

## SHIPPER LIABILITY FOR PROPER LOADING AND SECUREMENT OF FREIGHT

The third US Circuit Court of Appeals recently dealt with the question of whether Pennsylvania law imposed on a shipper, a duty of due care to safely secure the goods the shipper has loaded in a third-party carrier's tractor-trailer. The District Court, had concluded that Pennsylvania law did not impose such a duty and, awarded summary judgment in favor of the shipper. The court of appeals decided, under the circumstances Pennsylvania law imposed a duty of care on the shipper ESAB, I reversed the District Court's judgment.. ( Spence vs The EASB Group 623 f 3<sup>rd</sup> 212, ( 3d Cir Oct 18, 2010)

### I. Facts

In May, 2005, plaintiff Spence was injured when his tractor-trailer overturned as he was rounding a turn in Hanover, Pennsylvania. The accident occurred shortly after Spence, an experienced truck driver, picked up a load of cargo from ESAB to transport it to Houston, Texas. The cargo consisted of welding supplies manufactured by ESAB, packaged by ESAB into boxes and cartons, stacked onto pallets, and then stretch wrapped. Spence was on the trailer while ESAB loaded the pallets by forklift onto the trailer. Spence secured the cargo with "load stars" furnished by ESAB them.

Spence had transported welding supplies for ESAB on five other occasions, all packaged and loaded the same way as on the day of the accident . On the first occasion, Spence complained to ESAB that he did not like that the load was not blocked and braced. ESAB assured him that it never had a problem with any of its loads. Believing that ESAB "knew better" than he about securing ESAB's product, Spence hauled the load without blocking and bracing.

In addition to utilizing the load star securement devices provided by ESAB, Spence also used a "load lock" to secure the ESAB cargo. Spence's employer provided the load lock that he used to secure the ESAB cargo.

Although Spence did not encounter any problems during his first haul of ESAB product, on a subsequent trip, when Spence arrived at his destination, he opened the door of the trailer and saw that the pallets had shifted during transit. Spence did not dispute that only his employer-provided load lock was used to secure the load on this prior occasion. With the exception of that particular load, on all of his prior hauls for ESAB, Spence had secured the cargo with both load stars and a load lock. On none of Spence's hauls for ESAB, including on the day of the accident, was the cargo blocked and braced.

On the day of the accident, because he did not have a load lock with him, Spence secured the cargo only with ESAB's load stars. After the pallets were loaded onto the trailer, Spence closed, locked, and sealed his trailer doors and signed the bill of lading, got into his truck and drove away from ESAB's facility. As Spence rounded a curve a short distance from the ESAB facility, his tractor-trailer overturned, causing Spence serious injuries. Spence claims that the accident occurred because the load shifted laterally.

## II. Procedural History

On March 28, 2007, Spence brought suit against ESAB in the United States District Court in Pennsylvania, asserting numerous claims of negligence.

ESAB filed an amended summary judgment motion arguing that that, as the shipper, it owed no duty to Spence, the driver citing federal regulations ( 49 CFR 392.9(a) (b) and, 393.100-.136) and *United States v. Savage Truck Line, Inc.*, 209 F.2d 442 (4th Cir. 1953), for the common-law rule that the shipper who loads cargo is only liable for defects in loading that are latent and not apparent to the driver. Spence argued, that under Pennsylvania law ( citation) that the shipper ESAB owed a duty of care to Spence in both loading and securing the cargo, notwithstanding the fact that he admitted that under federal regulations he also had a duty to properly secure the load.

In October 2009 the District Court granted ESAB's motion for summary judgment on all five claims of the Amended Complaint and as to Spence's negligence claim, on which the instant appeal centers, the District Court found that Pennsylvania law did not impose on ESAB a duty of care under the circumstances.

## III. Discussion

Relying on PA law, Spence did not argue that the shipper's obligation to exercise reasonable care was exclusive. He acknowledged that he too had a duty of care insofar as securing the load against lateral movement was concerned. Spence contended that ESAB, as the party who undertook to place the load on his trailer, provided him with securement devices, and assured him that blocking and bracing was unnecessary, also owed him a duty of care.

Evidence showed that although it was Spence who physically secured the load with the load stars and closed and locked the truck, ESAB significantly involved itself in the securing of the load. ESAB went beyond the task of merely loading the product on the trailer, it supplied load stars as the securement device. Although ESAB had posted a sign at its loading dock saying that it is the driver's responsibility to secure the load, Spence provided evidence that the industry practice is for shippers to block and brace the cargo that they load, and that ESAB at one time had supplied material for blocking and bracing. Spence also provided evidence that supported an inference that ESAB assured him that transportation of the product without blocking and bracing was safe. Spence testified that on his first load for ESAB, he complained about the way the trailer was loaded.

According to the court, whether EASB exercised reasonable care was a question for a jury to decide.

According to the court, the imposition of duty of care on a shipper does not absolve the carrier or its driver of responsibility to assure the stability of the load during transport. The court held that a shipper may also owe a duty of care depending upon the role it assumes in connection with loading and securing its cargo. ( citation). The federal safety regulations impose a clear statutory duty on the carrier to secure the load safely, but they do not relieve those who breach a common law duty of care from liability for their negligence and their comparative share of the resulting damages. The court acknowledged

the Fourth Circuit's holding in *Savage*, the case upon which the District Court placed principal reliance. According to *Savage*:

“The primary duty as to the safe loading of property is . . . 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.”*id.* Notably, *Savage* did not hold that the exclusive duty to secure the cargo against movement during transit rested with the carrier. Instead, it recognized that the carrier, the party in the best position to know about the handling characteristics of its vehicles, had the primary obligation to assure that the cargo was loaded in a secure manner. Savage acknowledged that a shipper may have liability when an accident results from movement of goods during transport if the shipper created a non-apparent condition that caused the load to shift. It is interesting to note that in the instance case there was no analysis concerning “apparent condition”.

#### IV. Conclusion

According to the court, “... those who undertake the task of loading, securing, and hauling cargo on tractor-trailers have a duty to exercise due care to protect property and persons from the risk of harm. The primary duty to assure that a load does not shift in transit generally rests with the carrier and its driver.. But where there is evidence that a shipper undertook to load and secure the cargo being transported by a third party carrier, the shipper also bears an obligation to exercise reasonable care.....”

“Thus, because it undertook the task of furnishing securement devices and assuring a skeptical driver that such devices were adequate, ESAB cannot be absolved of liability at the summary judgment stage. Whether ESAB breached its duty of care and, if so, whether Spence was negligent are matters for resolution by a jury.

The outcome in this case as in most cases is determined by all of its facts and circumstances. Brokers may be wise to advise their shipper customers of this case to help them avoid liability arising out of loading and securing their freight.

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Ronald H. Usem Esq.

Huffman, Usem, Crawford, & Greenberg PA

5101 Olson Memorial Highway

Minneapolis, MN 55422

Ph: 763-545-2720; fax 763-545-2350

Email: ron@usems.com

