Tort Law

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West Virginia Supreme Court of Appeals

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A. Fraud Action

Justice McHugh developed the elements of a fraud action in *Lengyel v. Lin*920 based upon the decision in *Horton v. Tyree*.921 It was held in *Lengyel* that

[t]he 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

B. Action for Abuse of Process

In *Preiser v. MacQueen*,923 Justice McHugh held that "[a]n action for abuse of process must be brought within one year from the time the right to bring the action accrued."924 Justice McHugh also held in *Wayne County Bank v. Hodge*,925 that "[g]enerally, 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

C. Nuisance Action

Justice McHugh ruled in *Sticklen v. Kittle*927 that

[a]s 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

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921 139 S.E. 737 (W. Va. 1927).
922 280 S.E.2d at Syl. Pt. 1.
923 352 S.E.2d 22 (W. Va. 1985).
924 Id. at Syl. Pt. 3.
926 Id. at Syl. Pt. 2.
928 Id. at Syl. Pt. 3.
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. 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.

E. Medical Malpractice

In Cross v. Trapp, 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.

He continued in Cross by holding that

[i]n 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

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930 Id. at Syl. Pt. 6.
931 294 S.E.2d 446 (W. Va. 1982).
932 Id. at Syl. Pt. 2.
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

Justice McHugh narrowed the focus in Cross to address the party bearing the burden of going forward with evidence. The court held that “[i]t 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

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

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

[w]hen 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

933 Id. at Syl. Pt. 3.
934 Id. at Syl. Pt. 4.
935 Id. at Syl. Pt. 5.
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during the period in question. 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

Justice McHugh again addressed the issue of informed consent in the case of Adams v. El-Bash. 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

Justice McHugh addressed the issue of parental consent to medical treatment for a minor in Belcher v. Charleston Area Medical Center. 940 The court said that

[c]xcept 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

936 Id. at Syl. Pt. 7.
937 Id. at Syl. Pt. 8.
939 Id. at Syl. Pt. 3.
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.\footnote{Id. at Syl. Pt. 4.}

Justice McHugh addressed several issues Robinson v. Charleston Area Medical Center, Inc.,\footnote{414 S.E.2d 877 (W. Va. 1991).} 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.”\footnote{Id. at Syl. Pt. 4 (alteration in original).}

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.\footnote{Id. at Syl. Pt. 5.}

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
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."

In *Rine By & Through Rine v. Irisari*, 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."

Justice McHugh stated in *Morris v. Consolidation Coal Co.* 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."

**F. Invasion of Privacy**

In *Cordle v. General Hugh Mercer Corp.*, Justice McHugh confronted the question of whether invasion of privacy could form the basis of a cause of action. The court held that "[i]n West Virginia, a legally protected interest in privacy is recognized."

**G. Action for Malicious Prosecution**

Justice McHugh addressed the statute of limitations for a malicious prosecution action in *Preiser v. MacQueen.* 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

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945 *Id.* at Syl. Pt. 6.
947 *Id.* at Syl. Pt. 1.
948 446 S.E.2d 648 (W. Va. 1994).
949 *Id.* at Syl. Pt. 4.
951 *Id.* at Syl. Pt. 2.
within one year from the entry of the order of dismissal.\footnote{953} 

**H. Action for Civil Conspiracy**

Relying in part on Dixon v. American Industrial Leasing Co.,\footnote{954} Justice McHugh held in Cook v. Heck's Inc.\footnote{955} that “[i]n 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.”\footnote{956}

**I. Libel**

In Crain v. Lightner,\footnote{957} Justice McHugh stated that “[i]n 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.”\footnote{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.\footnote{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

\footnote{953} Id. at Syl. Pt. 2.
\footnote{954} 253 S.E.2d 150 (W. Va. 1979).
\footnote{955} 342 S.E.2d 453 (W. Va. 1986).
\footnote{956} Id. at Syl. Pt. 7.
\footnote{957} 364 S.E.2d 778 (W. Va. 1987).
\footnote{958} Id. at Syl. Pt. 4.
distress, it is overruled.  

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.  

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. 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.

Justice McHugh held next in Belcher that

960 Id. at Syl. Pt. 1.
961 Id. at Syl. Pt. 2.
963 Id. at Syl. Pt. 2.
[a]ny 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

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 He held that

[i]n 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 consortium-giving relationships are available to such child.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

Justice McHugh noted that “‘[p]arental consortium’ does not include the value of nursing, domestic or household services provided by a minor or handicapped child to the injured parent.”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

964 Id. at Syl. Pt. 3.
965 Id. at Syl. Pt. 5.
966 Id. at Syl. Pt. 4.
967 Belcher, 400 S.E.2d at Syl. Pt. 6.
968 Id. at Syl. Pt. 9.
amount of the child’s recovery of parental consortium damages.\textsuperscript{969}

The court concluded in \textit{Belcher} that

[a]pplying 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.\textsuperscript{970}

\textbf{L. Intentional Infliction of Emotional Distress}

Justice McHugh wrote in \textit{Ronnie S. v. Mingo County Board of Education}\textsuperscript{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

\textsuperscript{969} \textit{Id.} at Syl. Pt. 7.

\textsuperscript{970} \textit{Id.} at Syl. Pt. 8.

\textsuperscript{971} 500 S.E.2d 292 (W. Va. 1997).
rights of such children, rather than to restrict them.\textsuperscript{972}

\textbf{M. Tortious Interference with Medical Relationship}

A cause of action for interference with a medical relationship was created in \textit{Morris v. Consolidation Coal Co.}\textsuperscript{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.\textsuperscript{974}

\textbf{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 \textit{McGlone v. Superior Trucking Co.}\textsuperscript{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 \textit{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.\textsuperscript{976}

\textbf{O. Comparative Negligence}

Justice McHugh addressed the issue of whether a trial court or jury

\textsuperscript{972} \textit{Id.} at Syl. Pt. 2.
\textsuperscript{973} 446 S.E.2d 648 (W. Va. 1994).
\textsuperscript{974} \textit{Id.} at Syl. Pt. 5.
\textsuperscript{975} 363 S.E.2d 736 (W. Va. 1987).
\textsuperscript{976} \textit{Id.} at Syl. Pt. 1.
determined comparative negligence in the case of Reager v. Anderson. The court held:

[i]n 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.

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. It was said that “[i]n 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.” 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.

The court also stated in Jones that “[i]n 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.” 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

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Id. at Syl. Pt. 2.
Id. at Syl. Pt. 1.
Id. at Syl. Pt. 2.
Id. at Syl. Pt. 4.
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

Q. Action Under Federal Boiler Inspection Act

Justice McHugh wrote in *Gardner v. CSX Transportation, Inc.*984 that

[p]ursuant 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.986

The court held that “[u]nder 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

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 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

983 *Id.* at Syl. Pt. 5.
985 *Id.* at Syl. Pt. 1.
986 *Id.* at Syl. Pt. 2.
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constituting a violation of the Antitrust Act.988

S. Prejudgment Interest

In Bell v. Inland Mutual Insurance Co.,989 the court held:

[p]rejudgment 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

Justice McHugh indicated in Weimer-Godwin v. Board of Education of Upshur County991 that “[p]rejudgment 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

Justice McHugh addressed several issues concerning prejudgment interest in Grove By & Through Grove v. Myers.993 The court held that “[u]nder 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 Justice McHugh indicated that “[u]nder 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 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

988 Id. at Syl. Pt. 2.
990 Id. at Syl. Pt. 7.
991 369 S.E.2d 726 (W. Va. 1988).
992 Id. at Syl. Pt. 2.
994 Id. at Syl. Pt. 1.
995 Id. at Syl. Pt. 2.
expenses is certain or reasonably ascertainable, prejudgment interest on those expenses is to be recovered from the date the cause of action accrued.996

T. Attorney Fees and Costs

The issue in Sally-Mike Properties v. Yokum997 was whether attorney fees may be assessed as costs. Justice McHugh noted at the outset that “[o]rdinarily, attorney’s fees in excess of the nominal statutory amounts provided by W.Va. Code, 59-2-14 [1960] are not ‘costs.’”998 The court said that “[a]s 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 However, “[t]here 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 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

Justice McHugh held in Weimer-Godwin v. Board of Education of Upshur County1002 that “[a]n attorney’s gratuitous representation of a client does not prevent an award of reasonable attorney’s fees.”1003

In Grove By & Through Grove v. Myers,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

Justice McHugh stated in the case of Jordan v. National Grange Mutual

996 Id. at Syl. Pt. 3.
998 Id. at Syl. Pt. 1.
999 Id. at Syl. Pt. 2.
1000 Id. at Syl. Pt. 3.
1001 Id. at Syl. Pt. 4.
1002 369 S.E.2d 726 (W. Va. 1988).
1003 Id. at Syl. Pt. 3.
1005 Id. at Syl. Pt. 5.
[a]n 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.\(^{1007}\)

Justice McHugh addressed several matters involving attorney's fees in *Shaffer v. Charleston Area Medical Center, Inc.*\(^ {1008}\) The court first held that "[w]hen 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."\(^ {1009}\) 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.\(^ {1010}\)

**U. Garnishment**

Justice McHugh held in *Commercial Bank of Bluefield v. St. Paul Fire & Marine Insurance Co.*\(^ {1011}\) that "[g]arnishment [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

\(^{1006}\) Insurance Co.

\(^{1007}\) Id. at Syl. Pt. 1.

\(^{1008}\) 393 S.E.2d 647 (W. Va. 1990).

\(^{1009}\) Id. at Syl. Pt. 1.

\(^{1010}\) Id. at Syl. Pt. 3.

\(^{1011}\) 336 S.E.2d 552 (W. Va. 1985).
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

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 The court also determined that “[a]n 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

V. Mary Carter Settlement Agreements

Justice McHugh addressed several issues concerning Mary Carter settlement agreements in the case of Reager v. Anderson.1016 The court held that “[i]n 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

Justice McHugh also stated that

[d]isclosure 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

1012 Id. at Syl. Pt. 1 (alterations in original).
1013 Id. at Syl. Pt. 3.
1014 Id. at Syl. Pt. 4.
1015 Id. at Syl. Pt. 5.
1017 Id. at Syl. Pt. 6.
refuse to disclose the general nature of the “Mary Carter” agreement to the jury.\(^{1018}\)

The latter ruling by Justice McHugh was restated in syllabus point 4 of his opinion in *Mackey v. Irisari*.\(^{1019}\)

W. **Preinjury Exculpatory Agreements**

Justice McHugh held in *Murphy v. North American River Runners, Inc.*\(^{1020}\) that “[w]hen 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.”\(^{1021}\) 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.\(^{1022}\)

X. **Bankruptcy Automatic Stay**

In *Anderson v. Robinson*,\(^{1023}\) 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

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\(^{1018}\) Id. at Syl. Pt. 5.

\(^{1019}\) 445 S.E.2d 742 (W. Va. 1994).

\(^{1020}\) 412 S.E.2d 504 (W. Va. 1991).

\(^{1021}\) Id. at Syl. Pt. 1.

\(^{1022}\) Id. at Syl. Pt. 2.

coverage.  

Y.  

**Damages**

Justice McHugh addressed damages for emotional distress caused by contact with an AIDS patient in *Johnson v. West Virginia University Hospitals, Inc.* 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.  

In *Johnson by Johnson v. General Motors Corp.*, Justice McHugh said that

> [w]hen 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.  

Justice McHugh held in *Burgess v. Porterfield* that “[d]efendants 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.”

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1024  *Id.* at Syl.  
1026  *Id.* at Syl. Pt. 1.  
1028  *Id.* at Syl. Pt. 2.  
1030  *Id.* at Syl. Pt. 1.
Justice McHugh wrote in *Clark v. Kawasaki Motors Corp.*, U.S.A.\(^{1031}\) 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.\(^{1032}\)

Justice McHugh held in *Andrews v. Reynolds Memorial Hospital, Inc.*\(^{1033}\) 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.\(^{1034}\)

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*.\(^{1035}\) It was held:

\(^{1031}\) 490 S.E.2d 852 (W. Va. 1997).
\(^{1032}\) *Id.* at Syl. Pt. 3.
\(^{1033}\) 499 S.E.2d 846 (W. Va. 1997).
\(^{1034}\) *Id.* at Syl. Pt. 2.