

2009

Wayne L. Welsh and Carol Welsh v. Hospital Corporation of Utah, Lakeview Hospital : Brief of Appellee

Utah Court of Appeals

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IN THE COURT OF APPEALS FOR THE STATE OF UTAH

WAYNE L. WELSH and CAROL WELSH

Plaintiffs/Appellants,

v.

HOSPITAL CORPORATION OF UTAH,
d/b/a LAKEVIEW HOSPITAL

Defendant/Appellee.

Case No.: 20090361-CA

Trial Court No.: 060700106

BRIEF OF APPELLEE

APPEAL FROM A DECISION OF THE THIRD JUDICIAL DISTRICT COURT

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Parties to the Proceeding

The caption contains the names of all parties to this proceeding.

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STATEMENT OF JURISDICTION

The Utah Supreme Court had jurisdiction of this interlocutory appeal pursuant to Utah Code Annotated section 78A-3-102(3)(j). On June 1, 2009 the supreme court poured over this appeal to the Utah Court of Appeals (R. 473), and on June 3, 2009 the court of appeals granted the Welshes' petition for permission to appeal the trial court's interlocutory order. (R. 478.)

STATEMENT OF ISSUES AND STANDARD OF REVIEW

Issue 1: The Trial Court Properly Exercised Its Broad Discretion in Denying the Welshes' Motion for Enlargement of Time to File Expert Designations Given Its Previous Admonishment That There Would Be No Further Amendments to the Scheduling Order.

A trial court's ruling on a party's pretrial compliance with a scheduling order will be overturned only if it was an abuse of discretion. *Normandeau v. Hanson Equip., Inc.*, 2007 UT App 382, ¶9, 174 P.3d 1. An abuse of discretion is established "only when [the district court's] decision was against the logic of the circumstances and so arbitrary and unreasonable as to shock one's sense of justice . . . [or] resulted from bias, prejudice, or malice." *Johns v. Layton/Okland*, 2009 UT 39, ¶27, 214 P.3d 859; *see also Brewer v. Denver & Rio Grande W. R.R.*, 2001 UT 77, ¶16. 31 P.3d 557 (trial court's "exercise of discretion . . . necessarily reflects the personal judgment of the court and the appellate court can properly find abuse only if . . . no reasonable [person] would take the view adopted by the trial court.") In determining whether there has been an abuse of

discretion, an appellate court “will not substitute [its] judgment for that of the trial court unless the action it takes is so flagrantly unjust as to constitute an abuse of [that] discretion.” *Marchand v. Marchand*, 2006 UT App 429, ¶4, 147 P.3d 538. Even if the appellate court reaches a different conclusion, “[it] will not substitute [its] judgment for that of the trial court absent an abuse of discretion.” *Deeben v. Deeben*, 772 P.2d 972, 973 (Utah Ct. App. 1989).

Issue 2: The Trial Court Properly Exercised Its Broad Discretion in Barring the Welshes’ Expert Witnesses at Trial As a Sanction for Their Discovery Violation.

As a general rule, trial courts are granted a great deal of deference in selecting discovery sanctions, and the appellate court overturns a sanction only in cases evidencing a clear abuse of discretion. *Kilpatrick v. Bullough Abatement, Inc.*, 2008 UT 82, ¶23, 199 P.3d 957. The deferential abuse-of-discretion review in an appeal of a discovery sanction recognizes that trial courts must deal first-hand with the parties and the discovery process. *Id.*

Issue 3: The Trial Court Properly Maintained the Welshes’ Due Process Rights By Considering Plaintiffs’ Opposition to Sanctions in Their Motion for Relief and By Finding That the Welshes Engaged in Willful Noncompliance With the Court’s Fourth Scheduling Order.

In determining whether the trial court provided adequate due process protections before imposing Rule 37 sanctions, the appellate court applies an abuse of discretion standard of review. *F.D.I.C. v. Daily*, 973 F.2d 1525, 1532 (10th Cir. 1992).

ISSUES PRESERVED IN TRIAL COURT

The Welshes preserved these issues for review in their Motion for Enlargement of Time to File Expert Designation filed on November 26, 2008 and their Motion for Relief from the trial court's January 22, 2009 ruling on that motion, filed January 30, 2009. (R. at 72–90; R. at 213–306.)

DETERMINATIVE RULES

Utah Rule of Civil Procedure 37(b)(2)(B) is determinative of the issues in this case. This rule is set out in the addendum.

STATEMENT OF THE CASE

Nature Of Case

On February 27, 2006, the Welshes filed a medical malpractice case against Lakeview Hospital claiming negligence in the care and treatment provided to Wayne L. Welsh. The Welshes are appealing the trial court's denial of their *fifth request* for additional time to file their expert witness designations and the trial court's imposition of sanctions that would prevent them from introducing expert testimony. The Welshes' counsel failed to adhere to the trial court's fourth scheduling order that was entered on January 30, 2008, two and one-half years after the suit was filed, setting a deadline for expert designations. Instead, the Welshes filed a Motion for Enlargement of Time to Designate Expert Witnesses in the face of a prior warning from the trial court that no

further extensions of time would be permitted and that failure to comply could lead to a dismissal of all claims. Nevertheless, the trial court did not dismiss the Welshes' case as it threatened to do, but instead, denied Lakeview Hospital's motion for summary judgment and allowed the Welshes to pursue a *res ipsa loquitur* theory, for which no expert testimony is required.

Course Of Proceedings and Disposition Below

After the expert designation deadlines of three case management orders had passed, the parties submitted a proposed fourth case management order on September 10, 2008, whereby the Welshes were required to disclose their experts' opinions by December 1, 2008. Although the trial court initially denied the proposed case management order, the order was ultimately entered on September 30, 2008 after the trial court reiterated that it was the last amended order and that the case would be dismissed if it did not start moving forward. (R. 61–66.) On November 26, 2008, five days before the deadline, attorneys for the Welshes filed a Motion for Enlargement of Time to File Expert Designations and submit initial expert reports. (R. 72–90.) Although the court's *clerk* created a minute entry on December 29, 2008 stating that the Welshes' motion was granted, the trial court itself denied the Welshes' motion in a written order on January 22, 2009. (R. 442; R. 204–12.) The trial court also barred the Welshes from introducing expert testimony at trial as a sanction for their dilatory conduct. (R. 204–12.) The trial

court reaffirmed its decision in a written order dated April 14, 2009 following a fully-briefed motion for reconsideration by the Welshes. (R. 370–81.) The Welshes filed a Petition for Interlocutory Appeal, which was granted on June 3, 2009. (R. 476–77.)

Statement Of Facts and Procedural Background

This is a medical malpractice case arising out of the care and treatment rendered to Wayne Welsh by the staff of Lakeview Hospital on September 24, 2004. (R. 1–14.) Mr. and Mrs. Welsh allege that while in the hospital, Mr. Welsh fell from a table and suffered a fractured skull due to the hospital’s negligence. (R. 1–14.) The Welshes filed their Complaint, alleging negligence and loss of consortium on Mrs. Welsh’s behalf, on or around February 28, 2006. (R. 1–14.)

The Complaint was filed by Nathan Wilcox while he was a member of the law firm of Anderson & Karrenberg. (R. 1–14.) Anderson & Karrenberg withdrew as the Welshes’ counsel in June 2008, and Nathan Wilcox moved from an “of counsel” position at Anderson & Karrenberg to an “of counsel” position at Clyde Snow & Sessions. Mr. Wilcox, representing the Welshes, participated in a key telephone conference with Judge Allphin on September 30, 2008 to discuss the requested fourth and final scheduling order. (R. 441.) Mr. Wilcox was the only attorney of record until Matthew Steward and Rodney Snow, also members of Clyde Snow & Sessions, P.C., entered their appearances on November 26, 2008. (R. 441.)

Lakeview served and filed its Answer to the Complaint on April 13, 2006, denying all material allegations. (R. 17–24.) The trial court entered its first Scheduling Order in this case on August 4, 2006. The initial scheduling order required completion of fact discovery by December 26, 2006 and for the Welshes to designate experts by January 26, 2007. (R. 29–34.) The Welshes did not engage in any fact discovery prior to December 26, 2006 and failed to designate any experts by January 26, 2007.

In May and July 2007 letters, the Welshes requested the depositions of the hospital witnesses and advised in the July 2007 letter that if they did not hear from Lakeview about dates, they would notice up the depositions. (R. 355–56; R. 358–59.) In May 2007, the parties stipulated to an Amended Scheduling Order which provided that fact discovery would be completed by October 26, 2007 and that the Welshes would designate experts by November 23, 2007. (R. 42–47.)

On August 2, 2007, Lakeview forwarded Notices of Deposition for Wayne and Carol Welsh setting their depositions for August 30, 2007. (Notice of Depositions of Plaintiffs, attached as Exhibit B to Lakeview’s Opposition to Petition for Permission to Appeal Interlocutory Order.¹) Mr. and Mrs. Welsh did not appear for their depositions.

¹ Lakeview’s opposition to the Welshes’ Petition for Permission to Appeal Interlocutory Order (“Lakeview’s Opposition”) was filed with the supreme court on May 28, 2009, but was omitted from the appellate record by “error or accident.” Utah R. App. P. 11(h). Lakeview has filed with this Court a Motion to Correct Record seeking to have its Opposition added to the appellate court record, and a copy of Lakeview’s Opposition is

The Welshes did not engage in any fact discovery prior to October 26, 2007 and failed to designate any experts by November 23, 2007.

Although Lakeview Hospital served its First Set of Interrogatories and Requests for Production of Documents on the Welshes on August 3, 2007 and sent multiple requests for compliance, Mr. and Mrs. Welsh did not provide responses to the written interrogatories until October 1, 2008. (R. 48–49; Ex. D to Lakeview’s Opposition to Petition for Permission to Appeal Interlocutory Order.) The Welshes did not produce the requested documents until November 20, 2008, eleven days prior to their expert designation deadline established in the fourth and final scheduling order. (R. 451–52.)

The parties again stipulated to a third scheduling order that was entered by the trial court on February 11, 2008. (R. 50–55.) The Third Scheduling Order provided that fact discovery would be completed by May 19, 2008 and that the Welshes would designate experts by June 16, 2008. (R. 50–55.) Mr. and Mrs. Welsh did not engage in any fact discovery prior to May 19, 2008 and failed to designate any experts by June 16, 2008.

When the parties submitted their fourth scheduling order on September 10, 2008, the trial court initially denied it. (R. 440.) The court then ordered a telephone conference to confer with counsel regarding the status of the case and to inquire as to why yet

attached to the memorandum in support of that motion. Because the Motion to Correct Record is being filed on the same day as this response brief, Lakeview cannot cite to the official appellate record, and instead will cite directly to the Opposition and its exhibits.

another extension of the prior scheduling orders was appropriate. (R. 440.) During this scheduling conference on September 30, which included Mr. Wilcox (who was of counsel with Clyde Snow & Sessions) on behalf of the Welshes, Judge Allphin indicated that he would dismiss the case if it did not start moving forward. (R. 441.)

The trial court entered its fourth and final scheduling order on September 30, 2008. (R. 61–66.) The final scheduling order provided that fact discovery would be completed by October 31, 2008 and that the Welshes would designate experts by December 1, 2008. Lakeview Hospital was to designate its expert witnesses by January 30, 2009. Also, the trial court specifically provided that this was the “last amended order[.] [C]ase to move along or it will be dismissed.” (R. 65.)

On October 16, 2008, Lakeview’s counsel re-noticed the depositions of Mr. and Mrs. Welsh for October 22, 2008. (R. 68–69.) The Welshes again failed to appear for their depositions. Lakeview’s counsel then immediately sent out a third deposition notice for the Welshes’ depositions to occur on October 30, 2008. (*See Third Amended Deposition Notice*, attached as Exhibit H to Lakeview’s Opposition to Petition for Permission to Appeal Interlocutory Order.) Mr. and Mrs. Welsh were deposed on October 30, 2008, the day before the deadline to complete fact discovery pursuant to the Fourth Scheduling Order.

On November 20, 2008, nearly three weeks after the close of fact discovery, the Welshes forwarded correspondence to counsel for Lakeview Hospital requesting that the scheduling order be amended again to allow them additional time to designate their expert witnesses. (R. 451–52.) On November 25, 2008, counsel for the Welshes and counsel for Lakeview Hospital participated in a telephone conference wherein the Welshes’ counsel again requested that Lakeview Hospital stipulate to another amendment to the scheduling order to allow them to conduct fact discovery. (R. 77.) Counsel for Lakeview Hospital indicated that he could not stipulate to another amendment given the trial court’s clear mandate that the previous scheduling order would be the final order of the Court. (R. 77.) On November 26th—five days before their deadline to disclose expert witnesses—the Welshes filed a Motion for Enlargement of Time to Designate Expert Witnesses. (R. 72–90.)

Mr. and Mrs. Welsh failed to designate expert witnesses by December 1, 2008 as required by the trial court’s final case management order. Having received no expert disclosures from the Welshes, Lakeview Hospital filed a Motion for Summary Judgment on December 5, 2008. (R. 94–102.) Lakeview also opposed the Welshes’ Motion for Enlargement of Time. (R. 103–34.) After the Welshes’ Motion for Enlargement of Time was fully briefed, Mr. and Mrs. Welsh filed a Request to Submit their motion for decision on December 17, 2008. (R. 178–80.)

On December 17, 2008, the Welshes filed a designation of expert witnesses that named two experts. (R. 140–42.) No expert reports were included. On December 29, 2008, the trial court’s clerk entered a note in the docket indicating that the Welshes’ motion to enlarge time was granted and asking the Welshes to submit an order to the court. (R. 442.) Judge Allphin, however, did not enter an order granting the Welshes’ Motion for Enlargement of Time.

On January 22, 2009, the trial court issued a written ruling denying the Welshes’ Motion for Enlargement of Time and prohibiting Mr. and Mrs. Welsh from presenting expert testimony at the time of trial as a sanction for failing to file their expert designations pursuant to the deadline in the Fourth Scheduling Order. (R. 204–12.) The trial court also denied Lakeview’s Motion for Summary Judgment in that same order and ruled that the Welshes could still assert a *res ipsa loquitur* theory, which required no expert witnesses.²

In that order, the trial court pointed out that the Welshes filed their motion despite the prior warning that the trial court would not permit additional extensions of time for discovery. Moreover, the trial the court cited the “litigation’s slow progress over the past

² Despite the Welshes’ contention that the trial court directed Lakeview to submit an order reflecting its January 22 ruling denying Plaintiffs’ Motion for Enlargement of Time and the sanction barring Plaintiffs’ expert witnesses at trial (Br. of Aplt. at 14), the trial court actually directed that the Plaintiffs submit such an order. (R. 211.) No such order was submitted by the Plaintiffs.

two (2) plus years and the Court's issuing four (4) scheduling orders" giving the Welshes "ample time to designate their expert witnesses and submit their expert reports." (R. 208.) The trial court held that the Welshes provided "no persuasive good faith basis or justification" and denied their motion. (R. 204–12.)

The trial court held that due to its prior admonishment of the parties for not timely moving this litigation forward and its express warning that it would not permit further extensions of time or amendments to the final scheduling order, it was issuing a sanction to bar the Welshes from introducing any expert testimony at trial. (R. 204–12.)

Pursuant to the trial court's Fourth Scheduling Order, Lakeview submitted its expert designations and disclosures on January 30, 2009. (R. 312.) That same day, Mr. and Mrs. Welsh filed a Motion for Relief from Order and For Entry of Order Enlarging Time. (R. 213–306.) The Welshes claimed that the clerk's minute entry of December 29 was an order of the trial court granting their motion and they did not file their expert designations in reliance upon this "order." Lakeview Hospital opposed the Welshes' Motion for Relief. (R. 317–33.)

On February 10, 2009, more than three months after the close of fact discovery, the Welshes noticed up the deposition of one of the hospital witnesses for the first time. (R. 314–16.)

The trial court denied the Welshes' Motion for Relief on April 14, 2009 in a detailed written order. (R. 370–81.) The trial court reiterated that the *clerk's* note was not the *court's* ruling on the Welshes' Motion for Enlargement of Time and confirmed that the trial court's ruling on the motion was issued on January 22, 2009. The trial court found that the Welshes were not prejudiced by the actions of the clerk on December 29, 2008 because those actions took place twenty-nine days *after* the Welshes' deadline for expert designations, and also found that the Welshes' failure to comply with the discovery order was willful in that it was not due to involuntary noncompliance.

SUMMARY OF ARGUMENTS

When it entered the fourth scheduling order in this case, giving the Welshes until December 1, 2008 to designate their expert witnesses, the trial court demonstrated its frustration with the Welshes' failure to move their case forward for nearly three years. The Welshes were always represented by counsel and were fully aware that this was the last scheduling order and that continuing to delay the case's progress would result in sanctions, including the possibility that their case would be dismissed. Despite this strong and clear warning, the Welshes did not move the case forward. Five days before the expert designation deadline, they filed a motion for additional time, effectively requesting a fifth scheduling order in direct disobedience of the trial court.

The court clerk's December 29, 2008 minute entry indicating that the Welshes' motion for additional time was granted was not the order of the trial court itself. Rather, the trial court's January 22, 2009 order constituted the ruling of the court, and it denied the Welshes' motion for additional time and issued sanctions. Further, as the trial court noted, plaintiffs' claims of "reliance" on the clerk's minute order ignored that the minute order was not entered until twenty-nine days after the December 1, 2008 expert deadline imposed by the fourth and final scheduling order. The trial court's decision was not an abuse of discretion in light of the Welshes' repeated failure to adhere to the court's scheduling orders and their defiance of the trial court's express warning that no further extensions would be granted.

The trial court's decision to issue sanctions based upon the Welshes' willful noncompliance was properly supported by the record. Barring the Welshes' experts for their failure to disclose those experts was a narrowly-crafted response to address the Welshes' specific violation. Indeed, the court did not order the drastic sanction of dismissal that it said it would, instead allowing the Welshes to proceed with their *res ipsa* theory.

Finally, the trial court maintained the Welshes' due process rights by clearly warning them that sanctions would result if they again asked for additional time, explaining the behavior that formed the basis for the sanction, considering the Welshes'

arguments in opposition to the sanctions, and finding willful noncompliance on behalf of the Welshes. Mr. and Mrs. Welsh will still have their day in court on their negligence claims because the trial court allowed them to move forward on the basis of *res ipsa loquitur*, for which no expert testimony is required.

ARGUMENT

I. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE WELSHES' MOTION FOR ENLARGEMENT OF TIME TO FILE EXPERT DESIGNATIONS GIVEN ITS PREVIOUS ADMONISHMENT THAT THERE WOULD BE NO FURTHER AMENDMENTS TO THE SCHEDULING ORDER.

“A trial judge is given a great deal of latitude in determining the most fair and efficient manner to conduct court business.” *Morton v. Continental Banking Co.*, 938 P.2d 271, 275 (Utah 1997). The trial judge is in the best position to evaluate the status of a case, as well as the attitudes, motives, and credibility of the parties. *Id.* Judge Allphin had been involved in this case for almost three years at the time he denied the Welshes' motion for enlargement of time. He had ruled on motions, participated in phone conferences with the parties, and signed multiple case management orders. In his fourth and final scheduling order dated September 30, 2008, Judge Allphin wrote that this would be the “last amended order, case to move along or it will be dismissed.” Thus, the trial court's decision to deny the Welshes' request for additional time was not rash or abusive. Judge Allphin expressly warned the Welshes that failure to comply with the

fourth and final amended scheduling order, including the Welshes' disclosure of their expert witnesses by December 1, 2008, could result in dismissal. (R. 65.)

Although the Welshes were aware of the deadline and the consequences for not complying (as evidenced by the presence of their counsel, Mr. Wilcox, on the September 30 scheduling conference call with the trial court and their counsel's motion for additional time filed before the disclosure deadline), the Welshes chose not to obey the court's Fourth Scheduling Order requiring disclosure of their experts by December 1, 2008. Their request for an extension of time was not "reasonable" given the court's prior express warning that no further extension would be given. "While scheduling orders should never be so inflexible as to not accommodate exigencies that may occur, they are necessary to expedite the flow of cases through the court system and should not be lightly disregarded." *Arnold v. Curtis*, 846 P.2d 1307, 1310 (Utah 1993).

The Welshes claim that the trial court "unequivocally" granted their Motion for an Enlargement of Time based upon the contents of the court clerk's December 29, 2008 minute entry. (Br. of Aplt. At 21.) However, the clerk's minute entry did not constitute the trial court's ruling on the Motion.³ The trial court noted:

³ The fact that Judge Allphin's court clerk signed scheduling orders on occasion on behalf of Judge Allphin to send to the parties, while the copies of the orders in the original record contain the judge's signature, does not elevate the clerk's role to that of a judge.

[T]he Court neither entered a minute entry, made an oral ruling or order on the record, nor prepared or executed a ruling or order to that effect. Quite simply, no ruling was issued on the Welshes' motion for enlargement of time until the Court issued its written Ruling of January 22, 2009.

(R. 376.) Indeed, a minute entry is not a binding order of the court. *See Cook v. Gardner*, 381 P.2d 78, 80 (Utah 1963) (minute entry is superseded by the document signed by the judge which becomes the order of the court); *see also South Salt Lake v. Burton*, 718 P.2d 405, 406 (Utah 1986) (clerk's post-trial minute entry of judgment that was not signed by the judge was not susceptible of enforcement); *In re Discipline of Alex*, 2004 UT 81, 99 P.3d 865 (commencement of the 30 day deadline to file a notice of appeal was not the date of the minute entry reflecting the court's intention to deny a motion, but instead was the actual date the court entered an order denying the motion). Since the minute entry was not a binding order of the court, Judge Allphin's January 22, 2009 order denying the Welshes' motion for additional time was not a "reversal" of the minute entry, nor was it done *sua sponte*. Additionally, the Welshes' proposed order granting their Motion for Enlargement of Time, drafted in response to the court clerk's December 29, 2008 minute entry, was never signed by Judge Allphin. (R. 198–99.)

The Welshes contend the trial court improperly corrected a judicial error instead of a clerical error pursuant to Rule 60(a) when it changed its ruling from "motion granted" in the December 29 minute entry to "motion denied" in the trial court's January 22 order. (Br. of Aplt. at 24.) There was no need to correct *any* error by the trial court because the

December 29, 2008 minute entry did not constitute a binding order of the trial court and it was superseded by the trial court's January 22, 2009 order. *See Morgan v. Morgan*, 854 P.2d 559 (Utah Ct. App. 1993) (minute entry awarding 100% of stocks to husband in divorce proceeding superseded by court's decree awarding husband 75% of stocks; language of decree took precedence over any alleged inconsistent language in court's minute entry addressing the division of the parties' stock). Even if the January 22, 2009 order is deemed a correction of the December 29, 2008 minute entry, trial courts have clear discretion to reconsider and change their position with respect to any orders or decisions as long as no final judgment has been entered. *Brookside Mobile Home Park, Ltd. v. Peebles*, 2002 UT 48, ¶18, 48 P.3d 968; Utah R. Civ. P. 54(b).

The Welshes contend that they relied on the court clerk's December 29, 2008 minute entry and phone call advising them that their motion was granted and their reliance resulted in "considerable expense" in completing their expert reports. But the Welshes' claim rings hollow, given that they first designated two of their three expert witnesses on December 17, 2008 and presumably had already confirmed their opinions in advance of this designation. (R. 140–42.)

Moreover, any notations in the docket or statements made by the court clerk twenty-nine days *after* the deadline for expert designations could not possibly have influenced Mr. and Mrs. Welsh to assume, at any time before that, that the December 1st

deadline was extended. As the trial court noted, “this assumption [was] unjustified, particularly in light of the [trial] Court’s prior admonishments and express warning within the [Fourth Scheduling Order] that no further extensions of time would be permitted.” (R. 377.) The mere filing of a motion for enlargement of time did not relieve the Welshes of their duty under the Fourth Scheduling Order to serve expert designations and reports by December 1, 2008.

The Welshes cite two cases for the premise that justice and fairness required that the trial court allow them to designate witnesses after the court-imposed deadline. (Br. of Aplt. at 21.) However, the facts in those cases are substantially different from those at issue in this case. In *Carman v. Slavens*, 546 P.2d 601 (1976), plaintiff filed a notice for defendant to appear for his deposition and produce documents six weeks after service of the newly-filed complaint was perfected on defendant. Defendant did not appear for his deposition, and shortly thereafter, defendant’s counsel withdrew his representation. The trial court defaulted the defendant as a result of his failure to appear at his deposition. Citing the principle that reason and justice shall prevail over the arbitrary and uncontrolled will of a judge, the supreme court held the trial court abused its discretion and vacated the order. *Id.* at 602.

The procedural history of this case involves not six weeks of delay as in *Carmen*, but almost three years and four scheduling orders, during which time the Welshes failed

to move this case forward by answering written discovery or by presenting Mr. and Mrs. Welsh for their depositions. Moreover, the Welshes filed a motion for an extension of time to designate their expert witnesses after receiving a warning from the judge that they would receive a sanction of dismissal if they did not comply with the fourth scheduling order.

The Welshes also cite to *Boice ex. rel. Boice v. Marble*, 1999 UT 71, 982 P.2d 565, to support their claim that the trial court's denial of their motion for an extension of time was unfair and unjust. In *Boice*, the plaintiff's expert unexpectedly withdrew as a trial witness after the expert deadline and the plaintiff moved to substitute another expert witness before the final discovery cut-off date. Based upon the specific facts of that case, the supreme court found the trial court abused its discretion in excluding plaintiff's substitute expert witness.

The facts in *Boice* have no application to this case. Here, the Welshes never designated any expert witness at any time prior to the expiration of the fourth deadline for designation of expert witnesses. Thus, the trial court did not abuse its discretion.

The Welshes contend that they were precluded from complying with the fourth scheduling order because of a delay in transferring their case over to "new" counsel in November 2008. (Br. of Aplt. at 20.) But regardless of their attorney Nathan Wilcox's change of law firms, Mr. Wilcox represented the Welshes during the September 30, 2008

telephone conference wherein Judge Allphin agreed to the final fourth amended scheduling order and issued a warning about dismissal of the case if the Welshes failed to comply with that order. Therefore, although Mr. Rodney Snow and Mr. Matthew Steward did not file appearances with the court until November 26, 2008, Mr. and Mrs. Welsh were continuously represented by Mr. Wilcox, who was associated with Mr. Snow's and Mr. Steward's firm before, during, and after Judge Allphin's warning. Thus, the December 1, 2008 deadline and the consequences for noncompliance with the deadline were known, or should have been known, for two months before the December 1, 2008 deadline.

II. THE TRIAL COURT PROPERLY EXERCISED ITS BROAD DISCRETION IN BARRING THE WELSHES' EXPERT WITNESSES AT TRIAL AS A SANCTION FOR THEIR DISCOVERY VIOLATION.

A. The Trial Court Was Empowered to Bar the Welshes' Expert Witnesses as a Sanction for Their Discovery Violation.

The Utah Rules of Civil Procedure empower the trial court to sanction a party for discovery violations. *Stevenett v. Wal-Mart Stores, Inc.*, 1999 UT App 80, ¶9, 977 P.2d 508; Utah R. Civ. P. 37(b)(2). Rule 16(d) of the Utah Rules of Civil Procedure states in relevant part that “[i]f a party or a party’s attorney fails to obey a scheduling or pre-trial order . . . the court, upon a motion or its own initiative, may take any action authorized by Rule 37(b)(2).” Rule 37(b)(2)(B) provides in turn that if a party fails to obey an order entered under Rule 16(d), the court may prohibit the offending party from introducing

certain matters into evidence, such as witness testimony. *See* Utah R. Civ. P.

37(b)(2)(B).

On multiple occasions, Utah courts have affirmed a trial court's decision to bar or limit testimony when witnesses have been untimely designated. *See Griffith v. Griffith*, 1999 UT 78, ¶20, 985 P.2d 255 (trial court did not abuse discretion in barring plaintiff's witness at trial after failure to include witness on list required by court; sanction was reasonable response to the failure to comply with the court's managerial plan); *DeBry v. Cascade Enters.*, 879 P.2d 1353, 1361 (Utah 1994) (trial court did not abuse discretion in barring all of plaintiffs' expert witnesses for failure to comply with the scheduling order); *Rukavina v. Sprague*, 2007 UT App 331, ¶¶8–9, 170 P.3d 1138 (failure to comply with discovery was sanctionable and exclusion of witness and limitation of other witnesses' testimony was appropriate); *Arnold v. Curtis*, 846 P.2d 1307, 1310 (Utah 1993) (trial court did not abuse discretion in barring expert's affidavit when not filed by deadline in scheduling order); *see also Stevenett*, 1999 UT App 80, ¶24 (defendant violated discovery order in failing to supplement interrogatories regarding affirmative defenses; expert's testimony supporting affirmative defenses was limited as a sanction).

Pursuant to Rule 37(b)(2)(C), courts have even dismissed a party's claims in their entirety for failing to comply with court-imposed discovery deadlines. *See Morton v. Continental Banking Co.*, 938 P.2d 271, 274–75 (Utah 1997) (affirming dismissal of

personal injury action due to plaintiff's failure to comply with discovery orders); *Preston & Chambers, P.C. v. Koller*, 943 P.2d 260, 263 (Utah Ct. App. 1997) (affirming trial court's dismissal of defendant's counterclaim after he failed to comply with court's deadline to disclose expert witnesses); *Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 950, 962 (Utah Ct. App. 1989) (holding defendant's default was not an abuse of discretion due to his failure to comply with a court order compelling discovery). Here the trial court threatened to dismiss the Welshes' entire case, but ultimately resorted to a less severe sanction—even though dismissing the case in its entirety would have been well within the court's discretion.

B. The Trial Court Acted Well Within Its Discretion in Barring the Welshes' Expert Witnesses As A Sanction For Their Willful Discovery Violation of the Fourth Scheduling Order.

To warrant sanctions for failure to comply with discovery, a trial court must determine that one of the following circumstances exist: “(1) the party's behavior was willful; (2) the party has acted in bad faith; (3) the court can attribute some fault to the party; or (4) the party has engaged in persistent dilatory tactics tending to frustrate the judicial process.” *Morton*, 938 P.2d at 276. Willful failure is defined as “any intentional failure as distinguished from involuntary noncompliance. No wrongful intent need be shown.” *M.E.N. Co. v. Control Fluidics, Inc.*, 834 F.2d 869, 872–73 (10th Cir. 1987). Once this initial determination is made, the full range of options for sanctions under Rule

37 is available and the trial court has broad discretion to select which sanction to apply under the circumstances. *Morton*, 938 P.2d at 274.

In assessing the Welshes' behavior, the trial court noted that Mr. and Mrs. Welsh failed to comply with three prior court orders over the course of three years of litigation and they were well aware of the December 1st expert discovery deadline as well as the trial court's prior admonishment regarding the slow progress of the case. They had previously been warned that the Fourth Scheduling Order was the last and that if the case was not "moved along" it would be dismissed. Still, they filed a Motion for Enlargement of Time and failed to disclose their experts by the deadline imposed by the court.

This behavior does not constitute involuntary noncompliance, but instead, an affirmative failure by the Welshes to adhere to deadlines. The court added that Mr. and Mrs. Welsh asserted no surprise, unforeseen circumstances, or any other legitimate excuse for their failure to timely file their expert designations. *See Morton*, 938 P.2d at 275 ("Any mistakes, inadvertence and neglect which may have occurred at the office of the plaintiffs' counsel are not an excuse for the manner in which the plaintiffs' counsel has handled this matter."). Based upon these facts, the trial court properly determined that the Welshes' failure to comply was willful and not due to involuntary noncompliance.

In *Preston & Chambers, P.C. v. Koller*, 943 P.2d 260 (Utah Ct. App. 1997), a case substantially similar to this case, the court of appeals upheld the trial court's outright dismissal of defendant's counterclaims on the ground that he engaged in dilatory tactics and failed to comply with a court-imposed deadline to designate expert witnesses. After nearly three years of litigation, the trial court issued a deadline for disclosure of expert witnesses and expressly stated that the defendant's counterclaims would be dismissed if he did not comply. The appellate court concluded the trial court did not abuse its discretion in dismissing the defendant's counterclaims after finding he had ample time to designate an expert and he failed to comply with the order even after receiving notice of the consequences.

Similarly, in the instant case, the Welshes did not actively pursue this case for almost three years and were warned by the trial court that it might dismiss the case if the Welshes continued their noncompliance with the court's scheduling orders. Despite these facts showing a willful failure to comply with the trial court's order, Judge Allphin, in the proper exercise of his broad discretion, did not dismiss the Welshes' case but chose the less-severe sanction of barring the testimony of the witnesses who were not timely disclosed.

The trial court's failure to specifically reference the Welshes' willful noncompliance in its January 22 order is not dispositive. First, the trial court cited the

basis for its decision to issue sanctions in its January 22 order, including the Welshes' failure to submit their expert reports by the deadline even after the trial court expressly warned that it would not permit further amendments to the schedule and that the Welshes risked sanctions if they failed to comply. Second, the point is mooted by the fact that the trial court included a recitation of the evidence of the Welshes' willful behavior and made the requisite finding of willfulness in its April 14, 2009 order addressing the Welshes' Motion for Relief from the January 22 order. (R. 370–81.) Third, even if the trial court had not made such a finding in its April 14th order, it would not be grounds for reversal if a full understanding of the issues on appeal could nevertheless be determined by the appellate court. *See Amica Mut. Ins.*, 768 P.2d at 962 (no reversible error for trial court's failure to make specific finding of willfulness due to evidence of willful and bad faith conduct in the record); *Preston & Chambers, P.C.*, 943 P.2d at 263 (failure to articulate specific finding of willfulness, bad faith, fault, or dilatory tactics is not ground for reversal if findings appear in trial court's opinion or elsewhere to sufficiently indicate the factual basis for the ultimate conclusion); *see also Bailey v. Bayles*, 2002 UT 58, ¶10, 52 P.3d 1158 (an "appellate court may affirm on . . . any theory apparent on the record" (citation omitted)).

The Welshes contend they are "more innocent" of any intentional misconduct than the parties in other cases where sanctions have been overturned because they did not

disregard an existing case management order. (Br. of Aplt. at 28.) Each of the cases cited by the Welshes involves the reversal of sanctions following a single misstep without any indication that the court had previously put the offending party on notice that sanctions would be assessed for noncompliance. *See Carmen v. Slavens*, 546 P.2d 601 (Utah 1976) (supreme court reversed the trial court's decision to enter judgment against defendant following his first and only failure to appear at his deposition and produce documents); *Bonneville Billing & Collections v. Wall*, 2008 UT App 35, 2008 WL 256584 (court of appeals reversed trial court's default of defendant based upon his absence at first required court appearance; there was no evidence he had notice of the appearance and no finding that his actions were part of a series of actions indicating he was disrespectful of the court's orders).

In this case, the Welshes' failure to comply with the December 1, 2008 expert designation deadline was the culmination of a series of actions in which they disregarded the court's scheduling orders. They did not comply with any of the first three case management orders providing deadlines for fact discovery or expert designation deadlines. The Welshes were not relieved from complying with the December 1, 2008 expert designation deadline just because they filed a Motion for an Enlargement of Time five days before the deadline to designate their expert witnesses. Moreover, they requested a fifth scheduling order after being expressly warned that the fourth scheduling

order would be the last one and the case would be dismissed if it was not moved along.

“In cases meriting sanctions, there is often a consistent pattern of behavior disregarding discovery requirements or court orders, as well as evidence that the sanctioned party is on notice that its pattern of behavior will result in sanctions if it continues.” *Kilpatrick v. Bullough Abatement, Inc.*, 2008 UT 82, ¶35, 199 P.3d 957. This is precisely such a case.

Furthermore, the record shows that the Welshes delayed more than just their disclosure of expert witnesses. Although Lakeview Hospital sent Mr. and Mrs. Welsh written discovery in August 2007, the Welshes failed to answer interrogatories until October 2008 and failed to produce the requested documents until November 20, 2008 (after the close of fact discovery deadline and approximately eleven days before their expert designations were due). The Welshes did not appear for their depositions, which were initially noticed by Lakeview Hospital to take place on August 30, 2007. Following the trial court’s admonishment that the Fourth Scheduling Order would be the last, Lakeview Hospital immediately re-noticed the Welshes’ depositions for October 22, 2008. Mr. and Mrs. Welsh finally appeared for their depositions on October 30, 2008, one day before the conclusion of fact discovery. During this same period, the Welshes conducted no discovery and then failed for the fourth time to designate expert witnesses. It was the Welshes’ duty to move the case forward. *See Hales v. Oldroyd*, 2000 UT App 75, ¶27, 999 P.2d 588 (although plaintiff bears “the primary responsibility for moving the

case along” she showed little interest in diligently pursuing her cause of action); *Country Meadows Convalescent Ctr. v. Utah Dep’t of Health*, 851 P.2d 1212, 1216 (Utah Ct. App. 1993) (“[T]he duty to prosecute is a duty of due diligence imposed on a plaintiff, not on a defendant”).

The Welshes wrongly assert that the Lakeview Hospital’s failure to present its employees for their depositions “contributed significantly” to the delay in disclosing their experts by the December 1, 2008 deadline. (Br. of Aplt. at 30.) Besides the three letters requesting dates for the depositions (including one sent twenty days after the close of fact discovery), the Welshes have offered no actual support for their unfounded allegation that Lakeview Hospital blocked their efforts at discovery. The Welshes’ counsel did not issue a single deposition notice until well after fact discovery closed, even though he said he would do so in a July 2007 letter if he did not hear from Lakeview Hospital soon about potential dates. (R. 358-59.)

Notably, the Welshes’ Motion for Enlargement of Time did not even request additional time to complete the hospital witness depositions. If these depositions were critical to the Welshes’ ability to designate experts, it is axiomatic that they would have included this request in their motion. Moreover, if the Welshes’ counsel believed that Lakeview Hospital was improperly prohibiting them from taking these depositions, the

appropriate course of action would have been to file a motion to compel the discovery.⁴

The fact that the Welshes have never filed such a motion conclusively demonstrates that this discovery was never actively pursued and that Lakeview Hospital has not engaged in any inappropriate conduct that precluded the Welshes from taking these depositions.

The Welshes contend that the trial court's sanction improperly targeted the Welshes instead of their attorneys for the discovery violation. The barring of expert witnesses is not a sanction aimed directly at the Welshes, as opposed to a monetary fine, a finding of contempt of court, or a complete dismissal of the complaint. Moreover, the supreme court in *Kilpatrick* recognized that sanctions lodged against an attorney will typically also impact a client. *Kilpatrick*, 2008 UT 82 at ¶39. In *Kilpatrick*, the court recognized that a missing evidence instruction due to plaintiffs' failure to obtain a court ordered autopsy would be an appropriate sanction, even though it might impact the client and even preclude the plaintiff from pursuing his claims against the defendants. The court reasoned that the remedy served the dual purpose of mitigating any prejudice experienced by the defendants and providing a sufficient deterrent to others who may be tempted to purposely destroy important evidence.

⁴ During the September 30, 2008 hearing to discuss the fourth scheduling order, the trial court specifically advised the parties that "[i]f the Court needs to intervene on discovery, then motions need to be filed." (R. 67.)

In this case, the trial court “properly balanced the nature of the sanction” with the Welshes’ failure to disclose their expert witnesses, and “imposed a sanction not only well within its power but also carefully and narrowly crafted to address the violation.” *Stevenett*, 1999 UT App 80 at ¶24 (failure to supplement interrogatories regarding affirmative defenses supported by an independent medical examiner (IME) warranted narrowly crafted sanction of limiting the IME’s testimony). Although the trial court could have been well within its exercise of discretion to dismiss the entire case, instead it dismissed only the claims that required expert testimony and allowed the Welshes to proceed with their *res ipsa* claims.

III. THE TRIAL COURT PROPERLY MAINTAINED THE WELSHES’ DUE PROCESS RIGHTS IN ISSUING SANCTIONS BASED UPON THE WILLFUL NONCOMPLIANCE DEMONSTRATED IN THE RECORD.

Finally, in keeping with the tenets of due process, the Welshes were afforded an opportunity to address the discovery violation and court-imposed sanction even absent oral argument. Following the trial court’s January 22, 2009 order imposing the sanction, the Welshes filed a Motion for Relief from that order and fully explained the detailed circumstances surrounding the conduct for which they were sanctioned—their failure to file their expert designations by the deadline.

The due process right to respond does not necessarily require an adversarial evidentiary hearing and may be limited to the record. *F.D.I.C. v. Daily*, 973 F.2d 1525,

1531 (10th Cir. 1992). Indeed, the court's decision to issue sanctions was properly supported by the record. Multiple scheduling orders had been disregarded, the trial court directed that the fourth scheduling order entered September 30, 2008 was the last amended order and that the case would be dismissed if it was not moved forward, the Welshes nonetheless filed a motion requesting an amendment to the fourth scheduling order, and the Welshes failed to designate experts by the December 1, 2008 deadline.

The trial court also considered the contents of the Welshes' brief in support of their motion for relief, which detailed the circumstances surrounding the behavior for which the Welshes were sanctioned. Mr. and Mrs. Welsh do not claim that any arguments were omitted from their reconsideration motion and brief. Therefore, even though the trial court decided not to entertain oral argument, the Welshes' due process rights were not impinged. *See F.D.I.C.*, 973 F.2d at 1532 (failure to hold an evidentiary hearing before entering sanction of default judgment was not abuse of discretion).

CONCLUSION

The trial court's decision to deny the Welshes' request for additional time to designate their experts and to bar the Welshes from presenting expert testimony at trial as a sanction were well within its broad discretion and are supported by the record. Accordingly, Lakeview Hospital respectfully asks this Court to affirm the trial court's January 22, 2009 and April 14, 2009 orders and remand the case for further proceedings

on the remaining claim.

DATED this 19th day of November, 2009.

HALL PRANGLE & SCHOONVELD, LLC

A handwritten signature in cursive script, appearing to read "Shelley M. Doi", is written over a horizontal line.

Tawni J. Anderson

Stephen D. Alderman

Shelley M. Doi

*Attorneys for Hospital Corporation of Utah
d/b/a Lakeview Hospital*

CERTIFICATE OF SERVICE

I hereby certify that on the 19 day of November, 2009, two copies and a searchable pdf of the foregoing **BRIEF OF APPELLEE** were sent via first class mail, postage prepaid, to the following:

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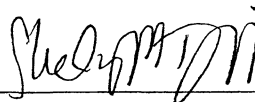


Exhibit A

Utah Rule of Civil Procedure 37. Failure to Make or Cooperate in Discovery; Sanctions.

* * *

(b) Failure to comply with order.

* * *

(b)(2) *Sanctions by court in which action is pending.* If a party fails to obey an order entered under Rule 16(b) . . . unless the court finds that the failure was substantially justified, the court in which the action is pending may take such action in regard to the failure as are just, including the following:

* * *

(b)(2)(B) prohibit the disobedient party from supporting or opposing designated claims or defenses or from introducing designated matters in evidence;

(b)(2)(C) strike pleadings or parts thereof, stay further proceedings until the order is obeyed, dismiss the action or proceeding or any part thereof, or render judgment by default against the disobedient party;

* * *

Exhibit B

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FILED

JAN 22 2009

SECOND
DISTRICT COURT

IN THE SECOND DISTRICT COURT, DAVIS COUNTY
STATE OF UTAH

WAYNE L. WELSH and
CAROL WELSH,

Plaintiffs,

vs.

HOSPITAL CORPORATION OF UTAH,
d/b/a LAKEVIEW HOSPITAL,

Defendant.

**RULING ON MOTION FOR
ENLARGEMENT OF TIME AND
DEFENDANT LAKEVIEW HOSPITAL'S
MOTION FOR SUMMARY JUDGMENT**

Case No. 060700106

Judge Michael G. Allphin

This matter is before the Court on the plaintiff's motion for enlargement of time and the defendant's motion for summary judgment. The Court has reviewed the moving and responding papers, along with their supporting documentation. Having considered all of the arguments, determined that a hearing is unnecessary for the Court's ruling, being fully advised in the premises, and for the reasons set forth below, the Court DENIES the plaintiff's motion for enlargement of time and DENIES the defendant's motion for summary judgment.

BACKGROUND

On February 28, 2006, the plaintiffs filed a complaint against the defendant alleging negligence and loss of consortium. In their complaint, the plaintiffs' alleged to have provided the defendant with a notice of their intent to commence a medical malpractice action and to have complied with the statutory requirements concerning pre-litigation review of their medical malpractice claims.

On April 13, 2006, the defendant answered the plaintiffs' complaint denying liability.

Thereafter, on August 10, 2006, the Court issued a Rule 26(f) attorney planning meeting report and scheduling order for this litigation. This order was subsequently amended on May 25, 2007, and again on February 12, 2008.

On September 30, 2008, the Court held a telephone conference regarding a third amended scheduling order. During this telephone conference, the Court stressed that this matter had moved too slowly and that it would not permit further extensions of time or additional amendments beyond its third amended scheduling order. The Court then issued its third amended scheduling order, to which the parties had stipulated. Within this order, the Court wrote: "Last amended order, case to move along or it will be dismissed." The third amended scheduling order set the date for the plaintiffs' initial expert reports and disclosures as December 1, 2008.

Subsequently, on November 26, 2008, the plaintiffs' filed a motion for enlargement of time and supporting affidavit of counsel.¹ In his supporting affidavit, counsel for the plaintiffs acknowledged that the Court had been "very patient in the scheduling of this case" and indicated a commitment to moving this case forward. Nevertheless, the plaintiffs' requested additional time to submit their initial expert reports and disclosures.²

On December 5, 2008, and in response to the plaintiffs not submitting their initial expert reports and disclosures by the December 1, 2008 deadline, the defendant filed a motion for summary judgment and supporting memorandum. In its supporting memorandum, the defendant argued that because the plaintiffs had failed to timely submit any expert testimony pertaining to

¹ On November 26, 2008, the plaintiffs also filed a motion to shorten the response time for the defendant's memorandum in opposition to their motion for enlargement of time. The Court granted this motion on December 10, 2008, and the defendant subsequently timely served its opposing memorandum on the plaintiffs.

² The plaintiffs' motion purposed the Court change the December 1, 2008 cutoff for submitting their initial expert reports and disclosures to January 9, 2009.

the issue of the requisite standard of care, the plaintiffs could not establish a prima facie claim of medical malpractice. The defendant further asserted that it had not breached the stand of care for a hospital and thus summary judgment was appropriate.

The defendant then, on December 15, 2008, filed a memorandum in opposition to the plaintiffs' motion for enlargement of time. In its memorandum, the defendant noted that the Court had made it clear during the September 30, 2008 telephone conference that it would not allow further amendments to the scheduling order. The defendant also asserted that there is no good faith basis for the plaintiffs to request additional time to complete discovery and designate expert witnesses, particularly in light of the Court's prior admonishment.

On December 17, 2008, the plaintiffs filed a reply memorandum in support of their motion for enlargement of time.³ In their reply, the plaintiffs again acknowledged the Court's need to move the case efficiently towards a resolution. The plaintiffs' then asserted that the delay in expert discovery was due to the defendant not cooperating with the plaintiffs' attempts to schedule certain employees of the defendant for deposition. Concurrent with their reply memorandum, the plaintiffs filed a request to submit for decision regarding their motion for enlargement of time.

Additionally on December 17, 2008, the plaintiffs filed a memorandum in opposition to the defendant's motion for summary judgment. In their memorandum, the plaintiffs asserted that their claim of negligence was not strictly a medical malpractice claim. The plaintiffs then argued that the doctrine of *res ipsa loquitur* creates an issue of material fact, which warrants the Court's denial of the defendant's motion even in the absence of expert testimony. The plaintiffs averred

³ The plaintiffs also on December 17, 2008, filed a designation of expert witnesses. This designation was not accompanied with the experts' reports and was filed over two (2) weeks late under the third amended scheduling order.

that the doctrine of *res ipsa loquitur* establishes a prima facie case of negligence from the circumstances of a case based on the knowledge and experience of laypersons and thus expert testimony is unnecessary for the plaintiffs' claims.⁴ The plaintiffs also argued that denial of the defendant's motion is warranted under Rule 56(f) of the Utah Rules of Civil Procedure, as the plaintiffs were unable to present facts essential to their opposition due to the defendant's lack of cooperation in arranging depositions with key witness.⁵

Finally, on December 24, 2008, the defendant filed a reply memorandum in support of its motion for summary judgment. In its reply, the defendant argued that the plaintiffs had not met the requirements of *res ipsa loquitur* and cited several cases from jurisdictions outside of Utah that hold *res ipsa loquitur* is inapplicable in medical malpractice cases.⁶

On January 2, 2009, the defendant filed a notice to submit for decision regarding its motion for summary judgment.⁷

ANALYSIS

I. The plaintiffs' motion for enlargement of time.

"A trial judge is given a great deal of latitude in determining the most fair and efficient manner to conduct court business." *Morton v. Continental Banking Co.*, 938 P.2d 271, 275 (Utah 1997). The plaintiffs' instant motion requested the Court enlarge the time for filing their initial

⁴ See *Nixdorf v. Hicken*, 612 P.2d 348, 352-54 (Utah 1980), *Virginia S. v. Salt Lake Care Ctr.*, 741 P.2d 969, 972-73 (Utah Ct. App. 1987), *Baczuk v. Salt Lake Regional Med. Ctr.*, 8 P.3d 1037, 1039-42 (Utah Ct. App. 2000).

⁵ In support of their Rule 56(f) argument, the plaintiffs filed a Rule 56(f) affidavit of counsel, which indicated the plaintiffs had made at least two (2) requests to depose certain employees of the defendant, but were unable to take such depositions due to the defendant's failure to produce the witnesses. Notably, however, the Court has no record of the plaintiffs attempting to subpoena these witnesses or set a date for their deposition.

⁶ See *Falcher v. St. Luke's Hosp. Med. Ctr.*, 506 P.2d 287 (Aliz. Ct. App. 1973), *Dollins v. Hartford Acci. & Indem. Co.*, 477 SW.2d 179 (Ark. 1972), *Taylor v. Beardstown*, 491 NE.2d 803 (Ill. App. Ct. 1986), *Tuggle v. Hosp. Auth. Of Gwinnett County*, 211 SE.2d 167 (Ga. Ct. App. 1974), *Griggs v. Morehead Mem'l Hosp.*, 345 SE.2d 430 (N.C. Ct. App. 1986), *Miller v. Delaware County Mem'l Hosp.*, 239 A.2d 340 (Pa. 1968).

⁷ Subsequently, on January 9, 2009, the plaintiffs submitted their expert reports to the defendant. This submission was served on the defendant over one (1) month late under the timeline of the Court's third amended scheduling order.

expert reports and disclosures. The plaintiffs have made this motion despite the Court's prior warnings that it would not permit additional extensions of time for discovery. Based on this litigation's slow progress over the past two (2) plus years and the Court's issuing four (4) scheduling orders, the Court expressly warned the parties that no additional extensions of time or amendments to its scheduling order would be permitted. The Court has granted the plaintiffs ample time to designate their expert witnesses and submit their expert reports and disclosures. Further, the plaintiffs have provided the Court with no persuasive good faith basis or justification for granting their motion for enlargement of time. Accordingly, the Court DENIES the plaintiffs' motion for enlargement of time.

In addition to denying the plaintiffs' motion, the Court shall also impose sanctions against the plaintiffs. "Trial courts have broad discretion in selecting and imposing sanctions for discovery violations, including dismissing the noncompliant party's pleadings." *Tuck v. Godfrey*, 981 P.2d 407, 411 (Utah Ct. App. 1999) (Internal quotations omitted); see also *SFR, Inc. v. Control, Inc.*, 177 P.3d 629, 633 (Utah Ct. App. 2008) ("the trial court has 'broad discretion' to select among the 'full range of options' in deciding which sanction to apply to the violator.").

Here, the third amended scheduling order, which governs the timing of this litigation set a December 1, 2008 deadline for the plaintiffs to submit their initial expert reports and disclosures. The plaintiffs' failed to submit their initial expert reports and disclosures by this date and have provided the Court no adequate justification for their failure to comply with the Court's scheduling order.

Rule 16(d) of the Utah Rules of Civil Procedure provides in relevant part: "If a party or a party's attorney fails to obey a scheduling or pretrial order ... the court, upon motion or its own

initiative, may take any action authorized by Rule 37(b)(2).” Due to the Court’s prior admonishment of the parties for not timely moving this litigation forward and the Court’s express warning that it would not permit further extensions of time or amendments to its scheduling order, the Court finds that sanctions are appropriate for the plaintiffs’ failure to comply with discovery deadlines.

Under Rule 37(b)(2)(B) of the Utah Rules of Civil Procedure, the Court may “prohibit the disobedient party from supporting or opposing designated claims or defenses or from introducing designated matters in evidence[.]” In light of the circumstances of this case and the plaintiffs’ failure to timely submit their initial expert reports and disclosures, the Court finds this an appropriate sanction to impose against the plaintiffs. The Court shall therefore prohibit the plaintiffs from introducing any expert testimony at trial regarding their claims.

II. The defendant’s motion for summary judgment.

Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Utah R. Civ. P 56(c); *See also Baczuk*, 8 P.3d at 1039. Additionally, “[s]ummary judgment should be granted with great caution in negligence cases.” *Williams v. Melby*, 699 P.2d 723, 725 (Utah 1985). Due to the plaintiffs’ failure to and timely submit their expert reports and disclosures, the defendant has moved the Court for summary judgment.

The defendant has argued that absent expert testimony, the plaintiffs cannot establish the standard of care necessary to set forth a *prima facie* case of medical malpractice. However,

contrary to the defendant's assertion and as argued by the plaintiffs, Utah courts have recognized and applied the doctrine of *res ipsa loquitur* in cases of medical malpractice.⁸

"Typically [in medical malpractice cases], the standard of care and the defendant's breach of that standard must be established through expert testimony." *Pete*, 141 P.3d at 636. However, Utah courts have long recognized an exception to this requirement. *Id.* Specifically, the Utah Supreme Court in *Nixdorf v. Hicken* stated:

"expert testimony is unnecessary to establish a standard of care owed the plaintiff where the propriety of the treatment received is within the common knowledge and experience of the layman." 612 P.2d at 352.

The Court in *Nixdorf* held that, [w]hen the appropriate evidentiary basis is presented a plaintiff may employ the doctrine of *res ipsa loquitur* to carry [the] burden [of establishing the requisite standard of care]." *Id.*

The doctrine of *res ipsa loquitur* is an evidentiary doctrine that arises when the plaintiff can establish: "(1) the accident was of a kind which, in the ordinary course of events, would not have happened had the defendant used due care, (2) the instrument or thing causing the injury was at the time under the management and control of the defendant, and (3) the accident happened irrespective of any participation at the time by the plaintiff." *Id.* at 352-353.

Here, the plaintiffs have alleged and argued that: (1) Mr. Welsh's fall from the exam table to the floor is not the type of event one would expect had he been properly supervised and stabilized by the defendant; (2) the defendant had control of the exam table and had custody of Mr. Welsh while he was being examined and treated; and (3) while Mr. Welsh may have been the one to faint or lose control of his physical faculties, the defendant was aware of his

⁸ See *Nixdorf v. Hicken*, 612 P.2d 348, 352-54 (Utah 1980); *Virginia S. v. Salt Lake Care Ctr.*, 741 P.2d 969, 972-73 (Utah Ct. App. 1987); *Baczuk v. Salt Lake Regional Med. Ctr.*, 8 P.3d 1037, 1039-42 (Utah Ct. App. 2000); *Pete v. Youngblood*, 141 P.3d 629 (Utah Ct. App. 2006).

vulnerable state, i.e. incapacitated in a similar way to one who is disabled or under anesthesia, and should have taken proper precautions to prevent his fall.

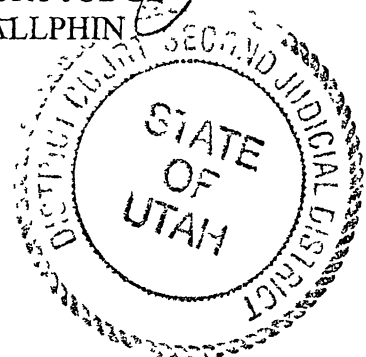
Given nature of the accident being a fall after admission to an emergency room due to a fainting episode and head injury, and consistent with the plaintiffs' allegations and arguments, the Court finds that it is within the common knowledge and experience of a lay person to determine if the defendant breached its standard of care. Accordingly, the plaintiffs may employ the doctrine of *res ipsa loquitur* in this matter to establish that the defendant acted negligently. Thus, a material issue of fact does exist as to the plaintiffs' claims and summary judgment is not appropriate. The Court must therefore DENY the defendant's motion for summary judgment.

CONCLUSION

The Court DENIES the plaintiff's motion for enlargement of time. Further, in light of the plaintiffs' failure to comply with the Court's scheduling order, and pursuant to Rules 16(d) and 37(b)(2)(B) of the Utah Rules of Civil Procedure, the Court shall prohibit the plaintiffs from introducing any expert testimony at trial regarding their claims. The Court also DENIES the defendant's motion for summary judgment. The Court directs the plaintiff to prepare and submit an order consistent with and reflecting this ruling.

Date signed: 1-22-09


DISTRICT COURT JUDGE
MICHAEL G. ALLPHIN



MAILING CERTIFICATE

I certify that I sent a true and correct copy of the foregoing **RULING ON MOTION
FOR ENLARGEMENT OF TIME AND DEFENDANT LAKEVIEW HOSPITAL'S
MOTION FOR SUMMARY JUDGMENT** postage pre-paid, to the following on this

date: 1/22/09.

Eric P. Schoonveld
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Eric P. Schoonveld

Exhibit C

APR 16 2009

HPS SLG

FILED

APR 14 2009

SECOND
DISTRICT COURT

IN THE SECOND DISTRICT COURT, DAVIS COUNTY
STATE OF UTAH

WAYNE L. WELSH and
CAROL WELSH,

Plaintiffs,

vs.

HOSPITAL CORPORATION OF UTAH,
d/b/a LAKEVIEW HOSPITAL,

Defendant.

**RULING ON MOTION FOR RELIEF
FROM ORDER AND FOR ENTRY OF
ORDER ENLARGING TIME**

Case No. 060700106

Judge Michael G. Allphin

This matter is before the Court on the plaintiff's motion for relief from order and for entry of order enlarging time. The Court has reviewed the moving and responding papers, along with their supporting documentation. Having considered all of the arguments, determined that a hearing is unnecessary and will not aid in the Court's ruling, being fully advised in the premises, and for the reasons set forth below, the Court DENIES the plaintiff's motion for relief from order and for entry of order enlarging time.

BACKGROUND

On February 28, 2006, the plaintiffs filed a complaint against the defendant alleging negligence and loss of consortium. The defendant filed its answer on April 13, 2006, denying liability.

Thereafter, on August 10, 2006, the Court issued a Rule 26(f) attorney planning meeting report and scheduling order. This order was subsequently amended on May 25, 2007, and again on February 12, 2008.

On September 30, 2008, the Court held a telephone conference regarding a third amended scheduling order. During this telephone conference, the Court stressed that this matter had progressed too slowly and that it would not permit further extensions of time or additional amendments beyond a third amended scheduling order. The Court then issued its third amended scheduling order, to which the parties had stipulated. Within this order, the Court wrote: “Last amended order, case to move along or it will be dismissed.” The third amended scheduling order set the deadline for the plaintiffs’ initial expert reports and disclosures as December 1, 2008.

Subsequently, on November 26, 2008, the plaintiffs’ filed a motion for enlargement of time and supporting affidavit of counsel. In his supporting affidavit, counsel for the plaintiffs acknowledged that the Court had been “very patient in the scheduling of this case” and indicated a commitment to moving this case forward. Nevertheless, the plaintiffs requested additional time to submit their initial expert reports and disclosures.¹

On December 5, 2008, and in response to the plaintiffs not submitting their initial expert reports and disclosures by the third amended scheduling order’s December 1, 2008 deadline, the defendant filed a motion for summary judgment.² The defendant then, on December 15, 2008, filed a memorandum in opposition to the plaintiffs’ motion for enlargement of time. In its memorandum, the defendant noted that the Court had made it clear during the September 30,

¹ The plaintiffs’ motion purposed the Court change the December 1, 2008 cutoff for submitting their initial expert reports and disclosures to January 9, 2009.

² By written ruling dated January 22, 2009, the Court denied the defendant’s motion for summary judgment, indicating that the plaintiffs’ claims would survive despite the Court’s prohibiting the plaintiffs’ use of belated expert discovery materials at trial.

2008 telephone conference that it would not allow further amendments to the scheduling order. The defendant also asserted that there is no good faith basis for the plaintiffs to request additional time to complete discovery and designate expert witnesses, particularly in light of the Court's prior admonishments.

On December 17, 2008, the plaintiffs filed a reply memorandum in support of their motion for enlargement of time.³ In their reply, the plaintiffs again acknowledged the Court's need to move the case efficiently towards a resolution. Concurrent with their reply memorandum, the plaintiffs filed a request to submit for decision regarding their motion for enlargement of time.

On December 29, 2008, and unaware of the Court's prior admonishment over the slow progress of this matter and the Court's warning within the third amended scheduling order that it would not permit further time extensions in this matter, the Court's clerk contacted the plaintiffs' counsel and indicated that a proposed order granting the plaintiffs' motion for enlargement of time should be submitted. That same day, the Court's clerk also entered a note on the Court's docket stating: "Mr. Steward's Motion to Enlarge Time is granted, last time. He needs to submit an order. I called his office this date." The plaintiffs subsequently submitted their proposed order on January 15, 2009.

Meanwhile, the Court requested its law clerk review the Court's case file and pleadings regarding the parties' pending motions. Upon such review, the Court was apprised of its warning within the third amended scheduling order and prior admonishments, and determined that its

³ The plaintiffs also on December 17, 2008, filed a designation of expert witnesses. This designation was not accompanied with the experts' reports and was filed over two (2) weeks late under the third amended scheduling order. Subsequently, on January 9, 2009, the plaintiffs submitted their expert reports to the defendant. This submission was served on the defendant over one (1) month late under the deadline for such expert discovery within the Court's third amended scheduling order.

prior admonishments and discovery order would stand. The Court then declined to execute the plaintiffs' proposed order and issued a written ruling, dated January 22, 2009 (herein, the "Ruling"), denying the plaintiffs' motion for enlargement of time and prohibiting the plaintiffs from using the belated expert discovery materials at trial.

In response to the Court's Ruling, the plaintiffs filed the instant motion for relief from order and for entry of order enlarging time. In their supporting memorandum filed concurrently therewith, the plaintiffs argued that their reliance on the Court's clerk's request for submission of a proposed order and the Court docket's note of December 29, 2008, justify relief from the Court's Ruling. The plaintiffs asserted that because they believed that the motion for enlargement of time was granted, considerable time and money was expended to produce their expert discovery. The plaintiffs further argued that the imposed sanction preventing the plaintiffs' use of expert testimony is unwarranted and extreme, despite the Court's prior discovery order, which stated dismissal would occur if the case did not progress.

On February 12, 2009, the defendant served its memorandum in opposition to the plaintiffs' instant motion for relief from order. In its opposing memorandum, the defendant argued that the Court's Ruling was within the Court's authority and justified under the circumstances of this case. The defendant asserted that the plaintiffs were not prejudiced by the Court's clerk's statements or the docket note of December 29, 2008, as the filing of the plaintiffs' motion for enlargement of time did not relieve the plaintiffs of their duty under the Court's third amended scheduling order to serve expert designations and reports on December 1, 2008. The defendant argued that because the plaintiffs provided no compelling reason why the deadline for expert discovery within the third amended scheduling order should be ignored, the

Court's Ruling was appropriate. Further, the defendant posited that since the plaintiffs were well aware of the December 1, 2008 expert discovery deadline and the Court's prior admonishments for the slow progression of this matter, the imposed sanction was appropriate. Accordingly, the defendant submitted that the plaintiffs failed to establish a good faith basis for the Court to amend or set aside its Ruling.

On February 23, 2009, the plaintiffs filed their reply memorandum in support of their instant motion for relief from order. In their reply, the plaintiffs reasserted their prior arguments regarding their reliance on the December 29, 2008 statements of the Court's clerk and docket note and that the imposed sanction is an undue prejudice to their claims. The plaintiffs further argued that because their failure to comply with the December 1, 2008 expert discovery deadline was not intentional or willful, the Court could not impose a sanction to exclude their use of expert testimony at trial.

Also on February 23, 2009, the plaintiffs filed a request to submit for decision regarding their motion for relief from order and requested oral argument on the same.⁴

ANALYSIS

The plaintiffs have requested relief from the Court's Ruling pursuant to Rules 54(b) and 60(b)(7) of the Utah Rules of Civil Procedure. Rule 54(b) provides in relevant part:

“[A]ny order or other form of decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties ... is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.”

⁴ The Court has reviewed the parties' pleadings and supporting materials, along with the Court's file. The Court finds that it is fully aware of the parties' arguments and the circumstances relevant to the plaintiffs' instant motion. The Court further finds that a hearing on the plaintiffs' instant motion for relief from order will not aid in its ruling on the same. The Court therefore DENIES the plaintiffs' request for oral argument. Accordingly, the plaintiffs' motion for relief from order and entry of order enlarging time is ripe for decision.

Utah R. Civ. P. 54(b). Further, Rule 60(b) provides that “[o]n motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding” for “any other reason justifying relief from the operation of the judgment.” Utah R. Civ. P. 60(b)(7). The grant or denial of relief requested under these Rules of Civil Procedure is left to the sound discretion of the trial court. *See Trembly v. Mrs. Fields Cookies*, 884 P.2d 1306, 1312 (Utah Ct. App. 1994) (“It is within the sound discretion of the trial court to grant a motion under Rule 54(b), and the decision to do so will not be disturbed on appeal absent an abuse of this discretion.”); *Fackrell v. Fackrell*, 740 P.2d 1318, 1320 (Utah 1987) (“In reviewing a trial court’s decision under Rule 60(b), we disturb the trial court only if it has abused its discretion.”). Further, “[a] trial judge is given a great deal of latitude in determining the most fair and efficient manner to conduct court business.” *Morton v. Continental Banking Co.*, 938 P.2d 271, 275 (Utah 1997).⁵

The plaintiffs’ instant motion pertains to their motion for enlargement of time for filing initial expert reports and disclosures. The plaintiffs made this motion despite the Court’s prior warnings that it would not permit additional extensions of time for discovery. Based on this litigation’s slow progress over the past three (3) plus years and the Court’s issuing four (4) scheduling orders, the Court found that it had granted the plaintiffs ample time to designate their expert witnesses and submit their expert reports and disclosures by the December 1, 2008 deadline within the third amended scheduling order. Further, the Court found that the plaintiffs provided no persuasive good faith basis or justification for granting their motion for enlargement

⁵ Particularly noteworthy in the instant matter, “[t]rial courts have broad discretion in selecting and imposing sanctions for discovery violations, including dismissing the noncompliant party’s pleadings.” *Tuck v. Godfrey*, 981 P.2d 407, 411 (Utah Ct. App. 1999) (Internal quotations omitted); *see also SFR, Inc. v. Control, Inc.*, 177 P.3d 629, 633 (Utah Ct. App. 2008) (“the trial court has ‘broad discretion’ to select among the ‘full range of options’ in deciding which sanction to apply to the violator.”). “[A]lthough some of Rule 37’s discovery sanctions are harsh and extreme, Rule 37 grants the trial court broad discretion to impose them because the trial court deals first hand with the parties and the discovery process.” *Wright v. Wright*, 941 P.2d 646, 650 (Utah Ct. App. 1997).

of time. Accordingly, the Court denied the plaintiffs' motion for enlargement of time. In addition, because the plaintiffs failed to comply with the deadlines of the third amended scheduling order, the Court imposed sanctions against the plaintiffs pursuant to Rules 16(d) and 37(b)(2)(B). Specifically, the Court's Ruling prohibited the plaintiffs from introducing any expert testimony at trial regarding their claims.

The plaintiffs now seek relief from this Ruling due to their alleged reliance on the Court's clerk requesting submission of a proposed order and the docket note of December 29, 2008. While the plaintiffs characterize both incidents as the Court issuing its "ruling" on the motion for enlargement of time, the Court neither entered a minute entry, made an oral ruling or order on the record, nor prepared or executed a ruling or order to that effect. Quite simply, no ruling was issued on the plaintiffs' motion for enlargement of time until the Court issued its written Ruling of January 22, 2009.

A note within the Court's docket does not constitute a ruling or order of the Court. The primary purpose of a note within the docket is to aid in the administration of the Court's case file. Court clerks will enter notes on the docket for several reasons, which could include: when a submitted document is received; indication of where submitted documents are sent and to whom; attempts of Clerks to contact counsel; or whether counsel has attempted to contact the Court. Notes on the Court's docket are not binding determinations of the Court and the plaintiffs' reliance on of the December 29, 2008 docket note in this matter is misplaced.

Further, while the Court's clerk may have informed the plaintiffs that the Court would grant their motion and to submit a proposed order reflecting the same, the Court was free to reject the proposed order and issue a written ruling on the plaintiffs' motion, even if the

December 29, 2008 docket note and clerk's statements could be considered the Court's ruling.

"It is well established that a court may vacate, set aside, or modify its orders or judgments entered by mistake or inadvertence which do not accurately reflect the result of its judgment."

Darrington v. Wade, 812 P.2d 452, 456 (Utah Ct. App. 1991) (Internal quotation omitted).

"When a trial judge signs an order prepared by counsel, mistakenly or inadvertently assuming that it correctly reflects the court's judgment, the mistake is of a clerical or perfunctory nature, *which the court may correct on its own motion.*" *Id.* (citing *Meagher v. Equity Oil Co.*, 299 P.2d 827 (Utah 1956); Utah R. Civ. P. 60(a)) (Emphasis added).

Additionally, the Court finds the plaintiffs' argument that they were prejudiced by the December 29, 2008 statements of the Court's clerk unpersuasive and without merit. As correctly noted by the defendant, the plaintiffs mere filing of a motion for enlargement of time did not relieve the plaintiffs of their duty under the third amended scheduling order to serve expert designations and reports on December 1, 2008. Any statements made by the Court's clerk were made twenty-nine (29) days after the plaintiffs' failed to comply with the expert discovery deadline. On December 1, 2008, rather than making some filing in regard to their expert designations and reports, the plaintiffs instead made the assumption that the Court would grant its motion and acted accordingly. The Court finds this assumption unjustified, particularly in light of the Court's prior admonishments and express warning within the third amended scheduling order that no further extensions of time would be permitted.

Finally, with regard to the sanction imposed by the Court for the plaintiffs' failure to comply with the third amended scheduling order, the Court again finds the plaintiffs' arguments unpersuasive and without merit. Rule 16(d) of the Utah Rules of Civil Procedure provides the

Court clear authority to impose “any action authorized by rule 37(b)(2)” as a sanction for failing to “obey a scheduling or pretrial order[.]” Utah R. Civ. P. 16(d). Rule 37(b)(2)(B) provides that the Court may “prohibit the disobedient party from supporting or opposing designated claims or defenses or from introducing designated matters in evidence” as such a sanction. Utah R. Civ. P. 37(b)(2)(B). This is precisely the sanction imposed by the Court in this matter.

Further, Utah courts have, on numerous occasions, affirmed a trial court’s decision to exclude testimony from witnesses designated untimely. *See Griffith v. Griffith*, 985 P.2d 255, 261 (Utah 1999) (“The order refusing to permit the witness to testify is such an order [under Rule 16(d)] and is a reasonable response to the failure to comply with the court’s managerial plan.”); *Arnold v. Curtis*, 846 P.2d 1307, 1310 (Utah 1993) (“Sanctions often are imposed when parties fail to obey pretrial order requiring the attorney to file statements, witness lists, or lists of evidence. In those situations, evidence has been excluded; defenses have been stricken.”); *Rukavina v. Sprague*, 170 P.3d 1138, 1141 (Utah Ct. App. 2007) (“If a party fails to obey a scheduling order, the trial court may prohibit him from introducing designated matters in evidence.”).⁶

Moreover, Rule 37 sanctions require a finding of “(1) the party’s behavior was willful; (2) the party has acted in bad faith; (3) the court can attribute some fault to the party; or (4) the party has engaged in persistent dilatory tactics tending to frustrate the judicial process.” *Morton*

⁶ Utah courts have even dismissed a party’s claims in their entirety for failing to comply with discovery orders. *See Morton v. Continental Banking Co.*, 938 P.2d 271, 276 (Utah 1997) (“In any event, all of these cases clearly stand for the proposition that trial courts are granted a great deal of deference in dismissing a case as a discovery sanction.”); *Preston & Chambers, P.C. v. Koller*, 943 P.2d 260, 263 (Utah Ct. App. 1997) (“Therefore, because the trial court issued an order imposing a discovery deadline, which Koller failed to meet, the decision to sanction Koller by dismissing his counterclaims is within the court’s discretion.”); *see also Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 950, 962 (Utah Ct. App. 1989) (“The trial court did not abuse its discretion in entering Schettler’s default for his failure to comply with the court’s discovery order.”). Therefore, in light of the Court’s warning that dismissal would occur if the case did not progress, the Court finds that the imposed sanction on the plaintiffs is not unduly prejudicial or overly extreme.

v. Continental Banking Co., 938 P.2d 271, 276 (Utah 1997). However, “[t]o find that a party’s behavior has been willful, there need only be any intentional failure, as distinguished from involuntary noncompliance.” *Id.*; *see also Tuck*, 981 P.2d at 411 (“To support a finding of willfulness, there need only be any intentional failure as distinguished from involuntary noncompliance. No wrongful intent need be shown.”).

The instant matter is analogous to that of *DeBry v. Cascade Enters.*, 879 P.2d 1353 (Utah 1994). In *DeBry*, the Utah Supreme Court upheld the trial court decision to exclude the Debrys’ use of expert testimony for failing to comply with the court’s discovery order. *Id.* at 1361. In reaching this decision the *DeBry* Court noted:

“In sum, the DeBrys had ample notice of the deadline. Not only did they miss that deadline, but they waited until after the discovery cut-off date to designate witnesses. They assert no surprise, no unforeseen circumstances, or any other legitimate excuse for their default. They simply seem to assume that the trial judge had some duty to allow them to violate the discovery orders for any or no reason. Under the circumstances, the trial judge was certainly not beyond the bounds of his discretion.”

Id. Likewise, in the instant matter, the plaintiffs were well aware of the expert discovery deadlines within the Court’s third amended scheduling order and of the Court’s prior admonishments regarding the slow progress of the case. The plaintiffs also have asserted neither surprise, unforeseen circumstances, nor any other legitimate excuse for their default. Accordingly, and particularly in light of the Court’s prior admonishments, the Court finds that at a minimum, the plaintiffs’ failure to comply with the discovery order was willful in that the plaintiffs’ failure to comply was not due to involuntary noncompliance.

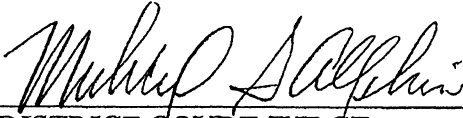
Accordingly, the Court finds that the its original Ruling of January 22, 2009 properly denied the plaintiffs’ motion for enlargement of time and that the imposed sanction was

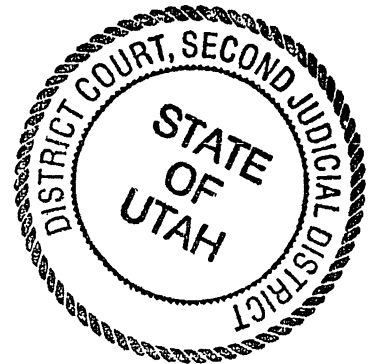
appropriate under the circumstances of this case. The Court further finds that the plaintiffs have not met their burden under Rule 54(b) or Rule 60(b)(7) of the Utah Rules of Civil Procedure to obtain relief from the Court's Ruling. The Court therefore DENIES the plaintiffs' motion for relief from order and for entry of order enlarging time.

CONCLUSION

The Court DENIES the plaintiff's motion for relief from order and for entry of order enlarging time. This ruling shall also constitute the Court's order in this matter; no separate order is necessary.

Date signed: 4-14-09.


DISTRICT COURT JUDGE
MICHAEL G. ALLPHIN



MAILING CERTIFICATE

I certify that I sent a true and correct copy of the foregoing **RULING ON MOTION
FOR RELIEF FROM ORDER AND FOR ENTRY OF ORDER ENLARGING TIME**

postage pre-paid, to the following on this date: 4/14/09.

Eric P. Schoonveld
Mark A. Riekhof
Hall Prangle & Schoonveld, LLC
136 East South Temple, Suite 2450
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Rodney G. Snow
Matthew A. Steward
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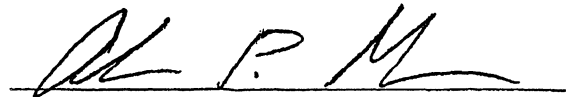
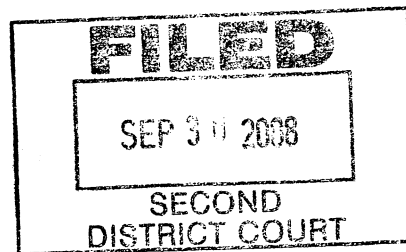
A handwritten signature in dark ink, appearing to read "E. P. M.", is written over a horizontal line.

Exhibit D

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MARK A. RIEKHOF #8420
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Attorneys for Hospital Corporation of Utah d/b/a Lakeview Hospital

**IN THE SECOND DISTRICT COURT, DAVIS COUNTY
STATE OF UTAH**

WAYNE L. WELSH and
CAROL WELSH,

Plaintiff,

v.

HOSPITAL CORPORATION OF UTAH,
d/b/a LAKEVIEW HOSPITAL,

Defendant.

**STIPULATED RULE 26(F) AMENDED
SCHEDULING ORDER**

CASE NO. 060700106

Judge Michael G. Allthin

Pursuant to Utah Rule of Civil Procedure 26(f), Nathan B. Wilcox of Clyde Snow Sessions & Swenson, attorney for Wayne L. Welsh and Carol Welsh, and Gerald W. Huston of Hall Prangle & Schoonveld, LLC, attorney for Defendant, discussed this case and agreed upon this Amended Scheduling Order.

1. **INITIAL DISCLOSURE:** The parties have already exchanged the initial information required by Rule 26(a)(1).

Stipulated Rule 26(F) Amended Scheduling Order



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2. **DISCOVERY PLAN:** The parties jointly propose to the court the following discovery plan:

- a. Discovery is necessary on all claims and defenses set forth in the parties' pleadings.
- b. Fact discovery will be completed no later than **Friday, October 31, 2008**.
All written discovery shall be served so as to conform with this deadline.
- c. The parties agree that the following discovery methods may be used, with responses due within thirty (30) days of the date of service plus additional time for service by mail as provided by Rule 6(b);
 - (1) Interrogatories, not to exceed 25;
 - (2) Requests for Production of Documents;
 - (3) Requests for Admissions; and
 - (4) Depositions, not to exceed ten (10) per party and one (1) day of seven (7) hours in length per deposition.
- d. Plaintiffs' Initial Expert Disclosures and Reports under Rule 26(a)(3) shall be served no later than **Monday, December 1, 2008**.
- e. Plaintiffs' Expert Witnesses shall be deposed by **Friday, January 2, 2009**.
- f. Defendant's Initial Expert Disclosures and Reports under Rule 26(a)(3) shall be served no later than **Friday, January 30, 2009**.

- g. Defendant's Expert Witnesses shall be deposed by **Friday, February 27, 2009.**
- h. Rebuttal Reports under Rule 26(e)(1) shall be served no later than **Friday, March 27, 2009.**
- i. Expert discovery will be completed no later than **Friday, April 24, 2009.**
- j. Supplementations are due as parties discover information or documents requiring supplementation.

3. OTHER ITEMS:


- a. The parties do not request a conference with the court prior to entry of the scheduling order.
- b. The parties request a final pretrial conference in **April 2009.**
- c. The deadline for filing a motion to amend pleadings shall be **Friday, November 14, 2008.**
- d. The deadline for serving dispositive or potential dispositive motions shall be **Friday, May 11, 2009.**
- e. The potential for settlement cannot be determined at this time.
- f. The potential for resolution of this matter through the court's alternative dispute resolution program cannot be determined at this time.
- g. The deadline for holding an initial mediation or other formal settlement conference or, in the alternative, determining such an alternative dispute

resolution process is not likely to be of assistance is **Friday, October 17, 2008.**

- h. Final lists of witnesses and exhibits pursuant to Fed.R.Civ.P. 26(a)(3) shall be served at least thirty (30) days before trial.
- i. The parties should have fourteen (14) days after service of final lists of witnesses and exhibits to list objections under Rule 26(a)(3).
- j. This case should be certified for trial by **June 2009.**
- k. The estimated length of the trial is 5 days. A jury has been demanded.


DATED this 20th day of August, 2008.

CLYDE SNOW SESSIONS & SWENSON


Nathan B. Wilcox
Attorneys for Wayne L. Welsh and Carol Welsh

DATED this 25th day of August, 2008.

HALL PRANGLE & SCHOONVELD, LLC


Stephen Alderman
Attorneys for Lakeview Hospital

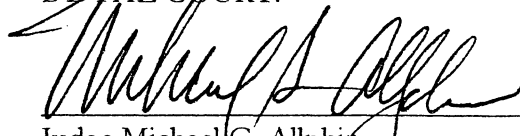
ORDER

The foregoing schedule is hereby adopted and implemented as the governing schedule in this case.

IT IS SO ORDERED.

DATED this 30th day of Sept, 2008.

BY THE COURT:



Judge Michael G. Allphin
Third District Court Judge

*Last amended order
Case to move along
or it will be dismissed
Mg*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **STIPULATED RULE 26(F)**
AMENDED SCHEDULING ORDER was mailed, postage prepaid, this 25 day of August,
2008 to the following:

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