IN THE COURT OF APPEALS OF IOWA

No. 1-549 / 10-1459
Filed December 21, 2011

KENNETH R. SMITH and
SUE A. SMITH,
Plaintiffs-Appellants,

vs.

HD SUPPLY WATER WORKS, INC.,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg, Judge.

Kenneth and Sue Smith appeal from the district court ruling granting summary judgment on their claim the defendant was negligent. **REVERSED AND REMANDED.**

Jerry L. Schnurr III and James E. Fitzgerald, Fort Dodge, for appellants.

Jason C. Palmer and Thomas M. Boes of Bradshaw Law Firm, Des Moines, for appellee.

Considered by Eisenhauer, P.J., and Potterfield and Tabor, JJ.

TABOR, J.

The question in this appeal is whether a half-century-old federal common-law rule assigning liability to carriers to secure their cargo before driving their tractor-trailers entitled HD Supply Waterworks Ltd.—whose employee loaded a large pipe onto Kenneth Smith's flatbed at its warehouse facility—to summary judgment in the negligence suit brought by the injured truck driver and his wife. Plaintiffs Kenneth and Sue Smith contend a material question of fact exists whether HD Supply owed him a duty of reasonable care and whether it breached that duty. They also contend the district court erred in declining to apply the doctrine of res ipsa loquitur.

Because the rule established in *United States v. Savage Truck Line*, 209 F.2d 442 (4th Cir. 1953), runs counter to the modern tort principles adopted by our supreme court and the comparative fault provisions enacted by our legislature, we conclude the district court erred in its reliance on that precedent to find as a matter of law that HD Supply breached no duty of care.

I. Background Facts and Proceedings. On November 28, 2007, truck driver Kenneth Smith delivered a load of fiberglass pipes to HD Supply's facility in Grimes, Iowa. The twenty-foot-long, 690-pound pipes came in bundles of nine and HD Supply had ordered eight pipes. HD Supply was the first of two stops Smith had scheduled for that day.

When Smith arrived at HD Supply, one of its employees, Jeff Cotten, used a forklift to unload one of two bundles of pipes from Smith's truck. Cotten stacked eight of the pipes in the storage yard and then placed a single pipe back on the flatbed trailer of Smith's truck. Cotten did not block or wedge the pipe into

position before delivering a bill of lading to Smith and heading into the HD Supply building. Smith recalled Cotten saying: "It's cold out here. I'm going inside."

Smith began to strap down the single pipe left from the bundle of nine so he could continue to the second delivery location. He connected one end of the strap to the hooks on the trailer and threw three or four straps over the pipe to ratchet them down on the other side of the trailer. Smith then crawled underneath the trailer to reach the other side instead of walking around the truck. While beneath the truck, Smith heard a noise. When he emerged on the other side of the truck, Smith saw the pipe rolling toward him. He tried to stop it with his arms, but it rolled off the bed and landed on his torso, pushing him to the ground and crushing his legs.

Smith testified at a deposition that in his experience as a truck driver the forklift operator would make the load stable so that it did not roll and then his job was to strap it down "without worry of it coming off on me." In his deposition, Jeff Cotten testified that HD Supply had wedging blocks "lying around" the yard when the accident occurred.

On November 26, 2008, Smith and his wife, Sue, filed a petition alleging HD Supply and others were negligent in failing to properly secure and stabilize the pipe and in failing to warn him it had not been secured or stabilized. Sue Smith claimed loss of consortium. They also claimed the theory of res ipsa loquitur applied to the accident.

HD Supply denied the Smiths' claims and, on March 4, 2010, moved for summary judgment, alleging it did not owe Kenneth Smith a duty of care. On August 4, 2010, the district court entered summary judgment in favor of HD

Supply, dismissing the Smiths' claims. The court held HD Supply did not owe Smith a duty after placing the pipe onto the trailer because the defect in failing to wedge or chock the pipe was not latent or concealed, but could be readily observed by Smith. The court further rejected the Smiths' theory of res ipsa loquitur. The Smiths appeal, asking us to reverse and remand for a trial.

II. Scope and Standard of Review. We review summary judgment rulings for the correction of errors at law. *Sweeney v. City of Bettendorf*, 762 N.W.2d 873, 877 (Iowa 2009). Summary judgment is appropriate where there is no genuine issue of material fact in dispute. *Id.* If reasonable minds can differ on how a material factual issue should be resolved, summary judgment should not be granted. *Id.*

We review the grant or denial of a motion for summary judgment in the light most favorable to the non-moving party, in this case the Smiths. *See Keokuk Junction Ry. Co. v. IES Indus., Inc.*, 618 N.W.2d 352, 355 (Iowa 2000). We also indulge every legitimate inference that the evidence will bear to determine whether a question of fact exists. *Crippen v. City of Cedar Rapids*, 618 N.W.2d 562, 565 (Iowa 2000). An inference is legitimate if it is "rational, reasonable, and otherwise permissible under the governing substantive law." *McIlravy v. North River Ins. Co.*, 653 N.W.2d 323, 328 (Iowa 2002). An inference is not legitimate if it is based on speculation or conjecture. *Id.* If reasonable minds may differ on the resolution of an issue, a genuine issue of material fact exists. *Id.*

III. Duty of Care and Breach. We first consider whether HD Supply owed Kenneth Smith a duty of care and whether that duty was breached.

Following the analysis in *Savage Truck Line*, 209 F.2d at 445, the district court found HD Supply could not be held liable for the unsecured pipe.

In *Savage Truck Line*, the Fourth Circuit Court of Appeals considered whether a common motor carrier was required to indemnify the United States when agents of the United States loaded airplane engines encased in cylindrical containers onto the truck, but did not fasten them sufficiently. 209 F.2d at 443–44. When the truck sped around a bend in the road, a 5000-pound cylinder fell from the truck and killed the driver of another vehicle. *Id*. The estate of the deceased driver sued Savage and the United States; the defendants filed indemnity suits against each other. *Id*. at 444. The Fourth Circuit examined "the Acts of Congress, the terms of the contract contained in the bill of lading, and the rules of common law which are recognized by the federal courts" to determine whether the shipper or the carrier was responsible. *Id.* at 445. It found the absolute rule of liability held the carrier liable to the holder of the bill of lading for any loss, damage, or injury to the property caused by the carrier. *Id.* "Acts of the shipper" stand as an exception to this rule. *Id.* While the carrier in *Savage Truck Line* argued the shipper was negligent in improperly fastening the load, the federal court held, "the duty rests upon the carrier to see that the packing of goods received by it for transportation is such as to secure their safety." *Id.* The court cited federal transportation statutes and interstate commerce regulations for the proposition that no motor vehicle shall be driven unless the carrier "ha[s] satisfied himself that all means of fastening the load are securely in place." *Id*.

The *Savage* rule arises from the following summary:

> The primary duty as to the safe loading of property is therefore upon the carrier. When the shipper assumes the responsibility of loading, the general rule is that he becomes liable for the defects which are latent and concealed and cannot be discerned by ordinary observation by the agents of the carrier; but if the improper loading is apparent, the carrier will be liable notwithstanding the negligence of the shipper. This rule is not only followed in cases arising under the federal statutes by decisions of the federal courts but also for the most part by the decisions of the state courts.

Id.

Applying this rule, the district court in the instant case found the Smiths had the burden of showing (1) HD Supply assumed sole responsibility for loading the pipe; (2) it caused a defect; and (3) the defect was latent and concealed, and could not otherwise be discerned by ordinary observation. Under the undisputed facts, the court found HD Supply did not assume sole responsibility, and the defect in loading the pipe was not latent and concealed, but could be discerned through ordinary observation.

The Smiths contend the *Savage* rule does not apply to the circumstances at issue and contravenes Iowa law. They argue the *Savage* court compared fault between the carrier and the shipper to determine which party was actively at fault and which was passively at fault to decide the issue of indemnity. *See id.* at 446 ("The conclusion has an important bearing upon the remaining question whether either of the parties, whose negligence contributed to the accident, is entitled to indemnity from the other."). The Smiths note the question of indemnity based on active versus passive negligence has been abandoned in Iowa in favor of comparative fault. *See Am. Trust & Sav. Bank v. U.S. Fidelity & Guar. Co.*, 439 N.W.2d 188, 190 (Iowa 1989) ("We now hold that the doctrine of indemnity based

upon active-passive negligence does not fit within our statutory network of comparative fault.").

We find the Smiths' argument to be persuasive. Questions of negligence and comparative fault generally are for the fact finder and may only be decided as a matter of law in exceptional cases. *See Perkins v. Wal-Mart Stores, Inc.,* 525 N.W.2d 817, 820–21 (Iowa 1994). The assessment of relative responsibility for Kenneth Smith's injuries should be left to the jury. *See Spence v. ESAB Group,* 623 F.3d 212, 219–20 (3d Cir. 2010) (citing Pennsylvania's comparative-fault scheme in reversing summary judgment based on *Savage* rule and opining that imposing duty of care on shipper "does not absolve the carrier or its driver of responsibility to assure the stability of the load during transport").

We also believe the timing of the accident in this case bars a strict application of the *Savage* rule. The Fourth Circuit based its decision about the respective liabilities of the carrier and shipper, in part, on federal laws requiring carriers to ensure that their load is properly fastened before driving on the highway. *Savage*, 209 N.W.2d at 445; *see also Vargo-Shaper v. Weyerhaeuser Co.*, 619 F.3d 845, 849 (8th Cir. 2010) (observing that policy behind the *Savage* rule "reflects the practice and understanding in the trucking industry as to carriers having final responsibility for the loads they haul."). In both *Savage* and *Vargo-Shaper*, the carriers left the shippers' facilities, and therefore had adequate opportunity to exercise their "final responsibility" of making their trailers safe before encountering trouble with their loads. By contrast, Kenneth Smith was still parked at HD Supply's facility and was in the process of strapping down the unchocked pipe that had been loaded by an HD Supply employee when it rolled

off his flatbed trailer and crushed him. A reasonable fact finder could determine that Smith did not have sufficient opportunity to fulfill his "final responsibility" to examine the load before hauling it.

This record reflects a genuine issue of material fact concerning HD Supply's liability for the accident that occurred on its premises. In *Koenig v. Koenig*, 766 N.W.2d 635, 644 (Iowa 2009), our supreme court reviewed the history of premises liability jurisprudence, finding American tort law "replete with special rules and arguably arbitrary common-law distinctions." In abandoning the distinction between invitees and licensees, the *Koenig* court found "no reason to question a jury's ability to perform in the area of premises liability as opposed to any other area of tort law." *Id*. at 645. We think the same is true when it comes to divvying up responsibility between a shipper and a carrier for negligently loaded cargo. A "special rule" derived from federal common law, governing cargo in transport, should not foreclose the plaintiffs' opportunity to have a jury consider the question of HD Supply's negligence.

In relying on the *Savage* rule, the district court did not consider how its special assignment of liability fit with our supreme court's recent embrace of the Restatement (Third) of Torts. In *Thompson v. Kaczinski*, 774 N.W.2d 829, 834 (Iowa 2009), the court emphasized Iowa's general rule that every person owes a duty to exercise reasonable care to avoid injuring others. The *Kaczinski* court noted that section 7 of the Restatement (Third) recognized the general duty to exercise reasonable care can be displaced or modified only in exceptional cases. *Id.* at 835. An exceptional case is one in which "an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of

cases." *Id.* The district court did not articulate a countervailing principle or policy that would warrant limiting liability in cases such as this, where a truck driver is injured as a result of the alleged negligent act of the shipper while still on the shipper's property.

Because the evidence in the summary judgment record, when viewed in the light most favorable to the Smiths, creates a genuine issue of material fact as to HD Supply's breach of duty in the manner it loaded the pipe onto Kenneth Smith's flatbed, we reverse the order granting summary judgment in favor of HD Supply on the Smiths' negligence claim.[1]

REVERSED AND REMANDED.

Potterfield, J., concurs; Eisenhauer, P.J., dissents.

[1] Having determined the summary judgment record generated a fact question regarding HD Supply's negligence and Smith knew the cause of his injury, we find it unnecessary to address the Smiths' contention that the doctrine of res ipsa loquitur applied.

EISENHAUER, P.J. (dissenting)

I dissent. I conclude the rule articulated in *Savage* is controlling. In a recent decision, the Eighth Circuit applied this rule to determine a shipper was not liable to its carrier after a truck driver was killed when an unstable stack of cardboard the shipper loaded onto his truck fell on him. *Vargo-Schaper*, 619 F.3d at 848-49. The court noted the rule in *Savage* placing the primary duty of safely loading property upon the carrier "reflects the practice and understanding in the trucking industry as to carriers having final responsibility for the loads they haul." *Id*. Because the shipper did not have a duty to prevent or correct any open or obvious loading defect, the plaintiff had the burden to present evidence of a latent defect to survive summary judgment. *Id.* at 849.

Spence, cited by the majority, is distinguishable because the person who loaded the cargo both supplied the devices to secure the load and, more importantly, gave assurances the load was secure. 623 F.3d at 222,

Applying the *Savage* rule, I conclude the Smiths failed to show HD Supply breached a duty of care to Smith. There is no evidence showing the defect in loading the pipe was latent. Because the defect was open and obvious, HD Supply owed Smith no duty of care and summary judgment was properly granted on this question. Therefore, I would affirm.