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STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS



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Praetorian Insurance Company,
Petitioner

vs.) No. 21-0243

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

and

Air Cargo Carriers, LLC,
Defendant Below, Respondent

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

RESPONSE TO ASSIGNMENT OF ERROR 1

STATEMENT OF THE CASE 1

PROCEDURAL HISTORY OF THE TORT CLAIM AND DECLARATORY
JUDGMENT ACTION 4

STATEMENT REGARDING ORAL ARGUMENT 8

STANDARD OF REVIEW 8

ARGUMENT 8

 I. Praetorian failed to seek intervention from June, 2019, until February,
2021. Praetorian has offered no reason for its unreasonable delay. Praetorian has offered
no reason for first filing the identical claim in another Court. The Court did not abuse its
discretion in denying Praetorian’s untimely Motion to Intervene 8

 II. Praetorian does not meet the elements to intervene in this action as a matter of
right. Praetorian has failed to demonstrate it has standing to assert the claim it seeks to file and
obtain the relief sought. Rule 24(a)(2) requires Praetorian to articulate a substantial interest in
the action, which is capable of definition, protectable under some law, and specific to the
intervenor. The negligence claim is a tort action solely between the Estate and ACC 10

 III. Praetorian Asserts No Justiciable Controversary between Petitioner and
Respondents Related To The Resolution Of The Estate’s Negligence Claim In The Wrongful
Death Claim 15

CONCLUSION 16

TABLE OF AUTHORITIES

WEST VIRGINIA CASES

A. H. v. CAMC Health System, Inc., 2020 WL 1243608, (W.Va. 2020)10, 15

City of Martinsburg v. Berkeley County Council, 825 S.E.2d 332, 336 (W.Va. 2019)10

Cox v. Amick, 466 S.E.2d 459, 469 (W.Va. 1995)10

Hustead on Behalf of Adkins v. Ashland Oil, Inc., 475 S.E.2d 55, 62 (W.Va. 1996) 15

Kanawha County Public Library Board v. Board of Education of the County of Kanawha,
745 S.E.2d 424, 435-36 (W.Va. 2013) 11

O’Neal v. Pocahontas Transp. Co., 129 S.E. 478, 481 (W.Va. 1925) 12

Robertson v. Hatcher, 135 S.E.2d 675, 681 (W.Va. 1964) 15

Robinson v. Cabell Huntington Hospital, Inc., 498 S.E.2d 27, 31-32 (W.Va. 1997) 11

Snyder v. Callaghan, 284 S.E.2d 241, 250 (W.Va. 1981) 11

State ex rel. Ball v. Cummings, 540 S.E.2d 917 (W.Va. 1999)8, 13

SWN Prod. Co. v. Conley, 243 W. Va. 695,702, 850 S.E.2d 695, 701 (W.Va. 2020) 8

Woodford v. Glenville State College Hous. Corp., 225 S.E.2d 671, 674 (W.Va. 1976) 12

FEDERAL CASES

DaimlerChrysler Corp. v. Cuno, 126, S.Ct. 1854 (2006) 10

Powers v. Ohio, 499 U.S. 400, 411 (1991) 11

Singleton v. Wulff, 428 U.S. 106, 116 (1976) 11

Spokeo, Inc. v. Robins, 135 S.Ct. 1540, 1547 (2016) 10

Town of Chester, New York v. Laroe Estates, Inc. 137 S. Ct. 1645 (2017)10

WEST VIRGINIA STATUTES

W.Va. Code §23-2-6 15

W.Va. Code §23-4-2 4

OTHER STATUTES

Wis. Stat. §632.2316

Wis Stat. §632.2516

WEST VIRGINIA COURT RULES

Rule 24(a)(2) of the West Virginia Rules of Civil Procedure4, 8, 10, 13

RESPONSE TO ASSIGNMENT OF ERRORS

1. The Court properly denied Praetorian's Motion to Intervene because Praetorian unreasonably delayed filing a Motion to Intervene and Praetorian has never stated any reason for its unreasonable delay.
2. The Court properly denied Praetorian's Motion to Intervene because Praetorian's same claim was already pending before a Court of competent jurisdiction – Civil Action No. 20-C-800 Judge Tod J. Kaufman/Kenneth D. Ballard presiding. Praetorian chose to file its Declaratory Action outside of the wrongful death claim on September 15, 2020, without first taking any action to intervene in the wrongful death claim. The Court correctly determined that Praetorian has no right to litigate the same claim in two courts. Praetorian caused any conflict between the two Circuit Courts by trying to litigate the same issue in two courts at the same time.
3. Praetorian has no standing to litigate the merits of the underlying tort claim. Praetorian does not meet the elements to intervene in this action as a matter of right. Praetorian has failed to demonstrate it has standing to assert the claim it seeks to file and obtain the relief sought. Rule 24(a)(2) requires Praetorian to articulate a substantial interest in the action, which is capable of definition, protectable under some law, and specific to the intervenor. The negligence claim is a tort action solely between the Estate and ACC.
4. Praetorian asserts no justiciable controversy.

STATEMENT OF THE CASE

On May 5, 2017, at 6:51 a.m. Air Cargo Carriers flight 1260, operated by Captain Jonathan Alvarado crashed during landing on runway 5 at Yeager Airport. On approach CRW advised Flight 1260 to expect the localizer 5 approach. This approach would provide a straight-in final approach course aligned with runway 5. Captain Alvarado rejected the localizer

approach and requested a VOR-A approach to runway 5. This approach requires a circling landing by pilot sight of the runway. The weather was overcast clouds at 500 feet and 10 miles visibility with light winds at the time of the crash. Captain Alvarado made an early descent below prescribed minimum stepdown altitude. Captain Alvarado also did not have the aircraft continuously in a position from which a descent to a landing on the intended runway could be made at a normal descent rate using normal maneuvers. At about 0.5 miles from the displaced threshold of the landing runway, the airplane entered a 2,500 ft-per-minute turning descent toward the runway in a steep left bank up to 42 degrees. Captain Alvarado was apparently trying to line up with the runway. Rather than continue the VOR-A approach with an excessive descent rate and airplane maneuvering, Captain Alvarado should have conducted a missed approach and executed the localizer 5 approach procedure. Instead, the aircraft struck the runway in a left bank, nose up direction. First Officer Anh Ho was killed in the crash.

Captain Alvarado's acts in making an early descent below specified altitudes and excessive maneuvering during landing were not isolated events that only occurred on the crash day. The NTSB has concluded that Captain Alvarado consistently committed these acts of procedural intentional noncompliance. Evidence demonstrating Captain Alvarado had a known history of poor instrument flight skills included video of prior landings within a month of the crash, Captain Alvarado's performance history, and Captain Alvarado's unsatisfactory check-rides due to poor instrument flying. Captain Alvarado's poor instrument flying skills and failures to conduct missed approaches and fly a go around had been occurring for years prior to the crash. Before Air Cargo Carriers, LLC hired Captain Alvarado, on at least 4 separate practical examinations, Captain Alvarado received "Notice of Disapproval" – fails on portions of his practical examinations. Those 4 separate occasions of fails included the following: Area of

Operation VII, normal and crosswind approach and landing; Lack of performance in Area VIII, emergency operations; Area IV, Takeoffs/Landings, and Go Arouns; Lack of performance in the Area of IV, Takeoffs, Landings, and Go Arouns; Area VI, Navigation; and Area IX, Emergency procedures. Captain Alvarado had also been fired by a prior employer within 5 years of being hired by ACC. Despite these repeated failures, when Captain Alvarado was asked on his Air Cargo Carriers application: "Have you ever failed any check rides, proficiency checks, IOE, or line checks?" Captain Alvarado answered: "No". Captain Alvarado violated regulations in failing to truthfully disclose his flying experience, safety record, professional competence and pass/fail rates for check rides. Air Cargo Carriers violated regulations in failing to perform a due diligence background check of Captain Alvarado's safety record, training, competency, and pass/fail rates for check rides. Air Cargo Carriers had no formal safety and oversight program to oversee, manage and assess Captain Alvarado's dangerous flying which continued once Air Cargo hired him.

UPS personnel loading and unloading the cargo flights operated by Captain Alvarado, and UPS supervisors overseeing the load and unload work, were aware of Captain Alvarado's dangerous flying. In that regard, a UPS Air Supervisor advised the NTSB investigators that Captain Alvarado would show her photographs and videos of his flights and approaches. He would place the iPad on the dash of the airplane and record video of his flights as he came out of the clouds or during a snow event. Not long before the crash, Captain Alvarado came up to the UPS supervisor after the flight and asked her if she had seen his approach. She stated he was excited and told her he almost brought it "straight nose down."

Ultimately, the NTSB faulted Captain Alvarado for many aspects of his flying and decision making. It specifically noted that "performance on the accident flight was consistent

with procedural intentional noncompliance." The NTSB also faulted Air Cargo Carriers and stated "The operator stands as the first line of defense against procedural intentional noncompliance by setting a positive safety attitude for personnel to follow and establishing organizational protections. However, the operator had no formal safety and oversight program to assess compliance with SOPs or monitor pilots, such as the captain, with previous performance issues."

The Estate of Anh Kim Ho filed her wrongful death claim in the Circuit Court of Kanawha County, West Virginia on May 3, 2019, Civil Action No. 19-C-450 pending before Judge Louis H. Bloom. AR 005-020. The Complaint asserts a West Virginia state law cause of action pursuant to *W.Va. Code* §23-4-2 against Air Cargo Carriers, LLC; alternative West Virginia state law based negligence claim against Air Cargo Carriers, LLC for failure to comply with the statutory requirements entitling it to employer immunity; West Virginia state law based negligence claims against United Parcel Service Co. and UPS Worldwide Forwarding, Inc.; and a West Virginia state law fraud claim against the Estate of Jonathan Pablo Alvarado. Discovery was actively ongoing in that underlying case related to all these claims, until the actions was stayed by this Honorable Court as a result of Praetorian's Appeal.

PROCEDURAL HISTORY OF THE TORT CLAIM AND DECLARATORY JUDGMENT ACTION

After the Estate of Anh Kim Ho filed this tort action in the Circuit Court of Kanawha County, West Virginia on May 3, 2019, the defense of ACC was tendered to Praetorian Insurance Company. On June 6, 2019, Praetorian issued a Reservation of Rights letter to ACC and hired Edgar A. Poe, Jr. and Pullin Fowler Flanagan Brown & Poe, PLLC to defend ACC. AR 183-186. Notably, Praetorian took no action to seek Declaratory Judgment relief regarding

its rights and responsibilities to provide indemnity and a defense for the Ho claim, and took no action to seek to intervene in the wrongful death claim.

Defendants removed the case to federal court on June 13, 2019. Initial discovery proceeded in federal court until February 10, 2020, when Judge Johnson remanded the case to the Circuit Court of Kanawha County, West Virginia, Judge Louis H. Bloom, presiding.

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

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

contribute its first layer of insurance which would trigger extensive excess coverage policies available to Defendants. Praetorian's new coverage arguments derailed the mediation involving 19 attendees. Shortly after that failed mediation, Praetorian Insurance Company filed a Declaratory Judgment action on September 15, 2020. AR 206-211.

When Praetorian filed its Declaratory Judgment Complaint, it did not do so by seeking to join or intervene in the wrongful death claim. Instead, Praetorian filed a separate Declaratory Judgment Complaint in Civil Action No. 20-C-800 originally pending before Judge Tod J. Kaufman, then Judge Kenneth D. Ballard. Count I of the Declaratory Action seeks a declaration that Praetorian Insurance Company's Worker's Compensation and Employers' Liability policy issued to ACC includes no insurance coverage for the employers' liability claim asserted against ACC in the wrongful death action. Count II sought a legal ruling on the viability and merits of the Estate's negligence claim against ACC. AR 206-211. On November 20, 2020, the Estate filed a Motion to Dismiss Count II of the Declaratory Judgment Complaint and on November 24, 2020, ACC also filed a Motion to Dismiss Count II. Those Motions to Dismiss challenged the justiciability, standing and jurisdiction to proceed with Count II. On December 30, 2020, Praetorian filed a Motion for Summary Judgment regarding Count I and Count II of its Declaratory Judgment Complaint. AR 165-168, AR 169-182.

Either fearing a bad ruling, or simply in an attempt to litigate the exact same issues in two courts, Praetorian filed its Motion to Intervene on February 10, 2021. AR 143-186. In that Motion, Praetorian sought Rule 24(a)(2) Intervention in the wrongful death claim to assert the same relief it sought through Count II in the declaratory action. Compare AR 158-164 to AR 314-320. The Court properly denied Praetorian's Motion to Intervene because Praetorian's same claim was already pending before a Court of competent jurisdiction – Civil Action No. 20-C-800

Judge Tod J. Kaufman/Kenneth D. Ballard presiding. The Court noted: "The Declaratory Judgment Complaint' requests a declaration of legal rights and responsibilities owed to Air Cargo Carriers, LLC, under a workers' compensation and employer's liability insurance policy that Praetorian provided to Air Cargo Carriers.' This request is clearly the same as the request made to this Court in the instant Motion to Intervene. The Court thus CONCLUDES that Praetorian Insurance is not entitled to intervention as of right because disposition of this action will not impair or impede Praetorian's protection of its interests, as Praetorian may protect that interest through the action before Judge Kaufman." AR 344. The Court further correctly determined that Praetorian failed to timely move to intervene. AR 344.

Since Praetorian filed this Appeal, the Court in the Declaratory Action has held a hearing and ruled on the Motions to Dismiss Count II of the Praetorian Declaratory Judgment Complaint. The Court has granted the Motions to Dismiss Count II. The Court has further denied Praetorian's Motion for Summary Judgment regarding Count I and II of its Declaratory Judgment Complaint. Notably, as a result of that ruling, Praetorian has a contractual duty to defend ACC against the deliberate intent claim asserted in the wrongful death action. Praetorian has always argued that its "substantial interest" in the wrongful death claim is obtaining a favorable ruling on the negligence claim so that it could end its duty to defend ACC. Because it has now been established that Praetorian must defend ACC against the deliberate intent action, Praetorian has no interest it can change, enforce or remedy through intervention in the underlying wrongful death action. Regardless of whether Plaintiff may or may not pursue a negligence claim against ACC in the underlying claim, Praetorian must still provide a defense to ACC for the deliberate intent claim.

STATEMENT REGARDING ORAL ARGUMENT

Respondent joins Petitioner in requesting oral argument.

STANDARD OF REVIEW

The West Virginia Supreme Court has established that "the question of the timeliness of a motion to intervene is a threshold issue." *SWN Prod. Co. v. Conley*, 243 W. Va. 695,702, 850 S.E.2d 695, 701 (W.Va. 2020). The West Virginia Supreme Court reviews a lower court's determinations as to timeliness for an abuse of discretion. *See id.* at Syl. Pt. 1 ("While Rule 24 of the West Virginia Rules of Civil Procedure provides for the intervention of parties upon a timely application, 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).").

ARGUMENT

- 1. Praetorian failed to seek intervention from June, 2019, until February, 2021. Praetorian has offered no reason for its unreasonable delay. Praetorian has offered no reason for first filing the identical claim in another Court. The Court did not abuse its discretion in denying Praetorian's untimely Motion to Intervene.**

The West Virginia Supreme Court of Appeals has determined "It is apparent from the text of Rule 24(a)(2) that any application for intervention must be timely – if it is untimely application for intervention must be denied." *SWN Prod. Co. v. Conley*, 243 W.Va. 695,702, 850 S.E.2d 701 (W.Va. 2020). This Court does not need to look beyond the trial Court's discretionary and well-reasoned conclusion that Praetorian's Motion to Intervene was untimely.

The Estate's Complaint was filed on May 3, 2019. By June 9, 2019, as set forth within Praetorian's reservation of rights letter, it already contemplated filing an action for declaratory relief, and warned ACC of that intention. AR 186. Praetorian sat on its hands for sixteen

months. When it finally took action to file its action for declaratory relief it had the option of seeking to intervene in the existing action, where the negligence claim it sought to participate in was actively being litigated. Praetorian chose not to seek to intervene, and instead filed an entirely separate but competing action. AR 206-211. Praetorian waited five more months before it finally filed its Motion to Intervene in the wrongful death claim. By then, Petitioner and Respondents were already seeking determinations, as a matter of law, regarding the standing, viability, and merits of Praetorian's declaratory action allegations regarding the wrongful death negligence claim. Notably, Praetorian had already moved for summary judgment on the exact same declaratory action it was seeking to start over and file as an Intervenor in the wrongful death claim. Compare AR 158-164 to Count II of AR 314-320. Praetorian was clearly trying to play two Courts against each other, and in doing so was wasting substantial Court and party resources.

In seeking to intervene in the wrongful death action, Praetorian never stated any reason for its undue delay or why Praetorian did not seek to intervene to litigate the negligence claim within the wrongful death action from the beginning. Even within the Petitioner's Brief filed before this Court, it never explains why it waited so long to file the Motion to Intervene and why it didn't seek to intervene in the wrongful death action instead of filing a separate competing lawsuit. Within the Motion to Intervene, Praetorian acknowledges that while it believes it will win the competing Count II declaratory action, it wants to also intervene in the wrongful death claim to file the same claim, just in case it loses. AR 145. Our court system does not permit parties to unduly delay taking action or to forum shop. The wrongful death action Court acted within its discretion to deny Praetorian's Motion to Intervene as untimely.

- 2. Praetorian does not meet the elements to intervene as a matter of right. Praetorian has failed to demonstrate it has standing to assert the claim it seeks to file and obtain the relief sought. Rule 24(a)(2) requires Praetorian to articulate a substantial interest in the action, which is capable of definition, protectable under some law, and specific to the intervenor. The negligence claim is a tort action solely between the Estate and ACC.**

Praetorian has failed to demonstrate it has standing to directly litigate the merits of the Estate's negligence claim against the Estate and its own insured. The United States Constitution provides that courts have the power only to hear "cases" and "controversies." U.S. Const Art. III, §2. The doctrine of standing is designed to ensure that courts do not exceed those constitutionally circumscribed powers. *Spokeo, Inc. v. Robins*, 135 S.Ct. 1540, 1547 (2016); *A. H. v. CAMC Health System, Inc.*, 2020 WL 1243608, (W.Va. 2020) copy attached. "To be clear, if there is no 'case' in the constitutional sense of the word, then a court lacks the power to issue a declaratory judgment." *City of Martinsburg v. Berkeley County Council*, 825 S.E.2d 332, 336 (W.Va. 2019), quoting *Cox v. Amick*, 466 S.E.2d 459, 469 (W.Va. 1995). "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp. v. Cuno*, 126, S.Ct. 1854 (2006). "For all relief sought, there must be a litigant with standing, whether that litigant joins the lawsuit as a plaintiff, a co-plaintiff, or an intervenor of right." *Town of Chester, New York v. Laroe Estates, Inc.* 137 S. Ct. 1645 (2017).

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

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

Praetorian has failed to articulate its own injury in fact to establish standing in its own right. West Virginia is not a direct action state and does not permit an injured plaintiff to directly sue the insurer instead of the tortfeasor. *Robinson v. Cabell Huntington Hospital, Inc.*, 498 S.E.2d 27, 31-32 (W.Va. 1997) ("As a general rule, in the absence of policy or statutory provisions to the contrary, one who suffers injury which comes within the provisions of a liability insurance policy is not in privity of contract with the insurance company and cannot reach the proceeds of the policy

for the payment of his claim by an action directly against the insurance company.") Reciprocally, an insurer cannot sue an injured plaintiff to litigate the tort claim. The West Virginia Supreme Court acknowledged in *O'Neal v. Pocahontas Transp. Co.*, 129 S.E. 478, 481 (W.Va. 1925) "The inherent difference between a breach of an agreement between parties, and that sort of breach of duty which we call a tort, is as old as the law itself." "There is no privity of contract between the injured person and the insurance company. The remedy, well established, is by a suit against the tort-feasor alone." Absent the ability of Praetorian to demonstrate language within its insurance policy that it was made for the Estate's sole benefit, there is no privity of contract between Praetorian and the Estate. "It is well-established that a contract of insurance is a personal contract between the insurer and the insured named in the policy." *Woodford v. Glenville State College Hous. Corp.*, 225 S.E.2d 671, 674 (W.Va. 1976). "This Court has held that in order for a contract concerning a third party to give rise to an independent cause of action in the third party, it must have been made for the third party's sole benefit. *Id.*

For nearly 100 years, West Virginia has recognized that resolution of the tort claim must be litigated between the injured party and tortfeasor, not directly with the indemnifying insurance carrier. Praetorian is urging this Court to open tort litigation to direct actions between tortfeasors and insurance carriers. West Virginia has never been a direct action claim state and Praetorian has presented the Court with no good reason to change this long precedent other than the fact that it does not agree with the defense strategy being employed by the parties to the tort.

Praetorian has likewise failed to demonstrate any real hindrance or obstacle preventing ACC from protecting its own interest which would confer *jus tertii* standing in Praetorian. ACC is represented by counsel in both the tort claim and the declaratory judgement claim. ACC has the ability to protect its own interests and has a significant stake in controlling defense strategy

decisions about when and whether it wants to litigate the Estate's burden of proof in the tort action. There are definite strategic advantages and disadvantages to whether ACC is faced with a "deliberate intent" claim or "negligence" claim. ACC can most effectively advocate its own right on that issue. Praetorian is intentionally trying to control the timing of that litigation in favor of its own interests and is not effectively advocating the interests of ACC.

Without standing to assert the proposed pleading, Praetorian has no Rule 24(a)(2) right of intervention to litigate the merits of the negligence action. Praetorian has also failed to demonstrate it meets the Rule 24(a)(2) four conditions of intervention including: (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. Rule 24(a)(2) of the West Virginia Rules of Civil Procedure. Praetorian must demonstrate its interest is direct and substantial. West Virginia defines "direct interest" as 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. *State ex rel. Ball v. Cummings*, 540 S.E.2d 917 (W.Va. 1999). If the interests of the proposed intervenor may be practically disadvantaged, the Court still must weigh the degree of 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. *Id.*

In this action, Praetorian misses every condition. Praetorian's Motion is not timely. Praetorian received notice of this lawsuit and waited more than 21 months to file its Motion to

Intervene. Praetorian has offered no explanation for the reason or excuse for the delay and has failed to demonstrate why it did not timely file a Motion to Intervene or Declaratory Judgment action in 2019. Praetorian has asserted no direct and substantial interest in the tort and injury which is the subject of the negligence action. Praetorian's legal rights and obligations are governed by its insurance contract. The insurance contract is between Praetorian and ACC. Praetorian has a contractual obligation to pay liability claims. That obligation does not exist until after liability has been established and it has no direct action right to litigate the tort claim against the injured victim or its own insured before the liability obligation has been established. West Virginia law has never recognized an insurer's contingent future liability obligation as a direct and substantial interest which entitles it to directly litigate a tort claim. Going against 100 years of West Virginia tort law will dramatically change legal precedent and practice in West Virginia and convert the state to a direct action state where claimants can directly sue insurers and insurers may directly litigate tort claims. Such a direct action practice does not serve the general interest of the public in the efficient resolution of legal actions. Disposition of the tort claim does not impair or impeded Praetorian's contractual rights and obligations. Praetorian accepted insurance premiums from ACC and in exchange agreed to pay liability claims. The outcome of the resolution of the negligence claim either will or will not trigger Praetorian's contractual obligation to pay liability but it will not impair or impede the rights or obligations Praetorian has under the insurance contract. Praetorian has no legal interest that can or will be impaired or impeded by the Court. Praetorian has offered no evidence that ACC cannot defend itself against the negligence claims. It has two lawyers working to defend it. Praetorian has only offered evidence that it does not agree with the way ACC has chosen to defend itself. Praetorian hired the lawyer it is complaining about

and controls the defense so how can Praetorian disagree with its handpicked counsel. That disagreement does not confer intervention of right on Praetorian.

3. Praetorian Asserts No Justiciable Controversy between Petitioner and Respondents Related To The Resolution Of The Estate's Negligence Claim In The Wrongful Death Claim.

The West Virginia Supreme Court of Appeals has directed that the following four factors should be considered to determine whether a declaratory judgment action¹ presents a justiciable controversy sufficient to confer jurisdiction:

"(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."

A.H. v. CAMC Health System, Inc., at pg. 2, quoting, *Hustead on Behalf of Adkins v. Ashland Oil, Inc.*, 475 S.E.2d 55, 62 (W.Va. 1996). Also, "whether a justiciable controversy exists depends upon the facts present at the time the proceeding is commenced." *A.H.*, at *Id.*, quoting *Robertson v. Hatcher*, 135 S.E.2d 675, 681 (W.Va. 1964).

Praetorian's sole claimed interest in the resolution of the negligence claim was premised on an assertion by Praetorian within the Declaratory Judgment Complaint that: "Because there is not insurance coverage under the Policy for deliberate intent actions, a declaration from this Court that Air Cargo is entitled to the protections of W.Va. Code §23-2-6 would effectively eliminate the possibility of any payments to Ms. Chau from the Policy." The Court has now entered an Order directly disputing that allegation by Praetorian. Under Wisconsin law, the state in which Praetorian issued the contract, Praetorian's insurance policy issued to ACC does

¹ Pursuant to the Motion to Intervene, Praetorian sought to file "Intervenor Praetorian Insurance Company's Declaratory Judgment Complaint" AR 314-318.

provide employer's liability coverage and Praetorian is statutorily responsible to the Estate for employer's liability coverage. See Wis. Stat. §632.23 and §632.25; and July 28, 2021 Order Denying Plaintiff's Motion for Summary Judgment. Praetorian does not dispute this.

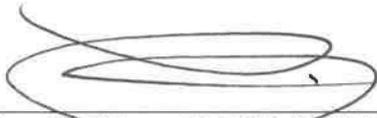
Therefore, resolution of the negligence issue does not put to rest Praetorian's duty to defend ACC or duty to indemnify the Estate. Praetorian has a statutory duty to provide a defense and indemnification for the deliberate intent claim. Resolution of the negligence claim does not "effectively eliminate the possibility of any payments to Ms. Chau from the Policy" which is the entire basis for Praetorian's claimed interest in intervening in the wrongful death case. Because there is no basis for Praetorian to claim any great harm if it cannot intervene, Praetorian has failed to assert a justiciable controversy.

CONCLUSION

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

**Virginia Chau, Administratrix
Of the Estate of Anh Kim Ho**

By Counsel



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STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Praetorian Insurance Company,
Petitioner

vs.) No. 21-0243

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

and

Air Cargo Carriers, LLC,
Defendant Below, Respondent

CERTIFICATE OF SERVICE

I, William Tiano, counsel for Plaintiff, do hereby certify that I have this 9th day of August, 2021, served the foregoing RESPONDENT VIRGINIA CHAU, ADMINISTRATRIX OF THE ESTATE OF ANH KIM HO'S BRIEF upon counsel of record by U.S. Postal Service addressed to the following counsel:

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