[J-42-2013]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

LISA VANDERHOFF, ADMINISTRATRIX OF THE ESTATE OF FORESTER VANDERHOFF, DECEASED,	: No. 98 MAP 2012
Appellant	: Appeal from the order of Superior Court at No. 1575 MDA 2010 dated February 6, 2012, reconsideration denied April 16, 2012, reversing the Judgment of the Luzerne County Court of Common Pleas, Civil Division, and remanding at No. 5611-C of 2003 dated September 23, 2010.
v.	
HARLEYSVILLE INSURANCE COMPANY,	: ARGUED: May 8, 2013
Appellee	

CONCURRING OPINION

MR. JUSTICE BAER **DECIDED: October 30, 2013**

I concur in the result. The Majority Opinion accurately sets forth the tortured path of this case and properly rejects the trial court's implication that, to prove prejudice resulting from delayed notice of a phantom vehicle, an insurance company must demonstrate the evidence it would have obtained if notice had been promptly provided. I further agree with the Majority's general proposition that "these cases must be addressed on a case-by-case basis wherein the court balances the extent and success of the insurer's investigation with the insured's reasons for the delay." Maj. Op. at 10. I write separately, however, because I view our grant of review in this case as an opportunity to provide specific guidance regarding how an insurance company can demonstrate prejudice resulting from an insured's failure to comply with the notice requirement of 75 Pa.C.S. § 1702 (defining uninsured motor vehicle).

As did the author of the current Majority Opinion, Defendant Harleysville Insurance Co. presented arguments opposing the imposition of any prejudice requirement in Vanderhoff v. Harleysville Insurance Company, 997 A.2d 328, 335 (Pa. 2010) (Eakin, J., dissenting) (Vanderhoff I). As Harleysville was unable to convince a majority of this Court to impose a per se prejudice standard in Vanderhoff I, it now presents balanced factors for Pennsylvania courts to employ when considering prejudice. These factors bridge the gap between the extreme positions of the per se prejudice that Harleysville originally suggested in Vanderhoff I and the trial court's near impossible requirement that the insurer demonstrate what would have been found if proper notice had been given.

I would adopt Harleysville's suggested test that the prejudice requirement can be met if "the insurer provides reasonable proof that its ability to investigate the accident was impaired in the context of both the accident and the delay at issue in the case." Harleysville Brief at 13. This broad inquiry supports the purpose of the notice requirement, which is to allow the insurer to investigate the accident to determine whether there is a legitimate claim of a phantom vehicle and to make an informed decision whether to cover the insured's claims or to reject them as unfounded. Harleysville articulates the following factors for courts to consider in applying this test.

First, to determine whether the insurer was prejudiced as a result of the late notice, courts should account for the evidence available to the insurer at the time notice is finally given from the accident itself. We may consider whether the insurance company has access to contemporaneous statements of disinterested eyewitnesses in police reports, video of the accident, or physical evidence that can either confirm or disprove the existence of the phantom vehicle. For example, if eyewitnesses blame the accident on another car, surveillance video indisputably confirms the existence of the

other car, or paint marks match the insured's description of the phantom vehicle, an insurance company has less reason to question the existence of the phantom vehicle and thus less need to pursue its own investigation. Moreover, there is a compelling argument that if an insurance company was previously aware of such evidence, it would de facto place the insurance company on notice of the existence of a currently unidentified vehicle's involvement in the accident, triggering its right to seek further information. Conversely, as in this case, if there are no eyewitnesses that mention the phantom vehicle and no physical evidence corroborating the insured's claims, the insurance company may well suffer substantial prejudice if it is not provided timely notice to allow it to canvas the area for eyewitnesses and physical evidence or perform accident reconstruction to determine the legitimacy of the insured's claims.

Similarly, courts should consider the details of the delay in notification. Obviously, courts must factor in the length of the delay. An insurer that receives notice one day after the expiration of the statutory thirty-day notification period will be hard pressed to establish prejudice just as an insured who does not give notice until a year after the accident may find it difficult to argue lack of prejudice, even recognizing that the insurer has the burden of demonstrating prejudice. Vanderhoff I, 997 A.2d at 335.

A court should also take into account the justification for the delay. An insurer may legitimately have reason to question the existence of a phantom vehicle, and thus suffer substantial prejudice from its inability to investigate the claims, if the insured's delay in providing notice is unexplained. For example, in the case at bar, red flags are raised because the insured failed to mention the existence of the alleged phantom vehicle in several of his descriptions of the accident, without any explanation for the significant delay in providing notice. In contrast, one can imagine the hypothetical injured-insured who wakes up from a comma and immediately blames the accident on a

phantom vehicle with detailed explanation. In such a case, the insurer will have less reason to suspect insurance fraud and, perhaps, less need to pursue further investigation. . In accordance with Harleysville's suggestion, the reason for the delay may factor into a court's analysis.

Accordingly, while I concur in the result of the Majority Opinion, I write separately to provide guidance to the bench and bar on the question of how an insurer can demonstrate prejudice resulting from an insured's failure to provide notice of the existence of a phantom vehicle within the thirty-day statutory notification period. As stated, in my view, courts should consider information relating to the accident, including the availability of eyewitness statements and physical evidence, as well as information relating to the delay, including the length and reason for the delay.[1]

[1] Additionally, I question whether the Majority Opinion's statement that the "primary goal" of the Motor Vehicle Financial Responsibility Law (MVFRL) is to "keep automobile insurance affordable" adds anything to a court's review of disputes between insurers and insured in 2013. Maj. Op. at 10. I have previously "call[ed] for advocates and the judiciary to cease their continued reliance on the unthinking perpetuation of the long-ameliorated concern for cost containment." Williams v. GEICO Government Employees Ins. Co., 32 A.3d 1195, 1211 (Pa. 2011). Moreover, a majority of justices have recently recognized that cost containment does not trump all other public policies. See Heller v. Pa. League of Cities and Municipalities, 32 A.3d 1213, 1222 (Pa. 2011) ("Despite our repeated affirmance of the cost containment policy underlying the MVFRL, we have cautioned that it has limits"); Williams, 32 A.3d at 1210 (Pa. 2011) (Saylor, J. concurring) ("I would also once and for all abandon the rubric that cost containment was the overarching policy concern of the [MVFRL], since the act clearly retained the core remedial objectives of the prior regulatory scheme."). Accordingly, I respectfully reject the Majority's view of the policy of cost-containment as remaining pertinent to judicial interpretation of the MVFRL.