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

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

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

* * * * *

Submitted 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 11th day of April, 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 The undersigned does also certify that the record on appeal was not withdrawn by this party.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 OF POINTS AND AUTHORITIES

APPENDIX

ARGUMENT

I. AS PREVAILING PARTY, KENTUCKY FLATBED WAS NOT REQUIRED TO FILE A CROSS-APPEAL

> If the summary judgment is sustainable on any basis, it must be affirmed. Appellee's [Rawlings'] failure to raise the issue in the Court of Appeals does not prevent Appellant [Kentucky Flatbed] from presenting it here as he had no duty to present it to the Court of Appeals since he defended the trial court decision and it had to be affirmed if it was sustainable on any basis.

Fischer v. Fischer ["Fischer I"], 197 S.W.3d 98, 103 (Ky. 2006) (emphasis added).

> It is the duty of the reviewing court to consider all the grounds raised, and to affirm the judgment if it should properly have been entered on any of the grounds raised.

Richmond v. Louisville & Jefferson Cty Metro. Sewer Dist., 572 S.W.2d 601, 602 (Ky.App.,1978) (emphasis added). Also Brewick v. Brewick, 121 S.W.3d 524 (Ky. App. 2003) (same); Wood v. Corman, 211 S.W.2d 424 (Ky. 1948) (same).

Kentucky Flatbed raised two issues in its motion for summary judgment: 1) the issue of limitation of action which was decided by the Shelby Circuit Court, and 2) lack of negligence on its part. (Motion and Memorandum, R. 568-82) Summary judgments involve no fact-finding, and the trial court's decision is reviewed de novo. 3D Enters. Contr. Corp. v. Jefferson Cty Metro. Sewer Dist., 174 S.W.3d 440, 445 (Ky.2005); Blevins v. Moran, 12 S.W.3d 698, 700 (Ky.App.2000). Contrary to Rawlings' contention, the judgment is reviewed on appeal, not specific issues. (Br. at 48). The parties had an opportunity to, and did, argue in opposition to all issues raised. (R. 727-92). If the judgment is correct, even on different grounds not decided below, the judgment must be affirmed and a cross-appeal is unnecessary.

Since the institution of this appeal and discretionary review, this Court has

rendered a decision in Fischer v. Fischer, – SW3d –, 2011 WL 1087156, 2009-SC-245-DG (Ky. March 24, 2011) [Referred to as "Fischer II"]. While this opinion is not yet final, Kentucky Flatbed refers to this Court's opinion under CR 76.28(c) as the most current statement of the law on this exact issue. Per the rule, a copy is attached.

In Fischer II, this Court extensively discussed the civil procedure followed on appeal. In doing so, this Court overruled Com. Trans. Cabinet Dept. of Highways v. Taub, 766 S.W.2d 49, 51 (Ky. 1988), to the extent it requires a prevailing party, such as Kentucky Flatbed before the Circuit Court, to seek an appeal from a judgment in its favor. Fischer II, at *14. As the Court noted:

> By requiring a winning party to seek a cross-appeal, Taub undermines the "general rule" that "a party may not appeal from a judgment in his own favor." Miller v. Miller, 335 S.W.2d 884, 886 (Ky.1960); see Brown v. Barkley, 628 S.W.2d 616, 618 (Ky.1982) ("A party must be aggrieved by a judgment in order to appeal from it."). The reason for this general rule is "that appeals are taken from judgments, not from unfavorable rulings as such." Brown, 628 S.W.2d at 618. And for this reason, "[a] cross-appeal is appropriate only when the judgment fails to give the cross-appellant all the relief he has demanded or subjects him to some degree of relief he seeks to avoid." Id. Brown went on to delineate when a cross-appeal is and is not required, again focusing on the difference between an adverse ruling and an adverse, even in part, judgment:
>
> > Some of our past opinions suggesting the necessity of a cross-appeal in order for an appellee to bring an adverse ruling of the trial court under review by an appellate court appear to have fostered confusion by failing to distinguish between those instances in which the judgment gives the appellee the ultimate relief for which he has contended and those in which the judgment gives him something less. In the latter case he cannot challenge the shortcomings of the judgment without a cross-appeal. He can, however, by way of bolstering the judgment against the possibility that the

> appellate court may accept the appellant's claim of error, make the point that he was nevertheless entitled to the judgment on a theory that was properly presented but erroneously rejected by the trial court. To cite a familiar example, if in a damage suit the judgment reflects a jury verdict in favor of the defendant, there is no reason why he cannot argue to the appellate court that certain errors raised on appeal by the losing plaintiff are immaterial because the defendant had moved for and was entitled to a directed verdict anyway. In short, "cross-appeals can be maintained only when the effect of the trial judgment is to place some obligation on appellee" (or, of course, to deny him something for which he has asked).
>
> Brown, 628 S.W.2d at 618–19 (quoting Clark v. Wells–Elkhom Coal Co., 215 Ky. 128, 284 S.W. 91, 93 (1926)) (footnote omitted, emphasis added).
>
> Brown comports with the treatment of cross-appeals at the federal level. There, "[a]bsent a cross-appeal, an appellee may 'urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court/but may not 'attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary.' " El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473, 479, 119 S.Ct. 1430, 143 L.Ed.2d 635 (1999) (quoting United States v. American Railway Express Co., 265 U.S. 425, 435, 44 S.Ct. 560, 68 L.Ed. 1087 (1924)). The same rule also applies to cross-petitions for certiorari, id. at 479 n. 3, which are the federal analog of our cross-motions for discretionary review. There is no reason for this Court to deviate from this long-standing and well-reasoned rule.

Fischer II, – S.W.3d –, 2011 WL 1087156, *11 (emphasis as in opinion).

Kentucky Flatbed's alternative grounds for summary judgment were properly raised to the Shelby Circuit Court. The Court of Appeals attempted to distinguish Fischer I, 197 S.W.3d 98, on the grounds that because the Shelby Circuit Court stated a decisional basis, the Appeals Court was not obliged to consider all issued raised to the Circuit Court. Rawlings v. Interlock Industries, Inc., 2010 WL 1006853

*10 (Ky. App. 2010). However, to the contrary, Fischer II notes a prevailing party, such as Kentucky Flatbed, need not file a cross appeal in order to assert that the lower court reached the right result for the wrong reason where the alternative issue was not decided below. 2011 WL 1087156 *8 (citing Hale v. Combs, 30 S.W.3d 146, 150 (Ky. 2000)).

The Court concluded,

> A party may seek a review of an adverse judgment, not one in his favor. However, if an appeal is taken or a motion for discretionary review is filed against a party who prevailed in the judgment, the appellee must raise any other grounds argued to the lower court upon which he also wishes to rely in his responsive brief, if not addressed in the judgment. This is necessary to provide the reviewing court with reasonable, timely notice of these other grounds, should the court reverse on the ground or grounds relied on by the lower court.

Fischer II, 2009-SC-000245-DG, 2011 WL 1087156 *14 (emphasis added). Kentucky Flatbed was the prevailing party at the Circuit Court and may not take an appeal from that decision. However, once Rawlings did so, Kentucky Flatbed promptly raised in the pre-hearing statement and in its brief, the alternative issue argued on summary judgment. It is entitled to have these issues reviewed on appeal as alternative grounds to affirm the Shelby Circuit Court.

II. THE PUBLIC POLICY OF NO-FAULT INSURANCE DOES NOT ACT AS A WAIVER OF LIMITATIONS

Appellee Rawlings argues that because a no-fault carrier, not a party to this action, did not seek to challenge their payment under the statute, that the Appellants have somehow waived their other statutory and common law rights. (Br. at 10). Respectfully, such third-party waiver cannot be the case.

The stated purpose of the MVRA is the "liberal and prompt payment of

benefits" following motor vehicle accidents. In passing the MVRA, the General Assembly stated:

> The toll of about 20,000,000 motor vehicle accidents nationally and comparable experience in Kentucky upon the interests of victims, the public, policyholders and others require that improvements in the reparations provided for herein be adopted to effect the following purposes:
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> * * *
>
> (2) To provide prompt payment to victims of motor vehicle accidents without regard to whose negligence caused the accident in order to eliminate the inequities which fault-determination has created;
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> * * *
>
> (5) **To reduce the need to resort to bargaining and litigation through a system which can pay victims of motor vehicle accidents without the delay, expense, aggravation, inconvenience, inequities and uncertainties of the liability system**;
>
> * * *

KRS § 304.39-010 (emphasis added). To achieve its goals, the MVRA places an obligation on insurers to pay basic reparations benefits (also known as "PIP"). Specifically, "Basic reparations benefits shall be paid without regard to fault," KRS 304.39-040(1), and essentially without challenge to the claim for benefits.

> The Kentucky MVRA preempts general insurance law where an insurance claim arises as a result of physical injury caused by a motor vehicle accident and establishes remedies for violations of the statute. . . MVRA is a comprehensive act which not only relates to certain tort remedies, but also establishes the terms under which insurers pay no-fault benefits, and provides for the penalties to which insurers are subjected if they fail to properly pay no-fault benefits.

Foster v. Ky. Farm Bureau Mutual Ins. Co, 189 S.W.3d 553, 557 (Ky. 2006).

The statute and the public policy behind it require an insurer to pay a basic reparations benefits claim before any analysis as to the cause of injury is or can be

made. The statute discourages any delay in paying a benefits claim – court permission is required to examine the claimant to relate the injury to the accident. KRS 304.39-270. Any delay also risks exposing the insurer to punitive fee and interest payments. KRS 304.39-220. Thus it is in the best interests of the insurer to promptly pay the basic reparations amount without challenge.

Kentucky Flatbed is not an insurance company. Regardless of this public policy desire for medical bills to be paid "without regard to fault," there is no provision that non-insurance carriers waive their other rights because a non-party paid benefits. The corollary of this, as noted by the Shelby Circuit Court, is that Rawlings' argument of "payment by accident = application of MVRA" is that "if Rawlings had been refused payment of reparations benefits by his insurer, Rawlings would be prohibited from bringing suit pursuant to the MVRA" as it does not apply to his situation. (Order, R. p. 802).

The MVRA does not apply to Rawlings' claim and Rawlings misses the distinction between his claims and his cited cases – his injuries did not arise from the use of a motor vehicle as a motor vehicle. State Farm Mut. Auto. Ins. Co. v. Kentucky Farm Bureau Mut. Ins. Co., 671 S.W.2d 258, 259 (Ky.App.,1984); Cochran v. Premier Concrete Plumbing, Inc., 2010 WL 1728920, *3 (Ky. App. April 20, 2010). Bailey v. Reeves, 662 S.W.2d 832 (Ky. 1984), does not control here and is easily distinguishable as, in Bailey, the plaintiff was actually operating and using a motor vehicle "as a motor vehicle" at the time of his injury. Rawlings was not, and cannot argue otherwise. Rawlings was not entitled to basic reparations benefits under the statue; that they were paid does not bring his claims under the protection

of a statute that does not apply. Therefore, as the Shelby Circuit Court correctly ruled, no provision of the MVRA, and certainly not the extended limitations period, controls in this matter. Further, any arguments on hypothetical "waiver" are irrelevant as it is undisputed that at the time of his accident, Rawlings was not using his vehicle as defined by the statute.

III. THIS IS NOT A MOTOR VEHICLE ACCIDENT AS DEFINED BY STATUTE

Contrary to Rawlings' arguments, Troxell v. Trammell, 730 S.W.2d 525 (Ky, 1987), served to apply the MVRA to motorcycles, not to effect a blanket extension of limitations because an engine is involved. See Wintersheimer, dissenting. KRS 304.39-230 sets forth the limited circumstances when the default limitations period of KRS 413.140(1)(a) is extended to two years. The plain language of KRS 304.39-020 excludes Rawlings' claims. Primarily because, unlike the motorcyclist in Troxell v. Trammell, 730 S.W.2d 525 (Ky, 1987), Rawlings was neither using his truck as a motor vehicle nor was he involved in an accident on a highway. This fact further distinguishes the error of Court of Appeals' decision in this case. Rather, Rawlings' injuries are more akin to those in O'Keefe v. North American Refractories, 78 S.W.3d 760 (Ky.App. 2002). In O'Keefe, although the forklift that caused the injury, like the forklift and tractor-trailer here, was "capable" of operating on public highways, it was not on a highway at the time of the accident and the one-year limitations period for personal injury actions applied rather than by MVRA's two-year limitations period. It is undisputed that Rawlings' truck was parked, in a loading parking area and not operating on a highway, and that Rawlings was not occupying or using said truck in any manner as a vehicle.

Additionally, the facts of this case are as similar to Clark v. Young, 692 S.W.2d 285 (Ky.App. 1985), as they are distinguished from Troxell. In Clark, plaintiff sued the motor carrier, driver, and lessor of truck and flatbed trailer for injuries he received when struck in eye with bungee strap while securing pipes on flatbed trailer. The Clark Court held "We do not believe Young's injury resulted from the operation, maintenance or use of a motor vehicle as contemplated by the Kentucky no-fault statute. KRS 304.39." Id. at 287. Further, as with Rawlings,

> it was purely fortuitous that the injury occurred while Young was standing on the trailer. We do not believe that simply because Young was standing on the trailer this amounted to occupying, entering into or alighting from the motor vehicle within contemplation of the statute. Cf. Commercial Union Assurance Companies v. Howard, Ky., 637 S.W.2d 647 (1982). The trial court erred in applying the two-year no-fault statute of limitations and should have applied the one-year statute of limitations mandated in KRS 413.140(1).

Id. at 288 (emphasis added). Clark is not a "BRB case", but was a primary tort personal injury case. Kentucky Flatbed submits the reasoning of Clark is sound, is in agreement with this Court's holdings in Howard and State Farm Mutual Automobile Ins. Co. v. Hudson, 775 S.W.2d 922 (Ky. 1989), and applies here to hold that the one-year limitations period of KRS 413.140(1) applies.

IV. THERE IS NO PROVISION FOR TOLLING A VALID LIMITATIONS PERIOD

Rawlings also argues inapplicable provisions of tolling and equitable estoppel. Such severe actions are used only against the concealing party. Rawlings cannot be arguing that Appellants somehow "conspired" to conceal from him that his injury occurred. Rawlings cannot, in good faith, assert that Kentucky Flatbed had a duty to "provide notice" that the MVRA did not apply to his accident as it was

a "normal" bodily injury claim. (Br. at 18). This Court has been explicit in defining the specific conditions where concealment tolls a limitations period. Harralson v. Monger et al, 206 S.W.3d 336 (Ky. 2006). This case does not fall under those conditions. Rawlings cannot, in good faith, argue to this Court that Kentucky Flatbed, a third-party defendant joined two years and seven months after the accident (R. 127-46) concealed Rawlings' "right to bring a claim within the proper statutory period." (Br. at 18). Vandertoll v. Com., 110 S.W.3d 789, 795 (Ky. 2003).

Nor was this situation beyond Rawlings' control. A plaintiff is in control of his suit. Cf. Friedenthal, Miller, Sexton & Hershkoff, Civil Procedure: Cases and Materials 652 (9th ed. 2005); Hawaii-Pac. Venture Capital Corp. v. Rothbard, 564 F.2d 1343, 1346 (9th Cir. 1977). Rawlings was in no manner "prejudiced" by a reasonable requirement to investigate his claim and determine the applicable limitations period. There is no basis in law to prejudice Kentucky Flatbed by permitting a claimant to bring a late suit then claim the benefit of his own mistake. Nanny v. Smith, 260 S.W.3d 815 (Ky. 2008) was a timely filed suit, but the mistake of the Court Clerk, a factor certainly outside the control of any party, caused the summons to be served after the limitations period expired. Here, there is no "circumstance beyond [Rawlings'] control" so as to apply Nanny.

Further, the procedure proposed by Rawlings acts to the severe prejudice of third-parties such as Kentucky Flatbed. There is no provision in the MVRA or any case law cited by Rawlings to justify holding third-parties, potentially unknowingly, hostage for years and denying them the certainty that the statute of limitations was authored to provide.

CONCLUSION

The Circuit Court's ruling on July 7, 2008, was correct. The MVRA did not apply at the time of this accident and the terms of KRS 413.140 control. Clark v. Young, 692 S.W.2d 285 (Ky.App. 1985). Moreover, public policy does not serve to "waive" the limitations period Kentucky Flatbed is entitled to. Nor have the courts extended the application of the MVRA beyond its literal scope to encompass "fortuitous circumstance" as with the facts here. Therefore, Appellant, Kentucky Flatbed Company, LLC, by counsel, respectfully requests that the Shelby Circuit Court's order of summary judgment be affirmed and reinstated.

Further, the facts establish that Rawlings observed and participated in the loading of aluminum bundles on his trailer. Rawlings decided to continue. He was then injured during unloading. No injury resulted from any action by Kentucky Flatbed. Under Richmond v. Louisville and Jefferson County Metropolitan Sewer Dist., 572 S.W.2d 601 (Ky.App. 1978), it was the duty of the Court of Appeals, upon Rawlings' appeal, to review all issues raised to the Shelby Circuit Court. Under Fischer v. Fischer, SW3d –, 2011 WL 1087156, 2009-SC-245-DG (Ky. March 24, 2011) , Kentucky Flatbed was not required to take a separate cross-appeal for this alternative issue to be reviewed. That the Court of Appeals refused to consider the negligence issue raised on motion for summary judgment was an error.

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