No.

IN THE

Supreme Court of the United States

YEITZA MARIE APONTE-BERMUDEZ, PETITIONER

v.

ELIGIO COLÓN ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

1. May a federal district court consistent with this Court's "the law of the case" doctrine grant judgment as a matter of law under Fed. R. Civ. P. 50(a) to respondents after petitioner had submitted her case in chief to the jury when the court before trial had already ruled that it was "up to the jury to evaluate [this] evidence" proving respondents were negligent?

2. Is due process denied and Rule 50(a) protocol undermined when the court of appeals fails to harmonize the district court's pretrial ruling declaring that petitioner's expert evidence of respondents' negligence was fit for a jury's evaluation with its later dismissal of her claims during trial without identifying what new evidence had been adduced or what facts had changed to warrant this new ruling?

PARTIES TO THE PROCEEDING

YEITZA MARIE APONTE-BERMUDEZ, Petitioner.

ELIGIO COLÓN, and his wife, DORIS DOE, each of them personally and in representation of their conjugal partnership; DORIS DOE, and her husband Eligio Colón, each of them personally and in representation of their conjugal partnership; CARMEN GLORIA FERNANDEZ TORRES; ELIGIO RAFAEL COLÓN FERNANDEZ; MANUEL PABLO COL N FERNANDEZ; MARIROSA COLÓN FERNANDEZ; MARICARMEN COLÓN FERNANDEZ; LUIS ALBERTO COLÓN FERNANDEZ; RICARDO COLÓN FERNANDEZ; MARIGLORIA COLÓN FERNANDEZ; COOPERATIVA DE SEGUROS MULTIPLES DE PUERTO RICO; and CONJUGAL PARTNERSHIP COLON-DOE, Respondents.

ANGEL NOLBERTO ROBLES, and his wife Betty Doe, each of them personally and in representation of their conjugal partnership; HECTOR H. BERRIOS, and his wife Sonia Ortiz, each of them personally and in representation of their conjugal partnership; SONIA ORTIZ, and her husband Hector H. Berrios, each of them personally and in representation of their conjugal partnership; CRISTALERIA VEGA, INC., or alternatively, John Doe Corporation d/b/a Cristaleria Vega; GABRIEL A. MEDINA-ORTIZ, and his wife Jane Doe, each of them personally and in representation of their conjugal partnership; JANE DOE, and her husband Gabriel A. Medina Ortiz, each of them personally and in representation of their conjugal partnership; BETTY

DOE, and her husband Angel Nolberto Robles, each of them personally and in representation of their conjugal partnership; JOHN DOES 1, 2, AND 3; A, B, AND C CORPORATIONS; UNKNOWN INSURANCE COMPANIES, A THROUGH H; CONJUGAL PARTNERSHIP BERRIOS-ORTIZ; CONJUGAL PARNTERSHIP MEDINA-DOE; CONJUDGAL PARTNERSHIP ROBLES-DOE; UNIVERSAL INSURANCE COMPANY, Defendants.

STATEMENT OF RELATED CASES

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The published Opinion of the United States Court of Appeals for the First Circuit in *Yeitza Marie Aponte-Bermudez v. Eligio Colón et al.*, C.A. No. 18-1266, decided December 20, 2019, and reported at 944 F.3d 963 (1st Cir. 2019), affirming the decision of the District Court for the District of Puerto Rico which granted respondents' motion for judgment as a matter of law under Fed. R. Civ. P. 50(a), is set forth in the Appendix hereto (App. 1-5).

The unpublished Opinion and Order of the United States District Court for the District of Puerto Rico in *Yeitza Marie Aponte-Bermudez v. Hector Berrios et al.*, Civil Action No. 15-1034 (CVR), filed April 6, 2020, and reported at 2020 WL 1692619 (D. P.R. 2020), denying respondents' motion for attorney's fees, is set forth in the Appendix hereto (App. 6-10).

The unpublished Opinion and Order of the United States District Court for the District of Puerto Rico in *Yeitza Marie Aponte-Bermudez v. Hector Berrios et al.*, Civil Action No. 15-1034 (CVR), filed March 15, 2018, and reported at 2018 WL 10435084, granting respondents' motion for judgment as a matter of law under Fed. R. Civ. P. 50(a), is set forth in the Appendix hereto (App. 11-23).

The unpublished and unreported Opinion and Order of the United States District Court for the District of Puerto Rico in *Yeitza Marie Aponte-Bermudez v. Hector Berrios et al.*, Civil Action No. 15-1034 (CVR), filed December 26, 2017, denying respondents' motion to exclude and limit the testimony

of petitioner's expert on liability, is set forth in the Appendix hereto (App. 24-28).

The unpublished Notice of Electronic Filing in the United States District Court for the District of Puerto Rico in *Yeitza Marie Aponte-Bermudez v. Hector Berrios et al.*, Civil Action No. 15-1034 (CVR), dated December 15, 2017, of docket entry #144 denying respondents' motion for summary judgment as untimely and denying as moot respondents' motion for leave to file Spanish language documents, is set forth in the Appendix hereto (App. 29).

The unpublished order of the United States Court of Appeals for the First Circuit in in *Yeitza Marie Aponte-Bermudez v. Eligio Colón et al.*, C.A. No. 18-1266, filed March 2, 2020, denying petitioner's timely filed petition for Panel rehearing or for rehearing *en banc*, is set forth in the Appendix hereto (App. 30-32).

JURISDICTION

The decision of the United States Court of Appeals for the First Circuit affirming the decision of the District Court granting respondents' motion for judgment as a matter of law under Fed. R. Civ. P. 50(a), was entered on December 20, 2019; and its further order denying petitioner's timely filed petition for Panel rehearing or for rehearing *en banc* was filed and decided on March 2, 2020 (App. 1-5;30-32).

In addition, on March 19, 2020, in light of the ongoing public health emergency associated with COVID-19, this Court issued an Order extending the deadline for the filing any petition for writ of certiorari

due on or after March 19, 2020, for 150 days from the date of the court of appeals' order denying a timely filed petition for rehearing.

This petition for writ of certiorari is filed within the time allowed by this Court's rules, 28 U.S.C. § 2101(c), and this Court's Order of March 19, 2020.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

> No person shall...be deprived of life, liberty, or property, without due process of law....

United States Constitution, Amendment VII:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Fed. R. Civ. P. 50(a):
(a) Judgment as a Matter of Law.

> (1) In General. If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:
> (A) resolve the issue against the party; and

> (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.
>
> (2) Motion. A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion *must* specify the judgment sought and the law and facts that entitle the movant to the judgment.
>
> No construction of any building within the proposed right of way will be authorized (Article 21, Act 76, enacted on June 24, 1975, as amended), unless the owner of the possession or property promises, to remove the structures and development works, at its own account and risk....The occupation or use of lawfully existing buildings or structures is permitted, until the government may have a need to acquire the property by any lawful means.

Puerto Rico Laws Ann, Title 31, § 5141:

Obligation when damage caused by fault or negligence

> 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. Concurrent imprudence of the party aggrieved does not exempt from liability, but entails a reduction of the indemnity.

Puerto Rico Laws Ann, Title 31, § 3022:

Unforeseen or inevitable events

> No one shall be liable for events which could not be foreseen, or which having been foreseen were inevitable, with the exception of the cases expressly mentioned in the law or those in which the obligation so declares.

STATEMENT

At about 9:00 PM on the evening of December 30, 2012, Gabriel Medina Ortiz ("Medina") was operating a Toyota motor vehicle in the southbound lane on Road PR152, approximately at Km 2.2, Barrio Quebradillas, Barranquitas, Puerto Rico. With only a learner's permit and lacking the skills to operate the vehicle safely, he negligently drove in excess of the speed limit and then lost control causing his vehicle to veer to the left and cross over into the northbound lane of Road PR152. As it did so, it invaded the parking area for the sports bar "El Bullpen de Norbeto" ("the sports bar"), an establishment which has a terrace located at its eastern side within commercial property owned by respondent Eligio Colón ("respondent" or "Colón").

Careening into this parking area, Medina's Toyota collided with a parked Jeep Wrangler near the north side of the sports bar's terrace. The force of the collision pushed the parked Jeep into the terrace area itself thereby causing portions of the structure to strike patrons sitting at tables located there, including petitioner Yeitza Marie Aponte-Bermudez ("petitioner").

Founding jurisdiction on diversity of citizenship under 28 U.S.C. § 1332, petitioner brought this civil action in the federal district court for the District of Puerto Rico against Medina, Colón, Colón's insurer Cooperativa de Seguros Multiples de Puerto Rico ("Cooperativa") and others. Petitioner's amended complaint founded liability against respondents Colón and Cooperativa on negligence stemming from: (1) their improper location of the sports bar's terrace, an accessory structure within Colón's commercial property which did not have the required permits or did not comply with the Building Code or the laws and regulations of the Commonwealth of Puerto Rico; and (2) their defective design or construction of the terrace, i.e., one which did not comply with the Building Code or the laws and regulations of the Commonwealth of Puerto Rico.

Colón died during the course of this litigation. Petitioner substituted his heirs as parties-defendants prior to trial. Except for her claims against Colón's heirs and their insurer Cooperativa ("respondents"), petitioner settled all her claims against the other parties prior to trial.

During discovery, petitioner produced a report of her expert on liability, Dr. Ivan Baiges-Valentin, a mechanical and forensic engineer with an expertise in accident reconstruction. He had studied the relevant police reports, photographs and security-camera videos of the accident; and he had inspected the site of the accident itself. He had also reviewed another expert report authored for petitioner by Carlos Vera-Munoz, an engineer with an expertise in project management.

Vera-Munoz's report showed that the terrace where petitioner suffered her injuries was built on Colón's property sometime between 2004 and 2006 and was constructed in violation of the applicable Puerto Rico zoning regulations. Specifically, those regulations require that any structure built next to a road be outside the road's easement, i.e., be constructed at least nine (9) meters (or 29.53 feet) away from the centerline of that particular road. Vera-Munoz found that Colón's structure was built illegally because it was constructed *within the road easement itself* without obtaining the required construction permits. That is, Colón built his terrace less than 26 feet from the road's centerline, demonstrably less than the 9-meter (or 29.53 feet) requirement.

Vera-Munoz also reported that obtaining the necessary construction permits for the terrace would be impossible since Colón would have had to show that the construction complied with all the requirements of the Puerto Rico Department of Transportation and Public Works (DTPW) as well as its Highway and Transportation Authority (HTA), requirements which mandate that any such construction next to a road take place beyond the 9-meter (or 29.53 feet) road easement. Finally, even if Planning Regulation #4 allows for a building permit to be granted for a structure within the road easement if the property owner promises to remove the structure when required, in this case it was shown that Colón *never* made such a promise and *no* building permit was ever issued to him.

Based on Vera-Munoz's expert report as well as his own studies of the accident, Dr. Baiges-Valentin's report found that the sports bar's terrace was less than

26 feet from the road's centerline and that some of the parking spaces for the sports bar were even closer to the road's centerline, in fact less than 15 feet from it. He further determined that the Jeep Wrangler was parked in front of the sports bar on its north side where the accident occurred; that Colón's terrace extended over 3 feet into the road's easement; and that the parked Jeep Wrangler was even closer to the road's centerline.

Dr. Biages-Valentin therefore determined that *the location* of Colón's terrace and the parking area for the sports bar itself constituted a hazard to patrons who sit in this terrace area because both the terrace and the adjacent parking area were too close to the road. Thus when a vehicle such as Medina's loses control and veers off the road, the close proximity of the terrace to the road and to vehicles parked just next to it creates the danger that an out-of-control vehicle will collide with a parked vehicle and, in turn, cause that parked vehicle to strike portions of the adjacent terrace and harm patrons sitting there like petitioner. Dr. Biages-Valentin thus concluded that if Colón's terrace had not been built so close to the road, the chances of the accident occurring would have been substantially reduced.

He also determined that *the design and construction* of Colón's terrace was incapable of withstanding the impact from vehicular accidents like this one and therefore could not safely protect patrons like petitioner from the effects of such an event. In this way, "the structure of this establishment was a hazard to the customers inside the structure" with the greatest hazard having this sports bar located so close to the

road, exposing its patrons to the intrusion of out-of-control moving vehicles.

Finally, Dr. Biages-Valentin concluded that respondents were responsible for this accident and the resulting injuries to petitioner for building and locating this unsafe structure so close to the road. Because this construction was in violation of all relevant zoning regulations requiring more distance between it and the road, respondents' locating their terrace so close to the road made foreseeable this kind of accident whereby a passing vehicle negligently hits a nearby parked car, pushing it into Colón's adjacent terrace and injuring its patrons.

On December 8, 2017, respondents moved pursuant to Fed. R. Evid. 702 to exclude and limit the trial testimony and report of Dr. Baiges-Valentin. They contended that his expert report "fails to provide the required elements to sustain the claim that the location of the Terrace was hazardous" or contributed to petitioner's injuries, e.g., proof of prior similar accidents or data showing the extent of the terrace's invasion of the road easement and its relationship to the accident itself (App. 26). They also argued that his report contained no evidence to show that the "[s]ubject accident was foreseeable" or that it provided the relevant standard of care for the design and construction of the terrace itself or provide the manner in which its design and construction fell below that standard, thereby failing to establish the duty element of petitioner's negligence claim against them (*Id.*).

Six days later, on December 14, 2017, respondents also moved for summary judgment in their

favor on all of petitioner's claims for the "same [reasons] as the ones for the Motion to Exclude" Dr. Biages-Valentin's trial testimony and report, i.e., that petitioner cannot show a breach of the duty element of her negligence claim because she lacks evidence to prove the standard of care for the design and construction of the terrace and how this design and construction deviated from such standard; and because she cannot prove through prior similar accidents that this accident was foreseeable, an element of proximate causation.

On December 15, 2017, Magistrate Judge Velez-Rive denied respondents' summary judgment motion as untimely(App. 29). On December 26, 2017, the Magistrate also denied respondents' motion to exclude and limit Dr. Biages-Valentin's report and testimony at trial (App. 24-28). She ruled that all the issues raised by respondents about Dr. Biages-Valentin's report

> go to the weight of the evidence, not its admissibility, and are precisely the kinds of issues that fall squarely within the jury's province. The expert report merely serves to buttress the elements of Plaintiff's claims, which they will be required to prove at trial. *It will be up to the jury to evaluate the evidence presented,and coupled with Mr. Biages' testimony and report, resolve the issue one way or the other.*
>
> ....
>
> Here, as an expert engineer, Mr. Baiges offered his conclusions as to the cause of the accident, after evaluating the totality of the evidence before him.

> The Court cannot say that his conclusions are irrelevant or unreliable, insofar as they seem properly grounded,well-reasoned, and are clearly based on the evidence he examined and his knowledge and experience in the field. That is all the Court needs to analyze as part of its gatekeeping function at this stage, and enough to clear this initial hurdle. *Whether or not his opinions and conclusions will ultimately sway a jury remains a matter to be assessed at trial by the trier of fact.*
>
> The same applies to Defendants' efforts to limit Mr. Biages' [trial] testimony....

(App. 26-27) (emphasis supplied) (citations omitted).

A jury trial ensued on March 12, 2018, before the Magistrate Judge (App. 12). Petitioner adduced fact witnesses as well as four expert witnesses, including the testimony of both Biages-Valentin and Vera-Munoz who testified consistent with their respective reports that respondents were negligent in locating their terrace too close to the road and in designing and building this structure in a manner which could not withstand this vehicular accident (App. 23). After petitioner submitted her case in chief to the jury, respondents orally moved pursuant to Fed. R. Civ. P. 50(a) for judgment as a matter of law in their favor contending that she had not met her burden of proof on her claims (App. 12). Petitioner orally opposed the motion (*Id.*).

On March 15, 2018, the Magistrate issued an opinion and order granting the motion and dismissing

all of petitioner's claims with prejudice (App. 11-23). She concluded that petitioner's expert opinion evidence was conclusory and not based on factual or scientific data through which a jury could measure petitioner's allegations of negligence (App. 16-17). Specifically, "[n]o building code, law or regulation applicable to the location and construction of the terrace at issue, in place at the moment of the accident, was presented by the expert witnesses and how the terrace construction and location violated said code" (App.17). Nor did petitioner's expert witnesses present what type of design or construction would have been required to resist impacts from vehicle accidents such as occurred here so that the jury could evaluate the terrace and compare it with what would be a reasonably safe design (App. 17-18).

The Magistrate further determined, contrary to petitioner's proof, that there was no evidence as to who constructed the terrace or when it was built (App. 18). Nor did she think there was any evidence to show how much of the terrace was located within the road easement, where petitioner was sitting relative to the easement and whether Medina's vehicle collided with the parked Jeep Wrangler within or outside the road easement (App. 19). Finally, she ruled that because no standard of care has been established, the jury could not say whether the structure was dangerous and whether there was a breach of any duty of due care (App. 20-22). Without this showing of duty (e.g., prior similar accidents), there was no proximate causal nexus between petitioner's injury and respondents' alleged acts or omission such that respondents could foresee the accident happening the way it did (App. 21-22). The

Magistrate accordingly dismissed all of petitioner's claims against respondents with prejudice (App. 22).

Petitioner appealed and on December 20, 2019, one and one-half years after the Magistrate's ruling and without providing petitioner any opportunity for oral argument, the court of appeals unanimously affirmed the Magistrate's ruling (App. 1-5). The Panel, speaking through Boudin, J., agreed that Vera-Munoz failed to identify any required permits, statutes or regulations which make illegal the construction of the terrace within the existing right of way (App. 3). In addition, Baiges-Valentin did not provide any industry standards defining a duty of care regarding the safe construction of roadside structures (App. 3-4).

On March 2, 2020, the court of appeals denied petitioner's timely filed petition for Panel rehearing or for rehearing *en banc* (App. 30-32).

Respondents then moved for their attorney's fees under Puerto Rico law contending that petitioner had acted "obstinately or frivolously" in pursuing her case, citing the earlier Rule 50(a) dismissal as grounds therefor (App. 7). On April 6, 2020, the Magistrate denied respondents' motion (App. 6-10). The Magistrate determined that there was no lack of proof to sustain petitioner's claims; petitioner worked diligently to pursue her "straightforward" case with experts and other evidence; and there was no evidence to infer her bad faith so as to justify such an award (App. 9-10).

REASONS FOR GRANTING THE PETITION.

The Federal District Court Established "The Law of the Case" When Before Trial It Denied A Motion To Exclude Petitioner's Experts And Ruled That It Was "Up To The Jury To Evaluate [This] Evidence" And Decide Whether Respondents Were Negligent In Locating Their Terrace Too Close To The Road Or In Designing And Building A Structure Which Could Not Withstand This Accident. Both Courts Below Violated The "Law of the Case" Doctrine And Petitioner's Due Process Right To A Jury Trial In Granting Respondents' Rule 50(a) Motion During Trial Without Identifying What New Evidence Had Been Adduced Or What Facts Had Changed To Warrant This New Ruling.

The district court's ruling before trial denying respondents' motion to exclude and limit Dr. Biages-Valentin's expert report and trial testimony established as "the law of the case" that petitioner's expert proof presented triable fact issues for a jury to decide in determining whether respondents were negligent and whether their negligence proximately caused petitioner's injuries. Respondents' untimely motion for summary judgment, made for the "same [reasons] as the ones for the Motion to Exclude," would have been denied as well and for the same reason, i.e., that on this record, genuine issues of material fact regarding respondents' liability remained for resolution by a jury at trial.

Consistent with this assessment of "the law of the case," petitioner's proof was otherwise persuasive enough to foster a settlement before trial with all other

defendants except respondents, the owners of the terrace responsible for its location within the roadway's easement in the first place; and it was probative enough to prevent the award of attorney's fees to respondents in the wake of the district court's Rule 50(a) ruling in their favor.

Yet after a trial of more than three days where petitioner adduced much more evidence than her expert witnesses, at the close of her case in chief and just before respondents were to introduce their lone witness, the Magistrate granted respondents' oral Rule 50(a) motion on grounds which contravened the very ruling she had *already* made before trial on the exact same issue, i.e., that petitioner's expert evidence was fit for a jury's assessment about whether respondents should be held liable for petitioner's injuries.

This mid-trial ruling by the district court dismissing petitioner's claims with prejudice---and the affirmance of this ruling by the court of appeals--- is not only at odds with this Court's " law of the case" doctrine but also with petitioner's due process rights to a jury trial and access to the courts. In addition, if both courts below believed that this "law of the case" should now be supplanted, they were dutybound to identify in their respective decisions what new evidence had been adduced or what facts had changed to warrant this new ruling. Both courts failed to do so.

Absent any explanation harmonizing the district court's pretrial ruling declaring that petitioner's expert evidence of respondents' negligence was fit for a jury's evaluation with its later abrupt dismissal of her negligence claims during trial, it remains "the law of

the case" that petitioner's proof of negligence and causation created fact questions for the jury to decide, *not* the district court or the court of appeals. Because these rulings below contravene this Court's vitally important "law of the case" jurisprudence, the petition should be granted and the matter remanded to the district court for a new trial on petitioner's claims.

In petitioner's case in chief, the jury heard Biages-Valentin and Vera-Munoz testify without contradiction that respondents located their terrace too close to the road and designed or built it in a manner which could not withstand this vehicular accident. Vera-Munoz's research showed the terrace was built around 2004-2006 and was done illegally because it was located *within the road easement itself*, less than 26 feet from the road's centerline, demonstrably less than the 9-meter (or 29.53 feet) requirement under the relevant zoning regulations, without obtaining the required construction permits.

Vera-Munoz testified that obtaining construction permits for locating the terrace so close to the road was unlikely even if pursued----Colón did not do so---- because such construction *must* take place beyond the 9-meter (or 29.53 feet) road easement under the zoning regulations; and even if Planning Regulation #4 allows for a building permit to be granted for a structure within the road easement if the property owner promises to remove the structure when required, the evidence showed that Colón *never* made such a promise and *no* building permit was ever issued to him.

Dr. Baiges-Valentin built upon this proof by testifying that some of the parking spaces for the sports

bar were *even closer* to the road's centerline than the terrace , in fact less than 15 feet from its centerline; and that while Colón's terrace extended over 3 feet into the road's easement, the parked Jeep Wrangler was even closer to the road's centerline at the time of the accident. In this way, as Baiges-Valentin testified, the location of Colón's terrace and the adjacent parking spaces constituted an inherently unsafe condition for patrons sitting in the terrace because it created the danger that a passing out-of-control vehicle would collide with vehicles parked within the roadway easement causing them to invade the nearby terrace area and harm its patrons, petitioner among them. He also concluded that if Colón's terrace had not been built so close to the road, the chances of the accident occurring would have been substantially reduced.

Moreover, that the force of the collision pushed the parked Jeep into the terrace and caused parts of the terrace to strike patrons sitting there supported Baiges-Valentin's common sense determination based on the very events which transpired that the terrace's design and construction could not withstand the impact from vehicular accidents like this one. According to him, its design and construction created an unreasonable risk of harm to "the customers inside the structure" with the greatest hazard being this sports bar's location so close to the road, exposing patrons to the intrusion of out-of-control moving vehicles. Because this construction of the terrace violated all relevant zoning regulations requiring more distance between it and the road, he testified that its very location made it foreseeable that a vehicular accident of this kind would cause the kind of chain reaction which would injure the sports bar's patrons sitting in the terrace.

All of this proof had caused the district court before trial to deny respondents' motion to exclude and limit Dr. Biages-Valentin's trial testimony. It wrote that "[i]t will be up to the jury to evaluate the evidence presented, and coupled with Mr. Biages' testimony and report, resolve the issue one way or the other;" and "[w]hether or not his opinions and conclusions will ultimately sway a jury remains a matter to be assessed at trial by the trier of fact" (App. 26-27).

Thus for the purposes of trial, this pre-trial ruling by the district court made "the law of the case" a resolution by the jury of three crucial issues, all of them addressed affirmatively by petitioner's expert testimony: (1) was the terrace located in an unsafe location, built as it was in violation of zoning regulations within the abutting road easement without obtaining the required construction permits; (2) did this unsafe location create the further danger that vehicles parked just outside the terrace were now caused to be parked further into the roadway easement, creating another dangerous condition or hazard for passing traffic; and (3) was this accident caused by a negligent driver hitting one of those parked vehicles which, in turn, caused parts of the adjacent terrace to strike and injure petitioner within the range of foreseeable risks created by respondents' negligent location and construction of the terrace too close to the roadway?

The district court's mid-trial ruling preventing the jury from resolving these crucial issues fatally undermines this Court's "law of the case" jurisprudence. Because "inconsistency is the antithesis of the rule of law," *LaShawn A. v. Barry*, 87 F.3d 1389,

1393 (D.C. Cir. 1996) (*en banc*), "the law of the case" doctrine holds that "the *same* issue presented a second time in the *same case* in the *same court* should lead to the *same result*." *Id.* (emphasis supplied).Thus "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case."*Musacchio v. United States*, 577 U.S. ___,___; 136 S.Ct. 709, 716 (2016) citing *Pepper v. United States*, 562 U.S. 476, 506 (2011) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)). Crafted with the course of ordinary litigation in mind, the doctrine directs a court's discretion; it does not define a tribunal's power. *Arizona*, *supra*. *Messenger v. Anderson*, 25 U.S. 436, 444 (1912). *Southern Ry. Co. v. Clift*, 260 U.S. 316, 319 (1922). It applies equally to the decisions of coordinate courts in the same case and to a court's own prior decisions. *Christianson v. Colt Indus. Oper. Corp.*, 486 U.S. 800, 816 (1988).

Refusing to reopen what has already been decided promotes efficiency, finality and obedience within the judicial system; it avoids time-consuming relitigation of issues by not permitting "end runs" around every previous ruling and by discouraging the cynical invitation of litigants to have a court "change its mind." See *Great Western Tel. Co. v. Burnham*, 162 U.S. 339, 343-344 (1896). *Krakowski v. Am. Airlines, Inc. (In re AMR Corp.)*, 567 B.R. 247, 254-256 & n. 6 (Bankr. S.D.N.Y. 2017); *Allapattah Servs., Inc. v. Exxon Corp.*, 372 F. Supp. 2d 1344, 1363 (S.D. Fla. 2005); *Naser Jewelers, Inc. v. City of Concord*, 538 F.3d 17, 20-21 (1st Cir.2008).

While a court should therefore be loathe to revisit its prior decisions, *Christianson*, 486 U.S. at 817,

"the law of the case" doctrine does not preclude reconsideration of a prior ruling where (1) significant new facts have emerged not earlier obtainable in the exercise of due diligence; (2) the controlling legal authority has changed dramatically; or (3) the earlier decision was clearly erroneous and would create manifest injustice. *Negron-Almeda v. Santiago*, 579 F.3d 45, 51-52 (1st Cir. 2009). *In re City of Philadelphia Litigation*, 158 F.3d 711, 718 (3rd Cir. 1998). *White v. Murtha*, 377 F.2d 428, 431-432 (5th Cir. 1967). See *Hamilton v. Leavy*, 322 F.3d 776, 787 (3rd Cir. 2003).

Thus even if the Magistrate's denials of respondents' motion to exclude and limit Biages-Valentin's expert report and trial testimony in 2017were interlocutory and therefore open to later reconsideration by this same judge or by a different judge of the same court, see *Langevine v. District of Columbia*, 106 F.3d 1018, 1023 (D.C. Cir. 1997), "the law of the case" doctrine still obligated the Magistrate to identify in her subsequent decision (1) the significant *new* facts which emerged since her prior ruling which were not earlier obtainable in the exercise of due diligence; or (2) the *new* controlling legal authority which had emerged since then; or (3) how her earlier decision was clearly erroneous and would create manifest injustice so that the parties (and the court of appeals) have fair notice of the reason(s) anchored in the record which justify reversing her earlier denial of the motion to exclude and limit expert evidence. *Roberts v. Ferman*, 826 F.3d 117, 126-127 (3rd Cir. 2016).

Stated another way, when the same judge (or two different judges) of the same court reach opposite conclusions about whether there are triable fact issues

for a jury at different points in the same litigation, the earlier ruling should control unless the second ruling identifies new facts, new law or the manifest injustice which justifies the new ruling. *Williams v. Commissioner*, 1 F.3d 502, 503-504 (7th Cir. 1993) (Posner, J.). *United States v. Desert Gold Mining Co.*, 433 F.2d 713, 715 (9th Cir. 1970). *Dictograph Products Company v. Sonotone Corporation*, 230 F.2d 131, 134-135 (2nd Cir. 1956) (Hand, J.). See also *Virgin Atl. Airways v. National Mediation Bd.*, 956 F.2d 1245, 1254-1255 (2nd Cir.), *cert. denied*, 506 U.S. 820 (1992).

The Magistrate provided none of these reasons except to unduly parse the expert opinions which before trial she had already determined were fit for a jury's assessment and then afterwards viable enough to warrant the denial of attorney's fees to respondents. Nor did the court of appeals harmonize in any way the district court's pretrial ruling declaring that petitioner's expert proof of respondents' negligence was fit for a jury's evaluation with its later abrupt dismissal of her negligence claims during trial. It therefore remained "the law of the case" that a jury should decide whether petitioner's proof of negligence and causation established liability on this record.

The "law of the case" doctrine is an integral part of the federal trial system for disposing of litigation in an orderly and fair manner. Where the federal trial system with its component rules of procedure and evidence provide a framework for disposing of litigation, those remedies must comport with the Due Process Clause. *Evitts v. Lucey*, 469 U.S. 387, 393 (1985). *Griffin v. Illinois*, 351 U.S. 12, 13-14 (1956). See *Ortwein v. Schwab*, 410 U.S. 656, 660 (1973).

Petitioner's cause of action and her right to have her claims heard and decided consistent with established protocol, including the "law of the case" doctrine, is a valuable property right entitled to due process protection. *Board of Regents v. Roth*, 408 U.S. 564, 571-572 (1972). See *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538;541 (1985) ("The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures"); *Gibbes v. Zimmerman*, 290 U.S. 326, 332 (1933); *Fidelity & Deposit Co. v. Arenz*, 290 U.S. 66, 68 (1933). See also *Boddie v. Connecticut*, 401 U.S. 371, 374-375 (1971).

The decision by both courts to ignore the district court's earlier pretrial rulings denying respondents' motions to exclude petitioner's expert evidence and then to preemptively dismiss with prejudice petitioner's claims based on a rereading of that same expert evidence---*already* determined to be fit for a jury's consideration----is a denial of due process and petitioner's right to a jury trial.

The decisions below also undermine the efficacy of the standards attending the entry of judgment as a matter of law under Rule 50(a). It is well settled that the motion should be denied if "reasonable minds could differ as to the import of the evidence." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251 (1986). *Winant v. Bostic*, 5 F.3d 767, 774 (4th Cir. 1993). Moreover, such motions, especially on this record, should be granted "sparingly" and "cautiously" because the right to a jury trial is at stake. See, e.g., *Pitts v. Delaware*, 646 F.3d 151, 155 (3rd Cir. 2011); *Weldy v.*

Piedmont Airlines, Inc., 985 57, 59 (2nd Cir. 1993). As the district court decided three months before trial, a jury should have been allowed to resolve these disputed fact questions raised by petitioner's expert proof and a fair, consistent application of this Court's "the law of the case" doctrine would have insured that result, giving petitioner the jury trial to which she was entitled.

The Court of Appeals' Unfair Treatment of Petitioner's Appeal.

The court of appeals maintained petitioner's appeal on its docket for nearly one and one-half years and then issued its terse five-page opinion without even allowing the parties oral argument, a customary if not mandatory practice in the Circuit. In doing so, the court of appeals for its own convenience deprived petitioner once again of the opportunity to have her case against respondents fully argued and heard by an impartial tribunal. The Circuit Judge who authored the court's opinion had participated in only one other opinion by the Circuit all year; between 2015 and 2017 inclusive, he had participated in no appeals and in 2018, only nine. Another judge on the Panel likewise rarely participates in oral argument.

While petitioner is sympathetic to the Circuit Judges' health issues, she believes that those issues should not prejudice the rights of appellants like her who justifiably rely on the judges of the court of appeals (and not their law clerks) to hear, rule upon and decide the issues presented. Denying petitioner oral argument may indicate a lack of due process whereby the court of appeals failed to address petitioner's claims in a manner commensurate with a full and fair hearing.

In the final analysis, due process requires a meaningful hearing where the participants are fully armed with the relevant facts so that the decisionmaker is fully informed. *Goldberg v. Kelly*, 397 U.S. 254, 269-270 (1970) citing *ICC v. Louisville & N. R. Co.*, 227 U.S. 88,93-94 (1913) and *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 103-104 (1963). The right to a fair hearing does not depend on a demonstration of certain success, only that it take place. *Cleveland board of Education v. Loudermill*, 470 U.S. 532, 544 (1985) citing *Carey v. Piphus*, 435 U.S. 247, 266 (1978). Without oral argument in this case or the opportunity to demonstrate to the court of appeals that such was necessary to make a fair decision here, petitioner was denied a meaningful hearing consonant with due process.

CONCLUSION

Petitioner had the right to have her "straightforward" case, buttressed by expert evidence and other persuasive proof, heard by a jury. This was her principal purpose in filing this case in the federal district court for the District of Puerto Rico. She had the right to have that jury determine the negligence of respondents which harmed her; and she had the right to have that jury evaluate and award her damages in this case, one in which she is now handicapped for life and where these respondents have unfairly escaped liability, all because the trial court changed its mind. Petitioner strongly believes that justice was not served in this case.

For all of these reasons identified herein, this Court should grant a writ of certiorari to review the

judgment of the United States Court of Appeals for the First Circuit and to vacate and reverse that judgment, remanding the matter to the district court for the District of Puerto Rico for trial on the merits of petitioner's claim that respondents are liable for the negligent location, design and construction of their terrace; or provide petitioner with such other relief as is fair and just in the circumstances of this case.

Respectfully submitted,

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944 F.3d 963

United States Court of Appeals, First Circuit.

Yeitza Marie APONTE-BERMÚDEZ, Plaintiff, Appellant,
v.
Eligio COLON et al., Defendants, Appellees,
Angel Nolberto Robles et al., Defendants.

No. 18-1266

December 20, 2019

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[Hon. Camille L. Velez-Rive, U.S. Magistrate Judge]

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Before Lynch, Boudin, Kayatta, Circuit Judges.

Opinion

BOUDIN, Circuit Judge.

On December 30, 2012, Gabriel Medina Ortíz ("Medina") drove his car into a vehicle parked outside a

building owned by Eligio Colón. The impact caused the parked vehicle to crash into the building's open terrace, injuring several individuals sitting within the terrace, including Yeitza Aponte-Bermúdez ("Aponte"). Aponte sued Medina, Colón, and others, thereafter settling her claims with all defendants, except for Colón, his heirs, and his insurer.[1]

At trial, two expert witnesses testified and submitted reports for Aponte. After Aponte's case-in-chief, the district court granted judgment, Fed. R. Civ. P. 50, for the defense, finding that Aponte failed to establish the applicable standard of care, a breach of duty, and that the accident was foreseeable to the defendants. Aponte now appeals.

Because this is a diversity case controlled by Puerto Rico law, see Rodríguez-Tirado v. Speedy Bail Bonds, 891 F.3d 38, 41 (1st Cir. 2018), Aponte had to show "damage ... through fault or negligence" of the defendant, P.R. Laws Ann. tit. 31, § 5141. Where, as here, Aponte claimed defective or negligent design, this circuit ruled in Vázquez-Filippetti v. Banco Popular de Puerto Rico that under Puerto Rico law, Aponte would ordinarily have to prove the applicable standard of care through expert witnesses. 504 F.3d 43, 51-52 (1st Cir. 2007). What is a reasonably safe design, the court said, is ordinarily "beyond the experience or knowledge of an average lay person." Id. at 52.

The rule ascribed to Puerto Rico has the ring and balance of a settled rule, and Vázquez-Filippetti presents it in these terms. What is "ordinarily" true is not invariably true: some negligence in design may be blatant enough not to require expert testimony just as an ordinary negligence case might occasionally call for more than lay testimony. But no such exception is claimed to apply to the negligent

design claim in this case nor would there be any sound basis for such an exception in this instance. And while standard tort treatises do not seem commonly to identify the expert witness requirement, Vázquez-Filippetti cites some authority for the rule in Puerto Rico, id. at 50-53, and Aponte agrees that Vázquez-Filippetti governs this case. As she also has not cited us to any Puerto Rico case contrary to Vázquez-Filippetti, Vázquez-Filippetti is binding in this circuit.

At trial, Aponte argued that the defendants' terrace was negligently designed in two respects: first, that the terrace was built too closely to the road to ensure the safety of customers inside and, second, that the structure was not capable of withstanding vehicular impacts. But her experts at trial did not present to the jury or otherwise point elsewhere in the record to any evidence showing "what the customary or usual standard of care [is] for traffic or structural engineers designing" roadside structures. Id. at 54.

Carlos Vera-Muñoz ("Vera"), qualified as an expert witness in engineering and project management, testified that "[the] structure was constructed illegally without permits and it was constructed inside the right of way of the road." Yet Vera identified no such required permits nor the statute or regulation that makes illegal the construction of the terrace within an existing right of way.

Vera reported that a Highway and Transportation Authority ("HTA") guide sets eighteen meters (nine meters from the road's center in each direction) as the typical cross-section for roads like PR-152, the road on which the accident occurred. Vera also testified that a planning regulation, Planning Regulation #4, prohibits construction within a government-owned roadside right of way without the

government's permission. In fact, one corner of the terrace was fewer than nine meters from the road's center.

On cross examination, Vera acknowledged that the HTA guide and Planning Regulation #4 were distinct regulations. Planning Regulation #4, at least as presented in Vera's report and testimony, does not refer to the HTA guide. Planning Regulation #4, provides, in pertinent part:

> No construction of any building within the proposed right of way will be authorized (Article 21, Act No. 76, enacted on June 24, 1975, as amended), unless the owner of the possession or property promises, to remove the structures and development works, at its own account and risk .... The occupation or use of lawfully existing buildings or structures ... is permitted, until the government may have a need to acquire the property by any lawful means.

Planning Regulation #4 does not create rights of way; it simply prohibits construction, unless the owner bears the risk of removal, in the rights of way that the 1975 act references.[2] Nor does the HTA establish rights of way or prohibit roadside construction.

As to the terrace's construction, Ivan Baigés-Valentín ("Baigés-Valentín"), an expert in mechanical engineering and accident reconstruction, reported that the terrace was "not capable of resisting impacts from vehicle accidents" or "safely protecting its customers from the impact of a vehicular collision." Yet Baigés-Valentín did not provide any industry standards establishing a standard of care regarding the construction of roadside structures.

Affirmed.

Footnotes

1Colón died prior to trial, and Aponte substituted Colón's heirs as defendants. See Fed. R. Civ. P. 25(a).

2Nor does the 1975 act create rights of ways. The act only prohibits the Regulations and Permits Administration from authorizing construction on rights of way that appear on an official map or that the Department of Transportation and Public Works is in the process of constructing. See P.R. Act No. 76 of June 24, 1975, at 231–32.

2020 WL 1692619

United States District Court, D. Puerto Rico.

Yeitza Marie APONTE BERMUDEZ, et als.,
Plaintiffs,
v.
Hector H. BERRIOS, et als., Defendants.

CIVIL NO. 15-1034 (CVR)

Signed 04/06/2020

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Colon Fernandez, Cooperativa de Seguros Multiples de Puerto Rico.

OPINION AND ORDER

CAMILLE L. VELEZ-RIVE, UNITED STATES MAGISTRATE JUDGE

The present case is the result of an accident where Plaintiff Yelitza Marie Aponte Bermúdez was injured when a car crashed into the outside terrace of a bar where she was sitting. Plaintiff settled the case with some of the Defendants, and then proceeded to trial only against co-Defendants Carmen Gloria Fernández Torres, Eligio Rafael Colón Fernández, Luis Alberto Colón Fernández, Ricardo Colón Fernández, Marigloria Colón Fernández, Manuel Pablo Colón Fernández, Maricarmen Colón Fernández and Marirosa Colón Fernández, and their insurer Cooperativa de Seguros Múltiples ("Defendants").

Defendants offered a Rule 50 motion for judgment as a matter of law at the close of Plaintiffs' case in chief. The Court granted the motion. Accordingly, the Court dismissed the case with prejudice. Plaintiffs then appealed the Court's ruling to the United States Court of Appeals for the First Circuit, which affirmed the Court's Rule 50 dismissal.

Before the Court now is Defendants' "Motion for Attorney's Fees" (Docket No. 219) and Plaintiffs' Opposition thereto. (Docket No. 224).

The general rule is that a prevailing party in a case must bear its own attorneys' fees and may not collect them from the losing party, unless there is an enforceable contract or a statutory provision providing for attorneys' fees. See Buckhannon v. West Va. Dept.

of Health, 532 U.S. 598, 602 (2001). Puerto Rico state law governs this issue in a Court sitting under diversity jurisdiction, where it has been well established that in the absence of a statutory or contractual provision, the prevailing party "may be entitled to attorneys' fees ... when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.' " See Peckham v. Continental Cas. Ins. Co., 895 F.2d 830, 841 (1st Cir. 1990) and Rodríguez-Torres v. Government Development Bank of Puerto Rico, 708 F.Supp.2d 195, 198 (D.P.R. 2010) (*quoting*Chambers v. NASCO, Inc., 501 U.S. 32, 45-46, 111 S.Ct. 2123 (1991)). Specifically, Rules 44.1(d) and 44.3 of the Puerto Rico Rules of Civil Procedure provide the basis for an attorney's fee award in this case, and permits fees only where a "party or its lawyer has acted obstinately or frivolously." P.R. Laws Ann. tit. 32, App. III, Rule 44.1(d) and Rule 44.3.

In order for the Court to find that the losing party has been "obstinate," it must find that the party has been "unreasonably adamant or stubbornly litigious, beyond the acceptable demands of the litigation, thereby wasting time and causing the court and the other litigants unnecessary expense and delay." De León-López v. Corporación Insular de Seguros, 931 F.2d 116, 126-127 (1st Cir. 1991). This seeks to penalize a party whose "stubbornness, obstinacy, rashness, and insistent frivolous attitude has forced the other party to needlessly assume the pains, costs, efforts, and inconveniences of a litigation." Top Entertainment, Inc. v. Torrejón, 351 F.3d 531, 533 (1st Cir. 2003) (*quoting*Fernández v. San Juan Cement Co., 118 D.P.R. 713, 718 (1987)).

Defendants submit that Plaintiff was frivolous in pursuing her claims against them, because the

dismissal of the case at the Rule 50 stage evidenced there was a total lack of evidence that could sustain Plaintiff's claims against them. The Court disagrees and cannot find that Plaintiffs behaved in a manner that would warrant an award of attorney's fees in the present case.

On the record as it stands, the Court cannot find that Defendants were stubbornly litigious, or displayed behavior beyond the acceptable demands of the litigation, the standard that the First Circuit has determined necessary for order for an award of attorneys' fees to proceed. *Cf.* Rishell v. Medical Card System, Inc., 982 F.Supp.2d 142 (D.P.R. 2013) ("The Court finds that plaintiffs' pursuit of repetitive, piecemeal litigation qualifies as obstinate litigation").

Furthermore, Courts may consider several factors, such as whether a litigant's conduct needlessly prolonged the litigation, wasted the other party's and the court's time, acted in bad faith and if the other party and the court incurred in needless procedures, unreasonable efforts and expenses. Renaissance Marketing, Inc. v. Monitronics Intern., Inc., 673 F.Supp.2d 79, 84 (D.P.R. 2009). These factors were likewise not present in this case.

This was a relatively straightforward case where an unfortunate accident resulted in injury to Plaintiff Aponte-Bermúdez. There was no needless prolongation of the litigation or a misuse of time. On the contrary, the Court finds that both parties worked diligently in prosecuting their respective cases and both had experts and witnesses prepared for trial. The fact that, at the Rule 50 stage, the Court dismissed Plaintiffs' case is not automatically indicative of bad faith by them. Moreover, Defendants can point to nothing specific in the record that would warrant the Court to find that

Plaintiffs acted in bad faith or otherwise meet the criteria established by Puerto Rico law for an award of attorney's fees.

For these reasons, Plaintiffs' "Motion for Attorneys' Fees" (Docket No. 219) is DENIED.

IT IS SO ORDERED.

**

2018 WL 10435084

United States District Court, D. Puerto Rico.

Yeitza Marie APONTE BERMUDEZ, Plaintiff,

v.

Hector H. BERRIOS, et al., Defendants.

CIVIL NO. 15-1034 (CVR)

Signed 03/15/2018

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OPINION AND ORDER

CAMILLE L. VELEZ RIVE, UNITED STATES MAGISTRATE JUDGE

The present case stems from an automobile accident, where co-Defendant Gabriel A. Medina Ortíz ("Medina") caused the vehicle he was driving to impact a parked motor vehicle in front of "El Bullpen de Norberto Sports Bar" owned by now deceased co-Defendant Eligio Colón and his heirs ("Colón Defendants"). The force of the crash caused the parked vehicle to impact the open terrace of a larger bar area and injure several clients inside, including Plaintiff Yeitza Marie Aponte Bermúdez ("Plaintiff"), who brought suit against the Colón Defendants, Medina and others for the injuries she sustained as a result of the accident. All claims were settled against all parties except the Colón Defendants and their insurer, Cooperativa de Seguros Múltiples ("Cooperativa" and collectively "Defendants").

The jury trial was held from March 12-14, 2018. Upon Plaintiff's submittal of her case in chief, Defendants orally requested and argued for the dismissal of all claims pursuant to Fed. R. Civ. P. 50, Judgment as a Matter of Law, contending that Plaintiff had not met her burden of proof for the causes of action raised in the Amended Complaint, and that dismissal at that time was proper. Plaintiff verbally opposed said petition.

For the reasons explained below, Defendants' Motion for Judgment as a Matter of Law under Fed. R. Civ. P. 50 is GRANTED. Accordingly, all claims filed by Plaintiff against the Colón Defendants and Cooperativa are DISMISSED WITH PREJUDICE.[1]

STANDARD

In ruling on a motion under Rule 50, the Court does not consider the credibility of witnesses, resolve conflicts in testimony, or evaluate the weight of the evidence. The motion is properly granted when the evidence and inferences reasonably drawn therefrom, viewed most favorably to the non-movant, permit only one reasonable conclusion. Colasanto v. Life Ins. Co. of N. Am., 100 F.3d 203, 208 (1st Cir. 1996). Such a motion may be granted "[i]f a party has been fully heard on an issue during a jury trial and the [C]ourt finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue". Fed.R.Civ.P. 50(a)(1).

Because granting a motion for judgment as a matter of law deprives the party opposing it of a determination by the jury, it is to be granted cautiously and sparingly. Rivera-Castillo v. Autokirey, Inc., 379 F.3d 4, 9 (1st Cir. 2004) ("Even in the best circumstance, the standards for granting a motion for judgment as a matter of law are stringent."); 9B Wright and Miller, *Federal Practice and Procedure* § 2524 (3d ed. 2008). A district court "may only grant a judgment contravening a jury's determination when 'the evidence points so strongly and overwhelmingly in favor of the moving party that no reasonable jury could have returned a verdict adverse to that party.' " Rivera-Castillo,379 F.3d at 9 (*quoting* Keisling v. SER-Jobs for Progress, Inc., 19 F.3d 755, 759-60 (1st Cir. 1994)).

In reviewing a motion for judgment as a matter of law, the Court "must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." Reeves v. Sanderson Plumbing Prods., 530

U.S. 133, 150, 120 S. Ct. 2097 (2000); see also White v. N.H. Dep't. of Corrections, 221 F.3d 254, 259 (1st Cir. 2000). The Court "should give credence to the evidence favoring the non-movant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that the evidence comes from disinterested witnesses." Reeves, 530 U.S. at 151 (citation omitted). Pursuant to Rule 50, therefore, Defendants "motion[s] for judgment cannot be granted unless, as a matter of law, [plaintiffs have] failed to make a case...." Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 251, 61 S.Ct. 189 (1940).

LEGAL ANALYSIS

As properly asserted by Defendants, and due to the claims raised by Plaintiff against Defendants in the Amended Complaint, the leading case applicable to the type of case before the Court is Vázquez-Filippetti v. Banco Popular de Puerto Rico, 504 F.3d 43, 50 (1st Cir. 2007). The Court liberally borrows from Vazquez-Filippetti to establish the relevant law applicable to this case.

Under Article 1802 of Puerto Rico's Civil Code, recovery of tort damages requires a showing that the defendant "by act or omission cause[d] damage to another through fault or negligence." P.R. Laws Ann. tit. 31, § 5141. In order to establish negligence under Puerto Rico law, a party must bring show: (1) defendant owed a duty to plaintiff; (2) defendant breached that duty (i.e. the defendant was negligent); (3) injury to the plaintiff; and (4) proximate cause between defendant's breach of the duty of care and plaintiffs injury. See Torres v. K-Mart Corp., 233 F.Supp.2d 273, 277-78 (D.P.R. 2002). Foreseeability is a

central issue in these cases, as it is an element of both breach of duty and proximate cause. See Woods-Leber v. Hyatt Hotels of P.R., 951 F.Supp. 1028, 1036 (D.P.R. 1996), *aff'd*, 124 F.3d 47 (1st Cir. 1997)(foreseeability is a component of breach of duty and proximate cause).

Breach of duty has, as its name implies, two sub-elements, to wit, duty and breach. In most cases, the duty is defined by the general rule that one must act as would a prudent and reasonable person under the circumstances. See Ortíz v. Levitt & Sons of P.R., Inc., 101 D.P.R. 290 (1973). Foreseeability is a component of the "breach" sub-element because a defendant only breaches his duty if he acted (or failed to act) in a way that a reasonably prudent person would foresee as creating undue risk. See Pacheco Pietri v. ELA, 133 D.P.R. 907 (1993). In other words, a person breaches the duty of reasonable care when his actions create reasonably foreseeable risks. A plaintiff, then, must show the foreseeable risks created by defendant's acts or omissions in order to carry his/her burden as to this element of a tort claim. Vazquez-Filippetti, 504 F.3d at 53.

Claims arising from dangerous properties can be premised on the existence of a dangerous condition, such as a wet floor, or as here, a negligent design. Negligent design cases involve a claim that the property was unsafe from its very conception, which means the risks to patrons stem from the layout of or the nature of improvements on the property. The flaws might include excessively steep stairways[2], a balcony without a fence or guardrail[3], or a busy intersection without stop signs or lights to direct traffic.[4]

The elements to be proven in a negligent design case are the same as any other tort claim: injury, breach of duty, and proximate cause. However, the plaintiff

also "bear[s] the burden of establishing the applicable standard of care." Prado Alvarez v. R. J. Reynolds Tobacco Co., 313 F.Supp.2d 61, 73 (D.P.R. 2004), *aff'd*, 405 F.3d 36 (1st Cir. 2005). In these cases, the property encountered by a plaintiff existed in the state intended by its owner and the alleged defect is inherent in the property's design. As such, the jury must evaluate defendant's actions with some understanding of what would, or would not, constitute a reasonably safe design. In other words, a plaintiff will only meet his/her burden of proof if he/she presents evidence as to the applicable standard of care, because the jury must be sufficiently familiar with that whatever the standard is in order to be able to evaluate whether the defendant's design complied with it.

A. Standard of Care.

As an initial matter, the Court finds Plaintiff did not establish the standard of care applicable to this case. Through Plaintiff's expert witnesses,[5] she alleged that: the terrace was built too close to the road and within the road easement zone; the location of the terrace was a hazard to the customers inside the structure; the structure of the terrace was not capable of resisting impacts from vehicle accidents or safely protecting its customers from the impact of a vehicular collision such as the one in this case; and the terrace lacked the required permits.

However, the evidence presented at trial shows the expert witnesses' opinions were conclusory and not based on factual data or scientific data and did not provide any scientific methodology. As a matter of fact, the expert witnesses failed to identify the standard of care through which the jury had to measure Plaintiff's

allegations. Thus, the jury does not know what such a standard provides. No building code, law or regulation applicable to the location and construction of the terrace at issue, in place at the moment of the accident, was presented by the expert witnesses and how the terrace construction and location violated said code. No building code, law or regulation was mentioned that would impose, upon structures such as the terrace at issue, specific construction or design elements to resist loads from an impact of motor vehicles. No list of the necessary permits from the government agencies (*i.e.* DTOP, ARPE, ACT, among others) required for the type of terrace was presented either. No building code, law or regulation was introduced in support of the allegation that, since the terrace was built inside the easement ("servidumbre"), it was an illegal construction.

The expert witnesses further failed to present what type of design or construction would have been required in order to resist impacts from vehicle accidents such as the one here. The expert witnesses did not establish either the specific characteristics of the construction and design of the terrace at issue, at that point in time, to demonstrate how those characteristics allegedly were faulty in location, design or construction.[6] They did not describe the specific physical characteristics of the terrace and its structural condition at the time of the accident. To this effect, Plaintiff's expert witnesses did not testify, nor did their expert reports include, any measurements of the terrace, the roof or the parking area; the limits of the commercial property; construction and design details and/or a sketch of the terrace and its components; the type of materials used in the construction of the terrace and the roof at the time; the amount and location of

railings, beams, panels and columns in the terrace and in support of the roof. Thus, the jury is unable to evaluate the terrace and compare it with what would, or would not, constitute a reasonably safe design. In sum, the jury has not been put in a position to evaluate the accuracy of Plaintiff Aponte's allegations. See Pérez, 444 F. Supp. at 626 (plaintiffs failed to identify any statutes or ordinances that could bolster the claim of an unreasonable or unsafe design, and thus failed to present "an objective standard [against which the court could] measure the accuracy of Plaintiff's contention").

The expert witnesses further based their conclusions on the fact that the terrace in question was built on the easement ("servidumbre"), yet no regulation was presented that would make this construction illegal. On the contrary, Planning Regulation #4 (cited by Engineer Vera) stated quite the opposite, to wit, that construction upon an easement is permissible if the owner committed himself to removing the structure at his/her cost in case of a government taking. Therefore, Regulation 4, by itself, cannot stand for the proposition that all constructions on easements are illegal, much less unsafe or inherently hazardous.

Furthermore, no evidence was presented as to who constructed the terrace at issue and when. Engineer Vera determined that the terrace was built between 2004 and 2006 by looking at Google maps. However, Engineer Vera admitted he did not interview the Defendants in this case (which include the owners of the commercial space and the operator of the Sports Bar) or neighbors in the area to determine with more certainty when the terrace was actually built. The date on which the terrace was built is important to determine which applicable code of regulation applies to

its construction and design. In addition, it is important to know whether the Colón Defendants or a third party constructed the terrace, to begin with, in order to establish liability for the accident. Plaintiff, therefore, failed to establish that construction of the terrace and its location on the easement was somehow unsafe.

Additionally, assuming for argument's sake that such a construction *per se* could be considered illegal, Engineer Baigés-Valentín did not testify regarding how much of the terrace was located within the alleged easement, failed to identify where Plaintiff Aponte was sitting in the terrace (that is, whether she was sitting in the part of the terrace that was inside or outside of the easement), and failed to establish whether the Toyota, being driven by Medina, impacted the parked Jeep within or outside of the easement.

In view of the evidence presented at the trial and summarized above, the expert witnesses failed to address the ways in which the location, design and construction of the terrace fell below the applicable standard of care. The lack of the information provided by the expert witnesses at trial prevents the jury to establish the type of location, design or construction that would have been required of the terrace at issue in order to resist vehicle impacts such as the one here. In addition, the expert witnesses failed to establish which rules, regulations and codes were not complied with. Thus, the standard of care was not established by Plaintiff and her claims against Defendants Colón and Cooperativa must fail.

B. Breach of Duty and Foreseeability.

The Court further finds that Plaintiff Aponte has failed to establish a breach of duty, and that the accident was foreseeable for the Colón Defendants.

As previously stated, in a negligent design case, breach of the duty of care arises from defendant's failure to create a safe environment. The danger in these cases arises from the intended design. Cedeño Nieves v. Aerostar Airport Holdings LLC, 251 F. Supp. 3d 360, 367 (D.P.R. 2017). Here, because no standard of care has been established, the jury cannot say whether or not the structure in question was dangerous to begin with, and Plaintiff's expert witnesses failed to so establish via their testimony. Plaintiff therefore failed to evidence that Defendants did not act as reasonable, prudent people under the circumstances in this case. Therefore, no breach of the duty of care was established.

The third element of negligence under Article 1802 of the Puerto Rico Civil Code is proximate cause, which was likewise not met here. To establish this element, a plaintiff must demonstrate "a sufficient causal nexus between the injury and defendant's act or omission." Vazquez-Filippetti, 504 F.3d at 49. Puerto Rico law makes the foreseeability of a plaintiff's injury central to the proximate cause inquiry, since it holds that "no one shall be liable for events which could not be foreseen, or which having been foreseen were inevitable" unless otherwise provided by law. P. R. Laws Ann. tit. 31, § 3022.

In the landmark case of Woods-Leber, 951 F.Supp. at 1028, this district held that foreseeability, as an element of proximate cause, could not be established through the simple fact that an accident occurred

because " '[t]he norm of foreseeability is that the risk that must be foreseen must be based on probabilities and not on mere possibilities.' " Id. at 1036. Based on this principle, the court stated that the primary method for such proof would be prior similar incidents, but that "some other sort of evidence tending to show that the incident was foreseeable" would also have been acceptable. Id. at 1039. In the absence of any such proof, the mere fact that the accident occurred, by itself, could not serve as evidence that it was foreseeable. Id.

Plaintiff Aponte failed to provide any evidence of any prior, similar accidents in the area that would have made this particular incident foreseeable and would have enabled Defendants to take remedial measures in order to avoid it. As previously stated, the mere fact that the terrace was constructed on an easement, alone, does not make it inherently dangerous, much less when there is an exception to that regulation which specifically allows for such construction. Thus, no reasonably prudent person could foresee this construction as creating undue risk and no causal nexus can he made between her injury and Defendants' acts or omissions.

Moreover, the intervening cause here, that co-Defendant Medina lost control of his vehicle, lacked the skills to handle it because he only had a learner's permit, was traveling over the speed limit for that road, invaded the opposite lane, and crashed into a Jeep which in turn hit with force the North side of the bar, was completely unforeseeable and Plaintiff cannot argue otherwise. The Court notes that the part of the terrace that Medina crashed into was not the front of the bar facing the busier main Road 152, but rather the North side of the terrace, which faced a side street, or alley.

The previously cited Woods case established that the risk be based on probabilities, not possibilities. While it is certainly possible that any accident can occur at any moment, Plaintiff had to prove that this risk here was *probable*, not just possible. She failed to do so with the evidence presented. See also Malavé-Felix v. Volvo Car Corp., 946 F.2d 967, 972 (1st Cir. 1991) ("intervening causes can break the chain of causation if they are not foreseeable").

While the Court is sympathetic to Plaintiff Aponte's injuries in this unfortunate case, she has not presented evidence connecting any act or omission by Defendants Colón and Cooperativa to her injury. As a result, "even though an owner or occupier of commercial premises must exercise due care for the safety of its patrons, it is not liable in tort without a showing of fault." Calderón-Ortega v. U.S., 753 F.3d 250, 254 (1st Cir. 2014) *(citing* Vázquez-Filippetti, 504 F.3d at 49).

CONCLUSION

For all the aforementioned reasons, Defendants Colón and Cooperativa's verbal Motion for Judgment as a matter of Law under Fed.R.Civ.P. is GRANTED. All causes of action against the Colón Defendants and their insurer, Cooperativa de Seguros Múltiples, are hereby DISMISSED WITH PREJUDICE.
Judgment will be entered accordingly.
IT IS SO ORDERED.

Footnotes

1For brevity and in light of the time constraints, I incorporate by reference the evidence, as accurately

summarized by counsel Jorge Carazo for Defendants, and the oral arguments he made in his verbal request for dismissal under Fed.R.Civ.P. 50.

2Rigual-Quintana v. United Parcel Serv., Co., 195 F.Supp.2d 358 (D.P.R. 2002).

3Pérez v. United States, 444 F.Supp. 623, 626 (D.P.R. 1978); *aff'd,* 594 F.2d 280 (1st Cir. 1979).

4Nieves-Rosado v. P.R. Hwys. Auth., 403 F.Supp.2d 170 (D.P.R. 2005).

5Plaintiff's expert witnesses presented at trial were: Carlos Vera-Muñoz, qualified as an expert witness in engineering and project management; and Dr. Iván Baigés-Valentín qualified as an expert witness in mechanical and forensic engineering and accident reconstruction.

6As a matter of fact, pursuant to the evidence presented at trial, the only damage to the terrace after the impact of the Jeep was the displacement of a wooden railing at the north side of the terrace and a column which sustained some damage. The roof, columns and other railings did not collapse.

United States District Court, D. Puerto Rico.
Yeitza Marie APONTE BERMUDEZ, Plaintiff,
v.
Hector H. BERRIOS, et al., Defendants.
CIVIL NO. 15-1034 (CVR)
Signed 12/26/2017

Named Expert: Mr. Ivan Baigés

Attorneys and Law Firms

Alberto J. Perez-Hernandez, Etienne Totti-Del-Toro, David Efron, David Efron Law Offices, San Juan, PR, Michael J. Smith, Morgan & Morgan, P.A., Tavares, FL, for Plaintiff.

Francisco J. Colon-Pagan, Colon & Colon PSC, Francisco E. Colon-Ramirez, Colon Ramirez LLC, Hector J. Ferrer-Rios, San Juan, PR, Jorge Carazo-Quetglas, Carazo Quetglas Law Office, Guaynabo, PR, for Defendants.

OPINION AND ORDER

CAMILLE L. VELEZ RIVE, UNITED STATES MAGISTRATE JUDGE

Before the Court is "Defendants' Motion to Exclude and Limit the Testimony of Plaintiff's Expert in Liability Mr. Ivan Baigés", filed by several Defendants, and Plaintiff's opposition thereto (Docket Nos. 139 and 145). Via this motion, Defendants seek to exclude and limit the testimony of Mr. Baigés in the present case. For the following reasons, the Court DENIES Defendants' motion.

Federal Rule of Evidence 702 states that:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case. Fed. R. Evid. 702.

A review of the case law after the landmark case of Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 595, 113 S. Ct. 2786, 2797 (1993) shows that the rejection of expert testimony is the exception, rather than the rule. The Daubert case did not work a "seachange over federal evidence law," because "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi, 80 F.3d 1074, 1078 (5th Cir. 1996). "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." Daubert, 509 U.S. at 595.

Furthermore, it has been well established that "Daubert does not require that a party proffering expert testimony convince the court that the expert's assessment of the situation is correct, but rather ... it

should be tested by the adversary process-competing expert testimony and active cross-examination-rather than excluded from jurors' scrutiny for fear that they will not grasp its complexities or satisfactorily weigh its inadequacies." U.S. v. Perocier, 269 F.R.D. 103, 107 (D.P.R. 2009) (citing Ruiz–Troche v. Pepsi Cola of Puerto Rico Bottling Co., 161 F.3d 77, 85 (1st Cir. 1998).

Defendants' proffer that.... "The presentation of the evidence is so critical that failure to present the same demands the dismissal of Plaintiff's claims"1; that the report "fails to provide the required elements to sustain the claim that the location of the Terrace was hazardous"; that the report is missing evidence that would show the "Subject Accident was foreseeable", and that the report is missing data "in order to establish that part of the Terrace that allegedly was within the easement contributed to Plaintiff's injuries". (Docket No. 139, pp. 10, 11). Yet, these issues go to the weight of the evidence, not its admissibility, and are precisely the kinds of issues that fall squarely within the jury's province. The expert report merely serves to buttress the elements of Plaintiff's claims, which they will be required to prove at trial. It will be up to the jury to evaluate the evidence presented, and coupled with Mr. Baigés' testimony and report, resolve the issue one way or the other. See Carrelo v. Advanced Neuromodulation Sys., Inc., 777 F. Supp. 2d 315, 318-19 (D.P.R. 2011) (a challenge to the factual underpinnings of an expert opinion is a matter that affects the weight and credibility of the testimony and is a jury question) citing United States v. Vargas, 471 F.3d 255, 264 (1st Cir. 2006).

Defendants also question the report's lack of reliability of principles and methods. Yet, it has been shown that some types of expert testimony will be

more objectively verifiable, and subject to the expectations of falsifiability, peer review, and publication, than other, non-scientific testimony. Indeed, some types of expert testimony will not rely on anything like a scientific method, and will thus have to be evaluated by reference to other standard principles attendant to the particular area of expertise. It is therefore the job of the trial judge to determine whether proffered expert testimony is properly grounded, well-reasoned, and not speculative before it can be admitted. See, e.g., American College of Trial Lawyers, Standards and Procedures for Determining the Admissibility of Expert Testimony after Daubert, 157 F.R.D. 571, 579 (1994) ("[W]hether the testimony concerns economic principles, accounting standards, property valuation or other non-scientific subjects, it should be evaluated by reference to the 'knowledge and experience' of that particular field.").

Here, as an expert engineer, Mr. Baigés offered his conclusions as to the cause of the accident, after evaluating the totality of the evidence before him. The Court cannot say that his conclusions are irrelevant or unreliable, insofar as they seem properly grounded, well-reasoned, and are clearly based on the evidence he examined and his knowledge and experience in this field. That is all the Court needs to analyze as part of its gatekeeping function at this stage, and enough to clear this initial hurdle. Whether or not his opinions and conclusions will ultimately sway a jury remains a matter to be assessed at trial by the trier of fact.

The same applies to Defendants' efforts to limit Mr. Baigés' testimony. At this stage, the Court simply cannot say that his testimony is not relevant to the case at hand. See Daubert, 509 U.S. at 592 (The district court's analysis must be flexible, not rigid, and must

ensure that expert testimony is relevant). Defendants shall be afforded an opportunity at trial to object to the presentation of said testimony and thoroughly cross-examine the expert in order to test his knowledge, methodology, and the relevance of the data he is presenting.

For all the aforementioned reasons, Defendants' motion in limine is DENIED.

Footnotes

1Referring to the standard of care and foreseeability.

United States District Court
District of Puerto Rico

Notice of Electronic Filing

The following transaction was entered on 12/15/2017 at 9:34 AM AST and filed on 12/15/17

Case Name: Aponte-Bermudez v. Berrios et al
Case Number: 3:15-cv-01034-CVR Filer:
Document Number: 144(No document attached)

Docket Text:

ORDER denying [142] motion for summary judgment as untimely; finding as moot [143] Motion for Leave to File Spanish language documents. Signed by US Magistrate Judge Camille L. Velez-Rive on 12/15/2017. (cvr)

***

United States Court of Appeals
For the First Circuit

No. 18-1266

YEITZA MARIE APONTE-BERMUDEZ,

Plaintiff - Appellant,

v.

ELIGIO COLON, and his wife Doris Doe, each of them personally and in representation of their conjugal partnership; DORIS DOE, and her husband Eligio Colon, each of them personally and in representation of their conjugal partnership; CARMEN GLORIA FERNANDEZ TORRES; ELIGIO RAFAEL COLON FERNANDEZ; MANUEL PABLO COLON FERNANDEZ; MARIROSA COLON FERNANDEZ; MARICARMEN COLON FERNANDEZ; LUIS ALBERTO COLON FERNANDEZ; RICARDO COLON FERNANDEZ; MARIGLORIA COLON FERNANDEZ; COOPERATIVA DE SEGUROS MULTIPLES DE PUERTO RICO; CONJUGAL PARTNERSHIP COLON-DOE,

Defendants - Appellees,

ANGEL NOLBERTO ROBLES, and his wife Betty Doe, each of them personally and in representation of their conjugal partnership; HECTOR H. BERRIOS, and his wife Sonia Ortiz, each of them personally and in representation of their conjugal partnership; SONIA ORTIZ, and her husband Hector H. Berrios, each of them personally and in representation of their conjugal

partnership; CRISTALERIA VEGA, INC., or alternatively, John Doe Corporation d/b/a Cristaleria Vega; GABRIEL A. MEDINA-ORTIZ, and his wife Jane Doe, each of them personally and in representation of their conjugal partnership; JANE DOE, and her husband Gabriel A. Medina Ortiz, each of them personally and in representation of their conjugal partnership; BETTY DOE, and her husband Angel Nolberto Robles, each of them personally and in representation of their conjugal partnership; JOHN DOES 1, 2, AND 3; A, B, AND C CORPORATIONS; UNKNOWN INSURANCE COMPANIES, A THROUGH H; CONJUGAL PARTNERSHIP BERRIOS-ORTIZ; CONJUGAL PARNTERSHIP MEDINA-DOE; CONJUDGAL PARTNERSHIP ROBLES-DOE; UNIVERSAL INSURANCE COMPANY,

Defendants.

Before

Howard, Chief Judge,
Torruella, Boudin, Lynch, Thompson, Kayatta, and Barron,
Circuit Judges.

ORDER OF COURT

Entered: March 2, 2020

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:

Maria R. Hamilton, Clerk

cc:
David Efron
Etienne Totti del Toro
Alberto J. Perez Hernandez
Julio Cesar Cayere-Quidgley
Hector J. Ferrer-Rios
Francisco Jose Colon-Pagan
Jorge Miguel Carazo-Quetglas
Francisco E. Colon-Ramirez