

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

3
4 NANCY BELFORT,

5 Plaintiff,

6 v.

CIVIL NO. 07-1240 (RLA)

7 CORPORACION HOGAR SAN AGUSTIN Y
8 TERESA, et al.,

9 Defendants.

10 **ORDER GRANTING PLAINTIFF'S MOTION**
11 **FOR PARTIAL SUMMARY JUDGMENT AS TO LIABILITY**
12 **AND LIMITING TRIAL TO DAMAGES**

13 Plaintiff has moved the court to enter partial summary judgment
14 in this action finding that defendant's acts or omissions were
15 negligent and the proximate cause of the death of decedent JUANA
16 BELFORT.

17 The court having reviewed plaintiff's legal arguments as well as
18 the documents submitted in support therewith hereby finds that a
19 finding of liability as requested is warranted.

20 **PROCEDURAL BACKGROUND**

21 Plaintiff, NANCY BELFORT, instituted this action seeking damages
22 for the death of her mother allegedly caused by the negligence of the
23 defendant HOGAR SAN AGUSTIN Y TERESA ("HOGAR").

24 At the Further Initial Scheduling Conference held on May 30,
25 2008,¹ the following discovery deadlines relevant to the matter
26 currently before us were set:

¹ See Minutes (docket No. 63).

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3 6/30/08 HOGAR to provide a description of the witnesses listed
4 as #4 to #16 in the Second Joint ISC memorandum
5 (docket No. 58) and their knowledge of decedent and/or
6 her pain.²

7 6/30/08 HOGAR to identify expert witnesses.

8 7/31/08 HOGAR to submit expert witness reports.

9 7/31/08 Conclusion of depositions of parties and/or fact
10 witnesses.

11 8/12/08 Blocked for deposition of HOGAR's expert witnesses.

12 8/26&
13 28/08 Alternate dates for expert depositions.

14 10/17/08 Dispositive Motions

15 At the STATUS/SETTLEMENT CONFERENCE held on September 11, 2008,³
16 the court became aware that HOGAR had failed to provide a description
17 of its witnesses listed as #4 through #16 nor had defendant complied
18 with the deadlines pertaining to expert witnesses. Accordingly, both
19 those particular fact witnesses as well as plaintiff's expert
20 witnesses were deemed waived.

21 Defendant's subsequent request for reconsideration of this
22 ruling was denied. In its order denying reconsideration the court
23 noted that "[a]part from the fact that petitioner has failed to

24 ² HOGAR was specifically admonished that failure to provide this
25 information by the court-imposed deadline would result in the automatic
26 waiver of these witnesses in this action. See Minutes (docket No. 63)
n.1.

³ See Minutes (docket No. 76).

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adduce any valid reason for disregarding the court's case management orders, allowing petitioner to comply with its discovery obligations at this late date would in effect deprive plaintiff of its [sic] right to take the depositions of these fact and expert witnesses."⁴

LOCAL RULE 56(c)

Motions for summary judgment must comport with the provisions of Local Rule 56(c) which, in pertinent part, reads:

A party opposing a motion for summary judgment shall submit with its opposition a separate, short, and concise statement of material facts. The opposing statement shall admit, deny or qualify the facts by reference to each numbered paragraph of the moving party's statement of material facts and unless a fact is admitted, shall support each denial or qualification by a record citation as required by this rule. The opposing statement may contain in a separate section additional facts, set forth in separate numbered paragraphs and supported by a record citation as required by subsection (e) of this rule.

This provision specifically requires that in its own statement of material fact respondent either admit, deny, or qualify each of movant's proffered uncontested facts and for each denied or qualified statement cite the specific part of the record which supports its

⁴ Order Denying Defendant's Motion for Reconsideration (docket No. 88).

2 denial or qualification. Respondent must prepare its separate
3 statement much in the same manner as when answering the complaint.

4 The purpose behind the local rule is to allow the court to
5 examine each of the movant's proposed uncontested facts and ascertain
6 whether or not there is adequate evidence to render it uncontested.

7 "This 'anti-ferret' rule aims to make the parties organize the
8 evidence rather than leaving the burden upon the district judge."

9 Alsina-Ortiz v. Laboy, 400 F.3d 77, 80 (1st Cir. 2005). "The purpose

10 of this 'anti-ferret rule' is to require the parties to focus the
11 district court's attention on what is, and what is not, genuinely
12 controverted. Otherwise, the parties would improperly shift the
13 burden of organizing the evidence presented in a given case to the
14 district court." Mariani-Colon v. Dep't of Homeland Sec., 511 F.3d

15 216, 219 (1st Cir. 2007) (internal citations omitted). *See also*,

16 Morales v. A.C. Orssleff's EFTE, 246 F.3d 32, 33 (1st Cir. 2001)

17 (summary judgment should not "impose [upon the court] the daunting
18 burden of seeking a needle in a haystack"); Leon v. Sanchez-Bermudez,
19 332 F.Supp.2d 407, 415 (D.P.R. 2004).

20 "When complied with, they serve to dispel the smokescreen behind
21 which litigants with marginal or unwinnable cases often seek to hide
22 and greatly reduce the possibility that the district will fall victim
23 to an ambush." Caban Hernandez v. Philip Morris USA, Inc., 486 F.3d
24 1, 7 (1st Cir. 2007) (citation, internal quotation marks and brackets
25 omitted).
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3 Apart from the fact that Local Rule 56(e) itself provides that
4 "[f]acts contained in a supporting or opposing statement of material
5 facts, if supported by record citations as required by this rule,
6 shall be deemed admitted unless properly controverted" in discussing
7 Local Rule 311.12, its predecessor, the First Circuit Court of
8 Appeals stressed the importance of compliance by stating that the
9 parties who ignore its strictures run the risk of the court deeming
10 the facts presented in the movant's statement of fact admitted.
11 "Given the vital purpose that such rules serve, litigants ignore them
12 at their peril. In the event that a party opposing summary judgment
13 fails to act in accordance with the rigors that such a rule imposes,
14 a district court is free, in the exercise of its sound discretion, to
15 accept the moving party's facts as stated." *Id.* See also, Alsina-
16 Laboy, 400 F.3d at 80 ("Where the party opposing summary judgment
17 fails to comply, the rule permits the district court to treat the
18 moving party's statement of facts as uncontested"); Cosme-Rosado v.
19 Serrano-Rodriguez, 360 F.3d 42, 46 (1st Cir. 2004) ("uncontested"
20 facts pleaded by movant deemed admitted due to respondent's failure
21 to properly submit statement of contested facts.)

22 "[A]bsent such rules, summary judgment practice could too easily
23 become a game of cat-and-mouse, giving rise to the 'specter of
24 district court judgment being unfairly sandbagged by unadvertised
25 factual issues.'" Ruiz-Rivera v. Riley, 209 F.3d 24, 28 (1st Cir.
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2 2000) (citing Stepanischen v. Merchants Despatch Transp. Corp., 722
3 F.2d 922, 931 (1st Cir. 1983)).

4 Providing an alternative statement of facts without addressing
5 the movant's factual proposals individually does not conform to the
6 Local Rule's mandate and will cause defendant's proffered facts to be
7 deemed uncontested. Mariani-Colon, 511 F.3d at 219. Further, denials
8 without more are ineffective. Rather, the opposing party "must offer
9 specific facts to counter those set out by [defendant].
10 [N]onmovant's facts must demonstrate the existence of definite
11 competent evidence fortifying plaintiff's version of the truth. This
12 is the case even where motive and intent are at issue. [Plaintiff]
13 may not meet his burden by citing an inequity and tacking on the
14 self-serving conclusion that the defendant was motivated by a
15 discriminatory animus." Arroyo-Audifred v. Verizon Wireless, Inc.,
16 527 F.3d 215, 219-20 (1st Cir. 2008) (internal citations and quotation
17 marks omitted).

18 A party's failure to abide by the strictures of Local Rule
19 56(c), however, does not automatically entitle movant to summary
20 judgment as requested. "It mainly means that the district judge can
21 accept the moving party's allegedly uncontested facts as true, but
22 whether or not this justifies summary judgment for the moving party
23 depends upon the legal and factual configuration that results." Caban
24 Hernandez, 486 F.3d at 8.

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3 In the case before us, HOGAR did not raise particularized
4 objections to plaintiff's proffered Statement of Facts as mandated by
5 Local Rule 56(c).⁵ Accordingly, we shall consider plaintiff's
6 submitted facts - which have adequate evidentiary support - as
7 uncontested.

8 **UNCONTESTED FACTS**

9 We find the following facts submitted by plaintiff which are
10 duly supported by the evidence are uncontested.

- 11 1. Plaintiff NANCY BELFORT is decedent JUANA BELFORT's
12 daughter.
- 13 2. Plaintiff signed a contract with HOGAR for the care of her
14 mother and thus was fully responsible for the monthly
15 payments, decedent's personal needs and any other
16 miscellaneous needs.
- 17 3. Pursuant to the aforementioned contract, HOGAR was
18 responsible for decedent's security, safety and medical
19 treatment.

21 ⁵ Instead, defendant submitted its own Controverted Material
22 Facts in its response to plaintiff's summary judgment request. See
23 Controverted Material Facts (docket No. 93). However, the vast
24 majority of those facts are based either on the statements of
25 individuals or on the opinion of defendant's expert all of which were
26 previously stricken by the court.

24 Additionally, we concur with the objections raised by plaintiff
25 as to the remaining proffered facts.

25 Based on the foregoing, we need not consider defendant's alleged
26 material facts in controversy for purposes of disposing of
plaintiff's summary judgment request.

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- 2 4. Decedent was admitted to the HOGAR in February 2002 where
3 she remained until September 2006.
- 4 5. MYRIAM AVILES, plaintiff's cousin, visited decedent
5 regularly at the HOGAR and kept plaintiff informed as to
6 decedent's condition.
- 7 6. DR. RAUL ROSADO FIGUEROA was the only physician provided by
8 HOGAR to care for decedent and was, in effect, her treating
9 physician.
- 10 7. When decedent arrived at the HOGAR, she was able to
11 ambulate, albeit with difficulty.
- 12 8. At least by May 2006, the Sunday prior to Mother's day,
13 decedent was placed in a wheelchair. Her relatives were
14 informed that it was to prevent falls.
- 15 9. According to the notes of DR. RAUL ROSADO FIGUEROA, from
16 2002 to 2006 decedent's muscular-skeletal system was "o.k."
17 with no changes and she could ambulate with difficulty.
18 This statement continued in the record even after decedent
19 was placed in a wheelchair.
- 20 10. Shortly after decedent was placed in a wheelchair, she
21 became bedridden as a result of a fracture of her right hip
22 evidenced by an x-ray taken at Hospital Metropolitano.
- 23 12. A person with a displaced hip fracture such as the one
24 decedent had could not have basically normal extremities as
25 recorded by DR. RAUL ROSADO FIGUEROA.
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2 13. At the time of her death JUANA BELFORT was 77 years old.

3 **SUMMARY JUDGMENT STANDARD**

4 Rule 56(c) Fed. R. Civ. P., which sets forth the standard for
5 ruling on summary judgment motions, in pertinent part provides that
6 they shall be granted "if the pleadings, depositions, answers to
7 interrogatories, and admissions on file, together with the
8 affidavits, if any, show that there is no genuine issue as to any
9 material fact and that the moving party is entitled to a judgment as
10 a matter of law." Sands v. Ridefilm Corp., 212 F.3d 657, 660-61 (1st
11 Cir. 2000); Barreto-Rivera v. Medina-Vargas, 168 F.3d 42, 45 (1st Cir.
12 1999). The party seeking summary judgment must first demonstrate the
13 absence of a genuine issue of material fact in the record.
14 DeNovellis v. Shalala, 124 F.3d 298, 306 (1st Cir. 1997). A genuine
15 issue exists if there is sufficient evidence supporting the claimed
16 factual disputes to require a trial. Morris v. Gov't Dev. Bank of
17 Puerto Rico, 27 F.3d 746, 748 (1st Cir. 1994); LeBlanc v. Great Am.
18 Ins. Co., 6 F.3d 836, 841 (1st Cir. 1993), *cert. denied*, 511 U.S.
19 1018, 114 S.Ct. 1398, 128 L.Ed.2d 72 (1994). A fact is material if
20 it might affect the outcome of a lawsuit under the governing law.
21 Morrissey v. Boston Five Cents Sav. Bank, 54 F.3d 27, 31 (1st Cir.
22 1995).

23 "In ruling on a motion for summary judgment, the court must view
24 'the facts in the light most favorable to the non-moving party,
25 drawing all reasonable inferences in that party's favor.'" Poulis-
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2 Minott v. Smith, 388 F.3d 354, 361 (1st Cir. 2004) (citing Barbour v.
3 Dynamics Research Corp., 63 F.3d 32, 36 (1st Cir. 1995)). "In
4 marshaling the facts for this purpose we must draw all reasonable
5 inferences in the light most favorable to the nonmovant. That does
6 not mean, however, that we ought to draw *unreasonable* inferences or
7 credit bald assertions, empty conclusions, rank conjecture, or
8 vitriolic invective." Caban Hernandez v. Philip Morris USA, Inc., 486
9 F.3d 1, 8 (1st Cir. 2007) (internal citation omitted italics in
10 original).

11 Credibility issues fall outside the scope of summary judgment.
12 "'Credibility determinations, the weighing of the evidence, and the
13 drawing of legitimate inferences from the facts are jury functions,
14 not those of a judge.'" Reeves v. Sanderson Plumbing Prods., Inc.,
15 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (citing
16 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505,
17 91 L.Ed.2d 202 (1986)). See also, Dominquez-Cruz v. Suttle Caribe,
18 Inc., 202 F.3d 424, 432 (1st Cir. 2000) ("court should not engage in
19 credibility assessments."); Simas v. First Citizens' Fed. Credit
20 Union, 170 F.3d 37, 49 (1st Cir. 1999) ("credibility determinations
21 are for the factfinder at trial, not for the court at summary
22 judgment."); Perez-Trujillo v. Volvo Car Corp., 137 F.3d 50, 54 (1st
23 Cir. 1998) (credibility issues not proper on summary judgment);
24 Molina Quintero v. Caribe G.E. Power Breakers, Inc., 234 F.Supp.2d
25 108, 113 (D.P.R. 2002). "There is no room for credibility
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3 determinations, no room for the measured weighing of conflicting
4 evidence such as the trial process entails, and no room for the judge
5 to superimpose his own ideas of probability and likelihood. In fact,
6 only if the record, viewed in this manner and without regard to
7 credibility determinations, reveals no genuine issue as to any
8 material fact may the court enter summary judgment." Cruz-Baez v.
9 Negron-Irizarry, 360 F.Supp.2d 326, 332 (D.P.R. 2005) (internal
10 citations, brackets and quotation marks omitted).

11 In cases where the non-movant party bears the ultimate burden of
12 proof, he must present definite and competent evidence to rebut a
13 motion for summary judgment, Anderson v. Liberty Lobby, Inc., 477
14 U.S. at 256-257, 106 S.Ct. 2505, 91 L.Ed.2d 202; Navarro v. Pfizer
15 Corp., 261 F.3d 90, 94 (1st Cir. 2000); Grant's Dairy v. Comm'r of
16 Maine Dep't of Agric., 232 F.3d 8, 14 (1st Cir. 2000), and cannot rely
17 upon "conclusory allegations, improbable inferences, and unsupported
18 speculation". Lopez-Carrasquillo v. Rubianes, 230 F.3d 409, 412 (1st
19 Cir. 2000); Maldonado-Denis v. Castillo-Rodríguez, 23 F.3d 576, 581
20 (1st Cir. 1994); Medina-Muñoz v. R.J. Reynolds Tobacco Co., 896 F.2d
21 5, 8 (1st Cir. 1990).

22 NEGLIGENCE

23 Plaintiff claims that defendant is liable due to the failure of
24 both the physician and the HOGAR's staff to detect decedent's
25 fractured hip and adequately monitor decedent's condition.
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3 Art. 1802 of the Puerto Rico Civil Code, P.R. Laws Ann. tit.,
4 § 5141 (1990), governs tort liability in Puerto Rico. It provides
5 that "[a] person who by an act or omission causes damage to another
6 through fault or negligence shall be obliged to repair the damage so
7 done." Negligence is the failure to exercise due diligence to avoid
8 foreseeable risks.

9 According to this provision, a person is liable for damages
10 resulting from his/her negligent acts or omissions. In order to
11 prevail plaintiff must establish: (1) a negligent act or omission,
12 (2) damages, and (3) a causal relationship between them. Irvine v.
13 Murad Skin Research Lab., Inc., 194 F.3d 313, 321 -322 (1st Cir.
14 1999); De-Jesus-Adorno v. Browning Ferris Indus. of P.R., Inc., 160
15 F.3d 839, 842 (1st Cir. 1998); Marshall v. Perez Arzuaga, 828 F.2d
16 845, 847 (1st Cir. 1987); Pons Anca v. Engebretson, 160 D.P.R. 347,
17 354 (2003); Montalvo v. Cruz, 144 D.P.R. 748, 755 (1998); Toro-Aponte
18 v. E.L.A., 142 D.P.R. 464, 473 (1997).

19 The mere fact that injuries or damages ensue is not grounds for
20 liability under art. 1802 for that would entail absolute liability.
21 Defendant will be liable only for those reasonably foreseeable
22 consequences to its conduct. De-Jesus-Adorno, 160 F.3d at 842; Pons
23 Anca, 160 D.P.R. at 354; Montalvo, 144 D.P.R. at 755; Toro-Aponte,
24 142 D.P.R. at 473; Ocasio Juarbe v. Eastern Airlines, Inc., 125
25 D.P.R. 410, 418 (1990) *official translation reproduced in full in* 902
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2 F.2d 117 (1st Cir.1990); Jimenez v. Pelegrina Espinet, 112 D.P.R. 700,
3 704, (1982); Pacheco v. A.F.F., 112 D.P.R. 296, 300 (1982).

4 Additionally, pursuant to art. 1803 of the Puerto Rico Civil
5 Code, P.R. Laws Ann. tit., 31 § 5142 (1990), tort liability may be
6 incurred not only for personal [negligent] acts and omissions, but
7 also for those [negligent acts or omissions] of the persons for whom
8 [a principal] should be [held] responsible." For instance, hospitals
9 and physicians can be held vicariously liable for the negligent acts
10 or omissions of their respective employees. Lopez v. Dr. Cañizares,
11 163 D.P.R. 119, 135 (2004); Blas v. Hosp. Guadalupe, 146 D.P.R. 267,
12 349 (1998). See also, Márquez Vega v. Martínez Rosado, 116 D.P.R.
13 397, 404-06 (1985) (hospitals jointly liable for acts or omissions of
14 physicians in the emergency room when the patient initially seeks
15 medical assistance from the hospital rather than directly from a
16 particular medical doctor).

17 Physicians are bound to furnish patients with that care and
18 attention which in light of modern means of communication and
19 knowledge satisfies the professional requirements generally
20 recognized by the medical profession at the time that the medical
21 care was provided. Lopez v. Dr. Cañizares, 163 D.P.R. at 133; Marti
22 v. Abreu, 143 D.P.R. 520, 526 (1997); Santiago Otero v. Mendez, 135
23 D.P.R. 540 (1994); Rodriguez Crespo v. Hernandez, 121 D.P.R. 639
24 (1988); Nuñez v. Cintron, 115 D.P.R. 598, 613 (1984).

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3 In order to prevail in a medical malpractice action, plaintiff
4 must prove, by a preponderance of the evidence, that the physician
5 was negligent and that his negligence was the proximate cause of the
6 patient's injuries. Lopez v. Dr. Cañizares, 163 D.P.R. at 133; Blas
7 v. Hosp. Guadalupe, 146 D.P.R. at 350.

8 An injury or damage is proximately caused by an act or a failure
9 to act whenever it appears from the evidence in the case that the act
10 or omission was the factor which most probably brought about or
11 actually caused the injuries complained of, and that the injuries
12 were either a direct result or a reasonably probable consequence of
13 the act or omission charged by plaintiffs. Crespo v. Hernandez, 121
14 D.P.R. 639 (1988).

15 **LIABILITY**

16 According to DR. GERMAN MALARET, plaintiff's expert witness,
17 decedent's fracture was a result of some kind of trauma most likely
18 a fall. This must have happened while decedent was at the HOGAR, most
19 probably prior to May 2006, since by that date she was confined to a
20 wheelchair.

21 If decedent was ambulating - albeit with difficulty - and
22 according to DR. ROSADO FIGUEROA's notes her musculo-skeletal system
23 was in good condition gives rise to the question: why was she placed
24 in a wheelchair and subsequently bedridden? The logical conclusion
25 is that she was in pain or could not walk due to the hip fracture
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2 which was not diagnosed by DR. ROSADO FIGUEROA and which also went
3 undetected by the HOGAR's staff.

4 DR. MALARET opined that DR. ROSADO FIGUEROA was negligent in
5 that he failed to diagnose decedent's fractured hip. Nor did the
6 HOGAR personnel, who were responsible for her daily care, become
7 aware of and/or ignored her condition.

8 Additionally, DR. MALARET indicated that the care provided by
9 the HOGAR's staff for decedent's ulcer condition was deficient in
10 that she was not turned as frequently as required. This type of ulcer
11 develops due to poor skin care and continued pressure in the area in
12 a patient that has poor circulation, particularly at the pressure
13 points, i.e., shoulders, hips, back, and heels.

14 DR. ROSADO FIGUEROA described for the first time a type-three
15 ulcer on September 1, 2006 which, according to DR. MALARET, means
16 that decedent had ulcers for a prolonged period of time prior to this
17 date.

18 Due to the untreated fracture, plaintiff was initially confined
19 to a wheelchair and subsequently bedridden which caused plaintiff to
20 develop severe decubitus ulcers in various parts of her body. DR.
21 MALARET concluded that decedent's death was proximately caused by the
22 irreversible deterioration and complications resulting from her being
23 bedridden and the ensuing grave ulcerous condition which was
24 deficiently treated.

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3 It is axiomatic that in this particular case the HOGAR is
4 responsible for the negligent acts or omissions of both DR. ROSADO
5 FIGUEROA and its employees. Similar to a hospital setting, this
6 physician was contracted directly by the institution to provide
7 medical care to the confined elderly population. As a matter of fact,
8 it is undisputed that this was the only medical doctor who regularly
9 attended decedent at the nursing home.

10 Thus, we find that defendant's negligence has been clearly
11 established by plaintiff's expert witness.⁶ The record reflects that
12 decedent's fractured hip went undetected by the treating physician
13 for an inordinate period of time.

14 The negligence of the HOGAR's staff is also well supported in
15 DR. MALARET's report. Again, there is no reference to decedent's
16 fracture in the HOGAR's records. It is evident from DR. MALARET's
17 conclusions that the HOGAR staff was negligent both in failing to
18 detect decedent's fracture and also in being derelict in the care of
19 a wheelchair bound and bedridden patient which resulted in the
20 development of decubitus ulcers.

21 Thus, the delay both by the physician and the staff in noticing
22 the fracture added to the failure to adequately handle the bedridden

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25 ⁶ Defendant's arguments in the opposition to the summary
26 judgement request are based exclusively on the testimony of its
expert and personnel all of which were stricken by the court.
Accordingly, this evidence may not be considered in our ruling.

2 patient caused her to develop the decubitus ulcers which eventually
3 resulted in her death.

4 **CONCLUSION**

5 Based on the foregoing, plaintiff's Motion for Partial Summary
6 Judgment as to Liability (docket No. **83**)⁷ is **GRANTED**.

7 Accordingly, we find that defendant is liable for the negligent
8 acts or omissions of DR. ROSADO FIGUEROA as well as those of the
9 HOGAR's staff which negligence was the proximate cause of decedent's
10 demise.

11 It is further ORDERED that the trial scheduled for **January 20,**
12 **2009,** shall be limited to damages only.

13 IT IS SO ORDERED.

14 San Juan, Puerto Rico, this 18th day of December, 2008.

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17 S/Raymond L. Acosta
RAYMOND L. ACOSTA
18 United States District Judge

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26 ⁷ See Opposition (docket No. **92**) and Reply (docket No. **102**).