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IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA
MAY 24 2024
JOHN D. HADDEN
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NORRIS AUTO SALES, LLC, an Oklahoma limited liability company; FIRRIS BIRRIS KLINE, an individual; T. J. NORRIS, an individual,

Plaintiffs/Appellees,

vs.

ZURICH AMERICAN INSURANCE COMPANY and UNIVERSAL UNDERWRITERS INSURANCE COMPANY,

Defendants/Appellants.

Case No. 120,050

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APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE SHEILA D. STINSON, TRIAL JUDGE

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS

Randall K. Calvert
Andrew R. Davis
CALVERT LAW FIRM
Oklahoma City, Oklahoma — For Plaintiffs/Appellees

Larry D. Ottaway
Amy Sherry Fischer
FOLIART, HUFF,
OTTAWAY & BOTTOM
Oklahoma City, Oklahoma

And

Ronald P. Schiller
Robert A. Wiygul
HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER
Philadelphia, Pennsylvania For Defendants/Appellants

OPINION BY JAMES R. HUBER, PRESIDING JUDGE:

Zurich American Insurance Company and Universal Underwriters Insurance Company (Zurich) appeal a judgment entered on a jury's verdict for $9,000,000 for breach of the duty of good faith, as well as $18,000,000 in punitive damages. Based on our review of the record and applicable law, we reverse the judgment on the verdict because the jury was improperly instructed, and remand for further proceedings consistent with this Opinion.

BACKGROUND

Zurich issued an insurance policy to Norris Auto Sales, LLC (NAS), which included $300,000 of auto hazard liability coverage and $2,000,000 of umbrella coverage. With respect to the umbrella coverage, the policy provided an employee of NAS was an insured only when acting "in the course and scope of their employment."

In 2013, NAS's employee, Firris Kline (Kline), was driving from his home to work in a NAS-owned vehicle when he collided with a motorcycle, seriously injuring Ted Haywood (Haywood). Haywood filed suit against Kline; NAS; and

NAS' owner, TJ Norris (Norris) (collectively, Plaintiffs). The case eventually settled for $4,300,000, of which Zurich paid policy limits of $2,300,000, and NAS agreed to pay $2,000,000.

Plaintiffs subsequently filed suit against Zurich for breach of the duty of good faith and fair dealing. Plaintiffs contended there was coverage under the umbrella policy because Kline was in the course and scope of his employment at the time of the accident, and that Zurich unreasonably failed to settle the case, exposing them to excess liability. Zurich disagreed, asserting Plaintiffs could not establish a *prima facie* case of bad faith, including coverage under the policy or that its handling of the claim was unreasonable. After a trial, the jury awarded Plaintiffs $4,000,000 in compensatory damages, and $4,000,000 in punitive damages.

Zurich appealed, arguing it was entitled to a directed verdict and that the jury was improperly instructed. In *Norris Auto Sales, LLC, an Oklahoma limited liability company, et al. v. Zurich American Ins. Co., et al.*, Case No. 117,024 (Okla. Civ. App. May 12, 2020) (unpublished) ("*Norris I*"), the Court of Civil Appeals, Division I (COCA), held the trial court properly denied Zurich's motion for directed verdict but reversed the judgment and remanded for a new trial, finding the jury was not accurately instructed on the law of *respondeat superior*.

Specifically, COCA found the trial court erroneously instructed the jury on the operation of the presumption that arises when an employee is driving an employer-owned vehicle as though it were substantive material evidence, as well as burdening Zurich to prove Kline was not in the course and scope of employment. In reversing, COCA stated that the issue of whether Kline was "in the course and scope of employment depends on the interest being served rather than the ownership of the vehicle," and that any evidence tending to prove he was not rendering a service to, or conferring an incidental benefit upon, NAS may rebut the presumption. *Id.* at ¶¶ 32, 34. Because Zurich had rebutted the presumption, the presumption was irrelevant, and the matter should have been submitted to the jury on the evidence to determine whether Plaintiffs sustained their burden of establishing Kline was in the course and scope of employment. *Id.* at ¶¶ 30-31.

Upon remand, a second trial was held, resulting in a verdict against Zurich for $27,000,000, which included $18,000,000 in punitive damages. A judgment on the verdict was entered on November 4, 2021.

Zurich appeals.

STANDARD OF REVIEW

A motion for directed verdict presents the question of whether "there is any evidence to support a judgment for the party against whom the motion is made." *Woods v. Freuhauf Trailer Corp.*, 1988 OK 105, ¶ 8, 765 P.2d 770. We review *de*

novo the denial of a motion for directed verdict. *Computer Publ'ns, Inc. v. Welton*, 2002 OK 50, ¶ 6, 49 P.3d 732. On review, we regard as true all evidence favorable to the non-moving party and all reasonable inferences drawn therefrom, disregard all evidence favorable to the moving party, and affirm the denial "unless there is an entire absence of proof on a material issue." *Id.*

In reviewing alleged error in jury instructions "given or refused" by the trial court, this Court must consider the instructions as a whole. *Myers v. Mo. Pac. R.R. Co.*, 2002 OK 60, ¶ 29, 52 P.3d 1014. The inquiry is whether the instructions reflect Oklahoma law on the relevant issue, not whether the instructions were perfect. *Id.* The test upon review is "whether there is a probability the jury was misled into reaching a result different from that which would have been reached but for the error." *Id.*

ANALYSIS

The fundamental issues at trial were whether Kline was acting in the course and scope of his employment at the time of the accident rendering coverage under the umbrella policy, and whether Zurich acted unreasonably in handling Haywood's claim.[1]

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[1] The umbrella policy provides an employee of NAS is an insured only when acting "in the course and scope of their employment." The policy therefore incorporates the common law doctrine of *respondeat superior*, which provides a superior must answer for the torts of its servant who is acting for it. *Norris I*, at ¶ 11.

Regarding the issue of course and scope of employment, as noted in *Norris I*, an employee commuting to work is generally not in the scope of employment. *Id.* at ¶ 13 (citing *Skinner v. Braum's Ice Cream Store*, 1995 OK 11, ¶ 4 n.7, 890 P.2d 922 ("During the commute, it is assumed that the employee does not render a service to the employer.")). This is commonly referred to as the "going and coming rule." There is an exception, however, "if the employee is rendering a service, either express or implied, to the employer with his/her consent," or if the employee is conferring "an incidental benefit to the employer not common to ordinary commuting trips of the work force." *Skinner*, 1995 OK 11, ¶ 5 (footnotes omitted). *See also Norris I*, at ¶¶ 13-14. When evidence exists to support a conclusion the employee was rendering a service or conferring a benefit on the employer at the time of the accident, then the determination of whether an employee is in the course and scope of employment must be made by the finder of fact. *Norris*, at ¶ 14 (citations omitted).

Moreover, as stated in *Norris I*, if the plaintiff presents evidence the driver was an employee *and* was driving an employer-owned vehicle at the time of the accident, then the plaintiff is entitled to a presumption the employee was in the course and scope of employment. *Id.* at ¶ 28 (citations omitted). The defendant is then obligated to present evidence to rebut it. *Id.* at ¶ 29. If rebutted, the presumption is disregarded, the jury is not instructed of its former procedural

function, and the matter is submitted to the jury on the evidence to determine if the plaintiff has met its burden. *Id.* at ¶¶ 29-31.

With regard to the reasonableness of Zurich's actions, the "decisive question is whether the insurer had a good faith belief, at the time its performance was requested, that it had justifiable reason for withholding payment under the policy." *Id.* at ¶ 21.

In view of the above law, we address whether Zurich was entitled to a directed verdict and whether the jury was properly instructed.

1. Motion for Directed Verdict

Zurich contends it was entitled to a directed verdict because Plaintiffs failed to establish a *prima facie* case of bad faith.[2] Specifically, Zurich asserts Plaintiffs failed to establish coverage under the umbrella policy as Kline was outside the course and scope of employment at the time of the accident and that it had a legitimate dispute over coverage, rendering its claim-handling reasonable. Plaintiffs disagree, asserting: 1) law of the case applies, and 2) there was ample evidence before the court justifying denial of Zurich's motion.

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[2] To establish a *prima facie* case of bad faith, Plaintiffs were required to show: 1) coverage under the insurance policy and that Zurich was required to take reasonable actions in handling the Haywood claim; 2) Zurich's actions were unreasonable under the circumstances; 3) Zurich failed to deal fairly and act in good faith towards Plaintiffs in their handling of the Haywood claim; and 4) the breach or violation of the duty of good faith and fair dealing was the direct cause of any damages sustained by Plaintiffs. *Norris I*, at ¶ 9 (citing *Badillo v. Mid Century Ins. Co.*, 2005 OK 48, ¶ 25, 121 P.3d 1080).

First, the law of the case doctrine provides that an issue already litigated and settled on appeal, or which could have been settled in that appeal, may not be the subject of further litigation between the parties in that case. *Acott v. Newton & O'Connor*, 2011 OK 56, ¶ 10, 260 P.3d 1271; *State ex rel. Pruitt v. Native Wholesale Supply*, 2014 OK 49, ¶ 18, 338 P.3d 613. If the appellate court reverses and remands the case, it "returns to the trial court as if it had never been decided, save only for the 'settled law' of the case. The parties are relegated to their prejudgment status and are free to re-plead or re-press their claims as well as defenses." *Smedsrud v. Powell*, 2002 OK 87, ¶ 13, 61 P.3d 891. The doctrine "applies when the facts and issues are materially or substantially the same in both appeals, or where new testimony is merely cumulative." *Gay v. Hartford Underwriters Ins. Co.*, 1995 OK 97, ¶ 17, 904 P.2d 83. Finally, there is only "one exception to the settled-law-of-the-case doctrine—the doctrine does not apply where the prior decision was palpably erroneous and [that failure to reverse it] will result in gross [or manifest] injustice." *Native Wholesale Supply*, 2014 OK 49, ¶ 19. *See Bierman v. Aramark Refreshment Servs., Inc.*, 2008 OK 29, ¶ 13, 198 P.3d 877. "This exception is one of limited application and is employed only in the most extreme circumstances." *Bierman, id. See also Worsham v. Nix*, 2006

OK 67, ¶ 29, 145 P.3d 1055 (the exception is not a "license to review otherwise final appellate decisions, except in the most extreme circumstances.").[3]

In *Norris I*, Plaintiffs presented evidence of the nature of Kline's employment, the reason he was driving a NAS-owned vehicle, and what he was doing at the time of the accident, as well as evidence Zurich's adjuster was unfamiliar with Oklahoma law and that he failed to properly investigate the claim. Zurich presented conflicting evidence. However, considering all evidence favorable to Plaintiffs, *Norris I* held it was properly a jury question whether Kline was in the course and scope of employment, and whether Zurich's claims-handling conduct was unreasonable.

On remand, Plaintiffs presented substantially the same evidence. Zurich, though, introduced new evidence bearing on the scope of employment issue, including admissions from Kline that he was not on a mission for NAS at the time of the accident. Thus, we reject Plaintiffs' assertion that law of the case applies to this issue and find the trial court properly decided Zurich's motion on the case presented on remand. *ONB Bank & Tr. Co. v. Kwok*, 2018 OK CIV APP 33, ¶ 29, 417 P.3d 393.

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[3] The Dissent has not established that *Norris I* was palpably erroneous or that failure to reverse it will result in gross or manifest injustice. Notably, the Dissent does not even address whether failure to reverse *Norris I* would result in gross or manifest injustice.

Regarding the merits of Zurich's motion, Plaintiffs presented evidence on whether Kline was in the course and scope of employment and whether Zurich acted unreasonably in handling the claim. For instance, Kline testified he needed the employer vehicle to be on-call and that he was responsible for opening the dealership. Plaintiffs also presented evidence Zurich knew its chances of prevailing on the issue were slim, and that it acted from profit motives in handling the claim. Though Zurich cites to conflicting evidence, as noted above, our standard of review requires us to consider the evidence favorable to Plaintiffs as true, including all reasonable inferences to be drawn. We cannot say there was an entire absence of proof on the questions of whether Kline was in the course and scope of employment or whether Zurich's conduct was unreasonable. Thus, the trial court correctly denied Zurich's motion for directed verdict, and the case was properly submitted to the jury.

2. Jury Instructions

Zurich further contends the trial court committed reversible error by denying its requested Instructions 25 (the going and coming rule), 26 (the effect of the presumption), 28 (legitimate disputes), and 57 (on-call employees).

In reviewing jury instructions given or refused, this Court must consider the instructions as a whole and evaluate "the accuracy of the statement of law as well as the applicability of the instructions to the issues." *Johnson v. Ford Motor Co.*,

2002 OK 24, ¶ 16, 45 P.3d 86. *See also Bierman*, 2008 OK 29, ¶ 22; *Myers*, 2002 OK 60, ¶ 29; *Woodall v. Chandler Mat'l Co.*, 1986 OK 4, ¶ 13, 716 P.2d 652. The test of reversible error in giving or refusing jury instructions is "whether the jury was misled to the extent of rendering a different verdict than it would have rendered had the errors not occurred." *Taliaferro v. Shahsavari*, 2006 OK 96, ¶ 25, 154 P.3d 1240.

a. Going and Coming Rule

First, Zurich asserts the trial court erred by failing to instruct the jury on the legal rules governing whether an employee is in the course and scope of employment while commuting to and from work.

On remand, the trial court instructed the jury with Oklahoma Uniform Jury Instruction (OUJI) 6.7,[4] a general statement on course and scope of employment that did not inform the jury of the going and coming rule and the exception discussed above in *Skinner*.[5] While the court acknowledged OUJI 6.7 did not follow *Norris I*, it apparently believed it was required to instruct using only OUJI.

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[4] The trial court's instruction (Instruction 11) provides: "An employee is acting within the scope of his employment if he is engaged in work which has been assigned to him by his employer, or is doing that which is proper, usual, and necessary to accomplish the work assigned to him by his employer or is doing that which is customary within the particular trade or business in which the employee is engaged."

[5] As previously noted, an employee commuting to work is generally not in the course and scope of employment, i.e., the going and coming rule. *Skinner*, at ¶ 4 n.7; *Norris I*, at ¶ 13. There is an exception if the employee is rendering a service to or conferring a benefit on the employer while commuting. *Skinner*, at ¶ 5; *Norris I*, at ¶¶ 13-14.

However, "when a jury instruction fails to aid the jury by accurately reflecting the applicable law, the trial court should alter, supplement, or replace the erroneous instruction." *In re T.T.S.*, 2015 OK 36, ¶ 18, 373 P.3d 1022. *See also* 12 O.S.2022, § 577.2 ("Whenever OUJI does not contain an instruction on a subject on which the court determines that the jury should be instructed, the instruction given on that subject should be simple, brief, impartial and free from argument."). Furthermore, "the giving of a general instruction which covers the subject in an abstract way does not justify the refusal of a particular instruction correctly applying the law to a specific situation, when such instruction was properly requested." *Woodall*, 1986 OK 4, ¶ 11. A source for such jury instructions is Oklahoma case law, including, here, *Skinner* and *Norris I.*

We reject Plaintiffs' assertion that review of Zurich's requested instructions is precluded because those issues were or could have been resolved in *Norris I.* The trial court has a duty to instruct the jury on the fundamental issues raised by the pleadings and the evidence. *Taliaferro*, ¶ 25; *Woodall*, 1986 OK 4, ¶ 10. Failure to do so is grounds for a new trial. *Taliaferro*, *id.* Clearly, a fundamental issue before the jury was whether Kline was in the course and scope of employment while commuting to work.

Accordingly, the court's general instruction on course and scope of employment did not accurately reflect the applicable law on a critical issue before

the jury. Because the jury was not instructed on the going and coming rule and its exception consistent with *Skinner* and *Norris I*, we agree with Zurich that the jury was probably misled regarding the legal standards they should apply to the evidence, resulting in a miscarriage of justice.[6]

b. Presumption and Rebuttal

Zurich further contends the trial court erred by failing to give its proposed Instruction 26, which would have informed the jury on the presumption that arises when an employee is driving an employer-owned vehicle at the time of the accident and that Zurich had met its burden of rebutting the presumption.

In denying the requested instruction, the trial court cited *Norris I*, which held that once the presumption is rebutted, the presumption disappears, "and the jury should not be instructed of its former procedural function." *Id.* at ¶¶ 29-31. However, *Norris I* also stated, "[i]n this bad faith action, we conclude that the instruction [on the presumption] did not accurately state the law. We do not reach the question of whether the jury should have been instructed about the effect of a presumption in the Haywood case." *Id.* at ¶ 31 n.2.

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[6] We reject Zurich's assertion the trial court erred in rejecting Instruction 57, which addressed on-call employees. *Norris I* addressed the issue of on-call employees, stating the determination of whether an employee is in the course and scope of employment requires a focus on the work duties. *Id.* at ¶ 12. Ultimately, COCA held the key issue is whether the employee was rendering a service to, or conferring an incidental benefit upon, the employer at the time of the accident. *Id.* at ¶¶ 12-15. Accordingly, OUJI 6.7 and an instruction on the going and coming rule and the exception adequately address the issue of on-call employees.

In the present case, the parties introduced evidence at trial discussing the presumption and rebuttal, including, *inter alia*, correspondence in Zurich's claim file between Haywood and Zurich's adjuster regarding the parties' interpretation of Oklahoma law on the issue. While the evidence concerned Zurich's opinion of coverage while handling the Haywood claim and therefore went to the reasonableness of its actions, the jury heard evidence about the presumption and its rebuttal without any instruction on it, including the effect of the procedural function in this case. Further, the parties discussed the presumption in arguments to the jury. Given such evidence and argument about the presumption was presented to the jury, it was necessary for the trial court to instruct the jury on the presumption's procedural function to ensure it was not misled or confused on the applicable legal standards.

Given no such instruction was given, we find the jury was probably misled regarding the legal standards they should apply to the evidence presented, resulting in a miscarriage of justice.

On remand, as part of its vicarious liability instructions, the trial court should instruct the jury on the general principles of the going and coming rule and its exception as set out in *Skinner*. The court should then separately advise the jury that evidence has been presented about the presumption that arises when an employee is driving an employer-owned vehicle at the time of the accident as well

as evidence rebutting the presumption. The law of the case in *Norris I*, which the trial court followed in the present case, dictates that Zurich met its burden to rebut the presumption, and the presumption disappears. But unlike the present case, the court should also instruct the jury that it has decided this question as a matter of law and neither the presumption nor its rebuttal should be considered by the jury in deciding whether Kline was acting in the course and scope of his employment at the time of the accident. Because the record is replete with discussions between the parties about the presumption, its rebuttal, and the effect of both on the questions of coverage and the propriety of Zurich's handling of the claim, the jury must be told to disregard the presumption and its rebuttal for purposes of determining the question of vicarious liability. For clarity, the trial court may wish to refer by number to the specific jury instructions governing the jury's consideration of the vicarious liability/course and scope of employment question.

c. Legitimate Dispute

Zurich contends the court erred in rejecting Instruction 28, which provided an insurer's decision to withhold or delay payment is not unreasonable or in bad faith if, at the time of the decision, it had a legitimate dispute concerning coverage.

In Oklahoma, the unreasonableness of the insurer's actions is the essence of a bad faith claim. *Barnes v. Okla. Farm Bur. Mut. Ins. Co.*, 2000 OK 55, ¶ 31, 11 P.3d 162. The critical question is "whether the insurer had a good faith belief, at

the time its performance was requested, that it had a justifiable reason for withholding [or delaying] payment under the policy." *Ball v. Wilshire Ins. Co.*, 2009 OK 38, ¶ 22, 221 P.3d 717. *See also Norris I*, at ¶ 21 (citing *Buzzard v. Farmers Ins. Co.*, 1991 OK 127, ¶ 11, 824 P.2d 1105). If there is a "legitimate dispute concerning coverage or no conclusive precedential legal authority requiring coverage," withholding or delaying payment is not unreasonable or in bad faith. *Porter v. Okla. Farm Bur. Mut. Ins. Co.*, 2014 OK 50, ¶ 23, 330 P.3d 511.

Here, Zurich presented evidence and argument that its actions were reasonable because it had a legitimate dispute as to whether Kline was in the course and scope of employment under Oklahoma law, including Kline's admissions he was not on a mission for NAS at the time of the accident. Conversely, Plaintiffs presented evidence and argument that Zurich did not have an honest belief it could defend Plaintiffs on the scope of employment issue because it failed to adequately investigate the issue, disregarded applicable law for months, and knew the facts were against it. Plaintiffs assert Zurich ignored their interests and gambled with their financial future on the slim chance a jury would find Kline not in the course and scope of employment.

Below, the trial court instructed the jury on the general elements of the tort of bad faith with OUJI 22.3 (modified).[7] OUJI 22.3 is a correct statement of law on the elements of the tort of bad faith. Under the circumstances of this case, however, it should have been augmented with an additional instruction addressing the fundamental issue raised by the pleadings and the evidence. *Taliaferro*, 2006 OK 96, ¶ 25; *Woodall*, 1986 OK 4, ¶ 11. Specifically, we refer to the critical question of whether Zurich had "a good faith belief, at the time its performance was requested, that it had a justifiable reason for withholding [or delaying] payment under the policy." *Ball*, 2009 OK 38, at ¶ 22; *Norris I*, at ¶ 21. Again, it "is the trial court's duty to instruct on the fundamental issues of a case." *Taliaferro*, 2006 OK 96, ¶ 25. "Failure to do so is grounds for a new trial." *Id.*

Given no such instruction was given, we find the jury was probably misled regarding the legal standards they should apply to the issues raised and the evidence presented, resulting in a miscarriage of justice.[8]

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[7] The trial court's instruction (Instruction 13) provided: Plaintiffs claim that Defendants violated their duty of good faith and fair dealing by unreasonably, and in bad faith, refusing to settle a claim against [Plaintiffs] within the policy limits. In order for Plaintiffs to recover damages in this case, they must show by the greater weight of the evidence: 1) That Plaintiffs were covered under the liability insurance policy, 2) That Defendants' actions were unreasonable under the circumstances, 3) That Defendants did not deal fairly and in good faith with Plaintiffs, and 4) The violation by Defendants of their duty of good faith and fair dealing was the direct cause of the injury sustained by Plaintiffs.

[8] Contrary to the Dissent's assertion that this Court is requiring such an instruction in every bad faith case, i.e., that this instruction is mandatory, the Opinion is limited to the case before us where a fundamental issue raised by the pleadings and evidence was whether Zurich had a legitimate dispute concerning coverage under Oklahoma law. Accordingly, *Linn v. Okla.*

CONCLUSION

We find the trial court erred by failing to instruct on fundamental issues on which evidence and argument were presented to the jury—specifically, the going and coming rule, the effect of the court's ruling on rebutting the presumption, and whether Zurich had a good faith belief that it had a justifiable reason for withholding or delaying payment consistent with *Norris I.* There is a probability the jurors were misled by the omissions, and thereby reached a different conclusion than they would have otherwise reached had they been properly instructed. Accordingly, the November 4, 2021 judgment on the verdict is reversed, and the matter remanded for further proceedings consistent with this Opinion.[9]

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WISEMAN, J. (sitting by designation), concurs, and BLACKWELL, J., dissents.

BLACKWELL, J., dissenting:

The majority reverses for a third trial in this matter because the trial court failed to give three of the thirty-seven non-OUJI instructions Zurich requested at the second trial. However, none of these three instructions were necessary below

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Farm Bur. Mut. Ins. Co., 2020 OK CIV APP 62, 479 P.3d 1013, which addressed a purported request by the defense that such an instruction be mandatory in all bad faith cases, is clearly inapposite.

[9] Because we reverse the judgment and remand for further proceedings, all remaining assertions of error are moot.

or required by *Norris I*. Requested instructions 25 ("the coming-and-going rule") and 26 ("the effect of the presumption"), each of which the majority requires to be given on remand, are both in direct conflict with an unbroken line of Oklahoma Supreme Court cases that began in 1924 and 12 O.S. § 2303, which has remained unchanged since the enactment of the Oklahoma Evidence Code 1978. Instruction 28 ("legitimate disputes")—despite requests—has never been required by the Oklahoma Supreme Court and has been properly rejected by another division of this Court. The judgment entered on a jury's verdict should be affirmed. Accordingly, I respectfully dissent.

Underlying this case is the decision in *Norris I*, that the first trial court erred in its instruction as to what to do with the presumption created because (as was undisputed in both trials) Kline was driving an employer-owned car at the time of the accident. For the following reasons, I would hold that *Norris I* was palpably erroneous and should not be followed if doing so would result in gross injustice.[1] *State ex rel. Pruitt v. Native Wholesale Supply*, 2014 OK 49, ¶ 18, 338 P.3d 613.

Section 2303—the product of a compromise between two competing academic theories of how to best contend with the evidentiary conundrum created by presumptions in the law—recognizes two classes of presumptions: those where

[1] However, as noted below, even if the mandate of *Norris I* was required to have been followed on remand, I cannot find that the trial court deviated from *Norris I*'s holding in this case. See, *infra*, pgs. 23-24.

the basic fact demonstrated has *any* probative value as to the existence of the presumed fact ("category-one presumptions") and those where it does not ("category-two presumptions"). The reversal of *Norris I* was *entirely premised* on the understanding that the presumption regarding scope of employment that arises when an employee is driving a company-owned vehicle is a category-two presumption. *Norris I*, ¶ 29-31. *This is demonstrably wrong.* The fact that an employee is driving an employer-owned vehicle clearly has *some* probative value as to question whether an employee is operating that vehicle as an employee. Indeed, the Evidence Subcommittee Notes from 1978, when section 2303 was passed, in noting that "[n]early all presumptions are" category-one presumptions, *used the specific example of an employer-owned vehicle as a canonical category-one presumption*. OKLA. ST. ANN. tit. 12, § 2303 (West 2020) (Evidence Committee Notes) (noting that "[a]mong the most common examples" of category-one presumptions "are the presumption against suicide, the presumption of death from seven years disappearance without tidings, ***the presumption that a vehicle driven by a regular employee of the owner was being driven in the course of the owner's business***, and the presumption of due delivery to addressee of a letter properly addressed, stamped and mailed." (emphasis added)).[2] Thus, the basis for

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[2] An example of a category-two presumption—which appear to be few and far between—appears in *Corbyn v. Oklahoma City*, 1946 OK 77, 172 P.2d 384. In that case the court referenced the following presumption:

reversal in *Norris I* is contrary to law. The trial court should never have been instructed on remand that it could not give an instruction regarding the proper presumption. And, as discussed below, the instruction given in *Norris I* on the coming-and-going rule was not in error; the first jury's verdict should have been affirmed.

Since 1924, the Oklahoma Supreme Court has held that if an employee is driving an employer-provided a vehicle—*even if just back and forth to work*—the employee is presumed to be in the scope of employment at the time of the accident. *Stumpf v. Montgomery*, 1924 OK 360, ¶ 0, 226 P. 65 (syllabus of the Court). While *Norris I* cites *Stumpf* several times, it failed to take this key holding from the case, and instead cited it for what a court was to do at that time when there is evidence rebutting the presumption—*i.e.*, disregard the evidence and allow the jury to make the decision without any presumption at play.[3] But, as noted above this procedure was overruled in 1978 (at the latest) with § 2303 when the fact establishing the presumption has *any* probative value as to the presumed fact.

> A grantor of land abutting on a railway right of way who owns the fee of the right-of-way subject to the burden thereof and who subsequent to the conveyance of the abutting land owns no part of the land on either side of the right of way, is presumed to have conveyed his interest in the right of way, unless a contrary intention clearly appears or is expressed.

Id. ¶ 37, 392.

[3] *Stumpf* cites to Wigmore's view, which would have *all* presumptions as "category two" presumptions. *Stumpf*, 1924 OK 360, ¶ 12. But, as noted above, this view did not prevail in Oklahoma with the passage of § 2303.

Since *Stumpf*, a long line of cases has upheld the case's key holding—that there is a presumption of *respondeat superior* liability when an employee is driving an employer-owned vehicle. *Tidal Pipe Line Co. v. Black*, 1932 OK 817, 17 P.2d 388, stated the law clearly, and has never been overruled or called into question. The Court held: "[W]here a person is furnished an automobile in order to enable him to reach his work, the relation of master and servant continues during such trip so that the master is liable for injuries resulting from the negligence of the driver."[4] *Id.* ¶ 7, 388. *See also, e.g., Pollard v. Grimes,* 1949 OK 225, ¶ 10, 210 P.2d 778, 780; *Hintergardt v. Operators, Inc.*, 940 F.2d 1386, 1387 (10th Cir. 1991). In such cases, it is the employer's responsibility to rebut the presumption, and the burden of proof on the issue shifts to the employer. As in the above-cited cases, to rebut the presumption the employer is required to show the employee "was then using the car on a mission of his own." *Pollard*, ¶ 12, 781. The matter,

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[4] *Norris I* attempted to limit *Tidel* to its facts. *Norris I*, ¶34-35. I do not believe any such limitation can be read into the case, or subsequent cases citing *Tidel*. The rule of law is clear and unambiguous: every employee driving an employer-owed vehicle operates that vehicle as an employee *unless* the employer can show otherwise. As *Tidel* itself shows, whether the employee is coming or going to work is immaterial. The opposite rule, as epitomized by *Skinner v. Braum's Ice Cream Store*, 1995 OK 11, 890 P.2d 922, applies where an employee is driving a vehicle *not* owned by the employer (usually the employee's vehicle). In such cases, the employee is presumed *not* to be operating the vehicle in the scope of employment unless *the employer* can show otherwise. Thus, it becomes important whether the only evidence the employee can marshal is that he was on his way to or from work; such evidence is insufficient in and of itself to combat the presumption. The myriad of cases cited by *Norris I* on this issue are employee-owned vehicle cases.

as any other fact issue, is one for the jury unless it can be determined as a matter of law.[5]

Nevertheless, even if *Norris I* is regarded as the law of the case, we must determine if the trial court erred in the second trial in failing to give the defendant's requested, non-OUJI instructions 25 and 26. In my view, *Norris I* required only that the trial court on remand *not give* the instruction it set forth in ¶ 35 of that opinion. Although I view that instruction as an accurate statement of the law, nothing in *Norris I* dictates that the trial court give the non-OUJI instructions at issue here. Because, for the reasons set forth above, those instructions are in deep conflict with Oklahoma statutory law, and the law of

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[5] *Norris I* also states that "[n]o Oklahoma Supreme Court case has approved a jury instruction that requires the jury to decide whether a presumption has been met. It is a legal question for the judge to make at the close of evidence." *Norris I*, ¶ 31. I disagree. *See, e.g.*, *Fleming v. Baptist Gen. Convention of Oklahoma*, 1987 OK 54, ¶ 13, 742 P.2d 1087, 1092 (superseded by statute) ("Inasmuch as the statute providing a presumption of negligence was in effect at the time this case came to trial and is a procedural provision, the trial court cannot be found to have erred in instructing the jury in accord with the provisions thereof. Under the views expressed in *Middlebrook*, *supra*, it is not error to allow the jury to be instructed upon both negligence and statutory presumption of negligence where the plaintiff has produced evidence of discrete negligence."). *See also* OUJI 3.4 ("*If you find* that [insert a description of the basic fact], then the burden of proof is upon the [party against whom the presumption operates] to prove that [insert description of non-existence of the presumed fact] is more probably true than not true." (emphasis supplied)); OUJI 32.3 ("*If you find* that the [Specify Property] was found in close proximity to" a presumption regarding the specific property's use arises." (emphasis supplied)). Certainly if, in this case for example, it had been contested that Kline was Norris's employee or that Kline had permission to use Norris's car, and those facts could not be determined as a matter of law, resolution of those facts must be reserved for the jury, and it would have been proper to instruct the jury as such.

respondeat superior as articulated by the Oklahoma Supreme Court since 1924, I would not find the trial court erred in failing to give them.

I also cannot agree with the majority that the standard jury instruction on bad faith—OUJI 22.3—was inadequate in this case. The majority holds that in cases where payment is withheld by the insurer—*i.e.*, nearly all bad-faith cases—it is error not to give a supplemental "justifiable reason" instruction based on *Buzzard v. McDanel,* 1987 OK 28, 736 P.2d 157, and *Ball v. Wilshire Ins. Co.*, 2009 OK 38, 221 P.3d 717, 725, that the insurer did not act in bad faith if it had a "good faith belief, at the time its performance was requested, that it had a justifiable reason for withholding [or delaying] payment under the policy." *Majority Opinion*, pg. 16 (citing *Ball*, 2009 OK 38, ¶ 22).

Division IV (2020) of this court examined a similar question in detail in *Linn v. Oklahoma Farm Bureau Mut. Ins. Co.*, 2020 OK CIV APP 62, 479 P.3d 1013 (cert. denied October 5, 2020) and reached the opposite conclusion.[6] In that case, Oklahoma Farm Bureau requested a substantially identical "justifiable reason" instruction which was refused. As the Court noted at that time:

> The scope of OFB's argument that the current uniform instruction, standing alone, does not accurately state the law goes well beyond the current case. OFB inherently argues that a jury cannot decide a bad faith case in a manner consistent with the law of Oklahoma unless additional instructions beyond the standard uniform instruction are

[6] Although Norris cites to *Linn* in its answer brief, neither Zurich nor the majority address the case.

> given. It inherently argues that new mandatory instructions have been necessary since 1978 at the earliest, and 2009 at the latest.

Id. ¶ 45.[7]

Linn noted that "[w]e find no indication that the Oklahoma Supreme Court Committee for Uniform Jury Instructions has recommended any change in OUJI No. 22.2," and that, despite the passage of at least eleven years since *Ball* neither the Supreme Court nor the legislature had made such an instruction mandatory. I see no further change in the law since 2020 that would make it mandatory some fifteen years after *Ball* and thirty-five years after *Buzzard.* OUJI 22.3 is sufficient to have allowed Zurich to make its argument that its multi-year delay in paying out this policy was not done in bad faith.[8] I would follow *Linn* and not create a split of authority among the divisions of this Court.[9]

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[7] Although *Ball v. Wilshire* is a most recent statement of the "legitimate dispute" rule, it dates back as far as *Manis v. Hartford Fire Ins. Co.*, 1984 OK 25, ¶ 12, 681 P.2d 760, 762 (holding that "[a] [bad faith] cause of action will not lie where there is a legitimate dispute") and arises in the form requested here in *Buzzard v. McDanel,* 1987 OK 28, ¶ 10, 736 P.2d 157, 159.

[8] OUJI 22.3 repeatedly uses terms such as "duty of good faith and fair dealing," "unreasonably," "bad faith," and "unreasonably under the circumstances." Such language allows ample room for Zurich to have made its argument to the jury that it acted reasonably under the circumstances in first denying coverage and then delaying payment due to a legitimate dispute as to coverage. Indeed, it has now made that argument to two separate juries, albeit unsuccessfully.

[9] It also appears the majority applied an incorrect standard of review as to the requested supplemental instructions. The majority applies the standard of review for "improper instructions," and evaluates whether there was a "probability that the jury was misled into reaching a different result." *Majority Opinion,* pg. 5. This is not an improper instruction case, as the majority agrees that each instruction given was appropriate. Rather, Zurich argued that it was entitled to *supplemental*, non-OUJI instructions, as discussed above. *Badillo v. Mid Century Ins. Co.*, 2005 OK 48, 121 P.3d 1080, clearly differentiates between the refusal of supplemental instructions and the giving of erroneous instructions:

For these reasons, I respectfully dissent from the majority opinion in this case. I have further reviewed each of the additional errors Zurich alleges and find no reversible error. The judgment entered on the jury's verdict should be affirmed.

May 24, 2024

> When the trial court submits a case to the jury under proper instructions on its fundamental issues and a judgment within the issues and supported by competent evidence is rendered in accord with the verdict, the judgment will not be reversed for refusal to give additional or more detailed instructions requested by the losing party, *if it does not appear probable that the refusal has resulted in a miscarriage of justice or substantial violation of constitutional or statutory rights.*

Id. ¶ 50, n.15 (emphasis supplied). Conversely: "'A judgment will not be disturbed because of allegedly erroneous instructions, unless it appears reasonably certain that the jury was misled thereby.'" *Id.* (quoting *Johnson v. Ford Motor Co.*, 2002 OK 24, ¶ 16, 45 P.3d 86, 92-93). The majority applies the latter standard where it should have applied the former.