

THURSDAY, MARCH 27, 2014

DAILY REPORT

A SMART READ FOR SMART READERS

An ALM Publication

Parking lot pipe hump leads to \$840K verdict

DEKALB JURY 'very sympathetic' to woman who injured elbow in fall 'because she never completely recovered,' lawyer says

GREG LAND | gland@alm.com

A WOMAN WHO shattered her elbow when she tripped over an asphalt hump in the parking lot of a Decatur condominium complex won more than \$840,000 after a 1½ day trial in DeKalb County State Court.

Jason Schneider, who represents plaintiff Joan Bither, said the defense turned down his side's last offer to settle the case for \$350,000 prior to trial, countering with a \$100,000 offer that his client refused.

"The jury awarded everything we asked for, right down to the penny," Schneider said.

Co-counsel Robert Hammers Jr., a member of Schneider's Atlanta practice, said Bither, now 70, never regained the full use of her dominant left arm despite months of post-surgery therapy.

"The jury was very sympathetic to her because she never completely recovered," said Hammers. "The elbow began to work again, but it affected her whole arm and shoulder."



REBECCA BREYER

Robert Hammers, left, and Jason Schneider said the defendant Decatur condominium complex turned down a pretrial settlement offer of \$350,000.

Dennis, Cory, Porter & Smith partner George Connell Jr., who represents Berkeley Square Condominium Association, did not respond to requests for comment.

Bither was in the process of relocating from Vero Beach, Fla., to Boston in February 2011, Schneider explained, when she and her sister stopped to spend

a few days with Bither's niece in Decatur.

"They pulled into a parking spot in front of the condo complex, went down a flight of stairs to her niece's unit" and stayed there for four days, Schneider said.

Hammers said that, while the women left the unit occasionally,

they used a staircase that led to another portion of the parking lot away from the area where the accident later occurred, and were thus unfamiliar with the asphalt hump.

On the last day of the women's visit, Schneider said, they emerged to shop for supplies for their trip to Boston, and when they returned they parked in the niece's parking space.

What Bither didn't know, he said, was that the Lawrenceville Highway complex had a storm-water runoff problem that caused flooding issues with lower-level units.



LAW OFFICES OF JASON T. SCHNEIDER

The plaintiff tripped over this asphalt-covered pipe in the condo's parking lot, her lawyers said.

"Instead of just grading it, their first attempt was running a large drainpipe through the parking lot, and covering it with asphalt," Schneider said. "The people who lived there knew about it, but it wasn't painted or anything. It was hazardous."

"Joan took one step out of the car, tripped, and shattered her left elbow," he said.

Doctors at DeKalb Medical Center diagnosed Bither with a radial head fracture of her left elbow, and referred her to Resurgens

Orthopaedics. The doctor there concluded she needed a replacement radial head, and performed the surgery a week after the incident.

Bither spent a few weeks in Georgia, then returned to Boston.

Bither brought a personal injury suit against the Berkeley Square Condominium Association in July 2012, claiming that the complex had created a "dangerous static condition" by "failing to perform repairs in a non-negligent manner" and failing to protect [Bither] from "hidden perils." She sought more than \$45,000 in medical expenses, plus damages for "physical and mental pain and suffering, inconvenience, inability to labor" and "inability to enjoy a normal life."

Hammers said there was no mediation, and the case went to trial March 11 before DeKalb County State Court Judge Wayne Purdom.

The lawyers said the only expert testimony introduced was that of Bither's treating surgeon at Resurgens, Lawrence Bircoll. The defense called the representative for the condo association, they said.

The defense portion of the pre-trial order said that the hump Bither tripped over "was a static condition and open and obvious," and that Bither's own negligence contributed to her fall. The filing said the defense would also rely on the "last clear chance doctrine," which allows a defendant to counter a negligence claim by a plaintiff who, by the exercise of reasonable vigilance, could have avoided the hazard.

"The defendant's case was that there was no way she could have been there for four days and not have known about it, and that she was responsible to look where she was going," Schneider said.

"George Connell was a gentleman, and he fought hard trying to present the view he thought the jury should have," said Hammers. "His defense was clear: 'If she was just paying attention there's no way this would occur. And if an accident does happen, it's not our fault.'"

"We argued that an asphalt pipe should never have been run through the parking lot, and that if it was so essential, it should have been painted so people could see it," Schneider said.

Schneider said he presented mortality tables showing that Bither had an estimated 17 years of life left.

At closing, he suggested a number of ways the jury could calculate damages, including a per diem method calculated on awarding \$8 an hour for 16 hours of each day she would have to live with her injuries, plus her medical expenses.

After 2½ hours of deliberations, the jury awarded \$840,828. 