STATE OF MICHIGAN

COURT OF APPEALS

PROGRESSIVE MARATHON INSURANCE COMPANY,

Plaintiff/Cross-Defendant-Appellee,

v

RYAN DEYOUNG and NICOLE L. DEYOUNG,

Defendants,

and

SPECTRUM HEALTH HOSPITALS and MARY FREE BED REHABILITATION HOSPITAL,

Intervenors/Cross-Plaintiffs-Appellants,

and

CITIZENS INSURANCE COMPANY OF AMERICA,

Intervenor/Cross-Defendant-Appellee.

UNPUBLISHED
May 24, 2011

No. 296502
Ottawa Circuit Court
LC No. 09-001034-CZ

Before: HOEKSTRA, P.J., and MURRAY and M. J. KELLY, JJ.

PER CURIAM.

Intervenors Spectrum Health Hospitals and Mary Free Bed Rehabilitation Hospital appeal as of right the trial court's grant of summary disposition in favor of plaintiff Progressive Marathon Insurance Company and intervenor Citizens Insurance Company of America, and the denial of Spectrum and Mary Free Bed's motion for summary disposition. On appeal, we must determine whether the trial court properly determined that Ryan DeYoung was not covered by his wife's no-fault insurance policy. Because we conclude that he was entitled to coverage under his wife's policy, we reverse and remand.

I. BASIC FACTS AND PROCEDURAL HISTORY

Defendant Nicole L. DeYoung owned an Oldsmobile Bravada and purchased a no-fault insurance policy through Progressive, which named her husband, Ryan DeYoung, as an excluded driver. Ryan knew that he was listed as an excluded driver and was not allowed to drive the vehicle.

On September 17, 2008, Ryan, who was intoxicated, took the Bravada without Nicole's permission, was involved in an accident, and sustained injuries. He incurred medical charges at Spectrum and Mary Free Bed and sought personal protection insurance (PIP) benefits from Progressive, which denied benefits on the basis that he was an "excluded driver." Following Progressive's denial, an application for benefits was filed with the Michigan Assigned Claims Facility (the Facility), which assigned the claims to Citizens. Progressive sued the DeYoungs for declaratory relief; specifically, Progressive asked the trial court to declare that Ryan was ineligible for PIP benefits. Spectrum, Mary Free Bed, and Citizens intervened. Spectrum and Mary Free Bed subsequently sued Progressive and Citizens for the costs associated with Ryan's care. The trial court granted summary disposition to Progressive and Citizens, finding that MCL 500.3113(a) precluded the payment of PIP benefits and that the "family joyriding exception" to subsection 3113(a) did not apply. The court also found that Ryan would be excluded from receiving benefits through the Facility under MCL 500.3173.

II. THE JOY RIDING EXCEPTION TO MCL 500.3113

A. STANDARD OF REVIEW

On appeal, Spectrum and Mary Free Bed argue that the trial court erred when it applied MCL 500.3113(a) to preclude coverage. Because Ryan was a family member and did not intend to steal the vehicle, they maintain, the trial court should have applied the judicially-recognized exception to MCL 500.3113(a) for joyriding family members. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Brown v Brown*, 478 Mich 545, 551; 739 NW2d 313 (2007).

B. ANALYSIS

Michigan's no-fault insurance act provides that a person is not entitled to be paid PIP benefits for accidental bodily injury if, in relevant part, "[t]he 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). However, a plurality of our Supreme Court established an exception to MCL 500.3113(a) in *Priesman v Meridian Mut Ins Co*, 441 Mich 60; 490 NW2d 314 (1992). In *Priesman*, our Supreme Court considered whether "an underage, unlicensed driver injured while driving his mother's automobile without her knowledge or consent may recover medical benefits from the no-fault insurer of her automobile." *Id.* at 61. The lead opinion concluded that § 3113(a) did not apply to teenagers "joyriding" in their parents' automobiles, and that the legislative intent could not have been to deny coverage to joyriding family members. *Id.* at 68.

This Court adopted the *Priesman* exception and extended it to an adult son in *Butterworth Hosp v Farm Bureau Ins Co*, 225 Mich App 244; 570 NW2d 304 (1997). There, an adult son living away from his parents asked his mother for permission to use her car. Although she refused permission, he took the car anyway and was involved in an accident. *Id.* at 246. This Court recognized that *Priesman* was not binding precedent, but felt compelled to follow it and concluded that § 3113(a) "does not apply to cases where the person taking the vehicle unlawfully is a family member doing so without the intent to steal but, instead, doing so for joyriding purposes." *Id.* at 248-249.

In *Mester v State Farm Mut Ins Co*, 235 Mich App 84, 88; 596 NW2d 205 (1999), this Court rejected the plaintiff's argument that the *Priesman* holding should be extended to apply to "anyone who is merely joyriding," explaining that the justices who recognized a joyriding exception in *Priesman* "did so not because joyriding does not involve an unlawful taking, but only because of special considerations attendant to the joyriding use of a family vehicle by a family member," and "[t]hose considerations [did] not warrant expansion of the exception beyond the family context." In *Allen v State Farm Mut Auto Ins Co*, 268 Mich App 342, 344; 708 NW2d 131 (2005), this Court considered the case of a man who was injured while driving a vehicle owned by a woman with whom he lived. There was no evidence that the driver intended to permanently deprive the owner of her vehicle, "and his conduct could be termed 'joyriding' as the exception has been discussed following *Priesman*," but because the driver and owner were not legally or biologically related, the joyriding exception did not apply. *Id.* at 346.

In *Roberts v Titan Ins Co (On Reconsideration)*, 282 Mich App 339, 353; 764 NW2d 304 (2009), citing MCR 7.215(J)(1), this Court recognized that *Butterworth* "specifically adopted the reasoning stated in the lead opinion in *Priesman*," and this Court held that it was "now bound by court rule to follow [the *Butterworth* decision]." This Court held that because there was no evidence that the 12-year-old driver, who became intoxicated and took his mother's vehicle without her permission, had any intent to steal the vehicle, the family joyriding exception applied. *Id.* at 342-343, 357.

Based on the reasoning in cases in which this Court has applied the joyriding exception, we must conclude that it applies here, notwithstanding that Ryan was an adult, was intoxicated, and was an excluded driver on Nicole's policy. In *Roberts*, this Court did not discuss the fact that Roberts was a minor or intoxicated when he got into the accident; instead, the Court focused on the fact that Roberts was a *family member* and did not intend to steal the vehicle when he took it. As such, the Court concluded that the joyriding exception applied. *Id.* at 357. Likewise, in *Butterworth*, 225 Mich App at 246, 249, 251, this Court noted that the holding in *Priesman* was not premised on the fact that the driver was a minor and domiciled with his parents. While no cases have dealt with an adult, intoxicated family member who was listed as an excluded driver on an insurance policy, this does not mean that the family joyriding exception does not apply. To hold otherwise would be to make an exception to the exception, something we will not do.

While Progressive asserts that PIP benefits are precluded for an excluded driver under its policy, the Named Driver Exclusion Endorsement provides that coverage will not be provided under Part I—Liability to Others, Part III—Uninsured/Underinsured Motorist Coverage, or Part IV—Damage to a Vehicle. The policy does not state that PIP benefits *cannot* be provided to an excluded driver. Progressive also argues that the "Exclusions" section of Part II precludes PIP

coverage for the unlawful taking of a motor vehicle. This section provides that PIP coverage will not apply to accidental bodily injury "sustained by any person using a **motor vehicle** or motorcycle that he or she had taken unlawfully, unless the person reasonably believed that he or she was entitled to take and use the vehicle." This Court considered a similar exclusion in *Roberts (On Reconsideration)*, 282 Mich App at 358-359:

> Under the terms of Irwin's Titan insurance policy, "coverage does **not** apply to **bodily injury** sustained by: 1. Any person using an **auto** taken unlawfully." (Emphasis in original.) Relying on this provision, Titan argues that the insurance policy alone clearly precludes coverage for Roberts's claims. However, "[t]o the degree that the contract is in conflict with the statute, it is contrary to public policy and, therefore, invalid." But "contracting parties are assumed to want their contract to be valid and enforceable," and "we are obligated to construe contracts that are potentially in conflict with a statute, and thus void as against public policy, where reasonably possible, to harmonize them with the statute." Therefore, preferring a construction of the contract that renders it legal and enforceable, we construe this contract in a manner that renders it compatible with the existing public policy by concluding that the exclusion does not apply to a joyriding family member.

Thus, we construe the exclusion in Part II as not applying to a joyriding family member.

Citizens also filed a brief on appeal, raising a separate issue, which is improperly presented because Citizens did not file a cross-appeal. We will not address that issue, and we note that Spectrum and Mary Free Bed have not challenged the trial court's grant of summary disposition in favor of Citizens, nor is it affected by our decision.

III. CONCLUSION

We are acutely aware that the family "joy riding exception," first enunciated by a plurality in *Priesman*, has no basis in MCL 500.3113(a). And, were we writing on a clean slate, we would not adopt such an exception for the reasons stated by JUSTICE GRIFFIN in *Priesman*, as well as JUSTICES CORRIGAN, YOUNG and MARKMAN in *Roberts v Titan Ins Co*, 485 Mich 935; 773 NW2d 905 (2009). However, we are bound to apply the judicially created "joy riding exception" utilized by this Court in *Butterworth*, 225 Mich App 244 (1997), *Allen*, 268 Mich App 342 (2005), and *Roberts*, 282 Mich App 339 (2009). See MCR 7.215(J)(1). Additionally, our Court has voted against holding a conflict panel to resolve the validity of this *judicially created* statutory exception. See *Roberts*, 282 Mich App at 341. Consequently, whether this exception should have any continuing validity in our jurisprudence is squarely a matter left to our Supreme Court.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing parties, Spectrum Health Hospitals and Mary Free Bed Rehabilitation Hospital may tax costs. See MCR 7.219(A).

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray
/s/ Michael J. Kelly