2014 WL 2799588 (Nev.Dist.Ct.) (Trial Motion, Memorandum and Affidavit)
District Court of Nevada.
Clark County

Mildred KING-BURGIN, an individual, Plaintiff,
v.
HEALTHSOUTH REHABILITATION HOSPITAL OF DESERT CANYON, LLC; Doc Nurses I through XX; Doc Cnas I through XX; Doe Care Takers I through XX; Does I through XXX; and Roe Corporations I through XXX, inclusive, Defendants.

No. 14A697825.
May 27, 2014.

Dept No.: VI
Date of Hearing: June 3, 2014
Time of Hearing: 8:30 a.m.

**Reply in Support of Motion to Dismiss**

RPLY, Lynn M. Hansen, Esq., Nevada Bar No.: 244, Burak S. Ahmed, Esq., Nevada Bar No.: 12547, Jimmerson Hansen, P.C., 415 South 6th Street, Suite 100, Las Vegas, Nevada 89101, Tel No.: (702) 388-7171, Fax No.: (702) 380-6406, lmh @jimmersonhansen.com, bsa@jimmersonhansen.com, for defendant Healthsouth Rehabilitation Hospital of Desert Canyon, LLC.

COMES NOW Defendant HEALTHSOUTH REHABILITATION HOSPITAL OF DESERT CANYON, LLC (hereinafter "HealthSouth"), by and through its counsels of record LYNN M. HANSEN, ESQ., and BURAK S. AHMED, ESQ., of the law firm of JIMMERSON HANSEN, P.C., and files its Reply in Support of Motion to Dismiss Plaintiff MILDRED KING-BURGIN's (hereinafter "Plaintiff"), Complaint pursuant to NRCP 12(b)(5) as to Plaintiffs causes of action for: second cause of action for res ipsa loquitor; third cause of action for infliction of emotional distress; fourth cause of action for breach of contract; seventh cause of action for **elder abuse** and neglect pursuant to §41.1395; eighth cause of action for negligence per-se; and ninth cause of action for punitive damages.

This Reply in made and based on the pleadings and papers on file, the memorandum of points and authorities and exhibits attached hereto, and any and all argument that may be adduced at the time of the hearing of the Motion,

DATED this *27* day of May, 2014.

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

Plaintiff's Complaint alleges she was a patient that fell at a hospital, which is a simple medical malpractice allegation. The Complaint omitted the allegation raised in her Opposition- that a HealthSouth nurse assisted her to the restroom during the middle of the night before the alleged fall. (See Opps. at 2:3-6). But even if that allegation is accepted as true, Plaintiff still lacks sufficient prima facie allegations to support her intentional tort and contract based causes of action.

First, Nevada's **elder** **abuse** statute is ambiguous, its enhanced penalties conflict with Nevada's medical malpractice statute, and its legislative history shows that the legislature did nointend to transform every medical malpractice action involving a person over the age of 60 into an **elder** **abuse** claim, thereby triggering double damages. Here, Plaintiff's **elder** **abuse** claim requires dismissal as there are no set of facts that would show that HealthSouth egregiously withheld care with a mens rea more than gross negligence, or that HealthSouth is a long-term care provider.

Second, courts determine as a matter of law whether a defendants alleged conduct may reasonably be regarded as so extreme, outrageous, or malicious as to permit recovery for intentional infliction of emotional distress and punitive damages. HealthSouth respectfully submits that Plaintiffs factual allegations lack sufficient plausibility to survive a NRCP 12(b)(5) dismissal. Thus, Plaintiff's causes of action for “[intentional] infliction of emotional distress” and “punitive damages” should be dismissed for failure to state a claim upon which relief can be granted.

Third, while Nevada is a notice pleading state, Plaintiff's res ipsa loquitur cause of action requires dismissal as she failed to allege the existence of an instrumentality that was under the exclusive control of HealthSouth, which is an essential element to the res ipsa jury instruction. Moreover, res ipsa loquitur is not a cause of action, but is rather a jury instruction for an inference of negligence. Plaintiff's cause of action for res ipsa loquitur should be dismissed pursuant to NRCP 12(b)(5).

Finally, Plaintiff's cause of action for breach of contract requires dismissal because Nevada law does in fact require a medical malpractice plaintiff to plead a contract for a particular result. Accordingly, HealthSouth respectfully requests the Court to dismiss Plaintiff's causes of action for res ipsa loquitur, infliction of emotional distress, breach of contract, **elder** **abuse**, negligence per-se, and punitive damages as there are no set of facts, which, if true, would entitle her to such relief.

**II. LEGAL STANDARD**

The purpose of a motion to dismiss is to test the legal sufficiency of the statement of the claim for relief. *See Wright & Miller, Federal Practice and Procedure:* Civil 3d § 1356 (2004). A motion to dismiss for failure to state a claim should be granted when it appears beyond a doubt that the plaintiff could prove no set of facts, which, if true, would entitle her to relief. *See Buzz Stew LLC v. City of North Las Vegas,* 124 Nev. 224, 227, 181 P.3d 670, 672 (2008). Dismissal is also proper where the allegations are insufficient to establish the elements of a claim for relief. *See Sanchez v. Wal-Mart Stores, Inc.,* 125 Nev. 818,

823, 221 P.3d 1276, 1280 (2009) (“this court accepts the plaintiffs' factual allegations as true, but the allegations must be legally sufficient to constitute the elements of the claim asserted”).

## III. ARGUMENT

### A. Plaintiff's Elder Abuse Claim and Negligence Per-Se Claim Should be Dismissed as the Elder Abuse Statute Is Ambiguous and the Legislative History Shows that it Does not Apply to Simple Medical Malpractice Actions

Plaintiff argues that the **elder** **abuse** statute is plain and unambiguous, and that it clearly and unmistakably applies to Plaintiffs alleged fall at HealthSouth. (See Pl.'s Opps. at 5:11- 6:11). Otherwise, Plaintiff does not dispute that the legislative history and case-law interpreting the **elder** **abuse** statute requires dismissal of Plaintiff's **elder** **abuse** cause of action. The **elder** **abuse** statute—NRS 41.1395—provides:

1. Except as otherwise provided in subsection 3, if an older person or a vulnerable person suffers a personal injury or death that is caused by **abuse** or neglect or suffers a loss of money or property caused by exploitation, the person who caused the injury, death or loss is liable to the older person or vulnerable person for two times the actual damages incurred by the older person or vulnerable person.

[...] 4. For the purposes of this section:

(a) “**Abuse**” means willful and unjustified:

(1) Infliction of pain, injury or mental anguish; or

(2) Deprivation of food, shelter, clothing or services which are necessary to maintain the physical or mental health of an older person or a vulnerable person.

(b) “Exploitation” means any act taken by a person who has the trust and confidence of an older person or a vulnerable person or any use of the power of attorney or guardianship of an older person or a vulnerable person to:

(1) Obtain control, through deception, intimidation or undue influence, over the money, assets or property of the older person or vulnerable person with the intention of permanently depriving the older person or vulnerable person of the ownership, use, benefit or possession of that person's money, assets or property; or

(2) Convert money, assets or property of the older person with the intention of permanently depriving the older person or vulnerable person of the ownership, use, benefit or possession of that person's money, assets or property. As used in this paragraph, “undue influence” does not include the normal influence that one member of a family has over another.

(c) “Neglect” means the failure of a person who has assumed legal responsibility or a contractual obligation for caring for an older person or a vulnerable person, or who has voluntarily assumed responsibility for such a person's care, to provide food, shelter, clothing or services within the scope of the person's responsibility or obligation, which are necessary to maintain the physical or mental health of the older person or vulnerable person. For the purposes of this paragraph, a person voluntarily assumes responsibility to provide care for an older or vulnerable person only to the extent that the person has expressly acknowledged the person's responsibility to provide such care.[...]

(e) “Vulnerable person” means a person who:

(1) Has a physical or mental impairment that substantially limits one or more of the major life activities of the person; and

(2) Has a medical or psychological record of the impairment or is otherwise regarded as having the impairment.

The term includes, without limitation, a person who has an intellectual disability, a person who has a severe learning disability, a person who suffers from a severe mental or emotional illness or a person who suffers from a terminal or catastrophic illness or injury.

The above statute is hardly the model of clarity: it is loaded with compound sentences, subordinate and independent clauses, conjunctions, and conclusiory phrases. It takes the reader multiple attempts to determine where one clause ends and the next begins, let alone come to a clear understanding of the meaning of its phrases. The only thing clear about the **elder abuse** statute is that it is unclear.

The most obvious ambiguity as it relates to this Action is in the term "failure" in the statute's definition of "neglect." NRS 41.1395(4)(c). "Failure" is capable of more than one reasonable interpretation as it does not indicate the applicable mental state necessary to have "failed" and thereby "neglected" an older or vulnerable person i.e. intent, malice, reckless, negligence, or strict liability. "Failure" is also capable than more than one reasonable interpretation as it does not indicate whether a "failure" refers to the substandard performance of services, or the outright withholding of services. For these reasons-and because the enhanced penalties under the **elder abuse** statute conflict with the limiting penalties under the medical malpractice statute—the courts in Brown v. Mg. Grant Gen. Hosp., 2013 WL 4523488 (D.Nev. 2013), Carter v. Prime Healthcare Paradise Valley, 198 Cal.App. 4th (Cal. App. 4th Dist. 2001), and Huppert v. HealthSouth Rehab. Hosp. of Desert Canyon, 2013 WL 6647086 (Nev.Dist.Ct. Oct. 8, 2013), turned to legislative history to interpret the **elder abuse** statute. Those courts found that the **elder abuse** statute requires a higher level of mens rea than gross negligence and that it only applies to the outright withholding of care—as opposed to the substandard performance of care. Since the term "failure" is ambiguous, this Court should resort to legislative history, follow the persuasive precedent of Brown, Carter, and Huppert, and find that the term "failure" requires a higher level of mens rea than gross negligence and only applies to the outright withholding of care.

Next, the term "persons" as used in the **elder abuse** statute creates an ambiguity as it could reasonably refer to persons providing short-term care or to persons providing long-term care. **Elder abuse** based on neglect applies against a person that egregiously withholds care with a mens rea more than gross negligence. See NRS 41.1395. A medical malpractice claim is the failure of a physician, hospital, or employee of a hospital to use the reasonable care, skill, or knowledge ordinarily used under similar circumstances in rendering services. See NRS 41A.009. When two statutes conflict with each other when applied to a specific factual situation, an ambiguity is created and courts turn to legislative intent in an attempt to reconcile the statutes. *See Szydel v. Markman*, 121 Nev. 453, 117 P.3d 200, 202-03 (Nev. 2005).

The clear conflict between Nevada's medical malpractice statute and **elder abuse** statute led the U.S. District Court in *Brown v. Mt. Grant Gen. Hosp.*, to resort to legislative history to determine that the **elder abuse** statute only applies to persons providing long-term care, and not persons or hospitals providing short-term care. 2013 WL 4523488 at *6 (D. Nev. 2013). Since the conflict between the **elder abuse** statute and medical malpractice statute creates an ambiguity, this Court should also resort to legislative history and follow the persuasive precedent of Brown, Carter, and Huppert. Accordingly, Plaintiff's cause of action for **elder abuse** and negligence per se should be dismissed for failure to state a claim upon which relief can be granted.

Finally, Plaintiff claims that she artfully pleads each and every element of an **elder abuse** claim and should therefore survive the motion to dismiss. [1] (See Pl.'s Opps at 4:12-5:8). The Nevada Supreme Court, however, disapproves of artful pleading for the purposes of evading the medical malpractice limitations as it looks to "the nature of the grievance to determine the character of the action, not the form of the pleadings." Egan v. Chambers, 299 P.3d 364, 366 n.2 (Nev. 2013) (citing State Farm Mut. Auto. Ins. Co. v. Wharton, 88 Nev. 183, 495 P.2d 359, 361 (1972)). In Fierle, the Nevada Supreme Court concluded that medical malpractice limitations extend to "both intentional and negligence-based" actions. 219 P.2d at 913 n.8. That means that plaintiffs cannot escape the medical malpractice limitations by pleading the intentional torts of battery or intentional infliction of emotional distress instead of negligence. Since the Nevada Supreme Court casts a jaundice eye on the artful pleading of

intentional torts in medical malpractice cases, the same principle applies to the artful pleading of **elder abuse** claims in medical malpractice cases.

In short, there are no set of facts that Plaintiff could prove that would entitle her to relief under the **elder abuse** statute, and therefore also for negligence per-se. The Brown court dismissed an **elder abuse** claim at the pleading stage when the plaintiff alleged a hospital intentionally concealed their substandard treatment of bedsores due to racial prejudice. 2013 WL 4523488 at *1. The Carter court affirmed dismissal of an **elder abuse** claim at the pleading stage when the plaintiff alleged he suffered injury, infection, and ulcers due to being constantly air dried after showers in front of an open window with a fan; being left alone, wet and helpless; and being denied hydration, nutrition and medication. 198 Cal.App. 4th at 401-02. The factual allegations in Brown and Carter were far more offensive than Plaintiff's allegations in this Action, which merely alleges a fall at a hospital. Since there are no set of facts that would entitle Plaintiff to relief under the **elder abuse** statute, her seventh cause of action for **elder abuse** and neglect pursuant to NRS §41.1395, and eighth cause of action for negligence per-se, should be dismissed for failure to state a claim upon which relief can be granted.

**B. Dismissal of Plaintiff's Ninth Cause of Action for Punitive Damages is Proper as Plaintiff's Factual Allegations are Legally Insufficient as a Matter of Law**

Plaintiff argues her cause of action for punitive damages should survive a motion to dismiss because she alleged “Defendants acted with ‘malice’ through a ‘conscious disregard’ pursuant to NRS 42.001(3) and NRS 42.005.” (*See* Opps. at 7:7-10). Not sufficient. District courts can determine whether a defendant's alleged conduct merits punitive damages as a matter of law. *See Bongiovi v. Sullivan*, 122 Nev. 556, 581, 138 P.3d 433, 451 (2006).

In *Bonavito v. Nevada Property 1, LLC*, a patron sued a property owner for negligence alleging the owner's failure to exercise due care caused him to slip and fall. 2014 WL 1347051 (D.Nev. 2014). The patron, like Plaintiff here, alleged a claim for punitive damages arguing the property owner's acts and omissions constituted “malice” in a conscious disregard of the safety of others. *Id.* at *1. The Court in *Bonavito* dismissed the patron's claim for punitive damages, holding those bare allegations are not sufficient to survive the plausibility pleading standard for punitive damages:
Punitive damages are a remedy, not a claim, but a plaintiff must still plead the facts to support an award of punitive damages to maintain a prayer for them in his complaint and to pursue them at trial. In Nevada, punitive damages are available only for torts involving oppression, fraud, or malice. And Nevada law defines malice as conduct “intended to injure a person or despicable conduct [that] is engaged in with a conscious disregard of the rights or safety of others.” Although malice need only be alleged generally and not with the level of specificity required for fraud or mistake, facts supporting the inference of malice must still be pled to survive a Rule 12(b)(6) dismissal.

*Id*

Similarly in *McCoy v. Healthsouth Hosp. at Tenaya*, a patient sued a hospital for medical malpractice arising out of the care and treatment of decubitus ulcers. 2012 WL 1452309 (Nev.Dist.Ct. Mar. 26, 2012). The patient, like Plaintiff here, alleged the hospital ignored the presence of the ulcers, failed to take appropriate steps to treat the ulcers, and further failed to properly document the worsening of the ulcers, which resulted in the patient's death. *Id.* The court in McCoy dismissed the patient's claim for punitive damages pursuant to NRCP 12(b)(5), finding the patient made no specific claims as to any intentional acts or acts that would adequately support a claim of punitive damages. *Id.*

The same deficiencies that the courts found in McCoy and Bonavito are found in Plaintiff's Complaint. Although Plaintiffs Complaint alleges that HealthSouth “engaged in despicable conduct with a conscious disregard of the rights or safety of others...,” that bald assertion is not supported by any facts alleged in the Complaint. The Complaint (and the nursing affidavit attached thereto), only alleged that Plaintiff should have been placed on strict fall precautions including the use of non-skid footwear, bedside mats, safety alarms, pressure sensor alarms, and a closer sense of monitoring and that the result of those acts

and/or omissions caused Plaintiff to fall. (See Compl. at ¶¶ 17-18). Plaintiffs Opposition raised for the first time the allegation that a nurse of HealthSouth assisted Plaintiff to the restroom during the middle of the night, but alleged the nurse did not return to assist Plaintiff to her bed. (See Opps. at 2:3-6). Those allegations, even if accepted as true, are not facts that constitute malice and they are insufficient to support a claim for punitive damages. Accordingly, Plaintiff's ninth cause of action for punitive damages should be dismissed as a matter of law.

**C. Dismissal of Plaintiff's Third Cause of Action for "Infliction of Emotional Distress" Is Proper as Plaintiff's Factual Allegations are Insufficient as a Matter of Law**

Plaintiff claims her cause of action "Infliction of Emotional Distress" is actually a properly plead cause of action for Intentional Infliction of Emotional Distress (hereinafter "IIED"). (*See* Pl.'s Opps. at 8:2-9). Not so. IIED requires a plaintiff to prove (1) extreme and outrageous conduct with either the intention or, or reckless disregard for causing emotional distress to plaintiff; and (2) plaintiff suffered severe or extreme emotional distress as the actual or proximate result of defendant's conduct. *See Dillard Dep't Stores, Inc. v. Beckwith,* 115 Nev. 372, 989 P.2d 882 (1999). It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery. See RESTATEMENT (SECOND) OF TORTS § 46, cmt. (h). IIED requires extreme and outrageous conduct that is outside all possible bounds of decency and is regarded as utterly intolerable in a civilized community. *See Maduike v. Agency Rent-A-Car,* 114 Nev. 1, 953 P.2d 24 (1998). Further, the Nevada Supreme Court holds that persons must necessarily be expected and required to be hardened to occasional acts that are definitely inconsiderate and unkind. *Id.*

In Wilkerson v. Butler, a patient sued a doctor for medical malpractice and IIED, among others claims, alleging the doctor misdiagnosed skin cancer, failed to report the findings of a biopsy, and falsified medical records. 229 F.R.D. 166, 168 (E.D.Cal. 2005). The doctor, like HealthSouth here, moved to dismiss the patients claim for IIED arguing the patient's claim failed to state anything beyond medical malpractice and the misdiagnosis was not sufficiently outrageous to state a claim for IIED. Id. at 171. The U.S. District Court in Wilkerson dismissed the patients claim for IIED finding the allegations insufficient as a matter of law:

> The intentional infliction of emotional distress (fifth) cause of action merely alleges that Dr. Butler knew or should have known that his misdiagnosis would cause Ms. Wilkerson distress. The cause of action lacks allegations of essential elements of an intentional infliction of emotional distress cause of action. The cause of action adds nothing new and merely asserts claims incorporated into the medical malpractice (first) cause of action to warrant striking it.

*Id.* at 172.

Similarly in *Alcala v. Huang,* the parents of an infant child sued a doctor for IIED, among other claims, alleging the doctor failed to properly monitor and interpret the infant's fetal heart rate, resulting in the infant's death. 2010 WL 8032678 (Nev.Dist.Ct. Feb. 1, 2010). The district court in *Alcala* dismissed the parents' IIED claim pursuant to NRCP 12(b)(5) because, although tragic, the complaint did not allege that the doctor acted intentionally with the purpose of causing emotional distress and that the allegations did not reach the level of extreme and outrageous conduct:

[T]he failure to properly monitor and interpret the fetal heart rate, under normal circumstances, cannot be considered "outside all possible bounds of decency." Not only does failing to monitor and properly interpret the fetal heart rate not reach the level of extreme and outrageous conduct, Alcala and Campos's Complaint does not allege that the Defendants acted intentionally with the purpose of causing Alcala and Campos's emotional distress. Therefore, the motion to dismiss is granted with respect to this claim.

*Id.* at *2.

Here, as in *Wilkerson* and *Alcala*, Plaintiff's "claim" for IIED merely regurgitates her medical malpractice allegations that HealthSouth "ignored Plaintiff, failed to implement fall prevention mechanisms, failed to perform a proper evaluation of the Plaintiff when first admitted, failed to check up on her regularly, and failed to monitor her," resulting in her fall. (Compl. ¶18). Even accepting those allegations as true, they add nothing new, they merely assert claims incorporated into the medical malpractice cause of action, and, as a matter of law, they are not sufficiently outrageous to meet the essential elements of an IIED cause of action. Accordingly, Plaintiff's third cause of action for "infliction of emotional distress" should be dismissed for failure to state a claim upon which relief can be granted.

**D. Dismissal of Plaintiff's Second Cause of Action for Res Ipsa Loquitur Fails to Allege Facts to Support an Inference of Negligence**

Plaintiff argues that there is no need to dismiss her "claim" for res ipsa loquitur as "Defendant alleges that these did not need to be plead because they are alternative theories to pursue a simple negligence claim." (*See* Pl.'s Opps. at 8:19-28). While Plaintiffs Opposition asserted new factual allegations regarding a HealthSouth nurse's assistance of Plaintiff to the restroom at night—these facts were omitted from the Complaint—Plaintiff still failed to allege the existence of an ***instrumentality*** that was under the exclusive control of HealthSouth, which is an essential element to the res ipsa jury instruction. *See Woosley v. State Farm Ins. Co.*, 117 Nev. 182, 18 P.3d 317 (2001). Since Plaintiff's Complaint fails to allege any set of facts concerning the instrumentality, manner, conduct, methods, and circumstances of Plaintiff's alleged fall, her second cause of action for res ipsa loquitur should still be dismissed as an improperly plead claim for relief and as legally insufficient to support an inference of negligence.

**E. Dismissal of Plaintiff's Claim for Breach of Contract is Proper as Nevada Does Not Recognize a General, Implied Contract Between Health Care Providers and Patients for Good Treatment**

Plaintiff argues *Szekeres v. Robinson*, 102 Nev. 93, 715 P.2d 1076 (1986), provides Nevada precedent that the mere allegation that "services were charged" and a "breach was alleged," in and of itself, is sufficient to survive a motion to dismiss a breach of contract claim. (See Pl's Opps. at 9:19-23). Not true. The Szekeres decision stands for the reverse proposition, that a patient can only sue a doctor for breach of contract when a contract promised a particular result. 102 Nev. at 96-97, at 1078. In Szekeres, a patient contracted with a doctor ***for the particular result*** of preventing a pregnancy from occurring, which failed and resulted in the birth of a child. *Id.* The Nevada Supreme Court affirmed dismissal of the patient's negligence claim because the "birth of a normal child is not a civil wrong for which the court will provide a remedy" in tort, but remanded the patient's breach of contract claim because the doctor contracted for the specific result of preventing a pregnancy from occurring:

> As stated above, if a physician or someone else is found to have contracted to prevent a pregnancy from occurring, certainly it was within the contemplation of the contracting parties that failure to carry out the process in the manner promised would result in an award, at least, of the costs of medical, surgical and hospital care associated with the failed surgery.

*Id.* at 98, at 1079.

Nevada's district courts are routinely dismissing breach of contract claims in garden variety medical malpractice actions where the plaintiff does not allege a particular result or a specific guarantee. In *Alcala v. Huang*, the parents of an infant child sued a hospital alleging the nursing staff and attending physicians failed to properly monitor and interpret the fetal heart rate tracing of their infant child. 2010 WL 8032678 (Nev.Dist.Ct. Feb. 1, 2010). The parents, like Plaintiff here, alleged a breach of an implied contract to provide "adequate treatment and care for the safety and wellbeing of [the child] in consideration for submitting billing statements..." Id. at *2-3. The Nevada district court dismissed the parents' breach of contract claim pursuant to NRCP 12(b)(5), for failing to allege the existence of any specific guarantees or a particular result:

In a medical malpractice case the plaintiff can bring a breach of contract claim only if a contract existed for a specific result. *See Szekeres v. Robinson*, 102 Nev. 93, 715 P.2d 1076 (1986); *see also McKinny v. Nash*, 174 Cal. Rptr. 642 (Ct. App. 1981)

(holding "to recover for breach of warranty or contract in a medical malpractice case, there must be proof of an express contract by which the physician clearly promises a particular result and the patient consent to treatment in reliance on that promise.") Id. at 649.

Here, the Complaint does not allege that the parties entered into an express contract for a specific result. The Complaint does generally state that the "Defendants agreed to provided adequate treatment and care for the safety and wellbeing of [Alcala and Campos]" in consideration for submitting billing statements to Alcala and Campos's insurance company to make payments for services renders. However, the Complaint does not aver there were ever any specific guarantees made to Alcala and Campos promising them a particular result. Therefore, Alcala and Campos cannot maintain a cause of action for breach of contract.

Id.

Similarly in *Lowe v. Ahn*, a patient sued a doctor alleging he suffered from paralysis due to a substandard performance of a fusion surgery. 2011 WL 7770044 (Nev.Dist.Ct. Aug. 2, 2011). The patient, like Plaintiff here, alleged the patient "'entered into contract(s) with [d]efendant(s) for appropriate medical care,' and that '[d]efendant(s) breached the contract(s) by failing to perform their obligations under the contract..."' *Id.* at *3. The Nevada district court *Lowe* dismissed the patient's breach of contract claim pursuant to NRCP 12(b)(5) as legally insufficient:

In an action for medical malpractice, a claim for breach of contract must allege that the physician expressly promised or assured a specific medical outcome separate from a mere statement that the result would be good. *See McKinney v. Nash*, 120 Cal. App. 3d 428, 442 (1981) (citing *Depenbrok v. Kaiser Found. Health Plan, Inc.*, 79 Cal. App. 3d 167,171 (1978)).

[...]

The Lowes have not shown that the Defendants expressly promised Mr. Lowe a specific outcome other than an improvement in back pain. Accordingly, the Lowes' claim for breach of contract is legally insufficient. Assuming the Lowes' allegations in the Complaint to be true, the Lowes are not entitled to relief from the Defendants on their claim for breach of contract.

*Id.*

The same deficiencies the Nevada district courts found in Alcala and Lowe are found the Plaintiff's Complaint in this Action. Plaintiff's general allegations do not equate to a clear promise of a particular result. Since Plaintiff cannot prove any set of facts, which, if true, would entitle her to relief for breach of contract, her fourth cause of action should be dismissed pursuant to NRCP 12(b)(5) for failure to state a claim upon which relief can be granted.

**IV. CONCLUSION**

Based on the above and foregoing, HealthSouth respectfully request the Court to dismiss Plaintiff's Complaint for: (1) second cause of action for res ipsa loquitor; (2) third cause of action for infliction of emotional distress; (3) fourth cause of action for breach of contract; (4) seventh cause of action for **elder abuse** and neglect pursuant to §41.1395; (5) eighth cause of action for negligence per-se; and (6) ninth cause of action for punitive damages.

DATED this *27* day of May, 2014.

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Footnotes

1 It should be separately noted that Plaintiff's Complaint failed to allege any set of facts that would show she was a vulnerable person i.e. “a person who has a physical or mental impairment that substantially limits one or more of [her] major life activities” and that she “has a medical or psychological record of the impairment or [was] otherwise regarded as having the impairment.” See NRS 41.1395(e)(1)&(2) (emphasis added). Instead, Plaintiff merely alleged the fact that she was over the age of 60 thereby qualifying as an **elder** person. (See Compl. at ¶42).