

BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

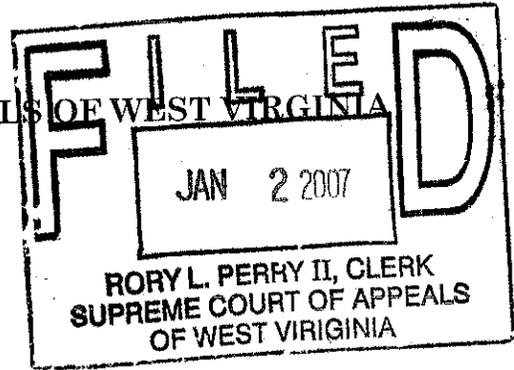
WEST VIRGINIA PHYSICIANS'
MUTUAL INSURANCE COMPANY,
a corporation,

Appellant,

v.

ROBERT J. ZALESKI, M.D.,

Appellee.



APPEAL NO. 33242

APPELLANT'S, WEST VIRGINIA PHYSICIANS'
MUTUAL INSURANCE COMPANY, BRIEF IN SUPPORT OF APPEAL

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I. INTRODUCTION

The Appellant, West Virginia Physicians' Mutual Insurance Company ("the Mutual"), by counsel, D.C. Offutt, Jr., Perry W. Oxley, Jody M. Offutt, and Offutt, Fisher & Nord, pursuant to Rule 10 of the West Virginia Rules of Appellate Procedure, hereby submits the "Appellant's, West Virginia Physicians' Mutual Insurance Company, Brief in Support of Appeal," regarding Appeal No. 33242 of this matter. The Appellant, the Mutual, appeals from two Orders entered by the Honorable Judge Arthur M. Recht in the Circuit Court of Ohio County, West Virginia on April 27, 2006 and September 22, 2005. For the reasons set forth below, the Court should reverse the lower Court's decision granting partial summary judgment to Robert J. Zaleski, M.D. ("Dr. Zaleski"), denying the Mutual's motion to dismiss, denying the motion to set aside its September 22, 2005 ruling, and denying the Mutual's motion to dismiss or motion for summary judgment.

II. KIND OF PROCEEDING AND NATURE OF RULING BELOW

The Appellant, the Mutual, seeks relief from the lower court's April 27, 2006 Order that granted partial summary judgment in favor of the Appellee, denied the Mutual's motions to dismiss, and denied the Mutual's Motion to Set Aside the Court's September 22, 2005 Order. Further, the Mutual seeks relief from the September 22, 2005 Memorandum of Opinion and Order granting Dr. Zaleski partial summary judgment and denying the Mutual's motion to dismiss or motion for summary judgment.

III. STATEMENT OF CASE

The Mutual is a West Virginia domestic, private, nonstock, nonprofit corporation, formed in 2004 in response to the State's "medical liability insurance crisis." In 2001, the West Virginia Legislature declared there was a "nationwide crisis in the field of medical liability insurance" which was "particularly acute in this State due to the small size of the insurance market." W. VA. CODE § 33-20F-2. To set the stage for formation of a physicians' mutual company, the Legislature took steps to "temporarily alleviate" the crisis by creating "programs to provide medical liability coverage through the board of risk and insurance management." *Id.*

On July 1, 2004, the Mutual accepted the transfer of all medical liability insurance obligations and risks associated with existing policies issued by the West Virginia Board of Risk Management ("BRIM"). W. VA. CODE § 33-20F-9(b)(1). As with any other insurer, the Mutual immediately had the right to decline to renew the policies of physicians whose prior loss experience or current training and capabilities created an unacceptable risk. W. VA. CODE §§ 33-20F-9(b)(1) and (f)(4).

Dr. Zaleski is an orthopedic surgeon in Wheeling, West Virginia. *See*, April 27, 2006 Order Granting Partial Summary Judgment to Plaintiff, at pg. 1, ¶1. He purchased a policy from BRIM providing coverage for claims made during the period from December 22, 2001 to December 22, 2004. *Id.* After Dr. Zaleski's BRIM policy was transferred to the Mutual along with all other BRIM physician policies, the Mutual reviewed his prior loss experience and current professional training and experience prior to the end of the policy term and determined that he represented an

unacceptable underwriting risk. Accordingly, Dr. Zaleski was notified, by certified letter dated September 8, 2004, that the Mutual would not renew his existing policy following its natural expiration 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. *Id.* at pg. 2, ¶5. The Mutual advised Dr. Zaleski, by certified letter dated October 4, 2004, that a hearing concerning his request would be held on October 9, 2004 in Charleston, West Virginia. *Id.* at pg. 2, ¶6. Dr. Zaleski advised the Mutual that he was unable to appear at the scheduled hearing. *Id.* at pg. 2, ¶7. As a result, the hearing was rescheduled for November 11, 2004. *Id.* at pg. 2, ¶8. The Mutual provided Dr. Zaleski with a thorough written description of the appeal process.¹ *Id.* at pg. 2-3, ¶ 9.

Dr. Zaleski appeared in person before the Mutual's Underwriting Committee, presented evidence, and responded to questions posed by Committee members. Dr. Zaleski's claim history revealed that 19 medical malpractice claims were asserted against him during his 25 years of practice, resulting in the payment of \$2,042,447 in indemnity settlements. *Id.* at pg. 3, ¶12. After considering Dr. Zaleski's appeal, the Mutual decided to uphold its decision. *Id.* at pg. 5, ¶18.

¹ The written description advised that: (1) coverage was declined by underwriting; (2) an appeal was requested by the Physician; (3) the Physician was requested to make a brief statement to the Underwriting Committee, could ask questions of the Committee, and could entertain questions from Committee members; (4) the Committee would review the application for coverage and the information gathered during the appeal and make a decision immediately following the Physician's appearance before the Committee; and (5) the Physician would receive a telephone call from a representative of the Committee the day following the appeal and a follow-up letter by mail. *See*, April 27, 2006 Order Granting Partial Summary Judgment to Plaintiff, at pg. 2, ¶9.

The decision not to renew Dr. Zaleski's policy was a rare decision by the Mutual. When the Mutual was created, 1,470 BRIM policies were transferred to it. *Id.* at pg. 5, ¶19. The Mutual renewed all but 20 of the original BRIM policies transferred to it when they came up for renewal. *Id.*

The decision not to renew Dr. Zaleski's policy was not based on the location of Dr. Zaleski's practice in Ohio County. The Mutual does not rate or underwrite any of its insureds based upon the location of the insured's residence or practice. *Id.* at pg. 4, ¶16. An analysis of medical malpractice claims against the Mutual's insured physicians reveals that patients in Ohio County are no more likely to file claims against their physicians than patients of physicians in other West Virginia counties. *Id.* at pg. 4-5, ¶17. In fact, the rate of claims per capita among the Mutual's insureds in Ohio County is only 0.12. *Id.* This compares to 0.12 for Kanawha, 0.16 for Raleigh, 0.14 for Wood, 0.13 for Greenbrier, and 0.17 for Jackson. *Id.* There are 14 West Virginia counties with rates higher than that of Ohio County. *Id.*

The Underwriting Committee considered five appeals of decisions made by underwriting not to renew on the same day it considered Dr. Zaleski's appeal. *Id.* at pg. 5, ¶18. The Committee only upheld the decision not to renew Dr. Zaleski's policy and the policy of one other physician. *Id.* The decision to uphold the non-renewal of Dr. Zaleski's policy was unanimous. *Id.* 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.

By letter dated November 30, 2004, Dr. Zaleski requested that the Mutual

provide a detailed explanation for his non-renewal. *Id.* at pg. 5, ¶22. Before the Mutual had an opportunity to respond, Dr. Zaleski sent the Insurance Commissioner a letter he described as a “formal complaint.” *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. On December 15, 2004, the Mutual responded in writing, setting forth its reasons for nonrenewal which included the “frequency of lawsuits in his history.” *Id.* at pg. 5, ¶22. The Insurance Commissioner provided Dr. Zaleski with a copy of this letter the following day. *Id.* During discovery, the Mutual further indicated that the reasons for Dr. Zaleski’s non-renewal included “prior claims history and other factors including prior alcohol and/or chemical dependency.” *Id.*

The Insurance Commissioner chose not to take administrative action against the Mutual, stating “it does not appear that [the Mutual] has violated any applicable statute or rule,” and advised Dr. Zaleski of this decision. *Id.* at pg. 6, ¶26. Although Dr. Zaleski had the opportunity to request a hearing and appeal the Insurance Commissioner’s decision to the Circuit Court of Kanawha County, he chose not to do so. *Id.* at pg. 6, ¶28.

Instead, on April 4, 2005, Dr. Zaleski filed the instant action in the Circuit Court of Ohio County, West Virginia, asserting claims for 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*, Complaint. All of the claims asserted in Dr. Zaleski’s Complaint allegedly arose out of the Mutual’s decision not to renew his insurance policy. *Id.* The Complaint

demanded “judgment . . . for compensatory damages in an amount to be determined by a jury and to the extent that the jury may determine that the aforesaid acts constitute actual malice . . . punitive damages,” as well as “an award of attorneys’ fees and expenses, pre and post judgment interest and any other relief as determined by the Court.” *Id.* at pg. 6.

On June 1, 2005, the Mutual filed a Motion to Dismiss, or in the Alternative, Motion for Summary Judgment, based on the claims set forth in Dr. Zaleski’s Complaint. *See*, Motion to Dismiss, or in the Alternative, Motion for Summary Judgment. In response, Dr. Zaleski filed a Cross-Motion for Summary Judgment, which raised for the first time an allegation that the Mutual is a state actor, and as such, it owed him procedural due process under the Fourteenth Amendment of the United States Constitution and Article III, Section 10 of the West Virginia Constitution. *See*, Cross-Motion for Summary Judgment, pg. 6-16. Further, Dr. Zaleski’s Cross-Motion for Summary Judgment alleged that the Mutual failed to provide proper procedural due process in its decision not to renew his insurance policy. *Id.* On September 22, 2005, the Ohio County Circuit Court denied the Mutual’s Motion to Dismiss, or in the Alternative Motion for Summary Judgment. *See*, Memorandum of Opinion and Order. As part of the same September 22, 2005 Order, the Court converted Dr. Zaleski’s cross-motion into a Motion for Partial Summary Judgment and granted Dr. Zaleski partial summary judgment on the issue that the Mutual was a state actor. *Id.* at pg. 9.

Additionally, the Court ordered that the Mutual submit a procedure for affording

a non-renewed policyholder the right to contest a decision not to renew. *Id.* On January 16, 2006, the Mutual filed the "Proposed Mechanism for Review and Appeal of Decisions Not to Renew Insurance Policies Submitted on Behalf of the West Virginia Physicians' Mutual Insurance Company Under Protest." *See*, Proposed Mechanism for Review and Appeal of Decisions Not to Renew Insurance Policies Submitted on Behalf of the West Virginia Physicians' Mutual Insurance Company Under Protest. The Mutual set forth various objections, which included that the Ohio County Circuit Court improperly considered claims not asserted in the Complaint and granted relief not demanded in the Complaint. *Id.* at 1-2. Further, the Mutual raised the issue that the Court lacked subject matter jurisdiction, and the Court's action was premature without conducting an evidentiary hearing. *Id.* at 3-5. Finally, the Mutual again raised the objection that it was not a state actor, but even assuming for the sake of argument that it was a state actor, Dr. Zaleski was provided sufficient due process by the Mutual. *Id.* at 5-8. Additionally, pursuant to the Circuit Court's Order and under protest, the Mutual outlined a detailed procedural mechanism substantially the same as the one actually provided to Dr. Zaleski pursuant to W. VA. CODE § 33-2-14. *Id.* at 8-10.

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 owed Dr. Zaleski the procedure set forth under W. VA. CODE § 33-2-13, and declared that Dr. Zaleski would have the right to appeal to the circuit court where the insured resides or in the Kanawha County Circuit Court pursuant to W. VA. CODE § 33-2-14. *See*, April 26, 2006 Order Granting Partial Summary Judgment to Plaintiff.

Further, the Ohio County Circuit Court reaffirmed its denial of the Mutual's Motion to Dismiss/Motion for Summary Judgment. *Id.* at pg. 7, ¶7. Without the benefit of a hearing, the Circuit Court ordered that the Mutual reinstate Dr. Zaleski's insurance. *Id.*

In the same Order, the Ohio County Circuit Court denied the Mutual's Motion to Set Aside its September 22, 2005 decision based on Dr. Zaleski's insufficient pleadings under Rule 8 of the West Virginia Rules of Civil Procedure or to force Dr. Zaleski to amend his pleadings, and the court denied its Motion to Dismiss for lack of subject matter jurisdiction. *Id.* at pg. 8. The Circuit Court acknowledged and overruled the Mutual's arguments that it was not a state actor, that Dr. Zaleski received the appropriate legal procedure, and that the Circuit Court's Order was invading the purview of the West Virginia Insurance Commissioner's Office. *Id.* at pg. 9-10. Finally, the Ohio County Circuit Court overruled the Mutual's objection to the court deciding all the facts set forth in the Order without a hearing and denied Mutual's Motion to have a hearing to establish a factual record regarding the appropriate procedural mechanism. *Id.* at pg. 10. The Ohio County Circuit Court deemed its April 27, 2006 Order final and appealable pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure. *Id.*

IV. ASSIGNMENTS OF ERROR

1. The Ohio County Circuit Court committed reversible error by denying the Mutual's Motion to Dismiss for lack of subject matter jurisdiction because Dr. Zaleski

failed to exhaust his administrative remedies.

2. The Ohio County Circuit Court committed reversible error by denying the Mutual's Motion to Dismiss/Motion for Summary Judgment.

3. The Ohio County Circuit Court committed reversible error by improperly denying Mutual's motion to have the judgment set aside because the court considered claims not asserted in the Complaint and granted relief not demanded in the Complaint.

4. The Ohio County Circuit Court committed reversible error by granting partial summary judgment in violation of the Mutual's due process rights by refusing to conduct an evidentiary hearing and by failing to evaluate the prerequisites for injunctive relief.

5. The Ohio County Circuit Court committed reversible error by granting Dr. Zaleski's Cross-Motion for Summary Judgment after improperly determining that the Mutual's notice, hearing, or appeal procedure were inadequate and improperly determining that the Mutual was a state actor.

V. STANDARD OF REVIEW

In West Virginia, "a circuit court's entry of summary judgment is reviewed *de novo*." *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). In undertaking its review, the court will apply the same standard for granting summary judgment utilized by the circuit court. *Burless v. West Virginia Univ. Hosp.*, 215 W. Va. 765, 601 S.E.2d 85 (2004). A trial court's ruling on a motion to dismiss is also reviewed under a *de novo* standard. *Rhododendon Furn. & Design, Inc. v. Marshall*, 214 W. Va. 463,

590 S.E.2d 656 (2003). When reviewing a trial court's ruling on a motion to vacate a judgment, the standard is abuse of discretion. "A motion to vacate a judgment made pursuant to Rule 60(b) of the West Virginia Rules of Civil Procedure is addressed to the sound discretion of the court and the court's ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of discretion." *Toler v. Shelton*, 157 W. Va. 778, 204 S.E.2d 85 (1974).

VI. ARGUMENT

The circuit court's April 27, 2006 Order, mandating the Mutual to reinstate insurance to Dr. Zaleski and decreeing that Dr. Zaleski be granted a legislatively enacted procedural appeal process, cannot be supported under West Virginia law and must be reversed. The Mutual is a private insurer that owes Dr. Zaleski no greater procedural safeguards than those required of any other private medical malpractice insurer. Moreover, the circuit court granted this extraordinary equitable relief without Dr. Zaleski asserting the appropriate claim, requesting equitable relief, and without an evidentiary hearing in clear violation of West Virginia law. In order to reach this strained result, the Court was forced to violate Article 5, Section 1 of the West Virginia Constitution by invading the powers of the legislature in creating the right of appeal from a private insurer directly to the circuit court.

Additionally, the circuit court should have dismissed this case because it does not have subject matter jurisdiction over this claim. Even if the court had subject matter jurisdiction, the case should have been dismissed immediately because none of the claims actually asserted in Dr. Zaleski's Complaint can withstand a motion to

dismiss. If the lower court would have granted the motion to dismiss, it would never have reached the unjust and bizarre result reached in this case.

If not overturned, the circuit court's decision will have long lasting catastrophic effects on health care in West Virginia. The Mutual provides the vast majority of physicians in West Virginia with medical malpractice coverage without which they could not practice, and the procedural requirements placed on the Mutual will place it at a competitive disadvantage with other medical malpractice insurance carriers by forcing it to raise premiums to remain solvent. Increased premiums will lead to increased costs of health care for healthcare consumers, the inability of the Mutual to competitively insure low-risk physicians, and, in the long term, will affect the ability of the Mutual to survive in a competitive medical malpractice insurance environment. Clearly, the circuit court's decision has a profound impact on the Mutual and all West Virginia residents. With all this at stake, the Mutual was not even granted an evidentiary hearing to make a clear record on these issues. As set forth more fully below, this Court should reverse the lower court's Orders.

A. The Circuit Court Improperly Denied The Appellant's Motion to Dismiss Based on the Court Not Having Subject Matter Jurisdiction Over This Case.

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).² As such, if an individual seeks administrative relief of matters with the West Virginia Insurance Commissioner, the individual must exhaust the administrative relief available to him before a circuit court will have the appropriate subject matter jurisdiction to act.

In this case, Dr. Zaleski filed a Formal Complaint with the West Virginia Insurance Commissioner by way of a December 8, 2004 letter. The West Virginia Insurance Commissioner then conducted an investigation, and upon completion of the investigation, concluded that the Mutual had violated no statute or rule and no administrative action was 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 action on his Formal

² In *FMC*, the plaintiff filed a complaint with the Human Rights Commission. *FMC Corp. v. West Virginia Human Rights Comm'n*, 184 W. Va. 712, 714, 403 S.E.2d 729, 731 (1991). The employer appealed the Commission’s decision to the Circuit Court of Kanawha County. *Id.* On appeal, the plaintiff attempted to improperly amend her pleadings to add a cause of action for damages, which the circuit court refused. *Id.* at 717-18, 733-34. On appeal to the Supreme Court of Appeals of West Virginia, the circuit court’s decision was affirmed. *Id.* In affirming the lower court’s ruling, this Court noted a plaintiff may, as an alternative to filing a complaint with the Human Rights Commission, initiate an action in circuit court to enforce rights granted by the Commission. *Id.* at 718, 734. Thus, because the plaintiff chose to avail herself to the Commission rather than the filing a civil action in the circuit court, she could not pursue an action in circuit court. *Id.*

Complaint.

Under W. Va. Code St. R. § 114-13-3.3, if the commissioner would have refused to give him a hearing, Dr. Zaleski could have appealed the decision to the Kanawha County Circuit Court pursuant to W. Va. Code § 33-2-14.³ Further, under § 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 § 33-2-14. Dr. Zaleski had just begun the administrative process before the West Virginia Insurance Commissioner, and because there seems to be no limitation on the time to make a demand for a hearing, Dr. Zaleski could still file a written demand for a hearing with the Commissioner.

In this case, Dr. Zaleski chose to seek relief before the West Virginia Insurance

³ 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

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.

Commissioner, and by doing so, he availed himself to the Commissioner's jurisdiction until he exhausted all administrative remedies available to him. Pursuant to *Crowie* and *FMC*, Dr. Zaleski must exhaust his administrative remedies before the circuit court has subject matter jurisdiction over the matter. The circuit court improperly denied the Mutual's motion to dismiss for lack of subject matter jurisdiction in this case because Dr. Zaleski failed to exhaust his administrative remedies. As such, this Court should reverse the circuit court's decision and dismiss the case because the circuit court did not have subject matter jurisdiction over this matter.

B. The Circuit Court Improperly Denied the Mutual's Motion to Dismiss, or in The Alternative, Motion for Summary Judgment Because The Mutual Is Entitled to Judgment as a Matter of Law on Each of the Claims Asserted by Dr. Zaleski.

As a responsive pleading, the Mutual filed a Motion to Dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, or in the alternative, a Motion for Summary Judgment pursuant to Rule 56 of the West Virginia Rules of Civil Procedure. In essence, the Mutual filed a Motion to Dismiss as a responsive pleading, which should have been converted to a Motion for Summary Judgment. The claims asserted by Dr. Zaleski, however, should have been dismissed based upon purely legal grounds and the undisputed facts of this case.

1. Dr. Zaleski's Claim for Breach of the Covenant of Good Faith And Fair Dealing Should Have Been Dismissed By The Circuit Court Because An Insurer Owes No Such Duty in the Renewal Process.

"[T]he common law duty of good faith and fair dealing in insurance cases under our law runs between insurers and insureds and is based on the existence of a

contractual relationship.” *Elmore v. State Farm Mut. Auto. Ins.*, 202 W. Va. 430, 897, 504 S.E.2d 893, 434 (1998). The duty arises from an insurer’s duty to carry out its responsibilities under the contract. See, *Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W. Va. 323, 352 S.E.2d 73 (1986) (holding that the insurer has a common law duty of good faith extending to insured to settle property damage claim) and *Shamblin v. Nationwide Mut. Ins. Co.*, 183 W. Va. 585, 396 S.E.2d 766 (1990) (holding that insurer has a duty of good faith and fair dealing to settle claims within policy limits); See also, *Dvorak v. Amer. Family Mut. Ins. Co.* 508 N.W.2d 329, 332 (N.D. 1993) (holding that “the genesis of an insurer’s duty to negotiate in good faith is its contractual responsibilities to the insured, we conclude that the duty does not extend to injured claimants who have no contractual relationship with the insurer.”)⁴ In sum, the limits of the duty of good faith and fair dealing is the scope of the contractual duties between the insurer and insured.

In this case, Dr. Zaleski brought a claim for failing to renew a contract, which is an alleged duty based on failing to enter or continue a contractual relationship. If there is no contractual relationship between the parties mandating performance of a contract, there can be no duty of good faith and fair dealing. See, *Elmore v. State Farm Mut. Auto. Ins.*, 202 W. Va. 430, 897, 504 S.E.2d 893, 434 (1998) (holding that no duty exists between a third-party claimant and an insurer). With respect to the renewal of contracts, various other jurisdictions have reached this conclusion, which is implicit

⁴ *Dvorak* was cited approvingly in *Elmore*. See, *Elmore*, 202 W. Va. 430, 897-98, 504 S.E.2d 893, 434-35.

in the foundation of this common law doctrine.⁵ Because there is no duty under the subject policy of insurance to renew Dr. Zaleski following expiration of the policy period, there is no duty of good faith and fair dealing with respect to the decision of whether or not to renew his policy. As such, the circuit court improperly denied the Mutual's Motion for Summary Judgment.

2. There Is No Claim in West Virginia for Arbitrary and Capricious Conduct by an Insurer, And As Such, The Ohio County Circuit Court Improperly Denied The Mutual's Motion for Summary Judgment.

Dr. Zaleski's Complaint asserted that the Mutual's decision not to renew his policy was "arbitrary and capricious" as a cause of action for money damages. Specifically, under the count titled "Arbitrary and Capricious Conduct," Dr. Zaleski alleged the following paragraphs in his Complaint:

[25]. There is a special relationship between Physicians Mutual and doctors of the state of West Virginia because it was created by West Virginia's Legislature to provide available and affordable professional liability insurance and was funded in part by West Virginia Physicians.

[26]. Dr. Zaleski is advised and believes that many other physicians are insured by Physicians Mutual who have had more claims in the last ten years and/or whose insurers have paid out more in verdicts and settlements than what has been paid on behalf of Dr. Zaleski.

⁵ See, *Bakker v. Cont'l Cas. Ins. Co.*, 941 F. Supp. 828 (D.C.W.D. Ark. 1996) (the court upheld the insurer's motion to dismiss the plaintiff's claims of breach of contract of his professional malpractice insurance where the insurer chose to non-renew the policy); *Jou v. Med. Ins. Exch. of California*, 70 P.3d 662 (Haw. 2003) (granting the insurer's motion to dismiss the physician plaintiff's claims of breach of duty of good faith and fair dealing as well as bad faith in failing to renew his professional liability policy); *Coira v. Florida Med. Ass'n Inc.*, 429 So.2d 23 (Fla. App. Ct. 1983) (the court held that summary judgment in favor of the insurer was proper where an insured's original medical malpractice insurance policy expired and the insurer had neither a duty to renew nor an obligation to renew one).

[27]. Physicians Mutual's underwriting guidelines are arbitrary or were applied in an arbitrary and capricious manner with regard to Dr. Zaleski and resulted in a non-renewal of his policy.

[28]. As a direct and proximate result of the action and omissions of Physicians Mutual, Dr. Zaleski has sustained damages including, but not limited to, economic loss and litigation costs and expenses and annoyance, aggravation and inconvenience.

West Virginia does not recognize a cause of action for "arbitrary and capricious" conduct or even reference such a private cause of action in any case. Further, no West Virginia case has held against a private medical malpractice insurer or any other medical malpractice insurer for enacting or applying underwriting guidelines in an arbitrary or capricious manner. In fact, the Mutual cannot find case law that recognizes such a private cause of action in any state in the union. Moreover, Dr. Zaleski did not even raise the argument that such a private cause of action should be recognized as a claim by the circuit court in his Complaint. Nonetheless, the lower court erroneously allowed Dr. Zaleski to proceed. As such, the circuit court's ruling denying the Mutual's Motion for Summary Judgment should be reversed.

3. The Ohio County Circuit Court Improperly Denied The Mutual's Motion For Summary Judgment Because There Is No Fiduciary Duty Imposed Upon an Insurance Company to Renew An Insurance Contract.

"The fiduciary duty is '[a] duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person. It is the highest standard of duty implied by law[.]'" *Elmore v. State Farm Mut. Auto. Ins.*, 202 W. Va. 430, 897, 504 S.E.2d 893, 434 (1998) quoting, 434 Black's Law Dictionary 625 (6th

ed.1990). Further, in *Elmore*, the Court stated that “[a]s a general rule, a fiduciary relationship is established only when it is shown that the confidence reposed by one person was actually accepted by the other, and merely reposing confidence in another may not, of itself, create the relationship.” *Id. quoting*, 36A C.J.S. *Fiduciary* § 385 (1961).

West Virginia recognizes neither a fiduciary duty between an insurer and insured, nor a cause of action for breach of such a duty under any circumstances.⁶ More importantly, no insured reposes confidence upon an insurer concerning renewal of a policy that is accepted by the insurer under *Elmore*.⁷ Further, no duty exists at all concerning the decision to enter into a contractual relationship, and as such, there can be no fiduciary duty. Such a notion is counterintuitive because the insurer would be required to demand the lowest price on behalf of the insured, which would adversely effect its own adversarial interests in a contractual negotiation. Moreover, the idea of a fiduciary duty between two parties seeking to enter a contract offends the principle of freedom of contract, which is an essential part of our legal system. Therefore, because no fiduciary duty exists between an insured and insurer for the renewal of a contract, the circuit court should have granted the Mutual’s Motion for Summary

⁶ West Virginia seems to have yet to even establish precise elements of a cause of action for breach of fiduciary duty. *State ex rel Affiliated Const. Trade Found. v. Vieweg*, 205 W. Va. 687, 701, 520 S.E.2d 854, 868 (1999) (Workman, J. concurring). As such, there is clearly a question as to whether or not a claim for breach of fiduciary duty is actionable, but the Court does not need to reach this question as the Mutual does not have a fiduciary duty to renew an insurance contract.

⁷ An insurer may be required to undertake a duty by statute or regulation, but there is no statute or regulation for Medical Malpractice Insurers.

Judgment.

4. Dr. Zaleski Cannot Demonstrate Any of the Essential Elements of a Claim for Intentional Infliction of Emotional Distress Failure to Renew an Insurance Contract.

In *Travis v. Alcon Lab., Inc.*, 202 W. Va. 369, 375, 504 S.E.2d 419, 425, (1998),

the Court set forth the elements of intentional infliction of emotional distress as follows:

(1) conduct by the defendant which is atrocious, utterly intolerable in a civilized community, and so extreme and outrageous as to exceed all possible bounds of decency; (2) the defendant acted with intent to inflict emotional distress or acted recklessly when it was certain or substantially certain such distress would result from his conduct; (3) the actions of the defendant caused the plaintiff to suffer emotional distress; and (4) the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.

Id. In this case, Dr. Zaleski cannot meet any of the elements of intentional infliction of emotional distress for failure to renew an insurance contract.

Failing to renew a medical malpractice contract is obviously not conduct that is atrocious, utterly intolerable in a civilized community, and so extreme and outrageous as to exceed all possible bounds of decency. In *Travis*, the Court elaborated on this conduct by stating that “[g]enerally, the case is one in which the recitation of the facts to an average member of the community would arise his resentment against the actor, and lead him to exclaim, ‘Outrageous!’” *Id.* Further, in *Travis*, “[t]he liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.” *Id.* Clearly, even if improper, the decision by a medical malpractice insurer not to renew a policy is not “outrageous conduct.” Instead of being conduct that

is utterly intolerable in a civilized community, not renewing medical malpractice insurance is an absolute necessity to running a medical malpractice business and one specifically sanctioned by statute. As such, the conduct of the Mutual in not renewing Dr. Zaleski's contract is not outrageous conduct, and the circuit court should have granted the Mutual's Motion for Summary Judgment.

Additionally, by failing to renew Dr. Zaleski's insurance coverage, the Mutual did not intend to inflict emotional distress or recklessly disregard some risk of emotional distress when it declined to renew his insurance policy. Rather, it conducted business by evaluating the risks associated with insuring Dr. Zaleski, and as a result of the numerous claims made against him, concluded that renewal would present an unacceptable risk. Because the decision not to renew insureds is a part of the normal operation of a medical malpractice insurer, this act clearly cannot be construed as an intentional attempt to cause emotional distress or reckless disregard of the risk of emotional distress. Thus, the Mutual is also entitled to summary judgment on this element as a matter of law.

5. Dr. Zaleski Cannot Sustain a Claim for Negligent Infliction of Emotional Distress Under West Virginia Law for the Failure to Renew an Insurance Policy.

Under West Virginia law, a defendant may be subjected to liability on a theory of negligent infliction of emotional distress only where a plaintiff has experienced severe emotional distress after witnessing a close relative suffer "critical injury or death as a result of the defendant's negligent conduct, even though such distress did not result in physical injury, if the serious emotional distress was reasonably

foreseeable.” *Stump et al. v. Ashland Inc., et al.*, 201 W. Va. 541, 547, 499 S.E.2d 41, 47 (1997). Specifically, the Court in *Stump* held that the plaintiff must establish that he or she was closely related to the injury victim. *Id.* Second, the plaintiff must prove that he or she was located at the scene of the injury and was aware that the incident in question was causing injury to the victim. *Id.* Third, the plaintiff must prove that the victim was critically injured or killed. *Id.* Finally, the plaintiff must prove that he or she has suffered serious emotional distress. *Id.*

In the instant case, Dr. Zaleski cannot establish any of these elements, much less prove his claim. Simply put, the facts of this case do not show that Dr. Zaleski observed the critical death or injury of a close relative. Accordingly, his claim of negligent infliction of emotional distress is without merit, and should have been dismissed by the circuit court.

C. **The Ohio County Circuit Court Improperly Denied the Mutual’s Request to Have the Judgment Set Aside Because the Court Considered Claims Not Asserted by Dr. Zaleski in the Complaint and Granted Relief Not Demanded in the Complaint.**

Rule 8(a) of the West Virginia Rules of Civil Procedure provides, in pertinent part, “[a] pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several types may be demanded[.]” This rule provides considerable latitude in framing pleadings and permits claims to be plead alternatively or hypothetically, regardless of consistency. *Arnold v. West Virginia Lottery Comm’n*, 206 W. Va. 583, 526 S.E.2d 814

(1999).

If a complaint fails to set forth claims or demand relief which a plaintiff believes to be warranted, the plaintiff may amend the complaint or obtain the consent of opposing parties to try issues not raised therein. Pursuant to Rule 15(a) of the West Virginia Rules of Civil Procedure, “[a] party may amend . . . once as a matter of course at any time before a responsive pleading. . . . Otherwise a party may amend . . . only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.” W. VA. R. CIV. P. 15(a). Rule 15 affords significant flexibility in amending pleadings, but “does not entitle a party to be dilatory in asserting claims[.]” *Dunbar Fraternal Order of Police, Lodge #119 v. City of Dunbar*, 218 W. Va. 239, 243, 624 S.E.2d 586, 590 (2005); *State ex rel. Bd. of Educ. of Ohio County v. Spillers*, 164 W. Va. 453, 259 S.E.2d 417 (1979). Moreover, pursuant to Rule 15(b), a party may even amend its claims even after a trial to conform to the evidence, but the pleadings must be amended.⁸

Where the pleadings are not amended and the parties do not consent to trial of issues not raised therein, any judgment must determine only those issues set forth in

⁸ When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time. . . . ***If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy to the court that . . . such evidence would prejudice the party. . . .*** W. VA. R. CIV. P. 15(b) (emphasis added). Rule 15(b), however, does not apply in this case because there was no trial on the issues.

the pleadings. See, e.g., *Miller v. City of Morgantown*, 158 W.Va. 104, 107-08, 208 S.E.2d 780, 783 (1974). As a result, any judgment or verdict that does not bear a correlation to the issues brought forth in the pleadings must be set aside. See, 75B Am. Jur. 2d, *Trials*, § 1791.⁹

Dr. Zaleski's Complaint asserted claims for breach of the covenant of good faith and fair dealing, arbitrary and capricious conduct, breach of fiduciary duty, and intentional and negligent infliction of emotional distress. His Complaint neither asserted a claim under 42 U.S.C. § 1983, nor any other violations of the United States Constitution or the West Virginia Constitution, which are the traditional basis for the assertion of a claim based upon an alleged denial of due process. The Complaint also did not allege that the Mutual is a "state actor." Instead, the Complaint demanded "judgment . . . for compensatory damages in an amount to be determined by a jury and to the extent that the jury may determine that the aforesaid acts constitute actual malice . . . punitive damages."¹⁰ Nowhere in the Complaint did Dr. Zaleski request injunctive or other equitable relief.

⁹ For nearly two centuries, the Supreme Court of the United States has required that a verdict pertain only to the issues raised in pleadings, even where evidence exists to support the verdict. *Patterson v. U.S.*, 15 U.S. 221, 225 (1817). West Virginia courts have long followed the lead of the federal government in insisting that "evidence without proper pleadings will not support a verdict." *Minotti v. Gridelli*, 99 W. Va. 97, 100, 127 S.E. 913 (1925), quoting, *Lawson v. W.V. Newspaper Pub. Co.*, 126 W. Va. 470, 29 S.E.2d 3 (1944).

¹⁰ After being nonrenewed by the Mutual, Dr. Zaleski entered into an arrangement with Wheeling Hospital. Pursuant to the tax documents produced by Dr. Zalski in discovery, he earned Three Hundred Fifty Eight Thousand Five Hundred Dollars (\$358,500.00) in 2004 and Four Hundred Ninety Two Thousand Nine Hundred and Fifty One Dollars (\$492,951.00) in 2005. In other words, as a result of this nonrenewal 2004, Dr. Zaleski's income increased by One Hundred Forty Three Thousand Four Hundred Fifty One Dollars (\$143,451.00).

Notwithstanding the fact that the Complaint did not assert any constitutional violations, on September 22, 2005, the circuit court granted partial summary judgment on the issue of "state action." In its Order, the court cited the Fourteenth Amendment to the United States Constitution and Article III, Section 10 of the West Virginia Constitution. Perhaps even more troubling, in both its September 22, 2005 order and its December 14, 2005 order, the circuit court went about the unsolicited task of framing and implementing a procedural mechanism which the Mutual is to utilize with respect to nonrenewed insureds. The Complaint, however, sought only monetary damages, and the trial court was bound to limit the relief granted to the relief pled.

Moreover, pursuant to Rule 8, the Complaint was completely and utterly insufficient to support the circuit court's Order. Accordingly, the Mutual objected to the pleadings as insufficient and moved to have the judgment set aside. Despite this objection, Dr. Zaleski did not move to amend his pleadings. Instead, the Court simply denied the Mutual's Motion. Because Dr. Zaleski took no steps to amend his pleadings, the Mutual is entitled to have the judgment set aside because Dr. Zaleski failed to establish a claim under the United States or West Virginia Constitution and does not request equitable relief in his Complaint. As such, the Court committed error by failing to set aside the verdict without granting a motion for summary judgment.

D. The Ohio County Circuit Court Violated the Mutual's Due Process Rights by Refusing to Conduct an Evidentiary Hearing and Failing to Evaluate the Prerequisites for Injunctive Relief.

The issuance of injunctive relief is examined in light of the due process guarantees afforded by the state and federal constitutions. *UMW v. Waters*, 200 W. Va.

289, 489 S.E.2d 266 (1997). The circuit court violated the Mutual's due process rights by refusing to conduct an evidentiary hearing and granting Dr. Zaleski injunctive relief based vaguely upon "proposal submitted by the parties." The law imposes a variety of prerequisites upon the provision of injunctive relief, and none of those were satisfied in this case.

"Courts are extremely cautious in considering applications for and awarding mandatory injunction, and a clear right must be shown, and the case must be one of necessity of extreme hardship." *Lamp v. Locke*, 89 W. Va. 138, 108 S.E. 889 (1921). If an adequate remedy at law is available, then injunctive relief is inappropriate. *See, Hechler v. Casey*, 175 W. Va. 434, 440, 333 S.E.2d 799, 805 (1985). In determining whether to issue a preliminary injunction, courts are to balance four factors: (1) the likelihood that the plaintiff will suffer irreparable harm if an injunction is not issued, (2) the likelihood that the defendant will suffer harm if an injunction is issued, (3) the likelihood of the plaintiff's success on the merits, and (4) the public interest. *Jefferson County Bd. of Educ. v. Jefferson County Educ. Ass'n.*, 183 W. Va. 15, 24, 393 S.E.2d 653, 662 (1990), quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048, 1054 (4th Cir. 1985).¹¹ None of these factors were balanced by the lower court in this case.

Rule 65 of the West Virginia Rules of Civil Procedure provides that notice and a hearing are required prior to issuance of an injunction. W. VA. R. CIV. P. 65(a). Further, a preliminary injunction ordered without notice to the adverse party is void.

¹¹ Before a permanent injunction can be issued, the plaintiff must succeed on the merits of his or her claim. *See, e.g.*, 42 Am Jur. 2d, *Injunctions*, § 10.

State ex rel. E.I. duPont Nemours & Co. v. Hill, 214 W. Va. 760, 591 S.E.2d 318 (2003).

In addition, security is required for costs or damages that may be incurred or suffered by any party found to have been wrongfully enjoined. W. VA. R. CIV. P. 65(c). A court may grant an *ex parte* order for a preliminary injunction only where it clearly appears from specific facts shown by affidavit or verified complaint that immediate and irreparable harm will result to the applicant before the adverse party or his or her attorney can be heard in opposition. *Ashland Oil, Inc. v. Kaufman*, 181 W. Va. 728, 384 S.E.2d 173 (1989). Obviously, the evidentiary burden rests upon the party seeking injunctive relief. *Camden-Clark Mem'l Hosp. Corp. v. Turner*, 212 W. Va. 752, 575 S.E.2d 362 (2002).

In this case, the circuit court improperly denied the Mutual an evidentiary hearing. To go a step further, Dr. Zaleski did not submit facts at a hearing at all. As such, he could not meet the evidentiary burden of proving that injunctive relief was warranted under Rule 65. Moreover, the circuit court made no findings of fact or conclusions of law to support reinstating insurance or mandating an appeals procedure. Hence, the circuit court did not conduct an evidentiary hearing as required for Dr. Zaleski to meet the strict evidentiary burden to obtain a preliminary injunction. The denial of the Mutual's request for an evidentiary hearing under these circumstances violates its rights under Rule 65, the United States Constitution, and the West Virginia Constitution. Accordingly, the circuit court improperly denied the Mutual's motion for an evidentiary hearing.

E. The Ohio County Circuit Court Improperly Granted Dr. Zaleski's Motion for Summary Judgment for Lack of Procedural Due Process.

Assuming *arguendo* that the Mutual is a state actor and owed Dr. Zaleski procedural due process, the Mutual provided Dr. Zaleski with sufficient procedural due process. Article III, Section 10 of the West Virginia Constitution, requires procedural due process against State action which affects a liberty or property interest." *Waite v. Civil Serv. Comm'n*, 161 W. Va. 154, 241 S.E.2d 164 (1977). In order to have a property interest, "an individual must demonstrate more than an abstract need or desire for it." *Kessel v. Monongalia Co. Gen. Hosp.*, 215 W. Va. 609, 616, 600 S.E.2d 321, 328 (2004). Instead, an individual must have a "legitimate claim of entitlement to it under state or federal law. Additionally, the protected property interest is present only when the individual has a *reasonable* expectation of entitlement deriving from the independent source." *Id.* Although a property interest protected by due process must derive from a private contract or state law, it "must be more than a unilateral expectation of continued employment." *Id.* Similarly, a physician must show more than a unilateral expectation of the renewal of his or her malpractice insurance policy with a particular company after it expires.

This Court addressed a similar issue in *Mahmoodian v. United Hosp. Ctr., Inc.*, 185 W. Va. 59, 404 S.E.2d 750 (1991). In that case, the Court held that the denial or revocation of a physician's staff privileges by a private hospital is not subject to procedural due process protection. *Id.* Although *Mahmoodian* deals with the denial of staff privileges, it is instructive because it developed a common law right to a

procedural mechanism for judicial review of such decisions. Specifically, the Court determined that the decision of a private hospital to revoke, suspend, restrict, or to refuse to renew the staff appointment or clinical privileges of a medical staff member is subject to limited judicial review to ensure that the hospital substantially complied with its bylaws governing such a decision, and to ensure that the bylaws afford basic notice and fair hearing procedures. *Id.* at 64, 755. Because the potential revocation of medical staff privileges by a hospital is at least as important to a practicing physician as the nonrenewal of insurance coverage, the Court can look to the *Mahmoodian* procedural mechanism as sufficient procedure under the facts of the instant case.

In applying the same analysis set forth in *Kessel* and *Mahmoodian*, it becomes apparent that Dr. Zaleski was clearly afforded all appropriate procedural safeguards in connection with the nonrenewal of his insurance coverage. Dr. Zaleski was granted an appeal of the Mutual's decision, and was allowed to present evidence at a hearing on the matter. Dr. Zaleski then filed a Formal Complaint with the West Virginia Insurance Commissioner on December 15, 2004. The insurance commissioner specifically found that the Mutual had not "violated any applicable statute or rule."

Dr. Zaleski also had the right to ask for a hearing from the insurance commissioner and failed to do so. If he would have asked for a hearing, he would have been able to appeal the Commissioner's decision pursuant to W. VA. CODE § 33-2-14. Furthermore, Dr. Zaleski could have appealed the decision of the circuit court to this Court if he chose to. Instead, he relinquished his right to appeal the insurance commissioner's decision to circuit court, and filed a Complaint in circuit court alleging

various causes of action wholly unrelated to due process concerns. In other words, the facts of this case suggest that Dr. Zaleski failed to exercise all of the due process rights that he claims he is entitled to receive. Therefore, even if Dr. Zaleski had been entitled to the protections of due process in connection with the decision whether to renew his policy of medical liability insurance, these protections were fully afforded to him, and the Court improperly granted Dr. Zaleski summary judgment.

F. The Circuit Court of Ohio County Incorrectly Concluded That the Mutual Is a Quasi-Public Entity And Thus a State Actor for Purposes of Due Process Analysis.

In its Memorandum of Opinion and Order, entered September 22, 2005, the circuit court opined that the Mutual's non-renewal of Dr. Zaleski's policy should be deemed state action. In so concluding, the circuit court placed considerable emphasis on the public interests reflected in W. VA. CODE § 33-20F-2, such as ensuring the availability of quality medical care and adequate medical liability insurance coverage. The Mutual, however, respectfully submits that the circuit court overemphasized the public purposes set out in the legislative enactment that created the Mutual and failed to consider the extensive factual evidence and legal authority which demonstrate that the Mutual is a private insurance company and cannot fairly be considered a state actor subject to due process restrictions. Because the Mutual was not a state actor, the Mutual is only required to comply with the applicable insurance statutes and regulations concerning nonrenewal, and it does not owe Dr. Zaleski procedural due process under the United States Constitution or the West Virginia Constitution.

In determining whether the conduct of an entity may be attributed to the state,

courts utilize four tests. The first three, sometimes referred to as the “*Blum* trilogy,” are: (1) the public function test--whether the entity exercises powers traditionally reserved exclusively to the state, (2) the state compulsion test--whether the state has so coerced or encouraged the entity to act that the entity’s choice must be regarded as the state’s choice, and (3) the symbiotic relationship or nexus test--whether there is a sufficient nexus between the state and the challenged conduct of the entity so that the entity’s conduct may be fairly treated as the state’s conduct. *Blum v. Yaretsky*, 457 U.S. 991 (1982) *rev’d*, 531 U.S. 288 (2001) (reversed as to whether the Academy was a state actor, but not as to the tests). The fourth test, sometimes called the “pervasive entwinement” test, considers whether an entity is “entwined with governmental policies,” or whether the “government is ‘entwined in [the entity’s] management or control.’” *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295-98 (2001). This test further asks whether the “nominally private character” of the entity “is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings [such that] there is no substantial reason to claim unfairness in applying constitutional standards to it.” *Id* at 298.

Under the public function test, it is beyond question that the Mutual does not exercise powers traditionally reserved exclusively to the state. The provision of insurance in general, and the provision of medical liability insurance in particular, have historically been carried out by the private sector. In fact, prior to the creation of BRIM II, which was only a temporary effort to alleviate a crisis, the provision of

medical liability insurance in West Virginia was traditionally carried out exclusively by the private market. Clearly, then, the public function test is not satisfied in this case.

Second, under the state compulsion test, it cannot be argued that the state coerced or encouraged the Mutual such that the Mutual's choice must be regarded as the state's choice. While the Mutual was required to accept transfers of policies from BRIM, the Mutual had full authority to decline to renew such policies upon their expiration and to establish underwriting criteria to be applied in making coverage decisions. W. VA. CODE § 33-20F-9(f)(1)-(4). Furthermore, the state does not control or influence the Mutual's underwriting decisions. The Supreme Court of the United States has held that a company's exercise of choice sanctioned by state law does not constitute state action, where the initiative comes from the company and not the state. *See e.g., Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). The Mutual's choice not to renew Dr. Zaleski's policy was an exercise of discretion sanctioned by West Virginia law, but in no way was that decision initiated or influenced by the state. Accordingly, the decision cannot rightfully be characterized as state action.

Third, under the symbiotic relationship or nexus test, there is an insufficient nexus between the state and the conduct of the Mutual; therefore, the conduct of the Mutual cannot fairly be treated as the conduct of the state. The state exercises no control and exerts no influence over the Mutual's conduct in connection with the issuance, non-renewal, or cancellation of policies of medical liability insurance, aside from the ordinary legislative mandates applicable to all insurers doing business in

West Virginia. The only nexus between the State of West Virginia and the conduct of the Mutual consists of the legislation facilitating the creation of the Mutual, which by its own terms mandates that the Mutual is a private insurer. These factors fail to establish the nexus required to transform the conduct of a private company into state action.

Fourth, under the pervasive entwinement test, it is clear that the Mutual is not a state actor. Although the creation of the Mutual was facilitated by legislation, the Mutual operates as an independent, private insurance company. The Mutual's daily operations are not unlike those of any other private insurer, and the state's regulation of the Mutual is coextensive with the state's regulation of any other private insurer. Employees of the Mutual are not on the state payroll and do not participate in the state employees' benefit program. The Mutual neither leases office space from the state, nor has offices located on state property. Further, the Mutual receives no operational funding from the state. In West Virginia, a corporation organized by permission of the legislature, supported largely by non-public funds, and managed by officers and directors who are not representatives of the state is a private corporation, although engaged in duties similar to those of public corporations or serving the public interest. *Sams v. Ohio Valley Gen. Hosp. Assoc'n*, 149 W. Va. 229, 140 S.E.2d 457, 460 (1965). The fact that the Mutual received initial loans from the state and that its operations positively impact the public interest do not transform the Mutual into a state actor.

Not all companies engaged in quasi-public businesses are state actors. This Court has held that the "insurance business is quasi-public in its character" and

subject to state regulation. *Barefield v. DPIC Companies, Inc.*, 215 W. Va. 544, 600 S.E.2d 256, 266 (2004). Despite the fact that the insurance business is quasi-public in nature, no reasonable person can argue that the underwriting decisions of all insurers should be deemed state action or that all insurers owe insureds and applicants procedural due process in connection with such decisions. "The central inquiry in determining whether a private party's conduct will be regarded as action of the government is whether the party can be described 'in all fairness' as a state actor." *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 650 (4th Cir. 1998). In this case, the Mutual cannot, in all fairness, be deemed a state actor.

The legislature determined that it was wise to transfer the liability assumed under BRIM back to the private sector and that a "stable, financially viable insurer *in the private sector*" was needed. W. VA. CODE § 33-20F-2(a) (emphasis added). The Mutual was established as a domestic, *private*, nonstock, nonprofit corporation. W. VA. CODE § 33-20F-4(a). Indeed, the legislature provided that the Mutual "is not and may not be considered a department, unit, agency, or instrumentality of the state for any purpose." W. VA. CODE § 33-20F-4(b). In this case, the legislature provided unequivocally that the Mutual is a private insurance company. The circuit court contradicted this legislative declaration despite the complete absence of factual evidence that the Mutual performs a governmental function, engages in conduct compelled by the state, maintains a close nexus to the state, or exhibits pervasive entwinement with the state. It is essential that the circuit court's erroneous

classification of the Mutual as a state actor and its attempt to impose due process restrictions be reversed, as “[f]aithful application of the state-action requirement . . . ensures that the prerogative of regulating private business remains with the States, and the representative branches, not the courts.” *Am. Mfrs. Ins. Co. v. Sullivan*, 520 U.S. 40, 52 (1999).

Unless set aside by this Court, the circuit court’s unsupported classification of the Mutual as a state actor will yield long-lasting, catastrophic effects on the system of health care in the State of West Virginia. Subjecting the Mutual to due process restrictions, to which other private insurers are not subject, will place the Mutual at a competitive disadvantage by forcing it to raise premiums to compensate for the costs associated with ensuring all insureds and applicants are afforded due process. The result will be the Mutual’s difficulty or inability to survive in the competitive marketplace of private insurance. The circuit court’s decision undermines the legislature, disregards the boundary between public and private entities, and threatens the future of health care in West Virginia. Accordingly, the Mutual respectfully requests that this Court reverse the circuit court’s improper classification of the Mutual as a state actor.

VII. RELIEF PRAYED FOR

For all of the foregoing reasons, the Appellant respectfully prays that this Honorable Court reverse the circuit court’s rulings. Further, the Appellant respectfully requests that it be awarded the costs and expenses incurred in prosecuting this appeal, including reasonable attorney fees, as well as any other relief deemed appropriate by

the Court.

Respectfully submitted,

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BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WEST VIRGINIA PHYSICIANS'
MUTUAL INSURANCE COMPANY,
a corporation,

Appellant,

v.

APPEAL NO. 33242

ROBERT J. ZALESKI, M.D.,

Appellee.

CERTIFICATE OF SERVICE

I, Perry W. Oxley, Esquire, counsel for Appellant, West Virginia Physicians' Mutual Insurance Company, do hereby certify that I served the foregoing, "Appellant's, West Virginia Physicians' Mutual Insurance Company, Brief In Support of Appeal" 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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