Circuit Court for Montgomery County
Case No.: 430554V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 278

September Term, 2018

GRACE GAO

v.

PROGRESSIVE MAX INSURANCE COMPANY

Fader, C.J.,
Kehoe,
Battaglia, Lynne, A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Battaglia, J.

Filed: April 16, 2019

Appellant, Grace Gao, sustained injuries when she was involved in a motor vehicle accident with Shawn Ryan Haas, who was driving a rental car owned by Enterprise RAC Company of Maryland, LLC, on October 24, 2014, in Montgomery County. At the time of the accident, Mr. Haas was insured by Appellee, Progressive Max Insurance Company, under a policy issued to him in West Virginia, which provided liability coverage for bodily injury in the amount of $20,000. Following the accident, Ms. Gao filed a personal injury claim against Mr. Haas, and pursuant to the liability coverage limit contained in Mr. Haas's insurance policy, Progressive offered her $20,000 in settlement. Ms. Gao refused the settlement offer, contending that because the accident occurred in Maryland, Mr. Haas was entitled, pursuant to Maryland law,[1] to $30,000 in liability coverage.

Subsequently, Ms. Gao filed suit in the Circuit Court for Montgomery County against Mr. Haas, Progressive, Enterprise, and GEICO Casualty Company, Ms. Gao's automobile insurance provider.[2] The suit, in part, sought a declaratory judgment to

[1] Subject to a few narrow exceptions not applicable here, at the time of Gao's accident, Section 17-103(b)(1) of the Transportation Article, Maryland Code (1988, 2012 Repl. Vol.) required that every owner of a registered motor vehicle maintain liability coverage for: "The payment of claims for bodily injury or death arising from an accident of up to $30,000 for any one person and up to $60,000 for any two or more persons, in addition to interest and costs[.]"

[2] Ms. Gao filed a multi-count complaint and then subsequently amended it. Count I of the amended complaint alleged that Mr. Haas's negligence caused her injuries. Count II of the amended complaint was the declaratory judgment action against Progressive, and in the alternative, against Enterprise. Count III of the amended complaint alleged that

(continued . . .)

establish that $30,000 of liability coverage was available to her under the Progressive policy. In the alternative, Ms. Gao requested that the court order Enterprise to pay her the additional $10,000 in liability coverage, as a dispute between Enterprise and Progressive existed as to who was responsible for covering the difference between the $20,000 in Mr. Haas's policy and the $30,000 minimum liability coverage required by Maryland law. Progressive filed an answer, and during discovery, provided Ms. Gao with a copy of the policy issued to Mr. Haas. The Section entitled "Out-of-State Coverage" in the Haas policy provided:

> If an accident to which this Part I applies occurs in any state, territory, or possession of the United States of America or any province or territory of Canada, other than the one in which a **covered auto** is principally garaged, and the state, province, territory, or possession has:
>
> 1. a financial responsibility or similar law requiring limits of liability for **bodily injury** or **property damage** higher than the limits shown on the **declarations page**,[3] this policy will provide the higher limits; or
>
> 2. a compulsory insurance or similar law requiring a non-resident to maintain insurance whenever the non-resident uses an **auto** in

(continued . . .)
GEICO, Gao's uninsured motorist liability coverage provider, breached its policy with her by failing to pay the difference between her uninsured motorist liability coverage and Mr. Haas's liability coverage.

The suit against GEICO was dismissed without prejudice, and after the court's denial of attorneys' fees, the entire suit was dismissed with prejudice as to the remaining defendants, Mr. Haas, Enterprise and Progressive.

[3] The Declaration Page of Mr. Haas's insurance policy stated that, in the event of a collision, Progressive would provide $20,000 in bodily injury liability for each person injured, with a maximum of $40,000 for each accident, and $10,000 in property damages liability for each accident.

> that state, province, or territory, or possession, this policy will provide the greater of:
>
> a. the required minimum amounts and types of coverage; or
>
> b. the limits of liability under this policy.

(Emboldened in original).

Ms. Gao's counsel, thereafter, demanded $30,000 from Progressive, to which Progressive demurred. Ms. Gao then filed a motion for partial summary judgment on her declaratory judgment action against Progressive. Progressive responded to the motion by stating that it would only provide higher limits than those stated in the policy where the accident occurred in a state that has a "financial responsibility or similar law" that requires higher limits or where "a compulsory insurance or similar law" requires non-residents to maintain insurance when a non-resident uses a motor vehicle in that state; Progressive argued that the requirements of the Maryland Transportation and Insurance Articles did not trigger either of these contractual provisions.

One day before the hearing on the motion for partial summary judgment, however, Progressive offered $30,000 in settlement to Ms. Gao, which she accepted, and, in turn, subsequently withdrew the motion. Ms. Gao then filed a motion for attorneys' fees and costs based upon the declaratory judgment action she had pursued against Progressive.

After a subsequent hearing on the motion for attorneys' fees and costs, to which Progressive responded, Judge Cynthia Callahan of the Circuit Court for Montgomery County denied Ms. Gao's request. Ms. Gao then filed a timely Notice of Appeal.

On appeal from the ruling of the Circuit Court, in positing multiple grounds for the recovery of attorneys' fees and costs, Ms. Gao presents two issues for our review:

> 1. Whether the trial court was legally incorrect in denying Gao's verified motion for payment of her attorney's fees and costs that she incurred in successfully litigating her declaratory judgment claim against Progressive, which claim resulted in Progressive extending liability insurance coverage of $30,000 for Gao's tort claim.
>
> 2. Whether the trial court was clearly erroneous in not considering Gao's claim against Progressive for attorney's fees under Maryland Rule 1-341, which was based on Progressive's unreasonable delay in extending Gao $30,000 in liability coverage for her tort claim against Haas and Progressive's further unreasonable delay in offering the policy limits of $30,000 to Gao to settle her tort claim against Haas.

For the reasons set forth below, we shall affirm the judgment of the Circuit Court and hold that Ms. Gao was not entitled to the award of attorneys' fees and costs.

STANDARD OF REVIEW

When a trial court determines that a party is not entitled to attorneys' fees as a matter of law, our review of that decision is de novo. *See Giant of Maryland, LLC v. Taylor*, 221 Md. App. 355, 368–69, *cert. denied*, 442 Md. 745 (2015); *Maryland Green Party v. State Bd. of Elections*, 165 Md. App. 113, 128 (2005), *cert. denied*, 390 Md. 501 (2006) (stating that the determination of "prevailing party" status, for purposes of entitlement to attorneys' fees and costs, is a question of law reviewed de novo (citing *Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268 (4th Cir. 2002)). In the instant case, because Ms. Gao asks us to award her attorneys' fees pursuant to the insurance policy entered into between Progressive and Mr. Haas, a contract, we embark upon an independent review of the law.

DISCUSSION

Maryland generally adheres to the "American Rule," in which each party to litigation is responsible for their own legal fees, regardless of who prevails in the litigation. *Henriquez v. Henriquez*, 413 Md. 287, 294 (2010). As such, where there is no statute, rule or contract explicitly permitting the recovery of attorneys' fees, a prevailing party generally may not recover them. *Bausch & Lomb Inc. v. Utica Mut. Ins. Co.*, 355 Md. 566, 590 (1999) (citation omitted); *see also Collier v. MD–Individual Practice Assoc., Inc.*, 327 Md. 1, 17 (1992) ("Maryland law has never recognized fee shifting in breach of contract actions, absent contractual provision, statute or rule."); *Nova Research, Inc. v. Penske Truck Leasing Co.*, 405 Md. 435, 445 & n. 3 (2008). Fee shifting, an exception to the American Rule whereby a court orders the losing side to pay the prevailing party's attorneys' fees, generally occurs pursuant to an express agreement providing the same or by statute. *Henriquez*, 413 Md. at 294 (citing *Friolo v. Frankel*, 403 Md. 443, 456 (2008)).

With respect to one such exception, it is firmly established in Maryland that if an insured "must resort to litigation to enforce its liability insurer's contractual duty to provide coverage for its potential liability to injured third persons, the insured is entitled to a recovery of the attorneys' fees and expenses incurred in that litigation." *Nolt v. U.S. Fid. & Guar. Co.*, 329 Md. 52, 66 (1993) (internal citations omitted). Essentially, then, if the insured is not afforded what they are due under the policy with respect to a defense to a suit, they may be awarded attorneys' fees, as the Court of Appeals, in *Bankers and Shippers Insurance Company of New York v. Electro Enterprises, Inc.*, noted:

> [A]n insurer is liable for the damages, including attorneys' fees incurred by an insured as a result of the insurer's breach of its contractual obligation to defend the insured against a claim potentially within the policy's coverage, and this is so whether the attorneys' fees are incurred in defending against the underlying damage claim or in a declaratory judgment action to determine coverage and a duty to defend.

287 Md. 641, 648 (1980) (citing *Brohawn v. Transamerica Ins. Co.*, 276 Md. 396, 347 (1975); *Gov't Employees Ins. v. Taylor*, 270 Md. 11, 22 (1973); *Cohen v. Am. Home Assurance Co.*, 255 Md. 334, 363 (1969); *Anderson v. Md. Casualty Co.*, 123 Md. 67, 71–72 (1914)); *see also Megonnell v. United Services Auto. Ass'n*, 368 Md. 633, 659 (2002) (stating that the exception does not extend to a third-party tort victim who is not an "insured" as defined by an insurance policy); *Mesmer v. M.A.I.F.*, 353 Md. 241, 264 (1999).

The promise to defend and indemnify the insured serves as the consideration received by the insured for their payment of the policy premiums to the insurer. *Brohawn*, 276 Md. at 409. While a policy may be referred to as "liability insurance, it is 'litigation insurance' as well," protecting the insured from the expense of defending suits for the acts covered by the policy brought against them. *Id.* at 409–10 (citation omitted). In turn, the insurer "has assumed the obligation of relieving its insured of the expense of defending an action alleging and seeking damages within the policy coverage." *Id.* at 410. Further, the right of an insured to recover attorneys' fees in such a situation not only applies to the individual named in the insurance policy, but also to any individual who falls within the policy's definition of an insured and against whom a claim "alleging a loss within the policy coverage has been filed." *Bankers and Shippers*, 287 Md. at 649.

In the instant case, Ms. Gao contends that as an "injured party" who successfully pursued her declaratory judgment claim for an increase in Mr. Haas's liability coverage against Progressive, she is entitled to the payment of attorneys' fees and costs, because she comes within the definition of an insured. Progressive, conversely, posits that the contractual fee-shifting exception to the American Rule does not apply because Ms. Gao was not in contractual privity with Progressive as an insured, and as such, is not entitled to the collection of attorneys' fees and costs.

As we wade into the instant dispute, we recognize that when interpreting the meaning of an insurance policy, we evaluate the instrument as a whole to determine the intention of the parties. *Clendenin Bros. v. U.S. Fire Ins. Co.*, 390 Md. 449, 458 (2006) (citations omitted). An insurance policy, the Court of Appeals has acknowledged, is a "contract between the parties, the benefits and obligations of which are defined by the terms of the policy." *Kendall v. Nationwide Insur. Co.*, 348 Md. 157, 165 (1997). We, therefore, first look to the contractual language employed by the parties to determine the scope of the insurance coverage. *Cole v. State Farm Mutual Insur. Co.*, 359 Md. 298, 305 (2000).

As a point of departure, we turn to the language of the Progressive-Haas policy to determine the breadth of its coverage. In pertinent part, Mr. Haas's policy with Progressive entitled "PART I – LIABILITY TO OTHERS," provides:

> **INSURING AGREEMENT**
>
> If **you** pay the premium for this coverage, **we** will pay damages for **bodily injury** and **property damage** for which an insured person becomes legally responsible because of an accident.

> Damages include prejudgment interest awarded against an **insured person**.
>
> **We** will settle or defend, at **our** option, any claim for damages covered by this Part I.

(Emboldened in original). Part I of the Haas-Progressive policy defines "insured person" as:

> a. **you** or a **relative** with respect to an accident arising out of the ownership, maintenance, or use of an **auto** or **trailer**;
>
> b. any person, other than a bailee for hire, with respect to an accident arising out of that person's use of a **covered auto** with the permission of **you** or a **relative**;
>
> c. any person or organization with respect only to vicarious liability for the acts or omission of a person described in a or b above; and
>
> d. any Additional Interest shown on the **declarations page** with respect only to its liability for the acts or omissions of a person described in a or b above.

(Emboldened in original).

Ms. Gao clearly does not meet the definition of "insured person." She is not the policyholder, a relative of Mr. Haas, a person who was permissibly driving a vehicle covered by Mr. Haas's policy, or an agent of his at the time of the collision. As a result, Ms. Gao, not an insured under the Progressive policy, is not entitled to attorneys' fees under the indemnity exception to the American Rule.

To argue otherwise, Ms. Gao offers *Cohen v. American Home Assurance Company*, 255 Md. 334 (1969), a case in which the Court of Appeals established the rule that permits an insured to recover attorneys' fees where its insurer fails to defend as contractually promised, to argue that the contractual exception to the American Rule

extends to any prevailing "injured party." In *Cohen*, the Court did utilize the term "injured party" but in the context of citing a Minnesota case, to conclude that an insured may collect attorneys' fees from its insurer in the context of a declaratory judgment action to determine liability coverage where the insurer breached its policy with the insured, which is the usual indemnity action. *Cohen*, 255 Md. at 358–59 (citing *Morrison v. Swenson*, 274 Minn. 127, 142 N.W.2d 640 (Minn. 1966)).

In an attempt to get another bite at the contractual exception to the American Rule, Ms. Gao posits that she is a third-party beneficiary to the Progressive-Haas policy, and as such, may enforce its provisions to achieve entitlement to an award of attorneys' fees. A third-party beneficiary to a contract will generally be created when it clearly appears that the parties to the contract "intended to recognize" the third party "as the primary party in interest and as privy" to the promises exchanged in the contract. *120 West Fayette St., LLLP v. Mayor and City Council of Baltimore*, 426 Md. 14, 36 (2012) (citing *Dickerson v. Longoria*, 414 Md. 419. 452 (2010)). To recover under the terms of a contract as a third-party beneficiary, the individual "must show that the parties to the contract clearly intended that the third party benefit from it." *Parlette v. Parlette*, 88 Md. App. 628, 637 (1991) (quoting *Shillman v. Hobstetter*, 249 Md. 678, 687 (1968)).

An incidental beneficiary, however, is not considered a third-party beneficiary merely because a contract may serve to benefit them. *Parlette*, 88 Md. App. at 637 (citing *Shillman*, 249 Md. at 687). Rather, an incidental beneficiary, "one who benefits from the contract although the benefit was not specifically intended or planned by the contracting parties, has no rights against the promisee or promisor." *Parlette*, 88 Md.

App. at 637 (citing *Shillman*, 249 Md. at 688). When applying this standard, we look to "the intention of the parties to recognize a person or class as a primary party in interest as expressed in the language of the instrument and consideration of the surrounding circumstances as reflecting upon the parties' intentions[.]" *CR-RSC Tower I, LLC v. RSC Tower I, LLC*, 429 Md. 387, 458 (2012) (quoting *Ferguson v. Cramer*, 349 Md. 760, 767 (1998)). Thus, the intention of the parties to benefit a third party is gleaned from the instrument under interpretation. Clearly, the insurance contract under consideration does not confer third-party beneficiary status to Ms. Gao.

Ms. Gao also proffers the "common fund doctrine" as a basis to recover attorneys' fees in the instant case because, in pursuing the declaratory judgment action against Progressive, she provided a benefit "common" to her and Mr. Haas by obtaining $30,000 against Progressive, as Mr. Haas would then not be obligated to her. Progressive, on the other hand, argues that the "common fund" doctrine by which attorneys' fees are shifted is not applicable because the exception is not utilized in declaratory judgment actions, but, rather only where a monetary judgment is provided. Progressive further avers that while Mr. Haas may have ultimately benefitted from the increase in coverage, Ms. Gao is not entitled to the award of attorneys' fees because she voluntarily settled the dispute with them.

The common fund doctrine "recognizes that plaintiffs who file suit and recover on behalf of others will have benefitted a group or class that has not contributed to the effort." *Bontempo v. Lare*, 217 Md. App. 81, 134 (2014), *aff'd*, 444 Md. 344 (2015) (citation omitted). A party "who recovers a common fund for the benefit of persons other

than" herself is entitled to reasonable attorneys' fees "from the fund as a whole." *Id.* (quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 100 S. Ct. 745 (1980)); *see e.g.*, *State v. Braverman*, 228 Md. App. 239, 254–55, *cert. denied*, 450 Md. 115 (2016) ("Under the 'common-fund doctrine,' class counsel are paid out of the monetary recovery that they generate for the class."); *Hess Constr. Co. v. Bd. of Educ. of Prince George's Cty.*, 341 Md. 155, 166 (1996) (stating that an equity court has "the power to direct payment of counsel fees out of a fund that has been created by the efforts of counsel.").

In *Hess Construction Company v. Board of Education of Prince George's County*, 341 Md. 155 (1996), the Court of Appeals articulated the basis of the common fund doctrine and noted that it has typically been applied in instances where all mortgage holders benefited from the sale of a security, where a stockholder's derivative action benefited all of the shareholders and where the action of a successful taxpayer benefited all the taxpayers of a particular class. *Hess Constr. Co.*, 341 Md. at 168–69 (citing *Terminal Freezing & Heating Co. v. Whitelock*, 120 Md. 408 (1913); *Davis v. Gemmell*, 73 Md. 530 (1891); *Bowling v. Brown*, 57 Md. App. 248 (1984); *Smith v. Edwards*, 46 Md. App. 452 (1980), *rev'd on other grounds*, 292 Md. 60 (1981)).

The standard, then, to determine whether the "common fund" doctrine applies is whether the representative secured recovery for a group or a class, which is not applicable here. Ms. Gao, therefore, is not entitled to attorneys' fees under the "common fund" doctrine, even were Mr. Haas to have derived a benefit by his insurer having settled a suit with Ms. Gao.

Finally, Ms. Gao avers that the trial court erred when it "summarily dismissed" her motion for attorneys' fees and costs filed pursuant to Rule 1-341. Rule 1-341, in pertinent part, provides:

> (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 the adverse party the costs of the proceeding and the reasonable expenses, including reasonable attorneys' fees incurred by the adverse party in opposing it.

Ms. Gao contends that Progressive acted in "bad faith" by unreasonably construing the terms of its policy and unreasonably delaying the settlement particularly when Progressive eventually paid $30,000. Progressive, conversely, avers that it did not act in bad faith or without substantial justification, because it offered a legitimate argument in originally denying the increased amount in liability coverage.

Initially, however, Ms. Gao did not preserve the argument she proffers pursuant to Rule 1-341. Counsel for Ms. Gao only referenced Rule 1-341 in a footnote of her Verified Motion for Payment of Attorney's Fees and Costs and Request for Hearing, stating:

> In this same vein, Maryland Rule 1-341 provides for the award of attorney's fees when a party acts in "bad faith." "Bad faith" means "vexatiously, for the purpose of harassment or unreasonable delay, or for other improper reasons." *See Inlet Associates v. Harrison Inn Inlet, Inc.*, 324 Md. 243, 268, 596 A.2d 1049 (1990). In the instant case, the court could view Progressive's unreasonable construction of its policy as done for "unreasonable delay" and, hence, constitutes bad faith under Maryland Rule 1-341.

Without further requesting explicit relief in the Verified Motion, in his Verified Supplemental Memorandum in Support of Plaintiff's Verified Motion for Payment of Attorney's Fees and Costs, proffering the same rationale, Ms. Gao's attorney stated: "Under these circumstances, attorney's fees and costs under Maryland Rule 1-341 are appropriate."

At the hearing on the motions, Ms. Gao's lawyer alluded he was entitled to recovery of his fees pursuant to Rule 1-341 but Judge Callahan opined that the issue was not properly briefed or requested, as a footnote was not sufficient notice to Progressive of its advocacy. Judge Callahan also did not specifically refer to the Rule in her decision, which is necessary to preserve its basis for denial on appeal. *See URS Corp. v. Fort Myer Construction Corp.*, 452 Md. 48, 72 (2017) (stating that to "impose sanctions under Rule 1-341(a), a court must make an explicit finding that a party conducted litigation either in bad faith or without substantial justification" and that such a finding should be supported by a "brief exposition of the facts upon which [it] is based" (citations omitted)); *Campitelli v. Johnston*, 134 Md. App. 689, 701 (2000), *cert. denied*, 363 Md. 206 (2001) (holding that because there was no "indication that the award of attorneys' fees was made on the basis of Md. Rule 1-341, there was no request under the Rule, and there were no findings of fact pursuant to that Rule[,]" the Court could not uphold the trial court's award of attorneys' fees).

Were Ms. Gao to have preserved her Rule 1-341 argument, for the sake of discussion, we still would not decide in her favor. Rule 1-341 is intended to put the "wronged party in the same position as if the offending conduct had not occurred."

Major v. First Virginia Bank-Central Maryland, 97 Md. App. 520, 530, *cert. denied*, 331 Md. 480 (1993). An award of attorneys' fees under Rule 1-341(a) is an extraordinary remedy, and accordingly, is used sparingly. *Talley v. Talley*, 317 Md. 428, 438 (1989). Redress under the Rule "applies only when a suit is patently frivolous and devoid of any colorable claim." *Black v. Fox Hills N. Cmty. Ass'n, Inc.*, 90 Md. App. 75, 84, *cert. denied*, 326 Md. 177 (1992). Sanctions are imposed only when there is "a clear, serious abuse of judicial process" and will not apply simply because a party "misconceived the legal basis upon which [they] sought to prevail." *Id.* (quoting *Hess v. Chalmers*, 33 Md. App. 541, 545 (1976)).

A two-tiered process is used to determine whether sanctions pursuant to Rule 1-341 are appropriate. *Barnes v. Rosenthal Toyota, Inc.*, 126 Md. App. 97, 105 (1999). The trial court must first determine whether the party or attorney pursued or defended the action in bad faith or without substantial justification and then secondly, must decide if sanctions are warranted in the first instance. *Id.*

For purposes of Rule 1-341, "bad faith" may be found when a party litigates with the "purpose of intentional harassment or unreasonable delay." *Id.* (citation omitted). Substantial justification to pursue or defend an action will exist where the litigant's position is "fairly debatable" and "within the realm of legitimate advocacy," *id.* at 105–06 (quoting *Inlet Assocs. v. Harrison Inn Inlet, Inc.*, 324 Md. 254, 268 (1991)), or where the party "reasonably believes that the case will generate a factual issue for the fact finder at trial." *Johnson v. Baker*, 84 Md. App. 521, 529 (1990), *cert. denied*, 322 Md. 131

(1991) (citation omitted). Substantial justification does not exist, however, when there is no basis in law or in fact to support a claim or defense. *Id.*

Our analysis of the record reflects that Progressive did not maintain or defend the action "in bad faith or without substantial justification." Progressive filed an opposition to Ms. Gao's motion for partial summary judgment which detailed its position as to why it was positing that Mr. Haas's policy did not contain promises in which the liability coverage exceeded $20,000. Its eventual agreement to provide coverage in the amount of $30,000 cannot be considered an admission that its position was without justification, as Ms. Gao would have us heed.

In conclusion, Ms. Gao is not entitled to an award of attorneys' fees and costs.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.