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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001616-MR

CHARLES RAWLINGS — APPELLANT

APPEAL FROM SHELBY CIRCUIT COURT
v. HONORABLE TOM MCDONALD, JUDGE
ACTION NO. 06-CI-00119

INTERLOCK INDUSTRIES, INC.; OHIO VALLEY ALUMINUM COMPANY, LLC; ROSENMAN'S, INC.; KENTUCKY FLATBED COMPANY, LLC; AND ANTHEM HEALTH PLANS OF KENTUCKY, INC. — APPELLEES

AND NO. 2008-CA-001617-MR

ROSENMAN'S, INC. — CROSS-APPELLANT

CROSS-APPEAL FROM SHELBY CIRCUIT COURT
v. HONORABLE TOM MCDONALD, JUDGE
ACTION NO. 06-CI-00119

CHARLES RAWLINGS; ANTHEM HEALTH PLANS OF KENTUCKY, INC.; INTERLOCK INDUSTRIES, INC.; AND OHIO VALLEY ALUMINUM COMPANY, LLC — CROSS-APPELLEES

AND NO. 2008-CA-001686-MR

INTERLOCK INDUSTRIES, INC.;
AND OHIO VALLEY ALUMINUM
COMPANY, LLC CROSS-APPELLANTS

CROSS-APPEAL FROM SHELBY CIRCUIT COURT
v. HONORABLE TOM MCDONALD, JUDGE
ACTION NO. 06-CI-00119

CHARLES RAWLINGS; ANTHEM
HEALTH PLANS OF KENTUCKY, INC.;
ROSENMAN'S INC.; AND KENTUCKY
FLATBED COMPANY, LLC CROSS-APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: CAPERTON AND DIXON, JUDGES; HENRY,[1] SENIOR JUDGE.

CAPERTON, JUDGE: Appellant Charles Rawlings appeals the trial court's grant of summary judgment to Appellees and Cross-Appellants (Interlock Industries, Inc. and Ohio Valley Aluminum Company, LLC [together "Interlock"] and Rosenman's, Inc.), and Appellee Kentucky Flatbed Co. LLC ("Kentucky Flatbed"). In granting summary judgment to the Appellees, the trial court determined that Rawlings's claims were barred by the statute of limitations found

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

in KRS 413.140(1) of one year for personal injury claims. This was the sole basis set forth by the trial court in its grant of summary judgment. To the contrary, Rawlings asserts that his claims fall within the purview of the Motor Vehicle Reparations Act ("MVRA") contained in KRS 304.39 and the corresponding two-year statute of limitations of KRS 304.39-230. Thus, Rawlings argues his claims were timely filed. In contrast, the Appellees argue that the motion for summary judgment was properly granted as Rawlings's claims were barred by the applicable statute of limitations. After a thorough review of the parties' arguments, the record, and the applicable law, we agree with Rawlings that summary judgment was improper as his claims are properly brought under the MVRA. Thus, we reverse the grant of summary judgment and remand for further proceedings.

The central argument on appeal focuses on the applicable statute of limitations; however, the Cross-Appellants and Appellees each present an additional argument on appeal. Rosenman's and Kentucky Flatbed each argue that they were entitled to summary judgment on the alternative theory that there was no evidence to establish negligence on their behalf. We address Rosenman's argument *infra*. As to Kentucky Flatbed's argument, we decline 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. Kentucky Rules of Civil Procedure (CR) 73.02.

Lastly, Interlock argues that the trial court abused its discretion in ruling that Interlock had violated the court's discovery deadline and thereby

excluded its expert witness testimony. We find no error by the trial court in exercising its discretion concerning discovery deadlines. Accordingly, we affirm the trial court's denial of Interlock's expert witness testimony.

The facts that give rise to this appeal may be briefly summarized from the depositions in the record. Rawlings, a tractor-trailer driver who contracted with Kentucky Flatbed, picked up a load of bundled scrap aluminum from Rosenman's and delivered the load to Interlock. These bundles were secured with straps. Upon delivery, Rawlings unhooked the straps and proceeded to roll up the straps in order to ready his tractor-trailer for return to the road. While he was rolling up the straps, the forklift driver for Interlock commenced unloading the aluminum bundles. According to Rawlings, he heard the sound of a forklift engine "rev," and within seconds he heard the sound of crunching aluminum and was pinned by a falling bundle.

Rawlings suffered multiple injuries and was paid Basic Reparations Benefits (BRB). He then initiated suit against Interlock approximately thirteen months after his accident, alleging that Interlock negligently unloaded the aluminum bundle and caused his injuries. Interlock filed an Answer alleging the affirmative defense that Rawlings's suit was barred by the applicable statute of limitations. Interlock filed a cross-complaint against Rosenman's and Kentucky Flatbed, alleging that Rosenman's had negligently loaded the aluminum bundles and that Kentucky Flatbed had allowed Rawlings to proceed with an unsafe load. The multiple defendants filed summary judgment motions.

The trial court granted the various summary judgment motions on the basis that Rawlings's claims fell under KRS 413.140(1), the one-year statute of limitations for personal injury actions, instead of the two-year statute of limitations found within the MVRA in KRS 304.39-230. It is not apparent from the record whether in reaching its decision the trial court considered Rosenman's and Kentucky Flatbed's arguments that there was no evidence to show negligence on their behalf.

The trial court based its conclusion on the term "use of a motor vehicle" as defined in the MVRA, which explicitly excludes unloading of vehicles from "use" unless the unloading occurs while occupying, entering into, or alighting from a vehicle. KRS 304.39-020(6). The court concluded that Rawlings's injury occurred while in the process of unloading his tractor-trailer and, thus, the MVRA was not applicable to him, citing *State Farm Mut. Auto. Ins. Co. v. Hudson,* 775 S.W.2d 922 (Ky. 1989).

The trial court further concluded that Rawlings's argument, that he was paid BRB and was thereby under the purview of the MVRA, was flawed as the plain language of the MVRA excluded his claim. Thus, the trial court ultimately concluded that Rawlings's claims were untimely filed, and the defendants were entitled to summary judgment as a matter of law. It is from this grant of summary judgment that Rawlings now appeals. Additional facts will be discussed as relevant to the parties' arguments.

The parties present a number of arguments on appeal. For clarity, we have re-characterized these into three issues. First, we must decide whether summary judgment was appropriate, which necessitates determining whether Rawlings's claim was properly brought under the MVRA. Second, we must decide if Rosenman's was entitled to summary judgment based on its argument that there was no evidence to establish negligence on its behalf. Third, we must decide whether the trial court abused its discretion in ruling that Interlock had violated the court's discovery deadline and, thereby, excluded their expert witness testimony. We now address these issues.

The applicable standard of review on appeal from a summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). Since summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*. *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky.App. 2001). Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, 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." CR 56.03.

The trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 480 (Ky. 1991). Thus, summary judgment is proper only "where the movant shows that the adverse party could not prevail under any circumstances." *Id.* However, "a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial." *Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992), citing *Steelvest, supra*. *See also O'Bryan v. Cave*, 202 S.W.3d 585, 587 (Ky. 2006); *Hallahan v. The Courier-Journal,* 138 S.W.3d 699, 705 (Ky.App. 2004).

We now turn our focus to the MVRA. In *Crenshaw v. Weinberg,* 805 S.W.2d 129, 131 (Ky. 1991), the Kentucky Supreme Court noted:

> The primary purpose of the MVRA is to benefit motor vehicle accident victims by reforming, and in some areas broadening, their ability to make and collect claims. One of these areas is by extending the statute of limitations in all actions for tort liability involving a motor vehicle accident victim "not abolished by KRS 304.39-060." KRS 304.39-230(6). We have so held in *Troxell v. Trammell, supra*, and in *Bailey v. Reeves, supra.*

While the Court's language in *Crenshaw* was expansive, we must be mindful that in *American Premier Ins. Co. v. McBride,* 159 S.W.3d 342, 347 (Ky.App. 2004), this Court noted that "[n]ot all actions arising out of motor vehicle accidents are covered by the MVRA." However, the determination of whether an accident

victim was "using" his or her vehicle "is made in light of the basic rule of statutory construction that the MVRA is to be liberally interpreted in favor of the accident victim." *Fields v. BellSouth Telecommunications, Inc.*, 91 S.W.3d 571, 572 (Ky. 2002). Thus, we turn to the question of whether Rawlings's claims properly fall within the MVRA and the corresponding statute of limitations.

In our Commonwealth, the recovery of damages as a result of vehicular accidents is based on tort. However, the MVRA provides a limited modification of when an action may be brought as a result of a vehicular accident. Thus, we first look to the statutory scope of the MVRA contained in the following statutes.

First, KRS 304.39-060 (1) states that:

> Any person who registers, operates, maintains or uses a motor vehicle on the public roadways of this Commonwealth shall, as a condition of such registration, operation, maintenance or use of such motor vehicle and use of the public roadways, be deemed to have accepted the provisions of this subtitle . . . .

This statutory subsection makes clear that any person who registers, operates, maintains or uses a motor vehicle on the public roadways accepts the following provisions.

Second, KRS 304.39.060(2)(a) states that "[t]ort liability with respect to accidents occurring in this Commonwealth and arising from the ownership, maintenance, or use of a motor vehicle is 'abolished' for damages because of bodily injury, sickness or disease to the extent the basic reparation benefits

provided in this subtitle are payable therefor . . . ." This statutory subsection makes clear that any action for tort is abolished only to the extent basic reparation benefits are payable.

Third, KRS 304.39-.060(2)(b) states that:

> *In any action of tort* brought against the owner, registrant, operator or occupant of a motor vehicle with respect to which security has been provided as required in this subtitle, or against any person or organization legally responsible for his acts or omissions, *a plaintiff may recover damages* in tort for pain, suffering, mental anguish and inconvenience because of bodily injury, sickness or disease *arising out of the ownership, maintenance, operation or use of such motor vehicle* only in the event that the benefits which are payable for such injury as "medical expense" or which would be payable but for any exclusion or deductible authorized by this subtitle exceed one thousand dollars ($1,000), or the injury or disease consists in whole or in part of permanent disfigurement, a fracture to a bone, a compound, comminuted, displaced or compressed fracture, loss of a body member, permanent injury within reasonable medical probability, permanent loss of bodily function or death. (Emphasis added.)

While this statutory subsection makes clear that a tort action may be brought for the ownership, maintenance, operation or use of a motor vehicle when the benefits payable as a result of the accident meet certain criteria, the bringing of such an action might be futile absent security to proceed against. Thus, the legislature gave us KRS 304.39-080(5), which provides:

> [E]*very owner or operator of a motor vehicle* registered in this Commonwealth or operated in this Commonwealth with an owner's permission *shall continuously provide* with respect to the motor vehicle while it is either present or registered in this

> Commonwealth, and any other person may provide with respect to any motor vehicle, *by a contract of insurance* or by qualifying as a self-insurer, *security for the payment of basic reparation benefits in accordance with this subtitle and security for payment of tort liabilities, arising from maintenance or use of the motor vehicle*. (Emphasis supplied.)

This last subsection makes clear that an owner or operator shall provide security through a contract of insurance to compensate victims for (1) basic reparation benefits and (2) the payment of tort liabilities. A plain reading of the above statutes makes apparent that how the terms "maintenance" and "use of a motor vehicle" are defined is essential to determining the application of the MVRA and benefits that arise therefrom. Thus, the insurance, which provides the security, is available to satisfy claims for tort damages arising from the maintenance and use of a motor vehicle. Therefore, our inquiry must focus upon the definition of the aforementioned terms.

"Use of a motor vehicle" as used in the entire subchapter of the MVRA is defined as:

> (6) "Use of a motor vehicle" means any utilization of the motor vehicle as a vehicle including occupying, entering into, and alighting from it. It does not include:
>
> > (a) Conduct within the course of a business of repairing, servicing, or otherwise maintaining motor vehicles unless the conduct occurs off the business premises; or
> >
> > (b) Conduct in the course of loading and unloading the vehicle unless the conduct occurs while occupying, entering into, or alighting from it.

KRS 304.39-020(6). While the language of the statute implies that "use of a motor vehicle" encompasses more than simply driving with the phrase "any utilization of a vehicle as a vehicle," it is likewise apparent that the MVRA excludes the unloading of a vehicle unless the conduct occurs while occupying, entering into, or alighting from the vehicle. Moreover, repairs to a vehicle have also been excluded from "any utilization of the motor vehicle as a vehicle." *Howard, infra* at 648. Consequently, we turn to our cases analyzing the MVRA.

In *Commercial Union Assur. Companies v. Howard,* 637 S.W.2d 647 (Ky. 1982), the Kentucky Supreme Court determined that the MVRA was not applicable to Howard's injuries. Howard was injured when he attempted to repair his own vehicle parked in his driveway. In finding the MVRA inapplicable, the Court held:

> There is obviously no clear definition to the phrase "maintenance of a motor vehicle." The closest definition is found at KRS 304.39-020(16) which defines "maintaining a motor vehicle," and clearly does *not* include repairing or servicing the motor vehicle. The question then is: did the legislature intend a different definition for the word "maintenance" and, if so, why was it not included in the list of definitions?
>
> The answer lies within KRS 304.39-020(6) which basically defines the "use of a motor vehicle" as "any utilization of the motor vehicle *as a vehicle*. . . ." (Emphasis added). The statute also covers acts incidental to this utilization as including entering into and alighting from the vehicle, but specifically *excludes* conduct in the course of loading or unloading unless the conduct occurs while occupying, entering into, or alighting from it. Furthermore, this subsection additionally excludes "*conduct within the course of a business* of repairing, servicing, or otherwise maintaining motor vehicles. . . ."

> (Emphasis added). The patent ambiguity arises at this point where the legislature makes an exception to this exclusion, to wit: "unless the conduct occurs off the business premises . . . ." It would seem logical to interpret this exception as to exclude a business, whose conduct is by nature repairing, servicing or maintaining motor vehicles, from collecting under an automobile no-fault provision when coverage could have and should have been provided for under some other type of business insurance policy.
>
> This interpretation also relates back to the exception described above. A person injured while loading or unloading a vehicle after it has been parked could conceivably be covered by both health insurance and homeowner's insurance policies. Such is the situation of the case at bar. Mr. Howard was not utilizing his truck *as a vehicle* at the time he received his injuries. It would seem that other relevant types of insurance coverage could have been available to him under the circumstances.
>
> It 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, not repairing it.

Howard at 649.[2] Under *Howard,* our focus then is whether Rawlings was using his tractor-trailer as a vehicle at the time of the accident. Consider *State Farm Mut. Auto. Ins. Co. v. Kentucky Farm Bureau Mut. Ins. Co.*, 671 S.W.2d 258 (Ky.App. 1984), wherein the insured was fatally injured while attaching a tow rope to a disabled vehicle. This Court held that the insured/decedent "was utilizing his vehicle in trying to get it to a service station for repairs." *State Farm* at 260. The deciding factor in this case was the actions undertaken by the insured/decedent.

[2] *See also Goodin v. Overnight Transp. Co.,* 701 S.W.2d 131, 133 (Ky. 1985).

Thus, our focus should be to analyze and properly characterize the actions of an insured, herein Rawlings.

In viewing Rawlings's actions, we must determine whether his actions constitute use of his tractor-trailer as a vehicle as opposed to simply unloading the tractor-trailer. The latter would exclude his claim from the purview of the MVRA due to "unloading" being statutorily exempted from "use."[3]

In *Clark v. Young*, 692 S.W.2d 285, 288 (Ky.App. 1985), this Court held that the MVRA did not apply to Young. Young, a warehouse leadman, was injured while loading cargo. Specifically, he was standing on a flatbed trailer attempting to secure the tarpaulin when a bungee strap struck him in the eye. This Court determined that "[w]e do not believe that simply because Young was standing on the trailer this amounted to occupying, entering into or alighting from the motor vehicle within contemplation of the statute." *Young* at 288.

Thus, the *Young* decision was contingent upon whether Young, a warehouse leadman in the process of loading the vehicle, could be characterized as occupying, entering, or alighting from the vehicle by virtue of the fact that he was standing on the vehicle. This is patently different from the case *sub judice*. Unlike *Young,* Rawlings contends that his actions were not instrumental in the unloading process. Instead, he was preparing his vehicle for return to the roadway. Rawlings was neither removing nor securing a load on his tractor-trailer but instead was

[3] Unless such unloading occurs while occupying, alighting, or entering into the vehicle. KRS 304.39-020(6).

rolling up straps already removed from the load they secured. With this in mind, we turn to *Goodin v. Overnight Transp. Co*., 701 S.W.2d 131 (Ky. 1985).

The Kentucky Supreme Court in *Goodin* held that the MVRA was applicable where the accident victim was injured while unloading a parked truck. In so holding, the Court noted that:

> [T]he term "utilization of the motor vehicle as a vehicle" as used in KRS 304.39-020(6) includes as a primary purpose the transportation of property.
>
> . . . .
>
> The fact that in KRS 304.39-020(6) "loading and unloading" is *excepted* from the definition of "use of a motor vehicle" in certain circumstances can mean only that it is an *included* use where the exception does not apply.
>
> . . . .
>
> When we consider the situation of a modern day personal injury victim, confronted with questions of no-fault coverage, first party medical and disability coverage, and workers' compensation insurance, replacing a one year statute of limitations with a two year statute is not unreasonable.

Goodin at 132, 133.

Goodin's holding was further clarified in *State Farm Mut. Auto. Ins. Co. v. Hudson*, 775 S.W.2d 922 (Ky. 1989);

> In *Goodin v. Overnight Transportation*, Ky., 701 S.W.2d 131 (1985), we held that a plaintiff injured *inside* a tractor-trailer while unloading the trailer would be entitled to recover because the injury arose from the use of a motor vehicle, his conduct falling within the

> "occupancy" exception to the "loading and unloading exception" to "use of a motor vehicle."

Hudson at 923.

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." *Id.* at 923. The Court explicitly held that "Hudson was not 'using' his vehicle when he was injured because he was engaged in an activity integral to unloading the truck." *Id.* Again, this is dissimilar to the facts *sub judice*.[4]

Interlock, Kentucky Flatbed, and Rosenman's all contend that Rawlings was unloading his tractor-trailer.[5] Rawlings contends that his actions were not instrumental in the unloading process and that he was instead preparing his vehicle to return to the roadway. In support thereof, Rawlings claims that he had completed all tasks necessary for Interlock to finish unloading the tractor-

[4] We note that Rawlings's contends that he was not unloading his tractor-trailer at the time of the accident. This is factually different from *Hudson,* wherein the question considered was whether *Hudson* met the exception of occupying the vehicle during unloading.

[5] Interlock and Kentucky Flatbed also argue that Rawlings's actions do not constitute maintenance as envisioned by the MVRA. Given *Howard, supra,* we are inclined to agree, although this argument is not dispositive. *See* our analysis *infra.*

trailer.[6] Interlock argues that the unloading was a "process" between Rawlings and the forklift operator.

[6] Interlock argues that Rawlings had not finished all of his tasks necessary to unload, based on pictures that show that straps and chains were still on the cargo. We find Interlock's argument misplaced. We note that Rawlings properly cites this Court to the record to support his assertions. Rawlings has not asserted that all straps were off the cargo but only that he had begun to roll up the removed straps, and that he had completed all actions necessary for Interlock to unload the part of the load that was unstrapped.

As noted *supra*, our focus is on the actions of the accident victim, not on Interlock's actions. Consider if Rawlings, while rolling up the straps, had stopped and been required to move the tractor-trailer a few feet so the forklift operator could have continued to unload the vehicle. Few would argue that Rawlings's actions in moving the tractor-trailer were not a "use" of the vehicle. The question then would become at what point did the character of Rawlings's actions change from allegedly "unloading" the tractor-trailer to a "use"?

The point to be made is that the action or sequence of actions required for removing straps from cargo and the rolling up of such straps are each and of themselves two separate actions. Prior actions do not determine the character of subsequent actions; each action or sequence of actions must be viewed separately to determine its character. Nothing prevents Rawlings from switching back and forth from removing straps, an action integral to unloading the vehicle, and from rolling up straps, an action in furtherance of his return to the roadway. We believe that Rawlings's actions were not integral to the unloading of the tractor-trailer but instead were in furtherance of the return of his tractor-trailer to its "use" as a cargo hauler.

Our Court agrees with Interlock that unloading a vehicle could be a process. Consider *Hudson*, in which unchaining the cargo was found to be an unloading of the vehicle. Certainly another part of the process would be physically unloading the vehicle, as was done by the forklift operator *sub judice*. But what part of the process, if any, would encompass Rawlings's actions? At 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. There is no evidence to suggest that Rawlings's rolling of the straps was an activity integral to unloading the tractor-trailer.[7] *See Hudson* and *Howard, supra.* Further, we must bear in mind that actions of an insured which could constitute or be properly characterized as having "dual character" should favor application of the MVRA as it is to be liberally interpreted when applied to accident victims. *See Fields, supra.* We conclude that Rawlings's actions were not integral to Interlock's unloading of the tractor-trailer and, thus, Rawlings's actions do not constitute unloading within the meaning of KRS 304.39-020(6), and we so hold.

Second, the rolling up of straps is more akin to attaching a tow rope to a disabled vehicle. Both enable the vehicle to be returned to the roadway. *See State Farm, supra.* It was necessary for Rawlings to roll the straps for the use of his tractor-trailer to continue. Few would argue that Rawlings could simply drive off, leaving the straps at the Interlock location or dangling from his tractor-trailer.

[7] For instance, Rawlings could have rolled the straps hours or even days later and the vehicle would have been unloaded just the same. This would be in stark contrast to his actions of removing the straps from a secured load.

The use of Rawlings's tractor-trailer was to haul cargo, and such "use" was accomplished by the use of straps.[8]

Our analysis inexorably leads to the conclusion that Rawlings's actions, while in proximity to his tractor-trailer and preparing it for continued use as a transport vehicle, [9] were encompassed in the term "use" of his vehicle and, thus, he was engaged in an activity covered by the MVRA. As Rawlings's actions were within the coverage of the MVRA and not excluded under the unloading exception, a court action brought under the MVRA is controlled by the statute of limitations found in KRS 304.39-230.

KRS 304.39-230 states in part:

> (1) If no basic or added reparation benefits have been paid for loss arising otherwise than from death, an action therefor may be commenced not later than two (2) years after the injured person suffers the loss and either knows, or in the exercise of reasonable diligence should know, that the loss was caused by the accident, or not later than four (4) years after the accident, whichever is earlier. If basic or added reparation benefits have been paid for loss arising otherwise than from death, an action for further benefits, other than survivor's benefits, by either the same or another claimant, may be commenced not later than two (2) years after the last payment of benefits.

Thus, Rawlings's claims were timely brought under the extended MVRA statute of limitations.[10] The trial court having concluded otherwise granted summary

[8] Was not the "use" of straps to secure his cargo as much of a "use" as turning the steering wheel and operating the various levers and pedals? To the contrary, what use would Rawlings's cargo transport vehicle have been without the equipment used to accomplish the transport?
[9] (as evidenced by his rolling up of the straps).

[10] We note that our courts have favored the longer statute of limitations when two statutes of limitations are arguably applicable. *Troxell v. Trammell*, 730 S.W.2d 525, 528 (Ky. 1987).

judgment in error. Therefore, we reverse the grant of summary judgment and remand. Having concluded that Rawlings's claims were properly within the MVRA and the corresponding two-year statute of limitations, we now turn to the second argument.

Rosenman's argues that it was entitled to summary judgment on the basis that there was no evidence to establish negligence on its behalf. This "lack of negligence" was an alternative argument presented to the trial court below, but was not set forth as a basis for the trial court's decision in its granting of the summary judgments.

In the proceedings before the trial court, Rosenman's moved for summary judgment on the alternative ground that there is no evidence in the record that it did anything that was a substantial factor in causing Rawlings's injury. The trial court, in granting summary judgment, did not address the alternative ground argued by Rosenman's but instead granted summary judgment solely on the statute of limitations issue. On appeal, Rosenman's argues that the circuit court's actions effectively denied Rosenman's alternative summary judgment motion. Rosenman's contends it was entitled to summary judgment as there is no evidence in the record that Rosenman's did anything to cause Rawlings's accident. Moreover, Rosenman's argues that this Court can affirm the trial court's summary judgment in favor of Rosenman's on the alternative theory even though not addressed by the trial court in rendering its judgment.

Interlock disagrees. Interlock argues that, because the trial court did not rule on the alternative argument as a basis for the summary judgment motion, the issue is not properly before this Court.[11] Secondly, Interlock argues that whether Rosenman's was negligent is a factual issue, and as such, there are genuine issues of material fact concerning the negligence of Rosenman's. With these arguments in mind, we turn to the applicable law.

Rosenman's is correct that this Court may affirm a trial court under an alternative theory not relied upon by the trial court. *See Com. Natural Resources and Environmental Protection Cabinet v. Neace,* 14 S.W.3d 15, 20 (Ky. 2000), and *Haddad v. Louisville Gas & Elec. Co*., 449 S.W.2d 916, 919 (Ky. 1969) ("A correct decision will not be disturbed on appeal merely because it was based on an incorrect ground or reason, and this is especially so where the correct grounds were presented to the trial court but not acted upon by it."). However, as noted in *Jewell v. City of Bardstown*, 260 S.W.3d 348, 350-351 (Ky.App. 2008):

> [T]he circuit court did not address any of these issues in reaching its decision. We 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. This is why we require that an appellant not only present an issue to the lower court on the record but also to make reasonable efforts to obtain a ruling from the court on the record concerning that issue. *See, e.g., Williams v. Williams*, 554 S.W.2d 880, 882 (Ky.App. 1977) (failure to obtain a ruling constitutes waiver). Here, the appellants failed to invoke legitimate procedural mechanisms, such as a motion to alter or amend, to obtain a ruling on any issues that the circuit court failed

[11] We note that Rawlings joins Interlock's argument on this issue.

> to address. Consequently, we hold that the issues not ruled upon in the circuit court are not properly preserved for our review.

Thus, the trial court's silence in regard to Rosenman's alternative summary judgment theory serves as the basis for Interlock's argument that this issue was not reached by the trial court and, thus, is not properly before our Court. While Rosenman's argues that the practical effect of the trial court's silence was to overrule its motion for summary judgment, the fact of the matter is that the trial court made no findings on the theory presented by the alternative argument. Our belief is that the lack of findings on the alternate theory by the trial court (in light of its specific findings on whether or not the MVRA governed the applicable statute of limitations) prevents our review of the trial court's decision under the alternate theory; *i.e*., whether or not there was evidence of negligence. This is consistent with our discussion of *Fischer*, *infra.*

In *Fischer v. Fischer*, 197 S.W.3d 98, 103 (Ky. 2006), our Supreme Court stated that "[i]f the summary judgment is sustainable on any basis, it must be affirmed." If taken out of context, this language would appear to support Rosenman's assertion that any argument before the trial court could be used to support its decision when reviewed on appeal. However, our Supreme Court qualified that language in stating, "[t]he trial court must be presumed to have examined the issue [presented by the alternate theory], as it is pivotal in determining the ultimate question . . . [concerning whether a partnership agreement

or statutory scheme controlled between the parties]." *Fischer* at 103. This qualifying language is paramount in understanding the *Fischer* decision.

We note that in *Fischer* an alternative argument was presented to the trial court as a basis for its decision, similar to our facts *sub judice*. However, unlike the *Fischer* court, the trial court *sub judice* made particular findings in sustaining the motions for summary judgment that defined the basis of its decision; *i.e.*, summary judgment was based on the statute of limitations and inapplicability of the MVRA. This is in stark contrast to the *Fischer* court which heard an alternative argument and granted summary judgment but did not state a decisional basis.

Moreover, our Supreme Court in *Fischer* presumed that the trial court must have considered the alternative argument because such was pivotal in deciding the ultimate issue. This is unlike the situation *sub judice* where the alternative basis, that is negligence, was not pivotal to the trial court's findings concerning the applicable statute of limitations and the MVRA. It simply cannot be argued that the trial court presumably considered the alternative basis when it clearly set forth the basis for its decision, and the alternative basis was not pivotal in deciding the issue. Having so concluded, we decline to consider the argument of Rosenman's concerning lack of negligence as an alternative basis to uphold the trial court's granting of summary judgment on appeal.

Alternatively, if we did consider Rosenman's argument that summary judgment was proper based on a lack of evidence of negligence, we would

nevertheless reverse. Interlock argues that the question of negligence is a question of fact for the jury. This is true and focuses our analysis on whether sufficient evidence was before the trial court upon which negligence of Rosenman's could be found. Thus, we must turn to the record, which is replete with depositions with varying factual recollections, which we have briefly summarized.

Rosenman's is in the business of recycling and new steel sales. Rosenman's picks up scrap aluminum, cuts the aluminum to length, and then bundles it together. When the aluminum bundles are not equal in weight or size, an attempt is made to make the bundles uniform by eyeballing the bundles. When loading the bundles for transport, two bundles are placed in three layers with dunnage, or chocks, placed between the layers for balance. Between each layer of bundles, the forklift operator, an employee of Rosenman's, places four short 4 by 4 pieces of lumber on top of the bundles in order to load the next layer. Lastly, chains and straps secure the bundles.

In the case *sub judice*, Rosenman's provided the lumber; both Rosenman's and Rawlings provided the dunnage. Rawlings strapped down the bundles and Rosenman's forklift driver oversaw the strapping process. When the aluminum bundles were loaded onto Rawlings's trailer, he expressed concern that the top bundle on the back passenger side was leaning. The President of Rosenman's, John Hull, visually inspected the bundles and told Rawlings that the load looked secure to him, although the load would pull to the driver's side because of the way it was strapped. Rosenman's forklift driver told Rawlings that

the lean was due to the bundles being oddly shaped. Rosenman's had no written safety rules concerning the loading of the bundles. Rawlings spoke with Gary Helton at Kentucky Flatbeds and expressed concern about the leaning bundle. Helton asked if Rawlings felt safe with the load and left it up to Rawlings as to whether to continue with the load. Rawlings left Rosenman's and proceeded to Interlock.

About fifty miles from Rosenman's, Rawlings stopped to check the load. At this point, the load had settled so he retightened everything. He later stopped at a truck stop and again noticed that the bundles had shifted six to ten inches toward the passenger side and again tightened the straps. Upon arrival at Interlock, one of the bundles had shifted; this bundle was unloaded without incident. According to the forklift driver, the back half of the load was leaning "real bad" to one side. Moreover, the forklift driver recalled that it was several minutes from when he inserted the forks into the load to when a bundle fell off the trailer onto Rawlings.

Based on the record, Rosenman's argues that the only bundle in question that could have been negligently loaded, the "leaning bundle," was unloaded safely. Thus, there is no evidence to support that Rosenman's did anything that was a substantial factor in causing Rawlings's accident. Interlock argues that the evidence within the record establishes that the entire load was negligently assembled, loaded, and secured.

Viewing the record in a light most favorable to the party opposing the motion for summary judgment, we must conclude that there are genuine issues of material fact in dispute concerning Rosenman's alleged negligence given that Rosenman's oversaw the loading process, provided some of the loading materials, possibly had non-uniform bundles that shifted multiple times in transit, and the forklift driver's account of the accident. *See Steelvest*, 807 S.W.2d at 480.

Rosenman's was not entitled to summary judgment. Moreover, a jury could certainly find that Rosenman's was negligent when viewing such evidence in the light most favorable to Rawlings, precluding a favorable ruling on this issue. Having concluded that Rosenman's was not entitled to summary judgment, we now turn to whether the trial court abused its discretion in ruling that Interlock had violated the court's discovery deadline, thereby excluding its expert witness testimony.

Interlock argues that the trial court abused its discretion when it entered an order on June 5, 2008, which excluded the testimony of Interlock's expert witness, Harold I. Durham, from trial for failure to comply with the Civil Rules and the court's order of November 28, 2007.

Interlock argues that any non-compliance on its behalf was inadvertent and resulted from misreading the court's order, because the order did not specify whether the timing for disclosure of expert witnesses was to be from the date of the order or within so many days before trial. Interlock contends that it thought Rawlings's expert disclosures were due 90 days before trial and that its

own disclosures were due 60 days before trial. Interlock claims that it filed its disclosures on May 29, 2008,[12] in good faith, believing that it had complied with the court's pretrial order. Thus, Interlock contends that it has the right to have its expert witness testify at trial if this case is remanded and that such testimony would not result in any prejudice to any party.[13]

At the crux of Interlock's argument is whether the trial court abused its discretion in imposing sanctions on Interlock for failure to comply with our Civil Rules and with the court's pretrial order. The test for abuse of discretion is whether the trial judge's decision was arbitrary, capricious, or unsupported by sound legal principles. *LeBlanc v. Dorten*, --- S.W.3d ----, 2009 WL 2971760 (Ky.App. 2009) (internal citations omitted). As stated in *LeBlanc*, "[a] sanction imposed should bear some reasonable relationship to the seriousness of the defect." *Id.* at *2. In the case *sub judice*, the sanction directly related to the defect and was not capricious or arbitrary. Accordingly, we find no abuse of discretion.

In support of its argument that it has the right to have its expert witness testify at trial if this case is remanded, Interlock references the trial court's subsequent order entered on December 27, 2007, rescheduling the trial from July

[12] Interlock argues that discovery continued through June of 2008. We think this argument would have been more appropriately addressed to the trial court, especially given the pretrial order.

[13] Rawlings argues that the trial court did not abuse its discretion by excluding Interlock's expert witness. Rawlings contends that the pretrial order was not confusing and, given that the trial court is permitted wide discretion over the admission of expert testimony, we should not overturn the decision, citing to *Baptist Healthcare Systems, Inc. v. Miller*, 177 S.W.3d 676 (Ky. 2005). We agree that the trial court has wide discretion in admitting or excluding expert testimony. However, this issue is one concerning a trial court's discretion in enforcing its own pretrial order, and we believe that the trial court acted within its discretion.

14, 2008, to July 21, 2008, which did not address the dates set by the prior pretrial order. Interlock argues that under *Rippetoe v. Feese,* 217 S.W.3d 887 (Ky.App. 2007), once the December 2007 order changed the trial date but did not address the pretrial dates, no discovery deadlines remained in place.

Our reading of *Rippetoe* yields a much different interpretation. In *Rippetoe,* this Court explained its reasoning in holding that no discovery deadlines remained in place:

> First, the June 5 disclosure deadline was set in the initial order setting the trial for June 11, 2005. This order was clearly superceded by the trial court's subsequent order which advanced the trial date to May 11, and correspondingly advanced the discovery deadlines. Rippetoe then moved for a continuance of the May trial date, admittedly for reasons which involved the inability to comply with the trial court's discovery deadlines. We are compelled to conclude that once the trial court granted that motion without imposing additional discovery deadlines, no discovery deadlines remained in place.

Rippetoe at 891.

To understand Interlock's argument and *Rippetoe's* application, if any, we must understand the pretrial order and the order rescheduling trial entered by the trial court below. The November 28, 2007, pretrial order consisted of seventeen numbered paragraphs and a "Deadline Checklist." That pretrial order set discovery deadlines and witness disclosures in terms of a certain number of days before trial, except in the case of disclosure of expert witnesses. The disclosure of expert witnesses was to be completed within ninety (90) days by the

Plaintiff; thereafter, the Defendant had sixty (60) days to disclose its expert witness.

The pretrial order made no less than seven references to "prior to trial" and "before trial" in matters other that expert disclosure. In the paragraph that set the terms for expert disclosure, conspicuously absent is any reference to the phrases "prior to trial" or "before trial." As a matter of fact, that paragraph does not use the word "trial" at all. The December 27, 2008, order rescheduling trial consisted of three typewritten lines. It rescheduled the start of trial from July 14, 2008, to July 21, 2008, and set a final pretrial conference for any motions on June 18, 2008.

Clearly, in the case *sub judice*, the trial court's order rescheduling the trial date did not affect the pretrial order's deadlines. The rescheduling order simply moved the trial date and thereby increased the time allowed for the preparation for trial. The order neither addressed the pretrial deadlines nor vacated the pretrial order.

In contrast, the court in *Rippetoe* advanced a trial date which, action in and of itself, changes the timeframe given the litigants to prepare for trial. When a trial date is initially set by a trial court, there is little doubt that the litigants will voice their opinion as to the time they need for discovery and preparation for trial, and the trial court will establish an appropriate trial date. Advancing the trial date compresses the time and, thereby, *may* make other previously established deadlines in the trial order impractical. By contrast, extending the trial date increases the

time for preparation for trial but has little if any effect on the other previously established deadlines; the litigants simply have more time to prepare for trial.

There was nothing in the rescheduling order that made the discovery deadlines or the time for preparation for trial impractical or otherwise incongruous with the flow of pretrial matters. As Interlock has only cited this Court to the one case, we are unprepared to establish a new stringent rule that a trial court may not issue an order rescheduling trial without imposing additional discovery deadlines when it is apparent from the trial court's order that the original discovery deadlines were unaffected. Accordingly, we affirm the trial court's exclusion of Interlock's expert witness.

For the aforementioned reasons, we reverse and remand the grant of summary judgment and affirm the trial court's exclusion of Interlock's expert witness.

ALL CONCUR.