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XVIII. STATE AND LOCAL GOVERNMENT

A. *Budgets*

Justice McHugh addressed three issues involving the state budget in *Jones v. Rockefeller*.¹²⁰⁸ He stated initially that

[p]ursuant 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

Justice McHugh next found that

[p]ursuant 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

It was concluded in *Jones* that

[w]here 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

¹²⁰⁸ 303 S.E.2d 668 (W. Va. 1983).

¹²⁰⁹ *Id.* at Syl. Pt. 1.

¹²¹⁰ *Id.* at Syl. Pt. 3.

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

Justice McHugh addressed the failure by the governor to submit a budget for a state agency in *State ex rel. Steele v. Kopp*.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 1983-84 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

In *State ex rel. Lambert v. Cortellesi*,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

¹²¹¹ *Id.* at Syl. Pt. 4.

¹²¹² 305 S.E.2d 285 (W. Va. 1983).

¹²¹³ *Id.* at Syl. Pt. 3.

¹²¹⁴ 386 S.E.2d 640 (W. Va. 1989).

officer whose budget is fixed by the county commission.¹²¹⁵

B. Public Funds

*State ex rel. Manchin v. West Virginia Secondary School Activities Commission*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 “quasi-public 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*, 12-2-2 [1983] as “moneys due the State.”¹²¹⁷

C. Salaries and Wages

Justice McHugh held in *Sell v. Chaplin*¹²¹⁸ that “[a]n 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

In *Maynard v. Board of Education of Wayne County*,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

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 The court held that

[w]here the voters by their approval of a special levy do not require that each employee of the county board of education is to

¹²¹⁵ *Id.* at Syl. Pt. 3.

¹²¹⁶ 364 S.E.2d 25 (W. Va. 1987).

¹²¹⁷ *Id.* at Syl. Pt. 1.

¹²¹⁸ 285 S.E.2d 133 (W. Va. 1981).

¹²¹⁹ *Id.* at Syl.

¹²²⁰ 357 S.E.2d 246 (W. Va. 1987).

¹²²¹ *Id.* at Syl. Pt. 1.

¹²²² 364 S.E.2d 540 (W. Va. 1987).

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

Justice McHugh held in *Weimer-Godwin v. Board of Education of Upshur County*¹²²⁴ that “[u]nder *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

Justice McHugh stated in *Courtney v. State Department of Health of West Virginia*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

D. Contracts

Justice McHugh held in *Corte Co. v. County Commission of McDowell County*,¹²²⁸ that “[p]ursuant 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

The court also stated:

When a contract is entered into between a county commission and a contractor for certain construction work and the contractor

¹²²³ *Id.* at Syl. Pt. 3.

¹²²⁴ 369 S.E.2d 726 (W. Va. 1988).

¹²²⁵ *Id.* at Syl. Pt. 1 (alteration in original).

¹²²⁶ 388 S.E.2d 491 (W. Va. 1989).

¹²²⁷ *Id.* at Syl. Pt. 2.

¹²²⁸ 299 S.E.2d 16 (W. Va. 1982).

¹²²⁹ *Id.* at Syl. Pt. 1.

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

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. Stalaker*.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

F. Recovery of Litigation Fees and Costs by State

In *Hechler v. Casey*,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 The court also held that

[t]he 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

¹²³⁰ *Id.* at Syl. Pt. 2.

¹²³¹ 280 S.E.2d 697 (W. Va. 1981).

¹²³² *Id.* at Syl. Pt. 3 (alterations in original).

¹²³³ 333 S.E.2d 799 (W. Va. 1985).

¹²³⁴ *Id.* at Syl. Pt. 14.

¹²³⁵ *Id.* at Syl. Pt. 15.

G. *Public Policy*

In *Cordle v. General Hugh Mercer Corp.*,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

H. *Freedom of Information*

The case of *Hechler v. Casey*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 “[t]he 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 The court indicated that “[a]n 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 Justice McHugh held that “[t]he primary purpose of the invasion of privacy exemption to the Freedom of Information Act, *W.Va. Code*, 29B-1-4(2) [1977], is to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information.”¹²⁴¹ It was said that “[u]nder *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

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

¹²³⁶ 325 S.E.2d 111 (W. Va. 1984).

¹²³⁷ *Id.* at Syl. Pt. 1.

¹²³⁸ 333 S.E.2d 799 (W. Va. 1985).

¹²³⁹ *Id.* at Syl. Pt. 4.

¹²⁴⁰ *Id.* at Syl. Pt. 5.

¹²⁴¹ *Id.* at Syl. Pt. 6.

¹²⁴² *Id.* at Syl. Pt. 7.

¹²⁴³ *Hechler*, 333 S.E.2d at Syl. Pt. 8.

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

Justice McHugh ruled that "[t]he 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

In *Hechler*, Justice McHugh went on to state that "[r]ecords . . . 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 Justice McHugh clarified matters in finding that "[t]he 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 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

Justice McHugh confronted the Freedom of Information Act in *Daily Gazette Co. v. Withrow*.¹²⁴⁹ The court held initially that

[a] release or other litigation settlement document in which one of

¹²⁴⁴ *Id.* at Syl. Pt. 9.

¹²⁴⁵ *Id.* at Syl. Pt. 10.

¹²⁴⁶ *Id.* at Syl. Pt. 11 (alteration in original).

¹²⁴⁷ *Id.* at Syl. Pt. 12 (alteration in original).

¹²⁴⁸ *Hechler*, 333 S.E.2d at Syl. Pt. 13.

¹²⁴⁹ 350 S.E.2d 738 (W. Va. 1986).

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

The court then stated that

[I]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

Justice McHugh noted in *Withrow* that "[a]ssurances 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 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 Finally, the court concluded that "[f]or 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

Justice McHugh ruled in *Keegan v. Bailey*¹²⁵⁵ that "[u]nless 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

Justice McHugh held in *Daily Gazette Co. v. West Virginia Development*

¹²⁵⁰ *Id.* at Syl. Pt. 2 (alteration in original).

¹²⁵¹ *Id.* at Syl. Pt. 3.

¹²⁵² *Id.* at Syl. Pt. 4.

¹²⁵³ *Id.* at Syl. Pt. 5.

¹²⁵⁴ *Withrow*, 350 S.E.2d at Syl. Pt. 6.

¹²⁵⁵ 443 S.E.2d 826 (W. Va. 1994).

¹²⁵⁶ *Id.* at Syl.

Office¹²⁵⁷ that

[w]hen 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

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

¹²⁵⁷ 482 S.E.2d 180 (W. Va. 1996).

¹²⁵⁸ *Id.* at Syl. Pt. 3.

¹²⁵⁹ *Id.* at Syl. Pt. 4.

I. *Obligations of Public Officer*

In *Graf v. Frame*,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

[o]ne 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

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

J. *Enactment of Ordinance*

In the case of *Perdue v. Ferguson*,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

Justice McHugh reasoned that “[i]t 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

¹²⁶⁰ 352 S.E.2d 31 (W. Va. 1986).

¹²⁶¹ *Id.* at Syl. Pt. 3 (alteration in original).

¹²⁶² *Id.* at Syl. Pt. 4.

¹²⁶³ 350 S.E.2d 555 (W. Va. 1986).

¹²⁶⁴ *Id.* at Syl. Pt. 1.

the community.”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

The court concluded that “[w]here 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

In *Par Mar v. City of Parkersburg*,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

K. Referendum

Justice McHugh held in *State ex rel. Foster v. City of Morgantown*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

L. Action Against Government

Justice McHugh held in *Wolfe v. City of Wheeling*¹²⁷² that “[t]he 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

¹²⁶⁵ *Id.* at Syl. Pt. 2.

¹²⁶⁶ *Id.* at Syl. Pt. 3.

¹²⁶⁷ *Id.* at Syl. Pt. 4.

¹²⁶⁸ 398 S.E.2d 532 (W. Va. 1990).

¹²⁶⁹ *Id.* at Syl. Pt. 3.

¹²⁷⁰ 432 S.E.2d 195 (W. Va. 1993).

¹²⁷¹ *Id.* at Syl. Pt. 4.

¹²⁷² 387 S.E.2d 307 (W. Va. 1989).

is ordinarily a question of fact for the trier of the facts.”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

Justice McHugh addressed statutory immunity for political subdivisions in the case of *Randall v. Fairmont City Police Department*.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

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 The court held initially that

[p]ursuant 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

¹²⁷³ *Id.* at Syl. Pt. 3.

¹²⁷⁴ *Id.* at Syl. Pt. 2.

¹²⁷⁵ 412 S.E.2d 737 (W. Va. 1991).

¹²⁷⁶ *Id.* at Syl. Pt. 8 (alteration in original).

¹²⁷⁷ 460 S.E.2d 761 (W. Va. 1995).

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

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

Justice McHugh concluded in *Hose* that

[w]hile *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

In *Koffler v. City of Huntington*,¹²⁸¹ Justice McHugh held that

[u]nder *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

¹²⁷⁸ *Id.* at Syl. Pt. 4.

¹²⁷⁹ *Id.* at Syl. Pt. 5.

¹²⁸⁰ *Id.* at Syl. Pt. 6.

¹²⁸¹ 469 S.E.2d 645 (W. Va. 1996).

free from nuisance does not extend exclusively to vehicles or vehicular travel.¹²⁸²

In *Mallamo v. Town of Rivesville*,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

Justice McHugh wrote in *Holsten v. Massey*¹²⁸⁵ that

[t]he 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

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

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 The court held that

[t]he 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.

¹²⁸² *Id.* at Syl. Pt. 3.

¹²⁸³ 477 S.E.2d 525 (W. Va. 1996).

¹²⁸⁴ *Id.* at Syl. Pt. 5.

¹²⁸⁵ 490 S.E.2d 864 (W. Va. 1997).

¹²⁸⁶ *Id.* at Syl. Pt. 6.

¹²⁸⁷ *Id.* at Syl. Pt. 8 (alterations in original).

¹²⁸⁸ 421 S.E.2d 682 (W. Va. 1992).

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

XIX. ELECTION LAW

A. *Recall Official*

In the case of *State ex rel. Durkin v. Neely*,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

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 The court said initially that “[t]he right to become a candidate for public office is a fundamental right, and restrictions upon that right are subject to constitutional scrutiny.”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

¹²⁸⁹ *Id.* at Syl. Pt. 2.

¹²⁹⁰ 276 S.E.2d 311 (W. Va. 1981).

¹²⁹¹ *Id.* at Syl. Pt. 2.

¹²⁹² 342 S.E.2d 287 (W. Va. 1986).

¹²⁹³ *Id.* at Syl. Pt. 1.