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West Virginia Supreme Court of Appeals Appellate Jurisdiction

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seventy-eight days before the general election.[1318]

XX. WEST VIRGINIA SUPREME COURT OF APPEALS APPELLATE JURISDICTION

A. *Necessity of a Ruling by Lower Court*

Wells v. Roberts[1319] held that ["a]s a general rule '[t]his Court will not consider questions, nonjurisdictional in their nature, which have not been acted upon by the trial court.'"[1320] Justice McHugh elaborated on this issue in *State v. Baker*,[1321] wherein he relied upon *State v. Thomas*[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]

Justice McHugh ruled in *State v. Glover*[1324] that

> [w]here 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]

Justice McHugh wrote in *Abbott v. Owens-Corning Fiberglas Corp.*[1326] that "[i]n 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

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1318 *Id.* at Syl. Pt. 2.

1319 280 S.E.2d 266 (W. Va. 1981).

1320 *Id.* at Syl. Pt. 3 (alteration in original).

1321 287 S.E.2d 497 (W. Va. 1982).

1322 203 S.E.2d 445 (W. Va. 1974).

1323 Baker, 287 S.E.2d at Syl. Pt. 1.

1324 355 S.E.2d 631 (W. Va. 1987).

1325 *Id.* at Syl. Pt. 3.

1326 444 S.E.2d 285 (W. Va. 1994).

decision."[1327]

B. Stay Pending Appeal

The court held in *State ex rel. Dye v. Bordenkircher*[1328] that

> [w]hen 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]

C. Costs on Appeal

Justice McHugh stated in *Reager v. Anderson*[1330] that "[w]here 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]

D. Criminal Appeal Generally

Justice McHugh held in *Judy v. White*[1332] that "[s]ingle 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]

E Appeal by State in Criminal Proceeding

Justice McHugh stated in *State v. Walters*[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]

1327 *Id.* at Syl. Pt. 4.

1328 284 S.E.2d 863 (W. Va. 1981).

1329 *Id.* at Syl. Pt. 2.

1330 371 S.E.2d 619 (W. Va. 1988).

1331 *Id.* at Syl. Pt. 7.

1332 425 S.E.2d 588 (W. Va. 1992).

1333 *Id.* at Syl. Pt. 1.

1334 411 S.E.2d 688 (W. Va. 1991).

1335 *Id.* at Syl.

F. Standards of Review

1. Unemployment Compensation Board of Review Decision

In the case of *Kisamore v. Rutledge*,[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]

Justice McHugh restated *Kisamore's* standard of review in *Ash v. Rutledge*.[1338]

2. Parole Board Decision

In *Rowe v. Whyte*,[1339] Justice McHugh wrote that

> [t]he 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]

3. Civil Service Commission Decision

Relying upon the decision in *Billings v. Civil Service Commission*,[1341] Justice McHugh ruled in *West Virginia Department of Health v. Mathison*[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]

1336 276 S.E.2d 821 (W. Va. 1981).

1337 *Id.* at Syl. Pt. 1.

1338 Syl. Pt. 2, Ash v. Rutledge, 348 S.E.2d 442 (W.Va. 1986).

1339 280 S.E.2d 301 (W. Va. 1981).

1340 *Id.* at Syl. Pt. 3.

1341 178 S.E.2d 801 (W. Va. 1971).

1342 301 S.E.2d 783 (W. Va. 1983).

1343 *Id.* at Syl. Pt. 2.

4. Ruling on Admitting Confession

Relying on the decision in *State v. Lamp*,[1344] Justice McHugh held in *State v. Wimer*[1345] that "[t]he trial court has a wide discretion as to the admission of confessions and ordinarily this discretion will not be disturbed on review."[1346]

5. Ruling on Improper Remarks by Prosecutor

It was held in *State v. Ocheltree*[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]

6. Ruling on Constitutional Issue

Justice McHugh said in *State v. Gravely*[1349] that

> [t]he 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]

7. Ruling on Order Involving Bill of Particulars

Justice McHugh held in *State v. Meadows*[1351] that "[t]he 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]

1344 254 S.E.2d 697 (W. Va. 1979).

1345 284 S.E.2d 890 (W. Va. 1981).

1346 *Id.* at Syl. Pt. 1.

1347 289 S.E.2d 742 (W. Va. 1982).

1348 *Id.* at Syl. Pt. 5.

1349 299 S.E.2d 375 (W. Va. 1982).

1350 *Id.* at Syl. Pt. 3.

1351 304 S.E.2d 831 (W. Va. 1983).

1352 *Id.* at Syl. Pt. 5.

8. Ruling on Proffer of Remote Evidence

Justice McHugh relied upon *Yuncke v. Welker*[1353] to hold in *Gough v. Lopez*[1354] that

> [w]hether 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]

9. Ruling on Admissibility of Evidence Generally

Justice McHugh held in *State v. Peyatt*[1356] that "[r]ulings 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]

10. Ruling on Joint Representation in Criminal Cases

Justice McHugh held in *State v. Mullins*[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]

11. Imposition of Sanctions in Civil Cases

Bell v. Inland Mutual Insurance Co.[1360] held that

1353 36 S.E.2d 410 (W. Va. 1945).

1354 304 S.E.2d 875 (W. Va. 1983).

1355 *Id.* at Syl.

1356 315 S.E.2d 574 (W. Va. 1983).

1357 *Id.* at Syl. Pt. 2.

1358 383 S.E.2d 47 (W. Va. 1989).

1359 *Id.* at Syl. Pt. 6.

1360 332 S.E.2d 127 (W. Va. 1985).

> [t]he 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]

12. Declaratory Judgment Order

In *Cox v. Amick*,[1362] Justice McHugh held that "[a] circuit court's entry of a declaratory judgment is reviewed de novo."[1363]

13. Plenary Review of Circuit Court Findings and Conclusions

Justice McHugh indicated in *Burgess v. Porterfield*[1364] that "[t]his 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]

14. Education and State Employees Grievance Board Ruling

In *Quinn v. West Virginia Northern Community College*,[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]

15. Decision of Board of Law Examiners

Justice McHugh wrote in *Matter of Dortch*[1368] that

> [t]his 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

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1361 *Id.* at Syl. Pt. 1.

1362 466 S.E.2d 459 (W. Va. 1995).

1363 *Id.* at Syl. Pt. 3.

1364 469 S.E.2d 114 (W. Va. 1996).

1365 *Id.* at Syl. Pt. 4.

1366 475 S.E.2d 405 (W. Va. 1996).

1367 *Id.* at Syl.

1368 486 S.E.2d 311 (W. Va. 1997).

> 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]

H. Notice of Plain Error

Justice McHugh held in *State v. Hutchinson*[1370] that

> [a]lthough 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 truth-finding function of the trial.[1371]

I. Moot Issues

Relying on *State ex rel. M.C.H. v. Kinder*,[1372] Justice McHugh held in *State ex rel. J.D.W. v. Harris*[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]

J. Withdrawal of Counsel

Justice McHugh indicated in *Summers County Citizens League, Inc. v. Tassos*[1375] that "[a]n 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

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1369 *Id.* at Syl. Pt. 2.

1370 342 S.E.2d 138 (W. Va. 1986).

1371 *Id.* at Syl. Pt. 2.

1372 317 S.E.2d 150 (W. Va. 1984).

1373 319 S.E.2d 815 (W. Va. 1984).

1374 *Id.* at Syl. Pt. 1.

1375 367 S.E.2d 209 (W. Va. 1988).

appellate court comes too late and usually will be disregarded."[1376]

K. Recusal of Justice

Justice McHugh stated in *State ex rel. Hash v. McGraw*[1377] that

> [t]he 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]

L. Unpublished Opinions

Justice McHugh stated in *Pugh v. Workers' Compensation Commissioner*[1379] that "[u]npublished 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]

M. Interlocutory Orders

Justice McHugh stated in *State ex rel. Arrow Concrete Co. v. Hill*[1381] that "[o]rdinarily 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]

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] that "[m]andamus may be used to attack the constitutionality or validity of a statute

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1376 *Id.* at Syl. Pt. 1.

1377 376 S.E.2d 634 (W. Va. 1988).

1378 *Id.* at Syl. Pt. 2.

1379 424 S.E.2d 759 (W. Va. 1992).

1380 *Id.* at Syl. Pt. 3.

1381 460 S.E.2d 54 (W. Va. 1995).

1382 *Id.* at Syl. Pt. 2.

1383 376 S.E.2d 839 (W. Va. 1988).