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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN Justice

PART 17

Index Number : 115505/2010
FLORES, CLAUDIA
VS.
ALLSTATE INSURANCE COMPANY
SEQUENCE NUMBER : 001
VACATE OR MODIFY AWARD

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion MS decided per attached interim decision

FILED

OCT 04 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9/23/11

_____ J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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CLAUDIA FLORES et al,

Index No. 115505/10

Petitioners,

v.

ALLSTATE INSURANCE COMPANY

Respondent.

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EMILY JANE GOODMAN, J.S.C.:

This proceeding arises out of an arbitration hearing, held pursuant to a Supplementary Uninsured/Underinsured Motorist Endorsement. Petitioners seek to vacate an arbitration award of $0 on the basis that the arbitrator, who found Petitioner pedestrian child comparatively negligent when he was struck by a car, exceeded his authority by granting adjournments to Respondent, in order to obtain evidence. Petitioners contend that if the adjournments were not permitted, the arbitrator would not have found the child partially responsible for his own injuries. Although not stated in the decision, based on a review of the last paragraph of the award, the arbitrator found that the child was 50 percent responsible for his injuries. Petitioners also argue that the arbitrator's finding that the damages totaled the policy amount of $100,000, was arbitrary and capricious, because higher damages should have been awarded. Petitioners view the arbitrator's statement that the child's hospital stay was mostly observational and uneventful, as evidence that the arbitrator did not read the hospital records which indicate that the Petitioner child became tachycardic and hypertensive, had a Foley catheter inserted, blood in the urine and a posttraumatic seizure, and in reply, maintain that damages should have been

higher. In reply, Petitioners also maintain that the arbitrator's method of calculation of when to apply the offset, in light of the finding of comparative fault, was improper. The arbitrator found that Petitioners' damages totaled $100,000, which he reduced by 50 percent fault, leaving $50,000. He then applied the offset of $50,000, resulting in an award of zero. Petitioners maintain that the arbitrator should have first applied offset of $50,000 to the damages of $100,000, leaving $50,000, and only then should have subtracted 50 percent for fault, leaving $25,000.

Petitioners' argument that the arbitrator exceeded his power by granting two adjournments is without merit. As noted by Respondent, the decision to grant an adjournment is within the discretion of the arbitrator (see Kool Air Systems, Inc. v Syosset Institutional Builders, Inc., 22 AD2d 672 [1st Dept 1964]). Even assuming that the arbitrator abused his discretion, Petitioners are incorrect in concluding that had the adjournments been denied, the child would not, and could not, be found partially responsible for his injuries. Based upon the child's description of the unobstructed location of the accident, the arbitrator found it incredible that the car came out of nowhere, and rationally concluded that the child was not paying attention to his surroundings. The testimony of the driver for which the hearing was adjourned, only bolstered this finding.

Petitioners' argument, clarified for the first time in Reply, regarding the amount of damages, cannot support vacature of the award. Although Petitioners maintain that there was nothing precluding the arbitrator from determining that the amount of damages exceeded the policy amount (which would result in Petitioners receiving a higher award after subtracting the offset and deduction for fault), there is no expert evidence indicating that the injuries should have been valued at more than $100,000.

However, Petitioners' argument, raised for the first time in Reply, regarding the arbitrator's method of calculation, for which the Court directed a Sur-Reply, may have merit. Both parties do not dispute that the arbitrator was entitled to apply a set off of $50,000, paid to Petitioners on behalf of the driver of the car. However, Petitioners maintain that the arbitrator should have deducted the offset of $50,000 from the total amount of damages and only then, deducted the percentage of fault. In maintaining that the arbitrator's method was proper, Respondent cites Liberty Mutual Ins. Co v Tetteh (277 AD2d 239 [2d Dept 2000]). However, this case only stands for the proposition that "the availability of offsets are matters expressly within the language of the arbitration clause of the relevant Supplemental Uninsured Motorist endorsements, and thus must be determined at arbitration" (id. at 240). There is no issue of whether the offset is available; the issue is the proper method of calculation–i.e., when to apply the offset when there is a finding of comparative fault; Liberty Mutual Ins. Co. sheds no light on that issue. Respondent also cites Prudential Property & Casualty Ins. Co. (145 AD2d 492 [2d Dept 1988]), where the arbitrator applied an offset for worker's compensation benefits, but that case did not involve comparative fault. Respondent cites to the part of the decision where the court refused to vacate a portion of the award as to the offset, because it was in accordance with the terms of the policy and had a rational basis. However, in the court also vacated a portion of the award as to the offset because it was irrational. Further, Respondent has not demonstrated that the method of calculation was in accordance with the terms of the policy. In fact, no portion of the policy endorsement is cited to support the arbitrator's method of calculation. The policy attached by Respondent does indicate that the maximum SUM payment is the difference between the SUM limit ($100,000 here) and payments received by the insured on behalf of other legal liable persons (here the $50,000 paid), but that is not the issue in dispute. Petitioners

similarly fails to support their argument, cites no cases, merely concluding that CPLR §1411 supports their argument, with no analysis. Accordingly,

It is hereby

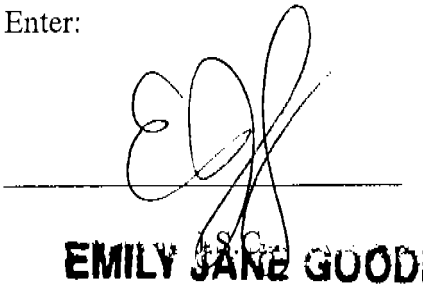
ORDERED that the petition is held in abeyance pending further briefs on the sole issue of the arbitrator's method of calculation; and it is further

ORDERED that both sides submit their briefs by November 1, 2011 in Room 551 at 60 Centre Street.

This Constitutes the Decision and Order of the Court

Dated: September 23, 2011

Enter:



EMILY JANE GOODMAN J.S.C.