IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2026 Term

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 24-419

NICK SHOWALTER and KELLY MATTSON, as
Co-Administrators of the Estate of Sierra Mattson,

Petitioners,

v.

MILBANK INSURANCE COMPANY,

Respondent.

Appeal from the Intermediate Court of Appeals of West Virginia
No. 23-ICA-213
(Circuit Court of Ohio County, Civil Action No. CC-35-2020-C-208)

REVERSED AND REMANDED

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JUSTICE FLANIGAN delivered the Opinion of the Court.
CHIEF JUSTICE BUNN and JUSTICE TRUMP dissent and reserve the right to file dissenting opinions.

SYLLABUS BY THE COURT

1. "On appeal of a decision from the Intermediate Court of Appeals of West Virginia, the Supreme Court of Appeals of West Virginia applies a de novo standard of appellate review to a circuit court's entry of summary judgment." Syl. Pt. 1, *Moorhead v. W. Va. Army Nat'l Guard*, 251 W. Va. 600, 915 S.E.2d 378 (2025).

2. "Where an order granting summary judgment to a party completely disposes of any issues of liability as to that party, the absence of language prescribed by Rule 54(b) of the West Virginia Rules of Civil Procedure indicating that 'no just reason for delay' exists and 'directi[ng] . . . entry of judgment' will not render the order interlocutory and bar appeal provided that this Court can determine from the order that the trial court's ruling approximates a final order in its nature and effect." Syl. Pt. 2, *Durm v. Heck's, Inc*., 184 W. Va. 562, 401 S.E.2d 908 (1991).

3. "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)." Syl. Pt. 4, *Pristavec v. Westfield Ins. Co.*, 184 W. Va. 331, 400 S.E.2d 575 (1990).

4. "Insurers may incorporate such terms, conditions and exclusions in an automobile insurance policy as may be consistent with the premium charged, so long as any such exclusions do not conflict with the spirit and intent of the uninsured and underinsured motorists statutes." Syl. Pt. 3, *Deel v. Sweeney*, 181 W. Va. 460, 383 S.E.2d 92 (1989).

5. "When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute." Syl. Pt. 5, *State v. Gen. Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 107 S.E.2d 353 (1959).

6. A provision in a motor vehicle insurance policy that conditions the availability of underinsured motorist coverage to an insured by requiring the owner or operator of the underinsured motor vehicle's "liability" for the damages to "arise out" of the ownership, maintenance or use of the underinsured motor vehicle is more restrictive than West Virginia Code § 33-6-31(b)'s statutory requirements. Such provision is void as against public policy and unenforceable to that extent.

FLANIGAN, Justice:

Petitioners Nick Showalter and Kelly Mattson, as Co-Administrators of the Estate of Sierra Mattson (collectively, "the Estate"), appeal the decision of the Intermediate Court of Appeals ("ICA") reversing the circuit court's award of summary judgment to the Estate in a declaratory judgment action filed by respondent Milbank Insurance Company ("Milbank"). The circuit court concluded that underinsured motorist ("UIM") coverage is available to the Estate under the Milbank policy because the at-fault driver's vehicle—which was not involved in the underlying automobile accident—qualified as an "underinsured motor vehicle" under West Virginia Code § 33-6-31(b). The ICA reversed the circuit court's order, concluding that UIM coverage was unavailable because the Milbank policy's UIM endorsement requires the liability of the underinsured owner or operator to "arise out of the ownership, maintenance or use" of the underinsured vehicle, and remanded with instructions to enter summary judgment for Milbank. The Estate appealed to this Court.

We conclude that UIM coverage is available because the at-fault driver's vehicle meets the definition of an "underinsured motor vehicle" under West Virginia Code § 33-6-31(b). Further, to the extent that Milbank's UIM endorsement runs afoul of the language embodied in West Virginia Code § 33-6-31(b), it is void as against public policy. Accordingly, we reverse the decision of the ICA and remand to the circuit court to reinstate its order granting summary judgment to the Estate on the issue of UIM coverage.

I. FACTS AND PROCEDURAL HISTORY

On November 23, 2019, Caleb Ratcliffe drove a Hyundai Accent owned by Sierra Mattson the wrong way on Ohio State Route 7 and collided head-on with a vehicle operated by Autumn Day. Ms. Mattson was a front-seat passenger in her own vehicle.[1] Five people died, including Mr. Ratcliffe and Ms. Mattson. Mr. Ratcliffe was driving with Ms. Mattson's permission. The accident was undoubtedly Mr. Ratcliffe's fault—he was speeding against oncoming traffic—and no fault was attributed to Ms. Day.

Ms. Mattson's vehicle was insured under a policy of insurance issued by Milbank. Mr. Ratcliffe separately owned his own vehicle which was insured under a policy of insurance issued by Erie Insurance Property and Casualty Company ("Erie"); his vehicle was located at his home and was undisputedly not involved in the accident.

The Estate filed claims against the liability coverage afforded by both the Milbank and Erie policies. Both companies tendered policy limits to be split among the multiple claimants; the Estate received $120,000 out of the pool of liability proceeds tendered,[2] which it contends was insufficient to satisfy Ms. Mattson's damages.

[1] Ms. Mattson was a resident of Wheeling, West Virginia.

[2] Both the Milbank and Erie policies had liability limits of $100,000 per person/$300,000 per accident.

The Estate then filed a claim for benefits under Ms. Mattson's Milbank UIM policy, treating Mr. Ratcliffe's Erie-insured (uninvolved) vehicle as the "underinsured motor vehicle." Milbank denied the claim.

In October 2020, Milbank filed a declaratory judgment complaint seeking a declaration that the Milbank policy did not provide UIM coverage to the Estate, asserting three separate coverage defenses: (1) the policy's "family use" exclusion, which provides that a vehicle owned or used by the insured or family members does not qualify for UIM coverage under the policy; (2) a provision in the UIM endorsement requiring the underinsured motorist's "liability" to "arise out of the ownership, maintenance or use" of the underinsured vehicle; and (3) the policy's "duplicate payment" provision which precludes coverage for the "same elements of loss" under both the liability and UIM coverages available under the policy. The Estate filed a counterclaim alleging breach of contract, unfair settlement practices, and bad faith.[3] After discovery, the parties filed cross-motions for summary judgment as to the declaratory judgment complaint; Milbank raised

[3] The Milbank UIM policy limits are $25,000 per person/$50,000 per accident; however, the Estate alleges in its counterclaim that the UIM selection/rejection forms were defective. As a result, it seeks coverage amounts equivalent to the liability limits contained in the Milbank policy. *See* W. Va. Code § 33-6-17 ("Any insurance policy, rider, or endorsement hereafter issued and otherwise valid which contains any condition or provision not in compliance with the requirements of this chapter, shall not be thereby rendered invalid but shall be construed and applied in accordance with such conditions and provisions as would have applied had such policy, rider, or endorsement been in full compliance with this chapter.").

only the family use exclusion and the language in the UIM endorsement in support of its motion.

In April 2023, the circuit court granted summary judgment to the Estate, finding UIM coverage is available under the Milbank policy. It held that Mr. Ratcliffe's vehicle qualified as an underinsured motor vehicle under both West Virginia Code § 33-6-31(b) and the Milbank policy. The circuit court found no policy provision requiring the underinsured vehicle to be involved in the accident and concluded that Mr. Ratcliffe's ownership of the underinsured (Erie-insured) vehicle was sufficient to trigger UIM coverage. The circuit court deemed this result consistent with the statute and its public policy. It also rejected the applicability of the family use exclusion in cursory fashion.

Citing West Virginia Rule of Civil Procedure 54(b),[4] the circuit court's order provides that it "constitutes the entry of a final judgment as to the issues of insurance coverage and declaratory judgment[.]" The circuit court then stayed the residual counterclaims pending Milbank's appeal to the ICA.

[4] Rule 54(b) provides, in pertinent part:

> **Judgment Upon Multiple Claims or Involving Multiple 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.

At the ICA, Milbank argued only that it owed no UIM coverage in this case because Mr. Ratcliffe's vehicle was not involved in the accident, and, for the first time, that the policy's duplicate payments provision barred coverage. Milbank did not renew its arguments on the policy's family use exclusion.

The Estate moved to dismiss the appeal arguing the ICA lacked jurisdiction because the circuit court's order was interlocutory. It argued that because no damages were awarded to the Estate, the judgment was neither "final" nor satisfied Rule 54(b), irrespective of the circuit court's Rule 54(b) certification. *See Milbank Ins. Co. v. Showalter*, 250 W. Va. 391, 395, 903 S.E.2d 260, 264 (W. Va. Ct. App. 2024). However, the ICA determined that it had jurisdiction to hear the appeal because the order "disposed of the coverage issue completely and left nothing else to accomplish on the subject of coverage applicability[,]" satisfying Rule 54(b). *Id*. at 395–96, 903 S.E.2d at 264–65.

The ICA reversed the circuit court's grant of summary judgment to the Estate, concluding that UIM coverage under the Milbank policy was unavailable pursuant to the language in the UIM endorsement. *Id*. at 393, 903 S.E.2d at 262. The ICA relied on Milbank policy's requirement that, to trigger UIM coverage, the underinsured "owner's or operator's liability . . . must arise out of the ownership, maintenance or use" of the vehicle. The ICA found that the circuit court's coverage determination erroneously focused on "the ownership interest a permissive driver [Mr. Ratcliffe] possessed in a tangential vehicle

wholly unrelated to the accident[.]" *Id*. at 397, 903 S.E.2d at 266. The ICA further rejected any purported conflict between the language in the Milbank UIM endorsement and West Virginia Code § 33-6-31(b)'s definition of "underinsured motor vehicle" and found that the policy language was the "starting and ending point" to ascertain the available coverage. *Id.* at 398, 903 S.E.2d at 267.[5] This appeal followed.

II. STANDARD OF REVIEW

With respect to the merits of the circuit court's award of summary judgment on the declaratory judgment action, we have held that "[o]n appeal of a decision from the Intermediate Court of Appeals of West Virginia, the Supreme Court of Appeals of West Virginia applies a de novo standard of appellate review to a circuit court's entry of summary judgment." Syl. Pt. 1, *Moorhead v. W. Va. Army Nat'l Guard*, 251 W. Va. 600, 915 S.E.2d 378 (2025); *see also* Syl. Pt. 3, *Cox v. Amick*, 195 W. Va. 608, 466 S.E.2d 459 (1995) ("A circuit court's entry of a declaratory judgment is reviewed de novo.").

III. DISCUSSION

A. Rule 54(b) Certification

The Estate first argues that Milbank's appeal of the declaratory judgment order is improper as it lacks the finality contemplated under Rule 54(b). It contends that

[5] Finding the coverage issue dispositive, the ICA declined to reach Milbank's duplicate payment defense; however, it noted that Milbank failed to present that argument before the circuit court, and the issue would be deemed to have been waived. *Showalter*, 250 W. Va. at 399 n.10, 903 S.E.2d at 268 n.10.

the absence of a damages award for the associated counterclaims for breach of contract, unfair claims practices, and bad faith precludes the use of Rule 54(b) to obtain review of the underlying coverage determination. The Estate relies on cases where the Rule 54(b) order included an award of damages or where the Court declined to review Rule 54(b)-certified orders that pertained to "liability" only and left damages pursuant to that liability unresolved.[6] Conversely, Milbank argues that the Court routinely accepts Rule 54(b)-certified declaratory judgment orders resolving insurance coverage issues when they present the finality of the action required under Rule 54(b).[7] As explained below, because the declaratory judgment on appeal completely resolves Milbank's entire claim against the Estate regarding the availability of UIM coverage, we find no error in the circuit court's certification that it should be afforded immediate review under Rule 54(b).

The circuit court clearly intended to permit the parties to seek immediate review of the declaratory judgment under Rule 54(b). The order states that "pursuant to

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[6] *See, e.g.*, *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."); *C & O Motors, Inc. v. W. Va. Paving, Inc*., 223 W. Va. 469, 677 S.E.2d 905 (2009) (finding appeal of partial summary judgment ruling as to liability only on single claim of negligence improperly certified under Rule 54(b)).

[7] *See, e.g.*, *Erie Ins. Prop. & Cas. Co. v. Chaber*, 239 W. Va. 329, 801 S.E.2d 207 (2017) (reviewing insurance coverage determination in favor of insured pursuant to Rule 54(b) where breach of contract, fraud, and associated claims remained); *Nat'l Union Fire Ins. Co. of Pittsburgh PA v. Miller*, 228 W. Va. 739, 724 S.E.2d 343 (2012) (reviewing final ruling on insurance coverage determination even in absence of Rule 54(b) language).

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." As noted, the circuit court subsequently stayed the action pending appeal to the ICA, further signaling its belief that its ruling was appropriate for appellate review without delay and, importantly, that the remainder of the case should not proceed until that review was complete. "[A]fter determining that immediate appellate review under Rule 54(b) is warranted . . . the circuit court's certification is entitled to substantial deference, disrupted only when 'clearly unreasonable.'" *Hopkins v. Sutphin*, 253 W. Va. 372, __, 931 S.E.2d 772, 783 (2026) (quoting Syl. Pt. 1, in part, *Province v. Province*, 196 W. Va. 473, 473 S.E.2d 894 (1996)).

Nonetheless, the Estate claims that the judgment lacks finality in "nature and effect" because it contains no award of damages for their remaining counterclaims for breach of contract, unfair claims practices, and bad faith—all of which are premised, at least to some degree, on Milbank's denial of UIM coverage. *See Hopkins*, 253 W. Va. at __, 931 S.E.2d at 782 (reiterating standard for Rule 54(b) review as whether order "approximate[s] a final order in its nature and effect and [whether] there [is] cause to render it immediately appealable" (quoting *Province*, 196 W. Va. at 478–79, 473 S.E.2d at 899–900)). Yet, there is no question that Milbank's declaratory judgment complaint constitutes the entirety of its claim against the Estate and does not itself contemplate an award of damages—regardless of the prevailing party—but rather seeks only a legal determination of the availability of UIM coverage. *See Province*, 196 W. Va. at 479, 473 S.E.2d at 900 ("[I]f 'different sorts of relief' are sought . . . . claims are 'separately enforceable' and

subject to Rule 54(b) certification even if they arise out of a single transaction or occurrence." (citations omitted) (footnote omitted)).

Because the nature of the claim underlying the order on appeal lends itself so readily to the compartmentalized partial judgment contemplated under Rule 54(b), the Estate relies on cases where damages were also awarded with regard to the declaratory judgment. But this reliance is misplaced. Our recognition that those courts proceeded to award damages does not signify a tacit holding that all Rule 54(b)-certified orders must include a damages award to be final in "nature and effect." Careful review of those cases reveals that the inclusion of a damages award was incidental to, and not determinative of, the propriety of Rule 54(b) certification. *See, e.g.*, *Erie Ins. Co. v. Dolly*, 240 W. Va. 345, 349, 811 S.E.2d 875, 879 (2018) (awarding damages for mandatory minimum uninsured motorist coverage where insurer improperly denied such coverage and damages were admittedly in excess of the mandatory minimum); *W. Va. Emps.' Mut. Ins. Co. v. Summit Point Raceway Assocs., Inc*., 228 W. Va. 360, 719 S.E.2d 830 (2011) (awarding damages for settlement and defense of deliberate intent lawsuit for which defense and indemnity was improperly denied); *Hubbard v. State Farm Indem. Co*., 213 W. Va. 542, 584 S.E.2d 176 (2003) (awarding damages incurred pursuant to default judgment against insured whose insurer improperly refused to indemnify and defend).

The instant case—like so many cases seeking declaratory judgment as to the availability of insurance coverage—does not automatically trigger an insurer's indemnity

for a sum certain. Even as to the circuit court's conclusion that UIM coverage under the Milbank policy is available to the Estate, the Estate asserts in its counterclaim that it is entitled to greater coverage due to a defective UIM rejection/selection form—an issue that was separately pleaded but has yet to be litigated. *See supra* n.3. Moreover, the Estate concedes that the damages to which it is entitled pursuant to the UIM coverage, as well as its entitlement to damages of any sort for the counterclaims, remains to be litigated. The presence or absence of damages resulting from a separate cause of action premised, in whole or in part, upon the outcome of the declaratory judgment does not undermine the finality and reviewability of the declaratory judgment ruling itself. Unlike cases where the partial judgment is *intertwined* with facts or legal theories that remain unlitigated, declaratory judgment as to the issue of insurance coverage in this and similar cases is the independent, foundational legal determination upon which the remaining claims largely rise or fall.[8] While the former lacks finality and subverts the use of Rule 54(b) review, the latter is often well-suited to immediate review in the interests of judicial economy.

It is this distinction that the Court underscored in *National Union Fire Insurance Co. of Pittsburgh, Pa. v. Westlake Chemical Corp.*, 249 W. Va. 575, 900 S.E.2d 1 (2024). In *Westlake*, we declined to review the circuit court's declaratory judgment ruling on the applicability of certain exclusions in an insurance policy. Notably, the order

[8] There are instances, of course, where the associated unfair claims practices or bad faith counts allege conduct that is not dependent upon the correctness of the insurer's coverage determination.

on appeal included no Rule 54(b) certification language, but we reviewed the substance of the order to determine if it nevertheless fulfilled the requirements for review under the collateral order doctrine. *Id*. at 584, 900 S.E.2d at 10. We concluded that the particular insurance coverage decisions rendered in the declaratory judgment action were far from final, as they were entirely dependent on fact-intensive causation determinations yet to be made: "The applicability of any of the policy exclusions at issue, which is the focus of the declaratory judgment count, is dependent on a determination of causation, one of many issues which are not yet resolved in this case." *Id*. at 582, 900 S.E.2d at 8. In fact, we emphasized that the court's declaratory judgment order may be subject to reconsideration, noting that "the applicability of any coverage exclusions to the damages incurred by the respondents rests on future resolution of factual matters" and further explaining in a footnote that when "causation is finally determined in this case, the circuit court could, if warranted, reconsider its orders on the coverage issues[.]" *Id*. at 583–84 & n.13, 900 S.E.2d at 9–10 & n.13; *see also Hopkins*, 253 W. Va. at ___, 931 S.E.2d at 783 (rejecting Rule 54(b) certification where "issues are so common and overlapping that . . . the still-pending claims sufficiently encompass those before us and are pleaded in the alternative to those other causes of action.").

A review of the foregoing caselaw demonstrates that no blanket rule renders declaratory judgments involving insurance coverage reviewable per se under Rule 54(b). Rather, the propriety of Rule 54(b) review rests on the particular facts and circumstances of each case. Here, the declaratory judgment order completely disposed of Milbank's claim

against the Estate related to UIM coverage. We therefore conclude that the order is reviewable under Rule 54(b).

B. Underinsured Motorist Coverage Determination

Turning to the merits of the declaratory judgment, we begin with the long-recognized concept that the purpose of UIM coverage is to "enable *the insured to protect himself*, if he chooses to do so, against losses occasioned by the negligence of other drivers who are underinsured." *Progressive Max Ins. Co. v. Brehm*, 246 W. Va. 328, 335, 873 S.E.2d 859, 866 (2022) (quoting *Deel v. Sweeney*, 181 W. Va. 460, 463, 383 S.E.2d 92, 95 (1989)). Indeed, we have held that

> *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.

Syl. Pt. 1, in part, *Alexander v. State Auto. Mut. Ins. Co.*, 187 W. Va. 72, 415 S.E.2d 618 (1992) (emphasis added) (quoting Syl. Pt. 4, *State Auto. Mut. Ins. Co. v. Youler*, 183 W. Va. 556, 396 S.E.2d 737 (1990)).[9]

[9] The public policy expressed in West Virginia Code § 33-6-31(b) is that uninsured and underinsured motorist coverage is person oriented, not vehicle oriented. *See* Richard A. Lord, *Williston on Contracts* § 49:35 (4th ed. May 2026 update) ("Uninsured and underinsured insurance provide 'first-party' coverage that is personal and portable, following the insured, rather than the vehicle.").

The Estate argues that the ICA erred by concluding that Milbank's UIM endorsement's language was preeminent and renders coverage inapplicable. The Estate contends that Mr. Ratcliffe's vehicle qualifies as an "underinsured motor vehicle" under both the statutory and policy definitions and that nothing in those definitions requires the vehicle to be involved in the accident. The Estate further argues that the UIM endorsement's language—requiring Mr. Ratcliffe's "liability" to "arise out of the ownership, maintenance or use" of his personal vehicle—runs afoul of the language and remedial public policy embodied in West Virginia Code § 33-6-31(b).

Milbank agrees that its policy and West Virginia Code § 33-6-31(b) define "underinsured motor vehicle" similarly.[10] West Virginia Code § 33-6-31(b) provides, in relevant part:

The Michigan Supreme Court examined the history and philosophy of underinsured motorist coverage and cogently explained that underinsured motorist coverage focuses on "the insured," and not on a particular insured vehicle. *Bradley v. Mid-Century Ins. Co*., 294 N.W.2d 141, 145 (Mich. 1980). As the court said, "[t]he coverage is portable: The insured and family members are covered not only when occupying the covered vehicle, but also when in another automobile, and when on foot, on a bicycle or even sitting on a porch." *Id*. Once insureds—people like Ms. Mattson in this case—purchase underinsured motorist coverage, "they are insured no matter where they are injured. They are insured when injured in an owned vehicle named in the policy, in an owned vehicle not named in the policy, in an unowned vehicle, on a motorcycle, on a bicycle, whether afoot or on horseback or even on a pogo stick." *Id.* at 152.

[10] The Milbank policy defines "underinsured motor vehicle" as a vehicle "to which a liability bond or policy applies at the time of the accident" without modifiers regarding "ownership, operation or use":

> "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).

However, Milbank relies on its policy's UIM endorsement which conditions the availability of UIM coverage on accidents where "[t]he owner's or operator's liability . . . arise[s] out of the ownership, maintenance or use" of the underinsured vehicle:

> **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[.]"*

> **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.

(Emphasis added).

The declaratory judgment action turns on the significance of the difference between the wording in the Milbank UIM endorsement—conditioning coverage on whether the underinsured owner or operator's "liability" "arise[s] out of the ownership, maintenance or use of the . . . 'underinsured motor vehicle'"—and West Virginia Code § 33-6-31(b)'s broader language requiring only that an underinsured motorist's "liability *insurance*" be made "*applicable*" with respect to the vehicle's ownership, operation or use. *Id*. (emphasis added).

The Estate argues that Milbank's UIM endorsement narrowing UIM coverage is void to the extent that it conflicts with West Virginia Code § 33-6-31(b). *See* W. Va. Code § 33-6-17 ("Any insurance policy, rider, or endorsement hereafter issued and otherwise valid which contains any condition or provision not in compliance with the requirements of this chapter, shall not be thereby rendered invalid but shall be construed and applied in accordance with such conditions and provisions as would have applied had such policy, rider, or endorsement been in full compliance with this chapter."); *Gibson v. Northfield Ins. Co*., 219 W. Va. 40, 46–47, 631 S.E.2d 598, 604–05 (2005) ("Provisions in an insurance policy that are more restrictive than statutory requirements are void and ineffective as against public policy."). The Estate relies on Syllabus Point 4 of *Pristavec v. Westfield Ins. Co.*, 184 W. Va. 331, 400 S.E.2d 575 (1990), wherein we held that: "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.'" (Quoting Syl. Pt. 7, in part, *Perkins v. Doe*, 177 W. Va. 84, 350 S.E.2d 711 (1986)). With respect to underinsured motorist coverage, this Court has concluded that

> the legislature has articulated a public policy of full indemnification or compensation underlying both uninsured and underinsured motorist coverage in the State of West Virginia. That is, the preeminent public policy of this state in uninsured or underinsured motorist cases is that the injured person be fully compensated for his or her damages not compensated by a negligent tortfeasor, up to the limits of the uninsured or underinsured motorist coverage.

Youler, 183 W. Va. at 564, 396 S.E.2d at 745.

In contrast, Milbank notes that this Court has also made it clear that "[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." *Deel*, 181 W. Va. 460, 383 S.E.2d 92, Syl. Pt. 3. Milbank argues that its UIM endorsement is permissible under *Deel* because it does not conflict with the statutory definition of "underinsured motorist," which contemplates that the applicability of liability insurance is triggered by "ownership, operation or use" of the underinsured vehicle. Milbank states that the UIM endorsement imposes two requirements: an owner/operator of an underinsured motor vehicle who is liable, *and* liability that "arise[s] out of" that vehicle's ownership, maintenance, or use; and only the first is met here.

Milbank emphasizes that the "only liability Mr. Ratcliffe has to the Estate relates to his operation of Ms. Mattson's vehicle[,]" not the ownership of his.[11]

The flaw in Milbank's argument is that it treats the policy's UIM endorsement and West Virginia Code § 33-6-31(b) as coextensive. They are not. The policy endorsement is subservient to West Virginia law and must comply with our UIM insurance statute. *See Perkins*, 177 W. Va. at 87, 350 S.E.2d at 714 ("A contractual endorsement cannot rise higher than the public policy of West Virginia, explicitly established through statute by the Legislature."); *Pristavec*, 184 W. Va. at 337, 400 S.E.2d at 581 ("Analyzing *W.Va. Code*, 33-6-31(b) in its entirety, we will not ascribe to the legislature an intent to 'shortchange' the public by an overly restrictive definition of an 'underinsured motor vehicle.' An overly restrictive definition of that term would be one which is inconsistent with the preeminent public policy of the statute as a whole, specifically, the full compensation of the injured party for his or her damages not compensated by a negligent tortfeasor, up to the limits of the underinsured motorist coverage.").

As noted above, Milbank's UIM endorsement requires that "[t]he owner's or operator's liability for these damages must arise out of the ownership, maintenance or use

[11] Milbank relies on *Cox v. Amick*, a decision which addressed a similar issue in the uninsured motorist ("UM") context, albeit with markedly different circumstances and arguments. 195 W. Va. at 608, 466 S.E.2d at 459. Because the issues in *Cox* fail to approximate the arguments advanced here, we find *Cox* of little utility.

of the . . . underinsured motor vehicle." The Milbank UIM endorsement language plainly conditions UIM coverage on the involvement of the underinsured vehicle.[12] In an attempt to limit the availability of UIM coverage, Milbank has substituted its UIM endorsement's requirement in place of West Virginia Code § 33-6-31(b)'s provision that requires only that "there is liability insurance applicable at the time of the accident." However, West Virginia Code § 33-6-31(b) is not susceptible to the attempts of the insurer to limit UIM protection. *See* W. Va. Code § 33-6-17; *Gibson*, 219 W. Va. at 46–47, 631 S.E.2d at 604–05.[13]

We hereby hold that a provision in a motor vehicle insurance policy that conditions the availability of underinsured motorist coverage to an insured by requiring the

[12] Rather than analyzing this distinction, the ICA declared the policy's language the "starting and ending point" of the coverage determination and concluded that because Mr. Ratcliffe's "liability" arose from his "use" of *Ms. Mattson's* vehicle, rather than his own, it failed to satisfy the policy requirement that his liability arise from the "ownership, maintenance or use" of his allegedly underinsured vehicle. *Milbank*, 250 W. Va. at 398, 903 S.E.2d at 267.

[13] *See also Taylor v. Travelers Indem. Co. of Am.*, 9 P.3d 1049, 1054 (Ariz. 2000) ("As a result of the broad, remedial interpretation we have given the statute mandating UM and UIM coverage, we have long held that exceptions to coverage not permitted by the statute are void. We found the 'other vehicle' exclusion void for UM and UIM coverage. We found intra-policy offset of UM and liability benefits void. We found the 'furnished for regular use' UIM exclusion void. Finally, we found that a UIM excess/escape clause and prorata limit reduction clause violated public policy." (citations omitted)); *Farmers Ins. Exch. v. Kretzer*, 541 P.3d 613 (Colo. App. 2023) (stating that automobile policy's driver exclusion from UM/UIM coverage can only be voided if it dilutes, conditions, or limits statutorily mandated coverage); *Bohme v. PEMCO Mut. Ins. Co.*, 899 P.2d 787, 789 (Wash. 1995) (explaining that a UIM exclusion must be struck if it conflicts with state statute or public policy.).

owner or operator of the underinsured motor vehicle's "liability" for the damages to "arise out" of the ownership, maintenance or use of the underinsured motor vehicle is more restrictive than West Virginia Code § 33-6-31(b)'s statutory requirements. Such provision is void as against public policy and unenforceable to that extent.

Mr. Ratcliffe's vehicle plainly qualifies as an underinsured motor vehicle under West Virginia Code § 33-6-31(b) because his "ownership" of a vehicle with applicable Erie liability coverage—coverage that proved insufficient to pay the full amount the Estate is legally entitled to recover as damages—is what triggers Mattson's UIM coverage. West Virginia Code § 33-6-31(b) defines an "underinsured motor vehicle" as one "with respect to the ownership, operation or use of which there is liability insurance applicable at the time of the accident" and because of "payments to others injured in the accident" the amount of available liability insurance has been reduced to an amount less "than limits the insured carried for underinsured motorists' coverage." Our canons of statutory construction require that: "When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute." Syl. Pt. 5, *State v. Gen. Daniel Morgan Post No. 548, V.F.W.*, 144 W. Va. 137, 107 S.E.2d 353 (1959).[14]

[14] Our dissenting colleagues maintain that it was not Mr. Ratcliffe's *ownership* of his vehicle that rendered his Erie policy's liability insurance "applicable" to the underlying accident. Rather, they reason that Mr. Ratcliffe's liability insurance was made "applicable" through Erie's contractual obligation to provide such coverage. The dissenters cite authority for the general proposition that liability coverage may extend to *non-owned*

"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," *Pristavec*, 184 W. Va at 332, 400 S.E.2d at 576, Syl. Pt. 5, in part, we conclude that the Estate is entitled to UIM coverage under a plain reading of West Virginia Code § 33-6-31(b). First, Ms. Mattson was an insured who paid premiums to Milbank for UIM coverage.[15] Second, the Estate is legally entitled to recover from Mr. Ratcliffe; Milbank concedes that Mr. Ratcliffe was at fault, and an insured establishes entitlement merely by establishing that the fault of the underinsured motorist gave rise to damages and the extent of those damages. *See Jenkins v. City of Elkins*, 230 W. Va. 335, 347, 738 S.E.2d 1, 13 (2012) (An insured establishes entitlement merely by establishing "that the fault of the uninsured motorist gave rise to damages and the extent of those damages"). Third, Mr. Ratcliffe owned an underinsured motor vehicle as defined by West Virginia Code § 33-6-31(b).

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vehicles, depending on the policy between the insurer and the insured. However, Mr. Ratcliffe *owned* the Erie-insured vehicle. Therefore, his liability insurance was made "applicable" through his "ownership," plain and simple. The dissenters would have us ignore West Virginia Code § 33-6-31(b)'s clear directive. That is reason enough to reject their position.

[15] West Virginia Code § 33-6-31(c), provides, in relevant part: "As used in this section, the term . . . 'named insured' means the person named as such in the declarations of the policy or contract . . . and the term 'insured' means the named insured . . . while in a motor vehicle or otherwise[.]"

Therefore, the ICA erred when it concluded that Mr. Ratcliffe's vehicle did not qualify as an "underinsured motor vehicle" under West Virginia Code § 33-6-31(b). We reverse its decision and remand this case to the circuit court to reinstate its summary judgment order in favor of the Estate on the issue of UIM coverage.[16]

IV. CONCLUSION

For the reasons stated above, we reverse the June 7, 2024, decision of the ICA and remand this case to the circuit court for further proceedings consistent with this opinion.

Reversed and
remanded.

[16] We agree with the ICA that Milbank failed to preserve for appellate review its alternative argument that UIM coverage is unavailable due to the "anti-stacking" language in its policy, which we assume to be a reference to the "duplicate payment" provision in its policy. *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.*, 206 W. Va. 333, 349 n.20, 524 S.E.2d 688, 704 n.20 (1999).").