COMMONWEALTH OF KENTUCKY
SUPREME COURT
No. 2020-SC-0260-D

ASHLAND HOSPITAL CORPORATION D/B/A KING'S DAUGHTERS MEDICAL CENTER, et al. — **APPELLANTS**

V.

On Discretionary Review from the Ky Court of Appeals
Case Nos. 2016-CA-372-MR and 2016-CA-396-MR
Boyd Circuit Court No. 15-CI-00070

DARWIN SELECT INSURANCE CO. N/K/A ALLIED WORLD SURPLUS LINES INSURANCE CO., et al. — **APPELLEES**

BRIEF ON BEHALF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF APPELLANTS

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CERTIFICATE OF SERVICE

I certify that on the 8th day of November 2021, the original and ten copies of this brief were served via U.S. Registered Mail on Kelly Stephens, Clerk of the Supreme Court of Kentucky, State Capitol, Room 235 700 Capital Ave., Frankfort, KY 40601-3415, and one copy via Mail on the following: Kimberly S. McCann, W. Mitchell Hall Jr., VanAntwerp Attorneys, LLP, 1544 Winchester Avenue, 5th Floor, Ashland, KY 41105-1111; Perry M. Bentley, Todd S. Page, Stoll Keenon Ogden PLLC, 300 West Vine Street, Suite 2100, Lexington, KY 40507; Jamie Wilhite Dittert, Sturgill, Turner, Barker & Moloney, PLLC, 333 West Vine Street, Suite 1500, Lexington, Kentucky 40507; Jonathan D. Hacker, O'Melveny & Myers LLP, 1625 Eye Street, N.W., Washington, D.C. 20006; Jeffrey Michael Cohen, Carlton Fields Jorden, Burt, PA, 100 S.E. Second Street, Suite 4200, Miami, FL 33131; D.C. Offutt, Jr., Offutt Nord Burchett, PLLC, 949 Third Avenue, Suite 300, Huntington, WV 25701; Charles E. Spevacek, Meagher & Geer, PLLP, 33 South Sixth Street, Suite 4400, Minneapolis, MN 55402; The Honorable George W. Davis, III, Chief Judge, Boyd Circuit Court, Second Division, 2805 Louisa Street, Catlettsburg, Kentucky 41129; and Boyd Circuit Court Clerk, Judicial Center, 2805 Louisa Street, P.O. Box 688, Catlettsburg, Kentucky 41129-0688.

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STATEMENT OF POINTS AND AUTHORITIES

PURPOSE AND INTEREST OF *AMICUS CURIAE* UNITED POLICYHOLDERS

United Policyholders (UP) is a national 501(c)(3) non-profit consumer organization founded in 1991 whose purpose is to support the loss indemnification purpose for which people and businesses buy insurance. UP educates and assists consumers on insurance matters and advocates for fair insurance sales, rating, underwriting and claim practices. The organization is funded by donations and grants from individuals, businesses, and foundations. United Policyholders works in partnership with insurance and banking regulators, local, state and federal government officials and agencies and community and trade associations. The purpose of this brief is to assist the court in considering how a decision in this case may impact insureds and insurers beyond the parties here.

An insured Kentucky business in this case was compelled *sua sponte* by a lower court to reimburse its insurer for substantial legal fees expended in a multi-year legal proceeding. That significant and erroneous holding could have a dramatic financial impact on insured businesses large and small *and* individuals in Kentucky for years to come. As such, we respectfully seek to offer this Court additional points for consideration.

As an official consumer representative to the National Association of Insurance Commissioners, UP has engaged for many years with Kentucky's insurance regulator Sharon Clark. UP is an information resource on sales, coverage, claims and litigation-related issues pertaining to the full range of insurance products with a special focus on property/casualty matters. UP is a member of the Federal Advisory Committee on Insurance to the U.S. Treasury, and a regular participant in the proceedings of the National Association of Insurance Legislators. Active in disaster-impacted regions, UP has Platinum

status on the Guidestar charity rating platform. In the past year, over 600,000 Americans visited the libraries, reports and resource materials available on UP's website.

A wide range of policyholders and stakeholders communicate on a regular basis with UP. UP routinely conducts consumer surveys and collaborates with stakeholders to monitor the insurance marketplace and the claim and coverage issues that end up in ligation. Since 1992 UP has sought to assist courts across the nation by submitting *amicus* briefs that are primarily drafted by volunteers *pro bono*. UP's *amicus curiae* briefs have been cited favorably by the United States Supreme Court in *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999), and numerous state Supreme Courts. *See Sproull v. State Farm Fire & Casualty Company*, 2020 IL App (5th) 180577, 172 N.E.3d 1186 (Ill. 2020); *Vandenberg v. Superior Court*, 982 P.2d 229 (Cal. 1999); *TRB Invs., Inc. v. Fireman's Fund Ins. Co.*, 145 P.3d 472 (Cal. 2006). UP has appeared in cases involving Kentucky insurance issues. *See Hicks v. State Farm Fire and Casualty Company*, 965 F.3d 452, 455 (6th Cir. 2020); *Knotts v. Zurich Ins. Co.*, 197 S.W.3d 512 (Ky. 2006); and *Ky. Farm Bureau Mut. Ins. Co. v. Rodgers*, 179 S.W.3d 815 (Ky. 2005).

In this matter, UP seeks to help the Court in its decision that will impact Kentuckians far into the future. As a consumer advocate, UP is concerned about the ramifications to individual and commercial insureds from the Court of Appeals' ruling permitting insurers to recoup previously paid defense costs from their insureds. UP hopes the foregoing *amicus curiae* will prove helpful to the Court in equitably resolving this case.

ARGUMENT

The question before the Court of whether an insurer may recover costs spent defending a claim against its insured, where such defense is subject to a unilateral

reservation of rights by the insurer, is an issue of first impression for this Court. *Travelers Property Cas. Co. of America v. Hillerich & Bradsby Co., Inc.*, 598 F.3d 257, 265 (6th Cir. 2010) ("Kentucky has not addressed whether an insurer can unilaterally reserve a right to reimbursement over the objection of the insured."). The Court of Appeals decision below relied exclusively upon conjecture by Federal courts sitting in Kentucky and their prediction as to what this Court would hold. This Court now has the opportunity to address this issue for the Commonwealth writ large.

As set forth below, the issue of recovery of defense costs was not properly before the Court of Appeals. It was not raised in or addressed by the trial court and was not briefed. The Court of Appeals thus lacked authority to decide the issue. Procedural issues aside, the Court of Appeals' decision should be reversed substantively. Darwin Select Insurance Co.'s ("Darwin") asserted right to seek reimbursement of defense costs undermines both the broad duty to defend owed by an insurer and allows Darwin to rewrite the underlying insurance contract in direct contradiction to established Kentucky law. Further, public policy considerations found in Kentucky law and other jurisdictions supports reversal of the Court of Appeals decision. Finally, the primary case relied upon by the Court of Appeals is not applicable to the present case as it is factually distinguishable and its stated rationale is inconsistency with Kentucky law.

I. Court of Appeals lacked authority to rule on the issue of recoupment of defense costs and thus must be reversed.

Initially, the Court of Appeals decision on the issue of recoupment must be reversed as the issue was not properly preserved, was not briefed, and was not before the Court. Kentucky Courts have long held that an appellate court does not have "authority to review issues not raised in or decided by the trial court." *Meyers v. Commonwealth,* 381 S.W.3d

280, 286 (Ky. 2012). This Court has recently recognized that it has "long endorsed a rule that specific grounds not raised before the trial court, but raised for the first time on appeal will not support a favorable ruling on appeal." *Norton Healthcare, Inc. v. Deng*, 487 S.W.3d 846, 852 (Ky. 2016). Likewise, "the Court of Appeals will not consider arguments to reverse a judgment that have not been raised in the prehearing statement or on timely motion." *LP Louisville East, LLC v. Patton*, 621 S.W.3d 386, 399 (Ky. 2020), *opinion modified and superseded on denial of reh'g* (Apr. 29, 2021).

Although this Court has recognized certain exceptions in the prehearing statement context, those exceptions have arisen only in limited circumstances. For instance, in *LP Louisville East*, this Court found that the failure to include an issue in the prehearing statement did not foreclose a decision on the issue. However, in that instance, the issue fell "under the broad issue identified in the prehearing statement", "was briefed by both parties", "was preserved by argument at the" trial court level, and "there was no prejudice or unfair surprise to [appellee]". *LP Louisville East, LLC*, 621 S.W.3d at 400

In the present case, the Court of Appeals lacked authority to decide the issue of whether Darwin, as an insurer, could seek reimbursement of defense costs. On this reason alone, this Court should reverse. Setting aside the procedural question, a meticulous analysis of Kentucky law and of sister jurisdictions faced with the same question further supports reversing the Court of Appeals. We now turn to this substantive analysis.

II. Allowing insurers to recoup costs would undermine this Court's holdings regarding an insurer's broad duty to defend and equate such duty with the separate and distinct duty to indemnify.

Under Kentucky law, an insurer's "duty to defend is separate and distinct from the obligation to pay any claim." *James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co.*, 814 S.W.2d 273, 279 (Ky. 1991). The duty "is a contractual right of the

insured for which [the insured] has paid a premium[.]" *Id.* at 280. The insurer becomes subject to the duty to defend "if there is any allegation which potentially, possibly or might come within the coverage of the policy." *Id.* at 279.

Importantly, "the duty to defend is ***broader*** than the duty to indemnify." (Emphasis added) *Id.* at 280. The expansive nature of the doctrine is reflected in the breadth of allegations that trigger the duty and because the duty "continues to the point of establishing that liability upon which plaintiff was relying was in fact not covered by the policy and ***not merely that it might not be*** [covered]." *Id.* at 279. Unlike the duty to defend, the duty to indemnify requires "that a complainant must first establish liability", i.e., the insured becomes obligated to pay a claim either by judgment or settlement. *Pryor v. Colony Ins.*, 414 S.W.3d 424, 432 (Ky. Ct. App. 2013).

Moreover, this Court has noted that even in circumstances where there is a later determination that a policy does not cover a claim, an insurer "would still have owed a duty to defend" as long as the allegations against the insured potentially, possibly, or might be covered. *Aetna Cas. & Sur. Co. v. Commonwealth*, 179 S.W.3d 830, 841 (Ky. 2005), *as modified on reh'g* (Jan. 19, 2006). In *Aetna*, the insured "owed a duty to defend, ***regardless*** of whether they were later adjudicated to owe a duty to pay." (Emphasis added) *Id.* Thus, the duty to defend under Kentucky law begins before liability is established, prior to a determination that the policy's coverage applies, and is not retroactively eliminated by a later finding that the policy does not provide coverage.

Permitting an insurer to seek reimbursement of those defense costs, incurred while the coverage remains uncertain, is inconsistent with Kentucky's broad interpretation of the duty to defend. Jurisdictions with similarly expansive duties to defend have pointed out

that allowing recoupment of such costs narrows "the duty to defend, and appreciably erode[s]…[the] view that the duty to defend is broader than the duty to indemnify." *Perdue Farms, Inc. v. Travelers Cas. And Surety Co. Of America*, 448 F.3d 252, 258 (4th Cir. 2006). Similarly, the Pennsylvania Supreme Court stated that permitting reimbursement under like circumstances amounts "to a retroactive erosion of the broad duty to defend[.]" *American and Foreign Ins. Co. v. Jerry's Sport Center, Inc.*, 606 Pa. 584, 614, 2 A.3d 526, 544 (2010). The *Jerry's Sport Center* court explained that allowing an insurer to recoup costs makes the "duty to defend contingent upon a court's determination that a complaint alleged covered claims". *Id.* at 544. Thus, "allowing for the recovery of defense costs when coverage is later found not to exist would effectively make the duty to defend and duty to indemnify coterminous." *Great American Assurance Company v. PCR Venture of Phoenix LLC*, 161 F. Supp. 3d 778, 786 (D. Ariz. 2015).

Some courts have reached the same conclusion to reject an insurer's assertion of the right to unilaterally seek recovery of defense costs on the basis of the duty to defend, albeit alternative rationales. *See, e.g., National Sur. Corp. v. Immunex Corp.*, 176 Wash. 2d 872, 884, 297 P.3d 688, 693 (2013) (Stating that "[d]isallowing reimbursement is most consistent with Washington cases regarding the duty to defend, which have squarely placed the risk of the defense decision on the insurer's shoulders."); *Terra Nova Ins. Co. Ltd. v. 900 Bar, Inc.*, 887 F.2d 1213, 1219–20 (3d Cir. 1989). This makes good sense. If an insurance company, like Darwin, believes early on that it owes no duty to defend, it should refuse to provide defense costs at the outset. Indeed, this is one of the core jobs of insurance companies – evaluating coverage. Of course, in situations where an insurance company wrongfully refuses to defend, it will be liable for the entire amount of the verdict rendered

against the insured without regard to policy limits. *Cincinnati Insurance v. Vance*, 730 S.W.2d 521 (Ky. 1987). Insurance companies should not be allowed to shift this risk of the defense decisions to their insureds through a cleverly worded letter. If the case is close and an insurance company is unsure of their duty, the correct action is to provide a defense and seek a declaratory judgment as to coverage.

Based upon the juxtaposition between the Court of Appeals ruling and the Commonwealth's view of the broad duty to defend, the Court of Appeals decision to allow Darwin to recover defense costs in the present matter should be reversed.

III. The Court of Appeals sanctioning of Darwin's ability to recoup defense costs allows Darwin to rewrite the underlying insurance contract in direct contradiction to established Kentucky law.

The Court of Appeals decision granting Darwin the ability to recover defense costs violates longstanding precedents on proper interpretation and construction of contracts by permitting Darwin to unilaterally modify the contractual terms and obligations of the insurance contract using a reservation of rights letter.

"[A] fundamental tenet of this jurisdiction [is] that the unambiguous language of a contract will be enforced as written and that the courts will not re-write the contract in contradiction of its plain meaning." *Wehr Constructors, Inc. v. Assurance Co. of America*, 384 S.W.3d 680, 685 (Ky. 2012), *as modified on denial of reh'g* (Dec. 20, 2012). Recently, this Court stated that courts within the Commonwealth "interpreting an insurance contract...are bound by the ***specific language of the contract before*** [it]." (Emphasis added) *Foreman v. Auto Club Property-Casualty Insurance Company*, 617 S.W.3d 345, 349 (Ky. 2021). Likewise, "courts cannot...make new contracts under the guise of construction, but must determine the parties' responsibilities according to the contract terms." *Kentucky Ass'n of Ctys. All Lines Fund Tr. v. McClendon*, 157 S.W.3d 626, 633

(Ky. 2005). Insurance contracts "must be construed without disregarding or inserting words or clauses[.]" *Kemper Nat. Ins. Companies v. Heaven Hill Distilleries, Inc.*, 82 S.W.3d 869, 875 (Ky. 2002). Therefore, the "terms of an insurance contract" are controlling unless those terms "contravene public policy or a statute." *Meyers v. Kentucky Medical Ins. Co.*, 982 S.W.2d 203, 209 (Ky. Ct. App. 1997).

A "court may not read into a policy of insurance conditions and terms which are not incorporated therein." *Old Reliable Ins. Co. v. Brown*, 558 S.W.2d 190, 191 (Ky. Ct. App. 1977). "It is well established in our Commonwealth that an insurance carrier 'must be held strictly accountable for the terms of the contract' it prepares." *Wine v. Globe American Cas. Co.*, 917 S.W.2d 558, 564 (Ky. 1996). Logically, if an insurer is "strictly accountable" for the terms included in a contract it drafts, it follows that an insurer would correspondingly be held accountable for omitting certain provisions.

Contrary to Darwin's assertions, the insurance policy at issue fails to address or contemplate the recoupment of defense costs.[1] Despite this absence, the Court of Appeals relies upon the reservation of rights letter sent by Darwin to hold that the defense costs for the underlying claim are recoverable from KDMC.[2] Setting aside KDMC's clear objection to Darwin's asserted right in its response letter, permitting the reservation of rights letter to unilaterally modify the terms of the insurance contract to place additional obligations upon the insured is wrong and contrary to Kentucky law.

"Generally, one party may not unilaterally modify a contract; mutual assent is required." *Abbott v. Chesley*, 413 S.W.3d 589, 601 (Ky. 2013). In contrast, the Court of Appeals, by its holding, permits the insurer to modify the insurance policy and create

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[1] *See*, ***Exhibit C*** to Appellants' Brief, previously filed with this Court.
[2] *See*, ***Exhibit G*** to Appellants' Brief, previously filed with this Court.

rights/obligations not found within the four corners of the policy as originally bargained.

Jurisdictions faced with substantially the same issue of whether an insurer is permitted to seek reimbursement for defense costs under pursuant to reservation of rights letter have noted that when the underlying insurance policy fails to address the issue, the reservation of rights letter is in essence an impermissible attempt to "create rights not contained in the insurance policy." *Texas Ass'n of Ctys. County Government Risk Management Pool v. Matagorda County*, 52 S.W.3d 128, 131 (Tex. 2000). Like the present case, the insurer in the *Matagorda County* decision failed to include a statement in its "policy that it could seek reimbursement…if it is later determined that the policy does not provide coverage." *Id.* at 131. Although the *Matagorda County* court acknowledge such a provision would have been permissible contract term, the absence thereof rendered the reservation of rights letter "a unilateral offer to append a reimbursement provision to the insurance contract." *Id.* at 131-32. The same rationale applies here. Darwin is a sophisticated company with an army of underwriters and lawyers to assist in the drafting of its insurance policies. It had every opportunity to include a clause specifically allowing for the reimbursement of defense costs in the contract it drafted and sold to KDMC. The fact that it did not do so is nobody's fault but its own, and Kentucky courts should not step in to provide Darwin with an undeserved post-contractual right.

In *Shoshone First Bank v. Pacific Employers Ins. Co.*, the Supreme Court of Wyoming was asked whether the state recognized "a legal or equitable right…allowing the insurer to allocate to its insured and recover…the costs of defending non-covered claims". 2 P.3d 510, 511-12 (Wyo. 2000). The *Shoshone First Bank* court held "that unless an agreement to the contrary is found in the policy, the insurer is liable for all of the costs of

defending the action." *Id.* at 514. In its analysis, the *Shoshone First Bank* court emphatically rejected the insurer's claim that the reservation of rights letter allowed recovery of defense costs paid on uncovered claims, stating that an "insurer is not permitted to unilaterally modify and change policy coverage." *Id.* at 515. Referencing their reliance upon the "four corners of the policy", the court noted that the insurer "could have included allocation language in the Policy, but failed to do so." *Id.* at 516. Citing the subject insurance policy's explicit duty to defend and absence of terms allocating defense costs, the court would "not permit the contract to be amended or altered by a reservation of rights letter." *Id.*

Because the insurance policy contains no indication that recoupment of defense costs was part of the bargain, Darwin, and similarly situated insurers, cannot be permitted to construct such a right after the fact by merely sending a letter sent to their insured, particularly when their insured vehemently objects to that letter. The Wyoming Supreme court recognized this in *Shoshone*, and the same rationale applies here.

IV. Public policy considerations found in Kentucky law and other jurisdictions further supports reversal of the Court of Appeals decision in this matter.

The Court of Appeals decision undermines public policy concerns which arise in the context of insurance law by creating a new right for insurers to the detriment of insureds. Under certain circumstances, "contractual provisions may be held to be unenforceable as against public policy." *Wehr Constructors, Inc. v. Assurance Co. of America*, 384 S.W.3d 680, 687 (Ky. 2012), *as modified on denial of reh'g* (Dec. 20, 2012). Current Kentucky law on the duty to defend provides the following approach for insurers upon receiving notice from an insured of a claim or potential claim against the insured:

> If the insurer believes there is no coverage, it has several options. One is to defend the claim anyway, while preserving by a reservation of rights letter

> its right to challenge the coverage at a later date. Another is to elect not to defend. However, should coverage be found, the insurer will be liable for "all damages naturally flowing from" the failure to provide a defense. See *Eskridge v. Educator and Executive Insurers, Inc.*, 677 S.W.2d 887 (Ky.1984). This includes "damages" for reimbursement of defense costs and expenses if the insured hires his own lawyer, and in some instances, the amount of a default judgment, if he does not.

Aetna Cas. & Sur. Co. v. Commonwealth, 179 S.W.3d 830, 841 (Ky. 2005), *as modified on reh'g* (Jan. 19, 2006). The *Aetna* court, in rejecting the applicability of a liability policy provision which eliminated "any adverse consequences" from a breach of a duty to defend, stated the public policy that "[a]n insurer should not stand to gain from its denial to defend its insured." *Id.* at 841-42.

Analogous to the above, many jurisdictions analyzing the issue of an insurer seeking reimbursement of defense costs have found public policy and similar concerns justify the rejection of such right. *See e.g.*, *General Agents Ins. Co. of America, Inc. v. Midwest Sporting Goods Co.*, 215 Ill. 2d 146, 162–63, 828 N.E.2d 1092, 1102 (2005) ("As a matter of public policy, we cannot condone an arrangement where an insurer can unilaterally modify its contract, through a reservation of rights, to allow for reimbursement of defense costs in the event a court later finds that the insurer owes no duty to defend."). In refusing to permit an insurer from obtaining recovery of its defense costs spent before a finding of no coverage the Third Circuit stated:

> A rule permitting such recovery would be inconsistent with the legal principles that induce an insurer's offer to defend under reservation of rights. Faced with uncertainty as to its duty to indemnify, an insurer offers a defense under reservation of rights to avoid the risks that an inept or lackadaisical defense of the underlying action may expose it to if it turns out there is a duty to indemnify. At the same time, the insurer wishes to preserve its right to contest the duty to indemnify if the defense is unsuccessful. Thus, such an offer is made at least as much for the insurer's own benefit as for the insured's. ***If the insurer could recover defense costs, the insured would be required to pay for the insurer's action in protecting***

> ***itself against the estoppel to deny coverage that would be implied if it undertook the defense without reservation.***

(Emphasis added) *Terra Nova Ins. Co. Ltd. v. 900 Bar, Inc.*, 887 F.2d 1213, 1219–20 (3d Cir. 1989); *Accord, Midwest Sporting Goods Co.*, 215 Ill. 2d at 163-64, 828 N.E.2d 1092 at 1103 ("[W]hen an insurer tenders a defense or pays defense costs pursuant to reservation of rights, the insurer is protecting itself at least as much as it is protecting its insured.").

Additional concerns arise from the burden placed upon insureds if insurers are permitted to recover defense costs in cases akin to the present matter. The Wyoming Supreme Court cogently expressed those concerns as follows:

> However, to allow the insurer to force the insured into choosing between seeking a defense under the policy, and run the potential risk of having to pay for this defense if it is subsequently determined that no duty to defend existed, or giving up all meritorious claims that a duty to defend exists, places the insured in the position of making a Hobson's choice.

Shoshone First Bank v. Pacific Employers Ins. Co., 2 P.3d 510, 516 (Wyo. 2000); *Accord, Midwest Sporting Goods Co.*, 215 Ill. 2d at 163, 828 N.E.2d 1092 at 1102 (Allowing an insurer to recover defense costs "effectively places the insured in the position of making a Hobson's choice between accepting the insurer's additional conditions on its defense or losing its right to a defense from the insurer."). This interest heightens when the policy fails to address recovery of defense costs and the insurer relies solely upon a reservation of rights. Under those circumstances, "endorsing such conduct is tantamount to allowing the insurer to extract a unilateral amendment to the insurance contract. If this became common practice, the insurance industry might extract coercive arrangements from their insureds, destroying the concept of liability and litigation insurance." *Id.* at 516; *Am. and Foreign Ins. Co. v. Jerry's Sport Center, Inc.*, 606 Pa. 584, 615, 2 A.3d 526, 544 (2010).

The Fourth Circuit Court of Appeals articulated like concerns stating that "allowing a partial recoupment of defense costs would significantly tip the scales in favor of the insurer." *Perdue Farms, Inc. v. Travelers Cas. And Surety Co. Of America*, 448 F.3d 252, 259 (4th Cir. 2006). Under a rule comparable to the Court of Appeals ruling in this case, the *Perdue* court stated, "liability insurance would all but cease to function as 'litigation insurance,'...instead merely providing insureds with an up-front defense whose line-item costs would then be the subject of subsequent litigation." *Id.* at 259.

In light of the foregoing, the Court of Appeals decision permitting Darwin to recover its defense costs should be reversed in furtherance of principled public policy and preservation of the current system of liability insurance in Kentucky.

V. *Travelers*, relied upon by the Court of Appeals, is inapplicable to the present matter and the reasoning set forth in that case would inconsistencies in Kentucky law

Finally, even if the Court of Appeals was justified in relying upon the Federal courts it referenced in its opinion, this Court should still reverse the Court of Appeals as the present matter is factually distinguishable falling outside the narrow scope of that ruling. Moreover, the reasoning of that Court appears inconsistent with Kentucky law.

In the *Travelers* case, the insured in question was not only notified of the insurer's intent to seek reimbursement for defense costs, the insured itself "retained meaningful control of the defense and negotiation process." *Travelers Property Cas. Co. of America v. Hillerich & Bradsby Co., Inc.*, 598 F.3d 257, 265 (6th Cir. 2010) (The insured in *Travelers* "retained its chosen defense counsel though [insurer] was paying the defense costs." *Id.* at 263). Additionally, the factual circumstances of *Travelers* would suggest that the ruling therein should be narrow in scope. Indeed, the *Travelers* court, after concluding that Kentucky would "allow reimbursement for an insurer after a unilateral reservation of rights

by the insurer over the objection of the insured", stated that such finding applied "in at least the narrow circumstances in this case and cases such as *Blue Ridge*." *Id.* at 268.

The *Travelers* Court's holding required not only that an insurer assert a reservation of rights and that the insured be notified "of its intent to seek reimbursement" it also required "the insured [have] meaningful control of the defense and negotiation process." *Id.* at 268. The Court of Appeals record provides no analysis on the issue of "meaningful control" in its opinion. At a minimum, the Court of Appeals failure to address one of the three elements must lead to a reversal on the issue of recouping defense costs, even to have specific briefing and findings on this element.

Furthermore, the rationale adopted by the *Travelers* court appears inherently flawed given it states that the "reimbursement right arises under an implied-in-law contract theory[.]" *Id.* at 268. This Court has defined an implied-in-law contract or quasi-contract as "an obligation imposed by law because of the conduct of the parties, or some special relationship between them, or because one of them would otherwise be unjustly enriched." *Kentucky Ass'n of Ctys. All Lines Fund Tr. v. McClendon*, 157 S.W.3d 626, 632–33 (Ky. 2005). However, the general rule is that where an express contract exists, the terms of that contract control and no recovery can be made on a theory of implied contract. *See e.g., Ellis v. Knight,* 382 S.W.2d 391, 393 (Ky. 1964); *Pryor v. York's Ex'r*, 305 S.W.2d 775, 776–777 (Ky. 1957); *Rider v. Combs*, 256 S.W.2d 749 (Ky. 1953). Likewise, the concept of unjust enrichment, which is related to implied-in-law contracts, "is unavailable when the terms of an express contract control." *Superior Steel, Inc. v. Ascent at Roebling's Bridge, LLC*, 540 S.W.3d 770, 778 (Ky. 2017).

Therefore, not only do the facts presented in this case differ materially from the Sixth Circuit's decision in *Travelers*, but the rationale used by the *Travelers* court appears inconsistent with fundamental precepts of Kentucky law. As such, the Court of Appeals decision must be reversed.

CONCLUSION

Based upon the foregoing, the Court of Appeals decision granting Darwin, and similarly situated insurers, the right to seek recovery of defense costs after judicial determination of no-coverage, should be reversed.

Respectfully submitted,

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