IN THE COURT OF APPEALS OF IOWA

No. 0-219 / 99-238
Filed August 30, 2000

NOVAK HEATING & AIR CONDITIONING,
Plaintiff-Appellee,

vs.

CARRIER CORPORATION,
Defendant-Appellant,

YELLOW FREIGHT SYSTEM and YOEMAN'S DISTRIBUTING,
Defendants.

FILED
AUG 30 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Linn County, Thomas M. Horan, Judge.

Manufacturer appeals a decision finding it jointly and severally liable for damage sustained by one of its units during delivery prior to its receipt by the unit's purchaser. **AFFIRMED.**

Webb L. Wassmer of Simmons, Perrine, Albright & Elwood, Cedar Rapids, for appellant.

No appearance for appellee.

Considered by Streit, P.J., and Vaitheswaran, J., and Hayden, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (1999).

HAYDEN, S.J.

This is a small claims appeal.

Novak Heating and Air Conditioning, Inc. (Novak) ordered a roof-top heat-cool unit from Carrier Corporation (Carrier) through Yeoman's Distributing Company (Yeoman's). Yeoman's is a distributor for Carrier. This sales transaction is reflected in Yeoman's exhibit No. 2, which is an invoice from Yeoman's to Novak dated April 16, 1998.

Yeoman's never had possession of this unit. This heat-cool unit was shipped directly from manufacturer Carrier to Novak in Cedar Rapids, Iowa. Yellow Freight Systems, Inc. (Yellow Freight) was the common carrier for transporting this unit to Novak. Yellow Freight picked the unit up at Carrier Corporation's dock. Novak picked this unit up at Yellow Freight's warehouse in Cedar Rapids on their truck.

The unit was not damaged while in the possession of Novak. The unit was packaged with wood pallets on top and bottom and surrounded by shrink wrap. The packing container was not removed until after the unit had been hoisted onto a roof of a building and set in place.

When the packaging material was removed, it was then discovered there had been damage to the air-conditioning unit. The condensing coil incurred major damage. At the time of trial, November 3, 1998, Novak had not yet repaired the unit but had estimated the cost of fixing it to be $3,450.75. On September 22, 1998, Novak sued the defendants in small claims court.

The small claims court dismissed Novak's claim against Yeoman's.

The small claims court, however, found and held Yellow Freight and Carrier chargeable with the damage to the unit. The small claims court also held Novak was in no position to prove where the damage occurred. The court determined Carrier and Yellow Freight were the two entities who had control of the merchandise after manufacture and prior to receipt by the buyer.

The small claims court entered judgment for Novak and against Yellow Freight and Carrier in the sum of $3,450.75.

Carrier appealed to the district court.

The district court reasoned, "similar to res ipsa loquitur, the burden shifted to each defendant to show lack of injury on their part. The evidence was clear the injury occurred either at the manufacturing plant or in transit. It was not error for the trial court to hold both liable for the damages incurred by Novak."

The district court concluded the facts and law supported the decision of the small claims court. The decision of the small claims court was affirmed by the district court.

Carrier applied to the Iowa Supreme Court for discretionary review. Discretionary review was ultimately granted and has been transferred to the Iowa Court of Appeals for decision.

Carrier claims the district court committed two errors in it's decision: (1) the district court ignored the fundamental principal of tort law Novak bore the burden of proving Carrier was negligent and such negligence proximately caused damage to Novak; (2) the district court ignored the express terms of Carrier's contract which provided Carrier's liability for damage ceased when Carrier placed the roof top heat-cool unit in the hands of Yellow Freight.

Our scope of review is for corrections of errors at law. Iowa R. App. P. 4. Neither Novak nor Yellow Freight participate in this appeal.

First, the small claims court, district court and this court on appeal, find Novak, the purchaser, did not cause the damage sustained to this roof-top heat-cool unit in question.

Carrier claims the district court's holding Carrier and Yellow Freight jointly and separately liable for the damage is contrary to law. We note in this respect, the district court held there was joint liability for the defendants Carrier and Yellow Freight. The district court further held:

> Similar to res ipsa loquitur, the burden shifted to each defendant to show lack of injury on their part. The evidence was clear that the injury occurred either at the manufacturing plant or in transit. It was not error for the trial court to hold both liable for damages incurred by Plaintiff [Novak].

Carrier claims the burden of proof did not shift to each defendant to show lack of injury on their part. Further, Novak bore the burden at all times to show one or both of the defendants were at fault and that fault proximately caused the damage.

In the case of *Brewster v. U.S.*, 542 N.W.2d 524, 530-31 (Iowa 1996), the Iowa Supreme Court did a thorough review and study of the res ipsa loquitur principal. The court noted the New Jersey case of *Rose v. Port of New York Authority*, 293 A. 2d 371, 373 (1972), which stated:

> Whether we refer to this rule as the rule of res ipsa loquitur or simply say that circumstances are such as to give rise to an inference that the defendant was negligent, is perhaps no great matter. Here the occurrence bespeaks negligence.

Id. at 531.

The *Rose* case was one of several cases throughout the United States that was discussed. In all of the state jurisdictions, only two states took a contrary position. *Brewster,* 542 N.W.2d at 531. We determine the circumstances in the instant case give rise to an inference one or both of the defendants were negligent. Here the damage to Novak's roof-top heat-air conditioning unit bespeaks negligence, and is the proximate cause for damages to Novak.

Section 433B(3) of The Restatement (Second) of Torts (1965) provides:

> Where the conduct of two or more actors is tortuous, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm.

The rationale for this rule is:

> the injustice of permitting proved wrongdoers, who among them have inflicted an injury upon the entirely innocent plaintiff, to escape liability merely because the nature of their conduct and the resulting harm has made it difficult or impossible to prove which of them has caused the harm.

Restatement (Second) of Torts, section 433B, comment f.

Having determined the circumstances are such as to give rise to an inference one or both of the defendants were negligent, the burden is upon each such defendant to prove that it has not caused the harm to Novak.

Neither Carrier, nor Yellow Freight, have carried their burden of proof to show that they respectively have not caused Novak's damage.

Carrier claims its contract excluded liability for any damage occurring after Carrier placed the unit in the hands of Yellow Freight.

Carrier cites no legal authority, case, or statute in support of this claim. We therefore consider it waived and do not address it. *See* Iowa R. App. P. 14(a)(3).

The district court's decision is affirmed in all respects.

AFFIRMED.

Vaitheswaran, J., concurs; Streit, P.J., dissents.

STREIT, J. (dissenting)

I respectfully dissent. Carrier Corporation appeals the district court's finding it was jointly and severally liable for damages sustained to an air conditioner prior to the purchaser's receipt of the unit. Carrier claims its contract with Yeoman's Distributing Company precludes its responsibility for damages. It also claims the district court improperly applied the doctrine of res ipsa loquitor. We should reverse.

In April 1998 Novak Heating and Air Conditioning Company, Inc., purchased a Carrier air conditioner unit from Yeoman's. The contract between Novak and Yeoman's provided all shipments and delivery would be F.O.B. (free on board) shipping point.

Yeoman's arranged for the air conditioner to be shipped by Yellow Freight System, Inc., directly from Carrier. Carrier's contract with Yeoman's provided for shipping, in which goods shipped from Carrier became the buyer's property upon delivery to the freight company. There is no evidence of any contractual relations between Carrier and Novak.

The shrink-wrapped air conditioner arrived in Cedar Rapids damaged. Repairs were estimated to cost over $3400.

Novak filed a small claims action against Carrier, Yellow Freight, and Yeoman's. The small claims court denied Novak's claim as to Yeoman's due to the contract terms. The court found Novak had sufficiently shown the damage was caused by either Carrier or Yellow Freight, or both of them. The court entered judgment against these two defendants.

Carrier appealed to the district court. The district court determined, "Similar to res ipsa loquitor, the burden shifted to each defendant to show lack of injury on their part." The court determined the small claims court had not erred in holding both Carrier and Yellow Freight liable for Novak's damages.

Negligence must be proved, and the mere fact an accident has occurred, with nothing more, is not evidence. *Brewster v. United States*, 542 N.W.2d 524, 528 (Iowa 1996). Negligence, however, is a fact and like any other fact, may be proved by circumstantial evidence. *Id.* The nature of the occurrence *alone* may be sufficient to prove the negligence. Thus, the doctrine of res ipsa loquitur may apply when the only facts are the occurrence and the injury. *Id.* at 526.

The *Brewster* court summarized the application of the doctrine:

> There must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.
>
> The second requirement--the accident is one such as in the ordinary course of things does not happen in the absence of negligence--is another way of stating a principle of circumstantial evidence. That principle requires that the event must be such that in the light of ordinary experience the event gives rise to an inference of negligence on someone's part. ...
>
> The purpose of the "under the management of defendant" requirement is "to link the defendant with the probability, already established, that the accident was negligently caused."

Id. at 528-529 (citation omitted).

It is clear Carrier could be found liable for any damages to the unit while it was in their possession under a doctrine similar to res ipsa—for such damages do not occur without negligence—but this was never shown. Novak never showed the unit was damaged while in Carrier's possession. "Failure to connect

the defendant with the negligent event defeats the application of res ipsa loquitur." *Id.* at 529.

There was no evidence showing the unit was damaged while Carrier had possession. If the evidence demonstrated the unit was damaged while in Carrier's control, the plaintiff would not be required to prove the negligent act that caused the damage—the damage speaks of negligence. However, the doctrine of res ipsa should not be used to shift a burden to several ***sequential*** suspects with them having the responsibility of proving their innocence. This case is best resolved by looking at the contracts entered into by the parties.

The concept of risk of loss denotes which party will pay for goods that are damaged. *See* Iowa Code §§ 554.2509, 554.2510. Risk of loss originates with the seller, but at some point in a transaction the risk shifts to the buyer. The question we must address is whether the risk of loss had shifted from the seller to the buyer under the facts of this case.

The parties to a contract may shift the risk of loss by a contractual provision. *Royal Zenith Corp. v. Citizens Publications, Inc.*, 179 N.W.2d 340, 344 (Iowa 1970). Section 554.2509(1) provides that where a contract requires the seller to ship the goods by carrier:

> a. if it does not require the seller to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (section 554.2505); but
>
> b. if it does require the seller to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery.

Here, the air conditioner unit was delivered F.O.B. shipping point from Carrier to Yeoman's, which means Carrier (the seller) bore the expense and risk of putting the unit into the possession of Yellow Freight (the carrier). *See* Iowa Code § 554.2319(1); *see also Rudy-Patrick Seed Co. v. Roseman,* 234 Iowa 597, 602-03, 13 N.W.2d 347, 349-50 (1944). Once the unit was placed with Yellow Freight, Carrier had no further risk of loss.

In addition, the agreement between Yeoman's and Novak was for delivery of the air conditioner unit F.O.B. shipping point. Under these terms, Yeoman's also had no risk of loss once the unit was placed with Yellow Freight.

We should reverse the decision of the district court finding Carrier jointly and severally liable with Yellow Freight for Novak's damages. Under the terms of the parties' contracts, Novak's only recovery would be against Yellow Freight. Yellow Freight has not appealed.