# **ARTICLE: A TRIBUTE TO THOMAS E. McHUGH: AN ENCYCLOPEDIA OF LEGAL PRINCIPLES FROM HIS OPINIONS AS A JUSTICE ON THE WEST VIRGINIA SUPREME COURT OF APPEALS**

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**Text**

**[\*11]**

I. INTRODUCTION

This encyclopedia of legal principles represents the legacy of Thomas E.

McHugh's outstanding work as a justice on the West Virginia Supreme Court of Appeals. Justice McHugh was elected to the Supreme Court of Appeals on January 1, 1981, and remained until his retirement on December 31, 1997. During his tireless and dedicated years on the court, he served as chief justice for a total of four years. The high esteem in which Justice McHugh was viewed by his colleagues was echoed by Justice Albright at a sine die when he remarked: "Chief Justice McHugh, you will always be my Chief Justice." A reporter captured the eloquence and statesmanship that embodies the life of Justice McHugh:

Justice McHugh is a very astute man with a mild manner and a compassionate nature. His demeanor is that which others in similar lofty circles would do well to emulate. He does not seek media attention -- in fact, the opposite holds true. He is candid when he can be, tactful when he should be and quite humorous when you allow him the opportunity. He is a man that many are proud to call friend and all are honored to call Chief. [[1]](#footnote-2)1

Justice McHugh wrote 486 opinions under his name. [[2]](#footnote-3)2 The material that **[\*12]** follows sets out every syllabus point of law created in each opinion authored by Justice McHugh. [[3]](#footnote-4)3 The syllabus points are organized under appropriate legal headings. [[4]](#footnote-5)4

Justice McHugh's judicial career belongs to history now. The work that became his life as justice on the West Virginia Supreme Court of Appeals is set out here for present and future legal minds to study. It is with the utmost humility that we give you the legal thoughts of a dear friend and West Virginia's judicial icon- **[\*13]** "Chief" Justice McHugh.

II. EVIDENCE

A. Evidence of Flight by Defendant

In State v. Payne, [[5]](#footnote-6)5 Justice McHugh confronted the issue of introducing evidence that a criminal defendant fled the scene of the crime. Justice McHugh wrote:

In certain circumstances evidence of the flight of the defendant will be admissible in a criminal trial as evidence of the defendant's guilty conscience or knowledge. Prior to admitting such evidence, however, the trial judge, upon request by either the State or the defendant, should hold an in camera hearing to determine whether the probative value of such evidence outweighs its possible prejudicial effect. [[6]](#footnote-7)6

B. Incriminating Evidence Not Associated with Defendant

Justice McHugh held in State v. Rector: [[7]](#footnote-8)7

It is reversible error for a trial judge to admit into evidence in a criminal trial of a defendant charged with a marihuana violation[,] drug paraphernalia and marihuana belonging to a state witness when such drug paraphernalia and marihuana have not been associated with the defendant and have no probative value relating to the guilt of the defendant. [[8]](#footnote-9)8

C. Testimony of Accomplice

Justice McHugh addressed the issue of permitting an accomplice to testify against a defendant in State v. Caudill. [[9]](#footnote-10)9 The court held that

in a criminal trial an accomplice may testify as a witness on behalf of the State to having entered a plea of guilty to the crime charged against a defendant where such testimony is not for the purpose of proving the guilt of the defendant and is relevant to the issue of the witness-accomplice's credibility. The failure by a trial **[\*14]** judge to give a jury instruction so limiting such testimony is, however, reversible error. [[10]](#footnote-11)10

D. Credibility of Witness

In State v. Kopa, [[11]](#footnote-12)11 Justice McHugh stated that "the credibility of a witness may be attacked by any party, including the party calling him and prior cases that expound a contrary principle are hereby overruled." [[12]](#footnote-13)12

E. Prior Inconsistent Statement

Justice McHugh set out guidelines for using a prior inconsistent statement of a witness in the case of State v. King. [[13]](#footnote-14)13 The court held as follows:

A videotaped interview containing a prior inconsistent statement of a witness who claims to have been under duress when making such statement or coerced into making such statement is admissible into evidence if: (1) the contents thereon will assist the jury in deciding the witness' credibility with respect to whether the witness was under duress when making such statement or coerced into making such statement; (2) the trial court instructs the jury that the videotaped interview is to be considered only for purposes of deciding the witness' credibility on the issue of duress or coercion and not as substantive evidence; and (3) the probative value of the videotaped interview is not outweighed by the danger of unfair prejudice. [[14]](#footnote-15)14

F. Evidence of Defendant's Sexual Predilections

Justice McHugh stated in State v. Adkins [[15]](#footnote-16)15 that "evidence regarding sexual predilections or conduct is not admissible at trial unless it is clearly relevant." [[16]](#footnote-17)16 **[\*15]**

G. Husband-Wife Communication Privilege

Justice McHugh ruled in State v. Evans [[17]](#footnote-18)17 that "the privilege against adverse spousal testimony contained in W.Va. Code, 57-3-3 [1931] applies only where the parties stand in the relation of husband and wife." [[18]](#footnote-19)18

H. Attorney Work Product

In State ex rel. United Hospital Center, Inc. v. Bedell, [[19]](#footnote-20)19 Justice McHugh addressed several matters pertaining to the attorney work doctrine. Initially he ruled that "to determine whether a document was prepared in anticipation of litigation and, is therefore, protected from disclosure under the work product doctrine, the primary motivating purpose behind the creation of the document must have been to assist in pending or probable future litigation." [[20]](#footnote-21)20

Justice McHugh concluded the opinion by stating:

When a corporation, partnership, association or governmental agency designates an attorney to testify on its behalf at a deposition pursuant to West Virginia Rule of Civil Procedure 30(b)(6), such corporation, partnership, association or governmental agency waives the attorney-client privilege and work product doctrine with regard to matters, set forth in the notice of deposition, about which the attorney was designated to testify. [[21]](#footnote-22)21

I. Evidence of Juvenile Record

In State v. Van Isler, [[22]](#footnote-23)22 Justice McHugh held that "W.Va. Code, 49-517(d) [1978], does not authorize a court to permit juvenile law enforcement records to be used in a criminal case as evidence in chief in the State's case." [[23]](#footnote-24)23 Van Isler concluded that "the use of a juvenile fingerprint card, or testimony derived from it, as evidence in a criminal trial of the person fingerprinted after that person has become an adult is reversible error because such use of juvenile records is not permitted by W.Va. Code, 49-5-17 [1978]." [[24]](#footnote-25)24 **[\*16]**

J. Use of Inadmissible Evidence to Impeach

In State v. Goodmon, [[25]](#footnote-26)25 Justice McHugh examined the use of inadmissible evidence to impeach a defendant who testifies. Justice McHugh held that

where a person who has been accused of committing a crime makes a voluntary statement that is inadmissible as evidence in the State's case in chief because the statement was made after the accused had requested a lawyer, the statement may be admissible solely for impeachment purposes when the accused takes the stand at his trial and offers testimony contradicting the prior voluntary statement knowing that such prior voluntary statement is inadmissible as evidence in the State's case in chief. [[26]](#footnote-27)26

K. Authentication of Evidence

Justice McHugh addressed issues involving authenticating evidence in the case of State v. Jenkins. [[27]](#footnote-28)27 Justice McHugh stated:

Preliminary questions of authentication and identification pursuant to W.Va.R.Evid. 901 are treated as matters of conditional relevance, and, thus, are governed by the procedure set forth in W.Va.R.Evid. 104(b). In an analysis under W.Va.R.Evid. 901 a trial judge must find that the party offering the evidence has made a prima facie showing that there is sufficient evidence "to support a finding that the matter in question is what its proponent claims." In other words, the trial judge is required only to find that a reasonable juror could find in favor of authenticity or identification before the evidence is admitted. The trier of fact determines whether the evidence is credible. Furthermore, a trial judge's ruling on authenticity will not be disturbed on appeal unless there has been an abuse of discretion. Lastly, a finding of authenticity does not guarantee that the evidence is admissible because the evidence must also be admissible under any other rule of evidence which is applicable. [[28]](#footnote-29)28

**[\*17]**

L. Bite-Mark Evidence

Justice McHugh stated in State v. Armstrong [[29]](#footnote-30)29 that "the general reliability of bite-mark evidence as a means of positive identification is sufficiently established in the field of forensic dentistry that a court is authorized to take judicial notice of such general reliability without conducting a hearing on the same." [[30]](#footnote-31)30

M. Evidence of Defendant's Tattoo

Justice McHugh addressed the issue of forcing a defendant to display his tattoos in the case of State v. Meade. [[31]](#footnote-32)31 The court held as follows:

Ordinarily, it is not an abuse of discretion for a trial court in a criminal case to direct the accused to reveal or display the accused's tattoos to a witness and to the jury at trial, where the accused's tattoos are relevant to the question of the identification of the perpetrator of the offense and where the trial court has weighed the probative value of such evidence against the danger of unfair prejudice, etc., pursuant to Rules 401, 402 and 403 of the West Virginia Rules of Evidence. [[32]](#footnote-33)32

N. Evidence of Other Crimes

The decision in State v. Caudill [[33]](#footnote-34)33 held that "evidence relating to a crime that a defendant is accused of committing, other than that charged in the indictment for which he is on trial, is not generally admissible to prove the offense for which the accused is on trial." [[34]](#footnote-35)34

O. Confession

Justice McHugh relied upon State v. Starr [[35]](#footnote-36)35 in holding in State v. Mitter [[36]](#footnote-37)36 that "the State must prove, at least by a preponderance of the evidence, that confessions or statements of an accused which amount to admissions of part or all **[\*18]** of an offense were voluntary before such may be admitted into the evidence of a criminal case." [[37]](#footnote-38)37

Justice McHugh said in State v. Adkins [[38]](#footnote-39)38 that "a witness at a criminal trial may testify that he, the witness, and not the defendant was responsible for the crime for which the defendant is on trial." [[39]](#footnote-40)39

P. Noninculpatory Statements by Defendant

Justice McHugh stated in State v. McFarland [[40]](#footnote-41)40 that "a noninculpatory statement made spontaneously by a criminal defendant in response to the greeting or salutation of a law enforcement officer does not result from an 'interrogation' under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and such a spontaneous statement is admissible without an in camera hearing on its voluntariness." [[41]](#footnote-42)41

Q. Evidence Precluded by the Dead Man's Statute

In Papenhaus v. Combs, [[42]](#footnote-43)42 Justice McHugh held that "a witness who is not a party to an action or has no interest in that action, is not precluded by W.Va. Code, 57-3-1 [1937], commonly referred to as the 'Dead Man's Statute,' from testifying with regard to a personal transaction or communication between such witness and a decedent." [[43]](#footnote-44)43

Justice McHugh addressed several issues involving the Dead Man's Statute in Cross v. State Farm Mutual Automobile Insurance Co. [[44]](#footnote-45)44 He held:

the testimony of a witness which is adverse to the interests of insurance beneficiaries in a declaratory judgment action brought on their behalf by the personal representative of the deceased insured against the insurer is testimony which is "against the executor or administrator," within the meaning of the Dead Man's Statute, W.Va. Code, 57-3-1 [1937]. [[45]](#footnote-46)45

Justice McHugh held that "a witness' status as an agent of a party, **[\*19]** without more, does not make him or her a 'person interested,' within the meaning of W.Va. Code, 57-3-1 [1937], and his or her testimony is not on that basis precluded by that statute." [[46]](#footnote-47)46

The court concluded by stating that

the Dead Man's Statute, W.Va. Code, 57-3-1 [1937], does not bar the testimony of an insurer's agents that they orally informed the decedent of the costs of various levels of uninsured motorist coverage, where the only assertion is that the insurer's agents are incompetent witnesses by virtue of their interests as agents. [[47]](#footnote-48)47

In Voelker v. Frederick Business Properties Co., [[48]](#footnote-49)48 Justice McHugh held:

Evidence of a beneficiary's relationship with the decedent may be admitted into evidence for purposes of determining damages in a wrongful death action pursuant to W.Va. Code, 55-7-6(c)(1) [1989] which provides for the recovery of damages for "sorrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices and advice of the decedent[.]" Whether evidence is relevant pursuant to W.Va.R.Evid. 401 and 402 when determining damages in a wrongful death action and whether the probative value of such evidence is substantially outweighed by the danger of unfair prejudice pursuant to W.Va.R.Evid. 403 must be determined on a case-by-case basis. Moreover, on appeal this Court will not disturb a trial court's ruling on the admissibility of such evidence unless there has been an abuse of discretion. [[49]](#footnote-50)49

R. Out-of-Court Identification of Defendant

In State v. Gravely, [[50]](#footnote-51)50 Justice McHugh confronted the issue of admitting out-of-court identification evidence. The court held:

An adversary judicial criminal proceeding is instituted against a defendant where the defendant after his arrest is taken before a magistrate pursuant to W.Va. Code, 62-1-5 [1965], and is, inter alia, informed pursuant to W.Va. Code, 62-1-6 [1965], of the complaint against him and of his right to counsel. Furthermore, **[\*20]** where the defendant at that magistrate proceeding expresses a desire to be represented by counsel, a subsequent pretrial identification of the defendant at a police initiated line-up or one-on-one police initiated confrontation between the defendant and a witness or crime victim, without notice to and in the absence of defense counsel, constitutes a violation of the defendant's right to counsel under the Sixth Amendment to the Constitution of the United States and under art. III, Sec. 14, of the Constitution of West Virginia, so as to preclude any trial testimony in regard to the identification procedure. [[51]](#footnote-52)51

S. In-Court Identification of Defendant

Justice McHugh relied upon State v. Pratt [[52]](#footnote-53)52 to hold in State v. Baker [[53]](#footnote-54)53 that "a defendant must be allowed an in camera hearing on the admissibility of a pending in-court identification when he challenges it because the witness was a party to pre-trial identification procedures that were allegedly constitutionally infirm." [[54]](#footnote-55)54

T. Out-of-Court Experiment

Justice McHugh ruled in State v. Kopa [[55]](#footnote-56)55 that

the results of an out-of-court experiment will not be admitted into evidence unless the party seeking to introduce such evidence demonstrates that the conditions under which the experiment was conducted were substantially similar to the original conditions sought to be recreated and the question of whether to admit such evidence for consideration by the jury is within the sound discretion of the trial court. [[56]](#footnote-57)56

U. Gruesome Photographs

The admission of gruesome photographs was addressed by Justice McHugh in State v. Clark. [[57]](#footnote-58)57 The court held: **[\*21]**

Where several gruesome photographs are admitted in evidence with an objection being made only to the least gruesome of such photographs, and where defense counsel during closing argument specifically calls the jury's attention to the other gruesome photographs, which photographs were not objected to when admitted in evidence, this Court will not find the admission of the least gruesome photograph reversible error on the ground of prejudice. [[58]](#footnote-59)58

V. Victim Character Evidence

Justice McHugh stated in State v. Dietz: [[59]](#footnote-60)59

It is proper for a trial court to exclude testimony relating to the reputation for aggressiveness and character for violence of the victim in a homicide case where the defendant claims reasonable apprehension of danger, but where the defendant had no prior knowledge of such reputation at the time of the homicide. [[60]](#footnote-61)60

Justice McHugh indicated in Dietz v. Legursky [[61]](#footnote-62)61 that

in a homicide case, malicious wounding, or assault where the defendant relies on self-defense or provocation, under Rule 404(a)(2) and Rule 405(a) of the West Virginia Rules of Evidence, character evidence in the form of opinion testimony may be admitted to show that the victim was the aggressor if the probative value of such evidence is not outweighed by the concerns set forth in the balancing test of Rule 403. [[62]](#footnote-63)62

W. Witness Character Evidence

Justice McHugh addressed conditions under which a witness's character for truthfulness or untruthfulness may be presented in the case of State v. Wood. [[63]](#footnote-64)63 In that opinion he held as follows:

West Virginia Rules of Evidence 608(a) permits the admission of evidence in the form of an opinion or reputation regarding a **[\*22]** witness's character for truthfulness or untruthfulness, subject to two limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness; and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise. The admission of testimony pursuant to W.Va.R.Evid. 608(a) is within the sound discretion of the trial judge and is subject to W.Va.R.Evid. 402, which requires the evidence to be relevant; W.Va.R.Evid. 403, which requires the exclusion of evidence whose "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[;]" and W.Va.R.Evid. 611, which requires the court to protect witnesses from harassment and undue embarrassment. [[64]](#footnote-65)64

X. Victim Testimony

Justice McHugh held in State v. Hall [[65]](#footnote-66)65 that "normally the owner of stolen property may testify as to its value because he is deemed qualified to give an opinion concerning the value of the things which he owns." [[66]](#footnote-67)66

Y. Testimony in Narrative Form

Justice McHugh opined in State v. Armstrong [[67]](#footnote-68)67 that "the trial court is vested with sound discretion to permit a witness to testify in narrative form, rather than by question and answer." [[68]](#footnote-69)68

Z. Hearsay

Justice McHugh indicated in Hess v. Arbogast [[69]](#footnote-70)69 that "in order for hearsay to be admissible evidence, it must first be either excepted or exempted from the general bar from admissibility contained in Rule 802. Second, it must meet the general requirements for admissibility, authenticity, relevancy, and competency." [[70]](#footnote-71)70 Hess also noted that "under W.Va.R.Evid. 803(8)(C), the contents of a public report, record or document are an exception to the hearsay rule and are assumed to be trustworthy, unless the opponent of the report establishes **[\*23]** that the report is sufficiently untrustworthy." [[71]](#footnote-72)71

In Heydinger v. Adkins, [[72]](#footnote-73)72 Justice McHugh held that "a statement is not hearsay if the statement is offered against a party and is his [or her] own statement, in either his [or her] individual or a representative capacity." [[73]](#footnote-74)73 The opinion also indicated that "where a party, after having submitted to a polygraph examination, makes any statement constituting an admission against interest, such testimony is admissible at trial pursuant to W.Va.R.Evid. 801(d)(2)(A), provided that the admission was not procured by coercive conduct or a denial of the party's constitutional rights." [[74]](#footnote-75)74

Justice McHugh held in Transamerica Occidental Life Insurance Co. v. Burke [[75]](#footnote-76)75 that

where the formal designation of the beneficiary(ies) of a life insurance policy or of other death benefits is ambiguous in light of the circumstances at the time of such designation, a declaration of the insured as to whom he or she intended to be the beneficiary(ies) is admissible as evidence of such intent under the exception to the hearsay rule for declarations of intent, W.Va.R.Evid. 803(3). [[76]](#footnote-77)76

Justice McHugh held in Rine By & Through Rine v. Irisari [[77]](#footnote-78)77 that "as a condition precedent to the admissibility of former testimony under W.Va.R.Evid. 804(b)(1), the proponent of such testimony must show the unavailability of the witness. If the witness is available, the in-court testimony of that witness is preferred." [[78]](#footnote-79)78

The case of State v. Satterfield [[79]](#footnote-80)79 presented Justice McHugh with an opportunity to discuss the dying declaration exception to hearsay. The court held initially that

a suicide note may be admissible pursuant to W.Va.R.Evid. 804(b)(2) as a dying declaration exception to the hearsay rule. In order for a statement found in a suicide note to be admissible as a **[\*24]** dying declaration the following must occur: the statement must have been made when the declarant was under the belief that his death was imminent, and the dying declaration must concern the cause or circumstances of what the declarant believes to be his impending death. [[80]](#footnote-81)80

Satterfield next held:

Once a trial judge determines that a statement falls within the dying declaration exception to the hearsay rule found in W.Va.R.Evid. 804(b)(2), then it must be determined whether the evidence is relevant pursuant to W.Va.R.Evid. 401 and 402 and, if so, whether its probative value is substantially outweighed by unfair prejudice pursuant to W.Va.R.Evid. 403. The statement is admissible only after the trial judge determines that its probative value is not substantially outweighed by unfair prejudice. [[81]](#footnote-82)81

AA. Demonstrative Evidence

In State v. Hardway, [[82]](#footnote-83)82 Justice McHugh considered the propriety of the prosecutor recreating a crime scene. The court held:

It is not error for a trial court, in a homicide case, to allow the State to conduct a demonstration in the presence of the jury which re-creates the scene of the homicide by arranging articles in substantially the same position as they were at the time of the homicide, if the demonstration allows the jury to more intelligently consider the State's theory of the case or to rebut the defendant's theory of the case and if the probative value of such demonstration is not substantially outweighed by the danger of unfair prejudice. [[83]](#footnote-84)83

Justice McHugh noted in State v. ***Kerns*** [[84]](#footnote-85)84 that "generally, the admissibility of demonstrative evidence is a matter within the discretion of the trial court." [[85]](#footnote-86)85 **[\*25]**

BB. Expert Testimony

Justice McHugh stated in State v. Dietz [[86]](#footnote-87)86 that

in a homicide case a medical examiner may be qualified to state an opinion as to whether the homicide was of a psychosexual type. Such qualification should be based upon the medical examiner's: post-mortem examination or a review of the report thereof; knowledge of psychosexual types of homicide; and experience in post-mortem examinations upon similarly situated victims. Whether a medical examiner is qualified in this regard is a determination to be made by the trial court, and, unless the trial court has abused its discretion, this Court will not disturb the trial court's ruling. [[87]](#footnote-88)87

Justice McHugh held in Gilman v. Choi [[88]](#footnote-89)88 that "W.Va. Code, 55-7B-7 [1986], being concerned primarily with the competency of expert testimony in a medical malpractice action, is valid under Rule 601 of the West Virginia Rules of Evidence." [[89]](#footnote-90)89

In Teter v. Old Colony Co., [[90]](#footnote-91)90 Justice McHugh's opinion stated "W.Va. Code, 37-14-1, et seq., is not designed to prevent an expert otherwise qualified under Rule 702 of the West Virginia Rules of Evidence from testifying with regard to the value of real property or the damages that may have resulted to it." [[91]](#footnote-92)91

In Mayhorn v. Logan Medical Foundation, [[92]](#footnote-93)92 Justice McHugh wrote:

Rule 703 of the West Virginia Rules of Evidence allows an expert to base his opinion on (1) personal observations; (2) facts or data, admissible in evidence, and presented to the expert at or before trial; and (3) information otherwise inadmissible in evidence, if this type of information is reasonably relied upon by experts in the witness' field. [[93]](#footnote-94)93

The court in Mayhorn next held: **[\*26]**

Pursuant to West Virginia Rules of Evidence 702 an expert's opinion is admissible if the basic methodology employed by the expert in arriving at his opinion is scientifically or technically valid and properly applied. The jury, and not the trial judge, determines the weight to be given to the expert's opinion. [[94]](#footnote-95)94

The court concluded:

Rule 702 of the West Virginia Rules of Evidence is the paramount authority for determining whether or not an expert is qualified to give an opinion. Therefore, to the extent that Gilman v. Choi, 185 W. Va. 177, 406 S.E.2d 200 (1990) indicates that the legislature may by statute determine when an expert is qualified to state an opinion, it is overruled. [[95]](#footnote-96)95

CC. Rebuttal

In Belcher v. Charleston Area Medical Center, [[96]](#footnote-97)96 Justice McHugh stated:

Under Rule 611(a) of the West Virginia Rules of Evidence, a trial court has broad discretion in permitting or excluding the admission of rebuttal testimony, and this Court will not disturb the ruling of a trial court on the admissibility of rebuttal evidence unless there has been an abuse of discretion. [[97]](#footnote-98)97

In State v. Dietz, [[98]](#footnote-99)98 Justice McHugh stated that "where a criminal defendant's witness on direct examination raises a material matter, and on cross-examination testifies adversely to the prosecution, it is proper for the trial court to allow the prosecution to present rebuttal evidence as to such matter." [[99]](#footnote-100)99

DD. Leading Questions

In the case of Rine By & Through Rine v. Irisari, [[100]](#footnote-101)100 Justice McHugh stated that "where the adverse party or a witness favorable to the adverse party is called as a witness by the opponent, leading questions by the adverse party's own counsel **[\*27]** on cross-examination will usually not be allowed." [[101]](#footnote-102)101

EE. Meaning of Materiality

In State v. ***Kerns***, [[102]](#footnote-103)102 Justice McHugh ruled that "the evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." [[103]](#footnote-104)103

III. CRIMINAL PROCEDURE

A. Defendant's Presence at All Critical Stages

Justice McHugh ruled in State ex rel. Redman v. Hedrick [[104]](#footnote-105)104 that "in a criminal proceeding, the defendant's absence at a critical stage of such proceeding is not reversible error where no possibility of prejudice to the defendant occurs." [[105]](#footnote-106)105

B. Continuance

The case of State ex rel. Shorter v. Hey [[106]](#footnote-107)106 called upon the West Virginia Supreme Court of Appeals to revisit its precedent concerning continuances in criminal cases. Justice McHugh noted that the court's precedent was inconsistent with fairness, and in doing so, he held that "[syllabus points] 1 and 2 in State ex rel. Holstein v. Casey, 164 W. Va. 460, 265 S.E.2d 530 (1980) are hereby overruled to the extent the same are in conflict with this opinion." [[107]](#footnote-108)107

The court in Hey then went on to establish new law in the area of continuances in criminal cases. Justice McHugh held as an initial matter that

the determination of what is good cause, pursuant to W.Va. Code, 62-3-1, for a continuance of a trial beyond the term of indictment is in the sound discretion of the trial court, and when good cause is determined a trial court may, pursuant to W.Va. Code, 62-3-1, grant a continuance of a trial beyond the term of indictment at the request of either the prosecutor or defense, or **[\*28]** upon the court's own motion. [[108]](#footnote-109)108

The Hey opinion next set fourth a bright line specifically for multi-judge circuit courts to sua sponte continue a criminal case. Justice McHugh wrote that "a trial judge in a multi-judge circuit may, upon his own motion and for good cause, order a continuance of a trial beyond the term of indictment because of the judge's congested trial docket, and such judge need not ascertain whether any other judge in the circuit can try the case within the term of indictment." [[109]](#footnote-110)109

Justice McHugh concluded the opinion in Hey by establishing a rule of law to assist trial courts when confronted with efforts by prosecutors to unjustifiably delay criminal trials. The court held as follows:

Where the trial court is of the opinion that the state has deliberately or oppressively sought to delay a trial beyond the term of indictment and such delay has resulted in substantial prejudice to the accused, the trial court may, pursuant to W.Va. Code, 62-31, finding that no good cause was shown to continue the trial, dismiss the indictment with prejudice, and in so doing the trial court should exercise extreme caution and should dismiss an indictment pursuant to W.Va. Code, 62-3-1, only in furtherance of the prompt administration of justice. [[110]](#footnote-111)110

C. Arrest

The court held in State v. Boggess: [[111]](#footnote-112)111

Where a conservation officer, employed by the West Virginia Department of Natural Resources, arrested an individual for the offense of possession of marihuana with the intent to deliver, which offense was committed in the presence of the officer, that arrest was authorized under the provisions of W.Va. Code, 20-7-4 [1971], which statute describes the authority, powers and duties of conservation officers. [[112]](#footnote-113)112 **[\*29]**

D. Indictment and Information

State v. Wade [[113]](#footnote-114)113 clearly articulated that "as a general rule, under W. Va. R. Crim. P. 7(c)(1), the body, charge or accusation contained in an information is to be judged by the same standards that determine the sufficiency of the body, charge or accusation of an indictment." [[114]](#footnote-115)114

In State ex rel. Starr v. Halbritter, [[115]](#footnote-116)115 Justice McHugh stated:

The failure of the grand jury as a body to vote upon the text of the indictment is a fundamental error so compromising the integrity of the grand jury proceedings as to constitute prejudice per se, and the indictment must be dismissed as void, without prejudice to the right of the state subsequently to seek a valid indictment. [[116]](#footnote-117)116

In State ex rel. Redman v. Hedrick, [[117]](#footnote-118)117 Justice McHugh held that "where a prosecutor in a criminal case becomes the presiding judge over the grand jury that ultimately indicts the defendant in such case, the record of the grand jury proceeding must be made a part of the record before this Court will determine whether prejudice has resulted therefrom." [[118]](#footnote-119)118

Justice McHugh addressed the issue of variance between proof and the charge contained in an indictment in the case of State v. Johnson. [[119]](#footnote-120)119 The court held that

if the proof adduced at trial differs from the allegations in an indictment, it must be determined whether the difference is a variance or an actual or a constructive amendment to the indictment. If the defendant is not misled in any sense, is not subjected to any added burden of proof, and is not otherwise prejudiced, then the difference between the proof adduced at trial and the indictment is a variance which does not usurp the traditional safeguards of the grand jury. However, if the defendant is misled, is subjected to an added burden of proof, or is otherwise prejudiced, the difference between the proof at trial and the indictment is an actual or a constructive amendment of the **[\*30]** indictment which is reversible error. [[120]](#footnote-121)120

E. Joinder of Offenses

Justice McHugh held in State v. McFarland [[121]](#footnote-122)121 that "if it appears that a defendant or the state is prejudiced by a joinder of offenses in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of the counts or provide whatever other relief justice requires." [[122]](#footnote-123)122

F. Preliminary Hearing

Justice McHugh relied upon the decision in Spaulding v. Warden, West Virginia State Penitentiary [[123]](#footnote-124)123 to address the issue of right to counsel at a preliminary hearing in the case of State v. Stout. [[124]](#footnote-125)124 The court held:

A preliminary hearing, when accorded an accused by a magistrate pursuant to [W. Va.] Code 1931, 62-18, as amended, is a critical stage in a criminal proceeding to which the right to counsel, guaranteed by the Sixth Amendment to the Constitution of the United States, attaches, and a denial of counsel in those circumstances constitutes error for which a defendant is entitled to relief, unless it is clear beyond a reasonable doubt that the denial of counsel was harmless error. [[125]](#footnote-126)125

Several crucial issues involving a preliminary hearing were addressed by Justice McHugh in Desper v. State. [[126]](#footnote-127)126 The court held initially that

A preliminary examination conducted pursuant to Rule 5.1 of the West Virginia Rules of Criminal Procedure serves to determine whether there is probable cause to believe that an offense has been committed and that the defendant committed it; the purpose of such an examination is not to provide the defendant with discovery of the nature of the State's case against the defendant, although discovery may be a by-product of the preliminary **[\*31]** examination. [[127]](#footnote-128)127

Justice McHugh next stated:

In challenging probable cause at a preliminary examination conducted pursuant to Rule 5.1 of the West Virginia Rules of Criminal Procedure, a defendant has a right to crossexamine witnesses for the State and to introduce evidence; the defendant is not entitled during the preliminary examination to explore testimony solely for discovery purposes. The magistrate at the preliminary examination has discretion to limit such testimony to the probable cause issue, and the magistrate may properly require the defendant to explain the relevance to probable cause of the testimony the defendant seeks to elicit. [[128]](#footnote-129)128

Disclosure of the identity of an informant during a preliminary hearing was addressed by Justice McHugh in State v. Haught. [[129]](#footnote-130)129 The court held that

during a preliminary hearing held for the purpose of determining the question of probable cause for an arrest or search, a trial court is not required to disclose the identity of a confidential informant, provided that there is a substantial basis for believing that the informant is credible, that there is a factual basis for the information furnished and that it would impose an unreasonable burden on one of the parties or on a witness to require that the identity of the informant be disclosed at the hearing. [[130]](#footnote-131)130

Justice McHugh said in Peyatt v. Kopp [[131]](#footnote-132)131 that

the magistrate has the discretion to allow hearsay evidence at a preliminary hearing under W. Va. R. Crim. P. 5.1 if three conditions are met: (1) the source of the hearsay is credible; (2) there is a factual basis for the information furnished; and (3) an unreasonable burden would be imposed on one of the parties or on a witness to require that the primary source of the evidence be produced at the hearing. [[132]](#footnote-133)132

**[\*32]**

G. Motion to Suppress

Justice McHugh ruled in State v. Preece [[133]](#footnote-134)133 that "when ruling upon a motion to suppress a statement made by a suspect pursuant to a traffic investigation due to the investigating officer's failure to provide Miranda warnings, the trial court must determine whether the statement was the result of custodial interrogation." [[134]](#footnote-135)134 The opinion noted that "Miranda warnings are required whenever a suspect has been formally arrested or subjected to custodial interrogation, regardless of the nature or severity of the offense." [[135]](#footnote-136)135 Preece concluded:

The sole issue before a trial court in determining whether a traffic investigation has escalated into an accusatory, custodial environment, requiring Miranda warnings, is whether a reasonable person in the suspect's position would have considered his or her freedom of action curtailed to a degree associated with a formal arrest. [[136]](#footnote-137)136

H. Trial Security

In State v. Peacher, [[137]](#footnote-138)137 Justice McHugh examined the use of security measures by trial courts. The court held:

Although the use of security precautions at a criminal trial is a matter which lies within the sound discretion of the trial judge, an evidentiary hearing should be held to determine whether the circumstances of a case justify greater than normal security precautions at trial. The absence of a record of such evidentiary hearing is not, per se, reversible error. [[138]](#footnote-139)138

I. Witness Immunity

The issue presented to Justice McHugh in State v. Pennington [[139]](#footnote-140)139 concerned who may invoke immunity granted to a prosecution witness. The court held: **[\*33]**

A prosecution witness who has purportedly been afforded immunity from prosecution pursuant to W.Va. Code, 57-5-2 [1931], and who testifies against a defendant in a criminal proceeding is the only person who may assert the protection of that statute in regard to that grant of immunity. The defendant, however, in that criminal proceeding may not assert irregularities in regard to the granting of that immunity from prosecution. [[140]](#footnote-141)140

J. Jury Instructions

In State v. Payne, [[141]](#footnote-142)141 the court stated:

Where the State's case is based upon the uncorroborated and uncontradicted identification testimony of a prosecuting witness, it is error not to instruct the jury upon request that, if they believe from the evidence in the case that the crime charged against the defendant rests alone on the testimony of the prosecuting witness, then the jury should scrutinize such testimony with care and caution. [[142]](#footnote-143)142

Justice McHugh quoted in part from the decision in Wiseman v. Ryan [[143]](#footnote-144)143 to hold in State v. Harshbarger [[144]](#footnote-145)144 that

W. Va. R. Crim. P. 30 (1981) provides that "unless otherwise ordered by the court with the consent of all parties affected thereby, instructions shall not be shown to the jury or taken to the jury room." However, prior to the effective date of such rule on October 1, 1981 "it was in the trial court's sound discretion whether instructions which have been read to the jury may be taken by them to their room when they retire to consider . . . their verdict." [[145]](#footnote-146)145

Justice McHugh held in State v. Hall [[146]](#footnote-147)146 that "an instruction to the jury is proper if it is a correct statement of the law and if sufficient evidence has been **[\*34]** offered at trial to support it." [[147]](#footnote-148)147

In State v. Kopa, [[148]](#footnote-149)148 Justice McHugh altered state precedent regarding the giving of an instruction on the alibi defense. The court stated:

Because of the holding in Adkins v. Bordenkircher, 674 F.2d 279 (4th Cir.), cert. denied, 103 S.Ct. 119, 74 L.Ed.2d 104 (1982), State v. Alexander, 161 W.Va. 776, 245 S.E.2d 633 (1978), is overruled to the extent that it permits the giving of an instruction that places the burden upon the defendant to prove his alibi defense sufficiently to create a reasonable doubt in the mind of the jury as to his guilt. [[149]](#footnote-150)149

Justice McHugh found it necessary to limit the scope of Kopa. The court stated:

The invalidation of the instruction approved in State v. Alexander, 161 W.Va. 776, 245 S.E.2d 633 (1978), that places the burden upon the defendant to prove his alibi defense sufficiently to create a reasonable doubt in the mind of the jury as to his guilt[,] is only applicable to those cases currently in litigation or on appeal where the error has been properly preserved at trial. [[150]](#footnote-151)150

The case of State v. Jones [[151]](#footnote-152)151 required Justice McHugh to develop a judicial test for determining whether an instruction on a lesser included offense is warranted. Justice McHugh held:

The question of whether a defendant is entitled to an instruction on a lesser included offense involves a two-part inquiry. The first inquiry is a legal one having to do with whether the lesser offense is by virtue of its legal elements or definition included in the greater offense. The second inquiry is a factual one which involves a determination by the trial court of whether there is evidence which would tend to prove such lesser included offense. [[152]](#footnote-153)152

Justice McHugh stated in State v. Harper [[153]](#footnote-154)153 that "a trial court must give **[\*35]** an instruction for a lesser included offense when evidence has been produced to support such a verdict." [[154]](#footnote-155)154

Additionally, Justice McHugh stated in State v. Miller [[155]](#footnote-156)155 that "the trial court must instruct the jury on all essential elements of the offenses charged, and the failure of the trial court to instruct the jury on the essential elements deprives the accused of his fundamental right to a fair trial, and constitutes reversible error." [[156]](#footnote-157)156

K. Jury Selection

Justice McHugh wrote in State v. Peacher [[157]](#footnote-158)157 that

the right to a trial by an impartial, objective jury in a criminal case is a fundamental right guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article III, Section 14, of the West Virginia Constitution. A meaningful and effective voir dire of the jury panel is necessary to effectuate that fundamental right. [[158]](#footnote-159)158

The court in Peacher concluded:

It is an abuse of discretion and reversible error for a trial judge, in the exercise of his discretionary control over the scope of inquiry during voir dire, to so limit the questioning of potential jurors as to infringe upon a litigant's ability to determine whether the jurors are free from interest, bias or prejudice, or to effectively hinder the exercise of peremptory challenges. [[159]](#footnote-160)159

Justice McHugh held in State v. Audia [[160]](#footnote-161)160 that

where a prospective juror is one of a class of persons represented by the prosecuting attorney at the time of trial, but there has been no actual contact between that juror and the prosecutor, the existence of the attorney-client relationship alone is not prima **[\*36]** facie grounds for disqualification of that juror. [[161]](#footnote-162)161

Justice McHugh held in State v. Meadows [[162]](#footnote-163)162 that "where a prospective juror, upon individual questioning, indicated that he was a former penitentiary guard but had retired ten years before trial, it was not reversible error to permit him to be a juror where no prejudice was shown." [[163]](#footnote-164)163

In State v. McFarland, [[164]](#footnote-165)164 Justice McHugh wrote that "it is within the sound discretion of the trial court to reject the proposed voir dire questions of a criminal defendant when the questions are substantially covered by others which are used." [[165]](#footnote-166)165 The opinion also went on to hold:

A criminal defendant is not entitled as a matter of right, under syl. pt. 7, State v. Williams, 172 W.Va. 295, 305 S.E.2d 251 (1983), to question potential jurors on voir dire to determine their views on the various theories underlying incarceration, namely, rehabilitation, punishment and deterrence. It is within the discretion of the trial court whether such a question may be asked on voir dire to enable the defendant to exercise more informed judgment in utilizing his peremptory challenges. [[166]](#footnote-167)166

Justice McHugh made clear in State v. Finley [[167]](#footnote-168)167 that

when a trial court determines that prospective jurors have been exposed to information which may be prejudicial, the trial court, upon its own motion or motion of counsel, shall question or permit the questioning of the prospective jurors individually, out of the presence of the other prospective jurors, to ascertain whether the prospective jurors remain free of bias or prejudice. [[168]](#footnote-169)168

Justice McHugh ruled in State v. Dietz [[169]](#footnote-170)169 that

in a criminal case the trial court's conduct of the voir dire is not reversible error if it is conducted in a manner which safeguards the **[\*37]** right of a defendant to be tried by a jury free of bias and prejudice. Accordingly, it is not reversible error in a criminal case for a trial court to refuse to ask questions submitted for voir dire by the defendant if such questions are substantially covered by other questions asked by the trial court. [[170]](#footnote-171)170

L. Plea Bargaining

In State ex rel. Forbes v. Kaufman, [[171]](#footnote-172)171 Justice McHugh addressed several issues involving a trial court's sentencing discretion when a plea agreement is entered. Justice McHugh stated:

Where the state agrees to make a sentencing recommendation and enters into a plea agreement with the defendant pursuant to Rule 11(e)(1)(B) of the West Virginia Rules of Criminal Procedure, the trial court is not bound to impose the sentence recommended by the state if it accepts the plea agreement. [[172]](#footnote-173)172

Justice McHugh indicated that

where the state agrees that a specific sentence is a suitable disposition of a criminal case and enters into a plea agreement with the defendant pursuant to Rule 11(e)(1)(C) of the West Virginia Rules of Criminal Procedure, the trial court may either accept or reject the entire agreement, but it may not accept the guilty plea and impose a different sentence. [[173]](#footnote-174)173

Justice McHugh concluded in Forbes that

if a plea is taken pursuant to a plea agreement and the state has agreed to a specific sentence in that agreement, yet if it is not clear whether the plea was taken under Rule 11(e)(1)(B) or 11(e)(1)(C) of the West Virginia Rules of Criminal Procedure, the trial judge may sentence the defendant without being bound by the sentencing provision in the plea agreement. [[174]](#footnote-175)174

Justice McHugh ruled in State ex rel. Phillips v. Boggess [[175]](#footnote-176)175 that **[\*38]**

a request for a transcript by a criminal defendant is not tantamount to an appeal. Therefore, an indigent defendant is entitled to a transcript of his trial without endangering a prior plea agreement wherein he agrees not to seek an appeal in exchange for the agreement of the State to forego initiation of a recidivist proceeding. If the defendant subsequently files a timely appeal, the State should not be held to the plea agreement. [[176]](#footnote-177)176

M. Three Term Rule

The decision in State v. Young [[177]](#footnote-178)177 restated a principle of law set out in State ex rel. Smith v. DeBerry. [[178]](#footnote-179)178 In Young, Justice McHugh held:

The three regular terms of a court essential to the right of a defendant to be discharged from further prosecution pursuant to provisions of [W. Va.] Code, 62-3-21, as amended, are regular terms occurring subsequent to the ending of the term at which the indictment against him is found. The term at which the indictment is returned is not to be counted in favor of the discharge of a defendant. [[179]](#footnote-180)179

The three term rule was again addressed by Justice McHugh in State ex rel. Webb v. Wilson. [[180]](#footnote-181)180 He held that

W.Va. Code, 62-3-21 [1959] limits the state to three unexcused regular terms of court, calculated in accordance with State ex rel. Spadafore v. Fox, 155 W.Va. 674, 186 S.E.2d 833 (1972), in which to bring an accused to trial on the charges contained in an indictment. Once three unexcused regular terms of court have lapsed, and the state has failed to bring the accused to trial on the charges contained in the indictment, the state may not further proceed on the charges contained in the indictment, for, under the plain meaning of the statute, the accused must be "forever discharged" and the indictment dismissed. [[181]](#footnote-182)181

Webb concluded that "once an accused is indicted, an entire panoply of constitutional rights attaches, including the right to trial without unreasonable **[\*39]** delay, as implemented by W.Va. Code, 62-3-21 [1959], regardless of whether the indictment is dismissed as void after three unexcused regular terms of court." [[182]](#footnote-183)182

N. 180 Day Rule

The requirement of prosecution within 180 days under the Agreement on Detainers Act was addressed in State ex rel. Modie v. Hill. [[183]](#footnote-184)183 Justice McHugh wrote that

the failure of the State to bring the accused to trial within 180 days following the State's receipt of the petitioner's notice of imprisonment and request for final disposition of the case, pursuant to the Agreement on Detainers, W.Va. Code, 62-14-1, article III(a) and article V(c) [1971], mandates the dismissal of the indictments pending against the petitioner, where there was no motion for continuance made by the State and the delay was not reasonable or necessary. [[184]](#footnote-185)184

O. Venue

The case of State v. Peacher [[185]](#footnote-186)185 addressed the issue of a defendant's ability to change venue due to hostile sentiment. Justice McHugh wrote that "a change of venue will be granted in West Virginia when it is shown that there is a present hostile sentiment against an accused, extending throughout the entire county in which he is brought to trial." [[186]](#footnote-187)186 Peacher also held that "in a criminal case the defendant who is trying to show the existence of a present hostile sentiment in the community that would affect his right to a fair and impartial jury panel should have a wide latitude of inquiry on voir dire." [[187]](#footnote-188)187

In State v. McFarland, [[188]](#footnote-189)188 Justice McHugh stated:

Even though a majority of individuals surveyed in a county where a prosecution is pending, by way of a questionnaire, indicate that, based upon what they have heard or read, there is existing hostile sentiment in that county but that the defendant would receive a fair trial in that county, before a change of venue shall be granted the circuit court must be satisfied that there exists in the county **[\*40]** where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial. [[189]](#footnote-190)189

P. Prosecutorial Misconduct

In State v. Pennington, [[190]](#footnote-191)190 Justice McHugh had to determine whether pretrial statements by a prosecutor required the prosecutor be disqualified from the case. He stated that

where a prosecutor, while involved in his election campaign, made pretrial statements regarding the status of a criminal case and also by newspaper advertisements responded to his opponent's newspaper advertisements which questioned acts of the prosecutor in the conduct of that case, absent evidence that the defendant was prejudiced by the prosecutor's conduct, that conduct alone may not necessarily disqualify the prosecutor in that case. [[191]](#footnote-192)191

Justice McHugh held in State v. Haught [[192]](#footnote-193)192 that

even though the prosecuting attorney participated in the investigation surrounding the defendant's arrest and was present at the defendant's arrest, where the record failed to disclose any evidence which would indicate that the prosecutor's interest in prosecuting the case went beyond his or her ordinary dedication to his or her duty to see that justice is done, the trial court did not err in denying a defendant's motion for a special prosecutor. [[193]](#footnote-194)193

Q. Appointment of Special Prosecutor

Justice McHugh ruled in State v. ***Kerns***: [[194]](#footnote-195)194

Where a special prosecutor is appointed to try a criminal case due to a conflict, and the case is dismissed without prejudice, but the defendant is reindicted on the same charges, it is not error for a trial court to deny a motion to remove the special prosecutor if it is shown that the conflict which led to the original removal of the **[\*41]** regular prosecutor still exists. [[195]](#footnote-196)195

In Harman v. Frye, [[196]](#footnote-197)196 Justice McHugh held:

Criminal cases involving the issuance of crosswarrants must be prosecuted by the prosecuting attorney, who is charged with the duty under W.Va. Code, 7-4-1 [1971] of instituting and prosecuting all necessary and proper criminal proceedings against offenders, and, in cases where it would be improper for the prosecuting attorney or his assistants to act, by a competent attorney who is appointed to act under W.Va. Code, 7-7-8 [1987]. [[197]](#footnote-198)197

R. Right to Counsel for Indigents

Justice McHugh took the opportunity in State ex rel. Barber v. Cline [[198]](#footnote-199)198 to examine the procedures for appointing counsel to indigent defendants. The Barber opinion stated:

Circuit courts ordinarily must follow the attorneyappointment sequence set forth in W.Va. Code, 29-219(c) [1989]. Cunningham v. Sommerville, 182 W.Va. 427, 429, 388 S.E.2d 301, 303 (1989). The attorneyappointment sequence in circuits where no public defender office is in operation is ordinarily as follows: (1) a voluntary member of the local panel of attorneys; (2) a voluntary member of the regional panel of attorneys; (3) any public defender office in an adjoining circuit which agrees to the appointment; (4) qualified private attorneys from in-circuit or outof-circuit. [[199]](#footnote-200)199

Barber next held that

a "local panel" under W.Va. Code, 29-21-9 [1989] is a panel of private attorneys whose principal offices are located within the circuit of the court establishing and maintaining such panel. A "regional panel" under W.Va. Code, 29-21-9 [1989] is a panel of private attorneys whose principal offices are located in circuits adjoining the circuit of the court establishing and maintaining **[\*42]** such panel. [[200]](#footnote-201)200

Justice McHugh also stated:

Reading W.Va. Code, 29-21-5(a) [1989] and W.Va. Code, 29-21-9(a)-(b) [1989] in pari materia, we hold that the executive director of public defender services has the obligation to assist each circuit court in establishing and maintaining local and regional panels of private attorneys desirous of appointments. In addition, such director has the obligation of assisting circuit courts by developing and revising periodically a statewide list of other "qualified private attorneys" from in-circuit or out-of-circuit who may be appointed to represent indigents in eligible proceedings when no local or regional panel attorney or public defender or assistant public defender is available for appointment. [[201]](#footnote-202)201

The opinion in Barber concluded that "an out-of-circuit lawyer in private practice who has never practiced law in a certain circuit and whose partners and associates, if any, have never practiced law in that circuit ordinarily should not be appointed to represent indigents in eligible proceedings in such circuit." [[202]](#footnote-203)202

Justice McHugh clarified the procedure for paying attorney fees to counsel appointed to represent indigents in the case of Judy v. White. [[203]](#footnote-204)203 It was said initially that

W.Va. Code, 29-21-13a [1990] mandates that a trial court review vouchers submitted by court-appointed attorneys for indigent criminal defendants to determine if the time and expense claims made therein are reasonable, necessary and valid; and said trial court shall then forward the voucher to the agency with an order approving payment of the claimed amount or such lesser sum as the trial court considers appropriate. The decision of the trial court in that regard will not be altered by the West Virginia Supreme Court of Appeals absent an abuse of discretion. [[204]](#footnote-205)204

The court in Judy held:

Trial courts must give a brief explanation for any order reducing the amount of fees claimed by a court-appointed attorney by virtue of W.Va. Code, 29-21-13a [1990]. Said explanation must provide **[\*43]** enough guidance for the court-appointed attorney to respond meaningfully by petitioning the trial court for reconsideration of the reduction order and allowing the attorney to submit additional supporting written documentation and explanation without appearance. The trial court shall then set the final amount of compensation without further explanation. Absent an abuse of discretion, the trial court's decision is final. [[205]](#footnote-206)205

Justice McHugh addressed the issue of right to counsel in municipal criminal court in the case of State ex rel. Kees v. Sanders. [[206]](#footnote-207)206 The court held:

In a municipal court proceeding on a minor traffic offense, where a judge states, in advance of the proceeding, that notwithstanding the applicable provision which permits a jail sentence, the judge will under no condition impose one nor impose a fine so onerous that the defendant cannot pay it thereby subjecting him to a contempt charge which may result in a jail sentence, then appointment of counsel pursuant to W.Va. Code, 29-21-2(2) [1990] is not required. [[207]](#footnote-208)207

S. Discovery

In State v. Audia, [[208]](#footnote-209)208 Justice McHugh ruled that "subject to certain exceptions, pretrial discovery in a criminal case is within the sound discretion of the trial court." [[209]](#footnote-210)209

The opinion in State v. Tamez [[210]](#footnote-211)210 addressed the issue of a defendant's ability to discover the identity of an informant from the prosecutor. Justice McHugh wrote:

When the State in a criminal action refuses to disclose to the defendant the identity of an informant, the trial court upon motion shall conduct an in camera inspection of written statements submitted by the State as to why discovery by the defendant of the identity of the informant should be restricted or not permitted. A record shall be made of both the in court proceedings and the statements inspected in camera upon the disclosure issue. Upon the entry of an order granting to the State nondisclosure to the **[\*44]** defendant of the identity of the informant, the entire record of the in camera inspection shall be sealed, preserved in the records of the court, and made available to this Court in the event of an appeal. In ruling upon the issue of disclosure of the identity of an informant, the trial court shall balance the need of the State for nondisclosure in the promotion of law enforcement with the consequences of nondisclosure upon the defendant's ability to receive a fair trial. The resolution of the disclosure issue shall rest within the sound discretion of the trial court, and only an abuse of discretion will result in reversal. [[211]](#footnote-212)211

Justice McHugh addressed the issue of production of statements by a testifying witness in State v. McFarland. [[212]](#footnote-213)212 The court held:

After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the state or the defendant and his attorney, as the case may be, to produce for the examination and use of the moving party any statement of the witness that is in their possession that relates to the subject matter concerning which the witness had testified. [[213]](#footnote-214)213

He further held in McFarland that "a witness' notes which are abstracts from reports in the possession of a defendant in a criminal case do not constitute a 'statement' as defined in W. Va. R. Crim. P. 26.2(f)." [[214]](#footnote-215)214

In State v. Bennett, [[215]](#footnote-216)215 Justice McHugh addressed late disclosure of discoverable matters by the state in a murder prosecution. The court held:

Where a defendant charged with murder of the first degree filed discovery motions seeking information concerning the manner in which the homicide was committed and a list of persons possessing knowledge of the facts and circumstances of the homicide, and the motions were granted by the trial court, the defendant was entitled to a new trial where (1) the State, two days before trial, informed defense counsel of the existence of a weapon used in the commission of the homicide, which weapon the State had knowledge of in excess of two months before trial, (2) the State, during the trial, revealed to defense counsel the names of four witnesses who could connect the weapon to both **[\*45]** the homicide and the defendant and (3) in camera hearings conducted during the trial with regard to such previously undisclosed evidence failed to overcome the undue prejudice suffered by the defendant at trial because of the non-disclosure. [[216]](#footnote-217)216

T. Extradition

Justice McHugh addressed the issue of a defendant's ability to challenge being extradited to West Virginia for prosecution in the case of State v. Flint. [[217]](#footnote-218)217 The court held that "once a fugitive has been brought within the jurisdiction of West Virginia as the demanding state, the propriety of the extradition proceedings which occurred in the asylum state may not be challenged. The extradition proceedings may be challenged only in the asylum state." [[218]](#footnote-219)218

Justice McHugh addressed several issues involving a rendition warrant in Cronauer v. State. [[219]](#footnote-220)219 The court held that

a rendition warrant issued by the Governor of this State under W.Va. Code, 5-1-8(a) [1937], in response to a request for extradition from the executive authority of a demanding state pursuant to the Uniform Criminal Extradition Act, as amended, W.Va. Code, 5-1-7 to 5-1-13, "substantially recites the facts necessary to the validity of its issuance" with respect to the crime charged therein, as required by W.Va. Code, 5-1-8(a) [1937], if the rendition warrant contains a statement that gives the person sought to be extradited reasonable notice of the nature of the crime charged in the demanding state; and a circuit court, when determining the sufficiency of a rendition warrant in a habeas corpus proceeding challenging the validity of custody in connection with extradition proceedings, may examine underlying documents filed by the demanding state in support of its request for extradition. [[220]](#footnote-221)220

Justice McHugh held in Feathers v. Detrick [[221]](#footnote-222)221 that

under the Uniform Criminal Extradition Act (W.Va. Code, 5-1-7 through W.Va. Code, 5-1-13), a demand for the extradition of one who has been convicted of a crime and sentenced and who, **[\*46]** thereafter, is alleged to have broken the terms of his or her parole, must be supported by documents authenticated by the executive authority of the demanding state, including a copy of a judgment of conviction or a sentence imposed in execution thereof, together with a statement by the executive authority of the demanding state that the person demanded has broken the terms of his or her parole. [[222]](#footnote-223)222

The court in Feathers also ruled:

The Uniform Criminal Extradition Act (W.Va. Code, 5-1-7 through W.Va. Code, 5-1-13), does not require, as a prerequisite to the extradition of an alleged parole violator, a judicial determination by the demanding state of probable cause to believe that the person demanded has broken the terms of his or her parole. [[223]](#footnote-224)223

U. Investigative Services for Indigents

In State v. Less, [[224]](#footnote-225)224 Justice McHugh wrote that "it is a matter within the sound discretion of the trial judge whether investigative services are necessary under W.Va. Code, 51-11-18, and the exercise of such discretion will not constitute reversible error unless the trial judge abuses such discretion." [[225]](#footnote-226)225

V. Same Judge Presiding Over Different Cases Against Defendant

Justice McHugh made it clear in State v. Flint [[226]](#footnote-227)226 that "it is not error for a trial judge to preside over more than one criminal case involving the same defendant even though some of the facts are the same in each of the cases." [[227]](#footnote-228)227

W. Stay and Postponement

Justice McHugh outlined the difference between staying a proceeding and postponing execution of a sentence in the case of State ex rel. Dye v. Bordenkircher. [[228]](#footnote-229)228 The court held: **[\*47]**

The term "postponing the execution of the sentence" in W.Va. Code, 62-7-1 [1931], is not synonymous with the term "stay of proceedings" in W.Va. Code, 62-7-2 [1931]. A postponement of the execution of the sentence in a criminal case under W.Va. Code, 62-7-1 [1931], delays that one specific event in the case. A stay of proceedings under W.Va. Code, 62-7-2 [1931], however, stops all action in the circuit court which otherwise might occur in a case after the stay takes effect. [[229]](#footnote-230)229

X. Competency of Defendant

Justice McHugh addressed issues concerning the holding of a competency hearing for a defendant in State v. Church. [[230]](#footnote-231)230 The court held initially that

a trial judge's failure to make a finding on the issue of a criminal defendant's competency to stand trial within five days after the filing of a report by one or more psychiatrists or a psychiatrist and a psychologist in compliance with W.Va. Code, 27-6A-1(d) [1977], will not be considered to be reversible error requiring a new trial absent prejudice to the defendant resulting from such failure. [[231]](#footnote-232)231

The court in Church concluded:

Even though a trial judge does not make a finding on the issue of a criminal defendant's competency to stand trial within five days after the filing of a report by one or more psychiatrists or a psychiatrist and a psychologist, the defendant may request a hearing on that issue under W.Va. Code, 27-6A-1(d) [1977], at any reasonable time prior to trial. [[232]](#footnote-233)232

Justice McHugh relied on State v. Daggett [[233]](#footnote-234)233 in State v. Wimer [[234]](#footnote-235)234 to hold:

There exists in the trial of an accused a presumption of sanity. However, should the accused offer evidence that he was insane, the presumption of sanity disappears and the burden is on the prosecution to prove beyond a reasonable doubt that the defendant **[\*48]** was sane at the time of the offense. [[235]](#footnote-236)235

Justice McHugh found in State v. Swiger [[236]](#footnote-237)236 that

a circuit court committed reversible error in finding a criminal defendant mentally competent to stand trial, where the sole witnesses who testified at the hearing to determine the defendant's competency were a psychologist and a psychiatrist, and the record clearly revealed that, (1) the testimony of the psychologist that the defendant was competent to stand trial was equivocal and subject to a previous indication by that psychologist that a psychiatric evaluation should be conducted to "support or deny" the psychologist's opinion concerning the defendant's competency, and (2) the psychiatrist, who examined the defendant upon two occasions, consistently maintained that the defendant was incompetent to stand trial. [[237]](#footnote-238)237

The court in Swiger also held:

Where a defendant in a felony case, found by a court of record to be incompetent to stand trial, is civilly committed to a mental health facility pursuant to W.Va. Code, 276A-2(d) [1979], and W.Va. Code, 27-5-1 et seq. [1979], "the defendant's competency to stand trial shall, pursuant to W.Va. Code, 27-6A-2(d) [1979], thereafter be periodically reviewed." [[238]](#footnote-239)238

In State v. Bias, [[239]](#footnote-240)239 Justice McHugh was asked to determine the status of criminal charges against a defendant found incompetent to stand trial. The court held:

Being a bar to trial, an accused's incompetency to stand trial, regardless of the duration thereof, will not, as a matter of due process, ordinarily require dismissal of an indictment for a felony. The State must, however, show that the accused suffered no substantial prejudice beyond that which ensued from the ordinary and inevitable delay attendant to the attainment of competency to **[\*49]** stand trial. [[240]](#footnote-241)240

Bias also held that "any term during which the defendant is unable to be tried because his or her competency to stand trial is being tested or evaluated does not count in favor of discharge from prosecution under the three-term rule, W.Va. Code, 62-3-21 [1959]." [[241]](#footnote-242)241

Justice McHugh addressed the competency of a defendant once again in the case of State v. Hatfield. [[242]](#footnote-243)242 The court observed initially that "it is a fundamental guaranty of due process that a defendant cannot be tried or convicted for a crime while he or she is mentally incompetent." [[243]](#footnote-244)243 Justice McHugh then ruled that

where a circuit court has found that a defendant in a criminal case where the possible punishment is life imprisonment without mercy is competent to stand trial, but subsequent to the competency hearing, the defendant attempts to commit suicide, then against advice of counsel indicates his desire to plead guilty to the charges in the indictment, before taking the plea of guilty, the trial judge should make certain inquiries of the defendant and counsel for the defendant in addition to those mandated in Call v. McKenzie, 159 W.Va. 191, 220 S.E.2d 665 (1975). The court should require counsel to state on the record the reason why counsel opposes the guilty plea. The court should then ask the defendant to acknowledge on the record that he understands his counsel's statements and if in view of them he still desires to plead guilty. If the defendant then states he still desires to plead guilty, the court may accept the plea. [[244]](#footnote-245)244

Y. Revocation of Bail

Justice McHugh outlined procedures for holding a hearing to determine reinstatement of revoked bail in the case of Marshall v. Casey. [[245]](#footnote-246)245 The court held:

An accused admitted to bail pursuant to W.Va. Code, 62-1C-1 [1983], et seq., whose bail is subsequently revoked, upon credible evidence reflected in a sworn affidavit by the prosecuting attorney, a law enforcement officer, surety or other appropriate **[\*50]** person, for alleged violations of law or conditions of the bail, may, by motion, challenge the revocation of bail and seek readmission to bail and upon that motion, the accused shall be entitled to a hearing. The hearing concerning the revocation of bail and requested readmission to bail shall be governed by subdivision (h) of Rule 46 of the West Virginia Rules of Criminal Procedure, which subdivision provides for "Bail Determination Hearings" in certain bail matters. [[246]](#footnote-247)246

Z. Probation Hearing

In State v. Turley, [[247]](#footnote-248)247 Justice McHugh stated that "probation statutes are remedial in nature and are to be liberally construed in favor of the defendant." [[248]](#footnote-249)248

Justice McHugh addressed several probation issues in State v. Godfrey. [[249]](#footnote-250)249 The opinion held initially that

a trial judge should, ordinarily, hear testimony regarding whether a defendant should be placed on probation if that defendant is statutorily eligible for such probation. The extent of such testimony, however, is within the sound discretion of the trial judge. [[250]](#footnote-251)250

Godfrey next held that "violation of the procedural requirement of W.Va. Code, 62-12-8 [1939], that an order denying probation state the reasons for such denial, will not be grounds for remand for resentencing where the reasons appear in the sentencing record." [[251]](#footnote-252)251 Justice McHugh concluded in Godfrey:

W.Va. Code, 62-12-2 [1979], which provides, in part, that, "all persons who have not been previously convicted of a felony within five years from the date of the felony for which they are charged . . . shall be eligible for probation" does not preclude a trial judge from considering a prior conviction when deciding whether to grant probation. [[252]](#footnote-253)252

**[\*51]**

Justice McHugh wrote in State v. Ranski [[253]](#footnote-254)253 that

pursuant to W.Va. Code, 62-12-2(c) [1979], a trial judge must specifically find, as a matter of record, that a firearm was used in the commission of the crime before a person convicted of the crime upon a plea of guilty may be found to be ineligible for probation under W.Va. Code, 62-12-2(b) [1979]. [[254]](#footnote-255)254

Justice McHugh noted in State v. ***Kerns*** [[255]](#footnote-256)255 that "allowance and recovery of costs was unknown at common law, and therefore only costs specifically allowed by statute may be recovered." [[256]](#footnote-257)256 The court concluded that "W.Va. Code, 62-12-9 [1992] does not authorize a circuit court to impose, as a condition of probation, that a convicted criminal defendant pay the fees of a special prosecutor as costs of the prosecution." [[257]](#footnote-258)257

AA. Good Time Credit

Justice McHugh held in State ex rel. Goff v. Merrifield [[258]](#footnote-259)258 that

a person who is ordered to serve a consecutive sixmonth period in the county jail as a condition of probation for one offense and also sentenced to serve an additional six-month period in the county jail on another offense, with the two six-month periods to be served consecutively, is eligible for good time credit pursuant to W.Va. Code, 7-8-11 [1986]. [[259]](#footnote-260)259

Goff concluded that "when a person is ordered to confinement in the county jail as a condition of probation and performs work as a trustee within the jail, that person is entitled to a reduction in his sentence for work performed in the county jail according to W.Va. Code, 17-15-4 [1987]." [[260]](#footnote-261)260 **[\*52]**

BB. Search with Warrant

In State v. Peacher, [[261]](#footnote-262)261 the court was concerned with the validity of a search warrant that was issued based upon an affidavit that contained information from an unlawful search. Justice McHugh wrote:

An affidavit in support of an application for a search warrant which contains information that antedates, and is totally independent of, information learned from an unconstitutional search, as well as information from the unconstitutional search, may still be the basis upon which a valid search warrant may issue, if the information in the affidavit, excluding that information attributable to the unconstitutional search, is sufficient to justify a finding of probable cause. [[262]](#footnote-263)262

In State v. Hall, [[263]](#footnote-264)263 Justice McHugh held that "the property to be seized must be described within the warrant itself or within the sworn complaint expressly made a part of the warrant by direct reference thereto. A search warrant should not be made a catchall dragnet." [[264]](#footnote-265)264

Justice McHugh addressed the authority of conservation officers to execute a search warrant in State v. Boggess. [[265]](#footnote-266)265 The court held:

Following a valid arrest by a conservation officer, employed by the West Virginia Department of Natural Resources, for the offense of possession of marihuana with the intent to deliver, the conservation officer was authorized under the provisions of W.Va. Code, 20-74 [1971], which statute describes the authority, powers and duties of conservation officers, and W.Va. Code, 62-1A-3 [1965], which statute concerns search and seizure, to execute a valid search warrant relating to the arrested individual's automobile, which automobile was found at the scene of the offense. [[266]](#footnote-267)266

Justice McHugh held in State v. Haught [[267]](#footnote-268)267 that "the description contained in a search warrant is sufficient where a law enforcement officer charged with making a search may, by the description of the premises contained in the **[\*53]** search warrant, identify and ascertain the place intended to be searched with reasonable certainty." [[268]](#footnote-269)268

CC. Search Without Warrant

The decision in State v. Cecil [[269]](#footnote-270)269 addressed search and seizure without a warrant. Justice McHugh held:

Although a search and seizure by police officers must ordinarily be predicated upon a written search warrant, a warrantless entry by police officers of a mobile home was proper under the "emergency doctrine" exception to the warrant requirement, where the record indicated that, rather than being motivated by an intent to make an arrest or secure evidence, the police officers were attempting to locate an injured or deceased child, which child the officers had reason to believe was in the mobile home, because of information they received immediately prior to the entry. [[270]](#footnote-271)270

The issue of a warrantless search and seizure was again addressed by Justice McHugh in the case of State v. Tadder. [[271]](#footnote-272)271 That court held:

Where police officers apprehended in a building two suspects of a breaking and entering of that building, and minutes thereafter the officers stopped a truck with two occupants attempting to leave the scene of the breaking and entering, a warrantless search of the vehicle by the officers, which resulted in the seizure from the glove compartment of the wallets of the suspects apprehended in the building, did not violate the defendant's constitutional rights against unreasonable searches and seizures, where the record demonstrated that the defendant, as a passenger in the truck, had no property or possessory interest in the truck, its glove compartment, or the items seized and, therefore, suffered no invasion of a legitimate expectation of privacy. [[272]](#footnote-273)272

**[\*54]**

DD. Issuance of Warrant

Justice McHugh held in Matter of Monroe [[273]](#footnote-274)273 that

the determination of whether probable cause exists to support the issuance of an arrest warrant under W. Va. R. Crim. P. 4 is solely a judicial function to be performed by the magistrate and is to be based upon the contents of "the complaint, or from an affidavit or affidavits filed with the complaint." [[274]](#footnote-275)274

EE. Prompt Presentment

In State v. Mitter, [[275]](#footnote-276)275 Justice McHugh relied upon the decision in State v. Persinger [[276]](#footnote-277)276 to examine the delay by police officers in taking a defendant before a judicial officer for an initial appearance. Mitter held that "the delay in taking the defendant to a magistrate may be a critical factor where it appears that the primary purpose of the delay was to obtain a confession from the defendant." [[277]](#footnote-278)277

FF. Recording Proceedings

Relying on State v. Bolling, [[278]](#footnote-279)278 Justice McHugh held in State v. Neal [[279]](#footnote-280)279 that "under the provisions of W.Va. Code, 51-7-1 and -2, all proceedings in the criminal trial are required to be reported; however, the failure to report all of the proceedings may not in all instances constitute reversible error." [[280]](#footnote-281)280

GG. Prison Transfer

The case of Matter of Crews [[281]](#footnote-282)281 required Justice McHugh to address the ability of inmates to transfer from prison to a state hospital for mental health and drug treatment. The court held as follows:

Inasmuch as the 1980 amendment to W.Va. Code, 28-5-31, modified the procedure for transfer of a "convicted person" in **[\*55]** prison under that statute, and further added provisions concerning security at the facility to which transfer is sought, but did not substantially change the criteria for transfer under the statute or the due process rights of a convicted person in a prison, under the circumstances of this case the "convicted persons" in prisons will not be prejudiced by being required to proceed under W.Va. Code, 28-5-31, as amended in 1980, if they wish to further prosecute their claims. [[282]](#footnote-283)282

HH. Protective Custody

Justice McHugh examined the rights of inmates held in protective custody in the case of Bishop v. McCoy. [[283]](#footnote-284)283 The court noted as a general matter that

protective custody inmates, as well as other prison inmates in the West Virginia correctional system, have rights, as described in Hackl v. Dale, 171 W.Va. 415, 299 S.E.2d 26 (1982), and Cooper v. Gwinn, 171 W.Va. 245, 298 S.E.2d 781 (1981), to (1) reasonable protection from constant threat of violence and sexual assault by fellow inmates and (2) rehabilitation. [[284]](#footnote-285)284

Bishop then went on to hold in detail:

In securing the rights of protective custody inmates to reasonable protection from constant threat of violence and sexual assault and to rehabilitation, the Commissioner of the West Virginia Department of Corrections is hereby directed to (1) establish and maintain, in addition to the safeguarding of protective custody inmates of the West Virginia Penitentiary at Moundsville, protective custody facilities for the safeguarding, for such periods of time as may be required, of protective custody inmates of institutions other than the West Virginia Penitentiary at Moundsville, and such facilities shall be in addition to the Protective Custody Unit at the West Virginia Penitentiary at Moundsville and shall be at a location or locations other than at the penitentiary at Moundsville; (2) ensure that all protective custody inmates, whether of the West Virginia Penitentiary at Moundsville or otherwise, shall, in continuing their rehabilitation, be entitled to the same educational, vocational, recreational and other program opportunities to which other prison inmates in this State are entitled and (3) ensure that no prison inmate under the supervision of the West Virginia Department of Corrections who **[\*56]** is not a maximum security inmate is transferred, solely for the purpose of placing that inmate in protective custody, to a maximum security institution. [[285]](#footnote-286)285

II. Multiple Prosecutions

In State v. Adkins, [[286]](#footnote-287)286 Justice McHugh was called upon to revisit a decision by the West Virginia Supreme Court of Appeals in State ex rel. Dowdy v. Robinson. [[287]](#footnote-288)287 In Dowdy, the court held that West Virginia Code section 61-11-14 was unconstitutional because it provided for multiple prosecutions of the same defendant for the same offense after an acquittal. [[288]](#footnote-289)288 In Adkins, however, Justice McHugh ruled that "syllabus point 2 of State ex rel. Dowdy v. Robinson, 154 W.Va. 263, 257 S.E.2d 167 (1979), was overbroad and is hereby overruled." [[289]](#footnote-290)289

JJ. Mistrial

Several issues concerned with a motion for mistrial made by the defendant were addressed by Justice McHugh in State v. Pennington. [[290]](#footnote-291)290 Justice McHugh held that "when a mistrial is granted on motion of the defendant, unless the defendant was provoked into moving for the mistrial because of prosecutorial or judicial conduct, a retrial may not be barred on the basis of jeopardy principles." [[291]](#footnote-292)291 The decision also held:

Where a defendant moves for a mistrial and fails to withdraw that motion before the motion is granted by the trial court, the trial court's declaration of the mistrial cannot be characterized as sua sponte, when the record does not disclose an objection by the defendant to the trial court's action. Thus, further prosecution of the defendant under the above circumstances does not offend jeopardy principles embodied in the federal and state constitutions. [[292]](#footnote-293)292

In Dietz v. Legursky, [[293]](#footnote-294)293 Justice McHugh held that **[\*57]**

because the right of a defendant in a criminal case to testify on his or her own behalf is fundamental, then, in a case where a trial court represents that a mistrial will be declared if the defendant does not so testify, in the event that the defendant does not in fact testify and can demonstrate that he or she decided to not testify in reliance on the trial court's representation, it is reversible error for the trial court to not declare a mistrial. [[294]](#footnote-295)294

KK. Return of Seized Property

Justice McHugh stated in Ray v. Mangum [[295]](#footnote-296)295 that "absent express statutory authority providing for the humane destruction of gamecocks seized as a result of illegal cockfighting in violation of W.Va. Code, 61-8-19 [1931], such gamecocks ordinarily must be returned to the owners thereof." [[296]](#footnote-297)296

LL. Preservation of Evidence

Justice McHugh was called upon to give trial courts guidance in resolving issues arising from the loss of evidence by prosecutors in the case of State v. Osakalumi. [[297]](#footnote-298)297 The court held:

When the State had or should have had evidence requested by a criminal defendant but the evidence no longer exists when the defendant seeks its production, a trial court must determine (1) whether the requested material, if in the possession of the State at the time of the defendant's request for it, would have been subject to disclosure under either West Virginia Rule of Criminal Procedure 16 or case law; (2) whether the State had a duty to preserve the material; and (3) if the State did have a duty to preserve the material, whether the duty was breached and what consequences should flow from the breach. In determining what consequences should flow from the State's breach of its duty to preserve evidence, a trial court should consider (1) the degree of negligence or bad faith involved; (2) the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available; and (3) the sufficiency of the other evidence produced at the trial to sustain the conviction. [[298]](#footnote-299)298

**[\*58]**

MM. Use of Exhibits by Jury During Deliberations

In State v. Armstrong, [[299]](#footnote-300)299 Justice McHugh held:

The jury, during deliberations, may use an exhibit, admitted into evidence, according to its nature and within the bounds of the evidence at trial in order to aid the jury in weighing the evidence, and the jury may make a more critical examination of an exhibit than was made during the trial. [[300]](#footnote-301)300

Justice McHugh stated in State v. Dietz: [[301]](#footnote-302)301

In a criminal case it is not reversible error for a trial court to allow a document, such as a transcript, a written statement, or a tape recording, any of which contains a confession or incriminating statement, and which has already been admitted into evidence, to be taken into the jury room for the jury's use during deliberations. [[302]](#footnote-303)302

NN. Sentencing

In State v. Turley, [[303]](#footnote-304)303 Justice McHugh held that

a person who has attained his or her sixteenth birthday but has not reached his or her twenty-first birthday at the time of the commission of the crime and who is convicted of or pleads guilty to aggravated robbery is eligible for suspension of sentence and commitment to a youthful offender center under W.Va. Code, 25-4-6 [1975]. [[304]](#footnote-305)304

Justice McHugh held in State v. Finley [[305]](#footnote-306)305 that "a sentencing judge, in evaluating a defendant's potential for rehabilitation and in determining the defendant's sentence, may consider the defendant's false testimony observed during the trial." [[306]](#footnote-307)306 **[\*59]**

Justice McHugh addressed sentencing a defendant pursuant to the habitual offender statute in State v. Cain. [[307]](#footnote-308)307 That court held:

A person convicted of a felony may not be sentenced pursuant to W.Va. Code, 61-11-18, -19 [1943], unless a recidivist information and any or all material amendments thereto as to the person's prior conviction or convictions are filed by the prosecuting attorney with the court before expiration of the term at which such person was convicted, so that such person is confronted with the facts charged in the entire information, including any or all material amendments thereto. [[308]](#footnote-309)308

Justice McHugh indicated in State v. Haught [[309]](#footnote-310)309 that

before a trial court conditions its recommendation for a defendant's parole upon the defendant's payment of statutory fines, costs and attorney's fees, the trial court must consider the financial resources of the defendant, the defendant's ability to pay and the nature of the burden that the payment of such costs will impose upon the defendant. [[310]](#footnote-311)310

In State v. ***Kerns***, [[311]](#footnote-312)311 Justice McHugh held that "a circuit court has the authority under W.Va. Code, 62-12-4 [1943] to apply the work release provisions of W.Va. Code, 62-11A-1 [1988] in lieu of a sentence of ordinary confinement imposed by a magistrate court in a misdemeanor case." [[312]](#footnote-313)312 The court also stated that "a circuit court has the authority under W.Va. Code, 62-124 [1943] to order electronically monitored home confinement, in a county having the equipment therefor, in lieu of incarceration imposed by a magistrate court in a misdemeanor case." [[313]](#footnote-314)313

Justice McHugh stated in State v. Craft [[314]](#footnote-315)314 that

pursuant to W. Va. R.Crim.P. 32(c)(3)(D), if the comments of the defendant and his counsel or testimony or other information introduced by them allege any factual inaccuracy in the **[\*60]** presentence investigation report or the summary of the report or part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the West Virginia Board of Parole. [[315]](#footnote-316)315

OO. Executive Clemency

Some of the practical effects of a reprieve were addressed by Justice McHugh in County Commission of Mercer County v. Dodrill. [[316]](#footnote-317)316 The court held that

when the governor grants a reprieve to an individual held in a county jail, who has been convicted of a felony and has been lawfully sentenced to the custody of the State Department of Corrections, but the reprieve is granted merely to delay that individual's transfer to a state penal or correctional institution, the state will be required to pay the reasonable maintenance and medical expenses related to that individual which are incurred by the county due to that delay. [[317]](#footnote-318)317

PP. Magistrate Court Criminal Procedure

In State ex rel. Tate v. Bailey, [[318]](#footnote-319)318 Justice McHugh followed the lead of Justice Miller in State ex rel. Burdette v. Scott [[319]](#footnote-320)319 to hold that "W.Va. Code, 50-5-7 (1976), requires that if a defendant is charged by warrant in the magistrate court with an offense over which that court has jurisdiction, he is entitled to a trial on the merits in the magistrate court." [[320]](#footnote-321)320

Justice McHugh held in State ex rel. O'Neill v. Gay [[321]](#footnote-322)321 that "pursuant to the provisions of W.Va. Code, 50-5-13 [1976], a defendant who pleads guilty in magistrate court to a criminal offense may appeal to circuit court, and to obtain such an appeal, the defendant need not allege error committed by the magistrate **[\*61]** court." [[322]](#footnote-323)322

Justice McHugh addressed several issues affecting prosecution in magistrate court in the case of Manning v. Inge. [[323]](#footnote-324)323 Manning held initially that "jeopardy attaches in a non-jury trial in a magistrate court which is exercising proper jurisdiction when the accused has been charged in a valid warrant and has entered a plea and the magistrate has begun to hear evidence." [[324]](#footnote-325)324 The court then looked at the authority of a prosecuting attorney to seek disqualification of a magistrate. Justice McHugh held:

The State is a party to a criminal proceeding for the purposes of W.Va. Code, 50-4-7 [1978], and the prosecuting attorney may file an affidavit alleging that a magistrate before whom the criminal proceeding is pending has a personal bias or prejudice either against the State or in favor of the defendant or that he has counseled with the defendant respecting the merits of the proceeding. [[325]](#footnote-326)325

The Manning decision went on to state that

"the discretionary decision to move for the disqualification of a magistrate under W.Va. Code, 50-4-7 [1978], ultimately rests with the prosecuting attorney as the State's official representative in a criminal case. The exercise of that discretion must be properly evidenced by the execution of an affidavit by the prosecuting attorney." [[326]](#footnote-327)326

Justice McHugh held in Matter of Mendez [[327]](#footnote-328)327 that "a magistrate in West Virginia has no power to suspend a sentence imposed in a criminal case." [[328]](#footnote-329)328

In Harman v. Frye, [[329]](#footnote-330)329 Justice McHugh abolished the practice of allowing individuals to go directly to magistrates to take out criminal complaints against their neighbors. The court held:

Except where there is a specific statutory exception, a magistrate may not issue a warrant or summons for a misdemeanor or felony **[\*62]** solely upon the complaint of a private citizen without a prior evaluation of the citizen's complaint by the prosecuting attorney or an investigation by the appropriate law enforcement agency. Following such evaluation by the prosecuting attorney or investigation by the appropriate law enforcement agency, the prosecuting attorney shall institute all necessary and proper proceedings before the magistrate, and, in suitable cases, law enforcement officers may obtain warrants and assist private citizens in obtaining the warrant or summons from the magistrate. To the extent In re Monroe, 174 W.Va. 401, 327 S.E.2d 163 (1985), is inconsistent with our holding in this case, it is overruled. [[330]](#footnote-331)330

IV. CRIMINAL LAW

A. Penal and Remedial Statutes

In State ex rel. Department of Transportation, Division of Highways v. Sommerville, [[331]](#footnote-332)331 Justice McHugh was called upon to determine if the state statute regulating the weight of trucks was remedial or criminal. The court held initially that "where a statute contains provisions which are both remedial and penal, such statute should be considered remedial when seeking to enforce the purpose for which it was enacted, and should be considered penal when seeking to enforce the penalty provided therein." [[332]](#footnote-333)332

Justice McHugh then said:

W.Va. Code, 17C-17-10(a) [1976] authorizes a police officer or a member of a Division of Highways' official weighing crew to "require the driver of any vehicle or combination of vehicles on any highway to stop and submit such vehicle or combination of vehicles to a weighing[,]" even where the driver refuses to comply pursuant to W.Va. Code, 17C-17-10(c) [1976] and is thus subject to a criminal penalty. [[333]](#footnote-334)333

Justice McHugh stated in State ex rel. Palumbo v. Graley's Body Shop, Inc. [[334]](#footnote-335)334 that

the question of whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction, and requires **[\*63]** the application of a two-level inquiry adopted by the United States Supreme Court in United States v. Ward, 448 U.S. 242, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980). First, courts must determine whether the legislature indicated, either expressly or impliedly, a preference for labeling the statute civil or criminal. Second, if the legislature indicates an intention to establish a civil remedy, courts must consider whether the legislature, irrespective of its intent to create a civil remedy, provided for sanctions so punitive as to transform the civil remedy into a criminal penalty. As part of the second level of the inquiry, courts should be guided by the following factors identified by the United States Supreme Court in Kennedy v. MendozaMartinez, 372 U.S. 144, 168-69, 83 S.Ct. 554, 567-68, 9 L.Ed.2d 644, 661 (1963): "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment--retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned[.]" [[335]](#footnote-336)335

B. Controlled Substances

Justice McHugh pointed out in State v. Rector [[336]](#footnote-337)336 that "constructive possession of a controlled substance, W.Va. Code, 60A-4-401(c), and constructive delivery or possession with intent to deliver a controlled substance, W.Va. Code, 60A-4-401(a), arise from separate offenses." [[337]](#footnote-338)337 The decision in Rector went on to hold that "it is reversible error for a trial judge to instruct a jury in a criminal trial of a defendant charged with a marihuana violation that the defendant may be found guilty of 'possession and delivery of a controlled substance' when such instruction considers 'possession and delivery of a controlled substance' as a single offense." [[338]](#footnote-339)338

The question of sustaining a conviction for delivery of a controlled substance, when nothing of value is received in return, was addressed by Justice McHugh in State v. Ashworth. [[339]](#footnote-340)339 The court held initially that

under the circumstances of this criminal case, the evidence was sufficient to sustain the verdict of the jury that the defendant was **[\*64]** guilty of the offense of delivery of marihuana in violation of W.Va. Code, 60A-4-401(a)(1)(ii) [1971], where the evidence indicated that the defendant transferred the marihuana from a third party to an undercover police officer. [[340]](#footnote-341)340

Justice McHugh concluded in Ashworth:

Where the evidence indicated that the defendant delivered marihuana in violation of W.Va. Code, 60A-4-401(a)(1)(ii) [1971], from a third party to an undercover police officer, a conviction of the defendant under that statute was proper, even though it was not shown by the evidence at trial that the defendant received compensation, pecuniary or otherwise, with respect to the transaction. [[341]](#footnote-342)341

In State v. Boggess, [[342]](#footnote-343)342 Justice McHugh held that "an instruction given to the jury in a case involving an alleged violation of the West Virginia Uniform Controlled Substances Act, W.Va. Code, 60A-1-101, et seq., which instruction defined 'marihuana' by following verbatim the statutory definition of 'marihuana' found in W.Va. Code, 60A-1101(n) [1981], was not error." [[343]](#footnote-344)343

Justice McHugh stated in State v. Nicastro [[344]](#footnote-345)344 that "an indictment alleging a violation of W.Va. Code, 60A-4-401(a), as amended, is sufficient to sustain a conviction for delivery of marihuana, even though the indictment omits stating whether the alleged offense was committed with or without remuneration." [[345]](#footnote-346)345 Nicastro went on to hold:

Prior to imposition of a sentence of incarceration for a defendant convicted of delivery of less than 15 grams of marihuana in violation of W.Va. Code, 60A4-401(a), as amended, who, although not within the "without remuneration" exception of W.Va. Code, 60A-4-402(c), as amended, has no prior criminal record, a trial court must consider: (1) whether the defendant has a history of involvement with illegal drugs; (2) whether the defendant is a reasonably good prospect for rehabilitation; (3) whether incarceration would serve a useful purpose; and (4) whether available alternatives to incarceration, such as probation conditioned upon community service, would be more **[\*65]** appropriate. [[346]](#footnote-347)346

Justice McHugh addressed issues involving prosecution of health care providers for unlawful distribution of controlled substances in the case of State v. Young. [[347]](#footnote-348)347 The decision held initially that

under W.Va. Code, 60A-4-401(a), as amended, which is part of West Virginia's Uniform Controlled Substances Act, the elements of the offense of a felonious constructive delivery of a controlled substance by a purported prescription issued by a registered physician, dentist or other registered practitioner are as follows:

(1) the defendant constructively delivered a controlled substance requiring a valid prescription by the issuance of a purported prescription on behalf of a purported patient who received the controlled substance from a pharmacist who filled such prescription; and

(2) the defendant issued such prescription intentionally or knowingly outside the usual "course of professional practice or research," thereby not engaging in the authorized activities of a "practitioner," as defined in W.Va. Code, 60A-1-101(v), as amended; in other words, such prescription was issued intentionally or knowingly without a legitimate medical, dental or other authorized purpose. [[348]](#footnote-349)348

Young indicated that

a count in an indictment charging that a registered practitioner violated W.Va. Code, 60A-4-401(a), as amended, by 'knowingly, intentionally, unlawfully and feloniously' delivering a controlled substance by prescribing the substance even though it was 'not necessary in the medical treatment and care' of the purported patient sufficiently states the elements of the offense. [[349]](#footnote-350)349

It was further stated that

W.Va. Code, 60A-5-506(a) [1971], excusing the State from having to negate, in an indictment or at trial, any exemption or exception under West Virginia's Uniform Controlled Substances Act, is not applicable to a prosecution of a registered practitioner for **[\*66]** feloniously prescribing a controlled substance in violation of W.Va. Code, 60A-4-401(a), as amended. Therefore, an indictment in such a prosecution must charge that the prescriptions were issued without a legitimate medical, dental or other authorized purpose, and the State must prove such element of the offense, as well as all other elements of the offense, beyond a reasonable doubt. This burden of proof includes the burden of the State, in its case in chief, to go forward with the evidence on the lack of such legitimate purpose for the prescriptions. [[350]](#footnote-351)350

Justice McHugh concluded in Young that

a count in an indictment charging that a registered practitioner violated W.Va. Code, 60A-4-401(a), as amended, in that he or she merely 'delivered' a controlled substance by prescribing the substance is fatally defective because it does not set forth all of the essential elements of the offense, particularly the lack of a legitimate medical, dental or other authorized purpose for the purported prescription. [[351]](#footnote-352)351

C. Burglary

In State v. Ocheltree, [[352]](#footnote-353)352 Justice McHugh held that "the intent to commit a felony or any larceny is an essential element of the crime of burglary under W.Va. Code, 61-3-11(a) [1973]. It is well settled, however, that such intent may be inferred by the jury from the facts and circumstances of the case." [[353]](#footnote-354)353

D. Conspiracy

Justice McHugh was called on to expound upon the state's general conspiracy statute in State v. Less. [[354]](#footnote-355)354 The court stated as an initial matter that "W.Va. Code, 61-10-31(1), is a general conspiracy statute and the agreement to commit any act which is made a felony or misdemeanor by the law of this State is a conspiracy to commit an 'offense against the State' as that term is used in the statute." [[355]](#footnote-356)355

Justice McHugh then held in Less that "the terms of W.Va. Code, 61-10-31(1), are clear and unambiguous on their face and are of sufficient **[\*67]** definiteness to give a person of ordinary intelligence fair notice that agreeing to commit an act made a felony or misdemeanor by the law of this State is prohibited." [[356]](#footnote-357)356 The opinion went on to hold that "in order for the State to prove a conspiracy under W.Va. Code, 61-10-31(1), it must show that the defendant agreed with others to commit an offense against the State and that some overt act was taken by a member of the conspiracy to effect the object of that conspiracy." [[357]](#footnote-358)357

Justice McHugh concluded in Less with the following rule of law:

Where the jury is permitted, but not required, to infer from the evidence that the defendant had the intent necessary for conspiracy to commit an offense against the State, and the jury is properly and adequately advised of the State's duty to prove that intent beyond a reasonable doubt, the giving of the instruction "that the jury may infer that a person intends to do that which he does, or which is the natural or necessary consequence of his act," is not error. [[358]](#footnote-359)358

E. Larceny

Justice McHugh held in State v. Riley [[359]](#footnote-360)359 that

a person who is present and participating with others in the taking of property in the commission of a larceny is chargeable with the entire value of the goods taken, even though such person may not have personally taken away each and every one of the items subject to the larceny. [[360]](#footnote-361)360

F. Arson

Justice McHugh addressed the crime of arson in State v. Jones. [[361]](#footnote-362)361 The court stated:

Arson in the third degree, W.Va. Code, 61-3-3 [1957], is a lesser included offense of arson in the first degree, W.Va. Code, 61-3-1 [1935]; thus, where a criminal defendant, an inmate of a county jail, admitted at trial that he started a fire in his cell block, and the evidence at trial was in conflict as to whether he intended to burn **[\*68]** the jail within the meaning of this State's arson in the first degree statute, W.Va. Code, 61-3-1 [1935], or intended to burn the personal property of a fellow-inmate within the meaning of this State's arson in the third degree statute, W.Va. Code, 61-3-3 [1957], the defendant, indicted for arson in the first degree, was entitled to an instruction upon arson in the third degree, as a lesser included offense under the indictment. [[362]](#footnote-363)362

Justice McHugh addressed several issues involving arson in State v. Mullins. [[363]](#footnote-364)363 It was noted initially that "an indictment for a charge of first degree arson is sufficient to sustain a conviction if, in charging the offense, it makes reference to W.Va. Code, 61-3-1, as amended, and fully informs the defendant of the particular offense with which the defendant is charged." [[364]](#footnote-365)364 The opinion held that "a building which contains an apartment, intended for habitation, whether occupied, unoccupied or vacant, is a 'dwelling house' for purposes of W.Va. Code, 61-3-1, as amended." [[365]](#footnote-366)365 Mullins stated that "to sustain a conviction of arson, when the evidence offered at trial is circumstantial, the evidence must show that the fire was of an incendiary origin and the defendant must be connected with the actual commission of the crime." [[366]](#footnote-367)366

G. Criminal Child Abuse and Neglect

Justice McHugh was called to address issues involving the criminal abuse and neglect statute in the case of State v. DeBerry. [[367]](#footnote-368)367 Justice McHugh held that

in order to obtain a conviction under W.Va. Code, 61-8D-4(b) [1988], the State must prove that the defendant neglected a minor child within the meaning of the term "neglect," as that term is defined by W.Va. Code, 61-8D-1(6) [1988], which definition is "the unreasonable failure by a parent, guardian, or any person voluntarily accepting a supervisory role towards a minor child to exercise a minimum degree of care to assure said minor child's physical safety or health." Furthermore, the State must prove that such neglect caused serious bodily injury. However, there is no requirement to prove criminal intent in a prosecution under W.Va. **[\*69]** Code, 61-8D-4(b) [1988]. [[368]](#footnote-369)368

H. Criminal Hunting Accident

In State v. Ivey, [[369]](#footnote-370)369 Justice McHugh set out the elements for the offense of causing harm while hunting. The court held that

under W.Va. Code, 20-2-57 [1991], it is unlawful for any person, while engaged in hunting, pursuing, taking or killing wild animals or wild birds, to act with ordinary carelessness or ordinary negligence in shooting, wounding or killing any human being or livestock, or in destroying or injuring any other chattels or property. Any person violating W.Va. Code, 20-2-57 [1991] is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than one thousand dollars nor more than ten thousand dollars, or imprisoned in the county jail not more than one year, or both fined and imprisoned. [[370]](#footnote-371)370

I. Criminal Trespass

Justice McHugh held in State v. Ocheltree [[371]](#footnote-372)371 that "criminal trespass, as defined by W.Va. Code, 61-3B-2 [1978], is not a lesser included offense of burglary by breaking and entering, as defined by W.Va. Code, 61-3-11(a) [1973]." [[372]](#footnote-373)372

J. Trafficking in Stolen Goods

In State v. Hall, [[373]](#footnote-374)373 Justice McHugh set out the elements of the offense of trafficking in stolen goods. The court stated that

the essential elements of the offense created by W.Va. Code, 61-3-18 [1931] are: (1) The property must have been previously stolen by some person other than the defendant; (2) the accused must have bought or received the property from another person or must have aided in concealing it; (3) he must have known, or had reason to believe, when he bought or received or aided in concealing the property, that it had been stolen; and (4) he must have bought or received or aided in concealing the property with a **[\*70]** dishonest purpose. [[374]](#footnote-375)374

The opinion in Hall also held that

under the provisions of W.Va. Code, 61-3-18 [1931] where the State proves that a defendant received or aided in the concealment of property which was stolen from different owners on different occasions, but does not prove that the defendant received or aided in the concealment of the property at different times or different places then such defendant may be convicted of only one offense of receiving or aiding in the concealment of stolen property. [[375]](#footnote-376)375

K. Carrying Deadly Weapon Without License

Justice McHugh ruled in State v. Hodges [[376]](#footnote-377)376 that

the absence of a license is an element of the crime of carrying a dangerous or deadly weapon without a license and the burden of proof as to this element must be borne by the State. To the extent it diverges from this opinion, State v. Merico, 77 W.Va. 314, 87 S.E. 370 (1913) is hereby overruled. [[377]](#footnote-378)377

In Cline v. Murensky, [[378]](#footnote-379)378 Justice McHugh addressed two issues involving the offense of carrying a deadly weapon without a license. The court first held:

Where in magistrate court a petitioner was charged with and entered a plea of guilty to the misdemeanor offense of brandishing a weapon, W.Va. Code, 61-7-10 [1925], the State was not precluded from subsequently seeking an indictment and prosecuting that petitioner for the misdemeanor offense of carrying a weapon without a license, W.Va. Code, 61-7-1 [1975], where, although those two offenses arose from the same criminal transaction, the plea of guilty to brandishing a weapon was taken in magistrate court shortly after the offenses were committed, and prior to the taking of that plea, the prosecuting attorney had no knowledge of or opportunity to attend that magistrate court **[\*71]** proceeding. [[379]](#footnote-380)379

The court next held in Cline that "the statutory offenses of brandishing a weapon, W.Va. Code, 61-710 [1925], and carrying a weapon without a license, W.Va. Code, 61-7-1 [1975], even when arising from a single criminal transaction, do not constitute the 'same offense' under constitutional prohibitions against double jeopardy." [[380]](#footnote-381)380

The determination of whether an instrument is dangerous or deadly was examined by Justice McHugh in State v. Choat. [[381]](#footnote-382)381 The court stated:

When the instrument involved in a prosecution under W.Va. Code, 61-7-1 [1975] is not one specifically enumerated in the statute, the issue as to whether it is a "dangerous or deadly weapon" is essentially a factual determination and must be submitted to the jury, unless the trial court can determine as a matter of law that under the evidence in the case the jury could not have concluded that the weapon was dangerous or deadly. To the extent that this Court's holding in Village of Barboursville ex rel. Bates v. Taylor, 115 W.Va. 4, 174 S.E. 485 (1934), is inconsistent with this opinion, it is hereby overruled. [[382]](#footnote-383)382

L. Worthless Check Offenses

In State v. Hays, [[383]](#footnote-384)383 Justice McHugh addressed issues involving the crimes of obtaining property for worthless checks and issuing worthless checks. It was held initially that "W.Va. Code, 61-3-39 [1977] and W.Va. Code, 61-3-39a [1977] are not unconstitutionally vague in violation of U.S. Const. amend. XIV, Sec. 1, or W.Va. Const. art. III, Sec. 10." [[384]](#footnote-385)384 Hays also held that

a violation of W.Va. Code, 61-3-39a [1977] is not a lesser included offense of W.Va. Code, 61-3-39 [1977]. Consequently, a defendant who is accused of violating W.Va. Code, 61-3-39 [1977] is not entitled to a 'lesser included offense' instruction reflecting the elements of W.Va. Code, 61-3-39a [1977]. [[385]](#footnote-386)385

**[\*72]**

M. First Degree Murder

Justice McHugh held in State v. Kopa [[386]](#footnote-387)386 that

it is the mandatory duty of the trial court to instruct the jury that it may add a recommendation of mercy to a verdict of murder of the first degree and such duty shall be fulfilled by the trial court over the objection of the defendant unless it affirmatively appears from the record that the defendant understands the consequences of his action. [[387]](#footnote-388)387

In State v. Phillips, [[388]](#footnote-389)388 Justice McHugh said that "if, on a trial for murder, the evidence is wholly circumstantial, but as to time, place, motive, means, and conduct it concurs in pointing to the accused as the perpetrator of the crime, he [or she] may properly be convicted." [[389]](#footnote-390)389

Issues involving murder by lying-in-wait were presented to Justice McHugh in State v. Harper. [[390]](#footnote-391)390 He said:

"Lying in wait" as a legal concept has both mental and physical elements. The mental element is the purpose or intent to kill or inflict bodily harm upon someone; the physical elements consist of waiting, watching and secrecy or concealment. In order to sustain a conviction for first degree murder by lying in wait pursuant to W.Va. Code, 61-2-1 [1987], the prosecution must prove that the accused was waiting and watching with concealment or secrecy for the purpose of or with the intent to kill or inflict bodily harm upon a person. [[391]](#footnote-392)391

Harper concluded that

where, in the prosecution of first degree murder by lying in wait, there is sufficient evidence before the trial court that the defendant was unaware that the principal in the first degree was preparing to kill or inflict bodily harm upon the victim, the trial court should also instruct the jury on the offense of second degree murder if the **[\*73]** elements of that offense are present. [[392]](#footnote-393)392

Justice McHugh addressed the issue of establishing the corpus delicti based upon a confession in the case of State v. Garrett. [[393]](#footnote-394)393 The court held:

The corpus delicti may not be established solely with an accused's extrajudicial confession or admission. The confession or admission must be corroborated in a material and substantial manner by independent evidence. The corroborating evidence need not of itself be conclusive but, rather, is sufficient if, when taken in connection with the confession or admission, the crime is established beyond a reasonable doubt. [[394]](#footnote-395)394

N. Perjury and False Swearing

Justice McHugh held in State v. Wade [[395]](#footnote-396)395 that

a "lawfully administered" oath or affirmation is an essential element of the crimes of perjury, W.Va. Code, 61-5-1 [1931], and false swearing, W.Va. Code, 61-5-2 [1931]; and a "lawfully administered" oath or affirmation, as that phrase is used in W.Va. Code, 61-5-1 [1931], and W.Va. Code, 61-5-2 [1931], is an oath or affirmation authorized by law and taken before or administered by a tribunal, officer or person authorized by law to administer such oaths or affirmations. [[396]](#footnote-397)396

O. Kidnapping

Justice McHugh was asked in State v. Brumfield [[397]](#footnote-398)397 whether incidental confinement of a correction officer by an escaping inmate constituted kidnaping. The court held:

Where an inmate, by force, has unlawfully confined a correctional officer for a minimal period of time within the walls of a correctional facility in order to facilitate his escape, and movement of that officer was slight and did not result in exposure to an increased risk of harm, a conviction for the offense of **[\*74]** kidnaping pursuant to W.Va. Code, 61-2-14a [1965] will be reversed where the confinement was incidental to the escape and the inmate has not utilized the officer as a hostage nor as a shield to protect that inmate or others from bodily harm or capture or arrest after that inmate or others have committed a crime. [[398]](#footnote-399)398

P. Driving Under the Influence

In State ex rel. Crank v. City of Logan, [[399]](#footnote-400)399 Justice McHugh had to determine whether municipalities could create DUI ordinances that carried penalties that were less than that which was provided by statute. He held that "pursuant to W.Va. Code, 17C-5-11(b), as amended, a municipal ordinance must impose the same penalty for driving under the influence of alcohol as is prescribed for the corresponding state offense." [[400]](#footnote-401)400

Q. Forgery

The case of State v. Phalen [[401]](#footnote-402)401 involved prosecution for the crime of forgery. Justice McHugh wrote that

it is a jury question as to whether the requisite intent to commit forgery, pursuant to W.Va. Code, 61-4-5 [1961], is present when a person who has given a false name later admits the name given was false. Additionally, a jury may find that giving a false name on a police fingerprint card constitutes forgery since the act prejudices the legal rights of the State by frustrating the State's authority to administer justice. [[402]](#footnote-403)402

R. Application of Habitual Offender Statute

At issue in Justice v. Hedrick [[403]](#footnote-404)403 was the use of an out-of-state conviction to enhance the punishment of the defendant's in-state conviction. Justice McHugh wrote that "where a defendant has been convicted of a crime in another jurisdiction, which defendant in West Virginia would have been treated as a juvenile offender, such prior conviction may not be used in subsequent West Virginia proceedings to enhance the defendant's sentence pursuant to the West **[\*75]** Virginia Habitual Criminal Statute." [[404]](#footnote-405)404

He concluded the opinion stating that "whether the conviction of a crime outside of West Virginia may be the basis for application of the West Virginia Habitual Criminal Statute, W.Va. Code, 61-11-18, -19 [1943], depends upon the classification of that crime in this State." [[405]](#footnote-406)405

S. Collateral Estoppel

In the case of State v. Porter, [[406]](#footnote-407)406 Justice McHugh held that "the principle of collateral estoppel applies in a criminal case where an issue of ultimate fact has once been determined by a valid and final judgment. In such case, that issue may not again be litigated between the State and the defendant." [[407]](#footnote-408)407

V. CIVIL PROCEDURE

A. Motion to Dismiss

Relying on the decision in Chapman v. Kane Transfer Co., [[408]](#footnote-409)408 Justice McHugh held in Dunlap v. Hinkle [[409]](#footnote-410)409 that "the trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." [[410]](#footnote-411)410

B. Summary Judgment

Justice McHugh took the opportunity in Brown v. Bluefield Municipal Building Commission [[411]](#footnote-412)411 to restate a rule of law fashioned in Masinter v. Webco Co. [[412]](#footnote-413)412 The court in Brown held that "even if the trial judge is of the opinion to direct a verdict, he should nevertheless ordinarily hear evidence and, upon a trial, direct a verdict rather than try the case in advance on a motion for summary judgment." [[413]](#footnote-414)413 **[\*76]**

In Community Bank and Trust, N.A. v. Keyser, [[414]](#footnote-415)414 Justice McHugh held that "where the material facts surrounding a transaction are in conflict, the question of usury is for the jury." [[415]](#footnote-416)415

The court's ruling in Gavitt v. Swiger [[416]](#footnote-417)416 formed the basis of the holding in Chambers v. Sovereign Coal Corp. [[417]](#footnote-418)417 Justice McHugh wrote in Chambers 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." [[418]](#footnote-419)418

Justice McHugh addressed the procedure for resisting summary judgment when discovery is incomplete in the case of Crain v. Lightner. [[419]](#footnote-420)419 The court held that

where a party is unable to resist a motion for summary judgment because of an inadequate opportunity to conduct discovery, that party should file an affidavit pursuant to W. Va. R. Civ. P. 56(f) and obtain a ruling thereon by the trial court. Such affidavit and ruling thereon, or other evidence that the question of a premature summary judgment motion was presented to and decided by the trial court, must be included in the appellate record to preserve the error for review by this Court. [[420]](#footnote-421)420

In Smith v. Buege, [[421]](#footnote-422)421 Justice McHugh held that

a motion for summary judgment under W. Va. R. Civ. P. 56 must be denied when the moving party merely makes the conclusory assertion that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. [[422]](#footnote-423)422

C. Default Judgment

Justice McHugh addressed default judgment in Bell v. Inland Mutual **[\*77]** Insurance Co. [[423]](#footnote-424)423 He said in Bell that

the restriction contained in W. Va. R. Civ. P. 54(c) that "a judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment," does not apply where the judgment by default has been rendered as the result of the defaulting party's failure to obey an order of the circuit court to provide or permit discovery under W. Va. R. Civ. P. 37(b) and the defaulting party otherwise appears at the subsequent trial on the issue of damages. [[424]](#footnote-425)424

D. Judgment on Less Than All Claims or Parties

Justice McHugh said in Smith v. Buege [[425]](#footnote-426)425 that

under W. Va. R. Civ. P. 54(b), an order relating to less than all of multiple parties is not a final, appealable judgment unless the order expressly states that it is a final order and contains an express determination that there is no just reason for delay in final adjudication of the rights and liabilities in question. [[426]](#footnote-427)426

E. Service of Process

Justice McHugh held in Sauls v. Howell [[427]](#footnote-428)427 that

a judgment debtor is entitled to notice that suggestion proceedings under chapter 38, article 5, of the West Virginia Code have been instituted by a judgment creditor, and the judgment debtor shall be entitled pursuant to that notice to a copy of the summons issued under the provisions of W.Va. Code, 38-5-10 [1931], upon the suggestion. [[428]](#footnote-429)428

F. Personal Jurisdiction

The subject of personal jurisdiction was addressed in Abbott v. Owens-Corning Fiberglas Corp. [[429]](#footnote-430)429 Justice McHugh wrote: **[\*78]**

A court must use a two-step approach when analyzing whether personal jurisdiction exists over a foreign corporation or other nonresident. The first step involves determining whether the defendant's actions satisfy our personal jurisdiction statutes set forth in W.Va. Code, 31-1-15 [1984] and W.Va. Code, 56-3-33 [1984]. The second step involves determining whether the defendant's contacts with the forum state satisfy federal due process. [[430]](#footnote-431)430

Justice McHugh held in State ex rel. Bell Atlantic-West Virginia, Inc. v. Ranson [[431]](#footnote-432)431 that

when a defendant files a motion to dismiss for lack of personal jurisdiction under W.Va.R.Civ.P. 12(b)(2), the circuit court may rule on the motion upon the pleadings, affidavits and other documentary evidence or the court may permit discovery to aid in its decision. At this stage, the party asserting jurisdiction need only make a prima facie showing of personal jurisdiction in order to survive the motion to dismiss. In determining whether a party has made a prima facie showing of personal jurisdiction, the court must view the allegations in the light most favorable to such party, drawing all inferences in favor of jurisdiction. If, however, the court conducts a pretrial evidentiary hearing on the motion, or if the personal jurisdiction issue is litigated at trial, the party asserting jurisdiction must prove jurisdiction by a preponderance of the evidence. [[432]](#footnote-433)432

G. Joinder of Parties

Justice McHugh held in Anderson v. McDonald [[433]](#footnote-434)433 that

when a release of liability is obtained by the representative of an insurance company and in a negligence action against the insured, the insured pleads the release as an affirmative defense pursuant to W.Va.R.Civ.P. 8(c), and the plaintiff has moved to join the insurance company as a party to the action, the trial judge may join the insurance company as a party to the action pursuant to W.Va.R.Civ.P. 20. [[434]](#footnote-435)434

**[\*79]**

H. Laches

Justice McHugh wrote in Maynard v. Board of Education of Wayne County [[435]](#footnote-436)435 that "a party must exercise diligence when seeking to challenge the legality of a matter involving a public interest, such as the manner of expenditure of public funds. Failure to do so constitutes laches." [[436]](#footnote-437)436

Justice McHugh wrote in State ex rel. West Virginia Department of Health and Human Resources, Child Advocate Office v. Carl Lee H.: [[437]](#footnote-438)437

If the reason a plaintiff delays in bringing an action for reimbursement child support is because he or she was misled by the misrepresentations of the defendant as to his or her rights to bring such action or because the delay was induced by the defendant, then the defendant may not raise the defense of laches. However, if the plaintiff does not use due diligence in bringing an action once he or she learns of the misrepresentations, then the defendant may raise the defense of laches, provided the defendant can also demonstrate that such delay has worked to his or her detriment. [[438]](#footnote-439)438

I. Statute of Limitations

Justice McHugh indicated in State ex rel. Hardesty v. Stalnaker [[439]](#footnote-440)439 that

W.Va. Code, 55-2-6 (1923), expressly provides that an action to recover ". . . upon an indemnifying bond taken under any statute, or upon a bond of an executor, administrator or guardian, curator, committee, sheriff or deputy sheriff, clerk or deputy clerk, or any other fiduciary or public officer . . ." shall be brought within ten years next after the right to bring the same shall have accrued. [[440]](#footnote-441)440

Justice McHugh said in Charlton v. M.P. Industries, Inc. [[441]](#footnote-442)441 that "a complaint which is amended to add a party, filed in compliance with Rule 5(e) of the West Virginia Rules of Civil Procedure, tolls W.Va. Code, 55-2-12(b) [1959], whether such complaint is amended in accordance with W.Va.R.Civ.P. 15(a) or **[\*80]** such party is added in accordance with W.Va.R.Civ.P. 21." [[442]](#footnote-443)442

In Maynard v. Board of Education of Wayne County [[443]](#footnote-444)443 Justice McHugh held:

It is the written employment contract, not the incorporated statutory law per se, which fixes the liability of a public employer to its public employees for the purpose of determining the applicable statute of limitations in a judicial action or proceeding for noncompliance with such contract and statutory duties incorporated therein. [[444]](#footnote-445)444

Justice McHugh examined tolling of the statute of limitations when a tortfeasor's identity is wrongfully hidden in the case of Sattler v. Bailey. [[445]](#footnote-446)445 The court ruled:

The general statute of limitations, W.Va. Code, 55-212, as amended, is tolled, with respect to an undiscovered wrongdoer, by virtue of the fraudulent concealment or obstruction of prosecution doctrine embodied in W.Va. Code, 55-2-17, as amended, when an action is brought timely against the known wrongdoer(s) and, despite the due diligence of the injured person to discover the identity of all the wrongdoers, the identity of one or more of them is hidden by words or acts constituting affirmative concealment, that is, a "cover-up." Tolling of the statute of limitations with respect to an undiscovered wrongdoer is especially appropriate in a case in which, as part of the cover-up, the injured person is impeded in discovering the identity of the wrongdoer in question by the invocation of governmental secrecy. In a case involving a wrongdoer whose identity is affirmatively concealed, the injured person must bring his or her action against such wrongdoer within the statutory period after the injured person discovers, or reasonably should have discovered, that wrongdoer's identity. [[446]](#footnote-447)446

Justice McHugh wrote in Hayes v. Roberts & Schaefer Co. [[447]](#footnote-448)447 that "W.Va. Code, 55-2A-2 [1959] provides that 'the period of limitation applicable to a claim accruing outside of [West Virginia] shall be either that prescribed by the law of the place where the claim accrued or by the law of [West Virginia], whichever bars the **[\*81]** claim.'" [[448]](#footnote-449)448

In the case of In re State Public Building Asbestos Litigation, [[449]](#footnote-450)449 Justice McHugh held that "W.Va. Code, 55-2-19 [1923] abrogates the common law doctrine of nullum tempus occurrit regi thereby making statutes of limitations applicable to the State." [[450]](#footnote-451)450

Justice McHugh wrote in Stone v. United Engineering, a Division of Wean, Inc. [[451]](#footnote-452)451 that

W.Va. Code, 55-2-6a, limits the time period in which a suit may be filed for deficiencies in the planning, design, or supervision of construction of an improvement to real property to ten years. This period commences on the date the improvement is occupied or accepted by the owner of the real property, whichever occurs first. [[452]](#footnote-453)452

Justice McHugh also held:

W.Va. Code, 55-2-6a [1983] does not limit the time period in which a suit may be filed against the owner of real property for deficiencies in the planning, design, survey, observation or supervision of construction or actual construction of any improvement to real property to ten years if that owner planned, designed, surveyed, observed or supervised the construction or actually constructed that improvement to real property. [[453]](#footnote-454)453

Justice McHugh concluded Stone by holding:

When determining whether an item is an improvement to real property under W.Va. Code, 55-2-6a [1983], the statute of repose, a court must consider the enhanced value created when the item is put to its intended use, the level of integration of the item within any manufacturing system, whether the item is an essential component of the system, and the item's permanence. [[454]](#footnote-455)454

**[\*82]**

In State ex rel. Smith v. Kermit Lumber & Pressure Treating Co., [[455]](#footnote-456)455 Justice McHugh examined several issues involving the statute of limitations. The court noted initially that

because the language in W.Va. Code, 55-2-19 [1923] is unambiguous in stating that "every statute of limitation, unless otherwise expressly provided, shall apply to the State[,]" the language in Ralston v. Town of Weston, 46 W.Va. 544, 33 S.E. 326 (1899) and Foley v. Doddridge County Court, 54 W.Va. 16, 46 S.E. 246 (1903) which suggests that statutes of limitation apply only when the State is acting in its private or proprietary capacity, is misleading. Thus, to the extent that Ralston and Foley imply that W.Va. Code, 55-2-19 [1923] only applies when the State is acting in its private or proprietary capacity, they are hereby modified. [[456]](#footnote-457)456

Justice McHugh next held in Smith:

W.Va. Code, 55-2-12(c) [1959], which clearly and unambiguously states that "every personal action for which no limitation is otherwise prescribed shall be brought . . . within one year next after the right to bring the same shall have accrued if it be for any other matter of such nature that, in case a party die, it could not have been brought at common law by or against his personal representative[,]" applies to civil actions brought under the Hazardous Waste Management Act found in W.Va. Code, 22-18-1 et seq. [[457]](#footnote-458)457

Justice McHugh continued:

The general one-year statute of limitations found in W.Va. Code, 55-2-12(c) [1959] "accrues" when any person "violates" or is "in violation" of "any provisions of [the Hazardous Waste Management Act found in W.Va. Code, 22-18-1 et seq.] or any permit, rule or order issued pursuant to [the Act]." W.Va. Code, 22-18-17(a)(1), 17(b) and 17(c) [1994]. Hazardous wastes which remain in the environment in amounts above the regulatory limits set pursuant to the Hazardous Waste Management Act constitute a continuing violation of the Act. [[458]](#footnote-459)458

**[\*83]**

Justice McHugh ruled next that

W.Va. Code, 55-2-12(c) [1959], which clearly and unambiguously states that "every personal action for which no limitation is otherwise prescribed shall be brought . . . within one year next after the right to bring the same shall have accrued if it be for any other matter of such nature that, in case a party die, it could not have been brought at common law by or against his personal representative[,]" applies to civil actions brought under the Water Pollution Control Act found in W.Va. Code, 22-11-1 et seq. [[459]](#footnote-460)459

In Smith, Justice McHugh went on to hold:

The general one-year statute of limitations found in W.Va. Code, 55-2-12(c) [1959] "accrues" when any person "violates any provision of [the Water Pollution Control Act, found in W.Va. Code, 22-11-1 et seq.] or of any rule or who violates any standard or order promulgated or made and entered under the provisions of [the Act]" or when a "violation occurred or is occurring" under the Act. W.Va. Code, 22-11-22 [1994]. Thus, any "sewage, industrial wastes or other wastes, or the effluent therefrom, produced by or emanating from any point source [and currently] flowing into the waters of this state[,]" W.Va. Code, 22-11-8(b)(1) [1994], in violation of any provision of the Water Pollution Control Act constitutes a continuing violation of the Act. [[460]](#footnote-461)460

Justice McHugh concluded in Smith that

when a public nuisance action is brought in order to remediate a business site containing hazardous waste found in the soil and flowing into the waters of this State, the one-year statute of limitations found in W.Va. Code, 55-2-12(c) [1959] does not accrue until the harm or endangerment to the public health, safety and the environment is abated. [[461]](#footnote-462)461

J. Selection of Jury

In West Virginia Department of Highways v. Fisher, [[462]](#footnote-463)462 Justice McHugh held: **[\*84]**

Where a physician-patient relationship exists between a party to litigation and a prospective juror, although such prospective juror is not disqualified per se, special care should be taken by the trial judge to ascertain, pursuant to W.Va. Code, 56-6-12 [1931], that such prospective juror is free from bias or prejudice. [[463]](#footnote-464)463

Justice McHugh held in Barker v. Benefit Trust Life Insurance Co. [[464]](#footnote-465)464 that

where a trial by jury has been secured by a party to litigation under W.Va.R.Civ.P. 38 or 39(b), a party to such litigation has a right to an impartial and unbiased jury; and, in order to insure that right, the party is entitled, in the absence of a waiver upon the record, to meaningful voir dire examination and peremptory challenges of the prospective jurors. [[465]](#footnote-466)465

K. Class Action

In addressing the issue of a spurious class action, Justice McHugh ruled in Burks v. Wymer [[466]](#footnote-467)466 that

the following factors should be considered by a trial judge in deciding whether a "spurious" class action may be maintained under W.Va.R.Civ.P. 23(a)(3):

(1) whether common questions of law or fact predominate over any questions affecting only individual members;

(2) whether other means of adjudicating the claims and defenses are practicable or inefficient;

(3) whether a class action offers the most appropriate means of adjudicating the claims and defenses;

(4) whether members not representative parties have a substantial interest in individually controlling the prosecution or defense of separate actions;

(5) whether the class action involves a claim that is or has been the subject of a class action, a **[\*85]** government action, or other proceeding;

(6) whether it is desirable to bring the class action in another forum;

(7) whether management of the class action poses unusual difficulties;

(8) whether any conflict of laws issues involved pose unusual difficulties; and

(9) whether the claims of individual class members are insufficient in the amounts or interests involved, in view of the complexities of the issues and the expenses of the litigation, to afford significant relief to the members of the class. [[467]](#footnote-468)467

L. Separate Trials

In State ex rel. Appalachian Power Co. v. Ranson, [[468]](#footnote-469)468 Justice McHugh outlined factors courts should consider in determining whether to consolidate separate claims for a unitary trial. The court held:

The trial court, when exercising its discretion in deciding consolidation issues under W.Va.R.Civ.P. 42(a), should consider the following factors: (1) whether the risks of prejudice and possible confusion outweigh the considerations of judicial dispatch and economy; (2) what the burden would be on the parties, witnesses, and available judicial resources posed by multiple lawsuits; (3) the length of time required to conclude multiple lawsuits as compared to the time required to conclude a single lawsuit; and (4) the relative expense to all concerned of the singletrial, multiple-trial alternatives. When the trial court concludes in the exercise of its discretion whether to grant or deny consolidation, it should set forth in its order granting or denying consolidation sufficient grounds to establish for review why consolidation would or would not promote judicial economy and convenience of the parties, and avoid prejudice and confusion. [[469]](#footnote-470)469

In the case of Anderson v. McDonald, [[470]](#footnote-471)470 Justice McHugh held that "in a negligence action, the granting of a separate trial upon the issue of the validity of a **[\*86]** release of liability rests within the discretion of the trial judge." [[471]](#footnote-472)471

M. Involuntary Dismissal

The effects of an involuntary dismissal of an action were addressed by Justice McHugh in Perlick & Co. v. Lakeview Creditor's Trustee Committee. [[472]](#footnote-473)472 The opinion stated that "when an action is dismissed pursuant to W.Va.R.Civ.P. 41(b), and that action is not reinstated within three terms after the entry of the order of dismissal, that dismissal, unless the court otherwise specified, operates as an adjudication upon the merits." [[473]](#footnote-474)473

N. Jury Instructions

In Jenrett v. Smith, [[474]](#footnote-475)474 Justice McHugh held that "an instruction is proper if it is a correct statement of the law and if there is sufficient evidence offered at trial to support it." [[475]](#footnote-476)475

Justice McHugh held in Brammer v. Taylor [[476]](#footnote-477)476 that "where [in a trial by jury] there is competent evidence tending to support a pertinent theory in the case, it is the duty of the trial court to give an instruction presenting such theory when requested to do so." [[477]](#footnote-478)477

In McGlone v. Superior Trucking Co., [[478]](#footnote-479)478 Justice McHugh overturned precedent that did not permit a "missing witness" jury instruction. The court held that

the unjustified failure of a party in a civil case to call an available material witness may, if the trier of the facts so finds, give rise to an inference that the testimony of the "missing" witness would, if he or she had been called, have been adverse to the party failing to call such witness. To the extent that syllabus point 1 of Vandervort v. Fouse, 52 W.Va. 214, 43 S.E. 112 (1902), syllabus point 5 of Garber v. Blatchley, 51 W.Va. 147, 41 S.E. 222 (1902), and syllabus point 3 of Union Trust Co. v. McClellan, 40 W.Va. 405, 21 S.E. 1025 (1895), are inconsistent **[\*87]** with this opinion, they are hereby overruled. [[479]](#footnote-480)479

The case of Valentine v. Wheeling Electric Co. [[480]](#footnote-481)480 called upon Justice McHugh to determine whether a jury instruction on public nuisance was appropriate. Justice McHugh held that

obstructions within the meaning of W.Va. Code, 1716-1, as amended, include utility poles erected on a public road in such a way that they interfere with the use of or prevent the easy, safe and convenient use of such public road for public travel. Utility poles erected in such a way are public nuisances within the contemplation of W.Va. Code, 17-16-1, as amended. Therefore, it is not error for a trial court to give an instruction stating that to be a public nuisance, a utility pole must be erected in such a way that it prevents the easy, safe and convenient use of a public road for public travel. [[481]](#footnote-482)481

O. Judgment Notwithstanding the Verdict

Justice McHugh said in McClung v. Marion County Commission [[482]](#footnote-483)482 that "in a case where the evidence is such that the jury could have properly found for either party upon the factual issues, a motion for judgment notwithstanding the verdict should not be granted." [[483]](#footnote-484)483 The court also held:

Where the trial court granted the motion for judgment notwithstanding the verdict, but failed to rule on the motion for a new trial, and the appellate court reverses the entry of the judgment notwithstanding the verdict, the appellate court has three dispositional alternatives. The appellate court may (1) reinstate the jury's verdict and enter judgment thereon; or (2) order a new trial; or (3) remand the case to the trial court for consideration of the motion for a new trial. [[484]](#footnote-485)484

P. New Trial

The issue of granting a new trial based upon juror disqualification or misconduct was taken up by Justice McHugh in McGlone v. Superior Trucking **[\*88]** Co. [[485]](#footnote-486)485 The opinion held:

Where a new trial is requested on account of alleged disqualification or misconduct of a juror, it must appear that the party requesting the new trial called the attention of the court to the disqualification or misconduct as soon as it was first discovered or as soon thereafter as the course of the proceedings would permit; and if the party fails to do so, he or she will be held to have waived all objections to such juror disqualification or misconduct, unless it is a matter which could not have been remedied by calling attention to it at the time it was first discovered. [[486]](#footnote-487)486

Justice McHugh held in the case of In re State Public Building Asbestos Litigation [[487]](#footnote-488)487 that

a motion for a new trial is governed by a different standard than a motion for a directed verdict. When a trial judge vacates a jury verdict and awards a new trial pursuant to Rule 59 of the West Virginia Rules of Civil Procedure, the trial judge has the authority to weigh the evidence and consider the credibility of the witnesses. If the trial judge finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, the trial judge may set aside the verdict, even if supported by substantial evidence, and grant a new trial. A trial judge's decision to award a new trial is not subject to appellate review unless the trial judge abuses his or her discretion. [[488]](#footnote-489)488

Justice McHugh was asked in Maynard v. Adkins [[489]](#footnote-490)489 to determine whether the trial court was correct in awarding a new trial on the basis of an alleged conflict of interest by counsel for plaintiff. The court held:

Where an attorney, as co-counsel, represented a plaintiff in a personal injury action and, in an unrelated matter, represented the personal representative of an estate of which the defendant was a beneficiary, the trial court abused its discretion in granting a new trial for the defendant upon those circumstances, where (1) the defendant attended neither the trial nor any pretrial proceedings **[\*89]** with regard to the personal injury action and (2) the record revealed no discussions or meetings between the attorney and the defendant with regard to either the personal injury action or the estate matter. [[490]](#footnote-491)490

Q. Relief from Final Judgment

Justice McHugh carved out the contours of relief from a final judgment in the case of N.C. v. W.R.C. [[491]](#footnote-492)491 He initially held that "in addition to a motion for relief from a final judgment, order or proceeding pursuant to the reasons set forth in W.Va.R.Civ.P. 60(b)(1) through (5), the rule specifically provides that a party may obtain relief from a final judgment, order or proceeding through an independent action." [[492]](#footnote-493)492

Justice McHugh next held that "the definition of an independent action, as contemplated by W.Va.R.Civ.P. 60(b), is an equitable action that does not relitigate the issues of the final judgment, order or proceeding from which relief is sought and is one that is limited to special circumstances." [[493]](#footnote-494)493

Justice McHugh concluded:

In order to obtain relief from a final judgment, order or proceeding through an independent action, the independent action must contain the following elements: (1) the final judgment, order or proceeding from which relief is sought must be one that, in equity and good conscience, should not be enforced; (2) the party seeking relief should have a good defense to the cause of action upon which the final judgment, order or proceeding is based; (3) there must have been fraud, accident or mistake that prevented the party seeking relief from obtaining the benefit of his defense; (4) there must be absence of fault or negligence on the part of the party seeking relief; and (5) there must be no adequate legal remedy. [[494]](#footnote-495)494

Justice McHugh indicated in Cruciotti v. McNeel [[495]](#footnote-496)495 that "Rule 60(b) of the West Virginia Rules of Civil Procedure should be liberally construed to accomplish justice." [[496]](#footnote-497)496

Justice McHugh outlined the procedural methods for challenging a final **[\*90]** order in State ex rel. McDowell County Sheriff's Department v. Stephens. [[497]](#footnote-498)497 He wrote:

A party whose case is dismissed under Rule 37 of the West Virginia Rules of Civil Procedure may appeal the dismissal order, pursuant to W.Va. Code, 58-5-4 [1990] and West Virginia Rules of Appellate Procedure 3. In lieu of an appeal, the party may file a motion to alter or amend the judgment no later than ten days after the judgment is entered, pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure. If such motion is not timely filed, a party, under appropriate circumstances, may seek relief from a final judgment, order or proceeding for the reasons set forth in Rule 60(b) of the West Virginia Rules of Civil Procedure. [[498]](#footnote-499)498

Justice McHugh wrote in Nancy Darlene M. v. James Lee M. [[499]](#footnote-500)499 that

Rule 60(b)(5) of the West Virginia Rules of Civil Procedure, which permits relief from a judgment where "it is no longer equitable that the judgment should have prospective application," is ordinarily limited to instances where the controlling circumstances of the action have changed subsequent to the entry of the judgment and is not to be invoked as a substitute for an appeal; in considering a motion for relief under Rule 60(b)(5), a circuit court should proceed with caution. [[500]](#footnote-501)500

R. Motion in Limine

Justice McHugh stated in Daniel v. Stevens [[501]](#footnote-502)501 that "notice of a written motion in limine presented during a hearing or trial need not be served in accordance with Rule 6(d) of the West Virginia Rules of Civil Procedure." [[502]](#footnote-503)502

S. Discovery Sanctions

Justice McHugh was called upon to outline the contours of imposing a sanction for violating a trial court's discovery order in Bell v. Inland Mutual **[\*91]** Insurance Co. [[503]](#footnote-504)503 The opinion noted initially:

Where a party's counsel intentionally or with gross negligence fails to obey an order of a circuit court to provide or permit discovery, the full range of sanctions under W.Va.R.Civ.P. 37(b) is available to the court and the party represented by that counsel must bear the consequences of counsel's actions. [[504]](#footnote-505)504

Justice McHugh then held:

Although the party seeking sanctions under W.Va.R.Civ.P. 37(b) has the burden of establishing noncompliance with the circuit court's order to provide or permit discovery, once established, the burden is upon the disobedient party to avoid the sanctions sought under W.Va.R.Civ.P. 37(b) by showing that the inability to comply or special circumstances render the particular sanctions unjust. [[505]](#footnote-506)505

Justice McHugh concluded in Bell that

the striking of pleadings and the rendering of judgment by default against a party as sanctions under W.Va.R.Civ.P. 37(b) for that party's failure to obey an order of a circuit court to provide or permit discovery may be imposed by the court where it has been established through an evidentiary hearing and in light of the full record before the court that the failure to comply has been due to willfulness, bad faith or fault of the disobedient party and not the inability to comply and, further, that such sanctions are otherwise just. [[506]](#footnote-507)506

Justice McHugh addressed the issue of being held in contempt of court as a sanction for violating a discovery order in the case of Vincent v. Preiser. [[507]](#footnote-508)507 The court stated that

a movant for a protective order under W.Va.R.Civ.P. 26(c)(4) may be held in contempt of court, under W.Va.R.Civ.P. 37(b)(2)(D), for failure to comply with court orders compelling discovery, where a fair reading of the orders compelling discovery as well as the circumstances, including repeated oral rulings of the **[\*92]** court, indicate that the Rule 26(c)(4) motion(s) have been denied. The Rule 26(c)(4) movant in such a case, by filing such motion(s), does not, in effect, grant himself a protective order until the court formally denies the motion(s) for protective order. [[508]](#footnote-509)508

T. Depositing Money with Court

Justice McHugh stated in Arcuri v. Great American Insurance Co. [[509]](#footnote-510)509 that

W.Va.R.Civ.P. 67 contemplates that a deposit or payment into court be with leave of court and that the money ordered deposited be subject to the exclusive control of the court. The party making the deposit must surrender all control over the money to the court, not to other persons claiming an interest in the money. [[510]](#footnote-511)510

U. Forum Non Conveniens

Justice McHugh indicated in Gardner v. Norfolk & Western Railroad Co. [[511]](#footnote-512)511 that

the common-law principle of forum non conveniens and the similar state statute on removal of civil proceedings, W.Va. Code, 56-9-1 [1939], are not applicable to actions brought in the courts of this State under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, as amended, in light of the strong policy favoring the plaintiffs' choice of forum in such cases and in light of the strong policy of W.Va. Const. art. III, § . 17 providing access to the courts of this State. [[512]](#footnote-513)512

In Abbott v. Owens-Corning Fiberglas Corp. [[513]](#footnote-514)513 Justice McHugh elaborated on the doctrine of forum non conveniens. Justice McHugh wrote:

The framework to analyze whether the common law doctrine of forum non conveniens is applicable has been set forth in Norfolk and Western Ry. Co. v. Tsapis, 184 W.Va. 231, 400 S.E.2d 239 (1990). This framework ensures that the doctrine of forum non conveniens is applied flexibly and on a case-by-case basis. A **[\*93]** presumption that the forum is convenient when a defendant is a resident of that forum would undercut the flexibility of the doctrine. [[514]](#footnote-515)514

V. Venue

Justice McHugh addressed the issue of venue in the context of a legal malpractice action in the case of McGuire v. Fitzsimmons. [[515]](#footnote-516)515 The court held that

under W.Va. Code, 56-1-1(a)(1) [1986] when determining venue in a legal malpractice case, a circuit court can find venue proper based on where either the defendants reside or the cause of action for the legal malpractice suit arose. The circuit court may find venue to be proper in more than one county. Venue based on where the cause of action for the legal malpractice suit arose is proper in the following counties: (1) where the attorney's employment was contracted, that is, where the duty came into existence; or (2) where the breach or violation of the duty occurred; or (3) where the manifestation of the breach--substantial damage--occurred. [[516]](#footnote-517)516

W. Res Judicata

In Sattler v. Bailey, [[517]](#footnote-518)517 Justice McHugh addressed the application of res judicata to a state cause of action dismissed in federal court. He held that

when the federal claim in a federal action is dismissed by the federal court prior to trial, and, therefore, it is clear that the federal court would have declined to exercise jurisdiction of a related state claim which could have been raised in the federal action pursuant to the "pendent" jurisdiction of the federal court, a subsequent action in a state court on the state claim which would have been dismissed, without prejudice, in the prior federal action is not barred by the doctrine of res judicata. [[518]](#footnote-519)518

X. Attorney Conflict of Interest

Justice McHugh addressed the issue of appearance of conflict of interest **[\*94]** by an attorney in the case of Garlow v. Zakaib. [[519]](#footnote-520)519 The court held that

a circuit court, upon motion of a party, by its inherent power to do what is reasonably necessary for the administration of justice, may disqualify a lawyer from a case because the lawyer's representation in the case presents a conflict of interest where the conflict is such as clearly to call in question the fair or efficient administration of justice. Such motion should be viewed with extreme caution because of the interference with the lawyer-client relationship. [[520]](#footnote-521)520

Justice McHugh also stated in Garlow that

before a circuit court disqualifies a lawyer in a case because the lawyer's representation may conflict with the Rules of Professional Conduct, a record must be made so that the circuit court may determine whether disqualification is proper. Furthermore, this Court will not review a circuit court's order disqualifying a lawyer unless the circuit court's order is based upon an adequately developed record. In the alternative, if the circuit court's order disqualifying a lawyer is based upon an inadequately developed record, this Court, under appropriate circumstances, may remand a case to the circuit court for development of an adequate record. [[521]](#footnote-522)521

Y. Guardian Ad Litem for Incarcerated Party

Justice McHugh addressed the role of trial courts when a guardian ad litem fails to appear in an action on behalf of an incarcerated party in the case of Jackson General Hospital v. Davis. [[522]](#footnote-523)522 Justice McHugh held:

Where a guardian ad litem who has been appointed, pursuant to W.Va.R.Civ.P. 17(c), to defend an incarcerated convict in a civil action, and who has been properly served with process concerning the action, fails to appear, plead or otherwise defend, the circuit court, prior to entry of a default judgment, has a duty, under W.Va.R.Civ.P. 55(b), to make an investigation or conduct a hearing upon the record concerning the guardian ad litem's representation of the incarcerated convict and, in addition, may order that the guardian ad litem be served with written notice of **[\*95]** the application for default judgment, as if the guardian ad litem had appeared in the action. [[523]](#footnote-524)523

Z. Guardian Ad Litem for Incompetent Party

Justice McHugh was concerned with appointment of a guardian ad litem for an incompetent person in the case of State ex rel. McMahon v. Hamilton. [[524]](#footnote-525)524 Justice McHugh noted as a general matter that

under W.Va.R.Civ.P. 17(c), whenever an infant, incompetent person, or convict has a duly qualified representative, such as a guardian, curator, committee or other like fiduciary, such representative may sue or defend on behalf of the infant, incompetent person, or convict. If a person under any disability does not have a duly qualified representative he may sue by his next friend. The court shall appoint a discreet and competent attorney at law as guardian ad litem for an infant, incompetent person, or convict not otherwise represented in an action, or the court shall make such other order as it deems proper for the protection of any person under disability. [[525]](#footnote-526)525

The court next held that

where a substantial question exists regarding the mental competency of a party not otherwise represented to proceed with the litigation presently before the court, the court may, where there is good cause shown, require the party to undergo a mental examination in order to determine whether a guardian ad litem should be appointed to protect the party's interests pursuant to West Virginia Rule of Civil Procedure 17(c). [[526]](#footnote-527)526

Justice McHugh concluded:

When a court orders a party to undergo a mental examination by a psychiatrist to determine whether a guardian ad litem should be appointed to protect the party's interests under West Virginia Rule of Civil Procedure 17(c), the court shall receive a copy of the appointed psychiatrist's report of such examination. Pursuant to W.Va. Code, 27-3-1(b)(3) [1977], the court may release such report only if it finds that it is sufficiently relevant to a proceeding **[\*96]** before the court to outweigh the importance of maintaining the confidentiality established by W.Va. Code, 27-3-1(a) [1977]. [[527]](#footnote-528)527

VI. DOMESTIC RELATIONS

A. Civil Child Abuse and Neglect

The case of In Interest of S.C. [[528]](#footnote-529)528 required Justice McHugh to examine issues regarding the burden of proof in civil child abuse and neglect proceedings. Justice McHugh held that

W.Va. Code, 49-6-2(c) [1980], requires the State Department of Welfare, in a child abuse or neglect case, to prove "conditions existing at the time of the filing of the petition . . . by clear and convincing proof." The statute, however, does not specify any particular manner or mode of testimony or evidence by which the State Department of Welfare is obligated to meet this burden. [[529]](#footnote-530)529

Justice McHugh concluded in In Interest of S.C. that "even when an improvement period is granted, the burden of proof in a child neglect or abuse case does not shift from the State Department of Welfare to the parent, guardian or custodian of the child. It remains upon the State Department of Welfare throughout the proceedings." [[530]](#footnote-531)530

Justice McHugh addressed terminating parental rights due to neglect or abuse in Interest of Darla B. [[531]](#footnote-532)531 The court held initially that

the decision of a circuit court terminating the rights of parents to their child pursuant to W.Va. Code, 496-5 [1977], will not be reversed by this Court for failure to grant the parents an improvement period, where the evidence supports a finding that the child, 38 days old, suffered from life-threatening injuries in the form of broken bones and bruises, which could not have occurred in the manner testified to by the parents, and the circuit court found "compelling circumstances" for the termination of parental rights. [[532]](#footnote-533)532

Justice McHugh concluded in Darla B. that **[\*97]**

the granting of an improvement period, pursuant to W.Va. Code, 49-6-2(b) [1980] and W.Va. Code, 49-65(c) [1977], unless otherwise provided by the laws of this State, is not an alternative disposition where a finding is made pursuant to W.Va. Code, 49-6-5(a)(6) [1977] that there is "no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future," and, pursuant to W.Va. Code, 49-6-2(b) [1980], "compelling circumstances" justify a denial thereof. [[533]](#footnote-534)533

Justice McHugh outlined the responsibilities of guardian ad litems to children in abuse and neglect proceedings in the case of In re Jeffrey R.L. [[534]](#footnote-535)534 The decision stated:

Each child in an abuse and neglect case is entitled to effective representation of counsel. To further that goal, W.Va. Code, 49-6-2(a) [1992] mandates that a child has a right to be represented by counsel in every stage of abuse and neglect proceedings. Furthermore, Rule XIII of the West Virginia Rules for Trial Courts of Record provides that a guardian ad litem shall make a full and independent investigation of the facts involved in the proceeding, and shall make his or her recommendations known to the court. Rules 1.1 and 1.3 of the West Virginia Rules of Professional Conduct, respectively, require an attorney to provide competent representation to a client, and to act with reasonable diligence and promptness in representing a client. The Guidelines for Guardians Ad Litem in Abuse and Neglect cases, which are adopted in this opinion and attached as Appendix A, are in harmony with the applicable provisions of the West Virginia Code, the West Virginia Rules for Trial Courts of Record, and the West Virginia Rules of Professional Conduct, and provide attorneys who serve as guardians ad litem with direction as to their duties in representing the best interests of the children for whom they are appointed. [[535]](#footnote-536)535

Justice McHugh was called upon in State ex rel. S.C. v. Chafin [[536]](#footnote-537)536 to further delineate the duties of officials when a child is brought into custody pursuant to the abuse and neglect statutes. The court held:

W.Va. Code, 49-6-3(b) [1992] provides that, whether or not the court orders immediate transfer of custody as provided in W.Va. **[\*98]** Code, 49-6-3(a) [1992], if the court finds that there exists imminent danger to the child, the court may schedule a preliminary hearing. If at the preliminary hearing the court finds there to be no alternative less drastic than removal of the child from his or her home, the court may order that the child be delivered into the temporary custody of the Department of Health and Human Resources or some other designated person for a period not exceeding sixty days. Furthermore, if, pursuant to W.Va. Code, 49-6-2 [1992], the court finds the child to be abused or neglected, then both the Department of Health and Human Resources and the court, no later than sixty days after the child is placed in the temporary custody of the Department of Health and Human Resources, are to proceed with the disposition of the child, in compliance with W.Va. Code, 49-6-5 [1992]. W.Va. Code, 49-6-5(a) [1992] requires the Department of Health and Human Resources to file with the court a copy of the child's case plan, including the permanency plan for the child. W.Va. Code, 49-6-5(a) [1992] defines a case plan as a written document which includes, where applicable, the requirements of a family case plan, as set forth in W.Va. Code, 49-6D3 [1984], as well as the additional requirements set forth in W.Va. Code, 49-6-5(a) [1992]. Furthermore, W.Va. Code, 49-6-5(a) [1992] requires the court to proceed to disposition, one of those being, if the court finds the abusing parent(s) unwilling or unable to provide adequately for the child's needs, the court may commit the child temporarily to the custody of the Department of Health and Human Resources. [[537]](#footnote-538)537

In Chafin, Justice McHugh also held that

W.Va. Code, 49-6-8(a) [1992] provides that if, twelve months after receiving physical custody of a child, the Department of Health and Human Resources has not placed the child in permanent foster care, in an adoptive home or with a natural parent, the Department of Health and Human Resources shall file with the circuit court a petition for review of the case as well as a report detailing the efforts which have been made to place the child in a permanent home and copies of the child's case plan including the permanency plan. W.Va. Code, 49-6-8(a) [1992] further requires the circuit court to schedule a hearing to review the child's case, to determine whether and under what conditions the child's commitment to the Department of Health and Human Resources shall continue, and to determine what efforts are necessary to provide the child with a permanent home. At the conclusion of the hearing the circuit court shall enter an **[\*99]** appropriate order of disposition, in accordance with the best interests of the child. Under W.Va. Code, 49-6-8(a) [1992], the court shall retain continuing jurisdiction over cases reviewed under this section for so long as a child remains in temporary foster care. [[538]](#footnote-539)538

Justice McHugh continued in Chafin by holding that

the purpose of the child's case plan is the same as the family case plan, except that the focus of the child's case plan is on the child rather than the family unit. The child's case plan is to include, where applicable, the requirements of a family case plan, as set forth in W.Va. Code, 49-6-5(a) [1992] and 49-6D-3(a) [1984], as well as the additional requirements articulated in W.Va. Code, 49-6-5(a). [[539]](#footnote-540)539

Justice McHugh further stated:

W.Va. Code, 49-6-8(d) [1992] requires the Department of Health and Human Resources to file a report with the circuit court in any case where any child in the temporary or permanent custody of the Department of Health and Human Resources receives more than three placements in one year no later than thirty days after the third placement. [[540]](#footnote-541)540

Justice McHugh wrote in Matter of Taylor B. [[541]](#footnote-542)541 that

a civil child abuse and neglect petition instituted by the West Virginia Department of Health and Human Resources pursuant to [W.Va.] Code, 49-6-1 et seq., is not subject to dismissal pursuant to the terms of a plea bargain between a county prosecutor and a criminal defendant in a related child abuse prosecution. [[542]](#footnote-543)542

B. Child Support

Justice McHugh held in Hopkins v. Yarbrough [[543]](#footnote-544)543 that **[\*100]**

in the absence of fraud or other judicially cognizable and harmful circumstance in the procurement of a decree for child support, a circuit court is without authority to modify or cancel arrearages of a former husband's child support payments, which payments accrued prior to the date of the adoption of such children by the wife's subsequent husband. [[544]](#footnote-545)544

Justice McHugh confronted the issue of maintaining an action for child support when child support is not addressed in a divorce decree in the case of Hartley v. Ungvari. [[545]](#footnote-546)545 Justice McHugh said in Hartley that

under the provisions of W.Va. Code, 48-2-15 [1980], where a divorce is granted upon constructive service of process and the divorce order grants custody of a child but makes no further provision for the support of that child, the custodial parent may maintain an action against the noncustodial parent, upon obtaining personal jurisdiction thereof, for reimbursement of reasonable past support expenditures furnished to the child by the custodial parent since the divorce unless, because of circumstances, the custodial parent is estopped from asserting the action. [[546]](#footnote-547)546

In Lambert v. Miller, [[547]](#footnote-548)547 Justice McHugh stated that "a child support order may be modified only upon a substantial change of circumstances which was uncontemplated by either of the parties at the time the order was entered and upon a showing that the benefit of the child requires such modification." [[548]](#footnote-549)548

Justice McHugh also held:

Remarriage of a divorced parent, standing alone, is not sufficient to justify modification of a child support order. It is, however, a circumstance that may be considered in weighing the equities of the situation, where other factors are present which may warrant the trial court, in its sound discretion, to modify the order. [[549]](#footnote-550)549

Justice McHugh stated in Holley v. Holley [[550]](#footnote-551)550 that

when a family law master or a circuit court enters an order **[\*101]** awarding or modifying child support, the amount of the child support shall be in accordance with the established state guidelines, set forth in 6 W.Va. Code of State Rules §§ 78-16-1 to 78-16-20 (1988), unless the master or the court sets forth, in writing, specific reasons for not following the guidelines in the particular case involved. [[551]](#footnote-552)551

Justice McHugh held in Scott v. Wagoner [[552]](#footnote-553)552 that

in a case involving child support, if compelling equitable considerations are present, under the provisions of W.Va. Code, 48-2-15(e), as amended, a court has the authority to enforce the child support obligation as a lien against the deceased obligor's estate. To the extent that Robinson v. Robinson, 131 W.Va. 160, 50 S.E.2d 455 (1948), is inconsistent herewith, it is overruled. [[553]](#footnote-554)553

Justice McHugh stated in Soriano v. Soriano [[554]](#footnote-555)554 that

in a case where the dependency exemption is allocated, that is, where a trial court requires the custodial parent to execute the necessary waiver pursuant to 26 U.S.C. § 152(e)(2)(A), as amended, the trial court should set forth its reasons for doing so in the order awarding child support. These reasons should clearly demonstrate that it is more equitable to allocate the dependency exemption to the noncustodial parent than it would be to allow the custodial parent to claim the dependency exemption. [[555]](#footnote-556)555

Justice McHugh discussed the form which payments to third parties may take in a divorce action in the case of Sly v. Sly. [[556]](#footnote-557)556 Justice McHugh stated initially:

W.Va. Code, 48-2-15(b)(4) [1991] provides that if the circuit court, upon ordering a divorce, requires payments to third parties in the form of home loan installments, land contract payments, rent, payments for utility services, property taxes, insurance coverage, or other expenses reasonably necessary for the use and occupancy of the marital domicile, those payments shall be deemed to be alimony, child support or installment payments for **[\*102]** the distribution of marital property in such proportion as the circuit court may direct. W.Va. Code, 48-2-15(b)(4) [1991] further provides that if the circuit court does not set forth in the order that a portion of such payments are deemed to be child support or installment payments for the distribution of marital property, then all such payments shall be deemed to be alimony. [[557]](#footnote-558)557

The court concluded in Sly that

where the circuit court, though not specifically using the term "child support," sets up a house payment provision in the final divorce decree to serve as child support for the minor child or children of the divorcing parties, such a provision shall be deemed to be child support under W.Va. Code, 48-2-15(b)(4) [1991]. [[558]](#footnote-559)558

Justice McHugh observed in Robinson v. McKinney [[559]](#footnote-560)559 that "the ten-year statute of limitations set forth in W.Va. Code, 38-3-18 [1923] and not the doctrine of laches applies when enforcing a decretal judgment which orders the payment of monthly sums for alimony or child support." [[560]](#footnote-561)560 Justice McHugh held next in Robinson that "in order to ensure that the best interests of the child are considered, ordinarily an agreement to modify or terminate a child support obligation is effective only upon entry of a court order, authorized by W.Va. Code, 48-2-15(3) [1991], which modifies or terminates the child support obligation." [[561]](#footnote-562)561

In Costello v. McDonald [[562]](#footnote-563)562 Justice McHugh wrote:

It is presumed that when the obligor fails to make his or her child support payments as ordered, the obligee assumed that additional burden in such a manner so as to protect the welfare of the child, and, therefore, in the event the obligee dies, his or her estate is entitled to recoup from the obligated party the child support arrearage which accrued prior to the death of the obligee. This presumption may be rebutted if the court makes written findings on the record that there is clear, cogent, and convincing evidence that the welfare of the child for whom the child support payments were ordered, was adversely affected or would be adversely affected if the child support arrearage is given to the obligee's estate. Whether the presumption has been rebutted is within the **[\*103]** sound discretion of the court and will have to be determined on a case-by-case basis. If the presumption is rebutted, then the court must determine the amount of child support arrearage which should be given to the child in order to ensure that the child has suitable shelter, food, clothing, medical attention, education, and maintenance in the station of life he or she is accustomed to living. If, however, the child becomes emancipated or reaches the age of majority, then the court must determine the amount of child support arrearage which should be awarded in order to ensure that the emancipated child or the child who has attained the age of majority is put in the same position as he or she would have been had the child support been timely paid. Furthermore, if a minor child is involved, then the court must outline a procedure whereby it is ensured that the minor child receives the benefits of the child support arrearage. [[563]](#footnote-564)563

Justice McHugh held in Carter v. Carter: [[564]](#footnote-565)564

Even though a custodial parent has interfered with or discouraged visitation between a noncustodial parent and the parties' children, a trial court may not reduce the amount of child support arrearages owed by the noncustodial parent in order to punish the custodial parent for such interference or discouragement of visitation. [[565]](#footnote-566)565

C. Child Custody

Justice McHugh stated in Phillips v. Phillips [[566]](#footnote-567)566 that

upon a petition seeking a change in the custody arrangement of a child from joint custody to sole custody, the primary criterion considered by a circuit court or family law master should be the best interests of the child and the mutual ability of the parties in reaching shared decisions with respect to those interests, and not solely whether a change in circumstances has occurred. [[567]](#footnote-568)567

Justice McHugh held in Sams v. Boston [[568]](#footnote-569)568 that **[\*104]**

a state remains the "home state" of the children, for purposes of the Uniform Child Custody Jurisdiction Act, specifically, W.Va. Code, 48-10-2(5) and 48-103(a)(1) [1981], and for purposes of the Parental Kidnaping Prevention Act, specifically, 28 U.S.C. § 1738A(b)(4) and § 1738A(c)(2)(A) (1982), for a reasonable period of time, where the children have been abducted to and concealed in another state by one of the parents. [[569]](#footnote-570)569

D. Child Visitation

In Ledsome v. Ledsome, [[570]](#footnote-571)570 Justice McHugh held that "a court, in defining a parent's right to visitation, is charged with giving paramount consideration to the welfare of the child involved." [[571]](#footnote-572)571 Ledsome also addressed the relationship of child support payments on a parent's right of child visitation. Justice McHugh held in Ledsome that

the right of a parent, not in custody of his or her child, to visit that child may not ordinarily be made dependent upon the payment of child support by that parent. However, when a court finds that the parent's refusal to make child support payments is contumacious, or willful or intentional, that parent's visitation rights may be reduced or denied, if the welfare of the child so requires. [[572]](#footnote-573)572

Justice McHugh took up the right of grandparents to visit grandchildren in Petition of Nearhoof. [[573]](#footnote-574)573 He said initially that "a trial court, in considering a petition of a grandparent for visitation rights with a grandchild or grandchildren pursuant to W.Va. Code, 48-2-15(b)(1) [1986] or W.Va. Code, 48-2B-1 [1980], shall give paramount consideration to the best interests of the grandchild or grandchildren involved." [[574]](#footnote-575)574 Justice McHugh then stated:

Upon the petition of a grandparent, pursuant to W.Va. Code, 48-2B-1 [1980], seeking visitation rights with a grandchild or grandchildren, who is the child or are the children of the grandparent's deceased child, a trial court may order that the grandparent shall have reasonable and seasonable visitation rights with the grandchild or grandchildren provided such visitation is in **[\*105]** the best interest of the grandchild or grandchildren involved, even though the grandchild or grandchildren has or have been adopted by the spouse of the deceased child's former spouse. [[575]](#footnote-576)575

Justice McHugh was called upon to confront the impact of allegations of child sexual abuse on child visitation during divorce proceedings in the case of Mary D. v. Watt. [[576]](#footnote-577)576 The court held initially:

Because an allegation of sexual abuse of a child involved in a divorce proceeding is extraordinary, such allegation would constitute "good cause" or grounds for a more expeditious resolution by the circuit court as contemplated by W.Va. Code, 48A-41(i) [1991], and accordingly, custody and visitation matters relating thereto may be retained by the circuit court, or, if already referred to a family law master, such referral may be revoked. [[577]](#footnote-578)577

Justice McHugh then held:

Prior to ordering supervised visitation pursuant to W.Va. Code, 48-2-15(b)(1) [1991], if there is an allegation involving whether one of the parents sexually abused the child involved, a family law master or circuit court must make a finding with respect to whether that parent sexually abused the child. A finding that sexual abuse has occurred must be supported by credible evidence. The family law master or circuit court may condition such supervised visitation upon the offending parent seeking treatment. Prior to ordering supervised visitation, the family law master or circuit court should weigh the risk of harm of such visitation or the deprivation of any visitation to the parent who allegedly committed the sexual abuse against the risk of harm of such visitation to the child. Furthermore, the family law master or circuit court should ascertain that the allegation of sexual abuse under these circumstances is meritorious and if made in the context of the family law proceeding, that such allegation is reported to the appropriate law enforcement agency or prosecutor for the county in which the alleged sexual abuse took place. Finally, if the sexual abuse allegations were previously tried in a criminal case, then the transcript of the criminal case may be utilized to determine whether credible evidence exists to support the allegations. If the transcript is utilized to determine that credible evidence does or does not exist, the transcript must be made a part of the record in the civil proceeding so that this Court, **[\*106]** where appropriate, may adequately review the civil record to conclude whether the lower court abused its discretion. [[578]](#footnote-579)578

Justice McHugh concluded in Mary D. that

where supervised visitation is ordered pursuant to W.Va. Code, 48-2-15(b)(1) [1991], the best interests of a child include determining that the child is safe from the fear of emotional and psychological trauma which he or she may experience. The person(s) appointed to supervise the visitation should have had some prior contact with the child so that the child is sufficiently familiar with and trusting of that person in order for the child to have secure feelings and so that the visitation is not harmful to his or her emotional well being. Such a determination should be incorporated as a finding of the family law master or circuit court. [[579]](#footnote-580)579

E. Paternity

In State ex rel. J.L.K. v. R.A.I. [[580]](#footnote-581)580 Justice McHugh held:

A woman, who conceived a child while she was married, but gave birth to the child while she was unmarried, may not obtain a warrant, pursuant to W.Va. Code, 48-7-1 [1969], accusing a person other than her former husband of being the father of the child if she has not lived separate and apart from her former husband for a space of one year or more prior to the birth of the child. [[581]](#footnote-582)581

Justice McHugh indicated in State ex rel. Division of Human Services v. Benjamin P.B. [[582]](#footnote-583)582 that

the dismissal with prejudice of a paternity action initiated by a mother against a putative father of a child does not preclude the child, under the principle of res judicata, from bringing a second action to determine paternity when the evidence does not show privity between the mother and the child in the original action nor does the evidence indicate that the child was either a party to the original action or represented by counsel or guardian ad litem in **[\*107]** that action. [[583]](#footnote-584)583

Justice McHugh indicated in Nancy Darlene M. v. James Lee M., Jr., [[584]](#footnote-585)584 that

an adjudication of paternity, which is expressed in a divorce order, is res judicata as to the husband and wife in any subsequent proceeding. Therefore, the provisions of W.Va. Code, 48A-7-26 [1986], part of the Revised Uniform Reciprocal Enforcement of Support Act, W.Va. Code, 48A-7-1 to 48A-7-41, as amended, which authorizes the adjudication of paternity under certain circumstances is not applicable if an adjudication of paternity is expressed in the divorce order. [[585]](#footnote-586)585

F. Termination of Parental Rights

The issue of termination of parental rights in Nancy Viola R. v. Randolph W. [[586]](#footnote-587)586 turned on the father's conviction for the murder of the child's mother. Justice McHugh held that "a conviction of first degree murder of a child's mother by his father and the father's prolonged incarceration in a penal institution for that conviction are significant factors to be considered in ascertaining the father's fitness and in determining whether the father's parental rights should be terminated." [[587]](#footnote-588)587

Justice McHugh also said that "where parental rights of a father have been terminated because of his conviction of the first degree murder of the child's mother, and other acts of violence to her and threats of violence to the child, permanent guardianship may be given to the West Virginia Department of Human Services." [[588]](#footnote-589)588

Termination of parental rights, due to inaction by a parent to abuse of the child, was addressed by Justice McHugh in Matter of Scottie D. [[589]](#footnote-590)589 Justice McHugh held:

Termination of parental rights of a parent of an abused child is authorized under W.Va. Code, 49-6-1 to 49-6-10, as amended, where such parent contends nonparticipation in the acts giving rise to the termination petition but there is clear and convincing **[\*108]** evidence that such nonparticipating parent knowingly took no action to prevent or stop such acts to protect the child. Furthermore, termination of parental rights of a parent of an abused child is authorized under W.Va. Code, 49-6-1 to 49-6-10, as amended, where such nonparticipating parent supports the other parent's version as to how a child's injuries occurred, but there is clear and convincing evidence that such version is inconsistent with the medical evidence. [[590]](#footnote-591)590

In Scottie D., Justice McHugh also addressed the role of a guardian ad litem in termination proceedings. Justice McHugh stated:

In a proceeding to terminate parental rights pursuant to W.Va. Code, 49-6-1 to 49-6-10, as amended, a guardian ad litem, appointed pursuant to W.Va. Code, 49-6-2(a), as amended, must exercise reasonable diligence in carrying out the responsibility of protecting the rights of the children. This duty includes exercising the appellate rights of the children, if, in the reasonable judgment of the guardian ad litem, an appeal is necessary. [[591]](#footnote-592)591

Justice McHugh indicated in In re Jeffrey R.L. [[592]](#footnote-593)592 that

parental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parents, even in the face of knowledge of the abuse, have taken no action to identify the abuser. [[593]](#footnote-594)593

G. Adoption

The case of West Virginia Department of Human Services v. La Rea Ann C.L. [[594]](#footnote-595)594 involved a teenager who sought to relinquish parental rights to her child. Justice McHugh noted initially that

the effect of W.Va. Code, 49-3-1(a) [1977, 1984] and of the proviso to W.Va. Code, 48-4-la [1965] (now W.Va. Code, **[\*109]** 48-4-5(a) [1984]) is, ordinarily, to make revocable any relinquishment of child custody by a minor parent to a licensed private child welfare agency or to the West Virginia Department of Human Services which has not yet been approved by a court of competent jurisdiction. [[595]](#footnote-596)595

The court then held:

Where the child has spent a substantial period of time in the home of foster parents, pending a ruling by the trial court on whether to approve a minor parent's relinquishment of child custody to a licensed private child welfare agency or to the West Virginia Department of Human Services, extraordinary circumstances exist which demand that the best interests of the child not only be considered but be given primary importance. In such a case the minor parent's right to revoke his or her relinquishment ceases to be absolute, due to the passage of the unreasonable period of time. [[596]](#footnote-597)596

H. Modification of Divorce Decree

Justice McHugh stated in Segal v. Beard [[597]](#footnote-598)597 that "a family law master lacks jurisdiction to hear a petition for modification of an order when the modification proceeding does not involve child custody, child visitation, child support or spousal support." [[598]](#footnote-599)598

The court also held that "a circuit court lacks jurisdiction under W.Va. Code, 48-2-15(e) [1986] to modify a divorce decree when the modification proceeding does not involve alimony, child support or child custody." [[599]](#footnote-600)599 Justice McHugh concluded in Segal that

the ten-day period for filing a petition for review of a family law master's recommended decision, W.Va. Code, 48A-4-7(a) [1986], is tolled until an aggrieved party is served with notice of the filing of the recommended decision. The family law master must serve notice of the filing of the recommended decision. [[600]](#footnote-601)600

**[\*110]**

In Blevins v. Shelton [[601]](#footnote-602)601 Justice McHugh ruled that

a circuit court lacks jurisdiction under W.Va. Code, 48-2-15(e), as amended, to modify a divorce decree by awarding rent, retroactively or prospectively, to a former spouse who is a co-owner of the marital home which is occupied under the divorce decree by the other former spouse and one or more of their minor children, when the rent is sought solely because a new spouse is also residing in the marital home. [[602]](#footnote-603)602

I. Annulment of Marriage

In Harvey v. Harvey [[603]](#footnote-604)603 Justice McHugh addressed the issue of obtaining an annulment due to a bigamous marriage. Justice McHugh held:

Pursuant to W.Va. Code, 48-2-1 [1935], bigamous marriages are "void from the time they are so declared by a decree of nullity." To obtain an annulment of a bigamous marriage, an order or decree must be entered in a court of competent jurisdiction declaring the nullity. Orders merely setting forth the conviction and sentence of a defendant for the felony offense of bigamy under W.Va. Code, 61-8-1 [1931], are not sufficient standing alone to constitute an annulment of a bigamous marriage. [[604]](#footnote-605)604

J. Alimony

Justice McHugh relied upon the decision of F.C. v. I.V.C. [[605]](#footnote-606)605 to address alimony issues in Crutchfield v. Crutchfield. [[606]](#footnote-607)606 Justice McHugh held in Crutchfield that "alimony may be awarded under W. Va. Code, 48-24(a)(7) against a 'faultless' party if 'principles of justice' so require, considering the financial needs of the parties and other factors listed in [W.Va.] Code, 48-2-16." [[607]](#footnote-608)607 The ruling in Crutchfield was inconsistent with a previous decision by the court. Therefore, Justice McHugh went on in Crutchfield to hold that "the Syllabus of Dyer v. Tsapis, 162 W.Va. 289, 249 S.E.2d 509 (1978), is modified in that W.Va. Code, **[\*111]** 48-2-4(a)(7), does not condition an award of alimony upon a finding of fault." [[608]](#footnote-609)608

Two issues involving alimony were addressed by Justice McHugh in Zirkle v. Zirkle. [[609]](#footnote-610)609 The court held initially in the opinion that

absent a court order, augmented black lung benefits received by an ex-spouse pursuant to Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §§ 901 et seq., and 20 C.F.R. §§ 725 et seq., after an alimony award has been ordered by a court, which court did not consider such benefits, may not be deducted from an alimony obligation by the ex-spouse ordered to pay such alimony. [[610]](#footnote-611)610

Justice McHugh next held in Zirkle that

arrearages of alimony, per se, is not a sufficient ground for a court to refuse to consider a petition for modification of alimony unless the court determines that the ex-spouse had the ability to comply with the order awarding alimony and the failure to pay the arrearages was contumacious, or willful or intentional or otherwise in contempt of court. [[611]](#footnote-612)611

Justice McHugh held in Peremba v. Peremba [[612]](#footnote-613)612 that "when alimony is sought under W.Va. Code, 48-2-4(a)(7), the court may consider substantial inequitable conduct on the part of the party seeking alimony as one factor in its decision. Substantial inequitable conduct is conduct which the trier of fact may infer caused the dissolution of the marriage." [[613]](#footnote-614)613

In Sauls v. Howell, [[614]](#footnote-615)614 Justice McHugh held that

matured, unpaid installments provided for in a decree of divorce, which decree ordered a husband to pay to his former wife $ 2,700, "in lieu of alimony"at $ 150 per month, stand as decretal judgments against the husband, and the wife is entitled to institute suggestion proceedings under W.Va. Code, 38-5-10 [1931], to recover upon those judgments, and she need not institute ancillary proceedings to reduce the amount of those judgments to a sum **[\*112]** certain. [[615]](#footnote-616)615

K. Cohabitation and Common Law Marriage

Justice McHugh held in Goode v. Goode [[616]](#footnote-617)616 that "pursuant to the statutory requirements of W.Va. Code, 48-1-5 [1969], every marriage in this state must be solemnized under a license. Therefore, the validity of a common-law marriage is not recognized." [[617]](#footnote-618)617 Justice McHugh also said:

A court may order a division of property acquired by a man and woman who are unmarried cohabitants, but who have considered themselves and held themselves out to be husband and wife. Such order may be based upon principles of contract, either express or implied, or upon a constructive trust. Factors to be considered in ordering such a division of property may include: the purpose, duration, and stability of the relationship and the expectations of the parties. Provided, however, that if either the man or woman is validly married to another person during the period of cohabitation, the property rights of the spouse and support rights of the children of such man or woman shall not in any way be adversely affected by such division of property. [[618]](#footnote-619)618

L. Committee for Incompetent

Justice McHugh noted in Old National Bank of Martinsburg v. Hendricks [[619]](#footnote-620)619 that "W.Va. Code, 27-11-4 [1974] creates a fiduciary relationship between a committee, appointed to manage the estate of an incompetent, and the incompetent, for whom the committee is appointed." [[620]](#footnote-621)620 The court also held:

When the sales price of an incompetent's real estate is increased, beyond that obtained by the committee, to its fair market value, through the efforts of an interested person, then that interested person is entitled to attorney's fees, pursuant to W.Va. Code, 37-1-15 [1959], based upon the efforts to increase the sales price, in an amount which is reasonable and just. In that situation, attorney's fees awardable pursuant to W.Va. Code, 37-1-15 [1959] shall be charged against the compensation of the committee and **[\*113]** not against the estate itself. [[621]](#footnote-622)621

Justice McHugh held in Sowa v. Huffman [[622]](#footnote-623)622 that "the duties of a guardian ad litem, who is appointed pursuant to W.Va. Code, 2711-1(b) [1990] to represent an alleged incompetent in a competency proceeding, end when the Committee is appointed and the appeal period has expired." [[623]](#footnote-624)623

VII. PROPERTY LAW

A. Eminent Domain

Use of the prior purchase price of property in an eminent domain proceeding was addressed by Justice McHugh in West Virginia Department of Highways v. Mountain Inc. [[624]](#footnote-625)624 In that opinion Justice McHugh held:

In an eminent domain proceeding to take private property for public use the purchase price of the property approximately four and a half years prior to the filing of such proceeding is not admissible when there has been a showing that a substantial change in the physical characteristics of the property has occurred since the sale took place and the original purchase price is not probative of the fair market value of the property at the time of the taking. [[625]](#footnote-626)625

In the case of West Virginia Department of Highways v. Fisher, [[626]](#footnote-627)626 Justice McHugh addressed the issue of jury bias or prejudice in an eminent domain proceeding. The court held that

in an eminent domain action, although all prospective jurors stated that they could return a verdict free from bias or prejudice, where the record indicates that thirteen prospective jurors were acquainted with the landowners and/or their appraisal witnesses, which witnesses testified at trial, and, of the petit jury selected from those prospective jurors, six jurors were acquainted with the landowners and/or such appraisal witnesses, a likelihood of bias or prejudice on the part of the jury existed sufficient to require that **[\*114]** the verdict of the jury be set aside and a new trial awarded. [[627]](#footnote-628)627

The case of West Virginia Department of Highways v. Roda [[628]](#footnote-629)628 involved determining the value of coal on property taken by eminent domain. Justice McHugh held in the opinion that

in eminent domain proceedings, the date of take for the purpose of determining the fair market value of property for the fixing of compensation to be made to the condemnee is the date on which the property is lawfully taken by the commencement of appropriate legal proceedings pursuant to W.Va. Code, 54-2-14a, as amended. [[629]](#footnote-630)629

Justice McHugh also stated that

when the contractor for the Department of Highways took the landowners' property prior to the institution of lawful condemnation proceedings, the trial judge did not err in refusing to allow the introduction of evidence as to the value of such property on a date prior to the institution of such proceedings. [[630]](#footnote-631)630

Finally, Justice McHugh stated in Roda that

when a condemnor had prior knowledge that its contractor was selling a condemnee's coal which had been severed from the land before the institution of lawful condemnation proceedings, the fair market value of the condemnee's coal, removed before the lawful date of take, is the price for which the coal could be sold, ready for loading, by a person desirous of selling to a person wishing to buy, both freely exercising prudence and intelligent judgment as to its value, without consideration of the mining, production, excavation and marketing costs. [[631]](#footnote-632)631

B. Easement

In Sticklen v. Kittle, [[632]](#footnote-633)632 Justice McHugh held that "an avigation easement in the airspace used by aircraft over lands adjacent to an airport cannot be acquired **[\*115]** by prescription." [[633]](#footnote-634)633

Justice McHugh was called upon to construe language in an indenture granting a right-of-way easement in the case of Kell v. Appalachian Power Co. [[634]](#footnote-635)634 Justice McHugh held in the opinion that

language in an indenture which gives a power company the right to cut and remove trees, overhanging branches or other obstructions that endanger the safety, or interfere with the use, of the power company's lines on the right-of-way granted by the indenture does not authorize the power company to apply toxic herbicides to that right-of-way by aerial broadcast spraying. [[635]](#footnote-636)635

C. Trustee Sale

Justice McHugh held in Dennison v. Jack [[636]](#footnote-637)636 that "the provisions of W.Va. Code, ch. 38, art. 1, which permit, pursuant to the terms of a trust deed, a public sale of property by a trustee upon the default of the grantor of the trust deed, do not violate the public policy of this State." [[637]](#footnote-638)637 In Dennison, Justice McHugh also stated:

Where a grantor executes a trust deed which confers upon the trustee a power of sale, and upon default of the grantor, the trustee, pursuant to the terms of the trust deed and W.Va. Code, ch. 38, art. 1, sells the property granted by the trust deed at public sale, such a sale does not involve significant action by the State of West Virginia; therefore, due process imposed notice and hearing to the grantor of the trust deed prior to the sale are not required by the Fourteenth Amendment to the Constitution of the United States or W.Va. Const., art. III, § 10. [[638]](#footnote-639)638

In Villers v. Wilson, [[639]](#footnote-640)639 Justice McHugh held:

The sale of property by a trustee under a trust deed will not be enjoined where the sole ground relied upon for the issuance of the injunction is that the grantor of the trust deed has an unliquidated claim against the creditor whose debt is secured by that trust deed **[\*116]** for damages arising out of a transaction unrelated to the trust deed agreement. [[640]](#footnote-641)640

D. Tenants in Common

Justice McHugh held in Keller v. Hartman [[641]](#footnote-642)641 that

where a tract of land is owned by tenants in common and one tenant grants an easement to a third party, which by the express terms of the grant, purportedly conveys only the grantor's undivided interest, such grant is effective to create an easement on the other tenants' interest, if the other tenant(s) consent to or subsequently ratify the conveyance. [[642]](#footnote-643)642

E. Restrictive Covenant

The case of Allemong v. Frendzel [[643]](#footnote-644)643 called upon Justice McHugh to examine issues involving a restrictive covenant in a property deed. Justice McHugh stated that "the fundamental rule in construing covenants and restrictive agreements is that the intention of the parties governs. That intention is gathered from the entire instrument by which the restriction is created, the surrounding circumstances and the objects which the covenant is designed to accomplish." [[644]](#footnote-645)644

Justice McHugh noted next that "a valid restrictive covenant may be enforced by one other than a party to the restrictive covenant provided that the parties to the deed in which the restrictive covenant originated intended that the restriction should benefit the land of the person claiming enforcement." [[645]](#footnote-646)645 Justice McHugh then concluded:

A restrictive covenant which provides "that no alcoholic beverages shall be sold on said premises, and this covenant shall run with the land" is valid. Where the grantor included the covenant in all subsequent deeds conveying a particular parcel of property with the intention to preserve and protect the quality of the neighborhood, a trial court may grant injunctive relief against a grantee who took the property with full notice of the restrictive covenant, provided that changes in the neighborhood's character are not so radical as to destroy the essential objects and purposes **[\*117]** of the neighborhood's original plan of development. [[646]](#footnote-647)646

F. Cemetery Plots

Justice McHugh addressed the legal sanctity of burial plots in Concerned Loved Ones & Lot Owners Ass'n of Beverly Hills Memorial Gardens v. Pence. [[647]](#footnote-648)647 The initial issue to be resolved was whether or not statutory restrictions imposed on trustees of burial grounds and incorporated cemetery associations, with respect to the sale of burial land, applied to others. In this opinion Justice McHugh held that "the provisions of W.Va. Code, 35-5-2 [1967] apply only to the types of entities set forth in W.Va. Code, 35-5-1 [1931]." [[648]](#footnote-649)648 Justice McHugh then held that "when land has been dedicated to cemetery purposes, the next of kin of those buried in the cemetery, as well as those who own land for burial in the cemetery, have a cause of action to prevent, or recover damages resulting from, the unlawful desecration of such cemetery." [[649]](#footnote-650)649

G. Surface Mining

Justice McHugh was called upon to harmonize state and federal law involving replacement of water polluted by surfacing mining in the case of Russell v. Island Creek Coal Co. [[650]](#footnote-651)650 Justice McHugh held:

W.Va. Code, 22A-3-24(b), as amended, part of the West Virginia Surface Coal Mining and Reclamation Act, which requires a coal operator to replace the water supply of an owner of an interest in real property whose water supply has been affected by contamination, diminution or interruption proximately caused by the surface-mining operation, but which statute further provides that the replacement of the water supply may be waived by the owner, is not inconsistent with the parallel federal provision contained in 30 U.S.C. § 1307(b), part of the Surface Mining Control and Reclamation Act. [[651]](#footnote-652)651

In Phillips v. Fox, [[652]](#footnote-653)652 Justice McHugh set out the circumstances in which an implied right to surface mine may occur. The court held: **[\*118]**

The grant of a right to surface mine may be express or implied. The right to surface mine will only be implied if it is demonstrated that, at the time the deed was executed, surface mining was a known and accepted common practice in the locality where the land is located; that it is reasonably necessary for the extraction of the mineral; and that it may be exercised without any substantial burden to the surface owner. [[653]](#footnote-654)653

In West Virginia Division of Environmental Protection v. Kingwood Coal Co., [[654]](#footnote-655)654 Justice McHugh wrote:

Under 38 C.S.R. 2-2.84(b)(6) (1996), promulgated pursuant to the West Virginia Surface Coal Mining and Reclamation Act, W.Va. Code, 22-3-1 et seq., owning or controlling coal to be mined by another person under a lease, sublease or other contract and having the right to receive such coal after mining or having authority to determine the manner in which that person or another person conducts a surface mining operation is presumed to constitute ownership or control. In order to rebut this presumption of ownership and control, the person subject to the presumption must demonstrate, by a preponderance of the evidence, that it does not in fact have the authority directly or indirectly to determine the manner in which the relevant surface mining operation is conducted. Whether a person has successfully rebutted a (b)(6) presumption is a factual determination to be resolved on a case-by-case basis. [[655]](#footnote-656)655

H. Zoning

Justice McHugh addressed issues involving nonconforming use of property in H.R.D.E., Inc. v. Zoning Officer of City of Romney. [[656]](#footnote-657)656 Justice McHugh held that

although the right to a nonconforming use when there is something less than actual use is generally determined on a case-by-case basis, the following factors are to be weighed when determining whether or not a landowner has acquired a vested right to a nonconforming use: (1) whether the landowner has made substantial expenditures on the project; (2) whether the landowner acted in good faith; (3) whether the landowner had notice of the proposed zoning ordinance before starting the project at issue; and **[\*119]** (4) whether the expenditures could apply to other uses of the land. Mere contemplated use or preparation or preliminary negotiations with contractors or architects will not vest the right to a nonconforming use. [[657]](#footnote-658)657

Justice McHugh concluded that "a landowner has a vested right to complete a project as a nonconforming use when the landowner acted in good faith while expending approximately $ 95,000 in preparing for the construction of a specially designed building for the elderly and physically handicapped before the municipality enacted a zoning ordinance." [[658]](#footnote-659)658

I. Real Estate Broker

The liability of a real estate broker for uninhabitable conditions of property was the subject in Teter v. Old Colony Co. [[659]](#footnote-660)659 Justice McHugh wrote:

A vendor's real estate broker may be liable to a purchaser if the broker makes material misrepresentations with regard to the fitness or habitability of residential property or fails to disclose defects or conditions in the property that substantially affect its value or habitability, of which the broker is aware or reasonably should be aware, but the purchaser is unaware and would not discover by a reasonably diligent inspection. It also must be shown that the misrepresentation or concealment was a substantial factor in inducing the purchaser to buy the property. [[660]](#footnote-661)660

J. Landlord and Tenant

The issue of a landlord's liability to a tenant for criminal conduct by a third party was addressed in Miller v. Whitworth. [[661]](#footnote-662)661 Justice McHugh ruled that

under the common law of torts, a landlord does not have a duty to protect a tenant from the criminal activity of a third party. However, there are circumstances which may give rise to such a duty, and these circumstances will be determined by this Court on a case-by-case basis. A landlord's general knowledge of prior unrelated incidents of criminal activity occurring in the area is not alone sufficient to impose a duty on the landlord. However, a duty will be imposed if a landlord's affirmative actions or omissions **[\*120]** have unreasonably created or increased the risk of injury to the tenant from the criminal activity of a third party. [[662]](#footnote-663)662

VIII. JUVENILE DELINQUENCY LAW

A. Restitution

Justice McHugh held in State v. M.D.J. [[663]](#footnote-664)663 that

a trial judge may order restitution as part of a "program of treatment or therapy" designed to aid in the rehabilitation of the child in a juvenile case when probation is granted under W.Va. Code, 49-5-13 [1978]. Such order, however, must be reasonable in its terms and within the child's ability to perform. [[664]](#footnote-665)664

B. Substance Abuse

Justice McHugh held in State ex rel. M.K. v. Black [[665]](#footnote-666)665 that "under the provisions of W.Va. Code, 16-1-10(19) [1983], W.Va. Code, 27-1A-11 [1983], and W.Va. Code, 27-5-9 [1977], the West Virginia Department of Health, through its Director and other personnel, has an affirmative duty to provide a comprehensive program for the care, treatment and rehabilitation of juvenile substance abusers." [[666]](#footnote-667)666

IX. LAWYER DISCIPLINARY LAW

A. West Virginia Supreme Court of Appeals Authority to Regulate the Practice of Law

Justice McHugh commented upon the West Virginia Supreme Court of Appeals' authority to regulate the practice of law in Committee on Legal Ethics of West Virginia State Bar v. Ikner. [[667]](#footnote-668)667 The court held:

Under the authority of the Supreme Court of Appeal's inherent power to supervise, regulate and control the practice of law in this State, the Supreme Court of Appeals may suspend the license of a lawyer or may order such other actions as it deems appropriate, after providing the lawyer with notice and an opportunity to be **[\*121]** heard, when there is evidence that a lawyer (1) has committed a violation of the Rules of Professional Conduct or is under a disability and (2) poses a substantial threat of irreparable harm to the public until the underlying disciplinary proceeding has been resolved. [[668]](#footnote-669)668

B. Admission to Practice Law

In the case Sargus v. West Virginia Board of Law Examiners, [[669]](#footnote-670)669 Justice McHugh addressed the federal constitutionality of a residency requirement for admission to practice law in the state. Justice McHugh held:

The requirement in Rule 1.000 of the West Virginia Code of Rules for Admission to the Practice of Law that an applicant for admission to the West Virginia State Bar must be a resident of West Virginia more than thirty (30) days prior to taking the bar examination is discriminatory against nonresidents in violation of the Privileges and Immunities Clauses contained in article IV, section 2, clause 1 of the United States Constitution and section 1 of the Fourteenth Amendment to the United States Constitution. [[670]](#footnote-671)670

Several matters involving admission to practice law were presented to Justice McHugh in Matter of Dortch. [[671]](#footnote-672)671 The court held initially that "pursuant to Rules 4.2(b), 5.0 and 5.2(b) of the Rules for Admission to the Practice of Law, in order to be eligible for admission to the practice of law in this State, an applicant must prove that he or she possesses good moral character." [[672]](#footnote-673)672 Justice McHugh held next that

when assessing the moral character of an applicant whose background includes a criminal conviction, the following factors should be considered: (1) The nature and character of the offenses committed; (2) The number and duration of offenses; (3) The age and maturity of the applicant when the offenses were committed; (4) The social and historical context in which the offenses were committed; (5) The sufficiency of the punishment undergone and restitution made in connection with the offenses; (6) The grant or denial of a pardon for offenses committed; (7) The number of years that have elapsed since the last offense was committed, and the presence or absence of misconduct during that period; (8) The **[\*122]** applicant's current attitude about the prior offenses (e.g., acceptance of responsibility for and renunciation of past wrongdoing, and remorse); (9) The applicant's candor, sincerity and full disclosure in the filings and proceedings on character and fitness; (10) The applicant's constructive activities and accomplishments subsequent to the criminal convictions; and (11) The opinions of character witnesses about the applicant's moral fitness. These factors are intended to be illustrative rather than exhaustive. [[673]](#footnote-674)673

Justice McHugh concluded in Dortch that

even though, pursuant to Rule 7.0 of the Rules for Admission to the Practice of Law, the West Virginia Board of Law Examiners issues a certificate of eligibility, and files it along with a character report, with this Court, for an applicant for admission to the practice of law, this Court is not required to admit that applicant. If this Court determines that the applicant possesses the necessary qualifications for admission, it will, pursuant to its inherent power to define, regulate and control the practice of law in this State, admit the applicant to the practice of law. However, if this Court determines that the applicant does not possess the necessary qualifications for admission, it will, pursuant to its inherent power to define, regulate and control the practice of law in this State, deny the applicant's admission to the practice of law. [[674]](#footnote-675)674

C. Suspension of Law License

In the case of Committee on Legal Ethics of the West Virginia State Bar v. Karl, [[675]](#footnote-676)675 Justice McHugh discussed some of the consequences of an attorney's license being suspended. Justice McHugh held:

Pursuant to article II, section 4 of the By-Laws of the West Virginia State Bar, a lawyer, whose license to practice law has been suspended, shall not be enrolled as an inactive member of the State Bar while such license is suspended. Furthermore, a judge of a court of record in this State shall not be enrolled as an inactive member of the State Bar if his or her license to practice law has been suspended. Because a judge of a court of record must attain inactive status through enrollment and without suspension, a lawyer, whose license to practice law has been suspended, does not satisfy the fundamental standards of conduct required of a **[\*123]** lawyer to assume or hold judicial office as prescribed by this Court pursuant to article VIII, section 8 of the West Virginia Constitution. [[676]](#footnote-677)676

Justice McHugh held in Committee on Legal Ethics of the West Virginia State Bar v. Keenan [[677]](#footnote-678)677 that

a suspended attorney who fails to comply with the provisions of article VI, section 28 of the By-Laws of the West Virginia State Bar may have his or her license to practice law annulled upon proof by the Committee on Legal Ethics of the West Virginia State Bar by full, preponderating and clear evidence that the suspended attorney failed to comply with the provisions. [[678]](#footnote-679)678

D. Duty of Confidentiality

Justice McHugh explained the extent of the meaning of confidentiality in the case of Lawyer Disciplinary Board v. McGraw. [[679]](#footnote-680)679 Justice McHugh held that

unlike the evidentiary attorney-client privilege recognized under West Virginia Rules of Evidence 501, a lawyer's ethical duty of confidentiality under Rule 1.6 of the Rules of Professional Conduct applies to all information relating to representation of a client, protecting more than just "confidences" or "secrets" of a client. The ethical duty of confidentiality is not nullified by the fact that the information is part of a public record or by the fact that someone else is privy to it. [[680]](#footnote-681)680

E. Aggravating Factors

In Committee on Legal Ethics of West Virginia State Bar v. Tatterson, [[681]](#footnote-682)681 Justice McHugh held that "prior discipline is an aggravating factor in a pending disciplinary proceeding because it calls into question the fitness of the attorney to continue to practice a profession imbued with a public trust." [[682]](#footnote-683)682 **[\*124]**

F. Criminal Conviction

Justice McHugh held in Committee on Legal Ethics of West Virginia State Bar v. Higinbotham [[683]](#footnote-684)683 that

where a lawyer has pleaded guilty to a charge of willful failure to file a federal income tax return and it also appears that the lawyer has failed to file federal income tax returns for a period of nine consecutive years, and has thereby violated DR 1-102(A)(6) of the Code of Professional Responsibility, a six-month suspension from the practice of law is an appropriate disciplinary sanction. [[684]](#footnote-685)684

G. Improperly Obtaining Witness Testimony

In the case of Committee on Legal Ethics of the West Virginia State Bar v. Sheatsley, [[685]](#footnote-686)685 the propriety of an attorney obtaining a witness's testimony was at issue. Justice McHugh held:

Disciplinary Rule 7-109(C) of the Code of Professional Responsibility, effective through December 31, 1988, (which has substantively been incorporated into Rule 1.8(k) of the Rules of Professional Conduct, effective January 1, 1989) is violated when a lawyer acquiesces in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. Therefore, when the Committee on Legal Ethics of the West Virginia State Bar proves by full, preponderating and clear evidence that a lawyer prepared an agreement that provided for the payment of compensation upon a favorable resolution of the case involving the lawyer's client and such agreement further reflected the possibility that the person to whom the compensation would be given may be a witness in that case, such lawyer is subject to appropriate disciplinary sanctions. [[686]](#footnote-687)686

H. Excessive Attorney Fees

Justice McHugh stated in Committee on Legal Ethics of West Virginia State Bar v. Tatterson [[687]](#footnote-688)687 that "in the absence of any real risk, an attorney's **[\*125]** purportedly contingent fee which is grossly disproportionate to the amount of work required is a "clearly excessive fee" within the meaning of Disciplinary Rule 2-106(A)." [[688]](#footnote-689)688 The opinion also determined:

If an attorney's fee is grossly disproportionate to the services rendered and is charged to a client who lacks full information about all of the relevant circumstances, the fee is "clearly excessive" within the meaning of Disciplinary Rule 2-106(A), even though the client has consented to such fee. The burden of proof is upon the attorney to show the reasonableness and fairness of the contract for the attorney's fee. [[689]](#footnote-690)689

The question of appropriate attorney fees in workers' compensation litigation was addressed by Justice McHugh in the disciplinary case of Committee on Legal Ethics of the West Virginia State Bar v. Coleman. [[690]](#footnote-691)690 Justice McHugh said initially that "under W.Va. Code, 23-5-5 [1975], an attorney's fee for assisting a workers' compensation claimant in obtaining a permanent total disability award, consisting of accrued and future benefits, is not to exceed twenty percent of the accrued and future benefits as one award subject to the 208-week limitation." [[691]](#footnote-692)691 Justice McHugh also held:

Where an attorney bases his or her fee upon a good faith interpretation of an ambiguous fee-limiting statute, the attorney's fee is not "an illegal or clearly excessive fee" under Disciplinary Rule 2-106(A), for the purpose of imposing disciplinary sanctions against the attorney. [[692]](#footnote-693)692

I. Ethical Duties of Prosecutor

Justice McHugh examined the duty of a prosecutor to disclose evidence to a defendant in the case of Lawyer Disciplinary Board v. Hatcher. [[693]](#footnote-694)693 Justice McHugh held:

A prosecutor in West Virginia, as an attorney licensed to practice law in this State, is subject to the rules of ethics currently set forth in the West Virginia Rules of Professional Conduct. Concomitant with the duty of a prosecutor to seek justice, rather than merely to **[\*126]** convict, is a duty to disclose evidence which is known to the prosecutor tending to exculpate the accused in a criminal proceeding. In addition to the risk of bringing reversible error to the criminal proceeding, a prosecutor, who knowingly fails to make a timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, also runs the risk of violating the West Virginia Rules of Professional Conduct, particularly Rule 3.8, concerning the special responsibilities of a prosecutor. [[694]](#footnote-695)694

J. Holding Disciplinary Proceeding in Abeyance

In Committee on Legal Ethics of The West Virginia State Bar v. Wilson, [[695]](#footnote-696)695 Justice McHugh stated:

An attorney who is the subject of a pending disciplinary proceeding under sections 23 and 25 of article VI of the By-Laws of the West Virginia State Bar may obtain an order from this Court holding the disciplinary proceeding in abeyance if, and only if, the attorney, pursuant to subsection (c) of section 26 of article VI of the By-Laws of the West Virginia State Bar, contends explicitly that he or she is suffering currently from a disability by reason of mental or physical infirmity or illness, or because of addiction to drugs or intoxicants, which makes it impossible for the respondent attorney to practice law currently and to defend himself or herself adequately in the disciplinary proceeding. If, after any such contention, it is determined subsequently that the attorney is not incapacitated to that extent, this Court, under subsection (c) of section 26 of article VI of the By-Laws of the West Virginia State Bar, will direct the resumption of the disciplinary proceeding against the respondent. The disciplinary proceeding ultimately would be dismissed only if the attorney's mental illness, at the time of the offense, rendered him or her unable to form the intent which is an element of the offense charged. [[696]](#footnote-697)696

K. Burden of Proof

Justice McHugh clarified the burden of proof in lawyer disciplinary **[\*127]** matters in the case of Lawyer Disciplinary Board v. McGraw. [[697]](#footnote-698)697 The opinion held that

Rule 3.7 of the Rules of Lawyer Disciplinary Procedure, effective July 1, 1994, requires the Office of Disciplinary Counsel to prove the allegations of the formal charge by clear and convincing evidence. Prior cases which required that ethics charges be proved by full, preponderating and clear evidence are hereby clarified. [[698]](#footnote-699)698

X. JUDICIAL DISCIPLINARY LAW

A. Construction of Judicial Code of Ethics

In Matter of Karr, [[699]](#footnote-700)699 Justice McHugh held that "when the language of a canon under the Judicial Code of Ethics is clear and unambiguous, the plain meaning of the canon is to be accepted and followed without resorting to interpretation or construction." [[700]](#footnote-701)700

B. Public Statements by Judicial Officer

Justice McHugh held in Matter of Hey [[701]](#footnote-702)701 that

under Canon 3A(6) of the Judicial Code of Ethics [1976] judges' public statements shall be considered to be in the "course of their official duties" when the statement is part of an official duty, or related to an official duty, or is sought from or given by the judge because of his or her official position. [[702]](#footnote-703)702

C. Ex Parte Communication

Justice McHugh examined ex parte conduct by a magistrate in a criminal case affecting the sentence of a defendant in the disciplinary case of Matter of Mendez. [[703]](#footnote-704)703 Justice McHugh held:

Where a magistrate sentenced a defendant to 60 days in jail, to be served upon weekends only, upon the misdemeanor offense of **[\*128]** destruction of property, and the magistrate subsequently suspended the sentence, partially served by the defendant, without lawful authority and upon the ex parte representation of the defendant's father that the sentence was harmful to a previously undisclosed medical ailment of the defendant, the magistrate, in suspending the sentence, violated Canon 3 of the West Virginia Judicial Code of Ethics. [[704]](#footnote-705)704

D. Campaign Funds

Justice McHugh stated in Matter of Karr [[705]](#footnote-706)705 that

when a candidate, including an incumbent judge, for a judicial office that is to be filled by public election between competing candidates personally solicits or personally accepts campaign funds, such action is in violation of Canon 7B(2) of the Judicial Code of Ethics. A committee established by a judicial candidate, including an incumbent judge, may solicit or accept funds for such candidate's campaign. [[706]](#footnote-707)706

E. Suspension of Judicial Officer

The authority of the West Virginia Supreme Court of Appeals to suspend a judicial officer was addressed by Justice McHugh in Matter of Grubb. [[707]](#footnote-708)707 Justice McHugh held that

under the authority of article VIII, sections 3 and 8 of the West Virginia Constitution and Rule II(J)(2) of the Rules of Procedure for the Handling of Complaints Against Justices, Judges, Magistrates and Family Law Masters, the Supreme Court of Appeals of West Virginia may suspend a judge, who has been indicted for or convicted of serious crimes, without pay, pending the final disposition of the criminal charges against the particular judge or until the underlying disciplinary proceeding before the Judicial Investigation Commission has been completed. [[708]](#footnote-709)708 **[\*129]**

F. Judicial Hearing Board

In Matter of Hey, [[709]](#footnote-710)709 Justice McHugh addressed the authority of the Judicial Hearing Board. The court stated that

under Rule III(C)(13) [1992] of the West Virginia Rules of Procedure for the Handling of Complaints Against Justices, Judges, Magistrates and Family Law Masters, the Judicial Hearing Board is limited to making a "written recommendation, which shall contain findings of fact, conclusions of law and proposed disposition." Because of the Board's limited judicial capacity, the Board is without authority to make a legal decision that is entitled to preclusive or res judicata effect. [[710]](#footnote-711)710

XI. CIVIL AND CRIMINAL CONTEMPT LAW

A. Civil Contempt

Justice McHugh set out a bright line for distinguishing between civil and criminal contempt in the case of State ex rel. Robinson v. Michael. [[711]](#footnote-712)711 Justice McHugh held that

whether a contempt is classified as civil or criminal does not depend upon the act constituting such contempt because such act may provide the basis for either a civil or criminal contempt action. Instead, whether a contempt is civil or criminal depends upon the purpose to be served by imposing a sanction for the contempt and such purpose also determines the type of sanction which is appropriate. [[712]](#footnote-713)712

In Robinson, Justice McHugh then held that

where the purpose to be served by imposing a sanction for contempt is to compel compliance with a court order by the contemner so as to benefit the party bringing the contempt action by enforcing, protecting, or assuring the right of that party under the order, the contempt is civil. [[713]](#footnote-714)713

Justice McHugh addressed the nature of a civil contempt in Robinson by **[\*130]** stating that

the appropriate sanction in a civil contempt case is an order that incarcerates a contemner for an indefinite term and that also specifies a reasonable manner in which the contempt may be purged thereby securing the immediate release of the contemner, or an order requiring the payment of a fine in the nature of compensation or damages to the party aggrieved by the failure of the contemner to comply with the order. [[714]](#footnote-715)714

Finally in Robinson, Justice McHugh held that

absent legislation otherwise, the public interest in the enforcement of a noncustodial parent's obligation of support does not create a positive duty on the part of a prosecuting attorney to prosecute a civil contempt action which arises from a failure to comply with a divorce decree which orders support payments. [[715]](#footnote-716)715

B. Criminal Contempt

In State ex rel. Robinson v. Michael, [[716]](#footnote-717)716 Justice McHugh indicated that "where the purpose to be served by imposing a sanction for contempt is to punish the contemner for an affront to the dignity or authority of the court, or to preserve or restore order in the court or respect for the court, the contempt is criminal." [[717]](#footnote-718)717

Justice McHugh also held that "the appropriate sanction in a criminal contempt case is an order sentencing the contemner to a definite term of imprisonment or an order requiring the contemner to pay a fine in a determined amount." [[718]](#footnote-719)718

XII. CONTRACT LAW

A. Interpreting Contract

In L.D.A., Inc. v. Cross, [[719]](#footnote-720)719 Justice McHugh restated a principle of law developed in Quinn v. Beverages of West Virginia. [[720]](#footnote-721)720 He held in Cross: **[\*131]**

Whether a contract is entire or severable is a determination to be made by the court according to the intention of the parties and such intention shall be ascertained from a consideration of the subject matter of the contract, a reasonable construction of the terms thereof and the conduct of the parties during their negotiations, all of which should be viewed in the light of the surrounding circumstances. [[721]](#footnote-722)721

B. Novation

In Perlick & Co. v. Lakeview Creditor's Trustee Committee, [[722]](#footnote-723)722 Justice McHugh defined and set out the elements of a novation. He held:

Novation is generally defined as a mutual agreement among all parties concerned for discharge of a valid existing obligation by the substitution of a new binding obligation on the part of the debtor or another. Thus, the necessary elements of a novation are (a) a previous valid obligation, (b) a consent by all parties to the new contract, (c) an abatement of the old contract and (d) a new contract which is valid and enforceable. Without any of these essential elements, there is no novation. [[723]](#footnote-724)723

C. Assignment

Justice McHugh held in Clendenin Lumber & Supply Co. v. Carpenter [[724]](#footnote-725)724 that "the phrase 'to another' as used in the definition of an assignment of earnings under W.Va. Code 46A-2116(2)(b) [1974], includes an employer when that employer is also the creditor of the employee." [[725]](#footnote-726)725

D. Mechanic's Lien

In Dunlap v. Hinkle, [[726]](#footnote-727)726 Justice McHugh relied upon the decision in Lilly v. Munsey [[727]](#footnote-728)727 in order to hold:

A mechanic's lien for supplies and labor used and employed in the improvement of real estate, to bind the interest of the owner of **[\*132]** such real estate, or any interest therein, must be based on contract for such improvement with such owner, of said real estate or interest therein, or his duly authorized agent. [[728]](#footnote-729)728

E. Oral Contract

Justice McHugh ruled in Lorenze v. Church [[729]](#footnote-730)729 that "a person whose rights, status, or other legal relations are affected by an oral contract may obtain a declaration of those rights, status, or other legal relations under W.Va. Code, 55-13-2 [1941]." [[730]](#footnote-731)730

F. ***Oil*** and Gas Lease

In Berry Energy Consultants & Managers, Inc. v. Bennett, [[731]](#footnote-732)731 Justice McHugh was concerned with rights of a lessor and lessee regarding property leased for ***oil*** and gas. Justice McHugh held:

Under the provisions of W.Va. Code, 36-4-9a [1979], a "rebuttable legal presumption" that a lessee intends to abandon an ***oil*** and/or gas well shall not be created, where the lessee has paid or tendered "delay rental" for the leased premises. Where, however, a lessor and a lessee have entered into a lease for the purpose of "exploring and operating for" and "producing and marketing" ***oil*** and gas, and a well has been drilled by the lessee and gas discovered, the payment or tender by the lessee of delay rental for the leased premises does not relieve the lessee from an implied obligation to exercise reasonable diligence in marketing gas from the leased premises. [[732]](#footnote-733)732

Justice McHugh addressed several issues involving an ***oil*** and gas lease in McCullough ***Oil***, Inc. v. Rezek. [[733]](#footnote-734)733 The court held initially:

An ***oil*** and gas lease (or other mineral lease) is both a conveyance and a contract. It is designed to accomplish the main purpose of the owner of the land and of the lessee (or its assignee) as operator of the ***oil*** and gas interests: securing production of ***oil*** or gas or both in paying quantities, quickly and for as long as production in **[\*133]** paying quantities is obtainable. [[734]](#footnote-735)734

Justice McHugh next held:

A habendum clause in an ***oil*** and gas lease (or other mineral lease) providing for a short primary term and a secondary term for "so long as" production in paying quantities or operations therefor continue, or similar language, conveys a "determinable" interest, that is, an interest subject to a special limitation. Such an interest automatically terminates by its own terms upon the occurrence of the stated event, namely, expiration of the primary term without production or operations at such time, or the cessation of production or operations during the secondary term. [[735]](#footnote-736)735

Continuing in McCullough ***Oil*** Justice McHugh ruled:

Where an ***oil*** and gas lease (or other mineral lease) contains a cessation of production clause applicable to the secondary term, the lease terminates automatically at the end of the "grace period" provided by such clause, unless production or operations are resumed within the grace period. The cessation of production clause grants the lessee the right to resume operations within the grace period; it does not impose the duty to do so. [[736]](#footnote-737)736

Justice McHugh concluded in McCullough ***Oil*** by holding that "the lessee (or its assignee as operator) is not entitled to notice before the lease terminates automatically under the habendum clause or the cessation of production clause of an ***oil*** and gas lease (or other mineral lease)." [[737]](#footnote-738)737

In Bruen v. Columbia Gas Transmission Corp., [[738]](#footnote-739)738 Justice McHugh construed language in an ***oil*** and gas lease. The decision stated:

If an ***oil*** and gas lease contains a clause to continue the lease for a term "so long thereafter as ***oil*** or gas is produced," but also provides for "flat-rate" rental payments, then quantity of production is not relevant to the expiration of the term of the lease if such "flatrate" rental payments have been made by the lessee. Therefore, in a case involving termination of such an ***oil*** and gas lease which provides "flat-rate" rental payments, it is reversible error for a circuit court to instruct the jury that the word **[\*134]** "produced" in the lease means "produced in paying quantities." [[739]](#footnote-740)739

G. Perfected Security Interest

In Daniel v. Stevens, [[740]](#footnote-741)740 Justice McHugh addressed issues under the Uniform Commercial Code pertaining to security interests. The court held:

Equitable estoppel is not a legally cognizable defense to avoid a prior perfected security interest in collateral, where the subsequent creditor or purchaser claims the equitable estoppel based upon an alleged representation by the prior secured party that its security interest had been terminated or released, but where the subsequent creditor or purchaser has not utilized available and convenient means of assuring priority, specifically, waiting until after a termination statement or a written release has been filed, pursuant to W.Va. Code, 46-9-404, as amended, or W.Va. Code, 46-9-406, as amended, respectively, before acquiring an interest in the collateral from the debtor. [[741]](#footnote-742)741

In Daniel, Justice McHugh also held:

The husband's signature on the financing statement as a "debtor" is sufficient notice to interested persons that the secured party has a valid security interest in the listed collateral to the extent of the husband's ownership interest therein, even if the wife is a co-owner of the collateral and a co-debtor and she has not signed the financing statement. In those circumstances interested persons cannot successfully claim the total invalidity of the security interest based upon the allegation or the fact that the wife did not sign the financing statement as another "debtor," as required by W.Va. Code, 46-9-402(1), as amended. [[742]](#footnote-743)742

H. Parol Evidence Rule

Justice McHugh stated succinctly in Haymaker v. General Tire Inc. [[743]](#footnote-744)743 that "the parol evidence rule may not be invoked by a stranger to a release." [[744]](#footnote-745)744 **[\*135]**

I. Liquidated Damages Clause

Justice McHugh wrote in Wheeling Clinic v. Van Pelt [[745]](#footnote-746)745 that

in determining whether a clause in a contract stating a sum to be paid in the event of a breach of the contract is liquidated damages or a penalty, the important question is not the intention of the parties but rather the reasonableness in fact of the agreed sum when the contract was made. [[746]](#footnote-747)746

J. Promissory Note

Justice McHugh held in Young v. Sodaro [[747]](#footnote-748)747 that "under the rule of perfect tender in time, a debtor, absent statutory authority or contractual language to the contrary, has no right to prepay a promissory note secured by a deed of trust prior to the date of maturity." [[748]](#footnote-749)748

XIII. CIVIL RIGHTS

A. Judicial Review of Decision by Human Rights Commission

In State ex rel. State of West Virginia Human Rights Commission v. Logan-Mingo Area Mental Health Agency, Inc., [[749]](#footnote-750)749 Justice McHugh held:

A determination, by the West Virginia Human Rights Commission, that an employer has accorded disparate treatment to members of different races, is a finding of fact which may not be reversed by a circuit court upon review, unless such finding is clearly wrong in view of the reliable, probative and substantial evidence on the whole record. [[750]](#footnote-751)750

B. Sufficiency of Administrative Complaint

Justice McHugh addressed several issues concerning prerequisites of a discrimination complaint filed with the Human Rights Commission in the case of **[\*136]** McJunkin Corp. v. West Virginia Human Rights Commission. [[751]](#footnote-752)751 Justice McHugh held:

In an administrative adjudication before the West Virginia Human Rights Commission, a complaint alleging a violation or violations of the West Virginia Human Rights Act, W.Va. Code, 5-11-1 to 5-11-19, as amended, must be sufficient to advise the adversarial party of the matters charged, and the charges must be adequately clear and specific to allow preparation of a defense. [[752]](#footnote-753)752

Justice McHugh also stated:

An allegation of an illegal layoff contained in a complaint to the West Virginia Human Rights Commission does not encompass an allegation of an illegal failure to rehire where no allegation relating to such failure to rehire is filed or where no amendment regarding such failure is made to the complaint within 180 days after the failure to rehire. [[753]](#footnote-754)753

Justice McHugh concluded:

Where an issue is not raised by the complainant in a complaint to the West Virginia Human Rights Commission, the Commission's hearing examiner is precluded from independently raising the issue and deciding it on the merits where the respondent has not received adequate notice of the issue in the form of a complaint or an amendment thereto nor had an opportunity to defend his or her position, provided that the issue not raised in the complaint or an amendment thereto is not heard by the express or implied consent of the parties. [[754]](#footnote-755)754

C. Subpoena Authority of Human Rights Commission

Justice McHugh examined the subpoena power of the Human Rights Commission in the case of West Virginia Human Rights Commission v. Moore. [[755]](#footnote-756)755 The decision held as follows:

A subpoena duces tecum, issued to an employer by the West Virginia Human Rights Commission is enforceable even where **[\*137]** the complainant/employee has signed a release waiving all claims against the employer which might arise out of the employment relationship, because the legislature has granted the Commission the authority to investigate alleged discriminatory practices pursuant to W.Va. Code, 5-1110, as amended, and the authority to issue a subpoena duces tecum pursuant to W.Va. Code, 5-11-8(d)(1), as amended. Additionally, the procedural requirements of issuing such a subpoena duces tecum must have been met and the evidence sought by the Commission must be relevant and material to the investigation. [[756]](#footnote-757)756

D. Definitions

Justice McHugh held in Shepherdstown Volunteer Fire Department v. State ex rel. State of West Virginia Human Rights Commission [[757]](#footnote-758)757 that

a volunteer fire department, organized and operated pursuant to the laws of the State of West Virginia, and which receives funding from public sources, is a "place of public accommodations" as defined by W.Va. Code, 5-11-3(j) [1981], and is thereby subject to the provisions of The West Virginia Human Rights Act, as amended, W.Va. Code, 5-11-1 et seq. [[758]](#footnote-759)758

Justice McHugh stated in Board of Education of County of Lewis v. West Virginia Human Rights Commission [[759]](#footnote-760)759 that "a county board of education is a "person" pursuant to W.Va. Code, 5-11-3(a), as amended, and a "place of public accommodations" pursuant to W.Va. Code, 5-11-3(j), as amended, and, therefore, may not discriminate against the handicapped in violation of W.Va. Code, 5-11-9(f), as amended." [[760]](#footnote-761)760

In Chico Dairy Co., Store No. 22 v. West Virginia Human Rights Commission, [[761]](#footnote-762)761 Justice McHugh was concerned with the procedure used by the Human Rights Commission to define a statutory term. The court held:

The rule of the West Virginia Human Rights Commission, 6 W.Va. Code of State Rules § 77-1-2.7 (1982), defining a "handicapped person," for purposes of the West Virginia Human Rights Act, to include a person who does not in fact have a **[\*138]** "handicap," as defined by W.Va. Code, 5-11-3(t), as amended, but who "is regarded as having such a handicap," is invalid. That rule is a "legislative rule" under W.Va. Code, 29A-1-2(d), as amended, but was not submitted to the legislative rule-making review committee for its approval, as required by W.Va. Code, 29A-3-9 to 29A-3-14, as amended. [[762]](#footnote-763)762

Justice McHugh ruled in Benjamin R. v. Orkin Exterminating Co. [[763]](#footnote-764)763 that "a person at any stage of infection with the human immunodeficiency virus, including a person who has tested positive for the antibodies to such virus but who is asymptomatic, is a person with a 'handicap' within the meaning of W.Va. Code, 5-11-3(t) [1981]." [[764]](#footnote-765)764

Justice McHugh said in Dobson v. Eastern Associated Coal Corp. [[765]](#footnote-766)765 that "in a case brought under the West Virginia Human Rights Act, W.Va. Code, 5-111, et seq., an offer of reinstatement that is subject to the passing of a physical examination is not an 'unconditional' offer of reinstatement." [[766]](#footnote-767)766

Justice McHugh stated in Woodall v. International Brothers of Electric Workers, Local 596 [[767]](#footnote-768)767 that

pursuant to the West Virginia Human Rights Act, set forth in W.Va. Code, 5-11-1 et seq., a labor organization is liable for unlawful discriminatory practices in its capacity as an employer only if it meets the definition of employer set forth in W.Va. Code, 5-11-3(d) [1981] because W.Va. Code, 5-119(c) [1981] only applies to a labor organization's representative capacity which involves its dealings with employers and union members. [[768]](#footnote-769)768

Justice McHugh also held that

pursuant to W.Va. Code, 5-11-3(e) [1981] officers and directors of a corporation are not employees for jurisdictional purposes under the West Virginia Human Rights Act unless they have additional duties which qualify them as employees outside of their **[\*139]** duties as officers and directors. [[769]](#footnote-770)769

In Williamson v. Greene, [[770]](#footnote-771)770 Justice McHugh held that

pursuant to W.Va. Code 5-11-3(d) [1994] of the West Virginia Human Rights Act, the term "employer" means the state, or any political subdivision thereof, and any person employing twelve or more persons within the state: Provided, That such terms shall not be taken, understood or construed to include a private club. To be an "employer" under W.Va. Code, 5-11-3(d) [1994], a person must have been employing twelve or more persons within the state at the time the acts giving rise to the alleged unlawful discriminatory practice were committed. [[771]](#footnote-772)771

E. Employment Discrimination Based on Handicap

Justice McHugh outlined the burden of proof in cases alleging handicap discrimination in employment discharge, in the case of Morris Memorial Convalescent Nursing Home, Inc. v. West Virginia Human Rights Commission. [[772]](#footnote-773)772 Justice McHugh held that

in order to establish a case of discriminatory discharge under W.Va. Code, 5-11-9 [1989], with regard to employment because of a handicap, the complainant must prove as a prima facie case that (1) he or she meets the definition of "handicapped," (2) he or she is a "qualified handicapped person," and (3) he or she was discharged from his or her job. The burden then shifts to the employer to rebut the complainant's prima facie case by presenting a legitimate nondiscriminatory reason for such person's discharge. If the employer meets this burden, the complainant must prove by a preponderance of the evidence that the employer's proffered reason was not a legitimate reason but a pretext for the discharge. [[773]](#footnote-774)773

In Hosaflook v. Consolidation Coal Co., [[774]](#footnote-775)774 Justice McHugh held that

in order to establish a prima facie case of handicap **[\*140]** discrimination pursuant to W.Va. Code, 5-11-9 [1992] of the West Virginia Human Rights Act, which provides that it is unlawful "for any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment if the individual is able and competent to perform the services required even if such individual is . . . handicapped[,]" a claimant must prove, inter alia, that he or she is a "qualified handicapped person" as that term is defined in 77 C.S.R. § 1-4.2 [1991]. 77 C.S.R. § 1-4.2 [1991] defines "qualified handicapped person" as "an individual who is able and competent, with reasonable accommodation, to perform the essential functions of the job in question." Furthermore, 77 C.S.R. § 1-4.3 [1991] defines "able and competent" as "capable of performing the work and can do the work[.]" An individual who can no longer perform the essential functions of a job either with or without reasonable accommodation and, thus, who is receiving benefits under a salary continuance plan which does not provide otherwise, is not performing the essential functions of a job by being a benefit recipient. Therefore, that person is not a "qualified handicapped person" within the meaning of the West Virginia Human Rights Act. [[775]](#footnote-776)775

F. Discrimination Based on Mental Impairment

Justice McHugh addressed the issue of employment discrimination against the mentally ill in the case of State ex rel. Ash v. Randall. [[776]](#footnote-777)776 The opinion held initially that "W.Va. Code, 275-9(a) [1977], provides, inter alia, that 'no person shall be deprived of any civil right solely by reason of his receipt of services for mental illness.'" [[777]](#footnote-778)777 Justice McHugh then ruled that

where an employee has been discharged from employment in violation of the provisions of W.Va. Code, 27-5-9(a) [1977], "solely by reason of his receipt of services for mental illness," that employee in contesting the discharge must nevertheless establish under Hurley v. Allied Chemical Corporation, 164 W.Va. 757, 262 S.E.2d 757 (1980), that he or she is "otherwise qualified" for that employment, which means that the mental illness would not impair his or her ability to perform the duties of that employment. [[778]](#footnote-779)778

**[\*141]**

G. Discrimination Based on Pregnancy

Justice McHugh addressed the issue of employment discrimination against a pregnant female employee in the case of Frank's Shoe Store v. West Virginia Human Rights Commission. [[779]](#footnote-780)779 The opinion held at the outset that "discrimination based upon pregnancy constitutes illegal sex discrimination under the West Virginia Human Rights Act, W.Va. Code, 5-11-9(a) [1981]." [[780]](#footnote-781)780 Justice McHugh wrote next that "when a pregnant employee who capably performs her duties experiences a reduction in work hours, solely because of her pregnant condition, such action by the employer constitutes illegal discrimination based upon the employee's sex and is violative of W.Va. Code, 5-11-9(a) [1981]." [[781]](#footnote-782)781 The decision then outlined the elements of a plaintiff's burden of proof on a claim of retaliatory discharge under the Human Rights Act:

In an action to redress an unlawful retaliatory discharge under the West Virginia Human Rights Act, W.Va. Code, 5-11-1, et seq., as amended, the burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation) (4) that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation. [[782]](#footnote-783)782

Justice McHugh concluded the opinion by holding that "an award of back pay is proper in a case where an employer has violated W.Va. Code, 5-11-9(a) [1981], by reducing work hours for discriminatory reasons of a pregnant employee and ultimately discharging her in retaliation for her involvement in protected activities." [[783]](#footnote-784)783

H. Discrimination Based on Age

Justice McHugh addressed the use of statistical evidence to prove age discrimination in Dobson v. Eastern Associated Coal Corp. [[784]](#footnote-785)784 The decision held that **[\*142]**

statistical evidence may be employed by a plaintiff in proving a claim of age discrimination in employment under the West Virginia Human Rights Act, W.Va. Code, 5-11-1, et seq. Under Rule 702 of the West Virginia Rules of Evidence it is not an abuse of discretion for the circuit court to allow the use of such statistical evidence if the defendant has the opportunity to rebut the same. [[785]](#footnote-786)785

I. Sexual Harassment

Justice McHugh outlined the burden of proof on a claim of sexual harassment in the case of Westmoreland Coal Co. v. West Virginia Human Rights Commission. [[786]](#footnote-787)786 The court held:

In order to prove "quid pro quo" sexual harassment at the workplace, the complainant must prove: (1) that the complainant belongs to a protected class; (2) that the complainant was subject to an unwelcome sexual advance by an employer, or an agent of the employer who appears to have the authority to influence vital job decisions; and (3) the complainant's reaction to the advancement was expressly or impliedly linked by the employer or the employer's agent to tangible aspects of employment. [[787]](#footnote-788)787

Justice McHugh also held that "the fact that sex-related conduct was 'voluntary,' in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit." [[788]](#footnote-789)788

J. Discrimination Based on Hearing Impairment

Justice McHugh held in Board of Education of County of Lewis v. West Virginia Human Rights Commission [[789]](#footnote-790)789 that

hearing-impaired children, between five and twentythree years of age, are handicapped for purposes of W.Va. Code, 18-20-1, as amended. Therefore, when a county board of education fails to provide an appropriate education for a hearing-impaired child between five and twenty-three years of age, such failure constitutes unlawful discrimination based upon handicap and is **[\*143]** violative of W.Va. Code, 5-11-9(f), as amended. [[790]](#footnote-791)790

K. Lawful Discrimination

Justice McHugh made a distinction in Chico Dairy Co., Store No. 22 v. West Virginia Human Rights Commission [[791]](#footnote-792)791 between employment discrimination practices that are unlawful and employment discrimination practices that are not prohibited by law. The court held that

it is an unlawful discriminatory practice under the West Virginia Human Rights Act for an employer to refuse to offer a job promotion to an employee on account of the person's "handicap," as defined by W.Va. Code § 5-11-3(t), as amended. However, where a complainant never alleges, and the evidence does not indicate, that the discrimination was on account of the complainant's "handicap," as statutorily defined, but solely because the employer regarded the complainant's physical appearance to be unacceptable, the conduct of the employer is not actionable under the clearly restrictive definition of "handicap" contained in the West Virginia Human Rights Act. [[792]](#footnote-793)792

L. Burden of Proof in Hiring Discrimination

In Shepherdstown Volunteer Fire Department v. State ex rel. State of West Virginia Human Rights Commission, [[793]](#footnote-794)793 Justice McHugh outlined the burden of proof in cases alleging discrimination in employment hiring and access to places of public accommodations. Justice McHugh held that

in an action to redress unlawful discriminatory practices in employment and access to "places of public accommodations" under The West Virginia Human Rights Act, as amended, W.Va. Code, 5-11-1 et seq., the burden is upon the complainant to prove by a preponderance of the evidence a prima facie case of discrimination, which burden may be carried by showing (1) that the complainant belongs to a protected group under the statute; (2) that he or she applied and was qualified for the position or opening; (3) that he or she was rejected despite his or her qualifications; and (4) that after the rejection the respondent continued to accept the applications of similarly qualified persons. If the complainant is successful in creating this rebuttable **[\*144]** presumption of discrimination, the burden then shifts to the respondent to offer some legitimate and nondiscriminatory reason for the rejection. Should the respondent succeed in rebutting the presumption of discrimination, then the complainant has the opportunity to prove by a preponderance of the evidence that the reasons offered by the respondent were merely a pretext for the unlawful discrimination. [[794]](#footnote-795)794

Justice McHugh outlined the burden for setting out a prima facie case of discriminatory discharge in State ex rel. State of West Virginia Human Rights Commission v. Logan-Mingo Area Mental Health Agency, Inc. [[795]](#footnote-796)795 The opinion held that

a complainant in a disparate treatment, discriminatory discharge case brought under the West Virginia Human Rights Act, [W.Va.] Code, 5-11-1, et seq., may meet the initial prima facie burden by proving, by a preponderance of the evidence, (1) that the complainant is a member of a group protected by the Act; (2) that the complainant was discharged, or forced to resign, from employment; and (3) that a nonmember of the protected group was not disciplined, or was disciplined less severely, than the complainant, though both engaged in similar conduct. [[796]](#footnote-797)796

Justice McHugh elaborated on the burden of proof in employment discrimination in the case of West Virginia Institute of Technology v. West Virginia Human Rights Commission. [[797]](#footnote-798)797 Justice McHugh stated that "the complainant's prima facie case of disparate-treatment employment discrimination can be rebutted by the employer's presentation of evidence showing a legitimate and nondiscriminatory reason for the employment-related decision in question which is sufficient to overcome the inference of discriminatory intent." [[798]](#footnote-799)798 Justice McHugh noted:

The complainant will still prevail in a disparatetreatment employment discrimination case if the complainant shows by the preponderance of the evidence that the facially legitimate reason given by the employer for the employment-related decision is **[\*145]** merely a pretext for a discriminatory motive. [[799]](#footnote-800)799

The court shifted its focus in holding that

unlawful employment discrimination in the form of compensation disparity based upon a prohibited factor such as race, gender, national origin, etc., is a "continuing violation," so that there is a present violation of the antidiscrimination statute for as long as such compensation disparity exists; that is, each paycheck at the discriminatory rate is a separate link in a chain of violations. [[800]](#footnote-801)800

Justice McHugh concluded by holding that "W.Va. Code, 5-11-10, as amended, does not authorize a 'cap' or time limits on back pay in continuing violation cases." [[801]](#footnote-802)801

M. Liability of State for Unlawful Discrimination

In ***Kerns*** v. Bucklew, [[802]](#footnote-803)802 Justice McHugh determined whether the state's constitutional immunity from civil liability shielded the state from liability under state and federal civil rights laws. Justice McHugh held that

in addition to the overriding effect of the supremacy clause of the Constitution of the United States (art. VI, cl. 2) upon contrary state law, federal legislation which is expressly authorized by section 5 of the fourteenth amendment to the Constitution of the United States and which implements such amendment will by its own force override contrary state constitutional or statutory law, such as governmental immunity (W.Va. Const. art. VI, § 35), which state law provides less protection or relief than provided by the fourteenth amendment and its implementing legislation, such as the Equal Employment Opportunity Act of 1972, as amended, 42 U.S.C. §§ 2000e to 2000e-17 (1982). [[803]](#footnote-804)803

Justice McHugh continued in ***Kerns*** by holding:

Affirmative relief, such as an award of back pay and reasonable attorney's fees, is recoverable against the State of West Virginia as an employer in employment discrimination cases adjudicated **[\*146]** before the West Virginia Human Rights Commission or in the court system of this State, as well as being recoverable in actions or proceedings in federal forums, state constitutional governmental immunity notwithstanding. In employment discrimination cases the federal law, which is paramount, is intended by the fourteenth amendment and Congress to "be vindicated at the state or local level." [[804]](#footnote-805)804

N. Public Policy Cause of Action Against Exempt Employer

Justice McHugh determined in Williamson v. Greene [[805]](#footnote-806)805 whether an employer, not covered under the Human Rights Act, could nevertheless be brought within the Act through public policy. The court held:

Even though a discharged at-will employee has no statutory claim for retaliatory discharge under W.Va. Code, 5-11-9(7)(C) [1992] of the West Virginia Human Rights Act because his or her former employer was not employing twelve or more persons within the state at the time the acts giving rise to the alleged unlawful discriminatory practice were committed, as required by W.Va. Code, 5-11-3(d) [1994], the discharged employee may nevertheless maintain a common law claim for retaliatory discharge against the employer based on alleged sex discrimination or sexual harassment because sex discrimination and sexual harassment in employment contravene the public policy of this State articulated in the West Virginia Human Rights Act, W.Va. Code, 5-11-1, et seq. [[806]](#footnote-807)806

O. Damages Under Human Rights Act

Justice McHugh noted in Dobson v. Eastern Associated Coal Corp. [[807]](#footnote-808)807 that "where a plaintiff, as an alternative to filing a complaint with the Human Rights Commission, has initiated an action in circuit court to enforce the West Virginia Human Rights Act, W.Va. Code, 5-11-1, et seq., then he or she may recover damages sounding in tort." [[808]](#footnote-809)808 **[\*147]**

XIV. LABOR LAW

A. State Capitol Employees

Justice McHugh decided whether the janitorial services for state capitol buildings could be performed by private contractors in the case of O'Connor v. Margolin. [[809]](#footnote-810)809 The court held:

W.Va. Code, 5A-4-1 [1969], which requires that the Director of the General Services Division of the Department of Finance and Administration furnish janitors for the maintenance of the State capitol buildings and grounds in Charleston, West Virginia, requires that janitors so retained be State employees, and the Commissioner of Finance and Administration and the Director of the General Services Division of that Department are without authority to terminate the employment of such employees as a class for the purpose of obtaining the same type janitorial service through private contracting. [[810]](#footnote-811)810

McHugh concluded in O'Connor that "W.Va. Code, 5A-4-1 [1969], which requires that the janitors employed pursuant to that statute be State employees, was not amended by way of the funding provisions in the State budget for fiscal year 1983, to provide that such janitorial services may be secured to the State by private contracting." [[811]](#footnote-812)811

B. At-Will Employment

In Cook v. Heck's Inc., [[812]](#footnote-813)812 Justice McHugh addressed the potential impact of language in an employee handbook on the status of an atwill employee. It was said initially that "contractual provisions relating to discharge or job security may alter the at will status of a particular employee." [[813]](#footnote-814)813 Justice McHugh noted that "generally, the existence of a contract is a question of fact for the jury." [[814]](#footnote-815)814 Turning to the central issue of the case, Justice McHugh held that

a promise of job security contained in an employee handbook distributed by an employer to its employees constitutes an offer for a unilateral contract; and an employee's continuing to work, **[\*148]** while under no obligation to do so, constitutes an acceptance and sufficient consideration to make the employer's promise binding and enforceable. [[815]](#footnote-816)815

The court concluded that "an employee handbook may form the basis of a unilateral contract if there is a definite promise therein by the employer not to discharge covered employees except for specified reasons." [[816]](#footnote-817)816

C. Retaliatory Discharge

Justice McHugh addressed the issue of discharging an employee in retaliation for exercising constitutional rights in the case of McClung v. Marion County Commission. [[817]](#footnote-818)817 It is important to note the defendant in the case was a public employer. Justice McHugh held initially that

it is in contravention of substantial public policies for an employer to discharge an employee in retaliation for the employee's exercising his or her state constitutional rights to petition for redress of grievances (W. Va. Const. Art. III, § 16) and to seek access to the courts of this State (W.Va. Const. Art. III, § 17) by filing an action, pursuant to W.Va. Code, 21-5C-8 [1975], for overtime wages. [[818]](#footnote-819)818

It was noted for summary judgment purposes that "whether the defendant in a retaliatory discharge case acted wantonly, willfully or maliciously is a function peculiarly within the province of the fact finder." [[819]](#footnote-820)819 In McClung, the court allocated the burdens in a retaliatory discharge case as follows:

In a retaliatory discharge action, where the plaintiff claims that he or she was discharged for exercising his or her constitutional right(s), the burden is initially upon the plaintiff to show that the exercise of his or her constitutional right(s) was a substantial or a motivating factor for the discharge. The plaintiff need not show that the exercise of the constitutional right(s) was the only precipitating factor for the discharge. The employer may defeat the claim by showing that the employee would have been **[\*149]** discharged even in the absence of the protected conduct. [[820]](#footnote-821)820

D. Maintaining Safe Work Environment

Justice McHugh held in United Mine Workers of America v. Faerber [[821]](#footnote-822)821 that

"full roof bolting" is required to be utilized in all underground coal mine sections in this State using auger-type continuous coal mining equipment, under W.Va. Code, 22A-225(a) [1985], which provides that "the roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs." [[822]](#footnote-823)822

E. Job Description

In Cruciotti v. McNeel, [[823]](#footnote-824)823 Justice McHugh addressed employment of a person as a teacher and athletic trainer. The court held that

pursuant to W.Va. Code, 18A-4-16 [1982], the duties of an athletic trainer are within the definition of "extracurricular duties," and, therefore, the assignment of a teacher to such duties shall be made only by mutual agreement of the teacher and the superintendent, or designated representative. A teacher's contract of employment shall be separate from an agreement to perform duties as an athletic trainer and such contract shall not be conditioned upon the teacher's acceptance or continuance of such extracurricular assignment as athletic trainer, which has been proposed by the superintendent, a designated representative, or the board of education. [[824]](#footnote-825)824

F. Employee Privacy

The issue of an employee's right to refuse to submit to a polygraph test required by an employer was addressed in Cordle v. General Hugh Mercer Corp. [[825]](#footnote-826)825 **[\*150]** Justice McHugh held:

It is contrary to the public policy of West Virginia for an employer to require or request that an employee submit to a polygraph test or similar test as a condition of employment, and although the rights of employees under that public policy are not absolute, in that under certain circumstances, such as those contemplated by W.Va. Code, 21-5-5b [1983], such a polygraph test or similar test may be permitted, the public policy against such testing is grounded upon the recognition in this State of an individual's interest in privacy. [[826]](#footnote-827)826

G. Restrictive Employment Covenant

Justice McHugh determined the validity of a restrictive employment covenant in Helms Boys, Inc. v. Brady. [[827]](#footnote-828)827 The court held that "when the skills and information acquired by a former employee are of a general managerial nature, such as supervisory, merchandising, purchasing and advertising skills and information, a restrictive covenant in an employment contract will not be enforced because such skills and information are not protectible employer interests." [[828]](#footnote-829)828

H. Employee Immunity from Tort Liability

Justice McHugh addressed immunity from tort liability granted to employees under the workers' compensation statutes in Jenrett v. Smith. [[829]](#footnote-830)829 The court held that

for purposes of determining whether a co-employee "is acting in furtherance of the employer's business" under W.Va. Code, 23-2-6a [1949], and thereby entitled to immunity from tort liability, a "dual purpose" trip, that is, a journey by an employee that serves both personal and business reasons, is a personal trip if it would have been made even though the business aspect of the journey was canceled. However, it is a business trip if the journey would have gone forward even though the personal errand was canceled. In any event, if the injury or death of an employee prevents the trip from going forward, the journey may still be a business trip if the business task would have been done by some **[\*151]** other employee at some other time. [[830]](#footnote-831)830

I. Unemployment Compensation

Justice McHugh held in Kisamore v. Rutledge [[831]](#footnote-832)831 that "findings of fact and conclusions of law by an arbitrator in an employment dispute matter are not binding upon the West Virginia Department of Employment Security or the courts of this State." [[832]](#footnote-833)832 The court went on to hold:

Where an employee is suspended from his employment for disciplinary reasons and his reinstatement to employment is conditional, in that work must be available and the employee must pass a physical examination, and during the suspension period the employee performs no services and no wages are payable to him from the suspending employer, such employee is "otherwise" separated from employment within the meaning of W.Va. Code, 21A-1-3, and such employee is totally unemployed and eligible to receive unemployment compensation benefits. [[833]](#footnote-834)833

In Lough v. Cole, [[834]](#footnote-835)834 Justice McHugh determined whether an employee who leaves an employer that is going out of business to find other work is disqualified from receiving unemployment benefits. The court held that

where an employee left his employment to seek other work because the employer was in the process of going out of business, that employee was not disqualified from receiving unemployment compensation benefits under the provisions of W.Va. Code, 21A-6-3(1) [1981], which section states, in part, that an individual shall be disqualified for benefits "for the week in which he left his most recent work voluntarily without good cause involving fault on the part of the employer and until the individual returns to covered employment and has been employed in covered employment at least thirty working days." [[835]](#footnote-836)835

Justice McHugh clarified the right of a claimant to proper notice regarding unemployment compensation benefits in Mizell v. Rutledge. [[836]](#footnote-837)836 The court in Mizell **[\*152]** held that

a notice of the decision of a deputy commissioner of the West Virginia Department of Employment Security regarding the disqualification of a claimant from receiving regular unemployment compensation benefits that fails to inform the claimant that such disqualification could render him ineligible for extended benefits under chapter 21A, article 6A of the West Virginia Code violates the notice requirements of W.Va. Code, 21A-7-8 [1978], which statute entitles the claimant, inter alia, "to a fair hearing and reasonable opportunity to be heard before an appeal tribunal." [[837]](#footnote-838)837

The case of Butler v. Rutledge [[838]](#footnote-839)838 required Justice McHugh examine the phrase "most recent work," in the context of determining whether a claimant is disqualified from receiving benefits. The court made an initial general ruling:

In 1981, the West Virginia Legislature deleted from W.Va. Code, 21A-6-3(1), the provision that "work" means "employment with the last employing unit with whom such individual was employed as much as thirty days, whether or not such days are consecutive"; therefore, in determining whether an individual is disqualified under W.Va. Code, 21A-63(1) [1981], from receiving unemployment compensation benefits (for leaving his or her "most recent work voluntarily without good cause involving fault on the part of the employer"), "most recent work," in that context, need not be employment in which the individual worked for "thirty days" or "thirty working days"; however, once an individual is determined to be disqualified under W.Va. Code, 21A6-3(1) [1981], from receiving benefits, the disqualification continues "until the individual returns to covered employment and has been employed in covered employment at least thirty working days," as W.Va. Code, 21A-6-3(1) [1981], further provides. [[839]](#footnote-840)839

Justice McHugh took Butler's general ruling and applied it to the facts of the case. The court held:

Where individuals left their employment and took other jobs, and the individuals, prior to working at the other jobs for thirty working days, were laid off by their employers, the other jobs constituted the individuals' "most recent work" for purposes of **[\*153]** determining whether they were disqualified under W.Va. Code, 21A-6-3(1) [1981], from receiving unemployment compensation benefits. [[840]](#footnote-841)840

Relying upon the decision in Belt v. Cole, [[841]](#footnote-842)841 Justice McHugh held in Ash v. Rutledge [[842]](#footnote-843)842 that

unemployment compensation claimants meet statutory eligibility requirements of "total or partial unemployment" and "availability for work" even if they are not working because of a labor dispute. W.Va. Code, 21A-6-3(4) must be applied to their cases to determine whether they are disqualified or fall within an exception to disqualification. Syllabus Points 3, 4, and 5 of Pickens v. Kinder, 155 W.Va. 121, 181 S.E.2d 469 (1971), are overruled. [[843]](#footnote-844)843

Justice McHugh addressed the issue of whether conduct by an employee constituted misconduct for the purpose of unemployment compensation in the case of Peery v. Rutledge. [[844]](#footnote-845)844 The court noted initially that "disqualifying provisions of the Unemployment Compensation Law are to be narrowly construed." [[845]](#footnote-846)845 The court held:

A claimant for unemployment compensation benefits is not guilty of disqualifying "misconduct" when the claimant refuses to perform a job assignment because he or she reasonably and in good faith believes that performance of the job assignment would jeopardize the claimant's own health or safety or the health or safety of others. [[846]](#footnote-847)846

Justice McHugh also indicated that

a claimant for unemployment compensation does not necessarily waive the right to raise the issue of his or her reasonable and good faith apprehension of harm to the health or safety of the claimant or others by accepting employment with the knowledge that the **[\*154]** working conditions involve a health or safety risk. [[847]](#footnote-848)847

The court in Peery went on to set out the burden of proof when an employer alleges an employee violated a work directive or rule. The court held that

if the former employer establishes that the unemployment compensation claimant has violated an ordinarily reasonable job assignment directive or work rule, the burden of going forward with the evidence shifts to the claimant to show that he or she was justified, or at least exercised good faith, in not complying with the directive or rule. If the claimant then introduces evidence of his or her reasonable fear of harm to the claimant's or others' health or safety, the former employer must rebut the reasonableness of the claimant's apprehension. [[848]](#footnote-849)848

In Davis v. Gatson, [[849]](#footnote-850)849 Justice McHugh wrote:

An unemployed individual shall be eligible to receive benefits only if the Commissioner finds, inter alia, that he has been totally or partially unemployed during his benefit year for a waiting period of one week prior to the week for which he claims benefits for total or partial unemployment, under W.Va. Code, 21A-6-1(4) [1994]. The terms total and partial unemployment are defined in W.Va. Code, 21A-1-3 [1994]. However, under the definition of wages found in W.Va. Code, 21A-1-3 [1994], the term wages shall not include vacation pay received by an individual before or after becoming totally or partially unemployed but earned prior to becoming totally or partially unemployed, provided that the term totally or partially unemployed shall not be interpreted to include employees who are on vacation by reason of the employer's request provided they are unequivocally so informed at least ninety days prior to such vacation. [[850]](#footnote-851)850

In the case of Smittle v. Gatson, [[851]](#footnote-852)851 Justice McHugh examined employer conduct to reduce wages and the employer shutdown exception for unemployment benefits. The court held initially that

W.Va. Code, 21A-6-3(4) [1990] allows the payment of **[\*155]** unemployment benefits when "an employer shuts down his plant or operation or dismisses his employees in order to force wage reduction, changes in hours or working conditions." In order to qualify for benefits under the employer shutdown exception of W.Va. Code, 21A-6-3(4) [1990], an employee must show, first, that the employer acted to shut down the work site, and second, that the shutdown was "to force" a change detrimental to the employee. [[852]](#footnote-853)852

It next held that

the determination of when an employer is trying "to force wage reduction" or other changes in benefits under W.Va. Code, 21-6-3(4) [1990], is made by comparing the employer's proposed change(s) to the status quo as shown by the expiring contract. If the employer's proposed change(s) would result in detrimental terms for the employee, then the employer is considered to be seeking "to force wage reduction, changes in hours or working conditions." [[853]](#footnote-854)853

Justice McHugh concluded in Smittle that "under W.Va. Code, 21A-6-3(4) [1990], employees are entitled to unemployment benefits when an employer rejects continuing the expiring contract for a reasonable time 'to force wage reduction, change in hours or working conditions.'" [[854]](#footnote-855)854

J. Workers' Compensation

Justice McHugh held in Geeslin v. Workmen's Compensation Commissioner [[855]](#footnote-856)855 that "where an altercation arises out of the employment, the fact that claimant was the aggressor does not, standing alone, bar compensation under the West Virginia Workmen's Compensation Act, W.Va. Code, 23-1-1 et seq., for injuries claimant sustained in the altercation." [[856]](#footnote-857)856 The court in Geeslin addressed prior precedent that was in conflict with its decision and held that "the Syllabus of Jackson v. State Compensation Commissioner, 127 W.Va. 59, 31 S.E.2d 848 (1944), is overruled. Claytor v. Compensation Commissioner, 144 W.Va. 103, 106 S.E.2d 920 (1959), and Turner v. State Compensation Commissioner, 147 W.Va. 106, 126 S.E.2d 40 (1962), are overruled to the extent they are inconsistent with the **[\*156]** principles enunciated herein." [[857]](#footnote-858)857

Justice McHugh addressed the issue of whether suicide while at work was compensable under the workers' compensation statutes in Hall v. State Workmen's Compensation Commissioner. [[858]](#footnote-859)858 The court held:

An employee's suicide which arises in the course of and results from covered employment is compensable under W.Va. Code, 23-4-1 [1974], provided, (1) the employee sustained an injury which itself arose in the course of and resulted from covered employment, and (2) without that injury the employee would not have developed a mental disorder of such degree as to impair the employee's normal and rational judgment, and (3) without that mental disorder the employee would not have committed suicide. [[859]](#footnote-860)859

Justice McHugh addressed the issue of proper notice to an employer of default in payment of assessed interest on past unpaid premiums in Mid-Eastern Geotech, Inc. v. Lewis. [[860]](#footnote-861)860 The court held:

Where an employer required to subscribe and pay premiums to the West Virginia Workers' Compensation Fund was determined by the West Virginia Workers' Compensation Commissioner to be in default for failure to pay interest assessed for past due quarterly premium payments, and that employer received no notice of the interest assessment and, nevertheless, maintained its account with the workers' compensation fund at the level required by law by way of the payment of premiums and the payment of periodic account deficiencies, that employer was entitled to notice in writing of its right, under the provisions of W.Va. Code, 23-2-5b [1983], to apply to the Commissioner for a settlement of the amount of the employer's default. [[861]](#footnote-862)861

Justice McHugh addressed the issue of timely processing workers' compensation claims in Scites v. Huffman. [[862]](#footnote-863)862 It was initially held in the opinion that

in view of the policy of the West Virginia workers' compensation system, reflected in W.Va. Code, 23-5-3a [1971], **[\*157]** that "the rights of claimants for workmen's [now workers'] compensation be determined as speedily and expeditiously as possible," the time limits specified in W.Va. Code, 23-5-1 [1973], with respect to actions by the Commissioner concerning the processing of claims for workers' compensation, are mandatory. [[863]](#footnote-864)863

The court in Scites went on to elaborate as follows:

The West Virginia Workers' Compensation Commissioner and Appeal Board are subject to the following statutory and regulatory time requirements concerning the processing before the Board of claims for workers' compensation benefits: (1) regular sessions of the Board, designated as "Appeal Board Hearing Days," shall, pursuant to W.Va. Code, 23-5-2 [1981], continue "as long as may be necessary for the proper and expeditious transaction of the hearings, decisions and other business before it," (2) upon appeal, the commissioner shall, pursuant to Commissioner's regulation ch. 23-1, series VI, 8.02 (1984), prepare and transmit claim files to the Board "within thirty working days from the date of receipt of notice of appeal in the Fund," (3) the Commissioner shall, pursuant to W.Va. Code, 23-5-3 [1953], "forthwith make up a transcript of the proceedings before him and certify and transmit the same to the board," (4) the Board shall, pursuant to W.Va. Code, 23-5-3 [1953], review actions of the Commissioner "at its next meeting after the filing of notice of appeal, provided such notice of appeal shall have been filed thirty days before such meeting of the board, unless such review be postponed by agreement of parties or by the board for good cause" and (5) "all appeals from the action of the commissioner shall [pursuant to W.Va. Code, 23-5-3 [1953]] be decided by the board at the same session at which they are heard, unless good cause for delay thereof be shown and entered of record." Those requirements are essential to the speedy and expeditious determination of the rights of claimants for workers' compensation benefits and are, therefore, mandatory. [[864]](#footnote-865)864

Justice McHugh held in Fausnet v. State Workers' Compensation Commissioner, Workers Compensation Appeal Board [[865]](#footnote-866)865 that

an employee injured in another state in the course of and resulting from his employment is entitled to seek workers' **[\*158]** compensation benefits in West Virginia, where the employee's employment in the other state is temporary or transitory in nature within the meaning of W.Va. Code, 23-2-1 [1976], and W.Va. Code, 23-2-1a [1975], under which statutes "employers" and "employees" subject to this State's workers' compensation laws are determined. [[866]](#footnote-867)866

The case of Deller v. Naymick [[867]](#footnote-868)867 required Justice McHugh to determine the applicability of the co-employee immunity from suit to a doctor employed by a subscriber to the workers' compensation fund or by a self-insured employer, and the effect, if any, of carrying liability insurance on such immunity. The court held initially that

a professional person is an "employee" for workers' compensation purposes when he or she provides his or her services "to an employer largely to the exclusion of otherwise special employment, for a certain fixed and determined period, at a regular salary, and holds [himself or herself] in readiness at all times to serve [his or her] employer[.]" [[868]](#footnote-869)868

The court in Deller then held:

If a doctor, who is employed by a subscriber to the Workmen's [Workers'] Compensation Fund to render medical and surgical aid and treatment to its employees, is so unskillful and negligent in his treatment of an employee, injured in the course of and resulting from his employment, that the injury is aggravated thereby, such action on the part of the doctor comes within the [Workers'] Compensation Act. Therefore, under such a state of facts, an action is not maintainable against the doctor. [[869]](#footnote-870)869

Justice McHugh noted in Deller that "the so-called 'dual capacity' or 'dual persona' doctrine does not except a full-time, salaried doctor employed by a subscriber to the Workers' Compensation Fund or by a selfinsured employer from the immunity provided by W.Va. Code, 23-2-6a [1949]." [[870]](#footnote-871)870 The court concluded that "the immunity from tort liability provided by W.Va. Code, 23-2-6a [1949] is not waived to the extent that liability insurance coverage is available." [[871]](#footnote-872)871 **[\*159]**

Justice McHugh stated in Williams v. Robinson [[872]](#footnote-873)872 that "W.Va. Code, 23-4-6(a), (b) and (d) [1986], and W.Va. Code, 23-4-14 [1986], when read in pari materia, require the Workers' Compensation Commissioner to recalculate permanent total disability benefits annually, based on the state average weekly wage." [[873]](#footnote-874)873

In the case of Dalton v. Spieler, [[874]](#footnote-875)874 Justice McHugh held:

Pursuant to W.Va. Code, 23-4-7a(c)(1), as amended, when an authorized treating physician recommends a permanent partial disability award of fifteen percent or less, and such recommendation is based upon an examination performed prior to the closing of a claimant's temporary total disability benefits, then the workers' compensation commissioner has a mandatory duty to enter an award of permanent partial disability benefits based upon the recommendation of the authorized treating physician. [[875]](#footnote-876)875

In Pannell v. Inco Alloys International, Inc., [[876]](#footnote-877)876 Justice McHugh restricted the reach of a statute giving employees a cause of action against employers, if they are terminated while recovering from work-related injuries. The court stated that "absent a clear expression by the legislature that retroactive application was intended, W.Va. Code, 235A-3 [1990], which confers substantial rights on injured employees, must be applied prospectively." [[877]](#footnote-878)877

Justice McHugh ruled in Pugh v. Workers' Compensation Commissioner [[878]](#footnote-879)878 that

W.Va. Code, 23-4-16 [1983], in part, permits the power and jurisdiction of the Workers' Compensation Commissioner to continue over cases before the Commissioner and to make modifications or changes with respect to former findings or orders as may be justified, provided that no further award may be made in the cases of nonfatal injuries more than two times within five years after the Commissioner shall have made the last payment in the original award or any subsequent increase thereto in any **[\*160]** permanent disability case. [[879]](#footnote-880)879

Justice McHugh addressed the issue of physician confidentiality in workers' compensation in Morris v. Consolidation Coal Co. [[880]](#footnote-881)880 Justice McHugh wrote:

A fiduciary relationship exists between a treating physician and a claimant in a workers' compensation proceeding. This fiduciary relationship prohibits oral ex parte communication which involves providing confidential information and any other ex parte communication which involves providing confidential information which is not authorized under the statutes or procedural rules governing a workers' compensation claim between the treating physician and the adversarial party. When a claimant files a workers' compensation claim, he does consent to the release of written medical reports to the adversarial party pursuant to W.Va. Code, 23-4-7 [1991]; however, this consent does not waive the existing fiduciary relationship thereby permitting ex parte oral communication between the physician and the adversarial party which involves providing confidential information unrelated to the written medical reports authorized by W.Va. Code, 23-4-7 [1991]. [[881]](#footnote-882)881

Justice McHugh ruled in Bush v. Richardson [[882]](#footnote-883)882 that

by the enactment of W.Va. Code, 23-2A-1 [1990], which provides that the Commissioner of Workers' Compensation "shall be allowed subrogation" when a workers' compensation claimant collects moneys from a third-party tortfeasor, the legislature expressly modified the usual, ordinary meaning of subrogation as it is used in that Code section by making the madewhole rule inapplicable. Therefore, the following provisions set forth by the legislature in W.Va. Code, 23-2A-1(b) [1990] shall be followed: "The commissioner or a self-insured employer shall be allowed subrogation with regard to medical benefits paid as of the date of the recovery: Provided, That under no circumstances shall any moneys received by the commissioner or self-insured employer as subrogation to medical benefits expended on behalf of the injured or deceased worker exceed fifty percent of the amount received **[\*161]** from the third party as a result of the claim made by the injured worker, his or her dependents or personal representative, after payment of attorney's fees and costs, if such exist (emphasis added)." [[883]](#footnote-884)883

K. Private Hospital Employee Discipline

In Mahmoodian v. United Hospital Center, Inc., [[884]](#footnote-885)884 Justice McHugh outlined minimum procedural requirements private hospitals must utilize in determining disciplinary measures against medical staff, in addition to setting out the degree of judicial review of such procedures. The court held:

The decision of a private hospital to revoke, suspend, restrict or to refuse to renew the staff appointment or clinical privileges of a medical staff member is subject to limited judicial review to ensure that there was substantial compliance with the hospital's medical staff bylaws governing such a decision, as well as to ensure that the medical staff bylaws afford basic notice and fair hearing procedures, including an impartial tribunal. [[885]](#footnote-886)885

It was further concluded that

a private or a public hospital, regardless of the breadth of discretion that is extended to it, may revoke or otherwise affect adversely the staff appointment or clinical privileges of a medical staff member only if, as an element of basic notice, the medical staff bylaws provide a reasonably definite standard proscribing the conduct upon which the revocation or other adverse action is based. [[886]](#footnote-887)886

Justice McHugh indicated that

a hospital may adopt and enforce a medical staff bylaw providing that the disruptive conduct of a physician, in the sense of his or her inability to work in harmony with other health care personnel at the hospital, is a ground for denying, suspending, restricting, refusing to renew or revoking the staff appointment or clinical privileges of the offending physician, when such inability may have an adverse impact upon overall patient care at the **[\*162]** hospital. [[887]](#footnote-888)887

The court concluded that "the decision of a private hospital revoking or otherwise affecting adversely the staff appointment or clinical privileges of a medical staff member will be sustained when, as an element of fair hearing procedures, there is substantial evidence supporting that decision." [[888]](#footnote-889)888

L. Suspension of Government Employee

Justice McHugh observed in Parham v. Raleigh County Board of Education [[889]](#footnote-890)889 that "the authority of a county board of education to suspend a teacher under W.Va. Code, 18A-2-8 [1990] must be based upon the causes listed therein and must be exercised reasonably, not arbitrarily or capriciously." [[890]](#footnote-891)890

M. Collective Bargaining Agreement

Several issues concerned with collective bargaining were presented to Justice McHugh in Local Division No. 812 of Clarksburg, West Virginia, of Amalgamated Transit Union v. Central West Virginia Transit Authority. [[891]](#footnote-892)891 The court held at the outset:

In determining whether or not the parties to a collective bargaining agreement have agreed to submit a particular dispute to arbitration, it must be recognized that there is a presumption favoring arbitration, and this presumption may be rebutted only where it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. [[892]](#footnote-893)892

The court held next that "procedural questions arising from a labor dispute and bearing on its final disposition are matters to be determined by an arbitrator." [[893]](#footnote-894)893 Justice McHugh ended the opinion by holding:

Where a transit authority has entered into a collective bargaining agreement to submit "all grievances arising between the Transit Authority and union" to arbitration and W.Va. Code, 8-27-21(g) **[\*163]** [1969] provides that the transit authority or any employees thereof have the right to submit to final and binding arbitration "any labor dispute relating to the terms and conditions of employment which is not settled through any established grievance procedure," an employee discharge falls within the definition of "terms and conditions of employment" and, accordingly, the matter of an employee discharge should be submitted to arbitration. [[894]](#footnote-895)894

N. Employment Contract

Justice McHugh confronted the issue of a lifetime employment contract in Williamson v. Sharvest Management Co. [[895]](#footnote-896)895 The court held:

An implied lifetime employment contract may be enforceable where the employee furnishes sufficient consideration in addition to those services incident to the terms of his or her employment. However, if the intent of the parties is clear and unequivocal that a lifetime employment contract exists, there is no requirement for additional consideration. [[896]](#footnote-897)896

O. Parental Leave

Justice McHugh addressed the Parental Leave Act in the case of Hudok v. Board of Education of Randolph County. [[897]](#footnote-898)897 The court held:

The plain language of W.Va. Code, 21-5D-4 [1989] mandates unpaid parental leave for up to twelve weeks, after the exhaustion of all annual and personal leave, during any twelve-month period, because of the birth of a child of an employee covered by the Parental Leave Act, W.Va. Code, 21-5D-1 to 21-5D-9 [1989]. The legislature, by including employees of "any county board of education in the state" in its definition of employees under W.Va. Code, 21-5D-2 [1989], clearly intended to grant parental leave rights to school teachers under the Parental Leave Act. [[898]](#footnote-899)898

**[\*164]**

P. Public Employee Retirement System

Justice McHugh indicated in West Virginia Public Employees Retirement System v. Dodd [[899]](#footnote-900)899 that "at common law, as under W.Va. Code, 5-10A-1 to 5-10A-10 [1976], a public officer's or public employee's service must be honorable at all times, and if not, there is a total forfeiture of the public pension." [[900]](#footnote-901)900 The case also addressed constitutional attacks on a statute providing for disqualification of retirement benefits. The court held:

The Act on the "Disqualification for Public Retirement Plan Benefits," W.Va. Code, 5-10A-1 to 5-10A-10 [1976], is not unconstitutional as cruel and unusual, or disproportionate, punishment (W. Va. Const. art. III, § 5), as a bill of attainder or bill of pain and penalties or an ex post facto law (W. Va. Const. art. III, § 4), as an impairment of contract (W. Va. Const. art. III, § 4), as a deprivation of property without due process of law (W. Va. Const. art. III, § 10) or as a forfeiture of estate (W. Va. Const. art. III, § 18). Furthermore, that Act is exempt, under 29 U.S.C. § 1003(b)(1) (1988), from the section of the Employee Retirement Income Security Act of 1974, as amended, on nonforfeitability of a normal retirement benefit, 29 U.S.C. § 1053(a) (1988). [[901]](#footnote-902)901

In State ex rel. Dadisman v. Caperton, [[902]](#footnote-903)902 Justice McHugh stated:

Where the mandate of an opinion of this Court requires a determination of whether the Public Employees Retirement System has been rendered actuarially unsound by past underfunding and, if so, requires appropriations which will return the System to actuarial soundness to be made, such appropriations are not necessary if it is determined that the System has not been rendered actuarially unsound by that underfunding. [[903]](#footnote-904)903

Justice McHugh said in State ex rel. Lambert v. County Commission of Boone County [[904]](#footnote-905)904 that

the West Virginia Public Employees Retirement Act, set forth in W.Va. Code, 5-10-1, et seq., must be read in pari materia with the **[\*165]** West Virginia Public Employees Insurance Act, set forth in W.Va. Code, 5-16-1, et seq. (specifically, §§ 2(7), 10, 22 and 24 of chapter 5, article 16 of the W.Va. Code). These statutes relate to providing benefits to retired employees who participate in the Public Employees Retirement System. Therefore, employers who elect to participate in the Public Employees Retirement System must, pursuant to W.Va. Code, 5-16-22 [1992], contribute to the Public Employees Insurance Agency when its retired employee elects to participate in the Public Employees Insurance Agency. After all, it is by virtue of the employer's participation in the Public Employees Retirement System that the retired employee has the option of electing to participate in the Public Employees Insurance Agency. [[905]](#footnote-906)905

Justice McHugh wrote in In re Appeal or Judicial Review of Decision of West Virginia Consolidated Public Retirement Board [[906]](#footnote-907)906 that

pursuant to W.Va. Code, 5-10-2(6) [1988], an individual is an employee for membership in the Public Employees Retirement System if such individual is employed full time and his or her tenure is not restricted as to temporary or provisional appointment. These requirements apply to any person who serves regularly as an officer or employee, on a salary basis, in the service of, and whose compensation is payable, in whole or in part, by any political subdivision, as well as to an officer or employee whose compensation is calculated on a daily basis and paid monthly or on completion of assignment. [[907]](#footnote-908)907

Q. Health Care Plan

In State ex rel. City of Wheeling Retirees Ass'n, Inc. v. City of Wheeling, [[908]](#footnote-909)908 Justice McHugh determined whether health care rates charged to retirees could be different from the rates charged regular employees. The court held:

W.Va. Code, 8-12-8 [1986] provides, in part, that "in the event that a municipality changes insurance carriers, as a condition precedent to any such change, the municipality shall assure that all retirees, . . . are guaranteed acceptance, at the same cost for the same coverage as regular employees of similar age groupings[.]" However, because W.Va. Code, 8-12-8 [1986] is remedial, and, **[\*166]** therefore, to be liberally construed, even though the municipality does not change insurance carriers, retirees who are insured under the provisions of this section are to be insured at the same cost for the same coverage as regular employees of similar age groupings where the present insurance carrier changes its rates and such change results in retirees being charged different rates for the same coverage as regular employees. [[909]](#footnote-910)909

R. Deliberate Intention Action Against Employer

Justice McHugh stated in Sias v. W-P Coal Co. [[910]](#footnote-911)910 that

the portion of the statute which authorizes "prompt judicial resolution" of "deliberate intention" actions against employers, specifically, W.Va. Code, 23-4-2(c)(2)(iii)(B) [1983, 1991], relates to plaintiffs' more specific substantive law burden under the five-element test of W.Va. Code, 23-4-2(c)(2)(ii)(A)-(E) [1983, 1991], but the preexisting procedural law still applies for granting employers' motions for summary judgment, directed verdict and judgment notwithstanding the verdict. [[911]](#footnote-912)911

S. Federal Employers' Liability Act

Justice McHugh held in Gardner v. CSX Transportation, Inc. [[912]](#footnote-913)912 that "to prevail on a claim under The Federal Employers' Liability Act, 45 U.S.C. § 51 (1939), a plaintiff employee must establish that the defendant employer acted negligently and that such negligence contributed proximately, in whole or in part, to plaintiff's injury." [[913]](#footnote-914)913

Justice McHugh elaborated upon the Federal Employers' Liability Act in the case of McGraw v. Norfolk & Western Railway Co. [[914]](#footnote-915)914 He noted:

Under the Federal Employers' Liability Act, 45 U.S.C. § 51 (1939), inter alia, "every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative . . . for such injury or death **[\*167]** resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier[.]" [[915]](#footnote-916)915

Justice McHugh held next that

pursuant to 45 U.S.C. § 56 (1948), federal and state courts have concurrent jurisdiction of claims brought under the Federal Employers' Liability Act, 45 U.S.C. § 51 (1939). Although a state court may use procedural rules applicable to civil actions in the state court unless otherwise directed by the Federal Employers' Liability Act, substantive issues under the Federal Employers' Liability Act are determined by the provisions of the statute and interpretative decisions of the Federal Employers' Liability Act given by the federal courts. [[916]](#footnote-917)916

The court continued in McGraw and held that

under the Federal Employers' Liability Act, 45 U.S.C. § 51 (1939), to establish that a railroad breached its duty to provide its employees with a safe workplace, the plaintiff must show circumstances which a railroad, in the exercise of due care, could have reasonably foreseen as creating a potential for harm. [[917]](#footnote-918)917

It was further heldd that

under the Federal Employers' Liability Act, 45 U.S.C. § 51 (1939), even though the foreseeable danger to an employee is from intentional or criminal misconduct, an employer nevertheless has a duty to make reasonable provision against it. Breach of that duty would be negligence and whether the employee's injury was the result, in whole or in part, from such negligence, is a question of fact for the jury. [[918]](#footnote-919)918

Justice McHugh concluded in McGraw that "because the Federal Employers' Liability Act, 45 U.S.C. § 51 (1939), inter alia, imposes liability upon an employer for 'the negligence of any of the officers, agents, or employees' of such employer, under the act, a railroad may be liable for the negligence of any railroad employee." [[919]](#footnote-920)919 **[\*168]**

XV. TORT LAW

A. Fraud Action

Justice McHugh developed the elements of a fraud action in Lengyel v. Lint [[920]](#footnote-921)920 based upon the decision in Horton v. Tyree. [[921]](#footnote-922)921 It was held in Lengyel that

the essential elements in an action for fraud are: "(1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied upon it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied upon it." [[922]](#footnote-923)922

B. Action for Abuse of Process

In Preiser v. MacQueen, [[923]](#footnote-924)923 Justice McHugh held that "an action for abuse of process must be brought within one year from the time the right to bring the action accrued." [[924]](#footnote-925)924 Justice McHugh also held in Wayne County Bank v. Hodges [[925]](#footnote-926)925 that "generally, abuse of process consists of the willful or malicious misuse or misapplication of lawfully issued process to accomplish some purpose not intended or warranted by that process." [[926]](#footnote-927)926

C. Nuisance Action

Justice McHugh ruled in Sticklen v. Kittle [[927]](#footnote-928)927 that

as a general rule, a fair test as to whether a particular use of real property constitutes a nuisance is the reasonableness or unreasonableness of the use of the property in relation to the particular locality involved, and ordinarily such a test to determine the existence of a nuisance raises a question of fact. [[928]](#footnote-929)928

**[\*169]**

D. Tortious Interference with Business Relationship

Justice McHugh was concerned with discerning the appropriate statute of limitations for a claim of tortious interference with business relationship in the case of Garrison v. Herbert J. Thomas Memorial Hospital Ass'n. [[929]](#footnote-930)929 The court held:

An individual's right to conduct a business or pursue an occupation is a property right. The type of injury alleged in an action for tortious interference with business relationship is damage to one's business or occupation. Therefore, the two-year statute of limitations governing actions for damage to property, set forth under W.Va. Code, 55-2-12 [1959], applies to an action for tortious interference with business relationship. [[930]](#footnote-931)930

E. Medical Malpractice

In Cross v. Trapp, [[931]](#footnote-932)931 Justice McHugh wrote at length upon the issue of "informed consent" in medical care. The court addressed this issue broadly at the outset and held:

A physician has a duty to disclose information to his or her patient in order that the patient may give to the physician an informed consent to a particular medical procedure such as surgery. In the case of surgery, the physician ordinarily should disclose to the patient various considerations including (1) the possibility of the surgery, (2) the risks involved concerning the surgery, (3) alternative methods of treatment, (4) the risks relating to such alternative methods of treatment and (5) the results likely to occur if the patient remains untreated. [[932]](#footnote-933)932

He continued in Cross by holding that

in evaluating a physician's disclosure of information to his or her patient, relative to whether that patient gave an informed consent to a particular medical procedure such as surgery, this Court hereby adopts the patient need standard, rather than physician disclosure standards based upon national or community medical disclosure practice. Pursuant to the patient need standard, the need of the patient for information material to his or her **[\*170]** decision as to method of treatment, such as surgery, is the standard by which the physician's duty to disclose is measured. Under the patient need standard, the disclosure issue is approached from the reasonableness of the physician's disclosure or nondisclosure in terms of what the physician knows or should know to be the patient's informational needs. Therefore, whether a particular medical risk should be disclosed by the physician to the patient under the patient need standard ordinarily depends upon the existence and materiality of such risk with respect to the patient's decision relating to medical treatment. [[933]](#footnote-934)933

Justice McHugh narrowed the focus in Cross to address the party bearing the burden of going forward with evidence. The court held that "it is recognized under the patient need standard that in certain situations such as an emergency where harm from failure to treat is imminent or where the physical or emotional result of disclosure could jeopardize a patient, disclosure by the physician may not be feasible. However, the burden of going forward with the evidence, pertaining to nondisclosure, rests upon the physician." [[934]](#footnote-935)934

The court in Cross next addressed the issue of expert testimony. Justice McHugh wrote:

Although expert medical testimony is not required under the patient need standard to establish the scope of a physician's duty to disclose medical information to his or her patient, expert medical testimony would ordinarily be required to establish certain matters including: (1) the risks involved concerning a particular method of treatment, (2) alternative methods of treatment, (3) the risks relating to such alternative methods of treatment and (4) the results likely to occur if the patient remains untreated. [[935]](#footnote-936)935

The focus of Cross shifted to the responsibility of a hospital. Justice McHugh said that

when a patient asserts that a particular method of medical treatment, such as surgery, was performed by the patient's privately retained physician without the patient's consent, the hospital where that treatment was performed will ordinarily not be held liable to the patient upon the consent issue, where the physician involved was not an agent or employee of the hospital **[\*171]** during the period in question. [[936]](#footnote-937)936

The court in Cross concluded:

Written general consent to treatment forms, whether submitted to the patient by a privately retained physician or by hospital personnel, which do not specify any particular type of treatment to which the patient might be subjected, are not adequate standing alone to satisfy a physician's duty under the patient need standard to disclose certain information to his or her patient concerning medical treatment. Furthermore, whether a written consent to treatment form signed by a patient, which form specifies a particular method of treatment and discloses other relevant medical information to the patient, satisfies the disclosure requirements of the patient need standard depends upon the facts and circumstances of each case. [[937]](#footnote-938)937

Justice McHugh again addressed the issue of informed consent in the case of Adams v. El-Bash. [[938]](#footnote-939)938 That court held:

In cases applying the doctrine of informed consent, where a physician fails to disclose the risks of surgery in accordance with the patient need standard of disclosure and the patient suffers an injury as a result of the surgery, a causal relationship, between such failure to disclose and damage to the patient, may be shown if a reasonable person in the patient's circumstances would have refused to consent to the surgery had the risks been properly disclosed. [[939]](#footnote-940)939

Justice McHugh addressed the issue of parental consent to medical treatment for a minor in Belcher v. Charleston Area Medical Center. [[940]](#footnote-941)940 The court said that

except in very extreme cases, a physician has no legal right to perform a procedure upon, or administer or withhold treatment from a patient without the patient's consent, nor upon a child without the consent of the child's parents or guardian, unless the child is a mature minor, in which case the child's consent would be required. Whether a child is a mature minor is a question of **[\*172]** fact. Whether the child has the capacity to consent depends upon the age, ability, experience, education, training, and degree of maturity or judgment obtained by the child, as well as upon the conduct and demeanor of the child at the time of the procedure or treatment. The factual determination would also involve whether the minor has the capacity to appreciate the nature, risks, and consequences of the medical procedure to be performed, or the treatment to be administered or withheld. Where there is a conflict between the intentions of one or both parents and the minor, the physician's good faith assessment of the minor's maturity level would immunize him or her from liability for the failure to obtain parental consent. To the extent that Browning v. Hoffman, 90 W.Va. 568, 111 S.E. 492 (1922) and its progeny are inconsistent herewith, it is modified. [[941]](#footnote-942)941

Justice McHugh addressed several issues Robinson v. Charleston Area Medical Center, Inc., [[942]](#footnote-943)942 involving legislative efforts to cap noneconomic damages in medical malpractice actions. The court initially stated:

The language of the "reexamination" clause of the constitutional right to a jury trial, W.Va. Const. art. III, Sec. 13, does not apply to the legislature, fixing in advance the amount of recoverable damages in all cases of the same type, but, instead, applies only to the judiciary, acting "in any particular case." [[943]](#footnote-944)943

Justice McHugh then said that

W.Va. Code, 55-7B-8, as amended, which provides a $ 1,000,000 limit or "cap" on the amount recoverable for a noneconomic loss in a medical professional liability action is constitutional. It does not violate the state constitutional equal protection, special legislation, state constitutional substantive due process, "certain remedy," or right to jury trial provisions. W.Va. Const. art. III, Sec. 10; W.Va. Const. art. VI, Sec. 39; W.Va. Const. art. III, Sec. 10; W.Va. Const. art. III, Sec. 17; and W.Va. Const. art. III, Sec. 13, respectively. [[944]](#footnote-945)944

In Robinson, the court concluded "W.Va. Code, 55-7B-8, as amended, which provides that 'the maximum amount recoverable as damages for noneconomic loss' in a medical professional liability action 'against a health care **[\*173]** provider' is $ 1,000,000, applies as one overall limit to the aggregated claims of all plaintiffs against a health care provider, rather than applying to each plaintiff separately." [[945]](#footnote-946)945

In Rine By & Through Rine v. Irisari, [[946]](#footnote-947)946 Justice McHugh ruled that "a negligent physician is liable for the aggravation of injuries resulting from subsequent negligent medical treatment, if foreseeable, where that subsequent medical treatment is undertaken to mitigate the harm caused by the physician's own negligence." [[947]](#footnote-948)947

Justice McHugh stated in Morris v. Consolidation Coal Co. [[948]](#footnote-949)948 that "a patient does have a cause of action for the breach of the duty of confidentiality against a treating physician who wrongfully divulges confidential information." [[949]](#footnote-950)949

F. Invasion of Privacy

In Cordle v. General Hugh Mercer Corp., [[950]](#footnote-951)950 Justice McHugh confronted the question of whether invasion of privacy could form the basis of a cause of action. The court held that "in West Virginia, a legally protected interest in privacy is recognized." [[951]](#footnote-952)951

G. Action for Malicious Prosecution

Justice McHugh addressed the statute of limitations for a malicious prosecution action in Preiser v. MacQueen. [[952]](#footnote-953)952 The court held:

An action for malicious prosecution must be brought within one year from the termination of the action alleged to have been maliciously prosecuted. In particular, where an action is dismissed pursuant to W.Va.R.Civ.P. 41(b) for delinquency in the payment of accrued court costs, with leave to reinstate within three terms after entry of the order of dismissal, an action alleging that the dismissed action was maliciously prosecuted must be brought within one year from the expiration of the three terms, rather than **[\*174]** within one year from the entry of the order of dismissal. [[953]](#footnote-954)953

H. Action for Civil Conspiracy

Relying in part on Dixon v. American Industrial Leasing Co., [[954]](#footnote-955)954 Justice McHugh held in Cook v. Heck's Inc. [[955]](#footnote-956)955 that "in order for civil conspiracy to be actionable it must be proved that the defendants have committed some wrongful act or have committed a lawful act in an unlawful manner to the injury of the plaintiff." [[956]](#footnote-957)956

I. Libel

In Crain v. Lightner, [[957]](#footnote-958)957 Justice McHugh stated that "in a libel action by a private individual against persons who are alleged to have procured or assisted other persons in publishing the alleged libel, the alleged procurers or assistants are not responsible as publishers of libel absent a showing of their participation or involvement in the publication." [[958]](#footnote-959)958

J. Negligent Infliction of Emotional Distress

Justice McHugh adopted a cause of action for emotional distress, when physical injury does not result therefrom, in the case of Heldreth v. Marrs. [[959]](#footnote-960)959 The court initially held that

a defendant may be held liable for negligently causing a plaintiff to experience serious emotional distress, after the plaintiff witnesses a person closely related to the plaintiff suffer critical injury or death as a result of the defendant's negligent conduct, even though such distress did not result in physical injury, if the serious emotional distress was reasonably foreseeable. To the extent that Monteleone v. Co-Operative Transit Co., 128 W.Va. 340, 36 S.E.2d 475 (1945), is inconsistent with our holding in cases of plaintiff recovery for negligent infliction of emotional **[\*175]** distress, it is overruled. [[960]](#footnote-961)960

The court in Heldreth held next that

a plaintiff's right to recover for the negligent infliction of emotional distress, after witnessing a person closely related to the plaintiff suffer critical injury or death as a result of defendant's negligent conduct, is premised upon the traditional negligence test of foreseeability. A plaintiff is required to prove under this test that his or her serious emotional distress was reasonably foreseeable, that the defendant's negligent conduct caused the victim to suffer critical injury or death, and that the plaintiff suffered serious emotional distress as a direct result of witnessing the victim's critical injury or death. In determining whether the serious emotional injury suffered by a plaintiff in a negligent infliction of emotional distress action was reasonably foreseeable to the defendant, the following factors must be evaluated: (1) whether the plaintiff was closely related to the injury victim; (2) whether the plaintiff was located at the scene of the accident and is aware that it is causing injury to the victim; (3) whether the victim is critically injured or killed; and (4) whether the plaintiff suffers serious emotional distress. [[961]](#footnote-962)961

K. Cause of Action for Loss of Parental Consortium

Justice McHugh developed the outline for a cause of action based upon loss or impairment to parental consortium in the case of Belcher v. Goins. [[962]](#footnote-963)962 The court held as follows:

"Parental consortium" refers to the intangible benefits to a minor child arising from his or her relationship with such child's natural or adoptive parent. It includes society, companionship, comfort, guidance, kindly offices and advice of such parent and the protection, care and assistance provided by the parent. Consistent with the wrongful death statute, W.Va. Code, 55-7-6, as amended, parental consortium also includes sorrow and mental anguish concerning the impairment of the relationship. [[963]](#footnote-964)963

Justice McHugh held next in Belcher that **[\*176]**

any minor child, or a physically or mentally handicapped child of any age who is dependent upon his or her natural or adoptive parent physically, emotionally and financially, may maintain a cause of action for loss or impairment of parental consortium, against a third person who seriously injures such child's parent, thereby severely damaging the parent-child relationship. To the extent that Wallace v. Wallace, 155 W.Va. 569, 184 S.E.2d 327 (1971), is inconsistent herewith, it is overruled. [[964]](#footnote-965)964

Justice McHugh noted in Belcher that "a claim for parental consortium ordinarily must be joined with the injured parent's action against the alleged tortfeasor." [[965]](#footnote-966)965 He held that

in determining the amount of damages to award the minor or handicapped child, the relevant factors include, but are not limited to, such child's age, the nature of the child's relationship with the parent, the child's emotional and physical characteristics and whether other consortiumgiving relationships are available to such child. [[966]](#footnote-967)966

In Belcher, the court continued by holding:

When there is a parental consortium claim, the nonfatally injured parent is entitled to claim recovery for the loss or impairment of the parent's pecuniary ability to support the minor or handicapped child, while the minor or handicapped child is entitled to claim recovery for loss or impairment of those nonpecuniary elements constituting parental consortium. [[967]](#footnote-968)967

Justice McHugh noted that "'parental consortium' does not include the value of nursing, domestic or household services provided by a minor or handicapped child to the injured parent." [[968]](#footnote-969)968 Additionally, the court ruled:

Because a minor or handicapped child's claim for loss or impairment of parental consortium and the parent's claim for physical injuries are based upon the same conduct of the alleged tortfeasor, and because the child's claim is secondary to the parent's primary claim, any percentage of comparative contributory negligence attributable to the parent will reduce the **[\*177]** amount of the child's recovery of parental consortium damages. [[969]](#footnote-970)969

The court concluded in Belcher that

applying the factors set forth in syllabus point 5 of Bradley v. Appalachian Power Co., 163 W.Va. 332, 256 S.E.2d 879 (1979), the principles of this opinion are fully retroactive, even to the very limited number of cases which are otherwise subject to this opinion and in which the parent's action for physical injuries has already been settled or finally adjudicated. However, to prevent stale claims, a parental consortium claim may not in any event be maintained if the parent was injured more than two years prior to this opinion. Furthermore, to accommodate the usual requirement that a parental consortium claim be joined with the parent's action for physical injuries, a parental consortium action must be brought no later than thirty days after this opinion is filed, where the parent's action was brought prior to this opinion for injuries which were inflicted no more than two years prior to this opinion. [[970]](#footnote-971)970

L. Intentional Infliction of Emotional Distress

Justice McHugh wrote in Ronnie S. v. Mingo County Board of Education [[971]](#footnote-972)971 that

a civil action filed in a West Virginia circuit court, seeking monetary damages and injunctive relief from a county board of education and its personnel for the frequent and injurious use of a device employed to strap an autistic child to a chair while attending school, and which action includes allegations that the device was used upon the child in an intentional or reckless manner, is not precluded by the federal Individuals with Disabilities Education Act, 20 U.S.C. 1400 [1991], et seq., or the Act's West Virginia counterpart found in W.Va. Code, 18-20-1 [1990], et seq., and in West Virginia State Board of Education policy no. 2419, 126 C.S.R. 16, nor is the action subject to the exhaustion of administrative remedies requirement thereof, the Individuals with Disabilities Education Act and its West Virginia counterpart having been enacted to assure children with disabilities "a free appropriate public education" and the Act and its State counterpart having been enacted to generally expand the **[\*178]** rights of such children, rather than to restrict them. [[972]](#footnote-973)972

M. Tortious Interference with Medical Relationship

A cause of action for interference with a medical relationship was created in Morris v. Consolidation Coal Co. [[973]](#footnote-974)973 Justice McHugh wrote that

a patient does have a cause of action against a third party who induces a physician to breach his fiduciary relationship if the following elements are met: (1) the third party knew or reasonably should have known of the existence of the physician-patient relationship; (2) the third party intended to induce the physician to wrongfully disclose information about the patient or the third party should have reasonably anticipated that his actions would induce the physician to wrongfully disclose such information; (3) the third party did not reasonably believe that the physician could disclose that information to the third party without violating the duty of confidentiality that the physician owed the patient; and (4) the physician wrongfully divulges confidential information to the third party. [[974]](#footnote-975)974

N. Strict Liability

Justice McHugh addressed the question of whether to extend a specific area of statutory strict liability for property damage to include personal injury in McGlone v. Superior Trucking Co. [[975]](#footnote-976)975 The court held that

this Court will not infer legislative intent that there be strict liability for personal injuries proximately caused by transporting, with or without a special permit, an oversize or overweight load on the highways, where W.Va. Code, 17C-17-13, as amended, provides that there is strict liability to the State for property damage, but is silent as to liability for personal injuries. [[976]](#footnote-977)976

O. Comparative Negligence

Justice McHugh addressed the issue of whether a trial court or jury **[\*179]** determined comparative negligence in the case of Reager v. Anderson. [[977]](#footnote-978)977 The court held:

in a comparative negligence or causation action the issue of apportionment of negligence or causation is one for the jury or other trier of the facts, and only in the clearest of cases where the facts are undisputed and reasonable minds can draw but one inference from them should such issue be determined as a matter of law. The fact finder's apportionment of negligence or causation may be set aside only if it is grossly disproportionate. [[978]](#footnote-979)978

P. Action Under Federal Fair Credit Reporting Act

Justice McHugh clarified a cause of action under the federal Fair Credit Reporting Act in the case of Jones v. Credit Bureau of Huntington, Inc. [[979]](#footnote-980)979 It was said that "in a case involving the Fair Credit Reporting Act, 15 U.S.C. Secs. 1681 to 1681t, federal law will control the substantive rights created by such Act while state law will control the procedural matters of the case." [[980]](#footnote-981)980 Justice McHugh stated:

The Fair Credit Reporting Act, 15 U.S.C. Secs. 1681 to 1681t, creates a federal statutory action, independent from a common-law action in tort, and the plaintiff need only prove that he or she sustained actual damages resulting from a willful or negligent failure to comply with the Act in order to recover such damages. The specific amount of the actual damages is to be determined by the trier of fact and this amount may include compensation for humiliation, emotional distress, injury to the plaintiff's reputation, and injury to the plaintiff's credit rating. [[981]](#footnote-982)981

The court also stated in Jones that "in an action under the Fair Credit Reporting Act, 15 U.S.C. Secs. 1681 to 1681t, in addition to recovery of actual damages, punitive damages may also be recovered. In such an action, it is not necessary that punitive damages bear a reasonable relationship to actual damages." [[982]](#footnote-983)982 The opinion concluded:

In an action under the Fair Credit Reporting Act, 15 U.S.C. Secs. 1681 to 1681t, in assessing punitive damages, the jury may **[\*180]** consider: (1) the remedial purpose of the Act; (2) the harm to the consumer intended to be avoided or corrected by the Act; (3) the manner in which the consumer reporting agency conducted its business; and (4) the consumer reporting agency's income and net worth. [[983]](#footnote-984)983

Q. Action Under Federal Boiler Inspection Act

Justice McHugh wrote in Gardner v. CSX Transportation, Inc. [[984]](#footnote-985)984 that

pursuant to the Federal Boiler Inspection Act, 45 U.S.C. § 23 (1988), it shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless, inter alia, that locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb. [[985]](#footnote-986)985

The court held that "under the Federal Boiler Inspection Act, 45 U.S.C. § 23 (1988), a carrier cannot be held liable for failure to install equipment on a locomotive unless the omitted equipment is either required by applicable federal regulations or constitutes an integral or essential part of a completed locomotive." [[986]](#footnote-987)986

R. Action Under West Virginia Antitrust Act

Justice McHugh clarified the nature of a state antitrust proceeding in the case of State ex rel. Palumbo v. Graley's Body Shop, Inc. [[987]](#footnote-988)987 There the court held:

The proceedings conducted and the monetary penalties imposed under the West Virginia Antitrust Act, W.Va. Code, 47-18-1 to 47-18-23, as amended, are civil, and not quasi-criminal in nature, and therefore, suspected violators of the Antitrust Act do not have the right to be informed that they are targets of an investigation nor do they have the right to be informed that they may have counsel present at oral deposition. In subpoenas issued pursuant to an investigation under the Antitrust Act, the Attorney General should adequately inform suspected violators of the conduct **[\*181]** constituting a violation of the Antitrust Act. [[988]](#footnote-989)988

S. Prejudgment Interest

In Bell v. Inland Mutual Insurance Co., [[989]](#footnote-990)989 the court held:

prejudgment interest accruing on amounts as provided by law prior to July 5, 1981, is to be calculated at a maximum annual rate of six percent under W.Va. Code, 47-6-5(a) [1974], and thereafter, at a maximum annual rate of ten percent in accordance with the provisions of W.Va. Code, 56-6-31 [1981]. [[990]](#footnote-991)990

Justice McHugh indicated in Weimer-Godwin v. Board of Education of Upshur County [[991]](#footnote-992)991 that "prejudgment interest on back pay is recoverable against a county board of education on appeal to the courts of an education employee's grievance claim that there has been a misinterpretation of a statute regarding compensation." [[992]](#footnote-993)992

Justice McHugh addressed several issues concerning prejudgment interest in Grove By & Through Grove v. Myers. [[993]](#footnote-994)993 The court held that "under W.Va. Code, 56-6-31, as amended, prejudgment interest on special or liquidated damages is recoverable as a matter of law and must be calculated and added to those damages by the trial court rather than by the jury." [[994]](#footnote-995)994 Justice McHugh indicated that "under W.Va. Code, 56-6-31, as amended, prejudgment interest on special or liquidated damages is calculated from the date on which the cause of action accrued, which in a personal injury action is, ordinarily, when the injury is inflicted." [[995]](#footnote-996)995 In Grove, the court concluded:

Under W.Va. Code, 56-6-31, as amended, prejudgment interest is to be recovered on special or liquidated damages incurred by the time of the trial, whether or not the injured party has by then paid for the same. If there is sufficient evidence to demonstrate that the injured party is obligated to pay for medical or other expenses incurred by the time of the trial, and if the amount of such **[\*182]** expenses is certain or reasonably ascertainable, prejudgment interest on those expenses is to be recovered from the date the cause of action accrued. [[996]](#footnote-997)996

T. Attorney Fees and Costs

The issue in Sally-Mike Properties v. Yokum [[997]](#footnote-998)997 was whether attorney fees may be assessed as costs. Justice McHugh noted at the outset that "ordinarily, attorney's fees in excess of the nominal statutory amounts provided by W.Va. Code, 59-2-14 [1960] are not 'costs.'" [[998]](#footnote-999)998 The court said that "as a general rule each litigant bears his or her own attorney's fees absent a contrary rule of court or express statutory or contractual authority for reimbursement." [[999]](#footnote-1000)999 However, "there is authority in equity to award to the prevailing litigant his or her reasonable attorney's fees as 'costs,' without express statutory authorization, when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons." [[1000]](#footnote-1001)1000 Justice McHugh concluded:

Bringing or defending an action to promote or protect one's economic or property interests does not per se constitute bad faith, vexatious, wanton or oppressive conduct within the meaning of the exceptional rule in equity authorizing an award to the prevailing litigant of his or her reasonable attorney's fees as 'costs' of the action. [[1001]](#footnote-1002)1001

Justice McHugh held in Weimer-Godwin v. Board of Education of Upshur County [[1002]](#footnote-1003)1002 that "an attorney's gratuitous representation of a client does not prevent an award of reasonable attorney's fees." [[1003]](#footnote-1004)1003

In Grove By & Through Grove v. Myers, [[1004]](#footnote-1005)1004 Justice McHugh stated that "a prevailing plaintiff in a personal injury or wrongful death action is not entitled to recover in that action his or her reasonable attorney's fees from the defendant's liability insurer for its alleged failure to negotiate a settlement in good faith." [[1005]](#footnote-1006)1005

Justice McHugh stated in the case of Jordan v. National Grange Mutual **[\*183]** Insurance Co. [[1006]](#footnote-1007)1006 that

an insured "substantially prevails" in a property damage action against his or her insurer when the action is settled for an amount equal to or approximating the amount claimed by the insured immediately prior to the commencement of the action, as well as when the action is concluded by a jury verdict for such an amount. In either of these situations the insured is entitled to recover reasonable attorney's fees from his or her insurer, as long as the attorney's services were necessary to obtain payment of the insurance proceeds. [[1007]](#footnote-1008)1007

Justice McHugh addressed several matters involving attorney's fees in Shaffer v. Charleston Area Medical Center, Inc. [[1008]](#footnote-1009)1008 The court first held that "when attorneys jointly undertake to represent a client there is a rebuttable presumption that the attorneys are to equally share any recovery of attorney's fees. This rebuttable presumption arises only in the absence of a valid oral or written agreement between the attorneys as to the division of attorney's fees." [[1009]](#footnote-1010)1009 He then explained:

A charging lien is the equitable right of an attorney to have fees and costs due the attorney for services in a particular action secured by the judgment or recovery in such action. A charging lien by an attorney against another attorney, involving a case in which each worked, may be premised upon an oral or written fee sharing agreement between the attorneys. A charging lien brought against another attorney may proceed in a separate suit or the underlying action in which the attorneys had formerly worked on together. [[1010]](#footnote-1011)1010

U. Garnishment

Justice McHugh held in Commercial Bank of Bluefield v. St. Paul Fire & Marine Insurance Co. [[1011]](#footnote-1012)1011 that "garnishment [in aid of execution on a judgment] is, in effect, a suit by the [judgment debtor], in the name of the [judgment creditor], against the garnishee, and he [the judgment creditor] generally occupies toward the **[\*184]** garnishee the same position that his debtor occupied; his rights are no higher." [[1012]](#footnote-1013)1012 The opinion indicated that

a judgment creditor may maintain a garnishment proceeding in aid of execution to reach the proceeds of a judgment debtor's employee fidelity insurance policy when the judgment debtor has sustained a loss within the meaning of that policy, even though a formal notice and proof of loss has not been furnished to the insurer and even though the amount of the loss has not been determined at the time the garnishment proceeding is brought. [[1013]](#footnote-1014)1013

On the other hand, Justice McHugh noted that "a judgment creditor of an indemnitee may not maintain, as a third-party beneficiary, a direct action against the indemnitor when the indemnity is against loss by the indemnitee." [[1014]](#footnote-1015)1014 The court also determined that "an indemnitor against loss ordinarily may not, in a garnishment-in-aid-of-execution proceeding, assert defenses against the judgment creditor which the indemnitee/judgment debtor failed to assert, such as the comparative negligence of the judgment creditor." [[1015]](#footnote-1016)1015

V. Mary Carter Settlement Agreements

Justice McHugh addressed several issues concerning Mary Carter settlement agreements in the case of Reager v. Anderson. [[1016]](#footnote-1017)1016 The court held that "in a case in which a settling defendant, pursuant to a 'Mary Carter' settlement agreement, remains an active party and incurs a joint judgment, a verdict for the plaintiff will be reduced by the amount guaranteed in the settlement, and the defendants' right to comparative contribution will be preserved." [[1017]](#footnote-1018)1017

Justice McHugh also stated that

disclosure to the jury of the general nature of a "Mary Carter" settlement agreement is not required in each case; such disclosure lies within the sound discretion of the trial court. Where the "Mary Carter" agreement is not reached until after all or most of the evidence has been presented, and the settling defendant during closing argument and examination does not indicate to the jury a realignment of loyalties so as to prejudice the nonsettling defendant(s), it is within the sound discretion of the trial court to **[\*185]** refuse to disclose the general nature of the "Mary Carter" agreement to the jury. [[1018]](#footnote-1019)1018

The latter ruling by Justice McHugh was restated in syllabus point 4 of his opinion in Mackey v. Irisari. [[1019]](#footnote-1020)1019

W. Preinjury Exculpatory Agreements

Justice McHugh held in Murphy v. North American River Runners, Inc. [[1020]](#footnote-1021)1020 that "when a statute imposes a standard of conduct, a clause in an agreement purporting to exempt a party from tort liability to a member of the protected class for the failure to conform to that statutory standard is unenforceable." [[1021]](#footnote-1022)1021 The court also held:

A general clause in a pre-injury exculpatory agreement or anticipatory release purporting to exempt a defendant from all liability for any future loss or damage will not be construed to include the loss or damage resulting from the defendant's intentional or reckless misconduct or gross negligence, unless the circumstances clearly indicate that such was the plaintiff's intention. [[1022]](#footnote-1023)1022

X. Bankruptcy Automatic Stay

In Anderson v. Robinson, [[1023]](#footnote-1024)1023 Justice McHugh recognized an exception to the effect of an automatic stay under federal bankruptcy laws. The court held:

Where a plaintiff has obtained a judgment against a tortfeasor who has filed a petition for bankruptcy in federal court, the "automatic stay" provisions contained in 11 U.S.C. Sec. 362, as amended, which are part of the federal bankruptcy laws, do not preclude the plaintiff from proceeding in the circuit courts of this state against the tortfeasor's insurer to satisfy the judgment where the bankruptcy court has modified the automatic stay in order for the plaintiff's lawsuit to proceed to the extent of available insurance **[\*186]** coverage. [[1024]](#footnote-1025)1024

Y. Damages

Justice McHugh addressed damages for emotional distress caused by contact with an AIDS patient in Johnson v. West Virginia University Hospitals, Inc. [[1025]](#footnote-1026)1025 He held that

damages for emotional distress may be recovered by a plaintiff against a hospital based upon the plaintiff's fear of contracting acquired immune deficiency syndrome (AIDS) if: the plaintiff is not an employee of the hospital but has a duty to assist hospital personnel in dealing with a patient infected with AIDS; the plaintiff's fear is reasonable; the AIDS-infected patient physically injures the plaintiff and such physical injury causes the plaintiff to be exposed to AIDS; and the hospital has failed to follow a regulation which requires it to warn the plaintiff of the fact that the patient has AIDS despite the elapse of sufficient time to warn. [[1026]](#footnote-1027)1026

In Johnson by Johnson v. General Motors Corp., [[1027]](#footnote-1028)1027 Justice McHugh said that

when a plaintiff seeks to recover damages on a theory of crashworthiness against the manufacturer of a motor vehicle, and the manufacturer requests that the jury apportion the damages between the first and second collisions, and the jury does so, the prior settlements between the plaintiff and the other defendants will not be set-off from the jury verdict. [[1028]](#footnote-1029)1028

Justice McHugh held in Burgess v. Porterfield [[1029]](#footnote-1030)1029 that "defendants in a civil action against whom awards of compensatory and punitive damages are rendered are entitled to a reduction of the compensatory damage award, but not the punitive damage award, by the amount of any good faith settlements previously made with the plaintiff by other jointly liable parties." [[1030]](#footnote-1031)1030 **[\*187]**

Justice McHugh wrote in Clark v. Kawasaki Motors Corp., U.S.A. [[1031]](#footnote-1032)1031 that

in reducing a jury verdict in a negligence action by the amount of the plaintiff's prior settlement with a joint tortfeasor, in light of the percentage of the plaintiff's comparative negligence later found by the jury at trial, this Court adopts the "settlement first," rather than the "fault first" method; under the "settlement first" method, the trial court in making the reduction first credits the amount of the prior settlement against the jury verdict, and then reduces the remainder by the percentage of the plaintiff's comparative negligence; whereas, under the "fault first" method, the trial court in making the reduction first reduces the jury verdict by the percentage of the plaintiff's negligence, and then credits against the remainder the amount of the prior settlement. [[1032]](#footnote-1033)1032

Justice McHugh held in Andrews v. Reynolds Memorial Hospital, Inc. [[1033]](#footnote-1034)1033 that

a jury award for the lost future earnings of an infant, in a negligence action alleging that the infant's death resulted from medical malpractice committed with regard to the mother's labor and delivery of the child, will not be set aside by this Court as speculative: (1) where the award of lost future earnings is within the range of estimated future earnings, based upon various life scenarios, reduced to present value, established by the expert testimony of an economist at trial and (2) where the economic and medical evidence of the plaintiff at trial indicates that the infant in question, though born prematurely, would statistically have had an average life expectancy and an average work life expectancy, but for the alleged medical malpractice. [[1034]](#footnote-1035)1034

XVI. ADMINISTRATIVE LAW

A. State Civil Service Commission

Justice McHugh struck a balance between technical error and substantial compliance with administrative procedural rules in Vosberg v. Civil Service Commission of West Virginia. [[1035]](#footnote-1036)1035 It was held: **[\*188]**

Where a state employee, covered by civil service W.Va. Code, ch. 29, art. 6, has instituted a grievance pursuant to a state personnel grievance procedure and the employee's supervisor violates the grievance procedure, such violation will not result in the reversal of an order by the West Virginia Civil Service Commission affirming the employee's dismissal from employment, where such violation of the grievance procedure is merely technical, following substantial compliance with the procedure, and there has existed between the employee and his supervisors ongoing communications concerning the employee's employment problems. [[1036]](#footnote-1037)1036

Justice McHugh held in State ex rel. Ginsberg v. West Virginia Civil Service Commission [[1037]](#footnote-1038)1037 that "a classified civil service employee who is suspended from his employment for thirty days or less is not entitled to an appeal to the West Virginia Civil Service System." [[1038]](#footnote-1039)1038

Relying upon the opinion in Caldwell v. Civil Service Commission, [[1039]](#footnote-1040)1039 Justice McHugh held in West Virginia Department of Health v. Mathison [[1040]](#footnote-1041)1040 that

the abolition of a position, covered by the Civil Service System, pursuant to the reorganization of a unit of state government is proper when it is shown to have been made to meet changing needs or to promote efficiency in government and has been approved by the Civil Service System. [[1041]](#footnote-1042)1041

In Barnes v. Public Service Commission, [[1042]](#footnote-1043)1042 Justice McHugh held that "W.Va. Code, 29-6-15 (1977) authorizes the Civil Service Commission to award attorney fees to a civil service employee as a remedy where the action taken by the appointing authority was too severe but was with good cause." [[1043]](#footnote-1044)1043

Justice McHugh stated in American Federation of State, County & Municipal Employees v. Civil Service Commission of West Virginia [[1044]](#footnote-1045)1044 that

where employees of the Department of Human Services of West **[\*189]** Virginia were classified for purposes of civil service as Economic Service Worker I or II, and the work performed by those employees was not distinguished by the Department of Human Services from the work performed by an Economic Service Worker III (a higher salaried position), such employees were entitled to the difference in compensation between their Economic Service Worker I or II classifications and the Economic Service Worker III classification. [[1045]](#footnote-1046)1045

B. Health Care Peer Review Organization

Justice McHugh addressed several issues concerning health care peer review organizations in Garrison v. Herbert J. Thomas Memorial Hospital Ass'n. [[1046]](#footnote-1047)1046 The court initially held that

under W.Va. Code, 30-3C-2(a) [1980], individuals providing information to any review organization may not be shielded from civil liability when they provide information that is: (1) unrelated to the performance of the duties and functions of such review organization; and (2) false, and the person providing such information knew, or had reason to believe, that such information was false. Thus, individuals conducting health care peer review must act in good faith in order to be statutorily immunized from civil liability under W.Va. Code, 30-3C-2 [1980]. [[1047]](#footnote-1048)1047

The court in Garrison held next that

the public policy in favor of full disclosure encourages individuals to provide "good-faith health care peer review." Mahmoodian v. United Hospital Center, Inc., 185 W.Va. 59, 65, 404 S.E.2d 750, 756, cert. denied, 502 U.S. 863, 112 S.Ct. 185, 116 L.Ed.2d 146 (1991). Thus, an agreement wherein a hospital agrees not to fully disclose truthful and pertinent information about a physician to a peer review organization would violate the public policy in favor of full disclosure. Conversely, an agreement by a hospital not to disclose information about a physician which is known to be false would not violate the public policy in favor of full disclosure. [[1048]](#footnote-1049)1048

**[\*190]**

C. Health Care Cost Review Authority

Justice McHugh clarified the duties of the Health Care Cost Review Authority in its determination of applications for certificates of need in the case of United Hospital Center, Inc. v. Richardson. [[1049]](#footnote-1050)1049 The court held initially that

pursuant to W.Va. Code, 16-29B-11 [1983], the West Virginia Health Care Cost Review Authority was designated this State's public health planning and development agency, which agency has the responsibility of administering the West Virginia public health certificate of need program, W.Va. Code, 16-2D-1 [1977], et seq.; in particular, the duties of the planning and development agency include the determination of the completeness of, the review of and the rendering of a final decision upon certificate of need applications for new institutional health services. [[1050]](#footnote-1051)1050

The court in Richardson next held that

where an applicant sought a certificate of need under the provisions of W.Va. Code, 16-2D-1 [1977], et seq., for the acquisition of a medical diagnostic service known as a mobile magnetic resonance imaging ["MRI"] unit, the West Virginia public health planning and development agency was required pursuant to W.Va. Code, 16-2D-7(f) [1981], to determine the completeness of the applicant's application within fifteen days of the agency's receipt of the application, and the action of the agency in imposing a "moratorium" upon the determination of completeness of that, and similar, applications, in order that standards for the processing of "MRI" applications could be developed, was arbitrary and capricious, in view of existing statutes and legislative rules allowing opportunity for the development of "MRI" standards during the agency's regular review process. [[1051]](#footnote-1052)1051

D. Division of Environmental Protection

In Ooten v. Faerber, [[1052]](#footnote-1053)1052 Justice McHugh held:

Where consideration of the reinstatement of an area deleted from a surface-mining permit is conditioned upon (1) completion of **[\*191]** mining and reclamation on a significant portion of the approved area and upon (2) a further determination of the possible effect of mining on the deleted area, there must be compliance with both of these conditions, including revegetation, prior to reinstatement, unless the permit conditions are modified in accordance with the statute. [[1053]](#footnote-1054)1053

Justice McHugh said in State ex rel. Laurel Mountain/Fellowsville Area Clean Watershed Ass'n v. Callaghan [[1054]](#footnote-1055)1054 that "when the language of a regulation promulgated pursuant to the West Virginia Surface Mining and Reclamation Act, W.Va. Code, 22A-3-1 et seq., is clear and unambiguous, the plain meaning of the regulation is to be accepted and followed without resorting to the rules of interpretation or construction." [[1055]](#footnote-1056)1055 The court ruled that "pursuant to 38 C.S.R. Sec. 2-12.4(c) (1991), the Commissioner of the Division of Environmental Protection has a duty to utilize the proceeds from forfeited bonds to accomplish the completion of reclamation of affected lands of a surface mine." [[1056]](#footnote-1057)1056

In Curnutte v. Callaghan, [[1057]](#footnote-1058)1057 Justice McHugh stated that "under the definition of valid existing rights for haul roads provided in 38 W.Va.C.S.R. Sec. 2-2.129 (1992), a permit applicant may establish valid existing rights for a coal haul road if the applicant demonstrates that the proposed road was in existence prior to August 3, 1977." [[1058]](#footnote-1059)1058

In the case of State ex rel. West Virginia Highlands Conservancy, Inc. v. West Virginia Division of Environmental Protection, [[1059]](#footnote-1060)1059 Justice McHugh wrote that

pursuant to W.Va. Code, 22A-3-11(g) [1990] and 38 W.Va.C.S.R. Sec. 2-12.4(d) (1991), the West Virginia Division of Environmental Protection has a mandatory, nondiscretionary duty to utilize moneys from the Special Reclamation Fund, up to [twenty-five percent] of the annual amount, to treat acid mine drainage at bond forfeiture sites when the proceeds from forfeited bonds are less than the actual cost of reclamation. However, when the cost of treating acid mine drainage at these sites is greater than the amount of funds available in the Special Reclamation Fund, the Division of Environmental Protection may expend the available funds in the Special Reclamation Fund at the highest **[\*192]** priority sites. [[1060]](#footnote-1061)1060

Justice McHugh wrote in State ex rel. East End Ass'n v. McCoy [[1061]](#footnote-1062)1061 that

under W.Va. Code, 22-15-10(b) [1994], it is unlawful for any person, unless the person holds a valid permit from the division of environmental protection to install, establish, construct, modify, operate or abandon any solid waste facility. All approved solid waste facilities shall be installed, established, constructed, modified, operated or abandoned in accordance with this article, plans, specifications, orders, instructions and rules in effect. A person who obtains a construction permit from the Division of Environmental Protection under W.Va. Code, 22-5-11 [1994] of the West Virginia Air Pollution Control Act to construct a medical waste incinerator is not required to also obtain a construction permit for that purpose under W.Va. Code, 22-15-10(b) [1994]. [[1062]](#footnote-1063)1062

In West Virginia Division of Environmental Protection v. Kingwood Coal Co., [[1063]](#footnote-1064)1063 Justice McHugh stated that "appeals of a final agency decision issued by the director of the division of environmental protection shall be heard de novo by the surface mine board as required by W.Va. Code, 22B-1-7(e) [1994]. The board is not required to afford any deference to the DEP decision but shall act independently on the evidence before it." [[1064]](#footnote-1065)1064

E. Division of Personnel

Justice McHugh restricted the authority of the Division of Personnel in grievance proceedings in the case of Parsons v. West Virginia Bureau of Employment Programs, Workers' Compensation Division. [[1065]](#footnote-1066)1065 The court initially stated that "the Division of Personnel has no jurisdiction to hear or decide misclassification grievances at level three of the Grievance Procedure for State Employees set forth in W.Va. Code, 29-6A-1, et seq., except in those instances where the Division of Personnel is the employing agency." [[1066]](#footnote-1067)1066 The court next held that

the legislature has statutorily mandated that the Division of **[\*193]** Personnel has the discretion of becoming a party at level three of the Grievance Procedure for State Employees, and as a party at level three of the grievance procedure the consent of the Division of Personnel is needed before the relief requested can be modified under W.Va. Code, 29-6A-3(k) [1988]. [[1067]](#footnote-1068)1067

F. Department of Health and Human Resources

Justice McHugh addressed the protocol for working with infectious medical waste in State ex rel. East End Ass'n v. McCoy. [[1068]](#footnote-1069)1068 He said that

under W.Va. Code, 20-5J-5(b) [1991] and 64 C.S.R. 564.1 [1993] no person may own, construct, modify, operate or close an infectious medical waste management facility without first obtaining a permit from the secretary of the Department of Health and Human Resources. According to 64 C.S.R. 56-4.4.4 [1993], an infectious medical waste management facility permit application must include, among other information, a proposed infectious medical waste management plan. The secretary of the Department of Health and Human Resources must approve this plan before he or she grants a permit to own, construct, modify, operate or close an infectious medical waste management facility. [[1069]](#footnote-1070)1069

The court next held that

under W.Va. Code, 20-5J-6(a)(9) [1994], the secretary of the Department of Health and Human Resources shall promulgate legislative rules in accordance with the provisions of W.Va. Code, 29A-1-1, et seq. necessary to effectuate the findings and purposes of the West Virginia Medical Waste Act, W.Va. Code, 20-5J-1, et seq. These rules shall include, but not be limited to, procedures for public participation in the implementation of this article. W.Va. Code, 20-5J6(a)(9) [1994] requires the secretary of the Department of Health and Human Resources to promulgate legislative rules setting forth procedures for public participation in the permit application process of noncommercial infectious medical waste management facilities. [[1070]](#footnote-1071)1070 **[\*194]**

G. Division of Human Services

Justice McHugh addressed an aspect of the method used by, what is now the division of human services, in determining food stamp eligibility in the case of Bragg v. Ginsberg. [[1071]](#footnote-1072)1071 The court held:

In establishing the value of a licensed vehicle of a household as a financial resource in determining whether the household's financial resources, or assets, exceeded the limits of eligibility for food stamps under the federal Food Stamp Act of 1977, 7 U.S.C. Sec. 2011 [1977], et seq., for which food stamps the household applied in May, 1977, the West Virginia Department of Human Services (then the "West Virginia Department of Welfare") was required, pursuant to 7 U.S.C. Sec. 2014(g) [1977], and applicable federal and state regulations, to determine the "fair market value" of the motor vehicle, and that fair market value was to be determined by the West Virginia Department of Human Services by assigning to the vehicle the vehicle's "wholesale value." [[1072]](#footnote-1073)1072

H. Division of Health

In Citizens Concerned About Valley Mental Health Center v. Hansbarger, [[1073]](#footnote-1074)1073 Justice McHugh clarified the authority of what is now the Division of Health and the Board of Health. The court noted initially that "the West Virginia Department of Health through its Board of Health and Director has a duty to insure the effective delivery of mental health services in this State." [[1074]](#footnote-1075)1074 Justice McHugh held next that

the discretion of the board of directors of comprehensive community mental health-mental retardation centers, such as Valley Comprehensive Community Mental Health Center, to determine the nature of mental health services which such centers provide to the communities they serve is circumscribed by guidelines and standards established by the State of West Virginia and, in particular, by the West Virginia Department of Health; those guidelines and standards are reflected (1) in the provisions of W.Va. Code, 27-2A-1 [1977], which statute enumerates various requirements for the licensure of comprehensive community mental health-mental retardation centers, (2) in the rules and regulations relating to such centers promulgated by the Board of **[\*195]** Health of the West Virginia Department of Health and (3) in other matters, including lease and service contract agreements between the State of West Virginia and comprehensive community mental health-mental retardation centers and state monitoring or evaluation of such centers. [[1075]](#footnote-1076)1075

The court in Hansbarger concluded by stating:

The Director of the West Virginia Department of Health has the power by statute to enforce the rules and regulations promulgated by the Board of Health, and the Director of the West Virginia Department of Health and certain others have the power by statute to hold investigations, inquiries and hearings concerning matters covered by the laws of this State pertaining to public health and within the authority of the Board of Health, and the rules, regulations and orders of the Board. [[1076]](#footnote-1077)1076

I. Department of Education

That court held in State ex rel. Wilson v. Truby [[1077]](#footnote-1078)1077 that "pursuant to Part III of the West Virginia Department of Education Employee Handbook, applicants within the Department who have met the objective eligibility criteria for a vacant professional position are entitled to an interview for such position." [[1078]](#footnote-1079)1078

Justice McHugh examined implementation of A Master Plan for Public Education in Pauley v. Bailey. [[1079]](#footnote-1080)1079 The court initially held that

the West Virginia Board of Education and the State Superintendent of Schools, pursuant to their general supervisory powers over education in West Virginia under W.Va. Const. art. XII, Sec. 2, and their specific duties to establish, implement and enforce high quality educational standards for all facets of education under the provisions of Chapter 18 of the West Virginia Code, have a duty to ensure the complete executive delivery and maintenance of a "thorough and efficient system of free schools" in West Virginia as that system is embodied in A Master Plan for Public Education which plan was proposed by agencies of the executive branch and found constitutionally acceptable by the Circuit Court of Kanawha County and that plan will be enforced until such time as it is altered or modified by this Court or the **[\*196]** circuit court. [[1080]](#footnote-1081)1080

The court in Pauley then held:

Board Policies Secs. 2510 and 2321 of the West Virginia Board of Education, standing alone, do not comply with the statutory duty of the West Virginia Board of Education, under W.Va. Code, 18-9A-22 [1981], to establish quality educational standards for the operation of the county school systems in West Virginia, nor will such policies comply with the duty of the West Virginia Board of Education, under the 1984 amended version of that statute, to establish "high quality" educational standards for the operation of the county school systems in West Virginia as such standards are detailed in A Master Plan for Public Education. [[1081]](#footnote-1082)1081

In Miller v. Board of Education of County of Boone, [[1082]](#footnote-1083)1082 Justice McHugh stated that "W.Va. Code, 18A-2-8a [1977] does not require the board of education or superintendent to take some affirmative action before the first Monday in May when not rehiring probationary employees." [[1083]](#footnote-1084)1083

J. Department of Motor Vehicles

The court in Wells v. Roberts [[1084]](#footnote-1085)1084 looked at the issue of mandatory revocation of a driver's license. Justice McHugh indicated initially that "mandatory administrative revocation of an operator's license, without an administrative hearing, under W.Va. Code, 17B-3-5, where there has been a prior hearing and conviction on the underlying criminal charge, does not deny the person whose license is so revoked due process of law." [[1085]](#footnote-1086)1085 The court in Wells then held:

W.Va. Code, 17B-3-5, provides for a mandatory revocation of an operator's license upon receipt of a record of conviction of a specified offense when that conviction has become final. That section does not provide for an administrative hearing either before or after the revocation, but, rather, for "forthwith" revocation. W.Va. Code, 17B-36, on the other hand, provides for discretionary suspension of an operator's license where there is evidence that the licensee has committed a specified offense. That **[\*197]** section does provide for an administrative hearing upon request after which the suspension may be rescinded, extended or changed to a revocation. [[1086]](#footnote-1087)1086

The court addressed the degree of evidence necessary in a license suspension hearing in Ours v. West Virginia Department of Motor Vehicles. [[1087]](#footnote-1088)1087 Justice McHugh held that

reports prepared by a police officer investigating an automobile accident and reports prepared by persons involved in such accident may not be the sole evidence upon which the Commissioner of the Department of Motor Vehicles bases a determination, after a suspension hearing conducted pursuant to W.Va. Code, 17D-3-15 [1972], that there is a "reasonable possibility of judgment" against a driver or owner of a vehicle involved in the accident and from whom security for that accident has been required pursuant to the provisions of chapter 17D, article 3 of the West Virginia Code. [[1088]](#footnote-1089)1088

In Kimes v. Bechtold, [[1089]](#footnote-1090)1089 Justice McHugh held that "W.Va. Code, 17C-5A-3 [1983], read in pari materia with W.Va. Code, 17C-5-7 [1983], does not authorize the early reissuance of a license to operate a motor vehicle, after the successful completion of an alcoholism educational, treatment or rehabilitation program, where the license had been revoked for a first refusal to submit to a designated secondary chemical test." [[1090]](#footnote-1091)1090

K. Board of Optometry

Justice McHugh addressed several issues involving the state board of optometry in the case of Serian v. State By & Through West Virginia Board of Optometry. [[1091]](#footnote-1092)1091 The first issue concerned the power of the board to act when all its members were not appointed. Justice McHugh wrote:

Where appointments of lay persons by the governor of this State to the West Virginia Board of Optometry pursuant to W.Va. Code, 30-1-4a [1977], had not been made, the West Virginia Board of Optometry, nevertheless, had jurisdiction to conduct license **[\*198]** revocation proceedings against an optometrist practicing in this State, where the record indicated that, pursuant to W.Va. Code, 30-1-5 [1931], a quorum of board members existed during the transaction of business relating to such revocation proceedings. [[1092]](#footnote-1093)1092

The next issue the court resolved in Serian concerned the board of optometry's adherence to a specific notice requirement in its rules and regulations. Justice McHugh held that

where the rules and regulations of the West Virginia Board of Optometry required that an optometrist charged with a violation of the optometry laws of this State be provided in writing with a list of persons, if any, who witnessed the alleged violation, such rules and regulations were complied with by the West Virginia Board of Optometry, where the written notices of hearing before the board upon the violation provided the names of persons who complained against the optometrist concerning the violation, and the testimony of other persons against the optometrist whose names were not provided in the notices or in any other document prior to the hearing was not considered by the board. [[1093]](#footnote-1094)1093

Justice McHugh continued in Serian by addressing the presumptive impartiality of practicing optometrist to be members of the board of optometry. The court stated that

the fact that members of the West Virginia Board of Optometry or members of board committees are practicing optometry in this State does not ordinarily suggest that such board or committee members have a pecuniary interest of sufficient substance to disqualify them from participating in license revocation proceedings against an optometrist also practicing in this State. [[1094]](#footnote-1095)1094

The final matter taken up by Justice McHugh in Serian involved the interchange of roles by members of the board of optometry. The court stated:

License revocation proceedings before the West Virginia Board of Optometry, wherein charges filed against an optometrist practicing in this State were investigated, heard and evaluated before the board and its appointed committee, did not violate due process per se through the alleged mixing of the roles of **[\*199]** complainant or prosecutor and judge. [[1095]](#footnote-1096)1095

L. Public Service Commission

In West Virginia-Citizen Action Group v. Public Service Commission of West Virginia, [[1096]](#footnote-1097)1096 Justice McHugh addressed several matters involving the authority of the Public Service Commission. The court initially held that "the Public Service Commission was created by the Legislature for the purpose of exercising regulatory authority over public utilities. Its function is to require such entities to perform in a manner designed to safeguard the interests of the public and the utilities. Its primary purpose is to serve the interests of the public." [[1097]](#footnote-1098)1097 The court next examined the authority of the Public Service Commission regarding a specific issue. It was stated that

where a public utility communicates, through its billing process, with its customers upon matters concerning the costs customers must bear if certain legislation concerning utilities is enacted into law, the Public Service Commission of West Virginia has jurisdiction under its authority to (1) safeguard the interests of the public, and (2) regulate the "practices, services and rates of public utilities," to establish methods by which the utility's customers may receive contrasting or opposing viewpoints concerning such costs. [[1098]](#footnote-1099)1098

Justice McHugh in Citizen Action Group concluded that

where a public utility placed in its monthly billing envelopes mailed to its customers an insert which stated that electric bills will "increase sharply" if certain legislation before the United States Congress, concerning utilities, is enacted into law, the Public Service Commission of West Virginia had jurisdiction to require that a subsequent mailing of the utility's billing envelopes contain the insert of an appropriate spokesman, setting forth contrasting or opposing viewpoints to the utility's insert. [[1099]](#footnote-1100)1099

In Stephens v. Public Service Commission of West Virginia, [[1100]](#footnote-1101)1100 Justice McHugh addressed a common carrier's efforts to obtain lawful authority to operate **[\*200]** in the state, after having previously operated unlawfully in the state. The court held that

if a common carrier by motor vehicle willfully operates unlawfully within this State by not first having applied for and obtained a certificate of convenience and necessity pursuant to W.Va. Code, 24A-2-5 [1980], and that common carrier subsequently applies for a certificate, the Public Service Commission may not base its findings that the public convenience and necessity require the proposed service or any part thereof on evidence relating to such unlawful operations. [[1101]](#footnote-1102)1101

Justice McHugh held in Blennerhassett Historical Park Commission v. Public Service Commission of West Virginia [[1102]](#footnote-1103)1102 that "the river transportation service on the Ohio River from Point Park in Parkersburg, West Virginia to Blennerhassett Island is a ferry service and, pursuant to W.Va. Code, 24-2-1 [1983], is a public utility subject to the regulatory jurisdiction of the Public Service Commission." [[1103]](#footnote-1104)1103

In Consumer Advocate Division of Public Service Commission of West Virginia v. Public Service Commission of West Virginia, [[1104]](#footnote-1105)1104 Justice McHugh addressed the ability of the Public Service Commission to alter laws. The court held that "a statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten." [[1105]](#footnote-1106)1105 Justice McHugh ruled that

where a rule of the Public Service Commission of West Virginia authorizes a waiver of such rule in the event that a provision of the rule would result in "undue hardship," this Court, upon appeal from a final order of the Commission waiving such rule due to "hardship," will remand the case for the Commission to follow its rule by finding whether an "undue hardship" would result from application of the rule. [[1106]](#footnote-1107)1106

Justice McHugh examined the authority of the Public Service Commission to grant certificates to radio carriers in the case of Capitol Radiotelephone Co. v. Public Service Commission of West Virginia. [[1107]](#footnote-1108)1107 He stated the following: **[\*201]**

In a case where a radio common carrier seeks a certificate of public convenience and necessity pursuant to the provisions of W.Va. Code, 24-2-11 [1983], the Public Service Commission must place the burden of proof upon the applicant in establishing that public convenience and necessity do exist. However, the Public Service Commission is not required to consider the effect of granting such certificate on existing radio common carriers. When such public convenience and necessity is properly shown, it is not error for the Public Service Commission to grant a certificate of public convenience and necessity. [[1108]](#footnote-1109)1108

The issue confronting Justice McHugh in Casey v. Public Service Commission of West Virginia [[1109]](#footnote-1110)1109 involved the authority of the Public Service Commission to intervene in interstate telephone billing disputes. The court held:

Where a billing dispute arises between an interstate telephone company and a customer concerning interstate telephone calls, which interstate calls are regulated by the Federal Communications Commission, and the Federal Communications Commission has an on-going procedure for the resolution of such disputes, the Communications Act of 1934, set forth in 47 U.S.C. Sec. 151, et seq., preempts the jurisdiction of the Public Service Commission of West Virginia to resolve such interstate telephone billing disputes, even though the Federal Communications Commission deferred to the states the determination of whether and under what circumstances local exchange carriers will be allowed to offer disconnection for nonpayment services to the interstate telephone company. [[1110]](#footnote-1111)1110

Justice McHugh wrote in City of Kenova v. Bell Atlantic-West Virginia, Inc. [[1111]](#footnote-1112)1111 that

in the event that a conflict arises between county commissions, between telephone companies, between a telephone company or companies and a county commission or commissions, or between the department of public safety and any of the foregoing entities concerning an emergency telephone system or systems or an enhanced emergency telephone system or systems, the public service commission, upon application by such county commission, telephone company, or department of public safety, **[\*202]** shall resolve such conflict, pursuant to W.Va. Code, . 246-7 [1989]. However, neither W.Va. Code, 24-6-7 [1989] nor W.Va. Code, 24-6-1a [1988] authorizes the public service commission to resolve conflicts which arise between a county commission and a municipality concerning an emergency telephone system or systems or an enhanced emergency telephone system or systems. [[1112]](#footnote-1113)1112

The court concluded in Kenova that

under the plain language of W.Va. Code, 24-6-5 [1989], an enhanced emergency telephone system, at a minimum, shall provide, inter alia, that all the territory in the county, including every municipal corporation in the county, which is served by telephone company central office equipment that will permit such a system to be established shall be included in the system. [[1113]](#footnote-1114)1113

In Jackson v. Donahue, [[1114]](#footnote-1115)1114 Justice McHugh addressed issues involving selfinsured foreign commercial trucking companies. The court noted that "the phrase 'self-insurance' means, generally, the assumption of one's own risk and, typically, involves the setting aside of a special fund to meet losses and pay valid claims, instead of insuring against such losses and claims through an insurance policy." [[1115]](#footnote-1116)1115 The court then stated that

under the law of this State, a foreign commercial trucking corporation, which has been granted authority by the West Virginia Public Service Commission to selfinsure under W.Va. Code, 24A-5-5(g) [1961], must afford, as a self-insurer, the same coverage under the West Virginia motor vehicle omnibus clause statutes, W.Va. Code, 33-6-31(a) [1982], and W.Va. Code, 17D-4-12(b)(2) [1991], for the protection of the public, as would a liability insurance contract. [[1116]](#footnote-1117)1116

Justice McHugh concluded in Jackson that

a foreign commercial trucking corporation operating in interstate commerce pursuant to a federal regulatory scheme, which provides federal minimum limits of liability coverage, is not **[\*203]** subject to the limits set forth in W.Va. Code, 17D-4-2 [1979], concerning this State's financial responsibility provisions, even though the corporation was granted authority to self-insure by the West Virginia Public Service Commission. [[1117]](#footnote-1118)1117

M. Police Civil Service Commission

Martin v. Pugh [[1118]](#footnote-1119)1118 required Justice McHugh to address several issues concerning appointment of police officers under the Police Civil Service Act. It was held initially that "W.Va. Code, 8-14-15 [1969], requires an average score to be calculated and utilized for each candidate who takes the competitive examination for a police civil service position on more than one occasion during the three years next preceding the date of the prospective appointment." [[1119]](#footnote-1120)1119 Justice McHugh next held that "the burden of proof is upon a candidate for appointment to a police civil service position to show that other candidates having higher average examination scores are no longer available for appointment for one or more of the reasons set forth in W.Va. Code, 8-14-14 and -15 [1969]." [[1120]](#footnote-1121)1120 In Martin, the court then ruled that "there must be strict compliance with the Police Civil Service Act, W.Va. Code, 8-14-6 to -23, and de facto appointments, based upon mere performance of duties as a police officer, are not contemplated under such Act." [[1121]](#footnote-1122)1121 Justice McHugh concluded in Martin that

where a candidate for appointment to a police civil service position does not satisfy the requirements of W.Va. Code, 8-14-15 [1969] for inclusion in the list of certified eligibles, is not so certified by the policemen's civil service commission, and is not selected by the appointing officer from such list, his purported "appointment" in any other manner is void ab initio, and the municipality is not estopped from subsequently resisting his efforts to obtain recognition of his status pursuant to the void appointment. [[1122]](#footnote-1123)1122

Justice McHugh clarified the weight to be accorded statutory criteria for promotion within the ranks of police departments in the case of Bays v. Police Civil Service Commission, City of Charleston. [[1123]](#footnote-1124)1123 The court stated: **[\*204]**

The Police Civil Service Act, in particular, W.Va. Code, 814-17, as amended, requires that the promotions of individuals thereunder are to be based upon merit and fitness to be ascertained by competitive written examination and upon the superior qualifications of the individuals promoted, as shown by their previous service and experience. One of these test factors, in itself, is not an adequate determinant of the applicant's merit and fitness; therefore, it should not be considered to the exclusion of the others. Accordingly, regulations of a police civil service commission which conflict with the statute on this point are void. [[1124]](#footnote-1125)1124

Justice McHugh scrutinized questionable promotional criteria in the case of Habursky v. Recht. [[1125]](#footnote-1126)1125 The court stated that

a rule of a police civil service commission basing seniority points, for the purpose of promotion, upon "years of in-grade service" is invalid, as it is too restrictive and conflicts with W.Va. Code, 8-14-17, as amended, which requires consideration of "previous service and experience." An "in-grade" service credit rule is invalid also when it conflicts with an existing, city-approved regulation of a police civil service commission which requires consideration of "years of service." [[1126]](#footnote-1127)1126

Justice McHugh observed in Mason v. City of Welch [[1127]](#footnote-1128)1127 that "parking-meter attendants are not 'members of a paid police department' as defined in W.Va. Code, 8-14-6 [1969] and are, therefore, not covered by the Police Civil Service Act, W.Va. Code, 8-14-6 to -23, as amended." [[1128]](#footnote-1129)1128

Justice McHugh held in Echard v. City of Parkersburg [[1129]](#footnote-1130)1129 that "entry of an order by a policemen's civil service commission takes place when entered in an order book of the policemen's civil service commission and dated by the recorder of the city." [[1130]](#footnote-1131)1130

N. Division of Water Resources

In Rayle Coal Co. v. Chief, Division of Water Resources, State Department **[\*205]** of Natural Resources, [[1131]](#footnote-1132)1131 Justice McHugh stated:

According to W.Va. Code, 20-5A-5(b), as amended, an application for a water pollution control permit is required whenever there is a discharge of any amount of "pollutant," treated or untreated, from a "point source" into the "waters" of this state, as these terms are defined in W.Va. Code, 20-5A-2, as amended. [[1132]](#footnote-1133)1132

The court also held that "the West Virginia Water Pollution Control Act, W.Va. Code, 20-5A-1 to 20-5A-24, as amended, requires an application for a permit when the cessation of business operations does not stop the pollution." [[1133]](#footnote-1134)1133

O. Water Development Authority

Justice McHugh addressed the ability of the Water Development Authority to impose service charges on public service districts in the case of State ex rel. Water Development Authority v. Northern Wayne County Public Service District. [[1134]](#footnote-1135)1134 The court held:

W.Va. Code, 22C-1-7 [1994] authorizes the Water Development Authority to directly impose on a public service district, which operates a public utility as defined in W.Va. Code, 24-1-2 [1979], "in its own name and for its own benefit service charges determined by it to be necessary" when the public service district defaults on a loan made by the Water Development Authority to the public service district. However, the Water Development Authority's power to impose such service charges upon the public service district which operates a public utility is subject to the regulatory review and approval of the Public Service Commission pursuant to W.Va. Code, 24-2-1 [1991]. [[1135]](#footnote-1136)1135

P. Division of Natural Resources

In State ex rel. Hamrick v. LCS Services, Inc., [[1136]](#footnote-1137)1136 Justice McHugh commented upon the right of the Division of Natural Resources to litigate a matter in state court that evolved out of a federal proceeding. The court held initially: **[\*206]**

When a federal district court orders the state Division of Natural Resources (DNR) to comply with state permit procedures for a solid waste facility which were in effect on February 3, 1988, and which procedures on that date required only a permit from state DNR authorities, but subsequent to that date, the legislature enacts new provisions, W.Va. Code, 20-5F-4a, as amended, and W.Va. Code, 20-9-12b, as amended, which require a certificate of site approval from county or regional solid waste authorities, the DNR may institute an action in circuit court to adjudicate the issue of compliance with the requirement for a certificate of site approval from county or regional solid waste authorities. Because the issue of the requirement of a certificate of site approval from county or regional solid waste authorities was not litigated in the federal district court, it is error for the circuit court to apply principles of res judicata and collateral estoppel to bar litigation seeking to adjudicate this issue in the circuit court. [[1137]](#footnote-1138)1137

Justice McHugh then concluded:

When a federal district court orders the state Division of Natural Resources (DNR) to comply with state permit procedures for a solid waste facility which were in effect on February 3, 1988, and which procedures on that date required only a permit from state DNR authorities, but subsequent to that date, the legislature enacts a new provision, W.Va. Code, 20-9-12c [1990], which requires approval by a county commission for the continued handling of 10,000 tons or more of solid waste per month, the DNR may institute an action in circuit court to adjudicate the issue of compliance with this requirement. Because the issue of approval by a county commission for the continued handling of 10,000 tons or more of solid waste per month was not litigated in the federal district court, it is error for the circuit court to apply principles of res judicata and collateral estoppel to bar litigation seeking to adjudicate this issue in the circuit court. [[1138]](#footnote-1139)1138

Q. Solid Waste Authority

Justice McHugh was called upon in In re Reitter [[1139]](#footnote-1140)1139 to address the propriety of certain compensation being given to board members of a solid waste authority. He held: **[\*207]**

Under W.Va. Code, 20-9-3 [1991], members of a solid waste authority shall not receive compensation for their services thereon, except for actual expenses incurred in the discharge of their duties. Therefore, an employer of a member of a solid waste authority may not be reimbursed for the wages and benefits paid to that board member while he or she is performing duties for the solid waste authority during his or her scheduled hours of employment with the employer. [[1140]](#footnote-1141)1140

R. Department of Highways

In State ex rel. Keene v. Jordan, [[1141]](#footnote-1142)1141 Justice McHugh determined whether department of highway agents could be subject to criminal prosecution for carrying out lawful orders. The court held that

pursuant to W.Va. Code, 17-4-1 [1972] the State Commissioner of Highways has exclusive authority and control over state roads. Therefore, a city official may not interfere with the legitimate authority of the State Department of Highways by criminally prosecuting, under a municipal ordinance, a state employee and an employee of a railroad company for closing a railroad crossing which was under the authority and control of the State Department of Highways. [[1142]](#footnote-1143)1142

S. Board of Medicine

Justice McHugh addressed the issue of discovery during a proceeding before the board of medicine in the case of State ex rel. Hoover v. Smith. [[1143]](#footnote-1144)1143 He held:

Pursuant to the West Virginia Medical Practice Act set forth in W.Va. Code, 30-3-1 et seq. and the regulations promulgated by the Board of Medicine pursuant to W.Va. Code, 30-3-1 et seq. found in 11 CSR 1A-1 et seq., discovery depositions are not expressly or implicitly authorized in a disciplinary proceeding before the Board of Medicine. Furthermore, the due process clause found in article III, 10 of the Constitution of West Virginia does not mandate that discovery be accorded to a physician in a disciplinary proceeding unless there are particular circumstances which would make it fundamentally unfair to refuse to allow the physician to conduct **[\*208]** discovery prior to the hearing in the disciplinary proceeding. In such event the physician may obtain subpoenas for purposes of obtaining pre-hearing discovery depositions. [[1144]](#footnote-1145)1144

T. Concurrent Jurisdiction

Justice McHugh addressed matters involving concurrent jurisdiction between courts and administrative agencies in State ex rel. Bell Atlantic-West Virginia, Inc. v. Ranson. [[1145]](#footnote-1146)1145 The court held that

where an administrative agency and the courts have concurrent jurisdiction of an issue which requires the agency's special expertise and which extends beyond the conventional experience of judges, the doctrine of primary jurisdiction applies. In such a case, the court should refrain from exercising jurisdiction until after the agency has resolved the issue. The court's decision whether to apply the primary jurisdiction doctrine is reviewed on appeal under an abuse of discretion standard. [[1146]](#footnote-1147)1146

Justice McHugh then stated that

in determining whether to apply the primary jurisdiction doctrine, courts should consider factors such as whether the question at issue is within the conventional experience of judges; whether the question at issue lies peculiarly within the agency's discretion or requires the exercise of agency expertise; whether there exists a danger of inconsistent rulings; and whether a prior application to the agency has been made. [[1147]](#footnote-1148)1147

U. Judicial Review Under Administrative Procedure Act

Justice McHugh articulated the standard of review by circuit courts under the Administrative Procedure Act in the case of Shepherdstown Volunteer Fire Dept. v. State ex rel. State of West Virginia Human Rights Commission. [[1148]](#footnote-1149)1148 The court held that

upon judicial review of a contested case under the West Virginia Administrative Procedure Act, Chapter 29A, Article 5, Section 4(g), the circuit court may affirm the order or decision of the agency or remand the case for further proceedings. The circuit court shall reverse, vacate or modify the order or decision of the **[\*209]** agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions or order are: "(1) In violation of constitutional or statutory provisions; or (2) In excess of the statutory authority or jurisdiction of the agency; or (3) Made upon unlawful procedures; or (4) Affected by other error of law; or (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." [[1149]](#footnote-1150)1149

XVII. INSURANCE LAW

A. Interpreting Policy Language

In Helfeldt v. Robinson, [[1150]](#footnote-1151)1150 Justice McHugh was forced to determine the effect of an exception to exclusion in a liability policy that was voided by other exclusions in the policy. The court held:

Although an exclusion in a comprehensive general automobile and property liability insurance contract contained an exception for "warranty of fitness or quality of the named insured's products or a warranty that work performed by or on behalf of the named insured will be done in a workmanlike manner," that exception to the contract's exclusion provision did not extend insurance coverage to a contractor for the defective construction of a home where the insurance contract contained other exclusions precluding insurance coverage and the insurance contract in question was a liability insurance policy and not a builder's risk policy. [[1151]](#footnote-1152)1151

In Shamblin v. Nationwide Mutual Insurance Co., [[1152]](#footnote-1153)1152 the court held that "the term 'occurrence' in a limitation of liability clause within an automobile liability insurance policy refers unmistakably to the resulting event for which the insured becomes liable and not to some antecedent cause(s) of the injury." [[1153]](#footnote-1154)1153 **[\*210]**

In Transamerica Occidental Life Insurance Co. v. Burke, [[1154]](#footnote-1155)1154 Justice McHugh determined the meaning of language in a life insurance, as it related to beneficiaries of the policy. Justice McHugh stated that "with reference to the beneficiary(ies), it has frequently been said that a policy of life insurance is testamentary in nature, and the rules for interpreting a will may guide the courts in ascertaining the legal effect of a clause in a life insurance policy designating the beneficiary(ies)." [[1155]](#footnote-1156)1155 The court held that "the term 'children' ordinarily does not include stepchildren, but it may include stepchildren when a contrary intent is found from additional language or circumstances." [[1156]](#footnote-1157)1156 Justice McHugh determined that "a class description such as 'children' ordinarily raises a latent ambiguity if there are, for example, stepchildren, so that evidence of the testator's or insured's relations with and attitude toward them is admissible to determine whether it was the testator's or insured's intent to include them in the gift." [[1157]](#footnote-1158)1157 He concluded:

If a will was drafted by one who is not a lawyer, a court will be more inclined to assume that the will was written in the language of the lay person and will be more inclined to give effect to the language of the will in accordance with the subjective sense employed by the testator or testatrix, and not according to the technical meaning of the language. The same principle applies to other documents which contain dispositions of property which are testamentary in nature, such as the beneficiary designation clause of an insurance policy providing death benefits. [[1158]](#footnote-1159)1158

In Marshall v. Fair, [[1159]](#footnote-1160)1159 Justice McHugh ruled that "bodily injury and property damage 'arising out of' uninsured premises, as that phrase is used in an uninsured premises exclusion provision, refers to the condition of the uninsured premises and does not exclude coverage for the allegedly tortious acts of the insured committed on either such uninsured premises or on premises closely related to the uninsured premises." [[1160]](#footnote-1161)1160

B. Renewal of Policy

In Horace Mann Insurance Co. v. Shaw, [[1161]](#footnote-1162)1161 Justice McHugh examined the statutory basis for renewal of specific types of insurance policies. The court held: **[\*211]**

Where an insurer has issued to its insured an automobile liability or physical damage insurance policy, which policy has been in existence for two consecutive years or longer, the insured is entitled to the renewal protection of W.Va. Code, 33-6A-4 [1980], i.e., that an insurer "may not fail to renew an outstanding automobile liability or physical damage insurance policy which has been in existence for two consecutive years or longer" except for the reasons enumerated in that statute; furthermore, an insured's existing renewal protection under W.Va. Code, 33-6A-4 [1980], applies with regard to additional policies issued by the insurer for additional or replacement automobiles acquired by the insured, and for such renewal protection the additional policies need not have been in existence for "two consecutive years or longer." [[1162]](#footnote-1163)1162

C. Employee Fidelity Insurance Policy

Justice McHugh explained in Commercial Bank of Bluefield v. St. Paul Fire & Marine Insurance Co. [[1163]](#footnote-1164)1163 that

employee fidelity insurance (sometimes called fidelity guaranty insurance) is a contract whereby one for consideration agrees to indemnify the insured against loss arising from want of integrity, fidelity or honesty of employees or other persons holding positions of trust. The insurer is liable to the insured only in the event of a loss sustained by the insured. [[1164]](#footnote-1165)1164

D. West Virginia Guaranty Association Act

Justice McHugh made several observations regarding the Guaranty Association Act in Cannelton Industries, Inc. v. Aetna Casualty & Surety Co. of America. [[1165]](#footnote-1166)1165 He said that "the West Virginia Guaranty Association is not required to notify insureds of the insolvent insurer unless the West Virginia Insurance Commissioner requires that such notice be given pursuant to W.Va. Code,. 33-26-10(2)(a) [1970] of the West Virginia Guaranty Association Act." [[1166]](#footnote-1167)1166 The court subsequently held:

Pursuant to the West Virginia Guaranty Association Act, **[\*212]** specifically, W.Va. Code, 33-26-8(1)(a) [1985], the West Virginia Guaranty Association is "obligated to the extent of covered claims existing prior to the determination of insolvency, and for such claims arising within thirty days after the determination of insolvency. . . . [However,] notwithstanding any other provision of this article, a covered claim shall not include any claim filed with the guaranty fund after the final date set by the court for the filing of claims against the liquidator or receiver of an insolvent insurer[.]" [[1167]](#footnote-1168)1167

E. Anti-Stacking Provision

Justice McHugh addressed anti-stacking language in an insurance policy in the case of Shamblin v. Nationwide Mutual Insurance Co. [[1168]](#footnote-1169)1168 In Shamblin, the court held:

When an automobile liability insurance policy contains language limiting the insurer's liability as the result of any one occurrence, "regardless of the number of . . . automobiles to which this policy applies," the insured is not entitled to "stack" liability coverages for each vehicle for which the insured has paid a separate premium. In light of the explicit "anti-stacking" language, the payment of a separate premium for each vehicle does not create an ambiguity in the insurance policy which should be resolved against the insurer. [[1169]](#footnote-1170)1169

Justice McHugh also clarified the legal legitimacy of anti-stacking provisions in Shamblin. He held:

A limitation of liability clause within an automobile liability insurance policy which limits coverage for any one occurrence, regardless of the number of covered vehicles, does not violate any applicable insurance statute or regulation, and there is no judicial policy that prevents an insurer from so limiting its liability and yet collecting a premium for each covered vehicle because each premium is for the increased risk of an "occurrence." [[1170]](#footnote-1171)1170

Justice McHugh addressed the impact of anti-stacking language on uninsured and underinsured motorist coverage in the case of State Automobile **[\*213]** Mutual Insurance Co. v. Youler. [[1171]](#footnote-1172)1171 The court held that

so-called "antistacking" language in automobile insurance policies is void under W.Va. Code, 33-6-31(b), as amended, to the extent that such language is purportedly applicable to uninsured or underinsured motorist coverage, and an insured covered simultaneously by two or more uninsured or underinsured motorist policy endorsements may recover under all of such endorsements up to the aggregated or stacked limits of the same, or up to the amount of the judgment obtained against the uninsured or underinsured motorist, whichever is less, as a result of one accident and injury. [[1172]](#footnote-1173)1172

Justice McHugh held in Miller v. Lemon [[1173]](#footnote-1174)1173 that

anti-stacking language in an automobile insurance policy is valid and enforceable as to uninsured and underinsured motorist coverage where the insured purchases a single insurance policy to cover two or more vehicles and receives a multi-car discount on the total policy premium. If no multi-car discount for uninsured or underinsured motorist coverage is apparent on the declarations page of the policy, the parties must either agree or the court must find that such a discount was given. In such event, the insured is not entitled to stack the coverages of the multiple vehicles and may only recover up to the policy limits set forth in the single policy endorsement. [[1174]](#footnote-1175)1174

F. Bad Faith Settlement

In Berry v. Nationwide Mutual Fire Insurance Co., [[1175]](#footnote-1176)1175 Justice McHugh stated that "punitive damages may be awarded to an insured if the insurer actually knew that the claim was proper and the insured can prove that it was willfully, maliciously and intentionally denied. Therefore, in such a case, it is not error for a trial court to give an instruction stating that punitive damages may be awarded." [[1176]](#footnote-1177)1176 **[\*214]**

G. Payment of Proceeds

The case of Arcuri v. Great American Insurance Co. [[1177]](#footnote-1178)1177 presented the issue of payment of proceeds from a policy by an insurer, when a person is wrongfully added to the policy as a beneficiary. Justice McHugh ruled:

W.Va. Code, 33-17-12 [1965], by providing that payment of the proceeds under a fire insurance policy to the person or persons designated in the policy fully discharges the insurer from all claims under the policy, makes it inappropriate for an insurer, which has wrongfully added an insured person to a fire insurance policy, to merely tender the proceeds to the clerk of the court in a pending action in which the parties are the joint payees of the proceeds, namely, the only person properly designated in the policy as an insured and another person, not properly designated in the policy as an insured but who claims an interest in the proceeds. The delay in payment to the person properly designated as an insured would, in such a case, be attributable to the insurer's wrongful designation of the additional insured person and the insurer's failure to follow the statute on payment to the person designated in the policy as the insured. [[1178]](#footnote-1179)1178

In Jones v. Wesbanco Bank Parkersburg, [[1179]](#footnote-1180)1179 Justice McHugh explained when a mortgagee on a deed of trust would be entitled to proceeds from a fire insurance policy. The court held:

Where the lender under a deed of trust executed by a property owner to secure a debt owing on the property is named as mortgagee in a standard mortgage clause in a fire insurance contract between an insurer and a property owner, it has an independent and distinct contract with the insurer and is deemed to be an insured to the extent of the balance due it from the property owner. Thus, the right of the lender under a deed of trust named as mortgagee to the insurance proceeds is determined at the time of the fire loss to the extent of the balance due it from the property owner. [[1180]](#footnote-1181)1180

H. Family Use Policy Exclusion

Justice McHugh addressed the validity of family use policy exclusions in **[\*215]** automobile coverage in the case of Thomas v. Nationwide Mutual Insurance Co. [[1181]](#footnote-1182)1181 He stated the following:

When an insurer issues an automobile insurance policy which provides both liability and underinsured motorists coverage, but which policy contains what is commonly referred to as a "family use exclusion" for the underinsured motorist coverage, and when, in a single car accident, the passenger/wife receives payments under the liability coverage for the negligence of the driver/husband, such exclusion is valid and not against the public policy of this state. That exclusion, which excludes from the definition of "underinsured motor vehicle" any automobile owned by or furnished for the regular use of the insured or a relative, has the purpose of preventing underinsured coverage from being converted into additional liability coverage. [[1182]](#footnote-1183)1182

I. Intentional Injury Policy Exclusion

Justice McHugh stated in Horace Mann Insurance Co. v. Leeber [[1183]](#footnote-1184)1183 that

there 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. [[1184]](#footnote-1185)1184

J. Insured Person Policy Exclusion

Justice McHugh addressed the issue of the validity of a clause excluding an insured person in a homeowner's policy in Rich v. Allstate Insurance Co. [[1185]](#footnote-1186)1185 He stated that

when a homeowner's insurance policy excludes coverage to an "insured person" and defines an "insured person" as a resident of the named insured's household and a dependent person in the named insured's care, a minor child who sustains bodily injury as a result of the negligence of the named insured on the named insured's premises, such minor child also being a resident of the **[\*216]** named insured's household and who is a dependent person in the named insured's care, is not covered under the homeowner's insurance policy. Such exclusionary language within the homeowner's insurance policy is not violative of the public policy of this state. [[1186]](#footnote-1187)1186

K. Fire Insurance Mortgage Clause

Justice McHugh determined the status of a lender named as a mortgagee in a fire insurance policy in the case of Firstbank Shinnston v. West Virginia Insurance Co. [[1187]](#footnote-1188)1187 The court held:

If a fire insurance contract between an insurer and a property owner includes a standard mortgage clause naming as mortgagee the lender under a deed of trust executed by the property owner to secure a debt owing on the property, the lender under the deed of trust pursuant to that clause has an independent and distinct contract with the insurer, as if the lender under the deed of trust had taken out a separate policy with the insurer, and is deemed to be an insured to the extent of the balance due it from the property owner. [[1188]](#footnote-1189)1188

L. Per Person Liability Limit

Justice McHugh expounded upon the reach of a per person liability limit provision in an automobile policy on a claim for loss of consortium in Federal Kemper Insurance Co. v. Karlet. [[1189]](#footnote-1190)1189 He held:

When a person is bodily injured in an automobile accident, an individual other than the bodily-injured person may also suffer damages as a result of such accident through loss of consortium. The claim for loss of consortium by an individual other than the one suffering bodily injury as a result of an automobile accident is generally recognized as arising out of the claim for damages of the bodily-injured person. As a result, the claim of the bodily-injured person and the claim for loss of consortium are covered within the same per person limit of liability provisions under the automobile insurance policy. More specifically, when the per person limit of liability in a policy provides coverage for "all damages arising out of bodily injury sustained by one person as a result of one **[\*217]** accident," both the claim of the bodily injured person and the claim for loss of consortium are covered within the same per person limit of liability, and recovery for both claims may not exceed the fixed amount of the maximum limit of damages under the per person limit of liability. If, however, there is language in the policy which includes loss of consortium as a separate bodily injury, such loss of consortium claim is entitled to a separate per person limit of liability. [[1190]](#footnote-1191)1190

In Davis v. Foley, [[1191]](#footnote-1192)1191 Justice McHugh distinguished per person limit from per occurrence limit within the context of a wrongful death action. The court held:

The damages in a wrongful death action arise out of the death of the decedent thereby making a wrongful death action a derivative claim. As a result, when language in an insurance policy clearly limits recovery of derivative claims to the per person limit, the per occurrence limit does not apply even though "the surviving spouse and children, including adopted children and stepchildren, brothers, sisters, parents and any persons who were financially dependent upon the decedent at the time of his or her death . . ." are entitled to share in the recovery in a wrongful death action pursuant to W.Va. Code, 55-7-6 [1992]. However, if there is language in the insurance policy which includes damages from a wrongful death as a separate bodily injury, then each person recovering for the wrongful death is entitled to a separate per person limit. [[1192]](#footnote-1193)1192

M. Subrogation

In Berry v. Nationwide Mutual Fire Insurance Co., [[1193]](#footnote-1194)1193 Justice McHugh stated that "where an insurer decides, after complete investigation, not to approve payment to its insured based upon the allegedly tortious conduct of another party, the insurer's claim that a subsequent settlement by the insured with the other party violates the subrogation clause of the insurance contract by prejudicing the insurer's subrogation rights is invalid." [[1194]](#footnote-1195)1194 **[\*218]**

N. Uninsured/Underinsured Coverage

In State Automobile Mutual Insurance Co. v. Youler, [[1195]](#footnote-1196)1195 Justice McHugh addressed several issues concerning uninsured and underinsured motorist coverage. The court initially that "the notice provisions of an automobile insurance policy ordinarily are activated in a case of uninsured or underinsured motorist coverage, not when there has been an accident, but when the insured, with reasonable diligence, ascertains that the alleged tortfeasor is uninsured or underinsured." [[1196]](#footnote-1197)1196 The court next held:

In an uninsured or underinsured motorist case, prejudice to the investigative interests of the insurer is a factor to be considered, along with the reasons for delay and the length of delay, in determining the overall reasonableness in giving notice of an accident. In the typical case, the insured must put on evidence showing the reason for the delay in giving notice. Once this prerequisite is satisfied, the insurer must then demonstrate that it was prejudiced by the insured's failure to give notice sooner. If the insurer fails to present evidence as to prejudice, then the insured's failure to give notice sooner will not be a bar to the insured's recovery. If the insurer puts on evidence of prejudice, however, the reasonableness of the notice ordinarily becomes a question of fact for the fact finder to decide. [[1197]](#footnote-1198)1197

Justice McHugh concluded in Youler that

W.Va. Code, 33-6-31(b), as amended, on uninsured and underinsured motorist coverage, contemplates recovery, up to coverage limits, from one's own insurer, of full compensation for damages not compensated by a negligent tortfeasor who at the time of the accident was an owner or operator of an uninsured or underinsured motor vehicle. Accordingly, the amount of such tortfeasor's motor vehicle liability insurance coverage actually available to the injured person in question is to be deducted from the total amount of damages sustained by the injured person, and the insurer providing underinsured motorist coverage is liable for the remainder of the damages, but not to exceed the coverage limits. [[1198]](#footnote-1199)1198

**[\*219]**

In Pristavec v. Westfield Insurance Co., [[1199]](#footnote-1200)1199 Justice McHugh clarified when underinsured motorist coverage is actually triggered. He held that

in light of the preeminent public policy of the underinsured motorist statute, which is to provide full compensation, not exceeding coverage limits, to an injured person for his or her damages not compensated by a negligent tortfeasor, this Court holds that underinsured motorist coverage is activated under W.Va. Code, 33-631(b), as amended, when the amount of such tortfeasor's motor vehicle liability insurance actually available to the injured person in question is less than the total amount of damages sustained by the injured person, regardless of the comparison between such liability insurance limits actually available and the underinsured motorist coverage limits. [[1200]](#footnote-1201)1200

Justice McHugh held in Johnson by Johnson v. General Motors Corp. [[1201]](#footnote-1202)1201 that "the collateral source rule operates to preclude the offsetting of uninsured or underinsured benefits since the benefits are the result of a contractual arrangement which is independent of the tortfeasor; therefore, we overrule syllabus point 1 of Cox v. Turner, 157 W.Va. 802, 207 S.E.2d 152 (1974) which held that uninsured motorist benefits were not a collateral source under the then existing statutory scheme." [[1202]](#footnote-1203)1202

Justice McHugh addressed several issues involving uninsured motorist coverage in Cox v. Amick. [[1203]](#footnote-1204)1203 He stated that

under W.Va. Code, 33-6-31d [1993] a knowing and intelligent rejection of optional uninsured and underinsured motorists coverages by any named insured under an insurance policy creates a presumption that all named insureds under the policy received an effective offer of the optional coverages and that such person exercised a knowing and intelligent rejection of such offer. The named insured's rejection is binding on all persons insured under the policy. [[1204]](#footnote-1205)1204

In Cox, the court also held:

When an insurance policy clearly and unambiguously provides **[\*220]** uninsured motorists coverage for damages suffered by the insured or a relative from the "owner or driver of an uninsured motor vehicle" if such damages have resulted from an accident arising out of the ownership, maintenance or use of the uninsured motor vehicle, the insured or relative may not recover damages pursuant to his or her uninsured motorists coverage from a person who was not occupying an uninsured motor vehicle involved in the accident when it occurred and who was not the owner or driver of the uninsured motor vehicle involved in the accident even though such person may be liable to the insured or relative under other appropriate causes of action. [[1205]](#footnote-1206)1205

O. Commercial Liability Policy

Justice McHugh addressed issues involving a commercial liability policy in Bruceton Bank v. U.S. Fidelity and Guaranty Insurance Co. [[1206]](#footnote-1207)1206 The court held that

where, under a commercial general liability policy and a related commercial umbrella liability policy issued to a bank, insurance coverage is provided for certain injuries and damages caused by an "occurrence" or an "incident," and the policies expressly equate the terms "occurrence" and "incident" with an "accident," no such insurance coverage, or duty to defend or investigate by the insurer, arises, where the underlying case against the bank, concerning the denial of a loan, is grounded upon breach of contract and is in the nature of a lender liability action. Although a case in the nature of a lender liability action would, ordinarily, be foreign to the risk insured against as reflected by such insurance policies, included in the consideration of whether the insurer has a duty to defend is whether the allegations in the complaint against the bank are reasonably susceptible of an interpretation that the claim may be covered by the terms of the insurance policies. To the extent that the syllabus point in Farmers & Mechanics Mutual Fire Insurance Company v. Hutzler, 191 W.Va. 559, 447 S.E.2d 22 (1994), differs from these principles, it is hereby clarified. [[1207]](#footnote-1208)1207 **[\*221]**

XVIII. STATE AND LOCAL GOVERNMENT

A. Budgets

Justice McHugh addressed three issues involving the state budget in Jones v. Rockefeller. [[1208]](#footnote-1209)1208 He stated initially that

pursuant to W.Va. Const., art. VI, Sec. 51, the Modern Budget Amendment, the governor's disapproval or reduction of items or parts of items contained within the budget bill is void unless the governor returns to each house of the legislature or files in the office of the secretary of state, as the case may be, objections for such disapproval or reduction. [[1209]](#footnote-1210)1209

Justice McHugh next found that

pursuant to W.Va. Const., art. VI, Sec. 51, the Modern Budget Amendment, the validity of the governor's disapproval or reduction of items or parts of items contained within the budget bill depends upon the governor's objections to such items or parts of items. The objections, to satisfy the mandate of the Modern Budget Amendment, need communicate in a rational manner to the public and current or future legislatures a statement of an adverse reason in opposition to a budget bill, or its items or parts, as to why the budget bill, or an item or part of an item within the budget bill, has been disapproved or reduced by the governor." [[1210]](#footnote-1211)1210

It was concluded in Jones that

where the West Virginia Legislature passed the budget bill containing Account No. 4160, which account enumerated appropriations for the state mental hospitals for fiscal year 1983-84, and furthermore, the legislature produced, pursuant to W.Va. Code, 4-1-18 [1969], a legislative digest directing specific appropriations within Account No. 4160 to Spencer Hospital, a subsequent reduction by the governor of appropriations within Account No. 4160 of the budget bill, which reductions would result in the closing or substantial curtailment of services at Spencer Hospital, was void under W.Va. Const., art. VI, Sec. 51, the Modern Budget Amendment, because the governor failed to file objections to those appropriations, as required by the **[\*222]** Amendment, where (1) the governor merely struck through certain appropriations, substituted reduced amounts, and added his initials, (2) the governor's message filed with the budget bill described the effects of the governor's reduction of appropriations upon certain state hospitals, rather than adverse reasons why appropriations for Spencer Hospital should be reduced and (3) the governor's message filed with the budget bill merely stated a general desire by the governor to eliminate the duplication of administrative costs with respect to state hospitals. [[1211]](#footnote-1212)1211

Justice McHugh addressed the failure by the governor to submit a budget for a state agency in State ex rel. Steele v. Kopp. [[1212]](#footnote-1213)1212 The court held:

Where the West Virginia legislature pursuant to its authority to regulate nonintoxicating beer in this State created, under the Nonintoxicating Beer Act, the office of the West Virginia nonintoxicating beer commissioner, and the statute creating that office provided a deputy commissioner and employees or agents to aid the commissioner in his or her duties, and where (1) the governor submitted a proposed budget for fiscal year 198384 to the legislature during its Regular Session in which the governor did not request appropriations for the office of the nonintoxicating beer commissioner, and (2) upon presentation to the governor of the budget bill as passed by the legislature, the governor effectively eliminated the functions of the office of the nonintoxicating beer commissioner by reducing legislative appropriations for that office to zero, except for the commissioner's salary and $ 50,000, the actions of the governor violated W.Va. Const., art. V, Sec. 1, concerning the separation of powers of government in this State, and W.Va. Const., art. VI, Sec. 51, concerning this State's annual budgetary process. [[1213]](#footnote-1214)1213

In State ex rel. Lambert v. Cortellessi, [[1214]](#footnote-1215)1214 Justice McHugh held:

The county commission is expressly granted the power to administer the fiscal affairs of the county by W.Va. Const. art. IX, Sec. 11, and pursuant thereto, the legislature, in W.Va. Code, 7-7-7, as amended, has included the circuit clerk as a county **[\*223]** officer whose budget is fixed by the county commission. [[1215]](#footnote-1216)1215

B. Public Funds

State ex rel. Manchin v. West Virginia Secondary School Activities Commission [[1216]](#footnote-1217)1216 required Justice McHugh to categorize funds received by a county education agency. He stated:

Funds received by the West Virginia Secondary School Activities Commission, which Commission operates pursuant to authority granted it by county boards of education under W.Va. Code, 18-2-25 [1967], are "quasipublic funds" as defined in W.Va. Code, 18-5-13 [1987], and are to be accounted for in a manner similar to that provided for funds of county boards of education, but such funds are not to be accounted for under W.Va. Code, 12-22 [1983] as "moneys due the State." [[1217]](#footnote-1218)1217

C. Salaries and Wages

Justice McHugh held in Sell v. Chaplin [[1218]](#footnote-1219)1218 that "an increase in salary for a municipal officer may not be made pursuant to an ordinance enacted after the beginning of such officer's term of office, although a provision for the increase was included in a municipal budget approved before the beginning of the officer's term of office." [[1219]](#footnote-1220)1219

In Maynard v. Board of Education of Wayne County, [[1220]](#footnote-1221)1220 Justice McHugh held that "a county board of education is not immune from contractual liability to its employees for unpaid salaries because it followed the directives of the State Superintendent of Schools." [[1221]](#footnote-1222)1221

Justice McHugh was required to determine the legality of using special levy funds to supplement the salary of county board of education employees in the case of Bane v. Board of Education of Monongalia County. [[1222]](#footnote-1223)1222 The court held that

where the voters by their approval of a special levy do not require that each employee of the county board of education is to **[\*224]** receive a designated amount of supplemental salary, the board of education may annually exercise sound discretion in allocating the special levy funds as salary supplements among its employees. A court may not interfere with such exercise of discretion, unless there is a clear showing of fraud, collusion or palpable abuse of discretion, or unless there is a clear showing of a violation of W.Va. Code, 18A-4-8, as amended, or its current statutory replacement, with respect to its uniformity provisions or its provisions on the nonreduction of local funds in the aggregate. [[1223]](#footnote-1224)1223

Justice McHugh held in Weimer-Godwin v. Board of Education of Upshur County [[1224]](#footnote-1225)1224 that "under W.Va. Code, 18A-4-5 [1969] and its successor, W.Va. Code, 18A-4-5a [1984], once a county board of education pays additional compensation to certain teachers, it must pay the same amount of additional compensation to other teachers performing 'like assignments and duties[.]'" [[1225]](#footnote-1226)1225

Justice McHugh stated in Courtney v. State Department of Health of West Virginia [[1226]](#footnote-1227)1226 that

W.Va. Code, 5-5-2 [1984] does not require an employee to be employed on the first day of the ensuing fiscal year in order to be entitled to receive an annual incremental salary increase provided by that statutory provision. Rather, the first day of any fiscal year is the date upon which the incremental salary increase is to be received. [[1227]](#footnote-1228)1227

D. Contracts

Justice McHugh held in Corte Co. v. County Commission of McDowell County, [[1228]](#footnote-1229)1228 that "pursuant to W.Va. Code, 56-6-27 [1931], a county commission may be liable, in an action founded on contract, for interest on the principal due, or any part thereof, at the time of trial, after allowing all proper credits, payments and sets off." [[1229]](#footnote-1230)1229

The court also stated:

When a contract is entered into between a county commission and a contractor for certain construction work and the contractor **[\*225]** knew, or had reason to believe, that funds from the federal government would be used for such work, then the contractor may not recover interest on the amount owed by the county commission if a delay in payment from the federal government occurs, provided that the county commission makes a reasonable effort to ensure that payment of the debt will be made in a timely manner. [[1230]](#footnote-1231)1230

E. Indemnity Bond Given by Public Officials

Justice McHugh expounded upon what constitutes a breach of a condition of an indemnity bond by a public official in State ex rel. Hardesty v. Stalnaker. [[1231]](#footnote-1232)1231 The court held:

A bond given by a public officer providing that such officer shall faithfully discharge or perform the duties of his office and shall account for and pay over all monies which may come into the hands of such public officer[,] is breached within the meaning of W.Va. Code, 6-2-3 (1923), upon the failure of such officer to return to the appropriate governmental entity overpayments in salary, such statute in part conditioning bonds upon an accounting for and paying over of all monies received by virtue of such public officer's office or employment. [[1232]](#footnote-1233)1232

F. Recovery of Litigation Fees and Costs by State

In Hechler v. Casey, [[1233]](#footnote-1234)1233 Justice McHugh ruled that "W.Va.R.App.P. 23(b) expressly precludes an award of costs for the benefit of the State or an agency or officer thereof in a case before this Court." [[1234]](#footnote-1235)1234 The court also held that

the State or an agency or an officer thereof which was represented by the Attorney General in proceedings to dissolve an injunction may not, under W.Va. Code, 53-5-9 [1931], recover reasonable attorney fees incurred in such proceedings because the State has not been "damaged" by payment of the salaries of the regular staff of the Attorney General. [[1235]](#footnote-1236)1235 **[\*226]**

G. Public Policy

In Cordle v. General Hugh Mercer Corp., [[1236]](#footnote-1237)1236 Justice McHugh addressed the issue of whether courts or juries determine public policy in litigation. Justice McHugh held that "a determination of the existence of public policy in West Virginia is a question of law, rather than a question of fact for a jury." [[1237]](#footnote-1238)1237

H. Freedom of Information

The case of Hechler v. Casey [[1238]](#footnote-1239)1238 required Justice McHugh to elaborate on the Freedom of Information Act in the context of disclosing names and addresses of security guards maintained by the secretary of state. Justice McHugh noted initially that "the disclosure provisions of this State's Freedom of Information Act, W.Va. Code, 29B-1-1 et seq., as amended, are to be liberally construed, and the exemptions to such Act are to be strictly construed." [[1239]](#footnote-1240)1239 The court indicated that "an agreement as to confidentiality between the public body and the supplier of the information may not override the Freedom of Information Act, W.Va. Code, 29B-1-1 et seq." [[1240]](#footnote-1241)1240 Justice McHugh held that "the primary purpose of the invasion of privacy exemption to the Freedom of Information Act, W.Va. Code, 29B1-4(2) [1977], is to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." [[1241]](#footnote-1242)1241 It was said that "under W.Va. Code, 29B-1-4(2) [1977], a court must balance or weigh the individual's right of privacy against the public's right to know." [[1242]](#footnote-1243)1242

Turning to the factual issue in Hechler, Justice McHugh wrote:

W.Va. Code, 29B-1-4(2) [1977] does not normally exempt from disclosure an individual's name and residential address because they are not "personal" or "private" facts but are public in nature in that they constitute information normally shared with strangers and are ascertainable by reference to many publicly obtainable books and records. Thus, disclosure of an individual's name and residential address would not result in an unreasonable invasion of privacy. [[1243]](#footnote-1244)1243

**[\*227]**

The court further held that

W.Va. Code, 29B-1-4(2) [1977] does not exempt from disclosure under the Freedom of Information Act a list of names and addresses of security guards furnished to the Secretary of State pursuant to his licensing and regulation of the guards' employer, since such information constitutes public facts and since the risk of harm from disclosure is speculative. [[1244]](#footnote-1245)1244

Justice McHugh ruled that "the primary purpose of the law enforcement exemption to the Freedom of Information Act, W.Va. Code, 29B-1-4(4) [1977], is to prevent premature disclosure of investigatory materials which might be used in a law enforcement action." [[1245]](#footnote-1246)1245

In Hechler, Justice McHugh went on to state that "'records . . . that deal with the detection and investigation of crime,' within the meaning of W.Va. Code, 29B-1-4(4) [1977], do not include information generated pursuant to routine administration or oversight, but is limited to information compiled as part of an inquiry into specific suspected violations of the law." [[1246]](#footnote-1247)1246 Justice McHugh clarified matters in finding that "the language, 'internal records and notations . . . which are maintained for internal use in matters relating to law enforcement,' within the meaning of W.Va. Code, 29B-1-4(4) [1977], refers to confidential investigative techniques and procedures." [[1247]](#footnote-1248)1247 It was further concluded:

W.Va. Code, 29B-1-4(4) [1977] does not exempt from disclosure under the Freedom of Information Act a list of names and addresses of security guards furnished to the Secretary of State pursuant to his licensing and regulation of the guards' employer, since such information was not part of an inquiry into specific suspected violations but was generated pursuant to routine administration of W.Va. Code, 30-18-1 et seq. and the regulations promulgated thereunder, and does not reveal confidential investigative techniques or procedures. [[1248]](#footnote-1249)1248

Justice McHugh confronted the Freedom of Information Act in Daily Gazette Co. v. Withrow. [[1249]](#footnote-1250)1249 The court held initially that

a release or other litigation settlement document in which one of **[\*228]** the parties is a public body, involving an act or omission of the public body in the public body's official capacity, is a "public record" within the meaning of a freedom of information statute, such as W.Va. Code, 29B-1-2(4), as amended, defining a "public record" as a writing which contains information "relating to the conduct of the public's business[.]" [[1250]](#footnote-1251)1250

The court then stated that

lack of possession of an existing writing by a public body at the time of a request under the State's Freedom of Information Act is not by itself determinative of the question whether the writing is a "public record" under W.Va. Code, 29B-1-2(4), as amended, which defines a "public record" as a writing "retained by a public body." The writing is "retained" if it is subject to the control of the public body. [[1251]](#footnote-1252)1251

Justice McHugh noted in Withrow that "assurances of confidentiality do not justify withholding public information from the public; such assurances by their own force do not transform a public record into a private record for the purpose of the State's Freedom of Information Act." [[1252]](#footnote-1253)1252 The court pointed out that "a public official has a common law duty to create and maintain, for public inspection and copying, a record of the terms of settlement of litigation brought against the public official or his or her employee(s) in their official capacity." [[1253]](#footnote-1254)1253 Finally, the court concluded that "for a person prevailing in an action under the State's Freedom of Information Act to recover reasonable attorney's fees, the evidence before the trial court must show bad faith, vexatious, wanton or oppressive conduct on the part of the custodian of the public record(s)." [[1254]](#footnote-1255)1254

Justice McHugh ruled in Keegan v. Bailey [[1255]](#footnote-1256)1255 that "unless records of stale dated warrants are presumed to be abandoned property as defined by W.Va. Code, 36-8-8b(a) [Supp.1990], such records of stale dated warrants are subject to disclosure pursuant to the Freedom of Information Act, W.Va. Code, 29B-1-1, et seq." [[1256]](#footnote-1257)1256

Justice McHugh held in Daily Gazette Co. v. West Virginia Development **[\*229]** Office [[1257]](#footnote-1258)1257 that

when a public body asserts that certain documents in its possession are exempt from disclosure under W.Va. Code, 29B-1-4(8) [1977], on the ground that those documents are "internal memoranda or letters received or prepared by any public body," the public body must produce a Vaughn index named for Vaughn v. Rosen, 484 F.2d 820 (D.C.Cir.1973), cert. denied, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974). The Vaughn index must provide a relatively detailed justification as to why each document is exempt, specifically identifying the reasons why W.Va. Code, 29B-1-4(8) [1977] is relevant and correlating the claimed exemption with the particular part of the withheld document to which the claimed exemption applies. The Vaughn index need not be so detailed that it compromises the privilege claimed. The public body must also submit an affidavit, indicating why disclosure of the documents would be harmful and why such documents should be exempt. [[1258]](#footnote-1259)1258

The court also stated in Daily Gazette that

W.Va. Code, 29B-1-4(8) [1977], which exempts from disclosure "internal memoranda or letters received or prepared by any public body" specifically exempts from disclosure only those written internal government communications consisting of advice, opinions and recommendations which reflect a public body's deliberative, decision-making process; written advice, opinions and recommendations from one public body to another; and written advice, opinions and recommendations to a public body from outside consultants or experts obtained during the public body's deliberative, decision-making process. W.Va. Code, 29B-1-4(8) [1977] does not exempt from disclosure written communications between a public body and private persons or entities where such communications do not consist of advice, opinions or recommendations to the public body from outside consultants or experts obtained during the public body's deliberative, decision-making process. [[1259]](#footnote-1260)1259

**[\*230]**

I. Obligations of Public Officer

In Graf v. Frame, [[1260]](#footnote-1261)1260 Justice McHugh addressed the general obligations of public officers and a specific area of conflict of interest involving public officers who are also practicing attorneys. The court held initially that

one who accepts a public office does so cum onere, that is, he assumes the burdens and the obligations of the office as well as its benefits, subjects himself to all constitutional and legislative provisions relating to the office, and undertakes to perform all the duties imposed on its occupant; and while he remains in such office he must perform all such duties. [[1261]](#footnote-1262)1261

The court then pointed out that

W.Va. Const. art. III, § 2 imposes a duty upon a public officer who is an attorney to refrain from representing persons who allegedly have claims against the public agency of which he is a member or against those agencies or employees thereof subject to the supervision of the public agency of which he is a member. [[1262]](#footnote-1263)1262

J. Enactment of Ordinance

In the case of Perdue v. Ferguson, [[1263]](#footnote-1264)1263 Justice McHugh was called upon to address the propriety of courts exercising discretion to become involved with the enactment of ordinances. The court held that

a court of equity normally may not enjoin a municipal legislative body from exercising legislative powers by enacting a municipal ordinance. This principle that an injunction does not lie to restrain enactment of an ordinance applies generally even though the proposed ordinance is alleged to be unconstitutional or otherwise invalid. [[1264]](#footnote-1265)1264

Justice McHugh reasoned that "it is presumed that an ordinance, especially one concerning the public health, safety or welfare, was passed in good faith and that the legislative body of the municipality acted in the best interest of **[\*231]** the community." [[1265]](#footnote-1266)1265 Consequently, Justice McHugh held:

An injunction does not lie to restrain the enforcement of an invalid municipal ordinance merely because the ordinance is unconstitutional, arbitrary or otherwise invalid; other circumstances, such as irreparable injury, inadequacy of remedies at law, etc., bringing the case within one or more of the grounds for equity jurisdiction must also be alleged and shown. [[1266]](#footnote-1267)1266

The court concluded that "where a municipal corporation or the officers thereof act within well-recognized powers, or exercise discretionary power, a court is unwarranted in interfering by granting an injunction, unless fraud is shown, or the power or discretion is being manifestly abused, to the oppression of the citizen." [[1267]](#footnote-1268)1267

In Par Mar v. City of Parkersburg, [[1268]](#footnote-1269)1268 Justice McHugh stated that "a zoning ordinance must draw lines for boundaries between zoning districts, and such line drawing, such as utilizing a highway or a street as a boundary, is not ipso facto 'arbitrary and unreasonable' so as to invalidate the application of a zoning ordinance." [[1269]](#footnote-1270)1269

K. Referendum

Justice McHugh held in State ex rel. Foster v. City of Morgantown [[1270]](#footnote-1271)1270 that "a municipal charter provision, granting to the qualified voters of a municipality the power of referendum to require reconsideration by the city council of any adopted ordinance, may not supersede W.Va. Code, 8-24-23 [1969], which does not authorize a referendum with respect to amendments to zoning ordinances." [[1271]](#footnote-1272)1271

L. Action Against Government

Justice McHugh held in Wolfe v. City of Wheeling [[1272]](#footnote-1273)1272 that "the question of whether a special duty arises to protect an individual from a local governmental entity's negligence in the performance of a nondiscretionary governmental function **[\*232]** is ordinarily a question of fact for the trier of the facts." [[1273]](#footnote-1274)1273 The court also stated:

To establish that a special relationship exists between a local governmental entity and an individual, which is the basis for a special duty of care owed to such individual, the following elements must be shown: (1) an assumption by the local governmental entity, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the local governmental entity's agents that inaction could lead to harm; (3) some form of direct contact between the local governmental entity's agents and the injured party; and (4) that party's justifiable reliance on the local governmental entity's affirmative undertaking. [[1274]](#footnote-1275)1274

Justice McHugh addressed statutory immunity for political subdivisions in the case of Randall v. Fairmont City Police Department. [[1275]](#footnote-1276)1275 The court held that

W.Va. Code, 29-12A-5(a)(5) [1986], which provides, in relevant part, that a political subdivision is immune from tort liability for "the failure to provide, or the method of providing, police, law enforcement or fire protection[,]" is coextensive with the common-law rule not recognizing a cause of action for the breach of a general duty to provide, or the method of providing, such protection owed to the public as a whole. Lacking a clear expression to the contrary, that statute incorporates the common-law special duty rule and does not immunize a breach of a special duty to provide, or the method of providing, such protection to a particular individual. [[1276]](#footnote-1277)1276

Justice McHugh addressed the immunity of political subdivisions from liability for matters arising from their licensing powers and functions in the case of Hose v. Berkeley County Planning Commission. [[1277]](#footnote-1278)1277 The court held initially that

pursuant to W.Va. Code, 29-12A-4(c)(2) [1986] and W.Va. Code, 29-12A-5(a)(9) [1986], a political subdivision is immune from liability if a loss or claim results from licensing powers or functions such as the issuance, denial, suspension or revocation of or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authority, regardless **[\*233]** of whether such loss or claim is caused by the negligent performance of acts by the political subdivision's employees while acting within the scope of employment. [[1278]](#footnote-1279)1278

The court held next that

W.Va. Code, 29-12A-5(a)(9) [1986] clearly contemplates immunity for political subdivisions from tort liability for any loss or claim resulting from licensing powers or functions such as the issuance, denial, suspension or revocation of or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authority, regardless of the existence of a special duty relationship. [[1279]](#footnote-1280)1279

Justice McHugh concluded in Hose that

while W.Va. Code, 29-12A-5(a)(9) [1986] expressly immunizes a political subdivision from liability if a loss or claim results from licensing powers or functions such as the issuance, denial, suspension or revocation of or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authority, such immunity does not extend to private individuals or entities to which a political subdivision has issued, denied, suspended, or revoked or has failed or refused to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authority. [[1280]](#footnote-1281)1280

In Koffler v. City of Huntington, [[1281]](#footnote-1282)1281 Justice McHugh held that

under W.Va. Code, 29-12A-4(c)(3) [1986], political subdivisions are liable for injury, death, or loss to persons or property caused by their negligent failure to keep public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds within the political subdivisions open, in repair, or free from nuisance, except that it is a full defense to such liability, when a bridge within a municipality is involved, that the municipality does not have the responsibility for maintaining or inspecting the bridge. A political subdivision's duty to keep its public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds open, in repair, or **[\*234]** free from nuisance does not extend exclusively to vehicles or vehicular travel. [[1282]](#footnote-1283)1282

In Mallamo v. Town of Rivesville, [[1283]](#footnote-1284)1283 Justice McHugh wrote:

Pursuant to W.Va. Code, 29-12A-4(c)(2) [1986] and W.Va. Code, 29-12A-5(a)(3) [1986], a political subdivision is immune from liability if a loss or claim results from the execution or enforcement of the lawful orders of any court regardless of whether such loss or claim is caused by the negligent performance of acts by the political subdivision's employees while acting within the scope of employment. [[1284]](#footnote-1285)1284

Justice McHugh wrote in Holsten v. Massey [[1285]](#footnote-1286)1285 that

the wanton or reckless conduct exception to an employee's (as the term "employee" is defined in the Governmental Tort Claims and Insurance Reform Act) immunity under W.Va. Code, 29-12A-5(b)(2) [1986] of the Governmental Tort Claims and Insurance Reform Act is an exception to the public duty doctrine separate and distinct from the common-law special relationship exception to the public duty doctrine. [[1286]](#footnote-1287)1286

The decision also held that "W.Va. Code, 29-12A-5(a)(5) [1986] clearly contemplates immunity for a political subdivision from tort liability for 'the failure to provide . . . police or law enforcement . . . protection.'" [[1287]](#footnote-1288)1287

M. Termination of Government Employees for Political Reasons

Justice McHugh addressed the security of government employees from termination due to political reasons in the case of Adkins v. Miller. [[1288]](#footnote-1289)1288 The court held that

the first amendment to the United States Constitution and article III, section 7 of the West Virginia Constitution do not confer any right upon a governmental employee to continued employment. **[\*235]** Under certain circumstances, those provisions do, however, extend a protection to governmental employees to be free from employment decisions made solely for political reasons. Therefore, W.Va. Code, 7-7-7 [1982] may not be interpreted as permitting a governmental employer to make employment decisions based solely upon political reasons, unless the employees hold certain types of positions. [[1289]](#footnote-1290)1289

XIX. ELECTION LAW

A. Recall Official

In the case of State ex rel. Durkin v. Neely, [[1290]](#footnote-1291)1290 taxpayers petitioned a circuit court for a writ of mandamus to compel the clerk of a municipality to certify the sufficiency of a petition to recall certain members of city council at a special election. The circuit court denied the writ and the taxpayers appealed. Writing for the court, Justice McHugh found a technical problem with the appeal and held:

If, pending an appeal to an order denying a writ of mandamus to require a clerk of a municipality to certify the sufficiency of a petition to recall certain members of a city council at a special election, and the city charter requires the council to cause such special election to be held "unless the general municipal election shall occur within one hundred twenty days from" the date the petition is certified as sufficient, and the next general municipal election is scheduled within one hundred twenty days when the case is heard, the appeal will be dismissed. [[1291]](#footnote-1292)1291

B. Qualifications to be a Candidate for Public Office

Justice McHugh addressed the issue of restrictions on a person's right to run for office in the case of Sturm v. Henderson. [[1292]](#footnote-1293)1292 The court said initially that "the right to become a candidate for public office is a fundamental right, and restrictions upon that right are subject to constitutional scrutiny." [[1293]](#footnote-1294)1293 Justice McHugh then stated that

W.Va. Code, 18-5-1 [1945], and W.Va. Code, 3-5-6 [1978], to the extent that they contain a provision that no more than a certain **[\*236]** number of members of a county board of education "shall be elected from the same magisterial district," are in conflict with W.Va. Const. art. IV, § 4, and W.Va. Const. art. IV, § 8, concerning the qualifications of candidates for certain public offices, and are, therefore, unconstitutional. [[1294]](#footnote-1295)1294

In Deeds v. Lindsey, [[1295]](#footnote-1296)1295 Justice McHugh stated that "the right to become a candidate for public office is a fundamental right, and . . . any restriction on the exercise of this right must serve a compelling state interest." [[1296]](#footnote-1297)1296 The court also stated that

a deputy sheriff is not denied equal protection of the law when he or she is prohibited from becoming a candidate for public office pursuant to W.Va. Code, 7-14-15(a) [1971], nor is a deputy sheriff denied equal protection of the law when he or she is not permitted a leave of absence to become such a candidate, notwithstanding the provisions of W.Va. Code, 29-6-20 [1983] which guarantees these rights to other state civil service employees, because there is a compelling state interest in prohibiting deputy sheriffs from seeking candidacy for public office. [[1297]](#footnote-1298)1297

In State ex rel. Harden v. Hechler, [[1298]](#footnote-1299)1298 Justice McHugh stated that

compelling state interests are served by article IV, section 4 of the West Virginia Constitution, which provides that a candidate for senator must be a citizen of the State for five years next preceding the election, and therefore, that constitutional provision does not violate a candidate's rights to equal protection. [[1299]](#footnote-1300)1299

C. Filing Requirements for Candidacy

Justice McHugh addressed the issue of timely filing a certificate of candidacy in Brady v. Hechler. [[1300]](#footnote-1301)1300 The court held:

Under W.Va. Code, 3-5-7 [1985], which provides that a person **[\*237]** seeking election to an office "to be filled by the voters of more than one county" shall file with the Secretary of State of West Virginia a certificate of candidacy for nomination for such office, it is mandatory that the certificate be filed with the Secretary of State "not later than the first Saturday of February next preceding the primary election day, and must be received before midnight, eastern standard time, of that day or, if mailed, shall be postmarked before that hour." [[1301]](#footnote-1302)1301

Justice McHugh concluded in Brady that

where the record indicated that a certificate of candidacy for nomination was received by the Secretary of State of West Virginia, or postmarked, after the time required under W.Va. Code, 3-5-7 [1985], for such receipt or postmarking, petitioners, seeking to strike the candidate's name from a primary election ballot, were, in view of the candidate's failure to comply with W.Va. Code, 3-5-7 [1985], entitled to mandamus relief. [[1302]](#footnote-1303)1302

Justice McHugh stated in Haynes v. Hechler [[1303]](#footnote-1304)1303 that "a private postage meter stamp is a presumptively valid and accurate postmark for purposes of W.Va. Code, 3-5-7 [1985]." [[1304]](#footnote-1305)1304

D. Holding Dual Public Offices

In Carr v. Lambert, [[1305]](#footnote-1306)1305 Justice McHugh stated that "the position of assistant prosecuting attorney is an appointed public office and pursuant to W.Va. Code, 18-5-1a [1967], a person holding such office is ineligible to serve as a member of any county board of education." [[1306]](#footnote-1307)1306

E. Removing Elected Official from Office

In George v. Godby, [[1307]](#footnote-1308)1307 Justice McHugh confronted the issue of impropriety by a county assessor. The court held: **[\*238]**

Where a county assessor cancelled or marked "improper" certain personal property tax tickets of associated corporations, one of which corporations had made a loan to the assessor which was never repaid, and the action of the assessor in cancelling or marking the tax tickets "improper" was done without prior authorization of the county commission under W.Va. Code, 11-3-27 [1939], that assessor was subject to removal from office under the provisions of W.Va. Code, 6-6-7 [1931]. [[1308]](#footnote-1309)1308

Justice McHugh qualified wasting public funds as a basis for removal from office. In his opinion he sttaed that "waste of public funds is not an absolute requirement to removal of a person from office under the provisions of W.Va. Code, 6-6-7 [1931]; however, waste of public funds may be considered with respect to the removal of a person from office under that statute." [[1309]](#footnote-1310)1309

Summers County Citizens League, Inc. v. Tassos [[1310]](#footnote-1311)1310 presented Justice McHugh several issues related to removal of elected officials from office due to the appearance of financial conflict. The court said that "under W.Va. Code, 6-6-7, as amended, a threshold question is whether the removal proceeding was filed during the term of the public officer in which the transaction(s) in question occurred. If so, the subsequent reelection of the public officer has no effect on the removal proceeding." [[1311]](#footnote-1312)1311 The court explained that

W.Va. Code, 61-10-15, as amended, is preventive in nature; it provides an absolute standard of conduct which is violated by entering into or continuing a relationship with a private entity where that relationship may make it difficult for the county officer to represent the public with the singleness of purpose required by the statute. The statute forbids a county officer from engaging in business transactions on behalf of the public if, by virtue of his or her private interests, he or she may benefit financially, directly or indirectly, from the outcome of those transactions. The question is not whether the county officer was certain to benefit from the contract, but whether the likelihood that the county officer might benefit was so great that he or she would be subject to those temptations which the statute seeks to avoid. [[1312]](#footnote-1313)1312

Justice McHugh elaborated on the statute in holding that **[\*239]**

under W.Va. Code, 61-10-15, as amended, a county officer is "pecuniarily interested, directly or indirectly, in the proceeds of any contract or service," where the county officer is an employee of a private entity which is the other party to the contract with the county, whether or not the county officer is also a shareholder, director or officer of such private entity. [[1313]](#footnote-1314)1313

The court concluded:

A county superintendent of schools, who is not a member of a county board of education and who, therefore, has no power to vote on matters to be decided by the board, is not subject to removal from office for a violation of W.Va. Code, 61-10-15, as amended, as the result of owning stock of a bank acting as a depository for the board's funds, unless the county superintendent as a matter of fact had "any voice, influence or control" with respect to the selection of that bank for the board's funds. [[1314]](#footnote-1315)1314

F. Write-in Candidates

In MacCorkle v. Hechler, [[1315]](#footnote-1316)1315 Justice McHugh held that "the provisions of W.Va. Code, 3-6-5 [1978], which authorize a voter to write in votes in a general election, also authorize a voter to write in votes for members of the political party executive committee, who are elected in a primary election. To the extent that State ex rel. Hott v. Ewers, 106 W.Va. 18, 144 S.E. 578 (1928), is inconsistent with this opinion, it is overruled." [[1316]](#footnote-1317)1316

G. Filling Nomination Vacancy When Candidate Disqualified

In State ex rel. Harden v. Hechler, [[1317]](#footnote-1318)1317 Justice McHugh held that

when a vacancy in nomination occurs as a result of the disqualification of the candidate not later than eighty-four days before the general election, W.Va. Code, 3-5-19 [1991] provides that a nominee may be appointed by the executive committee of the political party for the political division in which the vacancy occurs and certified to the proper filing officer no later than **[\*240]** seventy-eight days before the general election. [[1318]](#footnote-1319)1318

XX. WEST VIRGINIA SUPREME COURT OF APPEALS APPELLATE JURISDICTION

A. Necessity of a Ruling by Lower Court

Wells v. Roberts [[1319]](#footnote-1320)1319 held that ["a]s a general rule 'this Court will not consider questions, nonjurisdictional in their nature, which have not been acted upon by the trial court.'" [[1320]](#footnote-1321)1320 Justice McHugh elaborated on this issue in State v. Baker, [[1321]](#footnote-1322)1321 wherein he relied upon State v. Thomas [[1322]](#footnote-1323)1322 to hold:

As a general rule, proceedings of trial courts are presumed to be regular, unless the contrary affirmatively appears upon the record, and errors assigned for the first time in an appellate court will not be regarded in any matter of which the trial court had jurisdiction or which might have been remedied in the trial court if objected to there. [[1323]](#footnote-1324)1323

Justice McHugh ruled in State v. Glover [[1324]](#footnote-1325)1324 that

where the record on appeal is inconclusive as to whether counsel failed to investigate the sole possible defense or a material defense adequately and with reasonable diligence, this Court will not decide on such a record whether a criminal defendant was denied effective assistance of counsel but will remand the case for development of the record on the point and for a ruling by the trial court on the question. [[1325]](#footnote-1326)1325

Justice McHugh wrote in Abbott v. Owens-Corning Fiberglas Corp. [[1326]](#footnote-1327)1326 that "in order for this Court to review a trial court's decision regarding the application of the doctrine forum non conveniens, it is necessary for the trial court to provide a record in sufficient detail which will show the basis of its **[\*241]** decision." [[1327]](#footnote-1328)1327

B. Stay Pending Appeal

The court held in State ex rel. Dye v. Bordenkircher [[1328]](#footnote-1329)1328 that

when the Supreme Court of Appeals of West Virginia grants a petition for appeal all proceedings in the circuit court relating to the case in which the petition for appeal has been granted are stayed pending this Court's decision in the case. Such stay of proceedings is mandatory under W.Va. Code, 62-7-2 [1931]. [[1329]](#footnote-1330)1329

C. Costs on Appeal

Justice McHugh stated in Reager v. Anderson [[1330]](#footnote-1331)1330 that "where the matters designated for inclusion in the appellate record are relevant to the issues presented by the appeal or cross-assignment(s) of error, this Court will not divide the costs of reproducing the record." [[1331]](#footnote-1332)1331

D. Criminal Appeal Generally

Justice McHugh held in Judy v. White [[1332]](#footnote-1333)1332 that "single appeals to the West Virginia Supreme Court of Appeals, regardless of the number of convictions appealed from, for the purposes of W.Va. Code, 29-21-13a [1990], constitute a single proceeding." [[1333]](#footnote-1334)1333

E. Appeal by State in Criminal Proceeding

Justice McHugh stated in State v. Walters [[1334]](#footnote-1335)1334 that "W.Va. Code, 58-5-30 [1931] does not authorize an appeal to this Court by the State from a final order of a circuit court dismissing a criminal complaint filed initially in magistrate court." [[1335]](#footnote-1336)1335 **[\*242]**

F. Standards of Review

1. Unemployment Compensation Board of Review Decision

In the case of Kisamore v. Rutledge, [[1336]](#footnote-1337)1336 Justice McHugh held:

Findings of fact by the Board of Review of the West Virginia Department of Employment Security, in an unemployment compensation case, should not be set aside unless such findings are plainly wrong; however, the plainly wrong doctrine does not apply to conclusions of law by the Board of Review. [[1337]](#footnote-1338)1337

Justice McHugh restated Kisamore's standard of review in Ash v. Rutledge. [[1338]](#footnote-1339)1338

2. Parole Board Decision

In Rowe v. Whyte, [[1339]](#footnote-1340)1339 Justice McHugh wrote that

the decision to grant or deny parole is a discretionary evaluation to be made by the West Virginia Board of Probation and Parole. However, such a decision shall be reviewed by this Court to determine if the Board of Probation and Parole abused its discretion by acting in an arbitrary and capricious fashion. [[1340]](#footnote-1341)1340

3. Civil Service Commission Decision

Relying upon the decision in Billings v. Civil Service Commission, [[1341]](#footnote-1342)1341 Justice McHugh ruled in West Virginia Department of Health v. Mathison [[1342]](#footnote-1343)1342 that "a final order of the Civil Service Commission based upon a finding of fact will not be reversed by this Court upon appeal unless it is clearly wrong." [[1343]](#footnote-1344)1343 **[\*243]**

4. Ruling on Admitting Confession

Relying on the decision in State v. Lamp, [[1344]](#footnote-1345)1344 Justice McHugh held in State v. Wimer [[1345]](#footnote-1346)1345 that "the trial court has a wide discretion as to the admission of confessions and ordinarily this discretion will not be disturbed on review." [[1346]](#footnote-1347)1346

5. Ruling on Improper Remarks by Prosecutor

It was held in State v. Ocheltree [[1347]](#footnote-1348)1347 that "a judgment of conviction will not be reversed because of improper remarks made by a prosecuting attorney to a jury which do not clearly prejudice the accused or result in manifest injustice." [[1348]](#footnote-1349)1348

6. Ruling on Constitutional Issue

Justice McHugh said in State v. Gravely [[1349]](#footnote-1350)1349 that

the admission at trial of the testimony of a witness that he identified an accused prior to trial at a police initiated line-up or police initiated one-on-one confrontation between the witness and the accused, which pretrial identification procedure was a violation of the accused's right to counsel under the Sixth Amendment to the Constitution of the United States and under art. III, § 14, of the Constitution of West Virginia, constitutes reversible error, unless the admission of such testimony at trial is shown to be harmless constitutional error. [[1350]](#footnote-1351)1350

7. Ruling on Order Involving Bill of Particulars

Justice McHugh held in State v. Meadows [[1351]](#footnote-1352)1351 that "the ruling of a trial court concerning the sufficiency of a bill of particulars will not be reversed on appeal unless the trial court abused its discretion." [[1352]](#footnote-1353)1352 **[\*244]**

8. Ruling on Proffer of Remote Evidence

Justice McHugh relied upon Yuncke v. Welker [[1353]](#footnote-1354)1353 to hold in Gough v. Lopez [[1354]](#footnote-1355)1354 that

whether evidence offered is too remote to be admissible upon the trial of a case is for the trial court to decide in the exercise of a sound discretion; and its action in excluding or admitting the evidence will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion. [[1355]](#footnote-1356)1355

9. Ruling on Admissibility of Evidence Generally

Justice McHugh held in State v. Peyatt [[1356]](#footnote-1357)1356 that "rulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion." [[1357]](#footnote-1358)1357

10. Ruling on Joint Representation in Criminal Cases

Justice McHugh held in State v. Mullins [[1358]](#footnote-1359)1358:

When a trial court fails to follow the requirements of Rule 44(c) of the West Virginia Rules of Criminal Procedure, this Court will review the record to determine if any conflict likely existed between the jointly represented parties rather than to determine whether there is an actual conflict. If, after reviewing the record, this Court determines no conflict likely existed between the jointly represented parties, such joint representation will not be deemed reversible error. [[1359]](#footnote-1360)1359

11. Imposition of Sanctions in Civil Cases

Bell v. Inland Mutual Insurance Co. [[1360]](#footnote-1361)1360 held that **[\*245]**

the imposition of sanctions by a circuit court under W.Va.R.Civ.P. 37(b) for the failure of a party to obey the court's order to provide or permit discovery is within the sound discretion of the court and will not be disturbed upon appeal unless there has been an abuse of that discretion. [[1361]](#footnote-1362)1361

12. Declaratory Judgment Order

In Cox v. Amick, [[1362]](#footnote-1363)1362 Justice McHugh held that "a circuit court's entry of a declaratory judgment is reviewed de novo." [[1363]](#footnote-1364)1363

13. Plenary Review of Circuit Court Findings and Conclusions

Justice McHugh indicated in Burgess v. Porterfield [[1364]](#footnote-1365)1364 that "this Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed de novo." [[1365]](#footnote-1366)1365

14. Education and State Employees Grievance Board Ruling

In Quinn v. West Virginia Northern Community College, [[1366]](#footnote-1367)1366 Justice McHugh held that "a final order of the hearing examiner for the West Virginia Education and State Employees Grievance Board, made pursuant to W.Va. Code, 29-6A-1, et seq. [1988], and based upon findings of fact, should not be reversed unless clearly wrong." [[1367]](#footnote-1368)1367

15. Decision of Board of Law Examiners

Justice McHugh wrote in Matter of Dortch [[1368]](#footnote-1369)1368 that

this Court reviews de novo the adjudicatory record made before the West Virginia Board of Law Examiners with regard to questions of law, questions of application of the law to the facts, and questions of whether an applicant should or should not be **[\*246]** admitted to the practice of law. Although this Court gives respectful consideration to the Board of Law Examiners' recommendations, it ultimately exercises its own independent judgment. On the other hand, this Court gives substantial deference to the Board of Law Examiners' findings of fact, unless such findings are not supported by reliable, probative, and substantial evidence on the whole record. [[1369]](#footnote-1370)1369

H. Notice of Plain Error

Justice McHugh held in State v. Hutchinson [[1370]](#footnote-1371)1370 that

although this Court may, under Rule 30 of the West Virginia Rules of Criminal Procedure, notice plain error in the giving of an erroneous instruction (in the absence of a proper and timely objection at trial), this Court will not ordinarily recognize plain error under such circumstances, even of constitutional magnitude, where the giving of the erroneous instruction did not substantially impair the truthfinding function of the trial. [[1371]](#footnote-1372)1371

I. Moot Issues

Relying on State ex rel. M.C.H. v. Kinder, [[1372]](#footnote-1373)1372 Justice McHugh held in State ex rel. J.D.W. v. Harris [[1373]](#footnote-1374)1373 that

a case is not rendered moot even though a party to the litigation has had a change in status such that he no longer has a legally cognizable interest in the litigation or the issues have lost their adversarial vitality, if such issues are capable of repetition and yet will evade review. [[1374]](#footnote-1375)1374

J. Withdrawal of Counsel

Justice McHugh indicated in Summers County Citizens League, Inc. v. Tassos [[1375]](#footnote-1376)1375 that "an attempt by one of a number of plaintiffs/appellants to withdraw from the case after the final decree and after entry of the appeal in the **[\*247]** appellate court comes too late and usually will be disregarded." [[1376]](#footnote-1377)1376

K. Recusal of Justice

Justice McHugh stated in State ex rel. Hash v. McGraw [[1377]](#footnote-1378)1377 that

the administrative actions of the Chief Justice of the Supreme Court of Appeals of West Virginia in a particular case do not necessarily represent a pecuniary or personal interest that would affect the Chief Justice's impartiality, nor render the Chief Justice incapable of hearing the same case in a judicial capacity. [[1378]](#footnote-1379)1378

L. Unpublished Opinions

Justice McHugh stated in Pugh v. Workers' Compensation Commissioner [[1379]](#footnote-1380)1379 that "unpublished opinions of this Court are of no precedential value and for this reason may not be cited in any court of this state as precedent or authority, except to support a claim of res judicata, collateral estoppel, or law of the case." [[1380]](#footnote-1381)1380

M. Interlocutory Orders

Justice McHugh stated in State ex rel. Arrow Concrete Co. v. Hill [[1381]](#footnote-1382)1381 that "ordinarily the denial of a motion for failure to state a claim upon which relief can be granted made pursuant to West Virginia Rules of Civil Procedure 12(b)(6) is interlocutory and is, therefore, not immediately appealable." [[1382]](#footnote-1383)1382

XXI. WEST VIRGINIA SUPREME COURT OF APPEALS ORIGINAL JURISDICTION

A. Writ of Mandamus

Justice McHugh held in West Virginia Board of Education v. Hechler [[1383]](#footnote-1384)1383 that "mandamus may be used to attack the constitutionality or validity of a statute **[\*248]** or ordinance." [[1384]](#footnote-1385)1384

In State ex rel. Robinson v. Michael, [[1385]](#footnote-1386)1385 Justice McHugh held that "a writ of mandamus will not lie to compel the prosecuting attorney to represent a party in a civil contempt action arising out of the failure by a party to comply with a divorce decree which orders support payments." [[1386]](#footnote-1387)1386

Justice McHugh stated in Graf v. Frame [[1387]](#footnote-1388)1387 that "ordinarily, in mandamus proceedings, costs [and reasonable attorney fees] will not be awarded against a public officer who is honestly and in good faith endeavoring to perform his duty as he conceives it to be." [[1388]](#footnote-1389)1388

The issue in Vance v. Ritchie [[1389]](#footnote-1390)1389 involved the appropriateness of a mandamus action to compel institution of condemnation proceedings. Justice McHugh ruled that

an action in mandamus to compel the State Commissioner of Highways to institute condemnation proceedings and pay a property owner just compensation for damage done to his or her real property as a result of road work conducted by the State Department of Highways or agents thereof is within the contemplation of W.Va. Code, 14-2-2(b) [1976] relating to "any proceeding for injunctive or mandamus relief involving the taking, title, or collection for or prevention of damage to real property" which establishes proper venue in the "circuit court of the county in which the real property affected is situate." [[1390]](#footnote-1391)1390

The case of Staton v. Hrko [[1391]](#footnote-1392)1391 called upon Justice McHugh to address several matters pertaining to mandamus. The court held that "all factual allegations properly pleaded in the petition for a writ of mandamus which are not denied in the answer are deemed to be admitted." [[1392]](#footnote-1393)1392 It was said that "the procedure in effect before the adoption of the Rules of Civil Procedure in 1960 is applicable to extraordinary proceedings such as mandamus proceedings." [[1393]](#footnote-1394)1393 Justice McHugh noted that "a statute in effect prior to the Rules of Civil Procedure and which still applies to a mandamus proceeding is W.Va. Code, 57-4-1 **[\*249]** [1931]. Under this statute depositions are authorized or permitted to be taken." [[1394]](#footnote-1395)1394 The court further indicated that "special circumstances exist, authorizing the taking of a deposition in an action not covered by the Rules of Civil Procedure, when the knowledge of a particular matter rests wholly with the person or persons to be deposed, especially when accompanied by the likelihood of hostility or interest." [[1395]](#footnote-1396)1395 Staton concluded that

mandamus lies when a court or other tribunal, based upon a misapprehension of the law, refused to exercise certain jurisdiction or discretion because the court or other tribunal believed that it did not possess such jurisdiction or discretion. In that situation mandamus lies to compel the court or other tribunal to exercise the jurisdiction or discretion but does not ordinarily lie to direct the manner in which to exercise discretion. [[1396]](#footnote-1397)1396

Justice McHugh said in State ex rel. Lambert v. Cortellessi [[1397]](#footnote-1398)1397 that

mandamus lies to compel a county commission to "give due consideration to the duties, responsibilities and work required of the assistants, deputies and employees" of a county officer, as required by W.Va. Code, 7-7-7, as amended, where the county commission has arbitrarily fixed the overall budget of a county officer without having consulted with the county officer as to the amount of funds which is "reasonable and proper" for the performance of the statutory duties of his or her office. [[1398]](#footnote-1399)1398

The court also ruled that "where a county commission arbitrarily fixes a county officer's budget without complying with the provisions of W.Va. Code, 7-7-7, as amended, the county commission is responsible for the county officer's reasonable attorney's fees incurred in a mandamus proceeding to compel compliance with that statute." [[1399]](#footnote-1400)1399

Justice McHugh held in Pell v. Board of Education of Monroe County [[1400]](#footnote-1401)1400 that

pursuant to W.Va. Code, 18-5-13 [1990], a county board of education has the authority to close and consolidate schools. **[\*250]** However, mandamus will lie to control a county board of education in the exercise of its discretion upon a showing of caprice, passion, partiality, fraud, arbitrary conduct, some ulterior motive, or misapprehension of the law. If a comprehensive educational facilities plan has been developed by a county board of education, approved by the state board of education, submitted to a regional educational services agency, granted approval for funding on a priority basis by the state school building authority, satisfied all requirements for approval, notice, and hearing pursuant to W.Va. Code, 18-5-13a [1991], and contracts have been entered into to begin implementation of such plan, then it is arbitrary and capricious for a county board of education, with no articulated reasons, to take action that would cause the plan to not be implemented or to replace such plan with an alternative plan, where such action would place in jeopardy the possibility of obtaining the approved funding. [[1401]](#footnote-1402)1401

B. Writ of Prohibition

The case of State ex rel. Maynard v. Bronson [[1402]](#footnote-1403)1402 involved the issuance of a writ of prohibition in the context of dismissed indictments. Justice McHugh indicated that

prohibition is not a proper remedy to challenge the dismissal of indictments by a judge of a circuit court acting pursuant to the West Virginia Agreement on Detainers, W.Va. Code, 62-14-1, et seq., where the judge of the circuit court had jurisdiction of the subject matter in controversy, and nothing in the record indicates that the judge exceeded his legitimate powers." [[1403]](#footnote-1404)1403

Justice McHugh relied on the decision in Hinkle v. Black, [[1404]](#footnote-1405)1404 to address writ of prohibition issues in State ex rel. Oldaker v. Fury. [[1405]](#footnote-1406)1405 Oldaker stated that

in determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, **[\*251]** clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance. [[1406]](#footnote-1407)1406

Justice McHugh restated the holding of Oldaker in the single syllabus of his decision in the case of Ash v. Twyman. [[1407]](#footnote-1408)1407

Justice McHugh stated in Peyatt v. Kopp [[1408]](#footnote-1409)1408 that "prohibition does not lie against a prosecuting attorney to restrain him from presenting a case to a grand jury where the prosecuting attorney, in performing his statutory duties, has probable cause to believe that a criminal offense has been committed and that the defendant committed the offense." [[1409]](#footnote-1410)1409

C. Certified Questions

In Kincaid v. Mangum [[1410]](#footnote-1411)1410 Justice McHugh held:

When a certified question is not framed so that this Court is able to fully address the law which is involved in the question, then this Court retains the power to reformulate questions certified to it under both the Uniform Certification of Questions of Law Act found in W.Va. Code, 51-1A-1, et seq. and W.Va. Code, 58-5-2 [1967], the statute relating to certified questions from a circuit court of this State to this Court. [[1411]](#footnote-1412)1411

D. Writ of Habeas Corpus

Relying on State ex rel. Pingley v. Coiner, [[1412]](#footnote-1413)1412 Justice McHugh held in State ex rel. J.D.W. v. Harris [[1413]](#footnote-1414)1413 that "habeas corpus lies to secure relief from conditions of imprisonment which constitute cruel and unusual punishment in violation of the provisions of Article III, Section 5, of the Constitution of West Virginia and of the Eighth Amendment to the Constitution of the United **[\*252]** States." [[1414]](#footnote-1415)1414

In Bowman v. Leverette, [[1415]](#footnote-1416)1415 Justice McHugh was called upon to examine the use of habeas corpus to challenge a conviction based upon prior federal and state supreme court decisions that prohibited shifting the burden of proof on an element of an offense to a defendant. The Bowman court held that

W.Va. Code, 53-4A-1(d) [1967] allows a petition for postconviction habeas corpus relief to advance contentions or grounds which have been previously adjudicated only if those contentions or grounds are based upon subsequent court decisions which impose new substantive or procedural standards in criminal proceedings that are intended to be applied retroactively. [[1416]](#footnote-1417)1416

Bowman went on to address prior precedents on shifting the burden of proof to the defendant and held that "the decisions in Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), and State v. O'Connell, [163] W.Va. [366], 256 S.E.2d 429 (1979), do not require full retroactive application." [[1417]](#footnote-1418)1417

Justice McHugh held in State ex rel. Dye v. Bordenkircher [[1418]](#footnote-1419)1418 that "when a stay of proceedings under W.Va. Code, 62-7-2 [1931], is in effect the proper method of seeking bail pending appeal is by a petition for habeas corpus to this Court." [[1419]](#footnote-1420)1419

XXII. CONSTITUTIONAL LAW

A. Retroactive Application of Constitutional Pronouncements

Justice McHugh indicated in Kincaid v. Mangum [[1420]](#footnote-1421)1420 that "when this Court issues an interpretation of the W.Va. Const. which was clearly not foreshadowed, and when retroactive application of the new interpretation would excessively burden the government's ability to carry out its functions, then the new constitutional interpretation will apply prospectively." [[1421]](#footnote-1422)1421 **[\*253]**

B. Article 8 West Virginia Supreme Court of Appeals

Justice McHugh held in State ex rel. Crabtree v. Hash [[1422]](#footnote-1423)1422 that

W.Va. Const. art. VIII, §§ 3 and 8, and all administrative rules made pursuant to the powers derived from article VIII, supersede W.Va. Code, 51-2-10 [1931] and vest the Chief Justice of the Supreme Court of Appeals of West Virginia with the sole power to appoint a judge for temporary service in any situation which requires such an appointment. [[1423]](#footnote-1424)1423

Justice McHugh said in Committee on Legal Ethics of the West Virginia State Bar v. Karl [[1424]](#footnote-1425)1424 that

pursuant to article VIII, section 8 of the West Virginia Constitution, this Court has the inherent and express authority to "prescribe, adopt, promulgate and amend rules prescribing a judicial code of ethics, and a code of regulations and standards of conduct and performances for justices, judges and magistrates, along with sanctions and penalties for any violation thereof[.]" [[1425]](#footnote-1426)1425

C. Article 3, Section 14 Speedy Trial

In State ex rel. Shorter v. Hey, [[1426]](#footnote-1427)1426 the court clarified a defendant's right to a speedy trial pursuant to the constitution and by statute. Justice McHugh held that

whereas W.Va. Code, 62-3-1, provides a defendant with a statutory right to a trial in the term of his indictment, it is W.Va. Code, 62-3-21, rather than W.Va. Code, 62-3-1, which is the legislative adoption or declaration of what ordinarily constitutes a speedy trial within the meaning of U.S. Const., amend. VI and W.Va. Const., art. III, § 14. [[1427]](#footnote-1428)1427

**[\*254]**

D. Article 10, Section 4 Contracting Debt

In Devon Corp. v. Miller, [[1428]](#footnote-1429)1428 Justice McHugh addressed the effect of the Contract Clause contained in Article 3, Section 4 of the West Virginia Constitution and Article I of the United States Constitution. The court in Devon ruled:

The clauses of the Constitution of the United States and the Constitution of West Virginia which forbid the passage of a law impairing the obligation of a contract are not applicable to a statute enacted prior to the making of a contract. Specifically, an ***oil*** and gas lease obtained subsequent to the enactment of W.Va. Code, 22-4A-7(b)(4), which statute requires an operator to obtain the written consent and easement of surface owners prior to the drilling or operation of a deep well, is not unconstitutionally impaired by such statute. [[1429]](#footnote-1430)1429

Justice McHugh stated in State ex rel. Dadisman v. Caperton [[1430]](#footnote-1431)1430 that

the 1990 amendment to W.Va. Code, 5-10-28 eliminating, for most accounting purposes, the two divisions of the Public Employees Retirement System previously existing only for such purposes, specifically, the state division and the public employer division, does not constitute an unconstitutional impairment of the contractual rights of the former public employer division's beneficiaries or retirants, for the System has always owned all of the assets. [[1431]](#footnote-1432)1431

Justice McHugh held in State ex rel. Marockie v. Wagoner [[1432]](#footnote-1433)1432 that

the school building debt service fund, described in W.Va. Code, 29-22-18 [1994] as consisting of monies allocated from the net profits of the West Virginia Lottery, may be used to liquidate the School Building Authority's revenue bonds. This method of funding the School Building Authority's revenue bonds does not violate section 4 of article X of the West Virginia Constitution since the monies allocated to the school building debt service fund are a new revenue source and since the legislature specifically provided in W.Va. Code, 29-2218 [1990 and 1994] that the net **[\*255]** profits from the West Virginia Lottery are not to be treated as part of the general revenue of the State. [[1433]](#footnote-1434)1433

E. Article 6, Section 30 One Object Rule

Justice McHugh was called upon to explain the one object rule legislation provision in the state constitution in the case of Kincaid v. Mangum. [[1434]](#footnote-1435)1434 The court held:

If there is a reasonable basis for the grouping of various matters in a legislative bill, and if the grouping will not lead to logrolling or other deceiving tactics, then the oneobject rule in W.Va. Const. art. VI, § 30 is not violated; however, the use of an omnibus bill to authorize legislative rules violates the one-object rule found in W.Va. Const. art. VI, § 30 because the use of the omnibus bill to authorize legislative rules can lead to logrolling or other deceiving tactics. [[1435]](#footnote-1436)1435

F. Article 10, Section 8 Bonded Debt

In State ex rel. Council of City of Charleston v. Hall, [[1436]](#footnote-1437)1436 Justice McHugh indicated that "W.Va. Const. art. X, § 8 does not preclude a contract for a term of twentyfive years whereby a city is obligated to pay a fee for solid waste disposal when that fee comes from a special fund collected by the city for such solid waste disposal." [[1437]](#footnote-1438)1437 It was further held:

The provisions of an agreement which provide a city the option of buying back improvements made to its solid waste facility at certain years of the agreement or when the City chooses to prematurely terminate the agreement, do not violate W.Va. Const. art. X, § 8 or W.Va. Code, 11-826 [1963] since the City decides when or if it will buy back the improvements to the solid waste facility. However, if the City chooses to buy back the improvements made to the solid waste facility it must do so without violating W.Va. Const. art. X, § 8 or W.Va. Code, 11-8-26 [1963]. [[1438]](#footnote-1439)1438

**[\*256]**

Justice McHugh held in State ex rel. County Commision of Boone County v. Cooke [[1439]](#footnote-1440)1439 that

when tax increment obligations are issued pursuant to W.Va. Code, 7-11B-1, et seq. [1995], The Tax Increment Financing Act, to finance a county development project authorized therein, a debt is created within the meaning of article X, § 8 of the Constitution of West Virginia and such tax increment obligations may only be issued in accordance with article X, § 8." [[1440]](#footnote-1441)1440

The court went on to hold that

the issuance of tax increment obligations pursuant to W.Va. Code, 7-11B-1, et seq. [1995], The Tax Increment Financing Act, is not in accordance with W.Va. Const. art. X, § 8 because W.Va. Code, 7-11B-1, et seq. [1995] does not provide "for the collection of a direct annual tax on all taxable property therein, in the ratio, as between the several classes or types of such taxable property, specified in section one of this article [W. Va. Const. art. X, § 1], separate and apart from and in addition to all other taxes for all other purposes" in order to pay the principal of and interest on such tax increment obligations and is, therefore, unconstitutional. [[1441]](#footnote-1442)1441

G. Article 3, Section 6 Search and Seizure

Justice McHugh examined the constitutional issue of privacy, vis-a-vis an automobile, in State v. Peacher. [[1442]](#footnote-1443)1442 The court noted initially that "the Fourth Amendment of the United States Constitution, and Article III, Section 6, of the West Virginia Constitution protect an individual's reasonable expectation of privacy." [[1443]](#footnote-1444)1443 Justice McHugh then went on to find that

an individual's expectation of privacy in his automobile is less than that which he would have in his home or his place of business. The expectation of privacy associated with the exterior aspects of an automobile is even less than that associated with the interior portions. And, where an automobile is parked on a third person's property, after control had been relinquished to yet **[\*257]** another person, and the automobile is open to view from a public highway, any possible expectation of privacy regarding the exterior aspects of the automobile is even further diminished. [[1444]](#footnote-1445)1444

Justice McHugh relied on the decision in State v. Plantz [[1445]](#footnote-1446)1445 to hold in State v. Wimer [[1446]](#footnote-1447)1446 that

the general rule is that the voluntary consent of a person who owns or controls premises to a search of such premises is sufficient to authorize such search without a search warrant, and that a search of such premises, without a warrant, when consented to, does not violate the constitutional prohibition against unreasonable searches and seizures. [[1447]](#footnote-1448)1447

Justice McHugh was concerned with the issue of a warrantless search and seizure by public school officials in State v. Joseph T. [[1448]](#footnote-1449)1448 The court initially held that "public school students in West Virginia are entitled under U.S. Const. amend. IV and W.Va. Const. art. III, § 6, to security against unreasonable searches and seizures conducted in the schools by school principals, teachers and other school authorities." [[1449]](#footnote-1450)1449 The court then held that

in determining whether a warrantless search concerning a public school student conducted by school authorities is reasonable under U.S. Const. amend. IV and W.Va. Const. art. III, § 6, in the context of delinquency or criminal proceedings instituted against the student, the search is to be assessed in view not only of the rights of the public school student but also in view of the need of this State's educational system to prevent disruptive or illegal conduct by public school students; in particular, the search must be reasonable in terms of (1) the initial justification for the search and (2) the extent of the search conducted; the initial justification for the search is determined by the "reasonable suspicion standard" (a standard less exacting than "probable cause") under which a search is justified where school authorities have reasonable grounds for suspecting that the search will reveal evidence that the student violated the rules of the school or the law; the extent of the search conducted is reasonable when **[\*258]** reasonably related to the objective of the search and not excessively intrusive to the student. [[1450]](#footnote-1451)1450

Justice McHugh concluded Joseph T. by holding:

Where an assistant principal of a public school had reasonable grounds for suspecting that the locker of a public school student contained an alcoholic beverage in violation of the rules of the school, and a warrantless search of the student's locker revealed a number of marihuana cigarettes, the search, in the context of delinquency or criminal proceedings instituted against the student, did not constitute a violation of the student's right under U.S. Const. amend. IV and W.Va. Const. art. III, § 6, to security against unreasonable searches and seizures. [[1451]](#footnote-1452)1451

The case of State v. Choat [[1452]](#footnote-1453)1452 challenged the constitutionality of the stop and frisk procedure. Justice McHugh stated initially that "where a police officer observes several individuals in a high-crime vicinity during the early morning hours and has reason to believe at least one of those individuals is violating a city ordinance, an investigatory stop conducted by the police officers is constitutionally permissible." [[1453]](#footnote-1454)1453 The court then set out guidelines for conducting a stop and frisk:

Where a police officer making a lawful investigatory stop has reason to believe that an individual is armed and dangerous, that officer, in order to protect himself and others, may conduct a search for concealed weapons, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be certain that the individual is armed; the inquiry is whether a reasonably prudent man would be warranted in the belief that his safety or that of others was endangered. [[1454]](#footnote-1455)1454

H. Article 3, Section 14 Right to Counsel

Relying on State v. Thomas, [[1455]](#footnote-1456)1455 Justice McHugh addressed the constitutional right to counsel in criminal cases in State v. Baker. [[1456]](#footnote-1457)1456 The court in Baker held: **[\*259]**

In the determination of a claim that an accused was prejudiced by ineffective assistance of counsel violative of Article III, Section 14 of the West Virginia Constitution and the Sixth Amendment to the United States Constitution, courts should measure and compare the questioned counsel's performance by whether he exhibited the normal and customary degree of skill possessed by attorneys who are reasonably knowledgeable of criminal law, except that proved counsel error which does not affect the outcome of the case, will be regarded as harmless error. [[1457]](#footnote-1458)1457

Justice McHugh continued in Baker by holding that "where a counsel's performance, attacked as ineffective, arises from occurrences involving strategy, tactics and arguable courses of action, his conduct will be deemed effectively assistive of his client's interests, unless no reasonably qualified defense attorney would have so acted in the defense of an accused." [[1458]](#footnote-1459)1458

In State ex rel. Levitt v. Bordenkircher, [[1459]](#footnote-1460)1459 the defendant alleged ineffective assistance of counsel during his criminal prosecution. Justice McHugh responded to the claim as follows:

A defendant in a criminal case, whose voluntary tape recorded confession to police authorities indicated that he was guilty of murder of the first degree under the West Virginia "felony-murder rule," who entered a plea of guilty to murder of the first degree and received a sentence of life imprisonment, without a recommendation of mercy, failed to demonstrate that his conviction and sentence resulted from ineffective assistance of counsel, where his counsel (1) filed various pre-trial motions upon the defendant's behalf, including motions to discover the nature of the State's evidence, (2) evaluated the strength of the evidence against the defendant and met with the defendant upon several occasions prior to recommending the guilty plea and (3) attempted to mitigate the defendant's sentence by eliciting testimony from witnesses who stated that the defendant "turned himself in," helped the authorities locate a revolver used during the crime, and would, in time, be a good candidate for parole. [[1460]](#footnote-1461)1460

Justice McHugh held in State v. Glover [[1461]](#footnote-1462)1461 that "inexperience alone does **[\*260]** not constitute ineffective assistance of counsel." [[1462]](#footnote-1463)1462 The court also ruled:

Ineffective assistance of counsel is established when it is proved that counsel for a criminal defendant failed to investigate adequately a purported alibi defense and consequently failed to contact, subpoena and call alibi witnesses who were willing and able to testify for the defendant in a case in which the alibi was the defendant's sole possible defense or a material defense. [[1463]](#footnote-1464)1463

I. Article 3, Section 4 Ex Post Facto

In Shumate v. West Virginia Department of Motor Vehicles, [[1464]](#footnote-1465)1464 Justice McHugh said:

it is not a violation of the ex post facto clauses, U.S. Const. art. I, § 10, and W. Va. Const. art. III, § 4, to apply the provisions of W.Va. Code, chapter 17C, article 5A, as amended, to persons whose license to operate a motor vehicle has previously been suspended or revoked pursuant to W.Va. Code, chapter 17C, article 5, as amended. [[1465]](#footnote-1466)1465

The opinion concluded that "the ex post facto clauses of the United States Constitution, article I, section 10, and the West Virginia Constitution, article III, section 4, do not apply to administrative proceedings for which the purpose is to suspend or revoke a license to operate a motor vehicle." [[1466]](#footnote-1467)1466

In State ex rel. Collins v. Bedell [[1467]](#footnote-1468)1467 Justice McHugh ruled that

a procedural change in a criminal proceeding does not violate the ex post facto principle found in the W.Va. Const. art. III, § 4 and in the U.S. Const. art. I, § 10 unless the procedural change alters the definition of a crime so that what is currently punished as a crime was an innocent act when committed; deprives the accused of a defense which existed when the crime was committed; or increases the punishment for the crime after it was committed. [[1468]](#footnote-1469)1468

**[\*261]**

J. Article 3, Section 10 Equal Protection

Justice McHugh was concerned with the constitutional impact of a statute that limited funds for certain counties in State ex rel. Board of Education for Grant County v. Manchin. [[1469]](#footnote-1470)1469 Justice McHugh stated that

W.Va. Code, 18A-4-5 [1985], to the extent that it fixes a county's entitlement to state equity funding based upon whether an excess levy was in effect in that particular county on January 1, 1984, and continues to limit that county's funding to the specific amount awarded on January 1, 1984, despite the fact that the county's voters subsequently rejected continuation of the levy at the polls, violates equal protection principles because such a financing system operates to treat counties which never passed excess levies more favorably than those which had excess levies in effect on January 1, 1984, but failed to renew them. [[1470]](#footnote-1471)1470

Justice McHugh determined the constitutionality of a criminal statute in the Public Employees Insurance Act, in the case of Courtney v. State Department of Health of West Virginia. [[1471]](#footnote-1472)1471 The court held that the statute, "W.Va. Code, 5-16-12 [1988] does not violate equal protection principles contained in article III, sections 10 & 17 or in article VI, section 39 of the West Virginia Constitution." [[1472]](#footnote-1473)1472

In Lewis v. Canaan Valley Resorts, Inc., [[1473]](#footnote-1474)1473 Justice McHugh held:

The West Virginia Skiing Responsibility Act, W.Va. Code, 20-3A-1 to 20-3A-8 [1984], which immunizes ski area operators from tort liability for the inherent risks in the sport of skiing which are essentially impossible for the operators to eliminate, does not violate equal protection principles of article III, section 10 of the Constitution of West Virginia or of the fourteenth amendment to the Constitution of the United States. The Act similarly does not constitute special legislation in violation of article VI, section 39 of the Constitution of West Virginia. [[1474]](#footnote-1475)1474

In the case of Pritchard v. Arvon, [[1475]](#footnote-1476)1475 Justice McHugh held that **[\*262]**

W.Va. Code, 29-12A-16(d) [1986], which provides that the purchase of liability insurance or the establishment of an insurance program by a political subdivision does not constitute a waiver of any immunity or defense of the political subdivision or its employees, does not violate equal protection principles as set forth in W.Va. Const. art. III, § 10. [[1476]](#footnote-1477)1476

Justice McHugh held in Randall v. Fairmont City Police Department [[1477]](#footnote-1478)1477 that "the qualified tort immunity provisions of the West Virginia Governmental Tort Claims and Insurance Reform Act of 1986, W.Va. Code, 29-12A-1 to 29-12A-18, do not violate the equal protection principles of article III, section 10 of the Constitution of West Virginia." [[1478]](#footnote-1479)1478

In State ex rel. Lambert v. County Commission of Boone County, [[1479]](#footnote-1480)1479 Justice McHugh stated:

The provision of W.Va. Code, 5-16-22 [1992], which requires employers, whether or not they elect to participate in the Public Employees Insurance Agency, to contribute to the Public Employees Insurance Agency if they participate in the Public Employees Retirement System and their retired employees elect to participate in the Public Employees Insurance Agency, does not violate the equal protection principle found in West Virginia Constitution art. III, Sec. 10, which is West Virginia's due process clause. Such provision relates to a legitimate governmental purpose of providing medical coverage to retired employees who participate in the Public Employees Retirement System. [[1480]](#footnote-1481)1480

Justice McHugh ruled in Wetzel County Solid Waste Authority v. West Virginia Division of Natural Resources [[1481]](#footnote-1482)1481 that

the equal protection and due process rights found in W.Va. Const. art. III, § 10 are not violated by the imposition of the solid waste assessment fee as set forth in W.Va. Code, 7-5-22 [1990] because the imposition of the solid waste assessment fee is rationally related to the legitimate governmental purpose of defraying the administrative costs of the regional or county solid waste authorities and their solid waste programs. Furthermore, the **[\*263]** imposition of the solid waste assessment fee is neither arbitrary nor discriminatory. [[1482]](#footnote-1483)1482

Justice McHugh ruled in Payne v. Gundy [[1483]](#footnote-1484)1483 that

it is a violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and article III, section 10, of the Constitution of West Virginia for a party in a civil action to purposefully eliminate potential jurors from a jury through the use of peremptory strikes solely upon the basis of gender. [[1484]](#footnote-1485)1484

The court then held:

To establish a prima facie case of unlawful gender discrimination in the jury selection process through the use of peremptory strikes, the party moving to disqualify the jury must show: (1) that the opposing party has exercised peremptory strikes to eliminate potential jurors of the movant's gender, and (2) that the circumstances raise an inference that the opposing party used the peremptory strikes to exclude from the jury potential jurors solely upon the basis of their gender. The opposing party may defeat a prima facie case of such unlawful discrimination by providing non-discriminatory, credible reasons for using the peremptory strikes to eliminate members of the moving party's gender from the jury. Although the reasons or explanations of the opposing party for striking members of the moving party's gender from the jury need not rise to the level of a "for cause" challenge, the trial court has the discretion to conduct an evidentiary hearing upon the motion to disqualify the jury because of unlawful gender discrimination. [[1485]](#footnote-1486)1485

Justice McHugh wrote in State ex rel. Blankenship v. Richardson [[1486]](#footnote-1487)1486 that

W.Va. Code, 23-4-6(n)(1) [1995], which provides that in order to be eligible to apply for an award of permanent total disability benefits, a claimant must have been awarded the sum of fifty percent in prior permanent partial disability awards or have suffered an occupational injury or disease which results in a **[\*264]** finding that the claimant has suffered a medical impairment of fifty percent, does not violate W.Va. Const. Art. III, § 10, our equal protection clause. [[1487]](#footnote-1488)1487

K. Article 3, Section 22 Right To Bear Arms

Justice McHugh was concerned with legislative intrusion in to the state constitutional right to keep and bear arms in the case of State ex rel. City of Princeton v. Buckner. [[1488]](#footnote-1489)1488 Justice McHugh held that

W.Va. Code, 61-7-1 [1975], the statutory proscription against carrying a dangerous or deadly weapon, is overbroad and violative of article III, section 22 of the West Virginia Constitution, known as the "Right to Keep and Bear Arms Amendment." It infringes upon the right of a person to bear arms for defensive purposes, specifically, defense of self, family, home and state, insofar as it prohibits the carrying of a dangerous or deadly weapon for any purpose without a license or other statutory authorization. [[1489]](#footnote-1490)1489

Justice McHugh noted in Buckner that

the West Virginia legislature may, through the valid exercise of its police power, reasonably regulate the right of a person to keep and bear arms in order to promote the health, safety and welfare of all citizens of this State, provided that the restrictions or regulations imposed do not frustrate the constitutional freedoms guaranteed by article III, section 22 of the West Virginia Constitution, known as the "Right to Keep and Bear Arms Amendment." [[1490]](#footnote-1491)1490

L. Article 3, Section 7 Free Speech

The right of a citizen to speak while a police officer issues a traffic ticket to another person was addressed by Justice McHugh in State ex rel. Wilmoth v. Gustke. [[1491]](#footnote-1492)1491 The court held that

a person, upon witnessing a police officer issuing a traffic citation to a third party on the person's property, who asks the **[\*265]** officer, without the use of fighting or insulting words or other opprobrious language and without forcible or other illegal hindrance, to leave the premises, does not violate W.Va. Code, 61-5-17 [1931], because that person has not illegally hindered an officer of this State in the lawful exercise of his or her duty. To hold otherwise would create first amendment implications which may violate the person's right to freedom of speech. [[1492]](#footnote-1493)1492

Justice McHugh held in Wheeling Park Commission v. Hotel & Restaurant Employees, International Union, AFL-CIO [[1493]](#footnote-1494)1493 that

when evaluating whether an injunction's content-neutral restrictions on a person's or group's speech in a public forum is constitutional pursuant to W.Va. Const. art. III, § 7, the freedom of speech provision, as opposed to evaluating a content-neutral statute, ordinance or regulation, the standard time, place, and manner analysis of the restrictions is not sufficiently rigorous. Instead, a court must ensure that the content-neutral restrictions in the injunction burden no more speech than necessary to serve a significant government interest. [[1494]](#footnote-1495)1494

Justice McHugh examined the impact of mandatory disclosure of certain matters on the right to free speech in the case of State ex rel. Hechler v. Christian Action Network. [[1495]](#footnote-1496)1495 The court held:

Pursuant to W.Va. Code, 29-19-8 [1992] of the Solicitation of Charitable Funds Act all charitable organizations must include the following statement on every printed solicitation: "'West Virginia residents may obtain a summary of the registration and financial documents from the Secretary of State, State Capitol, Charleston, West Virginia 25305. Registration does not imply endorsement.'" The mandated statement does not violate the First Amendment to the Constitution of the United States or article III, section 7 of the Constitution of West Virginia because it burdens no more speech than is necessary to further the substantial state interest of "preventing deceptive and dishonest statements and conduct in the solicitation and reporting of funds for or in the name of charity." [[1496]](#footnote-1497)1496

**[\*266]**

The court further said that "an organization which 'holds itself out to be an . . . educational . . . organization' is a 'charitable organization' within the meaning of W.Va. Code, 29-19-2(1) [1992] of the Solicitation of Charitable Funds Act and, thus, is subject to the requirements of that Act." [[1497]](#footnote-1498)1497 The court concluded that "W.Va. Code, 29-19-8 [1992] does not authorize the Secretary of State to require charitable organizations to submit to his office copies of any solicitation materials mailed to the public." [[1498]](#footnote-1499)1498

M. Article 3, Section 15 Free Exercise

Justice McHugh indicated in Matter of Kilpatrick [[1499]](#footnote-1500)1499 that

the free exercise clause of the first amendment to the United States Constitution and art. III, § 15 of the West Virginia Constitution are not violated by the provision of W.Va. Code, 48-1-6 [1986] requiring a standard serological test before a license for marriage will be issued, because this statutory provision furthers the compelling interests in the health and welfare of the citizens of this State. [[1500]](#footnote-1501)1500

N. Article 6, Section 36 Lottery

The constitutional lottery provision was the subject of interpretation by Justice McHugh in State ex rel. Mountaineer Park, Inc. v. Polan. [[1501]](#footnote-1502)1501 It was said initially in the opinion:

Article VI, section 36 of the West Virginia Constitution provides an exception to the prohibition against lotteries to allow the operation of a lottery which is regulated, controlled, owned and operated by the State of West Virginia in the manner provided by general law. Only those lottery operations which are regulated, controlled, owned and operated in the manner provided by general laws enacted by the West Virginia Legislature may be properly conducted in accordance with the exception created under article VI, section 36 of our Constitution. [[1502]](#footnote-1503)1502

The Polan court then held: **[\*267]**

In order for a delegation of authority by the legislature to an administrative agency to be constitutional, the legislature must prescribe adequate statutory standards to guide the agency in the administration of the statute, and not grant the agency unbridled authority in the exercise of the power conferred upon it. A general delegation of authority by the legislature to the Lottery Commission under W.Va. Code, 29-22-9(b)(2) [1990], authorizing it to promulgate rules and regulations with regard to "electronic video lottery systems," is clearly not a sufficient statutory standard which would vest the Lottery Commission with power to include electronic gaming devices, such as electronic video lottery, as part of the operations of the state lottery. To hold otherwise would result in an unlawful delegation of legislative power to the Lottery Commission and would violate article VI, § 36 of the West Virginia Constitution. [[1503]](#footnote-1504)1503

O. Article 12, Section 2 Free Schools

Justice McHugh interpreted the constitutional authority of the state board of education in West Virginia Board of Education v. Hechler. [[1504]](#footnote-1505)1504 The court held:

Rule-making by the State Board of Education is within the meaning of "general supervision" of state schools pursuant to art. XII, § 2 of the West Virginia Constitution, and any statutory provision that interferes with such rule-making is unconstitutional. Consequently, W.Va. Code, 29A-3A-12 and -13 [1988] are hereby declared to be unconstitutional. [[1505]](#footnote-1506)1505

The court also stated in Hechler that

a rule adopted by the State Board of Education, setting forth minimum requirements for the design and equipment of school buses, is within the meaning of "general supervision" of state schools pursuant to art. XII, § 2 of the West Virginia Constitution. W.Va. Code, 29A-3A-12 and -13 [1988] interfere with such "general supervision," and, therefore, are unconstitutional. [[1506]](#footnote-1507)1506

**[\*268]**

P. Article 3, Section 17 Certain Remedy

In Lewis v. Canaan Valley Resorts, Inc., [[1507]](#footnote-1508)1507 Justice McHugh held that "the West Virginia Skiing Responsibility Act, W.Va. Code, 20-3A-1 to 20-3A-8 [1984], does not violate the certain remedy provision of article III, section 17 of the Constitution of West Virginia." [[1508]](#footnote-1509)1508 The court also held that

when legislation either substantially impairs vested rights or severely limits existing procedural remedies permitting court adjudication, thereby implicating the certain remedy provision of article III, section 17 of the Constitution of West Virginia, the legislation will be upheld under that provision if, first, a reasonably effective alternative remedy is provided by the legislation or, second, if no such alternative remedy is provided, the purpose of the alteration or repeal of the existing cause of action or remedy is to eliminate or curtail a clear social or economic problem, and the alteration or repeal of the existing cause of action or remedy is a reasonable method of achieving such purpose. [[1509]](#footnote-1510)1509

In Pritchard v. Arvon, [[1510]](#footnote-1511)1510 Justice McHugh held that

W.Va. Code, 29-12A-5(b) [1986], which provides immunity for an employee of a political subdivision under some circumstances, does not violate the certain remedy provision of W.Va. Const. art. III, § 17, nor does it violate equal protection principles as contained in W.Va. Const. art. III, § 10. [[1511]](#footnote-1512)1511

In Randall v. Fairmont City Police Department, [[1512]](#footnote-1513)1512 Justice McHugh stated that "the qualified tort immunity provisions of the West Virginia Governmental Tort Claims and Insurance Reform Act of 1986, W.Va. Code, 29-12A-1 to 29-12A-18, do not violate the certain remedy provision of article III, section 17 of the Constitution of West Virginia." [[1513]](#footnote-1514)1513 **[\*269]**

Q. Article 10, Section 1 Taxation

The issue of disproportionate tax assessment was addressed by Justice McHugh in the case of Petition of Maple Meadow Mining Co. for Relief from Real Property Assessment for Tax Year 1992. [[1514]](#footnote-1515)1514 The court held that

a taxpayer's right to equal and uniform taxation under article X, section 1 of the West Virginia Constitution and equal protection of the laws under amendment XIV, section 1 of the United States Constitution is not violated when a certain class of property of that taxpayer is assessed at a higher percentage than certain other classes of property of other taxpayers within the three-year period of achieving equality of assessed property valuation pursuant to W.Va. Code, 11-1C-1, et seq. Accordingly, article X, section 1 of the West Virginia Constitution and amendment XIV, section 1 of the United States Constitution is satisfied when general adjustments are utilized over a short period of time to equalize the differences existing among taxpayers regarding property valuation and assessments. [[1515]](#footnote-1516)1515

In Wetzel County Solid Waste Authority v. West Virginia Division of Natural Resources [[1516]](#footnote-1517)1516 Justice McHugh distinguished a regulatory fee from a tax. The court held that

the solid waste assessment fee authorized by W.Va. Code, 7-5-22 [1990] is a regulatory fee rather than a tax since the revenue from the fee is used for the sole purpose of defraying the costs of the administration of duties imposed upon the county or regional solid waste authorities. Therefore, W.Va. Code, 7-5-22 [1990] does not violate W.Va. Const. art. V, § 1, by impermissibly delegating taxing authority to the county or regional solid waste authorities nor does it violate W.Va. Const. art. X, § 1, which requires taxation to be equal and uniform throughout the State. [[1517]](#footnote-1518)1517

Justice McHugh ruled in City of Huntington v. Bacon [[1518]](#footnote-1519)1518 that

an ordinance which imposes a municipal service fee pursuant to W.Va. Code, 8-13-13 [1971] upon the owners of buildings at an **[\*270]** annual rate plus a percentage based upon the square footage of space contained in each structure on the lot for the sole purpose of defraying the cost of fire and flood protection services is a user fee rather than a tax and therefore, is not in violation of the Tax Limitation Amendment found in W. Va. Const. Art. X, § 1. [[1519]](#footnote-1520)1519

R. Article 6, Section 52 Road Funds

Justice McHugh was called upon in Contractors Ass'n of West Virginia v. West Virginia Department of Public Safety, Division of Public Safety [[1520]](#footnote-1521)1520 to explain the constitutional road fund provision. The court held that

the only purposes for which the funds described in W.Va. Const. art. VI, § 52 may be spent are for the "cost of administration and collection" and for the cost of "construction, reconstruction, repair and maintenance of public highways." The term "cost of administration" includes the cost of administering the duties of the Division of Motor Vehicles. The term "maintenance" includes the following activities which are directly related to ensuring the safety of our public highways: the road patrol, traffic, and traffic court activities of the Department of Public Safety; and the motorcycle safety and licensing program, but the term "maintenance" will not be construed to include activities which are remotely connected to highway safety such as the construction and operation of police barracks. [[1521]](#footnote-1522)1521

Justice McHugh also ruled that

the reimbursements by the Division of Motor Vehicles to the Department of Public Safety for the following activities: road patrol, traffic, traffic court, operator examinations, and assistance to the Division of Motor Vehicles with its administrative duties are authorized by W.Va. Code, 15-2-12(i) [1990] because the above activities are "related" to the duties of the Division of Motor Vehicles since the Department of Public Safety is responsible for enforcing traffic laws and regulations which the Division of Motor Vehicles has the duty to administer. [[1522]](#footnote-1523)1522

**[\*271]**

S. Article 3, Sections 10 and 14 Due Process

Justice McHugh expressed concern with the extent to which law enforcement officials could use an informant to infringe upon the rights of a defendant in State v. Leadingham. [[1523]](#footnote-1524)1523 The court held that

under the Fourteenth Amendment of the United States Constitution and article III, § 10 of the West Virginia Constitution, due process and fundamental fairness dictate that the police and the prosecuting attorney be precluded from using an undercover informant to penetrate the clinical environment of a psychiatric institution in order to elicit incriminating statements from a defendant who is undergoing a court-ordered psychiatric evaluation. Any incriminating statements elicited from a defendant under these circumstances, upon proper motion by the defendant, shall be suppressed in the trial on the criminal charges to which the incriminating statements relate. [[1524]](#footnote-1525)1524

The case of State v. Blair [[1525]](#footnote-1526)1525 involved the criminal prosecution of a water company executive under a statute challenged as being void for vagueness. Justice McHugh wrote:

W.Va. Code, 24-3-1 [1923] is unconstitutionally vague in violation of W.Va. Const. art. III, §§ 10 and 14 because the language "establish and maintain adequate and suitable facilities" and "perform such service . . . as shall be reasonable, safe and sufficient for the security and convenience of the public, and the safety and comfort of its employees" does not provide adequate standards for adjudication or set forth with sufficient definiteness the specific acts which are prohibited. [[1526]](#footnote-1527)1526

In State ex rel. Collins v. Bedell, [[1527]](#footnote-1528)1527 Justice McHugh said that "a defendant's due process rights set forth in the W.Va. Const. art. III, § 10 and the U.S. Const. amend. XIV, § 1 are not violated when a non-lawyer magistrate presides over the trial because W.Va. Code, 50-5-13 [1994] provides meaningful review on appeal." [[1528]](#footnote-1529)1528 **[\*272]**

Justice McHugh held in State v. Kelley [[1529]](#footnote-1530)1529 that

a defendant's constitutional rights to due process and trial by a fair and impartial jury, pursuant to amendment VI and amendment XIV, section 1 of the United States Constitution and article III, sections 10 and 14 of the West Virginia Constitution are violated when a sheriff, in a defendant's trial, serves as a bailiff and testifies as a key witness for the State in that trial. [[1530]](#footnote-1531)1530

Justice McHugh indicated in State v. Farmer [[1531]](#footnote-1532)1531 that

pursuant to West Virginia's kidnapping statute set forth in W.Va. Code, 61-2-14a [1965], a trial judge, for purposes of imposing a sentence on a defendant for a term of years not less than twenty or a sentence for a term of years not less than ten, has the discretion to make findings as to whether a defendant inflicted bodily harm on a victim and as to whether ransom, money, or any other concession has been paid or yielded for the return of the victim. Because the findings by the trial judge are made solely for the purpose of determining the sentence to be imposed on a defendant and are not elements of the crime of kidnapping, West Virginia Constitution art. III, §§ 10 and 14, relating to a defendant's due process rights and right to a trial by jury, are not violated. [[1532]](#footnote-1533)1532

In State v. Jenkins, [[1533]](#footnote-1534)1533 Justice McHugh was concerned with the impact of due process on the admissibility of evidence generally. The court held that

while ordinarily rulings on the admissibility of evidence are largely within the trial judge's sound discretion, a trial judge may not make an evidentiary ruling which deprives a criminal defendant of certain rights, such as the right to examine witnesses against him or her, to offer testimony in support of his or her defense, and to be represented by counsel, which are essential for a fair trial pursuant to the due process clause found in the Fourteenth Amendment of the Constitution of the United States and article III, § 14 of the West Virginia Constitution. [[1534]](#footnote-1535)1534

**[\*273]**

In State ex rel. White v. Todt, [[1535]](#footnote-1536)1535 Justice McHugh addressed the nature of due process that must be afforded a dangerous or potentially dangerous person who escaped from a mental institution in another state. The opinion noted as a general matter that "the due process clause found in article III, § 10 of the Constitution of West Virginia requires that laws provide explicit standards for those who apply them so as to prevent arbitrary and discriminatory enforcement of the laws." [[1536]](#footnote-1537)1536 Justice McHugh then held that

when a dangerous or potentially dangerous patient who has escaped from a mental health facility in another state is being detained in this State pursuant to article V of the Interstate Compact on Mental Health found in W.Va. Code, 27-14-1 [1957], the due process clause found in article III, § 10 of the Constitution of West Virginia requires, at a minimum, that before this State returns the dangerous or potentially dangerous patient to the state from where he or she has escaped, the dangerous or potentially dangerous patient be informed of the reason he or she is being detained, the dangerous or potentially dangerous patient be afforded a hearing to determine identification and the dangerous or potentially dangerous patient be afforded the opportunity to have the representation of counsel in the event he or she decides to challenge the identification. [[1537]](#footnote-1538)1537

Justice McHugh was concerned with the due process impact of workers' compensation legislation on injured workers in State ex rel. Blankenship v. Richardson. [[1538]](#footnote-1539)1538 The court observed initially that "though a workers' compensation statute, or amendment thereto, may be construed to operate retroactively where mere procedure is involved, such a statute or amendment may not be so construed where, to do so, would impair a substantive right." [[1539]](#footnote-1540)1539 The court then held that

where a workers' compensation claimant has been previously awarded permanent partial disability benefits that would have entitled the claimant to file for permanent total disability review, legislation that attempts to immediately preclude the claimant's substantive right to seek such review prior to the expiration of the ordinary ninety days provided in W.Va. Const. Art. VI, § 30, violates principles of fundamental fairness embodied in the due **[\*274]** process provisions of W.Va. Const. Art. III, § 10. [[1540]](#footnote-1541)1540

Justice McHugh wrote in State ex rel. Hechler v. Christian Action Network [[1541]](#footnote-1542)1541 that "the due process clause found in article III, § 10 of the Constitution of West Virginia requires that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he or she may act accordingly." [[1542]](#footnote-1543)1542

T. Article 3, Section 14 Right to Jury Trial

Justice McHugh held in State ex rel. Collins v. Bedell [[1543]](#footnote-1544)1543 that

W.Va. Code, 50-5-13 [1994], which sets forth the appeal procedure in a criminal proceeding from magistrate court to circuit court, but which does not give the defendant a statutory right to a jury trial de novo on the appeal to circuit court, does not violate W.Va. Const. art. III, § 14 or art. VIII, § 10. [[1544]](#footnote-1545)1544

Justice McHugh addressed the constitutionality of the state's criminal abuse and neglect statute in the case of State v. DeBerry. [[1545]](#footnote-1546)1545 The opinion stated that

the term "neglect," as defined by W.Va. Code, 61-8D1(6) [1988], is not unconstitutionally vague in violation of due process principles contained in U.S. Const. amend. XIV, Sec. 1, and W.Va. Const. art. III, § 10. Therefore, W.Va. Code, 61-8D-4(b) [1988] is not unconstitutionally vague in violation of due process principles contained in U.S. Const. amend. XIV, § 1, and W.Va. Const. art. III, § 10, because such statute's use of the term "neglect" gives a person of ordinary intelligence fair notice that his or her contemplated conduct is prohibited and it also provides adequate standards for adjudication. [[1546]](#footnote-1547)1546

**[\*275]**

XXIII. TAX LAW

A. Tax Rate for Value Added to Coal

The issue of the appropriate tax rate for value added in the production of coal was addressed in Gilbert Imported Hardwoods, Inc. v. Dailey. [[1547]](#footnote-1548)1547 Justice McHugh wrote that

the production of coal, for the purposes of W.Va. Code, 11-13-2a (1971), ends when the coal is reduced to possession on the surface. The screening, crushing, and washing of raw coal in tipples to remove the impurities from the coal so processed is an activity properly classified as manufacturing, compounding, or preparing for sale, profit or commercial use an article, substance, or commodity and, therefore, the value added to coal by such processing is properly subject to the tax rate set by W.Va. Code, 11-13-2b (1971). [[1548]](#footnote-1549)1548

B. Challenging Validity of Tax

In Tony P. Sellitti Construction Co. v. Caryl, [[1549]](#footnote-1550)1549 Justice McHugh held that

where a required tax return is not filed or a required tax is not paid due to a good-faith challenge to the validity of such requirement(s), the failure to file or to pay "is due to reasonable cause and not due to willful neglect," and a court, upon an appeal of a tax assessment in such a case, should vacate the addition to tax or any tax penalty authorized by W.Va. Code, 11-10-18 or - 19, as amended, even if the tax and interest portions of the tax assessment are affirmed. [[1550]](#footnote-1551)1550

C. Taxing Property Leased by County

Justice McHugh examined the ability of a county to tax the leasehold interest in property owned by the county, but leased to a private business in the case of In re Maier. [[1551]](#footnote-1552)1551 The court held that

a county assessment for ad valorem tax purposes of a leasehold **[\*276]** interest in county property was not prohibited by the provisions of W.Va. Code, 13-2C-15 [1963], of the Industrial Development Bond Act, W.Va. Code, 13-2C-1 [1963], et seq., (now known as the "Industrial Development and Commercial Development Bond Act"), which section sets forth certain exemptions from taxation, where the leasehold in question was established under the Industrial Development Bond Act with the county as lessor of the property and a private corporation as lessee, and where a commercial warehouse facility was operated upon the property by the lessee. [[1552]](#footnote-1553)1552

D. Service Fees

In Ellison v. City of Parkersburg, [[1553]](#footnote-1554)1553 Justice McHugh determined the validity of an ordinance imposing a solid waste fee on residents. The court held:

Parkersburg Code Sec. 955.07 [1979], which provides in pertinent part: "(a) Each property owner or occupant of a residential unit shall be responsible for the payment of a charge of Forty-eight Dollars ($ 48.00) per year for solid waste collection and disposal service per residential unit . . . . (b) The rates and charges specified by Section (a) herein shall be billed to the owners of each and every residential unit provided, that upon application by the occupant of any residential unit, filed with the Director of Finance and accompanied by an appropriate affidavit showing the occupant's status as such, such bills may be rendered to the occupant . . ." does not exceed the grant of authority given to municipalities in this State by the legislature in W.Va. Code, 8-13-13 [1971], which provides, in pertinent part: "Notwithstanding any charter provisions to the contrary, every municipality which furnishes any essential or special municipal service, including . . . the collection and disposal of garbage, refuse, waste, ashes, trash and any other similar matter, shall have plenary power and authority to provide by ordinance for the installation, continuance, maintenance or improvement of such service, to make reasonable regulations with respect thereto, and to impose by ordinance upon the users of such service reasonable rates, fees and charges to be collected in the manner specified in the ordinance . . . ." [[1554]](#footnote-1555)1554

**[\*277]**

The case of Hare v. City of Wheeling [[1555]](#footnote-1556)1555 required Justice McHugh to determine the validity of ordinances that imposed a police service fee on residents based upon the value of their real property. Justice McHugh held that

where certain ordinances of the City of Wheeling impose upon owners of property a police service charge based upon the value of property, as determined from the land books and personal property books of the Ohio County Assessor, such ordinances impose, in fact, an ad valorem tax upon property, and where, without regard to the police service charge, property within the City of Wheeling is taxed to the maximum amount permitted under W.Va. Const., art. X, § 1, known as the "Tax Limitation Amendment," and W.Va. Code, 11-8-6d [1949], such ordinances violate that constitutional provision. [[1556]](#footnote-1557)1556

The decision in Rhodes v. Malden Public Service District [[1557]](#footnote-1558)1557 called upon Justice McHugh to address fees imposed by a public service district. The court held initially:

W.Va. Code, 16-13A-9 [1965], provides, inter alia, public service districts with the power to require connection between public service district sewer facilities and certain houses, dwellings or buildings of property owners, tenants or occupants, and such owners, tenants or occupants have a duty under that statute to pay rates and charges for the district sewer facilities from and after the date of receipt of notice that such facilities are available. [[1558]](#footnote-1559)1558

Justice McHugh then turned to the specific facts of Rhodes and held that

in the absence of receipt of notice by the owner, tenant or occupant of a garage apartment that public service district sewer facilities are available with respect to that garage apartment, a public service district, under W.Va. Code, 16-13A-9 [1965], is without authority to impose charges and a lien against that dwelling for sewer services, even though the garage apartment is located upon a lot containing another dwelling which is properly subject to district sewer service charges. [[1559]](#footnote-1560)1559

**[\*278]**

Justice McHugh determined in City of Huntington v. Bacon [[1560]](#footnote-1561)1560 that

pursuant to W.Va. Code, 18-5-9 [1933], a county board of education is authorized to pay a municipal service fee imposed by a municipality for fire and flood protection services pursuant to W.Va. Code, 8-13-13 [1971] in order to protect the health of its pupils and in order to keep its school grounds and buildings in good order. [[1561]](#footnote-1562)1561

E. Property Tax Assessment

Justice McHugh outlined the procedure for challenging a property tax assessment in the case of State ex rel. Ayers v. Cline. [[1562]](#footnote-1563)1562 The court held that

the statutory scheme for relief from an excessive property tax assessment is for an owner of real property contesting the assessed value thereof to pay the tax assessment under protest, to appeal to circuit court and if the assessment is reduced, to obtain a refund of the overpayment. Payment may be withheld during an appeal in such a case only until the date of the sheriff's sale, or, at the very latest, until the end of the redemption period after such sale has occurred. [[1563]](#footnote-1564)1563

The court in Ayers also ruled that "the statutory method of paying a property tax assessment under protest pending judicial review of the assessed value of real property is an adequate remedy at law precluding an injunction of a sheriff's sale of real property for nonpayment of taxes." [[1564]](#footnote-1565)1564

In the case of Petition of Maple Meadow Mining Co. for Relief from Real Property Assessment for Tax Year 1992, [[1565]](#footnote-1566)1565 Justice McHugh held that

W.Va. Code, 11-1C-7(d) [1990] authorizes the tax commissioner to approve and a county assessor to adopt a valuation plan which "would permit the placement of proportionately uniform percentage changes in values on the books that estimate the percentage difference between the current assessed value and sixty percent of the fair market value for classes or identified sub-classes of property and distribute the change between the two **[\*279]** tax years preceding the tax year beginning on [July 1, 1993]." This method of valuation may be used in addition to or in lieu of placing individual values on the books at sixty percent of value. The goal of this provision is to ensure that all properties, whether it be properties revaluated by the county assessor, the board of public works or the state tax commissioner, reach the standard assessment rate of sixty percent of the fair market value by July 1, 1993, pursuant to W.Va. Code, 11-1C-1(d) [1990]. [[1566]](#footnote-1567)1566

F. B & O Tax Credit

Justice McHugh stated in Brockway Glass Co., Glassware Division v. Caryl [[1567]](#footnote-1568)1567 that

under W.Va. Code, 11-13C-5 [1969], a taxpayer who sells qualified investment property is entitled to the former business and occupation tax credit for industrial expansion for the year of sale, and the successor who continues to operate the business is entitled only to the remaining amount of the available credit for each year subsequent to the year of sale. [[1568]](#footnote-1569)1568

G. Sheriff's Tax Sale

The case of Geibel v. Clark [[1569]](#footnote-1570)1569 called upon Justice McHugh to restrict the retroactive application of prior precedent handed down by the United States Supreme Court. The court said:

Mennonite Board of Missions v. Adams, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983), the constitutional due process teachings of which this Court followed in Lilly v. Duke, 180 W.Va. 228, 376 S.E.2d 122 (1988), is not to be applied with general retroactive effect to invalidate virtually all sheriffs' tax sales of real property, with mere constructive notice, which were conducted before Mennonite Board of Missions was decided on June 22, 1983. General retroactive application of Mennonite Board of Missions would have severely disruptive effects on land titles in this state. [[1570]](#footnote-1571)1570

**[\*280]**

H. Consumer Sale, Service and Use Tax

Justice McHugh held in Tony P. Sellitti Construction Co. v. Caryl [[1571]](#footnote-1572)1571 that

the former consumers sales and service tax and use tax regulations excluding "speculative builders" from the former consumers sales and service tax and use tax statutory exemptions for purchases of services, machinery, supplies and materials directly used or consumed in the business of "contracting," W.Va. Code, 11-15-9(6) [1974] and W.Va. Code, 11-15A-3(3) [1969], were valid and enforceable during the time they were in effect. [[1572]](#footnote-1573)1572

The court also held that

the former consumers sales and service tax and use tax exemptions for purchases of services, machinery, supplies and materials directly used or consumed in the business of "contracting," W.Va. Code, 11-15-9(6) [1974] and W.Va. Code, 11-15A-3(3) [1969], did not deny equal protection to "speculative builders" insofar as these statutory tax exemptions were interpreted as excluding "speculative builders" from the "contracting" classification. [[1573]](#footnote-1574)1573

I. Tax Exemption

In New Vrindaban Community, Inc. v. Rose, [[1574]](#footnote-1575)1574 Justice McHugh stated that

where a question of taxability arises under W.Va. Code, 11-3-25 [1967], and such question involves the constitutionality of a statute granting exemption from taxation, the matter shall be heard de novo by the circuit court before this Court will pass on the constitutionality of the statute granting the exemption. [[1575]](#footnote-1576)1575

J. Tax Assessment of Coal

Justice McHugh created a presumption of validity of coal tax assessments in the case of Western Pocahontas Properties, Ltd. v. County Commission of Wetzel **[\*281]** County. [[1576]](#footnote-1577)1576 The court held that

as a general rule, there is a presumption that valuations for taxation purposes fixed by an assessor are correct. Thus, a tax assessment of coal property will be presumed to be correct when the assessor, in assessing the coal property: (1) relies upon the legislative rules prescribing the methods by which property is to be assessed; and (2) uses, as a guide, information furnished by the tax department, such as a list of comparable sales of similar property. The burden is on the taxpayer challenging the assessment to demonstrate by clear and convincing evidence that the tax assessment is erroneous. [[1577]](#footnote-1578)1577

K. Tax Refund

Justice McHugh wrote in Doran & Associates, Inc. v. Paige [[1578]](#footnote-1579)1578 that

under W.Va. Code, 11-10-14(l )(1) [1978], a taxpayer who receives an extension of time to file a tax return and who subsequently claims to be entitled to a refund shall file such claim for refund within three years after the date the return was due to be filed pursuant to the extension of time to file. [[1579]](#footnote-1580)1579

L. Personal Property Tax

Justice McHugh determined whether a specific item constituted personal property for tax purposes in Ohio Cellular RSA Ltd. Partnership v. Board of Public Works of State of West Virginia. [[1580]](#footnote-1581)1580 The court held as follows:

"Personal property" which is defined in W.Va. Code, 11-53 [1961] as 'all fixtures attached to land . . .; all things of value, moveable and tangible, which are the subjects of ownership; all chattels, real and personal; all notes, bonds, and accounts receivable, stocks and other intangible property[,]' does not include within its definition an FCC license which authorizes a person to provide cellular communication services. Thus, an FCC license authorizing a person to provide cellular communication services is not personal property which is subject to assessment **[\*282]** for personal property tax purposes under W.Va. Code, 11-67(e) [1986]. [[1581]](#footnote-1582)1581

XXIV. PROBATE LAW

A. Construction of Will

Justice McHugh relied upon the decision in Couch v. Eastham [[1582]](#footnote-1583)1582 in deciding the case of Keller v. Keller. [[1583]](#footnote-1584)1583 The court in Keller held that

when the will affords no satisfactory clue to the real intentions of the testator, the court must from necessity resort to legal presumptions and rules of construction. But such rules yield to the intention of the testator apparent in the will, and have no application when the intention thus appears. [[1584]](#footnote-1585)1584

B. Codicil to Will

Justice McHugh determined the effect of a codicil to a will in Bank of Raleigh v. Thompson. [[1585]](#footnote-1586)1585 The opinion held that

although a testatrix provided in a will for the bequest of the corpus of the trust to the Kansas City College of Osteopathy, now the University of Health Sciences, upon the death of the life estate beneficiaries, language used by the testatrix in a codicil to that will, "Money that was to be given as stated in the will to the Kansas City College . . . shall be given to West Virginia Osteopath shall be the amount of $ 1,500.00 . . . each year to the college to be used in a scholarship for a worthy student[,]" and subsequent use of the language, "Money is to be willed to my sister Macie Teter Williams . . ." evidences the testatrix's intent to alter the initial bequest in her will by bequeathing a sum sufficient to generate $ 1500 annually to the West Virginia School of Osteopathic Medicine for scholarship purposes while providing a residuary bequest of the corpus of the trust to the named beneficiary, Macie Teter Williams. [[1586]](#footnote-1587)1586

**[\*283]**

C. Joint Will

Justice McHugh addressed several issues involving a joint will in the case of Black v. Black. [[1587]](#footnote-1588)1587 The court initially addressed the status of real property left to beneficiaries of the joint will. Justice McHugh wrote that

where in a joint will dated August 11, 1969, three testators left all their property, both real and personal, to the two surviving testators and then to the last surviving testator, and the will further provided that upon the death of the last surviving testator the property "then remaining" would become the property "in fee" of certain named nieces and nephews, the last surviving testator received under the will a life estate in the property, and the named nieces and nephews received a remainder in fee simple. [[1588]](#footnote-1589)1588

The next issue in Black involved the effect of a provision in the joint will on property previously disposed of under a written agreement. Justice McHugh held that

a written agreement dated January 3, 1950, whereby three parties expressed an intent that certain real and personal property owned by them be held jointly with survivorship, was superseded by a joint will of the parties dated August 11, 1969, where two of the parties died and the joint will was probated as to them and the last surviving party accepted benefits under the joint will and where the disposition of property under the joint will was inconsistent with the 1950 agreement of the parties concerning the property in question. [[1589]](#footnote-1590)1589

Justice McHugh determined the rights of a survivor to a joint will in Seifert v. Sanders. [[1590]](#footnote-1591)1590 The court held that

where in a joint and mutual will persons devised all their real and personal property to the survivor of them to take and hold as his or her sole and entire property and vested in the survivor the power to dispose of the same and the will further provided that at the death of the survivor, the property "which shall not have been disposed of" would become, in equal shares, the property of certain named children and grandchildren, the survivor received a fee simple estate in the property and the power to dispose **[\*284]** absolutely of such property. [[1591]](#footnote-1592)1591

D. Drafting Will

Justice McHugh held in Brammer v. Taylor [[1592]](#footnote-1593)1592 that "drafting a will for another person, advising another person how to draft a will or supervising its execution are activities which constitute the practice of law." [[1593]](#footnote-1594)1593

E. Matters Disposable by Will

In Seifert v. Sanders, [[1594]](#footnote-1595)1594 Justice McHugh held that "depending upon the language used in an instrument by a grantor of a power to dispose of real and personal property, that power may be executed not only by a conveyance inter vivos, but that power may also be executed by will." [[1595]](#footnote-1596)1595

F. Quarantine

The issue of quarantine was addressed by Justice McHugh in Cutone v. Cutone. [[1596]](#footnote-1597)1596 Quarantine is the right of a surviving spouse to occupy and enjoy his or her former marital residence, or mansion house, until such time as dower is formally assigned. The court in Cutone held that

abandonment of the legal right of quarantine should be deemed to occur only where: (1) A person entitled to the right of quarantine has actually abandoned possession of the property subject to the right; (2) Prior to, or at the time of, abandoning the possession of the property the person knew of the existence of his right of quarantine; (3) After abandoning possession of the property the person entitled to quarantine has demonstrated a lack of intention to repossess it; and (4) The person entitled to quarantine has demonstrated an apparent indifference to what would become of the property. [[1597]](#footnote-1598)1597

**[\*285]**

G. Heirs

Relying in part on Wheeling Dollar Savings & Trust Co. v. Singer, [[1598]](#footnote-1599)1598 Justice McHugh held in First Nat. Bank in Fairmont v. Phillips [[1599]](#footnote-1600)1599 that

the doctrine of equitable adoption is hereby incorporated into the law of West Virginia, but a litigant seeking to avail himself of the doctrine in a dispute among private parties concerning trusts or the descent of property at death must prove by clear, cogent, and convincing evidence that he has stood from an age of tender years in a position exactly equivalent to that of a formally adopted or natural child[.] [[1600]](#footnote-1601)1600

The court also said in Phillips that

if an equitable adoption is established by clear, cogent and convincing evidence, the equitably adopted child would inherit from another child of the adoptive parent under W.Va. Code, 48-411(b) [1984], which provides that an adopted child inherits "from . . . the lineal . . . kindred of such adopting parent or parents in the same manner and to the same extent as though said adopted child were a natural child of such adopting parent or parents." [[1601]](#footnote-1602)1601

H. Fees and Commissions

The decision in Black v. Black [[1602]](#footnote-1603)1602 required Justice McHugh to examine the propriety of an attorney recovering legal fees and a commission as executor or administrator of a decedent's estate. Justice McHugh said:

In the case of a decedent's estate, this Court does not look with favor upon the charging of compensation for legal services in addition to a commission by an attorney who is the executor or administrator of that estate. Where the executor or administrator of a decedent's estate is an attorney, compensation for legal services in addition to a commission may only be allowed within carefully circumscribed bounds and upon exceptional circumstances. The burden is upon the attorney to establish those **[\*286]** exceptional circumstances by clear and convincing evidence. [[1603]](#footnote-1604)1603

I. Inheritance Tax

Justice McHugh stated in First National Bank of Morgantown v. McGill [[1604]](#footnote-1605)1604 that "the former West Virginia inheritance tax is ultimately the responsibility of the recipient of the specific property, unless the testator or testatrix clearly and specifically expresses otherwise in the will." [[1605]](#footnote-1606)1605 The opinion also indicated:

A clause in a will which contains a general direction to the personal representative to pay debts, expenses and taxes, or similar "stock" language, is not sufficient by itself to shift the liability for the former West Virginia inheritance tax from the specific devisees or legatees to the residuary estate. [[1606]](#footnote-1607)1606

J. Gift Causa Mortis

Justice McHugh addressed an issue involving a gift causa mortis in the case of Lutz v. Orinick. [[1607]](#footnote-1608)1607 The court held:

A party seeking to prove fraud, mistake or other equally serious fault must do so by clear and convincing evidence and if such fraud, mistake or other equally serious fault is not so proven, then the surviving joint tenant may rely on the conclusive presumption created by W.Va. Code, 31A-433, as amended, that the donor depositor of a joint and survivorship account intended a causa mortis gift of the proceeds remaining in the account after his death to the surviving joint tenant to establish such gift. [[1608]](#footnote-1609)1608

K. Notifying Beneficiaries of Will

Justice McHugh discussed the role of the county clerk to notify beneficiaries of a will in the case of Cary v. Riss. [[1609]](#footnote-1610)1609 Justice McHugh held:

Upon delivery of any will to the county clerk, the county clerk is required under the provisions of W.Va. Code, . 41-5-2 [1931] to **[\*287]** notify by mail or otherwise the beneficiaries named under the will. Notification "by mail or otherwise" shall be construed as certain to ensure actual notice. Upon receiving such actual notice, constitutional due process requirements are satisfied because beneficiaries have notice that the testator has died and that probate proceedings will be instituted. Neither due process nor any statutory provision requires that the beneficiaries must also be given actual notice of the county commission's refusal to probate the will under W.Va. Code, 41-5-10 [1923]. [[1610]](#footnote-1611)1610

L. Effects of Divorce on Will

The case of Foy v. County Commission of Berkeley County [[1611]](#footnote-1612)1611 involved interpretation of two statutes addressing the effects of a divorce on a will. Justice McHugh held initially that

W.Va. Code, 41-1-6 [1975], provided, in part that, "every will made by a man or woman shall be revoked by his or her marriage, annulment or divorce, except a will which makes provision therein for such contingency[.]" The amendments to W.Va. Code, 41-1-6 [Supp.1992], effective after June 5, 1992, provide that, "if after executing a will the testator is divorced or his marriage annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse, . . ., unless the will expressly provides otherwise." The primary difference between the 1975 version of the statute and the 1992 version of the statute is that the former, with certain exceptions, essentially revokes the entire will by marriage, divorce or annulment. The amended version only revokes the disposition of the property made by the will to the former spouse upon divorce or annulment. Marriage no longer revokes a will. [[1612]](#footnote-1613)1612

The opinion concluded:

When a decedent executed a will in 1986, married in 1990, and died in 1992, the will was revoked pursuant to W.Va. Code, 41-1-6 [1975], which provides that a subsequent marriage revokes a will. The will was not revived because it was not re-executed pursuant to W.Va. Code, 41-1-8 [1923], which requires that a will **[\*288]** be re-executed in order for it to be revived. [[1613]](#footnote-1614)1613

M. Effects of Marriage on Premarital Will

Justice McHugh stated in Mongold v. Mayle, [[1614]](#footnote-1615)1614 that "even though a testator executed a premarital will, as provided by W.Va. Code, 42-3-7 [1992], a surviving spouse of that testator is not precluded from taking an elective share of the decedent spouse's estate pursuant to W.Va. Code, 42-3-1 [1992]." [[1615]](#footnote-1616)1615

XXV. BUSINESS LAW

A. Shareholders

Relying in part on Southern Electrical Supply Co. v. Raleigh County National Bank, [[1616]](#footnote-1617)1616 Justice McHugh held in Laya v. Erin Homes, Inc. [[1617]](#footnote-1618)1617 that "the law presumes . . . that corporations are separate from their shareholders." [[1618]](#footnote-1619)1618

B. Partnership

In Transamerica Commercial Finance Corp. v. Blueville Bank of Grafton, [[1619]](#footnote-1620)1619 Justice McHugh addressed several matters pertaining to partnerships. The court initially stated:

W.Va. Code, 47-8-2 [1986], which provides that no general partnership may carry on business in this state under any assumed name other than the names of the individuals owning the business unless those persons file in the office of the clerk of the county commission certain information, is to be construed in pari materia with W.Va. Code, 46-9402(7) [1974], which specifies that it is sufficient to put the individual, partnership, or corporate names of the debtors on a financing statement whether or not it adds other trade names of the parties. [[1620]](#footnote-1621)1620

The court next held: **[\*289]**

A partnership name must be filed in the manner required by W.Va. Code, 47-8-2 [1986] before it sufficiently shows the name of the debtor partnership on a financing statement under W.Va. Code, 46-9-402(7) [1974] since the two statutes are to be construed in pari materia. If the partnership name is not filed as required by W.Va. Code, 47-8-2 [1986], then the individual partners' names must be listed as the debtors on a financing statement whether or not trade names are added. However, a financing statement may be effective against other creditors even though it lists a partnership name which is not filed pursuant to W.Va. Code, 47-8-2 [1986] if it is not seriously misleading as provided by W.Va. Code, 46-9-402(8) [1974]. [[1621]](#footnote-1622)1621

The opinion concluded:

When there is an error in the debtors' names in the financing statement because of failure to comply with W.Va. Code, 47-8-2 [1986], it is necessary to determine whether or not the error is seriously misleading under W.Va. Code, 46-9-402(8) [1974] by determining whether or not a reasonably prudent creditor searching the filing index for the financing statement would be misled so as to be unable to locate the financing statement. Whether an error is seriously misleading is to be determined by the facts of each case. [[1622]](#footnote-1623)1622

C. Piercing the Corporate Veil

Justice McHugh noted in Laya v. Erin Homes, Inc. [[1623]](#footnote-1624)1623 that "the propriety of piercing the corporate veil should rarely be determined upon a motion for summary judgment. Instead, the propriety of piercing the corporate veil usually involves numerous questions of fact for the trier of the facts to determine upon all of the evidence." [[1624]](#footnote-1625)1624 He also said that

in a case involving an alleged breach of contract, to "pierce the corporate veil" in order to hold the shareholder(s) actively participating in the operation of the business personally liable for such breach to the party who entered into the contract with the corporation, there is normally a two-prong test: (1) there must be such unity of interest and ownership that the separate personalities of the corporation and of the individual shareholder(s) no longer **[\*290]** exist (a disregard of formalities requirement) and (2) an inequitable result would occur if the acts are treated as those of the corporation alone (a fairness requirement). [[1625]](#footnote-1626)1625

The court in Laya concluded that

grossly inadequate capitalization combined with disregard of corporate formalities, causing basic unfairness, are sufficient to pierce the corporate veil in order to hold the shareholder(s) actively participating in the operation of the business personally liable for a breach of contract to the party who entered into the contract with the corporation. [[1626]](#footnote-1627)1626

D. Action by Foreign Corporation

Justice McHugh wrote in Dieter Engineering Services, Inc. v. Parkland Development, Inc. [[1627]](#footnote-1628)1627 that

pursuant to W.Va. Code, 31-1-66 [1974] which states, in relevant part, that "no foreign corporation which is conducting affairs or doing or transacting business in this State without a certificate of authority shall be permitted to maintain any action or proceeding in any court of this State until such corporation shall have obtained a certificate of authority[,]" such corporation may maintain an action or proceeding in any court in this State when the corporation obtains a certificate of authority even though the corporation did not have the certificate at the time it instituted the action or proceeding. [[1628]](#footnote-1629)1628

E. Appointing Corporate Counsel to Represent Indigents

Justice McHugh held in Cunningham v. Sommerville [[1629]](#footnote-1630)1629 that

house counsel employed on a full-time basis by a business corporation which forbids such counsel from engaging in the separate practice of law may, under Rule 6.2(b) of the West Virginia Rules of Professional Conduct (1989), avoid an appointment by a tribunal to represent an indigent in a criminal or **[\*291]** other eligible proceeding, on the ground that the representation "is likely to result in an unreasonable financial burden" on the lawyer. [[1630]](#footnote-1631)1630

F. Agency

Justice McHugh held in Teter v. Old Colony Co. [[1631]](#footnote-1632)1631 that "one of the essential elements of an agency relationship is the existence of some degree of control by the principal over the conduct and activities of the agent." [[1632]](#footnote-1633)1632

G. Capitalization

In Laya v. Erin Homes, Inc., [[1633]](#footnote-1634)1633 Justice McHugh stated that "generally, the presumption is that the party dealing with the corporation did not assume the risk of grossly inadequate capitalization." [[1634]](#footnote-1635)1634

XXVI. CONCLUSION

During his tenure on the West Virginia Supreme Court of Appeals, Justice McHugh established himself as a judicial giant who walked with a humble spirit and gracious demeanor. Although few may equal his talents as a legal thinker, none will ever measure up to the fullness of the man. As a member of our state's highest court, Justice McHugh was a judicial jewel who did his best not to allow his greatness to cast a shadow over the lights of those around him.

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1. 1 Lisa A. Stamm, Chief Justice Thomas E. McHugh Takes the Helm Once Again, W. VA. LAW., Jan. 1996, at 14. [↑](#footnote-ref-2)
2. 2 Justice McHugh wrote more than 500 per curiam opinions, which traditionally do not carry the name of the writer. He also concurred in the following opinions: Coleman v. Sopher, 499 S.E.2d 592 (W. Va. 1997) (McHugh, J., concurring); Sorsby v. Turner, 499 S.E.2d 300 (W. Va. 1997) (McHugh, J., concurring); State ex rel. Melanie Kaye P. v. MacQueen, 484 S.E.2d 635 (W. Va. 1997) (McHugh, J., concurring in part); Phillip Leon M. v. Greenbrier County Bd. of Educ., 484 S.E.2d 909 (W. Va. 1996) (McHugh, J., concurring in part); Dent v. Fruth, 453 S.E.2d 340 (W. Va. 1994) (McHugh, J., concurring); Largent v. West Virginia Div. of Health, 452 S.E.2d 42 (W. Va. 1994) (McHugh, J., concurring in part); Triggs v. Berkeley County Bd. of Educ., 425 S.E.2d 111 (W. Va. 1992) (McHugh, J., concurring in part); State v. Morris, 421 S.E.2d 488 (W. Va. 1992) (McHugh, J., concurring in part); Schartiger v. Land Use Corp., 420 S.E.2d 883 (W. Va. 1991) (McHugh, J., concurring in part); TXO Prod. Corp. v. Alliance Resources Corp., 419 S.E.2d 870 (W. Va. 1992) (McHugh, J., concurring); FMC Corp. v. West Virginia Human Rights Comm'n, 403 S.E.2d 729 (W. Va. 1991) (McHugh, J., concurring in part); Roberts v. Gatson, 392 S.E.2d 204 (W. Va. 1990) (McHugh, J., concurring in part); Tankersley v. Tankersley, 390 S.E.2d 826 (W. Va. 1990) (McHugh, J., concurring); P.G. & H. Coal Co. v. International Union, United Mine Workers of Am., 390 S.E.2d 551 (W. Va. 1988) (McHugh, J., concurring ); United Eng'rs & Constructors, Inc. v. Rose, 363 S.E.2d 477 (W. Va. 1987) (McHugh, J., concurring); Fox v. State, 347 S.E.2d 197 (W. Va. 1986) (McHugh, J., concurring); State ex rel. Cohen v. Manchin, 336 S.E.2d 171 (W. Va. 1984) (McHugh, J., concurring in part); State v. Clayton, 317 S.E.2d 499 (W. Va. 1984) (McHugh, J., concurring); State v. Young, 311 S.E.2d 118 (W. Va. 1983) (McHugh, J., concurring); Mason County Bd. of Educ. v. State Superintendent of Sch., 295 S.E.2d 719 (W. Va. 1982) (McHugh, J., concurring in part); Smith v. West Virginia State Bd. of Educ., 295 S.E.2d 680 (W. Va. 1982) (McHugh, J., concurring in part); Anderson's Paving, Inc. v. Hayes, 295 S.E.2d 805 (1982) (McHugh, J., concurring).

   Justice McHugh dissented in the following opinions: State ex rel. Melanie Kaye P. v. MacQueen, 484 S.E.2d 635 (W. Va. 1997) (McHugh, J., dissenting in part); Phillip Leon M. v. Greenbrier County Bd. of Educ., 484 S.E.2d 909 (W. Va. 1996) (McHugh, J., dissenting in part); State v. Hicks, 482 S.E.2d 641 (W. Va. 1996) (McHugh, J., dissenting); Barnhart v. Redd, 469 S.E.2d 1 (W. Va. 1996) (McHugh, J., dissenting); State ex rel. Azeez v. Mangum, 465 S.E.2d 163 (W. Va. 1995) (McHugh, J., dissenting); Largent v. West Virginia Div. of Health, 452 S.E.2d 42 (W. Va. 1994) (McHugh, J., dissenting in part); Municipal Mut. Ins. Co. of W. Va. v. Mangus, 443 S.E.2d 455 (W. Va. 1994) (McHugh, J., dissenting); Lucion v. McDowell County Bd. of Educ., 446 S.E.2d 487 (W. Va. 1994) (McHugh, J., dissenting); Women's Health Ctr. of W. Va., Inc. v. Panepinto, 446 S.E.2d 658 (W. Va. 1993) (McHugh, J., dissenting); State v. Layton, 432 S.E.2d 740 (W. Va. 1993) (McHugh, J., dissenting); Kirkpatrick v. Mid-Ohio Valley Transit Auth., 423 S.E.2d 856 (W. Va. 1992) (McHugh, J., dissenting); State v. Morris, 421 S.E.2d 488 (W. Va. 1992) (McHugh, J., dissenting in part); Triggs v. Berkeley County Bd. of Educ., 425 S.E.2d 111 (W. Va. 1992) (McHugh, J., dissenting in part); Schartiger v. Land Use Corp., 420 S.E.2d 883 (W. Va. 1991) (McHugh, J., dissenting in part); Town of Romney Hous. Auth. v. West Virginia Human Rights Comm'n, 406 S.E.2d 434 (W. Va. 1991) (McHugh, J., dissenting); Suter v. Harsco Corp., 403 S.E.2d 751 (W. Va. 1991) (McHugh, J., dissenting); FMC Corp. v. West Virginia Human Rights Comm'n, 403 S.E.2d 729 (W. Va. 1991) (McHugh, J., dissenting); State ex rel. Moomau v. Hamilton, 400 S.E.2d 259 (W. Va. 1990) (McHugh, J., dissenting); Means v. Sidiropolis, 401 S.E.2d 447 (W. Va. 1990) (McHugh, J., dissenting); Milner v. Milner, 395 S.E.2d 517 (W. Va. 1990) (McHugh, J., dissenting); Hodges Realty Co. v. John Smiley's Motel, Inc., 395 S.E.2d 751 (W. Va. 1990) (McHugh, J., dissenting); Noggy v. West Virginia Civil Serv. Comm'n, 391 S.E.2d 100 (W. Va. 1990) (McHugh, J., dissenting); Roberts v. Gatson, 392 S.E.2d 204 (W. Va. 1990) (McHugh, J., dissenting in part); Gant v. Hygeia Facilities Found., Inc., 384 S.E.2d 842 (W. Va. 1989) (McHugh, J., dissenting); State ex rel. Caryl v. MacQueen, 385 S.E.2d 646 (W. Va. 1989) (McHugh, J., dissenting); Holdren v. Workers' Compensation Comm'r, 382 S.E.2d 531 (W. Va. 1989) (McHugh, J., dissenting); Daily Gazette Co. v. Caryl, 380 S.E.2d 209 (W. Va. 1989) (McHugh, J., dissenting); Committee on Legal Ethics of W. Va. State Bar v. Triplett, 378 S.E.2d 82 (W. Va. 1988) (McHugh, J., dissenting); State ex rel. Dep't of Employment Sec. of State of W. Va. v. Manchin, 361 S.E.2d 474 (W. Va. 1987) (McHugh, J., dissenting); United Mine Workers of Am. v. Faerber, 365 S.E.2d 357 (W. Va. 1987) (McHugh, J., dissenting); Crane & Equip. Rental Co. v. Park Corp., 350 S.E.2d 692 (W. Va. 1986) (McHugh, J., dissenting); State v. Dolin, 347 S.E.2d 208 (W. Va. 1986) (McHugh, J., dissenting); Board of Educ. of Monongalia County v. Starcher, 343 S.E.2d 673 (W. Va. 1986) (McHugh, J., dissenting); Roberts v. Stevens Clinic Hosp., Inc., 345 S.E.2d 791 (W. Va. 1986) (McHugh, J., dissenting); State v. Golden, 336 S.E.2d 198 (W. Va. 1985) (McHugh, J., dissenting); State v. Hartshorn, 332 S.E.2d 574 (W. Va. 1985) (McHugh, J., dissenting); State v. Collins, 329 S.E.2d 839 (W. Va. 1984) (McHugh, J., dissenting in part); State ex rel. Atkinson v. Wilson, 332 S.E.2d 807 (W. Va. 1984) (McHugh, J., dissenting); State ex rel. Cohen v. Manchin, 336 S.E.2d 171 (W. Va. 1984) (McHugh, J., dissenting in part); Ray v. McCoy, 321 S.E.2d 90 (W. Va. 1984) (McHugh, J., dissenting); State v. Bonham, 317 S.E.2d 501 (W. Va. 1984) (McHugh, J., dissenting); State v. Hilliard, 318 S.E.2d 35 (W. Va. 1983) (McHugh, J., dissenting); Mason County Bd. of Educ. v. State Superintendent of Sch., 295 S.E.2d 719 (W. Va. 1982) (McHugh, J., dissenting in part); Smith v. West Virginia State Bd. of Educ., 295 S.E.2d 680 (W. Va. 1982) (McHugh, J., dissenting in part); Smith v. Mun. Mut. Ins. Co., 289 S.E.2d 669 (W. Va. 1982) (McHugh, J., dissenting); Cincinnati Milacron Co. v. Hardesty, 290 S.E.2d 902 (W. Va. 1982) (McHugh, J., dissenting); Higgins v. Board of Ed., Randolph County, 286 S.E.2d 682 (W. Va. 1981) (McHugh, J., dissenting); State v. Stotler, 282 S.E.2d 255 (W. Va. 1981) (McHugh, J., dissenting). [↑](#footnote-ref-3)
3. 3 During Justice McHugh's early years on the West Virginia Supreme Court of Appeals he occasionally placed his name on opinions that did not create new syllabus points. We include those opinions in the material and cite to the appropriate cases upon which Justice McHugh relied. [↑](#footnote-ref-4)
4. 4 The state constitution provides in relevant part that "it shall be the duty of the court to prepare a syllabus of the points adjudicated in each case in which an opinion is written . . . which shall be prefixed to the published report of the case." W. VA. CONST. art. VIII, § 4. Many of the syllabus points cited in this work could fit under several legal headings. However, we reproduced each syllabus point just once. [↑](#footnote-ref-5)
5. 5 280 S.E.2d 72 (W. Va. 1981). [↑](#footnote-ref-6)
6. 6 Id. at Syl. Pt. 6. [↑](#footnote-ref-7)
7. 7 280 S.E.2d 597 (W. Va. 1981). [↑](#footnote-ref-8)
8. 8 Id. at Syl. Pt. 3 (alteration in original). [↑](#footnote-ref-9)
9. 9 289 S.E.2d 748 (W. Va. 1982). [↑](#footnote-ref-10)
10. 10 Id. at Syl. Pt. 3. [↑](#footnote-ref-11)
11. 11 311 S.E.2d 412 (W. Va. 1983). [↑](#footnote-ref-12)
12. 12 Id. at Syl. Pt. 4. [↑](#footnote-ref-13)
13. 13 396 S.E.2d 402 (W. Va. 1990). [↑](#footnote-ref-14)
14. 14 Id. at Syl. Pt. 2. [↑](#footnote-ref-15)
15. 15 289 S.E.2d 720 (W. Va. 1982). [↑](#footnote-ref-16)
16. 16 Id. at Syl. Pt. 7. [↑](#footnote-ref-17)
17. 17 310 S.E.2d 877 (W. Va. 1983). [↑](#footnote-ref-18)
18. 18 Id.at Syl. Pt. 5. [↑](#footnote-ref-19)
19. 19 484 S.E.2d 199 (W. Va. 1997). [↑](#footnote-ref-20)
20. 20 Id. at Syl. Pt. 7. [↑](#footnote-ref-21)
21. 21 Id. at Syl. Pt. 9. [↑](#footnote-ref-22)
22. 22 283 S.E.2d 836 (W. Va. 1981). [↑](#footnote-ref-23)
23. 23 Id. at Syl. Pt. 1. [↑](#footnote-ref-24)
24. 24 Id. at Syl. Pt. 2. [↑](#footnote-ref-25)
25. 25 290 S.E.2d 260 (W. Va. 1981). [↑](#footnote-ref-26)
26. 26 Id. at Syl. Pt. 4. [↑](#footnote-ref-27)
27. 27 466 S.E.2d 471 (W. Va. 1995). [↑](#footnote-ref-28)
28. 28 Id. at Syl. Pt. 1. [↑](#footnote-ref-29)
29. 29 369 S.E.2d 870 (W. Va. 1988). [↑](#footnote-ref-30)
30. 30 Id. at Syl. Pt. 2. [↑](#footnote-ref-31)
31. 31 474 S.E.2d 481 (W. Va. 1996). [↑](#footnote-ref-32)
32. 32 Id. at Syl. Pt. 2. [↑](#footnote-ref-33)
33. 33 289 S.E.2d 748 (W. Va. 1982). [↑](#footnote-ref-34)
34. 34 Id. at Syl. Pt. 1. [↑](#footnote-ref-35)
35. 35 216 S.E.2d 242 (W. Va. 1975). [↑](#footnote-ref-36)
36. 36 289 S.E.2d 457 (W. Va. 1982). [↑](#footnote-ref-37)
37. 37 Id. at Syl. Pt. 1. [↑](#footnote-ref-38)
38. 38 289 S.E.2d 720 (W. Va. 1982). [↑](#footnote-ref-39)
39. 39 Id. at Syl. Pt. 3. [↑](#footnote-ref-40)
40. 40 332 S.E.2d 217 (W. Va. 1985). [↑](#footnote-ref-41)
41. 41 Id. at Syl. Pt. 8. [↑](#footnote-ref-42)
42. 42 292 S.E.2d 621 (W. Va. 1982). [↑](#footnote-ref-43)
43. 43 Id. at Syl. Pt. 1. [↑](#footnote-ref-44)
44. 44 387 S.E.2d 556 (W. Va. 1989). [↑](#footnote-ref-45)
45. 45 Id. at Syl. Pt. 1. [↑](#footnote-ref-46)
46. 46 Id. at Syl. Pt. 2. [↑](#footnote-ref-47)
47. 47 Id. at Syl. Pt. 3. [↑](#footnote-ref-48)
48. 48 465 S.E.2d 246 (W. Va. 1995). [↑](#footnote-ref-49)
49. 49 Id. at Syl. Pt. 2. [↑](#footnote-ref-50)
50. 50 299 S.E.2d 375 (W. Va. 1982). [↑](#footnote-ref-51)
51. 51 Id. at Syl. Pt. 1. [↑](#footnote-ref-52)
52. 52 244 S.E.2d 227 (W. Va. 1978). [↑](#footnote-ref-53)
53. 53 287 S.E.2d 497 (W. Va. 1982). [↑](#footnote-ref-54)
54. 54 Id. at Syl. Pt. 2. [↑](#footnote-ref-55)
55. 55 311 S.E.2d 412 (W. Va. 1983). [↑](#footnote-ref-56)
56. 56 Id. at Syl. Pt. 5. [↑](#footnote-ref-57)
57. 57 292 S.E.2d 643 (W. Va. 1982). [↑](#footnote-ref-58)
58. 58 Id. at Syl. Pt. 3. [↑](#footnote-ref-59)
59. 59 390 S.E.2d 15 (W. Va. 1990). [↑](#footnote-ref-60)
60. 60 Id. at Syl. Pt. 6. [↑](#footnote-ref-61)
61. 61 425 S.E.2d 202 (W. Va. 1992). [↑](#footnote-ref-62)
62. 62 Id. at Syl. Pt. 3. [↑](#footnote-ref-63)
63. 63 460 S.E.2d 771 (W. Va. 1995). [↑](#footnote-ref-64)
64. 64 Id. at Syl. Pt. 2. [↑](#footnote-ref-65)
65. 65 298 S.E.2d 246 (W. Va. 1982). [↑](#footnote-ref-66)
66. 66 Id. at Syl. Pt. 5. [↑](#footnote-ref-67)
67. 67 369 S.E.2d 870 (W. Va. 1988). [↑](#footnote-ref-68)
68. 68 Id. at Syl. Pt. 3. [↑](#footnote-ref-69)
69. 69 376 S.E.2d 333 (W. Va. 1988). [↑](#footnote-ref-70)
70. 70 Id. at Syl. Pt. 3. [↑](#footnote-ref-71)
71. 71 Id. at Syl. Pt. 4. [↑](#footnote-ref-72)
72. 72 360 S.E.2d 240 (W. Va. 1987). [↑](#footnote-ref-73)
73. 73 Id. at Syl. Pt. 1 (alterations in original). [↑](#footnote-ref-74)
74. 74 Id. at Syl. Pt. 2. [↑](#footnote-ref-75)
75. 75 368 S.E.2d 301 (W. Va. 1988). [↑](#footnote-ref-76)
76. 76 Id. at Syl. Pt. 6. [↑](#footnote-ref-77)
77. 77 420 S.E.2d 541 (W. Va. 1992). [↑](#footnote-ref-78)
78. 78 Id. at Syl. Pt. 3. [↑](#footnote-ref-79)
79. 79 457 S.E.2d 440 (W. Va. 1995). [↑](#footnote-ref-80)
80. 80 Id. at Syl. Pt. 2. [↑](#footnote-ref-81)
81. 81 Id. at Syl. Pt. 3. [↑](#footnote-ref-82)
82. 82 385 S.E.2d 62 (W. Va. 1989). [↑](#footnote-ref-83)
83. 83 Id. at Syl. Pt. 8. [↑](#footnote-ref-84)
84. 84 420 S.E.2d 891 (W. Va. 1992). [↑](#footnote-ref-85)
85. 85 Id. at Syl. Pt. 5. [↑](#footnote-ref-86)
86. 86 390 S.E.2d 15 (W. Va. 1990). [↑](#footnote-ref-87)
87. 87 Id. at Syl. Pt. 4. [↑](#footnote-ref-88)
88. 88 406 S.E.2d 200 (W. Va. 1990). [↑](#footnote-ref-89)
89. 89 Id. at Syl. [↑](#footnote-ref-90)
90. 90 441 S.E.2d 728 (W. Va. 1994). [↑](#footnote-ref-91)
91. 91 Id. at Syl. Pt. 8. [↑](#footnote-ref-92)
92. 92 454 S.E.2d 87 (W. Va. 1994). [↑](#footnote-ref-93)
93. 93 Id. at Syl. Pt. 2. [↑](#footnote-ref-94)
94. 94 Id. at Syl. Pt. 4. [↑](#footnote-ref-95)
95. 95 Id. at Syl. Pt. 6. [↑](#footnote-ref-96)
96. 96 422 S.E.2d 827 (W. Va. 1992). [↑](#footnote-ref-97)
97. 97 Id. at Syl. Pt. 2. [↑](#footnote-ref-98)
98. 98 390 S.E.2d 15 (W. Va. 1990). [↑](#footnote-ref-99)
99. 99 Id. at Syl. Pt. 2. [↑](#footnote-ref-100)
100. 100 420 S.E.2d 541 (W. Va. 1992). [↑](#footnote-ref-101)
101. 101 Id. at Syl. Pt. 4. [↑](#footnote-ref-102)
102. 102 420 S.E.2d 891 (W. Va. 1992). [↑](#footnote-ref-103)
103. 103 Id. at Syl. Pt. 6. [↑](#footnote-ref-104)
104. 104 408 S.E.2d 659 (W. Va. 1991). [↑](#footnote-ref-105)
105. 105 Id. at Syl. Pt. 3. [↑](#footnote-ref-106)
106. 106 294 S.E.2d 51 (W. Va. 1981). [↑](#footnote-ref-107)
107. 107 Id. at Syl. Pt. 5. [↑](#footnote-ref-108)
108. 108 Id. at Syl. Pt. 2. [↑](#footnote-ref-109)
109. 109 Id. at Syl. Pt. 3. [↑](#footnote-ref-110)
110. 110 Id. at Syl. Pt. 4. [↑](#footnote-ref-111)
111. 111 309 S.E.2d 118 (1983). [↑](#footnote-ref-112)
112. 112 Id. at Syl. Pt. 1. [↑](#footnote-ref-113)
113. 113 327 S.E.2d 142 (W. Va. 1985). [↑](#footnote-ref-114)
114. 114 Id. at Syl. Pt. 2. [↑](#footnote-ref-115)
115. 115 395 S.E.2d 773 (W. Va. 1990). [↑](#footnote-ref-116)
116. 116 Id. at Syl. Pt. 2. [↑](#footnote-ref-117)
117. 117 408 S.E.2d 659 (W. Va. 1991). [↑](#footnote-ref-118)
118. 118 Id. at Syl. Pt. 5. [↑](#footnote-ref-119)
119. 119 476 S.E.2d 522 (W. Va. 1996). [↑](#footnote-ref-120)
120. 120 Id. at Syl. Pt. 3. [↑](#footnote-ref-121)
121. 121 332 S.E.2d 217 (W. Va. 1985). [↑](#footnote-ref-122)
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123. 123 212 S.E.2d 619 (W. Va. 1975). [↑](#footnote-ref-124)
124. 124 310 S.E.2d 695 (W. Va. 1983). [↑](#footnote-ref-125)
125. 125 Id. at Syl. [↑](#footnote-ref-126)
126. 126 318 S.E.2d 437 (W. Va. 1984). [↑](#footnote-ref-127)
127. 127 Id. at Syl. Pt. 1. [↑](#footnote-ref-128)
128. 128 Id. at Syl. Pt. 2. [↑](#footnote-ref-129)
129. 129 371 S.E.2d 54 (W. Va. 1988). [↑](#footnote-ref-130)
130. 130 Id. at Syl. Pt. 2. [↑](#footnote-ref-131)
131. 131 428 S.E.2d 535 (W. Va. 1993). [↑](#footnote-ref-132)
132. 132 Id. at Syl. Pt. 1. [↑](#footnote-ref-133)
133. 133 383 S.E.2d 815 (W. Va. 1989). [↑](#footnote-ref-134)
134. 134 Id. at Syl. Pt. 2. [↑](#footnote-ref-135)
135. 135 Id. at Syl. Pt. 1. [↑](#footnote-ref-136)
136. 136 Id. at Syl. Pt. 3. [↑](#footnote-ref-137)
137. 137 280 S.E.2d 559 (W. Va. 1981). [↑](#footnote-ref-138)
138. 138 Id. at Syl. Pt. 6. [↑](#footnote-ref-139)
139. 139 365 S.E.2d 803 (W. Va. 1987). [↑](#footnote-ref-140)
140. 140 Id. at Syl. Pt. 3. [↑](#footnote-ref-141)
141. 141 280 S.E.2d 72 (W. Va. 1981). [↑](#footnote-ref-142)
142. 142 Id. at Syl. Pt. 5. [↑](#footnote-ref-143)
143. 143 182 S.E. 670 (W. Va. 1935). [↑](#footnote-ref-144)
144. 144 294 S.E.2d 254 (W. Va. 1982). [↑](#footnote-ref-145)
145. 145 Id. at Syl. Pt. 4 (alteration in original). [↑](#footnote-ref-146)
146. 146 298 S.E.2d 246 (W. Va. 1982). [↑](#footnote-ref-147)
147. 147 Id. at Syl. Pt. 8. [↑](#footnote-ref-148)
148. 148 311 S.E.2d 412 (W. Va. 1983). [↑](#footnote-ref-149)
149. 149 Id. at Syl. Pt. 1. [↑](#footnote-ref-150)
150. 150 Id. at Syl. Pt. 2. [↑](#footnote-ref-151)
151. 151 329 S.E.2d 65 (W. Va. 1985). [↑](#footnote-ref-152)
152. 152 Id. at Syl. Pt. 1. [↑](#footnote-ref-153)
153. 153 365 S.E.2d 69 (W. Va. 1987). [↑](#footnote-ref-154)
154. 154 Id. at Syl. Pt. 3. [↑](#footnote-ref-155)
155. 155 400 S.E.2d 611 (W. Va. 1990). [↑](#footnote-ref-156)
156. 156 Id. at Syl. [↑](#footnote-ref-157)
157. 157 280 S.E.2d 559 (W. Va. 1981). [↑](#footnote-ref-158)
158. 158 Id. at Syl. Pt. 4. [↑](#footnote-ref-159)
159. 159 Id. at Syl. Pt. 5. [↑](#footnote-ref-160)
160. 160 301 S.E.2d 199 (W. Va. 1983). [↑](#footnote-ref-161)
161. 161 Id. at Syl. Pt. 3. [↑](#footnote-ref-162)
162. 162 304 S.E.2d 831 (W. Va. 1983). [↑](#footnote-ref-163)
163. 163 Id. at Syl. Pt. 8. [↑](#footnote-ref-164)
164. 164 332 S.E.2d 217 (W. Va. 1985). [↑](#footnote-ref-165)
165. 165 Id. at Syl. Pt. 4. [↑](#footnote-ref-166)
166. 166 Id. at Syl. Pt. 6. [↑](#footnote-ref-167)
167. 167 355 S.E.2d 47 (W. Va. 1987). [↑](#footnote-ref-168)
168. 168 Id. at Syl. Pt. 1. [↑](#footnote-ref-169)
169. 169 390 S.E.2d 15 (W. Va. 1990). [↑](#footnote-ref-170)
170. 170 Id. at Syl. Pt. 10 [↑](#footnote-ref-171)
171. 171 404 S.E.2d 763 (W. Va. 1991). [↑](#footnote-ref-172)
172. 172 Id. at Syl. Pt. 1. [↑](#footnote-ref-173)
173. 173 Id. at Syl. Pt. 2. [↑](#footnote-ref-174)
174. 174 Id. at Syl. Pt. 3. [↑](#footnote-ref-175)
175. 175 416 S.E.2d 270 (W. Va. 1992). [↑](#footnote-ref-176)
176. 176 Id. at Syl. Pt. 3. [↑](#footnote-ref-177)
177. 177 280 S.E.2d 104 (W. Va. 1981). [↑](#footnote-ref-178)
178. 178 120 S.E.2d 504 (W. Va. 1961). [↑](#footnote-ref-179)
179. 179 280 S.E.2d at Syl. Pt. 2. [↑](#footnote-ref-180)
180. 180 390 S.E.2d 9 (W. Va. 1990). [↑](#footnote-ref-181)
181. 181 Id. at Syl. Pt. 1. [↑](#footnote-ref-182)
182. 182 Id. at Syl. [↑](#footnote-ref-183)
183. 183 443 S.E.2d 257 (W. Va. 1994). [↑](#footnote-ref-184)
184. 184 Id. at Syl. [↑](#footnote-ref-185)
185. 185 280 S.E.2d 559 (W. Va. 1981). [↑](#footnote-ref-186)
186. 186 Id. at Syl. Pt. 1. [↑](#footnote-ref-187)
187. 187 Id. at Syl. Pt. 2. [↑](#footnote-ref-188)
188. 188 332 S.E.2d 217 (W. Va. 1985). [↑](#footnote-ref-189)
189. 189 Id. at Syl. Pt. 1. [↑](#footnote-ref-190)
190. 190 365 S.E.2d 803 (W. Va. 1987). [↑](#footnote-ref-191)
191. 191 Id. at Syl. Pt. 5. [↑](#footnote-ref-192)
192. 192 371 S.E.2d 54 (W. Va. 1988). [↑](#footnote-ref-193)
193. 193 Id. at Syl. Pt. 3. [↑](#footnote-ref-194)
194. 194 420 S.E.2d 891 (W. Va. 1992). [↑](#footnote-ref-195)
195. 195 Id. at Syl. Pt. 8. [↑](#footnote-ref-196)
196. 196 425 S.E.2d 566 (W. Va. 1992). [↑](#footnote-ref-197)
197. 197 Id. at Syl. Pt. 3. [↑](#footnote-ref-198)
198. 198 391 S.E.2d 359 (W. Va. 1990). [↑](#footnote-ref-199)
199. 199 Id. at Syl. Pt. 1. [↑](#footnote-ref-200)
200. 200 Id. at Syl. Pt. 2. [↑](#footnote-ref-201)
201. 201 Id. at Syl. Pt. 3. [↑](#footnote-ref-202)
202. 202 Id. at Syl. Pt. 4. [↑](#footnote-ref-203)
203. 203 425 S.E.2d 588 (W. Va. 1992). [↑](#footnote-ref-204)
204. 204 Id. at Syl. Pt. 2. [↑](#footnote-ref-205)
205. 205 Id. at Syl. Pt. 3. [↑](#footnote-ref-206)
206. 206 453 S.E.2d 436 (W. Va. 1994). [↑](#footnote-ref-207)
207. 207 Id. at Syl. Pt. 1. [↑](#footnote-ref-208)
208. 208 301 S.E.2d 199 (W. Va. 1983). [↑](#footnote-ref-209)
209. 209 Id. at Syl. Pt. 8. [↑](#footnote-ref-210)
210. 210 290 S.E.2d 14 (W. Va. 1982). [↑](#footnote-ref-211)
211. 211 Id. at Syl. Pt. 3. [↑](#footnote-ref-212)
212. 212 332 S.E.2d 217 (W. Va. 1985). [↑](#footnote-ref-213)
213. 213 Id. at Syl. Pt. 13. [↑](#footnote-ref-214)
214. 214 Id. at Syl. Pt. 14. [↑](#footnote-ref-215)
215. 215 339 S.E.2d 213 (W. Va. 1985). [↑](#footnote-ref-216)
216. 216 Id. at Syl. Pt. 6. [↑](#footnote-ref-217)
217. 217 301 S.E.2d 765 (W. Va. 1983). [↑](#footnote-ref-218)
218. 218 Id. at Syl. Pt. 4. [↑](#footnote-ref-219)
219. 219 322 S.E.2d 862 (W. Va. 1984). [↑](#footnote-ref-220)
220. 220 Id. at Syl. Pt. 2 (alteration in original). [↑](#footnote-ref-221)
221. 221 336 S.E.2d 922 (W. Va. 1985). [↑](#footnote-ref-222)
222. 222 Id. at Syl. Pt. 2. [↑](#footnote-ref-223)
223. 223 Id. at Syl. Pt. 3. [↑](#footnote-ref-224)
224. 224 294 S.E.2d 62 (W. Va. 1981). [↑](#footnote-ref-225)
225. 225 Id. at Syl. Pt. 6. [↑](#footnote-ref-226)
226. 226 301 S.E.2d 765 (W. Va. 1983). [↑](#footnote-ref-227)
227. 227 Id. at Syl. Pt. 6. [↑](#footnote-ref-228)
228. 228 284 S.E.2d 863 (W. Va. 1981). [↑](#footnote-ref-229)
229. 229 Id. at Syl. Pt. 1. [↑](#footnote-ref-230)
230. 230 284 S.E.2d 897 (W. Va. 1981). [↑](#footnote-ref-231)
231. 231 Id. at Syl. Pt. 1. [↑](#footnote-ref-232)
232. 232 Id. at Syl. Pt. 2. [↑](#footnote-ref-233)
233. 233 280 S.E.2d 545 (W. Va. 1981). [↑](#footnote-ref-234)
234. 234 284 S.E.2d 890 (W. Va. 1981). [↑](#footnote-ref-235)
235. 235 Id. at Syl. Pt. 3. [↑](#footnote-ref-236)
236. 236 336 S.E.2d 541 (W. Va. 1985). [↑](#footnote-ref-237)
237. 237 Id. at Syl. Pt. 4. [↑](#footnote-ref-238)
238. 238 Id. at Syl. Pt. 5. [↑](#footnote-ref-239)
239. 239 352 S.E.2d 52 (W. Va. 1986). [↑](#footnote-ref-240)
240. 240 Id. at Syl. Pt. 2. [↑](#footnote-ref-241)
241. 241 Id. at Syl. Pt. 3. [↑](#footnote-ref-242)
242. 242 413 S.E.2d 162 (W. Va. 1991). [↑](#footnote-ref-243)
243. 243 Id. at Syl. Pt. 5. [↑](#footnote-ref-244)
244. 244 Id. at Syl. Pt. 6. [↑](#footnote-ref-245)
245. 245 324 S.E.2d 346 (W. Va. 1984). [↑](#footnote-ref-246)
246. 246 Id. at Syl. Pt. 2. [↑](#footnote-ref-247)
247. 247 350 S.E.2d 696 (W. Va. 1986). [↑](#footnote-ref-248)
248. 248 Id. at Syl. Pt. 2. [↑](#footnote-ref-249)
249. 249 289 S.E.2d 660 (W. Va. 1981). [↑](#footnote-ref-250)
250. 250 Id. at Syl. Pt. 2. [↑](#footnote-ref-251)
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253. 253 289 S.E.2d 756 (W. Va. 1982). [↑](#footnote-ref-254)
254. 254 Id. at Syl. [↑](#footnote-ref-255)
255. 255 420 S.E.2d 891 (W. Va. 1992). [↑](#footnote-ref-256)
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258. 258 446 S.E.2d 695 (W. Va. 1994). [↑](#footnote-ref-259)
259. 259 Id. at Syl. Pt. 6. [↑](#footnote-ref-260)
260. 260 Id. at Syl. Pt. 11. [↑](#footnote-ref-261)
261. 261 280 S.E.2d 559 (W. Va. 1981). [↑](#footnote-ref-262)
262. 262 Id. at Syl. Pt. 9. [↑](#footnote-ref-263)
263. 263 298 S.E.2d 246 (W. Va. 1982). [↑](#footnote-ref-264)
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265. 265 309 S.E.2d 118 (W. Va. 1983). [↑](#footnote-ref-266)
266. 266 Id. at Syl. Pt. 2. [↑](#footnote-ref-267)
267. 267 371 S.E.2d 54 (W. Va. 1988). [↑](#footnote-ref-268)
268. 268 Id. at Syl. Pt. 4. [↑](#footnote-ref-269)
269. 269 311 S.E.2d 144 (W. Va. 1983). [↑](#footnote-ref-270)
270. 270 Id. at Syl. Pt. 2. [↑](#footnote-ref-271)
271. 271 313 S.E.2d 667 (W. Va. 1984). [↑](#footnote-ref-272)
272. 272 Id. at Syl. Pt. 2. [↑](#footnote-ref-273)
273. 273 327 S.E.2d 163 (W. Va. 1985). [↑](#footnote-ref-274)
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275. 275 289 S.E.2d 457 (W. Va. 1982). [↑](#footnote-ref-276)
276. 276 286 S.E.2d 261 (W. Va. 1982). [↑](#footnote-ref-277)
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278. 278 246 S.E.2d 631 (W. Va. 1978). [↑](#footnote-ref-279)
279. 279 304 S.E.2d 342 (W. Va. 1983). [↑](#footnote-ref-280)
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283. 283 323 S.E.2d 140 (W. Va. 1984). [↑](#footnote-ref-284)
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286. 286 289 S.E.2d 720 (W. Va. 1982). [↑](#footnote-ref-287)
287. 287 257 S.E.2d 167 (W. Va. 1979). [↑](#footnote-ref-288)
288. 288 Id. at Syl. Pt. 2. [↑](#footnote-ref-289)
289. 289 Adkins, 289 S.E.2d at Syl. Pt. 2. [↑](#footnote-ref-290)
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293. 293 425 S.E.2d 202 (W. Va. 1992). [↑](#footnote-ref-294)
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295. 295 346 S.E.2d 52 (W. Va. 1986). [↑](#footnote-ref-296)
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297. 297 461 S.E.2d 504 (W. Va. 1995). [↑](#footnote-ref-298)
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301. 301 390 S.E.2d 15 (W. Va. 1990). [↑](#footnote-ref-302)
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303. 303 350 S.E.2d 696 (W. Va. 1986). [↑](#footnote-ref-304)
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305. 305 355 S.E.2d 47 (W. Va. 1987). [↑](#footnote-ref-306)
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307. 307 359 S.E.2d 581 (W. Va. 1987). [↑](#footnote-ref-308)
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309. 309 371 S.E.2d 54 (W. Va. 1988). [↑](#footnote-ref-310)
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311. 311 394 S.E.2d 532 (W. Va. 1990). [↑](#footnote-ref-312)
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314. 314 490 S.E.2d 315 (W. Va. 1997). [↑](#footnote-ref-315)
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316. 316 385 S.E.2d 248 (W. Va. 1989). [↑](#footnote-ref-317)
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318. 318 274 S.E.2d 519 (W. Va. 1981). [↑](#footnote-ref-319)
319. 319 259 S.E.2d 626 (W. Va. 1979). [↑](#footnote-ref-320)
320. 320 Tate, 274 S.E.2d at Syl. [↑](#footnote-ref-321)
321. 321 285 S.E.2d 637 (W. Va. 1981). [↑](#footnote-ref-322)
322. 322 Id. at Syl. [↑](#footnote-ref-323)
323. 323 288 S.E.2d 178 (W. Va. 1982). [↑](#footnote-ref-324)
324. 324 Id. at Syl. Pt. 4. [↑](#footnote-ref-325)
325. 325 Id. at Syl. Pt. 1. [↑](#footnote-ref-326)
326. 326 Id. at Syl. Pt. 2. [↑](#footnote-ref-327)
327. 327 344 S.E.2d 396 (W. Va. 1985). [↑](#footnote-ref-328)
328. 328 Id. at Syl. Pt. 3. [↑](#footnote-ref-329)
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339. 339 292 S.E.2d 615 (W. Va. 1982). [↑](#footnote-ref-340)
340. 340 Id. Syl. Pt. 3. [↑](#footnote-ref-341)
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342. 342 309 S.E.2d 118 (W. Va. 1983). [↑](#footnote-ref-343)
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344. 344 383 S.E.2d 521 (W. Va. 1989). [↑](#footnote-ref-345)
345. 345 Id. at Syl. Pt. 3. [↑](#footnote-ref-346)
346. 346 Id. at Syl. Pt. 6. [↑](#footnote-ref-347)
347. 347 406 S.E.2d 758 (W. Va.1991). [↑](#footnote-ref-348)
348. 348 Id. at Syl. Pt. 1. [↑](#footnote-ref-349)
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350. 350 Id. at Syl. Pt. 4. [↑](#footnote-ref-351)
351. 351 Id. at Syl. Pt. 8. [↑](#footnote-ref-352)
352. 352 289 S.E.2d 742 (W. Va. 1982). [↑](#footnote-ref-353)
353. 353 Id. at Syl. Pt. 3. [↑](#footnote-ref-354)
354. 354 294 S.E.2d 62 (W. Va. 1981). [↑](#footnote-ref-355)
355. 355 Id. at Syl. Pt. 1. [↑](#footnote-ref-356)
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360. 360 Id. at Syl. Pt. 3. [↑](#footnote-ref-361)
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381. 381 363 S.E.2d 493 (W. Va. 1987). [↑](#footnote-ref-382)
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383. 383 408 S.E.2d 614 (W. Va. 1991). [↑](#footnote-ref-384)
384. 384 Id. at Syl. Pt. 2. [↑](#footnote-ref-385)
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423. 423 332 S.E.2d 127 (W. Va. 1985). [↑](#footnote-ref-424)
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462. 462 289 S.E.2d 213 (W. Va. 1982). [↑](#footnote-ref-463)
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464. 464 324 S.E.2d 148 (W. Va. 1984). [↑](#footnote-ref-465)
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466. 466 307 S.E.2d 647 (W. Va. 1983). [↑](#footnote-ref-467)
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474. 474 315 S.E.2d 583 (W. Va. 1983). [↑](#footnote-ref-475)
475. 475 Id. at Syl. Pt. 5. [↑](#footnote-ref-476)
476. 476 338 S.E.2d 207 (W. Va. 1985). [↑](#footnote-ref-477)
477. 477 Id. at Syl. Pt. 2 (alteration in original). [↑](#footnote-ref-478)
478. 478 363 S.E.2d 736 (W. Va. 1987). [↑](#footnote-ref-479)
479. 479 Id. at Syl. Pt. 3. [↑](#footnote-ref-480)
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497. 497 452 S.E.2d 432 (W. Va. 1994). [↑](#footnote-ref-498)
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612. 612 304 S.E.2d 880 (W. Va. 1983). [↑](#footnote-ref-613)
613. 613 Id. at Syl. Pt. 1. [↑](#footnote-ref-614)
614. 614 309 S.E.2d 26 (W. Va. 1983). [↑](#footnote-ref-615)
615. 615 Id. at Syl. Pt. 1. [↑](#footnote-ref-616)
616. 616 396 S.E.2d 430 (W. Va. 1990). [↑](#footnote-ref-617)
617. 617 Id. at Syl. Pt. 2. [↑](#footnote-ref-618)
618. 618 Id. at Syl. Pt. 3. [↑](#footnote-ref-619)
619. 619 383 S.E.2d 502 (W. Va. 1989). [↑](#footnote-ref-620)
620. 620 Id. at Syl. Pt. 3. [↑](#footnote-ref-621)
621. 621 Id. at Syl. Pt. 4. [↑](#footnote-ref-622)
622. 622 443 S.E.2d 262 (W. Va. 1994). [↑](#footnote-ref-623)
623. 623 Id. at Syl. Pt. 2. [↑](#footnote-ref-624)
624. 624 279 S.E.2d 192 (W. Va. 1981). [↑](#footnote-ref-625)
625. 625 Id. at Syl. [↑](#footnote-ref-626)
626. 626 289 S.E.2d 213 (W. Va. 1982). [↑](#footnote-ref-627)
627. 627 Id. at Syl. Pt. 3. [↑](#footnote-ref-628)
628. 628 352 S.E.2d 134 (W. Va. 1986). [↑](#footnote-ref-629)
629. 629 Id. at Syl. Pt. 1. [↑](#footnote-ref-630)
630. 630 Id. at Syl. Pt. 2. [↑](#footnote-ref-631)
631. 631 Id. at Syl. Pt. 3. [↑](#footnote-ref-632)
632. 632 287 S.E.2d 148 (W. Va. 1981). [↑](#footnote-ref-633)
633. 633 Id. at Syl. Pt. 1. [↑](#footnote-ref-634)
634. 634 289 S.E.2d 450 (W. Va. 1982). [↑](#footnote-ref-635)
635. 635 Id. at Syl. [↑](#footnote-ref-636)
636. 636 304 S.E.2d 300 (W. Va. 1983). [↑](#footnote-ref-637)
637. 637 Id. at Syl. Pt. 2. [↑](#footnote-ref-638)
638. 638 Id. at Syl. Pt. 1. [↑](#footnote-ref-639)
639. 639 304 S.E.2d 16 (W. Va. 1983). [↑](#footnote-ref-640)
640. 640 Id. at Syl. [↑](#footnote-ref-641)
641. 641 333 S.E.2d 89 (W. Va. 1985). [↑](#footnote-ref-642)
642. 642 Id. at Syl. Pt. 4. [↑](#footnote-ref-643)
643. 643 363 S.E.2d 487 (W. Va. 1987). [↑](#footnote-ref-644)
644. 644 Id. at Syl. Pt. 2. [↑](#footnote-ref-645)
645. 645 Id. at Syl. Pt. 1. [↑](#footnote-ref-646)
646. 646 Id. at Syl. Pt. 4. [↑](#footnote-ref-647)
647. 647 383 S.E.2d 831 (W. Va. 1989). [↑](#footnote-ref-648)
648. 648 Id. at Syl. Pt. 1. [↑](#footnote-ref-649)
649. 649 Id. at Syl. Pt. 2. [↑](#footnote-ref-650)
650. 650 389 S.E.2d 194 (W. Va. 1989). [↑](#footnote-ref-651)
651. 651 Id. at Syl. Pt. 3. [↑](#footnote-ref-652)
652. 652 458 S.E.2d 327 (W. Va. 1995). [↑](#footnote-ref-653)
653. 653 Id. at Syl. [↑](#footnote-ref-654)
654. 654 490 S.E.2d 823 (W. Va. 1997). [↑](#footnote-ref-655)
655. 655 Id. at Syl. Pt. 4. [↑](#footnote-ref-656)
656. 656 430 S.E.2d 341 (W. Va. 1993). [↑](#footnote-ref-657)
657. 657 Id. at Syl. Pt. 1. [↑](#footnote-ref-658)
658. 658 Id. at Syl. Pt. 2. [↑](#footnote-ref-659)
659. 659 441 S.E.2d 728 (W. Va. 1994). [↑](#footnote-ref-660)
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661. 661 455 S.E.2d 821 (W. Va. 1995). [↑](#footnote-ref-662)
662. 662 Id. at Syl. Pt. 6. [↑](#footnote-ref-663)
663. 663 289 S.E.2d 191 (W. Va. 1982). [↑](#footnote-ref-664)
664. 664 Id. at Syl. [↑](#footnote-ref-665)
665. 665 318 S.E.2d 433 (W. Va. 1984). [↑](#footnote-ref-666)
666. 666 Id. at Syl. [↑](#footnote-ref-667)
667. 667 438 S.E.2d 613 (W. Va. 1993). [↑](#footnote-ref-668)
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669. 669 294 S.E.2d 440 (W. Va. 1982). [↑](#footnote-ref-670)
670. 670 Id. at Syl. [↑](#footnote-ref-671)
671. 671 486 S.E.2d 311 (W. Va. 1997). [↑](#footnote-ref-672)
672. 672 Id. at Syl. Pt. 3. [↑](#footnote-ref-673)
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674. 674 Id. at Syl. Pt. 5. [↑](#footnote-ref-675)
675. 675 449 S.E.2d 277 (W. Va. 1994). [↑](#footnote-ref-676)
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677. 677 450 S.E.2d 787 (W. Va. 1994). [↑](#footnote-ref-678)
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679. 679 461 S.E.2d 850 (W. Va. 1995). [↑](#footnote-ref-680)
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681. 681 352 S.E.2d 107 (W. Va. 1986). [↑](#footnote-ref-682)
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683. 683 342 S.E.2d 152 (W. Va. 1986). [↑](#footnote-ref-684)
684. 684 Id. at Syl. Pt. 3. [↑](#footnote-ref-685)
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691. 691 Id. at Syl. Pt. 1. [↑](#footnote-ref-692)
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693. 693 483 S.E.2d 810 (W. Va. 1997). [↑](#footnote-ref-694)
694. 694 Id. at Syl. Pt. 4. [↑](#footnote-ref-695)
695. 695 408 S.E.2d 350 (W. Va. 1991). [↑](#footnote-ref-696)
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697. 697 461 S.E.2d 850 (W. Va. 1995). [↑](#footnote-ref-698)
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699. 699 387 S.E.2d 126 (W. Va. 1989). [↑](#footnote-ref-700)
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701. 701 425 S.E.2d 221 (W. Va. 1992). [↑](#footnote-ref-702)
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703. 703 344 S.E.2d 396 (W. Va. 1985). [↑](#footnote-ref-704)
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707. 707 417 S.E.2d 919 (W. Va. 1992). [↑](#footnote-ref-708)
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709. 709 425 S.E.2d 221 (W. Va. 1992). [↑](#footnote-ref-710)
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716. 716 276 S.E.2d 812 (W. Va. 1981). [↑](#footnote-ref-717)
717. 717 Id. at Syl. Pt. 4. [↑](#footnote-ref-718)
718. 718 Id. at Syl. Pt. 5. [↑](#footnote-ref-719)
719. 719 279 S.E.2d 409 (W. Va. 1981). [↑](#footnote-ref-720)
720. 720 224 S.E.2d 894 (W. Va. 1976). [↑](#footnote-ref-721)
721. 721 279 S.E.2d at Syl. [↑](#footnote-ref-722)
722. 722 298 S.E.2d 228 (W. Va. 1982). [↑](#footnote-ref-723)
723. 723 Id. at Syl. Pt. 2. [↑](#footnote-ref-724)
724. 724 305 S.E.2d 332 (W. Va. 1983). [↑](#footnote-ref-725)
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726. 726 317 S.E.2d 508 (W. Va. 1984). [↑](#footnote-ref-727)
727. 727 63 S.E.2d 519 (W. Va. 1951). [↑](#footnote-ref-728)
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729. 729 305 S.E.2d 326 (W. Va. 1983). [↑](#footnote-ref-730)
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731. 731 331 S.E.2d 823 (W. Va. 1985). [↑](#footnote-ref-732)
732. 732 Id. at Syl. Pt. 2. [↑](#footnote-ref-733)
733. 733 346 S.E.2d 788 (W. Va. 1986). [↑](#footnote-ref-734)
734. 734 Id. at Syl. Pt. 1. [↑](#footnote-ref-735)
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736. 736 Id. at Syl. Pt. 3. [↑](#footnote-ref-737)
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738. 738 426 S.E.2d 522 (W. Va. 1992). [↑](#footnote-ref-739)
739. 739 Id. at Syl. [↑](#footnote-ref-740)
740. 740 394 S.E.2d 79 (W. Va. 1990). [↑](#footnote-ref-741)
741. 741 Id. at Syl. Pt. 2. [↑](#footnote-ref-742)
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743. 743 420 S.E.2d 292 (W. Va. 1992). [↑](#footnote-ref-744)
744. 744 Id. at Syl. [↑](#footnote-ref-745)
745. 745 453 S.E.2d 603 (W. Va. 1994). [↑](#footnote-ref-746)
746. 746 Id. at Syl. Pt. 5. [↑](#footnote-ref-747)
747. 747 456 S.E.2d 31 (W. Va. 1995). [↑](#footnote-ref-748)
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749. 749 329 S.E.2d 77 (W. Va. 1985). [↑](#footnote-ref-750)
750. 750 Id. at Syl. Pt. 5. [↑](#footnote-ref-751)
751. 751 369 S.E.2d 720 (W. Va. 1988). [↑](#footnote-ref-752)
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754. 754 Id. at Syl. Pt. 4. [↑](#footnote-ref-755)
755. 755 411 S.E.2d 702 (W. Va. 1991). [↑](#footnote-ref-756)
756. 756 Id. at Syl. [↑](#footnote-ref-757)
757. 757 309 S.E.2d 342 (W. Va. 1983). [↑](#footnote-ref-758)
758. 758 Id. at Syl. Pt. 1. [↑](#footnote-ref-759)
759. 759 385 S.E.2d 637 (W. Va. 1989). [↑](#footnote-ref-760)
760. 760 Id. at Syl. Pt. 2. [↑](#footnote-ref-761)
761. 761 382 S.E.2d 75 (W. Va. 1989). [↑](#footnote-ref-762)
762. 762 Id. at Syl. Pt. 1. [↑](#footnote-ref-763)
763. 763 390 S.E.2d 814 (W. Va. 1990). [↑](#footnote-ref-764)
764. 764 Id. at Syl. [↑](#footnote-ref-765)
765. 765 422 S.E.2d 494 (W. Va. 1992). [↑](#footnote-ref-766)
766. 766 Id. at Syl. Pt. 5. [↑](#footnote-ref-767)
767. 767 453 S.E.2d 656 (W. Va. 1994). [↑](#footnote-ref-768)
768. 768 Id. at Syl. Pt. 1. [↑](#footnote-ref-769)
769. 769 Id. at Syl. Pt. 3. [↑](#footnote-ref-770)
770. 770 490 S.E.2d 23 (W. Va. 1997). [↑](#footnote-ref-771)
771. 771 Id. at Syl. Pt. 4. [↑](#footnote-ref-772)
772. 772 431 S.E.2d 353 (W. Va. 1993). [↑](#footnote-ref-773)
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774. 774 497 S.E.2d 174 (W. Va. 1997). [↑](#footnote-ref-775)
775. 775 Id. at Syl. Pt. 6 (alterations in original). [↑](#footnote-ref-776)
776. 776 301 S.E.2d 832 (W. Va. 1983). [↑](#footnote-ref-777)
777. 777 Id. at Syl. Pt. 1. [↑](#footnote-ref-778)
778. 778 Id. at Syl. Pt. 2. [↑](#footnote-ref-779)
779. 779 365 S.E.2d 251 (W. Va. 1986). [↑](#footnote-ref-780)
780. 780 Id. at Syl. Pt. 2. [↑](#footnote-ref-781)
781. 781 Id. at Syl. Pt. 3. [↑](#footnote-ref-782)
782. 782 Id. at Syl. Pt. 4. [↑](#footnote-ref-783)
783. 783 Id. at Syl. Pt. 5. [↑](#footnote-ref-784)
784. 784 422 S.E.2d 494 (W. Va. 1992). [↑](#footnote-ref-785)
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786. 786 382 S.E.2d 562 (W. Va. 1989). [↑](#footnote-ref-787)
787. 787 Id. at Syl. Pt. 1. [↑](#footnote-ref-788)
788. 788 Id. at Syl. Pt. 2. [↑](#footnote-ref-789)
789. 789 385 S.E.2d 637 (W. Va. 1989). [↑](#footnote-ref-790)
790. 790 Id. at Syl. Pt. 3. [↑](#footnote-ref-791)
791. 791 382 S.E.2d 75 (W. Va. 1989). [↑](#footnote-ref-792)
792. 792 Id. at Syl. Pt. 3. [↑](#footnote-ref-793)
793. 793 309 S.E.2d 342 (W. Va. 1983). [↑](#footnote-ref-794)
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795. 795 329 S.E.2d 77 (W. Va. 1985). [↑](#footnote-ref-796)
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797. 797 383 S.E.2d 490 (W. Va. 1989). [↑](#footnote-ref-798)
798. 798 Id. at Syl. Pt. 2. [↑](#footnote-ref-799)
799. 799 Id. at Syl. Pt. 3. [↑](#footnote-ref-800)
800. 800 Id. at Syl. Pt. 4. [↑](#footnote-ref-801)
801. 801 Id. at Syl. Pt. 5. [↑](#footnote-ref-802)
802. 802 357 S.E.2d 750 (W. Va. 1987). [↑](#footnote-ref-803)
803. 803 Id. at Syl. Pt. 1. [↑](#footnote-ref-804)
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805. 805 490 S.E.2d 23 (W. Va. 1997). [↑](#footnote-ref-806)
806. 806 Id. at Syl. Pt. 8. [↑](#footnote-ref-807)
807. 807 422 S.E.2d 494 (W. Va. 1992). [↑](#footnote-ref-808)
808. 808 Id. at Syl. Pt. 4. [↑](#footnote-ref-809)
809. 809 296 S.E.2d 892 (W. Va. 1982). [↑](#footnote-ref-810)
810. 810 Id. at Syl. Pt. 1. [↑](#footnote-ref-811)
811. 811 Id. at Syl. Pt. 3. [↑](#footnote-ref-812)
812. 812 342 S.E.2d 453 (W. Va. 1986). [↑](#footnote-ref-813)
813. 813 Id. at Syl. Pt. 3. [↑](#footnote-ref-814)
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815. 815 Id. at Syl. Pt. 5. [↑](#footnote-ref-816)
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817. 817 360 S.E.2d 221 (W. Va. 1987). [↑](#footnote-ref-818)
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819. 819 Id. at Syl. Pt. 4. [↑](#footnote-ref-820)
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821. 821 365 S.E.2d 345 (W. Va. 1986). [↑](#footnote-ref-822)
822. 822 Id. at Syl. Pt. 1 (alteration in original). [↑](#footnote-ref-823)
823. 823 396 S.E.2d 191 (W. Va. 1990). [↑](#footnote-ref-824)
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827. 827 297 S.E.2d 840 (W. Va. 1982). [↑](#footnote-ref-828)
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831. 831 276 S.E.2d 821 (W. Va. 1981). [↑](#footnote-ref-832)
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834. 834 310 S.E.2d 491 (W. Va. 1983). [↑](#footnote-ref-835)
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836. 836 328 S.E.2d 514 (W. Va. 1985). [↑](#footnote-ref-837)
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838. 838 329 S.E.2d 118 (W. Va. 1985). [↑](#footnote-ref-839)
839. 839 Id. at Syl. Pt. 3. [↑](#footnote-ref-840)
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841. 841 305 S.E.2d 340 (W. Va. 1983). [↑](#footnote-ref-842)
842. 842 348 S.E.2d 442 (W. Va. 1986). [↑](#footnote-ref-843)
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870. 870 Id. at Syl. Pt. 3. [↑](#footnote-ref-871)
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872. 872 376 S.E.2d 304 (W. Va. 1988). [↑](#footnote-ref-873)
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874. 874 401 S.E.2d 216 (W. Va. 1990). [↑](#footnote-ref-875)
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878. 878 424 S.E.2d 759 (W. Va. 1992). [↑](#footnote-ref-879)
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884. 884 404 S.E.2d 750 (W. Va. 1991). [↑](#footnote-ref-885)
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894. 894 Id. at Syl. Pt. 3 (alteration in original). [↑](#footnote-ref-895)
895. 895 415 S.E.2d 271 (W. Va. 1992). [↑](#footnote-ref-896)
896. 896 Id. at Syl. Pt. 2. [↑](#footnote-ref-897)
897. 897 415 S.E.2d 897 (W. Va. 1992). [↑](#footnote-ref-898)
898. 898 Id. at Syl. Pt. 3. [↑](#footnote-ref-899)
899. 899 396 S.E.2d 725 (W. Va. 1990). [↑](#footnote-ref-900)
900. 900 Id. at Syl. Pt. 1. [↑](#footnote-ref-901)
901. 901 Id. at Syl. Pt. 3. [↑](#footnote-ref-902)
902. 902 413 S.E.2d 684 (W. Va. 1991). [↑](#footnote-ref-903)
903. 903 Id. at Syl. Pt. 1. [↑](#footnote-ref-904)
904. 904 452 S.E.2d 906 (W. Va. 1994). [↑](#footnote-ref-905)
905. 905 Id. at Syl. Pt. 2. [↑](#footnote-ref-906)
906. 906 476 S.E.2d 185 (W. Va. 1996). [↑](#footnote-ref-907)
907. 907 Id. at Syl. Pt. 2. [↑](#footnote-ref-908)
908. 908 407 S.E.2d 384 (W. Va. 1991). [↑](#footnote-ref-909)
909. 909 Id. at Syl. (alterations in original). [↑](#footnote-ref-910)
910. 910 408 S.E.2d 321 (W. Va. 1991). [↑](#footnote-ref-911)
911. 911 Id. at Syl. Pt. 3. [↑](#footnote-ref-912)
912. 912 410 S.E.2d 473 (W. Va. 1997). [↑](#footnote-ref-913)
913. 913 Id. at Syl. Pt. 6. [↑](#footnote-ref-914)
914. 914 500 S.E.2d 300 (W. Va. 1997). [↑](#footnote-ref-915)
915. 915 Id. at Syl. Pt. 3 (alterations in original). [↑](#footnote-ref-916)
916. 916 Id. at Syl. Pt. 4. [↑](#footnote-ref-917)
917. 917 Id. at Syl. Pt. 5. [↑](#footnote-ref-918)
918. 918 Id. at Syl. Pt. 6. [↑](#footnote-ref-919)
919. 919 Id. at Syl. Pt. 8. [↑](#footnote-ref-920)
920. 920 280 S.E.2d 66 (W. Va. 1981). [↑](#footnote-ref-921)
921. 921 139 S.E. 737 (W. Va. 1927). [↑](#footnote-ref-922)
922. 922 280 S.E.2d at Syl. Pt. 1. [↑](#footnote-ref-923)
923. 923 352 S.E.2d 22 (W. Va. 1985). [↑](#footnote-ref-924)
924. 924 Id. at Syl. Pt. 3. [↑](#footnote-ref-925)
925. 925 338 S.E.2d 202 (W. Va. 1985). [↑](#footnote-ref-926)
926. 926 Id. at Syl. Pt. 2. [↑](#footnote-ref-927)
927. 927 287 S.E.2d 148 (W. Va. 1981). [↑](#footnote-ref-928)
928. 928 Id. at Syl. Pt. 3. [↑](#footnote-ref-929)
929. 929 438 S.E.2d 6 (W. Va. 1993). [↑](#footnote-ref-930)
930. 930 Id. at Syl. Pt. 6. [↑](#footnote-ref-931)
931. 931 294 S.E.2d 446 (W. Va. 1982). [↑](#footnote-ref-932)
932. 932 Id. at Syl. Pt. 2. [↑](#footnote-ref-933)
933. 933 Id. at Syl. Pt. 3. [↑](#footnote-ref-934)
934. 934 Id. at Syl. Pt. 4. [↑](#footnote-ref-935)
935. 935 Id. at Syl. Pt. 5. [↑](#footnote-ref-936)
936. 936 Id. at Syl. Pt. 7. [↑](#footnote-ref-937)
937. 937 Id. at Syl. Pt. 8. [↑](#footnote-ref-938)
938. 938 338 S.E.2d 381 (W. Va. 1985). [↑](#footnote-ref-939)
939. 939 Id. at Syl. Pt. 3. [↑](#footnote-ref-940)
940. 940 422 S.E.2d 827 (W. Va. 1992). [↑](#footnote-ref-941)
941. 941 Id. at Syl. Pt. 4. [↑](#footnote-ref-942)
942. 942 414 S.E.2d 877 (W. Va. 1991). [↑](#footnote-ref-943)
943. 943 Id. at Syl. Pt. 4 (alteration in original). [↑](#footnote-ref-944)
944. 944 Id. at Syl. Pt. 5. [↑](#footnote-ref-945)
945. 945 Id. at Syl. Pt. 6. [↑](#footnote-ref-946)
946. 946 420 S.E.2d 541 (W. Va. 1992). [↑](#footnote-ref-947)
947. 947 Id. at Syl. Pt. 1. [↑](#footnote-ref-948)
948. 948 446 S.E.2d 648 (W. Va. 1994). [↑](#footnote-ref-949)
949. 949 Id. at Syl. Pt. 4. [↑](#footnote-ref-950)
950. 950 325 S.E.2d 111 (W. Va. 1984). [↑](#footnote-ref-951)
951. 951 Id. at Syl. Pt. 2. [↑](#footnote-ref-952)
952. 952 352 S.E.2d 22 (W. Va. 1985). [↑](#footnote-ref-953)
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954. 954 253 S.E.2d 150 (W. Va. 1979). [↑](#footnote-ref-955)
955. 955 342 S.E.2d 453 (W. Va. 1986). [↑](#footnote-ref-956)
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962. 962 400 S.E.2d 830 (W. Va. 1990). [↑](#footnote-ref-963)
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969. 969 Id. at Syl. Pt. 7. [↑](#footnote-ref-970)
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971. 971 500 S.E.2d 292 (W. Va. 1997). [↑](#footnote-ref-972)
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973. 973 446 S.E.2d 648 (W. Va. 1994). [↑](#footnote-ref-974)
974. 974 Id. at Syl. Pt. 5. [↑](#footnote-ref-975)
975. 975 363 S.E.2d 736 (W. Va. 1987). [↑](#footnote-ref-976)
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977. 977 371 S.E.2d 619 (W. Va. 1988). [↑](#footnote-ref-978)
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979. 979 399 S.E.2d 694 (W. Va. 1990). [↑](#footnote-ref-980)
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981. 981 Id. at Syl. Pt. 2. [↑](#footnote-ref-982)
982. 982 Id. at Syl. Pt. 4. [↑](#footnote-ref-983)
983. 983 Id. at Syl. Pt. 5. [↑](#footnote-ref-984)
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987. 987 425 S.E.2d 177 (W. Va. 1992). [↑](#footnote-ref-988)
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989. 989 332 S.E.2d 127 (W. Va. 1985). [↑](#footnote-ref-990)
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997. 997 365 S.E.2d 246 (W. Va. 1986). [↑](#footnote-ref-998)
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1002. 1002 369 S.E.2d 726 (W. Va. 1988). [↑](#footnote-ref-1003)
1003. 1003 Id. at Syl. Pt. 3. [↑](#footnote-ref-1004)
1004. 1004 382 S.E.2d 536 (W. Va. 1989). [↑](#footnote-ref-1005)
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1006. 1006 393 S.E.2d 647 (W. Va. 1990). [↑](#footnote-ref-1007)
1007. 1007 Id. at Syl. Pt. 1. [↑](#footnote-ref-1008)
1008. 1008 485 S.E.2d 12 (W. Va. 1997). [↑](#footnote-ref-1009)
1009. 1009 Id. at Syl. Pt. 3. [↑](#footnote-ref-1010)
1010. 1010 Id. at Syl. Pt. 4. [↑](#footnote-ref-1011)
1011. 1011 336 S.E.2d 552 (W. Va. 1985). [↑](#footnote-ref-1012)
1012. 1012 Id. at Syl. Pt. 1 (alterations in original). [↑](#footnote-ref-1013)
1013. 1013 Id. at Syl. Pt. 3. [↑](#footnote-ref-1014)
1014. 1014 Id. at Syl. Pt. 4. [↑](#footnote-ref-1015)
1015. 1015 Id. at Syl. Pt. 5. [↑](#footnote-ref-1016)
1016. 1016 371 S.E.2d 619 (W. Va. 1988). [↑](#footnote-ref-1017)
1017. 1017 Id. at Syl. Pt. 6. [↑](#footnote-ref-1018)
1018. 1018 Id. at Syl. Pt. 5. [↑](#footnote-ref-1019)
1019. 1019 445 S.E.2d 742 (W. Va. 1994). [↑](#footnote-ref-1020)
1020. 1020 412 S.E.2d 504 (W. Va. 1991). [↑](#footnote-ref-1021)
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1022. 1022 Id. at Syl. Pt. 2. [↑](#footnote-ref-1023)
1023. 1023 411 S.E.2d 35 (W. Va. 1991). [↑](#footnote-ref-1024)
1024. 1024 Id. at Syl. [↑](#footnote-ref-1025)
1025. 1025 413 S.E.2d 889 (W. Va. 1991). [↑](#footnote-ref-1026)
1026. 1026 Id. at Syl. Pt. 1. [↑](#footnote-ref-1027)
1027. 1027 438 S.E.2d 28 (W. Va. 1993). [↑](#footnote-ref-1028)
1028. 1028 Id. at Syl. Pt. 2. [↑](#footnote-ref-1029)
1029. 1029 469 S.E.2d 114 (W. Va. 1996). [↑](#footnote-ref-1030)
1030. 1030 Id. at Syl. Pt. 1. [↑](#footnote-ref-1031)
1031. 1031 490 S.E.2d 852 (W. Va. 1997). [↑](#footnote-ref-1032)
1032. 1032 Id. at Syl. Pt. 3. [↑](#footnote-ref-1033)
1033. 1033 499 S.E.2d 846 (W. Va. 1997). [↑](#footnote-ref-1034)
1034. 1034 Id. at Syl. Pt. 2. [↑](#footnote-ref-1035)
1035. 1035 275 S.E.2d 640 (W. Va. 1981). [↑](#footnote-ref-1036)
1036. 1036 Id. at Syl. Pt. 1. [↑](#footnote-ref-1037)
1037. 1037 294 S.E.2d 140 (W. Va. 1982). [↑](#footnote-ref-1038)
1038. 1038 Id. at Syl. [↑](#footnote-ref-1039)
1039. 1039 184 S.E.2d 625 (W. Va. 1971). [↑](#footnote-ref-1040)
1040. 1040 301 S.E.2d 783 (W. Va. 1983). [↑](#footnote-ref-1041)
1041. 1041 Id. at Syl. Pt. 1. [↑](#footnote-ref-1042)
1042. 1042 304 S.E.2d 685 (W. Va. 1983). [↑](#footnote-ref-1043)
1043. 1043 Id. at Syl. [↑](#footnote-ref-1044)
1044. 1044 324 S.E.2d 363 (W. Va. 1984). [↑](#footnote-ref-1045)
1045. 1045 Id. at Syl. Pt. 2. [↑](#footnote-ref-1046)
1046. 1046 438 S.E.2d 6 (W. Va. 1993). [↑](#footnote-ref-1047)
1047. 1047 Id. at Syl. Pt. 1. [↑](#footnote-ref-1048)
1048. 1048 Id. at Syl. Pt. 3. [↑](#footnote-ref-1049)
1049. 1049 328 S.E.2d 195 (W. Va. 1985). [↑](#footnote-ref-1050)
1050. 1050 Id. at Syl. Pt. 1. [↑](#footnote-ref-1051)
1051. 1051 Id. at Syl. Pt. 2 (alteration in original). [↑](#footnote-ref-1052)
1052. 1052 383 S.E.2d 774 (W. Va. 1989). [↑](#footnote-ref-1053)
1053. 1053 Id. at Syl. Pt. 2. [↑](#footnote-ref-1054)
1054. 1054 418 S.E.2d 580 (W. Va. 1992). [↑](#footnote-ref-1055)
1055. 1055 Id. at Syl. Pt. 1. [↑](#footnote-ref-1056)
1056. 1056 Id. at Syl. Pt. 2. [↑](#footnote-ref-1057)
1057. 1057 425 S.E.2d 170 (W. Va. 1992). [↑](#footnote-ref-1058)
1058. 1058 Id. at Syl. Pt. 1. [↑](#footnote-ref-1059)
1059. 1059 447 S.E.2d 920 (W. Va. 1994). [↑](#footnote-ref-1060)
1060. 1060 Id. at Syl. [↑](#footnote-ref-1061)
1061. 1061 481 S.E.2d 764 (W. Va. 1996). [↑](#footnote-ref-1062)
1062. 1062 Id. at Syl. Pt. 3. [↑](#footnote-ref-1063)
1063. 1063 490 S.E.2d 823 (W. Va. 1997). [↑](#footnote-ref-1064)
1064. 1064 Id. at Syl. Pt. 2. [↑](#footnote-ref-1065)
1065. 1065 428 S.E.2d 528 (W. Va. 1993). [↑](#footnote-ref-1066)
1066. 1066 Id. at Syl. Pt. 1. [↑](#footnote-ref-1067)
1067. 1067 Id. at Syl. Pt. 2. [↑](#footnote-ref-1068)
1068. 1068 481 S.E.2d 764 (W. Va. 1996). [↑](#footnote-ref-1069)
1069. 1069 Id. at Syl. Pt. 4. [↑](#footnote-ref-1070)
1070. 1070 Id. at Syl. Pt. 5. [↑](#footnote-ref-1071)
1071. 1071 314 S.E.2d 865 (W. Va. 1984). [↑](#footnote-ref-1072)
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1073. 1073 309 S.E.2d 17 (W. Va. 1983). [↑](#footnote-ref-1074)
1074. 1074 Id. at Syl. Pt. 1. [↑](#footnote-ref-1075)
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1077. 1077 281 S.E.2d 231 (W. Va. 1981). [↑](#footnote-ref-1078)
1078. 1078 Id. at Syl. Pt. 3. [↑](#footnote-ref-1079)
1079. 1079 324 S.E.2d 128 (W. Va. 1984). [↑](#footnote-ref-1080)
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1082. 1082 437 S.E.2d 591 (W. Va. 1993). [↑](#footnote-ref-1083)
1083. 1083 Id. at Syl. Pt. 6. [↑](#footnote-ref-1084)
1084. 1084 280 S.E.2d 266 (W. Va. 1981). [↑](#footnote-ref-1085)
1085. 1085 Id. at Syl. Pt. 2. [↑](#footnote-ref-1086)
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1087. 1087 315 S.E.2d 634 (W. Va. 1984). [↑](#footnote-ref-1088)
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1089. 1089 342 S.E.2d 147 (W. Va. 1986). [↑](#footnote-ref-1090)
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1096. 1096 330 S.E.2d 849 (W. Va. 1985). [↑](#footnote-ref-1097)
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1107. 1107 404 S.E.2d 528 (W. Va. 1991). [↑](#footnote-ref-1108)
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1134. 1134 464 S.E.2d 777 (W. Va. 1995). [↑](#footnote-ref-1135)
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1163. 1163 336 S.E.2d 552 (W. Va. 1985). [↑](#footnote-ref-1164)
1164. 1164 Id. at Syl. Pt. 2. [↑](#footnote-ref-1165)
1165. 1165 460 S.E.2d 18 (W. Va. 1994). [↑](#footnote-ref-1166)
1166. 1166 Id. at Syl. Pt. 4. [↑](#footnote-ref-1167)
1167. 1167 Id. at Syl. Pt. 5 (alterations in original). [↑](#footnote-ref-1168)
1168. 1168 332 S.E.2d 639 (W. Va. 1985). [↑](#footnote-ref-1169)
1169. 1169 Id. at Syl. Pt. 4 (alteration in original). [↑](#footnote-ref-1170)
1170. 1170 Id. at Syl. Pt. 5. [↑](#footnote-ref-1171)
1171. 1171 396 S.E.2d 737 (W. Va. 1990). [↑](#footnote-ref-1172)
1172. 1172 Id. at Syl. Pt. 3. [↑](#footnote-ref-1173)
1173. 1173 459 S.E.2d 406 (W. Va. 1995). [↑](#footnote-ref-1174)
1174. 1174 Id. at Syl. Pt. 4. [↑](#footnote-ref-1175)
1175. 1175 381 S.E.2d 367 (W. Va. 1989). [↑](#footnote-ref-1176)
1176. 1176 Id. at Syl. Pt. 5. [↑](#footnote-ref-1177)
1177. 1177 342 S.E.2d 177 (W. Va. 1986). [↑](#footnote-ref-1178)
1178. 1178 Id. at Syl. Pt. 3. [↑](#footnote-ref-1179)
1179. 1179 460 S.E.2d 627 (W. Va. 1995). [↑](#footnote-ref-1180)
1180. 1180 Id. at Syl. Pt. 4. [↑](#footnote-ref-1181)
1181. 1181 425 S.E.2d 595 (W. Va. 1992). [↑](#footnote-ref-1182)
1182. 1182 Id. at Syl. Pt. 2. [↑](#footnote-ref-1183)
1183. 1183 376 S.E.2d 581 (W. Va. 1988). [↑](#footnote-ref-1184)
1184. 1184 Id. at Syl. [↑](#footnote-ref-1185)
1185. 1185 445 S.E.2d 249 (W. Va. 1994). [↑](#footnote-ref-1186)
1186. 1186 Id. at Syl. Pt. 3. [↑](#footnote-ref-1187)
1187. 1187 408 S.E.2d 777 (W. Va. 1991). [↑](#footnote-ref-1188)
1188. 1188 Id. at Syl. Pt. 1. [↑](#footnote-ref-1189)
1189. 1189 428 S.E.2d 60 (W. Va. 1993). [↑](#footnote-ref-1190)
1190. 1190 Id. at Syl. [↑](#footnote-ref-1191)
1191. 1191 457 S.E.2d 532 (W. Va. 1995). [↑](#footnote-ref-1192)
1192. 1192 Id. at Syl. Pt. 4 (alteration in original). [↑](#footnote-ref-1193)
1193. 1193 381 S.E.2d 367 (W. Va. 1989). [↑](#footnote-ref-1194)
1194. 1194 Id. at Syl. Pt. 1. [↑](#footnote-ref-1195)
1195. 1195 396 S.E.2d 737 (W. Va. 1990). [↑](#footnote-ref-1196)
1196. 1196 Id. at Syl. Pt. 1. [↑](#footnote-ref-1197)
1197. 1197 Id. at Syl. Pt. 2. [↑](#footnote-ref-1198)
1198. 1198 Id. at Syl. Pt. 4. [↑](#footnote-ref-1199)
1199. 1199 400 S.E.2d 575 (W. Va. 1990). [↑](#footnote-ref-1200)
1200. 1200 Id. at Syl. Pt. 5. [↑](#footnote-ref-1201)
1201. 1201 438 S.E.2d 28 (W. Va. 1993). [↑](#footnote-ref-1202)
1202. 1202 Id. at Syl. Pt. 4. [↑](#footnote-ref-1203)
1203. 1203 466 S.E.2d 459 (W. Va. 1995). [↑](#footnote-ref-1204)
1204. 1204 Id. at Syl. Pt. 13. [↑](#footnote-ref-1205)
1205. 1205 Id. at Syl. Pt. 14. [↑](#footnote-ref-1206)
1206. 1206 486 S.E.2d 19 (W. Va. 1997). [↑](#footnote-ref-1207)
1207. 1207 Id. at Syl. Pt. 3. [↑](#footnote-ref-1208)
1208. 1208 303 S.E.2d 668 (W. Va. 1983). [↑](#footnote-ref-1209)
1209. 1209 Id. at Syl. Pt. 1. [↑](#footnote-ref-1210)
1210. 1210 Id. at Syl. Pt. 3. [↑](#footnote-ref-1211)
1211. 1211 Id. at Syl. Pt. 4. [↑](#footnote-ref-1212)
1212. 1212 305 S.E.2d 285 (W. Va. 1983). [↑](#footnote-ref-1213)
1213. 1213 Id. at Syl. Pt. 3. [↑](#footnote-ref-1214)
1214. 1214 386 S.E.2d 640 (W. Va. 1989). [↑](#footnote-ref-1215)
1215. 1215 Id. at Syl. Pt. 3. [↑](#footnote-ref-1216)
1216. 1216 364 S.E.2d 25 (W. Va. 1987). [↑](#footnote-ref-1217)
1217. 1217 Id. at Syl. Pt. 1. [↑](#footnote-ref-1218)
1218. 1218 285 S.E.2d 133 (W. Va. 1981). [↑](#footnote-ref-1219)
1219. 1219 Id. at Syl. [↑](#footnote-ref-1220)
1220. 1220 357 S.E.2d 246 (W. Va. 1987). [↑](#footnote-ref-1221)
1221. 1221 Id. at Syl. Pt. 1. [↑](#footnote-ref-1222)
1222. 1222 364 S.E.2d 540 (W. Va. 1987). [↑](#footnote-ref-1223)
1223. 1223 Id. at Syl. Pt. 3. [↑](#footnote-ref-1224)
1224. 1224 369 S.E.2d 726 (W. Va. 1988). [↑](#footnote-ref-1225)
1225. 1225 Id. at Syl. Pt. 1 (alteration in original). [↑](#footnote-ref-1226)
1226. 1226 388 S.E.2d 491 (W. Va. 1989). [↑](#footnote-ref-1227)
1227. 1227 Id. at Syl. Pt. 2. [↑](#footnote-ref-1228)
1228. 1228 299 S.E.2d 16 (W. Va. 1982). [↑](#footnote-ref-1229)
1229. 1229 Id. at Syl. Pt. 1. [↑](#footnote-ref-1230)
1230. 1230 Id. at Syl. Pt. 2. [↑](#footnote-ref-1231)
1231. 1231 280 S.E.2d 697 (W. Va. 1981). [↑](#footnote-ref-1232)
1232. 1232 Id. at Syl. Pt. 3 (alterations in original). [↑](#footnote-ref-1233)
1233. 1233 333 S.E.2d 799 (W. Va. 1985). [↑](#footnote-ref-1234)
1234. 1234 Id. at Syl. Pt. 14. [↑](#footnote-ref-1235)
1235. 1235 Id. at Syl. Pt. 15. [↑](#footnote-ref-1236)
1236. 1236 325 S.E.2d 111 (W. Va. 1984). [↑](#footnote-ref-1237)
1237. 1237 Id. at Syl. Pt. 1. [↑](#footnote-ref-1238)
1238. 1238 333 S.E.2d 799 (W. Va. 1985). [↑](#footnote-ref-1239)
1239. 1239 Id. at Syl. Pt. 4. [↑](#footnote-ref-1240)
1240. 1240 Id. at Syl. Pt. 5. [↑](#footnote-ref-1241)
1241. 1241 Id. at Syl. Pt. 6. [↑](#footnote-ref-1242)
1242. 1242 Id. at Syl. Pt. 7. [↑](#footnote-ref-1243)
1243. 1243 Hechler, 333 S.E.2d at Syl. Pt. 8. [↑](#footnote-ref-1244)
1244. 1244 Id. at Syl. Pt. 9. [↑](#footnote-ref-1245)
1245. 1245 Id. at Syl. Pt. 10. [↑](#footnote-ref-1246)
1246. 1246 Id. at Syl. Pt. 11 (alteration in original). [↑](#footnote-ref-1247)
1247. 1247 Id. at Syl. Pt. 12 (alteration in original). [↑](#footnote-ref-1248)
1248. 1248 Hechler, 333 S.E.2d at Syl. Pt. 13. [↑](#footnote-ref-1249)
1249. 1249 350 S.E.2d 738 (W. Va. 1986). [↑](#footnote-ref-1250)
1250. 1250 Id. at Syl. Pt. 2 (alteration in original). [↑](#footnote-ref-1251)
1251. 1251 Id. at Syl. Pt. 3. [↑](#footnote-ref-1252)
1252. 1252 Id. at Syl. Pt. 4. [↑](#footnote-ref-1253)
1253. 1253 Id. at Syl. Pt. 5. [↑](#footnote-ref-1254)
1254. 1254 Withrow, 350 S.E.2d at Syl. Pt. 6. [↑](#footnote-ref-1255)
1255. 1255 443 S.E.2d 826 (W. Va. 1994). [↑](#footnote-ref-1256)
1256. 1256 Id. at Syl. [↑](#footnote-ref-1257)
1257. 1257 482 S.E.2d 180 (W. Va. 1996). [↑](#footnote-ref-1258)
1258. 1258 Id. at Syl. Pt. 3. [↑](#footnote-ref-1259)
1259. 1259 Id. at Syl. Pt. 4. [↑](#footnote-ref-1260)
1260. 1260 352 S.E.2d 31 (W. Va. 1986). [↑](#footnote-ref-1261)
1261. 1261 Id. at Syl. Pt. 3 (alteration in original). [↑](#footnote-ref-1262)
1262. 1262 Id. at Syl. Pt. 4. [↑](#footnote-ref-1263)
1263. 1263 350 S.E.2d 555 (W. Va. 1986). [↑](#footnote-ref-1264)
1264. 1264 Id. at Syl. Pt. 1. [↑](#footnote-ref-1265)
1265. 1265 Id. at Syl. Pt. 2. [↑](#footnote-ref-1266)
1266. 1266 Id. at Syl. Pt. 3. [↑](#footnote-ref-1267)
1267. 1267 Id. at Syl. Pt. 4. [↑](#footnote-ref-1268)
1268. 1268 398 S.E.2d 532 (W. Va. 1990). [↑](#footnote-ref-1269)
1269. 1269 Id. at Syl. Pt. 3. [↑](#footnote-ref-1270)
1270. 1270 432 S.E.2d 195 (W. Va. 1993). [↑](#footnote-ref-1271)
1271. 1271 Id. at Syl. Pt. 4. [↑](#footnote-ref-1272)
1272. 1272 387 S.E.2d 307 (W. Va. 1989). [↑](#footnote-ref-1273)
1273. 1273 Id. at Syl. Pt. 3. [↑](#footnote-ref-1274)
1274. 1274 Id. at Syl. Pt. 2. [↑](#footnote-ref-1275)
1275. 1275 412 S.E.2d 737 (W. Va. 1991). [↑](#footnote-ref-1276)
1276. 1276 Id. at Syl. Pt. 8 (alteration in original). [↑](#footnote-ref-1277)
1277. 1277 460 S.E.2d 761 (W. Va. 1995). [↑](#footnote-ref-1278)
1278. 1278 Id. at Syl. Pt. 4. [↑](#footnote-ref-1279)
1279. 1279 Id. at Syl. Pt. 5. [↑](#footnote-ref-1280)
1280. 1280 Id. at Syl. Pt. 6. [↑](#footnote-ref-1281)
1281. 1281 469 S.E.2d 645 (W. Va. 1996). [↑](#footnote-ref-1282)
1282. 1282 Id. at Syl. Pt. 3. [↑](#footnote-ref-1283)
1283. 1283 477 S.E.2d 525 (W. Va. 1996). [↑](#footnote-ref-1284)
1284. 1284 Id. at Syl. Pt. 5. [↑](#footnote-ref-1285)
1285. 1285 490 S.E.2d 864 (W. Va. 1997). [↑](#footnote-ref-1286)
1286. 1286 Id. at Syl. Pt. 6. [↑](#footnote-ref-1287)
1287. 1287 Id. at Syl. Pt. 8 (alterations in original). [↑](#footnote-ref-1288)
1288. 1288 421 S.E.2d 682 (W. Va. 1992). [↑](#footnote-ref-1289)
1289. 1289 Id. at Syl. Pt. 2. [↑](#footnote-ref-1290)
1290. 1290 276 S.E.2d 311 (W. Va. 1981). [↑](#footnote-ref-1291)
1291. 1291 Id. at Syl. Pt. 2. [↑](#footnote-ref-1292)
1292. 1292 342 S.E.2d 287 (W. Va. 1986). [↑](#footnote-ref-1293)
1293. 1293 Id. at Syl. Pt. 1. [↑](#footnote-ref-1294)
1294. 1294 Id. at Syl. Pt. 2. [↑](#footnote-ref-1295)
1295. 1295 371 S.E.2d 602 (W. Va. 1988). [↑](#footnote-ref-1296)
1296. 1296 Id. at Syl. Pt. 1. [↑](#footnote-ref-1297)
1297. 1297 Id. at Syl. Pt. 2. [↑](#footnote-ref-1298)
1298. 1298 421 S.E.2d 53 (W. Va. 1992). [↑](#footnote-ref-1299)
1299. 1299 Id. at Syl. Pt. 1. [↑](#footnote-ref-1300)
1300. 1300 346 S.E.2d 546 (W. Va. 1986). [↑](#footnote-ref-1301)
1301. 1301 Id. at Syl. Pt. 2. [↑](#footnote-ref-1302)
1302. 1302 Id. at Syl. Pt. 3. [↑](#footnote-ref-1303)
1303. 1303 392 S.E.2d 697 (W. Va. 1990). [↑](#footnote-ref-1304)
1304. 1304 Id. at Syl. [↑](#footnote-ref-1305)
1305. 1305 367 S.E.2d 225 (W. Va. 1988). [↑](#footnote-ref-1306)
1306. 1306 Id. at Syl. Pt. 2. [↑](#footnote-ref-1307)
1307. 1307 325 S.E.2d 102 (W. Va. 1984). [↑](#footnote-ref-1308)
1308. 1308 Id. at Syl. Pt. 3. [↑](#footnote-ref-1309)
1309. 1309 Id. at Syl. Pt. 4. [↑](#footnote-ref-1310)
1310. 1310 367 S.E.2d 209 (W. Va. 1988). [↑](#footnote-ref-1311)
1311. 1311 Id. at Syl. Pt. 2. [↑](#footnote-ref-1312)
1312. 1312 Id. at Syl. Pt. 4. [↑](#footnote-ref-1313)
1313. 1313 Id. at Syl. Pt. 5. [↑](#footnote-ref-1314)
1314. 1314 Id. at Syl. Pt. 6. [↑](#footnote-ref-1315)
1315. 1315 394 S.E.2d 89 (W. Va. 1990). [↑](#footnote-ref-1316)
1316. 1316 Id. at Syl. Pt. 2. [↑](#footnote-ref-1317)
1317. 1317 421 S.E.2d 53 (W. Va. 1992). [↑](#footnote-ref-1318)
1318. 1318 Id. at Syl. Pt. 2. [↑](#footnote-ref-1319)
1319. 1319 280 S.E.2d 266 (W. Va. 1981). [↑](#footnote-ref-1320)
1320. 1320 Id. at Syl. Pt. 3 (alteration in original). [↑](#footnote-ref-1321)
1321. 1321 287 S.E.2d 497 (W. Va. 1982). [↑](#footnote-ref-1322)
1322. 1322 203 S.E.2d 445 (W. Va. 1974). [↑](#footnote-ref-1323)
1323. 1323 Baker, 287 S.E.2d at Syl. Pt. 1. [↑](#footnote-ref-1324)
1324. 1324 355 S.E.2d 631 (W. Va. 1987). [↑](#footnote-ref-1325)
1325. 1325 Id. at Syl. Pt. 3. [↑](#footnote-ref-1326)
1326. 1326 444 S.E.2d 285 (W. Va. 1994). [↑](#footnote-ref-1327)
1327. 1327 Id. at Syl. Pt. 4. [↑](#footnote-ref-1328)
1328. 1328 284 S.E.2d 863 (W. Va. 1981). [↑](#footnote-ref-1329)
1329. 1329 Id. at Syl. Pt. 2. [↑](#footnote-ref-1330)
1330. 1330 371 S.E.2d 619 (W. Va. 1988). [↑](#footnote-ref-1331)
1331. 1331 Id. at Syl. Pt. 7. [↑](#footnote-ref-1332)
1332. 1332 425 S.E.2d 588 (W. Va. 1992). [↑](#footnote-ref-1333)
1333. 1333 Id. at Syl. Pt. 1. [↑](#footnote-ref-1334)
1334. 1334 411 S.E.2d 688 (W. Va. 1991). [↑](#footnote-ref-1335)
1335. 1335 Id. at Syl. [↑](#footnote-ref-1336)
1336. 1336 276 S.E.2d 821 (W. Va. 1981). [↑](#footnote-ref-1337)
1337. 1337 Id. at Syl. Pt. 1. [↑](#footnote-ref-1338)
1338. 1338 Syl. Pt. 2, Ash v. Rutledge, 348 S.E.2d 442 (W.Va. 1986). [↑](#footnote-ref-1339)
1339. 1339 280 S.E.2d 301 (W. Va. 1981). [↑](#footnote-ref-1340)
1340. 1340 Id. at Syl. Pt. 3. [↑](#footnote-ref-1341)
1341. 1341 178 S.E.2d 801 (W. Va. 1971). [↑](#footnote-ref-1342)
1342. 1342 301 S.E.2d 783 (W. Va. 1983). [↑](#footnote-ref-1343)
1343. 1343 Id. at Syl. Pt. 2. [↑](#footnote-ref-1344)
1344. 1344 254 S.E.2d 697 (W. Va. 1979). [↑](#footnote-ref-1345)
1345. 1345 284 S.E.2d 890 (W. Va. 1981). [↑](#footnote-ref-1346)
1346. 1346 Id. at Syl. Pt. 1. [↑](#footnote-ref-1347)
1347. 1347 289 S.E.2d 742 (W. Va. 1982). [↑](#footnote-ref-1348)
1348. 1348 Id. at Syl. Pt. 5. [↑](#footnote-ref-1349)
1349. 1349 299 S.E.2d 375 (W. Va. 1982). [↑](#footnote-ref-1350)
1350. 1350 Id. at Syl. Pt. 3. [↑](#footnote-ref-1351)
1351. 1351 304 S.E.2d 831 (W. Va. 1983). [↑](#footnote-ref-1352)
1352. 1352 Id. at Syl. Pt. 5. [↑](#footnote-ref-1353)
1353. 1353 36 S.E.2d 410 (W. Va. 1945). [↑](#footnote-ref-1354)
1354. 1354 304 S.E.2d 875 (W. Va. 1983). [↑](#footnote-ref-1355)
1355. 1355 Id. at Syl. [↑](#footnote-ref-1356)
1356. 1356 315 S.E.2d 574 (W. Va. 1983). [↑](#footnote-ref-1357)
1357. 1357 Id. at Syl. Pt. 2. [↑](#footnote-ref-1358)
1358. 1358 383 S.E.2d 47 (W. Va. 1989). [↑](#footnote-ref-1359)
1359. 1359 Id. at Syl. Pt. 6. [↑](#footnote-ref-1360)
1360. 1360 332 S.E.2d 127 (W. Va. 1985). [↑](#footnote-ref-1361)
1361. 1361 Id. at Syl. Pt. 1. [↑](#footnote-ref-1362)
1362. 1362 466 S.E.2d 459 (W. Va. 1995). [↑](#footnote-ref-1363)
1363. 1363 Id. at Syl. Pt. 3. [↑](#footnote-ref-1364)
1364. 1364 469 S.E.2d 114 (W. Va. 1996). [↑](#footnote-ref-1365)
1365. 1365 Id. at Syl. Pt. 4. [↑](#footnote-ref-1366)
1366. 1366 475 S.E.2d 405 (W. Va. 1996). [↑](#footnote-ref-1367)
1367. 1367 Id. at Syl. [↑](#footnote-ref-1368)
1368. 1368 486 S.E.2d 311 (W. Va. 1997). [↑](#footnote-ref-1369)
1369. 1369 Id. at Syl. Pt. 2. [↑](#footnote-ref-1370)
1370. 1370 342 S.E.2d 138 (W. Va. 1986). [↑](#footnote-ref-1371)
1371. 1371 Id. at Syl. Pt. 2. [↑](#footnote-ref-1372)
1372. 1372 317 S.E.2d 150 (W. Va. 1984). [↑](#footnote-ref-1373)
1373. 1373 319 S.E.2d 815 (W. Va. 1984). [↑](#footnote-ref-1374)
1374. 1374 Id. at Syl. Pt. 1. [↑](#footnote-ref-1375)
1375. 1375 367 S.E.2d 209 (W. Va. 1988). [↑](#footnote-ref-1376)
1376. 1376 Id. at Syl. Pt. 1. [↑](#footnote-ref-1377)
1377. 1377 376 S.E.2d 634 (W. Va. 1988). [↑](#footnote-ref-1378)
1378. 1378 Id. at Syl. Pt. 2. [↑](#footnote-ref-1379)
1379. 1379 424 S.E.2d 759 (W. Va. 1992). [↑](#footnote-ref-1380)
1380. 1380 Id. at Syl. Pt. 3. [↑](#footnote-ref-1381)
1381. 1381 460 S.E.2d 54 (W. Va. 1995). [↑](#footnote-ref-1382)
1382. 1382 Id. at Syl. Pt. 2. [↑](#footnote-ref-1383)
1383. 1383 376 S.E.2d 839 (W. Va. 1988). [↑](#footnote-ref-1384)
1384. 1384 Id. at Syl. Pt. 4. [↑](#footnote-ref-1385)
1385. 1385 276 S.E.2d 812 (W. Va. 1981). [↑](#footnote-ref-1386)
1386. 1386 Id. at Syl. Pt. 7. [↑](#footnote-ref-1387)
1387. 1387 352 S.E.2d 31 (W. Va. 1986). [↑](#footnote-ref-1388)
1388. 1388 Id. at Syl. Pt. 5 (alteration in original). [↑](#footnote-ref-1389)
1389. 1389 358 S.E.2d 239 (W. Va. 1987). [↑](#footnote-ref-1390)
1390. 1390 Id. at Syl. (alteration in original). [↑](#footnote-ref-1391)
1391. 1391 379 S.E.2d 159 (W. Va. 1989). [↑](#footnote-ref-1392)
1392. 1392 Id. at Syl. Pt. 1. [↑](#footnote-ref-1393)
1393. 1393 Id. at Syl. Pt. 2. [↑](#footnote-ref-1394)
1394. 1394 Id. at Syl. Pt. 3. [↑](#footnote-ref-1395)
1395. 1395 Id. at Syl. Pt. 4. [↑](#footnote-ref-1396)
1396. 1396 Staton, 379 S.E.2d at Syl. Pt. 5. [↑](#footnote-ref-1397)
1397. 1397 386 S.E.2d 640 (W. Va. 1989). [↑](#footnote-ref-1398)
1398. 1398 Id. at Syl. Pt. 1. [↑](#footnote-ref-1399)
1399. 1399 Id. at Syl. Pt. 5. [↑](#footnote-ref-1400)
1400. 1400 426 S.E.2d 510 (W. Va. 1992). [↑](#footnote-ref-1401)
1401. 1401 Id. at Syl. Pt. 2. [↑](#footnote-ref-1402)
1402. 1402 277 S.E.2d 718 (W. Va. 1981). [↑](#footnote-ref-1403)
1403. 1403 Id. at Syl. [↑](#footnote-ref-1404)
1404. 1404 262 S.E.2d 744 (W. Va. 1979). [↑](#footnote-ref-1405)
1405. 1405 317 S.E.2d 513 (W. Va. 1984). [↑](#footnote-ref-1406)
1406. 1406 Id. at Syl. [↑](#footnote-ref-1407)
1407. 1407 Syl., Ash v. Twyman, 324 S.E.2d 138 (W. Va. 1984). [↑](#footnote-ref-1408)
1408. 1408 428 S.E.2d 535 (W. Va. 1993). [↑](#footnote-ref-1409)
1409. 1409 Id. at Syl. Pt. 2. [↑](#footnote-ref-1410)
1410. 1410 432 S.E.2d 74 (W. Va. 1993). [↑](#footnote-ref-1411)
1411. 1411 Id. at Syl. Pt. 3. [↑](#footnote-ref-1412)
1412. 1412 186 S.E.2d 220 (W. Va. 1972). [↑](#footnote-ref-1413)
1413. 1413 319 S.E.2d 815 (W. Va. 1984). [↑](#footnote-ref-1414)
1414. 1414 Id. at Syl. Pt. 2. [↑](#footnote-ref-1415)
1415. 1415 289 S.E.2d 435 (W. Va. 1982). [↑](#footnote-ref-1416)
1416. 1416 Id. at Syl. Pt. 1. [↑](#footnote-ref-1417)
1417. 1417 Id. at Syl. Pt. 2. [↑](#footnote-ref-1418)
1418. 1418 284 S.E.2d 863 (W. Va. 1981). [↑](#footnote-ref-1419)
1419. 1419 Id. at Syl. Pt. 3. [↑](#footnote-ref-1420)
1420. 1420 432 S.E.2d 74 (W. Va. 1993). [↑](#footnote-ref-1421)
1421. 1421 Id. at Syl. Pt. 5. [↑](#footnote-ref-1422)
1422. 1422 376 S.E.2d 631 (W. Va. 1988). [↑](#footnote-ref-1423)
1423. 1423 Id. at Syl. Pt. 2. [↑](#footnote-ref-1424)
1424. 1424 449 S.E.2d 277 (W. Va. 1994). [↑](#footnote-ref-1425)
1425. 1425 Id. at Syl. Pt. 5 (alteration in original). [↑](#footnote-ref-1426)
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1428. 1428 280 S.E.2d 108 (W. Va. 1981). [↑](#footnote-ref-1429)
1429. 1429 Id. at Syl. Pt. 1. [↑](#footnote-ref-1430)
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1433. 1433 Id. at Syl. Pt. 3. [↑](#footnote-ref-1434)
1434. 1434 432 S.E.2d 74 (W. Va. 1993). [↑](#footnote-ref-1435)
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1436. 1436 441 S.E.2d 386 (W. Va. 1994). [↑](#footnote-ref-1437)
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1446. 1446 284 S.E.2d 890 (W. Va. 1981). [↑](#footnote-ref-1447)
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1448. 1448 336 S.E.2d 728 (W. Va. 1985). [↑](#footnote-ref-1449)
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1456. 1456 287 S.E.2d 497 (W. Va. 1982). [↑](#footnote-ref-1457)
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1466. 1466 Id. at Syl. Pt. 3. [↑](#footnote-ref-1467)
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1528. 1528 Id. at Syl. Pt. 3. [↑](#footnote-ref-1529)
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1531. 1531 454 S.E.2d 378 (W. Va. 1994). [↑](#footnote-ref-1532)
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1537. 1537 Id. at Syl. Pt. 3. [↑](#footnote-ref-1538)
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1542. 1542 Id. at Syl. Pt. 7. [↑](#footnote-ref-1543)
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1546. 1546 Id. at Syl. Pt. 3. [↑](#footnote-ref-1547)
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1548. 1548 Id. at Syl. Pt. 3. [↑](#footnote-ref-1549)
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1554. 1554 Id. at Syl. (alterations in original). [↑](#footnote-ref-1555)
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1556. 1556 Id. at Syl. [↑](#footnote-ref-1557)
1557. 1557 301 S.E.2d 601 (W. Va. 1983). [↑](#footnote-ref-1558)
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1568. 1568 Id. at Syl. [↑](#footnote-ref-1569)
1569. 1569 408 S.E.2d 84 (W. Va. 1991). [↑](#footnote-ref-1570)
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1583. 1583 287 S.E.2d 508 (W. Va. 1982). [↑](#footnote-ref-1584)
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1585. 1585 351 S.E.2d 75 (W. Va. 1986). [↑](#footnote-ref-1586)
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1592. 1592 338 S.E.2d 207 (W. Va. 1985). [↑](#footnote-ref-1593)
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