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 REPLY BRIEF

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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 Insurance Company ("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. THE CIRCUIT COURT ABUSED ITS DISCRETION WHEN IT DENIED PRAETORIAN'S MOTION TO INTERVENE BASED SOLELY ON THE PASSAGE OF TIME

As Praetorian demonstrated in its Petitioner's Brief, Judge Bloom abused his discretion when he denied Praetorian's motion to intervene in exactly the same manner as the trial court did in SWN Production Company, LLC v. Conley, 243 W. Va. 696, 850 S.E. 2d 695 (2020): by focusing exclusively upon the passage of time. Specifically, Judge Bloom concluded only that Praetorian "failed to timely move to intervene" because Praetorian "waited to file its motion to intervene" for "nearly a full year" after this matter was remanded to Judge Bloom. AR 188-189.

In SWN, this Court 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. Judge Bloom did not consider the factual context of this matter, the status of the proceedings, the potential prejudice – or lack thereof – to Ms. Chau or Air Cargo (or any other party) if Praetorian were allowed to intervene, or the potential – and significant – prejudice to Praetorian if it is not allowed to intervene. Rather, Judge Bloom based his decision exclusively upon the passage of time. Accordingly, under SWN, Judge Bloom abused his discretion.

Respondents Virginia Chau and Air Cargo Carriers, LLC ("Air Cargo") do not contest that Judge Bloom failed to engage in the proper analysis in deciding Praetorian's motion to intervene. Rather, they appear to "double down" on the flawed analysis adopted by Judge Bloom by themselves fixating on the passage of time between the date when the Tort Action was first filed and the date on which Praetorian filed its motion to intervene.[1] Indeed, they challenge Praetorian to justify the timeliness of its motion to intervene. Despite this Court's clear holding in SWN, Ms. Chau and Air Cargo apparently want the law to empower a court to punish a putative intervenor for allegedly being dilatory in the assertion of its rights – even when the putative intervenor was not dilatory, and regardless of the surrounding circumstances and any potential prejudice to any of the parties.

Ms. Chau makes no attempt to bolster Judge Bloom's analysis with her own analysis of the other factors that Judge Bloom should have considered but did not. Her brief offers no analysis of

[1] Even Judge Bloom did not fixate on the passage of time between the date this action originally was filed (May 3, 2019) and the date Praetorian moved to intervene (February 10, 2021). For all his analytical failures in resolving Praetorian's motion, Judge Bloom acknowledged that this action had been removed to federal court and was not remanded back to the Circuit Court until February 2010.

the factual context of the case, the status of the proceedings, or the potential prejudice, if any, that Praetorian's intervention could cause to her, Air Cargo, or the other parties. Nor does she offer any analysis of the potential prejudice that the inability to intervene could cause to Praetorian. As such, her Respondent's Brief utterly fails to address the relevant issues in this appeal.

For its part, Air Cargo attempts to support its claim that Judge Bloom did not abuse his discretion by focusing only on the passage of time by citing to In re P.H., No. 15-0362, 2015 WL 6181417 (W. Va., Oct. 20, 2015), for the proposition that a trial judge acts within the limits of discretion when she/he focuses solely on the passage of time to deny a motion to intervene. Air Cargo's reliance on In re P.H. is misplaced for multiple reasons.

First, Air Cargo appears to misunderstand the trial court's ruling in In re P.H., as well as this Court's decision to affirm. In re P.H. originated as a petition by the West Virginia Department of Health and Human Resources ("DHHR") to take emergency custody of a child (P.H.), due to that child being put at risk by his mother. The putative intervenors were P.H.'s maternal grandparents. The trial court found that the grandparents waited more than a year after the DHHR had filed its petition for emergency custody to intervene, but that was only one factor in its decision to deny the grandparents' motion. The trial court also found that the grandparents failed to pass a home study and that they failed to participate in P.H.'s life. The trial court therefore considered more than just the mere passage of time when it denied the grandparents' motion to intervene: it considered the factual context of the case; the status of the proceedings; the potential for prejudice to P.H.; and the potential prejudice to the grandparents. In other words, the trial judge in In re P.H. satisfied the substantive requirements of SWN five years before SWN was issued. Therefore, In re P.H. fails to advance Air Cargo's arguments in this matter.

Second, even if In re P.H. could be read as endorsing a trial court considering only the passage of time when ruling on a motion to intervene, In re P.H. was a Memorandum Decision. As such, it only reflects this Court's application of then-existing established law to a specific set of facts. See Rule 21 of the West Virginia Rules of Appellate Procedure. The established law that was applied by this Court in In re P.H. was the law as it existed in 2015. In 2020, however, this Court issued SWN, supra, which contains new Syllabus Points establishing the law regarding intervention as a matter of right. Therefore, to the extent there is any conflict between the statements of law in In re P.H. and SWN, SWN is the controlling statement of the current law in West Virginia regarding intervention as a matter of right.

Regarding the factors other than timeliness that must be examined pursuant to SWN, Air Cargo's Brief only very slightly attempts to address the issue of prejudice to the existing parties if Praetorian is allowed to intervene. Air Cargo's prejudice "analysis" is contained in a single paragraph on page 9 of Air Cargo's Respondent's Brief. In it, Air Cargo attempts to contrast the status of the instant matter with the status of the SWN matter at the time of the relevant motions to intervene were filed. Air Cargo specifically argues that there was no then-current scheduling order in effect in SWN when the motion to intervene was filed, but that there was a scheduling order in the instant matter when Praetorian filed its motion to intervene. Air Cargo further argues that there were court deadlines looming in this matter and that the discovery process in this matter had progressed to the taking of depositions.

Unfortunately for Air Cargo, this analysis, too, is significantly flawed. A review of the record below will demonstrate that the depositions that had been scheduled (and which were re-scheduled multiple times, ultimately leading to discovery motion practice) were solely of UPS employees. Those witnesses would not have information relevant to the lone issue Praetorian

wished to address through its intervention: the issue of Air Cargo's workers' compensation immunity. AR 001-004 (and the full Record below). Hence, there would have been no danger that Praetorian would seek to re-depose any of the UPS witnesses who already had been deposed. Moreover, the Appendix Record shows that the existing parties historically have paid little attention to the urgency of court deadlines such as expert disclosure requirements; there were three successive extensions of the expert disclosure deadline before and after the August 18, 2020 mediation. AR 084-085; 086-088; and 089-091. Accordingly, to the extent there would have been any disruption in this matter's scheduling order caused by Praetorian's intervention, it would have been minimal and manageable.

More fundamentally, it is clear from the circumstances that Praetorian's intervention would not have caused any prejudice to the existing parties. Again, Praetorian only wishes to intervene to address a single issue: the purely legal issue of Air Cargo's workers' compensation immunity. As demonstrated in Praetorian's Petitioner's Brief, the existing parties would have to address that issue at some point prior to trial but had not done so as of the date on which Praetorian moved to intervene. And as demonstrated by the draft motion for summary judgment and supporting memorandum that Praetorian filed with its motion to intervene (AR 165-198, 169-182), Praetorian was ready (and still is ready) to address the issue immediately upon the grant of its motion to intervene.

Despite the minimal effort by Air Cargo to address some of the factors that Judge Bloom should have addressed – but did not address – in ruling on Praetorian's motion to intervene, the overall message to be taken from Ms. Chau's and Air Cargo's Respondent's Briefs is that they believe Judge Bloom was correct in focusing exclusively on the passage of time in ruling on Praetorian's motion to intervene and punishing Praetorian for not moving as quickly and he would

have liked. But as this Court made clear in SWN, focusing solely on the passage of time is an abuse of discretion. As such, this Court should reverse Judge Bloom's denial of Praetorian's motion to intervene for this reason alone.

II. PRAETORIAN'S RESPONSE TO THE RESPONDENTS' CHALLENGE REGARDING TIMELINESS OF THE MOTION TO INTERVENE

Although passage of time alone is not the metric by which motions to intervene should be decided, Ms. Chau and Air Cargo challenge Praetorian to justify the timing of its motion. While the detailed Statement of the Case contained in Praetorian's Petitioner's Brief sets out the justification well, Praetorian will further elaborate here.

Ms. Chau filed her lawsuit on May 3, 2019. In it, she sued Air Cargo for both "deliberate intent" and, in the alternative, for simple negligence. After reviewing the question of insurance coverage for Air Cargo, Praetorian sent Air Cargo a reservation of rights letter on June 6, 2019. In that letter, Praetorian warned Air Cargo that there was no coverage for Ms. Chau's "deliberate intent" claim, but informed Air Cargo that Praetorian would provide it with a defense because of the alternatively pled simple negligence claim. Praetorian hired attorney Ed Poe to defend Air Cargo. AR 183-186.

Respecting the independent judgment that any defense attorney must apply to their representation of their insured client, Praetorian did not interfere with Mr. Poe's representation of Air Cargo, and still endeavors not to. However, as the case approached an agreed-upon early mediation of this matter on August 18, 2020, it became clear to Praetorian that Air Cargo was not interested in resolving the question of its own workers' compensation immunity, likely for the reasons outlined in Section V. (pages 25-28) of Praetorian's Petitioner's Brief: That Air Cargo wanted to keep the issue of immunity unresolved as long as possible, so that Praetorian would continue to provide Air Cargo with a defense in this matter at Praetorian's expense. Asking Mr.

Poe to move forward faster on the immunity issue would potentially subject Praetorian to criticism for interfering in his independent judgment. So, Praetorian chose instead to pursue the issue itself. However, Praetorian first wished to see if this matter would resolve at the August 18, 2020 early mediation.[2]

Once the effort to resolve this matter at the August 18, 2020 early mediation failed, Praetorian immediately filed its Declaratory Judgment Action on September 15, 2020, gathered consent from all parties to both actions (including Ms. Chau and Air Cargo) to transfer of the Declaratory Judgment Action from Judge Kaufman to Judge Bloom (which consent motion was filed on November 24, 2020), and filed on December 8, 2020 a motion to consolidate the two actions so that they could both be heard by Judge Bloom. AR 206-211, 092-099, 105-113. Considering these efforts by Praetorian, the arguments by Ms. Chau and Air Cargo that Praetorian's filing of the Declaratory Judgment Action and its motion to intervene were attempts to seek the same relief in two separate Circuit Courts, and to play the two Circuit Courts against each other,[3] makes no sense. It was only due to Judge Bloom's puzzling decision to deny those motions that the two cases remained pending before two separate judges of the same Circuit Court. In short, it

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[2] Ms. Chau accuses Praetorian of not participating in the August 18, 2020 early mediation in good faith (Chau Brief, pp. 5-6). This accusation is simply untrue. Praetorian is hesitant to cite facts outside the record, particularly facts that are subject to confidentiality under Trial Court Rule 25.12, but feels compelled to defend itself against the baseless accusations by Ms. Chau in her Respondent's Brief. In that regard, Praetorian notes that, despite the absence of coverage available under the Policy for the claims made against Air Cargo in this matter, Praetorian was the only party at the August 18, 2020 early mediation that made any settlement offer to Ms. Chau – an offer that Ms. Chau rejected. These facts can be verified by affidavit, if requested by the Court.

Praetorian additionally takes issue with Ms. Chau citing to evidence outside the record in her Respondent's Brief. Specifically, on Page 5 of her Respondent's Brief, Ms. Chau quotes portions of an August 11, 2020 letter that Counsel for Praetorian sent to Counsel for Air Cargo. This letter is not contained anywhere in the Appendix Record, and it is not contained in the record below at all. Ignoring for a moment the blatant violation of the Rules of Appellate Procedure in relying on this letter, it is important to note that Ms. Chau mischaracterizes the nature of the letter. The August 11, 2021 letter was a "pass through" letter; it asked Mr. Poe to provide information to his client, and it was explicitly a follow-up letter to Praetorian's June 6, 2019 reservation of rights letter to Air Cargo (which can be found in the Appendix Record at AR 183-186). It was a reminder to Air Cargo of Praetorian's June 6, 2019 coverage position, provided in advance of the August 18, 2020 mediation, so that Air Cargo would be prepared to participate at the mediation armed with the knowledge of how Praetorian would proceed. A copy of the August 11, 2020 letter can be provided to the Court as a supplement to the Appendix Record, if requested.

[3] (Ms. Chau's Brief at p. 6-9, Air Cargo's Brief at p. 4).

is not Praetorian's fault that the two cases remain pending before two different judges of the same Circuit Court; that was Judge Bloom's decision. Any allegation that Praetorian was trying to "game the system" by seeking relief in two different courts is nonsense.

As for Ms. Chau's and Air Cargo's criticism of Praetorian filing a separate declaratory judgment action instead of immediately moving to intervene in the instant action, that criticism rings hollow because Ms. Chau and Air Cargo both take the position in their Respondent's Briefs that Praetorian never has standing to intervene. If Praetorian had moved to intervene sooner, Ms. Chau and Air Cargo simply would have objected to such intervention sooner.

Praetorian's choice to file a separate declaratory judgment action was based on a simple truth: Praetorian can file its own separate action without leave of court, but it would have had to move to intervene in the instant matter. Such motions can take time to resolve, and they are not always granted despite being appropriately filed (as evidenced here). The most efficient way for Praetorian to state its claims was to file a separate action, name the relevant parties (Ms. Chau and Air Cargo), and immediately move to transfer (if needed, depending on the random selection of judges in Kanawha County) and consolidate the two matters. That is exactly what Praetorian did.

Unfortunately, and inexplicably, Judge Bloom orally denied Praetorian's motions to transfer and consolidate at a December 17, 2020 hearing, citing his belief that the motions were untimely because they were filed too close to the trial date. AR 140-142. Yet, during the same December 17, 2020 hearing and almost immediately after he denied Praetorian's motions, Judge Bloom granted the existing parties' joint motion to extend discovery and continued the trial date for more than eight months. AR 135-137, 138-139. In other words, at the December 17, 2020 hearing, Judge Bloom denied Praetorian's motions and then undermined the basis for his denial in

almost the same breath. Judge Bloom reduced his December 17, 2020 oral denials of Praetorian's motions to a written order on January 13, 2021. AR 140-142.

In the meantime, Ms. Chau and Air Cargo had moved on November 20 and 24, 2020 (respectively) to dismiss Count II of Praetorian's separate Declaratory Judgment Action. AR 120-134, 145-146. Praetorian was faced with an unreasonable and untenable situation. Its attempts to have the two actions heard by the same judge had been refused by Judge Bloom, and Ms. Chau and Air Cargo were attempting to stop Praetorian from obtaining a ruling on the immunity issue from the judge presiding over the Declaratory Judgment Action (first Judge Kaufman, then Judge Ballard). At that point, in January 2021, the only way to make sure that Praetorian could have its day in court on the immunity issue was to also move to intervene in the instant action.[4] Therefore, Praetorian filed its motion to intervene in the instant action on February 10, 2021, less than one month after Judge Bloom reduced his oral denials of Praetorian's motions to transfer and consolidate to a written order.

As shown by the above, there was nothing dilatory about the timing of Praetorian's motion to intervene. The timing of the motion was driven by the circumstances with which Praetorian was faced at different stages of this dispute, and which changed over time. Following the principles it outlined in SWN, supra, this Court should hold that Judge Bloom abused his discretion when he found that Praetorian's motion to intervene was untimely.

[4] Praetorian's fear turned out to be well founded. On July 28, 2021, Judge Ballard granted Ms. Chau's and Air Cargo's motions to dismiss Count II of the Declaratory Judgment Action, thereby preventing Praetorian from obtaining a ruling on Air Cargo's immunity in that matter. See the Motions for Judicial Notice filed by all parties, which provide copies of Judge Ballard's July 28, 2021 Orders to this Court. Unless Judge Ballard's dismissal of Count II of Praetorian's Declaratory Judgment Action Complaint is reversed by this Court, intervention in the instant action is the only way that Praetorian will have its day in court on the question of Air Cargo's workers' compensation immunity.

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

In his February 25, 2021 Order denying Praetorian's motion to intervene, Judge Bloom did not address the question of whether Praetorian has a direct and substantial interest in the question of Air Cargo's workers' compensation immunity, the second of four factors to be addressed by a trial court when ruling on a motion to intervene. In fact, by focusing only on the timeliness of Praetorian's motion and the availability of another forum for Praetorian's arguments, Judge Bloom appeared to acknowledge that Praetorian has such an interest. Nevertheless, Ms. Chau and Air Cargo argue that Praetorian lacks standing to participate as an intervenor in the instant matter. Their arguments have no merit.

The concept of standing was generally addressed in Syllabus Point 5 of Findley v. State Farm Mut. Auto. Ins. Co., 213 W. Va. 80, 576 S.E. 2d 807 (2002):

> Standing is comprised of three elements: First, the party attempting to establish standing must have suffered an "injury-in-fact"--an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct forming the basis of the lawsuit. Third, it must be likely that the injury will be redressed through a favorable decision of the court.
>
> Standing to seek a declaratory judgment is established by W. Va. Code § 55-13-2:
>
> Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

Praetorian seeks to intervene in the instant matter in order to obtain a declaration that, as a matter of law, Air Cargo is immune from Ms. Chau's simple negligence claim due to the workers' compensation immunity granted to Air Cargo by W. Va. Code § 23-2-6. Praetorian seeks such a declaration because Ms. Chau and Air Cargo have left this purely legal issue unresolved for more

than two years despite it being apparent from the face of Ms. Chau's original complaint that her simple negligence claim against Air Cargo is impermissible as a matter of law. Praetorian is directly and adversely affected by Air Cargo's inaction: Praetorian is currently providing Air Cargo with a legal defense in the instant matter (under a reservation of rights) due to the presence of the simple negligence claim, and Ms. Chau and Air Cargo expect Praetorian to fund up to $1 million in connection with any damages awarded against Air Cargo for simple negligence. AR 183-186.

The problem is that there is ***no legal validity*** to Ms. Chau's simple negligence claim against Air Cargo. Air Cargo purchased the Policy from Praetorian pursuant to W. Va. Code § 23-2C-15(b), which provides for the purchase of private workers' compensation insurance policies by employers in the wake of the State of West Virginia's move from having a monopolistic, State-run workers' compensation system to an open, private market for the purchase of workers' compensation insurance. And, according to W. Va. Code § 23-2C-19(b), employers who purchase workers' compensation insurance on the private market pursuant to W. Va. Code § 23-2C-15(b) are entitled to the protections of W. Va. Code § 23-2-6, which provides employers with immunity from precisely the type of simple negligence claim that Ms. Chau has brought (in the alternative) against Air Cargo. The simple negligence claim that Ms. Chau filed against Air Cargo should have been dismissed immediately; yet, it was not. As a result, Praetorian is continuing to provide a defense to Air Cargo for a lawsuit in which there will never be any legally awardable damages against Air Cargo that are covered under the Policy.

Ms. Chau and Air Cargo admit that Air Cargo had – and paid the premium for – a valid, enforceable, workers' compensation insurance policy to provide workers' compensation benefits in connection with Ms. Ho's death. The Policy's mere existence makes Air Cargo immune from

Ms. Chau's simple negligence claim. Incredibly, however, the simple negligence claim lingers in the instant action. As a result, Praetorian is continuing to pay a lawyer to defend Air Cargo in this matter. More importantly, there remains the looming possibility that the simple negligence claim could (not legally, but illegitimately) result in a judgment against Air Cargo for which Ms. Chau and Air Cargo expect Praetorian to pay up to $1 million. The continued presence of the baseless simple negligence claim in this matter therefore is causing direct harm and risk to Praetorian.

These injuries-in-fact – the current expense of defending Air Cargo, combined with the lingering threat of an illegitimate simple negligence judgment against Air Cargo, covered under the Policy – are concrete and particularized. They are actual and imminent. They are the direct result of Ms. Chau and Air Cargo choosing to leave this issue unresolved as part of the instant action. 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.[5] Therefore, Praetorian's injuries-in-fact will be addressed by a decision by the Circuit Court on the immunity issue. Praetorian clearly has standing to seek a ruling regarding Air Cargo's workers' compensation immunity, according to Syllabus Point 5 of Findley, supra.

Both Ms. Chau and Air Cargo attempt to paint Praetorian's motion to intervene, in order to seek a ruling on the issue of Air Cargo's workers' compensation immunity, as an attempt to assert

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[5] 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.

the rights of Air Cargo, and as such, subject to scrutiny as a form of *jus tertii* standing. However, this is simply incorrect.

The majority of this Court first recognized the concept of *jus tertii* standing in Syllabus Point 5 of Kanawha County Public Library Board v. Board of Education of the County of Kanawha, 231 W. Va. 386, 745 S.E. 2d 424 (2013).[6] "To establish *jus tertii* standing to vindicate the constitutional rights of a third party, a litigant 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." Id. But *jus tertii* standing is irrelevant to this matter: Praetorian is not attempting to vindicate the rights of Air Cargo. Praetorian instead is seeking to protect its rights: as Air Cargo's liability insurer, Praetorian has a substantial amount of money at risk if Air Cargo impermissibly is held liable for simple negligence in connection with the death of Ms. Ho.

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. In other words, it is Praetorian's money that is at stake, not Air Cargo's. The Policy additionally provides Praetorian with the contractual "***right*** and duty to defend ... any claim, proceeding or suit against [Air Cargo] for damages payable by this insurance." AR 185 (emphasis added).

Praetorian currently is paying for Air Cargo's defense in this matter under a reservation of rights. Praetorian seeks to intervene in this matter 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

[6] Justice Robin Davis had mentioned the concept of *jus tertii* standing in separate concurring/dissenting opinions prior to the Kanawha County case. See State ex rel. Abraham Linc Corp. v. Bedell, supra, and Bowyer v. Hi-Lad, Inc., 216 W. Va. 634, 609 S.E. 2d 895 (2004). This Court also briefly mentioned it in footnote 8 of Affiliated Const. Trades Foundation v. West Virginia Dept. of Transp., 227 W. Va. 653, 713 S.E. 2d 809 (2011).

Ms. Ho's death despite the Policy's existence and Praetorian's payment of workers' compensation benefits in connection with Ms. Ho's death. 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. Ms. Chau and Air Cargo also expect Praetorian to pay up to $1 million towards any judgment entered against Air Cargo in this matter 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 this matter despite Air Cargo's obvious workers' compensation immunity. Praetorian therefore has standing to advocate for Air Cargo's workers' compensation immunity in this action.

Praetorian likewise has standing to seek such relief pursuant to W. Va. Code § 55-13-2. As shown above, there are no questions of fact regarding the existence of workers' compensation insurance under the Policy for the air crash. Funeral benefits were actually paid by Praetorian from the Policy on behalf of Ms. Ho and Mr. Alvarado. Whether Air Cargo enjoys workers' compensation immunity in connection with Ms. Ho's death is a purely legal question that turns on Praetorian's rights, status, or other legal relations that are affected by the application of three statutes: W. Va. Code § 23-2C-15(b), W. Va. Code § 23-2C-19(b), and W. Va. Code § 23-2-6.

Ms. Chau and Air Cargo alternatively argue that, more generally, a liability insurer has no right, under any circumstances, to intervene in a tort action against one of its insureds for the purpose of litigating issues relevant to the tort claim. This is an absurd, extreme position that should be rejected by this Court.

This Court has recognized that liability insurance companies and their insureds are sometimes involved in the same lawsuit, represented by separate counsel, each representing their respective clients, and each pursuing their own goals regarding the issues in the lawsuit. See State

ex rel. Univ. Underwriters Ins. Co. v. Wilson, 239 W. Va. 338, 801 S.E. 2d 216 (2017). And there often are circumstances in which the question of whether a liability insurance company will have a duty to indemnify an insured will be determined by the resolution of a factual or legal issue in the plaintiff's tort lawsuit against the insured. A classic example is well-illustrated by the motion to intervene that was at issue in Appalachian Power Company v. Kyle, No. 3:14-12051, 2015 WL 418145 (S.D. W. Va., Jan. 30, 2015).

In that case, Appalachian Power Company ("APCO") sued a couple, the Kyles, for building a home on land subject to an easement granted to APCO for its power lines. APCO had also sued another couple, the Childers, who had conveyed the land in question to the Kyles. State Farm had provided liability insurance to the Childers and moved to intervene in the action because a specific factual issue in the case would determine whether State Farm was obligated to defend and indemnify the Childers in APCO's lawsuit: Whether the Childers' conduct was intentional or unintentional. Intentional conduct by the Childers would trigger exclusions under their State Farm policy, while unintentional conduct would not. The court had no difficulty concluding that State Farm had a "direct and substantial" interest in the lawsuit, due to the fact that State Farm's duties to defend and indemnify the Childers hinged on that issue. Hence, the court granted State Farm's motion to intervene as of right.[7]

In certain circumstances, having a liability insurance company as a direct party in the tort lawsuit against its insured could lead to issues that must be managed, particularly if a jury trial will be conducted. It is important to note, however, that such concerns are not present here. The one

[7] A similar example can be found in Pulse v. Layne, No. 3:12-cv-70, 2013 WL 142875 (N.D. W. Va., Jan. 11, 2013), a case involving alleged violations of a person's constitutional rights and common law torts stemming from an altercation with police officers. The insurer for an officer was allowed to intervene as a matter of right, due to the potential for triggering several exclusions in the relevant insurance policy (i.e., expected or intended injury, fraud and dishonesty). The court concluded that the insurer had a substantial interest in not having to defend individuals not covered under its policy, and granted the insurer's motion to intervene as of right.

issue Praetorian seeks to litigate, if it is allowed to intervene, is a pure question of law, based on undisputed facts. There are no questions of fact that must be resolved to adjudicate that purely legal issue. Moreover, this is not a case where Praetorian is seeking the ability to advocate for a finding that its insured engaged in some type of misconduct, such as an intentional tort. Praetorian is seeking to enforce workers' compensation immunity that ought to apply to Air Cargo, which is an affirmative defense that Air Cargo itself pled in this matter. AR 077. Praetorian's finances will be protected by that immunity, and Praetorian has a direct contractual right under the Policy to defend Air Cargo against claims that such immunity does not exist.

As shown by the above, and contrary to the arguments made by Ms. Chau and Air Cargo, Praetorian has standing to seek a ruling from the Circuit Court regarding whether Air Cargo enjoys workers' compensation immunity as to the death of Ms. Ho. This Court should reverse Judge Bloom's denial of Praetorian's motion to intervene.

IV. PRAETORIAN'S INTERVENOR COMPLAINT CONCERNS A JUSTICIABLE CONTROVERSY THAT IS RIPE FOR CONSIDERATION

In addition to the standing argument presented by Ms. Chau and Air Cargo, they (very) briefly argue that there is no justiciable controversy between Praetorian, on the one hand, and themselves, on the other hand, that is ripe for consideration. This argument likewise has no merit.

Syllabus Point 4 of Hustead on Behalf of Adkins v. Ashland Oil, Inc., 197 W. Va. 55, 475 S.E. 2d 55 (1996) defines the standard for justiciability in West Virginia as follows:

> In defining whether a justiciable controversy exists sufficient to confer jurisdiction for purposes of the Uniform Declaratory Judgment Act, West Virginia Code §§ 55-13-1 to -16 (1994), a circuit court should consider the following four factors in ascertaining whether a declaratory judgment action should be heard: (1) whether the claim involves uncertain and contingent events that may not occur at all; (2) whether the claim is dependent upon the facts; (3) whether there is adverseness among the parties; and (4) whether the sought after declaration would be of practical assistance in setting the underlying controversy to rest.

Regarding the first factor (uncertain or contingent events), Praetorian's draft Intervenor Complaint (AR 158-164) does not dabble in speculation about uncertain or contingent events. Ms. Ho died in an air crash in 2017; Praetorian provided workers' compensation insurance coverage to Air Cargo, which paid workers' compensation funeral benefits on behalf of Ms. Ho and Mr. Alvarado; and Ms. Chau sued Air Cargo for simple negligence. Praetorian seeks a declaration that Air Cargo is immune from the simple negligence claim that Ms. Chau has already filed against Air Cargo.

Regarding the second factor (dependence upon the facts), Cox v. Amick, 195 W. Va. 608, 466 S.E. 2d 459 (1995), clarifies that this factor concerns the extent to which the claim is bound up in ***uncertain*** facts: "Courts are more likely to find a claim is justiciable if it is of an intrinsically legal nature ... and less likely to do so if the absence of a concrete factual situation seriously inhibits the weighing of competing interests." Cox, 195 W. Va. at 619, 466 S.E. 2d at 470. As noted above, there is only one fact relevant to the immunity issue: whether Air Cargo purchased a workers' compensation and employer's liability insurance policy from Praetorian that was in effect at the time of the air crash. That fact is not disputed. Praetorian's draft Intervenor Complaint therefore does not depend upon any uncertain facts generally or at issue in this matter.

Regarding the third factor (adverseness among the parties), this is evident from the fact that we are dealing with the current dispute over Praetorian's ability to intervene. Ms. Chau wants Air Cargo to not be immune from her simple negligence claim, so she is doing all she can to prevent any court from addressing the immunity issue. Perversely, Air Cargo seems to also not want to be immune from Ms. Chau's simple negligence claim and seemingly is working in tandem with Ms. Chau to oppose Praetorian's attempts to obtain a ruling on that issue. This would be puzzling were it not for the obvious: Ms. Chau and Air Cargo see that there likely will be no

insurance coverage for Air Cargo as to Ms. Chau's deliberate intent claim, but there could arguably be coverage for Air Cargo as to Ms. Chau's simple negligence claim. So, they are both fighting against a declaration that Air Cargo is immune from Ms. Chau's simple negligence claim. In short, there is clear adversity between Praetorian, on one hand, and Ms. Chau and Air Cargo on the other.

Regarding the fourth factor (whether a declaration will help resolve the underlying controversy), there can be no question that a ruling by the Circuit Court on the immunity issue will clarify the issues in this case and the case will be ready to move forward to trial or some other resolution regarding the only legal basis upon which Air Cargo potentially could be found liable for Ms. Ho's death – i.e., deliberate intent. A ruling by the Circuit Court on Air Cargo's immunity additionally will confirm that Praetorian will not be obligated to pay any simple negligence-related damages awarded against Air Cargo in this matter.

Ms. Chau and Air Cargo argue that rulings made by Judge Ballard in the Declaratory Judgment Action on July 28, 2021 render Praetorian's motion to intervene moot. This argument makes no sense. Judge Ballard's July 28, 2021 rulings on which Ms. Chau and Air Cargo rely for this position are subject to review by this Court, which Praetorian is seeking. Judge Ballard committed clear error in his rulings, as this Court will soon see. Therefore, nothing Judge Ballard ordered on July 28, 2021 can moot anything related to this dispute.

Moreover, this argument by Ms. Chau and Air Cargo is based on a misunderstanding by them both as to why Praetorian seeks a ruling on Air Cargo's workers' compensation immunity. They claim that Praetorian merely seeks to withdraw from the defense of Air Cargo in this matter. However, as Praetorian has made clear to them in various filings in this and the Declaratory Judgment Action, Praetorian potentially could have a duty to indemnify Air Cargo for damages up to the $1 million Policy limit. Praetorian respectfully submits that potentially being responsible

for up to $1 million in damages in connection with a legally impermissible negligence claim is a much more significant problem that Praetorian seeks to avoid by obtaining a ruling on Air Cargo's workers' compensation immunity.

For all these reasons, Praetorian's draft intervenor complaint presents a justiciable controversy.

CONCLUSION

For the reasons set forth above and its Petitioner's Brief, 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 REPLY 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 August, 2021, addressed as follows:

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