INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

MILBANK INSURANCE COMPANY, Appellant, Plaintiff Below	:	
vs.	:	Appeal No. 23-ICA-213 Civil Action No. 20-C-208 Judge David J. Sims
NICK SHOWALTER and KELLY MATTSON, Co-Administrators of the ESTATE OF SIERRA MATTSON, Appellees, Defendants Below	:	

BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. ASSIGNMENTS OF ERROR

Petitioner Milbank Insurance Company ("Milbank") appeals an Order from the Circuit Court of Ohio County on cross motions for summary judgment ("the Order") on two grounds:

A. The Circuit Court erred when it held that Mr. Ratcliffe's liability for Ms. Mattson's injury does "arise out of the ownership, maintenance or use" of Mr. Ratcliffe's vehicle.

B. The Circuit Court erred when it failed to hold that the anti-stacking language in the Milbank Policy prevented the Estate from recovering UIM proceeds after receiving liability coverage proceeds under the same policy.

II. STATEMENT OF THE CASE

A. Overview

None of the facts in this action are in dispute, and this action instead involves only questions of law.

Milbank issued an automobile policy of insurance ("the Milbank Policy") to Sierra Mattson. Ms. Mattson died in an accident ("the Accident") while traveling as a passenger in her own vehicle. Caleb Ratcliffe was driving Ms. Mattson's vehicle at the time of the Accident.

While paying the Milbank Policy's liability proceeds to the Estate and other claimants, Milbank denied the Estate's claim for underinsured motorist ("UIM") coverage. Milbank later filed a declaratory judgment action to confirm that it did not owe UIM coverage to the Estate. After discovery, Milbank and the Estate each filed a motion for summary judgment regarding the issue of UIM coverage. In the Order, the Circuit Court granted the Estate's motion and denied Milbank's, holding that the Estate was entitled to UIM coverage under the Milbank Policy.

The Circuit Court reached this decision by expressly concluding that the Milbank Policy did not require an underinsured motor vehicle to have been involved in the Accident, despite language in the Milbank Policy indicating that an owner's or operator's liability "must arise out of the ownership, maintenance or use" of such a vehicle to give rise to UIM coverage. The Court

also reached this decision despite anti-stacking language in the Milbank Policy which indicates that no one will be entitled to recover both liability proceeds and UIM proceeds for the same elements of loss.

Both aspects of the Order are wrong. And, if this Court agrees that either aspect of the Order is wrong, or that both are, this Court must reverse the Order and remand this matter to the Circuit Court for an entry of judgment in Milbank's favor on its claim for declaratory relief.

B. The Accident

On November 23, 2019, Ms. Mattson died as a result of the Accident. (A.R. 084-085.) At the time, Ms. Mattson was riding as a passenger in a vehicle she owned. (A.R. 085.) Mr. Ratcliffe was driving Ms. Mattson's vehicle with her permission. (A.R. 086.) There is no dispute that the Accident was Mr. Ratcliffe's fault, as he was driving the wrong direction and collided with an on-coming vehicle. (A.R. 086-089.)

At the time of the Accident, Mr. Ratcliffe owned a separate vehicle which he insured through Erie Insurance Property and Casualty Company ("Erie"). (A.R. 031.) There is no dispute that Mr. Ratcliffe's vehicle was not involved in the Accident. (A.R. 086.)

C. The Insurance Claims

The Estate and other parties involved in the Accident made liability claims against Mr. Ratcliffe under the policy Erie had issued to him and, because he was a permissive user of Ms. Mattson's vehicle, under the Milbank Policy that Milbank had issued to Ms. Mattson. (A.R. 031-032.) Milbank and Erie both paid the Estate and the other claimants from their policies' liability coverages. (A.R. 032.)

The Estate also made a UIM claim under the Milbank Policy. (A.R. 034-035.) Milbank denied this claim. (A.R. 035.) After the Estate disagreed with the denial, Milbank filed a

declaratory judgment action in the Circuit Court. (A.R. 001-023.) Therein, Milbank sought an order that it does not owe UIM coverage to the Estate. (A.R. 001-023.)

D. The Milbank Policy

The UIM coverage within the Milbank Policy is contained in a West Virginia Uninsured / Underinsured Motorists Coverage Endorsement. (A.R. 108-111.) According to the pertinent portion of the applicable Insuring Agreement:

> A. We will pay compensatory damages which an "insured" is legally entitled to recover from the owner or operator of an "uninsured motor vehicle" or "underinsured motor vehicle" where such coverage is indicated as applicable in the Schedule or in the Declarations because of:
>
> 1. "Bodily injury" sustained by an "insured" and caused by an accident; and
>
> 2. "Property damage" caused by an accident.
>
> ***The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the "uninsured motor vehicle" or "underinsured motor vehicle".***

(A.R. 108. Emphasis added.)

The Milbank Policy defines an "underinsured motor vehicle" in pertinent part as:

> D. "Underinsured motor vehicle" means a land motor vehicle or trailer of any type to which a liability bond or policy applies at the time of the accident but the amount paid for "bodily injury" or "property damage" to an "insured" under that bond or policy is not enough to pay the full amount the "insured" is legally entitled to recover as damages.[1]

(A.R. 108.)

[1] The Milbank Policy's insuring agreement and definition of "underinsured motor vehicle" are consistent with West Virginia Code § 33-6-31(b), which provides in pertinent part, "'Underinsured motor vehicle' means a motor vehicle with respect to the ownership, operation or use of which there is liability insurance applicable at the time of the accident, but the limits of that insurance are either: (i) Less than limits the insured carried for underinsured motorists' coverage; or (ii) has been reduced by payments to others injured in the accident to limits less than limits the insured carried for underinsured motorists' coverage." (Emphasis added.)

The Milbank Policy also contains the following Limit of Liability:

> B. ***No one will be entitled to receive duplicate payments for the same elements of loss under this coverage and Part A of this Policy.***

(A.R. 110. Emphasis added.) Part A of the Milbank Policy provides the liability coverage thereunder. (A.R. 097.)

E. The Estate's Responses to Milbank's Requests for Admission Regarding "Underinsured Motor Vehicle"

In an effort to shape the issues presented to the Circuit Court, Milbank served a series of requests for admission on the Estate. (A.R. 084-094.) Two of the Estate's responses read:

> REQUEST NO. 33: Admit that Caleb Ratcliffe was not the driver of an underinsured vehicle involved in the accident.
>
> **ANSWER**: Admit.
>
> REQUEST NO. 12: Admit that the vehicle upon which you rely to assert your entitlement to underinsured motorist coverage benefits under Ms. Mattson's policy of insurance bearing number 1000332816 issued by Milbank Insurance Company is a vehicle owned by Caleb Ratcliffe that was "at home" at the time of the November 23, 2019, accident. ***See* July 2, 2020, Letter, attached as Exhibit 1.**
>
> **ANSWER**: Deny. Defendant/Counterclaimant does not rely upon a vehicle, but rather the language in the Milbank policy issued to Sierra Mattson. The Ratcliffe vehicle is insured under a policy that provided liability coverage for the collision.

(A.R. 091, A.R. 087.) These responses confirm that (1) the Estate is not asserting that Ms. Mattson's vehicle, which Mr. Ratcliffe was driving, was an underinsured motor vehicle; but (2) the Estate is instead asserting that Mr. Ratcliffe's vehicle was an underinsured motor vehicle.

F. The Order

After making findings of fact consistent with the foregoing discussion, the Circuit Court entered summary judgment in favor of the Estate and against Milbank. (A.R. 156-164.) According to the Order, Mr. Ratcliffe's vehicle "was an underinsured motorist [*sic*] as defined by West

Virginia Code §33-6-31(b) on the date of the subject crash," and Mr. Ratcliffe's vehicle "was also an underinsured motor vehicle under the [Milbank Policy] pursuant to the language of the policy." (A.R. 162.)

The Order also indicates, "There is no provision within the [Milbank Policy] that requires the underinsured motor vehicle actually be involved in the accident that triggers the underinsured motorist bodily injury coverage." (A.R. 162.) The Order continues, "Further, Mr. Ratcliffe's ownership of the underinsured vehicle is sufficient to trigger the underinsured motorist bodily injury coverage under the [Milbank Policy]." (A.R. 162.) The Circuit Court therefore concludes that allowing UIM proceeds to be recovered in these circumstances under the Milbank Policy is "consistent with the underinsured motorist statute as set forth in W. Va. Code §33-6-31(b) and the preeminent public policy of the underinsured motorist statute." (A.R. 163.)

The Order does not discuss the anti-stacking limitation within the Milbank Policy or explain why it does not preclude the Estate's recovery of UIM proceeds in this instance. (A.R. 156-164.)

III. SUMMARY OF ARGUMENT

The Circuit Court erred in entering summary judgment for the Estate, rather than for Milbank, in two ways.

First, Mr. Ratcliffe's liability for the Accident does not "arise out of the ownership, maintenance or use" of Mr. Ratcliffe's vehicle, the purported underinsured motor vehicle. Mr. Ratcliffe's vehicle was not involved in the Accident, and Mr. Ratcliffe was instead driving Ms. Mattson's vehicle at the time of the Accident. As such, no UIM coverage exists for this claim.

Second, the Circuit Court erred by not applying the anti-stacking limitation of liability within the Milbank Policy's UIM coverage. Pursuant to that limitation, the Estate cannot recover

both liability coverage proceeds and UIM coverage proceeds. Because the Estate has already recovered liability coverage proceeds, the Estate has no viable UIM claim.

IV. STATEMENT REGARDING ORAL ARGUMENT

Oral argument is appropriate in this action under Rule 19 of the Rules of Appellate Procedure, as this matter involves assignments of error in the application of settled law and a narrow issue of law.

V. ARGUMENT

A. Statement of Jurisdiction and Standard of Review

1. This Court Has Jurisdiction over This Appeal.

The Order resolved all aspects of Milbank's declaratory judgment claim, and the Circuit Court certified the Order as a final judgment pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure. Further, in denying the Estate's Motion to Dismiss Appeal as Interlocutory, this Court has already confirmed that it has jurisdiction over this appeal.

2. Standard of Review

A Circuit Court's entry of summary judgment is reviewed *de novo*. Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 190, 451 S.E.2d 755, 756 (1994). Conducting a *de novo* review means giving "a new, complete and unqualified review to the parties' arguments and the record before the circuit court." *Edward S. v. Raleigh County Housing Auth.*, 889 S.E.2d 31, 36 (W.Va. 2023).

B. Standard for Summary Judgment

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Civ. R. 56(c). "Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving

party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. Pt. 4, *Painter*, 192 W.Va. at 190.

C. Standard for Interpreting an Insurance Contract, Including UIM Coverage

An insurance policy is a contract, and "[d]etermination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law." Syl. Pt. 1, *Tennant v. Smallwood*, 211 W.Va. 703, 704, 568 S.E.2d 10, 11 (2002). For almost a century, the Supreme Court of Appeals has recognized, "Policies of insurance, like other contracts, must receive a reasonable interpretation consonant with the apparent object and plain intent of the parties." Syl. Pt. 3, *Kanawha Inv. Co. v. Hartford Steam Boiler Inspection and Ins. Co.*, 107 W.Va. 555, 149 S.E. 605 (1929).

"Where the provisions of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended." Syl., *Keffer v. Prudential Ins. Co. of Am.*, 153 W.Va. 813, 172 S.E.2d 714 (1970). See also, Syl. Pt. 1, *Murray v. State Farm Fire and Cas. Co.*, 203 W.Va. 477, 479, 509 S.E.2d 1, 3 (1998) (a court interpreting an insurance policy should give the language of the policy "its plain, ordinary meaning."). A policy's language is only ambiguous when it is "reasonably susceptible of two different meanings or is of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning[.]" Syl. Pt. 2, *Murray*, 203 W.Va. at 479.

With regard to UIM coverage, "[i]nsurers may incorporate such terms, conditions and exclusions in an automobile insurance policy as may be consistent with the premium charged, so long as any such exclusions do not conflict with the spirit and intent of the uninsured and underinsured motorists statutes." Syl. Pt. 3, *Deel v. Sweeney*, 181 W.Va. 460, 460-461, 383 S.E.2d 92, 92-93 (1989).

At the end of the day, "a court should read policy provisions to avoid ambiguities and not torture language to create them." *Payne v. Weston,* 195 W.Va. 502, 507, 466 S.E.2d 161, 166 (1995).

D. The Circuit Court erred when it held that Mr. Ratcliffe's liability for Ms. Mattson's injury does "arise out of the ownership, maintenance or use" of Mr. Ratcliffe's vehicle.

For the Estate to recover UIM proceeds under the Milbank Policy, Mr. Ratliffe's liability for Ms. Mattson's death "must arise out of the ownership, maintenance or use" of an underinsured motor vehicle. Similarly, under the West Virginia Code, UIM coverage is tied to "the ownership, operation or use" of a vehicle with insufficient liability coverage. W.Va. Code § 33-6-31(b).

By admitting that Mr. Ratcliffe "was not the driver of an underinsured motor vehicle involved in the accident," the Estate has already conceded that Ms. Mattson's vehicle was not such a vehicle. Therefore, the Estate can only recover UIM proceeds by establishing that Mr. Ratcliffe's vehicle was an underinsured motor vehicle and that Ms. Mattson's death arose out of its ownership, maintenance or use.

The Estate cannot make this showing, however, because Ms. Mattson's death did not "arise out of" Mr. Ratcliffe's "ownership, maintenance or use" of Mr. Ratcliffe's vehicle. Mr. Ratcliffe's vehicle was indisputably not involved in the Accident. The Accident occurred while Mr. Ratcliffe was using Ms. Mattson's vehicle, not Mr. Ratcliffe's. Mr. Ratcliffe's liability for Ms. Mattson's death had nothing to do with his "ownership" or "maintenance" of any vehicle, and it only arose out of Mr. Ratcliffe's "use" of Ms. Mattson's vehicle.

The Circuit Court held that nothing in the Milbank Policy "requires the underinsured motor vehicle actually be involved in the accident that triggers the [UIM] coverage." (A.R. 108.) This is wrong. In order for an injury to "arise out of" the use of a motor vehicle – as the Milbank Policy requires – there must be:

> a causal connection between the use of the motor vehicle and the injury. Such causal connection must be more than incidental, fortuitous or but for. The injury must be foreseeably identifiable with the normal use of the vehicle.

Baber v. Fortner, 186 W.Va. 413, 417, 412 S.E.2d 814, 819 (1991), citing *Detroit Auto. Inter-Insurance Exchange v. Higginbotham*, 95 Mich. App. 213, 290 N.W.2d 414, 419 (1980). In *Baber*, the Supreme Court therefore held that an injury following an intentional shooting from a vehicle did not "arise out of" the use of the vehicle, because shooting someone is not "foreseeably identifiable with the normal use of the vehicle." *Id*.

Federal courts applying West Virginia law have similarly constrained the instances when an injury "arises out of" the use of a vehicle. In *Nationwide Mut. Ins. Co. v. Shumate*, 63 F.Supp.2d 745 (S.D.W.Va. 1999), for example, an insured sought uninsured motorist coverage after he was assaulted in a post-accident altercation. *Id*. at 746. That coverage was only available for injuries "arising out of the ownership, maintenance or use" of a vehicle. *Id*. Relying on *Baber*, the District Court held that the insured had not suffered any such injuries, because his injuries were not "foreseeably identifiable with the normal use of a vehicle." *Id*. at 747. See also, *Erie Ins. Prop. & Cas. Co. v. Jones*, 2011 WL 1743665, *4 (S.D.W.Va.) (officer's estate was not entitled to recover UIM proceeds after officer was accidentally shot by a fellow officer, because officer's death did not arise out of a criminal suspect's normal use of a vehicle; suspect was using vehicle as a battering ram at the time of the shooting).

Under *Baber*, *Shumate* and *Jones*, there must be "normal use" of an underinsured motor vehicle for covered injuries to then "arise" therefrom by having a causal connection thereto. In this action, however, there was no use at all of the purportedly underinsured motor vehicle. There can be no connection whatsoever between Mr. Ratcliffe's use of his vehicle and Ms. Mattson's death, because there was no use of that vehicle in the Accident. Without any connection or any

use whatsoever, there is certainly no causal connection between Mr. Ratcliffe's vehicle and Ms. Mattson's death. Mr. Ratcliffe's vehicle simply had no role in the Accident, and it certainly had less connection to the Accident than the vehicles in the foregoing decisions had to those insureds' claims.

Cox v. Amick, 195 W.Va. 608, 466 S.E.2d 459 (1995) is also instructive. In the facts giving rise to *Cox*, four high school boys spent a morning smoking marijuana and drinking alcohol. At a gas station, one of the boys, Clifford Reed, exited the vehicle to make a purchase. The other three boys drove away from the gas station without Reed, went left of center, and collided with and killed an oncoming motorist. Reed was not the owner of the vehicle, the driver of the vehicle, or present in the vehicle at the time of the accident *Id*. at 611.

The decedent's estate nevertheless asserted an uninsured motorist claim based on Reed's misconduct. Although the Circuit Court allowed this claim, the Supreme Court of Appeals reversed that decision. Under the decedent's policy, uninsured motorist proceeds were only recoverable for damages "arising out of the ownership; maintenance; or use; of the uninsured motor vehicle." *Id.* at 616. The Supreme Court held, pursuant to the applicable "arising out of" language in the decedent's policy:

> [T]he insured or relative may not recover damages pursuant to his or her uninsured motorists coverage from a person ***who was not occupying an uninsured motor vehicle involved in the accident*** when it occurred and ***who was not the owner or driver of the uninsured motor vehicle involved in the accident*** even though such person may be liable to the insured or relative under other appropriate causes of action.

Id. at 618. (Emphasis added.)

Like Reed, Mr. Ratcliffe was not "occupying" the purported underinsured motor vehicle – his vehicle – at the time of this Accident. And, like any vehicle Reed might have owned, Mr. Ratcliffe's vehicle was not "involved in the Accident." As such, *Cox* offers additional support for

the conclusion that Milbank is entitled to judgment on its claim for declaratory relief, not the Estate.

The Estate as a matter of law cannot meet the "arising out of ownership, maintenance or use" requirement for Mr. Ratcliffe's vehicle to establish UIM coverage under the Milbank Policy. As such, Milbank urges the Court to reverse the Order and remand this action to the Circuit Court for an entry of judgment in Milbank's favor.

E. The Circuit Court erred when it failed to hold that the anti-stacking language in the Milbank Policy prevented the Estate from recovering UIM proceeds after receiving liability coverage proceeds under the same policy.

Even if Ms. Mattson's death did arise out of Mr. Ratcliffe's "ownership, maintenance or use" of Mr. Ratcliffe's vehicle – which it did not – such that UIM coverage was potentially available, the Estate as a matter of law would still not be entitled to UIM coverage on this claim. Because the Estate received liability coverage proceeds under the Milbank Policy, the Estate cannot also recover UIM proceeds. By providing that "[n]o one will be entitled to receive duplicate payments for the same elements of loss under this [UIM] coverage and Part A [liability coverage] of this Policy," the UIM coverage's anti-stacking limitation precludes such recovery.

Such an anti-stacking provision is permissible in a West Virginia automobile insurance policy. *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W.Va. 80, 576 S.E.2d 807 (2002). In *Findley*, based on the negligence of a driver, an insured passenger recovered liability coverage proceeds under a policy insuring the vehicle in which the passenger was riding. The passenger then attempted to also recover UIM proceeds under the same policy. But, the policy defined an "underinsured motor vehicle" to exclude any vehicle "insured under the liability coverage of this policy." The insurer therefore denied the UIM claim. *Id.*

Affirming the Circuit Court, the Supreme Court of Appeals agreed with the insurer's denial. According to the Supreme Court, the policy's definition of an "underinsured motor

vehicle" "effectively precludes an insured, whose vehicle is insured under the policy's liability coverage, from also collecting UIM benefits with regard to the same vehicle involved in the same covered occurrence." *Id*. at 97-98. And the Supreme Court took no issue with this result. *Id*. at 98.

As the Court noted, the ability to stack coverages does not arise from common law. *Id*., citing Syl. Pt. 1, *Payne*, 195 W.Va. at 502. Because the right to stack coverages can only arise from a policy or statute, and because the UIM statute is silent on the issue, a long line of cases affirms an insurer's ability to restrict such stacked recoveries. *Findley*, 213 W.Va. at 98 (liability and UIM coverages); Syl. Pt. 2, *Thomas v. Nationwide Mut. Ins. Co.*, 188 W.Va. 640, 425 S.E.2d 595 (1992) (liability and UIM based on family use exclusion); Syl. Pt. 5, *Russell v. State Auto. Mut. Ins. Co.*, 188 W.Va. 81, 422 S.E.2d 803 (1992) (different vehicles' UIM coverages under the same policy); Syl. Pt. 4, *Starr v. State Farm Fire & Cas. Co.*, 188 W.Va. 313, 423 S.E.2d 922 (1992) (same). See also, Syl. Pt. 3, *Payne*, 195 W.Va. at 502 (precluding stacking liability coverages for multiple vehicles, when only one involved in accident).

For this reason, the Supreme Court in *Findley* cited with approval the Circuit Court's conclusion that allowing the insured to stack liability and UIM coverage would "emasculate this State's underinsured motorist statutory provision, and, in effect, would transform the underinsured coverage into liability coverage." *Findley*, 213 W.Va. at 98.

That is the exact result that will occur in this action if the Estate is allowed to recover both liability proceeds and UIM proceeds under the Milbank Policy. The UIM coverage would effectively become liability coverage for Mr. Ratcliffe, eliminating the distinction between such coverages. Contrary to the Order, such a result is in no way consistent with the purpose and policy of the UIM statute.

Like the insureds in the foregoing litany of cases, the Estate should not be allowed to stack liability coverage and UIM coverage under the Milbank Policy. The Milbank Policy makes clear that an insured is not entitled to recover liability proceeds under part A of the policy and UIM proceeds under the UIM Endorsement for the same loss, and the Estate unquestionably already recovered liability proceeds under the Milbank Policy. The Estate therefore has no viable UIM claim.

For this second, separate reason, the Circuit Court should have entered judgment in favor of Milbank, rather than in favor of the Estate. Milbank therefore requests that this Court remand this matter to the Circuit Court accordingly.

VI. CONCLUSION

For the foregoing reasons, Milbank requests that the Court reverse the Order entered in the Estate's favor and remand this matter to the Circuit Court for an entry of judgment in Milbank's favor on its claim for declaratory relief.

Respectfully submitted,

Milbank Insurance Company

By counsel

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CERTIFICATE OF SERVICE

I, William M. Harter, hereby certify that on the 24th day of August, 2023, I electronically filed the foregoing "***Brief of Petitioner***" with the Clerk of the Court using File & Serve Express filing system which will send notification to the following:

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