IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 21-0682

PRAETORIAN INSURANCE COMPANY,
Plaintiff Below/Petitioner,

v.

AIR CARGO CARRIERS, LLC,
Defendant Below/Respondent,

and

VIRGINIA CHAU, Administratrix of the Estate of ANH KIM HO,
Defendant Below/Respondent.

(On Appeal from Civil Action No. 20-C-800, Circuit Court of Kanawha County, West Virginia)

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR[1]

Assignment of Error Number 1: The Circuit Court erred when it found that Praetorian relies exclusively on the Policy's Deliberate Intent Exclusion as its sole basis for arguing that the Policy does not provide coverage for the "deliberate intent" claim filed against Air Cargo by Ms. Chau in the Tort Action.

Assignment of Error Number 2: The Circuit Court erred when it found that W.S.A. 632.23 applies to the Policy in general and the Policy's Deliberate Intent Exclusion in particular.

Assignment of Error Number 3: The Circuit Court erred when it found that W.S.A. 632.25 applies to the Policy's Deliberate Intent Exclusion.

Assignment of Error Number 4: The Circuit Court erred when it found that the "deliberate intent" exclusion at issue in Employers Mutual Insurance Co. v. Summit Point Raceway Associates, Inc., 228 W. Va. 360, 719 S.E.2d 830 (2011), is broader than the Policy's Deliberate Intent Exclusion, thereby distinguishing the Summit Point case as being inapplicable to a proper interpretation of the Policy's Deliberate Intent Exclusion.

Assignment of Error Number 5: The Circuit Court erred when it found that the Policy's Deliberate Intent Exclusion applies only if Air Cargo intentionally causes bodily injury or acts with intent to cause or aggravate bodily injury.

Assignment of Error Number 6: The Circuit Court erred when it found that the Policy's Deliberate Intent Exclusion is ambiguous.

Assignment of Error Number 7: The Circuit Court erred when it found that the Policy's Domestic Workers Endorsement provides coverage to Air Cargo for liability regarding the death of Anh Kim Ho.

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[1] The defined terms shown in the Assignments of Error are explained in detail in the Argument below.

Assignment of Error Number 8: The Circuit Court erred when it found that the Policy's Domestic Workers Endorsement is ambiguous.

Assignment of Error Number 9: The Circuit Court erred when it found that interpreting the Policy's Domestic Workers Endorsement such that there would not be coverage for liability regarding the death of Anh Kim Ho would render the endorsement illusory.

Assignment of Error Number 10: The Circuit Court erred when it found that the Business Pursuits Exclusion contained in the Policy's Domestic Workers Endorsement renders the endorsement's coverage illusory.

Assignment of Error Number 11: The Circuit Court erred when it found that there is no support in the law for an insurance company to file a declaratory judgment action to determine, as a matter of law, whether its insured is immune from a tort claim.

Assignment of Error Number 12: The Circuit Court erred when it found that it is inappropriate for one judge presiding over a declaratory judgment action in a Circuit Court to decide whether, as a matter of law, a party is immune from a particular claim in an action pending before a different judge in the same Circuit Court.

Assignment of Error Number 13: The Circuit Court erred when it found, as a matter of law, that Praetorian has a duty to defend Air Cargo against Ms. Chau's negligence claim in the Tort Action until final resolution, including any potential appeals.

Assignment of Error Number 14: The Circuit Court erred when it found that Count II of Praetorian's Complaint seeks to resolve factual issues as to the merits of Ms. Chau's negligence claim against Air Cargo.

Assignment of Error Number 15: The Circuit Court erred when it found that a ruling by the court regarding Count II of Praetorian's Complaint would waste judicial resources because such a ruling would not bind the parties in the Tort Action, and therefore would not terminate the uncertainty or controversy giving rise to the proceedings.

Assignment of Error Number 16: The Circuit Court erred when it found that Praetorian does not have standing to seek a ruling on the question of whether Air Cargo enjoys workers' compensation immunity as to the simple negligence claim filed against it by Ms. Chau in the Tort Action.

Assignment of Error Number 17: The Circuit Court erred when it found that Count II of Praetorian's Complaint fails to meet the requirements for a justiciable controversy in a declaratory judgment action.

STATEMENT OF THE CASE

A. The Air Crash

This case concerns the death of Anh Kim Ho in a May 5, 2017 aircraft crash at Yeager Airport in Charleston, West Virginia. AR 436-437.[2] At the time of the crash, Ms. Ho was serving as the First Officer of an aircraft being piloted by Jonathan Pablo Alvarado. AR 436-437. Ms. Ho and Mr. Alvarado were employees of Air Cargo Carriers, LLC ("Air Cargo") and were operating a flight for Air Cargo within the scope of their employment at the time of the crash. AR 436-437.

B. The Policy

Praetorian issued a workers' compensation and employers liability insurance policy (Policy No. AWC0500631) to Air Cargo that was in effect on the date of the crash that resulted in Ms. Ho's death (the "Policy"). AR 265-428. Air Cargo paid the required premium for the Policy and,

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

as of the May 5, 2017 crash, had not failed to meet any other conditions required by the Policy. AR 429-430. Pursuant to the terms of the Policy and the workers' compensation requirements under West Virginia law, Praetorian paid workers' compensation funeral benefits in connection with the deaths of Ms. Ho and Mr. Alvarado under Part One of the Policy, the portion of the Policy that provides workers' compensation coverage to Air Cargo. AR 447-448; AR 298-299.

"Employers liability" coverage for Air Cargo – the coverage relevant here – is found in Part Two of the Policy. AR 299-301. Paragraph A. of Part Two of the Policy specifies that "[t]his employers liability insurance applies to bodily injury by accident or bodily injury by disease" if the bodily injury "arise[s] out of and in the course of the injured employee's employment by [Air Cargo]." AR 299. Paragraph B. of Part Two of the Policy provides that Praetorian "will pay all sums that [Air Cargo] legally must pay as damages because of bodily injury to [Air Cargo's] employees, provided the bodily injury is covered by this Employers Liability Insurance" (the "EL Insuring Agreement"). Id. Paragraph D. of Part Two of the Policy provides that Praetorian has "the right and duty to defend, at [its] expense, any claim, proceeding or suit against [Air Cargo] for damages payable by this insurance." AR 300. However, Praetorian has "no duty to defend a claim, proceeding or suit that is not covered by this insurance." Id.

Relevant here, the Policy contains a standard-form endorsement drafted by the National Council on Compensation Insurance ("NCCI"):[3] the "West Virginia Employers Liability Insurance Intentional Acts Exclusion Endorsement." AR 352. This endorsement modifies Paragraph C.5. of Part Two of the Policy to provide as follows:

[3] NCCI is a national organization that serves numerous functions associated with the workers' compensation insurance industry. It also serves as a regulatory adjunct for many of the various state regulators of workers' compensation insurance, including West Virginia. See West Virginia Insurance Bulletin Notice 7-20-2020, 2020 WL 4060170 (WV Ins. Comm. July 20, 2020).

> This insurance does not cover ... bodily injury intentionally caused or aggravated by you or which is the result of your engaging in conduct equivalent to an intentional tort, however defined, including by your deliberate intention as that term is defined by W. Va. Code § 23-4-2(d)(2).

Id. (the "Deliberate Intent Exclusion").

C. The Tort Action

On or about May 3, 2019, Virginia Chau, acting in her capacity as the Administratrix of the Estate of Anh Kim Ho and seeking to recover in tort for the death of Ms. Ho, filed Civil Action Number 19-C-450 in the Circuit Court of Kanawha County, West Virginia (the "Tort Action"), against Air Cargo and others. AR 431-446. Judge Bloom presides over the Tort Action. AR 431.

Count I of the Amended Complaint in the Tort Action states a "deliberate intent" claim against Air Cargo pursuant to W. Va. Code § 23-4-2(d)(2). AR 437-440. Alternatively, Count I of the Amended Complaint states a simple negligence claim against Air Cargo based on the theory that Air Cargo is not entitled to the workers' compensation immunity granted by W. Va. Code § 23-2-6. AR 440.

Praetorian is defending Air Cargo in the Tort Action subject to a reservation of rights. AR 449-452.

D. The Declaratory Judgment Action

On September 15, 2020, Praetorian filed the action underlying the instant appeal, Civil Action Number 20-C-800, in the Circuit Court of Kanawha County, West Virginia (the "Declaratory Judgment Action"), to resolve Praetorian's and Air Cargo's rights and obligations under the Policy. AR 1-8. Judge Ballard currently presides over the matter, but it had originally been assigned to Judge Kaufman.[4] AR 1; 715-717.

[4] Judge Kaufman resigned in March 2021. The Governor appointed Judge Ballard to fill Judge Kaufman's unexpired term in April 2021.

Count I of the Declaratory Judgment Action seeks a legal determination that the Policy does not provide coverage for the "deliberate intent" claim filed against Air Cargo in the Tort Action. AR 5-6. Count II of the Declaratory Judgment Action seeks a legal determination that Air Cargo is entitled to the protections of W. Va. Code § 23-2-6 and, therefore, cannot be found liable for the simple negligence claim stated as an alternative theory of liability in Count I of the Tort Action. AR 6-7.

1. The Motions to Dismiss Count II of Praetorian's Complaint

The responsive pleadings filed by Ms. Chau and Air Cargo in the Declaratory Judgment Action answered Count I of Praetorian's Complaint and admitted the facts necessary to grant Praetorian a declaration as to Count II of its Complaint – i.e., that Praetorian issued the Policy to Air Cargo, that Air Cargo paid the required premium for the Policy, and that the Policy was in full force and effect at the time of the May 5, 2017 air crash. AR 4, 11, 33. Yet, Ms. Chau and Air Cargo moved to dismiss Count II of Praetorian's Complaint. AR 9-25; AR 26-40. They specifically argued that the issue presented in Count II – whether Air Cargo is immune from simple negligence in connection with Ms. Ho's death pursuant to W. Va. Code § 23-2-6 – must be resolved in the Tort Action. AR 9-12; AR 31-32.

For its part, Praetorian attempted to have the immunity issue resolved in the Tort Action, before Judge Bloom. On November 24, 2020, Praetorian filed a consent motion approved by all parties to the Tort and Declaratory Judgment Actions to transfer the Declaratory Judgment Action to Judge Bloom so that both cases would be before him. AR 623. On December 8, 2020, Praetorian moved to consolidate the Tort and Declaratory Judgment Actions so that the immunity issue could be addressed by Judge Bloom. AR 624. Judge Bloom denied both motions, after which Praetorian moved for summary judgment on Count II of its Complaint in the Declaratory

Judgment Action. AR 624; 241-492. In February 2021, Praetorian moved to intervene in the Tort Action to ensure that its interest in the immunity issue would be protected in case Judge Kaufman granted Ms. Chau's and Air Cargo's motions to dismiss Count II of Praetorian's Complaint in the Declaratory Judgment Action. AR 620-663. Judge Bloom denied that motion, too, and specifically concluded that Praetorian could adequately protect its interest in the immunity issue before Judge Kaufman.[5] AR 710.

2. Praetorian's Motion for Summary Judgment

On December 30, 2020, Praetorian moved for summary judgment on both counts of its Complaint. AR 241-492.

As to Count I, Praetorian demonstrated that the "deliberate intent" claim filed against Air Cargo in the Tort Action is not covered under the Policy because it: (1) does not trigger the Policy's EL Insuring Agreement; and (2) runs afoul of the Policy's Deliberate Intent Exclusion, which clearly and unambiguously excludes coverage for all claims arising under W. Va. Code § 23-4-2(d)(2). As to Count II, Praetorian demonstrated that Air Cargo is entitled to workers' compensation immunity regarding Ms. Chau's simple negligence claim in the Tort Action. Specifically, Air Cargo purchased the Policy from Praetorian on the private market pursuant to W. Va. Code § 23-2C-15(b) and employers who purchase workers' compensation insurance on the

[5] On March 3, 2021, Praetorian filed a request in the Declaratory Judgment Action that Judge Kaufman take judicial notice, pursuant to West Virginia Rule of Evidence 201(c)(2), of proceedings that had taken place in the Tort Action. AR 617-711. This judicial notice request informed Judge Kaufman that Praetorian had moved to intervene in the Tort Action, and that it had done so solely to seek a declaration regarding Air Cargo's workers' compensation immunity from Ms. Chau's simple negligence claim. AR 617, 620-632, 635-639. It also informed Judge Kaufman that Judge Bloom had denied Praetorian's motion to intervene in the Tort Action on February 25, 2021, and that Judge Bloom had done so partly because the workers' compensation immunity issue was pending before Judge Kaufman in the Declaratory Judgment Action. AR 710. Praetorian's appeal of Judge Bloom's denial of Praetorian's motion to intervene is currently pending before this Court as Appeal No. 21-0243. AR 726-750.

private market pursuant to W. Va. Code § 23-2C-15(b) are entitled to the workers' compensation immunity protections of W. Va. Code § 23-2-6.[6] See W. Va. Code § 23-2C-19(b).

3. Judge Ballard's July 28, 2021 Orders and the Instant Appeal

Judge Ballard heard Praetorian's Motion for Summary Judgment, and Ms. Chau's and Air Cargo's Motions to Dismiss Count II of Praetorian's Complaint, at a June 29, 2021 hearing. AR 715-717. On July 28, 2021, Judge Ballard issued three orders that resolved the Declaratory Judgment Action in its entirety: (1) an order granting Praetorian's Motion to Dismiss Count 2 of a Counterclaim by Air Cargo (AR 781-785); (2) an order granting Ms. Chau's and Air Cargo's Motions to Dismiss Count II of Praetorian's Complaint (AR 786-793); and (3) an order denying Praetorian's Motion for Summary Judgment (AR 764-780).[7] It is from the last two orders that Praetorian takes the instant appeal. Praetorian timely filed its notice of appeal on August 27, 2021. AR 794-835.

SUMMARY OF ARGUMENT

As shown by the long list of Assignments of Error shown above, the Circuit Court erred in myriad ways. These many errors fly in the face of established law, common sense, and basic fairness. These rulings must not stand; they should be reversed by this Court.

With respect to its denial of summary judgment on Count I of Praetorian's Complaint, the Circuit Court went to extreme (and legally insupportable) lengths to find coverage for the "deliberate intent" claim Ms. Chau filed against Air Cargo in the Tort Action.

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[6] Moreover, the Policy actually paid workers' compensation funeral benefits in connection with the deaths of Ms. Ho and Mr. Alvarado.

[7] The Circuit Court's denial of summary judgment to Praetorian effectively granted summary judgment to Air Cargo and Ms. Chau on Count I of Praetorian's Complaint and, therefore, is an appealable order pursuant to Arnold v. Palmer, 224 W. Va. 495, 500, 686 S.E. 2d 725, 730 (2009), quoting Syl. Pt. 4 of Employer's Liab. Assurance Corp. v. Hartford Accident & Indem. Co., 151 W. Va. 1062, 158 S.E. 2d 212 (1967).

By its terms (as interpreted by this Court), the Policy does not provide coverage for that claim that Ms. Chau filed against Air Cargo in the Tort Action. The Policy's EL Insuring Agreement does not cover "deliberate intent" lawsuits, and its Deliberate Intent Exclusion clearly and unambiguously precludes coverage for that claim. The Circuit Court, however, ignored the Policy's EL Insuring Agreement altogether and manufactured a demonstrably flimsy ambiguity to find that the Deliberate Intent Exclusion does not apply. Worse, the Circuit Court concluded the Deliberate Intent Exclusion was void based upon a Wisconsin statute that does not apply to workers' compensation and employer's liability policies like the Policy. And even when it focused on a Wisconsin statute that deals with employer's liability policies, the Circuit Court misunderstood the difference between an exclusion and a condition in an insurance policy.

In addition to its inability or unwillingness to apply the clear and unambiguous language of the Policy, the Circuit Court erred by ruling that a "Domestic Workers Endorsement" to the Policy applies to provide coverage for the "deliberate intent" claim filed against Air Cargo in the Tort Action. That endorsement does not apply in the first instance because the decedent, Ms. Ho, was not a "residence employee" to whom the endorsement applies. The work Ms. Ho performed for Air Cargo also was in furtherance of Air Cargo's core business pursuit (i.e., operating a cargo airline), which triggers a clear exclusion in that endorsement.

As for its denial of summary judgment to Praetorian on Count II of its Complaint (indeed, its dismissal of Count II), the Circuit Court simply (and inappropriately) refused to hear Praetorian's plea for a ruling on Air Cargo's workers' compensation immunity from the simple negligence claim filed against it by Ms. Chau – an issue so basic that it amounts to the legal equivalent of demonstrating that water is wet.

As Praetorian explained in its summary judgment motion, Air Cargo is entitled to the protections of W. Va. Code § 23-2-6 because it purchased the Policy from Praetorian. Inexplicably, the Circuit Court refused to rule on that issue and instead ruled that Praetorian has no right to seek such relief in the Declaratory Judgment Action. Specifically, the Circuit Court wrongly concluded that Praetorian does not have standing to litigate the issue of Air Cargo's workers' compensation immunity and "deferred" to Judge Bloom despite Judge Bloom himself having "deferred" to Judge Kaufman on that issue more than five months earlier.

Praetorian has standing to seek a declaratory judgment regarding Air Cargo's workers' compensation immunity because it is Praetorian's money that is at risk in connection with the simple negligence claim made against Air Cargo in the Tort Action. Air Cargo and Ms. Chau expect Praetorian to indemnify Air Cargo up to $1 million (the Policy's limit of liability) for any negligence-related damages awarded to Ms. Chau in the Tort Action. Meanwhile, Praetorian is paying for counsel to defend Air Cargo, subject to a reservation of rights. Praetorian has a right to seek a declaration regarding Air Cargo's workers' compensation immunity based upon Praetorian's direct contractual right to defend Air Cargo. This dispute over Air Cargo's workers' compensation immunity in the Tort Action between Praetorian, on one hand, and Ms. Chau and Air Cargo, on the other hand, clearly is a justiciable controversy.

Because there are no disputes regarding the material facts, and Praetorian is entitled to judgment as a matter of law, Praetorian asks this Court to reverse the Circuit Court's July 28, 2021 Orders granting Ms. Chau's and Air Cargo's Motions to Dismiss Count II of Praetorian's Complaint and denying Praetorian's Motion for Summary Judgment, and enter judgment as a matter of law on Counts I and II of Praetorian's Complaint.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

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

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

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

ARGUMENT

I. STANDARD OF REVIEW

This Court's review of Judge Ballard's Orders is *de novo*. See Syl. Pt. 1, Findley v. State Farm Mut. Auto. Ins. Co., 213 W. Va. 80, 576 S.E. 2d 807 (2002); Syl. Pt. 2, State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W. Va. 770, 461 S.E. 2d 516 (1995).

II. THE POLICY DOES NOT PROVIDE COVERAGE FOR THE "DELIBERATE INTENT" CLAIM MADE AGAINST AIR CARGO IN THE TORT ACTION (Assignments of Error 1-10)

The Amended Complaint filed in the Tort Action states a cause of action against Air Cargo for "deliberate intent." AR 437-440. That cause of action does not trigger the Policy's EL Insuring Agreement, which extends coverage to Air Cargo for "all sums that [Air Cargo] legally must pay

as damages because of bodily injury to [Air Cargo's] employees, provided the bodily injury is covered by this Employers Liability Insurance." AR 299. Relevant here, the Policy's employer's liability coverage applies only to "bodily injury ***by accident***." Id. (emphasis added). The Deliberate Intent Exclusion further provides that the Policy's employers liability coverage does not apply to "bodily injury intentionally caused or aggravated by [Air Cargo] or which is the result of [Air Cargo] engaging in conduct equivalent to an intentional tort, however defined, ***including by [Air Cargo's] deliberate intention as that term is defined by W. Va. Code § 23-4-2(d)(2)***." AR 352 (emphasis added). Based upon the Policy's clear and unambiguous language, the Policy does not provide coverage for the "deliberate intent" claim filed against Air Cargo by Ms. Chau.

A. Choice of Law.

This Court has long held that, in resolving questions about insurance policy interpretation and application, the courts of West Virginia should apply the substantive law of the state where the insurance policy was issued. See Syl. Pt. 1, Liberty Mut. Ins. Co. v. Triangle Indus., Inc., 182 W. Va. 580, 390 S.E. 2d 562 (1990). The Policy was delivered to Air Cargo at its Milwaukee, Wisconsin headquarters. AR 268. Accordingly, this Court should apply Wisconsin substantive law to the insurance coverage issues presented by this appeal.

Although Wisconsin courts have articulated clear rules for interpreting and enforcing insurance policies, Wisconsin courts have not addressed how the Policy's EL Insuring Agreement and Deliberate Intent Exclusion apply to a "deliberate intent" claim brought under W. Va. Code § 23-4-2(d)(2). There is simply no Wisconsin law on the topic.

When faced with an issue of first impression, Wisconsin courts consider persuasive authority from other jurisdictions. See Town v. Schoepke v. Rustick, 296 Wis. 2d 471, 478, 723 N.W. 2d 770, 774 (Wis. App. 2006), *citing* Strozinsky v. School Dist. of Brown Deer, 237 Wis.

2d 19, 56, 614 N.W. 2d 443, 461 (Wis. 2000). Because Ms. Chau's "deliberate intent" claim against Air Cargo in the Tort Action is based on a cause of action that only exists by virtue of a West Virginia statute (W. Va. Code § 23-4-2(d)(2)), and because the Deliberate Intent Exclusion likewise deals specifically with claims that arise under that same statute, there is no more persuasive authority on these issues than this Court's decision in Employers' Mutual Insurance Co. v. Summit Point Raceway Associates, Inc., 228 W. Va. 360, 719 S.E.2d 830 (2011).[8] Therefore, although this Court should apply general principles of Wisconsin law regarding how to interpret and enforce insurance policies, this Court should look to its own law – and specifically Summit Point – to resolve insurance coverage issues concerning "deliberate intent" lawsuits.

B. Ms. Chau's "Deliberate Intent" Claim Against Air Cargo Is Not Covered Under the Policy (Assignment of Error 1).

Under Wisconsin law, an insured "bears the burden of showing an initial grant of coverage, and if that burden is met the burden shifts to the insurer to show that an exclusion nevertheless precludes coverage." Day v. Allstate Indem. Co., 332 Wis. 2d 571, 584, 798 N.W.2d 199, 206 (Wis. 2011). If the language of an insurance policy is clear and unambiguous, it will be applied as written, giving the words contained therein their plain and ordinary meaning. This applies to exclusions as well as other policy provisions. See Marks v. Houston Cas. Co., 363 Wis. 2d 505, 521-522, 866 N.W. 2d 393, 401 (Wis. App. 2015); Whirlpool Corp. v. Ziebert, 197 Wis. 2d 144, 152, 539 N.W. 2d 883, 886 (Wis. 1995). Although exclusions are to be narrowly construed in favor of coverage, "the principle of construing exclusions narrowly does not allow a court to

[8] At least one court outside West Virginia has found that West Virginia law is controlling when asked to deal with insurance coverage matters concerning "deliberate intent" lawsuits brought pursuant to W. Va. Code § 23-4-2(d)(2). See Zurich Am. Ins. Co. v. Cabot Oil & Gas Corp., 4:14-cv-2735, 2015 WL 5604068, at *4-6 (SD. Tex. Sept. 23, 2015). Relying principally on Summit Point, that court found there was no coverage under a workers' compensation and employer's liability insurance policy regarding a "deliberate intent" cause of action because that policy contained the same exclusion at issue in the instant matter.

completely eviscerate an exclusion which is clear from the face of the policy. Rules of construction cannot be used to rewrite the clear and precise language of a contract." Id.

1. Ms. Chau's "Deliberate Intent" Claim Against Air Cargo Does Not Trigger the Policy's Employers Liability Coverage.

As noted above, the Policy's EL Insuring Agreement applies only to "bodily injury by accident." See AR 299. In Summit Point, this Court held that an insuring agreement identical to the Policy's EL Insuring Agreement did not provide coverage for a "deliberate intent" claim pursuant to W. Va. Code § 23-4-2(d)(2)(ii).[9] 228 W. Va. at 372, 719 S.E.2d at 842 ("Nothing in the plain language quoted above leads to a reasonable conclusion that deliberate intent coverage is included in this policy."). Accordingly, pursuant to Summit Point, the "deliberate intent" claim asserted against Air Cargo in the Tort Action does not trigger the Policy's employer's liability coverage in the first instance.

Under Wisconsin law, it is Air Cargo's (and/or Ms. Chau's) burden to prove that the "deliberate intent" claim filed against Air Cargo in the Tort Action triggers the Policy's employer's liability coverage. Although Praetorian consistently has argued it does not,[10] Air Cargo (and Ms. Chau) did not make any effort to meet their burden. And the Circuit Court completely ignored the issue. See AR 768 (stating, incorrectly, that Praetorian relied "exclusively" upon the Policy's Deliberate Intent Exclusion as its basis for arguing that there is no coverage under the Policy for the "deliberate intent" action filed against Air Cargo in the Tort Action). Because Air Cargo and Ms. Chau never responded to Praetorian's argument that the "deliberate intent" claim did not trigger the Policy's employer's liability coverage, the Circuit Court should have granted summary

[9] This was the prior version of what is now W. Va. Code § 23-4-2(d)(2)(B).
[10] See AR 5; AR 254.

judgment to Praetorian on Count I of its Complaint for that reason alone. It was clear error for the Circuit Court not to do so.

2. The Deliberate Intent Exclusion Bars Coverage for the "Deliberate Intent" Claim Against Air Cargo (Assignments of Error 4-6).

The Policy's Deliberate Intent Exclusion provides that "[t]his insurance does not cover ... bodily injury intentionally caused or aggravated by you or which is the result of your engaging in conduct equivalent to an intentional tort, however defined, including by your deliberate intention as that term is defined by W. Va. Code § 23-4-2(d)(2)." AR 352. This language clearly and unambiguously excludes coverage for ***all*** claims brought pursuant to W. Va. Code § 23-4-2(d)(2), including the one Ms. Chau has made against Air Cargo in the Tort Action pursuant to W. Va. Code § 23-4-2(d)(2)(B).

This conclusion is consistent with this Court's ruling in Summit Point, in which this Court addressed an exclusion to a workers' compensation/employer's liability policy providing that the policy's employer's liability coverage did not apply to:

> 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. at 372, 719 S.E.2d at 842 (emphasis added). Regarding this endorsement, this Court stated: "The above-quoted exclusion was conspicuous, plain, clear, and obvious in excluding coverage for deliberate intent actions." Id. at 373, 719 S.E.2d at 843.

The Policy's Deliberate Intent Exclusion is functionally identical to the exclusion at issue in Summit Point. Because Ms. Chau has sued Air Cargo for violating the very statute cited in the Deliberate Intent Exclusion, and because the Policy's Deliberate Intent Exclusion is "conspicuous,

plain, clear, and obvious in excluding coverage for deliberate intent actions,"[11] the Policy does not provide coverage for the "deliberate intent" claim filed against Air Cargo in the Tort Action.

Ignoring the Deliberate Intent Exclusion's clear and unambiguous application, the Circuit Court concluded that it applies only to bodily injury caused by Air Cargo's intentional misconduct. AR 770-771. In other words, the Circuit Court held that the Deliberate Intent Exclusion applies only to claims brought under W. Va. Code § 23-4-2(d)(2)(A), not to claims brought under W. Va. Code § 23-4-2(d)(2)(B). AR 772. To reach this perplexing conclusion, the Circuit Court not only failed to follow (very) basic grammar rules, it violated Wisconsin and West Virginia law regarding the proper interpretation of insurance policy language.

Again, the Policy's Deliberate Intent Exclusion states that the Policy does not cover:

> bodily injury intentionally caused or aggravated by you ***or*** which is the result of your engaging in conduct equivalent to an intentional tort, however defined, including by your deliberate intention as that term is defined by W. Va. Code § 23-4-2(d)(2).

AR 352 (emphasis added). Under Wisconsin and West Virginia law, the use of the word "or" in an insurance policy is plain and unambiguous: it is a connector of alternative choices in a series; in grammatical terms, it is a disjunctive. See Hull v. State Farm Mut. Auto. Ins. Co., 222 Wis. 2d 627, 638, 586 N.W. 2d 863, 867 (Wis. 1998); Alexander v. State Auto Mut. Ins. Co., 187 W. Va. 72, 78-79, 415 S.E. 2d 618, 624-625 (1992). So, the Policy's Deliberate Intent Exclusion applies to bodily injury: (1) "intentionally caused or aggravated by" Air Cargo; ***or*** (2) which is the result of Air Cargo "engaging in conduct equivalent to an intentional tort, however defined, including [Air Cargo's] deliberate intention as that term is defined by W. Va. Code § 23-4-2(d)(2)." The "deliberate intent" claim filed against Air Cargo in the Tort Action falls within this latter category of claims to which the Deliberate Intent Exclusion applies.

[11] Summit Point, 228 W. Va. at 373, 719 S.E.2d at 843.

To find the Deliberate Intent Exclusion ambiguous, the Circuit Court posited 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)[.]" AR 772. That reading of the Deliberate Intent Exclusion is anything but reasonable. The exclusion expressly states that the term "intentional tort" as used in the exclusion includes "deliberate intention as that term is defined by W. Va. Code § 23-4-2(d)(2)." The exclusion does not limit its application to W. Va. Code § 23-4-2(d)(2)(A) or (B).

Applying elementary grammar rules and the proper interpretation of the word "or" as recognized under both Wisconsin and West Virginia law, the Deliberate Intent Exclusion clearly and unambiguously excludes coverage for all claims made under W. Va. Code § 23-4-2(d)(2), including "deliberate intent" claims brought pursuant to W. Va. Code § 23-4-2(d)(2)(B). The Circuit Court clearly erred by finding otherwise.

3. The Policy's Deliberate Intent Exclusion is Not Void Under W.S.A. 632.23 (Assignment of Error 2).

In addition to its blatantly misreading the Policy's Deliberate Intent Exclusion, the Circuit Court found that the exclusion is void based upon W.S.A. 632.23. W.S.A. 632.23, entitled "Prohibited exclusions in aircraft insurance policies," states that:

> 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.

As explained below, the Circuit Court erred in concluding that W.S.A. 632.23 applied to the Deliberate Intent Exclusion because: (1) the Policy is not subject to W.S.A. 632.23; and (2) even if it was, the Deliberate Intent Exclusion does not exclude or deny coverage based upon the operation of an aircraft in violation of any federal, state, or local law, regulation, or ordinance.

a. W.S.A. 632.23 Does Not Apply to the Policy.

The premise of the Circuit Court's conclusion that the Deliberate Intent Exclusion is void under Wisconsin law is that W.S.A. 632.23 applies to the Policy. Under Wisconsin law, statutory interpretation begins with the language of the statute. See State v. Dorsey, 379 Wis. 2d 386, 405, 906 N.W. 2d 158, 168 (Wis. 2018). By its terms, W.S.A. 632.23 applies only to insurance policies that cover liability "arising out of the ownership, maintenance or use of an aircraft." Whether W.S.A. 632.23 applies to the Policy – a workers' compensation and employer's liability insurance policy – therefore depends on whether the Policy is a "policy covering any liability arising out of the ownership, maintenance or use of an aircraft" within the meaning of W.S.A. 632.23. It is not.

As W.S.A. § 632.23 recognizes, the insuring agreements in aircraft liability insurance policies provide coverage for liability "arising out of the ownership, maintenance or use of [an] aircraft." Wiesmueller v. Interstate Fire & Cas. Co., 568 F. 2d 40, fn. 7 (7th Cir. 1978); see also Littrall v. Indemnity Ins. Co. of N. Am., 300 F. 2d 340 (7th Cir. 1962); Gross v. Lloyds of London Ins. Co., 121 Wis. 2d 78, 358 N.W. 2d 266 (Wis. 1984). The Policy is a workers' compensation and employer's liability insurance policy that provides coverage for: (1) "the benefits required of you by the workers compensation law"; and (2) "all sums that you legally must pay as damages because of bodily injury to your employees, provided the bodily injury is covered by this Employers Liability Insurance." AR 298-299. The Policy's insuring agreements do not tie their application to liability "arising out of the ownership, maintenance or use of [an] aircraft." The Policy simply is not the type of insurance policy to which W.S.A. 632.23 applies.

Despite this obvious conclusion, the Circuit Court attempted to jam the very round peg that is the Policy into the very square hole that is W.S.A. 632.23 based on the fact that Ms. Ho died while she and Mr. Alvarado were operating an aircraft for Air Cargo. AR 768. This reasoning is

nonsensical. The fact that Ms. Ho died in connection with an aircraft accident is not what triggers coverage under the Policy; her death instead triggered the Policy's workers' compensation coverage because it occurred while she was acting in the course and scope of her employment with Air Cargo. Put differently, coverage under the Policy is available for covered injuries to Air Cargo's employees that occur in the course and scope of the employment with Air Cargo regardless of whether those injuries arise out of the ownership, maintenance or use of an aircraft.[12] The circumstances surrounding Ms. Ho's death do not – and, indeed, cannot – convert the Policy from a workers' compensation/employer's liability policy into an "aircraft insurance policy" governed by W.S.A. 632.23.[13]

Wisconsin law further demonstrates the chasm in the Circuit Court's logic. Each section of Chapter 632 of the W.S.A. identifies a specific type of insurance policy to which each statute applies. W.S.A. 632.23 is entitled: "Prohibited exclusions in aircraft insurance policies." W.S.A. 632.32 is entitled: "Provisions of motor vehicle insurance policies." Different sections of the W.S.A. address workers' compensation policies and employer's liability insurance policies. See W.S.A. 102.31, entitled: ""Worker's compensation insurance; policy regulations."; and W.S.A. 632.25, entitled: "Limited effect of conditions in employer's liability policies." W.S.A. 102.31

[12] For example, Air Cargo employs clerical office workers, and carries workers' compensation and employers liability insurance regarding its employment of such workers. AR 290. If any of Air Cargo's clerical office workers suffered covered injuries while in the course and scope of their employment for Air Cargo, the Policy would provide coverage for those injuries.

[13] The Circuit Court would have a more plausible basis for applying W.S.A. 632.23 to the Policy if the Policy contained an endorsement that explicitly provided insurance for liability arising out of the ownership, maintenance or use of an aircraft. In Rocker v. USAA Cas. Ins. Co., 289 Wis. 2d 294, 711 N.W. 2d 634 (Wis. 2006), the Supreme Court of Wisconsin applied W.S.A. 632.32 (governing motor vehicle insurance) to a commercial general liability insurance policy because the policy contained an explicit endorsement that provided a limited form of motor vehicle insurance. Here, though, the Policy does not include an endorsement providing coverage for liability arising out of the ownership, maintenance, or use of an aircraft.

(worker's compensation insurance) and W.S.A. 632.25 (employer's liability insurance) apply to the Policy. W.S.A. 632.23 (aircraft insurance) does not.

Although the titles of Wisconsin statutes are not part of the statutes,[14] they may be used in the interpretation of a statute. See State v. Dorsey, 379 Wis. 2d at 409, 906 N.W. 2d at 170. The titles shown above for each statute clarify which type of insurance policy is regulated by each statute. Only W.S.A. 102.31 and W.S.A. 632.25 even potentially apply to the Policy. The titles above also are consistent with the regulations under which the Wisconsin Commissioner of Insurance oversees the insurance industry, which similarly categorize insurance policies. Specifically, Wisconsin Admin. Code § Ins. 6.75, entitled "Classifications of insurance," states (in relevant part): "This rule defines and delimits lines and classes of insurance for any purposes within the commissioner's regulatory power unless the language or context of a statute or rule otherwise provides." The rule goes on to categorize fifteen (15) different types of insurance policies, each regulated in a different way. Subcategory (k) deals with worker's compensation insurance, including employers liability insurance when they are written in the same policy (as is true with the Policy here). Subcategory (o) deals with aircraft insurance.

For these reasons, the Circuit Court erred in concluding that W.S.A. 632.23 applies to the Policy.

b. W.S.A. 632.23 Does Not apply to the Policy's Deliberate Intent Exclusion.

Even if it applied to the Policy generally (which it does not), W.S.A. 632.23 does not apply to the Policy's Deliberate Intent Exclusion.

[14] See W.S.A. 990.0001(6).

By its terms, W.S.A. 632.23 prohibits only an exclusion or denial of coverage "because the aircraft is operated in violation of air regulation."[15] As noted above, the Policy's Deliberate Intent Exclusion is a standard-form exclusion drafted by NCCI that applies to workers' compensation and employer's liability policies issued to cover employers in West Virginia. It is drafted to apply to policies issued to all types of employers in all types of industries, not only employers whose operations involve aircraft operations. Indeed, the exclusion does not mention air regulations. It instead states that "[t]his insurance does not cover ... bodily injury intentionally caused or aggravated by you or which is the result of your engaging in conduct equivalent to an intentional tort, however defined, including by your deliberate intention as that term is defined by W. Va. Code § 23-4-2(d)(2)." AR 352. The Deliberate Intent Exclusion bars coverage for an entire category of claims – "deliberate intent claims" under W. Va. Code § 23-4-2(d)(2) – regardless of the facts giving rise to those claims.

Again, the Circuit Court sought to justify its misreading of W.S.A. 632.23 by focusing on the allegations of Ms. Chau's "deliberate intent" claim against Air Cargo in the Tort Action. That claim alleges Air Cargo violated federal air regulations in its operation of the aircraft in which Ms. Ho died – an allegation which is meant to satisfy essential elements of the "five part test" under W. Va. Code § 23-4-2(d)(2)(B). But W.S.A. 632.23's application does not depend on the allegations of a claim; its application instead turns on the language of an exclusion or denial of coverage in an insurance policy. Because the Deliberate Intent Exclusion's application does not depend on the operation of an aircraft in violation of air regulations, the Circuit Court erred when it concluded that W.S.A. 632.23 applies to the Deliberate Intent Exclusion.

[15] Such exclusions had been part of aircraft insurance policies decades ago. See Tison v. Fidelity & Cas. Co. of New York, 181 So. 2d 835, fn.2 (Ct. App. La. 1965). Various states (including Wisconsin, through W.S.A. 632.23) have regulated such provisions out of aircraft liability insurance policies.

4. W.S.A. 632.25 Also Does Not Apply to the Deliberate Intent Exclusion (Assignment of Error 3).

The Circuit Court found that W.S.A. 632.25 also applies to prevent Praetorian from relying upon the Deliberate Intent Exclusion. AR 768-769. In fact, based on W.S.A. 632.25, the Circuit Court went further and ordered that, "in the event it is determined that [Air Cargo] failed to comply with rules concerning the safety of persons, Praetorian shall be responsible to the Estate within the policy insurance limits of coverage." AR 769. This was clear error.

W.S.A. 632.25, entitled "Limited effect of conditions in employer's liability policies," states:

> 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 a breach by the insured the insurer shall nevertheless be responsible to the injured person under s. 632.24 as if the condition had not been breached, but shall be subrogated to the injured person's claim against the insured and be entitled to reimbursement by the latter.

(Emphasis added.) Although W.S.A. 632.25 at least generally deals with a type of insurance coverage that is actually at issue (employer's liability insurance), it does not apply here.

In Bortz v. Merriman Mutual Insurance Co., 92 Wis. 2d 865, 874, 286 N.W. 2d 16, 21 (Wis. App. 1979), the court addressed the application of W.S.A. 632.25 and held that it regulates conditions, not exclusions.[16] The Policy's Deliberate Intent Exclusion is just that – an exclusion. It was added to the Policy as part of the "West Virginia Employers Liability Insurance Intentional Act ***Exclusion*** Endorsement" that replaced "Part Two – Employers Liability Insurance, C. – ***Exclusions***, 5." AR 352 (emphasis added). The Policy does not include any conditions that

[16] In its Order denying Praetorian's motion for summary judgment, the Circuit Court failed to distinguish between ***conditions*** in an insurance policy (to which W.S.A. 632.25 might apply) and ***exclusions*** in an insurance policy (to which W.S.A. 632.25 does not apply). AR 768-769.

require compliance by the insured with rules concerning the safety of persons.[17] Pursuant to Bortz, W.S.A. 632.25 does not apply to the Policy's Deliberate Intent Exclusion. It was error for the Circuit Court to conclude otherwise.

C. The Policy's Domestic Workers Endorsement Does Not Apply to Ms. Ho (Assignments of Error 7-10).

As far as it stretched to apply W.S.A. 632.23 and 632.25 to the Deliberate Intent Exclusion, the Circuit Court stretched even farther to conclude that coverage is available for the "deliberate intent" claim Ms. Chau filed against Air Cargo in the Tort Action based upon the Policy's "Voluntary Compensation And Employers Liability Coverage For Residence Employees" Endorsement (the "Domestic Workers Endorsement"). AR 773-778.

The Domestic Workers Endorsement extends workers' compensation and employer's liability coverage to Air Cargo's "residence employees." AR 306. The Circuit Court concluded that the term "residence employee" was ambiguous and must be construed against Praetorian because it is not defined in the Policy. AR 774-775. The Circuit Court reached this conclusion by dissecting the single term "residence employee" into two words: "residence" and "employee." AR 775-776. According to the Circuit Court, the term "residence" might refer to the legal state of residence of the employee in question rather than to a residence in which a domestic worker would work. AR 775-776.

As explained below, there is no reasonable interpretation of the Domestic Workers Endorsement that supports its application to Ms. Ho, a certified pilot and flight crew officer for Air Cargo. Moreover, the employer's liability coverage available under the Domestic Workers Endorsement does not apply to "[b]odily injury arising out of any of [Air Cargo's] business

[17] Part Six of the Policy details the Policy's "Conditions." AR 303. There are five conditions in the Conditions section of the Policy. None of them requires compliance by the insured with rules concerning the safety of persons.

pursuits" (the "Business Pursuits Exclusion").[18] AR 306. Accordingly, whether it is because it does not apply to Ms. Ho in the first instance or because this claim triggers a clear exclusion, the Domestic Workers Endorsement does not provide coverage for the "deliberate intent" claim filed against Air Cargo by Ms. Chau.

1. As Used In the Domestic Workers Endorsement, "Residence Employee" Means Full-Time and Part-Time Domestic Workers.

Under Wisconsin law, the meaning of any particular provision of an insurance contract is to be ascertained with reference to the insurance contract as a whole. Folkman v. Quamme, 264 Wis. 2d 617, 634-635, 665 N.W. 2d, 857, 866 (Wis. 2003). Insurance policy language is ambiguous only if it is subject to more than one reasonable interpretation. Westphal v. Farmers Ins. Exch., 266 Wis. 2d 569, 583, 669 N.W. 2d 166, 173 (Wis. App. 2003). The fact that a term is undefined does not automatically create an ambiguity that must be construed against an insurer. Acuity v. Bagadia, 310 Wis. 2d 197, 208, 750 N.W. 2d 817, 822 (Wis. 2008). Rather, as even Air Cargo acknowledged below,[19] undefined insurance policy terms are afforded their ordinary meaning. Id. Applying these interpretive frameworks here and reading the term "residence employee" against the balance of the Domestic Workers Endorsement confirms that the term "residence employee" means full-time and part-time domestic workers.

The most compelling evidence that supports interpreting "residence employee" to mean full-time and part-time domestic workers can be found in the Domestic Workers Endorsement itself. Specifically, the endorsement's final page includes a Schedule within which there is a heading, in bold, titled "**Residence Employees.**" AR 308. Under that heading, there are two

[18] The Domestic Workers Endorsement also contains Exclusion D. 2 (as to workers' compensation coverage) and Exclusion C. 2 (as to employer's liability coverage), both of which exclude coverage regarding "[b]odily injury intentionally caused or aggravated by you."

[19] AR 531.

items: "Domestic Workers – Residences – Full-Time" and "Domestic Workers – Residences – Part-Time." These phrases define what the Domestic Workers Endorsement means when it uses the term "residence employee," and they are clear and unambiguous: "residence employee" refers to domestic workers who provide domestic services in residences, both on a full-time and on a part-time basis.

The presence of the Business Pursuits Exclusion in the Domestic Worker Endorsement further supports interpreting "residence employee" to mean only full-time and part-time domestic workers.

It is fundamental Wisconsin insurance law that insurance policies cannot be interpreted in ways that either render their terms "mere surplusage" or read terms out of the policy. Day, 332 Wis. 2d at 585, 798 N.W.2d at 206. The Circuit Court's interpretation of the Domestic Workers Endorsement does both. If the Circuit Court is correct that the term "residence" in "residence employee" refers simply to where an Air Cargo employee lives, then the Domestic Workers Endorsement would provide coverage for all of Air Cargo's employees and there would be no need for the remainder of the Policy. Interpreting "residence employee" to mean all of Air Cargo's employees (including those whose jobs are in furtherance of Air Cargo's core business pursuit operating a cargo airline) also reads the Business Pursuits Exclusion out of the Domestic Workers Endorsement. The only interpretation of the Domestic Workers Endorsement that harmonizes the coverage it provides with the balance of the Policy and the Business Pursuits Exclusion is that the endorsement is intended to extend workers' compensation and employer's liability coverage only to domestic workers who work in residences, not workers who further Air Cargo's business pursuits.

Although the language of the Domestic Worker Endorsement alone demonstrates the flaw in the Circuit Court's interpretation of "residence employee," this conclusion is further supported by how employees are classified for workers' compensation purposes under the system developed by the NCCI. NCCI uses codes to classify employees corresponding to job function.[20] AR 592-609. NCCI classifies full- and part-time domestic workers using two codes: 0913P ("Domestic Workers – Residences – Full time"); and 0908P ("Domestic Workers – Residences – Part time"). AR 593. NCCI uses separate codes for aviation workers, two of which are: 7403 ("Aviation – Airport or Heliport Operator – All Employees & Drivers"); and 7405N ("Aviation – Air Carrier – Scheduled, Commuter, or Supplemental – Flying Crew"). AR 604. These aviation-specific codes are identified on the portion of the Policy that details the premium charged to Air Cargo for its West Virginia operations, based on the types of employees who work for Air Cargo in West Virginia. The second code – 7405N – applies to Ms. Ho as a flight crew member. AR 288.

2. The Domestic Worker Endorsement's "Business Pursuits" Exclusion Bars Coverage for Ms. Chau's "Deliberate Intent" Claim Against Air Cargo.

Based on the foregoing, Ms. Ho was not a "residence employee" within the meaning of the Domestic Workers Endorsement. But even assuming, *arguendo*, that she was, the Business Pursuits Exclusion provides that the endorsement's coverage "does not apply to: 1. [b]odily injury arising out of any of your business pursuits." AR 306-307. It is undisputed that Ms. Ho's death arose out of Air Cargo's core business pursuit: the operation of a cargo airline. Therefore, the Business Pursuits Exclusion undoubtedly applies.

[20] AR 592-609 is a copy of a description of the West Virginia Assigned Risk Plan that is published by the West Virginia Offices of the Insurance Commissioner at: https://www.wvinsurance.gov/Workers-Compensation-Copy-2/ItemId/6014. AR 592-609 also contains a full description of all the NCCI worker classification codes, a description of what types of workers are included in each code, and the workers' compensation premium rate for covering each type of worker.

The Circuit Court did not substantially address the Business Pursuits Exclusion's application. Instead, the Circuit Court concluded that the exclusion rendered coverage under the Domestic Worker Endorsement illusory. AR 778. The Circuit Court's conclusion is understandable considering the faulty premise upon which it is based – i.e., that "residence employee" means all of Air Cargo's employees. As explained above, however, that premise is incorrect. The term "residence employee" as used in the Domestic Worker Endorsement refers to full-time or part-time employees who perform domestic services. Reading the Business Pursuits Exclusion against the backdrop of the correct interpretation of the term "residence employee" confirms that the exclusion does not render the endorsement's coverage illusory.

3. The Coverage Provided by the Domestic Workers Endorsement is Not Illusory.

Despite the language of the Domestic Workers Endorsement confirming that the term "residence employee" means full-time and part-time domestic workers, the Circuit Court offered two additional reasons for its conclusion otherwise. First, the Circuit Court found that the term "residence employee," as used in the Domestic Workers Endorsement, cannot mean only domestic workers because "Air Cargo does not own any real estate at all in West Virginia, let alone any 'residential' real estate." AR 776. Second, the Circuit Court found that "[t]o construe the term 'residence' to mean a person's physical home would also render the coverage provided by the endorsement illusory." Id. The Circuit Court clearly erred in this regard.

The Circuit Court's ruling ignores a specific, fundamental aspect of the Domestic Worker Endorsement: the additional coverage provided by the endorsement is voluntary. Indeed, the formal name of the Domestic Worker Endorsement is "***Voluntary*** Compensation And Employers Liability Coverage For Residence Employees" Endorsement. AR 773-778 (emphasis added). The voluntary nature of the coverage provided by the Domestic Workers Endorsement recognizes that

most domestic workers are not entitled to workers' compensation benefits under state workers' compensation laws, including West Virginia's. *See* W. Va. Code § 23-2-1(b)(1); C.S.R. § 85-8-4.3. But employers – like Air Cargo did here – can choose to provide workers' compensation benefits for their domestic workers by adding such coverage to their workers' compensation and employer's liability insurance policies. The fact that Air Cargo voluntarily chose to purchase such coverage despite its claim that such coverage was unnecessary because Air Cargo does not own any real estate in West Virginia speaks more to Air Cargo's insurance purchasing decisions than it does to what coverage the Policy provides.

Regardless, the fact that the Domestic Workers Endorsement does not provide coverage for Ms. Chau's "deliberate intent" claim against Air Cargo does not render the endorsement's coverage illusory. Under Wisconsin law, insurance coverage is illusory only if the policy language defines coverage in a manner such that coverage can ***never*** be triggered. See Marks, supra, 363 Wis. 2d at 523, 866 N.W. 2d at 402. Air Cargo easily could have hired workers who would be covered by the Domestic Workers Endorsement. Had Air Cargo done so, then any such employees potentially would have been covered under the Domestic Workers Endorsement.

III. THE CIRCUIT COURT ERRED BY DISMISSING COUNT II OF PRAETORIAN'S COMPLAINT (Assignments of Error 11-17).

Praetorian has asked two separate judges of the Circuit Court of Kanawha County, West Virginia to find that, because Air Cargo purchased workers' compensation insurance from Praetorian that paid funeral benefits as to Ms. Ho, Air Cargo is immune from simple negligence in connection with Ms. Ho's death pursuant to W. Va. Code § 23-2-6. This is a purely legal issue so simple and straightforward that no reasonable judge should refuse to resolve it. Yet, both have. Hence, Praetorian must ask this Court to correct those errors by the Circuit Court.

As explained in Praetorian's summary judgment motion (and as admitted by Air Cargo and Ms. Chau),[21] Air Cargo purchased the Policy from Praetorian pursuant to W. Va. Code § 23-2C-15(b). W. Va. Code § 23-2C-15(b) provides for the purchase of private workers' compensation insurance policies by employers in the wake of the State of West Virginia's move from having a monopolistic, State-run workers' compensation system to an open, private market for the purchase of workers' compensation insurance. Pursuant to W. Va. Code § 23-2C-19(b), employers who purchase workers' compensation insurance on the private market pursuant to W. Va. Code § 23-2C-15(b) are entitled to the protections of W. Va. Code § 23-2-6, which provides employers with immunity from precisely the type of simple negligence claim that Ms. Chau has brought (in the alternative) against Air Cargo in the Tort Action. Moreover, because the Policy was in effect at the time of Ms. Ho's death, Praetorian paid funeral benefits in connection with Ms. Ho's death. AR 429-430; 447-448. Hence, Air Cargo is immune from the simple negligence claim filed against it by Ms. Chau. There is no reasonable argument to the contrary.[22]

Given this irrefutable logic, the simple negligence claim that Ms. Chau pled against Air Cargo in the Tort Action should have been dismissed immediately after that lawsuit was filed. It was not, and it has lingered in the Tort Action for more than two years.

The presence of the simple negligence claim against Air Cargo in the Tort Action has very real and significant negative consequences for Praetorian. Praetorian is defending Air Cargo in the Tort Action (subject to a reservation of rights) solely because of the presence of Ms. Chau's simple negligence claim. AR 449-452. Moreover, Air Cargo and Ms. Chau expect Praetorian to

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[21] AR 4, 11, 33.

[22] Ms. Chau's argument why W. Va Code § 23-2-6 does not apply to Air Cargo, based on inapplicable provisions of the West Virginia Code, can be found at AR 551-554. Praetorian's Memorandum of Law and Reply in support of its Motion for Summary Judgment (AR 256-261; 585-589) demonstrate why Ms. Chau's argument lacks merit. There is no doubt under the proper reading of West Virginia law that Air Cargo is immune from Ms. Chau's simple negligence claim.

indemnify Air Cargo for any judgment rendered against it in connection with the simple negligence claim filed against it by Ms. Chau up to the Policy's $1 million limit of liability.

To protect itself from Air Cargo's failure – or reluctance – to have the issue of its workers' compensation immunity resolved in the Tort Action, Praetorian sought to have that issue decided itself. Praetorian even tried to have the issue resolved by the judge presiding over the Tort Action, Judge Bloom. Judge Bloom denied Praetorian's efforts at every turn, ultimately concluding that Praetorian could adequately protect its interest in the immunity issue in the Declaratory Judgment Action. AR 624, 710. Unfortunately, the Declaratory Judgment Action offered Praetorian no sanctuary: Judge Ballard chose to dismiss Count II of Praetorian's Complaint, finding that: (1) Praetorian has no standing to seek a ruling regarding Air Cargo's workers' compensation immunity; (2) Praetorian's Complaint seeking such a ruling does not present a justiciable controversy; and (3) the immunity issue must be "deferred" to Judge Bloom in the Tort Action (an action in which Praetorian is not allowed to participate as a party).

As shown below, these rulings were clearly erroneous, and cannot stand.

A. Praetorian Has Standing to Seek a Declaratory Judgment Regarding Air Cargo's Workers' Compensation Immunity from Ms. Chau's Simple Negligence Claim (Assignments of Error 11 & 16).

The concept of standing generally was addressed in Syllabus Point 5 of Findley, supra:

> Standing is comprised of three elements: First, the party attempting to establish standing must have suffered an "injury-in-fact"--an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct forming the basis of the lawsuit. Third, it must be likely that the injury will be redressed through a favorable decision of the court.

Each element is present here.

Injury in Fact. The Policy provides that Praetorian has the "right and duty to defend ... any claim, proceeding or suit against [Air Cargo] for damages payable by this insurance." AR 300. Praetorian also is obligated to "pay all sums that [Air Cargo] legally must pay as damages because of bodily injury to [Air Cargo's] employees, provided the bodily injury is covered by this Employers Liability Insurance." AR 299. Praetorian is directly and adversely affected by Air Cargo's inaction: as noted above, Praetorian currently is providing Air Cargo with a legal defense in the Tort Action (under a reservation of rights) due to the presence of the simple negligence claim, and Ms. Chau and Air Cargo expect Praetorian to fund up to $1 million in connection with any damages awarded against Air Cargo for simple negligence. AR 449-452. These injuries-in-fact – the current expense of defending Air Cargo combined with the lingering threat of an illegitimate simple negligence judgment against Air Cargo – are concrete and particularized, actual and imminent.

Causal Connection. Air Cargo purchased the Policy from Praetorian pursuant to W. Va. Code § 23-2C-15(b). Indeed, Ms. Chau and Air Cargo admitted in their responsive pleadings in the Declaratory Judgment Action that Air Cargo had – and paid the premium for – a valid, enforceable workers' compensation insurance policy to provide workers' compensation benefits in connection with Ms. Ho's death. AR 4, 11, 33. According to W. Va. Code § 23-2C-19(b), employers who purchase workers' compensation insurance on the private market pursuant to W. Va. Code § 23-2C-15(b) are entitled to the protections of W. Va. Code § 23-2-6, including immunity from precisely the type of simple negligence claim that Ms. Chau has brought against Air Cargo in the Tort Action. The Policy's mere existence therefore makes Air Cargo immune from Ms. Chau's simple negligence claim. Simply stated, there is no legal validity to Ms. Chau's simple negligence claim against Air Cargo in the Tort Action.

Incredibly, for more than two years before Judge Ballard issued his Orders which are the subject of this appeal, the purely legal issue of Air Cargo's workers' compensation immunity remained unresolved in the Tort Action despite it being apparent from the face of Ms. Chau's original and amended complaints that her simple negligence claim against Air Cargo is impermissible as a matter of law based upon W. Va. Code § 23-2-6. Consequently, because the Policy does not provide coverage for the "deliberate intent" claim Ms. Chau filed against Air Cargo and because Air Cargo is immune from the simple negligence claim filed against it by Ms. Chau, Praetorian is continuing to provide a defense to Air Cargo for a lawsuit in which there will never be any legally awardable damages against Air Cargo that are covered under the Policy. The continued presence of the baseless simple negligence claim in this matter therefore is causing direct harm and risk to Praetorian.

Redress. Praetorian filed Count II of its Complaint in the instant matter to obtain a declaration that, as a matter of law, Air Cargo is immune from Ms. Chau's simple negligence claim in the Tort Action due to the workers' compensation immunity granted to Air Cargo by W. Va. Code § 23-2-6. Praetorian's injuries-in-fact will be resolved by a decision in the Declaratory Judgment Action confirming that Air Cargo is immune from the simple negligence claim filed by Ms. Chau.[23]

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

Based upon the factors set forth in Syllabus Point 5 of Findley, supra, Praetorian clearly has standing to seek a ruling regarding Air Cargo's workers' compensation immunity. Praetorian likewise has standing to seek such relief pursuant to W. Va. Code § 55-13-2, which provides that:

> Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

Praetorian has a direct, contractual right under the Policy to seek the declaration defined by Count II of the Complaint. See AR 300 (noting that Praetorian has a "right and duty to defend ... any claim, proceeding or suit against [Air Cargo] for damages payable by this insurance"). Moreover, Praetorian's right to relief is directly affected by the application of (or, as in the instant matter, the Circuit Court's refusal to apply) three statutes: W. Va. Code § 23-2C-15(b), W. Va. Code § 23-2C-19(b), and W. Va. Code § 23-2-6. As such, Praetorian has standing to bring Count II of its Complaint pursuant to W. Va. Code § 55-13-2.

As Air Cargo's workers' compensation insurer and the entity that paid workers' compensation funeral benefits as to Ms. Ho, Praetorian has the right to enforce Air Cargo's workers' compensation immunity from simple negligence claims. The Circuit Court erred by finding otherwise. This Court should reverse that decision by the Circuit Court.

B. Count II of Praetorian's Complaint States a Justiciable Controversy (Assignment of Error 17).

The Circuit Court found that Count II of Praetorian's Complaint fails to state a justiciable controversy. AR 0791. This was clear error.

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

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

Regarding the first factor (uncertain or contingent events), Count II of Praetorian's Complaint (AR 1-8) does not dabble in speculation about uncertain or contingent events. The facts necessary to resolve Count II of Praetorian's Complaint are fixed: Ms. Ho died in an air crash in 2017; Praetorian provided workers' compensation insurance coverage to Air Cargo, which paid workers' compensation funeral benefits on behalf of Ms. Ho and Mr. Alvarado; and Ms. Chau sued Air Cargo for simple negligence in the Tort Action. AR 447-448. Count II of Praetorian's Complaint seeks a declaration that Air Cargo is immune from the simple negligence claim that Ms. Chau has already filed against Air Cargo. Again, whether Air Cargo enjoys workers' compensation immunity in connection with Ms. Ho's death is a purely legal question that turns on Praetorian's rights, status, or other legal relations that are affected by the application of three statutes: W. Va. Code §§ 23-2-6; 23-2C-15(b); 23-2C-19(b).

Regarding the second factor (dependence upon the facts), this factor concerns the extent to which the claim is bound up in ***uncertain*** facts. See Cox v. Amick, 195 W. Va. 608, 619, 466 S.E. 2d 459, 470 (1995) ("Courts are more likely to find a claim is justiciable if it is of an intrinsically legal nature ... and less likely to do so if the absence of a concrete factual situation seriously inhibits the weighing of competing interests."). As noted above, there is only one fact relevant to the immunity issue: whether Air Cargo purchased a workers' compensation and employer's liability insurance policy from Praetorian that was in effect at the time of the air crash. That fact

is not disputed: Air Cargo and Ms. Chau admit that Air Cargo purchased the Policy, that the Policy was in effect at the time of the aircraft that killed Ms. Ho, and that Praetorian paid workers' compensation benefits in connection with Ms. Ho's death. See AR 4; 11; 33. Count II of Praetorian's Complaint therefore does not depend upon any uncertain facts.

Regarding the third factor (adverseness among the parties), this is evident from the fact that we are dealing with the current dispute over Praetorian's standing to litigate the immunity issue. Ms. Chau wants Air Cargo to not be immune from her simple negligence claim, so she is doing all she can to prevent any court from addressing the immunity issue. Perversely, Air Cargo seems also to not want to be immune from Ms. Chau's simple negligence claim and seemingly is working in tandem with Ms. Chau to oppose Praetorian's attempts to obtain a ruling on that issue from any court. There is clear adversity between the parties.

Regarding the fourth factor (whether a declaration will help resolve the underlying controversy), there is no question that a ruling on the immunity issue will clarify the issues in the Tort Action and allow it to move forward to trial or some other resolution regarding the only legal basis upon which Air Cargo potentially could be found liable for Ms. Ho's death – i.e., deliberate intent. Once a declaration is issued in the instant matter regarding Air Cargo's immunity, all parties to this matter (Ms. Chau, Air Cargo and Praetorian) will be bound by the doctrine of collateral estoppel in any other matter, including the Tort Action. See Syl. Pt. 1, State v. Miller, 194 W. Va. 3, 459 S.E. 2d 114 (1995). A ruling on Air Cargo's immunity additionally will confirm that Praetorian will not be obligated to pay any simple negligence-related damages awarded against Air Cargo in this matter.

C. The Circuit Court Erred In Deferring to the Tort Action to Rule on the Immunity Issue (Assignments of Error 12, 14 & 15).

Rather than moving forward to substantively resolve Count II of Praetorian's Complaint, the Circuit Court dismissed that count in deference to the proceedings in the Tort Action. AR 787-789. The Circuit Court couched its decision in terms of judicial economy. Id. The problem with the Circuit Court's deference was that Judge Bloom himself already had "deferred" to Judge Kaufman on the issue.[24] See AR 709-711 (denying Praetorian's motion to intervene in the Tort Action because Praetorian "may protect that interest through the action before Judge Kaufman"). Yet, after taking over the Declaratory Judgment Action from Judge Kaufman, Judge Ballard ruled that the immunity issue should be resolved in the Tort Action (where Praetorian has not been permitted to participate). AR 789.

The obvious solution to the judicial economy concern expressed by Judge Ballard in his Order dismissing Count II of Praetorian's Complaint would have been for Judge Bloom to grant Praetorian's motions to transfer the Declaratory Judgment Action to him and to consolidate the Tort and Declaratory Judgment Actions. Unfortunately, Judge Bloom denied those motions as well as Praetorian's motion to intervene in the Tort Action. See AR 623-624. Between Judge Bloom's denial of Praetorian's motion to intervene in the Tort Action and Judge Ballard's dismissal of Count II of Praetorian's Complaint in the Declaratory Judgment Action, Praetorian is caught in a game of "hot potato" between Judges Bloom and Ballard.[25] The effect is that Praetorian's right to protect its interests in the issue of Air Cargo's workers' compensation immunity has been trampled. It defies basic concepts of fairness and justice (in addition to the

[24] Praetorian made Judge Kaufman aware of this ruling by Judge Bloom on March 2, 2021. AR 617-711.

[25] Any judicial inefficiency caused by the fact that the Tort and Declaratory Judgment Actions were pending before separate judges of the Circuit Court of Kanawha County, West Virginia was not Praetorian's doing. As shown above, Praetorian attempted to have the two cases consolidated before one judge, but Judge Bloom prevented it.

standing and justiciability arguments shown above) to "shut out" Praetorian from any participation in the immunity issue.

D. The Circuit Court Erred by Making a Gratuitous "Duty to Defend" Ruling on Ms. Chau's Simple Negligence Claim in the Tort Action (Assignment of Error 13).

Although it dismissed Count II of Praetorian's Complaint in the Declaratory Judgment Action in deference to the Tort Action and was careful to defer substantive rulings to the Tort Action when it denied Praetorian's Motion for Summary Judgment on Count II of Praetorian's Complaint,[26] the Circuit Court nevertheless issued a gratuitous ruling, pursuant to its misunderstanding of Wisconsin law, regarding Praetorian's duty to defend Air Cargo in the Tort Action. Specifically, the Circuit Court found, "as a matter of law, that Praetorian has a duty to defend the negligence claims in the Tort Action until final resolution, including any potential appeals." AR 779. It was error for the Circuit Court to issue this ruling for two reasons.

First, it was inappropriate for the Circuit Court to issue what really amounts to a gratuitous ruling. The Circuit Court's opinion expressly deferred on resolving Count II of the Praetorian's Complaint. Yet, the Circuit Court needlessly found that Praetorian has a duty to defend Air Cargo against the simple negligence claim asserted against Air Cargo in the Tort Action. The Circuit Court should have "picked a lane": if it meant to defer ruling on Count II of Praetorian's Complaint in favor of letting that issue be addressed in the Tort Action, then the Circuit Court should have refrained from issuing any ruling on that issue meant to bind Praetorian.

Second, the ruling is incorrect. Praetorian is defending Air Cargo, subject to a reservation of rights,[27] while also seeking a ruling on both coverage for the "deliberate intent" claim filed against Air Cargo in the Tort Action and Air Cargo's workers' compensation immunity. Wisconsin

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[26] AR 779.
[27] AR 449-452.

courts routinely resolve coverage issues – including whether an insurer has a duty to defend its insured – before resolving the insured's liability to a third-party. Indeed, that is the preferred course of action in Wisconsin. See Choinsky v. Employers Ins. Co. of Wausau, 390 Wis. 2d 209, 938 N.W. 2d 548 (Wis. 2020). If Praetorian is successful in the Declaratory Judgment Action, that will resolve whether Praetorian is obligated to continue defending Air Cargo in the Tort Action. Practically, then, resolving the Declaratory Judgment Action will confirm that Praetorian has no duty to defend Air Cargo in the Tort Action.

CONCLUSION

For the reasons set forth above, Praetorian asks this Court to reverse the Circuit Court's July 28, 2021 Orders granting Ms. Chau's and Air Cargo's Motions to Dismiss Count II of Praetorian's Complaint and denying Praetorian's Motion for Summary Judgment, and enter judgment as a matter of law on Counts I and II of Praetorian's Complaint.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 21-0682

PRAETORIAN INSURANCE COMPANY,
Plaintiff Below/Petitioner,

v.

AIR CARGO CARRIERS, LLC,
Defendant Below/Respondent,

and

VIRGINIA CHAU, Administratrix of the Estate of ANH KIM HO,
Defendant Below/Respondent.

(On Appeal from Civil Action No. 20-C-800, Circuit Court of Kanawha County, West Virginia)

CERTIFICATE OF SERVICE

I, Don C.A. Parker, hereby certify that I served true and correct copies of the foregoing **"PETITIONER'S BRIEF"** upon counsel of record by placing a true copy thereof in envelopes deposited in the regular course of the United States Mail, with postage prepaid, on this 29th day of November, 2021, addressed as follows:

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