

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
APPEAL NO. 34620

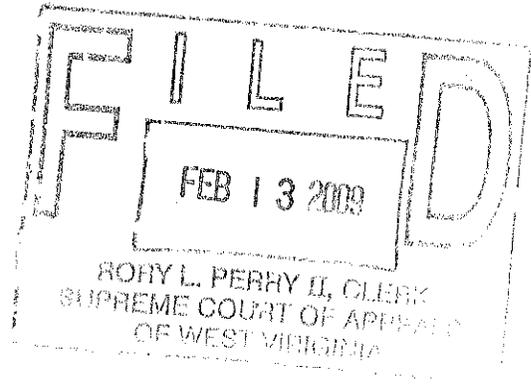
WEST VIRGINIA PHYSICIANS'
MUTUAL INSURANCE COMPANY,
a corporation,

Appellant,

v.

ROBERT J. ZALESKI, M.D.,

Appellee.



BRIEF ON BEHALF OF APPELLEE ROBERT J. ZALESKI, M.D.

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- B. The Ohio County Circuit Court had Jurisdiction to address the Content of the Mutual's Due Process Hearing Procedures For Non-Renewing Coverage.**
- C. The Lower Court Correctly Determined That a Review Procedure Which Complies with Due Process must Be Determined Before a Hearing on the Non-renewal Issue Could Be Held.**
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II.

KIND OF PROCEEDING AND NATURE OF RULING BELOW

On April 14, 2008, the Circuit Court of Ohio County entered an Order relating to all outstanding issues before the court. Pursuant to the Order, the lower court made certain “Findings of Fact” and “Conclusions of Law” and denied the following motions filed by the Appellant, West Virginia Mutual Insurance Company (hereafter referred to as “Appellant” or “Mutual”): Motion for Entry of Order Remanding the Non-Renewal to the Mutual for Further Hearing; Motion for Reconsideration of Circuit Court’s Adoption and Amendment of Mutual’s Due Process Hearing Procedures; and Motion for Entry of Order Granting Motion to Dismiss Pursuant to Rule 12(b)(6).

It is from the Order of April 14, 2008, that the Appellant appeals.

III.

STATEMENT OF FACTS

In 2001, the West Virginia Legislature determined that the nation faced a “crisis in the field of medical liability insurance,” W. VA. CODE ANN. § 33-20F-2(a)(1), which was “particularly acute in this State due to the small size of the insurance market.” W.VA. CODE ANN. § 33-20F-2(a)(4). During the 2001 crisis, West Virginia physicians found it “increasingly difficult, if not impossible to obtain medical liability insurance because either coverage [was] unavailable or unaffordable.” W.VA. CODE ANN. § 33-20F-2(a)(6). The Legislature determined that it needed to construct a solution to the problem because without action, the Legislature believed that qualified physicians may leave the State and thereby leave the citizens of West Virginia without quality health care. W.VA. CODE ANN. § 33-20-F-2(a)(7-8). Given the “substantial public interest in creating a

method to provide a stable medical liability market,” the State originally created programs to insure physicians through the Board of Risk and Insurance Management (“BRIM”). W.VA. CODE ANN. § 33-20F-2(a)(11-12).

BRIM’s programs, however, entailed substantial liability to the State of West Virginia, and the Legislature determined that “[a] stable, financially viable insurer in the private sector [would] provide a continuing source of insurance funds to compensate victims of medical malpractice.” W.VA. CODE ANN. § 33-20F-2(a)(15). To achieve this result, the State desired to transfer its liability to the private sector and to “creat[e] a stable self-sufficient entity which [would] be a source of liability insurance coverage for physicians” W.VA. CODE ANN. § 33-20F-2(a)(14). “[S]tate efforts to encourage and support the formation of such an entity, including providing a low-interest loan for a portion of the entity’s initial capital, [was] in the clear public interest.” W.VA. CODE ANN. § 33-20F-2(a)(16). Therefore, the Legislature enacted Article 20F to Chapter 33 to govern the creation of the Physicians’ Mutual Insurance Company (the “Mutual”) and to facilitate the “novation of the medical professional liability insurance programs” created by BRIM. W. VA. CODE ANN. § 33-20F-1(a).

The Mutual is described as a West Virginia, domestic, private, non-stock, nonprofit corporation created to provide insurance for West Virginia physicians. W.VA. CODE ANN. § 33-20F-4(a). Pursuant to W.VA. CODE § 33-20F-7(a)(b), the Mutual was initially funded by monies transferred from the West Virginia Tobacco Medical Trust Fund, in addition to a “special one-time assessment in the amount of \$1,000 imposed on every physician licensed by the Board of Medicine or the Board of Osteopathy for the privilege of practicing medicine in this state.” W.VA. CODE ANN. § 33-20F-7(a)(b).

Dr. Zaleski is an orthopedic surgeon who has practiced in Ohio County, West Virginia, for more than twenty-five years. (Compl., ¶1, Record at 1). He was previously insured by BRIM – a state-run program – for claims made during the period from December 22, 2001, through December 22, 2004. (Order Granting Partial Sum. J. to Pl., Apr. 27, 2006, ¶ 1, at 1, Record at 374). Dr. Zaleski's BRIM policy, along with the policies of 1,470 other West Virginia physicians, was transferred to the Mutual on July 1, 2004. (*Id.* ¶ 2, at 1).

On September 8, 2004, the Mutual sent Dr. Zaleski a letter informing him that it would not renew his insurance policy after its December 22, 2004 termination date. The Mutual also provided Dr. Zaleski a brief outline of its “Appeal Process.”¹ (Apr. 27, 2006 Order, ¶ 9, at 2-3). Thereafter,

¹ The Mutual's “Appeal Process” informed Dr. Zaleski:

- a. Coverage is declined by underwriting.
- b. An appeal is requested by the Physician.
- c. The Physician is requested to make a brief statement to the Underwriting Committee, can ask questions of the Committee, and can entertain questions from the Committee members.
- d. The Committee reviews the application for coverage and the information gathered during the appeal and makes a decision regarding the underwriting decision immediately following the Physician's appearance before the Committee.
- e. The Physician will receive a telephone call from a representative of the Committee the day following the appeal and will receive a follow-up letter by mail.

(Apr. 27, 2006 Order, ¶ 9, at 2-3, Record at 374).

Dr. Zaleski sent a letter to the Mutual protesting its decision. (Apr. 27, 2006 Order, ¶ 5, at 2, Record at 375).

The Mutual granted Dr. Zaleski an internal hearing on the basis of his protest letter; however, the Mutual advised him that “it is necessary that the process conclude within fifteen minutes.” (*Id.* ¶ 6, at 2). The Mutual failed to advise Dr. Zaleski in writing of his right to have counsel present at the hearing, inspect any documentary evidence that the Mutual might have, examine witnesses and present relevant evidence, have subpoenas issued to compel attendance of witnesses and production of evidence, or of his right to have a stenographic record prepared of the proceeding at his own expense. (*Id.*, ¶ 10, at 3, Record at 376). No stenographic record exists of the hearing. (*Id.* ¶ 11).

On November 11, 2004, Dr. Zaleski attended the brief hearing before the Mutual’s underwriting committee in Charleston, West Virginia. (Apr. 27, 2006 Order, ¶ 11, at 3, Record at 376). One day after the hearing, he was informed by telephone that his policy would not be renewed. (*Id.* ¶ 20, at 5). The Underwriting Committee never provided Dr. Zaleski with any written notice of a right to appeal its decision. (Apr. 27, 2006 Order, ¶¶ 21, 27, at 5-6, Record at 379-380). Angry over the summary nature of the Mutual’s decision, Dr. Zaleski sent a letter to the Mutual requesting a detailed explanation for its decision. (*Id.* ¶ 22). The Mutual never responded to that letter. (*Id.*). Accordingly, on December 8, 2004, Dr. Zaleski wrote to the West Virginia Insurance Commissioner in an attempt to force a written, rational reason for the Mutual’s decision not to renew his insurance policy. (*Id.* ¶ 23, at 6). The Insurance Commissioner promptly directed the Mutual to respond to Dr. Zaleski’s letter. (*Id.* ¶ 24). On December 15, 2004, the Mutual sent the Insurance Commissioner a letter describing its reasons for not renewing Dr. Zaleski’s policy as the frequency of medical

malpractice lawsuits against Dr. Zaleski and his prior alcohol and/or chemical dependency. (*Id.* ¶¶ 22, 25).

After receiving the letter from the Mutual, the Insurance Commissioner forwarded the letter to Dr. Zaleski and explained: “[I]t does not appear that the West Virginia Physicians’ Mutual has violated any applicable statute or rule. Therefore, no administrative action against the company appears to be appropriate at this time.” (Mem. In Supp. of Mot. to Dismiss, or in the Alternative, Mot. for Summ. J., at 4, Record at 28). Dr. Zaleski was never advised that the Commissioner’s letter was a final order (indeed, it was not an order at all), or that he had any further right to appeal. (Apr. 27, 2006 Order, ¶¶ 21, 27, at 5-6, Record at 374). Consequently, Dr. Zaleski filed suit on April 4, 2005, against the Mutual in the Circuit Court of Ohio County asserting causes of action for, *inter alia*, breach of the covenant of good faith and fair dealing and arbitrary and capricious conduct in depriving Dr. Zaleski of his medical malpractice insurance policy. (*See Compl.*) (alleging five counts where the Mutual’s conduct injured Dr. Zaleski).

On June 1, 2005, the Mutual filed its Motion to Dismiss the Complaint on the grounds that it did not have any duty to renew Dr. Zaleski’s insurance policy, and specifically alleged that even if its decision to not renew Dr. Zaleski’s policy were done in an arbitrary and capricious manner, “West Virginia law does not recognize an independent cause of action for arbitrary and capricious conduct on behalf of private entities.” (Mem. in Supp. of Mot. to Dismiss, or in the Alternative, Mot. for Summ. J., at 12, Record at 36). On August 5, 2005, the lower court held a hearing on the Mutual’s Motion. The Circuit Court determined that the Mutual’s status as a private, public, or quasi-public entity was a question of law that had to be determined before any other issues could be considered. (Tr. of Hr’g, August 5, 2005, at 5, Record at 537). Therefore, the Circuit Court did not

specifically address the merits of Dr. Zaleski's individual causes of action. (*See id.*) (concluding that it was improper to try other issues of the case without first determining whether the Mutual is a private or public entity).

Dr. Zaleski filed a Cross-Motion for Summary Judgment on September 6, 2005. (Record at 112), asking the Circuit Court to determine that the Mutual was required to renew Dr. Zaleski's professional liability insurance, or, in the alternative, to find that the Mutual is a quasi-public agency that must provide Dr. Zaleski with procedural due process before refusing to renew his professional liability insurance policy. (*See Cr.-Mot. & Mem. in Supp. of Cr.-Mot. for Summ. J.*) (moving the Circuit Court to make these determinations). The Circuit Court determined that:

West Virginia Code § 33-20F-2 clearly establishes the dynamic of a State Action because:

1. There . . . [exists] a recognized substantial public interest in providing access to quality health care to the citizens of West Virginia.
2. There . . . [exists] a recognition that persons who suffer injuries as a result of medical professional liability must be adequately compensated.
3. Access to quality health care is inextricably entwined with affording the physicians the opportunity to obtain medical liability insurance.
4. The State of West Virginia attempted to alleviate the current medical liability crisis by providing medical liability coverage through an exclusively State-run program (Board of Risk and Insurance Management).
5. The state-run program represented a substantial actual and potential liability to the state which could be addressed by transferring this actual and potential liability insurance coverage for physicians in this state and consequently achieving substantial public benefit.

6. The citizens of the State of West Virginia will greatly benefit from the formation of a Physicians' Mutual Insurance Company, justifying the efforts of the State of West Virginia to encourage and support the formation of a private sector entity, including providing a low-interest loan for a portion of the private entity's initial capital.

(Mem. of Op. and Order, Sept. 22, 2005, at 5-6, Record at 280-281) (citations omitted).

Furthermore, the Circuit Court found that these "various provisions of the Physicians' Mutual Insurance Act clearly establish a close nexus between the State of West Virginia and . . . [the Mutual], by which the goals of the State of West Virginia to protect the health, safety and welfare of its citizens are 'pervasively entwined' with the means of implementing those goals through a private insurance entity, without subjecting the State of West Virginia to substantial[,] actual[,] and potential liability." (*Id.*). Accordingly, on September 22, 2005, the Circuit Court denied the Mutual's Motion to Dismiss and granted Dr. Zaleski's Cross-Motion for Summary Judgment on the issue that the Mutual was a "quasi-public entity" and found that its decision not to renew Dr. Zaleski's insurance policy was a state action inasmuch as it had accepted BRIM's liability on Dr. Zaleski's policy of insurance. The Circuit Court also ordered the Mutual to submit a procedure for affording a non-renewed policy holder the right to contest that decision. (Dec. 14, 2005 Order Regarding Hr'g. of Nov. 15, 2005, at 2, Record at 330).

At a hearing on November 15, 2005, which was scheduled to address the "Boundaries of Due Process Hearing Mechanism," Counsel for the Appellant asserted that the facts concerning the appeal process that was available to Dr. Zaleski had not yet been fully developed. (Tr. of Hr'g, November 15, 2005, at 14-15, Record at 538). Therefore Judge Recht requested the parties to provide stipulated facts as to what occurred with regard to Dr. Zaleski's appeal of the decision not

to renew his insurance. As Judge Recht stated that if he considered the review appropriate, "then the case is over." (*Id.* at 15). Areas of dispute could be developed by way of affidavit or deposition, but the goal was for the judge to be able to determine the due process, if any, to which Dr. Zaleski was entitled and what he received. (*Id.*).

The parties exchanged stipulated facts on December 30, 2005. On January 11, 2006, Counsel for Dr. Zaleski provided "Zaleski's Response to Defendant's Proposed Stipulations, with Comments and Suggestions" to Mutual's counsel. On January 16, 2006, pursuant to the Court's Order of January 19, 2005, the Mutual submitted its "Proposed Mechanism for Review of Appeal of Decision not to Renew Insurance Policies Submitted on Behalf of the West Virginia Physicians' Mutual Insurance Company" (Record at 349), but did not attempt to discuss the proposed stipulations which the lower court had requested the parties to submit.

At a hearing on February 3, 2006, new counsel for the Mutual asked for a hearing to develop what occurred during Dr. Zaleski's review. The lower repeated its request that the parties submit stipulated facts regarding the hearing procedure. The lower court stated, "All I really wanted was just the two things that I asked for back in December; suggested procedure and a stipulated, if you could, and if not, let me know where you are on it. And I got nothing.....a stipulation is just that. If you can't stipulate, let me know where you are. And I didn't receive anything." (Tr. of Hr'g Feb. 3, 2006 at 17, Record at 387).

At a hearing on February 20, 2006, the parties reviewed proposed stipulations with the Court in an effort to determine those upon which there could be agreement. This was followed by an Order Granting Partial Summary Judgment entered on April 27, 2006, which incorporated those facts

discussed at the February 20, 2006 hearing, and which the parties did not dispute. At no time did the Appellant suggest the need for any depositions or affidavits to prove disputed facts.

On August 25, 2006, the Appellant filed its first Petition for Appeal claiming that the circuit court did not have subject matter jurisdiction over the case, that its motion to dismiss was improperly denied, that the circuit court considered claims and granted relief which were not in the Complaint, that its due process rights were violated by the lower court's refusal to conduct an evidentiary hearing, that the Appellee's motion for summary judgment for lack of procedural due process was improperly granted and that the lower court improperly concluded that the Mutual was a quasi-public entity and state actor for purposes of due process analysis.

That Petition for Appeal was granted on November 28, 2006. (See, November 28, 2006 Order Granting Petition for Appeal). Following briefing and oral argument, this Court affirmed Judge Recht's finding that Dr. Zaleski had a property interest in continued malpractice coverage and the Mutual was a state actor which obligated it to provide a review procedure that complied with due process. *Zaleski v. West Virginia Physicians' Mutual Ins. Co.*, 220 W.Va. 311, 647 S.E.2d 747 (2007).

The Mutual argued that the review provided to Dr. Zaleski did offer him procedural due process and/or that a review procedure was provided by W.VA. ANN. CODE § 33-20C-1. These arguments were rejected by the Court; however, the Court determined that the procedure recommended by the lower court exceeded due process requirements. The Court, relying on *North v. W.Va. Bd. of Regents*, 160 W.Va. 248, 233 S.E.2d 411 (1977), stated in Syl. Pt 8 as follows:

8. Being a state actor for due process purposes, West Virginia Physicians' Mutual Insurance Company is required to make available to parties affected by its non-renewal decisions a review process that

minimally includes: notice of the non-renewal which conforms with the requirements of West Virginia Code §33-20C-4(a) and which includes the reasons for non-renewal; hearing before an unbiased hearing examiner; reasonable time in which to prepare to rebut the charges; opportunity to have retained counsel at any hearings on the charges; opportunity to present relevant evidence which includes calling and cross-examining witnesses; and preservation of an adequate record of the review proceedings.

(220 W.Va. at 314, 647 S.E.2d at 750).

This Court also reversed the lower court's decision to reinstate insurance coverage and its decision to proceed to trial. The case was remanded to the circuit court "with directions for that court to: (1) remand the question of non-renewal to Mutual for further hearing in conformity with this opinion, and (2) conduct such further proceedings not inconsistent with this opinion as may be required, including the resolution of any disputes which may arise in the course of the Mutual hearing on non-renewal." (220 W.Va. at 322, 647 S.E.2d at 758).

By letter of July 18, 2007, Judge Recht set this matter for a status conference to be held on September 7, 2007. On September 6, 2007, the Mutual provided to Judge Recht and Dr. Zaleski a proposed hearing procedure for insured physicians whose policies would not be renewed. At the status conference, the court ordered the parties to report back by September 21, 2007, regarding whether further hearing was requested by either party regarding the hearing procedure proposed by the Mutual. Letters were exchanged between counsel, but since they were unable to resolve their dispute regarding the hearing procedure, Dr. Zaleski filed "Plaintiff's Response to Defendant's Proposed Review Process" (Record at 415) which raised three concerns with the Mutual's procedure: (1) the physician, rather than the Mutual, would bear the burden of proof; (2) the section titled "Finality of Appeal Hearing, Findings of Fact and Conclusions of Law" did not advise the physician

that he may pursue any available appeal of the Mutual's decision, and (3) a hearing tribunal composed of members of the Mutual's board of directors is not "unbiased".

A hearing was held and further briefs were provided by the parties. (See, "Memorandum in Support of Plaintiff Response to Defendants' Proposed Review Process", Record at 428 and "Defendant's Reply to Plaintiff Response to the Mutual's Review Process", Record at 444) By letter of January 9, 2008, Judge Recht agreed that the three changes proposed by the Appellee should be addressed by the Mutual in its review process. (See, Judge Recht letter of January 9, 2008, Record at 462).

Another hearing was scheduled for February 19, 2008. The primary issue was how to move forward with this case. The Mutual strongly advocated that the parties should go forward with the due process procedure provided by the Mutual, without modification, and the lower court could review the procedure after an outcome was obtained. Judge Recht felt that it was necessary to determine the appropriate due process procedure before going forward with the review hearing. The Mutual was to provide the plaintiff with a draft of a proposed order regarding the hearing procedure and any other outstanding issue (s) and then the parties were directed to confer and to provide the Court with a final appealable Order. (See, Order of March 4, 2008). On March 7, 2008, the Mutual submitted the following motions: Motion for Entry of Order Remanding the Non Renewal to the Mutual for Further Hearing; Motion for Reconsideration of Circuit Court's Adoption and Amendment of the Mutual's Due Process Hearing Procedures and Motion for Entry of Order Granting Motion to Dismiss Pursuant to Rule 12(b)(6).(Record at 464, 466, 475). A proposed final appealable Order was also submitted which denied the Mutual's motions. Dr. Zaleski responded to

each of the motions and, following consultation with the Mutual's counsel, submitted a revised Rule 55(b) Order which was entered by Judge Recht on April 14, 2008.(Record at 528).

IV.

REBUTTAL TO APPELLANT'S ASSIGNMENTS OF ERROR

- A. **The Appellant's Claim of Violation of Procedural Due Process Arising from the Personal Bias of the Lower Court Should Be Denied on the Basis of Waiver and Failure of Any Factual Support for Such Allegations.**
- B. **The Ohio County Circuit Court had Jurisdiction to address the Content of the Mutual's Due Process Hearing Procedures For Non-Renewing Coverage.**
- C. **The Lower Court Correctly Determined That a Review Procedure Which Complies with Due Process must Be Determined Before a Hearing on the Non-renewal Issue Could Be Held.**
- D. **The Lower Court Correctly Found That the Due Process Hearing Procedures Offered by the Mutual Did Not Meet the Minimum Due Process Requirements set forth in *Zaleski v. West Virginia Physicians' Mutual Insurance Company*.**

V.

STANDARD OF REVIEW

"A circuit court's entry of summary judgment is reviewed *de novo*." *Roberts v. W.V. American Water*, 221 W.Va. 373, 655 S.E.2d 119, Syl. Pt. 1 (2007) (quoting Syl. Pt. 1 of *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994)). Similarly, "[a]ppellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." *Rhododendron Furniture & Design, Inc. v. Marshall*, 214 W.Va. 463, 590 S.E.2d 656, Syl Pt. 1 (2003) (quoting Syl. Pt. 2 of *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va 770, 461 S.E.2d 516 (1995)). To the extent that any of the motions presented to the lower court can be read as requesting it to vacate a judgment, the applicable standard is abuse of discretion. "A motion to vacate a judgment made

pursuant to Rule 60(b), W.Va. R.C.P., 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 such discretion.” *Toler v. Shelton*, 157 W.Va. 778, 204 S.E.2d 85, Syl. Pt. 5 (1974).

VI.

ARGUMENT

A. The Appellant’s Claim of Violation of Procedural Due Process Arising from the Personal Bias of the Lower Court Should Be Denied on the Basis of Waiver and Failure of Any Factual Support for Such Allegations.

1. The Appellant has waived any complaints of a violation of procedural due process because this argument was never raised before the lower court.

The Appellant's claim of procedural due process should be denied because, despite ample opportunity to do so, the Mutual did not at any time bring this concern to the lower court's attention, and there has never been a ruling on this issue by the trial court. This Court has “long held that theories raised for the first time on appeal are not considered.” *Clint Hurt & Assoc. v. Rare Earth Energy, Inc.*, 198 W.Va. 320, 329, 480 S.E.2d 529, 538 (1996). The Court will not consider nonjurisdictional questions that have not been considered by the trial court. *Id.* See also *Crain v. Lightner*, 178 W.Va. 765, 771, 364 S.E.2d 778, 784 (1987). The Appellant has, through its appeal, attempted to manufacture “bias” where only an intellectual disagreement exists.

While the Appellee strongly believes that the Appellant is entitled to procedural due process, it just as strongly asserts that Appellant received due process before the lower court. To the extent that the Appellant in any way tries to equate the conduct of the proceedings below with the procedural defects set forth in the cited cases, the Appellant grossly overreaches.

In *Warren v. City of Athens, Ohio*, 411 F.3d 697 (6th Cir. 2005), the plaintiffs were owners of a Dairy Queen who sued the City of Athens after the city installed barricades that limited access to the ice cream shop and the plaintiffs had no way to challenge the erection of the barricades. In *U.S. v. Sciuto*, 531 F.2d 842 (7th Cir. 1976), a judge had an *ex parte* conversation with a probation officer which affected his opinion with regard to whether the defendant had violated the terms of his probation period. Given this, the Court found that the Judge had prejudged an issue important to the probation revocation and therefore, the revocation was reversed.

In *Bracy v. Gramley*, 520 U.S. 899, 117 S.Ct. 1793 (1997), bias was shown where a judge who had accepted bribes of other criminal defendants near the time of the defendant's trial had an interest in convicting the defendant so that the level of suspicion with regard to the other cases would be lowered. In *In Re Murchison*, 349 U.S. 133, 75 S.Ct. 623 (1955), due process was denied the defendants where a state court judge served as a one-man grand jury and then sat in judgment on the same individuals in a contempt proceeding arising from the grand jury matter. In *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437 (1927), the Court found that the mayor who tried the underlying case had a financial interest in convicting the defendant because he was using the fines to help the financial situation of his village.

Of all of the cases cited by the Appellant, *Payne v. Lee*, 24 N.W.2d 259 (Minn. 1946), probably comes closer to the complaints now made by the Appellant since the relationship between a party and the judge was at issue. However, in that case there was clear evidence of bitterness between the probate judge and the administrator of the estate. Without detailing how the relationship had deteriorated, the court stated, "It is sufficient to note that the resulting atmosphere has been tense and anything but conducive to the maintenance of that neutral state of mind so necessary to the

adjudication of controversial issues.” (*Id.* at 271). In the instant case there has been absolutely no evidence that Judge Recht has treated the Appellant or its counsel with anything but respect. The only objectionable statement or conduct the Appellant can cite is a statement made by the judge that the appeal procedure initially offered to Dr. Zaleski was “a sham at best and shallow at worst”. This is the only “factual” support it can claim in support of its charge of bias.

As stated above, although the cases cited by the appellant emphasized the importance of procedural due process, the facts of those cases are not remotely similar to the claims being made against Judge Recht.

The Appellant acknowledges that it does not have “information that would support a motion for disqualification.” (Appellant's Brief at 24). Despite this, Appellant asserts, by way of a footnote, that Judge Recht was obligated to recuse himself, consistent with Canon 3(E)(1) of the West Virginia Code of Judicial Conduct, because he represented Dr. Zaleski in the mid-1990's in a domestic matter and over twenty years ago represented a plaintiff in a medical malpractice case *against* Dr. Zaleski. *Id.* Fn. 7, p. 22-25. At the very first hearing in this case on August 5, 2005, Judge Recht, before doing *anything* in this case, advised counsel of these issues and his disclosure was an obvious invitation to counsel to raise any concerns that they had. None of the four attorneys representing the Mutual at the hearing, Kimberly Croyle, Justin Harrison, Robert Dinsmore and John S. Moore,² indicated an objection to Judge Recht's continued handling of the case. (Tr. of Hr'g, August 5, 2005.

²Interestingly, the Appellant added Ronald B. Johnson to its arsenal of lawyers shortly before the hearing on November 15, 2005. Mr. Johnson was a former law partner of Judge Recht and more significantly, has been his close personal friend for over 35 years. If the Mutual was concerned about bias toward Dr. Zaleski, it apparently chose to address the issue by employing Mr. Johnson rather than raise the issue with the Court, or perhaps it had some notion that it could attempt to use “bias” to its own ends.

at 4, Record at 537). This is confirmed in the Order of August 17, 2005, reflecting the hearing of August 5, 2005, which states “[n]either Plaintiff nor defendant had any objection with respect to the Court’s prior involvement with Dr. Zaleski.” (Order of August 17, 2005, Record at 92). Even if counsel was not prepared to make an immediate challenge to the judge, there is no excuse for their failure to mention it for three years. The firm of Offutt, Fisher & Nord, PLLC, was added to the Mutual’s legal team in late December, 2005 and still no concern was raised.

While arguably the domestic relations matter may have caused some concern for the Appellant, the Appellant did nothing to develop this issue by making any factual investigation concerning the extent of Judge Recht’s representation of Dr. Zaleski. More importantly, in the second example - the malpractice case - the Appellant fails to indicate how Judge Recht’s representation of a plaintiff *against* Dr. Zaleski would create the possibility of bias on Judge Recht’s part *in favor* of Dr. Zaleski.

Eight hearings were held in this case, and the Appellee defies the Appellant to show any occasion on which the Mutual or its attorneys were treated with anything but complete civility. It is patently unfair for a litigant to have a concern about possible bias on the part of a judge, not bring it to the judge’s attention, continue with the litigation for three years and then claim that it was deprived of due process due to the judge’s bias.

2. The Appellant’s claim of violation of procedure of due process is not “novel” so as to preclude it from the requirement that an objection be raised before the lower court.

The Appellant asserts that because its claim of procedural due process is “sufficiently novel,” there was no requirement to raise its objection before the lower court. As shown above, the facts relating to Judge Recht’s representation of Dr. Zaleski - and his representation of an adverse

party against him - were brought to the Appellant's attention at the first hearing in this case. There is nothing "novel" about a claim of bias based upon a judge's relationship with a litigant.

The Appellant appears to claim that the lack of procedural due process could only be seen from the vantage point of hindsight. None of the cases cited by the Appellant address this particular issue - that the amount of adverse rulings support a claim of a lack of procedural due process. In *Reed v. Ross*, 468 U.S. 1, 104 S.Ct. 2901 (1984), the trial court had given an instruction that the defendant bore the burden of proving lack of malice. Subsequently, in *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881 (1975), the Supreme Court struck down this requirement. In the habeas corpus proceeding brought by the defendant, the lower court found that the defendant could not attack the instruction because no objection had been raised on appeal. The Supreme Court found that the *Mullaney* issue was so novel that the defendant's attorney could not have been expected to raise it on appeal. In *Cuevas v. State*, 641 S.W. 2d 558 (Tex.Cr.App.1982), the issue concerned the ramifications of excluding a juror who had opinions against capital punishment. Pursuant to Texas law, a potential juror had to swear under oath that a mandatory death penalty or sentence of life in prison would not affect his deliberations on factual issues. A United States Supreme Court case later limited this law to exclude only those potential jurors who would automatically not impose the death penalty or who would not be able to be impartial about the defendant's guilt because of the potential imposition of the death penalty. In reviewing the issue of whether Cuevas' counsel should have raised this objection, the Court noted that "at the time of this trial our case made it abundantly clear that an objection to a Sec.12.31(b) exclusion on *Witherspoon* grounds would be futile. Where a defect of constitutional magnitude has not been established at the time of trial, the failure of counsel to object does not constitute waiver." (Id at 563). In *Ex parte Chambers*, 688 S.W.2d 483 (Tex. Cr.

App. 1985), again considered the ability to allege a constitutional violation in a habeas corpus proceeding due to a change in the law concerning custodial interrogation after the case had already been appealed. In *Mathews v. State*, 768 S.W.2d 731 (Tex.Cr.App.1989), the issue was also whether a change in the law was sufficiently novel so that the issue did not have to be raised on appeal, but in this case the Court found that the constitutional issue had already been articulated at the time of the defendants trial. The defendant's case was already on appeal when *Batson v. Kentucky*, 476 US 79, 106 S.Ct. 1712 (1986), was issued. Contrary to Mathews' claim, the Court found that *Batson* did not create a new constitutional right but instead shifted the burden of proof from the defendant to prove "purposeful discrimination" to the state in rebutting the defendants prima facie case. Since the constitutional issue concerning "purposeful discrimination" was already established, the defendant could not raise the issue on appeal. Interestingly in *Roth v. Weir*, 690 N. W. 2d 410 (Minn.App. 2005), the court found that despite the fact that the issue was not novel, it would be reviewed, in part, because it was raised implicitly in the briefing before the lower court. This did not occur in the instant case.

The Appellant was required to bring any issue of possible bias to the lower court's attention so that it could evaluate its actions to determine the credibility of the allegations and respond to them. Not giving Judge Recht the opportunity to make a record before the Appellant raised the issue with this Court is simply unfair. Pursuant to established West Virginia law, Appellant's failure to do so should result in a waiver of the claim of bias.

3. The failure of a judge to agree with a litigant is not an indication of "bias."

The substance of the Appellant's argument is that since Judge Recht disagreed with the legal arguments it advanced, Judge Recht must be biased. If this is the standard that the Appellant

seriously wants this Court to adopt, then we will see an explosion of “bias” claims against trial court judges. The claims made against Judge Recht are not just incorrect, they are absurd. Reading the transcripts of the hearings held in this case show that Judge Recht listened to the Mutual and was respectful of the Mutual, but strongly disagreed with its position on two issues: whether the Mutual is a state actor and what specific due process should be applied. All of Judge Recht's rulings stem from these two issues. The Appellant complains that the decisions and conduct by Judge Recht, taken cumulatively, indicate his bias.

Despite the fact that this Court has already ruled on the issue, the Appellant appears to use the claim of bias to re-argue Judge Recht's initial holding that the Mutual is a state actor. This is the fundamental issue which has shaped this litigation. From the beginning, Judge Recht recognized that this issue, and those flowing from it, had to be decided before the court could determine the substantive causes of action in the Complaint, and he has diligently attempted to put this case in a posture so that a hearing that comported with due process could go forward. Contrary to the Appellant's claim, the basis for granting Dr. Zaleski's partial motion for summary judgment in September, 2005, was not that Dr. Zaleski should have been provided with a *specific* due process procedure. Judge Recht found that the Mutual was a state actor and therefore *some* due process should have been provided and that what was provided to Dr. Zaleski was not adequate. Judge Recht candidly stated, “[b]ut the problem is, I don't know what is sufficient –well, nobody has had the opportunity to discuss that.” (Tr. of Hr'g, November 15, 2005 at 6, Record at 538). Ultimately, after further hearing and briefing by the parties, Judge Recht did make a determination regarding what due process would be appropriate so that this Court would have that finding and this case would not have to be appealed in a piecemeal fashion. (Tr. of Hr'g, February 3, 2006, at 16, Record at 387).

The Appellant argues that Judge Recht must have been biased because he held “the Mutual to a standard that no other insurance company in the world is required to achieve is evidence, in and of itself, of the administrative bias exposed during this process.” (Appellate Pet. for Appeal at 23). This is the same argument made by the Appellant before this Court held that the Mutual was a state actor. As the Judge responded to the Mutual, when counsel asked this exact question at the February 3, 2006 hearing, “What other insurance company is a state actor?” (Tr. of Hr’g, February 3, 2006, at 15, Record at 387).

The fact that this Court disagreed with the specific due process mechanism which should be applied to Dr. Zaleski's situation does not change the fact this Court decided that *whatever* “due process” the Mutual had given to Dr. Zaleski was not enough. Therefore, Judge Recht's decision that the Appellant was a state actor was affirmed, as was his decision that the due process purportedly offered by the Appellant was insufficient. It should also be noted that this Court disagreed with the Appellant regarding the applicability of W.VA.CODE ANN. §33-20C-1 as a mechanism of review. Therefore, if the Appellant is keeping a scorecard, then there are at least three key decisions made by Judge Recht, and affirmed by this Court, which cannot form the basis of its claimed “bias”.

The Appellant claims that Judge Recht denied its Motion to Dismiss without explanation or hearing. In fact, Judge Recht spent the hearing of August 5, 2005, which was scheduled on the Mutual's Motion to Dismiss, explaining his rationale. As he said:

Let me just tell you how I see this. I don't think, from a fundamental standpoint, first off, I don't see right now that there are any factual issues. I think we have to make a determination as to the status of Physicians Mutual Insurance Company as a matter of law.

That is, is it an exclusively private agency? Is it a public agency, or is it a quasi-public agency? I think that we have to make that determination first before anything else flows in terms of determining where we are.

(Tr. of Hr'g, August 5, 2005, at 5, Record at 537).

Judge Recht then asked the parties to submit additional briefing on whether, pursuant to the statute, the Mutual was a private, a public or a quasi-public entity. Again, contrary to the Mutual's claims, it was not denied a hearing on this issue. Although Judge Recht indicated that he did not think a hearing was needed, he offered twice on August 5, 2005, to hear arguments. *Id.* at 13 (“I don't think we need any further argument. If you want to, I'll be happy to hear you.”) and at 16 (“If you want further argument, if you do, let me know.”) If the Mutual felt that additional argument was necessary, all it had to do was ask.

The Mutual also complains that no evidentiary hearing was provided regarding the specifics of the due process afforded to Dr. Zaleski. (Appellant's Brief at 17-18). At the hearing on November 15, 2005, there was a discussion regarding how to get this case into a posture where it could be appealed. After counsel for the Appellant suggested that Judge Recht did not have all of the facts concerning the hearing afforded to Dr. Zaleski, a question was raised concerning whether there should be an evidentiary hearing on the “due process” Dr. Zaleski had been afforded by the Appellant. Judge Recht stated, “..and if in fact --let's just assume that the protocols that you are suggesting are what I would consider to be appropriate. If in fact they were done, then the case is over.” (Tr. of Hr'g, November 15, 2005, at 14-15, Record at 538). He then asked counsel how they wanted to establish the due process that was afforded. “I think if you want to do it by deposition, by affidavit. I don't know. What's the most efficient way?” (*Id.* at 15) Counsel for the Appellant

responded, "Yeah, I believe your honor however we can do it, perhaps we can agree on what happened and submit it, unless you all want to talk to someone." (*Id.* at 16).

The lower court then stated, "What I want to do, then, is try to get a stipulated set of facts, and those areas that are not stipulated and you have a dispute as to those, then either by way of deposition or somehow give me something that I can at least see to try to analyze the reason..." (*Id.* 16-17). The parties did go forward to exchange proposed stipulated facts on December 30, 2005, and on January 11, 2006, counsel for Dr. Zaleski sent a revised set of stipulated facts to counsel for the Appellant indicating areas of agreement, disagreement and/or proposed revision. The Appellant made no response and no further attempt was made by the Mutual to try to use the procedure clearly requested by the court to clarify areas of dispute.

Instead, at a hearing on February 3, 2006, new counsel for the Appellant asked for an evidentiary hearing "where we call witnesses to determine what happened in Dr. Zaleski's case for his non-renewal." (*See* Tr. of Hr'g, February 3, 2006, at 10, Record at 387). To the extent the Mutual seems to contend that it wanted to develop the reasons why Dr. Zaleski was not renewed, this issue is irrelevant if he was not afforded due process at the hearing itself. The lower court stated,

The Court: You're still arguing about the underpinning of the original decision, that the West Virginia Physician's Mutual is not a state actor. That seems to be the root of the entire problem here.

Mr. Offutt: Right.

The Court: It's done. You've said it, and I appreciate what you're saying. And this is not the Court at this point to present that to. I've said everything I'm going to say on that.

(*Id.* at 18-19).

Although the lower court had made the determination that the Mutual was a state actor, as indicated at the hearing in November, 2005, it was willing to revisit the issue of whether, as claimed by the Mutual, adequate due process had been offered to Dr. Zaleski. As of the hearing of February 3, 2006, the Mutual still had not offered the court stipulations of fact as to what occurred and where the areas of disagreement were. As indicated by the lower court, if the parties had submitted the proposed stipulations and offered the areas of disagreement, "maybe there would have been a hearing" (*Id.* at 19-20).

It is difficult to understand the point of Appellant's complaint since it chose not to provide depositions or affidavits to educate the lower court on the need for a hearing. More importantly, the parties were actually able to stipulate to what occurred. As reflected at the hearing of February 20, 2006, the court went through the proposed stipulations to see whether and/or in what way the stipulations could be modified so that they were acceptable to both parties. The stipulations discussed at this hearing then became the "conclusions of fact" in the Order Granting Partial Summary Judgment to Plaintiff of April 14, 2006, (Record at 528). The Appellant has not, in either of its two appeals challenged the factual underpinnings of the purported due process hearing reflected in this Order.

All of the above examples of "bias" occurred prior to the Appellant's last appeal to this Court, but were never raised by the Appellant. Instead, we have gone forward with this litigation while the Appellant apparently held on to past grievances. The significant issue before this Court is Judge Recht's interpretation of his authority pursuant to this Court's decision in *Zaleski*. As the Appellant correctly noted, "[e]ssentially the parties to this action have polar opposite interpretations of the *Zaleski* decision." (Appellant's *Id.* at 19). An intellectual difference in the interpretation of the law

does not mean that the judge is biased. Judge Recht believes that the language in *Zaleski* which remands “the question of non-renewal to Mutual for further hearing in conformity with this opinion” gives him the basis for determining whether the procedure offered by the Mutual meets the minimum prerequisites for due process required by this Court. Surely there has to be something more than a difference of opinion with regard to the interpretation of case law or statutes to suggest bias. If Judge Recht has misinterpreted the directive of this Court, he may be wrong, but it is not evidence of “unfettered bias” as described by the Appellant (Appellant's Brief at 24).

Judge Recht made two decisions after this case was remanded: he found that it was within his authority to review the hearing procedure developed by the Appellant before it was implemented and after reviewing the procedure, found it was lacking in three respects. If the judge had not reviewed the procedure before the review hearing, then the issue would have been appealed after the review hearing. The issues concerning the make-up of the independent hearing tribunal, the burden of proof and notification of the availability of review are substantive, and it makes sense to determine whether they should be included as part of the due process procedure before the hearing occurs.

In *Tennant v. Marion Health Care Foundation*, 194 W.Va. 97, 109, 459 S.E.2d 374, 386 (1995), the Court stated:

Therefore, it must be emphasized that the standard for recusal is an objective standard. The objective standard is essential when the question involves appearance: “[W]e ask how things appear to the well-informed, thoughtful and objective observer, rather than the hypersensitive, cynical, and suspicious person.” *U.S. v. Jordan*, 49 F.3d 152, 156 (5th Cir. 1995).[fn8] See also *In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990). The objective standard requires a factual basis for questioning a judge's impartiality.[fn. 9].

There is no "cumulative effect" of adverse rulings or inappropriate conduct which could result in a finding of bias on the part of Judge Recht. Even if this Court reverses Judge Recht, a reversal alone should not be the basis of the disqualification of a judge. The Appellee asks this Court to review the transcripts of the hearings in the lower court. Whatever disagreement Judge Recht had with the Appellant clearly related only to his interpretation of the facts and the law in this case. There is nothing which would suggest disrespect for either the Appellant or its counsel. The Appellant has utterly failed to articulate any objective factual basis for its claim that Judge Recht was biased or that this bias resulted in a denial of its due process rights.

B. The Ohio County Circuit Court had Jurisdiction to address the Content of the Mutual's Due Process Hearing Procedures For Non-Renewing Coverage.

The Appellant contends that this Court directed the lower court to dismiss the lawsuit filed by Dr. Zaleski and, therefore, Judge Recht did not have jurisdiction to review the Appellant's due process hearing procedures. This is countered by the fact that the Court clearly remanded the case to the trial court and indicated that the trial court was to retain jurisdiction of this matter for some purposes. If the defendant's motion to dismiss were granted, the case would be over. There would have been no need to find that the Mutual was a state actor, no need to remand the question of non-renewal to the Mutual, no need for the trial court to retain jurisdiction to conduct further proceedings, nor any need for the lower court to resolve disputes between the parties. If the case had been dismissed, we would not be before the Court at this time.

Until the Supreme Court issued its opinion in *Zaleski v. West Virginia Physicians' Mutual Ins. Co.*, *supra*, the Mutual consistently maintained that it was a private insurer and owed no procedural due process to its insureds. The motion to dismiss filed by the Mutual was predicated

on its status as a private insurer. The trial court found that the issue of whether the Mutual is a state actor would be key to determining the issues then before the court (*see*, Order of September 22, 2005, Record at 276) and this Court agreed “with the circuit court’s assessment that the issue central to the disposition of the competing motions is whether Mutual is a state actor.” (220 W.Va. at 317, 647 S.E.2d at 753).

Although this Court “largely” agreed with the trial court, the lower court’s decision to reinstate insurance coverage and proceed with trial was reversed.³ Instead, the Mutual was to be given the opportunity to “remedy the defect” by remanding the issue of non-renewal back to the Mutual in accordance with Syllabus Point 4 of *Barazi v. West Virginia State College*, 201 W.Va. 527, 498 S.E.2d 720 (1997), and *Clarke v. W. Va. Bd. of Regents*, 166 W.Va. 702, 279 S.E.2d 169 (1981).

It was in this context that the Supreme Court stated “[i]n summary, we affirm the lower court’s grant of partial summary judgment to Dr. Zaleski on state action grounds, but reverse the lower court’s denial of Mutual’s dismissal motion and order to reinstate insurance coverage.” (220 W.Va. at 322, 647 S.E.2d at 758). The Court did not make a dispositive ruling granting the Mutual’s motion to dismiss, and in fact could not do so since it ruled against the Mutual on the key issues of whether it was a state actor and/or whether sufficient due process had been provided to Dr. Zaleski. However, rather than permitting the case to proceed on the allegations made by Dr. Zaleski, this Court found that the remedy was to give the Mutual a chance to review the issues of non-renewal using the appropriate due process mechanism. The Complaint was not dismissed, which would have

³It should be noted that this Order was never effectuated - insurance was never provided to Dr. Zaleski by the Appellant.

ended the trial court's jurisdiction. Instead the trial court was ordered to "conduct such further proceedings not inconsistent with this opinion as may be required, including the resolution of any disputes which may arise in the course of the Mutual hearing on non-renewal." *Id.* The Mutual apparently believes that in this case, the "reversal" of a denial of a motion to dismiss results in the automatic granting of that motion on the grounds stated in the motion. This case has been "stayed" by virtue of the remand to the Mutual for further hearing, but the motion to dismiss was not granted nor was the case dismissed from the trial court's docket.

After Dr. Zaleski is provided with a hearing that comports with due process and a decision on the renewal of his malpractice insurance is made, the viability of the Complaint will then have to be assessed; however, it is simply incorrect at this time to argue that the plaintiff's Complaint was dismissed.

Based upon the foregoing, the lower Court had jurisdiction to address the content of the Mutual's due process hearing procedures for non-renewing coverage.

C. The Lower Court Correctly Determined That a Review Procedure Which Complies with Due Process must Be Determined Before a Hearing on the Non-renewal Issue Could Be Held.

1. The case was ripe for consideration by the lower court.

The Appellant suggests that the lower courts's "abstract review of the Mutual's Hearing Procedures before Dr. Zaleski had requested a due process non-renewal hearing was improper because it was not yet ripe for review." (Appellant's Brief at 26). It is evident that Dr. Zaleski has repeatedly argued that he is entitled to a review of the non-renewal decision *which comports with due process*. The fundamental complaint raised by the Appellant is that this matter should go back to the Mutual for a hearing on the decision not to renew Dr. Robert Zaleski's professional liability

insurance before an appropriate due process mechanism has been approved by the lower court. Where there are concerns about the process itself, it does not make sense to go through the hearing procedure just to obtain a result so that we can then scrutinize the process.

Dr. Zaleski's objections are not "abstract" - in fact they are quite pointed. The issues dealing with the burden of proof and the constituency of the hearing tribunal, if they stand, have the potential to completely undercut the fairness of the hearing. Given this, the lower court did not need to analyze the hearing procedure "in the context of its operation during the hearing." There may be situations in which the flaws of the hearing process are only obvious when the procedure is actually played out. That is simply not the case in the present situation. The determination of which party bears the burden of proof, as well as who will ultimately make the decision on the non-renewal issue, are questions which can be analyzed on their own merits without needing to be "fleshed out" by the hearing process itself. These issues fundamentally affect the hearing process itself. There is no way that these flaws can be cured by going forward with the hearing.

2. The lower court appropriately reviewed the hearing procedure before requiring it to be implemented.

The Appellant has conceded that it is up to the lower court "to determine whether our plan meets the minimum requirement set out in Syllabus Point 8 ." (Tr. of Hr'g, November 8, 2007, at 28, Record at 543). However this review, according to the Appellant, comes after Dr. Zaleski has availed himself of the hearing process offered by the Mutual. The Appellant maintains that this Court gave it the ability to create a hearing mechanism without any oversight by the trial court. This is clearly at odds with the decision in *Zaleski v. West Virginia Physicians' Mutual Ins. Co., supra*.

The Appellee maintains, and the lower court found, that there are three significant flaws in

the hearing procedure proposed by the Mutual which ultimately undermine the due process rights of Dr. Zaleski, namely, (1) the hearing tribunal is not "unbiased," (2) the physician should not bear the burden of proof and (3) the physician should be advised of his right to judicial review of an adverse decision. If the Mutual had limited the physician's right to counsel, no one would question the ability of the trial court to amend the procedure to meet due process requirements. The Supreme Court remanded the question of non-renewal to the Mutual for further hearing "*in conformity with this opinion.*" (220 W.Va. at 322, 647 S.E.2d at 758). Therefore, the lower court correctly found that the first issue has to be whether the Mutual established a due process hearing procedure that does conform with the directives in the opinion.

The apparent confusion regarding the jurisdiction of the lower court to review the mechanism for the due process hearing stems from the following language in *Zaleski v. Physicians' Mutual Ins. Co., supra*:

Therefore, the case is remanded to the Circuit Court of Ohio County with directions for that court to: (1) remand the question of non-renewal to Mutual for further hearing in conformity with this opinion, and (2) conduct such further proceedings not inconsistent with this opinion as may be required, including the resolution of any disputes which may arise in the course of the Mutual hearing on non-renewal.

(220 W.Va. at 322, 647 S.E.2d at 758).

The Appellant has relied on the clause "including the resolution of any disputes which may arise *in the course of* the Mutual hearing on non-renewal" (emphasis added) to suggest that the trial court's jurisdiction can be invoked only with regard to the resolution of matters which occur during the hearing itself and that any review of the due process issues can occur only after the hearing has occurred. Using the Appellant's reasoning, it would seem that no dispute would be ripe for review by the trial court until there was a final decision by the hearing tribunal. One has to question then

how the Appellant would give effect to the language in *Zaleski* that gives the trial court jurisdiction of “disputes which may arise in the course of the Mutual hearing on non-renewal.” (220 W.Va. at 322, 647 S.E.2d at 758).

The lower court found its jurisdiction to review the due process mechanism in this Court's directive that the hearing procedure to be developed by the Mutual should be “in conformity with this opinion.” (Tr. of Hr'g, November 8, 2007, at 26-27, Record at 543) (“...[T]he Mutual has to be guided by a due process plan that's formulated with the imprimatur of this Court. Otherwise they [the Supreme Court] they could have just dismissed it.” (*Id.*))

This Court repeated this instruction to the lower court when it told the court to “conduct such further proceedings not inconsistent with this opinion as may be required ...” If the entire phrase is reviewed, it is clear that while one of the issues the lower court may address is the resolution of disputes during the hearing process, it is not the only issue the court may address. If that were the intent of this Court, it could easily have limited the scope of the lower court's jurisdiction. Instead the Supreme Court gave the trial court the broader ability to also make determinations “in conformity with this opinion.”

The issue is then whether a review of the hearing process to determine minimum due process *before* such hearing is implemented is “inconsistent” with this Court's opinion in *Zaleski*. It clearly is not. The Court determined that the Mutual is a state actor for due process purposes and that Dr. Zaleski has a property interest in the availability of professional malpractice coverage; therefore, the question of what due process is appropriate is at the very heart of the opinion. The lower court was given jurisdiction to resolve disputes “which may arise in the course of the Mutual hearing on non-renewal.”

The initial dispute in this matter concerns the hearing to be afforded to Dr. Zaleski. Based upon the foregoing, the Appellee respectfully asks this Court to find that the lower court appropriately exercised jurisdiction to scrutinize the hearing mechanism proposed by the Mutual to determine whether it adheres to the minimum due process requirements set forth by this Court before the hearing procedure was implemented.

D. The Lower Court Correctly Found That the Due Process Hearing Procedures Offered by the Mutual Did Not Meet the Minimum Requirements set forth in *Zaleski*.

The Appellant is required to meet all of the minimum due process requirements outlined by the Supreme Court in *Zaleski*. The hearing process as proposed by the Mutual, while certainly better than what was provided to Dr. Zaleski, has three significant flaws: (1) the hearing tribunal is not unbiased; (2) the physician bears the burden of proof; and (3) the physician is not advised that judicial review of an adverse decision is available.

1. Hearing before an unbiased hearing examiner.

The parties agree that Dr. Zaleski is entitled to a hearing before an “unbiased hearing examiner” but differ with regard to their understanding of what the role of the hearing examiner should be: does the hearing examiner simply “administer” the hearing or is the hearing examiner also the decision-maker? The Appellant's hearing procedure provides for an unbiased hearing examiner, but the entity which will ultimately make the decision on the non-renewal, the hearing “tribunal,” is made up of members of its board of directors. The Appellant claims that “the Supreme Court did not require that the hearing take place before an unbiased **tribunal**, but only specifically required a hearing before an unbiased hearing examiner.” (Appellant's Brief at 29) (emphasis in original). The logical extension of the Appellant's argument is that there could be an unbiased hearing

examiner, but a biased hearing tribunal. The Appellee maintains that the Court did not intend for there to be a significant difference between the terms "hearing tribunal" and "hearing examiner."

In *North v. West Virginia Bd. of Regents*, 160 W.Va. 248, 255, 233 S.E.2d 411, 416 (1977), this Court stated that it would "approach the question of due process on a case by case basis." The context of this case is different because, rather than a state agency conducting the due process hearing, the state actor is also a domestic corporation. The issue is whether members of the board of directors of a corporation, who owe a fiduciary duty to the corporation, can avoid the appearance of impropriety and bias in reviewing a decision made by the company's underwriting department not to renew a physician's insurance.

In *Zaleski*, the Court, citing *North* stated:

From that standpoint, we have said that due process is met when an aggrieved party is afforded:

a formal written notice of charges; sufficient opportunity to prepare to rebut the charges; opportunity to have retained counsel at any hearings on the charges, to confront his accusers, and to present evidence on his own behalf; an unbiased hearing *tribunal*; and an adequate record of the proceedings. *North*, 160 W.Va. at 257, 233 S.E.2d at 417.

(220 W.Va. at 321, 647 S.E.2d at 757) (emphasis added).

It is apparent that this Court has not made the artificial distinction between a "tribunal" and an "examiner" that the Mutual finds persuasive, but instead has used the terms somewhat synonymously - the difference being whether the decision maker is an individual or a group. It does not matter how "unbiased" the hearing examiner is, if the entity making the dispositive decisions is biased. The composition of the tribunal must avoid the appearance of bias. For example, the Appellee has suggested that the tribunal be composed of physicians insured by the Mutual who are

not members of its governing board.

The cases cited by the Mutual are not substantially on point because the hearing tribunal in each case would not, by its composition, have a vested outcome in the result of the hearing. For example, in *North* there was an allegation of false information on an application to medical school. The review provided to the student included a committee composed of faculty and administrators, a committee on student discipline, an appeal by the president of the university and subsequent appeal to the board of regents. None of these entities would appear to have a special interest in the outcome of the case. In *State ex rel Rogers v. Bd. of Educ. of Lewis Co.*, 125 W.Va. 579, 25 S.E.2d 537 (1943), and *Beverlin v. Bd. of Education of Lewis County*, 158 W.Va. 1067, 216 S.E.2d 554 (1975), the reviewing entities were elected members of the board of education. Although the individual members may have a special interest in the outcome of a particular issue, as an elected body, there is not a concern that bias is built into the process.

The Court in *Rogers* did address the potential bias of individual members of the hearing tribunal. In that case, one or more of the board members brought the charges against the superintendent, four members of the board gave testimony against the superintendent and several "prosecuted" the charges:

A tribunal so constituted and acting carries a very serious burden of exercising impartiality and avoiding the appearance of bias, prejudice, or arbitrariness, in its actions. The same persons were prosecutors, witnesses and judges. We do not say that their proceedings were void for this reason alone (citation omitted), but we do emphasize the necessity of avoiding the appearance of unfairness in such a trial. An administrative body, clothed by law with quasi-judicial powers, must never depart from those elemental principles of discreetness and circumspection which our system of law requires in all tribunals which purport to conduct trials.

(125 W.Va at 588-589, 25 S.E.2d at 542).

While *Rogers* addresses personal bias, none of the cases cited address the institutional bias that the Mutual created by the composition of its hearing tribunal.⁴ The claim by the Mutual that a decision against it on this issue would “wreak havoc among all state agencies” is absurd. These state agencies enforce state law and regulations and have no vested interest in the outcome of their decisions. However, members of the board of directors of a corporation may get paid for their service by the company and may be entitled to other benefits which then can be revoked if they do not uphold the underwriting decisions of the company.

Similarly *Ladenheim v. Union Co. Hospital Dist.*, 394 N.E.2d 770 (Ill. App. Ok. 1979), and *Duffield v. Charleston Area Medical Center*, 503 F.2d 512 (4th Cir 1974), are not apposite to this case - at least not in the manner intended by the Appellant. The premise of those cases is that the fact that a decision-maker has prior information about a case does not result in disqualification. As an example, the Court in *Duffield* noted that a judge is not disqualified from rehearing a matter because he had been reversed on prior rulings.

Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437 (1927), describes a situation in which there is “institutional” bias on the part of the decision-maker. In that case the mayor had both a financial interest in the outcome of the case because he was paid only if there was a conviction and, as the executive of a village in a difficult financial situation, the mayor had an interest in assessing fines which would help the village. Granted, in the instant situation the pecuniary interest is not as direct,

⁴*Hoerman v. Western Heights Bd. of Education*, 913 P.2d 684 (Ok.Civ. App. 1995), and *Wolkenstein v. Reville*, 694 F.2d 35 (2nd Cir. 1982), both deal with school boards and so the analysis is the same as the West Virginia cases previously cited. In *Sifigalou v. Bd. of Trustees, etc.*, 840 P.2d 367 (Haw.1992), the court found that the Trustees of a pension board had no direct, personal or financial interest in their decisions.

but it is still present. If the underwriting department has not renewed a policy, the board of directors has an interest in making sure that the policy is not renewed for fear of potential liability. This is a type of institutional pecuniary interest which should be avoided.

Whether or not the individual members of the board of directors are actually impartial is not enough when a cloud of possible bias, prejudice or arbitrariness hangs over the proceedings because of their status within the organization. Simply stated, an "unbiased" tribunal cannot consist of individuals who are members of the board of directors of a corporation. As Judge Recht stated, "Clearly they would be biased because they have a fiduciary duty to protect the insurance company. That clearly is a basis for a determination of bias." (Tr. of H'rg, November 8, 2007, at 11, Record at 543).

2. Burden of proof.

There are some things which are so intrinsic to the concept of a fair hearing that one would not think it necessary to list them as a specific part of due process. In *State ex rel. Rogers v. Board of Education of Lewis County, supra*, a county school superintendent contested his removal from office by the school board. One of the concerns was that none of the statements given at the hearing were under oath. "Respondents concede that no witness heard was sworn. This alone nullifies the hearing. A 'hearing' by either a judicial or a quasi-judicial tribunal contemplates the taking of evidence, and oral testimony presupposes the administration of an oath." (125 W.Va. at 590, 25 S.E.2d at 542). The hearing procedure offered by the Mutual has placed the burden of proof on the physician whose insurance is not renewed. Just like the failure to administer an oath, this shift in the burden of proof goes against fundamental notions of fairness.

Whether a criminal or civil proceeding, the party bringing the allegations bears the burden of proof. While the Appellant's procedures provide for notice of the reasons for the non-renewal,

this is akin to an indictment. Although the defendant is provided with a list of his transgressions, the prosecution retains the burden of proving the allegations. The Appellant equates the ability to have the last word with the concept of burden of proof. A hearing that comports with due process requirements "presupposes" that the party making the allegations bears the burden of proof. Instead, the Mutual has determined that after finding that a physician is an unacceptable risk, the physician has to *prove* that he does meet their criteria for renewal. This Court has determined that a physician who is insured by the Mutual has a property interest in maintaining that insurance. Since the Mutual's decision not to renew has the effect of depriving the physician of this property interest, the Mutual should bear the burden of proof.

3. Availability of review.

The written procedure of the Mutual states that "[n]o additional right of appeal exists within the Mutual." While that is correct as far as it goes, the trial court found that the physician should be advised that he may be able to seek a review of the Mutual's decision, rather than leave the physician with the impression that no further review is available. Judge Recht in his letter opinion of January 9, 2008, (Record at 462) indicated that the hearing procedure should "inform the affected physician as to the scope of any appellate review." In *Beverlin*, *supra*, the Court noted that, "Beverlin was accorded actual notice, a meaningful (albeit unsuccessful) hearing, the opportunity to confront his accusers, assistance of counsel and the *availabilities of remedies for review*." (158 W.Va. at 1072, 216 S.E.2d at 557) (emphasis added). The Appellant asserts that all doctors will obtain legal counsel to represent them at the hearing to review the non-renewal decision and so there is no need to provide information regarding further appeal. This ignores the primary purpose of the notice - it is to provide the aggrieved party information concerning his or her rights. Whether the physician ultimately obtains legal representation is beside the point - he or she is entitled to notice.

not the attorney.

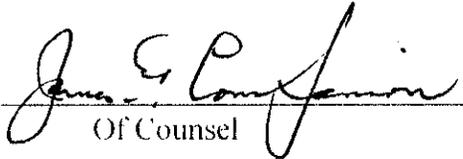
It is clear from the due process requirement that a record be made of the proceeding that an opportunity for appeal was anticipated by this Court. The Mutual, by counsel, appears to accept that judicial review is available under the Mutual's protocol. (Tr. of Hr'g, November 8, 2007, at 14, Record at 543) (Mr. Offutt: "...that's not true because there is still judicial review."). It seems that the Mutual simply does not want to tell the physician that it exists. The Appellant has not advanced any substantive reason not to include a notice of the availability of appeal. The Appellee respectfully requests that this Court find that providing a doctor with notice that he or she may have the right to seek a further review of any adverse decision comports with due process requirements.

VII.

RELIEF REQUESTED

For the above-mentioned reasons, Dr. Zaleski respectfully requests that this Court deny the Mutual's appeal and require the parties to go forward with a review hearing which incorporates the "amendments" ordered by the lower court to the due process hearing procedure proposed by the Mutual.

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CERTIFICATE OF SERVICE

Service of the foregoing **BRIEF ON BEHALF OF APPELLEE ROBERT J. ZALESKI, M.D.**, was made upon the Appellant, West Virginia Physicians' Mutual Insurance Company by mailing a true copy thereof to the following below-named counsel this 12th day of February, 2009:

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