

1 **IN THE UNITED STATES DISTRICT COURT**
2 **FOR THE DISTRICT OF PUERTO RICO**

3 **RAUL GUADALUPE-BAEZ, et al.,**

4 **Plaintiffs,**

5 **v.**

6 **HECTOR PESQUERA,**

7 **Defendant.**

CIVIL NO. 13-1529 (GAG)

8
9 **OPINION AND ORDER**

10 Raúl Guadalupe-Báez (“Plaintiff” or “Guadalupe”), Ivelissa Báez, and Antonia Hernández
11 (collectively “Plaintiffs”) filed the instant action seeking compensatory money damages against
12 named and unnamed defendants for the violation of their constitutional rights pursuant to 42 U.S.C.
13 §§ 1983 and 1985, stemming from the shooting of Guadalupe by members of the Puerto Rico Police
14 Department (“PRPD”) and the San Lorenzo Municipal Police (collectively “Defendants”). (Docket
15 No. 18.) Plaintiffs allege Defendants were reckless and grossly negligent during their intervention
16 with Guadalupe, when they used excessive force in violation of the Fourth Amendment to the
17 United States Constitution. Id. Furthermore, they claim Hector Pesquera (“Defendant Pesquera”),
18 Superintendent of the PRPD at the time of the events, and other Supervisor Defendants, are liable
19 for the negligent training, negligent entrustment, and negligent supervision of Police Officers A-Z,
20 which amounts to deliberate indifference and reckless disregard of Plaintiffs’ constitutional rights.

21 Id.

22 Defendants moved to dismiss the above-captioned complaint. The Court agreed with
23 Defendants’ arguments that the allegations in the Plaintiffs’ amended complaint lacked the
24 requisite plausibility. Therefore, the Court dismissed the entire action. (Docket No. 29);

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1 Guadalupe-Baez v. Police Officers A-Z, Civ No. 13-1529 (GAG), 2014 WL 4656663 (D.P.R. Sept.
2 17, 2014). On April 21, 2016, the First Circuit reversed the Court’s determination as to the
3 sufficiency of Plaintiffs’ supervisor liability claim against Defendant Pesquera. Guadalupe-Baez
4 v. Pesquera, 819 F.3d 509, 514-17 (1st Cir. 2016). On remand, the case continued onto discovery.
5 On February 21, 2017, Defendant Pesquera moved for Summary Judgment. (Docket No. 64).
6 Plaintiffs responded in opposition. (Docket No. 65.) Per leave of Court, Defendant Pesquera
7 replied. (Docket No. 71.)

8 **I. Standard of Review**

9 Summary judgment is appropriate when “the pleadings, depositions, answers to
10 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no
11 genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter
12 of law.” Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); see also FED. R. CIV. P. 56(a). “An
13 issue is genuine if ‘it may reasonably be resolved in favor of either party’ at trial, . . . and material
14 if it ‘possess[es] the capacity to sway the outcome of the litigation under the applicable law.’”
15 Iverson v. City of Boston, 452 F.3d 94, 98 (1st Cir. 2006) (citations omitted). The movant bears
16 the initial burden of demonstrating the lack of evidence to support the nonmovant’s case. Celotex,
17 477 U.S. at 325. Then, burden then shifts back to the nonmovant, who must establish at least one
18 issue of fact that is both genuine and material. Maldonado-Denis v. Castillo-Rodríguez, 23 F.3d
19 576, 581 (1st Cir. 1994).

20 The nonmovant may establish a fact is genuinely in dispute by citing particular evidence in
21 the record or showing that the material cited by the movant “do[es] not establish the absence or
22 presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to
23 support the fact.” FED. R. CIV. P. 56(c)(1)(B). If the Court finds that some genuine factual issue
24

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1 remains, the resolution of which could affect the outcome of the case, then the Court must deny
2 summary judgment. Liberty Lobby, 477 U.S. at 248.

3 The Court views the evidence in the light most favorable to the nonmovant, resolving all
4 reasonable inferences in that party's favor, without making any credibility determinations or
5 weighing the evidence. Id. However, summary judgment is appropriate when the nonmovant's
6 case rests merely upon "conclusory allegations, improbable inferences, and unsupported
7 speculation." Forestier Fradera v. Municipality of Mayagüez, 440 F.3d 17, 21 (1st Cir. 2006)
8 (citation omitted).

9 **II. Legal Analysis**

10 In support of his attempt to defeat Plaintiffs' supervisory liability claim, Defendant Pesquera
11 argues that Plaintiffs erroneously attribute the conduct of police officers Soto Rolón and Calderón
12 Vega to him. (Docket No. 64 at 12.) Defendant Pesquera argues that Plaintiffs have not pointed to
13 any specific or personal involvement to substantiate their supervisory liability claim. Id. Defendant
14 Pesquera also posits that the police officers' actions were justified under what are known as the
15 "Graham factors." Following this reasoning, he contends that because his subordinate's actions
16 cannot be found to have led to constitutional violations, he cannot be held liable in his supervisory
17 capacity. (Docket No. 64 at 13.)

18 The Court first addresses Defendant Pesquera's argument that his subordinate's actions
19 were justified pursuant to Graham v. Connor, 490 U.S. 386, 393-94 (1989). Defendant contends
20 that the Court must first determine "whether the officers directly involved in Plaintiff Guadalupe's
21 shooting could have been found to have employed force that was unreasonable to the circumstance"
22 under to the Graham factors, before addressing the supervisor liability claims against him. (Docket
23 No. 64 at 13.) The Graham factors are: (1) severity of crime at issue; (2) whether a suspect poses
24 an immediate threat to safety of the officers or others; (3) whether a suspect is actively resisting

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1 arrest or attempting to evade arrest by flight). Id. In conclusion, he contends that all three factors
2 are met, thus the supervisory liability claims cannot survive. (Docket No. 64 at 13-14.)

3 Pesquera's Graham argument fails at this, the summary judgment stage. The Court cannot
4 determine whether the officers' actions were justified given the existence of genuine issues of
5 material facts as to how Plaintiff Guadalupe's July 2012 shooting incident took place. The record
6 evidence shows conflicting versions of the shooting incident.¹ According to Plaintiffs, there were
7 about seven or eight four-tracks and two or three vehicles, not five. (Docket No. 66.) Moreover,
8 Plaintiffs object to Defendant's characterization of having been found alongside a fellow rider
9

10
11 ¹ In his statement of uncontested facts (Docket No. 64-1) Defendant Pesquera provides the PRPD's
12 version of the shooting incident. On the morning of July 9, 2012, at 12:11am, on Highway 181, km. 10, Quebrada
13 neighborhood of San Lorenzo, two police officers (Ortiz Landrau and Reyes Navarro) were headed to the Palo
14 Alto business in the Espino district then they saw five (5) four-track ATV's blocking the highway. The drivers
15 noticed the patrol car, lined up behind one another, and drove down the highway. The last four-track, which was
16 yellow, had two individuals on it. One of the passengers in the yellow four-track pulled out a weapon and shot
17 towards the grassy area twice, causing the other drivers to turn around and go in a different direction than the
18 police. A chase ensued.

19 Officers caught up to the yellow four-track, and instructed them to halt. The same passenger in the yellow
20 four-track unloaded two shots towards the agents, and the agents responded with two shots towards the grassy
21 area. Minutes afterwards, there was a report of a man called Guadalupe who said he had been shot by the police.

22 Police officers Soto Rolón and Calderón Vega heard through the patrol car radio that fellow officers
23 requested backup around 12:30am. The other officers explained that the suspects were dressed in black, wearing
24 masks, and firing shots. After driving towards the Quemados sector, Soto and Calderón found themselves facing
two four-tracks, a yellow ATV with two passengers and a red ATV with one passenger. The individuals saw the
officers and drove off, and the officers gave chase. When the officers commanded the individuals to halt, they
turned and fired two shots at the officers. Because it was dark, Soto could not make out which four-track shot at
them. The officers lost the yellow four-track after it took a sharp left turn at a sign that read *Quemados*, so they
followed the red four-track, which was on highway 181 headed towards highway 183. Although the officers told
the individual to stop, he kept going.

25 The officers and the individual then made it to a traffic light and stopped briefly. The red four-track driver
26 reached the highway 183 fire station, made a left turn, and acted like he was reaching towards his waist. When the
27 officers began to turn, the individual made a gesture akin to taking aim towards the patrol car with his right hand.
28 It was then that Soto shot at the driver, believing that because he and his partner were already targets of previous
29 gunshots, their lives were in danger. Officer Calderón believes that Sgt. Soto's use of the weapon was justified.
30 When Sgt. Soto ordered the individual to put his hands up where he could see them, the individual then threw
31 himself on the ground, face up, with his mask still on. Soon after, a patrol car from the District of Gurabo and an
32 ambulance arrived. The officers verified that the individual was not armed, and that he had an open fanny pack on
33 his waist.

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1 before the officers shot at him. He says that he was actually alone with the patrol car.² Plaintiffs'
2 version is supported by Guadalupe's deposition testimony (Docket No. 64-10), while Defendant's
3 version relies mostly on PRPD investigative reports on the shooting incident that include statements
4 by PRPD officers.³ (Docket Nos. 64-2, 64-3, 64-4, & 64-5.)

5 Plaintiffs' proffered evidence is sufficient to create a genuine issue as to whether the
6 officers' actions were justified. Resolving this factual issue, which is the prerogative of the jury,
7 will help determine the outcome of Plaintiffs' supervisor liability claims against Pesquera.

8 The Court now turns to the second part of Pesquera's argument. Defendant argues that he
9 is not liable because he did not have notice that the officers were prone to constitutional violations.
10 (Docket No. 64 at 15.) He reasons that although Officer Soto had four administrative complaints,
11 none of them were relevant to this case—two were related to domestic violence, for instance), and
12 Officer Calderón had none. (Docket No. 64 at 15). Defendant argues that there is no evidence
13 implicating either officer in episodes involving excessive use of force, and thus, there is no causal
14 link between Defendant and the constitutional violation, therefore, Plaintiffs fail to establish their
15 supervisory liability claim. (Docket No. 64 at 15-16.)

18
19 ² According to Plaintiffs, the patrol car passed the group in the opposite direction and the group was not
20 blocking the road. The "shots" heard by police were the result of one four-track backfiring, meaning that no shots
21 were fired. Guadalupe saw a driver of a four-track stop voluntarily and the police officers got off from the patrol
car aggressively and went after him. The group continued to an empty garage. Meanwhile, the group got word that
the driver who had stopped voluntarily had been thrown roughly on the ground, hit and slapped by the police and
arrested, at which point his four-track had been confiscated.

22 Guadalupe also asserts that the police were chasing him with no lights on, and that he made a sharp U-
23 turn because the patrol car was close enough that there was a risk of him being knocked down. After being shot in
the abdomen, Guadalupe fell on the ground.

24 ³ In his reply, Defendant opposes Plaintiffs' characterization of Defendant's SUMF's No. 1-44 as hearsay.
(Docket No. 71.) Defendant argues instead that these materials were produced in response to Plaintiff's discovery
requests, and that they establish the officers' state of mind during the pursuit. (Docket No. 71 at 2-3).

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1 In opposition, Plaintiffs argue that: (1) Defendant Pesquera’s arguments regarding the
2 “heightened pleading standard” for supervisor liability claims were disposed of by the First Circuit
3 in Guadalupe-Baez; (2) there is sufficient evidence that creates genuine issues of material fact as to
4 Defendant Pesquera’s liability as supervisor that render summary judgment inappropriate. (Docket
5 No. 65 at 14.)

6 A supervisory liability claim has two elements: “first, the plaintiff must show that one of
7 the supervisor’s subordinates abridged the plaintiff’s constitutional rights.” Guadalupe-Baez, 819
8 F.3d at 514 (quoting Pineda v. Toomey, 533 F.3d 50, 54 (1st Cir. 2008). “Second, the plaintiff must
9 show that “the [supervisor]’s action or inaction was affirmative[ly] link[ed] to that behavior in the
10 sense that it could be characterized as supervisory encouragement, condonation, or acquiescence or
11 gross negligence amounting to deliberate indifference.” Id. at 515 (quoting Lipsett v. Univ. of P.R.,
12 864 F.2d 881, 902 (1st Cir. 1988)) (alterations in original).

13 Plaintiffs’ supervisory liability claim against Pesquera is based on the theory of deliberate
14 indifference. To establish a supervisor’s deliberate indifference, plaintiff must satisfy a three part
15 test. See Ramírez-Lliveras, 759 F.3d at 20. Plaintiff must show: (1) the supervisor had knowledge
16 of the facts; (2) from which officials could draw the inference; (3) of a substantial risk of serious
17 harm. Guadalupe-Baez, 819 F. 3d at 515 (citations omitted). In addition to deliberate indifference,
18 a plaintiff must establish a “solid” causal link between the supervisor’s conduct and the
19 constitutional violation. Id. (citing Ramírez-Lliveras v. Rivera-Merced, 759 F.3d 10, 19 (1st Cir.
20 2014). Causation requires showing “the supervisor’s conduct led inexorably to the constitutional
21 violation.” Id. (quoting Hegarty v. Somerset Cnty, 53 F.3d 1367, 1380 (1st Cir. 1995)). A plaintiff
22 can meet this difficult standard, for example, by proving inaction despite a “known history of
23 widespread abuse sufficient to alert a supervisor to ongoing violations.” Maldonado-Denis, 23 F.3d
24 at 582 (citing Ramírez-Lliveras, at 19). “[D]eliberate indifference alone does not equate with

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1 supervisory liability.” Figueroa–Torres v. Toledo–Dávila, 232 F.3d 270, 279 (1st Cir. 2000)
2 (alteration in original) (quoting Camilo–Robles, 151 F.3d at 7). “Causation remains an essential
3 element, and the causal link between a supervisor's conduct and the constitutional violation must
4 be solid.” Guadalupe-Baez, 819 F.3d at 515 (citing Ramírez–Lliveras, 759 F.3d at 19.)

5 In support of their supervisory liability claim, Plaintiffs argue that there is a genuine dispute
6 of material fact as to Pesquera’s supervisor liability. (Docket No. 65.) Namely, Plaintiffs point to
7 Defendant’s interrogatories as a sign of nonchalant and deliberately indifferent conduct that would
8 bolster their supervisory liability claim (Docket Nos. 65 at 9; 64-8) because it evidences Pesquera’s
9 reckless disregard, as he stated that he was not even aware of Guadalupe’s shooting or the incident
10 with Soto. (Docket Nos. 66 at 23 ¶ J; 64-8 ¶ 7.) Plaintiffs allege that Pesquera did nothing to
11 respond to Officer Soto’s violations, and that he failed to institute procedures to evaluate and
12 respond to complaints of violence by his subordinates. To wit, Plaintiffs posit that Pesquera’s
13 knowledge of widespread abuses in the police force during his tenure, as well as his failure to train,
14 supervise, and control his police officers, reveal his inaction in the face of a crisis. (Docket No. 65
15 at 10.)

16 As recognized by the First Circuit in Guadalupe-Baez, Plaintiffs contend Pesquera’s
17 inaction, together with the Report of the *Investigation of the Puerto Rico Police Department* by the
18 Civil Rights Division of the United States Department of September 5, 2011 (“U.S. DOJ Report”),
19 is enough to find a causal link between Defendant’s action (or rather, inaction) and the violation of
20 Plaintiff Guadalupe’s constitutional rights. *Id.* at 11-13. “The existence of the Report put Pesquera
21 on luminously clear notice that he might become liable, in his supervisory capacity, should his acts
22 and omissions contribute to the continuation of the pathologies described in the Report.”
23 Guadalupe-Baez, 819 F.3d at 517 (citing Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011)).

1 Plaintiffs’ pleadings “when combined with the Report, . . . [are] enough to get Guadalupe
2 across the plausibility threshold: such random and anonymous violence appears to be a predictable
3 culmination of the systemic problems documented in the Report. In this instance, . . . the Report
4 plays a critical role in bridging the plausibility gap.” Guadalupe-Baez, 819 F.3d at 516–17.

5 As Superintendent, Pesquera bore the ultimate responsibility for overseeing
6 and directing all administrative, operational, training, and disciplinary aspects of the
7 PRPD. An appreciable amount of time elapsed between the issuance of the Report
8 and the shooting. Guadalupe alleges, though, that Pesquera continued—or at least
9 failed to ameliorate—policies which cause the pattern and practice of use of excessive
10 force. When this allegation is evaluated in conjunction with the rampant
11 constitutional violations limned in the Report and the parade of horrors allegedly
12 visited upon Guadalupe, a plausible inference exists that Pesquera either condoned
13 or at least acquiesced in the offending conduct—conduct that is affirmatively linked
14 to the harm Guadalupe suffered.

15 Guadalupe-Baez, 819 F.3d at 516. The First Circuit went further and stated that arguing lack of
16 knowledge would constitute deliberate indifference. Any claim by Pesquera that he was unaware
17 of the substantial risk of the serious harm that befell Guadalupe would constitute deliberate
18 indifference to the reality of the dysfunction that Pesquera inherited when he took over as
19 Superintendent of the PRPD.” Guadalupe-Baez, 819 F.3d at 516 (citing Ramírez-Lluveras, 759
20 F.3d at 20; Maldonado-Denis, 23 F.3d at 582.)

21 There is room to argue that Pesquera should have been on notice that the officers were prone
22 to constitutional violations. While Officer Calderón’s record is clean, Officer Soto had four
23 complaints against him. In addition, two of his previous violations have some relation to this case
24 —negligence and domestic violence. That, arguably, should have put Pesquera on notice that there
was a possibility that Soto would be involved in future episodes of use of excessive force,
particularly when the U.S. Department of Justice’s Report stated that the problem was widespread
and pervasive. The question of whether Officer Soto’s behavior was a pattern of violent behavior

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1 considering his four previous complaints is key to the resolution of this case, and it is for the jury
2 to decide.

3 Guadalupe has established a genuine dispute of material fact as to whether Pesquera
4 condoned or at least acquiesced in the offending conduct—conduct that is affirmatively linked to
5 the harm Guadalupe suffered. Guadalupe’s testimony, Pesquera’s statements, and other evidence
6 on record, if credited by the factfinder, would allow a reasonable jury to conclude that the
7 Superintendent of the PRPD reasonably would have known that substantial risk of a constitutional
8 violation existed. See Fernandez-Jorge v. Galarza-Soto, No. Civ, 14-1590 (GAG), 2017 WL
9 2534126, at *10 (D.P.R. June 12, 2017).

10 Lastly, the Court turns to Defendant’s final argument. Surprisingly, Defendant raises the
11 qualified immunity card despite the fact the First Circuit addressed this issue. Plaintiff opposed.
12 (Docket No. 65 at 13.) The First Circuit already determined that Defendant Pesquera cannot claim
13 qualified immunity. See Guadalupe-Baez, 819 F.3d at, 517 (“Because the Report put Pesquera on
14 clear notice of his potential liability, Pesquera cannot satisfy one of the showings required for
15 qualified immunity.”)

16 **III. Conclusion**

17 After carefully reviewing the parties’ submissions and pertinent law, the Court **DENIES**
18 Defendant Pesquera’s Motion for Summary Judgment at Docket No. 64. According to the evidence
19 on record, genuine issues of material fact arise from the parties’ submissions, making summary
20 judgment improper.

21 **SO ORDERED.**

22 In San Juan, Puerto Rico this 28th day of August, 2017.

23 *s/ Gustavo A. Gelpí*
24 GUSTAVO A. GELPI
United States District Judge