IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 21-0682

PRAETORIAN INSURANCE COMPANY,

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.

AIR CARGO CARRIERS, LLC'S RESPONSE BRIEF

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II. STATEMENT OF THE CASE

A. The Airplane Crash and Tort Action

Air Cargo is a Wisconsin limited liability company that runs certain air cargo operations out of Charleston's Yeager Airport. (AR 004). On May 5, 2017, Anh Ho, an employee of Air Cargo and first officer, was killed in an airplane crash during a regularly scheduled cargo route while the pilot was attempting to land at Yeager Airport. (AR 004). The airplane involved in the crash was owned by Air Cargo, and the pilot was Captain Jonathan Alvarado, who was also killed in the crash. *Id.*

On May 3, 2019, Virginia Chau, Administratrix of the Estate of Anh Ho, filed a wrongful death lawsuit against Air Cargo and others. (Civil Action No. 19-C-450, the "Tort Action") (AR 004-5). In the Complaint, Ms. Chau asserts a negligence claim against Air Cargo and also asserts a cause of action for "deliberate intent" pursuant to West Virginia Code Section § 23-4-2(d)(2). (AR 005). The Complaint further asserts that Air Cargo, as the employer, failed to comply with state and federal safety rules and regulations. (AR 769).

B. Relevant Policy Terms

Praetorian had previously issued a Worker's Compensation and Employers' Liability insurance policy ("Policy") to Air Cargo that was in effect at all relevant times. (AR 004). The Policy is interpreted and governed by Wisconsin law. (AR 767). On its face, the Policy is clear that it insures for worker's compensation liability for a company operating *aircraft*. The Extension of Information Page, Classifications and Premium Breakdown, expressly states "Aircraft" and "Aviation, (AR 076), and further assesses all premiums (except clerical staff) based upon "Aviation" codes. (AR 088). Moreover, the Servicing Agency and Responsible Agent of Record that facilitated/obtained the policy through Praetorian is Aviation Risk Management Associations,

Inc. ("Aviation Risk Management"). As its name implies, Aviation Risk Management helps obtain insurance for the *operation of aircraft*. (AR 066).

The Policy contains a WEST VIRGINIA EMPLOYERS LIABILITY INSURANCE INTENTIONAL ACT EXCLUSION ENDORSEMENT which applies to Part Two – Employers Liability Insurance ("Intentional Act Exclusion"). It expressly refers to two specific types of intentional conduct:

> This insurance does not cover:
>
> 5. "*bodily injury intentionally caused* or aggravated by you or which is the result of your engaging in *conduct equivalent to an intentional tort*, however defined, including by your deliberate intention as that term is defined by W. Va. Code §23-4-2(d)(2).

(AR 150) (emphasis supplied).

Next, the policy contains a VOLUNTARY COMPENSATION AND EMPLOYERS LIABILITY COVERAGE FOR RESIDENCE EMPLOYEES ENDORSEMENT which "adds Voluntary Compensation Coverage and Employers Liability Coverage to the Policy." ("Residence Employee Endorsement"). (AR 306-308). *Id.* It is undisputed that the term "residence employee" is not defined in the Residence Employee Endorsement or in the Policy.[1]

The Residence Employee Endorsement also states that it does not cover "Bodily injury arising out of any of your business pursuits." (AR 306). It is undisputed that Air Cargo is a limited liability company that engages *solely* in business pursuits.

C. History of the Declaratory Judgment Action

Under the Policy, Praetorian has been providing Air Cargo a defense to the Tort Action under a reservation of rights. (AR 449-452). Praetorian filed a declaratory judgment action in the

[1] This endorsement states that it does not cover "Bodily injury intentionally caused or aggravated by you." (AR 308). It does not specifically purport to exclude claims under W. Va. Code §23-4-2(d)(2). *Id.*

Circuit Court of Kanawha County (Civil Action No. 20-C-800) (the "Declaratory Judgment Action"). (AR 001-008). Under Count I of the Declaratory Judgment Action, Praetorian seeks a declaration with respect to the scope and extent of its duty to defend and/or indemnify Air Cargo for the "deliberate intent" cause of action. *Id.* Under Count II of the Declaratory Judgment action, Praetorian did not seek any declaration of its rights or duties under the applicable policy. Rather, Praetorian sought to have the Circuit Court make a substantive ruling on the ***merits*** of the negligence claim pending in the Tort Action, namely the question of Air Cargo's alleged immunity. *Id.*

Praetorian filed Praetorian Insurance Company's Motion for Summary Judgment (AR 241-262, plus Exhibits), seeking a ruling on Count I and Count II. The parties filed corresponding responses and replies. (AR 520-541; 542-572; 573-609; 718-721; 722-750; 752-756).

Air Cargo and Ms. Chau both filed Motions to Dismiss Count II of Praetorian's Complaint on the basis, among others, that Count II did not seek a Policy interpretation, but rather sought to impermissibly engage in a direct action seeking a ruling on the merits of Ms. Chau's negligence claim. (AR026-032; AR 009-025). The parties filed corresponding responses and replies. (AR 041-234; 493-519; 610-616).

On July 28, 2021, Judge Ballard entered an order in the underlying Declaratory Judgment Action dismissing Count II of Praetorian's Declaratory Judgment Complaint. ("Dismissal Order") (AR 786-793). On July 28, 2021, Judge Ballard also entered an Order denying Praetorian's Motion for Summary Judgment. ("Summary Judgment Order") (AR 764-780).

III. SUMMARY OF ARGUMENT

The Summary Judgment Order

In order to obtain relief from this Court regarding the Circuit Court's Summary Judgment Order as to Count I, Praetorian has to win three arguments. This is because the Circuit Court refused to grant Praetorian's Summary Judgment Motion on multiple, independent grounds, any one of which is adequate to affirm the Circuit Court's Ruling.

As an initial point, this appeal is NOT driven by anything in this Court's prior ruling in *W.Va. Employers' Mut. Ins. Co. v. Summit Point Raceway Assoc.,* 228 W.Va. 360, 719 S.E.2d 830 (2011). Not only is the Policy interpretation here governed by Wisconsin law, but the policy language at issue in *Summit Point* could not be more different than the policy language at issue in this case. It is the Policy language here, supported by the applicable legal principles under Wisconsin law regarding policy interpretation, including resolution of ambiguities in favor of coverage, that drives the analysis of this appeal. Notwithstanding the fact that the policy interpretation is governed by Wisconsin law, one statement by this Court in *Summit Point* worth noting in the context of this Court's analysis under this Appeal because it tracks Wisconsin law on this issue:

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

Summit Point at 373 (citations omitted).[2]

[2] As set forth above, Wisconsin law controls policy interpretation issues. Wisconsin law is similar with respect to the citation from *Summit Point* "Exclusion clauses are strictly construed against the insurer especially if they are of uncertain import. An insurer may, of course, cut off liability under its policy with a clear language, but it cannot do so with that dulled by ambiguity." *State Dep't of Public Welfare v. Central Standard Life Ins. Co.,* 19 Wis. 2d 426, 432 (1963).

Praetorian *chose* the langue in the Policy here. It must suffer the consequences of any lack of clarity, any missing definitions, and the ambiguities that arise from those decisions. Had Praetorian wished to exclude deliberate intent claims from coverage under the Policy in the first instance, Praetorian could have used language like the insurer in *Summit Point* that expressly stated that the insured was responsible for payment of deliberate intent claims. But Praetorian chose not to include such language.

Had Praetorian wished to avoid liability for non-intentional deliberate intent claims under W. Va. Code §23-4-2(d)(2)(B), it could have easily done so by using specific language like the insurer in *Summit Point* used to exclude deliberate intent claims, whether or not the act was intended to cause injury. But Praetorian chose language that does not exclude for non-intentional deliberate intent claims under W. Va. Code §23-4-2(d)(2)(B) or at a minimum is ambiguous to the point.

Had Praetorian intended for the Residence Employee Endorsement and/or the "business pursuits" exclusion therein to have specific meanings that excluded Ms. Chau from coverage, Praetorian could have easily done so. Yet, Praetorian chose not to define residence employee or business pursuits, leaving Air Cargo and the Circuit Court to guess as to their meanings, thereby creating ambiguities that must, under applicable law, be interpretated against the insurer and in favor of coverage.

Simply put, even if *Summit Point* governed this Court's analysis – which it does not – it is not Praetorian's path to victory regarding Count I given Praetorian's facts and chosen policy language. As established below, the Policy language here, combined with the applicable legal principles regarding undefined and ambiguous terms, is what primarily drives the analysis, and should result in this Court affirming the Circuit Court's ruling.

As to the Circuit Court's treatment of Count II in its Summary Judgment Order, the Circuit Court correctly determined not only that it is improper for Praetorian to attempt to directly litigate the merits of the underlying negligence claim, but further that it is premature to reach the merits of the underlying negligence claim. As a result, this aspect of the Circuit Court's Summary Judgment Order should not be deemed appealable because the Circuit Court did not rule on the merits of the negligence issue. *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 99 (2002) (Ordinarily, an order denying a motion for summary judgment is merely interlocutory, and leaves the case pending for trial).

The Dismissal Order

As set forth below, Praetorian spent two pages of its Opposition to the Motions to Dismiss Count II conceding that it was effectively pursuing a "direct action," under the mistaken belief that the law of Wisconsin, a "direct action" state, applied to that issue. However, the Circuit Court appropriately determined, under black letter West Virginia law, not only that West Virginia law controls that issue, but that West Virginia's clear prohibition against "direct actions" foreclosed Praetorian's efforts to directly participate in the merits of Ms. Chau's negligence claim that is pending in the Tort Action. That ruling encompasses and controls every Assignment of Error Praetorian alleges with respect to the Dismissal Order. As a result, the Court should affirm the Circuit Court's Dismissal Order.

Responses to the West Virginia Chamber of Commerce's *Amicus Curiae* Brief

The *Amicus Curiae* Brief filed by the West Virginia Chamber of Commerce advances two arguments: (i) that the Policy does not violate Wisconsin law, and (ii) that this Court should use the analysis in *Summit Point*, *supra* to determine that the Intentional Acts Exclusion in the policy excludes both intentional and non-intentional claims under W.Va. Code § 23-4-2(d)(2). The

arguments below on those issues are intended to respond to both the Appellant's Brief and the *Amicus Curiae* Brief.

IV. STANDARD OF REVIEW

As stated by this Court: "We review a circuit court's grant of summary judgment de novo, Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994), "'and, therefore, we apply the same standard as a circuit court,' reviewing all facts and reasonable inferences in the light most favorable to the nonmoving party." *Powderidge Unit Owners Ass'n v. Highland Props.*, 196 W. Va. 692, 698 (1996) (citations omitted). Additionally, "In general, this Court will apply a de novo standard of review to a circuit court's order granting a motion to dismiss." *Savarese v. Allstate Ins. Co.*, 223 W. Va. 119, 123 (2008).

With respect to the summary judgment standard applied by both the Circuit Court and to be applied by this Court:

> The nonmoving party is entitled to "the benefit of all inferences, as 'credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge[.]'" *Williams v. Precision Coil*, 194 W. Va. 52, 59, 459 S.E.2d 329, 336, quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Likewise, we have concluded that "the inferences to be drawn from the underlying affidavits, exhibits, answers to interrogatories, and depositions must be viewed in the light most favorable to the party opposing the motion." *Hanlon v. Chambers*, 195 W. Va. 99, 105, 464 S.E.2d 741, 747 (1995). On a motion for summary judgment, neither a trial nor appellate court can try issues of fact; a determination can only be made as to whether there are issues to be tried. To be specific, if there is any evidence in the record from any source from which a reasonable inference can be drawn in favor of the nonmoving party, summary judgment is improper." *Id.* at 105, 464 S.E.2d at 747.

Law v. Monongahela Power Co., 210 W. Va. 549, 557 (W. Va. 2001) .

V. STATEMENT REGARDING ORAL ARGUMENT

Air Cargo joins Petitioner in requesting oral argument.

VI. ARGUMENT

A. The Circuit Court Was Correct to Dismiss Count II of Praetorian's Declaratory Judgment Complaint Because Praetorian Conceded It Was Attempting an Impermissible Direct Action Under the Mistaken Belief That Wisconsin Law Applied to That Issue (Assignments of Error 11-17).

This Court can easily affirm the Circuit Court's dismissal of Count II on the sole basis that Praetorian conceded it was bringing a "direct action" claim under the mistaken belief that the law of Wisconsin, a "direct action" state, governs that issue. It does not.

Ms. Chau's Tort Action Complaint asserts two causes of action: (i) deliberate intent, and (ii) negligence. Count I of Praetorian's Declaratory Judgment Count sought (i) a declaratory judgment regarding the *interpretation of the Policy* and whether it covers Ms. Chau's deliberate intent claim. However, Count II does not seek any interpretation of the Policy. Rather, Count II asks the Circuit Court to rule on the merits of the underlying negligence claim, including a potential Air Cargo defense in the underlying Tort Action, in this separate declaratory judgment action where (i) the relief sought has nothing to do with the extent or scope of the Policy or its interpretation, (ii) if permitted, would have created a substantial risk of inconsistent judgments in the Tort Action on the same issue, and (iii) most importantly, placed Praetorian in the impermissible position of a direct action posture against Ms. Chau.

Praetorian's Opposition (AR 041-062) to the Motions to Dismiss filed by Ms. Chau (009-025) and Air Cargo (026-039) spent two pages conceding that it was attempting to engage in a "direct action" which it further acknowledges would be impermissible under West Virginia law.[3]

[3] For example, Praetorian emphasizes that "Wisconsin is also a 'direct action' state. This means that, under Wisconsin law, a third-party claimant who wishes to sue for tort damages does not have to sue the tortfeasor; she/he can directly sue only that tortfeasor's liability insurance company for the tort itself." (AR 50). Additionally, Praetorian attempts to justify its efforts to directly assert Air Cargo's defenses by resorting to Wisconsin law: "W.S.A. creates ***direct liability*** for a liability insurance company as to a tort committed by its insured. The liability insurance company defends itself in the direct action lawsuit by using any tort defenses available to its insured." (AR 051)

See AR 050 (citing *Robinson v. Cabell Huntington Hosp., Inc.*, 201 W. Va. 455, 459-60, 498 S.E. 2d 27, 31-32 (1997) for the proposition that West Virginia is not a "direct action state). Praetorian attempts to justify it on the basis that Wisconsin is a direct action state. This is simultaneously true and immaterial. Under West Virginia choice of law principles, the *contents* of the policy are governed by Wisconsin law whereas procedural and legal issues outside of the Policy are governed by West Virginia law.

Citing with approval to an Iowa case, this Court has stated: "An insurance policy is governed as to its nature, validity, and interpretation or construction . . . . by the law of the place where it was made or consummated, unless the parties clearly appear to have intended the law of a different place to govern . . . ." *Lee v. Saliga*, 179 W. Va. 762, 767 (W. Va. 1988) (citing *Cole v. State Automobile & Cas. Underwriters*, 296 N.W.2d 779 (Iowa 1980)).[4] This Court further stated that: "The laws of the state where a contract is made and is to be performed determine the substantive rights of the parties to such contract; *but in the enforcement of those rights by litigation, the procedural laws of the state where enforcement is sought control.*" *Lee* at 770, fn 13 (citing Syllabus Point 2 of *In Re Fox's Estate*, 131 W. Va. 429, 48 S.E.2d 1 (1948)) (emphasis supplied).

Simply put, the question of whether an insurer may engage in a "direct action" against a tort claimant in a lawsuit in West Virginia has absolutely nothing to do with the contents, terms or interpretation of a single word in an insurance policy. *See Robinson v. Cabell Huntington Hosp., Inc.*, 201 W. Va. 455, 459-60, 498 S.E. 2d 27, 31-32 (1997).

Moreover, as stated by the Circuit Court below:

> West Virginia law applies the *lex loci delicti* choice of law rule and declares that the substantive rights between the parties in a tort action are determined by the law of the place of injury. *Blais v. Allied Exterminating Co.*, 482 S.E.2d 550 (W.Va. 1996); and *McKinney v. Fairchild International, Inc.*, 487 S.E.2d 913 (W.Va.

[4] The parties do not dispute that the *contents* of the Policy are governed by Wisconsin law. *See* Appellant Brief at p. 12.

> 1997). The plane crash, which is the subject of the negligence tort claim, occurred in West Virginia and is governed by the West Virginia wrongful death statute. Additionally, "under the *lex loci delicti* choice of law rule, West Virginia procedure applies to all cases before West Virginia courts." *McKinney v. Fairchild International, Inc.*, 487 S.E.2d 913, 923 (W.Va. 1997).

(AR 0789-790).

This means that West Virginia law applies to the question of who may bring a direct claim in a court in West Virginia. The contents of the Policy are in no way implicated.

The Circuit Court found that "Praetorian relies on its insurance contractual defense and indemnity obligations to Air Cargo as a primary basis to assert standing to directly litigate the merits of the Estate's negligence claim in Praetorian's own name and on its own behalf." (AR 789). Additionally, the Circuit Court further stated:

> West Virginia recognizes resolution of a tort claim must be litigated between the injured party and tortfeasor, not directly with the indemnifying insurance carrier. West Virginia has never been a direct action claim state and Praetorian has presented no precedence for creating direct action general tort litigation between injured plaintiffs, tortfeasors and, insurers whose liability obligations are always contingent upon the outcome of the tort litigation.

(AR 792).

Indeed, Praetorian concedes that *under West Virginia law*, Ms. Chau is prohibited from bringing a "direct action" against Praetorian for proceeds under the Policy. (AR 050-051). Conversely, this means West Virginia law likewise prohibits Praetorian from asserting a "direct action" against Ms. Chau, in the form of usurping and litigating its insured's defense in the Tort Action.

Finally, it is telling that Praetorian's Appellant Brief does not utter a single word of its mistaken argument contained in its Opposition. The absence of any mention that Praetorian conceded this is a "direct action" is more significant than the presence of any other argument regarding dismissal of Count II. And the most glaring aspect of this is the fact that Praetorian does

not assert, as an Assignment of Error, that the Circuit Court erred in holding this to be an impermissible "direct action." This Court may affirm the Circuit Court's dismissal of Count II of Praetorian's Complaint on this basis alone, rendering Assignments of Error 11-17 moot.

1. Praetorian's Concession That it Was Bringing a "Direct Action" Claim Confirms Praetorian's Lack of Standing. (Assignments of Error 11-16).

At the close of its discussion of the fact that Praetorian could not bring Praetorian's conceded "direct action" to litigate the merits of the negligence immunity issue, the Circuit Court stated:

> West Virginia has never been a direct action claim state and Praetorian has presented no precedence for creating direct action general tort litigation between injured plaintiffs, tortfeasors and, insurers whose liability obligations are always contingent upon the outcome of the tort litigation. Further, Praetorian has presented no precedent recognizing an insurer's contingent indemnity obligation to create adverseness among it, an injured plaintiff and, its insured to establish standing to litigate the merits of a tort claim.

(AR 792). Thus, it was in the context of finding Count II to be an impermissible "direct action" that the Court found there was no precedent that there was either adversariness or standing to litigate the merits of the underlying tort claim. It is axiomatic that no argument about textbook standing or about adversariness can overcome West Virginia's black letter prohibition against "direct actions."

However, in the interest of addressing the standing argument, the Circuit Court did recite the applicable test for standing:

> "The irreducible constitutional minimum of standing consists of the following three elements: (1) the plaintiff must have suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.

(AR 790-791) (citing *A.H. v. CAMC Health System, Inc.*, 2020 WL 1243608 (W.Va. 2020)). As for injury, it is undisputed that Praetorian has not yet been called upon to pay anything on Ms.

Chau's litigation claims. It is further undisputed that, at least until resolution of this Appeal,[5] both the deliberate intent claim and the negligence claim are still pending in the Tort Action and still potentially covered under the Policy.

As for causal connection, Praetorian argues the very thing it is not permitted to argue - the merits of the underlying tort claim. Appellant Brief at p. 31.

As for redress by a favorable judicial decision, it is clear Praetorian's concession that this is a "direct action" prohibited by West Virginia law eliminates any possibility for redress of this claim brought by Praetorian. This factor alone proves Praetorian has no standing under the circumstances. Obviously, the merits of Ms. Chau's claims and Air Cargo's defenses thereto will eventually be determined in the Tort Action where Ms. Chau and Air Cargo have standing to litigate those issues. But the Circuit Court was correct to state, given West Virginia's prohibition on "direct actions," that "Praetorian has presented no precedent recognizing an insurer's contingent indemnity obligation to create adverseness among it, an injured plaintiff and, its insured to establish standing to litigate the merits of a tort claim." (AR 792).

2. Praetorian's Concession That It Was Bringing a "Direct Action" Claim Confirms the Lack of a Justiciable Controversy (Assignment of Error 17).

The Circuit Court's discussion of Praetorian's impermissible attempt at a "direct action" also resolves Praetorian's argument about a justiciable controversy. The Circuit Court cited the standard for a justiciable controversy:

> "(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."

(AR 791) (citing *A.H. v. CAMC Health System, Inc.*, at pg. 2).

[5] And potentially Praetorian's sister appeal, Appeal No. 21-0243.

The key factor here is whether there is adversariness between the parties. The Circuit Court adequately addressed this in discussing the relationship between an insurer and a tort claimant in the context of a "direct action." First, the Circuit Court cited *Robinson v. Cabell Huntington Hospital, Inc.*, 498 S.E.2d 27, 31-32 (W.Va. 1997) stating: "As a general rule, in the absence of policy or statutory provisions to the contrary, one who suffers injury which comes within the provisions of a liability insurance policy, is not in privity of contract with the insurance company, and cannot reach the proceeds of the policy for the payment of his claim by an action directly against the insurance company." (AR 792). The Circuit Court continued:

> *O'Neal v. Pocahontas Transp. Co.*, 129 S.E. 478, 481 (W.Va. 1925) acknowledges, "The inherent difference between a breach of an agreement between parties, and that sort of breach of duty which we call a tort, is as old as the law itself." "There is no privity of contract between the injured person and the insurance company. The remedy, well established, is by a suit against the tort-feasor alone." West Virginia recognizes resolution of a tort claim must be litigated between the injured party and tortfeasor, not directly with the indemnifying insurance carrier.

Black letter West Virginia law prohibiting "direct actions" precludes the adversariness component of a justiciable controversy. Praetorian cannot occupy the stance of directly litigating the merits of Ms. Chau's claims, which necessarily involves any defenses that Air Cargo, as the party in interest in that Tort Action, may raise to such claims.

3. The Circuit Court was Correct to Defer the Merits of Ms. Chau's Negligence Claim to the Tort Action, Particularly Given That West Virginia's Prohibition Against Direct Actions Prohibits Praetorian From Directly Litigating the Merits of That Claim (Assignments of Error 12, 14 and 15).

As set forth above, Praetorian spent two pages of its Opposition justifying its efforts to assert a direct action, albeit under the mistaken belief that Wisconsin law applies to that issue here. Notably, Praetorian makes no mention of it whatsoever in its Appellant Brief. Because Praetorian is prohibited from attempting to directly litigate the merits of the negligence claim (and defenses),

every act by the Circuit Court identified in Assignments of Error 12, 14 and 15 was completely appropriate and justified.

First, Praetorian creates a "red herring" in arguing that it was improper for the Circuit Court to defer the "Immunity Issue" to the Tort Action. Praetorian's argument assumes the Circuit Court was choosing to defer an issue that it *could* have decided in Praetorian's favor. The primary point of the Circuit Court's order dismissing Count II was that Praetorian does not get to litigate that issue – period. The Circuit Court acknowledged that:

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

(AR 789).[6] Notably, the Circuit Court's Order does not assume that Praetorian will get to directly participate in the merits of the negligence claim in the Tort Action. The Circuit Court simply pointed out the obvious: the Circuit Court presiding over the Tort Action will independently, in due course, address the merits of the negligence claim, including any defenses. Clearly the Circuit Court here contemplated a potential waste of resources and a corresponding risk of inconsistent judgments.

However, the Circuit Court ultimately found that Praetorian, as an insurer, was not permitted to participate in what Praetorian itself has conceded is a direct action. In its Appellant

[6] The Circuit Court also pointed out that, because the Circuit Court presiding over the Tort Action would still address the negligence claims independently, and could choose to reject the Circuit Court's ruling, "this Court may 'refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.'" (AR 789) (citing W.Va. Code §55-13-6)).

Brief, Praetorian asserts that "[t]he effect is that Praetorian's right to protect its interests in the issue of Air Cargo's workers' compensation immunity has been trampled." Appellant Brief at p. 36. This statement presumes that Praetorian has a right to protect "its interest" in the immunity issue. It does not, and neither Assignment of Error 12 nor 15 contains an error.

Next, Praetorian asserts in Assignment of Error 14 that "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." Appellant Brief at p. 2. The Circuit Court stated in its Findings of Fact that:

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

(AR 787). However, this finding of fact was not relied upon or given any weight by the Circuit Court in its Conclusions of Law. In its Conclusions of Law, the Circuit Court stated: "Defendants assert resolution of the merits of the negligence claim is contingent upon factual discovery ongoing in the tort action and ruling by the tort claim court. Ruling on the merits of the negligence claim are dependent on resolutions of facts by the tort court." (AR 788).

There is no doubt that the traditional tort requirements of a negligence claim, duty, breach, causation and damages, will have to be established in the Tort Action in order for Ms. Chau to prevail on the merits of a negligence claim.[7] Moreover, to the extent the fact of worker's compensation coverage is relevant to the merits of the negligence claim, or defense thereto, that too will have to be established in the Tort Action. Simply put, there was nothing inaccurate, hence no error, in the Circuit Court's Order on this point.

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[7] *Gable v. Gable*, 858 S.E.2d 838, 850 (W. Va. 2021) (In any negligence or tort case, a plaintiff is required to show four basic elements: duty, breach, causation, and damages).

4. The Circuit Court Did Not Err by Simply Citing Applicable, Valid, Black Letter Wisconsin Law on an Insurer's Duty to Defend. (Assignment of Error 13).

It is no secret that Praetorian's ultimate motive here is to put its own interests above the interests of its insured, put its checkbook in its pocket and exit the Courthouse. Indeed, Air Cargo's Summary Judgment Response specifically stated that a ruling on Count II in the Declaratory Judgment Action would not permit Praetorian an early exit because of its continuing duty to defend: "[R]uling on the negligence claim in this case serves no purpose whatsoever for Praetorian because it will not facilitate an early escape from its defense obligations even if all of the relief sought therein is granted." (AR 537).

It is important to remember that Praetorian chose to file a Declaratory Judgment Action seeking the Circuit Court rule on the scope and extent of Praetorian's rights and duties under the Policy. In the second half of its Order Denying Summary Judgment, the Circuit Court addressed Count II of Praetorian's Complaint. (AR 779-780). Specifically, the Circuit Court stated:

> "[w]hile the Court believes that it is appropriate for it to make determinations in this case regarding Praetorian's duty to defend and/or indemnify ACC, it is not appropriate for this Court to decide the merits of those claims pending before another Court.
>
> Moreover, even if Praetorian were correct that this Court has the power to effectuate an actual dismissal on the merits of the negligence claim in another case before a different judge, such a declaration by this Court would be of no effect because Wisconsin law is clear that the duty to defend, once triggered, remains in effect even after the dismissal of all potentially covered claims until the underlying case is fully and completely resolved, including the expiration of all possible appeal periods. *See, e.g., Anderson v. Kayser Ford, Inc.*, 386 Wis. 2d 210, 925 N.W. 2d 547 (2019). The Court finds that as a matter of law, Praetorian has a duty to defend the negligence claims in the Tort Action until final resolution, including any potential appeals.

(AR 779).

Praetorian alleges that the Circuit Court's ruling regarding its duty to defend is incorrect.

However, *Anderson v. Kayser Ford, Inc.*, 386 Wis. 2d 210, 925 N.W. 2d 547 (2019) is still good law in Wisconsin. There, the Wisconsin Supreme Court confirmed that the duty to defend continues for as long as the insurer has an "arguable" obligation to indemnify its insured:

> The duty to defend created by an insurance policy is not coextensive with the insurer's obligation to indemnify the insured but instead is broader. *Fireman's Fund*, 2003 WI 33, 261 Wis. 2d 4, ¶20, 660 N.W.2d 666. The duty to defend is broader because it is defined through the four-corners test, in which pertinent policy language is strictly compared with "'the nature of the claim[s] alleged against the insured [as expressed within the four corners of the complaint] ... even though the suit may be groundless, false or fraudulent.'" Id., ¶21 (quoting *Grieb v. Citizens Cas. Co. of N.Y.*, 33 Wis. 2d 552, 558, 148 N.W.2d 103 (1967)). Thus, under the four-corners test, the insurer has a duty to defend so long as the insurer "'could be held bound to indemnify the insured, assuming that the injured person proved the allegations of the complaint, regardless of the actual outcome of the case.'" *Sustache*, 311 Wis. 2d 548, ¶22 (emphasis added) (quoting Grieb, 33 Wis. 2d at 558, which in turn quotes 29A Am. Jur., Insurance § 1452, at 565 (1960)). Or, put another way, an insurer has a duty to defend as long as it has an "arguable" obligation to indemnify its insured if the plaintiff prevails on the merits. See *Fireman's Fund*, 2003 WI 33, 261 Wis. 2d 4, ¶¶19-21, 660 N.W.2d 666 (duty depends on "arguable," not "actual," obligation to indemnify).

Id at 21. Praetorian states that *if* it won both Counts of its Declaratory Judgment Action, that would "confirm that Praetorian has no duty to defend Air Cargo in the Tort Action." Yet, this is completely wrong. As set forth above, the Circuit Court correctly noted in the Dismissal Order that:

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

(AR 791). Thus, even *if* Praetorian had won both Counts of its Complaint in the Declaratory Judgment Action, which it has not, the Circuit Court presiding over the Tort Action could reach a different conclusion, meaning that there is still an "arguable" duty to indemnify.

Regardless, Praetorian did *not prevail* on its declaratory judgment complaint. There is still an "arguable" duty to indemnify. And under *Anderson, supra*, Praetorian has a continuing duty to defend Air Cargo. Praetorian may not like the Circuit Court's statements on this issue and it can attempt to interpret them as gratuitous. However, they are correct statements of law and Assignment of Error 13 asserts no error.

B. The Circuit Court Was Correct to Deny Summary Judgment on the Issue of Whether the Intentional Act Exclusion Excludes Plaintiff's W. Va. Code § 23-4-2(d)(2)(B) Deliberate Intent Claim (Assignments of Error 4-6).

Praetorian chose the language in the Policy, including the specific language in the Intentional Acts Exclusion. That language provides:

> This insurance does not cover:
>
> 5. Bodily injury *intentionally caused* or aggravated by you ***or*** which is the result of your *engaging in conduct equivalent to an intentional tort*, however defined, including your deliberate intention as that term is defined by W.Va. Code § 23-4-2(d)(2).

(AR 150) (emphasis supplied). It is undisputed that there are two methods for proving a deliberate intent claim under W. Va. Code §23-4-2:

(1) The first method is by showing a "deliberately formed intention to produce the specific result of injury or death to an employee" and further states that "This standard requires a showing of an actual, specific intent and may not be satisfied by allegation or proof of: (i) Conduct which produces a result that was not specifically intended; (ii) conduct which constitutes negligence, no matter how gross or aggravated; or (iii) willful, wanton or reckless misconduct." *Id.* Subsection (d)(2)(A)).

(2) The second method is to establish what is referred to as the *Mandolidis* factors which clearly can be shown through willful, wanton or reckless conduct without a showing of intent. Subsection (d)(2)(B).[8]

By comparison, the Intentional Act Exclusion here expressly excludes two types of claims. The first is "Bodily injury *intentionally caused* or aggravated by you." (AR 150) (emphasis supplied). There is no dispute that intentional conduct that would satisfy Subsection (d)(2)(A) would be excluded under the first clause of the Intentional Act Exclusion.[9] The second type of claim is "*conduct equivalent to an intentional tort, however defined,*" followed by the phrase "including your deliberate intention" as that term is defined by W.Va. Code § 23-4-2(d)(2). (AR 150) (emphasis supplied).

Importantly, this Court has specifically addressed the distinction between an intentional tort and conduct that is merely willful, wanton or reckless:

> In the seminal case of *Mandolidis v. Elkins Industries, Inc.*, 161 W. Va. 695, 246 S.E.2d 907 (1978), this Court attempted to clarify the meaning of deliberate intent, by providing in syllabus point one of Mandolidis, in part, that an employer would lose workers' compensation protection and be "subject to a common law tort action for damages or for wrongful death where such employer commits an intentional tort ***or*** engages in willful, wanton, and reckless misconduct . . . ."

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[8] In fact, this Court has confirmed that "[t]he statutory framework surrounding a Mandolidis-type action essentially provides for two separate and distinct methods of proving 'deliberate intention.' *Blevins v. Beckley Magnetite*, 185 W. Va. 633, 638 (W. Va. 1991). This is clearly established under the specific language of W. Va. Code §23-4-2(d)(2). The Legislature specifically chose two methods of proving a deliberate intent claim: one where there was a "deliberately formed intention to produce the specific result of injury or death to an employee," ((d)(2)(A)) and one where there was not a deliberately formed intention to produce injury or death ((d)(2)(B). Subsection (A) specifically states that "This standard requires a showing of an actual, specific intent and may not be satisfied by allegation or proof of: (i) Conduct which produces a result that was not specifically intended; (ii) conduct which constitutes negligence, no matter how gross or aggravated; or (iii) willful, wanton or reckless misconduct." *Id.* The sheer existence of this language in Subsection (d)(2)(A) confirms that "intent" is not required under Subsection (d)(2)(B). Moreover, by establishing that "willful, wanton or reckless misconduct" cannot satisfy Subsection (d)(2)(A), it necessarily follows that willful, wanton or reckless misconduct can be used to meet the factors under Subsection (d)(2)(B). As a result, deliberate intent can be established under Subsection (d)(2)(B) without showing intentional conduct. *Id.*

[9] Without regard to any other arguments that the exclusion is unenforceable, for example, under Wisconsin law.

Blake v. John Skidmore Truck Stop, 201 W. Va. 126, 130 (W. Va. 1997) (emphasis supplied). Additionally, The Restatement (Second) of Torts defines intent as follows: "The word 'intent' is used throughout the Restatement of this Subject to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it. Restat 2d of Torts, § 8A. Given the foregoing, Praetorian's chosen language, "Bodily injury *intentionally caused* or aggravated by you ***or*** which is the result of your *engaging in conduct equivalent to an intentional tort*," does not apply to claims brough under W. Va. Code 23-4-2(d)(2)(B).

On its face, the Intentional Act Exclusion excludes only intentional acts and conduct that is the equivalent of an "intentional tort." As such, there is no dispute that both clauses in the Intentional Act Exclusion would exclude claims for intentional conduct under W.Va. Code § 23-4-2(d)(2)(A).

However, there is also no dispute that Ms. Chau brought her claims under W.Va. Code § 23-4-2(d)(2)(B), which can be proven without a showing of intent. Thus, on the one hand, the second clause of the exclusion requires conduct that is the equivalent of an intentional tort, but on the other hand references the deliberate intent statute. As a result, because the second clause of the Intentional Act Exclusion requires the *equivalent of an intentional tort*, it is not clear whether the clause excludes conduct falling short of intentional, such as conduct that could establish a deliberate intent claim under W.Va. Code § 23-4-2(d)(2).

The Circuit Court agreed that the "Praetorian policy is ambiguous regarding whether or not the exclusion applies to both subsection (d)(2)(A) and subsection (d)(2)(B) of W.Va. Code § 23-4-2." (AR 772). The Circuit Court further agreed that "a reasonable reading of the exclusionary endorsement is that it applies to claims under subsection (d)(2)(A) but that it does not necessarily

apply to claims made under subsection (d)(2)(B) unless there is a separate finding by the trier of fact that the employer 'intentionally caused' the bodily injury." *Id.*

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

Thus, construing the ambiguous second clause of the Intentional Act Exclusion against Praetorian, and in favor of coverage, the Circuit Court found that "because [Ms. Chau] can prevail on that claim without proving that bodily injury to her decedent was "intentionally caused or aggravated" by Air Cargo, this Court cannot conclude as a matter of law that the exclusion relied upon by Praetorian applies." (AR 773).

The Circuit Court further found that, [u]nder Wisconsin law, the insurer bears the burden of proving that an exclusion applies, including the facts necessary for the operation of the exclusion (AR 773) (*citing Wilson Mut. Ins. Co. v. Faulk*, 360 Wis. 2d 67, 857 N.W.2d 156 (2014)), and denied summary judgment on this issue because: "This burden has not been met at least this time because so far, there has been no formal finding that Air Cargo 'intentionally caused' bodily injury

to its employee and also because such a finding is not required for the underlying plaintiff to prevail regarding her 'deliberate intent' claim." (AR 773).

Praetorian argues that *W.Va. Employers' Mut. Ins. Co. v. Summit Point Raceway Assoc.*, 228 W.Va. 360, 719 S.E.2d 830 (2011), shows that the Circuit Court erred in its analysis.[10] However, because the exclusionary language in that case expressly captured intentional *and unintentional* conduct, *Summit Point* actually proves that the Circuit Court was correct in *this instance* with *this specific language*. The differences are dispositive.

Comparative analysis of *Summit Point* calls for examination of the markedly different language chosen by each insurer.

The deliberate intent exclusion language in the *Summit Point* policy captured both intentional and unintentional conduct:

> "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 373 (emphasis supplied). By using the language "whether or not the act was intended to cause injury" the policy language in *Summit Point* expressly included "unintentional" deliberate intent claims, such as claims that can be established without a showing of intent under W. Va. Code § 23-4-2(d)(2)(B).

By contrast, the Intentional Act Exclusion here captures two versions of *intentional* conduct (Or, the language is at least ambiguous as to whether the second clause captures unintentional conduct, such as claims under W. Va. Code § 23-4-2(d)(2)(B)):

This insurance does not cover:

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[10] Again, Wisconsin law governs Policy interpretation. However, given Praetorian's arguments that *Summit Point* is at least persuasive, the analysis is warranted.

> 5. Bodily injury *intentionally caused* or aggravated by you ***or*** which is the result of your *engaging in conduct equivalent to an intentional tort*, however defined, including your deliberate intention as that term is defined by W.Va. Code § 23-4-2(d)(2).

(AR 150) (emphasis supplied).

Indeed, the Circuit Court appropriately found that the application of the Intentional Act Exclusion is driven by the issue of whether the claims in question were intentional:

> by the plain language of the exclusion, for it to apply, there must either be: 1) bodily injury intentionally caused or aggravated by the insured; or 2) an intentional tort. By using the connector "including," Praetorian made it clear that even if there is a claim made under W.Va. Code § 23-4-2(d)(2), for the exclusion to apply, there must still be either an intentional tort or the intent to cause or aggravate the bodily injury for the exclusion to apply.

(AR 771).

The Circuit Court also specifically addressed the Intentional Act Exclusion of intentional conduct when it found that Ms. Chau's claims were brought under subsection (d)(2)(B) and further found that claims under subsection (d)(2)(B) do "not require proof that the bodily injury was 'intentionally caused' by the employer or proof of an 'intentional tort.'" (AR 772-773). Additionally, the Court held that "[b]cause [the tort plaintiff] can prevail on that claim without proving that bodily injury to her decedent was 'intentionally caused or aggravated' by Air Cargo, this Court cannot conclude as a matter of law that the exclusion relied upon by Praetorian applies." (AR 773).

The Circuit Court appropriately found that summary judgment in favor of Praetorian was not appropriate under the circumstances because there has been no determination in the Tort Action of whether the acts in question were intentional or unintentional:

> Under Wisconsin law, the insurer bears the burden of proving that an exclusion applies, including the facts necessary for the operation of the exclusion. *See Wilson Mut. Ins. Co. v. Faulk*, 360 Wis. 2d 67, 857 N.W.2d 156 (2014). This burden has not been met at least this time because so far, there has been no formal finding that

> Air Cargo "intentionally caused" bodily injury to its employee and also because such a finding is not required for the underlying plaintiff to prevail regarding her "deliberate intent" claim.

Id. As a result, the Circuit Court did not err in holding that the specific Policy language was ambiguous as to whether it excluded non-intentional conduct and in denying summary judgment because there had not yet been a factual determination in the Tort Action on whether the conduct in question was intentional.

C. Praetorian Is Incorrect in Claiming That the Circuit Court Erred in Failing to Address Whether the Policy Excludes Deliberate Intent Claims in the First Instance. (Assignment of Error 1)

Praetorian notes that the Policy covers "bodily injury by accident" and proceeds to summarily conclude that the referenced language means that the Policy does not cover deliberate intent claims. To do this, Praetorian incorrectly claims that "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." Appellant Brief at p. 14. The language in the *Summit Point* policy was not even similar. There, Part One of the policy stated:

> You are responsible for any 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*;
>
> . . . .
>
> 3. you fail to comply with a health or safety law or regulation. . . .

Summit Point at 372 (emphasis supplied). Next, this Court noted that the policy stated in Part Two "[t]his employers liability insurance applies to bodily injury by accident," *Id.* This Court further stated, "Nothing in the plain language quoted above leads to a reasonable conclusion that deliberate intent coverage is included in this policy." *Id.* As set forth above, policy language drives the

analysis. It makes perfect sense that this Court found that the policy in *Summit Point* did not cover deliberate intent claims ***when there was a policy clause that specifically said that the insured was responsible for deliberate intent payments***. Here, and completely contrary to Praetorian's assertions of identical language, there is no language whatsoever in the Policy stating that Air Cargo is responsible for payments arising out of West Virginia Code § 23-4-2.[11] As such, not only is *Summit Point* wholly inapposite on this issue, it is disingenuous for Praetorian to suggest that the language is identical or that *Summit Point*. The existence of the specific reference to the *Summit Point* insured in that policy being responsible for deliberate intent payments is enough to reject this assignment of error.

Accordingly, the best that Air Cargo can glean from Praetorian's Assignment of Error 1, is that Praetorian believes the Circuit Court was supposed to determine whether the conduct in question in the Tort Action qualifies as "bodily injury by accident."

It is undisputed that the Policy is to be interpreted under Wisconsin, not West Virginia law. And it is undisputed that the word "accident" is not defined in the Policy. Under Wisconsin law, "undefined terms in an insurance policy are given their common and every day meaning." *Hughes v. Allstate Indem. Co.*, 389 Wis. 2d 625, 937 N.W.2d 305 (2019) (additional citations omitted). Additionally, under Wisconsin law, "an accident is '[a]n unexpected, undesirable event' or 'an unforeseen incident' ***which is characterized by a 'lack of intention.***'" *Estate of Sustache v. Am. Family Mut. Ins. Co.*, 2008 WI 87, P34 (Wis. 2008) (quoting The American Heritage Dictionary of the English Language 11 (3d ed. 1992)) (emphasis supplied). Thus, accident means unintended, as opposed to, intentional harm.

[11] Indeed, Section F of Part Two of the Policy that lists "Payments You Must Make," makes no reference to payments under §23-4-2. (AR 299).

Given the foregoing, Air Cargo submits that this was not an appropriate issue for determination by the Circuit Court at the summary judgment stage in a declaratory judgment action as it is driven by an as of yet undetermined finding in the Tort Action as to whether the conduct in question was unintentional. Praetorian is not asking, "what does my policy mean?" Praetorian is asking "does the conduct satisfy the phrase 'bodily injury by accident?'" Disregarding the fact that Praetorian does not even appear to assert a viable assignment of error in the first place, that is an unresolved factual question in the Tort Action and the Circuit Court effectively stated as much. By denying Praetorian's Motion for Summary Judgment on the grounds that there has not yet been a determination in the Tort Action regarding whether the conduct in question was "intentional" for purposes of the deliberate intent exclusion (*see* discussion below), the Circuit Court implicitly determined that it was likewise not in a position to determine, as a matter of law, whether claims constitute "bodily injury by accident."

Finally, to the extent this Court believes that the Circuit Court completely failed to address the issue of whether Part One and/or Part Two of the Policy covers deliberate intent claims without regard to the Intentional Act Exclusion (but should have), then Praetorian's remedy is a remand as this Court does not review issues on appeal that were not addressed below: *See e.g. Mulugeta v. Misailidis*, 2020 W. Va. LEXIS 18, *8, fn 1 (W. Va. 2020) ("Given that the circuit court did not address the merits of petitioner's appeal in the order on appeal, we decline to address petitioner's arguments in this regard".)

D. The Circuit Court Was Correct to Find That the Wisconsin Statutes Were Applicable. (Assignment of Error 2-3)

As an additional and independent basis for denial of summary judgment on Count I, the Circuit Court determined that Wisconsin Statutes §632.23 and §632.25 prohibited Praetorian from

excluding/denying coverage *if* it is determined in the Tort Action that the subject aircraft was operated in violation of "air regulation." (AR 768-769).

Wisconsin Statute §632.23

Wisconsin Statute §632.23 provides:

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

Id. (emphasis supplied). There is no dispute that the Air Cargo owns, maintains, and operates aircraft. There is no dispute that policy codes referenced above that are used to establish the insurance premiums are aircraft and aviation codes. (AR 76, 88). There is no dispute that the broker and servicing agent that acquired the policy has ***AVIATION RISK*** in its name. (AR 66). As stated by the Circuit Court:

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

(AR 768).

Fundamentally, this is another exercise in reading comprehension. Praetorian would like the Court to believe that the applicability of Wisconsin Statute §632.23 is based upon the *type of policy* at issue. However, the language of the statute makes it clear that it 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. Additionally, analysis of the words used by the Wisconsin legislature establish that the applicability of Wisconsin Statute §632.23 is based upon *how the liability arose*. It is clear the Wisconsin legislature intended the statute to apply to a policy that covers ***any liability***

arising out of the ownership, maintenance, or use of an aircraft where the aircraft is operated in violation of air regulation, whether derived from federal or state law or local ordinance. *Id.* (Emphasis supplied). There is also no dispute that the Tort Action Plaintiff asserts that Air Cargo, as the employer, failed to comply with state and federal safety rules and regulations. (AR 769).

The flaw in Praetorian's argument is revealed in Appellant's Brief where Praetorian states: "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." Appellant Brief at p. 21. Whether the Intentional Act Exclusion *depends on anything* is an irrelevant issue. The question is whether the ***Policy*** (without regard to the Intentional Act Exclusion) otherwise covers "liability arising out of ownership, maintenance or use of an aircraft . . ." The Circuit Court found that the Intentional Act Exclusion violates Wisconsin Statute §632.23 because the Policy (potentially) covers "liability arising out of the ownership, maintenance, or use of an aircraft."

Next, both Praetorian (and the Chamber of Commerce) attempt to place significance in the fact that the Wisconsin legislature created other statutes about other topics in the same vicinity in the Wisconsin Code as Wisconsin Statute §632.23. Those statutes and the structure of the Wisconsin Code have no bearing on the plain reading of §632.23, the statute that *is* relevant. It is the language in §632.23 itself, quoted above, that is relevant. It applies to ***any policy*** that would cover liability arising from operation of aircraft. The Policy does not have to say "Policy Insuring Aircraft" across the top to satisfy the statute. As stated above, it 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. The fact that the Policy (without consideration of the Intentional Act Exclusion) otherwise covers Ms. Chau's deliberate intent claim, and that claim ***arises*** out of the operation of

aircraft, leads to the conclusion that the Circuit Court was correct that the Intentional Act Exclusion violates § 632.23.

Wisconsin Statute §632.25

Wisconsin Statute §632.25 provides that "any condition in an employer's liability policy requiring compliance by the insured with rules concerning the safety of persons shall be limited in its effect in such a way that in the event of breach by the insured the insurer shall nevertheless be responsible to the injured person under §632.24 as if the condition has not been breached..."

Although this statute is not critical to the Circuit Court's ruling, it supplements the holding that Wisconsin Statute §632.23 is applicable if it is determined that Air Cargo violated any air safety regulations, the Policy must provide coverage. (AR 769).

The Circuit Court's order provided detailed analysis:

> 14. One of the five elements of a "deliberate intent" cause of action under W.Va. Code § 23-4-2(d)(2) is that there be a "specific unsafe working condition" that was a "violation of a state or federal safety statute, rule or regulation." Id. at subsection (d)(2)(B)(iii).
>
> 15. In the underlying case, to satisfy this element of her "deliberate intent" cause of action, Ms. Chau relies upon alleged violations by ACC of various federal regulations including 49 CFR §44703, 14 CFR § 91 Subpart A; 14 CFR § 119.69; 14 CFR §§35.21, .77, .81, .291, .293, .297, .299, .330, and .337. See underlying Complaint at ¶ 32.
>
> 16. The "deliberate intent" exclusion relied upon by Praetorian clearly violates Wis. Stat. § 632.23 in that Praetorian is seeking to use the exclusion to deny coverage for the underlying case when the allegations arise out of the ownership, maintenance, and use of an aircraft and when the claim is made in the context of alleged violations of federal air regulations.
>
> 17. Under Wisconsin law, when an exclusion is "contrary to statutory coverage provisions," the exclusion is "void" and of no effect. *Davison v. Wilson*, 71 Wis. 2d 630, 239 N.W. 2d 38 (1974).

(AR 769). Given the foregoing, the Circuit Court was correct to deny summary judgment. Moreover, to the extent this Court disagrees, the Circuit Court's independent holding that

W.S.A. § 632.23 is applicable provides an adequate and independent basis to find the Intentional Act Exclusion unenforceable under Wisconsin law.

E. The Circuit Court Was Correct to Find That the Residence Employee Endorsement Provides an Additional Source of Coverage for the Tort Action Plaintiff's Claims.[12]

The Residence Employee Endorsement purports to provide coverage that is in addition to the coverage provided in Part Two of the Policy. (AR 299-301). In analyzing the Residence Employee Endorsement, the Circuit Court noted that the term Residence Employee is undefined in either the Policy or the endorsement and determined that rendered it ambiguous:

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

(AR 774). The Court further recited the standards under Wisconsin law for addressing ambiguities:

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

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[12] Praetorian repeatedly attempts to refer to this as a Domestic Worker Endorsement. To be clear, the endorsement is called "Voluntary Compensation And Employers Liability Coverage for Residence Employees Endorsement." (AR 306-308).

Id. The Circuit Court further held that "[u]nder Wisconsin law, if there is any reasonable interpretation of the term 'residence employee' that favors coverage, this Court must resolve the ambiguity in favor of ACC and adopt the definition of that term that favors coverage."

Given that the term "Residence Employee" was undefined, the Circuit Court looked for a definition of "residence." The Circuit Court found that Black's Law Dictionary specifically recognizes that the term "residence" has "no precise legal meaning." (AR 775) (citing Black's Law Dictionary (6th Ed.) at p. 907). It also found that:

> Under Wisconsin law, "residence" has been defined simply as "a person's house." *State v. Lorentz*, 389 Wis. 2d 377, 936 N.W.2d 415 (2019). However, the term has also frequently been used to describe the act or fact of dwelling in a particular locality for some period of time and/or the status of a legal resident. *See, e.g., County of Dane v. Racine County*, 118 Wis. 2d 494, 347 N.W.2d 622 (1984) (defining "residence" as "the voluntary concurrence of physical presence with intent to remain in a place of fixed habitation"); *Golembiewski v. City of Milwaukee*, 231 Wis. 2d 719, 605 N.W.2d 663 (1999) (defining "residence" as "personal presence at some place of abode with no present intention of definite and early removal"); *Winnebago County v. A.S.*, 120 Wis. 2d 683, 357 N.W.2d 566 (1984) (defining "residence" as being physically present in a "county" with indefinite intent to remain).

(AR 775-776).

Based upon that analysis, the Circuit Court determined that "it is reasonable to define 'residence employee' as an employee of the insured who resides or has their legal residency in the state covered by the endorsement (in this case West Virginia)." (AR 776).

The Court further determined that, because Air Cargo does not own or lease real estate in West Virginia, interpreting residence to mean a person's physical home would render the coverage under the Residence Employee Endorsement illusory. (AR 776-777).

Praetorian makes essentially the same arguments in this appeal as its argument that were addressed by the Circuit Court below:

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

(AR 777). Thus, the Circuit Court determined, given (i) Praetorian's decision not to define Residence Employee, and (ii) that the ambiguity Praetorian's decision created, and (iii) the legal requirement to interpret an ambiguity against the insured and in favor of coverage, that finding the Residence Employee Endorsement applicable to Ms. Chau was a reasonable interpretation. (AR 774-777). Nothing in Praetorian's Appellant Brief mounts a significant challenge to the Circuit Court's analysis set forth in its Order on this issue.

Praetorian next argued that coverage for Ms. Chau under the Residence Employee Endorsement would be excluded by an exclusion contained in the endorsement which excludes: "[b]odily injury arising out of the any of your business pursuits." As was the case with the term Residence Employee, Praetorian also chose not to define "business pursuits." The Court noted that "under Wisconsin law, in the context of homeowner's coverage, the term 'business pursuits' has been defined as 'activities evincing: 1) continuity; and 2) a profit motive.'" (AR 778) (citing *Bartel v. Carey*, 127 Wis. 2d 310; 379 N.W.2d 864 (1985)).

The Circuit Court found that "these exclusions are designed to apply in the homeowner's policy context so that insureds are encouraged to obtain separate coverage for their businesses"

and that "it makes no sense to include a 'business pursuits' exclusion in a policy insuring an actual business that engages in nothing but business activities." (AR 778).[13] The Court held that "to apply this exclusion in the same manner that it has been applied to homeowner's policies under Wisconsin law would render the employers liability coverage illusory in the context of ACC's operations." *Id.* In fact, Praetorian itself cites Wisconsin law for the proposition that "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. Appellant Brief at p. 23 (citing *Day v. Allstate Indem. Co.*, 332 Wis. 2d at 585, 798 N.W.2d at 206 (2011). Yet, under Praetorian's position, there is no circumstance where the Residence Employee Endorsement would ever provide coverage to Air Cargo, a business.

Again, there is nothing in Praetorian's Appellant Brief beyond the arguments raised below that would mount any significant challenge to the Circuit Court's analysis on this issue.

F. The Circuit Court Was Correct to Deny Summary Judgment of Count II of Praetorian's Declaratory Judgment Complaint On The Basis That It Was Premature To Rule On The Merits of the Tort Action Negligence Claim (Assignment of Error 13).

In denying Praetorian's Summary Judgment Motion with respect to Count II, the Circuit Court expressly stated:

> Ms. Chau has identified in her response brief various potential issues of fact regarding the negligence claims asserted against ACC in the Tort Action, and it would be precipitous for this Court to grant summary judgment on the merits of those claims prior to the close of discovery regarding those issues.

[13] Hypothetically, the Endorsement would make much more sense if it were an endorsement insuring individual homeowner John Doe, an accountant. If Mr. Doe hired a live-in house keeper, the house keeper would be covered as long as he/she was not helping with Mr. Doe's accounting business. If this is the proper application of such an endorsement, then it is certainly a curiosity as an endorsement to a policy insuring a business. The business pursuits exception would indeed negate each and every grant of coverage, rendering the 3-page endorsement completely illusory. There is no dispute that Air Cargo paid an additional premium for this endorsement. What did it purchase?

(AR 780). The importance here is that the Circuit Court chose not to rule at all on the merits of the underlying negligence issue pending in the Tort Action. The Circuit Court correctly determined that this was an inappropriate issue for resolution on summary judgment. As a result, this aspect of the Circuit Court's Summary Judgment Order should not be deemed appealable because the Circuit Court did not rule on the merits of the negligence issue. *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 99 (2002) (Ordinarily, an order denying a motion for summary judgment is merely interlocutory, and leaves the case pending for trial).

VII. CONCLUSION

For the foregoing reasons, Respondent Air Cargo respectfully submits that the Circuit Court did not err in (i) denying Praetorian's Summary Judgment Motion, or in (ii) entering the Dismissal Order. Respondent requests that this Court affirm the rulings of the Circuit Court in this matter.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 21-0682

PRAETORIAN INSURANCE COMPANY,

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, Spencer D. Elliott, hereby affirm that on this date, January 13, 2022, I caused the foregoing **AIR CARGO CARRIERS, LLC'S RESPONSW BRIEF** to be served on the following attorneys by depositing a true and accurate copy of the same in the regular United States Mail, first class, postage prepaid, as follows:

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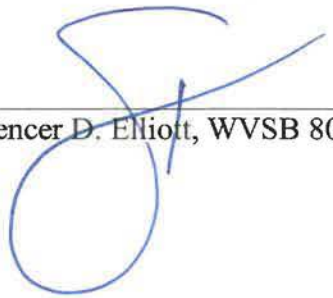

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