



ORIGINAL

NOT FOR OFFICIAL PUBLICATION
See Okla.Sup.Ct.R. 1.200 before citing.

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

JUL -9 2026

SELDEN JONES
CLERK

SHARON AL RIFAI,

Plaintiff/Appellant,

vs.

BOB CARTER, as Special
Administrator of the Estate of Margaret
Briggs, Deceased,

Defendant/Appellee.

Case No. 122,145

Rec'd (date)	7-9-26
Posted	☒
Mailed	☒
Distrib	☒
Publish	yes ☒ no ☒

APPEAL FROM THE DISTRICT COURT OF
LEFLORE COUNTY, OKLAHOMA

HONORABLE JONATHAN SULLIVAN, TRIAL JUDGE

REVERSED AND REMANDED WITH DIRECTIONS

Rick W. Bisher
Riley Bisher
RYAN BISHER RYAN & SIMONS
Oklahoma City, Oklahoma

For Plaintiff/Appellant

Eric J. Begin
Bradley E. Bowlby
STARR, BEGIN & KING, PLLC
Tulsa, Oklahoma

For Defendant/Appellee

OPINION BY JANE P. WISEMAN, PRESIDING JUDGE:

Plaintiff Sharon Al Rifai appeals a judgment in favor of Defendant Bob

Carter, as special administrator of the Estate of Margaret Briggs, entered on a jury verdict in this negligence case. After review, we reverse the order of the trial court and remand with directions.

FACTS AND PROCEDURAL BACKGROUND

On July 9, 2019, the parties were involved in a motor vehicle accident. Plaintiff brought the present negligence action against Defendant¹ alleging she and her minor child² sustained injuries requiring medical treatment. In the pretrial order, Defendant admitted fault for causing the accident but denied Plaintiff's damage claims.

The jury trial proceeded on Plaintiff's damages claims. During the jury instruction conference, Plaintiff objected to Defendant's proposed instruction on intervening cause and its modification of OUJI-CIV No. 4.1 regarding what to consider when determining damages. The trial court overruled the objections and gave both instructions. The jury returned a verdict in favor of Defendant, and Plaintiff appeals.

STANDARD OF REVIEW

"[T]he standard of review for jury instructions given or refused is whether a probability exists that jurors were misled, thereby reaching a different conclusion

¹ After the petition was filed, Defendant passed away and Bob Carter was appointed as the special administrator for defending this action on behalf of the Estate of Margaret Briggs.

² According to the pretrial order, the minor's claim was resolved by agreement.

than they would have reached but for [the] questioned instruction(s).” *Cimarron Feeders, Inc. v. Tri-County Elec. Coop., Inc.*, 1991 OK 104, ¶ 5, 818 P.2d 901.

“Reversible error exists upon discovery of a probability that jurors may have been misled and therefore reached a different result.” *Id.*

ANALYSIS

Plaintiff argued to the trial court that there was no basis for giving an intervening cause instruction in this admitted liability car accident case. The trial court itself was ambivalent about whether the evidence supported giving the instruction requested by the defense: “I’m trying to think back in the evidence if there’s anything that could be considered intervening.” Trial Tr., vol. III, p. 49, lines 12-14. Nevertheless, the court gave the instruction without specifically identifying what that “cause” was and despite using OUJI-CIV 9.8’s definition of “intervening cause” in the instruction as “another event [that] intervened between” Margaret Briggs’ negligent act and Plaintiff’s injury.

First, we note that Defendant never raised intervening cause as an affirmative defense in his answer, in a potential motion to amend his answer, or in the pretrial order. It is Defendant’s duty to raise in his answer any affirmative defense to Plaintiff’s petition against him. *See* 12 O.S.2021 § 2008(C); *Tulsa Ambulatory Proc. Ctr. v. Olmstead*, 2024 OK 57, ¶ 15, 558 P.3d 374 (“Under subsection C, a party responding to a pleading set forth in subsection A, *shall* raise

any affirmative defenses in an original responsive pleading.”). Failure to do so may result in a waiver of that defense. *See id.* By relying on the failure to list this defense in the pretrial order (or at any previous time), the trial court should have excluded it pursuant to Rule 5(I) of the Rules for the District Courts, 12 O.S.2021, ch. 2, app. (The pretrial “order shall control subsequent course of the action unless modified by a subsequent order.” And, “The contents of the pretrial order shall supersede the pleadings and govern the trial of the case unless departure therefrom is permitted by the Court to prevent manifest injustice.”).

The challenged Instruction No. 19 comes from OUJI-CIV No. 9.8.

Instruction No. 19 on “intervening cause-definition” given to the jury states:

An intervening cause is one that interrupts or breaks the connection between a defendant’s act and a Plaintiff’s injury. Margaret Briggs’ act would not be a direct cause of Sharon Al Rifai’s injury if another event intervened between the two and that event was

1. Independent of Margaret Briggs['] act;
2. Adequate by itself to cause Sharon Al Rifai’s injury; and
3. Not reasonably foreseeable by Margaret Briggs.

The Supreme Court specified the requirements for the proper application of Instruction No. 9.8 on the question of intervening cause in *Thompson v.*

Presbyterian Hospital, Inc., 1982 OK 87, ¶ 15, 652 P.2d 260:

The intervening factor which will break the causal nexus between the defendant’s negligence and the resulting injury is called in law the “supervening” cause. A true supervening cause that will operate effectively to

insulate the original actor from liability must meet a three-prong test. It must be (1) independent of the original act, (2) adequate of itself to bring about the result and (3) one whose occurrence was not reasonably foreseeable. Unless these characteristics are met, the chain of causation which extends from the original act to the injury is not broken. Whenever the causal factor under examination qualifies as one of supervening quality, the original negligence may be said to undergo a legal metamorphosis into a remote cause or “mere condition.”

(Footnotes omitted.)

Defendant clearly cannot argue that Plaintiff’s previous auto accidents in 1994 and 2009 were “intervening causes” because they occurred *before* the current collision in 2019 and not *between* the current collision and Plaintiff’s injuries. The only remaining argument made for this instruction lies in Defendant’s reference to a “flare up” in Plaintiff’s condition in March 2022 as an “intervening cause.” If this were truly an intervening act, Defendant should have raised it as an affirmative defense in the pretrial order filed more than a year and a half later in October 2023.

Under the evidence presented, we find this “flare up” to be insufficient to constitute an “intervening cause” as a matter of law, particularly when it manifests nearly two and a half years after the collision and appears to be a worsening of her pre-existing condition, not a new injury. We must consider whether this “flare up” really is “independent of the original act” as all truly intervening causes must be.

The record highlights four bases for finding no evidentiary support for submission of this defense to the jury: (1) Defendant offers no occurrence or event causing the “flare up,” (2) Plaintiff’s worsening condition cannot be said to be “independent of the original act” (the collision at issue), (3) no one testified that the “flare up” was “adequate of itself” to bring about the injuries complained of, and (4) with her condition, the occurrence of this “flare up” cannot be said to be “not reasonably foreseeable.” The defense of intervening cause was never intended for circumstances such as those presented here.

The Court in *Watson v. BNSF Railway Co.*, 2024 OK 74, 561 P.3d 67, enunciated the test on a challenged jury instruction: “[A]n appellate court reviews alleged errors in the instructions for whether a probability exists that jurors were misled and reached a different conclusion than they would have reached but for the questioned instructions.” *Id.* ¶ 11.

Without an evidentiary basis for consideration of this intervening cause issue, we cannot conclude that the probability of the jury being misled is nonexistent. This is a straightforward, admitted liability auto collision case which has been confused by an issue not supported by the evidence or the law. It is not enough to say that the jury could have found Plaintiff was not injured in this accident and the offering of this defense and Instruction No. 19 were harmless error. We would know this was the jury’s finding if the jury had found for the

Defendant without considering “intervening cause” as a complete defense to Plaintiff’s claims. However, based on the record presented and the emphasis Defendant gave to Plaintiff’s two previous accidents and her 2022 “flare up,” a probability exists that the jury was misled and confused by the erroneous instruction on intervening cause and reached a different conclusion than they would have without it. The Supreme Court’s conclusion in *Bouziden v. Alfalfa Electric Cooperative, Inc.*, 2000 OK 50, 16 P.3d 450, is instructive on this point:

The jury entered a general verdict in favor of [the defendant] and against the plaintiffs. The challenged instruction interjected intervening cause as a central issue in the case. It provided [the defendant] with a complete defense which was not available to it under the evidence. It is almost axiomatic that to submit an issue unsupported by competent evidence to the jury would be prejudicial error on the part of the trial court. We find there is a probability that the jurors were misled and thereby reached a different result than would have been reached but for the erroneous instruction. Accordingly, this case must be reversed and remanded to the district court.

Id. ¶ 36 (footnote omitted).

For these reasons, we reverse the judgment of the trial court and remand for a new trial.³

³ We further direct the trial court not to modify OUJI-CIV No. 4.1 to exclude “past and future” as to mental and physical pain and suffering and “past and future” as to medical expenses, which is Plaintiff’s other ground for complaint on appeal. The court gave no explanation for the modification, and under the evidence presented, these were issues for the jury to decide.

CONCLUSION

Based on our reasoning above, we reverse the judgment of the trial court and remand for a new trial.

REVERSED AND REMANDED WITH DIRECTIONS.

FISCHER, J., concurs, and BLACKWELL, J., dissents.

BLACKWELL, J., dissenting:

For the following reasons, I respectfully dissent. The judgment entered on the jury's verdict should be affirmed.

The plaintiff first argues that the court erroneously gave the jury an instruction for intervening cause.¹ The defendant argued at trial, and now argues on appeal, that testimony that the plaintiff had a "flare up" in March of 2022, almost three years after the accident, provided an evidentiary basis for the intervening cause instruction. Tr. (March 26, 2024), pg. 58. After her flare up, the plaintiff presented to her primary care physician, Dr. Grim, in a wheelchair as she was unable to walk. According to the defendant, the sudden onset of the flare up

¹ The majority faults the defendant for failing to plead "intervening cause" as an affirmative defense. However, in addition to the fact that the plaintiff never raised this alleged infirmity, per the Oklahoma Supreme Court there is never a reason to plead "intervening cause" as an affirmative defense, as "[s]uch a defense is not an affirmative defense." *Long v. Ponca City Hosp., Inc.*, 1979 OK 32, ¶ 19, 593 P.2d 1081, 1087. Rather, "[i]t is a denial of one of the essential elements of a cause of action in tort, i.e., that the injury was proximately caused by the defendant's negligence." *Id.* To that end, neither "intervening cause" nor "supervening cause" are specifically listed as "affirmative defenses" in 12 O.S. § 2008.

“was caused independently, whether by a traumatic event or an aggravation of the Plaintiff’s degenerative spinal condition taking place subsequent to the collision at issue.” *Answer Brief*, pg. 10.

Irrespective of whether a flare up of a preexisting condition can constitute an intervening cause, the relevant question on appeal is whether “the record demonstrates the probability that the jury was so misled by the alleged errors to cause a different verdict.” *Coryell Roofing & Constr., Inc. v. Burgess Farms, LLC*, 2025 OK 80, ¶ 3 (citing *Watson v. BNSF Ry. Co.*, 2024 OK 74, ¶ 15, 561 P.3d 67, 72). Put another way, is it likely the jury would have found for Ms. Al Rifai but for the court’s decision to give the intervening cause instruction?² Upon review, I find it unlikely that the jury would have issued a different verdict absent the intervening cause instruction as there was ample evidence, as detailed below, to support the finding that Ms. Rifai was not injured in the 2019 accident, and the instructions, read as a whole, were not misleading.

The jury heard testimony from the plaintiff’s primary care physician Dr. Glora Grim. Dr. Grim had been seeing the plaintiff roughly every three months since 2016. Dr. Grim noted that immediately after the accident, the

² This formulation stands in contrast the majority’s reframing. The Court says, “[w]ithout an evidentiary basis for consideration of this intervening cause issue, we cannot conclude that the probability of the jury being misled is *nonexistent*.” *Majority Opinion*, pg. 6 (emphasis supplied). But we must determine whether the allegedly erroneous instruction created a probability, not a possibility, that the jury was misled.

plaintiff was diagnosed with a cervical strain. Tr. (March 25, 2024), pg. 87. There was no evidence of any fractures, dislocations, or misalignments. *Id.* at 88. Ms. Al Rifai was prescribed a prescription dose (400 mg) of ibuprofen after the accident and eventually switched to tramadol. *Id.* at 77-78. However, it appears that she had already been prescribed a 400 mg dose of ibuprofen in as early as 2017 and refilled her prescription every few months leading up to the accident. *Id.* at 93-94. Notably, the plaintiff had been in two prior accidents, one in 1994 in Oklahoma and another in Florida in 2010. After the Florida accident, she had surgery in which three titanium discs were put in her neck. *Id.* at 114.

Dr. Grim testified that the plaintiff has degenerative joint disease, which occurs when the vertebrae have started to deteriorate. *Id.* at 62. The degeneration can then, in turn, cause a bilateral pars defect, which Dr. Grim defined as “a stress fracture on your vertebrae,” bone spurs, spondylosis, and osteoarthritis. *Id.* at 61-2. Dr. Grim reviewed one of the plaintiff’s MRIs taken after the accident, testifying that Ms. Al Rifai’s neck was compressed, there were bone spurs throughout her spine, she had multilevel spondylosis with severe disease, and pinched nerves. *Id.* at 64-67. However, Dr. Grim acknowledged that the plaintiff’s degenerative disc conditions existed before the accident and testified that these kinds of conditions take years to develop. *Id.* at 88. Further, she added

that the x-ray taken of the plaintiff's back the day after the accident contained the same types of findings as her pre-accident x-rays. *Id.* at 91.

Moreover, Dr. Grim reviewed a report comparing an x-ray of the low back taken September 9, 2019, two months after the accident, and a CT scan of the plaintiff's back that was done five years earlier. The report indicated that the degenerative changes had only mildly increased in the five-year period. *Id.* at 101. Dr. Grim opined that as the plaintiff was in her sixties, the kind of disc degeneration present in her case was normal. *Id.* at 100. Before the accident, Dr. Grim observed that the plaintiff had minimal complaints about pain which later increased after the accident. *Id.* However, Dr. Grim testified that she could not definitively say that the accident caused Ms. Al Rifai, a previously asymptomatic plaintiff with degenerative disc disease, to suddenly experience pain. *Id.* at 79. The plaintiff also experienced muscle spasms after the accident, and Dr. Grim testified that spasms are not necessarily an indicator that an injury has occurred; rather, they just demonstrate that the muscles are tight. *Id.* at 72. The plaintiff also complained of increased knee pain after the accident; however, Dr. Grim testified that the plaintiff had been diagnosed with osteoarthritis in both knees prior to the accident. *Id.* at 106. In summary, Dr. Grim could not affirmatively testify that the accident caused the plaintiff's increase in pain, all she could say was that it was a "strong possibility" that the accident exacerbated her prior conditions. *Id.* at 119.

The court instructed the jury on the basic elements of negligence. Jury Instruction 17, which was a modified version of OUJI 9.1, stated that the party claiming damages, in this case the plaintiff, had the burden of showing that she sustained injury, that the defendant was at fault (not at issue in this case as the defendant admitted liability), and that the negligence of the defendant was a direct cause of the injury sustained by the plaintiff. ROA 169. Further, Jury Instruction 18 defined direct cause as “a cause which, in a natural and continuous sequence, produces injury and without which the injury would not have happened.” ROA 170. Based on the evidence presented at trial, the jury could have concluded that the accident did not produce any additional injury to the plaintiff. She suffered no fractures, dislocations, or any additional injury as a result of the car accident. Rather, testimony elicited at trial suggests that her degenerative disc disease has mildly increased over the years, which in turn could cause increased pain via bone spurs, nerve impingement, and more. Dr. Grim stated that the accident *could* have caused the plaintiff’s reported increase in pain but could not say it was the cause with one-hundred percent certainty. Thus, even without the accident occurring, it is possible that this injury would have happened, suggesting the car accident may not have been a direct cause of the injuries alleged.

In light of this evidence and these instructions, I think that it is unlikely the jury was misled into rendering a decision it otherwise would not have but for the

intervening cause instruction. Accordingly, I would find the giving of this instruction was not reversible error.³

July 9, 2026

³ The majority cites *Bouziden v. Alfalfa Elec. Co-op., Inc.*, 2000 OK 50, 16 P.3d 450, as supporting reversal here. Therein, the Supreme Court reversed, finding that “[t]he challenged instruction interjected intervening cause as a central issue in the case.” *Id.* ¶ 36, 460. I do not find the same to be true here. Indeed, neither attorney so much as referenced the intervening-cause instruction or the doctrine in closing, but each focused almost exclusively on causation. I find any reliance on *Bouziden* inapposite.