

NEGLIGENCE**Assumption of Risk****Dentist injured right hand
moving an appliance at Sears****MEDIATED
SETTLEMENT \$350,000****CASE** Jozsef Linszky and Andrea Linszky v. Sears,
Roebuck & Co., d/b/a Sears Retail Outlet
Store, and Does 1 to 25, No. 02-040802**COURT** Superior Court of Alameda County,
Alameda, CA**JUDGE** Joan Cartwright**DATE** 3/14/2005**PLAINTIFF****ATTORNEY(S)** Cynthia McGuinn (lead), Law Offices of
William L. Veen, San Francisco, CA
Anthony L. Label, Law Offices of William
L. Veen, San Francisco, CA**DEFENSE****ATTORNEY(S)** Jeffrey W. Allen, Van De Poel & Levy,
Walnut Creek, CA
David D. Kim, Van De Poel & Levy,
Walnut Creek, CA
Kara A. Smith, Van De Poel & Levy,
Walnut Creek, CA

FACTS & ALLEGATIONS On May 21, 2001, plaintiff Jozsef Linszky and his wife, Andrea, rented a 14-foot U-Haul truck and went to a Sears store in San Leandro, where they were to pick up seven appliances they had purchased two days earlier, including a trash compactor.

A Sears employee who was loading the trash compactor into Linszky's nearly full U-Haul truck requested Linszky to assist him in lifting the trash compactor. While doing so, Linszky lacerated his right palm and pinky finger.

Linszky sued Sears, Roebuck & Co. He claimed that the store was negligent in failing to warn him that the trash compactor it sold had a damaged side which concealed a ragged piece of metal. He also claimed that the Sears employee loading the trash compactor and directing Linszky to assist him was negligent in how he conducted the loading procedure and in requesting assistance from a customer instead of locating another professional Sears loader. Linszky contended that the conduct of the Sears employee fell below the standard of care of professional loaders when he dropped his end of the trash compactor, causing Linszky to lose his grip on the compactor. Linszky also acknowledged that he was, to some degree, comparatively negligent in the occurrence of his injuries.

Sears contended that it had no legal responsibility for Linszky's injuries. It contended that Linszky himself was solely

responsible for his injuries because he attempted to "shimmy" the trash compactor into place in the U-Haul where it could not fit, and as a result he hurt himself.

Sears' defenses included assumption of risk, comparative negligence, and failure to mitigate damages. The defense argued that Linszky voluntarily undertook to assist in loading the appliances and even controlled a significant portion of the loading, thereby assuming the risk associated with the loading. Sears further contended that Linszky was comparatively negligent for insisting on loading everything into his U-Haul truck (which was already partially filled with other merchandise before he arrived at the Sears outlet store), for refusing to make a second trip when advised by a Sears employee to do so, and for unilaterally attempting to force the trash compactor to fit by shimmying it back and forth.

INJURIES/DAMAGES *finger, laceration; hand; lacerations; nerve damage, ulnar nerve*

As a result of the accident, Linszky suffered a 4-cm cut on his lateral right (dominant) palm just above the right pinky. The laceration severed the ulnar digital nerve, resulting in pain and numbness in Linszky's right pinky. He underwent micro-surgery on May 29, 2001, to repair (re-connect) the injured nerve. Linszky was advised to refrain from using the finger for at least six weeks up to three months, to avoid compromising the surgical result.

The defense contended that despite his doctor's advice, Linszky performed general dentistry in his office within a month of the May 29, 2001, surgery. He continued to practice dentistry following the accident for about a year until terminating his practice altogether on or about May 24, 2002 (one year post-injury), bringing into question whether or not Linszky failed to mitigate his damages.

Linszky disputed the claim that he failed to follow his doctor's advice and contended that his ongoing dental work was in areas not affected by his injury, and that the work was performed in order to mitigate his damages.

On March 18, 2003, Linszky underwent a second micro-surgery to repair the damaged ulnar nerve. Despite this second surgery, he claimed that he continued to have some numbness and loss of grip strength, which he argued forced him to close down his dental practice completely.

Linszky's experts were of the opinion that his ability to engage in his dental practice was diminished as a result of the accident. In addition to claims for medical specials and loss wages, Linszky sought substantial claims for loss of future earnings capacity. He contended that he had evidence of special damage exposure in the range of \$665,000 to \$1.4 million, prior to any reduction for his comparative negligence.

Sears disputed Linszky's damages claims. Based on a defense medical examination, while Linszky had some persistent numbness in the small right finger and mild decreased grip strength, Linszky had no pain with joint motion and no evidence of a flexor or extensor tendon injury. In short, the doctor who performed the examination concluded that Linszky should be able to perform any and all activities required in the practice of den-

tistry, despite Linszky's assertions to the contrary.

Linszky claimed damages in the range of \$3 million to \$4 million.

Linszky's wife Andrea filed a loss of consortium claim.

RESULT The parties settled prior to trial for \$350,000.

INSURER(S) Liberty Mutual Insurance Co. for Sears, Roebuck & Co.

PLAINTIFF EXPERT(S) Anthony Schilling, M.D., orthopedic surgery, Pittsburgh, CA (would have testified one of two treating hand surgeons)
Robert W. Johnson, M.B.A., economics, Los Altos, CA (would have testified)
Lisa Broering, OTR/CHT, hand function, (would have testified)
Thomas P. Yankowski, M.S., vocational rehabilitation, (would have testified)
Scott Corbin, M.D., dentistry/odontology, (would have testified)

DEFENSE EXPERT(S) Glenn B. Pfeffer, M.D., orthopedics, San Francisco, CA (would have testified)
Alan Gluskin, M.D., endodontics, San Francisco, CA (would have testified)
Laurence J. Deneen, Ph.D., vocational rehabilitation, Oakland/Sacramento, CA (would have testified)
Mark A. Cohen, Ph.D., economics, Lafayette, CA (would have testified)
Jennifer LeFever, C.H.T., hand function, Cupertino, CA (would have testified)
Marc J. Rabideaux, physical therapy, San Francisco, CA (would have testified)

-Amy Bourne

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