IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

CONSUELO CERVANTES,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**EP-18-CV-00110-KC**
	§	
TENET HOSPITALS LIMITED, a Texas Limited Partnership, d/b/a THE HOSPITALS OF PROVIDENCE EAST CAMPUS,	§	
	§	
Defendants.	§	

ORDER

On this day, the Court considered Defendant Tenet Hospitals' Motion to Dismiss for Failure to State a Claim. ECF No. 9. For the reasons set forth below, the Motion is **GRANTED**.

I. BACKGROUND

The following facts are alleged in Plaintiff Consuelo Cervantes' Amended Complaint and, at this stage, are accepted by the Court as true. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Plaintiff alleges she arrived at Defendant Providence Hospital ("Defendant" or "Providence") at 6:59 a.m. on April 10, 2016, after Del Sol Hospital[1] detected "a non-reducible loop of bowel in her umbilical" but then "told her to go to another hospital." Am. Compl. 2. After her arrival at Providence, a physician documented that she had a tender mass in her umbilical area. *Id.* Plaintiff alleges her blood pressure was low at 97/49 and her pulse rapid at 125 beats per minute. *Id.* at 3.

At 10:37 a.m., the Providence physician contacted a general surgeon to consult on Plaintiff's condition. Am. Compl. 3. At 12:36 p.m., about an hour after Plaintiff was first

[1] Del Sol Hospital is the defendant in another suit brought by Cervantes. *See Cervantes v. El Paso Healthcare Sys., Ltd.*, EP-18-CV-111-PRM.

administered saline intravenously and almost six hours after Plaintiff arrived at the hospital, the physician ordered a CT scan. *Id.* The physician reviewed the results of the scan three hours later, at 3:41 p.m., which revealed "air in the abdominal cavity and outside the intestines, fluid in the abdominal cavity outside the intestines, and a ventral hernia above the umbilical area containing loops of bowel." *Id.* at 4. Providence admitted Plaintiff to the intensive care unit at 4:09 p.m., and she underwent surgery at 7:00 p.m. *Id.* at 4. She then remained hospitalized from April 10, 2016, until May 19, 2016, when she was transferred to a rehabilitation center. *Id.* at 5.

Plaintiff filed suit on April 2, 2018, and filed an amended complaint on June 5, 2018. ECF Nos. 1, 5. Plaintiff claims Providence's conduct violated the Emergency Medical Treatment and Active Labor Act ("EMTALA"), 42 U.S.C. § 1395dd (2017), by failing to "adequately screen Plaintiff to determine whether Plaintiff had [an] emergency medical condition" and "to timely stabilize Plaintiff." Am. Comp. 5.

Defendant subsequently filed the instant 12(b)(6) motion to dismiss, arguing that Plaintiff's EMTALA claim fails because the conduct she alleges is not actionable as a failure to screen or failure to stabilize. Mot. 5–9, 10–13. Defendant alternatively argues that even if EMTALA does recognize such delays, Plaintiff fails to provide sufficient facts to render the claim plausible. Mot. 5–12. Plaintiff filed a timely Response on, ECF No. 12, and Defendant submitted a timely Reply, ECF No. 13.

II. DISCUSSION

A. Standard

A motion to dismiss pursuant to Rule 12(b)(6) challenges a complaint for failing to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). In ruling on a Rule 12(b)(6) motion, the court must accept well-pleaded facts as true and view them in a light most favorable

to the plaintiff. *Calhoun v. Hargrove*, 312 F.3d 730, 733 (5th Cir. 2002); *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000). Though a complaint need not contain "detailed" factual allegations, a plaintiff's complaint must allege sufficient facts "to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007) (internal quotation marks omitted) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)); *Colony Ins. Co. v. Peachtree Constr., Ltd.*, 647 F.3d 248, 252 (5th Cir. 2011). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

"[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555; *Colony Ins. Co.*, 647 F.3d at 252. Ultimately, the "[f]actual allegations [in the complaint] must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555 (internal citation omitted). Nevertheless, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" *Id.* at 556 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

B. Analysis

In its Motion, Defendant contends that Plaintiff's allegations, if true, would absolve it of any liability under EMTALA's screening and stabilization prongs. Mot. 5–9, 10–13. Defendant argues in the alternative that even if Plaintiff put forward a valid screening theory, she has not pleaded facts that make recovery plausible. Mot. 9; Reply 6–7.

1. EMTALA

To prevent hospitals from rejecting, or "dumping," indigent patients, Congress passed EMTALA and created specific duties for participating hospitals with emergency rooms. 42 U.S.C. § 1395dd; *Battle v. Mem'l Hosp. at Gulfport*, 228 F.3d 544, 557 (5th Cir. 2000). A hospital must provide an appropriate screening for emergency medical conditions and then stabilize the patient before transfer or discharge. 42 U.S.C. § 1395dd(a)–(c). At first glance, this may appear to create a federal malpractice statute, but the EMTALA regulatory framework and surrounding case law carefully separate a hospital's duties under EMTALA from those under tort law. *Marshall v. East Carroll Par. Hosp. Serv. Dist.*, 134 F.3d 319, 322 (5th Cir. 1998). This distinction can make hospitals' obligations difficult to discern, but it bounds hospitals' obligations and is critical to courts' analyses of EMTALA claims. *See id.* at 322-23.

The Act first requires hospitals with emergency rooms to provide an "appropriate medical screening within the capability of the hospital's emergency department," and to "determine whether or not an emergency medical condition . . . exists." 42 U.S.C. § 1395dd(a). EMTALA defines an emergency medical condition as:

> a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in--
> (i) placing the health of the individual . . . in serious jeopardy,
> (ii) serious impairment to bodily functions, or
> (iii) serious dysfunction of any bodily organ or part . . . .

Id. § 1395dd(e)(1)(A).

Next, EMTALA mandates that if the hospital finds an emergency medical condition, it must provide treatment sufficient to stabilize the patient before transfer or discharge. *Id.* § 1395dd(b)(1)–(c)(1).

However, the Act does not create a federal medical malpractice cause of action, and so neither does it set out a nationwide standard of care. *Marshall*, 134 F.3d at 322 (5th Cir. 1998). In other words, although EMTALA demands that hospitals do *something* to screen and stabilize patients, it leaves the contours of that care to state malpractice law and hospital policies. *Id.* (citing *Correa v. Hosp. San Francisco*, 69 F.3d 1184, 1192 (1st Cir. 1995) ("The essence of this requirement is that there be some screening procedure, and that it be administered even-handedly.")); *Baber v. Hosp. Corp. of Am.*, 977 F.2d 872, 882 (4th Cir. 1992) ("[A] requirement to perform an appropriate medical screening necessarily requires a hospital to perform *some* screening."); *Guzman v. Mem'l Hermann Hosp. Sys.*, 637 F.Supp.2d 464, 481 (S.D. Tex. 2009) (quoting *Baker v. Adventist Health, Inc.*, 260 F.3d 987, 995 (9th Cir. 2001)) ("Because hospitals are generally in the best position to assess their own capabilities, 'a standard screening policy for patients entering the emergency room generally defines which procedures are within a hospital's capabilities.'") *aff'd*, 409 F. App'x 769 (5th Cir. 2011).

2. Screening claim

Defendant argues first that Plaintiff's screening claim fails because she admits she received a screening without further alleging disparate treatment. Mot. 5–9. Second, Defendant asserts that even if EMTALA claims do not require disparate treatment, Plaintiff has not alleged sufficient facts to make plausible recovery for a delayed screening. Reply 6–7.

EMTALA does not define an "appropriate medical screening examination," but does specify the examination's purpose is to determine "whether or not an emergency medical condition . . . exists." 42 U.S.C. § 1395dd(a). What is "appropriate" in a given case depends upon the apparent severity of the symptoms and the capabilities of the hospital; that is, any screening examination must be "reasonably calculated to determine whether or not an emergency

condition exists." *Correa*, 69 F. 3d at 1192; *Guzman*, 637 F. Supp. 2d at 482; Centers for Medicare and Medicaid Services, State Operations Manual, Interpretive Guidelines, Appendix V—Interpretive Guidelines—Responsibilities of Medicare Participating Hospitals in Emergency Cases 36, https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/som107ap_v_emerg.pdf ("Depending on the individual's presenting signs and symptoms, an appropriate [screening] can involve a wide spectrum of actions . . . . If a hospital applies in a nondiscriminatory manner . . . a screening process reasonably calculated to determine whether an [emergency] exists, it has met its obligations under EMTALA."); *see also Byrne v. Cleveland Clinic*, 684 F. Supp. 2d 641, 652 (E.D. Pa. 2010) ("Depending on the particular circumstance of a case, the Court can find that no screening at all was provided to the patient.") (citing *Marrero v. Hosp. Hermanos Melendez*, 253 F. Supp. 2d 179, 194 (D.P.R. 2003)). In short, EMTALA requires hospitals to have a screening procedure in place and apply the procedure "uniformly to all those who present substantially similar complaints." *Correa*, 69 F.3d at 1192 (citing *Baber*, 977 F.2d at 879); *see Marshall*, 134 F.3d at 323–324.

Consequently, a hospital can fall short of EMTALA's screening requirement by (1) treating patients disparately, (2) failing to adhere to its own screening procedures, or (3) providing a screening so cursory that it amounts to no screening at all. *Fewins v. Granbury Hosp. Corp.*, 662 F. App'x 327, 331 (5th Cir. 2016); *Guzman v. Mem'l Hermann Hosp. Sys.*, 409 F. App'x 769, 773 (5th Cir. 2011); *Stiles v. Tenet Hosps. Ltd.*, EP-09-CV-463-FM, 2011 WL 13070423, at *5 (W.D. Tex. Aug. 16, 2011). Courts have added that an egregious and unjustified delay before a screening can likewise violate the Act. *Correa*, 69 F.3d at 1193; *McClure v. Parvis*, 294 F. Supp. 3d 318, 325 (E.D. Pa. 2018); *Byrne*, 684 F. Supp. 2d at 652; *Marrero*, 253 F. Supp. 2d at 194. To allow hospitals to dilatorily withhold a screening would

contravene EMTALA by giving emergency rooms a path around their obligations and "constructive[ly] dump" patients. *Correa*, 69 F.3d at 1193.

Defendant argues that because it admitted Plaintiff to the intensive care unit and ultimately treated her, it cannot be held liable under EMTALA. After all, it argues, it did not refuse to see her. Mot. 5–9. However, Defendant's argument ignores the fact that a paltry screening can amount to no screening at all. *See, e.g.*, *Guzman*, 409 F. App'x at 773. The same is true for a delayed screening—that a patient stayed despite a prolonged wait does not, by itself, prove that the delay was acceptable under the Act. *See, e.g.*, *Byrne*, 684 F. Supp. 2d at 652. Of course, the proper assessment here is not whether a wait was too long under the professional standard of care, but whether the wait was so unjustified and egregious that it was effectively no screening at all. *See Correa*, 69 F.3d at 1193. Failure to timely screen a patient can be a violation if egregious because it can deny the access to care EMTALA is meant to secure.[2]

That said, Plaintiff does not allege that her wait for a screening was egregious and unjustified.[3] In fact, Plaintiff does not allege in definite terms the length of any delay in screening. Nor has she stated facts showing Defendant treated her disparately or inconsistently

[2] Defendant, in its Reply, attached a medical treatment record that it purported would conclusively show Plaintiff had an appropriate medical screening under EMTALA. Reply Ex. A. However, the Court may consider documents attached to a motion to dismiss only if the documents are "referred to in the plaintiff's complaint and are central to her claim." *See Collins*, 224 F.3d at 498–99. Here, even if, as Defendant claims, the Complaint references the medical record, it is not central to Plaintiff's claims because it has no operative effect of its own, much like an investigation report prepared by a defendant after an accident. *See Scanlan v. Tex. A&M Univ.*, 343 F.3d 533, 535–39 (5th Cir. 2003). And unlike a contract in a contract dispute, considering the medical record would not "dispose of the claim entirely" because Plaintiff can cite other contradictory or contextualizing evidence. *See Crucci v. Seterus, Inc.*, No. EP-13-CV-317-KC, 2013 WL 6146040 at *6 (W.D. Tex. Nov. 21, 2013). Moreover, it is worth noting that these documents were not actually attached to the Motion, rather to the Reply. *See Heller v. Carnival Corp.*, 191 F. Supp. 3d 1352, 1363 (S.D. Fla. 2016) ("One of the factors in determining whether a court may consider a document outside the pleadings is whether the document is attached to a motion to dismiss, not a reply."). In sum, the Court does not consider the medical treatment record because it is not central to Plaintiff's claim. *See Collins*, 224 F.3d at 498–99.

[3] The Court notes that Plaintiff advances a delay theory in her Response rather than in the Complaint. Nonetheless, the Court considers the allegations in light of Plaintiff's delay legal theory. *See Pennsylvania v. Pepsico, Inc.*, 836 F.3d 173, 181 (3d Cir. 1988) (holding that plaintiffs may set out new legal theories in opposition to a motion to dismiss). .

with its own emergency screening guidelines. An EMTALA screening claim must be based upon either an egregious and unjustified period of inaction, cursory action, conduct inconsistent with the Hospital's own screening policy, or disparate treatment. *See Guzman*, 408 F. App'x at 773; *Correa*, 69 F.3d at 1193. While the Court must take the allegations pleaded as true and view them in the light most favorable to Plaintiff, the Court cannot consider facts Plaintiff did not plead. *See Colony Ins. Co.*, 647 F.3d at 252.

Plaintiff does not allege when she was first seen by a doctor, making it difficult for the Court to determine a waiting period, let alone whether it was egregious under EMTALA. *See Correa,* 69 F.3d at 1193. Plaintiff does allege she arrived at the emergency room at 6:59 a.m., and that her doctor consulted with a surgeon regarding her treatment at 10:37 a.m. Rather than establishing an egregious delay, however, these allegations establish only that prior to 10:37 a.m. a doctor evaluated Plaintiff and recognized the need to consult with a surgeon. Furthermore, to state a claim under EMTALA, any examination during that time would have to be so cursory that Defendant did not meet its EMTALA obligations. *See Guzman*, 409 F. App'x at 773. The allegations "must be enough to raise a right to relief above the speculative level," yet Plaintiff pleads no facts regarding any examination, let alone a cursory one. *See Twombly*, 550 U.S. at 555. Indeed her allegations imply otherwise.

This is not to suggest the Complaint must make relief probable, but taken as a whole, the complaint must raise the likelihood of wrongful conduct above a "mere possibility." *Id.* at 557; *see* Resp. 5 ("Plaintiff *possibly* waited almost *four hours* . . . .") (first emphasis added). Although the Court, here, construes the allegations liberally, it cannot re-write the Complaint. *See Peterson v. Atlanta Hous. Auth.*, 998 F.3d 904, 912 (11th Cir. 1993). Even viewing the facts in the light most favorable to Plaintiff as nonmovant, Plaintiff must have interacted with the

doctor in the hours between 6:59 a.m. and 10:37 a.m. As a result, the allegations do not show that Providence failed to provide Plaintiff with a screening reasonably calculated to determine whether she had an emergency condition. *See Guzman*, 637 F. Supp. 2d at 484.

3. Stabilization claim

Plaintiff also claims Defendant did not act quickly enough to stabilize her. Am. Compl. 5. Defendant responds that this claim fails because, as required by EMTALA, she received stabilizing treatment before being discharged or transferred. Mot. 10.

When a hospital determines after a screening that an individual is suffering from an emergency medical condition, it must provide treatment sufficient to stabilize the condition. 42 U.S.C. § 1395dd(b)(1)(A). Importantly, however, an EMTALA stabilization claim is distinct from an EMTALA screening claim. While a hospital may not improperly delay a screening, the same theory cannot undergird an EMTALA stabilization claim because the duty to stabilize arises only in conjunction with either transfer or discharge. *Byrne*, 684 F. Supp. 2d at 655 (holding that a delay "does not provide a basis for an EMTALA stabilization claim") (emphasis omitted); *Vazquez-Rivera v. Hosp. Episcopal San Lucas, Inc.*, 620 F. Supp. 2d 264, 270 (D.P.R. 2009) ("[T]he case law does not support [a delay claim] for the *stabilization* provision). Crucially, the term "stabilized" means that "no material deterioration of the condition is likely, within reasonable medical probability, to result from or occur during the transfer of the individual from a facility." *Id.* § 1395dd(e)(3)(A). And "transfer means the movement (including the discharge) of an individual outside a hospital's facilities." *Id.* § 1395dd(e)(4).

The different contours of liability between screening and treatment make sense considering the structure and purpose of EMTALA. The Act serves as a "gap-filler" for state malpractice law that brings patients into the system of care when they would otherwise be left

out. *Brooks v. Maryland Gen. Hosp., Inc.*, 996 F.2d 708, 710 (4th Cir. 1993) ("Under traditional state tort law, hospitals are under no legal duty to provide [emergency] care"); *Root v. Liberty Emergency Physicians, Inc.*, 68 F.Supp.2d 1086, 1091 (W.D. Mo. 1999). Other than the duty to stabilize, once a patient is in the care of the hospital, however, EMTALA has fulfilled its purpose and state tort law is equipped to provide remedies. *Bryan v. Rectors and Visitors of Univ. of Va.*, 95 F.3d 349, 351 (4th Cir. 1996).

Here, Plaintiff admitted she received stabilizing treatment, Am. Compl. 5, which satisfies the Defendant's treatment obligation under EMTALA. *See* 42 U.S.C. § 1395dd(b)(1)(A). Indeed, Plaintiff was hospitalized for thirty-nine days—during which time she underwent an operation and was then transferred to another hospital for further recuperation. *Id.* Plaintiff makes no claim that she was transferred or discharged before being stabilized. Instead, Plaintiff asserts she was not "timely stabilize[d]," which, as discussed, is not a valid EMTALA claim, *see Vazquez-Rivera*, 620 F. Supp. 2d at 270, because the Act does not provide a remedy for negligent treatment, *Marshall*, 134 F.3d at 322 (5th Cir. 1998). "[I]nserting into EMTALA an action for violation of standard medical procedures for patients admitted and treated for several hours would convert the statute into a federal malpractice statute . . . ." *Tank v. Chronister*, 941 F. Supp. 969, 972 (D. Kan. 1996) (quotation omitted). Therefore, the claim fails.

C. Leave to Amend

A motion to dismiss pursuant to Rule 12(b)(6) is generally disfavored and rarely granted. *Turner v. Pleasant*, 663 F.3d 770, 775 (5th Cir. 2011). Therefore, where a plaintiff's complaint fails to state a claim, courts usually grant leave to file an amended complaint, unless amendment would be futile. *See, e.g.*, *Brown v. Aetna Life Ins. Co.*, 975 F. Supp. 2d 610, 620 (W.D. Tex.

2013). Because Plaintiff could allege additional facts that would give rise to an EMTALA claim, amendment is not futile. Therefore, Plaintiff is granted leave to further amend the Amended Complaint.

III. CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss, ECF No. 9, is **GRANTED.** Plaintiff's claims against Defendant are **DISMISSED** without prejudice. Plaintiff may file an amended complaint **by no later than October 29, 2018.**

SO ORDERED.

SIGNED this 15th day of October, 2018.

KATHLEEN CARDONE
UNITED STATES DISTRICT JUDGE