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Nick Showalter and Kelly Mattson, as Co-Administrators of Sierra Mattson,	:	
Appellants / Petitioners,	:	
vs.	:	On Appeal from the Intermediate Court of Appeals No. 23-ICA-213
Milbank Insurance Company,	:	
Appellee / Respondent	:	

BRIEF OF APPELLEE / RESPONDENT

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I. STATEMENT OF THE CASE

A. Overview

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

Milbank Insurance Company ("Milbank") issued an automobile policy of insurance ("the Milbank Policy") to Sierra Mattson. Ms. Mattson died in an accident ("the Accident") while traveling as a passenger in her own vehicle. Caleb Ratcliffe was driving Ms. Mattson's vehicle at the time of the Accident. Mr. Ratcliffe's negligence was the cause of the Accident. Mr. Ratcliffe separately owned his own vehicle, which was uninvolved in the Accident.

Milbank paid the Milbank Policy's liability limit to the Estate of Sierra Mattson ("the Estate") and other claimants, but Milbank denied the Estate's claim for underinsured motorist ("UIM") coverage under the Milbank Policy. Milbank later filed a declaratory judgment action to confirm that it did not owe UIM coverage to the Estate. The Estate filed counterclaims for alleged breach of contract, unfair claim settlement practices and bad faith. After discovery, Milbank and the Estate each filed a motion for summary judgment regarding Milbank's declaratory judgment claim. In an Order issued by the Circuit Court of Ohio County ("the Order"), the Circuit Court granted the Estate's motion and denied Milbank's. In doing so, the Circuit Court held that the Estate was entitled to UIM coverage under the Milbank Policy.

The Circuit Court expressly concluded that the Milbank Policy did not require an underinsured motor vehicle to have been involved in the Accident. The Court reached this conclusion despite language in the Milbank Policy which indicates that an owner's or operator's liability "must arise out of the ownership, maintenance or use" of an underinsured motor vehicle to give rise to UIM coverage. The Circuit Court also reached this decision despite anti-stacking language in the Milbank Policy which indicates that no one will be entitled to recover both liability proceeds and UIM proceeds for the same elements of loss. Both aspects of the Order are wrong.

Milbank filed a timely appeal to the Intermediate Court of Appeals ("ICA"). The ICA agreed with Milbank's first argument, holding that the Milbank Policy would only provide UIM coverage to the extent that the Accident was caused by Mr. Ratcliffe's "ownership, maintenance or use" of his own vehicle. The ICA concluded that it did not need to, and therefore did not, address Milbank's second argument regarding the anti-stacking provision.

Because the parties agree that Mr. Ratcliffe's ownership, operation, maintenance and use of his own vehicle had nothing to do with the Accident, the ICA correctly reversed the Order and remanded the case to the Circuit Court for an entry of judgment in Milbank's favor. The same result would have also been appropriate under the Milbank Policy's anti-stacking provision. Milbank therefore respectfully requests that this Court affirm the decision of the ICA.

B. The Accident

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

At the time of the Accident, Mr. Ratcliffe owned a separate vehicle which he insured through Erie Insurance Property and Casualty Company ("Erie" and "the Erie Policy"). (JA 031.) There is no dispute that Mr. Ratcliffe's vehicle was not involved in the Accident. (JA 086.) Instead, Mr. Ratcliffe's vehicle was located at his home at the time of the Accident. (JA 159.)

C. The Insurance Claims

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

The Estate also made a UIM claim under the Milbank Policy. (JA 034-035.) Milbank denied this claim. (JA 035.) After the Estate disagreed with the denial, Milbank filed a declaratory judgment action in the Circuit Court. (JA 001-023.) Therein, Milbank sought an order that it does not owe UIM coverage to the Estate. (JA 001-023.)

D. The Milbank Policy

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

(JA 108. Emphasis added.)

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

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

(JA 108.)[1]

The Milbank Policy also contains the following Limit of Liability:

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

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

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

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

REQUEST NO. 33: Admit that Caleb Ratcliffe was not the driver of an underinsured vehicle involved in the accident.

ANSWER: Admit.

REQUEST NO. 12: Admit that the vehicle upon which you rely to assert your entitlement to underinsured motorist coverage benefits under Ms. Mattson's policy of insurance bearing number 1000332816 issued by Milbank Insurance Company is a vehicle owned by Caleb Ratcliffe that was "at home" at the time of the November 23, 2019, accident. ***See* July 2, 2020 Letter, attached as Exhibit 1.**

ANSWER: Deny. Defendant / Counterclaimant does not rely upon a vehicle, but rather the language in the Milbank policy

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

> issued to Sierra Mattson. The Ratcliffe vehicle is insured under a policy that provided liability coverage for the collision.

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

F. The Order

After making findings of fact consistent with the foregoing discussion, the Circuit Court entered summary judgment on Milbank's declaratory judgment claim in favor of the Estate and against Milbank. (JA 156-164.) According to the Order, Mr. Ratcliffe's vehicle "was an underinsured motorist [*sic*] as defined by West Virginia Code §33-6-31(b) on the date of the subject crash," and Mr. Ratcliffe's vehicle "was also an underinsured motor vehicle under the [Milbank Policy] pursuant to the language of the policy." (JA 162.)

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

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

G. The ICA Decision

The ICA disagreed with the Circuit Court's Order. According to the ICA:

> ***A plain reading of the Milbank policy issued to Ms. Mattson requires that the owner's or operator's liability must arise out of the ownership, maintenance, or use of the "underinsured motor vehicle."*** In the present case, [the Estate has] admitted that the Mattson vehicle was not the underinsured motor vehicle which they allege triggered coverage. See App. at 91. Instead, they assert that the vehicle owned by Mr. Ratcliffe, which was undisputedly not involved in the accident, is the underinsured vehicle triggering coverage. ***In an attempt to expand coverage beyond the plain language of the policy, [the Estate] and the circuit court disregard the express and unambiguous language of the Milbank policy, which expressly states that the underinsured motorists coverage arises from the "ownership, maintenance, or use" of the alleged underinsured motor vehicle. Instead, the court focused on the ownership interest a permissive driver possessed in a tangential vehicle wholly unrelated to the accident at hand.***

(JA 346. Emphasis added.)

The ICA therefore held that "the circuit court erred in finding that [the Estate was] entitled to underinsured motorists coverage under the Milbank policy." (JA 350.) The ICA reversed the Order and remanded the action for "the entry of an order granting summary judgment in favor of Milbank." (JA 350.) The ICA also indicated that it did not need to, and therefore would not address Milbank's anti-stacking argument, although the ICA did note – incorrectly, in Milbank's opinion – that the issue had not been presented in the Circuit Court briefing. (JA 352.)

II. SUMMARY OF ARGUMENT

A. In response to the Estate's first assignment of error, this appeal is procedurally proper.

The ICA did not commit reversible error in allowing Milbank's appeal. Milbank's appeal was from a final appealable order, rather than an impermissible interlocutory appeal. The Circuit Court properly certified the Order as a final judgment under Rule 54(b) of the Rules of Civil Procedure. In determining that UIM coverage was available to the Estate under the Milbank

Policy, the Order was a final decision on the issue of insurance coverage and resolved Milbank's declaratory judgment claim in full. Furthermore, no just cause exists to delay consideration of the appeal of the insurance coverage determination – especially now that the ICA has reversed the Circuit Court's Order.

B. In response to the Estate's second and third assignments of error, Milbank is entitled to judgment in its favor on the question of insurance coverage under both the Milbank Policy and the West Virginia UIM statute.

The Circuit Court erred in entering summary judgment for the Estate, rather than for Milbank. The ICA correctly reversed the Circuit Court and remanded this action for an entry of judgment in Milbank's favor. Milbank is entitled to judgment in this action for two independent reasons under the Milbank Policy and the West Virginia UIM statute.

First, Mr. Ratcliffe's liability for the Accident does not "arise out of the ownership, maintenance or use" (per the Milbank Policy) or out of the "ownership, operation or use" (per the UIM statute) of Mr. Ratcliffe's vehicle, the purported underinsured motor vehicle. The Milbank Policy's requirement that there must be an "arise out of" connection between Mr. Ratcliffe's vehicle and Mr. Ratcliffe's liability is consistent with the UIM statute and is not void. The Estate cannot satisfy this requirement. Mr. Ratcliffe's vehicle was not involved in the Accident, and Mr. Ratcliffe was instead driving Ms. Mattson's vehicle. The fact that Mr. Ratcliffe had liability coverage under the Erie Policy does not mean that the Estate's UIM claim "arose out of" Mr. Ratcliffe's ownership, maintenance, operation or use of his own vehicle. As such, Milbank owes the Estate no UIM coverage for this claim.

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

West Virginia law and was properly raised before the Circuit Court. Because the Estate has already recovered liability coverage proceeds, the Estate again has no viable UIM claim.

III. STATEMENT REGARDING ORAL ARGUMENT

This appeal involves a straightforward application of well-established law regarding UIM insurance coverage. Milbank does not believe oral argument is warranted in this appeal, as this Court can simply apply the undisputed facts of the Accident to the Milbank Policy and the UIM statute. But, if the Court believes oral argument would be helpful, Milbank would welcome the opportunity to address any questions the Court may have.

IV. ARGUMENT

A. Statement of Jurisdiction

The Estate asserts in its First Assignment of Error that Milbank's appeal of the Order was procedurally improper. This assertion is wrong.

The Rules of Civil Procedure permit a court to certify that an order is a final judgment as to an issue before it, even when there are other claims pending between the parties:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the 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.

W. Va. R. Civ. P. 54(b).

It is undisputed that the Circuit Court certified the Order under Rule 54(b) as a final judgment as to the insurance coverage issues involved and for the declaratory judgment:

> **ORDERED** 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.

(JA 164.)

1. Standard of Review

West Virginia appellate courts review the determination of a Rule 54(b) certification pursuant to a two-prong test. First, the court will "scrutinize *de novo* 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[.]" Syl. Pt. 1, *Province v. Province*, 196 W. Va. 473, 478–79, 473 S.E.2d 894, 899–900 (1996). "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." *Hubbard v. State Farm Indem. Co.*, 213 W. Va. 542, 550, 584 S.E.2d 176, 184 (2003) (quoting *Province*, 196 W.Va. at 479 n.12, 473 S.E.2d at 900 n.12.)

Second, the Court examines whether there is "any just reason for delay." *Province*, 196 W. Va. at 479, 473 S.E.2d at 900. For this prong, the Court "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.'" *Id.* (citing *Curtiss–Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 12, 100 S.Ct. 1460, 1467, 64 L.Ed.2d 1, 14 (1980)).

2. The Order completely disposed of Milbank's declaratory judgment claim.

The Order completely disposed of Milbank's declaratory judgment claim as to UIM coverage under the Milbank Policy. When it comes to determining whether a claim has been disposed of under Rule 54(b), "[c]laims are separable when there is more than one possible recovery," or if "different sorts of relief" are sought." *Province,* 196 W.Va. at 479, 473 S.E.2d at 900. (Citations omitted.)

Milbank's Complaint seeks only a declaration as to coverage. (JA 001-023.) Notably absent from the Complaint is any request that the Court make a determination as to damages available to the Estate under the Milbank Policy. (*Id.*) The Estate, on the other hand, did not seek declaratory relief in the counterclaims, and instead sought monetary damages for alleged breach of contract, unfair claim settlement practices and bad faith. (JA 029-043.) The different relief sought by Milbank and the Estate confirms the separability of Milbank's claim and the propriety of Milbank's appeal.

Contrary to the Estate's position, this Court has decided a declaratory judgment insurance coverage appeal when the underlying coverage decisions have been certified as final under Rule 54(b), even though the insured's breach of contract and bad faith claims remained pending. *Erie Ins. Prop. & Cas. Co. v. Chaber*, 239 W. Va. 329, 801 S.E.2d 207 (2017). This is exactly what the ICA did, appropriately, in this case.

In *Erie v. Chaber*, an insured sued its insurer for breach of contract, bad faith and declaratory relief regarding the scope of property coverage available following a landslide. The Circuit Court bifurcated and stayed all claims other than the declaratory judgment count. *Id*. at 332, 801 S.E.2d at 210. After a bench trial on just the declaratory judgment claim, the Circuit Court found that the policy in question provided coverage; entered judgment for the insured on the declaratory judgment claim; certified that judgment as final under Rule 54(b); and continued to stay the breach of contract and bad faith claims. *Id.* The insurer appealed, and this Court decided the appeal on the merits, reversing the Circuit Court's decision on the declaratory judgment claim. *Id*. at 338, 801 S.E.2d at 216. Again, this is precisely what Milbank asked the ICA to do, and what the ICA did.[2]

[2] When the Estate filed a Motion to Dismiss regarding Milbank's appeal, arguing as herein that the appeal was interlocutory, Milbank cited and relied upon *Erie v. Chaber*. (JA 262.) Given that *Erie v. Chaber* is squarely on point, Milbank finds it astonishing that the Estate has chosen to simply ignore this authority in its Brief.

Similarly, in *National Union Fire Ins. Co. of Pittsburgh v. Miller*, 228 W. Va. 739, 743, 724 S.E.2d 343, 347 (2012), an injured plaintiff sued a purported tortfeasor for negligence and sued the tortfeasor's insurer for a declaration that the insurer would be obligated to indemnify the tortfeasor. The Circuit Court entered judgment for the plaintiff on the declaratory judgment claim, finding that the insurer would have to indemnify the tortfeasor, but the Circuit Court did not enter any amount of damages to be indemnified. *Id.* at 746, 724 S.E.2d at 350. The Circuit Court did not include Rule 54(b) language. *Id*. This Court nevertheless heard the insurer's appeal, finding that "the order is final in its nature and effect as to the issue of indemnity." *Id*. at 746-747, 724 S.E.2d at 350-351.

The ICA relied on *National Union* in finding that it had jurisdiction to hear Milbank's appeal. (JA 343.) And, like the ICA in this action, this Court in *National Union* reversed the Circuit Court's coverage decision on the declaratory judgment claim and remanded the matter to the Circuit Court for an entry of judgment in the insurer's favor. *Id*. at 748, 724 S.E.2d at 352.

Unlike *Erie v. Chaber*, the Estate at least attempts to distinguish *National Union* based on the fact that the parties therein argued 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.) 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). "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." *Id*. at Syl. Pt. 2. (Emphasis added.) Indeed, in confirming that it had jurisdiction to hear the appeal in *National Union*, this Court found, "[T]he parties argue – ***and this Court agrees*** – that the order is final in its nature and effect as to the issue of indemnity." *National Union*, 228 W.Va. at 747, 724 S.E.2d at 351. (Emphasis added.)

One of the cases relied upon by the Estate also actually supports Milbank's position. In *Erie Ins. Co. v. Dolly*, 240 W.Va. 345, 353, 811 S.E.2d 875, 884 (2018), this Court heard a Rule 54(b) appeal of a declaratory judgment insurance coverage decision, even though the insured's bad faith claims were still pending in the Circuit Court. The only difference between *Erie v. Dolly* and this action is that in *Erie v. Dolly*, judgment was entered on the declaratory judgment claim in favor of the insured, so the judgment included a damages award. *Id*. But, as between the Estate and Milbank, there would have never been a damages award on the declaratory judgment claim, because Milbank sought no such damages and the Estate brought no such claim. So, if hearing the appeal was jurisdictionally appropriate in *Erie v. Dolly*, the ICA hearing Milbank's appeal was also appropriate.

In contrast to *Erie v. Chaber*, *National Union* and *Erie v. Dolly*, the Estate's other authorities on its jurisdictional assignment of error are easily distinguishable. In *Hubbard v. State Farm Indem. Co.*, 213 W.Va. 542, 549, 584 S.E.2d 176, 183, the Circuit Court did not include Rule 54(b) certification in the subject order. In *West Virginia Employers' Mut. Ins. Co. v. Summit Point Raceway Assocs., Inc*., 228 W. Va. 360, 364, 719 S.E.2d 830, 834 (2011), the Court only included the fact that damages had been awarded as a part of the factual recitation rather than as the reasoning for the Court's decision. Indeed, in *Summit Point*, the insured's claims for bad faith and unfair trade practices remained pending in the lower court, damages unaddressed, and this Court still heard – and reversed – the insurance coverage appeal. *Id.*

Finally, the Estate's reliance on *Kinsale Insurance Co. v. JDBC Holdings, Inc.*, 31 F.4th 870 (4th Cir. 2022) is misplaced. Although federal decisions can be persuasive to a West Virginia state court, *Kinsdale*'s import here is limited given established West Virginia procedure and the differences between reviewing Rule 54(b) certifications under the Federal Rules of Civil Procedure. As above, West Virginia law calls for a two-prong test that exercises different standards of review for each prong. In contrast, the standard of review as cited by the Fourth Circuit in *Kinsale* is different: "We review a district court's Rule 54(b) certification under an abuse of discretion standard." *Id.* at 874 (citations omitted). Given the different standards of review between West Virginia courts and federal courts, and given the decisions from this Court which are contrary to *Kinsale*, such as *Erie v. Chaber*, *National Union* and *Erie v. Dolly*, federal law is not instructive on this topic.

For the foregoing reasons, the Order completely disposed of Milbank's declaratory judgment claim, such that the first prong of Rule 54(b) review is satisfied.

3. There is no just reason for delay to prevent the coverage decision from being considered by this Court.

In considering under the second prong of Rule 54(b) whether no just reason for delay exists, this Court examines "(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." *Province*, 196 W. Va. at 479, 473 S.E.2d at 900. In this case, justice favors permitting a final decision regarding insurance coverage declaratory relief before the Estate and Milbank engage in additional discovery and briefing, and potentially trial, on the issues of breach of contract, bad faith and unfair claim settlement practices.

It is undeniable that, if the Circuit Court's coverage determination is reversed, the nature of the underlying matter will change. The Estate's claims against Milbank are based on a purported presence of UIM coverage and the resultant statutory and common law claim handling duties regarding the same. (JA 030-043.) If the Milbank Policy does not provide UIM coverage for the Estate's claim – as the ICA held – then the Estate's other claims should not be viable. This is consistent with the Circuit Court's decision to grant Milbank's Motion to Stay regarding the Estate's counterclaims pending appellate review of the coverage question. (JA 302.) Such a stay is also consistent with the approach taken in *Erie v. Chaber*, in which the Circuit Court stayed the insured's breach of contract and bad faith claims pending this Court's resolution of the declaratory judgment count. *Erie*, 239 W. Va. at 332, 801 S.E.2d at 210.

The only risk for inefficiency and inequity in this action would come from this Court refusing to consider the insurance coverage issue at this point in the litigation, as the Estate urges. The ICA has already reversed the Circuit Court's coverage decision. Even if this Court determines that that decision was <u>procedurally</u> premature, how is the Circuit Court supposed to address the <u>substance</u> of the ICA decision? On remand, will the Circuit Court have to oversee discovery, dispositive motion practice, and potentially trial on the Estate's counterclaims, all the while knowing that – at least as per the ICA – the Circuit Court reached the wrong result on the threshold question of insurance coverage? Or, will the Circuit Court have to issue a new summary judgment decision, presumably consistent with the ICA's decision, only to have the Estate re-start this appeal so that the parties are right back where they are now? Neither of those processes would be efficient or equitable.

Given that the ICA has already confirmed appellate jurisdiction and reversed the Circuit Court's decision, and given that the Estate and Milbank are already before this Court on the merits of the declaratory judgment claim, no just reason for delay exists. The most equitable and efficient approach for this Court is to resolve the substance of the declaratory judgment claim with finality.

B. Summary Judgment Standard of Review

A Circuit Court's entry of summary judgment is reviewed *de novo*. Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 190, 451 S.E.2d 755, 756 (1994). Conducting a *de novo* review means giving "a new, complete and unqualified review to the parties' arguments and the record before the circuit court." *Edward S. v. Raleigh County Housing Auth.*, 248 W.Va. 458, 463, 889 S.E.2d 31, 36 (2023).

C. Standard for Summary Judgment

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Civ. R. 56(c). "Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. Pt. 4, *Painter*, 192 W.Va. at 190.

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

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

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

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

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

E. The ICA correctly reversed the Circuit Court by holding that the Milbank Policy does not provide UIM coverage for the Estate's claim, because Mr. Ratcliffe's liability for Ms. Mattson's injury does not "arise out of the ownership, maintenance or use" of Mr. Ratcliffe's vehicle.

In order to recover UIM proceeds under the Milbank Policy, the Estate must prove that Mr. Ratcliffe's liability "arise[s] out of the ownership, maintenance or use" of Mr. Ratcliffe's vehicle. The Circuit Court did not address this requirement in the Order, but the Estate cannot satisfy the same. Because no such connection exists in this case, the ICA correctly reversed the Order.

1. The Order ignored a critical component of the Milbank Policy.

In finding UIM coverage for the Estate's claim, the Circuit Court held that Mr. Ratcliffe's vehicle was an "underinsured motor vehicle" under the Milbank Policy. (JA 162.) The Circuit

Court then concluded, without further analysis, that Milbank therefore owes the Estate UIM proceeds:

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

(JA 162.)

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

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

(JA 108. Emphasis added.)

The Insuring Agreement thus has two threshold requirements for the Estate to recover UIM proceeds: (1) there must be an owner or operator of an "underinsured motor vehicle" as defined in the Milbank Policy who is liable to the Estate for bodily injury damages; and (2) that owner or operator's liability "must arise out of the ownership, maintenance or use of the * * * 'underinsured motor vehicle.'" (JA 108.)

The Circuit Court and the Estate only focus on the first requirement of there being an owner or operator of an "underinsured motor vehicle" as defined by the Milbank Policy who is liable to the Estate. Admittedly, that first requirement is satisfied in this claim. Mr. Ratcliffe had liability insurance – the Erie Policy – on his own vehicle; the Erie Policy provided liability coverage for Mr. Ratcliffe even though he was driving Ms. Mattson's vehicle at the time of the accident; and the liability coverage under the Erie Policy was insufficient to satisfy Mr. Ratcliffe's liability to the Estate. These facts satisfy the first threshold requirement for the recovery of UIM proceeds. But only the first requirement. None of these facts satisfies the second requirement for UIM recovery under the Milbank Policy, because nothing connects Mr. Ratcliffe's ownership, maintenance or use of his own vehicle to his liability to the Estate.

2. Mr. Ratcliffe's liability to the Estate does not "arise out of" his ownership, maintenance or use of an underinsured motor vehicle.

Although Mr. Ratcliffe meets the Milbank Policy's definition of an owner of an "underinsured motor vehicle," that ownership is wholly unconnected to Mr. Ratcliffe's liability to the Estate. Mr. Ratcliffe's liability to the Estate certainly does not "arise out of" his ownership, maintenance or use of his own vehicle.

In order for an injury to "arise out of" the use of a motor vehicle – as the Milbank Policy requires – there must be:

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

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

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

Carroll v. Westfield Natl. Ins. Co., 695 F.Supp.3d 732 (N.D.W.Va. 2023) further proves this point. In *Carroll*, the District Court considered whether an insured's UIM claim "resulted from the ownership, maintenance or use" of the underinsured motor vehicle. To determine whether the insured could satisfy this "resulted from" requirement, the District Court looked to this Court's "instructive guide [] for finders of fact to follow in evaluating whether an injury ***arose from*** the 'use' of a motor vehicle[.]" *Id*. at 737-738, citing Syl. Pt. 2, *Cleaver v. Big Arm Bar & Grill*, 202 W.Va. 122, 502 S.E.2d 438, 438-439 (1998). (Emphasis added.) The District Court concluded that, because there was no sufficient connection between the insured's earlier use of a vehicle and the injury suffered after he stopped using it, the injury did not "result from" the use of the vehicle. *Id.* at 737. The insured was therefore not entitled to UIM proceeds. *Id*. at 738.

As the Estate repeatedly notes, yes, Mr. Ratcliffe was the owner of an "underinsured motor vehicle" as defined by the Milbank Policy. But, contrary to the Circuit Court's summary judgment decision and the Estate's Brief, merely owning an "underinsured motor vehicle" does not satisfy the UIM requirements under the Milbank Policy. Mr. Ratcliffe's liability did not "result from" that ownership; there is no "causal connection" between the liability and his ownership; and his liability to the Estate was not a "foreseeably identifiable" result of the "normal" ownership of his own vehicle. In other words, no matter the definition used, Mr. Ratcliffe's liability did not "arise out of" his ownership of his own vehicle. Mr. Ratcliffe's vehicle was not involved in, and was in fact nowhere near, the Accident.

As the ICA agreed, *Cox v. Amick*, 195 W.Va. 608, 466 S.E.2d 459 (1995) is also "persuasive." (JA 347.) In the facts giving rise to *Cox*, four high school boys spent a morning smoking marijuana and drinking alcohol. At a gas station, one of the boys, Clifford Reed, exited the vehicle to make a purchase. The other three boys drove away from the gas station without Reed, went left of center, and collided with and killed an oncoming motorist. Reed was not the owner of the vehicle, the driver of the vehicle, or using the vehicle at the time of the accident *Id*. at 611.

The decedent's estate nevertheless asserted a UM claim based on Reed's misconduct. Although the Circuit Court allowed this claim, this Court reversed that decision. Like the Milbank Policy, the decedent's policy in *Reed* provided that UM proceeds were only recoverable for damages "***arising out of*** the ownership; maintenance; or use; of the uninsured motor vehicle." *Id.* at 616. (Emphasis added.) This Court held, pursuant to the applicable "arising out of" language in the decedent's policy:

> [T]he insured or relative may not recover damages pursuant to his or her uninsured motorists coverage from a person ***who***

> ***was not occupying an uninsured motor vehicle <u>involved in the accident</u>*** when it occurred and ***who was not the owner or driver of the uninsured motor vehicle <u>involved in the accident</u>*** even though such person may be liable to the insured or relative under other appropriate causes of action.

Id. at 618. (Emphasis added.)

Like Reed, Mr. Ratcliffe was not "occupying" the purported underinsured motor vehicle – his own vehicle – at the time of this Accident. And, like any vehicle Reed might have owned, Mr. Ratcliffe's vehicle was not "involved in the Accident." As such, *Cox* offers additional support for the conclusion that Milbank is entitled to judgment on its claim for declaratory relief, not the Estate.

The Estate's Brief cites no favorable authority on the issue of "arising out of," and no decisions which suggest that when a vehicle is parked at a tortfeasor's home, the tortfeasor's liability nevertheless has a causal connection to the ownership, maintenance or use of that vehicle. The Estate's Brief does cite a string of cases for the purported rule, "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." (App. Br. 24.) But, none of the cases cited actually say that.

Instead, the only rule from those cases relates to the use of the disjunctive "or" generally. And Milbank agrees that UIM coverage would exist if Mr. Ratliffe's liability to the Estate arose out of his ownership of his own vehicle; or out of his maintenance of his own vehicle; or out of his use of his own vehicle. But, none of those scenarios exists, because there is no "arise out of" relationship. None of the Estate's authorities excuses that.

3. The ICA correctly enforced the "arise out of" provision of the Milbank Policy.

Unlike the Circuit Court, the ICA reached the correct result on this issue. A "plain reading" of the Milbank Policy confirms that UIM coverage only exists if Mr. Ratcliffe's liability "arise[s] out of" his "ownership, maintenance, or use" of the underinsured motor vehicle. (JA 346.) Mere ownership of such a vehicle is plainly insufficient – and, according to the ICA, "wholly unrelated to the accident at hand." (JA 346.) Instead, there must be an "arise out of" connection between Mr. Ratcliffe's ownership and his liability. In holding otherwise, the Circuit Court committed reversible error, and the ICA correctly entered a decision reversing the same. The Estate as a matter of law cannot meet the "arise out of ownership, maintenance or use" requirement for Mr. Ratcliffe's vehicle to establish UIM coverage under the Milbank Policy. As such, Milbank urges this Court to affirm the ICA's decision, which in turn reversed the Order and remanded this action to the Circuit Court for an entry of judgment in Milbank's favor.

F. The "arise out of" language of the Milbank Policy does not violate West Virginia public policy.

West Virginia Code §33-6-31(b) defines an "underinsured motor vehicle" as "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." *Id*. (Emphasis added.) As the ICA correctly concluded, "This statutory provision plainly requires that the liability insurance must be applicable based on the ownership, operation or use of the underinsured motor vehicle." (JA 349.)

The Estate admitted in discovery that Ms. Mattson's vehicle is not an underinsured motor vehicle. So, the only vehicle which could give rise to such coverage under the UIM statute is Mr.

Ratcliffe's vehicle. But, consistent with the foregoing "arise out of" discussion, Mr. Ratcliffe has no liability to the Estate "with respect to the ownership, operation or use" of his own vehicle. The only liability Mr. Ratliffe has to the Estate relates to his operation of Ms. Mattson's vehicle. As such, the same coverage result is reached under the Milbank Policy and the UIM statute.

Cox, supra further confirms the propriety of the language in the Milbank Policy. In *Cox*, the Court had to determine whether an insured was entitled to UM coverage under a policy which provided:

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

Cox, 195 W.Va. at 616, 466 S.E.2d at 467 (emphasis added). No substantive difference exists between the pertinent policy language in *Cox* and that in the Milbank Policy:

Policy in *Cox*	Milbank Policy
Damages must result from an accident arising out of the: 1. ownership; 2. maintenance; or 3. use; of the uninsured motor vehicle.	The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the "uninsured motor vehicle" or "underinsured motor vehicle".

In direct contravention to the Estate's "intent and spirit of the statute" argument, this Court applied the *Cox* policy language and found that the insured was not entitled to UM coverage. *Id.* at 615-616. The Court certainly had an opportunity in *Cox* to determine that the "arise out of" requirement for coverage was void as "contrary to the intent and spirit" of West Virginia's UM / UIM statute. But, equally as certain, this Court did not avail itself of that opportunity by reaching such a result. This Court instead reached the opposite result, applying the policy language to deny

UM coverage under the *Cox* policy, and in doing so, confirming that the policy language is valid, not void.

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

The Estate cites a litany of stacking cases, which it suggests are relevant because the insured would only ever have one vehicle in an accident. (App. Br. 30.) This argument is misguided, however. The question in this case is not how much UIM coverage is available to the Estate, but whether any coverage is available. Whether Ms. Mattson insured one vehicle under the Milbank Policy or ten has nothing to do with why Mr. Ratcliffe is liable to the Estate. The question of whether Mr. Ratcliffe's liability arises out of ownership, operation, maintenance or use of his own vehicle is unaffected by stacking decisions.

The Estate also cites *Deel* for the general rule that "uninsured and underinsured motorist coverage are not always viewed in the same light or treated identically." (App. Br., 37.) As a general rule, that is true, and the ICA recognized the same. (JA 348.). In *Deel*, however, this Court enforced a UIM exclusion even though the same exclusion had been deemed void in UM coverage. *Deel*, 181 W.Va. at 462-463, 383 S.E.2d at 94-95. In other words, the difference between UM and UIM coverage was that UM coverage was broader, while UIM coverage could be more limited. This Court reasoned that insurers were less able to limit UM coverage, because

UM coverage is required by statute; but insurers were more able to limit UIM coverage, because UIM coverage is optional. *Id*.

The Estate does not suggest any reason why the specific coverage issues in this case should be construed differently for UIM coverage versus for UM coverage. While the UIM statute is remedial in nature – *Adkins*, 201 W.Va. at 153, 494 S.E.2d at 920 – so is the UM statute. *Hamric v. Doe*, 201 W.Va. 615, 619, 495 S.E.2d 619, 621 (1997). Moreover, the Estate certainly does not suggest any reason why discretionary UIM coverage provisions would need to be interpreted more broadly than statutorily required UM coverage similar provisions. If anything, UM coverage would be broader than UIM coverage – which is not the result the Estate seeks from *Cox*.

The reason the Estate offers no such suggestions is that there is no reason why – on the issue of whether a tortfeasor's liability needs to have some causal connection to the ownership, operation, maintenance or use of his own vehicle – this Court should take a more expansive view of UIM coverage in this case than it took of UM coverage in *Cox*. As the cases cited herein show, this Court and others interpret the coverage issue in this case the same way, whether discussing liability coverage, UIM coverage, or UM coverage. Milbank urges the Court to take a similar approach in applying the "arise out of" provision in Milbank's favor, as the ICA did.

G. The anti-stacking language in the Milbank Policy prevents the Estate from recovering UIM proceeds after receiving liability coverage proceeds under the same policy, which is a second reason why Milbank does not owe the Estate UIM proceeds.

1. The anti-stacking provision of the Milbank Policy precludes the Estate's UIM claim.

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

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

Affirming the Circuit Court, this Court agreed with the insurer's UIM denial. According to this Court, the policy's definition of an "underinsured motor vehicle" "effectively precludes an insured, whose vehicle is insured under the policy's liability coverage, from also collecting UIM benefits with regard to the same vehicle involved in the same covered occurrence." *Id*. at 97-98. And this Court took no issue with this result. *Id*. at 98.

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

(1992) (same). See also, Syl. Pt. 3, *Payne*, 195 W.Va. at 502 (precluding stacking liability coverages for multiple vehicles, when only one involved in accident).

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

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

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

2. Milbank preserved the issue of the anti-stacking provision.

This anti-stacking argument was before the Circuit Court prior to its entry of summary judgment in favor of the Estate. In Milbank's Complaint, the language was both cited (A.R. 007) and asserted as a separate count on which declaratory judgment should be entered (A.R. 010-011). The language was then in Milbank's Motion for Summary Judgment briefing (A.R. 058), as was the primary case upon which Milbank relies for this issue, *Findley v. State Farm* (A.R. 067). Admittedly, "the failure of a litigant to assert a right in the trial court likely will result in the imposition of a procedural bar to an appeal of that issue." *State v. Miller*, 194 W.Va. 3, 17, 459 S.E.2d 114 (1995). In this instance, however, Milbank did assert the anti-stacking language to preserve the issue for this Court's consideration.

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

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

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

For this second, separate reason, the Circuit Court should have entered judgment in favor of Milbank, rather than in favor of the Estate.

V. <u>CONCLUSION</u>

For the foregoing reasons, Milbank requests that this Court affirm the decision of the ICA. As the ICA concluded, this matter should be remanded to the Circuit Court for an entry of judgment in Milbank's favor on its claim for declaratory relief.

Respectfully submitted,

Milbank Insurance Company

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WEST VIRGINIA SUPREME COURT OF APPEALS
DOCKET NO. 24-419

Nick Showalter and Kelly Mattson, as Co-Administrators of Sierra Mattson,	:	
Appellants / Petitioners,	:	
vs.	:	On Appeal from the Intermediate Court of Appeals No. 23-ICA-213
Milbank Insurance Company,	:	
Appellee / Respondent	:	

CERTIFICATE OF SERVICE

I, William M. Harter, hereby certify that on the 19th day of December, 2024, I electronically filed the foregoing "***Brief of Appellee / Respondent***" with the Clerk of the Court using File & Serve Express filing system which will send notification to the following:

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