NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

ROSE BOWLES, as Personal Representative of the Estate of James R. Bowles, Deceased,

Plaintiff/Appellant,

vs.

OKLAHOMA HEART HOSPITAL SOUTH, LLC, an Oklahoma Limited Liability Company; OKLAHOMA HEART HOSPITAL, LLC, an Oklahoma Limited Liability Company; LINDSAY HARRIS, R.N.; and CHRIS ZIELKE, R.N.,

Defendants/Appellees.

Case No. 119,738

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE DON ANDREWS, TRIAL JUDGE

AFFIRMED

Kirk Olson
THE BISON LAW FIRM
Yukon, Oklahoma

and

Melissa S. Hedrick
HEDRICK LAW FIRM
Oklahoma City, Oklahoma

For Plaintiff/Appellant

John Wiggins
Erin A. Dewberry
Andrew T. Gin
WIGGINS, SEWELL & OGLETREE
Oklahoma City, Oklahoma For Defendants/Appellees

OPINION BY DEBORAH B. BARNES, JUDGE:

In this medical malpractice action, Plaintiff Rose Bowles, as Personal Representative of the Estate of James R. Bowles, Deceased, appeals from the trial court's Order granting summary judgment to Defendants Oklahoma Heart Hospital South, LLC, Oklahoma Heart Hospital, LLC, Lindsay Harris, R.N., and Chris Zielke, R.N. Based on our review of the law and summary judgment record, we affirm.

BACKGROUND

The present appeal is the second filing of a lawsuit by Plaintiff against Defendants[1] stemming from injuries Plaintiff alleged occurred to her husband, James R. Bowles (decedent), in December 2015 while he was a patient at Oklahoma Heart Hospital South and under the care of Nurses Harris and Zielke. She alleged the four-wheeled walker provided to decedent by Defendants and instructed to use by Defendants was one he was unable to use because of physical

[1] Defendants state in their motion for summary judgment that the lawsuit was originally filed in April 2017, and dismissed just prior to pretrial on April 10, 2019. The case was refiled April 3, 2020. Plaintiff concedes in her response in opposition to Defendants' motion that she properly refiled the case after a prior dismissal of the first case.

limitations he had from a prior stroke. She alleged Defendants were "repeatedly advised" that decedent only "walks well and safely with the assistance of his four-legged walker with two (2) wheels and two (2) skis due to his physical limitations and balance difficulties[.]" Plaintiff alleged that at the instruction of Nurses Harris and Zielke and without any assistance from them, decedent used the four-wheeled walker to cross his room to a chair. She alleged decedent "lost his balance and control of the four-wheeled walker and fell, breaking his right femur." Among her claims of negligence, Plaintiff alleged Nurses Harris and Zielke negligently provided decedent with a walker with hand brakes and failed to appropriately evaluate and consider decedent's physical limitations from his prior stroke, and were negligent in "selecting and providing an appropriate walker to assist" decedent. Plaintiff sought damages for physical and emotional injury to decedent under negligence theories of vicarious liability, res ipsa loquitur, and negligent hiring, training and supervision, and for loss of consortium and punitive damages.

On October 20, 2020, Defendants answered and denied all allegations of negligence "throughout Plaintiff's Petition which states, implies or infers medical services provided by Defendants [were] negligent or fell below the applicable standard of care," and denied "directly or proximately causing or contributing to

[decedent's] injuries and/or death."[2] On the same day, Oklahoma Heart Hospital South served interrogatories and a request for production of documents upon Plaintiff. Among other things, Interrogatory No. 21 asked Plaintiff to "[p]rovide the name, address and qualifications of each expert witness who may be called to give testimony together with . . . the subject matter of the expert's testimony," "[t]he substance of the facts and opinions to which the expert is expected to testify," and "[a] summary of the expert's opinions[.]"[3] On December 3, 2020, in answer to Interrogatory No. 21, Plaintiff stated she had not yet retained an expert witness in the case and stated she "may supplement her response . . . in accordance with the Court's scheduling order."

On December 11, 2020, counsel for Defendants sent an email to Plaintiff's counsel in which, among other matters, they stated:

> With respect to expert discovery, [P]laintiff contends that she has not retained an expert witness in this case. As counsel is aware, Oklahoma law requires expert witness testimony to support [P]laintiff's allegations of medical negligence against [D]efendants. Again, this case has gone on far too long to not have expert support. As such, please supplement accordingly.

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[2] Defendants denied the specific paragraph allegations of Plaintiff's petition and asserted various defenses including a defense that "[a]ny damages claimed by Plaintiff were caused by or contributed to by intervening or supervening acts or omissions for which [the] Defendants are not responsible," and denied application of res ipsa loquitur, among other defenses.

[3] Defendants' Request for Production of Documents No. 23 asked for documentation pertaining to the expert's qualifications and experience.

Defendants sent another request to supplement on January 13, 2021. Plaintiff responded to Defendants' December 11, 2020 email on January 18, 2021, stating as to Interrogatory No. 21 that she would submit her supplemental response "in accordance with the November 19, 2020 Scheduling Order in this case." She stated she "anticipates that any expert that is retained to testify on behalf of Plaintiff will need to review the deposition testimony of the agents and employees of Defendant [Oklahoma Heart Hospital] that are deposed in this matter, prior to rendering any expert opinions in this case."[4]

On April 16, 2021, Defendants filed their motion for summary judgment in which they request "summary judgment in their favor because Plaintiff lacks the requisite expert testimony necessary to establish a *prima facie* case of medical negligence against them under Oklahoma law." They assert they

> have met their burden under 12 O.S § 2056 by showing the Court that there is a complete lack of evidence on the essential elements of Plaintiff's claims. Plaintiff has failed to provide expert witness testimony to support her claims of medical negligence against all Defendants. Under the law, Plaintiff cannot merely rely on the assertions in her pleadings to overcome the summary judgment standard. Thus, there is no genuine issue as to any material fact, "since a complete failure of proof concerning an essential element of

[4] According to Defendants' December 11, 2020 email, as of that date "Plaintiff has not issued any discovery requests to [D]efendants in connection with this refiled lawsuit." The only references to a deposition taken in this lawsuit are Defendants' assertion in their motion that in five years only one deposition had been taken and Plaintiff's answer to Interrogatory No. 20 in which she references her March 26, 2018 deposition testimony.

Plaintiff's case necessarily renders all other facts immaterial." Therefore, summary judgment is proper.[5]

On the same day, about four hours before Defendants filed their motion, Plaintiff provided her preliminary witness and exhibit list which "identified Shawn Smith, M.D., [decedent's] treating physician, to provide expert testimony." On May 4, 2021, Plaintiff filed her response in opposition to Defendants' motion. As discussed more fully herein, Plaintiff maintains that she has controverted Defendants' uncontroverted fact; that is, she supplied the name of an expert. She argues, "Defendants' Motion should be denied, first, because it is inaccurate, and second, because, even if accurate, the time within which the parties may disclose their experts has not yet passed and as such it is at best premature."

On May 28, 2021, Defendants filed a reply in which they argued Plaintiff's arguments about the timing of when she submitted her preliminary witness list are irrelevant to the issue of whether there is a disputed material fact concerning the appropriateness of Defendants' care of decedent. They argue Plaintiff is required to provide evidentiary materials in her opposition to their motion and the witness list is not appropriate evidentiary material. They argue, "based on the current evidence, Defendants' care was nothing but appropriate and within the appropriate

[5] (Citation omitted.)

standard of care. Plaintiff has provided no expert support to dispute that material fact. Therefore, as a matter of law, summary judgment is proper."

On June 23, 2021, the court entered its Order granting summary judgment to Defendants, finding that while Plaintiff identified an expert witness, "she failed to present any evidence showing that a genuine dispute of material fact exists in the case." Citing *Adams v. Moriarity*, 2005 OK CIV APP 105, ¶ 10, 127 P.3d 621, the trial court found, "Based on the evidence presented, Defendants' care was within appropriate standards of care, and Plaintiff has not provided any expert evidence to dispute this material fact."

Plaintiff appeals.

STANDARD OF REVIEW

When deciding a motion for summary judgment, the district court considers factual matters but the ultimate decision is purely legal; consequently, the de novo standard controls our review. *Carmichael v. Beller*, 1996 OK 48, ¶ 2, 914 P.2d 1051. De novo review involves a plenary, independent, and non-deferential examination of the trial court's rulings of law. *Neil Acquisition, L.L.C. v. Wingrod Invest. Corp.*, 1996 OK 125, ¶ 5 n.1, 932 P.2d 1100.

> In order for summary adjudication to be appropriate, not only must there be no dispute as to material facts, but all reasonable inferences and conclusions to be drawn from those facts must be in one party's favor and show that party is entitled to judgment as a matter of law. *Runyon v. Reid*, [1973 OK 25,] 510 P.2d 943[.] The evidentiary materials must be viewed in the light most favorable to the

> party opposing summary judgment. *Hargrave v. Canadian Valley Elec. Co-op.*, [1990 OK 43,] 792 P.2d 50[.]

Igleheart v. Warrington, 1995 OK CIV APP 15, ¶ 2, 891 P.2d 619. "Our review is based on the actual record presented to the trial court and the issues actually presented to the trial court." *Okla. Dep't of Sec. ex rel. Faught v. Wilcox*, 2011 OK 82, ¶ 16, 267 P.3d 106 (citation omitted).

However, mere allegations in a pleading that are unsupported by evidentiary material will not defeat an otherwise valid motion for summary judgment. *Weldon v. Dunn*, 1998 OK 80, ¶ 8, 962 P.2d 1273 (citing *Stephens v. Yamaha Motor Co., Ltd.*, 1981 OK 42, ¶ 11, 627 P.2d 439 (once party asserting motion for summary judgment supports statement of undisputed material facts with appropriate evidentiary materials, party opposing motion cannot rely solely on pleading but must present evidentiary material)). "[T]he mere contention that facts exist or might exist is not sufficient to withstand summary judgment. The party responding to a motion for summary judgment has an obligation to present something which shows that when the date of trial arrives, he will have some proof to support his allegations." *Davis v. Leitner*, 1989 OK 146, ¶ 12, 782 P.2d 924 (footnotes omitted). *See also Cook v. McGraw Davisson Stewart, LLC*, 2021 OK CIV APP 32, ¶ 18, 496 P.3d 1006.

ANALYSIS

Plaintiff argues the trial court erred as a matter of law because it granted summary judgment to Defendants on a basis different from that raised by them in their motion. She asserts the trial court granted judgment on an argument Defendants raised for the first time in reply to her response in opposition to summary judgment and to which she was not given an opportunity to respond, relying on *Glover Construction Company, Inc. v. State ex rel. Department of Transportation*, 2014 OK CIV APP 51, ¶ 15, 326 P.3d 547. She contends the trial court further erred in deciding the motion without a hearing. Plaintiff argues the "***sole***" basis for Defendants' motion is that she identified no expert witness; however, she argues on appeal, as she argued in her response to Defendants' motion, before the motion for summary judgment was filed she did identify an expert witness. She argues Defendants' reply brief, in which they argue no "testimony" was offered in support of her response "is akin to [an appellate] Court's affirming an order based on 'new issues, arguments and authorities to sustain the trial court's granting of summary judgment' which could have been raised below." She asserts the trial court committed reversible error in failing to limit Defendants' motion to the actual issues raised therein, citing *Northrip v. Montgomery Ward & Co.*, 1974 OK 142, ¶¶ 1-2, 529 P.2d 489.

Plaintiff's arguments are unpersuasive. First, to the extent Plaintiff's argument can be understood to assert the trial court erred in accepting and considering Defendants' reply brief because they raised *a new uncontroverted fact* – that is, it is uncontroverted that Plaintiff offered *no testimony* from an expert in support of her claim – the very authority upon which she relies supports the court's exercise of discretion. In *Glover*, the appellate court affirmed the trial court's grant of partial summary judgment to the defendant on the plaintiff's claim that the defendant rejected additional compensation the plaintiff claimed it was owed for certain materials used on a road construction project. There the plaintiff argued

> the partial summary adjudication order should be reversed because 1) the court's decision is based on a new defense raised for the first time in [the defendant's] reply brief to which new evidentiary materials were attached, 2) the court abused its discretion by refusing to allow [the plaintiff] to respond to the new argument and evidentiary materials at the motion hearing, and 3) [certain] disputed material facts exist . . . which preclude summary adjudication.

Glover, ¶ 8. Unlike the present appeal, in *Glover* a hearing was held; however, based on the Court's analysis of the Oklahoma Supreme Court's reasoning in *Hadnot v. Shaw*, 1992 OK 21, 826 P.2d 978, and the lack of a transcript of the hearing, the *Glover* Court found no abuse of discretion by the trial court in accepting the defendant's reply brief.

The *Glover* Court noted that the appellants in *Hadnot* also "argued they were 'never accorded an opportunity to respond' to the reply brief filed by the moving

party for summary judgment and the brief raised issues 'not tendered in the original motion.'" 2014 OK CIV APP 51, ¶ 14 (citation omitted). The *Glover* Court explained:

> The [*Hadnot*] Court declined to review the issue of the court's consideration of the reply brief because the appellants had never raised the issue to the court. Noting the reply brief had been filed "five days before the motion was reached" and the appellants "had ample opportunity to seek additional time to prepare a written response and to use the issue now pressed as a reason for their request" . . . the Court stated, "[t]hey failed to do so and cannot complain here of error."

Id. (citation omitted) (emphasis omitted). The *Glover* Court further explained that the Supreme Court in *Hadnot*,

> after explaining the [trial] court's "statement of uncontroverted facts only had one undisputed fact neither tendered in the original motion nor revealed by the evidentiary material " and that fact "stood conceded by [the appellants'] attorney during the summary judgment argument," held "the trial court's consideration of the [moving party's] reply, even if error, was at best harmless under these circumstances." As we interpret *Hadnot v. Shaw*, a reply brief by the moving party is permitted if the trial court accepts the reply brief and that brief does not raise new issues or arguments.

Glover, ¶ 15 (emphasis omitted) (citation omitted) (footnote omitted).

As to the record presented in *Glover*, the Court reasoned that almost two months passed between the filing of the reply and the hearing on the motion. The Court noted during that time the plaintiff filed no written motion to strike consideration of the reply brief "or to object to either the 'new' defense and/or the admissibility of the evidentiary materials" in the reply brief as permitted by Rule

13(c).[6] *Glover*, ¶ 16. The Court further noted the plaintiff "never sought approval to file a response to [the defendant's] reply brief during that two month period before the motion hearing." *Id.*

In the present case, while no hearing was held, Plaintiff specifically urged the court to deny Defendants' motion without a hearing pursuant to Rule 4(h), which provides "[m]otions may be decided by the court without a hearing," and the record reveals no effort by Plaintiff to withdraw that request or seek a hearing after Defendants filed their reply. However, the court did not enter its Order granting summary judgment until June 23, 2021. That Order states that on June 11, 2021, "in lieu of a hearing . . . the Court, upon agreement of the parties, ruled on the briefs submitted by the parties hereto pursuant to Rule 4(h) of the Rules for the District Courts of Oklahoma." While no hearing was held, Plaintiff had fourteen days between the filing of the reply brief and the court's consideration of the briefs and twenty-six days between the filing of the reply and the court's Order granting summary judgment. No written objection or motion to strike was filed; no request to file a brief in response to the reply was made.[7] It is only on appeal that Plaintiff

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[6] Rules for the District Courts of Oklahoma, 12 O.S. Supp. 2013, ch. 2, app. Rule 13(c), amended subsequent to *Hadnot*, provides, in part, that "A party challenging the admissibility of any evidentiary material submitted by another party may raise the issue expressly by written objection or motion to strike such material."

[7] We note the Official Court Rules of the Seventh Judicial and Twenty-Sixth Administrative Districts Comprised of Oklahoma and Canadian Counties, Rule 37(B) provides:

argues a lack of opportunity to address the "new" fact and "new" argument. In our view, that argument comes too late. Consequently, we do not agree the trial court abused its discretion in accepting and considering Defendants' reply brief.

Second, we further find unpersuasive Plaintiff's argument that the only controverted fact Defendants raised in their motion was her lack of an expert. Because she controverted that fact, Plaintiff argues the trial court should not have granted summary judgment and should not have accepted and considered Defendants' reply brief because it rests on a new argument – that is, that she failed to present testimony of an expert witness.

Plaintiff's theory rests on the language of Rule 13(b)[8] that the non-movant must reply to the statement of uncontroverted facts and state facts the non-movant

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> All motions, applications and responses thereto, including briefs, if required by Rule 4 of the Rules for District Courts, shall not exceed twenty (20) pages in length, excluding exhibits, without prior permission of the assigned judge. Reply briefs shall be limited to five (5) pages in length. . . . No further briefs shall be filed *without prior permission of the assigned judge*. . . .

(Emphasis added.)

[8] Rule 13(b) provides, in part, as follows:

> Any party opposing summary judgment . . . shall file . . . a concise written statement of the material facts as to which a genuine issue exists and the reasons for denying the motion . . . . Unless otherwise ordered by the court, the adverse party shall attach to, or file with, the statement evidentiary material justifying the opposition to the motion . . . . In the statement, the adverse party . . . shall set forth and number each specific material fact which is claimed to be in controversy and reference shall be made to the pages and paragraphs or lines of the evidentiary materials. All material facts set forth in the statement of the movant which are

asserts are controverted. Plaintiff argues she supplied evidence that she has an expert thus controverting Defendants' statement of uncontroverted fact that she has identified none. Having done so, she argues the trial court should not have granted summary judgment to Defendants on the ground that she has supplied no evidentiary materials about the expert's opinion. Plaintiff makes no argument below or on appeal that she is not required to present expert testimony to support her medical negligence claim. Plaintiff does not argue she has produced any such evidentiary material from her now-identified expert nor does any appear in the record on appeal.[9] Rather, Plaintiff's position is that the *identification* of an expert

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> supported by acceptable evidentiary material shall be deemed admitted for the purpose of summary judgment . . . unless specifically controverted by the statement of the adverse party which is supported by acceptable evidentiary material. . . .

[9] Plaintiff does argue, however, that under the Scheduling Order her final witness and exhibit list was not due for another thirty days after she filed her preliminary witness list; thus, she maintains she still had time to name other expert witnesses. She argues "dismissing this case at this stage would be akin to dismissal of her case for lack of an Affidavit of Merit," a requirement the Supreme Court has determined is unconstitutional. *See, e.g., John v. Saint Francis Hospital*, 2017 OK 81, ¶ 1, 405 P.3d 681 (In a medical negligence case, the Court concluded that, "The dispositive issue on appeal is whether the thrice incarnated affidavit of merit requirement found in Okla. Stat. tit. 12, § 19.1 (Supp. 2013), is unconstitutional. In the wake of *Zeier v. Zimmer*, 2006 OK 98, 152 P.3d 861, its sequel *Wall v. Marouk*, 2013 OK 36, 302 P.3d 775, and upon reexamination of the Oklahoma Constitution, the inevitable conclusion is that section 19.1 is an impermissible barrier to court access and an unconstitutional special law. Section 19.1 is stricken."). Contrary to Plaintiff's assertion, however, Defendants are not seeking "dismissal" of her lawsuit. An order granting summary judgment is not dismissal of a lawsuit; it is a judgment on the merits. We see no correlation between the two or merit in Plaintiff's argument. Moreover, the appellate record fails to show Plaintiff filed a motion pursuant to Rule 13(d) ("Should it appear from an affidavit of a party opposing the motion that for reasons stated the party cannot present evidentiary material sufficient to support the opposition, the court may deny the motion for summary judgment . . . without prejudice or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."). If Plaintiff planned to offer other expert

is the only basis of Defendants' motion. Defendants argue it is the absence of any evidentiary materials (e.g., deposition testimony, affidavits, opinion summary, etc.) from an expert in support of Plaintiff's claim that is at the core of their motion.

Defendants argue that in medical malpractice claims like the present case, Plaintiff bears the burden of producing expert testimony to support her claim, citing *Strubhart v. Perry Memorial Trust Authority*, 1995 OK 10, ¶ 33, 903 P.2d 263.[10] They argue they filed the motion one day before the deadline for the filing of dispositive motions because Plaintiff had yet to identify any expert witness.[11]

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testimony or exhibits in support of her claim, or if further discovery was contemplated in support of her case, Rule 13(d) provides a mechanism she could have used, but she failed to use.

[10] *See also Smith v. Hines*, 2011 OK 51, 261 P.3d 1129, wherein the Oklahoma Supreme Court reversed the grant of summary judgment to the defendant surgeon. The Court explained,

> In medical negligence cases, a physician's negligence is ordinarily established by expert medical testimony. However, when a physician's lack of care is so grossly apparent that laymen would have no difficulty recognizing it, expert testimony is not required to establish deficient care. Here, the patient provided the opinion of an expert witness, a board-certified neurologist, to support her allegations.

Id. ¶ 14 (footnotes omitted). In *Turney v. Anspaugh*, 1978 OK 101, 581 P.2d 1301, the Oklahoma Supreme Court reiterated that while the "negligence of physician or surgeon must be established by expert medical testimony," that rule "is subject to [the] exception that expert testimony is not required where negligence is so grossly apparent that laymen would have no difficulty in recognizing it." *Id.* ¶ 20 (citation omitted) (footnote omitted). Plaintiff makes no claim below or on appeal that this exception applies here and the sparse record on appeal provides no basis for the application of this exception. "An appellant has the undivided responsibility for producing an appellate record necessary to show the error in a trial court's decree. An appellant must include in the record on appeal 'all materials necessary for corrective relief.'" *Duke v. Duke*, 2020 OK 6, ¶ 35, 457 P.3d 1073 (footnotes omitted).

[11] The Scheduling Order, dated November 19, 2020, set June 16, 2021, as the date of the Pretrial Conference. The Order provided that discovery must be "[c]ompleted/answered by Pretrial unless otherwise agreed and approved by the Court." All motions including dispositive motions were required to be filed sixty days prior to Pretrial; that is, by April 17, 2021, a

They claim on appeal that the preliminary witness list Plaintiff filed did not identify decedent's treating physician as an expert witness and that he was "revealed for the first time" as the expert in Plaintiff's response to the motion for summary judgment. "However, in doing so," they argue, "Plaintiff failed to provide an affidavit or any other evidentiary material, outside her pleadings, to show [the physician's] expert support as required by Oklahoma law," citing *Bray v. Thomas Energy Systems, Inc.*, 1995 OK CIV APP 146, 909 P.2d 1191. Consequently, they argue, their reply was appropriately argued and the trial court did not, therefore, err in granting summary judgment to them.

Defendants' statement of uncontroverted facts, fact 9, states that as of the date of the filing of its motion, Plaintiff "does not have an expert witness to support her claims of medical negligence against Defendants," and, as a matter of law, "cannot refute that Defendants' care was anything other than appropriate and within the standard of care." Plaintiff admitted uncontroverted facts 1 through 8 in Defendants' motion,[12] but contested uncontroverted fact 9, that she has no expert

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Saturday, thus by April 19, 2021. The preliminary list of witnesses was also due sixty days prior to Pretrial and the final list was due thirty days prior to Pretrial.

[12] Plaintiff thus agreed the following facts are uncontroverted:

1. The lawsuit was refiled April 3, 2020;

2. Defendants timely filed their answer on October 20, 2020;

3. Defendants issued their first set of written discovery requests to Plaintiff on October 20, 2020, in which, among other things, Plaintiff was requested to identify her experts and disclose a summary of their opinions;

witness to support her claims of medical negligence against Defendants because she submitted the witness list before the motion was filed, albeit within a few hours of when the motion was filed.

We disagree with Plaintiff's assertion that Defendants made no argument or raised any issue about the lack of expert *testimony* in its summary judgment motion and brief and, thus, she lacked the opportunity to respond to Defendants' "new" arguments in their reply brief. First, as above noted, Defendants' uncontroverted fact 9 states Plaintiff "does not have an expert witness *to support her claims of medical negligence* against Defendants";[13] that is, it is not just the absence of a named expert but the absence of support for her claim of medical negligence. Defendants' arguments in their motion are not confined to simply a failure to name an expert. For example, Defendants maintain they "met their burden under 12 O.S. 2011 § 2056 by showing the Court that there is a complete *lack of evidence* on the essential elements of Plaintiff's claims. Plaintiff has failed to provide expert

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4. Defendants granted Plaintiff a ten-day extension of time to file her responses;

5. On December 3, 2021, Plaintiff filed her responses and revealed she had "not yet retained an expert witness in this case";

6. On December 11, 2021, Defendants' counsel requested Plaintiff supplement her discovery responses including a request to supplement her responses regarding an expert witness;

7. Receiving no response, another letter was sent to Plaintiff's counsel on January 13, 2021;

8. Plaintiff's counsel responded on January 18, 2021, but no expert was identified.

[13] (Emphasis added.)

witness *testimony* to support her claims of medical negligence against all Defendants." Relying on Oklahoma case law, Defendants argue: "Oklahoma courts have long held that unlike an ordinary negligence action, in all but the extraordinary medical malpractice case, the patient or plaintiff has the burden of producing expert testimony to support a case of negligence." Defendants argue that when the movant introduces evidence that indicates no substantial controversy as to material facts, the non-moving party has the burden of showing that evidence is available which would justify trial of the issue. Defendants conclude,

> For over four years, Plaintiff has offered nothing but conclusory allegations in her pleadings. Based on the current evidence in this case, there is no genuine issue as to any material fact to support Plaintiff's allegations, since a complete failure of proof concerning an essential element of her case necessarily renders all other facts immaterial.

Plaintiff was on notice through the arguments made in Defendants' motion not only that no expert had yet to be identified, but also, as a result, that no expert testimony or other evidentiary materials were of record challenging the appropriateness of the care Defendants provided to decedent. Plaintiff admitted uncontroverted fact number 3 that discovery requests included identification of her experts and a summary of their opinions. She agreed with uncontroverted facts 5 and 8 that she had failed to identify an expert "to support [her] allegations" as late as January 18, 2021. While Defendants "challenge[] Plaintiff to put forth an expert witness to support her case," we agree with the trial court's evident determination

that the challenge was not just to name an expert, but to name one who would support Plaintiff's case which necessarily includes providing evidentiary materials about what that expert's opinion is.

Plaintiff's preliminary witness list is not acceptable evidentiary material that shows a controverted material fact because it is simply a description by the Plaintiff's attorney of the topics about which the purported expert would testify. Witness lists are among the pretrial procedural filings intended to accomplish the objectives of scheduling and pretrial conferences but are not in themselves evidentiary materials.[14]

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[14] Rule 5(E), Rules for District Courts of Oklahoma, 12 O.S. Supp. 2013, ch. 2, app., provides that the objectives of scheduling and pretrial conferences should be designed to:

> 1. expedite the disposition of the action;
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> 2. establish early and continuing control so that the case will not be protracted because of lack of management;
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> 3. discourage wasteful pretrial activities;
>
> 4. improve the quality of the trial through more thorough preparation; and,
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> 5. facilitate the settlement of the case.

Rule 5(G) provides that, "In accordance with the objectives of a scheduling or pretrial conference, the participants under this rule should be prepared to address, or have taken action to: . . . ; 9. the identification of witnesses and documents . . . [.] Discussing an earlier version of Rule 5(C)(3), Scheduling, the Supreme Court in *Middlebrook v. Imler, Tenny & Kugler, M.D.'s, Inc.*, 1985 OK 66, 713 P.2d 572, stated:

> In *Short v. Jones*, [1980 OK 87,] 613 P.2d 452, this Court upheld the District Court's refusal to allow an unlisted witness to testify, noting that the District Court has the power to enforce its own pretrial order. Rule 5(c)(3) of the District Court is specifically designed to prevent surprise testimony.

In *Davis v. Leitner*, 1989 OK 146, 782 P.2d 924, decided under a former version of Rule 13(b),[15] the Supreme Court examined Rule 13 to ascertain what material could be considered by the trial court on a motion for summary judgment. There, the defendant moved for summary judgment. The plaintiffs filed a response containing a letter from a potential witness that the plaintiffs claimed put a controverted material fact in dispute. The trial court refused to consider the letter because, in the form presented on summary judgment, it would have been inadmissible at trial. In reversing the trial court, the Court explained:

> In the case before us the trial court was presented with a copy of a letter in a named witness'[s] own handwriting containing specific allegations of fact which, if otherwise admissible, could persuade a trier of fact to find in favor of attorneys on the key issue of [the defendant's] prior knowledge of their lien. Clearly, the response by [the plaintiffs] alleged the existence of a controverted material fact and set out with great specificity the nature and content of the

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Middlebrook, ¶ 23. *See also Peuplie v. Oakwood Retirement Village, Inc.*, 2020 OK CIV APP 40, ¶ 12, 472 P.3d 213.

[15] Rule 13(b), 12 O.S. 1981, ch. 2, app., provided, in part, as follows:

> [The adverse party] may attach to the statement affidavits *and other materials* containing facts that would be admissible in evidence, but the adverse party cannot rely on the allegations or denials in his pleading. In the objection, the adverse party or parties shall set forth and number each specific material fact which is claimed to be in controversy and reference shall be made to the pages, paragraphs and/or lines of the depositions, admissions, answers to interrogatories and to demands to admit, affidavits, exhibits *and other materials* whether filed by the moving party or the adverse party, and shall attach to his response the portions relied upon.

(Emphasis added.)

testimony which could and would be presented at trial to prove that allegation.

It is clear from the plain language of Rule 13, by the inclusion of the words "other materials," that attachments to a response in opposition to a motion for summary judgment are not to be limited to affidavits, depositions or any such strictly defined sort of evidentiary document. Supporting materials are sufficient if they show the reasonable probability, something beyond a mere contention, that the opposing party will be able to produce competent, admissible evidence at the time of trial which might reasonably persuade the trier of fact in his favor on the issue in dispute.

Davis, ¶¶ 14-15.

The only material Plaintiff appended to her response and objection was the scheduling order and her preliminary witness list in which Shawn Smith, M.D., was identified as the decedent's treating physician and would testify to decedent's "[l]imitations, disabilities, and therapy arising after 2013 stroke and *opinion testimony regarding the selection and use of walkers by Defendants*. Records Custodian."[16] Even if a statement by a party's counsel describing a witness's testimony in the witness list could be considered acceptable evidentiary material, Plaintiff's statement makes no statement about what the expert's testimony would be – good, bad, or indifferent – concerning the selection and use of walkers by Defendants. It does not "show the reasonable probability, something beyond a mere contention, that [Plaintiff] will be able to produce competent, admissible evidence at the time of trial which might reasonably persuade the trier of fact in

[16] (Emphasis added.)

[her] favor on the issue" that the selection and use constituted negligence. *Davis*, ¶ 15. Consequently, Plaintiff failed to meet her obligation under Rule 13(b) and the trial court did not err in granting summary judgment to Defendants.

CONCLUSION

From our review of the summary judgment record and the applicable law, we conclude the trial court did not err in granting summary judgment to Defendants. Accordingly, we affirm.

AFFIRMED.

WISEMAN, P.J., concurs, and BLACKWELL, J., dissents.

BLACKWELL, J., dissenting:

The trial court granted summary judgment in this case because, "[b]ased on the evidence presented, [1] the Defendants' care was within the appropriate standard of care, and [2] Plaintiff had not provided any expert evidence to dispute this material fact." R., Doc. 4, *Order*, pg. 2 (enumeration added). Although the defendants attached evidence to their motion in support of the *second* proposition, at no point did the defendants offer any evidence supporting the *first* proposition. As such, the plaintiff had no burden to offer evidence in its response to refute the first proposition. *See Spirgis v. Circle K Stores, Inc.*, 1987 OK CIV APP 45, ¶ 10, 743 P.2d 682, 685 ("[I]f the movant has not addressed all material facts, or if one or more such facts is not supported by admissible evidence, judgment for the

movant is not proper.") (approved for publication by the Oklahoma Supreme Court); *MidFirst Bank v. Wilson*, 2013 OK CIV APP 15, ¶ 10, 295 P.3d 1142.

If the defendants' theory of the mechanics of summary judgment prevailed, every defendant could (and likely would) make an immediate, post-answer, evidence-free motion for summary judgment. Plaintiffs would then be required to refute a bald allegation that, as in this case for example, "the Defendants' care was within the appropriate standard of care." This is contrary to our summary procedure, which requires the movant to base its statement of undisputed material facts on evidence. Okla. Dist. Ct. R. 13 ("A party may move for either summary judgment or summary disposition of any issue on the merits *on the ground that the evidentiary material filed with the motion or subsequently filed with leave of court show* that there is no substantial controversy as to any material fact." (emphasis supplied)). A plaintiff is under no independent duty to prove up its case except in response to a properly supported motion for summary judgment. Because the defendants' motion here was not properly supported, the request for summary judgment should have been denied. I respectfully dissent.

December 14, 2021