

2016

**Kari L. Baumann, Plaintiff/Appellant, v. The Kroger Company Dba
Smith's Pharmacy #40063; And Gregory P. Tayler, m.d.,
Defendants/Appellees**

Utah Supreme Court

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IN THE UTAH SUPREME COURT

KARI L. BAUMANN,

Plaintiff / Appellant,

v.

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

Defendants / Appellees.

No. 20160686-SC

BRIEF OF THE APPELLANT

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

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

Carolyn Stevens Jensen, 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 Addendumix 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:¹

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:²

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

² 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.

²(...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. Tayler 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.³ 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

³ 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.”)).⁴

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.

⁴ 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).⁵

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,

⁵ *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, ¶ 28.⁶

⁶ 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).

⁶(...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

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 6,165 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 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 A

Decision of the Utah Court of Appeals (July 29, 2016)

2016 UT App 165

JUL 29 2016

THE UTAH COURT OF APPEALS

KARI L. BAUMANN,
Appellant,

v.

THE KROGER COMPANY AND GREGORY P. TAYLER,
Appellees.

Opinion
No. 20150078-CA
Filed July 29, 2016

Fourth District Court, Heber Department
The Honorable Fred D. Howard
No. 130500017

Gregory W. Stevens, Attorney for Appellant
Todd C. Hilbig and Andrea M. Keysar, Attorneys for
Appellee The Kroger Company
Elliott J. Williams and John M. Zidow, Attorneys for
Appellee Gregory P. Tayler

SENIOR JUDGE PAMELA T. GREENWOOD authored this Opinion, in
which JUDGES MICHELE M. CHRISTIANSEN and KATE A. TOOMEY
concurred.¹

GREENWOOD, Senior Judge:

¶1 Kari L. Baumann appeals the district court's grant of summary judgment against her. Baumann failed to designate any expert witnesses under rule 26 of the Utah Rules of Civil Procedure, and the district court consequently precluded her

1. Senior Judge Pamela T. Greenwood sat by special assignment as authorized by law. *See generally* Utah R. Jud. Admin. 11-201(6).

from using undesignated experts to contest summary judgment under the same rule. We affirm.

BACKGROUND

¶2 Baumann first filed suit against The Kroger Company (Kroger) and Dr. Gregory P. Tayler (collectively, Defendants) in 2007 after she allegedly suffered “hypotension due to overmedication.” That complaint was dismissed upon stipulation of the parties. In February 2013, Baumann filed the instant action pursuant to Utah’s one-year savings statute.² In her new complaint, Baumann alleged that Dr. Tayler had breached the applicable standard of care in prescribing her medications. She also alleged that Kroger had breached its standard of care, violated Utah’s Pharmacy Practice Act, and failed to comply with its assumed duties and written assurances to her. After her attorney withdrew as counsel, Baumann represented herself pro se.

¶3 A year later, in February 2014, as part of pretrial discovery, Baumann replied to Defendants’ interrogatories requesting that she “[i]dentify each person [she] intend[ed] to call as a witness . . . including expert witnesses” and their anticipated testimonies. In reply, Baumann wrote that she would identify such “witnesses and their anticipated testimony . . . when scheduled to do so by case management order.” Two weeks later, Baumann and Defendants stipulated to a new schedule for additional time to conduct standard discovery.

2. Utah’s savings statute provides that if “any action is timely filed and . . . the plaintiff fails . . . upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the action has expired, the plaintiff . . . may commence a new action within one year after the . . . failure.” Utah Code Ann. § 78B-2-111 (LexisNexis 2012).

Baumann was to provide Defendants with expert disclosures by June 6, 2014, and expert discovery was to be completed by September 5, 2014.

¶4 Both June 6 and September 5 passed, and Baumann failed to disclose expert witnesses and their corresponding reports. Then, on September 11, 2014, Defendants jointly moved for summary judgment, arguing that without designated expert witnesses Baumann could not establish the applicable standards of care, breach of those standards, or that the breach was the proximate cause of Baumann's injuries. Baumann filed an opposition to the motion for summary judgment. Defendants responded on October 8, requesting that their motion be submitted for decision. Two days later, on October 10, Baumann filed approximately 150 pages of various documents with the court. The court scheduled a hearing on Defendants' motion for summary judgment on November 17, 2014. The day of the hearing, Baumann submitted an expert report applicable only to Kroger. No expert report applicable to Dr. Tayler was filed.

¶5 At the November 17, 2014 hearing on Defendants' joint motion for summary judgment, Baumann's husband sought permission to speak for her in court. The district court denied his request and granted a continuance for Baumann to find counsel—pro bono or otherwise.³ The court also told the parties that it would not consider any materials filed after October 8, 2014, the date Defendants had filed their motion to submit for decision; that "the pleadings have closed on the motion"; and

3. Baumann's husband asked to speak for Baumann "if there is no objection." Defendants objected to "a nonlawyer representing a pro se plaintiff." The court sustained the objection, explaining that while it was true that Baumann was "entitled to [speak for herself] under constitutional protection[,] if you have the assistance of an individual, [it] ought to be somebody that's licensed in the law."

that any new counsel would not “be at liberty to supplement this record” but would be there only “to speak on the question [that] has been filed.” The court also permitted Baumann to file a written statement detailing her arguments before the court if she had not found counsel to speak for her.

¶6 At the rescheduled hearing on January 5, 2015, Baumann—still unrepresented by counsel—read a written statement to the court. She contended that summary judgment was not proper because she had provided documents reflecting a Social Security Administration decision granting her disability benefits. She also told the court that she did not designate expert witnesses or their reports timely because she “was just [trying] to save quite a few thousand dollars,” “the facts would speak for themselves,” and she thought “the Defense would want to move forward with also a less expensive and more timely speedier way of getting resolution to this case that’s been personally hard on [her] also for eight years.” Baumann asserted that in any event “[p]rocedural formalities are not the law.” “In conclusion,” she stated, “I believe that summary judgment is improper due to the fact that the defendants’ basis is procedural not evidentiary.”

¶7 The district court granted Defendants’ motion for summary judgment, finding that Baumann had “failed to make expert disclosures” in accordance with the stipulation and rule 26 and that there was “no good cause for [Baumann’s] failure to make expert disclosures.” “Therefore,” the court ruled, Baumann “was precluded by Rule 26(d)(4) from using any undisclosed witness, document, or material in opposition to the Motion for Summary Judgment filed by the Defendants.” Because the “standards of care related to prescribing and dispensing blood pressure medication, and what neurological or other biological effects that blood pressure medications may have, are not within the common knowledge of laypersons,” the district court found that “expert testimony is required in this case.” Baumann, “having failed to make expert disclosures . . . [thus] cannot make

a *prima facie* case for her healthcare malpractice claims.” Baumann appeals the district court’s order.⁴

ISSUES AND STANDARDS OF REVIEW

¶8 Baumann—represented by counsel on appeal—contends that the district court abused its discretion when it “declined to permit” her to disclose and utilize an expert report applicable to Dr. Tayler and that it erred in its application of law when it refused to consider or admit her expert report applicable to Kroger. We review a district court’s decision to impose sanctions under rule 26(d)(4) for abuse of discretion. *Townhomes at Pointe Meadows Owners Ass’n v. Pointe Meadows Townhomes, LLC*, 2014 UT App 52, ¶ 13, 329 P.3d 815.⁵

4. Baumann does not contest the district court’s determination that expert witness testimony was necessary to prove her claims and, thus, that summary judgment was appropriate in the absence of such testimony, nor does Baumann contest the court’s ruling that there was no good cause for her failure to disclose her expert witnesses. We, therefore, do not address those issues here.

5. *Townhomes at Pointe Meadows Owners Association v. Pointe Meadows Townhomes, LLC*, 2014 UT App 52, 329 P.3d 815, was decided under the pre-2011 versions of rules 26 and 37. *See id.* ¶ 13 n.2. Prior to 2011, rule 26 did not include a “failure to disclose” provision, as it does today. Thus, a party’s failure to disclose an expert witness under rule 26(a) was then governed by rule 37(f):

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

(continued...)

ANALYSIS

I. Dr. Tayler Expert Report

¶9 Baumann argues that the district court abused its discretion by not allowing her to designate an additional expert

(...continued)

Utah R. Civ. P. 37(f) (2010). In 2011, however, amendments to the Utah Rules of Civil Procedure included a provision similar to rule 37(f) in rule 26(d)(4), which governs this case:

If a party fails to disclose . . . a [witness], that party may not use the undisclosed witness . . . at any hearing or trial unless the failure is harmless or the party shows good cause for the failure.

Id. R. 26(d)(4) (2012). Furthermore, as part of the 2015 amendments, the former rule 37(f) was deleted, because “the effect of non-disclosure is adequately governed by Rule 26(d).”

Id. R. 37 (2016) advisory committee’s note to 2015 amendments. Utah appellate decisions have referred to both rules 26 and 37 when discussing the ramifications of a failure to disclose witnesses. The district court in this case referred to rule 26(d)(4), as do we. However, we also utilize rule 37(f) cases in our analysis because of their similar applicability. Because the substance of rule 26(d)(4) has remained unaltered since its inception, unless otherwise noted, we cite the 2016 version of the rule.

Additionally, the accompanying note to the 2011 amendments explains that the “may not use” language of rule 26—like the “shall not be permitted to use” language of rule 37—provides for a mandatory preclusion of materials, not a permissive sanction. *See id.* R. 26 (2012) advisory committee’s note to 2011 amendments (stating that the noncompliant “party *cannot* use the undisclosed witness . . . *absent proof that*” the failure was either harmless or for good cause (emphases added)).

report applicable to Dr. Tayler. This argument is unpreserved, however, as Baumann concedes in her reply brief.⁶

¶10 Generally, we will not consider an issue on appeal unless it has been preserved. *Patterson v. Patterson*, 2011 UT 68, ¶ 12, 266 P.3d 828. “Our preservation rule promotes both judicial economy and fairness. The rule furthers judicial economy by giv[ing] the [district] 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 (alterations in original) (citations and internal quotation marks omitted). “The only exceptions to this general rule are instances involving exceptional circumstances or plain error.” *Id.* ¶ 27. The Utah Rules of Appellate Procedure provide that “[t]he brief of the appellant shall contain . . . a statement of grounds for seeking review of an issue not preserved in the trial court.” Utah R. App. P. 24(a), (a)(5)(B). Baumann’s opening brief provides us no such statement.⁷

6. Baumann did not file a motion or otherwise request permission to designate an expert as to Dr. Tayler during the proceedings before the district court.

7. In her reply brief, Baumann does argue that exceptional circumstances—her demonstrated “lack of understanding of the process and the significance of the schedule” and her ability as a disabled pro se plaintiff—justify departure from the preservation rule. “It is well settled that issues raised by an appellant in the reply brief that were not presented in the opening brief are considered waived and will not be considered by the appellate court.” *Allen v. Friel*, 2008 UT 56, ¶ 8, 194 P.3d 903 (citation and internal quotation marks omitted).

Even so, 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
(continued...)

¶11 Furthermore, Baumann’s specific argument—that the district court abused its discretion by refusing to allow her to submit an expert report applicable to Dr. Tayler—cannot prevail; the district court could not have abused its discretion in not making a ruling it was never asked to make. We thus decline to review Baumann’s contentions as to an expert witness report applicable to Dr. Tayler.

II. Kroger Expert Report

¶12 The district court found that Baumann “failed to make expert disclosures” in accordance with the stipulation and rule 26 and that there was “no good cause for [Baumann’s] failure to make expert disclosures.” Accordingly, it precluded Baumann

(...continued)

member of the bar.” *Jacob v. Cross*, 2012 UT App 190, ¶ 4, 283 P.3d 539 (per curiam) (first alteration in original) (citations and internal quotation marks omitted). “Consequently, [r]easonable considerations do not include . . . attempt[ing] to redress the ongoing consequences of the party’s decision to function in a capacity for which [she] is not trained.” *Id.* (first and second alterations in original) (citation and internal quotation marks omitted). Our supreme court has explained that

a lay[person] acting as [her] own attorney does not require the court to interrupt the course of proceedings to translate legal terms, explain legal rules, or otherwise attempt to redress the ongoing consequences of the party’s decision to function in a capacity for which [she] is not trained. Judges cannot be expected to perform that function.

Nelson v. Jacobsen, 669 P.2d 1207, 1213–14 (Utah 1983). Thus, while a pro se plaintiff “has the right to appear pro se . . . when a person chooses to do so, [she] must be held to the same standard as if [she] were represented by counsel.” *Johnson v. Aetna Cas. & Surety Co. of Hartford*, 630 P.2d 514, 517 (Wyo. 1981).

“from using any undisclosed witness, document, or material in opposition to the Motion for Summary Judgment filed by the Defendants” under rule 26(d)(4). Baumann argues that this was an abuse of discretion. She argues specifically that the district court should have applied rule 16(d) instead of rule 26(d) of the Utah Rules of Civil Procedure in accordance with the Utah Supreme Court’s decision in *Coroles v. State*, 2015 UT 48, 349 P.3d 739. As the *Coroles* court stated, under rule 16(d), “a court ‘may’ impose a sanction described in rule 37(e) for a failure to abide by the scheduling order.” *Id.* ¶ 22. Under rule 26(d), however, a party who has failed to disclose a witness “may not use the undisclosed witness . . . 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). Baumann argues that applying rule 16’s permissive standard rather than rule 26’s mandatory standard would have led to a more favorable result for her.

¶13 Rule 26 of the Utah Rules of Civil Procedure 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 and substance of the expert’s opinion.” *Townhomes at Pointe Meadows Owners Ass’n v. Pointe Meadows Townhomes, LLC*, 2014 UT App 52, ¶ 13, 329 P.3d 815 (citing Utah R. Civ. P. 26(a)(3)(B)). And importantly, as we stated above, “‘Utah law mandates that a trial court exclude an expert witness report disclosed after expiration of the established deadline’ unless the district court, in its discretion, determines that ‘good cause excuses tardiness’ or that the failure to disclose was harmless.” *Id.* (quoting *Posner v. Equity Title Ins. Agency, Inc.*, 2009 UT App 347, ¶¶ 8, 23, 222 P.3d 775).

¶14 Critically, a district court has “broad discretion in selecting and imposing sanctions for discovery violations” under rule 26. *Tuck v. Godfrey*, 1999 UT App 127, ¶ 15, 981 P.2d 407 (citation and internal quotation marks omitted). “Appellate courts may not interfere with such discretion unless . . . there is

either an erroneous conclusion of law or no evidentiary basis for the trial court's ruling." *Id.* (internal quotation marks omitted).

¶15 Moreover, contrary to Baumann's argument to the district court that bypassing her obligation to disclose her expert witness would have led to a speedier resolution in this case, Utah's supreme court-appointed advisory committee on the Utah Rules of Civil Procedure has stated that

[m]ore 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.

Utah R. Civ. P. 26 (2012) advisory committee's notes to 2011 amendments. Thus, sound policy supports strict enforcement of this rule.

¶16 So, too, do the facts of this case. This is an old case. Baumann's original claim arose in 2007. She filed a second suit under Utah's savings statute. Baumann also stipulated to a discovery schedule requiring her to disclose expert witnesses to Defendants by June 6, 2014, and providing that expert discovery—including expert witness depositions—would close on September 5, 2014. Baumann then failed to provide an expert witness or report as to either Kroger or Dr. Tayler. Defendants thus filed for summary judgment on September 11. After Baumann opposed Defendants' motion for summary judgment, Defendants submitted the motion for decision on October 8, and the court scheduled a hearing on the motion for November 17.

The day of the hearing, Baumann filed an expert report as to Kroger without seeking leave of court to do so—and contrary to the district court’s order that it would not consider filings submitted after October 8. At the rescheduled January 5, 2015 hearing, Baumann’s arguments to the district court—that she was trying to dispose of the case economically and that “[p]rocedural formalities are not the law”—were unpersuasive and ultimately, the district court precluded Baumann “from using any undisclosed witness, document, or material in opposition to the Motion for Summary Judgment filed by the Defendants.”

¶17 Nevertheless, Baumann argues that under *Coroles v. State*, 2015 UT 48, 349 P.3d 739, the district 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. Baumann specifically argues that, according to *Coroles*, the source of the district court’s authority to sanction her “for producing untimely discovery under a scheduling order” is rule 16(d), not rule 26(d). Baumann’s argument is similar to the appellant’s argument in *Sleepy Holdings LLC v. Mountain West Title*, 2016 UT App 62, 370 P.3d 963. While *Sleepy Holdings* dealt with initial disclosures and not an expert witness report, its analysis is apt and informs our decision here.

¶18 In *Sleepy Holdings*, the appellant argued that the district court abused its discretion when it excluded evidence under rule 26 of the Utah Rules of Civil Procedure and that it “should instead have applied the discretionary sanctions found in rule 16(d).” *Id.* ¶ 19. This court explained that rule 16 “governs pretrial conferences, scheduling, and management conferences,” *id.* ¶ 20, whereas rule 26 “governs initial disclosures and discovery,” *id.* ¶ 21. We indicated that the “sanction of exclusion is *automatic and mandatory* unless the sanctioned party can show that the violation . . . was either justified or harmless.” *Id.*

(emphasis added) (quoting *Dahl v. Harrison*, 2011 UT App 389, ¶ 22, 265 P.3d 139).⁸ We further noted that the district court sanctioned the appellant, Sleepy Holdings, for failure to disclose and stated that “[t]he district court’s ruling repeatedly cites rule 26; it never mentions rule 16.” *Id.* ¶ 22. Thus, this court declined to apply *Coroles*, as Sleepy Holdings urged, because “*Coroles* did not interpret—or even mention—rule 26” and because rule 26 appropriately authorized sanctions for failure to disclose. *Id.* ¶ 23.

¶19 So too here, where the district court refused to allow Baumann to disclose or utilize any expert witnesses. The court’s order references only rule 26, not rule 16. Thus, rule 26 is controlling here because Baumann failed to disclose her expert witness until the day of the hearing on Defendants’ joint motion for summary judgment on November 17, without seeking the court’s permission to do so. Consequently, the district court did not err in applying rule 26 when it found that Baumann was “precluded by Rule 26(d)(4) from using any undisclosed witness, document, or material” to contest summary judgment at that hearing.

8. Baumann also argues that in addition to making a finding of no good cause, the district court was also required to make a finding of harmfulness. This, however, is not the case. See *Sleepy Holdings LLC v. Mountain West Title*, 2016 UT App 62, ¶ 21, 370 P.3d 963. It 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. See Utah R. Civ. P. 26(d)(4) (explaining that a “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)); *Bodell Constr. Co. v. Robbins*, 2009 UT 52, ¶ 35, 215 P.3d 933. Thus, it is unnecessary for us to examine whether there was harm. This is not to suggest that the failure was harmless.

¶20 Furthermore, *Bodell Construction Co. v. Robbins*, 2009 UT 52, 215 P.3d 933, supports the district court’s characterization of Baumann’s action as a “failure to make expert report” disclosures rather than a failure to produce discovery timely under a scheduling order. In *Bodell*, the court affirmed the district court’s exclusion of plaintiff’s expert report in accordance with rule 37(f)—now subsumed in rule 26(d)(4)⁹—characterizing an expert report submitted only three weeks after close of fact discovery as a “failure to disclose.” *Id.* ¶¶ 13, 34–37, 40. Using the same metric, Baumann’s report was filed twenty-five weeks after the close of fact discovery.

¶21 In this case, the district court’s order did not address Baumann’s violation of the scheduling order, but instead relied upon rule 26(d)(4), stating that Baumann could not now use “any undisclosed witness, document, or material” to contest summary judgment. Thus, we believe *Sleepy Holdings’* framework provides us with an alternate, more precise way to approach the question of which rule applied in this case, i.e., not whether the district court made its ruling because Baumann violated a scheduling order or because she violated the rules of discovery, but because she did not disclose expert witnesses within the time confines of both the stipulated discovery schedule and the district court’s order cutting off filings after October 8. *See supra* ¶¶ 17–19.

¶22 Because the district court correctly precluded Baumann from using her undisclosed expert witness report to contest summary judgment under rule 26(d)(4) of the Utah Rules of Civil Procedure, we affirm.

9. See *supra* note 5 for our analysis of the applicability to this discussion of pre-2011 amendment cases affirming under rules 26 and 37.

CONCLUSION

¶23 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. As to the expert report applicable to Kroger, under the order of the district court, rule 26(d)(4)—not rule 16(d)—of the Utah Rules of Civil Procedure applied when Baumann failed to disclose the details of her proposed expert. The district court did not abuse its discretion in precluding her from using expert witness testimony to contest summary judgment under rule 26. For the foregoing reasons, we affirm.

CERTIFICATE OF MAILING

I hereby certify that on the 29th day of July, 2016, a true and correct copy of the attached DECISION was sent by standard or electronic mail to be delivered to:

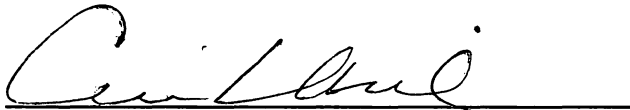
TODD C. HILBIG
ANDREA M. KEYSAR
MORGAN MINNOCK RICE & JAMES
thilbig@mrm.com
akeysar@mrm.com

ELLIOTT J. WILLIAMS
JOHN M. ZIDOW
WILLIAMS & HUNT
ewilliams@williamsandhunt.com
jzidow@williamsandhunt.com

GREGORY W. STEVENS
ATTORNEY AT LAW
utlaw@aol.com

HONORABLE FRED D. HOWARD
FOURTH DISTRICT, HEBER DEPT

FOURTH DISTRICT, HEBER DEPT
ATTN: JULI PATURZO
heberinfo@utcourts.gov



Judicial Secretary

TRIAL COURT: FOURTH DISTRICT, HEBER DEPT, 130500017
APPEALS CASE NO.: 20150078-CA

ADDENDUM B

**District Court Order Granting Defendants' Motion for Summary Judgment
and Final Order and Judgment (Jan. 29, 2015)**



ELLIOTT J. WILLIAMS (3483)
JOHN M. ZIDOW (10626)
WILLIAMS & HUNT
257 East 200 South, Suite 500
P. O. Box 45678
Salt Lake City, Utah 84145-5678
Phone: 801-521-5678
Facsimile: 801-364-4500
ewilliams@williamsandhunt.com
jzidow@williamsandhunt.com

*Attorneys for Defendant
Gregory P. Tayler, M.D.*

TODD C. HILBIG (8643)
ANDREA M. KEYSAR (12139)
MORGAN, MINNOCK, RICE & JAMES
136 South Main Street, Eighth Floor
Salt Lake City, Utah 84101
Phone: 801-531-7888
Facsimile: 801-531-9732
thilbig@mmrj.com
akeysar@mmrj.com

*Attorneys for Defendant The Kroger Co., dba
Smith's Pharmacy #40063*

IN THE FOURTH JUDICIAL DISTRICT COURT FOR WASATCH COUNTY

STATE OF UTAH

KARI L. BAUMANN,

Plaintiff,

v.

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

Defendants.

**[PROPOSED] ORDER GRANTING
DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT AND ORDER OF FINAL
JUDGMENT**

Civil No. 130500017

Judge Fred D. Howard

On Monday, January 5, 2015, at 2:00 p.m., following briefing by the parties, the Court, the Honorable Fred D. Howard presiding, heard oral argument on the joint Motion for Summary Judgment of Defendants The Kroger Company dba Smith's Pharmacy #40063 and Gregory P. Tayler, M.D. John M. Zidow of Williams and Hunt represented Defendant Gregory P. Tayler, M.D. ("Dr. Tayler"). Todd C. Hilbig of Morgan, Minnock, Rice & James represented

Defendant The Kroger Company dba Smith's Pharmacy #40063 ("Kroger"). Plaintiff Kari L. Baumann was pro se.

The Court entertained extensive oral argument from the parties and reviewed (1) the Memorandum in Support of Motion for Summary Judgment of Defendants Kroger and Dr. Tayler filed on September 11, 2014; (2) Plaintiff's Statement Opposing Defendant's Motion for Summary Judgment filed on September 29, 2014; (3) the Reply Memorandum in Support of Motion for Summary Judgment of Defendants Kroger and Dr. Tayler filed on October 8, 2014; and (4) Plaintiff's Statement for Continuation Opposing Defendants' Motion for Summary Judgment and Exclusion of Evidence filed by Plaintiff on January 5, 2015 with permission of the Court and which the Court considered in lieu of oral argument by Plaintiff. In accordance with the Court's Order dated December 22, 2014, all other papers served or filed by Plaintiff after October 8, 2014 were not considered by the Court because those papers were filed after Defendants' Motion for Summary Judgment had been fully briefed and submitted for decision and were, consequently, untimely and filed in violation of the Utah Rules of Civil Procedure and the Stipulation for Additional Time to Conduct Standard Discovery entered by the parties.

After hearing and carefully considering the arguments of the parties and the legal issues to be addressed, and having construed all facts and reasonable inferences to be made therefrom in a light most favorable to Plaintiff, the Court finds that Plaintiff failed to make expert disclosures as required by the Stipulation for Additional Time to Conduct Standard Discovery and Rule 26 of the Utah Rules of Civil Procedure and that there is no good cause for Plaintiff's failure to make expert disclosures. Therefore, Plaintiff was precluded by Rule 26(d)(4) from

using any undisclosed witness, document, or material in opposition to the Motion for Summary Judgment filed by the Defendants. The Court acknowledges 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, Plaintiff's claims are based on alleged overmedication of blood pressure medication. The standards of care related to prescribing and dispensing blood pressure medication, and what neurological or other biological effects that blood pressure 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 Plaintiff's injuries. Consequently, Plaintiff, 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 the Plaintiff, each of which must be established by expert testimony. *Robb v. Anderton*, 863 P.2d 1322, 1325-27 (Utah Ct. App. 1993); *Chadwick v. Nielsen*, 763 P.2d 817, 821 (Utah Ct. App. 1988); *Dalley v. Utah Valley Regional Medical Ctr.*, 791 P.2d 193, 195 (Utah 1990).

Therefore, **IT IS HEREBY ORDERED, ADJUDGED & DECREED** that the joint Motion for Summary Judgment of Defendants The Kroger Company dba Smith's Pharmacy #40063 and Gregory P. Tayler, M.D. is granted, that all of Plaintiff's claims against both

Defendants are dismissed with prejudice, and that the granting of Defendants' Motion for Summary Judgment is dispositive of this case.

APPROVED AS TO FORM:

DATED: January 23, 2015

/s/ Gregory W. Stevens
Gregory W. Stevens
Attorney for Plaintiff

**Executed and entered by the Court as indicated by the stamp and seal
at the top of the first page of this pleading**

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the attached **[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND ORDER OF FINAL JUDGMENT** was served upon the parties listed below via email and first-class U.S.

Mail, postage prepaid, on the 27th day of January, 2015.

Elliot J. Williams ewilliams@williamsandhunt.com
John M. Zidow jzidow@williamsandhunt.com
WILLIAMS & HUNT
257 East 200 South, Suite 500
P.O. Box 45678
Salt Lake City, Utah 84145-5678
Attorneys for Gregory Taylor, M.D.

Gregory W. Stevens utlaw@aol.com
2825 East Cottonwood Parkway
Cottonwood Corporate Center
Suite 500
Salt Lake City, Utah 84121-7060
Attorney for Plaintiff Kari L. Baumann

/s/ Krystal Day _____

ADDENDUM C

**Transcript of Oral Argument Before the District Court
and Decision from the Bench (Jan. 5, 2015)**

CERTIFIED COPY

IN THE FOURTH DISTRICT COURT
COUNTY OF UTAH, STATE OF UTAH

KARI L. BAUMANN,)	No. 130500017
)	
Plaintiff,)	
)	
vs.)	
)	
THE KROGER COMPANY,)	ORAL ARGUMENT
GREGORY P. TAYLOR, M.D.,)	RE SUMMARY JUDGMENT
)	
Defendants.)	

* * *

January 5, 2015

1:58 p.m to 2:32 p.m.

* * *

Reported by Letitia L. Meredith
-Registered Professional Reporter-
Certified Shorthand Reporter



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PHONE 801-328-1188
FAX 801-328-1189

• A TRADITION OF QUALITY •

A P P E A R A N C E S

For Plaintiff: Kari L. Baumann
Pro Se
1136 South 640 East
No. 012
Heber, Utah 84032

For Defendant Kroger Company:

Todd C. Hilbig
MORGAN, MINNOCK, RICE & JAMES
Kearns Building, Eighth Floor
136 South Main Street
Salt Lake City, Utah 84101

For Defendant Dr. Smith:

John M. Zidow
WILLIAMS & HUNT
257 East 200 South, Suite 500
Salt Lake City, Utah 84145

Also present: Terence Spain, Plaintiff's Spouse

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P R O C E E D I N G S

THE BAILIFF: All rise.

THE COURT: Please be seated and good afternoon.

This is the case of Kari L. Baumann versus
the Kroger Company and Gregory P. Taylor, M.D.,
Case No. 103500017.

And are you Kari Baumann?

MS. BAUMANN: Yes, I am, Your Honor.

THE COURT: We'll note that you've appeared.

And for the Defendants?

MR. HILBIG: Todd Hilbig for Smith's Kroger.

MR. ZIDOW: John Zidow for Dr. Taylor.

THE COURT: Thank you.

This is the time set, I think, for oral
argument. We have a reporter. Is that for
convenience of the parties?

MS. BAUMANN: It's for our convenience and for
records and clarification of point.

THE COURT: Do you have any objection to the use
of the reporter? I assume it would be for
convenience and we would keep our audio record as
well.

MR. HILBIG: We would like that. We have no
objection as long as the Defendants aren't required
to --

1 THE COURT: As long as what?

2 MR. HILBIG: The Defendants aren't required to
3 contribute to the cost.

4 THE CLERK: I have not turned on the audio.

5 THE COURT: Do you want to have an audio record?

6 MR. HILBIG: Yes, sir.

7 THE COURT: Give me a minute for that. We'll do
8 that. It will take a minute.

9 MR. HILBIG: Okay. Thank you.

10 THE CLERK: It's on.

11 THE COURT: All right. This is a motion for
12 summary judgment. I think it's the Defendants'. I
13 would hear from counsel for that, on that, and then,
14 Ms. Baumann, I'll hear from you, and they have a
15 chance in turn to reply.

16 Counsel, good afternoon.

17 MR. HILBIG: Good afternoon, Judge. May it
18 please The Court and the opposing parties.

19 This lawsuit was filed in February of 2013,
20 almost two years ago. In March of 2014 the parties
21 entered into a stipulation, and the court condoned
22 that stipulation with an order which put that cutoff
23 to May 30th of 2014. The Plaintiff's expert
24 disclosures were due on June 6th about 7 months ago.
25 Expert cutoff was September 5th, about 4 months ago,

1 and this instant motion was filed on September 11 of
2 2014.

3 The Plaintiffs -- Your Honor, the Plaintiff
4 failed to designate expert witnesses according to
5 Utah Rules of Civil Procedure and the stipulation for
6 additional time to conduct standard discovery. Under
7 Rule 26 D4, if a party fails to make a disclosure
8 required by Rule 26, quote, "that party may not use
9 the undisclosed witness, document, or material at any
10 hearing or trial unless the failure is harmless or
11 the party shows good cause for the failure."

12 Under Rule 37H of the Utah Rules of Civil
13 Procedure, if a party fails to disclose a witness,
14 document, or other material, that party shall not be
15 permitted to use the witness, document, or other
16 material at any hearing unless the failure to
17 disclose is harmless or the party shows good cause
18 for a failure to disclose.

19 In addition to or in lieu of this sanction,
20 the court on motion may take any action authorized
21 under Rule 37E2. In Plaintiff's answers to discovery
22 she signed way back in February of 2014,
23 February 20th, 2014, in more than one answer to
24 discovery, she postponed responding to
25 interrogatories or request for production to produce

1 the names of experts in the reports.

2 Your Honor, if I can approach the bench
3 with a copy of those. I failed to make sufficient
4 copies for Mr. Zidow, but I think he's aware of this
5 discovery. I do have one --

6 MS. BAUMANN: Thank you.

7 MR. HILBIG: -- however, for the Plaintiff.

8 THE COURT: Thank you.

9 MR. HILBIG: If I can direct The Court's
10 attention to page five, this is Plaintiff's response
11 to first set of combined discovery requests of
12 Defendants Gregory P. Taylor, M.D., and the Kroger
13 Company, dba Smith's Pharmacy. And if I can direct
14 The Court's attention to Interrogatory No. 13 and the
15 Plaintiff's sworn response.

16 "Plaintiff will identify such witnesses and
17 their anticipated testimony as requested when
18 scheduled to do so by case management order."

19 If I can also direct The Court's attention
20 to Interrogatory No. 15, "Identify each person you
21 intend to call as a witness in the trial or
22 arbitration of this action including expert witnesses
23 specifying for each their name, address, telephone
24 number, occupation, and a brief summary of their
25 expected testimony." The answer to No. 15 was "See

1 Answer No. 13."

2 If I could also direct The Court's
3 attention to page eight of this same document, signed
4 by Ms. Kari Baumann on February 20th, 2014. Request
5 No. 10, "Produce a copy of all documents, reports, or
6 opinions you have received from each expert witness
7 you intend to call to testify at the trial or
8 arbitration of this action."

9 Response No. 10, "Plaintiff will produce
10 request No. 10 when scheduled to do so by case
11 management order." Page nine is Ms. Baumann's
12 signature.

13 Your Honor, without expert testimony, the
14 Plaintiff cannot establish a prima facia case for her
15 medical malpractice claims, healthcare malpractice
16 claims. She cannot establish the standard of care
17 for a doctor or a pharmacy. She cannot establish
18 breach, and she cannot establish whether any alleged
19 breach caused injury.

20 For this reason, this case is -- for these
21 reasons this case is ripe to be dismissed with
22 prejudice and for summary judgment to be granted.

23 By order of this court on November 17th,
24 2014, Ms. Baumann is not permitted argue or submit
25 anything to the court beyond the date on which the

1 Defendants filed their request to submit for decision
2 which was on October 8th, 2014. Any filings by the
3 Plaintiff subsequent to that date are by court order
4 precluded to be considered by the court.

5 THE COURT: Okay.

6 MR. HILBIG: That November 17th, 2014 order was
7 memorialized by this court on December 12th, 2014.
8 The December 12, 2014 order negates any reports,
9 filings, memorandum, or the like subsequent to
10 October 8th, 2014.

11 That same order also allows the Plaintiff
12 who represents herself pro se to submit today one of
13 two things, verbal argument or a written statement in
14 lieu of oral argument.

15 Ms. Baumann has alluded to social security
16 documents, Social Security Administration documents.
17 These documents are not pertinent to this case or the
18 motion for summary judgment. The social security
19 documents do not satisfy Rule 26. The social
20 security documents do not create or even attempt to
21 create some standard of care that would be in any way
22 applicable to this case.

23 The records in no way comment on any breach
24 of the standard of care vis-a-vis a physician or a
25 pharmacy and have absolutely nothing to do with

1 causation or injuries related to this case or this
2 motion for summary judgment. The social security
3 documents have only relevance to Ms. Baumann's social
4 security disability claim.

5 Any subsequent filings past October 8th,
6 2014 by Ms. Baumann are an attempt to unring the
7 bell. They are an attempt to put the cart before the
8 horse, and they are akin to attempting to put a
9 witness on the stand after a jury is already
10 deliberating.

11 And so as part of this summary judgment
12 oral argument the Defense would request that
13 The Court reiterate its previous ruling that the late
14 October, November, December and for that matter
15 January filings being negated.

16 Judge, this case is old. Based on this
17 court's orders, both the order for discovery as well
18 as the recent December 22nd, 2014 order also form a
19 finding of summary judgment in favor of the
20 Defendants. The Defendants filed this motion jointly
21 and would request that this court dismiss
22 Mr. Baumann's case with prejudice.

23 If The Court has no further questions, I'll
24 yield.

25 THE COURT: Thank you. I have no questions.

1 MR. ZIDOW: Thank you, Your Honor, John Zidow
2 again for Dr. Taylor. I don't have anything to add
3 to that, but I would like the opportunity to reply to
4 any opposition argument.

5 THE COURT: Thank you.

6 Ms. Baumann, did you want to read your
7 statement?

8 MS. BAUMANN: Yes, please, Your Honor.

9 THE COURT: If you do, you may do so there
10 seated and make yourself comfortable.

11 MS. BAUMANN: Thank you, Your Honor.

12 If I may respond, in the statement that I
13 gave you, there was some critical errors of notation
14 in regards to the order that was signed that regards
15 the hearing and misrepresentation by the Defense on
16 pleadings and date cutoff of subsequent filings, and
17 that is why I provided you with not only a transcript
18 of the hearing but also a court docket that the
19 Defendants just sent to me along with your order that
20 was signed I received on Saturday.

21 In Mr. Hilbig's statement up there, he said
22 that you memorialized the order on December 12th. It
23 was actually signed on December 22nd. There was no
24 certificate of service issued, and I'm served by
25 first-class mail. It was not postmarked until

1 December 31st, and as such, I just received it
2 two days ago. That is an issue that then
3 circumvents, goes back to the fact of what was stated
4 in the oral argument hearing, and in regards to -- if
5 I can reference a point too from the transcript of
6 what was stated in regards to the cutoff date to
7 documents, I would respect your consideration to that
8 matter because it's very significant the evidence
9 they are trying to exclude.

10 And also they keep filing things
11 and telling -- it's a one-sided -- they are telling
12 me I'm not allowed to do things, and in turn they are
13 doing things requesting information from me and in
14 turn not responding or they are filing -- continuing
15 along with this procedure, it's turning into a
16 procedural, not an evidentiary, battle, which I know
17 summary judgment is evidentiary, not procedural.

18 So if I can ask you to -- the first part is
19 to on -- just a correction on page seven of the
20 docket for minutes to oral arguments under the
21 hearing, and third paragraph where it starts "The
22 court sustains the objection and allows Plaintiff to
23 choose whether to represent herself," the very last
24 sentence turns to "Defendant requests a continuance,"
25 and from that point forward, I was referred to as the

1 defendant. I'm asking for a correction to the
2 record.

3 THE COURT: That's just an error.

4 MS. BAUMANN: Correct. Another significant
5 point of the transcript is not in regards to my
6 filing statement for the argument but to the court's
7 order dated December 22nd, this -- I did write that
8 in here. It excludes relevant -- in the transcript
9 on page 11, line 22 through page 13, line 10, as you
10 can see, in answer to The Court's question,
11 Mr. Hilbig was nonresponsive and in fact
12 mischaracterized my pleadings.

13 He stated -- you had asked if there had
14 been any further filings, and they responded no.
15 They had in fact responded and actually put in --
16 submitted an amended order to submit all the way
17 back, the docket will show, on November 7, which
18 included my pleading.

19 THE COURT: May I interrupt you.

20 MS. BAUMANN: Certainly.

21 THE COURT: I understood the discussion that
22 we're speaking to had to do with confining --

23 MS. BAUMANN: This is because of -- I'm sorry.

24 THE COURT: -- confining the argument --
25 confining the discussion for today's argument to that

1 which had been filed.

2 MS. BAUMANN: It is accepted by their statement
3 at the hearing last time about when documents were
4 filed. I hadn't even received the order to submit
5 yet because I was served by via mail and the cutoff
6 date that The Court issued was October 8th.

7 THE COURT: Did you misunderstand The Court's
8 intention to limit the argument to the motion and the
9 opposition and only the reply?

10 MS. BAUMANN: No, I do understand that, but I
11 felt by excluding my documents due to me not even
12 receiving the documents, that was a key part of what
13 I was trying to point out, so I will move on with my
14 statement then.

15 THE COURT: All right. Go ahead.

16 MS. BAUMANN: "The language of summary judgment,
17 as stated in the Utah and Federal Rules of Civil
18 Procedure is clear. For summary judgment to be
19 proper there must be 'No genuine issue as to any
20 material fact,' and the moving party 'always bears
21 the initial responsibility of ... identifying those
22 portions ... which it believes demonstrates the
23 absence of a genuine issue of material fact.'"

24 "The Defendant's sole stated reason for
25 summary judgment is not based on the lack of evidence

1 but on their opinion that I knowingly committed a
2 procedural error and hence the case should be
3 dismissed. Procedural formalities are not the law,
4 and the Defendants have failed to identify with any
5 particularity any issues or absence of genuine
6 material fact in any of their multiple pleadings.
7 The Defendants, in fact, have strategized to prevent
8 me from presenting this case before a state
9 tribunal."

10 THE COURT: Let me interrupt you if I could.

11 MS. BAUMANN: Correct.

12 THE COURT: I've read much of this already.

13 MS. BAUMANN: Okay.

14 THE COURT: I read down to the last page and a
15 half, if that helps --

16 MS. BAUMANN: Okay.

17 THE COURT: -- since it's in writing. I've read
18 down to No. 4, Damages.

19 MS. BAUMANN: Okay.

20 THE COURT: Do you want to pick up there?

21 MS. BAUMANN: I can do that. Would you like me
22 to continue with the paragraph following that?

23 THE COURT: Well, let me read Damages.

24 MS. BAUMANN: Okay.

25 THE COURT: Go ahead.

1 MS. BAUMANN: "These elements of my prima facie
2 case are supported and evidenced in my Memorandum
3 opposing summary judgment dated October 10th." I,
4 again, said I never received the order to submit yet,
5 their motion to submit yet through the mail.

6 "In addition, Defendants stated in their
7 pleadings that I 'have shown that I can't get an
8 expert witness,' so in response I presented them in
9 March of 2014 the medical expert testimony in a
10 favorable social security ruling dated March 13,
11 2014.

12 "Dr. Houston described a disabling brain
13 injury which ALJ Switzer ruled an onset date of
14 injury and subsequent disability as of February 4,
15 2007, the date of the medication overdose.

16 "The Defendants are now choosing to
17 ignore," even though they previously stipulated to
18 the importance of the social security case and the
19 ruling -- and stayed the -- state procedures waiting
20 on this ruling and its significance -- "are choosing
21 to ignore the importance and relevance of
22 Dr. Houston's testimony and Judge Switzer's ruling."

23 That was also from a federal court remand.
24 There's been numerous reviews of this case in the
25 federal level. "In response to their contentions and

1 with great expense, I therefore retained Dr. James T.
2 O'Donnell as a pharmaceutical expert who prepared a
3 written report regarding the event and related
4 injuries." I then sent it to the defense on
5 November 12. That's another piece of evidence they
6 are trying to exclude.

7 "Defendants were successful in excluding
8 this relevant evidence by the mischaracterization of
9 material facts to the court during in the hearing on
10 November 17. Due to the Defendant's action,
11 The Court subsequently issued an order dated
12 September 22nd excluding this evidence."

13 The Social Security Ruling relevance,
14 "Defendants stipulated to my previous counsel and
15 Third District Court Judge Barrett the importance of
16 a final ruling on my first social security case which
17 was pending in federal court. Defendants agreed that
18 the pending ruling was significant due to the fact
19 that the time in question included February 4, 2007.

20 "On March 3rd, 2014, upon federal court
21 remand, Judge Switzer" -- excuse me -- "issued a
22 favorable ruling of disability retroactive to
23 February 4, 2007" -- that's a correction to the
24 date -- "the date of the overdose."

25 "After this affirmative ruling and

1 important notation of an onset date of 2/4/07 the
2 defendants now consider the ruling irrelevant. I
3 believe it is because they admitted to the fact" in
4 their answers to the complaints that I did go to the
5 emergency room with low blood pressure, and they
6 opined that my claimed injuries were preexisting but
7 have never provided any proof or any detail to that
8 effect.

9 "In conclusion, I believe that summary
10 judgment is improper due to the fact that the
11 defendant's basis is procedural not evidentiary. I
12 Kari L. Baumann, Plaintiff Pro Se, have followed Utah
13 Rules of Civil Procedure in parts 7, 9, 12,"
14 admission of special pleadings "15, 26, 37, and 56,
15 to the best of my ability."

16 And for good cause I've only admitted stuff
17 to save expense which I know that the Utah supreme
18 court is trying to limit litigation due to expense
19 especially to a pro se client is important and that
20 is why we submitted the medical testimony from
21 Dr. Houston that the federal courts had requested,
22 and in response again when that now became relevant
23 we retained the other expert.

24 We "pray for The Court's denial of the
25 defendant's motion for summary judgment and that I am

1 allowed my Constitutional right to Due Process," and
2 would hope that this case can be referred to ADR for
3 resolution. Thank you very much.

4 THE COURT: Thank you, Ms. Baumann, for my
5 record then perhaps I should include a copy of the
6 this statement since I read it.

7 MS. BAUMANN: That's your copy up there.

8 THE COURT: Do you have any objection to that,
9 Counsel?

10 MR. HILBIG: No, Your Honor. My only
11 reservation would be that we have not -- I'll need a
12 copy.

13 THE COURT: Your formal statement I'll include
14 in the record.

15 MS. BAUMANN: Thank you.

16 THE COURT: Does that conclude your statement?

17 MS. BAUMANN: Yes, it does, Your Honor.

18 THE COURT: Thank you.

19 Counsel.

20 MR. HILBIG: Yes, Judge, if I may respond.

21 THE COURT: Yes, uh-huh.

22 MR. HILBIG: We have not received a copy of
23 whatever writing you have before you from
24 Ms. Baumann.

25 THE COURT: Do you want a copy made?

1 MR. HILBIG: That would be helpful at some
2 point. We don't need to necessarily do it now.

3 THE COURT: I was not aware of that. Sorry.

4 MS. BAUMANN: If I may, Your Honor, they
5 actually, including the order that you presented that
6 I just received Saturday, they included a memorandum
7 opposing the admission of evidence, again, and
8 included exhibits which included that docket that you
9 have before you, and they had also, a couple days
10 before that, had submitted a motion against ADR.

11 THE COURT: Thank you.

12 Go ahead.

13 MR. HILBIG: Your Honor, just a few points, I'll
14 try and be brief. With respect to whatever writing
15 was just submitted to the court by the Plaintiff Pro
16 Se, just for the record, the December 22nd, 2014
17 order allowed Ms. Baumann to either make a verbal
18 argument or submit her verbal argument in writing,
19 and so either one of the two should apply.
20 Secondly --

21 THE COURT: Are you opposed to what happened
22 today, her reading her statement?

23 MR. HILBIG: Well, as long as her verbal
24 statements aren't outside the bounds of what she
25 provided the court in writing.

1 THE COURT: They seemed to --

2 MR. HILBIG: And I can't speak to that because I
3 haven't seen what's written.

4 THE COURT: I'm sorry you didn't have it. It
5 appears to me they were substantially consistent with
6 the written statement.

7 MR. HILBIG: Secondly, Your Honor, I'm not sure
8 how to quite address everything that was mentioned by
9 the Plaintiff in terms of dates and when things were
10 submitted and what was submitted, but let me simply
11 say that I believe the court's docket from my recent
12 review of it and the court's order should be able to
13 address each of those points in terms of when and
14 what was submitted.

15 Finally, Ms. Baumann argues that the
16 defendants are attempting to obtain a dismissal of this
17 case on procedural grounds not evidentiary. In fact,
18 the Defendants are seeking dismissal of this case
19 both on procedural and evidentiary points.

20 Thank you.

21 So in summary, based on the rules of
22 procedure, based on the most recent scheduling order
23 which gave the Plaintiff the benefit of clarifying
24 exactly which date or designation and reports were
25 due and based on the written briefing as well as this

1 court's orders, the Defendants respectfully request
2 that the court dismiss summarily the case brought by
3 Ms. Baumann. Thank you.

4 THE COURT: Counsel, do you have additional
5 argument?

6 MR. ZIDOW: I want to point out -- again,
7 John Zidow for Dr. Taylor. The court's order entered
8 December 22nd made it clear that the court was only
9 going to review those documents that were included in
10 the opposition that was filed in response to the
11 motion for summary judgment.

12 A lot of this information regarding the
13 Social Security Administration, the federal hearings,
14 were not part of that opposition memorandum, so I
15 want to make sure that I go on the record to clarify
16 for the court that those are perhaps beyond the scope
17 of what Your Honor said you would consider with
18 regard to this motion.

19 Would you like for me to address those
20 issues at all?

21 THE COURT: I think I understand the issue.

22 MR. ZIDOW: Okay. Great. That's it then, Your
23 Honor, thank you.

24 THE COURT: Thank you.

25 For my record then, does that conclude the

1 oral argument on the motion?

2 MS. BAUMANN: Your Honor, there was a
3 clarification in there that there were two points in
4 the hearing from last point where the Defense
5 requested that the cutoff date be October 8th of
6 which the points that Mr. Zidow just brought up were
7 included in my memorandum that was submitted on the
8 10th. I hadn't received the paperwork from the 8th.

9 And then also in the transcript from the
10 hearing, Mr. Hilbig in another paragraph that I
11 referenced in the statement then says that the cutoff
12 date is from when the court submits a hearing date
13 which was October 15 which I again did not receive,
14 but my memorandum fits into either one of those and
15 that it contains significant portions of everything
16 that they brought up saying that should not be
17 allowed, is contained in that, in that memorandum,
18 and I'm asking that you consider that, and the expert
19 witness report was just to try to save quite a few
20 thousand dollars for this point and thought that the
21 facts would speak for themselves and the Defense
22 would want to move forward with also a less expensive
23 and more timely speedier way of getting resolution to
24 this case that's been personally hard on me also for
25 eight years. Thank you.

1 THE COURT: Mr. Hilbig.

2 MR. HILBIG: Your Honor, Ms. Baumann is correct
3 that the notice from the court was issued on
4 October 15. However, the court's order at the prior,
5 for lack of a better term, initial hearing for this
6 motion on November 17th was that the court would
7 consider only the memoranda filed on or before
8 October 8th, 2014, which is the date that the
9 Defendants requested to submit for decision this
10 motion.

11 THE COURT: Thank you.

12 I understand your positions. I appreciate
13 your preparation, and I'm prepared to make a ruling.

14 First of all, The Court will not consider
15 filings the date past October 8th of 2014. Next,
16 under Rule 56, summary judgment may only be granted
17 if the pleadings and affidavits show that there is no
18 genuine issue as to material fact and that the moving
19 party is entitled to judgment as a matter of law.

20 The Court must consider the facts in the
21 light most favorable to the nonmoving party. The
22 nonmoving party must show whether there is a genuine
23 issue for trial setting forth specific facts and must
24 do so by admissible evidence. In medical malpractice
25 litigation, a plaintiff must prove both the standard

1 of care and proximate cause by expert testimony.

2 There is narrow exception to this rule
3 where plaintiff may prove both the standard of care
4 and proximate cause by lay testimony. This exception
5 applies where the standard of care and proximate
6 cause lay within common knowledge and would be clear
7 to a lay juror.

8 In this case, the appropriate standard of
9 care for a physician prescribing medication and for a
10 pharmacy filling that prescription does not lie
11 within the common knowledge of the layperson. Also,
12 the harmful effects of any potential overdose of that
13 medication lies outside of common knowledge as well.

14 Given the history and the record, the
15 Defendants' motion is therefore well taken and is to
16 be granted because Plaintiff has failed to provide
17 the required expert testimony as to the standard of
18 care, breach, and causation. Respectfully, The Court
19 will grant the motion to dismiss with prejudice.

20 I'll note to Ms. Baumann your record on the
21 matter today. I'll ask counsel for Defendants,
22 Mr. Hilbig, if you'll prepare an appropriate order.

23 MR. HILBIG: Yes, Judge.

24 THE COURT: Anything else to address?

25 MR. HILBIG: No, Your Honor. Thank you.

1 THE COURT: Ms. Baumann.

2 MS. BAUMANN: I understand you cutting off the
3 date on the 8th, but I had never received those
4 documents, and I submitted the memorandum which did
5 support that and did have testimony and followed
6 through with their admissions and all the supporting
7 evidence needed to prove that it was a standard of
8 care breach and an injury and they admitted to a lot
9 of portions of this.

10 So by denying that evidence submitted after
11 the 8th that's included in the memorandum of which
12 Mr. Hilbig at the last hearing called unusual and not
13 contrary to court rules is --

14 THE COURT: I --

15 MS. BAUMANN: I never received the order yet, so
16 how can I be penalized for not having submitted --
17 submitting something after the fact when I hadn't
18 even received the fact yet?

19 THE COURT: My position is the record -- and I
20 think the record reflects the discussion of the court
21 at the 17th -- November 17th hearing to close the
22 arguments relative to the pleadings. I have a
23 serious question about whether your filings would
24 have contained admissible evidence. Notwithstanding,
25 I've made my ruling. I'll note your record. Thank

1 you.

2 Anything else?

3 MR. HILBIG: No, Judge. Thank you.

4 THE COURT: Thank you. Please drive safely.

5 THE BAILIFF: All rise.

6 (Whereupon the taking of this hearing was
7 concluded at 2:32 p.m.)

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C E R T I F I C A T E

STATE OF UTAH)
)
COUNTY OF UTAH)

THIS IS TO CERTIFY that the foregoing hearing was taken before me, Letitia L. Meredith, Registered Professional Reporter and Notary Public in and for the State of Utah and State of California.

That the hearing was reported by me in Stenotype, and thereafter transcribed by computer under my supervision, and that a full, true, and correct transcription is set forth in the foregoing pages.

I further certify that I am not of kin or otherwise associated with any of the parties to said cause of action, and that I am not interested in the event thereof.

WITNESS MY HAND and official seal at Spanish Fork, Utah, this 9th day of January 2015.



Letitia L. Meredith, CSR/RPR

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ADDENDUM D
District Court Order (Dec. 22, 2014)

The Order of Court is stated below:

Dated: December 22, 2014
08:32:20 AM

/s/ Fred D. Howard
District Court Judge



ELLIOTT J. WILLIAMS (3483)
JOHN M. ZIDOW (10626)
WILLIAMS & HUNT
257 East 200 South, Suite 500
P. O. Box 45678
Salt Lake City, Utah 84145-5678
Phone: 801-521-5678
Facsimile: 801-364-4500
ewilliams@williamsandhunt.com
jzidow@williamsandhunt.com
Attorneys for Defendant
Gregory P. Tayler, M.D.

TODD C. HILBIG (8643)
ANDREA M. KEYSAR (12139)
MORGAN, MINNOCK, RICE & JAMES
136 South Main Street, Eighth Floor
Salt Lake City, Utah 84101
Phone: 801-531-7888
Facsimile: 801-531-9732

thilbig@mmrj.com
jstuart@mmrj.com

Attorneys for Defendant The Kroger Co., dba
Smith's Pharmacy #40063

IN THE FOURTH JUDICIAL DISTRICT COURT FOR WASATCH COUNTY

STATE OF UTAH

KARI L. BAUMANN,

Plaintiff,

v.

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

ORDER

Civil No. 130500017

Judge Fred D. Howard

Defendants.	
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THIS MATTER was before the Court for oral argument at 3:30 p.m. on November 17, 2014, on the joint Motion for Summary Judgment of Defendants The Kroger Company dba Smith's Pharmacy #40063 and Gregory Tayler, M.D. filed on September 11, 2014, with Plaintiff pro se, John Zidow appearing for Defendant Gregory P. Tayler, M.D. ("Dr. Tayler"), and Todd C. Hilbig appearing for the Kroger Co., dba Smith's Pharmacy ("Smith's"); and being fully advised in the premises and for good cause appearing,

IT IS ORDERED AND ADJUDGED that:

Oral argument which was originally set for 3:30 p.m. on November 17, 2014, on the Defendants' Joint Motion for Summary Judgment has been continued to 2:00 p.m. on Monday, January 5, 2015.

None of Plaintiff's current or future memoranda, briefs, reports, correspondence, emails, pleadings, or filings of any nature filed subsequent to October 8, 2014, which is the date of Defendants' originally filed Request to Submit for Decision, whether filed as a pro se or potentially represented Plaintiff, have been or will be considered by the Court prior to, during, or after oral argument on January 5, 2015, nor have they been or will be permitted to be considered by the Court in deciding, the joint Motion for Summary Judgment of Defendants The Kroger Company dba Smith's Pharmacy #40063 and Gregory Tayler, M.D. The only memoranda, reports, or filings which have been, or will be, accepted and considered by the Court are as follows: Motion for Summary Judgment of Defendants The Kroger Company dba Smith's Pharmacy #40063 and Gregory Tayler, M.D. dated September 11, 2014; Memorandum in Support of Motion for Summary Judgment of Defendants The Kroger Company dba Smith's Pharmacy #40063 and Gregory Tayler, M.D. dated September 11, 2014; Plaintiff's Statement Opposing Defendant's Motion for Summary Judgment Hearing Requested dated September 29, 2014; Reply Memorandum in Support of Motion for Summary Judgment of Defendants The Kroger Company dba Smith's Pharmacy #40063 and Gregory Tayler, M.D. dated October 8, 2014; and Request to Submit for Decision (Oral Argument Requested) dated October 8, 2014.

Plaintiff pro se has until the end of business on January 2, 2015, to retain a licensed attorney. That attorney, if any appears, is ordered to file a Notice of Appearance of Counsel before the end of business on January 2, 2015.

If Plaintiff pro se does not retain an attorney who has formally noticed his or her appearance by the end of business on January 2, 2015, then Plaintiff shall appear pro se at the oral argument on Monday, January 5, 2015, at 2:00 p.m., and Plaintiff pro se is the only person permitted to present oral argument for Plaintiff. If Plaintiff pro se wishes, she may submit to the

Court on January 5, 2015, her oral argument by way of a concise written statement in lieu of speaking, but she shall not employ the written statement as an attempt or means to submit to the Court an additional memorandum, brief, report, filing, or the like.

DATED this _____ day of _____, 2014.

BY THE COURT:

Honorable Fred D. Howard
Fourth Judicial District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the attached **ORDER OF COURT ON 11-17-14** in Case No. 130500017 before the Fourth Judicial District Court for Wasatch County, State of Utah, was served upon the parties listed below either via electronic notification or first-class U.S. Mail, postage prepaid, on the 28th day of November, 2014.

Counsel for Plaintiff

Kari L. Baumann, *Pro Se*
1136 South 640 East, #12
Heber City, Utah 84032

Counsel for Defendant Gregory P. Tayler, M.D.

Elliott J. Williams
John M. Zidow
WILLIAMS & HUNT
257 East 200 South, Suite 500
P. O. Box 45678
Salt Lake City, Utah 84145-5678

/s/ Lexi Balling

ADDENDUM E

Transcript of Oral Argument Before the District Court (Nov. 27, 2014)

CERTIFIED COPY

IN THE FOURTH DISTRICT COURT
COUNTY OF UTAH, STATE OF UTAH

KARI L. BAUMANN,)	No. 130500017
)	
Plaintiff,)	
)	
vs.)	
)	
THE KROGER COMPANY,)	ORAL ARGUMENT
GREGORY P. TAYLOR, M.D.,)	CONTINUATION
)	
Defendants.)	

* * *

November 17, 2014

3:32 p.m to 3:54 p.m.

* * *

Reported Letitia L. Meredith
-Registered Professional Reporter-
Certified Shorthand Reporter



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WWW.DEPOMAXMERIT.COM

TOLL FREE 800-337-6629
PHONE 801-328-1188
FAX 801-328-1189

A P P E A R A N C E S

For Plaintiff: Kari L. Baumann
Pro Se
1136 South 640 East
No. 012
Heber, Utah 84032

For Defendant Kroger Company:

Todd C. Hilbig
MORGAN, MINNOCK, RICE & JAMES
Kearns Building, Eighth Floor
136 South Main Street
Salt Lake City, Utah 84101

For Defendant Dr. Smith:

John M. Zidow
WILLIAMS & HUNT
257 East 200 South, Suite 500
Salt Lake City, Utah 84145

Also present: Terence Spain, Plaintiff's Spouse

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P R O C E E D I N G S

THE BAILIFF: All rise.

THE COURT: Please be seated. Good afternoon.
We may call the case. We have the matter of
Kari Baumann, Plaintiff, versus The Kroger Company,
and Gregory P. Taylor, M.D., Case 13050017.

And for my record, are you Kari Baumann?

MS. BAUMANN: Yes, I am, Your Honor.

THE COURT: We'll note you're present.

MS. BAUMANN: Kari Baumann.

THE COURT: Kari Baumann. Nice to have you
here. Welcome.

MS. BAUMANN: Thank you.

THE COURT: And for the Defense?

MR. HILBIG: Good afternoon, Judge. My name is
Todd Hilbig. I represent one of the Defendants,
Smith's Pharmacy.

THE COURT: Good afternoon.

MR. ZIDOW: Your Honor, thank you. My name is
John Zidow from the law firm of Williams & Hunt,
representing Dr. Taylor.

THE COURT: Good afternoon.

MR. SPAIN: Your Honor, my name is Terry Spain.
I am the husband of Kari Baumann, the Plaintiff. In
most matters I'll be speaking for her if there is no

1 objection by the court.

2 THE COURT: Well, there might be.

3 MR. HILBIG: Certainly we would object to a
4 nonlawyer representing a pro se plaintiff.

5 THE COURT: Let me interrupt you. Am I given to
6 understand that the parties have agreed to the
7 reporter here today as the person who can make the
8 record?

9 MR. HILBIG: Yes, Judge, I think we've
10 stipulated to that insofar as the Plaintiffs are
11 bearing the cost of such.

12 THE COURT: So far as they pay the cost of it?

13 MR. HILBIG: Bearing the cost.

14 THE COURT: Ms. Baumann, is that agreeable?

15 MS. BAUMANN: Yes, it is, Your Honor.

16 THE COURT: All right. I'll note the record.

17 Are you Mr. Baumann?

18 MR. SPAIN: I'm Mr. Spain, her husband, sir.

19 THE COURT: Spain.

20 MR. SPAIN: Spain. My last name is Spain.

21 THE COURT: I don't know that I have the ability
22 to let you speak for her if you're not a licensed
23 attorney.

24 MR. SPAIN: Your Honor, the pro se client in
25 this case is disabled and has a little bit of a hard

1 time communicating on her own, staying on task,
2 staying focused, communication, slurred speech, items
3 of this nature. I'm her husband, very familiar with
4 the case, and have filed all the documents in the
5 case to date after the loss of our last attorney.

6 I would be able to speak on her behalf
7 being her husband just my understanding, but I'm
8 muddling through all this as well. We're not
9 attorneys obviously but doing the very best we can.

10 THE COURT: Okay. Mr. Hilbig?

11 MR. HILBIG: Yes, Your Honor.

12 THE COURT: Do you object?

13 MR. HILBIG: I do.

14 THE COURT: Mr. Zidow.

15 MR. ZIDOW: I do as well, Your Honor. I think
16 there's a concern about the unlicensed practice of
17 law under these circumstances.

18 THE COURT: I really cannot do this because
19 while your motive may be correct and pure, in
20 principal you may do more harm than good not being a
21 licensed attorney. That's the concern.

22 MR. SPAIN: The client isn't a licensed attorney
23 either operating pro se and disabled, Your Honor.

24 THE COURT: The difference is she's entitled to
25 do this under constitutional protection. She's not

1 required to have an attorney, but if you have the
2 assistance of an individual, there ought to be
3 somebody that's licensed in the law. Perhaps she
4 could get an assistance of a pro bono attorney.

5 What I would -- hate to do this but I think
6 I would be inclined to continue the hearing to allow
7 you to secure an attorney if you wish or to proceed
8 at this time yourself, Ms. Baumann.

9 MS. BAUMANN: I can try to do my best for your
10 questions, but we've been in this process for seven
11 and a half years, so --

12 THE COURT: The choice is yours.

13 MS. BAUMANN: We tried to obtain counsel. The
14 only way we might be is through pro bono.

15 THE COURT: If you can -- if you want a
16 continuance to try to get a pro bono attorney, I
17 would probably grant you some time to do that.
18 Otherwise, you can proceed today yourself.

19 MS. BAUMANN: I will take the continuance.
20 We've been trying to get into ADR and avoid this. Is
21 there an in between here?

22 THE COURT: For mediation or something?

23 MS. BAUMANN: Yes.

24 THE COURT: Well, that's not the issue. The
25 issue is the hearing today.

1 MS. BAUMANN: I'll accept the continuance then.

2 THE COURT: Do you wish to speak to that,
3 Mr. Hilbig?

4 MR. HILBIG: I think I'm probably obligated to
5 in the best interest of both my client and the age of
6 the case. Yeah, I would like to, Your Honor, with
7 due respect, put on the record that my client wishes
8 to proceed today.

9 THE COURT: Wishes to proceed. Puts me in a
10 pickle, doesn't it?

11 MR. HILBIG: It does, and I apologize for that.

12 THE COURT: I don't blame anyone.

13 MR. HILBIG: But the tremendous expense that my
14 client has incurred over many years needs to also be
15 likewise honored and considered in today's hearing.
16 So, yes, I would object to that on the record,
17 certainly giving deference to the court.

18 THE COURT: Mr. Zidow?

19 MR. ZIDOW: I think there's just one point I
20 would like to make for the court's consideration is
21 that this claim arose in 2007. There's already been
22 one lawsuit filed. The Plaintiff did have
23 representation of counsel in that case. That case
24 was dismissed upon stipulation of the parties, and
25 then after -- within the saving statute this lawsuit

1 was filed again with counsel, and that counsel has
2 also withdrawn, and I think the only --

3 THE COURT: May I ask you a question?

4 MR. ZIDOW: Uh-huh.

5 THE COURT: Have you had any hearing in which
6 she had to speak before a tribunal?

7 MR. ZIDOW: No, Your Honor.

8 THE COURT: All right. Go ahead.

9 MR. ZIDOW: And that's it. I just want to offer
10 that perspective for the court. Dr. Taylor like
11 Kroger pharmacists involved from Kroger have been
12 dealing with this for a very long time. It's a hard
13 issue for Dr. Taylor, very personal, so I want to go
14 on the record and present that to the court. We
15 would like to get this going forward as fast as we
16 can in the event there is a continuance.

17 THE COURT: Well, okay then. I understand the
18 issue completely. I'm going to continue the hearing.
19 I think that being pro se Ms. Baumann probably would
20 not maybe -- maybe would not fully appreciate that
21 she could not have her husband speak for her inasmuch
22 as she had certain communicated disabilities or
23 limitations.

24 I therefore think that she's entitled to
25 some time in which to try to secure an attorney to

1 speak for her. At the same time, that attorney's not
2 going to be at liberty to supplement the record. The
3 motion -- the pleadings have closed on the motion, so
4 the issue is getting somebody here to speak on the
5 question and that which has been filed to date.

6 So what I'll do is set the matter for
7 hearing now, and I'll allow you to -- we'll reset the
8 oral argument, and, Ms. Baumann, you're going to be
9 needing to get that attorney here with you by that
10 date or plan on speaking yourself to the question.

11 And in that regard, if you would like, if
12 you have disability in terms of making oral
13 communication, you may simply write your statement as
14 long as it's reasonable in length, and I would be
15 happy to read that if that's going to be of help to
16 you.

17 MS. BAUMANN: If I may, may I ask what's the
18 statement and memorandum that were filed --

19 THE COURT: That which you have filed --

20 MS. BAUMANN: -- in response to their --

21 THE COURT: I've read it, and that's part of
22 your record. I'm speaking of oral argument or the
23 right to stand at the lecturn and simply talk about
24 it in general terms.

25 MR. HILBIG: May I seek clarification from the

1 court.

2 THE COURT: Yes. Let me ask her if she
3 understands.

4 Do you understand what I mean?

5 MS. BAUMANN: Yes, I do, Your Honor.

6 THE COURT: Okay. Go ahead, Mr. Hilbig.

7 MR. HILBIG: Yes. Your Honor, I understand that
8 there was an 11th hour -- that's not the appropriate
9 term -- an after-the-fact filing apparently today
10 with the court. Presuming that your order today
11 means that was --

12 THE COURT: There was additional filings?

13 MR. HILBIG: -- that that which was filed today
14 is not part of what the court will consider.

15 THE COURT: It is not. I'm unaware of it. I'm
16 speaking of that which was noticed under the request
17 to submit.

18 MR. HILBIG: And, again, for clarification, is
19 that the filings that were submitted before the
20 hearing was noticed?

21 THE COURT: Yes, the motion, the opposition, the
22 reply.

23 MR. HILBIG: Okay. Judge, I mention that
24 because there were some kind of supplemental,
25 unconventional filings since the hearing was set, and

1 as I understand the court, any of those supplemental
2 outside the scope of the rules filings are not going
3 to be considered at the court's hearing the next time
4 we come.

5 THE COURT: That's true.

6 MR. HILBIG: Thank you, Judge.

7 THE COURT: Mr. Zidow?

8 MR. ZIDOW: I think the -- Mr. Hilbig seeking
9 clarification on it. We filed two requests to submit
10 for decision, and we want to make sure which of those
11 two requests the court's referring to as being the
12 entire record here or --

13 MR. HILBIG: Judge?

14 THE COURT: I think it was dated October 8.

15 MR. HILBIG: Okay. So everything filed before
16 October 8 will be part of the record. Anything filed
17 subsequent to that date will not be considered by the
18 court.

19 THE COURT: That's correct.

20 MR. HILBIG: Okay. Thank you, Judge.

21 THE COURT: Ms. Baumann.

22 MS. BAUMANN: They filed stuff subsequent and we
23 were replying to these filings that we even got at
24 the end -- just the end of last week we received
25 filings from both parties here, and that was our

1 response. We're filing and trying to do our best to
2 file in response to their filings, and what they
3 submitted to you was amended -- to put before that
4 was just received at the end of the week, and we
5 answered that to make -- to clarify --

6 THE COURT: Let me ask them.

7 Did you file amended pleadings?

8 MR. HILBIG: Judge, just for the sake of
9 clarity, the Defendants filed a joint motion for
10 summary judgment. Ms. Baumann filed what was called
11 a statement opposing. The Defendants then filed a
12 reply memorandum and submitted the motion for oral
13 argument on October 8th.

14 THE COURT: Okay.

15 MR. HILBIG: Subsequent to that date,
16 Ms. Baumann filed what she called a memorandum in
17 support of statement opposing Defendants' motion for
18 summary judgment after the motion had been submitted
19 for decision. The Defendants have not filed anything
20 subsequent to that other than an additional reply in
21 order to, you know, respond to this supplemental
22 opposition. A second notice to submit for decision
23 was then filed by the Defendants. That's all.

24 THE COURT: And does the new memorandum in
25 support of the statement raise new issues?

1 MR. HILBIG: Well, it's an unusual document.

2 THE COURT: It's contrary to the rule.

3 MR. HILBIG: Correct.

4 THE COURT: Do you object to it?

5 MR. HILBIG: I agree with the court that all
6 that's needed is what was filed up until it was
7 noticed to submit per the rules for motion practice,
8 so I agree with the court that the only thing that
9 should be considered is what was filed up until the
10 notice was sent by the court for this hearing.

11 THE COURT: All right. Ms. Baumann.

12 MS. BAUMANN: In discovery there was a federal
13 remand from -- judge remand from social security.
14 When it came back there was a medical expert that
15 testified, and we submitted that to them and
16 believing that that -- because of the expense of
17 discovery of the experts, we were trying to --
18 because there's been admissions from part of the
19 defense towards this case of fault.

20 And we submitted that hoping that would
21 preclude -- and this goes back to March of this year,
22 and then when they filed for judgment, we responded
23 with this testimony again from this other medical
24 expert although unconventional in that it wasn't a
25 hearing.

1 THE COURT: Right.

2 MS. BAUMANN: So we then responded with having
3 to procure an expert which we then got for them and
4 submitted it to them as soon as we got it and they
5 subsequently responded with the two documents to
6 amend the oral arguments and what to include in it
7 that they just submitted.

8 THE COURT: Okay. Mr. Hilbig.

9 MR. HILBIG: Just for clarity of record, there
10 have been no admissions or any dating back to March
11 of 2014. There has been no medical expert, even if
12 unconventional, and I think by virtue of what we've
13 heard so far from the Plaintiff pro se, perhaps she
14 is articulate enough to go forward with the motion
15 today.

16 MR. SPAIN: Your Honor, that's incorrect.

17 THE COURT: You want to continue this matter?

18 MS. BAUMANN: I feel that in the record is --
19 because I know these facts because I was at the
20 hearing, they were submitted with this expert's
21 transcript.

22 THE COURT: I'm asking you if you want to
23 continue your arguments today.

24 MS. BAUMANN: No.

25 THE COURT: You want to argue today?

1 MS. BAUMANN: No.

2 THE COURT: You want to continue the hearing?

3 MS. BAUMANN: Yes, please.

4 THE COURT: All right. Thank you. I'll stand
5 on the previous decision. October 8th will be the
6 close of the pleadings, and we'll give you 30 days in
7 which to secure counsel. I'll give you a hearing
8 date of an hour and set a date at this time. We'll
9 look at our calendars together. I'll give you the
10 date so you can prepare. You're probably free on
11 December 23 but probably do not want to be here.

12 MR. SPAIN: Your Honor, we won't be in the state
13 until January 2nd.

14 THE COURT: How about January 5th, afternoon,
15 Monday?

16 MR. ZIDOW: We could be here for Dr. Taylor,
17 Your Honor.

18 MR. HILBIG: Yes, Your Honor. I'm free on the
19 5th.

20 THE COURT: How about 2:00?

21 MR. HILBIG: That sounds fine, Judge. Just so I
22 understand what will happen from this point
23 forward --

24 THE COURT: Monday, January 5th at 2:00. I'll
25 reserve an hour. We'll hear conventional arguments

1 on the motion limited to the October 8th request
2 pleadings.

3 MR. HILBIG: And if Plaintiff does not obtain a
4 lawyer within 30 days?

5 THE COURT: I can't hear you.

6 MR. HILBIG: If Plaintiff does not retain a
7 lawyer within 30 days?

8 THE COURT: We'll expect her to be here to
9 argue.

10 MR. HILBIG: Pro se.

11 MS. BAUMANN: Your Honor, if I may, from the
12 Rule 37 about the admission of evidence, there was no
13 maliciousness or -- you know, trying not to -- we
14 were following what we were submitting to them what
15 we thought they wanted and we want to ask that the
16 expert report that was given to them that they
17 requested that we be admitted to the record.

18 THE COURT: I'm not going to make any such
19 rulings today.

20 MS. BAUMANN: Okay. I just wanted it on the
21 record.

22 THE COURT: I'm not trying to criticize. I'm
23 just giving you time in which to speak to an attorney
24 so you can have someone argue your motion, your
25 opposition. So you have that time now which is a

1 month and a half.

2 MS. BAUMANN: Thank you, Your Honor.

3 MR. SPAIN: Thank you, Your Honor.

4 THE COURT: And, again, if you're unable to --
5 for some reason cannot do this, I'll entertain a
6 written oral statement. It's not a pleading. It
7 would be considered your oral statement if you have
8 difficulty speaking. I'll consider it only for that
9 purpose.

10 All right. Do you have any questions?

11 Thank you for your time.

12 MR. HILBIG: Judge, may I interject one more
13 item just because after so many years we're seeking
14 some clarity. 30 days from today would be
15 December 17th.

16 THE COURT: Would be what?

17 MR. HILBIG: December 17th.

18 THE COURT: Well, yeah, we've gone beyond that.
19 I gave her additional time because she's not
20 available.

21 MR. HILBIG: So you're giving her until the 5th.

22 THE COURT: I'm giving her to the 5th.

23 MR. HILBIG: Understood. Thank you, Judge.

24 THE COURT: Yeah. It was more than 30 days.
25 I'll grant you that.

1 MR. ZIDOW: Your Honor, if I may, one thing that
2 may be helpful for the parties is in the event they
3 do find an attorney would be to let the Plaintiffs
4 know that their attorney should contact us so we know
5 that he or she is involved and we may be able to
6 coordinate things. That would just be helpful so
7 we're notified of who their lawyer may be.

8 THE COURT: If she's decides to get an attorney,
9 perhaps they should communicate.

10 MR. SPAIN: That would be nice.

11 MS. BAUMANN: Yes, that would.

12 THE COURT: Anything else?

13 MR. HILBIG: Judge, with that in mind, could we
14 obtain an order from the court that the Plaintiff, if
15 she is able to retain an attorney, that that attorney
16 files a notice of appearance before the hearing date?

17 THE COURT: That seems advised. Let's do that.
18 Okay. Mr. Hilbig, if you want to write an order for
19 us for today, that would be fine.

20 MR. HILBIG: Perhaps collectively we can select
21 a date that's mutually agreeable to the court and to
22 the other side so that we'll know before the hearing
23 who's representing her or not.

24 THE COURT: I think it would be helpful.

25 Could you do that? Could you make sure

1 that the attorney you speak to would talk and tell
2 them that he's going to represent you and he can file
3 a notice of his appearance --

4 MS. BAUMANN: Certainly.

5 THE COURT: -- in the court file?

6 MR. HILBIG: Sorry to interrupt, Judge, but I
7 would propose that before the end of the year that
8 attorney files an appearance.

9 THE COURT: I'll give her right up until the
10 hearing date, a couple more days there so it can be
11 done by January 2nd.

12 MR. HILBIG: Okay. Thank you, Judge.

13 THE COURT: By January 2nd.

14 MS. BAUMANN: Yes, Your Honor.

15 THE COURT: Okay? That's a good point.
16 Anything else?

17 MR. ZIDOW: Not for me, Your Honor. Thank you.

18 MR. HILBIG: No, Judge. Thank you.

19 THE COURT: Have a good holiday.

20 THE BAILIFF: All rise.

21 (Whereupon the taking of this proceeding was
22 concluded at 3:54 p.m.)

23 * * *

C E R T I F I C A T E

STATE OF UTAH)
)
COUNTY OF SALT LAKE)

THIS IS TO CERTIFY that the foregoing deposition was taken before me, Letitia L. Meredith, Registered Professional Reporter and Notary Public for the State of Utah and Certified Shorthand Reporter for the State of California.

That the said witness was by me, before examination, duly sworn to testify the truth, the whole truth, and nothing but the truth in said cause.

That the testimony was reported by me in Stenotype, and thereafter transcribed by computer under my supervision, and that a full, true, and correct transcription is set forth in the foregoing pages.

I further certify that I am not of kin or otherwise associated with any of the parties to said cause of action and that I am not interested in the event thereof.

WITNESS MY HAND and official seal at Spanish Fork, Utah, this 19 day of November 2014.


Letitia L. Meredith, CSR, RPR

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