COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2010-SC-000264

INTERLOCK INDUSTRIES, INC., and
OHIO VALLEY ALUMINUM COMPANY, LLC — APPELLANTS

vs.

CHARLES RAWLINGS
ANTHEM HEALTH PLANS OF KENTUCKY, INC.,
ROSENMAN'S, INC. and
KENTUCKY FLATBED COMPANY, LLC — APPELLEES

BRIEF ON BEHALF OF APPELLANTS

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of this Brief on Behalf of Appellants was mailed this 28th day of January, 2011, to: 10 originals to the Clerk of the Supreme Court of Kentucky,209 Capitol Building, 700 Capital Avenue, Frankfort, KY, 40601; 5 copies to Samuel P. Givens, Jr., Clerk Court of Appeals 360 Democrat Driver, Frankfort, KY, 40106; Shelby Circuit Clerk, 9 Courthouse, 501 Main Street, Shelbyville, KY, 40065; Honorable Tom McDonald, Shelby Circuit Judge, 9 Courthouse, 501 Main Street, Shelbyville, KY, 40065; Brien G. Freeman, Todd K. Childers, FREEMAN & CHILDERS, 201 South Main Street, PO Box 1546, Corbin, KY 40702-1546; Gene F. Price, Joshua T. Rose, J. Morgan McGarvey, 400 W. Market Street, 32nd Floor, Louisville, KY 40202; John G. McNeill, Landrum & Shouse LLP, PO Box 951, Lexington, KY, 40588-0951; Robert E. Stopher, Boehl Stopher & Graves, LLP, Aegon Center, Suite 2300, 400 West Market Street, Louisville, KY 40202.

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INTRODUCTION

This is a case in which the Appellants, Interlock Industries, Inc. and Ohio Valley Aluminum Company, LLC, appeal from an Opinion of the Court of Appeals Affirming in Part, Reversing in Part and Remanding a Summary Judgment in favor of Appellants and holding that an action brought for personal injury while an individual was injured in the process of unloading a trailer fell under the two year statute of limitations of the MVRA and not the one year statute of limitations under KRS 413.140. In addition the Court of Appeals held that the Trial Court's Order suppressing the testimony of the Appellants' expert witness if a new trial is ordered.

STATEMENT CONCERNING ORAL ARGUMENT

Appellants welcome an opportunity for oral argument, but believe that the written briefs sufficiently clarify the issues.

STATEMENT OF FACTS

Appellee, Charles Rawlings, was a contract driver for Appellee and Cross-Appellant, Kentucky Flatbed Company, LLC ("Kentucky Flatbed") at the time of the accident which is the subject matter of this action. Kentucky Flatbed is a trucking company that hauls flatbed freight across the country. (Helton Depo. at 11). (Pertinent portions of Gary Helton's Deposition are attached as **Exhibit 1**). Charles Rawlings owned a tractor, which he leased to Kentucky Flatbed and drove for Kentucky Flatbed. (Helton Depo. at 23 and Rawlings Depo. at 5). (Pertinent portions of Charles Rawlings's Deposition are attached as **Exhibit 2**). One of the hauls that Rawlings undertook for Kentucky Flatbed was to travel to Appellee and Cross-Appellant, Rosenman's, Inc. in Ottumwa, Iowa, and pick up bundles of aluminum to be delivered to Appellant and Cross-Appellee, Ohio Valley Aluminum Company, LLC[1] ("OVA") in Shelbyville, Kentucky. (Rawlings Depo. at 23).

On January 26, 2005, Charles Rawlings arrived at Rosenman's where his trailer was loaded with bundles of aluminum. (*Id.*). The bundles were loaded in three layers in the front and three layers in the back, with dunage placed between the layers. (Rawlings Depo. at 31). The entire load was secured with chains and straps

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[1] Appellant and Cross-Appellee, Interlock Industries, Inc. ("Interlock"), is a holding company, which owns OVA, along with eight other entities. It is not involved in the active management or operation of the OVA Shelbyville Plant. Although OVA and Interlock are two separate entities, for purposes of this brief OVA and Interlock will be jointly referred to as "Interlock".

using a compression machine to tighten the straps. (Rawlings Depo. at 21 & 25). After the bundles were loaded, Rawlings continued with the load to OVA, stopping several times in route to check the load and tighten the straps because the bundles had shifted and loosened. (Rawlings Depo. at 36-39).

On January 27, 2005, Charles Rawlings arrived at OVA with his load of aluminum bundles. (Rawlings Depo. at 39). When he got to OVA, the top bundle on the passenger side had shifted, (Rawlings Depo. at 42), and the entire load on Rawlings' truck was leaning "real bad" on one side. (Mathis Depo at 14). (Pertinent portions of Mathis Deposition are attached as **Exhibit 3**). Mathis, the OVA forklift driver, and Rawlings discussed how they would unload the bundles of aluminum. (Rawlings Depo. at 44). Rawlins had the forklift operator put the forks under the top rear bundle to hold it in place while he walked around to the other side to release the straps that were securing the rear bundles. (Rawlings Depo. at 42 and Mathis Depo. at 14). After he had released the straps, the forklift operator unloaded the top bundles. (Rawlings Depo. at 45). Rawlings then released the remaining straps on the back half of the load and the binders on the chains. (Rawlings Depo. at 45-46). Mr. Rawlings then went around to the other side and started rolling up the straps as the forklift operator finished unloading the back bundles. (Rawlings Depo. at 46-47). As the forklift operator was unloading the back bundles, Rawlings rolled up the straps from the back bundles and hung the chains on the rack in the back of his truck's cab.

(Rawlings Depo. at 46-47). The back portion of the load was unloaded completely and uneventfully. (Mathis Depo. at 30).

Then Rawlings released the ratchets from the front half of the load (Rawlings Depo. at 48). There were five straps across the front half of the load, three across the very top and two across the middle, and then two chains across the bottom. (Rawlings Depo. at 48-49). Rawlings released all the straps and chains on the driver's side and then moved to the passenger side where he unstrapped the first strap and pulled it off and rolled it up. (Rawlings Depo. at 49-50). He then tried to pull the second strap but it was caught between the second and top layers of the aluminum. (Rawlings Depo. at 50-51). He left it and then moved to the third strap, the middle one across the very top and removed it. (Rawlings Depo. at 49-51). Rawlings then moved to strap number five on the passenger side, which was the last strap that went all the way across the top bundle and pulled it off. (Rawlings Depo. at 51). Mr. Rawlings then proceeded to commence rolling up the straps he had removed from the top bundle. (Rawlings Depo. at 51). As he commenced rolling up the strap, a bundle slowly rolled off the top of the front three bundles and made contact with him. (Rawlings Depo. at 51 and Martin Depo. at 6). (Pertinent portions of Martin Deposition attached as **Exhibit 4**).

At the time the bundle rolled off and made contact with Rawlings, the forklift driver was on the opposite side of the load with the forks inserted between the second

and top layers of bundles on the driver's side and not in contact with the bundle of aluminum which rolled off. (Mathis Depo. at 24 and 29). The forklift operator testified that it was several minutes between the time that he inserted the forks on the driver's side and the time the bundle rolled off. (Mathis Depo. at 29). It was 2 or 3 minutes before he heard the crash. (Mathis Depo. at 26). After he put forks under the bundle, he did not move the forklift at all. (Mathis Depo at 29). In a matter of seconds after unhooking the straps, the aluminum bundle rolled off. (Rawlings Depo at 51). Martin, an employee of OVA, had just gotten in his truck when he saw the bale and "it just started coming off there really slow...it was real slow. " (Martin Depo. at 6).

During his deposition, Mr. Rawlings was shown a set of pictures, which he identified as having been taken right after the incident and depicting the scene after his accident. When asked if the picture depicted the condition of the bundles of aluminum after his accident, Rawlings responded "The best of my knowledge, it is." (Rawlings Depo. at 74). The first picture "shows the front half of the trailer with three bundles still on the trailer." (Rawlings Depo. at 74 and Exhibit 2 of the Rawlings Depo. attached as **Exhibit 5**). Rawlings testified that the next picture showed the bundle that fell and hit him laying on the ground and two bundles still on the passenger side of the trailer. (Rawlings Depo. at 75 and Exhibit 3 of the Rawlings Depo. attached as **Exhibit 6**). Rawlings testified that the next picture again shows the

bundle that fell off from the top and "it shows two of the straps, and there's an additional third strap that has been placed over it." (Rawlings Depo. at 75 and Exhibit 4 of the Rawlings Depo. attached as **Exhibit 7**).

Rawlings brought this action on March 7, 2006, more than one year after the incident, alleging that an employee of Interlock negligently unloaded the aluminum from his trailer, pushing the aluminum onto him and causing injuries. On November 29, 2007, the Trial Court entered a Civil Pretrial Order in this case setting the trial in this action to commence on July 16, 2008.The Civil Pretrial Order set a time schedule for pretrial compliance. There was a subsequent Order entered on December 27, 2007, rescheduling the trial to July 21, 2008. That Order did not address the dates set for pretrial compliance. Interlock filed its Compliance and listing its expert witness to be called at trial. As a result of a mistaken interpretation of the Court's Pretrial Order, Interlock was late in filing its expert witness disclosure. The Trial Court entered an Order suppressing the testimony of their expert and denied Interlock's motion to reassign the trial date. At the time of said Order suppressing, discovery was still ongoing and continued through June of 2008.

After completion of all discovery, Kentucky Flatbed, Interlock, and Rosenman's Inc. all filed Motions for Summary Judgment. After oral arguments, the Trial court entered a Judgment in favor of all Defendants on the basis that the action was not governed by the MVRA, and therefore, barred by the one-year statute of

limitations. Mr. Rawlings then appealed to the Kentucky Court of Appeals who Affirmed in Part and Reversed in Part and Remanded this case back to the Trial Court. It is from this Opinion and Order that this Honorable Court has granted Discretionary Review.

ARGUMENT

I. This Action Should be Governed by the One Year Statute of Limitations under KRS 413.140(1)(a), not by Expanding the Two Year Statute of Limitations under the MVRA.

While the Motor Vehicle Reparations Act ("MVRA") is to be liberally construed, Courts are "required to give the words of the statute written by the legislature their plain meaning." *Troxell v. Trammell,* 730 S.W.2d 525, 527 (Ky. 1987), quoting *Bailey v. Reeves,* 662 S.W.2d 832, 833 (Ky. 1984). The Court must apply the statute "exactly as written." *Id.* at 526. The MVRA is clear that it only "extends the statute of limitations to two years for actions ... **arising from the ownership, maintenance or use of a motor vehicle.**" (Emphasis added). KRS 304.39-020(6) defines "use of a motor vehicle" as follows:

> any utilization of the motor vehicle as a vehicle including occupying, entering into, and alighting from it. It does not include:
>
> (a) Conduct within the course of a business of repairing, servicing or otherwise maintaining motor vehicles unless the conduct occurs off the business premises; or
>
> (b) Conduct in the course of loading and unloading the vehicle unless the conduct occurs while occupying, entering into, or alighting from it.

If the Act does not apply, then the one-year statute of limitations under KRS. 413.140(1)(a) applies.

> The one-year personal injury statute of limitations, KRS 413.140(1)(a) is a *general* statute of limitations "for an injury to the person of the plaintiff." It does not speak to motor vehicle accidents as such, . . . On the other hand, KRS 304.39-230(6) is a *special* statute of limitations, **part of a comprehensive, integrated code (the MVRA) applicable to the rights and liabilities of motor vehicle accident victims.** Citations omitted, emphasis added.
> *Bailey v. Reeves,* 662 S.W.2d at 526.

In the instant case, even construing the Act in the most liberal construction possible, Appellee Rawlings' claims do not fall under the MVRA as the Court of Appeals has held.

A. Rawlings' injury occurred in the process of unloading his trailer and does not come within the purview of the MVRA

1. Unloading a Trailer is not a "Use" of a Motor Vehicle as Contemplated by the MVRA.

KRS 304.39-030 provides "[I]f the accident causing injury occurs in thhis Commonwealth every person suffering loss from injury arising out of maintenance or use of a motor vehicle has a right to basic reparation benefits." The courts have interpreted KRS. 304.39-020(6)(b) to mean any injury that occurs in the process of loading or unloading a trailer is not a "use" of a motor vehicle and falls outside the purview of the MVRA. *See Clark v. Young,* 692 S.W.2d 285 (Ky.App. 1985). In *Clark,* Young was injured when he was standing on a flatbed trailer attempting to secure a load. The bungee strap he was using to secure the load snapped, hitting him

in the eye and blinding him. The Court held that "[w]e do not believe that simply because Young was standing on the trailer this amounted to occupying, entering into or alighting from the motor vehicle within the contemplation of the statute." *Id.* at 288. Therefore, the Court held that the one year statute of limitations mandated in KRS 413.140(1) applied, rather than the two year statute of limitations under the MVRA.

In *State Farm Mutual Automobile Insurance Company v. Hudson,* 775 S.W.2d 922 (Ky. 1989), the Court reaffirmed that the loading or unloading of a trailer is not a "use of a motor vehicle" under the MVRA. In that case, a case nearly identical in facts to the instant case, Hudson was injured when a log rolled off his trailer striking him as he was standing on the ground unfastening a chain in the course of unloading the trailer. The Court held that

> Under the statutory definition, Hudson was not "using" his vehicle when he was injured because he was engaged in an activity integral to unloading the truck. This conduct is specifically excluded from "use". Thus, respondent was not entitled to recover under the MVRA for his injuries....Plaintiff/respondent Hudson was in no way "occupying, entering into, or alighting from" the insured vehicle.... Hudson's conduct was not a "use" as contemplated by the MVRA. *Id.* at 923.

While the Court of Appeals acknowledged that unloading a vehicle could be a process, the Court found that at the time Rawlings was injured, no further action was required on his part for the trailer to be unloaded. Therefore, Rawlings actions

did not constitute "unloading" within the meaning of the MVRA. This skewed logic allowed the Court of Appeals to hold that Rawlings' claims fell under the MVRA.

2. Rawlings' injuries occurred as the trailer was being unloaded.

However, it is clear by Appellee Rawlings' own testimony that when the accident occurred, the process of unloading the aluminum bundles from the trailer had not been completed. When questioned about the steps that Rawlings took "in unloading" the back half of the trailer, Rawlings testified that he had the forklift operator put his forklift under the top bundle to hold it in place while he walked around and released the three straps holdings the top bundles. As the forklift driver took the top bundles away, Rawlings released the remaining two straps that secured the middle level and then released the binders on the two chains which secured the bottom bundles. As Rawlings was rolling up the straps, the forklift operator continued to unload the bundles. The chains were hung on a rack which was located in the back of the cab of his truck.

When there were only the bottom three bundles left on the back of the trailer, Rawlings testified that he released all the ratchets and binders for the front half of the load. Rawlings testified that the front load had a total of five straps and two chains securing it. There were three straps across the very top and two across the middle, as well as two chains securing the bottom layer of bundles. After Rawlings had released the ratchets and binders, he testified he pulled off the first strap that went across the

very top and rolled it up. He then went to a second strap which went across the middle bundles, but it stuck so he left it. He then proceeded to remove a third strap, which was the middle one across the very top. He removed that strap and rolled it up. He then moved to the last strap across the very top and after removing it, began rolling it up when the top bundle of aluminum fell off hitting him.

Just as in *State Farm Mutual Insurance Company v. Hudson, supra,* Rawlings was not "using" his vehicle at the time of his injury because he was engaged in an activity integral to unloading his trailer. The trailer could not be completely unloaded until Rawlings had finished unfastening and removing the remaining straps and bindings securing the remaining aluminum bundles. According to Rawlings own testimony, while he had released the ratchets on all five straps and the binders on the two chains securing the front load, he had only removed three of the five straps before he was injured. There remained two straps securing the middle bundles and the two chains securing the bottom layer of bundles, which had to be removed before his portion of the unloading process would be completed. In addition, none of the aluminum bundles on the front half of the trailer had yet been unloaded when the accident occurred. Rawlings testimony is supported by the pictures he identified as an accurate depiction of the scene after the accident and which are attached to his deposition as exhibits. The pictures clearly show there are two straps remaining on the front load, which had yet to be removed by Rawlings before the accident occurred.

In addition, the pictures clearly show the two chains across the bottom layer of bundles still securing that layer.

As Rawlings testified with regard to the unloading process as to the back half of the trailer, as bundles were being unloaded by the forklift driver, he would rol up the straps he had removed and then remove the chains and store them in the cab of the truck. This conduct was all a part of the unloading process. When the accident occurred, not all of the straps and bindings from the front half of the load had been removed. Clearly the testimony of Rawlings, along with the pictures taken after the accident, establishes that Appellee Rawlings was still in the process of unloading the trailer when the accident occurred. By Appellee Rawlings' own testimony, he **had not completed all tasks necessary for unloading.**

Therefore, contrary to the Court of Appeals' finding that Rawlings, at the time of his injury, was not engaged in any "activity integral to unloading within the meaning of KRS 304.39-020(6)," Rawlings still had all the straps and bindings on the front part of the load before those bundles could be unloaded. Further, what the Court of Appeals ignores, is that even if no further action on the part of Rawlings was required, the trailer was still being unloaded at the time he was injured. Rawlings' injuries occurred "in the course of unloading the vehicle."

Furthermore, at the time of his injury, the truck was unoccupied and Rawlings was standing on the ground next to the trailer as it was being unloaded. He was not

"occupying, entering into, or alighting from "his vehicle within contemplation of the Statute. *See Clark v. Young, supra.* At the time of Rawlings injury, his truck was not being utilized as a motor vehicle. Therefore, Rawlings' accident does not fall under the purview of the MVRA and its two year statute of limitations. The Court of Appeals' holding is not only in conflict with established case law and statutory mandate, but contradictory to the very definition of "use" under the MVRA.

B. Rawlings was not Using his Vehicle at the Time of the Accident.

The MVRA provides:

> for payment of benefits, not to all persons who are injured while making use of a motor vehicle, but only to those persons injured while making use of a motor vehicle whose injuries arose out of the use of the motor vehicle.
> *State Farm Mutual Automobile Insurance Co. v Rains,* consolidated with *Smith v. State Farm Mutual Insurance Company,* 715 S.W.2d 232, 234 (Ky. 1986).

"The term "arising out of the use of" implies a causal connection." *Id.* In those cases the Court held the "plain language of the statutes provides for the payment of basic reparation benefits to the victims of *motor vehicle accidents* for injuries *arising out of the use of a motor vehicle."* *Id.* at 233. "Even if it be conceded, however, that the injured were using a motor vehicle at the time they were injured, it remains their burden to demonstrate that the injuries arose out of the use of the vehicle." *Id.* at 234. The Court denied coverage for an individual hit on the head with a baseball bat while attempting to enter his car after engaging in a fistfight and to an individual shot by

another passenger while riding in the same car. The Court found that in "both cases the only connection between the victims and a motor vehicle was incidental. No motor vehicle accident contributed to their injuries." (*Id.*).

In order for the MVRA to apply, the "accident must have arisen out of *the inherent nature of the automobile, as such,* in order to bring it within the terms of a "use" clause." *United States Fidelity & Guaranty Co. v. Western Fire Insurance Co.,* 450 S.W.2d 491 (Ky.App. 1970). The MVRA does not apply if the owner was not "utilizing his truck *as a vehicle* at the time he received his injuries." (*Id.*) The court found that "[i]t is impractical to extend insurance coverage outside the field which it is intended to cover. . . . Basic automobile insurance policies are intended to cover 'driving' the vehicle." (*Id.*). Kentucky Courts have held that the injury suffered must be "a natural and reasonable incident or consequence of the use of the vehicle". *Fields v. Bellsouth Telecommunications, Inc.,* 91 S.W.3d 571 (Ky. 2002).

The same reasoning applies in the instant case, the only connection between Mr. Rawlings and a motor vehicle was incidental. No motor vehicle accident contributed to Mr. Rawlings' injuries. Mr. Rawlings had parked his tractor/trailer, exited it, and had spent some time after exiting his vehicle unloading the back portion of the trailer. As the Court of Appeals acknowledges, the tractor-trailer was still in the process of being unloading when Rawlings was injured. Even if such an act was not specifically excluded from coverage under the Statute, Rawlings' claim would

still be outside the parameters of the Act. The tractor-trailer was unoccupied and Rawlings was not "entering into, or alighting from" the tractor-trailer at the time he was injured. His claim did not arise "from the ownership, maintenance or use of a motor vehicle."

C. Rawlings' injuries did not arise from an inherent use of a motor vehicle.

1. Rawlings was not Performing Maintenance on a Disabled Vehicle at the Time he was Injured.

To find coverage the Court of Appeals compared the act of rolling up of straps, as Rawlings was doing when he was injured, to attaching a tow rope to a disabled car. Rawlings' act of rolling up the straps do not constitute maintenance of a motor vehicle as contemplated by the Act. Even if the rolling up of the straps was necessary as a part of the "routine maintenance that he must customarily do to travel on the roadway and prepare for the next load". It was not a necessary part of a routine maintenance to operate or use his truck. His truck was not disabled. There was nothing to prevent Rawlings from getting into his truck and driving away except for the fact that the trailer had not been completely unloaded. At the time of Rawlings' injuries, his truck was not disabled, such as is contemplated by the Statute and case law.

In *Kentucky Farm Bureau Mutual Insurance Company v. McKinney,* 831 S.W.2d 164 (Ky. 1992), Plaintiff was injured while flagging oncoming traffic around the site of a disabled vehicle. The Court held that Plaintiff's presence at the point of

impact was directly caused and necessitated by the disability of the insured vehicle. In the instant case, at the time Rawlings was injured, his presence was not caused by the disability of his truck. As a part of his employment, he had delivered a load of aluminum to Interlock and that load was in the process of being unloaded when his injuries occurred. The accident did not occur while he was en route with his load, nor while his vehicle was disabled on the side of the road. Rawlings had completed his journey, had parked, had exited his truck and had been standing outside his truck assisting in the unloading process when he was injured. *McKinney* is not applicable to the factual situation in the case at bar.

In *State Farm Mutual Automobile Ins. Co. v. Kentucky Farm Bureau Mutual Ins. Co.,* 671 S.W.2d 258 (Ky.App. 1984), the Court held that a person injured while attaching a towing rope to a disabled vehicle stopped on the roadside came within the Act. The Court held that because the injury occurred while the individual was trying to get the disabled car to a service station for repairs, he was a user of the vehicle at the time of the accident. Appellee Rawlings, at the time of his accident, was not performing maintenance on a disabled vehicle, which activity is clearly covered under the MVRA. Nor was his presence by the trailer caused or necessitated by the disability of his truck. His actions do not evidence any conduct which would place his injury under the MVRA.

Even if Rawlings rolling up the straps on the trailer was part of the "routine maintenance" that he did in preparation for travel and his next load, his claim still does not fall under the purview of the MVRA. This type of routine maintenance is more akin to the factual situation found in *Commercial Union Assurance Companies v. Howard*, 637 S.W.2d 647 (Ky. 1982). In *Howard* the Court denied coverage under the MVRA where a person was injured underneath his own truck while repairing the suspension system on his truck in his garage. The Court held that the MVRA did not apply because the owner was not "utilizing his truck *as a vehicle* at the time of his injuries." (*Id.*)

The Court found that "[i]t is impractical to extend insurance coverage outside the field which it is intended to cover . . . Basic automobile insurance policies are intended to cover 'driving' the vehicle." *Id.* Under the facts of this case at bar, it would be impractical to find coverage under the MVRA for injuries which did not arise out of the use of a motor vehicle.

2. There is not Causal Connection Between a Motor Vehicle and Rawlings' Injuries.

There is no causal connection between the use of a motor vehicle and Appellee Rawlings' injuries. Rawlings' injuries were a result of a bundle of aluminum falling off a parked tractor-trailer while the trailer was being unloaded. The fact that Rawlings was injured while rolling up the straps on the trailer standing next to the trailer is not an act that is inherent to the use of the truck. Appellee Rawlings' injuries

were not a natural and reasonable incident or consequence of the use of the truck. No motor vehicle accident contributed to his injuries.

> A casual relation or connection must exist between an accient or injury and the ownership, maintenance, or use of a vehicle in order for the accident or injury to come within the meaning of the phrase "arising out of the ownership, maintenance, or use" of a vehicle. 8A *couch on Insurance,* Third Edition §1059.

The "accident must have arisen out of *the inherent nature of the automobile, as such,* in order to bring it within the terms of a "use" clause." *United States Fidelity & Guaranty Co. v. Western Fire Insurance Co.,* 450 S.W.2d 491 (Ky.App. 1970).

Kentucky Courts have consistently applied this legal mandate. *See Clark v. Young, supra, State Farm Mutual Automobile Insurance Company v. Hudson, supra. State Farm Mutual Auto Insurance Company v. Raines, supra,* and *Commercial Union Assurance Companies v. Howard, supra.* As the Court in *United States Fidelity & Guaranty Company v. Western Fire Insurance Co.,* 450 S.W.2d at 493 stated:

> ... All of the cases agree that a causal relation or connection must exist between an accident or injury and the . . . use of a vehicle in order for the accident or injury to come within the meaning of the clause "arising out of the . . . use" of a vehicle, and where such causal connection or relation is absent coverage will be denied.

The same reasoning applies in the instant case, the only connection between Mr. Rawlings and a motor vehicle was incidental. No motor vehicle accident contributed to Mr. Rawlings' injuries. Mr. Rawlings was standing outside his

tractor/trailer and in the process of unloading the trailer when the accident occurred. Such an act is specifically excluded from coverage under the Statute. Further, even if this Court would construe the facts in such a way as to hold that Appellee Rawlings was not in the process of unloading his trailer, his claim would still be outside the parameters of the Act. Even if Mr. Rawlings was not in the process of unloading his trailer, his claim did not arise "from the ownership, maintenance or use of a motor vehicle."

Appellee Rawlings' testimony establishes that he was in the process of removing the straps and chains, which secured the aluminum bundles to the trailer, in preparation of the aluminum bundles being unloaded when the accident occurred. Even if this conduct is not considered to be an act of loading or unloading, it is not a use of his truck as contemplated by the Statute. Rawlings had "parked" his truck and "set the brakes and got out" before the unloading of his trailer began. He remained outside of his truck while the back half of the trailer was unloaded and there is no evidence that he intended to reenter his truck and leave until after the unloading process was complete. The entire front half of the truck had yet to be unloaded when Rawlings was injured. His conduct does not establish any intent "to undertake a new direction of activity", such as entering his truck and leaving as required by *Fields v. BellSouth Telecommunications, Inc., supra.* His conduct reflects just the opposite.

The Court has "a duty to accord to words of a statute their literal meaning unless to do so would lead to an absurd or wholly unreasonable conclusion." *Bailey v. Reeves,* 662 S.W.2d 832, 834 (Ky. 1984). To interpret standing outside his truck and rolling up straps as a utilization of a vehicle would be to give the meaning of the statute "an absurd or wholly unreasonable conclusion." While rolling up the straps may have been part of the routine maintenance to prepare for the next load, it is not part of the routine maintenance of a motor vehicle as contemplated by our legislature.

II. SHOULD THIS COURT ORDER A NEW TRIAL INTERLOCK SHOULD BE ALLOWED TO CALL AN EXPERT WITNESS AT THE NEW TRIAL.

The Trial Court's entered an Interlocutory Order on June 24, 2008, which suppressed the testimony of Harold I. Dunham, Appellee Interlock's expert witness, based upon non-compliance with the Trial Court's Pretrial Scheduling Order of November 28, 2007. It is Interlock's contention that it has the right to have its expert witness, Harold I. Dunham, testify in the trial of this action if this case is remanded back to the Trial Court for further proceedings. Any non-compliance on the part of Interlock was inadvertent. Further, permitting Mr. Dunham to testify in the trial of this action, if a new trial is ordered, would not result in any prejudice to any party. On the other hand, suppressing Mr. Dunham's testimony would be inequitable and result in an arbitrary and unduly harsh sanction.

Discovery in this case did not cease until June of 2008, one month prior to the scheduled trial and well after the cutoff dates established by the Court's Pretrial Scheduling Order. The deposition of Gary Helton, the owner of Kentucky Flatbed was taken on May 21, 2008. The deposition of Thomas Hull, President of Roseman's Inc., was taken on April 16, 2008. On May 8, 2008, Rawlings served Request for Production of Documents and Request for Admissions on Interlock and OVA. On May 12, 2008, Roseman's served Request for Production of Documents on Rawlings, Interrogatories on Kentucky Flatbed, Interrogatories on OVA and Interrogatories on Interlock. The evidence garnered from this late discovery was essential for a complete analysis by any expert who was expected to be called at the trial of this action.

Part of the information uncovered in this late discovery was necessary before Interlock's expert could completely and accurately analyze the case and reach an informed opinion regarding the case. The Court of Appeals ignored this fact stating that this argument should have been more appropriately made to the Trial Court. Interlock raised this same argument to the Trial Court without success. It is Appellee Interlock's contention that allowing discovery to continue past the deadlines set out in the pre-trial order, but then refusing to allow Interlock's expert to testify is arbitrary and an abuse of discretion. This is especially true given that the information garnered from the ongoing discovery was crucial to analysis by Interlock's expert.

Further, there was a subsequent Order entered on December 27, 2007, rescheduling the trial in this matter to July 21, 2008. That Order did not address the dates set for pretrial compliance. In a similar case, *Rippletoe v. Feese*, Ky, App. 2007, 217 S.W.3d 887, the Kentucky Court of Appeals was confronted with a case in which there had been two Pretrial Orders setting discovery cut-off dates followed by a third Pretrial Order which changed the trial date and did not set cut-off dates. The Court of Appeals held:

> We are compelled to conclude that once the trial court granted that motion without imposing additional discovery deadlines, no discovery deadlines remained in place.

Interlock made a good faith effort to comply with the Trial Court's Civil Pretrial Order and to disclose their expert witnesses in a timely manner. Interlock honestly believed that they had complied with the Court's Order and any mistake on their part was a mistaken interpretation of the reading of the Order. Any alleged prejudice resulting from this mistake will be eliminated by allowing all Parties an opportunity before trial, if a new trial is ordered, to take the deposition of its expert, Hal I. Dunham. Therefore, should a new trial be ordered, Interlock should be allowed to call its expert witness, Hal I. Dunham, at the trial of this action.

CONCLUSION

Appellee Charles Rawlings brought this action on March 7, 2006, more than one year after his injury, alleging that an employee of OVA negligently unloaded the

aluminum from his trailer, pushing the aluminum onto him and causing injuries. Because Rawalings was in the process of unloading his trailer at the time of his injury, the MVRA specifically excludes his claim from the Act and the one year statute of limitations applies. Even if it is held that Mr. Rawlings was not in the act of unloading at the time of his accident, the fact he was rolling up the straps on the trailer would not bring the Appellee's claim under the purview of the MVRA. The rolling up of the straps is not a use of a motor vehicle as contemplated by our legislature or by our courts. Nor can the rolling up of straps in the instant case be equated with maintenance of a disabled vehicle. There is no causal connection between the rolling up of the straps and the injury, and therefore, no coverage under the MVRA. If there is no coverage under the MVRA, the one year statute of limitations applies and Appellee Rawlings' claim is time barred.

This action is one for personal injury, and therefore governed by the one year statute of limitations under KRS.413.140(1)(a). Appellee Rawlings filed his action beyond the one year period. Therefore, this action is barred and the Court of Appeal's Opinion and Order entered March 19, 2010, Reversing the Trial Court's entry of Summary Judgment should be **REVERSED**.

Should this Court remand this case back to the Trial Court for a new trial, Appellant Interlock should be permitted to call Hal I. Dunham as its expert witness

at the trial of this action. If a new trial should be ordered in this action, no prejudice shall result to any party to this action by allowing Interlock to call its expert witness. The Trial Courts Order excluding this witness was arbitrary and an abuse of discretion. Therefore, the Court of Appeal's Opinion and Order entered March 19, 2010, Affirming the Trial Court's suppression of Interlock's expert should be **REVERSED** if a new this case is remanded back to the Trial Court for a new trial.

Respectfully submitted,

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