IN THE

COURT OF SPECIAL APPEALS OF MARYLAND

September Term, 2003

No. 00285

MONTGOMERY COUNTY BOARD OF EDUCATION,

Appellant

v.

HORACE MANN INSURANCE COMPANY,

Appellee

On Appeal from the Circuit Court for Montgomery County, Maryland

BRIEF OF APPELLANT

Charles W. Thompson, Jr.
County Attorney

Joann Robertson, Chief Counsel
Litigation Division

Sharon V. Burrell
Principal Counsel for Self-Insurance Appeals

Executive Office Building
101 Monroe Street, Third Floor
Rockville, MD 20850
(240) 777-6700
Attorneys for Appellant

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STATEMENT OF THE CASE

This action arises out of a previous lawsuit alleging that a former Montgomery County Public Schools teacher, Barbara Robbins, sexually abused a student that she mentored. This case presents the question of whether the Montgomery County Board of Education must reimburse Horace Mann Insurance Company for legal expenses it incurred in representing Robbins. Horace Mann filed a complaint for declaratory relief in the Circuit Court for Montgomery County against the Montgomery County Board of Education and the Montgomery County Self-Insurance Fund alleging that the Board had a duty to defend and indemnify Robbins against the allegations in the underlying lawsuit. All parties filed motions for summary judgment. The circuit court entered summary judgment on behalf of the Montgomery County Self-Insurance Fund because it is not a suable entity. On the merits, the court declared that the Board breached its duty to Robbins and that the Board is obligated to reimburse Horace Mann for sums it expended in defending Robbins and in settling the previous lawsuit. The Board noted this appeal.

QUESTIONS PRESENTED

I. Was the Board required to provide counsel to defend an employee in a suit for damages alleging sexual abuse of a student once it determined under Education Article § 4-104(d)(1) that the employee's actions were outside the scope of her employment and that she was not acting within her authorized official capacity?

II. Did the Board volunteer to defend its employees against allegations of sexual misconduct by obtaining insurance mandated under state law if the insurance limits coverage to acts within an employee's scope of employment?

III. Must the Board indemnify an employee for the amount of her settlement of a lawsuit with the child she was accused of sexually abusing?

STATUTES, ORDINANCES AND CONSTITUTIONAL PROVISIONS

The full text of all relevant statutes, ordinances and constitutional provisions appears in the record extract.

STATEMENT OF FACTS

In 1989 Wood Middle School instituted a mentoring program open to all teachers, administrators and staff. The mentoring program was designed to help at-risk students academically and with other aspects such as social skills, self-esteem and behavior. Students were recommended for the program by parents, teachers, grade level teams, counselors or were self-selected. The goal of the program was that the student and mentor would establish a comfortable relationship whereby the student could go to the mentor to discuss problems with school, personal life, and other issues. The mentor was to be an

advocate for the student. The program also helped staff members expand the horizons of the students through group cultural activities. (E. 16-20, 165-67) Mentoring activities included weekly mentor-mentee contact, help in academic assignments and group activities. Parental permission was an important part of the program. (E. 28, 61, 171)

Barbara Robbins, a teacher at Wood, was assigned as John Doe's mentor and maintained a relationship with him after he left Wood. (E. 2-3) In 1996 Doe was convicted and sentenced to jail for possession of drugs and armed robbery. A social worker at the jail took a statement from Doe before he began his incarceration. Doe informed the social worker that he had been sexually abused by Barbara Robbins while he was in middle school. The social worker notified the Montgomery County Police Department, which notified personnel officials at Montgomery County Public Schools ("MCPS"). MCPS immediately removed Robbins from teaching and launched an investigation in conjunction with the police. (E. 107, 143-44)

Personnel Specialist Samuel Daniel conducted the investigation under the direction and supervision of the Director of the Division of Staffing, Stan Schaub. Daniel spoke with Doe, who alleged that he had sexual intercourse with Barbara Robbins while he attended Wood Middle School and that the relationship continued after he graduated from Wood. Doe further alleged that Robbins gave him money, brought him food when he did not want what his mother cooked, and purchased cassette tapes, clothes and video games for him. (E. 68-73) Doe also gave Daniel cards and letters that he had received from

Robbins. Some of these were love notes that Robbins sent Doe over an extended period of time in which she called him "Sweets" and offered expressions of love. (E. 29-62)

Daniel spoke with Doe's former classmates, friends and Wood staff. Daniel concluded that while no one at Wood or within the school system was aware of a sexual relationship between Doe and Robbins, two secretaries thought that the relationship was strange. Further, two adults who knew the student while he attended high school had suspicions that Doe and Robbins had a sexual relationship. (E. 69) Robert Jackson, whom Doe lived with during his tenth grade year, informed Daniel that Robbins called Doe frequently, wanted to take him out, and bought him expensive gifts such as a Sony Walkman and expensive jeans. Jackson put a stop to the gifts and the visiting outside of the confines of his home. Based on his observations of Robbins with Doe, Jackson believed that they were involved in a relationship. (E. 95-101)

Elizabeth Grinder, the mother of a friend of Doe's, also was suspicious that Robbins was involved in a sexual relationship with the youth. Doe became friends with Mrs. Grinder's son while attending Good Counsel High School and spent many nights and weekends at the Grinder home. Robbins would call the Grinder home looking for Doe and would pick him up to go out to eat. Further, Robbins called Mrs. Grinder several times questioning whether she knew what was bothering Doe. To Mrs. Grinder, Robbins sounded like a jilted girlfriend. (E. 89-92) Additionally, Doe admitted both to Mrs.

Grinder and Mr. Jackson that he had sexual relations with Robbins. (E. 90, 99) Doe also told several friends that he and Robbins had a sexual relationship. (E. 76, 93)

The director of Personnel at MCPS, Dr. Elizabeth Arons, reviewed the investigation report and correspondence from Robbins to Doe, met with Robbins and her union representative, and met with Robbins and her husband. Robbins denied that she had a sexual relationship with Doe but admitted that she had used bad judgment with him. Dr. Arons shared with Robbins her concerns that the correspondence from Robbins indicated that the relationship between the two far exceeded a normal mentoring relationship. (E. 147-48, 151)

On February 18, 1998, Doe filed a complaint against Montgomery County Government and/or Montgomery County Public Schools, Sheila Dobbins (former principal of Wood Middle School), and Barbara Robbins in the United States District Court for the District of Maryland. (E. 1) Robbins requested the Board of Education to provide her with a defense and indemnification. (E. 108)

Joann Robertson, Chief of the Litigation Division in the Montgomery County Attorney's Office and counsel to the self-insurance fund, met with Dr. Arons, Stan Schaub, and Board of Education Attorney Judith Bresler for a determination of whether Robbins' actions were within the scope of her employment. Dr. Arons considered the letters, notes and cards from Robbins, the actions of Robbins of picking up Doe, visiting the youth's home when his parents were not present, and witnesses, such as Wood staff.

Dr. Arons also considered the gifts and Robbins' involvement in Doe's life without parental approval and determined that Robbins' actions were outside the scope of her employment. (E. 153-58) The Board, therefore, denied Robbins a defense and indemnification. (E. 112) Through her union, Robbins obtained coverage under a policy issued by Horace Mann, which provided Robbins with a defense to the federal lawsuit. (E. 224, 295)

The U.S. District Court dismissed or granted summary judgment to all defendants except Barbara Robbins. (E. 12-14) Robbins settled with John Doe prior to a trial on the merits. (E. 260)

Summary of Argument

Under Maryland case and statutory law, a Board of Education cannot be required to provide a defense to an employee who the Board determines has acted outside the employee's "authorized official capacity." The Montgomery County Board of Education has not volunteered to extend its duty to defend to employees who act outside the scope of their employment. For public policy reasons, the courts should not extend a Board of Education's duty to defend to suits against employees alleged to have committed sexual misconduct with children where a Board has conducted an independent review of the facts and determined that the employee acted outside the employee's authorized official capacity. Further, the Board has no duty to indemnify an employee who settles a lawsuit against her alleging that she engaged in the sexual abuse of a child.

ARGUMENT

In reviewing a grant of summary judgment, the proper standard is whether the trial court's decision was legally correct. *Nationwide Ins. Cos. v. Rhodes*, 127 Md. App. 231, 235, 732 A.2d 388, 390 (1999). Under Maryland Rule 2-501(e), summary judgment is appropriate when the motion and response show that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. *Bradley v. Fisher*, 113 Md. App. 603, 610, 688 A.2d 527, 530 (1997). The circuit court incorrectly ruled that the law required summary judgment for Horace Mann.

I. The Board was not required to provide counsel to defend an employee in a suit for damages alleging sexual abuse of a student once it determined under Education Article § 4-104(d)(1) that the employee's actions were outside the scope of her employment and that she was not acting within her authorized official capacity.

Md. Code Ann., Educ. § 4-104(d)(1) sets forth the rules for when a county board of education is required to provide counsel for a teacher who is a defendant in a lawsuit:

> [i]n any suit . . . brought against a principal, teacher . . . or other agent or employee of a county board by a parent or other claimant with respect to an action taken by the agent or employee, the board shall provide counsel for that individual if:
>
> (i) The action was taken in the performance of his duties, within the scope of his employment, and without malice; and
>
> (ii) The board determines that he was acting within his authorized official capacity in the incident.

In order to meet its obligations under § 4-104(d)(1), the Board participates in Montgomery County's self-insurance program pursuant to County Code § 20-37(d). Whether the Board had a duty to provide counsel to Robbins must be determined by a review of § 4-104(d)(1), County Code § 20-37, the self-insurance program procedures, and the agreement with the Board of Education. *See Matta v. Board of Education of Prince George's County*, 78 Md. App. 264, 271 n. 3, 552 A.2d 1340, 1343 n.3 (1989).

Based on the allegations of the Doe complaint, as well as undisputed facts, Robbins did not meet the requirements of § 4-104(d)(1).

Section 4-104(d)(1) establishes two tests to determine whether the Board must provide counsel to an employee in a lawsuit. The employee must meet each test before she is entitled to the benefit provided by the statute. The first test requires inquiry into whether actions were taken in the performance of the employee's duties, were within the scope of employment and without malice. § 4-104(d)(1)(i). If the employee achieves each of the standards in the first test, the employee has not yet met the burden for entitlement under the statute. To be qualified, the employee still must seek the Board's determination that she was acting in an authorized capacity in the incident. § 4-104(d)(1)(ii). Legally and factually, Robbins met neither test.

This Court applied § 4-104(d)(1) in *Matta v. Board of Education of Prince George's County*, a case very similar to the present case, yet different. In *Matta* a teacher alleged that the school board was obligated to provide a defense and coverage in a suit brought against him by female students who alleged inappropriate sexual conduct. This

Court, in considering both tests in § 4-104(d)(1), found that the duty to provide counsel depended on whether the teacher's alleged conduct "'was taken in the performance of his duties, within the scope of his employment, and without malice' and whether 'he was acting within his authorized official capacity in the incident.'" 78 Md. App. at 271, 552 A.2d at 1343.

Applying the first test, this Court looked to the amended complaint and found that there was no "suggestion that the conduct was merely negligent, that it was non-malicious." *Id*. at 273, 552 A.2d at 1344. This Court valued the conclusivity that the second test in § 4-104(d)(1)(ii) imposes on the resolution of this issue: "More importantly, the second condition stated in § 4-104(d) is that the board determine that Matta was acting 'within his authorized official capacity in the incident.'" *Id.* Despite the students' allegations that the teacher had acted within the scope of his employment, the Court found that the board had not determined that the teacher "was acting 'within his authorized official capacity in the incident'" as is required by § 4-104(d)(1)(ii):

> Obviously, the board made no such determination. Nor, under the averments in the complaint, could it reasonably make such a determination. Although the board, the superintendent, and the principal were all charged with failing to exercise proper control and supervision of Matta, there is no allegation that any of them authorized Matta to engage in the conduct charged to him. Nor, in our judgment, is it even potentially possible for any court or reasonable jury to conclude that teachers are "authorized" to sexually abuse or harass their students.

Id. at 274, 552 A.2d at 1345. Accordingly, the Court found that the board had no duty to provide counsel to the teacher.

Pursuant to *Matta* and § 4-104(d)(1), the Board properly denied Robbins' request to be provided counsel to defend her in the *Doe* case because she did not act within her authorized official capacity in her interactions with the student and her alleged conduct was not merely negligent.[1] Unlike in *Matta,* the record in this case clearly discloses the extensive investigation and review that supports the Board's determination that Robbins did not act within her "authorized official capacity." In determining that Robbins' actions were outside the scope of her employment and not within her "authorized official capacity," Dr. Arons considered the letters, actions involving Robbins' picking Doe up, visiting his home when his parents were not present and other witnesses, such as Wood staff, Robert Jackson and Elizabeth Grinder. Arons also considered gifts and Robbins' involvement in trying to get Doe into a private school without his parents' permission. This evidence was presented in the investigation of Samuel Daniel. (E. 68-106, 154-56)

Even if there was no conclusive evidence that Robbins had engaged in a sexual relationship with Doe, based on her letters, cards and notes to him, it was clear that the relationship was outside the scope of that which a mentor should have with a middle school student and that those letters and the relationship that they represent were not within Robbins' authorized official capacity. The correspondence that Robbins wrote

[1]Interestingly, Doe's suit did not claim that Robbins acted within the scope of her employment while she was sexually abusing him.

Doe clearly illustrated an inappropriate relationship. Robbins referred to the student in such endearing terms as "Sweets" (E. 29), told Doe that she loved him (E. 29-38), sent him Valentine's Day cards (E. 39-41), and signed some of her cards and letters "Love, Me" (E. 40, 44, 47). There was clear evidence of a relationship that went far beyond that of a mentor-student and was outside the scope of Robbins' employment as a teacher. The letters were not potentially executed in furtherance of Robbins' role as a mentor. While it may be appropriate for a mentor to send notes of encouragement to students, the content of Robbins' notes suggests something other than that — something romantic and inappropriate. (E. 57)

Although Robbins denied that she had a sexual relationship with Doe, she admitted to Dr. Arons that she had used bad judgment. (E. 151) Robbins also had written to the student's mother and acknowledged that much of her "assistance" was "untimely, unnecessary, and unwarranted. . . . and perhaps manifested itself into compounding a problem." (E. 63-64) In another letter Robbins apologized for interfering and recognized that Doe's mother did not want her in their lives. (E. 65-67)

Moreover, the Wood program was created to help students while they attended the school. As the investigation and correspondence clearly show, Robbins continued a relationship with Doe after he had left Wood and was attending high school - clearly outside her authorized official capacity. Any involvement that Robbins had in the student's life at that point could not be explained away as being within the scope of a

mentor-mentee relationship under the Wood program. Rather, the relationship was something entirely different and very inappropriate.

Further, the Board had no duty to provide counsel to Robbins because the allegations constituted malice as defined in *Matta.* Nothing in the complaint suggested that Robbins' actions were merely negligent. Doe complained that Robbins sexually abused him and intentionally inflicted emotional distress upon him. Moreover, he requested punitive damages. (E. 6-10) Since Robbins' alleged actions fell outside the scope of her employment, outside her authorized official capacity, and were intentional, the Board properly denied her request for a defense under § 4-104(d)(1). Substantial evidence supports the Board's determination that Robbins was not acting within her authorized official capacity in the incident. That determination was neither arbitrary or capricious, but clearly supported by the facts. Accordingly, the Board's determination should not be set aside. That determination, more importantly, conclusively prevents Robbins from claiming entitlement under the statute, just as it did in *Matta*.

II. The Board did not volunteer to defend its employees against allegations of sexual misconduct by obtaining insurance mandated under state law if the insurance limits coverage to acts within an employee's scope of employment.

In *Matta,* this Court noted that no issue had been raised concerning whether the Board had volunteered to provide counsel to the employee. Here, other than arguing that the terms of the state-mandated insurance might constitute sufficient basis entitling

Robbins to Board-provided counsel, Horace Mann offered nothing in the record to suggest that the Board volunteered to provide Robbins a defense.

The Board's insurance program did not entitle Robbins to a defense.

The terms of an insurance policy establish an insurer's duty to defend under Maryland law. *Litz v. State Farm Fire & Cas. Co.,* 346 Md. 217, 225, 695 A.2d 566, 569 (1997). The Board obtained its insurance pursuant to the requirements of Education Article § 4-105 through a self-insurance pool operated by Montgomery County. Thus, unlike most disputes involving the duty to defend, the Board is both an insured and a self-insurer. The analysis that the courts use to construe a typical insurance contract does not readily transfer when resolving the question of whether the Board somehow volunteered to defend Robbins. Nevertheless, the framework of the analysis suggests that the court must look at the terms of the contract, the law and public policy in resolving this issue:

> Construction of insurance contracts in Maryland is governed by a few well-established principles. An insurance contract, like any other contract, is measured by its terms unless a statute, a regulation, or public policy is violated thereby.

Id. at 224, 695 A.2d at 569.

The terms of the self-insurance program limit coverage to acts within the scope of employment consistent with § 4-104. County Code § 20-37(c) provides that the self-insurance program is to compensate for any "type of civil or tortious action resulting from the negligence or wrongful act of any public official, agent or employee *within the scope of official duties*." (emphasis added) The self-insurance fund program's procedures

similarly provide coverage for any actions within the scope of official duties. (E. 131) And the insuring agreement between the Board and the County provided that "the County will not indemnify in cases of wanton or malicious wrongdoing, or for actions falling outside the scope of employment or taken in bad faith." (E. 126)

Historically, the fund has provided a defense against covered claims brought against participating agencies and their employees arising within the scope of official duties only. (E. 218-19) Because Doe did not allege that Robbins was acting within the scope of her employment and because the Board determined that Robbins acted outside the scope of her employment in her relationship with Doe, she was not entitled to coverage under the self-insurance program and the Board properly refused to reimburse Horace Mann for the legal expenses incurred. The Court of Appeals recently reached the same result in a similar case.

In *Wolfe v. Anne Arundel County*, 374 Md. 20, 821 A.2d 52 (2003), a police officer who raped a woman after a traffic stop was convicted of misconduct of office. The woman subsequently sued the officer and Anne Arundel County for violation of her civil rights and obtained a judgment against the officer. The woman filed a claim for indemnification with the county's self-insurance fund, which denied the claim. She then sued Anne Arundel County, alleging that it had a contractual obligation to indemnify the officer.

The Court of Appeals first examined the Anne Arundel County self-insurance program. The county charter provided for a defense for any officer or employee for actions done "in the scope of the officer's or employee's employment." 374 Md. at 28, 821 A.2d at 56. The regulations adopted by the self-insurance fund committee defined an insured as an employee, or other listed person, "while acting within the scope of their duties as such or on behalf of the County." They excluded from coverage claims brought against insureds that resulted from willful actions or gross negligence. 374 Md. at 28-29, 821 A.2d at 57.

The woman argued that the program covered the officer because his collective bargaining agreement provided for civil liability coverage for acts within the scope of his employment and the traffic stop was an act within the scope of his employment. She contended that "but for" the officer's authority to make the traffic stop, she would not have been raped. The Court of Appeals rejected this argument, finding that the tortious and criminal conduct was not within the scope of the duties of a police officer:

> The litigation arose out of the "act" of raping Ms. Wolfe and not out of the "act" of the traffic stop. The petitioner's "but for" causation argument might have slightly more plausibility if the collective bargaining agreement had referred to litigation based on "acts arising out of the employment." The language of the agreement, however, requires that the "acts" be "within the scope of his/her employment."

374 Md. at 35, 821 A.2d at 61.

Applying *Wolfe* to the facts of this case, the alleged sexual abuse by Robbins does not come within the scope of her employment. Although as his mentor, Robbins was placed in the position of giving Doe rides home, or sending him notes, that was not the basis of the lawsuit. Like the woman in *Wolfe*, Doe filed the lawsuit due to Robbins' alleged sexual abuse of him — not for any innocuous actions that clearly were a part of Robbins' duties.

Illinois' highest court dealt with issues similar to those in this case and *Wolfe* in *Deloney v. Board of Education*, 666 N.E.2d 792 (Ill. App. Ct. 1st Dist. 1996). As with this case, suit was filed alleging that a Board of Education employee committed sexual misconduct and the Board refused to defend the employee. Unlike this case, however, in *Deloney*, the employee pleaded guilty to the criminal charges, but went to trial on the civil claims and prevailed. Then the employee and his lawyers sought indemnification from the Board. The Court denied their claims by concluding that suits alleging that a Board of Education employee has engaged in sexual misconduct with a student preclude a conclusion that the act was within the scope of employment:

> . . .Here, as noted above, the gravamen of the civil rights action was the alleged sexual misconduct of Deloney. That conduct, aggravated criminal sexual abuse, by its very nature precludes a conclusion that it was committed within the scope of employment. While an act may be within the scope of employment although consciously criminal . . ., generally, acts of sexual assault are outside the scope of employment.

Id. at 783-84. In reaching its decision, the court in *Deloney* relied on numerous cases from other jurisdictions that conclusively held that acts of sexual assault were outside the scope of employment.[2]

The fact that Robbins was not criminally charged like the employees in *Wolfe* and *Deloney* is not dispositive because the allegations clearly make out a case of Robbins' criminal behavior. Furthermore, Robbins was by no means exonerated inasmuch as the criminal investigation had not been completed while the civil case was pending. In fact, the investigating officer felt that Robbins had not been completely truthful with him when she was interviewed. (E. 183) The detective wanted to proceed with the investigation but the State's Attorney's Office felt that there could be problems given Doe's arrest status when he informed authorities of the abuse. Therefore, the State's Attorney's Office decided to wait until after the civil case was concluded and revisit the issue. While the

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[2]*See* cases cited by *Deloney*, 666 N.E.2d at 783-84, *e.g.*, *Randi F. v. High Ridge YMCA*, 170 Ill. App. 3d 962, 524 N.E.2d 966, 120 Ill. Dec. 784 (1988) (sexual assault of child by day-care teacher is deviation from scope of employment); *Horace Mann Ins. Co. v. Analisa N.*, 214 Cal. App. 3d 850, 263 Cal. Rptr. 61 (1989) (no duty by insurer to indemnify teacher in civil action alleging sexual abuse); *Worcester Insurance Co. v. Fells Acres Day School, Inc.,* 408 Mass. 393, 558 N.E.2d 958 (1990) (no vicarious liability by private employer for acts of sexual abuse); *Queen v. Minneapolis Public Schools, Special School District No. 1*, 481 N.W.2d 66 (Minn. Ct. App. 1992) (no duty by school district to provide legal counsel to teacher who engaged in sexual relationship with student); *Durham City Board of Education v. National Union Fire Insurance Co.*, 109 N.C. App. 152, 426 S.E.2d 451 (1993) (sexual assault of student by teacher beyond scope of employment).

civil case was pending, the detective still considered the investigation to be open. (E. 181-82)[3]

Reaching for a slender reed, Horace Mann contended, and the circuit court agreed, that there was a potentiality that the claims alleged by Doe were covered under the terms of the self-insurance program. A review of the complaint and extrinsic evidence, however, makes clear that Robbins was not entitled to coverage under the self-insurance program.

Doe's allegations did not establish that the complained of acts were potentially covered by the self-insurance program.

In a case involving a policy of insurance that provided that the insurer would defend even against claims that were groundless, the Court of Appeals determined that the duty to defend includes the obligation to defend an insured if there is the potentiality that the claims asserted could ultimately be covered by the applicable policy. *Brohawn v. Transamerica Ins. Co.*, 276 Md. 396, 408, 347 A.2d 842, 850 (1975). The potentiality rule involves two questions:

> (1) what is the coverage and what are the defenses under the terms and requirements of the insurance policy? (2) do the allegations in the tort action potentially bring the tort claim within the policy's coverage? The first question focuses upon the language and requirements of the policy, and the second question focuses upon the allegations of the tort suit. At times these two questions involve separate and distinct matters, and at other times they are intertwined, perhaps involving an identical issue.

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[3]By settling the lawsuit, Robbins may have avoided criminal prosecution.

St. Paul Fire & Marine Ins. Co. v. Pryseki, 292 Md. 187, 193, 438 A.2d 282, 285 (1981). If a potentiality of coverage is established by the allegations of a complaint, an insurer may not use extrinsic evidence to contradict that coverage. *Aetna Casualty & Sur. Co. v. Cochran*, 337 Md. 98, 108, 651 A.2d 859, 864 (1995). When, as in this case, the complaint does not establish a basis for coverage, actual or potential, the insured may offer extrinsic evidence to show the gravamen of the complaint involves covered acts to gain the protection bargained for under the policy. *Id.* As to this point, Horace Mann would ask the Court to adopt the reasoning rejected by the Court of Appeals in *Wolfe,* i.e., because Robbins was a teacher who was assigned to mentor Doe, her actions were within the scope of employment. The Court of Appeals rejected similar reasoning in *Wolfe* and this Court should reject that reasoning in this case — as the underlying suit against Robbins sought damages for her acts of sexual misconduct through different causes of action.

The potentiality rule is not limited to issues of coverage under traditional insurance policies, but is applicable to issues of coverage arising under self-insurance programs as well. This Court considered the potentiality rule in *Matta* but could not apply it because the record did not contain the necessary documents. *See Matta*, 78 Md. App. at 269-70, 552 A.2d at 1342-43. In this case, however, the relevant documents under the County's self-insurance program — the statute, procedures, and agreement with the Board — are included in the record.

The circuit court apparently focused on the preliminary statement and summary of action in the underlying complaint, which contains the factual allegations that are the basis for the suit. But the court picked out minor innocuous undisputed facts (such as Robbins' calling Doe and providing transportation) while ignoring the gravamen of the allegations. Although the complaint included facts that on their face were not sexual abuse, these facts were intertwined with the sexual abuse allegations:

> In the course of more than 3 years, Robbins repeatedly, sexually abused Doe by having vaginal and other forms of sex with him and she intentionally inflicted emotional distress upon him in violation of the law and of Doe's civil rights. Robbins abused her special relationship with Doe in numerous, inappropriate ways. More specifically, she:
> a. called him;
> b. bought him gifts;
> c. sent food to his home;
> d. invited him into the bedrooms and other rooms of her home;
> e. sent him love cards;
> f. wrote him love letters;
> g. provided him with transportation;
> h. and frequently had vaginal and other forms of sex with him.
> Moreover, Robbins intentionally and inappropriately interfered with his parents and guardians by inappropriately blending and confusing the roles of mentor, teacher, lover, friend and parent. The relationship and the abuse continued during summer and other school vacations and after Doe transferred to a private school. The relationship and the abuse continued when he was later re-enrolled in other (MCPS) Schools until the relationship was terminated.

(E. 3-4)

The circuit court parsed out the allegations in the complaint, ignoring that all of the allegations were inextricably grounded with the alleged sexual abuse. The court disregarded the repeated allegations of sexual abuse and instead focused on what cause of action could later be added or deleted:

> The Board's analysis ignores the potential dynamics of the process of a civil case, wherein theories of liability are added or deleted as the case develops. Even if all allegations of sexual abuse stated in the complaint are disregarded, a cause of action remains for economic and non-economic damages resulting from Barbara Robbins' alleged misuse of her position as a teacher/mentor. The potential exists that judgment in the tort suit could have been entered against Barbara Robbins for alleged improper conduct separate and apart from any sexual abuse. For that reason, the Court is persuaded that the Board of Education had a duty to defend part of the civil suit. Consequently, the Board had a duty to defend the lawsuit in its entirety.

(E. 292-93)

Contrary to the court's findings, there was no separate claim for misuse of the mentor relationship that did not involve allegations of sexual abuse. Count I of the *Doe* complaint was brought under 42 U.S.C. § 1983 and alleged that the physical sexual abuse of Doe by Robbins violated his rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. (E. 4-6) Count II was brought under Title IX of the Education Amendments of 1972 and alleged that "Robbins' sexual abuse of Doe discriminated against Doe on the basis of gender in the school's educational programs or activities." (E. 7) Although Doe designated Count III as negligence, it referred to

Robbins' intentional conduct of "engaging in an extended abusive sexual relationship with [Doe], as outlined in previous allegations, knowing he was under the age of consent." (E. 7-8) Further, as the Court of Appeals has noted, "sexual molestation is a tort which is only committed intentionally." *Pettit v. Erie Ins. Exch.*, 349 Md. 777, 786, 709 A.2d 1287, 1292 (1998). Lastly, Count V alleged intentional infliction of emotional distress based on Robbins' engaging in an "extended sexual relationship with Doe." (E. 9-10)[4] The circuit court erred in ruling that a judgment could have been entered against Robbins separate and apart from any sexual abuse. Given the counts in the *Doe* complaint, if a jury had found against Robbins on any one of them, it could not have done so without a finding that Robbins had engaged in a sexual relationship with a minor. The circuit court, however, did not read the complaint as it existed, but how it **could have been changed**, although it never was. Such an analysis is contrary to this Court's decision in *Reames v. State Farm Fire & Cas. Ins.*, 111 Md. App. 546, 683 A.2d 179 (1996), that an "insured's duty to defend a claim that is potentially covered by a policy is determined by evaluating the causes of action that were actually alleged, not those that might have been brought, as well as the relevant extrinsic evidence." *Id.* at 557, 683 A.2d at 184-85.

In *Reames* the insured alleged that because the factual allegations in a complaint supported a claim that would have been covered by the policy, although such cause of

[4]Count IV was brought solely against the principal.

action was never pled, the insurer had a duty to defend. This Court considered decisions by the Maryland Court of Appeals as well as the D.C. Court of Appeals and concluded that the cause of action must be asserted before an insurer has a duty to defend:

> From these cases, we glean that the analysis concerning an insurer's duty to defend a lawsuit filed against its insured on the ground that the allegations in the tort action potentially bring the tort claim within policy coverage is governed solely by evaluating the causes of action actually alleged by the plaintiff in that lawsuit . . . . Unasserted causes of action that could potentially have been supported by the factual allegations or the extrinsic evidence cannot form the basis of a duty to defend because they do not demonstrate "a reasonable potential that the issue triggering coverage will be generated at trial."

Id. at 560-61, 683 A.2d at 186 (quoting *Cochran*, 337 Md. at 112, 651 A.2d at 859). *See also Zurich Ins. Co. v. Principal Mut. Ins. Co.*, 134 Md. App. 643, 652, 761 A.2d 344, 349 (2000) (court applied potentiality of coverage rule by reviewing actual language in amended complaint); *Baltimore Gas & Electric Co. v. Commercial Union Ins. Co.*, 113 Md. App. 540, 688 A.2d 496 (1997) (no potentiality of coverage where covered claims were no longer asserted and could not be generated at trial).

Even applying the two-part test set forth in *St. Paul Fire & Marine Ins. Co. v. Pryseski*, there was no potentiality that any of the claims actually asserted could be covered by the self-insurance program because they were not within the scope of Robbins' employment. Here, given the underlying complaint's focus on the alleged sexual abuse, there was no reasonable potential that claims not connected with the abuse

would have been generated for trial. Moreover, the Board did not deny Robbins coverage in the *Doe* case based solely on the allegations of the complaint. Instead, the Board also relied on Robbins' own words written by her own hand.

Extrinsic evidence supported the Board's decision.

The Board considered *all* extrinsic evidence, favorable or not to Robbins. *Compare Aetna Cas. & Sur. Co. v. Cochran* (references to outside sources permitted if necessary to determine whether there is potentiality of coverage). The circuit court, without explanation, concluded that the extrinsic evidence supported a finding that the complaint alleged actions by Robbins in her role as a mentor that were potentially within the scope of a teacher/mentor. (E. 292) That conclusion varies dramatically with this Court's conclusion in *Matta* that it is not "potentially possible for any court or reasonable jury to conclude that teachers are 'authorized' to sexually abuse or harass their students." 78 Md. App. at 274, 552 A.2d at 1345. And the Court of Appeals' decision in *Wolfe* repudiates any potentiality that a teacher's role involves having a sexual liaison with a middle school child.

The only extrinsic evidence that Robbins offered was her denial of a sexual relationship. But merely because Robbins denied a sexual relationship and contended that her actions were taken in her role as a mentor does not make it so. Robbins was faced with criminal charges and the loss of her job. It is not surprising, therefore, that despite the overwhelming evidence to the contrary, that Robbins would deny that she had a sexual

relationship with a minor. Based on all of the extrinsic evidence before it, the circuit court erred in declaring that the Board breached its duty to Robbins.

Other courts subscribe to the rule that an insurer has no duty to defend suits alleging sexual liaisons between teachers and children.

Horace Mann ought to be familiar with the obligation of an insurer to defend against allegations of a teacher's sexual misconduct with children. It has participated in reported cases throughout the United States, generally taking a position contrary to that which it asserts in this case. In a suit arising out of a case in Alabama where a teacher had been sued for sexually abusing several students, Horace Mann sought to avoid the duty to defend and coverage under its policy based on essentially the same principles that it asserts compel the Board to provide coverage and to defend Robbins. Although the federal district court in *Horace Mann Ins. Co. v. Fore,* 785 F. Supp. 947 (M.D. Ala. 1992), was called upon to construe the term "educational employment activities," it used the same scope of analysis as our Court of Appeals used in *Wolfe*:

> While it is intuitively obvious that sexual abuse is not an activity concerned with education, there is case law amplifying the point. [A court in Massachusetts] noted that sexually abusive acts "were not of the kind [a school employee] was employed to perform" and were not "motivated . . . by a purpose to serve the employer." Similarly, a California court construing the same policy provision as that at issue here found that, as a matter of law, sexual abuse is not identified with employment as a teacher and that the insurer had no duty to indemnify or defend an elementary school teacher who molested a pupil. Summary judgment was entered for the insurer. . . . The court averred that it could not "fathom a more personal activity less related

> to the goal of education" than a teacher's sexual abuse of his student.

Id. at 948 (citations omitted).[5]

In *Horace Mann Ins. Co. v. D.A.C.*, 710 A.2d 1274 (Ala. Civ. App. 1998), the Alabama court of civil appeals followed the lead of the federal court in *Fore* and barred coverage for a teacher who was accused of sexually abusing a student. Horace Mann earned a similar result in Kentucky in *Goodman v. Horace Mann Ins. Co.*, 100 S.W.3d 769 (Ky. Ct. App. 2003), where the court held that a teacher who sexually molested his students was not acting within his educational employment activities. *See also Horace Mann Ins. Co. v. Richards*, 696 N.E. 2d 65, 68 (Ind. Ct. App. 1998) (fight at teacher's home was not as a matter of law within teacher's educational employment activities).

Based on Maryland caselaw, cases from other jurisdictions, and public policy considerations, the Board requests that this Court find that it had no duty to defend Robbins in the *Doe* lawsuit.

III. The Board has no responsibility to indemnify an employee for the amount of her settlement of a lawsuit with the child she was accused of sexually abusing.

Even if the Court determines that the Board was required to defend Robbins against allegations that she sexually abused a child, the insuring agreement prevents coverage of the settlement. The terms of that agreement limit coverage to acts within the

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[5]Subsequently, the State's highest Court followed suit in a case alleging the abuse of children in a couple's home. *State Farm Fire & Casualty Co. v. Davis*, 612 So.2d 458 (Ala. 1993).

employee's scope of employment. (E. 126) Just as a police officer cannot claim that sexual impropriety lies within the scope of employment, a teacher's scope of employment cannot include molesting children. Based on the record before it, the circuit court erred in declaring that the Board must reimburse Horace Mann for the sums it expended in settling the *Doe* litigation on behalf of Robbins.

CONCLUSION

In this case, it is undisputed that the allegations and the evidence against Barbara Robbins indicated that she engaged in an inappropriate relationship with a minor student whom she mentored, that she continued the relationship after the student's participation in the mentoring program ended, and that Robbins was sued solely because of the alleged sexual abuse. The Board, therefore, had no obligation to defend and indemnify Robbins from the lawsuit brought by the student. The circuit court erred in ruling otherwise. The Board respectfully requests that this Court reverse the circuit court's decision to the contrary and enter judgment in its favor.

Respectfully submitted,

Charles W. Thompson, Jr.
County Attorney

Joann Robertson, Chief Counsel
Division of Litigation

Sharon V. Burrell
Principal Counsel for Self-Insurance Appeals

Statement pursuant to Maryland Rule 8-504(a)(8): This brief was prepared with proportionally spaced type, using Times New Roman font and 13 point type size.