COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2010-SC-00264

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

v.

DISCRETIONARY REVIEW FROM
2008-CA-001616
2008-CA-001617
2008-CA-001686

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

CHARLES RAWLINGS et al. — APPELLEES

RESPONSE BRIEF OF APPELLEE, KENTUCKY FLATBED COMPANY, LLC

* * * * *

Submitted by:

JOHN G. MCNEILL
ELIZABETH A. DEENER
LANDRUM & SHOUSE LLP
P.O. Box 951
Lexington, Kentucky 40588-0951
Telephone: (859) 255-2424
Facsimile: (859) 233-0308

By: _____
Counsel for Kentucky Flatbed Company, LLC

CERTIFICATE REQUIRED BY CR 76.12(6)

The undersigned does hereby certify that a copies of this brief was served by mail this 25th day of March, 2011 upon the following: Hon. Tom McDonald, Circuit Judge, 9 Courthouse, 501 Main St. Shelbyville, KY 41056; Brien G. Freeman, Freeman & Childers, PO Box 1546, Corbin, KY 40702-1546; Gene F. Price, Frost Brown Todd LLC, 400 W. Market St., 32nd Floor, Louisville, KY 40202; Wayne J. Carroll, MacKenzie & Peden, P.S.C., 7508 New LaGrange Road, Louisville, KY 40222; Robert E. Stopher, Boehl Stopher & Graves, LLP, 400 West Market Street, Suite 2300, Louisville, KY 40202. The undersigned does also certify that the record on appeal was not withdrawn by this party.

BY: _____
JOHN G. MCNEILL/ELIZABETH A. DEENER

STATEMENT CONCERNING ORAL ARGUMENT

Appellee, Kentucky Flatbed Company, LLC, would welcome an oral argument before the Court to address the issues raised in this Discretionary Review.

COUNTER-STATEMENT OF POINTS AND AUTHORITIES

COUNTER-STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Appellee, Charles Rawlings, was an employee of C & J Trucking of Corbin, Kentucky, an independent contract hauler. (Ans. to Second Set of Interrogatories, R. 261-64). C & J Trucking entered into an agreement to haul for this Appellee, Kentucky Flatbed Company, LLC [also referred to as "Kentucky Flatbed"]. One of the contract hauls under this agreement was to travel to the facility of Appellee Rosenman's Inc. [Rosenman's], in Ottumwa, Iowa, to pick up bundles of aluminum.

On or about January 26, 2005, Rawlings arrived at Rosenman's facility, and parked his truck near several bundles of aluminum. While Rosenman's employees were preparing the bundles for loading, Appellee put "dunnage," described as 4 x 4 pieces of wood, on the floor of the trailer. (Rawlings Dep. p. 24, R. pp. 950). Employees of Rosenman's, including Thomas John Hull, then loaded the flatbed trailer attached to Rawlings' tractor truck. These bundles of aluminum were loaded one at a time, on each side of the trailer, loading from the front to rear. Rosenman's employees then used chains, furnished by Rawlings and tightened and secured the bundles. Id. pp. 25-26. Four "short 4 x 4s" were then placed on top of the secured bundles, and two more bundles were loaded on top. These bundles were also secured with straps. Id. p. 27. This process was repeated until the two columns were three bundles high. Two more columns were then added at the back end of the trailer. Id. pp. 30-32.

After completing his paperwork, Rawlings spoke to Mr. Hull and expressed

his concern that the top bundle on the passenger side back half of the trailer was leaning a bit to the outside. (Rawlings Depo. at p. 32, R. pp. 950). Mr. Hull thought the load looked secure and did not observe anything unusual. Then, as part of standard procedure, Rawlings called Kentucky Flatbed to report that his truck was loaded. Id. p. 33. During this call with Gary Helton of Kentucky Flatbed, Rawlings discussed his concern about the load. Id. p. 33. Mr. Helton asked Rawlings if he felt safe with the load; Rawlings responded he "didn't think it would be a safety issue." (Rawlings Depo. p. 34, R. pp. 950). Rawlings knew that, as the driver, the ultimate decision to travel with the load was up to him. Id. pp. 33-34. Rawlings admits he was never commanded or compelled to leave Rosenman's with the load. Mr. Helton testified that although he did not recall the specific conversation, the "go or no go" decision is up to the driver under Kentucky Flatbed's procedures and policies. (Depo. Helton pp. 21, 26-27, R. pp. 950-51)

Rawlings departed Rosenman's around 4:00 p.m. After traveling approximately 50 miles he stopped, checked the straps and bindings on the load, and tighten them to accommodate for the load settling. He continued to a truck stop in Bloomington, Illinois, where he again checked the bundle and straps. (Depo. Rawlings p. 36, R. pp. 950). He noted the "problem" bundle from Rosenman's had shifted 6 to 10 inches and was now leaning to the outside. He re-tightened the straps to remove slack. Id. pp. 37-38. He spent the night at a truck stop in Greenwood, Indiana, and the next morning his inspection revealed no load shifting. Id. p. 39.

Rawlings arrived at Appellant's, Ohio Valley Aluminum Company ["Ohio

Valley"], location in Shelbyville, Kentucky at about 10:00 a.m. on January 27, 2005. He parked the truck where indicated, and alighted. At this time, the truck ceased to be used as a "motor vehicle." It was, in effect, a rack stand at Ohio Valley Aluminum holding bales of shredded aluminum. No further use of the trailer as a motor vehicle occurred again.

Before the rack was unloaded, Rawlings showed one of the Ohio Valley forklift operators the "problem" bundle on the rear top passenger-side load – the one he felt was "leaning" – and "asked him if he could come up and put his forks under that bundle before I would release it so that it wouldn't fall." (Depo. Rawlings p. 42, R. pp. 950; Depo. D. Mathis, p. 14, R. 950). The Ohio Valley forklift operator went to the passenger side and "put his forklifts under the top bundle and to hold it in place on the back half of the trailer while I walked around to the driver's side to release the three straps that were holding those bundles on." (Depo. Rawlings p. 44, R. pp. 950). The Ohio Valley forklift operator then lifted the "leaning" bundle and unloaded it without problem. Id. p. 45.

While the Ohio Valley forklift operator was unloading the bundles from the back passenger side of the rack, the straps and chains holding the bundles in place were disconnected. Rawlings collected those straps and chains and, while standing a few feet away, began winding them. (Depo. Rawlings pp. 46-47, R. pp. 950; Depo. C. Martin, p. 6-13, R. 950). Unloading continued as Rawlings rolled straps and the forklift operator removed the released bundles. The process went without incident until the fifth or sixth bundle was reached for unloading.

While on the ground on the passenger's side, Rawlings removed the straps

retaining the top row. (Depo. Rawlings pp. 49-50, R. pp. 950). He then "moved to the second strap along the trailer which was across the middle bundles. [Rawlings] pulled on it, but it wouldn't give" as the strap was caught between "levels two and three." Id. pp. 50-51. He then removed the third strap, "the middle one across the very top," and strap five, the last strap. Id. At this same time, the Ohio Valley forklift operator picked up a bundle of aluminum, "within a couple of seconds, then 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." Id.

Further, the facts show that at the time of the accident, there was no "use of a motor vehicle." The truck and trailer were parked and stationary. The truck was not running and was not moving. Rawlings was not occupying the cab portion of the tractor. Instead, he was standing on the ground watching Ohio Valley employees unload. He was not participating in unloading. He was not driving a motor vehicle, operating it, occupying, or getting in or out of a motor vehicle. Rawlings was not event touching a motor vehicle. The trailer loaded with aluminum bundles was essentially converted into a stand containing aluminum bundles that Rawlings was standing near, watching being unloaded. It is from this stand, not a "motor vehicle" that the bundle being unloaded by Ohio Valley fell onto Rawlings, allegedly injuring him.

II. PROCEDURAL BACKGROUND

The accident occurred on or about January 27, 2005. Appellee Rawlings filed his Complaint on March 8, 2006, over one year and two months after the accident. This Complaint raised claims against Interlock Industries, Inc. and Ohio

Valley Aluminum Company, LLC. (Comp., R. 1-3). Anthem Health Plans of Kentucky intervened on July 6, 2006. (Intervening Comp., R. 25-28). Kentucky Flatbed Company, LLC, was joined by Third-Party Complaint on August 27, 2007, nearly a year and a half into the civil matter, and two and a half years after the accident. (Third Party Comp., R. 127-46). Kentucky Flatbed answered on October 10, 2007. (Answer, R. 164-68). Written discovery and depositions were completed.

On June 23, 2008, Kentucky Flatbed filed its motion for Summary Judgment raising the issues of limitation of action and lack of negligence on the part of Kentucky Flatbed. (Motion and Memorandum, R. 568-82). Appellants Interlock Industries and Ohio Valley Aluminum and Appellee Rosenman's Inc. followed with their own motions for summary judgment, asserting limitations and other issues. (Motions, R. 607-63). On July 7, 2008 the Shelby Circuit Court granted all motions for summary judgment and dismissed the action as barred by limitations. (Order, R. 823-27). Rawlings moved to vacate the order. (Motion to Vacate, R. 880-93). This was denied on August 7, 2008. (Order, R. 952). Rawlings appealed the order of summary judgment. (R. 953-54).

The Court of Appeals reversed the Order of the Shelby Circuit Court, holding that the MVRA applied and therefore Rawlings was entitled to the two-year limitations period. In reaching this decision, the Court of Appeals distinguished this Court's opinion in State Farm Mutual Automobile Insurance Company v. Hudson, 775 S.W.2d 922 (Ky. 1989), to find that, contrary to this Court's holding in that case, a person standing on the ground who is struck with material being unloaded from a flatbed trailer is using a motor vehicle, and reversed the judgment on the issue of

limitations.

These consolidated actions for discretionary review followed.

ARGUMENT

I. STANDARD OF REVIEW

The standard of review on appeal when a trial court grants a motion for summary judgment 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." Blackstone Mining Co. v. Travelers Ins. Co.,— S.W.3d —, 2010 WL 5135327, 4 (Ky. 2010) (quoting Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App.1996)); CR 56.03. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor," and summary "judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances." Steelvest, Inc. v. Scansteel Service Ctr., Inc., 807 S.W.2d 476, 480 (Ky. 1991); Scifres, 916 S.W.2d at 781.

II. THE COURT OF APPEALS ERRED BY EXPANDING THE SCOPE OF THE MOTOR VEHICLE REPARATIONS ACT

Kentucky Flatbed joins with Appellant Interlock in arguing that the Court of Appeals erred by expanding the reach of the limitations period of the Motor Vehicle Reparations Act [MVRA] to cover the accident here. (Br. at 6, inter alia). As noted in Interlock's brief, Troxell v. Trammell, 730 S.W.2d 525, 527 (Ky. 1987) and Bailey v. Reeves, 662 S.W.2d 832, 833 (Ky. 1984), recognized that the MVRA only extended the limitations period to accidents and injuries covered by the MVRA. Or,

as Bailey stated:

> [T]he literal language of the MVRA extends the statute of limitations to two years for actions 'with respect to accidents occurring in this Commonwealth and arising from the ownership, maintenance or use of a motor vehicle,' when not 'abolished' by the Act."

Bailey, supra, at 833-34.Here, it is quite clear from the evidence that Rawlings' injury did not arise from "use" of his truck as required by the plain language of KRS 304.39 et seq.

This Court has held that the Motor Vehicle Reparations Act [MVRA] only applies to motor vehicles being used as motor vehicles – or in other words, for transportation purposes. Goodin v. Overnight Trans. Co., 701 S.W.2d 131 (Ky. 1985). KRS 304.39-020(6). This Court has further clarified this point by specifically holding, in a factually identical accident, that unloading a parked trailer is not "use of a motor vehicle." State Farm Mut. Auto. Ins. Co. v. Hudson, 775 S.W.2d 922 (Ky. 1989). And, one month following the decision by the Court of Appeals in this matter, a different panel of the Court of Appeals held that it is clear under Goodin and Hudson that the MVRA does not apply to an injury arising from a parked truck. Cochran v. Premier Concrete Plumbing, Inc, 2010 WL 1728920 (April 20, 2010) (attached as Appendix D). The attempt to distinguish Hudson from the facts at hand was inconsistent with Cochran and expands the scope of the MVRA beyond the statutory limits and the holdings of this Court.

Contrary to the terms of the statute and case law interpreting it, the Court of Appeals did not find that Rawlings was affirmatively using his tractor-trailer as a motor vehicle, occupying it, or entering/exiting the truck when he was injured.

Rather, the Court found that because Rawlings was no longer involved in "loading or unloading" the truck, he therefore must be "using" it.

The MVRA allowed for the extension of the one-year bodily injury limitations period to two years in cases of automobile accidents that meet the MVRA definitions. As shown more fully below, this incident is not covered under the MVRA definitions. By his own testimony, Rawlings was standing some feet away, winding straps, an action construed by the Court of Appeals as "preparing his vehicle to return to the roadway". Rawlings v. Interlock Industries, Inc., 2010 WL 1006853, 4, 16 (Ky.App.,2010). The Court of Appeals erroneously interpreted this as meaning that he was "using" the truck as a motor vehicle. Standing next to a vehicle is not "using" it. C.f. State Farm Mut. Auto. Ins. Co. v. Kentucky Farm Bureau Mut. Ins. Co., 671 S.W.2d 258, 259 (Ky.App.,1984).

In making its decision, the Court of Appeals improperly changed the evaluation performed by a Court when determining if the MVRA applies from examining the character of the vehicle at the time of injury - whether it is being used as a vehicle - to that of the plaintiff. Rawlings, 2010 WL 1006853 86. "Thus, our focus should be to analyze and properly characterize the actions of an insured." Id.

As the facts show, Rawlings was not using his tractor-trailer at the time of his injury. He certainly was not using it as a vehicle at the time. He was not occupying a motor vehicle at the time of his injury as he was standing several feet away from the truck. Nor was he entering or getting out of a motor vehicle, as he was standing stationary to the side neither touching the truck or moving towards it. The truck was parked, with the engine off, and was not acting as a motor vehicle at the time the

bale of aluminum fell.

As the Court of Appeals noted in Cochran, in order for the MVRA to be applicable, the vehicle must be used "as a vehicle." Cochran v. Premier Concrete Pumping, Inc., 2010 WL 1728920 * 3. See also, Clark v. Young, 692 S.W.2d 285, 287 (Ky.App. 1985); U.S. Fidelity & Guaranty Co. v. Western Fire Ins. Co., 450 S.W.2d 491 (Ky.App. 1970).. This conclusion was confirmed by the Supreme Court in Commercial Union Assur. Co. v. Howard, 637 S.W.2d 647 (Ky. 1982), and Goodin v. Overnight Transp. Co., 701 S.W.2d 131 (Ky. 1985).At the time of the accident, Rawlings was not using his truck as a "vehicle." See also, State Farm Mut. Auto. Ins. Co. v. Hudson, 775 S.W.2d 922, 924 (Ky. 1989); KRS 304.39-030. Therefore, the Complaint should have been filed no later than January 26, 2006, and the Court of Appeals decision should be reversed as inconsistent with Hudson, KRS 413.140, and KRS 304.39-230(6).

III. THERE WAS NO "USE" OF A MOTOR VEHICLE

A. Rawlings' Actions Do Not Meet the Statutory Definition of "Use"

The MVRA clearly states that it applies only to injuries involving motor vehicles that "aris[e] from the ownership, maintenance or use of a motor vehicle." State Farm Mut. Auto. Ins. Co. v. Hudson, 775 S.W.2d 922, 924 (Ky. 1989); KRS 304.39-030. The facts of this case are clear that Rawlings was not using his truck as a vehicle at the time of his injury. Goodin, 701 S.W.2d at 133. He was not using the truck as anything. He was not touching the truck, nor was he in any physical contact with the truck or the trailer. According to him, he was standing to the side

winding chains that he had removed, completely, from the trailer in preparation for storing them in the truck itself. (Rawlings at 25-29, R. pp 950). Even if he was "preparing his vehicle to return to the roadway", Rawlings, supra at 16, he was not "using" the tractor-trailer as defined by the MVRA. C.f. State Farm Mut. Auto. Ins. Co. v. Kentucky Farm Bureau Mut. Ins. Co., 671 S.W.2d 258, 259 (Ky.App.,1984).

The Court of Appeals did not find that Rawlings was affirmatively using his tractor-trailer as a motor vehicle, occupying it, or entering/exiting the truck when he was injured. Instead of concluding that Rawlings met a statutory definition of "use", the Court of Appeals expanded "use" beyond the MVRA. To do this, the Court of Appeals held that because Rawlings was no longer involved in "loading or unloading" the truck, he therefore must be "using" it. This is a fallacy unsupported by statute or case law, and is incorrect in the face of the facts. By ruling this way, the Court of Appeals mistook the exception for the rule, and has dramatically expanded the scope of the MVRA.

The facts of this case are indistinguishable from those in State Farm Mut. Inc. Co. v. Hudson, 775 S.W.2d 922 (Ky. 1989), and Cochran. And, as in Hudson, Rawlings was not "using" his vehicle therefore the MVRA did not apply and Rawlings filed his Complaint untimely.

> In Hudson, Hudson was injured when a log rolled off the back of his tractor trailer and struck him. At the time of the injury, he was standing on the ground and unfastening the chain that had secured the log. The Kentucky Supreme Court found that because Hudson was unloading the truck, but not occupying, entering into, or alighting from it, he was not entitled to MVRA benefits. The Court distinguished the fact situation in Hudson from that of Goodin stating that the outcomes were different because in Goodin, the injured party was inside the trailer at the time of the injury, while Hudson was not.

> KRS 304.39-020(6) specifically states that loading or unloading a vehicle while occupying, entering into, or alighting from it is using a motor vehicle as a motor vehicle. The argument can be made that at the time of Cochran's injury, the cement was being unloaded from the truck. However, in the case at hand, like that of Hudson, no one was occupying, entering into, or alighting from the vehicle. Therefore Cochran's activities at the time of the accident do not meet the definition of using a motor vehicle as a motor vehicle, at least as it relates to the loading and unloading of the cement.

Cochran, 2010 WL 1728920, 3.

The holding of the Circuit Court was that Rawlings was not using his vehicle as a vehicle, therefore the MVRA did not apply. KRS § 304.39-230(6). In the alternative, if he was found to be using the truck as a vehicle, the "unloading" exception applied. This still requires a specific finding of "use" of the motor vehicle as a motor vehicle in transportation by Rawlings. No such use exists.

B. The Unloading Exception Applies

Furthermore, as the Circuit Court correctly ruled, and as clear by his own testimony, Rawlings was "unloading" the vehicle at the time of his accident. Thus, he was participating in an action expressly excepted from the MVRA: the unloading of the trailer. State Farm Mutual Auto. Ins. Co. v. Hudson, 775 S.W.2d 922, 924 (Ky. 1989).

> "Use of a motor vehicle" means 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.

KRS § 304.39-020(6) (emphasis added). An exception for "use" exists for conduct involved in "loading or unloading" the vehicle.

This Court has decided, in a factually similar case with an identical method of injury, that Rawlings' activities near his truck do not constitute "use" of a motor vehicle within the definition of the MVRA as set forth above. Hudson, 775 S.W.2d 922. In Hudson, the plaintiff was injured while standing next to his timber trailer, winding chains during the unloading process, when a log rolled off the trailer and hit him. The lower court had held the "unloading" exception did not apply as Hudson was an "effective occupant" of the vehicle. The Supreme Court expressly rejected such an interpretation, holding that under the MVRA, loading and unloading a vehicle or trailer does not constitute "use of a motor vehicle." Id. p. 923 (citing KRS 304.39-020(6)). Under this statutory definition, "Hudson was not 'using' his vehicle when he as injured because he was engaged in an activity integral to unloading the truck. This conduct Is specifically excluded from 'use.' Thus, [Hudson] was not entitled to recover under the MVRA for his injuries." Id. p. 923 (emphasis added).

Hudson is the most recent, and reasoned, interpretation of this issue by the Supreme Court. The Court specifically distinguished the earlier case of Goodin v. Overnight Transport Co, 701 S.W.2d 131 (Ky. 1985), upon which Rawlings relies. Hudson, 775 S.W.2d at 912. In Goodin, the plaintiff was inside the trailer when injured, and thus ruled to be "occupying" his motor vehicle at the time of the injury. Like the Hudson plaintiff, Rawlings' conduct was "outside the clear language of KRS 304.39-020(6)." 775 S.W.2d at 923. As such, his conduct was not a "use" as

contemplated by the MVRA, and the Circuit Court's holding correct and should be reinstated.

At the time of the accident, unloading of the trailer was ongoing. (Depo. Rawlings p. 50-53, R. 950). Rawlings argued unsuccessfully to the Circuit Court, but the Court of Appeals bought the concept, that the release of a strap connection is a black-line demarcation between his behavior as "unloading" the trailer and preparing his truck for travel. (Motion to Vacate, R. p. 882). At his deposition, Rawlings stated: "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...and within a couple of seconds, ten seconds maybe, I heard a crunching sound from aluminum." (Depo. Rawlings at 51; R. p. 950) (emphasis added). However, as Rawlings testified his role in the unloading was not complete as additional straps remained for him to remove to allow the unloading of other bundles. (Depo. Rawlings p. 52-53, R. 950). This is factually identical to State Farm v. Hudson, 775 S.W.2d 922, 923 (Ky. 1989).

C. "Routine Maintenance" or "Preparing for Travel" is Not "Use"

The Court of Appeals erred in determining that "preparing" the truck for future travel was an exception to the unloading exception and therefore "use" under the MVRA. Rawlings, supra *7-8. Rawlings was not working on this truck when he was injured, or preparing it for future travel. He was not in physical contact with the truck. (Depo. Rawlings pp. 52-53, R. pp. 950). He was not doing anything to the

truck. Rather, he was winding straps released from his trailer as part of the unloading process. According to his testimony, he was winding straps several feet away from the vehicle. He was fulfilling a task he has previously described as "housekeeping." (Motion to Vacate, R. 883).

Although the definition of "basic reparations benefits" from KRS 304.39-020(2) speaks of "maintenance," the term is undefined in that subsection. Referring elsewhere in the statute for guidance, as with "use," a definition is found. "Maintaining a motor vehicle" is "having legal custody, possession or responsibility for a motor vehicle by one other than an owner or operator." KRS 304.39-020(16) (emphasis added). In short, "maintenance" is defined as having possession of a vehicle belonging to another, as in a bailment situation. Rawlings was the owner-operator of his tractor-trailer. As such, he was not "maintaining" a vehicle belonging to another as defined by the statute. Furthermore, "maintenance," like "ownership," does not invoke the MVRA unless the vehicle is being utilized as a motor vehicle and the claimed injury arises from that use. KRS 304.39-060.

The Supreme Court addressed this statutory ambiguity in Commercial Union Assur. Companies v. Howard, 637 S.W.2d 647 (Ky. 1982), noting there was "no clear definition to the phrase 'maintenance of a motor vehicle.' The closest definition is found at KRS 304.39-020(16) which defines 'maintaining a motor vehicle,' and clearly does not include repairing or servicing the motor vehicle." 637 S.W.2d at 649 (emphasis added). Implicit in the court's comparisons of subsections (2), (6) and (16) is the determination that the General Assembly did not intend a different definition for "maintenance" in (2) than in (16). The Court went on to hold that the

MVRA did not cover a person injured while performing repairs on his motor vehicle. Id. p. 649.

Unlike the Court of Appeals's comparison, winding a load strap which would, at best be "normal vehicular repair work" and is not akin to a person "attaching a tow chain to his disabled vehicle." Rawlings, 2010 WL 1006853 *6. Rawlings' vehicle clearly wasn't disabled. His actions were not required to transport the vehicle. Rather, Rawlings' actions were clearly identical to the plaintiff's in Clark v. Young, 692 S.W.2d 285, 288 (Ky. App. 1985), where the MVRA was held not to apply to an employee attaching a bungee cord to the trailer.

Regardless, repairs to a motor vehicle, unless "occupying, entering into, or alighting from it" are not a "use" and are not covered by the MVRA. The Commercial Union Court expressly held that the owner of a tractor trailer who was injured while physically touching the tractor to repair it did not meet the requirements of the MVRA and therefore was not covered under its provisions. 637 S.W.2d at 649. This Court in Goodin maintained the holding in Commercial Union. Goodin, relying on Commercial Union, held that "repairing or servicing the motor vehicle was not 'utilization of the motor vehicle as a vehicle.'" Goodin, 701 S.W.2d at 133. If the Court determines that Rawlings' actions were "routine maintenance" or "preparing the vehicle for future travel" (as implied by the Court of Appeals) then Rawlings' actions at the time of his injury are expressly not "use of a motor vehicle" within the statute of the MVRA. The MVRA clearly does not apply to Rawlings claim, and the one-year limitations period of KRS 413.140(1) controls.

D. Rawlings' Actions Were Not "Preparing to Return to the Roadway"

The Court of Appeals construed Fields v. BellSouth Telecommunications, Inc., 91 S.W.3d 571, 572 (Ky.2002), to required a liberal interpretation of whether an accident victim was "using" his or her vehicle "in light of the basic rule of statutory construction that the MVRA is to be liberally interpreted in favor of the accident victim." Rawlings v. Interlock Industries, Inc., 2010 WL 1006853, 3 (Ky.App. 2010). In employing this policy of liberal interpretation, the Court of Appeals characterized Rawlings' actions as having a "dual character" – in other words, as being both part of unloading and part of preparing the truck for travel. Rawlings, 2010 WL 1006853 *7. As discussed above, any actions by Rawlings "preparing the truck for travel" is not use under the MVRA as it does not fall under the statutory definition of "occupying, entering, or exiting" the truck or using the truck as a "motor vehicle" for transportation. KRS 304.39-060; Goodin v. Overnight Trans. Co., 701 S.W.2d 131 (Ky. 1985). Further, Rawlings actions are indistinguishable from those of the plaintiff in Hudson. (Depo. Rawlings at 51, R. p. 950). The Court of Appeals illogically compared "the rolling up of straps [as] more akin to attaching a tow rope to a disabled vehicle" than to rolling straps disconnected from a logging trailer during unloading. Rawlings, 2010 WL 1006853, 8 (citing State Farm Mut. Auto. Ins. Co. v. Ky. Farm Bureau Mut. Ins. Co., 671 S.W.2d 258 (Ky.App. 1984)).

In the first place, the plaintiff in State Farm was attaching a tow line to his vehicle, not standing several feet away with no physical contact winding a strap that was no longer connected to the vehicle. The tow line in State Farm was the only means of propulsion for the disabled car. Here, Rawlings' truck would travel

perfectly well as a motor vehicle if Rawlings had negligently left his straps behind. The characterization of a "motor vehicle" does not change if the artificial "purpose" of the vehicle is lost or changes.

Second, the actions by Rawlings that the Court of Appeals interprets as "use" is, at best, "maintenance" which is not a covered activity. Commercial Union Assur. Companies v. Howard, 637 S.W.2d 647 (Ky. 1982) (MVRA "does not allow no-fault benefits to one privately engaged in normal vehicular repair work"); see section IV-B supra. Thus, the "unloading" exception clearly applies. State Farm Mutual Auto. Ins. Co. v. Hudson, supra, controls and the one-year limitation of KRS 413.140 bars this action. The Court proposes that no reasonable person would suggest that Rawlings leave Ohio Valley without his cargo straps. Rawlings, supra *8. Thus the Court implies that winding of these straps and their storage (installation) on the truck are indispensable to the operation of the truck as a "motor vehicle." Id. Such an interpretation is no different than the plaintiff in Howard working on the suspension system of his coal truck. Unlike Rawlings' truck which can obviously travel on the highways as a motor vehicle without cargo straps, the Howard coal truck could not operate without a working suspension system. However, this Court clearly held that routine maintenance, however necessary, is not covered by the MVRA.

E. Rawlings' Claimed Injuries Were Not Caused by a Motor Vehicle Accident

Kentucky Flatbed also joins with Interlock in arguing to the Court that there was no causal relationship between Rawlings' injuries and a motor vehicle. (Br. at 16-19).

As the facts show, Rawlings was not using his tractor-trailer at the time of his injury. United States Fidelity & Guaranty Co. v. Western Fire Insurance Co., 450 S.W.2d 491 (Ky. App. 1970), requires that for the MVRA to apply, the accident must have arisen from the inherent nature of the motor vehicle, as a motor vehicle. As there was no "motor vehicle" involved in this accident and alleged injury, there is no injury "caused" by a motor vehicle. As Western Fire holds, such a causal relationship is a requirement for MVRA application. Id. at 493. If there is no causal relationship between the accident or injury and the use of a motor vehicle as a motor vehicle, and not as any other purpose, then the one-year limitations of KRS 413.140 applies.

Rawlings' own testimony clearly establishes that he was not using his tractor-trailer as a motor vehicle at the time of his injury. Therefore, the MVRA does not apply and his suit is barred by the statue of limitations.

V. INTERLOCK'S EXPERT WITNESS DISCLOSURE WAS UNTIMELY

Kentucky Flatbed did not join with Interlock on discretionary review on the issue of Interlock's untimely disclosure of an expert witness. The trial court has "broad power to control the use of the discovery process and to prevent its abuse." Hoffman v. Dow Chemical Co., 413 S.W.2d 332, 333 (Ky. 1967). This includes the setting of pretrial disclosure deadlines and the exclusion or inclusion of expert witnesses for a variety of reasons, including KRE 702 and pretrial scheduling orders. Ultimately, until exclusion at trial, any order pertaining to an expert witness is interlocutory. As such, the Shelby Circuit Court is the appropriate venue for raising this issue prior to any trial.

In the event the Court reviews this issue, the standard of review of a trial court's ruling as to admitting or excluding evidence is limited to determining whether the trial court abused its discretion. Goodyear Tire and Rubber Co. v. Thompson, 11 S.W.3d 575, 577 (Ky. 2000).

> The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.

Id., at 581, citing Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999). Interlock does not point out where, or argue how, the ruling of the Shelby Circuit Court was arbitrary, unreasonable, unsupported by legal principles, or otherwise an abuse of the Circuit Court's discretion. As such, the decision of the Shelby Circuit Court on this issue should be affirmed.

CONCLUSION

The Circuit Court's ruling on July 7, 2008, was correct. Rawlings was not "using" his motor vehicle within the meaning of the MVRA at the time of this accident. The decision of the Court of Appeal's reviewed here expands the application of the MVRA beyond the terms of the statute and is contrary to the published opinions of this Court in State Farm Mut. Ins. Co. v. Hudson, and other panel opinions of the Court of Appeals. See Cochran v. Premier Concrete Plumbing, 2010 WL 1728920 (April 20, 2010). Therefore, Appellee, Kentucky Flatbed, supports the position of Appellant Interlock insofar as it requests that the March 19, 2010 decision of the Court of Appeals on the issue of the application of the MVRA be reversed and the decision of the Shelby Circuit Court reinstated.

BY: _____

JOHN G. MCNEILL
ELIZABETH A. DEENER