No. 34620 – Robert J. Zaleski, M.D., v. West Virginia Mutual Insurance Company, Formerly Known as West Virginia Physicians Mutual Insurance Company.

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Workman, Justice, dissenting:

I respectfully dissent from the Majority.

The underlying matter stems from an Ohio County Circuit Court action brought by Dr. Robert J. Zaleski, [hereinafter "Dr. Zaleski"], an orthopedic surgeon, following the decision of the West Virginia Mutual Insurance Company [hereinafter "the Mutual"] to deny renewal of Dr. Zaleski's malpractice insurance coverage. This marks the second time the parties have appeared in this Court on this issue. In our June 27, 2007, decision, we affirmed that Mutual was a state actor and that, consequently, Dr. Zaleski was entitled to a hearing to adequately protect his property interest in his liability policy.

In our initial decision, we specifically stated:

> 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.

Zaleski v. Physicians' Mutual Ins. Co., 220 W.Va. 311, 322, 647 S.E.2d 747, 758 (2007) [hereinafter "*Zaleski I*"]. In addition, we required Mutual to "make available to parties affected by its non-renewal decisions a renewal process that minimally includes: notice of the non-renewal which conforms with the requirement of W.Va. Code 33-20C-4(a) and which includes the reasons for non-renewal; hearing before an unbiased hearing examiner; reasonable time in which to prepare to rebut the charges; opportunity to have retained counsel at any hearings on the charges; opportunity to present relevant evidence which includes calling and examining witnesses; and the preservation of a record of the review process." *Zaleski I*, 220 W.Va. at 321-22, 647 S.E.2d 757-58.

After the *Zaleski I* remand, the parties disagreed on whether the hearing procedures established by Mutual met the minimum criteria established by this Court in the remand decision. Specifically, Mutual offered a hearing composed of hearing examiners drawn from its own Board of Directors. As we noted previously, the opinion in *Zaleski I* specifically required a hearing "before an unbiased hearing examiner." Mutual's Board of Directors clearly fall short of the mark. The interests of the members of the Board of Directors lie with Mutual, and they clearly cannot be characterized as unbiased regarding a dispute where Mutual is one of the parties. The circuit court rightfully intervened and required that the hearing:

1. Should contain the provision that the entire burden of proof as to the reason for the non-renewal should be upon the Mutual;
2. A provision should be added to require Mutual to inform an affected physician as to the scope of the appellate review;
3. The composition of the tribunal shall provide for a completely unbiased constituency which shall not include members of Mutual's Board of Directors.

Given our previous directive that the circuit court conduct its proceedings consistent with our opinion "as may be required," the circuit court's intervention was both prudent and within the bounds of *Zaleski I*'s directive. How the majority can possibly reason that the issue of the proper **procedures** for a hearing are not "ripe" until that hearing is completed is beyond non-sensical. Not only does it not make sense, but it fails to recognize the value of judicial economy to both the legal system and the parties. All too often, this and other courts fail to recognize the expense it puts all parties to when unnecessary hearings are required. This is especially egregious when the issue is as clear as this one.

Clearly, the lower court's determination that the hearing procedures failed to meet the minimum due process requirements required by *Zaleski I* was appropriately made **before** the hearing was to take place, and is consistent with our directive in *Zaleski I*.

The majority writes that the circuit court "put the cart before the horse" by requiring unbiased hearing examiners before the hearing actually took place. A more accurate sentiment may be that the circuit court merely ensured that the horse and cart were properly equipped.

For the reasons outlined in this opinion, I respectfully dissent.