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**ORIGINAL**

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

NATHAN SHINN, a minor, by and through )  
his parents, BRITTANY SHINN and )  
BRANDON SHINN, and BRITTANY )  
SHINN and BRANDON SHINN, )  
individually, )

Plaintiffs/Appellees, )

vs. )

HCA HEALTH SERVICES OF )  
OKLAHOMA, INC., d/b/a OU MEDICAL )  
CENTER d/b/a CHILDREN'S HOSPITAL; )  
OU MEDICAL CENTER, )

Defendants/Appellants. )

**FILED**  
COURT OF CIVIL APPEALS  
STATE OF OKLAHOMA

MAY 9 2008

MICHAEL S. RICHIE  
CLERK

Case No. 104,093

APPEAL FROM THE DISTRICT COURT OF  
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE BARBARA SWINTON, TRIAL JUDGE

**AFFIRMED**

Gerald E. Durbin, II  
Glen Mullins  
DURBIN, LARIMORE & BIALICK  
Oklahoma City, Oklahoma

For Plaintiffs/Appellees

Rec'd (date)	5-9-08
Posted	lh
Mailed	m
Distrib	mj
Publish	yes <input checked="" type="checkbox"/> no

Stephen J. Rodolf  
Leslie C. Weeks  
Brent L. Thompson  
RODOLF & TODD  
Tulsa, Oklahoma

For Defendants/Appellants

OPINION BY JOHN F. FISCHER, JUDGE:

Appellants seek review of a jury verdict awarding Appellees Nathan, Brittany and Brandon Shinn \$9,000,000 in compensatory damages and \$9,000,000 in punitive damages. Based on our review of the record on appeal and applicable law, we affirm.

**BACKGROUND**

On January 13, 2005, Nathan Shinn, a nine-month-old infant, was admitted to HCA Health Services of Oklahoma's Children's Hospital for treatment for injuries unrelated to this action. In the early morning hours Renny Jacob, the nurse assigned to the infant care unit, struck Nathan's head against a night stand while attempting to change his crib sheets. She did not immediately report the incident to anyone. The morning shift nurse performed a routine assessment of Nathan at 8:00 a.m., the following morning. Her assessment noted swelling and "sponginess" around Nathan's head. She did not order any tests or notify a doctor at this time. At 9:40 a.m. that morning, Nathan's father immediately noticed

swelling and softness around Nathan's head and demanded a doctor. A subsequent CT scan revealed that Nathan had suffered multiple skull fractures and an intracranial hematoma.

Following the test, hospital staff notified the police and the Department of Human Services (DHS). The police began investigating the incident to determine precisely how Nathan's injuries had occurred. DHS began investigating the Shinns for suspected child neglect and abuse and interrogated each separately. A police officer was then constantly stationed by Nathan's room. The Shinns were under police and DHS investigation for child abuse for the next twenty-four days.

Nurse Jacob initially lied about the incident to police. On January 16, 2005, she signed a sworn statement denying responsibility for Nathan's injury. On February 2, 2005, the police again interviewed Nurse Jacob who, after being asked whether she would submit herself to a lie detector test, finally admitted to the police that she had caused Nathan's injuries.

The hospital did not inform the Shinns about Nurse Jacob's actions until five days later on February 7, 2005. On that day, the hospital's Chief Nursing Officer met with the Shinns and told them how Nathan had been injured. She assured them that the nurse responsible for Nathan's injuries would be "taken care of," but claimed that because the matter dealt with hospital personnel she could not specify

what actions would be taken. Following this meeting, Nurse Jacob purportedly resigned from her position at the hospital. Her resignation was not documented in any of the personnel records offered at trial. On March 3, 2005, DHS sent a letter to the Shinns to inform them that it had closed the investigation on Nathan Shinn, concluding that the Shinns had no part in Nathan's injuries.

The Shinns filed this suit against HCA Health Services of Oklahoma, Inc. (HCA) in July 2005 seeking compensatory and punitive damages for Nathan's injuries and pain and suffering, their own pain and suffering and for an alleged cover-up of the incident by HCA. What followed was a bitter and protracted pre-trial discovery process wherein attorneys for HCA continually delayed compliance with the Shinns' discovery requests making their last, but still incomplete, response three days prior to the October 31, 2006, jury trial.

The Shinns served their initial discovery requests on August 14, 2005. In its response to the Shinns' document request, dated November 29, 2005, HCA produced no documents and objected to all but five of the Shinns' requests, claiming that the remaining requests were overbroad, burdensome, irrelevant, protected by various privileges or pertained to documents that did not exist. The few requests to which HCA was at all responsive were deficient in quality as well. For example, in response to the Shinns' request for "policies and regulations

governing the standard of care for incidents that result in injuries to a patient at the hospital,” HCA offered to “make available for inspection at the offices of [counsel] the Table of Contents of the relevant nursing unit.” The Shinns’ counsel conveyed their dissatisfaction with HCA’s responses to their discovery requests on numerous occasions. When asked whether or not the documents to be made available in opposing counsel’s office could simply be faxed to the Shinns’ counsel, HCA stated that it would do so but failed to fax the documents. Following numerous phone calls and letters, HCA supplemented its response on March 27, 2005. Rather than offer more documents or responses to the Shinns’ request, however, the supplemental response merely offered four new objections.

HCA’s non-compliance throughout the discovery process was not confined to the production of documents. The same pattern of obstructive non-compliance is evident throughout the record with regard to requests for admissions, interrogatories and even the production of witnesses for depositions. HCA sought numerous continuances. Eventually, the Shinns filed a motion to compel production of documents. In response, HCA moved to strike the motion but never responded to the Shinns’ original motion to compel. On August 25, 2006, the Trial Court granted the Shinns’ motion to compel and ordered complete and full responses from HCA within one week. HCA subsequently refused to sign the

Journal Entry memorializing the Trial Court's order and failed to respond to the discovery requests as ordered by the Trial Court. The Shinns then filed a motion for sanctions asserting HCA's failure to comply with the Trial Court's discovery orders. Seven days later, on the Friday afternoon three days prior to trial, HCA delivered to the Shinns' attorney's office a box of 735 pages of documents, an affidavit and a privilege log. Although the box contained some of the requested documents, the production was still largely deficient. In response, the Shinns filed a supplemental motion for sanctions the following Monday, citing HCA's egregious disregard for the Trial Court's order, obstructive tactics and spoliation of evidence. In their motion, the Shinns requested a judgment on liability and punitive damages.

Following a hearing the morning of trial, the Trial Court granted judgment on liability, but denied the request as to punitive damages. At the conclusion of the compensatory damages phase of trial, the jury returned a verdict in favor of the Shinns for \$9,000,000. The award represents a general verdict of \$4 million to Brittany and Brandon Shinn and \$5 million to Nathan Shinn for actual damages. The jury also found that HCA had acted with reckless disregard toward others and intentionally and with malice toward others. Following the punitive damages

phase of trial, the jury awarded the Shinns \$9,000,000 in punitive damages. HCA raises six issues on appeal, which we address below.

### STANDARD OF REVIEW

The imposition of sanctions is reviewed for an abuse of discretion.

*Hammonds v. Osteopathic Hosp. Founders Ass'n*, 1996 OK 100, ¶ 6, 934 P.2d 319, 322. “If the trial court’s decision stands supported by the record and reason, it will not be disturbed on review.” *Id.* Proceedings to impose sanctions are of equitable cognizance, and an award of sanctions will be presumed legally correct “unless found to be clearly contrary to the weight of the evidence or to some governing principle of law.” *Warner v. Hillcrest Med. Ctr.*, 1995 OK CIV APP 123, ¶ 49, 914 P.2d 1060, 1072.

“[A] general verdict of a jury constitutes a finding of every material fact necessary to support it, and is conclusive as to all disputed facts and conflicting statements.” *Grumman Credit Corp. v. Rivair Flying Serv. Inc.*, 1992 OK 133, ¶ 10, 845 P.2d 182, 185. On appeal, we will not disturb a jury verdict if it is supported by any competent evidence reasonably tending to support the verdict. *Florafax Int’l, Inc. v. GTE Mkt. Res., Inc.*, 1997 OK 7, ¶ 3, 933 P.2d 282, 287.

“Where (1) there is any competent evidence which reasonably supports the jury’s

verdict and (2) there are no prejudicial errors shown in the trial court's jury instructions, neither the verdict nor the judgment based thereon will be disturbed on review." *Stroud v. Arthur Andersen & Co.*, 2001 OK 76, ¶ 9, 37 P.3d 783, 787-88.

"The standard of review of challenged instructions is whether there is a probability that the jurors were misled and thereby reached a different result than they would have reached but for the error." *Smicklas v. Spitz*, 1992 OK 145, ¶ 14, 846 P.2d 362, 368. Moreover, we will not set aside a judgment on the ground of misdirection of the jury absent a finding that the error complained of either has probably resulted in a miscarriage of justice or constituted a substantial violation of a constitutional or statutory right. 20 O.S.2001 § 3001.1. Further, we will not reverse a judgment based on misconduct of counsel absent a showing that counsel's conduct substantially prejudiced the jury "to the material detriment of the party complaining." *Oklahoma Turnpike Auth. v. Daniel*, 1965 OK 7, ¶ 13, 398 P.2d 515, 518.

## DISCUSSION<sup>1</sup>

### I. Discovery Sanctions<sup>2</sup>

In its first allegation of error, HCA contends that the Trial Court abused its discretion by directing a verdict on liability in favor of the Shinns as a sanction against HCA for its failure to comply with discovery requests. Title 12 O.S. Supp. 2002 § 3237(B)(2)(c) provides that where a party fails to obey an order to provide discovery, the Trial Court may, as a permissible sanction, enter an order “rendering a judgment by default against the disobedient party.”

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<sup>1</sup> On July 25, 2007, HCA filed its notice of supplemental authority with this Court. We note that although the filing is titled as a notice of supplemental authority, the substance of the filing attempts to raise issues not raised in HCA’s brief in chief to this Court. “Assignments of error which are not argued or supported by the brief with citations to authority will be considered and treated as waived by this Court.” *Peters v. Golden Oil Co.*, 1979 OK 123, ¶ 3, 600 P.2d 330, 331.

<sup>2</sup> On December 22, 2006, the Shinns filed a Motion To Strike Materials Improperly Designated By Appellants For The Record On Appeal. The Shinns contend that HCA attempted to designate several documents in the record on appeal that were not before the Trial Court at the time of the decision appealed. Specifically, they complain of documents that were filed of record subsequent to the conclusion of trial on November 3, 2006. The Shinns’ motion also requests that this Court strike several subpoenas, summonses and notices of depositions designated by HCA on appeal. Supreme Court Rule 1.28(b), 12 O.S., ch. 15, app. 1., provides, in part:

The record on appeal shall not include the following unless upon order of the trial court or appellate court, or unless the document is specifically drawn in issue by the appeal: subpoenas, summonses, certificates of service, returns and acceptances of service, and procedural motions or orders (e.g. continuances, extensions of time, etc.). . . . Materials which were not before the trial court at the time of the decision appealed are not properly part of the record on appeal without order of the trial court or the appellate court.

As no order of the Trial Court or this Court requesting designation of these documents exist, we grant the motion to strike the challenged documents from the record on appeal.

In support of its proposition, HCA directs this Court's attention to *Payne v. Dewitt*, 1999 OK 93, 995 P.2d 1088. The *Payne* Court was confronted with a defendant who failed to appear for a "noticed deposition" after numerous attempts were made by opposing counsel to depose him. As a sanction, the trial court in *Payne* entered a default judgment against the defendant for actual and punitive damages. Before affirming this sanction as proper, the *Payne* Court noted a five-factor test employed by the U.S. Court of Appeals for the Tenth Circuit in similar contexts. See *Jones v. Thompson*, 996 F.2d 261, 264 (10th Cir. 1993); *Ehrenhaus v. Reynolds*, 965 F.2d 916, 920-21 (10th Cir. 1992). These five factors are: (1) the quantum of prejudice noncompliance has caused the adversary (or moving) party, (2) the extent of interference with the judicial process, (3) culpability of the litigant, (4) whether the court warned the party in advance that noncompliance could lead to dismissal or default judgment, and (5) the efficacy of lesser sanctions. *Payne*, 1999 OK 93 at ¶ 8, 995 P.2d at 1093.

In considering the first factor, the Trial Court noted that prejudice caused by HCA's noncompliance was evidenced by HCA's repeated failure to comply with discovery requests, even after being ordered to do so by the Trial Court, for more than a year. Further, HCA's failure to comply with discovery in any material way until three days prior to trial impeded the Shinns' ability to prepare for trial.

As to the second factor, the Trial Court's own admonitions to counsel for HCA more than support our affirmance:

I attempted to be very clear in what my expectations were of the defendants with the volume of information that had not been responded to [and that] I felt was relevant and ruled was relevant . . . to not have affidavits from the litigant as requested stating whether or not there were documents seems to be inexcusable in my mind.

The delay tactics on the part of the defendant have been well established in asking for continuances and delaying responding and hoping that the Motion to Disqualify the trial judge would get them the continuance they previously sought did not work out and I think that may have played [a] part in the failure to provide the necessary documents in this case for the plaintiffs to be properly prepared.

The uniform pattern of HCA's failure to respond to legitimate requests throughout the discovery process clearly supports the Trial Court's finding that this conduct unnecessarily obstructed the judicial process.

The next factor, the culpability of the litigant, is also clearly supported by reason and evidence. HCA willfully and recklessly disregarded the Trial Court's direct orders. HCA's first "material" attempt at responding to the Shinns' discovery requests came fourteen months after the initial request for production of documents was served. At best, HCA failed to honor the discovery process until three days before trial, which the Trial Court found to be an attempt to force the Shinns to request a continuance. HCA's culpability in this regard is undeniable.

On appeal, HCA contends that the Trial Court's sanction constitutes an abuse of its discretion with regard to the fourth factor – i.e., whether the Trial Court warned HCA that its noncompliance could lead to a default judgment. HCA contends that the Trial Court abused its discretion because it failed to explicitly warn counsel that a default judgment was a possible sanction for its noncompliance. The record lacks any explicit evidence that such notice was given.

However, HCA does not argue that the Trial Court's sanction constitutes error because it was unaware of the possibility of a default judgment. Rather, it argues that the Trial Court abused its discretion because *Payne* required the Trial Court to warn that default judgment as to liability was a sanction that was possible in this instance, prior to imposing that sanction. A cursory reading of *Payne* rebuts the imposition of such a duty on the Trial Court. In *Payne*, the defendant on whom the sanction of a directed verdict was imposed was held to have been given sufficient notice because he “was warned through his counsel that default would follow if he failed to appear at the court-ordered deposition.” 1999 OK 93 at ¶ 10, 995 P.2d at 1094. Thus *Payne* simply requires that a litigant on whom the discovery sanction of a directed verdict is imposed be warned by any source, including the litigant's own counsel. The record before this Court clearly establishes, beyond any doubt, that counsel for HCA was well aware of the

possibility of such a sanction; its July 20, 2006, motion for sanctions filed in response to the Shinns' alleged failure to comply with discovery requests filed July 20, 2006, states: "WHEREFORE, premises considered, Defendant HCA . . . respectfully requests this Court dismiss this case as a sanction for Plaintiff's failure to follow the Court's [scheduling order]."

In this context, affirmative notice from the Trial Court informing HCA of the possibility of a directed verdict was unnecessary because the record clearly demonstrates that counsel for HCA was aware of, and indeed asked for, a similar discovery sanction. Given the language of HCA's own pleading, evidencing its clear awareness of the possibility of judgment by default as a sanction available pursuant to 12 O.S. Supp. 2002 § 3237(B)(2)(c), we cannot say that the Trial Court abused its discretion in determining that HCA had sufficient notice of the sanction ultimately imposed.

In considering the efficacy of lesser sanctions, the Trial Court noted that any lesser sanction of striking certain documents would only assist HCA and would further "hand-tie" the Shinns in trying the case in a timely manner. Finally, the Trial Court determined that any continuance of the proceedings would only reward HCA's delay tactics with further delay. Based on this record, we cannot say that the Trial Court abused its discretion in directing a verdict on liability as an

appropriate sanction for HCA's continued failure to comply with its explicit orders. Further, we note that HCA's underlying liability for the injuries suffered by the Shinns was admitted prior to trial and the essential facts supporting the Trial Court's directed verdict are not in dispute. Finally, we observe that the Trial Court's sanction order was entered prior to any determination by the jury as to the amount of damages to be awarded in this case.

## II. Jury Instructions

At the conclusion of trial, the Trial Court gave the following instruction:

You are instructed that Defendant has conducted itself in violation of the laws of the State of Oklahoma. This conduct has occurred in my Courtroom. This conduct includes a violation of the laws of the State of Oklahoma, as to perjury and disobedience of a direct Court order. You may consider the Defendant's perjury and direct disobedience of a Court order in your consideration of punitive damages for Plaintiffs.

You are to consider these findings of the Court, in addition to the evidence presented, in determining whether Defendant acted in reckless disregard of the rights of others or intentionally and with malice towards others, when you consider punitive damages against Defendant in a later part of this trial. If you find that Defendant did not act in reckless disregard of the rights of others, or intentionally and with malice towards others, you may not award punitive damages against Defendant.

HCA contends that this instruction constitutes prejudicial error because it impermissibly impeached the credibility of HCA's witnesses and counsel. *See Sawyer v. Brown*, 1925 OK 377, ¶ 2, 236 P. 404, 405. As we have already noted,

