COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2010-SC-00368

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SUPREME COURT

KENTUCKY FLATBED COMPANY, LLC APPELLANT

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

BRIEF OF APPELLANT, KENTUCKY FLATBED COMPANY, LLC
NO. 2010-SC-00368

* * * * *

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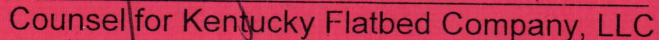
By: 
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CERTIFICATE REQUIRED BY CR 76.12(6)

The undersigned does hereby certify that a copies of this brief was served by mail this 4th day of February, 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 The undersigned does also certify that the record on appeal was not withdrawn by this party.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:
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INTRODUCTION

This is a case where Appellee was injured by a falling aluminum bale and sued in negligence more than one year after the date of his injury; as Appellee was not using a motor vehicle at the time of his injury the one-year statute of limitation applies. Appellant was granted summary judgment by the trial court, Appellee appealed the entire order, and Appellant's alternative grounds for summary judgment should also be reviewed on appeal.

STATEMENT CONCERNING ORAL ARGUMENT

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

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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 Appellant, 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 Rosenman's Inc. [Rosenman's], in Ottumwa, Iowa, to pick up bundles of aluminum.

On or about January 26, 2005, Appellee 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 Appellee's 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 Appellee 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 Ohio Valley Aluminum Company ["Ohio Valley"], 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 from the rack, 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 from the stand. The process went without incident until the fifth or sixth bundle was reached for unloading.

While on the ground on the passenger's side of the stand, 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.

The facts clearly establish that at no time did Appellant Kentucky Flatbed direct, instruct, or otherwise encourage Appellee Rawlings to travel with a load he considered unsafe. Rather, upon learning of Rawlings' concern, Appellant Kentucky Flatbed told him it was his decision to travel only if he felt it was safe. The result was, Rawlings arrived at his destination safely. Not only did he arrive without injury, the bundle at issue in this litigation is not the bundle for which Rawlings expressed concern. Thus, no action or inaction of Appellant Kentucky Flatbed resulted in injury to Appellant.

Further, the facts show that at the time of the accident, there was no "use of a motor vehicle." The trailer was parked and stationary. 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). This Appellant, 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). Appellant Kentucky Flatbed answered on October 10, 2007. (Answer, R. 164-68). Written discovery and depositions were completed.

On June 23, 2008, Appellant 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). Other Defendants and Third-Party Defendants 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 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).

As a review of summary judgment is both de novo and complete under Kentucky civil practice, Appellant Kentucky Flatbed briefed all issues raised in its Motion for Summary Judgement before the Shelby Circuit Court – both the issue of limitations reached by the Shelby Circuit and the issue of negligence. 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) (citing Paintsville Hospital Co. v. Rose, 683 S.W.2d 255 (Ky. 1985)); Scifres, 916 S.W.2d at 781.

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

Rawlings' injury did not arise from "use" of his truck as required by the plain language of KRS 304.39-060. 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. Inc. 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. In truth, the truck was, for all intents and purposes, a

stationary rack stand. As there was no "motor vehicle" involved in this accident and alleged injury, there is no extension beyond the one-year limitations period. KRS 304.39-230; KRS 413.140(1).

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. THE TRIAL COURT DID NOT ERR IN HOLDING THE MOTOR VEHICLE REPARATIONS ACT DOES NOT APPLY

The MVRA, KRS 304.39 et seq., does not apply in this case. The MVRA clearly defines what "motor vehicle accidents" are covered and not covered within its provisions. The MVRA provides that, "If the accident causing injury occurs in this Commonwealth every person suffering loss from injury arising out of maintenance or use of a motor vehicle has a right to basic reparations benefits." State Farm Mutual Automobile Ins. Company v. Hudson, 775 S.W.2d 922, 924 (Ky. 1989); KRS

304.39-030.

The interlocking sections of the MVRA provide as follows: KRS 304.39-230 establishes a two-year limitations period for tort liability not abolished by KRS 304.39-060 and for which basic or added reparation payments are required. Tort liability with respect to accidents "arising from the ownership, maintenance, or use of a motor vehicle is 'abolished' ... to the extent the basic reparation benefits provided in this subtitle are payable." KRS 304.39-060(2)(a) (emphasis added). The individual terms of each section are defined solely in KRS 304.39-020.

This court has consistently held that for basic reparation benefits to apply, the claimant must be utilizing the motor vehicle as a vehicle, or "using" the vehicle within the terms of KRS 304.39-020(6). The two-year limitations period only comes into effect if basic reparations benefits are required under the statute.

Under the plain language of the statute, and argued below, none of the conditions precedent for MVRA coverage are applicable. As the injury did not arise out of Rawlings' utilization of the tractor trailer as a vehicle, the MVRA does not apply and the one-year limitations period applies. Goodin v. Overnight Trans. Co., 701 S.W.2d 131, 133 (Ky. 1985); KRS 413.140. The Supreme Court held in Goodin that the words of a statute are given their literal meaning unless absurdity would result, and when the statute specifically states that only certain activities are included then only those activities invoke the coverage of the MVRA. At no point in the statute does the MVRA state that it applies to any circumstance other than "use of a motor vehicle." Rawlings agreed in his Motion to Vacate that coverage under the MVRA is defined under KRS 304.39-020(2). (R. 880-93). As Rawlings

repeatedly argued, Bailey v. Reeves, 662 S.W.2d 832 (Ky. 1984), held that, where the MVRA applied, the limitations period was extended to two years. Thus, Rawlings has conceded that if the accident was not covered under the terms of the MVRA, the limitations period is one-year.

IV. 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).

Rawlings' injury did not arise from "use" of his truck as required by the plain language of KRS 304.39-060. He was not touching the tractor-trailer. He was not entering or leaving the tractor-trailer. He was not even approaching it to enter. He was not driving the tractor trailer. He was not standing on the bed of the trailer. By his own testimony, he was standing some feet away, winding straps. See Rawlings. P. 4. 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.

As the facts of this case above show, it is indistinguishable from any other "falling object" tort injury case. More importantly, 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 "stand" from which the aluminum bales were being unloaded could be changed in the factual description from "trailer" to "rack" or "platform" or "loading dock" with no change in effect on the applicable law. This is because no "motor vehicle" was being used by Plaintiff at the time of his injury. There would be no question that the MVRA did not apply if Plaintiff had been standing winding straps next to a stationary stand holding bales of aluminum which were being unloaded when one fell on him. Such a scenario is no different than what happened. Plaintiff was not using his truck as a motor vehicle because the truck and trailer were effectively a stationary stand holding bales that he just happened to be standing next to.

The argument made to 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. Mere "Ownership" is Insufficient

Rawlings argued below that merely owning a motor vehicle is sufficient to

bring any injury under the MVRA. However, the plain language of KRS 304.39-230 that limits the application of the MVRA and its limitations period to incidents where basic reparations benefits are required, not where an insurance company has paid unnecessary benefits.

The MVRA sets forth the definitions for basic reparations benefits. The language of the statute is:

> (2) "Basic reparation benefits" mean benefits providing reimbursement for net loss suffered through injury arising out of the operation, maintenance, or use of a motor vehicle, subject, where applicable, to the limits, deductibles, exclusions, disqualifications, and other conditions provided in this subtitle. The maximum amount of basic reparation benefits payable for all economic loss resulting from injury to any one (1) person as the result of one (1) accident shall be ten thousand dollars ($10,000), regardless of the number of persons entitled to such benefits or the number of providers of security obligated to pay such benefits. Basic reparation benefits consist of one (1) or more of the elements defined as "loss."

KRS 304.39-020(2) (emphasis added). The statute makes no reference to ownership as a prerequisite to basic reparations recovery.

Under the terms of KRS 304.39-020, basic reparations benefits are only payable when the injury occurred from "use of a motor vehicle;" in other words: "any utilization of the motor vehicle as a vehicle including occupying, entering into, and alighting from it." KRS 304.39-020(6). "Owning" a motor vehicle has never been deemed a sufficient basis, in its own right, to require payment of basis reparation benefits absent use or operation of the vehicle. The Hudson court expressly referred to Bailey in reaching its conclusion that a factually identical case was not covered by the MVRA and the two-year limitations period.

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[1] 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. 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.

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1 The "circumstances" described in Goodin included the operator was inside the trailer, and thus occupying it while unloading. 701 S.W.2d at 133. In this situation, Rawlings was neither occupying nor touching his tractor-trailer.

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 Appellant's 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 Appellant 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 to the Circuit Court, and the Court of Appeals agreed, that the release of a strap connection is a black-line demarcation between his behavior as "unloading" the trailer and repairing 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).

E. 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. A taxi is no less of a motor vehicle when being driven by a single person than when carrying paying fare passengers. Nor would Rawlings' truck, when being driven on the highway, be something other than a motor vehicle if Rawlings lacked the straps to fasten a new load. Contra Rawlings, supra *8.

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.

F. Insurance Payments do Not Waive the Applicable Statute of Limitations

In an attempt to force the MVRA to fit where, by its own terms, it does not, Rawlings has argued that anytime a PIP [basic reparations] payment is made, the MVRA automatically applies even if the statutes terms are not met. This is a misreading of the holding of Wilder v. Noonchester, 113 S.W.3d 189, 190 (Ky.App.,2003), which stated, "KRS 304.39-230 extends the limitations period from the one-year statute of limitations for personal injury actions 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[.]'" (citing Bailey v. Reeves, 662 S.W.2d 832, 833 (Ky., 1984)) (internal quotes

omitted, emphasis added). Wilder does not state, "payment of PIP, whether applicable or not, extends the statute of limitations." Rather, it holds that the one-year limitations period is extended only when the MVRA applies because the injuries are causally related to the use of a motor vehicle as a vehicle. Id. For the MVRA to apply, the accident must have arisen from the inherent nature and use of the automobile. Western Fire Ins. Co., 450 S.W.2d 491. The injury claimed must be "a natural and reasonable" consequence of the "use of the vehicle" – i.e., causally connected to the vehicle's use as a vehicle. Fields v. BellSouth Telecommunications, Inc., 91 S.W.3d 571, 573 (Ky.2002). Rawlings' injuries were not causally, or rationally, connected to the use of the truck as a motor vehicle, therefore the MVRA two-year limitations period does not apply..

V. ALL ISSUES RAISED TO THE SHELBY CIRCUIT COURT ON SUMMARY JUDGMENT WERE APPEALED BY RAWLINGS

The Circuit Court was presented with several alternative grounds for granting summary judgment. (Motion and Memorandum, R.568-82). Besides the arguments raised under the MVRA regarding limitations that Rawlings was not using his vehicle at the time of his injury, Kentucky Flatbed argued lack of negligence on its part as there was no factual or causal connection between any action or inaction by Kentucky Flatbed and Rawlings' injury. The Shelby Circuit Court, having determined to grant summary judgment under limitations as the MVRA did not apply, the first of the grounds for summary judgment, did not rule on the negligence issue. However, this did not "decouple" the summary judgment issues on appeal.

On appeal, a summary judgment is reviewed to determine whether the circuit

judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law. Summary judgment is appropriate where the movant shows that the adverse party could not prevail under any circumstances. Pearson ex rel. Trent v. Nat'l Feeding Sys., Inc., 90 S.W.3d 46, 49 (Ky.2002). A summary judgment is proper when a movant demonstrates that the opposing party cannot prevail under any circumstance. Id. The function of summary judgment, thus, being to terminate litigation when it would be impossible for a responding party to produce evidence at trial warranting judgment in his favor. Id.

Summary judgment orders are reviewed, in their entirety, by the Court of Appeals de novo. Lewis v. B & R Corporation, 56 S.W.3d 432, 436 (Ky.App. 2001). This includes all the issues properly raised in the summary judgment, including those that the trial court declined to determine. Richmond v. Louisville and Jefferson County Metropolitan Sewer Dist., 572 S.W.2d 601, 602 (Ky. App. 1978). See, e.g., Garretson v. City of Madison Heights, 407 F.3d 789, 798 (6th Cir. 2005). There is absolutely no requirement that the Court of Appeals defer to the Circuit Court when analyzing a summary judgment motion. Murphy v. Second Street Corp., 48 S.W.3d 571 (Ky.App.2001).

The summary judgment in favor of Appellants (including Kentucky Flatbed) was appealed by Rawlings. As the entirety of the motions for summary judgment are all raised for review upon the appeal of a dismissal for summary judgment, regardless of the appealing party, no cross-appeal is required by CR 73.02. *See* Richmond, supra (all issues properly raised on summary judgment are to be considered, even those not considered in the dismissal). As Appellant Rawlings

appealed the summary judgment against him, he appealed all the issues raised in the summary judgment motions, including Kentucky Flatbed's issues of lack of negligence, a court of appeals must review all alternative grounds raised during the summary judgment hearings below. Richmond, 572 S.W.2d at 602.

As this Court has previously, and consistently held, when an a party seeking summary judgment under CR 56 has asserted multiple reasons to the circuit court to support a grant of summary judgment, the reviewing court must "consider all the grounds raised, and ... affirm the judgment if it should properly have been entered on any of the grounds raised." Richmond, 572 S.W.2d at 602 (emphasis added). "[I]t is well settled that a correct decision will not be disturbed merely because it was based upon incorrect grounds." Id. at 603; followed by Neurodiagnostics, Inc. v. Kentucky Farm Bureau Mut. Ins. Co., 250 S.W.3d 321, 329 (Ky. 2008); Community Trust Bancorp, Inc. v. Mussetter, 242 S.W.3d 690, 694 (Ky.App.,2007) ("While we reach the same conclusion as the trial court, we do so on grounds separate from those expressed in its order.").

Appellant Kentucky Flatbed notes that in Richmond, Neurodiagnostics, and Mussetter, the order of summary judgment was appealed only by the dismissed party. In each case, the appellate court considered every issue raised through summary judgment, as it was required to do. These courts each affirmed their respective dismissals, but on other grounds than those cited by the circuit courts in their respective summary judgment orders: "This court is of the opinion that a summary judgment in favor of two of the defendants was proper on grounds other than the plaintiff's contributory negligence." Richmond, 572 S.W.2d at 603. Thus,

the issues of negligence raised by Petitioner Kentucky Flatbed were properly before the Court for consideration.

VI. NO NEGLIGENCE ON THE PART OF KENTUCKY FLATBED

Kentucky Flatbed moved for summary judgment on several issues, including lack of negligence. (Mtn. Summary Judgment pp. 1-11, R. pp. 568-82). The issue of negligence was not addressed by the Circuit Court. However, as review of the summary judgment is *de novo*, this issue may be addressed more closely here. See Lewis v. B & R Corporation, 56 S.W.3d 432, 436 (Ky.App. 2001).

The Third-Party Plaintiff, Ohio Valley, alleged that this Appellant, Kentucky Flatbed "negligently authorized the Plaintiff" to proceed with the load for delivery. (Third Party Comp., R. pp. 129-46). In its interrogatory answers the Third-Party Plaintiff expanded on its theory, stating "Kentucky Flatbed, LLC, either by action or by inaction, permitted the Plaintiff Charles Rawlings to proceed from Ottumwa, Iowa to Shelbyville, Kentucky, with an unsafe load." (Interrogatory Answer No 4).

To establish that Kentucky Flatbed was negligent, either Rawlings or Ohio Valley must prove that Kentucky Flatbed (1) owed Rawlings a duty of care, (2) that the Kentucky Flatbed breached that duty, and (3) Rawlings was injured as a consequence of that breach. Mullins v. Commonwealth Life Ins. Co., 839 S.W.2d 245, 247 (Ky. 1992) (citing Illinois Central R.R. v. Vincent, 412 S.W.2d 874, 876 (Ky. 1967)). "The absence of any one of the three elements is fatal to the claim." Howard v. Fowler, 207 S.W.2d 559, 561 (Ky. 1948) (emphasis added).

A. No Duty or Breach on the Part of Kentucky Flatbed

Appellant Kentucky Flatbed did not owe Rawlings a duty associated with his injury or this incident. Specifically, there was no duty on the part of Kentucky Flatbed to guarantee the loading of the trailer by Rosenman's employees. Kentucky Flatbed was not a guarantor of Rawlings' actions when Rawlings exercised his own discretion regarding his load. Nor was it under a duty to prevent Ohio Valley's negligence during unloading.

Rawlings was an independent contractor. As such he had sole dominion and control over the trailer. (Depo. Helton pp. 16, 21-24, R. pp. 950-51). *Clark v. Young*, 692 S.W.2d 285, 289 (Ky.App. 1985) (negligence of independent contractor not imputable to principal). Rawlings was not mandated to travel with a load if he felt it was unsafe. When he expressed concern about the aluminum bundle to Rosenman's employees, he was under no requirement by this Appellee to leave without a secure or safe load. As Rawlings stated after this incident in a recorded statement and then testified later at his deposition, he was **not** instructed to travel with any load he felt was unsafe. (Rawlings depo. p. 34, R. p. 850). Prior to leaving Rosenman's, Rawlings told Helton that he "felt comfortable" driving with the load, and that he chose to continue at that time. That was Rawlings's conscious decision. This was further confirmed by Mr. Helton's testimony.

To the extent Kentucky Flatbed had a duty to instruct and/or control its driver, it fulfilled that duty. Kentucky Flatbed instructed Rawlings to collect a load in Ottumwa and to deliver it to Shelbyville. Rawlings was instructed to maintain and

operate his equipment safely and according to applicable laws. Appellee Kentucky Flatbed provided its drivers with a list of "Driver Responsibilities." Included in this list was: "Drivers are responsible for the securement and the weight of all loads. All loads must be legal weight. Drivers will make final determination of safety of load." (Mtn. for Summary Judgment p. 8, R. p. 578). This duty properly rests on Rawlings, the driver, and not on this Appellee.

At the time of loading at Rosenman's, Kentucky Flatbed was nearly 1200 miles away and was unable to assess the load in question. Rawlings was present and determined that he was comfortable, confident, and able to transport the load safely. Thus, the duty for the safety of the load rested with Rawlings, and not with the Appellant, Kentucky Flatbed. As there was no duty and no breach by Kentucky Flatbed, Kentucky Flatbed was entitled to summary judgment on the basis of negligence.

B. The Bundle Complained of Did Not Result in Rawlings' Injury

Assuming, arguendo, that Kentucky Flatbed did "know" that a bundle on the load from Rosenman's was unsafe and that it instructed or otherwise directed Rawlings to travel with an unsafe load, this action did not cause Rawlings's. In his deposition, Rawlings identified the load he felt was unbalanced when loaded by Rosneman's in Ottumwa. This "problem" bundle was the top bundle on the "back half of the trailer on the passenger's side." (Rawlings depo. p. 32, R. 850). He expressed no concerns about any other bundle. He did not tell anyone at Rosenman's that any other bundle was leaning. He did not tell Kentucky Flatbed that any other bundle was leaning. Over the next two days of travel, he inspected

the load at stops, and although he testified he felt that the one "problem" bundle had shifted, he expressed no concern about any other load. (Rawlings depo. pp. 32-40, R. 850).

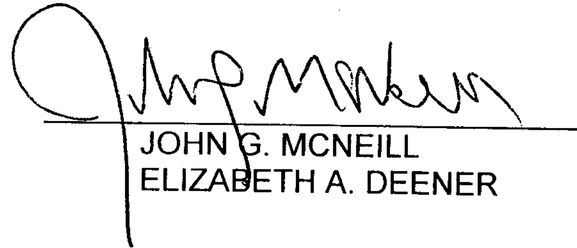
Rawlings testified that the "problem" bundle was safely unloaded in Shelbyville. Id. p. 42. In fact, it was the first bundle unloaded. Id. Rawlings stated that there were no problems unloading this bundle. He was not injured until after several bundles had been unloaded from the truck. He was injured when a bundle on the front passenger side of the trailer fell on him during the unloading by the Ohio Valley Aluminum forklift operator.

As no injury resulted from any action by Appellant Kentucky Flatbed, no cause of action for negligence exists. Therefore, Kentucky Flatbed was entitled to summary judgment, the Third-Party Complaint against it should be dismissed, and Kentucky Flatbed is entitled to summary judgment.

CONCLUSION

The Circuit Court's ruling on July 7, 2008, was correct. Appellant 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, Appellant, Kentucky Flatbed, requests that the March 19, 2010 decision of the Court of Appeals be reversed and the decision of the Shelby Circuit Court reinstated.

Furthermore, the facts establish that Appellant Kentucky Flatbed breached no duty owed to Rawlings, and that no injury resulted from any action by this Appellant. Therefore Kentucky Flatbed was entitled to summary judgment on the basis of liability. This issue was preserved for appeal as Appellee Rawlings appealed the grant of summary judgment against him. The issues presented on summary judgment included the negligence arguments and the Court of Appeals was obliged to review all issues properly presented to the Shelby Circuit Court under CR 56 on appeal. Therefore, Appellant, Kentucky Flatbed, requests that the Court direct a grant of summary judgment in its favor on the issue of liability under negligence.

BY: 

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