COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2011-SC-000026-D

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY — APPELLANT

vs. ON APPEAL FROM KENTUCKY COURT OF APPEALS
NO. 08-CI-00169, 09-CI-00105 AND 09-CI-00117

KAREN HODGKISS-WARRICK — APPELLEE

BRIEF FOR APPELLANT, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

CERTIFICATE OF SERVICE

This is to certify that on February 3rd, 2012 the foregoing Brief for Appellant, State Farm Mutual Automobile Insurance Company, has been served by mailing a true and correct copy to: Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Hon. Jeffrey T. Burdette, Chief Circuit Judge Rockcastle Circuit Court, 50 Public Square, Somerset, Kentucky 42501; J. Warren Keller, Clayton O. Oswald, Taylor Keller Dunaway & Tooms, PLLC, 1306 West Fifth Street, London, Kentucky 40741 and Charles C. Adams, Jr., Herren & Adams, 148 North Broadway, Lexington, Kentucky 40507. I further certify that the record on appeal was not withdrawn by the Appellant.

Respectfully submitted,

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INTRODUCTION

This is an insurance coverage case. The insurer appeals a decision from the Court of Appeals that fails to follow established Supreme Court precedent interpreting the relevant insurance contract language.

STATEMENT OF ORAL ARGUMENT

The Appellant believes an oral argument would be beneficial to the Court because the case involves clear contractual language that has previously been upheld by Kentucky courts on numerous occasions.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

This case arises from a motor vehicle accident that occurred in Rockcastle County, Kentucky on May 17, 2008. The Appellee, Karen Hodgkiss-Warrick, was a passenger in a vehicle driven by her daughter, Heather Hodgkiss. Ms. Hodgkiss-Warrick was injured. (Complaint RA pp. 1-3).

At the time of the accident, Ms. Hodgkiss-Warrick resided with Heather Hodgkiss in Pennsylvania. She and Ms. Hodgkiss made a trip to Burnside, Kentucky to pick up a special breed of puppy. They were on their way back to their home in Pennsylvania when the accident occurred. Ms. Hodgkiss-Warrick asserted a claim against her daughter and recovered benefits under the liability insurance coverage for the car she was occupying at the time of the accident.

Ms. Hodgkiss-Warrick also owned a car which was licensed and garaged in Pennsylvania. She obtained a policy of insurance on the car with the Appellee, State Farm Mutual Automobile Insurance Company ("State Farm"), in Pennsylvania. The contract contemplates coverage for Pennsylvania residents. Therefore, performance of the contract would be expected in Pennsylvania. (Trial Court Summary Judgment, RA 806-814, Appendix 1 hereto).

Ms. Hodgkiss-Warrick asserted an additional claim for underinsured motorist ("UIM") coverage under her personal policy with State Farm. The Trial Court granted summary judgment in favor of State Farm based on the fact that the policy language is clear and unambiguous and Pennsylvania has the most significant contacts. Therefore, Pennsylvania law should determine whether UIM coverage is available under the insurance contract. The Trial Court specifically

rejected the notion that the insurance policy language at issue violated Kentucky public policy. (See Trial Court Judgment Summary Judgment).

The insurance contract does not provide UIM coverage in this case because the vehicle Ms. Hodgkiss-Warrick was occupying does not qualify as an underinsured motor vehicle based on clear and unambiguous policy language. Specifically, the State Farm policy states:

> **Underinsured Motor Vehicle** does not include a land motor vehicle:
>
> **Owned by**, rented to, or furnished or available for the regular use of **you** or any **resident relative**.
> (Motion for Discretionary Review, Record Event No. 20).

There are no material issues of fact because Ms. Hodgkiss-Warrick resided with her daughter at the time of the accident. Her daughter owned the vehicle involved in the accident. (Trial Court Summary Judgment). The Court of Appeals reversed the Trial Court in an Opinion designated to be published. Essentially, the Court of Appeals said Pennsylvania law does not control interpretation of the Pennsylvania contract because the policy provision is contrary to perceived public policy of Kentucky. (Opinion Reversing and Remanding Record Event No. 17, Appendix 2 hereto).

ARGUMENT

The Kentucky Court of Appeals' decision is fundamentally wrong and should be reversed for several reasons. The Court of Appeals Opinion relies on a misguided analysis of the applicable insurance policy provision; attempts to apply Kentucky law where Pennsylvania law is controlling; misinterprets current

Kentucky law; and makes assumptions about the direction of our Kentucky Supreme Court which are not supported by existing case law.

First, the underlying claim is for recovery of underinsured motorist ("UIM") benefits on a policy issued in Pennsylvania for an insured in Pennsylvania. Pennsylvania law is controlling and Pennsylvania law precludes recovery of contractual UIM benefits under the factual circumstances of this case.

Second, there should be no additional UIM coverage available under the insurance policy at issue in this case even if the Supreme Court chooses Kentucky law, because all applicable precedent from the Kentucky Court of Appeals and the Kentucky Supreme Court supports the specific insurance policy language under review.

Third, the relevant policy language is not a "family" or "household" exclusion in automobile liability policy coverage. The actual provision defines "an underinsured" motor vehicle. The present case involves a first party UIM claim, not a liability claim. This is a significant point because (prior to this case) no Kentucky Court has found the policy language at issue contrary to the public policy of our state. In fact, the same provision has been found valid and not contrary to public policy on several other occasions. Moreover, the Kentucky legislature has given no indication that the policy provision which addresses non-mandatory UIM coverage could be contrary to Kentucky public policy.

Finally, the Court of Appeals' decision is based on a completely flawed analysis of two cases from the Kentucky Supreme Court, *State Farm Mut. Auto. Ins. Co. v. Marley*, 151 S.W.3d 33 (Ky. 2004) and *Williams v. State Farm Mut.*

Auto. Ins. Co., 255 S.W.3d 913 (Ky. 2008). Neither case invalidates the policy language at issue. *Marley* addresses an entirely different issue and has minimal, if any, relevance to the issue before this Court. And *Williams* actually supports enforcement of the insurance policy language under review. Each of these reasons for overturning the Kentucky Court of Appeals' decision will now be discussed in turn.

I. PENNSYLVANIA LAW IS CONTROLLING

The insurance policy was issued in Pennsylvania. The claimant/insured resided with her daughter in Pennsylvania. Performance of the insurance contract was largely expected to occur in Pennsylvania. The involved vehicle was licensed and garaged in Pennsylvania. The only connection to Kentucky is the location of the automobile accident.

As a general rule, Courts determine which state has the most significant relationship with the transaction and the parties when they are faced with a choice of law question involving a contract question. Restatement of Conflict of Laws, 2d. § 188 (1971). In most cases the law of the residence of the named insured should determine the scope of automobile insurance policy coverage. Restatement of Conflict of Laws, 2d. § 193 (1971).

Conflict of laws issues often arise in motor vehicle cases due to the transitory nature of automobiles. Consequently, there is significant Kentucky law regarding which state's law to apply in various types of situations which potentially invoke first party automobile uninsured ("UM") or underinsured ("UIM") insurance contractual coverages. The seminal case on conflict of laws issues in

situations involving first party automobile coverage is *Lewis v. American Family Ins. Group*, 555 S.W.2d 579 (Ky. 1977). In *Lewis* two brothers who were Indiana residents were injured in a motor vehicle accident that occurred in Kentucky. The brothers filed suit against the alleged tortfeasor and against their own UM insurance carrier. The *Lewis* Court determined that Indiana law applied with respect to the insurance policy coverage because the insurance contracts in question were entered into in Indiana between Indiana parties and concerned cars which were licensed and principally garaged in Indiana. *Id.* at 583 (citing *Allstate Insurance Co. v. Napier*, 505 S.W.2d 169 (Ky. 1974).

Likewise, the policy coverage issue involved in the present case is on a car that was insured in Pennsylvania, garaged in Pennsylvania, and licensed in Pennsylvania. The insured resided in Pennsylvania and had only briefly been in Kentucky when the accident occurred. There is no question that Pennsylvania law should apply if one applies the generally accepted principal that the law of the state with the most significant contracts is to be applied with respect to first party coverage under the insurance contract.

The policy language at issue contains standard language which establishes the scope of UIM coverage by defining "Underinsured Motor Vehicle" in the policy. In part, the policy states that the definition of underinsured motor vehicle does not include a vehicle that is "owned by, rented to or furnished for the regular use" of the named insured or any resident relative. The vehicle the claimant/insured, Karen Hodgkiss-Warrick, occupied clearly did not qualify as an underinsured motor vehicle. Therefore, according to the plain and unambiguous

language of the policy, there should be no UIM coverage available under the facts of this case.

The same basic policy provision has recently been enforced in Pennsylvania under the same basic fact scenario. In *Burstein v. Prudential Property and Casualty Insurance Co.*, 809 A.2d 204, 205 (Pa. 2002), the Bursteins were injured in an accident while occupying a vehicle owned by Ms. Burstein's employer, which was available for her personal use. The Burstein's recovered the other driver's policy liability limit and pursued a claim for UIM benefits under their personal automobile policies with Prudential Property and Casualty Company. Prudential denied the claim based on a similar policy exclusion, and the denial was upheld by the Pennsylvania Supreme Court. *Id.* at 210.

Here, the Court of Appeals' decision glosses over the fact that our courts have consistently applied other states' laws to interpret UIM policy provisions when the contract was entered into in another state and the only Kentucky connection is that the motor vehicle accident happened on our roadways. Additionally, the Court of Appeals ignored the fact that our courts have regularly applied the law of other states even in situations where the scope and applicability of UIM coverage differs from Kentucky law. To take it a step further, Kentucky courts have also applied the law of other states with the most significant contacts even in situations where there have been specific and prior Kentucky Court decisions invalidating insurance policy language or exclusions on public policy or other grounds. For example, in *Poore v. Nationwide Mut. Ins.*

Co., 208 S.W.3d 269 (Ky. App. 2006), the issue was whether UIM benefits in out-of-state insurance policies are "stackable" when an accident occurs in Kentucky. The Court applied the law of the state in which the insurance contracts were written and said the claimant could not stack the UIM coverages. *Id.* at 272. Whereas, if the policies had been issued in Kentucky the claimant clearly would have been allowed to stack all available UIM coverages from his personal automobile policies. *Allstate Ins. Co. v. Dicke*, 862 S.W.2d 327 (Ky. 1993).

In *Bonnlander v. Leader Nat'l Ins. Co.*, 949 S.W.2d 618 (Ky. App. 1996), the primary issue before the Court was whether an insured was entitled to full UIM benefits from his Indiana policy for an accident occurring in Kentucky. Specifically, the question was whether the total UIM coverage should have been off-set by the total amount of liability coverage, consistent with Indiana law. Or, alternatively, should the Court have followed Kentucky law which does not allow an insurer to reduce the total UIM coverage by the amount of available liability coverage? See KRS 304.39-320. The insured claimant, of course, argued that Kentucky law should be applied. The Court said the public policy behind the Kentucky Motor Vehicle Reparations Act is to protect Kentucky residents from out-of-state vehicles that come into Kentucky and have no liability insurance or inadequate liability insurance. Therefore, the *Bonnlander* Court followed Indiana law because Indiana was the state with the most significant contacts and there were no meaningful public policy concerns behind affording the amount of UIM coverage that would have been available if the policy had been issued in Kentucky. *Bonnlander*, supra at 619-626.

Here the Kentucky Court of Appeals actually acknowledged there would be no UIM coverage under Pennsylvania law and Pennsylvania law should be applied based solely on a "most significant contacts" analysis. Nevertheless, the Court of Appeals refused to apply Pennsylvania law based on its guess that the policy provision violates Kentucky's public policy. In doing so, the Court of Appeals applied questionable legal reasoning, used case law that is not particularly relevant to the case at hand, ignored existing Kentucky case law concerning the precise policy language at issue, and misinterpreted a recent Supreme Court decision. In the end, the Court of Appeals ultimately speculated the current Kentucky Supreme Court would reject the substantial existing case law approving the "owned or available for regular use" policy language. (Court of Appeals' Opinion, pp. 8-12). The Court of Appeals should have followed basic conflict of laws principles rather than rejecting applicable Pennsylvania law and then manipulating Kentucky law to reach a conclusion that is, frankly, not supported by the existing law of either state.

II. THE POLICY LANGUAGE AT ISSUE IS ALSO VALID AND ENFORCEABLE UNDER APPLICABLE KENTUCKY PRECEDENT

The Court of Appeals incorrectly characterized the policy provision as a "family" or "household" exclusion and inexplicably disregarded several cases upholding the actual "owned or available for regular use" language in automobile insuring agreements. There are several published cases in Kentucky which uphold the policy language that is now under attack in this case.

In B*urton v. Kentucky Farm Bureau Mut. Ins. Co.*, 326 S.W.3d 474, (Ky. 2010), a person was injured when involved in an accident while occupying a vehicle driven by her husband. The passenger received the minimum liability limits from her husband's insurance policy. She filed a separate claim against Kentucky Farm Bureau Insurance Company for UIM coverage off of another vehicle in the household. The *Burton* Court in 2010 upheld identical policy language and determined UIM coverage was not available under the Farm Bureau policy. *Id.* at 475. In doing so, the Court noted that "[r]egular use exclusions from UIM coverage have repeatedly been upheld as not contrary to public policy." *Id.* at 476.

This Court also upheld the relevant policy language in *Motorists Mut. Ins. Co. v. Glass*, 996 S.W.2d 437, 449-450 (Ky. 1999). In fact, the Court has never criticized or invalidated the precise policy language at issue here.

Our Court of Appeals has also repeatedly upheld the same or similar policy language under a variety of different factual situations. For example, in *Murphy v. Kentucky Farm Bureau Mut. Ins. Co.*, 116 S.W.3d 500 (Ky. App. 2002) the estate of a child who was killed in a motor vehicle accident involving a car driven by the child's brother asserted a claim for UIM benefits against other insurance policies insuring second and third household vehicles. The Court upheld identical policy language and specifically rejected a claim that the relevant policy language was contrary to public policy. *Id.* at 502. Interestingly, the Court of Appeals in *Murphy* also rejected the fairly standard argument seen in policy coverage cases that there are factual differences that justify rejecting policy

language as against public policy under one specific set of facts, but not on every other set of facts. In doing so, the Court of Appeals panel recognized it is not their function to arbitrarily overturn rules of law previously established by the Kentucky Supreme Court or create new public policy absent a clear legislative mandate to do so. *Id.* at 503. Clearly, there is no arguable legislative mandate that would express any kind of disapproval of the policy provision at issue. The Court of Appeals seemingly ignored recent Supreme Court case law and justified its decision based on a misguided assessment of the current Supreme Court mindset based on older case law related to a completely different policy exclusion. In doing so, the Court of Appeals implicitly rejected substantial precedent related to the actual policy language at issue.

In three other examples, the Court of Appeals also upheld the same policy language in *Estate of Snow v. West American Insurance Company,* 161 S.W.3d 338 (Ky. App. 2005) and in *Edwards v. Carlisle*, 179 S.W.3d 257 (Ky. App. 2004) and endorsed similar policy language in *Baxter v. Safeco Ins. Co. of America*, 179 S.W.3d 257 (Ky. App. 2004). In *Edwards*, a passenger grabbed the steering wheel and caused a wreck. The insured driver recovered from her parent's liability policy covering the vehicle. She made a separate claim for UIM benefits under her parent's policy with another insurer. The Court rejected "factual differences", ambiguity and reasonable expectation arguments and upheld the clear and unambiguous policy language. *Id.* at 261.

In *Estate of Snow v. West American Insurance Company*, 161 S.W.3d 338 (Ky. App. 2005), a father was driving an uninsured vehicle in which his young

daughter, a passenger, was killed. At the time of the accident, the father and his daughter resided with another family member who had a vehicle insured with West American Insurance. The Court upheld the same policy language and flatly rejected an argument that the "owned or available for regular use" provision in an automobile insuring agreement was contrary to public policy. Consequently, there was no coverage afforded under the West American Insurance Company policy to compensate the estate of the young girl who died in the tragic accident. *Id.* at 340-343.

And in *Baxter*, the estate of a motorcyclist pursued a claim for UIM coverage under the parent's automobile policies. The motorcyclist resided with the parents at the time of the accident. Therefore, the motorcyclist qualified as an insured family member under a Safeco Insurance policy. However, the Safeco policy precluded coverage for any insured while occupying an owned motorcycle. The Court upheld the policy provision and found no UIM coverage on the parent's policy. *Id.* at 588. Again, the policy language at issue has been consistently and repeatedly upheld against all arguments including factual distinctions, public policy or whatever else has come along.

III. THE COURT OF APPEALS' PUBLIC POLICY ANALYSIS IS WRONG

As stated above, Kentucky courts have consistently and repeatedly upheld the same or similar policy language with respect to a definition of a UIM vehicle. The Court of Appeals, of course, had no authority to overrule this specific precedent. Notwithstanding this fact, the Court of Appeals fashioned its decision around the idea that the policy language at issue violated public policy because

the old "household exclusion" had previously been invalidated in Kentucky in the context of automobile liability policies in *Lewis v. West American Ins. Co.*, 927 S.W.2d 829, 836 (Ky. 1996) (Court of Appeals' Opinion, p. 9).

There are numerous substantive problems with the Court of Appeals' public policy discussion. First, comparing the old "household" exclusion in an automobile liability policy to a provision defining an UIM motor vehicle is literally akin to comparing a peanut to a grapefruit. Second, the simple fact that two relatives were involved in the accident does not mean the policy language at issue is just a dressed up household exclusion. The other cases implicating the "owned or available for regular use" language typically include relatives. The old household exclusion basically precluded liability coverage when one household member sues another household member on a liability claim. Here, we are analyzing the definition of a UIM vehicle in the context of a first party contractual claim. While the relationship of the parties is potentially relevant to determine whether UIM coverage is available, the policy provision does not preclude one family member from asserting a liability claim against another family member, as Ms. Hodgkiss-Warrick successfully did in this case. Third, the *Lewis* case was decided in 1996. There have been several cases since 1996 upholding the "owned or available for regular use" language in automobile policies. With this in mind, it is difficult to discern exactly how *Lewis* can be used as authority for the proposition that the relevant State Farm policy language violates public policy. Fourth, the decision to invalidate the old household exclusion was based in large part on the fact that liability insurance became mandatory after adoption of the

Kentucky Motor Vehicle Reparations Act. Again, the present case involves non-mandatory UIM coverage. Therefore, there is no credible argument that legislature directed the policy provision be declared invalid as a matter of public policy. Our courts generally adhere to the principle that matters of public policy are the prerogative of the General Assembly. *Caneyville Volunteer Fire Dept. v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790 (Ky. 2009). Fifth, the courts should use "extreme caution" when declaring any contractual transaction void as against public policy. See eg., *Kentucky State Fair Board v. Fowler*, 221 S.W.2d 435, 439 (Ky. 1949). The Court of Appeals did not make its decision based on an interpretation of statutes enacted by the General Assembly. There is no legislative mandate that would support the decision. Furthermore, the Court of Appeals did not follow established precedent. Instead, the Court of Appeals conducted a flawed legal analysis and, in the process created new law out of mostly whole cloth. Finally, the Appellee is a Pennsylvania resident. The involved vehicles are primarily garaged in Pennsylvania. The insurance policy was purchased in Pennsylvania. Pennsylvania law does not afford UIM coverage under these facts. Surely, Kentucky has no greater need to protect Pennsylvania residents than does the state of Pennsylvania.

This is a case where the adage "sympathetic facts make bad law" might be applicable. It appears the public policy argument is largely based on the idea that Appellee had meaningful injuries and it just does not seem fair that the vehicle she was occupying did not meet the definition of underinsured vehicle under her insuring agreement. There is very little, if any, legitimate justification

for using public policy to reject the clear and unambiguous language of the contract. The Appellee would get exactly what she paid for when she purchased the Pennsylvania policy if the policy language were upheld. She would receive the same UIM coverage that she would have gotten in her home state of Pennsylvania if the policy language were upheld. Kentucky Courts have repeatedly upheld similar or the same policy language. There is no Kentucky legislative directive that indicates that UIM coverage should be afforded. And Kentucky courts have followed the law in the state with the most significant contacts in other situations involving UIM coverage even where there have been legitimate Kentucky policy considerations at play. Finally, the whole premise of the Court of Appeals' public policy is based on an entirely different policy exclusion involving mandatory automobile liability coverage. This is hardly a situation where the Court of Appeals exercised "extreme caution" before finding a breach of public policy.

IV. THE COURT OF APPEALS COMPLETELY MISCONSTRUED SUPREME COURT PRECEDENT

The Court of Appeals uses the fact that the Supreme Court has rejected the non-related "family" or "household" exclusion in a personal umbrella policy implicated by an automobile accident claim as support for its argument that the Supreme Court would reject of the "owned or available for regular use" provision in the definition section of the UIM coverage in the Pennsylvania State Farm policy. (See Court of Appeals Opinion 9 and 11) (citing *State Farm Mut. Auto Ins. Co. v. Marley*, 151 S.W.3d 33 (Ky. 2004)). The rationale of the Court of Appeals is difficult to understand for a number of reasons. For one thing, as

previously outlined herein, both the Supreme Court and panels of the Court of Appeals have considered the issue since 2004 and found the "owned or available for regular use" policy language valid and enforceable. Second, *Marley* involved the enforceability of a "household" or "family" exclusion in a personal umbrella insurance policy when applied to an automobile liability claim. Whereas, the present case addresses a provision concerning the definition of an UIM vehicle and is a first party contract claim. Third, there is no ambiguity in the policy language. Ms. Hodgkiss-Warrick could not have a "reasonable expectation" of coverage that is clearly precluded by the policy terms particularly when she would not have received the coverage in her home state of Pennsylvania. Additionally, the "household" or "family" exclusion line of cases addresses an entirely different exclusion in the context of automobile liability claims. Liability coverage is mandatory in Kentucky. UIM coverage is optional. The public policy of the Kentucky Motor Vehicle Reparations Act is to protect Kentucky residents and others when drivers come into our state with no or inadequate liability insurance. There is no public policy basis behind providing out-of-state residents with more first party UIM contract coverage then they contracted for in their own state. If anything, public policy supports enforcement of the contract based on freedom of contract or affordability of insurance. Existing law had previously rejected public policy and all other arguments when used in an attempt to invalidate the "owned or available for regular use policy language". In summary, the Court of Appeals' use of "public policy" as a way to find UIM coverage where none exists was misguided and wrong on several levels.

Additionally, the Court of Appeals' speculation regarding the current mindset or direction of the Kentucky Supreme Court is unsubstantiated and wrong. Obviously, the Court of Appeals should follow Supreme Court precedent. SCR 1.010(8)(a). The underlying decision side-steps this obligation by avoiding clear existing precedent and misinterpreting *Williams v. State Farm Mut. Auto Ins. Co.*, 255 S.W.3d 913 (Ky. 2008), to support its conclusion that the Supreme Court has recently had a change of heart with respect to how it views the "owned, or available for regular use" policy provision. In *Williams*, the Court determined there was ambiguity in the policy involved and upheld the fact that a vehicle was "owned" by a relative driver did not automatically mean the vehicle had been "furnished" to the owner for his regular use by the policyholder parents. Importantly, the pertinent policy provision in *Williams* only precluded UIM coverage for vehicles "furnished" to a family member. *Id.* at 915. Whereas, this case addresses a policy provision that excludes from UIM coverage vehicles "[o]wned by, rented to, a furnished or available for the regular use of you or any resident relative." The *Williams* case cannot be fairly interpreted to support a conclusion that the Supreme Court has suggested the "owned by or furnished or available for regular use" language is contrary to Kentucky public policy. If anything, the *Williams* decision provides additional support for the policy provision. The criticism in *Williams* was based on a perceived ambiguity in the policy language which does not exist here. There is nothing in the *Williams* decision that even remotely suggests the Court now suddenly believes the policy language at issue in this case is somehow against public policy. *See Id.* at 916.

In fact, the *Williams* Court was clear that it would have decided the case differently if the policy had included "owned or available for regular use" language like that in the State Farm policy in the present case.

CONCLUSION

Based on the foregoing, State Farm respectfully requests the Court of Appeals' decision be overruled and a decision be entered which is in conformity with all existing precedent.

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APPENDIX

1. Trial Court Summary Judgment.

2. Kentucky Court of Appeals' Opinion.