INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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

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REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

I. INTRODUCTION

In this appeal, Petitioner Milbank Insurance Company ("Milbank") filed a succinct, 13-page brief, almost half of which presented a now-unchallenged Statement of Facts. Substantively, Milbank identified the two reasons the Circuit Court erred in entering summary judgment in favor of Appellee The Estate of Sierra Mattson ("the Estate") instead of Milbank. First, the Circuit Court incorrectly held that Caleb Ratcliffe's liability for Ms. Mattson's death does "arise out of the ownership, maintenance or use" of Mr. Ratcliffe's vehicle – a requirement for the Estate to recover underinsured motorist ("UIM") proceeds. Second, the Circuit Court incorrectly failed to hold that the anti-stacking language in the insurance policy Milbank issued to Ms. Mattson ("the Milbank Policy") prevents the Estate from recovering UIM proceeds after receiving liability coverage under the same policy. Milbank supported each of these reasons, which are independent of each other, with indisputable policy interpretation and clearly applicable precedent.

In response, the Estate has filed a verbose, 29-page brief which re-asserts a jurisdictional argument this Court has already rejected; misinterprets the Milbank Policy; ignores on-point precedent; misrepresents the pleadings and summary judgment briefing from the Circuit Court; and devotes its last 3 pages to rebutting an argument which it acknowledges Milbank has not actually raised on appeal.

Importantly, however, the Estate's Response Brief does not identify any genuine issues of material fact regarding the insurance coverage questions in this case. The Estate's Brief also does not articulate any valid reason this Court should affirm the Circuit Court's judgment. For the above two independent reasons raised in Milbank's Brief, the Estate is not entitled to UIM coverage under the Milbank policy. Milbank therefore urges this Court to reverse the Circuit Court and remand this action for any entry of judgment in Milbank's favor.

II. LAW AND ARGUMENT

A. This Court Has Jurisdiction over This Appeal.

The Estate argues that this Court lacks jurisdiction over this appeal. (Response Br., pp. 5-6.) The Estate already raised this in a Motion to Dismiss, which made similar (and often *verbatim*) arguments. This Court refused the Motion to Dismiss. (Order, July 27, 2023.) To the extent the Court is inclined to re-visit jurisdiction, Milbank incorporates herein by reference its previously filed Response to the Estate's Motion to Dismiss. Otherwise, Milbank urges the Court to again reject the Estate's flawed jurisdictional argument.

B. 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.

1. The Milbank Policy has two threshold requirements for UIM coverage, only one of which is satisfied in the Estate's claim.

In finding UIM coverage for the Estate's claim, the Circuit Court held that Mr. Ratcliffe's vehicle was an "underinsured motor vehicle" under the Milbank Policy. The Court then concluded, without further analysis, that Milbank therefore owes the Estate UIM proceeds. According to the Circuit Court:

> 31. There is no provision within the Milbank policy in question that requires the underinsured motor vehicle actually be involved in the accident that triggers the underinsured bodily injury coverage.
>
> 32. Further, Mr. Ratcliffe's ownership of the underinsured vehicle is sufficient to trigger the underinsured motorist bodily injury coverage under the policy.

(A.R. 162.)

This analysis ignores a critical portion of the Milbank Policy's Insuring Agreement, however. The Estate makes the same mistake. According to the pertinent portion of the UIM 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.)

This Insuring Agreement thus has two threshold requirements for the Estate to recover UIM proceeds: (1) there must be an owner or operator of an "underinsured motor vehicle" who is liable to the Estate for bodily injury damages; and (2) that owner or operator's liability for those damages owed to the Estate "must arise out of the ownership, maintenance or use of the * * * "underinsured motor vehicle." *Id*.

The Circuit Court and the Estate only focus on the first requirement of there being an owner or operator of an "underinsured motor vehicle" who is liable to the Estate. Admittedly, that first requirement is satisfied in this claim. Mr. Ratcliffe had liability insurance on his vehicle ("the Erie Policy"); the Erie Policy provided liability coverage for Mr. Ratcliffe even though he was driving Ms. Mattson's vehicle at the time of the accident; and the liability coverage under the Erie Policy was insufficient to satisfy Mr. Ratcliffe's liability to the Estate. These facts satisfy the first threshold requirement for the recovery of UIM proceeds.

But none of these facts satisfies the second requirement for UIM recovery under the Milbank Policy. Although Mr. Ratcliffe meets the definition of an owner of an "underinsured motor vehicle," that ownership is unconnected to Mr. Ratcliffe's liability to the Estate. It is

undisputed that Mr. Ratcliffe **was not** "the driver of an underinsured motor vehicle involved in the accident" or the owner of a vehicle involved in the accident. (A.R. 091, 085.) Mr. Ratcliffe's liability to the Estate did not "arise out of the ownership, maintenance or use of" Mr. Ratcliffe's vehicle. Because the Estate cannot prove the second requirement for UIM coverage under the Milbank Policy, the Estate is not entitled to UIM coverage. The Circuit Court erred in holding otherwise.

2. The "must arise out of" language of the UIM Insuring Agreement does not violate West Virginia public policy.

Without conceding that it applies to the Estate's claim, the Estate asserts that the "must arise out of" requirement of the UIM Insuring Agreement is "contrary to the intent and spirit of West Virginia's uninsured and underinsured motorist statutes * * * and thus is void." (Response Br., p. 18.) This assertion is unfounded and wrong.

In making this assertion, the Estate curiously relies on *Cox v. Amick*, 195 W.Va. 608, 466 S.E.2d 459 (1995). In *Cox*, the Court had to determine whether an insured was entitled to coverage under a policy which provided:

> We will pay compensatory damages as a result of bodily injury * * * suffered by you * * * and due by law from the owner or driver of an uninsured motor vehicle. ***Damages must result from an accident arising out of the: 1. ownership; 2. maintenance; or 3. use; of the uninsured motor vehicle.***

Id. at 616 (emphasis added). There is no substantive difference between the pertinent policy language in *Cox* and that in the Milbank Policy:

Policy in *Cox*	Milbank Policy
Damages must result from an accident arising out of the: 1. ownership; 2. maintenance; or 3. use; of the uninsured motor vehicle.	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".

In direct contravention to the Estate's "intent and spirit of the statute" argument, the Supreme Court of Appeals in *Cox* applied the policy language in question and found that the insured was not entitled to uninsured motorist coverage. *Id*. at 615-616. The Court certainly had an opportunity in *Cox* to determine that the "arising out of" requirement for coverage was void as "contrary to the intent and spirit of West Virginia's uninsured and underinsured motorist statutes." But, equally as certain, the Court did not avail itself of this opportunity by reaching such a result. The Court instead reached the opposite result, applying the policy language to deny coverage under the policy, and in doing so, confirming that the policy language is valid, not void.

The other decisions cited by the Estate on this issue similarly fail to prove the Estate's argument. In *Deel v. Sweeney*, 181 W.Va. 460, 463, 383 S.E.2d 92 (1989), the Court enforced a different exclusion which the Court found to be consistent with the intent of the uninsured and underinsured motorist statutes. In *Adkins v. Meador*, 201 W.Va. 148, 494 S.E.2d 915 (W.Va. 1997), the Court remanded a case for further fact finding regarding whether an insured fit within a policy definition. Neither case addressed the "must arise out of" language in the Milbank Policy or anything related to it. On that issue, *Cox* remains unchallenged.[1]

[1] The Estate also cites *Deel* for the general rule that "uninsured and underinsured motorist coverage are not viewed in the same light or treated identically." (Response Br., p. 12.) As a general rule, that is true. But, the Estate has never suggested why the specific coverage issues in this case should be construed differently for UIM coverage versus for uninsured motorist coverage. Indeed, from the cases on which Milbank relies, Milbank asserts there is no reason to treat the coverage issues herein differently simply because this is a UIM claim. As the cases cited in Milbank Brief and herein show, Courts interpret the coverage issues in this case the same way, whether discussing liability coverage, UIM coverage, or uninsured motorist coverage.

3. Mr. Ratcliffe's liability to the Estate does not "arise out of" his ownership of his vehicle.

Once the Court applies the "must arise out of" requirement to the facts of this claim, case law confirms that Milbank is correctly interpreting the plain language of the UIM coverage requirements, and the Circuit Court and the Estate are not. Milbank's Brief cites four cases on the question of when liability for an injury "arises out of" the ownership or use of a vehicle:

(1) *Baber v. Fortner*, 186 W.Va. 413, 417, 412 S.E.2d 814, 819 (1991);

(2) *Nationwide Mut. Ins. Co. v. Shumate*, 63 F.Supp.2d 745 (S.D.W.Va. 1999);

(3) *Erie Ins. Prop. & Cas. Co. v. Jones*, 2011 WL 1743665, *4 (S.D.W.Va. Civil Action No. 2:10-cv-479, May 6, 2011); and

(4) *Cox v. Amick*, 195 W.Va. 608, 466 S.E.2d 459 (1995).

In each of these cases, the Court rejected the argument that an injury arose out of the use of a motor vehicle, either because there was no "causal connection" between the use and the injury or because the injury was not "foreseeably identifiable" with the "normal use" of the vehicle.

The Estate attempts to distinguish these cases factually based on the nature of their underlying accidents (Response Br., pp. 18-21), but that is a distinction without consequence. Milbank does not rely on these cases to suggest the accidents involved in these cases were factually similar to the accident in this case. They were not. Milbank relies on these cases because they are legally similar, in that the referenced Courts interpreted the same critical phrase, "arise out of," and its ilk under various automobile policies. The legal similarities provide the precedential value in this briefing, not the facts of any of the accidents. The Estate's Brief completely fails to legally distinguish Milbank's precedential authorities.

Another UIM decision, issued after Milbank filed its Brief, bolsters this point. In *Carroll v. Westfield Natl. Ins. Co.*, 2023 WL 6300045 (N.D.W.Va. Civil Action No. 1:22-cv-14, Sept. 27,

2023), the District Court considered whether an insured's UIM claim "resulted from the ownership, maintenance or use" of the underinsured motor vehicle. To determine whether the insured could satisfy this "resulted from" requirement, the Court looked to the Supreme Court of Appeals' "instructive guide [] for finders of fact to follow in evaluating whether an injury ***arose from*** the 'use' of a motor vehicle[.]" *Id*. at *4, citing Syll. Pt. 2, *Cleaver v. Big Arm Bar & Grill*, 202 W.Va. 122, 502 S.E.2d 438, 438-439 (1998). (Emphasis added.) The District Court concluded that, because there was no sufficient connection between the insured's earlier use of a vehicle and the injury suffered after he stopped using it, the injury did not "result from" the use of the vehicle. *Id.* at *5. The insured was therefore not entitled to UIM proceeds. *Id*.

Carroll further explains why the Circuit Court erred in entering judgment for the Estate instead of Milbank. Yes, Mr. Ratcliffe was the owner of an "underinsured motor vehicle." But, contrary to the Circuit Court's summary judgment decision, merely owning an "underinsured motor vehicle" does not satisfy the UIM requirements under the Milbank Policy. Mr. Ratcliffe's liability did not "result from" that ownership; there is no "causal connection" between the liability and his ownership; and his liability to the Estate was not a "foreseeably identifiable" result of the "normal" ownership of his own vehicle. In other words, no matter the definition used, Mr. Ratcliffe's liability did not "arise out of" his ownership of his own vehicle which was unquestionably not involved in the accident.

Because the Estate cannot satisfy the valid policy requirement that Mr. Ratcliffe's liability to the Estate "must arise out of" Mr. Ratcliffe's ownership of his own vehicle, the Circuit Court erred in entering judgment for the Estate instead of Milbank. Milbank urges this Court to reverse that decision and remand this matter for an entry of judgment in Milbank's favor.

C. 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 the Estate received liability coverage proceeds under the same policy.

1. The anti-stacking provision bars the Estate's UIM recovery.

Wholly separate from the foregoing "must arise out of" discussion, the Estate's UIM claim is also barred by the anti-stacking limit of liability within the Milbank Policy's UIM coverage:

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

(A.R. 110.)[2] Because the Estate already recovered liability coverage proceeds under Part A of the Milbank Policy, this provision precludes the Estate from also recovering UIM proceeds from Milbank.

Such an anti-stacking provision is permissible in a West Virginia automobile insurance policy. *Findley*, 213 W.Va. at 97-98. In *Findley*, the Supreme Court of Appeals had to interpret a policy in which the 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.* Even though the insured in *Findley* was not made whole as a result of its decision, the Court applied that definition to preclude the insured's recovery of UIM proceeds under a policy on which the insured had already recovered liability proceeds. *Id*. at 98.

[2] The description of this language as an "anti-stacking limit of liability" is not a "misnomer," as the Estate asserts. (Response Br., p. 22, fn. 1.) While anti-stacking limitations can apply to multiple-vehicle situations, as the Estate's string citation to eight decisions shows, "anti-stacking" is also a proper description for provisions which preclude multiple recoveries under the same policy. *Findley v. State Farm Mut. Auto. Ins.*, 213 W.Va. 80, 98, 576 S.E.2d 807 (2002) (Interpreting a policy with "two types of anti-stacking provisions," one of which precluded "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.")

As with the "must arise out of" argument discussed above, the Estate argues that this anti-stacking provision is "conflicting with the spirit and intent of the uninsured and underinsured motorist statutes[.]" (Response Br., p. 24.) The Estate is again wrong.

First, as noted, the Supreme Court in *Findley* applied the anti-stacking provision. So, clearly, the Supreme Court did not believe the provision was improper or needed to be voided.

Second, despite citing six cases for the assertion that the anti-stacking language makes the premiums paid "illusory" (Response Br., p. 24), none of the cited cases says that. Indeed, none of the cited cases even addresses an anti-stacking provision which limits double-recovery between liability coverage and UIM coverage under the same policy. Given that the Milbank Policy still allows an insured to receive the benefit of liability coverage and UIM coverage – just not on the same claim for the same insured – neither coverage is rendered "illusory" by the anti-stacking provision.

Milbank is the only party which has cited authorities discussing anti-stacking language between liability and UIM coverage. And all of those authorities enforce the anti-stacking language. *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 v. Weston*, 195 W.Va. 502, 466 S.E.2d 161 (1995) (precluding stacking liability coverages for multiple vehicles, when only one involved in accident). The Estate offers no rebuttal, for there is no rebuttal, for the conclusion in *Findley* 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.

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 claim for UIM proceeds.

For this second, wholly independent 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 reverse and remand this matter to the Circuit Court.[3]

2. The anti-stacking language in the Milbank Policy and Milbank's primary authority for the same were before the Circuit Court.

Perhaps recognizing the substantive deficiencies in its position on this issue, the Estate asserts that the procedural "raise or waive rule" precludes Milbank from making this argument. (Response Br., pp. 23-23.) Milbank disagrees.

This anti-stacking argument was before the Circuit Court prior to its entry of summary judgment in favor of the Estate. In Milbank's Complaint, the language was both cited (A.R. 007) and asserted as a separate count on which declaratory judgment should be entered (A.R. 010-011). The language was then in Milbank's Motion for Summary Judgment briefing (A.R. 058), as was the primary case upon which Milbank relies for this issue, *Findley v. State Farm* (A.R. 067). Admittedly, "the failure of a litigant to assert a right in the trial court likely will result in the

[3] Of course, this issue is obviated if the Court agrees with Milbank's First Assignment of Error and finds that Mr. Ratcliffe's liability to the Estate was required to, but did not, arise out of his ownership of his own vehicle. If the Estate cannot satisfy the UIM insuring agreement requirements, the question of whether the anti-stacking limitation also applies to preclude the Estate's UIM recovery becomes moot.

imposition of a procedural bar to an appeal of that issue." *State v. Miller*, 194 W.Va. 3, 17, 459 S.E.2d 114 (1995). In this instance, however, Milbank did assert the anti-stacking language to preserve the issue for this Court's consideration.

3. Even if this Court finds that Milbank did not preserve the anti-stacking argument, this Court should exercise its discretion to decide the same.

"[T]he 'raise or waive' rule, though important, is a matter of discretion." *Horton v. Professional Bureau of Collections of Maryland, Inc.*, 238 W.Va. 310, 313, 794 S.E.2d 395 (2016) (citation omitted). When "the facts of the case are sufficiently developed to permit meaningful review, and the issue was fully briefed by both parties," an appellate court can resolve a discrete legal issue even if the same was not raised in the trial court. *Id.*

In this instance, there are no issues of fact, and the agreed-upon facts present a very straight-forward insurance coverage question. Further, at this point, both parties have already briefed the substance of the issue, and Milbank has identified a Supreme Court of Appeals decision – *Findley v. State Farm* – which is squarely on point. So, even if the Court believes Milbank did not preserve the anti-stacking issue in the Circuit Court – a conclusion with which Milbank disagrees – this Court still has discretion to decide this issue. And Milbank respectfully requests that the Court do so in Milbank's favor, for the reasons discussed herein.

III. CONCLUSION

For the foregoing reasons, as well as those set forth in Milbank's Brief and its Response to the Estate's Motion to Dismiss, 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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William M. Harter, hereby certify that on the 30th day of October, 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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