

Circuit Court for Talbot County
Case No. 20-D-10-7116

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1424

September Term, 2017

RICHARD S. PHILLIPS AND
THE PHILLIPS LAW FIRM, P.A.

v.

DANIEL COX AND
COX LAW CENTER, L.L.C., et al.

Friedman,
Beachley,
Fader,

JJ.

Opinion by Beachley, J.

Filed: November 21, 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.

In this case, the Circuit Court for Talbot County granted appellee Mark Wester’s motion to compel discovery, and entered judgment in the amount of \$980.50 in favor of his attorneys, appellees Daniel Cox and the Cox Law Center, LLC (“Cox”), and against Jessica Wester’s attorneys, appellants Richard S. Phillips and the Phillips Law Firm, P.A. (“Phillips”). Phillips appeals that decision and presents seven questions for our review, which we have consolidated into three:¹

1. Did the court err in granting attorney’s fees as a sanction for discovery failures?

¹ Appellants’ original questions are:

1. Did the court err by imposing sanctions without making a finding of “bad faith” or “lack of substantial justification”?
2. Did the court err in failing to provide Constitutional Due Process in failing to properly notice a hearing?
3. Did the court err in finding that regular mailing of discovery material prior to the issuance of a summons constituted service under the Maryland Rules?
4. Is a Notice for a Deposition *Duces Tecum* that is improperly served effective when sent without court permission for a date prior to the date allowed by [Md. Rule] 2-411?
5. Did the Circuit Court err in sanctioning Appellant and Counsel for not attending a deposition not properly noticed under the Rules and for which no motion was filed?
6. Did the Circuit Court err in imposing sanctions for failure to file discovery responses to discovery which was not properly served?
7. Did the Circuit Court err in imposing sanctions for a delay in responding to discovery which was not properly served?

2. Did the court violate Phillips’s due process rights by failing to provide a hearing before imposing sanctions?
3. Did the court err in imposing sanctions without a finding of bad faith?

For the reasons discussed below, we discern no error and affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On June 19, 2008, Jessica and Mark Wester were divorced by a judgment issued by the Superior Court for Maricopa County, Arizona. The Arizona judgment provided, among other things, for the parties to share joint legal custody of their two children, with Jessica having primary physical custody.² In the spring of 2017, a dispute arose between the parties concerning whether Jessica would permit the children to attend Mark’s college graduation in Arizona scheduled for May 13, 2017. Because Jessica had moved to Easton, Maryland in 2014, Mark filed a “Motion for Emergency Visitation Order and for Order of Contempt of Court” (the “Motion”) on April 9, 2017, in the Circuit Court for Talbot County. In his Motion, Mark alleged that Jessica had violated the Arizona judgment, and requested that the children be permitted to attend his college graduation in Arizona. Mark also filed a separate petition for modification of physical and legal custody on April 9.

The same day that he filed the Motion and petition for modification in the circuit court, Mark’s counsel, Cox, filed a “Notice of Discovery Materials” in which he certified that he sent the following discovery materials by first-class mail to Jessica: a set of interrogatories, a request for production of documents, a request for admissions, and a

² We use Mr. and Ms. Wester’s first names for easier reference. We intend no disrespect by doing so.

notice to take Jessica’s deposition on May 1, 2017. Despite the fact that Cox mailed the discovery to Jessica on April 9, 2017, she was not personally served with the circuit court’s summons advising her to file a written response to Mark’s Motion and petition for modification of custody until April 22. Significantly, none of the discovery requests Cox mailed to Jessica on April 9 were personally served with the summons. As we shall see, it is this unusual procedure—where discovery was sent to Jessica by first-class mail on April 9 but not personally served on her when the summons was served on April 22—that led to confusion regarding when Jessica’s discovery was due.

On April 25, Jessica retained Phillips as her counsel and provided Phillips with the writ of summons and the pleadings she received by personal service on April 22. On April 26, the day after she retained Phillips as her counsel, Jessica delivered to Phillips all of the discovery requests that she had received from Cox by first-class mail. Also on April 26, Phillips’s legal assistant e-mailed Cox stating that Phillips would be representing Jessica and requested discovery documents by e-mail in Word format. Two days later, on April 28, Phillips’s assistant informed Cox that neither Phillips nor Jessica would be available for a May 1 deposition and, in any event, the deposition notice was defective because of improper service. On April 29, Cox e-mailed the discovery materials in Word format to Phillips’s assistant as requested and offered to reschedule Jessica’s deposition.

On May 15, 2017, Phillips responded only to the request for admissions. During a mediation on June 29, 2017, Cox verbally requested responses to the other discovery requests. On July 10, 2017, Cox sent Phillips an e-mail demanding “responses to all discovery,” specifically the interrogatories and request for production of documents that

had not been answered. The e-mail further warned Phillips: “This is also notice that unless we receive signed and fully answered responses by noon tomorrow, July 11, 2017, we will be necessarily informing the court via a motion to compel and for sanctions including attorney’s fees.” The next day, Phillips responded with: “Sorry. No Service.”

The parties also had a dispute concerning Jessica’s deposition. On May 2, 2017, the parties agreed via e-mail to reschedule Jessica’s deposition for June 1, 2017. In a telephone call later that month, Cox and Phillips discussed rescheduling the June 1 deposition. According to Phillips, Cox decided not to go forward with a deposition June 1, 2017, “because it had not been noticed” and the testimony had been garnered from Jessica during previous proceedings. According to Cox, however, Phillips cancelled the June 1 deposition and told him that the employee who scheduled the deposition “no longer works here and she penciled in a date of June 1 that doesn’t work for me.” Cox stated that he received no alternative dates from Phillips for the deposition.

On July 15, 2017, Cox filed a Motion to Compel Discovery and for Sanctions which summarized many of the above mentioned events and specifically requested an order requiring Jessica to provide answers to interrogatories and responses to the request for production of documents. Cox requested sanctions because his client, Mark, had incurred significant fees “in seeking responses to discovery requests[.]” In his response to the motion to compel, Phillips argued that service of the discovery requests sent by first-class mail directly to Jessica on April 9, 2017, before the summons was even issued, was defective. Additionally, Phillips claimed he was not aware of the Word documents Cox sent on April 29, 2017. He further contended that the motion to compel was moot because

he provided responses to the interrogatories and the request for production of documents on July 26, 2017.

On August 3, 2017, the parties appeared before a magistrate for a scheduled status conference. Because the parties were engaged in settlement discussions, the magistrate delayed the status conference for approximately thirty minutes. Thereafter, the parties reached a partial agreement concerning 2017 summer visitation with the children, which they placed on the record. At the end of the hearing, the magistrate asked whether Mark's motion to compel was still pending.³ After Cox stated that the motion to compel was unresolved, the magistrate advised the parties that the assigned trial judge was available to hear the motion. Neither party objected to the motion being heard that day. That afternoon, the parties appeared before the assigned judge regarding the motion to compel.

During the hearing, Cox acknowledged that he had received Jessica's responses to the requests for admissions on May 15, and answers to interrogatories and responses to the production of documents on July 26. Cox also stated that Jessica's deposition had not yet occurred and that "Mr. Phillips notified [him] prior to deposition that he would not be presenting her." Cox requested "at least a 30 day discovery extension" to allow him time to review the discovery responses that Phillips provided on July 26 and to depose Jessica. In his argument to the circuit court, Phillips stated that he "took the position that there was not proper service of the notice . . . prior to the show cause. And that's the reason there wasn't proper service of the notice of a deposition either." The circuit court found that

³ Because the parties only reached a partial agreement, other issues arising out of Mark's Motion and his petition for modification of custody remained unresolved.

“[a]ny argument that [Phillips] never received the discovery [was] moot at [that] point. [Phillips] received it on April 29th.” The court found that once Phillips entered his appearance, he could be served and was expected to have knowledge of his staff’s communications. The circuit court granted Cox’s Motion to Compel in an Order dated August 3, 2017, which stated:

Having considered [Mark’s] Motion to Compel Discovery, and for Sanctions, and for the reasons stated in open court on August 3, 2017, it is by the Circuit Court for Talbot County:

ORDERED that the Motion for Sanctions be, and is hereby, **GRANTED**; it is further,

ORDERED that [Mark] shall have until August 11, 2017[,] to file any motions with respect to [Jessica’s] Answers to Interrogatories or [Jessica’s] Answer for Production of Documents; it is further,

ORDERED that [Jessica], be available for deposition a[t] The Office of [Mark’s] Attorney, [Cox], or such other location as he designates during the month of August 2017; it is further,

ORDERED that the Court *will reserve on any request for attorney’s fees and costs.*

(Emphasis added).

On August 11, 2017, Cox filed a Motion for Attorney’s Fees pursuant to Md. Rules 1-341(b) and 2-433(e). Cox restated his position that he filed the July 15 motion to compel because Phillips unilaterally cancelled Jessica’s deposition and had refused to provide discovery responses.⁴ Cox requested an award of \$980.50 in attorney’s fees. The requested amount reflected Cox’s hours working on the Motion to Compel and for Sanctions, including time spent seeking discovery and demanding documents prior to filing the motion. He also requested partial travel fees he incurred to argue the motion. In response,

⁴ Jessica was eventually deposed on August 24, 2017.

Phillips denied unilaterally cancelling Jessica’s deposition and restated many of the arguments he made at the August 3 hearing. On August 24, 2017, the circuit court issued an “Order Regarding Attorney’s Fees,” in which the court found:

1. That the need for the Motion to Compel was occasioned by the complete lack of oversight on the part of [Phillips]
2. The amount of fees and costs, \$980.50, that were cha[r]ged by [Cox] are fair and reasonable.

Pursuant to Rule 2-433(e), the court entered judgment in favor of Cox and against Phillips for \$980.50. Phillips filed a Motion to Reconsider, which was denied. Mark and Jessica thereafter resolved their custody dispute by entering into a consent order on September 1, 2017. Phillips then noted a timely appeal from the \$980.50 judgment issued against him.

STANDARD OF REVIEW

Maryland trial courts have wide discretion in determining appropriate sanctions for discovery disputes. *N. River Ins. Co. v. Mayor of Balt.*, 343 Md. 34, 47 (1996). “Their determinations will be disturbed on appellate review only if there is an abuse of discretion.”

Id.

An abuse of discretion occurs “where no reasonable person would take the view adopted by the [trial] court” or when the court acts “without reference to any guiding principles or rules[,]” or when the ruling under consideration is “clearly against the logic and effect of facts and inferences before the court[.]” or when the ruling is “violative of fact and logic.”

Md. Bd. of Physicians v. Geier, 451 Md. 526, 544 (2017) (quoting *Gallagher Evelius & Jones, LLP v. Joppa Drive-Thru, Inc.*, 195 Md. App. 583, 597 (2010)). For an appellate court to overturn a trial court under this standard, the trial court must have “acted in a harsh, unjust, capricious and arbitrary way[.]” *Id.* (quoting *Ehrlich v. Grove*, 396 Md. 550, 561

(2007)).

DISCUSSION

I. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN AWARDING ATTORNEY’S FEES AS A SANCTION FOR DISCOVERY FAILURES.

The essence of Phillips’s claim of trial court error revolves around Cox’s service of discovery materials on Jessica. As noted above, Cox sent the discovery materials to Jessica directly by first-class mail on April 9, 2017. Cox also filed the Motion and the petition for modification of custody in the circuit court on April 9, and the clerk proceeded to prepare a writ of summons for Jessica pursuant to Rule 2-112.⁵ Although Rule 2-121(a) requires delivery of a copy of the summons, complaint, and all other papers filed with it on the person to be served, the private process server’s affidavit here indicates that the discovery requests were not included in the documents served on Jessica on April 22. Accordingly, Phillips is correct that, as of April 22, Jessica had not been properly served with the discovery requests that Cox mailed to her on April 9.

Phillips’s victory in this initial legal skirmish was quickly rendered irrelevant by subsequent events. There is no dispute that on April 25, 2017, Jessica retained Phillips to represent her, nor is there any dispute that Phillips entered his appearance in the circuit

⁵ Md. Rule 2-112(a):

Summons. Upon the filing of the complaint, the clerk shall issue forthwith a summons for each defendant and shall deliver it, together with a copy of each paper filed and a blank copy of the information report form required to be provided by Rule 16-302(b), to the sheriff or other person designated by the plaintiff. Upon request of the plaintiff, more than one summons shall issue for a defendant.

court on April 28.⁶ On April 29, Cox e-mailed all of the discovery materials in Word format to Phillips as Phillips’s assistant had requested on April 26.⁷ Because Phillips entered his appearance on April 28, the discovery materials could properly have been served on him as Jessica’s counsel pursuant to Rule 1-321.⁸ Although Phillips is correct that e-mail service is insufficient under Rule 1-321, he ignores the fact that defective service may be waived. During the hearing on the motion to compel, the following colloquy took place:

THE COURT: Well you [Phillips] received it. He emailed it to your office on April 29th so any argument you don’t have this discovery as of April 29th and we’re now three months later. Any argument that you never received the discovery is moot at this point. You received it on April 29th.

MR. PHILLIPS: And Your Honor . . .

THE COURT: It is inarguable.

MR. PHILLIPS: And I, I was unaware of their [sic] being a transmittal to our office.

THE COURT: Well you are in charge of what goes on in your office.

⁶ We also note that on April 26, Jessica delivered to Phillips all of the discovery requests that she had received from Cox by first-class mail.

⁷ In his appellate brief, Phillips asserts that he only learned of the e-mailed Word documents on July 25, 2017, when he was preparing a response to Cox’s motion to compel. We note that in his July 3, 2017 letter to Cox, Phillips acknowledged that he was aware of the “discovery items,” but because he could not confirm proper service, he “refrained from answering all but the Request for Admissions.”

⁸ Md. Rule 1-321(a), in relevant part, states:

Generally. Except as otherwise provided in these rules or by order of court, every pleading and other paper filed after the original pleading shall be served upon each of the parties. If service is required or permitted to be made upon a party represented by an attorney, service shall be made upon the attorney unless service upon the party is ordered by the court.

MR. PHILLIPS: Well I understand that, Your Honor.

THE COURT: If you're not overseeing your personnel that's not the fault of Mr. Wester's counsel. And this is what happens when you send a paralegal to do a lawyer's job. You should have been communicating directly with Mr. Wester, not your paralegal. He sent it to your office on April 29th. And nothing was done until three months later?

MR. PHILLIPS: That is correct, Your Honor.

THE COURT: Okay.

MR. PHILLIPS: But it was because, because the position, and we explained this position to him that he didn't have proper service.

THE COURT: But that's all moot as of April 29th.

MR. PHILLIPS: Well I recognize . . .

THE COURT: You are there to accept service for your client once your appearance is entered.

The court ultimately concluded, "Well again the argument of proper service, Mr. Cox addressed that no later than April 29th by emailing to [Phillips's] office [W]ord versions of each of these requests." We see no error in the trial court's factual determination that Phillips had received all discovery requests as of April 29. Moreover, in light of the specific request by Phillips's assistant that Cox provide the discovery in Word format and her representation that "[Phillips's office] [would] be returning discovery to [Cox] promptly," we discern no error in the court's implicit finding that Phillips waived service in strict compliance with Rule 1-321.

We likewise perceive no abuse of discretion in the assessment of attorney's fees and costs against Phillips. Having not received complete discovery responses from Phillips,

Cox, at the June 29, 2017 mediation, requested that Phillips comply with the discovery requests. In a letter dated July 3, Phillips responded, “we cannot confirm a service on the discovery items and for that reason, have refrained from answering all but the Request for Admissions.” In an e-mail dated July 10, Cox reminded Phillips that Phillips’s office had “acknowledged receipt of [the discovery] back in April[.]” Cox further advised Phillips of his intention to file a motion to compel and request sanctions, including attorney’s fees caused by Phillips’s refusal to provide discovery. Undaunted, Phillips replied, “Sorry. No service.” On July 15, Cox filed a motion to compel discovery and for sanctions, along with a certificate of Cox’s efforts to resolve the discovery dispute as required by Rule 2-431.

Phillips apparently reevaluated his position concerning service because he submitted answers to interrogatories and responses to the request for production of documents on July 26, just five days before the discovery deadline set forth in the scheduling order.

Against this backdrop, we conclude that the court properly exercised its discretion.

Md. Rule 2-433(d) provides in pertinent part:

If a motion filed under . . . Rule 2-432. . . is granted, the court, after opportunity for hearing, shall require (1) the party or deponent whose conduct necessitated the motion, (2) the party or the attorney advising the conduct, or (3) both of them to pay to the moving party the reasonable costs and expenses incurred in obtaining the order, including attorneys’ fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

Here, the court found “[t]hat the need for the Motion to Compel was occasioned by the complete lack of oversight on the part of [Phillips][.]” As we have thoroughly described above, the court’s determination in this regard is amply supported by the record.

Additionally, we conclude that the court judiciously exercised its discretion in determining the amount of the award. In awarding \$980.50 in attorney’s fees and costs, it is clear that the court carefully reviewed Cox’s attorney’s fees exhibit and only included legal time related to Cox’s efforts to obtain discovery. In that regard, the court did not award any fees beyond preparation and argument of the motion to compel. We therefore discern no error as to the award of attorney’s fees against Phillips.⁹

II. IN IMPOSING SANCTIONS, THE COURT DID NOT VIOLATE PHILLIPS’S CONSTITUTIONAL DUE PROCESS RIGHTS.

Next, Phillips asserts that his due process was violated in two ways: (1) he did not have “fair notice” of the August 3, 2017 hearing; and (2) he was denied the “opportunity for a hearing on the record” prior to the imposition of sanctions.

We summarily reject Phillips’s claim that he did not have “fair notice” of the August 3, 2017 hearing because that claim is unpreserved. After the magistrate advised the parties at the August 3 status conference that the assigned judge could hear the motion to compel that day, counsel, without objection, proceeded to argue the motion. Because the purported lack of “fair notice” was not raised below, we decline to address it. *See* Md. Rule 8-131(a) (“Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]”).

As to Phillips’s claim that he was denied the opportunity for a hearing, we initially

⁹ We note that Cox’s motion to compel primarily sought an order requiring Jessica to submit answers to interrogatories and responses to the request for production of documents. At oral argument, Phillips conceded that “not much” of the \$980.50 judgment was related to the confusion regarding Jessica’s deposition.

note that the court held a hearing on August 3. Moreover, although Md. Rule 2-433(d) expressly provides for an *opportunity* for a hearing when the court awards costs and expenses for discovery violations, Phillips never requested a hearing in either his response to the motion to compel or his response to Cox’s motion for attorney’s fees. *See also* Paul V. Niemeyer et al., Maryland Rules Commentary 254 (4th ed. 2014) (“When any rule provides for a hearing *and one is requested*, the request must be granted.”) (emphasis added). Accordingly, we perceive no due process violation.¹⁰

III. NEITHER BAD FAITH NOR LACK OF SUBSTANTIAL JUSTIFICATION IS REQUIRED UNDER RULE 2-433.

Finally, Phillips argues that the circuit court erred when it imposed sanctions without making a finding of either bad faith or lack of substantial justification. To support this proposition, Phillips cites *Jenkins v. Cameron & Hornbostel*, 91 Md. App. 316 (1992) and *Needle v. White, Mindel, Clarke & Hill*, 81 Md. App. 463 (1990). However, both of these cases discuss sanctions under Md. Rule 1-341¹¹ which prohibits unjustified proceedings brought in bad faith. In this case, the circuit court ordered sanctions under

¹⁰ To the extent that Phillips contends that he was entitled to a hearing on his motion to reconsider, we reject that claim as well. *See* Md. Rule 2-311(e) (“When a motion is filed pursuant to Rule . . . 2-534, the court shall determine in each case whether a hearing will be held, but it may not grant the motion without a hearing.”).

¹¹ Md. Rule 1-341(a):

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

Md. Rule 2-433 for failure to comply with discovery requests. Phillips does not cite, nor are we aware of, any case requiring a trial court to find bad faith or lack of substantial justification prior to imposing sanctions under Md. Rule 2-433. Phillips's reliance on Rule 1-341 and cases interpreting it is unpersuasive in our review of an award pursuant to Rule 2-433(d).

**JUDGMENT OF THE CIRCUIT COURT
FOR TALBOT COUNTY AFFIRMED.
COSTS TO BE PAID BY APPELLANTS,
RICHARD S. PHILLIPS AND THE
PHILLIPS LAW FIRM, P.A.**