SUPREME COURT OF KENTUCKY
CASE NO. 2010-SC-000352
COMPANION CASES: CASE NO. 2010-SC-000264
AND CASE NO. 2010-SC-000368

ROSENMAN'S INC. APPELLANT

v. **ROSENMAN'S INC.'S APPELLANT'S REPLY BRIEF**

CHARLES RAWLINGS, ET AL. APPELLEES

Submitted by:

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CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing was mailed this 15th day of April, 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 It is further certified, pursuant to CR 76.12(6), that the record on appeal was not withdrawn from the Clerk of the Shelby Circuit Court by the appellant.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.

III. STATEMENT OF POINTS AND AUTHORITIES

IV. ARGUMENT

A. THE COURT SHOULD LIBERALLY CONSTRUE THE MVRA IN FAVOR OF ACCIDENT VICTIMS. BUT THE COURT SHOULDN'T MISCONSTRUE THE ACT AS RAWLINGS URGES.

Rawlings's first response argument (Argument A) is a reminder that "[t]he MVRA is to be liberally construed in favor of the accident victim."[1] We agree with this statement of law, but we disagree with how Rawlings urges the Court to apply it. Rawlings wants the Court to turn "liberal construction" into "reconstruction." That's not permissible. As our court of appeals explained, "the MVRA's purpose is to provide benefits for those injured by a motor vehicle, [but] there are exclusions that narrow the coverage of the statute."[2] And as this Court explained, "[i]t is impractical to extend insurance coverage outside the field which it is intended to cover. Automobile insurance companies take many factors into consideration before deciding whether to write a policy and then at what cost. Basic automobile insurance policies are intended to cover 'driving' the vehicle."[3] In short, the MVRA isn't unlimited and "liberal construction" doesn't mean "reconstruction."

B. RAWLINGS DIDN'T FILE A CROSS-MOTION FOR DISCRETIONARY REVIEW. THUS, HE DIDN'T PRESERVE HIS ARGUMENTS THAT (1) PAYMENT OF BRB TRIGGERS THE APPLICATION OF THE MVRA'S TWO-YEAR STATUTE OF LIMITATIONS, (2) PAYMENT OF BRB SHOULD TOLL THE APPLICATION OF THE ONE-YEAR STATUTE OF LIMITATIONS, AND (3) TORT LIABILITY COVERAGE UNDER THE MVRA IS BROADER THAN BRB COVERAGE.

Rawlings's second argument (Argument B) is four arguments. He argues that (1) payment of BRB triggers application of the MVRA's two-year statute of limitations to an

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1 Appellee's Brief, pp. 8-10.

2 *Thompson v. KFB*, 901 S.W.2d 874 (Ky. App. 1995).

3 *Commercial Union Assurance Co. v. Howard*, 637 S.W.2d 647, 649 (Ky. 1982).

accident, (2) payment of BRB should toll the running of the one-year statute of limitations in cases where the Court determines that that limitations period applies, (3) tort liability coverage under the MVRA is broader than BRB, and (4) there is a material question of fact as to whether he was unloading his tractor-trailer at the time of the subject accident.[4]

In *Dept. of Highways v. Taub*, the Court held that it "will not address issues raised but not decided by the Court below. It is the rule in this jurisdiction that issues raised on appeal but not decided will be treated as settled against the appellant in that court upon subsequent appeals unless the issue is preserved by cross-motion for discretionary review."[5]

In this case, the court of appeals didn't address Rawlings's response arguments to this Court that (1) payment of BRB triggers application of the MVRA's two-year statute of limitations to Rawlings's accident, (2) payment of BRB should toll the running of the one-year statute of limitations if the Court determines that that limitations period applies, and (3) tort liability coverage under the MVRA is broader than BRB. And Rawlings didn't file a cross-motion for discretionary review of these issues. His failure to do so precludes review of the issues under *Taub*.[6]

C. RAWLINGS DIDN'T ARGUE TO THE COURT OF APPEALS THAT PAYMENT OF BRB SHOULD TOLL THE APPLICATION OF THE ONE-YEAR STATUTE OF LIMITATIONS. THUS, HE FAILED TO PRESERVE THE ARGUMENT.

The second argument in Rawlings's response Argument B is that, if the Court decides that the MVRA's two-year statute of limitations doesn't apply here, Northland

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4 Appellee's Brief, pp. 10-36.

5 766 S.W.2d 49, 51 (Ky. 1988).

6 We are aware of *Fischer v. Fischer*, 2011 WL 1087156 (Ky.). *Fischer* isn't final, however. Furthermore, *Taub* was controlling at the time Rawlings should have filed his cross-motion for discretionary review.

Insurance's payment of BRB to Rawlings should toll the running of the one-year statute of limitations on Rawlings's tort action.[7] Rawlings doesn't indicate where he preserved this argument below. And, to our knowledge, he didn't.

It's basic that "a new theory of error cannot be raised for the first time on appeal."[8] It's also basic that a party must state "with reference to the record showing whether [an] issue was properly preserved for review and, if so, in what manner."[9]

When it comes to Rawlings's argument that Northland's payment of BRB should toll the application of the one-year statute of limitations, Rawlings hasn't complied with these basic rules. He failed to provide a reference to the record regarding where he properly preserved the issue below. And, as far as we can tell, he didn't make the argument below. Rawlings's failure to preserve the issue precludes review.

D. THE PAYMENT OF BASIC REPARATION BENEFITS IS NOT WHAT TRIGGERS THE APPLICATION OF THE MVRA'S TWO-YEAR STATUTE OF LIMITATIONS.[10]

The first argument in Rawlings's response Argument B is that the MVRA's two-year limitations period applies here because Northland Insurance paid him BRB in relation to his accident.[11] In other words, Rawlings claims that Northland triggered application of the MVRA's two-year limitations period by paying him BRB.[12] Rawlings is

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7 Appellee's Brief, pp. 8-10.

8 *Springer v. Com.*, 998 S.W.2d 438, 446 (Ky. 1999).

9 CR 76.12(4)(c)(5).

10 As we pointed out under Argument B, Rawlings failed to preserve this issue by filing a cross-motion for discretionary review.

11 Appellant's Brief, pp. 10-18.

12 *Id.*

mistaken. Whether KRS 304.39-230(6)'s two-year limitations period applies here is a statutory-construction issue for the Court to resolve by reading KRS 304.39-230(6) in the context of the MVRA. As a matter of common sense, a non-party insurer's decision to pay an insured BRB cannot be the deciding factor in whether the insured's accident falls within the MVRA. Such a scheme would leave the MVRA's application in the hands of insurers.

Common sense aside, Rawlings's substantive mistake in arguing that Northland's BRB payments triggered the application of KRS 304.39-230(6) is that he confuses what it takes to trigger the application of KRS 304.39-230(6)'s two-year limitations period to an accident with what it takes to trigger the statute's two-year limitations period to begin to run in a case in which the statute applies. There's no dispute that, if KRS 304.39-230(6)'s two-year limitations period applies to an accident, an insurer's last BRB payment would trigger the running of the statute's limitations period. But that isn't the issue here. The issue here is whether KRS 304.39-230(6)'s limitations period applies to Rawlings's accident in the first place. And there's nothing in KRS 304.39-230(6) or the MVRA as a whole that makes Northland's BRB payments relevant to that issue.

In sum, Northland Insurance's mistaken decision to pay Rawlings BRB has no bearing on whether KRS 304.39-230(6)'s two-year limitations period applies to Rawlings's accident. Whether KRS 304.39-230(6)'s two-year limitations period applies is a statutory-construction issue for the Court. Furthermore, Rawlings can't estop the defendants from relying on a statute-of-limitations defense based on what Northland Insurance chose to do.

E. KRS 304.39-020(6)'S "USE OF A MOTOR VEHICLE" DETERMINES THE SCOPE OF THE MVRA, NOT MERELY THE SCOPE OF A PERSON'S ENTITLEMENT TO BASIC REPARATIONS BENEFITS.[13]

Rawlings's third argument in his response Argument B is that the court of appeals should not have applied KRS 304.39-020(6)'s definition of "use of a motor vehicle" to determine the scope of the MVRA.[14] Rawlings argues that KRS 304.39-020(6)'s definition of "use of a motor vehicle" doesn't determine the scope of the MVRA, because the definition only applies to the MVRA's BRB provisions.[15] In other words, Rawlings argues that KRS 304.39-020(6)'s definition of "use of a motor vehicle" determines whether an accident falls within the MVRA for the purpose of BRB eligibility but not whether the accident falls within the MVRA for purposes of applying the MVRA's two-year statute of limitations. The two sets of accidents are different, says Rawlings. Rawlings is mistaken.

The simplest proof of Rawlings's mistake is in the first five words of KRS 304.39-020. The statute's first five words are, "As used in this subtitle."[16] "This subtitle" is "Subtitle 39. Motor Vehicle Reparations Act."[17] Thus, Rawlings has no room to argue that KRS 304.39-020(6)'s definition of "use of a motor vehicle" applies only to the MVRA's BRB provisions. On its face, KRS 304.39-020's definitions apply to "[t]his subtitle."[18]

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13 As we pointed out under Argument B, Rawlings failed to preserve this issue by filing a cross-motion for discretionary review. Moreover, the court of appeals decided this issue against Rawlings when it held that "'[u]se of a motor vehicle' as used in the entire subchapter of the MVRA is defined [in KRS 304.39-020(6)]." Opinion, p.11.

14 Appellee's Brief, pp. 21-29.

15 *Id.* at 21.

16 KRS 304.39-020.

17 *Id.*

18 The court of appeals decided this issue against Rawlings. Opinion, p.11.

Now, we'll provide a slightly more complicated reason to show Rawlings's mistake. KRS 304.39-020(6) 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."[19] Below, the court of appeals held that KRS 304.39-020(6)'s definition of "use of a motor vehicle" determined the scope of the MVRA, including whether the MVRA's two-year limitations period applies to an accident. In other words, the court held that, for an accident to fall within the MVRA, the injured party had to be "using" her motor vehicle "as a vehicle" at the time of the accident. The court of appeals further held that Rawlings was "using" his tractor trailer "as a vehicle" at the time of his accident and, therefore, that his accident fell within the MVRA.

The Court's first question in analyzing Rawlings's argument that the court of appeals should not have applied KRS 304.39-020(6)'s definition of "use of a motor vehicle" to determine the scope of the MVRA may well be: "Why does Rawlings make this argument when it undermines the court of appeals' decision in his favor?" The answer is that Rawlings apparently understands that, with cases like *State Farm v. Hudson* in the books, there's a good chance that this Court will reverse the court of appeals on whether Rawlings was "using" a motor vehicle "as a motor vehicle" at the time of his accident. Because of this probability, Rawlings now argues that KRS 304.39-020(6)'s definition of "use of a motor vehicle" determines whether an accident falls within the MVRA for purposes of BRB eligibility but not whether the accident falls within the MVRA for purposes of applying the MVRA's two-year statute of limitations. Rawlings further argues that KRS 304.39-110

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[19] KRS 304.39-020(6).

establishes the MVRA's scope when it comes to whether the Act's two-year limitations period applies.[20]

The thrust of Rawlings's argument regarding KRS 304.39-110 is that the statute establishes a broader scope for the MVRA than KRS 304.39-020(6) because it mandates insurance coverage for accidents "arising out of the ownership, maintenance, use, loading, or unloading[] of [a] secured vehicle."[21] Critical here is "unloading." The defendants' position in this case is that Rawlings was unloading his tractor-trailer at the time of his accident and so not "using" the tractor-trailer "as a vehicle" under KRS 304.39-020(6) . The circuit court agreed and held that Rawlings's accident fell outside the MVRA. Of course, the court of appeals reversed. Rawlings, apparently concerned that this Court will agree with the circuit court, argues to the Court that, by mandating that motor-vehicle insurance cover unloading accidents, KRS 304.39-110, unlike KRS 304.39-020(6), places all unloading accidents (including his) within the MVRA.[22]

There are at least two holes in Rawlings's argument. First, and foremost, KRS 304.39-110 isn't "broader" than KRS 304.39-020(6) as Rawlings argues. The two statutes are compatible. KRS 304.39-020(6) 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."[23] This definition

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20 Appellee's Brief, pp. 21-29.

21 *Id.*

22 *Id.*

23 KRS 304.39-020(6).

indisputably places some, but not all, loading and unloading conduct within "use of a motor vehicle" and so within the scope of the MVRA. In harmony with KRS 304.39-020(6)'s treatment of loading and unloading conduct, KRS 304.39-110 requires insurance coverage for loading and unloading to ensure that there's coverage for the loading and unloading conduct that KRS 304.39-020(6) places within the MVRA. Contrary to Rawlings's argument, KRS 304.39-110's insurance requirement for loading and unloading doesn't override KRS 304.39-020(6)'s definition of "use of a motor vehicle" and place all loading and unloading conduct within the MVRA. To so read KRS 304.39-110, a statute that establishes required insurance coverage, is nonsense. Furthermore, such an interpretation violates the statutory-construction rule that, "[w]here there is an apparent conflict between statutes or sections thereof, it is the duty of the court to try to harmonize the interpretation of the law so as to give effect to both sections or statutes if possible."[24] KRS 304.39-110 and KRS 304.39-020(6) are harmonious when read as we suggest. But they are in conflict read as Rawlings argues because his proposed construction causes KRS 304.39-110 to override KRS 304.39-020(6)'s express limitation on the loading and unloading conduct that qualifies as "use of a motor vehicle."

The second hole in Rawlings's argument regarding KRS 304.39-110 is that the statute's express intent is to establish minimum insurance coverage under the MVRA. The statute evinces no intent to establish the scope of the MVRA.

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24 *Ledford v. Faulkner*, 661 S.W.2d 475, 476 (Ky. 1983).

F. NO ISSUES OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT. WHAT RAWLINGS WAS DOING AT THE TIME OF HIS ACCIDENT IS UNDISPUTED.

Rawlings's fourth argument in his response Argument B is that there's a factual dispute as to whether he was "unloading" his trailer at the time of his accident. There's not. For purposes of summary judgment and appeal, we've accepted Rawlings's contention that he was under his trailer gathering and rolling up tie-down straps when he was injured. Thus, there's no factual dispute about what Rawlings was doing.

The dispute that Rawlings points out, whether his undisputed conduct amounts to "unloading," doesn't raise an issue of fact. It raises a legal issue for the Court to resolve: "What does 'unloading' mean as used in KRS 304.39-020(6))?" The Court can resolve the issue by reading cases like *Hudson*, *Goodin*, and *Brotherton*. These cases, which we discussed in our original brief, show that "unloading" is more than the act of taking an object off a truck. "Unloading" is a process. And in this case, that process entailed, at a minimum, removing tie-down straps, unloading aluminum bundles, and gathering and re-stowing tie-down straps. Rawlings's gathering, rolling, and stowing tie-down straps was an "integral" part of unloading the trailer. Rawlings wasn't "using" his trailer "as a vehicle" when he gathered, rolled, and stowed the straps. He was unloading.

In sum, Rawlings's argument that there is a disputed issue of fact regarding whether he was involved in "conduct in the course of . . . unloading the trailer" is mistaken. The facts as to what Rawlings was doing are undisputed. Whether what Rawlings was doing was "unloading" under KRS 304.39-020(6) is a legal issue for the Court to decide just as the court of appeals and circuit court did. In fact, considering that the court of appeals decided the "unloading" issue as a matter of law in Rawlings's favor, it's unusual that Rawlings argues that the issue is for a jury. Again, we attribute Rawlings's willingness to undermine

the court of appeals' decision in his favor to the fact that Rawlings believes that this Court will disagree with the court of appeals' conclusion that Rawlings was not unloading his tractor-trailer at the time of his accident.

V. CONCLUSION

Charles Rawlings was in the process of unloading his tractor-trailer when he was struck and injured by an aluminum bundle. As such, Rawlings's accident doesn't fall within the scope of 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, under KRS 304.39-020(6), means that he wasn't "using" the tractor-trailer "as a vehicle" and, therefore, his accident doesn't fall within the scope of the MVRA. 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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