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.

Case No. 104,093

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE BARBARA SWINTON, TRIAL JUDGE

AFFIRMED

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For Plaintiffs/Appellees

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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[1]

I. Discovery Sanctions[2]

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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[1] 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.

[2] 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,

we will not reverse a jury's verdict based on an allegedly prejudicial instruction absent a showing that the jurors were misled and "reached a different result than they would have reached but for the error." *Smicklas,* 1992 OK 145 at ¶ 14, 846 P.2d at 368. The record is replete with evidence supportive of the Trial Court's instruction based on HCA's lack of candor. In addition to HCA's previously discussed violation of a direct court order, we emphasize two specific incidents of gross misconduct merely to illustrate the tenor of HCA's egregious and questionable behavior throughout litigation.

First, the Shinns' original request for production of documents included a request for "[c]olor copies of all medical records, photographs, videotapes, and other records and documents relating to Nathan Shinn while he was a patient at The Children's Hospital." In response, HCA provided black and white copies and contended before the Trial Court, as late as October 27, 2006, that "the original medical records were scanned and saved to a computer. As such the hard copies of the original records are no longer available and the only copies available are in black and white." On the first day of trial less than a week later, the Shinns subpoenaed Jindria Alvarado, Health Information Management Manager for the hospital, and demanded that she either produce the records or explain the process by which they had been destroyed. Alvarado arrived in court with the original

medical records and testified that the original documents had not been destroyed and were currently in the hospital's control. She further testified that she was never notified that the Shinn's attorneys had requested color copies of the original files. In a hearing outside the presence of the jury, the Trial Court once again admonished HCA's counsel for his misstatements, sequestered the medical records in chambers for review by the Shinns' attorney and reserved consideration of the complained of instruction on punitive damages until all evidence had been presented.

Second, evidence in the record clearly establishes that HCA was well aware of the cause of Nathan's injury as early as February 2, 2005. At trial, witnesses for HCA testified that the Shinns were invited to the hospital where they were informed of Nurse Jacob's culpability and offered an apology that same week. Despite awareness of these facts, in an answer filed September 26, 2005, HCA denied that it caused the injury or that any of its employees were negligent in the care and treatment provided to Nathan, contending that it was without sufficient knowledge to form a belief as to whether or not Nathan's injuries were directly caused by the acts or omissions of its agents or employees.

The Trial Court was justifiably troubled by HCA's lack of candor throughout these proceedings. The record supporting the Trial Court's instruction

is robust. However, the instruction merely notes that the jury may consider HCA's obstructive conduct during litigation as well as its, at best, misleading conduct prior to the filing of this suit in determining whether to award punitive damages.

HCA also contends that this instruction necessitates reversal because the Trial Court's finding of "perjury" was prejudicial and unsupported by the record. Once again we note that our standard of review necessitates affirmance of a Trial Court's jury instruction absent a showing that the instruction misled the jurors. The substance of the instruction, i.e., that HCA disobeyed a direct court order and that it had falsely asserted that evidence had been destroyed, was predicated on verifiable fact. HCA has not shown that the term "perjury," used to describe HCA's lack of candor, misled the jury.

Finally, HCA contends that the Trial Court prejudiced the jury by allowing three separate instructions regarding the hospital's duty, corporate negligence and chain of command, because they were not contained in the Oklahoma Uniform Jury Instructions (OUJI). HCA asserts that these instructions were repetitive with respect to liability and reinforced the Trial Court's directed verdict. "The cumulative effect of those erroneous and highly prejudicial instructions," HCA contends, "cannot be overlooked." The jury was certainly aware that the Trial Court had directed a verdict finding HCA liable for Nathan's injuries. We do not

perceive how informing the jury of this, or even reminding the jury of the same on more than one occasion, would cause them to render a verdict it would not have otherwise rendered. Therefore, we hold that the instruction does not constitute reversible error.

III. Evidence of HCA's Net Worth

HCA next alleges that the Trial Court erred by allowing evidence of its parent corporation's financial worth during the punitive damages phase of trial because the Trial Court lacked sufficient foundation to admit the evidence. Some discussion of the events leading up to the admission of these documents is necessary to give context to HCA's allegation of error.

On October 30, 2006, after announcing its discovery sanction, the Trial Court ordered HCA to produce financial records for use in the punitive damages phase of trial. On November 2, 2006, outside the presence of the jury, HCA offered a one-page summary of the audited financial records for the hospital for the year 2005. HCA did not offer any tax returns or financial information regarding any of its other facilities or the hospital's parent company. Counsel for the Shinns responded that the proffered evidence was not sufficient and explicitly requested HCA's tax returns for the last three years. Counsel for HCA stated to the Trial

Court that he was unaware of where that data would be housed, but that he would "find out."

The Shinns promptly subpoenaed HCA's accounting firm for the requested financial records and filed a trial memorandum on November 2, 2006, in which they contended that HCA was merely an alter-ego of its parent corporation Hospital Corporation of America, Inc. (HCAI). At the conclusion of the compensatory damages phase of trial, the Shinns once again requested HCA's tax returns. HCA again produced the same one-sheet summary, stating that tax returns could not be supplied because HCA "does not have its own financials" for the hospital or any of its other enterprises, and that the requested tax returns did not exist because HCA did not file its own tax returns.[3] At no point throughout the entire proceedings did HCA provide the requested documents. Based on the wholly deficient tenor of HCA's financial summary and the alleged alter-ego status

[3] On appeal, HCA asserts that the summaries for the hospital accurately depict HCA's financial worth because the hospital is the only facility operated by HCA. HCA makes this dubious argument despite testimony from HCA's Chief Nursing Officer that she was in charge of three separate facilities for HCA. On appeal, HCA contends that, "as a nurse," she was not qualified to speak about the operation of other facilities. Her assertions of fact appear to be accurate based on the record and her experience as HCA's Chief Nursing Officer. Further, HCA never objected to the Chief Nursing Officer's testimony with regard to these facts at trial, and its complaints of error will not be considered for the first time on appeal. 12 O.S.2001 § 2104.

of HCA, the Shinns argued that the financial records for HCAI were admissible to give an accurate financial picture of the defendant's assets.[4]

On November 3, 2006, the Trial Court granted the Shinns' request to amend their pleadings to conform to the evidence presented at trial pursuant to 12 O.S.2001 § 2015. The Trial Court then admitted HCA's annual financial report and SEC filings obtained from the internet. Counsel for HCA argued that the records were inadmissible because HCAI was not a named defendant and HCA was an "indirect subsidiary" of HCAI rather than an alter-ego or wholly owned subsidiary. In *Frazier v. Bryan Mem'l Hosp. Auth.*, the Oklahoma Supreme Court held:

> The question whether an allegedly dominant corporation may be held liable for a subservient entity's tort hinges primarily on *control.* Factors which may be considered at trial include whether 1) the parent corporation owns all or most of the subsidiary's stock, 2) the corporations have common directors or officers, 3) the parent provides financing to its subsidiary, 4) the dominant corporation subscribes to all the other's stock, 5) the subordinate corporation is

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[4] On appeal, HCA argues that "Plaintiffs falsely suggested to the Court that it had submitted a document request for the 10K of [HCAI]." We have thoroughly reviewed the record on appeal and find HCA's accusation of falsehood to be wholly unsupported by the record. At no point did the Shinns suggest to the Trial Court, either orally or in a written pleading, that they had previously requested from HCA the document introduced at trial. Rather, the Shinns accurately stated to the Trial Court that they had requested financial records and tax returns from HCA to no avail. In response to HCA's failure to comply with the Trial Court's order to provide the same, the Shinns offered the only document available to them on such short notice. We note that HCA's blatant mischaracterization of the Shinns' conduct is deficient in its candor to this tribunal consistent with its conduct in the Trial Court.

> grossly undercapitalized, 6) the parent pays the salaries, expenses or losses of the subsidiary, 7) almost all of the subsidiary's business is with the parent or the assets of the former were conveyed from the latter, 8) the parent refers to its subsidiary as a division or department, 9) the subsidiary's officers or directors follow directions from the parent corporation and 10) legal formalities for keeping the entities separate and independent are observed.

1989 OK 73, ¶ 17, 775 P.2d 281, 288 (footnotes omitted).

In support of their contention that HCA was merely an alter-ego of HCAI, the Shinns offered evidence to show: (1) the hospital's employees are subject to HCAI's employee conduct and patient care policies; (2) the Federation of American Hospitals lists the hospital, as well as the other facilities operated by HCA, as a facility of HCAI; (3) HCAI's web site lists the hospital as one of "our family of hospitals and surgery centers;" (4) HCAI nurse recruitment literature proposes a "career at HCAI" and advises potential recruits that they can be relocated throughout the country to any of HCAI's 400 facilities in 23 states; (5) HCAI established a "company-wide initiative to create a culture of patient safety" to implement patient safety practices in its hospitals throughout the country; (6) all HCAI-affiliated hospitals utilize HCAI-authored safety programs; (7) HCAI's press packet contains a map of "[HCAI] Locations" that includes the hospital; (8) HCAI enforces a mandatory code of conduct in all of its hospitals, including the hospital; (9) HCAI retains the right to institute disciplinary action against any

employee or facility in violation of the mandatory code of conduct; (10) HCAI operates an ethics hotline that local facilities may contact for assistance in resolving issues of patient safety, as well as a joint commission to which employees of local facilities may report issues of concern "if the reporting individual doubts that the issue has been given sufficient or appropriate attention" by a local facility's management; (11) HCAI directs and mandates the information available to patients at a local facility; (12) HCAI directs and controls how patient information is to be handled and how emergency treatment is to be conducted; (13) HCAI employs a "Corporate Ethics and Compliance Officer" to whom violations of the law or company policies can be reported to ensure compliance; (14) HCAI maintained an Internal Audit Department to monitor Code compliance at the hospital; (15) HCAI dictates procedures for the maintenance of business document accuracy, retention and disposal for the hospital; (16) HCAI implemented policies, procedures and systems to facilitate accurate billing to government payers, commercial insurance payers, and patients for the hospital; (17) HCAI controls the billing and coding procedures for the hospital; (18) HCAI controls dissemination of hospital business records; (19) HCAI controls the hospital communications systems, financial reporting and cost records; (20) HCAI has the authority to discipline hospital employees who abuse the communications system; (21) HCAI

requires all hospital employees to sign an acknowledgment, which recognizes HCAI's right to any authorship or invention created during employment; (22) HCAI's annual and quarterly reports include the income, assets, profits, losses and expenses of the hospital; (23) all HCAI facilities and affiliates are insured through a subsidiary of HCAI; (24) the hospital staff are eligible for stock options in HCAI; (25) the assets of the hospital are leased to HCAI; (26) five representatives of HCAI sit on the hospital's ten-member governing board; (27) the hospital was initially capitalized by a $40 million dollar contribution from HCAI; (28) HCAI continues to advance amounts to fund capital expenditures; (29) HCAI makes distributions and disbursements on behalf of the hospital for operating expenses and capital transactions; and (30) workers' compensation for the hospital staff is pooled with all other HCAI affiliates. HCA never called any witnesses or offered any evidence to dispute this evidence.

Nonetheless, HCA argues, "Plaintiffs wrongly used [HCAI's] net worth, even though the theory of alter ego was never litigated or decided on the merits." A cursory review of the record establishes that the Shinns filed an extensive memorandum arguing the alter ego theory to the Trial Court, the Trial Court conformed the pleadings to include the evidence of an alter ego, and HCA failed to present any evidence to refute the Shinns' contention. Given HCA's continued

delay in discovery, the extensive evidence of control by HCAI submitted by the Shinns and the absence of any evidence to controvert the Shinns' claims, the only evidence of record establishes that HCA was an alter ego of HCAI and, consequently, the Trial Court did not err in permitting the jury to consider evidence of HCAI's financial worth in formulating an appropriate punitive damages award.

IV. Statements of Counsel

HCA next contends that the Trial Court committed reversible error by allowing the Shinns to inform the jury, during the punitive damages phase of trial, that HCA's compensatory damages obligation would be satisfied by liability insurance. "[O]rdinarily any reference that injects the insurance feature . . . is improper and prejudicial to the rights of the defendant and failure to declare a mistrial upon timely motion constitutes reversible error." *Smith v. Hanewinckel,* 1965 OK 113, ¶ 22, 405 P.2d 99, 103 (quoting *M & P Stores, Inc. v. Taylor,* 1958 OK 123, 326 P.2d 804). "[W]hether or not testimony is prejudicial and effectually informs the jury that defendant is protected against a judgment by insurance, depends essentially upon the facts and circumstances of each case." *M & P Stores,* 1958 OK 123 at ¶ 16, 326 P.2d at 808. However:

> If counsel for one party pursues a line of argument not called for by the facts of the case and in itself improper and thereby invites a reply, the party so, through counsel, violating a proper course of procedure

> and the rules intended to secure the proper presentation of causes ought not to be heard to complain of the reply.

Helmerich & Payne v. Nunley, 1935 OK 633, ¶ 41, 54 P.2d 1088, 1095 (quoting *Taylor County v. Olds,* 67 S.W.2d 1102, 1106 (Tex. App. 1934)).

As in *M & P Stores,* our holding today is entirely dependent on the facts surrounding the discussion of HCA's liability insurance coverage. In his closing argument following the punitive damages phase of trial, counsel for HCA told the jury that HCA had already been "punished" enough by the compensatory damages award and that the hospital was a "facility that spends the vast majority of its time taking care of people who can't get care anywhere else." He further stated that by "punishing this defendant any further" the jurors "may wind up punishing [themselves] because of the care that is available there that's not available anywhere else." Immediately thereafter in a bench conference held outside the presence of the jury, the Shinns' attorney argued that by suggesting that any further punishment might unduly diminish the resources of the hospital such that it could no longer provide care, HCA had "opened the door" to present contradictory evidence that HCA's resources would not be depleted by the initial compensatory damages award, which was covered by HCA's liability insurance policy.

In this instance, HCA's suggestion that a punitive damages award in addition to the compensatory damages verdict would *further* tax its resources "opened the door." Therefore, discussion of HCA's liability insurance coverage was not only proper, but necessitated and provoked by HCA's closing argument. Further, to the extent HCA could show any improper argument by counsel for the Shinns, as stated otherwise in *Helmerich,* "[C]ounsel for defendant was more guilty of improper argument than was counsel for plaintiff." 1935 OK 633 at ¶ 40, 54 P.2d at 1095. Consequently, we hold that the Trial Court did not commit error by permitting the Shinns to make statements concerning HCA's liability insurance coverage to the jury.

V. Evidence in Support of Jury Verdict

HCA asserts that the jury's award of $9 million in actual damages was not supported by the evidence. Specifically, HCA contends that no testimony was offered establishing that Nathan would suffer lasting physical damage and that none of the evidence presented supports an award for the Shinns' emotional damage. In response, the Shinns argue that HCA has failed to preserve for appeal any objection based on the sufficiency of the evidence and that, regardless, evidence presented at trial was sufficient to support the jury's verdict.

Ordinarily, the issue of the insufficiency of the evidence presented at trial "may not be raised on appeal where there has been no demurrer to the evidence, motion for a directed verdict or other effort to raise the sufficiency issue in trial court." *John Deere Co. v. Payne*, 1979 OK CIV APP 8, ¶ 2, 592 P.2d 544, 545. HCA does not dispute that it failed to either demurrer to the evidence or move for a directed verdict. Rather, it contends that such a motion was unnecessary in light of the Trial Court's directed verdict because "the notion of a 'motion for a directed verdict' is clearly inapplicable where there is no jury whose verdict one may direct." *Id.* at ¶ 3, 592 P.2d at 545. However, the Trial Court's directed verdict against HCA as to liability is not relevant to the issue of damages. The jury was not directed by the Trial Court to award a specific amount. Rather, the jury rendered a verdict based on the evidence adduced at trial.

HCA directs this Court's attention to *Barnes v. Oklahoma Farm Bureau Mut. Ins. Co.*, in which the Oklahoma Supreme Court held that pursuant to 12 O.S.2001 § 991 "there was no requirement the [contested] issue be made the subject of a motion for new trial or remittitur in order to preserve it for appellate review." 2000 OK 55, ¶ 37, 11 P.3d 162, 176. Noting that the defendant had demurred to the plaintiff's evidence, moved for a directed verdict and objected to lifting the cap on punitive damages, the *Barnes* Court was satisfied that the

defendant had preserved the issue of sufficiency for appeal because it had consistently raised the issue of sufficiency to the trial court. Unlike the defendant in *Barnes,* HCA did not demurr to the evidence or move for a directed verdict or attempt to raise the issue of sufficiency to the Trial Court at any point in the proceedings below.

By neglecting to file a motion for a directed verdict, HCA has failed to preserve the error for review. *Richardson v. Butler,* 1952 OK 26, ¶ 13, 240 P.2d 1058, 1060; *Drouillard v. Jensen Constr. Co.,* 1979 OK 126, ¶ 5, 601 P.2d 92, 93. As such, HCA's failure to request a directed verdict in this instance is fatal to this issue on appeal. *Bane v. Anderson, Bryant & Co.,* 1989 OK 140, ¶ 33, 786 P.2d 1230, 1236 (claims of excessive damages can not be considered for the first time on appeal).[5]

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[5] Although we ultimately find that HCA has failed to preserve the issue of sufficiency on appeal, we are confident that the jury's award is supported by competent evidence as demonstrated by the record on appeal.

The jury's award of $9 million represents a general verdict of $4 million dollars to Brittany and Brandon Shinn and $5 million dollars to Nathan Shinn for actual damages. Although HCA correctly states that the Shinns "presented no medical evidence that the head injury caused any lasting damage to Nathan," the jury's verdict did not specify that the damages awarded were due solely to any lasting injury to Nathan. The uncontroverted testimony of all witnesses who testified at trial established that Nathan suffered a bilateral fracture of the skull as well as a subdural hematoma. The record further establishes that the nurse who caused the injury returned Nathan to his bed and failed to report his injury to anyone. Consequently, Nathan's injuries remained untreated for the next seven hours and ultimately required further medical care. Therefore, competent evidence exists to support the jury's award of actual damages despite the position urged by HCA - *i.e.,* that the extent of Nathan's injuries and the fact that he was untreated for seven hours were not sufficient evidence of pain and suffering to

support the jury's verdict absent evidence of any lasting physical injury.

HCA contends that the award to Brandon and Brittany Shinn was "larger than reason dictates" because: (1) they did not seek counseling; (2) they were only "two of many people interviewed" by the police; (3) Nathan was never removed from their custody; and (4) "[t]he combined impact of [HCA's] alleged actions and counsel's argument similarly 'influenced the jury to create an improper sympathetic response.'"

The bulk of evidence submitted at trial spoke to an alleged coverup by HCA that extended from the moment the Nurse Jacob's actions became known all the way through trial. In addition to the robust record of misconduct discussed above, we note several other troubling incidents supportive of the jury's verdict.

As noted above, following the CT scan, which revealed the extent of Nathan's injuries, DHS and the police began investigating the Shinns for suspected child abuse. Police officers were stationed at Nathan's room during the investigation, which lasted for some twenty-four days. Without question, the Shinns' trauma and stress of discovering that their infant child had suffered a severe head injury was only amplified by the subsequent police investigation. The record clearly establishes that, but for the Nurse Jacob's failure to confess her role in Nathan's injuries, these investigations would not have taken place. Further, the hospital made no attempt to inform DHS of the incident. Offering his testimony via affidavit submitted at trial, the DHS investigator assigned to Nathan's case stated that, up until that day - some twenty-two months after the injury - DHS was unaware that any employee of the hospital had caused Nathan's injuries.

When police were initially called to the hospital to investigate, the doctor reviewing Nathan's test results stated to police that the injury was suspicious and indicated non-accidental trauma. At trial, a sergeant from the police department testified that the department had recommended that the district attorney press charges against the nurse responsible for Nathan's injuries. We find the following exchange informative:

> Q: Everything you've heard about [the incident] during your investigation is about as bad an act as you can see, isn't it?
> A: Yes.
> Q: And you told us about that the DA, the charges were recommended against this nurse at the hospital.
> A: The LPN, yes.
> Q: And, in fact, even to this day your Major Welch and Captain Ligon still believe that those charges should be pursued, don't they?
> A: Yes.
> Q: [Do] [y]ou believe that?
> A: Yes.
> Q: And you're disappointed that they weren't?
> A: Yes.
> Q: And at one point you mentioned that the reason they weren't is because of a Dr. Stuemky [who] made a recommendation that it was an accident; is that right?
> A: Correct.

Q: Who is Dr. Stuemky?
A: I believe Dr. Stuemky, he's the -- he's senior physician for the [hospital], deals primarily with children's pediatric and is used as the State's witness for child abuse cases.
Q: And it was based on that recommendation?
A: That's what it said on the declined sheet.

As previously discussed, when the Shinns were first told of Nurse Jacob's actions, they were also assured that she would be "taken care of." HCA maintained that they could not disclose whether she had been fired because to do so would be a violation of personnel confidentiality. In a deposition taken prior to trial, HCA's Associate Chief Nursing Officer stated three separate times that she had fired the nurse. At trial, the nurse testified that she had resigned after HCA offered her the choice between resigning or being fired. She further testified that in March 2006 she had upgraded her license from an LPN to a Registered Nurse and had received a commensurate raise in pay from her current employer. She had, since the incident, obtained gainful employment at other medical facilities in Oklahoma City, including one that specializes in adolescent child care for special needs children. Despite HCA's employment practice to the contrary, Nurse Jacob's personnel records are silent with regard to her termination or resignation. HCA's Associate Chief Nursing Officer further testified that nothing in the nurse's personnel file would inform a potential employer of her actions with regard to Nathan Shinn or her subsequent resignation. Relevant portions of the transcript provide:

Q: Is there anything in her personnel file, her employment file that shows that she is not re-hireable?
A: Not in this personnel file. . . .
Q: Is there anything in the personnel file, the employment file that was produced to us last Friday that will show us any of the events, the meeting, the telephone conference, the decision to let her resign or quit rather than fire, anything in there that we can look at back then?
A: No.
. . . Q. . . . [I]f we're going to go back and, again, this actions - words versus actions, can you point us out anything back at that time that we could look at, ma'am?
A: The end of her employment.
Q: All right. Where do we go to look at that?
A: To know when the last day that she worked was.
Q: All right. Is there anything in her personnel file?
A: No.
Q: Where else do we go then?
A: (No response.)
. . . Q: Did you tell me during that, I think it was 100-page deposition, a single time that you let her resign rather than firing her?
A: No . . .

HCA's eleventh-hour discovery response contained the Nurse Jacob's personnel file, as

well as the files for two other nurses. The response was disorganized. At trial, the Shinns offered this as evidence of further obfuscation by HCA. Notably, relevant documentation of Nurse Jacob's performance history was placed in the file of another nurse. Among these "misplaced" performance reports was a December 16, 2003, individual action plan, which stated, "The summary findings for the individual assessed are: DOES NOT MEET EXPECTATIONS . . . [c]ommunicate findings ASAP to manager to determine readiness for assignment as LPN on the Infant Unit evening/night shift." Also misplaced in this file was a January 23, 2004, reassessment individual action plan, which provided, "Management of events is limited. Omits CMS check on the extremity of a five-year-old with an IV infiltrate. Omits stabilization of C-spine and calling, notifying RN for the infant found on floor after hearing a thump and begins CPR." Comments in the "Management of Problems" section of the plan provide that Nurse Jacob "[d]oes not consistently report all essential data to the RN to report to the MD . . . does not consistently take the nursing actions expected for role."

At trial, HCA's Chief Nursing Officer testified that the Oklahoma Board of Nursing (the Board) was the appropriate regulatory authority to which Nurse Jacob should have been reported for her actions. She further testified that based on the current state of the records no regulatory agency, accreditation agency, Medicare or Medicaid - organizations on which HCA relies for the receipt of benefits and accreditation - would have reason to know of her behavior or what happened with regard to Nathan Shinn. HCA's Associate Chief Nursing Officer testified that HCA had reported the nurse to the Board. According to HCA, her testimony in this regard was "unwavering." In a previous deposition, the Associate Chief Nursing Officer testified that the report to the Board had been filed online and, consequently, physical evidence of this report did not exist.

Despite HCA's insistence that it had reported Jacob to the Board, an overwhelming amount of evidence in this record suggests otherwise. First, Jacob testified that she had never been contacted by the Board for an investigation. Second, to explain the Board's investigation process, the Shinns called the Deputy Director of the Board to testify. She explained that, due to confidentiality concerns, she could not explicitly state whether or not HCA had reported to the Board. She further testified that once a nurse is under investigation by the Board, the hiring facility must provide all written documentation of the incident, which becomes public record once admitted. We find the following exchange, taken from the Deputy Director's direct examination at trial, most illuminating:

> Q: If no complaint has been filed based [on] this incident, does that indicate that no complaint or no report was submitted . . .?
>
> A: I don't know how to answer this question without violating my oath to the Oklahoma Board of Nursing and violating our procedures and our processes. . . . I can tell you that under circumstances that are - - if there is a report to us of a nursing practice incident that involves significant harm to a patient, death of a patient, something substantial - - something of substantial public interest, those cases are always opened and they are always pursued. . . .
>
> Q: Is a skull fracture a significant injury to a patient?
>
> A: Yes.

VI. Plaintiffs' Counsel's Conduct at Trial

As its final allegation of error, HCA contends that the conduct of the Shinns' counsel improperly prejudiced the jury. In support of this proposition, HCA contends that counsel: (1) used the directed verdict as a blank check to imply that their accusations had been supported by the Trial Court's verdict; (2) repeatedly reminded the jury that the Trial Court's verdict was based on lies and misrepresentations that occurred in the courtroom; (3) reminded witnesses that "we're just looking for the truth" and claimed "cover-up;" (4) informed the jury that it had heard "a lot of half truths and we've heard lies."

"In the context of the whole trial," HCA contends, "[counsel] caused harmful error and [*sic*] warrant a new trial." As we previously stated, we will not reverse a judgment based on misconduct of counsel absent a showing that counsel's alleged conduct substantially prejudiced the jury "to the material

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Despite the serious nature of the injury, the Deputy Director testified that, according to the Board's licensure records, "no disciplinary action" had been taken by the Board against the nurse. She stated that these records were the same documents used by the Board prior to approving accreditation for a registered nurse and that Nurse Jacob had subsequently received her registered nurse accreditation from the Board based, in part, on the absence of any disciplinary action on her record. Despite HCA's Associate Chief Nursing Officer's claims that she had filed the report online, the Deputy Director testified, "We don't have the availability to do online reporting of nursing practice incidents."

Although the Shinns presented considerably more evidence supportive of the theory of a cover up, we are confident that the examples discussed above support a finding that the Shinns had suffered a substantial amount of emotional distress due to this coverup, despite the fact that they did not seek counseling.

detriment of the party complaining." *Oklahoma Turnpike Auth. v. Daniel,* 1965 OK 7, ¶ 13, 398 P.2d 515, 518. Based on the record in this case, it is apparent that HCA's conduct throughout this entire process, rather than that of Plaintiffs' Counsel, substantially influenced the jury. And, legitimate comment by Plaintiffs' Counsel on this conduct does not warrant reversal.

CONCLUSION

The Trial Court did not abuse its discretion by imposing a discovery sanction of a directed verdict on liability against HCA, where it had habitually failed to comply with opposing counsel's discovery requests and the Trial Court's previous order compelling compliance with the same. The jury's verdict was not prejudiced by any instructions given at trial, and HCA has failed to preserve its claim of insufficient evidence for review. Further, the Trial Court did not err in permitting evidence of HCAI's net worth to be submitted to the jury. Lastly, we hold that the conduct of counsel for the Shinns, as well as statements concerning liability insurance made by counsel at trial, did not substantially prejudice the jury. We, therefore, affirm.

AFFIRMED.

GOODMAN, P.J., and WISEMAN, J., concur.

May 9, 2008