

Rodriguez v Barling

2017 NY Slip Op 32534(U)

May 26, 2017

Supreme Court, Erie County

Docket Number: 2011-19

Judge: Thomas P. Franczyk

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STATE OF NEW YORK
COUNTY OF ERIE
SUPREME COURT

FILED

2017 MY 31 PM 12:31

ERIE COUNTY CLERK

JUANITA RODRIGUEZ, as Parent and Natural Guardian of
MICHELY J. PEREZ, an Infant
PLAINTIFF

v.

DECISION & VERDICT
INDEX # 2011- 19

CHARLES BARLING and
TERRY L. COLE
DEFENDANTS

APPEARANCES: Martin Zuffranieri, Esq.
6024 Main Street
Williamsville, NY 14221
For the Plaintiff

Denis Kitchen, Esq.
8899 Main Street
Williamsville, NY 14221
For the Defendants

A non-jury trial was held before this court arising from an incident occurring on September 24, 2009 when the plaintiff, Michely J. Perez (age 12) slipped and fell on the bathroom floor of her apartment at 8 Garner Avenue, Buffalo, NY, upon exiting the shower and sustained a non-displaced Harris-Salter fracture of her left ankle. She also eventually developed back pain which was later diagnosed as Grade 1 Spondylolysis and Spondylolisthesis of her



lumbar spine at the L5/S1 level.

The plaintiff contends that her fall and injuries were due to the negligence of the defendants (property owner and property manager respectively) in failing to fix the bathroom floor tiles which they knew (from tenant complaints and Erie County Health Department notices) were in a state of disrepair (i.e. detached from the sub-flooring or loosely affixed so as to present a hazard).

While the defendants do not dispute their duty to maintain the premises or that the bathroom floor was in need of repair (which the defendant, Cole claims he tried to do but was refused entry by the plaintiff's mother), they contend that the proximate cause of the accident was the plaintiff's failure to use due care for her own safety (either in stepping onto an uncarpeted tile floor with damp feet or, as reflected by the hospital records, tripping over a carpet that was not laying flat on the floor). They also argue that there is no causal connection between the plaintiff's claimed back injury and the incident.

It should be noted that the defendant, Terry Cole's answer was stricken on account of his failure to comply with a court order dated August 1, 2013, directing him to submit to an examination before trial. Cole, who is in default, did not appear for the trial.

Michely Perez (dob 9/24/97) testified (with assistance of a court interpreter), that before this accident, she was a healthy, active child who played with friends, rode a bike, engaged in sports, helped around the house (including mopping of the floors) without any restrictions or limitations. Today at age 19 ½, she presents as someone who is no longer "herself" on account of on-going pain to her foot/ankle and lower back which prevents her from doing basic things like washing and combing her hair, tying her shoes and putting on pants without help from her

mother. She claims that she cannot climb up and down stairs without stopping, or walking any significant distance without pain which necessitates her wearing a boot. She also testified that her right shoe is now tighter than her left. (Why this is so given that her left ankle was injured is not clear).

On September 24, 2019, the plaintiff came home from school, played outside and then came inside to take a shower in preparation for her twelfth birthday party. (She thought it might be her 13th birthday but her year of birth indicates it was her 12th). After finishing her shower, she dried herself, replaced the towel on the shower rod, moved the curtain to the side and stepped out of the tub with damp feet (right foot first then her left) onto the floor. She testified that there was no bath mat or rug on the floor.

When her left foot stepped full weight onto the floor, the tile underneath (which was heretofore secured in place), became dislodged from the sub-floor and slid into the tile ahead of it causing her to continue sliding forward while her right foot remained behind her. She lost her balance, twisted her back and fell to the floor. She immediately screamed in pain and was attended to by her mother who took her to the hospital. She underwent an x-ray of her left ankle which was then placed in a cast up to her knee. She testified that the cast caused her pain and discomfort (itching). The cast was eventually replaced with a walking boot which she says she still wears, on an off, to this day. She missed two days of school after the accident but did not return to gym or any other athletic activity. She complains of pain radiating from her ankle to her rear end to her lower back. She says she experiences pain after about five to ten minutes of walking.

Juanita Rodriguez Rosario testified that she and her two daughters (Michely and Fabiola)

moved into the lower apartment at 8 Garner on November 1, 2008. At the time of her initial walk-through, she pointed out several areas of concern (including the bathroom floor) to the landlord's agent, Terry Cole, who told her he would take care of things after she moved in. She agreed to a \$425.00 a month rental (which she paid at first after which the Social Services Department took over paying by voucher). She and Cole signed the lease on the last page (Plaintiff's Exhibit #5) on October 25, 2008. (Neither party had a copy of the entire lease and Charles Barling testified that he'd never seen it nor was he aware of its contents).

Ms. Rosario spoke to Cole on several occasions about the needed repairs to no avail. In June and July, 2009 she informed him that the bathroom floor was getting worse (missing floor tiles) and he assured her that he'd take care of it. In August, she called the Department of Health to report the problem. On August 17, 2009, Lynn Ingrassia, a public health sanitarian, visited the premises and wrote up the bathroom for having its floor in disrepair. (Plaintiff's Exhibit #6). The ceiling in the bathroom and the kitchen were similarly cited and there was "no electrical service in the rear bedroom." The notice of violation was sent to Terry Cole on August 18, 2009, with instructions to address the problems by August 31st pending further inspection.

Ingrassia returned to the property two weeks later on September 14th and noted that nothing had been done. (Plaintiff's Exhibit #8). A "pre-court" warning letter was sent to Cole on September 15, 2009.

Juanita Rodriguez Rosario testified that Cole dropped off materials to fix the bathroom floor right after the first notice but never came back to do any work despite her requests that he do so. Barling testified that while he was not aware of the Health Department communiques, Cole informed him of the tenant's complaints about the floor which he told Cole to remedy

quickly and correctly. Cole reportedly called Barling on a few occasions advising him that Rodriguez refused to grant him entry to make the repairs because she didn't want him there when the "man of the house" was not present. After the third time, Barling instructed Cole to go forward with eviction proceeds on account of her lack of cooperation.

It should be noted that there is no male name that appears on the Landlord Statement (Plaintiff's Exhibit #4), and Juanita Rodriguez testified that Cole, who had his own key to the apartment, was free to do the floor repair whether or not she was in the dwelling. It seems implausible to this court that she would complain to Cole about the bathroom floor and then file a complaint with the Department of Health only to refuse him entry to do the very work that was required to address the problem. In this regard, this court is not particularly inclined to credit hearsay statements of a defendant in default coming through an interested party who, by any reckoning, qualifies as an absentee landlord. Given the condition of the apartment, the previous listing of violations of which Barling was aware (not to mention Cole's apparent ill health), it appears more likely that Cole was not one who made repairs with lightning quickness.

Juanita Rodriguez Rosario testified that she heard her daughter's fall whereupon she entered the bathroom and found her splayed on the bathroom floor with her left foot extended forward and her right leg behind her. She was also screaming and crying in pain. Rodriguez pointed to an open space in the tile near the tub (Plaintiff's Exhibit #1) to indicate the location where her daughter stepped before falling forward. She testified that there was no mat or rug on the floor because of the loose condition of the tiles. (She did agree that there was a fuzzy covering on the toilet top and tank with a matching rug which remained in the package and was not placed on the floor).

It should be noted that the emergency room record (Plaintiff's Exhibit # 13) which reflects treatment the following day, describes the narrative as: "pt. was walking and tripped on carpet twisting the l ankle/foot..." (Pg. 19)... "swollen l ankle after tripping on carpet" (Pg. 23)... c/o tripped on bathroom floor...injured l foot/ankle...left ankle swollen, abrasion of right elbow (Pg. 27)."

It was not lost on this court, however, that both mother and daughter had a limited command of the English language and that, while there are different Spanish words for "carpet" and "tile," when Ms. Rodriguez was asked on direct examination whether a carpet was out on the floor, she testified, "yes, but not fully pasted." The records from Pinnacle Orthopedics also contain multiple entries stating that an interpreter was used to explain things to Michely Perez and that more than half of the time with her during visits was spent "counseling or in the coordination of care." (Plaintiff's Exhibit # 11). Under the circumstances, it is not inconceivable that the plaintiff's description of the accident got lost in translation.

Ms. Rodriguez accompanied her daughter to all of her medical appointments beginning with follow-up at the Orthopedic Clinic of Children's Hospital (cast removed by Dr. Blum on October 5, 2009), and follow-up chiropractic care (about six months) with Dr. Croce who first took note of the plaintiff's complaints of lower back pain in late November, 2009. She then went for a second opinion (due to ongoing ankle and low back pain) to Pinnacle Orthopedics beginning in March, 2010, where she underwent MRI's of the lower back. Surgery (discectomy of L5/S1) was recommended (by Dr. Fishkin) but resisted by the plaintiff. According to her mother, Michely Perez is no longer the active child she was before, she can no longer help around the house and requires assistance with basic functions of everyday life on account of

persistent pain in her ankle and back. (Michely Perez pointed to her right ankle when describing her ongoing leg pain. Whether this was due to a language barrier, an inability to distinguish left from right or some condition to her right side is not clear).

The Pinnacle Orthopedic records reflect the following pertinent observations:

- 3/8/10 (Patient) presents with left ankle pain... (Patient) was placed into a cast for 3 weeks... (and she) was removed from cast by Dr. Blum. She has not participated in physical therapy for the ankle...pain is described as aching, sharp in character...(Patient) rates it to be a 10... Pain present since September 25, 2009...pain with standing, low back pain...no history of left ankle injury prior to September 25, 2009...MRI recommended.
- 3/22/10 (Patient) presents with six-month history of ongoing low back pain...(Patient) tripped on a rolled up edges (sic) the carpet stepping out of the shower...had a left lateral ankle fracture...also had diffuse back pain...(Patient) states low lumbar pain is 8/10.
- Gait: able to walk with a steady gait favoring the left leg...no difficulty standing up from a seated position.
- X rays: bilateral L5 spondylolysis with grade 1 spondylolisthesis.
- Plan: continue...chiropractic manipulation.
- 3/29/10 (Patient) has not participated in (PT) for the ankle...notes pain at 10/10...made worse by standing walking.
- Physical exam: left ankle: no evidence of deformity or swelling...tenderness to palpation of the distal fibula, anterior talofibular ligament posterior...ligament. Non tender...along medial...ankle.
- MRI (left ankle): no displaced fractures or dislocations. Edematous changes of anteromedial aspect of the epiphyseal plate in the distal tibia probably from residual changes of Salter Harris fracture, clinical correlation is recommended. No displaced fracture or dislocation.
- Plan: Increase...activities...initiate...(PT) over next 2 - 3 months. (If)...persistent pain, should be reevaluated.
- 8/4/10 (Patient) notes some persistent pain on lateral aspect of her ankle since her last

appointment... rates pain at 9.

Gait: Normal. No evidence of deformity or swelling (of her left ankle)...
tenderness to palpation of the distal fibula...non tender...along medial aspect.

MRI: No displaced fracture or dislocation. Edematous changes...probably from
residual changes of Salter Harris fracture.

Plan: Same as above.

10/18/10 (Patient) reports ongoing low back pain...but has not seen chiropractor in some
time...reports occasional numbness and tingling in legs but...not constant. She has
not (?) had symptoms for approximately six months since...fall she sustained out
of a bathtub...not any better today...continues with severe low back pain.

Medications: lace up ankle brace.

Gait: able to walk with a steady gait favoring the left leg...no difficulty standing
up from seated position ...uses no...walking devices.

X rays: Bilateral L5 pars defects... minimal grade 1 spondylolisthesis. She does
have a lumbar scoliosis...approximately 14°.

Assessment: Bilateral L5 Spondylolysis. L5 - S1 Spondylolisthesis.

Plan: Continue conservative care including chiropractic and/or (PT).

Referral for a back brace (per Dr. Fishkin).

1/10/11 (Patient) presents...with left ankle pain...she notes some persistent pain on the
lateral aspect of her ankle since last appointment...associated signs...include... low
back pain.

Gait: Normal...no evidence of deformity or swelling. Tenderness...of distal fibula.

X ray: Reveals preservation of joint space without evidence of fracture or
dislocation.

Interpretation: Normal left ankle with closing physes.

Plan: Recommend...increase (in) her activities...she may require further treatment
in regards to ankle...consideration may be given to an evaluation by foot and
ankle specialist.

3/2/11 (Patient) explains that on September 28, 2009....she was standing in the bathroom when she tripped over a broken tile on the floor, falling (and) injuring her lower back and left ankle... Over the past 1.5 years, she's had 7 sessions of (PT). She continues to suffer from lower back pain...she rates the pain as 8/10.

Gait: Able to walk with a normal gait and able to stand on heels and toes showing good balance and coordination.

Lumbar X ray: ...20.7° right lumbar scoliosis from T10 - L5. Good back quality (and) well preserved disc space throughout, there appears to be a bilateral pars interarticularis congenital defect versus fracture of L5 with a spondylolytic spondylolisthesis of approximately 2 - 3 mm. at L5 - S1.

Assessment: Spondylolisthesis. Degenerative/Acquired Spondylolysis (Acquired)

Plan: Recommend gentle (PT) program 2 - 3 times per week for 12 weeks. Recommend CT scan of L5 and MRI of lumbar spine.

4/7/11 (Patient) states that the low back pain is intermittent...tends not to radiate.

MRI (from 3/28/11): At the L5 - S1 level, there is slight, grade 1 anterior spondylolisthesis of L5 over S1. Minimal diffuse disc bulge of the annulus fibrosus is noted measuring less than 2 mm... which minimally impinges upon the anterior surface of the thecal sac...central annular tear is suspected. Minimal degree of bilateral foraminal stenosis is noted.

Plan: Continue to recommend a gentle therapy program.

9/7/11 (Patient) states...low back pain is intermittent...(8 - 9/10 rating).

Gait: Able to walk with normal gait and able to stand on heels and toes (with) good balance and coordination.

CT Scan (lumbosacral - from 3/28/11): No fractures, dislocations or destructive bony changes. Vertebral bodies are maintained in height...pedicles are intact. Bilateral spondylolysis of L5 with minimal anterolisthesis are noted.

Impression: Straightening of lumbar lordosis and dextro scoliosis of lumbar spine. Minimal multilateral posterior bulges.

MRI: Grade 1 anterior spondylolisthesis of L5 over S1. Old bilateral L5 spondylolysis is suspected.

Plan: Gentle PT.

3/5/12 (Patient) reports ongoing lower back pain for past two years s/a fall...in house on 9/24/09...intermittent back pain. (8 - 10/10).

Gait: Normal...with adequate balance and coordination.

Plan: Surgical recommendation for an... L5 - S1 discectomy and fusion...but...can hold off...unless she worsens...cannot exclude possibility of (future) surgery. Dr. C. Huckell) states, "I believe the relative instability of the left ankle ATFL is her worst problem as she is only 14 years old and a chronic instability pattern may lead to arthritis of the ankle joint over time."

5/7/12 (Patient) presents with left ankle pain...(rates a 9).

X-ray: Reveals preservation of the joint.

Interpretation: Normal left ankle with closed physes.

MRI/Impression: No evidence for displaced fracture or dislocation. Edematous changes...probably from residual changes of Salter-Harris fracture.

Plan: Seek evaluation by a pediatric specialist.

2/25/13 (Patient) presents...due to continual pain in the left ankle with gradual worsening. She continues to express lateral left ankle pain...(and) associated low back pain with radiation of left foot. (Pain rated 7 - 9/10).

X-ray: Preservation of joint space without evidence of fracture or dislocation. No soft tissue swelling is present. Closed physes....normal left ankle.

Plan: Seek evaluation by pediatric specialist (due to continued symptoms despite conservative treatment).

3/13/13 (Patient) reports ongoing (intermittent) lower back pain. (Rate 8/10)... has ongoing mechanical low back pain.

Plan: Review in six months.

9/9/13 (Patient) states that her symptoms (are) relatively unchanged...difficult to sleep secondary to pain...recommend pain management...for ongoing non-surgical treatment.

11/14/13 (Patient) should avoid pounding exercises...i.e. cross country running, jump rope, basketball...contact sports.

3/10/14 (Patient) reports intermittent low back pain. (8/10 rating).

CT scan (lumbar): Reveals stable Grade 1 Spondylolitic Spondylolisthesis but with evidence of worsened instability...if pain persists or worsens, (recommend)... L5 - S1 decompression discectomy and fusion...odds are significantly in her favor ...it (surgery) will reduce symptoms and pain. (But), she is very young with a progressively worsening condition...such that...she's facing prospect of surgery some time in her earlier than later years.

1/20/15 (Patient) describes her low back pain as unchanged. (8/10 rating).

Gait: Able to walk, but has to drag her left foot on the ground secondary to pain at the plantar aspect with full weight bearing. She is able to stand on heels and toes on the right foot, but unable to stand on her toes on the left foot secondary to pain showing guarded balance and coordination.

X-rays (lumbar spine): Reveal a stable Grade 1 Spondylolytic Spondylolisthesis, with evidence of instability.

The plaintiff was examined by a neurologist, Sherry Withiam-Leitch, MD, who was retained by the defense on January 17, 2017. At the outset, the plaintiff reported experiencing constant low back pain including numbness, tingling, burning and spasms. She said she couldn't play volleyball, walk for an appreciable distance without pain or comb her hair. She also described having left ankle pain.

Upon examination, Dr. Leitch found the plaintiff's ankle to function at full strength. There was no muscular atrophy or neurological abnormality. She observed no swelling, temperature differential, reflex abnormality or tenderness. The plaintiff made no complaint of right ankle pain (as she did during her trial testimony) and there was no abnormality of the growth plate.

Dr. Leitch did not dispute the diagnosis of a non-displaced Salter Harris fracture which, in her opinion, generally carries a prognosis of complete recovery within the first year. The plaintiff's current complaints with respect to her ankle, in this doctor's opinion, are not related to the accident of September 24, 2009.

Upon examination of the plaintiff's back, Dr. Leitch noted the following (based on the plaintiff's stopping when it hurt):

Flexion: 30°/90°

Extension: 15°/90°

Lateral flexion: 10°/30°

Right leg raise: 20°/90°

Left leg raise : 30°/90°

In Dr. Leitch's opinion, the plaintiff's spondylolysis (malalignment of vertebrae) was likely congenital rather than traumatic since the latter typically produces immediate pain. (In this case, the earliest report of back pain was in late November, 2009, approximately two months after the accident. The MRI results that she reviewed were relatively insignificant and did not support a conclusion of traumatic back injury. She did agree, however, that the fall of September 24, 2009, caused the plaintiff's ankle injury.

Analysis and Conclusion

In this court's view, the bathroom floor was in a continuous state of disrepair (loose tiles, some entirely, others partially) from November, 2008 through September 24, 2009, so as to

create an unreasonable risk that one of the residents could slip and fall. The defendants were clearly made aware of the problem and did nothing beyond dropping off materials after repeated complaints.

While the defendant claims that his property manager tried unsuccessfully to gain entry to do the work, this court finds it hard to believe that the plaintiff's mother would take the trouble to ask him repeatedly to address the problem, call the Health Department and then rebuff him on multiple occasions. The more plausible conclusion is that the defendant elected to rely from a distance on a manager who was nothing if not unreasonably slow in responding to tenant complaints regarding the condition of the property. Accordingly, the court finds that the defendants were negligent in failing to keep the premises in a reasonably safe condition.

With respect to the happening of the accident, while there were inconsistent versions describing how the plaintiff fell (trip over a carpet, slip on a tile that became dislodged), the court finds it more likely that she stepped onto a tile that was, up to this point, securely attached because it makes no sense that she would step on a tile that she knew (from prior observation and experience helping her mother mop the floor) was loose. While her story was, at times, difficult to follow if not confusing, the reference to tripping on a carpet could well have been lost in translation and it doesn't make sense that one would consciously deny doing what most sensible people do just before getting into the shower, i.e. putting down a bath mat or rug to absorb water and reduce the possibility of slipping on a tile floor.

Given the overall condition of the bathroom floor (see Plaintiff's Exhibits 1, 2, 3 and Defendant's Exhibit A), it was foreseeable that any one or more of the tiles could detach from the subfloor at any point especially since a bathroom, which is an often-used room, is subject to

moisture on a daily basis. The court finds, therefore, that the defendant's failure to keep the tiles in good repair was a substantial factor in causing the plaintiff to fall and become injured.

The court also finds, however, that the plaintiff was 25% negligent in stepping out of the shower with damp feet onto a tile floor without using a bath mat that could well have stopped her from sliding so far forward as to lose her balance and fall to the floor.

The court further finds that the plaintiff suffered an non-displaced Salter-Harris fracture of the left ankle that caused her immediate and ongoing pain, that significantly curtailed her day to day physical activities and intruded upon her ability to enjoy the life of an adolescent/teenage child. She continued to treat with her doctors for over six years and consistently reported experiencing pain in her ankle. That being said, the objective evidence showed a healed fracture that should have resolved without further symptoms over time let alone persist to this day and beyond. While this court does not doubt the plaintiff's sincerity, it does question the picture of a near invalid that was suggested by her mother.

Based on the evidence presented, the court hereby awards the plaintiff \$100,000.00 for past pain and suffering, including loss of enjoyment of life. Absent expert medical testimony that the plaintiff's ankle is likely to cause her pain going forward, the court finds no basis to give an award for future pain and suffering.

The court also finds that any claim that the plaintiff's lower lumbar condition is causally related to this accident (as opposed to being "congenital" or "acquired" as the medical records reflect), is unsubstantiated by any credible medical testimony and is, by and large anecdotal and coincidental in nature. The complaint of back pain a couple of months after the accident, does not, in the court's estimation, necessarily establish a causal nexus between the two. Accordingly,

the court declines to grant an award for either past or future pain and suffering as it relates to the plaintiff's lower back.

This decision shall constitute the verdict of the court.



Thomas P. Franczyk
Acting Supreme Court Justice

dated: May 26th, 2017

GRANTED

MAY 30 2017
BY Kimberly King
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