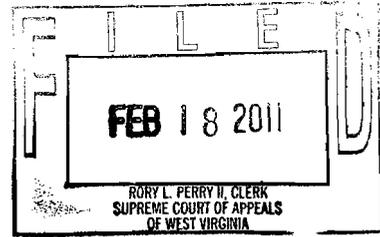


NO: 35761

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON



**WILLIAM R. HUGGINS and
DENISE L. HUGGINS, Plaintiffs Below,**

Appellants,

vs.

C.A. No. 09-C-135

**THE CITY OF WESTOVER SANITARY
SEWER BOARD, a public agency, THE
CITY OF WESTOVER, a municipal
corporation; and DAVE JOHNSON, Defendants Below.**

Appellees.

APPELLANTS' BRIEF

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1. KIND OF PROCEEDING AND NATURE OF THE RULING IN THE COURT BELOW

This is essentially a wrongful termination case involving the anti-discrimination provisions of the Workers' Compensation Act. William Huggins informed the Mayor of the City of Westover that he desired a transfer to a position with the City, and would leave his current position with the City of Westover Sanitary Sewer Board. Two weeks later he was injured on the job. Subsequent to that, the "resignation" from the Sewer Board was acted upon, but the transfer to the City never materialized. The Circuit Court of Monongalia County granted the Appellees' Motion for Summary Judgment on the premise that Huggins had not been discriminated against because he resigned; and there was no fraud, misrepresentation or breach of contract in failing to honor the transfer request. At the same time the Circuit Court also denied the Appellants' Motion for Partial Summary Judgment. That Order was entered on July 12, 2010.

2. STATEMENT OF THE FACTS OF THE CASE

For over twenty years William R. Huggins had been employed by either the City of Westover proper, or the City of Westover Sanitary Sewer Board (henceforth "Sewer Board"). His most recent job with either entity was as a working field supervisor for the Sewer Board. Sometime prior to October 14, 2008, Mr. Huggins approached the Appellee Dave Johnson — who was Mayor of the City of Westover and, by virtue of that position, Chairman of the Sanitary Sewer Board — about transferring to a job at the Westover city garage. Mayor Johnson requested that this be put in writing and Mr. Huggins complied. The letter was originally delivered unsigned. It stated in pertinent part "I would like to transfer to work at the garage and leave my position in the Sewer Department." (D.R. 8) Eventually, at the Mayor's request, this letter was signed on or about November 21, 2008.

(D.R. 565) In the interim, though, two events occurred. First, on October 27, 2008, Mr. Huggins suffered an on-the-job injury at his job with the Sewer Board. He was placed on Workers' Compensation for this injury. (D.R. 209) Second, on November 12, 2008, the Sewer Board chose to act on the "resignation" component of the October 14, 2008, letter and Mr. Huggins' employment was terminated. The Huggins did not learn of the complete rupture of Mr. Huggins' employment affiliation with either the City or its Sewer Board until they received a notice dated December 15, 2008 from the City of Westover's insurance carrier informing them that their health insurance coverage had been terminated effective November 12, 2008. (D.R. 7)¹ Huggins' counsel immediately wrote Mayor Johnson informing him of the violation of the Workers' Compensation Act which had occurred when Mr. Huggins' insurance coverage was terminated while he was on Worker's Compensation. This resulted in a response that Mr. Huggins was no longer an employee, as he had resigned. A later attempt to have the Sewer Board reinstate Mr. Huggins was met with the same response: "Mr. Huggins has resigned from his employment." In fact, throughout the lawsuit the Appellees consistently took the position that Mr. Huggins had resigned; that there had been no *quid pro quo* of a transfer; and, that the City of Westover and the Sewer Board were completely separate legal entities so that it was ridiculous to contend that a transfer could even be arranged.² However,

¹The Sewer Board employees were insured under the City's health plan. The Huggins had made payments for their share of the premium on November 14, 2008 and December 2, 2008. (D.R. 47-48) Their payments were not questioned at the time, and they did not receive a reimbursement until December 12, 2008. (D.R. 46)

² For example, compare paragraph 24 of the Complaint ("Mr. Huggins had an agreement with The City on the basis of negotiations with its agent, the defendant Johnson, to be employed at The City garage...")(D.R. 4) , and Defendants' Answer thereto ("Defendants deny the allegations contained in paragraph 24 of Plaintiffs' Complaint; and demand full and strict proof thereof.")(D.R. 12 - 13) See also Defendants' Answers to Interrogatories (e.g. "Williams Huggins could not transfer from the Sewer Board to the city of Westover Garage since they are separate legal entities...Mayor Johnson cautioned Mr. Huggins that there was no city position available, if he were to resign. Mayor Johnson also informed Mr.

the official recording of the Sewer Board's November 12, 2008 meeting contained the following discussion on the record:

* * * * *

Mayor Johnson: This next one we can probably do this in one motion. I will explain to you what's going on. Our current working field supervisor has completely fell apart. He's hurt now. He's off work. He doesn't no longer wants.....Got some stress involved. Rick's aware of it. We have a letter. Did you put a copy of the letter in there, Robin?

Robin: Yes

Mayor Johnson: Ok. What we want to do is take him from his position in the Sewer Board. He's going to go back to the City. The City part of it I'll handle. But we want to bring his brother from the City to his position here. And actually, we're... If it was my... My guess is, we are probably better off. So, if we can deal with both of these issues at once. If we can get a ... If I can get a motion to accept the resignation and hire at the same time. We can do that at the same time. So we won't have to deal with it two times. So, I got a motion to that effect?

Steve Eby: Yes

Rick: I'll second.

Mayor Johnson: We got a motion and a second. Robin?

Robin: Mr. Panico?

Mr. Panico: Yes

Robin: Steve Eby?

Steve: Yes.

Robin: Mayor Johnson?

Mayor Johnson: Yes. I will take care of the City part of it. We're just going to trade workers is all we are going to do.

* * * * *

Huggins that the Mayor did not have unilateral power to hire city employees...") Interrogatory Answer No. 2 (D.R. 20-21)

Mr. Johnson never did “take care of it.” With the exception of one period of temporary employment lasting less than a month, Mr. Huggins has been unemployed since being released to return to work in May 2009.

3. ASSIGNMENTS OF ERROR RELIED UPON AND THE MANNER THEY WERE DECIDED BELOW

- A. The Court erred by ruling that Mr. Huggins had not been discriminated against in violation of the Workers’ Compensation Act.
- B. The Court erred by ruling that Mr. Huggins could not transfer from the Sewer Board to the City of Westover because they are separate legal entities.
- C. The Court erred by ruling that Mayor Johnson had not committed breach of contract, fraud, or misrepresentation, as these were questions of fact for jury determination.
- D. The Court erred by ruling that The Governmental Tort Claims and Insurance Reform Act barred many of Mr. Huggins’ claims as a matter of law.

4. POINTS AND AUTHORITIES RELIED UPON

A. Cases

Aetna Casualty & Surety Co. v. Federal Ins. Co. of New York, 148 W.Va. 160, 133 S.E.2d 770 (1963).....6,9

Aikens v. Debow, 208 W.Va. 486 (2000).....8

Folio v. City of Clarksburg, 221 W. Va. 397 (2007).....14

Hanks v. Beckley Newspapers Corp., 153 W. Va. 834, 172 S.E.2d 816 (1970).....9

Hanlon v. Chambers, 195 W. Va. 99 (1995).....5,6

Hannah v. Heeter, 213 W. Va. 704, 710 (2003).....12

Harrison v. Town of Eleanor, 191 W. Va. 611 (1994).....9

Powderidge Unit Owners Ass'n v. Highland Props., 196 W. Va. 692, 698 (1996).....9

State ex rel. Saylor v. Wilkes, 216 W. Va. 766, 775 (2005).....13

B. Statutes and Other Authorities

W. Va. Code § 23-5A-1.....6
W. Va. Code § 23-5A-2.....6
W. Va. Code § 23-5A-3.....7
W. Va. Code § 29-12A-7.....15
W. Va. Code § 29-12A-18.....15
W. Va. R. Civ. P. 56(c).....5

5. DISCUSSION OF LAW

A. Standard of Review

The Appellants urge this Honorable Court to apply the Standard of Review which was applied in *Hanlon v. Chambers*, 195 W. Va. 99 (1995):

When considering a circuit court's grant of summary judgment, this Court noted in Syllabus Points 1 and 2 of Jones v. Wesbanco Bank Parkersburg, W. Va., 460 S.E.2d 627 (1995):

"1. 'A circuit court's entry of summary judgment is reviewed de novo.' Syl. pt. 1, Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994).

"2. "'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.' Syllabus Point 3, Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York, 148 W. Va. 160, 133 S.E.2d 770 (1963)." Syllabus Point 1, Andrick v. Town of Buckhannon, 187 W. Va. 706, 421 S.E.2d 247 (1992).' Syl. pt. 2, Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994)."

A motion for summary judgment may not be granted unless the circuit court determines there is no genuine issue of material fact to be tried and the facts as to which there is no such issue warrant judgment for the moving party as a matter of law. See, e.g. W. Va. R.Civ.P 56(c). See generally Williams v. Precision Coil, Inc., W. Va., 459 S.E.2d 329 (1995); Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The burden of showing that no genuine factual dispute exists rests on the party seeking summary judgment; in assessing the record to determine whether there is a genuine issue as to any material facts, the circuit court is required to resolve all ambiguities and draw all factual inferences in favor of the party against whom summary judgment is sought. The inferences to be drawn from the underlying affidavits, exhibits, answers to interrogatories, and depositions must be viewed in the light most favorable to the party opposing the motion.

On a motion for summary judgment, neither a trial nor appellate court can try issues of fact; a determination can only be made as to whether there are issues to be tried. To be specific, if there is any evidence in the record from any source from which a reasonable inference can be drawn in favor of the nonmoving party, summary judgment is improper. As succinctly stated in both Peavy and Williams, in reviewing a grant of summary judgment, this Court is governed by the same principles and we review the record de novo.

Although we have said that Rule 56 of the West Virginia Rules of Civil Procedure applies equally to claims of discrimination, we suggested in Williams a cautious approach to summary judgment motions where issues of motive and intent must be resolved. In most discrimination cases, once a plaintiff's allegations and evidence create a prima facie case (showing circumstances that permit an inference of discrimination on an impermissible bias), unless the employer comes forward with evidence of a dispositive nondiscriminatory reason as to which there is no genuine issue and which no rational trier of fact could reject, the conflict between the plaintiff's evidence establishing a prima facie case and the employer's evidence of a nondiscriminatory reason reflects a question of fact to be resolved by the factfinder at trial. *See generally* Barefoot v. Sundale Nursing Home, 193 W. Va. 475, 457 S.E.2d 152 (1995).

Hanlon, pgs 105 -106.

B. The Court erred by ruling that Mr. Huggins had not been discriminated against in violation of the Workers' Compensation Act.

Three anti-discriminatory statutes are at issue in this case:

§ 23-5A-1. Discriminatory practices prohibited. No employer shall discriminate in any manner against any of his present or former employees because of such present or former employee's receipt of or attempt to receive benefits under this chapter.

§ 23-5A-2. Discriminatory practices prohibited; medical insurance. Any employer who has provided any type of medical insurance for an employee or his dependents by paying premiums, in whole or in part, on an individual or group policy shall not cancel, decrease his participation on behalf of the employee or his dependents, or cause coverage provided to be decreased during the entire period for which that employee during the continuance of the employer-employee relationship is claiming or is receiving benefits under this chapter for a temporary disability. If the medical insurance policy requires a contribution by the employee, that employee must continue to make the contribution required, to the extent the insurance contract does not provide for a waiver of the premium.

§ 23-5A-3. Termination of injured employee prohibited; re-employment of

injured employees. (a) It shall be a discriminatory practice within the meaning of section one [§ 23-5A-1] of this article to terminate an injured employee while the injured employee is off work due to a compensable injury within the meaning of article four [§§ 23-4-1 et seq.] of this chapter and is receiving or is eligible to receive temporary total disability benefits, unless the injured employee has committed a separate dischargeable offense. A separate dischargeable offense shall mean misconduct by the injured employee wholly unrelated to the injury or the absence from work resulting from the injury. A separate dischargeable offense shall not include absence resulting from the injury or from the inclusion or aggregation of absence due to the injury with any other absence from work.

Clearly, Mr. Huggins was a Sewer Board employee on October 27th — otherwise he would not have been on the job so as to sustain a Workers’ Compensation injury. Mr. Huggins was in fact an employee of the Sewer Board until November 12, 2008 — the date that the Board acted upon his “resignation” by affirmatively voting to accept it. This was over two weeks following Mr. Huggins’ work injury; and nearly one month after the date of his letter to Mayor Johnson. Mayor Johnson was aware of the injury and resulting Workers’ Compensation claim as evidenced by a November 3, 2008 memo he delivered to Brickstreet to the effect that they could not accommodate Mr. Huggins with modified duty. (D.R. 39 - 40) Furthermore, had Mr. Huggins’ supposed resignation taken effect prior to November 12, 2008 it would have seemed natural for the Mayor to inform Brickstreet that Mr. Huggins was not even employed by the Sewer Board anymore. It is clear that — even giving the benefit of the doubt to Mr. Johnson’s and the Sewer Board’s apparent contention that Mr. Huggins intended to leap into the ranks of the unemployed without the conditional assurance of subsequent re-employment with the City — Mr. Huggins was an employee of the Sewer Board on November 12th; and that his employment was put to an end by the vote of the Sewer Board.

Black’s Law Dictionary, Abridged 8th Edition, defines “terminate” as follows: “1. To put an end to; to bring to an end. 2. To end; to conclude.” In the specific context of “termination of employment” the *Black’s* definition is: “[t]he complete severance of an employer-employee

relationship.” There can be no doubt that: 1) Mr. Huggins employment was severed while he was on Worker’s Compensation; and 2) that the act of severance was the Sewer Board voting to accept what was at the very best — even from its perspective — an ambiguous statement of resignation. On November 11, 2008, Mr. Huggins was an employee of the Sewer Board. On November 12th, he was no longer employed. What accounts for this change in status? Only the action of the Sewer Board taken at the November 12th meeting. Thus, their action is what terminated the employment, and the benefits.

Finally, in assessing the Appellants’ Motion for Partial Summary Judgment, whether the Appellees Johnson and the Sewer Board terminated Mr. Huggins in violation of the Workers’ Compensation statute in this instance was not a question of fact, but one of law for the trial court to decide.³ “The determination of whether a defendant in a particular case owes a duty to the plaintiff is not a factual question for the jury; rather the determination of whether a plaintiff is owed a duty of care by a defendant must be rendered by the court as a matter of law.” Syllabus Point 5, *Aikens v. Debow*, 208 W. Va. 486 (2000). This entire question could be framed “even if Mayor Johnson believed that Williams Huggins had expressed an interest nearly one month earlier in an outright resignation, should he and the Sewer Board have done anything to further his separation from employment once he was on Workers’ Compensation?” The statutes in question are suggestive of a strong public policy protecting employees who have filed Workers’ Compensation claims; so that their insurance status and employment status should be totally off limits pending the resolution of the claim. The trial court should have determined, as a matter of law, that taking any action leading

³ On the other hand, the trial court’s assessment of the Defendants’ Motion for Summary Judgment most clearly involved a question of fact for jury determination (e.g., was Mr. Huggins’ October 14, 2008 letter a resignation, or a request for transfer after which he would have left his job with the Sewer Board?)

to a Worker's Compensation claimant's termination from employment while receiving benefits is illegal.

What the trial court did instead was grant the Appellees' Motion for Summary Judgment. This was improper because, unlike the Appellants' Motion for Partial Summary Judgment which was based on issues of law, a ruling on the Appellees' Motion entailed either deciding or overlooking several genuine issues of material fact. The law on summary judgments is 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." Syl. Pt. 3, *Aetna Casualty & Surety Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963). Furthermore, "A motion for summary judgment should be granted if the pleadings, affidavits or other evidence show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Syllabus, *Hanks v. Beckley Newspapers Corp.*, 153 W. Va. 834, 172 S.E.2d 816 (1970). *Harrison v. Town of Eleanor*, 191 W. Va. 611 (W. Va. 1994) Also, "[s]ummary judgment is not a remedy to be exercised at the circuit court's option; it must be granted when there is no genuine disputed issue of a material fact." *Powderidge Unit Owners Ass'n v. Highland Props.*, 196 W. Va. 692, 698 (1996) The trial court was presented with multiple "trialworthy" issues which made an award of Summary Judgment inappropriate:

1. The Court ruled "Mr. Huggins did not apply for any positions with the City." (D.R. 565) Yet, a jury should have been permitted to consider whether his written statement "I would like to transfer to work at the garage..." was not application enough; as well as consider whether a defense based on that contention was pretextual — particularly when considered in the light of the subsequent rebuff to his attempt to return to the

Sewer Board. (D.R. 186)

2. The Court ruled “...he voluntarily resigned from his employment in order to be available for another position.” (D.R. 567-568) Yet, a jury should have been permitted to consider whether his letter was not primarily a request for transfer — after which, quite naturally, he would have left his job at the Sewer Board.
3. The Court emphasized Mr. Huggins’ deposition testimony that the Sewer Board and the City are two separate entities and that there was no ordinance or policy that allowed for or permitted a transfer between the two. Yet, a jury should have been permitted to consider:
 - a. Mr. Huggins’s deposition testimony that he knew of instances where this had occurred (D.R. 216, Page 34);
 - b. The City of Westover Personnel Handbook (which also applies to the Sewer Board) as it states “Mayor/Council has the authority to appoint, promote, demote, transfer, suspend, and remove employees...” Also, “[w]hen an employee desires to transfer from one department to another it must be agreeable to both department heads involved and approved by the Mayor/Council.” (D.R. 486-487)
 - c. The circumstances of his brother David Huggins, who was an employee of the City, being hired to replace him as supervisor. Even though there is supposedly no connection between the entities, the job was posted internally on November 12th, with a deadline of November 17th (D.R. 408), but filled by the Sewer Board that very same day at the November 12th meeting. So much for being separate entities that are bound by procedural formalities which precluded the Appellant from being transferred to the City;
 - d. The November 12, 2008 meeting tape recording where Mayor Johnson twice confirmed that Mr. Huggins was going to return to the City, and stated “I will take care of the City part of it.” (D.R. 393 - 397, includes Exhibit 2 – attached audio CD of the November 12 hearing)

Unfortunately, and in error, the Circuit Court Judge apparently ignored this undisputed piece of evidence, and never let Mayor Johnson’s own words reach a jury. To be precise, in the meeting

tape Dave Johnson clearly confirmed what Mr. Huggins has been claiming all along: that the Mayor had assumed a duty to switch the Appellant's job from the Sewer Board to the City of Westover. Unfortunately, what happened was that the Appellant was injured and the letter which was to have facilitated his transfer was co-opted into an involuntary resignation and loss of benefits. The Appellee's own words refute the defense theory and the trial court's written findings of fact and conclusions of law. Yet, the trial court made no mention of this important piece of evidence in its Order.

C. The Court erred by ruling that Mr. Huggins could not transfer from the Sewer Board to the City of Westover because they are separate legal entities.

Here again, there were multiple issues of fact which should have precluded the trial court from awarding the Appellees' Summary Judgment Motion on the issues of "Breach of Contract/Fraud/Misrepresentation:"

1. The Court found that "Mr. Huggins testified that he knew city council would have to vote on this employment decision..." (D.R. 569) Yet — as stated above — a jury should have been permitted to decide the issue of fact presented by the Mayor/Council language in the Personnel Handbook, and the November 12 hearing tape.
2. The Court held "Plaintiff cannot prove fraud" and "Mayor Johnson did not unequivocally promise Huggins a transfer to the City of Westover." Yet, a jury should have determined the issue of fact presented by the Mayor's own testimony ("I told him that we could talk about [trading jobs with his brother], that I really didn't see a problem with it.") (D.R. 205-206, and D.R. 397, Exhibit 2 – attached audio CD of the November 12 hearing)

One other thing about the summary judgment award is troubling. The trial court ruled “[i]mportantly, even if Mr. Huggins had an agreement for employment, he could not have fulfilled his end of the arrangement.” (D.R. 569) And so, even in the face of an unambiguous intention to remain employed in some capacity, and unambiguous evidence of an employer who reneged on a commitment, Mr. Huggins is totally deprived of any remedy at all. That is not how our system of justice is supposed to operate. This Honorable Court has held:

...we are mindful that "for every wrong there is supposed to be a remedy somewhere." Sanders v. Meredith, 78 W.Va. 564, 572, 89 S.E. 733, 736 (1916). This Court has opined that "the concept of American justice . . . pronounces that for every wrong there is a remedy. It is incompatible with this concept to deprive a wrongfully injured party of a remedy[.]" O'Neil v. City of Parkersburg, 160 W.Va. 694, 697, 237 S.E.2d 504, 506 (1977) (citation omitted). See also Gardner v. Buckeye Sav. & Loan Co., 108 W.Va. 673, 680, 152 S.E. 530, 533 (1930) ("It is the proud boast of all lovers of justice that for every wrong there is a remedy.")

Hannah v. Heeter, 213 W. Va. 704, 710 (2003).

By parsing out each of Mr. Huggins claims individually (the Workers’ Compensation discrimination claims vs. the Breach of Contract/Fraud/Misrepresentation) and in isolation from the other, the trial court disregarded the totality of the circumstances which a reasonable jury could have interpreted as evidence that Mr. Huggins had been wronged. The trial court substituted its judgment for that of a jury by ruling that Mr. Huggins resigned even in the face of documents which clearly suggest otherwise. The court stated that it had “considered all papers of record” — but most notably the November 12, 2008 hearing tape is not even mentioned. Not only was this incontrovertible, direct evidence on a key issue of this case but, had the case been permitted to go to trial before a jury, it would also have been powerful evidence impeaching the defense’s theory of the case and the credibility of their witnesses.

D. The Court erred by ruling that Mayor Johnson had not committed breach of contract, fraud, or misrepresentation, as these were questions of fact for jury determination.

In addition to asserting violations of the Worker's Compensation Act, the Appellants also relied on common law principles of contract law, and fraud and misrepresentation. Mr. Huggins had been assured by Mayor Johnson that transferring from the Sewer Department to the City of Westover garage would not be a problem. The October 14, 2008 letter stating that he wanted to transfer to the City garage and leave his job with the Sewer Department was specifically prepared at Johnson's request. Mr. Huggins provided valuable consideration in the form of the "resignation" component of his letter being acted upon, but did not derive the benefit of the "transfer to work at the garage" component of the letter.

In contract formation a valuable consideration may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other. Consideration is an essential element of a contract. Consideration has been defined as some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by another. A benefit to the promisor or a detriment to the promisee is sufficient consideration for a contract."

State ex rel. Saylor v. Wilkes, 216 W. Va. 766, 775 (2005).

Mr. Huggins laid out the *prima facie* elements of a breach of contract claim with evidence consisting of the letter itself, of Mayor Johnson's deposition testimony that he did not see a problem with the transfer and, most importantly, Johnson's own statements at the November 12, 2008 meeting that the Huggins brothers were going to trade jobs. It was error for the Court to rule in favor of the Appellees as a matter of law in the face of this evidence. Similarly, the Appellants had also established the necessary elements for a claim based on fraud and misrepresentation.

"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 on it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied on it." Horton v. Tyree, 104 W.Va. 238, 242, 139 S.E. 737 (1927).¹ Syl. Pt. 1, Lengyel v. Lint, 167 W.Va. 272, 280 S.E.2d 66 (1981)." Syllabus Point 5, Kidd v. Mull, 215 W.Va. 151, 595 S.E.2d 308 (2004).

Syllabus Point 5, Folio v. City of Clarksburg, 221 W. Va. 397 (2007).

Here, all three elements were present:

1. Mayor Johnson told Huggins that being transferred from the Sewer Board to the City would not be a problem, and that he should provide him with a letter to that effect.
2. Obviously, Johnson had no intention of following through on his commitment after Huggins complained about his loss of insurance coverage.
3. Mr. Huggins has been left unemployed.

From the very outset, the Appellees have taken a position which is completely inconsistent with what transpired at the November 12, 2008 meeting; and which could also be interpreted as inconsistent with the key language in the October 14th letter. In fact, ever since the November 12, 2008 meeting all indications are that Mr. Johnson has been intent on severing all employment ties with Mr. Huggins, which was not the purport of the October 14, 2008 letter or what Johnson told the Sewer Board.

E. The Court erred by ruling that The Governmental Tort Claims and Insurance Reform Act barred many of Mr. Huggins' claims as a matter of law.

The Summary Judgment Order states "[P]laintiffs' claim for punitive damage is prohibited by statute." (D.R. 571) This is in reference to the Governmental Tort Claims and Insurance Reform Act, W. Va. Code § 29-12A-1 *et seq.* However, the prohibition as to punitive damages only pertains to the political subdivision — not the individual employee. W. Va. Code § 29-12A-7(a) is explicit

that: “[I]n any civil action involving a political subdivision or any of its employees as a party defendant, an award of punitive or exemplary damages against such political subdivision is prohibited.”(Emphasis added) Dave Johnson was a party defendant. There is no reason why the jury could not have interpreted Mayor Johnson’s actions as constituting wilful and malicious conduct for which a jury could award punitive damages.

Most importantly, the Governmental Tort Claims and Insurance Reform Act does not even apply in this case. W. Va. Code § 29-12A-18 provides:

This article does not apply to, and shall not be construed to apply to, the following:

(a) Civil actions that seek to recover damages from a political subdivision or any of its employees for contractual liability;

(b) Civil actions by an employee, or the collective bargaining representative of an employee, against his or her political subdivision relative to any matter that arises out of the employment relationship between the employee and the political subdivision;

(c) Civil actions by an employee of a political subdivision against the political subdivision relative to wages, hours, conditions, or other terms of his or her employment . . .

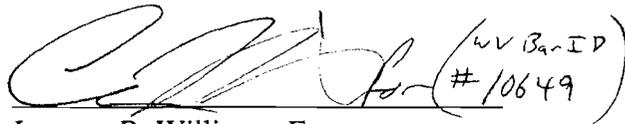
Because there was evidence from which a jury could find that Dave Johnson had acted wilfully and maliciously, and due to the further fact that Governmental Tort Claims and Insurance Reform Act does not even apply to this situation, the Trial Court committed error by relying on the Act as a basis for dismissing the Appellants’ civil action.

6. RELIEF REQUESTED

For these reasons, as well as others appearing from the record of this case, the Appellants request that the ruling by the Court below be reversed and the case remanded to the Circuit Court of Monongalia County with directions to enter an Order granting the Appellants’ Motion for Partial

Summary Judgment, and directing that a trial be conducted as to the remaining issues.

Respectfully submitted this 17th day of February 2011.



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CERTIFICATE OF SERVICE

I, Jacques R. Williams, counsel for appellants, hereby certify that on the 17th day of February, 2011, I have served a true copy of the foregoing "Appellants' Brief" upon the following person by depositing a true copy thereof in the United States Mail, postage pre-paid and addressed as follows:

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