

2017

**Karil. Baumann, Plaintiff' Appellant, v. The Kroger Company Db  
Smith's Pharmacy #40063; And Gregoryp. Tayler, m.d.,  
Defendants/ Appellees.**

Utah Supreme Court

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IN THE UTAH SUPREME COURT

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KARI L. BAUMANN,

Plaintiff/Appellant,

v.

THE KROGER COMPANY dba  
SMITH'S PHARMACY #40063; and  
GREGORY P. TAYLER, M.D.,

Defendants/Appellees.

Utah Court of Appeals Case No.:

20150078-CA

20160080-SC

(Fourth District Court Case No.:

130500017

Honorable Fred D. Howard)

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**BRIEF OF DEFENDANT/APPELLEE GREGORY P. TAYLER, M.D.**

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APPEAL FROM DECISION OF UTAH COURT OF APPEALS AFFIRMING  
SUMMARY JUDGMENT ENTERED BY THE HONORABLE FRED D. HOWARD IN  
THE FOURTH DISTRICT COURT, WASATCH COUNTY, PURSUANT TO THE  
GRANT OF A PETITION FOR WRIT OF CERTIORARI

---

Todd C. Hilbig (#8463)

Andrea M. Keysar (#12319)

Morgan, Minnock, Rice & James

136 South Main Street, Eighth Floor

Salt Lake City, Utah 84101

*Attorney for Defendant/Appellee*

*The Kroger Company*

Gregory W. Stevens (#7315)

Cottonwood Corporate Center

2825 East Cottonwood Parkway Suite 500

Salt Lake City, Utah 84121-7060

*Attorney for Plaintiff/Appellant*

*Kari L. Baumann*

Carolyn Stevens Jensen (6338)

Jennifer M. Brennan (14508)

Frankenburg Jensen, PLLC

420 East South Temple, Suite 510

Salt Lake City, Utah 84111

*Attorneys for Defendant/Appellee*

*Gregory P. Tayler, M.D.*

FILED  
UTAH APPELLATE COURTS

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Todd C. Hilbig (#8463)  
Andrea M. Keysar (#12319)  
Morgan, Minnock, Rice & James  
136 South Main Street, Eighth Floor  
Salt Lake City, Utah 84101  
*Attorney for Defendant/Appellee  
The Kroger Company*

Gregory W. Stevens (#7315)  
Cottonwood Corporate Center  
2825 East Cottonwood Parkway Suite 500  
Salt Lake City, Utah 84121-7060  
*Attorney for Plaintiff/Appellant  
Kari L. Baumann*

Carolyn Stevens Jensen (6338)  
Jennifer M. Brennan (14508)  
Frankenburg Jensen, PLLC  
420 East South Temple, Suite 510  
Salt Lake City, Utah 84111  
*Attorneys for Defendant/Appellee  
Gregory P. Tayler, M.D.*

## LIST OF PARTIES

Plaintiff/Appellant is Kari L. Baumann ("Ms. Baumann"). Defendants/Appellees are Gregory P. Tayler, M.D. ("Dr. Tayler") and The Kroger Company dba Smith's Pharmacy #40063 ("Kroger").

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## **STATEMENT OF JURISDICTION**

The Utah Supreme Court does not have jurisdiction to review issues relating to Dr. Tayler on two bases: 1) Ms. Baumann failed to preserve in the lower court any issue regarding her failure to timely disclose expert testimony as to Dr. Tayler, *Baumann v. Kroger, et al.*, 2016 UT App. 165, ¶ 11; and 2) This Court's Order granting Appellant's Petition for Writ of Certiorari limits the issues to be reviewed to those "with respect to Respondent Kroger Company." Order Granting Pet. for Writ of Cert. p. 1, Oct. 31, 2016, (Add. A hereto). The Order does not grant certiorari review with respect to any issues applicable to Dr. Tayler. *Id.*

## **STATEMENT OF THE ISSUES**

I. Ms. Baumann never proffered, or attempted to proffer, expert testimony against Dr. Tayler in the trial court, and, accordingly Ms. Baumann did not preserve for appeal the issue of whether she should have been able to submit expert testimony to oppose summary judgment.

II. Rules 16(d) and 26(d)(4) of the Utah Rules of Civil Procedure are inapplicable to any appellate analysis regarding Dr. Tayler because Ms. Baumann never tried to use expert testimony in opposition to Dr. Tayler's Motion for Summary Judgment. *Baumann*, 2016 UT App. 165, ¶11 n. 6; *see also* Aplt. Br. to Utah Court of Appeals pp. 9-10 (Add. B hereto).

III. The trial court properly granted summary judgment in favor of Dr. Tayler given that Ms. Baumann presented no expert testimony against Dr. Tayler in the trial court.

### *Standards of Review*

This Court reviews a court's decision whether to sanction a party under Rules 16(d) or 26(d)(4), as well as the selection of the appropriate sanction, for an abuse of discretion. *Coroles v. State*, 2015 UT 48, ¶ 20, 349 P.3d 739, 745; *Boice ex rel. Boice v. Marble*, 1999 UT 71, ¶ 8 n.3, 982 P.2d 565.

On certiorari review, this Court reviews “the court of appeal’s decision for correctness.” *Orvis v. Johnson*, 2008 UT 2, ¶ 6, 177 P.3d 600, 601; *accord Massey v. Griffiths*, 2007 UT 10, ¶ 8, 152 P.3d 312. The review focuses on whether the court of appeals correctly reviewed the trial court’s decision—in this case, to grant summary judgment to Dr. Tayler—under the appropriate standard of review. *Id.* An appellate court reviews a trial court’s “legal conclusions and ultimate grant or denial of summary judgment” for correctness, *id.*, and views “the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party.” *Higgins v. Salt Lake County*, 855 P.2d 231, 233 (Utah 1993).

### **RULES OF CENTRAL IMPORTANCE**

#### **I. Rule 24 of the Utah Rules of Appellate Procedure:**

Brief of appellant. The brief of the appellant shall contain under appropriate headings and in the order indicated:

(a)(5)(A) a citation to the record showing that the issue was preserved in the trial court; or

(a)(5)(B) a statement of grounds for seeking review of an issue not preserved in the trial court.

Utah R. App. P. 24(a)(5)(A)-(B).



II. Rule 16(d) of the Utah Rules of Civil Procedure:

If a party or a party's attorney fails to obey an order, if a party or a party's attorney fails to attend a conference, if a party or a party's attorney is substantially unprepared to participate in a conference, or if a party or a party's attorney fails to participate in good faith, the court, upon motion or its own initiative, *may* take any action authorized by Rule 37(e).

Utah R. Civ. P. 16(d) (emphasis added).

III. Rule 26(d)(4) of the Utah Rules of Civil Procedure:

If a party fails to disclose or to supplement timely a disclosure or response to discovery, that party *may not* use the undisclosed witness, document or material at any hearing or trial unless the failure is harmless or the party shows good cause for the failure.

Utah R. Civ. P. 26(d)(4) (emphasis added).

IV. Utah Rule of Civil Procedure 37(e)(2):

Unless the court finds that the failure was substantially justified, the court, upon motion, may impose appropriate sanctions for the failure to follow its orders, including the following:

....

(e)(2)(B) prohibit the disobedient party from supporting or opposing designated claims or defenses or from introducing designated matters into evidence; ....

....

(e)(2)(D) dismiss all or part of the action, strike all or party of the pleadings, or render judgment by default on all or part of the action;

.....

Utah R. Civ. P. 37(e)(2)(2014).<sup>1</sup>

V. Utah R. Civ. P. 37(h)(2014):

If a party fails to disclose a witness, document or other material as required by Rule 26(a) or Rule 26(d)(1) . . . that party *shall not* be permitted to use the witness, document or other material at any hearing unless the failure to disclose is harmless or the party shows good cause for the failure to disclose.

Utah R. Civ. P. 37(h)(2014) (emphasis added.)

### **STATEMENT OF THE CASE**

#### *Nature of the Case*

This is a medical malpractice case asserted by Ms. Baumann against Dr. Tayler and Kroger alleging they mis-prescribed blood pressure medication and caused her to suffer a hypotensive injury on February 4, 2007. R. 7-10.

#### *Course of Proceedings*

1. Ms. Baumann commenced this lawsuit by filing a Complaint on February 27, 2013, in the Fourth Judicial Court, State of Utah. R. 1-13.
2. In the trial court Ms. Baumann never made Rule 26(a)(4)(A) expert disclosures as necessary to state a *prima facie* case of medical malpractice against Dr.

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<sup>1</sup> On May 1, 2015, Rule 37 was renumbered and the wording of some of the permissible sanctions changed. The version of Rule 37 in effect prior to May 1, 2015 is quoted above. The same language is now reflected in Rule 26(d)(4).

Tayler. R. 83-87; *Baumann*, 2016 UT App. 165, ¶¶ 1-11 (Aplt. Add. A); Aplt. Br. on Pet. for Cert. pp. 9-10 (Add. C hereto).

3. Ms. Baumann never asked the trial court to allow her to use expert testimony relating to Dr. Tayler to withstand summary judgment. R. 83-87; *Baumann*, 2016 UT App. 165, ¶¶ 1-11 (Aplt. Add. A); Aplt. Br. on Pet. for Cert., pp. 9-10 (Add. C hereto).

4. On September 11, 2014, after the time to disclose experts and conclude discovery had expired, Dr. Tayler filed a Motion for Summary Judgment on the ground that Ms. Baumann could not make a *prima facie* case of medical malpractice against him because she had failed to make expert disclosures. R. 96-142.

#### *Disposition in the Lower Courts*

1. The Honorable Fred D. Howard of the Fourth Judicial District Court granted summary judgment and dismissed Ms. Baumann's claims against Dr. Tayler. R. 526-529.

2. Ms. Baumann appealed, arguing to the Utah Court of Appeals that the trial court erred in granting summary judgment because it abused its discretion by declining to permit her to make late expert disclosures. R. 531; Aplt. Br. on Pet. for Cert. pp. 1-2, 12-18 (Add. C).

3. With respect to Dr. Tayler, the Utah Court of Appeals affirmed the trial court's grant of summary judgment because Ms. Baumann did not preserve the issue for appeal given that she never asked the trial court to allow expert testimony against Dr. Tayler. *Baumann*, 2016 UT App. 165, ¶¶ 1-11. (Aplt. Add. A).

4. Ms. Baumann Petitioned this Court for a Writ of Certiorari, which was granted on the issue regarding “determination of the appropriate sanction for Petitioner’s failure to timely disclose expert testimony *with respect to Kroger Company.*” Order Granting Pet. for Writ of Cert. p. 1, Oct. 31, 2016 (emphasis added) (Add. A hereto).

*Statement of Facts*

1. Ms. Baumann’s Complaint asserts one claim of medical malpractice against Dr. Tayler for care that was provided to her in 2007. R. 5-7.

2. On March 7, 2014, Ms. Baumann signed and approved a Stipulation for Additional Time to Conduct Standard Discovery. R. 102, 87-84.

3. Pursuant to this Stipulation, Ms. Baumann agreed that she would serve her Rule 26(a)(4)(A) expert disclosures by no later than June 6, 2014 and that all discovery would be completed by no later than September 5, 2014. R. 86, 104.

4. On September 11, 2014, after the time to disclose experts and complete discovery had expired, Dr. Tayler and Kroger jointly filed a Motion for Summary Judgment on the ground that Ms. Baumann could not make a *prima facie* case of medical malpractice because she had failed to make expert disclosures. R. 96-97.

5. Ms. Baumann attempted to make late disclosures as to Kroger, but the trial court did not allow her to do so. R. 350-384, 391-395, 526-528.

6. Ms. Baumann did not make, and did not attempt to make, any expert disclosures as to Dr. Tayler. *Baumann*, 2016 UT App. 165, ¶¶ 1-11 n. 6 (Aplt. Add. A); Aplt. Br. on Pet. for Cert. pp. 9-10 (Add. C hereto).

7. Ms. Baumann never asked the trial court to decide whether she could make late expert disclosures as to Dr. Tayler. *Baumann*, 2016 UT App. 165, ¶¶ 1-11 n. 6 (Aplt. Add. A); Aplt. Br. on Pet. for Cert. pp. 9-10 (Add. C hereto).

8. Accordingly, the trial court granted the Motion for Summary Judgment and dismissed Ms. Baumann's claims against Dr. Tayler with prejudice. R. 526-527.

9. Ms. Baumann appealed, arguing to the Utah Court of Appeals that by declining to permit her to disclose an additional expert report the trial court abused its discretion under Rules 16(d), 26(d)(4) and 37(h) of the Utah Rules of Civil Procedure and the decision of *Coroles v. State*, 2016 UT 48, ¶¶ 20-23, 349 P.3d 739; Aplt. Br. on Pet. for Cert. pp. 1-2, 13-18 (Add. C hereto).

10. On appeal Ms. Baumann conceded that she never submitted expert disclosures, reports or testimony as necessary to support a *prima facie* case of medical malpractice against Dr. Tayler during the trial court proceedings. *Baumann*, 2016 UT App. 165, ¶¶ 1-11 n. 6 (Aplt. Add. A); Aplt. Br. for Pet. for Cert. pp. 9-10 (Add. C hereto).

11. As to Dr. Tayler, the Utah Court of Appeals affirmed the trial court's grant of summary judgment because Ms. Baumann did not preserve the issue for appeal, stating: "Baumann's argument as to any expert report applicable to Dr. Tayler was not preserved in the district court, and we therefore do not consider it." *Baumann*, 2016 UT App. 165, ¶ 23 (Aplt. Add. A).



12. Ms. Baumann petitioned this Court for a Writ of Certiorari asking that it reverse the decision of the Utah Court of Appeals affirming the trial court's grant of summary judgment. Aplt. Br. on Pet. for Cert. (Add. C hereto).

13. In her appellate brief seeking Writ of Certiorari, Ms. Baumann confirmed that she never served or filed an expert report applicable to her claims against Dr. Tayler. Aplt. Br. on Pet. for Cert. p. 10 (Add. C hereto).

14. Nevertheless, this Court granted Ms. Baumann's Petition for Writ of Certiorari "as to the following issues(s):"

1. Whether the court of appeals erred in concluding 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 expert testimony *with respect to Respondent Kroger Company*.
2. Whether the court of appeals erred in concluding the district court did not abuse its discretion in precluding Petitioner from using expert witness testimony to contest summary judgment.

Order Granting Pet. for Writ of Cert. p. 1, Oct. 31, 2016 (emphasis added)  
(Add. A hereto).

15. Ms. Baumann again concedes in her present brief to this Court that she "did not serve or file a separate expert report applicable to the alleged breaches and failures by Dr. Tayler." Aplt. Br. p. 10.

### **SUMMARY OF ARGUMENT**

There are two separate respondents in this case: Kroger and Dr. Tayler. The trial court proceedings and the appellate issues differ as to both of them. Ms. Baumann *never* made, and *never* asked the trial court to allow, any expert testimony as to Dr. Tayler.

*Baumann*, 2016 UT App. 165, ¶¶ 1-11 & n.6. (Aplt. Add. A). Ms. Baumann did, however, try to make late expert disclosures as Kroger, but the trial court did not allow her to do so. R. 350-384, 391-395, 526-528. Accordingly, with respect to Dr. Tayler, Ms. Baumann did not preserve for appeal the issue of whether she should have been able to submit untimely expert testimony to oppose summary judgment. This is because she did not ever proffer, or try to proffer, expert testimony in the trial court against Dr. Tayler to withstand summary judgment. Accordingly, Ms. Baumann did not preserve the issue for appeal with respect to Dr. Tayler and as such this Court should not consider it.

Even if Ms. Baumann's issue on appeal as to Dr. Tayler had been preserved and it were somehow appropriate for this Court to entertain it, Rules 26(d)(4) and 34(h) have no application to the analysis as to Dr. Tayler. The discretionary sanctions set forth in these rules apply only when the party seeks to *use* a previously undisclosed expert. In this case, Ms. Baumann never tried to do so.

The trial court appropriately applied Utah law as to Dr. Tayler. Ms. Baumann presented no expert testimony before the trial court to oppose Dr. Tayler's Motion for Summary Judgment. Without expert testimony, Ms. Baumann could not, as a matter of law, state a *prima facie* of medical malpractice against Dr. Tayler. The trial court thus correctly granted summary judgment in favor of Dr. Tayler.

### ARGUMENT

A. *The issues raised on appeal are not preserved as to Dr. Tayler.*

Utah appellate courts generally "will not consider an issue on appeal unless it has been preserved." *Patterson v. Patterson*, 2011 UT 68, ¶ 12, 266 P.3d 828. To "preserve

an issue for appeal, the party asserting error must (1) specifically raise the issue; (2) ‘in a timely manner,’ and (3) support the claim with ‘evidence and relevant legal authority.’” *Salt Lake City Corp. v. Jordan River Restoration Network*, 2012 UT 84, ¶ 27, 299 P.3d 990 (quoting *Donjuan v. McDermott*, 2011 UT 72, ¶ 20, 266 P.3d 839). In other words, an issue is preserved for appeal when it has been “presented to the trial court in such a way that the trial court has an opportunity to rule on [it].” *In Re Adoption of Baby E.Z.*, 2011 UT 38, ¶ 25, 266 P.3d 702.

The rule of preservation gives the trial court “an opportunity to address the claimed error, and if appropriate, correct it prior to an appeal.” *Salt Lake City Corp. v. Jordan River Restoration Network*, 2012 UT 84, ¶ 28, 299 P.3d 990. Further, the Utah Rules of Appellate Procedure provide that “[t]he brief of the appellant shall contain . . . a statement of the grounds for seeking review of an issue not preserved in the trial court.” Utah R. App. P. 24(a). Baumann’s brief provides no such statement to this court.<sup>2</sup> Aplt. Br. (Add. B hereto).

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<sup>2</sup> Baumann argues generally that exceptional circumstances exist that somehow allow her to avoid the rule of issue preservation because she was *pro se* and “did not understand her obligations.” Aplt. Br. 23. This is a far cry from an exceptional circumstance. Additionally, while *pro se* appellants are entitled to “every consideration that may reasonably be indulged . . . [a]s a general rule, a party who represents [herself] will be held to the same standard of knowledge and practice as any qualified member of the bar.” *Jacob v. Cross*, 2012 UT App. 190, ¶ 4, 283 P.3d 539 (per curiam); *see also Baumann*, 2016 UT App. 165, ¶¶ 3-8 n.7.

Although inapplicable to the analysis, Ms. Baumann’s assertion that there would be no cognizable injury by reversal is incorrect. This is an old case. There would be prejudice to Dr. Tayler. Ms. Baumann’s original claim arose in 2007—ten years ago. R. 1-13. She filed a second suit under Utah’s savings statute. *Baumann*, 2016 UT App 165 ¶ 16, 381 P.3d 1135, 1140. Such protracted litigation is expensive and imposes financial

It is uncontroverted that Ms. Baumann did not seek to use any expert witness material against Dr. Tayler in the trial court proceedings. R. 83-87; Aplt. Br. on Pet. for Cert., pp. 9-10 (Add. B); Aplt. Br. p. 10; *Baumann*, 2016 UT App. 165, ¶¶ 1-11, 23. Ms. Baumann did not preserve for appeal the issue of whether she should have been able to submit an expert testimony in the trial court, timely or otherwise. *Baumann*, 2016 UT App. 165, ¶¶ 1-11. Specifically, she never made expert disclosures as to Dr. Tayler in the trial court, she never asked the trial court for additional time to do so, and she never presented any expert witness testimony or information against Dr. Tayler before, at or after the summary judgment hearing. Ms. Baumann never asked the trial court to decide whether she could submit an expert report or testimony against Dr. Tayler to avoid summary judgment. R. 83-87; Aplt. Br. on Pet. for Cert., pp. 9-10 (Add. C hereto); *Baumann*, 2016 UT App. 165, ¶¶ 1-11, 23. Indeed, she concedes this fact again in this present appeal. Aplt. Br. p. 10.

Ms. Baumann never proffered an expert against Dr. Tayler in the trial court, and thus the trial court did not exclude expert testimony against Dr. Tayler. Because Ms. Baumann never asked the trial court to allow an expert against Dr. Tayler, the trial court did not exclude an expert against Dr. Tayler – under any rule. The sanctions of Rules 16, 26 and 37 were never applied with respect to Dr. Tayler; the trial court never had to

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and emotional burdens on the defendant while it is pending. With the passage of time, evidence is lost, memories fade and witnesses disappear, which certainly disadvanges Dr. Tayler's defense.

exercise discretion under Rules 16, 26 and 37 as to *whether* to exclude expert testimony against Dr. Tayler because Ms. Baumann never *asked* it to allow an expert against Dr. Tayler.

Rules 16, 26 and 37 of the Utah Rules of Civil Procedure address sanctions the trial court may impose at its discretion for party's failure to make timely expert disclosures. This law applies when a party seeks to *use* a previously undisclosed witnesses, documents or other materials at a hearing or trial. Utah R. Civ. P. 16(d), 26(d)(4) & 37(h). With respect to Dr. Tayler, there is no analysis to be made under these rules because Ms. Baumann made *no* expert disclosures and did not try to use expert testimony against Dr. Tayler in the trial court. These rules accordingly have no application as to Dr. Tayler.

*B. Even if Ms. Baumann had preserved issues re: expert testimony against Dr. Tayler, the two-part analysis of Rules 26 and 37 have no application as to Dr. Tayler.*

The plain language of Rule 26(a) requires a party disclosing an expert witness “to submit a written report that contains specific information, such as the expert’s qualifications and the basis for the substance of the expert’s opinion.”<sup>3</sup> Utah R. Civ. P. 26(a)(3)(B); *accord Townhomes at Pointe Meadows Owners Ass’n v. Pointe Meadows*

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<sup>3</sup> A scheduling order memorializing the *timing* requirements of Rule 26 does not magically remove the *disclosure* requirements of Rule 26. If that were the case, the disclosure obligations of Rule 26 would never apply. Thus, if this Court adopts Ms. Baumann’s position, trial judges would never apply the mandatory exclusionary sanction set forth in Rule 26(d). This would be contrary to the explicit intent of the advisory committee in creating this sanction.



*Townhomes, LLC*, 2014 UT App. 52, ¶ 13, 329 P.3d 814. “If a party fails to disclose or to supplement timely a disclosure or response to discovery, that party may not use the undisclosed witness, document or material at any hearing or trial unless the failure is harmless or the party shows good cause for the failure.” Utah R. Civ. P. 26(d)(4).

Similarly, Rule 37(h) provides that “[i]f a party failed to disclose a witness, document or other material...as required by Rule 26(d), that party shall not be permitted to use the witness, document or other material at any hearing unless the failure to disclose is harmless or the party shows good cause for the failure to disclose.” Utah R. Civ. P. 37(h).

The two-part analysis of Rules 26(d)(4) and 37(h) only requires a party to show that a failure to disclose a witness, document or other material is harmless or that good cause exists for the failure to disclose when that party seeks to *use* a previously undisclosed witness, document or other material at a hearing or trial. In this case, Ms. Baumann did not ask the trial court to use previously undisclosed expert information at any time in opposition to Dr. Tayler’s Motion for Summary Judgment. To the contrary, Ms. Baumann admits in her Brief that she has never served or filed expert reports related to her claims against Dr. Tayler. Aplt. Br. p. 10; *accord* R. 351-383. Because Ms. Baumann did not fail to disclose expert testimony and then later seek to use it to oppose Dr. Tayler’s Motion for Summary Judgment, there was no reason for the district court to do the two-part analysis under Rules 26(d)(4) or 37(h), i.e., whether a failure was harmless or good cause existed for the failure to disclose. These rules have no application as to Dr. Tayler and the decision of the district court should be affirmed.

C. *The Coroles v. State Opinion is Unavailing.*

Ms. Baumann nevertheless argues that under *Coroles v. State*, 2015 UT 48 ¶ 23, 349 P.3d 739, 746, the trial court should have applied Rule 16(d), not rule 26(d)(4) of the Utah Rules of Civil Procedure and that it abused its discretion in failing to do so. It is nonsensical to respond to this contention as it relates to Dr. Tayler because the trial court did not preclude any expert testimony against Dr. Tayler under these rules, as discussed at points A & B, *supra*. Indeed, Ms. Baumann's brief does not really even discuss or argue this issue as to Dr. Tayler. *See* Aplt. Br. p. 10.

That said, *Coroles* has no application to this appeal against Dr. Tayler. In *Coroles*, the plaintiff complied with the applicable scheduling order: the plaintiff served expert witness designations on the last day allowed by the case's scheduling order. *Id.* at 2015 UT 48 ¶ 5. After the expert discovery cutoff, the trial court struck plaintiff's experts because plaintiff's counsel improperly provided them with confidential information from the prelitigation panel process. When plaintiff tried to designate additional experts, the court struck them as being untimely, because the deadline for disclosing expert witnesses had passed. The Utah Supreme Court found that this was an abuse of discretion, finding "rule 16(d) is applied when evidence is produced late under the scheduling order, while rule 37(h) [now 26(d)] is applied when the evidence *is not disclosed at all.*" *Coroles v. State*, 2015 UT 48 ¶ 23, 349 P.3d 739, 746 (emphasis added).

The *Coroles* decision is consistent with the holding in *Boice ex re. Boice v. Marble*, 1999 UT 71, 982 P2d 565. In that case, a plaintiff in a medical malpractice case designated his expert witnesses by the deadline. After the deadline, the plaintiff tried to

substitute one of his experts due to that expert's withdrawal from the case. The district court refused to allow the substitution, because it would have occurred after the expert witness disclosure deadline. On appeal, the Utah Supreme Court found that the district court abused its discretion, because the plaintiff "had obeyed the scheduling order" and was only forced to try to substitute his expert because of "circumstances beyond his control." *Boice*, 1999 UT 71, ¶ 27.

In contrast, the plaintiff in *Sleepy Holdings LLC v. Mountain West Title*, 2016 UT App. 62, 370 P. 3d 963, never made disclosures regarding its claimed damages by the discovery cutoff. Instead, more than a year after the discovery cutoff date, plaintiff attempted to supplement its disclosures with damages information. The district court struck these disclosures under Rule 26(a) and (e), and ultimately granted summary judgment in favor of defendants. On appeal, the Utah Court of Appeals found that, because plaintiffs failed to make disclosures by the discovery deadlines, the mandatory exclusion sanction of Rule 26, not the more discretionary sanctions of Rule 16, applied. The court noted that "[t]hough the district court could have reopened fact discovery to allow [further discovery on the damages issue], the court was not obligated to do so." *Sleepy Holdings*, 2016 UT App. 62 ¶ 27 (citing *Bodell Construction Co. v. Robbins*, 2009 UT 52, 215 P.3d 933).

Both the *Coroles* and *Boice* plaintiffs made their expert disclosures by the required deadlines. Therefore, they did not fail to disclose experts. In both cases, plaintiffs sought to designate new experts after the cutoff due to circumstances beyond their control. In contrast, and like the plaintiff in *Sleepy Holdings*, here, Ms. Baumann did not serve her

expert disclosures as to Dr. Tayler (or Kroger) within the timeframe allotted by the Stipulation. Indeed, she never made any expert disclosures at all as to Dr. Tayler. *Baumann*, 2016 UT App. 165, ¶¶ 1-11, 23 (Aplt. Add. A); Aplt. Br. on Petition for Cert. pp. 9-10 (Add. C hereto); Aplt Br. p. 10.

On appeal, Ms. Baumann argues that she did not intend to miss the deadline. This argument is belied by Ms. Baumann's admission at the hearing on Appellees' joint Motion for Summary Judgment that she did not designate experts so that she could save money. Ms. Baumann further contends that she did not understand the implications of her decision not to designate experts in support of her claim, because she was representing herself.

Here, the effect of Ms. Baumann's failure to disclose expert testimony is dismissal of her case. The Supreme Court in *Coroles* cautions that "where exclusion of an expert is tantamount to the dismissal of a lawsuit, as is the case here, the district court should exercise restraint in choosing this grave step rather than a lesser sanction." *Coroles*, 2015 UT 48 ¶ 29, 349 P.3d 739, 747. Under the circumstances of *Coroles*, where the plaintiff did comply with the original scheduling order, such a sanction would be a "grave step." In contrast, here, where Ms. Baumann failed to comply with the discovery deadlines (as the plaintiff did in *Sleepy Holdings*), the trial court correctly applied the mandatory sanction.<sup>4</sup>

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<sup>4</sup> That excluding Ms. Baumann's expert testimony results in dismissal of her case is not the result of the District Court enforcing Rule 26; rather, it is a function of the case law applicable to this particular type of case – medical malpractice. One could imagine other evidence/witness exclusion scenarios contemplated by the rules that would not

Ms. Baumann contends that the district court should have applied the more permissive standard set forth in Rule 16(d), instead of the mandatory standard of Rule 26(d)(4), in its decision to preclude Ms. Baumann from using any expert witness testimony to oppose Dr. Tayler's Motion for Summary Judgment. First, this argument doesn't apply to Dr. Tayler because the trial court never precluded Ms. Baumann from using expert testimony. Aplt. Br. 15-19, 23.

Essentially, her argument is that anytime there is a case management order establishing case deadlines, the consequences of failing to make disclosures under Rule 26 do not apply. This position is contravened by the history and evolution of the case management/disclosure requirements of the Rules.

As noted by the Court of Appeals, such a result was not what the Utah Supreme Court's advisory committee on the Utah Rules of Civil Procedure intended. When it amended Rule 26 in 2011, the advisory committee explained at length the intent of requiring parties to make early and complete disclosures—to expedite resolution of cases, and allow triers of fact to resolve cases on their merits. While the advisory committee acknowledged that the automatic deadlines outlined in Rule 26, “as with other discovery rules . . . can be altered by stipulation of the parties or order of the

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necessarily dispense with a plaintiff's entire case. Moreover, Rule 26 does not make any exceptions for exclusions that have that effect. Ms. Baumann is essentially asking the court to create one in cases where exclusion has the effect of dismissal of the case. Such an outcome-based test would create a slippery slope for trial judges enforcing the rule—forcing them to decide in each instance what sanction is too extreme.



court,” the committee did not then say that when this occurs, Rule 16, rather than Rule 26, would apply to any failures to disclose. (Add. D attached). Rather, the advisory committee further explained that the intended effect of the mandatory sanction set forth in Rule 26(d) was to create “a powerful incentive to make complete disclosures.” *See Baumann*, 2016 UT App. 165 ¶ 15. Finally, the committee stated that such an incentive can only happen “if trial courts hold parties to this standard. Accordingly, although a trial court retains discretion to determine how properly to address this issue in a given case, the usual and expected result should be exclusion of the evidence.” *Id.*

*D. The trial court correctly granted summary judgment as to Dr. Tayler.*

Ms. Baumann’s Complaint alleges a claim of medical malpractice against Dr. Tayler. In a medical malpractice case, summary judgment may be granted if a plaintiff fails to present *prima facie* evidence of “the standard of care by which the [health care provider]’s conduct is to be measured.” *Dikeou v. Osborn*, 881 P.2d 943, 946 (Utah Ct. App. 1994) (citation and internal quotation marks omitted); *see also De Adder v. Intermountain Healthcare, Inc.*, 2013 UT App. 173, ¶ 25, 308 P.3d 543, 553; *Jensen v. IHC Hosps., Inc.*, 2003 UT 51, ¶ 96, 82 P.3d 1076.

To prove medical malpractice, a plaintiff who must establish: (1) the standard of care by which a healthcare provider’s conduct is to be measured; (2) the defendant’s breach of that standard; and (3) that such departure was the proximate cause of injury to the plaintiff. *Robb v. Anderton*, 863 P.2d 1322, 1327 (Utah Ct. App. 1993); *Chadwick v. Nielsen*, 763 P.2d 817, 821 (Utah Ct. App. 1988). Each of these elements must be established through competent expert testimony to withstand summary judgment.

*Jensen*, 2003 UT 51, ¶ 96; *Dalley v. Utah Valley Reg'l Med. Ctr.*, 791 P.2d 193, 195 (Utah 1990); *Robb*, 863 P.2d at 1325; *Chadwick*, 763 P.2d 821. Summary judgment appropriate if a plaintiff fails to present prima facie evidence of "the standard of care by which the [health care provider]'s conduct is to be measured." *Jensen*, 2003 UT 51, ¶ 96.

Without expert testimony against Dr. Tayler, Ms. Baumann could not, as a matter of law, state a *prima facie* claim of medical malpractice against Dr. Tayler, and summary judgment was correct. In this case, the trial court correctly reached that decision. The time to conduct fact and expert discovery had fully expired and the only remaining procedural step for the parties was to have a trial.<sup>5</sup> Because Ms. Baumann failed to make any expert disclosures related to her claims against Dr. Tayler, Ms. Baumann could not make a *prima facie* case for her claims of medical malpractice as a matter of law. The Order Granting Defendants' Motion for Summary Judgment and Order of Final Judgment states:

...that in some healthcare malpractice cases, the applicable standard of care, and whether a breach of that standard of care occurred and proximately caused a claimant's injuries, may be within the common knowledge of laypersons. In this case, however, [Ms. Baumann's] claims are based on alleged overmedication of blood pressure medication, and what neurological or other biological effects that blood pressure

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<sup>5</sup> Ms. Baumann tries to take issue with the fact that no Certificate of Readiness for Trial was filed, but this is not a significant fact. There is no reason, or obligation, for the parties to certify the case for trial with dispositive motions pending. Further, according to plaintiff's logic, as long as there is no trial date set the court can just extend deadlines forever. This would render the Utah Rules of Civil Procedure irrelevant. It would also result in disincentive to make timely disclosures and gamesmanship, which is the opposite of the intent of the rules.

medications may have, are not within the common knowledge of laypersons. The Court, therefore, finds that expert testimony is required in this case to set forth the applicable standards of care and whether any breach of those standards of care occurred and proximately caused [Ms. Baumann's] injuries. Consequently, [Ms. Baumann], having failed to make expert disclosures required by the Stipulation for Additional Time to Conduct Standard Discovery and Rule 26 of the Utah Rules of Civil Procedure, cannot make a *prima facie* case for her healthcare malpractice claims; viz., that the medical standard of care was breached, that the pharmacy standard of care was breached, or that any breach of a standard of care for a health care or pharmacy provider proximately caused injury to [Ms. Baumann], each of which must be established by expert testimony.

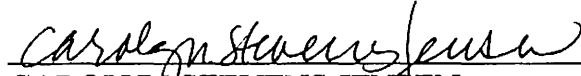
R. 526-527. Accordingly, the trial court granted the Motion for Summary Judgment and dismissed Ms. Baumann's claims with prejudice correctly as a matter of law.

### CONCLUSION

On appeal, Ms. Baumann seeks review of an issue that was never presented to the trial court. Ms. Baumann did not present any expert information relating to her claims against Dr. Tayler at any time in opposition to the Motion for Summary Judgment. Under these facts, analysis under Rules 16, 26 & 37 of the Utah Rules of Civil Procedure have no application as to Dr. Tayler and should not be considered with respect to Tayler. There is absolutely no basis for this Court to entertain Ms. Baumann's unpreserved arguments against Dr. Tayler, and there is no basis for reversal.

DATED this 17<sup>th</sup> day of January, 2017.

**FRANKENBURG JENSEN**



CAROLYN STEVENS JENSEN

JENNIFER M. BRENNAN

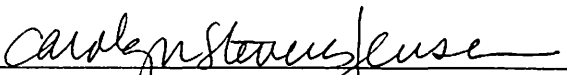
Attorneys for Defendant/Appellee Gregory P.  
Tayler, M.D.

**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 26(f)(1)(c), Utah Rules of Appellate Procedure, I hereby certify that this Brief complies with the type-volume limitation provided limitation provided by Rule 26(f)(1)(a) of the Utah Rules of Appellate Procedure. This brief contains 6,553 words.

DATED this 1<sup>st</sup> day of January, 2017.

**FRANKENBURG JENSEN**

  
\_\_\_\_\_  
CAROLYN STEVENS JENSEN  
JENNIFER M. BRENNAN  
Attorneys for Defendant/Appellee Gregory P.  
Tayler, M.D.



**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the attached **BRIEF OF DEFENDANT/APPELLEE GREGORY P. TAYLER, M.D.**, including all Addendums, and a CD containing a PDF copy, in Case No. 20150078-CA before the Utah Supreme Court was served upon the parties listed below by U. S. Mail on the 17<sup>th</sup> day of January, 2017.

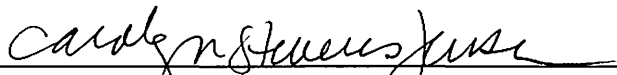
**Counsel for Plaintiff**

Gregory W. Stevens  
2825 E. Cottonwood Parkway  
Cottonwood Corporate Center, Suite 500  
Salt Lake City, Utah 84121-7060  
Email: [utlaw@aol.com](mailto:utlaw@aol.com)

**Counsel for Defendant The Kroger Co. dba Smith's Pharmacy**

Todd C. Hilbig  
Andrea M. Keysar  
MORGAN, MINNOCK, RICE & JAMES, L.C.  
136 South Main Street, 8<sup>th</sup> Floor  
Salt Lake City, Utah 84101  
[thilbig@mmrj.com](mailto:thilbig@mmrj.com)  
[akeysar@mmrj.com](mailto:akeysar@mmrj.com)

**FRANKENBURG JENSEN**

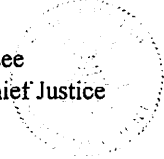
  
CAROLYN STEVENS JENSEN  
JENNIFER M. BRENNAN  
Attorneys for Defendant/Appellee Gregory P.  
Tayler, M.D.

**ADDENDUM A**  
**(Order Granting Petition for Writ of**  
**Certiorari)**

The Order of the Court is stated below:

Dated: October 31, 2016  
03:18:40 PM

/s/ Thomas R. Lee  
Associate Chief Justice



**IN THE SUPREME COURT OF THE STATE OF UTAH**

---00000---

Kari L. Baumann,  
Petitioner,

v.

The Kroger Company  
and Gregory P. Taylor, M.D.,  
Respondents.

**ORDER**

Appellate Case No. 20160686-SC

This matter is before the court upon a Petition for Writ of Certiorari, filed on August 22, 2016.

The Petition for Writ of Certiorari is granted as to the following issue(s):

1. Whether the court of appeals erred in concluding 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 expert testimony with respect to Respondent Kroger Company.
2. Whether the court of appeals erred in concluding the district court did not abuse its discretion in precluding Petitioner from using expert witnesses testimony to contest summary judgment.

A briefing schedule will be established hereafter. Pursuant to Rule 2 of the Rules of Appellate Procedure, the Court suspends the provision of Rule 26(a) that permits the parties to stipulate to an extension of time to submit their briefs on the merits. The parties shall not be permitted to stipulate to an extension. Additionally, absent extraordinary circumstances, no extensions will be granted by motion. The parties shall comply with the briefing schedule upon its issuance.

**End of Order - Signature at the Top of the First Page**

**ADDENDUM B**  
**(Appellant's Brief to Utah Court of Appeals)**

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**IN THE UTAH COURT OF APPEALS**

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KARI L. BAUMANN,

*Appellant,*

v.

Appellate Case No. 20150078

THE KROGER COMPANY dba  
SMITH'S PHARMACY #40063; and  
GREGORY P. TAYLER, M.D.,

*Appellees.*

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**BRIEF OF THE APPELLANT**

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On Appeal from the Fourth Judicial District Court,  
Wasatch County, Utah,  
The Honorable Fred D. Howard

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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*

Elliott J. Williams (#3483)  
John M. Zido (#10626)  
Williams & Hunt  
257 East 200 South, Suite 500  
P.O. Box 45678  
Salt Lake City, UT 84145-5678  
*Attorney for Appellee*  
*Gregory P. Tayler, M.D.*

Gregory W. Stevens (#7315)  
Cottonwood Corporate Center  
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*

**LIST OF PARTIES**

**APPELLANT**

Kari L. Baumann

**APPELLEES**

THE KROGER COMPANY dba SMITH'S PHARMACY #40063; and  
GREGORY P. TAYLER, M.D.

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## **STATEMENT OF JURISDICTION**

The Utah Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Ann. § 78A-4-103(2)(j).

## **STATEMENT OF THE ISSUES AND STANDARD OF REVIEW**

### ***1. FIRST ISSUE: EXCLUSION OF AN UNTIMELY EXPERT REPORT***

#### ***a. Issue Presented***

Whether the District Court abused its discretion under Rule 16(d) of the Utah Rules of Civil Procedure by excluding an untimely expert report submitted by a *pro se* party when the Court decided the Defendants-Appellees' motion for summary judgment.

#### ***b. Standard of Review***

This Court reviews the District Court's decision whether or not to sanction a party under Rule 16(d), as well as selection of the appropriate sanction, for an abuse of discretion. *Coroles v. State*, 2015 UT 48, ¶ 20, 2015 Utah LEXIS 148; *Boice ex rel. Boice v. Marble*, 1999 UT 71, ¶¶ 7, 11, 982 P.2d 565.

2. ***SECOND ISSUE: EXCLUSION OF EXPERT WITNESS REPORT THAT MS. BAUMANN FAILED TO DISCLOSE***

a. ***Issue Presented***

Whether the District Court abused its discretion under Rules 26(d)(4) and 37(h) of the Utah Rules of Civil Procedure by declining to permit Ms. Baumann to disclose an additional expert report.

b. ***Standard of Review***

This Court reviews the District Court's decision whether or not to sanction a party under Rules 26(d)(4) and 37(h) for an abuse of discretion. *R.O.A. General, Inc.*, 2015 UT App 124, ¶¶ 10-11, 327 P.3d 1233; *Welsh v. Hospital Corp. of Utah*, 2010 UT App 171, ¶ 19, 235 P.3d 791.

**CONSTITUTIONAL PROVISIONS, STATUTES OR RULES**

The following provisions are important to a proper resolution of this appeal:

A. **Utah R. Civ. P. 16(d)**

Rule 16(d) of the Utah Rules of Civil Procedure provides as follows:

If a party or a party's attorney fails to obey an order, if a party or a party's attorney fails to attend a conference, if a party or a party's attorney is substantially unprepared to participate in a conference, or if a party or a party's attorney fails to participate in good faith, the court, upon motion or its own initiative, may take any action authorized by Rule 37(e).

**B. Utah R. Civ. P. 26(d)(4)**

Rule 26(d)(4) of the Utah Rules of Civil Procedure provides as follows:

If a party fails to disclose or to supplement timely a disclosure or response to discovery, that party may not use the undisclosed witness, document or material at any hearing or trial unless the failure is harmless or the party shows good cause for the failure.

**C. Utah R. Civ. P. 37(h)**

Rule 37(h) of the Utah Rules of Civil Procedure previously provided as follows:<sup>1</sup>

If a party fails to disclose a witness, document or other material . . . as required by Rule 26(d), that party shall not be permitted to use the witness, document or other material at any hearing unless the failure to disclose is harmless or the party shows good cause for the failure to disclose.

**STATEMENT OF THE CASE**

**A. Nature of the Case, Course of Proceedings, and Disposition Below**

This is an appeal of a final judgment of the Fourth District Court. The Fourth District Court entered its Order Granting Defendants' Motion for Summary Judgment and Order of Final Judgment (attached as Addendum A) from which this

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<sup>1</sup> On May 1, 2015, Rule 37 was renumbered and the wording of some of the permissible sanctions changed. The version of Rule 37 in effect prior to May 1, 2015 is quoted above. See *Coroles v. State*, 2015 UT 48, ¶ 19 n. 3, 2015 Utah LEXIS 148. As noted above, the same language is now reflected in Rule 26(d)(4).

appeal is taken on January 29, 2015. Rec. at 524-520 (attached as Addendum A).<sup>2</sup> Ms. Baumann, through counsel, filed her Notice of Appeal on January 29, 2015. Rec. at 531.

## **B. Statement of Facts**

### ***Background***

This appeal involves Plaintiff-Appellant Kari Baumann, 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. ("Dr. Tayler" or "the Doctor"), collectively, Defendants-Appellees. This is an appeal from the District Court's grant of summary judgment in favor of the Pharmacy and Dr. Tayler in a medical malpractice action alleging breaches by each of them of the standards of care and duties that they owed to Ms. Baumann in the prescription and dispensing of medications.

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<sup>2</sup> The District Court appears to have numbered the record on appeal from the bottom up, as the record would have appeared in a hard-copy file. Accordingly, the page number for each document listed on the record index is the first page of each document, but the subsequent pages within each document are numbered, consistently, in reverse sequential order. Although not typical, the system applied by the District Court nonetheless permits citation to each document and to pages within each document.

### *Allegations Against Dr. Tayler*

Ms. Baumann, through counsel, filed her Complaint below on February 27, 2013. The Complaint alleges that, from June 2004 through September 2006, Dr. Tayler prescribed two medications for the treatment of Ms. Baumann's high blood pressure. Ms. Baumann filled the prescriptions at Smith's Pharmacy. Ms. Baumann's health insurer advised her by form letter to consult with her physician concerning a possible, less expensive alternative medication to one of the medications. Dr. Tayler renewed Ms. Baumann's prescription for one of the original medications and then also the alternative medication, but without discontinuing the prior prescription. Both prescriptions were prescribed in the highest available dose. Rec. at 11-10, ¶¶ 13-21. Dr. Tayler admitted in his Answer that he had prescribed the original medication and then "inadvertently" prescribed the duplicative medication that tripled her dosage. Rec. at 42, ¶ 9.

The Complaint also alleges that the duplicative prescriptions caused a sudden and substantial change in Ms. Baumann's anti-hypertensive regimen. Dr. Tayler also did not take Baumann's blood pressure or perform any other examination of his patient when deciding to renew her prescription for the original prescription or the alternative prescriptions; and did not do so until February 19, 2007, 15 days after Ms. Baumann suffered an acute anti-hypertensive event on February 4, 2007. Dr. Tayler did not inform Ms. Baumann that there were substantial and significant



risks in simultaneously prescribing duplicative anti-hypertensive drugs for her or that there were substantial and significant risks in prescribing these drugs in these dosages for her without checking blood pressure or doing a physical exam. Rec. at 10-9, ¶¶ 22-26.

### ***Allegations Against the Pharmacy***

The Complaint further alleges that, on January 18, 2007, Ms. Baumann arrived in person at Smith's Pharmacy, where employees of The Kroger Company simultaneously filled Dr. Tayler's duplicative prescriptions for her. Smith's Pharmacy had actual knowledge that the alternative medication was a "new" medication for her, as confirmed by the receipt for her purchase. Smith's Pharmacy also 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. Rec. at 9-8, ¶¶ 26-29.

### ***Ms. Baumann's Injuries Caused by the Over-Medication***

Soon after Ms. Baumann began taking the duplicative prescriptions as prescribed by Dr. Tayler and as instructed by Smith's Pharmacy, she collapsed in an acute hypotensive event on February 4, 2007. She lost consciousness, lost motor control and lost bladder and bowel control. Ms. Baumann was immediately taken to the Emergency Room at Heber Valley Hospital. The assessment of the ER

physician who discharged her from the ER was “hypotension due to over-medication.” Rec. at 8, 30-34; see also *Kari L. Baumann v. Michael J. Astrue*, 2:12-CV-00713-EJF, Memorandum Decision and Order, 194 Soc. Sec. Rep. Service 468, 2013 U.S. Dist. LEXIS 142135, \*4, 2013 WL 5435321 (D. Utah Sept. 30, 2013) at p. 3 (so finding).

Since her acute hypotensive event on February 4, 2007, Ms. Baumann has had persistent neurological impairments, including slurred speech, visual deficits, cognitive deficits and other physical impairments. On December 13, 2007, the Utah Department of Health entered its Final Agency Order, adopting the prior Recommended Decision of its Hearing Officer, who found that Ms. Baumann had been and was disabled within the meaning of 20 C.F.R. § 416.905 since the date of her acute hypotensive event on February 4, 2007. Rec. at 7, ¶¶ 35-36.

### ***Causes of Actions Asserted Below***

In her Complaint below, Ms. Baumann asserts a medical malpractice claim against Dr. Tayler for his alleged breach of the standard of care applicable to the prescription of medications; and a claim against Dr. Tayler based on his alleged failure to provide informed consent. Rec. at 7-5, ¶¶ 37-44.

Also in her Complaint below, Ms. Baumann asserts a malpractice claim against Smith’s Pharmacy based on its alleged breach of the standard of care expected of licensed pharmacists; a claim against Smiths’ Pharmacy that it violated

physician who discharged her from the ER was “hypotension due to over-medication.” Rec. at 8, 30-34; see also *Kari L. Baumann v. Michael J. Astrue*, 2:12-CV-00713-EJF, Memorandum Decision and Order, 194 Soc. Sec. Rep. Service 468, 2013 U.S. Dist. LEXIS 142135, \*4, 2013 WL 5435321 (D. Utah Sept. 30, 2013) at p. 3 (so finding).

Since her acute hypotensive event on February 4, 2007, Ms. Baumann has had persistent neurological impairments, including slurred speech, visual deficits, cognitive deficits and other physical impairments. On December 13, 2007, the Utah Department of Health entered its Final Agency Order, adopting the prior Recommended Decision of its Hearing Officer, who found that Ms. Baumann had been and was disabled within the meaning of 20 C.F.R. § 416.905 since the date of her acute hypotensive event on February 4, 2007. Rec. at 7, ¶¶ 35-36.

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Also in her Complaint below, Ms. Baumann asserts a malpractice claim against Smith’s Pharmacy based on its alleged breach of the standard of care expected of licensed pharmacists; a claim against Smiths’ Pharmacy that it violated

2014, Ms. Baumann filed a Statement Opposing Defendants' Motion for Summary Judgment. On October 8, 2014, the Doctor and the Pharmacy filed a joint Reply in Support of Motion for Summary Judgment and a Request to Submit for Decision and Request for Oral Argument. The Court set oral argument for November 17, 2014. Rec. at 97, 142, 152, 158; see also Rec. at 451, ¶¶ 2-5

On October 10, 2014, Ms. Baumann filed a second Memorandum in opposition to the Motion for Summary Judgment filed by the Doctor and the Pharmacy. By way of that second Memorandum, Ms. Baumann sought to introduce, among other documents, a decision by the Social Security Administration ("SSA") concerning the issue whether she was disabled, a transcript of the hearing before the Administrative Law Judge in that proceeding that included expert testimony and final decision of the SSA following a remand by the United States District Court for the District of Utah. See Rec. at 325-169. On November 4, 2014, the Doctor and the Pharmacy filed an additional Reply Memorandum and then, on November 7, 2014, an Amended Notice to Submit for Decision. Rec. at 346 and 350.

On November 12, 2014, five days before oral argument, 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.

The Court first conducted oral argument on the Motion for Summary Judgment on November 17, 2014. During the proceeding, Ms. Baumann sought permission from the Court to allow her husband to speak for her in light of her cognitive disabilities that include difficulty communicating, staying focused, staying on task and other issues. Counsel for Defendants-Appellees objected, the Court declined Ms. Baumann's request because her husband was not a licensed attorney, and the Court permitted her to retain counsel to represent her. Rec. at 519 [4:24-6:8] (transcript attached as Addendum D). The Court also ordered that any materials filed after October 8, 2014 (the date of the first Notice to Submit) would not be considered by the Court in deciding the Motion for Summary Judgment filed by Defendants-Appellees and that Ms. Baumann could have until January 5, 2015 to retain counsel. Rec. at 519 [8:17-9:16; 15:4-11; 10:7-11:18; and 19:6-11] (transcript attached as Addendum D). A written Order reflecting these decisions was then approved and entered by the Court on December 22, 2014. In that Order, the Court states that it would not consider any documents served or filed after October 8, 2014. Rec. at 401-400 (Order attached as Addendum C); see also Rec. at 450, ¶¶ 8-9.

The Court held the second hearing on the Motion for Summary Judgment filed by the Doctor and the Pharmacy on January 5, 2015. Ms. Baumann continued to represent herself *pro se*. During oral argument, Ms. Baumann argued, among other points, that the Court should decide summary judgment based on the 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. Ms. Baumann 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 B).

### ***The District Court's Decision***

At the close of that second hearing, the District Court granted summary judgment in favor of Dr. Tayler and Smith's Pharmacy. The District Court concluded that Ms. Baumann had failed to make an expert disclosure as required by the Stipulation for Additional Time to Conduct Standard Discovery and that there was no good cause for her failure to do so; and, therefore, that she was precluded by Rule 26(d)(4) of the Utah Rules of Civil Procedure using any undisclosed report. The Court further determined that Ms. Baumann's claims were based on standards of care and issues of proximate causation that were not within the common knowledge of laypersons. Therefore, the Court concluded, Ms. Baumann was unable to establish a *prima facie* case that the standards of care were breached or that any

breach proximately caused injury to her. Rec. at 528-27 (decision attached as Addendum A); see also Rec. at 486 [23:12-24:19] (transcript attached as Addendum B).

### **SUMMARY OF ARGUMENT**

This Court should vacate the judgment entered by the District Court and remand this case with instructions to the District Court, consistent with this Court's opinion in this appeal. The District Court clearly abused its discretion when it excluded an untimely expert report submitted by Ms. Baumann applicable to the Pharmacy. In so doing, the District Court applied Rule 26(d)(4) of the Utah Rules of Civil Procedure, but should have applied Rule 16(d) of the Utah Rules of Civil Procedure. If the Court had applied the appropriate legal standard, the extreme sanction of exclusion of the expert testimony would have been inappropriate. Likewise, the District Court clearly abused its discretion when it declined to consider any expert report filed by Ms. Baumann applicable to the Doctor. In so doing, the District Court again applied an erroneous legal standard, having failed to consider the complete lack of cognizable prejudice to either of the Defendants below that resulted from the late disclosure.

## ARGUMENT

### **I. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR WHEN IT EXCLUDED MS. BAUMANN'S UNTIMELY EXPERT REPORT APPLICABLE TO THE PHARMACY.**

The Utah Supreme Court's recent decision *Coroles v. State*, 2015 UT 48, 2015 Utah LEXIS 148, governs a proper resolution of this issue. In *Coroles*, the Court made clear that the more lenient standard set forth in Rule 16(d) of the Utah Rules of Civil Procedure, not the stricter standard set forth in Rule 37(h), applies when, as here, a part produces untimely discovery under a scheduling order. 2015 UT 48, ¶ 20. Specifically, the 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)).

In arriving at this conclusion, the Supreme Court noted that Rule 16 gives the district court "broad authority to manage a case." *Coroles*, 2015 UT 48, ¶ 19 (quoting *Boice*, 1999 UT 71, ¶ 8). Under this Rule, the Supreme 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)). The Supreme Court also stated that, if a party fails to obey a scheduling order establishing a discovery deadline, the district court "may take any action authorized



by Rule 37(e)” of the Utah Rules of Civil Procedure. *Coroles*, 2015 UT 48, ¶ 19 (quoting Utah R. Civ. P. 16(d)). The Supreme Court further noted that permissible sanctions for providing untimely discovery include “prohibit[ing] the disobedient party ... from introducing designated matters into evidence” or “order[ing] the party or the attorney to pay the reasonable expenses, including attorney fees, caused by the failure.” *Coroles*, 2015 UT 48, ¶ 19 (quoting Utah R. Civ. P. 37(e)(2)(B) and (E); and citing *Boice*, 1999 UT 71, ¶ 8 (“If a party fails to obey a date set under Rule 16, the court may sanction the offending party by excluding evidence the party intends to present.”)).

In reaching this conclusion, the Supreme Court in *Coroles* specifically repudiated this Court’s prior decisions to the extent that those cases suggest that Rule 37(h) should be applied when discovery is produced after a deadline set forth in a scheduling order. 2015 UT 48, ¶ 23 (citing and referring specifically to *Spafford v. Granite Credit Union*, 2011 UT App 401, ¶ 16, 266 P.3d 866 (reviewing the exclusion of an expert witness designated after the scheduling order deadline under the standard established in current rule 37(h)); *Brussow v. Webster*, 2011 UT App 193, ¶¶ 3-4, 258 P.3d 615 (same); *Lippman v. Coldwell Banker Residential Brokerage Co.*, 2010 UT App 89, at \*2 (same); and *Posner v. Equity Title Ins. Agency, Inc.*, 2009 UT App 347, ¶ 23, 222 P.3d 775 (same)).

The Supreme Court noted that the difference between the standard for sanctioning a party under Rule 16(d) and the standard for sanctioning a party under Rule 37(h) is meaningful. The Court pointed out that Rule 16(d) provides that a court “may” impose a sanction described in Rule 37(e) for a failure to abide by the scheduling order. By contrast, the Court noted, Rule 37(h) provides that, if a party fails to disclose a witness, the party “shall not” be permitted to use the witness “unless the failure to disclose is harmless or the party shows good cause for the failure to disclose.” *Coroles*, 2015 UT 48, ¶ 22. Thus, the Court added, Rule 16(d) leaves the decision whether to sanction a party to the district court’s broad discretion, while Rule 37(h) shifts the burden to the nondisclosing party to show why the evidence should not be excluded. *Coroles*, 2015 UT 48, ¶ 22.

It follows from all of this that the District Court committed reversible error when it excluded the untimely expert witness report submitted by Ms. Baumann. “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.*

It is equally clear that excluding the untimely expert report in the circumstances presented here would likewise be an abuse of discretion. Addressing the issue whether a Court should exclude expert testimony based on an untimely disclosure, the Supreme Court offered the following admonition in *Colores*:

[W]here the exclusion of an expert is tantamount to the dismissal of the lawsuit, as is the case here, the district court should exercise restraint in choosing this grave step rather than a lesser sanction.

*Colores*, 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 in nature and . . . should be employed only with caution and restraint.”). Relevant factors applicable here that counsel strongly in favor of not excluding the untimely expert report submitted by Ms. Baumann include the fact that she was representing herself *pro se*, that she had and has cognitive difficulties, that there is no evidence that she intentionally missed the applicable deadline, 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.

**II. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR WHEN IT DECLINED TO PERMIT MS. BAUMANN TO SUBMIT AN ADDITIONAL EXPERT REPORT APPLICABLE TO THE DOCTOR.**

The issue whether the District Court should permit Ms. Baumann to submit an additional expert report, applicable to the Doctor, is governed by Rule 26(d)(4) of the Utah

Rules of Civil Procedure. In light of this Court's decisions addressing Rule 37(h), it is clear that the District Court should be directed to do so.

Rules 26(d)(4) and 37(h) provides that the sanction of exclusion is mandatory unless the sanctioned party can show either that the failure to disclose was either justified or harmless. *R.O.A. General, Inc. v. Stewart Title Guaranty Co.*, 2015 UT App 124, ¶ 11, 327 P.3d 1233 (citations omitted); *see also Townhomes at Pointe Meadows Owners Ass'n v. Pointe Meadows Townhomes, LLC*, 2014 UT App 52, ¶ 14, 329 P.3d 815; *Welsh v. Hospital Corp. of Utah*, 2010 UT App 171, ¶ 10, 235 P.3d 791.<sup>3</sup> Thus, when a party has failed to file an expert report, "the proper inquiry is whether the district court abused its discretion in determining that the [party's] failure to disclose was not harmless and that good cause did not excuse its failure." *Pointe Meadows*, 2015 UT App 52, ¶ 14, *Welsh*, 2010 UT App 171, ¶ 10 (explaining that it may be an abuse of discretion for the trial court to exclude an expert report if, under the circumstances, "justice and fairness ... require that [the] court allow a party to designate witnesses ... after the court-imposed deadline for doing so has expired" (quoting *Boice*, 1999 UT 71, ¶ 10)).

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<sup>3</sup> In light of the Supreme Court's recent decision in *Colores*, this Court's decisions addressing the standard applicable to Rule 37(h), and by extension to the same language in Rule 26(d)(4), necessarily apply only to a failure to disclose and not to untimely disclosure under a scheduling order except to the extent that the principles may overlap.

In light of these principles, it is clear that the District Court here abused its discretion when it decided that Ms. Baumann could not rely on an expert report due to her failure to comply with Rule 26. In fact, the sole basis of the District Court's decision was that Ms. Baumann had did not establish good cause that excused her failure to file. The Court failed to consider and address the fact that there was no evidence of record that supported the conclusion that the failure to disclose was not harmless. In so doing, the Court plainly abused its discretion because the Court applied an erroneous legal standard. *E.g., Colores*, 2015 UT 48, ¶ 24; *Welsh*, 2010 UT App 171, ¶ 10.

Finally, in the end, a conclusion that the failure to disclose was not harmless and an additional expert report should be excluded would likewise constitute an abuse of discretion on the record before this Court. Again, as the Supreme Court stated in *Colores*, "the district court should exercise restraint in choosing this grave step rather than a lesser sanction," 2015 UT 48, ¶ 29. Likewise, as this Court stated in *Welsh*, "[e]xcluding a witness from testifying is . . . extreme in nature and . . . should be employed only with caution and restraint," 2010 UT App 171, ¶ 10. Here, as we note above, given that the case had not been certified for trial and no trial date had been set, there could be no cognizable prejudice except for the need for a new scheduling order and delay in the eventual trial date. As the Supreme Court made clear in *Colores*, such prejudice is insufficient to merit the extreme sanction of exclusion of a witness. *See Colores*, 2015 UT 48, ¶ 28.

## CONCLUSION

The Court should set aside the judgment entered by the District Court and instruct the District Court to establish a new discovery schedule that allows for completion of all fact discovery, the disclosure of expert witnesses by each party, disclosure of rebuttal experts if needed, time to conduct depositions of the experts if needed, and then a due date for dispositive motions if any.

Respectfully submitted this 27th day of May 2015:

/s/ Gregory W. Stevens  
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 4,349 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.

/s/ Gregory W. Stevens  
Gregory W. Stevens

**CERTIFICATE OF SERVICE**

I hereby certify that, this 27th day of May 2015, I served two copies each of the foregoing Brief of Appellant, including all Addenda, and a CD containing a PDF copy of the Brief and all Addenda, by Priority Mail, postage prepaid, on the following counsel:

John M. Zido, Esquire  
Williams & Hunt  
257 East 200 South, Suite 500  
P. O. Box 45678  
Salt Lake City, UT 84145-5678; and

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

/s/ Gregory W. Stevens  
Gregory W. Stevens



**ADDENDUM C**  
**(Appellant Brief on Petition for Certiorari)**

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**IN THE UTAH SUPREME COURT**

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KARI L. BAUMANN,

*Plaintiff / Appellant,*

v.

THE KROGER COMPANY and  
GREGORY P. TAYLER, M.D.,

*Defendants / Appellees.*

No. 20160686-SC

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**BRIEF OF THE APPELLANT**

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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, Esquire  
Jennifer M. Brennan, Esquire  
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*

Oral argument requested.

**LIST OF PARTIES**

**PLAINTIFF / APPELLANT / PETITIONER**

Kari L. Baumann

**DEFENDANTS / APPELLEES / RESPONDENTS**

The Kroger Company dba Smith's Pharmacy #40063; and  
Gregory P. Tayler, M.D.

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## **STATEMENT OF JURISDICTION**

The Utah Supreme Court has appellate jurisdiction over the opinion and judgment of the Utah Court of Appeals (attached as Addendum A) pursuant to Utah Code Ann. § 78A-3-102(3)(a). The Utah Court of Appeals entered its opinion from which this appeal is taken on July 29, 2016. The Utah Court of Appeals had jurisdiction over the underlying appeal to the Court of Appeal from the District Court pursuant to Utah Code Ann. § 78A-4-103(2)(j).

## **STATEMENT OF THE ISSUES**

### **A. Issues Presented**

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 Appellant's failure to timely disclose expert testimony.  
  
See *Baumann v. Kroger Co.*, 2016 UT App 165, ¶¶ 12, 18-21, 381 P.3d 1135; see also Rec. at 486 [15:1-18:3; 22:2-25; and 23:12-24:19] (Addendum B).
2. Whether the Court of Appeals erred in concluding that the District Court did not abuse its discretion in precluding Appellant from using an untimely expert report under Rule 26(d) to contest summary

judgment when it excluded the report based only on a finding that the failure to disclose was not justified.

See *Baumann v. Kroger Co.*, 2016 UT App 165, ¶ 18 n. 8, 381 P.3d 1135; see also Rec. at 486 [15:1-18:3; 22:2-25; and 23:12-24:19] (Addendum B).

**B. Standard of Review**

This Court reviews a court's decision whether to sanction a party under Rules 16(d) or 26(d)(4), as well as the selection of an appropriate sanction, for an abuse of discretion. *Coroles v. State*, 2015 UT 48, ¶ 20, 349 P.3d 739, 745, *Boice ex rel. Boice v. Marble*, 1999 UT 71, ¶ 8 & n. 3, 982 P.2d 565.

**CONSTITUTIONAL PROVISIONS, STATUTES, OR RULES**

The following provisions are important to a proper resolution of this appeal:

**A. Utah R. Civ. P. 16(d)**

Rule 16(d) of the Utah Rules of Civil Procedure provides as follows:

If a party or a party's attorney fails to obey an order, if a party or a party's attorney fails to attend a conference, if a party or a party's attorney is substantially unprepared to participate in a conference, or if a party or a party's attorney fails to participate in good faith, the court, upon motion or its own initiative, may take any action authorized by Rule 37(e).

**B. Utah R. Civ. P. 36(e)(2)(2014)**

Rule 37(e)(2) of the Utah Rules of Civil Procedure previously provided, in pertinent part, as follows:<sup>1</sup>

Unless the court finds that the failure was substantially justified, the court, upon motion, may impose appropriate sanctions for the failure to follow its orders, including the following:

(e)(2)(B) prohibit the disobedient party from supporting or opposing designated claims or defenses or from introducing designated matters into evidence; ....

(e)(2)(D) dismiss all or part of the action, strike all or part of the pleadings, or render judgment by default on all or part of the action;

**C. Utah R. Civ. P. 26(d)(4)**

Rule 26(d)(4) of the Utah Rules of Civil Procedure provides as follows:

If a party fails to disclose or to supplement timely a disclosure or response to discovery, that party may not use the undisclosed witness, document or material at any hearing or trial unless the failure is harmless or the party shows good cause for the failure.

**D. Utah R. Civ. P. 37(h)(2014)**

Rule 37(h) of the Utah Rules of Civil Procedure previously provided as follows:<sup>2</sup>

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<sup>1</sup> Rule 36(e)(2) was renumbered on May 1, 2015 as Rule 37(b).

<sup>2</sup> On May 1, 2015, Rule 37 was renumbered and the wording of some of the permissible sanctions changed. The version of Rule 37 in effect prior to May 1, 2015 is quoted above. See *Coroles v. State*, 2015 UT 48, ¶ 19 n. 3, 349 P.3d 739. (continued...)

If a party fails to disclose a witness, document or other material ... as required by Rule 26(d), that party shall not be permitted to use the witness, document or other material at any hearing unless the failure to disclose is harmless or the party shows good cause for the failure to disclose.

### **STATEMENT OF THE CASE**

#### **A. Nature of the Case, Course of Proceedings, and Disposition Below**

This case is before the Court on a Petition for Certiorari to the Utah Court of Appeals filed pursuant to Rule 45 of the Utah Rules of Appellate Procedure. Ms. Baumann, through counsel, had previously filed a timely Notice of Appeal from the District Court's Order Granting Defendants' Motion for Summary Judgment and Order of Final Judgment. Rec. at 524-520 (attached as Addendum B). The Utah Court of Appeals affirmed the District Court's grant of summary judgment in *Baumann v. Kroger Co.*, 2016 UT App 165, 381 P.3d 1135 (attached as Addendum A).

#### **B. Statement of Facts**

##### ***Background***

This case involves Plaintiff-Appellant Kari Baumann, 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.

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<sup>2</sup>(...continued)

As noted above, the same language is now reflected in Rule 26(d)(4).

(“Dr. Tayler” or “the Doctor”), collectively, Defendants-Appellees. The case is a medical malpractice action alleging breaches by the Pharmacy and the Doctor of the standards of care and duty that it owed to Ms. Baumann in the prescription and dispensing of medications.

*Allegations Against the Doctor*

Ms. Baumann, through counsel, filed her Complaint in the District Court on February 27, 2013. The Complaint alleges that, from June 2004 through September 2006, Dr. Tayler prescribed two medications for the treatment of Ms. Baumann’s high blood pressure. Ms. Baumann filled the prescriptions at Smith’s Pharmacy. Ms. Baumann’s health insurer advised her by form letter to consult with her physician concerning a possible, less expensive alternative medication to one of the medications. Dr. Tayler renewed Ms. Baumann’s prescription for one of the original medications and then also the alternative medication, but without discontinuing the prior prescription. Both prescriptions were prescribed in the highest available dose. Rec. at 11-10, ¶¶ 13-21. Dr. Tayler admitted in his Answer that he had prescribed the original medication and then “inadvertently” prescribed the duplicative medication that tripled her dosage. Rec. at 42, ¶ 9.

The Complaint also alleges that the duplicative prescriptions caused a sudden and substantial change in Ms. Baumann’s anti-hypertensive regimen. Dr. Tayler also did not take Baumann’s blood pressure or perform any other examination of his

patient when deciding to renew her prescription for the original prescription or the alternative prescriptions; and did not do so until February 19, 2007, 15 days after Ms. Baumann suffered an acute anti-hypertensive event on February 4, 2007. Dr. Tayler did not inform Ms. Baumann that there were substantial and significant risks in simultaneously prescribing duplicative anti-hypertensive drugs for her or that there were substantial and significant risks in prescribing these drugs in these dosages for her without checking blood pressure or doing a physical exam. Rec. at 10-9, ¶¶ 22-26.

#### *Allegations Against the Pharmacy*

The Complaint further alleges that, on January 18, 2007, Ms. Baumann arrived in person at Smith's Pharmacy, where employees of The Kroger Company simultaneously filled Dr. Tayler's duplicative prescriptions for her. Smith's Pharmacy had actual knowledge that the alternative medication was a "new" medication for her, as confirmed by the receipt for her purchase. Smith's Pharmacy also 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. Rec. at 9-8, ¶¶ 26-29.



***Ms. Baumann's Injuries Caused by the Over-Medication***

Soon after Ms. Baumann began taking the duplicative prescriptions as prescribed by Dr. Tayler and as instructed by Smith's Pharmacy, she collapsed in an acute hypotensive event on February 4, 2007. She lost consciousness, lost motor control and lost bladder and bowel control. Ms. Baumann was immediately taken to the Emergency Room at Heber Valley Hospital. The assessment of the ER physician who discharged her from the ER was "hypotension due to over-medication." Rec. at 8, 30-34; see also *Kari L. Baumann v. Michael J. Astrue*, 2:12-CV-00713-EJF, Memorandum Decision and Order, 194 Soc. Sec. Rep. Service 468, 2013 U.S. Dist. LEXIS 142135, \*4, 2013 WL 5435321 (D. Utah Sept. 30, 2013) at p. 3 (so finding).

Since her acute hypotensive event on February 4, 2007, Ms. Baumann has had persistent neurological impairments, including slurred speech, visual deficits, cognitive deficits and other physical impairments. On December 13, 2007, the Utah Department of Health entered its Final Agency Order, adopting the prior Recommended Decision of its Hearing Officer, who found that Ms. Baumann had been and was disabled within the meaning of 20 C.F.R. § 416.905 since the date of her acute hypotensive event on February 4, 2007. Rec. at 7, ¶¶ 35-36.

### ***Causes of Actions Asserted Below***

In her Complaint below, Ms. Baumann asserts a medical malpractice claim against Dr. Tayler for his alleged breach of the standard of care applicable to the prescription of medications; and a claim against Dr. Tayler based on his alleged failure to provide informed consent. Rec. at 7-5, ¶¶ 37-44.

Also in her Complaint below, Ms. Baumann asserts a malpractice claim against Smith's Pharmacy based on its alleged breach of the standard of care expected of licensed pharmacists; a claim against Smiths' Pharmacy that it violated Utah's Pharmacy Practice Act at § 58-17b-601(1)(a) and, in particular, Utah's Pharmacy Practice Act Rule R156-17b promulgated pursuant to the Act; and a claim against Smith's Pharmacy that it failed to comply with its undertaking of voluntarily-assumed duties and written assurance. Rec. at 5-2, ¶¶ 45-61.

### ***The Proceedings in the District Court***

The original Notice of Event Due Dates issued by the Court, reflecting the due dates set forth in Rule 26 of the Utah Rules of Civil Procedure, was filed by the Court on June 19, 2013. Rec. at 44. Pursuant to a Stipulation for Additional Time to Conduct Standard Discovery filed with the Court on March 7, 2014, counsel for Defendants-Appellees and Ms. Baumann, who was proceeding *pro se* at the time, agreed that the deadline for fact discovery would be May 30, 2014, that Ms. Baumann's expert disclosures were due by June 6, 2015, and that expert

discovery would be completed by September 5, 2014. Rec. at 87-86; and 452-51, ¶ 1. Rec. at 87-86; see also Rec. at 451, ¶ 6. No certificate of readiness for trial was ever filed and no trial date was ever set. See Rec. at 44 and 87.

On September 11, 2014, Dr. Taylor and Smith's Pharmacy filed a Joint Motion for Summary Judgment and supporting Memorandum. Rec. at 97, 142. The sole argument raised by Dr. Taylor and the Pharmacy in their supporting Memorandum was that, because of the lack of an expert, Ms. Baumann could not establish the applicable standards of care, a breach of those standards, and that the breach was the proximate cause of the injuries to Ms. Baumann. Rec. at 139. On September 29, 2014, Ms. Baumann filed a Statement Opposing Defendants' Motion for Summary Judgment. On October 8, 2014, Dr. Taylor and the Pharmacy filed a joint Reply in Support of Motion for Summary Judgment and a Request to Submit for Decision and Request for Oral Argument. The Court set oral argument for November 17, 2014. Rec. at 97, 142, 152, 158; see also Rec. at 451, ¶¶ 2-5

On October 10, 2014, Ms. Baumann filed a second Memorandum in opposition to the Motion for Summary Judgment filed by the Doctor and the Pharmacy. By way of that second Memorandum, Ms. Baumann sought to introduce, among other documents, a decision by the Social Security Administration ("SSA") concerning the issue whether she was disabled, a transcript of the hearing before the Administrative Law Judge in that proceeding that included expert testimony and

final decision of the SSA following a remand by the United States District Court for the District of Utah. See Rec. at 325-169. On November 4, 2014, the Doctor and the Pharmacy filed an additional Reply Memorandum and then, on November 7, 2014, an Amended Notice to Submit for Decision. Rec. at 346 and 350.

On November 12, 2014, five days before oral argument, 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.

The Court first conducted oral argument on the Motion for Summary Judgment on November 17, 2014. During the proceeding, Ms. Baumann sought permission from the Court to allow her husband to speak for her in light of her cognitive disabilities that include difficulty communicating, staying focused, staying on task and other issues. Counsel for Defendants-Appellees objected, the Court declined Ms. Baumann's request because her husband was not a licensed attorney, and the Court permitted her to retain counsel to represent her. Rec. at 519 [4:24-6:8] (transcript attached as Addendum E). The Court also ordered that any materials filed

after October 8, 2014 (the date of the first Notice to Submit) would not be considered by the Court in deciding the Motion for Summary Judgment filed by Defendants-Appellees and that Ms. Baumann could have until January 5, 2015 to retain counsel. Rec. at 519 [8:17-9:16; 15:4-11; 10:7-11:18; and 19:6-11] (transcript attached as Addendum E). A written Order reflecting these decisions was then approved and entered by the Court on December 22, 2014. In that Order, the Court states that it would not consider any documents served or filed after October 8, 2014. Rec. at 401-400 (Order attached as Addendum D); see also Rec. at 450, ¶¶ 8-9.

The Court held the second hearing on the Motion for Summary Judgment filed by the Doctor and the Pharmacy on January 5, 2015. Ms. Baumann continued to represent herself *pro se*. During oral argument, Ms. Baumann argued, among other points, that the Court should decide summary judgment based on the 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. Ms. Baumann 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).

### ***The Decision of the District Court***

At the close of that second hearing, the District Court granted summary judgment in favor of Dr. Tayler and Smith's Pharmacy. The District Court concluded that Ms. Baumann "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 there is no good cause for Plaintiff's failure to make expert disclosures." Rec. 5238. Applying Rule 26(d)(4) of the Utah Rules of Civil Procedure, the Court concluded that Ms. Baumann was precluded from using any undisclosed report.<sup>3</sup> The Court further determined that Ms. Baumann's claims were based on standards of care and issues of proximate causation that were not within the common knowledge of laypersons. Therefore, the Court concluded, Ms. Baumann was unable to establish a *prima facie* case that the standards of care were breached or that any breach proximately caused injury to her. Rec. at 528-27 (decision attached as Addendum B); see also Rec. at 486 [23:12-24:19] (transcript attached as Addendum C).

### ***The Decision of the Court of Appeals***

The Court of Appeals affirmed the decision of the District Court, concluding that the District Court properly applied the standard enunciated in Rule 26(d) of the

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<sup>3</sup> The District Court did not mention Rule 16(d) and made no finding whether the failure to disclose the expert report by the deadline set forth in the Stipulation was harmless.

Utah Rules of Civil Procedure. In so doing, the Court of Appeals rejected Ms. Baumann's argument that the permissive and more lenient standard set forth in Rule 16 rather than the mandatory standard set forth in Rule 26 should apply. Ms. Baumann had argued that, under the Utah Supreme Court's decision in *Coroles v. State*, 20156 UT 48, 349 P.3d 739, the appropriate source of the District Court's authority to sanction her for producing an untimely expert report under the Stipulation, adopted by the District Court as the basis of its decision, is Rule 16(d), not Rule 26(d). *Baumann v. Kroger Co.*, 2016 UT App 165, ¶ 12, 381 P.3d 1135.

In reaching this conclusion, the Court of Appeals applied the reasoning of its decision in *Sleepy Holdings LLC v. Mountain West Title*, 2016 UT App 62, 370 P.3d 963, which 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 [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.

The Court of Appeals also rejected Ms. Baumann's argument that, in addition to making a finding of no good cause, the District Court was also required to make a finding of harmlessness. The Court of Appeals stated that "a district court's exclusion of materials may be supported if the court makes a finding that there is either no good cause for the failure or that the failure is harmful." *Baumann v. Kroger Co.*, 2016 UT App 165, ¶ 18 n. 8, 381 P.3d 1135 (citing Utah R. Civ. P. 26(d)(4) and *Constr. Co. v. Robbins*, 2009 UT 52, ¶ 35, 215 P.3d 933). The Court of Appeals thus interpreted Rule 26(d)(4) to permit a district court to exclude evidence based on a finding by the court of either prong of the two-part test set forth in the Rule.

### **SUMMARY OF ARGUMENT**

This Court should vacate the decision of the Court of Appeals, vacate the judgment entered by the District Court, and remand this case to the District Court with instructions to the District Court consistent with this Court's opinion. 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*. Moreover, 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) requiring exclusion "unless the failure is harmless or the party shows substantial justification."

### **ARGUMENT**

**I. 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 MS. BAUMANN'S FAILURE TO TIMELY DISCLOSE HER EXPERT REPORT.**

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 the court – conflicts with this Court's decision in *Coroles v. State*, 2015 UT 48, 349 P.3d 739. In *Coroles*, this Court made clear that the more lenient standard set forth in Rule 16(d), not the stricter standard set forth in Rule 37(h), applies when, as here, a party produces untimely discovery under a scheduling order. 2015 UT 48, ¶ 20. Specifically, the 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)).

In arriving at this conclusion, this Court noted that Rule 16(d) gives the district court “broad authority to manage a case.” *Coroles*, 2015 UT 48, ¶ 19 (quoting *Boice*, 1999 UT 71, ¶ 8). Under this Rule, the Supreme 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)). The Supreme Court also stated that, if a party fails to obey a scheduling order establishing a discovery deadline, the district court “may take any action authorized by Rule 37(e)” of the Utah Rules of Civil Procedure. *Coroles*, 2015 UT 48, ¶ 19 (quoting Utah R. Civ. P. 16(d)). The Supreme Court further noted that permissible sanctions for providing untimely discovery include “prohibit[ing] the disobedient party ... from introducing designated matters into evidence” or “order[ing] the party or the attorney to pay the reasonable expenses, including attorney fees, caused by the failure.” *Coroles*, 2015 UT 48, ¶ 19 (quoting Utah R. Civ. P. 37(e)(2)(B) and (E); and citing *Boice*, 1999 UT 71, ¶ 8 (“If a party fails to obey a date set under Rule 16,

the court may sanction the offending party by excluding evidence the party intends to present.”).<sup>4</sup>

The Supreme Court noted that the difference between the standard for sanctioning a party under Rule 16(d) and the standard for sanctioning a party under Rule 37(h) is meaningful. The Court pointed out that Rule 16(d) provides that a court “may” impose a sanction described in Rule 37(e) for a failure to abide by the scheduling order. By contrast, the Court noted, Rule 37(h) provides that, if a party fails to disclose a witness, the party “shall not” be permitted to use the witness “unless the failure to disclose is harmless or the party shows good cause for the failure to disclose.” *Coroles*, 2015 UT 48, ¶ 22. Thus, the Court added, Rule 16(d) leaves the decision whether to sanction a party to the district court’s broad discretion, while Rule 37(h) shifts the burden to the nondisclosing party to show why the evidence should not be excluded. *Coroles*, 2015 UT 48, ¶ 22.

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<sup>4</sup> In reaching this conclusion, the Supreme Court in *Coroles* specifically repudiated the prior decisions of the Utah Court of Appeals to the extent that those cases suggest that Rule 37(h) should be applied when discovery is produced after a deadline set forth in a scheduling order. 2015 UT 48, ¶ 23 (citing and referring specifically to *Spafford v. Granite Credit Union*, 2011 UT App 401, ¶ 16, 266 P.3d 866 (reviewing the exclusion of an expert witness designated after the scheduling order deadline under the standard established in current rule 37(h)); *Brussow v. Webster*, 2011 UT App 193, ¶¶ 3-4, 258 P.3d 615 (same); *Lippman v. Coldwell Banker Residential Brokerage Co.*, 2010 UT App 89, at \*2 (same); and *Posner v. Equity Title Ins. Agency, Inc.*, 2009 UT App 347, ¶ 23, 222 P.3d 775 (same)).

It follows from all of this 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. Indeed, the District Court relied specifically on the 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.*

It is equally clear that excluding the untimely expert report under Rule 16(d) in the circumstances presented here would likewise be an abuse of discretion. Addressing the issue whether a Court should exclude expert testimony based on an untimely disclosure, the Utah Supreme Court offered the following admonition in *Colores*:

[W]here the exclusion of an expert is tantamount to the dismissal of the lawsuit, as is the case here, the district court should exercise restraint in choosing this grave step rather than a lesser sanction.

*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 in nature and . . . should be employed only with caution and restraint.”). Relevant factors applicable here that counsel strongly in favor of not excluding the untimely expert report submitted by Ms. Baumann include the fact that she was representing herself *pro se*, that she had and has cognitive difficulties, that there is no evidence that she intentionally missed the applicable deadline, 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.

**II. THE COURT OF APPEALS ERRED IN CONCLUDING THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN PRECLUDING MS. BAUMANN FROM USING AN UNTIMELY EXPERT REPORT UNDER RULE 26(d) TO CONTEST SUMMARY JUDGMENT WHEN IT EXCLUDED THE REPORT BASED ONLY ON A FINDING THAT THE FAILURE TO DISCLOSE WAS NOT JUSTIFIED.**

The decision of the Court of Appeals – requiring a finding under Rule 26(d)(4) of only a lack of justification – conflicts with the plain language of Rule 26(d)(4) and well-settled interpretations of that language. Even if Rule 26(d)(4) were the proper source for imposition of sanctions in the circumstances presented here, which, as we have made clear, it is not, the Court of Appeals’ conclusion that Rule 26(d)(4) requires a finding only of a lack of justification conflicts with the plain language of that Rule. It provides:

If a party fails to disclose or to supplement timely a disclosure or response to discovery, that party may not use the undisclosed witness, document or material at any hearing or trial *unless the failure is harmless or the party shows good cause for the failure.*

(Emphasis added.) The Court of Appeals, for its part, stated that “[i]t is well settled that a district court’s exclusion of materials may be supported if the court makes a finding that there is either no good cause for the failure or that the failure is harmful.” *Baumann v. The Kroger Co.*, 2016 UT App 165, ¶ 18 n. 8, 381 P.3d 1135. In support of this conclusion, the Court of Appeals cites to and quotes from Rule 26(d)(4). *Id.* Yet, the plain language of Rule 26(d)(4) requires mandatory exclusion when there has been a failure to disclose – unless the failure to disclose is harmless or unless the party shows good cause for the failure. Clearly, this is not drafted from the point of view of the district court, requiring the court to make a finding of only one or the other prior to exclusion. If it were, the Rule would say that the district court shall exclude the materials if the court finds *either* that the failure to disclose was not harmless or that the party lacked good cause for the failure. Rather, the Rule is, fairly obviously, drafted to require a district court to exclude materials unless the court finds one or the other alternative. Accordingly, before deciding to exclude evidence for a Rule 26 violation, a district court must make a finding as to both alternatives and conclude both that the party lacked justification for the failure and that the failure to comply was not harmless.

Likewise, the citation by the Court of Appeals' to this Court's decision in *Bodell Constr. Co. v. Robbins*, 2009 UT 52, ¶ 35, 215 P.3d 933 does nothing to support application of only one prong of the required two-part analysis. In *Bodell*, the appellant had argued that it had good cause for its failure to disclose its computation of damages as required under Rule 26 when it disclosed its theories of damages during fact discovery and later laid them out in greater detail in an expert report disclosed during the expert discovery period. This Court was unpersuaded by that argument, concluding that its original disclosure was insufficient. In addition, this Court also concluded that the failure to disclose a proper computation of damages would have prejudiced the appellees. Therefore, this Court affirmed the decision to exclude the report. *Id.* Thus, this Court did not, as the Court of Appeals seems to suggest in the decision below, rely only on a showing under Rule 26(d)(4) of a lack of good cause but, instead, also concluded that the failure to disclose was in fact prejudicial to the opposing parties. *See id.*

Finally, the interpretation of the Court of Appeals of Utah's Rule 26(d)(4), formerly found in Rule 37(h), is inconsistent with the interpretation given by the federal courts to Rule 37(c) of the Federal Rules of Civil Procedure. Rule 37(c) provides as follows:

If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless ....

In considering whether to expert testimony should be barred under this Rule for a Rule 26 violation, the federal courts will not exclude materials if the violation is either not substantially justified or harmless. *See, e.g., Eugene S. v. Horizon Blue Cross Blue Shield of N.J.*, 663 F.3d 1124, 1129 (10th Cir. 2011) (agreeing with the district court that a failure to disclose under Rule 26(a)(1) was either justified or harmless under Rule 37(c)); *Trost v. Trek Bicycle Corp.*, 162 F.3d 1004, 1008 (8th Cir. 1998) (Rules 26(a) and 37(c) “permit a court to exclude untimely evidence unless the failure to disclose was either harmless or substantially justified”); *Clark v. Wilkin*, 2008 U.S. Dist. LEXIS 45962, \*6 (D. Utah June 10, 2008) (concluding that exclusion of untimely supplemental disclosure under Rule 26(a)(1) was not proper, because, though the plaintiff’s disclosure was not substantially justified, it was harmless).<sup>5</sup>

It follows from all of this that, even applying Rule 26(d)(4), the District Court should have considered whether the failure to disclose was harmless. As this Court admonished in *Coroles*, “where the exclusion of an expert is tantamount to the dismissal of the lawsuit,

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<sup>5</sup> *See also, e.g., Rembrandt Vision Technologies, L.P. v. Johnson & Johnson Vision*, 725 F.3d 1377, 1381 (Fed. Cir. 2013) (party seeking to avoid sanctions may show substantial justification or harmlessness); *R & R Sails, Inc. v. Ins. Co. of Penn.*, 673 F.3d 1240, 1247 (9th Cir. 2012) (same). In so doing, the courts consider whether “(1) the prejudice or surprise to the party against whom the testimony is offered; (2) the ability of the party to cure the prejudice; (3) the extent to which introducing such testimony would disrupt the trial; and (4) the moving party’s bad faith or willfulness.” *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 953 (10th Cir. 2002) (quoting *Woodworker’s Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985, 993 (10th Cir. 1999)).



as is the case here, the district court should exercise restraint in choosing this grave step rather than a lesser sanction.” *Coroles*, 2015 UT 48, ¶ 29 (citations omitted). Exercising such restraint, even under Rule 26(d)(4), the District Court should not have excluded the untimely expert report submitted by Ms. Baumann. In fact, the record shows that Ms. Baumann was not only representing herself *pro se* but that, as a result of the incident at issue, she suffers from serious cognitive difficulties that include difficulty staying on task, slurred speech and lack of focus. Further, there is no actual evidence that Ms. Baumann intentionally missed the applicable deadline. In reality, she simply did not understand her obligations and burdens in a complex medical malpractice case like this one. Finally, and perhaps most significantly, there is simply no cognizable prejudice whatsoever. A mere delay in a case is not cognizable prejudice sufficient to justify the severe sanction imposed here. *See Colores*, 2015 UT 48, ¶ 28. Indeed, this case had not been certified as ready for trial, no trial date had been set, and the Court continued the November 17, 2014 hearing on the Motion for Summary Judgment to January 5, 2015. In these circumstances, even applying Rule 26(d)(4), exclusion of the untimely expert report would not be fitting. *See Colores*, 2015 UT 48, ¶ 28.<sup>6</sup>

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<sup>6</sup> This approach is in keeping with the approach taken by federal courts when, as here, exclusion of evidence as a sanction would result in dismissal of a claim. *See, e.g., R & R Sails, Inc.*, 673 F.3d at 1247-48 (stating that, because sanction amounted to dismissal of a claim, the district court was required, in making harmlessness inquiry, to consider whether the claimed noncompliance involved (continued...))

This is the appropriate result. In the context of considering whether a district court properly excluded evidence because a party's failed to comply with rule 26(a) or (e) of the Federal Rules of Civil Procedure, the Tenth Circuit has explained: "The parties to a litigation are not merely players in a game, trying to catch each other out. Rather, litigation should promote the finding of the truth, and, wherever possible, the resolution of cases on their merits." *Gillum v. United States*, 309 F. App'x 267, 270 (10th Cir. 2009). In the end, this principle 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)); *see also Butterfield v. Okubo*, 831 P.2d 97, 107 (Utah 1992) (so stating).

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<sup>6</sup>(...continued)  
willfulness, fault, or bad faith); *Design Strategy, Inc. v. Davis*, 469 F.3d 284, 296 (2d Cir. 2006) (requiring the district court to consider the possibility of a continuance); *S. States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 597 (4th Cir. 2003) (requiring consideration of the surprise to the party against whom the evidence would be offered and the ability of that party to cure the surprise); *Tex. A & M Research Found. v. Magna Transp., Inc.*, 338 F.3d 394, 402 (5th Cir. 2003) (requiring consideration of the possibility that a continuance would cure prejudice to the opposing party).

## CONCLUSION

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. Further, this Court should order that, if it becomes necessary for the District Court to address the issue of sanctions for the untimely designation of the expert, the District Court may choose a sanction short of exclusion of the experts if it determines a sanction is appropriate under Rule 16(d).

Respectfully submitted this 15th day of December 2016:

/s/ Gregory W. Stevens  
Gregory W. Stevens  
*Attorney for Appellant*  
*Kari L. Baumann*

### **CERTIFICATE OF COMPLIANCE**

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/s/ Gregory W. Stevens  
Gregory W. Stevens

**CERTIFICATE OF SERVICE**

I hereby certify that, this 15th day of December 2016, I served two copies each of the foregoing Brief, including all Addenda, and a CD containing a PDF copy of the Brief and all Addenda, 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

/s/ Gregory W. Stevens  
Gregory W. Stevens

**ADDENDUM D**  
**(RUCP 26 Advisory Committee Notes)**

## URCP 26.

### Advisory Committee Notes

**Disclosure requirements and timing. Rule 26(a)(1).** The 2011 amendments seek to reduce discovery costs by requiring each party to produce, at an early stage in the case, and without a discovery request, all of the documents and physical evidence the party may offer in its case-in-chief and the names of witnesses the party may call in its case-in-chief, with a description of their expected testimony. In this respect, the amendments build on the initial disclosure requirements of the prior rules. In addition to the disclosures required by the prior version of Rule 26(a)(1), a party must disclose each fact witness the party may call in its case-in-chief and a summary of the witness's expected testimony, a copy of all documents the party may offer in its case-in-chief, and all documents to which a party refers in its pleadings.

Not all information will be known at the outset of a case. If discovery is serving its proper purpose, additional witnesses, documents, and other information will be identified. The scope and the level of detail required in the initial Rule 26(a)(1) disclosures should be viewed in light of this reality. A party is not required to interview every witness it ultimately may call at trial in order to provide a summary of the witness's expected testimony. As the information becomes known, it should be disclosed. No summaries are required for adverse parties, including management level employees of business entities, because opposing lawyers are unable to interview them and their testimony is available to their own counsel. For uncooperative or hostile witnesses any summary of expected testimony would necessarily be limited to the subject areas the witness is reasonably expected to testify about. For example, defense counsel may be unable to interview a treating physician, so the initial summary may only disclose that the witness will be questioned concerning the plaintiff's diagnosis, treatment and prognosis. After medical records have been obtained, the summary may be expanded or refined.

Subject to the foregoing qualifications, the summary of the witness's expected testimony should be just that – a summary. The rule does not require prefiled testimony or detailed descriptions of everything a witness might say at trial. On the other hand, it requires more than the broad, conclusory statements that often were made under the prior version of Rule 26(a)(1) (e.g., "The witness will testify about the events in question" or "The witness will testify on causation."). The intent of this requirement is to give the other side basic information concerning the subjects about which the witness is expected to testify at trial, so that the other side may determine the witness's relative importance in the case, whether the witness should be interviewed or deposed, and whether additional documents or information concerning the witness should be sought. This information is important because of the other discovery limits contained in the 2011 amendments, particularly the limits on depositions.

Likewise, the documents that should be provided as part of the Rule 26(a)(1) disclosures are those that a party reasonably believes it may use at trial, understanding that not all documents will be available at the outset of a case. In this regard, it is important to remember that the duty to provide documents and witness information is a continuing one, and disclosures must be promptly supplemented as new evidence and witnesses become known as the case progresses.

The amendments also require parties to provide more information about damages early in the case. Too often, the subject of damages is deferred until late in the case. Early disclosure of damages information is important. Among other things, it is a critical factor in determining proportionality. The committee recognizes that damages often require additional discovery, and typically are the subject of expert testimony. The Rule is not intended to require expert disclosures at the outset of a case. At the same time, the subject of damages should not simply be deferred until expert discovery. Parties should make a good faith attempt to compute damages to the extent it is possible to do so and must in any event provide all discoverable information on the subject, including materials related to the nature and extent of the damages.

The penalty for failing to make timely disclosures is that the evidence may not be used in the party's case-in-chief. To make the disclosure requirement meaningful, and to discourage sandbagging, parties must know that if they fail to disclose important information that is helpful to their case, they will not be able to use that information at trial. The courts will be expected to enforce them unless the failure is harmless or the party shows good cause for the failure.

The 2011 amendments also change the time for making these required disclosures. Because the plaintiff controls when it brings the action, plaintiffs must make their disclosures within 14 days after service of the first answer. A defendant is required to make its disclosures within 28 days after the plaintiff's first disclosure or after that defendant's appearance, whichever is later. The purpose of early disclosure is to have all parties present the evidence they expect to use to prove their claims or defenses, thereby giving the opposing party the ability to better evaluate the case and determine what additional discovery is necessary and proportional.

The time periods for making Rule 26(a)(1) disclosures, and the presumptive deadlines for completing fact discovery, are keyed to the filing of an answer. If a defendant files a motion to dismiss or other Rule 12(b) motion in lieu of an answer, these time periods normally would be not begin to run until that motion is resolved.

Finally, the 2011 amendments eliminate two categories of actions that previously were exempt from the mandatory disclosure requirements. Specifically, the amendments eliminate the prior exemption for contract actions in which the

amount claimed is \$20,000 or less, and actions in which any party is proceeding pro se. In the committee's view, these types of actions will benefit from the early disclosure requirements and the overall reduced cost of discovery.

**Expert disclosures and timing. Rule 26(a)(3).** Expert discovery has become an ever-increasing component of discovery cost. The prior rules sought to eliminate some of these costs by requiring the written disclosure of the expert's opinions and other background information. However, because the expert was not required to sign these disclosures, and because experts often were allowed to deviate from the opinions disclosed, attorneys typically would take the expert's deposition to ensure the expert would not offer "surprise" testimony at trial, thereby increasing rather than decreasing the overall cost. The amendments seek to remedy this and other costs associated with expert discovery by, among other things, allowing the opponent to choose either a deposition of the expert or a written report, but not both; in the case of written reports, requiring more comprehensive disclosures, signed by the expert, and making clear that experts will not be allowed to testify beyond what is fairly disclosed in a report, all with the goal of making reports a reliable substitute for depositions; and incorporating a rule that protects from discovery most communications between an attorney and retained expert. Discovery of expert opinions and testimony is automatic under Rule 26(a)(3) and parties are not required to serve interrogatories or use other discovery devices to obtain this information.

Disclosures of expert testimony are made in sequence, with the party who bears the burden of proof on the issue for which expert testimony will be offered going first. Within seven days after the close of fact discovery, that party must disclose: (i) the expert's curriculum vitae identifying the expert's qualifications, publications, and prior testimony; (ii) compensation information; (iii) a brief summary of the opinions the expert will offer; and (iv) a complete copy of the expert's file for the case. The file should include all of the facts and data that the expert has relied upon in forming the expert's opinions. If the expert has prepared summaries of data, spreadsheets, charts, tables, or similar materials, they should be included. If the expert has used software programs to make calculations or otherwise summarize or organize data, that information and underlying formulas should be provided in native form so it can be analyzed and understood. To the extent the expert is relying on depositions or materials produced in discovery, then a list of the specific materials relied upon is sufficient. The committee recognizes that experts frequently will prepare demonstrative exhibits or other aids to illustrate the expert's testimony at trial, and the costs for preparing these materials can be substantial. For that reason, these types of demonstrative aids may be prepared and disclosed later, as part of the Rule 26(a)(4) pretrial disclosures when trial is imminent.

Within seven days after this disclosure, the party opposing the retained expert may elect either a deposition or a written report from the expert. A deposition is limited to four hours, which is not included in the deposition hours under Rule 26(c)(5), and the party taking it must pay the expert's hourly fee for attending the deposition. If a party elects a written report, the expert must provide a signed report containing a complete statement of all opinions the expert will express and the basis and reasons for them. The intent is not to require a verbatim transcript of exactly what the expert will say at trial; instead the expert must fairly disclose the substance of and basis for each opinion the expert will offer. The expert may not testify in a party's case in chief concerning any matter that is not fairly disclosed in the report. To achieve the goal of making reports a reliable substitute for depositions, courts are expected to enforce this requirement. If a party elects a deposition, rather than a report, it is up to the party to ask the necessary questions to "lock in" the expert's testimony. But the expert is expected to be fully prepared on all aspects of his/her trial testimony at the time of the deposition and may not leave the door open for additional testimony by qualifying answers to deposition questions.

The report or deposition must be completed within 28 days after the election is made. After this, the party who does not bear the burden of proof on the issue for which expert testimony is offered must make its corresponding disclosures and the opposing party may then elect either a deposition or a written report. Under the deadlines contained in the rules, expert discovery should take less than three months to complete. However, as with the other discovery rules, these deadlines can be altered by stipulation of the parties or order of the court.

The amendments also address the issue of testimony from non-retained experts, such as treating physicians, police officers, or employees with special expertise, who are not retained or specially employed to provide expert testimony, or whose duties as an employee do not regularly involve giving expert testimony. This issue was addressed by the Supreme Court in *Drew v. Lee*, 2011 UT 15, wherein the court held that reports under the prior version of Rule 26(a)(3) are not required for treating physicians.

There are a number of difficulties inherent in disclosing expert testimony that may be offered from fact witnesses. First, there is often not a clear line between fact and expert testimony. Many fact witnesses have scientific, technical or other specialized knowledge, and their testimony about the events in question often will cross into the area of expert testimony. The rules are not intended to erect artificial barriers to the admissibility of such testimony. Second, many of these fact witnesses will not be within the control of the party who plans to call them at trial. These witnesses may not be cooperative, and may not be willing to discuss opinions they have with counsel. Where this is the case, disclosures will necessarily be more limited. On the other hand, consistent with the overall purpose of the 2011 amendments, a party should receive advance notice if their opponent will solicit expert opinions from a particular witness so they can plan their case accordingly. In an effort to strike an appropriate balance, the rules require that such witnesses be identified and the information about their anticipated testimony should include that which is required under Rule 26(a)(1)(A)(ii), which should



include any opinion testimony that a party expects to elicit from them at trial. If a party has disclosed possible opinion testimony in its Rule 26(a)(1)(A)(ii) disclosures, that party is not required to prepare a separate Rule 26(a)(4)(E) disclosure for the witness. And if that disclosure is made in advance of the witness's deposition, those opinions should be explored in the deposition and not in a separate expert deposition. Otherwise, the timing for disclosure of non-retained expert opinions is the same as that for retained experts under Rule 26(a)(4)(C) and depends on whether the party has the burden of proof or is responding to another expert. Rules 26(a)(4)(E) and 26(a)(1)(A)(ii) are not intended to elevate form over substance—all they require is that a party fairly inform its opponent that opinion testimony may be offered from a particular witness. And because a party who expects to offer this testimony normally cannot compel such a witness to prepare a written report, further discovery must be done by interview or by deposition.

Finally, the amendments include a new Rule 26(b)(7) that protects from discovery draft expert reports and, with limited exception, communications between an attorney and an expert. These changes are modeled after the recent changes to the Federal Rules of Civil Procedure and are intended to address the unnecessary and costly procedures that often were employed in order to protect such information from discovery, and to reduce "satellite litigation" over such issues.

**Scope of discovery—Proportionality. Rule 26(b).** Proportionality is the principle governing the scope of discovery. Simply stated, it means that the cost of discovery should be proportional to what is at stake in the litigation.

In the past, the scope of discovery was governed by "relevance" or the "likelihood to lead to discovery of admissible evidence." These broad standards may have secured just results by allowing a party to discover all facts relevant to the litigation. However, they did little to advance two equally important objectives of the rules of civil procedure—the speedy and inexpensive resolution of every action. Accordingly, the former standards governing the scope of discovery have been replaced with the proportionality standards in subpart (b)(1).

The concept of proportionality is not new. The prior rule permitted the Court to limit discovery methods if it determined that "the discovery was unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." The Federal Rules of Civil Procedure contains a similar provision. See Fed. R. Civ. P. 26(b)(2)(C). This method of limiting discovery, however, was rarely invoked either under the Utah rules or federal rules.

Under the prior rule, the party objecting to the discovery request had the burden of proving that a discovery request was not proportional. The new rule changes the burden of proof. Today, the party seeking discovery beyond the scope of "standard" discovery has the burden of showing that the request is "relevant to the claim or defense of any party" and that the request satisfies the standards of proportionality. As before, ultimate admissibility is not an appropriate objection to a discovery request so long as the proportionality standard and other requirements are met.

The 2011 amendments establish three tiers of standard discovery in Rule 26(c). Ideally, rules of procedure should be crafted to promote predictability for litigants. Rules should limit the need to resort to judicial oversight. Tiered standard discovery seeks to achieve these ends. The "one-size-fits-all" system is rejected. Tiered discovery signals to judges, attorneys, and parties the amount of discovery which by rule is deemed proportional for cases with different amounts in controversy.

Any system of rules which permits the facts and circumstances of each case to inform procedure cannot eliminate uncertainty. Ultimately, the trial court has broad discretion in deciding whether a discovery request is proportional. The proportionality standards in subpart (b)(2) and the discovery tiers in subpart (c) mitigate uncertainty by guiding that discretion. The proper application of the proportionality standards will be defined over time by trial and appellate courts.

**Standard and extraordinary discovery. Rule 26(c).** As a counterpart to requiring more detailed disclosures under Rule 26(a), the 2011 amendments place new limitations on additional discovery the parties may conduct. Because the committee expects the enhanced disclosure requirements will automatically permit each party to learn the witnesses and evidence the opposing side will offer in its case-in-chief, additional discovery should serve the more limited function of permitting parties to find witnesses, documents, and other evidentiary materials that are harmful, rather than helpful, to the opponent's case.

Rule 26(c) provides for three separate "tiers" of limited, "standard" discovery that are presumed to be proportional to the amount and issues in controversy in the action, and that the parties may conduct as a matter of right. An aggregation of all damages sought by all parties in an action dictates the applicable tier of standard discovery, whether such damages are sought by way of a complaint, counterclaim, or otherwise. The tiers of standard discovery are set forth in a chart that is embedded in the body of the rule itself. "Tier 1" describes a minimal amount of standard discovery that is presumed proportional for cases involving damages of \$50,000 or less. "Tier 2" sets forth larger limits on standard discovery that are applicable in cases involving damages above \$50,000 but less than \$300,000. Finally, "Tier 3" prescribes still greater standard discovery for actions involving damages in excess of \$300,000. Deposition hours are charged to a side for the time spent asking questions of the witness. In a particular deposition, one side may use two hours while the other side uses only 30 minutes. The tiers also provide presumptive limitations on the time within which standard discovery should be completed, which limitations similarly increase with the amount of damages at issue. A statement of discovery issues will

not toll the period. Parties are expected to be reasonable and accomplish as much as they can during standard discovery. A statement of discovery issues may result in additional discovery and sanctions at the expense of a party who unreasonably fails to respond or otherwise frustrates discovery. After the expiration of the applicable time limitation, a case is presumed to be ready for trial. Actions for non-monetary relief, such as injunctive relief, are subject to the standard discovery limitations of Tier 2, absent an accompanying monetary claim of \$300,000 or more, in which case Tier 3 applies. The committee determined these standard discovery limitations based on the expectation that for the majority of cases filed in the Utah State Courts, the magnitude of available discovery and applicable time parameters available under the three-tiered system should be sufficient for cases involving the respective amounts of damages.

Despite the expectation that standard discovery according to the applicable tier should be adequate in the typical case, the 2011 amendments contemplate there will be some cases for which standard discovery is not sufficient or appropriate. In such cases, parties may conduct additional discovery that is shown to be consistent with the principle of proportionality. There are two ways to obtain such additional discovery. The first is by stipulation. If the parties can agree additional discovery is necessary, they may stipulate to as much additional discovery as they desire, provided they stipulate the additional discovery is proportional to what is at stake in the litigation and counsel for each party certifies that the party has reviewed and approved a budget for additional discovery. Such a stipulation should be filed before the close of the standard discovery time limit, but only after reaching the limits for that type of standard discovery available under the rule. If these conditions are met, the Court will not second-guess the parties and their counsel and must approve the stipulation.

The second method to obtain additional discovery is by a statement of discovery issues. The committee recognizes there will be some cases in which additional discovery is appropriate, but the parties cannot agree to the scope of such additional discovery. These may include, among other categories, large and factually complex cases and cases in which there is a significant disparity in the parties' access to information, such that one party legitimately has a greater need than the other party for additional discovery in order to prepare properly for trial. To prevent a party from taking advantage of this situation, the 2011 amendments allow any party to request additional discovery. As with stipulations for extraordinary discovery, a party requesting extraordinary discovery should do so before the close of the standard discovery time limit, but only after the party has reached the limits for that type of standard discovery available to it under the rule. By taking advantage of this discovery, counsel should be better equipped to articulate for the court what additional discovery is needed and why. The requesting party must demonstrate that the additional discovery is proportional and certify that the party has reviewed and approved a discovery budget. The burden to show the need for additional discovery, and to demonstrate relevance and proportionality, always falls on the party seeking additional discovery. However, cases in which such additional discovery is appropriate do exist, and it is important for courts to recognize they can and should permit additional discovery in appropriate cases, commensurate with the complexity and magnitude of the dispute.

**Protective order language moved to Rule 37.** The 2011 amendments delete in its entirety the prior language of Rule 26(c) governing motions for protective orders. The substance of that language is now found in Rule 37. The committee determined it was preferable to cover requests for an order to compel, for a protective order, and sanctions in a single rule, rather than two separate rules.

**Consequences of failure to disclose.** Rule 26(d). If a party fails to disclose or to supplement timely its discovery responses, that party cannot use the undisclosed witness, document, or material at any hearing or trial, absent proof that non-disclosure was harmless or justified by good cause. More complete disclosures increase the likelihood that the case will be resolved justly, speedily, and inexpensively. Not being able to use evidence that a party fails properly to disclose provides a powerful incentive to make complete disclosures. This is true only if trial courts hold parties to this standard. Accordingly, although a trial court retains discretion to determine how properly to address this issue in a given case, the usual and expected result should be exclusion of the evidence.