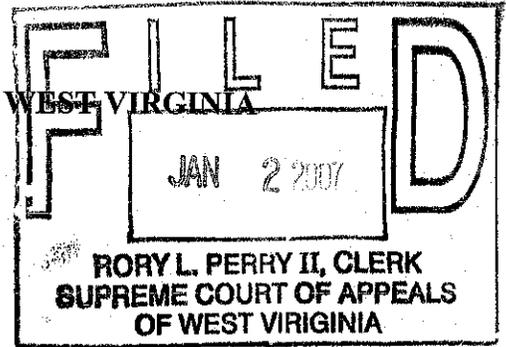


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 062410



**WEST VIRGINIA PHYSICIANS'
MUTUAL INSURANCE COMPANY,
a corporation**

Petitioner,

v.

ROBERT J. ZALESKI, M.D.,

Respondent.

AMICUS CURIAE BRIEF OF WEST VIRGINIA INSURANCE COMMISSIONER

Respectfully submitted,

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I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

The West Virginia Physicians' Mutual Insurance Company (hereinafter referred to as "the Mutual") recently filed a Petition for Appeal from an April 27, 2006 Order entered in *Robert J. Zaleski, M.D. v. West Virginia Physicians' Mutual Company*, pending in the Circuit Court of Ohio County, West Virginia, Civil Action No. 05-C-172. The case arose from the Mutual's decision not to renew the medical professional liability insurance policy of Dr. Robert Zaleski. The Court's April 27, 2006 Order reestablished the Ohio County Circuit Court's previous decision that the Mutual is a state actor and a quasi-public body and established a procedural mechanism that the Mutual must follow in non-renewing a professional liability insurance policy. Specifically, under the April 27, 2006 Order, the Mutual must provide an insured with the same opportunities for presentation of evidence and a hearing that the West Virginia Insurance Commissioner provides complainants under West Virginia Code § 33-2-13. Moreover, the Order grants a direct appeal from the Mutual to the Circuit Court in the county where the insured resides and states that the appeal shall not be made to the West Virginia Insurance Commissioner. The Order further finds that the West Virginia Insurance Commissioner has no jurisdiction over the Mutual with regard to the non-renewal of insurance policies due to the quasi-public nature of the Mutual.

Because the April 27, 2006 Order will have significant impact on the Office of the West Virginia Insurance Commissioner's regulation of the Mutual, the West Virginia Insurance Commissioner offers this Amicus Curiae brief to the Court and requests that this Court reverse the April 27, 2006 Order of the Circuit Court of Ohio County as unconstitutional.

II. STATEMENT OF FACTS

The West Virginia Insurance Commissioner (hereinafter referred to as "Insurance

Commissioner”) is a state employee appointed to a six year term by the Governor of the State of West Virginia, and is an administrative entity existing under the executive branch of the West Virginia government, with the mandatory obligation to promulgate and enforce rules and regulations necessary to discharge his or her duties under Chapter 33 of the West Virginia Code. *See*, W.Va. Code § 33-2-10. The Mutual is a West Virginia domestic, private, nonstock, nonprofit corporation, formed in 2004. Dr. Robert Zaleski is an orthopedic surgeon practicing in Wheeling, West Virginia, who had purchased a medical malpractice policy of insurance from the West Virginia Board of Risk and Insurance Management (hereinafter referred to as “BRIM”) providing coverage for claims made during the period from December 22, 2001 to December 22, 2004. *See*, the April 27, 2006 Order Granting Partial Summary Judgment to Plaintiff, at pg. 1, ¶1.

In July, 2004, Dr. Zaleski’s BRIM policy was transferred to the Mutual along with well over 1400 other medical professional liability policies. *Id* at pg. 1, ¶ 2. Prior to the end of the policy term and after investigation into his prior loss history and current professional training and experience, the Mutual determined him to be an unacceptable risk and declined to renew his policy. In September of 2004, the Mutual notified Dr. Zaleski that it would not be renewing his policy when it expired on December 22, 2004. *Id* at pg. 2, ¶3. Dr. Zaleski requested an appeal of the non-renewal of his policy by letter addressed to the Mutual dated September 23, 2004 and a hearing date was eventually agreed upon by the parties. *Id* at pg. 2, ¶5. Dr. Zaleski appeared in person before the Mutual’s Underwriting Committee, who heard evidence, questioned Dr. Zaleski and decided to uphold the decision to non-renew the policy at the end of the policy term. *Id* at pg. 5, ¶18.

Dr. Zaleski was notified of the decision by telephone the day after the hearing, as well as

by certified mail on November 12, 2004. *Id* at pg. 5, ¶20. In response, Dr. Zaleski sent a November 30, 2004 letter requesting that the Mutual provide a detailed explanation for his non-renewal. *Id* at pg. 5, ¶22. Dr. Zaleski shortly thereafter sent the Insurance Commissioner a formal complaint against the Mutual. *Id* at pg. 6, ¶23. The Insurance Commissioner forwarded Dr. Zaleski's complaint to the Mutual that same day, requesting a written response. *Id* at pg. 6, ¶24. The Mutual responded on December 15, 2005, setting forth its reasons for nonrenewal, which included multiple prior lawsuits against Dr. Zaleski. During discovery in the case, the Mutual indicated that the reasons for non-renewal also included a history of chemical and drug dependency. *Id* at pg. 5, ¶22.

After reviewing the merits of Dr. Zaleski's allegations, the Insurance Commissioner chose not to take administrative action against the Mutual because it did not appear that the Mutual had not violated any applicable statute or rule, and Dr. Zaleski was advised of this decision. *Id* at pg. 6, ¶26. After learning of the Insurance Commissioner's decision, Dr. Zaleski did not exercise his statutory right to appeal the Insurance Commissioner's decision to the Circuit Court of Kanawha County, instead choosing to file a civil suit in Ohio County, West Virginia, against the Mutual, alleging breach of the covenant of good faith and fair dealing, arbitrary and capricious conduct, breach of fiduciary duty, intentional infliction of emotional distress, and negligent infliction of emotional distress. *See*, the Complaint.

On April 27, 2006, the Ohio County Circuit Court issued a final and appealable order which reaffirmed its conclusion that the Mutual is a state actor; held that the Mutual, and not the Insurance Commissioner, owed Dr. Zaleski the procedure set forth under West Virginia Code § 33-2-13; and declared that Dr. Zaleski would have the right to appeal the Mutual's decision in either the Circuit Court for the county where he resided or in the Kanawha County Circuit Court,

pursuant to West Virginia Code § 33-2-14. See, the April 27, 2006 Order Granting Partial Summary Judgment to Plaintiff. Finally, the Ohio County Circuit Court ordered that the Mutual reinstate Dr. Zaleski's insurance coverage. *Id.*

III. ASSIGNMENTS OF ERROR

1. The Ohio County Circuit Court Erred by Failing to Require Plaintiff to Exhaust His Administrative Remedies under Chapter 33 of the West Virginia Code Prior to Filing Suit in Ohio County Circuit Court.

2. The Ohio County Circuit Court Erred by Attempting to Confer Jurisdiction Upon a Circuit Court Where No Such Jurisdiction Exists, in Violation of Article V, § 1 of the West Virginia Constitution and in Violation of the Separation of Powers Provision in the West Virginia Constitution.

IV. ARGUMENT

A. General Discussion of Law Relating to Nonrenewal of Medical Malpractice Insurance Policies.

Before discussing exhaustion of administrative remedies, it is helpful to review generally the law applicable to nonrenewal of medical malpractice insurance policies. While cancellation of a medical malpractice policy is restricted to a very few grounds¹, nonrenewal of such policies does not require the insurer to have a statutorily designated reason or reasons. Chapter 33 of the West Virginia Code further provides the insured with specific procedural rights with regard to mid-term policy cancellations. The insured must receive a written notice spelling out the reasons for the cancellation and informing the insured of the right to request a hearing before the

¹ Mid-term cancellation of medical malpractice policies must be based on one of the following: non-payment of premiums, material misrepresentation in the procurement of the policy, material violation of any terms of the policy, or the insurer's demonstrated inability to obtain reinsurance. See, W. Va. Code § 33-20C-2.

Insurance Commissioner. *See*, W. Va. Code § 33-20C-3. If a hearing is requested, the policy remains in effect until the Commissioner issues her order. *See*, W. Va. Code § 33-20C-5. The administrative hearing before the Commissioner is held in accordance with the process set forth in West Virginia Code § 33-2-13. Either party may appeal an adverse decision to the Circuit Court of Kanawha County. *See*, W. Va. Code § 33-2-14.

With respect to the nonrenewal of medical malpractice insurance policies, however, the only obligation imposed on the insurer is to send a written notice of the proposed action by certified mail at least ninety days prior to the policy's normal expiration date. *See*, W. Va. Code § 33-20C-4(a). This ability to non-renew, tempered only by the requirement that health care providers be given adequate time to secure other coverage, reflects the Legislature's recognition that medical malpractice insurers should be free to make their own underwriting decisions.² That the ability to nonrenew should apply to policies such as Dr. Zaleski's was made abundantly clear in the 2006 amendments to the statute governing the transfer of policies from BRIM:

On the transfer date:

(1) The company shall accept from the Board of Risk and Insurance Management the transfer of any and all medical liability insurance covering physicians, physician corporations and physician-operated clinics issued by the board pursuant to article twelve-b, chapter twenty-nine of this code: ***Provided, That the company may decline or refuse to renew any and all such contracts of insurance transferred to the company from the Board of Risk and Insurance Management upon the expiration of the respective terms of each contract of insurance so transferred and nothing in this section is intended to or shall be construed to otherwise obligate the company to accept, underwrite or renew any contract of insurance whatsoever.***

² The cancellation and nonrenewal of other types of insurance contracts are treated differently. For example, a property insurer may choose an option by which it may nonrenew homeowners' policies "for any reason consistent with its underwriting standards," but the number of nonrenewals in any year is limited to 1% of its policies in force in the state. *See*, W. Va. Code § 33-17A-4a. A homeowner whose policy is nonrenewed may protest to the Insurance Commissioner on a limited number of grounds that do not include the underwriting decision itself. *See also* W. Va. Code § 33-6A-4a (establishing a similar nonrenewal option for private passenger automobile insurance policies).

2006 W. Va. Acts c. 123 (codified at W. Va. Code § 33-20F-9(b)) (Emphasis added).³

B. Dr. Zaleski Failed To Exhaust The Required Administrative Remedies Afforded To Him Under Chapter 33 of the West Virginia Code Prior To Filing His Civil Suit Against the Mutual.

Having discussed the statutory requirements for nonrenewal of medical malpractice insurance policies, it is now appropriate to discuss the Insurance Commissioner's role in regulating the insurance industry and the rights afforded insureds who lodge complaints in her office against insurers. West Virginia Code § 33-2-3(a) requires the Insurance Commissioner to enforce the provisions of Chapter 33, which certainly includes the provisions discussed above relating to cancellation and nonrenewal of medical malpractice policies. *See*, W.Va. Code § 33-2-3. As part of her duties to enforce Chapter 33 of the West Virginia Code, the Insurance Commissioner is granted the power to handle Complaints filed with her Office by insureds against their insurance company. Specifically, under West Virginia Code § 33-2-13, the Insurance Commissioner may call and hold hearings for any purpose she considers necessary for the performance of her duties, and must hold hearings when required by Chapter 33 or upon a written request from a person who is aggrieved by an act or failure to act by the Insurance Commissioner or by any rule or order of the Insurance Commissioner. *See*, W. Va. Code § 33-2-13.

³ The 2006 amendments also deleted language cited by the Circuit Court in support of the proposition that the statute authorizing creation of the Mutual also created in Dr. Zaleski "an expectation of entitlement to continued coverage." In its September 22, 2005 order, the Court quoted the since amended version of West Virginia Code § 33-20F-9(f)(4), which then read as follows: "[The Mutual may] Except with respect to policies transferred from the Board of Risk and Insurance Management under this section, refuse to provide insurance coverage for individual physicians whose prior loss experience or current professional training and capability are such that the physician represents an unacceptable risk of loss if coverage is provided." 2003 W. Va. Acts c. 147. The Insurance Commissioner submits that the original intent of this now deleted language was to clarify that the Mutual could make underwriting decisions but at the same time to ensure that nothing would interfere with the Legislature's goal of first transferring all policies and related liability from the State to the Mutual. After this one time novation on July 1, 2004, it is submitted that the intent was to thereafter allow the Mutual to treat all insureds the same with regard to subsequent renewal decisions, rather than develop two classes of insureds subject to entirely different underwriting criteria: Those whose policies transferred from the State and those whose prior coverage was provided by another private commercial carrier.

A complainant has the right pursuant to under West Virginia Code § 33-2-14 to appeal from the Insurance Commissioner “to the circuit court of Kanawha county, or the judge thereof in vacation, by presenting a written petition to such court or judge and mailing a copy thereof to the commissioner.” See, W.Va. Code § 33-2-14 (Emphasis added).

In the instant case, after the Mutual declined to renew Dr. Zaleski’s policy, he filed a formal complaint against the Mutual with the West Virginia Insurance Commissioner, an act consistent with his available administrative remedies under Chapter 33 of the West Virginia Code. However, Dr. Zaleski then strayed from the procedures of Chapter 33 after the Insurance Commissioner’s Office determined that the Mutual had not violated any applicable rules or statutes in its decision not to renew the policy. Chapter 33 of the West Virginia Code provides Dr. Zaleski with certain rights through the Office of the Insurance Commissioner, including the right to appeal a decision of the Commissioner to the Circuit Court of Kanawha County. However, instead of following this appellate protocol, Dr. Zaleski chose not to exercise his statutory right of appeal when the Insurance Commissioner declined to take administrative action against the Mutual, but to bring a separate civil action against the Mutual for money damages. Since Dr. Zaleski failed to exhaust his administrative appellate remedies under Chapter 33 of the West Virginia Code, he should be precluded from bringing a civil claim for damages against the Mutual in Ohio County.

In West Virginia, “the general rule is where [an] administrative remedy is provided by statute or by rules and regulations having force and effect of law, relief must be sought from [the] administrative body, and such relief must be exhausted before courts will act.” *Crowie v. Roberts*, 173 W. Va. 64, 66 312 S.E.2d 35, 38 (1984). Even if an administrative body has concurrent jurisdiction with the Circuit Court, the choice by the plaintiff of administrative action requires him to exhaust his administrative remedies before the Circuit Court will act. *FMC*

Corp. v. West Virginia Human Rights Comm'n, 184 W. Va. 712, 718, 403 S.E.2d 729, 735 (1991). As such, if an individual seeks administrative relief of matters with the Insurance Commissioner, the individual should exhaust the administrative relief available to him before a Circuit Court will have the appropriate subject matter jurisdiction to act.

In the instant case, Dr. Zaleski filed a Complaint with the West Virginia Insurance Commissioner on December 8, 2004. The West Virginia Insurance Commissioner gathered information from the Mutual upon which its nonrenewal decision was based and reviewed the applicable statutes. The Insurance Commissioner concluded, based upon the allegations set forth in Dr. Zaleski's complaint, that the Mutual had violated no applicable statute or rule and administrative action against the Mutual was not appropriate. Pursuant to W.Va. Code St. R. § 114-13-3.1, "*[t]he commissioner shall hold hearings when required by law or upon a written demand therefore by a person claiming to be aggrieved by any act or failure to act by the commissioner or by any rule or order of the commissioner.*" (Emphasis added). As such, the insurance regulations clearly provide Dr. Zaleski with the option of seeking a hearing for the commissioner's failure to take further action on his Formal Complaint.

Under W.Va. Code St. R. § 114-13-3.3, had Dr. Zaleski asked for a hearing and had the commissioner refused to provide one, Dr. Zaleski had the right to appeal the decision to the Kanawha County Circuit Court pursuant to West Virginia Code § 33-2-14⁴. Further, under West

⁴ Specifically, W.Va. Code St. R. § 114-13-3.3 states as follows:

Hearing on written demand.--When the commissioner is presented with a demand for a hearing as described in subsections 3.1 and 3.2 of this section, he or she shall conduct a hearing within forty-five (45) days of receipt by him or her of such written demand, unless postponed to a later date by mutual agreement. *However, if the commissioner shall determine that the hearing demanded:*

a. Would involve an exercise of authority in excess of that available to him or her under law; or

Virginia Code § 33-2-14, Dr. Zaleski could appeal any decision of the West Virginia Insurance Commissioner after a hearing to the Kanawha County Circuit Court. Likewise, the decision of the Kanawha County Circuit Court can be appealed to the West Virginia Supreme Court of Appeals pursuant to West Virginia Code § 33-2-14. Dr. Zaleski was obviously familiar with his administrative remedies under Chapter 33 of the West Virginia Code, as he had in fact begun the administrative process before the Insurance Commissioner by filing his formal Complaint against the Mutual. However, he then changed his mind and decided to eschew his right to appeal the Insurance Commissioner's decision to the Circuit Court of Kanawha County in favor of filing a civil suit in Ohio County.

C. **The Ohio County Circuit Court's April 27, 2006 Order Is Unconstitutional And Should Be Set Aside Because it was an Invasion By the Judiciary Into the Purview of the Executive Branch of Government.**

The West Virginia Insurance Commissioner is an administrative agency under the executive branch with the mandatory duty to promulgate and enforce rules and regulations necessary to discharge his or her duties. *See*, W.Va. Code § 33-2-10. *See also*, *Meadows v. Hechler*, 462 S.E.2d 586, 590, 195 W.Va. 11, 15 (1995)(holding that “[w]hen the Legislature delegates its rule-making power to an agency of the Executive Department ... it vests the Executive Department with the mandatory duty to promulgate and enforce rules and regulations.”) In other words, the Insurance Commissioner is vested with the power to promulgate insurance regulations and is charged with enforcement of insurance statutes and regulations.

The April 27, 2006 Order of the Ohio County Circuit Court is void because it violates

b. Would serve no useful purpose, the commissioner shall, within forty-five (45) days of receipt of such demand, enter an order refusing to grant the hearing as requested, incorporating therein his or her reasons for such refusal. Appeal may be taken from such order as provided in W. Va. Code § 33-2-14. (Emphasis added)

Article V, § 1 of the West Virginia Constitution by mandating that an insurer step into the shoes of the Insurance Commissioner and provide a hearing as described in Chapter 33 of the West Virginia Code prior to non-renewal of an insured's policy, and by bestowing upon an insured the right to appeal the insurance company's nonrenewal decision directly to a specific Circuit Court.

Article V, § 1 of the West Virginia Constitution addresses the Division of Powers amongst the separate branches of government and states that "[t]he legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers belonging to either of the others;" *See*, W.Va. Const. Art. V § 1. West Virginia courts have consistently upheld this constitutional provision, citing that the Separation of Powers Provision precludes a court "from exercising administrative duties relating to the executive branch." *Lambert v. Cortellessi*, 182 W. Va. 142, 147, 386 S.E.2d 640, 646 (1989). *See also*, *State ex rel. Canterbury v. County Court*, 151 W.Va. 1013, 1019, 158 S.E.2d 151, 156 (1967). As such, pursuant to the West Virginia Constitution, the Ohio County Circuit Court may not exercise administrative duties of the West Virginia Insurance Commissioner, nor may the Circuit Court determine that the Insurance Commissioner has no jurisdiction over nonrenewal decisions made by a company that she is charged with regulating.

The Insurance Commissioner has general powers to enact all necessary regulations to discharge his or her duties under West Virginia Code § 33-2-10. Further, West Virginia Code § 33-2-3 requires the Commissioner to enforce the provisions in Chapter 33 of the West Virginia Code, and West Virginia Code § 33-20C-4 specifically deals with the nonrenewal of medical malpractice insurance policies. Finally, West Virginia Code § 33-2-13 provides a procedural mechanism for appeal that the Insurance Commissioner affords individuals who have lodged complaints in her office against insurance companies. Therefore, the legislature has

bestowed upon the executive branch, through the Commissioner, the right to enforce statutes regarding the nonrenewal of medical malpractice insurance policies and to establish regulations and enforce the procedural mechanism provided to individuals for specified matters falling under Chapter 33 of the West Virginia Code.

In this case, the Ohio County Circuit Court violated the Separation of Powers Provision by ordering that the Mutual owes the same procedural mechanism to Dr. Zaleski that the Insurance Commissioner provides to a complainant under West Virginia Code § 33-2-13, and that the Insurance Commissioner may not provide a remedy for Dr. Zaleski through the same administrative process. By specifically holding that the procedural mechanism must be provided by the Mutual (and not the Insurance Commissioner) and that Dr. Zaleski must appeal from the Mutual directly to a Circuit Court, the Commissioner is effectively deprived of jurisdiction over the matter, which it was specifically granted by Chapter 33 of the West Virginia Code.

Even if the actions of the Ohio County Circuit Court were not an invasion into the purview of the executive branch of the West Virginia government, West Virginia case law is clear that jurisdiction cannot be conferred from one Circuit Court to another. In *Lipsomb v. Tucker County Com'n*, 197 W. Va. 84, 475 S.E.2d 84 (1996), the Court set forth the well established rule that:

“It is the general rule that “[a]ppellate jurisdiction is derived from the constitutional or statutory provision by which it is created, and can be acquired and exercised only in the manner prescribed.” *State v. Legg*, 151 W.Va. 401, 151 S.E.2d 215 (1966) (quoting 4 Am.Jur.2d, Appeal and Error, § 4). The *Legg* Court was referring to the appellate jurisdiction of this Court; however, this rule is equally applicable to the circuit courts under the authority of Article VIII, § 6 of the Constitution of West Virginia, wherein certain jurisdictional authorities are enumerated and the provision is made that the “[c]ircuit courts shall also have such other jurisdiction, authority or power, original or appellate or concurrent, as may be prescribed by law.”

Simply put, the West Virginia Constitution does not grant a Circuit Court the right of

appeal directly from an insurance company, and no statute grants the right. In the instant case, the Circuit Court of Ohio County has attempted to grant another Circuit Court jurisdiction to hear future appeals from a decision of the Mutual, stating that the Mutual's decision must be appealed directly to the Circuit Court in the insured's town of residence or to the Circuit Court of Kanawha County. However, no such remedy is afforded Dr. Zaleski through statute or case law, and no such authority is bestowed in a Circuit Court.

The April 27, 2006 Order of the Ohio County Circuit Court violates Article I of the West Virginia Constitution by invading the province of the executive branch of our government. As such, the April 27, 2006 Order must be set aside, as it offends the Separation of Powers doctrine adopted by the West Virginia Constitution.

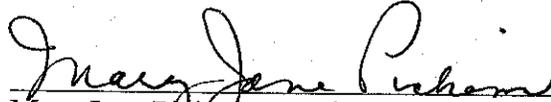
V. CONCLUSION

If upheld by the Court, the April 27, 2006 Order would become the law for any other doctor bringing a similar action against the Mutual in the future, which would effectively limit the Commissioner's regulation of the Mutual. The Legislature has directed that the Insurance Commissioner regulate the insurance industry and adopt rules to discharge her duties and to protect and safeguard the interests of policyholders and the public of this State. *See*, W. Va. Code § 33-2-10. It is a vitally important job when one considers the significant role played by insurance in our personal and professional lives. As such, the Insurance Commissioner must be allowed to hear complaints relating to the Mutual and to take action relating to those complaints pursuant to the procedures established in Chapter 33 of the West Virginia Code and applicable rules.

VI. RELIEF PRAYED FOR

WHEREFORE, the West Virginia Insurance Commissioner's Office files this Amicus Curiae brief with the Supreme Court of Appeals of West Virginia to preclude violations of the separation of powers doctrine and specifically for an Order striking the April 27, 2006 Order of the Circuit Court of Ohio County, and for any other relief this Court deems appropriate.

Respectfully submitted,



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Petitioner,

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ROBERT J. ZALESKI, M.D.,

Respondent.

CERTIFICATE OF SERVICE

I, Mary Jane Pickens, Esquire, counsel for the West Virginia Insurance Commissioner, do hereby certify that I served the foregoing, "Amicus Curiae Brief" upon the following counsel of record by depositing the same in the United States Mail, first class and postage pre-paid this 2nd day of January, 2007:

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