

STATE OF MICHIGAN
COURT OF APPEALS

LEJUAN RAMBIN,

Plaintiff-Appellant,

v

ALLSTATE INSURANCE COMPANY,

Defendant/Cross-Defendant/Third-
Party Plaintiff-Appellee,

and

TITAN INSURANCE COMPANY,

Defendant/Cross-Plaintiff-Appellee,

and

AAA OF MICHIGAN,

Third-Party Defendant.

FOR PUBLICATION
August 30, 2012
9:00 a.m.

No. 305422
Wayne Circuit Court
LC No. 10-009091-NF

Before: DONOFRIO, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

BOONSTRA, J.

Plaintiff appeals as of right from a circuit court order granting summary disposition to defendants Allstate Insurance Company and Titan Insurance Company in this action for no-fault benefits arising from a collision that occurred while plaintiff was operating a motorcycle. We reverse and remand for further proceedings.

I. BASIC FACTS AND PROCEDURAL HISTORY

The material facts are undisputed. Scott Hertzog owned a motorcycle. The motorcycle was stolen on August 4, 2009. On August 22, 2009, Andre Smith told plaintiff that he had an extra motorcycle that plaintiff could ride for a motorcycle club event. Plaintiff went to Smith's house and Smith gave him the keys to Hertzog's stolen motorcycle. Smith told plaintiff that he

owned the motorcycle and that plaintiff could use it for the scheduled event at 10:00 p.m. Plaintiff used the motorcycle to attend the social function. While driving the motorcycle to return it to Smith's house, plaintiff collided with a car and was injured.¹

Plaintiff filed this action for recovery of no-fault benefits, naming as defendants Allstate, the insurer of a motor vehicle owned by Hertzog, and Titan, which was assigned the claim by the Assigned Claims Facility pursuant to MCL 500.3172.² Both defendants moved for summary disposition. Applying what it believed to be controlling case law, the trial court agreed that plaintiffs' claim was barred by MCL 500.3113(a), and granted defendants' motions.

This Court reviews a trial court's decision on a motion for summary disposition *de novo*. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). We conclude, based on our review of the text of MCL 500.3113(a) and the applicable case law, that perhaps understandably in light of the tortured paths that have been taken in the development of the case law, the trial court erred in finding that defendants were entitled to summary disposition. Rather, we find that, under the circumstances presented, plaintiff did not "take [the motorcycle] unlawfully" within the meaning of MCL 500.3113(a), and that defendants therefore were not entitled to judgment as a matter of law. MCR 2.116(C)(10).

II. MICHIGAN NO-FAULT EXEMPTION

Plaintiff challenges the trial court's ruling that MCL 500.3113(a) bars his recovery of no-fault benefits. MCL 500.3113 provides, in pertinent 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:

(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. [MCL 500.3113(a) (emphasis added).]

The applicability of this statute involves two inquiries. "The first level of inquiry will always be whether the taking of the vehicle was unlawful." *Amerisure Ins Co v Plumb*, 282 Mich App 417, 425; 766 NW2d 878 (2009). The inquiry "necessarily entail[s] ascertaining whether the injured individual seeking coverage took the vehicle or engaged in the taking of the

¹ At the time, plaintiff's Tennessee driver's license had been suspended, and plaintiff had not obtained a valid Michigan license. Plaintiff testified at his deposition that he was aware at the time of the accident that he did not possess a valid license to operate a motorcycle.

² It appears from the record that the motor vehicle with which plaintiff collided was uninsured. Third-party defendant AAA of Michigan, the insurer of a relative with whom plaintiff resided, was added to the case by defendant Allstate, as a potential higher-priority insurer, pursuant to MCL 500.3114(5)(c). However, the parties ultimately stipulated to AAA's dismissal, and AAA is not a party to this appeal.

vehicle.” *Henry Ford Health Sys v Esurance Ins Co*, 288 Mich App 593, 599; 808 NW2d 1 (2010).³ “If the taking was lawful, the inquiry ends because § 3113(a) does not apply.” *Plumb*, 282 Mich App at 425. However, if the injured individual unlawfully took the vehicle, the next step, under the “savings clause” of the statute, is to determine if that person “reasonably believed that he or she was entitled to take and use the vehicle.” MCL 500.3113(a); *Plumb*, 282 Mich App at 427.

In this case, the first level of inquiry involves whether a claimant who takes possession of a vehicle with the mistaken belief that the owner had given consent (when in fact the person who gave consent was not the owner and was not authorized to give consent) “took” the vehicle “unlawfully,” within the meaning of MCL 500.3113(a). Our consideration of that question leaves us with the definite and firm conviction that the state of the law in this area has been hopelessly muddled and in desperate need of clarity. It further and once again highlights for us the confusion and uncertainty that is created in the law when (a) legislatures craft statutory language without adequate specificity and definition; and (b) courts then create “judicial exceptions” to statutory schemes and to fill in the blanks that were left by the legislature in drafting the statutory language that the courts are supposed to apply.

Our Supreme Court recently provided some clarity in this area in *Spectrum Health Hosps v Farm Bureau Mutual Ins Co et al*, and *Progressive Marathon Ins Co v DeYoung*, ___ Mich ___, ___ NW2d ___, 2012 WL 3101747 (2012). We endeavor herein to address and apply the statutory text to the facts before us, and also to appropriately apply the preceding case law, including the Supreme Court’s recent reasoning in *Spectrum Health/Progressive Marathon*, and thus to provide additional clarity in the context of the instant appeal.

A. Statutory Construction

As always, our statutory construction analysis must begin with the language of the statute. *US Fidelity Ins & Guaranty Co v Mich Catastrophic Claims Ass’n (On Rehearing)*, 484 Mich 1, 13; 773 NW2d 243 (2009). As quoted above, MCL 500.3113(a) creates an exemption from the otherwise-applicable entitlement to personal protection insurance benefits for accidental bodily injury (“PIP benefits”) if: (a) “[t]he person was using a motor vehicle or motorcycle”; (b) “which he or she had taken unlawfully”; (c) “unless the person reasonably believed that he or she was entitled to take and use the vehicle.”

There is no question here that plaintiff “was using a . . . motorcycle.” Therefore, this condition is satisfied.

Less clear is whether the motorcycle was one “which [plaintiff] had taken unlawfully.” Unfortunately, the legislature did not provide any definition of what “taken unlawfully” means,

³ In *Esurance*, the injured person was a passenger in the vehicle, and there was no evidence from which to conclude that *he* “‘had taken’ the vehicle, let alone that he took it unlawfully.” [*Esurance*, 288 Mich App at 600-01.]

particularly in a context such as this. And the courts have therefore been struggling ever since to provide the requisite definition in the various factual contexts in which the question has arisen.

Finally, and assuming that there was an unlawful taking, the question arises, under the “savings clause” of the statute, as to whether plaintiff had a reasonable belief that he was “entitled to take and use the vehicle.” Again, given the lack of legislative definition, the courts have been grappling with the meaning of “entitled to take and use,” and particularly whether, in the current context, “entitled to . . . use” relates to authorization from the vehicle’s owner (or perhaps another person) or additionally encompasses entitlement from the State (*e.g.*, in terms of licensure or insurance).

B. Unlawful Taking

By our reading of the statute, for a claimant to have “taken [a vehicle] unlawfully” under this statutory exemption: (a) a vehicle must have been “taken”; (b) the taking of the vehicle must have been “unlawful[]”; (c) it must have been the injured person who took the vehicle unlawfully (by virtue of the statutory prefacing of the words “had taken unlawfully” with the descriptor “he or she”); and (d) the injured person must therefore have both “taken” the vehicle and acted somehow “unlawfully” in doing so.

Since “taken unlawfully” is legislatively undefined under the no-fault act, the courts have been left to discern whether the term means, *e.g.*, a taking that is (a) in violation of a criminal statute (and, if so, which ones); (b) without authorization of law; (c) without authorization of any person; (d) without authorization of the vehicle’s owner; or (e) something else. Our Supreme Court in *Spectrum Health/Progressive Marathon* has now provided some guidance in that respect, holding that “any person who takes a vehicle contrary to a provision of the Michigan Penal Code⁴ . . . has taken the vehicle unlawfully for purposes of MCL 500.3113(a).” *Id.*, slip op at 3. The Court further found that “in this context, the term ‘unlawful’ can only refer to the Michigan Penal Code,” and rejected the reasoning of prior case law that “did not address whether the end user of a vehicle violated the Michigan Penal Code.” *Id.*, slip op at 3-4, 11, and n 22.⁵

In our view, taking into appropriate consideration the statutory language and the case law, including *Spectrum Health/Progressive Marathon*, the term “taken unlawfully” as used in MCL 500.3113(a) thus requires some action by the “end user” of the vehicle that is contrary to the Michigan Penal Code. At the same time, we cannot agree with plaintiff’s pre-*Spectrum Health/Progressive Marathon* characterization that “Michigan courts have repeatedly and

⁴ MCL 750.1 *et seq.*

⁵ As the Supreme Court noted in *Spectrum Health/Progressive Marathon*, “[t]he word ‘unlawful’ commonly means ‘not lawful; contrary to law; illegal,’ and the work ‘take’ is commonly understood as ‘to get into one’s hands or possession by voluntary action.’ When the words are considered together, the plain meaning of the phrase ‘taken unlawfully’ readily embraces a situation in which an individual gains possession of a vehicle contrary to Michigan law.” *Id.*, slip op at 11 (footnotes omitted).

correctly concluded that determination of an unlawful taking under MCL 500.3113 rest [sic] on whether possession violated criminal statutes such as MCL 750.413 [taking possession of and driving away a motor vehicle] or MCL 750.414 [unauthorized taking or use, without intent to steal of a motor vehicle].” Not only does the statutory text not expressly say that, but neither in our view did the case law, at least until the Supreme Court’s recent opinion in *Spectrum Health/Progressive Marathon*.⁶

While we therefore are unable to conclude that the pre-*Spectrum Health/Progressive Marathon* case law supports plaintiff’s interpretation, the Supreme Court in *Spectrum Health/Progressive Marathon* held – consistent with plaintiff’s position – that a MCL 500.3113(a) “unlawful taking” requires action by the “end user” that is “contrary to a provision of the Michigan Penal Code.” *Id.*, slip op at 3-4.

For the reasons that follow, we conclude that plaintiff did not “take [the motorcycle] unlawfully” under MCL 500.3113(a). Further, having reached that conclusion, we need not address the applicability of the “savings clause” of the statute or decide, under its second prong of analysis, whether plaintiff “reasonably believed that he [] was entitled to take and use the vehicle.” Accordingly, we reverse the trial court’s finding of an unlawful taking under MCL 500.3113(a), and remand for further proceedings.

Recognizing that the Supreme Court in *Spectrum Health/Progressive Marathon* has now addressed the issue, it remains helpful to consider that decision, and plaintiff’s arguments, in the context of the pre-existing case law. Because the case law gives context to our analysis, and because plaintiff argues that the cited case law requires an interpretation different from ours, we therefore discuss the development of the case law, up to and including *Spectrum Health/Progressive Marathon*. We believe that discussion further confirms our conclusion that the statutory scheme has long cried out for clarification.

With little analysis (albeit without the benefit of *Spectrum Health/Progressive Marathon* having yet been decided), plaintiff cites to: (a) the non-majority “lead opinion” and the “dissent” in *Priesman v Meridian Mut Ins Co*, 441 Mich 60; 490 NW2d 314 (1992); (b) a “concurring” opinion in *Allen v State Farm Mut Auto Ins Co*, 268 Mich App 342; 708 NW2d 131 (2005); (c) *Landon v Titan Ins Co*, 251 Mich App 633; 651 NW2d 93 (2002); (d) *Mester v State Farm Mut Ins Co*, 235 Mich App 84; 596 NW2d 205 (1999); and (e) *Butterworth Hospital v Farm Bureau Ins Co*, 225 Mich App 244, 570 NW2d 304 (1997).⁷ Based on the supposed clarity of those

⁶ In fact, the Supreme Court in *Spectrum Health/Progressive Marathon* expressly overruled (at least in part) many of the cases on which plaintiff purported to rely. *Id.*, slip op at 4-5, 33.

⁷ Apparently mistakenly, plaintiff also cites to: “*Roberts ex rel Irwin v Titan Ins Co*, 485 Mich 905, 907 (2009) (Corrigan, J., dissenting).” However, that citation is actually to: *Riley v State Farm Fire and Cas Co*, 485 Mich 905 (2009), in which Justice Corrigan did issue a dissenting opinion, on an order denying leave to appeal, in a matter that is not pertinent to this one. We assume that plaintiff intended to cite to: *Roberts v Titan Ins Co (On Reconsideration)*, 282 Mich App 339; 764 NW2d 304 (2009) (discussed *infra*).

decisions, plaintiff argues that he did not violate MCL 750.413 or 750.414, and that he therefore did not “take [the motorcycle] unlawfully”. Plaintiff further concludes, as a result, that *Plumb* (on which the trial court relied in granting summary disposition to defendants) wrongly concluded that a person unlawfully takes a vehicle unless he had an “unbroken chain of permission traceable to the owner” (language that appears nowhere in *Plumb*). Plaintiff therefore argues that *Plumb* was “wrongly decided” and that, under MCR 7.215(J)(1), we should reject it in favor of supposedly contrary prior post-1990 controlling precedent.⁸

We note that the Supreme Court in *Spectrum Health/Progressive Marathon* did not (at least explicitly) overrule *Plumb* in any respect, and in fact cited to it favorably (albeit on a point of law other than “unlawful taking”). *Spectrum Health/Progressive Marathon*, slip op at 12, n 25. But we also find *Plumb* to be distinguishable and not controlling here, particularly in light of *Spectrum Health/Progressive Marathon*, and therefore decline plaintiff’s invitation to reject *Plumb* as “wrongly decided.”

Plaintiff first relies upon a non-majority (three-Justice) lead opinion of our Supreme Court in *Priesman* where, faced with a lack of clear legislative definition, that plurality of Justices took it upon themselves to judicially read into MCL 500.3113(a) an exception for joyriding family members, even though “joyriding” indisputably is an “unlawful” activity.⁹ This plurality opinion, while not precedential, thus suggested that a denial of PIP benefits resulting from the application of MCL 500.3113(a) was limited to situations of “thieves while driving stolen vehicles.” *Priesman*, 441 Mich at 67. A three-Justice dissent (authored by Justice Griffin) in *Priesman* argued, to the contrary, that the application of the MCL 500.3113(a) exclusion was not limited to “car thieves,” and extended even to family members engaged in “joyriding.” Neither the lead opinion nor the dissent in *Priesman* stated, however, as plaintiff in the instant case suggests, that the “taken unlawfully” requirement of MCL 500.3113(a) requires a violation specifically of MCL 750.413 or MCL 750.414, or whether there might be some other basis for finding an “unlawful” taking.¹⁰

Thereafter, this Court in *Bronson Methodist Hospital v Forshee*, 198 Mich App 617; 499 NW2d 423 (1993), found that there was no “unlawful taking” where the injured person had used

⁸ Regardless of its genesis or past application, the Supreme Court has now rejected the “chain of permissive use” theory. *Spectrum Health/Progressive Marathon*, slip op at 18.

⁹ To add to the confusion, the lead opinion in *Priesman* did not identify the statutory provision prohibiting “joyriding.” The *Priesman* dissent identified it as MCL 750.414. *Priesman*, 441 Mich at 70. This Court in *Mester*, 235 Mich App at 88, identified it not as MCL 750.414, but rather as MCL 750.413. In his Brief on Appeal in this case, plaintiff variously describes it both ways. A concurring opinion in *Allen v State Farm Mut Auto Ins Co*, 268 Mich App 342, 351; 708 NW2d 131 (2005), describes “both” MCL 750.413 and MCL 750.414 as “generically referred to as ‘joyriding’ offenses.”

¹⁰ The lead opinion and the dissent in *Priesman* agreed that “unlawfulness” does not depend on “conviction of a crime.” *Id.*, 441 Mich at 63, n 5 (Levin, J.) (emphasis added), and at 72 (Griffin, J.).

the vehicle with the permission of his friend, who in turn had used it with the permission of his father, the vehicle's owner. Given the dearth of case law on what constitutes an "unlawful taking" in this no-fault context, the Court found "guidance in the decisions that have construed whether a vehicle was taken with consent for purposes of the owner's liability statute, MCL § 257.401; MSA § 9.2101," *Bronson*, 198 Mich App at 623, and concluded that "the broad definition of "consent" employed by the Supreme Court in the owner liability context is of equal applicability here." *Id.* at 624. The Court thus concluded that "an owner who willingly surrenders control of his vehicle to others consents to the assumption of the risks attendant upon his surrender of control. That is, the person to whom the vehicle is entrusted may thereafter violate the instructions of the owner, such as loaning the vehicle to another person. More to the point . . . when an owner loans his vehicle to another, it is foreseeable that the borrower may thereafter lend the vehicle to a third party and such further borrowing of the vehicle by the third party is, by implication, with the consent of the owner." *Id.* at 624-25.¹¹

Because there was an "unbroken chain of permissive use," the Court in *Bronson* found that the injured person had not "taken [the vehicle] unlawfully" under MCL 500.3113(a):

Thus, returning to the case at bar, under the reasoning of [a leading Supreme Court decision under the owner liability statute], Mark Forshee's use of the vehicle at the time of the accident was with the owner's consent inasmuch as the owner, Stanley Pefley, entrusted the vehicle to his son, Thomas, who in turn entrusted the vehicle to Morrow, who finally entrusted it to Forshee. Given this unbroken chain of permissive use, we cannot say that Forshee's taking of the automobile was unlawful [T]he mere fact that the borrower violates the restrictions placed on him by the owner does not negate the fact that the subsequent taking by a third party is, by implication, with the owner's consent. Therefore, even though Stanley Pefley had placed restrictions on the use of the vehicle he entrusted to his son, including the specific restriction that Mark Forshee was not to use the vehicle, the fact that the vehicle was ultimately entrusted to Forshee in violation of those restrictions does not change the fact that the taking and use was with the owner's consent [*Bronson*, 198 Mich App at 625.]

The "unbroken chain of permissive use" language thus emanated not from *Plumb*, as plaintiff suggests, but instead from *Bronson*.¹² Notably in our view, however, the Court in

¹¹ The Court in *Bronson* relied in part on the prior decision in *State Farm Mutual Automobile Ins Co v Hawkeye-Security Ins Co*, 115 Mich App 675, 321 NW2d 769 (1982). There the Court found that an employee's after-hours use of his employer's vehicle did not fall within the MCL 500.3113(a) exemption – even though that use was unauthorized by the vehicle's owner – since "the original taking . . . was not unlawful." *Id.*, 115 Mich App at 682.

¹² Perhaps in recognition of this, plaintiff argues that *Bronson* "never departed from *Priesman's* unanimous recognition that MCL 750.413 and MCL 750.414 govern determination of unlawful taking under MCL 500.3113(a)." But while it may be true that the Court in *Bronson* "never

Bronson did not say that *absent* an “unbroken chain of permissive use,” there necessarily would be an “unlawful taking.” In other words, the existence of an “unbroken chain of permissive use” was *sufficient* (according to *Bronson*) to conclude that there was no “unlawful taking.” But its existence was not necessarily a *requirement* in order for there to have been no “unlawful taking.”¹³

Thereafter, in *Butterworth*, this Court adopted the *Priesman* “family member joyriding exception,” in finding that a minor who took his mother’s vehicle without her permission did not fall within MCL 500.3113(a). Although the Court in *Butterworth* recognized that the lead opinion in *Priesman* was non-binding, and even noted that “any joyriding exception seems to be in derogation of the clear language of the statutes,” it nonetheless felt “compelled” to follow it because a majority of the Supreme Court had affirmed this Court’s lower court determination in *Priesman* “allowing coverage for a joyriding family member.” *Butterworth*, 225 Mich App at 248-49 and n 2.¹⁴ In adopting the “family member joyriding exception,” the Court in *Butterworth* contrasted “joyriding” (which occurs “without the intent to steal”) with “attempting to steal,” *id.*, 225 Mich App at 249, and suggested that only a taking of a vehicle with “intent to steal” fell within MCL 500.3113(a) (at least if carried out by a “family member”).

Subsequently, in *Mester*, this Court declined to extend the judicially created *Priesman/Butterworth* “joyriding exception” to injured parties other than “family members.”¹⁵ The Court specifically stated that “[a]n unlawful taking does not require an intent to permanently deprive the owner of the vehicle to constitute an offense,” and that in drafting MCL 500.3113(a) “the Legislature chose a term that encompasses the offense of joyriding,” *Mester*, 235 Mich App at 88. Noting that *Priesman* and *Butterworth* had created a “‘family member’ joyriding exception,” *id.*, at 87, the Court declined to extend that exception to non-family members.

departed” from *Priesman*, it is also true that this Court’s holding in *Bronson* did not rely upon *Priesman* at all.

¹³ Our Supreme Court has in any event now rejected “the *Bronson* Court’s ‘chain of permissive use’ theory [as] inconsistent with the statutory language of the no-fault act,” and as “not faithfully apply[ing] the standard articulated in MCL 500.3113(a) to determine whether the claimant ‘had taken [the vehicle] unlawfully.’” *Spectrum Health/Progressive Marathon*, slip op at 15, 18. Instead, the Court found that because the claimant violated MCL 750.414 (one of the joyriding statutes), “MCL 500.3113(a) precludes PIP benefits in this case.” *Spectrum Health/Progressive Marathon*, slip op at 19.

¹⁴ We note that the Court of Appeals’ decision in *Priesman* was decided, with scant analysis, on May 29, 1990 and released for publication on September 25, 1990. Therefore, it does not have “precedential effect” under MCR 7.215(J)(1) (which gives precedential effect to prior decisions of this Court “issued on or after November 1, 1990”) or its predecessor, Administrative Order 1990-6 (which was effective on that date).

¹⁵ A concurring opinion in *Butterworth* earlier had advocated for broadly reading the judicially-created *Priesman* joyriding exception to include “*anyone* who is merely joyriding.” *Id.*, 225 Mich App at 253 (Hoekstra, J., concurring) (emphasis in original). It also suggested that the MCL 500.3113(a) exemption should “preclude[] coverage only where the person taking the vehicle unlawfully does so with the *intent to steal*.” (Emphasis added).

In 2002, this Court in *Landon* found that *Butterworth* and *Mester* were inconsistent, and that they conflicted on the issue of whether a violation of MCL 750.413 fell within the MCL 500.3113(a) exclusion:

This Court has issued two decisions concerning whether a violation of M.C.L. § 750.413 qualifies as an “unlawful” taking and therefore allows application of the PIP benefits exclusion contained in M.C.L. § 500.3113(a). However, those decisions conflict. The *Mester* Court held that a violation of M.C.L. § 750.413 precludes an injured person from recovering PIP benefits under subsection 3113(a). *Mester, supra* at 88, 596 N.W.2d 205. In contrast, the *Butterworth* Court held that a violation of M.C.L. § 750.413 does not preclude an injured person from recovering PIP benefits under subsection 3113(a). *Butterworth, supra* at 249-250, 570 N.W.2d 304. The conflict between these two decisions appears to be premised on whether the “taken unlawfully” language of subsection 3113(a) applies only in situations where the injured person has “stolen” the vehicle in which the person was injured. Further, the conflict appears to arise from our Supreme Court’s fractured opinion in *Priesman v. Meridian Mut. Ins. Co.*, 441 Mich. 60, 490 N.W.2d 314 (1992). [*Landon*, 251 Mich App at 640.]

Ultimately, the Court in *Landon* determined that it did not need to resolve this conflict, because it found, under the facts before it,¹⁶ that the injured party was a “bailee” of the vehicle who possessed the vehicle with the owner’s consent, and who arguably had the implied (although not express) consent of the owner to use the vehicle and, therefore, did not violate MCL 750.413, did not “take [the vehicle] unlawfully” under the MCL 500.3113(a) exclusion, and accordingly was entitled to PIP benefits.¹⁷

In 2005, this Court decided *Allen*, which presented the issue of whether a live-in companion was a family member for purposes of the *Priesman/Butterworth* “family member joyriding exception.” A majority of this Court concluded that “family member joyriding exception” did not apply and, as in *Mester*, the Court thus refused to extend the exception beyond that stated in *Butterworth*. A concurring opinion expressly disagreed with the reasoning of *Butterworth*, and with its “application of MCL 500.3113(a) only to car thefts,” and endorsed the reasoning of Justice Griffin’s dissent in *Priesman*. *Allen*, 268 Mich App at 349-50 (K.F. Kelly, J., concurring).

¹⁶ The owner of the vehicle had received permission from the injured person to park the car in her yard for purposes of attempting to sell the vehicle. The owner left the keys in the unlocked car, so that potential purchasers could test-drive the vehicle. The injured person later used the vehicle herself, and was injured in an accident.

¹⁷ In distinguishing between MCL 750.413 and MCL 750.414, the Court in *Landon* noted that MCL 750.413 is a “felony” provision, while MCL 750.414 is a “misdemeanor” provision. The Court found that “a violation of MCL § 750.414 does not call for application of the benefits exclusion contained in subsection 3113(a).” *Landon*, 251 Mich App at 650.

In *Roberts*, this Court once again had occasion to consider the *Priesman/Butterworth* joyriding exception in connection with an injury to a minor who was driving, without permission, a motor vehicle that was owned by a non-family-member who lived with the minor and his mother (but possession of which the owner had given to the minor's mother to use). The trial court granted summary disposition to the insurer, on the ground that the minor had unlawfully taken the vehicle, and that the *Priesman* joyriding exception did not apply.

This Court reversed, and perhaps because of a presumption that the minor's mother "owned" the vehicle, did not rely upon *Mester's* and *Allen's* refusal to extend the *Priesman/Butterworth* joyriding exception to non-family members. Instead, the Court in *Roberts* found the joyriding exception to be applicable, noting that *Butterworth* had found that "MCL 500.3113(a) did not apply to any person who takes a family member's vehicle for joyriding purposes; rather, the statute only operated to exclude a person from coverage if he or she had an actual intent to steal the vehicle." *Roberts*, 282 Mich App at 351-352. But, expressing its disagreement with *Butterworth* and the lead opinion in *Priesman*, the Court stated, "were we not so bound to follow the *Butterworth* decision, we would instead follow Justice Griffin's dissent in *Priesman*, in which he concluded that, by creating the joyriding exception, the lead opinion improperly 'depart[ed] from the clear and unambiguous language of § 3113(a) . . .'" *Id.* at 353-54.¹⁸

In the context of this pre-existing case law, the Supreme Court in *Spectrum Health/Progressive Marathon* recently considered anew the "family member joyriding exception," as well as *Bronson's* "chain of permissive use" theory. In a decision that it described as "retrospective in its operation," the Court disavowed the plurality opinion in *Priesman*, "overruled its Court of Appeals progeny as inconsistent with MCL 500.3113(a)," and overruled *Bronson's* "chain of permissive use" theory. *Id.*, slip op at 4-5, 32-33.¹⁹

While it is undisputed that the instant case does not present an issue of "family member joyriding" under the now-disavowed judicially created *Priesman/Butterworth* exception, the above discussion adds to the overall context of the issues before us, and aids in understanding the underpinnings of the legislative and judicial morass that has preceded our consideration of this appeal.

¹⁸ In its original opinion of December 8, 2008, this Court in *Roberts* declared a conflict with *Butterworth, Roberts v Titan Ins Co*, 281 Mich App 551, 574 (2008), following which the judges of this Court were polled pursuant to court rule, and an order subsequently issued directing that a special conflict panel would not be convened pursuant to MCR 7.215(J). *Roberts v Titan Ins Co*, 281 Mich App 801 (2008). To the extent that such a conflict existed, *Butterworth* therefore remained controlling. MCR 7.215(J)(1).

¹⁹ The Supreme Court thus expressly overruled *Butterworth, Mester, Allen, and Roberts* because "the family-joyriding exception has no basis in the language of MCL 500.3113(a)." *Spectrum Health/Progressive Marathon*, slip op at 5.

That brings us to *Plumb*, which plaintiff contends was “wrongly decided” and should not be followed. In *Plumb*, the injured person (Rae Plumb), who had been drinking for several hours at a bar, left the bar with two men, one of whom apparently gave her the keys to a vehicle and asked her to drive him. The man who gave her the keys turned out not to be the owner of the vehicle. Rather, David Shelton testified that he had an agreement to buy the vehicle and had been using it for more than 30 days (and thus was considered an “owner” for purposes of the no-fault act), that he had left the keys in the vehicle when he parked it in the bar parking lot, and that he did not give the keys, or permission to drive the vehicle, to anyone.

Given Plumb’s apparent level of intoxication, the trial court initially concluded that she had presented mere speculation and conjecture with respect to how she had received permission to drive the vehicle. On reconsideration, the trial court found that it did not matter, and that even assuming that she had permission, she was not entitled to drive the vehicle because she lacked a driver’s license and was intoxicated. The trial court granted summary disposition to the defendant, finding that the MCL 500.3113(a) exemption applied.

On appeal, this Court briefly addressed the “unlawful taking” requirement of MCL 500.3113(a) but, primarily focusing on the “savings clause” and its second prong of analysis (discussed *infra*), affirmed the trial court’s finding “because there is no genuine issue of material fact that Plumb did not have a reasonable belief that she was entitled to ‘use’ the Jeep within the meaning of § 3113(a).” *Plumb*, 282 Mich App at 423.

With respect to the “unlawful taking” requirement, this Court merely stated as follows:

Although Plumb asserted that she received the keys from the unidentified man, there is no evidence that she received them from Shelton or the titled owner or otherwise had permission to take the Jeep and, accordingly, there is no material question of fact that Plumb lacked Shelton’s consent or implied consent to take the Jeep. Nor is there any evidence to suggest that Plumb had an intent to permanently deprive Shelton of the Jeep, and thus her conduct could be considered joyriding. However, given that Plumb and Shelton are not family members, the joyriding exception is unavailable. Therefore, there is no genuine issue of material fact that Plumb unlawfully took the Jeep, and § 3113(a) applies. [*Id.* at 426-427 (citations omitted).]

The majority opinion in *Plumb* thus acknowledged the then-existing *Priesman/Butterworth* “family member joyriding exception,” noted that *Butterworth* held that the MCL 500.3113(a) exemption required (at least for family members) an “actual intent to steal the vehicle” and an “intent to permanently deprive” the owner of the vehicle, but found the joyriding exception to be inapplicable because the injured person was not a “family member” of the owner.

The Court provided no further analysis of when an “unlawful taking” occurs outside the context of the joyriding exception. The Court merely noted a lack of any evidence that the injured person had “permission” of the owner to take the vehicle, and concluded that “therefore, . . . [the injured person] unlawfully took” the vehicle. *Plumb*, 282 Mich App at 427. On its face, this might suggest that nothing further is required. However, we believe that the

Plumb Court’s analysis on this point was colored by two critical factors: (a) *Plumb* was intoxicated to such a level that it could not be determined whether she had reason to know that the taking of the vehicle was “unlawful” or without proper authority; and (b) she apparently left the bar, in such an intoxicated condition, with two men, one of whom was in possession of the car keys and with whom she *jointly* then “took” the vehicle.

It is not surprising, under those circumstances, that the Court in *Plumb* rather cursorily concluded that there had been an “unlawful taking,” and instead focused upon, and premised its affirmance upon, the “savings clause” and its second prong of analysis, *i.e.*, *Plumb*’s lack of a “reasonable belief” that she was “entitled to take and use the vehicle.”

Here, by contrast, the record evidence indicates that plaintiff had every reason to believe that he had obtained the motorcycle from its rightful owner, and there were no countervailing considerations (such as intoxication or joint conduct with the actual “taker” of the motorcycle). We therefore find *Plumb* to be distinguishable, rather than “wrongly decided” on this first prong of analysis, the issue of an “unlawful taking.”

Plaintiff also contends that the court in *ACIA v American Ins Group*, 800 F Supp 2d 877, 883 (ED Mich 2011), erred in applying *Plumb*, and in “misreading” *Bronson*, to find an “unlawful taking” under MCL 500.3113(a) where, as here, a motorcycle operator was injured (in that case while taking the vehicle on a test drive). We agree. While *ACIA* represents a fact pattern similar to that of the instant case, it is not only unbinding upon us, but in our view, and for the reasons noted, it failed to correctly apply *Plumb* and the now-overruled *Bronson*. Moreover, the court in *ACIA* appeared to recognize the fallacy of applying the case law as it did, reaching its conclusion only because the “Michigan case law . . . *seemingly compels the conclusion* that [the injured person] unlawfully took the motorcycle he was riding at the time he sustained his injuries.” *ACIA*, 800 F Supp 2d at 883 (emphasis added). We believe that it does not, and we believe our conclusion to have been buttressed by the Supreme Court’s recent decision in *Spectrum Health/Progressive Marathon*, as discussed herein.

Plaintiff further argues that *Plumb* “spawned” another “anomalous” unpublished decision of this Court in which we found an “unlawful taking” in the absence of an unbroken chain of permissive use. The Supreme Court denied leave to appeal this Court’s determination in that case. *Farmers Ins Exchange v Young*, 489 Mich 909 (2011).²⁰ However, we again find *Young*

²⁰ Interestingly, Justice Markman indicated in a concurring opinion that he would “refine the holding” of *Plumb*. Citing *Mester* for the proposition that an “unlawful taking does not require an intent to permanently deprive the owner of the vehicle,” Justice Markman indicated instead that an unlawful taking “may occur where a person has taken a vehicle ‘without authority.’” *Young*, 489 Mich at 909 (Markman, J., concurring) (and, further, that the “authority” in question was that of the “owner” and did not include that of the State, such that lack of proper insurance or licensure should not enter into the “unlawful taking” analysis). Citing to MCL 750.413 and MCL 750.414 for the proposition that an unlawful taking may occur where the taking of the vehicle is “without authority,” Justice Markman presaged the outcome in *Spectrum Health/Progressive Marathon*, which cited with approval Justice Markman’s concurrence in

distinguishable because there was a plethora of evidence in that case that demonstrated that the injured person actually knew and had reason to know that he in fact was not authorized to take the vehicle. Moreover, we did not, as plaintiff asserts, conclude that a taking is necessarily unlawful “if” (emphasis added) consent could not be implied through a chain of entrustment from the owner to the injured person. To the contrary, we did not preclude a finding that a taking could be lawful even absent a “chain of entrustment.”

Of note too is Justice Marilyn Kelly’s dissent, in the denial of the application for leave to appeal in *Young*:

The question whether an individual violated a statute in taking a vehicle must be viewed from the perspective of the person taking the vehicle. This approach is mandated because statutes pertaining to the unlawful taking of a vehicle, such as MCL 750.413 or MCL 750.414, contain an element of intent. In the case at hand, defendant Young neither had the intent to steal nor to joyride when he drove Lee back to her cousin’s home. When Lee showed up at his place of work in the vehicle with its owner’s son in tow, she appeared to have the authority to drive the vehicle. [*Young*, 489 Mich 909, 912 (2011) (Marilyn Kelly, J., dissenting).]

While we would not necessarily endorse the conclusions of that dissent in the case in which it arose, we do believe that it appropriately recognizes that, in construing MCL 500.3113(a)’s requirement that “he or she ha[ve] taken [a vehicle] unlawfully,” there must be some focus on the *conduct* of the *injured person*, i.e., the “he or she” in question, some characteristic of “unlawful[ness] about that conduct, and some element of “intent” on the part of the actor. For the reasons noted, we believe this to be consistent with the text of the statute itself and, muddled though it has been, with the case law as well.

We further believe that our interpretation is consistent with the Supreme Court’s recent pronouncements in *Spectrum Health/Progressive Marathon*. In rejecting *Bronson*’s “chain of permissive use” theory, the Court found that *Bronson* improperly looked to the “owner’s liability statute, MCL 257.401,” for guidance in interpreting MCL 500.3113(a), and thus improperly focused on “an owner’s ‘express or implied consent or knowledge.’” *Spectrum Health/Progressive Marathon*, slip op at 14-16 (emphasis added). *Bronson* failed to recognize that MCL 500.3113(a) “examines the legality of the taking from the *driver’s* perspective—a perspective that the owner’s liability statute lacks.” *Spectrum Health/Progressive Marathon*, slip op at 16 (emphasis in original).

Spectrum Health/Progressive Marathon thus clarifies that MCL 500.3113(a) requires us to “examine[] the legality of the taking from the *driver’s* perspective,” and further requires that the “end user” driver has taken the vehicle “contrary to a provision of the Michigan Penal Code.” *Spectrum Health/Progressive Marathon*, slip op at 3-4, 16 (emphasis in original). In this case,

Young, and which included those statutory joy-riding proscriptions of the Michigan Penal Code within the “unlawful taking” component of MCL 500.3113(a). *Spectrum Health/Progressive Marathon*, slip op at 12, n 26.

there is no dispute that plaintiff did not take the vehicle in violation of the Michigan Penal Code, and that, viewed from plaintiff's [the driver's] perspective, there was no "unlawful taking."²¹

Applying the text of the statute and the case law discussed above, we therefore find, based on the record evidence, that there is no genuine issue of material fact that plaintiff did not "take [the motorcycle] unlawfully" under MCL 500.3113(a), and that the first prong of the statutory analysis is not satisfied. Simply put, plaintiff was not the person who took the vehicle unlawfully. He was a person who, with no unlawful intent and with no knowledge of any unlawful taking, used a vehicle that another person may have taken unlawfully. Accordingly, we reverse the trial court's award of summary disposition in favor of defendants, and remand for further proceedings.

C. Reasonable Belief of Entitlement to Take and Use Vehicle

Given our conclusion that plaintiff did not "take [the vehicle] unlawfully", we need not reach the second phase of analysis, under the "savings clause" of MCL 500.3113(a). Under that clause, even if an injured person had "taken [a vehicle] unlawfully", MCL 500.3113(a) does not apply if "the person reasonably believed that he or she was entitled to take and use the vehicle." *Id.*; *Plumb*, 282 Mich App at 429. We therefore do not decide that question here, and write further only to more expansively demonstrate how the uncertain state of the law would benefit from a further injection of clarity with respect to this second prong of analysis.

In construing the "savings clause," this Court in *Plumb* distinguished between entitlement to "take" a vehicle and entitlement to "use" it. The Court stated, "[i]f Plumb received the keys from someone who appeared to own the Jeep, it would have been reasonable for her to believe that she was entitled to take the Jeep within the meaning of [the savings clause of] § 3113(a)." *Id.*, 282 Mich App at 430. The Court thus found that there was a genuine issue of material fact concerning whether Plumb "reasonably believed" that she was entitled to *take* the vehicle. *Id.*, 282 Mich App at 430-431 (emphasis added). However, the Court further found that because Plumb drove the vehicle while she was intoxicated (and because she additionally knew that her

²¹ We note that the Supreme Court in *Spectrum Health/Progressive Marathon* rejected the opinion of the dissent in that case that the majority's interpretation of MCL 500.3113(a) (as inclusive of unlawful takings by "anyone") "precludes a class of injured parties from recovering PIP benefits even when a party was given permission to take a car by an intermediate user." *Id.*, slip op at 12-13 and n 26, quoting dissenting op at 7 (Hathaway, J., dissenting). On the facts before it, the Court based its disagreement with the dissent on the existence of the savings clause of MCL 500.3113(a) (the second prong of analysis, discussed *infra*). *Id.* However, we do not read *Spectrum Health/Progressive Marathon* as precluding a finding, in appropriate circumstances, that an "end user" who was given permission by an "intermediate user" also did not "take [a vehicle] unlawfully" under the first prong of analysis under MCL 500.3113(a). *Id.* Our conclusion finds support in the Supreme Court's requirement that, under MCL 500.3113(a), an "end user" have "violated the Michigan Penal Code" in order to have "unlawfully taken" a vehicle. *Id.*, slip op at 3-4, 11 and n 22. Where, as here, the "end user" did not "violate[] the Michigan Penal Code," there is no "unlawful taking" within the meaning of MCL 500.3113(a).

driver's license had been suspended), Plumb "could not have reasonably believed that she was entitled to use [the vehicle.]" *Id.*, 282 Mich App at 431-32 (emphasis added).²²

Plaintiff argues that *Plumb* "disregarded post-1990 published law that a suspended license does not exempt operation of the 'reasonable belief to use' exception," citing *Bronson* and *Butterworth*.²³ The Court in *Plumb* found, however, that *Bronson's* discussion (in its "savings clause" analysis) of the ramifications of a claimant's lack of a driver's license was dicta, since the Court's holding rested on there having been no unlawful taking at all (such that the savings clause analysis was superfluous). See *Plumb*, 282 Mich App at 427, n 4; *Bronson*, 198 Mich App at 625. See also *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 436-437; 751 NW2d 8 (2008) (defining obiter dictum to include "a judicial opinion in a matter related but not essential to a case"). Cf. *Boodt v Borgess Med Ctr*, 481 Mich 558, 563-564 n 4; 751 NW2d 44 (2008) (discussion that is "not essential" to the case does not create a rule of law pursuant to MCR 7.215(J)).

The Court in *Plumb* therefore arguably read into the "entitled to ... use" language of the "savings clause" a requirement that the person be able to "legally operate the vehicle" under the motor vehicle laws. See *Plumb*, 282 Mich App at 433 (O'Connell, J., dissenting). Justice Markman has since opined that "[w]hether the use was 'legal,' will often be a highly relevant factor in making this determination" under the "savings clause" (but not under the initial "unlawful taking" analysis). *Young*, 489 Mich at 909 (denying application for leave to appeal) (Markman, J., concurring). Justice Marilyn Kelly finds it relevant to neither analysis. *Id.* 489 Mich at 912 (Marilyn Kelly, J., dissenting) ("[n]otwithstanding the fact that Young did not have a valid driver's license, under the facts of this case, his belief that he was entitled to take and use the vehicle was reasonable").

As to *Butterworth*, this Court there addressed the insurer's argument that the claimant "took the vehicle unlawfully because he took it knowing that he . . . was not entitled to be a licensed driver." *Id.* In rejecting that argument, the Court therefore addressed (in a conclusion that appears now to have been called into question by at least two of our current Supreme Court Justices, see *supra*), the "licensure" issue in the context of the "unlawful taking" first prong of analysis. It did not, however, examine it under the "savings clause's" second level inquiry. *Butterworth* therefore did not establish a rule of law on that point.

²² Were we to reach the "savings clause" analysis in this case, we might be obliged to apply *Plumb* to reach a similar conclusion here, since plaintiff used the motorcycle knowing that his Tennessee driver's license had been suspended and that he had not obtained a valid Michigan driver's license.

²³ If *Plumb* conflicts with either of those decisions, this Court is obligated to follow the first opinion issued. See *Auto-Owners Ins Co v Harvey*, 219 Mich App 466, 473-474; 556 NW2d 517 (1996) ("[w]hen a panel is confronted with two conflicting opinions published after November 1, 1990, the panel is obligated to follow the first opinion issued").

What does all of this mean? It again means that the law, not only as to the “unlawful taking” analysis, but additionally as to the “savings clause” of MCL 500.3113(a), has been (and to some extent remains) seriously muddled and in need of clarification. With respect to the “savings clause” of MCL 500.3113a, any analysis will require a fact intensive inquiry that may ultimately constitute a question of fact for the fact finder. For the reasons noted, we confine our effort to provide clarity to the “unlawful taking” component of the analysis, and need not (and do not) reach the “savings clause.”

III. CONCLUSION

For the reasons stated, we find that plaintiff did not “take [a vehicle] unlawfully” within the meaning of MCL 500.3113(a). Accordingly, we reverse the trial court’s order granting summary disposition to defendants. We note that, in and of itself, our finding that plaintiff should not be *denied* PIP benefits under the MCL 500.3113(a) exemption is not dispositive of whether plaintiff is *entitled* to PIP benefits, or from whom. Those issues remain to be addressed in the trial court. Accordingly, we remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark T. Boonstra

/s/ Pat M. Donofrio