IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 02/24/11
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JANET MORO and DAVID MORO, wife and husband,	1 CA-CV 10-0353
	DEPARTMENT C
Plaintiffs/Appellants,	**MEMORANDUM DECISION**
v.	(Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)
GARY THOMAS and JANE DOE THOMAS, husband and wife; AMERISTEEL STRUCTURES, INC.; a Texas corporation,	
Defendants/Appellees.	

Appeal from the Superior Court in Yavapai County

Cause No. P1300CV20080590

The Honorable Kenton D. Jones, Judge

REVERSED AND REMANDED

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B R O W N, Judge

¶1 Janet and David Moro appeal the trial court's decision granting summary judgment in favor of defendants Gary Thomas and AmeriSteel Structures Incorporated ("AmeriSteel"). For the following reasons, we reverse and remand for further proceedings.

BACKGROUND

¶2 The Moros purchased a prefabricated barn from AmeriSteel. The sales contract provided that unless the Moros paid for AmeriSteel to erect the barn, unloading the materials was the Moros' responsibility. When they elected not to pay for the service, an AmeriSteel representative told them that the barn "would be very easy to unload, that it would only take a couple of people, and that [they] could do it very easily." When the barn materials were ready for shipment from Texas, employees of AmeriSteel "loaded and secured the bundles, comprising the entire prefabricated barn," on a semi-truck with a flatbed trailer provided by Armstrong Transportation ("Armstrong").

¶3 Armstrong delivered the barn materials to the Moros' horse property in Yavapai County on April 22, 2006. The loaded trailer contained steel beams, stall doors, and sheet metal panels. The panels were at the bottom of the load, bound

together by metal bands. There were two stacks of panels, located on each side of the middle of the trailer.[1]

¶4 Mr. Franco, the truck driver, removed the tie-down straps from the load and then assisted the Moros with unloading the materials. David handed the materials down to Franco and Janet, who stacked them on the ground. The wind had "started to pick up" and, rather than attempting to carry the entire heavy stack of sheet metal over to the ground, Janet climbed on the trailer to cut the metal bands which held the sheets together. According to David, he and the driver were going to take the "16 or 18-foot long pieces of metal down one at a time or two at a time."

¶5 While kneeling, Janet began cutting one of the bands on the driver's side stack when a gust of wind picked up a piece of sheet metal and hit her in the back, knocking her off the trailer and injuring her shoulder.[2] The piece that struck her was not part of the barn materials. When Janet called

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[1] According to the affidavit of the owner of AmeriSteel, the manufacturer of the metal sheet panels places a "cover sheet" on top of the bundles of sheeting to prevent damage to the actual barn materials. AmeriSteel obtains the sheets from the manufacturer "already bundled with the cover sheet on top."

[2] After Franco and David finished unloading the barn materials so that Franco could leave, the Moros traveled to the emergency room. Janet eventually had surgery and completed physical therapy to repair her injured shoulder.

AmeriSteel after the accident, she was told that the company uses extra sheet metal to protect the paint.

¶6 The Moros sued AmeriSteel,[3] alleging that it "negligently included with the load extraneous materials that were not properly identified, loaded, secured, stacked, and fastened thereby creating an unreasonably dangerous condition." The Moros further alleged that AmeriSteel "failed to provide adequate warnings, instructions or otherwise provide any notice" relating to the unsecured piece of material. AmeriSteel moved for summary judgment on the grounds that the alleged failure to strap the cover sheet was not a substantial factor in causing Janet's injury and the wind was an intervening and superseding cause of the injury. Following oral argument, the trial court ordered supplemental briefing on (1) whether AmeriSteel owed a duty to the Moros once the barn materials left its facility; (2) whether any federal or state requirements exist concerning common carriers' responsibility for securing their loads; and (3) what duty, if any, Armstrong owed to the Moros.

¶7 After considering the briefing, the court granted the motion, finding it was unnecessary to address AmeriSteel's argument that the wind was an "Act of God" or an intervening or superseding event. Instead, the court determined that even if

[3] Armstrong was later named as a defendant when the Moros filed an amended complaint.

AmeriSteel had placed the cover sheet on the trailer unsecured, "that situation should have been discovered and corrected by the trucking company before it was driven into Arizona in violation of Arizona law requiring secured loads." Thus, the court reasoned that AmeriSteel had nothing to do with the shipment once it was placed with Armstrong and that to the extent any duty was owed to the Moros once the load left Texas, that duty was "solely" Armstrong's. The Moros filed a timely appeal.

DISCUSSION

¶8 Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c)(1). We determine *de novo* whether the non-moving party established any genuine issues of material fact and whether the court properly applied the law. *Mousa v. Saba*, 222 Ariz. 581, 585, ¶ 15, 218 P.3d 1038, 1042 (App. 2009). We view the facts and the inferences to be drawn from those facts in the light most favorable to the party against whom summary judgment was entered. *Id.*

¶9 To establish a negligence claim, a plaintiff must prove four elements: "(1) a duty requiring the defendant to conform to a certain standard of care; (2) a breach by the defendant of that standard; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual

damages." *Gipson v. Kasey,* 214 Ariz. 141, 143, ¶ 9, 150 P.3d 228, 230 (2007). Duty is a question of law for the court to decide. *Markowitz v. Ariz. Parks Bd.*, 146 Ariz. 352, 354, 706 P.2d 364, 366 (1985), *superseded on other grounds by statute*, Ariz. Rev. Stat. ("A.R.S.") § 33-1551 (2007). Breach, causation, and damages due to the injury are usually factual matters to be decided by a jury. *Gipson*, 214 Ariz. at 143, ¶ 9, 150 P.3d at 230. Summary judgment is only appropriate if no reasonable juror could conclude that the standard of care was breached or that the injuries were proximately caused by the defendant's conduct. *Id.* at 143 n.1, ¶ 9, 150 P.3d at 230 n.1.

I. AmeriSteel's Duty

¶10 In the trial court, AmeriSteel did not argue absence of duty in its motion for summary judgment. In its supplemental brief, however, AmeriSteel asserted that no duty existed because the materials had been placed with Armstrong and AmeriSteel had no knowledge that would trigger a duty to warn the Moros. On appeal, AmeriSteel acknowledges that, as a distributor of prefabricated steel structures, it has a "limited" duty to warn of known dangerous conditions.

¶11 Duty is an "obligation, recognized by law, which requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm." *Markowitz*, 146 Ariz. at 354, 706 P.2d at 366. The

standard of care is defined as what the defendant must do, or must not do, to satisfy that duty. *Coburn v. City of Tucson*, 143 Ariz. 50, 52, 691 P.2d 1078, 1080 (1984). "Whether the defendant has met the standard of care——that is, whether there has been a breach of duty——is an issue of fact that turns on the specifics of the individual case." *Gipson,* 214 Ariz. at 143, ¶ 10, 150 P.3d at 230. In contrast, the "issue of duty is not a factual matter; it is a legal matter to be determined before the case-specific facts are considered." *Id.* at 145, ¶ 21, 150 P.3d at 232; *see also* 1 Dan B. Dobbs, *The Law of Torts* § 226, at 577 (2001) ("The most coherent way of using the term duty states a rule of law rather than an analysis of the facts of particular cases.").

¶12 In this case, the trial court did not specifically address the duty of care owed by AmeriSteel because the court essentially found that Armstrong assumed the duty, if any, at the time it accepted the materials for transportation. The court erred, however, in making this determination.

¶13 AmeriSteel functioned as a shipper when it loaded the materials on the truck furnished by Armstrong. A shipper does not extinguish its duty to exercise due care simply by using the services of a carrier to send its goods to the consumer. The predominant view regarding the duty of care in loading cargo is

discussed at length in *United States v. Savage Truck Line, Inc.*, 209 F.2d 442, 445 (4th Cir. 1953).

> 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. The "*Savage* rule," followed in several jurisdictions, supports the conclusion that AmeriSteel was not relieved of liability based solely on the fact that Armstrong transported the load. *See, e.g., Alitalia v. Arrow Trucking Co.*, 977 F.Supp. 973, 984 (D. Ariz. 1997); *Decker v. New England Pub. Warehouse, Inc.*, 749 A.2d 762, 766 (Me. 2000).

¶14 Additionally, we find the trial court's reliance on the Federal Motor Carrier Safety Regulations and an Arizona transportation statute misplaced. The purpose of these regulations appears to be primarily directed at ensuring the safety of those traveling the highways. *See* 49 C.F.R. § 393.1 (West 2011); A.R.S. § 28-1098 (Supp. 2010). Thus, if the injury in this case had occurred because a piece of unsecured sheet metal fell off the truck while it traveled on the highway, these transporting regulations could be relevant in determining the duty of care. But the injury to Janet, on the facts before us, had nothing to do with the manner in which the load was

transported. Stated differently, this case does not involve any allegation of improper transporting; instead, the claims are based on negligent loading and failure to warn. Thus, any duty of care owed by Armstrong to the Moros is separate or in addition to the duty owed the Moros by AmeriSteel. *See Decker*, 749 A.2d at 766 (noting that the "*Savage* rule does not absolve shippers from all responsibility as they bear the onus when cargo has been loaded improperly and [the] defect is latent."); *see also* A.R.S. § 12-2506(B) (2003) ("In assessing percentages of fault the trier of fact shall consider the fault of all persons who contributed to the alleged injury . . . regardless of whether the person was, or could have been, named as a party to the suit.").

¶15 Based on the *Savage* rule, as well as the contractual relationship between AmeriSteel and the Moros, we hold that AmeriSteel owed a duty to avoid creating an unreasonable risk of harm to the Moros by loading the trailer in a reasonably safe manner. *See Gipson*, 214 Ariz. at 145 n.3, ¶ 18, 150 P.3d at 232 n.3 (relationship between the parties may help to identify and define duties of care). Additionally, to the extent it knew or should have known that any of the loaded items constituted a safety hazard, AmeriSteel had a duty to warn those responsible for unloading the materials. *See, e.g.*, *Central Steel Tube Co. v. Herzog*, 203 F.2d 544, 547 (8th Cir. 1953) (finding that

evidence was sufficient to support that a negligently packed grain swather caused an injury during unloading when a lever was "in the nature of a spring-gun" without warning).

II. Breach

¶16 Although the trial court did not address breach of the standard of care, we may affirm the grant of summary judgment for any reason that supports the court's ruling. *Hawkins v. State*, 183 Ariz. 100, 103, 900 P.2d 1236, 1239 (App. 1995). A breach of care typically cannot be presumed "from the mere fact that an accident has occurred or that an injury as been sustained." *Nieman v. Jacobs*, 87 Ariz. 44, 47, 347 P.2d 702, 704 (1959). Foreseeability is not a factor to be considered by courts in relation to duty, but it often determines whether a defendant "acted reasonably under the circumstances or proximately caused injury to a particular plaintiff." *Gipson*, 214 Ariz. at 144, ¶¶ 15-16, 150 P.3d at 231. "Such factual inquiries are reserved for the jury." *Id.* at ¶ 16; *see also* Dan B. Dobbs, Robert E. Keeton, & David G. Owen, *Prosser and Keeton on Torts* § 45, at 321 (5th ed. 1984) ("[I]n any case where there might be a reasonable difference of opinion as to the foreseeability of a particular risk, the reasonableness of the defendant's conduct with respect to it, or the normal character of an intervening cause, the question is for the jury, subject

of course to suitable instructions from the court . . . .") (footnote omitted).

¶17 AmeriSteel contends that the Moros offered no evidence to establish that AmeriSteel knew or had reason to know of any "danger present in the pre-packaged materials," including the "purportedly loose cover sheet." Rather, AmeriSteel asserts that it "merely took the pre-packaged bundle from its warehouse and placed it into Armstrong's care for transit." These assertions, however, viewed in the light most favorable to the Moros, are not supported by the limited record before us.

¶18 There is no evidence as to what actually happened regarding the loading of the truck, except that employees of AmeriSteel loaded and secured all the materials. In his affidavit, Thomas made several avowals as to the standard practices of AmeriSteel. But he made no assertions that he was aware of how these particular materials were loaded. Moreover, AmeriSteel asserted that, for purposes of the summary judgment motion, the issue of whether AmeriSteel failed to secure the cover sheet, even though a disputed fact, was immaterial. The trial court acknowledged this when it assumed that the cover sheet was unsecured.

¶19 The Moros alleged that breach occurred when AmeriSteel failed to band the cover sheet with the other metal sheets and failed to warn them of the unsecured material. Janet testified

at her deposition that she was the one who cut the metal bands around the sheets and that she only climbed on the truck one time. She stated she was cutting the first stack on the driver's side when she was struck by the cover sheet. She also stated she would have been more careful when the wind increased had she possessed any knowledge that there was unsecured material on the trailer. She added, "Why didn't they tell me about the sheet metal, that there would be loose parts? They never told me that."[4] Based on these facts, and given that the issue of breach was not briefed by the parties in the summary judgment motion, we decline to affirm summary judgment for AmeriSteel on the issue of whether it breached the standard of care.

III. Causation

¶20 Similarly, the trial court did not address causation, except for its finding that based on Armstrong's "failure to secure the load as required by law," Janet's "injuries cannot be said to be proximate to the conduct of AmeriSteel." On appeal, AmeriSteel argues that it had no duty to warn or protect the Moros from the wind, which was an "unforeseeable act of God." It asserts further that the gust of wind in this case was an

[4] According to Franco, all materials on the trailer were securely bundled with metal bands. He also avowed that prior to Janet's injury, the wind picked up one of the pieces of sheet metal, hitting him "slightly in the head" and knocking off his hat. Janet testified she had no knowledge of this incident.

intervening, superseding cause that relieved it of liability. We decline to affirm the summary judgment ruling based on these grounds.

¶21 A proximate cause is one that produces an injury in a natural and continuous sequence that would not have occurred without it. *Cent. Alarm of Tucson v. Ganem*, 116 Ariz. 74, 76, 567 P.2d 1203, 1205 (App. 1977). In contrast, an intervening cause is an event that occurs between the defendant's original act of negligence and the final result. *Robertson v. Sixpence Inns of Am., Inc.,* 163 Ariz. 539, 546, 789 P.2d 1040, 1047 (1990). An intervening cause becomes a superseding cause relieving the defendant of liability only if it was unforeseeable and extraordinary. *Id.* An intervening cause is not a superseding cause if the defendant's negligence created a risk that the particular harm would occur. *State v. Slover*, 220 Ariz. 239, 244, ¶ 11, 204 P.3d 1088, 1093 (App. 2009); *Parness v. City of Tempe*, 123 Ariz. 460, 464, 600 P.2d 764, 768 (App. 1979).

¶22 Based on the limited record before us, we cannot conclude, as a matter of law, that the wind was unforeseeable and extraordinary. The only evidence on the matter comes from Franco, who avowed it was a windy day, and the Moros, who both said that the wind was starting to pick up while they were unloading. When reasonable persons can differ and material

facts are in dispute, deciding the facts must be left to a fact-finder and not decided as a matter of law. *Markowitz*, 146 Ariz. at 357-58, 706 P.2d at 369-70. We find that to be the case here. "Defendant's act need not have been a 'large' or 'abundant' cause of the final result; there is liability if the result would not have occurred but for defendant's conduct, even if that conduct contributed 'only a little' to plaintiff's injuries." *Ontiveros v. Borak*, 136 Ariz. 500, 505, 667 P.2d 200, 205 (1983) (citation omitted). It may be that further discovery will show that AmeriSteel's conduct contributed even less than "only a little" to the injury here, but we cannot decide that here as a matter of law under our standard of review. *See Knauss v. DND Neffson Co*., 192 Ariz. 192, 197, 963 P.2d 271, 276 (App. 1997) (noting that "legal issues relating to breach of duty and causation are best left for initial consideration and determination by the trial court, after the parties have marshaled and presented all relevant facts").

CONCLUSION

¶23 We hold that AmeriSteel owed the Moros a duty of reasonable care, including a duty to warn of known dangers. As to the elements of breach and proximate cause, on this record, genuine issues of material fact preclude entry of summary judgment. Accordingly, we reverse the trial court's decision and remand for further proceedings.

/s/
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MICHAEL J. BROWN, Judge

CONCURRING:

/s/
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DANIEL A. BARKER, Presiding Judge

/s/
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MARGARET H. DOWNIE, Judge