Circuit Court for Montgomery County
Case No. 281804

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 292
September Term, 2019

Consolidated

No. 1285
September Term, 2019

HEATHER STANLEY- CHRISTIAN

v.

MATERNAL-FETAL MEDICINE ASSOCIATES OF MARYLAND, LLC, et al.

Meredith,*
Kehoe,
Beachley,

JJ.

Opinion by Meredith, J.

Filed: December 23, 2020

*Meredith, Timothy E., J., now retired, participated in the hearing of this case while an active member of this Court, and after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and the preparation of this opinion.

The last time this litigation was in the appellate courts, the Court of Appeals affirmed this Court's ruling that ordered the case remanded to the Circuit Court for Montgomery County for that court to conduct further proceedings regarding a request for attorney's fees pursuant to Maryland Rule 1-341. *Christian v. Maternal-Fetal Medicine Associates of Maryland, LLC*, 459 Md. 1 (2018). The Court of Appeals stated:

> We hold that the hearing judge did not commit clear error in finding no substantial justification for [three of the six] claims brought by [Dr. Christian], namely, fraudulent inducement, negligent misrepresentation, and wrongful termination. We determine, however, that the hearing judge abused his discretion in assessing $300,000 in attorney's fees against [Dr. Christian] **without articulating how he calculated the fees**. Therefore, we affirm the judgment of the Court of Special Appeals vacating the award of attorney's fees and **we remand the case** to the Circuit Court **for further fact finding**.

459 Md. at 9 (emphasis added).

Upon remand, the Circuit Court for Montgomery County entered a new judgment against Dr. Heather Stanley Christian ("Dr. Christian"), appellant, in favor of Maternal-Fetal Medicine Associates of Maryland, LLC ("Maternal-Fetal") and Dr. Sheri L. Hamersley, appellees, for attorney's fees and expenses in the amount of $490,364.59. This appeal followed.

QUESTIONS PRESENTED

Dr. Christian presents the following questions:

> 1. Did [Maternal-Fetal] meet its burden of proving what attorneys' fees and costs, if any, it would not have incurred "but for" the three counts of six that the trial court found were brought in in [sic] violation of Md. Rule 1-341?

> 2. Did the trial court correctly apply the law and make the necessary factual findings to support an award of attorneys' fees and costs in the amount of $490,364.59?
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> 3. Did the trial court err in failing to enter a judgment in favor of Dr. Christian for unpaid costs from the two prior appeals?
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> 4. Was [Maternal-Fetal's] judgment in the amount of $22,902 satisfied by [Maternal-Fetal's] garnishment of $35,535.07, plus [Maternal-Fetal's] unpaid costs in the amount of $4,513.34 from the prior appeals?

We answer "no" to Questions 3 and 4, and shall affirm the circuit court's rulings with respect to those issues. With respect to Questions 1 and 2, however, for the reasons that follow, we shall vacate the judgment the circuit court entered awarding attorney's fees and costs, and we shall remand the case for further proceedings.

BACKGROUND

In *Christian*, 459 Md. 1, the Court of Appeals summarized the facts that led to this litigation as follows:

> This case has meandered through the judicial system for over a decade, and, unfortunately for the parties, its odyssey does not end with us. Dr. Christian entered into an employment agreement with Maternal–Fetal on November 14, 2005. After a deterioration in relations between D[r.] Christian and [Dr.] Hamersley, Dr. Christian left her employment with Maternal–Fetal on July 17, 2006. In March 2007, [Dr. Christian] began employment at Greater Washington Maternal–Fetal Medicine and Genetics ("Greater Washington"), located in the Washington area. Soon after, Dr. Hamersley informed Greater Washington of a non-compete agreement between Dr. Christian and Maternal–Fetal. Greater Washington terminated [Dr. Christian's] employment shortly thereafter. [Dr. Christian], in turn, filed a complaint in the Circuit Court for Montgomery County on April 19, 2007, [against Dr. Hamersley and Maternal-Fetal], alleging fraudulent inducement, breach of contract, tortious interference with contract, wrongful termination, and [seeking a] declaratory judgment, damages, attorney's fees, injunctive relief, and equitable relief.

> After dismissal of the original complaint without prejudice, [Dr. Christian] filed an amended complaint on August 27, 2007. The amended complaint included all five of the original claims and added a claim for negligent misrepresentation. [Maternal-Fetal and Dr. Hamersley] filed a counterclaim for breach of contract, asserting that [Dr. Christian] had breached the terms of the non-compete clause [and also breached her contractual obligation to reimburse Maternal-Fetal for the premiums it had paid for her malpractice insurance]. [Maternal-Fetal and Dr. Hamersley] filed and the trial judge granted a motion for summary judgment in favor of [Maternal-Fetal and Dr. Hamersley] on all of [Dr. Christian]'s claims, except the wrongful termination claim. After the close of plaintiff's case in chief, [Maternal-Fetal and Dr. Hamersley] moved for judgment as a matter of law, which the trial court denied. The trial judge, however, granted [Maternal-Fetal and Dr. Hamersley]'s renewed motion for judgment at the close of all the evidence.
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> * * *
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> . . . The jury returned a verdict in favor of [Maternal-Fetal and Dr. Hamersley] on the breach of contract counterclaim and awarded damages in the amount of $22,902 [for Dr. Christian's breach of her contractual obligation to reimburse Maternal-Fetal for its payment of premiums for her malpractice insurance coverage. But the jury ruled in favor of Dr. Christian on Maternal-Fetal's claim for damages based upon its assertion that she had breached the covenant against competition. *See Christian v. Maternal-Fetal* (second unreported opinion), 2017 WL 2839146 at *4.]
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> After the jury returned its verdict on [Maternal-Fetal and Dr. Hamersley]'s counterclaim, [Maternal-Fetal and Dr. Hamersley] filed a motion for attorney's fees and expenses [in the amount of $555,995.81] pursuant to Maryland Rule 1–341. [*See Christian v. Maternal-Fetal* (second unreported opinion), 2017 WL 2839146 at *6.] On December 29, 2009, the hearing judge indicated he would assess attorney's fees in an amount to be determined upon submission of the legal bills to the court. The hearing judge awarded $300,000 in attorney's fees and costs on July 25, 2011. Both parties noted timely appeals.

Id. at 9-11 (footnote omitted).

As the Court of Appeals observed, during the parties' first appeal this Court "grappled with the basis of the trial court's award of fees, and remanded for clarification"

of the basis for fee-shifting. *Id*. at 12. We stated in our unreported opinion in the first appeal: "[I]t is unclear from the court's order whether it based its award on the provisions of the parties' contract or [Maryland] Rule 1–341." *See Maternal-Fetal v. Stanley-Christian* (first unreported opinion), 2013 WL 3941970 at *22. Consequently, we said: "Because the court's order awarding fees does not articulate the basis for its decision, we will vacate the trial court's order awarding attorney's fees and remand this case for further proceedings." *Id.* at *1.

On remand from the first appeal, the circuit court clarified that it concluded that Dr. Christian had prosecuted all six of the counts of her amended complaint "without substantial justification," and, for a second time, the circuit court awarded $300,000 in attorney's fees and costs, which the court said represented the "reasonable and necessary amount to defend the claims brought by Dr. Christian without substantial justification." 459 Md. at 15.

Dr. Christian filed a second appeal. As the Court of Appeals later summarized:

> On March 2, 2015, [Dr. Christian] noted a timely appeal to the Court of Special Appeals. In its second unreported opinion, the Court of Special Appeals vacated the judgment of the Circuit Court. *Christian v. Maternal–Fetal Medicine Assocs.*, No. 0013, 2015, 2017 WL 2839146 (Md. Ct. Spec. App., July 3, 2017). The Court of Special Appeals affirmed the hearing judge's findings of no substantial justification for the fraudulent inducement, negligent misrepresentation, and wrongful termination claims. *Id*. However, the Court of Special Appeals reversed the hearing judge's findings of no substantial justification with respect to the breach of contract and tortious interference with contract claims. *Id*. The Court of Special Appeals then remanded the case. *Id*.

459 Md. at 15-16 (footnote omitted).

As the Court of Appeals noted, in our unreported opinion in the second appeal, *see Christian v. Maternal-Fetal*, 2017 WL 2839146, we reviewed the six counts alleged in Dr. Christian's amended complaint, and we concluded that the circuit court had not erred in ruling (on remand) that the counts alleging fraud in the inducement, negligent misrepresentation, and wrongful termination were maintained and pursued without substantial justification. *Id*. at *9-*15.

But we held that the circuit court had erred in finding that Dr. Christian acted without substantial justification when she asserted a count claiming that Maternal-Fetal had breached its contract. *Id*. at *10-*11 ("[T]he trial judge's determination that Dr. Christian's breach of contract claim lacked substantial justification was clearly erroneous in light of our previous ruling concluding that there was sufficient evidence to submit to the jury the issue of Maternal–Fetal's breach of contract." *Id.* at *11.).

We also held that the circuit court erred in ruling after our first remand that Dr. Christian had acted without substantial justification in asserting a claim that appellees had committed tortious interference with Dr. Christian's contract with a subsequent employer. *Id*. at *14. We noted that Dr. Christian's claim of tortious interference was based upon Maternal-Fetal's communication to the subsequent employer about Maternal-Fetal's covenant prohibiting competition by Dr. Christian. We explained that there was a non-frivolous argument that the non-competition provision was overbroad and unenforceable in whole or in part. *Id*. at *13-*14. And, we noted that, when the jury considered Maternal-Fetal's counterclaim for damages for Dr. Christian's alleged breach of the non-

competition provision, the "jury found in favor of Dr. Christian, and against Maternal–Fetal, on its claim that she had violated the Non–Compete Provision." *Id*. at *13. We therefore held that Dr. Christian's "claim of tortious interference was not [pursued] without substantial justification." *Id.* at *14. And, similarly, we held: "Dr. Christian had a reasonable basis for seeking a declaration of her rights and obligations under the Non–Compete Provision." *Id*. at *15.

As a result of reversing the circuit court's conclusion that all of Dr. Christian's claims were maintained without substantial justification, we concluded that a remand was necessary. We quoted from this Court's opinion in *Beery v. Maryland Medical Laboratory, Inc*., 89 Md. App. 81, 102 (1991), in which we held:

> A party seeking "sanctions" under Rule 1–341, *i.e.*, reimbursement of reasonable expenses including reasonable attorney's fees, incurred in opposing an unjustified or bad faith claim or defense, **must not only establish the bad faith or lack of justification but also the expenses actually incurred as a result thereof.** The latter burden may present no major difficulty in a case in which all claims were unjustified. **Where only part of a proceeding was maintained** in bad faith or **without substantial justification, however, the aggrieved party may have a great deal of difficulty in separating expenses incurred in opposing one part of his opponent's claim or defense from the remaining part or parts.**
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> . . . **A *post facto* arbitrary apportionment of generalized time records will not suffice**.

(Emphasis added.) *Accord Christian v. Maternal-Fetal* (second unreported opinion), 2017 WL 2839146 at *16.

We concluded our unreported opinion in the second appeal by stating:

> Consequently, because we have concluded that the trial court erred in finding a lack of substantial justification for Counts Two, Three, and Six,

> we shall vacate the $300,000 award of attorney's fees and remand the case for further proceedings to consider an appropriate award of counsel fees. **On remand, it will be necessary for the court to determine the fees incurred in defending the claims properly found to be without substantial justification**, and to assess the reasonableness of the fees in light of Rule 1.5(a) of the Maryland Lawyers' Rules of Professional Conduct. *See* Maryland Rule 19–301.5.

Id. at *17 (emphasis added).

But, before the circuit court conducted further proceedings pursuant to our order for a second remand, the Court of Appeals granted Dr. Christian's petition for a writ of *certiorari* to consider whether the circuit court erred in awarding $300,000 in attorney's fees. 459 Md. at 16. The Court of Appeals affirmed this Court's holding that only Dr. Christian's "claims of fraudulent inducement, negligent misrepresentation, and wrongful termination lacked substantial justification under Md. Rule 1–341." *Id*. at 17. And the Court of Appeals affirmed this Court's holding that the circuit court had made insufficient findings to support the award of $300,00 in attorney's fees, stating:

> Notwithstanding our observation that the hearing judge was not clearly erroneous in finding no substantial justification for these [three] claims, we determine that the hearing judge abused his discretion under Rule 1–341(a) when he awarded $300,000 in attorney's fees without explaining the basis for that award. Thus, **we remand for further factual findings regarding the amount of attorney's fees to be paid, if any**, by [Dr. Christian], **and for an explanation as to how the court calculates the specific amount.**

Id. (emphasis added).

The Court of Appeals also provided the circuit court and the litigants extensive guidance regarding the required "explanation as to how the court calculates the specific amount." *Id*.

The Court of Appeals reiterated that Rule 1-341 is not intended to be punitive: "Despite its capacity as a deterrent, Rule 1–341 should not be construed as a punishment but merely as a mechanism to place the wronged party in the same position *as if the offending conduct had not occurred*." *Id.* at 19 (emphasis added; internal quotation marks and citations omitted). Rule 1-341 "is not punitive." *Id*.

As noted, the Court agreed with our conclusion that the circuit court had not erred in finding that there was a lack of substantial justification for part of Dr. Christian's claims, namely the counts alleging fraudulent inducement to enter into the employment contract with Maternal-Fetal, the similar claim of negligent misrepresentation, and also the claim of wrongful termination. *Id.* at 26-30. With respect to the second finding required for an award of attorney's fees pursuant to Rule 1-341, the Court of Appeals explained the need to limit the award to those fees reasonably incurred on account of claims pursued without substantial justification:

> In light of the severity of the imposition and the rarity with which a court ought to impose such fees under Rule 1–341, the second step in determining an award of attorney's fees under Rule 1–341 is a determination of how much, if any, in fees should be awarded. Ordering attorney's fees to be paid by an adverse party who brought a claim in bad faith or without substantial justification is within the discretion of the court, as is the discretion to not award attorney's fees. *DeLeon Enterprises, Inc.*, 92 Md. App. at 419, 608 A.2d at 838 ("Rule 1–341 provides only that a court may require the offending party to pay reasonable expenses and thus permits the court to exercise its discretion not to award fees despite the existence of the predicate for doing so.") (cleaned up).
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> **A party must demonstrate, by a preponderance of the evidence, that it has the right to the amount of attorney's fees sought**. *Diamond Point Plaza Ltd. P'ship v. Wells Fargo Bank, N.A.*, 400 Md. 718, 761, 929 A.2d 932, 957 (2007). **A court must make findings of fact regarding its**

> **award of attorney's fees, and those findings must be made on the record**. *Barnes*, 126 Md. App. at 106, 727 A.2d at 435–36 ("[A] court may not impose [attorney's fees] 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 .... Hence, **a court must denote with particularity how its award corresponds with a party's misconduct[.]"). The findings of the amount of fees awarded must be clearly delineated lest the court abuse its discretion**. *See Miller v. Miller*, 70 Md. App. 1, 12–13, 519 A.2d 1298, 1304 (1987) (concluding that "even though there may be a basis for an award of some counsel fees and costs pursuant to the rule, the award of all such fees and costs is, on this record, arbitrary and clearly wrong"). **The basis must be ascertainable in order to survive appellate review**. *See Talley v. Talley*, 317 Md. 428, 438, 564 A.2d 777, 782 (1989) (vacating an award for attorney's fees where the court did not explain the basis for awarding attorney's fees).

Id. at 30-31 (emphasis added).

The Court of Appeals reiterated: "A court must also make a finding that the fees requested by the aggrieved party are reasonable. **The party seeking an award of attorney's fees bears the burden of demonstrating the reasonableness of the attorney's fees sought**." *Id*. at 31 (emphasis added). And: "**The findings must be on the record** in order for the court not to abuse its discretion in imposing attorney's fees." *Id*. at 32 (emphasis added).

And the Court of Appeals said that, in a case such as the present one, where only specific aspects of the litigation were found to be without substantial justification, apportionment is required: "An award of attorney's fees **must be apportioned based on the particular claims** requiring compensation **and must be limited to those claims** in order to be reasonable." *Id*. (emphasis added). In support of this requirement, the Court quoted, at *id*., from *Barnes v. Rosenthal Toyota, Inc*., 126 Md. App. 97, 106 (1999),

where this Court said: "Moreover, in cases involving multiple causes of action . . . **a court must make specific findings of fact as to which of the litigant's attorney's fees and expenses are attributable to the maintenance of the meritless claims**.'" (Emphasis added.) And the Court of Appeals observed that, in *Beery v. Maryland Medical Laboratory, Inc.*, 89 Md. App. 81, 102 (1991), this Court had cautioned: "An attorney who intends to claim compensation under Rule 1–341 for defending a multiple-count claim in which at least one count has colorable merit may have to keep records that accurately reflect what time is expended on specific aspects of the case, in order to meet the burden of proof on that issue." (Quoted at 459 Md. at 33.)

Elsewhere in its opinion in the previous appeal of this case, 459 Md. at 39, the Court of Appeals also highlighted the following admonition from *Beery*, 89 Md. App. at 102, where this Court had stated: "Where only part of a proceeding was maintained in bad faith or without substantial justification," the aggrieved party may face difficulty "separating expenses incurred," but, "in order to meet the burden of proof on that issue[, a] *post facto* arbitrary apportionment of generalized time records will not suffice."

In addition to providing that overview of what is required to support an award of attorney's fees pursuant to Rule 1-341, the Court of Appeals explained why the award the circuit court had made in this case could not stand:

> **This Court has mindfully and attentively scoured the record for any basis upon which the hearing judge awarded $300,000 in attorney's fees** to Respondent[, Maternal-Fetal]. **We find none.** The only finding of fact related to attorney's fees conducted by the hearing judge was that the actual amount of attorney's fees requested consisted of $555,905.81.10 **Absent findings in the record, an appellate court has no**

> **means to review a court's exercise of discretion to award attorney's fees.** *See Fowler v. Printers II, Inc.*, 89 Md. App. 448, 487, 598 A.2d 794, 813 (1991) ("Without such a finding, it is impossible for an appellate court to review the circuit court's decision."). The Honorable Howard S. Chasanow provided the following sage wisdom regarding Rule 1–341 motions for attorney's fees: **"[I]n too many cases, the pleadings that evidence the most bad faith and the least justification are motions requesting costs and attorney's fees**." *Zdravkovich*, 323 Md. at 212, 592 A.2d at 504. In the present case, the hearing judge may very well have had a reasonable basis for imposing $300,000 in attorney's fees based upon his findings that Petitioner lacked substantial justification for her claims. However, **the hearing judge's rationale as to how he arrived at $300,000 does not appear in the record**. Accordingly, we affirm the judgment of the Court of Special Appeals to vacate the award of attorney's fees granted by the hearing judge. Additionally, **we remand for findings that are specific to the calculation of attorney's fees as those fees relate to the litigation expenses incurred**, consistent with our holding.

Id. at 33-34 (emphasis added).

So the case was remanded for a second time in order for the circuit court to make the findings necessary to support an award of attorney's fees in this case pursuant to Rule 1-341. In their brief, appellees provide this summary of what happened on the second remand:

> [The trial judge] considered the parties' post-appeal briefs, reviewed the legal bills submitted by Appellees, listened to the parties' respective arguments at the hearing on the requests for award of attorney's fees and exercised his discretion in finding that Appellees actually incurred the amount of $490,364.59 in attorney fees and costs to defend Appellant's claims that violated Maryland Rule 1-341.

This third appeal followed.

Questions 1 and 2. Attorney's fee award pursuant to Rule 1-341

On the second remand, rather than focus on the deficiencies identified by the Court of Appeals, the circuit court conducted limited proceedings. It appears that

appellees filed a post-appeal brief in the circuit court in support of an award of attorney fees and expenses, appellant filed an opposing brief, and appellees filed a reply. In the appellees' brief in this Court in this appeal, they state: "The circuit court already had a copy of Appellees' legal bills when it previously found that Appellant's violations of Maryland Rule 1-341 warranted an award of attorney fees and costs." Nevertheless, appellees also note that they filed copies of their legal bills in the circuit court as Exhibit A to their post-appeal brief.

But those bills do not provide details that would enable any trier of fact conducting a diligent review to "'make specific findings of fact as to which of the litigant's attorney's fees and expenses are attributable to the maintenance of the meritless claims.'" *Christian*, 459 Md. at 32 (quoting *Beery*, 89 Md. App. at 102). And we have not been directed to testimony or affidavits in the record that would have been considered by the trial judge on remand and enabled him to make that apportionment.

Appellees note in their brief in footnote 1: "On August 27, 2010, [*i.e.*, before the first appeal,] the [Circuit] Court originally conducted an evidentiary hearing on the reasonableness of Appellees' attorney fees and costs that included testimony from Appellees' counsel. Dkt. No. 342." But no testimony from that hearing is reproduced in either the appellant's record extract or appellees' appendix. We see no indication that there was evidence offered at that juncture that would have enabled the circuit court to determine which of appellees' attorneys' fees and expenses are wholly attributable to the maintenance of the three specific counts pursued without substantial justification.

Appellees seek refuge in a few comments the Court of Appeals made in its opinion in this case allowing some leeway in proof of attorney's fees. Indeed, the Court did quote *Barnes*, 126 Md. App. at 106, for the proposition that, in proving the amount of the fees attributable to the opponent's lack of substantial justification, "'the aggrieved party may have a great deal of difficulty in separating expenses incurred in opposing one part of his opponent's claim or defense from the remaining part[s.]'" *Christian*, 459 Md. at 33. And the Court of Appeals further quoted from *Diamond Point Plaza Limited Partnership*, 400 Md. at 761, where the Court had said: "Because such a precise delineation may not always be practicable, however, we do not regard it as a *sine qua non* of the right to recover, for to conclude otherwise would, in many cases, deny *all* recovery where some recovery is clearly warranted." *Christian*, 459 Md. at 33. The Court of Appeals also acknowledged that this is not an exact science and trial courts "should[] not become green-eyeshade accountants." *Id*. at 36.

But we do not view any of these statements as excusing an aggrieved party from its burden of making a good faith effort to provide testimonial and documentary evidence that is sufficient for the trier of fact to make a rational finding by a preponderance of the *evidence* as to which of the fees and expenses should be reimbursed because they would not have been incurred if the opposing party had not maintained claims without substantial justification. The bottom line is that, when the Court of Appeals considered whether the court properly awarded fees *in this very case*, the Court of Appeals did not say that the appellees were excused from producing evidence that would enable the court

to limit the fees and costs awarded to only those incurred in defense of the three counts that were pursued without substantial justification, and the remand was for the express purpose of giving the trial judge another chance to make the necessary findings in that regard.

We note also that appellees cite *Weichert Co. of Maryland, Inc. v. Faust*, 191 Md. App. 1 (2010), and *Ochse v. Henry*, 216 Md. App. 439 (2014), but neither of those cases was considering an assessment of litigation fees and expenses pursuant to Rule 1-341.

We recognize that the circuit court signed an order—apparently drafted by counsel for the appellees—which included conclusory statements that "the amount of $490,364.59 in attorney's fees and costs was actually incurred and paid by [appellees] in connection with their defense of the Maryland Rule 1-341 causes of action that were maintained by [appellant] in these proceedings in violation of Maryland Rule 1-341." But we detect no analysis of the bills submitted by appellees. And, from our review of those documents, we cannot see any way any finder of fact could have determined by a preponderance of the evidence—without further explanatory testimony that we do not see in the record—what fraction of the appellees' attorneys' time was spent defending the three meritless counts, to the exclusion of the three other counts and the prosecution of appellees' counterclaims.

Most of the time entries on the bills provide no clue as to which substantive issue(s) or count(s) the time related. And several of the bills appear to relate to appellees' post-trial efforts to recover attorney's fees from appellant. *See U.S. Health, Inc. v. State*,

87 Md. App. 116, 131-32 (1991) (Rule 1-341 "does not provide for expenses incurred in asserting the claim under the rule except, perhaps, to the extent that the offending party resists the claim for counsel fees without substantial justification for doing so"). The basis for the amount of the fees the circuit court awarded is no clearer now than it was when the Court of Appeals declared that it had "scoured the record" and "f[ou]nd none." *Christian*, 459 Md. at 33.

And the basis for the amount awarded on remand seems even more mysterious and unfounded when we recall that the trial court had twice before concluded that an award of $300,000 was the "reasonable and necessary amount to defend the claims brought by Dr. Christian without substantial justification" at a time when the court was erroneously assessing the cost of defending against *all six* counts in the amended complaint, but the award on remand *increased by 63%* even though both of Maryland's appellate courts have held that only three of the six counts in the amended complaint were correctly found to be without substantial justification.

In light of the fact that appellees' claim for attorney's fees and expenses has been to this Court two times before, and the litigants have already received clear guidance from our State's highest Court regarding the prerequisites for making an award pursuant to Rule 1-341, we question whether the time has arrived to simply hold that the appellees have failed to meet their burden to prove their entitlement to reimbursement. Indeed, we note that the Court of Appeals was explicit in saying—twice—that the circuit court

should consider on remand what amount of fees "if any" should be awarded pursuant to Rule 1-341. *Christian*, 459 Md. at 17 and 40.

Nevertheless, the Court of Appeals also said that, when a trial court errs in making an award of fees, the appropriate remedy is generally a remand for further proceedings:

> When a court has abused its discretion in imposing attorney's fees, the appropriate remedy is to vacate the award and remand for further proceedings to develop the factual basis for how the court chooses to exercise its discretion. *Talley*, 317 Md. at 438, 564 A.2d at 782; *Miller*, 70 Md. App. at 13, 519 A.2d at 1304 ("On remand, the court must again consider whether, and to what extent it should award fees and costs pursuant to the rule.").

Id. at 33.

And the Court of Appeals ordered a second remand even though, as we noted above, it found that the record was devoid of a sufficient basis to support an award of $300,000 pursuant to Rule 1-341. *Id*.

We shall follow the example set by the Court of Appeals and remand the case yet again for further proceedings regarding the appropriate amount, *if any*, to award to appellees to reimburse them for the fees and expenses that they can prove with reasonable certainty they incurred *because of* having to defend against the three counts that were asserted by Dr. Christian without substantial justification, excluding from that assessment any fees and expenses that were incurred in defense of the three remaining counts and in pursuit of appellees' counterclaims.

We also note that Dr. Christian complains that the appellees refused to provide any discovery regarding the claimed attorneys' fees and expenses. Although that issue has not

been preserved for this appeal, we will exercise our discretion pursuant to Maryland Rule 8-131(a) to comment on the issue because we hope to avoid the expense and delay of yet another appeal. In a case in which one party is being asked to reimburse the opposing party for hundreds of thousands of dollars in litigation expenses, some amount of discovery is appropriate.

Indeed, it appears that a special master appointed by the circuit court to make recommendations for resolving discovery disputes in this case forecasted that some amount of post-trial discovery would be required to analyze the prevailing party's claim for attorney's fees. The master's report filed September 5, 2008, stated (in pertinent part): "[B]oth parties intend to request attorney's fees and costs at the conclusion of this case." "[T]his Special Master does not believe that it would be of any benefit to the Court for [supporting documents] to be specifically produced by either of the parties at this time." But the Special Master further expressed the view that limited discovery should be permitted once the result of the trial was known:

> Further, following the outcome [of the trial on the merits,] the Court could not only order the production of said documents but allow limited discovery as necessary to ensure that both sides are satisfied that the attorney's fees and/or costs have been properly documented for purposes of argument to the Court at the appropriate time.
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> This procedure seems to be the procedure followed in the Federal Courts and . . . is likely to be adopted by the Maryland Rules Committee at some point in the future with perhaps some variation.

We will leave it up to the circuit court to determine on remand whether to enter an order regarding the amount of discovery that appellant is permitted to pursue and

appellees are required to provide. But it is clear to us that some amount of discovery is appropriate regarding the basis of the fee request and the allocation of the legal efforts between defending against the three counts that were without substantial justification and the legal efforts directed at defending Dr. Christian's other claims and pursuing appellees' counterclaims.

Question 3. Division of Costs on Appeal

Dr. Christian points out that, in two of the previous appellate opinions, the language assessing costs stated that costs were "to be divided equally between the parties." She contends that, because there were a total of three named parties (*i.e.*, Dr. Christian, Dr. Hamersley, and Maternal-Fetal), an equal division of the costs requires that each of the three named litigants bear one-third of the total costs.

We reject the suggestion that the costs in those previous appeals were to be divided such that Dr. Christian was obligated to pay only one-third of the total. This Court customarily divides costs between parties appellant on the one hand and parties appellee on the other hand in a fraction roughly proportional to each side's success or lack thereof on appeal. Here, the costs were to be divided equally between the appellant and appellees. Under that order, Dr. Christian was obligated to bear half of the costs, and the appellees (Maternal-Fetal and Dr. Hamersley jointly) were obligated to bear the other half. We perceive no merit in Dr. Christian's argument to the contrary.

Question 4. Judgment on Count II of the Counterclaim

Count II of appellees' counterclaim alleged a breach of the employment contract, and sought a judgment against appellant for the prorated portion of a malpractice insurance premium paid by Maternal-Fetal on behalf of appellant prior to the time appellant terminated her employment, as permitted by Section 9 of the parties' employment agreement.[1] The jury found in favor of appellees, and on February 20, 2009, the trial court entered judgment in the amount of $22,902 against appellant on Count II of appellees' counterclaim. That judgment was separately recorded in the judgment index of the Circuit Court for Montgomery County on February 20, 2009. Post-judgment interest began to accrue as of the date of entry of that judgment. *Medical Mutual v. Davis*, 365 Md. 477, 486 (2001) ("post-judgment motions or appeals, which may cause a money judgment for a plaintiff to lose some aspects of its finality, ordinarily do not have the

[1] Section 9(a) of the Employment Agreement was referred to as the Premium Reimbursement Provision and provided, in relevant part:

> The Company shall, at its sole expense, maintain professional liability insurance or self insurance covering the Employee's activities as an employee hereunder, with insurance carriers (in the case of commercial insurance), in amounts and on terms and conditions determined, from time to time, in the sole and absolute discretion of the Manager. [. . .] **Upon the termination for cause or by notice of from the Employee, the Company shall be entitled to receive, or to set off against any amounts owed to the Employee, the pro-rata portion of all malpractice premiums to cover the Employee while Employee was employed with the Company.**

(Emphasis added.)

effect of postponing the accrual of post-judgment interest from the date that the original money judgment was entered").

In the years of litigation since entry of the judgment in favor of appellees on Count II of the counterclaim, the $22,902 judgment was never vacated or even challenged. Indeed, appellant noted in her brief that she had "consented to entry of a judgment for that amount."

Appellees attempted to collect on the $22,902 judgment by filing requests to issue writs of garnishment. One garnishee, PNC Bank, National Association, filed an answer confessing that it held three accounts in appellant's name that contained funds totaling $35,535.07. On July 24, 2015, appellees filed a motion for entry of order of payment, noting that it was attempting to collect on a $22,902 judgment that had been entered in 2009 which, with the post-judgment interest that had accrued, then totaled over $36,000. Appellees calculated the payoff amount due with accrued interest to be $36,649.20, and asked the court to order PNC Bank to pay over the proceeds of the three accounts.

On July 28, 2015, appellant filed a "Motion to Dismiss [Appellees'] Writs of Garnishment to 'PNC Bank,' to Release Funds, to Approve Tender of Undisputed Judgment Amount and Reply to Answer of PNC Bank Association." Appellant asserted that the February 20, 2009 judgment in the principal amount of $22,902 was not a *final* judgment "because it did not resolve all claims against all parties," asserting that the issue of appellees' entitlement to attorney's fees had not yet been resolved. Therefore, argued appellant, no post-judgment interest began to accrue on the separate $22,902 judgment

until the first $300,000 fee award was entered as a final judgment resolving all claims on July 25, 2011. But, at the time the $22,902 judgment was entered, all claims other than the collateral issue of attorney's fees had been resolved as to all parties. Consequently, the judgment entered on February 20, 2009, was final and began accruing interest on that date.

While the parties were litigating their appeals, appellant's counsel had, on February 19, 2014, tendered to appellees' counsel a check in the amount of $21,821.45, which appellant's counsel said represented the original amount of the five-year-old judgment, without any interest, reduced by $1,080.55 for unreimbursed court costs. The check conspicuously included the words "Satisfaction of Judgment," as did the transmittal letter. Appellees refused to accept the check, and thereafter, appellant moved for the court to "enter an order that no interest, post-judgment or otherwise, accrue" on the amount following the rejected "tender" of less than the amount due on account of the judgment. Following a hearing, the court denied appellant's motion. The court also ordered that the funds held in the three PNC accounts be released to appellee. Appellant noted an appeal of that order, but she later dismissed that appeal.

Nevertheless, appellant argues in her brief in this appeal that she is entitled, "[p]ursuant to Md. Rule 2-626," to "an order declaring the February 20, 2009 judgment in the amount of $22,902 [was] satisfied due to [appellees'] garnishment in the amount of $35,535.07, plus the unpaid appellate costs of $4,515.34." Appellant made this argument

in the circuit court at the March 7, 2019 hearing, and it was rejected, with the court noting:

> [THE COURT]: Okay. So, on the issue of determining whether or not that initial [judgment] of [$]22,902 had been paid and satisfied, I think we covered this when we had the hearing back when we were dealing with the funds that were obtained through the garnishment [in 2015, as referenced above]. And at that time, I think it was determined and today I'll also determine that the post judgment interest began to run on February 20, 2009 and so it was in excess of the [$]35,535 back in November of 2015 which is the reason why the funds were released to [appellee] at that time.
>
> So, to my knowledge the original judgment of [$]22,902 plus post judgment interest has not been fully paid and satisfied because the amount obtained in the garnishment didn't pay all of the judgment plus post judgment interest that accrued as of that time and it's now been three-and-a-half years later after that. I also in looking at this tender offer argument that's been made, the amount of [$]21,821.45 that was offered in February of 2014 was not sufficient to cover the judgment and post judgment interest at the time.
>
> So, there was not a tender offer made to cover the judgment plus interest at the time which obviously was rejected by [appellee]. So, I don't believe that that was not [sic] a sufficient amount offered to pay the outstanding judgment and interest. So, it's clear that the reason why [appellee] rejected it. So, I'll deny the motion to determine that that judgment has been paid and satisfied at this time.
>
> [APPELLANT'S COUNSEL]: Your Honor, if I could be heard just briefly on that.
>
> [THE COURT]: Go ahead.
>
> [APPELLANT'S COUNSEL]: And that is even if [--] I don't want to regurgitate what I just said but [--] you give them the credit for the [$]35,535.07 which is the amount of the garnishment. . . . And you add the appella[te] costs that are outstanding, under his theory giving him the benefit of every doubt it's satisfied. So, I just ask that if you're going to proceed down that road that you take it under advisement and do the appellant cost first and the do the math second on the judgment ---

> [COURT]: So, I'm just going to keep these separate. They're just separate issues, they're separate amounts, they're separate judgments, there's everything is separate about them. So, the only way to deal with it is I think keep them separate. The judgment of [$]22,902 was entered back in February of '09, that was a discrete and definite number that was entered against which this post judgment interest would apply. So, you may, I mean there may be some entitlement to a set off that you're claiming but it doesn't affect the judgment that was entered 10 years ago.

We agree with the trial court that appellant was not entitled to an order "pursuant to Maryland Rule 2-626" reflecting that the full amount of the judgment, with all accrued post-judgment interest from February 20, 2009, had been satisfied. It had not been satisfied.[2]

[2] Rule 2-626 provides:

> (a) Upon being paid all amounts due on a money judgment, the judgment creditor shall furnish to the judgment debtor and file with the clerk a written statement that the judgment has been satisfied. Upon the filing of the statement the clerk shall enter the judgment satisfied.
>
> (b) If the judgment creditor fails to comply with section (a) of this Rule, the judgment debtor may file a motion for an order declaring that the judgment has been satisfied. The motion shall be served on the judgment creditor in the manner provided in Rule 2-121. If the court is satisfied from an affidavit filed by the judgment debtor that despite reasonable efforts the judgment creditor cannot be served or the whereabouts of the judgment creditor cannot be determined, the court shall provide for notice to the judgment creditor in accordance with Rule 2-122.
>
> (c) If the court enters an order of satisfaction, it shall order the judgment creditor to pay to the judgment debtor the costs and expenses incurred in obtaining the order, including reasonable attorney's fees, unless the court finds that the judgment creditor had a justifiable reason for not complying with the requirements set forth in section (a). If the motion for an order of satisfaction is denied, the court may award costs and expenses, including reasonable attorney's fees, under Rule 1-341.

continued…

Maryland Rule 2-604(b) is clear: "A money judgment shall bear interest at the rate prescribed by law from the date of entry." Here, it is undisputed that the judgment in the amount of $22,902 was entered by the clerk on February 20, 2009. The "legal rate" of interest on judgments is 10% per annum. *See* Maryland Code (1973, 2013 Repl. Vol.), Courts and Judicial Proceedings Article, § 11-107(a). Accordingly, the $22,902 judgment that was docketed on February 20, 2009, had been accruing simple interest at the rate of $2,290.20 per year from that date until the date the garnished funds were received by appellees' counsel.

The trial court was not persuaded that the garnished funds, after being applied first to accrued interest, and then as a payment on account of the judgment, were sufficient to totally pay off the outstanding amount due. As noted above, appellees calculated the payoff amount to be $36,649.20, and after applying the garnished funds in the amount of $35,535.07, there remained an unpaid balance due on the judgment in the amount of "approximately $1,110." That unpaid remaining balance due on the judgment would have been accruing interest at the rate of 10 percent per annum ever since (unless appellant made additional payments thereon that are not mentioned in the briefs). In the absence of any specific ruling of court, even if the appellant had had some offsetting claim regarding unreimbursed court costs, that would not serve to extinguish the balance

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continued…

Rule 2-645(l) provides that a garnishee is entitled to "a statement of satisfaction setting forth the amount paid," but that rule provides no similar language relative to the judgment debtor.

due on a judgment of record. Nor would the conditional tender of less than the full judgment debt—*i.e.*, an offer to pay an amount less than the full amount owed on the condition that it would be accepted as payment in full—stop the accrual of post-judgment interest.

The court did not err in refusing to enter an order of satisfaction.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED IN PART AND VACATED IN PART. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.
COSTS TO BE PAID ONE-HALF BY APPELLANT AND ONE-HALF BY APPELLEES.

The correction notice(s) for this opinion(s) can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/0292s19cn.pdf