No. 32565 – *Family Medical Imaging, LLC, Gary L. Poling, D.O., and Scott Lostetter, D.O. v. West Virginia Healthcare Authority*

Starcher, J., dissenting:

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I write separately to express my disagreement with the majority decision. The decision of the majority affirming the West Virginia Healthcare Authority's rejection of appellants' certificate of need application is sure to have a chilling effect on healthcare-related investment and innovation in West Virginia. This is an example of the powerful and wealthy wielding their influence over government regulation. Reading between the lines of technicalities and legalese, this case is simply about protecting the financial interest of Raleigh General Hospital – nothing more, nothing less.

Under the guise of "interpretive rules" the majority allows the Authority unfettered power to protect existing healthcare operations from competition without proof of harm to the existing providers. From my review of the record in this case, I find that no ambiguity exists in the applicable standards to be applied to appellants' application for a certificate of need. For this reason there is no need to engage in a discussion of interpretive-rule principles since the circumstances of this case fail to satisfy Syllabus Point 3 of *Appalachian Power Co. v. State Tax Dep't of West Virginia*, 195 W.Va. 573, 466 S.E.2d 424 (1995).

Furthermore, even if it is necessary to engage in an analysis of interpretive-rule principles, I am not persuaded that any deference should be given the Authority's

interpretation. No doubt the majority cites to my concurrence in *Cookman Realty Group, Inc. v. Taylor*, 211 W.Va. 407, 566 S.E.2d 294 (2002) (*per curiam*), knowing of my expressed opposition to the majority decision. In *Cookman* I discussed four factors that, in appropriate cases, should be determinative of the weight that should be accorded an administrative judgment. If the majority intends to rely of the *Cookman* four-factor analysis, it fails to analyze this case on the basis of all of those factors. Furthermore, the majority decided this case *per curiam*, rather than writing a new syllabus point establishing as law the four-factor analysis quoted from my concurrence in *Cookman*.

By sanctioning the Authority's interpretation of the standard as requiring a "significant pre-existing client population," the majority has placed all would-be applicants in a "catch 22" position. In order to establish "significant pre-existing client population" an applicant would be required to be in operation, but on the other hand they could not operate without the Authority's certificate of need. I find this repugnant to the purposes of the Authority.

Finally, from the record it is clear that the Authority indirectly applied quantitative criteria which was not embraced in rules governing ambulatory care facilities, but rather looked to rules applicable to acute care facilities in arriving at their decision.

The evidence offered by the appellants clearly satisfied the requirements of the rules for ambulatory facilities by defining the ". . . expected areas around the ambulatory care facility from which the center is expected to draw its patients." *State Health Plan, Certificate of Need Standards, Ambulatory Care Centers*, Section IIA. The HCA and the

majority were clearly wrong to disregard evidence of need tendered by appellants in all six counties named in their application.

Perhaps appellants' mistake was proceeding initially *pro se* and taking the advice of Authority staff in completing their application.

Respectfully, I dissent.