

2009

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

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 APPELLANTS

APPEAL FROM A DECISION OF THE SECOND JUDICIAL DISTRICT COURT

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STATEMENT OF JURISDICTION

Utah Code Ann. § 78A-3-102(3)(j) provided the Utah Supreme Court with jurisdiction over this interlocutory appeal. The Supreme Court transferred this case to this Court pursuant to Utah Code Ann. § 78A-3-102(4). This Court granted the interlocutory appeal on June 3, 2009. (R. 478.) This Court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(j) and Utah R. App. P. 5.

ISSUES AND STANDARD OF REVIEW

1. **Issue:** Whether the trial court abused its discretion by denying Appellants Wayne and Carol Welshes' (the "Welshes") Motion for a 39-day enlargement of time to designate expert witnesses and submit initial expert reports, where: (a) the trial court had already granted the Motion in an earlier ruling; (b) the Welshes had relied upon the trial court's first ruling granting the Motion; and (c) the extension of time that the trial court granted in its first ruling did not prejudice either Appellee Hospital Corporation of Utah d/b/a Lakeview Hospital ("Lakeview") or the trial court. The trial court's first ruling granting the Motion did not alter any of the dates in the scheduling order and, at the time, the case had yet to be set for trial or even certified as ready for trial.

Standard of Review: In general appellate courts "review whether a trial court properly ruled on pretrial compliance with a scheduling order under an abuse of discretion standard." *Normandeau v. Hanson Equip., Inc.*, 2007 UT App 382, ¶9, 174 P.3d 1. In this case, however, the trial court initially granted the Welshes' Motion for an extension of time and then, after the Welshes complied with the trial court's ruling by designating their experts and submitting initial expert reports, the trial court reversed

itself, without notice to the Welshes or an opportunity to respond. Subsequently, the trial court justified this reversal as authorized by Rule 60(a). To the extent the trial court based its authority to reverse itself in this manner on its interpretation of the Utah Rules of Civil Procedure, this Court reviews that decision as a matter of law. *See Glacier Land Co., LLC v. Claudia Klawe & Assocs., LLC*, 2006 UT App 516, ¶13, 154 P.3d 852 (observing, “to the extent the issue on appeal required the trial court ‘to interpret rules of civil procedure, it presents a question of law which we review for correctness.’ ” (quotations and citations omitted)).

2. Issue: Whether the trial court abused its discretion by *sua sponte* sanctioning the Welshes, for filing a Motion for a 39-day enlargement of time, by prohibiting their introduction of expert testimony at trial, where neither the Welshes nor their counsel engaged in any bad faith, intentional or willful misconduct to justify the extreme sanctions and where the trial court had initially granted the Motion in its first ruling.

Standard of Review: This Court reviews a trial court’s imposition of discovery sanctions for an abuse of discretion. *Kilpatrick v. Bullough Abatement, Inc.*, 2008 UT 82, ¶23, 199 P.3d 957.

3. Issue: Whether the trial court violated the Welshes’ due process rights when it *sua sponte* sanctioned the Welshes by prohibiting their introduction of expert testimony at trial, where: (a) the trial court did not provide the Welshes with notice or an opportunity to respond prior to imposing sanctions; (b) the trial court did not make the requisite findings of bad faith, intentional or willful misconduct prior to imposing

sanctions; (c) the trial court *sua sponte* reversed its earlier ruling granting the Motion, a ruling on which the Welshes relied; and (d) where neither the Welshes nor their counsel engaged in any bad faith, intentional or willful misconduct to justify the extreme sanctions.

Standard of Review: “Constitutional issues, including questions regarding due process, are questions of law that we review for correctness.” *State v. Mejia*, 2007 UT App 337, ¶8, 172 P.3d 315 (citation omitted).

Preservation of Issues: All of these issues were preserved through the Welshes’ Motion for Enlargement of Time, filed by the Welshes’ new counsel on November 26, 2009, and the Welshes’ Motion for Relief, filed January 29, 2009. (R. 72-90; 137-39; 213-306; 337-366.)

DETERMINATIVE LAW

Issue 1: In its April 14, 2009 Ruling on Motion for Relief Order and Entry of Order Enlarging Time, the trial court relied on Rule 60(a) of the Utah Rules of Civil Procedure to support its January 22, 2009 *sua sponte* reversal of its December 29, 2008 decision granting the Welshes’ Motion for a 39-day enlargement of time. Utah R. Civ. P. 60(a) provides:

(a) **Clerical Mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

No other statutory or constitutional provisions or other rules or regulations are determinative of this issue.

Issue 2: No statutory or constitutional provisions or other rules or regulations are determinative of this issue.

Issue 3: The constitutional provisions determinative on this issue are:

1. Utah Constitution, Article I, Section 7:

No person shall be deprived of life, liberty or property, without due process of law.

2. Fifth Amendment of the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor **be deprived of life, liberty, or property, without due process of law;** nor shall private property be taken for public use, without just compensation.

3. Fourteenth Amendment of the United States Constitution, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or property, without due process of law;** nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Nature of the Case

The Welshes initiated the underlying action against Lakeview to recover for severe permanent injuries Wayne L. Welsh suffered as a direct and proximate result of Lakeview's negligence. Although the merits of the underlying action are not before the Court in this interlocutory appeal, the resolution of this appeal will likely have a potentially significant impact on the outcome of the underlying action.

By this appeal, the Welshes ask this Court to reverse the unreasonable and unconstitutional procedural rulings and draconian sanctions that the trial court imposed in the midst of discovery. Shortly after the Welshes retained Rodney G. Snow and Matthew Steward as new counsel in November 2008, the Welshes' new counsel moved the trial court for a 39-day extension of time to designate experts and submit initial expert reports. On December 29, 2008, the trial court granted the Welshes' Motion ("December 29 Ruling"). Pursuant to the trial court's December 29 Ruling, the Welshes retained and designated their experts and submitted their reports in compliance with the new deadline.

Despite the fact that the parties were proceeding with discovery and other matters according to the trial court's December 29 Ruling, the trial court abruptly reversed itself and denied the extension it had granted less than one month earlier. The trial court further *sua sponte* sanctioned the Welshes by prohibiting the Welshes from introducing expert testimony at trial. (See January 22, 2009 Ruling on Motion for Enlargement of Time and Defendant Lakeview Hospital's Motion for Summary Judgment, hereafter

“January 22, 2009 Order,” attached as Addendum A.) It is the rulings in this Order that are the subject of this interlocutory appeal.

The trial court did not make any of the requisite findings of willful misconduct by the Welshes or their counsel prior to imposing the extreme sanctions in the January 22, 2009 Order. In fact, neither the Welshes nor their counsel engaged in any willful misconduct. Instead, the Welshes had fully complied with the trial court’s ruling in December 2008 Ruling granting their Motion. Nevertheless, when the Welshes’ notified the trial court of the lack of evidence to support the sanctions in a motion seeking relief from the January 22, 2009 Order, the trial court affirmed the sanctions and made after-the-fact findings to support the rulings in the January 22, 2009 Order. (*See* April 14, 2009 Ruling on Motion for Relief from Order and for Entry of Order Enlarging Time, hereafter “April 14, 2009 Order,” attached as Addendum B.) Even accepting the trial court’s procedurally flawed *post-hoc* findings, those findings still fail to justify the imposition of sanctions *against the Welshes* in this matter.

Course of Proceedings and Disposition Below

The interlocutory appeal results from the trial court’s procedural rulings. Accordingly, the primary material facts to this appeal are the course of proceedings and disposition below. For economy, the Welshes have provided a detailed history of the course of proceedings and disposition in the “Procedural Background” section of the Statement of Facts, immediately below.

Statement of Facts

Factual Background

Wayne L. Welsh served as the State Auditor for the Utah Legislature for thirty (30) years. In September 2004, Mr. Welsh went to Lakeview Hospital, for treatment after suffering a syncope and a fall at an automobile repair shop. While at Lakeview Hospital, and despite his syncope and complaints that he felt dizzy and nauseated, Mr. Welsh was improperly left alone on an elevated examination table during the administration of a Persantine Stress Test. While left alone, Mr. Welsh fell off of the elevated metal examination table where he had been left, resulting in a fracture to his skull and massive subdural hematoma and eventual coma. Despite emergency brain surgery at the University of Utah Medical Center, Mr. Welsh remained in the coma for several days. Mr. Welsh suffered significant brain damage that has devastated both his and his wife's quality of life, requiring extensive care, for which they seek redress. (R. 2-9, 218-19.)

Procedural Background

1. The Welshes filed their Complaint against Lakeview in this action on February 27, 2006, and completed service of process on Lakeview March 7, 2006. (R. 1-14; *see also* "Trial Court's Docket," April 20, 2009, attached as Addendum C.)
2. From the time the Complaint was filed through approximately November 2008, the Welshes' counsel on this case was Nathan Wilcox. Mr. Wilcox was a shareholder in the law firm Anderson & Karrenberg through October 2009, when he became in-house counsel of a Utah county company. Mr. Wilcox remained associated with Anderson & Karrenberg in an "of-counsel" capacity. He left Anderson &

Karrenberg in June 2008. Anderson & Karrenberg withdrew as counsel for the Welshes on June 19, 2008. After leaving Anderson & Karrenberg, Mr. Wilcox became “of counsel” with Clyde Snow & Sessions. However, there was inevitable delay in transitioning active cases that Anderson & Karrenberg could not handle to Clyde Snow & Sessions, including the instant matter. (R. 56-58, 76, 341.)

3. A scheduling order in this case was entered by the trial court on August 4, 2006 (R. 29-34.)

4. Counsel for Plaintiff requested a scheduling conference with the trial court pursuant to Utah R. Civ. P. 16 on February 14, 2007. The requested scheduling conference was conducted by telephone on May 4, 2007. (R. 35-37; *see also* Trial Court’s Docket.)

5. Immediately following the May 4, 2007 telephone conference, Mr. Wilcox sent a letter to Lakeview’s counsel to set up depositions of several of Lakeview’s key employees. Lakeview’s counsel did not respond with available deposition dates. (*See* R. 343-44; 355-56; *see also* May 4, 2007 Letter, attached as Addendum D.)

6. The parties’ counsel also executed a stipulated amended scheduling order following the May 4, 2007 conference. (R. 42-47; *see also* Trial Court’s Docket.)

7. On July 10, 2007, Mr. Wilcox sent Lakeview’s counsel a follow-up letter (to the May 4, 2007 letter), again requesting the depositions of key Lakeview employees. Once again, this request went unanswered and Lakeview did not make the requested employees available for deposition or provide a single date. (R. 225; 343-44; 358-59; *see also* July 10, 2007 Letter, attached as Addendum E.)

8. In January of 2008, the parties' counsel again met and executed a proposed amended scheduling order. Lakeview's counsel prepared this amended scheduling order and submitted it to the trial court for execution. The trial court executed it on February 11, 2008. (R. 50-55; *see also* Trial Court's Docket.)

9. In August 2008, the parties' counsel (including Mr. Wilcox for the Welshes) again met and executed the final amended scheduling order. Lakeview's counsel prepared this amended scheduling order and filed it on August 28, 2008. (R. 61-66; *see also* Trial Court's Docket.)

10. The trial court scheduled a telephone conference on September 30, 2008 to discuss the final amended scheduling order. During the scheduling conference, Mr. Wilcox indicated that the case was progressing slowly, in part, because Lakeview's counsel was not cooperating in his requests to depose Lakeview's witnesses and employees. Following the telephone conference, the trial court executed the final amended scheduling order on September 30, 2008 ("September 2008 Scheduling Order," attached as Addendum F). This Scheduling Order also included a handwritten note stating "Last amended order[.] [C]ase to move along or it will be dismissed[.]" (R. 61-66; *see also* Trial Court's Docket.)

11. The September 2008 Scheduling Order, *inter alia*, set a date of December 1, 2008 for the Welshes to designate expert witnesses and submit initial expert reports. (*See* September 2008 Scheduling Order, ¶2(d).)

12. The transition of the Welsh case to Clyde Snow & Sessions was completed in November 2008. The undersigned counsel, Rodney G. Snow and Matthew A. Steward

became new counsel for the Welshes in this matter in November of 2008, entering notices of appearances on November 26, 2008. (R. 71-72, 76.)

13. Upon taking over the case, Mr. Snow and Mr. Steward realized it would be difficult to complete the initial expert reports by the December 1, 2008 deadline. Mr. Steward first contacted Lakeview's counsel to discuss extending the expert report deadlines, and again requested dates to take Lakeview's employee's depositions. Lakeview's counsel, having never provided a single date for the depositions of any of Lakeview's employees, refused to stipulate to the extension. However, Lakeview's counsel agreed that the requested depositions could be taken after the discovery deadline of the current Scheduling Order. (R. 70-71; 343-44; 361-62; *see also* November 20, 2008 Letter from Mr. Steward to Mr. Riekhof, attached as Addendum G.)

14. Unable to obtain a stipulation from Lakeview's counsel, the Welshes' counsel filed a Motion for Enlargement of Time on November 26, 2008. This Motion was filed before the expiration of the existing deadline and sought an extension of time from December 1, 2008 until January 9, 2009 to provide Plaintiffs' initial expert disclosures and expert reports to Lakeview. Pursuant to the Motion, Lakeview was also to receive an extension of time to file initial expert reports from January 31, 2009 until February 13, 2009. (R. 72-74.)

15. The Welshes' counsel did not seek to change any other dates in the September 2008 Scheduling Order, including the certification of readiness for trial set for June 2009, through the Motion. (R. 72-74; *see also* September 2008 Scheduling Order, p. 4.)

16. The grounds for the enlargement of time were, *inter alia*, that the Welshes had recently obtained new counsel and Lakeview had failed cooperate in the deposition of its employees—specifically, the lab technician, Mr. Alan Kunnard, who left Mr. Welsh unattended and was a key witness to the alleged negligence. Lakeview’s failure to make its employees available for deposition, despite repeated requests and the fact that the Welshes allowed Lakeview to take their depositions, caused a delay in the completion of fact discovery and, in turn, a delay in the exchange of expert reports. (R. 72-73, 76-77.)

17. Briefing was completed on Plaintiffs’ Motion for Enlargement of Time and the Welshes’ filed a Request to Submit for Decision on December 16, 2008. (R. 178-80.)

18. On December 29, 2008, the Court entered the following ruling on Plaintiffs’ Motion for Enlargement of Time on its docket:

12-29-08 Note: Mr. Steward’s [Plaintiffs’ counsel] Motion to Enlarge Time is granted, last time. He needs to submit an order. I called his office this date.

(*See* Trial Court’s Docket (emphasis added).)

19. As indicated on the Trial Court’s Docket, the trial court’s clerk also called Mr. Steward on December 29, 2008 and informed him that the Welshes’ Motion to Enlarge Time was granted. (*See* Trial Court’s Docket.)

20. In accordance with this December 29, 2008 Ruling (“December 29 Ruling”), the Welshes’ counsel prepared and filed a proposed Order on January 14, 2009, pursuant Utah R. Civ. P. 7(f), for entry by the trial court. The proposed Order was approved as to form by Lakeview’s counsel. (R. 198-201; *see* Proposed Order, attached hereto as Addendum H.)

21. Based upon the trial court's December 29 Ruling, the Welshes' counsel completed their expert designations and served their initial reports upon Defendant's counsel by the January 9, 2009 deadline. (R. 140-42; 202-03.)

22. The Welshes' expert witnesses include: (1) Feras Bader, M.D., FACC; (2) Candace Jae Winter, BSN, RN, CCM, CLCP; and (3) Kelly R. Johnson, MVA, CPA/ABV, DABFA. That these experts are critical to the Welshes should have been obvious to all parties and the trial court. For example:

a. Dr. Bader provided an expert opinion that Lakeview clearly violated the standard of care in its treatment of Mr. Welsh. (R. 241-46.)

b. Candace Winter is a life care specialist who provided an expert opinion on Mr. Welsh's needs and condition over the remainder of his life. (R. 273, 279.)

c. Kelly Johnson is a forensic accountant who provided an expert opinion on the economic loss incurred by Mr. Welsh as a result of the injuries he sustained from Lakeview's negligent treatment, including future injury-related expenses, past and future lost income, past medical expenses, and other criteria. Mr. Johnson calculated Mr. Welsh's economic loss from the negligent treatment at \$1,357,343.00. (R. 272-96.)

23. The Welshes' and their counsel relied on the phone call from the trial court's clerk, as well as the trial court's December 29 Ruling noted on the docket granting their Motion for Enlargement of Time. Considerable time and money were spent producing the reports by the January 9, 2009 deadline. (R. 222-23.)

24. Also based upon the trial court's December 29 Ruling granting the Motion for Enlargement of Time, counsel for the Welshes and Lakeview had been actively working on scheduling the depositions of the Welshes' expert witnesses and pursuing mediation. This case was on its way to being resolved until derailed and further delayed by the trial court's inexplicable reversal of its December ruling. (R. 223, 458; *see also* January 13, 2009 Letter from Mark A. Reikhof to Matthew A. Steward, attached as Addendum I.)

The January 22, 2009 Order

25. On January 22, 2009, the trial court entered a Ruling on Motion for Enlargement of Time and Defendant Lakeview Hospital's Motion for Summary Judgment ("January 22 Order," attached as Addendum A.). As part of the January 22 Order, the trial court *sua sponte* reversed the December 29 Ruling, without notice or an opportunity to be heard, and denied the Welshes' Motion for Enlargement of Time. (January 22 Order, p. 5.) In addition, once again without hearing or notice, the trial court sanctioned the Welshes pursuant to Utah R. Civ. P. 16(d) and 37(b)(2)(B) by prohibiting the Welshes "from introducing any expert testimony at trial regarding their claims," (*id.*, p. 6), apparently as a sanction for the Welshes' filing of a Motion to enlarge time to submit initial expert reports, which Motion the trial court initially granted.

26. The trial court did not make any findings of bad faith, fault, or intentional/willful misconduct by the Welshes to support its imposition of sanctions against the Welshes in its January 22 Order reversing its December 29 Ruling. (*See* January 22 Order.)

27. Indeed, while Lakeview opposed the Welshes' Motion for Enlargement of Time, Lakeview did not seek the extreme and unjustified sanction imposed by the trial court. Moreover, Lakeview did not claim to be prejudiced by an enlargement of time. (R. 103-34.)

28. The January 22 Order was not a final order on this issue. Rather, the trial court directed Lakeview's counsel to prepare an order consistent with the trial court's ruling. (See January 22 Order, p. 8.) Lakeview's counsel never prepared the Order as directed.

29. Following the January 22 Order, Lakeview refused to make its witnesses available for depositions and reneged on its previous request to mediate the dispute.¹ (R. 462-63; *see also* February 17, 2009 Letter from Mark A. Reikhof to Matthew A. Steward, attached as Addendum J.)

The April 14, 2009 Order

30. On January 29, 2009, the Welshes filed a Motion for Relief from the January 22 Order and for Entry of Order Enlarging Time pursuant to Rules 54(b) and 60(b)(7), and requested oral argument ("Motion for Relief"). (R. 213-306.)

31. Although Lakeview opposed the Welshes' Motion for Relief, it again did not claim any prejudice would result from the trial court reinstating its December 29 Ruling granting the Welshes a 39-day extension of time. (R. 317-36.)

¹ Following the Welshes' filing of their Petition for Interlocutory Appeal, Lakeview again changed its posture by agreeing to meditation. Lakeview and the Welshes met for meditation in June 2009, which was unfortunately unsuccessful, in large part because of the trial court's January 22 Order.

32. Briefing was completed on the Welshes' Motion for Relief, and oral argument was requested, on February 23, 2009. (R. 337-66; 367-69 *see also* Trial Court's Docket.)

33. By written decision dated April 14, 2009, however, the trial court denied the Welshes' Motion for Relief without a hearing (See "April 14 Order," attached as Addendum B.)

34. In the April 14 Order, to support its *sua sponte* imposition of sanctions, the trial court made an after-the-fact finding of "willfulness" by Welshes in failing to meet the expert report deadline. The trial court also stated that (a) the December 29 Ruling on which the parties had relied was not an order or other binding determination from the trial court and that (b) even if it were binding, it was subject to correction as a "clerical" error. The trial court further stated that, despite its December 29 Ruling, the Welshes were not prejudiced by the reversal because filing a motion does not excuse their duty to comply with the scheduled dates. (See April 14 Order, pp. 5-11.)

35. The April 14 Order was the final order of the trial court on this issue, indicating that no further order was necessary. (See April 14 Order, p. 11.)

SUMMARY OF THE ARGUMENT

1. The trial court first abused its discretion by granting and then inexplicably denying the Welshes' request for a 39-day extension of time to designate experts and submit initial expert reports. The Welshes' request was reasonable and was properly granted, given (a) the relatively short extension sought; (b) the Welshes' acquisition of new counsel; (c) the fact that no other dates in the Scheduling Order were to be affected;

(d) the fact that trial was not yet scheduled; (e) the fact that Lakeview failed to produce witnesses for depositions; and (f) the overall lack of prejudice to either the trial court or Lakeview.

In fact, the trial court initially agreed with the reasonableness of the requested extension, granting the Welshes' Motion on December 29, 2008. The Welshes incurred considerable expense designating experts and submitting initial expert reports by the new deadline. The trial court's unexplained *sua sponte* reversal of its December 29, 2008 Ruling on January 22, 2009 was an abuse of discretion and was founded upon errors of law. Contrary to the trial court's *post-hoc* justification, it could not simply reverse its ruling based on authority stemming from Rule 60(a) for correcting clerical errors, particularly once the Welshes were notified of and relied upon the trial court's ruling of December 29, 2008. A change from "motion granted" to "motion denied" is not clerical, but a substantive exercise at judicial authority. The trial court's actions in this case must be reversed as they were inequitable and unduly prejudicial to Welshes—Plaintiffs who were very seriously damaged by Lakeview's negligence.

2. The trial court next abused its discretion by *sua sponte* sanctioning the Welshes by precluding their use of expert testimony at trial, without a motion from Lakeview seeking sanctions, and without the proper findings and evidentiary support. Utah law requires a finding of intentional misconduct, from facts in the record, before sanctions are justified. The trial court did not make any such findings, nor could it have, against the Welshes or their counsel in its January 22, 2009 Order imposing sanctions. This was error.

Rather than correct its error by reversing the sanctions, once the Welshes notified the trial court of the lack of evidentiary basis, the trial court attempted to breathe life into its flawed sanctions by making an after-the-fact finding of willfulness in its April 14, 2009 Order. Even then, however, the trial court could not identify any affirmative intentional misconduct by the Welshes or their counsel. Instead, it implied willfulness from the fact that the Welshes did not argue unforeseen circumstances, surprise or other such excuse. While unforeseen circumstances or surprise could excuse a failure to comply with the Scheduling Order—indeed, the delays in Mr. Wilcox’s transition from private practice to general counsel were unforeseen—not citing such an excuse does not render alleged non-compliance willful. Furthermore, the Welshes had complied with the trial court’s December 29 Ruling, thereby eviscerating any finding of willful noncompliance. The facts of the case do not support the imposition of sanctions here as against the Welshes or their counsel.

Moreover, even assuming the trial court could properly impose sanctions by implying intentional misconduct against the Welshes’ counsel, this does not support an imposition of sanctions against the Welshes personally, particularly where the sanctions deprive the Welshes of a fair trial. “[W]here discovery sanctions are concerned, ‘if the fault lies with the attorneys, that is where the impact of the sanction should be lodged.’” *Kilpatrick v. Bullough Abatement, Inc.*, 2008 UT 82, ¶39, 199 P.3d 957 (citation omitted). There is no evidence establishing that the Welshes willfully failed to comply with the September 2008 Scheduling Order. Thus, the trial court further abused its discretion by imposing severe sanctions against the Welshes without any evidentiary support.

3. The trial court's after-the-fact imposition of sanctions, without evidentiary basis, also violated the Welshes' due process rights in at least three ways. First, the Welshes were not given notice or an opportunity to respond before the trial court *sua sponte* reversed its December 29 Ruling and denied their fundamental rights to a fair trial. Second, the trial court's *sua sponte*, after-the-fact finding of implied willfulness deprived the Welshes of an opportunity to rebut or answer for the conduct for which it imposed sanctions. Finally, trial court made no inquiry and ordered no hearing or fact-finding procedure to determine whether the Welshes were to blame or whether they had any defenses that might absolve them of responsibility for the discovery violation. This deprived the Welshes of their due process rights of notice and opportunity to be heard prior to the imposition of punitive sanctions aimed at defeating their right to a fair trial.

ARGUMENT

While the trial court has discretion to consider requests to amend a scheduling order and to impose sanctions for violations of a scheduling order, that discretion is not unbridled. Indeed, the Utah Supreme Court has cautioned trial courts against overzealous use of their discretionary authority:

Fundamental to the concept of the rule of law is the principle that reason and justice shall prevail over the arbitrary and uncontrolled will of any one person; and that this applies to all men in every status: to courts and judges, as well as to autocrats or bureaucrats. The meaning of the term 'discretion' itself imports that the action should be taken within reason and good conscience in the interest of protecting the rights of both parties and serving the ends of justice. It has always been the policy of our law to resolve doubts in favor of permitting parties to have their day in court on the merits of a controversy.

Carmen v. Slavens, 546 P.2d 601, 603 (Utah 1976) (emphasis added) (footnotes omitted); accord *Carlson v. Carlson*, 584 P.2d 864, 865 (Utah 1978) (“**[D]iscretionary power is not absolute, but must be exercised with reason and good conscience upon a foundation of facts so justifying.**” (emphasis added)). Rather than exercise the temperance required by the Supreme Court, the trial court used its authority rashly and abusively to put the Welshes—the injured parties—in a potentially disadvantageous position at trial.

The Welshes have lost their right to present expert testimony regarding the standard of care and damages, even though they are completely innocent of any intentional or willful misconduct. Lakeview, on the other hand, would presumably have the full use of expert testimony, even though it caused to many of the delays in this case by refusing to produce its employees for depositions and even though it stipulated all previous amendments to the scheduling order (even preparing some). Thus, although counsel on both sides contributed to the delays in this case, the trial court has punished only the Welshes. Without expert testimony, the Welshes will have a significantly more difficult case to establish Lakeview’s negligence. Even if they are able to establish Lakeview’s negligence, it will be difficult, at best, to obtain full redress for their injuries without economic experts and life care specialists. Given the Welshes’ blamelessness, such action must be reversed.

I. The Trial Court Abused its Discretion by *Sua Sponte* Reversing its December 29 Ruling and Denying the Welshes' Request for a Reasonable Extension of Time to Submit Initial Expert Reports.

The Welshes' Motion to Enlarge Time to submit initial expert reports was a reasonable request with no prejudice to the trial court or Lakeview. Lakeview did not claim prejudice. The Welshes were precluded from completing their expert reports by the December 1, 2008 deadline in part as a result of Lakeview's refusal to make Mr. Kunnard, Lakeview's employee and a key witness to the negligence in this case, available for deposition, despite repeated requests from the Welshes' counsel. (See Fact Nos. 5, 7 10, 13, 16, and 29; Addenda D, E, G, and J.) In addition, the Welshes obtained new counsel in November 2008, who quickly realized that it would be difficult to meet the December 1, 2008 deadline to designate experts and submit initial expert reports.

As such, the Welshes' new counsel filed a Motion for an Enlargement of Time, seeking an additional five weeks, until January 9, 2009. The Motion did not impact the June-of-2009 date the trial court set to certify the case as ready for trial. (See September 2008 Scheduling Order, p. 4.) Based on this schedule, the earliest this case would have been set for trial was the third or fourth quarter 2009. Pursuant to the Motion for Enlargement of Time, the January 9, 2009 date for the production of initial expert reports was still seven or eight months before the matter was actually going to trial. The Welshes promptly completed their expert reports by January 9, 2009.

Lakeview, although opposing the Motion for an Enlargement of Time, never argued that it would suffer any prejudice from the extension and such an argument would have been disingenuous in any event. Given the circumstances of this case, including the

demonstrated lack of prejudice, the Welshes should be given the opportunity to fully present their case on the merits, including expert testimony. *See Carmen*, 546 P.2d at 603; *see also Boice ex. rel. Boice v. Marble*, 1999 UT 71, ¶10, 982 P.2d 565 (“[J]ustice and fairness will require that a court allow a party to designate witnesses, conduct discovery, or otherwise perform tasks covered by a scheduling order after the court-imposed deadline for doing so has expired.”).

Apparently recognizing the justice and fairness in an extension of the expert deadline, the trial court unequivocally granted the Welshes’ Motion on December 29, 2008, and directed the Welshes’ counsel to prepare a conforming Order. (*See* Fact Nos. 18-19; Addendum C.) The trial court’s clerk confirmed this ruling by placing a telephone call to Mr. Steward on December 29, 2008. (*See* Fact No. 19; Addendum C.) The trial court memorialized its ruling in its minute entry. (*Id.*) Based on the December 29 Ruling, including the clerk’s phone call, Mr. Steward prepared a proposed Order for entry by the trial court, which was approved by Lakeview’s counsel. (*See* Addendum H.) In reliance on the trial court’s ruling, the Welshes incurred considerable expense in completing their expert reports in accordance with the January 9, 2009 deadline ordered by the court.

Despite this, however, on January 22, 2009—nearly three weeks after the Welshes sent their expert reports to Lakeview per the December 29 Ruling—the trial court reversed its December 29 Ruling *sua sponte*. As a result, the Welshes have been prejudiced as this change substantially impacts their right to a fair trial on the merits. There can be little debate regarding the benefit expert testimony can provide to a litigant

at trial. This benefit is particularly compelling where, as here, the case involves serious permanent and life threatening injuries and significant economic damages.² The jury, seeing the Welshes' lack of expert testimony, may infer that they were unable to find any experts to support their position. For example, without a Dr. Bader's expert testimony, the Welshes could lose their ability to establish Lakeview's negligence. Without Candace Winter's expert testimony regarding the life care plan for Mr. Welsh, and Kelly Johnson's expert testimony regarding Mr. Welsh's economic damages, the Welshes will have a very difficult time establishing the full extent of their \$1.3 million dollar economic (special) damages. Lakeview will presumably produce its own experts to opine that not only was it not negligent, but that the Welshes have suffered little damage. The jury will not have the benefit of considering competing expert testimony and assessing relative credibility.

Notwithstanding the impact of its decision, the trial court offered no explanation for the reversal in its January 22 Order, not even acknowledging the December 29 Ruling or the Welshes' reliance thereon. Although the trial court addressed the issue in the April 14 Order, it wholly disregarded the prejudice to the Welshes from the *sua sponte* reversal.

² See *Bowman v. Kalm*, 2008 UT 9, ¶7, 179 P.3d 754 (observing that expert testimony is usually necessary in a medical malpractice case). Here, the trial court correctly ruled that Lakeview was not entitled to summary judgment despite the Welshes' inability to provide expert testimony, as the malpractice was within the common knowledge of the layman. (See January 22 Order, p. 7-8; see also *Bowman*, 2008 UT 9 at ¶9). Nevertheless, the lack of expert testimony will make the Welshes' task at trial much more difficult, as explained above.

Instead, the trial court concluded that (a) December 29 Ruling was not the ruling of the court; (b) even if it were the ruling, the court was free to modify orders or judgments “entered by mistake or inadvertence which do not accurately reflect the result of its judgment”; and (c) there was no prejudice to the Welshes because the “mere filing of a motion for enlargement of time did not relieve the plaintiffs of their duty . . . to serve expert designations and reports on December 1, 2008.” (*See* April 14 Order, p. 8.)

This rationale misses the mark. The facts are that the trial court did indicate on its docket that the Welshes’ Motion was granted and the trial court’s clerk called Mr. Steward to inform him of the Court’s ruling and instruct him to prepare an order in conformity therewith. It was not uncommon in this case for the clerk to relay the trial court’s rulings or even appear to execute Orders on Judge Allphin’s behalf. For example, with respect to both the February 12, 2008 and September 30, 2008 Scheduling Orders, the copies sent to the Welshes’ counsel were signed by an undisclosed party, presumably the trial court’s clerk, on behalf of Judge Allphin.³ For all intents and purposes, the December 29 Ruling was *the* ruling of the trial court as of December 29, 2008. The Welshes and their counsel acted reasonably in relying upon this ruling and the Welshes’ are prejudiced by the trial court’s *sua sponte* reversal as it goes to their right to obtain a fair trial on the merits.

³ Copies of the scheduling orders dated February 12, 2008 and September 30, 2008 that were sent to the Welshes’ counsel are attached as Addenda K and L to this brief, respectively. The corresponding scheduling orders in the official court record appear to be signed by Judge Allphin. The Welshes’ counsel was unaware of this discrepancy until it reviewed the record on appeal, and is not certain as to the reason.

Moreover, the authority to correct “clerical mistakes” that the trial court relied on to “correct” the December 29 Ruling is derived from Utah R. Civ. P. 60(a) and is not applicable to this situation. Utah courts have “drawn a distinction between clerical errors, which a court may correct, and judicial errors, which it may not.” *Frito-Lay v. Labor Com’n*, 2008 UT App 314, ¶14, 193 P.3d 665 (quotations and citation omitted). “The distinction . . . does not depend upon who made it. Rather it depends on whether it was made in rendering a judgment or in recording the judgment as rendered.” *Id.* (quotations and citation omitted); *see also Stanger v. Sentinel Sec. Life Ins. Co.*, 669 P.2d 1201, 1206 (Utah 1983) (“[I]t matters little whether the error was made by the court clerk, the jury foreman, counsel, a party, or the judge himself . . .”).

A clerical error exists when without evident intention one word is written for another, when the statement of some detail is omitted the lack of which is not a cause of nullity, or when there are mistakes in proper names or amounts made in copying but which do not change the general sense of a record; . . . a mistake which naturally excludes any idea that its insertion was made in the exercise of any judgment or discretion

Frito-Lay, 2008 UT App 314 at ¶14 n. 2 (emphasis added) (quotations and citation omitted).

Following these principles, the purported “error,” in the December 29 Ruling, while ostensibly made by the clerk, is not an error capable of *sua sponte* correction by the trial court under Rule 60(a). The change from “motion granted” under the December 29 Ruling, to “motion denied” under the January 22 Order, is not clerical, but rather a substantive exercise of judicial authority. The trial court’s rationale for its reversal

indicates that the trial court simply changed its mind. (See April 14 Order, pp. 3, 7-8.)

Such a ruling is not permitted to be reversed *sua sponte*, particularly because notice of the ruling had been given to the parties, was relied upon by the Welshes to their detriment, and because reversal of that ruling affects the Welshes' substantial rights going forward by jeopardizing their right to a full and fair trial on the merits.⁴ See *Richards v. Siddoway*, 24 Utah 2d 314, 471 P.2d 143, 317 (Utah 1970) (indicating "[j]udicial errors in judgments are to be corrected by appeal or writ of error, or by certiorari, or by awarding a new trial, or by any means specially provided by statute, and not by amendment"); Utah R. Civ. P. 7(f) (permitting vacation or modification only of orders "made without notice to the adverse party").

II. The Trial Court Abused its Discretion by Sanctioning the Welshes Because the Sanctions Lacked a Proper Evidentiary Basis.

A sanction that excludes evidence is an extreme sanction, particularly where the sanction excludes the evidence of a party bringing suit for redress of severe personal injuries. See, e.g., *United States v. Golyvansky*, 291 F.3d 1245, 1249 (10th Cir. 2002) ("*It would be a rare case where, absent bad faith, a district court should exclude evidence rather than continue the proceedings.*" (emphasis added)). "An abuse of discretion may be demonstrated by showing that the district court relied on an 'erroneous conclusion of law' or that there was 'no evidentiary basis for the trial court's ruling.'" *Kilpatrick*, 2008 UT 82 at ¶23. Here, the trial court's imposition of sanctions against the Welshes lacks evidentiary basis, violates the Welshes' due process rights, is contrary to

⁴ In addition, the trial court's *sua sponte* reversal violates the Welshes' due process rights, as explained in Section III, below.

law, and is unduly punitive. *See, e.g., Golyvansky*, 291 F.3d at 1249 (“In the absence of a finding of bad faith, the court should impose the least severe sanction that will accomplish prompt and full compliance with the discovery order.”).

A. The record fails to demonstrate any intentional misconduct by the Welshes or their counsel, making the imposition of sanctions an abuse of discretion.

Sanctions are warranted only where “(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.” *Kilpatrick*, 2008 UT 82 at ¶25 (quotations and citation omitted). Where *the party* is sanctioned, the circumstances of the case must clearly demonstrate “aggravated misconduct,” “willful disobedience” or some other “intentional” misbehavior by *the party*. *See id.* at ¶¶29-30, 33 (citation omitted) (observing, “in this list [of sanctionable conduct], willfulness, bad faith, and persistent dilatory tactics all involve intentional behavior”).

For example, in *Kilpatrick*, an asbestos-related tort litigation, the Supreme Court held that the trial court abused its discretion by dismissing the plaintiffs’ claims as sanctions for violating the case management order by failing to obtain an autopsy—essentially a failure to preserve evidence by the party itself. 2008 UT 82 at ¶24. The Supreme Court held:

It was improper for the district court to dismiss the plaintiffs’ claims absent a factual finding that plaintiffs’ failures to procure the autopsies were willful. ***The willfulness requirement cannot be satisfied by showing mere prejudice.***

Rather, there must be evidence that the noncompliance was the product of willful failure.

Id. (emphasis added).

Likewise, in *Bonneville Billing & Collections v. Wall*, 2008 UT App 35, 2008 WL 256584 (unpublished mem. decision), the Utah Court of Appeals held that the trial court abused its discretion by striking the defendant's answer and entering default judgment against him for failure to participate in a court-ordered pretrial mediation conference. *Id.* at *1. In so holding, the *Bonneville* Court observed that there were no findings that the defendant's actions were willful or part of "series of other actions indicating [the defendant] was not respectful of the district court's orders." *Id.* The circumstances did not warrant the sanctions or suffice to override "the supreme court's admonition that our policy is to resolve doubts in favor of permitting parties to have their day in court." *Id.*⁵

The Tenth Circuit similarly requires evidence of bad faith or affirmative misconduct prior to imposing extreme sanctions. In *United States v. Ivory*, for example, the Tenth Circuit reversed, as an abuse of discretion, sanctions against the government excluding evidence for a violation of a discovery order. 131 Fed. Appx. 628, 631 (10th Cir. 2005). The *Ivory* Court found that, because of the lack of bad faith and prejudice to

⁵ In *Carmen v. Slavens*, the Supreme Court held that the trial court abused its discretion by striking the defendant's pleadings and entering judgment against him as a sanction for failure to appear at a deposition. See 546 P.2d at 603. Although the defendant and his attorney were served with the notice of deposition, and the defendant offered no justification for his failure to appear other than at the time of the deposition he was not represented by counsel, "under the circumstances shown . . . the interests of justice will best be served by vacating the [sanctioning] order and remanding the case for trial." *Id.* at 603.

the defendant, the case was “not that rare case” where the trial court should exclude evidence rather than continue the proceedings,

particularly given that the trial was not underway (nor had the jury been empaneled), and a relatively short continuance (one month according to defense counsel at oral argument) would solve the problem with respect to [defendant] without impairing his speedy trial rights.

Id. (emphasis added).

The Welshes and their counsel are even more innocent of any intentional misconduct than the appellants in the above cases. Unlike these appellants, the Welshes did not disregard an existing case management order, but rather filed a Motion for a short extension of time, prior to the expiration of the existing deadline. This Motion was initially granted by the trial court *and* after the Welshes complied with the new deadline by timely submitting their expert reports.

Tellingly, in the January 22 Order, the trial court did not make any of the four requisite findings necessary to impose discovery sanctions against the Welshes. Only *after* the Welshes pointed out this omission in their Motion for Relief, the trial court made an after-the-fact finding of “willfulness” by the Welshes in the April 14 Order. This is improper.

The trial court found the Welshes willfully failed to comply with the September 2008 Scheduling Order because

they were well aware of the expert discovery deadlines within the Court’s [September 2008 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

the default. Accordingly, and particularly in light of the Court's prior admonishments, the Court finds that at a minimum, the plaintiffs' failure to comply was willful in that the plaintiffs' failure to comply was not due to involuntary noncompliance.

(April 14 Order, p. 10.)

Rather than holding a hearing, issuing an order to show cause, or initiating other fact finding proceedings on January 22, 2009, trial court rashly imposed sanctions *sua sponte* to punish the Welshes for seeking additional time to submit expert reports—a Motion that the trial court ironically granted less than a month earlier. Then, when questioned about the justification for sanctioning the Welshes for filing a Motion that the trial court actually granted, the trial court attempted to justify its sanctions after-the-fact. The trial court even refused the Welshes' request for a hearing on this issue in connection with their Motion for Relief. Instead, in the April 14 Order, the trial court remarkably *implied* willful disregard by the Welshes from the fact that the scheduling order in place prior to the trial court's December 29 Ruling contained a deadline and the Welshes did not assert surprise or unforeseen circumstances for failing to meet that deadline. (*Id.*)

The trial court's finding of implied willfulness is error. To impose sanctions, the "record in this case" must "demonstrate willful disobedience of the CMO [Case Management Order]." *Kilpatrick*, 2008 UT 82 at ¶30. Contrary to the trial court's ruling, the mere fact that the Welshes did not cite surprise or unforeseen circumstances in support of their motions does not support a finding that either the Welshes or their counsel willfully disregarded the Scheduling Order. The sanctions were *sua sponte*, the Welshes had no opportunity to provide any excuse. Indeed, the delays caused by Mr.

Wilcox's transition from private practice to general counsel of a Utah county company and the transfer of the case to new counsel at Clyde Snow & Sessions were unforeseen. The transition was an understandably complex and meticulous process, involving multi-party discussions regarding which cases would be transferred from Anderson & Karrenberg, conflict checks, determining who at Clyde Snow would undertake the representation, discussing the transfer with the clients, etc.

However, *not* citing an excuse such as unforeseen circumstances does not automatically make any non-compliance willful. There must be some other conduct, prior to the time excuse is given for that conduct, that would indicate the conduct amounted to a willful disregard. *See id.* at ¶35 (“In cases meriting sanctions, there is often a consistent pattern of behavior disregarding discovery requirements or court orders . . .”).

Neither the Welshes' nor their counsel's conduct fits this description. Rather the facts in the record demonstrate a lack intentional misconduct by either the Welshes or their counsel. These facts include:

- There is no evidence that the Welshes or their counsel disregarded court orders or other discovery requirements. Even with the purportedly “missed” December 1, 2008 deadline for expert designations and reports, the Welshes did not simply disregard that deadline, but in advance of this deadline, filed a Motion for a 39-day enlargement of time. That Motion was granted and the Welshes completed and served their expert designations and reports by the new January 9, 2009 deadline that the trial court set in the December 29 Ruling. (*See* Fact Nos. 12-14, 20-23.)
- Lakeview's conduct contributed significantly to the delays in this case. Lakeview's counsel stipulated to the previous amendments to the scheduling order, even preparing two of the Scheduling Orders. (*See* Fact Nos. 8-9.) Lakeview further ignored the repeated requests from the

Welshes' counsel to make its employees available for depositions, which delayed the Welshes' ability to complete their expert reports. (See Fact Nos. 5, 7, 10, 13, 16, 29; *see also* Addenda D, E, G, J.)

- The Welshes obtained the undersigned counsel as new counsel in November 2008, after their previous counsel, Mr. Wilcox, became general counsel to a Utah County company. The Welshes' new counsel, who entered their appearances on November 26, 2008, realized that completing the expert disclosures and reports by December 1, 2008 would be difficult. As such, new counsel requested and were initially granted a five-week extension of time to submit their expert designations and initial expert reports, which deadline they met. (See Fact Nos. 2, 12-13.)
- There is no prejudice to either Lakeview or the trial court from the Welshes' Motion for an Enlargement of Time. Because no other dates in the September 2008 Scheduling Order were to be altered, the extension of the expert deadline would not have delayed trial or resolution of the case. Lakeview acknowledged this by failing to assert at any point that it was prejudiced by the extension.

Accordingly, the trial court abused its authority by sanctioning the Welshes without any evidence of intentional misconduct by the Welshes or their counsel. This Court should reverse that trial court's imposition of sanctions and remand the case for a fair trial in which all parties are permitted to present all relevant evidence.

B. The Welshes themselves are completely blameless for any delays, making the imposition of sanctions against them personally an independent abuse of discretion.

Even if there were facts to support the trial court's finding of willful noncompliance with the September 2008 Scheduling Order, which there are not, this would not justify the imposition of extreme sanctions *against the Welshes personally*. At best, it might warrant sanctions against the Welshes' counsel.

“[W]here discovery sanctions are concerned, ‘if the fault lies with the attorneys, that is where the impact of the sanction should be lodged.’” *Kilpatrick*, 2008 UT 82 at ¶39 (citation omitted). The Supreme Court explained:

Our case law resists sanctioning a party whose noncompliance is due to someone else’s failure. For example, in *Depew v. Sullivan*, [2003 UT App 152, 71 P.3d 601] a client failed to provide tax returns in satisfaction of a discovery request despite a court order compelling a response. The district court ordered sanctions against the client and the attorney. The court of appeals remanded the sanctions against the attorney for a factual finding as to whether the attorney was actually to blame for the discovery violation. The court of appeals explained, “We believe that [a sanction] is unjust when it is imposed against a person who had absolutely no fault for the discovery violation at issue....”

Id. at ¶37 (footnotes omitted); see also *M.E.N. Co. v. Control Fluidics, Inc.*, 834 F.2d 869 (10th Cir. 1987) (reversing the district court’s imposition of sanctions against the appellant clients who failed to provide discovery, violated a court order for failing to appear for noticed depositions, failed to file a pretrial trial memorandum, and pay monetary sanctions to other party because the clients’ attorneys never notified them of the discovery obligations).

III. The Trial Court’s Imposition Of Sanctions Against The Welshes Without Evidentiary Support Violates Their Due Process Rights.

The trial court’s January 22 and April 14 Orders should be reversed outright as an abuse of discretion, for the reasons stated above. In addition, the January 22 and April 14 Orders should be reversed because the trial court violated the Welshes’ due process rights through its (a) *sua sponte* reversal of its December 29 Ruling, (b) *sua sponte* imposition of sanctions and (c) after-the-fact findings to support the sanctions.

Article I, Section 7, of the Utah Constitution provides, “No person shall be deprived of life, liberty or property, without due process of law.” Utah Const. Art. I § 7. The 5th and 14th Amendments of the United States’ Constitution contain nearly identical language. *See* U.S. Const. amend. V (“No person shall . . . be deprived of life, liberty or property, without due process of law”); U.S. Const. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty or property, without due process of law.”).⁶ “Due process requires, at a minimum, adequate and timely notice.” *In re McCully*, 942 P.2d 327, 332 (Utah 1997). The Welshes were not given notice or an opportunity to respond before the trial court *sua sponte* reversed its December 29 Ruling and denied their fundamental rights to a fair trial. This in itself violates due process.

The Welshes also were denied notice and an opportunity defend themselves against the allegations of misconduct and imposition of sanctions. “A judgment imposing sanctions under Rule 37 in violation of the offending parties’ due process rights is void.” *See F.D.I.C. v. Daily*, 973 F.2d 1525, 1531 (Tenth Cir. 1992). The Tenth Circuit has held that “due process requires notice and a right to respond before the

⁶ As a general rule, “Utah’s constitutional guarantee of due process is substantially the same as the due process guarantees contained in the Fifth and Fourteenth amendments to the United States Constitution.” *Bailey v. Bayles*, 2002 UT 58, ¶ 11 n. 2, 52 P.3d 1158 (citations and internal quotation marks omitted). Therefore, this Court’s “analysis of questions concerning procedural due process under the due process provisions of the United States and Utah constitutions are [sic] also substantially the same.” *Id.* (quotations and citations omitted). This general rule is likely applicable here because there appears to be no Utah law addressing the issue on appeal, and therefore the Welshes cite to federal law. *But see Morton v. Continental Baking Co.*, 938 P.2d 271, 280 (Utah 1997) (Stewart, J. dissenting) (observing, although due process was apparently not raised as an issue on appeal in that case, that “constitutional due process rights may be violated if a court refuses to hear the merits of the case where there has been a relatively trivial infraction of procedural rules.”).

sanctions of costs, expenses, or attorney's fees are imposed." *Id.* "The process due depends upon the severity of the considered sanctions." *Id.*; *cf. Morton v. Continental Baking Co.*, 938 P.2d 271, 280 (Utah 1997) (Stewart, J. dissenting) (observing that "constitutional due process rights may be violated if a court refuses to hear the merits of the case where there has been a relatively trivial infraction of procedural rules."). While the "right to respond does not necessarily require an adversarial, evidentiary hearing," the sanction inquiry must be supported by the record. *Daily*, 973 F.2d at 1531

As indicated, the trial court imposed severe sanctions against the Welshes *sua sponte*, without a hearing and without first making the requisite findings of intentional misconduct. Then, after the Welshes challenged the trial court's *sua sponte* sanctions based on this omission, the trial court made an after-the-fact finding of willfulness by implying it from the Welshes' failure to submit their expert disclosures by the December 1, 2008 deadline of the September 2008 Scheduling Order and their failure to argue surprise or inadvertent conduct as an excuse. Implying willfulness as the trial court did is clearly not a ruling supported by the record.

The trial court further violated the Welshes' due process rights by failing to provide the Welshes with an opportunity to rebut or answer for the conduct for which it imposed sanctions. Lakeview did not seek sanctions against the Welshes in its Opposition to the Motion for an Enlargement of Time. The trial court failed to make the requisite intentional misconduct finding before *sua sponte* imposing sanctions in the January 22 Order. Once apprised of this omission by the Welshes, rather than grant them a hearing to discuss the sanctions or issue an order to show cause, the trial court made a

finding of willfulness to try to support the sanctions. Thus, the Welshes were never given an opportunity to address the conduct for which they were sanctioned. As indicated, no evidence exists that would support a finding of willfulness, bad faith or other intentional misconduct by the Welshes. The sanctions therefore violate due process.

Further, the trial court improperly inferred that missing the discovery deadline under the current Scheduling Order *alone* supports a finding of fault by *the Welshes* sufficient to support sanctions against the Welshes. The Tenth Circuit's opinion in *Braley v. Campbell*, 832 F.2d 1504 (10th Cir. 1987), is instructive. There, the court considered the due process protections that must be provided to an attorney prior to imposing sanctions against the attorney for filing an appeal deemed frivolous. *Id.* at 1514-15. The court observed, "In one sense, notice may seem superfluous when an appellate court has determined, after considering briefs, argument and the record that the appeal is so unmeritorious as to be frivolous." *Id.* at 1514.

But the determination to impose sanctions on an attorney for bringing a frivolous appeal involves another step—***placing the blame***. And there remains for consideration the defenses which might absolve the lawyer of the responsibility for taking the frivolous appeal. This, we hold, justifies and requires notice and opportunity to be heard before final judgment.

Id. (emphasis added).

Here, the trial court made no inquiry and ordered no hearing or fact-finding procedure to determine whether the Welshes were personally to blame or whether they had any defenses that might absolve them of responsibility for the discovery violation. No such evidence exists. Instead, the trial court inferred willful misconduct by the

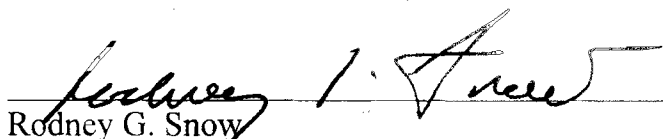
Welshes on April 14, 2009 from the single fact that the expert disclosures were not timely submitted under the September 2008 Scheduling Order notwithstanding the Welshes' counsel's filing of a motion to extend this deadline on November 26, 2008, and notwithstanding the trial court granting this motion on December 29, 2008. Based on this record, the trial court's imposition of sanctions against the Welshes violates due process and is void.

CONCLUSION

For the foregoing reasons, the trial court's January 22, 2009 Order and April 14, 2009 Order must be reversed as erroneous, an abuse of discretion, a violation of due process, and then remanded for further proceedings.

DATED this 10th day of September 2009

CLYDE SNOW & SESSIONS


Rodney G. Snow
Matthew A. Steward
Aaron D. Lebenta
*Attorneys for Plaintiffs/Petitioners Wayne L. &
Carol Welsh*

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of September 2009, two copies of the foregoing **APPELLANTS' BRIEF** were sent via first class mail, postage prepaid, to the following:

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RECEIVED

JAN 26 2009

CLYDE. BRIDW,
SESSIONS & JOHNSON

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 witness or set a date for their deposition.

⁶ See *Falcher v. St. Luke's Hosp. Med. Ctr.*, 506 P.2d 287 (Ariz. 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.

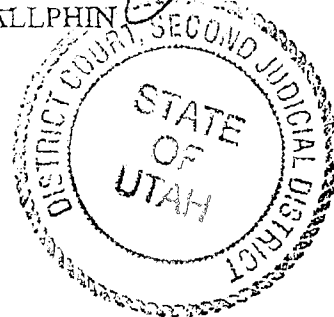
Given nature of the accident being a fall after admission to an emergency room due to a fainting episode and head injury, and consistent with the plaintiffs' allegations and arguments, the Court finds that it is within the common knowledge and experience of a lay person to determine if the defendant 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

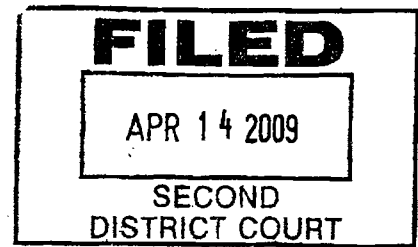
I certify that I sent a true and correct copy of the foregoing **RULING ON MOTION
FOR ENLARGEMENT OF TIME AND DEFENDANT LAKEVIEW HOSPITAL'S
MOTION FOR SUMMARY JUDGMENT** postage pre-paid, to the following on this

date: 1/22/09.

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DL P. M.



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

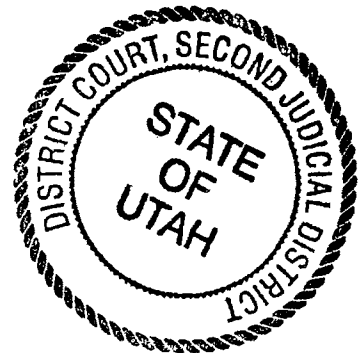
appropriate under the circumstances of this case. The Court further finds that the plaintiffs have not met their burden under Rule 54(b) or Rule 60(b)(7) of the Utah Rules of Civil Procedure to obtain relief from the Court's Ruling. The Court therefore DENIES the plaintiffs' motion for relief from order 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
Salt Lake City, Utah 84111

Rodney G. Snow
Matthew A. Steward
Clyde Snow Sessions & Swenson
One Utah Center, 13th Floor
201 South Main Street
Salt Lake City, Utah 84111-2216

AL P M

2nd District - Farmington
DAVIS COUNTY, STATE OF UTAH

WAYNE L WELSH vs. HOSPITAL CORPORATION OF UTAH

8/11/17
5/6/2009 10:46:47
CASE NUMBER 060700106 Malpractice

CURRENT ASSIGNED JUDGE
MICHAEL G ALLPHIN

PARTIES

Plaintiff - WAYNE L WELSH
Represented by: RODNEY G SNOW
Represented by: MATTHEW A STEWARD

Plaintiff - CAROL WELSH
Represented by: RODNEY G SNOW
Represented by: NATHAN B WILCOX
Represented by: MATTHEW A STEWARD

Defendant - HOSPITAL CORPORATION OF UTAH

Doing Business As - LAKEVIEW HOSPITAL
Represented by: STEPHEN D ALDERMAN

ACCOUNT SUMMARY

TOTAL REVENUE	Amount Due:	235.00
	Amount Paid:	235.00
	Credit:	0.00
	Balance:	0.00

REVENUE DETAIL - TYPE: COMPLAINT - NO AMT S	
Amount Due:	155.00
Amount Paid:	155.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: JURY DEMAND - CIVIL	
Amount Due:	75.00
Amount Paid:	75.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: TELEPHONE/FAX CHARGE	
Amount Due:	5.00
Amount Paid:	5.00
Amount Credit:	0.00

CASE NUMBER 060700106 Malpractice

Balance: 0.00

PROCEEDINGS

02-28-06 Case filed
 02-28-06 Judge MICHAEL G ALLPHIN assigned.
 02-28-06 Filed: Complaint No Amount
 02-28-06 Filed: Demand Civil Jury
 02-28-06 Fee Account created Total Due: 155.00
 02-28-06 Fee Account created Total Due: 75.00
 02-28-06 COMPLAINT - NO AMT S Payment Received: 155.00
 Note: Code Description: COMPLAINT - NO AMT S, JURY DEMAND
 - CIVIL, Mail Payment;
 02-28-06 JURY DEMAND - CIVIL Payment Received: 75.00
 03-16-06 Filed return: Proof of Service/Summons and Complaint (Jury
 Demanded)
 Party Served: HOSPITAL CORPORATION OF UTAH
 Service Type: Personal
 Service Date: March 07, 2006
 03-16-06 Filed return: Proof of Service/Summons and Complaitn (Jury
 Demanded)
 Party Served: LAKEVIEW HOSPITAL
 Service Type: Personal
 Service Date: March 07, 2006
 04-13-06 Filed: Defendant's answer to complaint
 HOSPITAL CORPORATION OF UTAH
 06-08-06 Filed: Certificate of Service Defendant Hospital Corporation of
 Utah, d/b/a Lakeview Hospital's Initial Rule 26(a)(1)
 Disclosures
 07-19-06 Filed: Certificate of Service
 07-27-06 Note: Rule 26(f) Attorneys' Planning Meeting Report and
 (Proposed) Scheduling Order to MGA
 08-10-06 Filed order: Rule 26(f) Attorneys' Planning Meeting Report and
 (Proposed) Scheduling Order
 Judge MICHAEL G ALLPHIN
 Signed August 04, 2006
 02-22-07 Filed: Request for Rule 16 Scheduling Conference
 02-27-07 TELEPHONE SCHEDULING CONF. scheduled on April 26, 2007 at 08:30
 AM in Courtroom 5 with Judge ALLPHIN.
 04-12-07 Notice - NOTICE for Case 060700106 ID 10043397
 TELEPHONE SCHEDULING CONF. is scheduled.
 Date: 04/26/2007
 Time: 08:30 a.m.
 Location: Courtroom 5
 Judicial Complex
 800 West State Street
 Farmington, UT 84025
 Before Judge: MICHAEL G ALLPHIN

CASE NUMBER 060700106 Malpractice

04-24-07 TELEPHONE SCHEDULING CONF. Cancelled.
Reason: Rescheduled.

04-25-07 TELEPHONE CONFERENCE scheduled on May 04, 2007 at 08:45 AM in
Courtroom 5 with Judge ALLPHIN.

05-04-07 Minute Entry - Minutes for TELEPHONE CONFERENCE
Judge: MICHAEL G ALLPHIN
Clerk: teris
TELEPHONE CONFERENCE
PRESENT
Plaintiff's Attorney(s): NATHAN B WILCOX
Defendant's Attorney(s): MARK A RIEKHOF
Video

HEARING

The parties advise that they have drafted an Amended Scheduling Order which they will submit for review and signature of the Court.

05-25-07 Filed: Amended Rule 26(f) Attorneys Planning Meeting Report and
[Proposed] Amended Scheduling Order

08-03-07 Filed: Certificate of Service Defendant Lakeview Hospital's
First Set Interrogatories and Requests for Production of
Documents to Plaintiffs

01-28-08 Note: Rule 26(F) Amended Scheduling Order to MGA on February 6,
2008

01-28-08 Note: Rule 26(F) Amended Scheduling Order to MGA on February 6,
2008

02-12-08 Filed order: Rule 26(f) amended scheduling order
Judge MICHAEL G ALLPHIN
Signed February 11, 2008

06-20-08 Filed: Notice of Withdrawal of Counsel

08-28-08 Note: Stipulated Scheduling Order to MGA

09-09-08 TELEPHONE CONFERENCE scheduled on September 30, 2008 at 08:45
AM in Courtroom 5 with Judge ALLPHIN.

09-09-08 Notice - NOTICE for Case 060700106 ID 10311873
TELEPHONE CONFERENCE is scheduled.
Date: 09/30/2008
Time: 08:45 a.m.
Location: Courtroom 5
Judicial Complex
800 West State Street
Farmington, UT 84025
Before Judge: MICHAEL G ALLPHIN

09-09-08 TELEPHONE CONFERENCE scheduled on September 30, 2008 at 08:45
AM in Courtroom 5 with Judge ALLPHIN.

09-10-08 Note: Scheduling Order denied - telephone conference set.

09-10-08 Notice - NOTICE for Case 060700106 ID 10312276
TELEPHONE CONFERENCE is scheduled.

Printed: 04/20/09 11:40:04

Page 3

CASE NUMBER 060700106 Malpractice

000440

Date: 09/30/2008

Time: 08:45 a.m.

Location: Courtroom 5

Judicial Complex

800 West State Street

Farmington, UT 84025

Before Judge: MICHAEL G ALLPHIN

09-10-08 TELEPHONE CONFERENCE Cancelled.

09-30-08 Filed order: Stipulated Rule 26(F) Amended Scheduling Order

Judge MICHAEL G ALLPHIN

Signed September 30, 2008

09-30-08 Minute Entry - Minutes for TELEPHONE CONFERENCE

Judge: MICHAEL G ALLPHIN

Clerk: karensd

TELEPHONE CONFERENCE

PRESENT

Plaintiff's Attorney(s): NATHAN B WILCOX

Defendant's Attorney(s): MARK A RIEKHOF

Video

HEARING

The Court has received a third amended scheduling order. The Court is ready to dismiss the case because nothing is being filed to move the case forward. Requests for discovery was filed in August 2007.

Mr. Wilcox states that he has asked for depositions of Defendants and he believes time is being wasted. He wants to move the case along. He feels the case has merit and he intends to pursue it. He will provide responses to discovery requests today.

But opposing counsel has filed to motion to compel.

Mr. Riekhof states that they have had many discussions but nothing happens in a time line. There have been no dates set for depositions.

The Court states that the case is 2 1/2 years old and we have received the 4th scheduling order. The Court will dismiss this case if it doesn't start moving forward. If the Court doesn't see some action, it will notice the case for Pretrial and

determine what has been done and if it isn't moving forward, the Court will dismiss the action. If the Court needs to intervene on discovery, then motions need to be filed.

10-16-08 Filed: Second Amended Notice of Deposition of Plaintiffs Wayne L. Welsh and Carol Welsh

11-26-08 Filed: Notice of Entry of Appearance - Rodney G. Snow & Matthew A. Steward for Wayne & Carol Welsh

11-26-08 Filed: Motion for Enlargement of Time
Filed by: STEWARD, MATTHEW A

11-26-08 Filed: Affidavit of Matthew A. Steward
 11-26-08 Filed: Ex Parte Motion for Order Shortening Response Time
 Filed by: STEWARD, MATTHEW A
 11-26-08 Note: Order Sortening Response Time to MGA on 12/8/08
 12-05-08 Filed: Defendant Lakeview Hospital's Motion for Summary
 Judgment
 12-15-08 Filed: Defendant Lakeview Hospital's Opposition to Plaintiffs'
 Motion for Enlargement of Time
 12-16-08 Filed order: Order Shortening Response Time
 Judge MICHAEL G ALLPHIN
 Signed December 10, 2008
 12-17-08 Filed: Reply Memorandum in Support of Plaintiffs' Motion for
 Enlargement of Time
 12-17-08 Filed: Plaintiffs' Designation of Expert Witnesses
 12-17-08 Filed: Plaintiffs' Opposition to Defendant's Motion for Summary
 Judgment
 12-17-08 Filed: Rule 56(f) Affidavit of Counsel for Plaintiffs
 12-17-08 Filed: Request to Submit for Decision on Motion to Enlarge Time
 12-24-08 Filed: Defendant's Lakeview Hospitals Reply Memorandum in
 Support of Motion for Summary Judgment
 12-29-08 Note: Mr. Steward's Motion to Enlarge Time is granted, last
 time. He needs to submit an order. I called his office this
 date.
 01-02-09 Filed: Notice to Submit for Decision and Request for Hearing
 01-15-09 Filed: UNSIGNED Order on Plaintiff's Motion for Enlargement of
 Time
 01-15-09 Note: Order on Plainitiffs' Motion to MGA
 01-16-09 Filed: Certificate of Service of Expert Reports2
 01-22-09 Filed: Ruling on Motion for Enlargement of Time and Defendant
 Lakeview Hospital's Motion for Summary Judgment
 01-23-09 Note: FF & DD to MGA
 01-30-09 Filed: Motion for relief from order and for entry of order
 enlarging time
 Filed by: SNOW, RODNEY G
 01-30-09 Filed: Memorandum in support of motion for relief from order
 and for entry of order enlarging time
 01-30-09 Filed: Ex-Parte motion for order shortening response time
 01-30-09 Note: Order shortening response time to MGA 2/10
 01-30-09 Filed: UNSIGNED Order Shortening Response Time
 02-02-09 Filed: Certificate of service
 02-12-09 Filed: Notice of deposition of Allen Kunnard
 02-17-09 Filed: Defendant Lakeview Hospital's Opposition to Plaintiffs'
 Motino for Reflief from Order and for Entry of Order Enlarging
 Time
 02-17-09 Note: **OBJECTION FILED**
 02-23-09 Filed: Reply Memorandum in Support of Motion for Relief from
 Order and for Entry of Order Enlarging Time
 02-23-09 Filed: Request to Submit for Decision on Motion for Relief From
 Order and for Entry of Order Enlarging Time (Oral Argument

Printed: 04/20/09 11:40:04

Page 5

CASE NUMBER 060700106 Malpractice

Requested)

04-14-09 Filed: Ruling on Motion for Relief from Order and for Entry of
Order Enlarging Time

04-15-09 Fee Account created Total Due: 5.00

04-15-09 TELEPHONE/FAX CHARGE Payment Received: 5.00

04/20/09 11:40:04

Printed: 04/20/09 11:40:04

Page 6 (last)

000443

<http://xchange.utcourts.gov/casesearch/CaseSearch?action=caseHist>

4/2

LAW OFFICES
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www.aklawfirm.com

JOHN T. ANDERSON
FRANCIS J. CARNEY
PIERO RUFFINENGO
Of Counsel

May 4, 2007

Mark A. Riekhof
Hall Prangle & Schoonveld, LLC
136 East South Temple, Suite 2450
Salt Lake City, UT 84111

RE: Welsh v. Lakeview Hospital

Dear Mark:

It was good to talk with you again this morning. I have prepared the enclosed proposed attorneys' report and amended order ("proposed order") for your review and consideration. I tried to email it to you at the email address that you provided, but it was returned to me as undeliverable. If you could send me a test email (nwilcox@aklawfirm.com), I can then respond to that email with a copy of the proposed order.

I modified the proposed order with respect to the expert dates so that you would have an additional month that you indicated you would need during our telephone conference with the Court. I set the dates based upon the default time periods under the Rule, but I would prefer shortening all of the dates.

Please review the enclosed proposed order and give me a call as soon as possible so that we can discuss it. As soon as we have an agreement, I will send the proposed order to you via U.S. mail and email so that it can be executed and filed with the Court for consideration.

I would like to schedule depositions in this matter as soon as possible. I would like to depose the following:

- (1) Dr. Robert Keddington;
- (2) the nurse who transported Wayne to the nuclear medicine lab and then received him when he returned. I cannot identify her name from medical records, but believe it is "S. Gee";
- (3) Allen Kunard-imaging and cardio tech;

Mark A. Riekhof
May 4, 2007
Page 2

- (4) Dr. Eric Anding;
- (5) the supervisor or head nurse for the nuclear medicine lab;
- (6) Elayne M. Shutt; and
- (7) any other medical personnel who were present during any of the testing for Wayne.

I understand that you do not represent Dr. Keddington. I will contact his counsel to set up a deposition. If you do not represent Dr. Anding, please let me know and I will contact him through his office to arrange for a deposition. In addition, please let me know if you will be representing the others whom I have identified and when they would be available for deposition.

Yours very truly,



Nathan B. Wilcox

NBW/sd
Enclosure

000356

LAW OFFICES
ANDERSON & KARRENBURG
A PROFESSIONAL CORPORATION

THOMAS R. KARRENBURG
STEVEN W. DOUGHERTY
SCOTT A. CALL
JOHN P. MULLEN
JOHN V. HARPER
NATHAN B. WILCOX
STEPHEN P. HORVAT
JENNIFER R. ESHELMAN
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JOHN T. ANDERSON
FRANCIS J. CARNEY
PIERO RUFFINENGO
Of Counsel

July 10, 2007

Mark A. Riekhof
Hall Prangle & Schoonveld, LLC
136 East South Temple, Suite 2450
Salt Lake City, UT 84111

RE: Welsh v. Lakeview Hospital

Dear Mark:

This letter is a follow up to my letter to you dated May 4, 2007, wherein I indicated that I would like to schedule the depositions of the following:

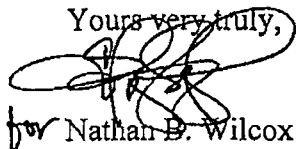
- (1) Dr. Robert Keddington;
- (2) the nurse who transported Wayne to the nuclear medicine lab and then received him when he returned. I cannot identify her name from medical records, but believe it is "S. Gee";
- (3) Allen Kunard-imaging and cardio tech;
- (4) Dr. Eric Anding;
- (5) the supervisor or head nurse for the nuclear medicine lab;
- (6) Elayne M. Shutt; and
- (7) any other medical personnel who were present during any of the testing for Wayne.

I would like to notice up these depositions as soon as possible. Please let me know when these individuals are available for depositions. For your information, I am available July 23, 25 (p.m.), 31 (p.m.) and August 1, 6 (a.m.), 7 (a.m.), 10, 13-19, 20-24. Please let me know as soon as possible which dates will work for you and your clients. If I do not hear from you on or before July 19, 2007, I will notice up the depositions of the individuals identified above providing you with at least two weeks notice.

Mark A. Riekhof
July 10, 2007
Page 2

As for the depositions of my clients, please let me know when you would like to take those depositions and I can make them available. It is my goal to have these depositions all completed before the end of August so that we may move this matter forward.

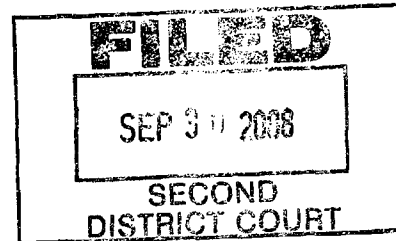
Yours very truly,



for Nathan B. Wilcox

NBW/sd
Enclosure

000359



ERIC P. SCHOONVELD #10900
MARK A. RIEKHOF #8420
HALL PRANGLE & SCHOONVELD, LLC
136 East South Temple, Suite 2450
Salt Lake City, Utah 84111
Telephone: 801-320-0900
Facsimile: 801-320-0896

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.

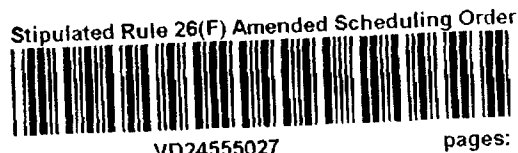
STIPULATED RULE 26(F) AMENDED
SCHEDULING ORDER

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).



VD24555027

pages: 6

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:

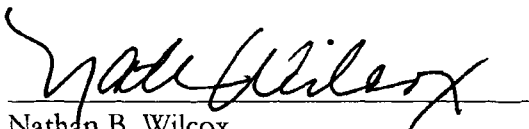
- a. The parties do not request a conference with the court prior to entry of the scheduling order.
- b. The parties request a final pretrial conference in **April 2009.**
- c. The deadline for filing a motion to amend pleadings shall be **Friday, November 14, 2008.**
- d. The deadline for serving dispositive 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

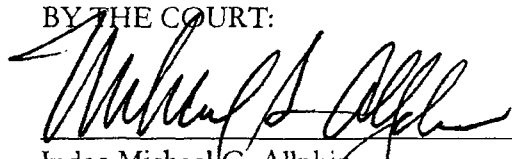
ORDER

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. Alphin
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:

Nathan B. Wilcox
CLYDE SNOW SESSIONS & SWENSON
One Utah Center
201 S. Main Street, 13th Floor
Salt Lake City, Utah 84111
Attorneys for the Plaintiffs

Jennifer R. Eshelman
ANDERSON & KARRENBURG
700 Bank One Tower
50 West Broadway
Salt Lake City, UT 84101-2006
Attorneys for Plaintiffs



ClydeSnow

ATTORNEYS AT LAW

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MATTHEW A. STEWARD

(801) 322-2516
mas@clydesnow.com

November 20, 2008

Mark A. Riekhof, Esq.
Hall Prangle & Schoonveld, LLC
136 E. South Temple, Suite 2450
Salt Lake City, UT 84111

RE: *Welsh v. Lakeview Hospital*
Case No. 060700106

Dear Mark:

Pursuant to our phone conference of last week, enclosed please find the documents you requested which are Bates Stamped WW000001-000110. We still have not received any response to our request to take the depositions of the individuals of the hospital staff involved in the Welsh incident including the following:

1. Alan Kunnard (RT);
2. The nurse who transported Mr. Welsh to the Nuclear Medicine Lab and then received Mr. Welsh when he returned. The medical records are not clear who this individual is but it may be "S. Gee;"
3. The supervisor for the Nuclear Medicine Lab;
4. Elayne M. Shutt; and
5. Any other personnel who were present during the administration of the Persantine Stress Test.

I know Mr. Wilcox has contacted you at least twice regarding these depositions and has not received a response other than your agreement that these depositions may be taken after the discovery deadline of the current scheduling order.

You and I further discussed rearranging some of the dates of the Scheduling Order including the expert report deadlines to accommodate the remaining discovery. We should absolutely be able to accomplish this without moving the deadline for serving dispositive or potentially dispositive motions of May 11, 2009 or the certification of trial date of June 2009.

{00001895}

Mark A. Riekhof, Esq.
November 20, 2008
Page 2

Please let me hear from you regarding the foregoing at your very earliest convenience.

Sincerely,



Matthew A. Steward

Enclosures

cc: Nathan B. Wilcox, Esq.
Rodney G. Snow, Esq.

{00001895}

000362

Rodney G. Snow (#3028)
Matthew A. Steward (#7637)
CLYDE SNOW & SESSIONS
One Utah Center, 13th Floor
201 South Main Street
Salt Lake City, Utah 84111-2216
Telephone (801) 322-2516
Facsimile (801) 521-6280

Attorneys for Plaintiffs

IN THE SECOND JUDICIAL DISTRICT COURT

DAVIS COUNTY, STATE OF UTAH

WAYNE L. WELSH and CAROL WELSH, :

Plaintiffs, :

v. :

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

Defendant. :

**ORDER ON PLAINTIFFS' MOTION
FOR ENLARGEMENT OF TIME**

Case No. 060700106

Judge Michael G. Allphin

Plaintiffs' Motion for Enlargement of Time was filed on or about November 26, 2008. The matter was fully briefed and submitted for decision on December 17, 2008. Neither party requested oral argument. Based upon Plaintiffs' Motion and for good cause appearing, IT IS HEREBY ORDERED:

1. That the Plaintiffs' initial expert reports and disclosures shall be provided to Defendant's counsel on or before Friday, January 9, 2009;
2. That the Defendant's initial expert reports and disclosures shall be provided to Plaintiffs' counsel on or before February 13, 2009;

3. That the Plaintiffs' rebuttal expert reports, if any, shall be provided to Defendant's counsel on or before March 27, 2009;

4. That the completion of expert discovery date shall remain Friday, April 24, 2009;
and


5. That the certification of readiness for trial date shall remain June 29, 2009.

DATED this _____ day of _____ 2009.

BY THE COURT:

Michael G. Allphin
District Court Judge

Approved as to form:



Mark A. Riekhof

92/2700 12:00:01 6002/7/2

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of December 2008, a copy of the foregoing
ORDER ON PLAINTIFFS' MOTION FOR ENLARGEMENT OF TIME was sent via
hand-delivery to the following:

Eric P. Schoonveld
Mark A. Riekhof
Hall Prangle & Schoonveld, LLC
136 E. South Temple, Suite 2450
Salt Lake City, UT 84111

Attorneys for Defendant

Kari J Peck

Mark Riekhof
801.320.0900
mrlekhof@hpslaw.com

January 13, 2009

VIA FACSIMILE: (801) 521-6280 & VIA U.S. MAIL

Matthew A. Steward
CLYDE SNOW SESSIONS & SWENSON
One Utah Center
201 S. Main Street, 13th Floor
Salt Lake City, Utah 84111

Re: Welsh v. Lakeview Hospital
HCII Claim No: 120416
HPS Case No.: 0081-0001

Dear Matthew:

I am in receipt of your January 12, 2009 correspondence and just wanted to clarify that I in no way meant to imply that you had any improper ex parte communications with the Court. I simply could not tell from the Court's docket what the Court had ordered and therefore did not feel comfortable signing off on the Order as to form. With your confirmation that the Court merely granted the Order as requested, I am happy to sign off on the Order. I have attached the signature page herewith.

With respect to the depositions of your experts, if you can see if Dr. Bader is available on any of the January dates provided it would be appreciated as I would like to get him deposed prior to my expert designation deadline. If we can fit Kelly Johnson in as well, great, but if not we can take that deposition after you have completed your trial.

You have requested to take the deposition of Mr. Kunard and I believe I can accommodate you in that regard. I will contact the hospital and see when he is available for deposition. I believe I also discussed with Nathan taking the deposition of the Welsh's son who is in charge of their finances. Can you please determine when he is available for deposition?

Lastly, Nathan and I and Gerald Houston had discussed for a couple of years the possibility of getting this matter settled. However, we never received any type of demand from Nathan in that regard. I believe we would still be interested in at least attempting to see if we can reach an amicable solution to this case. Obviously, if we can do that prior to expending time and resources in expert discovery it would be better for both of our clients. Is this something your clients would still be interested in pursuing? If so, can you please provide us with a demand that we can consider. We might also be willing to participate in mediation if it appears it would be helpful for the parties.

Chicago

Las Vegas

Salt Lake City

000458

5/6/2009 10:06:47 AM 008140

5/6/2009 10:06:47 AM 01-91

Thank you for your attention to these matters.

Very truly yours,

HALL PRANGLE & SCHOONVELD, LLC

A handwritten signature in black ink, appearing to read 'M. A. Riekhof', written over the printed name.

Mark A. Riekhof

000459

5/6/2009 10:05:47 AM 143

3. That the Plaintiffs' rebuttal expert reports, if any, shall be provided to Defendant's counsel on or before March 27, 2009;

4. That the completion of expert discovery date shall remain Friday, April 24, 2009;
and

5. That the certification of readiness for trial date shall remain June 29, 2009.

DATED this _____ day of _____ 2009.

BY THE COURT:

Michael G. Allphin
District Court Judge

Approved as to form:


Mark A. Riekhof

Mark Riekhof
801.320.0900
mrlekhof@hpslaw.com

February 17, 2009

VIA FACSIMILE: (801) 521-6280 & VIA U.S. MAIL

Matthew A. Steward
CLYDE SNOW SESSIONS & SWENSON
One Utah Center
201 S. Main Street, 13th Floor
Salt Lake City, Utah 84111

Re: Welsh v. Lakeview Hospital
HCL Claim No: 120416
HPS Case No.: 0081-0001

Dear Matthew:

I am in receipt of your February 10, 2009 correspondence and accompanying deposition notice. For the reasons I will articulate below, we do not believe it is appropriate to have Mr. Kunnard sit for a deposition at this time.

As you are aware, fact discovery in this matter closed on October 31, 2008. Given the tenor of the Court's most recent order denying your request for an extension of time to designate expert witness, I am quite hesitant to proceed with discovery that the Court mandated be completed more than three months ago. As such, until such time as the Court reverses its prior order, we will not engage in any additional fact discovery.

If you require a formal motion to quash to take this deposition off calendar, please let me know and I will be happy to file one with the Court. Additionally, if you intend to have a court reporter present to take a certificate of non-appearance, please let me know as I will make an appearance and make a record of our objection to the deposition. If I do not hear from you in this regard, I will assume you will voluntarily take this deposition off calendar, without the need for a motion to quash, and that you will not attempt to take a certificate of non-appearance, without notifying me in advance so that I may participate.

With respect to the depositions of your experts, I do not believe I will need to depose them given the Court's current order barring Plaintiffs' from introducing expert testimony at the time of trial. If the Judge elects to reverse course and allows Plaintiffs the opportunity to introduce expert testimony, I am confident that he will allow us ample opportunity to take their depositions. As such, I do not believe we will need to schedule those depositions at this time.

Chicago

Las Vegas

Salt Lake City

000462

5/6/2009 10:06:47 AM 0146

Lastly, I am unclear as to your inquiry into the insurance policy. I know that the hospital is insured for several million dollars under the policy in force and effect at the time of this incident. If you can clarify why in fact you are seeking the actual policy at this juncture, I will consider whether it should be produced.

Thank you for your attention to these matters.

Very truly yours,

HALL PRANGLE & SCHOONVELD, LLC


Mark A. Riekhof

000463



ERIC P. SCHOONVELD #10900
 MARK A. RIEKHOF #8420
 HALL PRANGLE & SCHOONVELD, LLC
 136 East South Temple, Suite 2450
 Salt Lake City, Utah 84111
 Telephone: 801-320-0900
 Facsimile: 801-320-0896

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.

**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 Anderson & Karrenberg, attorneys 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).

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, including responses to written discovery, will be completed no later than **Monday, May 19, 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, June 16, 2008**.
- e. Plaintiffs' Expert Witnesses shall be deposed by **Monday, July 21, 2008**.
- f. Defendant's Initial Expert Disclosures and Reports under Rule 26(a)(3) shall be served no later than **Monday, August 18, 2008**.

- g. Defendant's Expert Witnesses shall be deposed by **Monday, September 15, 2008.**
- h. Rebuttal Reports under Rule 26(e)(1) shall be served no later than **Monday, September 29, 2008.**
- i. Expert discovery will be completed no later than **Monday, October 27, 2008.**
- j. Supplementations are due as parties discover information or documents requiring supplementation.

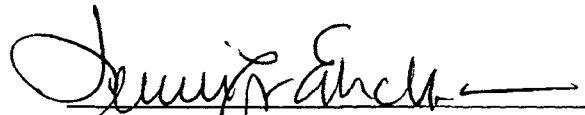
3. **OTHER ITEMS:**

- 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 **January 2009.**
- c. The deadline for filing a motion to amend pleadings shall be **Monday, April 21, 2008.**
- d. The deadline for serving dispositive or potential dispositive motions shall be **Monday, November 24, 2008.**
- 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. 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.

- h. The parties should have fourteen (14) days after service of final lists of witnesses and exhibits to list objections under Rule 26(a)(3).
- i. This case should be certified for trial by **January 2009**.
- k. The estimated length of the trial is 4 days. A jury has been demanded.

DATED this 24th day of January, 2008.

ANDERSON & KARRENBERG



Nathan B. Wilcox

Jennifer R. Eshelman

Attorneys for Wayne L. Welsh and Carol Welsh

DATED this _____ day of January, 2008.

HALL PRANGLE & SCHOONVELD, LLC

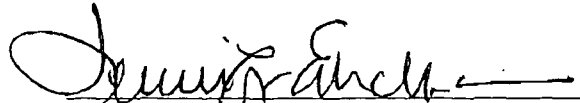
Mark A. Riekhof

Attorneys for Lakeview Hospital

- h. The parties should have fourteen (14) days after service of final lists of witnesses and exhibits to list objections under Rule 26(a)(3).
- i. This case should be certified for trial by January 2009.
- k. The estimated length of the trial is 4 days. A jury has been demanded.

DATED this 24th day of January, 2008.

ANDERSON & KARRENBERG



Nathan B. Wilcox

Jennifer R. Eshelman

Attorneys for Wayne L. Welsh and Carol Welsh

DATED this 25th day of January, 2008.

HALL PRANGLE & SCHOONVELD, LLC



Mark A. Riekhof

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 11 day of Feb, 2008.

BY THE COURT:

1st Michael G Allphin

Judge Michael G. Allphin
Third District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 25th day of January, 2008 to the following:

Nathan B. Wilcox
Jennifer R. Eshelman
ANDERSON & KARRENBURG
700 Bank One Tower
50 West Broadway
Salt Lake City, UT 84101-2006
Attorneys for Plaintiffs

Bullock

ERIC P. SCHOONVELD #10900
MARK A. RIEKHOF #8420
HALL PRANGLE & SCHOONVELD, LLC
136 East South Temple, Suite 2450
Salt Lake City, Utah 84111
Telephone: 801-320-0900
Facsimile: 801-320-0896

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).

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:**

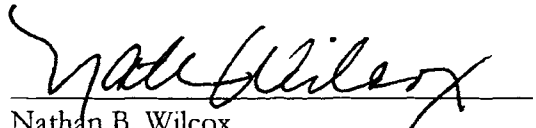
- a. The parties do not request a conference with the court prior to entry of the scheduling order.
- b. The parties request a final pretrial conference in **April 2009.**
- c. The deadline for filing a motion to amend pleadings shall be **Friday, November 14, 2008.**
- d. The deadline for serving dispositive 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:

/s/ Michael G. Allphin
Judge Michael G. Allphin
Third District Court Judge

Judge's note: Last amended order
Case to move along
or it will be dismissed

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: 6 OCT

Nathan B. Wilcox
CLYDE SNOW SESSIONS & SWENSON
One Utah Center
201 S. Main Street, 13th Floor
Salt Lake City, Utah 84111
Attorneys for the Plaintiffs

Jennifer R. Eshelman
ANDERSON & KARRENBURG
700 Bank One Tower
50 West Broadway
Salt Lake City, UT 84101-2006
Attorneys for Plaintiffs

