2017

Karil. Baumann, Plaintiff I Appellant, v. The Kroger Comp Any and Gregoryp. Tayler, m.d., Defendants I Appellees.·

Utah Supreme Court

IN THE UTAH SUPREME COURT

KARI L. BAUMANN, *Plaintiff / Appellant,* v. THE KROGER COMPANY and GREGORY P. TAYLER, M.D., *Defendants / Appellees.*	No. 20160686-SC

REPLY BRIEF OF THE APPELLANT

On a Grant of a Petition for a Writ of Certiorari
to the Utah Court of Appeals

Todd C. Hilbig (#8643)
Andrea M. Keysar (#12139)
Morgan, Minnock, Rice & James
136 South Main Street, Eighth Floor
Salt Lake City, UT 84101
Attorney for Appellee
The Kroger Company

Carolyn Stevens Jensen (#6338)
Jennifer M. Brennan (#14508)
Frankenburg Jensen, PLLC
420 East South Temple, Suite 510
Salt Lake City, UT 84111
Attorney for Appellee
Gregory P. Tayler, M.D.

Gregory W. Stevens (#7315)
2825 East Cottonwood Parkway
Suite 500
Salt Lake City, UT 84121-7060
Telephone: (801) 990-3388
Facsimile: (801) 606-7378
Attorney for Appellant
Kari L. Baumann

IN THE UTAH SUPREME COURT

KARI L. BAUMANN, *Plaintiff / Appellant,* v. THE KROGER COMPANY and GREGORY P. TAYLER, M.D., *Defendants / Appellees.*	No. 20160686-SC

REPLY BRIEF OF THE APPELLANT

On a Grant of a Petition for a Writ of Certiorari
to the Utah Court of Appeals

Todd C. Hilbig (#8643)
Andrea M. Keysar (#12139)
Morgan, Minnock, Rice & James
136 South Main Street, Eighth Floor
Salt Lake City, UT 84101
Attorney for Appellee
The Kroger Company

Carolyn Stevens Jensen (#6338)
Jennifer M. Brennan (#14508)
Frankenburg Jensen, PLLC
420 East South Temple, Suite 510
Salt Lake City, UT 84111
Attorney for Appellee
Gregory P. Tayler, M.D.

Gregory W. Stevens (#7315)
2825 East Cottonwood Parkway
Suite 500
Salt Lake City, UT 84121-7060
Telephone: (801) 990-3388
Facsimile: (801) 606-7378
Attorney for Appellant
Kari L. Baumann

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Decisions

TABLE OF AUTHORITIES (... continued)

Page

Utah Rules of Civil Procedure

Secondary Authority

ARGUMENT

The contentions raised by Defendant-Appellee The Kroger Company, doing business as Smith's Pharmacy #40063 ("Smith's Pharmacy" or "the Pharmacy") and Defendant-Appellee Gregory P. Tayler, M.D. (the "Doctor" or "Dr. Tayler") are not well taken, for the following reasons:

First, contrary to the assertions by Smith's Pharmacy and Dr. Tayler, the issues that this Court has called upon the parties to address were in fact preserved in and addressed by the District Court and Court of Appeals.

Second, it remains clear that the Court of Appeals' decision affirming the District Court's application of Rule 26(d)(4) to exclude an expert report that was untimely under a Stipulation adopted by the Court as the source of the applicable deadline conflicts with this Court's decision in *Coroles v. State*, 2015 UT 48, 349 P.3d 739.

Third, even if Rule 26(d)(4) were the proper source for imposition of sanctions in the situation presented here, the Court of Appeals' interpretation of Rule 26(d)(4) to require only a showing of a lack of justification conflicts with the plain language of Rule 26(d)(4) and well-settled interpretations of the analogous Federal Rule of Civil Procedure.

I. PRESERVATION OF THE ISSUES THAT THIS COURT CALLED UPON THE PARTIES TO ADDRESS.

The issues presented here concerning the District Court's exclusion of the expert report that was prepared by a pharmacologist and filed with the Court were presented to the District Court, decided by the District Court, and addressed by the Court of Appeals. The preservation of those issues applies with equal force to the Doctor, because, though a separate expert report as to Dr. Tayler was not prepared or filed, the expert report by the pharmacologist would be admissible on remand to evaluate the standard of care and causation as applied to the Doctor.

A. PRESERVATION AS TO THE PHARMACY.

Smith's Pharmacy contends (Pharm. Br. at 32-49)[1] that Ms. Baumann did not preserve, before the District Court, the two issues that this Court asked the parties to address in its October 31, 2016 Order granting Ms. Baumann's Petition for Writ of Certiorari: (1) whether the Court of Appeals erred in concluding that the District Court properly applied Rule 26(d)(4) of the Rules of Civil Procedure, rather than Rule 16(d), to its determination of the appropriate sanction for Petitioners failure to timely disclose her pharmacologist-expert's report; and (2) whether the Court of Appeals erred in concluding the District Court did not abuse its discretion in

---

[1] Citations in this form refer to the "Brief of Appellee The Kroger Company dba Smith's Pharmacy #40063 ('Smith's Pharmacy')" filed with this Court in this appeal.

precluding Petitioner from using her pharmacologist-expert's testimony to contest summary judgment. The Pharmacy is mistaken.

Under the general preservation rule, "generally an appellant must properly preserve an issue in the district court before it will be reviewed on appeal." *O'Dea v. Olea*, 2009 UT 46, ¶ 15, 217 P.3d 704; *accord Patterson v. Patterson*, 2011 UT 68, ¶ 12, 266 P.3d 828. To satisfy this requirement, the issue must have been "'presented to the district court in such a way that the court has an opportunity to rule on [it].'" *Patterson*, 2011 UT 68, ¶ 12 (quoting *J.M.W. v. T.I.Z. (In Re Adoption of Baby E.Z.)*, 2011 UT 38, ¶ 25, 266 P.3d 702).

In light of these principles, it is clear that the Ms. Baumann properly preserved the issue of whether the District Court should consider her untimely expert report when it decided the Defendant-Appellees' Motion for Summary Judgment. In fact, during the second hearing on the Motion, Ms. Baumann argued, among other points, that the Court should decide summary judgment based on the complete record that she had submitted, the decision of the SSA, and the report of the expert witness that she had filed and served, not based on a procedural error on her part.[2] Ms. Baumann

---

[2] The January 5, 2015 hearing was not the first time that Ms. Baumann had raised the issue. On November 17, 2014, Ms. Baumann had filed a document entitled "Request for Admission of Plaintiff's URCP 26 Expert Report" and a copy of the report of her expert. Then, on December 15, 2015, Ms. Baumann filed a document entitled "Motion to Admit Plaintiff's Expert Witness Report." Rec. at 395. In that Motion, Ms. Baumann asked the District Court to consider and not (continued...)

also made clear that her failure to disclose an expert and then her untimely disclosure of an expert were not intentional. See Rec. at 486 [15:1-18:3 and 22:2-25] (transcript attached as Addendum C to Appellant's opening Brief). Counsel for the Pharmacy, in turn, argued that the District Court should not consider any expert report filed after October 8, 2014. Id. [4:19-6:1].

The District Court then specifically ruled on the issues presented here. In particular, at the close of the hearing, the Court decided it would not consider expert reports submitted after the deadline contained in the Stipulation for Additional Time to Conduct Standard Discovery. Rec. at 486 [23:12-24:19] (transcript attached as Addendum C to Appellant's opening Brief). Finally, in its written decision granting the Motion, which was prepared as a proposed order by counsel for the Defendants-Appellees, the District Court specifically ruled as follows concerning Ms. Baumann's request to consider her untimely expert report that had been filed with the Court and served on counsel for Defendants-Appellees:

> [T]he Court finds that Plaintiff failed to make expert disclosures as required by the Stipulation for Additional Time to Conduct Standard Discovery and Rule 26 of the Utah Rules of Civil Procedure and that

---

[2](...continued)
exclude the expert report that she had filed. Then, on January 5, 2015, Ms. Baumann filed a document entitled "Plaintiff's Statement for Continuation Opposing Defendants' Motion for Summary Judgment and Exclusion of Evidence." Rec. at 459. In that document, which the Court identified as one that it considered in granting the Motion, Ms. Baumann likewise argued against exclusion of the expert report. See Rec. at 587.

> there is no good cause for Plaintiff's failure to make expert disclosures. Therefore, Plaintiff was precluded by Rule 26(d)(4) from using any undisclosed witness, document, or material in opposition to the Motion for Summary Judgment filed by the Defendants.

Rec. at 528-27 (decision attached as Addendum B to Appellant's opening Brief).[3]

It follows from all of this that the precise issues presented here were actually presented to the District Court in such a way that the District Court had an opportunity to and did in fact rule on it. Accordingly, in this situation, it is clear that the issue was properly preserved for consideration by this Court. *See, e.g., Patterson*, 2011 UT 68, ¶ 12. In the end, the Pharmacy's effort to fabricate a fictional scenario in which the issues presented here were not preserved is simply unavailing.

Against all this, the Pharmacy repeatedly contends (Pharm. Br. at 36-37 and 42-43) that the District Court did not "exclude" Ms. Baumann's untimely expert report in deciding the motion for summary judgment. In reality, the Pharmacy is

---

[3] The Pharmacy is plainly wrong when it asserts (Pharm. Br. at 4) that, in our opening Brief in this appeal, we did not provide sufficient citation to the record at which the issues presented here had been preserved. In reality, in the Statement of the Issues presented in our opening Brief (at 1-2 and 35), we cite to both the presentation made by Ms. Baumann during oral argument on the Motion for Summary Judgment; to the decision by the District Court in which it specifically decided that it would not consider the untimely report, also with citations to the record; and to the opinion of the Court of Appeals in which it likewise addressed the issues presented here. Then, in the Statement of Facts in our opening Brief (at 10-12), we again demonstrate the fact that Ms. Baumann presented the issues to the District Court and that the District Court actually ruled specifically on the issues presented here.

playing semantic games when it asserts that the District Court did not "exclude" Ms. Baumann's untimely expert report because, the Pharmacy says, she never sought leave to file the report and it was filed after the close of expert discovery under the stipulation of the parties that was adopted by the Court as a scheduling order. The Pharmacy's attempt to create a distinction is unsupportable and unavailing. In reality, Ms. Baumann repeatedly asked the Court to consider the expert report and, in deciding the Motion for Summary Judgment, the District Court explicitly declined to consider the report actually filed and served by Ms. Baumann. In so doing, the District Court in fact exclude her untimely report from consideration on the Motion. The Pharmacy's argument to the contrary is nothing short of fanciful.

B. PRESERVATION AS TO THE DOCTOR.

The Doctor contends (Dr. Br. at 9-12)[4] that Ms. Baumann did not preserve before the District Court the issue whether she should have been permitted to submit an expert report, whether timely or not, as to Dr. Tayler. This contention is accurate. As to Dr. Tayler, Ms. Baumann did not submit and seek in the District Court to rely on a separate expert report that specifically addressed the standard of care applicable to the Doctor or the issue of causation.[5] Accordingly, Ms. Baumann did not seek, in

---

[4] Citations in this form refer to the Brief of Defendant / Appellee Gregory P. Tayler, M.D. filed with this Court in this appeal.

[5] As noted in our principal Brief (at 10), on November 12, 2014, five days (continued...)

her Petition for Writ of Certiorari, to obtain review by this Court whether the District Court and, in turn, the Court of Appeals erred in excluding such a report.

That, however, does not end the inquiry as to the Doctor's potential liability in the event that this Court reverses the District Court's decision to exclude the expert report that Ms. Baumann did file and serve in opposition to the Defendants' joint motion for summary judgment. It is wrong to suggest, as the Doctor does (Dr. Br. at 15-16), that the expert the expert report filed and served by Ms. Baumann is limited to consideration of liability on the part of the Pharmacy alone. Rather, the pharmacologist-expert offered expert opinions about the dangers of prescribing the duplicative medications; and whether the Pharmacy breached the applicable standard of care by prescribing the duplicative medications, instructed Ms. Baumann to take the duplicative medications just as prescribed by Dr. Tayler, and failed to warn her that they were duplicative drugs or that there were any special risks associated with taking the duplicative drugs in the dosages prescribed. See Rec. at 383-81; and

---

[5](...continued)
before oral argument on the Defendants' Motion for Summary Judgment, Ms. Baumann provided counsel for the Doctor and the Pharmacy with an expert report and curriculum vitae applicable to the alleged breaches and failures by the Pharmacy. On November 15, 2014, Ms. Baumann also filed the same expert report in response to the Reply Memorandum filed by Defendants-Appellees and also a request to the Court to admit the report in response to their Motion for Summary Judgment. Ms. Baumann did not serve or file a separate expert report applicable to the alleged breaches and failures by Dr. Tayler. See Rec. at 451, ¶¶ 6-7; 383-81; and 380-351.

380-351. The pharmacologist's report also offered the expert opinion that the duplicative medications prescribed by Dr. Tayler and as instructed by the Pharmacy caused her to suffer the injuries that she experienced. See id.

It follows that, in the event that this Court reverses the District Court's decision to exclude the expert report filed and served by Ms. Baumann, the question presented for the District Court will be whether the expert report of the pharmacologist is sufficient to establish a dispute of material fact that precludes summary judgment as to the Doctor. That issue, of course, is not presented now before this Court. Yet, it is worth noting that the pharmacist-expert is properly qualified to testify as to the properties of the duplicative drugs at issue here, the standard of care in prescribing those drugs, and the danger of duplicative medications – all of which apply with equal force to the Doctor. *See, e.g., Garvey v. O'Donoghue*, 530 A.2d 1141, 1142, 1146-47 (D.C. 1987) (holding that testimony by pharmacologist was admissible in medical malpractice action against physicians for negligent prescription of drugs, given that physicians rely on pharmacological information supplied by pharmacologists for information about dosage and proper prescriptions).[6] Thus, the Doctor is wrong when he asserts (Dr. Br. at 19-20) that,

---

[6] *See also, e.g., Parker v. Harper*, 803 So.2d. 76, 79 (La. Ct. App. 2001) (holding that pharmacist could define the existence, nature, and the probability of a risk's occurrence in a medical practice action against a physician alleging that he failed to inform the plaintiff of the potential side effects and warning signs of the (continued...)

absent separate expert testimony as to the Doctor, Ms. Baumann cannot, as a matter of law, establish a *prima facie* claim of medical malpractice. Indeed, the question presented to the District Court on remand as to the Doctor's potential liability will be whether, in light of the pharmacologist-expert's testimony as to a proper prescription and the danger of duplicative prescription, the Doctor breached the applicable standard of care when mistakenly prescribed the two medications. Considered in the context of a motion for summary judgment, it is clear that a reasonable jury could conclude that he did breach the applicable standard by

---

[6](...continued)
prescribed drug); *Sinkfield v. Oh*, 229 Ga. App. 883, 495 S.E.2d 94, 95 (Ga. Ct. App. 1997) (holding that expert testimony by toxicologist was admissible in medical malpractice action against prescribing physician concerning the scientific effect of the prescribed medicine); *Goodman et al. v. Lipman*, 197 Ga. App. 631, 399 S.E.2d 255, 256-58 (Ga. Ct. App. 1990) (holding that testimony of pharmacologist was admissible in medical malpractice action against physician who prescribed drugs to establish properties of the prescribed drugs as relevant to the finder of fact; *Thompson v. Carter*, 518 So.2d 609, 615 (Miss. 1987) ("The instant record reflect[ed] that [the pharmacologist], who taught medical students and advised and counseled physicians as to drug use and administration, through his skill, knowledge, training, and education, knew the standard of care to which physicians adhered when prescribing Bactrim" and, therefore, he was qualified as an expert witness.); *United States v. Smith*, 573 F.3d 639, 653 (8th Cir. 2009) (holding that pharmacologist was qualified to testify as to the standard of care applicable to the prescription of drugs); and *United States v. Bek*, 493 F.3d 790, 795 (7th Cir. 2007) (holding that pharmacologist was qualified as an expert as to the standard of care applicable to the prescription of drugs without diagnostic tests and review of patients' medical histories).

prescribing duplicative medications with the risks enunciated by the pharmacologist-expert, without need for additional expert testimony by a physician. *See id.*[7]

II. THE ERRONEOUS APPLICATION OF RULE 26(d)(4) OF THE UTAH RULES OF CIVIL PROCEDURE, RATHER THAN RULE 16(d), TO THE FAILURE TO TIMELY DISCLOSE THE EXPERT REPORT.

The Pharmacy asserts (Pharm. Br. at 41-43) that the Court of Appeals acted properly in applying Rule 26(d)(4), rather than Rule 16(d), to Ms. Baumann's untimely disclosure of her expert report. The Pharmacy is mistaken.[8]

The decision of the Court of Appeals – applying Rule 26(d) rather than Rule 16(d) to exclude an expert report that was untimely under a stipulation adopted by

---

[7] Put another way, a lay jury could reasonably conclude that the Doctor breached the applicable standard of care by prescribing duplicative medications that, when taken together in the quantities prescribed, posed serious risk of the very injuries suffered by Ms. Baumann. *See, e.g., Bowman v. Kalm*, 2008 UT 9, ¶¶ 9-13, 179 P.3d 754 (holding that expert testimony was not needed to establish causation with respect to a claim for medical malpractice where connection was within common knowledge of lay juror); *Nixdorf v. Hicken*, 612 P.2d 348, 353 (Utah 1980) (holding that common knowledge exception applies to general requirement of expert testimony applies to standard of care where surgical is left in patient).

[8] Dr. Tayler contends (Dr. Br. at 13-18) that the issue whether the District Court acted properly in relying on Rule 26(d)(4) does not apply to the Doctor at all. In support of this contention, the Doctor says (see id.) that Ms. Baumann never sought to introduce a separate expert report as to the Doctor and, accordingly, the District Court did not actually exclude any such report in deciding the Defendants' joint motion for summary judgment. Yet, though the premise of this statement is a fair one, the conclusion does not follow. Ms. Baumann is not now arguing that the District Court, on remand, should consider a separate expert report that she never previously filed and served below. Rather, as we note above, the District Court will be asked to address the question whether the expert report that was submitted is sufficient to establish liability as to the Doctor.

the court – conflicts with this Court's decision in *Coroles v. State*, 2015 UT 48, 349 P.3d 739. In *Coroles*, this Court held that Rule 16(d) is the source of a district court's authority to sanction a party for producing untimely discovery under a scheduling order. *Coroles*, 2015 UT 48, ¶ 20 (citing *Boice ex rel. Boice v. Marble,* 1999 UT 71, ¶ 8 & n. 3, 982 P.2d 565 and *Arnold v. Curtis*, 846 P.2d 1307, 1309-10 (Utah 1993)). Under this Rule, this Court noted, a district court may "'establish[] the time to complete discovery'" through a scheduling order. *Coroles*, 2015 UT 48, ¶ 19 (quoting Utah R. Civ. P. 16(a)(9)).

In light of this, it is clear that the District Court committed reversible error when it excluded the untimely expert witness report submitted by Ms. Baumann. Here, the source of the deadline for disclosure of expert reports was found not standard provision set forth in Rule 26, and the Notice of Event Due Dates that identified those deadlines; but, instead, in the Stipulation to which the parties agreed that was filed with the Court.[9] Indeed, the District Court relied specifically on the

---

[9] This is why, contrary to the Pharmacy's contention (Pharm. Br. at 41) and the decision of the Court of Appeals here, the decision of the Court of Appeals in *Sleepy Holdings LLC v. Mountain West Title*, 2016 UT App 62, 370 P.3d 963, is inapplicable here. The decision in *Sleepy Holdings* addressed a failure to serve initial disclosures under Rule 26(a)(1). *Bauman v. The Kroger Co.*, 2016 UT App 165, ¶¶ 18-19, 381 P.3d 1135. In *Sleepy Holdings*, the appellant argued that the district court abused its discretion when it excluded evidence under Rule 26 and that it should instead have applied the discretionary sanctions found in Rule 16(d). *Id.* ¶ 19. In *Sleepy Holdings*, the Court of Appeals explained that Rule 16 "governs pretrial conferences, scheduling, and management conferences," *id.* ¶ 20, whereas (continued...)

Stipulation and, in so doing, adopted that deadline as the scheduling order applicable to the case and relied on that Stipulation as the basis of its decision to exclude Ms. Baumann's expert report. "Although courts have discretion to sanction parties for violating a scheduling order, an exercise of discretion guided by an erroneous legal conclusion is reversible." *Coroles*, 2015 UT 48, ¶ 24 (reversing district court's order excluding untimely expert reports, because the decision was based on an application of Rule 37(h) and not Rule 16(d)). Accordingly, it is clear that this Court should reverse the District Court's exclusion of the untimely expert report submitted by Ms. Baumann. *See id.*

Finally, as we showed in our principal Brief (at 18-19), a decision by the District Court to exclude the untimely expert report under Rule 16(d) in the circumstances presented here would likewise be an abuse of discretion. *See, e.g., Coroles*, 2015 UT 48, ¶ 29 (citing *Moore's Federal Practice* § 16.92[5][c][i] (3d ed. 2014) and *Welsh v. Hosp. Corp. of Utah*, 2010 UT App 171, ¶ 10, 235 P.3d 791 ("Excluding a witness from testifying is . . . extreme

---

[9](...continued)
[R]ule 26 "governs initial disclosures and discovery," *id.* ¶ 21. The Court of Appeals declined to apply *Coroles*, as the appellant had urged, because, the Court decided, *Coroles* does not interpret or even mention Rule 26 and because Rule 26 properly authorized sanctions for the failure to disclose. *Id.* ¶ 23. Therefore, the Court of Appeals concluded in the instant case, the District Court properly treated Ms. Baumann's failure to timely disclose an expert report under the parties' Stipulation not as a failure to make a timely disclosure under a scheduling order but as a failure to disclose. *Baumann v. Kroger Co.*, 2016 UT App 165, ¶¶ 18-21, 381 P.3d 1135. Yet, as we make clear above, the source of the deadline for disclosure of expert reports here was found not standard provision set forth in Rule 26, and the Notice of Event Due Dates that identified those deadlines; but, instead, in the Stipulation to which the parties agreed that was filed with the Court.

in nature and . . . should be employed only with caution and restraint."). As we stated in our principal Brief (at 19), the factors that counsel strongly in favor of not excluding the untimely expert report include the fact that she was representing herself *pro se*, that she had and has cognitive difficulties,[10] that there is no evidence that she intentionally missed the applicable deadline,[11] that the case had not been certified for trial and no trial date had been set, and that there could be no cognizable prejudice to the Doctor or the Pharmacy except for the need for a new scheduling order and delay in the eventual trial date. *See Colores*, 2015 UT 48, ¶ 28.

---

[10] The Pharmacy asserts (Pharm. Br. at 53) that Ms. Baumann's status as a *pro se* litigant in the District Court should have no impact in resolving the issues presented in this appeal. Yet, as the Pharmacy notes (id), though a *pro se* party is not entitled to unlimited indulgence, he or she is "entitled to every consideration that may be reasonably indulged." (Citing *Sivuich v. Dept. of Workforce Services*, 2015 UT App 101, ¶ 6, 2015 UT App LEXIS 101.) Here, in resolving this appeal, we cannot simply ignore the fact that Ms. Baumann was representing herself *pro se* in the District Court, had no experience at all with the applicable Rules of Civil Procedure, and also suffered from cognitive difficulties caused by Defendants' conduct. In the end, if Ms. Baumann had been represented by counsel, her attorney would have no doubt been cognizant of the deadline for expert disclosures, and would have asked for, and received from opposing counsel as a professional courtesy, an extension of time within which to complete those disclosures. The result here thus differs from the result that would have been realized had Ms. Baumann been represented by competent counsel.

[11] The Pharmacy asserts (Pharm. Br. at 55), with no actual evidentiary support, that "the record shows that Ms. Baumann's decision to not properly and timely designate experts and provide expert reports related to her claims against Smith's Pharmacy was intentional because she desired to avoid expenses and because she believed that the law did not require experts in this case." Yet, in reality, this assertion is nothing more than mere argument by the Pharmacy. Indeed, there is no evidence whatsoever in the record that supports such a conclusion.

III. THE ERRONEOUS EXCLUSION OF THE UNTIMELY EXPERT REPORT UNDER RULE 26(d) BASED ONLY ON A FINDING THAT THE FAILURE TO DISCLOSE WAS NOT JUSTIFIED.

Smith's Pharmacy contends (Pharm. Br. at 56-60) that the District Court and, in turn, the Court of Appeals, properly applied Rule 26(d)(4) of the Utah Rules of Civil Procedure. The Pharmacy is wrong. Even assuming for the sake of argument that Rule 26(d)(4), and not Rule 16(d), should have been applied at all, it is clear that the District Court and the Court of Appeals each erred in its application of Rule 26(d)(4).

As we showed in our principal Brief (at 19-22), the decisions of the District Court and the Court of Appeals, which required only a finding under Rule 26(d)(4) of a lack of justification, conflicts with the plain language of Rule 26(d)(4) and well-settled interpretations of that language. *See, e.g.,* Utah R. Civ. P. 26(d)(4) (party who fails to disclose may not use the material "unless the failure is harmless ***or*** the party shows good cause for the failure) (emphasis added); *see also, e.g., Eugene S. v. Horizon Blue Cross Blue Shield of N.J.*, 663 F.3d 1124, 1129 (10th Cir. 2011); *Trost v. Trek Bicycle Corp.*, 162 F.3d 1004, 1008 (8th Cir. 1998).

Thus, even applying rule 26(d)(4), the District Court should have considered whether the failure to disclose was harmless, based on the plain language of the Rule. *See, e.g., Coroles*, 2015 UT 48, ¶ 29 (stating that the district court should exercise restraint in deciding to exclude an expert where exclusion is tantamount to dismissal of the lawsuit). And, as we made clear in our principal Brief (at 23-24), if the District Court had done so, the District

Court could not have properlyl excluded the untimely expert report submitted by Ms. Baumann.. *See Colores*, 2015 UT 48, ¶ 28. This result, as we also made clear in our principal Brief (at 24), is in keeping with this Court's "general judicial policy that favors a trial on the merits when there is some doubt as to the propriety of a summary judgment." *King v. Searle Pharmaceuticals, Inc.*, 832 P.2d 858, 865 (Utah 1992) (citation omitted).

CONCLUSION

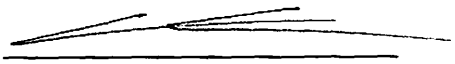
For the foregoing reasons and for the reasons set forth in our principal Memorandum, the Court should vacate the decision of the Court of Appeals, vacate the judgment entered by the District Court, and remand this case with instructions to the District Court, consistent with this Court's opinion.

Respectfully submitted this 1st day of February 2017:

Gregory W. Stevens
Attorney for Appellant
Kari L. Baumann

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 24(f)(1)(c) of the Utah Rules of Appellate Procedure, I hereby certify that this document complies with Rule 24(f)(1)(A) of the Rules. It is printed in Times New Roman, 14-point type, a proportionally spaced font, and contains 4,368 words, excluding items enumerated in Rule 24(f)(1)(B). I relied on Corel WordPerfect X7, the wordprocessor used to create this document, to determine this count.



Gregory W. Stevens

CERTIFICATE OF SERVICE

I hereby certify that, this 1st day of February 2017, I served two copies each of the foregoing Reply Brief, and a CD containing a PDF copy of the Reply Brief, by Priority Mail, postage prepaid, on the following counsel:

Todd C. Hilbig, Esquire
Andrea M. Keysar, Esquire
Morgan, Minnock, Rice & James
136 South Main Street, Eighth Floor
Salt Lake City, UT 84101; and

Carolyn Stevens Jensen, Esquire
Jennifer M. Brennan, Esquire
Frankenburg Jensen, PLLC
420 East South Temple, Suite 510
Salt Lake City, UT 84111

Gregory W. Stevens