STATE OF MICHIGAN

IN THE SUPREME COURT

LEJUAN RAMBIN,

Plaintiff-Appellee,

Supreme Court No. 146256

v

Court of Appeals No. 305422

ALLSTATE INSURANCE COMPANY,

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

Wayne County Circuit Court
No. 10-009091-NF

and

TITAN INSURANCE COMPANY,

Defendant/Cross-Plaintiff,

and

AAA OF MICHIGAN,

Third-Party Defendant.

_____/

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SUPPLEMENTAL BRIEF ON BEHALF OF DEFENDANT-APPELLANT, ALLSTATE INSURANCE COMPANY

PROOF OF SERVICE

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Defendant-Appellant, ALLSTATE INSURANCE COMPANY, answers, "Yes."

Plaintiff-Appellee, LEJUAN RAMBIN, would answer, "No."

II. IN THE EVENT A TAKING UNDER THE FIRST PHRASE OF §3113(a) CAN BE "UNLAWFUL" ONLY IF THE TAKER KNOWS THAT THE TAKING WAS NOT AUTHORIZED BY THE VEHICLE OWNER, DID THE COURT OF APPEALS NEVERTHELESS ERR IN CONCLUDING THAT PLAINTIFF LACKED SUCH KNOWLEDGE AS A MATTER OF LAW GIVEN THE CIRCUMSTANTIAL EVIDENCE PRESENTED IN THIS CASE?

Defendant-Appellant, ALLSTATE INSURANCE COMPANY, answers, "Yes."

Plaintiff-Appellee, LEJUAN RAMBIN, would answer, "No."

INTRODUCTION

By its Application for Leave to Appeal filed November 30, 2012, Defendant-Appellant, ALLSTATE INSURANCE COMPANY, sought to challenge the published opinion of the Court of Appeals in this case, *Rambin v Allstate Ins Co*, 298 Mich App 679 (2012), which reversed an order of summary disposition in favor of Defendant and ruled as a matter of law that Plaintiff did not take a vehicle "unlawfully" within the meaning of MCL 500.3113(a).[1]

Defendant acknowledges that its Application raised only a single issue -- that being whether the Court of Appeals, having vacated the summary disposition in Defendant's favor, erred in precluding further proceedings on whether Plaintiff unlawfully took the motorcycle on which he sustained his injuries. Presuming that application of §3113(a)'s unlawful taking provision requires not only that a taking be unauthorized but also that it be knowingly unauthorized, Defendant argued that strong circumstantial evidence in the case raised a genuine factual dispute as to whether Plaintiff knew, contrary to his assertions, that he lacked rightful authority to take possession of the motorcycle in this case.

Under MCR 7.302(H)(4), however, a party may be permitted to add issues subsequent to the filing of its application, and the Court has authority on its own to raise additional issues for review. By its order of May 1, 2013, the Court requested argument on two specific issues,

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[1] 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).

the first of which was not previously raised in Defendant's application, and the second of which was addressed at length in the application. The two issues raised by the Court are as follows:

> 1. [T]he parties shall address whether the plaintiff took the motorcycle on which he was injured "unlawfully" within the meaning of of MCL 500.3113(a), and specifically, whether "taken unlawfully" under MCL 500.3113(a) requires the "person ... using [the] motor vehicle or motorcycle" to know that such use has not been authorized by the vehicle or motorcycle owner, see MCL 750.414; *People v Laur*, 128 Mich App 453 (1983);
>
> 2. and, if so, whether the Court of Appeals erred in concluding that plaintiff lacked such knowledge as a matter of law given the circumstantial evidence presented in this case.

(Order, No. 146256, May 1, 2013).

Defendant answers the Court's first question in the negative. For the reasons articulated in Argument I.A below, Defendant submits that the misdemeanor joyriding statute, MCL 750.414, itself is a strict liability crime in which lack of guilty knowledge is immaterial. Accordingly, since guilty knowledge on the part of an unauthorized taker of a motor vehicle is immaterial to the crime of misdemeanor joyriding, a person need not "know" that his or her taking of a vehicle is unauthorized for it be unlawful under §3113(a). On the other hand, even if, contrary to the plain text of MCL 750.414, a conviction of misdemeanor joyriding requires proof of guilty knowledge, Argument I.B below contends that this *mens rea* element is equivalent to §3113(a)'s reasonable belief clause and must be addressed there, rather than in the statute's "taken unlawfully" clause, since to construe the statute otherwise would render the second clause of §3113(a) "surplusage or nugatory." Accordingly, for purposes of §3113(a), the taking of a motor vehicle or motorcycle without the authority of its owner is "unlawful[]" without regard to whether the taker knew or believed he was authorized.

Finally, Defendant answers "yes" to the Court's second question, for the reasons presented in Defendant's Application for Leave to Appeal and those additional reasons set forth herein.

I. WHERE A MOTOR VEHICLE OR MOTORCYCLE IS TAKEN WITHOUT THE AUTHORITY OF ITS OWNER, IN VIOLATION OF THE EXPLICIT TERMS OF THE MISDEMEANOR JOYRIDING STATUTE, THE TAKING IS "UNLAWFUL" WITHIN THE MEANING OF MCL 500.3113(a) SUCH THAT THE TAKER IS EXCLUDED FROM ENTITLEMENT TO PIP BENEFITS UNLESS THE "REASONABLE BELIEF" CLAUSE OF THE STATUTE IS SATISFIED.

The Court has requested that the parties address whether, in order for a person to take a motor vehicle or motorcycle "unlawfully" under MCL 500.3113(a), the taker must know that he or she did not have authority to do so. The Court has previously held that reference to the penal code is appropriate, particularly to the "joyriding" provisions of MCL 750.413 and MCL 750.414, to determine whether a taking is "unlawful" for purposes of §3113(a). *Spectrum Health Hospitals v Farm Bureau Mut Ins Co*, 492 Mich 503, 517, 523; 821 NW2d 117 (2012).

It is undisputed that, to be convicted of felony joyriding under MCL 750.413, a person who takes and drives away another person's motor vehicle not only must lack authority to do so but must perform the act with the criminal knowledge that he or she lacks authority to do so. The statute's inclusion of the word "wilfully" makes this certain. *People v Dutra*, 155 Mich App 681, 685; 400 NW2d 619 (1986). The misdemeanor joyriding statute, MCL 750.414, however, contains no such words of intent or knowledge. Accordingly, notwithstanding the line of Court of Appeals case opinions to the contrary, *e.g.*, *People v Crosby*, 82 Mich App 1; 266 NW2d 465 (1978) (not to mention the standard criminal jury instruction, CJI2d 24.2) in which knowledge

of the lack of authority is regarded as an element for a conviction under the statute, the following will show that taking a motor vehicle without the owner's authorization violates MCL 750.414 irrespective of the taker's guilty knowledge or mistaken beliefs.

Yet even if a conviction of misdemeanor joyriding requires a showing that the defendant took another's vehicle *knowing* that he lacked the owner's authority to do so, any taking that is in fact unauthorized, Defendant submits, must constitute an "unlawful" taking within the meaning of MCL 500.3113(a). Just as the strict liability text of MCL 750.414 is softened (under this argument) by the criminal law's protective overlay of a *mens rea* requirement, so likewise is §3113(a) unlawful taking exclusion softened by the provision's reasonable belief clause. To construe §3113(a) otherwise would render its "reasonable belief" clause nugatory. If an "unlawful[]" taking under the first half of §3113(a) can occur only where the taker *knows* the taking is unauthorized, the "reasonable belief" clause of §3113(a) is mere surplusage. It is impossible for a person to "reasonably believe" that he or she is entitled to take and use another person's motor vehicle when the person *knows* he or she lacked the owner's authority.

A. Unlike the felony offenses of joyriding under MCL 750.413 and receiving a stolen vehicle under MCL 750.535(7), misdemeanor joyriding under MCL 750.414 contains no "wilful" or "knowledge" element, thus, despite the taker's lack of knowledge, a vehicle is "unlawfully" taken under MCL 500.3113(a) if it was not authorized by the vehicle's owner.

The Court has queried whether, for a motor vehicle or motorcycle to be "taken unlawfully" under §3113(a) of the No-Fault Act, the person taking the vehicle must know that the use has not been authorized by the owner. Defendant submits that the answer is no. By its

terms, MCL 750.414 declares it unlawful for a person to take a motor vehicle without authority; there is no requirement of "knowledge" or a particular intent provided in the text of the statute:

> **Unauthorized taking or use, without intent to steal, of motor vehicle**
>
> Any person who takes or uses without authority any motor vehicle without intent to steal the same, or who is party to such unauthorized taking or using, is guilty of a misdemeanor ... .

MCL 750.414.[2] On its face, this is a strict liability offense.

The "overarching rule" of statutory construction is that the Court "'must enforce clear and unambiguous statutory provisions as written.'" *US Fidelity Ins & Guar Co v MCCA (On Rehearing)*, 484 Mich 1, 12; 773 NW2d 243 (2009), *quoting*, *Preferred Risk Mut Ins Co v MCCA*, 433 Mich 710, 721; 449 NW2d 660 (1989). As the goal is to give effect to the intent of the Legislature, the Court's task must begin with examination of the language of the statute itself because the words of a statute provide the most reliable evidence of the Legislature's intent. Where that language is unambiguous, the Court presumes that the Legislature intended the meaning clearly expressed -- "no further judicial construction is required or permitted, and the statute must be enforced as written." *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999); *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

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[2] The statute proceeds to articulate the penalties for a violation, then provides an intriguing exception for employees whose circumstances might cause them to believe mistakenly that they are permitted to drive the owner's vehicle:

> However, this section does not apply to any person or persons employed by the owner of said motor vehicle or anyone else, who, by the nature of his or her employment, has the charge of or the authority to drive said motor vehicle if said motor vehicle is driven or used without the owner's knowledge or consent.

MCL 750.414 [last sentence]. This safety valve available to an employee who uses his or her employer's vehicle without consent makes sense if the crime otherwise is a strict liability offense; but it seems doubtful that the legislature would go out of its way to exonerate any employee who uses the employer's vehicle *knowing* that he or she has no authority to do so.

On its face the misdemeanor joyriding statute renders *any* unauthorized taking of a vehicle unlawful. Accordingly, any construction under which an unauthorized taking is only unlawful if the person *knows* he or she lacks authority breaches "the well-established principle of statutory construction that a court 'is not free to add language to a statute or interpret a statute on the basis of [the] court's own sense of how the statute should have been written.'" *C G Automation & Fixture, Inc v Autoform, Inc*, 291 Mich App 333, 344; 804 NW2d 781 (2011), *quoting, Kirkaldy v Rim*, 478 Mich 581, 587; 734 NW2d 201 (2007) (Cavanagh, J., concurring), and *In Re Wayne Co Prosecutor*, 232 Mich App 482, 486; 591 NW2d 359 (1998) ("[a] court must not judicially legislate by adding into a statute provisions that the Legislature did not include"); *accord, Roberts v Mecosta County Gen Hospital*, 466 Mich 57, 63; 642 NW2d 663 (2002) ("If the statute's language is clear and unambiguous, then we assume that the Legislature intended its plain meaning and the statute is enforced as written. [] A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.") (citations omitted) (emphasis added).

In *People v Laur*, 128 Mich App 453; 340 NW2d 655 (1983) (cited in the Court's order of May 1, 2013), the misdemeanor joyriding statute, MCL 750.414, was held to be a "general intent" crime. Contrasting the misdemeanor statute with the felony joyriding statute,[3] under which one's taking of a motor vehicle violates the statute only where it is done "*wilfully* and without authority" (emphasis added), the Court of Appeals distinguished the general intent under

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[3] TAKING POSSESSION OF AND DRIVING AWAY A MOTOR VEHICLE -- Any person who shall, wilfully and without authority, take possession of and drive or take away ... any motor vehicle, belonging to another, shall be guilty of a felony[.] MCL 750.413.

the misdemeanor statute from the specific intent required under the felony statute: "Whereas general intent is the intent simply to do the physical act, specific intent is 'a particular criminal intent beyond the act done.'" *Laur*, 128 Mich App at 455 (citations omitted) (emphasis added); *accord, id.*, at 456 ("Here, no intent is required beyond that to do the act itself; this is a general intent only"). In these statements, Defendant submits, the *Laur* court describes the statute accurately.

Yet in the same passage, 128 Mich App at 455-456, the *Laur* court then articulates a specific knowledge element that goes beyond an intent simply to do the physical act itself -- "a defendant must have intended to take or use the vehicle, knowing that he had no authority to do so," *id.* (emphasis added), citing only *People v Crosby*, 82 Mich App 1; 266 NW2d 465 (1978). This "knowledge element," the court said, "reflects only the general criminal intent necessary in most crimes." 128 Mich App at 456.

By so imputing an element of guilty knowledge into MCL 750.414, however, the Court of Appeals effectively incorporates the felony statute's "wilfully" component into the misdemeanor offense. It is clear that the felony statute's express requirement that a taking be both "wilfully *and* without authority" means nothing more than that the person had "guilty knowledge" -- i.e., that the person be shown not only to have taken the vehicle without the owner's authority, but that the person *knew* he or she lacked such authority. *People v Dutra*, 155 Mich App 681, 685; 400 NW2d 619 (1986), *citing*, *People v Andrews*, 45 Mich App 354, 359; 206 NW2d 517 (1973).

Thus the court's discussion of the "wilful" element in felony joyriding in *People v Lerma*, 66 Mich App 566, 569-571; 239 NW2d 424 (1976), and its conclusion that it establishes a specific intent crime, is particularly revealing in light of the *misdemeanor* joyriding statute being

held to be a general intent crime: "Specific intent has been defined as 'meaning some intent in addition to the intent to do the physical act which the crime requires', while general intent 'means an intent to do the physical act which the crime requires'." *Id.*, 66 Mich App at 569. When analyzed in terms of the actors' various mental states, the court said, "specific intent crimes would be limited only to those crimes which are required to be committed either 'purposefully' *or knowingly*', while general intent crimes would encompass those crimes which can be committed either 'recklessly' or 'negligently'." *Id.* (emphasis added). Concluding that the "wilfully" element of MCL 750.413 equates with "guilty knowledge," citing *People v Andrews, supra*, the court held that felony joyriding is a specific intent crime. Because of the "wilfully" element in the statute, there must be "some intent *in addition* to the intent to do the mere physical act which the crime requires. The intent to do only the required physical act -- the taking or driving away of the motor vehicle without authority -- would therefore be insufficient to constitute the crime of [*felony*] 'joyriding', as the act must also be committed 'wilfully'." *Lerma*, 66 Mich App at 570-571 (emphasis added).

In short, a conviction of felony joyriding requires not only that the defendant took and drove away a motor vehicle without the owner's authority to do so, but that the defendant did so *knowing* that he or she lacked the owner's authority. This is so only because the *felony* joyriding statute establishes a specific intent crime with an explicit requirement that the unauthorized taking be done "wilfully." Where *misdemeanor* joyriding is a *general* intent crime and lacks any requirement that an unauthorized taking be done "wilfully," Defendant submits it is error for the courts to add a "guilty knowledge" requirement that is utterly unsupported by the text of the statute.

Although strict liability offenses generally are disfavored, there is no constitutional prohibition of strict liability criminal statutes. *People v Likine*, 492 Mich 367, 391; 823 NW2d 50 (2012); *People v Quinn*, 440 Mich 178, 185, 188-189; 487 NW2d 194 (1992). Accordingly, where the Legislature has enacted a criminal statute that omits language indicating that fault is a necessary element of the crime, the proper focus is on statutory construction and whether the Legislature, irrespective of its silence, intended to require some fault as a predicate to finding guilt. *People v Trotter*, 209 Mich App 244, 246-247; 530 NW2d 516 (1995), *citing*, *People v Quinn*, 440 Mich at 185.

Prime among the considerations for determining whether to infer a an element of criminal intent when the statutory offense is silent regarding *mens rea* is whether the criminal statute is a codification of a common law crime. If so, and if *mens rea* was a necessary element of the crime at common law, then courts are inclined to read an element of scienter into the otherwise silent statute. *Trotter*, 209 Mich App at 247, *citing*, *Quinn*, 440 Mich at 185-186; *Likine*, 492 Mich 390, n. 32. Here, the misdemeanor joyriding statute's silence with regard to any element of *mens rea* should not be judicially altered, since the crime of joyriding was *not* a crime at common law. Rather, it was invented by the legislature, soon after the appearance of the automobile, in response to the emergence of "an annoying, but relatively harmless type of trespass" involving the non-larcenous taking of motor vehicles. *People v Hendricks*, 446 Mich 448-449; 521 NW2d 546 (1994), *citing*, *People v Stanley*, 349 Mich 362, 364-365; 84 NW2d 787 (1957) ("'so the Legislature created this crime...'").

Other considerations for determining whether to add an element of criminal intent to a statutory crime that is otherwise silent as to *mens rea* include whether there is guidance to interpretation provided by other statutes, and the severity of the punishment provided. *Likine*,

492 Mich 390, n. 32; *People v Quinn*, 440 Mich at 190, n. 14. Here, as already detailed in this discussion, MCL 750.413 does contain a *mens rea* element under which the "wilfully and without authority" clause requires that, to be guilty, the defendant must *know* that he lacks the owner's authority. The statutory crime of receiving or possessing a stolen motor vehicle likewise expressly requires knowledge as a predicate to guilt. MCL 750.535(7).[4] By contrast, the total absence of any *mens rea* element in the text of MCL 750.414, in light of the Legislature's affirmative placement of such elements in these otherwise similar statutes -- both of which are felonies, as compared to MCL 750.414, which is only a misdemeanor -- supports the conclusion that the misdemeanor joyriding statute must be applied, as written, as a strict liability offense.

B. Even if a conviction under MCL 750.414 requires proof that the taker knew he lacked the vehicle owner's authorization to take or use the vehicle, an unauthorized taking is still "unlawful" under MCL 500.3113(a) since, in order for the second phrase of §3113(a) not to be rendered nugatory, any lack of guilty knowledge must be addressed in the "reasonabl[e] belie[f]" clause of the statute.

Under §3113(a) of the No-Fault Act, MCL 500.3113(a), a person injured while using a motor vehicle or motorcycle "which he or she had taken unlawfully" is disqualified from entitlement to no-fault PIP benefits, "unless the person reasonably believed he or she was entitled to take and use the vehicle." By its terms, §414 of the Penal Code, MCL 750.414, declares that a person who takes a motor vehicle without authority is guilty of a misdemeanor. This Court has clarified that this joyriding statute's reference to "authority" obviously means the authority of the owner of the vehicle. *Spectrum Health Hospitals v Farm Bureau Mut Ins Co*, 492 Mich 503,

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[4] "A person shall not buy, receive, possess, conceal, or aid in the concealment of a stolen motor vehicle knowing, or having reason to know or reason to believe, that the motor vehicle is stolen, embezzled, or converted. ... " MCL 750.585(7) (emphasis added).

518 n. 25; 821 NW2d 117 (2012). "Accordingly, for purposes of MCL 500.3113(a), a vehicle is 'unlawfully taken' if it is taken without the authority of its owner." *Id.*

Despite the plain language of MCL 750.414, which renders any taking of a vehicle unlawful if not authorized by the vehicle owner, case law (and a standard jury instruction) hold that a conviction under this statute requires not only that the defendant take or use a vehicle without authority but also that the defendant intend to do so *knowing* that he or she lacks such authority. *People v Laur*, 128 Mich App at 455; *People v Crosby*, 82 Mich App at 3; CJI2d 24.2.

This brief has argued that a conviction under MCL 750.414, in fact, requires no such affirmative showing of "criminal knowledge," that the cases and jury instruction that add this element to the statute's text do so erroneously. Even assuming, however, that a criminal conviction under the statute is dependent upon proof of the defendant's knowledge that his or her taking of the vehicle was not authorized by its owner, Defendant submits that this "knowledge" element is not imposed on the "unlawful taking" phrase of §3113(a). Rather, where the text of MCL 750.414 declares any unauthorized taking of a vehicle contrary to law, without regard to what the taker knew or believed, such a taking is "unlawful" under §3113(a). It must be so in order for the "reasonable belief" clause of §3113(a) not to be rendered superfluous.

When interpreting and applying a statute, the Court seeks to effectuate the Legislature's intent and looks to the words of the statute itself as the most reliable indicator of such intent. The Court will interpret those words "in the context within the statute and read them harmoniously go give effect to the statute as a whole." *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011) (emphasis added). Courts "must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage

or nugatory." *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012), quoting *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002); *People v Peltola*, 489 Mich at 181. This tenet of construction "is axiomatic." *Duffy v Mich Dept of Natural Resources*, 490 Mich 198, 215; 805 NW2d 399 (2011).

Here, quite simply, if one's taking of a motor vehicle without the owner's authority is "unlawful" within the meaning of §3113(a) *only* if the person *knows* that he or she is doing so without the owner's authority, the remainder of §3113(a) [second phrase] is mere surplusage. The entire "unless" phrase would be utterly meaningless since it could never come into play. It is manifestly impossible, Defendant submits, for a person to take a motor vehicle belonging to another person, *knowingly* without the owner's authority, and at the same time "reasonably believe[] that he or she [is] entitled to take and use the vehicle." §3113(a).

In accord with the unqualified text of MCL 750.414, then, any "taking" of a motor vehicle not authorized by the vehicle owner must be construed as "unlawful" within the meaning of the first phrase of §3113(a). If the taker is able to show that, notwithstanding such lack of authority in fact, he reasonably believed he *was* entitled to take and use the vehicle, he will potentially have grounds not only for avoiding disqualification from entitlement to PIP benefits but, consistent therewith, for avoiding a conviction under the joyriding statutes, as well.

This construction of §3113(a) is supported by the Court's observation at note 26 in *Spectrum Health Hospitals*, 492 Mich at 518, which dovetails directly with the facts presented in the case at bar. After stating that §3113(a)'s unlawful taking clause "applies to *anyone* who takes a vehicle without the authority of its owner," *id.* (emphasis in original), the Court examined whether such a strict reading would preclude an entire class of injured parties from ever qualifying for PIP benefits -- those who permissively take possession of a car from an

intermediate user but without the true owner's permission. The Court rejected the notion that such users would automatically be excluded from benefits, since "we are only interpreting the phrase 'taken unlawfully' in [§3113(a)]. An end user who takes a vehicle without [the actual owner's] authority can still recover PIP benefits as long as he or she 'reasonably believed that he or she was entitled to take and use the vehicle.' MCL 500.3113(a)." *Spectrum Health Hospitals*, 492 Mich at 518, n. 26. Inherent in this observation is the notion that one's seemingly innocent but ultimately unauthorized taking of a vehicle from a person other than the vehicle owner can be "unlawful" for purposes of the first phrase of §3113(a) since any exonerating reasonable belief is addressed in the second phrase of the statute.

In the event, therefore, that constitutional and/or traditional protections unique to the criminal law dictate that an unwritten element of "guilty knowledge" must be proven to convict a person of misdemeanor joyriding under MCL 750.414, the fact remains that the statute itself declares any unauthorized taking of another's vehicle unlawful. The fact that a person lacking "guilty knowledge" might avoid conviction by virtue of the criminal law's extra-statutory protections does not change the text of the statute; indeed, such an innocent "*mens rea*" under the criminal law directly mirrors the exonerating "reasonable belief" clause of §3113(a) in the No-Fault Act.

Thus, in response to the Court's question whether "taken unlawfully" within the meaning of MCL 500.3113(a) requires the person using the vehicle to know that such use has not been authorized by the vehicle owner, Allstate answers, "No." Either MCL 750.414 itself is a strict liability crime in which lack of guilty knowledge is immaterial, or the criminal law protection of a *mens rea* overlay is equivalent to §3113(a)'s reasonable belief clause and is addressed there,

not in the statute's "taken unlawfully" clause, since to construe the statute otherwise would render the second clause of the statute "surplusage or nugatory."

II. IN THE EVENT A TAKING UNDER THE FIRST PHRASE OF §3113(a) CAN BE "UNLAWFUL" ONLY IF THE TAKER KNOWS THAT THE TAKING WAS NOT AUTHORIZED BY THE VEHICLE OWNER, THE COURT OF APPEALS NEVERTHELESS ERRED IN CONCLUDING THAT PLAINTIFF LACKED SUCH KNOWLEDGE AS A MATTER OF LAW GIVEN THE CIRCUMSTANTIAL EVIDENCE PRESENTED.

In the event it is determined that a person must know his taking of a vehicle was unauthorized in order for such taking to have been "unlawful[]" under §3113(a), the second part of the question posed by the Court's order queries "whether the Court of Appeals erred in concluding that plaintiff lacked such knowledge as a matter of law given the circumstantial evidence in this case." (Order, No. 146256, May 1, 2013). This question, which Defendant would answer in the affirmative, constituted the entire focus of Defendant's principal brief in support of the application for leave to appeal. Defendant relies on the argument presented therein.

Plaintiff has asserted that Defendant, in moving for summary disposition on the premise that this case could be resolved in its favor as a matter of law, waived or failed to preserve any contention that genuine issues of material fact exist, as claimed in the application for leave to appeal. For the reasons stated in Defendant's discussion of the Standard of Review (Application for Leave to Appeal, 11/30/2012, p. 8), Plaintiff is mistaken.

Indeed, the trial court directly held that "there's an issue of fact" as to whether the Plaintiff had unlawfully taken the motorcycle (Tr 7/15/2011, p. 6) (attached as Exhibit D to

Defendant's Application for Leave to Appeal).[5] Based on circumstantial evidence that Plaintiff in fact knew, contrary to his asserted innocence, that he lacked rightful authority to take and use the motorcycle on which he sustained his injuries, and the case law confirming that the kind of circumstantial evidence present in this case supports a finding of guilty knowledge in analogous settings (*see*, Defendant's Application for Leave to Appeal, pp. 11-13), the Court should conclude, at a minimum, that a genuine issue of fact precluded a rendering of summary disposition in Plaintiff's favor.

Accordingly, if the Court reaches the second issue raised in its Order of May 1, 2013, it should conclude that the Court of Appeals erred insofar as it resolved the unlawful taking issue in Plaintiff's favor as a matter of law rather than vacating the grant of summary disposition for Defendant and remanding the case for further proceedings in the trial court on that issue.

CONCLUSION

For all the reasons presented, Defendant-Appellant, ALLSTATE INSURANCE COMPANY, respectfully requests that the Court grant leave to appeal to decide, or decide on an expedited basis without plenary review, that Plaintiff RAMBIN's taking of the subject motorcycle in this case, indisputably not authorized by its actual owner, constituted an unlawful taking within the meaning of MCL 500.3113(a) as a matter of law. Accordingly, the Court should decide, further, that since Plaintiff's undisputed lack of a valid operator's license

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[5] The court proceeded nevertheless to grant summary disposition in Defendant's favor on the basis that Plaintiff could not satisfy the "reasonable belief" clause of the statute (Tr 7/15/2011, p. 6). Defendant concedes that the court's analysis in this respect was flawed, since a genuine issue of fact on the question of unlawful taking would necessarily preclude summary disposition being rendered against Plaintiff.

precluded him from having a reasonable belief that he was entitled to take and use the vehicle (*see, Spectrum Health Hospitals*, 492 Mich at 518 n. 25), Plaintiff's claim fails as a matter of law. The Court should reinstate the trial court's order granting summary disposition in favor of Defendant.

Alternatively, for the reasons detailed in Defendant's principal brief in support of its application for leave to appeal, Defendant would ask the Court to modify the Court of Appeals' remand directions to include further proceedings on the issue of whether the motorcycle was "taken unlawfully" by Plaintiff so as to disqualify him from entitlement to PIP benefits under MCL 500.3113(a).

Respectfully submitted,

GARAN LUCOW MILLER, P.C.

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July 17, 2013

HAND DELIVERED TO:

Larry S. Royster, Chief Clerk
Michigan Supreme Court
Michigan Hall of Justice
925 West Ottawa Street
Lansing, MI 48915

Re: Lejuan Rambin v Allstate Ins Co and
Titan Ins Co and AAA of Michigan
Michigan Supreme Court No. 146256
Court of Appeals No. 305422
Our File No. 116-2018

Dear Mr. Royster:

Enclosed please find an original and seven copies of **Supplemental Brief on Behalf of Defendant-Appellant, Allstate Insurance Company**, and **Proof of Service**, in the captioned matter. Also attached is an extra copy of our Brief to be date stamped and returned to this writer in the enclosed self-addressed, stamped envelope.

Thank you so much for your kind consideration relative to this matter. Please do not hesitate to contact the undersigned if there are any questions or concerns.

Very truly yours,

DANIEL S. SAYLOR
For the Firm

DSS/lcd
Enclosure
cc w/ encl.: Donald M. Fulkerson , Esq.

Document #1107797.1

STATE OF MICHIGAN

IN THE SUPREME COURT

LEJUAN RAMBIN,
Plaintiff-Appellee,

Supreme Court No. 146256

v

Court of Appeals No. 305422

ALLSTATE INSURANCE COMPANY,

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

Wayne County Circuit Court
No. 10-009091-NF

and

TITAN INSURANCE COMPANY,

Defendant/Cross-Plaintiff/Appellee,

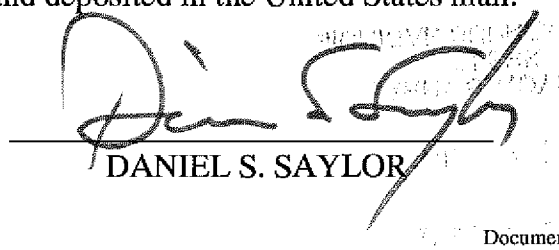
and

AAA OF MICHIGAN,

Third-Party Defendant.
_____/

PROOF OF SERVICE

DANIEL S. SAYLOR certifies that he is associated with the law firm of GARAN LUCOW MILLER, P.C., counsel for Defendant-Appellant, Allstate Insurance Company, and that on **July 17, 2013**, he served said party's **Supplemental Brief**, and this **Proof of Service**, upon Plaintiff-Appellee's counsel, Donald M. Fulkerson, Esq., P.O. Box 85395, Westland, MI 48185, full legal postage prepaid thereon and deposited in the United States mail.



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