STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH HUBBARD, JR.,

Plaintiff-Appellee,

and

ENNA R. HUBBARD, as Next Friend of GWENDOLYN HUBBARD, a minor, CYNTHIA HUBBARD, a minor, and ESTATE OF MONICA HUBBARD,

Plaintiffs,

v

AUTOMOBILE CLUB INSURANCE ASSOCIATION,

Defendant-Appellant.

UNPUBLISHED
September 9, 1997

No. 190815
Washtenaw Circuit Court
LC No. 92-7743 NF

Before: Cavanagh, P.J., and Reilly and White, JJ.

PER CURIAM.

Defendant Automobile Club Insurance Association appeals as of right from Washtenaw Circuit Judge Donald E. Shelton's order confirming the $20,000 arbitration award in favor of plaintiff Joseph Hubbard, Jr. We affirm.

The underlying facts are not in dispute. On July 7, 1991, plaintiff Joseph Hubbard, Jr. (hereinafter "plaintiff") and his wife Monica were returning from Cedar Point with plaintiff's two younger sisters, Gwendolyn and Cynthia Hubbard, and plaintiff's nephew, Javon Hurston, when an unidentified van struck plaintiff's car, causing the car to hit a guardrail, become airborne, and crash into a bridge abutment. Monica Hubbard was killed in the accident, and all other occupants sustained injuries.

Defendant insured plaintiff s car under a liability policy with limits of $20,000 per person and $40,000 per occurrence. The policy provided uninsured motorists (UM) benefits with the same 20/40 limits.

Gwendolyn, Cynthia, Javon and the Estate of Monica Hubbard brought claims against plaintiff. Defendant paid $20,000 to the estate and $20,000 split among Gwendolyn, Cynthia and Javon under the liability provisions of plaintiff's insurance policy. Thereafter plaintiff, his wife's estate, Cynthia and Gwendolyn filed suit against defendant seeking UM benefits under plaintiff's policy. Javon settled with another insurer with whom Javon's father had a policy.

Defendant moved for summary disposition, claiming that it had no UM liability because there was no contact between the unidentified van and plaintiff's car and further claiming that, even if there was contact, defendant was not required to pay additional amounts because plaintiff's insurance policy contains a provision entitling defendant to offset the amount it paid under the liability provisions of the policy ($40,000) against its total possible UM exposure ($40,000), leaving a net of zero.

Following a trial in which the jury determined that there had been contact between the unidentified van and plaintiff's car, the remaining set-off issue went to independent arbitration pursuant to the terms of defendant's insurance policy.

The arbitrators did not reach a unanimous decision. The neutral arbitrator wrote the majority opinion, and the other two each wrote separate opinions, concurring in part and dissenting in part. With respect to plaintiff's claim, the only claim at issue in this appeal, the majority of arbitrators rejected defendant's argument that the $20,000 otherwise available to plaintiff under the UM provisions should be reduced by the $40,000 that defendant had already paid in liability damages, finding that the set-off provision of the policy was ambiguous and unconscionable.

Following the arbitration, defendant filed a motion to vacate the arbitration award. The court denied defendant's motion, concluding that the arbitrators' interpretation of the contract was not contrary to any established principle of law.

On appeal, defendant argues that the arbitrators exceeded their powers when they disregarded the set-off provision contained in the UM section of defendant's automobile insurance policy. We agree with the arbitrators' conclusion that the set-off provision was ambiguous and therefore find no error of law warranting vacation of the arbitration award.

A court's power to vacate an arbitration result is very limited. *Gordon Sel-Way, Inc v Spence Brothers, Inc*, 438 Mich 488, 495; 475 NW2d 704 (1991); MCR 3.602(J). Defendant argues that the arbitrators exceeded their authority in rendering their decision by acting "in contravention of controlling principles of law." *DAIIE v Gavin*, 416 Mich 407, 434; 331 NW2d 418 (1982); MCR 3.602(J)(1)(c).

> The character or seriousness of an error of law which will invite judicial action to vacate an arbitration award under the formula we announce today must be error so

material or so substantial as to have governed the award, and but for which the award would have been substantially otherwise. [*Gavin, supra* at 443.]

The set-off provision at issue is found in the policy under the subheading "LIMITS OF LIABILITY" in "PART IV—UNINSURED MOTORISTS INSURANCE COVERAGE" and states:

> Any amount payable will be reduced by:
>
> payment made by the owner or operator of the **uninsured motor vehicle** or organization which may be legally liable;
>
> payment made under the Liability Insurance Coverage of this Policy;
>
> payment made under Medical Payments Coverage of any policy.

The second of the three subparts of this provision is at issue in this case.

The second subpart of the set-off provision does not identify the recipient of the payment that will reduce an individual's UM recovery. Defendant has taken the position that amounts paid to individuals other than plaintiff (specifically, $40,000 paid to plaintiff's wife's estate, Gwendolyn and Cynthia Hubbard and Javon Hurston) should be deducted from any amount plaintiff would have been entitled to recover under the UM provisions. However, an alternative interpretation of the second subpart would limit the amount an individual's UM recovery is reduced to the amount received by that individual under the liability provisions of the policy. According to this interpretation, the $20,000 payable to plaintiff under the UM provision would not be reduced because he did not receive any amount under the liability provisions of the policy.

Because the second subpart of the set-off provision may reasonably be understood in different ways[1], it is ambiguous and must be construed against the insurer. *Clevenger v Allstate Ins Co*, 443 Mich 646, 654; 505 NW2d 553 (1993); *Michigan Mutual Ins Co v Dowell*, 204 Mich App 81, 87; 514 NW2d 185 (1994). Thus, the arbitrators did not commit an error of law in refusing to reduce plaintiff's recovery under the UM provision by the amounts paid to the estate, Gwendolyn, Cynthia and Javon Hurston under the liability provisions of the policy. The circuit court correctly affirmed the arbitration award.

We note that the arbitrators based their decision to refuse to enforce the set-off provision because they perceived a different ambiguity than that discussed above and because they concluded the provision was unconscionable. Because we conclude that the arbitration award was correctly affirmed, it is unnecessary for us to resolve whether there were other bases for the arbitrators' decision not to enforce the provision.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Maureen Pulte Reilly
/s/ Helene N. White

[1] The reasonableness of defendant's interpretation is questionable, particularly when the second subpart is examined in context. None of the three subparts of this provision indicate to whom the payment must be made for defendant to set off the amount, and all of the subparts are written in a similar form. Defendant would have us imply the words "to anyone" following "payment made" in the second subpart. Yet, if defendant's interpretation was applied to the other subparts, the results would be patently absurd. For example, under the first subpart, if one of the occupants successfully collected some amount from an owner of an uninsured vehicle, that amount would be deducted from each occupant's UM recovery, even if defendant paid nothing under the liability provisions of the policy and the other occupants obtained no other benefits. Under the third subpart, amounts that anyone received under the medical payments coverage of "any policy" could be deducted from the insured's UM recovery even if the insured received no other benefit.