

No. 32862 – *Jeremy Bender v. Donald Ray Glendenning, Jr., and The Webster County Board of Education; and The Webster County Board of Education v. Donald Ray Glendenning, Jr.; and Donald Ray Glendenning, Jr., v. Continental Casualty Company, a CNA company*

No. 32863 – *Travis Sturm, Jason Brooks and Jason Gregory v. Donald Ray Glendenning, Jr., and The Webster County Board of Education; and The Webster County Board of Education v. Donald Ray Glendenning, Jr.; and Donald Ray Glendenning, Jr. v. Continental Casualty Company, a CNA company*

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SUPREME COURT OF APPEALS

OF WEST VIRGINIA

Starcher, J., concurring:

I concur with the majority’s conclusion that the liability insurance policy bought by the Webster County Board of Education provided coverage in this case. I write separately to emphasize the reasons for the majority’s decision.

First, the majority opinion was based on a simple reading of the insurance policy. The majority’s conclusion was not based on some pie-in-the-sky “desire to provide . . . funds to compensate the victims of Donald Glendenning’s horrific abuse” as one of my dissenting colleagues suggests. My dissenting colleagues refuse to acknowledge what is obvious: this policy was sloppily and broadly written by the insurance company to provide coverage for, well, just about everything bad that a school employee could do. The opinion therefore reflects the majority’s desire to give some effect to the King’s English. When a school board buys an insurance policy that explicitly covers a “wrongful act” and “malfeasance” by a school employee, this Court shouldn’t be in the business of ignoring that policy language as the dissenters would prefer.

Second, the position urged by the dissenters would have the effect of giving the insurance company a windfall at the expense of the school board and the taxpayers of this State. The policy clearly covers the perverted acts of malfeasance inflicted by Donald Glendenning, and the school board and taxpayers paid premiums for that coverage. The dissenters would let the insurance company pocket those premiums, at the expense of the school board, the taxpayers, and – most importantly – Mr. Glendenning’s victims.

Third, the Governmental Tort Claims and Insurance Reform Act was adopted by the Legislature to “limit liability of political subdivisions and provide immunity to political subdivisions in certain instances.” *W.Va. Code*, 29-12A-1 [1986]. The Act was not designed to limit the contractual liability of insurance companies, or to provide immunity to insurance companies that provide insurance to political subdivisions. The immunity belongs to the political subdivision, not the insurance company. Therefore, an insurance company cannot say it sold coverage to a political subdivision for a particular risk for which the political subdivision is immune, and when a loss later occurs, announce to the political subdivision that there is no coverage under the Act – all the while, pocketing the premiums paid for the coverage by the political subdivision.

Fourth, my dissenting colleagues assert that the Act can only be read to establish the *maximum* amount of coverage that insurance companies must provide to a political subdivision. But the majority’s opinion makes clear that the Act can be read another way. The Act can also be read – like most insurance statutes are – to delineate the *minimum* amount of coverage that insurance companies must legally provide. Viewed this way, the

Act says that the *minimum* coverage a company must provide to a school board is liability coverage against “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.” *W.Va. Code*, 29-12A-11(a)(1) [1986]. Likewise, *W.Va. Code*, 29-12-5a [1986]¹ specifies the *minimum* coverage that the State Board of Risk and Insurance Management “shall” purchase for school boards and school employees. There is nothing in the language of either statute preventing an insurance company from selling, and a school board from buying, coverage that exceeds these statutory

¹29-12-5a [1986] provides,

In accordance with the provisions of this article, the state board of risk and insurance management shall provide appropriate professional or other liability insurance for all county boards of education, [and] teachers. . . .

Such insurance coverage shall be in an amount to be determined by the state board of risk and insurance management, but in no event less than one million dollars for each occurrence. . . .

The insurance policy shall include comprehensive coverage, personal injury coverage, malpractice coverage, corporal punishment coverage, legal liability coverage as well as a provision for the payment of the cost of attorney’s fees in connection with any claim, demand, action, suit or judgment arising from such alleged negligence or other act resulting in bodily injury under the conditions specified in this section.

The county superintendent and other school personnel shall be defended by the county board or an insurer in the case of suit, unless the act or omission shall not have been within the course or scope of employment or official responsibility or was motivated by malicious or criminal intent.

This statute was modified in 2005, but no changes were made affecting this case.

minimums. Applied to this case, as the majority opinion holds, there is nothing preventing a school board from purchasing insurance against wrongful acts or acts of malfeasance.

Fifth, the position advocated by my dissenting colleagues is wholly contrary to public policy. School boards unfortunately routinely incur stupendous financial losses as a result of sexual misconduct by teachers and other school employees. The risk that a school employee will engage in sexual misconduct with a student is known, definable and measurable to the insurance industry. Accordingly, if the insurance industry chooses to sell liability coverage for that risk, then good public policy is that school boards should be permitted to minimize their risk of financial loss by buying that coverage. My dissenting colleagues instead appear to suggest that either school boards and taxpayers should bear the financial burden of a rogue teacher's conduct; or the victims of the teacher's conduct should bear their losses without any remedy. The law abhors allowing a wrong without a remedy.

Finally, the Tort Claims and Insurance Reform Act is, in a word, a "snafu." The various provisions of the Act are vague, convoluted and conflicting, and (as this case shows) are fertile ground for clever lawyers to breed wasteful litigation. Take, for instance, the lawyers in this case. The plaintiffs filed their lawsuit in 2001 seeking recompense for their injuries inflicted by Mr. Glendenning and, to a far lesser degree, the Webster County Board of Education. The parties want some closure. Yet here we are, five years later with the lawyers dickering over the meaning of the Tort Claims and Insurance Reform Act. All the while the insurance company is pocketing interest on the premiums paid by the school board.

The majority's opinion was a proper reading of the insurance policy purchased by the Webster County Board of Education. That policy was purchased for expensive premiums, and the language of the policy fairly protected the school board and its employees against liability – even from “wrongful acts” and “malfeasance.” To hold otherwise, as my dissenting colleagues wish, would be manna from heaven for insurance companies.

I therefore respectfully concur.