[J-4-1998]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

MADISON CONSTRUCTION COMPANY, Appellant	:	No. 21 E.D. Appeal Dkt. 1997
v.	:	Appeal from the Order of the Superior Court entered on June 20, 1996, at 4329 PHL 1994 reversing the order entered on November 17, 1994 in the Court of Common Pleas, Chester County, Civil Division at 93-10875
The HARLEYSVILLE MUTUAL INSURANCE COMPANY, NICHOLAS EZZI, BRIAN MURTAUGH, KELRAN ASSOCIATES, INC., AND EUCLID CHEMICAL COMPANY, Appellees	:	SUBMITTED: January 13, 1998

DISSENTING OPINION

MR. JUSTICE NIGRO **DECIDED: July 27, 1999**

The Majority concludes that the pollution exclusion clause contained in the insurance policy issued to Madison relieves Harleysville of its obligation to defend Madison against Ezzi's personal injury action. Since I believe that the specific claims for relief pled by Ezzi in his personal injury action against Madison do not trigger the application of the pollution exclusion clause at issue, I must respectfully dissent.

As the Majority notes, the general liability insurance policy issued to Madison by Harleysville expressly excluded from its coverage any claims for compensation for bodily injury or property damage "arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants. . . ." However, Ezzi's complaint against Madison does not allege that his injuries arose out of the dispersal of pollutants at the work site. Rather, Ezzi's complaint alleges that his injuries were caused

by Madison's failure to warn and protect others from the hazardous situation, to properly ventilate the work site, and to cover the hole where he fell. (Complaint at 4-5.)

"[I]t is not the actual details of the injury, but the nature of the claim which determines whether the insurer is required to defend." Springfield Township v. Indemnity Ins. Co. of North America, 361 Pa. 461, 464, 64 A.2d 761, 762 (1949). In addition, in determining whether an insurer has a duty to defend, the averments contained in the underlying complaint must be "liberally construed with all doubts as to whether the claims may fall within the policy coverage to be resolved in favor of the insured." Roman Mosaic and Tile Co. v. Aetna Cas. and Sur. Co., 704 A.2d 665, 669 (Pa. Super. 1997)(citing Cadwallader v. New Amsterdam Cas. Co., 396 Pa. 582, 152 A.2d 484 (1959)). Given the fact that the negligence claims raised by Ezzi in his complaint against Madison are not premised upon Madison's dispersal of the fumes emanating from the curing agent, and construing the averments contained within the four corners of the complaint liberally in favor of Madison as the insured, I believe that the pollution exclusion is not applicable, and that Harleysville is obligated to defend Madison against the claims raised by Ezzi. Accordingly, I respectfully dissent.[1]

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[1] A contrary result is not dictated by the Court's recent decision in Mutual Benefit Ins. Co. v. Haver, 1999 WL 112358 (Pa.). In Haver, a pharmacist obtained an insurance policy which expressly excluded coverage for bodily injuries which are a consequence of "knowing endangerment" by the pharmacist. The pharmacist was later sued by a husband and wife who sought to recover for injuries that they allegedly sustained because the pharmacist improperly dispensed various prescription drugs to the wife without any prescriptions. The pharmacist's insurance carrier refused to defend against the lawsuit, contending that the pharmacist's actions triggered the "knowing endangerment" exclusion contained within his insurance policy. The lower courts disagreed, and found that the insurance carrier had a duty to defend the pharmacist, because the claims raised by the plaintiffs in their complaint did not allege "knowing endangerment" by the pharmacist, but (continued…)

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only negligence on his part. This Court reversed, finding that despite the fact that the plaintiffs' complaint was based on negligence theory, the factual allegations contained within the complaint constituted "knowing endangerment" as a matter of law. Underlying the Court's decision in Haver was its concern that a contrary result would encourage plaintiffs to frame their requests for redress in order to avoid exclusions in liability insurance policies despite the fact that the harms that they allege fall clearly within those same policy exclusions. Conversely, the claims leveled by Ezzi against Madison are in complete accord with the facts that he alleges in his complaint. Ezzi alleges that his injuries arose out of Madison's negligent conduct, and the Majority has not, and can not contend that his claims for relief were merely contrived in an attempt to avoid the application of the pollution exclusion clause at issue.