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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

REPLY BRIEF OF APPELLANTS/PETITIONERS

JAMES G. BORDAS III (#8518)
RICHARD A. MONAHAN (#6489)
MATTHEW C. SCHREBE (#11972)
BORDAS & BORDAS, PLLC
1358 National Road
Wheeling, WV 26003
Telephone: 304-242-8410
jbordasiii@bordaslaw.com
rmonahan@bordaslaw.com
mschrebe@bordaslaw.com
Counsel for Appellants/Petitioners

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I. COUNTER TO MILBANK'S STATEMENT OF THE CASE

While the Estate agrees that the salient facts of this case are not in dispute, which can be readily demonstrated by a comparison of the parties' respective "Statements of the Case," as to the procedural history of the case, Milbank is in error when it contends that it raised an argument to the trial court in its motion for summary judgment that anti-stacking language in the policy prevented coverage of underinsured motorist benefits to the Estate. Rather, Milbank argued that the "family use exclusion" applied to prevent such coverage. (See J.A., at 064-071, 129-131, 150-153). As to that argument, the trial court correctly held:

37. Likewise, Milbank's assertion of the "family use exclusion" is unfounded and does not apply to the instant situation.

38. As Defendant's claim for underinsured motorist benefits is based upon Mr. Radcliffe's motor vehicle policy issued by Erie and not the policy issued by Milbank, any "family use exclusion" set forth in the Milbank policy would be inapplicable here.

39. The cases cited in support by Milbank pertained to single vehicle accident in which one policy applied and the claims were presented for both liability and underinsured motorist coverage under that one policy.

40. As the Supreme Court explained 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.

41. Here, Ms. Mattson played no role in determining how much liability coverage was available under the policy of insurance that Erie sold to Mr. Ratcliffe.

J.A., at 163-164.

Milbank did not raise such “family use exclusion” in its appeal to the Intermediate Court of Appeals (“ICA”). Rather, it improperly attempted to raise an anti-stacking argument for the first time during such appeal. And, while it is true that the ICA said that it did not need to address the issue, it is also true that the ICA nonetheless noted that Milbank had waived such argument by not raising it before the Circuit Court, specifically stating:

We further note Milbank’s failure to present the anti-stacking argument before the circuit court; therefore, such assignment would be deemed to have been waived and not properly preserved on appeal. *See Noble v. W. Va. Dep’t of Motor Vehicles*, 223 W. Va. 818, 821, 679 S.E.2d 650, 653 (2009) (“[o]ur general rule is that nonjurisdictional questions . . . raised for the first time on appeal, will not be considered.” *Shaffer v. Acme Limestone Co., Inc.*, 206 W. Va. 333, 349 n. 20, 524 S.E.2d 688, 704 no. 20 (1999).”).

Milbank Ins. Co. v. Showalter, 903 S.E.2d at 267-68 n. 10; J.A. 350-352 n. 10.

II. ARGUMENT

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

Milbank cites two cases which it submits are directly on point in support of its position that the ICA had jurisdiction to hear this appeal: *National Union Fire Ins. Co. of Pittsburgh v. Miller*, 228 W. Va. 739, 724 S.E.2d 343 (2012), which was the case relied upon by the ICA, and *Erie Ins. Prop. & Cas. Co. v. Chaber*, 239 W. Va. 329, 801 S.E.2d 207 (2017). Milbank feigns astonishment that the Estate did not discuss the *Erie v. Chaber* case because Milbank had cited it in its response to the Estate’s motion to dismiss the appeal. However, Milbank fails to acknowledge that such opinion does not discuss W.Va.R.Civ.P. 54(b) and that neither party sought to have the appeal dismissed for lack of being a final appealable order. Milbank then acknowledges that the Estate distinguished the Court’s holding in *Miller* by arguing that the parties therein agreed that the

declaratory judgment decision was immediately appealable and ““thus did not bring to this Court’s attention all of the cases and respective holdings’ cited by the Estate. (App. Br., 19).” (Milbank App. Br., 11). Nonetheless, Milbank asserts that the ‘Estate’s effort is unavailing because, regardless of whether the parties agree that this Court has jurisdiction, ‘this Court has a responsibility *sua sponte* to examine the basis of its jurisdiction.’ Syl. Pt. 1, *James M. B. v. Carolyn M.*, 193 W.Va. 289, 291, 456 S.E.2d 16, 18 (1995).” *Id.* While the Estate does not dispute that this Court has the power to *sua sponte* determine its jurisdiction to hear an appeal, no party can dispute the heavy caseload of this Court and the difficulty in addressing issues that are not even raised or challenged by the parties themselves, particularly when they are not facially obvious. Neither of these cases cited by Milbank addressed the specific challenge and case law raised by the Estate herein.

Moreover, this Court has recently expressly rejected a party’s similar reliance upon *National Union Fire Ins. Co. of Pittsburgh v. Miller*, holding:

Petitioners cite the *Miller* case for the proposition that “West Virginia law clearly recognizes that orders are final and appealable even if they do not dispose of all claims, particularly in an insurance coverage context” – a statement that is far too broad and ignores the existence of a significant distinguishing feature in *Miller*. There, the parties *agreed* that the circuit court’s order was “final in its nature and effect as to the issue of indemnity[,]” which the Court cited as the basis for its conclusion that “therefore the matter is properly before this Court on appeal, and the Court may consider whether the circuit court’s order is correct.” *Miller*, 228 W. Va. at 747, 724 S.E.2d at 351. In the instant case, in contrast, there is no such agreement, as the parties vehemently dispute the finality of the circuit court’s orders for all of the reasons discussed *supra*. Further, nothing in *Miller* can be read to establish a rule governing interlocutory appeals in insurance coverage cases; indeed, as noted *supra* the only relevant syllabus point in *Miller* provides that “‘[t]he entry of an order denying a motion for summary judgment made at the close of the pleadings and before trial is merely interlocutory and not then appealable to this court.’ ” *Miller*, 228 W. Va. at 742, 724 S.E.2d at 346, Syl. Pt. 7 (citing Syllabus, *Wilfong v. Wilfong*, 156 W.Va. 754, 197 S.E.2d 96 (1973) and Syl. Pt. 1, *Arnold v. Palmer*, 224 W. Va. 495, 686 S.E.2d 725 (2009)).

National Union Fire Ins. Co. of Pittsburgh v. Westlake Chemical Corp., 249 W.Va. 575, 583, 900 S.E.2d 1, 9 (2024).

Additionally, as acknowledged in the Estate's opening brief, in its motion for summary judgment and memoranda filed before the trial court, Milbank did not even request that the court's decision be a "Final Judgment." (See J.A., at 046-072). Rather, Milbank wrote a letter on which it merely copied counsel for the Estate after the Court's ruling asking that Rule 54(b) language be added, and no reasonable opportunity was provided for the Estate to respond before the trial court did so. In so doing, the Circuit Court's certification is not entitled to any deference because it 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.

As has been noted by this Court:

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.***

Province v. Province, 196 W.Va. 473, 479, 473 S.E.2d 894, 900 (1996) (emphases added). 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, 196 W.Va. at 480, 473 S.E.2d at 901 (emphases added; footnote omitted).

This Court acknowledged in *Hubbard v. State Farm Indemnity Co.*, 213 W.Va. 542, 549 n. 13, 584 S.E.2d 176, 183 n. 13 (2003), 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.’).” The importance of having a substantive claim completely resolved by having an award of damages was also acknowledged by the 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. 345, 354, 811 S.E.2d 875, 884 (2018) (“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.”¹ (emphasis added)); Syl. Pt. 3, *National Union Fire Ins. Co. of Pittsburgh v. Westlake Chemical Corp.*, 249

¹ Milbank ignores the significance of this particular quote when it attempts to argue in its brief that the decision in *Erie Ins. Co. v. Dolly*, *supra*, actually supports its position.

W.Va. at 581-83, 900 S.E.2d at 7-9. No such award of damages as to the Estate'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, this Court has also recognized that other "courts that have generally addressed the issue of an interlocutory order granting judgment only as to liability take the position that *'[o]rordinarily, 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. 469, 474, 677 S.E.2d 905, 910 (2009) (emphases added; citations omitted).

Indeed, 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.*, 31 F.4th 870 (4th Cir. 2022), a case directly on point:

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 adjudicated 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 exists 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).

In the present case, Milbank totally ignores that the Circuit Court neither provided any explanation as to why the unresolved issues of damages and the counterclaims were insufficient to constitute just reasons 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. Moreover, the ICA also did not do so in its opinion; another point ignored by Milbank.

Accordingly, neither the Circuit Court's Order nor the opinion of the ICA are entitled to any deference on such findings or conclusions.

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.

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).

In applying this statute, this Court has declared:

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).”).

As noted in the Estate's opening brief, 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.

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's remedial underinsured motorist statute as well as relevant language of Milbank's own insurance policy.

C. 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.

Other than Milbank’s blanket assertion that its policy’s language as interpreted by it--including its interpretation of its insuring agreement as requiring that the underinsured motorist’s liability for causing damages to the insured victim must arise from the actual use, ownership, or maintenance of the motor vehicle--is consistent with West Virginia’s remedial Underinsured Motorist Statute, it offers no explanation as to how this is so when the statute’s actual language is considered.

Unfortunately, the ICA accepted the argument of Milbank, holding:

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.")

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

As noted in the Estate's opening brief, 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.²

² 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. Due to page constraints, the Estate will not attempt herein to distinguish such cases again, but instead relies upon its discussion of such cases in its opening brief. (App. Br., at 30-38).

Moreover, Milbank ignores the Estate's argument that 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.

D. Milbank has waived any argument that the provision against duplicate payments (which it labels as an 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.³ (See J.A., at 001-012, 046-072, 134-154). And, while Milbank did quote the provision against duplicate payments for the same elements of loss and assert a claim thereunder in its complaint for declaratory judgment, (J.A., at 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 Milbank 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 Estate from obtaining summary judgment on their cross motion. (See J.A., at 046-072 & 134-154). Similarly, while Milbank did include the provision against making duplicate payments in the portion of its supporting memorandum of law that quoted from the Milbank insurance policy, (J.A., 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 as an anti-stacking provision and entitled it to an award of summary judgment or prevented the Estate from obtaining summary judgment on their cross motion. (See J.A., at 046-072 & 134-154).

³ As noted in its opening brief, 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).

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 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).

And, as noted previously, while the ICA stated that it did not need to address this issue, it nonetheless noted that Milbank had waived such argument by not arguing it before the Circuit Court, specifically stating:

We further note Milbank's failure to present the anti-stacking argument before the circuit court; therefore, such assignment would be deemed to have been waived and not properly preserved on appeal. *See Noble v. W. Va. Dep't of Motor Vehicles*, 223 W. Va. 818, 821, 679 S.E.2d 650, 653 (2009) ("[o]ur general rule is that nonjurisdictional questions . . . raised for the first time on appeal, will not be considered." *Shaffer v. Acme Limestone Co., Inc.*, 206 W. Va. 333, 349 n. 20, 524 S.E.2d 688, 704 no. 20 (1999).").

Milbank Ins. Co. v. Showalter, 903 S.E.2d at 267-68 n. 10; J.A. 350-352 n. 10.

E. 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.

Should this Court decide to address this issue, 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* J.A., at 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. 4, *State Automobile Mut. Ins. Co. v. Youler*, *supra*; Syl. Pts. 1 & 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.").

Interestingly, the only cases that have been relied upon by Milbank in support of its anti-stacking argument are the same ones that it asserted before the Circuit Court in support of its argument that the "family use exclusion" applies to prevent coverage. *See 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). However, 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 Estate has based its 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 Milbank, any "family use exclusion" set forth in the policy issued by Milbank (regardless of how it seeks to phrase it) is simply inapplicable to this case and the above decisions are readily distinguishable.

III. CONCLUSION

For all of the foregoing reasons, as well as those set forth in its opening brief, the Estate respectfully requests that Your Honorable Court (1) dismiss the underlying appeal of Milbank as being an improper interlocutory appeal of a non-final order and vacate the ICA's mandate and opinion or (2) 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 partial summary judgment.

Respectfully submitted,

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

By: /s/ James G. Bordas III
JAMES G. BORDAS III (#8518)
RICHARD A. MONAHAN (#6489)
MATTHEW C. SCHREBE (#11972)
BORDAS & BORDAS, PLLC
1358 National Road
Wheeling, WV 26003
Telephone: 304-242-8410
jbordasiii@bordaslaw.com
rmonahan@bordaslaw.com
mschrebe@bordaslaw.com
Counsel for Appellants-Appellees//Defendants below

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of January, 2025, I electronically filed the foregoing *Reply Brief of Appellants/Petitioners* with the Clerk of the court using the File & Serve Express filing system which will send notification to the following counsel of record:

William M. Harter, Esq.
Elise N. McQuain, Esq.
Frost Brown Todd, LLP
10 West Broad Street, Suite 2300
Columbus, OH 43215
wharter@fbtlaw.com
emcquain@fbtlaw.com

Carte P. Goodwin, Esq.
Frost Brown Todd, LLP
500 Virginia Street East, Suite 1100
Charleston, WV 25301
cgoodwin@fbtlaw.com

/s/ James G. Bordas III
JAMES G. BORDAS III (#8518)
RICHARD A. MONAHAN (#6489)
MATTHEW C. SCHREBE (#11972)
BORDAS & BORDAS, PLLC
1358 National Road
Wheeling, WV 26003
Telephone: 304-242-8410
jbordasiii@bordaslaw.com
rmonahan@bordaslaw.com
mschrebe@bordaslaw.com
Counsel for Appellants/Petitioners