No. 32862 *Jeremy Bender, et al. v. Donald Ray Glendenning, Jr., et al.*
and
No. 32863 *Travis Strum, et al. v. Donald Ray Glendenning, Jr., et al.*

FILED
May 16, 2006
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Benjamin, Justice, dissenting:

While I understand my colleagues' desire to provide the potential for available funds to compensate the victims of Donald Glendenning's horrific abuse, I must respectfully dissent from the majority opinion in this matter because, in my opinion, the governmental insurance policy at issue herein simply does not provide coverage for a teacher's criminal acts of sexually abusing his students.

The insurance policy before this Court herein was issued to the State of West Virginia. It covers all county boards of education, including the Webster County Board of Education, as a named insureds.[1] The policy provides various forms of coverage including comprehensive general liability coverage, professional liability coverage, personal injury liability coverage, stop gap liability coverage and wrongful act liability coverage. The only coverage part at issue herein is the wrongful act liability coverage.[2]

---

[1] There is no dispute that coverage exists under this policy for the students' claims asserted against the Webster County Board of Education arising from the Board's employment and supervision of Mr. Glendenning.

[2] The policy in question on this appeal was issued for the policy period of July 1, 1994 to July 1, 1995. It is apparently undisputed that the sexual abuse at issue is alleged to

A.

Governmental Immunity, the West Virginia Governmental Tort Claims and Insurance Reform Act and State Insurance

The question of whether insurance coverage exists for a claim against a governmental employee must necessarily begin with a determination as to whether a constitutional or statutory immunity applies to the claim. If there is an applicable immunity, insurance coverage cannot exist because the insurance coverage may only be purchased to cover those claims for which there is no constitutional or statutory immunity. As such, an analysis of whether coverage exists under the State's insurance policy for the claims asserted

---

have occurred during the 1994-1995 school year which would include the policy period. However, the wrongful act liability coverage part contains the following insuring clause:

> The Company agrees with the insureds that *if, during the policy period, any claim or claims first made* against the insureds, individually or collectively, for a wrongful act, the company will pay on behalf of, in accordance with the terms of this coverage part, the insureds, or any of them, their executors, administrators or assignees for all loss which the said insureds, or any of them, shall become legally obligated to pay damages.

(Emphasis added). While the acts of abuse at issue are asserted to have occurred during the policy period, the claims herein were not made until the year 2001. Therefore, I question whether coverage under the policy presented would be triggered. When questioned at oral argument regarding whether the claims made coverage at issue was triggered when the occurrence happened during the policy period but the claim was not made until nearly five years after expiration of the policy period, counsel advised that coverage under this policy was triggered due to a novation agreement.

This coverage part defines insured to include a named insured's employees. Thus, teachers employed by the Webster County Board of Education, such as Glendenning, may be included with the coverage part's definition of insured.

against Glendenning must begin with a discussion of constitutional and statutory immunities.

Until fairly recently in our State's history, the general rule was that constitutional immunity barred most claims against governmental entities. Pursuant to Article VI, Section 35 of the *West Virginia Constitution*,

> The State of West Virginia shall never be made a defendant in any court of law or equity, except the State of West Virginia, including any subdivision thereof, or any municipality therein, or any officer, agent, or employee thereof, may be made a defendant in any garnishment or attachment proceeding, as a garnishee or suggestee.

Deeming absolute immunity for governmental entities to be unduly harsh, this Court created exceptions to the same.[3] Ultimately, in 1974, this Court summarily concluded that the immunity set forth in Article 35, Section 6 does not extend to municipalities, rejecting the argument that local government is a "branch" of the State. Syl. Pt. 4, *Higginbotham v. City of Charleston*, 157 W. Va. 724, 733, 204 S.E.2d 1, 7 (1974).

One year later, in 1975, then-Chief Justice Haden conducted an extensive analysis of the history of common-law governmental immunity and its intricate governmental-proprietary function exceptions, particularly as applied to municipal entities

[3] In *Pittsburgh Elevator Co. v. West Virginia Board of Regents*, 172 W. Va. 743, 749-755, 310 S.E.2d 675, 681-687 (1983), this Court discussed the history of judicial interpretation of constitutional immunity, including its intricate exceptions, procedural methods to avoid immunity and its sometimes contradictory holdings applying the same.

in *Long v. City of Weirton*, 158 W. Va. 741, 767-86, 214 S.E.2d 832, 850-60 (1975). Noting the history of common-law municipal governmental immunity did not support a continued recognition of the same, the Court abolished it in *Long*. Syl. Pts. 9 & 10, *Long*. However, in so doing, Chief Justice Haden encouraged legislative action regarding the scope of local governmental immunity stating:

> Although, indeed, it would seem preferential for the Legislature to speak comprehensively, we do not wish to perpetuate bad law of judicial origin pending the fortuity of action by the Legislature.

Long, 158 W. Va. at 783, 214 S.E.2d at 859. Prior to the Legislature accepting Chief Justice Haden's invitation, this Court went on to abolish common law governmental immunity as it applied to county commissions and county boards of education. *See*, Syl. Pt. 2, *Gooden v. County Commission*, 171 W. Va. 130, 298 S.E.2d 103 (1982) (county commissions); *Ohio Valley Contractors v. Board of Education*, 170 W. Va. 240, 293 S.E.2d 437 (1982) (county boards of education). The Legislature finally accepted Chief Justice Haden's invitation in 1986, when it enacted the West Virginia Governmental Tort Claims and Insurance Reform Act, W. Va. Code §§ 29-12A-1, *et. seq.* (1986) (hereinafter, the "Act").

In *Randall v. Fairmont City Police Department*, 186 W. Va. 336, 412 S.E.2d 737 (1991), Justice McHugh, writing for the Court, acknowledged this Court's prior abolition of common-law governmental immunity and the Leglislature's reaction thereto in enacting the Act. Justice McHugh eloquently described the Act as follows:

"Its purposes are to *limit* [tort] liability of political subdivisions *and* [to] provide [tort] *immunity* to political subdivisions in *certain* instances *and* to *regulate* the costs and coverage of *insurance* available to political subdivisions for such liability." *W. Va. Code*, 29-12A-1 [1986] (emphasis added). The basic structure of the Act is as follows.

Under the Act a political subdivision is stated to be immune generally from liability for damages in a civil action brought for death, injury or loss to persons or property allegedly caused by any act or omission of the political subdivision. *W. Va. Code*, 29-12A-4(b)(1) [1986]. The Act lists seventeen specific types of acts or omissions covered by the tort immunity available under the Act to a political subdivision. *W. Va. Code*, 29-12A-5(a)(1)-(17) [1986]. . . .

The Act also immunizes an employee of a political subdivision from tort liability, unless his or her acts or omissions were manifestly outside the scope of employment or official responsibilities; or unless the employee's acts or omissions were with malicious purpose, in bad faith or in a wanton or reckless manner; or unless any statute expressly imposes liability upon the employee. *W. Va. Code*, 29-12A-5(b)(1)-(3) [1986].

On the other hand, the Act recognizes the tort liability of a political subdivision for acts or omissions in five fairly broad situations, W. Va. Code, 29-12A-4(c)(1)-(5) [1986], including liability in tort for damages "caused by the negligent performance of acts by their [political subdivisions'] employees while acting within the scope of employment [,]" *W. Va. Code*, 29-12A-4(c)(2) [1986]. For these situations where liability attaches, the Act imposes a $500,000 limit of liability for the noneconomic loss of any one person, *W. Va. Code*, 29-12A-7(b) [1986], and disallows punitive damages, *W. Va. Code*, 29-12A-7(a) [1986].

The Act explicitly provides that "[t]he purchase of liability insurance . . . by a political subdivision does not constitute a waiver of any immunity it may have pursuant to this article or [of] any defense of the political subdivision or its employees." *W. Va. Code*, 29-12A-16(d) [1986]. The liability insurance

> could be purchased by a political subdivision "with respect to its potential liability and that of its employees" under the Act. *W. Va. Code*, 29-12A-16(a) [1986].
>
> Finally, the Act contains provisions regulating the costs and coverage of liability insurance available to political subdivisions. *W. Va. Code*, 29-12A-17 [1986].
>
> The history in West Virginia of the qualified immunity, from tort liability, available to municipalities and certain other political subdivisions of the state is consistent with the typical pattern in most of the other jurisdictions: a broad, often total, abrogation by the judiciary of the state common-law local governmental tort immunity, followed soon thereafter by the enactment of governmental tort claims legislation, typically providing in substance for a broad reinstatement of local governmental immunity from tort liability.

Randall, 186 W. Va. at 341-2, 412 S.E.2d at 742-3 (emphasis in original, footnotes omitted).

As recognized by this Court in Justice McHugh's description of the Act, insurance may be purchased to cover liability for those acts where immunity has not been retained. The Act's immunity provisions and the scope of insurance which may be obtained are thereby interrelated. The Act explicitly provides that:

> The purchase of liability insurance, or the establishment and maintenance of a self-insurance program, by a political subdivisions ***does not constitute a waiver of any immunity it may have pursuant to this article*** or any defense of the political subdivision or its employees.

W. Va. Code § 29-12A-16 (d) (2003) (emphasis added). While the majority acknowledges (albeit in a "*but see*" parenthetical) the presence of this statutory provision, I most disagree with its description of the same. The majority states this provision provides "purchase of an

insurance policy does not *automatically* waive immunity provided by the Act." (Emphasis added). Contrary to this suggestion by the majority, the plain language of the statute unambiguously provides that the terms of the insurance policy *does not* operate to *waive* statutory immunity. I find no equivocation whatsoever in the language chosen by the Legislature. The statute does not provide that the policy must specifically preserve statutory immunity as the majority deems is required. Similarly, W. Va. Code § 29-12-5 (a)(4) (2004)[4], which authorizes the State Board of Risk and Insurance Management to procure insurance on behalf of the state and its political subdivisions[5], unambiguously states "[t]hat nothing herein shall bar the insurer of political subdivisions from relying upon any *statutory immunity* granted such political subdivisions against claims or suits" and does not require a specific preservation of the same in the policy itself. (Emphasis added).

Our statutory law governs both who and what may be covered by a governmental insurance policy. The policy should not be read independent of our governing statutes as I believe the majority has done in this instance. The policy at issue herein contains three separate provisions which, in my opinion, recognize this interrelationship. These

[4] Although various amendments have been made to W. Va. Code § 29-12-5 subsequent to the purchase of the policy at issue herein, W. Va. Code § 29-12-5(a)(4) was not affected.

[5] The term "political subdivision" includes county boards of education for purposes of obtaining liability insurance and for the Act. W. Va. Code § 29-12-5 (b)(1)(A) (2004); W. Va. Code § 29-12A-3(c) (1986).

include policy Endorsement Number 6,[6] Wrongful Act Liability Coverage Part Section VI. D[7] and Wrongful Act Liability Coverage Exclusion 4.[8] The majority acknowledges only Endorsement Number 6, noting that it purports to preserve the provisions of the Act but finding it is not "sufficiently 'conspicuous, plain, and clear'" to be enforced. I disagree with

---

[6] Endorsement Number 6 provides:

> 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.

[7] Section VI. D states:

> Conformity Clause
>
> Terms of this Coverage Part which are in conflict with the statutes of those states wherein certain provisions and coverages included under this coverage part are not permitted are hereby amended to cover only those provisions and coverages as apply and conform to such statutes

[8] Wrongful Action Liability Coverage Part IV. Exclusions provides:

> The Company shall not be liable to make any payment in connection with any claim made against the insureds:
>
> 4. Which is insured on a primary basis by another valid policy or policies (including the policy to which this coverage part is attached) *or which shall be deemed uninsurable under the law pursuant to which this endorsement shall be construed.*

(Emphasis added).

this conclusion. Here, we are dealing with a governmental insurance policy which was purchased by virtue of statutory authority to cover claims for which the State has not waived or preserved immunity on its behalf or on behalf of its political subdivisions. It is my opinion that the policy must be read in light of the applicable statutes, not independent of them.

The majority avoids discussion of applicable statutes by citing to Syllabus Point 5 of this Court's opinion in *Parkulo v. West Virginia Bd. of Probation & Parole*, 199 W. Va. 161, 483 S.E.2d 507 (1996). According to Syllabus Point 5, the terms of an insurance contract control where they grant greater or lesser immunities than those found in *case law*.[9] However, the issue presented to this Court did not involve defenses and immunities found in *case law*. The issue herein involves the application of *statutory law*, not *case law.* In *Parkulo*, we expressly recognized that the "*Legislature may direct such limitation or expansion of the insurance coverages and exceptions applicable* to cases brought under W. Va. Code §29-12-5, as, in its wisdom, may be appropriate." *Parkulo*, 199 W. Va. at 175, 483 S.E.2d at 521. As we recognized in *Parkulo*, legislative direction - such as that found in

---

[9] Syllabus Point 5 states, in its entirety:

> 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.

Parkulo, supra. (Emphasis in original).

our statutes - trumps arguably contrary provisions found in the insurance policy at issue. The majority decision now brings this accepted principle into question. To rely upon precedent which states that contrary policy provisions override common-law immunities in order that applicable statutes may be ignored is, in my opinion, not only contrary to our prior jurisprudence, but is also inappropriate in view of the statutory law applicable herein. To my knowledge, we have never held that the terms of an insurance policy may negate statutory law.

Examination of our statutory law reveals that coverage does not exist under the State's insurance policy for the claims asserted against Glendenning. Glendenning was employed, as a teacher by the Webster County Board of Education when he, by his admission, sexually abused some of his students. Pursuant to W. Va. Code § 29-12-5a (1986), in effect during the times at issue herein, the State Board of Risk and Insurance Management was required to provide:

> appropriate professional or other liability insurance for all county boards of education [and] teachers . . . Said insurance shall cover any claim, demand, action, suit or judgment by reason of *alleged negligence or other acts* resulting in bodily injury or property damages . . . *if, at the time of the alleged injury, the teacher, . . . was acting in the discharge of his duties, within the scope of his office, position or employment, under the direction of the board of education* . . . The [teacher] shall be defended by the county board or an insurer *unless the act or omission shall not have been within the coarse or scope of employment or official responsibility or was motivated by* ***malicious or criminal***

intent.[10]

(Emphasis added). Likewise, the Act, in W. Va. Code § 29-12A-11 (a)(1) (1986), requires a political subdivision to provide for the defense of an employee, such as Glendenning, relating to claims for injuries "allegedly caused by an act or omission of the employee *if* the act or omission 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.*" (Emphasis added). One cannot seriously question that a teacher who engages in criminal misconduct of the kind admitted to by Glendenning to herein has neither acted in good faith nor within the scope of his employment or responsibilities. These were purposeful acts. These were criminal acts.

The Act similarly immunizes a political subdivision employee from personal liability *unless* his acts or omissions were (1) "manifestly outside the scope of employment or official responsibilities" or (2) "with malicious purpose, in bad faith, or in a wanton or reckless manner[.]" W. Va. Code § 29-12A-5 (b)(1)-(2) (1986).[11] The Act also authorizes liability to be imposed upon the political subdivision for the acts of its employees where the injury is caused "by the *negligent* performance of acts by their employees *while acting within*

---

[10] This statute was amended in 2005. The amendments essentially broke down the statute into subsections and added language, in subsection (a), that insurance is not required to be provided for every activity or responsibility of the board and teachers. The provisions cited in the text above remain in the amended statute.

[11] An employee's immunity is also waived where another statute expressly imposes liability upon the employee. W. Va. Code § 29-12A-5(b)(3).

the scope of employment" or "by the *negligence* of their employees and that occurs within or on the grounds of buildings that are used by such political subdivisions." W. Va. Code § 29-12A-4 (c)(2) & (4) (1986).

Reading each of the above statutes *in para materia* leads, in my opinion, to the inescapable conclusion that a political subdivision employee, such as Mr. Glendenning, may only be provided coverage under the State's insurance policy in limited instances. Our statutory law authorizes the purchase of insurance to correspond to liabilities assumed and immunities waived by statute. If the employee is acting in good faith, not manifestly outside the scope of his employment or official responsibilities, and without malicious or criminal intent, he is entitled to a defense and is immune from personal liability. *See*, W. Va. Code §§ 29-12-5a; 29-12A-11 (a)(1) and 29-12A-5 (b). While granting the employee this immunity, the Legislature simultaneous imposed liability upon the political subdivision employer for its employee's negligent acts and required the employer to provide a defense to the employee. *See*, W. Va. Code §§ 29-12-5a; 29-12A-4 (c)(2) & (4). Likewise, the Legislature authorized the purchase of liability insurance to provide a defense and indemnification in these limited circumstances. W. Va. Code § 29-12-5a.

The Legislature has specifically *prohibited* the purchase of insurance to defend and indemnify a teacher when the teacher is acting outside the course or scope of his employment or official responsibility or when the acts or omissions are motivated by

malicious or criminal intent. W. Va. Code § 29-12-5a. In the instant matter, Glendenning, a teacher, pled guilty to criminal charges arising from the sexual abuse of his student, Mr. Bender, and was criminally sentenced for the same. He also admitted, in the criminal proceedings, to sexually abusing Mr. Strum, Mr. Gregory, and Mr. Brooks. At a minimum, therefore, because the conduct which forms the basis of the claims asserted herein was criminal in nature, no authorization to purchase insurance covering liability arising from his misconduct ever existed. Thus, the claims asserted against Glendenning cannot, as a matter of law, fall within the coverage of the State's insurance policy.[12]

B.

The Majority's Interpretation of the Insurance Policy

Although I do not believe, based upon the above analysis, that coverage can exist under the policy for the claims asserted against Mr. Glendenning, I feel compelled to also address the majority's interpretation of the policy provisions. The majority primarily relies upon its interpretation of the Wrongful Act Liability Coverage's definition of "wrongful act"[13] and the inclusion of the term "malfeasance" in the same to support its holding in this

[12] To be clear, I am not expressing an opinion on whether there would be a duty to defend a teacher accused in a civil action of sexual abusing a student prior to an admission of guilt by the teacher. That situation is not currently before the Court in this matter.

[13] The coverage part defines by stating:

> "[w]rongful act" shall mean any actual or alleged error or

matter. Surprisingly, the majority omits mention in its analysis to this Court's recent opinion in *Moore v. CNA Insurance Company, d/b/a Continental Casualty Company*, 215 W. Va. 286, 599 S.E.2d 709 (2004), which involved the precise wrongful act definition at issue herein. In *Moore*, this Court found that former-Governor Moore's criminal guilty pleas precluded both a duty to defend and a duty to indemnify him for claims asserted in a civil action relating to the conduct forming the basis of the guilty pleas. The same circumstance is presented here. Coverage is sought for claims arising from the same misconduct which form the basis of Mr. Glendenning's criminal guilty pleas. In *Moore*, this Court found that the criminal guilty pleas were sufficient to preclude both a duty to defend and a duty to indemnify under the same wrongful act definition contained in the State's insurance policy. The majority herein now reaches the exact opposite conclusion without explanation and without reference to *Moore*.

I am also troubled by the breadth of the majority's holding. The majority emphasizes the phrase "and any other matter claimed against them solely by reason of their being or having been insureds" in finding coverage existed under the Wrongful Act Liability provisions of the policy. By this, it appears that the majority has found that so long as a claim is asserted against a governmental employee which has some relationship to that employee's

---

> 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.

employment, coverage exists. The potential for frivolouss actions seeking to use the State's insurance policy as a deep pocket for recoveries is enhanced by the majority's holding. For example, suppose an off-duty State Trooper was cleaning a personal gun when it accidentally discharged, injuring a visiting neighbor. The neighbor files suit, alleging that because of his training as a State Trooper, the State Trooper possessed heightened experience and training in handling a gun and as such, should have been able to avoid the accidental discharge. This allegation would not have been made but for his status as a State Trooper. Under the majority's analysis, coverage would apparently exist under the State Insurance policy for this claim as it is made solely by reason of his being an insured State Trooper. I fear the majority's broad holding may indeed abolish all statutory coverage limitations and all otherwise valid policy exclusions. Under the majority's analysis, it appears that to obtain coverage under the State's insurance policy, all one needs to do is to creatively plead that the defendant for whom coverage is sought is a government employee and there is some relationship, however tenuous, between the claim and the defendant's employment. Statutory limitations providing that coverage may only be provided for acts within the scope of employment which were done without malicious or criminal intent have seemingly been invalidated by implication in the majority's *per curium* opinion.

Finally, I am unpersuaded by the majority's reasoning that to find coverage that does not exist for the claims asserted against Glendenning in this matter would require the Court to read an intentional acts exclusion into the policy. As discussed above, the

Legislature has simply not authorized the purchase of insurance to cover intentional acts. The intentional act exclusion the majority seeks to avoid reading into the policy is a statutory prohibition, not a policy exclusion. There simply is no need for a policy to exclude that which is already excluded by statute. Furthermore, there is a strong public policy against the state insuring criminal misconduct. The criminal, not the citizens of West Virginia whose tax dollars provide the coverage found by the majority, should pay for the consequences of the criminal's conduct.

For the reasons stated above, I respectfully dissent from the majority opinion issued herein.