IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2024 Term

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OF WEST VIRGINIA

No. 21-1016

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., ALLIANZ GLOBAL RISKS US INSURANCE COMPANY, ACE AMERICAN INSURANCE COMPANY; ZURICH AMERICAN INSURANCE COMPANY, GREAT LAKES INSURANCE SE, XL INSURANCE AMERICA, INC., GENERAL SECURITY INDEMNITY COMPANY OF ARIZONA, ASPEN INSURANCE UK LTD, NAVIGATORS MANAGEMENT COMPANY, INC., IRONSHORE SPECIALTY INSURANCE COMPANY, VALIDUS SPECIALTY UNDERWRITING SERVICES, INC., and HDI-GERLING AMERICA INSURANCE COMPANY,
Defendants Below, Petitioners,

v.

WESTLAKE CHEMICAL CORPORATION and
AXIALL CORPORATION,
Plaintiffs Below, Respondents.

Appeal from the Circuit Court of Marshall County, West Virginia,
Business Court Division
The Honorable Christopher C. Wilkes, Senior Circuit Judge
Civil Action No. 19-C-59

APPEAL DISMISSED

Submitted: January 9, 2024
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JUSTICE WOOTON delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "This Court's jurisdictional authority is either endowed by the West Virginia Constitution or conferred by the West Virginia Legislature." Syl. Pt. 2, in part, *Smith v. Andreini*, 223 W. Va. 605, 678 S.E.2d 858 (2009).

2. **"**Where an order granting summary judgment to a party completely disposes of any issues of liability as to that party, the absence of language prescribed by Rule 54(b) of the West Virginia Rules of Civil Procedure indicating that 'no just reason for delay' exists and 'directi[ng] . . . entry of judgment' will not render the order interlocutory and bar appeal provided that this Court can determine from the order that the trial court's ruling approximates a final order in its nature and effect.**"** Syl. Pt. 2, *Durm v. Heck's, Inc.*, 184 W. Va. 562, 401 S.E.2d 908 (1991).

3. **"**An order determining liability, without a determination of damages, is a partial adjudication of a claim and is generally not immediately appealable. However, an immediate appeal from a liability judgment will be allowed if the determination of damages can be characterized as ministerial. That is, a judgment that does not determine damages is a final appealable order when the computation of damages is mechanical and unlikely to produce a second appeal because the only remaining task is ministerial, similar to assessing costs." Syl. Pt. 3, *C & O Motors, Inc. v. W. Va. Paving, Inc.*, 223 W. Va. 469, 677 S.E.2d 905 (2009).

WOOTON, Justice:

In this case we are asked to review three orders entered by the Circuit Court of Marshall County, West Virginia, Business Court Division, granting partial summary judgment to the respondents Westlake Chemical Corporation ("Westlake") and Axiall Corporation ("Axiall") (collectively "the respondents") on the ground that none of three exclusions contained in All-Risk insurance policies issued by the petitioners National Union Fire Insurance Company of Pittsburgh, PA, Allianz Global Risks US Insurance Company, Ace American Insurance Company, Zurich American Insurance Company, Great Lakes Insurance SE, XL Insurance America, Inc, General Security Indemnity Company of Arizona, Aspen Insurance UK LTD, Navigators Management Company, Inc., Ironshore Specialty Insurance Company, Validus Specialty Underwriting Services, Inc., and HDI-Gerling American Insurance Company (collectively "the petitioners")[1] bar the respondents' coverage claims.

[1] Axiall purchased a commercial property insurance program for the period beginning November 19, 2015, to November 19, 2016, which program was comprised of thirteen separate insurance policies issued by the twelve petitioner insurers. Each of the petitioner insurers subscribed to various quota shares of the insurance program.

Upon careful consideration of the parties' briefs and oral arguments, the appendix record,[2] and the applicable law, we conclude that the circuit court's orders are not final orders subject to appeal at this stage of the proceedings.

I. Facts and Procedural Background

On August 27, 2016, Axiall suffered a multi-million-dollar loss to its chlorine manufacturing plant and equipment in Natrium, West Virginia, when ninety tons of liquid chlorine leaked from a rupture in a railroad tanker car that had been recently repaired by third-party contractors. When the liquid chlorine came in contact with the air, it vaporized and formed a cloud or plume that traveled throughout the Natrium plant and elsewhere.[3]

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[2] The appendix record in this case contains 11,957 pages of material and did not contain a table of contents at the time of its submission, a requirement set forth in Rule 7(c) of the West Virginia Rules of Appellate Procedure: "Immediately following the certification page, an appendix *must* contain a table of contents that lists and briefly describes *each item* included in the appendix by reference to its page number and volume number, if applicable." (Emphasis added). Thereafter, upon request by our Clerk of the Court, the petitioners' counsel submitted a table of contents that is woefully insufficient; for example, attempting to determine what "Exhibits 1 – 133" might be, and where in pages "1234 – 8430" they might be located, would discourage the most ardent truffle-hunting pig. *See Multiplex, Inc. v. Town of Clay*, 231 W. Va. 728, 731 n.1, 749 S.E.2d 621, 624 n.1 (2013) ("'[j]udges are not like pigs, hunting for truffles buried in briefs[,]' *State Department of Health v. Robert Morris N.,* 195 W.Va. 759, 765, 466 S.E.2d 827, 833 (1995), and the same observation may be made with respect to appendix records."). We caution counsel that appendix records not in compliance with the mandates of Rule 7(c) may be rejected by the Clerk.

[3] A neighboring business claimed that its facility was damaged by the chlorine plume as well. Its suit against the third-party contractors was subsequently consolidated with respondents' suit against the contractors and tried to a verdict in Pennsylvania. *See* text *infra*.

The respondents allege that the chlorine plume caused corrosion damage to the equipment at the Natrium plant in an estimated amount ranging from one million dollars to four hundred forty million dollars. *See infra* note 4.

Three days after the chlorine leak, Axiall put the insurers on notice of a claim for damages resulting from the chlorine leak, and four days after the leak, Westlake acquired Axiall in what is variously described in the appendix record as a long-planned acquisition or a hostile takeover. Thereafter, the parties engaged in a prolonged, but seemingly collaborative, claim adjustment period.[4]

During that same extended time frame, the National Transportation Safety Board ("NTSB" or "the Board") was investigating the occurrence at the Natrium plant, issuing its final report on February 11, 2019. A key takeaway from that report was the Board's conclusion that

> the probable cause of the chlorine release was an undetected preexisting crack near the inboard end of the stub sill cradle pad, that propagated to failure with the changing tank shell stresses during the thermal equalization of the car after loading

[4] At the onset of the claim adjustment process, the "placeholder" estimate of damage was $1,000,000, a figure well below the applicable deductible of $3,750,000. On May 22, 2018, the respondents submitted a partial proof of loss in the amount of $5,746,231, and some time thereafter the working estimate of damage increased to $15,000,000, a figure that the petitioners' adjustment team termed "extremely precautionary and preliminary." On December 13, 2018, that team concluded that the cost of repair and replacement of respondents' property would be $220,000,000 to $440,000,000, figures which far exceeded the original "placeholder" estimates that ranged from $1,000,000 to $5,746,231 to $15,000,000 during the sixteen-month claim adjustment period.

> with low temperature chlorine. Contributing to the failure was Axiall Corporation's insufficiently frequent stub sill inspection interval that did not detect the crack, the low fracture resistance of the nonnormalized steel used in the tank car construction, and the presence of residual stresses associated with [the third-party contractors'] tank wall corrosion repairs and uncontrolled local postweld heat treatment.

In their briefs, the parties rely on selected portions of the NTSB report to support their respective arguments as to the cause of the damages sustained by the respondents, notwithstanding the fact that 49 United States Code section 1154(b) (2018) prohibits the admission into evidence or use of any part of an NTSB report in a civil action for damages resulting from a matter mentioned in the report.[5]

On August 24, 2018, as the claim adjustment and NTSB investigative processes continued but the statute of limitations was about to run, the respondents sued the third-party contractors involved with the inspection, maintenance, and repair work on

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[5] *See*, *e.g.*, *Chiron Corp. & PerSeptive Biosystems v. Nat'l Transp. Safety Bd.*, 198 F.3d 935, 940 (D.C. Cir. 1999) ("Congress has quite explicitly provided that, '[n]o part of a report of the Board, related to an accident or an investigation of an accident, may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report.' 49 U.S.C. § 1154(b) (1994). The simple truth here is that NTSB investigatory procedures are not designed to facilitate litigation, and Congress has made it clear that the Board and its reports should not be used to the advantage or disadvantage of any party in a civil lawsuit. In our view, this congressional mandate could not be clearer.").

Further, although there is a split of authority as to whether *factual* information contained in an NTSB report may be admitted into evidence in a civil action, *see Chiron*, 198 F.3d at 940-41, we have found no cases in which the NTSB's findings relating to *causation* have been deemed admissible.

the ruptured tank. The suit was brought in Pennsylvania and ultimately concluded with a verdict in respondents' favor and an award of $5,900,000 in damages. *See* text *infra.*

Almost immediately after the petitioners' adjustment team had revised its estimated repair and replacement cost estimate to $220,000,000 – $440,000,000, *see supra* note 4, the petitioners replaced their lead adjuster and retained coverage counsel. On January 18, 2019, they sent a reservation of rights letter to respondents which identified three exclusions in their respective policies relating to corrosion, faulty workmanship, and contamination. On March 20, 2019, the respondents submitted a proof of loss in an estimated amount in excess of $278,000,000 and possibly as high as $404,000,000. On April 9, 2019, the petitioners issued a denial of coverage letter and filed a coverage action in Delaware. The following day, the respondents filed the instant action in Marshall County, West Virginia, asserting five causes of action against the petitioners: (I) declaratory judgment, (II) breach of contract, (III) bad faith under Georgia law, (IV) bad faith under West Virginia law, and (V) statutory bad faith under the West Virginia Unfair Trade Practices Act.

The Delaware court deferred to the West Virginia court. Thereafter, the circuit court dismissed Count III of the complaint sua sponte, holding that West Virginia law applied to all bad faith claims. The petitioners filed a petition for writ of prohibition in this Court, which was granted as moulded; we reversed the circuit court's dismissal of Count III and remanded to the court for a determination in the first instance as to whether

the Georgia choice-of-law provision in the insurance policies applied to all counts. *See State ex rel. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Hummel*, 243 W. Va. 681, 850 S.E.2d 680 (2020).

On remand, the case was transferred to the Circuit Court of Marshall County, Business Court Division, where the court ruled that Georgia law applies to all of the respondents' claims,[6] a ruling that is not at issue here. The parties then engaged in extensive litigation, much of it focused on the issue of whether any or all of the three different policy exclusions barred coverage. In three separate orders, all dated November 19, 2021, the court granted partial summary judgment to the respondents on the coverage issues.[7] Reduced to their essence, the court's rulings were as follows:

Corrosion. The policies did not exclude corrosion *damage* resulting from a loss; rather, they only excluded coverage for claims where corrosion was the *cause* of the loss.

Faulty Workmanship. The policies barred recovery only for damage to the tank car and the cost incurred in repairing or replacing it, not to the resultant chlorine leak and the physical loss or damage to the Natrium plant which resulted from that leak.

Contamination. The contamination exclusion in the policies was designed to address environmental pollution, which is not what this case is about; and in any event, if pollution

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[6] Accordingly, Counts IV and V, which were specifically predicated on West Virginia law, were dismissed.

[7] In its rulings on the respondents' motions for partial summary judgment, the court also denied the petitioners' motions for summary judgment on the same coverage issues.

or contamination *damage* resulted from the tanker car leak, it would be (and was, in this case) a covered loss.

These orders form the basis for the petitioners' appeal.[8]

II. Standard of Review

This Court has stated that

> "[i]t is well established that the issue of subject matter jurisdiction can be raised at any time, even *sua sponte* by this Court." *State ex rel. Universal Underwriters Ins. Co. v. Wilson*, 239 W. Va. 338, 345, 801 S.E.2d 216, 223 (2017). "Whether a court has subject matter jurisdiction over an issue is a question of law[.]' *Snider v. Snider*, 209 W. Va. 771, 777, 551 S.E.2d 693, 699 (2001). Because 'jurisdictional issues are questions of law, our review is de novo." *Wilson*, 239 W. Va. at 343, 801 S.E.2d at 221 (citing Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995))."

[8] After the petitioners filed their notice of appeal, the respondents filed a motion to dismiss the appeal as interlocutory. This Court denied the motion, deeming it appropriate to allow full development of the case before making a determination as to whether the judgment orders at issue were "final" for purposes of appeal. *See* text *infra*. In this regard, in October, 2021, the respondents had been awarded $5,900,000 in the Pennsylvania action for what the jury specifically designated on its verdict form as "damages to Natrium plant and equipment." Thereafter, by order entered on March 3, 2022, approximately three months after the instant appeal had been filed, the circuit court granted partial summary judgment to the petitioners, holding that the respondents would be limited in the instant case to claiming $5,900,000 in damage, less an applicable $3,750,000 deductible. The respondents filed a motion to alter or amend judgment, and on joint motion of the parties this Court remanded the case for the circuit court to rule on the motion. The motion was denied, and that ruling is not before us at this time.

M.H. v. C.H., 242 W. Va. 307, 312, 835 S.E.2d 171, 176 (2019). It is with these standards in mind that we review the appeal before us.

III. Discussion

Although the parties' briefs and oral arguments focus solely on the merits of the circuit court's rulings, this Court must determine at the outset whether the rulings are final judgments subject to appeal.[9] In this regard, this Court has held that we have "the inherent power and duty to determine unilaterally [our] authority to hear a particular case. Parties cannot confer jurisdiction on this Court directly or indirectly where it is otherwise lacking." Syl. Pt. 5, in part, *Erie Ins. Co. v. Dolly*, 240 W. Va. 345, 811 S.E.2d 875, 877 (2018) (citing Syl. Pt. 2, in part, *James M.B.*, 193 W.Va. 289, 456 S.E.2d 16 (1995) and *C & O Motors,* 223 W.Va. at 471, 677 S.E.2d at 907, Syl. Pt. 1, in part).

Because "[t]his Court's jurisdictional authority is either endowed by the West Virginia Constitution or conferred by the West Virginia Legislature[,]" Syl. Pt. 2, in part, *Smith v. Andreini*, 223 W. Va. 605, 678 S.E.2d 858 (2009), we begin with the statutory grant of appellate authority in civil cases that is set forth in West Virginia Code section 58-5-1(a) (Supp. 2023). The statute provides, in relevant part, that

> [a] party to a civil action may appeal to the Supreme Court of Appeals from a *final judgment* of any circuit court or from an

[9] As set forth *supra*, we can now make this determination based on a complete record of the proceedings below, including not only what has happened to date but also what, if anything, remains to be litigated regardless of the outcome of this appeal.

> order of any circuit court *constituting a final judgment* as to one or more but fewer than all claims or parties upon an express determination by the circuit court that there is no just reason for delay and upon an express direction for the entry of judgment as to such claims or parties [.]

Id. (emphasis added). We have held that this "'rule of finality' is designed to prohibit 'piecemeal appellate review of trial court decisions which do not terminate the litigation[.]'" *James M. B.*, 193 W. Va. at 292, 456 S.E.2d at 19; *see also Dolly*, 240 W. Va. at 347, 811 S.E.2d at 877-78, Syl. Pt. 6 ("'Under W.Va. Code, 58-5-1 [1998], appeals only may be taken from final decisions of a circuit court. A case is final only when it terminates the litigation between the parties on the merits of the case *and leaves nothing to be done but to enforce by execution what has been determined*.'") (emphasis added and citations omitted)). In congruence with this statutory grant of jurisdiction, Rule 54(b) of the West Virginia Rules of Civil Procedure explicates the parameters of a "final judgment" subject to immediate appeal:

> **Judgment Upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. *In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties*, and the order or other form of decision is subject to

> revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Id. (emphasis added).

In the instant case, the circuit court did not enter its orders pursuant to Rule 54(b), did not find "that there is no just reason for delay," and made no "express direction for the entry of judgment." In most cases, this would be the end of the inquiry; absent specific Rule 54(b) findings, an order is interlocutory and thus not appealable until the case is finally concluded. *See Cabell Cnty. Comm'n v. Whitt*, 242 W. Va. 382, 390, 836 S.E.2d 33, 41 (2019) ("Under W. Va. Code, 58-5-1 [1998], appeals only may be taken from final decisions of a circuit court. A case is final only when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined.") (citation omitted)); *James M.B.*, 193 W.Va. at 291, 456 S.E.2d at 18 (1995) (same); Syl. Pt. 7, in part, *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Miller*, 228 W. Va. 739, 724 S.E.2d 343 (2012) ("The entry of an order denying a motion for summary judgment made at the close of the pleadings and before trial is merely interlocutory and not then appealable to this Court."). However, we have held that there are limited situations in which an interlocutory order, although not entered pursuant to Rule 54(b), may nonetheless be reviewable. Exceptions to the rule of finality include

> interlocutory orders which are made appealable by statute or by the West Virginia Rules of Civil Procedure, or . . . [which] fall within a jurisprudential exception" such as the "collateral order" doctrine. *James M.B.,* 193 W.Va. at 292-93, 456 S.E.2d at 19-20; *accord Adkins v. Capehart*, 202 W.Va. 460, 463, 504

> S.E.2d 923, 926 (1998) (recognizing prohibition matters, certified questions, Rule 54(b) judgment orders, and "collateral order" doctrine as exceptions to rule of finality).

Credit Acceptance Corp. v. Front, 231 W. Va. 518, 523, 745 S.E.2d 556, 561 (2013). Additionally, we have held that a circuit court's pre-trial rulings on governmental immunity defenses, motions to enforce an arbitration clause, and temporary injunctions, are always reviewable.[10]

Here, where no constitutional provision or statute confers subject matter jurisdiction, and in the absence of a Rule 54(b) certification by the circuit court, we are left to determine whether the circuit court's summary judgment orders are appealable pursuant to the collateral order doctrine:

> Under the collateral order doctrine, an interlocutory order may be subject to immediate appeal if it "(1) conclusively determines the disputed controversy, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment."

[10] *See* Syl. Pt. 6, in part, *State ex rel. Vanderra Res., LLC v. Hummel*, 242 W. Va. 35, 829 S.E.2d 35 (2019) ("A circuit court's denial of summary judgment that is predicated on qualified immunity is an interlocutory ruling which is subject to immediate appeal under the 'collateral order' doctrine."); Syl. Pt. 1, in part, *Certegy Check Servs., Inc. v. Fuller*, 241 W. Va. 701, 828 S.E.2d 89 (2019) ("An order denying a motion to compel arbitration is an interlocutory ruling which is subject to immediate appeal under the collateral order doctrine."); Syl. Pt. 1, in part, *Ne. Nat. Energy LLC v. Pachira Energy LLC*, 243 W. Va. 362, 844 S.E.2d 133 (2020) ("West Virginia Constitution, article VIII, section 3, which grants this Court appellate jurisdiction of civil cases in equity, includes a grant of jurisdiction to hear appeals from interlocutory orders by circuit courts relating to preliminary and temporary injunctive relief.").

> *Credit Acceptance Corp. v. Front*, 231 W.Va. 518, 523, 745 S.E.2d 556, 561 (2013) (citation omitted).

Dolly, 240 W. Va. at 355, 811 S.E.2d at 885. In essence, we look to "whether the order approximates a final order in its nature and effect." *Id*. at 354, 811 S.E.2d at 884. Thus, one key question is whether an order is dispositive as to liability. *See* Syl. Pt. 2, *Durm v. Heck's, Inc.*, 184 W. Va. 562, 401 S.E.2d 908 (1991) ("Where an order granting summary judgment to a party completely disposes of any issues of liability as to that party, the absence of language prescribed by Rule 54(b) of the West Virginia Rules of Civil Procedure indicating that "no just reason for delay" exists and "directi[ng] . . . entry of judgment" will not render the order interlocutory and bar appeal provided that this Court can determine from the order that the trial court's ruling approximates a final order in its nature and effect."); Syl. Pt. 2, *Turner ex rel. Turner v. Turner*, 223 W. Va. 106, 672 S.E.2d 242 (2008) (same). The second key question is whether the order is dispositive as to damages. *See C & O Motors*, 223 W. Va. at 471, 677 S.E.2d at 907, Syl. Pt. 3 ("An order determining liability, without a determination of damages, is a partial adjudication of a claim and is generally not immediately appealable. However, an immediate appeal from a liability judgment will be allowed if the determination of damages can be characterized as ministerial. That is, a judgment that does not determine damages is a final appealable order when the computation of damages is mechanical and unlikely to produce a second appeal because the only remaining task is ministerial, similar to assessing costs.").

In applying our precedents to the facts of this case, we have little difficulty in determining that the circuit court's partial summary judgment orders are not appealable pursuant to the collateral order doctrine. Although the petitioners argue that a ruling by this Court in their favor would completely dispose of the declaratory judgment count in the respondents' complaint, we disagree. The applicability of any of the policy exclusions at issue, which is the focus of the declaratory judgment count, is dependent on a determination of causation, one of many issues which are not yet resolved in this case.[11] The petitioners argue that the causation question has been fully and finally resolved because the jury's verdict in the Pennsylvania action – which was premised on third-party contractors' faulty repairs having proximately caused the tank rupture and chlorine leak – will collaterally estop the respondents from relitigating causation in the instant case. Again, we disagree. As a threshold matter, the possible application of offensive collateral estoppel is a question to be resolved in the first instance by the circuit court, not by this Court.[12] Further,

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[11] The fact that the petitioners submitted an 11,957-page appendix record in an appeal challenging the circuit court's construction of the language in three policy exclusions and two policy endorsements – straightforward issues of law – could easily support an inference that resolution of every facet of this case is dependent on the *facts*: what happened, why did it happen, and what damage resulted.

[12] We have explained that "'a stranger's right to utilize the doctrine of collateral estoppel is not *automatic* because it may depend on the peculiar facts of a given case,' but such application is not precluded—the trial court has 'rather broad discretion in determining when it should be applied.'" *W. Va. Dep't of Transportation v. Veach*, 239 W. Va. 1, 10, 799 S.E.2d 78, 87 (2017) (citing *Conley v. Spillers*, 171 W.Va. 584, 592, 301 S.E.2d 216, 223-24 (1983)).

inasmuch as none of the pleadings from the Pennsylvania case have been included in the appendix record, this Court would have no way to ascertain what was at issue in that case and what may have been resolved by the jury's verdict. Finally, petitioners' counsel acknowledged during oral argument that the jury's verdict has been appealed to the Superior Court of Pennsylvania and that the appeal is still pending; thus, the question arises as to "whether there was "'a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings.'" *Crouse v. Hobday*, No. 15-1186, 2016 WL 6835735, at *2 (W. Va. Nov. 21, 2016) (memorandum decision) (citing Syl. Pt. 3, in part, *W.Va. Human Rights Comm'n v. Esquire Grp., Inc.*, 217 W.Va. 454, 618 S.E.2d 463 (2005)). Although we have not squarely addressed the issue of when a circuit court judgment is final for purposes of res judicata and/or collateral estoppel, we have held that "[t]he doctrines of collateral estoppel and res judicata apply to a magistrate court judgment only when it becomes final, either through failure to appeal that judgment or after exhausting appellate proceedings." Syl. Pt. 2, *State ex rel. Veard v. Miller*, 238 W. Va. 333, 795 S.E.2d 55 (2016). In footnote sixteen of that opinion, we signaled that a broader application of this holding would be supported by persuasive authority from other jurisdictions:

> *See In re Casey*, No. 08–10777, 2008 WL 4552195, at *3 (Bankr. E.D. Tenn. Oct. 6, 2008) ("[R]es judicata and collateral estoppel apply only if judgment is final; judgment is not final as long as there is a right to appellate review." (internal quotations and citation omitted)); *Slavens v. Board of Cnty. Comm'rs for Uinta Cnty.*, 854 P.2d 683, 685 (Wyo. 1993) ("decision became final with affirmance after appeal to the

> district court and no further appeal, the doctrines of res judicata and collateral estoppel applied").

Veard, 238 W. Va. at 341 n.16, 795 S.E.2d at 63 n.16.

There are additional considerations supporting our conclusion that under the facts and circumstances of this case, the circuit court's orders are not appealable under the collateral order doctrine. Stated succinctly, because the facts of this case are so complex (we are told that more than a million documents have been disclosed and exchanged during the discovery process), because the petitioners will still have to litigate the breach of contract and bad faith claims regardless of what happens with the declaratory judgment claim, because all three of the causes of action are so factually and legally intertwined,[13] and because significant factual and legal issues remain as to damages, piecemeal review of any issues by this Court would serve only to delay final resolution of the matter, including all claims and all defenses[14] presented by the parties. As we observed in *Vaughan v. Greater Huntington Park & Recreation District*, 223 W. Va. 583, 678 S.E.2d 316 (2009),

> [t]he "finality rule" preserves the autonomy of the trial court by minimizing appellate interference, ensuring that the role of the appellate court will be one of review rather than one of intervention. It furthers efficiency by providing there only will

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[13] It should be noted that when the issue of causation is finally determined in this case, the circuit court could, if warranted, reconsider its orders on the coverage issues; "[a]s long as a circuit court has jurisdiction over the case, then it possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient." *Hubbard v. State Farm Indem. Co.*, 213 W. Va. 542, 544, 584 S.E.2d 176, 178 (2003).

[14] The petitioners have asserted thirty-seven defenses to the respondents' claims.

> be review where the record is complete and the judgment pronounced. It preserves integrity and emphasizes the importance of the harmless error doctrine by prohibiting review until an appellate court can determine whether a claimed trial error was harmless. Finally, in the civil context, the rule reduces the ability of litigants to wear down their opponents by repeated, expensive appellate proceedings.

Id. at 587-88, 678 S.E.2d at 320-21 (citing *James M.B.*, 193 W. Va. at 292 n.2, 456 S.E.2d at 19 n.2).

Petitioners cite the *Miller* case for the proposition that "West Virginia law clearly recognizes that orders are final and appealable even if they do not dispose of all claims, particularly in an insurance coverage context" – a statement that is far too broad and ignores the existence of a significant distinguishing feature in *Miller*. There, the parties *agreed* that the circuit court's order was "final in its nature and effect as to the issue of indemnity[,]" which the Court cited as the basis for its conclusion that "therefore the matter is properly before this Court on appeal, and the Court may consider whether the circuit court's order is correct." *Miller*, 228 W. Va. at 747, 7224 S.E.2d at 351. In the instant case, in contrast, there is no such agreement, as the parties vehemently dispute the finality of the circuit court's orders for all of the reasons discussed *supra*. Further, nothing in *Miller* can be read to establish a rule governing interlocutory appeals in insurance coverage cases; indeed, as noted *supra* the only relevant syllabus point in *Miller* provides that "'[t]he entry of an order denying a motion for summary judgment made at the close of the pleadings and before trial is merely interlocutory and not then appealable to this court.'" *Miller*, 228 W.

Va. at 742, 724 S.E.2d at 346, Syl. Pt. 7 (citing Syllabus, *Wilfong v. Wilfong*, 156 W.Va. 754, 197 S.E.2d 96 (1973) and Syl. Pt. 1, *Arnold v. Palmer*, 224 W. Va. 495, 686 S.E.2d 725 (2009)).

In summary, we find that the circuit court's partial summary judgment orders do not "conclusively determine the disputed controversy" where, as here, there are myriad disputed issues of material fact that will affect every claim asserted in the respondents' complaint and every defense raised in the petitioners' answer. Additionally, the liability and damage issues yet to be resolved are hardly "ministerial"[15] in nature; this litigation is far from over. Further, the circuit court's partial summary judgment orders do not "resolve[] an important issue completely separate from the merits of the action,"[16] in that the applicability of any coverage exclusions to the damages incurred by the respondents rests on future resolution of factual matters. Finally, the petitioners do not claim that the orders are "effectively unreviewable on appeal from a final judgment."[17]

These factors, taken separately or together, compel the conclusion that the orders sought to be appealed in this case are not "final judgments" under West Virginia Code section 58-5-1(a) or West Virginia Rule of Civil Procedure 54(b), and do not

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[15] *See C & O Motors*, 223 W. Va. at 471, 677 S.E.2d at 907, Syl. Pt. 2

[16] *See Dolly*, 240 W. Va. at 355, 811 S.E.2d at 885.

[17] *See id*.

"approximate[] . . . final order[s] in [their] nature and effect" under the collateral order doctrine. *Dolly*, 240 W. Va. at 354, 811 S.E.2d at 884. Accordingly, we conclude that this Court lacks subject matter jurisdiction to determine the merits of the issues raised by the petitioners, and this appeal must be dismissed, without prejudice.

IV. Conclusion

For the foregoing reasons, the appeal is dismissed.

Dismissed.