

it. Therefore, Defendants' motion to dismiss the Plaintiffs' Complaint or, in the alternative, to stay proceedings and compel arbitration, is denied.³

I

Travel

On September 11, 2013, Ms. Fonseca was admitted to the Pawtucket Center following surgery to repair a broken hip. At some point on the following day—the exact time is not known—Ms. Fonseca allegedly signed the Arbitration Agreement, purporting to bind both parties to arbitration regarding any disputes arising out of her stay at the Pawtucket Center. Ms. Fonseca subsequently died on November 18, 2013. Her daughter, Kristen Baker (Ms. Baker), individually and in her capacity as administratrix of Ms. Fonseca's estate, filed suit against the Pawtucket Center and other Defendants on January 14, 2015, claiming wrongful death. The parties agree that Ms. Baker did not demand arbitration prior to filing suit. Ms. Fonseca's husband, Amadeu Fonseca (Mr. Fonseca), joined in the action claiming loss of consortium.

The Pawtucket Center sought to dismiss the complaint pursuant to Super. R. Civ. P. 12(b)(1), 12(b)(3), and 12(b)(6), or, in the alternative, to stay proceedings and compel arbitration in accordance with the Arbitration Agreement and pursuant to § 10-3-1 (the Arbitration Act). Conversely, Plaintiffs moved for an evidentiary hearing with limited discovery pursuant to § 10-3-5. On September 16, 2015, the motions were argued before the Court. The Court determined that the Arbitration Agreement, if valid, was binding

³ The Court also notes that Plaintiffs filed their own motion on May 1, 2015, asking the Court to defer ruling on the Pawtucket Center's motion to dismiss or, in the alternative, to stay proceedings and compel arbitration, and to schedule the matter for an evidentiary hearing pursuant to § 10-3-5, while allowing for limited discovery on the issue of Ms. Fonseca's physical and mental condition at the time she entered into the Agreement.

against all the named Plaintiffs, including Ms. Baker and Amadeu Fonseca. However, the Court also determined that the validity of the Arbitration Agreement remained in question, and granted Plaintiffs' request for an evidentiary hearing on that limited issue pursuant to § 10-3-5.⁴

At the evidentiary hearing, Plaintiffs' case in chief included testimony from Lisa Marwell-Bussick (Ms. Marwell-Bussick), the Assistant Director of Admissions at the Pawtucket Center at the time Ms. Fonseca was a patient there; Ms. Baker; Brian Martel, Ms. Baker's boyfriend who knew Ms. Fonseca; and Dr. Francis Sparadeo, an expert witness specializing in Clinical Neuropsychology. Defendants' case in chief included expert testimony from Dr. Mark Rohrer, who specializes in internal medicine and post-acute care, with an additional certification in geriatrics. Both parties provided the Court with a number of exhibits.

II

Witness Testimony

A

Lisa Marwell-Bussick

Ms. Marwell-Bussick testified that she was Assistant Director of Admissions at the Pawtucket Center during the time that Ms. Fonseca was a patient there. She had no medical or legal training and had no prior experience with arbitration agreements. As part of her responsibilities, Ms. Marwell-Bussick would review an admissions packet (the Admissions Packet) for the Pawtucket Center with each patient when they were admitted

⁴ See also Bjartmarz v. Pinnacle Real Estate Tax Servs., 771 A.2d 124, 126 (R.I. 2001) (explaining that when a challenge to the creation of an agreement to arbitrate is raised, the court should “[p]roceed] to resolve [the] predicate facts ‘summarily’ via a trial or an evidentiary hearing . . .”).

to the facility. This Admissions Packet would always include the Arbitration Agreement and needed to be completed within twenty-four hours. Ms. Marwell-Bussick further testified that before reviewing the Admissions Packet with a patient, it was her customary practice to consult with the nursing supervisor on duty regarding the patient's ability to review the packet, and also to call the resident's contact person in order to determine if the resident was capable of completing his or her own paperwork.⁵ If either the patient's contact person or nursing supervisor was of the opinion that the patient was unable to complete the Admissions Packet, Ms. Marwell-Bussick averred that she would stop this process and schedule a meeting with the patient's contact person. Additionally, she stated that she never began reviewing the Admissions Packet with patients prior to 9:00 am.

Assuming the patient's contact person and nursing supervisor did not assert that the patient was unable to complete their own paperwork, Ms. Marwell-Bussick stated that it would have been her usual practice to sit with the patient and converse with them for a time before eventually going over the Admissions Packet. Notably, Ms. Marwell-Bussick testified that it was important that no one else be in the room during this process, and thus she would have been the only person discussing the Admissions Packet with Ms. Fonseca. Ms. Marwell-Bussick further explained that she was taught by her former supervisor to explain to the patient that signing each document was voluntary, meaning the patient could "always change their mind." Ms. Marwell-Bussick also represented that after explaining what each portion of the Admissions Packet meant to a patient, she would fill in the pertinent information on each page of the Admissions Packet herself—

⁵ In this case, Ms. Fonseca's contact person would have been her husband, Amadeu Fonseca. However, Ms. Marwell-Bussick could not specifically recall speaking to Mr. Fonseca or the on duty nursing supervisor regarding Ms. Fonseca, and merely testified that doing so would have been her usual custom and practice.

based on how the patient responded to her explanations of each section of the packet—and subsequently have the patient sign at the end if they chose to. Furthermore, Ms. Marwell-Bussick testified that she would have followed this exact procedure with Ms. Fonseca on September 12, 2013, although she could not specifically remember doing so; she merely averred that this would have been her normal practice, and noted that some of the handwriting referenced in the packet was her own, which suggests that she went through her customary routine.

B

Brian Martel

Mr. Martel testified that he was the live-in partner of Ms. Baker. He had no medical training and did not witness Ms. Fonseca sign any documents, nor did he meet Ms. Marwell-Bussick. Because of his relationship with Ms. Baker, Mr. Martel became familiar with Ms. Fonseca's normal demeanor and behavior. Prior to her injury which led to her admission to the Pawtucket Center, Mr. Martel testified that Ms. Fonseca could walk around on her own and wore glasses regularly for reading. He further testified that he visited Ms. Fonseca at the Pawtucket Center on September 12, 2013 after he got out of work—somewhere between 4:00 PM and 5:00 PM. According to Mr. Martel, Ms. Fonseca appeared “run-down” and was drifting in and out of consciousness. He averred that her behavior was not normal, noting that she repeatedly referred to him by her son's name, Tony, and also that she was frequently asking for pain medication. He stated that she appeared disoriented and confused, and overall was “not herself.”

C

Kristen Baker

Ms. Baker testified that she lived with her mother for part of her adult life, and once she began to live on her own, would visit her three or four times per week. Ms. Baker had no medical or legal training. She testified that her mother was a former licensed practical nurse who stopped working in 2007 after undergoing surgery for a heart transplant. Ms. Baker said that she visited her mother on September 12, 2013 after work—between approximately 5:00 PM and 7:00 PM. She was not involved in the completion of any of the admission paperwork, nor did she ever see any such paperwork. Further, Ms. Baker did not speak with Ms. Marwell-Bussick, a nurse, or a doctor at the Pawtucket Center regarding her mother’s admission. When asked about Ms. Fonseca’s state, Ms. Baker testified that her mother was sleeping on an off for most of her visit, and at times would ask for personal items such as her cellular phone or personal hygiene products. Overall, however, Ms. Baker stated that her mother could not hold a steady conversation and “was not herself.” She also asserted that her mother frequently expressed that she was in pain, and further that she was concerned that her mother had been overly medicated. Ms. Baker also testified that her mother wore glasses in 2013—primarily for reading—but that she was not wearing those glasses when Ms. Baker visited her. She noted that Ms. Fonseca’s glasses were in her pocketbook when she visited her on September 12, 2013, which suggests that Ms. Fonseca had not been wearing them at any point that day.

D

Doctor Francis Sparadeo

Dr. Sparadeo is a Clinical Neuropsychologist who specializes in brain disorders and behavioral relationships. He received a Post Doctorate degree from Brown University in Neuropsychology and Pain Management, and purported to be a member of several medical associations. Dr. Sparadeo is currently an adjunct professor of Psychopharmacology at Salve University, and formerly held a similar position at Brown University. His work in Neuropsychology has been published, and he routinely presents his work at both national and international conferences. Dr. Sparadeo has been appointed in the past at Rhode Island Hospital, St. Joseph's Hospital, and Our Lady of Fatima Hospital, where he, inter alia, evaluated the cognitive status of elderly patients. Currently, Dr. Sparadeo practices in traumatic brain injury and pain management and specifically assesses patients—mostly people over forty years of age—for cognitive impairment. He has participated as an expert witness in many cases in the past—including in arbitration and mediation settings—both in Rhode Island and in other states. Dr. Sparadeo was offered and accepted as an expert in Clinical Neuropsychology.

In Dr. Sparadeo's expert opinion and to a reasonable degree of medical certainty, Ms. Fonseca did not possess the cognitive ability to understand the Arbitration Agreement at the time she signed it. Since Dr. Sparadeo never met Ms. Fonseca, he formed his opinion on the totality of her medical history—specifically relying on medical records he was provided from Tufts Medical Center and the Pawtucket Center—as well as from the perceptions of Ms. Fonseca's family regarding her abnormal behavior on

September 12, 2013. See Tuft's Medical Center Discharge Summary, Pls.' Ex. 3.⁶ From those records, Dr. Sparadeo determined that Ms. Fonseca possessed an increased risk of cognitive impairment based on her past medical history; specifically, her history of cardio disease (including a heart transplant), chronic kidney disease, and a brain aneurism. He also noted that the fact that Ms. Fonseca suffered a fall at Tufts Medical Center on September 6, 2013 after failing to call for help—despite reminders to do so—indicated that she was suffering from cognitive impairment.

Dr. Sparadeo additionally explained that there were five domains of cognition: attention/concentration, learning/memory, language, visual/perceptual, and reasoning/executive function. Based on her medical records, Dr. Sparadeo averred that Ms. Fonseca was more likely than not experiencing cognitive impairments in three of these domains: attention/concentration, visual/perceptual, and reasoning/executive function, and opined that this would have affected her ability to read and understand the Arbitration Agreement at the time she signed it.⁷

Dr. Sparadeo further formed his opinion of Ms. Fonseca's cognitive status on September 12, 2013 by reviewing her medication record. Of the bevy of medications Ms. Fonseca was taking, at least four of them affected brain function: Amitriptyline, Ativan, Gabapentin,⁸ and Oxycodone. See Pawtucket Center Physician Admission Orders, Pls.' Ex. 4.

⁶ All Exhibits referenced by the Court in this Decision were admitted as full Exhibits at the evidentiary hearing.

⁷ Dr. Sparadeo noted that Ms. Fonseca did not appear to have a cognitive impairment in the language domain, and in his opinion her intact language skills could have masked her other cognitive impairments.

⁸ Dr. Sparadeo noted that Ms. Fonseca was usually given Gabapentin at night, until she was admitted to the Pawtucket Center, at which point she was given the medication on the morning of September 12, 2013. This suggested to him that she was likely experiencing its side effects at the time she signed the Arbitration Agreement.

Ex. 11. While overall the dosages of these medications given to Ms. Fonseca were average—and Dr. Sparadeo conceded on cross-examination that none of them were hallucinogenic and that medicine affects people in different ways—some common side effects he noted were confusion, headaches, disorientation, memory difficulty, dizziness, mood changes, and sleepiness. In general, Dr. Sparadeo asserted that the combination of these drugs would have slowed Ms. Fonseca’s cognitive processing and caused her to be confused—especially considering her advanced age. He also suggested that the fact that she indicated she was in serious pain would have further distracted her. See Occupational Therapy Initial Evaluation, Defs.’ Ex. A6. Additionally, Dr. Sparadeo considered the deposition testimony of both Ms. Baker and Brian Martel in forming his opinion, and noted that Ms. Fonseca’s behavior as described by both of them—such as her sleepiness and confusion—was consistent with that of a person afflicted with cognitive impairment. Such behavior also suggests that her medications were affecting her cognitive status at that time.

When specifically considering the Arbitration Agreement, Dr. Sparadeo testified that people experiencing cognitive impairment—as he believes Ms. Fonseca was on September 12, 2013—have more trouble understanding the kind of formal language contained in the Arbitration Agreement. Furthermore, in his opinion, the Pawtucket Center did not adequately evaluate Ms. Fonseca’s cognitive function prior to presenting the Admissions Packet to her.⁹ Thus, in Dr. Sparadeo’s opinion, Ms. Fonseca could not

⁹ Specifically, Dr. Sparadeo averred that the BIMS—or Brief Interview of Mental Status—test performed by the Pawtucket Center staff on Ms. Fonseca on September 12, 2013 is an insufficient mechanism to diagnose cognitive disorders. See Social History and Initial Assessment, Pls.’ Ex. 22 at 400. In Dr. Sparadeo’s opinion, the results of this test are inconsistent at best, and what should have been performed was a

have understood the Arbitration Agreement she signed on September 12, 2013 as her attention, concentration, executive functioning and judgment all appear to have been impaired. Moreover, after reading the deposition testimony of Ms. Marwell-Bussick, Dr. Sparadeo was of the opinion that the manner in which the Admissions Packet was presented would easily have overwhelmed a person in Ms. Fonseca's likely state.

In addition to his own testimony, Dr. Sparadeo was also called on to rebut the expert testimony of Dr. Mark Rohrer (discussed infra). During that rebuttal testimony, he opined that both of the narrative reports of CT scans performed on Ms. Fonseca on March 27, 2013 and September 11, 2013 revealed the existence of lesions on her brain; and, that these lesions could suggest—albeit not conclusively show—cognitive impairment and affect Ms. Fonseca's concentration, learning, memory, visual perceptive skills and reasoning ability. See Laboratory Results Report, Pls.' Ex. 27 at 107 and Tufts Medical Center Discharge Order/Plan, Defs.' Ex. A8 at 27. While he agrees that there was no change in the lesions from the first CT scan to the second one, he nevertheless opined that the existence of such lesions indicate that Ms. Fonseca's brain was not normal. Even more pertinent to Dr. Sparadeo's opinion was that some of these lesions were located on the “white matter” of the right frontal lobe of Ms. Fonseca's brain—an area that affects a person's ability to make judgments and decisions. Overall, because CT scans do not show impairments, and rather reveal abnormalities, Dr. Sparadeo testified that they allow one to develop a hypothesis regarding possible cognitive impairment. In this case, Ms.

Neuropsychological Evaluation. Furthermore, Dr. Sparadeo opined that it was unusual that Ms. Fonseca answered no to every question of the Resident Mood Interview portion of the test, which implied to him that she was simply trying to get through that process. See id. at 402.

Fonseca's CT scans further supported his opinion that she was suffering from a cognitive impairment due to the abnormalities of her brain that they reveal.

Accordingly, in Dr. Sparadeo's expert opinion, Ms. Fonseca lacked the cognitive ability to understand the nature of the Arbitration Agreement when she signed it.

E

Doctor Mark Rohrer

Dr. Rohrer is a certified Geriatrician¹⁰ who specializes in Internal Medicine, and currently practices in Jamaica Plain and Needham, Massachusetts. He graduated from Tufts Medical School in 1974 and completed his residency at St. Elizabeth's Medicine of Boston in 1977. From there, Dr. Rohrer has held several positions, some of which include appointments at the University of California Berkeley, Rutgers Medical School, Tufts Medical School, Harvard Medical School, and Beth Israel Deaconess. His present clinical practice involves providing long term acute care as well as providing home medicine to over six-hundred patients per month. Dr. Rohrer has also been an instructor of Medicine and Geriatrics at Harvard Medical School since 2012, and previously taught Post-Acute Care Medicine at Tufts Medical School for over twenty years. Dr. Rohrer was offered and accepted as an expert in Geriatrics and Internal Medicine, which includes Post-Acute Care.

Dr. Rohrer never met Ms. Fonseca, and like Dr. Sparadeo, formed his opinions by reviewing select medical records from Tufts Medical Center and the Pawtucket Center, as well as by reviewing the Pawtucket Center Admissions Packet—including the Arbitration Agreement—and the relevant deposition transcripts. Upon reviewing these materials, Dr.

¹⁰ Geriatrics involves the treatment of patients approximately sixty-five (65) years or older. Dr. Rohrer averred that most of his patients are over seventy years.

Rohrer testified that in his opinion, and to a reasonable degree of medical certainty, Ms. Fonseca understood the nature and effects of signing the Arbitration Agreement on September 12, 2013. He saw no evidence of a legal guardianship or alternate decision maker for Ms. Fonseca, and felt there was ample evidence to suggest to him that Ms. Fonseca had the ability to understand her circumstances, follow directions, and fully participate in her recovery process. See Physical Therapy Initial Evaluation, Defs.' Ex. A5 at 151. Dr. Rohrer did concede that there was no evidence to suggest that a physician evaluated Ms. Fonseca upon her arrival at the Pawtucket Center, but opined that this was not out of the ordinary. He also acknowledged on cross-examination that observations of family and friends could help identify a change in mental status, but he did not believe such a change existed here.

Additionally, Dr. Rohrer testified that part of his duties as an instructor involves teaching about cognitive status, and that he often interacts with patients who suffer from dementia, depression, or other cognitive disabilities. Thus, he assesses the cognitive status of patients on a daily basis. Therefore, in his opinion, the clinical staff at the Pawtucket Center was qualified to assess Ms. Fonseca's cognitive ability on September 12, 2013. Further, Dr. Rohrer testified that based on the records that had been created by that clinical staff, it was his opinion that Ms. Fonseca did not suffer from any cognitive impairment at the time she signed the Arbitration Agreement. Dr. Rohrer did, however, acknowledge on cross-examination that some of Ms. Fonseca's ailments—particularly her stage four chronic kidney disease—put her at greater risk for cognitive impairment.

Additionally, Dr. Rohrer stated that the BIMS test is one of many different tests that a medical center might use to assess a patient's status, and one that he has used on

hundreds of occasions over thirty-nine years of practice. In his opinion, the BIMS test provides a suitable assessment of one's cognitive status. Therefore, he believes that Ms. Fonseca's recorded responses to the BIMS test—which indicate that she was alert and oriented, in a good mood and showed no behavioral issues—sufficiently indicates that she was not suffering from a cognitive impairment—even though this test did not ask Ms. Fonseca to memorize or recall any complex or legal terms. See BIMS Assessment, Pls.' Ex. 22 at 400-07.

When considering the medications that Ms. Fonseca was taking at the time the Arbitration Agreement was signed, Dr. Rohrer testified that, in his opinion, she was not taking any medication that would have affected her decision making ability. In forming that opinion, Dr. Rohrer referenced several documents that were either signed by Ms. Fonseca or noted a qualified staff member's observation of her.¹¹ These documents, he believed, indicated that Ms. Fonseca was oriented and possessed the cognitive ability to understand what she was doing in order to make important healthcare decisions for herself—though he did acknowledge that one can appear alert and oriented but still be cognitively impaired.¹² Additionally, Dr. Rohrer observed what medications Ms. Fonseca was taking upon her discharge from Tufts Medical Center, and while he conceded that some may cause drowsiness, confusion or other side effects, he opined that not every patient who is drowsy or sedated has a cognitive impairment. He also averred that patients often would experience very few side effects from these drugs, and many times a

¹¹ Dr. Rohrer testified that he relied on nurses, therapy professionals and other medical staff constantly to assess a patient's cognitive status.

¹² See Pneumococcal Immunization Informed Consent Form, Defs.' Ex. A2; Influenza Immunization Informed Consent Form, Defs.' Ex. A3; and Pawtucket Skilled Nursing and Rehabilitation Center Progress Notes, Defs.' Ex. A4 (Dr. Rohrer also pointed out that no negative side effects were noted in these progress notes).

patient will experience none at all.¹³ See Tufts Medical Center Discharge Medication List, Pls.’ Ex. 4. He further noted that upon her discharge from Tufts Medical Center, Ms. Fonseca was considered “neurologically intact” and noted that a CT scan performed on her head came back negative; thus, he found no error in not referring her to a neuropsychologist.¹⁴ See Tufts Medical Center Discharge Order/Plan, Defs.’ Ex. A8 at 27.¹⁵ Based on the aforementioned information, Dr. Rohrer was of the opinion that Ms. Fonseca was not suffering from any cognitive impairment on September 12, 2013 and therefore, was aware of the consequences explained to her before signing the Arbitration Agreement.

III

Standard of Review

“The determination of whether the parties have formed an agreement to arbitrate is a matter of state contract law.” DeFontes v. Dell, Inc., 984 A.2d 1061, 1066 (R.I. 2009). Mindful that “[a]rbitration is a matter of contract,” the Court applies “[g]eneral rules of contract construction.” Radiation Oncology Assocs., Inc. v. Roger Williams Hosp., 899 A.2d 511, 514 (R.I. 2006). Considering this, “[w]hen clearly written and expressed, a provision in a written contract to settle by arbitration a controversy thereafter

¹³ Dr. Rohrer also testified that he would have considered Ms. Fonseca to be “opiate tolerant” as opposed to “opiate naïve,” meaning that because she had taken opiate medications in the past, she was less likely to experience stronger side effects from them.

¹⁴ Dr. Rohrer did acknowledge on cross-examination that Ms. Fonseca’s CT scan upon being discharged from Tufts Medical Center suggested the existence of lesions on her brain. However, he also noted that these lesions had not changed from a previous CT scan that had been performed on March 27, 2013, and thus opined that they would not impair Ms. Fonseca’s cognitive ability. See Laboratory Results Report, Pls.’ Ex. 27 at 107.

¹⁵ See also Tufts Medical Center Discharge Summary Results Report, Pls.’ Ex. 3 at 32 and Occupational Therapy Initial Evaluation, Defs.’ Ex. A6 at 179 (suggesting that Ms. Fonseca was neurologically intact).

arising out of such contract, or out of the refusal to perform the whole or any part thereof, or an agreement in writing between two (2) or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract . . .” Sec. 10-3-2. Further, “[a] duty to arbitrate a dispute arises only when a party agrees to arbitration in clear and unequivocal language; and, even then, the party is only obligated to arbitrate issues that it explicitly agreed to arbitrate.” Torrado Architects v. R.I. Dep’t of Human Servs., 102 A.3d 655, 657 (R.I. 2014).

The Rhode Island Supreme Court has articulated a public policy that explicitly favors arbitration. See Radiation Oncology Assocs., 899 A.2d at 515 (stating that “[i]t is true that this Court has voiced a preference in favor of arbitration as a particularly efficacious alternative method of dispute resolution”); Brown v. Amaral, 460 A.2d 7, 10 (R.I. 1983) (“[t]his court has enunciated a policy in favor of resolving any doubt in favor of arbitration.”) With respect to the party seeking to compel arbitration, § 10-3-4 states that “the party aggrieved by the alleged failure, neglect, or refusal of another to perform under a written agreement for arbitration may petition the superior court... for an order directing that the arbitration proceed in the manner provided for in the agreement . . .” Since “a party cannot be required to submit to arbitration any dispute which [it] has not agreed so to submit,” the issue of arbitrability “turns upon the parties’ intent when they entered into the contract from which the dispute ultimately arose.” Radiation Oncology Assocs., 899 A.2d at 514. Accordingly, if the Court finds that it was the parties’ intention to arbitrate and that the agreement was valid, then the motion to compel should be

granted, absent a showing by Plaintiffs of any grounds which exist at law or in equity that show otherwise.

IV

Analysis

In support of their motion to compel arbitration, Defendants proffer several arguments. As a threshold issue, Defendants acknowledge that they are initially required to prove the existence and validity of the Arbitration Agreement, a showing of which would then shift the burden onto Plaintiffs to show that some defense in law or equity exists which would invalidate the Arbitration Agreement. Consequently, Defendants argue that the Arbitration Agreement is valid and enforceable under Rhode Island law. Furthermore, Defendants assert that Plaintiffs have not proven that any of the defenses at law presented to the Court—most notably Ms. Fonseca’s lack of capacity, that the Arbitration Agreement was a contract of adhesion or unconscionable, or that Ms. Fonseca’s signature was procured through fraud or material misrepresentation—are adequate to find that the Arbitration Agreement should be found invalid. The Court will consider these arguments based on their pertinence to this Decision.

A

Validity of the Arbitration Agreement

As a threshold issue, Defendants contend that the Arbitration Agreement is clearly written and expressed, and is thus valid and enforceable. Consequently, it is the duty of Plaintiffs to show that a valid defense in law or equity exists in order to invalidate the Agreement. See Defontes v. Dell Computers Corp., 2004 WL 253560 (R.I. Super. Ct. Jan. 29, 2004) (explaining that upon Defendants proving the existence of a valid and

enforceable arbitration agreement, “the burden then shifts to the plaintiff to show that some defense in law or equity exists which would invalidate the arbitration agreement.”)

As § 10-3-2 of the Arbitration Act reads:

“When clearly written and expressed, a provision in a written contract to settle by arbitration a controversy thereafter arising out of such contract, or out of the refusal to perform the whole or any part thereof, or an agreement in writing between two (2) or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. . . .” Sec. 10-3-2.

Defendants’ argument that the Arbitration Agreement is valid on its face is persuasive. As Defendants point out, the Agreement is three pages long and plainly explains the rights and obligations of the parties. See generally Arbitration Agreement. Moreover, the parties do not dispute that Ms. Fonseca’s signature appears on the last page of the Agreement.¹⁶ As such, the Arbitration Agreement appears to be clearly written and expressed, containing an offer to arbitrate which was presumably accepted by Ms. Fonseca. Accordingly, the Court finds that the Arbitration Agreement is valid and enforceable on its face, absent a showing by Plaintiffs which demonstrates that a defense in law or equity exists to invalidate the Agreement.¹⁷ The Court will consider Plaintiffs purported defenses pertinent to this question.

¹⁶ See also Miller v. Cotter, 863 N.E.2d 537, 547 (Mass. 2007) (stating that there is nothing generally about the nursing home setting that would invalidate the agreement).

¹⁷ It is also noteworthy that Plaintiffs have not argued that the Arbitration Agreement should be deemed invalid on its face, and have instead focused on their affirmative defenses in an attempt to demonstrate why the Agreement should be found invalid.

B

Unconscionability

“Unconscionability, a defense to contracts generally, is also grounds to defeat an arbitration agreement; proof thereof overcomes the presumption favoring arbitration.” Defontes, 2004 WL 253560, at *5. “In order to establish unconscionability, a party must prove that (1) there is an absence of meaningful choice on the part of one of the parties; and (2) the challenged contract terms are unreasonably favorable to one party.” E.H. Ashley & Co., Inc. v. Wells Fargo Alarm Serv., 907 F.2d 1274 (1st Cir. 1990) (applying Rhode Island law). “Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965). “In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power. The manner in which the contract was entered is also relevant to this consideration.” Id. With regards to the second prong of the test, “[i]n determining reasonableness or fairness, the primary concern must be with the terms of the contract considered in light of the circumstances existing when the contract was made.” Id. at 450.

Additionally, a contract can be procedurally unconscionable—resulting from improprieties in contract formation—or substantively unconscionable—resulting from actual contract terms that are unduly harsh, unreasonable, and grossly unfair in the circumstances. See Defontes, 2004 WL 253560, at *10 (“[w]here the factual theory ‘concerns assent to the benefit of the agreement and focuses on the facts surrounding the bargaining process,’ procedural unconscionability is at issue. On the other hand, where

the arguments ‘concern the fairness of the benefit agreement,’ substantive unconscionability is at work”) (internal citations omitted).

Turning to the instant matter, the Court acknowledges that the Arbitration Agreement does not appear unfair on its face. Indeed, it is only three pages long, clearly indicates that it is a voluntary agreement, was not in minuscule font and was not a condition for admission. However, considering the surrounding circumstances, the Arbitration Agreement was unfair in its presentation. See Williams, 350 F.2d at 449. In other words, while the Court does not believe that the Arbitration Agreement is substantively unconscionable, it does conclude from the evidence and testimony presented that it is procedurally unconscionable.

Ms. Fonseca was admitted to the Pawtucket Center on the night of September 11, 2013. At some point the next day—though notably no witness could testify for sure as to what time—she was asked to review the Pawtucket Center Admissions Packet with Ms. Marwell-Bussick, despite being heavily medicated and in a vulnerable situation. A review of the Admissions Packet presented to Ms. Fonseca reveals that it is quite lengthy and could easily be deemed overwhelming to a person in Ms. Fonseca’s state—as was suggested by Dr. Sparadeo.¹⁸ The Arbitration Agreement is just one of several documents that make up the Admissions Packet, and appears to have been presented to Ms. Fonseca in a manner reflecting simple “standard procedure” rather than separately with clearer

¹⁸ Specifically, the Pawtucket Center Admissions Packet consisted of these documents: Consent for Treatment and Release of Information, Admission Agreement, Representative Designation, Screen for Medicare Secondary Payor (MSP) Questionnaire, Resident Fund Accounts, the Arbitration Agreement, Notice of Non-Coverage by Medicare, Admission Financial Questionnaire, Consent for Center to Assist in Establishing Medicaid Eligibility, and Credit/Debit Card and Direct Transfer Authorization.

explanation, as the Court believes a document of this magnitude and with these consequences ought to be—especially considering Ms. Fonseca had no legal training, and the Arbitration Agreement contained some important legal terms.¹⁹

Additionally, while the Court finds no fault in the actions of Ms. Marwell-Bussick, the fact remains that she has no legal or medical training and was not qualified to determine if it was appropriate to ask Ms. Fonseca to agree to binding arbitration in her current mental state on September 12, 2013. Notably, Ms. Marwell-Bussick testified that she was the only one to go over the Admissions Packet with Ms. Fonseca—as this was routine practice at the Pawtucket Center—and the Arbitration Agreement was buried exactly in the middle of the Admissions Packet.

Further, Ms. Marwell-Bussick’s testimony revealed that she herself did not fully understand the ramifications of signing a binding Arbitration Agreement, as she admitted to not knowing what arbitration meant. According to her testimony, Ms. Marwell-Bussick’s supervisor, Sharon Glaude, trained her to explain to patients that arbitration meant that “you tell your side and they tell their side and a neutral person decides.” Ms. Marwell-Bussick was also unaware that the Arbitration Agreement was binding on a patient’s executors and heirs.

Accordingly, the Court is of the opinion that the Admissions Packet was completed in a manner that was routine, with the goal being to simply complete the

¹⁹ While Defendants argue that the Arbitration Agreement contained a fifteen day rescission period which Plaintiffs’ failed to execute, the Court is not persuaded that this alone prevents the Agreement from being procedurally unconscionable. It is certainly plausible that Plaintiffs were not aware of this provision until it had lapsed, given that Ms. Fonseca more likely than not failed to comprehend the ramifications of the Arbitration Agreement or even gain awareness of the rescission period, and none of her family members appeared to ever see the Agreement.

process rather than focus on important details and ensure that the patient fully understood each document.²⁰ Ms. Marwell-Bussick testified that she filled in all of the blanks in the forms, and then just put the papers in front of the patient to sign. Furthermore, the Court notes that attaining a patient's consent to subject her to binding arbitration is fundamentally different and more important than obtaining her permission for more trivial matters, such as salon treatment or telephone service. To present such a document in the same manner as routine administrative documents to a person all alone, pumped up on pills and in new surroundings, after having been discharged from a hospital following surgery and a fall, is fundamentally unfair. Defendants argue that Ms. Fonseca had no guardian and was legally competent to sign the Arbitration Agreement. While that may be true, and even assuming Ms. Fonseca had the apparent mental capacity to make those decisions, the procedural process for the execution of the Arbitration Agreement was unconscionable, and it is therefore unenforceable.

C

Lack of Capacity

While the Arbitration Agreement in this case is unenforceable because the manner in which it was presented to Ms. Fonseca makes it unconscionable, the Court finds it prudent to also address Plaintiffs' affirmative defense of lack of capacity, as the facts and

²⁰ By way of example, the Court notes its own questioning of Ms. Marwell-Bussick regarding the second page of the Consent for Treatment and Release of Information document. See Pawtucket Center Admissions Packet, Pls.' Ex. 19 at 0007. On this page, it is indicated under Center Services that Ms. Fonseca did not give her permission for television service, but did give her permission for cable service—an obviously illogical decision. While the Court recognizes that such a discrepancy appears harmless on its face, it also suggests that the standard operating procedure when reviewing the Admissions Packet with patients was to quickly check through the items in the packet and then attain the patient's signature—not to carefully scrutinize and explain the ramifications of the decisions being made by the patient.

reasoning pertaining to both defenses are related. Plaintiffs contend that Ms. Fonseca lacked the mental capacity necessary to validly enter into the Arbitration Agreement when she signed it on September 12, 2013. Specifically, Plaintiffs argue that the Arbitration Agreement was just one of several documents presented to Ms. Fonseca by Ms. Marwell-Bussick upon her admission to the Pawtucket Center, and that it was presented to her by a person with no legal or medical training at a time when Ms. Fonseca was heavily medicated and in a vulnerable mental state. Conversely, in considering the affirmative defense of lack of capacity, Defendants aver that as an adult, Ms. Fonseca is presumed to have had contractual capacity when signing the Arbitration Agreement, and Plaintiffs cannot show otherwise. See Restatement (Second) of Contracts § 15 (1981) (explaining that “[w]here there has been no previous adjudication of incompetency, the burden of proof is on the party asserting incompetency”); see also Connor v. Schlemmer, 996 A.2d 98 (R.I. 2010).

A person lacks capacity to contract if at the time of the transaction he or she was unable to understand the nature and effects of his or her acts. Thus, such contracts are voidable. See Landmark Med. Ctr. v. Gauthier, 635 A.2d 1145, 1148 (R.I. 1994). The Court in Landmark Med. Ctr. stated that “[i]ncidents of mental illness alone will not incapacitate a person from making a valid contract provided that person is able to understand the nature and effect of his or her acts.” Id. Further, the Court explained that in the absence of probative evidence which shows that a person was suffering from mental incapacity at the relevant time, a general allegation of chronic mental illness does not suffice to negate capacity. Id. The Restatement (Second) of Contracts § 15 (1981) further provides that “(1) [a] person incurs only voidable contractual duties by entering

into a transaction if by reason of mental illness or defect (a) he is unable to understand in a reasonable manner the nature and consequences of the transaction. . . . ”²¹

Additionally, the evidence supporting lack of capacity to sign a legal document must be directed at the person’s mental state on the date the document was signed. See Sosik v. Conlon, 91 R.I. 439, 443, 164 A.2d 696, 698 (1960). Thus, the pertinent inquiry for this Court is whether or not Plaintiffs can provide probative evidence showing that Ms. Fonseca was unable to understand the nature and effect of her actions when she signed the Arbitration Agreement on September 12, 2013. This Court concludes that Plaintiffs have met this burden.

As a threshold issue, the Court is persuaded that Ms. Fonseca’s medical history—including the fact that she suffered several falls in the month leading up to her admission

²¹ Comment b of the Restatement (Second) of Contracts § 15 is also instructive here when assessing competency:

“The standard of competency. It is now recognized that there is a wide variety of types and degrees of mental incompetency. Among them are congenital deficiencies in intelligence, the mental deterioration of old age, the effects of brain damage caused by accident or organic disease, and mental illnesses evidenced by such symptoms as delusions, hallucinations, delirium, confusion and depression. Where no guardian has been appointed, there is full contractual capacity in any case unless the mental illness or defect has affected the particular transaction: a person may be able to understand almost nothing, or only simple or routine transactions, or he may be incompetent only with respect to a particular type of transaction. Even though understanding is complete, he may lack the ability to control his acts in the way that the normal individual can and does control them; in such cases the inability makes the contract voidable only if the other party has reason to know of his condition. Where a person has some understanding of a particular transaction which is affected by mental illness or defect, the controlling consideration is whether the transaction in its result is one which a reasonably competent person might have made.”

to the Pawtucket Center—presents multiple indications that she was likely suffering from some cognitive impairment. Indeed, even Defendants’ expert, Dr. Rohrer, conceded on cross-examination that Ms. Fonseca possessed factors that would put her at risk for cognitive impairment—particularly her stage four kidney disease. Furthermore, the Court is persuaded by the testimony of Dr. Sparadeo that the lesions that existed on Ms. Fonseca’s brain by the two CT scans performed in 2013 suggest an abnormality, which increases the likelihood that she was suffering from some cognitive impairment on September 12, 2013. When this medical history is coupled with the testimony of Ms. Baker and Mr. Martel—both of whom testified to Ms. Fonseca’s abnormal behavior and seemingly confused state when they visited her on September 12, 2013—the facts suggest that she was likely cognitively impaired at the time she signed the Arbitration Agreement.²²

Furthermore, both experts noted that Ms. Fonseca began taking Gabapentin six days prior to her admission to the Pawtucket Center—which suggests that she would likely still be quite susceptible to its side effects (dizziness, confusion, etc.). The Court also notes Dr. Sparadeo’s testimony that she appeared to have been administered this medication on the morning of September 12, 2013—again increasing the likelihood that she was experiencing its side effects at the time of the execution of the Arbitration Agreement. Additionally, the Court is not convinced by Dr. Rohrer’s testimony that the

²² Defendants suggest that the testimony of Ms. Baker and Mr. Martel stating that Ms. Fonseca requested specific items from them, such as her ATM card and personal hygiene products, indicates that her capacity was intact. The Court disagrees, as the testimony of Ms. Baker and Mr. Martel seemed to clearly suggest that Ms. Fonseca asked for such items multiple times without remembering that she had already done so previously, and further that her requests were often not lucid or comprehensible, suggesting that she was in fact cognitively impaired.

notations made by Pawtucket Center staff in Ms. Fonseca's medical record suggesting she was alert and oriented indicate that she was not cognitively impaired—especially considering that such an opinion was not noted by a licensed neuropsychologist,²³ and is inconsistent with the observations of Ms. Baker and Mr. Martel, both of whom testified to Ms. Fonseca's delirious state on September 12, 2013. Moreover, Dr. Sparadeo's testimony regarding the unreliability of the BIMS test is persuasive in this case, as Ms. Fonseca's ability to understand the questions posed to her while being administered this test do not appear comparable to the ability to understand the legal ramifications of signing the Arbitration Agreement.

Accordingly, this Court finds that the probative evidence provided by Plaintiffs shows that Ms. Fonseca lacked the mental capacity to enter into a binding arbitration agreement on September 12, 2013, and therefore, the Arbitration Agreement in this case is unenforceable.

V

Conclusion

Upon consideration of the parties' arguments, the testimony of the witnesses, and the remaining evidence before it, this Court finds that Ms. Fonseca lacked the mental capacity necessary to understand what she was entering into when she signed the Arbitration Agreement on September 12, 2013. The Arbitration Agreement was presented by someone with no legal or medical training to Ms. Fonseca in conjunction with a plethora of other documents when she was in a heavily medicated state and likely

²³ Defendants rely heavily on the notations of occupational therapists, physical therapists, social workers and nurses, but notably cannot point to any evaluation of Ms. Fonseca by a neuropsychologist, or other professional who is properly trained to assess a patient's cognitive status.

experiencing a cognitive impairment. Additionally, it also appears to this Court that the process by which Ms. Fonseca's admission paperwork was completed was hastily done in an effort to simply complete it quickly rather than in a careful, detailed oriented manner. Accordingly, Defendants' motion to stay proceedings and compel arbitration is denied.²⁴ Counsel will present the appropriate Order.

²⁴ Given that this Court has determined that Ms. Fonseca lacked the adequate mental capacity to enter into a binding arbitration agreement on September 12, 2013, and also that the manner in which the Arbitration Agreement was presented to her was unconscionable, the Court need not discuss Plaintiffs' remaining affirmative defenses of material misrepresentation, contract of adhesion, or failure to knowingly and voluntarily waive the constitutional right to a jury trial.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: Kristen Baker, et al. v. Pawtucket Skilled Nursing and Rehabilitation, LLC, et al.

CASE NO: PC 15-0181

COURT: Providence County Superior Court

DATE DECISION FILED: August 16, 2016

JUSTICE/MAGISTRATE: Licht, J.

ATTORNEYS:

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