IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FILED
MAR 11 2015
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

NO. 14-1059

ERIE INSURANCE PROPERTY & CASUALTY COMPANY, and
WEST VIRGINIA INSURANCE COMMISSIONER,

Respondents-Below, Petitioners

v.

VINCENT J. KING,

Petitioner-Below, Respondent.

From the Circuit Court of Kanawha County, West Virginia
Civil Action No. 13-AA-95

PETITIONER ERIE INSURANCE PROPERTY & CASUALTY COMPANY'S REPLY BRIEF

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I. INTRODUCTION

Petitioner Erie Insurance Property and Casualty Company ("Erie") files this Reply Brief seeking reversal of the Circuit Court of Kanawha County's *Decision on Appeal* which overturned the Insurance Commissioner's administrative decision and retroactively disapproved Erie's Rate Protection Endorsement ("RPE").[1]

II. ASSIGNMENTS OF ERROR

1. The Circuit Court improperly substituted its judgment for that of the Insurance Commissioner in reviewing the record *de novo* to determine whether the Commissioner should have withdrawn its 2010 approval of the Rate Protection Endorsement (RPE). In its *Decision on Appeal*, the Circuit Court summarily dismissed the relevance of three controlling cases of this Court, determining that they deal only with the sufficiency of the administrative process. See generally State ex. rel. CitiFinancial v. Madden, 223 W. Va. 229, 672 S.E.2d 365 (2008) ("CitiFinancial I"), West Virginia Employers' Mutual Insurance Company v. The Bunch Company, 231 W. Va. 321, 745 S.E.2d 212 (2013) ("Bunch") and Lightner v. Riley, et al., 760 S.E.2d 142, 2014 W. Va. LEXIS 629 (2014) ("CitiFinancial II") (Collectively, "CitiFinancial Trilogy"). To the contrary, these cases very clearly set forth the deference to be afforded to the Insurance Commissioner's decisions pursuant to W. Va. Code § 33-6-30(c), which the Circuit Court ignored here.

2. The Circuit Court erred by improperly reexamining the insurance policy form, the RPE, and corresponding rate that had been previously approved by the Commissioner in violation of W. Va. Code § 33-6-30(c). W. Va. Code § 33-6-30(c) provides that any policy and

[1] Respondent King's note that Erie did not appeal the Commissioner's Order underscores Erie's belief that the Commissioner's Order was correct and, for that reason, there was no need for Erie to appeal. Even at oral argument, Erie "deferred" to the Commissioner; it did not "waive" its right to appeal an adverse ruling to this Court.

corresponding rate filing approved by the Insurance Commissioner is presumed to be in full compliance with the requirements of Chapter 33 of the West Virginia Code. In addition, this Court, in CitiFinancial I, held that "the burden for disproving the validity of such rates is placed on the entity who seeks to set the rates aside. . . . the presumption of statutory compliance for approved insurance rates set forth in West Virginia Code § 33-6-30(c) may only be rebutted in a proceeding before the Commissioner." Id. at 239-240. In this case, the Circuit Court's *Decision on Appeal* ignored this statutory presumption of validity and, instead, undertook a full review of the "statutory basis for mandated withdraw[al] of approval" under W. Va. Code § 33-6-9 which provides six separate criteria by which "[t]he *commissioner* shall disapprove any such form of policy application, rider, or endorsement or withdraw any previous approval thereof[.]" (Emphasis added). Thus, rather than presuming the validity of the RPE, the Circuit Court improperly conducted a *de novo* review of the underlying record and substituted its own judgment where the Legislature clearly intended the Insurance Commissioner to have exclusive authority.

3. The Circuit Court's *Decision on Appeal* is clearly wrong because its Findings of Fact and Conclusions of Law are contrary to the evidence contained in the Record, misapply the Record, and fail to give adequate deference to the Commissioner's conclusions and findings based on the same Record.

4. The Circuit Court's *Decision on Appeal* violates the West Virginia State Constitution's Separation of Powers clause. The Legislature has given the Insurance Commissioner rate-making authority, and this Court has repeatedly recognized and upheld this authority. The Circuit Court, in reversing the Insurance Commissioner's Order, committed clear error by ignoring the deference to which the Insurance Commissioner is entitled.

5. The Circuit Court erred by misapplying the standard of review set forth in the West Virginia Administrative Procedures Act ("WVAPA"); specifically, W. Va. Code § 29A-5-4(g), by substituting its judgment for that of the Insurance Commissioner. West Virginia law is clear that courts must give deference to an administrative agency's findings, and the Circuit Court's failure to do so here constitutes reversible error

6. The Circuit Court's *Decision on Appeal* is clearly wrong and erroneous as a matter of law. It not only ignores West Virginia law, but is confusing, represents an obfuscation of the different roles of the Insurance Commissioner and the judiciary, and has the effect of destabilizing the regulation of insurance in West Virginia.

III. STATEMENT OF THE CASE

Erie hereby incorporates the Statement of the Case included in its *Brief of Petitioner*, filed with this Court on January 13, 2015.

IV. STATEMENT REGARDING ORAL ARGUMENT

Erie restates its request for oral argument under Rule 19 of the West Virginia Rules of Appellate Procedure because this case involves assignments of error in the application of settled law, an unsustainable exercise of discretion where the law governing that discretion is settled, and insufficient and contrary evidence against the weight of the evidence in the record on appeal. It also believes that a memorandum decision pursuant to Rule 21(e) is proper.

V. ARGUMENT

A. The Circuit Court's Invalidation of the Rate Protection Endorsement Is Contrary to This Court's Decisions.

King's assertion that this case is a "Form" case and not a "Rate" case is incorrect. This Court's holdings in State ex. rel. CitiFinancial v. Madden, 223 W. Va. 229, 672 S.E.2d 365 (2008) ("CitiFinancial I"), West Virginia Employers' Mutual Insurance Company v. The Bunch

Company, 231 W. Va. 321, 745 S.E.2d 212 (2013) ("Bunch") and Lightner v. Riley, et al., 760 S.E.2d 142, 2014 W. Va. LEXIS 629 (2014) ("CitiFinancial II") (collectively, "CitiFinancial Trilogy") are fatal to King's claim because this Court has made clear that a circuit court cannot invade the exclusive province of the Insurance Commissioner by substituting its judgment for his. As a result, in order to prevail, King must shift this case outside the parameters of these decisions, which he cannot do.

King argues "[t]his is a form case (albeit that Erie's Rate Protection Endorsement has an impact on ultimate premium). . . . This case will present the court's first opportunity to say whether its holdings in the trilogy of cases relied upon are also applicable to forms." (Response Brief, p. 6.) The CitiFinancial Trilogy, however, is clearly applicable here because this *is* a rate case, and even if that is in dispute, rates and forms are inextricably intertwined in the authority granted to the Commissioner by the Legislature.

First, Erie's RPE is not a traditional coverage form in that it only affects premium, rendering it a *rating plan*. A policyholder with RPE has the identical coverages as a policyholder who has not opted for RPE; the endorsement is merely a vehicle for implementing an alternative rating plan and allowing the policyholder to lock in their premium. As Cody Cook testified, Erie developed the RPE, or "rate lock" program to address customers' frustrations with rate increases over time:

> Q.[King] In simple terms, just give me an overview of the concept and the purpose behind rate protection endorsement.
>
> A.[Cook] Sure. So one of the things over the last decade that's happened is auto insurers have put a lot of time and resources into improving the rating of auto insurance. There's a lot of competition, as you know, in the industry. With competition becomes thinning of margins and increased efforts to get the best product, the best price, et cetera.

> During that time what we learned, through the process of improving our pricing, was that it was very disruptive for our consumers. So consumers didn't always understand why a change impacted their premium. So just as an example, they'd get their dec page and their premium would go up, even though they hadn't actually changed anything and they didn't understand why that would happen.
>
> So what rate lock has - - - *rate lock is designed to try to improve that experience for the customer. It's really around trying to provide the most sophisticated price, but only do so when a customer expects a rate change*, the three things that are outlined in the program, drivers, vehicles or address. When any of those three things change, we've learned and seen that our customers expect their premiums to change. And so we use those opportunities to get the most appropriate price possible.
>
> *And to do that we have to lock in the premium. So we lock in the premium past that renewal effective date.* That's the time period when consumers, like I said before, are frustrated if their price changes. There's nothing special to them about a renewal date except that it includes a bill. So in order to be able to feel confident and comfortable in locking our customer's prices in we had to make sure that we get the price as accurate as possible. And so we have under - - - behind the scenes a very sophisticated pricing algorithm that was filed with the State of West Virginia as well as other locations where we use this product, filed and approved.

(APP 0431-0433.)(emphasis added).

Given that Erie's RPE is a rating program designed for pricing, it is indisputable that the CitiFinancial Trilogy applies here, and the Circuit Court's failure to follow the controlling law in this area is clearly erroneous. The root of the legislative grant of authority on which the controlling cases rely is based on amendments, adopted by the Legislature in 2002, to W. Va. Code § 33-6-30 and the associated legislative intent. The Legislature clearly intended for the Commissioner to approve *forms* as well as rates:

> (b) The Legislature finds:
>
> (1) That consumers and insurers both benefit from the legislative mandate that the Insurance Commissioner *approve the forms used* and *the rates charged* by insurance companies in this state;

* * *

> (3) That historically, as a prerequisite to *a rate or form* being approved, neither the Legislature nor the Insurance Commissioner has ever required that the insurer demonstrate that there was a specific premium reduction for certain exclusions incorporated into policies of insurance;
>
> (4) That the provisions of this chapter were enacted with the intent of requiring the filing of *all rates and forms* with the Insurance Commissioner to enable the Insurance Commissioner to review and regulate *rates and forms* in a fair and consistent manner;
>
> (5) That the provisions of this chapter do not provide and were not intended to provide the basis for monetary damages in the form of premium refunds or partial premium refunds *when the form used and the rates charged* by the insurance company have been approved by the Insurance Commissioner;
>
> * * *
>
> (7) That it is in the best interest of the citizens of this state to ensure a stable insurance market.

W. Va. § 33-6-30(b) (emphasis added).

This Court in CitiFinancial I cited these very provisions as the basis for finding that insurance issues are reserved exclusively for the Insurance Commissioner. Indeed, in Bunch, this Court reversed the Circuit Court's decision, relying on these very insurance statutes:

> Proceeding to the ultimate issue of whether the insurance rates at issue were reasonable, the petitioners and the amicus curiae strenuously maintain that the trial court ignored this Court's holdings in CitiFinancial and improperly injected itself into a rate making matter expressly delegated to the Commission. *We agree.* The Legislature, in no uncertain terms, has reposed the authority for rate making matters in the Commission. *See W. Va. Code § 33-6-30(c).* As discussed above at length, the amendments to the insurance statutes enacted in the aftermath of *Broadnax* left no question that rate making was not a matter intended for the courts.

Bunch at 331, 222. King's attempt now to disavow this clear language from the statute – "rates and forms" – is without merit. The Circuit Court in this case afforded no deference to the Insurance Commissioner's previous approval of Erie's RPE – whether a rate or a form – and the

Commissioner's subsequent 20-page administrative decision, improperly substituting its judgment for that of the regulator. The *Decision on Appeal* violates West Virginia law.

B. King's Effort to Defend the *Decision on Appeal* Ignores the Clear Statutory Presumption of Validity Required by W. Va. Code § 33-6-30.

In addition to the Circuit Court's failure to apply the CitiFinancial Trilogy, it also failed to apply the required presumption of validity to the Commissioner's prior approval of Erie's RPE.

In pertinent part, W. Va. Code § 33-6-30(c) states:

> Where any insurance policy form, including any endorsement thereto, has been approved by the commissioner, and the corresponding rate has been approved by the commissioner, there is a presumption that the policy forms and rate structure are in full compliance with the requirements of this chapter.

In its *Decision on Appeal*, the Circuit Court erroneously ignored the plain mandate of W. Va. Code § 33-6-30(c) when it failed to presume that Erie's RPE, which had been approved by the Commissioner in 2010 and then re-approved by the Insurance Commissioner in response to King's administrative complaint, was valid. First, King argues that the statutory presumption of validity does not apply where the Commissioner reviews his own prior approval of a rate filing. Instead of relying on the plain language of the statute, however, King now asks this Court to read exclusionary language into the West Virginia Code where none exists. He argues that because the statute does not specifically state that the presumption applies to administrative proceedings, it *cannot* apply. This is inconsistent with the plain language of the statute, however, because the Legislature did not exempt the Commissioner's administrative review from the broad statutory presumption contained in W. Va. Code § 33-6-30(c). To read it otherwise would be error.

Assuming *arguendo* that the statutory presumption does not apply to the Commissioner when reviewing a previously-approved rate filing, King's argument still must fail as the Commissioner engaged in a complete re-review of Erie's 2010 approval in its review of King's administrative complaint. King asserts that, because the Commissioner "decided not to conduct a hearing to allow new evidence," the Commissioner essentially rubber-stamped the 2010 approval of Erie's rate filing through the Commissioner's application of the presumption of validity. In fact, and despite King's best efforts to hoodwink this Court into believing otherwise, the Commissioner applied the statutory presumption of validity *and* engaged in a complete re-review of the 2010 rate approval. (APP 1297-1318.) While King correctly asserts that the Commissioner denied his hearing request[2], he conveniently omits that, in reaching his determination, the Commissioner re-reviewed the original 2010 rate filing in addition to "the voluminous filings of the parties." (APP 1056.) Those filings included nearly 600 pages of documents, including a 198-page transcript of the deposition of Cody Cook (APP 0392-0590) and a 398 page "RPE HEARING EXHIBIT NOTEBOOK" (APP 0613-1011) that King filed in support of his position. After reviewing these documents, the Commissioner concluded that Erie's RPE was "in proper accordance with West Virginia law." (APP 1058.) Clearly, King's argument that the Commissioner relied on the presumption of validity and did not engage in a full review of the initial rate approval as well as the documents King submitted in opposition to that approval, must fail.

King's second argument in defense of the Circuit Court's failure to apply the statutorily-required presumption of validity is also meritless because it ignores the plain language of W. Va. Code § 33-6-30(c) which required the Court to give effect to the meaning of the phrase, "there is a presumption that the policy forms and rate structure are in full compliance with the

[2] King did not appeal the provisions of the Commissioner's Order that denied his hearing request.

requirements of this chapter." Based on the materials originally submitted with Erie's 2009 rate application, as well as the supplemental materials submitted by Erie and nearly 600 pages of discovery filed by King, the Commissioner specifically analyzed the statutory reasons for disapproval contained in W. Va. Code § 33-6-9 and held that Erie's RPE did not violate the statute.[3] As such, even where the Circuit Court disagreed with the Commissioner's judgment, it was required, under the provisions of W. Va. Code § 33-6-30(c), to presume the validity of the Commissioner's findings.

King asserts, however, that the Circuit Court was not required to apply the presumption because *the Commissioner* improperly relied upon the presumption during the administrative appeal. If that is the case, which it is not, then the Circuit Court was still required to apply the presumption of validity to the Commissioner's *Findings of Fact, Conclusions of Law and Final Order Denying Hearing Request of Petitioner* because it included a complete re-review of the 2010 rate approval.

By arguing that the presumption of validity applies neither to the Commissioner in his review of a previously-approved rate, nor to the Circuit Court reviewing the Commissioner's decision which was based on a complete re-review of the previously-approved rate, King asks this Court to abandon the plain language of W. Va. Code § 33-6-30(c) and render its content moot. Erie urges this Court to give meaning to the presumption contained in the statute.

C. King, Like the Circuit Court in its *Decision on Appeal*, Ignores the Record In Order to Reach His Intended Conclusion.

The Circuit Court's *Decision on Appeal* is contrary to the evidence contained in the Record, misapplies the Record, and fails to give adequate deference to the Commissioner's

[3] See *Findings of Fact, Conclusions of Law and Final Order Denying Hearing Request of Petitioner, Conclusions of law 16-20, supported by Findings of Fact 1-31. (APP 1047-1067.)*

conclusions and findings based on the same Record. King's Response Brief fails to clarify the record to overcome this reversible error.

In his Response Brief, King asserts that there is *no* factual evidence to support Erie's contention that RPE was optional. First, Erie's Rate Filing, which the Court had available to it during its review, specifically states: "This endorsement can be dropped at any time. Policyholders may add this endorsement when they have a change in their exposure or at their policy renewal date." (APP at 005.)

Additionally, King states that Erie's position "...assumes a fact not in evidence, i.e., that RPE is indeed optional." (Response Brief, p. 10.) On Page 553 of the Record Below (APP 0553), however, Cody Cook testified that King could, in fact, jettison his RPE in favor of the Age 55 discount, or any other discount provided by Erie, should King so desire:

> Q. [KING] All right. So back to the original question; yes, it will cause me to lose that discount *unless I take off the rate protection endorsement*?
>
> A. [COOK] Again, lose the discount is something you're defining differently than what I am. Your premium will not go down at renewal if you've locked in the premium optionally. *You will have the opportunity, if you choose, at age 55 to go back to the traditional rating.*
>
> Q. Right. Would that be true of any other discount that I might ask you about? Same exact procedure?
>
> A. Yes. Or surcharge, just to be complete.

(APP 0553-0554.) (emphasis added).

Clearly, King understood that he had the option to take off the RPE in order to return to the traditional rating method any time, including when other discounts became available to him. This is an *optional* endorsement. As such, there was evidence before the Circuit Court that the RPE did not "trump" other discounts available to King. Instead, the evidence before the Circuit

Court clearly showed that King, in additional to all other eligible Erie customers, were permitted to opt into and out of the RPE.

The Response Brief also asserts that Erie's argument relating to the optional nature of the RPE "assumes that the insured is either told of that option or otherwise knows to request such a change. Again, the record is devoid of any such evidence." (Response Brief, p. 10.) King's assertions again fall flat. In Cody Cook's deposition, undertaken by King, Cook testified to the process by which a consumer selects the RPE:

> Q. [KING] Is RPE supposed to be optional to the insured?
>
> A. [COOK] It is optional.
>
> Q. And how is the offer supposed to take place?
>
> A. We advise our agents to explain both products and provide both prices.
>
> Q. And how is the acceptance or rejection to be recorded?
>
> A. In the user interface in the system we call DS Pro, on the left side of the box there's the option to select the traditional rating and if that option's select[ed], the traditional price, the pre or non RPE price will be uploaded and the product will exist in that traditional format. There's a box on the right side, that if they click it, it's right next to the premium for a rate protection. If they click that, that's the price they'll pay for their insurance and they'll have the rate protection endorsement communicated to them in their documentation that's sent out with the endorsement.

(APP 0478-0479.)

Cook's testimony clearly evidences that the RPE is optional. Erie instructs its agents to explain how the RPE works and to inform customers of the optional nature of the RPE. Erie also instructs its agents to ask customers whether they wish to select the RPE or the traditional rating method. In addition to Cook's testimony, however, the "Important Notice" that Erie filed with the Commissioner and subsequently mailed to each Erie customer that selected the RPE contains

the following language: "You may contact your agent at any time to remove the endorsement and receive the current non-smoothed rate." (APP 0194.)

General practice aside, however, King was specifically informed of the optional nature of the RPE. Not only did King admit to receiving the "Important Notice"[4], the Commissioner's investigation of King's administrative complaint uncovered that King was, in fact, apprised of the optional nature of the RPE, and given the opportunity, on numerous occasions, to remove the RPE from his policy and return to the traditional rating method. (APP at 1036-37.) The evidence in the Record on these points was available to the Circuit Court, and it should have been considered, not ignored, when the Court reached its *Decision on Appeal.*

King also argues that the "Important Notice" that he received is not relevant as the language of the RPE itself is misleading. Specifically, King asks this Court to read the language of the RPE out of context and to ignore the fact that King, like all other Erie customers who selected the RPE, was sent an explanation of how the RPE worked on numerous occasions. (APP at 1054-1055.) This explanation did not conflict with the plain language of the RPE. The "Important Notice" that King admitted receiving in conjunction with his declarations page in April 2012 unambiguously states:

> The Rate Protection Endorsement is designed to smooth out rates over time, and it may initially result in an increase or decrease in your total policy premium depending on a number of factors. The endorsement gives you a level of predictability and control over your auto insurance premium. Until you make a change, your premium will remain the same. If ERIE's rates decrease or increase and you have this endorsement on your policy, your premium will not be adjusted at renewal to reflect the rate decrease or increase.

(APP at 0194.)

The RPE language, in light of the "Important Notice" which was sent to all Erie customers who selected the RPE, clearly indicates that the insured's premium would not change

[4] (APP at 1054-1055.)

after selection of the RPE, except for the designated reasons set forth in the RPE. The "Important Notice" clearly indicates that the insured's premium will be re-calculated as a result of selecting the RPE and then protected by the RPE *after* it has been recalculated. This is not ambiguous.

King also asserted that he experienced a "40% increase in liability rates for three years running, without one dime of the initially perceived prospective expense having come to fruition[]" as support for the Circuit Court's determination that the benefit provided by the RPE was unreasonable in relation to the premium charged. (Response Brief, p. 12.) Importantly, however, King experienced an *overall premium decrease* as a result of his selection of the RPE. (APP at 0407). Moreover, this statement shows a fundamental misunderstanding of how insurance rate-making and the RPE work. Insurance companies collect premiums based on the projected risk of a policyholder *over time.* Given that the purpose of the RPE is to provide rate stability to customers over time, King's premiums would reflect, in part, Erie's actuaries' evaluation of his risk over the life of the prospective "locked in" premium term. King's RPE is not based solely on his alleged claim-free history; instead, it is based on a number of actuarial considerations, including his desire to keep the optional RPE applied to his policy.

Finally, King attacks Erie's reliance on a particular exchange between Cook and King involving the dispute over whether the RPE was a "profit center," as the Circuit Court incorrectly concluded. The Response Brief suggests that Erie did not give a full picture of Cook's testiomny on this point and referred the Court to 15 pages of testimony, which the Circuit Court also cited[5] in support of its determination that the RPE was a "profit center" for Erie. King asserts that, after a review of fifteen pages of cited transcript, "the Circuit Court's conclusion becomes inevitable." (Response Brief, p. 12.) Erie, like King, also encourages the Court to undertake a

[5](APP 0446-0460.)

full review of these pages because Erie's message in its brief – and now in its Reply – is that the Circuit Court, and now King, misinterpreted Cook's testimony.

Cook did not testify that Erie has seen increased profits as a result of the implementation of the RPE. The Circuit Court confused premiums with profits and relied on statements made with the clear caveat that they were not statistically valid due to the limited number of years the RPE had been offered and its effect on premiums and profits studied. As such, the Circuit Court's *Decision on Appeal* was based on an incomplete or inaccurate review of the evidence before it.

D. The Circuit Court, Not the Commissioner, Usurped the Legislatively-Delegated Powers of the Other in Violation of the Separation of Powers Clause.

The primary purpose of the separation of powers doctrine is to prevent judicial intervention into the administrative arena created by the legislative branch, and to preserve the authority given to administrative agencies through the legislature's necessary and proper delegation of powers. The Legislature has determined that the Insurance Commissioner is best equipped to evaluate policy and rate structures for compliance in light of the purpose and intent of applicable statutes and is compelled to engage in such an analysis in order to carry out his charge to enforce Chapter 33 of the West Virginia Code.

Contrary to King's reference to the footnote in the Circuit Court's Order, this Court in Marks did not hold that the Commissioner is not a quasi-judicial officer. See State of West Virginia ex rel State Farm Mut. Ins. Co., v. Marks, 230 W. Va. 517, 741 S.E.2d 75 (2012). Rather, the Marks Court clarified the role of the Court vis-à-vis the Commissioner in managing discovery issues and limiting an insurer's dissemination of confidential medical information in a civil action. It was a more limited holding than suggested by the *Decision on Appeal* (submitted by King) and again in King's Response Brief.

Accordingly, in being charged with the responsibility to regulate insurance rates, and to approve and disapprove forms of policies, applications, riders, and endorsements, according to West Virginia law, the Commissioner is necessarily tasked with construing each of these in light of the language, purpose, and intent of the applicable statute. In opposition to the Circuit Court's Finding of Fact No. 9 in its *Decision on Appeal*, the Commissioner did not exceed his authority by attempting to determine the spirit and intent of the Legislature, nor by reading statutory provisions *in pari materia*. Clearly, the Commissioner is charged with upholding and enforcing Chapter 33 and is best equipped to evaluate policy and rate structures for agreement with the purpose and intent of the applicable statute.

E. The Circuit Court's Misapplication of the Standard of Review Constitutes Reversible Error.

In response to Erie's argument that the Circuit Court's failure to give proper deference to the Circuit Court constitutes reversible error, King asserts that Erie misunderstood the Bunch decision, as follows:

> On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W.Va. Code § 29A-5-4 and reviews questions of law presented de novo; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings of fact to be clearly wrong.

> W. Va. Employer's Mutual Ins. Co. v. The Bunch Co., supra. Erie complains that 'the Circuit Court failed to apply this deferential standard'. But this Court's syllabus is not talking about the standard to be applied by this Circuit Court. This Court's syllabus is talking about the standard it applies[.]

(Response Brief, p. 14.) Erie does not dispute this Court's review standard and, as it set forth in its initial brief, emphasized that deference is to be afforded to an administrative agency's findings, and the Circuit Court did not do so here, despite substantial evidence in the record to support the Commissioner's findings. Indeed, Erie also cited this Court's decisions in Frank's

Shoe Store v. W. Va. Human Rights Commission, 179 W. Va. 53, 365 S.E.2d 251 (1986); Ruby v. Insurance Comm'n, 197 W. Va. 27, 475 S.E.2d 27 (1996); and Gino's Pizza of W. Hamlin, Inc., 187 W. Va. 312, 418 S.E.2d 758 (1992), all for the purpose of showing that it is well-settled in West Virginia that

> [a] reviewing court must evaluate the record of the agency's proceeding to determine whether there is evidence on the record as a whole to support the agency's decision. The evaluation is conducted pursuant to the administrative body's findings of fact, regardless of whether the court would have reached a different conclusion on the same set of facts.

Ruby, 197 W. Va. at 32, 475 S.E.2d at 32 (1996).

It is well settled that, in reviewing agency action, the reviewing court must "evaluate the record of the agency's proceeding to determine whether there is evidence on the record as a whole to support the agency's decision." Further, the Circuit Court's review must be "conducted pursuant to the administrative body's findings of fact, regardless of whether the court would have reached a different conclusion on the same set of facts." Id.

Erie cited a few examples of the Circuit Court's failure to apply this standard in its initial brief. For example, the Circuit Court concluded that Erie charged an unreasonable premium compared to the benefit provided despite the Commissioner's reliance on evidence that the RPE provided rate certainty and even that King's overall premium *went down*. (APP at 1322, 0192, 0432-0433, 0581.) It is this that is the crux of Erie's Fifth Assignment of Error: the Circuit Court misapplied the standard of review by failing to afford proper deference to the administrative agency here. The *Decision on Appeal* must be reversed.

F. The Circuit Court's *Decision on Appeal* Creates Ambiguity for Erie as to Whether it Can Use Products Approved by the Commissioner.

King's assertion that Erie's concern about the ambiguity the Circuit Court's reversal of a prior approval of the RPE is "feigned" and "contrived" is incorrect. Insurers routinely file

products, rates and rating rules with the Insurance Commissioner and, once approved, expect to be able to rely on them in the marketplace. Complex computer systems are programmed to incorporate approved products and rates; policies, endorsements and applications are printed en masse and mailed; agents are provided with copies and trained in the marketing of approved products and rates;, and customers and policyholders are provided with approved products and charged approved rates. Erie establishes rates, collects premiums and pays claims based on the approvals received from the Commissioner. It is the Commissioner's approval that sets this in motion.

Although the Commissioner's decision admittedly are subject to the provisions of W. Va. Code § 33-6-9 requiring the Commissioner to disapprove or withdraw a form, application, or endorsement given certain criteria as King seeks here, the import of this is the very reason the Legislature expressly delegated highly specialized insurance rate and form matters to the Commissioner's expertise and jurisdiction. CitiFinancial, 223 W. Va. at 237, 672 S.E.2d at 373.

As this Court has further cautioned:

> A further peril that cannot be overlooked is that judicial intervention in the rate making area would open the door to conflicting decisions amongst the various circuits regarding what constitutes an unreasonable or excessive charge for credit insurance. In this manner then, the uniformity of regulation that the Legislature has established by delegating all matters involving rate making and rate filings to the Commissioner is certain to be infringed if circuit courts or jurors are permitted to second guess the reasonableness of rates previously approved by the Commissioner.

CitiFinancial at 237, 373.

Erie included this argument in its initial brief for these reasons. It fears the import of the *Decision on Appeal*, if not reversed. It injects uncertainty into the regulatory scheme established by the Legislature and will cloud the deference to be afforded to the agency if any rate or product

can be retroactively disapproved by a Court, *after* it has been approved *and affirmed* again in an administrative action by the regulator charged with overseeing insurance issues.

As the Brief of *Amicus Curiae* West Virginia Insurance Federation rightly noted,

> This Court should protect the legislatively mandated expertise of the Insurance Commissioner in facilitating a stable and predictable insurance market in West Virginia, and discourage the resulting turbulence when a settled decision is upset by a circuit court simply because the court's' opinion is different than the commissioner's findings and conclusions.

(*Brief of the West Virginia Insurance Federation as Amicus Curiae*, p. 13.)

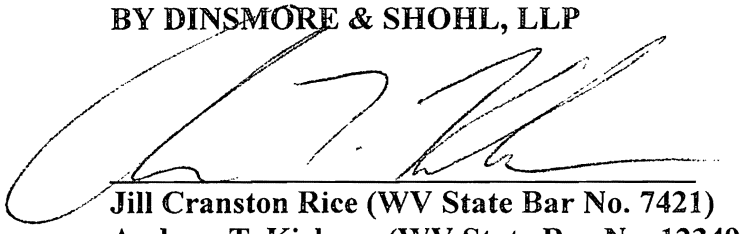
The Circuit Court disregarded the statutory scheme which this Court repeatedly has upheld and which the Circuit Court here disregarded. It should be set aside.

VI. CONCLUSION

For the foregoing reasons, as well as those contained in Erie's Brief, the Insurance Commissioner's briefs, the briefs of *Amici Curiae*, and any other reasons apparent to the Court, Erie Insurance Property & Casualty Company respectfully requests that this Court reverse the Circuit Court's *Decision on Appeal.*

ERIE INSURANCE PROPERTY & CASUALTY COMPANY

BY DINSMORE & SHOHL, LLP



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-1059

ERIE INSURANCE PROPERTY & CASUALTY COMPANY, and WEST VIRGINIA INSURANCE COMMISSIONER,

Respondents-Below, Petitioners

v.

VINCENT J. KING,

Petitioner-Below, Respondent.

From the Circuit Court of Kanawha County, West Virginia
Civil Action No. 13-AA-95

CERTIFICATE OF SERVICE

I, Jill C. Rice, hereby certify that on this 11th day of March, 2014, I have served a true and exact copy of the **PETITIONER ERIE INSURANCE PROPERTY & CASUALTY COMPANY'S REPLY BRIEF OF PETITIONER** upon all parties to this matter, by depositing a true copy of the same in the U.S. Mail, postage prepaid, properly addressed to the following:

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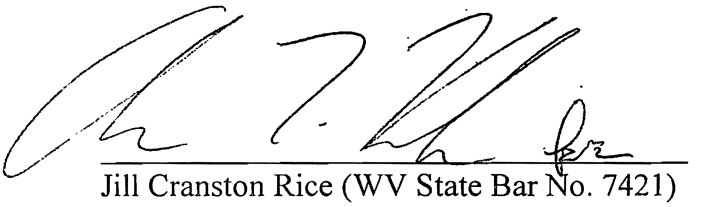

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