STATE OF MICHIGAN

COURT OF APPEALS

HEIDI ALLEN, as Conservator of the Estate of BENJAMIN STROTHER,

Plaintiff-Appellant,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee.

FOR PUBLICATION
October 4, 2005
9:05 a.m.

No. 253015
Lapeer Circuit Court
LC No. 03-032939-NF

Official Reported Version

Before: Borrello, P.J. and Bandstra and Kelly, JJ.

KELLY, J. *(concurring).*

I agree with the lead opinion that Benjamin Strother is not a "family member" of the insured, Heidi Allen, as that term is used in the joyriding family member exception articulated in *Priesman v Meridian Mut Ins Co*, 441 Mich 60; 490 NW2d 314 (1992), and *Butterworth Hosp v Farm Bureau Ins Co*, 225 Mich App 244; 570 NW2d 304 (1997). However, although I concur with the result reached by the lead opinion, I write separately to note that the joyriding family member exception does not appear in the plain language of the no-fault act, MCL 500.3101 *et seq.* Rather, it was effectively inserted into the statute by the appellate courts of this state.

Under MCL 500.3113, first-party no-fault personal protection insurance (PIP) benefits[1] are precluded under certain circumstances. MCL 500.3113 provides, in relevant part:

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:

---

[1] The statutory phrase is "personal protection insurance benefits," but they are also known as "first-party" or "PIP" benefits. *McKelvie v Auto Club Ins Ass'n*, 459 Mich 42, 44 n 1; 586 NW2d 395 (1998).

> (a) The person was using a motor vehicle or motorcycle which he or she had taken unlawfully, unless the person reasonably believed that he or she was entitled to take and use the vehicle.

Under MCL 500.3113(a), PIP benefits will be denied if (1) a person takes a vehicle unlawfully and (2) that person also did not have a reasonable basis for believing that he or she could take and use the vehicle. *Bronson Methodist Hosp v Forshee*, 198 Mich App 617, 626; 499 NW2d 423 (1993).

Although the term "taken unlawfully" is not defined in the statute, in *Priesman*, three members of our Supreme Court created a judicial exception to MCL 500.3113(a) for "joyriding" family members, generally, teenagers taking their parents' vehicles without permission. The three justices[2] believed that because joyriding was such a common occurrence in families, benefits should not be denied in that situation, because that was not what the Legislature presumably intended. *Priesman, supra* at 68.

Dissenting Justice Griffin, with Justices Brickley and Riley concurring, criticized this conclusion. After noting that "[w]hen the language of a statute is certain, clear and unambiguous, it is to be applied as written," Justice Griffin stated:

> The majority departs from these principles to conclude that because legislators "generally are also parents and sometimes grandparents" and "[s]ome may have had experience with children, grandchildren, nephews, nieces, and children of friends who may have used a family vehicle without permission," they did not intend to exclude coverage in case such as this. Although such an argument may have emotional appeal, it is not supported by the language of [MCL 500.3113(a)], nor by the legislative history of that provision. [*Id.* at 72-73 (citation omitted).]

Justice Griffin further observed that the "proper guide for this Court's interpretation is not the general or ideal role of the family in our society, but the specific language of the statute selected by the Legislature." *Id.* at 73 n 13.

Priesman is not binding precedent because only three justices concurred in the reasoning of the lead opinion. Under the doctrine of stare decisis, a plurality decision—one in which a majority of the justices participating do not concur in the reasoning—is not binding precedent. *Swickard v Wayne Co Med Examiner*, 438 Mich 536, 570 n 15; 475 NW2d 304 (1991) (opinion by Levin, J.); *Negri v Slotkin*, 397 Mich 105, 109-110; 244 NW2d 98 (1976); *Summers v Detroit*, 206 Mich App 46, 50; 520 NW2d 356 (1994). Nonetheless, this Court, in *Butterworth*, followed and adopted the reasoning of the lead opinion in *Priesman.* In so doing, this Court held that when a vehicle is taken by a family member, benefits will only be denied under MCL 500.3113(a) if there was an actual intent to steal the vehicle. *Butterworth, supra* at 249-250.

---

[2] Justice Boyle concurred in the result only.

Neither the majority opinion nor the concurring opinion discussed the fact that the Legislature deliberately chose to use the term "taken unlawfully," rather than any other term to indicate that a larcenous intent was required to preclude benefits.

Although bound by the rule of law in *Butterworth* pursuant to MCR 7.215(J)(1), I disagree with its reasoning. I do not believe there is any authority that permits this Court to limit the application of MCL 500.3113(a) only to car thefts, given the clear terms adopted by the Legislature. "Had the Legislature intended to exempt from [MCL 500.3113(a)] all joyriding incidents, it would have chosen to use a different term than 'unlawful taking,' such as 'steal' or 'permanently deprive.'" *Mester v State Farm Mut Ins Co*, 235 Mich App 84, 88; 596 NW2d 205 (1999). As noted in *Priesman, supra* at 66-67, the Legislature refused to follow the language of the Uniform Motor Vehicle Accident Reparations Act, a model act that excluded coverage for "converters" of vehicles. The Legislature instead chose a term, "taken unlawfully," that encompasses crimes other than larceny or stealing of a motor vehicle. "The Legislature is presumed to have intended the meaning it has plainly expressed, and if the expressed language is clear, judicial construction is not permitted and the statute must be enforced as written." *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002). Courts may not rewrite the plain language of the statute and substitute their own policy decisions for those already made by the Legislature. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 405; 605 NW2d 300 (2000).

An unlawful taking does not require an intent to permanently deprive the owner of the vehicle to constitute an offense. There are two crimes that involve the unlawful driving or taking of motor vehicles, but do not require the intent to steal. Both MCL 750.413 and MCL 750.414 are generically referred to as "joyriding" offenses. MCL 750.413 prohibits the unlawful driving away of an automobile; the offense "requires an intent to take or drive the vehicle away but not to steal the vehicle." *Mester, supra* at 88, citing *People v Davis*, 36 Mich App 164, 165; 193 NW2d 393 (1971). In other words, the offense requires the "specific intent to take possession of the vehicle unlawfully, . . . and punishes conduct that does not rise to the level of larceny where an intent to permanently deprive the owner of the property is lacking." *Mester, supra* at 88, citing *People v Lerma*, 66 Mich App 566, 568, 570; 239 NW2d 424 (1976). MCL 750.414 prohibits the use of an automobile without authority and without the intent to steal. *Butterworth, supra* at 249.

It is uncontested that Strother took the vehicle without permission, but without the intention to permanently deprive Allen of her vehicle. Accordingly, I believe that *even if* Strother were a member of Allen's family, he would be precluded from recovering PIP benefits pursuant to the plain language of MCL 500.3113(a). Thus, I agree with the lead opinion that the trial court did not err in granting defendant's motion for summary disposition.

/s/ Kirsten Frank Kelly