

**UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF PUERTO RICO**

AUREA ESTHER RAMIREZ-VELEZ, ET  
ALS.,

Plaintiffs,

v.

CENTRO CARDIOVASCULAR DE PUERTO  
RICO Y DEL CARIBE, ET ALS.,

Defendants.

CIV. NO. 05-1732 (PG)

**OPINION AND ORDER**

In the instant diversity suit, plaintiffs Aurea Esther Ramirez-Velez, Wanda Ramirez-Velez, and Waleska Ramirez-Velez are suing the Centro Cardiovascular de Puerto Rico y del Caribe (hereinafter "Centro Cardiovascular" or "the Hospital"), Corporación del Centro Cardiovascular de Puerto Rico y del Caribe, Dr. Pedro Diaz, Dr. Eddy Mieses, and Dr. Elizardo Matos, alleging that co-defendants should be held responsible for the death of their mother, Abiezer Velez. According to plaintiffs, defendants departed from the standards of care in the medical treatment provided to their mother, and their negligence resulted in her untimely death. See Complaint, Docket No. 1.

Before the Court is the Centro Cardiovascular's motion for summary judgment (Dockets No. 51-53), plaintiffs' opposition (Dockets No. 56-57), and a reply and sur-reply thereto (Dockets No. 61-62, 65). After a close examination of the record and the applicable statutory and case law, the Court **DENIES** the Centro Cardiovascular's motion for summary judgment for the reasons explained below.

### I. SUMMARY JUDGMENT STANDARD

A motion for summary judgment is governed by Rule 56(c) of the Federal Rules of Civil Procedure, which allows disposition of a case if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." See *Sands v. Ridefilm Corp.*, 212 F.3d 657, 660 (1<sup>st</sup> Cir.2000). A factual dispute is "genuine" if it could be resolved in favor of either party, and "material" if it potentially affects the outcome of the case. *Calero-Cerezo v. U.S. Dep't of Justice*, 355 F.3d 6, 19 (1<sup>st</sup> Cir .2004).

To be successful in its attempt, the moving party must demonstrate the absence of a genuine issue as to any outcome-determinative fact in the record, *DeNovellis v. Shalala*, 124 F.3d 298, 306 (1<sup>st</sup> Cir.1997), through definite and competent evidence. *Maldonado-Denis v. Castillo Rodriguez*, 23 F.3d 576, 581 (1<sup>st</sup> Cir.1994). Once the movant has averred that there is an absence of evidence to support the non-moving party's case, the burden shifts to the non-movant to establish the existence of at least one fact in issue that is both genuine and material. *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 48 (1<sup>st</sup> Cir.1990) (citations omitted). If the non-movant generates uncertainty as to the true state of any material fact, the movant's efforts should be deemed unavailing. *Suarez v. Pueblo Int'l*, 229 F.3d 49, 53 (1<sup>st</sup> Cir.2000). Nonetheless, the mere existence of "some alleged factual dispute between the parties will not affect an otherwise properly supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

At the summary judgment juncture, the Court must examine the facts in the light most favorable to the non-movant, indulging that party with all possible inferences to be derived from the facts. See *Rochester Ford Sales, Inc. v. Ford Motor Co.*, 287 F.3d 32, 38 (1<sup>st</sup> Cir.2002). The Court must review the

record "taken as a whole," and "may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 135 (2000). This is so, because credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. *Id.*

## II. FACTUAL AND PROCEDURAL BACKGROUND

On July 5, 2005, plaintiffs filed the instant claim alleging that the physician defendants and the caring hospital, Centro Cardiovascular, breached their duty under Articles 1802 and 1803 of the Puerto Rico Civil Code, P.R. LAWS ANN. tit. 31, §§ 5141-5142, to provide medical care and treatment in compliance with the applicable standards of the medical profession. Federal jurisdiction is predicated on diversity of citizenship pursuant to 28 U.S.C. § 1332. Co-defendants answered the complaint and denied all responsibility for the damages alleged by plaintiffs. See Dockets No. 9, 13, 17, 19.

It is uncontested that on January 11, 2005, Abiezer Velez was admitted to the Centro Cardiovascular as a private patient of co-defendant Dr. Eddy Mieses and under his direct orders. Abiezer Velez arrived in stable condition to have an elective ambulatory cardiac catheterization performed. Dr. Mieses performed said procedure on that same date. After the initial procedure, the patient's condition required further evaluation and treatment. Dr. Mieses determined that an angioplasty was necessary, at which point he consulted Dr. Pedro Diaz to perform the procedure. Dr. Diaz requested Dr. Matos to provide surgical back-up.

The next day, January 12, 2005, Dr. Diaz, with the assistance of other hospital personnel, performed a percutaneous transluminal coronary angioplasty and stent replacement on Abiezer Velez. Shortly after this procedure, and while still in the recovery room, Abiezer Velez showed the following symptoms: sweating, dizziness, hypotension, decreased hemoglobin. Due to the complications that arose after the angioplasty, Abiezer Velez had to be

transferred to the Intensive Care Unit. She then suffered a cardio-respiratory arrest, which required that she be intubated and aided by a mechanical ventilator. Thereafter, Abiezer Velez entered into a comatose state and on January 13, 2005, she suffered another cardio-respiratory arrest during which she died. Abiezer Velez was declared dead at 6:30 p.m. on January 13, 2005. The provisional diagnoses listed in Abiezer Velez's Autopsy Report are: (i) massive abdominopelvic hemorrhage; (ii) atherosclerotic disease; and, (iii) diverticulosis, sigmoid colon. See Provisional Autopsy Report, Docket No. 57-3.

It is also uncontested that neither Dr. Mieses, Dr. Diaz or Dr. Matos is an employee of the Centro Cardiovascular. These physicians merely hold clinical privileges at the Hospital. The record also shows that they have furnished the Hospital with the credentialing documents and the recertification papers issued by the Puerto Rico Board of Medicine in order to maintain active privileges at the Centro Cardiovascular. It is also a fact that there is not a CT scan machine at the Centro Cardiovascular. The closest CT scan machine is located in a different building.

Co-defendant the Centro Cardiovascular now filed a request for summary judgment arguing, in essence, that plaintiffs cannot make a showing of a malpractice claim against the Hospital. The Centro Cardiovascular claims that the deceased patient did not entrust her care to the Hospital, but to her private physician. Thus, under the applicable jurisprudence, a medical institution, in this case the Centro Cardiovascular, cannot be held liable for the alleged malpractice by a physician who merely holds privileges at the institution and, wherefore, is treating a private patient at the institution. See Docket No. 52.

Plaintiffs opposed co-defendant's dispositive motion asserting that under the applicable law there are independent grounds to establish direct hospital liability for the negligence of its employee nurses and other personnel, and

for its failure to have available adequate and necessary medical equipment. Plaintiffs argue that their expert witnesses support their theory of the case with regards to the Centro Cardiovascular's departure from the medical standard of care, and that the disagreement between their experts and the co-defendant precludes entry of summary judgment. See Docket No. 56.

The Centro Cardiovascular riposted plaintiffs' opposition asserting that plaintiffs failed to advance any evidence of the required elements to establish a hospital's liability according to Puerto Rico case law. See Docket No. 61. In their sur-reply, plaintiffs essentially rehashed the arguments set forth in their opposition. See Docket No. 65.

### III. ANALYSIS

In this diversity suit, the substantive law of Puerto Rico controls. The statute that governs the liability of a physician in a medical malpractice suit is Article 1802 of the Puerto Rico Civil Code. See P.R. LAWS ANN. tit. 31, § 5141; see also Vda. De López v. ELA, 104 P.R. Dec. 178, 183 (1975). This statute states that "[a] person who by an act or omission causes damage to another through fault or negligence shall be obliged to repair the damage so done." P.R. LAWS ANN. tit. 31, § 5141. "Under this proviso, three elements comprise a *prima facie* case of medical malpractice." Cortes-Irizarry v. Corporacion Insular De Seguros, 111 F.3d 184, 189 (1<sup>st</sup> Cir.1997). In order to prevail in a medical malpractice claim under Puerto Rico law, "a party must establish (1) the duty owed; (2) an act or omission transgressing that duty; and (3) a sufficient causal nexus between the breach and the harm." Marcano Rivera v. Turabo Medical Center Partnership, 415 F.3d 162, 167 (1<sup>st</sup> Cir.2005); see also Rojas-Ithier v. Sociedad Espanola de Auxilio Mutuo y Beneficiencia de P.R., 394 F.3d 40, 43 (1<sup>st</sup> Cir.2005); Cortes-Irizarry v. Corporacion Insular De Seguros, 111 F.3d at 189; Lama v. Borrás, 16 F.3d 473, 478 (1<sup>st</sup> Cir.1994); Rolon-Alvarado v. Municipality of San Juan, 1 F.3d 74, 77 (1<sup>st</sup> Cir.1993); Torres Nieves v. Hospital Metropolitano, 998 F.Supp. 127, 136 (D.P.R. 1998).

The duty owed to a patient has been explained by the Puerto Rico courts as “[t]hat (level of care) which, recognizing the modern means of communication and education, ... meets the professional requirements generally acknowledged by the medical profession.” Marcano Rivera, 415 F.3d at 167-68 (citing Lama v. Borrás, 16 F.3d 473 at 478 (quoting Oliveros v. Abreu, 101 P.R. Dec. 209, 226 (1973))). This standard is considered national and must be proven through expert testimony. To establish the act or omission transgressing the duty owed, Plaintiff must bring forth proof that “the medical personnel failed to follow these basic norms in the treatment of the patient.” Lama v. Borrás, 16 F.3d 473 at 478.

With regards to the third requirement, causation cannot be found based on mere speculation and conjecture. Expert testimony, consequently, is generally essential in order to clarify complex medical issues that are more prevalent in medical malpractice cases than in standard negligence cases. See Marcano Rivera, 415 F.3d at 168; see also Rojas-Ithier, 394 F.3d at 43. Hence, a plaintiff must establish, by a preponderance of the evidence, that the defendants’ negligent conduct was the factor that most probably caused the harm suffered by plaintiff. Id.

With regard to a hospital’s liability towards its patients, it is a firmly established doctrine by the highest court of Puerto Rico that said institutions owe their patients that degree of care that would be exercised by a reasonable and prudent man in the same conditions and circumstances. See Marquez Vega v. Martínez Rosado, 116 P.R. Dec. 397, 404-405 (1985) (internal quotations omitted). Puerto Rico courts have held a hospital liable to its patients for malpractice “on account of a negligent act on the part of the institution’s employees; consequently, the hospital’s liability has been predicated on the vicarious liability doctrine.” Marquez Vega, 116 P.R. Dec. at 405. The statutory source of the vicarious liability doctrine is Article

1803 of the Puerto Rico Civil Code, P.R. LAWS ANN. tit. 31, § 5142, which states in relevant part that:

The obligation imposed by § 5142 of this title is demandable, not only for personal acts and omissions, but also for those of the persons for whom they should be responsible ... Owners or directors of an establishment or enterprise are likewise liable for any damages caused by their employees in the service of the branches in which the latter are employed or on account of their duties.

When a patient goes directly to a hospital for medical treatment and the hospital "provides" the physicians that treat him/her, the Supreme Court of Puerto Rico has established that the hospital and the physician are jointly liable for any act of malpractice. See Marquez Vega, 116 P.R. Dec. at 406-407. However, a special situation arises in cases where a physician is not employed by the hospital, but is granted the privilege of using the hospital's facilities for his/her private patients. When a patient goes directly to a physician's private office, agrees with him/her as to the treatment he or she is going to receive, and goes to a given hospital on the physician's recommendation merely because said institution is one of several which the physician has the privilege of using, the hospital should not be held liable for the exclusive negligence of an unsalaried physician, who was first and foremost entrusted with the patient's health. Id. at 408-409. Notwithstanding the above, even in these types of situations, the hospital has the continuous obligation to protect the health of its patients by: (a) carefully selecting the physicians who, for some reason or another, are granted the privilege of using its facilities; (b) requiring that said physicians keep up-to-date through professional advancement studies; (c) monitoring the labor of said physicians and taking action, when possible, in the face of an obvious act of malpractice; (d) discontinuing the privilege granted in the face of the repeated or crass acts of malpractice on the part of one of those physicians;

and (e) keeping reasonably up-to-date on current technological breakthroughs. Id. at 409-410 (internal quotations omitted).

In its motion for summary judgment, the Centro Cardiovascular sustains that, according to Puerto Rico's malpractice law, plaintiffs cannot make a showing of a malpractice claim against it because the Hospital cannot be held liable for the medical negligence allegedly incurred by the three physicians sued in this case, who are not employees of the Hospital, but merely hold privileges to use its facilities for the benefit of their private patients. The Hospital argues that it has complied with its continuous obligation to protect the health of its patients in accordance with the requirements set forth in Marquez Vega. Accordingly, plaintiffs have failed to purport a cognizable claim of medical malpractice against the Centro Cardiovascular. See Docket No. 52.

On the other hand, according to plaintiffs, there are independent grounds for which liability against the Centro Cardiovascular can be found. Plaintiffs argue that the nurses at the Centro Cardiovascular failed to comply with the Hospital's rules and regulations by not promptly informing the attending physicians of the emergency Abiezer Velez was going through. Plaintiffs also pin responsibility on the Hospital for failing to have a CT scan machine on its premises. According to plaintiffs' expert witness, Dr. Andrew Selwyn, Professor of Medicine at Harvard Medical School:

The failure to utilize any internal guidelines and standards by the nurses at the Cardiovascular Center of Puerto Rico and the Caribbean represented a failure in a necessary standard of care and contributed to this patient's death. These guidelines should have been used to identify continuation of severe hypovolemic shock, urgent efforts to institute adequate resuscitation and to continuously notify doctors. In addition the Institution failed to provide CT scanning. In 2005 this is an unacceptable lack of services required to support cardiac catheterization. These deficiencies in nursing standards and guidelines also lack of investigative facilities played a significant role in deterioration and death in this patient.

See Exhibit III, *Expert Report of Dr. Andrew Selwyn*, Docket No. 57-4. Plaintiffs' second expert witness, Dr. Luis Soltero Harrington, also stated in his expert report:

It is absurd that in a supratertiary institution like the Cardiovascular Center of Puerto Rico and the Caribbean there is not a CT Scan machine in existence. Nowadays these are found in all recognized hospitals. The CT is essential in cases like these just as in cases dealing with tumors, aortic dissection, effusions, etc. etc. etc.. Not having the CT Scan available in the hospital is a deviation of the standard of care and exposes patients to additional and unnecessary risk.

See Exhibit IV, *Expert Report of Dr. Soltero Harrington*, Docket No. 57-5. Accordingly, plaintiffs sustain the Hospital is vicariously liable for malpractice on account of the negligent acts on the part of its nurses and other personnel, as well as for not keeping reasonably up-to-date on current technological breakthroughs by not having a CT scan machine on its premises. See Docket No. 61.

Plaintiffs' experts' assertions and the Centro Cardiovascular's arguments are clearly juxtaposed, and the net result is a factual issue as to what is the applicable standard of care and whether or not the Hospital and its employees breached it.<sup>1</sup> To decide whether summary judgment is warranted would require that the Court weigh the evidence and decide who is more credible, plaintiffs or co-defendant the Centro Cardiovascular. This the Court cannot do as issues of deviations from the medical standard of care are questions of fact that must be decided by the jury. Plaintiffs' evidence "establishes factual disagreements as to which reasonable minds may differ. No more is exigible ... Right or wrong, the plaintiff[s] [are] entitled to present [their] case to a jury." See *Cortes-Irizarry*, 111 F.3d at 189 (1<sup>st</sup> Cir.1997) (internal quotations omitted). Quite simply, the controversies as to the facts mentioned

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<sup>1</sup>In light of the obvious genuine issues of material facts, co-defendant's reply and plaintiffs' reply need not be discussed herein.

above preclude any such finding, and thus, the Centro Cardiovascular's motion for summary judgment is denied.

**IV. CONCLUSION**

For the foregoing reasons, this Court hereby **DENIES** co-defendant the Centro Vascular's motion for summary judgment (Dockets No. 51-53).

**IT IS SO ORDERED.**

In San Juan, Puerto Rico, October 25, 2007.

S/ JUAN M. PEREZ-GIMENEZ  
JUAN M. PEREZ-GIMENEZ  
U.S. DISTRICT JUDGE