



THE CITY OF KEY WEST

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October 5, 2018 (Rev. 10/22/18)

To: The City Commission for the City of Key West

From: Ron Ramsingh, Chief Assistant City Attorney

RE: Settlement of Sandra & Giacomo Avanzato vs. City of Key West 2017-CA-716-K

Judge: Bonnie Helms

Executive Summary

Ms. Avanzato (Plaintiff) is a 31-year-old married mother of a 1-year old daughter. Plaintiff has a high school education and holds a practitioner license in cosmetology. Plaintiff was born in PA and grew up in NC and now lives in Woodbine NJ with her husband Giacomo who is a sheriff's detention deputy. Giacomo has filed a loss of consortium claim¹. Plaintiffs filed this complaint in circuit court in September, 2017 and the city was served with said complaint in November, 2017. Plaintiff reports as being a hairdresser for much of her working life. She has worked at Dee's Hair Salon in Sea Isle City, NJ, as well as being an instructor part time at Shore Beauty School and Jolie Beauty Academy; both in Egg Harbor Township, NJ. Plaintiff claims that since this accident in 2015, she has lost income and has cut down her teaching opportunities. She states that she no longer works at Dee's because of the need for her to be on her feet for long periods. For a short time after leaving Dee's, Plaintiff worked as a bookkeeper for her husband's family's pizzeria, where Giacomo also worked until he recently took a job at the sheriff's office.

¹ Loss of Consortium claims can be filed by spouses or others who "give up the companionship or services" of the injured person due to the alleged negligence of another.

Prior Medicals

Plaintiff was deposed by the undersigned on 5/17/18. Plaintiff claims to have been an avid runner prior to this 1/14/15 trip and fall on a city sidewalk. She indicated that in 2009, she fractured her 4th and 5th metatarsal bone in her right foot while training for a marathon². I reviewed her medical records and it appears that Dr. Carey in NJ treated her for the fracture with a CAM boot and not much else. Plaintiff denied any other surgeries, ER visits or hospital stays, however, Dr. Daniel's medical reports indicates a prior history of a fractured L femur.

Accident History

Plaintiff claims that she came to the FL Keys for 1 week to visit her cousin and aunt who live in Little Torch Key. The Plaintiffs were staying with their family. On 1/14/15, they were in Key West walking around old town getting a tour from Plaintiff's cousin. They parked their car facing north on the east side of the 200 block of Elizabeth St., between the intersection of Dey Street and Caroline Street. Plaintiffs report that they had lunch, but did not drink any alcohol. Around sunset, they were walking south on the east sidewalk back to the car. They were walking 3 across; shoulder to shoulder. Plaintiff was on the right side-closest to the curb. Plaintiff stepped into a large, cracked area of the city sidewalk, rolled her ankle, and fell to the ground on her right side. Plaintiff was helped up by her husband and felt immediate pain in her right foot. Plaintiffs and the cousin drove back to Little Torch Key and went to a walk-in clinic in Big Pine Key the next day where Plaintiff was diagnosed with a fracture to her 4th metatarsal, prescribed a CAM boot, Vicodin and advised that she follow up with her ortho/podiatrist. Plaintiffs were scheduled to fly back to NJ the next day anyway and did so. Plaintiff followed up with Dr. Carey in NJ on 1/19/15, who sent her for more diagnostic studies and noted her need for a "better CAM walker and that she may benefit from a bone stimulator due to prior injury, non-union fracture of the 4th metatarsal." The x-rays taken on the same day (1/19/15) indicate a comparison to other studies done on 8/10/09. Specifically, the report notes that Plaintiff had *an old, non-union fracture of the 4th metatarsal from 2009 that is now seen again, as well as an old healed fracture of the mid-right 5th metatarsal bone in its midportion with*

² Pinky toe and the toe next to it.

healing compared to 8/10/09. There is reported a new faint radiolucency through the proximal one quarter of the 5th metatarsal bone representing a new fracture of the 5th metatarsal bone. This is a hairline fracture and may not be a complete fracture.

The medical reports that I have in my file thus far indicate that Plaintiff has a “chronic ununited 4th and 5th metatarsal proximal metaphyseal fracture with pseudo-arthritis, most apparent in the 4th metatarsal.” Plaintiff underwent an open reduction and internal fixation of the 4th and 5th metatarsals on 5/7/15 performed by Dr., Daniels, who took over her care from Dr. Carey. After the surgery, the medical records from Dr. Daniel indicates that *Patient denies pain at the surgical site, not medicating for discomfort, 5th metatarsal is completely healed, no evidence of loosening, 4th metatarsal fracture shows evidence of complete healing medically, however, incompletely healing laterally and the plate has failed at its midbody. Also, there is a mechanical complication of orthopedic implant, right 4th metatarsal, but that the patient is completely asymptomatic and with that there is no indication for treatment.* -9/16/15 medical note. Further, *The patient denies pain. There is evidence of significant interval healing of the 4th metatarsal fx. All hardware is in place without evidence of loosening, toggle, or failure.* – 8/12/15 medical note. I do not have any significant medical reports since 2015. Plaintiff reports having seen Dr. Daniel a week prior to her deposition, complaining about pain. She reports that Dr. Daniel has not ruled out another surgery, but has presently recommended custom orthotics to address her recent reports of pain, but again, I do not have any medical reports that indicate a need for a further surgery, and Plaintiffs’ attorney did not provide same at mediation either.

Assessment

There is no doubt that the city has a very large, deteriorated crack on the sidewalk where the Plaintiff fell. There is no doubt that the cracked-up sidewalk has existed for several years. Google Images shows the crack in its same, aged state going back at least to 2011. Richard Sarver, Community Services representative for the city testified in deposition that he has a crew of men that patrol the historic district every 60 days blowing the sidewalks and looking for garbage and debris. While the city has no formal inspection program, the existence of this crew, as well as the 3-man right of way repair crew, and the length of time

that this significant defect in the sidewalk has existed certainly can demonstrate constructive notice to the city of its existence. Therefore, on the issue of liability, I do not

believe that the city will succeed. The issue will be damages. Specifically, how much will the jury attribute fault to the Plaintiff regarding how open and obvious this condition was, the fact that there are 2 functioning street lights on either side of this defect, the fact that her 4th metatarsal was previously fractured. Also, the Plaintiff is claiming lost wages as a result of this injury. She testified in deposition that she cannot stand on her feet any longer for lengthy periods of time. Therefore, she had to quit Dee's Hair Salon. Additionally, she has significantly decreased her teaching at the 2 beauty academies. When pushed a little during deposition, she agreed that some of that decrease had to do with not finding childcare for her newborn. I was able to get some of her W-2s. Regarding Pioneer Education LLC (assuming that is one, if not both of the beauty schools), her income in 2013 was \$20,793.13, in 2014 was \$26,114.69, and in 2015 it was \$30,370.23. Regarding Dee's Hair, her 2014 W-2 shows an income of \$19,533.00. In 2015, it was \$5,716.00. Therefore, she significantly increased her earnings teaching after her injury, and decreased her earnings actually doing hair.³ Plaintiffs' counsel explains the discrepancy by saying she received money that was due to her injury. I have no evidence to corroborate this other than testimony.

Plaintiff claims that Dr. Daniel is recommending a possible surgery in the future, but I do not have any medical records to substantiate that. Plaintiff testified that right now, he is recommending orthotics for her. Therefore, I am likewise not giving any value to future medical expense either. Plaintiff has boarded \$22,920.00 in medicals thus far. Assuming that she cannot prove lost wages, and Giacomo cannot prove a loss of consortium, if we use a 3.5 multiplier for pain and suffering, and the loss of consortium claim, a verdict can exceed \$100,000.00. If she can prove lost wages, that number will be higher. The City Manager and I attended a mediation that was conducted by Wayne Miller. After consulting with our adjuster and Manager we offered \$100k. The lowest that Plaintiff's counsel would

³ Plaintiff did testify that she quit Dee's Hair shortly after her fall, which is consistent with her W-2. It did seem that she far preferred to teach than to work in a salon doing hair. Nevertheless, this demonstrates an actual *ability* to earn an increased income teaching despite her foot issues. Once I get her full tax returns from 2013-present, I will be able to get a better picture of her lost wage claim. But for now, I am not assigning any value to it since it has not been fully substantiated.

go at mediation was \$175k. The mediation ended in an impasse. Afterwards, I began to work the case up for further depositions of non-fact witnesses. I called the marriage counselor to verify her address for a subpoena⁴. I also began coordinating the depositions of Dr. Carey, Dr. Daniel, as well as our own medical exam, and a subsequent deposition of our doctor as well; specifically, regarding the re-fracture of the 4th metatarsal and when the 5th was fractured and why. I also planned to depose a representative of Dee's to get more insight as to why Plaintiff quit (more teaching opportunities vs. her foot), and a representative from each of the beauty schools to find out those circumstances as well.

I also ordered several days of surveillance. Through those efforts, I was able to determine that Plaintiffs are opening a new franchise restaurant. A few days after the mediation, I received a call from Tom Scolaro, the partner in the Plaintiffs' law firm. He informed me that the very bottom dollar that he can take is \$150k. In the interim, I also filed a Notice of Proposal for Settlement for the \$100k that was offered at mediation. I told him that I would confer with the adjuster, risk manager and the city manager. After conferencing with city representatives, we all agreed that given the facts of this case tempered by the statutory cap of \$200k, \$150k is still too unreasonable of a discount value. I had a few more conference calls with opposing counsel and reminded them that whether or not the case settles or if they get a successful verdict, attorney fees are capped by statute at 25%. I was able to get them to accept the previously offered \$100k. The City's adjuster agrees with the settlement.

⁴ This was to verify their claims of marriage difficulties due to this accident.