IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 21-0243

PRAETORIAN INSURANCE COMPANY,

Putative Intervenor Below/Petitioner,

v.

VIRGINIA CHAU, Administratrix of the Estate of ANH KIM HO,

Plaintiff Below/Respondent,

and

AIR CARGO CARRIERS, LLC,

Defendant Below/Respondent.

(On Appeal from Civil Action No. 19-C-450, Circuit Court of Kanawha County, West Virginia)

PETITIONER'S BRIEF

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Assignment of Error Number 1:

The Circuit Court erred when it found that Praetorian is not entitled to intervene as a matter of right, based on the Circuit Court's erroneous conclusion that the disposition of this matter will not impair or impede Praetorian's protection of its interests.

Assignment of Error Number 2:

The Circuit Court erred when it found that Praetorian is not entitled to intervene as a matter of right, based on the Circuit Court's erroneous conclusion that Praetorian failed to timely file its motion to intervene.

STATEMENT OF THE CASE

A. The Air Crash and the Tort Action

This case concerns the death of Anh Kim Ho in a May 5, 2017 aircraft crash at Yeager Airport in Charleston, West Virginia. AR 010-011.[1] At the time of the crash, Ms. Ho was serving as the First Officer of an aircraft being piloted by Jonathan Pablo Alvarado. AR 010. Both Ms. Ho and Mr. Alvarado were employees of Air Cargo Carriers, LLC ("Air Cargo"), operating a flight for Air Cargo pursuant to a contract between Air Cargo and UPS Worldwide Forwarding, Inc. ("UPS Worldwide"). AR 010-011.

On or about May 3, 2019, Virginia Chau ("Chau"), acting in her capacity as the Administratrix of the Estate of Anh Kim Ho and seeking to recover in tort for the death of Ms. Ho, filed Civil Action Number 19-C-450 in the Circuit Court of Kanawha County, West Virginia (the instant matter, or the "Tort Action"). AR 005-020. The Tort Action originally named as defendants Air Cargo, United Parcel Service Co ("UPS Co."), and the Sheriff of Kanawha County

[1] AR signifies reference to specific pages of the Appendix Record.

("Sheriff") in his capacity as the Administrator of the Estate of Jonathan Pablo Alvarado. AR 005-020. Ms. Chau later amended her Complaint in the Tort Action to add UPS Worldwide as a defendant. AR 037-052. Judge Louis H. "Duke" Bloom presides over the Tort Action. AR 005.

Count I of the Amended Complaint in the Tort Action states a "deliberate intent" claim against Air Cargo pursuant to W. Va. Code § 23-4-2(d)(2). AR 043-046. In the alternative, Count I of the Amended Complaint states a simple negligence claim against Air Cargo based on the theory that Air Cargo is not entitled to the workers' compensation immunity granted by W. Va. Code § 23-2-6. AR 046.

B. The Praetorian Policy

Praetorian issued a workers' compensation and employer's liability insurance policy to Air Cargo that was in effect on the date of the aircraft crash that resulted in Ms. Ho's death (the "Policy"). AR 183-186. Praetorian has paid all workers' compensation benefits owed in connection with this matter under the Policy. AR 171. Moreover, although no coverage exists under the Policy for the "deliberate intent" claim Ms. Chau filed against Air Cargo in the Tort Action, Praetorian sent a reservation of rights letter to Air Cargo on June 6, 2019, agreeing to defend Air Cargo in the Tort Action due to the alternative simple negligence claim Ms. Chau filed against Air Cargo. AR 183-186. The Policy provides that Praetorian has "the right and duty to defend, at our expense, any claim, proceeding or suit against you for damages payable by this insurance." AR 185. Praetorian hired counsel to defend Air Cargo in the Tort Action, and continues to provide Air Cargo with counsel in the Tort Action. AR 186.

C. The Removal to Federal Court

On June 13, 2019, UPS removed the Tort Action to federal court. AR 001. It was remanded to the Circuit Court on February 10, 2020. AR 001.

D. The Post-Removal Scheduling Order and Early Mediation

Judge Bloom issued a Scheduling Order in the Tort Action on April 15, 2020. AR 060-061. It set the following deadlines (among others): a July 1, 2020 deadline to complete early mediation; a December 15, 2020 deadline to complete a later mediation; and a February 1, 2021 date to begin trial. AR 060-061.

By agreement of the parties, and with the approval of Judge Bloom, the early mediation of the Tort Action took place August 18, 2020, a month and a half after the deadline set in the April 15, 2020 Scheduling Order. AR 080-083. Before the early mediation, Praetorian informed all counsel and the mediator that it would participate separately from Air Cargo, and it did so. AR 128. Unfortunately, despite Praetorian's efforts, the Tort Action did not settle at the August 18, 2020 early mediation. AR 100-103.

E. The Declaratory Judgment Action

On September 15, 2020, Praetorian filed Civil Action Number 20-C-800 in the Circuit Court of Kanawha County, West Virginia (the "Declaratory Judgment Action") in order to resolve Praetorian's and Air Cargo's rights and obligations under the Policy. AR 206-211. Judge Tod E. Kaufman initially presided over the Declaratory Judgment Action prior to his resignation on March 31, 2021; Judge Kenneth D. Ballard currently presides over the matter. AR 206.

Count I of the Declaratory Judgment Action seeks a legal determination that the Policy does not provide coverage to Air Cargo for the "deliberate intent" claim filed by Ms. Chau in Count I of the Tort Action. AR 208-209. The relevant insuring agreement of the Policy does not provide coverage for "deliberate intent" actions; moreover, an exclusion in the Policy states that the Policy's insurance "does not cover ... bodily injury intentionally caused or aggravated by you or which is the result of your engaging in conduct equivalent to an intentional tort, however defined,

including by your deliberate intention as that term is defined by W. Va. Code § 23-4-2(d)(2)." AR 209. Count I of the Declaratory Judgment Action is not directly at issue here.

Count II of the Declaratory Judgment Action seeks a legal determination that Air Cargo is entitled to the protections of W. Va. Code § 23-2-6 and, therefore, cannot be found liable for the simple negligence claim stated as an alternative theory of liability in Count I of the Tort Action. AR 209-210. Practically, Count II of the Declaratory Judgment Action seeks a declaration that the simple negligence claim asserted against Air Cargo in the Tort Action does not seek any damages to which the Policy's "Employer's Liability" Coverage might apply. Because Praetorian's duty to defend and indemnify Air Cargo extends only to "any claim, proceeding or suit against [Air Cargo] for damages payable by" the Policy, Count II functionally seeks a declaration that the claims made against Air Cargo in the Tort Action do not trigger Praetorian's duty to defend or indemnify Air Cargo, due to Air Cargo's workers' compensation immunity under W. Va. Code § 23-2-6. AR 185.

F. The Motions to Dismiss Count II of the Declaratory Judgment Action

Respectively, on November 20 and 24, 2020, Ms. Chau and Air Cargo moved to dismiss Count II of Praetorian's Complaint in the Declaratory Judgment Action. AR 120-134; AR 145-146. They specifically argued that the issue presented in Count II (*i.e.*, whether Air Cargo is immune from simple negligence in connection with Ms. Ho's death pursuant to W. Va. Code § 23-2-6) must be resolved in the Tort Action, before Judge Bloom. AR 120-123; AR 130-131. Those motions to dismiss have not yet been ruled on; therefore, although Praetorian believes they ultimately should be denied, it is possible those motions to dismiss will be granted.

G. The Consent Motion to Transfer the Declaratory Judgment Action

On November 24, 2020, Praetorian filed a consent motion, approved by all parties to both the Tort and Declaratory Judgment Actions, to transfer the Declaratory Judgment Action from Judge Kaufman to Judge Bloom so that both cases would be before the same judge. AR 092-099.

H. The Motion to Extend Discovery and Continue the Trial of the Tort Action

On November 30, 2020, the parties to the Tort Action filed a joint motion to extend discovery and continue the trial date, citing delays caused by COVID-19, travel restrictions, and the unsuccessful early mediation as good cause for the extensions and continuance. AR 100-103. As of the date that motion was filed, only limited written discovery had taken place in the Tort Action and no depositions had been taken. AR 100-101.

I. The Motion to Consolidate the Tort Action and the Declaratory Judgment Action

On December 8, 2020, Praetorian filed a motion to consolidate the Tort and Declaratory Judgment Actions so that the immunity issue could be addressed by one judge (Judge Bloom). AR 105-113.

J. Judge Bloom's Denial of the Consent Motion to Transfer and the Motion to Consolidate, but Simultaneous Grant of the Existing Parties' Motion to Extend Discovery and Continue the Trial of the Tort Action

At a virtual hearing conducted on December 17, 2020, Judge Bloom orally denied both Praetorian's Consent Motion to Transfer and its Motion to Consolidate. AR 140-142. Although not memorialized in his written order, Judge Bloom stated during the hearing his belief that Praetorian sought to transfer and consolidate Count II of the Declaratory Judgment Action too close to the trial in the Tort Action.[2] AR 189. Yet, at the same December 17, 2020 hearing, Judge

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[2] Judge Bloom's decision was memorialized in a written order issued on January 13, 2021. AR 140-142. His belief that Praetorian had filed its motions to transfer and consolidate too close to the trial date was generally referenced in his Order denying Praetorian's motion to intervene. AR 189.

Bloom granted the existing parties' joint motion to extend discovery and continue the trial date. AR 135-137; AR 138-139. On December 23, 2020, Judge Bloom entered an amended scheduling order setting the trial of the Tort Action for October 4, 2021, with a dispositive motions deadline of July 30, 2021. AR 138-139.

K. The Motion to Intervene in the Tort Action

In recognition of the fact that Ms. Chau's and Air Cargo's motions to dismiss Count II of Praetorian's Complaint in the Declaratory Judgment Action possibly might be granted, Praetorian filed a Motion to Intervene in the Tort Action on February 10, 2021. AR 143-186. It did so to ensure that its interest in the issue of Air Cargo's workers' compensation immunity under W. Va. Code § 23-2-6 would be protected before whichever court will ultimately resolve the issue. AR 145-146. Judge Bloom denied that motion by an Order issued on February 25, 2021. AR 187-189. Judge Bloom's denial of Praetorian's Motion to Intervene in the Tort Action is the basis for the instant appeal. Praetorian timely filed its Notice of Appeal on March 26, 2021. AR 235-256.

SUMMARY OF ARGUMENT

Rule 24(a) of the West Virginia Rules of Civil Procedure calls for intervention as a matter of right if the applicant satisfies four conditions:

(1) The application must be timely;

(2) The applicant must claim an interest relating to the property or transaction which is the subject of the action;

(3) Disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest; and

(4) The applicant must show that the interest will not be adequately represented by existing parties.

When reviewing findings by a Circuit Court regarding a motion to intervene as a matter of right, this Court reviews findings as to the first condition for abuse of discretion, and reviews findings as to the other conditions *de novo*.

The Circuit Court abused its discretion in analyzing the first condition under Rule 24(a). For one, the Circuit Court limited its "timeliness" analysis to solely the passage of time between the date when the Tort Action was filed and the date Praetorian filed its motion to intervene. The Circuit Court also was required to consider the factual context of the case, the status of the proceedings, the prejudice that would be suffered by the existing parties if intervention were to be allowed, and the prejudice to the applicant if intervention were to be denied. The Circuit Court did not address any of these factors. Had it done so, the Circuit Court would have seen that permitting Praetorian to intervene in the Tort Action solely to address Air Cargo's obvious workers' compensation immunity would have sped up the resolution of the Tort Action because Praetorian was ready to file a motion for summary judgment on the immunity issue immediately upon being allowed to intervene. But even if the Circuit Court's focus only on the passage of time was appropriate (it was not), the Circuit Court used the incorrect start date for its analysis. The timeliness of Praetorian's motion to intervene should have been judged from the date of the Circuit Court's written order denying Praetorian's motion to consolidate the Tort and Declaratory Judgment Actions (i.e., January 13, 2021), not the date Ms. Chau first filed the Tort Action.

Regarding the second condition for intervention as a matter of right (claiming an interest in the subject matter of the action), the Circuit Court failed to address this condition. Praetorian has a clear, direct, and substantial interest in the outcome of the issue of Air Cargo's workers' compensation immunity. As Air Cargo's liability insurer, Praetorian possibly stands to lose a substantial amount of money (possibly up to the $1 million Policy limit) if Air Cargo is found,

albeit incorrectly, to have lost its workers' compensation immunity. Indeed, many courts have found that a liability insurance company for a tort defendant has a direct and substantial interest in the outcome of issues in the lawsuit against the insured that will affect whether money will be paid from the insurance policy at issue.

Regarding the third condition for intervention as a matter of right (disposition of the action may, as a practical matter, impede or impair the applicant's ability to protect its interest in the action), the Circuit Court only superficially addressed this condition and concluded that refusing Praetorian intervention would not impair its ability to protect its interest because Praetorian's rights would be addressed in the Declaratory Judgment Action. In fact, the instant matter may turn out to be the only forum in which Air Cargo's workers' compensation immunity will be determined. Although Praetorian seeks a ruling on this issue from Judge Ballard in the Declaratory Judgment Action, Ms. Chau and Air Cargo both have moved to dismiss the immunity issue from that action. If Judge Ballard grants those motions to dismiss, then the immunity issue will only be decided in this case. But Praetorian is not a party to this case. Consequently, if Judge Bloom decides that Air Cargo does not enjoy workers' compensation immunity in connection with Ms. Ho's death (a decision unsupported by the law), then Praetorian would have no right to appeal that erroneous decision and may have a duty to indemnify Air Cargo for up to $1 million (the Policy limit) in negligence-based damages. Only intervention will allow Praetorian to protect itself from such an erroneous ruling. Therefore, the disposition of this action may, as a practical matter, impede or impair Praetorian's ability to protect its interest in the issue of Air Cargo's immunity.

Regarding the fourth condition for intervention as a matter of right (the applicant's interest will not be adequately represented by existing parties), the Circuit Court also failed to address this

condition. This condition is satisfied as long as Praetorian's interest in the immunity issue is not identical to that of any of the existing parties.

Praetorian's interest in the immunity issue not only is not identical to Air Cargo's, their interests appear to be adverse. Ms. Chau is suing Air Cargo under two mutually exclusive theories of recovery: "deliberate intent" and simple negligence. Air Cargo does not have insurance coverage under the Policy for "deliberate intent" actions; it could have purchased such coverage from a carrier that offers it, but did not. Air Cargo therefore may be covered under the Policy only for simple negligence claims. However, because Air Cargo had workers' compensation coverage through Praetorian for the death of Ms. Ho (Air Cargo's employee), because Air Cargo paid its premium for that coverage, and because Praetorian paid workers' compensation benefits on behalf of Ms. Ho, Air Cargo is immune from all simple negligence lawsuits arising out of Ms. Ho's death as a matter of law.

Praetorian seeks to resolve the immunity issue as quickly as possible, and to preserve Air Cargo's workers' compensation immunity. But Air Cargo's failure to purchase "deliberate intent" coverage (and, therefore, its lack of liability insurance for that claim filed against it by Ms. Chau) appears to be motivating Air Cargo to allow the simple negligence claim filed against it to proceed in the Tort Action so that Praetorian will defend Air Cargo – and may indemnify it – for such a claim. At the very least, Air Cargo is motivated to delay the resolution of the immunity issue so that Praetorian will provide it with a defense for as long as possible. Indeed, Air Cargo could simply have used the draft summary judgment motion that Praetorian attached to its motion to intervene as a template for its own summary judgment motion on its immunity from the simple negligence claim filed against it by Ms. Chau. In short, it appears that Praetorian and Air Cargo have significantly divergent interests when it comes to the issue of Air Cargo's workers'

compensation immunity and no other existing party has an interest in Air Cargo's workers' compensation immunity that is identical to Praetorian's.

As demonstrated in greater detail below, Praetorian satisfies all four requirements for intervention as a matter of right. The Circuit Court abused its discretion as to the first requirement, and this Court's *de novo* review of the other three requirements should result in a finding that Praetorian is entitled to intervene in this action as a matter of right for the sole purpose of litigating the issue of Air Cargo's workers' compensation immunity.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary in this matter because the criteria outlined in Rule 18(a) of the West Virginia Rules of Appellate Procedure do not render oral argument unnecessary: No party has waived oral argument, this appeal is not frivolous, the parties disagree as to whether the dispositive issues have been authoritatively decided, and this Court's decisional process would benefit from oral argument.

Oral argument should take place pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure, as opposed to Rule 20, because this case involves the application of settled law to a particular set of operative facts that are not in dispute.

A memorandum decision is probably not appropriate in this matter. Praetorian is seeking reversal, and according to Rule 21(d) of the West Virginia Rules of Appellate Procedure, a memorandum decision reversing the decision of a Circuit Court should only be issued in limited circumstances.

ARGUMENT

I. STANDARD OF REVIEW

The appropriate standard of review in this matter differs, depending on which of the four requirements for intervention of right under Rule 24(a) of the West Virginia Rules of Civil Procedure is at issue.

Rule 24 states, in relevant part:

> (a) *Intervention of right.* -- Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

According to Syllabus Point 4 of SWN Production Company, LLC v. Conley, 243 W. Va. 696, 850 S.E. 2d 695 (2020), Rule 24(a) calls for intervention as a matter of right if the applicant satisfies four conditions:

(1) The application must be timely;

(2) The applicant must claim an interest relating to the property or transaction which is the subject of the action;

(3) Disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest; and

(4) The applicant must show that the interest will not be adequately represented by existing parties.

Syllabus Point 3 of SWN defines the standard of review regarding all but the first condition for intervention as a matter of right under Rule 24(a): "The standard of review of circuit court rulings on the elements governing a timely motion to intervene as a matter of right under Rule 24(a) of the West Virginia Rules of Civil Procedure is de novo." *Id.*, 850 S.E. 2d at 697. In contrast, "the timeliness of any intervention is a matter of discretion with the trial court." Syl. Pt.

3, State ex rel. Ball v. Cummings, 208 W. Va. 393, 540 S.E. 2d 917 (1999). Therefore, this Court reviews lower court rulings as to the timeliness of a motion to intervene for abuse of discretion.

II. PRAETORIAN'S MOTION TO INTERVENE WAS TIMELY

The Circuit Court abused its discretion in concluding that Praetorian's motion to intervene was untimely by focusing only on the passage of time between the date the Tort Action was filed and the date Praetorian sought to intervene in the Tort Action. For one, the Circuit Court used the incorrect start date for its timeliness review. More fundamentally, however, the Circuit Court ignored the framework for evaluating timeliness set forth in SWN, *supra*.

In SWN, several parties claimed rights related to oil and gas interests associated with specific tracts of land. One such claimant filed an action to quiet title in May 2014. In June 2016, after more than two years of active litigation, several competing claimants filed motions for summary judgment. SWN, which was not a party to the lawsuit but claimed an interest in the action due to its ownership of adjacent tracts, moved to intervene in July 2016. The Circuit Court denied SWN's motion, in part because the Circuit Court found that SWN's motion to intervene had been filed more than two years after the action had commenced and during the pendency of summary judgment motions. The Circuit Court later denied the competing motions for summary judgment in June 2017, and litigation of the matter continued.

In May 2017, SWN entered into a lease with the claimant who initiated the action. In August 2018, SWN filed a second motion to intervene, claiming its new lease as an additional basis for intervention. In February 2019, the Circuit Court denied SWN's second motion to intervene, in part because the second motion to intervene was filed by SWN nearly a year and a half after it had entered into the new lease, which the Circuit Court found to be untimely.

SWN appealed the Circuit Court's denial of its second motion to intervene. This Court relied upon the following legal principles (and the cited authorities) in its review of the Circuit Court's decision regarding the timeliness of SWN's second motion to intervene:

> In considering the issue of timeliness, we recognize that timeliness of the application to intervene is not subject to mechanistic inquiry. In other words, there is no bright line delineating the point at which the passage of time, without more, is a bar to intervention as a matter of right. It has been said that courts must approach the issue of timeliness with flexibility and a view toward considering all the circumstances. E.g., *NAACP v. New York*, 413 U.S. 345, 366, 93 S.Ct. 2591, 37 L.Ed.2d 648 (1973) (the point to which suit has progressed is but one factor in determining timeliness of intervention, it is not solely dispositive, and must be determined from all the circumstances).
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> In reviewing and balancing the question of timeliness, we are also guided by the generally accepted proposition that although the movant bears the burden of establishing its right to intervene, Rule 24 is to be given a liberal construction. 7C Wright & Miller, *supra* § 1904, 6 James W. Moore et al., Moore's Federal Practice § 24.03 (1) (a) (3d ed. 2008). Rule 24 is designed, in part, to be a practical procedural tool promoting efficiency of the courts by resolving related issues in a single lawsuit while also protecting the interests of both the original parties and the non-parties. *See*, *Smuck v. Hobson*, 408 F.2d 175, 179 (D.C. Cir. 1969) (intervention involves the accommodation of competing goals in achieving judicial economies of scale while preventing lawsuits from becoming too complex or unending). While it is axiomatic that parties often do not want others meddling in their litigation, intervention should be permitted when there is no prejudice and greater justice could be obtained with the inclusion of a non-party who has a real interest in the matter being litigated. *See McDonald v. E. J. Lavino*, 430 F.2d 1065, 1074 (5th Cir. 1970) (court should allow intervention in those circumstances when no original party will be hurt, and greater justice could be obtained).

SWN, *supra*, 850 S.E. 2d at 703-704.

Applying these principles to the Circuit Court's decision in SWN, this Court found that the Circuit Court abused its discretion by addressing the timeliness of SWN's motion to intervene in a perfunctory fashion: "The circuit court looked solely to the age of the case in addressing the question of timeliness, thereby failing to consider the status of the proceedings and the circumstances of the parties." SWN, *supra*, 850 S.E. 2d at 703. This Court further noted that the

Circuit Court completely failed to address the question of what prejudice to Respondents, if any, would result from allowing the intervention of SWN, and likewise failed to address the prejudice that SWN would suffer from not being allowed to intervene. *Id.* As to the Circuit Court's timeliness finding, this Court ultimately held: "[W]e conclude that the circuit abused its discretion in finding that SWN's motion to intervene as of right was untimely because it based its denial solely on the passage of time without considering the factual context of the case, the status of the proceedings, and the prejudice, if any, to the Respondents and to SWN." SWN, *supra*, 850 S.E. 2d at 704.

The Circuit Court in the instant matter abused its discretion in precisely the same way the Circuit Court did in SWN. Judge Bloom's February 25, 2021 Order denying Praetorian's motion to intervene relies upon two bases for the denial, the second of which is timeliness.[3] Judge Bloom's timeliness analysis consists of a single paragraph:

> Moreover, the Court **CONCLUDES** that Praetorian Insurance Company failed to timely move to intervene. This action was filed on May 3, 2019; removed to the United States District Court for the Southern District of West Virginia on June 13, 2019; and remanded back to this Court on February 12, 2020. Nevertheless, Praetorian Insurance waited to file its motion to intervene until nearly a full year later, on February 10, 2021. Praetorian argues that it filed the declaratory judgment with a "reasonable expectation" that it would be permitted to transfer and consolidate that action with the instant action before this Court because "all parties to both this matter and the Declaratory Judgment Action had consented to such a transfer." The Court first notes that decisions are made by this Court regardless of the consent the parties' consent. Praetorian's expectation that it would be permitted to transfer and consolidate the declaratory judgment action is of little value. If Praetorian believed that it needed to be made a party to this action in order to protect its interests, Praetorian could have moved to intervene soon after the action was filed in May 2019, or at the very latest, soon after the action was remanded in February 2020. Instead, Praetorian waited until September 15, 2020, to file the Declaratory Judgment Action and seemingly proceeded forward with a mistaken belief that the Court was bound to grant the motion to transfer and consolidate because the parties had consented. However, the Court concluded that the motion to transfer and consolidate was untimely and thus ordered that it be denied. Likewise, the Court **CONCLUDES** that the *Motion to Intervene as of Right* was

[3] Praetorian will address the other basis for the Circuit Court's denial below in Section IV.

not timely filed by Praetorian Insurance because this action was filed on May 3, 2019, and has been pending here uninterrupted since February 12, 2020.

AR 188-189.

The above paragraph contains absolutely no consideration of the factual context of this matter. It contains absolutely no consideration of the status of the proceedings. It contains absolutely no consideration of the potential prejudice, or lack thereof, to Ms. Chau or Air Cargo (or any other party) if Praetorian were to be allowed to intervene. It contains absolutely no consideration of the potential – and significant – prejudice to Praetorian if it is not allowed to intervene. The Circuit Court's timeliness analysis consists solely of a comparison of the date the case was first filed (and the dates it was removed and remanded) with the date Praetorian filed its motion to intervene. As a matter of law, according to SWN, the Circuit Court abused its discretion by failing to consider factors beyond the passage of time.

A full consideration of all the above factors demonstrates that Praetorian's motion to intervene should have been granted. It is important to note that Praetorian sought to intervene in the instant matter to litigate a single issue: Whether Air Cargo enjoys workers' compensation immunity in connection with Ms. Ho's death. By the time Praetorian moved to intervene in February 2021, the Tort Action had been pending since May 2019. Yet, neither of the parties with an interest in the question of Air Cargo's immunity (i.e., Ms. Chau and Air Cargo) took ***any*** steps to resolve that purely legal question. The following timeline is illuminating:

- The air crash in question occurred on May 5, 2017. AR 010-011.
- Ms. Chau filed the Tort Action on May 3, 2019. AR 005-020. As one of the insurance carriers for Air Cargo, Praetorian agreed to provide a defense to Air Cargo in Ms. Chau's lawsuit, subject to a June 6, 2019 reservation of rights. AR 183-186.
- Defendant UPS removed the case to federal court on June 13, 2019, and it was remanded to the Circuit Court on February 10, 2020. AR 001.

- The Circuit Court issued a Scheduling Order on April 15, 2020, which set an early mediation deadline of July 1, 2020, a later mediation deadline of December 15, 2020, and a trial date of February 1, 2021. AR 060-061. The parties conducted the early mediation on August 18, 2020. AR 080-083. Despite Praetorian's efforts, the case did not settle at the early mediation. AR 128; AR 100-103.

- Against the backdrop of the apparent lack of interest by Ms. Chau or Air Cargo in resolving the purely legal question of Air Cargo's workers' compensation immunity, Praetorian filed its separate Declaratory Judgment Action on September 15, 2020, seeking rulings on both the immunity issue and the above-described insurance coverage issue. AR 206-211.

- In November 2020, Ms. Chau and Air Cargo moved to dismiss the portion of the complaint in the Declaratory Judgment Action that addressed the issue of Air Cargo's workers' compensation immunity. AR 120-134; AR 145-146. Ms. Chau and Air Cargo both argued that the immunity issue must be resolved ***only*** in the instant matter, and not the Declaratory Judgment Action. AR 120-123; AR 130-131; AR 145-146.

- On November 24, 2020, with the consent of all parties to the instant matter and the Declaratory Judgment Action, Praetorian filed a consent motion to transfer the Declaratory Judgment Action. AR 092-099.

- On November 30, 2020, the existing parties to the Tort Action filed a joint motion to extend discovery and continue the trial. AR 092-099; AR 100-103. Notably, the existing parties agreed that, due to a variety of factors (Covid-19, travel restrictions, the unsuccessful early mediation), discovery would not be complete by December 1, 2020, nor would the case be ready for trial by February 1, 2021. AR 100-103.

- On December 8, 2020, Praetorian filed a motion to consolidate the Tort Action and the Declaratory Judgment Actions so that the issue of Air Cargo's workers' compensation immunity could be addressed by one judge (Judge Bloom). AR 105-113.

- At a virtual hearing conducted on December 17, 2020, Judge Bloom orally denied both Praetorian's Consent Motion to Transfer and its Motion to Consolidate. AR 140-142. Although not memorialized in his written order, Judge Bloom stated during the hearing his belief that Praetorian sought to transfer and consolidate Count II of the Declaratory Judgment Action too close to the February 1, 2021 trial date in the Tort Action.[4] AR 189. Yet, at the same December 17, 2020 hearing, Judge Bloom granted the existing parties' joint motion to extend discovery and continue the trial date. AR 135-137; AR 138-139. On December 23, 2020, Judge

[4] Judge Bloom's decision was memorialized in a written order issued on January 13, 2021. AR 140-142. His belief that Praetorian had filed its motions to transfer and consolidate too close to the trial date was generally referenced in his Order denying Praetorian's motion to intervene. AR 189.

> Bloom entered an amended scheduling order setting the trial of the instant matter for October 4, 2021, with a dispositive motion deadline of July 30, 2021. AR 138-139.

Recognizing that Ms. Chau's and Air Cargo's November 2020 motions to dismiss the immunity issue from the Declaratory Judgment Action could be granted, and considering Judge Bloom's refusal to hear both cases (despite the consent of all parties), Praetorian determined that it would need to intervene in the instant matter to ensure its interest in the immunity issue would be protected. Specifically, if the immunity issue were to be dismissed from the Declaratory Judgment Action, that would leave the instant matter as the only forum for resolution of the issue. And, because Praetorian is not a party to the instant matter, it would have no recourse on appeal if the Circuit Court were to err and find that Air Cargo did not enjoy workers' compensation immunity regarding the death of Ms. Ho. Unfortunately, the Circuit Court denied Praetorian's motion to intervene.

Against this backdrop, the Circuit Court's purely formulaic approach to evaluating the timeliness of Praetorian's motion to intervene was an abuse of discretion. But even if it had been appropriate for the Circuit Court to focus solely on the passage of time in its consideration of Praetorian's motion to intervene (which it was not), the Circuit Court still got it wrong. Respectfully, the filing of Praetorian's motion in February 2021 should not have been compared to the May 2019 filing date of the instant lawsuit. Rather, the timeliness of Praetorian's February 2021 motion should have been evaluated from January 13, 2021 – the date on which the Circuit Court's verbal order denying Praetorian's motion to consolidate the instant matter and the Declaratory Judgment Action was reduced to a written order.[5] Using the appropriate timeline to

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[5] "It is a paramount principle of jurisprudence that a court speaks only through its orders." State v. White, 188 W. Va. 534, 536 n. 2, 425 S.E. 2d 210, 212 n. 2 (1992). "[I]t is clear that where a circuit court's written order conflicts with its oral statement, the written order controls." Tennant v. Marion Health Care Foundation, Inc., 194 W. Va. 97, 107 n. 5, 459 S.E. 2d 374, 384 n. 5 (1995).

evaluate the timeliness of Praetorian's motion confirms that Praetorian's motion to intervene was timely.

The instant matter also has not progressed on the immunity issue at all, let alone to a point where Praetorian's intervention would slow down the resolution of that issue. Although the question of Air Cargo's immunity is a question of law that must be resolved prior to the trial in this matter, as of this submission, neither Air Cargo nor Ms. Chau have attempted to address that purely legal issue.[6] The existing parties seem content (or perhaps motivated) to leave the issue unresolved as long as possible. Praetorian, in contrast, was – and still is – ready, willing, and able to file a summary judgment motion on the immunity issue immediately upon the Circuit Court's grant of intervention. Praetorian even attached a draft of its summary judgment motion to its motion to intervene with a supporting memorandum that detailed why, legally, Air Cargo is immune from the simple negligence claim filed against it by Ms. Chau. AR 169-182. The Circuit Court's grant of Praetorian's motion to intervene therefore would not have slowed down the resolution of either the immunity issue or the case generally. Instead, it would have sped up the resolution of that issue and the case generally.

Additionally, no party would have been prejudiced by Praetorian's intervention. As noted above, granting Praetorian's motion would have sped up the resolution of both the immunity issue (on which Praetorian was prepared to immediately move for summary judgment) and the case generally. Praetorian's intervention and the resolution of Air Cargo's immunity from Ms. Chau's claim for simple negligence would have clarified the scope of issues necessary to resolve before and at the trial.

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[6] As explained in footnote 9, *infra*, Ms. Chau must either pursue a "deliberate intent" case or a simple negligence case against Air Cargo. She cannot pursue both.

In contrast to the lack of prejudice to the existing parties in granting Praetorian intervention, Praetorian stands to potentially suffer great harm if it is denied intervention. Judge Ballard (the judge currently presiding over the Declaratory Judgment Action) may choose to grant Ms. Chau's and Air Cargo's motions to dismiss the immunity issue from the Declaratory Judgment Action. If that happens, then the issue of Air Cargo's immunity will only be resolved in the instant matter. But if Praetorian is not permitted to intervene in the instant matter, then Praetorian will have no right to appeal if the Circuit Court errs and finds that Air Cargo does not enjoy workers' compensation immunity regarding the death of Ms. Ho. Praetorian could have a contractual obligation to indemnify Air Cargo for up to $1 million (the policy limit) if negligence-based damages are awarded against Air Cargo in this matter. Hence, being denied intervention may cause substantial prejudice to Praetorian.

When this Court weighs the considerations that the Circuit Court was obligated (but failed) to weigh, as outlined in SWN, it becomes clear that Praetorian's motion to intervene was timely filed. Praetorian therefore respectfully submits that this Court should both find that the Circuit Court's failure to weigh those considerations was an abuse of discretion and reverse the Circuit Court's denial of Praetorian's motion to intervene on that basis alone.

III. AS AIR CARGO'S INSURER, PRAETORIAN HAS A DIRECT AND SUBSTANTIAL INTEREST IN THE ISSUE OF AIR CARGO'S IMMUNITY

> To justify intervention of right under West Virginia Rule of Civil Procedure 24(a)(2), the interest claimed by the proposed intervenor must be direct and substantial. A direct interest is one of such immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment to be rendered between the original parties. A substantial interest is one that is capable of definition, protectable under some law, and specific to the intervenor. In determining the adequacy of the interest in a motion to intervene of right, courts should also give due regard to the efficient conduct of the litigation.
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> Syl. Pt. 5, SWN Production Company, supra, citing Syl. Pt. 4 of State ex rel. Ball v. Cummings, *supra*.

According to the Policy, Praetorian is contractually obligated to "pay all sums that [Air Cargo] legally must pay as damages because of bodily injury to [Air Cargo's] employees, provided the bodily injury is covered by this Employers Liability Insurance." AR 185. Moreover, Praetorian has "the ***right*** and duty to defend ... any claim, proceeding or suit against [Air Cargo] for damages payable by this insurance." (emphasis added) AR 185.

Praetorian seeks to intervene in this matter in order to exercise its explicit contractual right under the Policy to defend Air Cargo against a single aspect of Ms. Chau's lawsuit – specifically, Ms. Chau's claim that Air Cargo does not enjoy workers' compensation immunity in connection with Ms. Ho's death despite the existence of the Policy and Praetorian's payment of workers' compensation benefits on Ms. Ho's behalf. If the Circuit Court errs and decides that purely legal issue in Ms. Chau's favor, it may cause substantial and direct harm to Praetorian. Praetorian currently is paying for Air Cargo's defense in the Tort Action – under a reservation of rights. Ms. Chau and Air Cargo also expect Praetorian to pay up to $1 million towards any judgment entered against Air Cargo in the Tort Action for simple negligence. Simply put, Praetorian's money – not Air Cargo's money – potentially is at risk if Ms. Chau's legally impermissible simple negligence claim against Air Cargo proceeds in the Tort Action despite Air Cargo's obvious workers' compensation immunity.

Although this Court does not appear to have spoken on the issue, it is well recognized by the federal courts in West Virginia that a liability insurance company has a direct and substantial interest in the outcome of the tort case against its insured. See Appalachian Power Company v. Kyle, No. 3:14-12051, 2015 WL 418145 (S.D. W. Va., Jan. 30, 2015); and Pulse v. Layne, No. 3:12-cv-70, 2013 WL 142875 (N.D. W. Va., Jan. 11, 2013). In each of these cases, a motion to intervene as a matter of right filed by the alleged tortfeasor's liability insurance company was

granted by the court, so that the insurance company could protect its rights. In both cases, a question to be resolved in the lawsuit would directly impact the question of whether payments would have to be made under the terms of a liability insurance policy. The courts in those cases recognized what is also evident in the instant matter: Under a normal liability insurance policy, the liability insurance company's money is directly at stake, both in terms of the insurance company's duty to defend the insured and its duty to indemnify the insured.[7]

Where courts have denied a liability insurer the right to intervene in a tort action filed against its insured, it is often because the insurance coverage dispute between the insurance company and its insured involved different questions from those that would be resolved in the tort action. See Haines v. Shirley, No. 3:12-cv-51, 2013 WL 685380 (N.D. W. Va. Feb. 25, 2013). Allowing intervention in that circumstance would add new issues to the tort case, rather than merely allow the insurance company to participate in litigating issues already before the court. But that is not the situation here: Praetorian seeks to intervene in the instant matter to resolve only the issue of Air Cargo's workers' compensation immunity – an issue that the Circuit Court must resolve before the instant matter goes to trial.[8] Praetorian simply seeks to be a party in the instant matter so that it may participate in the resolution of that single issue.

Praetorian stands to directly lose a substantial amount of money if the Circuit Court finds that Air Cargo is not immune from Ms. Chau's simple negligence claim. That interest is well

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[7] This same reasoning has led courts across the country to likewise grant intervention as a matter of right to the alleged tortfeasor's liability insurance company so that the insurance company could protect its rights: Briggs & Stratton Corp. v. Concrete Sales & Services, Inc., 166 F.R.D. 43 (M.D. Ga. 1996); U.S. v. Thorson, 219 F.R.D. 623 (W.D. Wis. 2003); Hagen v. Van's Lumber & Custom Builders, Inc., No. 06-C-122, 2006 WL 3404772 (E.D. Wis. Nov. 22, 2006); Forrest v. C.M.A. Mortgage, Inc., No. 06-C-14, 2007 WL 2903311 (E.D. Wis. Oct. 3, 2007); Appleton Papers, Inc. v. George A. Whiting Paper Co., No. 08-C-16, 2009 WL 62988 (E.D. Wis. Jan. 8, 2009); Zellner v. Herrick, No. 08-C-0315, 2009 WL 188045 (E.D. Wis. Jan. 22, 2009); Doe v. County of Milwaukee, No. 14-C-200, 2014 WL 3728078 (E.D. Wis. Jul. 29, 2014); and Perez v. Potts, No. 2:16-cv-612, 2016 WL 11664974 (S.D. Ohio Dec. 15, 2016).

[8] See footnote 9, *infra*.

defined, protected by law, and specific to Praetorian. Allowing Praetorian to intervene in this matter for the sole, limited purpose of seeking a ruling on the immunity issue will not harm the efficiency of this litigation in any way. In fact, as noted above, Praetorian's involvement will enhance it, as demonstrated by Praetorian's interest in moving this issue toward resolution. Accordingly, this factor supports granting Praetorian's motion to intervene. While the Circuit Court did not address this factor in its February 25, 2021 Order denying Praetorian's motion to intervene, Praetorian respectfully submits that this Court should find, as part of its *de novo* review, that Praetorian has a direct and substantial interest in the outcome of the issue of Air Cargo's workers' compensation immunity.

IV. DISPOSITION OF THIS MATTER MAY, AS A PRACTICAL MATTER, IMPAIR OR IMPEDE PRAETORIAN'S ABILITY TO PROTECT ITS INTEREST IN AIR CARGO'S IMMUNITY

> In determining whether a proposed intervenor of right under West Virginia Rule of Civil Procedure 24(a)(2) is so situated that the disposition of the action may impair or impede his or her ability to protect that interest, courts must first determine whether the proposed intervenor *may* be *practically* disadvantaged by the disposition of the action. Courts then must weigh the degree of practical disadvantage against the interests of the plaintiff and defendant in conducting and concluding their action without undue complication and delay, and the general interest of the public in the efficient resolution of legal actions.
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> Syl. Pt. 6, SWN Production Company, *supra*, citing Syl. Pt. 5 of State ex rel. Ball v. Cummings, *supra*.

"It is generally agreed that in determining whether disposition of the action will impede or impair the applicant's ability to protect his interest the question must be put in practical terms rather than in legal terms." State ex rel. Ball v. Cummings, *supra*, 208 W.Va. at 401, 540 S.E. 2d at 925, quoting 7C Charles A Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 1908, p. 301 (1986).

As noted above, the Circuit Court must address the question of Air Cargo's workers' compensation immunity at some point prior to trial. That is because Ms. Chau cannot proceed to trial against Air Cargo on both her "deliberate intent" theory of recovery and her simple negligence theory of recovery; only one theory or the other may go forward.[9] Yet, since May 2019, the existing parties in this matter have chosen to leave this purely legal question unresolved.

Again, Judge Ballard, who presides over the Declaratory Judgment Action, may deny the motions filed by Ms. Chau and Air Cargo in that matter seeking to dismiss the issue of Air Cargo's workers' compensation immunity from that case. If so, then Judge Ballard will find that Air Cargo either does, or does not, enjoy workers' compensation immunity in connection with Ms. Ho's death. However, Judge Ballard instead may grant the motions to dismiss filed by Ms. Chau and Air Cargo, thereby finding that the immunity issue must be decided by Judge Bloom in the instant matter. In that case, If Judge Ballard grants the motions to dismiss pending in the Declaratory Judgment Action, then the Tort Action will be the only forum in which a court will decide the question of whether Air Cargo is immune from Ms. Chau's simple negligence claim.

If that occurs, then Praetorian will have no ability to protect its interests unless it is permitted to intervene in the Tort Action. In the absence of intervention, Praetorian will not be a party to the instant action. Judge Bloom may find (erroneously) that Air Cargo does not enjoy workers' compensation immunity regarding the death of Ms. Ho. Without party status in this matter, Praetorian will have no right to appeal such a decision by Judge Bloom. In that event,

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[9] It should be beyond dispute that whether Air Cargo is entitled to the protections of W. Va. Code § 23-2-6 must be resolved at some point prior to the trial. Indeed, it would not only constitute reversible error for the Circuit Court to allow a simple negligence action to go to trial against a defendant that is immune under W. Va. Code § 23-2-6; it would warrant the issuance of an extraordinary writ from this Court to prevent the Circuit Court from proceeding with such a trial. Such was the case in State ex rel. Abraham Linc Corp. v. Bedell, 216 W. Va. 99, 602 S.E. 2d 542 (2004). The reason is obvious: If Ms. Chau is allowed to proceed to trial against Air Cargo on a simple negligence claim when Air Cargo even arguably is immune from such an action, then all of the time, effort, and money invested in the trial would be wasted if it is later determined that Air Cargo is, in fact, immune.

Praetorian will face potential liability to indemnify Air Cargo for up to $1 million (the Policy limit) of negligence-based damages that could be awarded against Air Cargo, yet will have no way of challenging such an erroneous ruling. In a very real, practical way, Praetorian's ability to protect its interests will be impaired or impeded if it is not allowed to intervene in the instant matter.

Importantly, the risk of impairing or impeding an interest need not be certain; the ***mere possibility*** of such a disadvantage satisfies this aspect of Rule 24(a)(2) (hence this Court's emphasis on the word "may" in the Ball v. Cummings Syllabus Point quoted above). The disposition of this matter therefore may, as a practical matter, resolve the question of Air Cargo's immunity – an issue in which Praetorian has a direct interest. And, as noted above, Praetorian's participation in the resolution of that issue will cause no undue complication or delay. Instead, it will speed up the process, since Praetorian has demonstrated that it is ready to immediately file a motion for summary judgment on the issue.

The Circuit Court erred by either misinterpreting or misapplying this requirement for intervention as a matter of right. Judge Bloom's February 25, 2021 Order concluded that, since the issue of Air Cargo's workers' compensation immunity is currently pending in the Declaratory Judgment Action, the disposition of the instant action will not impair or impede Praetorian's ability to protect its interests. But Judge Bloom appears to have simply ignored that Ms. Chau and Air Cargo have moved to dismiss the immunity issue from the Declaratory Judgment Action, and that those motions have not yet been ruled on. Those motions possibly may be granted, leaving Judge Bloom, in the instant matter, as the only court to rule on the question of Air Cargo's workers' compensation immunity. In essence, Judge Bloom's February 25, 2021 Order found that it was impossible for the outcome of the instant matter to impair or impede Praetorian's ability to protect its interest in the immunity issue. But that simply is not true.

Since this requirement for intervention as a matter of right is subject to *de novo* review, this Court has no obligation to pay any deference to the Circuit Court's flawed logic. Praetorian respectfully submits that this Court should find that Praetorian may, as a practical matter, be impaired or impeded in its protection of its interest in the issue of Air Cargo's workers' compensation immunity by a ruling on that issue in the instant matter.

V. PRAETORIAN'S INTEREST IN AIR CARGO'S IMMUNITY WILL NOT BE ADEQUATELY REPRESENTED BY EXISTING PARTIES

> If the proposed intervenor's interest is not represented by the existing party, or the existing party's interests are adverse to those of the proposed intervenor, intervention should be granted. If the interests of the proposed intervenor and the existing party are similar, "a discriminating judgment is required on the circumstances of the particular case, but [the proposed intervenor] ordinarily should be allowed to intervene unless it is clear that the existing party will provide adequate representation for the absentee." 7C Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 1909, p. 319 (footnote omitted). *See also* 26 Fed. Proc. L.Ed. Parties § 59:303. Finally, if the interests are identical, intervention should be denied unless there is a compelling showing as to why the existing representation is inadequate. *See* 26 Fed. Proc. L.Ed. Parties § 59:303. A compelling showing may include, but is not limited to, adversity of interest, the representative's collusion with an opposing party, or nonfeasance by the representative. 26 Fed. Proc. L.Ed. Parties § 59:304.
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> SWN Production Company, *supra*, 850 S.E. 2d at 707, quoting State ex rel. Ball v. Cummings, *supra*, 208 W. Va. at 403, 540 S.E. 2d at 927.
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> [T]he showing required of inadequate representation "should be treated as minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538, n.10, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972). Moreover, "all reasonable doubts should be resolved in favor of allowing the absentee, who has an interest different from that of any existing party to intervene so that the absentee may be heard in his own behalf." 7C Wright & Miller, *supra* § 1909.
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> SWN Production Company, *supra*, 850 S.E. 2d at 707.

This fourth factor relevant to intervention as a matter of right is satisfied as long as the interests of the intervenor are adverse to the existing parties, or are merely similar to the interests

of the existing parties. Only if the intervenor's interests are ***identical*** to those of an existing party should this factor be considered unsatisfied.

A superficial review of the facts of this matter could lead one to believe that Praetorian's interest in the immunity issue would be adequately represented by Air Cargo. After all, Air Cargo should want to protect and assert its own immunity under the workers' compensation laws of West Virginia, and Air Cargo preserved its workers' compensation immunity as an affirmative defense in its answer to Ms. Chau's amended complaint. AR 077. However, a more thorough review clarifies that Air Cargo's and Praetorian's interests are not identical and even may be adverse.

Praetorian currently is defending Air Cargo in this lawsuit pursuant to a reservation of rights. Praetorian's reservation of rights letter, sent to Air Cargo in June 2019 (AR 183-186), made it clear to Air Cargo that the only basis for Praetorian's provision of a defense to Air Cargo is the presence of Ms. Chau's simple negligence claim, pled in the alternative to her "deliberate intent" claim. That is because the Policy does not provide coverage for the "deliberate intent" claim made against Air Cargo by Ms. Chau due, in part, to an explicit exclusion applicable to such actions.[10]

Consequently, once the Circuit Court finds that Air Cargo is immune from Ms. Chau's simple negligence claim, that claim will be dismissed from this action. This will leave Air Cargo in an unenviable position: There will be no insurance available under the Policy for the only remaining claim Ms. Chau has against Air Cargo – her "deliberate intent" claim.[11] Without a simple negligence claim as part of the case, Praetorian will no longer have any basis to provide a defense to Air Cargo. Therefore, Air Cargo will face liability to Ms. Chau for "deliberate intent" with no insurance coverage to provide either a defense or indemnity regarding that claim. In other

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[10] The validity of a similar (and functionally identical) exclusion has been upheld by this Court. See Employers' Mutual Insurance Co. v. Summit Point Raceway Associates, Inc., 228 W. Va. 360, 719 S.E.2d 830 (2011).

[11] Air Cargo's unenviable situation is its own doing. Air Cargo could have purchased "deliberate intent" coverage from a carrier that provides such coverage but did not.

words, if the law is followed and the terms of the Policy are honored, Air Cargo will face liability to Ms. Chau for "deliberate intent" only, and it will do so without the benefit of either a defense or indemnity from Praetorian.

In contrast, if the Circuit Court erroneously concludes that Air Cargo does not enjoy workers' compensation immunity in connection with Ms. Ho's death, such a finding would allow Ms. Chau to move forward on her negligence claim against Air Cargo, and jettison her "deliberate intent" claim. Since Praetorian is currently providing a defense to Air Cargo solely because of the existence of Ms. Chau's simple negligence claim, Praetorian would likely continue to provide that defense. Moreover, since there may be coverage for Air Cargo under the Policy for Ms. Chau's simple negligence claim, Praetorian may have a duty to indemnify Air Cargo for any negligence-based damages awarded against Air Cargo in this matter, up to the $1 million Policy limit. So, under this scenario, Air Cargo would likely have both a legal defense and indemnification (up to the $1 million Policy limit) provided by Praetorian.

Even if the Circuit Court ultimately concludes that Air Cargo enjoys workers' compensation immunity, Air Cargo has delayed resolving that purely legal issue. Praetorian outlined the argument in favor of Air Cargo's workers' compensation immunity in the summary judgment motion Praetorian filed in the Declaratory Judgment Action in December 2020 and in the draft summary judgment Praetorian attached to its motion to intervene. Air Cargo could have filed – but has not filed – its own dispositive motion in the Tort Action adopting those same arguments. Air Cargo's reluctance (or unwillingness) to address its workers' compensation immunity practically has forced Praetorian to defend Air Cargo in the Tort Action for as long as the issue remains unresolved. In other words, the longer Air Cargo and Ms. Chau can delay resolution of the workers' compensation immunity issue, the longer Air Cargo benefits from

Praetorian defending Air Cargo against that legally impermissible claim. For these reasons, Praetorian's and Air Cargo's interests in resolving the issue of Air Cargo's workers' compensation immunity not only are not identical, they appear to be adverse.

No other existing party to the Tort Action has an interest in the immunity issue identical to Praetorian's. Ms. Chau's interests are adverse to Praetorian's insofar as Ms. Chau seeks a finding that Air Cargo does not enjoy workers' compensation immunity. The UPS defendants also will benefit from a finding that Air Cargo is not immune from liability for the simple negligence claim filed against it by Ms. Chau because more money paid as damages in connection with Ms. Chau's negligence claim by others means that less money will be paid by the UPS defendants. And, although the Sheriff (on behalf of Mr. Alvarado's Estate) would benefit from Air Cargo maintaining its workers' compensation immunity (since Mr. Alvarado would enjoy co-employee immunity), the Sheriff faces other claims by Ms. Chau that might not be barred by such immunity. Accordingly, the immunity issue is far less of a concern for the Sheriff than it is for Praetorian.

While the Circuit Court did not address this factor in its February 25, 2021 Order denying Praetorian's motion to intervene, Praetorian respectfully submits that this Court should find, as part of its *de novo* review, that Praetorian's interest in the workers' compensation immunity issue will not be adequately represented by the existing parties.

CONCLUSION

For the reasons set forth above, Praetorian asks this Court to reverse the Circuit Court's February 25, 2021 Order denying Praetorian's motion to intervene, and remand the case with instructions to allow Praetorian to intervene in this matter for the sole purpose of litigating the issue of Air Cargo's workers' compensation immunity as to the death of Ms. Ho.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 21-0243

PRAETORIAN INSURANCE COMPANY,

Putative Intervenor Below/Petitioner,

v.

VIRGINIA CHAU, Administratrix of the Estate of ANH KIM HO,

(On Appeal from Civil Action No. 19-C-450, Circuit Court of Kanawha County, West Virginia)

Plaintiff Below/Respondent,

and

AIR CARGO CARRIERS, LLC,

Defendant Below/Respondent.

CERTIFICATE OF SERVICE

I, Don C.A. Parker, hereby certify that I served true and correct copies of the foregoing **"PETITIONER'S BRIEF"** upon counsel of record by placing true copies thereof in envelopes deposited in the regular course of the United States Mail, with postage prepaid, on this 25th day of June, 2021, addressed as follows:

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