COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2007-SC-000246-MR

AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
CASE NO. 05-CI-000791
APPEAL FROM KENTUCKY COURT OF APPEALS
NO. 2007-CA-002510

HONORABLE EDDY COLEMAN, JUDGE
PIKE CIRCUIT COURT, ET AL. — APPELLEES

THE ESTATE OF IDA SWORD McCOWN, By and Through JAMES L. McCOWN, ADMINISTRATOR — REAL PARTY IN INTEREST/APPELLEE

BRIEF OF REAL PARTY IN INTEREST/APPELLEE

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The undersigned hereby certifies that copies of this Brief were served by first class U.S. Mail on June 29th, 2007, to: Robert Y. Gwin, Donald L. Miller, II, Marcia L. Pearson, Edward H. Stopher, Raymond G. Smith, Scott A. Davidson, Bayard V. Collier, Hon. Eddy Coleman, Byron N. Miller, and Kevin M. Murphy.

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INTRODUCTION

This appeal involves the Kentucky Court of Appeals' denial of American Insurance Specialty Lines Insurance Company ("AISLIC")'s writ of prohibition and/or mandamus seeking to prevent the trial court from hearing a declaratory judgment action filed by Real Party in Interest, Plaintiff below and referred to herein as Plaintiff, against AISLIC, as the insurer for Parkview Nursing and Rehabilitation Center, to determine whether Plaintiff's tort claims were made within the coverage period of AISLIC's policy.

STATEMENT OF POINTS AND AUTHORITIES

COUNTER STATEMENT OF THE CASE

I. Introduction

Plaintiff, James L. McCown, Executor of the Estate of Ida Sword McCown, et al., filed suit in the Pike Circuit Court against Parkview Partnership d/b/a Parkview Nursing and Rehabilitation Center, and other related entities and persons ("Parkview Defendants"), alleging various tort claims stemming from the facility's care and treatment of Ms. McCown, who was a resident of the facility. **R. 297-314**[1] Prior to his filing suit, the Parkview Defendants had concluded a bankruptcy reorganization in Georgia. Plaintiff was subsequently told by Parkview's bankruptcy counsel that, as a result of the bankruptcy, he could only recover damages by pursuing any available insurance proceeds. **R. 398-402** In light of this information, Plaintiff moved to amend his Complaint to name Parkview Defendants' insurer, AISLIC, as a defendant (**R. 319-21**) and thereafter sought a declaration that Plaintiff's claims were within the coverage period of AISLIC's policy issued to Parkview Defendants. **R. 326-37** AISLIC filed a Motion to Dismiss Plaintiff's Amended Complaint on the basis that Plaintiff could not file a direct action against it and that, in any event, Plaintiff lacked standing to litigate the construction of an insurance policy to which he was not a party. **R. 33-53** The trial court denied AISLIC's motion. **R. 296**

AISLIC then filed a writ of prohibition and/or mandamus, alleging that the trial court lacked jurisdiction to hear Plaintiff's declaratory judgment action and that, even if the trial court had jurisdiction, it acted erroneously. **R. 9-31** Specifically, AISLIC argued that no actual, justiciable controversy existed absent a judgment against Parkview

[1] References to the Record before the Kentucky Court of Appeals are made herein with the notation "R.___"

Defendants. AISLIC maintained that, because it was under no legal obligation to pay damages until a judgment was obtained, Plaintiff lacked standing, and the trial court had no jurisdiction to hear the declaratory judgment action. Alternatively, AISLIC argued that the trial court acted erroneously, albeit within its jurisdiction. AISLIC contended that it had no remedy by appeal because it could not recover its litigation expense. AISLIC also maintained that no showing of great and irreparable injury was required because the trial court's decision to inject insurance into tort cases violates the law.

In denying AISLIC's claim for extraordinary relief, the Kentucky Court of Appeals held that the trial court was acting within its jurisdiction in denying AISLIC's Motion to Dismiss. Given the unique circumstances of this case, Plaintiff has standing to pursue his declaratory judgment action to determine whether his claims were made within the coverage period provided by AISLIC's policy. **R. 404-11** The Court of Appeals also recognized that an insolvency/bankruptcy exception to the rule that a plaintiff may not sue a defendant's insurer indeed exists. In addition, the Court of Appeals found that, given that the trial court was acting within its jurisdiction, AISLIC failed to make the requisite showing that it lacked an adequate remedy by appeal or otherwise and that great injustice and irreparable injury would result. The Court of Appeals rejected AISLIC's characterization that the trial court, by entertaining Plaintiff's declaratory judgment action, was injecting insurance into a tort case in light of the fact that the tort phase of the proceedings was to be held in abeyance while the trial court alone was to determine the issue of insurance coverage.

AISLIC timely filed its Notice of Appeal to the Kentucky Supreme Court from the Court of Appeals' denial of its writ of prohibition and/or mandamus. **R. 412-13**

II. Facts

Ida McCown was a resident of the Parkview Nursing and Rehabilitation Center from on or about November 5, 2003, through January 22, 2004, with brief periods of interruption for hospitalizations. Ms. McCown died on June 2, 2004, and her son, James McCown, was appointed Executor of her Estate on June 3, 2004, by Order of the Pike District Court. **R. 315** On or about June 3, 2005, Plaintiff filed his original suit against Parkview Defendants in the Pike Circuit Court alleging failures in the care and treatment of Ms. McCown while she was a resident of the Parkview Nursing and Rehabilitation Center. **R. 297-314**

Without completing formal discovery, Plaintiff's claim was placed in abeyance for the parties to determine insurance coverage. During a conference held on February 3, 2006, between counsel for Plaintiff and the Honorable William Oldham, as counsel for the Parkview Defendants, the method and manner of determining that insurance coverage was discussed. On February 14, 2006, Plaintiff's counsel wrote to Mr. Oldham reminding him that he was to provide the insurance information in the McCown case. **(See Exhibit 1) R. 395** Not having received the information as of March 10, 2006, Plaintiff's counsel sent another letter on March 13, 2006, reminding Mr. Oldham that he had indicated that a declaratory judgment action to determine the applicability of the insurance policy in this matter might not be necessary. **(See Exhibit 2) R. 396** Plaintiff's counsel also questioned Mr. Oldham about his ability to speak for the insurance company in that regard, since the coverage dispute would create a conflict in his representation.

Counsel for Plaintiff received a letter from Mr. Oldham dated April 19, 2006. **(See Exhibit 3) R. 397 and R. 322** Therein, Mr. Oldham stated that the policy of insurance that had been obtained by the Parkview Defendants from AISLIC was a "claims made" policy effective from August 7, 2002, through August 7, 2004. Mr. Oldham further expressed his determination that since the Plaintiff did not make his claim until filing suit on June 3, 2005, the coverage of the policy was no longer in effect. Although this position had been stated in a legal pleading in a companion case, *Betty Fronto, as Administratrix of the Estate of Adam Damron v. Parkview Partnership d/b/a Parkview Nursing and Rehabilitation, et al.*, Pike Circuit Court Action No. 05-CI-00026, this had only been verbally stated by Mr. Oldham up to the point of this letter. Mr. Oldham concluded with the statement that he did not represent the insurance company "at this time." **See Exhibit 3.**

By way of background, by the time Plaintiff filed his Complaint, the Parkview Defendants had filed and concluded bankruptcy reorganization in the State of Georgia. Because of said bankruptcy, Plaintiff cannot sue to recover from the Parkview Defendants directly. On January 6, 2005, Plaintiff's counsel received an e-mail from the Honorable David Stern, bankruptcy counsel for the Centennial Healthcare Plan of Reorganization. **(See Exhibit 4) R. 398-402** Therein, Mr. Stern advised that "It is the Reorganized Debtors' position that the Plan does not prohibit your client [the Estate of Adam Damron] from filing a law suit, provided that he only does so to liquidate his claim for purposes of pursuing any available insurance proceeds. It is only if your client seeks a recovery directly from a defendant that there is a problem." This e-mail was in response to an e-mail from counsel for Plaintiff asking about the ability to attempt to

liquidate the claim. Despite the passage of time, the inability of Plaintiff to recover from the Parkview Defendants directly, and the position of the Parkview Defendants that no coverage existed under the claims-made policy, the Parkview Defendants did not file a Motion for Declaratory Judgment to determine coverage. Accordingly, on May 2, 2006, Plaintiff filed a motion to amend his Complaint to add AISLIC as a defendant. **R. 319-21** To the extent that AISLIC suggests that this pursuit of a declaratory judgment is barred or affected by bankruptcy rules, such suggestions are inaccurate, as they conflict with the previously stated position of the Parkview Defendants' bankruptcy counsel.

AISLIC moved to dismiss Plaintiff's declaratory judgment action against it on grounds that an injured person cannot sue the tortfeasor's insurer for a determination of insurance coverage prior to a determination of liability in the underlying action. **R. 33-53** The trial court denied AISLIC's motion on November 9, 2006. **R. 296** Thereafter, AISLIC sought a writ of prohibition and/or mandamus to prevent the trial court from hearing Plaintiff's declaratory judgment action. **R. 9-31** The Kentucky Court of Appeals properly denied the relief sought by AISLIC. **R. 404-11** From that decision comes this appeal by AISLIC.

ARGUMENT

THE KENTUCKY COURT OF APPEALS PROPERLY DENIED AISLIC'S WRIT OF PROHIBITION AND/OR MANDAMUS SEEKING TO PREVENT THE TRIAL COURT FROM HEARING PLAINTIFF'S DECLARATORY JUDGMENT ACTION AGAINST IT.

I. Standard for Granting a Writ of Prohibition.

It is well established that a writ of prohibition is an "extraordinary remedy" and that the courts have "always been cautious and conservative both in entertaining petitions for and in granting such relief." *Bender v. Eaton,* 343 S.W.2d 799, 800 (Ky. 1961). Writ cases typically fall into two categories, which are distinguished by "whether the inferior court allegedly is (1) acting without jurisdiction (which includes 'beyond its jurisdiction'), or (2) acting erroneously within its jurisdiction." *Id.; see also Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 808 (Ky. 2004). "[W]hen a high standard of harm is not met a writ will only be ordered in exceptional circumstances, *i.e.*, when failure to issue the writ would result in a substantial miscarriage of justice." *The St. Luke Hospitals, Inc. v. Kopowski,* 160 S.W.3d 771, 775 (Ky. 2005). *See also Wal-Mart Stores, Inc. v. Dickinson*, 29 S.W.3d 796, 800-801 (Ky. 2000)(writ of prohibition addressed, in part, production of testimony and documents invasive of attorney-client privilege and work product doctrine, information that once released no appeal could remedy). Injury that results in a "mere failure to succeed in [the underlying] litigation, followed by the loss of that which success might have brought [the petitioner]" does not establish great and irreparable harm within the meaning of requirements for granting a writ of mandamus or prohibition. *Osborn v. Wolfford,* 39 S.W.2d 672, 673 (Ky. 1931); *see also Bender,* 343 S.W.2d at 801 (citing *Osborn* with approval). Blanket allegations

of irreparable harm are insufficient to sustain a claim of irreparable injury. *See Grange Mut. Ins. Co.*, 151 S.W.3d at 817-18.

> The proper standard for review depends on the category of writ case.
>
> De novo review will occur most often under the first class of writ cases, i.e., where the lower court is alleged to be acting outside its jurisdiction, because jurisdiction is generally only a question of law. De novo review would also be applicable under the few second class of cases where the alleged error invokes the "certain special cases" exception or where the error involves a question of law. But in most of the cases under the second class of writ cases, i.e., where the lower court is acting within its jurisdiction but in error, the court with which the petition for a writ is filed only reaches the decision as to issuance of the writ once it finds the existence of the "conditions precedent," i.e., no adequate remedy on appeal, and great and irreparable harm. "'If [these] procedural prerequisites for a writ are satisfied, "whether to grant or deny a petition for a writ is within the [lower] court's discretion.'"

Id., 151 S.W.3d at 810.

II. The Court of Appeals Properly Determined That the Trial Court Acted Within Its Jurisdiction and Scope In Allowing the Declaratory Action to Proceed.

AISLIC argued to the Court of Appeals that the trial court was without jurisdiction to hear the pending declaratory action because, according to AISLIC, without a determination of liability in the underlying action, there was no actual, justiciable controversy. (AISLIC Memorandum Brief, p. 2) **R. 35-53**

Contrary to AISLIC's allegations, K.R.S. 418.040 authorizes the filing of a claim for a declaration of rights, either alone or with other relief, and further authorizes a Court of general jurisdiction, such as the Pike Circuit Court, to make a binding declaration of rights, whether or not consequential relief is or could be requested. The declaratory judgment statute is liberal in respect to procedural and judicial discretion. *Board of*

Education of Berea v. Muncy, 239 S.W.2d 471(Ky. 1951). The Court of Appeals properly determined that the trial court acted within its jurisdiction.

A. Plaintiff has standing to proceed against AISLIC under the insolvency/ bankruptcy exception.

A claim for declaratory relief seeking construction and interpretation of a contract is valid. *Bankers Trust Company v. Old Republic Insurance Company,* 959 F.2d 677, 682 (7th Cir. 1992). If either AISLIC or the Parkview Defendants had filed this claim for declaratory relief, it would be without question that this Court not only had jurisdiction but an obligation to determine whether a "claims-made" policy, which the Parkview Defendants contend was provided by AISLIC and which AISLIC admits was, at least, previously in effect, is still effective for Plaintiff's claims. *Dodson v. Key*, 508 S.W.2d 586 (Ky. App. 1974); *Kentucky Farm Bureau Mutual Insurance Company v. Snell*, 319 S.W.2d 462 (Ky. App. 1959). However, because Plaintiff, an injured third party, filed this declaratory action against AISLIC, AISLIC questions the trial court's jurisdiction to proceed with the declaratory action. The Court of Appeals correctly affirmed the trial court's determination that Plaintiff does have standing to bring this action against AISLIC. As acknowledged by the Court of Appeals, the Kentucky appellate courts have long-recognized an exception to this general rule "in cases of insolvency or bankruptcy." *Harris v. Jackson*, 192 S.W.3d 297, 302 (Ky. 2006) (*citing Cuppy v. General Acc. Fire & Life Assurance Corp.*, 378 S.W.2d 629, 632 (Ky. 1964)).

Justice Posner, writing for the Seventh Circuit United States Court of Appeals, succinctly explained the reasoning behind such an exception to the general rule prohibiting direct actions by an injured third party,

> An ironclad rule that the insured's victim can never bring suit against the insurer unless he has a judgment against the insured would be equally inappropriate. For suppose that the day after the accident in which the victim was injured, and therefore long before he could feasibly bring a tort suit, let alone obtain a judgment, the insurer declared the liability insurance policy void; and suppose the insured had no other assets. Then a tort suit would be worthless unless the insured's victim could obtain a declaration that the policy was valid after all. Must the victim go to the expense of prosecuting to judgment a tort suit that will be completely worthless unless the policy is declared valid? Or does not the victim have sufficient interest in the policy to proceed simultaneously, on both fronts, against the insured and insurer, or even against the latter first if less preparation is necessary for that suit?

Bankers Trust Company v. Old Republic Insurance Company, 959 F.2d 677, 682 (7th Cir. 1992). As recognized by the *Bankers Trust* case, the general rule prohibiting actions by injured third parties against insurers protects the insurance company from the hostility of juries. *Ibid.* However, an action such as that filed by Plaintiff does not bear this risk. By the declaratory action, Plaintiff seeks, not to establish that Parkview Defendants committed a tort against Ms. McCown, but to establish that AISLIC's policy remains in force for Plaintiff's claims.

Contrary to the argument of AISLIC, Plaintiff is not pursuing a direct action against it. *See Bankers Trust, supra,* 959 F.2d at 682; *Community Action of Greater Indianapolis, supra*, 708 N.E.2d at 886. Parkview Defendants have filed bankruptcy. Moreover, that bankruptcy prevents Plaintiff from seeking any recovery from the Parkview Defendants directly.

Whether Plaintiff could have sought some recovery in the bankruptcy proceedings is irrelevant to Plaintiff's declaratory action. Plaintiff was not constrained by the bankruptcy Plan to file his claim, if at all, in the bankruptcy proceeding. **See Exhibit 4.** Instead, Plaintiff was permitted, and has elected, to collect his damages, if at

all, from Parkview Defendants' insurer. Of course, there is no potential for recovery of damages from AISLIC if Plaintiff's claims were made outside of AISLIC's policy period. Accordingly, Plaintiff instituted the declaratory action to secure a determination of coverage, which will resolve whether additional judicial resources need to be expended on the underlying litigation. *See Bankers Trust, supra,* 959 F.2d at 682; *Community Action of Greater Indianapolis, supra*, 708 N.E.2d at 886. The determination of when Plaintiff's claim was made is the sole focus of the declaratory action and, properly, was the sole focus of the trial court's denial of AISLIC's Motion to Dismiss. The trial court action within its jurisdiction in denying AISLIC's motion. Tangential issues regarding Parkview Defendants' bankruptcy are not relevant.

Likewise, the amount of coverage provided under AISLIC's policy is not relevant to this analysis. For the first time in this appeal, AISLIC has asserted that no determination of the applicable policy period is necessary because AISLIC's policy was for excess coverage only. AISLIC attaches to its Supreme Court brief not only those policies previously submitted to the trial court, but additional policies with different terms and conditions. While the construction of any policy is not necessary beyond the determination of whether a claim was made within the policy period, certainly the terms of policies not brought to either the trial court's or Court of Appeals' attention are not the proper subject of review on appeal to the Supreme Court. It is well settled that issues which are not presented to the trial court cannot be raised for the first time on appeal. *Regional Jail Authority v. Tackett,* 770 S.W.2d 225, 228 (Ky. 1989). *See also, Cabbage Patch Settlement House v. Wheatly,* 987 S.W.2d 784, 786 (Ky. 1999).

Moreover, any argument regarding the amount of coverage available should not be considered because it is not relevant to the determination of when Plaintiff's claim was made. While AISLIC suggests that the likelihood of a verdict there would implicate its policy is unlikely, it fails to recognize that there does exist in Kentucky clear precedent for nursing home verdicts in excess of $1,000,000. See *Wanda R. Delaplane v. Beverly Health And Rehabilitation Services, Inc. d/b/a Beverly Health and Rehabilitation Of Frankfort, Et Al*, Franklin Circuit Court, Division II, Civil Action No: 02-CI-01119 (jury verdict of $20,000,000 entered June 1, 2006)**(Exhibit 5)**. Indeed, the soundness of Plaintiff's decision to proceed in an action where, as AISLIC now argues, only excess coverage is potentially available is an assessment to be performed by Plaintiff, not by this Court. Such analysis has no bearing on, but is simply an effort to deflect from, the underlying issue of coverage during the time when Plaintiff's claim was made. At least three policies are submitted as Exhibit 3 to AISLIC's brief. Moreover, the policy terms submitted by AISLIC vary with each policy. Whether the $1,000,000 self-insured retention now argued by AISLIC would apply under each policy to each of Plaintiff's claims is not certain, nor is it relevant to the underlying issue of Plaintiff's claim date.

AISLIC and Parkview Defendants deny that coverage exists, yet neither AISLIC nor the Parkview Defendants has elected to adjudicate the issue of coverage, for reasons that are only known to them. Under the unique circumstances of this case, Plaintiff may properly step in and bring a declaratory action for resolution of the coverage issue. The issue before the trial court was whether Plaintiff asserted a "claim" within the policy period, not whether Plaintiff is likely to recover under that policy. The

coverage determination requested is separate from the underlying tort claim and can be determined independently of the tort claims. As recognized in Kentucky, the 7th Circuit, and elsewhere, where the insured is bankrupt or insolvent, the injured victim has a legally protectable interest in the insurance policy sufficient to support standing in a declaratory action against the insurer on the separate issue of coverage, which is independent from the issues raised in the underlying tort suit. *See Harris v. Jackson*, 192 S.W.3d 297, 302 (Ky. 2006); *Truck Insurance Exchange v. Ashland Oil, Inc.*, 951 F.2d 787, 789 (7th Cir. 1992); *Wilson v. Continental Casualty Company*, 778 N.E.2d 849 (Ind. App. 2002)(an injured victim's interest in a tortfeasor's liability insurance policy will support standing under the Uniform Declaratory Judgments Act); *Reagor v. Travelers Insurance Co.*, 415 N.E.2d 512 (Ill. App. 1980); *Dial v. Marine Office of America*, 743 N.E.2d 621 (Ill. App. 2001); *Howard v. Montgomery Mutual Insurance Company*, 805 A.2d 1167 (Md. App. 2002).

The mere fact that litigation may not be terminated by a declaration of rights is not grounds for denying declaratory relief. Indeed, where an advance determination of rights, duties, or liabilities of the parties will eliminate or minimize a risk of wrong action or mistakes, then a Court may grant declaratory relief. *Bank One Kentucky NA v. Woodfield Financial Consortium, LP*, 957 S.W.2d 276 (Ky. App. 1997). Here, given the unusual circumstances of the Parkview Defendants' bankruptcy, the Court of Appeals correctly recognized that it is appropriate to determine whether the Parkview Defendants' policy remained in effect for purposes of Plaintiff's claims before any further action is taken.

B. Plaintiff has standing as a third-party beneficiary.

Notwithstanding the fact that Parkview Defendants' bankruptcy creates an exception allowing Plaintiff to bring a declaratory action for determination of insurance coverage, AISLIC argues that this Plaintiff has no standing to bring a declaratory action because Plaintiff is not a third-party beneficiary to the contract. The Court of Appeals did not address third party beneficiary status in its opinion in this case. Yet standing based on third-party beneficiary status has long been recognized in the Commonwealth.

In *Lincoln National Life Insurance Company v. Mean*, 95 S.W.2d 264 (Ky. App. 1936), the then High Court of Kentucky held that upon making a contract for the benefit of a third party, privity between the promisor and the third-party beneficiary necessary to make a binding, legal obligation is created by operation of law, notwithstanding that the primary purpose of the contracting parties was to benefit themselves, and further notwithstanding that the third-party beneficiary may even have been unaware of the contract at the time of its execution.

In *Traylor Brothers Inc. v. IT Pound*, 338 S.W.2d 687(Ky. App. 1960), the then High Court of Kentucky held that a third-party beneficiary of a contract may look to the promisor directly and sue him in his own name to enforce a promise made for his benefit, even though he is a stranger, it being sufficient that there is consideration between the parties that made the agreement for the benefit of the third party. In *Saylor v. Saylor*, 389 S.W.2d 904 (Ky. App. 1965), the then High Court of Kentucky held likewise.

In *Simpson v. IOC Coal, Inc.*, 677 S.W.2d 305 (Ky. 1984), the Kentucky Supreme Court held that all that is necessary for an enforceable contract for the benefit of a third

party is that there be consideration for the agreement flowing to the promisor and that the promisee intended to exact the promise directly benefiting the third party.

It has long been the law in Kentucky that a contract of insurance that will pay an innocent party for damages caused by the insured is a third-party beneficiary contract. *See, generally, Home Indem. Co. v. St. Paul Fire & Marine Ins. Co.*, 585 S.W.2d 419, 422 (Ky. App. 1979; *Central Mut. Ins. Co. v. Pippen,*111 S.W.2d 425 (Ky. A0p. 1937). Indeed, the most common third-party beneficiary contract in the Commonwealth is the contract of liability insurance. As the third-party beneficiary of Parkview Defendants' insurance policy, Plaintiff has standing to bring this action against AISLIC.

III. AISLIC Cannot Demonstrate Irreparable Harm or Miscarriage of Justice Sufficient to Warrant a Writ of Prohibition and/or Mandamus.

AISLIC argues, in the alternative, that, even if the trial court did not exceed its jurisdiction, the trial court's failure to dismiss the action subjects AISLIC to irreparable harm for which AISLIC does not have an adequate remedy on appeal. AISLIC argues that, even though the harm it will incur in defending the action will not be of a "ruinous nature," it is sufficient that it will not have an adequate remedy on appeal because it may expend time and money in defending the litigation that may thereafter prove to be unnecessary if Plaintiff does not secure a judgment against the Parkview Defendants. AISLIC cites *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803 (Ky. 2004), for this proposition. With regard to writs of prohibition necessary for the interest of orderly judicial administration, the *Grange* Court wrote that such writs:

> 'ordinarily ha[ve] not been granted unless the petitioner established, as conditions precedent, that he (a) had no adequate remedy by appeal or otherwise, *and* (b) would suffer great and irreparable injury (if error has been committed and relief denied).' We 'have consistently (apparently without exception) required the petitioner to pass the first test; i.e., he

> must show he has no adequate remedy by appeal or otherwise.' The petitioner must then also meet the requirements of the second test, i.e., by showing great and irreparable injury, alternately defined as 'something of a ruinous nature,' before a writ will issue. 'Ordinarily if this cannot be shown, the petition will be dismissed.'
>
> We have also held, however, that a showing of great and irreparable harm in this second class of cases is not 'an absolute prerequisite' for the issuance of a writ. The requirement may be put aside in '*certain special cases* ... [where] a substantial miscarriage of justice will result if the lower court is proceeding erroneously, *and* correction of the error is necessary and appropriate in the interest of orderly judicial administration.' But these 'certain special cases' are exactly that--they are rare exceptions and tend to be limited to situations where the action for which the writ is sought would violate the law, e.g. by breaching a tightly guarded privilege or by contradicting the requirements of a civil rule. In those rare cases, a court may peek behind the curtain, i.e., beyond the petitioner's failure to meet the great and irreparable harm test, at the merits of the petitioner's claim of error by the lower court.

Grange Mut. Ins. Co. v. Trude, 151 S.W.3d 803, 808 (Ky. 2004).

Plaintiff directs the Court to review the context in which such "rare exceptions" acknowledged by the *Grange* Court have been made. The proposition has most commonly been adopted in cases involving the disclosure of privileged information and trade secrets. *See Bender v. Eaton,* 343 S.W.2d 799, 802 (Ky. 1961); *see also Wal-Mart Stores, Inc. v. Dickinson,* 29 S.W.3d 796, 800 (Ky. 2000)(noting the lack of adequate remedy on appeal for disclosure of trade secrets); *Sisters of Charity Health Systems, Inc. v. Raikes*, 984 S.W.2d 464, 466 (Ky. 1998)(We have previously held that extraordinary relief is warranted to prevent disclosure of privileged documents...privileged information cannot be recalled once it has been disclosed.)

Here, the Court of Appeals correctly held that AISLIC has failed to demonstrate any "great injustice and irreparable injury" it will suffer in defending Plaintiff's declaratory action. Moreover, as explained by the Court of Appeals, AISLIC has failed to provide

the Court with any substantiation for its claim that proceeding in the trial court will effect a miscarriage of justice. No description of the type or amount of expense AISLIC will incur is provided. Blanket allegations of irreparable harm are insufficient to sustain a claim of irreparable injury. *See Grange Mut. Ins. Co. v. Trude,* 151 S.W.3d 803, 817 - 818 (Ky. 2004). The conclusory statements of harm based on time and money, without any factual basis to support them, are insufficient to support AISLIC's Petition.

AISLIC further argues that allowing Plaintiff's claims against it to proceed will inject the issue of insurance into the underlying action, which AISLIC argues is unduly prejudicial and constitutes reversible error. To the extent that AISLIC contends that the Plaintiff will be injecting insurance into this litigation and thereby potentially prejudicing the jury, its contention is invalid. So long as the declaratory judgment action is pending, the trial court will decide only whether the policy is applicable. The tort claim will be held in abeyance pending this determination.

In *Home Indemnity Company v. St. Paul Fire and Marine Insurance Company,* 585 S.W.2d 419 (Ky. App. 1979), one (1) insurance company filed a declaratory judgment action against others while a tort action was still pending to determine the extent of liability, if any, of three (3) insurance companies, with respect to an automobile accident. In the companion case of *Davis v. Home Indemnity Company*, 659 S.W.2d 185 (Ky. 1983), the Kentucky Supreme Court addressed still continuing issues in the *Home Indemnity* litigation and noted that while the tort action was pending, St. Paul Fire and Marine Insurance Company brought the declaratory judgment action against two (2) other insurance carriers, the purpose of which was to determine whether coverage applied in the case and if so, to provide a prospective allocation of responsibility for

payment among the three (3) insurance carriers. Furthermore, the Supreme Court recognized without criticism that the tort action was held in abeyance pending the determination of the declaratory judgment action.

In *Guaranty National Insurance Company v. George,* 953 S.W.2d 946 (Ky. 1997), the Kentucky Supreme Court held that an automobile insurer did not act in bad faith by challenging coverage in a declaratory judgment action case where the insurer provided at the same time a defense to its insured against a wrongful death claim and, once the trial court equitably reformed the insurance contract, the insurer settled the claim within a short period of time. In that case, the declaratory judgment action was brought by the carrier at the same time the carrier provided a defense and at the same time the tort action was pending, and the Court obviously recognized that the trial court made a determination without a jury trial as to the applicability of the insurance contract.

In *Baxter v. Safeco Insurance Company of American*, 46 S.W.3d 577 (Ky. App. 2001), the Kentucky Court of Appeals reviewed an action wherein the Administrator of the Estate of a deceased motorcyclist brought an action against Safeco, asking the trial court to declare that Safeco provided coverage and although the decision of the trial court, as affirmed by the Court of Appeals, was that coverage was not available to the motorcyclist under the Safeco policies, the Court did not criticize or condemn the bringing of the declaratory judgment action by the Estate to determine whether the policies applied.

The trial court's interpretation of an insurance policy is a question of law. *Deerfield Insurance Company v. Warren County Fiscal Court*, 88 S.W.3d 867 (Ky. App. 2002). Accordingly, Plaintiff may proceed before the trial court with his declaratory

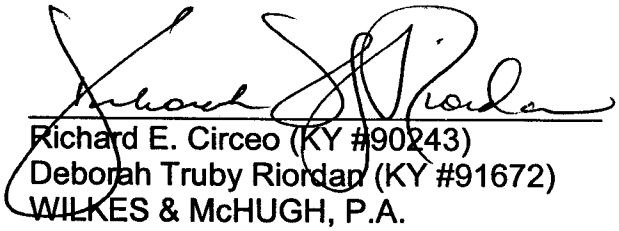
action against AISLIC independent of, and without prejudicing, his underlying tort claims against the Parkview Defendants. As recognized by the Court of Appeals, the resolution of Plaintiff's action against AISLIC, the only potential basis of any recovery by Plaintiff, would not work a substantial miscarriage of justice.

CONCLUSION

The Court of Appeals correctly affirmed the trial court's determination that Plaintiff may proceed with his declaratory action against AISLIC. Indeed, a present and real controversy exists. Plaintiff has been directed by bankruptcy counsel for Parkview Defendants that he may liquidate damages, if at all, only against available insurance coverage. Both Parkview Defendants and AISLIC have denied that any such coverage exists. Accordingly, the bankruptcy exception permits Plaintiff to proceed with a declaratory action to determine insurance coverage. AISLIC has not demonstrated irreparable harm or a miscarriage of justice resulting from the trial court's order denying its Motion to Dismiss. For each of these reasons, AISLIC's Petition must be denied.

Respectfully submitted,

COUNSEL FOR PLAINTIFF

By: 

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via First Class Mail, postage prepaid, on the following attorneys of record this 29th day of June, 2007.

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