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

COUNTRYWAY INSURANCE COMPANY — APPELLANT

VS.

UNITED FINANCIAL CASUALTY COMPANY
and
SHARON BARTLEY — APPELLEES

BRIEF FOR APPELLANT

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

WARREN CIRCUIT COURT
CIVIL ACTION NUMBER 10-CI-00689

In accord with CR 76.12(6), I certify that a copy of this Brief for Appellants has been served by first class mail, postage prepaid, on March 30, 2015, to Hon. Tracey Smith, Suite 100, 401 West Main Street, Louisville, Kentucky 40202-2938; Hon. Brian Driver, 102 East Public Square, Glasgow, Kentucky 42141; Hon. John R. Grise, Judge, Warren Circuit Court, Division II, Justice Center, 1001 Center Street, Suite 401, Bowling Green, Kentucky 42101-2184; and the Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; and that the Record on Appeal was not checked out.

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By: _____
Hon. Brian K. Pack

INTRODUCTION

This is a dispute to determine whether an UM (uninsured motorist) insurer of a vehicle involved in an accident with a second, uninsured vehicle would have primary responsibility to pay damages to an injured party over the personal UM insurer of same injured party when each have "excess insurance" clauses in their respective policies.

STATEMENT CONCERNING ORAL ARGUMENT

An oral argument would assist the Court in determining whether this Court should adopt the same priority of payment rule for UM coverage as exists for liability, PIP and UIM coverage.

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STATEMENT OF THE CASE

The facts relevant to this appeal are uncontroverted. This action arises from a motor vehicle accident that occurred on September 27, 2007, in Warren County, Kentucky. On that date, the Appellee Sharon Bartley (hereinafter referred to as "Mrs. Bartley") was a passenger in a semi-tractor operated and owned by her son, Joey Bartley. The semi-tractor was negligently struck by an uninsured vehicle owned and operated by Gregory Gaskey (hereinafter referred to as "Gaskey").[1] The Bartley semi-tractor was insured by United Financial Casualty Insurance Company (hereinafter "United Financial")[2] which provided uninsured motorist (UM) benefits up to $50,000.00 per person for each accident. United Financial did not dispute that Mrs. Bartley was eligible for UM benefits under this policy. A copy of United Financial's policy is attached as Appendix 3.

At the time of the accident, Mrs. Bartley also maintained her own personal automobile insurance policy with Countryway Insurance Company (hereinafter "Countryway") that also had UM coverage up to $100,000.00 per person for each accident. A copy of Countryway's insurance policy is attached hereto as Appendix 4.

The Countryway policy contained a standard "other insurance" clause with respect to UM coverage, which provided that the UM coverage was excess over

[1] Gaskey was formerly an Appellee in the appeal before the Kentucky Court of Appeals. Mr. Gaskey died shortly after the Notice of Appeal was filed. As a result, the Kentucky Court of Appeals dismissed him from the appeal by Order entered August 7, 2013.

[2] The Plaintiff filed suit against Progressive Casualty Insurance Company as UM insurer of the Bartley semi-tractor, however, on June 6, 2013, the Kentucky Court of Appeals ordered that the caption of the appeal be amended to substitute United Financial Casualty Company for Progressive Casualty Insurance Company.

any other UM coverage available to the insured in a particular accident. United Financial's policy also contained a similar "other insurance" provision.

On or about December 2, 2011, and while the priority of coverage matter between the two UM insurers was pending before the trial court, United Financial entered into a settlement with Mrs. Bartley for the amount of $22,500.00 resolving her claim as to all parties. United Financial advanced those sums to Mrs. Bartley. Countryway had previously agreed that United Financial's advancement of the settlement proceeds would not waive United Financial's claim for contribution from Countryway for a portion of the ultimate settlement amount, which Countryway was otherwise contesting.

On June 3, 2011, Countryway brought the contribution issue before the trial court by filing a Motion to Determine Priority of Payment.[3] In so moving, Countryway contended that Kentucky case law mandated that the insurer of the vehicle (United Financial) had primary UM coverage and the personal insurer of the injured party (Countryway) had no responsibility to pay for damages until the policy limit of the primary insurer was exhausted. Countryway relied *inter alia* on pre-MVRA precedent of American Automobile Insurance Company v. Bartlett, 560 S.W.2d 6 (Ky. 1977), and the rationale recently announced by the Kentucky Supreme Court case in Kentucky Farm Bureau Mut. Ins. Co. v. Shelter Mut. Ins. Co., 326 S.W.3d 803 (Ky. 2010), as controlling. In response, United Financial supported its claim to contribution under a theory that its policy was a "commercial auto policy" and that the UM coverage was contractual and outside

[3] See Record on Appeal # 50 and #63.

the parameters of the MVRA, suggesting the rationale of the Kentucky Farm Bureau opinion to be distinguishable and inapplicable. United Financial was unable to distinguish Bartlett other than to say it was irrelevant.[4]

By Order entered October 29, 2012, and amended on November 27, 2012[5], the trial court rejected the "simplistic rule announced in the Kentucky Farm Bureau case"[6] that priority of coverage should lie with the insurer of the vehicle involved in the accident. Instead, the trial court ordered that the settlement amount should be pro-rated between the two UM insurers in proportion to their policy limits. In so doing, the trial court cited no precedent or statute to support the proration. Countryway appealed to the Kentucky Court of Appeals. No cross-appeal was filed by United Financial.

Before the Kentucky Court of Appeals, Countryway advocated for the same bright line rule for UM priority coverage disputes as exists for liability, PIP, and UIM coverages. That bright line rule is that priority of coverage should lie with the insurer of the vehicle involved in the accident. United Financial continued to argue for proration of coverage between the two UM insurers.

The Kentucky Court of Appeals reversed and remanded the trial court, but not in favor of Countryway. Like the trial court, the Court of Appeals rejected the bright line rule of Kentucky Farm Bureau established for liability coverage by this Court. Rather the Court of Appeals held that Countryway, as the personal UM insurer of Mrs. Bartley, had priority of coverage up to its limits before the UM

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[4] See Appeal Record #88 for United Financial's Response to Motion to Determine Priority of Coverage.
[5] A copy of the trial court's orders entered October 29, 2012, and November 27, 2012, are composite Appendix 1.
[6] Page 3 of the trial court's order entered October 29, 2012.

insurer of the vehicle involved in the accident had any liability. Thus, Countryway would be required to reimburse United Financial the full $22,500 settlement instead of the prorated amount. The Court of Appeals ruling put Countryway in a worse position than the trial court's order, despite there being no cross-appeal filed by United Financial. Because the Court of Appeals opinion would change long standing precedent and unnecessarily complicate priority of coverage disputes, discretionary review was sought by Countryway and granted by this Court.

ARGUMENT

I. STANDARD OF REVIEW AND PRESERVATION OF ISSUE FOR APPEAL

The question before this Court is whether United Financial should be deemed the primary UM insurer since it provided coverage for the vehicle involved in the accident, with Countryway being secondary as the personal UM insurer of the injured party. Because the only question presented in this appeal is a question of law, the proper standard of review is *de novo*. Cinelli v. Ward, 997 S.W.2d 474 (Ky. App. 1998) (holding that the interpretation of an insurance policy is a question of law which is reviewed *de novo*).

The issue raised in this appeal was properly preserved for appellate review via Countryway's Motion to Determine Priority of Coverage filed June 2, 2011.[7]

[7] See Record on Appeal #50 and #63.

II. AS INSURER FOR THE VEHICLE INVOLVED IN THE ACCIDENT, UNITED FINANCIAL HAS PRIMARY UM COVERAGE AND COUNTRYWAY HAS SECONDARY COVERAGE

A. Kentucky Appellate Courts Have Consistently Held That UM And UIM Insurer Of Vehicle Involved In Accident Had Primary Coverage And Personal Insurer Had Secondary

Common 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.

The first Kentucky case that addressed this issue was Bartlett, supra, involving facts that mirror those in the case at bar. In Bartlett, Mary Bartlett was fatally injured when an unknown vehicle came in contact with a vehicle in which she was a passenger that was owned and driven by a friend who was insured by Aetna Casualty Surety Company. Aetna had $25,000.00 liability coverage and an additional $10,000.00 UM coverage. Mary Bartlett had her own automobile insurance through American Automobile Insurance Company which had $10,000.00 in UM coverage. The American insurance policy had the typical "Other Insurance" provision which read as follows:

> With respect to bodily injury to an insured while occupying an automobile not owned by the named insured, the insurance under Part IV shall apply only as excess insurance over any other similar insurance available to such insured and applicable to such automobile as primary insurance, and this insurance shall then apply only in the amount which the limit of liability for this Coverage exceeds the applicable limit of liability of such other insurance.

Ms. Bartlett's estate settled with Aetna for $25,000.00 although it had available $35,000.00 when combining the liability and UM coverage. The estate sought to recover on American's UM coverage which American challenged. A jury trial was conducted which resulted in a verdict against the driver of Ms. Bartlett's vehicle in the amount of $34,000.00. The trial court held that her estate could recover from American the $9,000.00 since the verdict had exceeded the $25,000.00 settlement payment from Aetna. American appealed arguing that the plaintiff's estate could recover from American's UM coverage **only after** Aetna's liability and UM coverage were **fully** exhausted since Aetna insured the vehicle that was involved in the accident. The Kentucky Supreme Court agreed and reversed the trial court.

The Kentucky Supreme Court wrote, "**[w]e are of the opinion that the Thacker automobile, covered by Aetna's policy, had the primary coverage for this accident** and that American's liability on its policy with [plaintiff] would be effective only to the extent that the jury verdict was in excess of $35,000.00." (emphasis added), Id., at 9. Since the verdict did not exceed Aetna's combined liability and UM limit of $35,000.00, American, as personal insurer of the injured party, was not liable as secondary UM insurer. **The rule of law set forth by the Kentucky Supreme Court was clear: the UM insurer of the vehicle involved in the accident has primary coverage for an injured passenger, and the personal UM insurer for same passenger has secondary coverage.**[8]

[8] It is noteworthy that the Supreme Court did not reference the Kentucky Motor Vehicle Reparations Act (MVRA) in rendering its decision. Although the MVRA had been enacted at the time of the opinion, the accident in question pre-dated the enactment. Nevertheless, even in the absence of the MVRA, the Court

Because Kentucky appellate courts have often regarded UIM and UM coverages as similar in nature, it is worth reviewing UIM priority of coverage precedent. In Hamilton Mutual Insurance Company v. USF&G, 926 S.W.2d 466 (Ky.App. 1996)[9], the Kentucky Court of Appeals addressed a priority of coverage issue as to UIM coverage. Therein, the plaintiffs were occupying a car which they did not own when they were struck by a third party, causing physical injuries. The plaintiffs' vehicle was **owned by a corporation** and insured by USF&G. The USF&G policy had UIM limits of $100,000.00 per accident. The plaintiffs also had UIM coverages from two separate insurance companies that insured two separate vehicles owned by the plaintiffs' family. USAA insured one vehicle and had UIM limits of $300,000.00 per person and $500,000.00 per accident. Hamilton Mutual had UIM limits of $500,000.00 per accident. The plaintiffs' injuries undoubtedly exceeded the liability coverage of the tortfeasor and thus the issue of how the three different UIM carriers would be responsible for the excess damages came to issue. Each of the three insurance policies had the standard "Other Insurance" provisions similar to the language quoted in Bartlett.

The trial court held that the liability of the three UIM carriers should be apportioned equally with each paying one-third of the verdict exceeding the liability coverage to the extent of the policy limits of each UIM insurer. The Court of Appeals reversed, holding that **USF&G, as insurer of the vehicle involved in**

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held that the UM insurer of the vehicle involved in the accident had primary coverage over an injured passenger's personal UM insurer.

[9] The Court of Appeals inadvertently referenced the Hamilton case as addressing UM benefits (Slip. Op. p. 9). That case actually addressed UIM benefits of three separate policies.

the accident, had primary UIM coverage and that the other two insurers had only secondary UIM coverage. Between those two secondary UIM coverages, the apportionment of liability would be pro-rated based on the respective policy limits per person. Regardless, those two UIM carriers had no responsibility for coverage until the primary UIM insurer (insurer of vehicle involved in the accident) had exhausted its limits. In rendering its opinion, the Court did not rely on the MVRA in holding that the vehicle involved in the accident had primary UIM coverage. It simply stated, "[a] reading of each "Other Insurance" clause, **together with a simple sense of fairness**, leads us to the conclusion that USF&G must be primarily liable for any excess judgment up to its policy limits before Hamilton or USAA become secondarily liable." (Emphasis added). Hamilton, supra, at 470.

A similar holding consistent with Bartlett and Hamilton was applied in Metcalf v. State Farm, 944 S.W.2d 151 (Ky. App. 1997). In Metcalf, the plaintiff was injured in an accident while driving an automobile for his employer which was insured by Liberty Mutual Insurance Company. The plaintiff had his own personal insurance with State Farm Mutual Automobile Insurance Company. Throughout the entire opinion, the Kentucky Court of Appeals made it clear that the Liberty Mutual's UIM coverage was primary and State Farm's UIM coverage for the plaintiff was secondary. Id., at 152. The Court cited the Bartlett case (a UM case) favorably in continuing its long-standing rule that the insurer for the

vehicle involved in the accident provided primary UM and UIM coverage for its occupants.

Each of these three prior cases consistently held that the insurer of the vehicle involved in the accident had primary UM or UIM coverage and that the personal insurer of the injured party had secondary coverage. Countryway asks in this appeal that this long standing rule continue to be recognized in the case at bar.

B. Recent Kentucky Supreme Court Rationale Would Support Continued Application of Long Standing Rule

Recently, the Kentucky Supreme Court reaffirmed its long standing rule regarding primary/secondary automobile insurance coverage in facts analogous to the issue now pending before this Court. In Kentucky Farm Bureau, supra, the Court addressed priority of coverage between two liability insurers, one being the personal insurer of the non-owner, but permissive driver, of the vehicle and the other being the insurer of the vehicle through the owner's policy. Each insurer had the typical "Other Insurance" or "Excess Insurance" provisions. Essentially the question before the Court was which insurer had the primary responsibility to pay its liability policy limits before the other for damages caused by the permissive driver in this two vehicle accident, or alternatively would the two insurers share the liability on a pro-rata basis.

This Court held that the insurer of the vehicle had the primary liability coverage and was required to pay for damages up to its policy limit before the permissive driver's insurance would kick in. The Court explicitly

rejected the pro-rata approach. In so doing, the Court sought to avoid trial courts having to continuously interpret insurance policies to decide the "battle of the excess clauses," opting rather for a clear cut rule in all such cases. The Court specifically stated:

> After due consideration, we reverse the Court of Appeals, and hold that the insurer of the vehicle in this case, Shelter, had the primary coverage and was thus liable for the damages to the extent of its coverage. In so doing, we decline, in this instance, to further embroil Kentucky courts in unduly complicated two-step insurance policy interpretations of continually emerging and changing insurance avoidance clauses and the consequent burden of apportionment because such considerations are inconsistent with the policies and intent of the MVRA.

Id., at 805.

This ruling mirrored the holdings in Bartlett and Hamilton, even though Bartlett dealt with competing UM coverages and Hamilton dealt with competing UIM coverages. Regardless, the rationale behind each of these rulings remained the same: judicial economy. It is senseless to have plaintiff attorneys and trial courts continuously trying to interpret constantly changing "excess insurance provisions" when a bright line and sensible rule would clearly establish each insurers' responsibility in a given motor vehicle accident. The rule set forth in Bartlett, Hamilton and Kentucky Farm Bureau accomplishes that task.

Unfortunately, in the case *sub judice,* both the trial court and the Court of Appeals ignored this Court's bright line rule that the insurer of the vehicle involved in the accident would have priority of payment over an individual's personal insurer. The trial court opted for a pro rata approach. The Court of

Appeals placed primary coverage on the personal insurer of the injured party. Because both of these rulings failed to follow precedent and would cause unnecessary confusion, Countryway urges this Court to reverse and remand with instructions to follow the long standing rule set for in Bartlett and furthered by Kentucky Farm Bureau.

C. The Trial Court Erred In Adopting A Pro-Rata Approach

In its October 29, 2012 Order, the trial court reverted to the pro-rata approach that was rejected in Hamilton, supra, a UIM case. The trial court held that United Financial and Countryway should share in the UM coverage in proportion to their policy limits, resulting in United Financial paying 1/3 of the settlement and Countryway 2/3 since their policy limits were $50,000 and $100,000 respectively. In so ruling, the trial court attempted to distinguish the Supreme Court's rationale in the Kentucky Farm Bureau opinion (and presumably the Hamilton opinion) by simply stating that UM coverage did not fall within the MVRA as did liability coverage. The trial court, however, failed to address why the Supreme Court's opinion in Bartlett would not apply, or why the judicial economy rationale would nonetheless apply to competing UM policies despite such coverage not falling within the MVRA.

Even though UM coverage is not set forth in the MVRA (KRS 304.39-010 et seq.), it is nonetheless mandatory per KRS 304.20-020 just as liability coverage is mandatory. Regardless, whether mandatory coverage exists in the MVRA or in another section of KRS Chapter 304, a strong public policy of judicial

economy and "a simple sense of fairness"[10] are inferred throughout KRS Chapter 304 and should continue to be recognized as it was in Bartlett. There is no justifiable reason why rules regarding primary/secondary coverage should be different for UM and liability coverage. The trial court's reliance upon the MVRA was a distinction without a real difference.

Likewise, there is no justifiable reason to treat UM coverage differently than UIM coverage as to priority of coverages. In Hamilton, the Kentucky Court of Appeals held that the insurer of the vehicle involved in the accident was primarily responsibility for UIM coverage over the personal UIM insurers of the injured party. UM coverage in many ways mirrors that of UIM coverage, although UIM is contained in the MVRA. Both UM and UIM insurance are fault-based coverages obligating insurers to provide indemnification for injuries caused be uninsured or underinsured motorists. Injured parties, as well as the trial courts that hear their pleas, need clear cut, consistent rules to determine which policy would have primary responsibility to cover a particular injury without the consternation of having to constantly interpret ever changing "excess insurance" clauses. The rule set forth in Bartlett and Kentucky Farm Bureau accomplishes this goal. To have a priority of coverage rule for UIM that differs from UM would cause confusion that is unnecessary and avoidable.

[10] See Hamilton, supra, at 470.

D. The Trial Court's Ruling Would Force Trial Courts To Continue the Disfavored Practice of Interpreting Competing "Excess Insurance" Clauses

Throughout the case, United Financial has argued that even though it was the insurer of the vehicle involved in the accident, its "excess insurance" clause prevents it from being the primary insurer for this accident. Unfortunately for United Financial, the public policy announced in both Bartlett and Kentucky Farm Bureau does not allow an insurance company to avoid its obligations with crafty language. As the Kentucky Supreme Court pointed out, "**without a primary insurer, there can be no excess**." (Emphasis added). Kentucky Farm Bureau, supra, at 807.

It has been United Financial's position that both United Financial and Countryway are excess insurers and thus should share on a pro-rata basis. The trial court adopted this reasoning which would require the trial courts to continually interpret "Excess Insurance" provisions when faced with competing UM coverage. The Kentucky Supreme sought to put an end to that practice in Kentucky Farm Bureau.

As the Supreme Court has noted, there cannot be an excess insurer without a primary insurer. With its opinion in Kentucky Farm Bureau, the Court makes it clear that it wishes to avoid embroiling, "Kentucky courts in unduly complicated two-step insurance policy interpretations" not just in competing liability coverage situations but in all competing insurance situations. The Court opted for a clear cut approach that the liability insurer of the vehicle in all cases

shall be the primary insurer and the insurer for the permissive driver would be the excess insurer. That same approach should be adopted for UM coverage.

As discussed in more detail below, there is no reason why the Kentucky Farm Bureau rationale would not equally apply to UM coverage. The reasoning contained in the Kentucky Farm Bureau opinion equally applies to UM coverage and would prevent Kentucky trial courts from having to continually interpret "excess insurance" clauses to determine priority of coverage.

Simply stated, United Financial insured the semi-tractor in which the Plaintiff was a passenger at the time of the accident. The case of Bartlett and its progeny mandate that United Financial would have primary coverage for UM benefits for the Plaintiff and only after those benefits were exhausted would Countryway's UM coverage be implicated. The undersigned can find no Kentucky case that would support United Financial's position that it can re-write Kentucky common law within its own policy. Kentucky's common law is long-standing and based on sound logic. This Court is bound by this precedent and should hold United Financial's UM coverage in the case at bar to be primary to that of Countryway.

E. The Court Of Appeals Erred In Rejecting This Court's Rationale In Kentucky Farm Bureau

Because the trial court had erred, the Court of Appeals correctly reversed the trial court's order. Unfortunately, the Court of Appeals chose a rule on priority of coverage different than that selected by the Supreme Court in Bartlett and Kentucky Farm Bureau. The Court of Appeals chose to place primary

responsibility upon the personal UM insurer instead of the UM insurer of the vehicle. Such a rule would cause unnecessary confusion among the bar and insurance companies alike.

Currently, Kentucky law is clear on priority of coverages as it relates to liability coverage, Kentucky Farm Bureau; PIP coverage, KRS 304.39-050; and UIM coverage, Hamilton. The insurer for the vehicle involved in an accident is required to pay first and a party's individual insurer pays second. The rule set forth by the Court of Appeal in the case at bar would be just the opposite for UM coverage, having the party's individual UM insurer pay first and the UM insurer of the vehicle second.

To have a bright line rule for one type of auto coverage that is directly opposite to one applicable to three (3) other types of auto coverage will unnecessarily complicate coverage issues. A primary/secondary rule that is consistent on all auto coverages would avoid such confusion.

The confusion that would be created by the Court of Appeal decision becomes manifest when considering the following example: a permissive, non-owner driver insured by "Insurer A" negligently collides with a second, uninsured vehicle causing injuries to a passenger of the insured vehicle. The injured passenger has his own auto insurance, "Insurer B". Priority for paying damages for the injured passenger would be **on the insurer of the vehicle** the passenger occupied ("Insurer A"), for both liability coverage (via Kentucky Farm Bureau) and PIP coverage (via KRS 304.39-050). However, if the same accident was the

uninsured party's fault, the current Court of Appeals ruling would cause separate rules for priority of payment depending on the coverage implicated. "Insurer A" would have priority for PIP benefits and the injured party's personal insurer, "Insurer B," would have priority to pay UM benefits. It is interesting to note that if the second vehicle was merely underinsured instead of uninsured, via Hamilton, "Insurer A" would have priority for all applicable coverage: liability, PIP and UIM and Insurer B would be secondary for UIM.[11]

In this same example, if fault was apportioned between the two drivers, the priority of payment rules under the Court of Appeals ruling would be even more convoluted. "Insurer A" would have priority for liability and PIP but secondary for UM, and Insurer B would have priority for UM.

There is no need for this quagmire to exist when a simple rule that the vehicle's insurer would have priority for all applicable coverages would suffice and simplify the claims process.

In its opinion, the Court of Appeals relied heavily on the fact that UM coverage is personal to the insured in holding the passenger's insurer should have priority (Slip Opn. p. 15). While Countryway appreciates the fact that a person's UM coverage is personal to him or her, it is no more personal than PIP coverage, which can also be rejected by the policy holder. When the Kentucky legislature was faced with the issue of deciding priority among PIP insurers in like

[11] The Court of Appeals tried to distinguish Hamilton on the basis that the policy language dictated that result instead of a broader policy favoring priority of the vehicle insurer over a personal insurer. When considering that the Hamilton Court based its ruling on, "a simple sense of fairness" in holding that the insurer of vehicle in an accident was primarily liable," Id., at 470, it is clear the Court intended to establish a precedent instead of merely making a fact specific ruling.

circumstance, it weighed the equities and determined that the PIP insurer for the vehicle involved would be primary for an injured passenger, and the personal insurer for the injured passenger would be secondarily liable for PIP benefits. KRS 304.39-050. There is no basis to treat priority of competing PIP coverages different than UM coverage.

The same could be said for liability coverage. When a person is sued for alleged negligence in operating a motor vehicle, the insurance coverage that protects their personal assets from a judgment and pays the attorney that defends them is just as personal as UM coverage. **Not having to pay money for causing injuries is just as personal as being able to receive money when sustaining injuries.** There exists no substantive reason to treat the various insurance coverages differently when determining priority of coverages. All coverages are equally personal to the insured. For this reason the Court of Appeals should be reversed and the case remanded to the trial court with instructions to enter an order holding United Financial, as insurer of the vehicle involved in the accident, primarily responsible for UM coverage up to the limits of its policy.

Accordingly, Countryway respectfully requests this Court to reverse the decision of the trial court and the Court of Appeals and remand to the trial court with directions to follow the primary/secondary rule set forth in Bartlett and Kentucky Farm Bureau.

III. APPELLATE JURISPRUDENCE PRECLUDES THE COURT OF APPEALS FROM PLACING COUNTRYWAY IN A WORSE POSITION THAN PLACED IN THE TRIAL COURT JUDGMENT WITHOUT A CROSS-APPEAL

If this Court agrees with Countryway's position above, Countryway acknowledges this issue would become moot. Nevertheless, out of an abundance of caution, Countryway presents the following argument.

It has long been held by the appellate courts of this Commonwealth that a claim of a prevailing party which was denied by a trial court would not be considered by a reviewing court in absence of a cross-appeal. Stevenson v. Adams, 433 S.W.2d 347, 349 (Ky. 1968); Standard Farm Stores v. Dickson, 339 S.W.2d 440, 441 (Ky. 1960); Board of Ed. of Lawrence County v. Workman, 281 S.W.2d 3, 5 (Ky. 1955).

In that same vein, the Kentucky Supreme Court has refused to consider new, legal theories of 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. Smith v. Wal-Mart Stores, Inc., 6 S.W.3d 829 (Ky. 1999); Brown v. Barkley, 628 S.W.2d 616, 618-19 (Ky. 1982).

Countryway acknowledges that United Financial would not be required to cross-appeal if they simply sought to maintain the trial court's pro-rata approach. As stated in Brown, supra, 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. Conversely, if United Financial sought a more favorable outcome than pro-rata liability, a cross-appeal would be required.

Regardless of whether United Financial actually presented arguments to the Court of Appeals for a more favorable outcome than the trial court awarded, the failure to file a cross-appeal precluded the Court of Appeals from considering such an outcome. In the absence of a cross-appeal in this case, the Kentucky appellate courts have only one of two options available for review: (i) affirm the trial court's *pro-rata* approach, or (ii) adopt Countryway's argument that United Financial is the primary UM insurer for the claim and Countryway secondary. Countryway respectfully submits that the Court of Appeals did not have available to it the option it selected, awarding United Financial more relief than the trial court. In other words, without a Cross-Appeal, Countryway could not be placed in a worse monetary position by an appellate court than placed by the trial court's judgment. Unfortunately, the current Court of Appeals Opinion does just that. In doing so, the Court of Appeals ignored appellate, procedural precedent. See Lee County v. Hieronymus, 252 Ky. 463, 42 S.W.2d 730 (1931).

Accordingly, Countryway respectfully requests that if this Court is unwilling to accept its priority of coverage position, then, at minimum, it should modify the Court of Appeals opinion to place Countryway in a position no worse than placed by the trial court's judgment.

In making this request, Countryway acknowledges that this Court would have the power to announce a policy that, while not applying in the case at bar for procedural reasons, would nevertheless apply in all cases in the future based on the doctrine of judicial economy. But due to the absence of a Cross-Appeal,

this Court should not reverse and remand the trial court's judgment in a manner that requires Countryway to pay 100% of the judgment when the trial court's judgment only required sixty-six percent (66%).

CONCLUSION

WHEREFORE, Countryway respectfully requests the Court to reverse the trial court's Order Regarding Priority of Coverage entered October 29, 2012, as amended on November 27, 2012, and reverse the Opinion of the Kentucky Court of Appeals and remand with instructions that Appellee, United Financial Casualty Insurance Company, would have priority to pay Plaintiff its UM limits prior to invoking Countryway's UM coverage. Countryway would further request the Court to announce a uniform "priority of payment" system such that the insurer of the vehicle involved in the accident has primary responsibility to pay liability, PIP, UM and UIM coverages when facing competing coverages for the same injury.

Respectfully submitted,

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Hon. Brian K. Pack