STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Praetorian Insurance Company,
Plaintiff Below/Petitioner

vs.) No. 21-0682

Air Cargo Carriers, LLC,
Defendant Below, Respondent

and

Virginia Chau, Administratrix of the
Estate of Anh Kim Ho,
Defendant Below, Respondent

RESPONDENT VIRGINIA CHAU, ADMINISTRATRIX OF THE ESTATE OF ANH KIM HO'S BRIEF

Counsel for Respondent
Virginia Chau, Administratrix of the Estate of Anh Kim Ho
William M. Tiano (WVSB # 4308)
TIANO O'DELL PLLC
118 Capitol Street
Post Office Box 11830
Charleston, West Virginia 25339
(304) 720-6700
wtiano@tolawfirm.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES .....iii, iv

RESPONSE TO ASSIGNMENT OF ERROR 1

STATEMENT OF THE CASE 2

PROCEDURAL HISTORY CIVIL ACTION NO. 19-C-450 (BLOOM) AND CIVIL ACTION NO. 20-C-800 (BALLARD).....5

STATEMENT REGARDING ORAL ARGUMENT 9

STANDARD OF REVIEW 9

ARGUMENT 10

1. West Virginia Code §55-13-6 grants the trial court authority to refuse to render declaratory judgment where such judgment or decree, if rendered would not terminate the uncertainty or controversy giving rise to the proceeding 10

2. West Virginia is not a direct action state and does not permit an injured plaintiff to directly sue the insurer instead of the tortfeasor, nor does it permit the insurer to directly litigate and defend tort claim. Petitioner's insurance contract prohibits this direct action 13

3. Count II presents no justiciable controversy between Petitioner Praetorian and Respondents Air Cargo Carriers and The Estate and therefore, the Court lacks jurisdictional authority to issue a declaratory judgment 17

4. Wisconsin law prohibits the insurance policy exclusion Petitioner relies upon for its basis to deny coverage under Count I. W.S.A. §632.23.....19

5. The Court properly denied Petitioner's Motion for Summary Judgment regarding Count II because a decision for summary judgment before any discovery has been completed must be viewed as precipitous. The ruling denying Petitioner's Motion for Summary Judgment regarding Count II is not a final appealable order and Petitioner's request that this Court "enter judgment as a matter of law on Count ... II of Praetorian's Complaint" should be dismiss.....21

6. Air Cargo Carriers purchased additional employers liability coverage for its residence employees through Endorsement WC 00 03 12 A. That endorsement provides coverage and Petitioner's Motion for Summary Judgment regarding Count I was properly denied 21

CONCLUSION 24

TABLE OF AUTHORITIES

WEST VIRGINIA CASES

A. H. v. CAMC Health System, Inc., 2020 WL 1243608, (W.Va. 2020) 17

Aetna Casualty and Surety Co. v. Federal Insurance Company of New York, 133 S.E.2d 770 (W.Va. 1963) 9

Blais v. Allied Exterminating Co., 482 S.E.2d 550 (W.Va. 1996)..... 15

City of Martinsburg v. Berkeley County Council, 825 S.E.2d 332, 336 (W.Va. 2019) 18

Cox v. Amick, 466 S.E.2d 459, 469 (W.Va. 1995) 18

Doering v. City of Roncerte, 718 S.E.2d 497 (W.Va. 2011) 9

Employers' Mutual Insurance Co.v Summit Point Raceway Assocs. Inc., 719 S.E.2d 830 (W.Va. 2011) 15

Kanawha County Public Library Board v. Board of Education of the County of Kanawha, 745 S.E.2d 424, 435-36 (W.Va. 2013) 19

Lontz v. Tharp, 220 W.Va. 282, 647 S.E.2d 718 (2007) 9

McKinney v. Fairchild International, Inc., 487 S.E.2d 913 (W.Va. 1997) 15

Nadler v. Liberty Mutual Fire Insurance Company, 424 S.E. 2d 256 (W.Va. 1992) 14

O'Neal v. Pocahontas Transp. Co., 129 S.E. 478, 481 (W.Va. 1925) 16

Painter v. Peavy, 451 S.E.2d 755 (W.Va. 1994) 9

Rhododendron Furniture & Design v. Marshall, 214 W.Va. 463, 590 S.E.2d 656 (2003) 9

Robinson v. Cabell Huntington Hospital, Inc., 498 S.E.2d 27, 31-32 (W.Va. 1997).....16

Snyder v. Callaghan, 284 S.E.2d 241, 250 (W.Va. 1981).....19

Woodford v. Glenville State College Hous. Corp., 225 S.E.2d 671, 674 (W.Va. 1976).....17

FEDERAL CASES

Powers v. Ohio, 499 U.S. 400, 411 (1991).....19

Singleton v. Wulff, 428 U.S. 106, 116 (1976) 19

Spokeo, Inc. v. Robins, 135 S.Ct. 1540, 1547 (2016) 17

Town of Chester, New York v. Laroe Estates, Inc. 137 S. Ct. 1645 (2017) 18

WISCONSIN CASES

Farm Mut. Auto Ins. Co. v. Bailey, 734 N.W.2d 386 (Wis. 2007) 24

Katze v. Randolph & Scott Mut. Fire Ins. Co., 341 N.W.2d 689 (Wis. 1983).....23

WEST VIRGINIA STATUTES

W.Va. Code §23-1-1.....11

W.Va. Code §23-2-1 .....11, 12

W.Va. Code §23-2-6.....12

W.Va. Code §23-4-2 .....5, 21, 23

W.Va. Code §55-13-6 .....1, 10, 13

OTHER STATUTES

Wis. Stat. §632.23 .....2, 19, 20

Wis. Stat. §632.25 ..... 20, 21

UNITED STATES CONSTITUTION

U.S. Const Art. III, §2 17

RESPONSE TO ASSIGNMENT OF ERRORS

1. Praetorian Assignments of Error Numbers 11 – 17. The Court properly granted the Motions to Dismiss Count II of the Declaratory Complaint because:

- West Virginia Code §55-13-6 grants the trial court authority to refuse to render declaratory judgment where such judgment or decree, if rendered would not terminate the uncertainty or controversy giving rise to the proceeding. The trial court correctly determined that a declaration of Count II in its Civil Action No. 20-C-800 would not terminate the uncertainty or controversy on the same claim already pending in Civil Action No. 19-C-450. Further, a declaration could substantially increase uncertainty in the proceedings.
- West Virginia is not a direct action state and does not permit an injured plaintiff to directly sue the insurer instead of the tortfeasor, nor does it permit the insurer to directly litigate and defend tort claims in the name of and on behalf of the insurer instead of its insured tortfeasor.[1] West Virginia recognizes resolution of a tort claim must be litigated between the injured party and tortfeasor, not as a direct action with the indemnifying insurance carrier. In fact, Petitioner's own insurance contract prohibits this direct action.
- Count II presents no justiciable controversy between Petitioner Praetorian and Respondents Air Cargo Carriers and The Estate and therefore, the Court lacks jurisdictional authority to issue a declaratory judgment.

2. Praetorian Assignments of Error Numbers 1 – 6. All parties to this litigation have agreed Wisconsin law applies to the coverage issues presented by Petitioner's Motion for Summary Judgment regarding Count I and no party has argued any state other than Wisconsin has a more

[1] The only exception to this rule is W.Va. Code §33-6-31(d) related to litigation of underinsured motorist claims.

significant relationship to the insurance policy contract transaction. Wisconsin law prohibits the insurance policy exclusion Petitioner relies upon for its basis to deny coverage under Count I. W.S.A. §632.23.

3. Praetorian Assignments of Error Numbers 11 – 17. The Court properly denied Petitioner's Motion for Summary Judgment regarding Count II because a decision for summary judgment before any discovery has been completed must be viewed as precipitous. Respondents identified issues of fact requiring discovery which are material to resolution of the merits of the negligence claim by The Estate against Air Cargo Carriers.

4. The ruling denying Petitioner's Motion for Summary Judgment regarding Count II is not a final appealable order and Petitioner's request that this Court "enter judgment as a matter of law on Count … II of Praetorian's Complaint" should be dismissed. Respondent will file separately file a Rule 31 Motion to Dismiss this element of the Appeal. The Court denied Petitioner's Motion for Summary Judgment regarding Count II. The Court did not issue a judgment on the merits of the claim.

5. Praetorian Assignments of Error Numbers 7 - 10. Air Cargo Carrier purchased additional Employers Liability Coverage for Resident Employees, including the decedent. That additional Employers Liability Coverage set forth in Endorsement WC 00 03 12 A provides no exclusion applicable to the claims asserted by The Estate against Air Cargo Carriers. The Trial Court appropriately applied Wisconsin law to deny Petitioner's Motion for Summary Judgment regarding Count I.

STATEMENT OF THE CASES AND PROCEDURAL HISTORY

Facts of Tort Case - Civil Action No. 19-C-450 (Bloom) – Subject Of Petitioner Praetorian's Appeal No. 21-0243 Currently Pending Before This Court

On May 5, 2017 at 6:51 a.m. Air Cargo Carriers flight 1260, operated by Captain Jonathan Alvarado crashed during landing on runway 5 at Yeager Airport. On approach CRW advised Flight 1260 to expect the localizer 5 approach. This approach would provide a straight-in final approach course aligned with runway 5. This approach relies on pilot instrument skills. Captain Alvarado rejected the localizer approach and requested a VOR-A approach to runway 5. This approach requires a circling landing by pilot sight of the runway. The weather was overcast clouds at 500 feet and 10 miles visibility with light winds at the time of the crash. Captain Alvarado made an early descent below prescribed minimum stepdown altitude. Captain Alvarado also did not have the aircraft continuously in a position from which a descent to a landing on the intended runway could be made at a normal descent rate using normal maneuvers. At about 0.5 miles from the displaced threshold of the landing runway, the airplane entered a 2,500 ft-per-minute turning descent toward the runway in a steep left bank up to 42 degrees. Captain Alvarado was apparently trying to line up with the runway. Rather than continue the VOR-A approach with an excessive descent rate and airplane maneuvering, Captain Alvarado should have conducted a missed approach and executed the localizer 5 approach procedure. Instead, the aircraft struck the runway in a left bank, nose up direction. First Officer Anh Ho was killed in the crash.

Captain Alvarado's acts in making an early descent below specified altitudes and excessive maneuvering during landing were not isolated events that only occurred on the crash day. The NTSB has concluded that Captain Alvarado consistently committed these acts of procedural intentional noncompliance. Video of prior landings within a month of the crash, Captain Alvarado's performance history, and Captain Alvarado's unsatisfactory checkrides due to poor instrument flying demonstrated that his instrument flight skills were marginal. Captain Alvarado's

poor instrument flying skills and failures to conduct missed approaches and fly a go around had been occurring for years prior to the crash. Before Air Cargo Carriers, LLC hired Captain Alvarado, on at least 4 separate practical examinations, Captain Alvarado received "Notice of Disapproval" – fails on portions of his practical examinations. Those 4 separate occasions of fails included the following: Area of Operation VII, normal and crosswind approach and landing; Lack of performance in Area VIII, emergency operations; Area IV, Takeoffs/Landings, and Go Arounds; Lack of performance in the Area of IV, Takeoffs, Landings, and Go Arounds; Area VI, Navigation; and Area IX, Emergency procedures. Captain Alvarado had also been fired by a prior employer within 5 years of being hired by ACC. Despite these repeated failures, when Captain Alvarado was asked on his Air Cargo Carriers application: "Have you ever failed any check rides, proficiency checks, IOE, or line checks?" Captain Alvarado answered: "No". Captain Alvarado violated regulations in failing to truthfully disclose his flying experience, safety record, professional competence and pass/fail rates for check rides. Air Cargo Carriers violated regulations in failing to perform a due diligence background check of Captain Alvarado's safety record, training, competency, and pass/fail rates for check rides. Air Cargo Carriers had no formal safety and oversight program to oversee, manage and assess Captain Alvarado's dangerous flying which continued once Air Cargo hired him.

UPS personnel loading and unloading the cargo flights operated by Captain Alvarado, and UPS supervisors overseeing the load and unload work at both Yeager Airport and Louisville, were aware of Captain Alvarado's dangerous flying. In that regard, a UPS Air Supervisor advised the NTSB investigators that Captain Alvarado would show her photographs and videos of his flights and approaches. He would place the iPad on the dash of the airplane and record video of his flights as he came out of the clouds or during a snow event. Not long before the crash, Captain Alvarado

came up to the UPS supervisor after the flight and asked her if she had seen his approach. She stated he was excited and told her he almost brought it "straight nose down".

Ultimately, the NTSB faulted Captain Alvarado for many aspects of his flying and decision making. It specifically noted that "performance on the accident flight was consistent with procedural intentional noncompliance". The NTSB faulted Air Cargo Carriers and stated "The operator stands as the first line of defense against procedural intentional noncompliance by setting a positive safety attitude for personnel to follow and establishing organizational protections. However, the operator had no formal safety and oversight program to assess compliance with SOPs or monitor pilots, such as the captain, with previous performance issues."

Procedural History - Civil Action No. 19-C-450 (Bloom) and Civil Action No. 20-C-800 (Ballard)

The Estate of Anh Kim Ho filed its tort Complaint in the Circuit Court of Kanawha County, West Virginia on May 3, 2019, Civil Action No. 19-C-450 before Judge Louis H. Bloom. The Complaint asserts a West Virginia state law cause of action pursuant to *W.Va. Code* §23-4-2 against Air Cargo Carriers, LLC, alternative West Virginia state law based negligence claim against Air Cargo Carriers, LLC for failure to comply with the statutory requirements entitling it to employer immunity, West Virginia state law based negligence claims against United Parcel Service Co. and UPS Worldwide Forwarding, Inc., and a West Virginia state law fraud claim against the Estate of Jonathan Pablo Alvarado.

The defense of ACC was tendered to Praetorian Insurance Company. On June 6, 2019, Praetorian issued a Reservation of Rights letter to ACC and hired Edgar A. Poe, Jr. and Pullin Fowler Flanagan Brown & Poe, PLLC to defend ACC. AR 0231-0234. Notably, Praetorian took no action to seek Declaratory Judgment relief regarding its rights and responsibilities to provide indemnity and a defense for the Ho claim, and took no action to seek to intervene in the

tort action.

Initial motion and written discovery proceeded and then depositions scheduled to proceed in the tort matter in early spring of 2020 were all canceled because Governor Justice issued a Stay at Home Order on March 16, 2020. As the parties and the Court emerged from the initial lock down state of the court system and the practice of law resumed in June 2020, all parties engaged in a conference and it was determined that the case was appropriate for early mediation and resolution. Accordingly, all parties agreed to schedule and participate in mediation on August 18, 2020.

More than a year after the tort claim was filed, and only 7 days before the August 18, 2020 mediation, Praetorian Insurance Company retained a lawyer who sought to participate in and represent Praetorian at the mediation. Praetorian's new counsel wrote a letter to the lawyer Praetorian hired to defend ACC, and for the first time advised ACC that "Simply put: There is an extremely low chance of Praetorian having a duty to indemnify ACC for anything in this case, so Praetorian's settlement offers at the upcoming mediation will reflect that." Praetorian did not share this information with any other party and never advised anyone in the tort claim, including the Court, that it had issued a reservation of rights letter and did not intend to participate in the mediation in good faith. Praetorian's insurance coverage is the first layer of coverage which is followed by multiple layers of insurance coverage providing coverage for all the defendants in the tort action. It was not until the mediation, that the parties, adjusters, lawyers, and mediator were made aware that Praetorian asserted it had no coverage and would not contribute its first layer of insurance which would trigger excess coverage policies available to Defendants. Praetorian's new postition derailed the mediation involving 19 attendees. Shortly after the failed mediation, Praetorian Insurance Company filed a Declaratory Judgment action on September 15,

2020. AR 0001-0008 – Civil Action No. 20-C-800.

When Praetorian filed its Declaratory Judgment Complaint, it did not do so by seeking to join or intervene in the tort Civil Action No. 19-C-450. Instead, Praetorian filed a separate Declaratory Judgment Complaint in Civil Action No. 20-C-800 originally pending before Judge Tod J. Kaufman, then Judge Kenneth D. Ballard. Count I of the Declaratory Action seeks a declaration that Praetorian Insurance Company's Worker's Compensation and Employers' Liability policy issued to ACC includes no insurance coverage for the employers' liability claim asserted against ACC in tort Civil Action No. 19-C-450. Count II sought a legal ruling on the viability and merits of the Estate's negligence claim against ACC. AR 0001 - 0008. On November 20, 2020, the Estate filed a Motion to Dismiss Count II of the Declaratory Judgment Complaint and on November 24, 2020, ACC also filed a Motion to Dismiss Count II. AR 0009-0015, AR0015-0025, AR0026-0040. Those Motions to Dismiss challenged the justiciability, standing and jurisdiction to proceed with Count II. On December 30, 2020, Praetorian filed a Motion for Summary Judgment regarding Count I and Count II of its Declaratory Judgment Complaint. AR0241-0244.

Either fearing a bad ruling, or simply in an attempt to litigate the exact same issues in two courts, Praetorian filed its Motion to Intervene in Civil Action No. 19-C-450 on February 10, 2021. AR0620-0663. In that Motion, Praetorian sought Rule 24(a)(2) Intervention in the wrongful death claim to assert the same relief it sought through Count II in the declaratory action. Compare AR0001-0008 to AR0635-0641. The Court properly denied Praetorian's Motion to Intervene as untimely filed and because Praetorian was trying to file the same claim in two courts. AR0709-0711.

Discovery remained actively ongoing in the tort Civil Action No. 19-C-450 until

Petitioner filed Appeal No. 21-0243, currently pending before this Court and Petitioner moved to stay the tort Civil Action No. 19-C-450[2]. This Court granted Petitioner's Motion to Stay Civil Action No. 19-C-450 on June 14, 2021 as part of Appeal No. 21-0243.

Notably, Petitioner continued its pursuit of a ruling on its Declaratory Judgment Complaint in Civil Action No. 20-C-800 even though it had filed its Notice of Intent to Appeal the Order denying intervention on March 26, 2021 (Appeal No. 21-0243). Thus, while Petitioner has been seeking appellate relief in Appeal No. 21-0243 to file its Declaratory Judgment Complaint in Civil Action No. 19-C-450, it has been litigating that same Declaratory Judgment Complaint in Civil Action No. 20-C-800.

Judge Ballard provided the parties a full opportunity to brief Petitioner's Motion for Summary Judgment and Respondents' Motions to Dismiss Count II, held a lengthy hearing regarding the Motions, permitted the parties an opportunity to provide supplemental briefs following the hearing, and after considered reasoning and analysis, denied Petitioner's Motion for Summary Judgment as to Count I, denied Petitioner's Motion for Summary Judgment as to Count II as premature and issued no ruling on the actual merit of that claim, and granted the Motions to Dismiss Count II based upon the lack of justiciable controversy between the parties.

Petitioner has never dismissed its Petition for Appeal in Appeal No. 21-0243. It is now before this Court in two appeals seeking to pursue the same Declaratory Judgment Complaint in two West Virginia Circuit Courts at the same time. Petitioner is asking for the right to pursue

[2] Petitioner has been openly critical of the defense law firm Pullin Fowler Flanagan Brown & Poe, PLLC and lawyer it hired to defend Air Cargo Carrier in Civil Action No. 19-C-450 and has called their defense strategy "incomprehensible" within briefs Praetorian filed in the competing underlying actions. Praetorian has openly criticized the defense firm for not filing Motions quickly enough and causing Praetorian to incur defense costs it does not want to incur. With no regard to the huge impediments caused by COVID, Praetorian has complained that the tort parties have wasted time and money. However, Praetorian's actions in filing an identical overlapping claim in Civil Action No. 20-C-800, filing multiple Appeals, and seeking a stay of the underlying tort action are the cause of wasted time and money for three West Virginia courts and all the parties.

that claim within Civil Action No. 19-C-450 and asking this Court to reverse the reasoned decisions made on the same issues in Civil Action No. 20-C-800. Petitioner Praetorian caused all the Court jockeying between Civil Action Nos. 19-C-450 and 20-C-800 and Appeal Nos. 21-0243 and 21-0682 by failing to timely seek a declaration in 2019 of its rights and obligations to provide employer's liability coverage as required under Wisconsin law. Praetorian is now trying to play two Kanawha County Circuit Courts against each other to angle for its own interest with disregard to the best interests of its insured, the time and expense of three courts, time and expense of the parties, and significant delay and prejudice to the multiple parties which want timely and cost-efficient resolution of the underlying tort case. This Court should deny both Appeals and uphold the interests of judicial economy and Court integrity in the rulings issued within Civil Action Nos. 19-C-450 and 20-C-800.

STATEMENT REGARDING ORAL ARGUMENT

Respondent joins Petitioner in requesting oral argument.

STANDARD OF REVIEW

The Order granting the Motions to Dismiss Count II are reviewed de novo. *Doering v. City of Roncerte*, 718 S.E.2d 497 (W.Va. 2011); Syl. pt. 1, *Lontz v. Tharp,* 220 W.Va. 282, 647 S.E.2d 718 (2007); syl. pt. 1, *Rhododendron Furniture & Design v. Marshall,* 214 W.Va. 463, 590 S.E.2d 656 (2003).

In the event this Court determines to reverse the Order granting the Motions to Dismiss and permits Petitioner to pursue a Declaratory Judgment regarding Count II, the denial of Petitioner's Motion for Summary Judgment regarding Count II was not a ruling as a matter of law on the merits of that claim. Accordingly, that ruling is not a final appealable Order reviewable by this Court. The Order includes no indication that there is "no just reason for delay

exists" and directing entry of judgment as to Count II. Further, nothing on the face of the Order reaches the merits of the factual and legal issues presented by Count II. Therefore, this Court cannot determine from the order that the trial court's ruling approximates a final order on its nature or effect as to the merits of Count II. "An order denying a motion for summary judgment is merely interlocutory, leaves the case pending for trial and is not appealable except in special instances in which an interlocutory order is appealable." Syl. Pt. 8, *Aetna Casualty and Surety Co. v. Federal Insurance Company of New York*, 133 S.E.2d 770 (W.Va. 1963).

The Order denying Petitioner's Motion for Summary Judgment regarding Count I is reviewed de novo. *Painter v. Peavy*, 451 S.E.2d 755 (W.Va. 1994).

ARGUMENT

1. **West Virginia Code §55-13-6 grants the trial court authority to refuse to render declaratory judgment where such judgment or decree, if rendered would not terminate the uncertainty or controversy giving rise to the proceeding.**

Count II of Praetorian's Declaratory Judgment Complaint seeks to litigate the merits of the Estate's negligence cause of action against Air Cargo Carriers and not any insurance coverage issue requiring interpretation or application of the Praetorian Insurance Company policy. The merits of the negligence action must be litigated between the Estate and Air Cargo Carriers in the tort claim. Praetorian admits Count II litigates the merits of the negligence claim, but it wants to control how the merits of that claim are litigated because it doesn't like the way Air Cargo is litigating that same claim in the tort action. Notably, Praetorian hired the lawyer representing Air Cargo, Ed Poe, a well respected insurance defense lawyer, in the tort claim and he reports to Praetorian. Now Praetorian seeks to misuse the declaratory judgment process to control Air Cargo's defense of the negligence claim.

Litigating the same claim in two Courts is a waste of judicial resources, litigating the

same claim in two courts will not terminate the uncertainty or controversy, and may end in conflicting results. Civil Action No. 19-C-450 is nearly two years in to litigating the same negligence claim Praetorian is attempting to litigate in Civil Action No. 20-C-800. In that action, only written discovery has been filed on Petitioner, which it failed to answer in compliance with Rules 33 and 34 of the West Virginia Rules of Civil Procedure. The determination of whether Air Cargo Carriers is or is not entitled to statutory immunity is the subject of substantial ongoing discovery in Civil Action No. 19-C-450. The following is offered to demonstrate the evidence developed in Civil Action No. 19-C-450 relevant to this issue and to outline the ongoing nature of outstanding discovery on the legal and factual issues relevant to the claim. It is important for the Court to appreciate this is an issue being actively litigated in Civil Action No. 19-C-450 and is not as simple as demonstrating water is wet as suggested by Petitioner.

Evidence developed within Civil Action No. 19-C-450 demonstrates Air Cargo Carriers failed to comply with statutory requirements necessary to receive the benefits of employer statutory immunity under W.Va. Code §23-1-1, et. seq. Specifically, W.Va. Code §23-2-1(a) and 1(f) provide mandatory requirements an employer must fulfill in order to qualify for statutory immunity. One of those mandatory requirements for foreign corporations, such as Air Cargo, provides:

> "Any foreign corporation employer choosing to comply with the provisions of this chapter and to receive the benefits under this chapter **shall**, at the time of making application to the commission in addition to other requirements of this chapter, furnish the commission with a certificate from the Secretary of State, where the certificate is necessary, showing that it has complied with all requirements necessary to enable it legally to do business in this state and no application of a foreign corporation employer shall be accepted by the commission until the certificate is filed."

W.Va. Code §23-2-1(f). At the time of the plane crash, and for years before and after the crash, Air Cargo operated at least two, and at times three, staffed business offices in West Virginia

including Charleston and Beckley, West Virginia. Air Cargo employed full time employees within the state of West Virginia. Records obtained to date from the West Virginia Secretary of State's office and Air Cargo demonstrates Air Cargo was doing business in West Virginia with no Certificate of Authority to do business in this State from the Secretary of State's office for years. After being sued, in August 2019, for the first time Air Cargo filed a 24 hour expedited application for Certificate of Authority to do business in West Virginia. There is no question Air Cargo was not in compliance with the mandatory requirement of W.Va. Code §23-2-1(f) at the time of the plane crash and for the entire time it employed the decedent as a full time employee. Having failed to comply with the mandatory requirements of §23-2-1(f), Air Cargo does not qualify for statutory immunity pursuant to §23-2-6 because it had not "complied fully with all other provisions of this chapter".

Additional written and deposition discovery was ongoing in Civil Action No. 19-C-450 to determine whether Air Cargo obtained the requisite West Virginia State Tax Department registration which would trigger Air Cargo's classification for West Virginia state and county business, sales, and employee taxation. Failing to fulfill tax obligations in West Virginia is another disqualifying event which would prohibit Air Cargo from receiving the benefits of West Virginia employer statutory immunity. Finally, discovery and investigation was ongoing into Air Cargo's registration and compliance with West Virginia's Public Service Commission as a public cargo air carrier.

Allowing Praetorian to litigate the same issues in this case will cause two Kanawha County Circuit Courts to spend time, money, and manpower resources litigating the exact same issues. A ruling in Civil Action No. 20-C-800 will not end the uncertainty or controversy and because the progression of that action is substantially behind the progression of Civil Action No.

19-C-450, no resolution on the merits of that claim is likely before resolution in the tort claim. W.Va. Code §55-13-6 grants the trial court authority to refuse judgment as follows:

> The Court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

The Court correctly determined that "The judgment sought by Count II would not terminate the uncertainty or controversy giving rise to the proceeding. This Court's declaration for or against the matters asserted in Count II will not terminate the negligence claim in the tort action. The Court in Civil Action No. 19-C-450 would maintain jurisdiction and authority to rule on the same issue. That Court would control the timing of when the matter would be addressed and whether to accept or reject this Court's ruling. A declaration on Count II in this Court would not terminate the uncertainty or controversy and could substantially increase uncertainty in the proceedings." AR0781-0785.

As discussed in more detail below, Praetorian erroneously seeks to apply Wisconsin law to analyze Count II while the tort Court will apply West Virginia law to the tort case. If the law of two different states is applied to the same claim, this will almost certainly cause two different rulings on the same issue.

2. West Virginia is not a direct action state and does not permit an injured plaintiff to directly sue the insurer instead of the tortfeasor, nor does it permit the insurer to directly litigate and defend tort claims. Petitioner's insurance contract prohibits this direct action.

The plain language of Petitioner's Employers Liability Insurance contract relays Petitioner's clear intent that it not be named in an action against the insured to determine the

insured's liability. In that regard Part Two Employers Liability Insurance Section I. Actions Against Us provides: "This insurance does not give anyone the right to add us as a defendant in an action against you to determine your liability." The use of the term "anyone" in the language of the policy includes Praetorian. Accordingly, Praetorian's efforts to involve itself in a direct action to determine Air Cargo Carrier's liability, either in the tort claim or declaratory action, violates the plain language of Petitioner's Employers Liability Insurance contract. The language of that contract should be enforced equally against Petitioner and the direct action should be prohibited.

Petitioner claims because the Praetorian/Air Cargo insurance policy which is the subject of Count I will be interpreted under Wisconsin law, the Court should apply Wisconsin law to also analyze the merits of the tort claim asserted in Count II. Petitioner seems to even utilize Wisconsin law for the procedural standing analysis, despite the fact that the crash occurred in West Virginia. Petitioner argues it has standing under Wisconsin law to be a party to the tort claim because Wisconsin is a "direct action" state which permits an injured plaintiff to directly sue an insurer for tort damages instead of the tortfeasor. Therefore, Petitioner argues it should be permitted to sue the Estate to disprove the tort negligence claim. In fact, this issue helps crystalize why Count II should remain dismissed from Civil Action No. 20-C-800.

It is important to first clarify that the Declaratory Complaint presents the Court with three conflict of laws issues. Count I is a pure insurance policy contractual coverage analysis involving a Wisconsin insurance policy issued in Wisconsin to a Wisconsin company. West Virginia law acknowledges that an insurance policy should be construed according to the laws of the state where the policy was issued, and risk insured was principally located. *Nadler v. Liberty Mutual Fire Insurance Company*, 424 S.E. 2d 256 (W.Va. 1992). There seems to be no dispute

that the substantive law of Wisconsin should apply to analyze Count I of the Complaint, as conceded by Petitioner. However, Petitioner appears to substantially rely on West Virginia law as a basis for its Motion for Summary Judgment regarding Count I as its primary focus appears to rely upon *Employers' Mutual Insurance Co.v Summit Point Raceway Assocs. Inc.,* 719 S.E.2d 830 (W.Va. 2011). Regardless, Wisconsin law governs the analysis of Count I.

Count II solely relates to the tort dispute between the Estate and Air Cargo. West Virginia law applies the *lex loci delicti* choice of law rule and declares that the substantive rights between the parties in tort actions is determined by the law of the place of injury. See *Blais v. Allied Exterminating Co.*, 482 S.E.2d 550 (W.Va. 1996); and *McKinney v. Fairchild International, Inc.*, 487 S.E.2d 913 (W.Va. 1997). The plane crash tort in this case occurred in West Virginia involving the death in West Virginia and is governed by the West Virginia wrongful death statute. Thus, West Virginia law applies to Count II, i.e. was Air Cargo negligent for causing the death of Anh Ho.

The final conflict of law analysis determines what state law governs the procedural issues presented by the declaratory action. The primary dispute raised by the Motion to Dismiss is one of standing. In that regard, justiciability concerns the limits upon legal issues over which a court can exercise its judicial authority. It includes, but is not limited to, the legal concept of standing, which is used to determine if the party bringing the suit is a party appropriate to establishing whether an actual adversarial issue exists between the parties to the action. Essentially, justiciability seeks to address whether a court possesses the ability to provide adequate resolution of the dispute. Where a court believes that it cannot offer final determination, the matter is not justiciable.

Petitioner argues Wisconsin law confers standing on an insurer to be a direct party to tort

claims. "However, under the *lex loci delicti* choice of law rule, West Virginia procedure applies to all cases before West Virginia courts." *McKinney,* at 923. "It is traditional that a forum court always applies its own procedural rules and practices, regardless of the procedure that might be employed if the case were tried at the place where the cause of action arose." *Id.* Petitioner **chose** to file this declaratory action in West Virginia, and West Virginia law will determine the procedural issues presented by this case. Petitioner could have filed its declaratory action in Wisconsin and Wisconsin procedural law would have applied. However, based on Petitioner's choice, Wisconsin's law on standing or justiciability does not apply to confer jurisdiction in the West Virginia trial court or standing in Petitioner.

As Petitioner acknowledged in its response brief, West Virginia is not a direct action state and does not permit an injured plaintiff to directly sue the insurer instead of the tortfeasor. AR0041-0234. *Robinson v. Cabell Huntington Hospital, Inc.,* 498 S.E.2d 27, 31-32 (W.Va. 1997) ("As a general rule, in the absence of policy or statutory provisions to the contrary, one who suffers injury which comes within the provisions of a liability insurance policy is not in privity of contract with the insurance company and cannot reach the proceeds of the policy for the payment of his claim by an action directly against the insurance company.") Reciprocally, an insurer cannot sue an injured plaintiff to litigate the tort claim. The West Virginia Supreme Court acknowledged in *O'Neal v. Pocahontas Transp. Co.*, 129 S.E. 478, 481 (W.Va. 1925) "The inherent difference between a breach of an agreement between parties, and that sort of breach of duty which we call a tort, is as old as the law itself." "There is no privity of contract between the injured person and the insurance company. The remedy, well established, is by a suit against the tort-feasor alone." Absent the ability of Petitioner to demonstrate language within its insurance policy that it was made for the Estate's sole benefit, there is no privity of

contract between Petitioner and the Estate. "It is well-established that a contract of insurance is a personal contract between the insurer and the insured named in the policy." *Woodford v. Glenville State College Hous. Corp.*, 225 S.E.2d 671, 674 (W.Va. 1976). "This Court has held that in order for a contract concerning a third party to give rise to an independent cause of action in the third party, it must have been made for the third party's sole benefit. *Id.*

For nearly 100 years, West Virginia has recognized that resolution of the tort claim must be litigated between the injured party and tortfeasor, not directly with the indemnifying insurance carrier. Petitioner is urging this Court to open tort litigation to direct actions between tortfeasors and insurance carriers. West Virginia has never been a direct action claim state and Petitioner has presented the Court with no good reason to change this long precedent other than the fact that it does not agree with the defense strategy being employed by the parties to the tort. A ruling permitted Petitioner to directly litigate the merits of a tort claim with the Estate will open the floodgates and will permit every injured party to directly sue insurers in the name of the insurer, instead of suing tortfeasors.

3. Count II presents no justiciable controversy between Petitioner Praetorian and Respondents Air Cargo Carriers and The Estate and therefore, the Court lacks jurisdictional authority to issue a declaratory judgment.

Petitioner has failed to demonstrate it has standing to directly litigate the merits of the Estate's negligence claim against the Estate and its own insured. The United States Constitution provides courts have the power only to hear "cases" and "controversies." U.S. Const Art. III, §2. The doctrine of standing is designed to ensure that courts do not exceed those constitutionally circumscribed powers. *Spokeo, Inc. v. Robins*, 135 S.Ct. 1540, 1547 (2016); *A. H. v. CAMC Health System, Inc.*, 2020 WL 1243608, (W.Va. 2020). "To be clear, if there is no 'case' in the constitutional sense of the word, then a court lacks the power to issue a declaratory judgment."

City of Martinsburg v. Berkeley County Council, 825 S.E.2d 332, 336 (W.Va. 2019), quoting *Cox v. Amick*, 466 S.E.2d 459, 469 (W.Va. 1995). "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp. v. Cuno,* 126, S.Ct. 1854 (2006). "For all relief sought, there must be a litigant with standing, whether that litigant joins the lawsuit as a plaintiff, a co-plaintiff, or an intervenor of right." *Town of Chester, New York v. Laroe Estates, Inc.* 137 S. Ct. 1645 (2017).

In cases where a party attempts to vindicate its own rights, to establish Article III standing, it must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo*, at 1547. Therefore, if Petitoner seeks to establish standing through its own right, it must articulate an injury in fact traceable to the challenged conduct of the Estate and/or its own insured.

It is crucial to appreciate that Petitioner's duty to pay for a defense and indemnity on behalf of Air Cargo Carriers is solely a result of Petitioner's insurance contract with Air Cargo Carrier. Petitioner chose to engage in the business of insurance and determined it would offer Air Cargo Carrier's a contractual right to defense and indemnity in return for payment of hundreds of thousands of dollars in premium. Petitioner's obligation to defend and indemnify arise from its bargained contract with Air Cargo Carriers, not from the wrongful death of Anh Ho. Keeping that premise in mind, West Virginia law regarding standing, demonstrates Petitioner has no injury in fact from Anh Ho's wrongful death claim. Further, Petitioner has failed to satisfy the criteria to vindicate Air Cargo's rights.

In cases where a party attempts to vindicate the rights of a third party through a declaratory judgment action, West Virginia courts require the party to establish the existence of *jus tertii* standing by demonstrating a three-factor test is met. To demonstrate *jus tertii* standing the party

must "(1) have suffered an injury in fact; (2) have a close relation to the third party; and (3) demonstrate some hindrance to the third party's ability to protect his or her own interests. *Kanawha County Public Library Board v. Board of Education of the County of Kanawha*, 745 S.E.2d 424, 435-36 (W.Va. 2013); and *Powers v. Ohio*, 499 U.S. 400, 411 (1991). "Courts have been reluctant to allow persons to claim standing to vindicate the rights of a third party on the grounds that third parties are generally the most effective advocates of their own rights and that such litigation will result in an unnecessary adjudication of rights which the holder either does not wish to assert or will be able to enjoy regardless of the outcome of the case." *Snyder v. Callaghan*, 284 S.E.2d 241, 250 (W.Va. 1981). Further, the United States Supreme Court has acknowledged the third prong requires a showing of a genuine obstacle to the third party's ability to protect its own interest. "Under the third prong of *Powers*, it must be shown that there is some genuine obstacle to the third party's assertion of his rights." *Singleton v. Wulff*, 428 U.S. 106, 116 (1976). Therefore, Petitioner must demonstrate a genuine obstacle that prevents ACC from protecting its own interest in the negligence claim.

ACC is represented by counsel in both the tort claim and the declaratory judgement claim. ACC has the ability to protect its own interests and has a significant stake in controlling defense strategy decisions about when and whether it wants to litigate the Estate's burden of proof in the tort action. There are definite strategic advantages and disadvantages to whether ACC is faced with a "deliberate intent" claim or "negligence" claim. ACC can most effectively advocate its own right on that issue.

4. Wisconsin law prohibits the insurance policy exclusion Petitioner relies upon for its basis to deny coverage under Count I. W.S.A. §632.23.

All parties agree the insurance contract is governed by Wisconsin law. Pursuant to *W.S.A.*

§632.23, Praetorian Insurance Company is prohibited from denying coverage for The Estate's deliberate intent claims related to Air Cargo's ownership and use of the crash flight aircraft because it was operated in violation of federal, state, and local air regulations. Specifically, *W.S.A.* §632.23 provides:

> 632.23 **Prohibited exclusions in aircraft insurance policies.** No policy covering any liability arising out of the ownership, maintenance or use of an aircraft, may exclude or deny coverage because the aircraft is operated in violation of air regulation, whether derived from federal or state law or local ordinance.

The Estate's claims against Air Cargo Carriers are based upon Air Cargo Carrier's violations of federal and state laws regarding its ownership and use of the crash flight. In fact, in order to succeed with a deliberate intent claim, The Estate must demonstrate such violations of federal or state safety violations.

Petitioner does not dispute that the Estate's claim and burden of proof against Air Cargo Carriers related to the deliberate intent claim relates to proof that Air Cargo Carriers's aircraft was operated in violation of air regulation derived from federal, state and/or local laws and ordnances. Petitioner further does not deny that it knew it was contracting to cover a company whose sole business was the ownership maintenance and use of aircraft. The plain language of *W.S.A.* §632.23 prohibits Petitioner from issuing an insurance policy to its aircraft insured and then excluding or denying coverage because the aircraft was operated in violation of air regulations. Petitioner is seeking to deny coverage in direct violation of Wisconsin statutory law governing insurance.

Additionally, Wisconsin law clearly provides Petitioner is obligated to pay The Estate under its employer's liability policy for Air Cargo Carrier's violations of federal and state safety violations. In that regard, *W.S.A* §632.25 provides as follows:

> 632.25 **Limited effect of conditions in employer's liability policies.** Any condition in an employer's liability policy requiring compliance by the insured with rules concerning the safety of persons shall be limited in its effect in such a way that in the event of breach by the insured the insurer shall nevertheless be responsible to the injured person under 632.24 as if the condition has not been breached, but shall be subrogated to the injured person's claim against the insured and be entitled to reimbursement by the latter.

The effect of this statute is that Petitioner remains obligated to the Estate for its employers liability insurance limits and then Petitioner may seek subrogation from Air Cargo Carriers if it is determined in Civil Action No. 19-C-450 that Air Cargo Carriers violated rules concerning the safety of persons. Petitioner's reliance on the heading in its policy titled Part Six Conditions is misplaced. Petitioner knows that its Conditions section relates to the rights of the insurer to inspect the books and business of the insured, addresses the length of the policy and the administrative specifics of how a policy can be canceled. Petitioner's Conditions section does not set forth the workplace conditions and safety compliance conditions required for employers liability insurance. The plain language and intent of *W.S.A* §632.25 is to prevent an employer's liability carrier from refusing to pay an injured worker because it put a condition that the insured comply with safety rules in its policy. Petitioner directly violated this statute when it placed a condition insurance on conduct in compliance with W.Va. Code 23-4-2(d)(2). This statute clearly intends that when an employer's liability carrier is going to limit its insurance so narrowly, the injured worker must still be paid and the carrier has the remedy of collecting from the insured.

5. The Court properly denied Petitioner's Motion for Summary Judgment regarding Count II because a decision for summary judgment before any discovery has been completed must be viewed as precipitous. The ruling denying Petitioner's Motion for Summary Judgment regarding Count II is not a final appealable order and Petitioner's request that this Court "enter judgment as a matter of law on Count ... II of Praetorian's Complaint" should be dismissed.

Neither the Order granting the Motion to Dismiss Count II or the Order denying the Motion for

Summary Judgment regarding Count II reached the actual merits of the claims asserted in Count II. The Motion to Dismiss was premised upon the Court's right to decline declaratory judgment when ruling will not resolve uncertainty or terminate the controversy. The Order was further premised on the lack of justiciable controversy because Petitioner lacks standing to directly litigate the merits of The Estate's negligence claim against Air Cargo Carriers. AR0781-0785. Those rulings to not reach or address the merits of the underlying negligence claim.

Similarly, the denial of Petitioner's Motion for Summary Judgment regarding Count II was premised on the premature nature of the Motion, i.e. it was precipitous to seek ruling on that Count before discovery had begun. AR0764-0780. The Court did not analyze the merits of the negligence and immunity issues presented by Count II and issue a ruling on those merits. Accordingly, there has not been a final appealable order on the merits of Count II and there is no basis for Petitioner's request in its Conclusion of Petitioner's Brief that asks this Court to "enter judgment as a matter of law on Count ... II of Praetorian's Complaint. Respondent asserts that this Court should affirm the Trial Court's Orders. In the event the Orders as to Count II are not affirmed, full litigation, including discovery, must occur regarding the merits of Count II before any judgment as a matter of law can be considered. As presented by Petitioner, the Order denying the Motion for Summary Judgment regarding Count II is not a final appealable order as set forth within the Standard of Review section, herein.

6. Air Cargo Carriers purchased additional employers liability coverage for its residence employees through Endorsement WC 00 03 12 A. That endorsement provides coverage and Petitioner's Motion for Summary Judgment regarding Count I was properly denied.

Air Cargo Carrier purchased additional Employers Liability Insurance which was added by Endorsement WC 00 03 12 A to Petitioner's policy. This endorsement is a stand-alone part of the policy providing additional "employers liability" coverage to Air Cargo and must be

analyzed separately from the other provisions of the policy. The language relied upon by Petitioner regarding W.Va. Code §23-4-2-(d) is not contained in or made a part of this additional employer's liability coverage and it does not modify the coverage added by that Endorsement.

The only requirements for application of the coverage provided by the Employers Liability Endorsement are that (1) the bodily injury must "arise out of and in the course of the residence employee's employment by you"; (2) the employment "must be necessary or incidental to work in the state of the residence premises or a state listed in the schedule"; and (3) the bodily injury "must occur during the policy period." Petitioner failed to define the terms within the insurance policy and Petitioner now seeks to define the terms to its benefit and to the deteriment of its insured and The Estate. Petitioner, as the drafter of its own policy was obligated to define the terms within its own policy as it stated it would in the endorsement. (""Bodily Injury", "residence employee", "residence premises", "you", and "we" have the meanings stated in the policy.") Despite saying it defined those terms in the policy, Petitioner did not. Petitioner may not now define those policies, post claim, to exclude coverage.

All of the requirements of this separate employers liability coverage are met by the Estate claim. The Estate does not and has not alleged Air Cargo Carriers "intentionally caused" Anh Ho's death. Respondent pled the requisite elements of her claim to satisfy the provisions of *W.Va. Code §23-4-2(d)(2)* and Petitioner has failed to identify any claim from the tort Complaint asserting Air Cargo Carriers "intentionally caused" the death.

Wisconsin law places the burden on Petitioner to draft its policy language with clear unambiguous terms. Where terms are ambiguous, the Court must resolve the ambiguity "in favor of the insured". *Katze v. Randolph & Scott Mut. Fire Ins. Co.,* 341 N.W.2d 689 (Wis. 1983). The test is "not what the insurer intended the words to mean but what a reasonable

person in the position an insured would have understood the words to mean." *Id.* Policy language is ambiguous if it is "susceptible to more than one reasonable construction." *Farm Mut. Auto Ins. Co. v. Bailey*, 734 N.W.2d 386 (Wis. 2007). The plain meaning of "residence employee" is especially applicable in the context of an air cargo carrier business where crew are in residence where they are based for nightly cargo runs. Purchasing this additional employers liability coverage for its "residence employee" flight crew, supplied the crew with employers liability coverage as they were reassigned to new places of residence/base. Construing "residence employee" as Petitioner asks this Court to do, strains the imagination. Air Cargo Carrier was not a babysitting or housecleaning business. Air Cargo Carriers bases flight crews at its residence hubs for nightly cargo runs. It needed this unique employer's liability coverage to fill in the coverage gap for their residence flight crew.

CONCLUSION

Wherefore the Respondent, Virginia Chau as Administratrix of the Estate of Anh Ho, respectfully requests that this Honorable Court grant the relief requested herein and for such other and further relief as the Court deems appropriate.

Virginia Chau, Administratrix
Of the Estate of Anh Kim Ho

By Counsel

William M. Tiano (WVSB # 4308)
TIANO O'DELL PLLC
118 Capitol Street
Post Office Box 11830
Charleston, West Virginia 25339
(304) 720-6700
wtiano@tolawfirm.com
Counsel for Respondent Virginia Chau, Administratrix of the Estate of Anh Kim Ho

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Praetorian Insurance Company,
Plaintiff Below/Petitioner

vs.) No. 21-0682

Air Cargo Carriers, LLC,
Defendant Below, Respondent

and

Virginia Chau, Administratrix of the
Estate of Anh Kim Ho,
Defendant Below, Respondent

CERTIFICATE OF SERVICE

I, William Tiano, counsel for Plaintiff, do hereby certify that I have this 13th day of January, 2022, served the foregoing RESPONDENT VIRGINIA CHAU, ADMINISTRATRIX OF THE ESTATE OF ANH KIM HO'S BRIEF upon counsel of record by U.S. Postal Service addressed to the following counsel:

Spencer D. Elliott, Esq.
Lewis Glasser PLLC
P. O. Box 1746
Charleston, WV 25326
Counsel for Plaintiff

Don C. A. Parker, Esq.
Spilman Thomas & Battle, PLLC
P. O. Box 273
Charleston, WV 25321-0273
Counsel for Praetorian Insurance Company

William M. Tiano (Bar No. 4308)
TIANO O'DELL PLLC
Post Office Box 11830
Charleston, West Virginia 25339