2012 WL 2616314 (Okl.Dist.) (Trial Motion, Memorandum and Affidavit)
District Court of Oklahoma.
Oklahoma County

Nadine ROGERS, Guardian of Josephine Tennyson, and Josephine Tennyson, individually, Plaintiffs,

v.

EDWARDS REDEEMER NURSING CENTER, L.L.C., and Promise Redeemer, L.L.C., Defendants.

No. CJ-2009-10257.
March 13, 2012.

Defendant Promise Redeemer, L.L.C.'S Motion for Summary Judgment and Brief in Support

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COMES NOW the Defendant, Promise Redeemer, L.L.C., an Oklahoma Company, and pursuant to Rule 13 of the Rules for District Courts of Oklahoma, moves this Court for an Order granting summary judgment in its favor on the following grounds and/or claims asserted by Plaintiff: Negligence, Punitive damages, *Res Ipsa Loquitur*, Breach of Contract, Negligent Infliction of Emotional Distress. In support of this Motion, Defendant, Promise Redeemer, L.L.C. submits the following brief:

I. INTRODUCTION

This is a medical liability case concerning nursing home care provided to Josephine Tennyson on or about June 21, 2009. On October 28, 2009, Plaintiffs instituted this action, alleging that Defendant Edwards Redeemer Nursing Center, L.L.C. was negligent in Ms. Tennyson's care. On May 5, 2010, Plaintiffs filed their First Amended Petition naming Promise Redeemer, L.L.C. as an additional Defendant. Josephine Tennyson, age 104, was a resident of the subject facility from September 21,2003 until her discharge on June 26,2009. Ms. Tennyson presented to the emergency department at OU Medical Center on June 21, 2009, was evaluated by Larry Lovelace, D.O., diagnosed with "soft tissue injuries secondary to a fall", and discharged back to the nursing home the same day. (See Clinical Report from OU Medical Center, Exhibit A). Ms. Tennyson returned to the subject facility where she remained until her discharge on June 26, 2009. The Oklahoma State Department of Health investigated this incident on June 25, 2009 and found no wrong doing on the part of the subject facility. (See Oklahoma State Department of Health Investigative Report Number OK00035722, Exhibit B). Plaintiffs have asserted claims grounded in general negligence, *res ipsa loquitur*, and emotional distress. Plaintiffs allege compensatory and punitive damages for personal injuries of Josephine Tennyson. Plaintiffs' First Amended Petition also raises a breach of contract claim, alleging that the care Ms. Tennyson received while at Edwards Redeemer Nursing Center fell below the accepted standard of care, thus breaching her admission contract with this Defendant.

II. UNDISPUTED MATERIAL FACTS

1. Plaintiffs' Petition was filed on October 28, 2009. (Source: Plaintiffs Petition, Exhibit C).

2. Plaintiffs' First Amended Petition was filed on May 10,2010 (Source: Plaintiffs First Amended Petition, Exhibit D).

3. Plaintiffs' First Amended Petition asserts claims against defendant based upon the following alleged theories of liability and/or damages: Negligence, *res ipsa loquitur*, breach of contract, and punitive damages. (Source: Plaintiffs Petition First Amended Petition, Exhibit D).

4. Josephine Tennyson was transferred to OU Medical Center on June 21, 2009, evaluated by Dr. Lovelace, diagnosed with "soft tissue injuries secondary to a fall", and discharged back to Edwards Redeemer Nursing Center on the same day. (Source: Clinical Report from OU Medical Center, Exhibit A).

5. On June 22, 2009, Plaintiff, Nadine Rogers, filed a complaint with the Oklahoma State Department of Health against the subject facility. (Source: Plaintiffs' Response to Interrogatory No. 18, Exhibit E).

6. On June 25, 2009, Katheran Meeks, R.N., Clinical Health Facility Surveyor for the Oklahoma State Department of Health made an unannounced visit to the subject facility and investigated the complaint concerning Ms. Tennyson's injuries. No deficiencies were cited and the allegation was unsubstantiated. (Source: Oklahoma State Department of Health Investigative Report Number OK00035722, Exhibit B).

III. SUMMARY JUDGMENT STANDARD

Pursuant to Section 2056.E, "an opposing party may not rely merely on allegations or denials in its own pleadings; rather, its response must, by affidavits or as otherwise provided in this rule, set out specific facts showing a genuine issue for trial." As outlined in the undisputed facts above, and pursuant to § 2056.C, Defendant has provided discovery materials which establish the material facts necessary to render judgment in its favor.

Rule 13 of the Rules for District Courts of Oklahoma provides that a party may seek summary judgment or summary disposition of any issue on the merits when the evidentiary material filed with the court shows no substantial controversy as to any material fact. It is the duty of a trial court to grant a motion for summary judgment when admitted facts and law justify judgment as a matter of law. *Will v. Jones*, 1969 OK CIV APP 16, ¶ 5, 463 P.2d 702. A ruling on a motion for summary judgment is to be made on the record which the parties have actually presented, not on the record which is potentially possible. *Roberson v. Waltner*, 2005 OK CIV APP 15, ¶ 8, 108 P.3d 567, 569 (Okla. Civ. App. 2005).

A party opposing a summary judgment motion, in order to prevail, must file a written statement containing the material facts which show a genuine issue exists, and attach affidavits and other evidentiary material containing admissible evidence. Moreover, the summary judgment evidence must set forth facts admissible in evidence, rather than allegations or conclusory statements. *Buckner v. General Motors Corp.*, 1988 OK 73, ¶¶ 28-30, 760 P.2d 803, 812.

In *First Nat'l Bank & Trust Co. v. Kissee*, 1993 OK 96, ¶¶ 7-8, 859 P.2d 502, 505, the Oklahoma Supreme Court held:

> A party cannot merely rely upon conjecture or suppositions, and assert that facts exist or might exist, [because such] is not sufficient to create a substantial controversy when the party moving for summary judgment has introduced evidence showing the existence of facts which would preclude recovery by the party against whom the motion was made.

In view of these standards and the material facts, Defendant is entitled to judgment on Plaintiffs Negligence, *res ipsa loquitur*, Breach of-Contract, Emotional Distress, and Punitive Damages claims.

IV. ARGUMENT AND AUTHORITY

PROPOSITION I

PLAINTIFF'S NEGLIGENCE CLAIM LACKS THE ESSENTIAL ELEMENT OF CAUSATION *AND THEREFORE FAIL AS A MATTER OF LAW.*

Plaintiffs have failed to establish the essential causal link between Defendant's alleged negligence at Edwards Redeemer Nursing Center and any injury to Ms. Tennyson. This failure is fatal to Plaintiffs' negligence.

To establish *a prima facie* case of negligence against a health care provider defendant, three elements must be proven:
(a) a duty owed by the defendant to protect the plaintiff from injury,

(b) a failure to properly exercise or perform that duty and

(c) plaintiffs injuries proximately caused by the defendant's failure to exercise his duty of care.

Thompson v. Presbyterian Hospital, Inc., 1982 OK 87, ¶7, 652 P.2d 260, 263.

Oklahoma law requires that Plaintiff support these elements of negligence in a medical liability case with expert testimony. *Harder v. F.C. Clinton, Inc.,* 1997 OK 137, ¶14, 948 P.2d 298, 305 n.30; *Grayson v. Children's Hosp. of Oklahoma,* 1992 OK CIV APP 116, ¶7,838 P.2d 546,549; *Boxberger v. Martin,* 1976 OK 78, ¶14, 552 P.2d 370, 373.

The law is clear that a person trained in the diagnoses of diseases is required to present evidence regarding causation. *Matchen v. McGahey,* 1969 OK 48, ¶¶20-21,455 P.2d 52, 57. Proof of injury or suffering in and of itself is not sufficient to support a cause of action. The plaintiff must prove an injury proximately resulted from the alleged negligence. *Sloan v. Owen,* 1977 OK 239, 20, 579 P.2d 812, 814; *Nicholson v. Tacker,* 1973 OK 75,512 P.2d 156; *Rush v. Mullins,* 1962 OK 62, 370 P.2d 557. The plaintiffs failure to establish this causal relationship bars any recovery. *Woodward v. Kinchen,* 1968 OK 152, 446 P.2d 375; *Ellis v. Hollis,* 1965 OK 15, 398 P.2d 832.

Here, Plaintiffs' allegation that the care provided to Ms. Tennyson caused her to suffer injuries is not supported by the evidence. Plaintiffs have not identified a qualified medical expert to support causation. Therefore, the third element in a *prima facie* negligence case remains unsatisfied in Plaintiffs' negligence claim.

Failure to establish this essential causal link between an asserted act of malpractice and the patient's medical injuries warranted summary judgment in favor of the defendant physician in *Parsons v. Wood,* 1978 OK 84, ¶¶11-12, 584 P.2d 1332, 1334. In Parsons, the defendant physician introduced evidence which established there was no causal relationship between the alleged malpractice and the injuries suffered by the decedent. In response, the plaintiff attempted to establish causation by securing opinions from other physicians that the ruptured appendix *couldpossibly have caused* the acceleration or spread of the decedent's cancer. In sustaining the defendant physician's motion for summary judgment, the court in *Parsons* quoted *Weeks v. Wedgewood Village, Inc.,* 1976 OK 72, 554 P.2d 780, wherein it was held:

> If the defendant introduces evidence which indicates there is no substantial controversy as to a fact material to plaintiffs cause of action, and this fact is in the defendant's favor, the plaintiff has the burden of showing that evidence is available which would justify trial of the issue.

Parsons, supra, at 1334. [emphasis added].

The court in *Parsons* held the plaintiff could not “get around the total failure of the evidence to establish the essential causal link between the asserted act of malpractice and the injuries suffered by the deceased.” *Parsons,* 584 P.2d at 1335.

Oklahoma law further holds that this essential causal link cannot competently be made by a nurse. The Oklahoma Supreme Court specifically held that a nurse should not be allowed to render a medical causation opinion. In *Shawnee Gas & Elec. v. Hunt*, 1912 OK 276, ¶3, 122 P. 673, 674, the Court stated:

> It is believed that it is safer to confine expert testimony, in which the witness is permitted to give an opinion, to those persons who have special training in the *diagnoses and treatment of diseases* ... the nurse was not competent to testify under the proof authored ... *there is no proof in the case showing that the nurses, aspart of their training, are required to learn to diagnose diseases.*

[emphasis added].

In *Shawnee*, a nurse was allowed to testify that a patient was suffering from an epileptic condition. The Court reversed the trial court's jury verdict, holding that the testimony of the nurse should not have been allowed.

In *Matchen, supra*, the Oklahoma Supreme Court stated as follows:

> Where injuries are of a character requiring skilled and professional men to determine cause and extent thereof, the scientific question presented must necessarily be determined by testimony of skilled and professional persons ... the plaintiff is not qualified to diagnose diseases or to form opinions as to the necessity of treatment for physical disorders. The cause ... must necessarily be determined by skilled and professional persons.

Matchen, 455 P.2d at 57.

In this case, Plaintiffs have not identified a qualified medical expert who can properly support *a prima facie* negligence claim. Instead, Plaintiff has identified a nurse, Susan Barnes, RN, as an expert. (See Plaintiffs' Response to Interrogatory No. 9, Exhibit F). Ms. Barnes is not a medical doctor, and is therefore not qualified to diagnose and treat diseases. Without expert testimony from a physician that the Defendant's alleged negligence directly caused injuries to Ms. Tennyson, Plaintiffs' negligence claim fails as a matter of law. Plaintiffs have not identified any treating physicians of Ms. Tennyson to provide opinion testimony supportive of the negligence claims. (Plaintiffs' Witness List, Exhibit G). Plaintiffs obviously do not intend to rely on the expertise of any medical doctors, treating or otherwise, to support their negligence claim.

Plaintiffs' specific allegations of negligence include failure to provide reasonable professional medical and nursing care to Ms. Tennyson. Expert medical testimony from a physician is essential to assist the jury in understanding whether the negligence alleged by Plaintiffs directly caused these alleged injuries. Only a physician is qualified to opine whether a medical diagnosis was truly caused by substandard care, or was in fact an unavoidable consequence of some underlying health condition. While Plaintiffs' expert nurse *may* be qualified to testify regarding the applicable standard of nursing care, and potentially testify regarding breaches of the nursing standard of care, she is not qualified to take the next step and render a diagnosis of whether Ms. Tennyson suffered “injuries” as a result of her alleged nursing home negligence. The skill and judgment of a medical expert trained in the diagnosis of disease is instead required for the jury members to understand and judge Plaintiffs' negligence claims. Because Plaintiffs' only identified expert is not a physician trained in the diagnosis of disease, Plaintiff's medical negligence claims lack the essential element of causation. Summary judgment on Plaintiff's negligence claims is therefore required.

Moreover, the regulating agency of nursing facilities, i.e., the Oklahoma State Department of Health, has already investigated Plaintiffs' very complaint concerning Ms. Tennyson's care at Edwards Redeemer Nursing Center and found that Defendant was in no way deficient and that Plaintiffs' allegations were *unsubstantiated.* (See Oklahoma State Department of Health Investigative Report No. OK00035722, Exhibit B).

PROPOSITION II

PLAINTIFFS' CLAIM FOR PUNITIVE DAMAGES AGAINST *DEFENDANT FAILS AS A MATTER OF LAW*

Plaintiffs' First Amended Petition alleges a claim for punitive damages against the defendants. (Plaintiffs' First Amended Petition, Exhibit C, ¶¶ 12 and 22). For example, Plaintiffs allege that "the acts, conduct and behavior of Defendants were so grossly negligent, performed knowingly, intentionally and with such willful disregard of the rights of Tennyson as to constitute fraud and oppression...". (e.g., Exhibit C, ¶ 12). However, for the reasons outlined in Defendant's briefing, there is a total lack of any evidence to support a punitive damages claim against Defendant.

Title 23 O.S. § 9.1 does not list gross negligence as a basis for the imposition of punitive damages, but Oklahoma courts have held that if there is evidence of gross negligence *sufficient as* to infer malice, punitive damages maybe recovered. *See, e.g., Schuman v. Chatman,* 1938 OK 605, 17, 86 P.2d 615, 618; *Fuller v. Neundorf,* 1954 OK 362, ¶14, 278 P.2d 836, 839. However, to infer malice, the negligence must be so gross and flagrant as to "virtually raise the presumption of wanton and willful misconduct on the part of the offending party." *Clainton v. Chrisman,* 1935 OK 973, ¶ 11, 51 P.2d 748, 750. In *White v. B.K. Trucking Co., Inc.,* it was held that under Oklahoma law, gross negligence alone will not give rise to an inference of malice necessary to award punitive damages. 405 F. Supp. 1068, 1070-71 (W.D. Okla 1975). Rather, it takes "such" gross negligence that evil intent can be inferred from the defendant's conduct. *Id.* In reaching this conclusion, the court held:

> It appears under the pronouncements of the Oklahoma Supreme Court that gross negligence may support a recovery of punitive damages though it is not specifically enumerated in the Statute (23 Oklahoma Statutes § 9, *supra*). But it must be *such* gross negligence as to warrant the inference of or be deemed equivalent to an evil intent or perhaps *such* gross negligence as indicates a reckless disregard for the rights of others.

White, 405 F.Supp. at 1070. The Oklahoma legislature has defined the degrees of negligence in 25 O.S. § 6 as follows:
§ 6. Degrees of negligence defined.

Slight negligence consists in the want of great care and diligence; ordinary negligence in the want of ordinary care and diligence; and gross negligence in the want of slight care and diligence.

According to *White,* it is not believed that the Oklahoma Supreme Court has adopted this definition of gross negligence (want of slight care and diligence) as the equivalent of *such* gross negligence that will support an award of punitive damages. If this was the proper test of gross negligence to support an award of punitive damages, the Oklahoma Supreme Court would undoubtedly have applied or referred to this Statute as the standard or test for an award of punitive damages by reason of gross negligence. Rather, the Oklahoma Supreme Court instead refers to *such* gross negligence as is deemed equivalent to evil intent, which, of course, forms the basis of malice. *White,* 405 F. Supp. at 1070.

In this case, there is no evidence of any evil intent or malice by defendant toward Josephine Tennyson. In fact, Ms. Tennyson was a resident of defendant facility for nearly six years and yet Plaintiffs are unable to identify a more specific complaint concerning Ms. Tennyson's care at Edwards Redeemer Nursing Center than "Facility stafffailed to provide a safe environment resulting in a fall with injury to the plaintiff". (See November 30, 2011 Correspondence from Joe Carson to Defense Counsel Supplementing Interrogatories, Exhibit H). Summary disposition of Plaintiffs' punitive damages claim against these defendants is therefore appropriate.

PROPOSITION III

PLAINTIFF'S *RES IPSA LOQUITUR CLAIM FAILS AS A MATTER OF LAW*

The term *res ipsa loquitur* literally means "the thing speaks for itself." Black's Law Dictionary 1305 (6th ed. 1990). When applied, *res ipsa loquitur* "affords reasonable evidence, in the absence of an explanation, that injury arose from the defendant's want of care." *Id.* Hence, *res ipsa loquitur* is a doctrine of circumstantial evidence that applies when a plaintiff is unable to establish by direct evidence that the defendant was negligent. *See also, Harder v. F.C. Clinton, Inc.*, 948 P.2d 298, 305 (Okla. 1997).

In 1905, the doctrine was summarized in a three-part test that is now almost universally accepted in the United States:
(1) The accident is one that does not normally occur absent someone's negligence;

(2) The accident was caused by an agency or instrumentality within the exclusive control of the defendant;

(3) The accident was not due to any voluntary action or contribution on the part of the plaintiff.

4 J. Wigmore, Evidence Section 2509 (1st ed. 1905).

The doctrine of Res Ipsa Loquitur as applied in a nursing home negligence case is:

> a pattern of proof which may be followed when an injury is alleged to have been negligently inflicted and the harm is shown not to occur in the usual course of everyday conduct unless a person who controls the instrumentality likely to have produced the harm fails to exercise due care to prevent its occurrence.

Harder v. Clinton, 948 P.2d 302.

A nursing home has a duty to provide care at a reasonable standard, taking into consideration the resident's known mental and physical condition. *Id.* at 304. The doctrine of Res Ipsa Loquitur may be followed in nursing home negligence cases only upon proof of the foundation elements. *Id.* Plaintiffs have failed to establish more than one of the requisite foundation elements. Therefore, his action fails as a matter of law.

A. Plaintiff Has Not Established the Alleged Injury of Ms. Tennyson Does Not Occur in the Ordinary Course of Operations.

The first foundational requisite requires a showing that the alleged injury does not occur in the ordinary course of operations at a nursing home. Plaintiff has not produced any evidence that Josephine Tennyson's "injury" (currently only identified as "soft tissue injury" by Dr. Lovelace), does not occur without negligence in a nursing home. This is yet another example of the need for expert testimony in such cases. There exists in this case an investigation report created by the Oklahoma State Department of Health wherein the state determined that Plaintiffs' complaints about the care Josephine Tennyson received at Edwards Redeemer Nursing Center were unsubstantiated. The state investigator investigated Plaintiffs claims only four days after Ms. Tennyson's incident and reviewed her medical records and facility policies and procedures. In addition to reviewing all of these documents, the investigator interviewed nursing home staff, Plaintiff, Josephine Tennyson, at least two residents, and the complainant. (See Oklahoma State Department of Health Investigative Report No. OK00035722, Exhibit B). Even with all of the information reviewed and obtained by the OSDH investigator, the OSDH report concerning Ms. Tennyson's care at Edwards Redeemer Nursing Center contains no determination as to the *probable* cause (or any possible cause) of Ms. Tennyson's injuries. Plaintiffs have produced no evidence from any source that such injuries cannot occur unless the nursing home fails to exercise due care to prevent its occurrence.

There are a multitude of possible explanations for Ms. Tennyson's injuries, not the least of which is simply her age and diagnoses. Plaintiff has failed to satisfy the first foundational requisite.

B. Plaintiff Has Not Established Defendants Had Exclusive Control of the Instrumentality That Caused the Alleged Injury.

"Exclusive control is a flexible concept which denotes no more than elimination, within reason, of all explanations for the genesis of the injurious event other than the defendant's negligence-a showing that defendant's negligence probably caused the accident." *Harder*, 948 P.2d at 306 (emphasis in original). The nature and degree of control must be such that the reasonable probabilities point to the nursing home and support an inference that it was the negligent party. No such showing of "reasonable probability" that the nursing home caused this alleged injury has been made to this Court.

It must be noted that there has been no determination by anyone as to any "instrumentality" that in probability terms caused Ms. Tennyson the alleged injury as was the situation in the *Harder* case. Therefore, it does not make sense this Defendant was in exclusive control. Moreover, the Defendant could not prohibit Plaintiff Rogers from visiting her mother, Plaintiff Tennyson, privately in her room. Further, Plaintiff was in the care of EMSA prior to her evaluation at the hospital. Clearly, she was outside the exclusive control of Defendant and in the exclusive control of another for some period of time. All explanations cannot be eliminated as to a cause for Ms. Tennyson's alleged injury (except for Defendant's negligence) and the second foundational requisite is not met.

C. The True Explanation for the Alleged Injury is Not More Accessible to the Defendant.

No one knows in probability terms whether Ms. Tennyson was "injured". There are no witnesses to any such alleged incident or occurrence. The third element of Res Ipsa Loquitur consists of evidence that the precise cause of the accident be more accessible to the defendant than to the plaintiff. Until June 21, 2009, Josephine Tennyson was under the care of Edwards Redeemer Nursing Center, but also on that date, she was under the care of EMSA and later OU Medical Center, and after June 26, 2009, she was under the care of Grace Living Center - Northeast 21st. The nursing home has no more knowledge or accessibility than Plaintiffs have to what caused Ms. Tennyson's alleged injuries, therefore, the third foundation fact is not met. Of course, the medical explanations for the injuries of Ms. Tennyson are outside the realm of common knowledge of a layperson.

D. The Injuries Alleged Could Have Occurred Absent Negligence by Defendant.

The final foundational requisite requires Plaintiffs to present reasonably supportive evidence that this alleged injury to Ms. Tennyson would not ordinarily occur absent negligence on the part of someone who had the instrumentality in its exclusive control. There are numerous explanations for Ms. Tennyson's injuries and death other than alleged negligence of the Defendant. Plaintiffs need not show that defendant's negligence is the only cause for the alleged injury but "[t]his element is satisfied if, under the facts of the case, common experience indicates that *the injury was more likely than not the result of the defendant's negligence.*" *Harder*, 948 P.2d at 309 (emphasis in original). Because the cause for Ms. Tennyson's injuries could have been the result of her falling (as assumed by Plaintiff Rogers), an assault by a third party not under the control of Defendant (as also suggested Plaintiffs' counsel to the Court and Defendant during the December 9, 2011 hearing), self inflicted by shaking her siderails, simply a bruising/pooling reaction caused in some patients as a reaction to certain medications, or presumably even an event or occurrence while she was outside the nursing home, this foundational requisite is not met. In sum, there is no evidence beyond mere speculation, guesswork or "possibility" that Defendant was negligent and, thus, Plaintiffs have failed to meet the requirements of the application of Res Ipsa Loquitur.

PROPOSITION IV

PLAINTIFFS' ALLEGATIONS SOUND IN TORT, NOT BREACH OF CONTRACT, AND AS SUCH, *PLAINTIFFS' CLAIM OF BREACH FAILS AS A MATTER OF LAW*

The Plaintiffs, in their Original and First Amended Petition, have stated a claim against Defendants for breach of contract. However, there is well-established law in Oklahoma, as well as law in other jurisdictions, regarding actions for alleged breach of contract in medical malpractice cases. This Court has already, in effect, recognized the validity of the argument raised in this Proposition with its ruling that the two-year statute of limitations for tort actions is applicable herein. This is a medical negligence action and sounds in tort, not contract law. Therefore, Defendant is entitled to summary judgment on the Plaintiffs' claim for breach of contract. The Oklahoma Pleading Code, 12 O.S. § 2008(A)(2), requires a plaintiff to demand a specific amount of money "in actions sounding in contract." Instead, Plaintiff has requested judgment "in excess of $10,000.00" which is the requisite statement for relief in tort claims.

Under Oklahoma law, this matter is clearly a tort action:

> In Oklahoma, *an action for malpractice, whether medical or legal, though based on a contract of employment, is an action in tort*..... and is governed by the two year statute of limitations at 12 O.S.A. 1981 §95 Third.

Funnell v. Jones, 1985 OK 73, ¶ 6, 737 P.2d 105,107[emphasis added]. *See also Winn v. Estate of Holmes*, 1991 OK CIV APP 78, ¶ 16, 815 P.2d 1231, 1233; *Seanor v. Brown*, 1932 OK 61, 7 P.2d 627.

In addition, the Oklahoma Supreme Court has held that, in a nursing home negligence action, when a plaintiff alleges violations of the Nursing Home Care Act, 63 O.S. § 1-1918, the terms of the Act create a "statutory tort." *Morgan v. Galilean Health Enterprises, Inc.*, 1998 OK 130, ¶ 8, 977 P.2d 357, 361. In *Morgan*, the Court held that breach of the Oklahoma Nursing Home Care Act gives rise to an action *ex delicto.* [1] Accordingly, nothing in the Nursing Home Care Act or interpreted case law supports Plaintiffs breach of contract claim.

Oklahoma first addressed this issue in *Champion v. Keith*, 87 P. 854 (Okla. 1906) where the court stated:

> A physician or surgeon is never considered as warranting a cure, unless under special contract for that purpose. His contract as implied by law is that he possesses that reasonable degree of learning, skill and experience which is ordinarily possessed by others of his profession; that he will use reasonable and ordinary care and diligence in the treatment of the case which he undertakes, and that he will use his best judgment in all cases of doubt as to the proper course of treatment...

Id. at 847. *See also Kerodle v. **Elder***, 102 P. 138 (Okla. 1909); *Seanor v. Browne*, *supra* at 630; *Karriman v. Orthopedic Clinic*, 516 P.2d 534, 539-540 (Okla. 1974). More specifically, if a healthcare provider merely contracts to provide services which comply with this implied-in-law standard of "ordinary care," the action sounds in tort. *Seanor supra* at 630; *Karriman*, *supra* at 539-540.

Other jurisdictions have disallowed breach of contract claims in quality of care cases involving nursing homes. *See Northport Health Service, Inc.*, 682 So.2d 52, 55 (Ala. 1996) (claims of breach of contract against nursing home for the **abuse**, neglect, mistreatment, or treatment of a patient constitute medical malpractice claim falling under applicable malpractice statutes.); *Crockett* v. Medicalodges, *Inc.*, 799 P.2d 1022, 1028 (Kan. 1990) (Suit against nursing home alleging wrongful discharge of patient from nursing home involved breach of duties and obligations imposed on nursing homes by law, and breach of those duties is malpractice with damages in tort, despite an express contract between the parties); *Baldyga v. Independence Health Plan*, 413 N.W.2d 30 (Mich. Ct. App. 1987) (Where plaintiff contracts for provision of professional services and then alleges defendant failed to adequately perform services, claim is for malpractice not breach of contract); *Ogle v. De Sano*, 693 P.2d

1074 (Idaho Ct. App. 1984) (plaintiffs claim against her doctor to remove an IUD in return for payment was a tort claim); *Stiffelman v. Abrams*, 655 S.W.2d 522, 536 (Mo. 1983) (Dismissal of breach of contract claim involving the death of a nursing home resident.)

Other courts have also refused to permit what essentially amounts to a second bite at the apple. Often the cases involve failure to provide health care at the appropriate level styled as a breach of contract claim in an effort to avoid a statute of limitations problem. For example, in *Brickey v. Concerned Care of the Midwest, Inc.*, 988 S.W.2d 592, 595 (Mo. Ct. App. 1999), plaintiff's purported breach of contract claim alleged that the defendant nursing home breached its admissions contract by failing to provide proper care for the resident. The *Brickey* court reviewed this issue and held the allegations to be premised upon a breach of the ordinary care applicable in rendering health care, thus sounding in tort, not contract. *Id.*

The *Brickey* court determined that allegations involving a nursing home's breach of its admission contract by failing to properly care for a resident was actually a negligence claim, rather than contract, and because it thus fell under state medical malpractice statute was time barred. *Brickey, Id* at 592. Plaintiffs claimed entitlement to a refund for the sums paid for the resident's care on the theory of breach of the admission contract. In *Brickey*, plaintiffs claimed that the admission contract, which agreed to exercise a high standard of care toward residents, also provided for non-medical services, thus establishing a contract claim. *Brickey, Id* at 595. The court disagreed and held plaintiffs' claims sounded in tort and not contract. Accordingly, the contract claim was dismissed and plaintiffs' negligence claims were disposed of as being barred by the statute of limitations. Id.

Based on the above cited authorities, both from Oklahoma and from other jurisdictions, it is abundantly clear that the Plaintiffs' cause of action for breach of contract against Defendant Promise Redeemer, L.L.C. is improper and unfounded. The allegations against the nursing home stem from alleged improper care and treatment provided to Josephine Tennyson while a resident of Edwards Redeemer Nursing Center. Any cause of action relating to this allegation or any other aspect of the case arises in tort, and not in contract, as shown above.

Plaintiffs are attempting to create separate and distinct causes of action against the nursing home by repeated attempts to label this lawsuit as something other than a medical negligence action. The contract which exists in this matter is a contract which relates to payment terms and conditions for new residents. The contract does not warrant a cure or promise a result. This is a traditional medical negligence case, sounding in tort. Any claims other than medical negligence against the nursing home are derivative of that claim and require the testimony of qualified medial experts. While it is true that expert testimony may not be required in a breach of contract action, expert testimony is required in a medical negligence action to establish both the alleged breach and that such breach caused the Plaintiffs' injury. Defendant refers the Court to the authorities cited in this motion for summary judgment addressing the breach of contract issue in the context of medical malpractice cases. Again, simply because Plaintiffs are suing a nursing home and not a doctor or hospital does not take this case out of the parameters of Oklahoma law as it pertains to medical negligence.

Given the above authority, it is clear that any action brought against a nursing home with respect to services it agrees to provide to residents, in an admissions contract or otherwise, should be considered a medical negligence action. Further, Oklahoma, apparently in anticipation of just such an attempt to call a claim something (breach of contract) other than what it really is (negligence claim), has addressed the issue peripherally by statute. Plaintiff cannot utilize this type of argument to extend the recognized two year statute of limitations governing all claims against “any physician, health care provider or hospital licensed by the laws of this state.” Section 18 of Title 76 prescribes that such causes of action, “whether based on tort, breach of contract or otherwise, arising out of patient care, shall be brought within two (2) years of the date the plaintiff knew or should have known through the exercise of reasonable diligence of the existence of the death, injury or condition complained of...” 76 O.S. § 18.

Plaintiffs' cause of action in this matter arises from an allegation of sub-standard care and treatment rendered to Josephine Tennyson. Any cause of action regarding this care and treatment is an action which is founded in the tort. Therefore, Promise Redeemer, L.L.C., requests that judgment be entered as a matter of law as to Plaintiffs' claim for breach of contract.

PROPOSITION V

OKLAHOMA LAW DOES NOT RECOGNIZE A SEPARATE AND INDEPENDENT TORT OF *NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS*

Although not pled in their Original or First Amended Petition, Plaintiffs allege in their Pre-Trial Order that they are seeking damages for "Emotional Distress, Past and Future". (See Plaintiffs' Pre-Trial Order Submissions, Exhibit I, T 3B). Under Oklahoma law, negligent infliction of emotional distress is not recognized as a separate cause of action or independent tort. *Lockhart v. Loosen*, 943 P.2d 1074, 1081 (1997).

The *Lockhart* Court specifically addressed a situation wherein Plaintiff sought to proceed on a "negligent-infliction-of-emotional-distress theory of liability." *Id.* During the appeal, Lockhart asserted that she was allowed to proceed against the defendant, Loosen, on a negligent infliction of emotional distress theory of liability as a separate theory of liability from negligence. On review, the Oklahoma Supreme Court pronounced, "This is not so." *Id.* at 1081. The *Lockhart* Court held: "Under Oklahoma's jurisprudence the negligent causing of emotional distress is not an independent tort, but is in effect the tort of negligence." *Id.* at 1081.

Accordingly, Plaintiffs are barred from proceeding in the instant case asserting the additional cause of action, Emotional Distress, as a separate and independent tort from a general negligence theory of liability.

VI. CONCLUSION

Based upon the foregoing arguments and authorities, Defendant Promise Redeemer, L.L.C. is entitled to summary judgment on Plaintiffs' negligence claim, Plaintiffs' claim for punitive damages, Plaintiffs' *res ipsa loquitur* claim, Plaintiffs' breach of contract claim, and Plaintiffs' emotional distress claim.

WHEREFORE, defendant Promise Redeemer, L.L.C., request an Order entering summary judgment in its favor.

Respectfully Submitted,

<<signature>>

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Footnotes

1 Even if the court were to find that the Act implied a contract, it would nevertheless be true that this action is based on the asserted breach of a duty of care. When a tort is committed in relation to a contractual relationship, the remedy is an action *ex delicto* and not an action *ex contractu. Jackson v. Central Torpedo Company,* 1926 OK 434, 246 P. 426, *syllabus by the court.*

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