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Robert Eisenstaedt v. Sears Roebuck Co. and Otis Elevator : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

ROBERT EISENSTAEDT, Plaintiff/Appellee, vs. SEARS ROEBUCK CO., and OTIS ELEVATOR, Defendants/Appellant.	Case No.: 900135 CA Priority Number: 16

REPLY BRIEF OF APPELLANT OTIS ELEVATOR

Appeal from the denial of Motions for New Trial, JNOV, or Remittitur
Third Judicial District Court, Salt Lake County
The Honorable Frank G. Noel

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TABLE OF CONTENTS

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Appellant Otis Elevator files this Reply Brief in response to Eisenstaedt's Brief.

1. <u>The Jury Disregarded The Overwhelming Medical Testimony Against Mr. Eisenstaedt</u>.

The medical testimony produced at trial was manifestly and overwhelmingly against Mr. Eisenstaedt. (Appellant's Brief, pp. 8-13.) Dr. Reichert, Dr. Duerksen and Dr. Provost all concluded and testified that they could find nothing wrong with Mr. Eisenstaedt's arm. In Dr. Provost's words, Eisenstaedt's alleged injury was "no big deal." (Tr. p. 274.) Dr. Provost went even further, testifying that Mr. Eisenstaedt harbored an "ulterior purpose" in pursuing the claims against Otis Elevator. (Tr. p. 277.) That ulterior purpose, according to

Dr. Provost, was likely to achieve "some secondary gain or something." Id.

Eisenstaedt's responding argument to the overwhelming medical testimony is to assert: "that is not what the jury heard." (Eisenstaedt Brief, p. 19.) Eisenstaedt's response proves the precise point. By "not hearing" the testimony the jury "disregarded competent evidence", Bennion v. LeGrand Johnson Const., 701 P.2d 1078, 1083 (1985) and thereby substantially fulfills the criteria for a new trial.

Moreover, Eisenstaedt attempts to bolster his case by referring to Dr. Stream and Dr. Fishburn. (See Eisenstaedt Brief, pp. 4, 6, 20). However, Dr. Stream and Dr. Fishburn did not testify at trial and gave no evidence for or against Mr. Eisenstaedt. The only physicians who appeared, Dr. Duerksen, Dr. Reichert and Dr. Provost, uniformly testified that Mr. Eisenstaedt's claims of nerve damage and severe injury were supported by medical evidence. Eisenstaedt's back-door admission that the jury "did not hear" the physician's testimony supports Otis Elevator's arguments for a new trial.

2. **Don Vernon's Examination was Restricted by DeBry & Associates.**

Mr. Eisenstaedt refers to testimony of Don Vernon, a physical therapist, in an attempt to marshall

evidence to support the jury's verdict. (Eisenstaedt Brief, p. 7.) Vernon was hired by DeBry & Associates to examine the plaintiff. Mr. Vernon testified that his tests indicated a strength loss in Mr. Eisenstaedt's left arm. However, he admitted that his examination of Eisenstaedt was specifically restricted by DeBry & Associates. During examination regarding the plaintiff's left arm, he was asked:

> Q: Would you expect to see some atrophy based upon your findings here?
>
> A: Possibly. I don't know when the injury occurred, if it was a recent injury. I don't know exactly when his injury occurred. All I know is he told me he had been injured. If it occurred within three days, a week, the atrophy would certainly be less than if it were four to five months or years.
>
> Q: Let me tell you: injury in this case allegedly occurred on April 9, 1986, or two years before you tested him. At that point would you expect to some atrophy to correspond with the test?
>
> A: I probably would.
>
> Q: But you didn't see any atrophy.
>
> A: I didn't measure for atrophy.
>
> Q: You weren't asked to measure?
>
> A: I was asked to measure for strength.
>
> Q: Mr. DeBry's firm didn't ask you to measure for atrophy?
>
> A: That's correct.

(Trial Transcript, p. 134).

Q: Did you notice any atrophy in Mr. Eisenstaedt's arm?

A: No.

Q: Would you call these findings significant?

A: Yes.

The Court: These findings meaning?

Q: On August 8, 1988 would you find those significant?

A: Yes.

Q: Would you normally expect to see some atrophy?

A: If I was asked to measure for atrophy.

(Trial Transcript, p. 133).

Interestingly, Mr. DeBry's firm requested Mr. Vernon to conduct strength tests but not to measure Eisenstaedt's arm to determine if there was corresponding atrophy. However, the undisputed truth was revealed by Dr. Provost's testimony: there was no forearm atrophy. (Tr. p. 272.) If Eisenstaedt's arm strength had actually been reduced, Dr. Provost would expect to see significant atrophy. (Tr. p. 271.) Mr. Vernon agreed. (Tr. p. 134.) The lack of atrophy led Dr. Provost to conclude that Mr. Eisenstaedt was manipulating the strength tests. (Tr. p. 272.) The attempts to manipulate Mr. Vernon's examination gives some indication concerning the lack of medical evidence

to support Mr. Eisenstaedt.

3. The Medical Evidence Corresponded With Mr. Schott's Testimony.

Eisenstaedt argues that Mr. Schott testified the balanced beam detector may have malfunctioned if Eisenstaedt was taken at his word. However, Eisenstaedt neglected to reveal Mr. Schott's full testimony. Even if there was such a malfunction, according to Mr. Schott, the balanced beam detector would not affect the elevator door speed. The door speed was completely safe. (Tr. at 175.) Thus, even if there was a balanced beam detector malfunction, the elevator door speed would not be adversely affected.

Mr. Schott's testimony tightly corresponded with the medical testimony. Mr. Eisenstaedt did not receive a blow to his arm sufficient to produce any evidence of injury. The medical testimony was uniformly against Mr. Eisenstaedt on this issue. (Appellant's Brief, pp. 8-12.) Accordingly, there was complete and consistent testimony by Mr. Schott and Dr. Duerksen, Dr. Reichert and Dr. Provost.

4. The Evidence Does Not Support The Verdict.

The formidable testimony of Mr. Schott, Mr. Anderson, Ms. Hurtado, Mr. Joseph, Dr. Reichert, Dr. Duerksen, and Dr. Provost, as shown in the Appellant's Brief, stands in stark contrast to the testimony of Don Vernon and Mr. Eisenstaedt. Eisenstaedt's testimony that

he was in a Nazi concentration camp likely made him a sympathetic figure to the jury. (Tr. p. 24.) Nevertheless, the natural sympathy for him is not sufficient to overcome the substantial, competent evidence against him. In the end, his own physician did not trust him. (Tr. p. 277.) Accordingly, Eisenstaedt's claim that this appeal is frivolous (Eisenstaedt's Brief, p. 29) is completely unwarranted. In our system of law, a jury's verdict is not sacred or sacrosanct. Mistakes are made and competent evidence, on occasion, is ignored. Further, the very nature of the appeal, taken under Rule of Civil Procedure 59A(5) and (6) requires Otis to deal with the evidence at trial. Eisenstaedt's criticism that the appeal is too fact intensive (Eisenstaedt Brief, p. 30) is inappropriate.

Based upon a review of the case, it is apparent that the jury disregarded competent evidence and made an award that was excessive and manifestly against the weight of evidence. The jury failed to take into account proven facts thereby warranting a new trial.

CONCLUSION

On the basis of the foregoing reasons, Otis Elevator respectfully requests a new trial.

DATED this 5 day of September, 1990.

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Attorneys for Defendants/ Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed, first class, postage prepaid on this 5th day of September, 1990, to the following counsel of record:

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