IN THE UTAH SUPREME COURT

KARI L. BAUMANN,

Plaintiff/Appellant,

vs.

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

Defendants/Appellees.

BRIEF OF APPELLEE THE KROGER COMPANY DBA SMITH'S PHARMACY #40063 ("SMITH'S PHARMACY")

Supreme Court Case No. 20160686

APPEAL FROM UTAH COURT OF APPEALS AFFIRMING ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND ORDER OF FINAL JUDGMENT ENTERED IN THE FOURTH DISTRICT COURT, WASATCH COUNTY, STATE OF UTAH, THE HONORABLE FRED D. HOWARD PRESIDING

ORAL ARGUMENT REQUESTED

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grounds for seeking review of issues not preserved in the trial court as necessitated by Rule 24(a)(5)(B) of the Utah Rules of Appellate Procedure. Smith's Pharmacy asserts that Ms. Baumann never noticed up for decision any request for leave to allow Ms. Baumann to extend discovery or to belatedly disclose or use an expert or expert report related to the standard of care for a pharmacy, any breach of that standard of care, or whether any such breach proximately caused her alleged injuries. With regard to Smith's Pharmacy, there is only one issue preserved and presented to the district court which may be addressed in Ms. Baumann's appeal:

1. Whether the district court correctly granted Smith's Pharmacy summary judgment after determining the age of the case (Record ("R.") 479-480), the history and record of the case (R.496; 479-480), and the expiration of all discovery (R.86-87), and after considering Ms. Baumann's failures to: timely designate experts (R.86-87), comply with representations in her answers to discovery (R.513-515), comply with the Utah Rules of Civil Procedure (R.525-529), comply with the stipulated scheduling order (R.86-87), follow the district court's orders on briefing (R.402), and make out a prima facie case for her pharmacy malpractice claim (R.95-97; 526-529).

   STANDARD OF REVIEW: In reviewing a motion for summary judgment, an appellate court accords no deference to the district court's legal conclusions but

examines them for correctness. *Butterfield v. Okubo*, 831 P.2d 97, 102 (Utah 1992); *Schurtz v. BMW of North Am., Inc.*, 814 P.2d 1108, 1112 (Utah 1991).

CONSTITUTIONAL PROVISIONS, STATUTES, OR RULES

See Addendum A attached hereto quoting, in relevant part, the following Utah Rules of Civil Procedure:

56(b). Summary Judgment.

56(c). Summary Judgment.

7(c)(1). Pleadings allowed; motions, memoranda.

16(d). Pretrial conferences.

37(e)(2). Discovery and disclosure motions; Sanctions. (2014)[1]

37(h). Discovery and disclosure motions; Sanctions. (2014)[2]

P. 29. Stipulations regarding disclosure and discovery procedure.

26(a)(4)(C). General provisions governing disclosure and discovery.

26(d)(4). General provisions governing disclosure and discovery.

[1] Renumbered May 1, 2015 to Utah R. Civ. P. 37(b).

[2] On May 1, 2015, Rule 37 was renumbered. The version of Rule 37 in effect prior to May 1, 2015 is quoted in Addendum A.

STATEMENT OF THE CASE

Prior to this action, Kari Baumann's claim arose in 2007, and she previously filed an initial lawsuit that was later dismissed. Within the one year savings statute, the instant lawsuit was filed again in 2013. R.479-480. Ms. Baumann filed this action on February 27, 2013, in the Fourth Judicial District Court. R.1. Ms. Baumann's Complaint alleges health care provider negligence against Dr. Tayler and Smith's Pharmacy and claims that the breach of the respective duties of Dr. Tayler and Smith's Pharmacy constituted the proximate cause of Ms. Baumann's alleged injury. R.2-11. After the expiration of Ms. Baumann's expert designations deadline and the close of expert discovery, Defendants filed a Joint Motion for Summary Judgment. During the first oral argument on November 17, 2014, the district court ordered and explained to Plaintiff/Appellant that the date of Defendants' Request to Submit for Decision or October 8, 2014 was the close of the pleadings on Defendants' Joint Motion for Summary Judgment. The district court did not re-open discovery. Also at the first oral argument on November 17, 2014, the district court ordered and explained that it would continue the hearing to January 5, 2015 for the sole purpose of allowing Plaintiff pro se an opportunity to retain an attorney to make oral argument on her behalf on January 5, 2015, but that the attorney, if retained, was "not going to be at liberty to supplement this record." Plaintiff did not hire an attorney, and she appeared pro se on January 5, 2015, at the second hearing. At the conclusion of the

second oral argument, the district court granted Smith's Pharmacy and Dr. Tayler's joint motion for summary judgment. R.460. On January 29, 2015, the district court executed and entered an Order Granting Defendants' Motion for Summary Judgment and Order of Final Judgment. R.525-529.

Ms. Baumann appealed, and the Utah Court of Appeals concluded that the "district court did not abuse its discretion...." The Court of Appeals affirmed summary judgment granted by the lower court "[b]ecause the district court correctly precluded Baumann from using an undisclosed expert witness report to contest summary judgment under rule 26(d)(4)…." The Court of Appeals entered its opinion, from which Ms. Baumann takes this appeal, on July 29, 2016.

STATEMENT OF FACTS

1. Ms. Baumann's Complaint of February 27, 2013, alleges that she suffered an acute hypotensive event on February 4, 2007, as a result of being prescribed and having taken duplicative prescription blood pressure medications. R.7-11.
2. Prior to this instant action, Ms. Baumann's claim had arisen in 2007, and she previously filed an initial lawsuit that was later dismissed upon stipulation of the parties. Within the one year savings statute, the instant lawsuit was filed again February 27, 2013. R.479-480.

3. In the subject February 27, 2013 Complaint, Ms. Baumann alleges a claim of medical negligence along with a claim for "breach of duty of informed consent" against Dr. Tayler. R.5-7.
4. With regard to each claim against Dr. Tayler, Ms. Baumann alleges that Dr. Tayler breached the applicable standard of care as a physician and that the breach was the proximate cause of Ms. Baumann's injuries. R.5-7.
5. Regarding her claims against Smith's Pharmacy, Ms. Baumann alleges that Smith's Pharmacy breached the applicable standard of care expected from a pharmacy and that such a breach proximately caused injury. R.2-5.
6. At the time of her Complaint, Ms. Baumann was represented by counsel. R.1.
7. However, on June 19, 2013, Ms. Baumann's counsel filed a Notice of Withdrawal. R.34-35.
8. On June 19, 2013, the same day that Ms. Baumann's counsel withdrew from this case, Dr. Tayler filed his Answer to Plaintiff's Complaint and the district court issued its Notice of Event Due Dates. R.44.
9. On June 21, 2013, Smith's Pharmacy filed its Answer to the Complaint; and Notices to Appoint New Counsel or Appear in Person were served on Ms. Baumann and filed with the Court. R.45-47 & 60-62.

10. Ms. Baumann filed a Notice of Appearance Pro Se on August 14, 2013. R.63 & 66-67.

11. On March 7, 2014, consistent with Rule 29 of the Utah Rules of Civil Procedure, the parties executed and filed a Stipulation for Additional Time to Conduct Standard Discovery. R.84-87 & 98-106.

12. The Stipulation for Additional Time to Conduct Standard Discovery, which was approved and signed by Ms. Baumann, specifically provided that "Plaintiff's Rule 26(a)(4)(A) expert disclosures shall be made no later than June 6, 2014." R.86, 100, 102, & 104 (emphasis added).

13. The Stipulation for Additional Time to Conduct Standard Discovery, signed by Ms. Baumann, also provided that "Expert discovery shall be completed by no later than September 5, 2014." R.86, 100, 102, & 104 (emphasis added).

14. Defendants/Appellees specifically addressed those two expired deadlines with the district court at the summary judgment oral argument hearing on January 5, 2015. R.515-516.

15. More than three months passed between the June 6, 2014 deadline for Ms. Baumann to serve and file her 26(a)(4)(A) expert disclosures and September 11, 2014, when Smith's Pharmacy and Dr. Tayler filed their joint Motion for Summary Judgment and demonstrated that Ms. Baumann did not file or serve-- and that Ms.

Baumann was now precluded from filing or serving-- any expert disclosures as required by the Utah Rules of Civil Procedure or the Stipulation for Additional Time to Conduct Standard Discovery, and that without expert testimony Ms. Baumann cannot establish a *prima facie* case for her claims that the medical or pharmacy standards of care were breached or that any alleged breach by a health care provider proximately caused injury. R.95-97 & 98-142.

16. The joint Motion dated September 11, 2014, demonstrated to the district court the case was ripe for summary judgment and dismissal with prejudice as follows:

> Pursuant to Rule 56 of the Utah Rules of Civil Procedure, Plaintiff failed to designate expert witnesses in the time mandated by the Utah Rules of Civil Procedure and the Stipulation for Additional Time to Conduct Standard Discovery entered into by the parties. Without expert testimony, Plaintiff cannot establish a *prima facie* case for her claims that the medical standard of care was breached, or that the pharmacy standard of care was breached, or that any breach in the standard of care for a healthcare provider proximately caused injury to the Plaintiff. Accordingly, this action and the claims asserted therein should be dismissed with prejudice.

R.95-97.

17. The Memorandum in Support of Motion for Summary Judgment of Defendants dated September 11, 2014, showed that under the history, timing, and circumstances of the case a lack of expert disclosures warranted summary judgment, as follows:

A plaintiff who alleges a healthcare negligence claim can only establish a *prima facie* case through expert testimony that establishes: (1) the standard of care by which a healthcare provider's conduct is to be measured; (2) the defendant's breach of that standard; and (3) that such departure was the proximate cause of injury to the plaintiff. *Robb v. Anderton*, 863 P.2d 1322, 1327 (Utah Ct. App. 1993); *Chadwick v. Nielsen*, 763 P.2d 817, 821 (Utah Ct. App. 1988). Each of these elements must be established through competent expert testimony to withstand summary judgment. *Dalley v. Utah Valley Regional Medical Ctr*., 791 P.2d 193, 195 (Utah 1990); *Robb*, 863 P.2d at 1325; *Chadwick*, 763 P.2d 821.

> A plaintiff's failure to present evidence that, if believed by the trier of fact, would establish any one of the three prongs of the *prima facie* case justifies a grant of summary judgment to the defendant.

Dikeou v. Osborn, 881 P.2d 943, 946 (Utah Ct. App. 1994). Healthcare providers are not insurers or guarantors of results and an undesired outcome standing alone is not evidence of negligence. *Nielsen v. Pioneer Valley Hosp*., 830 P.2d 270, 273 (Utah 1992).

In this case, Rule 26 of the Utah Rules of Civil Procedure and the Stipulation for Additional Time to Conduct Standard Discovery required Plaintiff to serve her expert disclosures by June 6, 2014. Plaintiff has not made any expert disclosures in the specialties of family medicine, cardiovascular health, neuroscience, pharmacy, or pharmacology to testify regarding the applicable standards of care, any alleged breach of a standard of care, and whether any such breach proximately caused Plaintiff's alleged injury or damage. Summary judgment, therefore, is appropriate and ripe because Plaintiff cannot establish the required elements of her claims.

In summary, because Plaintiff has failed to make expert disclosures as required by Rule 26 of the Utah Rules of Civil Procedure and the Stipulation for Additional Time to Conduct Standard Discovery, there will be no expert testimony at trial that will establish a *prima facie* case against Dr. Tayler or Kroger/Smith's Pharmacy for Plaintiff's healthcare-based claims. This action should, therefore, be summarily dismissed with prejudice.

R.138-139; & 98-142.

18. Appellant/Plaintiff's September 29, 2014 "Statement Opposing Defendant's Motion for Summary Judgment" and her attachments did not include any Rule 26(a)(4)(A) expert designations or expert reports. R.143-152.

19. In her Statement Opposing the Defendants' joint Motion for Summary Judgment, Appellant/Plaintiff (1) admits that she has not served any expert disclosures required by the URCP; (2) states that a ruling from the Social Security Administration in an unrelated matter is a basis for not granting Defendants' motion; and (3) asserts that medical and other documents produced during discovery will allow Plaintiff to make a *prima facie* case of liability. R.150-152.

20. Dr. Tayler and Smith's Pharmacy's October 8, 2014 joint Reply Memorandum demonstrated that the matter was now ripe for Defendants' Motion for Summary Judgment to be granted and Plaintiff's claims to be dismissed, in light of the following:

> Rule 26(a)(4)(c)(i) of the Utah Rules of Civil Procedure provides that "[t]he party who bears the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by [Rule 26(a)(4)(A)] within seven days after the close of fact discovery." Rule 26(d)(4) further provides that if a party fails to make a disclosure required by Rule 26, "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." Additionally, Rule 37(h) states that "[i]f a party fails to disclose a witness, document or other material … 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. In addition to or in lieu of this sanction, the court on motion may take any action authorized under [Rule 37(e)(2)]."

Plaintiff was represented by counsel at the time her Complaint was filed. On June 19, 2013, Plaintiff's counsel filed a Notice of Withdrawal. On that same day, the Court issued its Notice of Event Due Dates. As a consequence of the formal withdrawal of Plaintiff's counsel, the discovery event due dates issued by the Court were delayed. Subsequent to Plaintiff filing her Notice of Appearance Pro Se, the parties entered into a Stipulation for Additional Time to Conduct Standard Discovery (the "Stipulation"). The Stipulation clearly states that it was being amended to account for the "additional 85 days provided for the service of Plaintiff's initial disclosures …" As shown above, Rule 26(a)(4)(c)(i) requires that the party with the burden of proof serve expert disclosures within seven days of the close of fact discovery. Because the parties stipulated that fact discovery was to be completed no later than May 30, 2014, the Stipulation clearly indicated for Plaintiff that she was to make her Rule 26(a)(4)(A) expert disclosures seven days thereafter, on June 6, 2014. The Notice of Event Due Dates served by the Court simply included a deadline by which all expert discovery was to be completed.

Contrary to Plaintiff's suggestion that the insertion of Plaintiff's expert disclosure deadline was "misleading" or in violation of the Standards of Professionalism and Civility, inclusion of the deadline clarified to Plaintiff when her expert disclosures were to be served in order to comply with the requirements of Rule 26(a)(4)(A) – specifically, that her expert disclosures were to be made within seven days of the close of fact discovery, a legally mandated deadline not included in the Court's Notice of Event Due Dates.

Plaintiff's opposition affirms that she has not made and cannot make any expert disclosures required by Rule 26. There is no evidence that Plaintiff has any expert information to disclose as required by Rule 26(a)(4)(A). "In general, a pro se document 'is to be liberally construed . . . [H]owever, inartfully pleaded, it must be held to less stringent standards than formal pleadings drafted by lawyers and can only be dismissed . . . if it appears beyond doubt that the plaintiff can prove no set of facts in support [of her] claim which would entitle [her] to relief." *McNair v. State*, 2014 UT App 127, ¶ 12, 328 P.3d 874 (citation omitted). Here, liberally construing Plaintiff's opposition, there are no facts showing in any way that Plaintiff has made or can make expert disclosures. The fact that Plaintiff has had a ruling before the Social Security Administration is irrelevant to this case and does not provide any basis for an ability to make expert disclosures in this case. Further,

while medical documents and other discovery have been exchanged, to withstand summary judgment, Utah law clearly requires Plaintiff to set forth expert testimony to establish (1) the standard of care by which a health care provider's conduct is to be measured; (2) the defendant's breach of that standard; and (3) that such departure was the proximate cause of injury to the plaintiff. *Robb v. Anderton*, 863 P.2d 1322, 1322-27 (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). Because it appears beyond any doubt that Plaintiff has failed to serve or is able to serve expert disclosures required by Rule 26(a)(4)(A), Defendants' Motion should be granted and the Plaintiff's action should be dismissed with prejudice.

Plaintiff has failed to make any expert disclosures in the time mandated by the Utah Rules of Civil Procedure and the Stipulation for Additional Time to Conduct Standard Discovery entered into by the parties. Without expert testimony, Plaintiff cannot establish a *prima facie* case for her claims, *viz.*, that the medical standard of care was breached, that the pharmacy standard of care was breached, or that any breach in the standard of care for a health care provider proximately caused injury to the Plaintiff. Accordingly, Defendants respectfully requested that the action and claims asserted therein be dismissed with prejudice.

R.153-158.

21. About nine (9) months before Defendants Dr. Tayler and Smith's Pharmacy filed their joint Motion for Summary Judgment, Defendants/Appellees served Ms. Baumann on December 18, 2013, with interrogatories and requests for production of documents entitled "First Set of Combined Discovery Requests of Defendants Gregory P. Tayler, M.D., and The Kroger Company dba Smith's Pharmacy #40063 to Plaintiff." R.78-79.

22. On February 20, 2014, Ms. Baumann signed and served her Responses, and on February 21, 2014, she filed her certificate of service entitled "Plaintiff's Responses to First Set of Combined Discovery Requests of Defendants Gregory P. Tayler, MD and The Kroger Company dba Smith's Pharmacy #40063". R.82-83.

23. At the January 5, 2015, oral argument hearing on Defendants'/Appellees' motion for summary judgment, the district court reviewed the pertinent portions of Ms. Baumann's signed Responses to the combined discovery requests. R.513- 515.

24. In Plaintiff's Responses, signed on February 20, 2014, Ms. Baumann verified-- in more than one answer-- that she would comply with the case management order and identify her experts and their testimony when scheduled to do so by the scheduling order rather than answer the interrogatories or requests for production

of documents which requested the names of her experts and production of expert reports. R.513- 515.

25. At the January 5, 2015, oral argument hearing on Defendants'/Appellees' motion for summary judgment, the district court received a complete copy of Ms. Baumann's signed Responses. R.514.

26. On page five of Ms. Baumann's Responses, Ms. Baumann's sworn Response to Interrogatory No. 13 was as follows: "Plaintiff will identify such witnesses *and their anticipated testimony* as requested *when scheduled to do so by case management order*." (emphasis added) R.514.

27. The district court's attention at the second (or January 5th) oral argument hearing was next directed to Interrogatory No. 15, which asked: "Identify each person you intend to call as a witness in the trial or arbitration of this action *including <u>expert witnesses</u> specifying for each their name, address, telephone number, occupation, and a brief summary of their expected <u>testimony</u>.*" (emphasis added) R.514.

28. Ms. Baumann's sworn Response to Interrogatory No. 15 was: "See Answer No. 13 [i.e., "Plaintiff will identify such *[expert] witnesses and their anticipated testimony* as requested *when scheduled to do so by case management order*."]." R.513-514.

29. The district court's attention at the second oral argument was further directed to page eight of Ms. Baumann's Responses which she signed on February 20, 2014. R.513.

30. On page eight, Request for Production of Documents No. 10 requested the following: "Produce a copy of all *documents, reports, or opinions you have received from each expert witness* you intend to call to testify at the trial or arbitration of this action." (emphasis added) R.513.

31. Again, Ms. Baumann's sworn Response to Request for Production of Documents No. 10 was: "Plaintiff *will produce request No. 10 when scheduled to do so by case management order.*" (emphasis added) R.513.

32. On page nine is Ms. Baumann's signature. R.513.

33. In light of the age of the case, the Utah Rules of Civil Procedure, the deadlines in the Stipulation for Additional Time to Conduct Standard Discovery signed by Ms. Baumann, Ms. Baumann's promises made in her signed Responses to written discovery, and the court's rulings at the first oral argument on November 17, 2015, Smith's Pharmacy asserted to the district court at the second, or the January 5, 2015, oral argument: "Your Honor, without expert testimony, the Plaintiff cannot establish a prima facie case for her medical malpractice case for her medical malpractice claims, healthcare malpractice claims. She cannot establish the

standard of care for a doctor or a pharmacy. She cannot establish breach, and she cannot establish whether any alleged breach caused injury." R.513. "For … these reasons this case is ripe to be dismissed with prejudice and for summary judgment to be granted." R.513.

34. Smith's Pharmacy reminded the district court at the second oral argument hearing that: "By order of this court [at the first oral argument] on November 17th, 2014, Ms. Baumann is not permitted [to] argue or submit anything to the court beyond the date on which the Defendants filed their request to submit for decision which was on October 8th, 2014. Any filings by the Plaintiff subsequent to that date are by court order precluded to be considered by the court." R.512-513.

35. At the second oral argument, the district court confirmed with Ms. Baumann that she understood the court's intention at the first oral argument to not allow consideration of any belated or impermissible memoranda or other filings, but rather to limit the filings to only the Defendants'/Appellees' summary judgment motion, the opposition, and the reply: "THE COURT: *Did you misunderstand the Court's intention to limit the argument to the motion and the opposition and only the reply*? MS. BAUMANN: *No, I do understand that*…." (emphasis added) R.507.

36. At the first oral argument hearing on November 17, 2014, the husband of Plaintiff pro se, Mr. Spain, who is not a lawyer, had attempted to speak for and argue on

behalf of Plaintiff pro se, at which point the district court stated: "I don't know that I have the ability to let you speak for her if you're not a licensed attorney." The district court further expressed its concern over Mr. Spain's participation as follows: "I really cannot do this because while your [Mr. Spain's] motive may be correct and pure, in principal you may do more harm than good not being a licensed attorney. That's the concern." R.482-483.

37. In response, the following conversation ensued between the district court and Ms. Baumann, Plaintiff pro se: "The difference is she [Ms. Baumann] is entitled to do this under constitutional protection. She's not required to have an attorney, but if you have the assistance of an individual, there ought to be somebody that's licensed in the law. Perhaps she could get an assistance of a pro bono attorney. What I would – hate to do this but I think I would be inclined to continue the hearing to allow you to secure an attorney if you wish or to proceed at this time yourself, Ms. Baumann. * * * The choice is yours." R.481.

38. Ms. Baumann responded during the first oral argument that she had already tried unsuccessfully to obtain counsel. R.481.

39. The district court in turn offered: "If you can – if you want a continuance to try to get a pro bono attorney, I would probably grant you some time to do that. Otherwise, you can proceed today yourself." R.481.

40. Ms. Baumann: "I will take the continuance." R.481.

41. After insights on the case's history by the attorneys for the Defendants/ Appellees relevant to the question of whether the district court should continue the summary judgment hearing (R.479-480), the district court held as follows: "Well, okay then. I understand the issue completely. I'm going to continue the hearing. I think that being pro se Ms. Baumann probably would not maybe – maybe would not fully appreciate that she could not have her husband speak for her…. I therefore think that she's entitled to some time in which to try to secure an attorney to speak for her. *At the same time, that attorney's not going to be at liberty to supplement this record. The motion – the pleadings have closed on the motion, so the issue is getting somebody here to speak on the question and that which has been filed to date [October 8, 2014].*" (emphasis added) R.478-480.

42. The district court merely reset the first oral argument hearing on November 17, 2014 to January 5, 2015 to permit Plaintiff pro se one final opportunity to retain a lawyer, and that if she was unable to obtain a lawyer by the second hearing she must "plan on speaking yourself to the question" and "stand at the lectern", but that if she would like she "may simply write your statement." There was no other ground for the continuance. R.478-480.

43. The district court ensured that Plaintiff/Appellant understood what the court meant: "THE COURT: Yes. Let me ask her if she understands. *Do you understand what I mean?* MS. BAUMANN: *Yes, I do, Your Honor*." (emphasis added) R.477.

44. The district court did not continue the first hearing to permit late or additional filings by Plaintiff/Appellant beyond October 8, 2014, the date the Defendants/ Appellees appropriately and timely filed their Request to Submit for Decision the joint motion for summary judgment. R.472 & 476; 159-162.

45. Anything filed after October 8, 2014 is contrary to the motion practice rule. R.474.

46. "MR. HILBIG: So everything filed [by] October 8 will be part of the record. *Anything filed subsequent to that date will not be considered by the court*. THE COURT: *That's correct*." (emphasis added) R.476; 468-478.

47. Plaintiff/Appellant elected to continue the hearing and take advantage of the court's offer to allow her to obtain counsel in the interim, but the court once again clarified to Plaintiff/Appellant its prior decision to limit the summary judgment motion pleadings to what the rules of procedure allow. "THE COURT: You want to argue today? MS. BAUMANN: No. THE COURT: You want to continue the hearing? MS. BAUMANN: Yes, please. THE COURT: All right. Thank you. *I'll stand on the previous decision. October 8th [2014] will be the close of the pleadings, and we'll give you 30 days in which to secure counsel."* (emphasis added) R.472-473.

48. "THE COURT: And, again, if you're unable to – for some reason cannot do this [i.e., secure counsel], I'll entertain a written oral statement. It's not a pleading. It would be considered your oral statement if you have difficulty speaking. I'll consider it only for that purpose." R.470.

49. According to the "Minutes Oral Argument in Provo", *the "Court closes the pleadings on the Motion for Summary Judgment as of 10/8/2014."* (emphasis added) R.388.

50. The rulings the court issued during the November 17, 2014 hearing are detailed in the court's Order entered on December 22, 2014. R.400-402.

51. The December 22, 2014 court-executed Order explicitly explains that:

> "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."
>
> R.401.

52. In light of the court's November 17, 2014 orders (entered on December 22, 2014), the district court would not consider any documents filed after October 8, 2014, which includes the following:

- Plaintiff's Memorandum in Support of Statement Opposing Defendants' Motion for Summary Judgment -- filed October 10, 2014;

- Plaintiff's URCP 26 Expert Report in Response to Reply Memorandum in Support of Statement Opposing Defendants' Motion for Summary Judgment -- filed November 17, 2014; or,

- Request for Admission of Plaintiff's URCP 26 Expert Report and CV to the Document Record in Response to Defendants' Amended Request to Submit for Decision -- filed November 17, 2014.

R.401; 325; 383; & 386.

53. Pursuant to court Order, the only documents the district court was to consider in deciding Defendants' Joint Motion include the following:

- Motion for Summary Judgment of Defendants The Kroger Company dba Smith's Pharmacy #40063 and Gregory Tayler, M.D. dated September 11, 2014; (R.97)

- 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; (R.142)

- Plaintiff's Statement Opposing Defendant's Motion for Summary Judgment Hearing Requested dated September 29, 2014; (R.152)

- 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; (R.158) and,

- Request to Submit for Decision (Oral Argument Requested) dated October 8, 2014. (R.162)

R.401.

54. On the above-discussed two conditions, that the pleadings had closed October 8, 2014, and that Plaintiff pro se had one more opportunity to find an attorney for oral argument, the district court continued, for Ms. Baumann's benefit, the oral argument from November 17, 2015 to January 5, 2015. R.472.

55. At the second oral argument for summary judgment on January 5, 2015, Plaintiff appeared unrepresented, and Smith's Pharmacy verbally reaffirmed to the district court as follows: "So in summary, based on the rules of procedure, based on the most recent scheduling order which gave the Plaintiff the benefit of clarifying exactly what date [her] designation and reports were due, and based on the written briefing as well as this court's orders, the Defendants respectfully request that the court dismiss summarily the case brought by Ms. Baumann. Thank you." R.499-500.

56. The district court verbally ruled from the bench that:

> "In this [Ms. Baumann's] case, the appropriate standard of care for a physician prescribing medication and for a pharmacy filling that prescription does not lie within the common knowledge of the layperson. Also, the harmful effects [i.e., causation and damages], of any potential overdose of that medication lies outside of common knowledge as well."

R.496.

57. The district court further concluded from the bench that:

"Given the history and the record" the "Plaintiff has failed to provide the required expert testimony as to the standard of care, breach, and causation."

R.496.

58. As recorded in the district court's "Minutes Oral Argument in Provo" on January 5, 2015, the district court granted Defendants' Motion. R.460.

59. The district court's Order Granting Defendants' Motion for Summary Judgment and Order of Final Judgment, signed on January 29, 2015, states in part as follows:

"[F]ollowing 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 court entertained extensive oral argument from the parties and reviewed (1) the Memorandum in Support of Motion for Summary Judgment of Defendants … filed on September 11, 2014; (2) Plaintiff's Statement Opposing Defendants' Motion for Summary Judgment filed on September 29, 2014; (3) the Reply Memorandum in Support of Motion for Summary Judgment of Defendants … 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 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 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."

R.525-529.

60. Ms. Baumann retained counsel who appeared on January 16, 2015, and filed a Notice of Appeal on January 29, 2015. R.461-4622; 530-531.

61. On May 18, 2016, the Utah Court of Appeals held oral argument; and on July 29, 2016, the Utah Court of Appeals issued its decision. See Addendum B, *Baumann v. The Kroger Co. and Gregory P. Tayler*, 381 P.3d 1135 (Utah Ct. App. 2016).

62. Because the district court did not abuse its discretion, and because the district court appropriately precluded--under rule 26(d)(4) of the Utah Rules of Civil Procedure--Baumann from using her undisclosed expert witness report (which Baumann filed twenty-five weeks after the close of fact discovery, several months after the expiration of expert disclosures, two months after expert discovery cutoff, and five weeks after the court had cut off dispositive motion filing) to contest summary judgment, the Court of Appeals affirmed. Addendum B, *Baumann*, 381 P.3d at 1141.

63. Ms. Baumann filed a Petition for Writ of Certiorari on August 22, 2016.

64. On September 26, 2016, Dr. Tayler and Smith's Pharmacy filed their respective Oppositions to Ms. Baumann's Petition for Writ of Certiorari.

65. This Court issued an Order dated October 31, 2016 granting Petitioner's Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

This Court should affirm the Court of Appeals which found that the district court did not abuse its discretion and justifiably granted summary judgment in favor of Smith's

Pharmacy. Ms. Baumann failed to preserve for appeal the issue of whether the district court abused its discretion; the district court never excluded an expert inasmuch as none had ever properly existed.

The URCP sustain the district court's reasonable and proper use of discretion after the expiration of all discovery to close the pleadings on and grant summary judgment. The comparison of *Coroles* to Baumann is inapposite because in Ms. Baumann's case by the time she attempted to improperly file a report, without leave, expert discovery and the summary judgment briefings and filings had already closed. The principles in *Sleepy Holdings v. Mountain West* apply as do Rules 26(a) and Rule 26(d).

The decision of the SSA is irrelevant to the issue presented by Smith's Pharmacy and Dr. Tayler's joint motion for summary judgment. A decision by the SSA determining the existence of disability does not review the standards of care related to a pharmacy, whether a breach occurred, and whether a claimant's disability was proximately caused by a breach. A decision of the SSA does not provide the expert information required to be disclosed by Rule 26(a) of the Utah Rules of Civil Procedure.

Ms. Baumann's pro se representation has no impact on this appeal. While a self-represented party is entitled to every consideration that may reasonably be indulged, a party who represents herself will be held to the same standard of knowledge and practice as any qualified member of the bar.

The district court did not abuse its discretion in its application of Rules 7, 56, and 26(d). There is more than a sufficient evidentiary basis in the record of how the district court governed this case, discovery, and briefing on summary judgment to conclude that the district court's application of the rules of procedure was not abusive at all, let alone clearly abusive. The Utah Court of Appeals correctly affirmed the district court. This Court should affirm.

ARGUMENT

I. MS. BAUMANN FAILED TO PRESERVE FOR APPEAL THE ISSUE OF WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BY NOT CONSIDERING BELATEDLY FILED EXPERT REPORT FILED AFTER CLOSE OF ALL DISCOVERY AND BRIEFING.

As a general matter, "to preserve an issue for appeal, the party asserting error must (1) specifically raise the issue; (2) 'in a timely manner;' and (3) support the claim with 'evidence and relevant legal authority.'"[3] In other words, an issue is preserved for appeal when it has been "presented to the district court in such a way that the court has an *opportunity* to rule on [it]."[4] This standard applies unless there are exceptional circumstances or plain error.[5] "The exceptional-circumstances doctrine 'is a concept

[3] *Salt Lake City Corp. v. Restoration Network*, 2012 UT 84, ¶ 26, 299 P.3d 990 (quoting *Donjuan v. McDermott*, 2011 UT 72, ¶ 20, 266 P.2d 839).
[4] *J.M.W. v. T.I.Z. (In Re Adoption of Baby E.Z.)*, 2011 UT 38, ¶ 25, 266 P.3d 702 (internal quotation marks omitted)(emphasis added).
[5] *Id*. (citation omitted).

that is used sparingly, and [is] properly reserved for truly exceptional situations, for cases … involving rare procedural anomalies.'"[6] Further, the exceptional-circumstances doctrine is reserved for "the most unusual circumstances where [the] failure to consider an issue that was not properly preserved for appeal would [] result[] in manifest injustice."[7] The plain error exception requires that a party demonstrate "that (i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome."[8] Finally, the Utah Supreme Court has clarified:

> Our preservation rule promotes both judicial economy and fairness. The rule furthers judicial economy by giving the district court an opportunity to address the claimed error, and if appropriate, correct it prior to an appeal. Next, it encourages fairness by giving an opposing party an opportunity to address the alleged error in the district court. Similarly, the rule prevents a party from avoiding an issue at trial for strategic reasons only to raise the issue on appeal if the strategy fails.
>
> Rule 24(a)(5) of the Utah Rules of Appellate Procedure complements the preservation rule. It requires an appellant's brief to provide "a statement of the issues presented for review" and a "citation to the record showing that [an] issue

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[6] *State v. Isom*, 2015 UT App 160, ¶ 19, 789 Utah Adv. Rep. 21 (quoting *State v. Kozlov*, 2012 UT App 114, ¶ 35, 276 P.3d 1207 (omission in original) (citation and internal quotation marks omitted)).
[7] *Id*. (quoting *State v. Nelson-Waggoner*, 2004 UT 29, ¶ 23, 94 P.3d 186.
[8] *Meadow Valley Contrs., Inc. v. State DOT*, 2011 UT 35, ¶ 17, 266 P.3d 671 (internal quotation marks and citation omitted).

> was preserved in the [district] court." However, in the case of appellant who appears pro se, we retain discretion to address issues raised that do not strictly comply with the requirements of Rule 24.[9]

Finally, Rule 24(a)(5)(B) requires that a party provide a statement of grounds for seeking review of an issue not preserved in the district court.

In this case, the issues Ms. Baumann seeks review of on appeal with regard to her claims against Smith's Pharmacy are 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," and whether "the Court of Appeals erred in concluding 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".[10] However, Ms. Baumann, does not provide adequate citation to the record showing that these issues, as stated, were preserved in the district court--in a timely manner, with evidence and legal authority, and presented to the court in a way the district court had

[9] On appeal, Ms. Baumann is represented by an attorney. Therefore, the discretion retained to an appellate court regarding a pro se appellant's compliance with Rule 24 of the Utah Rules of Appellate Procedure does not exist in this case.

[10] Aplt's Br., pp. 1 - 2.

an opportunity to rule on it. Ms. Baumann also fails to set forth a statement of grounds for seeking review of the unpreserved issues. Ms. Baumann's Brief admits on the one hand that she was over five months (June 2014 to November 2014) late in filing a first ever "expert report … applicable to the alleged breaches and failures by the Pharmacy," on the eve of "oral argument" [11], i.e., well after the close of the briefing allowed by the district court, but Ms. Baumann then attempts on the other hand to assert, *without having preserved the issue*, that the district court's "*excluding* the untimely expert report … would … be an abuse of discretion" and that the District Court applied Rule 26(d)(4) but should have applied Rule 16(d) of the Utah Rules of Civil Procedure.[12] Ms. Baumann asserts that *Coroles v. State*, 349 P.3d 739 (Utah 2015), applies to Ms. Baumann's situation and that thus "the District Court committed reversible error when it *excluded* the untimely expert witness report submitted by Ms. Baumann", that "*excluding* the untimely expert report … would … be an *abuse* of discretion", and that accordingly "this Court should reverse *the District Court's exclusion* of the untimely expert report submitted by Ms. Baumann."[13]

[11] *Id*. at 10.
[12] *Id*. at 15 & 18 (emphasis added).
[13] *Id*. at 18 (emphasis added).

Ms. Baumann failed to preserve for appeal the issue of excluding an expert. The District Court never considered any experts, or requests for leave to file expert reports by Ms. Baumann, because fact and expert discovery had fully closed, the joint motion for summary judgment was before the district court, and all the briefing on the motion had closed on October 8, 2014. There was never a timely or permitted expert designation, expert report, or request for leave to designate late experts or file late expert reports for the District Court to have stricken or excluded.

In deciding summary judgment, the District Court did not exclude any expert report. The summary judgment was fully briefed and ready for oral argument before there was ever any indication of any expert report, and leave was never sought to submit an expert report before briefing was closed. Ms. Baumann's attempt now on appeal to argue an issue that Ms. Baumann never preserved--i.e., that the district court somehow *excluded* a report-- is contrary to the Utah Rules of Appellate Procedure. Rule 24(a)(5)(A) of the Utah Rules of Appellate Procedure required Ms. Baumann to have made "citation to the record showing that the issue was preserved in the trial court." Ms. Baumann did not, and could not, make such a citation. Such a citation is not feasible because the district court never ruled on, or made an order, excluding Plaintiff's first ever expert report which was filed not just extremely late but after the summary judgment motion briefings had been closed by the court on October 8, 2014. Besides scheduling orders, the only rulings

and Orders entered by the district court were: 1) to cap the briefing and filings pertinent to the Defendants' joint motion for summary judgment pursuant to the Utah Rules of Civil Procedure (*viz.*, motion/memorandum, opposition, and reply/request to submit), and 2) to grant summary judgment and order dismissal with prejudice. Therefore, the only preserved issue for appeal is Defendants' joint motion for summary judgment.

In stark contrast to Ms. Baumann's case, the issue reviewed in *Coroles* was a trial court's *striking* two separate sets of experts. That trial court struck the first set of experts who had been designated on time according to the scheduling order. That trial court also struck a second replacement set filed after the designation date but before expert discovery expired. Because experts (*all filed before designation or expert cutoff*) no longer existed, the trial court considered and granted summary judgment and dismissed the plaintiff's medical malpractice claim. *Coroles,* 349 P.3d at 741. The *Coroles* scenario was significantly different than Ms. Baumann's situation in which the district court did not strike any expert for there was never any trace of an expert until *after* the expert designation deadline, the expert discovery cutoff, and the briefing on summary judgment had all expired. In *Coroles*, the trial court struck the plaintiff's experts disclosed before expert cutoff, and then summary judgment was considered and granted. Yet in Ms. Baumann's case, the trial court considered all timely documents filed for summary judgment and granted the motion, the issue of leave to file late experts having never

arisen at summary judgment and having never become an appealable issue. Only after all summary judgment briefing was completed did Ms. Baumann make attempt to file an expert report. No striking of experts occurred in Ms. Baumann's case at the district court level, and thus no preservation of such an issue has occurred for the appellate courts.

Ms. Baumann also cites *Welsh v. Hospital Corp. of Utah*, 2010 UT App 171, ¶ 10, 235 P.3d 791, for the proposition that "excluding a witness from testifying is … extreme in nature and … should be employed only with caution and restraint" and for the suggestion that it may be an abuse of discretion for the trial court to exclude an expert report if, under the circumstances, justice and fairness require that the court allow a party to designate witnesses after the court-imposed deadline for doing so has expired.[14] However, the issue reviewed in *Welsh* was a trial court's denial of a Motion for Enlargement of Time to designate expert witnesses and submit expert reports.[15] Again, the record in this case is devoid of any request made by Ms. Baumann, *prior to completion of the summary judgment briefing*, to the district court for an enlargement of time to allow her to submit expert reports related to her claims against either Dr. Tayler or Smith's Pharmacy. A request made by Ms. Baumann to the district court to consider expert reports was filed on December 15, 2014—well over six months after Ms. Baumann's

[14] Aplt's Br., p. 19.
[15] 2010 UT App 171, ¶ 1.

expert designations were due (June 6, 2014) and well over two months subsequent to the deadline (October 8, 2014) the district court had closed all briefing and filings on the Defendants' joint motion for summary judgment.[16] But Ms. Baumann's request was nonetheless moot under the district court's previous November 17, 2014 rulings and orders. The issue Ms. Baumann seeks review of on appeal was simply not preserved inasmuch as there never was any exclusion of experts.

Finally, Ms. Baumann's appellate brief does not contain supported or persuasive argument related to whether exceptional circumstances or plain error exist showing that this unpreserved issue should be reviewed on appeal. Consequently, to the extent that Ms. Baumann desires review of an unpreserved issue, her brief is inadequate pursuant to Rule 24(a)(9) of the Utah Rules of Appellate Procedure because it does not contain supportable or convincing contentions or developed reasoning, with citation to authorities, statutes, and parts of the record, showing that the unpreserved issue should be reviewed on appeal.[17]

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[16] R.395-391.

[17] *Isom*, 2015 UT App 160, ¶ 17, confirms that Rule 24(a)(9) requires an appellant's brief to "contain the contentions and reasons of the appellant with respect to the issues presented, … with citation to the authorities statutes, and parts of the record relied on." The *Isom* opinion, further directs that "[b]riefs require not just bald citation to authority but development of that authority and reasoned analysis based on that authority" and that "[a]n issue is inadequately briefed when the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court." *Id*.

The February 19, 2016 Utah Court of Appeals opinion of *Robinson v. Jones Waldo* provides additional guidance. *Robinson v. Jones Waldo*, 369 P.3d 119 (Utah Ct. App. 2016)(affirming the defendant's motion for summary judgment against a pro se plaintiff). Under the principles of *Robinson*, Ms. Baumann's pro se status did not excuse her from making adequate or timely expert designations or reports, or from being held to "the same standard of knowledge and practice as any qualified member of the bar." *Id*. at 127. Also, as in *Robinson*, Ms. Baumann "did not present to the district court the arguments [she] now raises on appeal. Because [Baumann] did not present [her] claims in such a way that the court could rule on them, they are not preserved. Because the challenges are unpreserved, [the appellate court] deemed them waived." *Id*. Ms. Baumann's attempt to assert the district court struck experts should be deemed waived, and the district court and Court of Appeals should thus be affirmed.

(quotation marks and citations omitted). Finally, *Isom* affirms that "'[i]t 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.'" *Id*. ¶ 16 (quoting *Allen v. Friel*¸ 2008 UT 56, ¶ 8, 194 P.3d 903).

II. RULES 7, 56, 16, 37, AND 26 OF THE URCP SUSTAIN THE DISTRICT COURT'S DECISIONS AND USE OF DISCRETION, *SLEEPY HOLDINGS* IS APPLICABLE, AND *COROLES*[18] IS INNAPLICABLE BECAUSE EXPIRATION OF DISCOVERY AND SUMMARY JUDGMENT BRIEFING PRECEDED ANY ATTEMPT BY MS. BAUMANN TO DESIGNATE A LATE EXPERT WITHOUT LEAVE OR ANY ATTEMPT TO REQUEST LEAVE FOR BELATED EXPERTS.

In response to pages 15 through 19 of Ms. Baumann's brief, Smith's Pharmacy submits the March 31, 2016 Utah Court of Appeals opinion of *Sleepy Holdings LLC v. Mountain West Title et al.*, 370 P.3d 963 (Utah Ct. App. 2016) applies. In *Sleepy Holdings*, at paragraph 22, the Court of Appeals agreed with the lower court and held that "rule 26 applies here." *Id.* at 969. The lower court relied on rule 26 of the U.R.C.P. in sanctioning Sleepy Holdings for failure to make and supplement the initial disclosures required by rules 26(a) and 26(e). In *Sleepy Holdings*, at paragraph 23, the Court of Appeals refused to follow *Coroles.* The Court of Appeals clarified that *Coroles* did not interpret or mention rule 26. "*Coroles* did not purport to address what sanctions apply when a party fails to timely make or timely supplement initial disclosures under rules 26(a) or 26(e); in fact, it never mentions initial disclosures or rule 26. Thus, *Coroles* does not control here." This analysis applies in Ms. Baumann's appeal. Ms. Baumann failed to timely make or supplement her expert designations or reports under rule 26. Ms. Baumann stipulated

[18] *Sleepy Holdings LLC v. Mountain West Title et al.*, 370 P.3d 963 (Utah Ct. App. 2016); *Coroles v. State*, 349 P.3d 739 (Utah 2015).

that "Plaintiff's Rule 26(a)(4)(A) expert disclosures shall be made no later than June 6, 2014"; but she failed to do so. (R.86, 100, 102, & 104 (emphasis added)). The district court ordered that "Plaintiff was precluded by Rule 26(d)(4) from using any undisclosed witness, document, or material [or "any papers filed…after October 8, 2014"] in opposition to the Motion for Summary Judgment filed by the Defendants." (R.525-529). Therefore, *Coroles* does not control here.

Ms. Baumann's comparison of her case to *Coroles* is inapposite. The significant difference is that *Coroles* timely filed expert designations on the final day permitted by the scheduling order and timely served expert reports. The district court later struck the experts upon the defendants' motion. *Coroles* designated her replacement experts *three months* before the deadline to complete expert depositions. Thereafter, upon motion, the district court struck the replacement set of *Coroles'* experts. Given that the plaintiff had no requisite medical experts, the district granted defendants summary judgment. [19] "Because these two rulings deprived Mrs. Coroles of any expert witnesses to testify at trial, the district court granted summary judgment in favor of the defendants."[20]

Here, however, the district court did not exclude experts; rather, Ms. Baumann simply did not file any expert designations per the scheduling order deadline. Then,

[19] *Id.* at 741-742.
[20] *Id.* at 742 & 747.

months after that designation deadline, expert discovery expired. In turn, after the close of all discovery, Defendants filed a joint motion for summary judgment. The parties briefed the motion. The court granted it. The district court decided to close the briefing for the summary judgment motion as of October 8, 2014, the date Dr. Tayler and Smith's Pharmacy appropriately submitted the joint motion, a decision the lower court certainly had the discretion to render. The district court was in no way abusive in limiting the briefing and filings it would consider to those filed within the time and manner allowed for a dispositive motion by rule. There were no experts designated by Ms. Baumann within that time frame.[21]

The manner in which this case unfolded since its original inception is distinctive. Based on the history of the case, the record, the permitted briefings and filings, the rules of procedure, and oral argument, the district court dismissed the case. It was too late and contrary to the rules when Plaintiff then attempted to cure her problem by belatedly and impermissibly filing a report without leave of court.[22] Plaintiff/Appellant did not timely

[21] Nor was there ever any affidavit *testimony* of any purported expert ever submitted.

[22] Rule 56(c) of the Utah Rules of Civil Procedure states: "The motion, memoranda and affidavits shall be in accordance with *Rule 7*."

With respect to motions including a summary judgment motion, Rule 7(c)(1) of the Utah Rules of Civil Procedure states: "*No other memoranda will be considered without leave of court*."

Also, this Court has held: "Although the trial court has discretion to consider issues raised in additional memoranda, *such memoranda will [not] be considered*

seek leave from the trial court or preserve the issue of late reports for appeal, yet Plaintiff/Appellant now-- counter to the Rules of Appellate Procedure and without basis—seeks, in a roundabout but groundless way, this Supreme Court's invalidation of the justifiable discretion exercised by the district court. The discretion employed by the district court was completely within the bounds of the Utah Rules of Civil Procedure and the district court's authority and mandate to manage its court and preside over its cases.

Stripping the district court of the type of discretion the lower court exercised in Ms. Baumann's matter would in effect deprive the district court of the ability to issue and also hold the parties to its rulings and orders and manage discovery and the motions before it. Ms. Baumann's creative but unfounded attempt to shape this appeal into abuse of discretion in *striking* expert reports is unavailing. This appeal can and should only focus on the preserved issue, which is the discretion the district court appropriately exercised in *holding the parties, including Ms. Baumann, to the briefing and filings allowed for a dispositive motion brought following the conclusion of all discovery*, making its decision

without leave of court." *Soriano v. Graul*, 2008 UT App 188, ¶ 12, 186 P.3d 960, 964 (quotations and citations omitted)(alteration in original).

on those allowed pleadings, and precluding any unpermitted post hoc briefing and filings to be submitted.

The district court and its proper use of discretion should be affirmed. Granting summary judgment in this case was entirely appropriate in light of the fact that Plaintiff promised but failed to produce her experts during discovery, Plaintiff failed to designate experts on time, fact and expert discovery had expired, the pleadings for the summary judgment motion had closed, and unlike *Coroles* the only remaining procedure to occur was trial.

Rule 26 of the Utah Rules of Civil Procedure, along with Rule 16, provide the framework for expert discovery and the district court's discretion in managing that discovery. In fact, the Supreme Court Advisory Committee Notes to Rule 26 provide:

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

Also, Ms. Baumann acknowledges in her own Appellant Brief that Rule 16 of the Utah Rules of Civil Procedure gives the district court "'broad authority to manage a

case.'"[23] Ms. Baumann admits the Supreme Court's emphasis that, under this rule, a district court may "'establish [ ] the time to complete discovery" through a scheduling order.[24] Ms. Baumann further concedes the Supreme Court's clarification 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.[25] Ms. Baumann agrees that the Supreme Court permits sanctions for providing untimely discovery which would include "'prohibit[ing] the disobedient party … from introducing designated matters into evidence' (e.g., exclusion of the evidence disclosed after the deadline)".[26] Finally, Ms. Baumann states the *Coroles* Court's standard for sanctioning a party. The standard lies in Rule 16(d) of the Utah Rules of Civil Procedure ["may" impose a sanction/exclude evidence] and not in Rule 37(h) ["shall not" be permitted to use the witness].[27] In other words, this Court "has held that rule 16(d) is the source of the district court's authority to sanction a party for producing untimely discovery under a scheduling order."[28] This Court held further that "Rule 16(d) provides that a court 'may' impose a

[23] Aplt's Br., p. 16; *Coroles* 349 P.3d at 745 (quoting *Boice ex rel. Boice v. Marble,* 982 P.2d 565 (Utah 1999).
[24] Aplt's Br., p. 16; *Coroles* 349 P.3d at 745 (quoting U.R.C.P 16(a)(9)).
[25] Aplt's Br., p. 16; *Coroles* at 745 (quoting U.R.C.P 16(d)).
[26] Aplt's Br., p. 16 - 17; *Coroles* at 745 (quoting *Boice,* P.2d at 565).
[27] Aplt's Br., p. 17; *Coroles* at 745.
[28] *Coroles* at 745-746.

sanction described in rule 37(e) for a failure to abide by the scheduling order."[29] Rule 16(d)[30] states in relevant part as follows:

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

Rule 37(e)(2)[31] [now numbered 37(b) as of 5-1-15] in effect at the relevant time states in pertinent part as follows:

> Unless the court finds that the failure was substantially justified, the court in which the action is pending *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*….

After conceding all of the above rules and district court discretion substantiated by this Court, Ms. Baumann paints with a broad brush in her Brief when making the sweeping but ungrounded declaration: "It follows from all this that the District Court committed reversible error" when "it excluded the untimely expert witness report".[32] In fact, it does not follow from all the facts and circumstances in Ms. Baumann's case. Just

[29] *Coroles* at 746.
[30] Rule 16, URCP.
[31] Rule 37, URCP.
[32] Aplt's Br., p. 18.

the opposite. First, there was no preserved issue or reversible error by the district court; the district never ruled on excluding expert designations or reports. No designation or reports even existed during fact or expert discovery; and, moreover, no designation or reports ever existed during the time frame allowed for the summary judgment motion briefing. Second, the history of the Baumann matter is not comparable to *Coroles.* The unfolding of Ms. Baumann's case was: no expert disclosures, discovery cutoff, close of motion for summary judgment pleadings, and then motion for summary judgment granted. *Coroles'* timeline, in stark contrast, was: experts timely filed, experts stricken and motion for summary judgment by the defendants, new experts refiled by the plaintiff *during* summary judgment and three months *before* expert cutoff, experts stricken again, and then a decision on summary judgment.[33]

[33] In addition to demonstrating that *Coroles* is inapplicable to the Baumann case and distinguishable on the facts and law applied in granting summary judgment, Smith's Pharmacy further notes that even assuming, for the sake of argument, that this Court's clarification of the standard of Rule 16 versus Rule 37 could apply to the facts and law noted in the Baumann case, *Coroles* should not be retroactively applied to this case. The district court made its rulings and decisions without the benefit of the *Coroles* decision, and the clarification of any applicable standards. The trial court was operating under current, applicable case law, and to the extent it relied on any standard or case law clarified or abrogated by *Coroles*, the trial court justifiably relied on the state of the law pre-*Coroles*. This Court should accordingly limit or prohibit the retroactive operation of *Coroles* to the review of this trial court's decision – especially under an abuse of discretion standard. See, e.g., *Merrill v. Utah Labor Comm'n*, 2009 UT 74, 223 P.3d 1099, 1100-01; and *Exxon Corp. v. Utah State Tax Comm'n*, 2010 UT 16, 228 P.3d 1246, 1248.

In *Coroles*, the district court's preserved rulings on exclusion of experts was the error, and thus summary judgment by definition became an error as well. Here, in Ms. Baumann's case, the district court's exercise of discretion was with respect to summary judgment (experts never timely arose and the issue was never preserved), and was fair and reasonable under all the circumstances. The district court's discretion was far from abused. Rather, the district court contemplated myriad bases warranting its decision to contain the summary judgment pleadings and grant summary judgment:

- Maturity and age of case. R.479-480;
- History and record of case. R.496; 479-480.
- Ms. Baumann's multiple answers in her Responses to discovery, which she signed on February 20, 2014, refusing to produce experts and testimony at that time, but promising to later produce experts and testimony on the date required by the scheduling order. R.513- 515.
- Scheduling order stipulated to and signed by Ms. Baumann specifically requiring her expert designations and anticipated expert testimony by June 6, 2014. R.86-87; 100, 102, & 104; 98-106; 515-516.
- Scheduling order signed by Ms. Baumann closing expert discovery on September 5, 2014. R.86, 100, 102 & 104.
- Rules 56 and 26 of the Utah Rules of Civil Procedure. R.525-529.

- Summary judgment pleadings allowed, and prohibited, by the district court per its orders. R.388; 399-402.
- Two oral arguments. R.463-486; 487-519.
- District court's offering Ms. Baumann the benefit of continuing oral argument and offering her an opportunity to retain a lawyer for the second oral argument. R.472-473; 478-480.
- District court's rulings and Orders limiting the time frame, and materials, to be considered for summary judgment, and prohibiting subsequent papers or filings. R.388; 399-402; 470; 472-473; 476-480.
- Ms. Baumann's statements to the court that she understood those limitations. R.507; 477; 478-480.

The district court's discretion exercised on the issue preserved for appeal (summary judgment; not exclusion), the above-listed factors considered by the district court which demonstrate the justified and proper use of discretion, and the result of the district court's discretion remain the same regardless of whether the district court applied discretion under a "may sanction" or a "shall sanction" standard. As the statement of facts and factors listed above illustrate, the district court was fair and reasonable, not abusive, in its decisions and discretion. Thus, the Court of Appeals, and the district court

and its proper use of discretion applied to grant Smith's Pharmacy's motion for summary judgment, should be affirmed.

III. THE DECISION OF THE SOCIAL SECURITY ADMINISTRATION WAS CONSIDERED BY THE DISTRICT COURT AND IS IRRELEVANT TO THE ISSUE PRESENTED BY THE DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT.

Ms. Baumann states in her appellate brief that during oral argument on summary judgment she asserted the district court should decide summary judgment based on the record that she had submitted, including the decision of the Social Security Administration ("SSA").[34] On March 13, 2014, the Social Security Administration Office of Disability Adjudication and Review issued a Notice of Decision qualifying Ms. Baumann for disability payments. Ms. Baumann subsequently served the Notice of Decision along with the related transcript of the decision on both Defendants.[35] In addition to her oral argument, Ms. Baumann also cited to the SSA decision in her "Statement Opposing Defendant's Motion for Summary Judgment" filed on September 29, 2014.[36] As Smith's Pharmacy pointed out in the Reply Memorandum in Support of Motion for Summary Judgment filed on October 8, 2014, "[t]he fact that [Ms. Baumann] has had a ruling before the [SSA] is

[34] Aplt's Br., p. 11; 9 - 10.
[35] R.152, 323 [Subparagraph I].
[36] R.152. The existence of the SSA decision, and Ms. Baumann's points related to the decision, were therefore not subject to the order entered by the district court on December 22, 2014 [R.402] wherein the district court ruled that it would not consider anything filed by Ms. Baumann after October 8, 2014.

irrelevant to this case and does not provide any basis for an ability to make expert disclosures in this case."[37] A decision by the SSA determining the existence of disability does not review the standards of care related to a pharmacy or pharmacist, whether a breach of a standard of care for a pharmacy occurred, and whether a claimant's disability was proximately caused by a breach in a pharmacy's standard of care. Rather, a disability decision by the SSA is exactly that – it is an exclusive determination of whether a disability exists and whether a claimant is entitled to disability payments. More important, a decision of the SSA does not provide the expert information required to be disclosed by Rule 26[38] of the Utah Rules of Civil Procedure. Besides, Ms. Baumann's argument section in her appellate brief does not even attempt to construe any of Ms. Baumann's SSA documents as expert reports or Rule 26 compliant. She only seeks now on appeal for permission to file late designations and reports (non SSA related) against Dr. Tayler and

[37] R.155.

[38] Utah R. Civ. P. 26(a)(4)(A) provides "[a] party shall, without waiting for a discovery request, serve on the other parties the following information regarding any person who may be used at trial to present evidence under Rule 702 of the Utah Rules of Evidence and who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony: (i) the expert's name and qualifications, including a list of all publications authored within the preceding 10 years, and a list of any other cases in which the expert has testified as an expert at trial or by deposition within the preceding four years, (ii) a brief summary of the opinions to which the witness is expected to testify, (iii) all data and other information that will be relied upon by the witness in forming those opinions, and (iv) the compensation to be paid for the witness's study and testimony."

Smith's Pharmacy. Consequently, the existence of a decision by the SSA has absolutely no bearing on Ms. Baumann's appeal.

IV. MS. BAUMANN'S PRO SE REPRESENTATION HAS NO IMPACT ON THIS APPEAL.

Ms. Baumann represented herself before the district court. A self-represented party is "entitled to every consideration that may reasonably be indulged."[39] However, "reasonable indulgence is not unlimited indulgence" and courts are required "to redress the ongoing consequences of [a self-represented] party's decision to function in a capacity for which [s]he is not trained."[40] Furthermore, "a party who represents [her]self will be held to the same standard of knowledge and practice as any qualified member of the bar.'"[41]

In this case, the parties specifically stipulated that Ms. Baumann was to serve her expert reports by no later than June 6, 2014.[42] The record also shows that Smith's Pharmacy made a discovery request to Ms. Baumann asking that she "[p]roduce a copy

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[39] *Sivulich v. Dep't of Workforce Services*, 2015 UT App 101, ¶ 6, 2015 Utah App, LEXIS 101 (internal quotation marks and citations omitted).
[40] *Id*. (internal quotation marks and citations omitted).
[41] *Id*. (internal quotation marks and citations omitted).
[42] *See* Stipulation for Additional Time to Conduct Standard Discovery, R.88 [subparagraph b]. Smith's Pharmacy notes that the Utah Rules of Civil Procedure normally do not provide a date certain for parties to make expert disclosures. Rather, Rule 26 simply provides a number of days after the close of fact discovery that a party with a burden of proof is to make expert disclosures. *See* Utah R. Civ. P. 26(a)(4)(C).

of all documents, reports, or opinions you have received from each expert witness you intend to call to testify at the trial…of this action."[43] In her response made on February 20, 2014, Ms. Baumann stated that she would produce the requested documents "when scheduled to do so by [the] case management order." Ms. Baumann's Brief asserts that she filed "an expert report and curriculum vitae applicable to the alleged breaches and failures by the Pharmacy" [44] on November 17, 2014, but Ms. Baumann at the time, and even her appellate brief now, completely ignore the district court's myriad grounds for, and orders that, *no such untimely filings post October 8, 2014* would be considered for Defendants' joint motion for summary judgment.[45] Moreover, during oral argument, Ms. Baumann asserted that no expert witness report was to "save quite a few thousand dollars" and because she "thought that the facts would speak for themselves and the Defense would want to move forward with also a less expensive and more timely speedier way of getting to resolution to this case…"[46] Additionally, within the papers filed by Ms. Baumann in opposition to the Motion for Summary Judgment, Ms. Baumann cites a Utah Supreme Court decision for the proposition that "[e]xpert

[43] R.519 [p. 7:2-12].
[44] Aplt's Br., p. 10.
[45] R.388; 401; 472-473; 476; 468-478; 478-480.
[46] R.519 [p. 22:18-25].

testimony…is not required in cases where the causal connection between the alleged negligence and the harm caused is a matter of common knowledge."[47]

Thus, contrary to Ms. Baumann's assertion on appeal, the record shows that Ms. Baumann's decision to not properly and timely designate experts and provide expert reports related to her claims against Smith's Pharmacy was intentional because she desired to avoid expenses and because she believed that the law did not require experts in this case. The district court correctly, and specifically, ruled that the applicable standard of care and whether a breach of that standard of care proximately caused Ms. Baumann's alleged injuries was not within the common knowledge of laypersons and that expert testimony was required in this case.[48] Providing Ms. Baumann's actions before the district court with all reasonable indulgences, the record is clear that the issue that Ms. Baumann seeks appellate review of was not preserved, that Ms. Baumann never timely requested leave to make expert disclosures related to her claims against Smith's Pharmacy, that Ms. Baumann in fact believed expert testimony was not required for her claims against Smith's Pharmacy, and that Ms. Baumann did not timely (or in accordance with the November 17, 2014 orders of the district court, the stipulated scheduling order, the fact and expert discovery period, or Ms. Baumann's own promises

[47] R.319.
[48] R.527.

in her Responses to discovery) seek to use expert testimony related to her claims against Smith's Pharmacy. Ms. Baumann, while self-represented before the district court, ultimately must be held to the same standard of knowledge and practice as any qualified member of the bar. The opinion of the Utah Court of Appeals and the decision of the district court should, therefore, be affirmed.

V. THE UTAH COURT OF APPEALS CORRECTLY CONCLUDED THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN APPLYING RULE 26(D)(4).

Ms. Baumann argues that the Court of Appeals erred in its application and analysis of Rule 26(d)(4). Ms. Baumann contends that the Court of Appeals was incorrect to uphold the district court's application of Rule 26(d)(4), under an abuse of discretion standard, based on the district court's finding that Ms. Baumann's failure to disclose lacked any good-cause justification. Ms. Baumann asserts that the Court of Appeals erred by not reading the language of Rule 26(d)(4) to also require the district court to consider whether Ms. Baumann's failure to disclose was harmless. Ms. Baumann, in turn, suggests (only on appeal) that her failure to disclose was harmless and that the district court abused its discretion below.

However, this argument is without merit. The Court of Appeals rejected Ms. Baumann's argument when, in a footnote, it explained:

> "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."

(See Addendum B, *Baumann*, 381 P.3d at footnote 8). The Court of Appeals further concluded in a footnote that:

> "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*."

(See Addendum B, *Baumann*, 381 P.3d at footnote 4; emphasis added). This Court, as with the Utah Court of Appeals, need not address this issue.

The Court of Appeals aptly explained that, "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."

(Addendum B, *Baumann*, 381 P.3d at 1140.)

Indeed, a district court has "broad discretion in selecting and imposing sanctions for discovery violations" under Rule 26. *Tuck v. Godfrey*, 981 P.2d 407, 411 (Utah Ct. App. 1999)(citation an internal quotation marks omitted). Under the extensive discretion given to district courts when applying discovery and motion rules, the Court of Appeals was correct to find, under all the circumstances of this case, that the district court did not abuse its discretion in its application of Rule 26(d)(4) because there was no good cause for Ms. Baumann's failure to disclose and that harmlessness did not need to be examined on appeal.

Yet, even assuming for the sake of argument that the Court of Appeals should have examined whether there was harm, or whether the district court was required to make a specific finding under the rule that Ms. Baumann's failure to disclose was not harmless, the issue on appeal still ultimately turns on whether there is a sufficient evidentiary basis supporting the district court's exercise of its broad discretion. *See Kilpatrick v. Bullough Abatement, Inc.*, 2008 UT 82, ¶29, 199 P.3d 957, 966 (discussing

that a failure to make a specific factual finding in exercising discretion "is not always grounds for reversal . . . if a full understanding of the issues on appeal can nevertheless be determined by the appellate court"(quotations and citations omitted)). Here, considering the entire record, the district court's exercise of discretion should not be disturbed on appeal. There was no abuse of discretion at all, let alone a clear abuse of discretion which would mandate reversal. *See id*. at ¶23 (stating that appellate courts will "overturn a sanction only in cases evidencing a clear abuse of discretion").

Appellate courts in Utah afford district courts "'a great deal of latitude in determining the most fair and efficient manner to conduct court business' because the district court judge 'is in the best position to evaluate the status of his [or her] cases, as well as the attitudes, motives, and credibility of the parties.'" *Bodell Const. Co. v. Robbins*, 2009 UT 52, ¶ 35, 215 P.3d 933, 943 (citations omitted)(alterations in original). Thus, where a district court issues orders, manages discovery, handles dispositive motions, and imposes discovery sanctions under the rules, Utah's appellate courts will determine that a district court "'has abused its discretion in choosing which sanction to impose only if there is either an erroneous conclusion of law or no evidentiary basis for the [district] court's ruling.'" *Id.* (alterations in original)(citations omitted). Appellate courts should otherwise not second guess the district court's exercise of discretion where the decision is adequately supported by the evidence and record.

Here, there is more than a sufficient evidentiary basis in the record regarding how the district court governed this case, discovery, and briefing on summary judgment to conclude that the district court's application of Rule 26(d)(4) was not abusive. Ms. Baumann, not Smith's Pharmacy, bears the burden of establishing that the failure is harmless or that there was good cause for her failure. However, Ms. Baumann did not meet her burden in front of the district court, nor has she met it here on appeal. Some of the factors and arguments Ms. Baumann asserts on appeal to show the failure to disclose was harmless or that it was justified by good cause were items she failed to raise and preserve before the trial court. Nevertheless, assessing the totality of the circumstances in front of the district court, and what it observed from its position in dealing with the case and the parties, no abuse of discretion can be found in its application of Rule 26(d)(4).

Ms. Baumann failed to disclose experts or expert reports within the requisite discovery period, or even after a stipulated extension of the scheduling order. In fact, it was not until five weeks after all briefing had been concluded and the motion for summary judgment was submitted that Baumann attempted to file a report with the court on the day of oral argument. The report was not filed until several months after designations were due and expert discovery had been concluded and at a stage when the Defendants were not able to conduct further discovery to rebut the expert. While,

hypothetically, the district court could in its discretion opt to reopen discovery and reopen briefing on a dispositive motion, the court is not, under its discretion, obligated to do so nor did it here. Ms. Baumann never even timely sought leave to file late expert designations, serve belated expert reports, or restart discovery.

In light of all the details of this particular case, the court justifiably employed Rule 26(d)(4), and it remained properly within the bounds of its discretion. The record amply supports the court's application of the rules of procedure, and there is no clear abuse of discretion when considering all the circumstances under which the court managed this unique matter. Despite her endeavor on appeal to suggest non-disclosure was harmless, in the end nothing in the record suggests that Ms. Baumann possessed good cause to excuse her failure to disclose or that her failure was harmless. When viewing the entire picture, the trial and appellate courts' decisions below should not be overturned.

CONCLUSION

Based upon the foregoing, Smith's Pharmacy respectfully requests that the Utah Court of Appeals' opinion be affirmed and the district court's Order Granting Defendants' Motion for Summary Judgment and Order of Final Judgment be affirmed.

DATED this 13th day of January, 2017.

MORGAN, MINNOCK, RICE & MINER

/s/ Todd C. Hilbig
Todd C. Hilbig
Attorneys for Appellee
Smith's Pharmacy

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with Rule 24(f)(1)(A) of the Utah Rules of Appellate Procedure and contains a total of 13,968 words.

/s/ Todd C. Hilbig
Todd C. Hilbig

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of January, 2017, I caused two (2) true and correct copies and one (1) disk of the foregoing **BRIEF OF APPELLEE SMITH'S PHARMACY** to be mailed via first-class mail, postage prepaid, to the following:

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/s/ Krystal Day

ADDENDUM A

Utah R. Civ. P. 56(b). Summary Judgment. *For defending party.*

A party against whom a claim … is asserted … may, at any time, move for summary judgment as to all or any part thereof.

Utah R. Civ. P. 56(c). Summary Judgment. *Motion and proceedings thereon.*

The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Utah R. Civ. P. 7(c)(1). Pleadings allowed; motions, memoranda….

All motions…shall be accompanied by a supporting memorandum. Within 14 days after service of the motion and supporting memorandum, a party opposing the motion shall file a memorandum in opposition. Within 7 days after service of the memorandum in opposition, the moving party may file a reply memorandum, which shall be limited to rebuttal of matters raised in the memorandum in opposition. No other memoranda will be considered without leave of court. A party may attach a proposed order to its initial memorandum.

Utah R. Civ. P. 16(d). Pretrial conferences. *Sanctions.*

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

Utah R. Civ. P. 37(e)(2). Discovery and disclosure motions; Sanctions. *Failure to comply with order.* (2014)[1]

Sanctions by the court in which action is pending. Unless the court finds that the failure was substantially justified, the court in which the actions is pending may impose appropriate sanctions for the failure to follow its orders, including the following:

[1] Renumbered May 1, 2015 to Utah R. Civ. P. 37(b).

(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;

Utah R. Civ. P. 37(h). Discovery and disclosure motions; Sanctions. *Failure to disclose.* (2014)[2]

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.

Utah R. Civ. P. 29. Stipulations regarding disclosure and discovery procedure.

The parties may modify the limits and procedures for disclosure and discovery by filing, before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a stipulated statement that the extraordinary discovery is necessary and proportional under Rule 26(b)(2) and that each party has reviewed and approved a discovery budget. Stipulations extending the time for disclosure or discovery do not require a statement regarding proportionality or discovery budgets. Stipulations extending the time for or limits of disclosure or discovery require court approval only if the extension would interfere with a court order for completion of discovery or with the date of a hearing or trial.

Utah R. Civ. P. 26(a)(4)(C). General provisions governing disclosure and discovery. *Timing for expert discovery.*

The party who bears the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the close of the fact discovery.

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[2] On May 1, 2015, Rule 37 was renumbered. The version of Rule 37 in effect prior to May 1, 2015 is quoted above.

Utah R. Civ. P. 26(d)(4). General provisions governing disclosure and discovery. *Requirements for disclosure or response; disclosure or response by an organization; failure to disclose; initial and supplemental disclosures and responses.*

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.

LIST OF PARTIES TO THE PROCEEDING

APPELLANT:
Kari L. Baumann

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

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TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF JURISDICTION

The Utah Supreme Court has jurisdiction over this matter pursuant to UTAH CODE ANN. § 78A-3-102(3)(a).

RESTATEMENT OF THE ISSUE

Smith's Pharmacy does not agree with Ms. Baumann's Statement of The Issues. According to Ms. Baumann, the issues on appeal are essentially "[w]hether the Court of Appeals erred in concluding that the District Court properly applied Rule 26(a)(4)…rather than Rule 16(d)…" and "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)…." Brief of Appellant ("Aplt's Br."), p.1-2. However, Ms. Baumann failed to provide sufficient citation to the record demonstrating that Ms. Baumann preserved these issues in the trial court as required by Rule 24(a)(5)(A) of the Utah Rules of Appellate Procedure. Ms. Baumann has failed to provide supportable

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