**COMMONWEALTH OF KENTUCKY**
**SUPREME COURT OF APPEALS**
**NO. 2010-SC-00368**
**COMPANION CASES: 2010-SC-352 and 2010-SC-264**

KENTUCKY FLATBED COMPANY, LLC — APPELLANT

VS

CHARLES RAWLINGS
ANTHEM HEALTH PLANS OF KENTUCKY, INC.
INTERLOCK INDUSTRIES, INC.,
OHIO VALLEY ALUMINUM COMPANY, LLC, AND
ROSEMAN'S, INC. — APPELLEES

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**INTERLOCK INDUSTRIES, INC. AND OHIO VALLEY ALUMINUM COMPANY, INC.**
**BRIEF ON DISCRETIONARY REVIEW FROM**
**COURT OF APPEALS CASE NO. 2008-CA-001616**
**COURT OF APPEALS CASE NO. 2008-CA-00167**
**COURT OF APPEALS CASE NO. 2008-CA-001686**

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Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of this Brief on behalf of Appellees was mailed this 29 day of March, 2011, to: 10 originals to the Clerk of the Supreme Court of Kentucky,209 Capitol Building, 700 Capital Avenue, Frankfort, KY, 40601; 5 copies to Samuel P. Givens, Jr., Clerk Court of Appeals 360 Democrat Driver, Frankfort, KY. 40106; Shelby Circuit Clerk, 9 Courthouse, 501 Main Street, Shelbyville, KY, 40065; Honorable Tom McDonald, Shelby Circuit Judge, 9 Courthouse, 501 Main Street, Shelbyville, KY, 40065; Brien G. Freeman, Todd K. Childers, FREEMAN & CHILDERS, 201 South Main Street, PO Box 1546, Corbin, KY 40702-1546; Gene F. Price, Joshua T. Rose, J. Morgan McGarvey, 400 W. Market Street, 32nd Floor, Louisville, KY 40202; John G. McNeill, Landrum & Shouse LLP, PO Box 951, Lexington, KY, 40588-0951; Robert E. Stopher, Boehl Stopher & Graves, LLP, Aegon Center, Suite 2300, 400 West Market Street, Louisville, KY 40202.

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## STATEMENT CONCERNING ORAL ARGUMENT

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

## COUNTERSTATEMENT OF POINTS AND AUTHORITIES

## COUNTERSTATEMENT OF THE CASE

The Appellee, Charles Rawlings, was a contract driver for the Appellant and Cross-Appellee, Kentucky Flatbed Company, LLC ("Kentucky Flatbed") at the time of the accident which is the subject matter of this action. Kentucky Flatbed is a trucking company that hauls freight across the country. (Helton Depo. at 23 ). (Pertinent portions of Helton's Deposition are attached as **Exhibit 1**). Charles Rawlings owned a tractor, which he leased to and drove for Kentucky Flatbed for two or three years prior to the accident. (Rawlings Depo. at 5 and Helton Depo. at 23). (Pertinent portions of Rawlings Deposition are attached as **Exhibit 2**). Rawlings did not have his own operating authority. (Rawlings Depo. at 5). Kentucky Flatbed found the loads to haul, directed Rawlings where to pick up and drop off the loads, provided the permits, filed the fuel taxes and supplied the trailer. (Rawlings Depo. at 12-13). Kentucky Flatbed paid Rawlings by the mile at the rate of $.83 per mile. (Helton Depo. at 24).

In addition to providing Rawlings with the flatbed trailer, Kentucky Flatbed also supplied the chains, binders, straps and some dunnage for the trailer. (Helton Depo. at 16-18 and 24). Each driver was supplied with a minimum of six 20" grade eight chains and 4" wide nylon straps measuring 27" to 30" long. (Helton Depo. at 18). Binders were used to secure and tighten the chains and straps. (Helton Depo. at 19). The Dunnage is eight feet long 4' by 4' boards, which were used to balance the load. (Helton Depo. at 18 and 42). Each driver usually carried eight to twelve pieces

of dunnage. (Helton Depo. at 18). It was the driver's responsibility to secure and unsecure the loads they hauled. (Helton Depo at 16). Kentucky Flatbed instructed its drivers, including Charles Rawlings, on safety procedures and training on securing and unsecuring loads. (Helton Depo. at 21 and 26). When Rawlings started with Kentucky Flatbed, he spent two weeks with another driver to help him learn how to secure loads to the trailer, how to unsecure loads and how to cover loads. (Rawlings Depo. at 15).

One of the hauls that Rawlings undertook for Kentucky Flatbed was to travel to Appellee and Cross-Appellant, Rosenman's, Inc. in Ottumwa, Iowa, and pick up bundles of aluminum to be delivered to Appellee and Cross-Appellant, Ohio Valley Aluminum Company, LLC ("OVA")[1] in Shelbyville, Kentucky. (Rawlings Depo. at 23). Mr. Rawlings had never hauled aluminum prior to this load. (Rawlings Depo. at 24). On January 26, 2005, Charles Rawlings arrived at Rosenman's where his trailer was loaded with bundles of aluminum. (Rawlings Depo. at 23). While an employee of Rosenman's was getting the first bundles of aluminum ready to load, Rawlings placed pieces of dunnage on the floor of the trailer, two on the front half of the floor and two on the back half of the floor. (*Id.*) After Rosenman's forklift driver loaded the first layer of bundles, Mr. Rawlings secured the load with chains and

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

tightened the chains. (Rawlings Depo. at 25 and 26). The bundles were loaded in three layers in the front and three layers in the back. (Rawlings Depo. at 31). Between each layer of bundles the forklift operator, an employee of Rosenman's, put four short 4 x 4s on top of the bundles, which Rosenman's provided, and then loaded the next layer of bundles. (Rawlings Depo. at 27 and 30 and Hull Depo. at 20). (Pertinent portions of Hull Deposition are attached as **Exhibit 3**). Normally there are two 4 x 4 chocks, or pieces of dunnage, between each layer and then the bundles are strapped using a compression machine. (Hull Depo. at 21). Rawlings used ratchets to tighten the straps and secure the load as each layer was loaded. (Rawlings Depo. at 29-31). There were two straps placed over the middle layer of bundles and three straps placed over the third tier of bundles. (Rawlings Depo. at 29-31).

After the bundles were loaded, Rawlings expressed concern that the top bundle on the back passenger side was leaning. (Rawlings Depo. at 32). Rosenman's forklift driver told Rawlings that it was just because the bundles were shaped oddly. *Id.* Mr. Rawlings then called Kentucky Flatbeds and spoke with Gary Helton, expressing concern that the bundles might be leaning to the passenger side. (Rawlings Depo. at 33). Mr. Helton asked Rawlings if he felt safe with the load and left it up to Rawlings as to whether to continue with the load. (Rawlings Depo. at 34). Rawlings then continued with the load to OVA. (Rawlings Depo. at 35).

Rawlings stopped about 50 miles down the road where he pulled off and re-checked the straps and binders. (Rawlings Depo. at 36). The "load had settled" so he "retightened everything". (*Id.*) He again checked the load at a truck stop and noticed the bundle had shifted 6 to 10 inches to the passenger side. (Rawlings Depo. at 37). It had moved "due to settling where it was bouncing on the roads." ((*Id.*). By the time Rawlings got to Bloomington, Indiana, the bundle was leaning even more than when he had left Ottumwa. (Rawlings Depo. at 38). He ratcheted the straps and made sure there was no slack in them. (*Id.*) He stopped again at a rest area on I-74 and rechecked the straps. (*Id.*) When he got to Greenwood, Indiana, it looked as if the load had not moved anymore. (Rawlings Depo. at 38-39).

On January 27, 2005, Charles Rawlings arrived at OVA with his load of aluminum bundles. (Rawlings Depo. at 39). When he got to OVA, the top bundle on the passenger side had shifted (Rawlings Depo. at 42). And the entire load on Rawlings' truck was leaning "real bad" on one side. (Mathis Depo at 14). (Pertinent portions of Mathis Deposition are attached as **Exhibit 4**). Mathis, the OVA forklift driver, and Rawlings discussed putting the forks between the bundles while the Rawlings unstrapped the bundles. (Rawlings Depo. at 42 and Mathis Depo. at 14). Rawlings had the forklift driver come to the passenger side and put his tines under the top bundle "to hold it in place" while he released the three straps holding the top bundles. (Rawlings Depo. at 44). Rawlings then released all the straps of the top two

bundles. (Rawlings Depo. at 45). After the forklift driver took away the top bundles on the back, Rawlings released the remaining straps and the binder on the chains securing the bottom layer of bundles. (Rawlings Depo. at 45-46). Then Rawlings rolled up the straps he had released as the forklift driver unloaded the bundles on the back half of the trailer. (Rawlings Depo. at 47). When there were three bundles left on the back half of the trailer, Rawlings released all the ratchets and binders on the front half of the trailer. (*Id.*).

Rawlings released all the straps and chains on the driver's side and then moved to the passenger side where he unstrapped the first strap and pulled it off. (Rawlings Depo. at 49). He then tried to pull the second strap but it was caught between the second and top layers of the aluminum. (Rawlings Depo. at 50-51). He left it and then removed the other straps. (Rawlings Depo. at 51). As Rawlings commenced rolling up a strap, a bundle rolled off and made contact with him. (Rawlings Depo. at 51 and Martin Depo. at 6). (Pertinent portions of Martin Deposition attached as **Exhibit 5**). In a matter of seconds after unhooking the straps, the aluminum bundle rolled off the trailer. (Rawlings Depo. at 51). Martin, an employee of OVA, had just gotten in his truck when he saw the bale and "it just started coming off there really slow...it was real slow " (Martin Depo. at 6).

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

and top layers of bundles on the driver's side and not in contact with the bundle of aluminum which rolled off. (Mathis Depo. at 24 and 29). The forklift operator testified that it was several minutes between the time that he inserted the forks on the driver's side and the time the bundle rolled off. (Mathis Depo. at 29). It was 2 or 3 minutes before he heard the crash. (Mathis Depo. at 26). After he put forks under the bundle, he did not move the forklift at all. (Mathis Depo. at 29).

Rawlings had parked his tractor-trailer on an incline with the load inclining toward Rawlings as he was standing at the front passenger side rolling up the straps. (Mathis Depo. at 42 and Martin Depo. at 13).

## PROCEDURAL HISTORY

Appellee Rawlings brought this action on March 7, 2006, alleging that an employee of the Appellees and Cross-Appellants Interlock negligently unloaded the aluminum from Mr. Rawlings' trailer, pushing the aluminum onto him and causing injuries. Appellees and Cross-Appellants Interlock filed an Answer and as an affirmative defense pled that the claim of the Appellee Charles Rawlings was barred by the applicable statute of limitations. On August 27, 2007, Interlock joined Appellant and Cross-Appellee Kentucky Flatbed and Appellee and Cross-Appellant Rosenman's by Third-Party Complaint seeking contribution or indemnification.

On November 29, 2007, the Trial Court entered a Civil Pretrial Order in this case setting the trial in this action to commence on July 16, 2008. (Attached as

**Exhibit 6**). The Civil Pretrial Order set out a time schedule for pre-trial compliance and discovery. All Motions for Summary Judgment were to be filed no later than ninety days prior to trial. All depositions of parties were to be completed 120 days prior to trial and witness depositions were to be completed sixty days prior to trial. A subsequent Order was entered on December 27, 2007, rescheduling the trial in this matter to July 21, 2008.

Discovery was still ongoing in this case through June of 2008. The deposition of Gary Helton, the owner of Appellant and Cross-Appellee Kentucky Flatbed, was taken on May 21, 2008. The deposition of Tomas Hull, President of Appellee and Cross-Appellant Rosenman's Inc., was taken on April 16, 2008. On May 8, 2008, Rawlings served Request for Production of Documents and Request for Admissions on Interlock and OVA. On May 12, 2008, Rosenman's served Request for Production of Documents on Kentucky Flatbed and Interrogatories on Rawlings. On May 12, 2008, Rosenman's served Requests for Production of Documents on Rawlings, and on Kentucky Flatbed, on OVA, and on Interlock.

On May 29, 2008, Appellees and Cross-Appellants Interlock filed their Compliance with Civil Pretrial Order listing Hal I. Dunham, P.E., a mechanical engineer, as an expert witness and attaching his report and opinion on causation of the

subject accident.[2] (See Report of Hal I. Dunham attached as **Exhibit 7**). It was Mr. Dunham expert opinion that the subject accident was caused by the unsecured and precariously stacked irregularly shaped bundles on the trailer. (*Id.*) It was his opinion that these bundles lacked a flat, level, and secure top and bottom surfaces, which caused a hazardous condition in that the bundles could lean, roll and fall off the trailer when the chains and straps were released. (*Id.*). Further, it was his opinion that Kentucky Flatbed did not provide adequate training and written guidelines to Rawlings on how to safely secure a stacked load on flatbed trailers. (*Id.*) It was his conclusion that Rawlings failed to use proper caution when unloading the front bundles of aluminum and by parking on a slope. (*Id.*).

After completion of all discover, Appellant and Cross-Appellee Kentucky Flatbed, Appellees and Cross-Appellants Interlock, and Appellee and Cross-Appellant Rosenman's Inc. all filed Motions for Summary Judgment. In its Motion, Appellant Kentucky Flatbed moved for Summary Judgment on the basis of its alleged lack of negligence, in addition to the argument that Rawlings' claim was time barred. After oral arguments, the Trial court entered a Judgment in favor of Interlock, Kentucky Flatbed and Rosenman's on the basis that the action was barred by the one-year statute of limitations. (**Exhibit 8**). Appellee Rawlings filed a Motion to Alter,

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[2] An Order entered June 24, 2008, suppressed the testimony of Hal I. Dunham. However, if a new trial in this case is ordered, Appellees and Cross-Appellants Interlock believe that they have the right to call Mr. Dunham as an expert witness in the trial of this action. This issue has been addressed in Appellees and Cross-Appellants Interlock Argument II in its Brief in the companion case 2010-SC-000264 and will not be readdressed here.

Amend or Vacate. (**Exhibit 9**). After a hearing on said Motion, where oral arguments were made, the Trial Court denied Appellee's Motion. (**Exhibit 10**).

Appellee Rawlings then appealed the Trial Court's granting of Summary Judgment to the Kentucky Court of Appeals who Affirmed in Part and Reversed in Part and Remanded this case back to the Trial Court. (Court of Appeals' Opinion rendered on March 19, 2010, Affirming in Part, Reversing in Part, and Remanding attached as **Appendix A**). (Order of the Shelby Circuit Court entered on July 7, 2008, attached as **Appendix B**). It is from this Opinion and Order that Discretionary Review was granted.

## ARGUMENT

## I. SUMMARY JUDGMENT WAS APPROPRIATE.

### A. Standard of Review

CR 56.03 states that Summary Judgment should be granted if the pleadings, "together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." A party opposing the motion "cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482 (Ky. 1991). Movant must establish that it "appears impossible for the non-movant to prove facts establishing a right to relief." *Blevins v. Moran,* 12 S.W.2d 698, 701 (Ky.App. 2000).

"Impossible" is used in a practical sense, not an absolute sense. *Perkins v. Hausladen,* 828 S.W.2d 652, 654 (Ky. 1992). Summary Judgment is proper "where the court is required to resolve *only legal issues...*" *Cornett v. Commonwealth,* 899 S.W.2d 502, 505 (Ky.App. 1995) (emphasis added).

In the instant case, whether this action falls under the purview of the MVRA and its two year statute of limitations or under the one year statute of limitations of KRS. 413.140(1) is a matter of law to be determined by the Court. Under the undisputed facts of this case, this action does not fall under the purview of the MVRA and the Act's two year statute of limitations, KRS.304.39-230. This is an action for personal injury and falls under the one-year statute of limitation of KRS. 413.140(1). Appellee Rawlings did not file this action until more than one year after the date of the accident resulting in this action being time barred. Therefore, the decision of the Court of Appeals in reversing the Trial Court's Opinion and Order granting Summary Judgment should be **REVERSED** and the Trial Court's Opinion and Order granting of Summary Judgment on the basis that Appellee Rawlings' claims are time barred based on the applicable statute of limitations should be **AFFIRMED**.

Further, because the Trail Court did not make findings of fact or law regarding the issue of Kentucky Flatbed's negligence, this issue is not properly before this Court. The Court of Appeals Opinion declining "to address the merits as Kentucky

Flatbed did not file a cross-appeal concerning this issue, and, thus, the issue is not properly before our court" should be **AFFIRMED**.

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

Appellees and Cross-Appellants Interlock hereby adopts and incorporates the Appellant and Cross-Appellee Kentucky Flatbed's argument under this heading and refer this Honorable Court to Appellees and Cross-Appellants' Argument I (This action should be governed by the one year statute of limitations under KRS 413.140(1)(a), not by the two year statute of limitations of the MVRA) in Interlock's Brief for Appellees and Cross-Appellants, Interlock Industries, Inc. and Ohio Valley Aluminum Company, LLC in the companion case of 2010-SC-000264.

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

Appellees and Cross-Appellants Interlock hereby adopts and incorporates the Appellant and Cross-Appellee Kentucky Flatbed's argument under this heading and refer this Honorable Court to Appellees and Cross-Appellants' Argument I (This action should be governed by the one year statute of limitations under KRS 413.140(1)(a), not by the two year statute of limitations of the MVRA) in Interlock's Brief for Appellees and Cross-Appellants, Interlock Industries, Inc. and Ohio Valley Aluminum Company, LLC in the companion case of 2010-SC-000264.

## IV. THERE WAS NO "USE" OF A MOTOR VEHICLE.

Appellees and Cross-Appellants Interlock hereby adopts and incorporates the Appellant and Cross-Appellee Kentucky Flatbed's argument under this heading and refer this Honorable Court to Appellees and Cross-Appellants' Argument I (This action should be governed by the one year statute of limitations under KRS 413.140(1)(a), not by the two year statute of limitations of the MVRA) in Interlock's Brief for Appellees and Cross-Appellants, Interlock Industries, Inc. and Ohio Valley Aluminum Company, LLC in the companion case of 2010-SC-000264.

## V. ALL ISSUES RAISED TO THE SHELBY CIRCUIT COURT ON SUMMARY JUDGEMENT WERE NOT APPEALED BY RAWLINGS.

When Kentucky Flatbed filed its Response brief in Court of Appeals Case No. 2008-CA-1616, Rawlings v. Anthem Health Plans of Kentucky, Inc., Interlock Industries, Inc. and Ohio Valley Aluminum Company, LLC, Rosenman's Inc. and Kentucky Flatbed Company, LLC, it not only responded to Appellant Charles Rawlings' argument, but deviated from Appellant's Argument. Kentucky Flatbed, in violation of the Civil Rules set out an argument not covered in Appellant Rawlings' Civil Appeal Prehearing Statement nor in any Supplemental Prehearing Statement: No Negligence on the Part of Kentucky Flatbed Company, LLC. In order for Appellant and Cross-Appellee Kentucky Flatbed to have raised this issue, it would have had to file a Cross-Appeal, just as this Appellee and Cross-Appellant and Appellee and

Cross-Appellant Rosenman's did. This attempted appeal within a Response was in violation of the Civil Rules.

CR 73.01 states that all appeals shall be taken to the next higher court by filing a notice of appeal in the court from which the appeal is taken. CR 73.02 provides that the notice of appeal shall be filed within 30 days and provides, along with CR 74.01, for how all appeals and cross-appeals shall be filed. CR 73.02(2) provides that the "failure of a party to file timely a notice of appeal, cross-appeal, or motion for discretionary review shall result in a dismissal or denial." Kentucky Flatbed did not file a Cross-Appeal in this case. Therefore, the Court of Appeals was correct in declining to address this argument "as Kentucky Flatbed did not file a cross-appeal concerning this issue and, thus, the issue is not properly before our Court."

Further, the issue of Kentucky Flatbed's negligence, or lack thereof, is an issue that has never been adjudicated by the Trial Court. "The Court of Appeals is without authority to review issues not raised in **or decided** by the trial court." *Regional Jail Authority v. Tackett,* 770 S.W.2d 225, 228 (Ky.App. 1989) (emphasis added). See also *Fisher v. Fischer,* 197 S.W.3d 98 (Ky. 2006). It is only if the question is purely one of law that a *de novo* review is permitted. *Jewell v. City of Bardstown,* 250 S.W.3d 348 (Ky.App. 2008). Kentucky Flatbed's negligence, or lack thereof, is an issue of fact, not one of law, and a *de novo* review is not permissible without the Trial Court having adjudicated that issue.

While Kentucky Flatbed is correct that an Appellate Court may affirm a Trial Court on an alternative theory not relied upon by the Trial Court, it is also true that without a ruling from the Trial Court the issue is not properly before the Appellate Court. The Appellate Court may "only review decisions of the lower courts for prejudicial error, consequently, without a ruling of the lower court on the record regarding a matter, appellate review of that matter is virtually impossible. . .Consequently, we hold that the issues not ruled upon in the circuit court are not properly preserved for our review." *Id.* at 351.

In the case at bar, Kentucky Flatbed's Motion for Summary Judgment on the issue of its negligence was never adjudicated by the Trial Court. The Trial Court in its Grant of Summary Judgment made findings only on the issue of whether the claim of the Appellee Rawlings was time barred. The Trial Court never issued an opinion, or findings of fact, on Kentucky Flatbed's claim that it had no duty, and therefore, no negligence. Therefore, the issue of whether Kentucky Flatbed was not negligent as a matter of law is not properly before this Court and the Court of Appeals properly declined to hear this issue. If this Honorable Court decides to hear this issue, Appellee and Cross-Appellant Interlock presents the following Counter-Argument.

## VI. THERE IS A GENUINE ISSUE OF FACT OF WHETHER KENTUCKY FLATBED WAS NEGLIGENT.

Kentucky Flatbed is correct that in order to prove negligence there must be a duty, a breach of that duty and injury as a result of that breach. *Pathways, Inc. v.*

*Hammons.*, 113 S.W.3d 85 (Ky. 2003). However, Kentucky Flatbed is incorrect in stating that Kentucy Flatbed did not owe Rawlings a duty. Kentucky Flatbed owed the Appellee Rawlings a duty to properly train him in securing all types of loads and in safety procedures. Kentucky Flatbed breached that duty by failing to provide adequate training and written guidelines to Rawlings on how to safely secure a stacked load on a flatbed trailer and how to take proper precaution and safety measures when that load was being unloaded. It was a result of this lack of training that resulted in, or contributed to, the subject accident and Rawlings injuries.

### A. There is an Issue of Fact as to Whether Kentucky Flatbed Breached a Duty to Rawlings.

#### 1. Rawlings was an agent of Kentucky Flatbed.

An employer may be held vicariously liable for the negligence of its employees or agents. *Patterson v. Blair,* 172 S.W.3d 361 (Ky. 2005). If Appellee Rawlings is found to have acted negligently, then such negligence is attributable to Kentucky Flatbed under an agency theory. Kentucky Flatbed, argues that Appellee Rawlings was an independent contractor, and therefore, his negligence cannot be imputed to them. However, there is an issue of fact with regard to whether Rawlings was in fact an independent contractor or an agent of Kentucky Flatbed.

While it is true that "Agency is a legal conclusion to be reached only after analyzing the relevant facts, where the facts are in dispute and the evidence is contradictory or conflicting, the question of agency, like other questions of fact, is to

be determined by a jury." *CSX Transportation,Inc. V. First National Bank of Grayson,* 550 S.W.2d 540, 543 (Ky. 1999), *quoting Thomas v. Hodge,* 897 F.Supp. 980, 982 (W.D.Ky. 1995) and *Wolford v. Scott Nickels Bus Co.,* 257 S.W.2d 594, 595 (Ky. 1953). In determining whether an individual is an independent contractor or an agent/servant "substance prevails over form, and... the main dispositive criterion is whether it is understood that the alleged principal or master has the right to control the details of the work." *Id.* at 543. Prominent among the various elements in determining whether a master/servant relationship exists is the right of one party to direct what work is to be done by the other party. *Makan v. Litton,* 321 S.W.2d 243 (Ky.App. 1959). "[T]he right to control is considered the most critical element in determining whether an agency relationship exists." *CSX Transportation, Inc. v. First National Bank of Grayson,* 550 S.W.2d at 567 quoting *Grant v. Bill Walker Pontiac GMC, Inc.,* 523 F.2d 1301, 1305 (6th Cir. 1975).

In *CSX Transportation*, CSXT had a written contract with another company to manage its trucking operations, explicitly stating that the company was an independent contractor. CSXT trained the employees of the management company, controlled the contract process between the company and the carriers, and controlled its operational conduct. The Court found that notwithstanding the written contract, the company was an agent for CSXT. The facts of the instant case are more in line with *CSX Transportation* than with *Clark v. Young,* 692 S,W,2d 285 (Ky.App. 1985).

In *Clark*, the carrier entered into a lease agreement with Clark for a truck, trailer and equipment, together with a driver to haul a load for one of its customers. In that case, it was undisputed that Clark had operational control of the truck, trailer and load, not only under the lease agreement, but in actual fact. Further, it was Clark, not the carrier, that was responsible for the operation and maintenance of all the equipment used during transport, for hiring and firing drivers, for setting wages, hours, performance standards, working conditions and had sole discretion of the means and manner of the hauling, the pick-up, the loading and unloading of the haul. This is not the relationship between Kentucky Flatbed and Rawlings. Kentucky Flatbed, not Rawlings, was responsible for the operational control of the truck, load, transport and hauls.

Although there may have been a contract between Rawlings and Kentucky Flatbed stating that Rawlings was an independent contractor, the facts show otherwise. This is not a case where Rawlings had "sole dominion and control over the trailer" as argued by Kentucky Flatbed. In the instant case, Appellee Rawlings owned a truck which he leased to Kentucky Flatbed and drove for Kentucky Flatbed. Kentucky Flatbed solicited the hauling contracts for Rawlings and its other drivers, received payment on the loads Rawlings hauled and paid Rawlings based on a per mile rate. Rawlings was directed by Kentucky Flatbed where to go to pick a load up and where to drop the load off. Kentucky Flatbed provided the permits and filed the

fuel taxes. Kentucky Flatbed owned the trailer Rawlings used to haul loads, in addition to supplying Rawlings with the supplies necessary to secure the load to the trailer, i.e. chains, binders, straps and some dunnage. Further, Kentucky Flatbed admitted it was responsible for instructing its drivers, including Rawlings, on safety procedures and on securing loads. Rawlings testified when he started driving for Kentucky Flatbed, he spent two weeks with another driver learning how to secure loads to the trailer, among other things.

It was Kentucky Flatbed, not Rawlings, that had the right and authority to control the work performed by Rawlings. Rawlings had no operational authority with regard to hauling loads for Kentucky Flatbed. Under these facts, the fact finder could reasonably find that Rawlings was an agent of Kentucky Flatbed, not an independent contractor, notwithstanding any contract to the contrary. Further, while it may have been the driver's responsibility to make sure the load was secure, it was Kentucky Flatbed's admitted responsibility to ensure its drivers were properly trained in securing a load and trained in safety procedures. There is a genuine issue of fact as to whether Kentucky Flatbed breached that duty.

**2. Kentucky Flatbed breached its duty to properly train Appellee Rawlings.**

Although Rawlings had hauled various materials prior to the subject incident, he testified that he had never hauled aluminum before. When the load of aluminum was loaded at Rosenman's, Rawlings had expressed concern that the top bundle in

the rear was leaning. He even went so far as to call Mr. Helton at Kentucky Flatbed to share those concerns and get direction on whether it was safe to transport the load. Rather than give Rawlings any guidance, Helton left it up to Rawlings to determine whether it was safe to continue with the load of aluminum. Helton had to have known that Rawlings had never hauled aluminum before, because it was Kentucky Flatbed who got the contracts for which Rawlings hauled and directed Rawlings on what to haul and where to haul it.

Further, Kentucky Flatbed undertook to train Rawlings and as such, had a duty to insure that he was properly trained in hauling all types of loads, including aluminum, and in safety procedures, which included securing a load. Having undertaken this obligation, Kentucky Flatbed cannot be relieved of liability by stating that Rawlings had the discretion to determine if it was safe to continue with a load for which he had no prior experience. Kentucky Flatbed failed to provide Rawlings with any training or written guidelines on how to safely secure stacked loads on a flatbed trailer. This was a new and different experience for Rawlings, one that he was not adequately trained to handle. It was a result of that lack of training that caused, or contributed, to Rawlings injuries. This is exemplified by Rawlings' own testimony.

**B. The Entire Load was Unstable.**

Kentucky Flatbed argues that even if it did have a duty to Appellee Rawlings, his injuries were not a result of any breach of that duty. It argues that Rawlings only

concern regarding the load was for the one bundle in the back half of the trailer, which was unloaded without incident. However, this argument ignores the evidence in this case. The overwhelming evidence in this case establishes that the entire load of aluminum Rawlings was hauling was unstable and not properly secured from the moment it was loaded at Rosenman's.

Rawlings had knowledge that the stacked bundles were unstable from the very beginning because of the leaning top rear bundle. Not only did Rawlings testify that the top rear bundle was leaning immediately after the aluminum bundles were loaded, but he testified that he had to stop several times in route to OVA to check the straps and retightened the entire load. He testified that 50 miles from Rosenman's, when he stopped to check the straps and binders, the "load had settled" and he had to "retightened everything". At another stop he noticed the top rear bundle had shifted six to ten inches "due to settling where it was bouncing on the roads." He had to continuously stop and ratchet the straps to get the slack out of them. This testimony establishes that the irregularly shaped aluminum bundles were not properly secured. By Rawlings' own testimony, the entire load was shifting en route and the straps had to be continuously tightened.

Further, there is corroborating testimony that the entire load on the trailer was leaning "real bad" on one side when Rawlings reached OVA. This testimony, together with Rawlings' testimony, establishes that it was not just the top bundle in

the back that had shifted during transport, but the entire load had shifted and settled at some point during transport. The testimony further establishes that Rawlings parked on a slight slope, which inclined toward him as he was standing on the front passenger side taking the straps off the front load. The evidence is that within seconds after Rawlings unsecured the top bundle on the passenger side, that bundle slowly rolled off onto Rawlings causing him injury. There is ample evidence from which a jury could reasonable conclude that the load of aluminum was not properly secured when it was loaded causing the load to shift during transport and roll off once the bindings were released.

The testimony was the OVA's forklift driver inserted his forks between the second and top layers of bundles to help secure the load while Rawlings unstrapped the front load on the passenger side. Once the forks were in place, the forklift driver testified he did not move the forks and had not started unloading the top front layer when one of the top bundles rolled off onto Rawlings. The driver testified that it was two to three minutes between the time he placed the forks and the time the bundle rolled off. Another witness testified the bundle rolled off "real slow". Seconds before the bundle rolled off, Rawlings testified that he had just finished unstrapping the front load. This testimony supports Interlock's contention that the bundle rolled off because it was improperly loaded and secured, and not because any alleged negligence on the part of the forklift driver.

Under Kentucky law, Summary Judgment is only appropriate if it appears "impossible" for Interlock to produce evidence at trial warranting a judgment in their favor. Viewing the evidence in the light most favorable to Interlock and resolving all doubts in their favor, as Kentucky law requires, the evidence establishes that the forklift driver did nothing to cause the bundle to roll off. Rather, the evidence is that the entire load was unstable and had shifted during transport because it was not properly secured when loaded. Further, the evidence establishes that Rawlings had parked his trailer on an incline and when he unstrapped the bindings on the load, gravity caused the aluminum bundle to roll off onto him causing his injuries. This conclusion is supported by the fact that Rawlings testified that after undoing one of the top straps, he could not pull it off because it was stuck between the second and top layers. It is reasonable to conclude that if the load had not shifted, the strap would not have gotten stuck between the layers.

Further, because the Rawlings had parked the trailer on an incline, it is possible to conclude that gravity caused the bundle to roll off onto him. This is supported by the testimony that the bundle rolled off slowly and only seconds after Rawlings had finished unstrapping the bindings on the front load. This evidence raises a genuine issue of fact as to whether Rawlings was adequately trained by Kentucky Flatbed in securing loads to flatbed trailers and in taking proper safety measures during the unloading process. Based upon this evidence, a jury could reasonably find that

Kentucky Flatbed breached its duty to properly train Rawlings and that breach resulted in, or contributed to, his injuries. Therefore, Kentucky Flatbed is not entitled to Summary Judgment on the issue of its negligence.

## CONCLUSION

Appellee Charles Rawlings brought this action on March 7, 2006, alleging that an employee of OVA negligently unloaded aluminum bundles from his trailer, pushing an aluminum bundle onto him and causing injuries. Appellees and Cross-Appellants Interlock filed an Answer and as an affirmative defense pled that the claim of the Appellee Rawlings was barred by the applicable statute of limitations. The testimony of Appellee Rawlings, supported by the pictures of the accident scene, establishes that when the accident occurred he was still in the process of unloading the aluminum bundles from the trailer. Because he was in the process of unloading the trailer, the MVRA specifically excludes his claim from coverage under the Act. The fact Appellee Rawlings was rolling up the straps on the trailer would not bring his claim under the purview of the MVRA. The rolling up of the straps is not a use of a motor vehicle as contemplated by our legislature or by our courts. Finally, there is no causal connection between the rolling up of the straps and the injury, and therefore, no coverage under the MVRA. If there is no coverage under the MVRA, the one year statute of limitations applies and Appellee Rawlings' claim is time barred.

This action is one for personal injury, and therefore governed by the one year statute of limitations under KRS.413.140(1)(a). Appellee Rawlings filed his action beyond the one year period. Therefore, this action is barred and Court of Appeals' Opinion Reversing and Remanding the entry of Summary Judgment by the Trial Court should be **REVERSED** and the Trial Court's Opinion and Order entered July 7, 2008, sustaining Appellees and Cross-Appellants Interlock's Motion for Summary Judgment should be **AFFIRMED**.

Appellant and Cross-Appellee Kentucky Flatbed did not file a Cross-Appeal. Therefore, its argument that there is no negligence on the part of Kentucky Flatbed, is not properly before this Court and this Court should decline to address the merits of this issue. However, if this Honorable Court should determine to hear this argument, it should deny Appellant and Cross-Appellee Kentucky Flatbed's Motion for Summary Judgment. Appellant and Cross-Appellee Kentucky Flatbed, contends that Appellee Rawlings was an independent contractor and any negligence on his part cannot be imputed to them. However, the evidence of record establishes that Rawlings was an agent/servant of Kentucky Flatbed and not an independent contractor. Further, the evidence establishes that it was Kentucky Flatbed's admitted responsibility to ensure that Rawlings was properly trained. Viewing the evidence in the light most favorable to Interlock and resolving all doubts in their favor, a jury could reasonably believe that the aluminum bundle rolled off injuring Rawlings

because he failed to properly secure the load and that his conduct during the unloading of the bundles of aluminum contributed to his injuries. The foregoing evidence of record create genuine issues of material facts making Summary Judgment inappropriate in this case on the issue of Kentucky Flatbed's negligence. Therefore, Kentucky Flatbed Company, LLC's, is not entitled to Judgment as a matter of law and the Court of Appeals properly declined to address the merits of Appellee Kentucky Flatbed's argument that it was not negligent as a matter of law.

Respectfully submitted,

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