2018

JAMES PRIEUR, DAN PRIEUR, MARY HERSCH, AND JOHN PRIEUR, INDIVIDUALLY AND AS HEIRS OF SHARON HOREN, DECEASED Plaintiffs and Appellants, vs. THE ENSIGN GROUP, INC.; THE ENSIGN GROUP, INC. dba OREM REHABILITATION & NURSING CENTER; THE ENSIGN GROUP, INC dba OREM REHABILITATION & SKILLED NURSING; HUENEME HEALTHCARE, INC.; HUENEME HEALTHCARE, INC.; HUENEME HEALTHCARE, INC, dba OREM REHABILITATION & NURSING CENTER; HUENEME HEALTHCARE, INC, dba OREM REHABILITATION & SKILLED NURSING; DAVID WORKMAN, M.D.; DAVID WORKMAN, M.D., P.C., Defendants and Appellees. : Brief of Appellee

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Allen M. Young; attorney for appellant.

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IN THE UTAH COURT OF APPEALS

JAMES PRIEUR, DAN PRIEUR, MARY HERSCH, AND JOHN PRIEUR, INDIVIDUALLY AND AS HEIRS OF SHARON HOREN, DECEASED

Plaintiffs and Appellants,

vs.

THE ENSIGN GROUP, INC.; THE ENSIGN GROUP, INC. dba OREM REHABILITATION & NURSING CENTER; THE ENSIGN GROUP, INC dba OREM REHABILITATION & SKILLED NURSING; HUENEME HEALTHCARE, INC.; HUENEME HEALTHCARE, INC, dba OREM REHABILITATION & NURSING CENTER; HUENEME HEALTHCARE, INC, dba OREM REHABILITATION & SKILLED NURSING; DAVID WORKMAN, M.D.; DAVID WORKMAN, M.D., P.C. ,

Defendants and Appellees.

BRIEF OF APPELLEE

Appellate Case No. 20180704

District Court No. 130400555

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IN THE UTAH COURT OF APPEALS

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OTHER PARTIES BELOW NOT PARTIES TO THIS APPEAL

Schryver Medical Sales & Marketing, Inc.

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Pursuant to Utah Rule of Appellate Procedure 24(b), Appellees The Ensign Group, Inc.; Ensign Group, Inc., dba Orem Rehabilitation & Nursing Center; Ensign Group, Inc., dba Orem Rehabilitation & Skilled Nursing; Hueneme Healthcare, Inc.; Hueneme Healthcare, Inc., dba Orem Rehabilitation & Nursing Center; Hueneme Healthcare, Inc., dba Orem Rehabilitation & Skilled Nursing; David Workman, M.D.; and David Workman, M.D., P.C. (collectively, "Orem Rehab") submit the following responsive brief.

Statement of Jurisdiction

This Court has jurisdiction over this matter as this case was poured over from the Utah Supreme Court. *See* Utah Code Ann. § 78A-4-103(j).

Statement of Issues

The issue or issues Appellants (hereafter referred to as "Plaintiffs") seek to raise on appeal are not entirely clear. Plaintiffs describe this appeal as one from the trial court's grant of summary judgment, *see* Brief of Appellant, p. 7. As described below, that decision was entered April 2017, *see* R.235-39, was based on wholly undisputed facts, and Plaintiffs' response to that motion contained one sentence of legal argument. *See* R.199-202.

Plaintiffs also refer to the trial court's denial of their motion for new trial, a decision that was not entered until July 2018. *See* R.473-83. While Plaintiffs state that the "issue on appeal" was preserved pursuant to that motion, *see id.*, p. 6, Plaintiffs do not challenge the ruling denying that motion. Similarly, while Plaintiffs' Notice of Appeal states that the appeal is from "the Court's Order on Plaintiffs' Motion for New Trial

entered on July 27, 2018," there is no other mention of that ruling nor any mention of Utah R. Civ. P. 59 within Appellants' brief. The "Summary of Arguments" contained in the appeal brief then mentions only the trial court's "order granting Summary Judgment." *Id.*, p. 10.

While this uncertainty makes a proper response to Plaintiffs' appeal brief difficult, one thing that is certain is Plaintiffs refer to the wrong standard of review. Plaintiffs state, without citation to authority, that review here is for legal error. *See* Brief of Appellant, p. 6. This is incorrect, as the question raised by Plaintiffs is whether the trial court erred by refusing to further extend the time for Plaintiffs to conduct expert discovery. Such matters are reviewed for abuse of discretion. As described by this Court in *Townhomes at Pointe Meadows Owners Ass'n v. Pointe Meadows Townhomes, LLC*, 2014 UT App 52, 329 P.3d 815

> The Association first challenges the district court's denial of its motion to extend the discovery deadlines established by the amended case management order. "Trial courts have broad discretion in managing the cases before them and we will not interfere with their decisions absent an abuse of discretion." *A.K. & R. Whipple Plumbing & Heating v. Aspen Constr.*, 1999 UT App 87, ¶ 11, 977 P.2d 518.

Id., ¶ 9. *See also Solis v. Burningham Enterprises*, 2015 Utah App 11, ¶ 11, 342 P.3d 812 ("We review the trial court's . . . exclusion of testimony . . . for an abuse of discretion."); *Green v. Louder*, 2001 UT 62, ¶ 37, 29 P.3d 638 ("Because trial courts have broad discretion in matters of discovery, this issue is reviewed for abuse of discretion."). Accordingly, the question(s) raised by Plaintiffs are reviewed for abuse of discretion.

Statement of the Case

Relevant Procedural History.

The procedural facts of this case are set forth below. Fact nos. 1-29 below were established pursuant to Defendants' Motion for Summary Judgment, filed March 10, 2017. *See* R.132-35. Plaintiffs' response thereto, filed March 24, 2017, did not address or challenge these factual assertions. *See* R.199-202. Accordingly, these facts were deemed admitted pursuant to Utah R. Civ. P. 56(a)(4).

1. Plaintiffs James Prieur, Dan Prieur, Mary Hersch, and John Prieur, individually and as heirs of Sharon Horen, deceased ("Plaintiffs") filed a Complaint initiating the above-referenced matter on April 13, 2013. Plaintiffs filed an Amended Complaint on June 17, 2013. *See* R.132.

2. Defendants filed an Answer on August 12, 2013. *See id.*

3. Pursuant to the Notice of Event Due Dates, the original fact discovery deadline was April 21, 2014. *See id.*

4. On April 17, 2014, the parties executed a Stipulated Statement to Extend Fact Discovery, extending the fact discovery deadline to July 21, 2014 and extending all deadlines that follow after the completion of fact discovery as outlined in Rule 26 of the Utah Rules of Civil Procedure ("1st Extension"). *See id.*

5. Plaintiffs did not conduct discovery of any kind following the 1st Extension. *See id.*

6. On July 21, 2014, the parties executed a Second Stipulated Statement to Extend Fact Discovery, extending the fact discovery deadline to October 31, 2014 and

extending all deadlines that follow after the completion of fact discovery as outlined in Rule 26 of the Utah Rules of Civil Procedure ("2nd Extension"). *See id.*

7. Plaintiffs did not conduct discovery of any kind following the 2nd Extension. *See* R.133.

8. On March 26, 2015, the parties executed a Third Stipulated Statement to Extend Fact Discovery, extending the fact discovery deadline to June 30, 2015 and extending all deadlines that follow after the completion of fact discovery as outlined in Rule 26 of the Utah Rules of Civil Procedure (3rd Extension"). *See id.*

9. Plaintiffs did not conduct discovery of any kind following the 3rd Extension. *See id.*

10. On December 24, 2015, the Court issued a Notice of Intent to Dismiss. *See id.*

11. On January 5, 2016, the parties executed a Stipulated Written Statement Showing Good Cause (the "Statement of Good Cause"). *See id.*

12. Pursuant to the Statement of Good Cause, the parties indicated that they were working on a stipulation and anticipated that "once the stipulation is finalized, the parties are prepared to move this case forward into the next phase of discovery," meaning expert discovery (4th Extension). *See id.*

13. Plaintiffs did not conduct discovery of any kind following the 4th Extension. *See id.*

14. Orem Rehab provided the referenced stipulation (the "Stipulation") to Plaintiffs' counsel via email dated February 18, 2016. *See id.*

15. The provision of the Stipulation concluded fact discovery per the parties' Statement of Good Cause (*see* Statement of Good Cause). *See id.*

16. Plaintiffs failed to designate any experts following their receipt of the Stipulation. *See* R.134.

17. The Parties attended a failed mediation on August 25, 2016. *See id.*

18. Immediately following the failed mediation, Plaintiffs issued a Rule 30(b)(6) Deposition Notice to Defendants ("Deposition Notice"). *See id.*

19. In response to Plaintiffs' untimely Deposition Notice, on September 22, 2016, Defendants filed a Statement of Discovery Issues seeking entry of a protective order precluding the 30(b)(6) deposition on the basis that fact discovery was closed. *See id.*

20. On that same day, and to remove any doubt that fact discovery had closed, Defendants filed the Stipulation pursuant to the 4th Extension. *See id.*

21. In an acknowledgement that fact discovery had closed, the following day, on September 23, 2016, Plaintiffs withdrew their Deposition Notice. *See id.*

22. Plaintiffs failed to designate any expert witnesses following the filing of the Stipulation, or Plaintiffs' withdrawal of their Deposition Notice. *See id.*

23. On January 4, 2017, the Court issued a second Notice of Intent to Dismiss. *See id.*

24. On January 24, 2017, the parties executed a second Stipulated Written Statement Showing Good Cause (the "Second Statement"). *See id.*

25. Pursuant to the Second Statement, the parties indicated that "[f]act discovery in this matter has been completed" and "[t]he parties are now moving into expert discovery." *See* R.135.

26. The parties attached a proposed Stipulation and Case Management Order to the Second Statement which provided that Plaintiffs' expert disclosures would be due on February 28, 2017, one month after the filing of the Second Statement. *See id.*

27. On January 30, 2017, however, the Court declined to sign the proposed Case Management Order, finding that "[t]he discovery period has closed. The parties do not show good cause for the delays in this case. This case should either be dismissed, or proceed to trial without further delay." *See id.*

28. Plaintiffs did not file anything in response to the Court's January 30th Docket Entry. *See id.*

29. The Court then issued a Notice of Final Pre-Trial Conference on February 21, 2017 terminating discovery and requiring the Parties to file any pre-trial motions by March 10, 2017 and to attend a final pre-trial conference on April 17, 2017. *See id.*

30. Because Plaintiffs failed to disclose any expert testimony to establish the proximate cause element of their *prima facie* case, Defendants filed a Motion for Summary Judgment on March 10, 2017 on the basis that this was a medical malpractice case requiring expert testimony and Plaintiffs had failed to designate any such witness. *See* R.129-160).

31. In response, Plaintiffs submitted a one-and-a-half page memorandum in opposition. *See* R.199-202. Plaintiffs did not challenge the facts set forth in Orem Rehab's motion, while the entirety of the argument provided was as follows:

> In the present case, the failure by Plaintiffs to disclose expert witnesses is harmless and the Plaintiffs have good cause for the failure.

R.200.

32. The trial court granted Defendant's Motion for Summary Judgment on April 12, 2017, on the basis that Plaintiffs had failed to designate an expert witness in a case requiring expert testimony, thereby dismissing all of Plaintiffs' claims against Defendants. *See* R.235-239.

33. Specifically, the trial court ruled:

> Utah courts have consistently held that expert testimony must be timely disclosed and that failure to do is prejudicial to an opposing party. Because the Court finds Plaintiffs' failure to disclose expert witnesses is not harmless and there is no showing of good cause, Defendants are entitled to judgment as a matter of law.

R.239.

34. At the same time that Orem Rehab filed its Motion for Summary Judgment March 19, 2017), it also filed a Motion for Order in Limine re: Damages. *See* R.167-93. That motion sought to preclude "the introduction, or admission of any evidence related to Plaintiffs' damages claims at trial." As stated therein, the grounds for this Motion were "that Plaintiffs failed to provide a computation of damages in their initial disclosures, or in response to Defendants' discovery requests seeking the same information." R.168.

35. The Motion for Order in Limine re: Damages was granted per an Order entered on April 12, 2017. *See* R.244-248. As set forth in that Order, Plaintiffs were precluded from setting forth any evidence of damages. *See* R.247. This Order is not even mentioned in Plaintiffs' Brief of Appellant and is not a subject of the instant appeal.

36. Plaintiffs did file an appeal from the various orders granted by the trial court back in 2017, Appeal No. 20170384. *See* R.270-72. However, Plaintiffs later discovered that they had failed to serve defendant Schryver Medical Sales & Marketing, Inc. ("Schryver") in the four (4) years that the case had been pending.

37. Plaintiffs then sought voluntary dismissal of their appeal and entered into a stipulation to dismiss their claims against Schryver. *See* docket, Appeal No. 20170384. The trial court entered a stipulated Order of Dismissal of Plaintiffs' Claims Against Schryver (the "Order of Dismissal") on March 30, 2018. *See* R.336-338.

38. Plaintiffs filed a Motion for New Trial on April 27, 2018. *See* R.341-359.

39. The Motion for New Trial was denied per a Ruling on Plaintiff's Motion for a New Trial, entered July 26, 2018. *See* R. 473-483.

40. This appeal followed, filed on August 23, 2018. The Notice of Appeal states that Plaintiffs appeal "the Court's Order on Plaintiffs' Motion for New Trial entered on July 27, 2018." R.517-19.

Relevant Substantive Facts.

This was a medical malpractice wrongful death case arising out of the care and treatment received by Plaintiffs' decedent, Sharon Horen ("Ms. Horen"), at Central Utah Clinic and Defendant Orem Rehabilitation and Skilled Nursing ("Orem Rehab"). On

October 15, 2010, Ms. Horen, was seen by John Walker, a nephrology APRN, at Central Utah Clinic for examination following an observed change in Ms. Horen's condition at Orem Rehab. During the October 15, 2010 visit, Mr. Walker wrote an order for STAT labs to be performed on Ms. Horen. Instead of having the STAT labs performed at Central Utah Clinic, Mr. Walker returned Ms. Horen to Orem Rehab with the order for STAT labs. Ms. Horen's blood was drawn and the STAT lab results were faxed to Orem Rehab at approximately 7:14 p.m. on October 15, 2010. The STAT lab results indicated that Ms. Horen had a serum potassium level of 8.6 which is a "high panic" value. *See* R.130-131.

Unfortunately, the staff at Orem Rehab failed to notice, report, or otherwise act on the STAT labs. Further, Mr. Walker failed to follow up on his STAT lab order pursuant to his duty as Ms. Horen's treating nephrologist. As a result, none of Ms. Horen's health care providers were made aware of her serum potassium level of 8.6. Just after midnight on October 16, 2010, Ms. Horen was found minimally responsive by Orem Rehab staff. Following transport to Utah Valley Regional Medical Center, and pursuant to Ms. Horen's advanced directive, no therapeutic treatments were administered and Ms. Horen expired on October 16, 2010. *See id.*

Given Ms. Horen's underlying conditions and co-morbidities, and the timing and course of treatment by Mr. Walker and Orem Rehab, this case necessarily involved highly complex issues related to allocation of fault to non-party health care providers (*i.e.*, Mr. Walker) and causation. In the nearly four years this case was pending, however, Plaintiffs failed to conduct a single deposition, or designate any experts. *See id.*

This fact cannot be overstated. Despite filing this action in 2013, despite knowing that proof of their sole claim for relief required expert testimony, Plaintiffs never took *any* steps to fulfill the requirements of rule 26. No expert designations were ever made, let alone expert disclosures produced. This was true even when the trial court made clear it was rejecting the proposed 4th Extension, even when the trial court issues a Notice of Final Pretrial Conference. Plaintiffs not only failed to make their required designations, they failed to seek leave from the trial court to do so. This is the antithesis of the proportionality requirement contained in rule 26(b)(2)(C) that discovery be "consistent with the overall case management and will further the just, speedy and inexpensive determination of the case." Utah R. Civ. P. 26(b)(2)(C)

Summary of Arguments

Plaintiffs argue that the trial court erred when it refused to grant them a 4th Extension to make expert disclosures. Plaintiffs also argue that the trial court should have allowed oral argument on a largely unconstested motion for a new trial. These arguments fail to show reversible error for several reasons.

First, these issues are irrelevant. Even if Plaintiffs had been able to show some error regarding these rulings, they would establish harmless error only. This is because Plaintiffs ignore the fact that, in addition to granting the Motion for Summary Judgment on the basis of Plaintiffs' failure to make expert disclosures, the trial court granted a separate motion in limine excluding all evidence of damages at trial. Absent a showing of damages, Plaintiffs could not succeed on their claim for negligence.

Second, the trial court properly granted the Motion for Summary Judgment. The facts were all undisputed and Plaintiffs made no argument as to why dismissal was improper. For the latter reason, all arguments now made on appeal were not preserved and, as set forth below, are unconvincing in any event.

Third, while Plaintiffs argue that the trial court erred when it refused to allow Plaintiffs a fourth extension to provide expert disclosures, this is the sort of decision squarely within the wide discretion afforded to trial courts. Plaintiffs fails to show any abuse of that discretion.

Fourth, while Plaintiffs now complain that the trial court did not afford them oral argument, Plaintiffs neglect to mention they did not ask for oral argument until after the trial court ruled on the Motion for Summary Judgment.

Finally, to the extent Plaintiffs argue there was some error in regard to the denial of their motion for new trial, the argument is insufficiently briefed. Plaintiffs do not even reference rule 59 or the trial court's ruling, let alone explain why that ruling was in error.

For each of these reasons, this Court should affirm.

Argument

1. Plaintiffs' Arguments on Appeal, Even if Proven, Amount to Harmless Error Only.

Orem Rehab filed a Motion for Order in Limine re: Damages on the same day it filed its Motion for Summary Judgment. *See* R.167-193. The motion in limine sought to preclude "the introduction, or admission of any evidence related to Plaintiffs' damages claims at trial." R.168. The basis for this motion was Plaintiffs' failure to provide a

computation of damages in their initial disclosures, or in response to Defendants' discovery requests, as required by Utah R. Civ. P. 26. The trial court granted this motion pursuant to Utah R. Civ. P. 26(d)(4). *See* R.244-248. This Order is not even mentioned by, let alone argued in, Plaintiffs' appeal brief.

Plaintiffs' appeal brief focuses on whether the trial court erred when it refused to grant Plaintiffs additional time to make expert disclosures. No time is spent, no argument is made, regarding the trial court's separate ruling excluding all evidence of Plaintiffs' damages. Because the trial court excluded all such evidence, even if this Court were to reverse on the issue of expert disclosures, Plaintiffs' negligence claim necessarily fails. Accordingly, the error alleged by Plaintiffs is irrelevant and harmless.

"Harmless error" is defined

> as an error that is sufficiently inconsequential that we conclude there is no reasonable likelihood that the error affected the outcome of the proceedings. Put in other words, an error is harmful only if the likelihood of a different outcome is sufficiently high as to undermine our confidence in the verdict. On appeal, the appellant has the burden of demonstrating an error was prejudicial—that there is a reasonable likelihood that the error affected the outcome of the proceedings.

Covey v. Covey, 2003 UT App 380, ¶ 21, 80 P.3d 553 (quotations and citations omitted).

In this case, regardless of whether the trial court properly refused to allow Plaintiffs additional time to disclose expert witnesses, the trial court's Order precluding evidence of damages rendered dismissal appropriate.

Plaintiffs alleged only one cause of action, sounding in negligence. *See* Am. Compl., p. 7 (R.20). A plaintiff must establish four essential elements to prove negligence:

> (1) that the defendant owed the plaintiff a duty, (2) that the defendant breached that duty, (3) that the breach of duty was the proximate cause of the plaintiff's injury, and (4) that the plaintiff in fact suffered injuries or damages.

Webb v. University of Utah, 2005 UT 80, ¶ 9, 125 P.3d 906. "A plaintiff's failure to present evidence that, if believed by the trier of fact, would establish any one of the [elements] of the prima facie case justifies a grant of summary judgment to the defendant." *Stevens-Henager College v. Eagle Gate College*, 2011 UT App 37, ¶ 14, 248 P.3d 1025. This includes a failure to present any evidence of damage. *See id.*, ¶ 35 ("The trial court correctly granted Eagle Gate's motion for summary judgment on the ground that Stevens–Henager failed to provide evidence that could establish its damages.").

Because Plaintiffs are prohibited from presenting any evidence of damages at trial, their negligence claim fails. Because this result would follow regardless of whether the trial court properly used its discretion to deny further extensions to Plaintiffs as to expert disclosures, Plaintiffs' argument on appeal cannot succeed. *See Covey*, 2003 UT App 380, ¶ 22 ("Because Almon has failed to carry his burden under our harmless error analysis by demonstrating that the alleged error committed by the trial court was prejudicial, his argument is without merit and we affirm the ruling of the trial court.").

2. The Trial Court Correctly Granted Summary Judgment.

Orem Rehab filed a Motion for Summary Judgment on the basis that Plaintiffs failed to identify any expert witness who would testify in support of Plaintiffs' prima

facie case. Because this was a complicated medical malpractice action, the failure to provide expert testimony was fatal to Plaintiffs' claims. *See* R.129-160.

Plaintiffs' response to this motion was less than two pages. None of the facts set forth in Orem Rehab's motion were addressed. The argument that expert testimony was required was not disputed. Instead, Plaintiffs simply responded that, "[i]n the present case, the failure by Plaintiffs to disclose expert witnesses is harmless and the Plaintiffs have good cause for the failure."

Given that the facts set forth by Orem Rehab were undisputed and given application of Utah law regarding the effect of failure to designate expert witnesses, the trial court granted Orem Rehab's Motion for Summary Judgment. *See* R.235-239.

Plaintiffs provide no reason to disturb this ruling.

Utah R. Civ. P. 56 makes clear that "[t]he court *shall* grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(a) (emphasis added). After all, "[t]he purpose of summary judgment is to eliminate the time, trouble, and expense of trial when it is clear as a matter of law that the party ruled against is not entitled to prevail." *Amjacs Interwest, Inc. v. Design Assoc.*, 635 P.2d 53, 54 (Utah 1981).

There was no dispute below, and no dispute on appeal, that expert testimony was required to prove Plaintiffs' case and that Plaintiffs never disclosed any expert witness at any time during the course of the proceedings.

The sole arguments now made by Plaintiffs on appeal appear to be: (1) the trial court erred when it held that the time for discovery was over and refused to accept a

fourth stipulated scheduling order; and (2) the trial court ruled on summary judgment without hearing oral argument. These arguments fail for three reasons.

a. Plaintiffs' Arguments Were Not Preserved.

Neither argument now made by Plaintiffs was preserved below, at least not in regard to the relevant summary judgment order that is being challenged on appeal. Failure to preserve an issue in the trial court generally precludes a party from arguing that issue in an appellate court, absent a valid exception. *See Patterson v. Patterson*, 2011 UT 68, ¶ 12, 266 P.3d 628; *State v. Johnson*, 2017 UT 76, ¶ 19, 416 P.3d 443; *Hill v. Superior Property Management Services, Inc.*, 2013 UT 60, ¶ 46, 321 P.3d 1054.

There was no response to the facts set forth in Orem Rehab's Motion for Summary Judgment, no legal argument presented. "[I]n order to preserve a contention of error in the admission of evidence for appeal, a defendant must raise a timely objection to the trial court in clear and specific terms." *State v. Larsen*, 828 P.2d 487, 495 (Utah Ct. App. 1992). "Importantly, the grounds for the objection must be distinctly and specifically stated." *State v. Winward*, 941 P.2d 627, 633 (Utah Ct. App. 1997) (quotations and citations omitted). "Where there [is] no clear or specific objection . . . and the specific ground for objection [is] not clear from the context . . . the theory cannot be raised on appeal." *Larsen*, 828 P.2d at 495.

Plaintiffs fail to even acknowledge that their arguments were not preserved when opposing the Motion for Summary Judgment, let alone show that a valid exception applies. Accordingly, Plaintiffs' arguments on appeal should be deemed waived.

b. The Trial Court Did Not Abuse its Discretion When it Refused a Fourth Continuance of Discovery Dates.

Even if Plaintiffs' arguments had been preserved, they fail on the merits. For instance, Plaintiffs repeatedly state that the trial court's decision to disallow further discovery was "arbitrary and capricious," but fail to show how or why this is the case.

"Trial courts have broad discretion in managing the cases before them and we will not interfere with their decisions absent an abuse of discretion." *Townhomes at Pointe Meadows Owners Ass'n v. Pointe Meadows Townhomes, LLC*, 2014 UT App 52, ¶ 9, 329 P.3d 815. "When reviewing a district court's exercise of discretion, we will reverse only if there is no reasonable basis for the district court's decision." *Id.*

Here, the district court simply applied Utah R. Civ. P. 26(d)(4) to the undisputed facts and held that, because the failure to disclose expert witnesses was unexcused, Plaintiffs would not be allowed to supplement and continue their discovery. Because there was no dispute that expert witnesses were required, Plaintiffs' case was dismissed.

Rule 26(a)(4) requires specific disclosures regarding potential expert testimony, including the expert's name, qualifications, a summary of opinions and data and information that will be relied upon. *See* Utah R. Civ. P. 26(a)(4)(A). Rule 26 also explains the consequences of a failure to disclose. "If a party fails to disclose or to supplement timely a disclosure or response to discovery, that party may not use the undisclosed witness, document or material at any hearing or trial unless the failure is harmless or the party shows good cause for the failure." Utah R. Civ. P. 26(d)(4).

The Advisory Committee Notes to this rule make clear the rule means what it says:

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

Utah R. Civ. P. 26, Advisory Committee Notes (emphasis added).

Plaintiffs, without dispute, never identified expert witnesses. Rule 26(d)(4) clearly provides that a party who fails to timely disclose witnesses as required shall not be permitted to use the witness at any hearing or trial. Utah Courts follow this requirement. *See Baumann v. The Kroger Co.*, 2016 UT App 165, ¶ 12, 381 P.3d 1135; *Sleepy Holdings LLC v. Mountain West Title*, 2016 UT App 62, ¶¶ 25-28, 370 P.3d 628; *Brussow v. Webster*, 2011 UT App 193, ¶ 3, 258 P.3d 615; *Dahl v. Harrison,* 2011 UT App 389, ¶ 22, 265 P.3d 139. Indeed, this sanction is viewed as "automatic and mandatory." *Dahl,* 2011 UT App 389, ¶ 22

> "Utah law mandates that a trial court exclude an expert witness . . . disclosed after expiration of the established deadline unless the district court, in its discretion, determines that good cause excuses tardiness or that the failure to disclose was harmless."

Solis v. Burningham Enterprises, 2015 Utah App 11, ¶ 21 (quoting *Townhomes at Pointe Meadows Owners Ass'n*, 2014 UT App 52, ¶ 13). *See also ROA Gen. v. Chung Ji Dai*, 2014 UT App 124, ¶ 11, 327 P.3d 123 (describing exclusion of evidence as "automatic").

Moreover, Plaintiffs never provided facts to the trial court describing why their failure to disclose should have been excused under this rule. Accordingly, Plaintiffs fail to show any error, let alone an abuse of discretion.

Ignoring both Rule 26 and the trial court's ruling on summary judgment, Plaintiffs instead focus on the fact that the parties submitted a stipulation for a fourth continuance of the discovery order and the fact that the trial court rejected this. Citing no case law or legal authority, Plaintiffs argue this was reversible error as a matter of law. This is incorrect.

As described above, this issue was not raised to the trial court in response to the motion for summary judgment. *See* R.199-202. In any event, this Court in *Townhomes at Pointe Meadows,* 2014 UT App 52, ¶ 9, specifically held that such decisions are well within the discretion of the trial court. Given the facts of this case and Plaintiffs' repeated delays, the trial court did not abuse its discretion by failing to allow for additional time to make expert designations.

Plaintiffs has failed to designate an expert for years. Plaintiffs acknowledged that fact discovery had closed—at the very latest—on September 23, 2016. *See* R.134. For months thereafter, Plaintiffs failed to designate any expert witnesses. Plaintiffs failed to attempt to designate any experts, or otherwise moved the trial court to allow them to designate experts following the Court's January 30, 2017 Docket Entry, pursuant to the

Court's Notice of Final Pre-Trial Conference, or even in response to Orem Rehab's motion for summary judgment. Plaintiffs never offered any expert testimony in the form of a designation or affidavit, nor did they seek the trial court's permission to do so.

Plaintiffs' failure to offer any expert testimony in this case, or even attempt to do so, precluded them from offering any expert testimony at trial under Utah R. Civ. P. 26(d)(4) and the trial court correctly ruled as much.

Plaintiffs argue as if the stipulation at issue was a substantive agreement or one that resolved the case. For instance, Plaintiffs cite to *First of Denver Mortg. Invest. v. CN Zundel & Assoc.*, 600 P.2d 521 (Utah 1979), a case that involved an agreement to waive lien rights. Plaintiffs also cite to *Birch v. Birch*, 771 P.2d 1114 (Utah Ct. App. 1989), a case involving a stipulated property settlement. This is nothing like the stipulation for a fourth continuance at issue here. There was no right to the continuance; it was always subject to the discretion of the trial court to allow it. This would seem to be precisely the type of discretion afforded trial courts. *See A.K. & R. Whipple Plumbing & Heating v. Aspen Constr.*, 1999 UT App 87, ¶ 11, 977 P.2d 518 ("Trial courts have broad discretion in managing the cases before them and we will not interfere with their decisions absent an abuse of discretion.").

The trial court did not allow it and Plaintiffs fail to show any abuse of discretion. Indeed, Plaintiffs cannot cite to a single case where a similar decision was deemed improper and an abuse of discretion on appeal. Accordingly, even if this argument had been raised, it fails on the merits.

c. Oral Argument Was Not Requested Until After the Trial Court Ruled.

Plaintiffs' only other argument on the merits is that the trial court erred when it failed to allow Plaintiffs oral argument on Orem Rehab's motion for summary judgment. *See* Brief of Appellant, p. 16. This argument is a bit of a mystery, as there was no written request for oral argument until *after* the motion for summary judgment was granted. In any event, the argument fails on the merits.

During the briefing stage of the motion for summary judgment, Plaintiffs did not request oral argument. The trial court granted the motion on April 12, 2017, specifically noting that "[n]either party requested oral argument." April 12, 2017 Ruling (R.235). The first time that Plaintiffs requested oral argument was the following day. *See* April 17, 2017 Motion for Oral Argument (R.251-260).

This Court has previously held that the "question of whether the court erred in granting summary judgment without a hearing is governed by rule 7 of the Utah Rules of Civil Procedure." *Zundel v. Magana*, 2015 UT App 69, ¶ 4, 347 P. 3d 444. Pursuant to Utah R. Civ. P. 7(h), a party "may request a hearing in the motion, in a memorandum or in the request to submit for decision." That request "must be separately identified in the caption of the document containing the request." Utah R. Civ. P. 7(h). No such request was made in this case. Accordingly, this request should be deemed waived and is not available as a reason for finding fault on appeal. *See, e.g., State v. Smedley*, 2003 UT App 79, ¶ 10, 67 P.3d 1005 ("One who fails to make a necessary objection or who fails to insure that it is on the record is deemed to have waived the issue.").

Moreover, even if a hearing is requested, the failure to provide one is only error if there "is a reasonable likelihood that a hearing would have affected the district court's resolution of the parties' summary judgment motions." *Zundel*, 2015 UT App 69, ¶ 17. Plaintiffs' written response did not respond to the facts asserted nor did it make a credible, developed argument. It is unlikely Walt Whitman could have provided assistance to the trial court under such circumstances.

Moreover, rule 7 also provides that a trial court need not grant a hearing if it finds that the "issue has been authoritatively decided." Utah R. Civ. P. 7(h). The trial court's ruling contained this specific statement. *See* April 12, 2017 Ruling (R.235).

Accordingly, this argument fails to provide a basis for reversal.

3. Plaintiffs Inadequately Brief the Issue of Whether the Trial Court Erred When it Denied Plaintiffs' Motion for New Trial.

Out of an abundance of caution, in the unlikely event that Plaintiffs argue in reply that the trial court erred when it denied Plaintiffs' motion for new trial, that issue is briefly addressed herein.

"Motions for a new trial are governed by rule 59 of the Utah Rules of Civil Procedure." *Barrientos ex rel. Nelson v. Jones*, 2012 UT 33, ¶ 7, 282 P. 3d 50. "Because the grant of a new trial is ordinarily left to the sound discretion of the trial court," this Court reviews the trial court's decision "under an abuse of discretion standard." *Id.*

Rule 59 defines the limited circumstances in which a new trial is appropriate. *See* Utah R. Civ. P. 59(a). "[T]he trial court has *no discretion* to grant a new trial absent a

showing of at least one of the grounds set forth in Rule 59(a)...." *Matter of Estate of Justheim,* 824 P.2d 432, 433 (Utah Ct. App. 1991) (emphasis added).

Plaintiffs fail to even cite to rule 59, let alone provide a basis under that rule that could support a new trial. No analysis is provided, no citation to the ruling of the trial court. As such, this issue, to the extent it is an issue, is inadequately briefed. *See* Utah R. App. P. 24(a)(9); *Bank of America v. Adamson*, 2017 UT 2, ¶ 11 391 P. 3d 196 ("[a]n issue is inadequately briefed if the argument merely contains bald citations to authority [without] development of that authority and reasoned analysis based on that authority."); *Crossgove v. Stan Checketts Properties*, 2015 UT App 35, ¶ 6, 344 P.3d 1163 ("We will not assume the appellant's burden of argument and research where the contentions are asserted without the support of legal reasoning or authority."); *State v. Thomas*, 961 P.2d 299, 304 (Utah 1998) ("It is well established that a reviewing court will not address arguments that are not adequately briefed."). Because this issue is inadequately briefed, Plaintiffs necessarily fail to carry their burden of persuasion on appeal. *See Adamson*, 2017 UT 2, ¶ 12.

CONCLUSION

"On appeal, it is appellant's burden to convince this Court that the trial court exceeded its authority." *Polyglycoat Corp. v. Holcomb*, 591 P.2d 449, 450-51 (Utah 1979). Plaintiffs wholly fail to meet this burden here.

From the outset, it is unclear just what order Plaintiffs' appeal from. Ultimately, however, it makes little difference. To the extent Plaintiffs appeal from the trial court's order granting summary judgment due to Plaintiffs' failure to make expert disclosures,

any error Plaintiffs could show is irrelevant given the trial court's separate ruling precluding all evidence of damages.

Moreover, when Plaintiffs failed, after four years of litigation, to submit any expert designations or disclosures, the trial court properly granted summary judgment in favor of Orem Rehab pursuant to Utah R. Civ. P. 26. The arguments now made by Plaintiffs were not preserved below and fail to show error in any event.

Plaintiffs' separate argument that the trial court erred when it failed to conduct oral argument ignores the fact that Plaintiffs did not seek oral argument prior to the trial court's ruling.

Last, to the extent Plaintiffs argue the trial court erred when it denied Plaintiffs' motion for new trial, this argument is insufficiently briefed.

For each of these reasons, Plaintiffs fail to meet their burden on appeal and Orem Rehab requests that this Court affirm.

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that this brief contains approximately 6,041 words and therefore complies with the 14,000 word limit contained in Utah R. App. P. 24(g)(5)(C).

DATED this 11th day of February, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 11th day of February, 2019, I caused to be served a true and correct copy of the foregoing Appellee's Brief via E-Mail to the following:

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