IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 21-0682

PRAETORIAN INSURANCE COMPANY,

Plaintiff Below/Petitioner,

v. **(On Appeal from Civil Action No. 20-C-800; in the Circuit Court of Kanawha County, WV)**

AIR CARGO CARRIERS, LLC,

Defendant Below/Respondent,

and

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

Defendant Below/Respondent.

BRIEF OF THE WEST VIRGINIA INSURANCE FEDERATION AS AMICUS CURIAE IN SUPPORT OF THE POSITION OF PETITIONER PRAETORIAN INSURANCE COMPANY

By Counsel

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INTRODUCTION

The West Virginia Insurance Federation ["Federation"] files this brief as *amicus curiae* in support of the position of the Petitioner Praetorian Insurance Company ["Praetorian"] in its appeal.[1] It does so because the Order denying Praetorian's Motion for Summary Judgment entered by the Circuit Court of Kanawha County, West Virginia, on July 28, 2021 conflicts with well-settled law established by this Court and would cause confusion and inconsistency in the interpretation and application of deliberate intent exclusions in employers liability insurance policies. Consequently, the Federation has a grave concern that, if the Circuit Court's decision is not reversed, insurance companies will be saddled with the onerous burden of having to defend and indemnify cases where their insurance policies clearly provide no coverage. Thus, the Federation respectfully requests that this Court reverse the Circuit Court's holding to the extent that it found the deliberate intent exclusion in the Praetorian policy to be ambiguous.[2]

STATEMENT OF THE CASE

The Federation incorporates by reference the Statement of the Case set forth by Praetorian in its Petitioner's Brief.

STATEMENT OF INTEREST

The Federation is the state trade association for property and casualty insurance companies doing business in West Virginia. Its members insure approximately 80% of the automobiles and homes in West Virginia and more than 80% of the workers'

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[1] This *amicus curiae* brief has been authored in its entirety by the undersigned counsel. Neither party nor their respective counsel made a monetary contribution specifically intended to fund the preparation or submission of this brief. This disclosure is made pursuant to Rule 30(e)(5) of the West Virginia Rules of Appellate Procedure.

[2] Pursuant to West Virginia Rule of Appellate Procedure 30(b), the Federation provided notice on November 19, 2021, to all parties of its intention of filing an *amicus curiae* brief.

compensation policies insuring employees in West Virginia. The Federation is widely regarded as the voice of West Virginia's insurance industry and has served the property and casualty industry for more than 40 years.

The Federation files this brief, pursuant to Rule 30 of the West Virginia Rules of Appellate Procedure, in support of the position of Praetorian in its appeal because the Federation's members have a strong interest in ensuring that when a policy they issue contains a clear and unambiguous exclusion, like the deliberate intent exclusion here, that exclusion will be given full force and effect by West Virginia courts in accordance with the well-settled holdings of this Court. The decision of the Circuit Court of Kanawha County threatens to upend the well-established law giving effect to deliberate intent exclusions and to force the Federation's members to defend and indemnify in instances where there is no coverage provided by the insurance policy they issued. Accordingly, the Federation appears as *amicus curiae* because the Circuit Court's decision has placed the Federation's members in great jeopardy, and this must be rectified now in order to avoid future circumstances where the holdings of this Court are inexplicably ignored. The Federation urges the Court to reverse the Circuit Court's denial of Praetorian's motion for summary judgment and hold that the deliberate intent exclusion in the policy at issue is unambiguous and must be given full effect.

ARGUMENT

I. Pursuant to the well-settled law of this Court, the exclusion of coverage for deliberate intent claims contained in the Praetorian employers liability insurance policy is clear and unambiguous and should be given full force and effect.

The holding of the Circuit Court of Kanawha County must be reversed because it is in direct conflict with settled precedent of this Court which has been the governing law

for the past ten (10) years. An insurer may lawfully provide an employer with an insurance policy that covers bodily injury by accident to an employee while excluding coverage for deliberate intent claims. *See West Virginia Employers' Mutual Insurance Company d/b/a BrickStreet Mutual Insurance Company v. Summit Point Raceway Associates, Inc.*, 228 W. Va. 360, 719 S.E.2d 830 (2011) (upholding deliberate intent exclusion in Workers Compensation and Employers Liability Insurance Policy).[3] The exclusionary clause in the policy must simply be clear, consistent and unambiguous. *See id.*, 228 W. Va. at 373, 719 S.E.2d at 843. Specifically,

> [a]n insurer wishing to avoid liability on a policy purporting to give general or comprehensive coverage must make exclusionary clauses conspicuous, plain, and clear, placing them in such a fashion as to make obvious their relationship to other policy terms, and must bring such provisions to the attention of the insured.

First Mercury Insurance Company Inc. v. Russell, 239 W. Va. 773, 779, 806 S.E.2d 429, 435 (2017) (quoting Syl. Pt. 6, *Summit Point*, 228 W. Va. 360, 719 S.E.2d 830). If the policy's provisions are clear and unambiguous, "they are not subject to judicial construction or interpretation." Syl. Pt. 5, *First Mercury*, 239 W. Va. 773, 806 S.E.2d 429. Rather, full effect must be given to the plain meaning of the provisions. *Id.*[4]

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[3] While Wisconsin law applies to the interpretation and application of the insurance policy here because the policy was issued in Wisconsin, Wisconsin has not addressed the issue presented here pertaining to the interpretation and application of a provision in an employers liability insurance policy excluding coverage for deliberate intent claims brought under W. Va. Code § 23-4-2(d)(2). Under Wisconsin law, it is appropriate to consider persuasive authority from other jurisdictions where a novel question is presented. *See Town v. Schoepke v. Rustick*, 723 N.W.2d 770, 774 (Wis. 2006). Accordingly, West Virginia law on this issue is instructive. Moreover, Wisconsin principles of contract application and construction do not differ from those of West Virginia as Wisconsin recognizes that when a policy is clear and unambiguous, it "should not be rewritten by construction to bind an insurer to a risk ... it [never] contemplate[d] or [intended] to cover, and for which it was not paid." *Blum v. 1st Auto & Cas. Ins. Co.*, 786 N.W.2d 78, 83 (Wis. 2010).

[4] *First Mercury* reaffirmed *Summit Point's* holding that exclusionary clauses must be given effect when they are conspicuous, plain and clear. 239 W. Va. at 779, 806 S.E.2d at 435. In *First*

In *Summit Point*, this Court extensively examined and evaluated a strikingly similar policy and exclusion and held that there was plainly no coverage for deliberate intent actions. *Id.*, 228 W.Va. at 372, 719 S.E.2d at 842. Nothing in the plain language of that policy, which is similar in all relevant aspects to the Praetorian Policy here, led to a reasonable conclusion that deliberate intent coverage was included in the policy. *Id.* This Court also determined that "the circuit court erred in concluding that the policy was ambiguous and therefore resulted in deliberate intent coverage being included in the policy under the doctrine of reasonable expectations." *Id.* at 228 W.Va. at 373, 719 S.E.2d at 843.

There were various provisions of the employers liability policy at issue in *Summit Point* that clearly precluded coverage for deliberate intent actions, and those provisions are also included in the Praetorian Policy. [*See* AR0097-99, 150] In examining Part Two of the policy pertaining to employers liability insurance, this Court found that the policy expressly stated that "[t]his employers liability insurance applies to bodily injury *by accident*" and specified that:

> The damages we [BrickStreet] will pay, where recovery is permitted by law, include damages:
>
> 1. for which you are liable to a third party by reason of a claim or suit against you by that third party to recover the damages claimed against such third party as a result of injury to your employee;
>
> 2. for care and loss of services; and

Mercury, this Court found the case to be distinguishable from *Summit Point* because an ambiguity was found where the *First Mercury* policy purported to provide "stop gap" coverage while also purporting to exclude deliberate intent coverage, which the Court found to be inconsistent with the meaning of stop gap coverage. The distinctions in *First Mercury* are not applicable in this case as the Praetorian Policy does not purport to provide stop gap coverage, and no such argument was advanced by Air Cargo before the Circuit Court.

3. for consequential bodily injury to a spouse, child, parent, brother or sister of the injured employee; provided that these damages are the direct consequence of bodily injury that arises out of and in the course of the injured employee's employment by you; and

4. because of bodily injury to your employee that arises out of and in the course of employment, claimed against you in a capacity other than as an employer.[5]

Id. The Court found that nothing in this plain language could lead to a reasonable conclusion that deliberate intent coverage was included in the policy.

This Court further noted that the policy included a West Virginia Intentional Injury Exclusion Endorsement that excluded coverage for deliberate intent actions and that stated, in relevant part:

C. Exclusions

This insurance does not cover

1. Bodily injury caused by your intentional, malicious or deliberate act, whether or not the act was intended to cause injury to the employee injured, or whether or not you had actual knowledge that an injury was certain to occur, or any bodily injury for which you are liable arising out of West Virginia Annotated Code *§ 23-4-2.*[6]

Id., 228 W.Va. at 372-73, 719 S.E.2d at 842-43 (emphasis added). Ultimately, it was held that the exclusion was "conspicuous, plain, clear, and obvious in excluding coverage for deliberate intent actions." *Id.*, 228 W.Va. at 373, 719 S.E.2d at 843.

Here, the Praetorian Policy also unambiguously excludes coverage for deliberate intent actions and is highly similar in all relevant respects to the policy in *Summit Point*. The Praetorian Policy includes language identical to the *Summit Point* Policy regarding damages it will pay:

[5] Compare with the largely identical provision in the Praetorian Policy, AR0097-98.
[6] Compare with the similar provision in the Praetorian Policy, AR0150.

> The damages we [Praetorian] will pay, where recovery is permitted by law, include damages:
>
> 1. For which you are liable to a third party by reason of a claim or suit against you by that third party to recover the damages claimed against such third party as a result of injury to your employee;
>
> 2. For care and loss of services; and
>
> 3. For consequential bodily injury to a spouse, child, parent, brother or sister of the injured employee; provided that these damages are the direct consequence of bodily injury that arises out of and in the course of the injured employee's employment by you; and
>
> 4. Because of bodily injury to your employee that arises out of and in the course of employment, claimed against you in a capacity other than as an employer.

[AR0097-98] The Praetorian Policy also contains a "West Virginia Employers Liability Insurance Intentional Act Exclusion Endorsement" similar to the exclusion endorsement in the *Summit Point* policy which states:

> This insurance does not cover:
>
> 5. 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).

[AR0150 (emphasis added)]

The language of the policy and the deliberate intent exclusion endorsement must be given effect pursuant to the directly applicable holdings of this Court in *Summit Point*. Just as in *Summit Point*, the deliberate intent exclusion in this case is "conspicuous, plain, clear, and obvious in excluding coverage for deliberate intent actions." 228 W.Va. at 373, 719 S.E.2d at 843. While worded in a slightly different manner, it serves the

same purpose and function as the exclusion in *Summit Point*. Despite this clear language, the Circuit Court ruled in direct contravention of *Summit Point* when it held that the Praetorian Policy's exclusion of coverage for deliberate intent claims was ambiguous. That holding must be reversed as it's unquestionably at odds with *Summit Point*.

II. The Circuit Court provided no justification for deviating from *Summit Point*'s holdings in construing and applying the Praetorian Policy.

What is particularly disturbing about the Circuit Court's Order denying Praetorian's Motion for Summary Judgment is that it contains no reasoned analysis to support deviating from the holding in *Summit Point.* The Circuit Court did not point to any language in the subject policy that would sufficiently distinguish it from the policy in *Summit Point,* undoubtedly because there are no distinguishing features between the *Summit Point* policy and the Praetorian policy. This glaring deficiency in the Circuit Court's order can best be explained by the fact the Circuit Court merely adopted verbatim the Proposed Order submitted by Air Cargo Carriers, LLC. Since 1967, however, this Court has repeatedly cautioned that a Circuit Court should make its own findings and should not delegate the function to the adoption of findings proposed by counsel. *See S. Side Lumber Co. v. Stone Const. Co.,* 151 W.Va. 439, 152 S.E.2d 721 (1967); *see also State ex rel. Cooper v. Caperton,* 196 W.Va. 208, 214 470 S.E.2d 162, 168 (1996) ("[v]erbatim adoption of proposed findings and conclusions of law prepared by one party is not the preferred practice."); *Fruth v. Powers,* 239 W.Va. 809, 816, 806 S.E.2d 465, 472 (2017) ("it invites criticism to adopt one party's proposal verbatim" though it is not in itself considered reversible error).

Because the Circuit Court adopted a counsel-crafted order, the court adopted an incorrect interpretation of the Praetorian Policy's deliberate intent exclusion and, in doing so, manufactured an ambiguity that, upon a thorough analysis, does not exist. Again, the Praetorian Policy exclusion excludes coverage for "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)." [AR0150 (emphasis added)] Even though the provision explicitly states that coverage does not apply to deliberate intent claims under W. Va. Code § 23-4-2(d)(2)—without any additional limitation—the Court read into the provision that it actually excluded only deliberate intent claims under W. Va. Code § 23-4-2(d)(2)(A) and not claims under § 23-4-2(d)(2)(B). This conclusion is baseless and not supported by the language of the exclusion. The first part of the exclusion excludes coverage for injuries intentionally caused. The second part of the exclusion excludes coverage for injuries caused by conduct "equivalent to an intentional tort" including by deliberate intention under § 23-4-2(d)(2). If the second part of the exclusion only applied to intentionally caused injuries like the first part, it would be redundant. Moreover, if the second clause only applied to intentionally caused injuries, there would be no need for the language "equivalent to an intentional tort." This language itself recognizes that deliberate intent can be found even where there is no finding of a specific intention to cause injury, yet it still falls under "deliberate intent" under W. Va. Code § 23-4-2(d)(2) and is "equivalent to an intentional tort." As such, the circuit court committed clear error in interpreting this plain language and reading in additional language that is not contained in the policy endorsement.

Because the deliberate intent exclusion clearly and unambiguously excludes coverage for claims under W. Va. Code § 23-4-2(d)(2), it must be given effect pursuant to *Summit Point*.

III. If left undisturbed, the Circuit Court's holding places the Federation's members in jeopardy of being forced to provide coverage where there is none.

The Circuit Court's refusal to grant Praetorian summary judgment, despite the clear and unambiguous exclusion of coverage for deliberate intent claims, effectively requires Praetorian to provide deliberate intent coverage where such coverage was not intended or anticipated. The types of deliberate intent exclusions at issue in this case and in *Summit Point* are common in the employers liability insurance policies issued by the Federation's members. The Federation is concerned that if the Circuit Court's decision stands, it will wreak havoc for the Federation's members. Insurers will be unable to predict whether West Virginia courts will give effect to the clear and unambiguous deliberate intent exclusions contained in their employers liability insurance policies. If small variations in the language of an exclusion from the *Summit Point* exclusion language are enough to cause the language not to be given effect, there will be substantial confusion over whether the deliberate intent exclusion language of a given policy should be applied. This will lead to inconsistency in courts' application of deliberate intent exclusions, and the Federation's members will be forced, at great cost, to defend and perhaps provide indemnity in cases where there would be no coverage under the *Summit Point* analysis. It is, therefore, important that this Court correct this error now to avoid such an undesirable and harmful result.

CONCLUSION

The Federation urges the Court to rectify the Circuit Court's error and prevent the Federation's members from suffering the fallout that will result from the Circuit Court's misinterpretation of the Praetorian Policy and misapplication of *Summit Point*. The Court should reverse the Circuit Court of Kanawha County's denial of Praetorian's motion for summary judgment and hold, consistent with the well-established prior holdings of this Court, that the Praetorian Policy clearly and unambiguously excludes coverage for deliberate intent claims.

WEST VIRGINIA INSURANCE FEDERATION

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Defendant Below/Respondent.

CERTIFICATE OF SERVICE

I, Morgan E. Villers, counsel for West Virginia Insurance Federation, do hereby certify that on this 29th day of November 2021, I served "**West Virginia Insurance Federation's Motion for Leave to File *Amicus Curiae* Brief in Support of the Position of Petitioner Praetorian Insurance Company**" and "**Brief of the West Virginia Insurance Federation as *Amicus Curiae* in Support of the Position of Petitioner Praetorian Insurance Company**" via regular U.S. Mail to the following counsel of record as follows:

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