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 REPLY BRIEF

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STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Statement Regarding Oral Argument and Decision contained in Praetorian's Petitioner's Brief appropriately states Praetorian's positions.

ARGUMENT

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

A. Ms. Chau's "Deliberate Intent" Claim Against Air Cargo Does Not Trigger the Policy's Employers Liability Coverage (Assignment of Error 1).

In its opening brief, Praetorian demonstrated that this Court need look no further than its decision in Employers' Mutual Insurance Co. v. Summit Point Raceway Associates, Inc., 228 W. Va. 360, 719 S.E.2d 830 (2011), to resolve this matter. In Summit Point, this Court concluded that a workers' compensation and an employer's liability policy – like the policy Praetorian issued to Air Cargo (the "Policy") at issue here – did not provide coverage for a "deliberate intent" claim brought under (d)(2)(B).[1] See 228 W. Va. at 372, 719 S.E.2d at 842.

Seeking to avoid Summit Point's clear application here, Respondent Air Cargo Carriers, LLC ("Air Cargo") contends that Summit Point is neither persuasive nor controlling because the insurance policy at issue in Summit Point contained additional language that the Policy does not. Specifically, Air Cargo points to a condition in Part One of the policy at issue in Summit Point ("Condition F.") providing that the employer, as opposed to the insurer, was "responsible for payments in excess of the benefits regularly provided by the workers' compensation law including those required because: 1. of your serious and willful misconduct, or arising out of West Virginia Annotated Code §23-4-2[.]" ACC Resp. Br. at 27. According to Air Cargo, this additional

[1] As used herein, "(d)(2)(B)" refers to W. Va. Code § 23-4-2(d)(2)(B) and "(d)(2)(A)" refers to W. Va. Code § 23-4-2(d)(2)(A).

language was the essential ingredient without which the court would have come to the opposite conclusion from the one it ultimately reached. Id. at 28. Air Cargo is incorrect.

Standard workers' compensation and employer's liability insurance policies like the one at issue in Summit Point and the Policy here are separated into two parts. Part One addresses coverage for workers' compensation benefits an employer is obligated to pay, and Part Two addresses employer's liability insurance coverage. Condition F. applied only to Part One of the policy at issue in Summit Point. 228 W. Va. at 372, 719 S.E.2d at 842. The insurance coverage dispute in the instant matter involves Part Two of the Policy, not Part One. Consequently, Condition F. and the portions of Summit Point that address it are not relevant here.

Turning to the Court's discussion of Part Two of the policy at issue in Summit Point, this Court quoted the insuring agreement in Part Two of the policy (which is identical to the insuring agreement in Part Two of the Policy[2]), emphasized that the insuring agreement applied only to "bodily injury *by accident*," and concluded that "[n]othing in the plain language quoted above leads to a reasonable conclusion that deliberate intent coverage is included in this policy."[3] Id. (emphasis in original). Based upon its review of the policy as a whole, this Court concluded that "there is plainly no coverage for deliberate intent actions." Id.

Despite Praetorian seeking a declaration that the "deliberate intent" claim filed against Air Cargo in the Tort Action[4] did not fall within the insuring agreement of Part Two of the Policy (the "EL Insuring Agreement"), the Circuit Court completely ignored the argument. Compare AR 254 with AR 764-780. Air Cargo attempts to excuse the Circuit Court's clear error by suggesting that

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[2] Compare AR 299-300 and Summit Point, 228 W. Va. at 372, 719 S.E. 2d at 842.

[3] The Court also quoted the "deliberate intent" exclusion contained in the Summit Point policy – which, as noted in Praetorian's opening brief, is functionally identical to the Policy's "deliberate intent" exclusion – and concluded that the exclusion "was conspicuous, plain, clear, and obvious in excluding coverage for deliberate intent actions." Id., 228 W.Va. at 373, 719 S.E. 2d at 843.

[4] As used herein, "Tort Action" refers to Chau v. Air Cargo Carriers, et al., Civil Action No. 19-C-450.

the Circuit Court's silence was tantamount to finding there was an unresolved question of fact. ACC Resp. Br. at 29. It was not; whether the (d)(2)(B) claim falls within the Policy's EL Insuring Agreement is purely a question of law. In that regard, Air Cargo claims that the "deliberate intent" claim filed against it by Ms. Chau involves a "bodily injury by accident" within the meaning of the Policy's EL Insuring Agreement because Ms. Chau's claim under (d)(2)(B) "can be proven without a showing of intent." Id. at 23. This argument fundamentally misapplies Wisconsin insurance law and misunderstands the basis for imposing liability under (d)(2)(B).

Under Wisconsin law, the test for evaluating whether an "accident" exists under an insurance policy is not whether the ultimate injury is unexpected. Instead, an "accident" exists only if the "means or cause" of the result is accidental. Schinner v. Gundrum, 349 Wis. 2d 529, 558-560, 833 N.W.2d 685, 700-01 (Wis. 2013) (citation omitted). Under West Virginia law, an employer may be liable under (d)(2)(B) only if it is proven, among other things, that, prior to an employee's injury, the employer: (1) had actual knowledge of the existence of the specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by the specific unsafe working condition; and (2) nevertheless "intentionally thereafter exposed an employee to the specific unsafe working condition." In other words, although an employer need not intend an employee's injury to be liable under (d)(2)(B), the employer must intend to expose its employee to the specific unsafe working condition that results in the injury.

Comparing the requirements to find liability under (d)(2)(B) with the "means or cause" test employed by Wisconsin courts to determine if an "accident" exists within the meaning of an insurance policy, the "means or cause" of Ms. Ho's death (as alleged by Ms. Chau) clearly was not accidental. According to Ms. Chau, Air Cargo knew that the working conditions it imposed

upon Ms. Ho were unsafe and posed a high degree of risk for a fatal plane crash but nevertheless "intentionally exposed" Ms. Ho to those conditions. AR 439. Just like throwing an illegal underage drinking party and encouraging a partygoer to drink who is known to become aggressive when intoxicated is not "accidental,"[5] neither is intentionally exposing an employee to "specific unsafe working conditions" which present a "high degree of risk and the strong probability of serious injury or death." Accordingly, Praetorian respectfully submits that this Court should reaffirm its decision in Summit Point and find that the EL Insuring Agreement does not provide coverage for the (d)(2)(B) claim filed against Air Cargo by Ms. Chau in the Tort Action.

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

As noted in Praetorian's Petitioner's Brief, the Policy's employers liability insurance does not apply to "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)" (the "Deliberate Intent Exclusion"). AR 352. Praetorian and Air Cargo agree that the exclusion applies to claims based upon (d)(2)(A). Air Cargo, however, contends that the exclusion does not apply to claims under (d)(2)(B), such as the one filed against it in the Tort Action. According to Air Cargo, the inclusion of the phrase "engaging in conduct equivalent to an intentional tort" in the Deliberate Intent Exclusion limits its application to claims of intentional misconduct only. ACC Resp. Br. at 23. Air Cargo's argument fails for two basic reasons.

First, Air Cargo simply ignores the language of the Deliberate Intent Exclusion. By its terms, the exclusion provides that "conduct equivalent to an intentional tort" includes "your

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[5] See Schinner, 833 N.W.2d at 701 (concluding that this conduct "was not accidental, so no occurrence triggered coverage under [the insured's] homeowner's policy"). West Virginia law is in accord with Wisconsin law on this issue. See American Modern Home Ins. Co. v. Corra, 222 W. Va. 797, 671 S.E. 2d 802 (2008).

deliberate intention as that term is defined by W. Va. Code § 23-4-2(d)(2)." AR352. This reference to W. Va. Code § 23-4-2(d)(2) does not differentiate between subsections (d)(2)(A) and (d)(2)(B). The language instead unambiguously pulls into the exclusion's reach ***all*** claims based on a theory that the insured acted with "deliberate intention" as defined in W. Va. Code § 23-4-2(d)(2). The Deliberate Intent Exclusion therefore applies to claims made under both (d)(2)(A) and (d)(2)(B).

Second, Air Cargo's misinterpretation of the Deliberate Intent Exclusion violates Wisconsin law that insurance policies cannot be interpreted in ways that render their terms "mere surplusage."[6] Day v. Allstate Indem. Co., 332 Wis. 2d 571, 585, 798 N.W.2d 199, 206 (Wis. 2011). Air Cargo's reading of the Deliberate Intent Exclusion is that the phrase "including by your deliberate intention as that term is defined by W. Va. Code § 23-4-2(d)(2)" refers only to claims under (d)(2)(A). As noted above, claims under (d)(2)(A) require proof that an employer acted "with a consciously, subjectively, and deliberately formed intention to produce the specific result of injury or death to an employee." But the Deliberate Intent Exclusion separately applies to "bodily injury intentionally caused or aggravated by you." Reading the reference to W. Va. Code § 23-4-2(d)(2) in the Deliberate Intent Exclusion to apply only to claims under (d)(2)(A) results in the exclusion applying only to claims based on intentional misconduct. What good is the reference to W. Va. Code § 23-4-2(d)(2) in the Deliberate Intent Exclusion if it applies only to the same claims as the exclusion's first clause? There is none.

[6] Air Cargo argues that the "deliberate intent" exclusion at issue in Summit Point somehow was more effective at excluding coverage for claims made under (d)(2)(B) than the Policy's Deliberate Intent Exclusion. See ACC Resp. Br. at 25. Although the exclusions in the Summit Point policy and the Policy use slightly different language, both exclusions unambiguously exclude ***all*** possible types of statutory claims under W. Va. Code § 23-4-2(d)(2) from coverage under each respective insurance policy. They are therefore functionally identical.

Considering the lengths to which Air Cargo goes to try to convince this Court that the Policy covers "deliberate intent" claims, perhaps it is necessary to state the obvious: Air Cargo did not buy, did not pay for, and, hence, did not receive "deliberate intent" coverage when it purchased the Policy. "Deliberate intent" coverage does not come automatically with a workers' compensation and employer's liability insurance policy. It is an optional coverage for which an insured must pay a separate (or additional) premium, and West Virginia law does not even obligate insurers to offer "deliberate intent" coverage. See Luikart v. Valley Brook Concrete & Supply, Inc., 216 W. Va. 748, 613 S.E. 2d 896 (2005). While no one envies an insured that has chosen not to buy insurance to cover a specific type of risk (in this instance, "deliberate intent" exposure) and later must cover a loss on its own, this Court should not accept Air Cargo's invitation to twist and contort the Policy's clear and unambiguous language to require Praetorian to cover a "deliberate intent" liability it did not contract to insure. If Air Cargo wanted "deliberate intent" coverage, it should have bought it from an insurance company that was willing to sell it that coverage.

C. The Policy's Deliberate Intent Exclusion is Not Void Under W.S.A. 632.23, Nor Subject to W.S.A. 632.25 (Assignments of Error 2 and 3).

As it did below, Air Cargo argues in its Respondent's Brief that W.S.A. 632.23 applies to the Policy. To recap, W.S.A. 632.23 provides that "[n]o 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." According to Air Cargo, W.S.A. 632.23 applies to "any type of insurance policy purchased by an aircraft company that would cover any liability arising out of the operation of the aircraft" and not only to aircraft liability insurance policies. ACC Resp. Br. at 30.

Fundamentally, Air Cargo's position ignores that Wisconsin law specifically regulates its insurance industry by type of insurance policy. Chapter 632 of the Wisconsin Statutes is entitled

"INSURANCE CONTRACTS IN SPECIFIC LINES" and contains eight subchapters based on the type of insurance provided.[7] W.S.A. 632.23 is entitled "Prohibited exclusions in ***aircraft insurance policies***." (Emphasis added.) W.S.A. 632.25, in contrast, is titled: "Limited effect of conditions in ***employer's liability policies***." (Emphasis added.) Other sections of Wisconsin law apply more broadly to all types of liability insurance policies. See W.S.A. 632.22, 632.24, and 632.26. Regulations promulgated by the Wisconsin Commissioner of Insurance similarly are based upon types of insurance policies, each of which is regulated differently. See Wis. Admin. Code § Ins. 6.75 (identifying fifteen (15) different subcategories of insurance policies, including: (1) subcategory (k), which deals with worker's compensation insurance, including employers liability insurance when they are written in the same policy like the Policy here; and (2) subcategory (o), which deals with aircraft insurance). As these categories demonstrate, applying Wisconsin statutes based upon the type of insurance is simply how Wisconsin designed its insurance law.

Curiously, Air Cargo attempts to buttress its argument that Section 632.23 applies to the Policy by arguing that W.S.A. 632.25 "supplements the holding that Wisconsin Statute §632.23 is applicable if it is determined that Air Cargo violated any air safety regulations...."[8] ACC Resp. Br. at 32. The illogic of this position is glaring. By Air Cargo's (incorrect) reasoning, W.S.A. 632.23 applies to all types of insurance policies, not just aircraft policies. If that is true, then

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[7] These subchapters categorize the types of insurance as follows: fire and other property insurance; surety insurance; liability insurance in general; automobile and motor vehicle insurance; life insurance and annuities; disability insurance; fraternal insurance; and "miscellaneous."

[8] As Praetorian has noted in its Petitioner's Brief, the plain language of W.S.A. 632.25 confirms that W.S.A. 632.25 applies only to conditions in employer's liability insurance policies, not exclusions. Praetorian even supported its position by citing to Bortz v. Merriman Mutual Insurance Co., 92 Wis. 2d 865, 874, 286 N.W. 2d 16, 21 (Wis. App. 1979). Respondents completely ignored Bortz in their Respondents' Briefs and responded to Praetorian's argument by simply claiming that the Circuit Court was correct to apply the statute. Respondents therefore have failed to "specifically respond to each assignment of error, to the fullest extent possible," as required by West Virginia Rule of Appellate Procedure 10(d), and consequently have conceded that the Circuit Court erred in applying W.S.A. 632.25 to the Policy's Deliberate Intent Exclusion.

W.S.A. 632.23 also applies to employer's liability policies and prohibits exclusions or denials of coverage based on the operation of an aircraft in violation of air regulations. But Air Cargo (and, incidentally, Ms. Chau) argues that W.S.A. 632.25 likewise prohibits exclusions or denials of coverage in employer's liability insurance policies based on the operation of an aircraft in violation of air regulations. The result of Air Cargo's illogic is that W.S.A. 632.23 and 632.25 prohibit the same things. Reading W.S.A. 632.23 and 632.25 this way renders them redundant and violates a well-established canon of statutory construction under Wisconsin law. See Pawlowski v. American Family Mut. Ins. Co., 322 Wis. 2d 21, 32, 777 N.W. 2d 67, 72 (Wis. 2009).

Even assuming, *arguendo*, that W.S.A. 632.23 applies generally to the Policy (which it does not), W.S.A. 632.23 states only that such insurance policies may not "exclude or deny coverage because the aircraft is operated in violation of air regulation, whether derived from federal or state law or local ordinance." The Policy's Deliberate Intent Exclusion does not "exclude or deny coverage because the aircraft is operated in violation of air regulation," as prohibited by W.S.A. 632.23.[9]

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

Respondents primarily respond to Praetorian's arguments about the applicability of the Domestic Workers Endorsement by repeating their own (and the Circuit Court's) flawed reasoning below. Praetorian therefore refers to its Petitioner's Brief to addresses Respondents' primary arguments in response to Assignments of Error 7 through 10, albeit with one addition: like the Policy's EL Insuring Agreement, the employers liability coverage provided by the Domestic Workers Endorsement applies only to "bodily injury by accident" suffered by Air Cargo's "residence employees." For the same reasons as those discussed above in connection with the

[9] This is addressed in detail in Praetorian's Petitioner's Brief, p. 20-21.

Policy's EL Insuring Agreement, Ms. Ho's death would not qualify as a "bodily injury by accident" within the meaning of the employers liability coverage available under the Domestic Workers Endorsement.

In her Respondent's Brief, Ms. Chau offers a new argument on appeal why the Domestic Workers Endorsement applies to Ms. Ho.[10] She argues that the interpretation of the phrase "residence employees" offered by her and Air Cargo (i.e., that it means employees who are residents of the state in question) applies to members of Air Cargo's various flight crews, who are "residents" wherever they happen to be for nightly cargo runs.[11] See Chau Resp. Br. at 24. Consequently, Ms. Chau argues, the Domestic Workers Endorsement provides employer's liability protection regarding those employees because they are variously reassigned to different locations.

Ms. Chau's new argument has no merit because it renders the balance of the Policy redundant and/or mere surplusage in violation of Wisconsin law. See Day, 332 Wis. 2d at 585, 798 N.W.2d at 206. The base form of the Policy provides workers' compensation coverage and employer's liability coverage to Air Cargo's flight crew employees, and the Policy includes multiple endorsements which are specific to Air Cargo's West Virginia operations which amend the base form of the Policy. See AR 277-293; 306-308; 323; 352; 353; and 354. Under Ms. Chau's reading of the Domestic Workers Endorsement, there would be no need for the Policy's base form and its West Virginia-specific endorsements.

As explained in Praetorian's opening brief, there is only one reasonable interpretation of the Domestic Workers Endorsement: it provides workers' compensation and employer's liability

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[10] The Court should not consider Ms. Chau's new argument because the Court consistently has held that non-jurisdictional questions not raised at the Circuit Court level, but raised for the first time on appeal, will not be considered. See Barney v. Auvil, 195 W. Va. 733, 741, 466 S.E. 2d 801, 809 (1995). Nevertheless, for purposes of completeness, Praetorian substantively responds to Ms. Chau's new argument.

[11] This new argument by Ms. Chau is also based on a flawed understanding of what is required to establish residence in a given location. See Lotz v. Atamaniuk, 172 W. Va. 116, 119, 304 S.E. 2d 20, 23 (1983). Spending the night in a locale, awaiting a return flight, does not establish residence.

coverage in connection with a class of employees who are otherwise left out of the workers' compensation system – domestic workers. After all, the Domestic Workers Endorsement's Schedule specifically identifies the types of "residence employees" to whom the endorsement's coverage applies as full-time and part-time "Domestic Workers – Residences." AR 308. And it is understandable why a separate endorsement providing coverage for these employees is necessary: 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. 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.

For its part, Air Cargo argues in its Respondent's Brief that the Court cannot interpret the Domestic Workers Endorsement how Praetorian does because the endorsement's "Business Pursuits" Exclusion renders the endorsement's coverage illusory. Specifically, Air Cargo contends, "there is no circumstance where the Residence Employee Endorsement would ever provide coverage to Air Cargo, a business." ACC Resp. Br. at 36.

As noted in Praetorian's Petitioner's Brief, the test to find coverage "illusory" in Wisconsin is whether an insurance policy's coverage can never be triggered. See Pet. Br. at 28 (citing Marks v. Houston Cas. Co., 363 Wis. 2d 505, 523, 866 N.W.2d 393, 402 (Wis. App. 2015)). One certainly can envision a scenario in which coverage under the Domestic Workers Endorsement possibly is triggered. For example, airlines like Air Cargo may find it more economical to lease or own residences near the various airports it services in order to provide overnight accommodations for

its flight crews when they are off-duty.[12] And airlines which do so might hire domestic workers to clean those residences on a regular basis. Depending on the facts and circumstances surrounding an injury to such a domestic worker, it is possible that the Domestic Worker Endorsement might provide coverage for that injury.

The Policy's Domestic Workers Endorsement is precisely what it purports to be: a voluntary addition to Air Cargo's workers' compensation and employer's liability insurance policy designed to provide coverage for a class of workers (i.e., domestic workers) normally excluded from the workers' compensation system. It does not apply to Ms. Ho, and it is not illusory. It is simply irrelevant to the loss at issue in this matter.

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

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).

As addressed in Praetorian's Petitioner's Brief (p. 33-33), Praetorian meets the standing requirements under Findley v. State Farm Mut. Auto. Ins. Co., 213 W. Va. 80, 576 S.E. 2d 807 (2002) and W. Va. Code § 55-13-2 to seek the declaratory judgment expressed in Count II of its Complaint. It was clear error for the Circuit Court to find otherwise. The most animated argument Respondents make against Praetorian's standing to pursue Count II of its Complaint is their argument that West Virginia is not a "direct action" state. According to Respondents, West Virginia law does not allow a tort plaintiff to directly sue the tortfeasor's liability insurance company for a tort (the operative distinction of a "direct action" state), so a liability insurance

[12] Federal Aviation Administration regulations require cargo airlines such as Air Cargo to provide rest time to cargo flight crews at various intervals, some of which may involve overnight stays. See 14 C.F.R. § 121.500 et seq. The rest requirements for two pilot crews, such as Ms. Ho's, can be found at 14 C.F.R. § 121.505.

company should not be allowed to sue the tort plaintiff directly, either. ACC Resp. Br. at 13; Chau Resp. Br. at 16.

Respondents' "direct action" argument is a red herring. Praetorian addressed the fact that Wisconsin is a "direct action" state in its briefing before the Circuit Court because it was unclear whether the Circuit Court would apply Wisconsin or West Virginia law to resolve the "standing" issue with respect to Count II of Praetorian's Complaint. See AR 48-55. It is disingenuous for Respondents to focus on Praetorian's discussion of Wisconsin law below as if this were the essence of Praetorian's argument for standing. Indeed, Praetorian's argument about standing in its Petitioner's Brief relied exclusively upon West Virginia law. See Pet. Br. at 29-33.

Respondents' apparent misunderstanding of Praetorian's "standing" argument aside, they argue that Praetorian lacks standing to bring Count II of its Complaint based upon the faulty premise that a liability insurer has no right, under any circumstances or in any court, to seek a declaratory judgment on an issue that will be decided in the context of a tort action against one of its insureds. But there often are circumstances in which the question of whether a liability insurance company will have a duty to indemnify an insured will be determined by the resolution of a factual or legal issue in a plaintiff's tort lawsuit against the insured, and this Court has recognized that an insurer and its insured may pursue their own, separate goals in the same lawsuit. See State ex rel. Univ. Underwriters Ins. Co. v. Wilson, 239 W. Va. 338, 801 S.E. 2d 216 (2017).

A classic example is well-illustrated by Appalachian Power Company v. Kyle, No. 3:14-12051, 2015 WL 418145 (S.D. W. Va., Jan. 30, 2015). There, Appalachian Power Company ("APCO") sued a couple, the Kyles, for building a home on land subject to an easement granted to APCO for its power lines. APCO had also sued another couple, the Childers, who had conveyed the land in question to the Kyles. State Farm provided liability insurance to the Childers and

moved to intervene in the action because a specific factual issue in the case would determine if State Farm was obligated to defend and indemnify the Childers in APCO's lawsuit: whether the Childers' conduct was intentional or unintentional. Intentional conduct by the Childers would trigger exclusions under their policy; unintentional conduct would not. The court had no difficulty concluding that State Farm had a "direct and substantial" interest in the lawsuit due to the fact that State Farm's duties to defend and indemnify the Childers hinged on that issue. Hence, the court granted State Farm's motion to intervene as of right.[13]

Liability insurers often have a direct stake in issues that will be decided in tort lawsuits filed against their insureds and, therefore, have a legal right to be involved in the litigation of that issue. See State ex rel. Univ. Underwriters Ins. Co. v. Wilson, supra. Although there may be certain cases in which a liability insurer's involvement could create a cause for concern,[14] this action certainly is not one of them. The issue of Air Cargo's workers' compensation immunity is a pure question of law on which all necessary facts have been admitted by Respondents. See AR 11 and 13 (admitting that Air Cargo purchased the Policy from Praetorian and paid the Policy's premium, thereby entitling Air Cargo to immunity pursuant to W. Va. Code §§ 23-2-6 and 23-2C-19). And, along the spectrum of cases in which a liability insurer may wish to seek a ruling on an issue that also is relevant to a tort lawsuit against its insured, the instant matter presents the least problematic scenario imaginable and, frankly, the most deserving of a finding that Praetorian has standing to litigate the issue.

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

[14] For instance, if a liability insurer wished to be directly involved in a jury trial, its involvement could reveal to the jury that the insured has liability insurance, something West Virginia Rule of Evidence 411 is designed to prevent, if possible. A trial court would need to find a creative way to manage such issues.

Praetorian is Air Cargo's workers' compensation carrier and paid funeral benefits in connection with Ms. Ho's death as required by the Policy. AR 447-448. Pursuant to W. Va. Code § 23-2C-19, the Policy's mere existence makes Air Cargo immune from the simple negligence claim filed against it in the Tort Action. But the presence of that legally impermissible claim against Air Cargo in the Tort Action requires Praetorian to fund Air Cargo's defense in that lawsuit, and Respondents expect Praetorian to pay up to its $1 million limit of liability to satisfy any judgment entered against Air Cargo on that same claim. Put differently, Respondents are attempting to have Praetorian pay twice in connection with Ms. Ho's death: once for benefits owed under Part One of the Policy, which Praetorian already paid, and amounts under Part Two of the Policy which cannot be recovered from Air Cargo as a matter of law. Against this backdrop, this Court should find, as a matter of law, that an employer's liability insurer (Praetorian) that also paid workers' compensation benefits in connection with the death of that insured's employee (Ms. Ho) has standing to seek a ruling that the insured (Air Cargo) is immune from simple negligence lawsuits based on injury to, or the death of, the employee.

Respondents alternatively argue against Praetorian's standing to litigate Count II of its Complaint by characterizing Count II as an attempt to assert the rights of Air Cargo, and as such, subject to scrutiny as a form of *jus tertii* standing. Respondents once again are incorrect.

The majority of this Court first recognized the concept of *jus tertii* standing in Syllabus Point 5 of Kanawha County Public Library Board v. Board of Education of the County of Kanawha, 231 W. Va. 386, 745 S.E. 2d 424 (2013).[15] "To establish *jus tertii* standing to vindicate

[15] Justice Robin Davis had mentioned the concept of *jus tertii* standing in separate concurring/dissenting opinions prior to the Kanawha County case. See State ex rel. Abraham Linc Corp. v. Bedell, 216 W. Va. 99, 602 S.E. 2d 542 (2004), and Bowyer v. Hi-Lad, Inc., 216 W. Va. 634, 609 S.E. 2d 895 (2004). This Court also briefly mentioned it in footnote 8 of Affiliated Const. Trades Foundation v. West Virginia Dept. of Transp., 227 W. Va. 653, 713 S.E. 2d 809 (2011).

the constitutional rights of a third party, a litigant must (1) have suffered an injury in fact; (2) have a close relation to the third party; and (3) demonstrate some hindrance to the third party's ability to protect his or her own interests." Id. But *jus tertii* standing is irrelevant to this matter because Praetorian is not attempting to vindicate Air Cargo's rights. Praetorian is contractually obligated to "pay all sums that [Air Cargo] legally must pay as damages because of bodily injury to [Air Cargo's] employees, provided the bodily injury is covered by this Employers Liability Insurance." AR 299. The Policy additionally provides Praetorian with the contractual "***right*** and duty to defend ... any claim, proceeding or suit against [Air Cargo] for damages payable by this insurance." AR 300 (emphasis added). Accordingly, whether it is to enforce its contractual right to assert Air Cargo's workers' compensation immunity or to remedy the injury in fact that the continued presence of the baseless negligence claim in the Tort Action has caused Praetorian to suffer,[16] Count II seeks to protect Praetorian's rights, not Air Cargo's.

B. Count II of Praetorian's Complaint States a Justiciable Controversy, and is Ripe for Consideration (Assignment of Error 17).

In addition to their standing arguments, Respondents argue that Count II of Praetorian's Complaint fails to state a justiciable controversy because (so their argument goes) a ruling from a court in the instant matter would not resolve the controversy and, therefore, would fail to satisfy the fourth requirement stated in Syllabus Point 4 of Hustead on Behalf of Adkins v. Ashland Oil, Inc., 197 W. Va. 55, 475 S.E. 2d 55 (1996). According to Respondents, the workers' compensation immunity issue would remain unresolved in the Tort Action even if there is a resolution of the issue in the instant matter. That simply is not true. All the parties who have a protected interest

[16] Again, Praetorian has paid – and continues to pay – to defend Air Cargo in the Tort Action, and Respondents expect Praetorian to pay up to $1 million towards any judgment entered against Air Cargo in connection with the simple negligence claim filed against Air Cargo in the Tort Action. It is Praetorian's money that is at stake, not Air Cargo's.

in the issue of Air Cargo's workers' compensation immunity (Ms. Chau, Air Cargo, and Praetorian) are parties to this action. As such, a ruling on that issue in this lawsuit will bind them 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).

Respondents further argue that, because Judge Ballard dismissed Count II of Praetorian's Complaint, a reversal of that decision by this Court should not also go the further step of granting judgment to Praetorian on the workers' compensation immunity issue. They argue that the workers' compensation immunity issue has not been fully addressed by the Circuit Court on its merits and, therefore, is not final and appealable and should not be addressed by this Court. Ms. Chau, however, substantively argues her case against Air Cargo's workers' compensation immunity in her Respondent's Brief. Because Ms. Chau is willing to engage Praetorian on the merits of that issue in the context of this appeal, Praetorian respectfully submits that this Court take the opportunity to resolve this purely legal issue.

In support of its argument that Air Cargo is immune from the simple negligence claim filed against it in the Tort Action, Praetorian notes the following:

In 2005, West Virginia privatized its workers' compensation system. W. Va. Code § 23-2C-15(b) now provides for the purchase of private workers' compensation insurance policies by employers, in contrast to the monopolistic, State-run workers' compensation system that had existed previously. W. Va. Code § 23-2C-19(b) applies the workers' compensation immunity provided by W. Va. Code § 23-2-6 (part of the pre-2005 section of the Code) to employers that purchase private workers' compensation insurance. If an employer chooses to purchase workers' compensation insurance from a private insurer, the employer need only pay its premium for that insurance to the private insurer to trigger immunity under W. Va. Code § 23-2-6. See W. Va. Code

§ 23-2C-19(a). It is only when an employer fails to pay its premiums that the employer is deprived of its immunity under W. Va. Code § 23-2-6. See W. Va. Code § 23-2C-19(b).

Based on the foregoing, Air Cargo needed only to pay its premium for the Policy to preserve its immunity from simple negligence claims such as the one brought against it by Ms. Chau in the Tort Action under W. Va. Code § 23-2-6. Respondents both have admitted that Air Cargo did so,[17] and Praetorian paid workers' compensation benefits in connection with Ms. Ho's death.[18] Accordingly, pursuant to controlling West Virginia law, Air Cargo is immune from liability in connection with the simple negligence claim asserted against it in the Tort Action.

Ignoring the above, Ms. Chau bases her arguments against Air Cargo's immunity on W. Va. Code § 23-2-1(f), which states:

> Any foreign corporation employer choosing to comply with the provisions of this chapter and to receive the benefits under this chapter shall, at the time of making application to the commission in addition to the other requirements of this chapter, furnish the commission with a certificate from the Secretary of State, where the certificate is necessary, showing that it has complied with all the requirements necessary to enable it legally to do business in this state and no application of a foreign corporation employer shall be accepted by the commission until the certificate is filed.

Regardless of what facts Ms. Chau believes may support her argument, it fails as a matter of law because W. Va. Code § 23-2-1(f) does not apply to employers (like Air Cargo) which purchase workers' compensation insurance from private insurers (like Praetorian).[19]

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[17] AR 11 and 13.

[18] AR 447-448.

[19] Further proof that W. Va. Code § 23-2-1(f) is inextricably tied to the purchase of insurance directly from the State as part of the old monopolistic workers' compensation system is the fact that the statute itself explicitly states the ramification for noncompliance: the State simply will not allow the foreign corporation in question to purchase workers' compensation insurance from the State (i.e., "no application of a foreign corporation employer shall be accepted by the commission until the certificate is filed"). Noncompliance does not result in a loss of workers' compensation immunity, as claimed by Ms. Chau; it results in the foreign corporation not being allowed to buy workers' compensation insurance from the State in the first place.

Because Ms. Chau substantively has engaged the issue of Air Cargo's workers' compensation immunity, there is no reason for this Court to refrain from deciding that issue here and now, as a matter of law. Indeed, whether the issue of Air Cargo's workers' compensation immunity is resolved in this action and the Tort Action if they are consolidated, in only the Tort Action upon Praetorian's intervention,[20] or in this matter, that purely legal issue ultimately will be raised before, and resolved by, this Court.

In considering whether to address the issue of Air Cargo's immunity now, Praetorian respectfully submits that it is worthwhile for the Court to ask what motivates Respondents to try and stall the resolution of that issue.

With respect to Ms. Chau, she seeks compensation for the death of Ms. Ho, as is her right. Her obvious claim against Air Cargo (Ms. Ho's employer) is a claim under (d)(2)(B). However, as demonstrated above and in Praetorian's Petitioner's Brief, the Policy does not provide coverage for that claim. It also is easier to prove a case of simple negligence than a claim under (d)(2)(B), and, like any plaintiff, Ms. Chau would rather pursue a defendant with at least a possibility of insurance coverage (no matter how remote) than one without insurance coverage (regardless of whatever assets that defendant might have). So, from Ms. Chau's perspective, suing Air Cargo for simple negligence is much lower hanging fruit than proving her (d)(2)(B) claim.

As for Air Cargo, it likewise recognizes that the Policy does not provide coverage for the (d)(2)(B) claim made against it in the Tort Action, but that there may be coverage for the simple negligence claim filed against Air Cargo if it is determined that Air Cargo is not immune from liability in connection with that claim. Moreover, as long as the simple negligence claim remains active in the Tort Action, Praetorian is providing defense counsel to Air Cargo in the Tort Action.

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[20] See Appeal No. 21-0243.

AR 449-452. So, from Air Cargo's perspective, allowing itself to be sued for simple negligence despite its clear immunity from liability for simple negligence is much more advantageous than seeking dismissal of that claim.

The problem for Respondents is that Ms. Chau's simple negligence claim against Air Cargo in the Tort Action is legally impermissible. As noted above, Air Cargo is immune from the simple negligence claim filed against it in the Tort Action as a matter of law pursuant to W. Va. Code § 23-2-6 and W. Va. Code § 23-2C-19(b). And, as the workers' compensation and employer's liability insurer for Air Cargo, Praetorian benefits from Air Cargo's workers' compensation immunity: it will not have to indemnify Air Cargo for simple negligence damages, because Air Cargo is immune. The savings to Praetorian and other, similarly-situated insurers inure to the benefit of all West Virginia employers in the form of lower rates for this type of insurance compared to what the rates would be if there were no workers' compensation immunity.

If Respondents are allowed to agree that Ms. Chau can sue Air Cargo for simple negligence instead of "deliberate intent," even though Air Cargo is immune from such actions, Praetorian will bear the financial brunt of such an arrangement. In the longer term, all workers' compensation and employer's liability carriers will be harmed because, if this scheme is allowed in the instant matter, it will spread. And, ultimately, all employers in West Virginia will be harmed because the carriers will have no choice but to increase premiums to make up for the losses caused by paying simple negligence claims that run afoul of the exclusive remedy provisions of W. Va. Code § 23-2-6 and W. Va. Code § 23-2C-19(b). This Court can prevent such harm by simply enforcing Air Cargo's workers' compensation immunity.

CONCLUSION

For the reasons set forth above and in its Praetorian's Petitioner's Brief, 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 in Praetorian's favor on Counts I and II of Praetorian's Complaint as a matter of law.

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,

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

and

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

CERTIFICATE OF SERVICE

I, Don C.A. Parker, hereby certify that I served true and correct copies of the foregoing **"PETITIONER'S REPLY BRIEF"** upon counsel of record by placing a true copy thereof in envelopes deposited in the regular course of the United States Mail, with postage prepaid, on this 2nd day of February, 2022, addressed as follows:

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