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Nick Showalter and Kelly Mattson, as Co-Administrators of Sierra Mattson,

Appellants/Petitioners,

v.

Milbank Insurance Company,

Appellee/Respondent.

On Appeal from the
Intermediate Court of Appeals
No. 23-ICA-213

BRIEF OF APPELLANTS/PETITIONERS

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I. ASSIGNMENTS OF ERROR

A. The West Virginia Intermediate Court of Appeals ("ICA") committed reversible error in holding that the appeal by Defendant Milbank Insurance Company ("Milbank") was the appeal of a final, appealable Order/Judgment rather than the impermissible appeal of an interlocutory, non-final Order because this Court has held that an appealable final judgment does not exist when a trial court has ruled on the 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.

B. The ICA committed reversible error in reversing the trial court and in holding that the West Virginia Underinsured Motorist Statute requires that the underinsured motor vehicle must actually be involved in the collision when the statute does not contain such an express requirement. Rather, the Statute is a remedial statute that must be liberally construed so as to accomplish its preeminent public policy of providing full compensation, not exceeding coverage limits, to an injured person for her damages not compensated by a negligent tortfeasor. And, in the present case, Caleb Ratcliffe's ownership of his vehicle insured by Erie Insurance Property and Casualty Company ("Erie") led to Erie paying its liability coverage limits and such vehicle constituted an underinsured motor vehicle under the express language of the Statute because the liability limits were insufficient to pay all of the damages suffered as a result of the death of Sierra Mattson.

C. The ICA committed reversible error in reversing the trial court and holding that the Milbank policy requires that the underinsured motor vehicle must actually be involved in the accident. The policy language does not contain any such requirement in clear and unambiguous terms and, to the extent that the policy language is ambiguous, it must be strictly construed against the insurer and liberally construed in favor of the insured. Moreover, to the extent that the policy language is not ambiguous and expressly requires that the underinsured motor vehicle must be involved in the accident, it is void as being contrary to the language, intent, and public policy of the remedial West Virginia Underinsured Motorist Statute.

II. STATEMENT OF THE CASE

This civil action arises from a tragic automobile collision that occurred on November 23, 2019, and resulted in five deaths, including the deaths of Sierra Mattson and Caleb Ratcliffe. Mr. Ratcliffe was driving a 2019 Hyundai Accent owned by Ms. Mattson, who was a passenger, at the time of its collision with another vehicle, and it was his negligent operation of such vehicle that was responsible for the deadly collision. (J.A. 084-089). At the time of the collision, Ms.

Mattson's vehicle was insured by a policy of insurance issued by Milbank Insurance Company ("Milbank"), Policy No. 1000332816, that provided both liability and underinsured motorists coverage provisions. At such time, Mr. Ratcliffe also owned a separate vehicle that was insured through a policy with Erie Insurance Property and Casualty Company ("Erie"), Policy No. Q08 8005268. (J.A. 031-036).

Nick Showalter and Kelly Mattson, as Co-Administrators of the Estate of Sierra Mattson ("the Estate"), made a liability insurance claim under the policy Erie had issued to Mr. Ratcliffe, and Erie paid the liability coverage limits available under Mr. Ratcliffe's policy for the separate vehicle insured thereunder. The Estate also made a liability claim under the policy issued by Milbank which Milbank paid since Mr. Ratcliffe was a permissive user of the Mattson vehicle insured thereunder at the time his negligence caused the collision in question. However, the Estate also made a claim under the Milbank policy for underinsured motorist coverage limits based upon the Ratcliffe vehicle for which Erie had paid its liability limits. (J.A. 031-036). Milbank denied this claim made by the Estate and filed a declaratory judgment action seeking a declaration from the Circuit Court of Ohio County that it did not owe UIM coverage to the estate under the facts of this case. (J.A. 001-023). The Estate filed an answer to such complaint and also filed counterclaims for recovery of the underinsured motorist coverage limits and breach of contract, unfair claims settlement practices under the West Virginia Trade Practices Act and related regulations, and first-party bad faith. (J.A. 024-045).

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." (Emphases added).

The UIM coverage within the Milbank Policy is contained in a West Virginia Uninsured/ Underinsured Motorists Coverage Endorsement. (J.A. 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".

(J.A. 108).

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.

(J.A. 108).

Subsequently, Milbank moved for summary judgment contending that the Estate was not entitled to UIM coverage because the underinsured vehicle owned by Ratcliffe was not involved in the collision and because the family-use exclusion allegedly applied to also bar coverage. (J.A. 046-112). The Estate both opposed such motion and filed a cross motion for summary judgment on the basis that neither the West Virginia Underinsured Motorist Statute nor the Milbank Insurance Policy required that the underinsured motorist vehicle must actually be involved in the collision as long as liability coverage was paid for such vehicle and such coverage was insufficient to pay the damages suffered by the insured claimant; thereby rendering the vehicle an underinsured motorist vehicle. Additionally, the Estate argued that the family-use exclusion did not apply because both liability coverage and underinsured motorist coverage was not being sought under the same policy for the same insured vehicle. (J.A. 113-132).

After the completion of relevant discovery, the Ohio County Circuit Court entered an Order on April 25, 2023, denying Milbank's motion for summary judgment and granting the Estate's cross motion for summary judgment. (J.A. 156-165.) Rather than awaiting a resolution of all claims of all parties, including a trial to determine the amount of compensatory damages suffered by the Estate in connection with its claims for underinsured motorist coverage limits and breach of contract as well as a verdict on the remaining counterclaims for unfair settlement practices and first-party bad faith, Milbank filed an appeal to the West Virginia Intermediate Court of Appeals ("ICA"). The Estate filed a motion to dismiss the appeal as being an improper interlocutory appeal of a non-final Order. (J.A. 236-258.) During the briefing of the appeal, Milbank first argued again that it did not owe the Estate UIM coverage limits because the underinsured Ratcliffe vehicle was not involved in the collision. However, Milbank did not expressly argue on appeal that the family-use exclusion also barred coverage. Rather, it argued secondly that anti-stacking language of the Milbank Policy which prohibited double payments for the same damages purportedly applied although it had not raised such argument before the Circuit Court in its motion for summary judgment. (J.A. 165-182.)

After the conclusion of briefing (*see* J.A. 165-334) and oral argument (*see* J.A. 335), the ICA on June 7, 2024, entered an opinion concluding that the appeal was not an improper interlocutory appeal and reversing the Order of the Circuit Court of Ohio County on the first ground raised by Milbank and remanding the case for entry of an Order granting summary judgment in favor of Milbank and denying the Estate's cross motion for summary judgment. *Milbank Ins. Co. v. Showalter*, 903 S.E.2d 260 (W.Va. App. 2024); J.A. 336-352.

The ICA correctly did not address Milbank's second argument and instead agreed with the Estate that Milbank had waived such argument by not arguing it before the Circuit Court. *Milbank Ins. Co. v. Showalter*, 903 S.E.2d at 267-68, n. 10; J.A. 350-352 n. 10. Mandate was issued by the ICA on July 8, 2024. J.A. 353.

III. SUMMARY OF ARGUMENT

Jurisdictionally speaking, Milbank's appeal to the ICA should have been dismissed as an improper interlocutory appeal inasmuch as the Circuit Court's Order does not constitute an appealable final judgment. Courts, including this Honorable Court, 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. In the present case, even if the Estate's claims for Unfair Settlement Practices and bad faith may be considered to be separate claims, the Estate's claim for breach of contract and request for damages thereunder for the underinsured motorist coverage provided by the policy is inextricably intertwined with Milbank's claim for a declaratory judgment as to such exact coverage.

As to the merits of the appeal, contrary to the holding of the ICA and the assertions of Milbank, 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); *see also* J.A. 108.

While it is likely true that in many cases, the underinsured motor vehicle will be one of the vehicles involved in the collision and the underinsured motorist's negligent operation of such vehicle will be the basis of his tort liability for the collision, such a relationship is not expressly required under the terms of the remedial West Virginia Underinsured Motorist Statute in order for a victim to recover underinsured motorist coverage. 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* J.A. 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." J.A. 108. Accordingly, the ICA's holding denying coverage in this case as requested by Milbank contravenes the intent and spirit of West Virginia underinsured motorist statute as well as relevant language of Milbank's own insurance policy.

Moreover, to the extent that Milbank has essentially attempted to alter the language of the statute by substituting in its insuring agreement that *"[t]he 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'"* (J.A. 108 (emphases added)) in place of the statute's provision only requiring that *"there* ***is liability insurance applicable*** *at the time of the accident"*, such alteration is inconsistent with such statutory definition of an underinsured motor vehicle and, thus, is void as being contrary to the intent and spirit of West Virginia's Underinsured Motorist Statute, W.Va. Code § 33-6-31(b).

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/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. The ICA Did Not Have Jurisdiction Over This Interlocutory Appeal.

For the reasons set forth in the Estate's motion to dismiss appeal and supporting reply memorandum, the appeal to the ICA should have been dismissed as an improper interlocutory appeal inasmuch as the Circuit Court's Order does not constitute an appealable final judgment. Courts, including this Honorable Court, 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 the Estate's claims for Unfair Settlement Practices and bad faith may be considered to be separate claims, the Estate's claim for breach of contract and request for damages thereunder for the underinsured motorist coverage provided by the policy is inextricably intertwined with Milbank's claim for a declaratory judgment as to such exact coverage.

This Court has held:

> 1. A court of limited appellate jurisdiction is obliged to examine its own power to hear a particular case. This Court's jurisdictional authority is either endowed by the West Virginia Constitution or conferred by the West Virginia Legislature. Therefore, this Court has a responsibility *sua sponte* to examine the basis of its own jurisdiction.
>
> 2. Where neither party to an appeal raises, briefs, or argues a jurisdictional question presented, this Court has the inherent power and duty to determine unilaterally its authority to hear a particular case. Parties cannot confer jurisdiction on this Court directly or indirectly where it is otherwise lacking.
>
> 3. Under W.Va.Code, 58–5–1 (1925), appeals only may be taken from final

> decisions of a circuit court. *A case is final only when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined.*

Syl. Pts. 1-3, *James M.B. v. Carolyn M.*, 193 W.Va. 289, 456 S.E.2d 16 (1995) (emphasis added); *Accord* Syl. Pts. 1 & 2, *C & O Motors, Inc. v. West Virginia Paving, Inc.*, *supra*; Syl. Pts. 5-7, *Erie Ins. Co. v. Dolly*, *supra*.

The Court further explained in the body of its opinion:

> It is, of course, axiomatic that a court of limited appellate jurisdiction is obliged to examine its own power to hear a particular case. This Court's jurisdictional authority is either endowed by the West Virginia Constitution or conferred by the West Virginia Legislature. Therefore, this Court has a responsibility *sua sponte* to examine the basis of its own jurisdiction. *Louisville & Nashville R.R. v. Mottley,* 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908). As occurred in this case, where neither party to an appeal raises, briefs, or argues the jurisdictional question presented, this Court has the inherent power and duty to determine unilaterally its authority to hear a particular case. Parties cannot confer jurisdiction on this Court directly or indirectly where it is otherwise lacking. Thus, it is irrelevant that the parties have not disputed jurisdiction. Accordingly, we address as a threshold matter whether there is an appealable order in this case.
>
> Under W.Va.Code, 58–5–1 (1925), appeals only may be taken from final decisions of a circuit court. *Parkway Fuel Service, Inc. v. Pauley,* 159 W.Va. 216, 219, 220 S.E.2d 439, 441 (1975) ("*W.Va.Code,* 58–5–1, permits a party to a controversy to obtain an appeal ... when the matter in controversy exceeds three hundred dollars and a *final judgment* has been entered." (Emphasis added)). *This rule, commonly referred to as the "rule of finality," is designed to prohibit "piecemeal appellate review of trial court decisions which do not terminate the litigation[.]" United States v. Hollywood Motor Car Co., Inc.,* 458 U.S. 263, 265, 102 S.Ct. 3081, 3082, 73 L.Ed.2d 754, 756 (1982). The requirement of finality has been called " 'an historic characteristic of ... appellate procedure.' " *Flanagan v. United States,* 465 U.S. 259, 263, 104 S.Ct. 1051, 1053–54, 79 L.Ed.2d 288, 293 (1984), *quoting Cobbledick v. United States,* 309 U.S. 323, 324, 60 S.Ct. 540, 541, 84 L.Ed. 783, 785 (1940). Pertinent here, *a case is final only "when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined." St. Louis, Iron Mountain & Southern R.R. Co. v. Southern Express Co.,* 108 U.S. 24, 28–29, 2 S.Ct. 6, 8, 27 L.Ed. 638, 639 (1883).
>
> With rare exception, the "finality rule" is mandatory and jurisdictional. Thus, to be appealable, an order must be final as discussed above, must fall within a specific class of interlocutory orders which are made appealable by statute or by

> the West Virginia Rules of Civil Procedure, or must fall within a jurisprudential exception. It is manifest that none of the exceptions to the final judgment rule remotely applies in this case; therefore, our discussion will address only whether there is a final appealable order.

James M.B. v. Carolyn M., 193 W.Va. at 292-93, 456 S.E.2d at 19-20 (emphases added; footnotes omitted). *Accord McGraw v. American Tobacco Co.*, 224 W.Va. 211, 219-21, 681 S.E.2d 96, 104-06 (2009).

The Court further noted:

> Moreover, this Court may entertain judgments that are made under Rule 54(b). Rule 54(b) applies to judgments in cases involving multiple parties or claims and provides, in part:
>
> "[T]he court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."
>
> The rationale behind this rule is to prevent a party from experiencing hardship or injustice as a result of delay by forcing a party to wait until a final judgment is rendered as to all claims and parties. *See Durm v. Heck's, Inc.*, 184 W.Va. 562, 401 S.E.2d 908 (1991).

James M.B. v. Carolyn M., 193 W.Va. 292 n. 3, 456 S.E.2d at 19 n.3. *Accord Vaughan v. Greater Huntington Park and Recreation Dist.*, 223 W.Va. 583, 587-88, 678 S.E.2d 316, 320-21 (2009).

Moreover, the Court has acknowledged:

> The "finality rule" preserves the autonomy of the trial court by minimizing appellate interference, ensuring that the role of the appellate court will be one of review rather than one of intervention. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528, 1536 (1949). It furthers efficiency by providing there only will be review where the record is complete and the judgment pronounced. *Flanagan v. United States*, 465 U.S. at 263–64, 104 S.Ct. at 1054, 79 L.Ed.2d at 293. It preserves integrity and emphasizes the importance of the harmless error doctrine by prohibiting review until an appellate

> court can determine whether a claimed trial error was harmless. Finally, in the civil context, the rule reduces the ability of litigants to wear down their opponents by repeated, expensive appellate proceedings.

James M.B. v. Carolyn M., 193 W.Va. 292 n. 2, 456 S.E.2d at 19 n.2. *Accord Vaughan v. Greater Huntington Park and Recreation Dist.*, 223 W.Va. at 587-88, 678 S.E.2d at 320-21 (also noting that "[b]y limiting appellate consideration to final judgments, the finality rule serves to avoid piecemeal review of trial court rulings which do not end litigation regarding all or some claims or parties in a case.").

The April 25, 2023, Order sought to be appealed by Milbank herein is not a final judgment that is appealable despite the Court's inclusion of language at the request of Milbank stating "that pursuant to W.Va.R.Civ.P. 54(b), this Order constitutes the entry of a final judgment as to the issues of insurance coverage and declaratory judgment raised herein." Neither the Court nor Milbank asked for the Defendants/Counterclaim Plaintiffs' position on the finality of the Order as a "Final Judgment" under the law of West Virginia. Indeed, in its motion and memoranda filed below, Milbank did not even request that the Court's decision be a "Final Judgment." Rather, Milbank wrote a letter on which it merely copied counsel for the Defendant/Counterclaim Plaintiffs after the Court's ruling asking that Rule 54(b) language be added, providing no opportunity for the Defendants/Counterclaim Plaintiffs to respond. Moreover, the Circuit Court failed to provide any explanation or reasoning as to why the unresolved issues of damages and the counterclaims were insufficient to constitute just reason to delay a Rule 54(b) certification. Similarly, the Circuit Court did not explain why Milbank would suffer undue hardship if final judgment was not entered and certified for immediate appeal.

The West Virginia Supreme Court of Appeals has held that even the inclusion of the language required by Rule 54(b) to certify an order as final will not suffice to render an Order appealable if the Order is found to "not satisfy the elements of a final judgment making an order ripe for appeal." *Vaughan v. Greater Huntington Park and Recreation Dist.*, 223 W.Va. at 588, 678 S.E.2d at 321. *Accord Province v. Province*, 196 W.Va. 473, 473 S.E.2d 894 (1996). As expressly held by this Court:

> "Under W.Va.Code, 58–5–1 (1925), appeals only may be taken from final decisions of a circuit court. *Parkway Fuel Service, Inc. v. Pauley,* 159 W.Va. 216, 219, 220 S.E.2d 439, 441 (1975)." *James M.B. v. Carolyn M.,* 193 W.Va. 289, 292, 456 S.E.2d 16, 19 (1995). The required finality is a statutory mandate, not a rule of discretion. In *James M.B.,* we stated a decision is final for purposes of our statute if it ends the litigation on the merits and leaves nothing for the circuit court to do but execute the judgment. 193 W.Va. at 292, 456 S.E.2d at 19. Still pending in the lower court is the part of this proceeding dealing with child support and other matters that were not assigned to the special commissioner. In other words, none of the circuit court's decisions in the April 15, 1994 order relates to child support. . . . *Even if we were to assume that the mandates of Rule 54(b) have been met, a circuit court's determinations, which directly affect the scope of our appellate jurisdiction are not conclusive on us. See James M.B. v. Carolyn M., supra.* Instead, we review such determinations to see if they fit within the scope of the rule. *See Braswell Shipyards, Inc. v. Beazer East, Inc.,* 2 F.3d 1331, 1336 (4th Cir.1993).
>
> We apply a two-prong test to review a circuit court's Rule 54(b) certification. *Curtiss–Wright Corp. v. General Elec. Co.,* 446 U.S. 1, 10, 100 S.Ct. 1460, 1466, 64 L.Ed.2d 1, 12 (1980). *First, we scrutinize the circuit court's evaluation of the interrelationship of the claims, in order to decide whether the circuit court completely disposed of one or more claims, which is a prerequisite for an appeal under this rule. Our scrutiny under this first prong approaches de novo review, because we have a duty to ensure the limits in our jurisdiction are observed; however, there is some room for deference particularly where the circuit court has made its reasoning clear. See Curtiss–Wright,* 446 U.S. at 10, 100 S.Ct. at 1466, 64 L.Ed.2d at 12–13 (proper role of appellate court is to ensure that the circuit court's rule 54(b) related conclusion and assessment are judicially sound and supported by the record).
>
> *Certification should not, however, be routinely granted in any event. See Curtiss–Wright,* 446 U.S. at 8, 100 S.Ct. at 1465, 64 L.Ed.2d at 11 ("Not all final judgments on individual claims should be immediately appealable, even if they are in some sense separable from the remaining unresolved claims"). *It should be granted only if there exists some danger of hardship or injustice through delay, that would be alleviated by immediate appeal. To be clear, the purpose of Rule 54(b) is to codify the historic practice of "prohibit[ing] piecemeal disposal of litigation and permitt[ing] appeals only from final judgments,"* except in the "infrequent harsh case" in which the circuit court properly makes the determinations contemplated

> by the rule. Fed.R.Civ.P. 54(b) advisory committee's note to 1946 amendment.
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> * * *
>
> As to the second prong of the inquiry under the rule—whether there is any just reason for delay—we accord the circuit court's determination considerably more deference than we do its first-prong determination. *Curtiss–Wright,* 446 U.S. at 10, 100 S.Ct. at 1466, 64 L.Ed.2d at 12–13. We will not disturb the circuit court's assessment that there is "no just reason for delay" unless the court's conclusion was clearly unreasonable, because "the task of weighing and balancing the contending factors is peculiarly one for the trial judge, who can explore all the facets of a case." *Curtiss–Wright,* 446 U.S. at 12, 100 S.Ct. at 1467, 64 L.Ed.2d at 14.
>
> Under the second prong, we must examine the circuit court's assessments of (1) any interrelationship or overlap among the various legal and factual issues involved in the decided and pending claims, and (2) any equities and efficiencies implicated by the requested piecemeal review. In reviewing the second prong, we do not have the benefit of the circuit court's reasoning. *Ordinarily, an appellate court cannot properly evaluate this prong without knowing how the circuit court feels about separating these issues for appellate purposes. Indeed, the entire purpose of Rule 54(b) is to place this decision in the hands of the trial court who can best make this delicate balance.* As a practical matter, we have gone as far as an appellate court should go in allowing appeals under Rule 54(b) where there was no express certification by the circuit court. *See State ex rel. McGraw v. Scott Runyan Pontiac–Buick, Inc.,* 194 W.Va. 770, 775, 461 S.E.2d 516, 521 (1995); *Sisson v. Seneca Mental Health/ Mental Retardation Council, Inc.,* 185 W.Va. 33, 404 S.E.2d 425 (1991); *Durm v. Heck's, Inc.,* 184 W.Va. 562, 401 S.E.2d 908 (1991).

Province v. Province, 196 W.Va. 473, 478-80, 473 S.E.2d 894, 899-901 (1996) (emphases added; footnotes omitted) (also noting, at 481, at 902: "Neither party challenges jurisdiction in this case. Our decision to remand the case for further factual development does not ultimately harm either side.").

The Court also cautioned:

> The caseload of this Court has grown faster than any other component of the West Virginia judiciary. A more liberal construction of Rule 54(b) has a tremendous potential to increase our caseload still more rapidly, because of the rule's natural tendencies to multiply appeals in a single case. *This case is a good example: even if we were to decide each of the issues raised in the present appeal, we are quite likely to have to decide one or more additional appeals in this case in the future.* Although it might be easier to decide each appeal in a series of multiple appeals in the same case than would be an appeal from a final judgment disposing of the entire

> lawsuit, *the greater simplicity will usually be outweighed by the burden on this Court of having to reacquaint itself again and again with at least the basic facts of the case*. Thus, in reviewing disputed or questionable Rule 54(b) certifications, we will keep in mind the purpose and practical implications of the rule.

Province v. Province, 196 W.Va. at 480, 473 S.E.2d at 901 (emphases added; footnote omitted).

As explained in *Hubbard v. State Farm Indemnity Co.*, 213 W.Va. 542, 584 S.E.2d 176 (2003), in order for a claim to be completely resolved an award of damages thereon is required.

> Thus, even if an order is not certified by a circuit court under Rule 54(b), it may nevertheless be considered "final" if it approximates a final order in its nature and effect. As we explained in syllabus point 1, in part, of *State ex rel. McGraw v. Scott–Runyan Pontiac–Buick, Inc.,* 194 W.Va. 770, 461 S.E.2d 516 (1995), "[t]he key to determining if an order is final is not whether the language from Rule 54(b) of the West Virginia Rules of Civil Procedure is included in the order, but is *whether the order approximates a final order in its nature and effect*." Rule 54(b) does not, however, dispense with the requirement of finality as to the claim that is the subject of Rule 54(b). "A judgment properly may be certified under Rule 54(b) only if it possesses the requisite degree of finality. That is, *the judgment must completely dispose of at least one substantive claim*." *Province v. Province,* 196 W.Va. 473, 479 n. 12, 473 S.E.2d 894, 900 n. 12 (1996).
>
> Here, the November 28 order found that State Farm Indemnity had a duty to defend and that the State Farm Indemnity policy covering the Allis' vehicle provided coverage. *The circuit court award damages in the amount of $300,000 together with interest, costs and fees-the total award of the default judgment Ms. Hubbard took against Gregory and the Allis. Therefore, even though the November 28 order lacked an express 54(b) certification under our holding in Durm we think it can be read as a final order as to Ms. Hubbard's claim that State Farm Indemnity owed a duty to defend and to provide coverage.*

Hubbard v. State Farm Indemnity Co., 213 W.Va. at 549-50, 584 S.E.2d at 183-84 (emphases added). Indeed, this Court acknowledged in *Hubbard* that "*[a] partial summary judgment which adjudicates liability but not damages is, by definition, interlocutory. See* W.Va.R.Civ.P. 56(c) ('A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.')" *Id.*, 213 W.Va. at 549 n. 13, 584 S.E.2d at 183 n.13 (emphasis added).

The importance of having a substantive claim completely resolved by having an award of damages was also acknowledged by this Court in *West Virginia Employers' Mut. Ins. Co. v. Summit Point Raceway Associates, Inc.*, 228 W.Va. 360, 719 S.E.2d 830 (2011), wherein it reasoned: "*Given that the circuit court entered a judgment order* ***awarding damages to Summit Point with respect to the claims for which it was granted partial summary judgment****, the order is final as to those issues.* Consequently, we find that this appeal meets the criteria set out in W.Va.R.Civ.P. 54(b) and Syllabus point 2 of *Durn v. Heck's Inc.*" *West Virginia Employers' Mut. Ins. Co. v. Summit Point Raceway Associates, Inc.*, 228 W.Va. at 364 n. 5, 719 S.E.2d at 834 n. 5 (emphases added). *Accord Erie Ins. Co. v. Dolly*, 240 W.Va. at 354, 811 S.E.2d at 884 ("The circuit court's declaratory judgment order was a final order that completely resolved the coverage claim, *including damages for that claim*, thus Erie's Rule 54(b) appeal of the declaratory judgment order is appropriately before this Court." (emphasis added)). No such award of damages as to Plaintiff's coverage claim or other counterclaims has been awarded in this case. Accordingly, the Order sought to be appealed is not a final order ripe for appeal.

Moreover, the West Virginia Supreme Court of Appeals has also acknowledged that other "courts that have generally addressed the issue of an interlocutory order granting judgment only as to liability take the position that *'[o]rdinarily, a determination of liability, without a determination of damages, is a partial adjudication of a claim, and the partial adjudication is not immediately appealable.'* . . . Indeed, it has been correctly noted that *'[a]n order ... adjudging liability but leaving the quantum of relief still to be determined has been a classic example of non-finality and non-appealability* from the time of Chief Justice Marshall to our own.'" *C & O Motors, Inc. v. West Virginia Paving, Inc.*, 223 W.Va. at 474, 677 S.E.2d at 910 (emphases added; citations omitted).

The United States Court of Appeals for the Fourth Circuit is one of the other courts that has reached this same conclusion. As explained by the Fourth Circuit in *Kinsale Insurance Co. v. JDBC Holdings, Inc., supra*:

> The district court's order, however, is not a final decision. Though the district court resolved the key question of whether Kinsale was liable for providing insurance coverage for the damage caused by the fire at the JDBC facility, *"the order does not embody the essential elements of a money judgment because the court has not found all of the facts necessary to compute the amount of damages due." Calderon v. GEICO Gen. Ins. Co.*, 754 F.3d 201, 205 (4th Cir. 2014). In *Calderon*, we held that we lacked jurisdiction over a partial summary judgment order on liability because the district court did not resolve the amount of damages to be awarded to a class of GEICO workers who sued their employer for a failure to pay them overtime. *Id.* at 201–203. We have maintained that *"a judgment on liability that does not fix damages is not a final judgment because the assessment of damages is part of the merits of the claim that must be determined." Carolina Power & Light Co. v. Dynegy Mktg. & Trade*, 415 F.3d 354, 358 (4th Cir. 2005), *abrogated on other grounds by Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Engineers & Participating Emps.*, 571 U.S. 177, 183, 134 S.Ct. 773, 187 L.Ed.2d 669 (2014); *see also Krus v. Krus*, No. 21-1774, 2021 WL 5275546, at *1 (4th Cir. Nov. 12, 2021) (vacating a Rule 54(b) certification because a "review of the record reveals that the district court did not adjudicate all of the issues raised in the case [as the] district court did not fix the amount of damages owed, and it expressly stated that it would not enter a final judgment in the case until it did so."); *Ins. Servs. of Beaufort, Inc. v. Aetna Cas. & Sur. Co.*, 966 F.2d 847, 853 (4th Cir. 1992) ("[A] default judgment may not be entered without a full hearing unless the damages are liquidated or otherwise uncontested.").
>
> Here, *the district court did not specify the amount Kinsale must pay and Kinsale maintains that "damages remain disputed and should be addressed at trial."* . . .
>
> Kinsale cites to two cases to argue that we may exercise jurisdiction where there are pending issues below. However, both cases are readily distinguishable. First, in *Res. Bankshares Corp. v. St. Paul Mercury Ins. Co.*, 407 F.3d 631 (4th Cir. 2005), we exercised appellate jurisdiction over the district court's Rule 54(b) certification because the district court's declaratory judgment on liability mooted all remaining issues, such as bad faith and indemnification, and, thus, the declaratory judgment was a final decision. *See Res. Bankshares Corp. v. St. Paul Mercury Ins. Co.*, 323 F.Supp.2d 709, 723 (E.D. Va. 2004). *Here, we have pending issues below which have not been mooted by the district court's declaratory judgment.* Second, in *Penn-Am. Ins. Co. v. Mapp*, 521 F.3d 290, 296 (4th Cir. 2008), we declined to exercise jurisdiction because the district court's judgment only resolved one of two issues of liability. *Here, there are remaining issues of whether Kinsale is liable for breach of contract and bad faith which remain unadjudicated*

> *below.*
>
> *In all, because the district court still needs to conduct a trial to determine the final amount that Kinsale must pay, as well as adjudicate the remaining counterclaims below, "it cannot be said [that] the order before us [ ] left nothing more for the district court to do than enforce a judgment." Calderon*, 754 F.3d at 206. Accordingly, *since we are likely to encounter the issue of damages, liability, and counterclaims again on appeal, the district court's order was not a final decision* under § 1291.

Kinsale Insurance Co. v. JDBC Holdings, Inc., 31 F.4th at 874-76 (emphases added).

The Fourth Circuit further concluded that just reasons for delaying an appeal exist in such a case, particularly in the absence of any explanation of contrary reasons and a showing of undue hardship in the event that an immediate appeal is not allowed, explaining:

> *The district court did not explain why the unresolved issue of damages and the counterclaims were insufficient to constitute just reason to delay a Rule 54(b) certification. Moreover, the district court did not explain why Kinsale "would suffer undue hardship if final judgment" was not entered and certified for immediate appeal. Braswell*, 2 F.3d at 1335. *Without such reasoning, "deference normally accorded such a certification is nullified." Braswell*, 2 F.3d at 1336.
>
> Indeed, we have held that "*the fact the parties on appeal remain contestants below militates against the use of Rule 54(b).*" *Braswell*, 2 F.3d at 1336. As "Rule 54(b) certification is ... the exception rather than the norm[,] [i]t should n[ot] be granted routinely." *Id.* at 1335. Accordingly, *"[i]t will be a rare case where Rule 54(b) can appropriately be applied when the contestants on appeal remain contestants below*." *Id.* at 1336 (quoting *Spiegel*, 843 F.2d at 44).
>
> Here, JDBC and Kinsale have disputed and unresolved claims below which the district court stayed pending our review of the district court's declaratory judgment. J.A. 2250; *see also* J.A. 2434 (the district court held "that [though] plaintiff has a duty to accept and pay defendant's insurance claim, defendant is not entitled to partial summary judgment on its counterclaims at this time."). Namely, *the disputed issues of damages, breach of contract, and common law bad faith are "interrelat[ed]" or "inextricably intertwined," Braswell*, 2 F.3d at 1337, *with the question of whether Kinsale was bound to provide coverage.*
>
> Furthermore, in cases involving two parties, *all claims that are intertwined must be "pursued together," rather than "separately." Braswell*, 2 F.3d at 1337. Here, we have a two-party dispute between an insurance company and the insured over three key questions: (1) does Kinsale have to pay for the damage caused by the fire? (2) if so, how much is Kinsale required to pay in damages? and (3) is

> Kinsale's refusal to pay a breach of contract and/or is it an act of bad faith? Though the district court answered the first key question, it has left the remaining questions to be resolved at trial. *All three questions are interrelated because the answer to the first question implicates the remaining two questions. Accordingly, our policy against "piecemeal appeals when multiple claims are resolved in the course of a single lawsuit" controls and counsels against Rule 54(b) certification. Braswell,* 2 F.3d at 1335.
>
> Without a final decision to review, we must dismiss the appeal before us and remand it for further proceedings so that all remaining claims and issues can be resolved. . . .

Kinsale Insurance Co., 31 F.4th at 876-77 (emphases added). As previously noted, in the present case, the Circuit Court has neither provided any explanation as to why the unresolved issues of damages and the counterclaims were insufficient to constitute just reason to delay a Rule 54(b) certification nor provided any reasoning as to why Milbank would suffer undue hardship if final judgment was not entered and certified for immediate appeal. Accordingly, its Order is not entitled to any deference on such findings or conclusions.

This Court has explained that the only exception to the rule requiring an award of damages is when the awarding of damages is merely ministerial in nature, similar to assessing costs. *C & O Motors, Inc.*, 223 W.Va. at 474-75, 677 S.E.2d at 910-11. As held by the Court:

> *An order determining liability, without a determination of damages, is a partial adjudication of a claim and is generally not immediately appealable.* However, an immediate appeal from a liability judgment will be allowed if the determination of damages can be characterized as ministerial. That is, *a judgment that does not determine damages is a final appealable order when the computation of damages is mechanical and unlikely to produce a second appeal because the only remaining task is ministerial, similar to assessing costs.*

Syl. Pt. 3, *C & O Motors, Inc. v. West Virginia Paving, Inc., supra.* (emphases added).

In the instant case, an award of damages on the Estate's underinsured motorist coverage claim is not merely "ministerial, similar to assessing costs." *Id.* As previously noted, while the Circuit Court will eventually award the Plaintiffs damages for attorney's fees, a jury will be required to award Plaintiffs damages for their underinsured motorist coverage claim and net economic losses, and annoyance and inconvenience on their breach of contract, unfair settlement practices, and/or bad faith claims in addition to punitive damages on the latter such claims. Any such awards of damages could be subject to an appeal. Accordingly, the Circuit Court's Order at issue herein is not a final judgment on Plaintiffs' underinsured motorist coverage claim or their related counterclaims for unfair settlement practices and first-party bad faith and, thus, is not ripe for appeal. And, even if this Court would disagree with the *Kinsale* Court as to the issue of whether the Estate's claims for Unfair Settlement Practices and bad faith may be considered to be separate claims, the Estate's claim for breach of contract and request for damages thereunder for the underinsured motorist coverage provided by the policy is clearly inextricably intertwined with Milbank's claim for a declaratory judgment as to such exact coverage.

Unfortunately, the ICA in reaching its conclusion essentially ignored all of the above cases cited by the Estate and instead relied upon *National Union Fire Ins. Co. of Pittsburgh v. Miller*, 228 W.Va. 739, 746-47, 724 S.E.2d 343, 350-51 (2012); a case in which the respective parties agreed contained a "final" order and thus did not bring to this Court's attention all of the cases and respective holdings discussed herein to the contrary. *See Milbank Ins. Co. v. Showalter*, 903 S.E.2d at 264-65; J.A. 341-43. Accordingly, for all of the reasons expressed above, the Estate respectfully submits that the ICA erred in ignoring the case law cited by the Estate in support of its motion to dismiss and in its ultimate resolution of this jurisdictional issue.

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 judgement, 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*, *supra*.

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. The ICA committed reversible error in disagreeing with and reversing the holding of the Circuit Court.

1. The Underinsured Motorist Statute only requires that there be liability insurance applicable at the time of the accident for the underinsured motorist and not that the vehicle being driven by the underinsured motorist at the time of the accident be the one to which the liability endorsement applies.

While it is likely true that in many cases, the underinsured motor vehicle will be one of the vehicles involved in the collision and the underinsured motorist's negligent operation of such vehicle will be the basis of his tort liability for the collision, such a relationship is not expressly required under the terms of the remedial West Virginia Underinsured Motorist Statute in order for a victim to recover underinsured motorist coverage. 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) (emphases added).

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.

J.A. 108 (emphasis added).

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) (emphases 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); Syl. Pt. 1, *Alexander v. State Auto. Mut. Ins. Co.*, 187 W.Va. 72, 415 S.E.2d 618 (1992); Syl. Pt. 2, *State ex rel. Allstate Ins. Co. v. Karl*, 190 W.Va. 176, 437 S.E.2d 749 (1993).

> *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."). *Accord* Syl. Pt. 4, *Pritavec v. Westfield Ins. Co.*, *supra* ("The uninsured/underinsured motorist statute, W.Va.Code, 33-6-31(b), as amended, 'is remedial in nature and, therefore, must be construed liberally in order to effect its purpose.' Syl. Pt. 7, in part, *Perkins v. Doe*, 177 W.Va. 84, 350 S.E.2d 711 (1986).").

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) (emphasis added); *see also* J.A. 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." J.A. 108. Accordingly, the ICA's holding denying coverage in this case as requested by Milbank contravenes the intent and spirit of West Virginia underinsured motorist statute as well as relevant language of Milbank's own insurance policy.

2. **To the extent that Milbank has essentially attempted to alter the language of the statute by substituting in its insuring agreement that *"[t]he 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 place of the statute's provision only requiring that *"there is liability insurance applicable at the time of the accident"*, such alteration is inconsistent with such statutory definition of underinsured motor vehicle and, thus, is void as being contrary to the intent and spirit of West Virginia's Underinsured Motorist Statute.**

Indeed, the ICA failed to appropriately recognize that the language of the Milbank policy, as interpreted by it, is inconsistent with the language of the remedial West Virginia Underinsured Motorist Statute and that, to the extent that such language is inconsistent, the statutory language prevails over the policy language. More specifically, the ICA held:

> Our plain reading of the Milbank policy is consistent with West Virginia Code § 33-6-31(b) (2015), which provides, in 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."
>
> This statutory provision plainly requires that the liability insurance must be applicable based on the ownership, operation, or use of the underinsured motor vehicle. In the present case, the liability insurance at issue was applicable due to Mr. Ratcliffe's use of Ms. Mattson's vehicle, not the alleged underinsured motor vehicle. Therefore, reading the statutory provision in conjunction with the Milbank policy, we find no conflict.
>
> Respondents claim that the fact Mr. Ratcliffe's insurance coverage for third-party damages paid full liability limits is evidence that he should be viewed as the underinsured motorist. We do not agree. What transpired between Erie Insurance and their insured, Mr. Ratcliffe, was entirely based on the Erie policy issued to Mr. Ratcliffe and Erie's administration of that policy. Such actions do not dictate the treatment of insureds under a separate policy of insurance issued by Milbank to Ms. Mattson. To presume that Erie viewed Mr. Ratcliffe as an underinsured motorist is not the appropriate test for interpreting a separate contract between Milbank and Ms. Mattson. The plain language of the Milbank policy regarding underinsured motor vehicle coverage is the starting and ending point for such an analysis because

of its clear and unambiguous policy language.

> Lastly, Respondents assert that public policy concerns and potential inequities may result from this Court's determination that liability must arise from the ownership, maintenance, or use of the underinsured motor vehicle. We find no merit in such an assertion. The plain language of the Milbank policy and West Virginia Code § 33- 6-31(b) require that the liability for an underinsured vehicle arise from the "ownership, maintenance, or use" or "ownership, operation, or use" of the alleged underinsured motor vehicle. In the present case, the Ratcliffe vehicle satisfies neither test. To the extent that this result may seem inequitable, the Legislature is the proper place to address such public policy concerns. *See Lewis v. Canaan Valley Resorts, Inc.*, 185 W. Va. 684, 692, 408 S.E.2d 634, 642 (1991) ("[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.")
>
> In summary, after a review of the record and applicable law, we find that the circuit court erred in finding that Respondents were entitled to underinsured motorists coverage under the Milbank policy. Here, it is undisputed that Mr. Ratcliffe's liability did not arise from "the ownership, maintenance, or use" of his personal underinsured vehicle, as required by the terms of Milbank policy.

Milbank Ins. Co. v. Showalter, 903 S.E.2d 260, 267 (W.Va. App. 2024) (emphases added). J.A. 348-50 (emphases added).

The ICA's above holding is wrong on at least two counts. First, in the present case the liability insurance from the Erie policy for the Ratcliffe vehicle is the liability insurance at issue for which the Estate has requested underinsured motorist coverage from Milbank, not the liability insurance from the Milbank policy for the Mattson vehicle. Second, the language of the Milbank policy concerning underinsured motor vehicle coverage is not the starting and ending point of the analysis. Rather, the language of the statute is the starting and ending point of the analysis to the extent that the language of the Milbank policy must be consistent with the language, intent, and spirit of the statute. *See, e.g.,* Syl. Pt. 3, *Deel v. Sweeney*, *supra* ("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*." (emphasis added)); Syl. Pt. 2, *Alexander v. State Auto. Mut. Ins. Co., supra*; Syl. Pt. 4, *Russell v. State Auto. Mut. Ins. Co., supra*; Syl. Pt. 1, *Thomas v. Nationwide Mut. Ins. Co.*, 188 W.Va. 640 (1992); Syl. Pt. 3, *Miller v. Lemon, supra*. *See also* Syl. Pt. 2, *Shamblin v. Nationwide Mut. Ins. Co.*, 175 W.Va. 337, 332 S.E.2d 639 (1985) (" ' "Where provisions in an insurance policy are plain and unambiguous *and where such provisions are not contrary to a statute, regulation, or public policy*, the provisions will be applied and not construed." ' Syl., *Farmers' & Merchants' Bank v. Balboa Insurance Co.,* 171 W.Va. 390, 299 S.E.2d 1 (1982), quoting syl., *Tynes v. Supreme Life Insurance Co.,* 158 W.Va. 188, 209 S.E.2d 567 (1974)." (emphasis added)).

The relevant statutory language provides: *" '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*** *. . . ."* W.Va.Code Code § 33-6-31(b). Such statute does not expressly state that the underinsured motorist's tort liability for causing the accident must arise from his ownership, operation or use of the underinsured motor vehicle. Rather, the statute merely provides requires the existence of liability insurance applicable at the time of the accident. In the present case, in addition to the liability insurance provided by the Milbank policy for Caleb Ratcliffe's negligence while operating the Mattson vehicle as its permissive user, said underinsured motorist also had liability insurance that was applicable at the time of the accident due to his ownership of the vehicle that was insured by Erie and Erie paid such liability insurance coverage limits which were insufficient to fully compensate for the damages caused by the death of Sierra Mattson. It is concerning this latter applicable liability insurance for which the Estate seeks underinsured motorist coverage limits and nothing more than its applicability is required by the express language of the West Virginia Underinsured Motorist Statute.

Moreover, if an insured can only ever seek insurance coverage applicable to the actual vehicle involved in the accident, there would never be a need to discuss whether an insured can ever stack coverages for endorsements for multiple vehicles insured under an insurance policy. For instance, in West Virginia, due to the remedial purposes of the West Virginia Uninsured and Underinsured Motorist Statute, an insured can stack uninsured or underinsured coverage limits for multiple vehicles insured under the same insurance policy unless the insurance policy contains express anti-stacking language for which a multi-car discount has been provided to the insured by the insurer. *See, e.g.,* Syl. Pt. 4, *Miller v. Lemon, supra*; Syl. Pt. 1, *Cupano v. West Virginia Ins. Guar. Ass'n*, 207 W.Va. 703, 536 S.E.2d 127 (2000); Syl. Pt. 4, *Linkinoggor v. Nationwide Mut. Ins. Co.*, 200 W.Va. 265, 489 S.E.2d 19 (1997). In West Virginia, as to liability limits, because--other than the statute that requires minimal liability limits to meet financial responsibility requirements--there is no remedial statute similar to the Uninsured and Underinsured Motorist Statute, an insured only can stack liability coverage limits for endorsements for multiple vehicles insured under the same insurance policy if the language of the policy permits such stacking. *See, e.g.,* Syl. Pts. 1-3, *Payne v. Weston*, 195 W.Va. 502, 466 S.E.2d 161 (1995); Syl. Pt. 4, *Shamblin v. Nationwide Mut. Ins. Co., supra*. The debates and discussions concerning whether stacking is permitted for insurance coverages due to endorsements involving multiple vehicles leading to the above judicial opinions would never have been necessary if an insured could only ever recover the coverage limits available for the motor vehicle actually involved in the collision.

None of the cases cited to the ICA by Milbank or which were otherwise relied upon by the ICA involve the precise issues involved in this case and, therefore, all such cases are distinguishable on that basis. The holdings of *Cox v. Amick*, 195 W.Va. 608, 466 S.E.2d 459 (1995), upon which the Milbank relied before the Circuit Court and the ICA, are distinguishable from the facts and circumstances of this case for such reason as well as others. First, this case involves underinsured motorist coverage while *Cox v. Amick* involved uninsured motorist coverage. As noted by the Court in *Deel v. Sweeney, supra*, 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; thereby, establishing his tort liability for causing 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 once again 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) (emphases added).

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

> B. 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".

(J.A. 108).

And the Milbank Policy, itself, defines an "underinsured motor vehicle" in pertinent part as:

> E. "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.

(J.A. 108 (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, as argued above, to the extent that Milbank has essentially attempted to alter the language of the statute by substituting in its insuring agreement that *"[t]he 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'"* (J.A. 108 (emphases added)) in place of the statute's provision only requiring that "*there* ***is liability insurance applicable*** *at the time of the accident"*, such alteration is inconsistent with such statutory definition of an underinsured motor vehicle and, thus, is void as being contrary to the intent and spirit of West Virginia's Underinsured Motorist Statute, W.Va. Code § 33-6-31(b). *See, e.g.,* Syl. Pts. 4, 5, & 6, *Cox v. Amick, supra*; *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 Estate submits that these rules of construction establish that the ICA was incorrect and that the Circuit Court indeed was correct in denying Milbank's motion for summary judgment and granting the Estate's cross motion for summary judgment; such rulings of the Circuit Court 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 when the available liability insurance limits are insufficient to pay for the insured's damages.

The Estate also notes 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 (which the Estate continues to assert that an insurer cannot), 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 ICA ignored in its opinion that Milbank has presented absolutely no evidence in this case to demonstrate that the premium was adjusted in a manner to justify Milbank excluding from coverage an underinsured motor vehicle which otherwise fully meets the actual definition of underinsured motor vehicle--such as the Ratcliffe motor vehicle that, while not actually involved in the accident, 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 Milbank attempted to support its argument before the ICA 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, Milbank's failure to raise them in support of its argument to the Circuit Court should have resulted in the ICA refusing to consider them under the "raise or waive" rule. Unfortunately, the ICA did consider at least the *Baber* opinion. In the event that this Court decides to consider any of these cases, they also 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 insured by Erie. Furthermore, it is not disputed that the liability limits paid were insufficient to fully compensate the Estate for injuries suffered by its decedent, Seirra Mattson, to which it is 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 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 Estate has 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.

VI. CONCLUSION

For all of the foregoing reasons, the Estate respectfully requests that Your Honorable Court vacate the mandate and reverse the opinion of the ICA and affirm the Order of the Circuit Court below denying Milbank's motion for summary judgment on its claim for declaratory relief and granting the Estate's cross motion for summary judgment.

Respectfully submitted,

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By: */s/ James G. Bordas III*

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of November, 2024, I electronically filed the foregoing *Brief of Appellants/Petitioners* and the *Joint Appendix* 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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