FILED
JUN 03 2015
CLERK
SUPREME COURT

COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2014-SC-000265-DG

COUNTRYWAY INSURANCE COMPANY — APPELLANT

VS.

UNITED FINANCIAL CASUALTY COMPANY
AND SHARON BARTLEY — APPELLEES

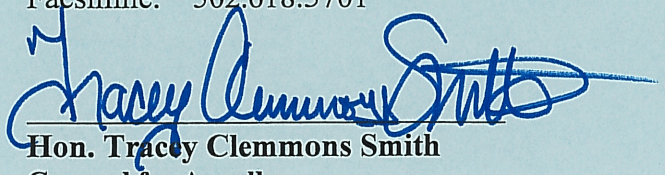
RESPONSE BRIEF OF APPELLEE UNITED FINANCIAL CASUALTY COMPANY

ON APPEAL FROM THE
KENTUCKY COURT OF APPEALS
CASE NO. 2012-CA-002051

CERTIFICATE OF SERVICE

In accordance with CR 76.12 (5) and (6), the undersigned certifies that a true and correct copy of this Brief of Appellee has been mailed to Hon. Brian K. Pack, Herbert, Herbert & Pack, 135 North Public Square, P.O. Box 1000, Glasgow, Kentucky 42142-1000; Hon. Brian Driver, 102 East Public Square, Glasgow, Kentucky 42141, and Hon. J. Grise, Judge Warren Circuit Court, Division II, Justice Center, 1001 Center Street, Suite 401, Bowling Green, Kentucky 42101-2184, on this 2nd day of June, 2015.

GWIN STEINMETZ & BAIRD, PLLC
401 West Main Street, Suite 1000
Louisville, Kentucky 40202
Telephone: 502.618.5700
Facsimile: 502.618.5701



Hon. Tracey Clemmons Smith
Counsel for Appellee

STATEMENT CONCERNING ORAL ARGUMENT

The well-reasoned opinion from the Kentucky Court of Appeals from which this appeal is taken does not hinge on any unique issue of law and the facts are undisputed. Accordingly, Appellee, United Financial Casualty Company ("United"), does not believe that oral argument would necessarily be helpful to the Court.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

I. INTRODUCTION

This appeal originally arises from the Warren Circuit Court's determination that United Financial Casualty Company ("United") and Countryway Insurance Company's ("Countryway") uninsured motorist coverages ("UM") were both excess and mutually repugnant, and therefore, the damages paid to their mutual insured Sharon Bartley should be pro-rated between the companies.

The Kentucky Court of Appeals, reviewing this question of law *de novo* after briefing and oral argument, went the appropriate next step adopting a bright line rule for priority of conflicting UM policies holding that "because UM coverage is first-party coverage, it should follow the person, not the vehicle, as a matter of priority." (Ky. Ct. App. Op. Reversing and Remanding 14, Jan. 24, 2012.) Thus, after agreeing that the United and Countryway policies were both excess and mutually repugnant, the Court of Appeals held that Sharon Bartley's personal policy with Countryway was primary with UM limits first exhausted before United's policy was subject to any claim.

In this appeal, this Court has the opportunity to go one step further and declare the Court of Appeals' bright line rule applicable to all scenarios with multiple UM (and underinsured motorist "UIM") coverages.[1] Each and every UM insured in Kentucky should be permitted to seek coverage directly from the insurance carrier that he or she

---

[1] For purposes of this brief, the Appellee will refer to UM coverage due to the case involving an uninsured driver. However, this Court has held "UIM coverage serves the same purpose and follows the same pattern as UM coverage...we can discern no fundamentally different insurance arrangement from that provided for under the UM statute." *Coots v. Allstate Ins. Co.,* 853 S.W.2d 895, 898-99 (Ky. 1993). "Underinsured and uninsured carriers should be treated similarly, as their purpose and intent of their coverage is similar." *Id.* at 903.

chose to contract with. No UM insured should ever be forced to first seek benefits from a "stranger" company they did not choose. Personal first party coverages outside the confines of the MVRA, such as UM, should always be available from the insurance company that the injured party chose to personally protect them.

II. FACTS

This priority of coverage dispute arises from a September 27, 2007, accident in Bowling Green, Warren County, Kentucky, involving a vehicle operated by an uninsured motorist Gregory Gaskey and a semi-tractor trailer ("semi-tractor") operated by Joey Bartley. (R. Vol.1, 21-25.) Joey Bartley's mother, Sharon Bartley ("Bartley"), was a passenger inside the semi-tractor at the time of the accident. (R. Vol. 1, 21-25.) Bartley pursued a UM claim against United pursuant to a Commercial Auto Insurance Policy issued to Joey Bartley, d/b/a J.B. Contracting, which insured the tractor trailer involved in the accident. (R. Vol. 1, 1-5.) Bartley also pursued a UM claim against Countryway pursuant to her personal automobile policy wherein she was listed as a driver and the policy insured 3 vehicles not involved in the accident. (R. Vol. 1, 1-5.)

Both policies of insurance contain an "other insurance" provision regarding UM coverage, which provides UM coverage is excess over any other UM coverage available. (R. Vols. 1&2, 141 and 156-157.) In the underlying lawsuit, the parties requested the trial court to declare the priority of the UM coverages relating to the two separate insurance policies issued by United and Countryway. (R. Vols. 1&2, 50-183.)

On June 3, 2011, Countryway filed its Motion to Determine Priority of Coverage between the two excess clauses. (R., Vol. 1, 50-57.) On July 21, 2011, Countryway filed an additional Memorandum in Support based upon reliance on *Kentucky Farm Bureau v.*

Shelter Ins. Co., 326 S.W.3d 803, 804 (Ky. 2010), a case dealing with mandatory liability insurance coverage. (R. Vol. 1, 63-85.) Countryway's position to the lower court was that because United was the insurer for the vehicle involved in the accident, United's UM coverage was primary and Countryway would only provide secondary coverage after United's Policy limits were exhausted. (R. Vol. 1, 50-57.) Additionally, Countryway argued that because *Shelter* declared a bright line rule that liability coverage follows the vehicle in competing excess clauses this same rule was applicable to UM coverage. (R. Vol. 1, 63-85.)

On August 9, 2011, United filed its Response to Motion to Determine Priority of Coverage. (R. Vols. 1&2, 88-183.) United's position to the trial court was that because United and Countryway had other insurance clauses which made them both excess, under Kentucky law, the two companies would provide UM coverage on an apportionment pro-rata basis pursuant to Kentucky precedent. (R. Vol. 1, 88-98.) Furthermore, United distinguished *Shelter* and argued that *Shelter* is not applicable because it dealt with liability coverage that follows the vehicle and a permissive driver of a vehicle who expects to have coverage when driving a vehicle because such coverage is mandated by the Kentucky Motor Vehicle Reparations Act ("MVRA"). (R. Vol. 1, 88-98.) Finally, United took the position at the trial court that "if the court chooses to adopt a bright line rule, UM coverage follows the person not the vehicle." (R. Vol. 1, 88-98.)

After the priority of coverage issue was fully briefed and argued, the trial court entered its Order on October 30, 2012, concluding that UM coverage should be apportioned between the two companies pro-rata. The court's opinion addressed Countryway's arguments and concluded that reliance on *Kentucky Farm Bureau v.*

Shelter Ins. Co., 326 S.W.3d 803, 804 (Ky. 2010) was misplaced as that case dealt with mandatory liability coverage under the MVRA instead of personal uninsured motorist policies. (R. Vol. 2, 193-196.) The trial court pointed out the distinguishing factor in *Shelter* by stating "[t]he court's reliance on the MVRA, however, discourages application of that rule to the present case because uninsured motorist policies are not covered under the MVRA and, thus, not subject to the policies and intent of it. (R. Vol. 2, 194.) The trial court ultimately held that pursuant to the relevant UM policy provisions which are not covered by the MVRA "both United and Countryway's policies 'are excess and mutually repugnant' and thus damages should be pro-rated between the two." (R. Vol. 2, 195.)

Countryway filed a Notice of Appeal to the Kentucky Court of Appeals on November 26, 2012. (R. Vol. 2, 202-203.) After briefs and oral argument including substantial discussion of an appropriate bright line rule, the Court of Appeals overturned the trial court's pro-rata apportionment between Countryway and United and instead adopted a bright line rule for priority between two conflicting UM policies.

The Court of Appeals, persuaded by Kentucky's Court's view of the "personal nature" of UM insurance and this Court's recent rejection of pro-rata apportionment between conflicting excess liability insurance in *Shelter*, concluded that UM coverage should follow the person, not the vehicle as a matter of priority. After agreeing the Countryway and United policies conflicted, the Court of Appeals applied a bright line rule for public policy reasons of ensuring prompt payment and reducing litigation costs. The application of the Court of Appeals' bright line rule held that Sharon Bartley's personal UM policy with Countryway was primary and her UM benefits with

her own carrier Countryway must be first exhausted before United's UM policy was subject to any claim. The Court of Appeals elaborated:

> [t]he same basic public policy concerns of ensuring prompt payment to injured victims and reducing litigation are also present when dealing with UM coverage. Abolishing the rule of apportionment for UM coverage is a logical and natural extension of *Shelter*. It will undoubtedly lead to quicker payment to injured victims of uninsured motorists, cut down on the battle of the forms, and reduce litigation. (Ky. Ct. App. Op. at 12.)

Unhappy with this result, Countryway moved this Court for discretionary review and this appeal followed.

ARGUMENT

I. STANDARD OF REVIEW

The only questions presented in this appeal are questions of law relating to priority of UM coverage between United and Countryway. The standard of review for questions of law is *de novo*. *Dowell v. Safe Auto Ins. Co.,* 208 S.W.3d 872, 875 (Ky. 2006). Under *de novo* review, this Court (and the Court of Appeals previously) owes no deference to the trial court's application of the law to the established facts. *Grange Mutual Ins. Co. v. Trude,* 151 S.W.3d 803, 810 (Ky. 2004).

II. THE BRIGHT LINE RULE ADOPTED BY THE COURT OF APPEALS CORRECTLY ADHERES TO THE PURPOSE OF PERSONAL UM/UIM INSURANCE AND IS A NATURAL EXTENSION FOLLOWING THE ABOLITION OF PRO RATA APPORTIONMENT FOR CONFLICTING LIABILITY POLICIES.

A. Purpose of First Party UM Coverage

Countryway's appeal wholly ignores all reasoning and discussion by the Kentucky Court of Appeals regarding the purpose of UM coverage, how Kentucky Courts previously resolved conflicting excess policy provisions and why the Courts' bright line rule is appropriate. Instead, Countryway simply reasserts its prior appellate arguments and demands the implementation of a different bright line rule – that when UM policies conflict, the primary policy should be the policy covering the vehicle in which a UM insured is injured. Countryway's arguments should again be rejected as the Kentucky Court of Appeals simply got it right in applying a bright line rule and Countryway offers no rebuttal or retort to the Court's well-reasoned opinion.

The Court of Appeals correctly recognized from the outset the very personal nature of UM insurance. Indeed, first party UM coverage is designed "to make available

to injured parties ***from their own insurer*** a stated minimum amount of insurance coverage when no valid or collectible insurance exists with respect to the vehicle causing the damage." (Ky. Ct. App. Op. at 5, citing *Commonwealth Fire & Cas. Ins. Co. v. Manis,* 549 S.W.2d 303, 305 (Ky. App. 1977)) (emphasis added). Because it is personal insurance, it is not mandatory by the MVRA or any other statute. Supporting this concept, the Court of Appeals noted that while Kentucky requires insurers to make UM coverage available under all automobile liability policies of insurance, "it does not require owners and operators of motor vehicles to carry UM coverage." (Ky. Ct. App. Op. at 6, citing KRS 304.20-020).

With these two fundamental principles laying the foundation for the personal treatment of UM insurance, the Court of Appeals appropriately emphasized the consistent conclusions by Kentucky courts (including this Court) that UM coverage is in fact "personal in nature." This Court offered that very advice in *Coots v. Allstate Ins. Co.,* 853 S.W.2d 895, 898 (Ky. 1993) concluding that "[f]rom its inception [Kentucky courts] have recognized UM coverage is *first party coverage,* which means that it is a contractual obligation directly to the insured which must be honored even if the tortfeasor cannot be identified."

The Court of Appeals next turned to its own prior emphasis highlighting UM coverage as personal and the specific effect of what that means. "Given the personal nature of UM coverage, we have held that it follows the insured regardless of whether the insured is injured as a motorist, a passenger, or as a pedestrian and such coverage is only limited by the actual, valid exclusions of each insurance policy." (Ky. Ct. App. Op. at 6, citing *Dupin v. Adkins,* 17 S.W.3d 538, 543 (Ky. App. 2000)).

B. The Court of Appeals' bright line rule keeps UM coverage personal.

This case has always been about pro-rata apportionment and/or applications of a bright line rule in the UM context. Countryway received a bright line rule, just not the one it prefers. At the trial court and again at the Court of Appeals, Countryway incorrectly claimed that a bright line rule has already been established and that priority of coverage for first party insurance follows the vehicle. Now for a third time, Countryway tries again claiming "[c]ommon law of Kentucky has consistently held that the UM or UIM insurer for the vehicle involved in a wreck had primary responsibility to pay judgments for the injured insured over the injured insured's personal insurer who offered the same coverage." (Appellant's Br. at 5.) The trial court and Court of Appeals appropriately found this theory to be simply untrue. Nothing has changed.

For its third try, Countryway relies on the same three cases — *American Automobile Insurance Company v. Bartlett*, 560 SS.W.2d 6 (Ky. Ct. App. 1977), *Hamilton Mutual Insurance Company v. USF&G*, 926 S.W.2d 466 (Ky. Ct. App. 1996), and *Metcalf v. State Farm*, 944 S.W.2d 151 (Ky. Ct. App. 1997) — that it relied upon at the trial court and Court of Appeals. (Ky. Ct. App. Op. at 8 –10.) The Court of Appeals' well-reasoned, unanimous decision addressed each of these cases individually and found "no persuasive authority to support Countryway's position." (Ky. Ct. App. Op. at 8.)

The Court of Appeals first rejected any reliance *American Automobile Ins. Co. v. Bartlett*, 560 S.W.2d 6 (Ky. App. 1977) because "the only principle of law *American Auto* establishe[d] is that policy provisions control priority if they can be reconciled." (Ky. Ct. App. Op. at 9.) *American Auto*, addressed only the effect of a release signed by the plaintiff who only sought UIM benefits against one of two possible UIM

insurers. Ultimately, the court decided that the UIM insurer who was sued was liable only as an excess insurer, but there was no discussion or analysis of the policy language of the other insurer or any discussion of priority between two excess insurers. *American Auto,* 560 S.W.2d. at 9. The Court of Appeals correctly concluded that *American Auto* offers no advice about how a court should proceed if the policy provisions cannot be reconciled.

The Court of Appeals next rejected Countryway's reliance on *Hamilton Mut. Ins. Co. v. USF&G Co.,* 926 S.W.2d 466, 470 (Ky. App. 1996), correctly concluding that "[i]f anything," this case "undermines Countryway's position." (Ky. Ct. App. Op. at 9.) A simple reading of the case reveals that the reason USF&G was held to have primary coverage was because under the terms of its policy, it was primarily liable. This was not a situation where all the policies involved were mutually repugnant on their faces and all provided excess coverage. By its very terms, USF&G's policy language said USF&G would be primary: "[t]he USF&G policy is clear on its face that the coverage it provides for the Lincoln is primary to any other coverage." *Hamilton Mut. Ins. Co. v. USF&G Co.,* 926 S.W.2d 466, 470 (Ky. App. 1996). Thus, the court's decision was "based upon the plain language of the policies" and not because the claimant was a passenger in any particular vehicle at the time of the accident as Countryway erroneously suggests. *Id.* As to the remaining two insurers' policies involved in that case, the court held that "[s]ince both applicable policies contain excess clauses, such is effectively nullified and Hamilton and USAA shall be deemed co-insurers with the obligation to provide pro rata coverage toward any excess amount remaining after USF&G has exhausted its limits." *Id.*

To complete the trifecta, the Court of Appeals agreed that reliance is equally misplaced on *Metcalf v. State Farm*, 944 S.W.2d 151 (Ky. Ct. App. 1997). In that case, the court stated, in dicta, that Liberty Mutual would be the primary carrier of UIM coverage because pursuant to its own policy language, Liberty Mutual could not be considered an excess insurer. *Id.* at 152. The reading of the policy had to do with ownership of the insured vehicle, not whether the claimant was located in a particular vehicle at the time of the accident. *Id.* Moreover, the issue decided in the case had nothing to do with priority of coverage between two excess insurers. Rather the issue decided by the court was whether an insured's settlement with the primary UIM insurer for less than primary UIM limits precluded recovery of excess UIM benefits. The court held the insured might still collect excess UIM coverage if he could prove bodily injury in excess of applicable primary coverage. *Id.* at 152-53. Nothing in *Metcalf* addresses "how to determine priority if UM/UIM coverage is deemed excess under two mutually repugnant policies." (Ky. Ct. App. Op. at 10.)

After reviewing these cases, the Court of Appeals reached the same conclusion United and the trial court reached: the only "long-standing" rule in Kentucky prioritizing conflicting UM/UIM coverages is pro-rata apportionment. (Ky. Ct. App. Op. at 8.) However, United, Countryway and the Court of Appeals all agree that a better approach to prioritizing multiple first party coverages is a bright line rule. To get there, the Court of Appeals followed this Court's lead in *Shelter* and created one.

In *Shelter,* a non-owner, permissive driver of a vehicle negligently caused an accident. *Kentucky Farm Bureau v. Shelter Ins. Co.,* 326 S.W.3d at 804. The non-owner permissive driver was injured in the accident and sought liability coverage

under the policy issued by Shelter Insurance that covered the vehicle involved in the accident. *Id.* The non-owner permissive driver also sought liability coverage under his own personal policy issued by Farm Bureau. *Id.* This Court in analyzing the liability coverage, discussed whether one liability carrier should be primary and the other excess when both policies had excess other liability insurance language. *Id.* at 810. Relying on the public policy reasons behind mandatory liability coverage under the MVRA, the court adopted a bright line approach that the vehicle owner's liability insurance is always primary. *Id.*

The bright line rule approach in *Shelter* makes sense because it eliminated a "battle of the policies" that led to repetitive litigation when excess policy provisions collided. *Id.* at 807. It also eliminated the complexity of properly apportioning competing policies because none of the apportionment methods achieved an entirely just result." *Id.* at 808.

Persuaded by *Shelter,* in advocating a bright line rule as a better approach to replacing the battle of policies, the Court of Appeals agreed to extend *Shelter* and establish a bright line rule in this first party context. However, because "Kentucky courts have repeatedly distinguished UM coverage from liability coverage," the rule in this case is different. (Ky. Ct. App. Op. at 14.)

Unlike liability insurance, mandated by statute for the benefit of others, UM coverage is not mandatory. While an insurer must make UM coverage available, an insured can reject it. The Court of Appeals smartly concluded, "[t]hus, the *insured* has the ability to control the risk. Given the personal nature of UM coverage and the insured's ability to reject it under Kentucky law, it seems counterintuitive to follow

Shelter's exact priority rule to place primary UM coverage on the vehicle. This would be contrary to how UM coverage has been treated under Kentucky law for the last four decades." (Ky. Ct. App. Op. at 14.)

Since an insured can validly reject UM coverage, a passenger has no reasonable expectation that the driver of the vehicle he or she is riding in has procured the coverage. The only way the passenger can be certain he or she is covered is to secure personal UM coverage. The purpose of the UM statute is to make that coverage available to all Kentucky insureds to the extent they want it. If the bright line rule offered by the Court of Appeals is not affirmed, first party UM coverage would cease to be personal. The coverage purchased by a third party would take precedence over the personal choice an individual made contracting with a specific company for his or her own benefit and protection. As the Court of Appeals concluded, this "is not a sound or just result." (Ky. Ct. App. Op. at 15.)

To be sound and just, United urges this Court to take the additional step promoted in *Shelter*. Not only should the bright line rule adopted by the Court of Appeals be affirmed, it should apply uniformly to all circumstances where multiple UM (and/or UIM) coverages are available to a Kentucky insured. Regardless of policy language, a Kentucky insured should first be permitted to seek coverage from the insurance carrier that he or she chose to contract with. No insured should ever be forced to first seek first party benefits of UM/UIM from a "stranger" company they did not choose. Personal first party insurance outside the confines of the MVRA such as UM/UIM should always be available from the company an injured person selected to protect them. Such a bright line rule will provide speed clarity and certainty to the application of these first party personal

benefits to all Kentucky insureds and insurers. It is the right result and the most logical application to this Court's justifications and sound reasoning in *Shelter* to first party UM/UIM insurance.

III. IF A BRIGHT LINE RULE IS REJECTED, THE TRIAL COURT'S PRO RATA DETERMINATION IS CORRECT.

In this case, the contract terms of both policies (Countryway's and United's) provide conflicting excess provisions. If a bright line approach is rejected, Kentucky courts have consistently held that conflicting excess policies providing UM coverage results in a pro-rata sharing. *Progressive Northern Ins. Co. v. Conner*, 2006 WL 318819 (E.D. Ky. 2006). Absent the affirmation of the Court of Appeals' bright line approach, there is no reason to change the line of precedent in this case, or to change non-ambiguous contract language to create a result that is not supported by Kentucky law.

United's Uninsured/Underinsured Motorist Coverage Endorsement states, in relevant part:

> Other Insurance
>
> If there is other applicable uninsured or underinsured motorists coverage, **we** will pay only **our** share of the damages. **Our** share is the proportion that **our** limits of liability bears to the total of all available coverage limits. However, any insurance **we** provide shall be excess over any other uninsured or underinsured motorists coverage, except for **bodily injury** to **you** and, if the named insured is an actual person, a **relative,** when **occupying** an **insured auto** or temporary substitute.

(R. Vol. 1, 141.)

In applying United's "other insurance" clause, Bartley is only entitled to UM coverage on an excess basis as a passenger in the vehicle insured by United. Bartley is

not "you" or a "relative" as defined in the policy. The term "you" is defined in the policy as the named insured on the declarations page. (R. Vol. 1, 141.) Bartley is not the named insured shown on the declarations page. A "relative" is defined in the policy as "any person related to you by blood, marriage or adoption while residing in the same household as you." (R. Vol. 1, 109.) Bartley does not reside in the same household as the named insured and did not live with her son at the time of the accident. (Sharon Bartley Dep. at 80-82.)[2] Because Bartley is neither you nor a relative as defined in the policy, any insurance United provides to her is excess over any other uninsured motorists coverage, including her own personal UM policy with Countryway.

Countryway's Policy contains similar excess language in its Uninsured Motorists Coverage – Kentucky endorsement:

> Other Insurance
>
> If there is other applicable insurance similar to the insurance provided by this endorsement, we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance similar to the insurance provided by this endorsement.

(R. Vol. 2, 179.) Countryway's Policy, like United's Policy, provides coverage to Bartley on an excess basis because she did not own the vehicle involved in the accident.

---

[2] The deposition transcript of Sharon Bartley was included in the Trial Record, but was listed separately from the numbered documents in the Trial Record. Accordingly, citations to the deposition transcript are denoted by the traditional deposition citation format rather than citations to the Trial Record.

Thus, both applicable UM policy provisions are excess policies by their very terms. As discussed above, the Court of Appeals correctly dispelled any notion that current case law mandates that primary UM coverage automatically goes to the insurer of the vehicle involved in the accident. If a bright line approach is not adopted, case law has consistently held that in similar situations, insurers with policies that both provide excess UM or UIM coverage do so on a pro-rata basis. *See, Progressive Northern v. Connor*, 2006 WL 318819 (E.D. Ky. 2006).

In *Conner*, an unpublished federal decision with facts similar to this case, Conner was a passenger on a motorcycle insured by Progressive Northern that was involved in an accident. *Id.* at *1. Conner presented claims for UIM coverage to Progressive Northern (as the insurer of the motorcycle involved in the accident) as well as Kentucky Farm Bureau, her own personal insurer. *Id.* Both policies contained other insurance clauses that made both policies excess. *Id.*

The Progressive Northern policy language, which is nearly identical to the policy language at issue in this case, stated that "any insurance we provide shall be excess over any other uninsured or underinsured motorists coverage, except for bodily injury to you or a relative when occupying a covered vehicle." *Id.* at *2. As in this case, the exceptions for bodily injury to you or a relative did not apply to Conner and the UIM coverage was deemed to be excess.

Kentucky Farm Bureau's other insurance clause stated that "any insurance we provide with respect to any owned or non owned vehicle, other than your covered auto, shall be excess over any other similar collectible insurance or self-insurance, whether primary, excess or contingent." *Id.* at *2. This language is very similar to

Countryway's other insurance clause in this case and was also deemed to provide excess coverage.

In *Conner,* Progressive Northern argued that when both policies provide excess coverage, the coverage should apply on a pro-rata basis according to the policies' respective limits of liability. *Id.* However, Kentucky Farm Bureau argued that Progressive Northern should provide primary UIM coverage because its insured's vehicle was involved in the accident. To support this position, Kentucky Farm Bureau unsuccessfully relied upon the exact precedent Countryway relies upon here: *Hamilton Mut. Ins. Co. v. USF&G Co.*, 926 S.W.2d 466 (Ky. Ct. App. 1996) and *Metcalf v. State Farm Mut. Auto. Ins. Co.*, 944 S.W.2d 151 (Ky. Ct. App. 1997).

However, just like the trial court and Court of Appeals in this case, the federal court, interpreting Kentucky law, rejected Kentucky Farm Bureau's argument and the application of those cases. It also noted that it had already rejected this same argument one year prior in the unpublished case of *Sibley v. United Max Ins. Co.*, Case No. 04-CV-117-HRW. *Id.* at *2.

The Court in *Conner* explained that:

> The court in *Sibley* rejected State Farm's argument that UIM coverage on the vehicle involved in an accident is primary, and all other applicable coverages are secondary. In support, the court noted that 'Kentucky courts have expressly held that UIM coverage, as distinct from other types of coverage, is personal to the insured and not connected to a particular vehicle.' (Memorandum Opinion, p. 7). *See Dupin v. Adkins*, 17 S.W.3d 538 (Ky. Ct. App. 2000). For the same reason, this Court rejects Farm Bureau's argument that United Northern's UIM coverage should be construed as primary, despite unambiguous policy language to the contrary, based solely on the fact that it insured Mr. Graley's motorcycle.

Id. at *3. The *Conner* court noted that *Sibley* also found State Farm's reliance on the *Hamilton Mutual* and *Metcalf* cases "misplaced." *Id.* The court said that the *Hamilton Mutual* case was not applicable because it involved apportionment between three policies, one of which was, on its face, primary and two which were excess. The court held that the two excess insurers were to provide pro rata coverage toward any excess amount remaining. The court distinguished *Metcalf* because the issue of apportionment was not even before the court. *Id.* at *3.

The court in *Conner*, like the court in *Sibley*, concluded that "where there are competing excess insurance clauses in a UIM context, coverage should be apportioned on a pro rata basis according to the parties' respective limits of liability." *Id.* These cases mandate that United and Countryway share coverage on a pro-rata basis.

In application, both of the policies of United and Countryway clearly and unambiguously state that each provides UM coverage on an excess basis. Insurance policies that are clear and unambiguous should be enforced as written. *Masler v. State Farm Mut. Auto Ins. Co.,* 894 S.W.2d 633, 636 (Ky. 1995). Therefore, if a bright line approach is rejected, the trial court's order should be reinstated providing pro rata apportionment between the Countryway and United policies.

IV. A CROSS APPEAL WAS NOT REQUIRED FOR THE COURT OF APPEALS TO APPLY A BRIGHT LINE RULE.

A. The issue before the Court of Appeals was purely legal.

The question to be determined in front of the Court of Appeals did not change from the trial court level – it remained a "purely legal one regarding coverage under insurance policies." (Ky. Ct. App. Op. at 5.) The Court of Appeals' review of the coverage decision was *de novo*, or completely anew. Civil litigants appeal questions of

law at their own risks, including the risk of less favorable results, because an appellate court "is not bound by the trial court's decision on questions of law." *See Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001).

Countryway incorrectly claims that the Court of Appeals "did not have available to it the option it selected." The Court of Appeals was asked by Countryway to review the question of law regarding priority of coverage, the review is *de novo* and the Court of Appeals could consider all available options for declaring the law on priority of coverage for UM insurance clauses. A *de novo* review of an issue implies that any result is possible. Being placed in a "worse position" after remand is a risk inherent in any civil appeal, especially one exclusively involving questions of law being reviewed *de novo*.

B. The "Inveterate and Certain" rule applies.

Countryway appealed the trial court's decision and argued for the application of a bright line rule, instead of pro-rata apportionment decided by the trial court. The Court of Appeals ***accepted*** Countryway's argument that a bright line rule should be adopted, but decided, as a matter of law, that the bright line rule should follow the person not the vehicle which was argued at the trial court (and Court of Appeals) as a defense to Countryway's bright line demand. There was no cross-appeal because the only issue to appeal was the declaration of the priority of coverage that was already appealed by Countryway.

At the trial court and before the Court of Appeals, both parties addressed and provided support for a bright line rule in UM excess clauses in lieu of pro-rata apportionment. Notwithstanding the procedural history documenting same, Countryway asserts that because United's arguments to the Court of Appeals went beyond seeking to

"maintain the trial court's pro-rata approach," United was obligated to file a cross-appeal. (Appellant's Br. at 18.) Additionally, Countryway urges this Court that United's failure to cross-appeal precluded the Court of Appeals from considering all of United's available counter-arguments and from reaching its conclusion.

Countryway cites no supporting law giving credence to their proposition that the Court of Appeals overstepped its authority and "ignored appellate, procedural precedent" (Appellant's Br. at 19.) Likewise, Countryway fails to quote a single authority supporting their argument regarding its alleged "worse position" or failure to file a cross appeal. Among the cases noted by Countryway in its brief, are *Stephenson v. Adams*, 433 S.W.2d 347 (Ky. 1968) and *Board of Ed. v. Workman*, 281 S.W.2d 3 (Ky. 1955). These cases are inapposite to the issue of United's need to file a cross-appeal.[3]

In *Stephenson* and *Workman*, the appellees were apparently seeking to reverse decisions adverse to them at the trial level, but failed to cross-appeal. In *Workman*, for instance, the appellee specifically complained of errors allegedly made by the lower court in his response brief at the appellate level. The *Workman* court, however, refused to consider the alleged errors because no cross-appeal had been prosecuted. *Workman*, 281 S.W.2d at 5. United is not complaining of any errors. It simply is defending the argument that if there is a bright line rule, it should be based upon the personal nature of first party insurance that falls outside the purview of the MVRA.

Countryway also relies on *Brown v. Barkley*, 628 S.W.2d 616, 618-19 (Ky. 1982), claiming that "the Kentucky Supreme Court has refused to consider new, legal theories of

---

[3] *Standard Farm Stores v. Dixon*, 339 S.W.2d 440 (Ky. 1960), also cited by Countryway is entirely inapplicable. *Dixon* dealt with a cross-appeal that was not ***procedurally*** perfected, but the Court gave no analysis to its deficiency.

a prevailing party in the absence of a cross-appeal except for the sole purpose of bolstering the prevailing party's argument as to why the lower court's judgment should be upheld." (Appellant's Br. at 18.) Relying on this assertion, Countryway makes the claim that United was required to cross-appeal. However, this contention misrepresents the law and the procedural history of this case.

An elementary principle of law provides "that any basis for relief that is neither pleaded nor proven in the lower court cannot be considered for the first time by" appellate courts. *Bibbs v. Kentucky & I.T. Railroad*, 300 S.W.2d 229, 231 (Ky. App. 1957). However, "[a]n appellee can still raise issues and arguments in response to a direct appeal even if he does not file a cross-appeal." CALDWELL'S KENTUCKY FORM BOOK §101.00 (Kevin P. Buckman ed., 5th ed. 2015). This legal principle is also known as the "inveterate and certain" rule. *See Massachusetts Mut. Life Ins. Co. v. Ludwig*, 426 U.S. 479, 481 (1967). The United States Supreme Court has held that "it is settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." *Id. citing Morely Co. v. Maryland Cas. Co.,* 300 U.S. 185, 191 (1937), and *United States v. American Ry. Exp. Co.,* 265 U.S. 425, 435 (1924).

The record clearly demonstrates that United's advocacy of a bright line rule adopted in part by the Court of Appeals was not a "new legal theory" as asserted by Countryway. United's arguments rebutting Countryway's bright line rule arguments were brought squarely before the trial court. In United's August 9, 2011, Response to Countryway's Motion to Determine Priority of Coverage at the trial court, United took

the position that "if the Court chooses to adopt a bright line rule, ***UM coverage follows the person not the vehicle.***" (R. Vol. 1, 88-98.) (emphasis added). In that same August 9, 2011, Response, United argued that "because UM coverage, unlike liability coverage, follows the person not the vehicle, the appropriate bright line rule in the UM context is that Countryway's policy is primary because Countryway personally insured [Plaintiff] and [United's] policy is secondary or excess." (R. Vol. 1, 88-98.) In the Conclusion to its Response, United requested if a bright line rule were adopted, as suggested by Countryway, then it should follow the person not the vehicle, and therefore, Countryway's policy is primary. United is allowed to defend Countryway's suggested bright line rule by providing arguments and case law that show the proper bright line rule, if one should be adopted. (R. Vol. 1, 88-98.)

The trial court's ultimate decision to follow pro-rata apportionment is irrelevant to the bright line rule issues on appeal and does not preclude United from making those arguments in defense of Countryway's appeal. Instead, United's persistent advocacy of a bright line rule was an appropriate method "of bolstering the judgment against the possibility that the appellate court may accept the appellant's claim of error." *Barkley,* 628 S.W.2d at 619. Moreover, because United's arguments in support of a bright line rule "make the point that [they were] nevertheless entitled to the judgment on a theory that was properly presented but erroneously rejected by the trial court" a cross-appeal was not required. *Id.*

Countryway's reliance on *Barkley* is also misplaced in that it lends no support to Appellee's insistence on United filing a cross-appeal. The Court in *Barkley* held that "[a] cross-appeal is appropriate only when the judgment fails to give the cross-appellant all

the relief he has demanded or subjects him to some degree of relief he seeks to avoid." *Id.* at 618. There is a clear distinction between situations where a trial court's judgment "gives the appellee the ultimate relief for which he has contended," as was the case below for United, and "those in which the judgment gives him something less." *Id.* at 619. In the current appeal, a judgment[4] was not rendered, but a law was declared relating to an UM coverage dispute between two insurance companies.[5] Therefore, the Court's decision is a declaration of law which precludes Countryway's arguments relating to being in a worse position.

CONCLUSION

The Kentucky Court of Appeals, reviewing this question of law *de novo* after briefing and oral argument, appropriately adopted a bright line rule for priority of conflicting UM policies. Because UM coverage is first-party coverage, it should follow the person, not the vehicle, as a matter of priority.

This Court should adopt the conclusions of the Court of Appeals and go one step further. This Court should declare the Court of Appeals' bright line rule applicable to

---

[4] In *Brown v. Barkley*, Barkley had made a constitutional argument regarding a statute. Ultimately, the trial court entered a judgment in favor of Barkley. 628 S.W. 2d 616, 619 (Ky. 1982). The governor appealed and Barkley raised the constitutional argument on appeal. The appellate court declared it couldn't hear the constitutional argument because there was no cross appeal by Barkley. *Id. at 618.* The Kentucky Supreme Court overturned the appellate court stating that in an effort to "clear up a misunderstanding with regard to appellate practice," the trial court's judgment gave Barkley the relief for which he asked, and therefore, it was not necessary for him to cross appeal. *Id.* A "cross appeal is appropriate only when the judgment fails to give the cross-appellant all the relief he has demanded." *Id.* Therefore, even if a judgment had been rendered, it would not have been necessary for United to file a Cross Appeal because it was not asking the Court for any relief from the trial court's decision, and it had been given the ultimate relief that United requested.

[5] United settled with Bartley at the trial court level and entered into a stipulation that Countryway would agree to reimburse United for the advanced settlement if it was declared to be pro-rata or if a court declared Countryway's policy to be primary.

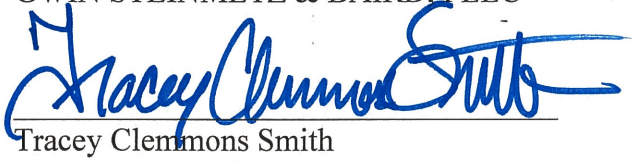
all scenarios with multiple UM/UIM coverages. Each and every UM/UIM insured in Kentucky should be permitted to first seek coverage from the insurance carrier that he or she chose to contract with. No UM/UIM insured should ever be forced to first seek benefits from a "stranger" company they did not choose. Personal first party insurance outside the confines of the MVRA such as UM/UIM should always be available from the company an injured person selected to protect them.

A bright line rule settles disputes relating to priority of coverage(s) in the UM/UIM context. This Court, in declaring a definitive bright line rule, allows judicial economy to be served and assists Insured(s) in receiving benefits without a complex declaratory action relating to the battle of drafting UM/UIM insurance clauses which wastes time and money.

Wherefore, United respectfully requests this Court to declare a bright line rule allowing the UM/UIM insurance to follow the person.

Respectfully Submitted,

GWIN STEINMETZ & BAIRD, PLLC



Tracey Clemmons Smith
401 West Main Street, Suite 1000
Louisville, Kentucky 40202
Telephone: (502) 618-5700
Facsimile (502) 618-5701
Counsel for Appellee
United Financial Casualty Company (designated in the appeal as Progressive Casualty Insurance Company)