No. 34620 – *Robert J. Zaleski, M.D. v. West Virginia Mutual Insurance Company, formerly known as West Virginia Physicians Mutual Insurance Company, a corporation*

Ketchum, J., concurring:

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I concur because we are bound by "the law of the case" as set out in *Zaleski v. West Virginia Physicians' Mut. Ins. Co.*, 220 W.Va. 311, 647 S.E.2d 747 (2007) ("*Zaleski I.*")

However, *Zaleski I* was plainly wrong. It held that West Virginia Mutual Insurance Company ("W.Va. Mutual") is a "state actor" and, therefore, Dr. Zaleski was entitled to a due process hearing concerning the December 22, 2004 non-renewal of his malpractice insurance policy.

W.Va. Mutual was authorized and created by statute as a private corporation. It initially borrowed State money, and the State temporarily exercised some control over the company. However, the State gave up all control over the company as of June 30, 2004. *W.Va. Code,* 33-20F-5(d) [2006] provides that, as of July 1, 2004, the provisional board of directors shall be replaced by a permanent board of directors which are not appointed by the State, but are rather "chosen in accordance with the articles of incorporation and bylaws of the company." Further under *W.Va. Code*, 33-20F-4(a) [2006], W.Va. Mutual is a "domestic

mutual insurance company" owned by its policyholders; the only policyholders are physicians licensed to practice medicine in this State.

Plainly, the State has had no control over W.Va. Mutual since June 30, 2004, and had no control when Dr. Zaleski's policy was not renewed in December 2004.

Zalenski I is not only contrary to the views of various legal commentators, but is also contrary to the U.S. Supreme Court decision in *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374 (1995). This case holds that when a corporation is created by legislation for government objectives, it is not a "state actor" if the government does not retain permanent authority to appoint a majority of its board of directors. Federal courts have consistently held that, for due process purposes, "private activity will generally not be deemed 'state action' unless the state has so dominated such activity as to convert it to state action[.]" *Philips v. Pitt County Memorial Hosp.*, 572 F.3d 176, 181 (4th Cir. 2009) (*quoting Wahi v. Charleston Area Medical Center, Inc.*, 562 F.3d 599, 616 (4th Cir. 2009) (*quoting DeBauche v. Trani*, 191 F.3d 499, 507 (4th Cir.1999)).

Because *W.Va. Code*, 33-20F-1, *et seq.*, created a domestic private corporation which the State does not control, the due process hearing requirements imposed on W.Va. Mutual by *Zaleski I* are improper. The only process due to a doctor for termination of a malpractice insurance policy is spelled out in *W.Va. Code*, 33-20C-1, *et seq.*, regarding the

cancellation or non-renewal of malpractice insurance policies. *Zalenski I*'s requirement of a separate due process procedure for cancellation or non-renewal of W.Va. Mutual's malpractice insurance policies is clearly wrong.

In the future, I believe the Court should revisit *Zalenski I*, strictly apply our law creating W.Va. Mutual (as set forth in *W.Va. Code*, 33-20F-1, *et seq.*), and consider overruling the decision.