

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

ROBERT J. ZALESKI, M.D.,

Plaintiff,

v.

Civil Action No. 05-C-172

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

Defendant.

ORDER

The plaintiff, Robert J. Zaleski, M.D., by counsel, James F. Companion and Yolonda G. Lambert, and the defendant, West Virginia Mutual Insurance Company, by counsel, D.C. Offutt, Jr. and Perry W. Oxley, appeared before the Court February 19, 2008 concerning issues remaining before the Court, and at said hearing, the Court requested that the parties file written motions and corresponding memoranda on all remaining issues before the Court so that the Court could issue its rulings in a final Order susceptible to appellate review. The parties have complied with the Court's direction and the issues are now ripe for decision by the Court. After reviewing the Motions and Memorandum submitted by the parties and hearing arguments of counsel, the Court makes the following findings of fact and conclusions of law.

opposing the motion, and the defendant filed a memorandum in support of the motion.

6. On September 6, 2005, Dr. Zaleski filed a "Cross Motion for Summary Judgment and Memorandum in Support." Subsequently, the defendant filed a memorandum opposing the motion, and the plaintiff filed a memorandum in support of the motion.

7. On September 22, 2005, the Court entered an Order converting the plaintiff's Cross Motion for Summary Judgment to a partial motion for summary judgment on the issue of whether or not The Mutual was a State Actor, and it denied defendant's motion to dismiss for summary judgment or in the alternative, motion for summary judgment.

8. On December 6, 2005, The Mutual filed "Defendant's Motion to Alter or Amend the Court's September 22, 2005 Order and Renewed Motion to Dismiss, which the Court denied by Order dated December 14, 2005.

9. On April 27, 2006, the Court entered an Order Granting Partial Summary Judgment to Plaintiff and denied a variety of Motions filed by the defendant, all of which are incorporated in said Order. Specifically, the Court adopted a hearing procedure for The Mutual and ordered Dr. Zaleski's insurance reinstated. Further, the Order denied various motions filed by the defendant, which included and incorporated the Court's September 22, 2005 Order by reference.

10. The Mutual filed a timely appeal, and on June 17, 2007, the West Virginia Supreme Court of Appeals issued a reported decision that is styled *Zaleski* 220 W. Va. 311, 322, 647 S.E.2d 747, 758 (2007). Specifically, the Court instruction to the Circuit Court was:

In 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. 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. Thus, for the reasons set forth, the final order of the Ohio County Circuit Court entered on April 27, 2006, is affirmed, in part, reversed, in part, and the case is remanded with directions.

(emphasis added).

11. On July 18, 2007, the Circuit Court sent notice to the parties of a status conference set for September 7, 2007 by way of letter from Judge Arthur M. Recht to counsel for the parties.

12. The parties appeared for a hearing on September 7, 2007. Prior to the hearing The Mutual provided the plaintiff and the Court with a copy of its Hearing Procedure for non-renewal of insurance coverage. At the hearing, the Court expressed its intent to allow the Plaintiff to review the procedures and make any objections he deemed appropriate over the objection of the Mutual.

13. By Order entered on September 17, 2007, the Court Ordered the parties to report back on September 21, 2007 and advise whether any further hearings were desired by the parties.

14. On September 22, 2007, the plaintiff filed "Plaintiff's Response to Defendant's Proposed Review Process" in which the Plaintiff made three objections to The Mutual's Hearing Procedure.

15. On November 2, 2007, the Plaintiff filed his "Memorandum of Plaintiff's Response to Defendant's Proposed Review Process."

16. On November 7, 2007, The Mutual filed "Defendant's Reply to Plaintiff's Response to The Mutual's Review Process."

17. On November 8, 2007, the Circuit Court conducted a hearing in which the parties made arguments concerning the issues presented by plaintiff's objection to The Mutual's review process and the defendant's reply to said objections. The Court decided to take the matter under advisement at the end of the hearing.

18. On January 9, 2008, the Court advised the parties of its ruling by letter. In pertinent part, the Court ruled in plaintiff's favor and held as follows:

It is the conclusion of this Court that the review process set forth in the proposal attached to your submission of September 6, 2007 should be adopted with three major changes.

First, the protocol should contain the provision that the entire burden of proof as to the reason for the non-renewal should be upon the Mutual;

Second, a provision should be added to require Mutual to inform an affected physician as to the scope of the appellate review;

Third, the composition of the tribunal described in Item VIII of the proposed protocols, shall provide for a completely unbiased constituency which shall not include members of Mutual's Board of Directors.

Please revise the proposed submission attached to your letter of September 6, 2007 and submit it to Mr. Companion for his review.

19. On February 12, 2008, The Mutual wrote to the Court to object to the Court's decision and to state its intent to preserve certain objections for appellate review and its refusal to voluntarily revise its procedures.

20. On February 19, 2008, a hearing was conducted in which the parties stated their position on the remaining issues and the Court decided to allow all remaining issues to be brought before it concerning the case so that they could be decided in one Order, which the parties could appeal.

21. On March 6, 2008, the Mutual served on the Plaintiff its Motion for Entry of Order Remanding the Non-Renewal to the Mutual for further Hearing, Motion for Entry of Order Granting Motion to Dismiss Pursuant to Rule 12(b)(6), and Motion for Reconsideration of Court's Adoption and Amendment of the Mutual's Hearing Procedure. The Plaintiff has been

provided an opportunity to file any response that he wishes to said motions, and the Court finds these motions ripe for determination.

Conclusions of Law

A. The Court hereby reaffirms its decision to amend The Mutual's Hearing Procedures as set forth in its January 9, 2008 letter to Mr. Offutt.

B. Specifically, the Court hereby **ORDERS** that the Hearing Procedures submitted to this Court are hereby amended as follows:

1. The Mutual shall bear the entire burden of proof during a hearing procedure for non-renewal as to the reason for the non-renewal.

2. The Mutual shall be required to inform an affected physician as to the scope of the appellate review.

3. The composition of the tribunal descry bed in Item VIII of the proposed protocols by the Mutual shall provide for a completely unbiased constituency which shall not include members of Mutual's Board of Directors.

C. The Mutual's Motion for Entry of Order Remanding the Non-Renewal to the Mutual for Further Hearing is **DENIED**.

D. The Mutual's Motion for Entry of Order Granting Motion to Dismiss Pursuant to Rule 12(b)(6) is **DENIED**.

E. The Mutual's Motion for Reconsideration of Court's Adoption and Amendment of the Mutual's Hearing Procedure is **DENIED**.

F. Finally, the Court recognizes and preserves those objections of The Mutual concerning its decision to judicial amendment of the Hearing Procedures and to deny the three motions set forth in paragraphs C, D and E.

Specifically, the Court recognizes the objections brought before it regarding a lack of jurisdiction, lack of ripeness or an actual case or controversy as well as these objections made in other memorandum filed with the Court up to the date of this Order and all other verbal objections made on the record since the return from appeal. These objections are all **OVERRULED**.

WHEREFORE, the Court **SUSTAINS** the Plaintiff's Objections to the Defendant's Hearing Procedures, and as such, the Court incorporates The Mutual's Hearing Procedures to this Order and **ORDERS** that the procedures are hereby judicially amended as set forth herein. The Court **DENIES** the Defendant's Motion for Entry of Order Remanding the Non-Renewal to the Mutual for Further Hearing; the Defendant's Motion for Entry of Order Granting Motion to Dismiss Pursuant to Rule 12(b)(6); and the Defendant's Motion for Reconsideration of Court's Adoption and Amendment of The Mutual's Hearing Procedure. Finally, the Court hereby **OVERRULES** the objections of The Mutual to the Court's Order amending its Hearing Procedures, which specifically includes the objections as to lack of jurisdiction, ripeness and a lack of a case in controversy for a review of the Defendant's Procedures.

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

All objections of the defendant are hereby noted and preserved.

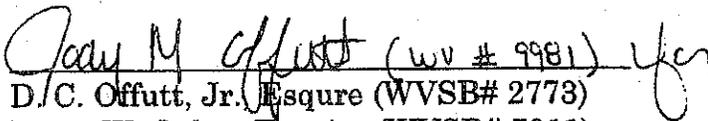
The clerk is hereby **ORDERED** to send a copy of this **ORDER** to all counsel of record.

Entered this 14th day of April, 2008

/s/ Arthur M. Recht

Honorable Judge Arthur M. Recht

Prepared by:

 (wv # 9981) *yes*

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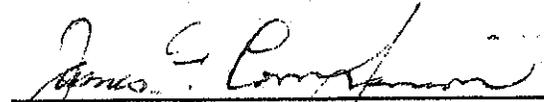
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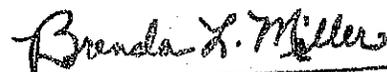
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Circuit Clerk