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TIMOTHY J. ABEEL
EDITOR

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Commercial Motor Vehicle Section:

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Nigel A. Greene
Jeffrey A. Segal
Gary N. Stewart
James A. Wescoe

OF COUNSEL

Dawn L. Jennings
Marc F. Ullom

PHILADELPHIA

(215) 575-4200
Fax (215) 563-2583

NEW YORK

(212) 323-7070
Fax (212) 323-7099

NEW JERSEY

(856) 596-4800
Fax (856) 596-6164

HARRISBURG

(717) 234-7700
Fax (717) 234-7710

DELAWARE

(302) 778-1200
Fax (302) 778-1400

PITTSBURGH

(412) 261-5700
Fax (412) 261-5710

PENNSYLVANIA

DUTY TO SECURE LOAD



Diane B. Carvell

A recent Memorandum decision by U.S. District Judge Sylvia H. Rambo of the U.S. District Court for the Middle District of Pennsylvania (Harrisburg), reaffirmed the duty of the driver and carrier to secure a load.

In *Spence v. The ESAB Group*, No. 1:07-cv-00583 (M.D. Pa. Oct. 13, 2009), plaintiff Spence was injured while driving a tractor trailer that was allegedly improperly loaded and braced. Prior to the accident, Spence transported welding supplies from ESAB's facility on approximately five occasions. Spence claimed that on the first occasion, after seeing the way the cargo was loaded in the center of his trailer, he complained to ESAB about the lack of blocking and bracing. Before the accident, Spence always used load locks to secure the load. On all but one occasion, he also used load stars to secure the freight.

On May 12, 2005, Spence picked up cargo again from ESAB. It was the same type of cargo, loaded and packaged the same way as the cargo that he had picked up and transported on the five prior occasions. Spence was present while the cargo was loaded and he placed load stars into the bottom of the trailer to secure the load. On this occasion, however, Spence did not secure the cargo with a load lock because he did not have one with him. After leaving the ESAB facility, Spence's vehicle overturned while traveling around a curve, causing him to be injured.

Spence brought suit against ESAB for, among other things, negligence, breach of an assumed duty, and gross negligence. ESAB filed a motion for summary judgment arguing that Spence could not establish that ESAB had a duty to secure the load.

Judge Rambo initially looked at the Federal Motor Carrier Safety Regulations and found them to be instructive. She determined that the regulations "squarely place the duty on the driver and carrier of the load to ensure that cargo loaded onto its trailer is adequately secured." The Court noted that read together, Sections 392.1(a) and 393.100 of the Federal Motor Carrier Safety Regulations impose a duty on the driver to properly distribute and adequately secure the cargo "to prevent shifting upon or within the vehicle to such an extent that the vehicle's stability or maneuverability is affected" (citing §392.1(a) and § 393.100). Thus, under federal law,

the responsibility to adequately secure a load “rests squarely on the driver.” Shippers are not subject to the federal regulations.

Spence argued that under the common law, ESAB had a duty to load the truck in a safe manner. In making this argument, Spence relied upon the Pennsylvania Supreme Court decision of *Kunkle v. Continental Transp. Lines*, 92 A.2d 690 (Pa. 1952). In that case, the Supreme Court upheld a jury verdict finding that a shipper was negligent in loading the truck and that the driver was not negligent for failing to inspect the truck.

Judge Rambo found multiple ways to distinguish *Kunkle*. First, she noted that *Kunkle* was decided before the Federal Motor Carrier Safety Regulations were promulgated. Although *Kunkle* still remains Pennsylvania law, the Court questioned the continued vitality of *Kunkle* in light of the Regulations. The Regulations, she noted, speak directly of the driver’s responsibility to secure the cargo and ensure that the cargo is “properly distributed.” See 49 C.F.R. § 392.1. The *Kunkle* Court, however, did not discuss which party was responsible for securing the cargo once it was loaded.

In further distinguishing *Kunkle*, Judge Rambo noted that the cases were factually different. In *Kunkle*, the driver was in the cab of his truck while it was loaded. Spence, on the other hand, was in the trailer at the time it was loaded and took measures to secure the load by placing load stars on the bed of the trailer before the cargo was loaded. Moreover, the

Kunkle case related to improper loading. Spence’s own expert, however, admitted that the cargo was properly loaded. Rather, Spence was arguing that the cargo was not properly secured.

Judge Rambo also noted that *Kunkle* conflicted with the prevailing common law duty announced in *United States v. Savage Truck Line, Inc.*, 209 F.2d 442 (4th Cir. 1953). In that case, the Fourth Circuit developed the following test: When the shipper assumes the responsibility of loading, the shipper is liable for latent or concealed defects that cannot be discerned by ordinary observation by the agents of the carrier. However, if the improper loading is apparent, the carrier will be liable notwithstanding the negligence of the shipper. Although neither the Third Circuit nor the Pennsylvania Courts have specifically adopted the *Savage* test, it has been consistently cited in other Circuits, as the common law standard for the duty to secure cargo. Judge Rambo found that the consistency between the *Savage* rule and the federal regulations “mitigates heavily in favor of the court adopting this standard.”

Judge Rambo found no common law duty nor any statutory duty to secure the load that could be placed upon the shipper. As such, Spence’s claims for general negligence, breach of an assumed duty, and gross negligence were dismissed. Summary judgment was granted in favor of the shipper. Spence’s Complaint was dismissed and the case was ordered closed.

Although the *Spence* case did not

specifically pertain to carriers, Judge Rambo did note that the duty to secure was placed squarely on both the driver and the carrier. Section 392.9 of the FMCSR states, in relevant part: “A driver may not operate a commercial vehicle *and a motor carrier may not require or permit a driver to operate a commercial motor vehicle* unless ... the commercial motor vehicle’s cargo is properly distributed and adequately secured as specified in §§ 393.100 through 393.136” (emphasis added).

Judge Rambo’s thoughtful and well reasoned decision reaffirms the duty of the driver and the carrier to ensure that a load is properly secured.

Diane B. Carvell, of **Rawle & Henderson’s** Harrisburg office, received her law degree in 1996 from Dickinson School of Law where she was the recipient of the Golub Foundation Graduate Scholarship and the Sandor Yelon Award. In addition, she was a member of the Dickinson Journal of International Law. She graduated, *magna cum laude*, from Elmira College in 1993 where she was Phi Beta Kappa and the recipient of the Iris Leadership award.

Ms. Carvell served as a legal intern for the Honorable John P. Callanan, Schuyler County Court, Watkins Glen, NY and in the Chemung County Public Defender’s Office in Elmira, NY.

Diane can be reached at:

Direct: (717) 234.1054

Fax: (717) 234.7710

E-mail: dcarvell@rawle.com