

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND
ON MOTION FOR RECONSIDERATION

No. 16
SEPTERMER TERM, 2015

FORT MYER CONSTRUCTION
CORPORATION
v.
MARYLAND-NATIONAL CAPITAL PARK
AND PLANNING COMMISSION, *et al.*

No. 71
SEPTEMBER TERM, 2015

URS CORPORATION
v.
MARYLAND-NATIONAL CAPITAL PARK
AND PLANNING COMMISSION

Eyler, Deborah S.,
Reed,
Salmon, James P.
(Retired, Specially Assigned)

JJ.

Opinion by Eyler, Deborah S., J.

Filed: April 28, 2016

*This is an unreported opinion and therefore may not be cited either as precedent or as persuasive authority in any paper, brief, motion, or other document filed in this Court or any other Maryland court. Md. Rule 1-104.

This consolidated appeal stems from contractual disputes arising out of the construction of a pedestrian bridge located at the intersection of Viers Mill Road and Aspen Hill Road in Montgomery County (the “Bridge Project”).

In the Circuit Court for Montgomery County, Fort Myer Construction Corporation (“Fort Myer”) sued the Maryland-National Capital Park and Planning Commission (“the Commission”) for breach of contract and declaratory judgment. The Commission filed a third-party complaint against the URS Corporation (“URS”), claiming, *inter alia*, that URS had a contractual obligation to defend it in the suit by Fort Myer, *i.e.*, to pay the cost of its defense. URS filed a counterclaim against the Commission for breach of contract.

The court dismissed Fort Myer’s complaint without prejudice for failure to file a Certificate of Qualified Expert (“CQE”), pursuant to Md. Code (1973, 2013 Repl. Vol.), sections 3-2C-01 and 02 of the Courts and Judicial Proceedings Article (“CJP”). The Commission filed a motion for sanctions under Rule 1-341 against Fort Myer, and URS filed a motion to join that motion, which the court granted. Fort Myer filed an opposition and also filed a motion for sanctions based on discovery violations. The court granted the motion filed by the Commission and URS and awarded sanctions against Fort Myer of \$248,638.31 to URS and \$376,597.68 to the Commission.

A bench trial was held on the Commission’s third-party complaint against URS and URS’s counterclaim against the Commission. The court entered judgment in favor of the Commission on the third-party complaint, ruling that URS owed the Commission a contractual duty to pay for the Commission’s defense in the action brought by Fort Myer. The court also entered judgment in favor of URS on its counterclaim, for \$103,420.00 in

damages against the Commission. In a subsequent damages hearing, the court awarded the Commission \$352,355.68 on the duty to defend claim. In the meantime, Fort Myers moved for reconsideration of the sanctions awards, which was denied.

In its appeal, URS presents two questions for review, which we have consolidated and rephrased as follows:

- I. Did the circuit court err in ruling that URS owed a duty to defend the Commission against Fort Myer’s claims?

In its appeal, Fort Myer presents three questions, which we have combined and rephrased as follows:

- I. Did the circuit court err in finding that Fort Myer maintained its suit against the Commission without substantial justification?
- II. Did the circuit court abuse its discretion in awarding sanctions against Fort Myer?

FACTS AND PROCEEDINGS

URS is an engineering design firm. In 1999, it began providing transportation engineering services to Montgomery County (the “County”) on an as-needed basis.

On February 26, 2004, URS and the County entered into a Basic Ordering Agreement (“BOA”). The BOA governs the process by which URS submits proposals to complete various projects for the County. It provides that when services are needed, the County must develop Task Orders detailing the requested services. URS then submits a proposal to complete the services within the BOA guidelines, including purchase price and costs.

Several attachments and provisions are appended to the BOA. Attachment E includes an indemnification clause that provides in relevant part:

The contractor must indemnify and save the County harmless from any loss, cost, damage and other expenses, including attorney's fees and litigation expenses, suffered or incurred due to the contractor's negligence or failure to perform any of its contractual obligations. If requested by the County, the contractor must defend the County in any action or suit brought against the County arising out of the contractor's negligence, errors, acts or omissions under this contract.

Additionally, an attachment entitled "SECTION A – INSTRUCTIONS, CONDITIONS AND NOTICES" includes a "Joint Procurement" provision. That provision provides that several entities, including the Commission, "must be able to purchase directly from any contracts resulting from this Solicitation" and "[w]hile this solicitation is prepared on behalf of [the County], it is intended to apply for the benefit of [those entities] as though they were expressly named throughout the document."

In September of 2004, the Commission asked URS to submit a proposal for the Bridge Project. URS submitted its proposal consistent with the guidelines in the BOA. The Commission drafted a contract (the "Design Contract"), which URS and the Commission signed. URS prepared the engineering design for the Bridge Project and drafted design documents that it submitted to the Commission.

In March of 2008, the Commission issued a request for bids for construction of the Bridge Project. Fort Myer won the bid and on November 6, 2008, entered into a contract

with the Commission (the “Construction Contract”).¹ The Construction Contract specified that the Bridge Project was to be substantially completed by September 9, 2010. The Commission forwarded URS’s design documents to Fort Myer to use to undertake construction of the Bridge Project.

According to Fort Myer, URS’s design documents should have contained an erection plan for the Bridge Project, but did not. As a consequence, it had to devise an erection plan itself. Over the course of construction, Fort Myer encountered complications due to URS’s design. The most significant complication concerned the placement of a steel girder (the “Uplift Issue”). As a result of the Uplift Issue and other complications, Fort Myer completed construction on January 24, 2011, 137 days after the substantial completion date designated in the Construction Contract, and incurred additional and increased costs. By letter of September 2, 2011, Fort Myer informed the Commission that URS’s design neglected to “provide at least one erection plan capable of constructing the bridge as designed in the” design documents and did not “design a bridge that would conform to standard tolerances.”²

On January 26, 2012, anticipating that Fort Myer would seek reimbursement, the Commission notified URS in writing about the dispute with Fort Myer and that it was withholding further payment to URS until the dispute was resolved.

¹ The Construction Contract was not subject to any of the terms of the BOA.

² In its letter, Fort Myer miscalculates the construction postponement as 127 days.

On January 27, 2012, Fort Myer sent the Commission a formal claim for payment. Fort Myer detailed the various complications it had encountered and requested \$876,822.03 for additional and increased costs. Then, on March 19, 2012, the Commission sent URS a formal demand for “indemnification against Fort Myer’s claim,” including that URS pay the cost to defend the Commission against Fort Myer’s claim, pursuant to the BOA. The Commission renewed this demand in writing on May 8 and July 2 of 2012.

On October 12, 2012, Fort Myer filed suit against the Commission, alleging that it had breached the Construction Contract in a number of ways, including by providing design documents from URS that were incomplete and did not allow for proper construction of the bridge. In a breach of contract count, it sought \$876,822.03 in lost profits, increased costs, and markups. In a declaratory judgment count, it sought to have the Commission release \$315,000.00 in retainage that it had kept under the Construction Contract.³

In February of 2013, the Commission demanded that URS pay the Commission’s cost of defense in the Fort Myer suit. URS refused. On March 27, 2013, the Commission filed a third-party complaint against URS for indemnification, contribution, and breach of contract. The Commission alleged that its Design Contract with URS

³ In the declaratory judgment count, Fort Myer asked the court to award it damages of \$315,000.00. In essence, this count also was for breach of contract.

incorporated the duty to defend provision of the BOA and that URS had breached the contract by refusing to pay for the Commission's defense in Fort Myer's suit against it.

On May 9, 2013, URS filed a counterclaim, alleging that the Commission had breached the Design Contract by failing to pay it \$103,420.00 that was due and owing.

Because the remaining facts and proceedings are bound up in the legal issues, they shall be set forth in our discussion.

DISCUSSION

I.

For reasons we shall discuss in Question II, on March 31, 2014, the court dismissed Fort Myer's complaint, without prejudice. On April 7 and 8, 2014, the court held a bench trial on the Commission's third-party complaint against URS and URS's counterclaim against the Commission. The court ruled in favor of the Commission on its third-party claim, stating that the Design Contract between the Commission and URS incorporated the BOA, which in turn incorporated a duty to defend. The Court ruled in favor of URS on its breach of contract counterclaim against the Commission, awarding it damages of \$103,420.00, which was entered as a judgment on May 5, 2014.

In the meantime, on April 11, 2014, the Commission filed a motion for sanctions against Fort Myer, pursuant to Rule 1-341, on the ground that it brought and maintained the suit against the Commission without substantial justification. As noted, the court allowed URS to join in that motion, and Fort Myer filed an opposition and also filed a

motion for sanctions. The court held a hearing on April 28, 2014, and granted the motion for sanctions against Fort Myer.

On May 15, 2014, URS filed a notice of appeal, apparently challenging the court’s oral ruling of April 8, 2014, on the cost of defense issue.

On June 2, 2014, the court entered judgments on the Rule 1-341 motion, against Fort Myer and in favor of the Commission for \$376,597.68, and against Fort Myer and in favor of URS for \$248,638.31. Two days later, on June 4, 2014, Fort Myer filed a notice of appeal.

By order of August 29, 2014, this Court consolidated the two appeals. Ultimately, however, on September 25, 2014, this Court issued an order dismissing the consolidated appeal as not permitted by law, pursuant to Rule 8-602(a)(1), “with leave to file a notice of appeal from a final judgment.” The mandate issued on October 30, 2014.

Before then, on October 7, 2014, the circuit court issued an order setting the case in for an evidentiary hearing on the remaining liability and damages issues pertaining to the Commission’s third-party claim against URS.

On November 10, 2014, Fort Myer filed a motion for reconsideration of the court’s June 2, 2014 Rule 1-341 judgments against it for sanctions. It filed an amended motion for reconsideration on December 2, 2014.

On December 18, 2014, the court held the evidentiary hearing on the outstanding issues on the cost of defense third-party claim by the Commission against URS and also heard argument on Fort Myer’s amended motion for reconsideration of the sanctions

judgments. On the third-party claim, the court ruled from the bench, finding that the Commission was entitled to recover \$352,355.68 against URS. The court took Fort Myer’s amended motion for reconsideration on the sanctions judgments under advisement.

The docket entries for December 18, 2014, include the following: “COURT ENTERS JUDGMENT IN FAVOR OF THE DEFENDANT MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION AGAINST THE DEFENDANT URS CORPORATION-MARYLAND IN THE AMOUNT OF THREE HUNDRED FIFTY-TWO THOUSAND, THREE HUNDRED FIFTY-FIVE DOLLARS AND SIXTY EIGHT CENTS (\$352,355.68).”

In fact, the court never issued an order in writing memorializing its ruling on the third-party claim. All that was “entered” on the docket on December 18, 2014, was the fact that a hearing took place.

On February 19, 2015, the court entered an order denying Fort Myer’s amended motion for reconsideration. That order makes no reference to the third-party claim.

On March 9, 2015, Fort Myer filed a notice of appeal. The Commission filed a notice of appeal on March 19, 2015, and URS filed a notice of appeal on March 20, 2015.

We shall dismiss the appeal noted by URS.⁴ With exceptions that are not applicable here, an appeal only may be taken from a final judgment. *See* Md. Code (1974, 2013 Repl. Vol.), § 12-301 of the Courts and Judicial Proceedings Article. Among other things, for a judgment to be final, it must be “set forth on a separate document[,]” Rule 2-601(a), and entered in the docket. Thus, an oral ruling that is not memorialized by a written document is not a final judgment and therefore is not appealable, even if there is a docket entry reflecting the ruling. *See Hiob v. Progressive Am. Ins. Co.*, 440 Md. 466, 479 (2014).

Because the court did not issue a separate document memorializing its oral ruling that the Commission was entitled to damages in the amount of \$352,355.68 on its third-party claim against URS, there still is not a final judgment in this case. Accordingly, URS’s appeal must be dismissed as not permitted by law. Md. Rule 8-602(a)(1)

II.

(a)

On January 10, 2013, the Commission responded to Fort Myer’s complaint by filing a motion to dismiss based on insufficiency of service of process and a motion to stay for failure to exhaust administrative remedies. Fort Myer filed oppositions and both parties requested a hearing. The court denied the motions on February 11, 2013. Over a

⁴ We also shall dismiss the appeal noted by the Commission, for the same reasons we are about to explain. We note, however, that even though the Commission filed a notice of appeal it did not pursue the appeal, *i.e.*, it did not file an appellant’s brief.

month later, on March 27, 2013, the Commission filed its third-party complaint against URS. URS filed its answer and counterclaim on May 10, 2013.

The case subsequently was specially assigned and a scheduling order was entered, which called for a trial date of April 7, 2014.

The parties engaged in discovery and by the fall of 2013 were embroiled in numerous discovery disputes. Fort Myer sought protective orders and the Commission sought immediate sanctions against Fort Myer and URS for discovery failures. URS joined in the motion against Fort Myer. The parties filed oppositions to the various motions against them. At the conclusion of a hearing on open motions on December 20, 2013, the court announced that it was going to refer the case to a special discovery master. It entered an order appointing the master on January 7, 2014. On January 30, 2014, the master filed his report and recommendations, to which the Commission excepted. On February 5, 2014, the court approved and entered the report and recommendations. In its report and recommendations, the master noted:

While I am not in a position at this time to suggest sanctions (which I believe the Court may want my input for) this Special Master would strongly suggest to all parties that they work together in a timely fashion.

At the end of the day these Recommendations are for the purpose of making sure that all discovery is done so that the Pretrial Conference and/or the trial dates is not affected. If that occurs, I would suggest to the court that sanctions be a consideration.

(Emphasis in original.)⁵

On February 27, 2014, URS filed a motion to dismiss Fort Myer’s complaint or in the alternative for summary judgment, on the ground that, although Fort Myer’s claim against the Commission was for breach of contract for failure to pay cost overruns, etc., its theory of recovery required it to prove that URS’s design for the Bridge Project was defective. Therefore, URS argued, Fort Myer’s claim was subject to CJP section 3-2C-02, which requires a plaintiff alleging malpractice on the part of a “licensed professional” (which includes a professional engineer) to file a CQE within 90 days after the claim is filed. The CQE must “[c]ontain a statement from a qualified expert attesting that the licensed professional failed to meet an applicable standard of professional care[.]” *Id.* at § 3-2C-02(a)(2)(i). If not, the claim “shall be dismissed, without prejudice[.]” *Id.* at § 3-2C-02(a)(1). Fort Myer had filed expert witness identifications but had not filed a CQE.

On March 5, 2014, Fort Myer filed an opposition to URS’s motion. It argued that CJP section 3-2C-02 did not apply to its claim against the Commission, which was based on breach of contract; that it did not sue the Commission for negligence and the Commission is not a licensed professional; and that URS was acting as an independent contractor, and not as an employee of the Commission, when it made the design errors.

⁵ The master issued a second report and recommendations on February 18, 2014, recommending that the Commission return nine documents that Fort Myer produced inadvertently. It was silent as to sanctions. The court accepted this report and recommendations in full on February 19, 2014. The Commission then filed exceptions on February 25, 2014, which the court denied.

Also on March 5, 2014, the Commission filed a motion for partial summary judgment against Fort Myer, on the basis that the Construction Contract “expressly delegated and placed exclusively on Fort Myer the obligation to prepare an erection plan for the [Bridge] Project”; stipulated that approval of Fort Myer’s working documents by the Commission and URS “would not relieve Fort Myer from the consequences of constructing the [Bridge] Project according to Fort Myer’s own submittals”; and “warranted that the [design documents] were adequate to produce an acceptable result and that Fort Myer would not make claim on the basis of alleged inadequate or improper” design documents. In that motion, the Commission argued that Fort Myer failed to timely designate any expert who could opine that the Commission and/or URS had violated the standard of care in drafting the design documents, and therefore it did not have sufficient evidence to take its claims to a jury.

That same day, URS filed a motion for summary judgment on Fort Myer’s claim, on the ground that limitations had expired. Five days later, on March 10, 2014, the Commission filed a motion for summary judgment on Fort Myer’s claim on the ground of release, waiver, and accord and satisfaction, and URS filed a motion to dismiss or in the alternative for summary judgment on the Commission’s third-party claim.

On March 11, 2014, Fort Myer filed a paper withdrawing its opposition to URS’s motion to dismiss, stating that “it did not take any of the steps listed in [CJP] § 3-2C-02(a)(2)” and “consent[ing] to the relief requested,” *i.e.*, the dismissal of its claims against the Commission without prejudice.

Additional motions were filed, including the Commission's response to URS's motion to dismiss Fort Myer's claim in which it moved to have Fort Myer's case dismissed with prejudice (filed March 13, 2014); URS's motion for summary judgment against the Commission (filed March 14, 2014); Fort Myer's motion for partial summary judgment against the Commission (filed March 14, 2014); the Commission's motion for partial summary judgment against URS (filed March 14, 2014); and oppositions thereto.

On March 31, 2014, the court held a hearing on the outstanding motions. URS argued that Fort Myer recognized that without a standard of care expert to testify at trial it would lose on summary judgment and that it only was conceding that CJP section 3-2C-02 applied so its case would be dismissed without prejudice, affording it an opportunity to refile. URS asked the court to dismiss Fort Myer's claims *with* prejudice, as a matter of equity. The Commission argued that CJP section 3-2C-02 did not apply, and that the court should deny URS's motion to dismiss and grant its (the Commission's) motion for summary judgment against Fort Myer. Fort Myer countered that because it withdrew its opposition to URS's motion, its complaint should be dismissed *without prejudice*, in conformity with the plain language of CJP section 3-2C-02(a); and dismissal would moot the pending motions for summary judgment.

The court ruled:

I think the fair reading of the statute is giving the circumstance and the allegation[s] that have been made in the complaint, given the fact that . . . URS's motion to dismiss [Fort Myer's] complaint against the commission on the grounds that [CJP section] 3-2C-02 . . . have not been met, makes it very clear that everybody acknowledges and anticipates that that requirement indeed was not met. And everybody's in agreement that the

motion to dismiss should be granted. The suggestion is that because of equities and the harsh result, and I, certainly, acknowledge that and am sensitive to that. But I don't write the law. I just get the obligation or have the obligation to apply the law.

And, you know, I could be flat out wrong. But it seems to me that the language of the statute says in this particular set of facts this type of facts where it's required that a certificate of qualified expert be filed. And it wasn't. The remedy is under [(a)(1)] that a claim shall be dismissed without prejudice. The fact that the legislature went to the extent to include that specific language in there suggests to this court that I don't have the discretion to do anything else. I don't have the discretion. Equity is notwithstanding, harshness notwithstanding. I don't under this statute have the discretion to do anything else. . . .

But in a fair and what I think is correct application of the statute, this court doesn't have any other alternative but to dismiss the claim without prejudice pursuant to 3-2C-02[(a)(1)].^[6]

During the hearing, counsel for URS suggested that it might file a motion for sanctions under Rule 1-341. The court stated that any party wishing to file a motion for sanctions should do so by April 11, 2014. On that date, the Commission and Fort Myer filed motions for sanctions, and URS filed a motion to join in the Commission's motion. The parties all filed oppositions to each other's motions.

In their Rule 1-341 motion, the Commission and URS argued that Fort Myer had brought and maintained its case without substantial justification because it failed to consult and retain expert witnesses to pursue its claim against the Commission; it failed to ensure that its corporate designees and employees appeared for depositions; it took depositions of the Commission's witnesses with the knowledge that its complaint was

⁶ Fort Myer refiled its complaint against the Commission on January 23, 2015, in the Circuit Court for Montgomery County, under case number 399804-V. That action has been stayed pending the outcome of this appeal.

“fatally flawed”; it failed to produce relevant bidding documents; and it argued that CJP 3-2C-02 did not apply, only to later agree that it did. The Commission and URS sought sanctions in the full amount of the reasonable attorneys’ fees and expert witness costs they had incurred throughout the course of the entire litigation.

At the conclusion of the April 28, 2014 hearing, the court ruled on the Rule 1-341 motion as follows:

Let me make it very clear, the court’s decision is not singularly or in an isolated fashion based upon the failure to file the certificate of merit with regard to the expert witness that should’ve been named.

The court’s ruling has to do with the posture of the entire case. And that goes back to the discovery violations that this court found, such that the motion for sanctions was filed. . . . My recollection is I don’t remember a case that I was more frustrated with in terms of what I consider to be just blatant violations of the discovery rules. Just ignoring deposition dates. Just ignoring court’s rulings. Just complete ignoring discovery issues. Just not showing up for depositions. No motions for protective orders. No appropriate remedies being sought pursuant to the discovery rules. And I think I said that at a previous hearing.

I also, for the only time in my time in this court and in track IV civil -- the only time was so frustrated with counsel related to discovery disputes that the court referred this to a discovery master. And I continued to get reports from the discovery master and continued to get filing after filing after filing, incurring more costs, more costs, and more costs associated with this case.

This is not a question of whether [Fort Myer] had a right to pursue their case, and the court’s ruling has nothing to do with [Fort Myer’s] right to pursue their case. They have every right to pursue their case. They also have a legal obligation to do it without fatal flaws. That’s not my rule. That’s a requirement under the statute, and that was not complied with. Does that rise to the level of the court concluding lacking substantial justification? Perhaps looking at that in an isolated fashion it may not, but when the court looks to the conduct of counsel related to all of the issues regarding this case from the initial discovery violations and disputes that were simply unwarranted, to not having complied with the statute, resulting in the dismissal without prejudice of the case on the day of trial -- on the

day of trial. How do you prove a case that has allegations of negligence without an expert witness having been designated?

* * *

Again, I am perplexed beyond belief. And I agree wholeheartedly with respect to this. The suggestion after this case was dismissed[,] Fort Myer files a motion for sanctions against the Commission. I'm speechless. I'm absolutely speechless. You failed to file the required certificate of merit on this statute resulting in consenting to a dismissal. All of the money associate[d] with this case in terms of experts and discovery and attorneys' fees, and you file a motion for sanctions against the Commission. That is part of this court's decision today. So it's not -- the court's rationale is not just on the failure to comply with the statute. Again, that may be a cause of action in some other court, some other day, for some other judge to decide. That's not what I'm dealing with today. What I'm dealing with is a lack of substantial justification to bring this case. You can say, well, it's just a procedural issue and it's easily remedied. After nearly half a million dollars having been spent. That, to me, is lacking substantial justification.

I'm not going to go so far as to address the issues of bad faith, and I realize that the appellate courts have said that the application of [Rule] 1-341 should be addressed. In a very reserved and cautious matter by the courts, it is. I understand the sensitivities of that. I understand the ramifications of that. So much so that I will go on the record and say that in 15 years on the bench I have never, ever awarded any damages, attorney's fees, costs, or whatever pursuant to 1-341, but this case -- I've never seen a case that fits more squarely into what the rationale is for 1-341. This case has been a classic example of how not to conduct oneself between counsel related to attorneys' fees, related to discovery issues, related to this entire case in toto. It's not simply based upon the one issue of the failure to comply with the statute. That's a significant issue, but it also is in totality, is conduct related to all of the unnecessary discovery issues in this case, and nothing to preclude Fort Myer from having filed a motion for sanctions against the Commission. . . .

The court finds that there has been a 1-341 violation taking place in its entirety, discovery violations, conduct of counsel, lacking substantial justification. The court is going to grant the relief that has been filed by the Commission . . . and grant the sanctions that were requested by the Commission and grant the relief sought by the Commission of attorneys' fees in the amount of \$241,174.50, costs \$8,824.08, expert witness fees \$110,725.91, and other related deposition and copying costs \$15,873.19. Total cost \$376,597.68.

The court is going to gran[t] the relief by the defendant, URS’s motion for sanctions. . . . The court grants the motion for sanctions against the plaintiff, Fort Myer, in favor of URS, legal fees in the amount of \$239,545.80, expen[s]es \$9,092.51. Total cost \$248,638.31.

As we have explained, the judgments on the Rule 1-341 motions were entered on June 2, 2014, and Fort Myer filed a notice of appeal two days later. The appeal was consolidated with the premature appeal URS had noted on May 14, 2014, and, ultimately, was dismissed. With the case back before the circuit court, Fort Myer filed a motion for reconsideration of the judgments for fees against it, on November 10, 2014, and an amended motion for reconsideration on December 2, 2014.

On February 19, 2015, the court⁷ entered a memorandum opinion and order denying the amended motion for reconsideration, stating, in part:

While the Court acknowledges it has the authority to reconsider [its previous] Order under Rule 2-602(a), the Court declines to exercise its discretion to do so in this case. No new facts or legal arguments are presented on the motion. In the absence of such new information, “where litigants have once battled for the court’s decision, they should neither be required, nor without good reason permitted, to battle for it again.” [(Citations omitted.)]

* * *

The determination of whether a party is maintaining a suit without substantial justification, to some extent, requires a Court to assess not only a party’s conduct but also the party’s intent. . . . The question of whether [this court] committed error in arriving at that judgment based upon a review of the entire record is one better addressed to the judges of the Court of Special Appeals and, potentially, the Court of Appeals.

⁷ The case had been reassigned to a different judge because the originally specially assigned judge had retired.

(b)

Rule 1-341, entitled “Bad faith – Unjustified proceeding,” states, in relevant part:

(a) Remedial Authority of Court. In any civil action, if the court finds that the conduct of any party in maintaining or defending any proceeding was in bad faith or without substantial justification, the court, on motion by an adverse party, may require the offending party or the attorney advising the conduct or both of them to pay to the adverse party the costs of the proceeding and the reasonable expenses, including reasonable attorneys’ fees, incurred by the adverse party in opposing it.

As the rule makes clear, to order an “offending party” to pay the costs and reasonable expenses of the proceeding the court first “must make an evidentiary finding of ‘bad faith’ or ‘lack of substantial justification’” in maintaining or defending the proceeding. *Thomas v. Capital Med. Mgmt. Assoc., LLC*, 189 Md. App. 439, 473 (2009) (citations omitted). On appeal, we review the finding of bad faith or lack of substantial justification for clear error. *Inlet Assoc. v. Harrison Inn Inlet, Inc.*, 324 Md. 254, 267 (1991). ““Second, the [court] must find that the bad faith and/or lack of substantial justification merits the assessment of costs and/or attorney’s fees. [On appeal,] [t]his finding will be affirmed unless it was an abuse of discretion.”” *Barnes v. Rosenthal Toyota, Inc.*, 126 Md. App. 97, 105 (1999) (quoting *Inlet Assoc.*, 324 Md. at 267–68); see also *Legal Aid Bureau, Inc. v. Bishop’s Garth Assoc. Ltd. P’ship*, 75 Md. App. 214, 221 (1988) (“On appeal, the appropriateness of the sanction imposed is reviewed under an abuse of discretion standard[.]” (citing *Blanton v. Equitable Bank, N.A.*, 61 Md. App. 158, 163 (1985))).

(c)

Fort Myer contends the circuit court’s finding that it maintained its suit against the Commission without substantial justification was clearly erroneous.⁸ It asserts that whether CJP section 3-2C-02 applied was a fairly debatable issue; that its underlying claim against the Commission was “at least colorable if not meritorious”; that the court erred in basing, at least in part, its lack of substantial justification finding on unspecified discovery violations; and that the court’s apparent finding that it failed to designate an expert witness to testify at trial, also offered as a basis for finding a lack of substantial justification, was clearly erroneous.

The Commission responds that Fort Myer waived any challenge to the court’s lack of substantial justification finding with regard to the CQE by conceding that CJP section 3-2C-02 applied to the underlying action. On the merits, the Commission argues that the court’s finding that Fort Myer prosecuted its suit without substantial justification because it did not retain an expert witness by which to prove at trial that URS’s design was defective was not clearly erroneous. It also argues that the court properly took into account the totality of the circumstances, including the failure to retain experts, various discovery violations, and Fort Myer’s unwarranted request for sanctions, to find that Fort Myer maintained its suit without substantial justification.

⁸ As the circuit court’s ruling makes plain, it did not find that Fort Myer maintained its suit against the Commission in bad faith.

URS joins in the Commission’s waiver argument and further asserts that the trial court “made it clear numerous times on the record that . . . Fort Myer had maintained its case without substantial justification because just days before trial it belated[ly] admitted that it had failed to comply with a statutory condition precedent to pursuing its case and insisted that [the court] had no choice but to dismiss the case without prejudice[.]” It argues that Fort Myer conceded that CJP section 3-2C-02 applied merely to avoid an unfavorable summary judgment ruling, and that supports the court’s finding that Fort Myer’s claims lacked substantial justification.

“An award of counsel fees pursuant to Rule 1-341 is an ‘extraordinary remedy,’ which should be exercised only in rare and exceptional cases.” *Barnes*, 126 Md. App. at 105 (citing *Black v. Fox Hills N. Cmty. Ass’n Inc.*, 90 Md. App. 75, 83 (1992)); *Legal Aid Bureau, Inc. v. Farmer*, 74 Md. App. 707, 722 (1988) (“Rule 1-341 represents a limited exception to the general rule that attorney’s fees are not recoverable by one party from an opposing party.”). “Rule 1-341 sanctions should be imposed only when there is a clear [and] serious abuse of judicial process.” *Jenkins v. Cameron & Hornbostel*, 91 Md. App. 316, 323–24 (1992) (quoting *Black*, 90 Md. App. at 84) (alteration in *Jenkins*).

“[C]onduct lacks substantial justification when there is no basis in law and/or fact to support the plaintiff’s claim against the defendants who seek fees and costs.” *Johnson v. Baker*, 84 Md. App. 521, 529 (1990) (citations omitted). “[A] reasonable basis for believing that a case will generate a factual issue for the fact-finder at trial provides

substantial justification for initiating or defending an action.” *Needle v. White*, 81 Md. App. 463, 476 (1990).

[S]anctions under Rule 1-341 are available only when an offending party or attorney maintains a suit [or a defense] that is patently frivolous and devoid of any *colorable claim*. . . . The rule does not apply simply because a complaint failed to state a cause of action. . . . [or] because a party “misconceived the legal basis upon which he sought to prevail,” . . . or urged a legal theory which was not adopted by the court.

Art Forms Interiors, Inc. v. Columbia Homes, Inc., 92 Md. App. 587, 595 (1992) (emphasis in original) (internal citations and internal quotation marks omitted). There is a substantial justification to pursue a legal position when it is “fairly debatable.” *Newman v. Reilly*, 314 Md. 364, 381 (1988) (quoting *Yamaner v. Orkin*, 310 Md. 321, 328 (1987)); see also *Deitz v. Palaigos*, 120 Md. App. 380, 399 (1998).

The primary basis for the court’s finding that Fort Myer maintained its breach of contract claim against the Commission without substantial justification was that it did not file a CQE in support of its claim and ultimately, shortly before trial, agreed that its claim had to be dismissed (without prejudice) on that ground. This finding is clearly erroneous, and, contrary to the argument advanced by the Commission and URS, Fort Myer did not waive its right to argue that the finding is clearly erroneous.

Whether Fort Myer’s breach of contract claim against the Commission was subject to CJP section 3-2C-02, necessitating the filing of a CQE, was a fairly debatable legal question, as is evident from the positions the parties took below. URS filed its motion to dismiss on February 27, 2014 (about five weeks before trial), alleging that Fort Myer had failed to file a CQE within 90 days of bringing suit. URS argued that, even though the

Commission was not a licensed professional, Fort Myer’s contract claim against the Commission was based on negligence on URS’s part, and therefore the statute applied.

The Commission did not join in that argument, and indeed at the March 31, 2014 hearing on all pending motions, argued that CJP section 3-2C-02 did *not* apply to Fort Myer’s claim against it. In its opposition to URS’s motion to dismiss, Fort Myer’s made that same argument, pointing out that it had not sued URS; that it had sued the Commission, which was not a “licensed professional”; and that URS was not an “employer, partnership, or other entity through which [a] licensed professional performed professional services” within the meaning of CJP section 3-2C-01.

As noted, Fort Myer withdrew its opposition to URS’s motion to dismiss, agreeing that a CQE was required, and because it did not file one, the case should be dismissed without prejudice, as the statute requires. At the March 31, 2014 hearing, counsel for Fort Myer explained that, while he believed, initially, that his claim against the Commission was not governed by the statute, the law was not clear, and, rather than prevail in his opposition and prevail in his claim against the Commission, only to risk reversal on the ground that Fort Myer was required to have filed a CQE, he decided to consent to the dismissal without prejudice.

Without question, whether CJP section 3-2C-02 governed Fort Myer’s breach of contract claim against the Commission was, and is, a “fairly debatable” legal issue. In their filings, and during argument before the circuit court, the parties referenced the Court of Appeals’s decision in *Heavenly Days Crematorium, LLC v. Harris, Smariga and*

Associates, Inc., 433 Md. 558, 575 (2013), in which it held that it was premature to dismiss an action for breach of contract and negligence for failure to file a CQE when, on the allegations of the complaint, the defendant's deficiencies were not ascribed to negligence on the part of a licensed professional; but that, if the deficiencies later are attributed to a licensed professional, the defendant can file a motion for summary judgment on the ground of failure to file a CQE.

Moreover, the circuit court in this case interpreted the statute itself and ruled that it applied to Fort Myer's claim. The court's decision to grant the motion to dismiss was not based on Fort Myer's withdrawal of its opposition to URS's motion. Rather, it was based on its own interpretation of the law. In that circumstance, Fort Myer cannot be seen to have waived, for purposes of appeal, its right to challenge the court's finding of lack of substantial justification based on failure to file a CQE.

As noted, the Commission did not join in URS's argument regarding CJP section 3-2C-02; its position, advocated in its motion for summary judgment, was that Fort Myer had failed to name any expert witness to testify that URS's design documents, and bridge design itself, were deficient so as to have caused Fort Myer to incur additional costs; and that without such an expert, Fort Myer could not prove its claim against the Commission. Fort Myer filed an opposition, asserting that it in fact named expert witnesses and was prepared to present whatever expert witness testimony was necessary at trial. The court did not rule on the Commission's motion, finding that it had become moot upon the granting of URS's motion to dismiss.

At the hearing on the Rule 1-341 sanctions motions, the court, in the course of recounting its frustration over the many discovery disputes in the case, stated: “How do you prove a case that has allegations of negligence without an expert witness having been designated?” When counsel for Fort Myer protested that it had designated an expert witness, the court characterized its question as “rhetorical.” Clearly, the court made no finding that Fort Myer had maintained its action against the Commission without necessary expert witness testimony to adduce at trial. Even if that could be a basis for a finding of lack of substantial justification, there was no such finding here. Moreover, there was no finding by the court that, irrespective of the CQE and expert witness issues, Fort Myer’s claim that the Commission owed it money for cost overruns, etc., lacked substantial justification.

“[A] court may not impose sanctions under Rule 1-341 without rendering specific findings of fact on the record as to a party’s bad faith or lack of substantial justification in pursuing a cause of action.” *Barnes*, 126 Md. App. at 106 (emphasis omitted) (citing *Inlet Assoc.*, 324 Md. at 269). In the case at bar, the court made sweeping and nonspecific observations about the ongoing discovery disputes in the case, stating that it was frustrated with what it considered to be “just blatant violations of the discovery rules. Just ignoring deposition dates. Just ignoring court’s rulings. Just complete ignoring discovery issues.” However, as explained, the court referred the discovery disputes to a special master, who did not recommend that discovery sanctions be imposed against Fort Myer. The Commission’s exceptions to the master’s recommendations were overruled

by the court, and by the deadline for filing dispositive motions all requested discovery had been completed.

If there were discovery violations that warranted the imposition of sanctions, the discovery rules provided for that remedy. Rule 1-341 does not allow for a “totality of the circumstances” assessment of whether there was a lack of substantial justification to maintain an action that takes into account unspecified, alleged discovery violations.

Finally, the court expressed outrage over the fact that, after the case was dismissed without prejudice, Fort Myer filed a motion for sanctions under Rule 1-341. At the conclusion of the hearing at which the motion to dismiss was filed, counsel for URS suggested that Rule 1-341 motions might be filed, and the court designated April 11, 2014, as the deadline for doing so. That designation applied to all parties; there was nothing to prohibit Fort Myer from filing a motion. At the hearing on the Rule 1-341 motions, the court did not address Fort Myer’s motion, other than to say it was “speechless.” Although this was an implicit denial of the motion, it was not a ruling that the motion lacked substantial justification. And, if the court had ruled on the motion, addressed whether it was brought without substantial justification, and made a specific finding that it was, the fees awarded would have had to have been limited to those incurred in defending that motion.

The court’s initial ruling on the sanctions motion and its ruling denying the motion for reconsideration of that ruling are properly before this Court on appeal. The February 19, 2015 order was a final decision as to the original sanctions motion and the motion for

reconsideration, and was entered on the docket. Even if we only consider the court's denial of the motion for reconsideration, the sanctions judgment must be reversed. Fort Myer's noted a timely appeal from that order. Our standard of review of such a motion is abuse of discretion. *Wilson-X v. Dept. of Human Res.*, 403 Md. 667, 675–76 (2008). For the same reasons we have explained above, the denial of the amended motion for reconsideration was an abuse of discretion. The legal issue at the heart of the sanctions motion clearly was fairly debatable, and the totality of the circumstances basis for the finding of lack of substantial justification was contrary to well-established Maryland law on Rule 1-341.

The circuit court's finding that Fort Myer maintained its action against the Commission without substantial justification was clearly erroneous, and the court's denial of Fort Myer's motion for reconsideration was an abuse of discretion. Accordingly, the judgments against Fort Myer based on Rule 1-341 shall be reversed.

**APPEALS BY URS AND THE
COMMISSION DISMISSED.**

**JUDGMENTS OF THE CIRCUIT
COURT FOR MONTGOMERY
COUNTY AWARDING SANCTIONS
AGAINST FORT MYER AND IN
FAVOR OF URS AND THE
COMMISSION REVERSED.**

**COSTS TO BE PAID 1/2 BY URS AND
1/2 BY THE COMMISSION.**