

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**January 2006 Term**

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**No. 32862**

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**FILED**

**May 12, 2006**

released at 10:00 a.m.  
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SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**JEREMY BENDER, TRAVIS STURM,  
JASON GREGORY, AND JASON BROOKS,  
Plaintiffs Below,**

**JEREMY BENDER,  
Appellant,**

**V.**

**DONALD RAY GLENDENNING, JR., AND  
THE WEBSTER COUNTY BOARD OF EDUCATION,  
Defendants Below, Appellees,**

**and**

**THE WEBSTER COUNTY BOARD OF EDUCATION,  
Defendant and Third-Party Plaintiff Below, Appellee,**

**V.**

**DONALD RAY GLENDENNING, JR.,  
Third-Party Defendant Below, Appellee,**

**and**

**DONALD RAY GLENDENNING, JR.,  
Fourth-Party Plaintiff Below, Appellee,**

**V.**

**CONTINENTAL CASUALTY COMPANY,  
A CNA COMPANY,  
Fourth-Party Defendant Below, Appellee.**

**AND**

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**No. 32863**

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**JEREMY BENDER, TRAVIS STURM,  
JASON GREGORY, AND JASON BROOKS,  
Plaintiffs Below,**

**TRAVIS STURM, JASON GREGORY, AND  
JASON BROOKS,  
Appellants,**

**V.**

**DONALD RAY GLENDENNING, JR., AND  
THE WEBSTER COUNTY BOARD OF EDUCATION,  
Defendants Below, Appellees,**

**and**

**THE WEBSTER COUNTY BOARD OF EDUCATION,  
Defendant and Third-Party Plaintiff Below, Appellee,**

**V.**

**DONALD RAY GLENDENNING, JR.,  
Third-Party Defendant Below, Appellee,**

**and**

**DONALD RAY GLENDENNING, JR.,  
Fourth-Party Plaintiff Below, Appellee,**

**V.**

**CONTINENTAL CASUALTY COMPANY,  
A CNA COMPANY,  
Fourth-Party Defendant Below, Appellee.**

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**Appeals from the Circuit Court of Webster County  
Honorable Jack Alsop, Judge  
Civil Action No. 01-C-29  
Consolidated with Civil Action Nos. 01-C-52 and 02-C-10**

**REVERSED AND REMANDED**

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**Submitted: February 28, 2006  
Filed: May 12, 2006**

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**The Opinion of the Court was delivered PER CURIAM.**

**JUSTICES MAYNARD AND BENJAMIN dissent and reserve the right to file dissenting opinions.**

**JUSTICE STARCHER concurs and reserves the right to file a concurring opinion.**



## SYLLABUS BY THE COURT

1. “A circuit court’s entry of summary judgment is reviewed *de novo*.”

Syllabus point 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

2. “The interpretation of an insurance contract, including the question

of whether the contract is ambiguous, is a legal determination that, like a lower court’s grant of summary judgment, shall be reviewed *de novo* on appeal.” Syllabus point 2, *Riffe v. Home Finders Associates, Inc.*, 205 W. Va. 216, 517 S.E.2d 313 (1999).

3. “Language in an insurance policy should be given its plain, ordinary

meaning.” Syllabus point 1, *Soliva v. Shand, Morahan & Co., Inc.*, 176 W. Va. 430, 345 S.E.2d 33 (1986), *abrogated on other grounds by National Mutual Insurance Co. v. McMahan & Sons, Inc.*, 177 W. Va. 734, 356 S.E.2d 488 (1987).

4. “If the terms of the applicable insurance coverage and contractual

exceptions thereto acquired under W. Va. Code § 29-12-5 *expressly* grant the State greater or lesser immunities or defenses than those found in the case law, the insurance contract should be applied according to its terms and the parties to any suit should have the benefit of the terms of the insurance contract.” Syllabus point 5, *Parkulo v. West Virginia Board of Probation & Parole*, 199 W. Va. 161, 483 S.E.2d 507 (1996).

5. “An insurer wishing to avoid liability on a policy purporting to give general or comprehensive coverage must make exclusionary clauses conspicuous, plain, and clear, placing them in such a fashion as to make obvious their relationship to other policy terms, and must bring such provisions to the attention of the insured.” Syllabus point 10, *National Mutual Insurance Co. v. McMahon & Sons, Inc.*, 177 W. Va. 734, 356 S.E.2d 488 (1987), *abrogated on other grounds by Potesta v. United States Fidelity & Guaranty Co.*, 202 W. Va. 308, 504 S.E.2d 135 (1998).

**Per Curiam:**

The appellants<sup>1</sup> herein and plaintiffs below, Jeremy Bender, Travis Sturm, Jason Gregory, and Jason Brooks [hereinafter collectively referred to as “Mr. Bender”], appeal from an order entered December 9, 2004, by the Circuit Court of Webster County. By the terms of that order, the circuit court awarded summary judgment to Continental Casualty Company [hereinafter referred to as “Continental”],<sup>2</sup> finding that the policy of insurance issued by Continental to the Webster County Board of Education [hereinafter referred to as “the Board”] did not provide coverage for the acts of sexual misconduct which the various appellants allege that the Board’s former<sup>3</sup> employee, Donald Ray Glendenning, Jr. [hereinafter referred to as “Mr. Glendenning”], committed against them. On appeal to this Court, the appellants argue that the circuit court erred by granting summary judgment in favor of Continental and by concluding that the subject policy of

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<sup>1</sup>This matter originated as two different appeals: one filed by Jeremy Bender, Case Number 32862, and one filed by the remaining appellants, Travis Sturm, Jason Gregory, and Jason Brooks, Case Number 32863. Due to the similarity of the parties and the identical nature of the issues involved in both appeals, this Court consolidated these two cases “for purposes of argument, consideration and decision” by order entered October 6, 2005. The underlying matters from which these appeals originated previously had been consolidated by the circuit court.

<sup>2</sup>It appears that National Union Fire Insurance Company of Pittsburgh, PA, who filed the appellee’s responsive brief on behalf of Continental Casualty Company in this proceeding, has replaced Continental pursuant to a novation agreement. To maintain consistency with the lower court’s proceedings, however, we will continue to refer to the insurer at issue in this case as “Continental”.

<sup>3</sup>Mr. Glendenning was employed by the Webster County Board of Education at all times relevant to the coverage question at issue in this proceeding. His employment with the Board has since been terminated.

insurance did not provide coverage for Mr. Glendenning. Upon a review of the parties' arguments, the record designated for appellate consideration, and the pertinent authorities, we agree with the appellants and find that the Continental insurance policy did, in fact, provide coverage for the acts of sexual misconduct that the appellants have alleged against Mr. Glendenning. Accordingly, we reverse the December 9, 2004, order of the Circuit Court of Webster County and remand this case for further proceedings consistent with this opinion.

## I.

### **FACTUAL AND PROCEDURAL HISTORY**

The events from which the instant proceeding originated began during the 1994-95 school year and are not disputed by the parties. At that time, Mr. Bender, as well as Mr. Sturm, Mr. Gregory, and Mr. Brooks, were students at Diana Elementary School in Webster County, West Virginia. Mr. Glendenning was the boys' teacher. Mr. Bender complained that Mr. Glendenning had allegedly sexually assaulted him, and, during the course of a criminal investigation of those charges, Mr. Glendenning admitted to having also sexually abused and/or assaulted Mr. Sturm, Mr. Gregory, and Mr. Brooks.

By order entered March 5, 1999, the Circuit Court of Webster County accepted Mr. Glendenning's pleas of guilty to one count of sexual abuse by a parent,

guardian, or custodian<sup>4</sup> and one count of sexual assault in the third degree<sup>5</sup> for the

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<sup>4</sup>At the time of the events at issue in this proceeding, W. Va. Code § 61-8D-5(a) (1991) (Repl. Vol. 1997) directed that

[i]n addition to any other offenses set forth in this code, the Legislature hereby declares a separate and distinct offense under this subsection, as follows: If any parent, guardian or custodian of a child under his or her care, custody or control, shall engage in or attempt to engage in sexual exploitation of, or in sexual intercourse, sexual intrusion or sexual contact with, a child under his or her care, custody or control, notwithstanding the fact that the child may have willingly participated in such conduct, or the fact that the child may have consented to such conduct or the fact that the child may have suffered no apparent physical injury or mental or emotional injury as a result of such conduct, then such guardian or custodian shall be guilty of a felony, and, upon conviction thereof, shall be imprisoned in the penitentiary not less than five nor more than fifteen years, or fined not less than five hundred nor more than five thousand dollars and imprisoned in the penitentiary not less than five nor more than fifteen years.

This section subsequently was amended in 1998 and 2005. *See* W. Va. Code § 61-8D-5 (1998) (Repl. Vol. 2000); W. Va. Code § 61-8D-5 (2005) (Supp. 2005).

<sup>5</sup>The crime of sexual assault in the third degree is set forth in W. Va. Code § 61-8B-5 (1984) (Repl. Vol. 1997) which provides, in pertinent part, that

(a) A person is guilty of sexual assault in the third degree when:

....

(2) Such person, being sixteen years old or more, engages in sexual intercourse or sexual intrusion with another person who is less than sixteen years old and who is at least four years younger than the defendant.

(continued...)

instances of sexual misconduct alleged by Mr. Bender. The circuit court, by order entered June 22, 1999, subsequently sentenced Mr. Glendenning

to the West Virginia Penitentiary for a term of not less than Five (5) nor more than Fifteen (15) years for the felonious crime of sexual abuse by a parent, guardian, or custodian and not less than One (1) nor more than Five (5) years for the felonious crime of sexual assault in the 3rd degree with sentences to run consecutively,

which sentences he currently is serving.

Thereafter, on about July 6, 2001, Mr. Bender, Mr. Sturm, Mr. Gregory, and Mr. Brooks filed civil actions against Mr. Glendenning claiming that they had all been victims of Mr. Glendenning's sexual abuse and/or assault and for which injuries they now sought damages.<sup>6</sup> During the course of this litigation, on April 13, 2004, Mr. Glendenning filed a petition for declaratory relief asking the circuit court to ascertain whether the Board's policy of insurance with Continental provided coverage to him for the

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<sup>5</sup>(...continued)

(b) Any person who violates the provisions of this section shall be guilty of a felony, and, upon conviction thereof, shall be imprisoned in the penitentiary not less than one year nor more than five years, or fined not more than ten thousand dollars and imprisoned in the penitentiary not less than one year nor more than five years.

After the time of the events at issue herein, the Legislature amended this section. *See* W. Va. Code § 61-8B-5 (2000) (Repl. Vol. 2005).

<sup>6</sup>*See supra* note 1.

aforementioned claims. Specifically, Mr. Glendenning argued that because he was an insured under the terms of the Board’s policy of insurance with Continental,<sup>7</sup> Continental should provide both indemnity and a defense for the claims made against him.

Continental then filed a motion for summary judgment on about September 14, 2004, contending that the policy did not provide coverage for Mr. Glendenning’s wrongful acts of sexual misconduct and, thus, that it was entitled to judgment as a matter of law. Following a hearing on the matter, the circuit court, by order entered December 9, 2004, granted summary judgment to Continental, finding that Continental had no duty to defend Mr. Glendenning and further concluding that Mr. Glendenning’s criminal

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<sup>7</sup>The “named insured endorsement” of the Continental policy provides that

It is agreed that each of the following is a “named insured”

- A. The State of West Virginia;
- B. Each West Virginia County Board of Education; and
- C. Each West Virginia political subdivision or non profit or for profit non-governmental organization covered by certificates of liability insurance on file with the company.

Additional definitions in the policy also extend “insured” status to Mr. Glendenning. *See infra* note 11 and accompanying text. Insofar as the real party in interest in this appeal is the Webster County Board of Education, and not the State of West Virginia, we will refer to the insurance policy at issue as one that was issued to the Board.

actions were outside the scope of his employment duties with the Board and, likewise, outside the scope of the “wrongful act” coverage provided by the Continental policy. From this adverse ruling, Mr. Bender appeals to this Court.

## II.

### STANDARD OF REVIEW

The sole issue presented for our resolution by this appeal is whether the circuit court correctly determined that the subject policy of insurance does not provide coverage for Mr. Glendenning’s actions and, thus, whether an award of summary judgment in favor of Continental was proper. We previously have held that “[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Syl. pt. 3, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963). When considering the propriety of such an award, we employ a plenary review. “A circuit court’s entry of summary judgment is reviewed *de novo*.” Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

Also at issue in this appeal is whether the subject policy of insurance provides coverage for Mr. Glendenning’s actions. In this regard, we have held that “[d]etermination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law.” Syl. pt. 1, *Tennant v. Smallwood*, 211 W. Va. 703, 568

S.E.2d 10 (2002). Consequently, “[t]he interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination that, like a lower court’s grant of summary judgment, shall be reviewed *de novo* on appeal.” Syl. pt. 2, *Riffe v. Home Finders Assocs., Inc.*, 205 W. Va. 216, 517 S.E.2d 313 (1999). *See also* Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995) (“Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.”).

Mindful of these standards, we now consider the parties’ arguments.

### III.

#### DISCUSSION

On appeal to this Court, the appellants assign error to the circuit court’s ruling granting summary judgment to Continental based upon its conclusion that the policy of insurance issued by Continental to the Board, and purportedly insuring Mr. Glendenning as an employee thereof, did not provide coverage for the acts of sexual misconduct that the appellants have alleged against Mr. Glendenning. In so ruling, the circuit court determined that because the acts of sexual misconduct with which Mr. Glendenning has been charged are criminal in nature, they are outside the scope of coverage provided by Continental to indemnify the Board against wrongful acts and are not insurable under the governing statutory law. *Citing* W. Va. Code § 29-12A-11(a)(1)

(1986) (Repl. Vol. 2004).<sup>8</sup> Arguing that this reasoning is erroneous, Mr. Bender contends that the policy provides coverage for Mr. Glendenning’s actions under the definition of a “wrongful act”. By contrast, Continental agrees with the circuit court’s interpretation of the applicable policy language finding that the scope of coverage does not contemplate providing indemnity for an employee’s criminal acts.

Before reaching the merits of the parties’ arguments regarding the extent of coverage provide by the terms of the Continental policy, we first must consider the effect of the West Virginia Governmental Tort Claims and Insurance Reform Act [hereinafter referred to as “the Act”], W. Va. Code § 29-12A-1, *et seq.*, upon the facts of this case. In

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<sup>8</sup> W. Va. Code § 29-12A-11(a)(1) (1986) (Repl. Vol. 2004) governs the “[d]efense and indemnification of employees . . .”:

Except as otherwise provided in this section, a political subdivision shall provide for the defense of an employee, in any state or federal court, in any civil action or proceeding to recover damages for injury, death, or loss to persons or property allegedly caused by an act or omission of the employee if the act or omission occurred or is alleged to have occurred while the employee was acting in good faith and not manifestly outside the scope of his employment or official responsibilities. Amounts expended by a political subdivision in the defense of its employees shall be from funds appropriated for this purpose or pursuant to the contractual agreement between the insurer and the political subdivision. The duty to provide for the defense of an employee specified in this subsection does not apply in a civil action or proceeding that is commenced by or on behalf of a political subdivision.

short, this Act has as its purposes “to limit liability of political subdivisions and provide immunity to political subdivisions in certain instances . . . .” W. Va. Code § 29-12A-1 (1986) (Repl. Vol. 2004). Because the Board is a political subdivision, *see* W. Va. Code § 29-12A-3(c) (1986) (Repl. Vol. 2004), the immunity provisions of the Act limit the extent to which the Board and its employees may be held liable for their actions. *See, e.g.*, W. Va. Code § 29-12A-4 (1986) (Repl. Vol. 2004); W. Va. Code § 29-12A-5 (1986) (Repl. Vol. 2004).

Despite these various limitations of liability, however, when a policy of insurance provides coverage for a political subdivision, the terms of such insurance contract determine the rights and responsibilities of the insurer and its insured(s):

If a policy or contract of liability insurance covering a political subdivision or its employees is applicable, the terms of the policy govern the rights and obligations of the political subdivision and the insurer with respect to the investigation, settlement, payment and defense of suits against the political subdivision, or its employees, covered by the policy. The insurer may not enter into a settlement for an amount which exceeds the insurance coverage.

W. Va. Code § 29-12A-9(a) (1986) (Repl. Vol. 2004). *But see* W. Va. Code § 29-12A-16(d) (1986) (Repl. Vol. 2001) (indicating that political subdivision’s purchase of an insurance policy does not automatically waive immunity provided by the Act).<sup>9</sup> In other

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<sup>9</sup>After the events at issue in this proceeding, the Legislature amended this act in 2003. *See* W. Va. Code § 29-12A-16(d) (2003) (Repl. Vol. 2004). However, these  
(continued...)

words, the existence of an insurance policy does not per se eliminate the grants of immunity provided by the Act unless the policy fails to include appropriate language and/or exclusions which specifically preserve the Act's immunity provisions. The broad policy of insurance issued by Continental to the Board in the case *sub judice* does not contain any such limiting language and/or exclusions and, thus, its terms define the scope and extent of the Board's liability as well as that of its employee, Mr. Glendenning.

Turning now to the applicable Continental insurance policy in question, we first must ascertain whether Mr. Glendenning was, in fact, an insured under the Board's policy and then, if he was, whether the policy provided coverage for the acts with which he has been charged. We previously have held that "[l]anguage in an insurance policy should be given its plain, ordinary meaning." Syl. pt. 1, *Soliva v. Shand, Morahan & Co., Inc.*, 176 W. Va. 430, 345 S.E.2d 33 (1986), *abrogated on other grounds by National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W. Va. 734, 356 S.E.2d 488 (1987). Thus, "[w]here provisions in an insurance policy are plain and unambiguous and where such provisions are not contrary to a statute, regulation, or public policy, the provisions will be applied and not construed." Syl. pt. 2, *Shamblin v. Nationwide Mut. Ins. Co.*, 175 W. Va. 337, 332 S.E.2d 639 (1985). *Accord* Syl., *Keffer v. Prudential Ins. Co. of America*, 153 W. Va. 813, 172 S.E.2d 714 (1970) ("Where the provisions of an insurance policy contract

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<sup>9</sup>(...continued)  
amendments do not affect our consideration or decision of this appeal.

are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended.”).

With specific regard to the parties involved in the instant appeal, *i.e.*, a political subdivision and its employee who are both protected by the terms of the West Virginia Governmental Tort Claims Act, we have observed that “[t]he general rule of construction in governmental tort legislation cases favors liability, not immunity. Unless the legislature has clearly provided for immunity under the circumstances, the general common-law goal of compensating injured parties for damages . . . must prevail.” Syl. pt. 2, in part, *Marlin v. Bill Rich Constr., Inc.*, 198 W. Va. 635, 482 S.E.2d 620 (1996).

Therefore,

[i]f the terms of the applicable insurance coverage and contractual exceptions thereto acquired under W. Va. Code § 29-12-5 *expressly* grant the State greater or lesser immunities or defenses than those found in the case law, the insurance contract should be applied according to its terms and the parties to any suit should have the benefit of the terms of the insurance contract.

Syl. pt. 5, *Parkulo v. West Virginia Bd. of Probation & Parole*, 199 W. Va. 161, 483 S.E.2d 507 (1996) (emphasis in original).

Considering the precise language employed in the subject contract of insurance, we find that the policy language clearly includes Mr. Glendenning as a named insured. In this regard, the named insured endorsement plainly includes within its ambit

“each West Virginia County Board of Education[.]”<sup>10</sup> Thereafter, the policy language specifically defines an “insured” to include “the ‘named insured’ and those persons who were[,] are now[,] or shall be . . . employees of the ‘named insured.’”<sup>11</sup> Insofar as the parties do not dispute that Mr. Glendenning was an employee of the Board at all times relevant to Mr. Bender’s claims against him, we conclude that Mr. Glendenning was, in fact, a named insured under the Board’s Continental policy.

Next, we must determine whether the terms of the Board’s policy provide coverage to Mr. Glendenning for the various acts of sexual misconduct with which he has been charged. The parties do not dispute that the relevant policy language is the insurance contract’s definition of and statement of coverage for a “wrongful act”. In this regard, a

“[w]rongful act” shall mean any actual or alleged error or misstatement or act or omission or neglect or breach of duty including malfeasance[,] misfeasance, and non-feasance by the insureds in the discharge of their duties with the “named insured,” individually or collectively, or *any other matter claimed against them solely by reason of their being or having been insureds.*”

(Emphasis added). Given the broad nature of this language, we find that coverage clearly exists under this definition of a wrongful act. Mr. Bender has alleged that, while he was a student at an elementary school operated by the Webster County Board of Education,

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<sup>10</sup>*See note 7, supra.*

<sup>11</sup>*See supra note 3.*

his teacher, Mr. Glendenning, who was employed by that same Board, committed various acts of sexual misconduct against him. In short, Mr. Bender has made his claims against his teacher, Mr. Glendenning, “solely by reason of [Mr. Glendenning’s] being or having been [an] insured[],” which basis for recovery is plainly within the policy’s definition of a wrongful act for which coverage is provided.

Alternatively, coverage for Mr. Glendenning’s acts of sexual misconduct is provided by that part of the wrongful act’s definition that indemnifies its insureds against claims of “malfeasance”. Insofar as the policy, itself, does not explain the meaning of the term “malfeasance,” we must resort to the word’s “plain, ordinary meaning.” Syl. pt. 1, in part, *Soliva v. Shand, Morahan & Co., Inc.*, 176 W. Va. 430, 345 S.E.2d 33. “Malfeasance” is defined as “[a] wrongful or unlawful act[.]” Black’s Law Dictionary 968 (7th ed. 1999). *Accord* II Abbott’s Law Dictionary 71 (1879) (explaining “malfeasance” as “[t]he commission of some act which is positively unlawful”); Ballentine’s Law Dictionary 767 (3d ed. 1969) (defining “malfeasance” as “[t]he doing of an act which is positively unlawful or wrong” (citation omitted)). *Cf.* 2 Bouvier’s Law Dictionary Unabridged 2067 (8th ed. 1984) (construing “malfeasance” as “[t]he unjust performance of some act which the party had no right, or which he had contracted not, to do”). Thus, given that the acts of sexual misconduct levied against Mr. Glendenning were criminal in nature, it goes without saying that they constituted “wrongful or unlawful act[s],” which satisfy the definition of malfeasance for which coverage is provided by the Board’s

Continental policy. Accordingly, the Board's insurance contract not only identifies Mr. Glendenning as an insured but also specifically provides coverage for the claims Mr. Bender has asserted against him, both by virtue of Mr. Glendenning's status as an employee of the Board and by reason of the criminal nature of his misconduct against Mr. Bender.

Finally, where, as here, a policy of insurance clearly provides coverage for a claim of loss, liability nevertheless may be avoided where there exists an exclusion to limit the scope or extent of such coverage. With specific regard to claims alleging sexual misconduct, we have held that

[t]here is neither a duty to defend an insured in an action for, nor a duty to pay for, damages allegedly caused by the sexual misconduct of an insured, when the liability insurance policy contains a so-called "intentional injury" exclusion. In such a case the intent of an insured to cause some injury will be inferred as a matter of law.

Syl., *Horace Mann Ins. Co. v. Leeber*, 180 W. Va. 375, 376 S.E.2d 581 (1988). However, any type of exclusion, whether it limits coverage for intentional injuries, criminal acts, or other types of misconduct, must be stated with such clarity and specificity so as to place an insured on notice as to its existence in the subject policy of insurance. In other words,

[a]n insurer wishing to avoid liability on a policy purporting to give general or comprehensive coverage must make exclusionary clauses conspicuous, plain, and clear, placing them in such a fashion as to make obvious their relationship to other policy terms, and must bring such provisions to the attention of the insured.

Syl. pt. 10, *National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W. Va. 734, 356 S.E.2d 488 (1987), *abrogated on other grounds by Potesta v. United States Fid. & Guar. Co.*, 202 W. Va. 308, 504 S.E.2d 135 (1998).

Reviewing the Continental policy at issue in this case, we are able to identify only one provision that attempts to exclude coverage in the case *sub judice*. Endorsement Number 6 of the policy states,

It is agreed that:

A. The terms of the policy which are in conflict with the statutes of the state of West Virginia wherein certain provisions and coverages included under this policy are not permitted are hereby amended to cover only those provisions and coverages as apply and conform to such statutes.

While this clause purportedly seeks to preserve the immunities granted to political subdivisions and its employees by the West Virginia Governmental Tort Claims, we do not find that it is sufficiently “conspicuous, plain, and clear” so as to clearly identify the precise limitation of liability it is intended to impart. Syl. pt. 10, in part, *National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W. Va. 734, 356 S.E.2d 488. *See also* Syl. pt. 5, *id.* (“Where the policy language involved is exclusionary, it will be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated.”). Because there are no other provisions in the Continental policy which seek to exclude from coverage an insured’s criminal or intentional acts, we find that coverage existed under the

subject policy for Mr. Bender's claims against Mr. Glendenning. Accordingly, we reverse the circuit court's ruling finding that the Board's policy did not provide such coverage to Mr. Glendenning and the court's corresponding award of awarding summary judgment to Continental. We further remand this matter for further proceedings consistent with this opinion.

#### **IV.**

#### **CONCLUSION**

For the foregoing reasons, the December 9, 2004, order of the Circuit Court of Webster County is hereby reversed, and this case is remanded for further proceedings consistent with this opinion.

Reversed and Remanded.