



## Lifeguards didn't notice bather in distress, suit alleged

**Amount:** \$7,000,000

**Type:** Settlement

**State:** New York

**Venue:** Erie County

**Court:** Erie Supreme, NY

**Injury Type(s):**

- *brain* - coma; brain damage
- *sensory/speech* - speech/language, impairment of
- *mental/psychological* - psychiatric
- *pulmonary/respiratory* - hypoxia

**Case Type:**

- *Recreation* - Swimming Pool
- *Worker/Workplace Negligence* - Negligent Supervision

**Case Name:** Jannette Morales v. Asarese Matters Community Center, Rees-Allison Pool, City of Buffalo Parks and Recreation Department, Erie County Department of Parks and Recreation, City of Buffalo and County of Erie

**Date:** November 29, 2011

**Plaintiff(s):**

- Jannette Morales (Female, 37 Years)

**Plaintiff Attorney(s):**

- Joseph (Jed) E. Dietrich III; The Dietrich Law Firm; Amherst NY for Jannette Morales

**Plaintiff Expert (s):**

- Jerome H. Modell M.D.; Drownings & Aquatic Injuries; Gainesville, FL called by: Joseph (Jed) E. Dietrich III
- Thomas Polisoto M.D.; Physical Medicine; Buffalo, NY called by: Joseph (Jed) E. Dietrich III

**Defendant(s):**

- Erie County
- City of Buffalo
- Rees-Allison Pool
- Asarese-Matters Community Center
- Erie County Department of Parks and Recreation
- City of Buffalo Parks and Recreation Department

**Defense Attorney(s):**

- David G. Brock; Jaeckle, Fleischmann & Mugel, L.L.P.; Buffalo, NY for Erie County Department of Parks and Recreation, Erie County
- Robert Quinn; Assistant Corporation Counsel, Office of the Corporation Counsel; Buffalo, NY for City of Buffalo Parks and Recreation Department, Asarese-Matters Community Center, Rees-Allison Pool, City of Buffalo

**Facts:**

On Aug. 21, 2009, plaintiff Jannette Morales, a 37-year-old unemployed woman, visited the Asarese-Matters Community Center, which is located at 50 Rees St., in Buffalo. During the course of the day, Morales bathed in the facility's Rees-Allison Pool. Morales became unconscious while she was bathing, but she was not noticed by the pool's lifeguards. She was ultimately rescued by her son, but not before she had sustained hypoxia that caused severe damage of her brain.

Morales sued Rees-Allison Pool; Asarese-Matters Community Center; the facility's owners, the city of Buffalo and the City of Buffalo Division of Parks & Recreation; and the facility's operators, Erie County and the Erie County Department of Parks, Recreation and Forestry. Morales alleged that the pool's lifeguards were negligent in their supervision of the pool and its patrons. Morales further alleged that the defendants were vicariously liable for the lifeguards' actions.

Plaintiff's counsel claimed that the lifeguards failed to respond to a prolonged period in which Morales was floating motionless, face-down in the pool. He presented a witness who contended that one lifeguard was preoccupied with sending text messages on a cellular telephone. The witness reported that the lifeguard was treating the phone as a "lifeline." Plaintiff's counsel claimed that a second lifeguard admitted seeing Morales floating motionless, but that the lifeguard did not detect a problem and began conversing with other swimmers. Plaintiff's counsel contended that Red Cross lifeguard guidelines specify that a lifeguard must promptly investigate all instances in which swimmers are floating face-down. He claimed that Morales was floating in that position for about five minutes before her son rescued her. He retained an aquatic-accidents expert, and the expert submitted a report in which he agreed that Morales' injuries were of an extent that suggested that she endured about five minutes of hypoxia.

Defense counsel claimed that Morales' unconsciousness may have been a result of a seizure disorder that had been diagnosed prior to the incident. They contended that post-accident tests suggested that Morales may not have been utilizing her prescribed anti-seizure medication, and they further contended that Morales should have disclosed her medical condition to the lifeguards.

**Injury:**

Morales suffered hypoxia and cardiac arrest. She was placed in an ambulance, and she was transported to Millard Fillmore Gates Circle Hospital, in Buffalo. She was intubated, and a coma was induced. Doctors determined that she had sustained damage of her brain, largely within its right occipital region. Morales' hospitalization lasted about three weeks, and she subsequently underwent about six weeks of inpatient rehabilitation that was administered at a skilled nursing facility.

During the six months that followed the accident, Morales could not ambulate independently, dress herself or independently perform nearly all of her everyday activities. She requires the constant attention of a nurse; she cannot care for her small children; and she has regained little of her verbal communication skills. She currently undergoes physical therapy, speech therapy and psychiatric treatment.

Morales sought recovery of her past and future medical expenses and damages for her past and future pain and suffering.

Defense counsel contended that Morales' future damages should not have addressed a period of more than seven years. They noted that her medical history includes diabetes, bipolar disorder and heroin addiction, and they contended that she currently undergoes methadone treatment.

**Result:**

The parties negotiated a pretrial settlement. Erie County agreed to pay \$7 million, and the other defendants did not contribute.

**Trial Information:****Judge:**

Frederick J. Marshall

**Editor's  
Comment:**

This report is based on information that was provided by plaintiff's counsel and counsel of Asarese-Matters Community Center, the city of Buffalo, the City of Buffalo Division of Parks & Recreation, and Rees-Allison Pool. The remaining defendants' counsel did not respond to the reporter's phone calls.