**[J-58-2005]**
**IN THE SUPREME COURT OF PENNSYLVANIA**
**MIDDLE DISTRICT**

**CAPPY, C.J., CASTILLE, NIGRO, NEWMAN, SAYLOR, EAKIN, BAER, JJ.**

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| STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, | : | No. 7 MAP 2005 |
| Appellee | : | Appeal from the Order of the Superior Court entered 1-22-2004 at No. 1200 MDA 2002 which Affirmed the Order of Huntington County Court of Common Pleas Civil Division entered 7-15-2002 at No. 2001-1382 |
| v. | : | |
| LORI FOSTER, | : | |
| Appellant | : | ARGUED: May 17, 2005 |

## DISSENTING OPINION

**MR. JUSTICE BAER** **Decided: December 30, 2005**

In this case, Appellant Lori Foster was injured when forced to jump out of the way of an unidentified motorist who failed to stop for the stop sign she was holding while working as a flagperson for Glenn O. Hawbaker, Inc. As a result, she went to local emergency room, informed the hospital of the incident, and was treated for leg injuries. Subsequently, her employer accepted her claim for workers' compensation benefits, and Appellee State Farm Mutual Automobile Insurance Company paid her claimed first party medical benefits. Despite the fact that none of the relevant parties contest the validity of the accident or her resultant injury, and that the hospital, her employer and State Farm all received timely notice of her injury, State Farm nonetheless has refused to pay Appellant's claim for

uninsured motorist benefits based solely on her failure to satisfy the provision in her insurance policy requiring notification of police. Regrettably, this Court now affirms this miscarriage of justice in conflict with our precedent.

In Brakeman v. The Potomac Insurance Co., 371 A.2d 193 (Pa. 1977), this Court recognized that the provisions of an insurance contract are not negotiated, but dictated by the insurance company, and refused to construe strictly a requirement that the insured notify the insurance company of an injury when to do so would result in forfeiture of coverage. Instead, we required the insurance company to demonstrate prejudice resulting from the lack of notice in order to avoid the company's use of "a technical escape-hatch by which to deny coverage in the absence of prejudice [or evade] the fundamental protective purpose of the insurance contract to assure the insured and the general public that liability claims will be paid up to the policy limits for which premiums were collected." Id. at 197 (citation omitted).

In the interim, the legislature has enacted and amended the Motor Vehicle Financial Responsibility Law (MVFRL) as a replacement for the No-Fault Motor Vehicle Insurance Act for the oft-acknowledged purpose of controlling the spiraling costs of insurance. See Burstein v. Prudential Prop. and Cas. Ins. Co., 809 A.2d 204, 211-213 (Pa. 2002) (Saylor, J., dissenting) (setting forth detailed background of MVFRL and its treatment of uninsured and underinsured motorist coverage). In doing so, the legislature made significant changes in an attempt to reduce premiums, including, in 1990, making optional the purchase of uninsured and underinsured motorist coverage. See id.; 75 Pa.C.S. § 1731(a) ("Purchase of uninsured motorist and underinsured motorist coverages is optional").

Given the legislature's wholesale revision of Pennsylvania's motor vehicle insurance law in enacting the MVFRL, we can presume that the General Assembly was aware of this Court's holding in Brakeman, involving the proper construction of motor vehicle insurance policies. Cf. Metropolitan Prop. & Liab. Ins. Co. v. Ins. Comm'r of Commonwealth of

Pennsylvania, 580 A.2d 300, 302 (Pa. 1990) ("The legislature must affirmatively repeal existing law or specifically preempt accepted common law for prior law to be disregarded."); Balkiewicz v. Asenavage, 178 A.2d 591, 594 (Pa. 1962) ("In Merrick v. DuPont, [132 A. 181 (Pa. 1926)], we reannounced a principle operative throughout the whole course of our existence as a Commonwealth in which the foundations of jurisprudence are in the common law, that a statute should be so interpreted that it will accord, as nearly as may be, with the theretofore existing course of the common law."). A review of the MVFRL, however, reveals no provision that contradicts Brakeman or requires the denial of benefits as a result of an insured's failure to notify police.[1] Although the Majority bases its decision on the inclusion of a notice provision in Section 1702's definition of an uninsured motor vehicle, I do not read that definition as evidence of the legislature's intent to override Brakeman's prejudice requirement in notification cases or to require the forfeiture of benefits as a consequence of the failure to comply with a notice provision.

This silence stands in contrast to other provisions of the MVFRL where the legislature has demonstrated its ability to proscribe recovery under certain circumstances. Section 1714, "Ineligible claimants," for example, explicitly bars recovery of first party benefits to owners of currently registered motor vehicles who do not have financial responsibility. Similarly, Section 1718(a), "Exclusion from benefits," provides that an insurer shall exclude an insured from certain benefits when the conduct of the insured contributed to the injury sustained in specified ways, such as intentional injury. Moreover, and directly applicable to the provision of uninsured motorist coverage, Section 1731(d), "Limitation on recovery [of uninsured and underinsured motorist coverage,]" categorically

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[1] In so stating, I concur with Justice Saylor's critique of the Majority's conclusion that police notification is required by the MVFRL, specifically his observation that "nothing precludes an insurer from omitting a police notification provision." See Concurring Slip Op. at 1-2.

denies recovery of underinsured motorist benefits for persons who have recovered damages under uninsured motorist coverage and recovery of non-economic damages under uninsured or underinsured motorist coverage when the individual would not be able to recover non-economic damages pursuant to Section 1705 (relating to the election of limited tort). Absent from these limitation and exclusion provisions is any mention of the denial of coverage for want of notice.

Moreover, the limitation and exclusion provisions discussed above promote the identified purpose of the MVFRL to reduce the spiraling costs of insurance in Pennsylvania due in part to the large numbers of uninsured motorists who do not contribute to the pool of insurance premiums. See Burstein v. Prudential Prop. & Cas. Ins. Co., 809 A.2d 204, 207-08 (Pa. 2002). This policy, however, is in no way advanced by denying an insured recovery due to the failure to notify police, absent a demonstration of prejudice. Unlike other cases where we have invoked the cost-containment policy, this case does not involve a plaintiff seeking benefits for which she did not pay, but rather concerns a claim for coverage for which Appellant contracted and paid, even where the uninsured motorist coverage was optional. See id. (approving coverage exclusion based on cost-containment policy which "functions to protect insurers against forced underwriting of unknown risks that insured have neither disclosed nor paid to insure"). Moreover, I do not believe the strict application of the notice provision against an insured is necessary to foster the legislative intent to prevent fraudulent claims in phantom vehicle cases where, as in this case, notice was provided to the insurance company, which had an incentive to investigate the claim if they suspected fraud.

In the absence of such policy concerns and in light of our decision in Brakeman, I believe we must construe the MVFRL liberally in favor of the insured, see L.S. ex rel. A.S. v. Eschbach, 874 A.2d 1150, 1155 (Pa. 2005), and recognize the remedial purpose of the act and in particular the uninsured and underinsured motorist coverage provisions as

discussed more fully in Justice Saylor's concurring opinion. Therefore, I do not read the MVFRL's definition of an uninsured motor vehicle to bar recovery due to the lack of notice to police, especially considering that insurance companies are not required to include the condition in the policies they write. See Concurring Slip Op. at 2.

Additionally, I distance myself from the Majority's reliance on Superior Court cases strictly applying the notice requirements in Assigned Claims Plan cases. Unlike plaintiffs claiming under the Assigned Claims Plan, cases such as the case at bar trigger the concerns raised in Brakeman because they involve plaintiffs who contracted and paid premiums for uninsured motorist coverage and would be subject to forfeiture if the notice provisions were applied strictly. I, therefore, would reverse the decision of the Superior Court and refuse to provide the insurance company with a "technical escape hatch by which to deny coverage in the absence of prejudice." Brakeman, 371 A.2d at 197.

Mr. Justice Castille joins this dissenting opinion.

Mr. Justice Nigro did not participate in the decision of this case.