NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NOS. A-4024-05T5
A-4249-06T5

MARK TLUMACKI and
DEBRA TLUMACKI,

Plaintiffs-Respondents,

v.

CNA INSURANCE COMPANIES,
CNA INSURANCE GROUP, and
CONTINENTAL INSURANCE COMPANY,

Defendants/Third-Party
Plaintiffs-Appellants,

v.

CLARENDON NATIONAL INSURANCE
COMPANY,

Third-Party Defendant-
Respondent.

MARK TLUMACKI and
DEBRA TLUMACKI,

Plaintiffs-Respondents,

v.

CNA INSURANCE COMPANIES,
CNA INSURANCE GROUP, and
CONTINENTAL INSURANCE COMPANY.

Defendants-Appellants.

Argued February 3, 2009 – Decided March 31, 2009

Before Judges Wefing, Yannotti and LeWinn.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Docket Nos. L-21-04 and L-2076-06.

Jerald J. Howarth argued the cause for appellants (Howarth & Associates, L.L.C., attorneys; Mr. Howarth, on the brief).

Bruce H. Stern argued the cause for respondents Mark and Debra Tlumacki (Stark & Stark, attorneys; Mr. Stern, of counsel and on the brief).

John J. Russo argued the cause for respondent Clarendon National Insurance Company (DiFrancesco, Bateman, Coley, Yospin, Kunzman, Davis & Lehrer, P.C., attorneys; Mr. Russo, on the brief).

PER CURIAM

These appeals arise from a claim by plaintiff Mark Tlumacki for underinsured motorist (UIM) coverage under a policy of insurance issued by defendants CNA Insurance Companies, CNA Insurance Group and Continental Insurance Company (collectively, CNA). CNA appeals from orders entered by the trial court that, among other things, dismissed its third-party complaint against Clarendon National Insurance Company (Clarendon) for contribution and/or indemnification; compelled it to participate in UIM arbitration; and confirmed the arbitration award entered in favor of plaintiff. For the reasons that follow, we affirm.

I.

We begin with a brief recitation of the relevant facts. In 1998, plaintiff was employed as a chief mechanic by Ferraro Trucking Co., Inc. (Ferraro), a company owned by his son, Mark Tlumacki, Jr. (Mark). Ferraro owned, and allowed plaintiff to use, a 1994 Land Rover. That vehicle, and several others owned by Ferraro, were insured under a CNA insurance policy that provided UIM coverage of $1 million.

On July 2, 1998, plaintiff and Mark drove the 1994 Land Rover to the Woodbridge Land Rover dealership to have it serviced. There, Mark signed an agreement with Enterprise Rent-A-Car (Enterprise) to rent a "service loaner" or replacement vehicle. The dealership paid the rental fee.

At approximately 7:26 p.m. that evening, plaintiff was injured in an accident while riding as a passenger in the rental vehicle, which was being driven by his wife, Debra Tlumacki (Debra). The rental vehicle was struck by a car that was being driven by Victor Hsu (Hsu). According to Debra, Hsu "ran the stop sign" at an intersection and she was unable to stop in time to avoid the collision.

The vehicle that Hsu was driving was owned by his mother, Meige Hsu. Liberty Mutual Insurance Company (Liberty Mutual) insured the Hsu vehicle. Its policy provided $250,000 of

liability coverage. Enterprise was self-insured and it did not provide UIM coverage. The Land Rover dealership was insured under a policy issued by Clarendon, which provided $1 million in UIM coverage.

In March 2000, plaintiff and Debra filed an action against Hsu and his mother. Plaintiff alleged, among other things, that he sustained in the accident a closed head injury, abbreviated loss of consciousness, post-traumatic amnesia, and traumatic brain injury with residual cognitive neurological impairments. Debra asserted a claim for the loss of her husband's services, society and consortium.

Hsu and his mother filed a third-party complaint against Debra. CNA provided coverage to Debra and had an answer to the third-party complaint filed on her behalf. CNA also intervened in the personal injury action, as permitted by Zirger v. General Accident Insurance Company, 144 N.J. 327, 340-41 (1996).

The trial in the matter commenced on June 17, 2003. The following day, plaintiff and Debra agreed to settle their claims against the Hsus for $225,000, and the Hsus agreed to settle their claims against Debra for $35,000. Plaintiff and Debra provided CNA with notice of the proposed settlement pursuant to Longworth v. Van Houten, 223 N.J. Super. 174 (App. Div. 1988). Plaintiff and CNA did not, however, provide notice to Clarendon.

By letter dated June 20, 2003, plaintiff made a formal demand for UIM arbitration. CNA rejected plaintiff's demand. In a letter dated June 24, 2003, CNA's attorney stated that plaintiff was not entitled to UIM coverage because he failed to exhaust the limits under the policies covering the vehicles and failed to protect CNA's subrogation rights. In a letter dated July 8, 2003, CNA's counsel further asserted that CNA never gave plaintiff permission to settle the personal injury action. He again stated that plaintiff did not qualify for UIM benefits.

In January 2004, plaintiff filed an order to show cause and verified complaint seeking to compel CNA to submit his claim to UIM arbitration.[1] This action was docketed as MER-L-21-04. On February 20, 2004, CNA filed an answer denying coverage. CNA subsequently filed a third-party complaint against Clarendon seeking contribution and/or indemnification. In its third-party complaint, CNA alleged that Clarendon was obligated to provide primary UIM coverage to plaintiff.

Plaintiff thereafter filed a motion for summary judgment on his demand for UIM arbitration, and CNA and Clarendon filed cross-motions for summary judgment. The trial court considered the motions on January 6, 2006, and placed its decision on the

[1] We note that Debra also was a plaintiff in this action. It appears, however, that only plaintiff was asserting a UIM claim.

record that day. The court granted plaintiff's motion for summary judgment, denied CNA's cross-motion and granted Clarendon's cross-motion. The court entered orders dated January 9, 2006, which memorialized its decision. In the order granting plaintiff's motion, the court directed plaintiff and CNA to designate their respective arbitrators within twenty days.

CNA did not appoint an arbitrator but filed a motion for reconsideration of the January 9, 2006 order. Plaintiff filed a cross-motion for appointment by the court of a defense arbitrator. The trial court considered the motions on March 17, 2006, and placed its decision on the record on that date. The court denied CNA's motion for reconsideration and granted plaintiff's motion for appointment of a defense arbitrator.

The court entered an order dated March 17, 2006, which memorialized its decision and appointed Gregory J. Giordano (Giordano) to serve as the defense arbitrator. CNA filed a notice of appeal from the trial court's January 9, 2006 and March 17, 2006 orders. This appeal was docketed as A-4024-05.

The arbitration hearing was conducted on July 5, 2006, by Giordano, John Gorman (Gorman) and Louis J. DeMille, Jr. (DeMille), a neutral arbitrator selected by Giordano and Gorman. On July 31, 2006, the arbitrators issued their decision. By a unanimous vote, the arbitrators found that Hsu was 100%

responsible for the accident. In addition, by a two-to-one-vote, the arbitrators awarded plaintiff damages in the amount of $845,000.

In August 2006, plaintiff filed a summary action to confirm the arbitration award.[2] This action was docketed as MER-L-2076-06. Thereafter, CNA filed a cross-motion to vacate the award. In October 2006, we granted CNA's motion to dismiss the appeal docketed as A-4024-05 and remanded the matter to the trial court until plaintiff's newly-filed action was resolved.

On January 12, 2007, the court conducted oral argument in the matter and placed its decision on the record. The court denied CNA's motion to vacate the award and confirmed the award. The court entered a judgment dated January 29, 2007, for plaintiff and against CNA in the amount of $595,000, which represented the $845,000 awarded by the arbitrators, less the $250,000 liability limits under Hsu's policy. CNA then filed a motion for reconsideration, which the court denied in an order entered on April 3, 2007.

On April 13, 2007, CNA filed a notice of appeal from the trial court's January 29, 2007 and April 3, 2007 orders. This appeal was docketed as A-4249-06. We entered an order on

[2] Debra also was a plaintiff in this matter; however, the award had been entered in favor of plaintiff only.

September 4, 2007, vacating the remand of A-4024-05 and consolidating the appeals.

II.

CNA first argues that the trial court erred by granting Clarendon's motion for summary judgment and dismissing CNA's third-party claim for contribution and/or indemnification.

In considering whether the trial court erred by granting summary judgment in favor of Clarendon, we apply the same standard that the trial court applies when it considers a summary judgment motion. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). Rule 4:46-2(c) provides that summary judgment may be granted only when the evidential materials before the court "show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

Here, the trial court held that CNA had a duty to provide Longworth notice to Clarendon regarding the proposed settlement of plaintiff's claims in the underlying personal injury action and its failure to do so barred it from asserting a claim for contribution or indemnification against Clarendon for plaintiff's UIM claim. CNA maintains that the court erred by granting Clarendon's motion. We disagree.

It is well-established that, in order to perfect a claim for UIM coverage, the claimant must provide the carrier with prompt written notice of any tentative settlement with a tortfeasor in the underlying personal injury action. Longworth, supra, 223 N.J. Super. at 194-95. The purpose of the notice is to protect the insurer's right to subrogation against the tortfeasor. Id. at 190.

In Longworth, we set forth the procedure to be followed in providing such notice. We stated that:

> as a matter of future conduct, an insured receiving an acceptable settlement offer from the tortfeasor should notify his UIM carrier. The carrier may then promptly offer its insured that sum in exchange for assignment to it by the insured of the claim against the tortfeasor. While promptness is to be ultimately determined by the circumstances, 30 days should be regarded as the presumptive time period if the insured notices his carrier prior to assignment of a trial date. In any event, an insured who has not received a response from his carrier and who is in doubt as to whether acceptance of the tortfeasor's offer will impair his UIM rights may seek an immediate declaratory ruling from the trial court on order to show cause on such notice as is consistent with the circumstances.
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> [Id. at 194-95.]

In Rutgers Casualty Insurance Co. v. Vassas, 139 N.J. 163, 171 (1995), the Supreme Court endorsed the procedure spelled out in Longworth.

As we stated previously, CNA intervened in the underlying personal injury action. CNA's attorney participated in discovery. CNA's attorney also was present for the trial and the settlement discussions. Plaintiff's attorney provided CNA's attorney with notice of the proposed settlement of plaintiff's and Debra's claims against the Hsus, as required by Longworth.

It is undisputed that neither plaintiff nor CNA provided Clarendon with notice of the underlying action, the UIM claim or the proposed settlement, within the time required by Longworth. Clarendon first received notice of plaintiff's UIM claim on June 2, 2005, when CNA filed its third-party complaint seeking contribution and/or indemnification from Clarendon.

The trial court correctly ruled that, under the circumstances, CNA had a duty to provide Longworth notice to Clarendon. The trial court's decision was in accord with Hallion v. Liberty Mut. Ins. Co., 337 N.J. Super. 360 (App. Div. 2001). In Hallion, the plaintiff had been involved in a multi-vehicle accident. Id. at 363. She had been operating a motor vehicle owned by her daughter. Ibid. The plaintiff was insured by Liberty Mutual Insurance Company (Liberty Mutual) and her policy had UIM coverage of $500,000. Id. at 364. In addition, the car in which the plaintiff was riding was insured by CNA Insurance Company (CNA Insurance), under a policy that provided $300,000

in UIM coverage. Ibid. The automobile that struck the plaintiff's car had liability coverage of only $15,000. Ibid.

The plaintiff filed a personal injury action against the driver of the automobile that collided with her. Ibid. The driver's insurer offered to settle the plaintiff's claim for the policy limits. Ibid. The plaintiff had provided Longworth notice to Liberty Mutual; however, neither the plaintiff nor Liberty Mutual notified CNA Insurance of the insurer's settlement offer. Ibid.

After the settlement was consummated, the plaintiff made demands upon Liberty Mutual and CNA Insurance for UIM arbitration. Id. at 364-65. Liberty Mutual appointed an arbitrator but CNA Insurance rejected the demand. Ibid. The plaintiff brought an action against Liberty Mutual and CNA Insurance seeking a declaration that the insurers were obligated to provide UIM coverage. Ibid.

CNA Insurance argued that it was not required to provide UIM coverage because neither the plaintiff nor Liberty Mutual had informed it of the settlement offer in the underlying litigation, as required by Longworth. Id. at 365. We held that, under the circumstances, CNA Insurance was not obligated to provide UIM coverage to the plaintiff. Id. at 369. We concluded that the plaintiff had fulfilled her obligation under Longworth

by providing notice of the proposed settlement to Liberty Mutual, and Liberty Mutual had the "ultimate responsibility" to provide "Longworth notice to the primary carrier." Id. at 373.

In reaching this conclusion, we relied in part upon Prudential Property & Casualty Co. v. Keystone Insurance Co., 286 N.J. Super. 73 (Law Div. 1995). In that case, Kristi Giordano (Giordano) had been injured while riding in a car operated by Patrick Gallagher (Gallagher). Id. at 76. Giordano was insured by Prudential and her policy had UIM coverage of $100,000/$300,000. Gallagher's vehicle was insured by Keystone Insurance Co. (Keystone) under a policy that provided UIM coverage of $50,000/$100,000. Ibid.

Gallagher's car had been struck by a vehicle operated by Hector Velez (Velez), which was insured by a policy with $15,000/$30,000 in coverage. Ibid. Giordano settled with Velez's carrier for the policy limits. Ibid. Giordano provided Prudential with Longworth notice but did not provide such notice to Keystone. Id. at 77. After the matter was settled, Giordano sent Keystone a Longworth notice. Id. at 77.

Prudential brought an action against Keystone, seeking a determination that Prudential was an excess UIM carrier and Keystone was the primary UIM carrier. Id. at 76. Keystone acknowledged that it was the primary UIM carrier but argued that

there could be no recovery under its policy because neither the plaintiff nor Prudential had provided notice of the proposed settlement of the underlying action pursuant to Longworth. Id. at 77-78.

The Law Division agreed with Keystone and held that:

> the duty to notify precedes the right to recover. That is, in the normal situation recovery of UIM benefits under Longworth depends upon notice to one's own UIM carrier that the tortfeasor has offered a settlement. In turn, if the noticed carrier takes the position that its policy is excess or "co-primary" it, not the insured, has the duty to relay that notice to the alleged primary carrier promptly, and provide that carrier reasonable time to consent or to tender the settlement amount to protect its subrogation rights.
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> [Id. at 79-80.]

In Hallion, we stated that we were "in complete accord with the analysis and conclusion in Prudential." Hallion, supra, 337 N.J. Super. at 373. We held that

> as between the insured and the insured's carrier, the insured's carrier has the responsibility to provide Longworth notice to the primary carrier. Therefore, when an insured under a policy providing UIM benefits is involved in an accident and has undertaken legal action against the tortfeasor, the insured must provide Longworth notice to his or her insurance carrier. In turn, the insured's carrier is responsible for providing Longworth notice to any asserted primary carrier. To be sure, the better practice is for the insured to provide Longworth notice to all potential

> UIM providers. However, the ultimate responsibility is upon the UIM insurer to give Longworth notice to the primary carrier.
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> [Ibid.]

CNA argues that Hallion and Prudential do not apply to this dispute. CNA maintains that it had no duty to provide Longworth notice to Clarendon because this case does not present "a normal situation" where an insured makes a demand for UIM coverage under his or her personal automobile insurance policy. CNA additionally argues that it had no duty to provide Longworth notice because it denied plaintiff's UIM claim "outright" on a variety of grounds and because this matter involves commercial insurance policies rather than policies providing personal auto insurance.

We recognize that the UIM claim in this case arises in a different factual context than the UIM claims at issue in Hallion and Prudential. Despite those factual differences, the principles and reasoning that underlie the decisions in Hallion and Prudential apply here. Where, as in this case, a demand for UIM coverage is made upon an insurer and that insurer takes the position that the UIM obligation rests in whole or in part on another carrier, the insurer has the duty to provide notice under Longworth to the allegedly responsible carrier.

CNA additionally argues that it did not have a duty to provide Longworth notice to Clarendon because it had no knowledge of the existence and terms of the Clarendon policy until late 2004 or early 2005. Again, we disagree.

As the trial court pointed out in the decision it placed on the record on January 6, 2006, CNA was aware of and participated in the underlying action. CNA had notice during the three years that the underlying action was pending that plaintiff was riding in a replacement vehicle provided at the expense of the dealership.

The court correctly observed that CNA had "years to investigate the potential for additional coverage prior to the settlement, took no action for nine months after the settlement, and only provided Longworth notice . . . [twenty-two] months after settlement of the underlying claim." As the court found, CNA cannot rely on its own inaction as a justification for its failure to provide Longworth notice to Clarendon.

We therefore conclude that the trial court correctly determined that Clarendon was entitled to summary judgment on CNA's third-party complaint seeking contribution and/or indemnification. In view of that determination, we need not consider CNA's alternative contention that there was a genuine

issue of material fact as to whether plaintiff was insured under Clarendon's policy.

III.

CNA argues that the trial court erred by granting plaintiff's motion for summary judgment and compelling it to arbitrate plaintiff's UIM claim.

A. Exhaustion of coverage limits

CNA first contends that plaintiff is not entitled to UIM coverage because plaintiff and Debra settled their claims for less than the coverage limits of $250,000 under the Hsu policy. We disagree.

The duty to exhaust available coverage derives from N.J.S.A. 17:28-1.1(e)(1), which provides in pertinent part that "[a] motor vehicle shall not be considered an underinsured motor vehicle . . . unless the limits of all bodily injury liability insurance or bonds applicable at the time of the accident have been exhausted by payment of settlements or judgments." An insured who is entitled to UIM coverage does not, however, automatically forfeit his or her right to coverage if the insured settles a claim against a tortfeasor for an amount less than the tortfeasor's policy limits. Rutgers Cas., supra, 139 N.J. at 171-72; Longworth, supra, 223 N.J. Super. at 191.

An insured who is entitled to UIM coverage may accept what he or she considers to be the best available settlement, even if it is less than the tortfeasor's policy limits. Ibid. Nevertheless, the insured does not have "an unfettered right to settle the underlying suit for a modest or insignificant sum and pursue a UIM claim[.]" Ohio Cas. Ins. Co. v. Bornstein, 357 N.J. Super. 282, 287 (App. Div. 2003). See also Winner v. Revill, 382 N.J. Super. 399, 404-07 (App. Div.), certif. denied, 186 N.J. 604 (2006).

CNA asserts that plaintiff and Debra settled their claims against Hsu for $190,000. The record does not support that assertion. Hsu provided plaintiff and Debra with a release dated August 6, 2003, which states that plaintiff and Debra received $225,000 in settlement of their claims against Hsu. Although CNA contends that it contributed $35,000 towards the settlement, the record shows that CNA's payment was made to Hsu's insurer in order to resolve the third-party claims that Hsu had asserted against Debra.

Thus, plaintiff's and Debra's claims in the underlying action were resolved for $225,000, the amount stated in the release. This settlement represents 90% of the coverage limits under the Hsu policy. In our judgment, the settlement satisfied plaintiff's obligation under N.J.S.A. 17:28-1.1(e)(1) to exhaust

the limits of Hsu's policy. See Winner, supra, 382 N.J. Super. at 403-06 (holding that the UIM claimant satisfied his duty to exhaust available coverage when he settled claims for $30,000 on a $50,000 policy); Ohio Cas., supra, 357 N.J. Super. at 287 (concluding that $60,000 settlement was "substantial" when compared to the policy limits of $100,000).

Moreover, CNA suffered no prejudice from the settlement because it received a credit for the full amount of the coverage under the Hsu policy against the final arbitration award. Longworth, supra, 223 N.J. Super. at 191 (noting that if injured party accepts less than policy limits, his recovery against the UIM carrier must reflect a reduction of the "full policy limits.").

B. Subrogation rights

CNA next argues that plaintiff's UIM claim was barred because he failed to protect CNA's subrogation rights by naming Debra as a defendant in the underlying personal injury action. Again, we disagree. A "UIM endorsement does not require an insured to join [in a lawsuit] all persons involved in the accident . . . irrespective of fault, in order to protect the insurer's subrogation rights." Hreshko v. Harleysville Ins. Co., 337 N.J. Super. 104, 111 (App. Div. 2001).

Plaintiff did not name Debra as a defendant in the underlying lawsuit because plaintiff reasonably believed that she was not at fault in the accident. Thus, plaintiff's failure to name Debra as a defendant in the underlying action did not bar plaintiff from pursuing his UIM claim.

Furthermore, CNA was permitted to assert in the UIM arbitration proceeding that Debra was an additional tortfeasor. The arbitrators ultimately determined that Debra was not at fault in the accident. Thus, CNA's subrogation rights were not adversely affected by plaintiff's failure to name Debra as a defendant in the underlying action.

C. Alleged genuine issue of material fact

CNA additionally argues that summary judgment should not have been granted to plaintiff because there was a genuine issue of material fact as to whether plaintiff was in a "temporary substitute" for a "covered automobile" at the time of the accident, as required for coverage under CNA's policy.

"An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c). "If there exists a single, unavoidable resolution of the alleged

disputed issue of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of Rule 4:46-2." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 213 (1986)).

CNA argues that plaintiff did not present sufficient evidence to establish that the Land Rover was being serviced on the date of the accident. CNA therefore contends that plaintiff failed to establish that the Enterprise rental car was a "temporary substitute" for that vehicle.

Plaintiff and Mark testified, however, that Mark had taken the Land Rover to the dealership for servicing on the day of the accident. It is undisputed that the Land Rover was covered under CNA's policy. At the dealership, Mark had signed the agreement to rent a "service loaner" car from Enterprise. Thus, the evidence clearly established that, at the time of the accident, plaintiff was riding in a "temporary substitute" for a vehicle covered under CNA's policy.

We accordingly conclude that the trial court correctly determined that plaintiff was entitled to summary judgment on his claim for UIM coverage.

IV.

We turn next to CNA's contention that the trial court erred by granting plaintiff's motion for the appointment of a defense arbitrator. CNA maintains that the court wrongfully deprived it of its right under the policy to name its own arbitrator.

We are satisfied that the trial court did not err by appointing an arbitrator for CNA. CNA had the right under its policy to select its own arbitrator and was in fact ordered to do so. However, because CNA failed to act within the time required by the court's January 9, 2006 order, the court did not abuse its discretion by appointing the arbitrator.

CNA additionally asserts, that, after the court ruled on plaintiff's motion, plaintiff's attorney agreed to allow CNA to select its own arbitrator but later reneged on that agreement. As the trial court pointed out in its bench decision of January 12, 2007, when the alleged agreement was made, the court had already appointed Giordano as the defense arbitrator.

Therefore, the parties were required to comply with the trial court's order and, if they subsequently agreed to allow CNA to select its own arbitrator, they would have been required to apply to the court for approval of the agreement. No such application was made.

Furthermore, plaintiff's counsel stated that, although he initially indicated that he would be willing to allow CNA to select its own arbitrator, CNA had to act promptly. Counsel stated that he withdrew the offer because CNA did not act promptly. The trial court found that there had been no binding agreement to allow CNA to pick its own arbitrator.

The record supports the court's finding. Clearly, CNA recognized that there was no agreement on this issue because it never moved in the trial court to enforce the alleged agreement. Moreover, CNA participated in the arbitration proceeding with the arbitrator chosen by the court.

V.

CNA also argues that the trial court erred by denying its motion to vacate the arbitration award and granting plaintiff's motion for confirmation of the award.

The standard of review in a private arbitration is limited. Tretina Printing, Inc. v. Fitzpatrick & Assoc., Inc., 135 N.J. 349, 358 (1994) (citing Perini Corp. v. Greate Bay Hotel & Casino, Inc., 129 N.J. 479, 548 (1992)). A court may only vacate an arbitration award for the following reasons:

> a. Where the award was procured by corruption, fraud or undue means;
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> b. Where there was either evident partiality or corruption in the arbitrators, or any thereof;

> c. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause being shown therefor, or in refusing to hear evidence, pertinent and material to the controversy or of any other misbehaviors prejudicial to the rights of any party; [or]
>
> d. Where the arbitrators exceeded or so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made.
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> [N.J.S.A. 2A:24-8.]

CNA argues that the award of $845,000 lacked an evidentiary basis. CNA further contends that the award shows that the arbitrators were not impartial and that the result was obtained by "undue means."

The standard of review for a private arbitration award does not, however, allow a court to review an award in order to determine whether it was supported by substantial credible evidence. Habick v. Liberty Mut. Fire Ins. Co., 320 N.J. Super. 244, 252 (App. Div.), certif. denied, 161 N.J. 149 (1999). There is no evidence to show that the arbitrators were not impartial or that the award was obtained by "undue means." Although CNA may disagree with the decision of the arbitrators, that does not constitute a ground to vacate the award under N.J.S.A. 2A:24-8.

CNA additionally contends that the award should be vacated because the arbitrators wrongfully denied its request for an

adjournment. Although N.J.S.A. 2A:24-8c permits an award to be vacated in the event that the refusal to postpone a hearing rises to the level of "misconduct," an award may be vacated on this basis "only when, in the totality of the circumstances, the refusal to postpone impinges upon a party's fair and reasonable opportunity to be heard by the arbitrators." Johowern Corp. v. Affiliated Interior Designers, Inc., 187 N.J. Super. 195, 199 (App. Div. 1982). We are convinced from our review of the record that the arbitrators' refusal to postpone the matter did not constitute "misconduct" under N.J.S.A. 2A:24-8c. R. 2:11-3(e)(1)(E).

In addition, CNA maintains that the court erred by denying its motion to vacate the award because DeMille, the neutral arbitrator chosen by arbitrators Giordano and Gorman, failed to disclose an alleged "business" relationship with plaintiff's attorneys. CNA also contends that the trial court erred by quashing subpoenas served on DeMille and plaintiff's attorneys. CNA apparently served the subpoenas to obtain facts concerning this alleged "business" relationship.

We are convinced that these contentions are entirely without merit. CNA's allegation is based upon the fact that DeMille had served as a neutral arbitrator in a separate matter in which plaintiff's attorneys represented the plaintiff. In

that case, an allegation was made that the award was "outrageous" and DeMille had shown "partiality and preference" to plaintiff's attorneys.

In our view, CNA failed to establish a prima facie case of "partiality or corruption" on DeMille's part that would have justified discovery on this issue, let alone vacation of the award pursuant to N.J.S.A. 2A:24-8b. The facts as alleged by CNA do not amount to an improper "business" relationship between DeMille and plaintiff's attorneys.

We have considered all of the other arguments raised by CNA and find them to be of insufficient merit to warrant comment in this opinion. R. 2:11-3(e)(1)(E).

Affirmed.