

After Watching Surveillance Video, Jury Awards Plaintiffs Only \$11,600

BURLINGTON - On January 20, 2000 Caleb Hurst-Hiller was operating a Nissan Pathfinder west on Route 11 between Springfield and Londonderry, with three college friends in the car, all on their way to a ski vacation. At the same time, Berge Heede was heading east in a Lincoln Town Car. His wife, Sandra, was in the passenger seat, and the Heedes were returning home after having dinner in Londonderry. Route 11 was partially obscured by snow as it had been snowing on and off throughout the day. As the cars approached each other, Hurst-Hiller moved to the right, encountered slush, lost control of his vehicle, fishtailed, crossed the double yellow line into the opposite travel lane and collided with the Heedes' vehicle. Both vehicles were totaled.

None of the occupants of the Pathfinder was injured, but both the Heedes were taken by ambulance to Springfield Hospital. Sandra was treated for multiple contusions to her chest, a fractured left foot, and facial injuries. Berge was treated for contusions to the chest wall, right knee, right arm and right foot. He also claimed severe and permanent injuries to his left testicle (including constant pain which made it difficult to stand from a seated position) and plantar fasciitis of the left foot. After the accident, both complained of back problems. Although the ER records did not mention back pain, Sandra complained of debilitating back pain a couple of days after the accident. Berge also claimed back pain which impacted his lifestyle. The Heedes had been very active prior to the accident, enjoying golf, skiing and gardening. After the accident, Sandra claimed to be unable to ski, golf or garden and Berge said he could not do much of anything without some degree of pain.

At trial, defense lawyer Sam Angel pointed out that Sandra had preexisting back problems, including a spinal fusion in 1969, and an operation to repair a herniated disk and to perform a partial takedown of the fused vertebrae in 1983. Although Sandra had chronic degenerative osteoarthritis in her back, she testified that she had been relatively free of back pain from 1983 to the time of the accident, at least such that she could enjoy golfing, skiing, gardening and the like. Sandra also had a degenerative condition to her right knee and was already scheduled to have a knee replacement operation in May, 2000 (which she did). Berge also had a preexisting condition affecting his left groin, including a hernia repair about 40 years earlier and a slight, intermittent ache in his groin. He also testified that he had mild discomfort in his back, but neither condition limited his activity.

Both plaintiffs testified that the accident resulted in such a drastic change of lifestyle that they were no longer as active or social as they had been, and they became largely house-bound. About a year later, citing an inability to enjoy Vermont any more, the Heedes moved to Hilton Head, South Carolina. In January of 2003, the Heedes filed in federal court against Hurst-Hiller and Gypsy Rose,

Inc., the owner of the Nissan. (The son of the owner of the corporation was one of the passengers in the car, but the corporation was later dismissed from the suit.)

At trial before Magistrate Jerome Niedermeier, plaintiffs offered testimony from Dr. James R. Dickson of Portchester, NY, who conducted an IME and gave his opinion that Sandra Heede was completely disabled and that Berge Heede had suffered permanent injuries to his left groin and back all as a result of the accident. He further opined that Sandra would require a complicated future anterior/posterior back operation to relieve her symptoms, and that the etiology of Berge's groin pain was not resolved, thus requiring both diagnostic and therapeutic future medical expenses. The back operation for Sandra was estimated to cost over \$200,000. Additionally, Dr. Dickson declared that Sandra was not able to complete the physical therapy for her right knee because of pain in her back caused by the accident; as a result of the incomplete therapy, Sandra would have to have a second knee replacement surgery. Dr. Dixon also concluded that as a result of the accident, Berge had suffered a 6% impairment of the whole person.

Angel hired Mark Bucksbaum, MD, of Rutland to conduct an IME. Bucksbaum believed that Sandra had a 26% impairment to the whole person, of which 23% preexisted the accident. Of the 3% impairment existing after the accident, 1 1/2% was due to a "hard sit" she experienced in January 2004, which resulted in a 20% compression fracture to one of her vertebra.

Angel also hired Jason Mullins of Claims Verification Incorporated to conduct surveillance on the plaintiffs in South Carolina. From the investigation, the defense obtained more than four hours of videotape over 10 days, which was edited to 31 minutes for trial purposes. The video showed Berge playing golf and getting in and out of his car in a fluid manner and showed Sandra walking in a fluid manner in flip flops without a supporting knee brace. Another section showed her bending over numerous times at the waist in excess of 90 degrees, as well as planting plants on her hands and knees.

At the time of an Early Neutral Evalua-

tion with Jim Spink on September 22, 2003, the Heedes' demand was \$850,000. Eventually the demand came down to \$500,000, but Angel never offered more than \$65,000. On the eve of trial, the defendants admitted liability, so the case proceeded on the issue of damages alone. Plaintiffs argued that the jury should award \$9,373.59 in past medicals for Sandra, \$300,000 for future medicals, \$14,422.78 in past medicals for Berge, \$24,000 for future bills, as well as compensatory damages for pain and suffering and diminution in the quality of life.

Prior to final jury selection, a member of the panel reported to Judge Niedermeier that she had seen Sandra Heede in the lobby walking normally, then saw her approach the courtroom with a noticeable limp. Niedermeier decided it would be appropriate to excuse the juror.

The trial lasted four days. Plaintiffs' counsel argued that the accident was a catastrophic event that not only caused physical injuries but also rearranged the Heedes' lifestyle. They called as their first witnesses the State Trooper at the scene, who testified as to the severity of the accident. Both plaintiffs testified about the impact of the injuries on their lives. Two friends of the plaintiffs testified as to the extent of plaintiffs' activities before and after the accident, and Dr. Dickson offered his opinion about the injuries themselves.

Defense counsel Angel argued that while the accident was horrific, it was not the cause of all the problems claimed by plaintiffs. Witnesses for the defense included the defendant driver, the private investigator, and Dr. Bucksbaum. Angel pointed out that only 3 months after the accident, the couple went on a two-week Caribbean cruise, and that 13 months after the accident Sandra performed better on a cardiopulmonary endurance treadmill test than she had four years prior to the accident.

The jury deliberated for hours, returning at 8 p.m. on April 19 with a verdict in the amount of \$6,157.44 for Sandra (\$5,157.44 in past medicals plus \$1,000 for pain & suffering) and \$5,443.45 for Mr. Heede (all past medicals) for a total verdict of \$11,600.89. The plaintiffs did not appeal.

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