

[J-163-1998]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

MUTUAL BENEFIT INSURANCE COMPANY,	:	No. 21 W.D. Appeal Docket 1998
	:	
Appellant	:	Appeal from the Order of the Superior Court at No. 2251PGH96 entered September 9, 1997, affirming in part and reversing in part the Order of the Court of Common Pleas of Jefferson County, Civil Division, at No. 310-1994 C.D.
v.	:	
JOSEPH B. HAVER T/A HAVER PHARMACY, JOHN MACKO AND CANDACE M. MACKO, HIS WIFE,	:	
	:	
Appellees	:	ARGUED: September 15, 1998
	:	

CONCURRING OPINION

MADAME JUSTICE NEWMAN

DECIDED: March 5, 1999

I join the majority because I agree that Mutual Benefit has no duty to either defend or to indemnify Haver as the conduct at issue falls within the “knowing endangerment” exclusion contained within the policy of insurance. I further agree with the concurring opinion of Mr. Justice Nigro that Haver, having pled guilty to the federal criminal charges, cannot credibly argue that the allegations in the complaint sound in negligence.

In this statement, I write separately, however, because I believe that in analyzing this matter, we should not concentrate simply on the criminal actions of Haver and whether his conduct fits within the exclusion contained in the policy of insurance. According to the facts of this case, I believe that regardless of the averments in the complaint or the language of the policy of insurance, it is against public policy to allow insurance coverage for an illegal drug transaction. My reading of the record before us is that Ms. Macko is a substance abuser

who illegally bought a large quantity of controlled substances without a prescription from Haver for a period of approximately four years. Ms. Macko's conduct, as well as Haver's, was part of an illegal drug transaction, and is no less so because Haver was a pharmacist rather than a street corner pusher. See, e.g., Commonwealth v. Gordon, 511 Pa. 481, 515 A.2d 558, 560-61 (1986) (pharmacist engaging in illicit and clandestine drug deals for prescription drugs is like common "street pusher"). There is little difference between this case and the case of drugs on the corner, and we should not treat it differently. Id.

It is my opinion that the public policy of this Commonwealth does not allow insurance coverage for a criminal venture where one who has participated in criminal acts by obtaining drugs illegally can recover from the other participant's insurance carrier simply because the result of the crime had bad or unintended results for one of the participants. I am mindful that this court should not lightly formulate judicial pronouncements of public policy. Muschany v. United States, 324 U.S. 49, 60 (1945); Guardian Life Insurance Company of America v. Zerance, 505 Pa. 345, 479 A.2d 949, 954 (1984); Mamlin v. Genoe, 340 Pa. 320, 17 A.2d 407, 409 (1941). However, in the circumstances of this case, I believe that both the legislature and the courts of this Commonwealth have uniformly held that the drug transaction that occurred here is against the public's health, safety, morals, and welfare. See, e.g., 35 P.S. Sections 780-113(a)(12), (14) and 780-113(f) (possession and sale of controlled substances by means of fraud, forgery, or misrepresentation, are felonies); Commonwealth v. Sojourner, 268 Pa. Super. 488, 408 A.2d 1108, 1111 (1979) (preventing and deterring unauthorized possession of controlled substances is purpose of Controlled Substances Act); Commonwealth v. Garrick, 210 Pa. Super. 124, 232 A.2d 8, 10

(1967)(“The use of drugs is offensive to society precisely because of its effect on the person and the harm to which such use may lead.”).

Thus, I would reverse the decision of the Superior Court because no circumstances should require an insurance carrier to provide coverage for its insured’s criminal acts that harm a participant in a crime who is injured because of her knowing involvement in a criminal enterprise.

Mr. Chief Justice Flaherty joins this concurring opinion.