty Insurance Co. v. Flynn*, 687 A.2d 440, 441 (R.I. 1996)).

The "policy of finality is reflected in the limited grounds that the Legislature has delineated for vacating an arbitration award." *Prudential*, 687 A.2d at 441. In reviewing an arbitrator's award, the Superior Court follows § 10-3-12, which sets forth narrow situations when an arbitration award must be vacated. *See Berkshire Wilton Partners, LLC*, 91 A.3d at 835; *see also Atwood Health*

Properties, LLC v. Calson Construction Co., 111 A.3d 311, 314 (R.I. 2015). Section 10-3-12 states:

> "[T]he 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." Section 10-3-12.

Interpreting § 10-3-12(4), the Rhode Island Supreme Court has found that "[a]n arbitrator may exceed his or her authority by giving an interpretation that fails to draw its essence from the parties' agreement, is not passably plausible, reaches an irrational result, or manifestly disregards a provision of the agreement [or the law]." *Berkshire Wilton Partners, LLC*, 91 A.3d at 835.

Nonetheless, "[o]nly in cases in which an award is so tainted by impropriety or irrationality that the integrity of the process is compromised should courts intervene." *Prudential*, 687 A.2d at 441. Moreover, "when a party claims that the arbitrators have exceeded their authority, the claimant bears the burden of proving this contention, and every reasonable presumption in favor of the award will be made." *Coventry Teachers' Alliance v. Coventry School Committee*, 417 A.2d 886, 888 (R.I. 1980).

III

ANALYSIS

Plaintiff asserts that this Court should vacate the Arbitration Award because the arbitrator exceeded his authority by manifestly disregarding the law. *See generally* Pl.'s Mem. Plaintiff challenges the arbitrator's interpretation of federal law that permits parties to indemnify themselves under maritime law if the exculpatory clause is sufficiently specific. *See* Pl.'s Mem. 4-7, 9-14. Plaintiff specifically points to the holding in *Torres v. Offshore Professional Tour, Inc.*, cited *supra*, finding a waiver that allows for the violation of USCG regulations is unenforceable. *See id.* at 9-11; *see also Torres*, 629 S.2d at 193. Additionally, Plaintiff argues that the arbitrator's interpretation of *Waggoner v. Nags Head Water Sports, Inc.* and *Brozyna v. Niagara Gorge Jetboating, Ltd.*, cited *supra*, was erroneous because it is Plaintiff's position that both cases held that a waiver will not be enforced if the violation contravenes public policy, which occurred in this matter. *See* Pl.'s Mem. 11-14; *see also Waggoner*, 141 F.3d at *5, *Brozyna*, 2011 WL 4553100, at *5. Lastly, despite acknowledging that courts uphold exculpatory indemnification clauses so long as they are sufficiently specific, Plaintiff contends that the arbitrator failed to strictly construe the Membership Agreement waiver and release provisions as required under Rhode Island law. *See* Pl.'s Mem. 14-15; *see also Dower v. Dower's Inc*., 100 R.I. 510, 513, 217 A.2d 437, 439 (1966) (requiring strict construction of waivers).

In response, Defendant emphasizes that Plaintiff has a substantial burden to overcome to prove that the arbitrator manifestly disregarded the law, and that he fell short of this burden. *See* Def.'s Mem. 13-14. Defendant contends that the arbitrator's conclusion that the waiver provisions of the Membership Agreement were sufficiently specific was correct and not a manifest disregard of the law. *See id.* at 17-19. Additionally, Defendant argues that the USCG regulation violation is

a complete red-herring as the USCG regulation violation had no connection to Plaintiff's injury, which the arbitrator did not overlook. *See id.* at 13-17.

Manifest disregard of the law is a non-statutory standard of reviewing arbitration awards apart from 9 U.S.C. § 10. *See McCarthy v. Citigroup Global Markets Inc.*, 463 F.3d 87, 91 (1st Cir. 2006). A successful assertion depends on "the challenger's ability to show that the award is (1) unfounded in reason and fact; (2) based on reasoning so palpably faulty that no judge, or group of judges, ever could conceivably have made such a ruling; or (3) mistakenly based on a crucial assumption that is concededly a non-fact." *Id.* Moreover, manifest disregard of the law occurs in "a situation 'where it is clear from the record that the arbitrator recognized the applicable law—and then ignored it.'" *Id.* (quoting *Advest, Inc. v. McCarthy*, 914 F.2d 6, 9 (1st Cir. 1990)). "To succeed under this standard 'there must be some showing in the record, other than the result obtained, that the arbitrators knew the law and expressly disregarded it.'" *Id.* at 92 (quoting *Advest, Inc.*, 914 F.2d at 10). "'[D]isregard' implies that the arbitrators appreciated the existence of a governing legal rule but willfully decided not to apply it." *Id.* (quoting *Advest, Inc.*, 914 F.2d at 10). "However, the Supreme Court in *Hall Street Associates, L.L.C.*, [cited *supra*], cast doubt on the continued existence of manifest disregard of the law as a ground for vacatur, and [the First Circuit Court of Appeals] stated . . . that the doctrine remains 'only as a judicial gloss.'" *See Mountain Valley Property, Inc.*, 863 F.3d at 94 (citation omitted); *see also Patton*, 2018 WL 3655785, at *6 (Rhode Island District Court also recognizing the questionable survival of the manifest disregard standard acknowledged by the First Circuit).

The Rhode Island Supreme Court has stated that "[t]o vacate an arbitrator's decision, [the court] must conclude that the arbitrator has manifestly disregarded the law." *Berkshire Wilton Partners, LLC*, 91 A.3d at 836. "[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 arbitrators to understand or apply the law.'" *North Providence School Committee v. North Providence Federation of Teachers, Local 920, American Federation of Teachers*, 945 A.2d 339, 344 (R.I. 2008). Rather, "[a] manifest disregard of the law occurs when an arbitrator understands and correctly articulates the law, but then proceeds to disregard it." *Id.* However, "[a]s long as an arbitration award 'draws its essence' from the contract and is based upon a 'passably plausible' interpretation of the contract, it is within the arbitrator's authority and our review must end." *Prudential*, 687 A.2d at 441.

First the arbitrator looked at the relevant case law in *Waggoner* and *Brozyna* to determine whether admiralty law recognizes exculpatory clauses. *See* Arbitration Award, at 43-44; *see also Waggoner*, 141 F.3d at *3-5; *Brozyna*, 2011 WL 4553100, at *4-5. The arbitrator specifically stated that:

> "[i]n both of these cases, the courts granted defendants' motions for summary judgment on the ground that as a matter of well-established admiralty law, recovery in these cases was precluded by plaintiffs' execution of a valid and enforceable waiver and release of claims against defendants as a condition of their participation in these water sport pursuits, which were inherently dangerous recreational activities. *The Arbitrator finds these cases strike to the heart of the facts and legal issues in the matter before the Arbitrator*." Arbitration Award, at 43 (emphasis added).

The arbitrator corroborated this finding by incorporating the courts' holdings in *Waggoner* and *Brozyna* into the Arbitration Award to demonstrate an understanding of the applicable law. *See* Arbitration Award, at 43-44; *see also Waggoner*, 141 F.3d at *3-5 (upholding exculpatory clauses that are "conspicuous and unambiguous"); *Brozyna*, 2011 WL 4553100, at *4 (stating "There is a substantial body of general maritime law dealing with the enforceability of the type of liability waiver[.]"). The Court finds this demonstrates that the arbitrator grounded his decision in

the established admiralty law that recognizes exculpatory clauses and applied it, rather than willfully deciding not to apply it. *See McCarthy.*, 463 F.3d at 91.

Plaintiff contends that the arbitrator manifestly disregarded the law identified in *Torres*, which found a waiver that allows for the violation of USCG regulations is unenforceable. *See* Pl.'s Mem. at 9-11; *see also Torres*, 629 S.2d at 193. However, Plaintiff's interpretation of the case law can be categorized as a disagreement with the arbitrator's interpretation, which is insufficient to prove a manifest disregard of the law. *See id.*; *see also Berkshire Wilton Partners, LLC*, 91 A.3d at 836-37. Moreover, even if this Court adopted Plaintiff's interpretation of *Torres*, *Waggoner*, and *Brozyna*, such adoption would not permit this Court to vacate the award because an arbitration award cannot be overturned based on a mere disagreement by this Court with the arbitrator. *See Bangor Gas Co., LLC.*, 695 F.3d at 187. Plaintiff has not pointed to anything in the record, other than the conflicting interpretation of the case law, that the arbitrator knew the law and expressly disregarded it. *See McCarthy*, 463 F.3d at 91. Thus, Plaintiff has failed to satisfy his burden of establishing substantially more than an erroneous conclusion of law to show a manifest disregard of the law. *See Patton*, 2018 WL 3655785, at *5; *see also Coventry Teachers' Alliance*, 417 A.2d at 888.

After finding admiralty law recognizes exculpatory clauses, the arbitrator conducted a methodical and exacting examination of Paragraphs 14 and 21 of the Membership Agreement to determine whether the language was sufficiently specific pursuant to *Dower v. Dower's Inc*., cited *supra*. *See* Arbitration Award, at 46-48; *see also Dower*, 100 R.I. at 513, 217 A.2d at 438 (requiring strict construction of waivers). The arbitrator analyzed the verbiage and usage of capitalization and underlining of Paragraph 14 and 21 as well as the timeliness that Plaintiff had to review the Membership agreement compared to such factors in *Waggoner* and *Brozyna* within the backdrop

of *Dower*. *See* Arbitration Award, at 46-48; *see also Waggoner*, 141 F.3d at *4 (citing *Krazek v. Mountain River Tours, Inc.*, 884 F.2d 163, 166 (4th Cir. 1989) (declining to require the word negligence to appear in a release and "declin[ing] . . . to formulate a rule that requires the use of specific 'magic words' in [indemnification] contracts[.]"); *see also Brozyna*, 2011 WL 4553100, at *6 (highlighting a much shorter timeline to review said indemnification clause that was enforced). Ultimately, the arbitrator found that the language was clear and unambiguous and sufficiently specific to meet the legal standard in *Dower*. *See id.* at 48.

The Court finds this thorough analysis does not show a disregard for the relevant caselaw but indicates an honest attempt to interpret the waiver and release language in the Membership Agreement in light of the holdings in *Dower*, *Waggoner*, and *Brozyna*. *See* Arbitration Award, at 46-48; *see also North Providence School Committee*, 945 A.2d at 344 n.9 (noting that, if an award contains an "honest decision," the courts will not set it aside for an error of law or fact). Moreover, Plaintiff acknowledged that the arbitrator distinguished the sufficiently specific standard in *Dower*, but claims the arbitrator disregarded that law by holding the Membership Agreement enforceable. *See* Pl.'s Mem. 14-15. The court in *Prudential Property & Casualty Insurance Co.*, cited *supra*, rejected an argument that arbitrators manifestly disregarded the law where the plaintiff conceded that arbitrators distinguished the case law precedent. *See Prudential*, 687 A.2d at 442. This Court is inclined to also respectfully reject such an argument. *See id.* Thus, Plaintiff has failed to show the arbitrator manifestly disregarded the law. *See id.*

Importantly, the arbitrator questioned whether the violation of the USCG regulation had a causal relationship to Plaintiff's injury. *See* Arbitration Award, at 46, 49-50. "[A] violation of a statute, which itself creates a duty to the public, may be relied on by a plaintiff as evidence of the existence of a duty and the breach of that duty." *Maldonado v. Jorge*, No. PC 02-5468, 2008 WL

5261965 (R.I. Super. Dec. 05, 2008) (Trial Order) (citing *Sitko v. Jastrzebski*, 68 R.I. 207, 210, 27 A.2d 178, 179 (1942)). However, "'plaintiff [is required] to prove that the violation was the direct and proximate cause of the injury and not merely a condition or circumstance which furnished the occasion therefor.'" *See id.* (quoting *Clements v. Tashjoin*, 92 R.I. 308, 314, 168 A.2d 472, 475 (1961)). "[A] causal relation must be established by competent evidence . . . [such as] establishing that the harm to the plaintiff would not have occurred but for the defendant's negligence." *Perry v. Alessi*, 890 A.2d 463, 467 (R.I. 2006). The arbitrator "note[d] that the evidence in this case may not even satisfy the standard for negligence[.]" Arbitration Award, at 46 (referencing the lack of probative value in particular evidence and calling into question whether Plaintiff exercised reasonable care). The Arbitrator also highlighted that "[Plaintiff] observed the portable fuel tank on his test drive with . . . the dock master, and did not express any reservations about it being unsecured." *Id.* at 50. Additionally, the arbitrator relied on Plaintiff's testimony "that he was aware that the wind gauge, wind detector, and depth detector on Wyld Thing were not operating, and yet he was not deterred from going solo sailing on June 12, 2017." *Id.*

Plaintiff firmly maintains that a violation of a USCG regulation cannot be waived if it contravenes public policy but fails to provide competent evidence that the violation was a direct and proximate cause of his injury. *See* Pl.'s Mem. 11-14*; see also* Arbitration Award, 41-52; *see also Perry*, 890 A.2d at 467. *But see* Arbitration Award, at 5 (Plaintiff alleging that he injured his left shoulder when he attempted to pull down the mainsail); 6-7 (Dr. Greene and P.A. Berlin treating Plaintiff for previous shoulder). While Plaintiff has referred this Court to *Torres*, cited *supra*, that decision, while not binding on this Court, is readily distinguishable. *See* Pl.'s Mem. 9-11; *see also Torres*, 629 S.2d at 193-94. In *Torres*, the lower court granted summary judgment; however, on appeal while finding there was a proximate cause, the court stated that "[plaintiff]'s

injuries are a proximate result of a boating accident which occurred during a race for which the promoter did not secure a permit [in violation of a statute and state and federal regulations]." *Torres*, 629 S.2d at 194. The court held that "the trial court erred in entering summary judgment when issues of fact remain unresolved regarding [defendant]'s conduct, and whether the conduct amounts to negligence per se." *Id.* Whereas, in the instant case, the arbitrator, as the fact finder, found Plaintiff's injuries were not a proximate result of the violation of the USCG regulation. Accordingly, the Court finds that the arbitrator did not manifestly disregard the law because the arbitrator's decision was founded in reason and fact based on Plaintiff's failure to present competent evidence showing a causal relationship between the violation of the USCG regulation and Plaintiff's injury. *See McCarthy*, 463 F.3d at 91; *see also Perry*, 890 A.2d at 467.

IV

CONCLUSION

The arbitrator undeniably grounded his analysis of the Membership Agreement with the relevant federal and state law. He cited extensively to the relevant admiralty law and the well-settled state law requiring strict construction of waivers to make an informed decision on whether the language of the Membership Agreement was sufficiently specific to uphold the exculpatory clauses. The Court is satisfied that the Arbitration Award drew its essence from the relevant federal and state law and thus, the arbitrator's decision was a passably plausible interpretation of the Membership Agreement. *See McCarthy.*, 463 F.3d at 91; *see also Prudential*, 687 A.2d at 441.

Furthermore, the Court concludes that the arbitrator properly questioned the causal relationship between the violation of the USCG regulation and the Plaintiff's injury because of the lack of competent evidence presented by Plaintiff. *See Perry*, 890 A.2d at 467. Therefore, the

arbitrator's decision is entitled to deference from this Court. *See McCarthy.*, 463 F.3d at 91; *see also Prudential*, 687 A.2d at 441.

For the foregoing reasons, this Court denies Plaintiff's Motion to Vacate the Arbitration Award and accordingly, grants Defendant's Motion to Confirm the Arbitration Award.

Counsel shall prepare an appropriate order and judgment for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: **Jay Lasky v. MSI Boat Club, LLC**

CASE NO: **NC-2017-0433**

COURT: **Newport County Superior Court**

DATE DECISION FILED: **July 8, 2022**

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

ATTORNEYS:

For Plaintiff: **Jennifer Gehringer Puerini, Esq.**

For Defendant: **Keith B. Kyle, Esq.**