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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

ROBERT BURGESS and KARRIE BURGESS, Individually, and as Parents and Next of Kin of ROBERT BLAKE BURGESS, Deceased,

Plaintiffs/Appellees,

v.

INTEGRIS HEALTH EDMOND, INC., BRET S. LANGERMAN, D.O., and EMERGENCY SERVICES OF OKLAHOMA, P.C.,

Defendants/Appellants.

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STATE OF OKLAHOMA
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No. 122,076
FOR OFFICIAL PUBLICATION

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY HONORABLE RICHARD OGDEN, DISTRICT JUDGE

¶ 0 In the fall of 2020, Robert Blake Burgess (Blake), a 21-year-old man, contracted COVID-19. He began having chest pain, shortness of breath, and lightheadedness, and his mother took him to the emergency room. Twenty days after being treated and discharged, Blake died from cardiac arrest as a consequence of pulmonary embolism with an underlying cause of COVID-19. Blake's parents, Plaintiffs/Appellees, Robert Burgess and Karrie Burgess (Parents), brought this wrongful death/medical negligence action against Defendants/Appellants, Integris Health Edmond, Emergency Services of Oklahoma, P.C., and Dr. Bret Langerman (Providers). Following a jury verdict and monetary award to Parents, Providers appealed and we retained the appeal. We hold that Providers are immune from liability under Oklahoma's COVID-19 Public Health Emergency Limited Liability Act for ordinary negligence and were entitled to a directed verdict under 63 O.S.2020, § 6406 as a matter of law. We further hold that Providers are not immune from liability under the federal Public Readiness and Emergency Preparedness Act (PREP Act) and that the trial court did

not err in granting a directed verdict in favor of Parents on the issue of intervening/supervening causation.

JUDGMENT OF DISTRICT COURT REVERSED REMANDED FOR NEW TRIAL.

Jason A. Ryan and Patrick R. Pearce, Jr.; Ryan Whaley, Oklahoma City, Oklahoma, and Brad Miller and Jami Rhoades Antonisse, Miller Johnson Jones Antonisse & White, PLLC, Oklahoma City, Oklahoma, for Plaintiffs/Appellees, Robert Burgess and Karrie Burgess.

Brandon C. Whitworth and Emily Jones Ludiker, Rodolf & Todd, Tulsa, Oklahoma, and Zachary Williams, Hall Booth Smith, P.C., Oklahoma City, Oklahoma, and Teresa Pike Tomlinson, Hall Booth Smith, P.C., Columbus, Georgia, for Defendants/Appellants Bret S. Langerman, D.O., and Emergency Services of Oklahoma, P.C.

David A. Branscum and Patrick R.B. Sherry, Foliart, Huff, Ottaway & Bottom, Oklahoma City, Oklahoma, and Catherine L. Campbell, Phillips Murrah P.C., Oklahoma City, Oklahoma, for Defendant/Appellant Integris Health Edmond, Inc.

OPINION

DARBY, J.:

¶ 1 The present case arises from a wrongful death/medical negligence action brought by Plaintiffs/Appellees Robert Burgess and Karrie Burgess (Parents), the parents of Robert Blake Burgess (Blake). Parents claim that Defendants/Appellants, Integris Health Edmond (Integris), Emergency Services of Oklahoma, P.C. (ESO), and Dr. Bret Langerman[1] (Providers) failed to diagnose and treat Blake for pulmonary embolism when he received treatment at the emergency

[1] Appellant, Emergency Services of Oklahoma, P.C. (ESO), is an emergency room physician placement service which contracts with Integris and employs Dr. Langerman. Langerman and ESO Br. in Chief 5. Dr. Langerman and ESO have filed combined responses and briefs in the present appeal. For purposes of this opinion, when Dr. Langerman's arguments and filings are discussed, we are referencing both Dr. Langerman and ESO.

room on September 14, 2020. Providers contend that they are immune from liability under the federal Public Readiness and Emergency Preparedness Act (PREP Act), 42 U.S.C. § 247d-6d, and Oklahoma's COVID-19 Public Health Emergency Limited Liability Act, 63 O.S.2020, § 6406. Providers further contend that the trial court erred in granting Parents' motion for directed verdict on the issue of intervening/supervening causation, and that the jury instructions on gross negligence did not accurately reflect the law.

¶ 2 Providers each filed a motion to retain the appeal, and this Court granted the motions.

I. BACKGROUND AND PROCEDURAL HISTORY

A. Factual History

¶ 3 In the fall of 2020, Blake Burgess, a 21-year-old student at the University of Oklahoma, was exposed to COVID-19. He experienced flu-like symptoms for a few days, and then began to feel better. After about a week, he began to suffer from chest pain during exertion, shortness of breath, and feeling like he might pass out. Blake went to an urgent care clinic in Norman on September 11, 2020, where he tested positive for COVID-19. He received an inhaler and was instructed to quarantine. Blake's symptoms did not improve, and on September 14, 2020, his mother took him to the emergency room at Integris, where he complained of shortness of breath and sharp stabbing pain in his right chest.

¶ 4 The essential facts are not in dispute regarding the treatment provided to Blake at Integris. The emergency room physician, Dr. Langerman, examined Blake and determined that he had normal vital signs, normal oxygenation rate, normal lung sounds, and no signs of lightheadedness or dizziness. Blake had no indication of blood clots in the extremities which might travel to the lungs. Dr. Langerman found that Blake had pleuritic chest pain (brought on by coughing, moving, palpation), cough, congestion, and shortness of breath.

¶ 5 Providers performed an EKG on Blake which indicated an abnormality and possible ischemia (lack of blood flow to the heart muscle) consistent with right heart strain. Dr. Langerman testified that it would have been his normal practice to inform Blake of the abnormal EKG, but no such discussion was documented in Blake's chart. In addition, Blake received a chest x-ray which showed an opacity on Blake's right lung. Dr. Langerman interpreted the x-ray as showing no acute issues and he did not note it as abnormal. After Blake's discharge, a hospital cardiologist read the EKG, and a radiologist read the chest x-ray. Both determined what they observed showed abnormal results. Although the reports were viewable on Blake's on-line Integris patient portal, there is no evidence that anyone advised Blake directly of his abnormal EKG or chest x-ray. Blake's mother testified that Blake's discharge papers only mentioned chest pain and COVID.

¶ 6 Pulmonary embolism (PE) is a serious condition where one or more arteries in the lungs become blocked by a blood clot.[2] Dr. Langerman testified that he considered PE as a possibility for Blake because shortness of breath and chest pain are common symptoms of PE. Dr. Langerman used an evaluation process known as the Pulmonary Embolism Rule-Out Criteria (PERC rule) to determine whether Blake was experiencing a PE.[3] Dr. Langerman ruled out PE as a possibility based on the PERC rule results, and did not order additional tests.

¶ 7 During the COVID-19 state of emergency, Integris implemented infection-control policies and procedures that included a "no visitor rule" for adult patients in the emergency room, limited entrance to designated areas, and related checkpoints staffed by a registration clerk. Integris' infection-control policy required the registration clerk to remain at the checkpoint unless another person was available to cover the station. On the night Blake was treated at the emergency room, the registration clerk had no one to relieve her, and she was not able to leave the checkpoint.

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[2] "Pulmonary embolism" is defined as "obstruction of a pulmonary artery or one of its branches that is usually produced by a blood clot which has originated in a vein of the leg or pelvis and traveled to the lungs and that is marked by labored breathing, chest pain, fainting, rapid heart rate, cyanosis, shock, and sometimes death." *Pulmonary embolism*, Merriam-Webster.com, https://www.merriam-webster.com/medical/pulmonary%20embolism (last visited May 20, 2026).

[3] The PERC rule involves a set of eight criteria: 1) age less than 50 years old; 2) heart rate less than 100 beats per minute; 3) oxygen saturation more than 95%; 4) no coughing up blood; 5) no unilateral leg swelling; 6) no recent surgery or trauma; 7) no history of deep vein thrombosis or prior PE; and 8) no hormone use. Trial Tr. vol. III, 40-43.

¶ 8 For patients with COVID-19, Integris also had heightened isolation procedures, requirements for caregivers to wear extra personal protection equipment (PPE), and additional infection-control steps for staff leaving a COVID-19 patient's room. Because Blake reported that he had tested positive for COVID-19, he was placed in a designated room under the hospital's isolation and infection-control policies. Only doctors and nurses were permitted to enter the area, and the registration clerk spoke with them by telephone.

¶ 9 After Blake was admitted to the emergency room, Blake's mother waited in her vehicle for approximately five minutes. She then returned to the registration desk and gave a handwritten note to the clerk advising that Blake had a family history of antithrombin III deficiency,[4] a blood clotting disorder, and

[4] MedlinePlus, an online service of the National Library of Medicine (NLM) and part of the National Institutes of Health (NIH), hosts the A.D.A.M. Medical Encyclopedia, which describes this condition as follows:

> Congenital antithrombin III (three) deficiency is a genetic disorder that causes the blood to clot more than normal.
>
> Antithrombin III is a protein in the blood that blocks blood clots from forming. It helps the body keep a healthy balance between bleeding and clotting. Congenital antithrombin III deficiency is an inherited disease. It occurs when a person receives one variant copy of the antithrombin III gene from a parent with the disease.
>
> The variant gene leads to a low level of the antithrombin III protein. This low level of antithrombin III can cause blood clots (thrombi) that can block blood flow and damage organs.

requested the clerk to take the note to the emergency doctor treating Blake. The record includes no evidence that anybody delivered the note to Dr. Langerman or communicated this information to the medical staff.

¶ 10 Blake's chart makes no mention of antithrombin III deficiency. Dr. Langerman determined that Blake's symptoms were due to his COVID-19 infection and released him to go home. Dr. Langerman also prescribed an anti-inflammatory drug and instructed Blake to continue to use his Albuterol inhaler. He also told Blake to follow up with his primary care physician in two days and to return to the ER sooner for any problems. Blake did not follow up with anyone.

¶ 11 Blake's symptoms continued to fluctuate until ten days later, on September 23, 2020, when he passed out after running up and down the stairs at his house, which prompted his roommates to call 911. The lead paramedic on the scene, William Chase Boyd, testified that when he arrived Blake was pale, but awake and alert, sitting upright on the couch. Blake advised Boyd that he now felt fine with no complaints, and that he had recently been diagnosed with COVID-19. Boyd evaluated Blake and concluded there was no indication of any critical condition. Boyd testified that nothing in Blake's presentation raised a concern that he was

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> People with this condition will often have blood clots at a young age for no reason. They are also likely to have family members who have had a blood clotting problem.

Congenital antithrombin III deficiency, A.D.A.M. Medical Encyclopedia, https://medlineplus.gov/ency/article/000558.htm (last visited May 20, 2026).

experiencing a PE. Blake adamantly refused to go by ambulance to the emergency room and stated that he felt comfortable staying home. Boyd testified that his standard approach is to try to convince each patient to go to the hospital ("you call we haul"). But after staying on the scene for a few minutes, he noted Blake was no longer pale, seemed to be improving, was acting appropriately for a 21-year old male, and was even joking around. Boyd testified that he was comfortable with Blake remaining at home. Blake signed a "Release for Patient's Refusal to Accept Medical Care or Transportation to a Medical Care Facility."

¶ 12 Five days later, on September 28, 2020, Blake's condition took a turn for the worse. He again passed out at his house and one of his roommates called 911. The paramedics transported Blake to Norman Regional Hospital. Blake died on October 4, 2020. His death certificate listed his cause of death as cardiac arrest as a consequence of pulmonary embolism with an underlying cause of COVID-19.

B. Procedural History

¶ 13 Parents filed the present case for wrongful death and medical negligence and alleged Providers were negligent in failing to properly assess, diagnose and treat Blake for pulmonary embolism during his emergency room visit on September 14. Parents also alleged Providers' conduct was reckless and requested punitive damages.

¶ 14 On April 5, 2021, Providers filed a motion to dismiss for failure to state a claim upon which relief may be granted and for lack of subject matter jurisdiction and argued that they had immunity for treating Blake while he had COVID-19 under the Oklahoma COVID-19 Public Health Emergency Limited Liability Act (COVID-19 Act) and the Federal Public Readiness and Emergency Preparedness Act (PREP Act). Providers further argued for dismissal on the grounds that Parents had failed to exhaust their administrative remedies, and that the PREP Act preempts Plaintiffs' state-law claims. The trial court overruled the motion to dismiss.

¶ 15 In their answers to Parents' amended petition, Providers again asserted immunity under the PREP Act and the Oklahoma COVID-19 Act, this time raising the arguments as affirmative defenses. Parents moved for partial summary judgment on these affirmative immunity defenses on October 20, 2022. At the hearing on the motion, the parties agreed that the issue of whether treatment provided to Blake included any "covered countermeasures" which could invoke immunity under the PREP Act was a question of law for the court to determine. The trial court granted Parents' motion for partial summary judgment, finding no evidence of the use or administration by Providers of any "covered countermeasures" as that term is defined in the statutory text and/or the Federal Register and struck Providers' PREP Act immunity defense. The trial court determined, however, that material disputed

facts precluded summary judgment on the applicability of the Oklahoma COVID-19 Act.

¶ 16 Providers moved for summary judgment on February 21, 2023, again asserting immunity under the Oklahoma COVID-19 Act. The trial court denied the motion.

¶ 17 The trial court conducted an eleven-day jury trial, beginning on February 5, 2024. The court denied Providers' motions for a directed verdict to grant Providers immunity as a matter of law under the Oklahoma COVID-19 Act. The court also denied Parents' motions regarding applicability of the COVID-19 Act.

¶ 18 Providers argued in favor of an intervening cause instruction based upon Blake's failure to obtain follow-up medical treatment and his refusal of transport to the emergency room on September 23rd. The court rejected Providers' arguments and granted Parents' motion for directed verdict on Providers' affirmative defense of intervening/supervening cause. The court did, however, instruct the jury on contributory negligence, and provided applicable verdict forms. The parties also agreed that special interrogatories[5] should be given to the jury to find whether the facts supported the required conditions for immunity under the Oklahoma COVID-19 Act.

[5] See *infra* ¶ 25 n. 7.

¶ 19 The jury returned a verdict in favor of Parents on February 22, 2024, awarding damages in the amount of ten million dollars ($10,000,000). The jury found Blake 25% contributorily negligent, Dr. Langerman 40% negligent, and Integris 35% negligent. The jury also found that Parents did not prove by clear and convincing evidence that Dr. Langerman acted in reckless disregard of the rights of others and was not subject to punitive damages. The trial court entered judgment for Parents and reduced the damages award to the sum of $7,500,000 to reflect the contributory negligence of Blake. Providers appealed, and this Court retained their appeal.

¶ 20 Dr. Langerman presses several propositions of error. First, regarding the PREP Act, he argues that the final judgment is void because 1) federal statutory immunity bars the claim, 2) the suit was defensively preempted by federal law, and 3) Parents failed to exhaust administrative remedies. Second, Dr. Langerman maintains that the trial court failed to apply the Oklahoma COVID-19 Act's required standard of liability, and the Act bars Plaintiff's ordinary negligence claims. Third, he argues the trial court erred in granting Parents' motion for directed verdict on the issue of intervening/supervening causation.

¶ 21 Integris also raises multiple issues on appeal. First, it claims that the trial court erred in its application of the Oklahoma COVID-19 Act because 1) the trial court improperly submitted issues of statutory interpretation to the jury, and the

only fact question for the jury should have been whether Providers were grossly negligent or acted willfully and wantonly, and 2) the jury instructions on gross negligence did not accurately reflect the law. Second, Integris argues that the PREP Act provides immunity to Providers for their administration of "covered countermeasures" to Blake.

II. STANDARD OF REVIEW

¶ 22 The present case involves issues of statutory interpretation by the trial court, which are subject to *de novo* review. *Hayes v. Penkoski*, 2024 OK 49, ¶ 2, 550 P.3d 931, 933. A *de novo* standard of review also applies to questions concerning the jurisdictional power of the trial court to act. *Dilliner v. Seneca-Cayuga Tribe*, 2011 OK 61, ¶ 12, 258 P.3d 516, 519. Further, applicability of a statutory immunity provision is a question of law subject to our *de novo* review. *State ex rel. Okla. Dep't of Pub. Safety v. Gurich*, 2010 OK 56, ¶ 6, 238 P.3d 1, 3 (analyzing qualified immunity under Oklahoma's Governmental Tort Claims Act).

¶ 23 A trial court's ruling on a motion for directed verdict is subject to *de novo* review. *Comp. Pubs., Inc. v. Welton*, 2002 OK 50, ¶ 6, 49 P.3d 732, 735. If a trial court finds an absence of sufficient facts necessary to prove a legal element, the issue on appeal is a matter of law and is reviewed *de novo*. *Bailey v. State ex rel. Bd. of Tests for Alcohol & Drug Influence*, 2022 OK 50, ¶ 24, 510 P.3d 845, 853 (denial of a directed verdict is reviewed *de novo*). In exercising *de novo* review,

"this Court possesses plenary, independent, and non-deferential authority to examine the issues presented." *Benedetti v. Cimarex Energy Co.*, 2018 OK 21, ¶ 5, 415 P.3d 43, 45.

III. ANALYSIS

A. Oklahoma COVID-19 Act

¶ 24 On April 13, 2020, Oklahoma Governor Kevin Stitt declared a public health and safety emergency in all 77 Oklahoma counties due to the COVID-19 pandemic.[6] The legislature then enacted Oklahoma's COVID-19 immunity legislation on May 12, 2020, known as the "COVID-19 Public Health Emergency Limited Liability Act" (Act or COVID-19 Act). 63 O.S.2020, § 6406. The Act provides in pertinent part:

> C. A health care facility or health care provider shall be immune from civil liability for any loss or harm to a person with a suspected or confirmed diagnosis of COVID-19 caused by an act or omission by the facility or provider that occurs during the COVID-19 public health emergency, if:
> 1. The act or omission occurred in the course of arranging for or providing COVID-19 health care services for the treatment of the person who was impacted by the decisions, activities or staffing of, or the availability or capacity of space or equipment by, the health care facility or provider in response to or as a result of the COVID-19 public health emergency; and
> 2. The act or omission was not the result of gross negligence or willful or wanton misconduct of the health care facility or health care provider rendering the health care services.

[6] Amend. Exec. Ord. 2020-13, Apr. 13, 2020. The COVID-19 public health emergency remained in force in Oklahoma until the Governor withdrew and rescinded it effective May 4, 2021. Exec. Ord. 2021-11, May 3, 2021.

63 O.S.2020, § 6406(C). In the next paragraph, the Act adds that, "[i]n no event shall this act be construed to grant immunity from civil liability for an act or omission in the provision of health care services to a person who did not have a suspected or confirmed diagnosis of COVID-19 at the time of the services." 63 O.S.2020, § 6406(D). If the terms of subsections (C), (C)(1), (C)(2), and (D) are met, the Act operates to provide immunity to healthcare providers and facilities regarding liability arising from their ordinary negligence concerning the patient impacted. 63 O.S.2020, § 6406.

¶ 25 Before trial, the court denied Providers' motions for summary judgment on the applicability of the COVID-19 Act. Order 2, May 26, 2023; R. at 1618. At the close of evidence, the trial court also denied Parents' and Providers' opposing motions for directed verdict on applicability of the COVID-19 Act and ultimately submitted agreed-upon special interrogatories to the jury.[7]

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[7] The court submitted the following special interrogatories to the jury:

> Has [provider] proved by a greater weight of the evidence that the act or omission occurred in the course of arranging for or providing Covid-19 health care services for the treatment of Blake Burgess which impacted decisions, activities or staffing of, or the availability or capacity of space or equipment by [provider] as a result of or in response to the COVID-19 public health emergency?
> YES NO
>
> If you answer YES and find that [provider] proved by a greater weight of the evidence that the act or omission occurred in the course of arranging for or providing Covid-19 health care services for the treatment of Blake Burgess which impacted decisions, activities or staffing of, or the availability or capacity of space or equipment by [provider] as a result of or in response to the COVID-19 public health emergency, then you must determine

¶ 26 Providers must show compliance with all the statutory conditions to qualify for immunity from liability. *Smith v. Deaconess Hosp.*, 2007 OK 45, ¶ 12, 161 P.3d 314, 318. No party contests that Blake had a confirmed diagnosis of COVID-19 when he received medical services from Providers. Providers argue that the trial court improperly interpreted the COVID-19 Act, improperly denied Providers' motion for directed verdict, and improperly denied Providers' argument for qualified statutory immunity regarding Parents' claims of ordinary negligence. If Providers are correct, the only fact question for the jury to decide would have been whether Providers were grossly negligent or acted willfully and wantonly.

¶ 27 Parents do not dispute that the requirements of § 6406(C) and (C)(1) were met for immunity, except for whether Blake was "impacted" as described in (C)(1). Parents maintain that Providers' acts and omissions which allegedly caused Blake's death were unrelated to the COVID-19 public health emergency. In support

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> whether [provider] acted with gross negligence or with willful and wanton conduct. You should use the instructions for gross negligence and willful and wanton conduct in making this decision.
>
> If you answer NO and find [provider] has not proved by a greater weight of the evidence that the act or omission occurred in the course of arranging for or providing Covid-19 health care services for the treatment of Blake Burgess which impacted decisions, activities or staffing of, or the availability or capacity of space or equipment by [provider] as a result of or in response to the COVID-19 public health emergency, then you must determine whether [provider] acted with negligence. You should use the instructions for negligence in making this decision.

Jury Instrs., Feb. 22, 2025, Special Interrog. – Bret S. Langerman, D.O. & Special Interrog. – Integris Health Edmond, Inc.; R. at 2480, 2517–20.

of their claim, Parents emphasize that the evidence showed that when Blake arrived the hospital was fully staffed and the emergency department was below capacity, with only six other patients. No other patient came in during the hour before Blake arrived, or for approximately 40 minutes thereafter. Regarding overall resources, the hospital was not dealing with any "surge" of COVID-19 patients, and Providers had the ability that night to run any blood tests or CT scans necessary to rule out pulmonary embolism.

¶ 28 But the COVID-19 Act's "impact" element is not necessarily focused on contemporaneous circumstances "impacting" Blake or his treatment as argued by Parents. The Act concerns the policies and procedures implemented by Providers and enforced by Providers, and their potential impact on Blake and his treatment. Findings regarding the factors argued by Parents would be decided by a jury on other claims. Those potential findings do not influence our holding today.

¶ 29 In our recent decision in *Austbo v. Greenbriar*,[8] we discussed the "impact" requirement in the COVID-19 Act and held that 63 O.S.2020, § 6406(C)(1) "conditions immunity on a person being in some way affected by a health care provider's decisions, activities, staffing, or capacity in response to or as a result of the greater COVID-19 public health emergency." 2025 OK 85, ¶ 35, 588 P.3d 879,

[8] It must be noted that this decision was not available to the trial court at the time it considered the present case.

889. The Governor of Oklahoma declared the COVID-19 public health emergency, and providers all over the state responded.

¶ 30 The modifications implemented by medical service providers in Oklahoma in response to the COVID-19 emergency were so widespread they affected, or impacted, a great number of medical patients to at least some degree. "It is plausible that many, if not most, COVID patients will have been affected by a facility's or a provider's decisions, activities, staffing, or capacity in response to or a result of the COVID-19 public health emergency." *Id.* Providers in this case were certainly among those making the hard decisions and implementing changes which impacted COVID patients who came to them for medical services. The issue we must decide is whether those changes specifically impacted Blake and his treatment when he came to the emergency room and saw Dr. Langerman.

¶ 31 We have held many times that if the words used in a statute are plain and unambiguous, legislative intent is deemed as expressed by the statutory language. *Stricklen v. Mult. Inj. Tr. Fund*, 2024 OK 1, ¶ 14, 542 P.3d 858, 865–66, as corrected (Jan. 31, 2024). When the meaning of language in the statute is susceptible to more than one reasonable interpretation we will employ traditional canons for statutory construction. *Id.*, at ¶ 14, 542 P.3d, at 866. Regarding the COVID-19 Act, the intended meaning of "impact" is ambiguous because the meaning is susceptible to very different reasonable interpretations. *See ibid.* Our

goal is to give effect to the intent of the legislature. *Signature Leasing, LLC v. Buyer's Grp., LLC*, 2020 OK 50, ¶ 18, 466 P.3d 544, 549.

¶ 32 The legislature did not define "impact" within the Act. The Act does not offer the nature or degree of impact necessary to satisfy the requirement. After this case was decided in the trial court, this Court published our opinion in *Austbo*. In *Austbo*, we observed the COVID-19 Act imposes no materiality threshold regarding the severity of the impact on the patient. *Austbo*, 2025 OK 85, ¶ 35, 588 P.3d, at 889. We recognized Governor Stitt's emergency declarations, plus the context of the language in the COVID-19 Act, and agreed with a North Carolina federal court applying a similar statute that the "impact" element does not appear difficult to satisfy. *See id.* The Act simply requires that Blake was "in some way affected" by Providers' decisions, activities, staffing, or capacity in response to or as a result of the greater COVID-19 public health emergency. *Id.*

¶ 33 The trial court in *Austbo* granted the defendants' motion for summary judgment and ordered that both the PREP Act *and* the COVID-19 Act immunized the defendants. But this Court reversed the trial court's order granting immunity under the COVID-19 Act on appeal because the defendants failed to submit *evidence* to support their argument the patient was impacted as the Act demands. Assertions alone are not enough on summary judgment. *See Video Gaming Techs., Inc. v. Rogers Cnty. Bd. of Tax Roll Corr.*, 2019 OK 83, ¶ 2, 475 P.3d 824, 825.

¶ 34 This Court continues to interpret the COVID-19 Act to require that a patient was "impacted," as we have described, as one element of immunity. We also continue our view that showing the patient was "impacted" is not a high bar. But demonstrating the impact is not automatic. The providers in *Austbo* failed to show the necessary impact because they did not comply with District Court Rule 13 and submit evidentiary material to support their assertions that the plaintiff/patient was in fact impacted.[9]

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[9] Rule 13. Summary Judgment.

a. 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. The motion shall be accompanied by a concise written statement of the material facts as to which the movant contends no genuine issue exists and a statement of argument and authority demonstrating that summary judgment or summary disposition of any issues should be granted. Reference shall be made in the statement to the pages and paragraphs or lines of the evidentiary materials that are pertinent to the motion. Unless otherwise ordered by the court, a copy of the material relied on shall be attached to or filed with the statement.

The motion may be served at any time after the filing of the action, except that, if the action has been set for trial, the motion shall be served at least twenty (20) days before the trial date unless an applicable scheduling order establishes an earlier deadline. The motion shall be served on all parties and filed with the court clerk.

b. Any party opposing summary judgment or summary disposition of issues shall file with the court clerk within fifteen (15) days after service of the motion a concise written statement of the material facts as to which a genuine issue exists and the reasons for denying the motion; provided, however, that a responsive statement shall not be due from a party earlier than forty-five (45) days after service of the first summons by, or upon, that party. 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, but may incorporate by reference material attached to or filed with the papers of another party. In the statement, 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 and paragraphs or lines of the evidentiary materials. All material facts set forth in the

statement of the movant which are supported by acceptable evidentiary material shall be deemed admitted for the purpose of summary judgment or summary disposition unless specifically controverted by the statement of the adverse party which is supported by acceptable evidentiary material. If the motion for summary judgment or summary disposition is granted, the party or parties opposing the motion cannot on appeal rely on any fact or material that is not referred to or included in the statement in order to show that a substantial controversy exists.

c. The affidavits that are filed by either party shall be made on personal knowledge, shall show that the affiant is competent to testify as to the matters stated therein, and shall set forth matters that would be admissible in evidence at trial. The admissibility of other evidentiary material filed by either party shall be governed by the rules of evidence. If there is a dispute regarding the authenticity of a document or admissibility of any submitted evidentiary material, the court may rule on the admissibility of the challenged material before disposing of the motion for summary judgment or summary disposition. 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. Evidentiary material that does not appear to be convertible to admissible evidence at trial shall be challenged by objection or motion to strike, or the objection shall be deemed waived for the purpose of the decision on the motion for summary judgment or summary disposition. If a trial of factual issues is required after proceedings on a motion for summary judgment or summary disposition, evidentiary rulings in the context of the summary procedure shall be treated as rulings *in limine*.

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 or summary disposition 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. A motion filed pursuant to this paragraph shall not be deemed a consent to the exercise by the court of jurisdiction over the party, or a waiver of the right to file a motion to dismiss the action.

e. If it appears to the court that there is no substantial controversy as to the material facts and that one of the parties is entitled to judgment as a matter of law, the court shall render judgment for said party.

If the court finds that there is no substantial controversy as to certain facts or issues, the court may enter an order specifying the facts or issues which are not in controversy and direct that the action proceed for a determination of the remaining fact or issues. An order denying either summary judgment or summary disposition is interlocutory and is not reviewable on appeal prior to final judgment.

f. The serving of a motion for either a summary judgment or summary disposition of issues before a responsive pleading is served where a responsive pleading is permitted does not preclude the opposing party from amending the pleading without leave of court. If a motion for either a summary judgment or summary disposition is served after the case is at issue, the hearing on the motion

¶ 35 In the present case, the evidence admitted at trial showed that Integris made several decisions and altered its activities and staffing in its emergency department in response to or as a result of the COVID-19 public health emergency. These decisions and alterations included prohibiting visitors from accompanying

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and the pretrial conference may, in the discretion of the court, be held at one time. A court may decide a motion for either a summary judgment or summary disposition without a hearing, and where this is done, the court shall notify the parties of its ruling in writing by mail or email.

g. The pleadings or the pretrial conference order may be amended either before or during the hearing on a motion for either summary judgment or summary disposition under this rule, and the court may continue the hearing to a subsequent time. After a court grants a judgment under this rule, neither the pleadings nor the pretrial conference order may be amended by the addition of allegations in regard to any fact which was known to the party and which could have been presented at the hearing on the motion, and a motion for a rehearing or for a new trial on the ground of newly discovered evidence must comply with the provisions of 12 O.S. § 655.

h. Judgments entered on motion for summary judgment or appealable summary disposition are subject to accelerated appellate review under Rule 1.36 of the Oklahoma Supreme Court Rules. The record on appeal will be limited to:

(1) the memorialized entry of judgment; in multi-party or multi- claim cases the judgment or dismissal order must *either* (1) dispose of all claims and all parties or (2) entirely dispose of at least one claim or one party *and* contain the express determination that there is no just reason for delay with the express direction by the trial judge that judgment be filed. See 12 O.S. § 994.

(2) pleadings proper as defined by 12 O.S. § 2007(A);

(3) applicable instruments on file, including the motion and response with supporting briefs and materials filed by the parties as prescribed by subsections (a) and (b);

(4) any other item on file which, according to some recitation in the trial court's written journal entry or in some other order, was considered in its decision;

(5) any other order dismissing the claim or determining the issues as to some but not all parties or claims;

(6) any transcripts of the hearing on the motion; and

(7) any motions, along with supporting and responsive briefs, for new trial (re-examination) of summary judgment or appealable summary disposition process.

12 O.S.2021, ch. 2, app., R. 13.

adult patients, requiring the registration clerk to remain at the entry checkpoint, and following enhanced infection-control practices for COVID-19 patients.

¶ 36 Integris' COVID-19 policy changes prohibited Blake's mother from accompanying him into the emergency department patient room and providing information directly to medical providers regarding Blake's family history of a hereditary blood clotting disorder. Blake's mother therefore gave a handwritten note to the registration clerk regarding the history of antithrombin III deficiency in Blake's family and then asked the clerk to take the note to the emergency doctor treating Blake. Integris' COVID-19 policy required the clerk to remain at the entry checkpoint unless another person was available to cover the station, another person was not available, and this prevented the clerk from hand-delivering the note. The record includes no evidence that anybody ever delivered the note to Dr. Langerman or communicated the information in the note to the medical staff. Blake's chart makes no mention of antithrombin III deficiency. The procedures Integris implemented in response to the COVID emergency stopped the note, and Blake's mother, at the checkpoint. This impacted Blake and his medical treatment.

¶ 37 Dr. Langerman testified that had he known of Blake's family history of antithrombin III deficiency (AT III), his differential diagnosis and medical decision-making would have been different:

> Q. Do you agree that if someone comes into the ER and you note chest pain and shortness of breath and AT III, that person's high risk of PE?

A. If you have those three things in combination, yes, that would – that would raise your suspicions.
Q. You bet. They go right to the CT angiogram, right?
A. Likely.
Q. All right. And what we think we call it CT with contrast? [sic]
A. Yes. CT or CT with contrast.
Q. All right. But certainly – I think you would certainly ask more questions of that person if you found out that they had an AT III history, right?
A. That's correct.
Q. Even if – even if the AT III that you knew about with shortness of breath and chest pain was just that a family member in direct lineage, like a parent had, you'd ask questions?
A. I would ask questions.
Q. More questions?
A. More questions.

Trial Tr. vol. III, 212–13.

¶ 38 When faced with a motion for directed verdict, "a trial court must consider as true all of the evidence favorable to the party against whom the motion or demurrer is directed, together with all inferences that reasonably may be drawn therefrom, and must disregard all conflicting evidence favorable to the movant." *Downing v. First Bank in Claremore*, 1988 OK 67, ¶ 8, 756 P.2d 1227, 1229. In the present case there is no conflicting evidence. Only one inference can reasonably be drawn from the evidence presented at trial; Providers' COVID-19 decisions and procedures, made in response to the Governor's declaration of the COVID-19 public health emergency, prevented Blake's mother from entering Blake's patient room and disrupted the transmission of Blake's relevant family medical history to Dr. Langerman. Providers' COVID-19 decisions therefore impacted Blake's treatment.

¶ 39 There are no controverted material facts regarding this issue. And, "[w]here only one inference can reasonably be drawn from the evidence as to a material issue relating to a party's claim or defense, it is not error for a trial court to remove said issue from the jury's consideration and to direct a verdict thereon." *Badillo v. Mid Century Ins. Co.*, 2005 OK 48, ¶ 55, 121 P.3d 1080, 1102. Section 6406(C)(1)'s impact requirement was satisfied as a matter of law, and no fact question remained for the jury to resolve with respect to the impact element of Providers' COVID-19 Act immunity defense.

¶ 40 Where the elements in § 6406(C) and (C)(1) are satisfied as a matter of law, the inquiry turns to paragraph (C)(2). The only question that should have gone to the jury on Providers' COVID-19 Act defense was whether Providers' acts or omissions which allegedly harmed Blake were the result of gross negligence or willful or wanton misconduct. *See* 63 O.S.2020, § 6406(C)(2).

¶ 41 We hold that the trial court committed reversible error when it denied Providers' motion for directed verdict on 63 O.S.2020, § 6406(C)(1)'s impact requirement. As a result, the trial court delivered an improper instruction to the jury

which allowed it to find Providers liable for ordinary negligence.[10] This error requires remand to the trial court for a new trial.[11]

B. The Public Readiness and Emergency Preparedness (PREP) Act

i. The PREP Act History and Immunity Protections

¶ 42 Providers assert that the federal Public Readiness and Emergency Preparedness Act (PREP Act), currently codified at 42 U.S.C. § 247d-6d and § 247d-6e,[12] shields them from tort liability under Parents' state-law claims. Congress enacted the PREP Act in 2005 to address liability concerns associated with the rapid development and deployment of vaccines and medical countermeasures during public health emergencies.[13] The PREP Act authorizes the Secretary of the

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[10] We recognize that the trial court did not have the benefit of our decision in *Austbo* when it considered Providers' motions for directed verdict. We also note that the trial court conducted several jury instruction conferences, and devoted considerable time with counsel working through the complex language of 63 O.S.2020, § 6406(C) and developing the special interrogatories given to the jury.

[11] Our decision to overturn a jury verdict is not taken lightly, and we acknowledge the tragic circumstances of this case. The Legislature, however, has immunized health care providers from ordinary negligence claims falling within the scope of the COVID-19 Act. This Court is "obliged to apply statutes without second-guessing the wisdom of legislative policy decisions." *Franklin v. OU Med., Inc.*, 2025 OK 84, ¶ 1, 582 P.3d 1127, 1130.

[12] "The PREP Act was enacted on December 30, 2005, as Public Law 109-148, Division C, Section 2. It amended the Public Health Service (PHS) Act, adding Section 319F-3, which addresses liability immunity, and Section 319F-4, which creates a compensation program. These sections are codified at 42 U.S.C. 247d-6d and 42 U.S.C. 247d-6e, respectively." Decl. Under the Pub. Readiness and Emer. Preparedness Act for Med. Countermeasures Against COVID-19, 85 Fed. Reg. 15,198-01 (March 17, 2020) (Declaration).

[13] *See* U.S. Dep't of Health & Human Servs., Pandemic Planning Update: A Report from Secretary Michael O. Leavitt 6 (March 13, 2006) ("The threat of liability has been a major obstacle to developing a strong domestic vaccine industry. . . . As a result, Congress adopted legislation

United States Department of Health and Human Services (Secretary) to make "a determination that a disease or other health condition or other threat to health constitutes a public emergency, or . . . future . . . emergency." 42 U.S.C. § 247d-6d(b)(1). If the Secretary so determines, he or she "may make a declaration . . . recommending the manufacture, testing, development, administration, or use of one or more covered countermeasures" and stating that the PREP Act's liability protections are "in effect with respect to the activities so recommended." *Id.* Once the Secretary makes such a declaration, the PREP Act provides immunity to "covered persons" for the administration or use of "covered countermeasures" in response to the declared state of emergency. 42 U.S.C. § 247d-6d(a)(1).

¶ 43 The full text of the PREP Act's immunity provision states as follows:

> Subject to the other provisions of this section, a covered person shall be immune from suit and liability under Federal and State law with respect to all claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure if a declaration under subsection (b) has been issued with respect to such countermeasure.

Id. In March 2020, the Secretary declared that the spread of SARS-CoV-2 and the resulting disease COVID-19 constituted a public health emergency, and activated the PREP Act for covered countermeasures related to the pandemic (Declaration).[14]

(PREP Act) providing industry with limited liability when meeting a declared public health emergency.") https://www.govinfo.gov/content/pkg/GOVPUB-HEPURLLPS68894/pdf/GOVPUB-HEPURLLPS68894.pdf

[14] Declaration, 85 Fed. Reg. 15,198-01.

ii. PREP Act Preemption

¶ 44 Providers argue that the trial court lacked subject matter jurisdiction because the PREP Act provides complete federal preemption of Parents' state-law claims. Providers also argue that the Parents' suit was defensively preempted by the PREP Act. We address these arguments together.

¶ 45 The doctrine of complete preemption arises from the Supremacy Clause of the United States Constitution, U.S. Const. Art. VI, cl. 2, and "invalidates any state law that contradicts or interferes with an Act of Congress." *Wilson v. Harlow*, 1993 OK 98, ¶ 18, 860 P.2d 793, 799 (quoting *Missouri–Kansas–Texas R. Co. v. State*, 1985 OK 108, ¶ 42, 712 P.2d 40, 47). Complete preemption occurs when a federal statute "wholly displaces the state-law cause of action," and "a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8, 123 S. Ct. 2058, 2063 (2003). To establish complete preemption, Congress must have intended the federal statute to provide "the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action." *Id.*

¶ 46 The PREP Act creates an exclusive federal cause of action against covered persons for injuries "proximately caused by willful misconduct." 42 U.S.C. § 247d-6d(d)(1). It defines "willful misconduct," as "an act or omission that is taken

(i) intentionally to achieve a wrongful purpose; (ii) knowingly without legal or factual justification; and (iii) in disregard of a known or obvious risk that is so great as to make it highly probable that the harm will outweigh the benefit." *Id.* § 247d-6d(c)(1)(A). The PREP Act's definition of willful misconduct "shall be construed as establishing a standard for liability that is more stringent than a standard of negligence in any form or recklessness." *Id.* § 247d-6d(c)(1)(B). Before bringing an action in federal court, a person asserting a willful-misconduct claim must first exhaust administrative remedies via a specified compensation fund process. *Id.* § 247d-6e(d)(1). Parents' petition alleges ordinary medical negligence, not willful misconduct, thus it is not completely preempted by the PREP Act.

¶ 47 A defendant may invoke defensive preemption as an affirmative defense "to defeat a plaintiff's state-law claim on the merits by asserting the supremacy of federal law." *Mitchell v. Advanced HCS, L.L.C.*, 28 F.4th 580, 585 (5th Cir. 2022) (citations omitted). The rule of ordinary preemption created by the PREP Act provides immunity to covered persons from all federal and state claims for loss caused by the administration or use of covered countermeasures. *Hudak v. Elmcroft of Sagamore Hills*, 58 F.4th 845, 855 (6th Cir. 2023); *see also Cagle v. NHC Healthcare-Maryland Heights, LLC*, 78 F.4th 1061, 1067 (8th Cir. 2023). Explaining that state courts may properly consider whether immunity applies, the Second Circuit has clarified the inquiry as follows:

> State courts addressing immunity defenses under the PREP Act *are required to answer only whether the plaintiff's claims fall within the PREP Act's immunity provision. See 42 U.S.C. Section 247d-6d(a)(1) If the answer is no, as the district court found, there is no federal law left to apply and the case can proceed under state law.*

Solomon v. St. Joseph Hosp., 62 F.4th 54, 61 n.4 (2d Cir. 2023) (emphasis added).

¶ 48 In the present case, Providers assert that where Congress has provided suit immunity, a state court may not exercise jurisdiction over the matter. But the state court has jurisdiction to evaluate whether the PREP Act preempts the claims under ordinary preemption rules. *Id.*; *Maglioli v. Alliance HC Holdings LLC*, 16 F.4th 393, 412–13 (3d Cir. 2021). The immunity provision of the PREP Act would still apply to qualifying claims, whether they are brought in state or federal court. *Solomon*, 62 F.4th, at 62. In this respect, immunity under the PREP Act is an affirmative defense which may be determined in state court. *Martin v. Petersen Health Operations*, LLC, 37 F.4th 1210, 1214 (7th Cir. 2022); *Goins v. Saint Elizabeth Med. Ctr., Inc.*, 2024 WL 229568, at *5 (6th Cir. Jan. 22, 2024).

¶ 49 We recognize that this procedural approach aligns with the PREP Act's express preemption clause, which prohibits enforcement of any state law or legal requirement which is different from, or conflicts with, the PREP Act's immunity provisions.[15] Under this provision, a state-law claim against a defendant *who*

[15] 42 U.S.C. § 247d-6d(b)(8) states as follows:

qualifies for immunity under the PREP Act cannot proceed in state court. But where a state court determines the PREP Act's immunity *does not apply*, then an ordinary negligence claim poses no conflict, and is not preempted via the PREP Act's express terms. We hold that the PREP Act does not completely preempt Parents' claims in the present case. Nor does the PREP Act preclude the state trial court from determining whether the claims are defensively preempted by the Act's immunity provisions.

iii. PREP Act Immunity Does Not Apply in the Present Case

¶ 50 We turn next to Providers' argument that the trial court erred in its interpretation of the PREP Act, and that the trial court's judgment is void due to the federal statutory immunity and defenses contained in the PREP Act. On this point,

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Preemption of State Law

> During the effective period of a declaration under subsection (b), or at any time with respect to conduct undertaken in accordance with such declaration, no State or political subdivision of a State may establish, enforce, or continue in effect with respect to a covered countermeasure any provision of law or legal requirement that –
>
> > (A) is different from, or is in conflict with, any requirement applicable under this section; and
> >
> > (B) relates to the design, development, clinical testing or investigation, formulation, manufacture, distribution, sale, donation, purchase, marketing, promotion, packaging, labeling, licensing, use, any other aspect of safety or efficacy, or the prescribing, dispensing, or administration by qualified persons of the covered countermeasure, or to any matter included in a requirement applicable to the covered countermeasure under this section or any other provision of this chapter, or under the Federal Food, Drug, and Cosmetic Act.

we must determine whether the PREP Act's immunity protection extends to Providers. We hold that it does not.

¶ 51 In construing a statute, we will not consider only one word or phrase, but will propend all relevant provisions "to ascertain and give effect to the legislative intent and the public policy underlying the intent." *Am. Airlines, Inc. v. State, ex rel. Oklahoma Tax Comm'n*, 2014 OK 95, ¶ 33, 341 P.3d 56, 65. In *Lancaster v. State*, 1967 OK 84, 426 P.2d 714, we explained:

> The general rules that apply in construing a statute are that the legislative intent must govern, and to arrive at the legislative intent, the entire act must be considered; a construction should be given the act which is reasonable and sensible, and should not be construed so that it would lead to an inconsistency between different parts as they bear upon each other.

Lancaster, 1967 OK 84, ¶ 6, 426 P.2d at 716 (citations omitted). We apply these same principles to interpretation of the PREP Act.

¶ 52 The intent of the PREP Act is described as follows:

> Congress enacted the PREP Act in 2005 "[t]o encourage the expeditious development and deployment of medical countermeasures during a public health emergency" by allowing the HHS Secretary "to limit legal liability for losses relating to the administration of medical countermeasures such as diagnostics, treatments, and vaccines."

Cannon v. Watermark Ret. Cmtys., Inc., 45 F.4th 137, 139 (D.C. Cir. 2022) (quoting Kevin J. Hickey, Cong. Rsch. Serv., LSB10443, *The PREP Act and Covid-19, Part 1: Statutory Authority to Limit Liability for Medical Countermeasures*). The PREP

Act serves as an emergency response to the COVID pandemic, with the purpose of emboldening caregivers to provide certain approved forms of care with the assurance that they will not face liability for doing so. *See Estate of Maglioli v. Andover Subacute Rehabilitation Center I*, 478 F. Supp. 3d 518, 529 (D.N.J. 2020) *aff'd sub nom. Estate of Maglioli v. Alliance HC Holdings, LLC*, 16 F.4th 393 (3d Cir. 2021).

a. Causation

¶ 53 Parents argue there was no claim or evidence presented which established that Blake's death was *caused by* the administration or use of a stethoscope, chest x-ray, or EKG. They contend that the PREP Act's causation requirement is not satisfied in the present case and we agree.

¶ 54 For PREP Act protection to apply, the PREP Act's immunity provision specifies that the loss must be "caused by, arising out of, relating to, or resulting from" the administration to or use by an individual of a covered countermeasure. 42 U.S.C. § 247d-6d(a)(1). The next subsection in the PREP Act, entitled "Scope," further limits the immunities provided:

> The [PREP Act's] immunity ... applies to any claim for loss that has a *causal relationship* with the administration to or use by an individual of a covered countermeasure, including a *causal relationship* with the design, development, clinical testing or investigation, manufacture, labeling, distribution, formulation, packaging, marketing, promotion, sale, purchase, donation, dispensing, prescribing, administration, licensing, or use of such countermeasure.

42 U.S.C. § 247d-6d(a)(2)(B).

¶ 55 The PREP Act's plain language requires "some nexus – some 'causal relationship' – between the claimed loss and the administration or use of a covered countermeasure." *Schleider v. GVDB Operations, LLC*, 121 F.4th 149, 162 (11th Cir. 2024). The Ninth Circuit has explained that the phrases in the PREP Act's immunity provision – "caused by," "arising out of," and "resulting from" – all connote some type of direct causal relationship:

> At the very least, then, for PREP Act immunity to apply, *the underlying use or administration of a covered countermeasure must have played some role in bringing about or contributing to the plaintiff's injury.* It is not enough that some countermeasure's use could be described as relating to the events underpinning the claim in some broad sense.

Hampton v. California, 83 F.4th 754, 764 (9th Cir. 2023) (emphasis added).

¶ 56 This Court analyzed the PREP Act's causation requirement in two recent decisions – *Franklin v. OU Med., Inc.*, 2025 OK 84, 582 P.3d 1127, and *Austbo v. Greenbriar Nursing Home No. Two, Inc.*, 2025 OK 85, 588 P.3d 879. In *Franklin*, we held that the PREP Act's causation requirement was satisfied. In *Austbo*, we held that it was not.

¶ 57 In *Franklin*, a disabled adult patient who had been dependent on a tracheostomy since she was two years old was admitted to OU Medical Center with a severe COVID-19 infection and COVID pneumonia. Due to the patient's dropping oxygen levels, she was placed on a ventilator which required her uncuffed tracheostomy tube to be replaced with a cuffed tracheostomy tube. While a nurse

was cleaning the patient, the cuffed tracheostomy tube became dislodged and the patient's airway was blocked, causing her to suffer acute hypoxia and an anoxic brain injury. The patient's mother sued the OU medical providers, and the trial court dismissed the claim based on PREP Act immunity. The Court of Civil Appeals reversed the trial court and held that the defendants were not immune from suit.

¶ 58 This Court granted certiorari and vacated COCA's opinion. *Franklin*, 2025 OK 84, ¶ 52, 582 P.3d, at 1139. We first determined that the cuffed tracheostomy tube, even though it had become dislodged, was being administered to and used by the patient to treat her COVID-19, and thus qualified as a covered countermeasure. *Id.*, at ¶ 29, 582 P.3d, at 1135. We next considered whether the plaintiff alleged an injury which was caused by the administration of the covered countermeasure. The plaintiff's petition asserted "that dislodgement of the tracheostomy (the countermeasure) was the cause-in-fact" of the patient's brain injury. *Id.*, at ¶ 42, 582 P.3d, at 1137. We recognized that dislodgement was "a plainly foreseeable risk of using and administering a cuffed tracheostomy" which further bolstered the argument for the existence of a causal relationship. *Ibid.* Although the defendants may have been negligent for causing the tracheostomy to dislodge, we concluded that the patient's injury could not be divorced from the administration of a covered countermeasure. *Id.*, ¶ 44, 582 P.3d, at 1138. Thus, the

PREP Act's causation requirement was satisfied, and the PREP Act's immunity protections precluded the plaintiff's claims. *Id.*, ¶ 48, 582 P.3d, at 1138.

¶ 59 In *Austbo*, an elderly patient with COVID-19 and Alzheimer's disease was transferred from the hospital to the defendant skilled nursing home, where she stayed for eighteen days. During her stay, her condition deteriorated, and she suffered from respiratory failure requiring oxygen supplementation, worsening mental status, decreased oral intake, renal failure, pressure wounds, and other health problems. Her physician noted that treatment options were extremely limited due to her severe dementia. Although the physician recommended hospice care, her family took her home without arrangements for home health care or hospice. The next day, the patient returned to the hospital and was admitted to the ICU. She received oxygen supplementation and treatment for multiple pressure wounds. Her providers recommended a feeding tube, but the family declined. The family took the patient home again, this time under hospice care, where she died nine days after being discharged. The patient's surviving spouse sued Greenbriar and the facility's attending physician for negligence and wrongful death. The district court granted summary judgment for the defendants, holding both the PREP Act and the Oklahoma COVID-19 Act immunized the defendants.

¶ 60 On appeal, we reversed the district court's grant of summary judgment. *Austbo*, 2025 OK 85, ¶ 17, 588 P.3d, at 885. We noted that the plaintiff's petition

alleged the patient "suffer[ed] skin breakdowns, dehydration, and malnutrition" because the defendants failed to ensure that her "basic life necessities, such as mobility, nutrition, and hydration," were met. *Id.* The claims did not involve COVID-19. The defendants argued that the measures they used to treat the patient's COVID-19 may have side effects and cause the patient's deterioration, weakness, and unwillingness to eat or drink. The record, however, contained no factual support for this argument. We determined that summary judgment was improper because the defendants had presented no material facts nor any other evidence demonstrating a causal relationship between the patient's death and the countermeasures administered by the defendants. *Id.*, ¶ 23, 588 P.3d, at 886.

¶ 61 With regard to the claims asserted here, the present case is more like *Austbo* than *Franklin*. Parents do not allege that the Provider's physical provision of an x-ray, EKG, or use of a stehoscope played a role in bringing about Blake's death. Rather, they claim that Dr. Langerman misread Blake's x-ray and negligently failed to diagnose and treat Blake for pulmonary embolism; even though Blake had indicative symptoms, an abnormal EKG, and his x-ray results showed an opacity on Blake's right lung. Assuming *arguendo* that the diagnostic tests (x-ray and EKG), examinations, or drugs administered to Blake qualify as covered countermeasures under these circumstances, Parents do not claim the administration of those measures caused any loss or injury to Blake. Unlike *Franklin*, the record here contains no

evidence that the tests, or their administration, caused Blake's pulmonary embolism or in any way resulted in his death. There is no requisite direct causal relationship between Blake's death and the use or administration of a covered countermeasure.

¶ 62 In *Franklin* we also discussed *Mills v. Hartford Healthcare Corp.*, 298 A.3d 605 (Conn. 2023). Like the present case, *Mills* involved the defendants' alleged failure to diagnose and treat a life-threatening condition suffered by a patient with COVID-19. In *Mills*, the plaintiff daughter filed a wrongful death action alleging the defendants were negligent in treating her mother's acute myocardial infarction (STEMI or heart attack). The defendant hospital had implemented COVID-19 protocols which prohibited admitting patients to the heart catheterization lab until testing negative for COVID-19, unless their symptoms indicated the need for emergency catheterization. Although her lab tests and EKG indicated the decedent was experiencing a myocardial infarction, the defendant cardiologists believed she was suffering from a non-life-threatening cardiac condition induced by COVID-19, so they delayed her transfer to the catheterization lab. After several days, the decedent's COVID-19 test result came back as negative. But before the defendants could proceed with treatment, she suffered cardiac arrest and died.

¶ 63 The *Mills* court acknowledged that the COVID-19 test itself was indisputably a covered countermeasure but found that the plaintiff did not claim that any other countermeasure had been employed for purposes of PREP Act immunity.

Id., at 629. The plaintiff did not allege that the decedent's death was caused by the defendants' improper administration, prescription, dispensing, or use of the COVID-19 test or any other covered countermeasure. The court explained that "[i]n determining whether PREP Act immunity applies in a given case, courts focus on the claims of the plaintiff, as pleaded in the complaint." *Id.*, at 630. The plaintiff's allegations focused on failure to diagnose and treat decedent's myocardial infarction despite the various test results that were indicative of that condition, and failure to timely admit her to the catheterization lab. The *Mills* court further explained:

> We recognize that the delay in treatment attendant to the COVID-19 test may in fact have had a causal relationship to the decedent's death. Indeed, if the processing of the test had been instantaneous or taken little time – a matter beyond the defendants' control – the decedent might well have been admitted to the catheterization lab immediately, which may have saved her life (or, regardless of the outcome, eliminated the claim of malpractice). But *the mere fact that the defendants administered and used a COVID-19 test did not, in and of itself, dictate whether they should or should not proceed with treatment while the test result was pending.* That decision was driven by the defendants' clinical COVID-19 related diagnosis and the hospital's catheterization lab protocol. There would have been no delay attributable to the defendants if they had immediately diagnosed her STEMI or, despite suspecting that she suffered from COVID-19, had immediately admitted her to the catheterization lab while the COVID-19 test result was pending, as the plaintiff alleges they should have done. *Thus, as alleged by the plaintiff, the gross negligence resulting in the decedent's demise was not causally related to, did not arise out of, and was not related to the administration or use of the COVID-19 test within the meaning of the PREP Act.*

Mills, 298 A.3d 605, 632–33 (emphasis added).

¶ 64 Similar to *Mills*, Parents contend that Providers failed to diagnose and treat a life-threatening condition despite various symptoms and test results that indicated its presence. The operative petition, and the evidence presented at trial, contain no indication that Blake's death was caused by, or arose from, the tests administered by Providers. Further, the fact that Blake had COVID-19 did not, in and of itself, dictate whether Providers should or should not have proceeded with testing and treating Blake's pulmonary embolism. The causal relationship between administration of medical care and Blake's death, as required by the PREP Act, is lacking here. *See also Roos v. HealthPartners, Inc.*, 22 N.W.3d 211, 220 (Minn. Ct. App. 2025) (suspicion that patient had COVID-19 did not prevent defendants from diagnosing and treating bacterial pneumonia, and complaint failed to allege causal relationship between administration of covered countermeasures and decedent's death). Parents' claim for loss does not have a causal relationship with Providers' provided care, thus the claims do not fall within the PREP Act's immunity provision.

b. Covered Countermeasures

¶ 65 The parties here spend a great deal of time debating whether Blake's treatment involved "covered countermeasures" as defined in the PREP Act. This term has a complex definition which has evolved over time. We need not determine the issue of covered countermeasures because we have found Parents' claims for

loss were not caused by, arising out of, relating to, or resulting from Providers' provided care.

c. "Failure to Administer" Covered Countermeasures

¶ 66 Dr. Langerman argues that his medical decision-making process itself constituted "administration or use" of covered countermeasures in diagnosing and treating Blake. He urges that a provider's professional judgment is necessarily involved in the administration or use of countermeasures to diagnose or treat patients. Therefore, he contends that the Act precludes the present medical negligence action arising from his administration or use of countermeasures to diagnose and treat Blake. We are not persuaded by this argument.

¶ 67 In order for immunity protection to apply to a physician's medical decision-making, the Fourth Amendment contemplates "prioritization or purposeful allocation" of a covered countermeasure, instead of the failure to use the countermeasure at all. *Manyweather v. Woodlawn Manor, Inc.*, 40 F.4th 237, 246 (5th Cir. 2022). Claiming that a provider failed to administer a particular countermeasure differs in kind from an allegation that the administration or use of the countermeasure caused a patient's death. *Hudak*, 58 F.4th, at 856. Such a "failure to administer" claim is "the opposite of a contention that a covered countermeasure caused harm." *Martin*, 37 F.4th, at 1213–14 ; *see also Schleider*, 121 F.4th at 162 (finding lack of causation where the defendants' alleged negligence

was failure to take or implement any covered countermeasures to prevent the spread of COVID-19 at their facility); *Hudak*, 58 F.4th, at 857 (PREP Act immunity did not apply where loss was allegedly caused by defendant's failure to take appropriate care of the patient). The Act "provides immunity only from claims that relate to 'the administration to or the use by an individual of' a covered countermeasure – not such a measure's non-administration or non-use." *Hampton*, 83 F.4th at 763.

¶ 68 In the present case, Providers' decisions whether to administer, or not to administer, additional treatment to Blake were not based on prioritization or purposeful allocation of covered countermeasures. Dr. Langerman testified that he opted not to order additional tests such as a D-dimer test or a CT scan to check for pulmonary embolism because Blake had an alternate diagnosis (COVID-19) which explained his symptoms, he did not have any risk factors for PE, and all of the answers to PERC rule questions were negative. The record contains no evidence that Defendants failed to provide additional diagnostics to Blake because they needed to administer covered countermeasures to other patients. Providers were not dealing with limited availability of countermeasures and would have been able to perform additional testing had they elected to do so. Nothing required Providers to prioritize other patients or prevented them from following up on Blake's abnormal EKG or chest x-ray.

¶ 69 Parents' petition does not allege that Blake's death was caused by administration of a covered countermeasure used to diagnose or treat COVID-19. Their petition asserts that Providers negligently failed to diagnose and treat Blake for pulmonary embolism despite his abnormal EKG, x-ray, and symptoms. The present case is lacking the requisite direct causal connection between the administration of medical care and the alleged loss. Accordingly, we hold that PREP Act immunity does not apply to Providers.

d. Hospital COVID-19 Policies

¶ 70 With regard to facilities and hospitals, the Secretary explains that the definition of "administration" extends to certain "activities related to management and operation of programs and locations" for providing countermeasures to recipients. Declaration, 85 Fed. Reg. at 15,202. Under the Declaration's guidance, such covered activities may include "decisions and actions involving security and queuing, *but only insofar as those activities directly relate to the countermeasure activities*." Declaration, 85 Fed. Reg. at 15,200. (emphasis added). The Declaration explains:

> [t]he Act precludes a liability claim relating to the management and operation of a countermeasure distribution program or site, such as a slip-and-fall injury or vehicle collision *by a recipient receiving a countermeasure* at a retail store serving as an administration or dispensing location that alleges, for example, lax security or chaotic crowd control. However, a liability claim alleging an injury occurring at the site *that was not directly related to the countermeasure activities*

> *is not covered, such as a slip and fall with no direct connection to the countermeasure's administration or use.* In each case, whether immunity is applicable will depend on the particular facts and circumstances.

Id.

¶ 71 Integris argues that the hospital's COVID-19 infection-control policies and procedures prevented Blake's mother from accompanying Blake into the emergency department and prevented the emergency personnel from receiving her note regarding Blake's family history of a blood clotting disorder. Integris claims that the failure of the note to arrive contributed to Dr. Langerman's provision of covered countermeasures, and therefore Parents' loss is causally related to management of its program to provide covered countermeasures, or management of the location it utilizes to provide covered countermeasures.

¶ 72 The largely unstated premise of Integris' argument is that the PREP Act applies to any negligence occurring in the course of Blake's treatment, even those acts which were not connected to the emergency department's COVID-19 infection-control policies or which were not related to its administration of covered countermeasures. We do not read the Act to extend so broadly.

¶ 73 The Declaration distinguishes between an injury to a "recipient receiving a covered countermeasure" versus an injury "not directly related to the countermeasure activities." *Id.* It conditions immunity on the injury being directly connected to a countermeasure's administration or use. *Id.* The Secretary's

examples are significant – immunity applies to a slip and fall in a vaccination line at a retail store, but does not apply to a slip and fall at the retail store if there was no connection to the distribution of a covered countermeasure. *Id.*

¶ 74 Parents and Integris both discuss *Hudak*, 58 F.4th 845, a case involving state-law tort claims against an assisted-living facility relating to failure to wear facemasks or follow infection-control procedures allegedly resulting in the death of a resident from COVID-19. There, the Sixth Circuit rejected the facility's argument that the plaintiff's claims alleged a causal connection between the patient's death and the facility's "management and operation" activities. The court noted that "the declaration does not suggest that the term 'administration' extends to all activities associated with the management or operation of a facility" but rather "the term encompasses management and operation activities that are *taken for the purpose of distributing and dispensing countermeasures*." *Hudak*, 58 F.4th, at 856–57. The court provided the following examples:

> The declaration suggests that an entity that dispenses an antiviral medication (a covered countermeasure) might be immune from a claim for loss sustained while waiting in line for the medication that alleges that the facility failed to design and implement an appropriate waiting procedure (the administration of the countermeasure). *But that same entity would not receive immunity under the PREP Act for injuries unrelated to its provision of the covered countermeasure solely because it provides countermeasures.*

Hudak, 58 F.4th, at 856–57 (citations omitted)(emphasis added).

¶ 75 The court determined that the plaintiff's claim did not allege the patient's death was caused by the facility's distribution or use of countermeasures, but rather by the facility's failure to use countermeasures or to take appropriate care of the patient, and therefore did not relate to the "administration" of covered countermeasures. *Id.*, at 857; *see also Eaton v. Big Blue Healthcare, Inc.*, 480 F. Supp. 3d 1184, 1194 (D. Kan. 2020) (a facility's use of covered countermeasures somewhere in the facility is not sufficient to invoke the PREP Act as to all claims that arise in that facility, because the Act still requires a causal connection between the injury and the use or administration of covered countermeasures).

¶ 76 Like the claims in *Hudak*, Parents' claims do not allege Blake's death was caused by the administration of a covered countermeasure. Parents' allegations concern Providers' failure to provide adequate care to Blake independent of the administration of medical care. In *Franklin*, we explained that "just because a covered countermeasure has been administered or used during a pandemic does not automatically mean medical providers are immune." *Franklin*, 2025 OK 84, ¶ 41, 582 P.3d, at 1137. "Rather, a plaintiff's injury must have a causal relationship to the administration or use of the countermeasure." *Id.* The PREP Act's definition of "administration" extends to management and operation of a countermeasure distribution program or site, but only where the alleged injury is directly related to the facility's countermeasure activities. Declaration, 85 Fed. Reg. at 15,200.

¶ 77 Blake had a prior COVID-19 diagnosis but was experiencing symptoms caused by a pulmonary embolism. As noted above, the mere presence of COVID-19 during Blake's assessment and treatment does not transform all ordinary care rendered to him into covered countermeasures. The record contains no evidence that the emergency department's COVID-19 protocols had a causal relationship to Providers' treatment of Blake after receipt of the abnormal EKG and x-ray results, or prevented Blake from receiving additional testing. There is also no support in the record that the COVID-19 infection-control policies prevented the hospital from contacting Blake regarding his results after the hospital's in-house professionals reviewed the imaging reports. The evidence does not establish that Blake's injury was related to the hospital's program of distributing and dispensing countermeasures. The causal connection between the hospital's protocols and Blake's death, as required by the Act, is lacking.

¶ 78 To be clear, this analysis regarding the PREP Act differs from our examination of the "impact" requirement under the Oklahoma COVID-19 Act. *See supra* ¶¶ 28-38. The COVID-19 Act requires only that the person was in some way affected by a provider's decisions, activities, staffing, or capacity in response to or as a result of COVID-19, without any requirement as to the materiality or severity of the impact. *Austbo*, 2025 OK 85, ¶ 35, 588 P.3d, at 889. There we explained that receiving COVID-19 health care services and being "impacted" by the providers'

COVID-19 activities are two separate criteria. *Id.*, at ¶ 34, 588 P.3d, at 889. We also noted that the "impact" element does not appear difficult to meet. *Id.*, at ¶ 35, 588 P.3d, at 889. The PREP Act, however, requires more than just an "impact." It requires a causal relationship between the alleged loss and the facility's management and operation of a countermeasure distribution program or site, and only insofar as those activities relate to the provision of covered countermeasures to a recipient. *See* Declaration, 85 Fed. Reg. at 15,200.

¶ 79 We recognize the challenges faced by healthcare professionals generally, and hospital emergency rooms in particular, during the early and chaotic days of the pandemic. Nonetheless, although Blake had a COVID-19 diagnosis, the alleged negligence involved failure to diagnose and treat a life-threatening pulmonary embolism. We do not interpret the PREP Act to provide a new defense to such standard medical negligence claims. Blake's treatment consisted of ordinary emergency care and diagnostic measures set against the background of the COVID-19 pandemic. Defendants may utilize all the usual defenses available in a medical negligence case and are not foreclosed from showing that they adhered to the requisite standard of care.

¶ 80 Summary judgment is proper when there are no disputed issues of material fact, and based upon the submitted evidentiary materials, a party is entitled to judgment as a matter of law. *Carmichael v. Beller*, 1996 OK 48, ¶ 2, 914 P.2d

1051, 1053; *Boyle v. ASAP Energy, Inc.*, 2017 OK 82, ¶ 7, 408 P.3d 183, 187–88. All inferences and conclusions which may be drawn from the evidentiary materials must be viewed in the light most favorable to the party opposing the motion. *Carmichael*, 1996 OK 48, ¶ 2, 914 P.2d, at 1053. Because Parents do not allege an injury directly caused by the administration or use – or prioritization or purposeful allocation – of covered countermeasures as contemplated by the PREP Act, we hold that the trial court did not err in granting summary judgment to Parents and striking Providers' argument for immunity under the PREP Act.

iv. Administrative Remedies - Covered Countermeasure Process Fund

¶ 81 Providers argue that Parents failed to exhaust mandatory administrative remedies prior to filing the present action. Where a claim is not barred by the PREP Act, the statute does not impose an exclusive administrative process or otherwise preempt the action. Providers' argument that a plaintiff must exhaust administrative remedies before seeking judicial intervention applies only where administrative remedies are available in the first place. Parents' petition alleges cognizable claims under state law that are not subject to PREP Act immunity. Therefore, Parents' action falls outside the scope of the compensation fund administrative process.[16] The trial court properly exercised subject matter jurisdiction over the case.

[16] Dr. Langerman cites several cases involving claims subject to PREP Act immunity and therefore covered by the Countermeasures Injury Compensation Program (CICP), in support of the proposition that a plaintiff must exhaust administrative remedies before filing suit. *See Cowen v.*

C. Gross Negligence Jury Instructions

¶ 82 Next, Integris asserts that the jury instruction for gross negligence does not accurately reflect the law. We decline to answer this question, as it seeks a prohibited advisory opinion. At trial, the jury answered "no" to the special interrogatories as to both Integris and Dr. Langerman. At that point, the special interrogatories instructed the jury to consider the *negligence* instructions and *not* the gross negligence instruction. Jury Instrs., Feb. 22, 2025, Special Interrog. – Bret S. Langerman, D.O. & Special Interrog. – Integris Health Edmond, Inc.; R. at 2480, 2517-20 ("If you answer NO, then you must determine whether [provider] acted with negligence" and "[y]ou should use the instructions for negligence in making this decision.").

¶ 83 In the present case, based upon the jury answering "no" to the special interrogatories, the gross negligence instructions did not apply to the jury's deliberations *at all*. Even if the trial court had given the Providers' requested gross negligence jury instruction, the jury would not have considered it. Thus, the inquiry before us presents a hypothetical question of whether either instruction *would have*

Walgreen Co., No. 22-CV-157-TCK-JFJ, 2022 WL 17640208, at *2 n.2 (N.D. Okla. Dec. 13, 2022) (claim for injuries resulting from COVID-19 vaccination fell under PREP Act immunity and remedy must be sought through the CICP); *Storment v. Walgreen, Co.*, No. 1:21-CV-00898 MIS/CG, 2022 WL 2966607, at *3 (D.N.M. July 27, 2022) (PREP Act applies to claim for injuries incurred after COVID-19 vaccine, and remedy is through the CICP). We do not find these to be persuasive.

resulted in reversible error *if* the jury had reached the issue of gross negligence. This Court does not issue advisory opinions or answer hypothetical questions. *See Ball v. Wilshire Ins. Co.*, 2007 OK 80, ¶ 1 n. 3, 184 P.3d 463, 464; *Scott v. Peterson*, 2005 OK 84, ¶ 27, 126 P.3d 1232, 1240. Any pronouncement we make here would be in the form of a prohibited advisory opinion applicable only to future proceedings. We decline to do so.

D. Intervening Cause

i. Blake's Conduct as Intervening/Supervening Cause

¶ 84 Dr. Langerman complains that the trial court erred by directing a verdict in favor of Parents on Providers' affirmative defense of intervening/supervening cause. He contends that Blake's failure to obtain follow-up medical treatment and his refusal of transport to the emergency room on September 23 constitute a supervening event which broke any causal connection with Dr. Langerman's conduct. We disagree.

¶ 85 The well-recognized rule in Oklahoma is that "the causal connection between an act of negligence and an injury is broken by the intervention of a new, independent and efficient cause which was neither anticipated nor reasonably foreseeable." *Thompson v. Presbyterian Hosp., Inc.*, 1982 OK 87, ¶ 12, 652 P.2d 260, 263–64. In *Thompson*, we explained that a supervening cause which operates 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. *Id.*, ¶ 15, 652 P.2d, at 264.

¶ 86 Dr. Langerman argues that Blake failed to follow his discharge instructions to follow up with his primary care physician and to return to the emergency room if he developed any problems. Dr. Langerman also points to expert testimony that Blake would have lived had he received medical care on September 23, 2020.[17] Dr. Langerman maintains that, at most, Providers' conduct created a mere condition, but Blake's knowing refusal of follow-up care caused his injuries and death.

¶ 87 This Court discussed the "cause versus condition" analysis in *Long v. Ponca City Hospital, Inc.*, 1979 OK 32, 593 P.2d 1081. In *Long*, the defendant hospital negligently placed a catheter in the rectum of a patient, rather than in her bladder. During the patient's surgery, the attending physician removed the catheter,

[17] Providers' experts, Dr. Anita Rajasekhar and Dr. John Kress, testified at trial that, *had* Blake gone to the emergency room on September 23, and *had* he been diagnosed with PE at that time, and *had* he been started on anticoagulants, then he more than likely would not have died. Trial Tr. vol. VI 30–31 & 180–81. Prior to trial, the court sustained Parents' motion to exclude Dr. Rajasekhar's opinion that if Blake had gone to the ER, he more likely than not *would have* been diagnosed with PE and received life-saving treatment. Journal Entry, Feb. 5, 2024; R. at 2385. The trial court determined that "[w]ithout any medical records, it would be improper speculation for an expert to offer opinions as to what *would have* happened had [Blake] gone to the emergency room on September 23, 2020." *Id.* (emphasis added). The trial court determined that Dr. Rajasekhar could offer an opinion only as to Blake's chance of survival *had* he gone to the ER on September 23 *and* received medical treatment for PE.

contaminating the operating field with fecal material and bacteria, allegedly causing the plaintiff to suffer infection and additional medical problems. The hospital argued that the actions of the surgeon superseded its liability.

¶ 88 We stated the general rule requires that "where a negligent act merely creates a condition making an injury possible, and a subsequent independent act causes the injury, the original act of negligence is not ordinarily the proximate cause thereof." *Long*, 1979 OK 32, ¶ 10, 593 P.2d at 1085 (quoting *Champlin Oil & Ref. Co. v. Roever*, 1970 OK 217, ¶ 10, 477 P.2d 662, 665). We explained that "the distinction between a cause and a condition is the element of foreseeability." *Long*, 1979 OK 32, ¶ 13, 593 P.2d, at 1086. The fundamental question "is whether the actions and damage subsequent to the misplacement of the catheter were foreseeable." *Id.*, at ¶ 17, 593 P.2d, at 1087. If they were, then "the subsequent occurrences would not supersede the hospital's antecedent negligence." *Ibid.* We determined there that a legitimate fact question existed regarding the foreseeability of the physician's actions, and the trial court properly submitted the question to the jury. *Id.* ¶ 18, 593 P.2d, at 1087.

¶ 89 For an act to be supervening, not only must the intervening act be unforeseeable, it must also be independent of the first act and be adequate to serve as the sole and exclusive cause of the loss. In other words, the condition created by

the original act, in and of itself, would *not* have resulted in the plaintiffs' loss *without* the independent intervening event.

¶ 90 Such a situation does not exist in the present case. To the contrary, the evidence did not establish that Blake's failure to obtain follow-up treatment was the sole, independent cause of his death. Blake died due to cardiac arrest as a consequence of an undiagnosed pulmonary embolism with an underlying cause of COVID-19. Providers set that course of events in motion when they released Blake from the emergency room without diagnosing and treating this life-threatening condition of PE. Speculative testimony as to what might have happened if Blake had gone to the emergency room after his fainting incident on September 23 does not serve to break the chain of causation flowing from Providers' failure to diagnose Blake.

¶ 91 Further, Blake's conduct was not unforeseeable or independent of Providers' conduct. Providers released Blake from the emergency room with a diagnosis of COVID-19 and did not advise him of the abnormal EKG and chest x-ray. Blake had been experiencing chest pain and shortness of breath, went to urgent care on September 11, and then sought treatment from Providers on September 14. Dr. Langerman testified that he would have explained to Blake that COVID-19 symptoms can wax and wane, and some people take longer to get over it. When Blake continued having symptoms, it was foreseeable that he would attribute them

to COVID-19 and not follow up or go to the emergency room again regardless of medical advice otherwise.

¶ 92 Even assuming some fault can be attributed to Blake for failing to obtain follow-up medical care, Providers' failure to diagnose pulmonary embolism continued to operate as a "but-for" causal factor of his death. Where a second act occurs, but is not a superseding cause, the original act "continues to operate, so that the injury is the result of both causes acting in concert" and "each act may be regarded as the proximate cause thereof." *Long,* 1979 OK 32, ¶ 10, 593 P.2d at 1085. This Court explained in *Thompson*:

> Not every intervening cause will insulate the original negligent actor from liability. If a causal factor is capable of combining or acting in concert with another act or omission to produce the injury, each negligent actor will be subject to liability for the harm that evolves. The same is said to be true when several causes operate to bring about a single result.

Thompson, 1982 OK 87, ¶ 16, 652 P.2d, at 264.

¶ 93 The question of proximate cause becomes one of law only when there is no evidence from which the jury could reasonably find a causal nexus between the negligent act and the resulting injuries. *Id.*, 1982 OK 87, ¶ 12, 652 P.2d, at 263. The court has the duty to determine as a matter of law whether the evidence is sufficient to show a causal connection between the original negligence and the resulting injury or whether the intervening factors adduced by the proof served to break that causal

nexus. *Id.*, ¶ 13, 652 P.2d, at 264. In the present case, the trial court found that the facts presented at trial did not warrant an intervening/supervening cause instruction. We conclude that the court did not err on this determination.

¶ 94 Moreover, the trial court instructed the jurors regarding comparative negligence, apprising the jury of its ability to attribute fault to Blake for his conduct. The jury acted upon this instruction and allocated 25% negligence to Blake. In this process, the jury had the option to determine that Blake's negligence exceeded that of Providers. It did not reach such a conclusion. We hold that the trial court's approach on the issue of Blake's alleged negligence resulted in no fundamental error which prejudiced Providers.

ii. Third-Party Emergency Responders' Conduct

¶ 95 In his brief in chief, Dr. Langerman complains that the trial court improperly overlooked evidence of the non-party emergency responders' intervening and supervening negligence. On appeal, Dr. Langerman asserts, for the first time, that "the [Providers'] negligence of not conducting enough or proper diagnostics to learn of Blake's pulmonary embolism on September 13, 2020, may arguably have been the creation of a 'mere condition,' but it was the emergency responders who purportedly convinced Blake not to seek medical treatment on September 23, 2020 [sic] that 'caused' his death." Langerman Br. in Chief 29.

¶ 96 Parents contend that Providers did not raise this issue before the trial court and may not now assert it for the first time on appeal. We agree. Issues and arguments not first presented to the trial court may not be raised for the first time in the appellate court. *Okla. Dep't of Secs. ex rel. Faught v. Wilcox*, 2011 OK 82, ¶ 17, 267 P.3d 106, 110; *Jernigan v. Jernigan*, 2006 OK 22, ¶ 26, 138 P.3d 539, 548. We decline to consider this new argument raised for the first time on appeal.

IV. CONCLUSION

¶ 97 We hold that Providers are immune from liability under Oklahoma's COVID-19 Public Health Emergency Limited Liability Act for ordinary negligence and were entitled to a directed verdict on 63 O.S.2020, § 6406 as a matter of law. We remand to the district court for a new trial. We further hold that Defendants/Appellants are not immune from liability under the federal Public Readiness and Emergency Preparedness Act (PREP Act), and we hold that the trial court did not err in granting a directed verdict in favor of Plaintiffs/Appellees on the issue of intervening/supervening causation.

JUDGMENT OF DISTRICT COURT REVERSED REMANDED FOR NEW TRIAL.

Edmondson, Combs, Gurich, Darby and Jett, JJ., concur

Rowe, C.J., (by sep. writing), Kuehn, V.C.J., (by sep. writing) Winchester, (by sep. writing), and Kane, JJ., dissent