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CLERK
SUPREME COURT

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2010-SC-000264
CASE NO. 2010-SC-000352
CASE NO. 2010-SC-000368

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SUPREME COURT

INTERLOCK INDUSTRIES, INC., OHIO VALLEY ALUMINUM COMPANY, LLC, ROSENMAN'S, INC. and KENTUCKY FLATBED COMPANY, LLC — APPELLANTS

APPEAL FROM
SHELBY CIRCUIT COURT NO. 06-CI-00119

vs.

ON DISCRETIONARY REVIEW FROM
KENTUCKY COURT OF APPEALS
CASE NO. 2008-CA-1616
CASE NO. 2008-CA-1617
CASE NO. 2008-CA-1686

CHARLES RAWLINGS, ET AL — APPELLEES

BRIEF FOR APPELLEE CHARLES RAWLINGS IN RESPONSE TO ALL APPELLANTS' BRIEFS

CERTIFICATE OF SERVICE

I certify that a copy of this Brief has been served by first class mail, postage prepaid, on this 29th day of March 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 Drive, Frankfort, Kentucky 40601, Shelby Circuit Court Clerk, 9 Courthouse, 501 Main Street, Shelbyville KY 40065; Hon. Tom McDonald, Shelby Circuit Judge, 9 Courthouse, 501 Main Street, Shelbyville KY 40065; 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; Wayne J. Carroll, MacKenzie & Peden, P.S.C., 7508 New LaGrange Road, Louisville KY 40222; Robert E. Stopher, Boehl Stopher & Graves, LLP, Aegon Center, Suite 2300, 400 West Market Street, Louisville KY 40202.

Brien G. Freeman
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FREEMAN & CHILDERS

STATEMENT CONCERNING ORAL ARGUMENT

Oral argument should not be necessary. The briefs sufficiently present the disputed facts, issues and law. Nonetheless, counsel for Mr. Rawlings would be honored to argue this case to the Court should the panel believe oral arguments would be helpful.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

Appellee, Charles Rawlings ("Rawlings"), does not accept the Appellants' Statements of the Case (designated as "Statement of Facts" in Interlock's Brief). The issue for decision: *Is this action governed by KRS 304.39-230(6)--the two year statute of limitations under the Motor Vehicle Reparations Act (MVRA)?*

There are four guiding considerations controlling this issue:

(1) Rawlings received basic reparation benefits ("BRB"). KRS 304.39-230(6)[1] expressly provides that he had **two (2) years** to bring his tort claim after the last BRB payment. **No published Kentucky opinion has ever denied an accident victim two years to bring his tort claim after receiving BRB.** To do so now in direct contravention of the express wording of the statute, and by retroactively changing a two year limitations period to one year, would be grossly unfair and unconscionably inequitable to the rights of Rawlings;

(2) If this Court decides that the one year statute of limitations for non-MVRA claims should apply, the one year period should be tolled **when BRB has been paid**. After BRB has been paid, the one year statute should not be applied until the tort defendant or liability insurer establishes that BRB should not have been paid, thereby giving the accident victim fair notice as to the shortened statute of limitations;

(3) This Court should bring clarity and continuity to the conflicting and confusing Kentucky MVRA cases by reaffirming that tort liability under the MVRA is broader than BRB coverage, in that an action may fall within the MVRA's two year statute of limitations even when basic reparation benefits are not properly payable. In particular for this case, the MVRA's tort liability provisions specifically include coverage for injuries from unloading, even if the same injuries would be excluded under the BRB provisions.

(4) If this Court decides to apply the MVRA's BRB provisions to this tort liability claim, then the Court of Appeals correctly determined that Rawlings conduct did not fall with the BRB's "unloading" exception. At the very minimum, this Court should hold that the trial court failed to recognize that the ***factual*** issue of whether Rawlings was unloading his tractor trailer was a disputed issue of material fact that precluded entry of summary judgment against him.

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1 KRS 304.39-230 is attached at App. A-1.

A) Factual Background:

Charles Rawlings was severely injured in an accident on January 27, 2005.[2] Rawlings, a tractor-trailer driver, delivered twelve bundles of scrap aluminum to Appellant, Ohio Valley Aluminum Co., LLC (referred to herein as "Interlock"). The bundles were stacked two deep and three high on the front and back of the trailer.[3] The bottom two bundles were strapped with chains, the middle bundles were strapped with nylon straps and the top bundles were strapped with nylon straps.[4] Each bundle was 20 to 24 feet in length, 2-1/2 to 3 feet tall and **weighed approximately 3,500 pounds**.[5]

When Rawlings arrived at Interlock's facility, he was directed where to park.[6] He and the Interlock forklift driver then discussed a rear top bundle that had shifted during transport.[7] This bundle was successfully removed and all six bundles on the rear portion of the trailer were removed without incident.[8]

The front section was very stable with no leaning bundles.[9] Rawlings loosened all the straps from the driver's side of the front section where they were ratcheted down, then walked around the back of the trailer to the passenger side, and slid the nylon straps off the top of the load.[10] At this point, Rawlings had completed all tasks necessary for Interlock to finish unloading the truck.[11]

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2 R. at 1.
3 R. 950, C. Rawlings Dep. at 24-32, attached at App. A-5.
4 *Id.*
5 *Id.* at 73; T. Hull Dep. at 26-27, 32-34.
6 R. 950, C. Rawlings Dep. at 40-42, attached at App. A-5.
7 *Id.* at 42; D. Mathis Dep. at 15, 30.
8 R. 950, D. Mathis Dep. at 15, 30.
9 *Id.* at 20.
10 R. 950, C. Rawlings Dep. at 47-53, attached at App. A-5.
11 R. 850, Aff. C. Rawlings, attached at App. A-4.

Interlock states that "in a matter of seconds after unhooking the straps, the aluminum bundle rolled off." Interlock Br. at 4. It further states that it was a matter of "2 or 3 minutes" or "several minutes" after the forklift driver inserted his forks into the load before the bundle fell. *Id.* It advises the Court that Rawlings had to pull on a strap that was caught, and then a bundle "slowly rolled off." Interlock Br. at 3. Interlock's imaginative factual recitation leaves the impression that Rawlings possibly pulled the **3,500 pound bundle** onto himself.

Contrary to Interlock's Brief, Rawlings stated that it was a few seconds after he heard the forklift engine that the bundle was knocked onto him; not a few seconds after he unstrapped the load.

> At that point, I moved to the very – to strap number five on the passenger side, which was the last strap that goes all the way across the top bundle, pulled it off, rolled it up, and was in the process of rolling it when I heard a – I heard a forklift engine, I heard the motor rev up, and within a couple of seconds, ten seconds maybe, I heard a crunching sound from aluminum. And the next thing I knew, I was pinned up against the trailer and then down on the ground.

R. 950, C. Rawlings Dep. at 51. Interlock twists the facts, leaving out that it was seconds after the forklift engine was heard (not after the straps were loosened) that the bundle was knocked off.

Rawlings' affidavit confirms this factual chronology. "My only involvement in the unloading process of the aluminum bundle was to remove the straps prior to unloading. This had been done **several minutes** before the aluminum bundle struck me."[12] These sworn statements of record were also omitted from Interlock's purported facts.

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12 R. 850, Aff. C. Rawlings, attached at App. A-4 (emphasis added).

Even Interlock's own witness, forklift driver Danny Mathis, stated that he did not know what Rawlings was doing on the other side because he could only see his legs as he went into the bundle.[13] He further testified that the bundle may have fallen quicker than 2 or 3 minutes after his forks entered the load because "everything went so fast that day."[14] These facts too are omitted by Interlock.

Appellant Rosenman's own president, Thomas Hull, who loaded the load in question,[15] when asked how he understood the accident happened, stated: "the forklift driver went to unload a bundle, and possibly the forks were poking through the back side of the bundle he was unloading and maybe rolled the other bundle off the other side."[16]

Mr. Hull testified that he had over 20 years experience operating forklifts and was familiar with the way the truck in question was loaded.[17] He stated that it would be "unsafe" to "enter the load of aluminum with the top layer unstrapped if somebody is standing on the opposite side of the truck."[18] This unsafe action caused Charles Rawlings' severe injuries.[19]

Rosenman's asserts that Rawlings was hurt while he was under his trailer. This untrue statement has no support in the record.

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13 R. 950, D. Mathis Dep. at 25-26.
14 R. 950, D. Mathis Dep. at 29-30.
15 R. 950, T. Hull Dep. at 6, 26-27, 32-34.
16 R. 950, T. Hull Dep. at 57.
17 R. 950, T. Hull Dep. at 46.
18 *Id.*
19 Interlock also argues that the pictures taken after the accident support its factual representations. Br. at 4, 10-11. To the contrary, Rawlings testified that the pictures were not the same as when the accident occurred. He testified that the pictures show "an additional third strap" that someone had placed over the bundles after the accident. R. 950, C. Rawlings Dep. at 75. He also testified that he had released all of the straps and chains before the forklift driver entered the load, knocking the bundle onto him.

Rosenman's also falsely asserts that the accident occurred while Rawlings was unloading aluminum bundles. Again, this is an untrue statement. As the Court of Appeals properly found and as the record shows, Rawlings was not unloading his tractor trailer when he was injured. He had already completed all tasks necessary for Interlock's employee to unload the vehicle.[20] He had spent several minutes rolling up his straps so he would be ready to return to the road.[21] In fact, he was rolling up his last strap when the forklift driver went into the load, causing a passenger side bundle to come off, strike Rawlings, pin him against the trailer and then knock him to the ground.[22]

Rawlings suffered serious injuries: fractured nose; bruised lung; fractured ribs; fractures at L1, L4 and L5; sacral facture; femoral head fracture resulting in surgery and placement of three 6 inch screws in the hip; and, a right knee fracture resulting in surgery and placement of six screws and a plate.[23] His medical expenses are approximately $103,000.00.[24]

B) Procedural Background:

Trial of this matter was set for July 21, 2008.[25] Ninety days prior to trial, April 22, 2008, was the deadline for filing motions for summary judgment.[26] Contravening this deadline, Interlock filed its motion for summary judgment on June 27, 2008, and the Third-Party Defendant, Kentucky Flatbed, filed its motion

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20 R. 850, Aff. C. Rawlings, attached at App. A-4.
21 *Id.*; R. 950, C. Rawlings Dep. at 51-53, attached at App. A-5.
22 R. 950, C. Rawlings Dep. at 51-53, attached at App. A-5.
23 *Id.* at 55-67; Dr. Beliveau Dep. at 5-13.
24 R. at 345 (Damages List).
25 R. at 227.
26 R. at 203.

on June 20, 2008.[27] Both motions were based on the argument that BRB should not have been paid to Rawlings, and therefore this action should have been governed by a one year statute of limitations rather than the MVRA's two year statute of limitations. Notably, these motions (only a month before the scheduled trial) were the first time any party had argued that BRB should not have been paid to Rawlings. Thus, Rawlings had no notice whatsoever that BRB payments were an issue until long after he would have had any opportunity to file suit within the one year statute of limitations had BRB been challenged.

The trial judge dismissed this action by summary judgment on the same day Rawlings' Response was filed in the record.[28] Failing to recognize that whether Rawlings was unloading was a disputed factual issue, the trial judge based his ruling on the **presumption** that Rawlings was unloading his vehicle when injured. Noting that the MVRA precludes coverage for BRB when a party is injured while unloading a vehicle, the trial judge erroneously decided that tort claims must also be precluded under the MVRA, *even when a party has actually been paid BRB under the MVRA.*

The Court of Appeals **unanimously** held that the trial judge erred in granting summary judgment, finding that Rawlings was not unloading his vehicle when injured but was preparing it and maintaining it for continued use on the roadway. Therefore, his tort claim was covered under the MVRA. Op. at 19-20.

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27 R. at 568, 654.

28 R. 823. Rawlings' asserted procedural objections to the motions for summary judgment in that they were filed after the pretrial deadline (R. 203) and in violation of the local rules (LCRP-53-5(D)(ii)) requiring motions for summary judgment to be filed at least **20 days** prior to motion hour. R. 828-29. Interlock served its Motion only **two** business days before motion hour, and Kentucky Flatbed served its motion only **twelve** days before motion hour. The special judge did not address these arguments.

As the Court of Appeals properly ruled (Op. at 8), the "MVRA is to be liberally interpreted in favor of the accident victim." As such, when analyzing whether the MVRA's two year statute of limitations should apply (as opposed to the one-year statute for personal injury actions), our Courts have broadly applied the Act, as illustrated by *Goodin v. Overnight Transp. Co.*, 701 S.W.2d 131 (Ky. 1985).

Additionally, since this case was decided by summary judgment, the Court of Appeals viewed the factual record in a light most favorable to Rawlings, the non-moving party. Op. at 7. Summary judgment cannot be rendered unless it would be impossible for the non-moving party to prevail at trial under any circumstances. *Id.* As the Court of Appeals' ruled, it is Rawlings that must be given every favorable benefit of interpretation under the facts and the law as to MVRA coverage, and his right to a jury trial.

The Court of Appeals noted, Op. at 13 & 17 n.6, that it is the injured party's conduct that is to be liberally construed in favor of coverage under the Act, not the defendant's conduct against coverage. In other words, the fact that Interlock's fork lift operator was unloading the aluminum at the time of Rawlings' injury does not preclude MVRA coverage for Rawlings, who was not unloading.

After analyzing Rawlings' conduct, the Court of Appeals correctly concluded that he was "using" his vehicle so as to come within the purview of the MVRA. Op. at 14-19. The facts of record clearly support this ruling.

By improperly focusing on the forklift driver's conduct, the Appellants argue that Rawlings was in the "process of unloading" when he was injured. This is contrary to the evidence when considering Rawlings' conduct as required

by the MVRA. Op. at 14, 17 n.6. As previously mentioned, Rawlings had already completed all tasks necessary for unloading.[29] The straps had already been unfastened and removed off the load when the accident occurred minutes later.[30] When he was injured, he was performing an act required for him to get his vehicle ready to get back on the road--he was rolling his straps.[31] This was routine maintenance for him to get his vehicle road ready, akin to changing a tire or cleaning the windshield.

The Act broadly defines "use of a motor vehicle" to include "any utilization of the motor vehicle."[32] In fact, as the Court of Appeals noted (Op. at 13 & 18), our Courts have found this definition so broad as to include the connecting of a tow rope or chain to the front of a disabled vehicle by a party who is then hit by the disabled vehicle rolling forward.[33]

The Court of Appeals properly analyzed the facts in a light most favorable to Rawlings and resolved all doubts in his favor as the law requires. Thus, its opinion should be affirmed.

ARGUMENT

A) MVRA BACKGROUND

The MVRA is to be liberally construed in favor of the accident victim:

This Court has often noted that the "MVRA is to be liberally interpreted in favor of the accident victim."[34] As such, when analyzing whether the MVRA's two

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29 R. 850, Aff. C. Rawlings, App. A-4.
30 R. 850, Aff. C. Rawlings, App. A-4.
31 R. 850, Aff. C. Rawlings, App. A-4.
32 *Id.* (emphasis added).
33 *State Farm v. Kentucky Farm Bureau*, 671 S.W.2d 258, 259 (Ky. App. 1984).
34 *Fields v. BellSouth Telecommunications, Inc.*, 91 S.W.3d 571, 572 (Ky. 2002); *Lawson v. Helton Sanitation*, 34 S.W.3d 52, 62 (Ky. 2000).

year statute of limitations should apply (as opposed to the one-year statute for personal injury actions), our Courts have broadly applied the Act, as illustrated by *Goodin v. Overnight Transp. Co.*, 701 S.W.2d 131 (Ky. 1985).

In *Goodin*, like here, the trailer of a hitched but parked semi-truck was being unloaded when the plaintiff was injured.[35] Also, as in this case, the issue was not whether the plaintiff was entitled to BRB, but rather whether the Court should apply the one year statute of limitations for personal injury actions or the two year MVRA statute to his claim for tort liability. As here, if the one year statute applied, the plaintiff's claim would have been untimely.[36]

Goodin cited *Bailey v. Reeves*, 662 S.W.2d 832 (Ky. 1984) for the rule that the MVRA's two year statute of limitation (KRS 304.39-230(6)) must be given its plain meaning "*without limitation.*"[37] As such, the Court held that the injured plaintiff's claim was governed by the MVRA's two-year limitations period.[38] The Court aptly noted the following that equally applies to the case at hand:

> When we consider the situation of a modern day personal injury victim, confronted with questions of no-fault coverage, first party medical and disability coverage, and worker's compensation insurance, replacing a one year statute of limitations with a two year statute is not unreasonable.

Id.

With this public policy in mind, the Court stated that the "legislature intended exactly what it said" when it enacted the two year statute for "an action

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35 *Id.* at 132.
36 *Id.*
37 *Id.*
38 *Id.* at 133.

for tort liability" prescribed in KRS 304.39-230(6).[39] Thus, the "two years applies to all tort actions" not abolished by the Act (i.e., all actions other than those seeking recovery for BRB).[40]

This Court concluded its Goodin opinion with the following that applies equally to the case at hand:

> [W]e hold that the term "Use of a Motor Vehicle" as defined in KRS 304.39-020(6) includes within its definitional parameters the unloading of a trailer in the circumstances of this case.

Id.

This Court has also noted that "the main reason for the adoption of the MVRA was to create a system to protect the interests of victims, the public, policyholders and others."[41] It has further ruled that the "MVRA is social legislation that must be liberally construed to accomplish" its objectives, including to "insure continuous liability insurance coverage in order to protect the victims of motor vehicle accidents and to insure that one who suffers loss as the result of an automobile accident would have a source and means of recovery."[42]

B) THIS ACTION IS GOVERENED BY THE TWO-YEAR MVRA STATUTE OF LIMITATIONS:

1) Payment of BRB triggers the two-year statute of limitations:

In its Summary Judgment Order, the trial judge erroneously relied on *State Farm v. Hudson*, 775 S.W.2d 922 (Ky. 1989). This obscure case has almost never been cited because it deals not with tort liability or statute of limitation

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39 *Id.*
40 *Id.*
41 *Mitchell v. Allstate Ins. Co.*, 244 S.W.3d 59, 63 (Ky. 2008).
42 *Id.* (citing *Nat'l Ins. Ass'n v. Peach*, 926 S.W.2d 859, 861 (Ky. App. 1996)).

periods for tort injuries, but rather whether a claimant is entitled to BRB under the No-Fault provisions of the MVRA.

Reparation benefits are often referred to interchangeably as PIP benefits, BRB or No-Fault benefits. It is rare for the expense of litigation to justify pursuing a claim for these benefits (typically in the amount of $10,000) all the way to trial, much less to the appellate level where an opinion could be published. Nonetheless, in *Hudson*, the parties litigated the claim all the way to this Court; the issue being whether the plaintiff was "entitled to reparations."[43] The Court concluded that he was not entitled to BRB because his conduct was not a "use" of a motor vehicle as contemplated by the **BRB provisions** of the MVRA.[44] Since *Hudson* was not a tort claim, the Court did not analyze the MVRA's tort liability provisions.

Importantly, in contrast to *Hudson*, BRB was never at issue in the case at hand until the trial judge rendered summary judgment based on his finding that they should not have been paid. Rawlings was paid BRB by Northland Insurance in the amount of $10,000 three years before the trial judge entered summary judgment.[45] Once these benefits were paid, only one issue remained for statute of limitations purposes, that is, was Rawlings' claim for injuries (i.e., tort liability) "commenced" within two years of the injury or the last BRB payment, whichever later occurred?[46]

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43 *Id.* at 923.
44 *Id.*
45 R. 837-39 (Ex. A to Pl.'s Resp. to Mot. For Summ. J.).
46 KRS 304.39-230(6), App. A-1.

The simplicity of this analysis was made clear in the seminal case for tort liability under the MVRA: *Bailey v. Reeves*, 662 S.W.2d 832 (Ky. 1984).[47] In *Bailey*, the issue was whether the two year statute of limitations of the MVRA should apply where the plaintiff's injury arose from striking a cow with his truck. As here, the defendant argued the claim should have been brought within one year from the date of the accident. This Court referred to the MVRA as a "patchwork" that included portions of the Uniform Act "here and there."[48]

This Court ruled that it must apply the MVRA's limitations section (KRS 304.39-230(6)) as written without adding exceptions to the positive terms of the provision.[49] This Court set forth the language of the statute as it is worded today:

> An action for tort liability not abolished by KRS 304.39-060 may be commenced not later than two (2) years after the injury, or the death, or the last basic or added reparation payment made by any reparation obligor, whichever later occurs.

Id. This Court stated it must give the words of this provision "their plain meaning" without "adding restrictive language" where it does not exist.[50] As such, the statute "covers any action for tort liability not abolished by KRS 304.39-060."[51] Consequently, this Court held that the two year statute of limitations of KRS 304.39-230(6) applied to the action.

Bailey is directly applicable to the case at hand. Rawlings received BRB.[52] As such, the plain wording of KRS 304.39-230(6) applies, giving him two years

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47 In contrast to *Hudson*, *Bailey* has been cited over sixty (60) times by published opinions in Kentucky since it was rendered in 1984.

48 *Id.*

49 *Id.* at 834.

50 *Id.*

51 *Id.* at 834-35.

52 R. 837-39 (Ex. A to Pl.'s Resp. to Mot. For Summ. J.).

from the date of the accident or the last payment of BRB (whichever occurs later) to commence this action for tort liability. Rawlings filed his claim well within this statutory period.

Until the decision of the trial judge in this case, our courts have not required an accident victim to analyze whether BRB was "properly paid" before applying the two year statute of limitations to the victim's tort claim. The trial judge and Appellants effectively add the following to KRS 304.39-230(6): "Before this section may be utilized by the accident victim, the trial court must first make a determination of whether basic or added reparation payments were properly paid." To the contrary, KRS 304.39-230(6) must be applied as written without adding exceptions or restrictions.[53]

A recent Court of Appeals opinion, *Wilder v. Noonchester*, 113 S.W.3d 189 (Ky. App. 2003), confirms that, **when BRB has been paid**, the sole issue for applying the statute of limitations under KRS 304.39-230 is when the last BRB payment was made. As plainly stated, "the date the PIP provider made the last payment to the medical service provider begins the running of the two-year statute of limitations."[54] The court further ruled that:

> **[I]f** reparation benefits, such as **PIP payments, have been paid**, an action for further benefits, may be commenced not later than two (2) years after the last payment of benefits.

Id. at 190 (emphasis added).

Thus, **"if"** PIP/BRB has been paid, then the last PIP/BRB payment controls the statute of limitations issue. Again, there has been no Kentucky case

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53 *Bailey v. Reeves*, 662 S.W.2d 832, 834 (Ky. 1984).

54 *Id.* at 190.

requiring an analysis of whether BRB was "properly paid" before the two year statute will be applied. The trial judge's decision to dismiss this action on the basis of whether BRB should have been paid was not only contrary to the existing case law, but also violated the rule that the Act is to be "liberally interpreted in favor of the accident victim."[55]

Since the MVRA is to be liberally construed in favor of the accident victim, when analyzing whether the Act's two year statute of limitations should apply, our Courts (like the Court of Appeals in this case) have broadly applied the Act's two-year limitations period, as illustrated by *Goodin,*[56] previously discussed. The MVRA's statute of limitations should not be given a restricted meaning.[57]

Even *Hudson's* holding is in accord with this principle, as it did not restrict an accident victim's right to bring a tort claim under the Act's two year statute of limitations. Instead, it held simply that the plaintiff was not entitled to BRB under a "use" analysis. The Court left unaddressed whether the plaintiff would have been able to bring a tort claim under the Act's two year statute of limitations. It also left unaddressed whether the plaintiff would have been entitled to BRB under a "maintenance" or "ownership" analysis, as discussed later in this Brief. The trial judge's decision to dismiss Rawling's claim based on *Hudson* effectively decides these unaddressed, undecided issues in *Hudson* against Rawlings.

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55 *Fields v. BellSouth Telecommunications, Inc.*, 91 S.W.3d 571, 572 (Ky. 2002); *Lawson v. Helton Sanitation*, 34 S.W.3d 52, 62 (Ky. 2000).

56 701 S.W.2d 131 (Ky. 1985).

57 *Troxell v. Trammell*, 730 S.W.2d 525, 527-28 (Ky. 1987).

Such analysis is entirely contrary to the "purview of the Act" which is to redress "motor vehicle accident victims" not motor vehicle accident defendants.[58]

In summary, this case was filed within two years after the injury or the last BRB payment as required by KRS 304.39-230(6) and *Bailey.*[59] The trial judge's reliance on *Hudson,*[60] a case where **BRB payments were never paid**, is misplaced. In the case at hand, BRB was paid to Rawlings, and this action was filed March 8, 2006 (R. 11), well-within two years of the injury (January 27, 2005) and the last BRB payment (September 27, 2005).

The Appellants fail to cite a single case for the proposition that, after BRB has been paid, a trial court should determine whether such benefits were properly payable before an accident victim's tort claim will be covered by the Act's two year statute of limitations, KRS 304.39-230(6).

With the plain wording of the statute and the cases against them, the Appellants utilize a fairness based argument: it would be unfair to them for the Act's two year statute to apply to an accident victim's tort claim until a determination is made that BRB was properly paid.

This argument has multiple problems. First, the statute and the case law do not support it. There is no Kentucky case or statute supporting the trial court's decision to restrict § 230(6) by requiring a determination of whether BRB should have been paid before applying the statute. *Bailey* directly contradicts this approach.[61]

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58 *Bailey*, 662 S.W.2d at 835.
59 662 S.W.2d 832 (Ky. 1984).
60 775 S.W.2d 922 (Ky. 1989).
61 662 S.W.2d at 834.

Second, when deciding between favoring the defendant or the accident victim, the fairness analysis always must come down in favor of the accident victim.[62] It is the injured party's conduct that is to be liberally construed in favor of coverage.[63] "The plaintiff is the victim of the motor vehicle accident and is within the class whom the Act is designed to protect."[64]

Third, the Appellants' argument also defeats the purpose of the Act. The Act is purposed to encourage medical treatment and rehabilitation and to reduce the need to resort to litigation.[65] Under the Act, the accident victim has two years to obtain needed treatment and attempt to resolve his claim short of litigation.[66]

Under the Appellants' interpretation of the Act, the accident victim would never be safe using the two years to get treatment for his injuries and to attempt to negotiate his claim and refrain from litigation. If he waits beyond one year to file suit, he does so at his own peril because the trial court will have the opportunity to decide whether BRB was "properly payable" when the tort claim is filed. If the court decides these benefits should not have been paid, then the accident victim's two year statute of limitations is lost, and the one year statute of limitations is retroactively applied after it has already passed.

In other words, the Appellants believe that, although an accident victim has been paid BRB (which solely originates from the MVRA), his tort claim can be fairly and lawfully excluded from the Act. They believe that the accident victim can be fairly and lawfully barred from bringing a tort claim by applying the one

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62 *Fields v. BellSouth Telecommunications, Inc.*, 91 S.W.3d 571, 572 (Ky. 2002).
63 *Fields,* 91 S.W.3d at 572.
64 *Bailey*, 662 S.W.2d at 835.
65 KRS 304.39-010.
66 *Bailey*, 662 S.W.2d at 834.

year statute of limitations for personal injuries, which passed while the victim was utilizing BRB paid under the Act to get medical treatment for his injuries as contemplated by the Act. This grossly unfair scenario has never happened before in a published opinion; it is neither the law of this Commonwealth nor the legislative intent based on the purpose and plain wording of the Act. Nonetheless, this is what happened to Rawlings' claim in this case.

The trial judge erroneously states that Rawlings' reasoning regarding BRB being the trigger is flawed because if no BRB payments were paid then Rawlings would not be under the Act. Thus, the argument goes, he cannot be under the Act simply as a result of BRB being paid. Op. at 3. The simple answer to this point is that § 230(6) provides two years from the last BRB payment **or** the date of the injury. If BRB was not paid, Rawlings would have still had two years from the date of the injury.[67]

The real point here is that if BRB is not paid, then an accident victim (like Rawlings) is subject to establishing that "the injury" arose under the Act; the difference being that BRB payments under Kentucky law originate from only one source, the MVRA, whereas personal injuries can obviously arise from inside or outside of the Act. Thus, if BRB payments are made, the accident victim **is** under the Act; if BRB payments are not made, the accident victim may or may not be under the Act.

The analysis to this point is a simple one. Rawlings was a motor vehicle accident victim who was paid BRB. KRS 304.39-230(6) plainly provides two years for him to file his tort claim after the last BRB payment. The purpose of the

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67 *See Troxell v. Trammell*, 730 S.W.2d 525 (Ky. 1987).

Act is achieved by giving the accident victim two years. Rawlings filed his claim within two years of the last BRB payment. Consequently, the trial judge erred in granting summary judgment based on the one year personal injury statute.

The remaining arguments need only be considered if this Court decides that BRB payment is not a trigger for application of the two year statute of limitations under the Act.

2) **If payment of BRB does not trigger the MVRA's two year statute, such payment should toll the application of the one year statute of limitations until a determination is made that such benefits were not properly payable:**

If this Court decides that the one year statute of limitations for non-MVRA claims should apply, the one year period should be tolled **when BRB has been paid.** After BRB has been paid, a one year statute of limitations should not be applied until the tort defendant or liability insurer establishes that BRB should not have been paid, thereby giving the accident victim fair notice as to the shortened statute of limitations. Until the tort victim has "actual notice" that he is no longer under the MVRA because BRB was not properly payable, the statute of limitations should be tolled. *See Vandertoll v. Commonwealth of Kentucky, Transp. Cab.*, 110 S.W.3d 789 795 (Ky. 2003) (agreeing that a statute of limitations should be tolled when the action of another party conceals the claimant's right to bring a claim within the proper statutory period).

The Appellants do not dispute that Rawlings received $10,000 in BRB payments, nor do they dispute that BRB payment is the statutory trigger for the two year statute of limitations in KRS 304.39-230(6). Nevertheless, they argue

that his claim should be restricted to a one-year statute, even though he justifiably relied upon BRB payments to trigger the two year statute.

A reasonable accident victim should not have to, and normally would not, "second guess" his receipt of BRB benefits. These benefits help him. They allow him to obtain prompt, necessary medical care for his injuries. They allow him to obtain prompt payment for wages he has lost as a result of his injuries. They allow him time to try to resolve his claim and avoid litigation by giving him time to medically treat and heal from his injuries, and then negotiate his claim in good faith before filing suit only if necessary.

In other words, payment of BRB accomplishes what the Act designed them to accomplish.[68] In sum, they help protect "the interests of victims" and they simplify and speed up the process for providing compensation without the need for resorting to litigation.[69]

The Appellants' approach would require the BRB recipient to "second guess" his receipt of BRB benefits. He could never feel safe using the Act's two year statute for time to treat for his injuries and negotiate his claim in good faith, for fear that his suit may be considered untimely if it is later determined that BRB was not "properly payable." Thus, an accident victim would always have to file suit within one year (regardless of his receipt of BRB) if he wanted to insure that his suit would be considered timely filed. This interpretation stands the MVRA on its head as it encourages, rather than discourages, litigation, and it protects the tortfeasor and the liability insurer, rather than the accident victim.

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[68] KRS 304.39-010; *Progressive Max Ins. Co. v. Nat'l Car Rental Sys.*, 329 S.W.3d, 320, 322-23 (Ky. 2011); *Mitchell v. Allstate Ins. Co.*, 244 S.W.3d 59, 63 (Ky. 2008).

[69] *Mitchell*, 244 S.W.3d at 63.

Consequently, if this Court decides that it must be determined whether BRB was "properly paid" before the proper statute of limitations can be retroactively applied, then the Court should apply equitable tolling so that the limitations period does not start to run until a court has determined whether BRB was in fact paid properly. By applying equitable tolling principles, this Court would still accomplish the purposes of the Act because accident victims would not have to rush to suit within one year when they are paid BRB.

In *Nanny v. Smith*, 260 S.W.3d 815, 818 (Ky. 2008), equitable tolling of a statute of limitations was held appropriate where a party would be clearly prejudiced (i.e., the statute would otherwise expire) by circumstances that are beyond that party's control. Likewise, actions of a liability carrier may toll the limitations period.[70]

In light of the MVRA's stated purposes as interpreted by this Court, and the relationship between the reparation obligor's payment of BRB and the accident victim's tort claim against the tortfeasor (handled by his liability insurer), BRB payment should be construed as a presumptive finding that the MVRA's two year statute of limitations applies to the victim's tort claim. This presumption could be later overcome by a judicial finding that BRB payments were not "properly payable," but the limitations period would be tolled until such final judicial determination is made. Otherwise, the MVRA's intent to help the victim and to reduce and avoid litigation if possible is completely frustrated. "Discerning

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[70] *Miller v. Thacker*, 481 S.W.2d 19 (Ky. 1972).

and effectuating legislative intent is the first and cardinal rule of statutory construction."[71]

Moreover, at the time Rawlings filed his claim (and even currently), no published Kentucky opinion has held that a BRB recipient does not have two years to file his tort claim, as expressly recognized in KRS 304.39-230(6). Under Kentucky law, "the law in effect on the date of injury controls the rights and obligations of the parties."[72] As Rawlings followed the law,[73] as it existed at the time of his injury, his claim should not be barred if this Court decides that KRS 304.39-230(6) should now be interpreted to not trigger the two year statute of limitations under the MVRA.

3) Tort liability coverage under the MVRA is broader than BRB coverage:

This Court should bring clarity and continuity to the conflicting and confusing Kentucky MVRA cases by reaffirming what it previously held in *Troxell*:[74] tort liability coverage under the MVRA is broader than BRB coverage. Stated more particularly for this case, a tort action may fall within the MVRA's two year statute of limitations even when basic reparation benefits are not properly payable.

KRS 304.39-020(6), the MVRA section defining "use of a motor vehicle" to exclude certain loading and unloading, is expressly limited to basic reparation benefits.[75] In other words, KRS 304.39-110(1)[76] (the compulsory liability

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71 *Saxton v. Com.*, 315 S.W.3d 293 (Ky. 2010).
72 *Johnson v. Gans Furniture Indus., Inc.*, 114 S.W.3d 850, 854 (Ky. 2003).
73 KRS 304.39-230(6); *Wilder v. Nooncheste*r, 113 S.W.3d 189, 190 (Ky. App. 2003))
74 *Troxell v. Trammel*, 730 S.W.2d 525, 527 (Ky. 1987).
75 App. A-2.
76 App. A-4.

insurance provision) is broader than KRS 304.39-020 (the basic reparation benefits provision) in that it expressly provides coverage for "use of a secured vehicle" as well as for ownership, maintenance, loading and **unloading**. Thus, an action for tort liability may fall within the two year statute of limitations of the MVRA even when BRB is not payable.

In *addition to* the BRB subsection of the MVRA (KRS 304.39-020), the Act also has subsections pertaining to liability coverage for tort liability, including KRS 304.39-110(1) (setting forth the standards for minimum liability coverage) and KRS 304.39-230(6) (setting forth the two-year statute of limitations). Critical to the issue at hand, when setting forth the minimum liability requirements for tort liability, KRS 304.39-110(1) does not have the restrictive terms found in the BRB subsection. Instead, it provides that "security for payment of **tort liabilities** is fulfilled" by either:

> (1) . . . liability coverage of not less than twenty-five thousand dollars ($25,000) for all damages arising out of bodily injury sustained by one (1) person . . . as a result of any one (1) accident **arising out of ownership, maintenance, use, loading, or unloading, of the secured vehicle**; or
>
> (2) Single limits liability coverage of not less than sixty thousand dollars ($60,000) for all damages whether arising our of bodily injury or damage to property as a result of any one (1) accident **arising out of ownership, maintenance, use, loading, or unloading, of the secured vehicle.**

KRS 304.39-110(1) (emphasis added).

Under these provisions pertaining to tort liability, coverage is provided not only for "use of the secured vehicle" but also for "ownership", "maintenance",

"loading", or "unloading" without any restrictions on those terms. *Stevenson v. Anthem Cas. Ins. Group*, 15 S.W.3d 720, 721-22 (Ky. 1999).

> The present statute **mandates** minimum **liability coverage** "for **all damages** ... arising out of the ownership, maintenance, use, loading, or **unloading**, of the secured vehicle ..." KRS 304.39-110 (1).

Id. (emphasis added). Thus, MVRA coverage is mandated for "all damages . . . **arising out of ownership, maintenance, use, loading, or unloading, of the secured vehicle** KRS 304.39-110(1) (emphasis added).

It is only in the BRB subsection (KRS 304.39-020(2) & (6)) that the phrase "use of a motor vehicle" is defined to include and exclude certain types of loading, unloading, repairing, servicing and maintaining. In contrast, in the **tort liability** subsection (KRS 304.39-110(1)), the terms maintenance, loading and unloading are all used as separate and distinct terms from "use of the secured vehicle," and none of them are restricted.

Similarly, in the statute of limitations subsection for tort liability (KRS 304.39-230(6)), there is no restriction for claims involving only the "use of a motor vehicle." Instead, all claims for "tort liability" get the benefit of the two-year limitations period except those claims for BRB under KRS 304.39-060. The period of limitations is two years from the date of injury or the date of the BRB payment, whichever later occurs.[77]

Moreover, the statute of limitations subsection (KRS 304.39-230) has a **different** subsection that applies to claims for BRB, KRS 304.39-230(1). Again, subsection (6) provides the limitations period for actions for "tort liability" while

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[77] KRS 304.39-230(6).

subsection (1) provides the limitations period for actions for BRB.[78] This statutory structure further shows that the Act clearly has distinct coverage for tort liability on one hand, and BRB on the other. **Consequently, just because a claimant is not entitled to BRB does not mean he is similarly not entitled to the Act's broad coverage for tort liability.**

In summary, in *addition to* the basic reparation subsection of the MVRA, the Act also has *broader* subsections pertaining to liability coverage for tort liability, including KRS 304.39-110(1) and KRS 304.39-230(6). As this Court stated in *Troxell*, the Act encompasses more than just BRB:

> The Motor Vehicle Reparations Act is remedial legislation for motor vehicle accident victims much **broader than just basic reparation (or no-fault) benefits.** Among other things, it also provides for **compulsory liability insurance (§ -110)** and underinsured motorist coverage (§ -320), both of which are provisions that still apply whether or not the insurer rejects no fault coverage.

Troxell v. Trammel, 730 S.W.2d 525, 527 (Ky. 1987) (emphasis added).

As stated in *Goodin* and *Bailey*, the provisions of the MVRA should not be given a restricted meaning. Instead, the Act must be liberally interpreted in favor of the accident victim."[79]

Consistent with this policy, our courts have broadly found tort liability coverage under the MVRA for injuries arising from tripping on a utility pole guy-

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[78] Subsection (2) also applies a limitations period for BRB, but only when the accident victim dies. KRS 304.39-230(2).

[79] *Fields v. BellSouth Telecommunications, Inc.*, 91 S.W.3d 571, 572 (Ky. 2002); *Lawson v. Helton Sanitation*, 34 S.W.3d 52, 62 (Ky. 2000).

wire located near a parked car,[80] moving a battery from one car to another,[81] and trying to connect a tow rope or chain from one vehicle to another.[82]

As the record shows, Rawlings was rolling up straps attached to the side of his flat-bed trailer when the injury occurred as a result of Interlock's unloading it.[83] Thus, he was maintaining or servicing his truck as he must customarily do to travel on the roadway and prepare for the next load.[84]

As stated above, the tort liability statute (KRS 304.39-110(1)) not only provides coverage for unloading but also for maintenance of the secured vehicle. As such, the MVRA provides coverage for Rawlings for multiple reasons beyond the trial judge's limited analysis of the phrase "use of a motor vehicle" under the BRB statute. Consequently, even if this Court believes that Rawlings should not have been entitled to BRB based on a use-of-the-motor-vehicle analysis, he should still be entitled to the broader coverage under the Act for tort liability coverage for his damages.

The Appellants use most of their briefs arguing the same point: there should be no coverage under the Act unless the accident arises from the "use of a motor vehicle." They have to make this argument because it is the basis of the trial court's opinion. He utilized the Act's "use of a motor vehicle" definition (§ 020(6)) to conclude the Act did not cover Rawlings.[85]

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80 *Fields*, 91 S.W.3d 571 (Ky. 2002).

81 *Kentucky Farm Bureau v. Gray*, 814 S.W.2d 928 (Ky. App. 1991).

82 *State Farm v. Kentucky Farm Bureau*, 671 S.W.2d 258 (Ky. App. 1984).

83 R. 850, Aff. C. Rawlings, attached hereto at App. A-4.

84 *Id.*

85 Kentucky Flatbed asserts that the Court of Appeals never made a finding that Rawlings was using his vehicle as a motor vehicle at the time of his injury. This is incorrect. At page 13 of the Court of Appeals Opinion, the Court states "our focus then is

As shown in this section of Rawlings' Brief, the Appellants are incorrect in asserting that there is no tort coverage under the MVRA unless the injury arises from the "use of a motor vehicle." In fact, this Court stated in *Bailey* that the MVRA extends the statute of limitations for tort claims to two year for accidents arising from "**the ownership, maintenance or use of a motor vehicle.**"[86] Thus, injuries under the MVRA can arise from ownership or maintenance of a motor vehicle regardless of "use." Moreover, they can also arise from loading and unloading as well under § 110(1).

Since the statute expressly says it, no one can reasonably question that the MVRA has a tort liability provision that provides coverage for all bodily injury damages "arising out of ownership, maintenance, use, loading or unloading" of a secured vehicle.[87]

As previously noted, *Troxell* explains that the MVRA is "broader than just basic reparation (or no fault) benefits" in that it provides "among other things, . . . for compulsory liability insurance (§ 110) . . . ."[88]

Rosenman's argued to the Court of Appeals that KRS 304.39-020 states that its definitions are for the entire "subtitle." This is not a novel point and does

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whether Rawlings was using his tractor-trailer as a vehicle at the time of the accident." Again, at page 14, the Court of Appeals states "we must determine whether his actions constitute use of his tractor-trailer as a vehicle." Without question, the Court of Appeals focused its analysis on whether Rawlings was using his vehicle as a motor vehicle when he was injured. Moreover, after several pages of analysis specifically on the "use" issue, the Court found that he was using his vehicle as a vehicle at the time he was injured: "Our analysis inexorably leads to the conclusion that Rawlings's actions . . . were encompassed in the term "use" of his vehicle and, thus, he was engaged in an activity covered by the MVRA." Op. at 18-19.

86 *Bailey*, 662 S.W.2d 832, 833 (Ky. 1984) (emphasis added).

87 KRS 304.39-110(1) (emphasis added).

88 *Troxell*, 730 S.W.2d at 527.

not contradict Rawlings' arguments in the least. The Act is replete with provisions for BRB, not just § 020, so obviously the terms defined in § 020 must apply to the rest of the BRB provisions in the subtitle. Rawlings has not argued to the contrary.

The critical point is that the Act also has broader provisions such as § 110 as this Court recognized in *Troxell.* That § 020 primarily addresses BRB is indisputable when it is read in its entirety. But as stated by this Court in *Troxell,* § 110 is broader than the BRB provisions in the Act, wherever those provisions may be found. How is it broader? It is broader in that it **mandates** tort liability not simply for "use of a motor vehicle" (regardless of how that term is defined) but for damages "arising out of ownership, maintenance, use, loading, or unloading" of a secured vehicle.[89] It is hard to imagine how § 110 could be argued to the contrary, unless its terms are simply ignored.

There are two additional, important points regarding the interaction between § 110 and § 020. First, § 020 has in quotes the various terms it defines. The one that is in question here is "use of a motor vehicle" as defined at § 020(6). The phrase "use of a motor vehicle" is found in six sections of the MVRA all of which not surprisingly deal directly with BRB.

§ 020(2) (definition of BRB)
§ 030(1)&(2) (right to BRB)
§ 040(2) (obligation to pay BRB)
§ 050(1) (priority of security for BRB)
§ 060(1) (abolition of tort liability where BRB has been provided)
§ 100(2) (requiring insurance contracts to provide BRB)

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89 KRS 304.39-110.

The phrase "use of a motor vehicle" is **not found** in § 110, the compulsory liability provision. Instead, it states that liability coverage must be provided for damages "arising out of ownership, maintenance, use, loading or unloading" of the secured vehicle. Consequently, by the plain terms of the MVRA, § 110 is broader than the BRB provisions in that an accident victim making a tort claim is not limited to only damages "arising from the use of a motor vehicle."

Second, even if a strained argument could be made that the definition of "use of a motor vehicle" in § 020(6) must be applied to § 110, it still would not diminish § 110's broader application. Under this strained argument, § 110 would effectively read (with the provisions from § 020(6) added) that liability coverage must be provided for damages arising from:

- **Ownership** of a secured vehicle;
- **Maintenance** of a secured vehicle;
- **Use** of a secured vehicle as long as that use does not include conduct within the course of a business of repairing, servicing or otherwise maintaining motor vehicles unless the conduct occurs off the business premises, or conduct in the course of loading and unloading the vehicle unless the conduct occurs while occupying, entering into, or alighting from it.
- **Loading** a secured vehicle;
- **Unloading** a secured vehicle.

When the illogical combination of §110 and § 020(6) is actually set forth in this manner, it is readily evident that applying the "use of a motor vehicle" definition from § 020(6) makes § 110 ambiguous and impossible to consistently follow. Under this incompatible yoking, liability coverage would have to be expressly provided for "loading" and "unloading" with no restrictions and for "use" unless the use of the vehicle included "loading and unloading" not occurring while occupying, entering into or alighting from the vehicle. Can anyone rationally

argue that this is what the legislature intended? Such an interpretation leads to "an absurd or wholly unreasonable conclusion," which is expressly prohibited.[90]

Again, it would appear obvious that § 110, as *Troxell* states, is broader than the BRB subsections and that the BRB definition for "use of a motor vehicle" from § 020(6) cannot rationally be inserted into § 110 to limit and restrict its plain terms. By the express terms of § 110, Rawlings is entitled to liability coverage for his injuries as long as they arose from ownership, maintenance, use, loading or unloading of his secured motor vehicle. The Appellants and the trial court even agree that Rawlings injuries arose from unloading. Rawlings would also argue his injuries arose from maintenance, ownership and use of his vehicle. In the final analysis, he has multiple grounds for coverage under the compulsory liability section of the Act (§110).

In summary, as shown by the foregoing analysis, a tort action may fall within the MVRA's two year statute of limitations even when BRB is not properly payable. This is because the MVRA's tort liability provisions provide broader coverage than the BRB provisions, and specifically cover Rawlings for **unloading**, ownership or maintenance even if this Court determines that he did not meet the "use" definition under the BRB section.

4) Summary Judgment was inappropriate when there was a genuine issue of material fact as to whether Rawlings was unloading his vehicle at the time of the accident.

In short, the Appellants argued below that Rawlings was unloading the trailer; Rawlings argued he was not. At a minimum, this created a factual issue for the jury to resolve. "Even though a trial court may believe the party opposing

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[90] *Bailey*, 662 S.W.2d at 834.

the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact."[91] The "court must view the record in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor."[92]

The Summary Judgment factually states that Rawlings was "in the course of releasing the tie-downs on the aluminum to unload the cargo" when injured.[93] Similarly, it states he was "injured when a bundle of aluminum fell from his truck and struck him as he unfastened tie-downs securing the load of aluminum."[94] This recitation of facts is not Rawlings' testimony as to what happened.

As the Court of Appeals properly found, Rawlings was no longer involved in the unloading process when the accident occurred. Instead, he was rolling up his trailer straps that had already been unfastened and removed off the load.[95] Rawlings was **not** preparing his trailer for unloading. He had already completed **all tasks** necessary for unloading.[96] Again, the evidence of record shows that he was rolling up the vehicle straps when the injury occurred.[97] This was part of the routine maintenance that he must customarily do to travel on the roadway and prepare for the next load.[98]

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91 *Follett v. Gateway Regional Health Sys., Inc.*, 229 S.W.3d 925, 928 (Ky. App. 2007).
92 *Follett*, 229 S.W.3d at 928.
93 Op. at 1-2.
94 *Id.*, Op. at 3.
95 R. 850, Aff. C. Rawlings, attached hereto at App. A-4.
96 R. 850, Aff. C. Rawlings, attached hereto at App. A-4.
97 R. 850, Aff. C. Rawlings, attached hereto at App. A-4.
98 R. 850, Aff. C. Rawlings, attached hereto at App. A-4.

Unlike the plaintiff in *Hudson,*[99] who was still completing an act that had to be done before the truck could be unloaded (i.e., removing a chain that held down his load), Rawlings was doing an act that was unnecessary for the unloading of his truck. In fact, even if the straps had remained unrolled, Interlock's unloading of the truck would have been unaffected.

Based on the premise that Rawlings was unloading his vehicle, the trial judge concluded he was not making "use of a motor vehicle" because the BRB statute (unlike the tort liability statute § 110) excludes conduct in the course of "loading and unloading" unless the conduct occurs while "occupying, entering into, or alighting from" the vehicle.[100]

Even under the MVRA's "use of a motor vehicle" BRB provisions, if Rawlings was not "loading or unloading" his vehicle, he would come within the Act because it broadly defines "use of a motor vehicle" to include "**any utilization** of the motor vehicle."[101] In fact, our Courts have found this definition so broad as to include the connecting of a tow rope or chain to the front of a disabled vehicle by a party who is then hit by the disabled vehicle rolling forward.[102]

> We construe subsection (6) of KRS 304.39-020 as embracing the activities being performed by the decedent at the time of his death. He was **utilizing his vehicle** in trying to get it to a service station for repairs. He being a user of the vehicle at the time of his accident, the appellee is primarily liable for basic reparation benefits.

Id. at 259 (emphasis added).

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99 775 S.W.2d 922 (Ky. 1989).
100 KRS 304.39-020(6)(a).
101 *Id.* (emphasis added).
102 *State Farm v. Kentucky Farm Bureau*, 671 S.W.2d 258, 259 (Ky. App. 1984).

Analyzing the facts in a light most favorable to Rawlings and resolving all doubts in his favor as the law requires, he was not "unloading" his vehicle when the accident occurred. He had completed all steps necessary for the trailer to be unloaded by Interlock's employee. It is the injured party's conduct that is to be liberally construed in favor of coverage under the Act, not the defendant's conduct against coverage.[103]

In other words, the fact that Interlock was unloading does not preclude coverage for Rawlings, who was not unloading.[104] *Fields* best shows the principle as the defendant's conduct there had nothing to do with use of a motor vehicle. Instead, the defendant was sued for negligent placement of a guy-wire anchor for a utility pole.[105] Even though no vehicle came into contact with the guy-wire anchor, the plaintiff tripped over it while in the process of entering into her car.[106] The Court concluded that the claim came within the Act's two year statute of limitations based on the plaintiff's conduct, even though the defendant's alleged negligent placement of the guy-wire anchor would not normally come within the Act.[107] Unquestionably, the claim based on the

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103 *Fields v. Bellsouth Telecommunications*, 91 S.W.3d 571 (Ky. 2002).

104 As stated in *Bailey*, "the plaintiff is the victim of the motor vehicle accident and is within the class whom the Act is designed to protect, regardless of whether the tortfeasor is a motorist or nonmotorist." 662 S.W.2d at 835. This is why coverage is found even where the defendant's conduct is completely unrelated to a motor vehicle. *Wilder v. NoonChester*, 113 S.W.3d 189, 190 (Ky. App. 2003) (coverage found where the defendant was sued for failing to control horses that were hit while standing in roadway); *Kentucky Farm Bureau v. Hall*, 807 S.W.2d 954, 955 (Ky. App. 1991) (coverage found where the plaintiff was injured by a rock propelled by a lawn mower); *Fields*, 91 S.W.3d at 572 (coverage under the Act against defendant for negligent placement of a guy-wire).

105 *Id.*

106 *Id.* at 573.

107 *Id.* at 574.

defendant's negligent conduct would not have come under the Act but for the conduct of the plaintiff.

Likewise, since Rawlings was not unloading the vehicle at the time of this accident, he is covered under the Act's two year statute of limitations, regardless of the fact that Interlock was unloading the trailer. At a minimum, there is a genuine issue of material fact as to whether he was unloading, which should have precluded entry of summary judgment in this case.

Moreover, even if Rawlings conduct could exclude him from BRB coverage for "use of a motor vehicle," he would have still been entitled to BRB coverage for injuries from the ownership or maintenance of a motor vehicle. This was not analyzed by the lower courts.

As previously explained, KRS 304.39-020(6) only refers to "loading and unloading" when it defines the term "use of a motor vehicle." This "use of a motor vehicle" definition expressly excludes "loading and unloading" unless the conduct occurs while "occupying, entering into, or alighting" from the vehicle.[108] However, with regard to a claim arising from "ownership" or "maintenance" of a motor vehicle, there is no similar limitation.

Since the Act is to be liberally construed in favor of the accident victim, the coverage analysis for BRB under the Act is: Did the accident arise from **either** (1) ownership of the motor vehicle; (2) maintenance of the motor vehicle; or (3) use of the motor vehicle? If the answer is "yes" to any one of these three, then coverage for BRB applies.

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[108] KRS 304.39-020(6).

The effect of the Summary Judgment Order is to burden accident victims with additional requirements not found in the MVRA before they can obtain its benefits. The Order correctly notes that the MVRA covers injuries arising from ownership, maintenance or use of the motor vehicle.[109] However, the Order then indicates there is no coverage unless the plaintiff's conduct is considered "use of the vehicle."[110] Requiring that vehicle maintenance be related to its use as a vehicle is an additional hurdle for the victim not written into the MVRA. The Act has no language requiring maintenance of the vehicle to be related to its use.[111]

Our Courts have held that BRB is payable when there is a "causal connection between the injuries and the **maintenance or use** of the motor vehicle."[112] Thus, the causal connection can be related to maintenance **or** use.[113]

> The statutes allow for basic reparation benefits due to accidental injuries arising out of the use or maintenance of a motor vehicle.

Kentucky Farm Bureau, 807 S.W.2d at 956.

As to maintenance, the Appellants have argued that Rawlings should be denied coverage for maintenance of his vehicle under *Commercial Union Assur. Companies v. Howard.*[114] This argument is not only contrary to the express wording of the Act, but it has also been rejected by this Court in *Goodin.*

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109 *Bailey*, 662 S.W.2d at 833; Op. at 2.

110 Op. at 3.

111 Aside from "maintenance", Rawlings owned the subject vehicle (R. 950, C. Rawlings Dep. at 10), so this accident could also reasonably be argued to have arisen out of his "ownership" of a motor vehicle.

112 *Kentucky Farm Bureau v. Hall*, 807 S.W.2d 954, 955 (Ky. App. 1991) (emphasis added); *State Farm Mut. Auto v. Rains*, 715 S.W.2d 232, 234 (Ky. 1986).

113 Even if maintenance must be related to use, maintaining the straps and chains for the next load is directly related to the use of the vehicle as hauler of commodities.

114 637 S.W.2d 647 (Ky. 1982).

In *Goodin*, Justice Wintersheimer **in dissent** made the same argument that under *Commercial Union* there should be no coverage under the Act for "repairing or unloading merchandise" from a vehicle.[115] He noted that the *Commercial Union* case "was a repair case and not an unloading case," but argued the same reasoning applied in either scenario.[116] The majority opinion rejected this argument, finding coverage under the Act for injuries caused during unloading and noted that *Commercial Union* contained inapplicable "dicta."[117]

Further, the Court in *Commercial Union* conceded that the Act has no clear definition of the phrase "maintenance of a motor vehicle."[118] While the Court then discussed the Act's definition of "maintaining a motor vehicle", it concluded that these terms were not the same since it stated that they created "patent ambiguity."[119] At the end of the opinion, the Court again noted that the legislature had employed "ambiguous language" in drafting this section of the Act. Thus, *Commercial Union* cannot be reasonably relied upon for guidance as to what is, or is not, "maintenance of a motor vehicle" under the Act.

Additionally, a distinguishing fact in *Commercial Union* is that the injury occurred while on the plaintiff's premises.[120] The Act excludes coverage for maintenance occurring on the premises of a business that repairs, services or

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115 701 S.W.2d 131, 134 (Ky. 1985) (Wintersheimer, J., dissenting).
116 *Id.*
117 *Id.* at 133.
118 637 S.W.2d at 649.
119 *Id.*
120 *Id.* at 648.

otherwise maintains motor vehicles.[121] Rawlings was not involved in such a business and, if he was, was off the business premises.

Therefore, even if there was not a genuine issue of material fact as to whether Rawlings was unloading when injured, his claim would still be covered by the BRB subsection because he was injured while **maintaining**, or performing **maintenance** on, his vehicle.

C) THE CASES

Rather than making this brief more lengthy by addressing the three Appellants' arguments as to every case cited, Rawlings will limit his case analysis to the leading cases relied upon by the parties. As the above establishes, whether the cases deal with BRB or tort liability is critical since tort liability is broader under the Act.

(1) *Bailey v. Reeves*, 662 S.W.2d 832 (Ky. 1984)

Bailey is the seminal case with regard to claims for tort liability under the Act. It is instructional here because Justice Leibson drafted an opinion explaining how our courts should approach **tort liability claims** under the Act where there is an issue as to whether the Act's two year statute of limitation should apply instead of one year statute for personal injuries, KRS 413.140. These are the same general issues in the case at hand.

The basic facts: a truck struck a cow, injuring the truck driver. Suit was filed by the truck driver. As here, the trial court dismissed the action since it was not filed within one year from the date of the accident. *Id.* at 833. Further, as

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[121] KRS 304.39-020(6)(a).

here, the defendant argued that a provision from a BRB section of the MVRA (§ 070) should limit the Act's two year statute of limitations.

The defendant argued that the MVRA's two year statute of limitations should only apply to claims against an "owner, operator or occupant of a motor vehicle." *Id.* at 834. This phrase, "owner, operator or occupant," comes from only one section of the Act, KRS 304.39-070, which pertains to a reparation obligor's right to recovery of BRB payments.

Using language more applicable to the case at hand than any other case cited in the various briefs, this Court refused to restrict or limit KRS 304.39-230(6) (the two year statute of limitations for tort claims) by adding provisions to it from sections of the Act dealing with BRB.

> We have 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. A legislature making no exceptions to the positive terms of a statute is presumed to have intended to make none.
>
> Here, giving the words of the statute [KRS 304.39-020(6)] their literal meaning and adding no exceptions neither leads to absurdity nor to a wholly unreasonable conclusion. On the contrary, there appears to be bona fide reasons why the two-years statute is both sensible and reasonable. When one looks to the policy and purposes behind the Act, KRS 304.39-010, it is evident that **the legislature intended to encourage those injured in auto accidents to look first to their no-fault benefits and then pursue a tort claim if necessary.** This approach presupposes the need for a longer statute of limitations, regardless of whether the tort claim to be pursued is against a motorist or a nonmotorist.
>
> . . .
>
> But the fundamental question is not which statute is preferable [the two year versus one year statute of limitations]. Instead, **we are required to give the words of the statute written by the legislature their plain meaning. To do so restricts us**

from adding restrictive language to KRS 304.39-230(6) where it does not now exist.

Id. at 834 (internal citations omitted) (emphasis added).

Bailey thus answers the issue before this Court. KRS 304.39-230(6) must be applied as written without restricting it by adding terms from other sections of the Act. As the Court explains, the legislature intended for accident victims like Rawlings to look first to his BRB and then to pursue a tort claim only if necessary. This is exactly what Rawlings did. So, when KRS 304.39-230(6) directs that he had two years from the last BRB payment to file his tort claim, the statute must be applied as written to give him two years, not one.

(2) *Goodin v. Overnight Transp. Co.*, 701 S.W.2d 131 (Ky. 1985)

The next time the Supreme Court looked at these issues was in *Goodin*. This too was a tort liability claim under the MVRA wherein the Court was asked whether the one year personal injury statute of limitations should be applied or the two year statute under the Act. This opinion was also drafted by Justice Leibson. It also has particular factual significance for the case at hand because it (as here) involved an injury resulting from the unloading of a semi-truck.

As in *Bailey*, the defendant argued that the MVRA's two year statute of limitations "should be given a restricted meaning." *Id.* at 133. The defendant argued that the statute should not cover the "present situation" (i.e., an injury from unloading a semi-truck), while the plaintiff argued that the statutory language "speaks for itself." *Id.* at 132. Again, this Court ruled that the statute must be applied without adding words of limitation to it. "The express words of

KRS 304.39-230(6) cover 'an action for tort liability not abolished by KRS 304.39-060' *without limitation*." *Id.*

Stating that "the legislature intended exactly what it said" in § 230(6), the Court ruled that the MVRA's two year statute of limitations controlled the action, even where the injury occurred from unloading a tractor trailer. *Id.* at 133.

Despite the rulings and statements of the Court cited above, Rosenman's argues that the only reason *Goodin* applied the two year statute of limitations is that the accident victim was inside the trailer of the semi-truck when the injury occurred. Rosenman's argues that, if he had been outside of the truck, the Court would have held against him. Rosenman's prescience is not binding precedent. It is the Court's actual holding that is the binding precedent: " [W]e hold that the term "Use of a Motor Vehicle" as defined in KRS 304.39-020(6) includes within its definitional parameters the unloading of a trailer in the circumstances of this case." *Id.*

While the Court did address the fact that the plaintiff was injured while inside the truck and whether such an injury would be included within the definitional section of KRS 304.39-020, it did so because it was specifically asked to do so in the certified question of law posed by Judge Siler for the federal court. *Id.* at 132-33. Justice Leibson does not state or intimate that the Court would have ruled otherwise if the accident victim was injured while standing beside the truck. In fact, just the opposite is true when the Court's response to Justice Wintersheimer's dissent is considered.

Justice Wintersheimer's argued that the majority should follow the reasoning of *Commercial Union v. Howard*, 637 S.W.2d 647 (Ky. 1982), and generally exclude MVRA coverage when the injury arises from unloading. The Court rejected Justice Wintersheimer's dissenting argument, noting that *Commercial Union* contained inapplicable dicta. *Id.* at 133. It also rejected Justice Wintersheimer's argument (made by the Appellants here) that the MVRA's two year statute should only apply when the injury occurs from the "utilization of the vehicle as a vehicle." *Id.* at 134.

While we can argue what may or may not have been the outcome of *Goodin* under differing fact patterns, it is incontrovertible that *Goodin* firmly stands, like *Bailey*, for the proposition that the MVRA should be liberally construed in favor of accident victims, and when a tort claim is made, KRS 304.39-230(6) must be applied as worded without any restrictions or limitations.

(3) *Troxell v. Trammell*, 730 S.W.2d 525 (Ky. 1987)

Troxell followed shortly after *Bailey* and *Goodin*. Again this Court applied the plain wording of the MVRA's two year statute of limitations in response to an attempt to restrict its plain terms. In this case, the defendant argued that the one year personal injury statute should apply to a tort claim when a motor vehicle accident victim has rejected BRB. *Id.* at 525-26.

With Justice Leibson again authoring the Court's opinion, the Court ruled that KRS 304.39-230(6) plainly gives the auto accident victim two years after payment of BRB **or** the date of injury to file his claim. *Id.* Thus, the trial court erred in applying the one year statute of limitations. The two year MVRA statute

controlled, allowing the claim to be filed within two years of the injury even though BRB was never paid. *Id.* at 528.

Again, the issues framed for the Court are directly applicable here. The defendant argued that since the plaintiff had rejected the BRB provisions of the Act, he could not utilize the two year statute of limitations for tort claims under the Act. *Id.* at 526-27. This is similar to the Appellants' argument that since they believe Rawlings' injury does not fall within certain BRB provisions of the Act, his tort claim should also not fall within the Acts' two year statute.

Not so, according to the Court. "The statute as written provides two years, not one. By so holding, we are applying the statute exactly as written." *Id. at 526.* Throwing a large net, the Court ruled that the Act "applies alike to everyone who uses a motor vehicle on the public roads in Kentucky" regardless of whether they are denied BRB under the Act. *Id.* at 527. When a claimant "makes his claim as a motor vehicle accident victim, . . . he is within the 'purview of the Act.'" *Id.* at 528.

The Court relied heavily on *Bailey* and *Goodin* in its opinion. It ruled, as in these cases, that KRS 304.39-230(6) must be liberally interpreted in favor of the accident victim without adding "restrictive language." *Id.* at 527-28. Moreover, *Troxell* is the opinion wherein the Court noted that the MVRA is "**much broader than just basic reparations (or no-fault) benefits**" in that, among other things, it provides for "compulsory liability insurance" in § 110 regardless of "whether or not the insured rejects no-fault coverage." *Id.* at 527 (emphasis added).

Like *Bailey* and *Goodin*, *Troxell* strongly shows that Rawlings' claim is governed by the Act's two year statute even if BRB should not have been paid as argued by the Appellants.

(4) The BRB cases: *State Farm v. Hudson*, 775 S.W.2d 922 (Ky. 1989); *State Farm v. Rains*, 715 S.W.2d 232 (Ky. 1986); *Commercial Union Assur. v. Howard*, 637 S.W.2d 647 (Ky. 1982)

Hudson, *Rains* and *Howard* (relied on by the Appellants and the trial court) are not tort liability cases or statute of limitations cases. While the Appellants spend much time discussing these three opinions, KRS 304.39-230(6) is not mentioned in any of them. Again, these are cases interpreting some of the BRB provisions of the Act; they do not interpret or even mention the compulsory tort liability section, § 110, or the two year tort statute of limitations section, § 230(6). Additionally, none of them hold, imply or even state in dicta that after BRB has been paid, the trial court should decide whether BRB was properly payable before allowing a tort claim under the Act's two year statute.

For the law applicable to the issues before this Court, the cases interpreting the tort provisions of the Act, more specifically § 110 and § 230(6), are the cases that must be considered. As these cases have been discussed above, they will not be discussed further with the exception of *Hudson* since Rosenman's argues that this Court need go no further than *Hudson* to decide this case.[122] Critical differences exist between *Hudson* and this case.

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[122] Rosenman's upside down view of the MVRA would have this Court analyze and interpret the Act liberally in favor of the tortfeasor and its liability insurer rather than in favor of the accident victim and in favor of coverage as required. This topsy-turvy view is seen in the hypothetical provided by Rosenman's in its Brief at 9-11. It argues that, even if Rawlings was in his vehicle driving it when he was injured, he would still be excluded from the MVRA because such conduct could still be characterized as conduct

First, *Hudson* was not a tort claim. It says nothing about the proper analysis when analyzing whether a **tort victim's claim** falls under the MVRA's two year statute of limitations. Instead, *Hudson* is a BRB case wherein the **BRB insurer** (not the tortfeasor as here) argued that the claimant was not entitled to BRB. In other words, **BRB was never paid to start with in *Hudson***. This is a very different issue than whether, **after BRB has been paid under the MVRA**, the tort victim should be entitled to proceed under the Act's two year statute of limitation for tort claims.

Second, in *Hudson,* it was **factually undisputed** that the claimant was unloading his vehicle when he was injured. The *Hudson* Court stated it was an "undisputed fact that Hudson was preparing his log-hauling tractor trailer for unloading at the time of the accident."[123] The Court further stated that Hudson was struck by a log as he was "unfastening a chain in the course of unloading the truck."[124] This distinction, which Rosenman's ignores, is material. While it is easy for Rosenman's to gloss over this distinction in the name of advocacy, the law requires accuracy and liberality when analyzing whether a severely injured tort victim should be denied his right to recover damages under the MVRA.

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in the course of unloading. Rosenman's chides the Court of Appeals for not understanding this. Br. at 11. Where would the logical chain of Rosenman's view stop? A truck which is designed for loading/unloading would never be under the MVRA under Rosenman's hypothetical because it would always be acting in "furtherance" of loading or unloading. As the Court of Appeals properly ruled, "actions of an insured which could constitute or be properly characterized as having "dual character" should favor application of the MVRA as it is to be liberally interpreted when applied to accident victims." Op. at 17

123 *Hudson*, 775 S.W.2d at 923.

124 *Id.*

In *Hudson*, the injured party was not rolling up cargo straps to ready his tractor trailer for returning to the road. Instead, while his load of logs was still secured with chains, he unfastened one of the chains so that unloading could commence. When he unfastened the chain for unloading purposes, a log rolled onto him, causing injury. The parties agreed that the injured claimant was in the process of unloading when his injury occurred. Thus, unlike the case at hand, there were no disputed factual issues of whether the claimant was unloading when injured.

Even if the issue of unloading had not been conceded in *Hudson*, there is an obvious material factual difference between when the injury occurred there versus when the injury occurred to Rawlings, which logically requires a different result under the MVRA. Without question, chains or straps securing a load to a truck bed must be unfastened before a load of cargo can be unloaded. If an injury occurred during the unfastening process, it would be logical for the parties and the courts to conclude that the injury occurred during the process of unloading.

In contrast, in this case (as with most loads) once the chains or straps securing the load were removed, the load could be unloaded without further involvement of the person (Rawlings) who removed the chains and straps. The chains/straps could remain on the ground indefinitely, unrolled, and the unloading process could proceed regardless of any further steps being taken by the individual who released the chains/straps. In this case, Rawlings decided to

prepare his truck to return to the road by rolling up his straps. He was injured while doing this action that was not necessary for unloading.

Again, the fact that Rawlings was no longer involved in unfastening his straps to allow Interlock's employee to commence unloading is a critical and material difference between Hudson and the case at hand. In Hudson, the claimant was injured doing an activity necessary for unloading. In this case, Rawlings was injured while doing an activity **un**necessary for unloading but necessary for him to return to the road to use his vehicle as a motor vehicle. As such, the Court of Appeals' opinion is in accord rather than in "direct conflict" with *Hudson.*

(5) Brotherton v. Map Enterprises, Inc, 104 F.3d 361 (6th Cir. 1996), unpublished, No. 95-6698, 1996 U.S. App. LEXIS 33272 (6th Cir. 1996).

Rosenman's argues that the Court of Appeals' Opinion is contrary to *Brotherton v. Map Enterprises, Inc.*[125]

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125 104 F.3d 361 (6th Cir. 1996), unpublished, No. 95-6698, 1996 U.S. App. LEXIS 33272 (6th Cir. 1996). *Brotherton* will be discussed herein because Rosenman's has cited it and argued that it is authoritative. However, it should not be considered by this Court because it is unpublished and Rosenman's has violated both CR 76.28(4)(c) and Sixth Cir. R. 28(f) and FRAP 32.1(b) in citing and relying upon it. CR 76.28(4)(c) expressly prohibits use or citation of unpublished decisions "in any court of this state" unless it is a Kentucky appellate decision rendered after January 1, 2003, and no other published opinion addresses the issue. As an unpublished opinion from a federal court, rendered before 2003, *Brotherton* obviously fails to meet the criteria of CR 76.28(4)(c). This Court has expressly admonished against the citation of unpublished opinions in violation of CR 76.28(4)(c). *Travelers Ins. Co. v. Duvall*, 884 S.W.2d 665, 666 n.1 (Ky. 1994). As such, the opinion cited by Rosenman's should not be considered by this Court. Moreover, *Brotherton* would be refused even if it were being cited to a federal court in Kentucky since Sixth Cir. R. 28(f) (formerly Rule 24) and FRAP 32.1(b) provide that unpublished federal decisions can only be cited if rendered after January 1, 2007.

Rosenman's skewed analysis of *Brotherton* is similar to its analysis of *Hudson* in that it ignores the key factual distinction. In *Brotherton*, the injured party was injured while doing an act necessary for loading/unloading; the plaintiff was "pulling down the side rails attached to the truck bed in order to prepare the truck for loading" when he was thrown against the truck and injured. Therefore, the Sixth Circuit ruled that the two year statute under the MVRA did not apply because he was injured in the course of loading/unloading. Since he was injured doing an act necessary for loading/unloading, the analysis as to his coverage under the MVRA is materially different than that properly applied by the Court of Appeals for Rawlings, who was injured doing an act that was not necessary for loading/unloading.

Obviously, Rosenman's wants this Court to accept its biased argument that Rawlings' conduct was "close enough" to loading/unloading that he should be excluded from the Act's two year statute of limitations. However, as Rawlings was the accident victim, his conduct must be liberally construed in favor of coverage under the MVRA as made clear by *Bailey v. Reeves,* 662 S.W.2d 832 (Ky. 1984). Rosenman's failure to discuss *Bailey* is not surprising, as it is directly applicable here and directly contrary to Rosenman's position.

(6) *Cochran v. Premier Concrete Pumping, Inc.,* 2010 Ky. App. LEXIS 378 (Ky. App. April 30, 2010).

The Appellants rely upon *Cochran v. Premier Concrete Pumping, Inc.,* 2010 Ky. App. LEXIS 378 (Ky. App. April 30, 2010) (**unpublished).** In this unpublished opinion, a split Court of Appeals panel ruled that a claim by a party injured by a hose connected to a concrete boom connected to a concrete truck

was governed by the one year statute of limitations for personal injuries rather than the two year statute of limitations under the MVRA.

Importantly, factual distinctions abound between *Cochran* and this case. First, there was no BRB payment made to the injured party, Cochran. The opinion makes no mention whatsoever of BRB. This distinction is critical as Cochran did not have this key "trigger" for the two year statute's application under the MVRA section 304.39-230(6).

Second, it was not argued that Cochran was doing any action to prepare or maintain his vehicle to return to the road. He was simply standing beside his vehicle while another person, operating a concrete boom by remote, injured him. The boom hit a hose that hit Cochran and knocked him to the ground. Thus, there was no finding like the one made in this case that "Rawlings was preparing his vehicle to return to the roadway." Op. at 13, 15, and 16 n. 6.

Third, and finally, as an unpublished, split opinion, *Cochran* has minimal precedential authority, especially in light of the fact that it relies upon a BRB case, *Hudson,* rather than the tort liability cases under the Act such as *Bailey*, *Goodin* and *Troxell.*

D) NO ABUSE OF DISCRETION REGARDING EXCLUSION OF EXPERT WITNESS

Interlock argues the trial court abused its discretion by excluding an expert witness. The Court excluded Interlock's expert because it failed to disclose the expert in response to discovery requests (expert disclosed two years after the request) and within the time required by the Court's Order (over 30 days late).

As it did before the Court of Appeals, Interlock feigns confusion over the trial court's scheduling order. The scheduling order clearly provided that summary judgment motions had to filed 90 days prior to trial, and Defendants' expert witnesses had to be disclosed 60 days after Plaintiff's expert disclosures. Interlock failed to meet both of these deadlines.[126] For violating the Order and failing to respond to Rawlings' discovery requests, the trial judge denied Interlock's attempt to add an expert after the deadline.

The trial court has wide discretion over the admission of expert testimony, and its decision to exclude such testimony should not be overturned absent an abuse of discretion.[127] As the trial court did not abuse his wide discretion in excluding Interlock's untimely witness, the Court of Appeals properly affirmed its decision.

E) KENTUCKY FLATBED IMPROPERLY ASKS THIS COURT TO AFFIRM SUMMARY JUDGMENT ON GROUNDS NOT APPEALED AND NOT RULED UPON BY THE TRIAL COURT:

The Court of Appeals properly found that Kentucky Flatbed did not file a cross-appeal concerning its alternate basis for summary judgment. Op. at 3. Therefore, the issue was never properly brought before the Court of Appeals, and thus cannot be reviewed. CR 73.02; Op. at 4. Moreover, the circuit judge granted summary judgment on the sole issue of the statute of limitations. There was no ruling regarding any other basis for summary judgment.

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126 R. at 203.

127 *Baptist Healthcare Sys. v. Miller*, 177 S.W.3d 676, 680-81 (Ky. 2005); *Jones v. Stern*, 168 S.W.3d 419, 424 (Ky. App. 2005).

Even under *de novo* review, appellate courts must have a decision to review.[128] The standard of review is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law."[129] Since this appellate Court is a reviewing court, it must have something to review. It uses various standards of review—clearly erroneous, abuse of discretion, *de novo*—but these standards all apply to a decision that has been made by the trial court. In this case, the trial court did not make any finding that there were no genuine issues of material fact on the substantive issues of whether Kentucky Flatbed was negligent in this matter. As such, even if Kentucky Flatbed had filed a cross appeal, the Court of Appeals would have had no decision to review as to these matters.

CONCLUSION

The Court of Appeals should be affirmed because this action was properly filed within the MVRA's two year statute of limitations for the following reasons. Since BRB was paid to Rawlings, the Act covers his tort claim. The Act does not restrict § 230(6) to require a finding that BRB was properly paid. Second, even if the propriety of BRB is analyzed, such benefits were properly paid to Rawlings. At a minimum, there was a genuine issue of material fact on the issue of whether he was unloading, which should have precluded entry of summary judgment.

Third, even if BRB should not have been paid, the Act's broad coverage for tort liability specifically includes injuries arising from unloading, ownership and maintenance. As such, the Act's two year statute of limitations covers this claim.

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128 *Lewis v. B&R Corp.*, 56 S.W.3d 432, 437 (Ky. App. 2001).

129 *Id.* (emphasis added).

Finally, even if the Court believes that Rawlings' claim should be governed by the one year statute of limitations, such statute should be deemed equitably tolled since Rawlings relied upon the receipt of BRB under the Act in calculating his limitations period. It would be fundamentally unfair to an accident victim who has received BRB to retroactively shorten his statute of limitations from two years to one year based upon a subsequent finding that BRB was not properly payable.

Respectfully submitted,

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