

Circuit Court for Baltimore City
Case No. 02-C-14-187383

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0347

September Term, 2020

DANIEL B. HOLT

v.

LAURIE L. HOLT

Fader, C.J.
Reed,
Beachley

JJ.

Opinion by Reed, J.

Filed: August 11, 2021

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This case comes before us a second time on appeal from a judgment awarding attorney’s fees and expert costs after we remanded for the circuit court to articulate its finding of bad faith pursuant to Md. Rule 1-341 to support the award of attorney’s fees. Prior to their divorce, Daniel Holt (“Appellant”) and Laurie Holt (“Appellee”) agreed all of Appellee’s computer files would be returned to her from the marital home where Appellant resided. The agreement was memorialized in a Consent Order of Court and then incorporated, not merged, into the Judgment of Absolute Divorce entered January 15, 2015. Appellee filed a Petition for Contempt on June 22, 2015, alleging Appellant violated the Consent Order after refusing to return her computer files.

On August 28, 2015, Appellee filed a Request for Counsel Fees and Other Relief after extending efforts to recover her files from Appellant. On October 8, 2015, Appellee’s request was granted and a hearing was scheduled to determine the costs incurred. On March 10, 2016, the circuit court found Appellant was not in contempt but still awarded Appellee attorney’s fees of \$9,000 and \$8,721 in expert fees. Appellant filed a timely appeal and this Court vacated the award and remanded for the circuit court to articulate its finding of bad faith pursuant to Md. Rule 1-341 to support the award of attorney’s fees. Pursuant to the Mandate of this Court, on June 24, 2019 the parties agreed to file, through counsel, “a written memorandum on the basis, or lack thereof, for attorney’s fees as to Md. Rule 1-341, limited to the record only...” On May 21, 2020, the circuit court issued an Order awarding attorney’s fees and expert costs to Appellee based on Md. Rule 1-341. It is from this Order that Appellant brings his second appeal.

In bringing his appeal, Appellant presents four questions for appellate review, which we have condensed to two¹:

- I. Did the trial court err by finding Appellant in bad faith and applying Maryland Rule 1-341?
- II. Did the trial court err in its determination of the expert award amount?

For the following reasons, we answer both questions in the negative and affirm the decision of the circuit court.

FACTUAL & PROCEDURAL BACKGROUND

Prior to their divorce, on December 4, 2014, the parties agreed all of Appellee’s computer files would be returned to her from the marital home where Appellant resided. The agreement was memorialized in a Consent Order of Court and then incorporated, not merged, into the Judgment of Absolute Divorce entered January 15, 2015². The Order provided:

ORDERED, by the agreement of the parties, that [Appellee] shall retain

¹ Appellant presents the following questions:

1. Did the trial court err by finding the conduct of the appellant to be in bad faith?
2. Did the trial court err by applying Maryland Rule 1-341?
3. Did the trial court err in its determination of the expert award amount?
4. Did the trial court err by not requiring the adverse party to file a motion in compliance with Maryland Rule 2-311 seeking relief pursuant to Maryland 1-341

² The Judgment of Absolute Divorce, entered January 15, 2015, provided that “all terms of this Court’s Consent Order of Court shall remain in full force and effect.” In an unreported opinion addressing Appellant’s first appeal, CSA-REG-0097-2016, this Court held the Consent Order was enforceable as intended by the language of the circuit court in the Judgment for Absolute Divorce.

sole ownership and control of... all of her electronic files currently in [Appellant's] possession, including e-mail archives from "laurie" and "welau" omegaquest email domains[.]

Appellant initially provided a thumb drive which he claimed contained "all electronic files then currently in his possession." Upon further review, Appellee reported "the vast majority" of the files were missing. Appellant responded that a year before the Consent Order was issued, he deleted the remaining files "in a fit of rage." To determine whether the deleted files were recoverable, Appellee requested to review all the hard drives where the files had been stored but Appellant claimed the hard drives were damaged and discarded after he moved from the marital home.

On June 22, 2015, Appellee filed a Petition for Contempt, alleging Appellant violated the Consent Order by refusing to turn over the hard drives. To avoid further destruction of any potentially recoverable files, Appellee also filed a Request for Emergency Injunctive Relief, requesting Appellant be ordered to surrender the computer hard drives in his possession. In her pleadings, Appellee requested that the circuit court "order [Appellant] to pay costs including reasonable attorney's fees" incurred from Appellant's failure to deliver the computer files.

Prior to the contempt hearing, on August 10, 2015, the parties reached an agreement during their emergency hearing on Appellee's Request for Injunctive Relief. The agreement was placed on the record and reduced to writing on August 19, 2015 as a Preliminary Injunction that required Appellant to "turn over to his counsel, Jonathan Gladstone, all computers, servers, laptops (including internal and external hard drives) in his possession or control for inspection by [Appellee]... and her computer expert."

Appellant produced twelve hard drives to his attorney which were copied, scanned, and reviewed by Matthew Lempka, Appellee’s computer expert. Over 35,000 files belonging to Appellee were recovered and Mr. Lempka testified the process took in excess of 250 hours and that he charged Appellee \$8,721 for his services. On August 28, 2015, Appellee filed a Request for Counsel Fees and Other Relief, arguing she incurred additional fees due to Appellant’s “bad faith actions” and failure to comply with the Consent Order. Appellee’s request for relief was granted without a hearing on October 8, 2015 through an Order entered by Judge Wachs. In pertinent part, Judge Wachs’ Order states “[t]he Defendant/Counter-Plaintiff shall be entitled to the reasonable costs incurred employing an expert to review and analyze the Plaintiff/Counter-Defendant’s computer hard drives” and awarded Appellee “the reasonable attorney’s fees incurred in bringing her Petition for Contempt and related matters.” Appellant did not seek reconsideration of Judge Wachs’ Order.

Appellee then filed a Supplemental Motion for Contempt, Attorney’s Fees, Expert Costs and Other Relief. Appellee’s Supplemental Motion included updated invoices to reflect she incurred \$8,721.70 in expert fees and over \$10,000 in attorney’s fees as a direct result of Appellant’s failure to comply with the Consent Order. Appellee also argued that pursuant to Md. Rule 1-341 she is entitled to attorney’s fees and expert costs as a result of Appellant’s bad faith actions “in refusing to turn over [her] computer files and then deliberately destroying some of her files.” A hearing was held on March 8, 2016 before Judge McCormack to determine reasonable costs incurred by Appellee pursuant to Judge Wachs’ Order. During the hearing, Appellee’s expert testified about the process he used to

recover her computer files, the amount of hours it took to complete the job, and the costs associated with the process. Appellee's computer expert testified that although the work he completed, which took in excess of 150 hours, would normally cost \$20,000, he provided Appellee with a discount that resulted in a final fee of \$8,721.70. Appellee also presented evidence of the legal fees she incurred in her efforts to obtain the files.

At the conclusion of the hearing, Judge McCormack found Appellant was not in contempt of the parties' Consent Order because he did turn over the computer hard drives. However, Judge McCormack noted in her oral findings that Appellant's testimony about destroying the files was disingenuous and that she questioned his credibility. In her ruling, Judge McCormack found that Appellee incurred reasonable attorney's fees of \$9,000 and \$8,721.70 in computer expert fees to recover her files and awarded Appellee both pursuant to Judge Wachs' Order. An Order granting Appellee's attorney's fees was entered March 10, 2016.

On March 29, 2016, Appellant noted his initial appeal of that Order. In an unreported opinion by this Court, we vacated the award due to the circuit court's failure to hold an evidentiary hearing to make findings or articulate any legal basis to justify granting Appellee's request for attorney's fees and the computer expert's fees. We remanded the case back to the circuit court to make and articulate findings to support an award of attorney's fees. On remand, by agreement of Chambers and counsel, the parties submitted a memorandum in support of or opposition to attorney's fees in lieu of conducting a hearing to present more testimony and evidence. On May, 21, 2020 the circuit court entered an order in favor of Appellee after finding Appellant's conduct "regarding the return/recovery

of computer files to [Appellee] pursuant to the Consent Order was in bad faith.” Judge McCormack awarded Appellee \$9,000 in attorney’s fees and an additional \$8721.70 in expert fees. [E. 102] It is from this order that Appellant filed this appeal.

DISCUSSION

I. Applicability of Md. Rule 1-341

A. Parties’ Contentions

Appellant contends the trial court erred in applying Md. Rule 1-341 because there is insufficient evidence in the record to support Appellant acted in bad faith at any phase of the proceedings. Appellant argues he consented to and complied with every demand made by Appellee to turn over physical hard drive files and that any delays were completely justifiable as they were unintended. Moreover, Appellant contends a lack of bad faith is evidenced by the circuit court’s finding that he was not in contempt of Judge Wachs’ Order. Appellant asserts the lack of evidence that *any* of his conduct was in bad faith renders Md. Rule 1-341 inapplicable and requires the award be vacated. Appellee contends the circuit court properly determined there was sufficient evidence of bad faith pursuant to Md. Rule 1-341 after finding Appellant’s testimony about destroying Appellee’s files disingenuous and finding he intentionally failed to turn over all the hard drives in his possession. Appellee contends further that Appellant can still be found to have acted in bad faith despite not being found in contempt by the circuit court. For these reasons, Appellee asserts that Md. Rule 1-341 is applicable.

B. Standard of Review

Md. Rule 1-341 provides:

- (a) **Remedial Authority of Court.** In any civil action, if the court finds that the conduct of any party 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 attorney’s fees, incurred by the adverse party in opposing it.

Md. Rule 1-341, as evidenced from “the history of the rule and the case law interpreting it,” is designed to operate as a deterrent against unnecessary and abusive litigation. *Worsham v. Greenfield*, 435 Md. 349, 369 (2013). “An award of counsel fees [pursuant] to Rule 1-341 is an ‘extraordinary remedy,’ which should be exercised only in rare and exceptional cases.” *Garcia v. Foulger Pratt Devi., Inc.*, 155 Md. App. 634, 678 (2003). (“[W]e are mindful that Rule 1–341 was not intended to punish legitimate advocacy, or to force abandonment of questionable or innovative causes, or to penalize exploration beyond existing legal horizons.”) (internal citations and quotation marks omitted). *Thomas v. Cap. Med. Mgmt. Assocs., LLC*, 189 Md. App. 439, 473 (2009) (quoting *U.S. Health, Inc. v. State*, 87 Md. App. 116, 128 (1991)). Accordingly, prior to awarding attorney’s fees or other costs based on Md. Rule 1-341, the trial judge must make two independent findings:

First, the judge must find that the proceeding was maintained or defended in bad faith and/or without substantial justification. *This finding will be affirmed unless it is clearly erroneous or involves an erroneous application of law.* Second, the judge must find that the bad faith and/or lack of substantial justification merits the assessment of costs and/or attorney’s fees. This finding will be affirmed unless it was an abuse of discretion.

(emphasis added). *Worsham v. Greenfield*, 187 Md. App. 323, 342 (2009) (quoting *Inlet Assocs. v. Harrison Inn Inlet, Inc.*, 324 Md. 254, 267–68, 596 A.2d 1049 (1991)). If the conduct of an attorney or counsel is found to be in bad faith or without substantial justification, as long as “there is any competent material evidence to support the factual findings of the [] court, those findings cannot be held to be clearly erroneous.” *Christian v. Maternal-Fetal Med. Assoc. of Md., LLC*, 459 Md. 1 (2018).

C. Analysis

Appellee asserts that, regardless of any excuse Appellant has raised, he knew he had access to the twelve hard drives that were eventually produced and had they been turned over when she initially requested her files, following the issuance of the Consent Order, instead of Appellant defending his failure to comply, all of these proceedings and additional fees could have been avoided.

A party that litigates “vexatiously for the purpose of harassment or unreasonable delay” is engaging in bad faith under Md. Rule 1-341. *Christian*, 459 Md. at 21-22. (quoting *Inlet Assocs. v. Harrison In Inlet, Inc.*, 324 Md. 254, 268 (1991)). Appellant contends that he consistently acted in good faith and maintained compliance with every court order. Appellant cites to Judge McCormack’s finding of no contempt to support his compliance. However, Appellee cites to a footnote of the circuit court’s May 20, 2020 Order, finding Appellant not in contempt, which states “[t]he finding that the Plaintiff [Appellant] was not legally in contempt does not preclude a finding of bad faith and an award of costs and fees under Maryland Rule 1-341.” Furthermore, Appellee asserts that, regardless of any belief the files were actually deleted, Appellant still had access to hard

drives that he knew may have Appellee's files backed up on them and instead of turning over everything at the outset, he intentionally withheld them, prolonging the litigation. We agree.

Appellant argues that the Consent Order merely specified that Appellee retained sole ownership of her electronic files and that he was not required to turn over all the hard drives he had. However, as the owner of that property, Appellee had a right to have her files returned to her and Appellant's delay in producing them when Appellee requested them was intentional. Even if Appellant reasonably believed that the files had been destroyed and were not recoverable, he knew he had access to the twelve hard drives he eventually turned over. But the testimony and evidence show Appellant lied about destroying the files, causing further delay and costs to Appellee. Appellant's failure to be forthcoming with the files in his possession was deliberate and unnecessary bad faith conduct that forced Appellee to extend proceedings by filing her Motion for Contempt and the subsequent request for temporary injunction. Because Appellant intentionally delayed turning over Appellee's files and defended these proceedings despite his deliberate noncompliance, we hold the circuit court's finding that Appellant's conduct was in bad faith was not clearly erroneous.

II. Award of Attorney's Fees and Expert Costs

A. Parties' Contentions

Appellant contends that the circuit court erred in awarding Appellee attorney's fees because she failed to file a motion in compliance with Md. Rule 2-311 to receive relief under Md. Rule 1-341. Appellant asserts that Appellee never made a motion, orally or in

writing, during any hearing or trial requesting relief pursuant to Md. Rule 1-341.

Although Appellee filed a Motion Requesting Attorney’s Fees and Other Relief, Appellant asserts it failed to mention bad faith or Md. Rule 1-341 and the parties’ memorandums filed in support or opposition of attorney’s fees pursuant to Md. Rule 1-341 are not motions and thus cannot satisfy this requirement. Appellant also contends the trial court abused its discretion by failing to articulate its findings or calculations for Appellee’s award of attorney’s fees or expert costs. Appellant asserts the trial court erred in not considering a series of factors relevant to calculating such an award outlined in *Kilsheimer v. Dewberry & Davis*, 106 Md. App. 600, 627 (1995). Appellant argues the trial court’s failure to articulate “what portion of expert costs and Appellee’s legal fees are relative to the conduct characterized as bad faith and what factors and calculations were used to make the awards” renders the awards themselves arbitrary and punitive “and therefore an abuse of discretion.”

Appellee contends the circuit court was well within its discretion to grant the award Appellee received because the record provides clear testimony and evidence to support the circuit court’s decision. Further, Appellee argues the factors Appellant claims the circuit court should have applied to determine an award of attorney’s fees are inapplicable because the case he relies on, *Kilsheimer*, is a distinguishably different case where this Court interpreted Md. Rule 2-402(e)(3) which governs the award of fees to expert witnesses in discovery matters. Appellee also contends that her Supplemental Motion for Contempt properly sought relief pursuant to Md. Rule 1-341 and Appellant’s assertion that Appellee failed to file a motion in compliance with Md. Rule 2-311 is

without merit.

B. Standard of Review

“Attorney’s fees may be awarded under Md. Rule 1-341, provided the court makes the proper findings, and the record must reflect the finding and basis.” *Smith v. Luber*, 165 Md. App. 458, 472 (2005). Prior to imposing sanctions under Md. Rule 1-341(a), “a court must make two separate findings, each with different, but related, standards of review.” As stated, *supra*, the trial court must find 1) the proceeding was maintained or defended in bad faith and/or without substantial justification and 2) that the bad faith and/or lack of substantial justification merits the assessment of costs and/or attorney’s fees. Per our analysis in section I, we hold the trial court’s finding of bad faith was not clearly erroneous. We now consider if the trial court’s award of attorney fees was an abuse of discretion.

It is within the trial court’s discretion “to refuse sanctions and attorney’s fees, even if there is a finding of bad faith.” *Garcia v. Foulger Pratt Development, Inc.*, 155 Md. App. 634, 677 (2003). An award of attorney’s fees “will be upheld on appellate review unless found to be an abuse of discretion.” *Fort Myer*, 452 Md. at 72. There is an abuse of discretion where “no reasonable person would take the view adopted by the [trial] court’ or when the court acts ‘without reference to any guiding principles.’” *Santo v. Santo*, 448 Md. 620, 625-26 (2016).

C. Analysis

Appellant construes the issue of whether Appellee filed a Motion in accordance with

Md. Rule 2-311³ pursuant to Md. Rule 1-341 as one of statutory interpretation requiring our review *de novo*. But review of the record clearly indicates there is no statutory interpretation issue before this Court. In fact, Appellant's contention that at no point during the proceedings does Appellee make a motion pursuant to Md. Rule 2-311 to put him on notice of the bad faith accusations, as required by Md. Rule 1-341, is completely without merit. As Appellee points out, she clearly made a request for relief pursuant to Md. Rule 1-341 in her Supplemental Motion for Contempt, Attorney's Fees, Expert Costs, and Other Relief by citing Appellant's bad faith conduct in delaying Appellee's ability to recover her files and conclude the proceedings. Accordingly, we find this issue without merit and dispose of it.

To determine the award of attorney's fees and expert costs, the circuit court relied on testimony from Appellee's experts about the hours spent to recover her files and the amount of attorney's fees incurred in bringing the Petition for Contempt. During the hearing on Appellee's Petition for Contempt held March 8, 2016, Judge McCormack received testimony and evidence related to the issue of reasonable attorney's fees and expert costs incurred by Appellee as a result of Appellant's bad faith conduct. Despite finding Appellant not in contempt of Judge Wachs' Order, Judge McCormack made her oral ruling that the evidence presented formed the basis for the amount awarded:

[Trial Court]: A hearing was supposed to be set to determine the

³ Md. Rule 2-311 provides:

(a) Generally. An application to the court for an order shall be by motion, which unless made during a hearing or trial, shall be made in writing, and shall set forth the relief or order sought.

amount of reasonable attorney’s fees. We had that testimony here today. That’s what that case was scheduled for in addition to the contempt. So I am going to find based on this order, as instructed by Judge Wachs, that the [Appellant]...“Daniel Holt has satisfied and shall immediately surrender to his counsel all of the computer hard drives including the lap top hard drives,” that that’s been done. “That the – [Appellee] shall be entitled to reasonable costs incurring employing an expert to review and analyze the [Appellant’s] computer hard drive.” That amount has been presented to me is an [sic] invoice that we went through and heard testimony on that I do find to be reasonable and fair and that was –I’m trying to find it-- \$8,721, I think it was.

[Plaintiff Counsel]: Yes

[Trial Court]: Eight thousand seven hundred twenty-one dollars and seventy cents. So I’m order [sic] that that amount be paid pursuant to Judge Wachs’ order, that attorney’s fees you incurred in bringing her Petition for Contempt and related matters be ordered and that – I didn’t hear anything with regard to lost income or paid leave.

[Plaintiff Counsel]: None

[Trial Court]: With regard to the attorney’s fees, I did receive an invoice. I did receive testimony that that was fair and reasonable. I am going to not give the full amount of attorney’s fees that have been requested, but I am going to issue an order for \$9,000 on attorney’s fees.

With testimony from Appellee’s expert, testimony from Appellee, and invoices of Appellee’s fees submitted into evidence, the circuit court had more than enough to make a proper determination of what fees Appellee incurred as a result of Appellant’s intentional delay of the proceedings and bad faith conduct. The circuit court did not need to consider the factors outlined in the *Kilsheimer* case cited by Appellant. In pertinent part, that case

discussed whether a trial court abused its discretion in determining fee awards to experts pursuant to Md. Rule 2-402 which, as Appellee correctly highlights, governs payment of expert fees associated with discovery. *Kilsheimer*, 106 Md. App. at 604-05. Moreover, the *Kilsheimer* Court stated, “we do not mean to suggest, however, that, whenever the court faces a dispute with respect to expert witness fees, it must always conduct a mini-trial and issue lengthy, detailed findings of fact.” *Id.* at 629. Accordingly, we hold the circuit court’s award of attorney’s fees and expert costs was not an abuse of discretion.

CONCLUSION

The circuit court properly made the two-step findings required to establish a proper basis for awarding attorney’s fees and other costs pursuant to Md. Rule 1-341. Despite Appellant’s baseless assertion that he maintained compliance with every court order throughout the proceedings, the contrary is evidenced by the record. Accordingly, we hold the circuit court’s finding of bad faith was not in error and the sanction of attorney’s fees and expert costs to Appellee was not an abuse of discretion.

**JUDGMENT OF THE CIRCUIT COURT
FOR ANNE ARUNDEL COUNTY
AFFIRMED; COSTS TO BE PAID BY
APPELLANT.**

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

<https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/0347s20cn.pdf>