

COMMONWEALTH OF KENTUCKY  
SUPREME COURT OF KENTUCKY  
NO. 2009-SC-000577

**FILED**

MAY 11 2010

SUPREME COURT CLERK  
APPELLANT

PROGRESSIVE MAX INSURANCE COMPANY

v.

NATIONAL CAR RENTAL SYSTEMS, INC.

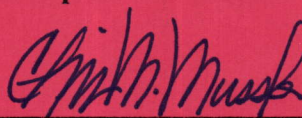
APPELLEE

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BRIEF OF APPELLANT

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Gwin Steinmetz & Baird, PLLC  
Robert L. Steinmetz  
Christopher M. Mussler

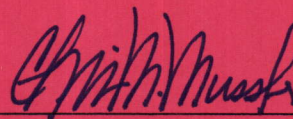


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401 W. Main Street, 10<sup>th</sup> Floor  
Louisville, KY 40202  
(502) 618-5700  
Counsel for Appellant

CERTIFICATE OF SERVICE

In accordance with CR 76.12(5) and (6), this is to certify that a copy of the foregoing was mailed, first class, postage prepaid, to Michael F. Lawrence, 440 South Seventh Street, Suite 200, Louisville, KY 40203 Counsel for Appellee and Hon. Geoffrey P. Morris, Jefferson Circuit Court, Jefferson County Judicial Center, 700 W. Jefferson Street, Louisville, KY 40202 on this 10<sup>th</sup> day of May, 2010.



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Christopher M. Mussler  
Counsel for Appellant

## I. INTRODUCTION

This appeal arises from a subrogation dispute regarding basic reparation benefits paid by National Car Rental Systems, Inc. ("National Car Rental") after an accident involving a vehicle owned by National Car Rental. The issues on appeal are:

1. Whether Progressive Max Insurance Company ("Progressive Max") was obligated to provide Basic Reparation Benefits ("BRB") for a passenger in a vehicle owned by National Car Rental, which vehicle Progressive Max did not insure.
2. If Progressive Max was obligated to provide BRB, whether Progressive Max or National Car Rental was the *primary* basic reparation obligor under KRS 304.39-050.
3. If Progressive Max was not the primary basic reparation obligor, whether KRS 304.39-070(3) provides National Car Rental's exclusive remedy for its subrogation claim, thereby barring its action against Progressive Max.

## II. STATEMENT CONCERNING ORAL ARGUMENT

Progressive Max does not believe that oral argument would be helpful to the Court in deciding the issues presented because they do not involve any unique issue of law or facts.

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#### IV. STATEMENT OF THE CASE

On October 26, 2001, Ed Jones rented a motor vehicle from National Car Rental. While driving the National Car Rental vehicle on November 1, 2001, Jones was involved in an accident (the "Accident"), which resulted in injuries to his passenger, Shannon Wilkerson. At the time of the accident, National Car Rental owned and self-insured the vehicle involved in the Accident. Jones had a liability insurance policy issued by Progressive Max to cover his personal vehicle.

Between March 5, 2002 and November 18, 2002, National Car Rental paid \$10,000 in basic reparation benefits to or for Wilkerson for injuries sustained in the Accident. In an attempt to recover the basic reparation benefits paid for Wilkerson, National Car Rental filed suit against Jones and Progressive Max in Jefferson Circuit Court.<sup>1</sup> In the Complaint against Progressive Max, National Car Rental identified its statutory right of subrogation under KRS 304.39-070<sup>2</sup> as follows:

At the time of the alleged accident, Defendant Ed Jones, was covered by a policy of insurance issued by Defendant Progressive [Max] Insurance Company...Plaintiff has a statutory right of subrogation pursuant to KRS 304.39-070 against Defendant Progressive [Max] Insurance Company for benefits Plaintiff has paid as a result of the negligence

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<sup>1</sup> Progressive Max Insurance Company was incorrectly identified in the Complaint as Progressive Casualty Insurance Company. Progressive Max issued the liability policy in question and is the proper party to this appeal. The claim against Jones is not part of this appeal. Jones was never served process and National Car Rental's subrogation suit only proceeded against Progressive Max.

<sup>2</sup> KRS 304.070 provides in pertinent part: (2) A reparation obligor which has paid or may become obligated to pay basic reparation benefits shall be subrogated to the extent of its obligations to all the rights of the person suffering the injury against any person or organization other than a secured person. (3) A reparation obligor shall have the right to recover basic reparation benefits paid to or for the benefit of a person suffering the injury from the reparation obligor of a secured person as provided in this subsection, except as provided in KRS 304.39-140(3). The reparation obligor shall elect to assert its claim (i) by joining as a party in an action that may be commenced by the person suffering the injury, or (ii) to reimbursement, pursuant to KRS 304.39-030, sixty (60) days after said claim has been presented to the reparation obligor of secured persons. The right to recover basic reparation benefits paid under (ii) shall be limited to those instances established as applicable by the Kentucky Insurance Arbitration Association as provided in KRS 304.39-290.



of Progressive Max Insurance Company's Insured,  
Defendant, Ed Jones.

(Complaint ¶ 6; RA 2-3).

After answering the Complaint, Progressive Max moved to dismiss on October 7, 2004 (RA 19-23) on the ground that National Car Rental failed to comply with KRS 304.39-070, which requires subrogation claims to be brought through arbitration or by joining an action commenced by the person suffering the injury. Because National Car Rental's action was a stand-alone suit and therefore did not satisfy either condition for obtaining the statutory remedy under KRS 304.39-070(3), National Car Rental's action against Progressive Max was barred as a matter of law. In its response to Progressive Max's motion, National Car Rental cross-moved for summary judgment, denied Progressive Max's exclusive remedy argument, and suggested that a different statute, KRS 304.39-050, permitted its subrogation action. (RA 24-31).

The pertinent language of KRS 304.39-050 provides as follows:

- (1) The basic reparation insurance applicable to bodily injury to which this subtitle applies is security covering the vehicle occupied by the injured person at the time of the accident or, if the injured person is a pedestrian, the security covering the vehicle which struck such pedestrian. If the reparation obligor providing such insurance fails to make payment for loss within thirty (30) days after receipt of reasonable proof of the fact and the amount of loss sustained, the injured person shall be entitled to payment under any contract of basic reparation insurance under which he is a basic reparation insured and the insurer making such payments shall be entitled to full reimbursement from the reparation obligor providing the security covering the vehicle...

By shifting its focus from KRS 304.39-070(3) to KRS 304.39-050, and pointing to *Affiliated FM Ins. Companies v. Grange Mut. Cas. Co.*, 641 S.W.2d 49 (Ky. App. 1982) to argue that it had an absolute right to pursue subrogation regardless of the requirements under KRS 304.39-070(3), National Car Rental changed the legal issue in

this case from one of tort subrogation under KRS 304.39-070 to one of statutory priority of insurance coverage under KRS 304.39-050.

The Jefferson Circuit Court denied the parties' cross-motions and requested discovery to further clarify the issues (RA 41-43). In response, the parties cross-briefed the motions again and stipulated to the following facts (RA 64-66; 71-87; and 90-94):

1. On October 26, 2001, Jones rented a motor vehicle from National Car Rental.
2. On November 1, 2001, Jones was involved in a motor vehicle accident while driving the rented vehicle. Wilkerson, his passenger at the time, was injured in the accident.
3. At the time of the accident, Jones had insurance coverage on his personal motor vehicle issued by Progressive Max, which included liability benefits while driving a rental vehicle.
4. Based on her injuries, Wilkerson pursued a personal injury claim against Jones and also sought basic reparation benefits from National Car Rental.
5. Between March 5, 2002 and November 18, 2002, National Car Rental paid \$10,000.00 in basic reparation benefits to and on behalf of Wilkerson for the injuries she sustained in the November 1, 2001 accident.
6. On August 16, 2002, Wilkerson filed a personal injury suit against Jones. That suit was dismissed on September 16, 2002.
7. Wilkerson did not notify National Car Rental that she had filed a complaint. Likewise, Wilkerson did not notify National Car Rental that the suit was dismissed.
8. National Car Rental seeks reimbursement from Progressive Max of the basic reparation benefits paid on behalf of Wilkerson.
9. National Car Rental is not a signatory to the insurance company Arbitration Compact and did not demand arbitration through that forum. Arbitration is enumerated under KRS 304.39-070(3) as a remedy for PIP subrogation claims.
10. Wilkerson did not notify National Car Rental of her 2002 personal injury action and National Car Rental did not intervene in that action to present its basic reparation benefit subrogation claim against Progressive Max.



11. To recover its basic reparation benefit payments, National Car Rental filed an action against Progressive Max and Jones. In response, Progressive Max denied liability to National Car Rental on the grounds that KRS 304.39-070(3) (arbitration or intervention) is National Car Rental's exclusive remedy for a basic reparation benefit subrogation claim.

There were no other facts in evidence before the Court of Appeals or the Jefferson Circuit Court. National Car Rental never put into evidence Jones' Progressive Max policy, under which it now claims that Progressive Max owed BRB to Wilkerson.

On July 9, 2007, the Jefferson Circuit Court entered an Order of Judgment in favor of National Car Rental, but without stating whether its ruling was based on KRS 304.39-070 tort subrogation or a KRS 304.39-050 direct obligation to pay Wilkerson's BRB. The court awarded National Car Rental \$10,000 plus prejudgment interest. (RA 88-89). The court subsequently denied Progressive Max's Motion to Alter, Amend or Vacate that Order of Judgment (RA 95-104), but vacated the award of prejudgment interest. (RA 107).

Progressive Max appealed the trial court's decision, requesting reversal of the Order and remand with an order that judgment be entered in favor of Progressive Max. Progressive Max argued that KRS 304.39-070 was National Car Rental's exclusive remedy and that National Car Rental failed to follow the requirement set forth in KRS 304.39-070 to either join as a party plaintiff or submit the claim to arbitration. Progressive Max argued further that National Car Rental's reliance on KRS 304.39-050 should be rejected because KRS 304.39-050 applies only to disputes between reparation obligors that are both obligated to pay basic reparation benefits without regard to fault, and Progressive Max was never a basic reparation obligor for Wilkerson.

On May 8, 2009, the Kentucky Court of Appeals affirmed the trial court's decision. Citing to a prior Kentucky Supreme Court decision in *Progressive Casualty Ins. Co. v. Kidd*, 602 S.W.2d 416 (Ky. 1980), the Court of Appeals acknowledged that KRS 304.39-070(2) and (3) “plainly says that the reparation obligor shall elect to assert its claim in one of two specified ways’ – arbitration or joinder. But the court distinguished this action from *Kidd* stating that there are “two insurance companies for whom liability exists” here and priority must attach to one over the other. Pointing to KRS 304.39-050(1), the court concluded that Progressive Max was the primary basic reparation obligor for Wilkerson.

On May 28, 2009, Progressive Max filed a Petition for Rehearing, arguing that the court had (i) overlooked material facts, controlling statutes, and decisions and (ii) misapplied the applicable law not only by concluding that Progressive Max is a basic reparation obligor for Wilkerson, but also by concluding that Progressive Max is the primary basic reparation obligor for Wilkerson. National Car Rental responded to the Petition by admitting that it – not Progressive Max – was the primary basic reparation obligor, but arguing that the Petition should be denied because Progressive Max was a basic reparation obligor and the Progressive Max policy covered the vehicle involved in the Accident. The Court of Appeals denied Progressive Max's Petition on August 17, 2009.

## V. ARGUMENT

The Court of Appeals misapplied the basic reparation benefit (“BRB”) priority statute in a manner that is not only prohibited by KRS 304.39-050 but also in direct conflict with published, controlling authority. Indeed, the Court of Appeals' opinion

shifts obligations for BRB coverage from vehicle owners and their insurers to vehicle borrowers and their insurers. This is a significant result – one that would affect all BRB claims by all passengers in borrowed or rented vehicles and create new BRB obligations for liability insurers that had not agreed to cover the vehicle itself. Such coverage obligations are not required by the Kentucky legislature or recognized by Kentucky courts.

Under the facts of this case and controlling case law, the one and only primary basic reparation obligor is the vehicle owner, National Car Rental. The obligation to provide BRB always rested with the vehicle owner, National Car Rental, and never shifted to Progressive Max. Progressive Max did not insure National Car Rental's vehicle and was never a basic reparation obligor for Wilkerson on any level, either primary or secondary. KRS 304.39-050 imposes BRB liability on basic reparation obligors only, and therefore does not obligate Progressive Max to pay anyone.

When applying the proper statute to the facts of this case, National Car Rental's failure to join an existing action by the injured person or to submit its subrogation claim for arbitration mandates reversing the decision of the lower courts. Kentucky law dictates that National Car Rental's exclusive remedy for pursuing a BRB subrogation claim is provided by KRS 304.39-070(3), which requires intervention in an action by the injured person or submission of the claim for arbitration. Because National Car Rental's action does not comply with KRS 304.39-070(3), it is barred. Accordingly, the decisions of the Kentucky Court of Appeals and the Jefferson Circuit Court awarding \$10,000 to National Car Rental should be reversed with directions to enter a judgment in favor of Progressive Max dismissing National Car Rental's claims.

**A. Progressive Max is not obligated to provide BRB because it did not insure National Car Rental's vehicle or Wilkerson individually.**

There are only two ways that Progressive Max could have become obligated to provide basic reparation benefits to Wilkerson, who is an absolute stranger to the Progressive Max policy:

- (1) if Wilkerson was an "insured person" under the Progressive Max policy or the controlling statutes; or
- (2) if the vehicle Wilkerson occupied and owned by National Car Rental was a covered vehicle under Progressive Max's policy.

In other words, Progressive Max either had to insure *the person* (Wilkerson) or insure *the vehicle* (owned and self-insured by National Car Rental) before it could have become a basic reparation obligor for Wilkerson, a passenger in the vehicle. National Car Rental has failed to establish either as a matter of fact under the insurance policy or as a matter of law under the controlling statutes.

The only conclusion supported by the stipulated facts and controlling statutes is that Progressive Max was obligated to provide *liability* coverage for its named insured, Jones, if he were liable for tort damages for his operation of National Car Rental's vehicle. That means that Progressive Max had certain coverage obligations *to Jones personally*. It does not mean that Progressive Max had any coverage obligations *to National Car Rental's vehicle*. In its opinion affirming, the Court of Appeals erred in relying on KRS 304.39-050, which is applicable to insurers (or self insureds, like National Car Rental) that have agreed to provide coverage for the vehicle itself. There is no evidence whatsoever that Progressive Max ever agreed to provide coverage for the vehicle involved in the Accident or that any Kentucky statute requires Progressive Max

to cover *a vehicle* (as opposed to a person) that is not identified as a covered auto on its policy.

National Car Rental led the trial court and the Court of Appeals to believe that Progressive Max agreed to cover National Car Rental's own vehicle, not just the driver (Progressive Max's named insured, Jones) – a belief that is not based on evidence. Because Progressive Max only provides security for Jones, and not security covering the motor vehicle involved in the Accident, the Court of Appeals applied the wrong statute and imposed an obligation on Progressive Max that only the vehicle owner or its insurer has.

**B. National Car Rental, the owner of the vehicle involved in the Accident, is the one and only basic reparation obligor.**

Although the Court of Appeals correctly stated that Jones rented a vehicle from National Car Rental and was involved in an accident while driving National Car Rental's vehicle, the court took a wrong turn when it said that Wilkerson was a passenger "in Jones's vehicle." The vehicle involved in the Accident is and always was National Car Rental's vehicle.

The only evidence relating to the Progressive Max policy and any obligation under it is the statement found in the stipulated facts: "At the time of the accident, Ed Jones had insurance coverage on his personal motor vehicle issued by Progressive Max Insurance Company, which included liability benefits while driving a rental vehicle." (RA 64-66; 71-87 and 90-94). The parties made no stipulation relating to Wilkerson or whether she qualified as an "insured person" for basic reparation benefits under the terms of the Progressive Max policy. And the parties made no stipulation relating to any coverage for the vehicle itself under the terms of the Progressive Max policy.

For there to be any coverage obligation imposed on Progressive Max as a matter of law, the obligation must come from applying the controlling statutes to the stipulated facts. Moreover, that obligation must be clearly required notwithstanding the terms of Progressive Max's policy, a policy that National Car Rental has never put in evidence. The statute urged by National Car Rental and cited by the Court of Appeals as the cornerstone for its opinion affirming is KRS 304.39-100:

"National contends that, since Progressive is an insurance company which provided a contract of liability insurance covering the use of a motor vehicle within the Commonwealth, it is deemed to provide BRB under KRS 304.39-100."

(Opinion Affirming, p. 4).

It is important, however, to read all of KRS 304.39-100 and break down its defined terms:

#### 304.39-100 INCLUDED COVERAGES

- (1) An insurance contract which purports to provide coverage for basic reparation benefits or is sold with representation that it provides security covering a motor vehicle has the legal effect of including all coverages required by this subtitle.
- (2) An insurer authorized to transact or transacting business in this Commonwealth shall file with the commissioner of insurance as a condition of its continued transaction of business within this Commonwealth a form approved by the commissioner of insurance declaring that in any contract of liability insurance for injury, wherever issued, covering the ownership, maintenance or use of a motor vehicle other than motorcycles while the vehicle is in this Commonwealth shall be deemed to provide the basic reparation benefits coverage and minimum security for tort liabilities required by this subtitle, except a contract which provides coverage only for liability in excess of required minimum tort liability coverage. Any nonadmitted insurer may file such form.

Regarding subsection (1), which actually provides the scope of the coverage obligation, National Car Rental had to prove (i) that the Progressive Max policy "purports

to provide coverage for basic reparation benefits” for Wilkerson or (ii) that Progressive Max provides “security covering” National Car Rental’s vehicle. National Car Rental provided absolutely no proof that Wilkerson could qualify as a basic reparation insured under the Progressive Max policy or that Progressive Max agreed that National Car Rental’s vehicle would be a covered vehicle under Progressive Max’s policy.

To the contrary, “security covering the vehicle” is a defined term under the Motor Vehicle Repairs Act. KRS 304.39-080 provides in relevant part:

- (1) “Security covering the vehicle” is the insurance or other security so provided. The vehicle for which the security is so provided is the “secured vehicle.”

\* \* \* \* \*

- (5) Except for entities described in subsections (3) and (4), **every owner** of a motor vehicle registered in this Commonwealth or operated in this Commonwealth by him or with his permission **shall continuously provide** with respect to the motor vehicle while it is either present or registered in this Commonwealth, and any other person may provide with respect to any motor vehicle, by a contract of insurance or by qualifying as a self-insurer, security for the payment of basic reparation benefits in accordance with this subtitle and security for payment of tort liabilities, arising from maintenance or use of the motor vehicle...(emphasis added)

Because there is no evidence that Progressive Max agreed in its policy to cover National Car Rental’s vehicle, the Court of Appeals must have found that Progressive Max was obligated by KRS 304.39-080(5) to provide “security covering” National Car Rental’s motor vehicle. But this statute – the statute relied upon by the Court of Appeals – imposes that obligation only on the vehicle’s owner – National Car Rental.

Although KRS 304.39-080(5) contemplates that an insurer “may” nonetheless agree to provide security covering another’s motor vehicle, it has to be done “by contract of insurance.” There is no evidence here that Progressive Max agreed to cover National



Car Rental's vehicle. The only evidence regarding coverage was that Progressive Max agreed to cover Jones, not the vehicle owned by National Car Rental.

Progressive Max cannot be liable for basic reparation benefits to Wilkerson unless Progressive agreed to provide security covering National Car Rental's vehicle. KRS 304.39-050 states: "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 ...." It is undisputed that National Car Rental – as the owner that self-insured the vehicle – is obligated by KRS 304.39-080(5) to provide that security. That is presumably why National Car Rental voluntarily paid basic reparation benefits to Wilkerson in the first place.

While Progressive Max may have agreed to insure Jones' liability for operating the vehicle, it did not agree to provide security for the vehicle itself, with all that entails – like paying basic reparation benefits for passengers. There is no evidence that Progressive Max ever agreed to provide anything more than liability coverage for the tortious conduct of Jones, and the controlling statutes obligate National Car Rental to provide security covering its own vehicle – the vehicle involved in the Accident and the vehicle in which Wilkerson was injured.

**C. The Court of Appeals' decision is contrary to published authority.**

The Court of Appeals' decision in favor of National Car Rental is inconsistent with its decision in *Rees v. US Fidelity and Guar. Co.*, 715 S.W.2d 904 (Ky. App. 1986). In that case, Rees was driving a service loaner owned by Gambrel Motors while his father's vehicle was being repaired. Gambrel Motors' service loaner was insured by United States Fidelity and Guaranty Company ("USF&G"). Rees' father had insurance

for his vehicle with Shelter Insurance Company. While driving the service loaner, Rees allegedly caused an accident, which resulted in injuries to his passenger. The court held that while the “escape clause” in the USF&G policy would allow the USF&G liability coverage for Rees to be secondary to Shelter’s coverage of Rees, USF&G alone provided the security covering the vehicle for basic reparation benefits:

The “security covering the vehicle” in the present case is the policy written by USF&G, *see* KRS 304.39-080, which is, therefore, primarily liable for the payment of basic reparation benefits to the injured passenger. We have been referred to nothing in the MVRA which permits shifting the liability for the payment of basic reparation benefits as is the case with respect to the payment of tort liabilities. As a consequence, the policy written by USF&G must be interpreted to furnish primary coverage for basic reparation benefits to the injured passenger. *See* KRS 304.39-100.

*Id.* at 906.<sup>3</sup> That is exactly the case here. As owner and self-insurer of the vehicle, it is National Car Rental – not Progressive Max – that provides the security covering the vehicle involved in the Accident.

The Court of Appeals opinion affirming is also inconsistent with *Affiliated FM Ins. Companies v. Grange Mut. Cas. Co.*, 641 S.W.2d 49 (Ky. App. 1982). In *Affiliated*, an individual was injured while operating a vehicle leased by his employer. *Id.* at 50. The employer insured that vehicle with Affiliated FM Insurance Companies (“Affiliated FM”), which provided basic reparation benefits. *Id.* The injured employee also had a personal automobile insurance policy with basic reparation benefits through Grange Mutual Casualty Company. *Id.* When Affiliated FM refused to pay basic reparation benefits, the injured employee submitted his claim to his own carrier, Grange. *Id.* Grange paid \$10,000 in basic reparation benefits for the injured employee and then filed suit for reimbursement from Affiliated FM. *Id.*

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<sup>3</sup> Progressive Max notes that KRS 190.033 was subsequently amended to limit the application of escape clauses by car dealers like Gambrel.

The Court of Appeals in *Affiliated* held that priority suits between reparation obligors who are obligated to pay loss claims *without regard to fault* are not barred by the exclusive remedy provisions of KRS 304.39-070(3) because the legislature provided for such actions in KRS 304.39-050. *Id.* at 50-51. The pertinent language of KRS 304.39-050 provides:

- (1) The basic reparation insurance applicable to bodily injury to which this subtitle applies is security covering the vehicle occupied by the injured person at the time of the accident or, if the injured person is a pedestrian, the security covering the vehicle which struck such pedestrian. If the reparation obligor providing such insurance fails to make payment for loss within thirty (30) days after receipt of reasonable proof of the fact and the amount of loss sustained, the injured person shall be entitled to payment under any contract of basic reparation insurance under which he is a basic reparation insured and the insurer making such payments shall be entitled to full reimbursement from the reparation obligor providing the security covering the vehicle...

*Id.* at 50. The court explained, however, that when the issue is fault-based, like National Car Rental's claims against Jones and Progressive Max, intervention or arbitration under KRS 304.39-070(3) is the exclusive remedy. *Id.* at 50-51. The court also noted that KRS 304.39-070(3), "which requires either intervention or arbitration on the part of the basic reparation obligor, attempts to provide a mechanism for reimbursement of losses paid as basic reparation benefits based solely on the law of torts."

National Car Rental's claims in this case are based upon fault and the law of torts. Paragraph 6 of National Car Rental's own Complaint makes that clear: "Plaintiff has a statutory right of subrogation pursuant to KRS 304.39-070 against Defendant Progressive [Max] Insurance Company for benefits Plaintiff has paid as a *result of the negligence of* Progressive Max Insurance Company's Insured, Defendant, Ed Jones." (RA 2-3)

(emphasis added). In National Car Rental's own words, Progressive Max's responsibility to pay a subrogation claim is contingent on the alleged negligence of its insured, Jones.

When properly asserted, National Car Rental would only have a subrogation claim against Progressive Max to the extent that Progressive Max's insured, Jones, is liable for Wilkerson's injuries. That is not only distinguishable from the facts of *Affiliated*, where "the appellee's claim for reimbursement was not based upon fault or the law of torts but rather on statutory priority" between reparation obligors, but also makes the remedy under KRS 304.39-050 unavailable and inapplicable here. *Id.* at 51.

The effect of the Court of Appeals' opinion affirming here is just the opposite of what the Court of Appeals held in *Affiliated*. The Court of Appeals' opinion affirming requires the liability insurer of the driver to provide basic reparation benefits to a passenger who is a stranger to the driver's policy, and allows the insurer of the vehicle involved in the accident to escape its primary liability for BRB. Under KRS 304.39-050 and the *Affiliated* case, there can be only one primary reparation obligor, and here that is National Car Rental – not Progressive Max.

**D. National Car Rental's exclusive remedy is found in KRS 304.39-070 which bars this action against Progressive Max.**

As long-ago held by this Court in *Progressive Cas. Ins. Co. v. Kidd*, 602 S.W.2d 416, 417 (Ky.1980), "the statutory mechanism for subrogation of a reparation obligor" is found in KRS 304.39-070(2) and (3), which provide:

- (2) A reparation obligor which has paid or may become obligated to pay basic reparation benefits shall be subrogated to the extent of its obligations to all the rights of the person suffering the injury against any person or organization other than a secured person.
- (3) A reparation obligor shall have the right to recover basic reparation benefits paid to or for the benefit of a person suffering the injury from

the reparation obligor of a secured person as provided in this subsection, except as provided in KRS 304.39-140(3). The reparation obligor shall elect to assert its claim (i) by joining as a party in an action that may be commenced by the person suffering the injury, or (ii) to reimbursement, pursuant to KRS 304.39-030, sixty (60) days after said claim has been presented to the reparation obligor of secured persons. The right to recover basic reparation benefits paid under (ii) shall be limited to those instances established as applicable by the Kentucky Insurance Arbitration Association as provided in KRS 304.39-290.

In *Kidd*, this Court explained that a reparation obligor may not maintain its own action to recover reparation benefits and that its “options only include joinder as a party plaintiff and arbitration.” *Id.* at 417 quoting *Smith v. Earp*, 449 F.Supp. 503, 506 (W.D. Ky. 1978) (emphasis added). The “statute plainly says that the ‘reparation obligor shall elect to assert its claim in one of the two specified ways.’” *Id.*

Any “equitable right” of subrogation “has been supplanted by the statute” and these statutory avenues for recovery are “the exclusive remedy for subrogation of a ‘no-fault’ insurer.” *Id.* That the remedies found in KRS 304.39-070(3) are exclusive makes sense because this statutory right of subrogation created by the legislature “supersedes any common law subrogation right.” *Lafferty v. United States*, 880 F. Supp. 1121, 1130 (E.D. Ky. 1995) citing *Kentucky Central Ins. Co. v. Kempf*, 813 S.W.2d 829 (Ky. App. 1991).

Notably, National Car Rental has not satisfied either condition outlined in KRS 304.39-070(2) and (3). It neither joined as a party in the action by the injured person – Wilkerson – nor submitted its claim for arbitration. Accordingly, National Car Rental’s separate action against Progressive Max is impermissible and should have been dismissed as a matter of law.

National Car Rental has argued that it would be left without a subrogation remedy because it did not have notice of the lawsuit prior to the dismissal. However, whether National Car Rental now has an available remedy should not be considered by the Court because National Car Rental had a remedy available to it at one time, but forfeited that remedy through its own inaction, and National Car Rental chose not to join the Kentucky Insurance Arbitration Association even though it is required by statute to be a member.

As the parties have stipulated, Wilkerson filed a lawsuit against Ed Jones. Although National Car Rental did not receive notice of that action before it was dismissed thirty days later, Kentucky law charges reparation obligors with the duty to investigate and remain informed about such actions if they wish to seek subrogation by joining in those lawsuits. *See KRS 304.39-070(3)*.

Second, the fact that arbitration was not available to National Car Rental is a pitfall of its own making. National Car Rental is a reparation obligor as defined by KRS 304.39-020(13):

‘Reparation obligor’ means an insurer, self-insurer, or obligated government providing basic or added reparation benefits under this subtitle.

The arbitration provision of KRS 304.39-070(3) states only that the arbitration remedy is “limited to those instances established as applicable by the Kentucky Insurance Arbitration Association as provided by KRS 304.39-290.” KRS 304.39-290(2) mandates that “all basic reparation obligors shall be and remain members of the association.” Membership in the Arbitration Association is required because it is “the mechanism for reimbursement, among reparation obligors of losses paid as basic or added reparation benefits, based solely on the law of torts.” KRS 304.39-290(1). As a reparation obligor,

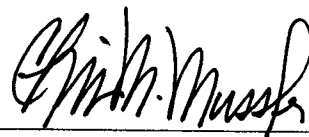
it is National Car Rental's obligation to maintain membership in the Arbitration Association to avail itself of the arbitration remedy.

The subrogation procedure outlined in KRS 304.39-070 is how the legislature intended claims like the one brought by National Car Rental to be resolved. National Car Rental should not be allowed to sustain its subrogation claim against Progressive Max simply because it failed to maintain its membership in the Arbitration Association and failed to intervene in Wilkerson's action.

## VI. CONCLUSION

For these reasons, the decisions of the Jefferson Circuit Court and the Kentucky Court of Appeals in favor of National Car Rental should be reversed. This case should be remanded to the Jefferson Circuit with an Order that judgment be entered in favor of Progressive Max, dismissing all claims by National Car Rental with prejudice. Basic reparation benefits exist only by statute and all rights related to them, including the right to subrogation, exist only by statute. The Court of Appeals' opinion, which shifts obligations for BRB coverage from vehicle owners and their insurers to vehicle borrowers and their insurers, creates coverage obligations that are neither required by the Kentucky legislature nor recognized by Kentucky courts.

Respectfully submitted,



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Robert L. Steinmetz  
Christopher M. Mussler  
Gwin Steinmetz & Baird, PLLC  
401 W. Main Street, 10<sup>th</sup> Floor  
Louisville, Kentucky 40202  
(502) 618-5700