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IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

OCT 21 2026

SELDEN JONES
CLERK

TIMOTHY JOHN HAYES, as Personal Representative of the Estate of Jess Junior Smethers,

Plaintiff/Appellant,

vs.

OKLAHOMA HEART HOSPITAL, LLC,

Defendant/Appellee.

Case No. 122,994

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE C. BRENT DISHMAN, DISTRICT JUDGE

AFFIRMED

Rec'd (date) 10-21-26
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Publish ___ yes X no

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OPINION BY GREGORY C. BLACKWELL, PRESIDING JUDGE:

The plaintiff, Timothy Hayes (as personal representative of the estate of Jess Junior Smethers), appeals from the court's order accepting the jury's verdict in favor of the Oklahoma Heart Hospital (OHH). The plaintiff alleges that the trial court committed several errors throughout trial warranting reversal and that the trial court should have disqualified itself from the case after trial but before the entry of the final journal entry of judgment. Upon review, we affirm the court's denial of the plaintiff's motion to disqualify and the court's order accepting the jury's verdict as there were no instructional or evidentiary errors, the plaintiff's due process rights were not violated, the jury's verdict was supported by competent evidence, and several propositions of error were unpreserved or waived.

I.

On September 23, 2019, a family member dropped off Mr. Smethers—age ninety-six—for an appointment at OHH. Mr. Smethers, using a walker, attempted to enter OHH through an automatic revolving door. Before he fully made it inside, the still-moving door clipped Mr. Smethers's foot, causing him to fall. As a result of the fall, Mr. Smethers sustained a fracture to his left hip and underwent surgery to repair the fracture. After the surgery, Mr. Smethers

developed blood clots in his legs and a pulmonary embolism, which ultimately caused his death.

The plaintiff filed this lawsuit against OHH on behalf of Mr. Smethers's estate for his injuries and wrongful death. After significant pretrial discovery and motion practice, a five-day jury trial began on April 8, 2024. The jury found—by a vote of eleven to one—in favor of OHH.

After trial, plaintiff's counsel contacted the juror who did not find in favor of OHH. The juror disclosed the following sequence of events. On the first day of trial, the juror purportedly witnessed counsel for OHH mouthing and suggesting answers to a witness, an employee of OHH, who was testifying on direct. The juror wrote a note describing what she believed she had witnessed and gave it to the bailiff. At trial the next day, the bailiff informed the juror that she had delivered the note to the judge, who indicated that he would keep an eye out for the alleged inappropriate behavior. The juror allegedly noticed the coaching again, looked to see if the judge was watching, and discovered that he was not.

Upon learning this information post-verdict but before any journal entry had been entered, the plaintiff's counsel procured an affidavit from the juror. Pursuant to Rule 15 disqualification procedure, plaintiff's counsel delivered the affidavit and a letter to the trial judge asking him to disqualify himself from the case and requesting an in camera hearing. Plaintiff's counsel also requested that a court reporter be present at the in camera hearing, but the trial court denied his request. The in camera hearing was held, and the judge denied the plaintiff's request to disqualify.

Then, pursuant to Rule 15 and upon the plaintiff's motion, the court held a public hearing on the disqualification issue. At that hearing, which was on the record, the trial judge recapped what transpired at the in camera hearing and reiterated that he was denying the plaintiff's request to recuse. It was also clarified at this hearing that the note the juror gave the bailiff was not preserved.

Pursuant to the next stage in the Rule 15 procedure, the plaintiff reurged its motion before the chief judge of the district court. After an on-the-record hearing, the chief judge denied the plaintiff's motion.

The plaintiff then filed an original action in the Oklahoma Supreme Court seeking a writ of mandamus requiring Judge Dishman to disqualify. *See* Supreme Court Case No. 122,579. The Court assumed jurisdiction, but, by a vote of five-to-two, denied the requested relief. Justice Gurich, joined by Justice Combs, would have granted the petition and issued a writ disqualifying Judge Dishman. The Court's order denying the writ was specifically "without prejudice to Petitioner seeking appellate review based on the same allegations raised for disqualification in this original proceeding." *Id.* (order filed December 16, 2024).

On March 6, 2025, Judge Dishman issued an order accepting the jury's verdict and entering judgment in favor of OHH. In this appeal, the plaintiff presents the disqualification issue, as well as several other propositions of error, all discussed below.

II.

A.

We first address the issue of the request for Judge Dishman to disqualify. The plaintiff alleges that the judge's conduct denied the plaintiff of his right to a fair trial before an impartial judge. The plaintiff contends that the trial court's receipt of a juror's note reporting that defense counsel mouthed answers and coached witnesses, the court's decision to investigate that conduct itself, and the court's failure to disclose the conduct to either side require vacatur of the judgment and a new trial before an impartial judge. We first note, however, that while the plaintiff characterizes the decision before us as whether a new trial should be granted, that is not the decision before this court.

The plaintiff sought disqualification of the trial judge in this case pursuant to Oklahoma District Court Rule 15. The plaintiff followed Rule 15 disqualification procedure, even seeking a writ of mandamus, which our Supreme Court denied on the basis that the plaintiff was free to raise the issue in this appeal. However, in reading the plaintiff's recusal motions and replies, we find it clear that he was asking the trial judge to recuse so that he *could* file a motion for new trial with a new judge. However, after the Rule 15 proceedings culminated in a denial of the plaintiff's motion, and the trial court issued its judgment accepting the jury's verdict on March 6, 2025, the plaintiff did not file a motion for new trial and instead filed this appeal.

By asking for a new trial now, the plaintiff conflates two distinct forms of relief. Rule 15 allows a party to challenge the judge's continued participation in

a case, and its remedy is limited to removal of that judge. When disqualification is wrongly denied, the trial court is directed to: "1) vacate all orders entered while the motions to recuse were pending; and 2) refrain from further rulings in this cause." *Miller Dollarhide, P.C. v. Tal*, 2007 OK 58, ¶ 21, 163 P.3d 548, 556. In this case, that would be the journal entry of judgment only. Rule 15 does not authorize an appellate court to set aside a jury's verdict and *sua sponte* order a new trial. Thus, the question before this court is whether the trial court should have recused or disqualified itself from the case, not whether a new trial should be granted on the basis of judicial misconduct.

B.

We next turn to the merits of the motion to disqualify.

It is undisputed that the plaintiff followed Oklahoma Rule 15 procedure.[1] The plaintiff made an *in camera* request for the judge to disqualify, which was denied. The plaintiff then filed a formal motion to disqualify, which was denied after a hearing. The plaintiff then re-presented his motion to the chief judge, who also denied the motion after a hearing. Both the trial court judge and the chief judge denied the plaintiff's motion, at least in part, due to its alleged untimeliness. However, the Oklahoma Supreme Court has made it clear that a

[1] We note that Rule 15 requires that a party aggrieved by the refusal of a judge to grant a motion to disqualify must re-present his motion to the chief judge within five days of the date of refusal. The docket sheet reflects that the trial court denied the request to recuse after a formal hearing on May 30, 2024, and plaintiff's motion asking the chief judge to review the matter was not filed until June 13, 2024. The chief judge acknowledged the untimeliness of the motion at the hearing; however, the court's order denying the motion exclusively states that its denial is based on the fact that the motion was not filed ten days before trial, rather than the plaintiff failing to re-urge the motion to the chief within five days. ROA 2984, *Order Denying Plaintiff's Motion to Recuse*, pg. 2.

party can succeed on a Rule 15 motion after trial in instances where the party learns of judicial bias after the trial has already occurred. *See Casey v. Casey*, 2011 OK 46, ¶ 14, 270 P.3d 109, 113. However, this court may affirm "if there is a different but proper legal theory upon which to base the decision." *McMinn v. City of Oklahoma City*, 1997 OK 154, ¶ 11, 952 P.2d 517, 521.

The trial court also denied the motion to recuse on the merits, stating as follows:

> At one point early in the trial, I believe maybe it was the first defense witness, a juror passed a note to my bailiff saying that she observed what she thought was defendant's counsel mouthing responses or answers back to ... the witness. So receiving this note, the Court had a couple of things it could have done at that point.
>
> First, I could have immediately addressed it with both parties, but the Court decided not to do that because I had not personally observed that conduct. If there was a situation where an attorney was mouthing answers back to a witness, the Court would see where that could possibly be grounds for a mistrial or some sort of sanction against the attorney, and I didn't want to go down that road without first personally observing that.
>
> So I allowed the questioning of the witness to continue after the break, while closely observing defense counsel. In doing so, I realized that defense counsel was looking down at her page and talking to herself, I suppose, lips were moving, but there was no – clearly no intention to relay an answer to the witness. So knowing that, I did not raise the issue with counsel and let the case proceed as opposed to creating an issue on the record that didn't need to be on the record.
>
> So, in that way, as defense counsel just asserted, she's correct that the Court did not observe any of the alleged misconduct in this case. In fact, I was watching closely for it and it simply did not exist.

Tr. (Aug. 20, 2024), pgs. 4-5. At the second hearing before the chief judge, the court also opined on the merits of the plaintiff's motion. The chief judge stated that there was not enough evidence to show that the trial court was biased in

any way. Tr. (Oct. 3, 2024), pg. 15. And that, even if the trial court was biased, it either affected both parties equally, or not at all. *Id.* at 16.

When an order of a judge in a civil proceeding denies a disqualification application, that order will not be reversed on appeal unless a clear abuse of discretion is shown. *Pierce v. Pierce*, 2001 OK 97, ¶ 21, 39 P.3d 791, 800. The burden is on the party seeking disqualification to substantiate a claim that the appearance of a fair trial is not present, or that the judge's impartiality might reasonably be questioned. *Id.* ¶ 19. Every litigant is entitled to nothing less than the cold neutrality of an impartial judge. *Miller Dollarhide, P.C. v. Tal*, 2007 OK 58, ¶ 17, 163 P.3d 548, 554. Where there are circumstances that cause doubts as to a judge's partiality, it is the judge's duty to disqualify, notwithstanding the judge's personal belief that he or she is impartial. *Id.* The question of a judge's appearance of impartiality is determined by an objective standard. *Pierce*, 2001 OK 97, ¶ 13. The common law contains a presumption that a judge is not biased, and a party must point to some fact to overcome the presumption to require disqualification because of bias. *Id.* (citing *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 820, 106 S. Ct. 1580, 1585).

Upon careful review, we find that the plaintiff cannot overcome the presumption that the trial court was not biased and has not shown the judge's impartiality might reasonably be questioned under the above-referenced objective standard. As the court explained, the trial court did not personally observe the alleged misconduct of the defense attorney in this case. Indeed, the trial court observed behavior that would tend to explain the allegation but that

did not suggest any misconduct on the part of the defense counsel. The premise of the plaintiff's theory that the judge should have recused is that defense counsel improperly coached a witness while the judge observed. Importantly, it is also the very fact the trial court found did not exist. An objective observer, aware that the trial court watched for the alleged misconduct and did not notice anything other than counsel talking to herself, would not reasonably question the judge's neutrality.

And importantly, the plaintiff cannot and does not point to any fact suggesting the judge was biased in favor of either party or that the judge's decision to not alert the parties of the juror's note influenced the outcome in this case. We agree with the observation of the chief judge, who determined that failure to disclose the existence of the note was either "bias to no one or ... bias to everyone." Tr. (Oct. 3, 2024), pg. 16. Determining whether disclosing the note would have helped the defendant or the plaintiff more is a game of rank speculation. On the one hand, the plaintiff argues that it helped the defendant because it potentially concealed allegedly inappropriate behavior by defense counsel and precluded plaintiff's counsel from making its own investigation into the allegation. It could also be argued that failing to disclose the note could favor the plaintiff, as disclosing the note would have tipped the defendant off that at least one juror thought defense counsel was behaving inappropriately, allowing defense counsel to cure that behavior, even if innocent.

While hindsight is twenty-twenty, whether the better course of action would have been to disclose the note to both parties is not the question that is

before this court. The question is whether, on these facts, failure to have done so requires disqualification because an objective, impartial observer would believe "the judge's impartiality might reasonably be questioned" because he did not disclose the note. Oklahoma Judicial Conduct Rule 2.11. 5 O.S. Ch. 1, App. 4, Rule 2.11. Upon review of the full relevant record, we think not.

Because the plaintiff has not overcome the presumption of impartiality or shown that the trial court judge's neutrality might reasonably be questioned, the denial of disqualification was not a clear abuse of discretion. Judge Dishman was not required to disqualify.

C.

The plaintiff also alleges that the trial court denied him the right to due process by denying his request for a court reporter at the in camera hearing. Oklahoma District Court Rule 15(a) states as follows: "Before filing any motion to disqualify or recuse a trial judge for any of the reasons set forth in 20 O.S. 2025, § 1401, in the common law, or in Rule 2 of the Code of Judicial Conduct, 5 O.S. 2025, ch. 1, app. 4, an in camera request shall first be made to the judge to disqualify." Meanwhile the court reporter statute, 20 O.S. § 106.4, requires court reporters to make a full report "in trials and judicial proceedings to which the court reporter is assigned by the appointing judge unless excused by the judge who is trying the case with the consent of the parties to the action." A refusal of the court to permit any statement to be taken down by the court reporter shall constitute a denial of due process of law. *Id.* The plaintiff requested to have a court reporter at the in camera hearing via email, and the court's bailiff

responded that because it was not a public hearing, no court reporter would be present. The plaintiff contends that the in camera discussion was a "judicial proceeding" as defined in 20 O.S. § 106.4 and his constitutional rights were violated when the court denied him the opportunity to have a court reporter.

First, we note that Rule 15 does not operate in isolation. Rather, it implements the statutory disqualification mechanism now codified at 20 O.S. § 1403. The Oklahoma Supreme Court outlined the history of § 1403 and its intended purpose in *Pierce v. Pierce*. The Court noted that § 1403 was enacted "to provide a procedure for parties to avoid a trial before a disqualified judge, and to create a court record on the disqualification issue so that the jurisdiction of the replacement judge would appear on the face of the record." *Id.* ¶ 7. Section 1403 provides that a party "may ... file a written application with the clerk of the court, setting forth the grounds or facts upon which the claim is made that the judge is disqualified, and request said judge so to certify ...." *Id.*

In reviewing the plain language of the statute and its purpose which was already articulated in *Pierce*, it is clear that the purpose of § 1403, to create a court record on the disqualification issue, is satisfied by the *filing* of a written application. This provision in § 1403 best correlates with the second step in a Rule 15 proceeding, the filing of a formal motion, and not the informal in camera hearing. Because the purpose of § 1403 and the later-created Rule 15 is to allow a party to make a record on the disqualification issue at the *formal, filing* stage of a disqualification proceeding, it follows then that having a record of the

informal, in camera proceeding was not contemplated by the statute or the court rule.

Indeed, to read 20 O.S. § 106.4 to compel the presence of a court reporter during the informal first step in Rule 15 would also collapse the very distinction Rule 15 draws between its first two steps. Specifically, Rule 15(a) requires that "an in camera request shall first be made to the judge," and only "if such in camera request is not satisfactorily resolved" may a motion to disqualify be filed pursuant to 20 O.S. § 1403. (Okla. Dist. Ct. R. 15). The Supreme Court, in several different cases, has described step one as the point at which a party must "first informally ask the trial judge in camera to recuse," and step two as the "formal request." *Clark v. Bd. of Educ. of Indep. Sch. Dist. No. 89 of Oklahoma Cnty.*, 2001 OK 56, 32 P.3d 851; *Miller Dollarhide, P.C. v. Tal*, 2007 OK 58, 163 P.3d 548.

Based on that distinction, we conclude that the informal, in camera request is preparatory and the formal motion is the operative, filed-of-record event that can be considered a "judicial proceeding" within the meaning of 20 O.S. § 106.4. Indeed, Rule 15(a) expressly states that "[u]ntil such time as the formal motion is filed, the assigned judge may proceed with the case." If the judge may keep presiding until the formal motion is filed, it follows that the informal request is not itself the kind of "proceeding" that 20 O.S. § 106.4 contemplates. Thus, we find that the plaintiff's due process rights were not violated when the court denied his request for a court reporter at the in camera hearing.

D.

We also decline to adopt the plaintiff's theory that the bailiff's receipt of the note and the judge's instruction to the bailiff to tell the juror that he would watch for the alleged misconduct constituted an ex parte communication in violation of Rule 2.9. 5 O.S., Ch. 1, App. 4, Rule 2.9. The plaintiff contends that Rule 2.9 prohibits a judge from engaging in ex parte communication unless the circumstances require it. However, we note that ex parte is defined as "[d]one or made at the instance and for the benefit of one party only, and without notice to, or argument by, anyone having an adverse interest; of, relating to, or involving court action taken or received by one party without notice to the other." *Ex Parte*, Black's Law Dictionary (12th ed. 2024). In the present case, the court did not communicate with the juror directly and the court did not decide to personally observe the lawyer's conduct at the request of either side. Neither party was aware that the juror/bailiff interaction took place until after trial. Accordingly, we find that the trial court did not engage in ex parte communication in violation of Rule 2.9.

E.

The plaintiff also alleges that the trial court, by watching OHH's counsel to observe the alleged misconduct for himself, made itself a witness in violation of the Oklahoma Judicial Conduct Rule 2.11. 5 O.S. Ch. 1, App. 4, Rule 2.11. In his brief, the plaintiff writes that Rule 2.11(A)(2) "requires the trial judge's recusal in matters where the judge has 'personal knowledge of the facts in dispute.'" *Brief in Chief*, pg. 9. However, Rule 2.11(A)(2) does not contain the language quoted in

the plaintiff's brief. Instead, it provides that a judge should disqualify himself from a case when:

> The judge knows that the judge, the judge's spouse, a member of the judge's household, or a person within the third degree of relationship to any of them, or the spouse of such a person is:
>
> (a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;
>
> (b) acting as a lawyer in the proceeding;
>
> (c) a person who has more than a de minimis interest that could be substantially affected by the proceeding; or
>
> (d) likely to be a material witness in the proceeding.

Id. Thus, the question is whether the judge knew that he was likely to be a material witness in this proceeding. Upon review, we find that the judge's decisions to personally observe the alleged misconduct of counsel and not bring the matter to the parties' attention were judicial decisions, and those decisions did not make the court a witness to any disputed fact in the case. This proposition of error is rejected.

III.

A.

We next turn to three allegations of error that the plaintiff raises related to jury instructions that the trial court gave or declined to give at trial. "[A]n appellate court reviews alleged errors in the instructions for whether a probability exists that jurors were misled and reached a different conclusion than they would have reached but for the questioned instructions." *Watson v. BNSF Ry. Co.*, 2024 OK 74, ¶ 10, 561 P.3d 67, 71 (citing *Cimarron Feeders, Inc.*

v. Tri-County Elec. Coop., Inc., 1991 OK 104, ¶ 5, 818 P.2d 901, 902). We must consider "the accuracy of the statement of law, the applicability of the instructions to the issues when the instructions are considered as a whole, and *above all*, whether the probability arose that jurors were misled and reached a different conclusion due to an error in the instruction." *Id.* (emphasis supplied). We may not reverse a judgment based on misdirection of the jury unless we conclude "that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right." 20 O.S. § 3001.1. The relevant question on appeal is whether "the record demonstrates the probability that the jury was so misled by the alleged errors to cause a different verdict." *Coryell Roofing & Constr., Inc. v. Burgess Farms, LLC*, 2025 OK 80, ¶ 3, 579 P.3d 724, 725 (citing *Watson*, 2024 OK 74, ¶ 10.).

B.

The trial court gave the jury an instruction titled *No Allegation of Design Defect or Product Liability.* ROA 2466. The instruction reads as follows:

> The automatic revolving door in this case was manufactured by Besam. Plaintiff is not alleging that the door was improperly designed or manufactured by Besam. The Oklahoma Heart Hospital was not involved in the design or manufacturing of the Besam automatic revolving door at issue in this case and cannot be liable for any alleged design defect. However, you may find Oklahoma Heart Hospital liable pursuant to other theories of liability, discussed elsewhere in these instructions.

Id. The plaintiff summarily states that "[t]he error in this instruction is obvious and warrants reversal for a new trial." *Brief in Chief*, pg. 11. The plaintiff explains that he objected to this instruction because products liability was not an issue

in this case and it would confuse the jury. The court acknowledged the potential confusion and added the last sentence to the instruction, clarifying that OHH could be held liable on other theories, to remedy that potential confusion. Tr. (Apr. 12, 2024), pgs. 8-9. The plaintiff still objected to the court giving the instruction even with the additional sentence and now claims that the remedy was insufficient.

Even presuming the instruction should not have been given,[2] we cannot find the verdict would have likely been different if this instruction had not been given. The instruction explicitly states that the plaintiff is *not* making a claim based on a design defect, and it clarifies that the jury could still find the hospital liable on other theories. We find that this challenged instruction did not likely mislead the jury and could not have resulted in a miscarriage of justice.

C.

Next, the plaintiff alleges that the trial court erred in refusing to instruct the jury on the doctrine of res ipsa loquitur. The requested instruction, based on OUJI No. 9.13, reads as follows:

> In addition to the rules which have been stated with respect to negligence, there are situations in which a jury may, but is not required to, find negligence from the mere fact that the accident occurred.
>
> Tim Hayes as the Personal Representative of the Estate of Jess Junior Smethers contends that this case involves such a situation, and consequently has the burden of proving each of the two following propositions:

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[2] There was a great deal of evidence concerning the design of the door at trial. We do not hold that giving this instruction was erroneous under the circumstances.

> 1. That the injury was caused by the Oklahoma Heart Hospital North Entrance revolving door which was under the exclusive control and management of Oklahoma Heart Hospital
>
> 2. That the event causing the injury to Jess Smethers was of a kind which ordinarily does not occur in the absence of negligence on the part of the person in control of the Oklahoma Heart Hospital north entrance revolving door.
>
> If you find that each of these propositions is more probably true than not true, then you are permitted, but not required, to find that Oklahoma Heart Hospital, LLC was negligent.

ROA, *Court's Exhibit 6*, pg. 40. Counsel for the plaintiff argued for its inclusion because "given the circumstances of this incident, the fact that Oklahoma Heart Hospital is clearly in exclusive possession and control of the door and it hit a gentleman, I mean that doesn't—it would apply." Tr. (Apr. 11, 2024), pg. 200. The trial court declined to give the instruction because it was not "pled in pretrial." *Id.*

It is well established in Oklahoma law that res ipsa loquitur is an evidentiary rule "which may be followed when an injury is alleged to have been negligently inflicted and the harm is shown not to occur in the usual course of everyday conduct unless a person who controls the instrumentality likely to have produced that harm fails to exercise due care to prevent its occurrence." *Harder v. F.C. Clinton, Inc.*, 1997 OK 137, ¶ 8, 948 P.2d 298, 302 (emphasis removed). The *Harder* Court specifically held that the purpose of this "evidentiary rule" is to assist a plaintiff in making "a prima facie case of negligence in circumstances when direct proof of why the harm happened is beyond the power or knowledge of the plaintiff." *Id.* Because res ipsa loquitur is an evidentiary rule, not a pleading requirement, it follows then that a party is not required to plead res

ipsa loquitur in order to obtain a jury instruction on the issue. However, this court may affirm "if there is a different but proper legal theory upon which to base the decision." *McMinn v. City of Oklahoma City*, 1997 OK 154, ¶ 11, 952 P.2d 517, 521.

Whether res ipsa loquitur is applicable in a case presents a question of law. *See Rogers v. Mercy Health Center, Inc.*, 2014 OK CIV APP 69, ¶ 23, 334 P.3d 426, 431 (citing *Harder v. F.C. Clinton, Inc.*, 1997 OK 137, ¶ 9, 948 P.2d 298). Our Supreme Court has held that once the foundational facts for res ipsa loquitur are established, negligence *can be inferred* from the incident without the aid of circumstances pointing to the responsible cause. *Harder*, 1997 OK 137, ¶ 8. The foundational facts in this case based on the OUJI requested by the plaintiff are: (1) that Mr. Smethers's injury was caused by the door which was under the exclusive control and management of OHH and (2) that the door contacting Mr. Smethers and causing him to fall was "of a kind which ordinarily does not occur in the absence of negligence on the part of" OHH. ROA, *Court's Exhibit 6*, pg. 40.

Here, it is undisputed that OHH exclusively controlled and managed the revolving door at issue in this case, establishing the first foundational fact. However, the plaintiff did not meet its burden to establish the second foundational fact as a revolving door hitting or contacting a person coming through that door is the kind of event that ordinarily occurs in the absence of negligence. Indeed, Dr. Shawn Smith, M.D., testified that patients can fall at a hospital even when all appropriate precautions are taken. Tr. (Apr. 10, 2024),

pg. 59. Additionally, Jamie Yowell, the current Director of Risk, Safety, Security, and Performance Improvement at OHH, testified that "not all falls can be prevented and sometimes people fall. When we reviewed [instances of prior falls] they weren't a result of an issue with the door." Tr. (Apr. 9, 2024), pg. 274. Further, Lance Parr, the defendant's door expert, explicitly stated that the door did not malfunction when Mr. Smethers came through it that day. Tr. (Apr. 10, 2024), pgs. 241, 268. He also stated that, at the time of the accident, Mr. Smethers had moved outside of the sensor coverage area when the door hit him, and the door would have stopped if he had been in the sensor area. Tr. (Apr. 11, 2024), pg. 117.

In light of the foregoing, we find that the plaintiff did not meet its burden to establish the second foundational fact: that the door contacting Mr. Smethers and causing him to fall was "of a kind which ordinarily does not occur in the absence of negligence on the part of" OHH. ROA, *Court's Exhibit 6*, pg. 40. The evidence showed that the door did not malfunction and that falls are common, especially for a ninety-six-year-old individual. The only door expert called to testify in this case consistently maintained that the door only hit Mr. Smethers because he was outside of the sensor coverage, which caused the door to continue rotating. Accordingly, we find no error with the trial court's decision to not instruct the jury on res ipsa loquitur.

D.

The plaintiff also alleges that the trial court erred in refusing to give the jury a spoliation instruction. The plaintiff claims that OHH was on notice of its

duty to preserve evidence when Mr. Smethers's granddaughter went to OHH and wrote a letter requesting a hold on video footage of all entrances on the date of the accident from 8 a.m. to 8 p.m. OHH preserved a video of the fall itself, but claims that it was unable to produce any other videos from the day of the accident because their surveillance program only keeps video for thirty days before the footage is deleted. The plaintiff claims that it was prejudiced by OHH's failure to preserve the footage because it was not able to verify whether any door inspections occurred before or after the accident. The requested instruction, based on Oklahoma Uniform Jury Instruction 3.11A, reads as follows:

> Oklahoma Heart Hospital, LLC had a duty to preserve the video of Mr. Smethers's fall in this case and Oklahoma Heart Hospital, LLC destroyed the evidence. You may therefore conclude that the evidence would have been unfavorable to Oklahoma Heart Hospital LLC.

ROA, *Court's Exhibit 6*, pg. 21.

A spoliation instruction is not a typical jury instruction based purely on the evidence presented at trial. It is a sanction against a party. *Am. Honda Motor Co. Inc. v. Thygesen*, 2018 OK 14, ¶ 2, 416 P.3d 1059, 1060. The Court in *Barnett v. Simmons*, 2008 OK 100, 197 P.3d 12, provided a comprehensive definition of spoliation:

> Spoliation refers to the destruction or material alteration of evidence or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation. *West v. Goodyear Tire*, 167 F.3d 776, 779 (2nd Cir.1999). In *Patel v. OMH Medical Center, Inc.*, 1999 OK 33, 987 P.2d 1185, 1202, spoliation was defined as the destruction or significant and meaningful alteration of a document or instrument. We said that spoliation occurs when evidence relevant to prospective civil litigation is destroyed, adversely affecting the ability of a litigant to prove his or her claim.

> *Id.*, 987 P.2d at 1202. Spoliation includes the intentional or negligent destruction or loss of tangible and relevant evidence which impairs a party's ability to prove or defend a claim. *Koch v. Koch Industries, Inc.*, 197 F.R.D. 488, 490 (N.D.Okla.1999).

Id. ¶ 21. The *Barnett* Court also clarified that the "duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation." *Id.* ¶ 20. The critical time for determining a party's duty to preserve is not specifically addressed in *Barnett*; however, this court noted in *Akins v. Ben Milam Heat, Air & Elec., Inc.*, 2019 OK CIV APP 52, 451 P.3d 166, that the facts in *Barnett* suggest that the requisite knowledge must exist at the time relevant evidence is destroyed. *Id.* ¶ 43.

In this case, Jamie Yowell testified that the system the hospital uses to store video footage deletes old videos after thirty days to make space for new footage. Tr. (Apr. 9, 2024), pg. 48. Thus, the footage requested by the plaintiff would have been destroyed thirty days after September 23, 2019. As stated above, Mr. Smethers's granddaughter visited OHH three days after the accident and wrote the letter requesting the video footage from 8 a.m. to 8 p.m. on the date of the accident. It is therefore undisputed that OHH was in receipt of a request for twelve hours of footage from the day of the accident. Although the lawsuit against OHH was not filed until roughly one year after the accident, it is likely, based on the nature of the letter and the accident, OHH reasonably should have known that the video footage might have been relevant to anticipated litigation. However, the Court in *Barnett* also made clear that spoliation is the

"intentional or negligent destruction or loss of tangible and relevant evidence." 2008 OK 100, ¶ 21, 197 P.3d 12, 20 (citing *Koch v. Koch Industries, Inc.*, 197 F.R.D. 488, 490 (N.D.Okla.1999)). Thus, assuming OHH had a duty to preserve the footage requested, the question we must address is whether the "destruction" of that evidence was intentional or negligent.

Title 12 O.S. § 3237(G) provides: "Absent exceptional circumstances, a court may not impose sanctions on a party for failure to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." We note that the footage was lost through the system's automatic, routine deletion, not through any affirmative act made by Ms. Yowell or another OHH employee. Additionally, we note that Ms. Yowell saved a thirty-eight second video clip which shows Mr. Smethers walking through the revolving door, the contact, the subsequent fall, the door stopping, and a hospital employee rushing to aid Mr. Smethers. Tr. (Apr. 8, 2024), pg. 18; Plaintiff's Exhibit 24.365. Ms. Yowell explained that she saved that clip because the noted concern in the letter was the fall. Tr. (Apr. 9, 2024), pg. 67. Specifically, she stated: "I saved what I needed to review his fall but also comply with the federal regulations that the hospital was held to for HIPAA standards. So I limited the length of that video specifically to his fall so to minimize the number of other patients that were captured and saved in that video." *Id.* at 51. While the hospital does have a policy regarding preservation of security camera footage, it specifically relates to electronic holds for discovery. *Id.* at 70-73. Thus, the record reflects that Ms. Yowell was trying to balance this patient's family member's

request to capture the fall, while also considering the relevant HIPAA requirements and patient confidentiality.

In light of the foregoing, we find that the plaintiff was not entitled to a spoliation instruction. The record reflects that the video footage was not intentionally or negligently destroyed by a hospital employee; rather, the footage was disposed of in the normal course of business established by OHH. Ms. Yowell decided to save a video directly covering the fall in an attempt to balance a family member's request with federal law, which suggests that her decision was made in good faith. Indeed, the fact that there is video evidence of the fall demonstrates the hospital's desire to comply with the family member's request to the extent possible. And, we note that although the judge did not give the spoliation instruction, the plaintiff was permitted to question Ms. Yowell on cross examination and essentially made the spoliation argument to the jury in closing.[3] In effect, the plaintiff obtained the practical benefit of making an adverse inference argument without the formal instruction. Accordingly, we find no error with the trial court's decision to not instruct the jury on spoliation.

IV.

A.

The plaintiff next alleges that the trial court erred when it granted OHH's *Daubert* motion, excluding the opinion of plaintiff's expert, Michael Panish.[4] "A

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[3] OHH did not object to the plaintiff's raising this issue during closing argument.

[4] The record reflects that the plaintiff retained two other experts before Mr. Panish but later agreed that they would not testify.

trial court's *Daubert* order is an evidentiary ruling and an interlocutory order anterior to judgment which is usually reviewed when a subsequent judgment or appealable order is appealed *and after adequate steps have been pursued to preserve the alleged error.*" *Andrew v. Depani-Sparkes*, 2017 OK 42, ¶ 9, 396 P.3d 210, 214 (emphasis supplied). In its appellate brief, OHH claims that the plaintiff failed to preserve any alleged error on appeal because it did not raise the issue or make an offer of proof as to Mr. Panish's testimony at trial. Title 12 O.S. § 2104 provides that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of a party is affected, and .... [i]f the ruling is one excluding evidence, the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked." Thus, we agree with OHH that the trial court's *Daubert* ruling pretrial was not final, and the plaintiff was required to make an offer of proof at the appropriate time during trial in order to preserve the issue for appeal.

In *Andrew*, the Oklahoma Supreme Court held:

> A *Daubert* issue may be raised by a pretrial motion in limine. *Christian v. Gray*, 2003 OK 10, ¶ 48, 65 P.3d 591, 610. A pretrial motion in limine excluding evidence does not conclusively decide an issue of admissibility because the issue must be raised during a subsequent trial. *Middlebrook v. Imler, Tenny & Kugler M.D.'s, Inc.*, 1985 OK 66, 713 P.2d 572, 579 (party aggrieved by an order in limine should raise the issue at the appropriate time during the trial, either by objecting when the challenged evidence or testimony is admitted or by making an offer of proof of the excluded matter); *Badillo v. Mid Century Ins. Co.*, 2005 OK 48, n. 16, 121 P.3d 1080, 1103 (same).

2017 OK 42, ¶ 38, n.55. Based on the foregoing, we find that it is well established in Oklahoma law that a pretrial *Daubert* ruling, like any liminal ruling made before trial, must be raised again at trial to preserve any alleged error. Here, the plaintiff failed to make an offer of proof explaining what Mr. Panish would have testified to and how that testimony is admissible. Therefore, this issue was not preserved for appellate review.

B.

The plaintiff contends that the trial court erred in denying his *Motion to Exclude Certain Opinions and Testimony of Lance Parr.* ROA 1613. Specifically, the plaintiff requested that Mr. Parr be prohibited from opining on whether Mr. Smethers was standing in the sensor-covered area of the revolving door when it made contact. The plaintiff now contends that the motion in limine was denied without explanation and the court erroneously allowed Mr. Parr to present an animation to demonstrate his opinion. Counsel for the plaintiff failed to raise the issue at trial and, as explained above, "the party against whom a liminal ruling is made must re-press the issue at trial" in order to preserve the error on appeal. *Myers v. Missouri Pac. R. Co.*, 2002 OK 60, ¶ 36, n. 66, 52 P.3d 1014, 1033. Additionally, a party who invites error, if any, in the introduction of evidence cannot later be heard to complain about its admission. *See Republic Nat'l Life Ins. Co. v. Chilcoat,* 1961 OK 254, ¶ 19, 368 P.2d 821, 826.

At trial, the plaintiff called Mr. Parr to testify as a part of his case in chief and specifically asked that he be recognized as an expert in automatic doors. Tr. (Apr. 10, 2024), pg. 86. Plaintiff's counsel initiated the discussion on the

animation by asking Mr. Parr whether the hospital asked to have an animation made. *Id.* at 200. Additionally, counsel asked Mr. Parr the following questions:

> Counsel: An animation is intended to do a couple of things, at least a couple of things. One is to help you demonstrate to the jury the safety features of the door, correct?
>
> Witness: (indicating)
>
> Counsel: Is that correct?
>
> Witness: Yeah.
>
> Counsel: Another thing is to help you demonstrate to the jury how the infrared sensors on the door would not have detected Mr. Smethers because of where he was located when this happened; is that correct?
>
> Witness: Correct.

Id. at 201. Later, counsel also asked if Mr. Parr "would agree that the whole reason ... for doing this animation and all this fancy stuff is to be able to demonstrate how the sensors would have missed him, correct?" *Id.* at 207. Plaintiff's counsel did not play the animation for the jury during Mr. Parr's testimony, as it was reserved for the defendant to play by agreement, but counsel did show Mr. Parr still photographs of the animation and asked him many questions about its accuracy. *Id.*

Even if the plaintiff had made a contemporaneous objection at trial to Mr. Parr's testimony on the ultimate issue and the animation to preserve the error for appeal, the issue would be waived because the plaintiff introduced the animation and asked Mr. Parr many questions about the ultimate issue. As stated above, a party who has introduced evidence at trial cannot later assert its

inadmissibility or ask for a new trial on that basis. This proposition of error is rejected.

V.

The plaintiff alleges that the trial court committed reversible error when it refused to strike a prospective juror, Ms. Ewert, for cause because her daughter worked as a medical aide for one of the doctors at OHH. Tr. (Apr. 9, 2024), pg. 32. A trial court's ruling on a challenge of a juror for cause will not be disturbed unless there has been an abuse of discretion shown. *McAlester Urban Renewal Auth. v. Lorince*, 1973 OK 148, ¶ 9, 519 P.2d 1346, 1348. The record reflects that both attorneys inquired about whether the jurors could decide the case fairly without letting their emotions, bias, and personal experiences influence their decision. The prospective juror never indicated to either side that her daughter's position would influence her decision in any way. Accordingly, we find that the court did not abuse its discretion in denying the plaintiff's for-cause challenge as to Ms. Ewert.

VI.

A.

Next, the plaintiff contends that the trial court erroneously precluded plaintiff's counsel from impeaching Mr. Parr. Counsel showed Mr. Parr a video of the revolving door taken after the accident. Tr. (Apr. 10, 2024), pg. 138. Counsel paused the video[5] and asked Mr. Parr about the "wing sensors" on the

[5] It is unclear when counsel paused the video and which frame would have been shown during this line of questioning.

door. *Id.* Counsel asked if Mr. Parr agreed that there were three different sensors on the door and pointed out their location, and he answered in the affirmative. *Id.* Counsel then asked if there were any more sensors on the door, and Mr. Parr responded that there was one more "that you can't hardly see back behind the leading edge sensor." *Id.* Counsel then inquired if Mr. Parr had previously testified that there were only three sensors. *Id.* at 139. Counsel for OHH objected to improper use of a deposition. *Id.* The parties approached the bench and plaintiff's counsel stated that Mr. Parr previously testified that there were only three sensors on the door. *Id.* The court and the parties began reviewing Mr. Parr's deposition, and counsel for OHH explained: "He was asked to identify what's present in this picture. He circled three. He just testified that the other one is not visible in this picture. He has never said there were only three sensors on this door." *Id.* at 140. The court also stated, "I don't see anything that contradicts the answer he just gave" and sustained the objection. *Id.* at 142.

In *Crussel v. Kirk*, 1995 OK 41, ¶ 8, 894 P.2d 1116, 1118–19, the Oklahoma Supreme Court articulated the foundational requirements for impeachment with prior inconsistent statements. The Court held:

> The criteria for admission of prior inconsistent statements to attack the veracity or credibility of a witness are governed by the Evidence Code's §§ 2607 and 2613. Before allowing evidence of a witness's prior inconsistent statements, the nisi prius court *must* satisfy itself that the proffered testimony is sufficiently inharmonious with the declarant's in-court testimony and is relevant to a *non-collateral* matter. A proper foundation must be laid before the extrinsic impeachment evidence may be admitted.

Id. ¶ 8 (footnotes omitted). Upon review, we find that the plaintiff did not lay the proper foundation to impeach Mr. Parr.

Plaintiff's counsel later read the relevant portion of Mr. Parr's deposition into the record when making an offer of proof to the court. Tr. (Apr. 10, 2024) pgs. 188-190. We agree with the trial court's conclusion after listening to the proffered testimony. Specifically, the court stated: "As I heard the answers come out of the witness and then your proffer of what the deposition said, I did not hear a discernable difference between the two" and maintained the sustention of OHH's counsel's objection for improper use of a deposition. *Id.* at 191-192. "Rulings concerning the admission of evidence are measured against the abuse of discretion standard." *Holm–Waddle v. William D. Hawley, M.D., Inc.,* 1998 OK 53, ¶ 5, 967 P.2d 1180, 1182. The court reviewed the relevant deposition testimony and explicitly stated that the deposition testimony and the witness's testimony at trial were not inconsistent. Based on our review, we find that the court's decision to sustain OHH's objection was not an abuse of discretion.

B.

The plaintiff also claims the court erred in prohibiting his counsel from impeaching Mr. Parr with an American National Standards Institute (ANSI) booklet depicting sensor coverage on a revolving door. Mr. Parr described this booklet as the "Bible of automatic doors." Tr. (April 10, 2024), pg. 106. Plaintiff's counsel wanted to draw a distinction between OHH's demonstrative exhibit, which Mr. Parr helped create, and the graphic in the ANSI booklet. Counsel for the plaintiff specifically asked Mr. Parr if he would agree that the ANSI graphic

accurately shows how the sensors work for the door at issue. *Id.* at 160. Mr. Parr answered, "somewhat." *Id.* Then, the plaintiff moved for the admission of the exhibit into evidence and counsel for OHH objected to its admission. *Id.* The court sustained the objection, specifically noting that "the witness has said that, to his knowledge, this picture, for lack of a better term, is not an accurate representation of the door in question. So I'm going to sustain the objection." *Id.* at 162. Plaintiff's counsel then asked if he could "offer it as impeachment based upon the fact that it is contained within the ANSI booklet that he brought with him that he says applies to this door?" *Id.* The court replied that it did not understand how it would be possible to impeach a witness with information about a different door than the one at issue. *Id.*

"Under the Oklahoma Evidence Code, the trial court stands as a gatekeeper, admitting or excluding evidence based on the judge's assessment of its relevance and reliability." *Myers v. Missouri Pac. R. Co.*, 2002 OK 60, ¶ 36, 52 P.3d 1014, 1033. Additionally, a judgment will not be reversed based on a trial judge's decision to admit or exclude evidence absent a clear abuse of discretion. *Id.* Here, Mr. Parr consistently testified that the depiction in the ANSI booklet did not completely or accurately reflect the revolving door at OHH. Thus, the court did not abuse its discretion in denying the admission of the exhibit on that basis alone. We also recognize that plaintiff's counsel was later able to impeach Mr. Parr with the same booklet, tr. (Apr. 10, 2024) at 182, and the plaintiff was not otherwise prohibited from cross-examining the witness on contents of the booklet, the graphic at issue, and the door sensors.

C.

The plaintiff also alleges that he was precluded from impeaching OHH's corporate representative, Jamie Yowell, based on prior inconsistent statements the hospital made in its discovery requests. As stated above, to impeach a witness with a prior inconsistent statement, the court must determine whether the prior statement is "sufficiently inharmonious with the declarant's in-court testimony." *Crussel v. Kirk*, 1995 OK 41, ¶ 8, 894 P.2d 1116. In his brief, the plaintiff recounts several instances where Ms. Yowell purportedly testified inconsistently, which we will review below.

First, the plaintiff states that during discovery he requested that the hospital produce copies of all documents concerning repairs, maintenance, modifications, and software upgrades for the north entrance revolving door. Tr. (Apr. 8, 2024), pg. 253. In response, the hospital answered that it deferred to the records produced in discovery by Door Controls, the door manufacturer.[6] *Id.* Ms. Yowell did not dispute that OHH referred to Door Controls in its answer. She was then asked if she would agree with plaintiff's counsel that the hospital has no record of performing a daily safety inspection. *Id.* at 255. To which Ms. Yowell responded: "That is correct. We don't have those daily safety inspections documented." *Id.* at 255. In his brief, the plaintiff merely states that the statement was contrary to OHH's responses to interrogatories, but does not explain how. And, upon review of the trial transcript and Ms. Yowell's testimony

[6] The plaintiff brought this action against Door Controls (now Dormakaba), but they were dismissed at some point during this litigation.

on this issue, it is unclear to this court how Ms. Yowell's testimony was inconsistent with the prior discovery responses.

The plaintiff also states Ms. Yowell testified that Door Controls produced invoices made by Mr. Parr which documented the times he performed maintenance on the door. *Id.* at 253. Ms. Yowell added that eight invoices had been produced which covered what she believed was a five-year period. The plaintiff apparently disputes this, stating the invoices covered an eleven-year period instead. *Brief in Chief*, pg. 27. However, at trial, when plaintiff's counsel asked Ms. Yowell questions about the invoices, she asked to see the interrogatory to clarify her answer, and the parties had a conversation with the judge about the line of questioning. Tr. (Apr. 8, 2024), pg. 254. However, after this discussion off the record, the plaintiff never followed up with any clarifying questions about whether it was five or eleven years.[7] The plaintiff therefore cannot meet its burden to show that Ms. Yowell's testimony about the invoices was "sufficiently inharmonious" to impeach. *Crussel*, 1995 OK 41, ¶ 8.

Lastly, the plaintiff states that his counsel asked Ms. Yowell which OHH employee was responsible for performing daily inspections of the door, and she responded that Gary Waits, the security guard on duty that day, would have

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[7] The plaintiff's brief implies that he was prohibited from continuing the line of questioning because the court expressed concern with how plaintiff's counsel was attempting to refresh the witness's recollection. *Brief in Chief*, pg. 27. However, at trial, the court was very clear with its instructions, stating: "The interrogatories can help her remember. Hand it to her, let her read it, take it back, and then ask her if her recollection is refreshed. Then reask her the question. That's [sic] should solve all of this." Tr. (Apr. 8, 2024), pg. 254.

been responsible. Tr. (Apr. 8, 2024), pg. 255. Then, the following exchange took place:

> Mr. Smith: Okay. Have you given a different response to that question before?
>
> Ms. Yowell: Oh, I'm sorry. Is that—is that Interrogatory No. 3?
>
> Mr. Smith: Yes.
>
> Ms. Yowell: ... When I helped Erin and Andy respond to those, I interpreted that question as asking for a—the word inspection threw me off. I felt like that was an official inspection by a certified door technician and responded Door Controls, who is what Dormakaba called themselves previously. So an official inspection would have been done by Dormakaba or Door Controls. The daily walk-through is done by security, which would have been Gary Waits that day.

Id. at 255-256. Then, plaintiff's counsel started asking a follow-up question, but was met with an objection from OHH's counsel that plaintiff's counsel was using the discovery responses improperly. The court did not rule on the objection, but encouraged plaintiff's counsel to shift its focus from "interrogation of interrogatories." *Id.* at 256.

It is not clear to this court how the above-referenced exchange constitutes a prohibition on impeachment of the witness. Ms. Yowell explained that she thought the interrogatory was asking about formal inspections, and answered accordingly. Although that is perhaps not what the plaintiff meant when formulating the interrogatory, that does not make Ms. Yowell's trial testimony inconsistent with that answer. Accordingly, we find that plaintiff's counsel was not prohibited from impeaching this witness in any way, and this proposition of error is rejected.

VII.

The plaintiff also contends that the trial court erred in prohibiting him from inquiring into bias at trial. Plaintiff's counsel wanted to inquire into the ownership structure of OHH because it is a doctor-owned facility. For example, OHH called Dr. John Harvey, the chief executive officer of OHH, to testify. Tr. (Apr. 11, 2024), pg. 124. Dr. Harvey testified about OHH's safety culture and the awards the hospital received for safety. The plaintiff alleges he "was not permitted to inquire into the fact that Dr. Harvey was an owner of OHH and would be financially affected by a verdict against OHH." *Brief in Chief*, pg. 28. However, on cross-examination, plaintiff's counsel asked Dr. Harvey directly if he was an owner of the hospital, to which he answered that he was not and that he was just the CEO. Tr. (Apr. 11, 2024), pg. 171. In his brief, the plaintiff also fails to cite where he raised the issue of bias with this witness[8] to the court.

The plaintiff also contends that he was precluded from inquiring about any potential bias with Dr. Kimberly Smith, the surgeon who repaired Mr. Smethers's hip. The plaintiff called Dr. Smith to testify by way of video deposition. *Id.* at 37. At trial, OHH objected to two questions and responses pertaining to the motion in limine prohibiting inquiry into the ownership structure of the hospital. *Id.* at

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[8] Instead, the plaintiff cites to the second day of trial when Ms. Yowell testified. Plaintiff's counsel asked Ms. Yowell if there was common ownership between Mercy Hospital and OHH, which drew an objection from counsel for OHH due to the court's prior grant of a motion in limine prohibiting the introduction of evidence about the ownership of OHH. *Id.* at 66. It appears the issue of a specific doctor's ownership stake in the hospital was never actually at issue before the court. The plaintiff only sought to inquire about the ownership structure between Mercy and OHH with Ms. Yowell, and the plaintiff does not now argue that it should have been able to inquire about the ownership structure of the hospital with Ms. Yowell due to her bias.

38. The court agreed, and purportedly stopped and restarted the video to avoid the introduction of those questions and answers. However, neither the video testimony of Dr. Smith nor a transcript of her deposition is contained in this record on appeal. We are therefore unable to review those specific questions and answers and determine whether they should have been played for the jury. "It is the duty of the appealing party to procure a record that is sufficient to obtain the corrective relief sought." *Chamberlin v. Chamberlin*, 1986 OK 30, ¶ 7, 720 P.2d 721, 724. And, this court will indulge in the presumption that the ruling of the trial court is correct. *Chandler v. Denton,* 1987 OK 38, 741 P.2d 855.

VIII.

The plaintiff next alleges that the trial court erred in permitting OHH's counsel to ask plaintiff's witnesses leading questions while OHH was cross-examining those witnesses. The record reflects that the plaintiff objected to OHH leading Ms. Yowell and Justin Price, the facility manager at OHH, during their testimony. Tr. (Apr. 9, 2024), pg. 104; Tr. (Apr. 11, 2024), pg. 16. We note that the plaintiff called both of these witnesses to testify, not the defendant. Oklahoma Courts have held that 12 O.S. § 2611, the statute governing the use of leading questions, allows a party, in this case the plaintiff, to call an adverse party as a witness, such as hospital employees, and use leading questions in *direct* examination. The Court in *Three M Investments, Inc. v. Ahrend Co.*, 1992 OK 33, 827 P.2d 1324, clarified that § 2611 does not, however, permit the adverse party's own counsel to use leading questions during cross-examination. *Id.* ¶ 24. Thus, it appears that the plaintiff is correct that counsel for OHH should

not have been permitted to ask leading questions of Ms. Yowell and Mr. Price, although they were technically being cross-examined by OHH.

However, 12 O.S. § 2611 also provides that "the court shall exercise control over the manner ... of interrogating witnesses" to allow for effective presentation, to avoid needless consumption of time, and to protect the witness. *Id.* § 2611(A)(1)-(3). Additionally, it states that leading questions may be allowed as necessary to develop a witness's testimony. *Id.* § 2611(D). The trial court, in ruling on the plaintiff's objection when Ms. Yowell was testifying stated, "in the interest of time, I'll overrule the objection but ask to the greatest extent possible that [counsel for OHH] ask open-ended questions of this witness." Tr. (Apr. 9, 2024), pgs. 104-105. When ruling on a leading objection while Mr. Price was testifying, the court found that the question asked was not leading as it was a yes or no question, but also instructed OHH to "watch the leading as you move through the witnesses." Tr. (Apr. 11, 2024), pg. 20. It is well established in Oklahoma law that the conduct of a trial is a matter of the sound discretion of the trial court, and in absence of abuse of that discretion, the trial court's ruling will not be disturbed. *Nail By & Through Nail v. Oklahoma Children's Mem'l Hosp.*, 1985 OK 101, ¶ 14, 710 P.2d 755, 760. It appears the trial court was balancing the plaintiff's concerns with leading by admonishing counsel for OHH to be mindful of it, while also considering time and efficiency. Upon review, these rulings were not an abuse of discretion, and we decline to find the trial court erred on this basis.

IX.

For the plaintiff's final proposition of error, he contends that while each of the errors addressed above individually warrant reversal, the cumulative effect of those errors resulted in an unfair trial. Because we have found no error among the propositions that the plaintiff raised, this proposition of error is rejected.

* * *

Upon review, we hold that the trial judge did not err in refusing to disqualify after the jury's verdict and none of the other allegations of error presented by the plaintiff necessitate reversal. Accordingly, the trial court's journal entry of judgment is affirmed.

AFFIRMED.

BARNES, J., and HUBER, J., concur.

October 21, 2026