IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

PRAETORIAN INSURANCE COMPANY,
A Pennsylvania Insurance Company

Plaintiff,

Civil Action No. 20-C-800
Judge Ballard

v.

AIR CARGO CARRIERS, LLC,
a Wisconsin Limited Liability Company, *et al*,

Defendants.

DEFENDANTS' ORDER DENYING
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This day came the Plaintiff, Praetorian Insurance Company (hereinafter "Praetorian"), by counsel, the Defendant Air Cargo Carriers, LLC (hereinafter "ACC"), by counsel, and the Defendant Virginia Chau, Administratrix of the Estate of Anh Kim Ho (hereinafter "Ms. Chau"), by counsel, pursuant to a Motion for Summary Judgment filed by Praetorian. After considering the briefs of the parties and other matters deemed relevant, the Court hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On May 5, 2017 at 6:51 a.m., ACC flight 1260, operated by Captain Jonathan Alvarado, crashed during landing on runway 5 at Yeager Airport.

2. Ms. Chau alleges that the crash was caused by a complex series of events including alleged negligence on the part of Captain Alvarado in making an early descent below specified altitudes and excessive maneuvering during landing.

3. Ms. Chau's decedent (First Officer Anh Ho) was killed in the crash.

4. Ms. Chau alleges that ACC violated applicable 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.

5. Defendant ACC denies any liability for the subject crash.

6. Ms. Chau further alleges that United Parcel Service Co. and UPS Worldwide Forwarding, Inc. (hereinafter collectively referred to as "UPS") are at least partially liable for the crash though UPS was not made a party to this action by Praetorian.

7. Ms. Chau, on behalf of the Estate of Anh Kim Ho, filed a related underlying tort action on May 3, 2019 (Civil Action No. 19-C-450) pending in the Circuit Court of Kanawha County, West Virginia before the Honorable Louis H. Bloom (hereinafter the "Tort Action").

8. In the Tort Action, Ms. Chau asserts a West Virginia state law cause of action pursuant to *W.Va. Code* §23-4-2 against ACC, as well as an alternative West Virginia state law based negligence claim against ACC for failure to comply with the mandatory statutory requirements entitling ACC to employer immunity.

9. In the Tort Action, Ms. Chau also asserts a West Virginia state law based negligence claim against UPS and a West Virginia state law fraud claim against the Estate of Jonathan Alvarado.

10. At the time of the entry of this Order, discovery is actively ongoing in the Tort Action related to all of the above claims. Extensive written discovery has been exchanged, expert witnesses have been disclosed, and depositions are proceeding.

11. Praetorian filed this Declaratory Judgment Action on September 15, 2020.

CONCLUSIONS OF LAW

1. "Under the *lex loci delicti* choice of law rule, West Virginia procedure applies to all cases before West Virginia courts." *McKinney v. Fairchild International, Inc.*, 487 S.E.2d 913, 923 (W.Va. 1997).

2. Praetorian chose to file this declaratory action in West Virginia, and West Virginia law will therefore determine the procedural issues presented by this case, including the standard of review to be applied under Rule 56 of the West Virginia Rules of Civil Procedure.

3. The Circuit Court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue of material fact for trial. *Painter v. Peavy*, 451 S.E.2d 755 (W.Va. 1994).

4. A party is not entitled to summary judgment unless the facts established show a right to judgment with such clarity as to leave no room for controversy and show affirmatively that the adverse party cannot prevail under any circumstances. *Smith v. Sears, Roebuck & Co.*, 447 S.E.2d 255 (W.Va. 1994); *Johnson v. Mays*, 447 S.E.2d 563 (W.Va. 1994).

5. Summary judgment is only appropriate where the record, taken as a whole, cannot lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove. *Stewart v. SMC, Inc.*, 452 S.E.2d 899 (W.Va. 1994); *Painter v. Peavy*, supra at 758-759.

6. This Court must grant the nonmoving party, in this case, Defendants, the benefit of all inferences since credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, and not those of a judge. *See Cavender v. Fouty*, 464 S.E.2d 736 (W.Va. 1995).

7. Even where there is no dispute regarding the evidentiary facts, but a dispute exists as to the inferences to be drawn therefrom, summary judgment should not be granted. *See Wilson v. Daily Gazette Co.*, 214 W.Va.. 208, 588 S.E.2d 197 (2003).

8. The Praetorian Policy was issued in Wisconsin by an insurer with its principal place of business in Wisconsin to a Wisconsin insured and, therefore, the Court finds that Wisconsin law applies to any coverage issues including any issues related to coverage or the duty to defend. *See, e.g., Lee v. Saliga*, 179 W.Va. 762, 373 S.E.2d 345 (1988) (holding that the general rule is that the "contractual relationship" between and insurer and its insured and any "insurance coverage issues" are "controlled by the law of the state in which the policy was issued"). *See, also, Liberty Mut. Ins. Co. v. Triangle Indus.*, 182 W.Va. 580. 392 S.E.2d 562 (1990) (holding that "in a case involving the interpretation of an insurance policy, made in one state to be performed in another, the law of the state of the formation of the contract shall govern, unless another state has a more significant relationship to the transaction and the parties"). All parties to this litigation have agreed that Wisconsin law applies to the coverage issues, and no party has argued that any state other than Wisconsin has a "more significant relationship to the transaction and the parties."

9. Praetorian seeks summary judgment with respect to both Counts of its Declaratory Judgment Complaint. In Count I, Praetorian seeks a declaration that it has no duty to defend or indemnify ACC with respect to the "deliberate intent" claims made against ACC in the Tort Action under W.Va. Code § 23-4-2(d)(2). In Count II, Praetorian seeks a declaration that while the simple negligence claims against ACC are generally covered, ACC is immune. Thus, in Count II, Praetorian seeks to have this Court determine the legal and/or factual merits of the negligence claim in the Tort Action.

COUNT I - "Deliberate Intent"

10. Praetorian relies exclusively upon the following exclusionary language in its policy which is added by endorsement:

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 your deliberate intention as that term is defined by W.Va. Code § 23-4-2(d)(2).

See policy at West Virginia Employers Liability Intentional Act Exclusion Endorsement.

11. However, Wisconsin has a statute that is directly on point (Wis. Stat. § 632.23) which provides:

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

Id.

12. Clearly, the Praetorian policy is a policy that potentially covers "liability arising out of the ownership, maintenance, or use of an aircraft" since it is an Employer's Liability policy insuring a company that ships cargo by aircraft piloted and/or occupied by its own employees. The policy also contains countless references to things such as "aviation," or "aircraft." In fact, there are numerous "premium breakdown" pages that classify the business for premium purposes as "Aircraft or Heli Ops Air Carrier" or "Aviation- Air Carrier."

13. The Estate argues that coverage applies under the Praetorian policy because W.S.A. §632.25 provides that "any condition in an employer's liability policy requiring compliance by the insured with rules concerning the safety of persons shall be limited in its effect in such a way that in the event of breach by the insured the insurer shall nevertheless be responsible to the injured

person under §632.24 as if the condition has not been breached..." That code section limits any exclusion in the Practorian policy if the insured is required to comply with rules concerning the safety of persons. The claims asserted by Virginia Chau under W.Va. Code §23-4-2 assert that ACC, as the employer, failed to comply with state and federal safety rules and regulations. In fact, as part of the Plaintiff's claim, she must prove evidence of a specific working condition that was a violation of a safety statute, rule, or regulation. The Court hereby Orders, in the event it is determined that ACC failed to comply with rules concerning the safety of persons, Praetorian shall be responsible to the Estate within the policy insurance limits of coverage.

14. One of the five elements of a "deliberate intent" cause of action under W.Va. Code § 23-4-2(d)(2) is that there be a "specific unsafe working condition" that was a "violation of a state or federal safety statute, rule or regulation." *Id.* at subsection (d)(2)(B)(iii).

15. In the underlying case, to satisfy this element of her "deliberate intent" cause of action, Ms. Chau relies upon alleged violations by ACC of various federal regulations including 49 CFR §44703, 14 CFR § 91 Subpart A; 14 CFR § 119.69; 14 CFR §§35.21, .77, .81, .291, .293, .297, .299, .330, and .337. *See* underlying Complaint at ¶ 32.

16. The "deliberate intent" exclusion relied upon by Praetorian clearly violates Wis. Stat. § 632.23 in that Praetorian is seeking to use the exclusion to deny coverage for the underlying case when the allegations arise out of the ownership, maintenance, and use of an aircraft and when the claim is made in the context of alleged violations of federal air regulations.

17. Under Wisconsin law, when an exclusion is "contrary to statutory coverage provisions," the exclusion is "void" and of no effect. *Davison v. Wilson*, 71 Wis. 2d 630, 239 N.W. 2d 38 (1974).

18. In addition, regarding Count I, Praetorian places great reliance upon the decision of the Supreme Court of Appeals of West Virginia in *W. Va. Employers' Mut. Ins. Co. v. Summit Point Raceway Assoc.*, 228 W.Va. 360, 719 S.E.2d 830 (2011) which Praetorian argues is dispositive.

19. However, the Court finds *Summit Point* to be more persuasive authority since Wisconsin law applies to any coverage issues, and the Court also finds for the reasons discussed below that the case is distinguishable.

20. Praetorian asserts that the "deliberate intent" exclusion in *Summit Point* is "functionally identical" to the exclusion in this case. However, the Court agrees with defendants that the "deliberate intent" exclusion in that case was actually much broader.

21. The exclusion in *Summit Point* provided as follows:

C. Exclusions

This insurance does not cover:

> 5. 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.

Id. The Court notes that the *Summit Point* exclusion did not require proof that the employer intentionally caused the bodily injury to the employee so long as there was an intentional "act" that led to it. In addition, the exclusion broadly applies to "any" bodily injury for which the insured is liable arising out of W.Va. Code § 23-4-2, whether intentional or not.

22. In contrast, the exclusion relied upon by Praetorian in this case is much narrower and excludes coverage as follows:

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 your deliberate intention as that term is defined by W.Va. Code § 23-4-2(d)(2).

See policy at West Virginia Employers Liability Intentional Act Exclusion Endorsement. The Court notes that in *Summit Point,* the exclusion applied to bodily injury resulting from an intentional act even if the insured did not intend to cause harm to the injured employee. In contrast, in this case, the exclusion specifically requires that the insured "intentionally" cause the bodily injury or that it rise to the level of an "intentional tort."

23. The Court also notes that in *Summit Point,* the exclusion broadly excluded all claims made under 23-4-2 by use of the connector word "or" while in this case, Praetorian chose to use the connector word "including" which means that the first part of the exclusion must still be satisfied for application thereof. In other words, by the plain language of the exclusion, for it to apply, there must either be: 1) bodily injury intentionally caused or aggravated by the insured; or 2) an intentional tort. By using the connector "including," Praetorian made it clear that even if there is a claim made under W.Va. Code § 23-4-2(d)(2), for the exclusion to apply, there must still be either an intentional tort or the intent to cause or aggravate the bodily injury for the exclusion to apply.

24. The Court finds that W.Va. Code § 23-4-2(d)(2) provides two methods for an injured employee to prove "deliberate intent." The first method is found under subsection (d)(2)(A) which requires proof that the employer acted with a "subjectively and deliberately formed intention to produce the specific result of injury or death to an employee." *Id.* Claims made under this subsection would likely be excluded by the Praetorian exclusionary endorsement since they necessarily involve bodily injury "intentionally caused" by the employer and/or an "intentional tort."

25. However, a second method for proving "deliberate intent" is found in subsection (d)(2)(B) of W.Va. Code § 23-4-2, and this subsection does not require proof that the bodily injury was "intentionally caused" by the employer or proof of an "intentional tort." Rather, this subsection allows an employee to prevail merely by satisfying a five-part test essentially requiring proof of each of the following: 1) the existence of a specific unsafe working condition presenting a high degree of risk; 2) actual knowledge on the part of the employer of this specific unsafe working condition; 3) evidence that the specific unsafe working condition was a violation of a safety statute, rule or regulation; 4) evidence that the employer intentionally exposed the employee to the unsafe working condition; and 5) proof that the employee suffered serious injury or death as a result. *Id.* Nowhere does subsection (d)(2)(B) require proof that the employer intentionally cause injury to the employee or that the employer engage in conduct equivalent to an "intentional tort." To the contrary, the Court finds that as a matter of law, it is possible for an employee to establish a claim under subsection (d)(2)(B) without necessarily establishing actual intent to cause or aggravate bodily injury and/or conduct equivalent to an "intentional tort."

26. The Court finds that under Wisconsin law, "[a]mbiguities in exclusions to a grant of coverage are construed narrowly, thereby limiting the exclusion." *Wadzinski v. Auto-Owners Ins. Co.*, 342 Wis. 2d 311, 818 N.W.2d 819 (2012).

27. ACC argues that the Praetorian policy is ambiguous regarding whether or not the exclusion applies to both subsection (d)(2)(A) and subsection (d)(2)(B) of W.Va. Code § 23-4-2 and further argues that a reasonable reading of the exclusionary endorsement is that it applies to claims under subsection (d)(2)(A) but that it does not necessarily apply to claims made under subsection (d)(2)(B) unless there is a separate finding by the trier of fact that the employer "intentionally caused" the bodily injury. The Court agrees with ACC.

28. The Court notes that it is undisputed that Ms. Chau is pursuing her "deliberate intent" claim under subsection (d)(2)(B) rather than subsection (d)(2)(A) of W.Va. Code § 23-4-2. *See* Tort Action Complaint at ¶ 35. Because she can prevail on that claim without proving that bodily injury to her decedent was "intentionally caused or aggravated" by Air Cargo, this Court cannot conclude as a matter of law that the exclusion relied upon by Praetorian applies.

29. Under Wisconsin law, the insurer bears the burden of proving that an exclusion applies, including the facts necessary for the operation of the exclusion. *See Wilson Mut. Ins. Co. v. Faulk.* 360 Wis. 2d 67, 857 N.W.2d 156 (2014). This burden has not been met at least this time because so far, there has been no formal finding that Air Cargo "intentionally caused" bodily injury to its employee and also because such a finding is not required for the underlying plaintiff to prevail regarding her "deliberate intent" claim.

30. The Court further notes that Praetorian relies entirely upon the "employers liability" coverage provided by Part Two of the policy and the "deliberate intent" exclusion that modifies that coverage. However, ACC has argued that there is also coverage under separate "employers liability" coverage that was "added" to the policy by virtue of the West Virginia "Employers Liability Coverage for Residence Employees."[1]

31. This endorsement states that "[t]his endorsement adds ... Employers Liability Coverage to the policy." *Id.* The Court finds that this is a stand-alone part of the policy that provides additional "employers liability" coverage that must be analyzed separately from any "employers liability" coverage provided by Section Two of the policy.

[1] There are separate similar "voluntary compensation and employers liability" endorsements for several states included in the policy that provide added coverage to that found in Parts One and Two of the main policy. One of the endorsements is specific to West Virginia and that is the one discussed herein.

32. The Court finds that the exclusion relied upon by Praetorian for "deliberate intent" claims under W.Va. Code Section 23-4-2(d)(2) applies on its face only to "Part Two" of the policy, and it does not refer to or otherwise apply to any "employers liability" coverage that is provided by the "Employers Liability Coverage for Residence Employees Endorsement."

33. The Court finds as a matter of law that the "Employers Liability Coverage for Residence Employees Endorsement" is ambiguous. The endorsement states that several terms, including "residence employee," will "have the meanings stated in the policy" yet the policy has no definitions section and does not otherwise define "residence employee" or any of the other terms that supposedly have "the meanings stated in the policy."

34. Wisconsin law is clear that if policy language is ambiguous, the Court must resolve any ambiguities "in favor of the insured." *Katze v. Randolph & Scott Mut. Fire Ins. Co.*, 116 Wis. 2d 206, 341 N.W.2d 689 (1983). The test is "not what the insurer intended the words to mean but what a reasonable person in the position an insured would have understood the words to mean." *Id.* Policy language is ambiguous if it is "susceptible to more than one reasonable construction." *Farm Mut. Auto. Ins. Co. v. Bailey*, 302 Wis. 2d 409, 734 N.W.2d 386 (2007). *See, also, Tempelis v. Aetna Cas. & Sur. Co.*, 169 Wis. 2d 1, 485 N.W.2d 217 (1992) (holding that "[a]n ambiguity exists when the policy is reasonably susceptible to more than one construction from the viewpoint of a reasonable person of ordinary intelligence in the position of the insured"). Ambiguous terms are construed against the insurer because "the insurer is better situated to eliminate ambiguity." *Connors v. Zurich Am. Ins. Co.*, 365 Wis. 2d 528, 872 N.W.2d 109 (2015). Under Wisconsin law, whether or not an insurance contract is ambiguous is a "question of law." *Wadzinski v. Auto-Owners Ins. Co.*, 342 Wis. 2d 311, 818 N.W.2d 819 (2012).

35. In this case, the issue for the Court is whether the underlying plaintiff's decedent, Anh Kim Ho, was arguably a "residence employee" of ACC within the meaning of the policy. Under Wisconsin law, if there is any reasonable interpretation of the term "residence employee" that favors coverage, this Court must resolve the ambiguity in favor of ACC and adopt the definition of that term that favors coverage.

36. The endorsement at issues states that "residence employee" shall "have the meaning stated in the policy" but nowhere does the policy define that term. This alone creates an ambiguity.

37. The parties were unable to cite to any Wisconsin cases that shed light on the proper definition of "residence employee" under Wisconsin law.

38. Under Wisconsin law, "undefined terms in an insurance policy are given their common and every day meaning." *Hughes v. Allstate Indem. Co.*, 389 Wis. 2d 625, 937 N.W.2d 305 (2019) (additional citations omitted).

39. It is undisputed that Anh Kim Ho was an "employee" of ACC.

40. The Court finds that the term "residence employee" is ambiguous because the term "residence" has more than one distinct meaning. In fact, Black's Law Dictionary specifically recognizes that the term "residence" has "no precise legal meaning." *Black's Law Dictionary* (6th Ed.) at p. 907.

41. Under Wisconsin law, "residence" has been defined simply as "a person's house." *State v. Lorentz*, 389 Wis. 2d 377, 936 N.W.2d 415 (2019). However, the term has also frequently been used to describe the act or fact of dwelling in a particular locality for some period of time and/or the status of a legal resident. *See, e.g., County of Dane v. Racine County*, 118 Wis. 2d 494, 347 N.W.2d 622 (1984) (defining "residence" as "the voluntary concurrence of physical presence with intent to remain in a place of fixed habitation"); *Golembiewski v. City of Milwaukee*, 231 Wis.

2d 719, 605 N.W.2d 663 (1999) (defining "residence" as "personal presence at some place of abode with no present intention of definite and early removal"); *Winnebago County v. A.S.*, 120 Wis. 2d 683, 357 N.W.2d 566 (1984) (defining "residence" as being physically present in a "county" with indefinite intent to remain).

42. Based upon the above, the Court finds that it is reasonable to define "residence employee" as an employee of the insured who resides or has their legal residency in the state covered by the endorsement (in this case West Virginia). Because the policy is ambiguous and because there is a reasonable interpretation that favors coverage, this Court must adopt the interpretation of the policy that favors coverage.

43. The Court also agrees with ACC that defining the term "residence" to instead mean a person's physical home or residential property would render the coverage meaningless because ACC has established by unopposed sworn affidavit that it does not own any real estate in West Virginia, let alone any "residential" real estate.

44. The Court further finds that to construe the term "residence" to mean a person's physical home would also render the coverage provided by the endorsement illusory.

45. Under Wisconsin law, whether or not a policy provides "illusory" coverage is a question of law. *Continental Western Ins. Co. v. Reid*, 292 Wis. 2d 674, 715 N.W.2d 689 (2006). Insurance coverage is "illusory" under Wisconsin law when it defines coverage in a manner that "coverage will never actually be triggered." *Id.* Under Wisconsin law, a policy can also be deemed "illusory" if "a premium was paid for coverage which would not pay benefits under any reasonably expected set of circumstances." *Link v. General Cas. Co*, 185 Wis. 2d 395, 518 N.W.2d 261 (1994). Stated another way, coverage is illusory under Wisconsin law if "no benefits will ever be paid" or if it "will never be triggered in practice." *Ellifson v. West Bend Mut. Ins. Co.*, 312 Wis.

2d 664, 754 N.W.2d 197 (2008). Where coverage is deemed "illusory" by a court, "the policy may be reformed to meet an insured's reasonable expectations of coverage." *Reid, supra,* at p. 679.

46. In the instant case, to construe "residence employee" to somehow involve an actual physical home or residential real property would render the coverage "illusory" because it is undisputed that Air Cargo does not own or lease any "residential" property in West Virginia to which the coverage could apply.

47. Praetorian attempts to respond to these arguments by pointing out that the endorsement mentions the term "Domestic Workers" in the schedule. However, this term is also undefined. Much like the term "residence," the term "domestic" is also ambiguous. It can mean "a household servant." *See* Black's Law Dictionary (6th Ed.) at p. 484. However, it can also mean "pertaining ...to a home, a domicile, or to the place of birth, origin, creation, or transaction." *Id.* Thus, "Domestic Worker," similar to "residence employee," could reasonably be found to mean a "worker" who has their domicile in the subject state. Moreover, the only place in the three-page endorsement that mentions "Domestic Worker' is the "Schedule" section near the end but the "Schedule" does not add, exclude, or explain any coverages. This section of the endorsement is at best ambiguous and would not be understandable to an ordinary insured. In addition, ACC has submitted undisputed evidence to the Court that it does not employ any persons in West Virginia that might be categorized as "domestic workers" if that term is defined to mean cleaning or maintenance staff, and thus Praetorian's interpretation of the policy would render the coverage illusory.

48. Praetorian also argues that the endorsement contains an exclusion for "[b]odily injury arising out of the any of your business pursuits." *See* endorsement at exclusion C.1.

However, Praetorian chose once again not to define an important term, and "business pursuits" has no specific definition in the policy.

49. The Court notes that under Wisconsin law, in the context of homeowner's coverage, the term "business pursuits" has been defined as "activities evincing: 1) continuity; and 2) a profit motive." *Bartel v. Carey*, 127 Wis. 2d 310; 379 N.W.2d 864 (1985). The Court finds that these exclusions are designed to apply in the homeowner's policy context so that insureds are encouraged to obtain separate coverage for their businesses.

50. However, the Court agrees with ACC that it makes no sense to include a "business pursuits" exclusion in a policy insuring an actual business that engages in nothing but business activities, and it is difficult for the Court to fathom what type of liability claim could possibly be asserted against ACC arising out of its West Virginia operations that does not involve its business activities. The Court therefore finds that to apply this exclusion in the same manner that it has been applied to homeowner's policies under Wisconsin law would render the employers liability coverage illusory in the context of ACC's operations.

COUNT II - Simple Negligence Claim

51. With respect to Count II, Praetorian is not seeking a declaration from this Court regarding whether it has a duty to defend or indemnify ACC. Rather, Praetorian concedes that this claim is arguably covered and is instead asking this Court to rule on the merits of the simple negligence claim that was made against ACC in the underlying Tort Action.

52. ACC argues that it is unprecedented and inappropriate for Praetorian to attempt to use this declaratory judgment action as a vehicle to seek a ruling on the merits of a claim asserted in the underlying Tort Action. The Court agrees that there is no support in the law for an insurer to use a declaratory judgment as a means to attempt to raise the merits of a defense for its insured

in another case in which the insurer is not a party, and the Court finds it notable that Practorian was not able to cite to a single case from any jurisdiction where this occurred.

53. Moreover, the Court notes that under Wisconsin law:

> [a]n insurer's duty to defend is predicated on allegations in a complaint which if proved would give rise to recovery under the terms and conditions of the insurance policy. Put another way, ***the duty to defend is based upon the nature of the claim and has nothing to do with the merits of the claim.***

Wosinski v. Advance Cast Store Co., 377 Wis. 2d 596, 901 N.W. 2d 797 (2017) (citing *Elliot v. Donahue*, 169 Wis. 2d 310, 485 N.W.2d 403 (1992)) (emphasis added). Accordingly, while the Court believes that it is appropriate for it to make determinations in this case regarding Practorian's duty to defend and/or indemnify ACC, it is not appropriate for this Court to decide the merits of those claims pending before another Court.

54. Moreover, even if Practorian were correct that this Court has the power to effectuate an actual dismissal on the merits of the negligence claim in another case before a different judge, such a declaration by this Court would be of no effect because Wisconsin law is clear that the duty to defend, once triggered, remains in effect even after the dismissal of all potentially covered claims until the underlying case is fully and completely resolved, including the expiration of all possible appeal periods. *See, e.g., Anderson v. Kayser Ford, Inc.*, 386 Wis. 2d 210, 925 N.W. 2d 547 (2019). The Court finds that as a matter of law, Praetorian has a duty to defend the negligence claims in the Tort Action until final resolution, including any potential appeals.

55. In addition, this Court finds that even if it could consider the merits of the claim in another case, to make a substantive ruling now would be premature. The Supreme Court of Appeals of West Virginia has acknowledged that a decision for summary judgment before discovery has been completed must be viewed as "precipitous." *Ohio Co. Board of Education v.*

Van Buren and Firestone, Architects, Inc., 165 W.Va. 140, 144, 267 S.E.2d 440, 443 (W.Va. 1980). Ms. Chau has identified in her response brief various potential issues of fact regarding the negligence claims asserted against ACC in the Tort Action, and it would be precipitous for this Court to grant summary judgment on the merits of those claims prior to the close of discovery regarding those issues.

Accordingly, the Court does hereby DENY Praetorian's Motion for Summary Judgment. It is so ORDERED.

The Clerk is ORDERED to mail certified copies of this Order to all counsel of record addressed as follows:

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ENTER this 28th day of July, 2021.

Honorable Kenneth D. Ballard

7-28-21
Date
[illegible] copies sent to counsel of record parties other (please indicate)
certified/1st class mail fax hand delivery interdepartmental
Other direct [illegible] accomplished:
Deputy Circuit Clerk

J. Stebbins
W. Tiano
D. Parker

STATE OF WEST VIRGINIA
I, CATHY GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND STATE AFORESAID, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 28 DAY OF July 2021
Cathy Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
by S. Parker

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

PRAETORIAN INSURANCE COMPANY,
A Pennsylvania Insurance Company

Plaintiff,

Civil Action No. 20-C-800
Judge Ballard

v.

AIR CARGO CARRIERS, LLC,
a Wisconsin Limited Liability Company, *et al*,

Defendants.

ORDER GRANTING MOTION TO DISMISS COUNT II

Pending before the Court are Motions to Dismiss Count II of the Declaratory Judgment Complaint filed by Air Cargo Carriers, LLC and Virginia Chau, Administratrix of the Estate of Anh Him Ho. All parties have fully briefed the Motions including: the submission of Motion to Dismiss Count II of Plaintiff's Complaint, Answer and Affirmative Defenses, and Counterclaim of Air Cargo Carriers, LLC; Defendant Virginia Chau, Administratrix of the Estate of Anh Kim Ho's Motion to Dismiss Count II and Answer to Count I in Response to the Declaratory Judgment Complaint; Defendant Virginia Chau, Administratrix of the Estate of Anh Kim Ho's Memorandum of Law in Support of Motion to Dismiss Count II of the Declaratory Judgment Complaint; Praetorian Insurance Company's Opposition to Ms. Chau's and Air Cargo's Motions to Dismiss Count II of Praetorian's Complaint; and Defendant Virginia Chau, Administratrix of the Estate of Anh Kim Ho's Reply in Support of Motion to Dismiss Count II of the Declaratory Judgment Complaint.

For the reasons set forth below, after considering the Motions, Supporting Memorandum of Law, Opposition Brief, and Reply, the Court hereby GRANTS the Motions to Dismiss Count II of the Declaratory Judgment Complaint.

I. FINDINGS OF FACT

1. Defendants Virginia Chau, Administratrix of the Estate of Anh Kim Ho, and Air Cargo Carriers, LLC are opposing parties in a pending tort action arising out of a plane crash at Yeager Airport on May 5, 2017. That action was filed on May 3, 2019 in the Circuit Court of Kanawha County, West Virginia, Civil Action No. 19-C-450, pending before Judge Louis H. Bloom ("tort action"). Within the tort action, Virginia Chau, as Administratrix, asserts a wrongful death claim against Air Cargo Carriers, LLC pursuant to W.Va. Code §23-4-2, and alternative negligence claim against Air Cargo Carriers, LLC for failure to comply with the statutory requirements entitling Air Cargo Carriers to statutory employer immunity. The negligence claim remains pending in that tort action, and discovery is proceeding. The discovery period in that tort action is currently ongoing.

2. Praetorian Insurance Company filed a Declaratory Judgment Complaint on September 15, 2020, which is the subject of this action.

3. Count I of the Complaint seeks a ruling on the insurance coverage rights and obligations under a policy of insurance issued by Praetorian Insurance Company to Air Cargo Carriers, LLC, Policy No. AWC0500631 effective January 1, 2017, to January 1, 2018, for claims asserted by Virginia Chau, as Administratrix against Air Cargo Carriers. Count I of the Complaint is not the subject of the Motions to Dismiss and is not dismissed pursuant to this Order.

4. Count II of the Complaint seeks a declaration by this Court of the factual and legal merits of the negligence claim by Virginia Chau, Administratrix, and defense of Air Cargo Carriers asserted within Civil Action No. 19-C-450. Praetorian does not dispute that Count II in this action litigates the same issue pending in the negligence claim of the tort action.

5. Defendant Virginia Chau, Administratrix of the Estate of Anh Kim Ho filed a Motion to Dismiss Count II of the Declaratory Judgment Complaint in her initial responsive pleading. Defendant Air Cargo Carriers, LLC filed a Motion to Dismiss Count II of the Declaratory Judgment Complaint in its initial responsive pleading.

II. CONCLUSIONS OF LAW

1. The Motions to Dismiss challenge Plaintiff's standing to assert Count II. Defendants assert Count II presents no justiciable controversy between Plaintiff and Defendants. Defendants assert resolution of the merits of the negligence claim is contingent upon factual discovery ongoing in the tort action and ruling by the tort claim court. Ruling on the merits of the negligence claim are dependent on resolutions of facts by the tort court. Defendants assert there is no adverseness between Plaintiff and Defendants. The negligence claim is alleged by the Estate against Air Cargo. West Virginia is not a "direct action" state and does not permit the merits of a tort claim to be directly litigated between the injured claimant and the tortfeasor's insurer. Finally, Defendants assert the sought declaration would not resolve any controversy. Consideration by this Court of the same claim ongoing in the tort claim will not end the dispute in the tort claim and is a waste of judicial resources.

2. Praetorian admits in its opposition brief that "Praetorian issued an insurance policy to Air Cargo that arguably may cover the simple negligence claim asserted against Air Cargo in the Tort Action if that claim is not barred by the workers' compensation immunity granted to employers by W.Va. Code §23-2-6." Praetorian asserts it has filed Count II to assert a defense to Air Cargo's liability in the tort action because Air Cargo did not seek immediate dismissal of the negligence claim in the tort action. Praetorian claims "it is incomprehensible that Air Cargo has let Ms. Chau's simple negligence claim proceed in the Tort Action this long; that claim

immediately should have been dismissed in the Tort Action." Praetorian also asserts Praetorian's insurance money is at stake in Virginia Chau's negligence claim, not Air Cargo's money. Praetorian relies on its insurance contractual defense and indemnity obligations to Air Cargo as a primary basis to assert standing to directly litigate the merits of the Estate's negligence claim in Praetorian's own name and on its own behalf.

3. Plaintiff's action is filed pursuant to West Virginia's Uniform Declaratory Judgment Act, W.Va. Code §55-13-1, et seq. Pursuant to that act, this Court "shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed." W.Va. Code §55-13-1. However, this Court may "refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." W.Va. Code §55-13-6.

4. The judgment sought by Count II would not terminate the uncertainty or controversy giving rise to the proceeding. This Court's declaration for or against the matters asserted in Count II will not terminate the negligence claim in the tort action. The Court in Civil Action No. 19-C-450 would maintain jurisdiction and authority to rule on the same issue. That court would control the timing of when the matter would be addressed and whether to accept or reject this Court's ruling. A declaration on Count II in this Court would not terminate the uncertainty or controversy and could substantially increase uncertainty in the proceedings. Additionally, permitting the same issue to proceed in two courts simultaneously is a waste of judicial resources.

5. Count II seeks a declaration on the merits of the negligence tort dispute between the Estate and Air Cargo. West Virginia law applies the *lex loci delicti* choice of law rule and declares that the substantive rights between the parties in a tort action are determined by the law

of the place of injury. *Blais v. Allied Exterminating Co.*, 482 S.E.2d 550 (W.Va. 1996); and *McKinney v. Fairchild International, Inc.*, 487 S.E.2d 913 (W.Va. 1997). The plane crash which, is the subject of the negligence tort claim, occurred in West Virginia and is governed by the West Virginia wrongful death statute. Additionally, "under the *lex loci delicti* choice of law rule, West Virginia procedure applies to all cases before West Virginia courts." *McKinney v. Fairchild International, Inc.*, 487 S.E.2d 913, 923 (W.Va. 1997). "It is traditional that a forum court always applies its own procedural rules and practices, regardless of the procedure that might be employed if the case were tried at the place where the cause of action arose." *Id.* Therefore, West Virginia law will apply to the procedural and substantive analysis of Count II. Praetorian asserts that the rights and responsibilities under the Policy are to be determined by Wisconsin substantive law. However, Count II seeks no declaration of Praetorian's and Air Cargo's rights and responsibilities under the Policy. While Wisconsin substantive law applies to Count I, it does not apply to Count II.

6. The presence of a justiciable controversy in the declaratory judgment context is a matter of jurisdictional authority. *City of Martinsburg v. Berkeley City Council*, 825 S.E.2d 332, 335 (W.Va. 2019); *A.H. v. CAMC Health System, Inc.*, 2020 WL 1243608 (W.Va. 2020). "The United States Constitution provides that courts have the power only to hear "Cases" and "Controversies." U.S. Cont. art. III, §2. The doctrine of standing, which developed through case law, is designed to ensure that courts do not exceed those constitutionally circumscribed powers." *A.H. v. CAMC Health System, Inc.*, 2020 WL 1243608 (W.Va. 2020), quoting *Spokeo, Inc. v. Robbins*, 135 S.Ct. 1540, 1547 (2016). "The irreducible constitutional minimum of standing consists of the following three elements: (1) the plaintiff must have 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." *Id.* "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. Berkley City Council*, 825 S.E.2d 332, 336 (W.Va. 2019), quoting *Cox v. Amick*, 466 S.E.2d 459, 469 (W.Va. 1995)) (Cleckley, J., concurring).

7. Under West Virginia law, the following four factors should be considered to determine whether a declaratory judgment action 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). "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).

8. Count II fails to meet the requirements for a justiciable controversy in a declaratory judgment action. The substantive claims of Count II are pending in another court. A ruling by this Court on the issues raised by Count II will not resolve of the negligence claim in the tort action. The resolution of that claim will remain uncertain and contingent upon the outcome of those Court proceedings. The tort action Court may rule Air Cargo Carriers is entitled to employer's liability statutory immunity or may rule Air Cargo Carriers does not meet the statutory requirements for immunity. Either of those rulings could issue even if a contrary ruling is issued in this action.

9. 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.") *O'Neal v. Pocahontas Transp. Co.*, 129 S.E. 478, 481 (W.Va. 1925) acknowledges, "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." West Virginia recognizes resolution of a tort claim must be litigated between the injured party and tortfeasor, not directly with the indemnifying insurance carrier. West Virginia has never been a direct action claim state, and Praetorian has presented no precedence for creating direct action general tort litigation between injured plaintiffs, tortfeasors, and insurers whose liability obligations are always contingent upon the outcome of the tort litigation. Further, Praetorian has presented no precedent recognizing an insurer's contingent indemnity obligation to create adverseness among it, an injured plaintiff, and its insured to establish standing to litigate the merits of a tort claim.

Accordingly, the Court hereby GRANTS the Motions to Dismiss Count II of the Complaint for Declaratory Relief. It is so ORDERED.

The Clerk is ORDERED to mail certified copies of this Order to all counsel of record addressed as follows:

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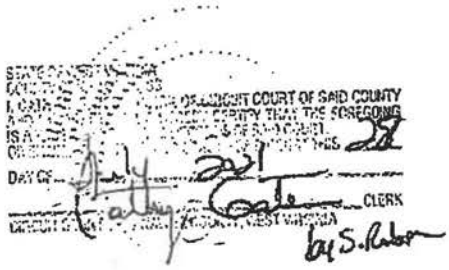
ENTER this 28th day of July, 2021.

Honorable Kenneth D. Ballard



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