

BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WEST VIRGINIA PHYSICIANS'
MUTUAL INSURANCE COMPANY,
a corporation,

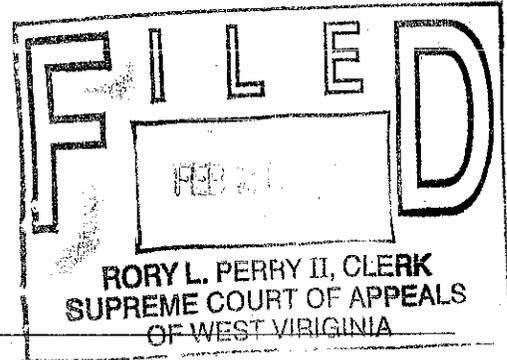
Appellant,

v.

APPEAL NO. 33242

ROBERT J. ZALESKI, M.D.,

Appellee.



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

Respectfully submitted,

D.C. Offutt, Jr., Esquire (WV #2773)
Perry W. Oxley, Esquire (WV #7211)
Jody M. Offutt, Esquire (WV #9981)
OFFUTT, FISHER & NORD
949 Third Avenue, Suite 300
Post Office Box 2868
Huntington, West Virginia 25728-2868
(304) 529-2868
Facsimile (304) 529-2999
*Counsel for the Appellant, West Virginia
Physicians' Mutual Insurance Company*

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I. INTRODUCTION

The Appellant, the West Virginia Physicians' Mutual Insurance Company ("the Mutual"), by counsel, D.C. Offutt, Jr., Perry W. Oxley, Jody Offutt and the law firm of Offutt, Fisher & Nord, offers the following Reply to the Appellee's, "Brief on Behalf of Appellee, Robert J. Zaleski, M.D."

II. ARGUMENT

A. The Ohio County Circuit Court Improperly Denied the Appellant's Motion to Dismiss Because the Court Lacked Subject Matter Jurisdiction Over This Case.

The Appellee contends that the trial court had subject matter jurisdiction over this case because Dr. Zaleski failed to exercise his administrative remedies through the West Virginia Insurance Commissioner. In support of his argument, the Appellee contends that various stipulated facts should be ignored outright, which is a tactic taken throughout the Appellee's Brief. In this instance, the Appellee contends that the December 8, 2004 letter to the Insurance Commissioner authored and titled by the Appellee as, "Formal Complaint," is not in fact a Complaint received and acted upon by the West Virginia Insurance Commissioner. The rationale behind this contention is that the document sent to the West Virginia Insurance Commissioner was a letter in which he was just "attempting to advise the Commissioner that the Mutual was being unfair for not renewing his insurance." Further, the argument climbs out further on a limb by contending that despite the Insurance Commissioner's assertion to the contrary, the Insurance Commissioner did not treat his December 8, 2004 letter as a

formal complaint.

The Appellee's arguments are transparent and wrong. The Appellee's "Formal Complaint" has the same effect regardless of the medium upon which he makes his argument. The Appellee cites to no authority that there is a legal requirement that a "Formal Complaint" take the form of a pleading or letter before the West Virginia Insurance Commissioner. In other words, a "Formal Complaint" is a "Formal Complaint" whether it is written as a traditional pleading or letter, or whether its written on bond paper or toilet paper. Further, despite the form that the "Formal Complaint" took, the Insurance Commissioner initiated an investigation based on the "Formal Complaint" and issued a ruling that the Appellant violated no law.

The Appellee availed himself to the Insurance Commissioner's jurisdiction and received a response. The Appellee had the right pursuant to W. VA. Code St. R. § 114-13-3.1 to request a hearing for the Insurance Commissioner's failure to act upon his "Formal Complaint." The Appellee could have appealed any denial of the right to a hearing to the Circuit Court pursuant to W. VA. Code § 33-2-14. Of course, these laws are all published, and the Appellee was more than capable of retaining learned counsel to handle the "Formal Complaint" with the Insurance Commissioner.

The Appellee also argues that the Appellant failed to properly raise subject matter jurisdiction at the trial court level in order to raise it during this appeal. However, as the Appellee also recognizes, West Virginia law allows subject matter jurisdiction issues to be raised at any time, including on appeal. *State v. Tommy Y., Jr.*, 219 W. Va. 530, 536, 637 S.E.2d 628, 634 (2006). Despite the Appellee's agreement

that the argument is futile, the Appellee goes on to argue in his Brief that “the Mutual’s arguments are not well taken because the Mutual *never seriously* argued in the Circuit Court that it lacked subject matter jurisdiction.” (emphasis added). Unfortunately, the actual events of the case in no way support this contention as the April 27, 2006 Order clearly states:

B. The defendant objected on the grounds that the Court lacks subject matter jurisdiction to hear this matter and moved that the Court dismiss this case on said grounds. After reviewing the memorandum submitted by the parties and hearing arguments of counsel, the Court finds the defendant’s objection is without merit and hereby **DENIES** its motion to dismiss.

Clearly, the trial Court recognized the motion to dismiss for lack of subject matter jurisdiction and denied the motion. As such, even if subject matter jurisdiction could not be raised on appeal, the matter was clearly properly raised and decided by the trial Court.

B. The Denial Of The Appellee’s Motion For Summary Judgment And Motion to Dismiss Are Appealable As It Was Found To Be A Final Appealable Order.

The Appellee argues that the Motion for Summary Judgment and Motion to Dismiss cannot be appealed at the time of the ruling. Unfortunately, the argument badly misstates the law regarding this issue, which is crystal clear. In pertinent part, Rule 54(b) of the West Virginia Rules of Civil Procedure states as follows:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, *the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is not just reason for delay and upon express direction for entry of judgment.*

(Emphasis added.) Clearly, if the court makes a decision that is a final, appealable order pursuant to Rule 54(b), the appeal for the motion for summary judgment and motion to dismiss is appropriate.

In the April 27, 2006 Order, the Court stated that it “incorporates the September 22, 2005 Order, which partially granted Plaintiff’s Motion for Summary Judgment and denied Defendant’s Motion to Dismiss/Motion for Summary Judgment.” Further, the same April 27, 2006 Order states that:

The Court further finds that the *September 22, 2005 Order* and the decisions set forth herein represent a *final judgment on some of the claims asserted by the plaintiff, that there is no just reason for delay and the judgment is entered on these claims pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure.*

(Emphasis added). Clearly, the April 27, 2006 Order incorporates the Court’s Decision on the Motion to Dismiss/Motion for Summary Judgment, and both the Order of September 22, 2005, originally denying the Mutual’s Motions, and the April 27, 2006 Order incorporating the decision on the motion are final appealable orders under Rule 54(b). Thus, the appellate issues raised based on the denial of the Appellant’s Motion to Dismiss/Motion for Summary Judgment are properly before the Court.

C. Dr. Zaleski Failed to Meet the Requirements of Rule 8 of the West Virginia Rules of Civil Procedure.

In his response brief, Dr. Zaleski erroneously argues that he sufficiently complied with Rule 8 of the West Virginia Rules of Civil Procedure because he only alleged causes of action in his Complaint that are assertable against a state actor; therefore, the Mutual was put on notice of the claims made and relief sought.

Unfortunately, the plaintiff has taken the concept of noticing pleadings to a new ludicrous level by arguing that a plaintiff no longer has to assert facts sufficient to make out a claim. Instead, the Appellee argues he can subtly put the opposing party on notice during the course of litigation in lieu of making a short and plain statement in his Complaint. Likewise, according to the Appellee, there is no need to even amend his Complaint pursuant to W. VA. R. CIV. P. 15 because these subtle references given through references in legal memorandum should give the opposing party clues to claims the party is asserting.

Clearly, the Appellee's argument is terribly strained and fails to consider the clear language of Rule 8 of the West Virginia Rules of Civil Procedure which requires only a short and plain statement showing that the pleader is entitled to relief. Simply put, Dr. Zaleski did not assert sufficient facts in his Complaint to meet the elements of a claim for procedural due process, and he did not pray for equitable relief. Moreover, a claim for "arbitrary and capricious" simply does not exist. Despite numerous opportunities to amend the Complaint after the Appellant had raised the issue to the attention of the Appellee and the Court¹, the plaintiff's proceeded without even acknowledging the insufficiencies or amending the Complaint.

Further, Dr. Zaleski mistakenly contends that the United States Supreme Court found it appropriate for an appeals court to consider an argument that an entity is public, even when the plaintiff disavowed it in the lower court and did not explicitly

¹ The insufficiency of the pleadings was raised in the Objections to the January 16, 2006 "Proposed Mechanism of Review And Appeal of Decisions not to Renew Insurance Policies Submitted on Behalf of the West Virginia Physicians' Mutual Insurance Company Under Protest."

raise it until his brief to the Supreme Court in *Lebron v. Nat'l R.R. Passenger, Corp.*, 513 U.S. 374, 379 (1995). In *Lebron*, the Court set forth the traditional rule that “[o]nce a **federal claim is properly presented**, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.” (emphasis added.) *Id.* However, unlike *Lebron*, the Appellee in this case failed to establish a claim or set forth specific form of relief. The Court in *Lebron* did not suggest that a party would be permitted to assert a new claim or demand different relief on appeal. Because *Lebron* deals with making new appellate arguments, the Appellee’s reliance upon it is misplaced.

D. The Circuit Court Improperly Denied The Mutual A Hearing And Failed to Make the Requisite Findings for Equitable Relief

The Appellee makes an argument that the Mutual was not entitled to an evidentiary hearing, that sufficient facts existed for the issuance of an injunction, and then that the Circuit Court made the appropriate findings for an injunction. These arguments, however, are unfounded and not otherwise supported by the law. Specifically, an evidentiary hearing is required under Rule 65(a) of the West Virginia Rules of Civil Procedure before an injunction may be issued. Further, the Mutual specifically requested an evidentiary hearing and was denied the right to such a hearing. *See*, April 27, 2006 Order. Further, the stipulated facts in the order do not come close to touching on the scope of evidence relevant to the elements of an injunction. For example, the Mutual was denied the right to introduce evidence concerning whether or not Dr. Zaleski would suffer harm if an injunction was issued

or whether the public interest was affected. Finally, the April 27, 2006 Order does not contain conclusions of law sufficient to meet the elements for the issuance of an injunction, because no such rulings exist.

E. The Circuit Court Erred in Concluding that the Mutual is a Quasi-Public Entity And That it Owes Greater Procedural Safeguards Than A Private Insurer.

The Appellee argues that the Circuit Court properly concluded that the Mutual was a state actor based principally upon the creation of the entity. Unfortunately, the Appellee have decided to turn a blind eye to the fact that the legislature did not create the Mutual. Instead, the legislature enacted W. VA. CODE § 33-20F-4, which stated that “a physicians' mutual insurance company may be created as a domestic, private, nonstock, nonprofit corporation.” The legislature did not create the Mutual, but only provided incentives for its creation. Further, the legislature specifically stated 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). Likewise, “all debts, claims, obligations, and liabilities of the company, whenever incurred, shall be the debts, claims, obligations, and liabilities of the company only and not of the state or of any department, unit, agency, instrumentality, officer, or employee of the state.” *Id.*

The Appellant's argument necessarily fails because the state did not create the Mutual, but recognized the need for a physician owned insurer to provide medical malpractice and laid the foundation to attract the creation of such an entity. In fact, the statutes that state that the Mutual “may” be created and that incentives would be

provided for its creation strongly demonstrate that the Mutual is an independent private entity created of its own volition. Further, the following statutes express the spirit and intent of the legislature by confirming that the Mutual and the state are separate legally and financially. Clearly, a close review of the creation of the Mutual reveals that it is necessarily a private entity.

The Mutual's existence as a private corporation is critical to its ability to function in a complex and dynamic medical malpractice insurance market. The ability of the Mutual to co-exist with its competitors in a challenging market place also hangs in the balance as dealing with competitive disadvantages will cripple the Mutual. Ultimately, the health care of the citizens of West Virginia hang in the balance, and as a result, the best interests of the residence of our great state outweigh the rights of one doctor, whose practice of medicine has been uninterrupted by the Mutual decision not to renew his insurance coverage. For all these reasons, the Court should find that the Mutual is not a quasi-public entity.

III. CONCLUSION

WHEREFORE, the Appellant respectfully requests this Honorable Court reverse the lower court's rulings, and for any and all other relief this Court deems appropriate.

Respectfully submitted,

Perry Oxley / JMO

D.C. Offutt, Jr., Esquire (WV #2773)

Perry W. Oxley, Esquire (WV #7211)

Jody M. Offutt, Esquire (WV #9981)

OFFUTT, FISHER & NORD

949 Third Avenue, Suite 300

Post Office Box 2868

Huntington, West Virginia 25728-2868

Phone (304) 529-2868

Facsimile (304) 529-2999

dcoffutt@ofnlaw.com

pwoxley@ofnlaw.com

jmooffutt@ofnlaw.com

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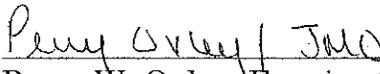
ROBERT J. ZALESKI, M.D.,

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, Reply Brief in Support of Appeal" upon the following counsel of record via facsimile and by depositing the same in the United States Mail, first class and postage pre-paid this 20th day of February, 2007:

James F. Companion, Esquire
Yolanda G. Lambert, Esquire
Schrader, Byrd & Companion, PLLC
The Maxwell Centre, Suite 500
32 - 20th Street
Wheeling, West Virginia 26003


Perry W. Oxley, Esquire (WVSB# 7211)
Offutt, Fisher & Nord
949 Third Avenue, Suite 300
P.O. Box 2868
Huntington, West Virginia 25728-2868
(304) 529-2868
facsimile (304) 529-2999
pwoxley@ofnlaw.com