

BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 34620

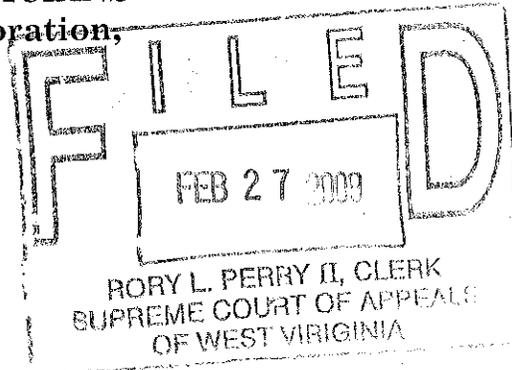
WEST VIRGINIA MUTUAL INSURANCE COMPANY,
formerly known as WEST VIRGINIA PHYSICIANS
MUTUAL INSURANCE COMPANY, a corporation,

Appellant,

v.

ROBERT J. ZALESKI, M.D.,

Respondent.



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

Respectfully submitted,

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

Perry W. Oxley, Esquire (WV #7211)

David E. Rich, Esquire (WV #9141)

OFFUTT NORD, PLLC

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 Mutual Insurance Company

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. ARGUMENT 1

 A. A Complete Review Of The Record Leaves Little Doubt That Judge Recht Is Undoubtedly Biased Against The Mutual 1

 B. Because The Evidence Of Bias By Judge Recht Had Not Ripened Sufficiently For Appellant To Completely Comprehend At The Time Of The Underlying Case, Pursuant *Reed v. Ross*, Appellant Should Be Permitted To Argue Judge Recht’s Bias To This Court 8

 C. A Hearing Tribunal Made Up Of Physicians Who Are Members Of The Appellant’s Board Of Directors Is Not Per Se Biased ... 12

 D. The Record Is Devoid Of Any Evidence That Judge Recht Ever Intended Or Offered The Appellant A Meaningful Due Process Hearing On The Sufficiency Of Its Hearing Procedures, As Applied To Dr. Zaleski, Prior To Unilaterally Changing The Hearing Procedure Himself 16

 E. Appellees Have Not Successfully Offered A Counter-Argument To Appellant’s Ripeness Argument Or That The Mutual’s Hearing Procedures Meet The Threshold Requirements of *Zaleski* .. 18

III. CONCLUSION 19

TABLE OF AUTHORITIES

Cases:

<i>Cuevas v. State</i>	9
641 S.W.2d 558, 563;	
<i>Ex parte Chambers</i>	9
688 S.W.2d 483, 485 (Tx. 1985).	
<i>Mathews v. Texas</i>	9
768 S.W.2d 731 (Tex.Ct. App.1989)	
<i>Reed v. Ross</i>	8
468 U.S. 1, 104 S.Ct. 2901 (1984)	
<i>Roth v. Weir</i>	9, 11
690 N.W.2d 410 (Minn. App. 2005)	
<i>Subaru of America, Inc. v. State Board of Vehicle Manufacturers, Dealers and Salespersons</i>	14
842 A.2d 1003, 1009 (2004)	
<i>U.S. v. Sciuto</i>	11
531 F.2d 842 (7 th Cir. 1976)	
<i>Wolkenstein v. Reville</i>	14
694 F.2d 35, 41 (1982)	

Statutory Provisions:

W. Va. Code Section 33-20F-9	13
------------------------------------	----

I. INTRODUCTION

The Appellant, the West Virginia Mutual Insurance Company (“the Mutual”), by counsel, D.C. Offutt, Jr., Perry W. Oxley, David E. Rich and the law firm of Offutt Nord PLLC, offers the following Reply to the Appellee’s, “Brief on Behalf of Appellee, Robert J. Zaleski, M.D.”

II. ARGUMENT

A. A Complete Review Of The Record Leaves Little Doubt That Judge Recht Is Undoubtedly Biased Against The Mutual.

Appellee goes to great lengths in his response brief to argue that Judge Recht has been nothing but civil, courteous and respectful to counsel for the Mutual during the four years of litigation in this case. However, the manner that Judge Recht has treated counsel during hearings in this case is irrelevant as to whether he denied the Mutual it’s constitutional right to due process.

Judge Recht’s judicial decisions over the past four year period of this litigation are at the heart of the matter, and it is this conduct that tramples upon the due process rights of the Mutual. Specifically, as set forth during this appeal, Judge Recht’s refusal to grant Appellant’s repeated pleas for a hearing on the issue of the content of the Hearing Procedures of the Mutual, can be perceived as biased.

Judicial bias can present itself in a number of different ways. Sometimes it occurs when the judge has some pecuniary or interpersonal relationship with one of the parties or their counsel which makes it impossible for he or she to treat both sides equally. Sometimes the Judge simply has a personal feeling that he or she believes

will affect his or her judgment in a case, that may not be reasonable or capable of detection. If a Judge has some true personal bias that is in fact unexplained or nearly imperceivable by the affected party, the only person truly aware of it may be the Judge himself. However, the rulings and actions of the Judge will speak for him, and in this case, the conduct of Judge Recht speaks volume.

In this case, as pointed out in Appellant's brief, there is no clear-cut evidence of Judge Recht's bias against the Mutual, meaning there is no statement from the Judge saying, "There is no way I am ever going to rule in your favor on any motion in this case, even if it lasts 100 years." Certainly, if that were the case there wouldn't be an issue at all on how to proceed. In this case, it is the position of the Appellant that for some reason, which it is not aware, Judge Recht has consistently held against it whenever possible in this case, even in the face of a Supreme Court mandate to rule in favor of the Appellant.

In its brief, Appellant offered numerous examples from the Record of conduct by Judge Recht that it believes demonstrates his manifest bias against it. The strongest undisputed evidence of his bias is Judge Recht's decision to violate the mandate of the West Virginia Supreme Court of Appeals by failing to remand the case to the Mutual and enter an Order granting the motion to dismiss. There is no reasonable justification for this conduct. However, evidence of his bias is apparent in other ways. For instance, perhaps the most emphatic piece of evidence that demonstrates Judge Recht's bias against the Mutual is the fact that he called the Hearing Procedures of the Mutual "at best shallow and at worst a sham" in his

September 22, 2005 Order denying the Mutual's Motion to Dismiss. See the September 22, 2005 Order, in the Record. Shockingly, at the time this finding was made, Judge Recht hadn't even reviewed one sentence of the Mutual's Hearing Procedures. In fact, not only did he not review the Mutual's Hearing Procedures prior to making this ruling, he had not even looked at the series of letters exchanged between Dr. Zaleski and the Mutual regarding the hearing procedure and the renewal of Dr. Zaleski's insurance. Later, during a February 20, 2006 hearing, almost five months after the September 22, 2005 Order containing the "shallow/sham" comment, Judge Recht admitted that he had just recently received all of the materials which would have allowed him to judge the sufficiency of the Hearing Procedures of the Mutual:

Judge Recht:

And it really came together for me once I received—well, at the conclusion of the last hearing, on the 3rd of February, I was handed the proposed stipulated facts. And that was somewhat of a start. But then I received a letter from Mr. Companion that contained various documents, specifically correspondence involving Dr. Zaleski and the Physician's Mutual Insurance Company that, as I see it at least, represents the conduct insofar as the decision of West Virginia Physician's Mutual Insurance Company to not renew Dr. Zaleski's policy, beginning with a letter dated September 8, 2004, which was the seminal correspondence. And then we have a letter of September 23rd, 2004, which was Dr. Zaleski's response, a letter of October 4, 2004, which was the response on behalf of, I would say, the insurance company, and then another letter dated November 5, 2004, again from the insurance company that's addressed to Dr. Zaleski.

See the February 20, 2006 Hearing Transcript, in the Record.

By the Judge's own admission, he deemed the Hearing Procedures of the Mutual

“at best shallow and at worst a sham” without even looking at the Hearing Procedures themselves, without reading the non-renewal letter from the Mutual to Dr. Zaleski, Dr. Zaleski’s response letter or any of the documents concerning the hearing on Dr. Zaleski’s renewal, including the document he described as the “seminal correspondence” to the event. This was further pointed out to Judge Recht during a November 15, 2005 hearing by counsel for the Mutual:

Attorney Croyle: And unfortunately, you don’t have these facts before you, because we had not developed any factual record at all basically. But there were three steps when a decision was reviewed, not only internally by management, but by Dr. Zaleski’s peers where he actually had an opportunity–

Judge Recht: **I didn’t know any of that. I think you better put that in.**

See the November 15, 2005 Hearing Transcript at 13 (emphasis added).

Appellant is without any other explanation than bias for why a fair and unbiased Circuit Court judge would jump to such a conclusion without the benefit of documents that even he admits, after the fact, were “seminal” in a determination of the sufficiency of the Hearing Procedures at issue.

Throughout the record in this case, there are other somewhat subtle references by the Judge that suggest a bias against the Mutual. One such reference occurred during the November 15, 2005 hearing, where Judge Recht takes a slight jab at the West Virginia Legislature for changing the tort system and explains that he believes that physicians should not be judged for renewal purposes based on claims made against them under the old tort system. This is significant because the Mutual has

stated repeatedly that one of the reasons for the nonrenewal of Dr. Zaleski's insurance was his claim history, most of which occurred prior to the legislative tort reform. Specifically, Judge Recht offered the following thoughts at the November 15, 2005 hearing:

Judge Recht: We can debate forever the wisdom of that action, but that's not the function of this Court. It was a-determined by the legislature that there was a correlation between medical care and the tort system. So it changed the law. And you have physicians who had a history of liability that was incurred under the old system prior to the two changes. And then the system was changed. You have an insurance carrier that accepts a physician such as Dr. Zaleski. He has no current loss experience under the new paradigm and, yet, they just simply say: We're not going to renew you. Why? Because of conduct that was measured under standards that the legislature determined were the reason for the medical malpractice crisis in the first place. And that, I believe, is the reason that Dr. Zaleski has a property interest in continued or- yeah, continued coverage;

See the November 15, 2005 Hearing Transcript at 4.

Another tongue-in-cheek example of how Judge Recht feels about this case, the Mutual, and his desire to control the outcome of the case, was demonstrated during a February 19, 2007 hearing:

Judge Recht: All I want to do- this case is getting whiskers. It's an 05 case. It may be one of the oldest cases I have. **And I am running again so- only because of this.**

See the February 19, 2007 Hearing Transcript at 18 (emphasis added).

Perhaps one explanation for Judge Recht's unknown bias against the Mutual is

some kind of anger or resentment at the Legislature for tort reform and he is taking it out on the Mutual because he believes past claims against physicians prior to the tort reform should not be considered when making a decision on non-renewal. Perhaps this resentment against the legislature is why Judge Recht seemed intent on holding the Mutual to the same standard as the West Virginia Insurance Commissioner, commenting that "What other insurance company is a state actor?" Obviously while the cause of Judge Recht's bias is undeterminable by anyone other than Judge Recht himself, the evidence rampant throughout the record is that the bias exists.

Unfortunately, Appellant is without any other option to investigate the alleged bias of Judge Recht but this Court. This Court has the ultimate jurisdiction over this matter and can determine whether Judge Recht is incorrect or correct in refusing to follow the mandate of this Court from the case of *Zaleski v. West Virginia Physicians' Mutual Ins. Co.*, 220 W.Va. 311, 647 S.E.2d 747 (2007) and is free to accept Judge Recht's position that he has the judicial leeway to interpret *Zaleski* however he wishes to ensure that his will be done and that he is the final interpreter of all acts by the Mutual. Judge Recht has demonstrated throughout this process that he believes he can take an express decision by this Supreme Court and apply it any way he wishes. Judge Recht would argue that he then can interpret the spirit of a Supreme Court decision and avoid applying any part he disagrees with.

For instance, even though this Court expressly reversed Judge Recht's denial of the Mutual's motion to dismiss, Judge Recht does not "read the case" that way. While reasonable minds may have different interpretations of language in some

judicial opinions, the language used by this Court reversing the denial of the motion to dismiss leaves little ambiguity. Judge Recht's problem does not seem to be one of interpretation, but rather he simply wants the outcome to be different. The plaintiff compounds Judge Recht's contrived misinterpretation by making the absurd argument that reading the case as the Mutual suggested would lead to the dismissal of the entire claim. This is an extremely weak argument because the "state actor" due process argument was never raised in the Complaint, but was raised *sua sponte* by the Judge at the hearing on the Mutual's Motion to Dismiss the Complaint. In fact, the Mutual raised as error on the last appeal that Dr. Zaleski's claim for breach of procedural due process should fail because it was not raised in his Complaint. The Motion to Dismiss in issue did not even address procedural due process because it was not alleged in the Complaint, and as a result, the reversal of the denial of the motion to dismiss will do nothing to the due process claim because it was never raised in the Complaint. The truth is that the dismissal of all the claims in the Appellee's Complaint has no impact at all on his claim for procedural due process.

In West Virginia, the West Virginia Supreme Court of Appeals stands as the Mutual's sole recourse and only opportunity for justice in this case, because Judge Recht will not follow this Court's orders. Every litigant depends on this Court to act as a shining light of fairness that spreads justice to every corner of our state. In other words, this Court is a court of last resort that is responsible for seeing that unfair judicial decisions are properly remedied. When the Court reigns in an errant judge by reversing a decision, that mandate must be followed. The trial court's failure to

institute the decisions of the this Court threatens the very foundation of our legal justice system. In this case, Judge Recht has threatened our system of justice by failing to follow an Order of this high Court. The Court should correct this injustice by assigning the case to a new judge and reversing the case with instructions to the new judge to remand the case to the Mutual and to enter an Order granting the Mutual's motion to dismiss. Such a decision by this Court will send the message that this Court's decisions cannot be ignored by any trial judge in West Virginia and that no trial judge will be allowed to cast a shadow over the light shone by this Court.

B. Because The Evidence Of Bias By Judge Recht Had Not Ripened Sufficiently For Appellant To Completely Comprehend At The Time Of The Underlying Case, Pursuant *Reed v. Ross*, Appellant Should Be Permitted To Argue Judge Recht's Bias To This Court.

In its brief, Appellant offered the case of *Reed v. Ross*, 468 U.S. 1, 104 S.Ct. 2901 (1984), to demonstrate that an exception can be made to the rule that requires that all issues raised on appeal must first have been raised in the lower court. In *Reed v. Ross*, 468 U.S. 1 (1984), the Court dealt with the federal habeas jurisdiction of a federal court reviewing a state criminal conviction and held that "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures." *Id.* at 16. The *Reed* Court further stated that "if counsel had no reasonable basis upon which to formulate a constitutional question. . .it is safe to assume that he is sufficiently unaware of the question's latent existence that we cannot attribute to him strategic moves of any sort." *Id.* at 15. In summary, the Court in *Reed* held that there

are some circumstances that may not completely present themselves during the underlying case, that when looked at retrospectively, demonstrate a claim or right that was not in existence, or perceivable, at the time of the underlying case, and those such claims may be raised for the first time on appeal.

The *Reed* doctrine has been expanded upon in a variety of settings, and in particular, Courts have held that “[w]here the defect of constitutional magnitude has not been established at time of trial, failure of counsel to object does not constitute waiver.” *Cuevas v. State*, 641 S.W.2d 558, 563; *Ex parte Chambers*, 688 S.W.2d 483, 485 (Tx. 1985). *See also Mathews v. Texas*, 768 S.W.2d 731 (Tex.Ct. App.1989) (“If constitutional claim is sufficiently novel, there is no procedural default in failing to make contemporaneous objection). The Court in *Roth v. Weir*, 690 N.W.2d 410 (Minn. App. 2005) set forth some helpful factors for applying the *Reed* doctrine, which are: (1) the issue is a novel legal issue of first impression, (2) the issue was raised prominently in briefing, (3) the issue was implicit in or closely akin to the arguments below, and (4) the issue is not dependent on any new or controverted facts.

In this case, the actions of Judge Recht nicely follow this exception carved out by the Court in *Reed*. Specifically, in this case there is no outright act of bias by Judge Recht which would rise to the level of a Motion for Disqualification. Rather, it is the entire course of Judge Recht’s conduct during this four year litigation, and the seemingly unexplainable rationale for not following the clear mandate of this Supreme Court, to the detriment of the Appellant, along with his refusal to even consider

granting the Appellant a formal hearing on the sufficiency of its Hearing Procedures as applied to Dr. Zaleski, that when viewed retrospectively, in totality, create a clear and perceptible bias. Clearly, when you weigh the *Roth* factors out, the facts of this case reflect a novel constitutional legal doctrine, based on the same conduct that is now the basis for two appeals and is not dependant on any new or controverted facts. Based on the facts of this case, there can be no question that this case falls squarely under the *Reed* doctrine and the perceived bias of Judge Recht is now raised in a timely fashion on Appeal.

The Appellee misinterprets Appellant's argument and suggested application of *Reed* in its response brief when it says, "There is nothing 'novel' about a claim of bias based upon a judge's relationship with a litigant." See Appellee's Brief at 17. Appellant is not suggesting in this case that Judge Recht is biased against the Mutual because of his relationship with either party. That is why *Reed* is applicable, because there is no obvious explanation for the actions of Judge Recht in refusing to grant the Mutual's repeated requests for a hearing or his "shallow/sham" statements prior to even reviewing the Hearing Procedures, other than bias. That is what makes this situation "novel." As in *Reed*, in the instant case, the bias was not raised in the underlying case because it would not only have been futile considering Judge Recht's position on the issues in the case but also all of the evidence suggesting bias had not ripened sufficiently to evaluate collectively and to conclude that a good faith allegation of bias could be supported.

Appellee suggests in its brief that had the Appellant implicitly raised the issue of Judge Recht's bias in the Circuit Court, that this Court would then have been able to consider the bias argument, as the Court did in *Roth v. Weir*, 690 N.W.2d 410 (Minn.App. 2005). In fact, counsel for the Mutual did implicitly raise the issue of Judge Recht's bias in the underlying case, by objecting on the Record to each and every holding and ruling that it believed demonstrated bias, including Judge Recht's refusal to provide a formal hearing on the sufficiency of the hearing procedures offered to Dr. Zaleski, an objection that was formalized in the September 22, 2005 Order signed by Judge Recht. Moreover, the Mutual preserved every objection and has brought this case back to the Court a second time solely because Judge Recht refused to follow this Court's express written Order in *Zaleski*.

Appellee attempts to distinguish the case of *U.S. v. Sciuto*, 531 F.2d 842 (7th Cir. 1976) to suggest that the bias in that case was excusably identified after it should have been raised in the lower court because it involved an *ex parte* communication between the Judge and a probation officer that affected the Judge's decision on whether the defendant had violated the terms of his probation. Despite the fact that there is no evidence in this case of an *ex parte* communication by any party with the Judge, something in this case caused Judge Recht to come to a conclusion that the Hearing Procedures of the Mutual were "at best shallow and at worst a sham," prior to him even seeing a written copy of the Hearing Procedures and without the benefit of review of any correspondence between the Mutual and Dr. Zaleski concerning his non-renewal.

While the instant circumstance may lack the *ex parte* smoking gun that was present in the *Sciuto* case, both cases involve a Judge who has compromised fairness based upon some fact outside of the evidence in the case, and as such, Judge Recht's prejudgment of the Hearing Procedures of the Mutual is akin to an *ex parte* communication where he has demonstrated his inability to be fair on the issue. As repeated multiple times herein, the Appellant does not know the specific reason why a sitting Circuit Court Judge would issue such a statement about a written procedure he had not even read. The point that *Sciuto* shares with this case is the observable evidence of bias that follows from outside influences, such as an *ex parte* communication in *Sciuto*. The only difference is that Appellant could not identify the genesis or motivation behind Judge Recht's bias in this case, and only after reflection on Judge Recht's failure to follow the Court's mandate has this bias become undeniable.

Therefore, since Appellant impliedly objected to Judge Recht's biased behavior, the holding in *Reed* should apply and this court should consider Appellant's claim of bias by Judge Recht.

C. A Hearing Tribunal Made Up Of Physicians Who Are Members Of The Appellant's Board Of Directors Is Not Per Se Biased.

In their brief, Appellee points out that the Mutual was created pursuant to the perceived medical malpractice crisis in the state of West Virginia. In fact, there was such a crisis and that crisis was so severe that the Governor and the Legislature agreed that the only way to continue to have a viable healthcare system in West

Virginia which would provide compensation to justifiably injured patients was to take the unprecedented step to expand BRIM, the agency of the State that insures the State, to insure private practicing physicians. Since the state found this unacceptable, it took the unprecedented step of loaning the needed capital to the Mutual to start up this company. It is important to note that despite Appellee's attempt to make it otherwise, the Mutual is different from all other corporate companies in West Virginia. It is not a stock company owned by out-of-state investors, but rather is a mutual company owned by the West Virginia physicians who purchase insurance from it and every dollar spent defending claims such as the instant claim by Dr. Zaleski is a dollar of West Virginia physicians' premiums. In this case, Dr. Zaleski does not have and does not want or need to have insurance coverage through the Mutual. He has not asked for coverage to be provided by the Mutual. However, each doctor that the Mutual does insure, all 1700 of them, is paying for this case to continue in this Court.

In footnote fourteen of *Zaleski*, the Court stated that "[a]lthough review of non-renewal decisions is warranted under due process principles, there is no question that Mutual has the authority to refuse to renew medical liability policies as this decision is reserved to Mutual by statute. W. Va. Code Section 33-20F-9." *Id* at n. 14. As plainly stated as possible, the Mutual may choose the physicians it insures, and it may choose the physicians it renews. The Appellee's argument must necessarily be viewed through the prism of the reality that the Mutual is going about the business of insurance and that business necessitates the evaluation of the risk that each of its potential insureds brings with him or her prior to the issuance of insurance. The right

and duty of the entity to evaluate this risk and to decide who it will insure is fundamental to an understanding of the need to provide due process.

Appellee's suggestion in this case is rather simplistic- if members of the Mutual's Board are on the tribunal that considers a physician insured by the Mutual's policy renewal, the hearing is intrinsically biased.¹ First and foremost, this argument ignores the fact that this Court did not make this a requirement in the *Zaleski* decision, that the issue is not ripe and Judge Recht did not have jurisdiction over the matter. However, if we ignore all these facts, as set forth above and in Appellant's brief, the Mutual has the right to select its insureds. As a result, the Mutual's decision makers must necessarily make the final decision concerning insurance. The Court in the *Zaleski* decision provided Dr. Zaleski with the right to be heard, but it did not take away the right for the Mutual to make the eventual decision concerning insurance. In fact, as set forth in footnote 14, the Court recognized the Mutual's right to make the final decision. Because Zaleski's argument ignores this fundamental principal, it is

¹ The situation concerning the bias of a hearing examiner most oftentimes occurs in the setting of an administrative governmental agency. In those cases, rather than a presumption of bias in a case where an administrator serves as an adjudicator, those individuals are actually "presumed to be unbiased and this presumption can be rebutted by showing of disqualifying interest, either pecuniary, or institutional, and burden of establishing disqualifying interest rests on party making that assertion." *Wolkenstein v. Reville*, 694 F.2d 35, 41 (1982). "Speculative gain or loss is not enough to show that an adjudicator has an improper interest in the outcome of a case warranting disqualification." *Subaru of America, Inc. v. State Board of Vehicle Manufacturers, Dealers and Salespersons*, 842 A.2d 1003, 1009 (2004). The Court in *Subaru* set forth a test to find the kind of impermissible bias Appellee is claiming in this case, which requires that "the interest of the adjudicator in the outcome of the case must be direct, and it must be substantial." *Id* at 1011. Applying the *Subaru* test to the instant case, in order for Appellee to prove bias amongst the Board members sitting on the Mutual's hearing tribunal, Appellee has to first prove that each individual has a "direct and substantial" interest in not renewing his policy of insurance, which as mentioned above, is not present in this case.

fundamentally flawed and must necessarily fail. Appellee cannot have it both ways. When he wants to challenge the sufficiency of the Mutual's procedural due process hearing procedures he wants the Mutual to be a state actor but when he argues the mechanism of that hearing procedure, he now wants to argue that the Mutual is more like a private corporation, out for profit, whose individual board members are financially motivated and inherently biased.

If we go a step further with Appellee's flawed argument, the truth is that the Mutual has adopted hearing procedures that are fairly robust in terms of avoiding perceived or actual bias among tribunal members. In relevant part the procedures provide:

The members of the Mutual's Board of Directors are eligible to serve as a member of the Tribunal unless otherwise subject to recusal. Grounds for recusal exist if the board member participated in the non-renewal decision and/or maintains a family, religious, social, professional or business relationship with the appealing physician that would prevent the member from being fair and impartial to the physician or the Mutual. Recusal is appropriate if a relationship exists that gives the appearance of being unable to be fair and impartial. Recusal is determined solely by the involved board member except in those circumstances where recusal is mandatory. Mandatory recusal must occur when the board member and the appealing doctor have a close personal friendship, a history of a personality conflict, an active referral history and/or a material collaborative or competitive economic relationship. If the physician requests recusal and the member of the Tribunal declines, the Hearing Officer shall resolve the issue only upon a determination that grounds exist for mandatory recusal.

After considering footnote 14 of Zaleski, and the makeup of the Appellant's tribunal, Appellee's argument that just the members of the hearing tribunal are intrinsically biased is without merit.

D. The Record Is Devoid Of Any Evidence That Judge Recht Ever Intended Or Offered The Appellant A Meaningful Due Process Hearing On The Sufficiency Of Its Hearing Procedures, As Applied To Dr. Zaleski, Prior To Unilaterally Changing The Hearing Procedure Himself.

The thrust of Appellant's procedural due process claim in this matter is that Judge Recht, despite numerous requests for a hearing by counsel for Appellant, failed to provide procedural due process notice and an opportunity for a hearing to take place before he changed the Appellant's hearing procedures for non-renewal of a physician's coverage. Appellant has been so consistently offended by Judge Recht's course of conduct in refusing to provide any type of formal hearing on the issue, that it volunteered to draft the September 22, 2005 Order, which Judge Recht signed and entered, and which holds that part of the reason Appellant objects to the alteration and amendment of its hearing procedures is because it was not provided a formal hearing prior to the amendment of said procedures. *See* the September 22, 2005 Order, in the Record. Essentially, of all the issues Appellant takes with the actions of Judge Recht, this is the one that most offends the Appellant's sense of fairness, justice and constitutional faith.

Despite the utter lack of any proof in the record whatsoever that any hearing was ever offered to Appellant, counsel for Appellee argues in his response brief that Judge Recht actually offered to give the Appellant the opportunity for a hearing on this issue, and the Appellant did not accept his offer. *See* the Brief of Appellee at 21. Such fast and loose play with the Record in this case is both misleading and unproductive. Even a cursory review of the record in this case demonstrates that counsel for

Appellant requested time and time again the opportunity for a hearing prior and subsequent to Judge Recht's unilateral amendment of the Hearing Procedures of the Mutual. At times, D.C. Offutt, Jr., counsel for the Mutual, practically begged for such a hearing and even went so far as to specifically describe witness by witness the kind of testimony that could be proffered by the Mutual at such a hearing.

It is worth specifically analyzing that portion of the August 5, 2005 hearing transcript cited by the Appellee in his brief to shed light on the true events of the day and the absence of any real offer of a hearing by Judge Recht. During a portion of that hearing, Judge Recht began pontificating from the bench about the possible course of action to take in the case, what statutory authority controlled the matter and whether he had enough information upon which to issue a written opinion. And when he did offer to "hear" from the counsel present on the subject, it was simply a suggestion that he would welcome the attorney's "thinking on this" and not an invitation or an offer to have a formal procedural due process hearing on the issue of whether he can amend or alter the Hearing Procedures of the Mutual:

Judge Recht: Now, you can say that the legislature, of course, knows what it is doing and, if they intended to afford any kind of hearing and review mechanism for a failure to renew, they would have included that in 33-20(c)-5. It's intellectually a decent argument. However, if in fact there are some procedural due-process requirements mandated here, it is 33-20(c)-5 not a reliable guide as to how to address any procedural due process requirements. Don't know. Now, you haven't addressed that, mainly because you don't think we even get this far. I appreciate that. But I just am intrigued by this whole question. I need to have-- we have the best and the brightest out

there, so give me your thinking on this. **Then, I believe– I don't think we need any further argument. If you want to, I'll be happy to hear you. But I think I can write an opinion as to where we're going next.**

See the August 5, 2005 Hearing Transcript at 13 (emphasis added).

Clearly, Judge Recht's invitation to counsel to "hear you" on the subject was not an invitation for the formal hearing counsel for the Mutual had been continuously requesting during this process but rather was a request for suggestions on how to proceed with the case procedurally, and an invitation to comment on the Judge's rambling thoughts during the August 5, 2005 conference. For Appellee's counsel to suggest in a response brief that this was an offer for a procedural due process hearing is misleading.

E. Appellee Has Not Successfully Offered A Counter-Argument To Appellant's Ripeness Argument Or The Argument That The Mutual's Hearing Procedures Meet The Threshold Requirements of Zaleski.

Appellee has chosen to attack the merits of Appellant's appeal by avoiding a head-on confrontation on the issues and instead choosing to try to pick away at small portions of certain arguments and by examining caselaw indirectly on point. As argued in Appellant's brief, the issue of the insufficiency of Dr. Zaleski's procedural due process hearing is not yet ripe, as he has not gone through the hearing procedure or exhausted his administrative remedies so that he would have standing to bring a claim to challenge the constitutionality of those procedures. In essence, Judge Recht is allowing Appellee to challenge the constitutionality of a hearing procedure that if allowed to work on its own may not require judicial intervention and may not result

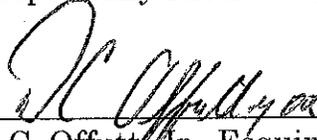
in any harm to Appellee. Essentially, without Judge Recht's intervention, Appellee may just get the procedural due process hearing he is entitled to, but until he goes through that process, the issue of the sufficiency of said hearing is unripe and not justiciable.

Appellee also alleges in his brief that he is somehow prejudiced by having the burden of proof at his hearing in front of the Mutual's tribunal on his renewal. Ironically, the current system actually works to Dr. Zaleski's advantage. The concept of "the last word" is so valuable in a hearing or jury trial that it is almost customary these days for defense counsel, at the end of his closing argument, to point out to the jurors that he would love to have the last word but he is not given that opportunity. It is inconceivable that Dr. Zaleski views this incredibly valuable process where he gets to set the stage with the opening and then rebut all the Mutual's claims and finalize his arguments in a rebuttal as an insurmountable burden.

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,



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

Perry W. Oxley, Esquire (WV #7211)

David E. Rich, Esquire (WV #9141)

OFFUTT NORD PLLC

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

jmoffutt@ofnlaw.com

BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 34620

WEST VIRGINIA MUTUAL INSURANCE COMPANY,
formerly known as WEST VIRGINIA PHYSICIANS
MUTUAL INSURANCE COMPANY, a corporation,

Appellant,

v.

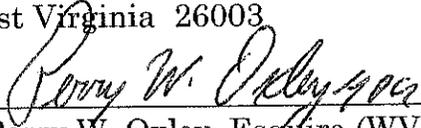
ROBERT J. ZALESKI, M.D.,

Respondent.

CERTIFICATE OF SERVICE

I, Perry W. Oxley, Esquire, counsel for Appellant, West Virginia Mutual Insurance Company, do hereby certify that I served the foregoing, "Appellant's, West Virginia Mutual Insurance Company's, 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 27th day of February, 2009:

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 Nord PLLC
949 Third Avenue, Suite 300
Huntington, West Virginia 25728-2868
(304) 529-2868 facsimile (304) 529-2999
pwoxley@ofnlaw.com