INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

MILBANK INSURANCE COMPANY,

Appellant, Plaintiff Below,

v.

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

RESPONSE BRIEF OF APPELLEES

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I. ASSIGNMENTS OF ERROR

As to the two assignments of error, contrary to the assertions of the Appellant Milbank Insurance Company ("Milbank") as to the Circuit Court's rulings on cross motions for summary judgment:

A. The Circuit Court did not err when it held that the ownership by Caleb Ratcliffe of a motor vehicle led to the payment by his insurer, Erie Insurance Property and Casualty Company, of its liability limits under its automobile insurance policy which rendered the Ratcliffe vehicle an "underinsured motor vehicle" since the liability payment did not fully compensate the Estate for the injuries suffered by the decedent Sierra Mattson under her automobile insurance policy with Milbank, despite the Ratcliffe vehicle, itself, not being actually involved in the fatal collision, entitling her Estate to a payment of Milbank's underinsured motorist coverage limits consistent with the law of West Virginia.

B. The Circuit Court did not err when it held that the family use exclusion did not apply and that Ms. Mattson's Estate is entitled under the Milbank policy to liability coverage for Mr. Ratcliffe's operation of her motor vehicle insured under her policy with Milbank and for underinsured motorist coverage for Mr. Ratcliffe's own motor vehicle which was insured under a separate insurance policy with another insurer that paid its liability limits for such vehicle owned by Mr. Ratcliffe. But Appellant has not expressly raised the Circuit Court's ruling on the family use exclusion in this appeal and has waived any argument that a provision prohibiting duplicate payments, which it now labels as an anti-stacking provision, entitled it to summary judgment or barred the Appellees from being awarded summary judgment by not arguing it in their motion for summary judgment and supporting memoranda of law. Additionally, the provision against duplicate payments for the same elements of loss under the facts of this case would not apply to prohibit the payment of both liability and underinsured motorist coverages. Any contrary conclusion would violate the intent and spirit of the West Virginia Uninsured and Underinsured Motorists Statutes.

II. STATEMENT OF CLAIM

The Appellees continue to assert for the reasons set forth in their motion to dismiss appeal and supporting reply memorandum, that this appeal should be dismissed as an improper interlocutory appeal inasmuch as the Circuit Court's Order does not constitute an appealable final judgment. As to the Appellant's Statement of Claim, the Appellees do not contest its summary of the facts and procedural history relevant to this appeal.

However, for reasons set forth below, the Appellant's assertion that the motor vehicle owned by Mr. Ratcliffe that was insured by another insurer which paid its liability limits does not constitute an underinsured motor vehicle under the Milbank policy because it was not involved in the motor vehicle collision is not accurate and is contrary to the law of West Virginia concerning underinsured motorist coverage as well as the terms of the Milbank policy, itself. The Circuit Court had also correctly determined that the family use exclusion did not apply under the facts of this case to prevent the Appellees from obtaining both liability and underinsured motorist coverages under the Milbank policy. In fact, the Appellant did not assign this ruling as an error or otherwise argue it in its appeal brief.

Additionally, the Appellant did not raise and argue in the cross motions for summary judgment that the Milbank policy's provision prohibiting duplicate payments for the same elements of loss, which it labels as an anti-stacking provision, applies in this case. Accordingly, the "raise or waive" rule applies on this appeal and prevents the Appellant from now asserting it. Moreover, such provision against duplicate payments does not apply to a payment of underinsured motorist benefits that is intended to help fully compensate an injured party when the liability limits are insufficient to do so and is not intended to provide duplicate payments for the same elements of loss, the latter of which is what is prevented by such provision. Any contrary conclusion would violate the law of West Virginia by conflicting with the spirit and intent of the uninsured and underinsured motorist statutes.

III. SUMMARY OF ARGUMENT

Contrary to Appellant's assertions, the statutory and common law of West Virginia concerning underinsured motorist coverage as well as the provisions of the Milbank policy, itself, when interpreted consistent with accepted principles of construction for insurance policies,

supports that Mr. Ratcliffe's ownership of a motor vehicle which was insured under a separate insurance policy with another insurer that paid its liability limits for such vehicle owned by Mr. Ratcliffe rendered such vehicle an "underinsured" motor vehicle for which the Appellees were entitled to receive coverage for the policy limits of the Milbank policy for such an underinsured motor vehicle.

Simply stated, nothing contained within the language of W.Va. Code § 33-6-31(b) or in clear and unambiguous terms of the Milbank policy's own definition of "underinsured motor vehicle" provides that the underinsured motor vehicle must actually be a vehicle involved in the accident. Rather, the key requirement pursuant to the underinsured motorist statute is that "with respect to the ownership, operation or use of [the underinsured motor vehicle] there is liability insurance applicable at the time of the accident" which is insufficient to pay the full amount the insured is legally entitled to recover as damages. W.Va. Code § 33-6-31(b); A.R. 108.

As previously acknowledged, in the present case, there are two independent and unrelated insurance policies paying claims. Caleb Ratcliffe was an insured under an automobile insurance policy issued by Erie Insurance Property and Casualty Company ("Erie") that provided liability coverage for the Ratcliffe motor vehicle that was located at his home at the time of the accident at issue in this lawsuit. The Erie policy paid its liability coverage limits for the Ratcliffe motor vehicle. *See* A.R. 031, 086-087. However, such available coverage limits were insufficient to pay the full amount the insured is legally entitled to recover as damages; thereby, rendering it an "underinsured motor vehicle" pursuant to the definition contained in W.Va. Code § 33-6-31(b) and the Milbank policy at issue in this case. Indeed, it clearly fell within the Milbank policy's definition of an underinsured motor vehicle which it defines as one "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." A.R. 108. Accordingly, the Appellant's attempt to deny coverage in this case contravenes the intent and spirit of the West Virginia underinsured motorist statute as well as relevant language of its own insurance policy.

As to the Appellant's purported second assignment of error raised in this appeal, Appellant neither raised an argument in its summary judgment motion and supporting memorandum of law nor in its reply brief in support of its motion for summary judgment that the provision prohibiting duplicate payments, that it designates as an anti-stacking provision, applied to this case and entitled it to summary judgment or otherwise prohibited the Appellees from obtaining summary judgment. *See* A.R. 046-072 & 134-154. Accordingly, the "raise or waive" rule prohibits it from doing so on this appeal.

In any event, such provision against duplicate payments does not apply to a payment of underinsured motorist benefits that is intended to help fully compensate an injured party when the liability limits are insufficient to do so and is not intended to provide duplicate payments for the same elements of loss, the latter of which is what is intended to be prevented by such provision. Any contrary conclusion would make the existence of underinsured motorist coverage for which premiums had been paid illusory and would violate the law of West Virginia by conflicting with the spirit and intent of the uninsured and underinsured motorists statutes.

The Appellant's actual second argument before the Circuit Court was that the "family use exclusion" contained in the Milbank policy prevents the payment of both liability and underinsured motorist limits in this case. However, while the family use exclusion may prohibit payment of both liability and underinsured motorist limits for the same motor vehicle insured thereunder in order to prevent underinsured motorist coverage from being converted into additional liability

coverage, it does not prohibit the payment of both such limits when the liability limits are paid for a vehicle insured under the policy and the underinsured motor vehicle limits are paid for a different motor vehicle that is insured by a separate insurance policy issued by a different insurer to the tortfeasor. Interestingly, perhaps recognizing the frivolousness of such prior argument, the Appellant chose not to expressly raise the family use exclusion argument on this appeal; thereby waiving it for purposes of this appeal.

IV. STATEMENT REGARDING ORAL ARGUMENT

Appellees agree with Appellant that 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/or narrow issues of law. W.Va.R.App.P. 19(a)(1) & (4).

V. ARGUMENT

A. Statement of Jurisdiction and Standard of Review

1. This Court Does Not Have Jurisdiction Over This Interlocutory Appeal.

For the reasons set forth in Appellees' motion to dismiss appeal and supporting reply memorandum, which they adopt and incorporate as if fully set forth herein, this appeal should be dismissed as an improper interlocutory appeal inasmuch as the Circuit Court's Order does not constitute an appealable final judgment. Courts, including the West Virginia Supreme Court of Appeals, have held that an appealable final judgment does not exist when a trial court has ruled on a party's liability for a claim but has not yet awarded relevant damages that have been requested on such claim, including through counterclaims filed in response to a declaratory-judgment complaint. *See, e.g., C & O Motors, Inc. v. West Virginia Paving, Inc.*, 223 W.Va. 469, 474, 677 S.E.2d 905, 910 (2009); *Hubbard v. State Farm Indemnity Co.*, 213 W.Va. 542, 549-50 & n. 13, 584 S.E.2d 176, 183-84 & n. 13 (2003); *West Virginia Employers' Mut. Ins. Co. v. Summit Point*

Raceway Associates, Inc., 228 W.Va. 360, 364 n. 5, 719 S.E.2d 830, 834 n. 5 (2011); *Erie Ins. Co. v. Dolly*, 240 W.Va. 345, 354, 811 S.E.2d 875, 884 (2018); *Kinsale Insurance Co. v. JDBC Holdings, Inc.*, 31 F.4th 870, 874-77 (4th Cir. 2022). In the present case, even if Appellees' claims for Unfair Settlement Practices and bad faith may be considered to be separate claims, the Appellees' claim for breach of contract and request for damages thereunder for the underinsured motorist coverage provided by the policy is inextricably intertwined with Appellant's claim for a declaratory judgment as to such exact coverage.

2. Standard of Review on Appeal

(a) Summary Judgment

On appeal, a circuit court's grant of summary judgment is reviewed *de novo*. *Painter v. Peavy*, 192 W.Va. 189, 192, 451 S.E.2d 755, 758 (1994); *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W.Va. 692, 698, 474 S.E.2d 872, 878 (1996). "'We therefore give a new, complete and unqualified review to the parties' arguments and the record before the circuit court.'" *Gastar Exploration Inc. v. Rine*, 239 W.Va. 792, 798, 806 S.E.2d 448, 454 (2017) (quoting *Blackrock Capital Investment Corp. v. Fish*, 239 W.Va. 89, 96, 799 S.E.2d 520, 526 (2017)).

However, as to a circuit court's findings of fact and conclusions of law:

> "In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review. *See* syl. pt. 1, *Burnside v. Burnside,* No. 22399, [194] W.Va. [263], [460] S.E.2d [264] (Mar. 24, 1995)." *Phillips v. Fox,* 193 W.Va. 657, 661, 458 S.E.2d 327, 331 (1995).

Syl. Pt. 1, *Barney v. Auvil*, 195 W.Va. 733, 466 S.E.2d 801 (1995) (per curiam). *Accord* Syl. Pt. 5, *Peters v. Rivers Edge Min., Inc.*, 224 W.Va. 160, 680 S.E.2d 791 (2009). "Even when our review is *de novo*, '[w]e review a circuit court's underlying factual finding under a clearly

erroneous standard.' *See Staten v. Dean*, 195 W.Va. 57, 62, 464 S.E.2d 576, 581 (1995)." *Barney v. Auvil*, 195 W.Va. at 737, 466 S.E.2d at 805.

(b) Insurance Contracts

> The interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination that, like a lower court's grant of summary judgment, shall be reviewed *de novo* on appeal.

Syl. Pt. 2, *Riffe v. Home Finders Associates, Inc.*, 205 W.Va. 216, 517 S.E.2d 313 (1999). *Accord* Syl. Pt. 3, *Drake v. Snider*, 216 W.Va. 574, 608 S.E.2d 191 (2004); Syl. Pt. 2, *Horace Mann Ins. Co. v. Adkins*, 215 W.Va. 297, 599 S.E.2d 720 (2004); Syl. Pt. 3, *Certain Underwriters At Lloyd's, London v. Pinnoak Resources, LLC*, 223 W.Va. 336, 674 S.E.2d 197 (2008). "Determination 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, 568 S.E.2d 10 (2002). *Accord* Syl. Pt. 1, *Horace Mann Ins. Co. v. Adkins*, 215 W.Va. 297, 599 S.E.2d 720 (2004).

B. Standard of Review for Summary Judgment

> A circuit court's entry of summary judgment is reviewed *de novo. See Drewitt v. Pratt,* 999 F.2d 774 (4th Cir.1993). Under Rule 56(c) of the West Virginia Rules of Civil Procedure, summary judgment is proper only where the moving party shows that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. In Syllabus Point 1 of *Andrick v. Town of Buckhannon,* 187 W.Va. 706, 421 S.E.2d 247 (1992), we reiterated the standard for granting summary judgment:
>
> " 'A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.' Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York,* 148 W.Va. 160, 133 S.E.2d 770 (1963)."

Painter v. Peavy, 192 W.Va. 189, 192, 451 S.E.2d 755, 758 (1994). *Accord Fravel v. Sole's Elec. Co., Inc.*, 218 W.Va. 177, 178, 624 S.E.2d 524, 525 (2005) (*de novo* review on appeal).

C. Standard of Review for Interpreting Insurance Contracts

As to the standard for interpreting insurance contracts, the West Virginia Supreme Court of Appeals has held:

> 4. " ' "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." Syllabus, *Keffer v. Prudential Ins. Co.,* 153 W.Va. 813, 172 S.E.2d 714 (1970).' Syl. pt. 1, *Russell v. State Auto. Mut. Ins. Co.,* 188 W.Va. 81, 422 S.E.2d 803 (1992)." Syl. pt. 1, *Miller v. Lemon,* 194 W.Va. 129, 459 S.E.2d 406 (1995).
>
> 5. " ' "Language in an insurance policy should be given its plain, ordinary meaning." Syl. Pt. 1, *Soliva v. Shand, Morahan & Co.,* 176 W.Va. 430, 345 S.E.2d 33 (1986).' Syl. pt. 2, *Russell v. State Auto. Mut. Ins. Co.,* 188 W.Va. 81, 422 S.E.2d 803 (1992)." Syl. pt. 2, *Miller v. Lemon,* 194 W.Va. 129, 459 S.E.2d 406 (1995).
>
> 6. " ' "Insurers 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, 383 S.E.2d 92 (1989).' Syl. pt. 4, *Russell v. State Auto. Mut. Ins. Co.,* 188 W.Va. 81, 422 S.E.2d 803 (1992)." Syl. pt. 3, *Miller v. Lemon,* 194 W.Va. 129, 459 S.E.2d 406 (1995).

Syl. Pts. 4, 5, & 6, *Cox v. Amick*, 195 W.Va. 608, 466 S.E.2d 459 (1995) (emphasis added).

However, the Court has also held:

> "When the words of an insurance policy are, without violence, susceptible of two or more interpretations, that which will sustain the claim and cover the loss must be adopted." Syllabus point 2, *Farmers Mutual Insurance Co. v. Tucker,* 213 W.Va. 16, 576 S.E.2d 261 (2002).

Syl. Pt. 4, *Drake v. Snider*, 216 W.Va. 574, 608 S.E.2d 191 (2004).

In a similar vein, the Court has held:

> 4. It is well settled law in West Virginia that ambiguous terms in insurance contracts *are to be strictly construed against the insurance company and in favor of the insured*.
>
> 5. Where the policy language involved *is exclusionary, it will be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated*.

* * *

7. *An insurance company seeking to avoid liability through the operation of an exclusion has the burden of proving the facts necessary to the operation of that exclusion*.

8. With respect to insurance contracts, *the doctrine of reasonable expectations is that the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations*.

9. *Where ambiguous policy provisions would largely nullify the purpose of indemnifying the insured, the application of those provisions will be severely restricted*.

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

Syl. Pts. 4, 5, & 7-10, *National Mutual Ins. Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1987) (emphases added), *overruled on other grounds*, Syl. Pt. 3, *Parsons v. Halliburton Energy Services, Inc.*, 237 W.Va. 138, 785 S.E.2d 844 (2016) (overruling Syl. Pt. 3 of *National Mutual Ins. Co.* to the extent that it required proof of prejudice or detrimental reliance to establish common-law doctrine of waiver). *Accord* Syl. Pts. 8, 10 & 11, *Cherrington v. Erie Ins. Property and Cas. Co.*, 231 W.Va. 470, 745 S.E.2d 508 (2013).

D. The Circuit Court did not err when it held that Mr. Ratcliffe's ownership of his vehicle led to the payment by his insurer of its liability limits under its policy of insurance which rendered Mr. Ratcliffe's vehicle an "underinsured" motor vehicle under Ms. Mattson's insurance policy with Milbank entitling her Estate to a payment of Milbank's underinsured motorist coverage limits.

West Virginia Code § 33-6-31(b) 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. No sums payable as a result of underinsured

> motorists' coverage may be reduced by payments made under the insured's policy or any other policy.

W.Va. Code § 33-6-31(b).

Consistent with said statute, the policy issued by Milbank Insurance Company ("Milbank") that is at issue on this appeal contains the following relevant definition:

> 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.

A.R. 108.

The use of the disjunctive "or" in the statutory phrase "a motor vehicle with respect to the ownership, operation or use of which there is liability insurance applicable at the time of the accident" establishes that ownership alone of a motor vehicle for which there is liability insurance of an inadequate amount applicable at the time of the accident is sufficient to render such motor vehicle an "underinsured motorist vehicle" under the statute. *See*, *e.g.*, *Holsten v. Massey*, 200 W.Va. 775, 790, 490 S.E.2d 864, 879 (1997); *Tennant v. Smallwood*, 211 W.Va. 703, 712, 568 S.E.2d 10, 19 (2002); *State v. Taylor*, 176 W.Va. 671, 674-75, 346 S.E.2d 822, 825-26 (1986); *State v Saunders*, 219 W.Va. 570, 574-75, 638 S.E.2d 173, 177-78 (2006).

Moreover, as declared by the West Virginia Supreme Court of Appeals:

> *W.Va.Code, 33–6–31(b), as amended, on uninsured and underinsured motorist coverage, contemplates recovery, up to coverage limits, from one's own insurer, of full compensation for damages not compensated by a negligent tortfeasor who at the time of the accident was an owner or operator of an uninsured or underinsured motor vehicle.* Accordingly, the amount of such tortfeasor's motor vehicle liability insurance coverage actually available to the injured person in question is to be deducted from the total amount of damages sustained by the injured person, and the insurer providing underinsured motorist coverage is liable for the remainder of the damages, but not to exceed the coverage limits.

Syl. Pt. 4, *State Automobile Mut. Ins. Co. v. Youler*, 183 W.Va. 556, 396 S.E.2d 737 (1990) (emphasis added). *Accord* Syl. Pt. 1, *Pritavec v. Westfield Ins. Co.*, 184 W.Va. 331, 400 S.E.2d 575 (1990); Syl. Pt. 2, *Kronjaeger v. Buckeye Union Ins. Co.*, 200 W.Va. 570, 490 S.E.2d 657 (1997).

> *In light of the preeminent public policy of the underinsured motorist statute, which is to provide full compensation, not exceeding coverage limits, to an injured person for his or her damages not compensated by a negligent tortfeasor*, this Court holds that underinsured motorist coverage is activated under *W.Va.Code,* 33–6–31(b), as amended, *when the amount of such tortfeasor's motor vehicle liability insurance actually available to the injured person in question is less than the total amount of damages sustained by the injured person*, regardless of the comparison between such liability insurance limits actually available and the underinsured motorist coverage limits.

Syl. Pt. 5, *Pritavec v. Westfield Ins. Co.*, *supra* (emphases added). *Accord* Syl. Pt. 5, *Arndt v. Burdette*, 189 W.Va. 722, 434 S.E.2d 394 (1993); *Kronjaeger v. Buckeye Union Ins. Co.*, 200 W.Va. at 579, 490 S.E.2d at 666.

Consistent with this preeminent public policy that an injured person be fully compensated for his or her damages not adequately compensated by a negligent tortfeasor, up to the limits of the underinsured motorist coverage, the Court has recognized that "[t]he underinsured motorist statute is remedial and it should be liberally construed." *Adkins v. Meador*, 201 W.Va. 148, 153, 494 S.E.2d 915, 920 (1997) ("Accordingly, if the language of Liberty Mutual's policy does not comply with the broad terms of W.Va. Code, 33-6-31, then the policy language is void and the policy must be construed to contain the coverage provided for by statute.").

Importantly, nothing contained within the language of W.Va. Code § 33-6-31(b) or the Milbank policy's own definition of "underinsured motor vehicle" provides that the underinsured motor vehicle must actually be a vehicle involved in the accident. Rather, the key requirement pursuant to the underinsured motorist statute is that "with respect to the ownership, operation or

use of [the underinsured motor vehicle] there is liability insurance applicable at the time of the accident" which is insufficient to pay the full amount the insured is legally entitled to recover as damages. W.Va. Code § 33-6-31(b); A.R. 108. As previously acknowledged, in the present case, there are two independent and unrelated insurance policies paying claims. Caleb Ratcliffe was an insured under an automobile insurance policy issued by Erie that provided liability coverage for the Ratcliffe motor vehicle that was located at his home at the time of the accident at issue in this lawsuit. The Erie policy paid its liability coverage limits for the Ratcliffe motor vehicle. However, such available coverage limits were insufficient to pay the full amount the insured is legally entitled to recover as damages; thereby, rendering it an "underinsured motor vehicle" pursuant to the definition contained in W.Va. Code § 33-6-31(b) and the Milbank policy at issue in this case. Indeed, it clearly fell within the Milbank policy's definition of an underinsured motor vehicle which it defines as one "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." A.R. 108. Accordingly, the Appellant's attempt to deny coverage in this case contravenes the intent and spirit of West Virginia underinsured motorist statute as well as relevant language of its own insurance policy.

The holdings of *Cox v. Amick*, 195 W.Va. 608, 466 S.E.2d 459 (1995), upon which the Appellant relied before the Circuit Court and on this appeal, are distinguishable from the facts and circumstances of this case. First, this case involves underinsured motorist coverage while *Cox v. Amick* involved uninsured motorist coverage. As noted by the Court in *Deel v. Sweeney*, 181 W.Va. 460, 383 S.E.2d 92 (1989), uninsured motorist coverage and underinsured motorist coverage are not viewed in the same light or treated identically.

> [S]tatutory changes indicate that *the Legislature does not view uninsured and underinsured coverage in the same light*. Uninsured motorist coverage is required, while underinsured motorist coverage is optional. There are significant public policy reasons for the mandatory requirement of uninsured coverage. As *Bell* pointed out, the State has a legitimate interest in assuring every citizen is protected from the risk of loss caused by the uninsured motorist. *Bell[v. State Farm Mut. Auto. Ins. Co.,* 157 W.Va. [623,] at 627, 207 S.E.2d [147,] at 150 [(1974)]. The purpose of optional underinsured motorist coverage is to enable the insured to protect himself, if he chooses to do so, against losses occasioned by the negligence of other drivers who are underinsured. A contract for greater benefits generally justifies a greater premium. The Legislature, three years after it approved paragraph (k), of *Code,* 33–6–31 required insurers to offer optional, underinsured motorist coverage, but allowed them to charge "appropriately adjusted premiums" for this coverage. The optional underinsured motorist coverage and paragraph (k) of *Code,* 33–6–31 appear to go hand-in-hand. The insurer must offer underinsured motorist coverage; the insured has the option of taking it; and terms, conditions, and exclusions can be included in the policy as may be consistent with the premiums charged. Clearly, an insurer can limit its liability so long as such limitations are *not* in conflict with the spirit and intent of the statute and the premium charged is consistent therewith.
>
> However, we hasten to add that insurers should not seize upon this holding as some faint encouragement that the public policy, as indicated in the statutes and as enunciated in the *Bell* case, may be subject to erosion. *This Court will continue to be vigilant in holding the insurers' feet to the fire in instances where exclusions or denials of coverage strike at the heart of the purposes of the uninsured and underinsured motorist statutes provisions*.

Deel v. Sweeney, 181 W.Va. at 463, 383 S.E.2d at 95 (emphases added; footnote omitted).

Second, the underlying facts are vastly different. In *Cox v. Amick*, the alleged "uninsured motorist," Clifford Reed, was a high school student who was neither the owner, driver, nor occupier of the alleged tortfeasor's vehicle. Instead, he had exited the car before the collision ever happened and was not alleged to be liable for the collision due to negligent or reckless driving, ownership, or maintenance, but rather under theories of joint enterprise or aiding and abetting the commission of a tort. *Cox v. Amick*. 195 W.Va. at 611 & 615-16, 466 S.E.2d at 462 & 466-67.

Additionally, there was no automobile liability insurance policy which paid liability coverage limits, below the required minimum limits or otherwise insufficiently to cover an insured

victim's damages, on behalf of Reed as a result of his ownership, maintenance, or driving of a motor vehicle. Indeed, no vehicle separately owned by Clifford Reed, insured or otherwise, is even mentioned in the opinion and as to the tortfeasor Amick's vehicle that was involved in the accident, the Court noted:

> Nationwide maintains that the Amick vehicle had the mandatory liability insurance required by W.Va.Code, 17D–4–2 [1979]. Thus, Nationwide correctly points out that the Amick vehicle does not meet the definition of an "uninsured motor vehicle" under the Nationwide policy which defines the term as a vehicle "for which there is no bodily injury liability bond or insurance at the time of the accident in at least the amounts required by the West Virginia Motor Vehicle Safety Responsibility Law [set forth in W.Va.Code, 17D–1–1, et seq.]." Thus, any argument by the appellees that Reed's use of Amick's vehicle implicates uninsured motorists coverage under the Nationwide policy is misplaced because the policy clearly and unambiguously states that the "[d]amages must result from an accident arising out of the ... use[ ] of the **uninsured motor vehicle**." (underlining indicates emphasis added and bold indicates emphasis supplied).

Cox v. Amick, 195 W.Va. at 616 n. 7, 466 S.E.2d at 467 n. 7.

The policy language at issue in *Cox v. Amick* provided, in pertinent part:

> **We** will pay compensatory damages as a result of **bodily injury** and/or **property damage** suffered by **you** or a **relative** 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.**
>
> (bold indicates emphasis supplied and underlining indicates emphasis added). . . .

Cox v. Amick, 195 W.Va. at 616, 466 S.E.2d at 467.

As to the issue of whether uninsured motorist coverage existed, the insurer did not argue that the above language of the policy relied upon by the insurer violated the intent or spirit of the uninsured and underinsured motorist statute, but rather argued that it was inconsistent with other

language contained in an "acknowledgment of coverage selection and rejection of uninsured and underinsured motorists coverage" form that is not at issue in the present lawsuit. *See Cox v. Amick*, 195 W.Va. at 616-17, 466 S.E.2d at 467-68.

The Court ultimately held:

> Thus, we conclude that the circuit court erred by holding that Reed met the definition of an uninsured motorist pursuant to the Nationwide policy at issue in the case before us even though he was not the owner of a vehicle involved in the accident nor was he in a vehicle involved in the accident at the time of the accident. The circuit court, therefore, should not have entered summary judgment for the appellees on this issue.

Cox v. Amick, 195 W.Va. at 618, 466 S.E.2d at 469.

In the present case, Caleb Ratcliffe was negligently or recklessly driving a motor vehicle involved in the accident. Moreover, for reasons set forth herein, the Ratcliffe motor vehicle, although not actually involved in the accident, meets the definition of "underinsured motor vehicle" under both W.Va. Code § 33-6-31(b) and the Milbank policy at issue in this case. It is worth reiterating that West Virginia Code § 33-6-31(b) 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. No sums payable as a result of underinsured motorists' coverage may be reduced by payments made under the insured's policy or any other policy.

W.Va. Code § 33-6-31(b).

The Milbank policy provides, in pertinent part:

UNINSURED/UNDERINSURED MOTORISTS COVERAGE – WEST VIRGINIA

I. Part C – Uninsured Motorists Coverage is replaced by the following:

***

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." We will pay damages under this coverage caused by an accident with an "underinsured motor vehicle" only if 1. or 2. below applies:

   1. The limits of liability under any bodily injury liability bonds or policies applicable to the "underinsured motor vehicle" have been exhausted by payment of judgment or settlements; or

   2. A tentative settlement has been made between an "insured" and the insurer of the "underinsured motor vehicle" and we:

      a. Have been given prompt written notice of such tentative settlement; and

      b. Advance payment to the "insured" in an amount equal to the tentative settlement within 30 days after receipt of notification.

      c. Any judgment for damages arising out of a suit brought without our written consent is not binding on us.

B. "Insured" as used in this endorsement means: You or any "family member".

1. Any other person "occupying" or using "your covered auto".

2. Any person for damages that person is entitled to recover because of "bodily injury" to which this coverage applies sustained by a person described in 1. or 2. above.

***

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.

However, "underinsured motor vehicle" does not include any vehicle or equipment:

1. To which a liability bond or policy applies at the time of the accident but the bonding or insuring company legally denies coverage or the bond or policy is uncollectible in whole or in part because the company: **a.** Is or becomes insolvent.
   b. Has been placed in receivership.
2. Owned or operated by a self-insurer under any applicable motor vehicle law.

***

F. Neither "uninsured motor vehicle" nor "underinsured motor vehicle" includes any vehicle or equipment:

1. Owned by or furnished or available for the regular use of you or any "family member".

***

A.R. 108-09 (italicized emphasis added).

As previously submitted, nothing in the definition of "underinsured motor vehicle" in either the statute or the policy requires that the vehicle actually be involved in the accident. West Virginia law also provides that "[w]hen the words of an insurance policy are, without violence, susceptible of two or more interpretations, that which will sustain the claim and cover the loss must be adopted." Syl. Pt. 2, *Farmers Mutual Insurance Co. v. Tucker, supra*. *Accord* Syl. Pt. 4, *Drake v. Snider*, *supra*. Similarly, West Virginia law additionally declares that both policy language that is ambiguous or that attempts to limit or restrict coverage, including exclusions, must be liberally construed in favor of the insured and strictly construed against the insurer. Syl. Pts. 4, 5, & 7-10, *National Mutual Ins. Co. v. McMahon & Sons, Inc.*, *supra*; Syl. Pts. 8, 10 & 11, *Cherrington v. Erie Ins. Property and Cas. Co.*, *supra*.

Moreover, to the extent that any other clear and unambiguous language of the policy is inconsistent with such definition of underinsured motor vehicle, it is contrary to the intent and spirit of West Virginia's uninsured and underinsured motorist statutes, including W.Va. Code § 33-6-31(b), and thus is void. Syl. Pts. 4, 5, & 6, *Cox v. Amick*; *Deel v. Sweeney*, 181 W.Va. at 463, 383 S.E.2d at 95; *Adkins v. Meador*, 201 W.Va. at 153, 494 S.E.2d at 920. The Appellees submit that these rules of construction establish that the Circuit Court was correct in denying Appellant's motion for summary judgment and granting the Appellees' cross motion for summary judgment; such rulings being consistent with the preeminent public policy of the underinsured motorist statute that an injured person not fully compensated by a negligent tortfeasor be compensated up to the limits of the underinsured motorist coverage.

Appellees also note that even if an insurer could include language in the policy requiring that the underinsured motor vehicle must actually be involved in the accident without violating the intent and spirit of the statute, the insurer would be required to demonstrate that the premium was adjusted in a manner to entitle it to make such an otherwise unnecessary and unwarranted, additional requirement. *See* Syl. Pts. 4, 5, & 6, *Cox v. Amick, supra*; *Deel v. Sweeney*, 181 W.Va. at 463, 383 S.E.2d at 95. The Appellant has presented absolutely no evidence in this case to demonstrate that the premium was adjusted in a manner to justify it excluding from coverage an underinsured motor vehicle which otherwise fully meets the actual definition of underinsured motor vehicle--such as the Ratcliffe motor vehicle which, while not actually involved in the accident, otherwise meets all parts of the definitions of underinsured motor vehicle contained in both the underinsured motorist statute and the Milbank policy.

Lastly, it should be noted that the Appellant has attempted to support its argument on this assignment of error by citing and discussing three cases which were not submitted to the Circuit

Court below for its consideration. *See Baber v. Fortner*, 186 W.Va. 413, 412 S.E.2d 814 (1991); *Erie Ins. Prop. & Cas. Co. v. Jones*, Civil Action No. 2:10-CV-00479, 2011 WL 1743665 (S.D.W.Va. May 6, 2011); *Nationwide Mut. Ins. Co. v. Shumate*, 63 F. Supp.2d 745 (S.D.W.Va. 1999). Because these cases were in existence before the cross motions for summary judgment were filed in this case, the Appellants' failure to raise them in support of its argument to the Circuit Court should result in this Court refusing to consider them under the "raise or waive" rule which is discussed in much greater detail *infra* in connection with the next assignment of error. However, in the event that this Court decides to consider these cases, they are either readily distinguishable or otherwise unpersuasive.

The decision in *Baber v. Fortner*, *supra*, involved a question of whether liability coverage was applicable under an automobile policy so as to require an insurer to defend a wrongful death action against an insured who while occupying his stationary pickup truck had shot and killed a man. The *Baber* Court was not faced with any question involving underinsured motorist coverage or the statute providing for underinsured motorist coverage that is to be liberally construed so as to effectuate its purpose of providing underinsured motorist coverage to an injured person who has not been fully compensated for her injuries and damages by any liability coverage of a tortfeasor. *See Baber*, 186 W.Va. at 414-18, 412 S.E.2d at 815-19.

And, in the present case, there is no dispute that Caleb Ratcliffe's own insurer, Erie, decided to pay its full liability limits for the negligent or reckless acts of Mr. Ratcliffe based upon another motor vehicle that, while not actually in use and involved in the collision, was owned by Mr. Ratcliffe (and/or his family) and insured by Erie. Furthermore, it is not disputed that the liability limits paid were insufficient to fully compensate the Appellees for injuries suffered by their decedent, Seirra Mattson, to which they are entitled to recover. Accordingly, the question of

what constitutes "arising out of the 'use' of a motor vehicle" so as to trigger the relevant basis for liability coverage in dispute in *Baber* is not at issue herein. *See Baber*, 186 W.Va. at 417, 412 S.E.2d at 818 (citing *Detroit Auto. Inter-Insurance Exchange v. Higginbotham*, 95 Mich. App. 213, 290 N.W.2d 414, 419 (1980)).

The federal court decision in *Nationwide Mut. Ins. Co. v. Shumate*, *supra*, is neither binding on this Court nor otherwise persuasive. First, this appeal involves underinsured motorist coverage while *Shumate* involved uninsured motorist coverage. As noted by the Court in *Deel v. Sweeney*, 181 W.Va. at 463, 383 S.E.2d at 95, and as previously discussed herein, uninsured motorist coverage and underinsured motorist coverage are not always viewed in the same light or treated identically. Next, the plaintiff in *Shumate* did not receive any injuries as a result of any motor vehicle, whether uninsured or underinsured. Rather, the plaintiff received injuries in a subsequent physical altercation with the person whom had driven an uninsured motor vehicle that had caused a prior collision. Indeed, the only insurance question at issue in *Shumate* involved what constituted the "use" of a vehicle resulting in the court noting "[w]hen . . . the 'use' of a vehicle is in question for insurance purposes due to the separation of an individual from a vehicle at the time of an accident, the court must determine whether there is a causal connection between the motor vehicle and the injury." *Shumate*, 63 F. Supp.2d at 747 (quoting *Cleaver v. Big Arm Bar & Grill, Inc.*, 202 W.Va. 122, 127, 502 S.E.2d 438, 443 (1998)). In the present case, it was the ownership of a motor vehicle by Caleb Ratcliffe (and/or his family) which was insured by Erie, not its use, that caused Erie to pay its liability coverage limits under its automobile policy; thereby rendering it an underinsured motor vehicle for the purposes of the underinsured motorist coverage contained in the Milbank policy and governed by West Virginia statutory law.

The federal court decision in *Erie Ins. Property & Cas. Co. v. Jones*, *supra*, which involved the accidental shooting death of a police officer by friendly fire when the police were attempting to apprehend a suspect who was fleeing in a truck and was attempting to avoid capture by ramming his truck into police vehicles, is also not binding on this Court or otherwise is not persuasive. First, the *Jones* Court relied upon the holdings of *Baber* and *Shumate* in reaching its holding that the injuries did not arise out of the ownership or use of an underinsured motor vehicle. *See Jones*, 2011 WL 1743665, at **3-4. To the extent that the Appellees have already explained why *Baber* and *Shumate* are distinguishable or otherwise unpersuasive, such reasoning similarly applies to *Jones*. Second, the *Jones* Court concluded that even if it would hold that the injuries arose out of the ownership or use of a motor vehicle, the insured would not be entitled to underinsured motorist benefits because a valid exclusion applied to bar coverage where the bodily injury resulted from accidental or intentional use of any weapon. *Jones*, 2011 WL 1743665, at *4. Obviously, no such valid exclusion applies in this appeal.

E. The Circuit Court did not err when it held that Ms. Mattson's Estate is entitled under the Milbank policy to liability coverage for Mr. Ratcliffe's operation of her motor vehicle insured under her policy with Milbank and for underinsured motorist coverage for Mr. Ratcliffe's own motor vehicle which was insured under a separate insurance policy with another insurer that paid its liability limits for such vehicle owned by Mr. Ratcliffe.

1. Appellant has waived any argument that the provision against duplicate payments (which it labels as anti-stacking provision herein) prohibits payment for both liability and underinsured motorist coverages in this case and entitles it to an award of summary judgment by failing to raise it before the Circuit Court in its motion for summary judgment and supporting memoranda.

Nowhere in its complaint for declaratory judgment, its motion for summary judgment and/or supporting memorandum of law, or its reply brief in support of its motion for summary judgment did the Appellant use the term "anti-stacking" or expressly argue that Appellees' claims

for coverage involve a violation of an "anti-stacking" provision.[1] *See* A.R. 001-012; 046-072 & 134-154. And, while Appellant did quote the provision against duplicate payments for the same elements of loss and assert a claim thereunder in its complaint for declaratory judgment, A.R. 005, 007, & 010-011, nowhere in its motion for summary judgment and/or supporting memorandum of law, or its reply brief in support of its motion for summary judgment did the Appellant make an argument that the provision against making duplicate payments applied in this case so as to entitle it to summary judgment on its complaint for declaratory judgment or to prevent the Appellees from obtaining summary judgment on their cross motion. *See* A.R. 046-072 & 134-154. Similarly, while the Appellant did include the provision against making duplicate payments in the portion of its supporting memorandum of law that quoted from the Milbank insurance policy, A.R. at 055 & 058, nowhere in its motion for summary judgment, supporting memorandum of law, or reply brief did it make an express argument that such provision was applicable and entitled it to an award of summary judgment or prevented the Appellees from obtaining summary judgment on their cross motion. *See* A.R. 046-072 & 134-154.

Numerous decisions of the West Virginia Supreme Court of Appeals establish that a party may not raise an issue or argument for the first time on appeal. Rather, the "raise or waive" rule provides that a party waives for purposes of appeal any nonjurisdictional issue or argument that

[1] Appellant's attempt to label the provision prohibiting duplicate payments for the same elements of loss as an "anti-stacking" provision appears to be a misnomer. An anti-stacking provision generally seeks to prohibit an insured who has multiple vehicles insured by an insurer from stacking the applicable type of coverage (not different types of coverage) available to each vehicle; instead limiting the insured to a single policy endorsement for such type of coverage for each occurrence. *See, e.g.,* Syl. Pt. 5, *Russell v. State Auto. Mut. Ins. Co.*, 188 W.Va. 81, 422 S.E.2d 803 (1992) (uninsured or underinsured motorist coverage); Syl. Pt. 11, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W.Va. 80, 576 S.E.2d 807 (2002) (same); Syl. Pt. 4, *Miller v. Lemon*, 194 W.Va. 129, 459 S.E.2d 406 (1995) (same); Syl. Pt. 2, *Mitchell v. Federal Kemper Ins. Co.*, 204 W.Va. 543, 514 S.E.2d 393 (1998) (same); Syl. Pts. 1 & 4, *Joslin v. Mitchell*, 213 W.Va. 771, 584 S.E.2d 913 (2003) (same); Syl. Pt. 2, *Starr v. State Farm Fire and Cas. Co.*, 188 W.Va. 313, 423 S.E.2d 922 (1992) (same in connection with a permissive user); *Payne v. Weston*, 195 W.Va. 502, 507-12, 466 S.E.2d 161, 166-71 (1995) (liability coverage); Syl. Pt. 5, *Shamblin v. Nationwide Mut. Ins. Co.*, 175 W.Va. 337, 332 S.E.2d 639 (1985) (liability coverage).

was not raised first in the trial court. *E.g., State v. LaRock*, 196 W.Va. 294, 316, 470 S.E.2d 613, 635 (1996) ("'One of the most familiar procedural rubrics in the administration of justice is the rule that the failure of a litigant to assert a right in the trial court likely will result' in the imposition of a procedural bar to an appeal of that issue . . . There is also an equally salutary justification for the raise or waive rule: It prevents a party from making a tactical decision to refrain from objecting and, subsequently, should the case turn sour, assigning error (or even worse, planting an error and nurturing the seed as a guarantee against a bad result)." (citations omitted)); *State ex rel. Cooper v. Caperton*, 196 W.Va. 208, 216, 470 S.E.2d 162, 170 (1996) ("To preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect. . . . It must be emphasized that the contours for appeal are shaped at the circuit court level by setting forth with particularity and at the appropriate time the legal ground upon which the parties intend to rely." (citation omitted)); *Whitlow v. Bd. of Educ.*, 190 W.Va. 223, 226, 438 S.E.2d 15, 18 (1993) ("Our general rule in this regard is that, when nonjurisdictional questions have not been decided at the trial court level and are then first raised before this Court, they will not be considered on appeal."); *Noble v. West Virginia Dept. of Motor Vehicles*, 223 W.Va. 818, 821, 679 S.E.2d 650, 653 (2009) (same); *State v. Sites*, 241 W.Va. 430, 438-39, 825 S.E.2d 758, 766-68 (2019); *State v. Trail*, 236 W.Va. 167, 185-86, 778 S.E.2d 616, 634-35 (2015); *State v. Larry A.H.*, 230 W.Va. 709, 716 n. 19, 742 S.E.2d 125, 132 n. 19 (2013); *State v. Proctor*, 227 W.Va. 352, 359-60, 709 S.E.2d 549, 556-57 (2011); *Perrine v. E.I. du Pont de Nemours and Co.*, 225 W.Va. 482, 530-32, 694 S.E.2d 815, 863-65 (2010); *Hanlon v. Logan County Bd. of Educ.*, 201 W.Va. 305, 315-16, 496 S.E.2d 447, 457-58 (1997); *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W.Va. 692, 703 & 706-07, 474 S.E.2d 872, 883 & 886-87 (1996).

2. The provision against duplicate payments does not apply to a payment of underinsured motorist benefits that is intended to help fully compensate an injured party when the liability limits are insufficient to do so and is not intended to provide duplicate payments for the same elements of loss, the latter of which is what is intended to be prevented by such provision.

In any event, such provision against duplicate payments does not apply to a payment of underinsured motorist benefits that is intended to help fully compensate an injured party when the liability limits are insufficient to do so and is not intended to provide "duplicate payments for the same elements of loss[,]" the latter of which is what is intended to be prevented by such provision. *See* A.R. 110. Any contrary conclusion would make the existence of underinsured motorist coverage for which premiums had been paid illusory and would violate the law of West Virginia by conflicting with the spirit and intent of the uninsured and underinsured motorist statutes that have been already discussed herein. *See, e.g.,* Syl. Pt. 6, *Cox v. Amick*, *supra;* Syl. Pt. 4, *State Automobile Mut. Ins. Co. v. Youler*, *supra*; Syl. Pt. 1, *Pritavec v. Westfield Ins. Co.*, *supra*; Syl. Pt. 2, *Kronjaeger v. Buckeye Union Ins. Co.*, *supra*; Syl. Pt. 5, *Pritavec v. Westfield Ins. Co.*, *supra*; Syl. Pt. 5, *Arndt v. Burdette*, *supra*; *Kronjaeger v. Buckeye Union Ins. Co.*, 200 W.Va. at 579, 490 S.E.2d at 666; *Adkins v. Meador*, 201 W.Va. at 153, 494 S.E.2d at 920 ("Accordingly, if the language of Liberty Mutual's policy does not comply with the broad terms of W.Va. Code, 33-6-31, then the policy language is void and the policy must be construed to contain the coverage provided for by statute.").[2]

[2] The only cases cited by the Appellant in support of this second assignment of error are those it discussed before the Circuit Court in connection with its then-second argument concerning the alleged applicability of the family use exclusion. Appellees will address why such cases do not apply to the facts of this case below in subsection 4.

3. The Appellant has failed to raise its second argument before the Circuit Court that was premised upon the alleged applicability of the "family use exclusion" as an assignment of error in this appeal and to otherwise appropriately brief it.

The Appellant's second argument before the Circuit Court was that the "family use exclusion" contained in the Milbank policy prevents the payment of both liability and underinsured motorist limits in this case. However, as found by the Circuit Court, while the family use exclusion may prohibit payment of both liability and underinsured motorist limits for the same motor vehicle insured thereunder, it does not prohibit the payment of both such limits when the liability limits are paid for a vehicle insured under the policy and the underinsured motor vehicle limits are paid for a different motor vehicle that is insured by a separate insurance policy issued by a different insurer to the tortfeasor. *See* A.R. 163-164.

Perhaps recognizing the frivolousness of such prior argument when viewed under the facts of this case, the Appellant chose not to expressly raise the family-use exclusion argument on this appeal; thereby waiving it for purposes of this appeal. *See, e.g.,* Syl. Pt. 6, *Addair v. Bryant*, 168 W.Va. 306, 284 S.E.2d 374 (1981) ("Assignments of error that are not argued in the briefs on appeal may be deemed by this Court to be waived."); *State v. LaRock*, 196 W.Va. at 302, 470 S.E.2d at 621 ("Although we liberally construe briefs in determining issues presented for review, issues which are not raised, and those mentioned only in passing but are not supported with pertinent authority, are not considered on appeal."); *Tiernan v. Charleston Area Medical Center, Inc.*, 203 W.Va. 135, 140 n. 10, 506 S.E.2d 578, 583 n. 10 (1998) ("Issues not raised on appeal or merely mentioned in passing are deemed waived."); *Noland v. Virginia Ins. Reciprocal*, 224 W.Va. 372, 378, 686 S.E.2d 23, 29 (2009) (same); *Evans v. United Bank, Inc.*, 235 W.Va. 619, 629, 775 S.E.2d 500, 510 (2015) (same); *State v. Larry A.H.*, 230 W.Va. at 715-16, 742 S.E.2d at 131-32 (same); *State v. Lilly*, 194 W.Va. 595, 605 n. 16, 461 S.E.2d 101, 111 n. 16 (1995) ("casual mention

of an issue in a brief is cursory treatment insufficient to preserve the issue on appeal"); *State v. Myers*, 229 W.Va. 238, 241, 728 S.E.2d 122, 130 (2012) ("[a]n appellant must carry the burden of showing error in the judgment of which he complains. This Court will not reverse the judgment of a trial court unless error affirmatively appears from the record. Error will not be presumed, all presumptions being in favor of the correctness of the judgment." (internal quotations and citations omitted)). *See also* W.Va.R.App.P. 10(c)(3) & (7) (setting forth requirements for assignments of error and arguments in briefs).

4. In any event, the Circuit Court correctly concluded that the family use exclusion did not apply under the facts of this case to bar the payments of both liability and underinsured motorist coverages under the Milbank policy.

Should this Court determine that the Appellant has not waived for the purposes of appeal any argument concerning the family use exclusion, Appellees acknowledge that before the Circuit Court the Appellant argued in connection with the cross motions for summary judgment that the "family use exclusion" as applied in cases such as *Cantrell v. Cantrell*, 213 W.Va. 372, 582 S.E.2d 819 (2003) (per curiam); *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W.Va. 80, 576 S.E.2d 807 (2002); and *Thomas v. Nationwide Mut. Ins. Co.*, 188 W.Va. 640, 425 S.E.2d 595 (1992), barred the payment of both liability and underinsured motorist coverages under the Milbank policy. However, as recognized by the Circuit Court, unlike the present case, all of those decisions involved single vehicle accidents in which only one insurance policy applied and the insured was seeking the recovery of both liability and underinsured motorist limits from only that one policy. Only under those limited facts and circumstances, did the West Virginia Supreme Court of Appeals find that the "family use exclusion" properly applied.

More specifically, as held by the Court:

> When an insurer issues an automobile insurance policy which provides both liability and underinsured motorists coverage, but which policy contains what is

> commonly referred to as a "family use exclusion" for the underinsured motorist coverage, and when, in a single car accident, the passenger/wife receives payments under the liability coverage for the negligence of the driver/husband, such exclusion is valid and not against the public policy of this state. That exclusion, which excludes from the definition of "underinsured motor vehicle" any automobile owned by or furnished for the regular use of the insured or a relative, has the purpose of preventing underinsured coverage from being converted into additional liability coverage.

Syl. Pt. 2, *Thomas v. Nationwide Mut. Ins. Co., surpa*. *Accord* Syl. Pt. 4, *Cantrell v. Cantrell*, *supra*; Syl. Pt. 9, *Findley v. State Farm Mut. Auto. Ins. Co.*, *supra*.

As further explained by the Court in *Thomas v. Nationwide Mut. Ins. Co.*:

> Because recovery by a plaintiff of underinsured motorist benefits is dependent on the existence of two policies, the tortfeasor's and the plaintiff insured's, when a tortfeasor is underinsured, the plaintiff insured normally recovers third-party liability benefits from the tortfeasor's insurance coverage and supplements this recovery, if necessary, with underinsured motorist benefits through his or her own insurance. A family use exclusion, which excludes from the definition of "underinsured motor vehicle" any vehicle owned by or furnished for the regular use of the insured or a relative, or in like terms, has the purpose of preventing underinsured coverage from being converted into additional liability coverage, because when the exclusion is applied, it is the liability coverage that has been paid for by the insured, and not underinsured coverage. Therefore, such an exclusion would not violate the public policy of full compensation of an insured.

Thomas v. Nationwide Mut. Ins. Co., 188 W.Va. at 645, 425 S.E.2d at 600.

The present case does not involve a single vehicle accident and, most importantly, there are two separate insurance policies from which the relevant claims have been sought. Because the Appellees have based their claim for underinsured motorist benefits on the Ratcliffe motor vehicle insured by Erie being the underinsured motor vehicle at issue in this case, not the vehicle owned by the decedent, Ms. Sierra Mattson, and insured by Appellant Milbank, any "family use exclusion" set forth in the policy issued by Milbank is simply inapplicable to this case and the above decisions are readily distinguishable. Accordingly, the Appellant's Motion for Summary

Judgment was correctly denied by the Circuit Court and the Appellees' cross motion for summary judgment was appropriately granted. *See* A.R. 163-164.

VI. CONCLUSION

For all of the foregoing reasons, the Appellees respectfully request that Your Honorable Court affirm the Order of the Circuit Court below denying the Appellant's motion for summary judgment on its claim for declaratory relief and granting the Appellees' cross motion for summary judgment.

Respectfully submitted,

KELLY MATTSON and NICHOLAS A. SHOWALTER, as Co-Administrators of the Estate of SIERRA DAWN MATTSON, Defendants,

By: */s/ Richard A. Monahan*

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of October, 2023, I electronically filed the foregoing Response Brief of Appellees with the Clerk of the court using the File & Serve Express filing system which will send notification to the following counsel of record:

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