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**

REPLY 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 Reply Brief for Appellants has been served by first class mail, postage prepaid, on June 17, 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

STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

I. ALL AUTOMOBILE INSURANCE COVERAGES ARE PERSONAL TO THE INSURED AND SHOULD HAVE THE SAME RULES REGARDING PRIORITY OF COVERAGES

The crux of Appellee's argument, as well as the Court of Appeals opinion, is that UM coverage is "personal" and therefore should be treated differently than liability and PIP coverages when competing coverages exist. The implication being that UM coverage is more personal than liability and PIP coverages and therefore should be treated differently. Appellee's further argue that when a choice exists between a third party insurer and a first party insurer, priority of coverage should lean toward the first party insurer. Appellee's position is inconsistent with policies announced by the Kentucky Supreme Court and Kentucky statutory law.

When an individual purchases automobile insurance and pays a separate premium for liability, PIP, UIM, and UM coverages, each of those coverages are equally personal to the individual. Each of these coverages provides a personal benefit and protection to the insured not afforded by the other coverage. Whether the coverage is mandatory or not, once it is purchased, that coverage becomes inherently personal to the insured and provides a financial benefit for the potential to receive money for damages sustained or not paying money for damages caused.

Liability coverage provides personal protection to the insured and prevents the insured from having to pay money to persons they negligently

injure. **Not having to pay money is just as personal to an individual as receiving money.** In fact, the liability coverage extends the extra benefit of providing counsel to the negligent insured at the insurer's expense.

This Court undoubtedly recognized how "personal" liability coverage was when it decided Kentucky Farm Bureau Mut. Ins. Co. v. Shelter Mut. Ins. Co., 326 S.W.3d 803 (Ky. 2010). In denouncing the practice of trial courts having to constantly analyze competing insurance coverages, this Court held that the liability insurer of the vehicle involved in the accident had priority of coverage over the personal insurer of the non-owner, negligent driver. This Court had no qualms with the fact that the negligent driver would have to primarily deal with an insurance company he did not contract with even though the company he did contract with also had coverage available for said accident.

PIP coverage is likewise personal to the insured and certainly no less personal than UM coverage. If an insured is injured in a motor vehicle accident, PIP coverage is available to pay for medical expenses and lost wages of the insured up to the policy limit regardless of who may be at fault for the accident. The benefits of not having to pay medical expenses out of pocket and the recovery of lost wages are similar to the benefits afforded by UM coverage and just as personal to the insured.

Kentucky legislature understood the personal nature of PIP coverage and anticipated that multiple PIP coverages would apply in any given motor vehicle accident when it enacted KRS 304.39-050. Even though it had the option of

allowing an insured to deal first with his/her own insurer, the Kentucky legislature nevertheless placed the priority of PIP coverage on the insurer of vehicle involved in an accident. KRS 304.39-050(1) reads in part:

> (1) The basic reparation insurance applicable to bodily injury to which this subtitle applies is the security covering the vehicle occupied by the injured person at the time of the accident or, if injured person is a pedestrian, the security covering the vehicle which struck such pedestrian.

The Kentucky legislature had no hesitation in requiring passengers and pedestrians to seek PIP benefits from the insurer of the vehicle involved in the accident even though PIP benefits would have otherwise been available from the insurance company with whom the passenger or pedestrian had a contract.

Because PIP and liability coverages are just as personal to the insured as UM coverage, the argument advanced by the Appellee and the Court of Appeals to have different rules when competing coverages exist is nonsensical. To have a bright line rule for UM coverage that is directly opposite to one applicable to liability and PIP coverages will unnecessarily complicate coverage issues. A primary/secondary rule that is consistent on all auto coverages would avoid such confusion. There is no need for a quagmire to exist when a simple rule that the vehicle's insurer would have priority for all applicable coverages would suffice and expedite the insurance claims process. This Court and the Kentucky legislature has consistently declined to adopt a policy that would favor priority toward first party coverage over third party coverage.

In its Brief, the Appellee attempts to buttress its argument with the fact that UM coverage is not mandatory thus justifying a different rule. First, this argument fails because it is a distinction without a substantive difference. The true goal that is to be achieved when considering the priority of payment between two insurers is simplifying the insurance claims process so both the injured party and negligent driver can have the claim resolved quickly. Because liability and property damage coverages are often immediately implicated, the insurers of the vehicles involved in the accident are notified very soon after an accident and conduct an immediate investigation of the facts. Insurers of vehicles not involved in an accident may not receive notice until weeks or months after the accident since it may take several days to determine whether a vehicle involved in the accident was actually uninsured. Furthermore, because so many insurers are hesitant to provide policy limits information prior to a complaint being filed, it may be several months before an injured party knows that an underinsurance claim exists. This delay can complicate the investigation of such an insurer and cause delay in the handling of the claim. If priority of coverage falls to the insurer of the vehicle involved with the accident, then there is less delay and quicker claims processing because they have already conducted an investigation of the accident.

Second, the argument fails because, like UM coverage, PIP coverage may be rejected by an insured and thus is not mandatory. See KRS 304.39-030(1).

Despite not being mandatory, the priority for PIP payments lies with the insurer of the vehicle over an injury party's first party insurer.

For these reasons, the trial court's judgment and the Court of Appeals opinion should be reversed and remanded with instructions that Appellee has priority to pay Plaintiff its UM limits prior to invoking Appellant's UM coverage.

II. THE COURT OF APPEALS ERRED WHEN IT REMANDED WITH INSTRUCTIONS TO ENTER A HIGHER JUDGMENT AGAINST THE APPELLANT WITHOUT A CROSS-APPEAL

Again, this argument is moot if this Court agrees with the Appellant's primary argument. Appellee argues that because the standard of review is *de novo* a cross-appeal was unnecessary. Appellee's argument is not well taken.

Appellee acknowledges that a cross-appeal is required when a trial court fails to grant a litigant all the relief that he has demanded or subjects him to some degree of relief he seeks to avoid.[1] Brown v. Barkley, 628 S.W.2d 616, 618-19 (Ky. 1982). Appellee also acknowledges it argued as an alternative argument that if a bright line rule was to be adopted by the trial court, such rule should favor Appellee thus requiring Appellant to pay the full settlement amount of $22,500.00.[2] When the trial court ordered a pro-rata payment between Appellant and Appellee, the Appellee was not granted all the relief it had sought to avoid, i.e., paying a portion of the settlement. If Appellee was seeking relief from that pro-rata judgment, a cross-appeal was required. Without a cross-appeal, the Court of Appeals may have been entitled to announce a rule of law prospectively for future cases under a *de novo* review, but nonetheless should have been

[1] See Appellee Brief, pp. 21-22.
[2] See Appellee Brief p. 3.

limited in its action in the case at bar to either agreeing with Appellant's appeal or affirming the trial court's judgment. To reverse the trial court and remand with instructions to enter a judgment against Appellant higher than the trial court's original judgment violated the principles of basic appellate jurisprudence as set forth in Barkley.

CONCLUSION

WHEREFORE, Appellant, Countryway Insurance, 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. Appellant 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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