Circuit Court for Montgomery County
Case No. 338934

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 953

September Term, 2016

THOMAS H. McLACHLEN,

v.

DYNATEMP, INC. et al.

Nazarian,
Friedman,
Harrell, Jr., Glenn T.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: March 12, 2018

*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.

All litigation must eventually come to an end. In bringing this appeal, Appellant Thomas McLachlen tests the outer limits of this principle. After securing a jury verdict in his favor in the Circuit Court for Montgomery County in 2013, McLachlen unsuccessfully moved for an award of attorney's fees and litigation costs. In further pursuit of that award, McLachlen next intervened in the bankruptcy proceedings of both defendants, objecting to their respective settlement agreements and accusing the defendants' trial counsel of ethical misconduct. When that didn't work, McLachlen filed a motion to reopen the circuit court case so that he could move for sanctions—in the form of attorney's fees and costs—against defendants' trial counsel. On appeal here, McLachlen makes a final attempt to recover his attorney's fees by challenging the denial of those motions. We affirm the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

In 2008, McLachlen purchased a geothermal HVAC system for his home from Dynatemp, Inc., a heating and cooling contracting business founded by Thomas Hackshaw. Once installed, however, the system did not adequately heat or cool the home, and McLachlen made several requests to Dynatemp for repairs. By late 2009, Dynatemp's attempted repairs remained unsuccessful, and McLachlen terminated Dynatemp's work on the project. McLachlen then consulted an independent professional engineer to diagnose the defects and hired a contractor to correct the system's design. McLachlen paid out-of-pocket for these repairs, and notified Dynatemp that he intended to sue for damages related to the failed project.

In March 2010, Hackshaw sold 100% of Dynatemp's stock to a group of investors, who formed Dynatemp Holding Company, LLC for the purpose of carrying on Dynatemp's

heating and cooling business. As part of the agreement, the investors hired Hackshaw to be the lead engineer and salesperson. The sale took place pursuant to a Stock Purchase Agreement (the "Agreement"), which required Hackshaw to disclose all of Dynatemp's liabilities, including any pending or threatened litigation. The Agreement also contained an indemnification clause that made Hackshaw financially responsible for "any claim with regard to the conduct of [Dynatemp's] business prior to Closing … including but not limited to any claims by … persons suffering … damage or loss due to the negligence or intentional misconduct of [Dynatemp], its agents and employees." In the event that such claims were made against Dynatemp, the Agreement gave the investors the right to recover all associated costs and expenses, including attorney's fees, from Hackshaw, personally. Hackshaw did not inform the investors about the problems with McLachlen's HVAC system or that McLachlen had threatened to sue Dynatemp.

About six months later, McLachlen filed suit in the Circuit Court for Montgomery County against both Dynatemp and Hackshaw seeking damages for the defective geothermal HVAC system. Hackshaw retained the law firm of Asmar, Schor & McKenna, PLLC (the "Law Firm"), which agreed to represent both Hackshaw and Dynatemp in the lawsuit. After an unsuccessful attempt at mediation, the case proceeded to a ten day jury trial. The jury found for McLachlen and awarded him approximately $340,000 in damages. McLachlen filed a post-trial motion for attorney's fees and litigation related costs, which the trial court denied. McLachlen timely appealed the denial of his motion (the "2013 Appeal"). Shortly before McLachlen noted the 2013 Appeal, however, both Hackshaw

(voluntarily) and Dynatemp (involuntarily) filed for Chapter 7 bankruptcy. This Court stayed McLachlen's 2013 Appeal pending the conclusion of the bankruptcy proceedings.

In the bankruptcy, the Law Firm brought an adversary proceeding seeking repayment of the legal fees it incurred in its representation of Dynatemp and Hackshaw in the suit brought by McLachlen. This resulted in the disclosure of the retainer agreements between the Law Firm and Dynatemp, and between the Law Firm and Hackshaw, respectively. The Law Firm's retainer agreement with Hackshaw provided that, in its capacity as Hackshaw's counsel, the Law Firm would also represent Dynatemp because, under the Agreement, Hackshaw was obligated to defend and indemnify Dynatemp. The Law Firm's retainer agreement with Dynatemp included the following provision regarding potential conflicts of interest arising from the dual representation:

> By signing below, you agree that you are aware of our prior and ongoing representation of Mr. Hackshaw … You also agree that you have been advised that **our representation of Mr. Hackshaw and you creates a potential conflict of interest which could, at some point, develop into an actual and/or irreconcilable conflict of interest**.… By signing below, you agree that, should we, you or Mr. Hackshaw determine that an actual conflict of interest exists to such a degree that dual representation is no longer allowable, that we will notify you and Mr. Hackshaw of the conflict and discuss how to proceed."

(emphasis added).

Dynatemp's bankruptcy trustee retained an attorney to investigate whether the Law Firm's dual representation of Dynatemp and Hackshaw had, in fact, generated an irreconcilable conflict of interest. In particular, Dynatemp's trustee suspected that because Hackshaw had failed to inform Dynatemp that McLachlen had threatened litigation,

Dynatemp could have sued Hackshaw for breach of the Agreement. Thus, because Dynatemp may have had a claim against Hackshaw arising out of Hackshaw's dealings with McLachlen, Dynatemp's bankruptcy trustee believed that the Law Firm's representation of both parties resulted in an irreconcilable conflict of interest. Dynatemp's trustee contended that Dynatemp could recover over $700,000 in damages if Dynatemp brought a legal malpractice suit against the Law Firm. The Law Firm denied that it had a conflict.

Ultimately, all parties to the adversary proceeding entered settlement negotiations. Dynatemp, Hackshaw, and the Law Firm agreed to a settlement in which the Law Firm would waive a portion of the fees owed to it in exchange for Dynatemp's waiver of any potential conflict of interest or legal malpractice claims against the Law Firm. The parties filed a Motion to Approve Compromise in the bankruptcy court. By this time, however, McLachlen had obtained the Law Firm's retainer agreements with Hackshaw and Dynatemp. Seizing upon the potential conflict of interest generated by the Law Firm's dual representation, McLachlen filed an objection to the Motion to Approve Compromise, alleging that the settlement unfairly benefitted the Law Firm.[1] The bankruptcy court held a hearing to consider the objection and denied it, advising McLachlen, "it's time to give up

[1] McLachlen also sent letters to the Attorney Grievance Commissions in Maryland and Washington, D.C. alleging that the dual representation by the Law Firm violated the rules of professional conduct. These grievances were either dismissed completely or dismissed with a "warning," which is not considered disciplinary action in either jurisdiction.

your claim, [give up] your fight, Mr. McLachlen.… I just recognize there is an end at some point, and this is it." The bankruptcy court granted the motion and approved the settlement.

After the bankruptcy court approved the settlement agreement but before it closed the matter, the Clerk of the Circuit Court for Montgomery County notified McLachlen that his case there had been dismissed without prejudice for lack of prosecution under Maryland Rule 2-507.[2] It further notified him, pursuant to the rule, that he had 30 days to file a motion to vacate the dismissal and reinstate the case. McLachlen took no action within that time frame. Five months later, however, McLachlen filed a motion to reopen the case in the Circuit Court for Montgomery County. He simultaneously filed a motion for sanctions against the Law Firm, in which he alleged that the Law Firm engaged in a bad faith defense and that, as a result, the circuit court should order the Law Firm to pay McLachlen his attorney's fees and litigation costs as a sanction. The circuit court denied both motions in

[2] Rule 2-507 provides that "an action is subject to dismissal for lack of prosecution at the expiration of one year from the last docket entry." Md. Rule 2-507(c). Thirty days prior to dismissing a case under Rule 2-507, the clerk's office is required to send a notice of contemplated dismissal. The docket entries reveal that this notice, though sent to McLachlen, was returned as undeliverable. Nevertheless, it appears as though the clerk's office dismissed McLachlen's case in the circuit court due to his failure to prosecute his pending appeal in this Court for the denial of his motion for attorney's fees. This Court, however, had not yet lifted the stay it had imposed on that appeal as a result of the bankruptcy proceedings. The circuit court's 2-507 dismissal, therefore, violated the stay imposed by this Court pending the resolution of the bankruptcy cases. The ramifications of this erroneous dismissal are addressed in footnote 5.

a one-page order without a hearing.[3] It is from the denial of these motions that McLachlen noted this timely appeal (the "2016 Appeal").[4]

ANALYSIS

McLachlen argues that the circuit court abused its discretion by denying his motion to reopen the case and his motion for sanctions against the Law Firm. The sole purpose for which McLachlen filed the motion to reopen the case was so that the circuit court could consider his motion for sanctions. We conclude that McLachlen failed to present sufficient evidence that the Law Firm acted in bad faith or without substantial justification in its defense of Dynatemp and Hackshaw, and therefore that sanctions were not appropriate. As

[3] McLachlen argues that his motions to reopen and for sanctions should have been assigned to the same judge who presided over the trial. He further argues that the circuit court's denial of the motions without granting a hearing or providing thorough reasoning for the decision constitute reversible error. While we agree that it may be best practice to assign a post-trial motion for sanctions to the same judge who presided over the trial itself and who is most familiar with the case, there is no rule that requires that to happen.

Moreover, although the circuit court did not provide its specific reasoning for denying the motion to reopen and the motion for sanctions, trial judges are "presumed to know the law and apply it properly." *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 426 (2007) (quoting *State v. Chaney*, 375 Md. 168, 179 (2007)). We can, therefore, assume that the trial judge properly considered the criteria for determining whether sanctions are appropriate under Rule 1-341 and came to an informed conclusion that McLachlen had not satisfied those requirements. *Id.* Therefore, we reject McLachlen' argument that the trial judge's failure to explain the grounds for denying McLachlen's motions constitutes an abuse of discretion.

[4] Seven days after McLachlen noted the 2016 Appeal, this Court lifted the stay and dismissed the 2013 Appeal, as both Appeals sought identical relief: an order of attorney's fees and litigation costs. McLachlen does not challenge this Court's dismissal of the 2013 Appeal.

a result, it was not an abuse of discretion for the circuit court to deny both of McLachlen's motions.[5] We explain.

A trial court has significant discretion in deciding whether to reopen a case. *Cooper v. Sacco*, 357 Md. 622, 637 (2000). "The trial court should not be reversed for granting or denying a motion to reopen a case absent an abuse of discretion." *Id.* When a party seeks to reopen a case to submit evidence that "is not essential or material to the case … the discretion of the trial judge as to whether to reopen the case will be broader." *Id.* at 643. In other words, when deciding whether to reopen a case, a trial court considers whether there is good cause to do so. *Cooney v. Bd. of Cnty. Comm'rs. of Carroll Cnty.*, 21 Md. App. 57, 60 (1974). Here, McLachlen stated that he had "good cause for the reopening of the instant case for consideration of his Motion for Sanctions." We must determine, therefore, whether McLachlen established that sanctions against the Law Firm were warranted—and thus presented good cause to reopen the case—or whether the circuit court properly exercised its discretion by denying the motion to reopen and motion for sanctions.

[5] McLachlen also argues that the circuit court should never have dismissed his case pursuant to Rule 2-507 because that dismissal violated this Court's stay of his 2013 Appeal. We agree that the case was dismissed in error. McLachlen further argues, however, that based on the erroneous 2-507 dismissal, it was an abuse of discretion for the circuit court to deny the motion to reopen the case that is at issue in this 2016 Appeal. As we will explain, McLachlen failed to present good cause to reopen the case because he did not establish that sanctions were warranted. Thus, it was not an abuse of discretion for the circuit court to deny McLachlen's motion to reopen the case.

McLachlen filed both his motion to reopen the case and his motion for sanctions pursuant to Maryland Rule 1-341.[6] Rule 1-341 provides:

> In any civil action, if the court finds that the conduct of any party in … defending any proceeding was in bad faith or without substantial justification, the court, on motion by an adverse party, may require … the attorney advising the conduct … to pay to 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(a). Courts apply a two-step process to determine whether to impose sanctions against a party's attorney pursuant to Rule 1-341(a), asking *first*, whether the attorney defended the case in bad faith or without substantial justification; and *second*, whether that bad faith or lack of substantial justification merits an order of sanctions. *Garcia v. Foulger Pratt Dev. Inc.*, 155 Md. App. 634, 676-77 (2003).

In the context of Rule 1-341, bad faith is defined as litigating "with the purpose of intentional harassment or unreasonable delay." *Id.* (quoting *Barnes v. Rosenthal Toyota*, 126 Md. App. 97, 105 (1999)). A defense is considered lacking a substantial justification if "the litigant's position [is not] fairly debatable and [not] within the realm of legitimate

[6] The Law Firm contends that McLachlen's motion to reopen the case was untimely because a motion to reopen a case to submit additional evidence must be filed within 10 days after entry of judgment, *see* Md. Rule 2-534, and a motion to reopen to revise a judgment must be filed within 30 days after entry of judgment. *See* Md. Rule 2-535(a). As described above, however, McLachlen's motion to reopen was filed more than five months after the circuit court dismissed the case pursuant to Rule 2-507, and more than two years after the entry of the trial judgment. We note, however, that McLachlen filed his motion to reopen the case pursuant to Maryland Rule 1-341. Unlike Rules 2-534 and 2-535(a), under Rule 1-341 there is no prescribed time period within which a party must make a motion for sanctions. We hold, therefore, that McLachlen's motion was timely. Md. Rule 1-341(a); *Litty v. Becker*, 104 Md. App. 370, 375 (1995) (The "only time limitation arises out of those equitable considerations that a … judge may weigh in his discretion").

advocacy." *Id.* at 677 (quoting *Barnes*, 126 Md. App. at 105-06); *see Legal Aid Bureau, Inc. v. Bishop's Garth Assocs. Ltd. P'ship*, 75 Md. App. 214, 223 (1988) ("a party need only assert a *colorable* claim or defense to escape Rule 1-341 sanctions") (emphasis in original). A trial court makes these determinations on a preponderance of the evidence standard, meaning the trial court must be persuaded that, more likely than not, the attorney either acted in bad faith or with no substantial justification for its defense. *Att'y Grievance Comm'n v. Alison*, 349 Md. 623, 635 (1998).

In arguing that the Law Firm engaged in a bad faith defense with no substantial justification, McLachlen relies heavily on the possible conflict of interest that arose when the Law Firm undertook the dual representation of Dynatemp and Hackshaw. His argument proceeds as follows: the Law Firm knew that Dynatemp could sue Hackshaw for breach of the Agreement, resulting in a non-waivable conflict of interest, but the Law Firm obtained Dynatemp's permission for dual representation anyway; the Law Firm intentionally concealed the conflict because, if Dynatemp had known about it, it would have asserted its rights under the Agreement to retain independent defense counsel at Hackshaw's expense; Hackshaw lacked the resources to pay two sets of attorney's fees and would have been forced to settle early on if Dynatemp requested independent representation; if Hackshaw settled rather than proceeding through a lengthy and expensive trial, the Law Firm would have missed out on a large legal fee; to maximize its profits, the Law Firm purposely concealed the conflict of interest so it could drag the litigation out. Ultimately, McLachlen contends that he never intended for the case to go to trial and was amenable to settling for a relatively modest amount, but due to the Law Firm's bad faith defense, he incurred huge

legal fees of his own. Thus, he urged the court below to order the Law Firm to pay his attorney's fees as a Rule 1-341 sanction.

We conclude that the circuit court did not abuse its discretion by denying McLachlen's motion to reopen and for sanctions for three reasons: *first*, the foundation of McLachlen's argument rests on the purported conflict of interest between the Law Firm and Dynatemp and Hackshaw, but he offers no legal support for the proposition that he has standing to assert that conflict; *second*, McLachlen did not provide sufficient evidence that the Law Firm engaged in a bad faith defense without a substantial justification; *third*, by failing to advance adequate legal and factual support for his arguments, McLachlen could not have persuaded the trial court that Rule 1-341 sanctions, which are highly discretionary, were warranted. McLachlen's motions, therefore, were properly denied. We explain.

The basis for McLachlen's argument that sanctions against the Law Firm are proper significantly lacks legal support. He contends that the Law Firm's dual representation of Hackshaw and Dynatemp resulted in a non-waivable conflict of interest in violation of the Maryland Rules of Professional Conduct and thus merits sanctions. We have found no cases in Maryland holding that a *plaintiff* has standing to assert a conflict of interest *between defendants*. The Preamble to the Maryland Rules of Professional Conduct states that "[t]he fact that a Rule is a just basis for … sanctioning an attorney under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule." Md. Rule 19-300.1[20]. Moreover, a majority of our sister jurisdictions agree that "only a current or former client of an attorney has standing to complain of that attorney's representation of

interests adverse to that current or former client." *See, e.g., Coyler v. Smith*, 50 F. Supp. 2d. 966, 969 (C.D. Cal. 1990) (surveying cases from other jurisdictions). Thus, the weight of authority supports the conclusion that McLachlen lacks standing to assert the conflict of interest between Dynatemp, Hackshaw, and the Law Firm as a means to recover *his own* attorney's fees. But, even under the minority view that a "non-client litigant does not have standing to merely enforce a technical violation of the Rules" but may have standing in limited situations "when he or she can demonstrate that the opposing counsel's conflict somehow prejudiced *his* or *her* rights," we are not persuaded that McLachlen could prevail because, as we discuss next, he failed to present sufficient evidence that any conflict existed or that, if it did, it prejudiced his rights. *See In re Appeal of Infotechnology, Inc.*, 582 A.2d 215, 221 (Del. 1990) (emphasis in original).

In addition to lacking the necessary legal foundation for his claims, McLachlen did not adequately establish that the Law Firm defended Dynatemp and Hackshaw in bad faith or without substantial justification. McLachlen contends that, despite requesting a jury trial, he would have settled for "as little as $100,000" and that the Law Firm's refusal to settle unreasonably delayed the disposition of the case by forcing it to proceed to a long and expensive trial. This, he suggests, served the Law Firm's ulterior motive to collect a large legal fee from the defendants. McLachlen, however, supplies only speculative, conclusory statements in support of this claim, and relies almost exclusively on his own affidavit, which he attached to his motion for sanctions and that simply recounts the history of this litigation. McLachlen provides no support for his contention that the Law Firm maliciously avoided settling the case or that Hackshaw would have refused to take the case

to trial if Dynatemp had retained its own defense counsel. Moreover, McLachlen ignores the fundamental principle that parties have no duty to settle cases. *Supik v. Bodie, Nagle, Dolina, Smith & Hobbs, P.A.*, 152 Md. App. 698, 721 (2003) (discussing parties' rights to decide not to settle a case at any time until an agreement is signed and emphasizing that parties maintain a right to proceed to court even if negotiations have taken place). Given the utter lack of evidence supporting McLachlen's allegations, we cannot say that the Law Firm's decision not to settle reaches the level of "unreasonable delay," "intentional harassment," or "vexatious[]" action that constitutes bad faith in the context of Rule 1-341 or that it lacked a substantial justification for its defense. *RTKL Assoc., Inc. v. Baltimore Cnty.*, 147 Md. App. 647 (2002); *Inlet Assocs. v. Harrison Inn Inlet, Inc.*, 324 Md. 254, 268 (1991) (there is a substantial justification for a party's defense if it is "within the realm of legitimate advocacy") (quoting *Newman v. Reilly*, 314 Md. 364 (1989)).

Because McLachlen did not present sufficient evidence for the circuit court to find that the Law Firm acted in bad faith or with no substantial justification, he failed to establish that Rule 1-341 sanctions were warranted. *Garcia*, 155 Md. App. at 676. We reiterate that McLachlen filed his motion to reopen the case for the sole purpose of having the circuit court consider his motion for sanctions against the Law Firm. The grant of attorney's fees pursuant to Rule 1-341 is "an extraordinary remedy, which should be exercised only in rare and exceptional cases." *Id.* at 678 (quoting *Barnes*, 126 Md. App. at 105); *Bishop's Garth*, 75 Md. App. at 223 ("The rule should be utilized judiciously."). Given the rarity in which Rule 1-341 sanctions should be imposed, we are hard-pressed to imagine a situation where a trial court's *denial* of sanctions would be considered an abuse

of discretion. Because no sanctions could have been imposed, McLachlen failed to establish good cause to reopen the case and the circuit court did not abuse its discretion by denying his motions.

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