IN THE UTAH COURT OF APPEALS

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Chad Farr, Rian Farr, Alec Farr, and Seth Farr, individually and as beneficiaries of the Sheryl Marie Bluth Farr Living Trust, Plaintiffs and Appellants, v. Bruce Hughes, individually and as past trustee of the Sheryl Marie Bluth Farr Living Trust; Academy at Cedar Mountain, Inc., a Utah corporation; and Academy Equity Investors, LLC, a Utah limited liability company, Defendants and Appellees.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20080204-CA F I L E D (June 18, 2009) 2009 UT App 161

Fifth District, St. George Department, 030500098
The Honorable James L. Shumate

Attorneys: Chad Farr, Hurricane; Alec Farr, Washington; Rian Farr, St. George; and Seth Farr, Eagar, Arizona, Appellants Pro Se[1]
Brian L. Olson, St. George, for Appellees

Before Judges Greenwood, Orme, and McHugh.

GREENWOOD, Presiding Judge:

Plaintiffs Chad, Rian, Alec, and Seth Farr (the Family) challenge the trial court's order of dismissal in favor of Defendants Bruce Hughes and Academy Equity Investors, LLC (the School) as a sanction under rules 16(d) and 37(b)(2) of the Utah Rules of Civil Procedure. Dismissal of a complaint as a

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[1]Plaintiffs' counsel prepared their briefs filed on appeal, but withdrew as counsel prior to submission of the case to this court.

discovery sanction under rule 37 of the Utah Rules of Civil Procedure is reviewed for a clear abuse of discretion. See Morton v. Continental Baking Co., 938 P.2d 271, 274 (Utah 1997).

Earlier in the case, the trial court granted the Family partial summary judgment, holding, among other things, that the School had breached the buy-sell agreement and improperly received sums from the decedent's trust funds. The partial summary judgment concluded by stating, "It remains for the parties to either litigate their obligations under the buy-sell agreement or to settle or mediate." The trial court then refused to grant the School's motion to alter or amend the summary judgment, but nevertheless stated in several hearings that perhaps the buy-sell agreements had not been breached. The trial court then indicated that the remaining issues had to do with determining the obligations under the buy-sell agreement and calculation of the amount, if any, owed by the decedent to the School. As a result, the trial court issued the scheduling order that was stipulated to by the parties. Each side was to designate an expert and then provide an expert report, on specified dates, with the Family to go first, both in designating its expert and, after the School designated its expert, providing the expert report. The Family never objected to going first nor asked for relief from the requirement of providing an expert report.

The Family now argues that the partial summary judgment concluding that the School breached the buy-sell agreements constitutes the law of the case. Further, they argue that the contract breach precludes recovery by the School of any funds from the decedent's trust. It is true that "under the law of the case doctrine, a decision made on an issue during one stage of a case is binding in successive stages of the same litigation." IHC Health Servs., Inc. v. D & K Mgmt, Inc., 2008 UT 73, ¶ 26, 196 P.3d 588 (internal quotation marks omitted). However, even after granting summary judgment, "the [trial] court remains free to reconsider that decision." Id. ¶ 27; see also Utah R. Civ. P. 54(b).

We acknowledge it would have been preferable for the trial court to have entered a written order modifying the partial summary judgment as to any breach of contract. However, the trial court's change of mind is clear from the record and the scheduling order stipulated to by the Family explicitly requires further proceedings to calculate amounts owed under the buy-sell agreements. Therefore, the breach of contract conclusion in the partial summary judgment does not constitute the law of the case herein.

We conclude that the trial court did not abuse its discretion in dismissing the Family's claims. Citing its authority under rules 16(d) and 37(b)(2) of the Utah Rules of Civil Procedure to sanction a party who fails to obey an order, the trial court dismissed the Family's case after the Family failed to comply with the court's pretrial order to provide an expert witness report. See Utah R. Civ. P. 16(d) ("If a party or a party's attorney fails to obey a scheduling or pretrial order . . . the court, upon motion or its own initiative, may take any action authorized by Rule 37(b)(2)."); id. R. 37(b)(2) - (b)(2)(C) ("If a party fails to obey an order entered under Rule 16(b)[,] . . . unless the court finds that the failure was substantially justified, the court . . . may . . . dismiss the action or proceeding.").

"We will find that a trial 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 trial court's ruling." Morton v. Continental Baking Co., 938 P.2d 271, 274 (Utah 1997) (omission in original) (internal quotation marks omitted). Furthermore, there are four circumstances justifying sanctions under rule 37:

> (1) the party's behavior was willful; (2) the party has acted in bad faith; (3) the court can attribute some fault to the party; or (4) the party has engaged in persistent dilatory tactics tending to frustrate the judicial process.

Id. at 276.

This court has also held that "[t]rial courts have broad discretion in selecting and imposing sanctions for discovery violations, including dismissing the noncomplying party's [pleadings]. Appellate courts may not interfere with such discretion unless abuse of discretion is clearly shown." Aurora Credit Servs., Inc. v. Liberty W. Dev., Inc., 2006 UT App 48, ¶ 9, 129 P.3d 287 (second alteration in original) (internal quotations omitted). Furthermore, rule 26(a)(3)(B) of the Utah Rules of Civil Procedure requires an expert report unless stipulated to by the parties or ordered by the court. See Utah R. Civ. P. 26(a)(3)(B). There was no such stipulation or order in this case. The trial court determined that the Family's failure to adhere to the court's deadline "was [not] substantially justified." The trial court stated:

> [The Family] argue[s], somewhat bafflingly in light of this Court's previous orders, that they are not required to provide an expert

> report. This position is untenable given (1) the Court's clear directive at the February 20, 2007 hearing; [and] (2) the Amended Scheduling Order with deadlines extended for the very purpose of allowing Plaintiffs to obtain an expert report.

These assertions support the first and third circumstances justifying imposition of sanctions: that the party's behavior was willful and that the court can attribute some fault to the party. See Morton, 938 P.2d at 276. Thus, we conclude the trial court did not abuse its discretion in dismissing the Family's case as a sanction for failing to provide an expert report. See id. at 274. Affirmed.

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Pamela T. Greenwood,
Presiding Judge

WE CONCUR:

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Gregory K. Orme, Judge

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Carolyn B. McHugh, Judge