SUPREME COURT OF KENTUCKY
Case No. 2010-SC-000~~264~~ 352

ROSENMAN'S INC. APPELLANT

v.

ROSENMAN'S INC.'S APPELLANT'S BRIEF

CHARLES RAWLINGS, ET AL. APPELLEES

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CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing was mailed this 7th day of February, 2011 to: Ms. Susan Stokley Clary, Clerk of the Supreme Court of Kentucky, 209 Capitol Building, 700 Capital Avenue, Frankfort, KY 40601; Mr. Samuel Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Honorable Tom McDonald, 9 Courthouse, 501 Main Street, Shelbyville, KY 40065; Mr. Brien G. Freeman, Mr. Todd K. Childers, FREEMAN & CHILDERS, 201 South Main Street, P.O. Box 1546, Corbin, KY 40702-1546; Mr. Gene F. Price, Mr. Joshua T. Rose, FROST BROWN TODD, LLC, 400 West Market Street, 32nd Floor, Louisville, KY 40202-3363; Mr. Wayne J. Carroll, Ms. Deborah L. Harrod, MACKENZIE & PEDEN, P.S.C., 7508 New LaGrange Road, No. 3, Louisville, KY 40222; and Mr. John G. McNeill, Ms. Elizabeth A. Deener,LANDRUM & SHOUSE, LLP, 106 West Vine Street, Suite 800, P. O. Box 951, Lexington, KY 40588-0951. It is further certified, pursuant to CR 76.12(6), that the record on appeal was not withdrawn from the Clerk of the Shelby Circuit Court by the appellant.

COUNSEL FOR APPELLANT, ROSENMAN'S INC.

I. INTRODUCTION

This is a personal-injury case that arises out of an accident that occurred while plaintiff Charles Rawlings and an Ohio Valley Aluminum forklift driver were unloading Rawlings's tractor-trailer at defendant Ohio Valley Aluminum's yard.

II. STATEMENT CONCERNING ORAL ARGUMENT

Oral argument is welcome but unnecessary. This Court can decide this case on the briefs.

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IV. STATEMENT OF THE CASE[1]

A. INTRODUCTION

The parties on appeal are plaintiff/appellee Charles Rawlings and defendants/appellants Rosenman's, Inc., Interlock Industries, Inc., Ohio Valley Aluminum Co., and Kentucky Flatbed Co., LLC.[2] Rawlings's action arises out of an accident at Ohio Valley Aluminum.[3] The accident occurred while an Ohio Valley forklift driver and Rawlings were unloading aluminum bundles from Rawlings's tractor-trailer.

Prior to unloading the bundles, Rawlings had driven them from Iowa to Ohio Valley.[4] When he arrived at Ohio Valley, Rawlings parked his tractor-trailer and removed tie-down straps from some of the bundles on the tractor-trailer.[5] After that, an Ohio Valley employee began unloading bundles with a forklift.[6] While the forklift driver unloaded bundles, Rawlings began gathering the tie-down straps that he'd removed from those bundles.[7] To do this, Rawlings crawled under his trailer. While he was there, Ohio Valley's forklift driver knocked an aluminum bundle off the trailer and onto Rawlings.[8]

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1 There are no disputed issues of material fact in this case. To prove that point, we'll use Mr. Rawlings's facts from his court of appeals' brief. Of course, we only accept his facts for briefing purposes. The brief is attached as Appendix Item 3.

2 *See* Opinion (Appendix Item 1).

3 Appendix Item 3, pp. 1-2.

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.* at 2-3.

8 *Id.* at 3.

B. CIRCUIT COURT'S SUMMARY JUDGMENT

Rawlings filed his complaint 13 months after his accident.[9] As a result, the defendants (now appellants) moved for summary judgment on limitations grounds. The circuit court agreed with the defendants that Rawlings had filed his action too late and granted summary judgment.[10] The court's summary judgment turned on the resolution of a legal issue. The issue was which limitations period applied to Rawlings's accident—KRS 413.140(1)'s one-year period for personal injuries or the Kentucky Motor Vehicle Reparations Act's two-year period for injuries arising out of the use of a motor vehicle.[11] The circuit court, interpreting the MVRA's definition of "use of a motor vehicle" in KRS 304.39-020(6), held that Rawlings's accident occurred during the course of unloading Rawlings's trailer and, therefore, that his injuries didn't arise out of the use of the trailer as a motor vehicle as required for the MVRA to apply. As such, the court applied KRS 413.140(1) and granted the defendants summary judgment.[12]

C. THE COURT OF APPEALS' DECISION

The court of appeals reversed the circuit court. The court of appeals held that Rawlings wasn't in the course of unloading his tractor-trailer when he was struck but was furthering the tractor-trailer's return to the road and so using it as a vehicle as defined by

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9 Complaint (ROA 1-3).

10 Opinion and Order (Appendix Item 2).

11 *Id.*

12 *Id.*

KRS 304.39-020(6). Consequently, the court held that the MVRA's two-year limitations period applied to Rawlings's accident.[13]

D. THE ISSUE ON APPEAL

The ultimate issue on appeal is whether the MVRA's two-year limitations period applies here. The more substantive issue on appeal is whether, under KRS 304.39-020(6), Rawlings's conduct when he was struck and injured (gathering tie-down straps from under his trailer while Ohio Valley's forklift driver was unloading the trailer) was "conduct in the course of unloading" his tractor-trailer or "use of the tractor-trailer as a vehicle." The circuit court, relying on *State Farm v. Hudson*, held that Rawlings's conduct was conduct in the course of unloading his tractor-trailer and so not "use" of the tractor-trailer as a vehicle. The court of appeals, distinguishing *Hudson*, held that Rawlings's conduct was use of his tractor-trailer as a vehicle and, therefore, that the MVRA applied to Rawlings's accident. It's for this Court to decide which lower court got it right.

E. STANDARD OF REVIEW

The appellants are asking the Court to review the court of appeals' interpretation of KRS 304.39-020(6) and *State Farm v. Hudson*. That review is *de novo*.

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[13] Appendix Item 1, pp. 16-19.

V. ARGUMENT

A. FOR THE MVRA'S TWO-YEAR LIMITATIONS PERIOD TO APPLY TO AN ACCIDENT, THE ACCIDENT HAD TO HAVE OCCURRED DURING THE USE OF A MOTOR VEHICLE AS A VEHICLE. UNDER KRS 304.39-020(6), CONDUCT IN THE COURSE OF UNLOADING A MOTOR VEHICLE, UNLESS THE CONDUCT OCCURS WHILE OCCUPYING, ENTERING INTO, OR ALIGHTING FROM THE MOTOR VEHICLE, ISN'T USE OF THE MOTOR VEHICLE AS A VEHICLE. RAWLINGS WAS INJURED WHEN THE FORKLIFT DRIVER UNLOADING HIS TRACTOR-TRAILER KNOCKED AN ALUMINUM BUNDLE OFF THE TRAILER ONTO RAWLINGS, WHO WAS UNDERNEATH THE TRAILER GATHERING TIE-DOWN STRAPS AT THE TIME. WAS THE COURT OF APPEALS RIGHT TO HOLD THAT RAWLINGS WAS USING HIS TRACTOR-TRAILER AS A VEHICLE WHEN HE WAS INJURED OR WAS THE CIRCUIT COURT RIGHT TO HOLD THAT RAWLINGS WAS IN THE COURSE OF UNLOADING HIS TRACTOR-TRAILER AND NOT USING IT AS A VEHICLE WHEN HE WAS INJURED?[14]

For the MVRA's two-year limitations period to apply to Rawlings's accident, Rawlings had to be "using" his tractor-trailer as a motor vehicle at the time he was struck. KRS 304.39-020(6) expressly excludes from "use of a motor vehicle" any "[c]onduct in the course of . . . unloading the vehicle."[15] Therefore, the central issue on this appeal is whether Rawlings's conduct at the time he was struck (gathering tie-down straps from under his trailer while it was being unloaded with a forklift) was "conduct in the course of . . . unloading the [trailer]."[16]

The facts the Court needs to resolve this issue are undisputed. Rawlings was struck and injured by a falling aluminum bundle.[17] The bundle fell while Rawlings's tractor-

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14 Rosenman's preserved this issue in its summary-judgment memoranda, its brief to the court of appeals, and in its motion for discretionary review.

15 KRS 304.39-020(6).

16 *See id.*

17 Appendix Item 3, pp. 2-3.

trailer was being unloaded with a forklift by an Ohio Valley forklift driver.[18] At the time the bundle fell, Rawlings was under his trailer gathering the trailer's tie-down straps.[19] Rawlings wasn't occupying, entering, or alighting from his trailer when struck. He was on the ground.[20]

The circuit court held that the MVRA's two-year limitations period did not apply to Rawlings's accident because Rawlings was in the course of unloading his tractor-trailer when he was struck. The court's holding turned on KRS 304.39-020(6). As noted above, the statute defines "use of a motor vehicle" as "any utilization of the motor vehicle as a vehicle . . . [but 'use'] does not include . . . conduct in the course of loading and unloading the vehicle unless the conduct occurs while occupying, entering into, or alighting from it."[21] The circuit court held that Rawlings's conduct at the time of his accident was "conduct in the course of unloading" his tractor-trailer and, therefore, not "use of a motor vehicle" under KRS 304.39-020(6).[22]

In reaching this holding, the circuit court relied on *State Farm v. Hudson*.[23] In *Hudson*, Homer Hudson was injured while he was preparing a trailer-load of logs for unloading by removing tie-down straps from the logs. A log rolled off the trailer and struck Hudson. The *Hudson* Court held that, although Hudson wasn't actually unloading logs when injured, his removing tie-down straps from the logs was conduct in the course of

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18 *Id.*

19 *Id.*

20 *Id.* at 3.

21 KRS 304.39-020(6).

22 Appendix Item 2.

23 775 S.W.2d 922 (Ky. 1989).

unloading the logs and, therefore, not use of his tractor-trailer as a motor vehicle under KRS 304.39-020(6).[24] Based on this holding, the *Hudson* court further held that the MVRA's two-year limitations period didn't apply to Hudson's accident, because the MVRA only applies to accidents that involve the "use" of a motor vehicle.[25]

Applying *Hudson* below, the circuit court held that Rawlings's conduct when injured was materially the same as Hudson's when viewed through the lens of KRS 304.39-020(6). That is, the circuit court concluded that Rawlings, like Hudson was injured during the course of unloading his tractor-trailer. And because Rawlings, like Hudson, wasn't occupying, entering into, or alighting from the trailer when injured, the circuit court held that *Hudson* precluded application of the MVRA's two-year limitations period to Rawlings's accident.

(1) The court of appeals failed to meaningfully distinguish Hudson.

In its opinion reversing the circuit court, the court of appeals downplayed *Hudson*'s application to Rawlings's accident. The court of appeals' analysis of the critical unloading-versus-use-of-a-motor-vehicle issue starts on page eight of the court's opinion. Remarkably, the court cited more than half a dozen cases in eight pages of analysis before it mentioned *Hudson*. And when the court finally mentioned *Hudson*, this is what it wrote.

> *Hudson* held the MVRA is inapplicable when the plaintiff "was injured when a log rolled off his truck and struck him as he was standing on the ground unfastening a chain in the course of unloading the truck." The Court explicitly held that "Hudson was not 'using' his vehicle when he was injured because he was

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[24] *Id.*

[25] *Id.*

> engaged in an activity integral to unloading the truck." Again, this is dissimilar to the facts *sub judice*.[26]

The court of appeals went on to explain that Hudson's accident was "dissimilar" to Rawlings's, because Rawlings gathering tie-down straps from under his trailer was conduct in furtherance of returning his tractor-trailer to the road and so "use" of the trailer, while Hudson's conduct (removing tie-down straps from his load) was conduct in the course of unloading his trailer.[27]

The question for this Court is whether Hudson removing tie-down straps while preparing to unload his tractor-trailer is materially "dissimilar" to Rawlings picking up his tie-down straps after he'd removed them to unload his trailer. Again, the court of appeals' answer to this question was that Rawlings was "using" his tractor-trailer because, "[a]t the time Rawlings was struck by the aluminum bundle, no further action was required on his part for that portion of the tractor-trailer to be unloaded."[28] According to the court of appeals, Rawlings gathering tie-down straps wasn't "integral" to the unloading process.[29]

In deciding whether the court of appeals got this right, the first thing for this Court to consider is what, practically speaking, unloading a tractor-trailer entails. At a minimum, unloading a tractor-trailer consists of (1) parking it, (2) removing its tie-down straps, (3) unloading its cargo, and (4) gathering and restowing the tie-down straps. A driver couldn't leave his tie-down straps lying on the ground and be said to be finished

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26 Appendix Item 1, p. 16.

27 *Id.* at 16-18.

28 *Id.* at 17.

29 *Id.*

unloading. Thus, contrary to the court of appeals' holding, Rawlings gathering and stowing his tie-down straps was as "integral" to the unloading process as his removing the straps.

Furthermore, the court of appeals' not-integral-to-unloading reasoning ignores KRS 304.39-020(6)'s plain language. The statute defines "use of a motor vehicle" as "any utilization of the motor vehicle as a vehicle including occupying, entering into and alighting from it [but] does not include . . . conduct in the course of loading and unloading the vehicle unless the conduct occurs while occupying, entering into, or alighting from it."[30] It's undisputed that Rawlings was struck by an aluminum bundle during the "course of unloading" his trailer. So whether Rawlings's conduct was "integral" to unloading isn't the issue. The issue is whether he was injured during the "course of unloading." And he was.

The court of appeals also missed the fact that Rawlings and Ohio Valley's forklift driver were working together to unload Rawlings's trailer. Instead of recognizing that the unloading process was a joint effort between Rawlings and the forklift driver, the court of appeals distinguished Rawlings's actions from the driver's by holding that Rawlings had finished his unloading work and was furthering the return of his tractor-trailer to the road by gathering its tie-down straps. According to the court of appeals, Rawlings was "using" his tractor-trailer at the same time that Ohio Valley's forklift driver was unloading it. That doesn't make sense. Let's suppose that the offending aluminum bundle had struck the forklift driver before striking Rawlings. Under the court of appeals' reasoning, Rawlings would be entitled to the MVRA's two-year limitations period, because he was taking "action in furtherance of his tractor-trailer's return to the roadway."[31] But Ohio Valley's forklift

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30 KRS 304.39-020(6).

31 Appendix Item 1, p. 17, n. 6

driver, who was hit by the same bundle in the same accident, would be subject to KRS 413.140(1)'s one-year limitations period because he was unloading Rawlings's trailer. Again, that doesn't make sense. What makes sense is the circuit court's holding that Rawlings, like Ohio Valley's forklift driver, and like Homer Hudson in the *Hudson* case, was in the course of unloading his trailer when he was struck and so wasn't "using" his tractor-trailer "as a vehicle."

The defect in the court of appeals' attempt to distinguish *Hudson* with its "furtherance" argument lies in the court's fundamental premise, which is that all conduct in furtherance of the return of a motor vehicle to the road is "use" of the vehicle under KRS 304.39.020(6)(b) and not unloading of the vehicle under KRS 304.39-020(6). This premise ignores the obvious fact that all conduct in the course of unloading a motor vehicle is conduct in furtherance of returning the vehicle to the road. So in trying to distinguish *Hudson* with its "furtherance" rationale, the court of appeals effectively read KRS 304.39-020(6)(b)'s unloading exclusion out of the statute. To illustrate, let's assume that this Court had applied the court of appeals' "furtherance" logic in *Hudson*. If that were so, the Court would have held that Hudson's removing his tie-down straps was "in furtherance of the return of his tractor-trailer to its 'use' as a cargo hauler" and so "use" of the tractor-trailer as a vehicle. The Court would, therefore, have applied the MVRA's limitations period to Hudson's lawsuit. In the process, the Court would have read KRS 304.39-020(6)'s unloading exclusion out of the statute.

To further illustrate this point, we'll agree with the court of appeals that Rawlings's conduct herein could be considered conduct in furtherance of his tractor-trailer's return to the road. Where we most strongly disagree with the court of appeals is with the

court's conclusion that, because Rawlings's conduct could be considered conduct in furtherance of his trailer's return to the road, it wasn't conduct in the course of unloading the trailer. Rawlings's conduct logically could be both. We've shown that his conduct was integral to the unloading process and so conduct in the process of unloading. His conduct is also arguably integral to returning his tractor-trailer to the road and so equally conduct in furtherance of his trailer's return to the road. The same can be said of Homer Hudson's conduct when he was struck. Hudson's removing tie-down straps was integral to unloading his tractor-trailer but also integral to returning the tractor-trailer to the road. Obviously, in distinguishing Rawlings's conduct from Hudson's conduct by holding that Rawlings was furthering the return of his trailer to the road, the court of appeals failed to realize that Homer Hudson was also furthering the return of his trailer to the road. The court failed to realize that effectively all vehicle-unloading conduct is conduct in furtherance of the return of a vehicle to the road. With this in mind, the court of appeals distinction between Charles Rawlings and Homer Hudson melts. *Hudson*, therefore, controls the result in this case.

Another flaw in the court of appeals' reasoning can be found in the hypothetical in footnote six of the court's opinion. In the hypothetical, Rawlings stops gathering his tie-down straps, gets in his tractor-trailer, and moves the tractor-trailer so that Ohio Valley's forklift driver can reach the remaining bundles on the trailer.[32] The court of appeals asks "at what point [in this hypothetical would] the character of Rawlings's actions change from . . . 'unloading' the tractor-trailer to 'use?'"[33] The correct answer is "never." Rawlings moving his tractor-trailer for the forklift driver would be conduct in the course of unloading his trailer. Moving the tractor-trailer wouldn't change the character of

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32 *Id.*

33 *Id.*

Rawlings's actions from "unloading" the tractor-trailer to "use" of the tractor-trailer as the court of appeals concludes. Logically, even while moving his tractor-trailer, Rawlings's actions would be conduct in the process of unloading the trailer. The court of appeals didn't understand this. It concluded that moving the tractor-trailer would change the character of Rawlings's conduct from "unloading" to "use." It wouldn't.

That said, we agree with the court of appeals that, while Rawlings is moving his tractor-trailer, he would be "utilizing the tractor-trailer as a vehicle." But that isn't because the character of his conduct changed from "unloading" to "use." It's because, while he's moving the tractor-trailer, Rawlings would be "occupying, entering into, or alighting from" the tractor-trailer. Under KRS 304.39.020(6)(b), while he's occupying, entering into, or alighting from his tractor-trailer, he's both in the course of unloading the trailer and using the tractor-trailer as a vehicle. But there's no time during the court of appeals' hypothetical scenario where "the character of Rawlings's actions changes from . . . 'unloading' the tractor-trailer to 'use[.]'"[34] In the hypothetical, Rawlings would be covered by the MVRA while moving the tractor-trailer, because he's occupying the tractor-trailer in the course of moving it, not because the character of his actions changes from "unloading" to "use" as the court of appeals seems to think. The court's *Goodin v. Overnight Transportation* opinion, which we analyze below, makes this point.[35]

In the final analysis, the court of appeals' attempt to distinguish this case from *Hudson* by characterizing Rawlings's actions as conduct in furtherance of returning his tractor-trailer to the road is ineffective. KRS 304.39-020(6)(b) excludes all unloading

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34 *Id.*

35 *See infra*, pp. 12-14.

conduct, except unloading conduct that occurs while occupying, entering into, or alighting from a vehicle, from the MVRA's definition of "use." It's undisputed that Rawlings wasn't occupying, entering into, or alighting from his trailer when he was struck and injured. Therefore, despite that Rawlings might have been furthering the return of his tractor-trailer to the road, the fact that he was in the process of unloading the trailer when he was struck and injured puts him squarely within KRS 304.39.020(6)(b)'s unloading exclusion. Thus, contrary to the court of appeals' conclusion, Rawlings's at-issue conduct is materially the same as Homer Hudson's conduct in *Hudson*. Both men where struck and injured during the course of unloading their tractor-trailers. Neither man was occupying, entering into, or alighting from his tractor-trailer. Consequently, in both cases, KRS 304.39.020(6)(b)'s unloading exclusion precluded the application of the MVRA's two-year statute of limitations.

(2) Goodin v. Overnight Transportation and Brotherton v. Map Enterprises, Inc. also undermine the court of appeals' decision.

State Farm v. Hudson is the only case that the Court needs to decide this case. Nevertheless, out of an abundance of caution, we're going to look at two additional cases. The first is this Court's decision in *Goodin v. Overnight Transportation*.[36] The material facts in *Goodin* were that Clyde Goodin was "unloading goods from the inside of an unlit tractor-trailer when he stepped through a hole in the trailer bed."[37] Goodin was injured. He sued Overnight one year and ten days after his fall.[38]

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36 701 S.W.2d 131 (Ky. 1985).

37 *Id.* at 132.

Overnight moved for summary judgment on limitations grounds. Overnight argued that the MVRA's two-year limitations period didn't apply to Goodin's fall.[39] Overnight based its argument on KRS 304.39-020(6)'s definition of "use of a motor vehicle." KRS 304.39-020(6) provided then, as it does now, that "'[u]se of a motor vehicle' means any utilization of the motor vehicle as a vehicle including occupying, entering into and alighting from it [but] does not include . . . conduct in the course of loading and unloading the vehicle unless the conduct occurs while occupying, entering into, or alighting from it."[40] Overnight argued that Goodin was "unloading" the subject tractor-trailer and not "using" it.[41]

This Court disagreed with Overnight. The Court held that Goodin was "using" the tractor-trailer when he fell and that the MVRA's two-year limitations period applied.[42] The detail that the Court emphasized in *Goodin* was that Goodin was inside Overnight's trailer when he fell. Goodin was "occupying" the trailer and "occupying" is an exception to the "unloading" exclusion under KRS 304.39-020(6).[43] This Court made it clear that it was the fact that Goodin was "occupying" the trailer that made Goodin's case fall within KRS 304.39-020(6)'s definition of "use of a motor vehicle."[44] If Goodin had been unloading the trailer from the outside of the trailer, it's plain that the Court would've held against him.

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38 *Id.*

39 *Id.*

40 *Id.* (quoting KRS 304.39-020(6)).

41 *Id.*

42 *Id.*

43 *Id.*

44 *Id.*

The Court would've held that Goodin's case was outside the MVRA because he was "unloading" and not "using" the tractor-trailer.

Turning back to this case, we've explained that, at a bare minimum, unloading Rawlings's trailer required parking the trailer, removing the trailer's tie-down straps, unloading the aluminum bundles, and gathering and storing tie-down straps. Gathering and storing the tie-down straps was as much "conduct in the course of . . . unloading" the trailer as taking the straps off.[45] It was conduct "integral" to unloading. As such, Rawlings was involved in the unloading process and, unlike Mr. Goodin, Rawlings wasn't occupying his trailer at the time of his accident.

The second case we'll look at in this section is *Brotherton v. Map Enterprises, Inc.*[46] On May 24, 1994, Billy Brotherton and some co-workers removed a dike for Kentucky Power Company.[47] In the process, they created a pile of dirt. They brought in a truck to remove the dirt. To prepare the truck for loading the dirt, Brotherton started to lower its side rails. The first rail Brotherton tried broke and he was injured.[48]

On May 25, 1995, a year and a day after his accident, Brotherton filed suit.[49] His defendant moved for summary judgment on limitations grounds. Judge Hood granted the motion. He held that KRS 413.140's one-year limitations period applied, not the

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45 KRS 304.39-020(6).

46 104 F.3d 361 (6th Cir. 1996) (unpublished) (Appendix Item 4).

47 *Id.*

48 *Id.*

49 *Id.*

MVRA's two-year limitations period.[50] Judge Hood based his decision on *Hudson* and *Goodin*. He held "that Brotherton was in the course of preparing his truck for loading when his injury occurred, that such activity constitutes 'conduct in the course of loading and unloading a vehicle,' and thus that Brotherton was not engaged in the 'use of a motor vehicle' as required."[51]

Brotherton appealed, arguing that he was "using" the truck "as a vehicle" at the time of his accident. The Sixth Circuit disagreed. The court began by explaining that the MVRA "covers persons injured while involved in the use or maintenance of a motor vehicle."[52] Then the court turned to KRS 304.39-020(6)'s definition of "use of a motor vehicle." The court noted that "use" means "'utilization of the motor vehicle as a vehicle' and excludes 'conduct in the course of loading and unloading the vehicle unless the conduct occurs while occupying, entering into, or alighting from it.'"[53]

Applying this definition to Brotherton's facts, the Sixth Circuit held that "it is apparent that Brotherton, who was preparing to load the truck at the time he was injured, cannot take advantage of the [MVRA]'s statute of limitations on the ground that he was a 'user' of a motor vehicle at the time of his accident."[54] The court explained that *Hudson* was "controlling on this issue."[55] Just like Homer Hudson, Billy Brotherton "was engaged in an

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50 *Id.*

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.*

activity 'integral' to unloading the truck and . . . such conduct is specifically excluded from 'use' by the 'loading and unloading' exception."[56]

> Brotherton is . . . barred by the loading and unloading exception. At the time of his injury, Brotherton was pulling down the side rails to facilitate shoveling dirt onto the truck bed. He was thus injured while performing an activity "integral" to loading the truck, and such activity is specifically excluded from the Act's "use of a motor vehicle" definition by the loading and unloading exception. Brotherton cannot, therefore, qualify for the Act's two-year statute of limitations on the theory that he was using a motor vehicle at the time of his injury.[57]

Brotherton is persuasive here. Charles Rawlings, like Billy Brotherton,"was injured while performing an activity 'integral' to [un]loading the truck, and such activity is specifically excluded from the Act's 'use of a motor vehicle' definition by the loading and unloading exception. [Rawlings] cannot, therefore, qualify for the Act's two-year statute of limitations on the theory that he was using a motor vehicle at the time of his injury."[58]

In the end, the court of appeals' decision in this case is illogical and conflicts with *Hudson*, *Goodin*, *Brotherton*, and other similar cases. As such, we respectfully submit that this Court should reverse and reinstate the circuit court's summary judgment in favor of the defendants/appellants. Charles Rawlings isn't entitled to avail himself of the MVRA's two-year limitations period, because he was not using his tractor-trailer as a vehicle when he was injured. Rawlings was taking actions in the course of unloading the trailer, and he was not occupying the trailer when he was struck and injured.

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56 *Id.*

57 *Id.*

58 *Id.*

B. RAWLINGS HADN'T COMPLETED ALL HIS UNLOADING TASKS AT THE TIME HE WAS STRUCK AND INJURED.

The court of appeals found that, at the time he was struck and injured, Rawlings had completed everything that he needed to do for Ohio Valley's forklift driver to unload Rawlings's trailer. Rosenman's obviously disagrees. And in addition to its argument that gathering tie-down straps was integral to unloading Rawlings's trailer, Rosenman's adopts co-appellant Interlock Industries, Inc.'s argument on this point.[59]

C. THE CIRCUIT COURT DIDN'T ABUSE ITS DISCRETION IN EXCLUDING INTERLOCK'S EXPERT WITNESS HAROLD DUNHAM.

Interlock argues that, should the Court remand this case for trial, it should reverse the circuit court's decision to exclude Interlock's expert witness, Harold Dunham. Rosenman's disagrees. Interlock admits that it failed to comply with the circuit court's order regarding disclosing Mr. Dunham.[60] The admission defeats any argument that the circuit court abused its discretion in excluding Dunham.[61]

VI. CONCLUSION

Contrary to what the court of appeals held in this case, Charles Rawlings was in the process of unloading his tractor-trailer when he was struck and injured by an

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59 *See* Interlock's Appellant's Brief, pp. 9-12.

60 *Id.* at 19.

61 Rosenman's filed a cross-appeal in the court of appeals. We argued that the court of appeals could uphold the summary judgment in Rosenman's favor on an alternate ground. The court of appeals held that the circuit court hadn't decided the alternative issue and refused to consider Rosenman's cross-appeal. Rosenman's didn't seek review of that decision here. But Rosenman's isn't waiving the argument it made in its cross-appeal if this case gets remanded to the circuit court.

aluminum bundle that fell off the trailer. As such, Rawlings's accident doesn't fall under the MVRA, because he wasn't "using" his tractor-trailer "as a vehicle" when he was injured. Instead, as the circuit court held, Rawlings was "in the course of unloading" his tractor-trailer when injured, which, by statute, necessarily means that he wasn't "using" the tractor-trailer "as a vehicle." Accordingly, we respectfully ask the Court to reverse the court of appeals' decision in this case and reinstate the circuit court's summary judgment in favor of the defendants/appellants.

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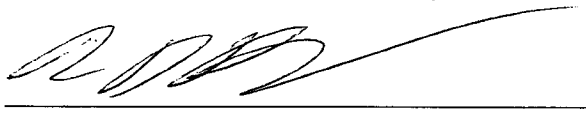

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