**COMMONWEALTH OF KENTUCKY**
**SUPREME COURT OF APPEALS**
**NO. 2010-SC-00264**
**COMPANION CASES: 2010-SC-352 and 2010-SC-368**

ROSENMAN'S INC. — APPELLANT

VS

CHARLES RAWLINGS
ANTHEM HEALTH PLANS OF KENTUCKY, INC.
INTERLOCK INDUSTRIES, INC.,
OHIO VALLEY ALUMINUM COMPANY, LLC, AND
KENTUCKY FLATBED COMPANY, LLC — 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 29th 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.

## COUNTER STATEMENT OF POINTS AND AUTHORITIES

## COUNTERSTATEMENT OF THE CASE

The Appellee, Charles Rawlings, was a contract driver for the Appellee and Cross-Appellant, 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. One of the hauls that Rawlings undertook for Kentucky Flatbed was to travel to Appellant and Cross-Appellee, Rosenman's, Inc. in Ottumwa, Iowa, and pick up bundles of aluminum to be delivered to Appellee, Ohio Valley Aluminum Company, LLC ("OVA")[1] in Shelbyville, Kentucky. (Rawlings Depo. at 23) (Pertinent portions of Rawlings' Deposition are attached as **Exhibit 1**). On January 26, 2005, Charles Rawlings arrived at Rosenman's where his trailer was loaded with bundles of aluminum. (Rawlings Depo. at 23).

When loading the aluminum bundles for transport the bundles are 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 puts four short 4 x 4s on top of the bundles and then load the next layer of bundles. (Rawlings Depo. at 27 and 30)

After Rosenman's forklift driver loaded the first layer of bundles, Mr. Rawlings secured the load with chains and tightened the chains. (Rawlings Depo. at

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[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".

25 and 26). 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). Each layer is strapped by the driver with Rosenman's checking the strapping to see that it is done correctly. (Rawlings Depo. at 23).

On January 27, 2005, Charles Rawlings arrived at OVA with his load of aluminum bundles. (Rawlings Depo. at 39). Mathis, the OVA forklift driver, and Rawlings discussed putting the forks between the bundles while the Rawlings unstrapped the bundles. (Rawlings Depo. at 42). 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 Rawlins commenced rolling up a strap, a bundle rolled off and made contact with him. (Rawlings Depo. at 51). In a matter of seconds after unhooking the straps, the aluminum bundle rolled off. (Rawlings Depo. at 51).

During his deposition, Mr. Rawlings was shown a set of pictures, which he identified as having been taken right after the incident and depicting the scene after his accident. When asked if the picture depicted the condition of the bundles of aluminum after his accident, Rawlings responded "The best of my knowledge, it is." (Rawlings Depo. at 74). The first picture "shows the front half of the trailer with three bundles still on the trailer." (Rawlings Depo. at 74 and Exhibit 2 of the Rawlings Depo. attached as **Exhibit 2**). Rawlings testified that the next picture showed the bundle that fell and hit him laying on the ground and two bundles still on the passenger side of the trailer. (Rawlings Depo. at 75 and Exhibit 3 of the Rawlings Depo. attached as **Exhibit 3**). Rawlings testified that the next picture again shows the bundle that fell off from the top and "it shows two of the straps, and there's an additional third strap that has been placed over it." (Rawlings Depo. at 75 and Exhibit 4 of the Rawlings Depo. attached as **Exhibit 4**).

## 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-Appellees 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 Appellee and Cross-Appellant Kentucky Flatbed and Appellant and Cross-Appellee 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 5**). 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. That Order did not address the dates set for pretrial compliance. On May 29, 2008, Appellees Interlock filed their Compliance with Civil Pretrial Order listing Hal I. Dunham, P.E., a mechanical engineer. The Trial Court entered an Order suppressing the testimony of their expert and denied Interlock's

motion to reassign the trial date. At the time of said Order suppressing, discovery was still ongoing.

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

After completion of all discover, Appellee and Cross-Appellant Kentucky Flatbed, Appellees and Cross-Appellants Interlock, and Appellant and Cross-Appellee Rosenman's Inc. all filed Motions for Summary Judgment. In its Motion, Appellant and Cross-Appellee Rosenman's moved for Summary Judgment on the basis of its lack of negligence. After oral arguments, the Trial court entered a Judgment in favor of all Appellees on the basis that the action was barred by the one-year statute of limitations. (**Exhibit 6**). Appellee Rawlings filed a Motion to Alter, Amend or Vacate, which was denied.

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**). It is from this Opinion and Order that Discretionary Review was granted.

## 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 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, should this Court remand this case back to the Trial Court for a new trial, Appellee and Cross-Appellant Interlock should be permitted to call Hal I. Dunham as its expert witness at the trial of this action. If a new trial should be ordered in this action, no prejudice shall result to any party to this action by allowing Interlock to call its expert witness. Therefore, the Court of Appeals decision affirming the Trial Court's Order excluding Interlock's expert witness should be **REVERSED**.

## 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 INJURED WHEN A ALUMINUM BUNDLE ROLLED OFF THE TRAILER ONTO RAWLINGS. 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?[2]**

Appellees Interlock hereby adopts and incorporates the Appellant and Cross-Appellee Rosenman's argument under this heading and refer this Honorable Court to Appellees and Cross-Appellants Interlock's Argument I (This action is 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.

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[2]While Appellee and Cross-Appellant Interlock adopts and incorporates Appellant Rosenman's argument under this section, Interlock takes issue with the Appellant Rosenman's characterization in the heading under this section that states that "Rawlings was injured when the forklift driver unloading his tractor-trailer knocked an aluminum bundle off the trailer onto Rawlings." Although not relevant to the argument presented in this brief, the issue of exactly what caused the aluminum bundle to roll off the trailer is a factual issue that will be determined at the trial of this case, if this case is remanded back the Trial Court. Interlock disputes that its forklift driver knocked off the aluminum bundle which injured Rawlings.

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

Appellees and Cross-Appellants Interlock hereby adopts and incorporates the its argument in its brief in the companion case to this case and refer this Honorable Court to Appellees' Argument I (This action is 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 Industries, Inc. and Ohio Valley Aluminum Company, LLC Brief in the companion case of 2010-SC-000264.

## C. THE CIRCUIT COURT ABUSED ITS DISCRETION IN EXCLUDING INTERLOCK'S EXPERT WITNESS HAROLD DUNHAM.

The Trial Court's entered an Interlocutory Order on June 24, 2008, which sustained Appellee's Motion to suppress the testimony of Harold I. Dunham, Appellees and Cross-Appellants Interlock's expert witness, based upon non-compliance with the Civil Rules and the Court's Order of November 28, 2007. It is Appellees and Cross-Appellants Interlock's contention that they have the right to have their expert witness, Harold I. Dunham, testify in the trial of this action if this case is remanded back to the Trial Court for further proceedings. Any non-compliance on the part of Interlock was inadvertent and permitting Mr. Dunham to testify in the trial of this action, if a new trial is ordered, would not result in any prejudice to any party.

Every deadline in the Trial Court's Civil Pretrial Order set a perimeter of so many days prior to trial, except for the paragraph dealing with the disclosure of expert

witnesses. The paragraph dealing with disclosure of expert witnesses simply stated that Plaintiff was to disclose his expert witnesses within ninety (90) days and Defendants sixty (60) days after Plaintiff's disclosure. It did not clarify whether that was ninety (90) days before trial or ninety (90) days from the date of the Order.

Appellees and Cross-Appellants Interlock, when calculating the time for compliance, interpreted this to mean that Rawlings' expert witness disclosure was due ninety (90) days prior to trial, or on April 22, and Interlock's disclosure within sixty (60) days thereafter, or on June 21. Interlock filed their expert disclosure with strict compliance with CR 26.02 (4)(a)(I) on May 29, 2008, with service to all parties on May 28, 2008. Interlock in good and honest faith believed that they were in compliance with the Trial Court's Civil Pretrial Order. Further, permitting Mr. Dunham to testify in the trial of this action, if a new trial is ordered, would not result in any prejudice to any party. On the other hand, suppressing Mr. Dunham's testimony would be inequitable and result in an arbitrary and unduly harsh sanction.

Discovery in this case did not cease until June of 2008, one month prior to the scheduled trial and well after the cutoff dates established by the Court's Pretrial Scheduling Order. The evidence garnered from this late discovery was essential for a complete analysis by an expert who was expected to be called at the trial of this action. Part of the information uncovered in this late discovery was necessary before Interlock's expert could completely and accurately analyze the case and reach an

informed opinion regarding the case. The Court of Appeals ignored this fact stating that this argument should have been more appropriately made to the Trial Court. Interlock raised this same argument to the Trial Court without success. It is Appellees and Cross-Appellants Interlock's contention that allowing discovery to continue past the deadlines set out in the pre-trial order, but then refusing to allow Interlock's expert to testify is arbitrary and an abuse of discretion. This is especially true given that the ongoing discovery was crucial to analysis by Interlock's expert.

Further, there was a subsequent Order entered on December 27, 2007, rescheduling the trial in this matter to July 21, 2008. That Order did not address the dates set for pretrial compliance. In a similar case, *Rippletoe v. Feese*, Ky, App. 2007, 217 S.W.3d 887, the Kentucky Court of Appeals was confronted with a case in which there had been two Pretrial Orders setting discovery cut-off dates followed by a third Pretrial Order which changed the trial date and did not set cut-off dates. The Court of Appeals held:

> We are compelled to conclude that once the trial court granted that motion without imposing additional discovery deadlines, no discovery deadlines remained in place.

Discovery in this case did not cease until May of 2008. Evidence collected from this discovery was needed prior to a complete analysis by any expert. The deposition of Gary Helton, the owner of Appellee and Cross-Appellant Kentucky Flatbed was taken on May 21, 2008. The deposition of Tomas Hull, President of

Appellant and Cross-Appellee 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, Appellant and Cross-Appellee Rosenman's served Request for Production of Documents on Appellee and Cross-Appellant Kentucky Flatbed and Interrogatories on Rawlings. On May 12, 2008, Rosenman's served Requests for Production of Documents on Rawlings, Interrogatories on Kentucky Flatbed, Interrogatories on OVA and Interrogatories on Interlock. Part of the information uncovered in this discovery was necessary before Interlock's expert could completely and accurately analyze the case and reach an informed opinion regarding the case. Further, until all trial preparation, including discovery, was completed Interlock could not any reasonably and intellectually make a decision on whether to call an expert witness in the trial of this action.

Interlock made a good faith effort to comply with the Trial Court's Civil Pretrial Order and to disclose their expert witnesses in a timely manner. Interlock honestly believed that they had complied with the Court's Order and any mistake on their part was a mistaken interpretation of the reading of the Order. Any alleged prejudice resulting from this mistake will be eliminated by allowing all Parties an opportunity before trial, if a new trial is ordered, to take the deposition of its expert, Hal I. Dunham. Therefore, should a new trial be ordered, Interlock should be allowed to call its expert witness, Hal I. Dunham, at the trial of this action.

## CONCLUSION

Appellee Charles Rawlings brought this action on March 7, 2006, alleging that an employee of OVA negligently unloaded the aluminum from his 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 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 the Act. Even if it is held that Mr. Rawlings was not in the act of unloading at the time of his accident, the fact he was rolling up the straps on the trailer would not bring the Appellee's 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, even if the rolling up of the straps could be considered a use of a motor vehicle, 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 the Trial Court's Opinion and Order entered July 7, 2008, sustaining Appellees and Cross-Appellants Interlock's Motion for Summary Judgment, Motion to Vacate, alter or Amend denied by Order entered August 7, 2008, should be **AFFIRMED**.

Should this Court remand this case back to the Trial Court for a new trial, Appellees and Cross-Appellants Interlock should be permitted to call Hal I. Dunham as its expert witness at the trial of this action. If a new trial should be ordered in this action, no prejudice shall result to any party to this action by allowing Interlock to call its expert witness. The Trial Courts Order excluding this witness was arbitrary and an abuse of discretion. Therefore, the Court of Appeal's Opinion and Order entered March 19, 2010, Affirming the Trial Court's suppression of Interlock's expert should be **REVERSED** if a new this case is remanded back to the Trial Court for a new trial.

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