# STATE OF MICHIGAN

# COURT OF APPEALS

THOMAS TAGG, III, JEANENE TAGG and JACK BELZER, Personal Representative of the Estate of THOMAS TAGG, IV, Deceased,

Plaintiffs-Appellants,

v

TRANSAMERICA INSURANCE COMPANY OF AMERICA, FRANKENMUTH MUTUAL INSURANCE COMPANY and FARMERS INSURANCE EXCHANGE,

Defendants-Appellees.

UNPUBLISHED
April 12, 1996

No. 164081
LC No. 92-18199-OK

Before: Murphy, P.J., and White and W. Collette,* JJ.

Plaintiffs appeal as of right the trial court's order dismissing their uninsured motorist claims as to all defendants under MCR 2.116(C)(8). The trial court declined to order arbitration or provide other relief requested in plaintiffs' complaint to compel arbitration on the ground that it lacked authority to do so because the arbitration provisions at issue were not statutory. We reverse.

I

The underlying facts appear to be undisputed. Thomas Tagg, IV (Thomas), was the fourteen-year-old son of plaintiffs Jeanene and Thomas Tagg, III (Tagg). On June 21, 1992, while Thomas operated an uninsured vehicle owned by William Sprague (Sprague), the father of one of Thomas' friends, the vehicle left the road and struck a tree, causing injuries which eventually resulted in Thomas' death.[1] Tagg was the named insured in two automobile insurance policies written by Transamerica and Frankenmuth, and Jeanene Tagg was the named insured in the policy written by Farmers. The three policies contained uninsured motorist coverage providing for arbitration of disputed claims, the provisions of which are set forth below. Plaintiffs asserted that Sprague's liability falls within the coverage of each insurance contract's policy language.

On November 12, 1992, plaintiffs filed a complaint to compel arbitration alleging that they made demands for arbitration of the uninsured motorist claims to each defendant, and that each had failed or refused to name an arbitrator or otherwise participate in arbitration. Plaintiffs' complaint quoted the arbitration provisions of each insurance contract, and stated the action was brought in whole or in part pursuant to MCR 3.602.[2] Plaintiffs sought as relief that the trial court order defendants to proceed with arbitration of the uninsured motorist claims, rule that defendants waived their right to select an arbitrator, appoint a third arbitrator and order

*Circuit Court judge sitting on the Court of Appeals by assignment.

arbitration to proceed with plaintiffs' arbitrator and the third arbitrator, confirm any award rendered for the plaintiffs and enter judgment on the award with interest, award plaintiffs costs, and order other relief to which the court found plaintiffs entitled. Plaintiffs also filed a motion to compel arbitration and noticed it for hearing January 11, 1993.

Farmers filed an answer and concurrently moved for summary disposition under MCR 2.116(C)(8), arguing that Thomas' estate could not sue itself because Thomas was negligent, and it could not sue Sprague because Sprague's liability under the Owner Liability Statute, MCL 257.401; MSA 9.2101, was vicarious through Thomas. Plaintiffs responded that MCR 3.602(B)(4) precludes denial of an application for arbitration on the ground the claim sought to be arbitrated lacks merit, that their claim against Sprague was not based on vicarious liability, but on Sprague's own criminal negligence arising from his pressuring the reluctant, unlicensed, fourteen-year-old Thomas to drive Sprague's car, and that Farmers could argue comparative negligence, but in the proper forum--an arbitration hearing.

Transamerica also moved for summary disposition, arguing Tagg had cancelled his coverage prior to the accident, and also filed a counterclaim. Frankenmuth also counterclaimed, seeking a declaration that the policy did not provide coverage under the facts presented. In response to plaintiffs' motion to compel arbitration, Frankenmuth argued that its policy provides that coverage issues are not arbitrable.

In a supplemental brief, Farmers argued that the proceeding was a common-law, and not a statutory, arbitration and therefore plaintiffs' reliance on MCR 3.602 was misplaced, and the court could properly reach the merits of the underlying claim. Farmers also argued that MCL 600.5035; MSA 27A.5035, would permit the court to reach the merits in any event. Farmers went on to argue that plaintiffs have no claim against Sprague that would afford coverage under the policy, and that any award in plaintiffs' favor would be contrary to law.

The trial court heard argument on the various motions on January 11, 1993. Frankenmuth argued its policy excluded arbitration of coverage issues. Plaintiff responded by relying on other language in the policy stating what matters are subject to arbitration. Farmers argued plaintiffs failed to establish a legal basis upon which to recover damages and thus any arbitration award would be contrary to law. Transamerica echoed Farmers' argument and further argued its policy had been cancelled.

Regarding Frankenmuth, the court stated that the matter would not proceed to arbitration. The court did not elaborate on its reasoning. Transamerica's motion was denied based on the existence of material issues of fact.[3] As to Farmer's motion, the court expressed doubt as to plaintiff's ability to establish a viable claim against Sprague, but offered plaintiff the opportunity to file a supplemental brief on the issue. The matter was adjourned.

In a supplemental brief, plaintiffs provided case law in support of their argument that a viable negligent entrustment claim against Sprague was presented, asserting that Michigan recognizes such a cause of action by an entrustee against an entrustor. Plaintiffs also argued that Sprague himself violated various provisions of the motor vehicle code. Farmers responded with a brief discussing the cases relied on by plaintiffs.

On February 16, the trial court heard additional argument regarding the scope of the cause of action for negligent entrustment and granted Farmers' motion for summary disposition, concluding Michigan recognizes no such cause of action by an entrustee.

Frankenmuth and Transamerica then filed motions for summary disposition based on the court's ruling on Farmers' motion. Plaintiffs filed a response to the motions, and a motion for reconsideration of the court's grant of summary disposition to Farmers, reiterating the arguments that defendants presented no case holding that an entrustee cannot sue the entrustor, and that case law supports such a claim.[4] Plaintiffs further argued that under the arbitration clauses, the issue was one for the arbitrators.

The trial court heard argument on Transamerica's and Frankenmuth's motions on March 29. After defendants presented a brief argument on the negligent entrustment issue, the court raised the question whether statutory arbitration was involved. Plaintiffs' counsel conceded that the policies do not contain the language required by statute and that the court was not bound by MCR 3.602. The court asked whether there was any authority other than the court rule to allow the court to order arbitration. Plaintiffs' counsel responded that the insurance polices provided for an application to the court for appointment of an arbitrator, and the polices themselves provide the authority to order arbitration. Plaintiffs' counsel then addressed the subject matter of the motions, arguing that all three policies provide that the question whether the person "is legally entitled to recover damages" is a matter for arbitration, and so the issue brought before the court by the motions -- whether plaintiffs have a viable cause of action -- is one for the arbitrators, and further, that plaintiffs have a valid cause of action against Sprague, relying on *Moning v Alfono*, 400 Mich 425; 254 NW2d 759 (1977), and the fact that Sprague pleaded guilty of negligent homicide. Farmers responded by addressing the *Moning* case. The court then stated that it was not persuaded that it should reconsider its ruling and continued:

> I think this whole thing though goes back to the plaintiff's [sic] complaint wherein the plaintiff [sic] claimed they were pursuing relief under MCR 3.602, and the complaint sought relief in the form of an order to compel arbitration, order the defendants to proceed with arbitration, order the defendants to proceed with arbitration of the uninsured motorist claims and appoint an arbitrator and confirm an award and enter a judgment on an award and the award cost, etc. And I felt maybe I had overlooked something, and I went back and read the statute and I can't find that anyone has plead [sic], first of all, I think that it's a deficit [sic] complaint in terms of even requesting the relief because there is no--nothing before me that anyone has made a written demand as required by the policy language for arbitration, that is not pled, but even if we got passed [sic] those minor procedural hurdles, I suppose you could say the complaint may be defective in asking for the relief. *I go back to the fact that this is not a statutory arbitration* because there is no language attached, nor--and even if it were attached it isn't in the policies upon which the plaintiff is relying that contains a provision that he can come back to me as provided in the statute 27A.5001 [MCL 600.5001] to enter a judgment upon an award of an arbitrator. And *without this type of policy language, without this type of agreement I don't have any authority to order an arbitration and the complaint fails to state a claim upon which relief can be granted. And that is all, as I said, that I was asked to rule on, so really I shouldn't have even gotten into the merits*

and if I had found it was statutory arbitration, if it was a statutory arbitration, I totally agree with [plaintiffs' counsel] that I would not have ever gotten to rule on the [*Tortora v General Motors Corp,* 373 Mich 563; 130 NW2d 21 (1964).] issue, the merits would have been for the arbitrator and he cites it, I believe in your--in either your pleadings or in your brief you--you remarked on that particular point. At any rate, that was at 3.602(B)(4) in which it is stated an application to compel arbitration may not be denied on the grounds of the claim sought to be arbitrated lacks merit. Failure to state a claim upon which relief can be granted, (C)(8) motion granted for all defendants.

II

A

Frankenmuth's policy provides in pertinent part:

LEGAL ACTION--AGAINST US

No legal action may be brought against us until there has been full compliance with the terms of this coverage. In addition, no legal action may be brought against us after one year from the date of accident causing the injury . . .

* * * *

PART D UNINSURED MOTORISTS COVERAGE

INSURING AGREEMENT

We will pay damages which an insured is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of bodily injury:

1. Sustained by an insured, and 2. Caused by an accident.
The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the uninsured motor vehicle.

* * * *

ARBITRATION

If we and an insured do not agree:

1. Whether that person is legally entitled to recover damages under this Part; or

2. As to the amount of damages;

either party may make a written demand for arbitration. A written demand for arbitration must be filed within three years from the date of the accident or we will not pay damages under this Part. Unless otherwise agreed by express written consent of both parties, disagreements concerning insurance coverage, insurance afforded by the coverage, or whether or not a motor vehicle is an uninsured motor vehicle are not subject to arbitration and suit must be filed within three years from the date of the accident.

In this event, each party will select an arbitrator. The two arbitrators will select a third. *If they cannot agree within 30 days, either may request that selection be made by a judge of a court having jurisdiction.* Each party will:

1. Pay the expenses it incurs, and
2. Bear the expenses of the third arbitrator equally.

Unless both parties agree otherwise, arbitration will take place in the county in which the insured lives. Local rules of law as to procedure and evidence will apply. A decision agreed to by two of the arbitrators will be binding as to:

1. Whether the insured is legally entitled to recover damages, and

2. The amount of damages. This applies only if the amount does not exceed the minimum limit for bodily injury liability . . . [Emphasis added.]

B

Farmers' policy states:

PART II--UNINSURED MOTORIST

Coverage C--Uninsured Motorist Coverage

We will pay all sums which an insured person is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by the insured person. The bodily injury must be caused by accident and arise out of the ownership, maintenance or use of the uninsured motor vehicle.

Determination as to whether an insured person is legally entitled to recover damages or the amount of damages shall be made by agreement between the insured person and us. If no agreement is reached, the decision will be made by arbitration.

* * * *

Arbitration

If an insured person and we do not agree (1) that the person is legally entitled to recover damages from the owner or operator of an uninsured motor vehicle, or (2) as to the amount of payment under this part, either that person or we may demand that the issue be determined by arbitration.

In that event, an arbitrator will be selected by the insured person and us. *If agreement on an arbitrator cannot be reached within (30) days, the judge of a court having jurisdiction will appoint the arbitrator.* The expense of the arbitrator and all other expenses of arbitration will be shared equally. Attorney's fees and fees paid for the witnesses are not expenses of arbitration and will be paid by the party incurring them.

The arbitrator shall determine (1) the existence of the operator of an uninsured motor vehicle, (2) that the insured person is legally entitled to recover damages from the owner or operator of an uninsured motor vehicle, and (3) the amount of payment under this part as determined by this policy or any other applicable policy.

Unless the parties otherwise agree, arbitration will take place in the county where the insured person lives. Local court rules governing procedures and evidence will apply. The decision in writing of the arbitrator will be binding subject to the terms of this insurance.

Formal demand for arbitration shall be filed in a court of competent jurisdiction. The court shall be located in the county and state of residence of the party making the demand. Demand may also be made by sending a certified letter to the party against whom arbitration is sought, with a return receipt as evidence.

* * * *

PART V--CONDITIONS

* * * *

3. Legal Action Against Us

We may not be sued unless there is full compliance with all the terms of this policy. We may not be sued under the Liability Coverage until the obligation of a person we insure to pay is finally determined either by judgment against that person at the actual trial or by written agreement of that person, the claimant and us. No one shall have any right to make us a party to a suit to determine the liability of a person we insure. [Emphasis added.]

C

Transamerica's policy provides in pertinent part:

PART C - UNINSURED MOTORISTS COVERAGE (UMBI)

INSURING AGREEMENT

A. We will pay compensatory damages which an "insured" is legally entitled to recover from the owner or operator of an "uninsured motor vehicle" because of "bodily injury":

1. Sustained by an "insured"; and 2. Caused by an accident.

The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the "uninsured motor vehicle." Any judgment for damages arising out of a suit brought without our written consent is not binding on us.

* * * *

ARBITRATION

A. If we and an "insured" do not agree:
1. Whether that person is legally entitled to recover damages under this Part; or
2. As to the amount of damages;

either party may make a written demand for arbitration. In this event, each party will select an arbitrator. The two arbitrators will select a third. *If they cannot agree within 30 days, either may request that selection be made by a judge of a court having jurisdiction.*

B. Each party will:

1. Pay the expense it incurs; and
2. Bear the expenses of the third arbitrator equally.

C. Unless both parties agree otherwise, arbitration will take place in the county in which the "insured" lives. Local rules of law as to procedure and evidence will apply. A decision agreed to by two of the arbitrators will be binding as to:

1. Whether the "insured" is legally entitled to recover damages; and

2. The amount of damages . . . . [Emphasis added.]

III

We agree with plaintiffs that the circuit court erred in ruling that the complaint failed to state a claim upon which relief could be granted.

A

Initially, we agree with plaintiffs' characterization of the proceedings. The focus of the motions before the court was the validity of the underlying claim against Sprague, and whether MCR 3.602(B)(4) or the policies prohibited the court from addressing the merits. At the March 29 hearing, the court dismissed the complaint on a different basis, concluding that the complaint for arbitration failed to state a valid claim for arbitration. Plaintiffs were not afforded an adequate opportunity to address any deficiencies in the complaint through amendment, and amendment would not have been futile.

While the complaint was largely based on MCR 3.602, plaintiffs counsel made clear at argument that plaintiffs asserted the court's authority came from the policies, and not the court rule. While plaintiffs' counsel conceded at argument that the arbitration clauses did not contain the language to make them "statutory," counsel argued that, beyond MCR 3.602, the court had authority under the insurance policies themselves because the policies provided that if the parties could not agree on a third arbitrator within thirty days, either party could request the selection be made by a court of competent jurisdiction.[5]

We thus reject defendants' argument that the court properly dismissed the complaint because plaintiff's reliance on MCR 3.602 was misplaced.

B

The trial court apparently concluded that absent language making the arbitration provisions "statutory," it had no authority to grant plaintiffs any relief. The court erroneously failed to recognize that it could appoint an arbitrator and compel defendants to arbitrate, although it was correct in concluding it lacked authority to confirm or enter judgment on any resulting arbitration award under the court rule:

> The basis of statutory arbitration is the fact that the contract or arbitration agreement in question provides that a judgment may be entered on the arbitration award. See MCLA 600.5001 . . . If the contract or agreement has no such provision, the parties have an agreement for common law arbitration. They may have a perfectly valid agreement, *and may be required to arbitrate*, but *enforcement* of the arbitration award may be had only by a civil action governed by the general rules of civil procedure. [Michigan Court Rules Practice, MCR 3.602, p 90. Citations omitted and emphasis added.]

Each arbitration clause at issue here contemplates resort to the courts by providing that either party may request a court to appoint an arbitrator. Additionally, the Farmers' arbitration provision provides: "formal demand for arbitration shall be filed in a court of competent jurisdiction," although also allowing demand by letter.

We conclude the trial court had authority to appoint an arbitrator and enforce the common law agreements to arbitrate. Each of the policies, reasonably construed, requires arbitration of the issue whether an insured is legally entitled to recover damages if the insured and insurer cannot agree on the issue and either party requests arbitration.

7 Am Jur 29, Automobile Insurance, § 338, discusses the effect of an arbitration clause on the right of an insured to bring an action directly against the insurer, and refers to *Kelsey v Mutual of Enumclaw Ins Co,* 720 P2d 858 (Wash App 1986).[6] *Kelsey* involved an insurance policy with an arbitration provision virtually identical to the provisions at issue here, although it pertained to underinsured motorists coverage:

> E. ARBITRATION
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> 1. If we and a covered person disagree whether that person is legally entitled to recover damages from the owner or operator of an underinsured motor vehicle or do not agree as to the amount of damages, either party may make a written demand for arbitration. In this event, each party will select an arbitrator. The two arbitrators will select a third and if they cannot agree within 30 days, either may request that selection be made by a judge of a court having jurisdiction. Each party will pay the expense it incurs, and bear the expenses of the third arbitrator equally.

> 2. Unless both parties agree otherwise, arbitration will take place in the county and state in which covered person lives. A decision agreed to by two of the arbitrators will be binding.

In *Kelsey*, the plaintiff insured filed suit, the defendant insurer demanded arbitration under the above provision, the plaintiff refused, and the defendant then brought a motion to compel arbitration. 720 P 2d at 859. The Court of Appeals reversed the trial court's denial of the insurer's motion and determined the trial court erred in determining arbitration was not required under the insurance contract, stating:

> Here, the arbitration provisions are unambiguous; *once either party tenders its written demand for arbitration, that manner of resolving the dispute becomes mandatory.* Although insurance contracts are subject to certain public policy limitations, it is clear provisions requiring arbitration of liability and damages are generally upheld because they 'tend to fair dealing and the prevention of litigation.'
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> * * * *
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> . . . . The court may not alter the method by which the parties agreed to resolve their dispute. [*Id.* at 860, emphasis added.]

In the instant case, plaintiffs alleged they submitted demands to all defendants as required under the policies.[7] Plaintiffs thus set in motion the arbitration provision language contained in the three policies by which the manner of resolving certain disputes is mandatory--arbitration.

Defendants advance various arguments in support of the view that the court was without authority to order arbitration or to appoint an arbitrator. Frankenmuth argues that because its policy provides for common law, and not statutory, arbitration, the agreement can be revoked at any time before an award. However, Frankenmuth never revoked its agreement to arbitrate. Rather, it asserted that the dispute between the parties was not arbitrable under the contract, and, later, that there was no basis upon which plaintiffs could recover. We thus reject Frankenmuth's argument that the court's dismissal was proper in this case because common law agreements to arbitrate are revocable.

On appeal, Frankenmuth again argues that its policy provides that "disagreements concerning insurance coverage, insurance afforded by the coverage, or whether or not a motor vehicle is an uninsured vehicle are not subject to arbitration . . ." and therefore the court properly determined that plaintiffs had no basis on which to compel arbitration. While the court's final decision granted defendants motions on the basis set forth *supra*, pages 6-7, it does appear that at the earlier January 11 hearing, the court ruled in favor of Frankenmuth on this issue. (see page 4 *supra*).

We reject Frankenmuth's argument that its policy precluded arbitration of plaintiffs' claim, and conclude the court erred to the extent it denied arbitration on this basis. Frankenmuth's policy provides:

ARBITRATION

If we and an insured do not agree:

1. Whether that person is legally entitled to recover damages under this Part; or

2. As to the amount of damages;

either party may make a written demand for arbitration. A written demand for arbitration must be filed within three years from the date of the accident or we will not pay damages under this Part. Unless otherwise agreed by express written consent of both parties, disagreements concerning insurance coverage, insurance afforded by the coverage, or whether or not a motor vehicle is an uninsured motor vehicle are not subject to arbitration and suit must be filed within three years from the date of the accident.

A fair reading of the policy is that it provides for arbitration of the questions whether an insured is legally entitled to recover damages under the uninsured motorist coverage, and the amount of damages, but does not allow for arbitration, without consent, of the question whether a person is covered under the policy, the scope of the coverage, or whether the vehicle alleged to be uninsured was, in fact, uninsured. In the instant case, it appears there are no coverage questions. Frankenmuth does not contend that plaintiffs are not insureds, or that the policy did not provide uninsured motorist coverage. Rather, the issue concerns whether the insured is legally entitled to recover damages, an issue expressly confided to arbitration. There was some minimal discussion before the trial court regarding whether the vehicle was uninsured. However, this was not specifically focused on or addressed. To the extent Frankenmuth contests this issue, it may seek a judicial determination on remand. We note that the other policies do not contain the provision relied on by Frankenmuth.

Farmers does not directly argue that the court had no authority to compel arbitration. Rather, it asserts that plaintiffs had no viable legal claim and therefore any arbitration award would be contrary to law. We disagree. Farmers provides no authority for the position that a party may avoid arbitration by asserting that the underlying claim lacks legal merit. While defendants may seek to defend a suit seeking a judgment on the award by asserting the award is contrary to law, defendants agreed to arbitrate the issue of plaintiffs' legal entitlement to damages, and should not be permitted to avoid that agreement by challenging the underlying merit of plaintiffs' claim.

Further, we do not agree that any award by the arbitrators would be in excess of their powers under the contract and contrary to law. The policies undertake to provide coverage for damages the insured is legally entitled to recover from the owner or operator of an uninsured vehicle because of bodily injury sustained by an insured, caused by accident, provided--as to Transamerica and Frankenmuth -- the owner's or operator's liability arises out of the ownership maintenance or use of the uninsured motor vehicle, -- and as to Farmers -- the injury arises out of the ownership, maintenance or use of the uninsured vehicle. Further, all three policies give the arbitrators the authority to decide whether the insured is legally entitled to recover damages.

Moreover, we question the trial court's conclusion that Michigan recognizes negligent entrustment actions only by third parties and not by an entrustee against an entrustor. The doctrine of negligent entrustment provides:

> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm *to himself and others* whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them. [2 Restatement Torts, 2d, § 390. Emphasis added.]

The doctrine of negligent entrustment has been adopted and applied in Michigan.[8] And, although the appellate courts have never directly addressed the question whether an entrustee can maintain such a suit, the cases do not suggest that such an action cannot be maintained.[9] *Shepherd v Barber,* 20 Mich App 464; 174 NW2d 163 (1969),[10] involved a claim by the administrator of the entrustee's estate against the entrustor. The entrustee was a nineteen-year-old boy who was killed while driving a truck borrowed from the defendant. There was evidence at trial that the defendant knew the deceased had no driver's license and could not read or write, and that the deceased's parents had asked the defendant not to allow the boy to drive the truck. *Id.* at 466. This Court affirmed the trial court's denial of the defendant's motion for summary disposition during trial, and its submission of the question of liability to the jury. *Id.* at 467. While the defendant did not challenge an entrustee's right to bring such an action, and the court did not rule on that question, the case assumes such a cause of action exists. Further, plaintiffs also asserted common law negligence against Sprague for violation of criminal statutes.[11] We thus reject defendants' claim that any award would be so contrary to law as to be beyond the arbitrator's authority.

On appeal, Transamerica seeks to incorporate by reference various arguments of Frankenmuth and Farmers. To the extent Transamerica relies on the arguments of the other defendants, the arguments are rejected for the reasons set forth above. Transamerica also argues that the vehicle was not uninsured because Thomas Tagg was insured as a driver under his parents' policies. This issue was, however, not addressed or developed in the trial court and the record is insufficient to address it here. Transamerica simply relies on *Priesmen v Meridian Mutual Ins Co*, 441 Mich 60; 490 NW2d 314 (1992), a case involving first-party no-fault coverage, and *Bennett v Pitts*, 31 Mich App 530; 188 NW2d 81 (1971), a case involving an insured driver of a vehicle that was not insured, but, as to this argument, does not discuss the liability coverage allegedly covering the claim or the specific language of the uninsured motorist endorsement as to coverage and the scope of arbitration.[12]

We vacate the trial court's order dismissing plaintiffs' complaint and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

Reversed and remanded.

/s/ William B. Murphy
/s/ Helene N. White
/s/ William E. Collette

[1] Plaintiffs explain that since the case was dismissed with little discovery, the facts are taken largely from criminal proceedings against Willaim Sprague. These resulted in his pleading guilty of negligent homicide on March 18, 1993.

Plaintiffs argued in response to Farmers' motion for summary disposition that the Argentine Township Police report indicated Thomas was playing at the home of a friend, fourteen-year-old Jason Sprague, where Jason's twelve-year-old sister, a sixteen-year-old family friend, and Sprague were also present. That evening, Sprague asked the sixteen-year-old, who had a driver's license, to drive them in Sprague's car to the store because he had been drinking. After leaving the store, Sprague allowed his twelve-year-old daughter to drive for about ten minutes on back roads, and then had his fourteen-year-old son drive. Sprague then decided it was Thomas' turn. According to the sixteen-year-old, Thomas did not want to drive at first, but relented. While traveling on Bird Road, which the officer described as a washboard, Thomas lost control of the car, which left the road and struck a tree, killing him and injuring the other occupants of Sprague's car.

Sprague was charged with manslaughter for Thomas' death and felonious driving in connection with the serious injuries suffered by the other occupants. Plaintiffs' responsive brief below stated he was bound over to circuit court on these charges in August [1992]. Plaintiffs' counsel informed the trial court of Sprague's negligent homicide guilty plea conviction at the March 29, 1993 hearing on Frankenmuth and Transamerica's motions for summary disposition. Plaintiffs attached to their appellate brief a copy of Sprague's judgment of sentence entered on his guilty plea conviction of negligent homicide.

[2] The opening paragraph of plaintiffs' complaint stated "Plaintiffs . . . file this Complaint pursuant to MCR 3.602 . . ." Paragraph 25 of the complaint alleged "This action is brought in whole or in part pursuant to MCR 3.602."

[3] Transamerica's counterclaim that the policy had been cancelled was eventually dismissed and made the subject of a separate declaratory action.

[4] Plaintiffs relied on *Shepherd v Barber*, 20 Mich App 464; 174 NW2d 163 (1969), *Moning v Alfono*, 400 Mich 425; 254 NW2d 759 (1977), *White v Chrysler*, 421 Mich 192; 364 NW2d 619 (1984), and an annotation found at 12 ALR 4th 1062. Farmers' reply to the motion for reconsideration discussed the cases relied on by plaintiffs.

[5] At the first hearing, plaintiffs' counsel argued in pertinent part that Sprague's actions were "basically Russian roulette with an automobile" and:

> At the time of this accident there are three policies that were in effect that we are making claim for uninsured motorist benefits. We filed a demand for arbitration because our demand for uninsured benefits was denied, but actually . . . they simply didn't respond to it. All three of the policies provided for arbitration of disputed UM [uninsured motorist] claims . . .
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> * * * *

. . . We demanded arbitration, all three of these policies provide that if the parties cannot agree upon the neutral arbitrator within 30 days, then a court of competent jurisdiction may be petitioned to appoint the arbitrator.

So what we have here are--are three carriers that simply ignored the claim and apparently are trying to circumvent the provisions of their own policies by not responding to the claim, not designating an arbitrator, not participating in the selection of a neutral arbitrator.

Pursuant to the terms of the policy I filed this civil action to compel the arbitration and ask that the arbitration be ordered and ask that the Court appoint a neutral arbitrator. If the defendants don't want to appoint their own arbitrator, that's fine, the policies provide that two out of the three arbitrators can render a ruling.

So the motion that I brought before the Court today was simply a motion based upon a showing of an agreement to arbitrate and a refusal on the part of the defendants to participate in arbitration, ask the Court to compel arbitration and appoint a neutral arbitrator so we can proceed.

The--I will concede that this is not the usual factual circumstance under which arbitration--UM benefits are . . . sought, but if the Court is to look at the policy provisions themselves that these companies will stand in--stand and cover the liability of the owner or operator of an uninsured motor vehicle. I don't think there is any question that Mr. Sprague was the owner of the car, I don't think there is any question that it was an uninsured motor vehicle, and I don't think there is any question but that Tom Tagg's death arose out of the operation of that motor vehicle. There are certainly going to be claimed comparative negligence but that's going to be the comparative negligence of a 14-year-old boy versus the comparative--the negligence of Mr. Sprague who has been bound over to circuit court on charges of Involuntary Manslaughter and Negligent Homicide based on Tom Tagg's death.

I'm certainly prepared to go before an arbitration panel and to present the evidence of Mr. Sprague's gross and probably criminal negligence, and I'm prepared to also argue comparative negligence on the part of Thomas Tagg. A 14-year-old boy who was killed due to the negligence of Bill Sprague, this is certainly a situation that falls within the--the language of the coverage that each of these insurance companies wrote. Those policies provide that these types of cases are to be arbitrated and I simply am asking the Court to order the arbitration that these policies provided for.

* * * *

. . . Frankenmuth and Farmers have taken a position . . . the deceased cannot sue himself, well, we're not doing that. The . . . claim against Bill Sprague is not based on the Owner's Liability Statute, it's not based on vicarious liability, it's based on . . .his own negligence. It--it falls within the provisions of the policy and we would simply like to take this case to the forum where these parties intended to have it resolved.

[6] Cumulative 1995 Supplement § 338, pp 73-74.

[7] Transamerica's and Frankenmuth's policies require a written demand. Farmers policy provides for demand by filing suit or by certified letter.

[8] *Moning v Alfono*, 400 Mich 425, 443-449; 254 NW2d 759 (1977); *White v Chrysler Corp*, 421 Mich 192, 201-202; 364 NW2d 619 (1984).

[9] In *White, supra*, the Court stated:

> The doctrine of negligent entrustment concerns the supply of chattels that involve an "unreasonable risk of physical harm to himself [the person to whom the chattel is entrusted] and others whom the supplier should expect to share in or be endangered by its use. A gun entrusted to a child, an automobile entrusted to an inexperienced driver, poses an unreasonable risk of physical harm to the child or inexperienced driver and to others. 421 Mich at 202; emphasis and bracketed phrase in original, footnote omitted.]

In *Moning*, the court stated:

> [A] reasonable person will have in mind the immaturity, inexperience and carelessness of children. If, taking those traits into account, a reasonable person would recognize that his conduct involves a risk of creating an invasion of the child's or some other person's interest, he is required to recognize that his conduct does involve such a risk. [*Moning, supra* at 445; emphasis added.]

[10] *Shepherd* is one of the cases cited in Negligent Entrustment: Bailor's Liability to Bailee Injured Through His Own Negligence or Incompetence, 12 ALR 4th 1062, a copy of which plaintiffs attached to their responsive brief below. Plaintiffs' supplemental brief below discussed *Shepherd*.

[11] Plaintiffs argued that regardless of whether the claim against Sprague was labeled one of negligent entrustment, plaintiffs would prove a viable common law negligence claim against Sprague based on his violation of at least two statutes, MCL 257.325; MSA 9.2025, and MCL 257.326; MSA 9.2026, which provide, respectively:

> It shall be unlawful for any person to cause or knowingly permit any minor to drive a motor vehicle upon a highway as an operator, unless the minor has first obtained a license to drive a motor vehicle under the provisions of this chapter.

and

> No person shall knowingly authorize or permit a motor vehicle owned by him or under his control to be driven by any person in violation of any of the provisions of this act.

In this regard, we think analogy to *Longstreth v Gensel*, 423 Mich 675; 377 NW2d 804 (1985), is instructive.

[12] Transamerica makes similar arguments relating to the uninsured motorist fund. However, we fail to see the relevance of these arguments, since plaintiff's claim is qoverned by the contract of insurance.