UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0013

September Term, 2015

HEATHER STANLEY CHRISTIAN

v.

MATERNAL-FETAL MEDICINE ASSOCIATES OF MARYLAND, et al.

Meredith,
Reed,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned)

JJ.

Opinion by Meredith, J.

Filed: July 3, 2017

Heather Stanley-Christian, M.D., ("Dr. Christian"), appeals the entry of an order awarding attorney's fees to Maternal-Fetal Medicine Associates of Maryland, LLC ("Maternal-Fetal" or "MFMA"), and Sheri Hamersley, M.D. ("Dr. Hamersley"), appellees, pursuant to Maryland Rule 1-341. In July 2011, following a jury trial in the Circuit Court for Montgomery County, the circuit court granted appellees' petition for attorney's fees, and entered a judgment against Dr. Christian in the amount of $300,000.00. In an unreported opinion filed on July 24, 2013, this Court vacated that judgment and remanded the case to the circuit court to reconsider the award of attorney's fees; we held in that previous appeal that Maternal-Fetal was not entitled to an award of attorney's fees pursuant to a contractual fee-shifting provision, but we could not discern from the circuit court's opinion whether the court might have based the award on Rule 1-341. *See Maternal-Fetal Medicine Associates of Maryland, LLC et al. v. Heather Stanley-Christian*, No. 967, September Term, 2009, consolidated with No. 1301, September Term, 2011 (consolidated opinion filed July 24, 2013). On remand, the trial court stated that it found that each of Dr. Christian's claims were maintained without substantial justification, and the circuit court for a second time ordered Dr. Christian to reimburse appellees for attorney's fees in the amount of $300,000.00. This appeal followed.

QUESTIONS PRESENTED

Dr. Christian poses the following questions:

1. Did the trial court err in holding that Dr. Christian brought all six of her Counts in the Amended Complaint in bad faith in violation of Md. Rule 1-341?

2. Did the trial court err in awarding [Maternal-Fetal] $300,000 in attorney's fees where no discovery was allowed on the issue of attorney's fees, no hearing was held on the issue of bad faith attorney's fees, and no factual findings and conclusions of law were made supporting the amount of attorney's fees awarded?

Because we answer "yes" to the first question, we shall vacate the judgment of the circuit court. We conclude that the trial court erred: (a) in concluding that there was no substantial justification for Dr. Christian to pursue the claims asserted in Counts Two, Three, and Six, and, as a consequence, (b) in failing to limit the award of attorney's fees to the amount incurred in defending the claims that were maintained without substantial justification.

BACKGROUND

In our opinion in the previous appeal, Judge Kehoe provided the following summary of the facts that gave raise to this litigation:

> Christian and Hamersley are perinatologists. Perinatology, also known as 'maternal-fetal medicine,' is a sub-specialty of obstetrics concerned with providing care during the perinatal period for women with complicated and high-risk pregnancies.
>
> In 2001, Hamersley founded Maternal-Fetal, a private practice specializing in perinatology, and worked as the practice's sole physician. In November 2005, Hamersley hired Christian to work as a physician in the practice. Christian and Maternal-Fetal each employed counsel to draft a comprehensive employment agreement (the "Agreement"). The most important provisions of the Agreement for these appeals are:
>
> > (1) Section 5(k) (the "Ethics Provision"), which stated that Maternal-Fetal would conduct business in accordance with "applicable ethical canons and restrictions," as well as applicable federal and Maryland law;

(2) Section 9(a) (the "Premium Reimbursement Provision"), requiring Christian, upon her termination for any reason, to refund a pro rata portion of malpractice insurance premiums paid in advance by Maternal-Fetal on Christian's behalf;

(3) Section 14(a) (the "Non-Competition Provision") prohibiting Christian from practicing medicine in Montgomery County, Northwest Washington D.C., and/or within 20 miles of any Maternal-Fetal office for a two year period following the termination of her employment for any reason;

(4) Section 14(c), which stated that, if Christian violated the Non-Competition Provision, Maternal-Fetal could, at its option, seek injunctive relief or recover liquidated damages equal to Christian's annual salary and bonus, which totaled $375,000; and

(5) Section 14(d) (the "Attorney's Fees Provision"), which provided . . . for the recovery of attorney's fees under certain circumstances.

Christian signed the Agreement on November 14, 2005 and began working at Maternal-Fetal full-time on March 27, 2006. Soon thereafter, Christian became dissatisfied with the employment arrangement ostensibly because of certain billing and patient care procedures utilized at Maternal-Fetal. Christian told Hamersley that she wanted to leave the practice, to which Hamersley responded by requesting that Christian "give it more time." On June 15, 2006, Christian told Hamersley that she would resign from Maternal-Fetal unless Hamersley consented to remove language in the Agreement that permitted Maternal-Fetal to use either the practice's provider identification number or an employee physician's separate provider number to bill for professional services rendered by an employee. (This change would address Christian's previously articulated concerns about Maternal-Fetal's billing practices.) However, Christian conditioned her continued employment upon the following additional modifications to the Agreement:

- striking out the Premium Reimbursement Provision;
- increasing the amount that Maternal-Fetal was obligated to pay for Christian's professional liability insurance premiums;
- increasing Christian's option to purchase an interest in the practice from 20-30% to 49%;

- reducing the scope of the Non-Competition Provision from 20 miles to 5 miles;

- reducing the liquidated damages provision from 100% of her annual salary to $75,000;

- striking out a paragraph stating that the parties agreed the Non-Competition Provision was reasonable; and

- increasing Christian's compensation.

Hamersley did not agree to amend the Agreement, and Christian resigned from Maternal-Fetal by letter dated July 11, 2006. Christian worked her last day at the practice on July 17, 2006. Christian did not reimburse Maternal-Fetal as required by the Premium Reimbursement Provision of the Agreement.

On March 7, 2007, approximately eight months after leaving Maternal-Fetal, Christian signed a short-term employment agreement with Greater Washington Maternal Fetal Medicine and Genetics ("Greater Washington"), a Washington area maternal-fetal medical practice that was a direct competitor of Maternal-Fetal, to take the place of a Greater Washington physician while that doctor was on maternity leave. Although Christian contracted with Greater Washington, her duties were limited to serving at Holy Cross Hospital's Perinatal Diagnostic Clinic (the "Clinic"), a charitable facility operated by Holy Cross Hospital and staffed by Greater Washington. Specifically, Christian's contract provided that she would work at the Clinic, seeing only indigent uninsured patients. Both Greater Washington and the Clinic are located approximately 1 mile and 13 miles from Maternal-Fetal, respectively.

Christian worked at the Clinic for a total of eight days in the period from March 13 through March 22, 2007. There was conflicting evidence as to the sequence of events leading up to Christian's last day at the Clinic. At some point just before or very soon after Christian began working at the Clinic, Dr. Thomas Pinckert, the Greater-Washington physician who hired Christian, received a letter dated March 12, 2007 from Hamersley's counsel, stating:

> It has come to [Maternal-Fetal]'s attention that your practice has hired or intends to hire [Christian.] As you may be aware, [Christian] remains subject to a contractual covenant

> not to compete with [Maternal-Fetal]. This covenant not to compete specifically precludes [Christian] from engaging in the practice of medicine in certain areas in and around Washington, D.C., including Montgomery County, Maryland.
>
> Please be advised, therefore, that [Christian]'s employment with your practice violates the terms of her Employment Agreement with [Maternal-Fetal]. Accordingly, demand is hereby made for you to either refrain from employing [Christian] or to immediately terminate and discontinue her employment with your practice . . . ."

Hamersley's counsel also carbon copied the letter to the Obstetrix Medical Group ("Obstetrix") located in Sunrise, Florida.

An employee of Greater Washington called Hamersley to attempt to resolve the issue with no success. Soon thereafter, Pinckert himself called Hamersley, a former colleague, to request that she permit Christian to work at the Clinic. According to Pinckert, he and Hamersley did not come to any agreement during the telephone call, but ended the conversation with Hamersley stating that she would consider his proposal to permit Christian to work only with indigent patients. According to Hamersley, she expressly refused to permit Christian to be employed by Greater Washington during her telephone conversation with Pinckert and that Pinckert had agreed to terminate Christian. Regardless, Hamersley's counsel sent another letter to Pinckert, dated March 21, 2007, stating:

> This is to memorialize your recent conversations with [Hamersley], wherein you agreed not to employ or otherwise retain [Christian] in any capacity or affiliation with your practice . . . .
>
> Please sign below to confirm your agreement to the foregoing and return the executed original of this letter to me no later than the close of business Friday, March 23, 2008 . . . .

Pinckert testified that he understood the letter to mean Hamersley refused to permit Christian to work at the Clinic. He testified that he terminated Christian within a day or two of receiving that letter. As noted, Christian's last day working at the Clinic was March 22, 2007.

The Litigation and the Parties' Respective Claims

Thereafter, Christian filed a five-count complaint against Hamersley and her medical practice group, Maternal-Fetal, alleging: (1) fraud in the inducement; (2) breach of contract and duty of good faith and fair dealing; (3) tortious interference with contract or prospective business advantage; (4) wrongful termination (constructive discharge); and seeking (5) a declaratory judgment as to whether or not the Non-Competition Provision was enforceable. Christian subsequently filed an amended complaint which added a sixth claim for (6) negligent misrepresentation. Christian requested $2,000,000 in compensatory damages and injunctive relief.

Maternal-Fetal filed a counter-claim asserting that Christian had breached the Non-Competition Provision by working at the Clinic under contract with Greater Washington and that Christian had breached the Premium Reimbursement Provision of the Agreement. Maternal-Fetal sought $375,000 in liquidated damages for breach of the Non-Competition Provision and $23,999 for breach of the Premium Reimbursement Provision.

Hamersley and Maternal-Fetal filed for summary judgment on all of Christian's claims. After a hearing held on December 3, 2008, the circuit court granted summary judgment in favor of Maternal-Fetal and Hamersley on all of Christian's claims, except for the sole claim of constructive discharge. We will discuss the grant of summary judgment on these claims in greater detail in Section IV of our discussion below. For now, it is sufficient to note that the court concluded that the restrictive covenant was valid and enforceable.

The Trial

Christian's constructive discharge claim and Maternal-Fetal's counter-claims proceeded to trial before a jury. The trial court divided the evidentiary portion of the trial into two phases. In the first, the parties presented evidence as to Christian's constructive discharge claim. In the second phase, the parties presented evidence as to Maternal-Fetal's counterclaims.

* * *

Maternal-Fetal . . . presented its breach of contract case. For purposes of efficiency, the court did not require the parties to reintroduce evidence and testimony already elicited during the constructive discharge case. We will discuss the evidence presented as necessary later in this opinion. Both parties

> moved for judgment at the close of the evidence, and the circuit court denied both motions.
>
> Before instructing the jury, the circuit court, over Maternal-Fetal's objection, granted Christian's request to include the Maryland Civil Pattern Jury Instruction 9:25 for "material breach." The court delivered the material breach instruction to the jury, stating: "[A] material breach by one party relieves the other party from the duty of performance. A breach is material if it affects the purpose of the contract in an important or vital way."
>
> The jury returned a verdict in favor of Maternal-Fetal on its claim for breach of the Premium Reimbursement Provision and in favor of Christian on Maternal-Fetal's claim for breach of the Non-Competition Provision. The jury awarded $22,902 to Maternal-Fetal for Christian's breach of the Premium Reimbursement Provision. . . . Maternal-Fetal then filed a motion for judgment notwithstanding the verdict, which the circuit court denied after a hearing. Maternal-Fetal also filed a petition for attorney's fees, and both parties filed motions to alter or amend the judgment. The court later awarded Maternal-Fetal $300,000 in attorney's fees. Both Christian and Maternal-Fetal filed timely appeals.

By order entered on December 29, 2009, the trial court granted Maternal-Fetal's motion to alter and/or amend the judgment, and ordered that the judgment against Dr. Christian be amended to include an award of attorney's fees in an amount "that shall be determined by the Court upon receipt of Defendant's legal bills." Maternal-Fetal submitted $555,995.81 in legal bills, and, in July 2011, the trial court entered a fee award in the amount of $300,000.00. As noted above, in our unreported opinion filed on July 24, 2013, we vacated that order on the ground that "it is unclear from the court's order whether it based its award on the provisions of the parties' contract or [Maryland] Rule 1–341." We explained:

> There were two bases for Maternal-Fetal's motion for fees: first, that it was contractually entitled to reimbursement for its attorney's fees, and, second, that the court should award fees against Christian pursuant to Maryland Rule

> 1-341. We conclude that Maternal-Fetal is not entitled to attorney's fees as a matter of contract. 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.

On remand, the trial court determined that "[e]ach claim brought forth by Dr. Christian was without substantial justification." In a memorandum opinion, the trial judge explained:

> The basis for most of Dr. Christian's claims was Defendants' medical billing and prescription of the drug Lovenox. Dr. Christian's allegations of misconduct regarding these issues lacks merit.
>
> Dr. Christian alleged Defendants overbilled patients and Dr. Hamersley improperly signed billing forms when Dr. Christian was the physician who provided the service. Dr. Hamersley denied this allegation and presented exhibits at trial that showed billing forms alleged to be signed by Dr. Hamersley were actually signed by Dr. Christian. Defendants also presented evidence showing Dr. Hamersley was not even in town when the bills at issue were signed. Defendants' medical billing expert, Robin Roach [sic], testified at trial that it is appropriate for a supervising physician to sign billing forms on behalf of a practice, and the supervising physician obtained no benefit from signing the forms. Dr. Christian did not retain a medical billing expert for trial or even cross-examine Robin Roach [sic]. While Dr. Christian claims that others (i.e., Wayne Kramer and Megan Sterner) have witnessed improper billing, none of those individuals were called as witnesses at trial. Dr. Christian failed to present any evidence to the jury that Defendants' billing practices were illegal or unethical.
>
> * * *
>
> This case has been fully litigated and Dr. Christian had plenty of opportunity to present evidence to support her claims, but failed to do so.
>
> Dr. Christian also claimed Dr. Hamersley had a financial arrangement with the manufacturers of the blood thinner, Lovenox, and Dr. Hamersley over-prescribed Lovenox because of the financial relationship. As a result of this allegation, Defendants were required to hire Adam Duhl, a medical expert on the prescription of Lovenox during pregnancy, to justify Dr. Hamersley's prescription of Lovenox to patients. No evidence was brought

forth by Dr. Christian to support this claim, so this claim is without justification.

* * *

At summary judgment, this Court found that Dr. Christian failed to establish any material misrepresentation made by Defendants and failed to show that Defendants had any intent to defraud Dr. Christian. . . . Because Dr. Christian failed to bring forth a fraudulent misrepresentation, this claim was also without substantial justification.

Similar to the issue of Fraud in the Inducement, Dr. Christian failed to plead or prove any facts to support a claim of Negligent Misrepresentation. . . .

Dr. Christian was not justified in bringing forth a breach of contract claim. Dr. Christian failed to provide any specific claims about how Defendants breached the parties' Employment Agreement.

* * *

[Maternal-Fetal] was justified in enforcing the parties' restrictive covenant. This contract was a negotiated and agreed to by the parties in this case. Both were represented by attorneys. At the very least, the Defendant had reasonable grounds to notify the other employer that this non-compete clause existed. Dr. Christian therefore did not have a substantial justification to bring forth this claim.

* * *

The standard for constructive discharge is whether the employer has deliberately caused or allowed the employee's working conditions to become so intolerable that a reasonable person in the employee's place would have felt compelled to resign. . . .

* * *

[T]he evidence presented by Dr. Christian was not even close to the standard required for a constructive discharge claim.

[But] Dr. Christian was substantially justified in defending Defendants' Non-Compete counterclaim. (Underlining omitted.)

* * *

Conclusion

> The total amount of attorney's fees accumulated by Defendants was $555,995.81. Pursuant to Maryland Rule 1-341, the Court will award Defendants $300,000 in attorney's fees as the amount it finds to be reasonable and necessary to defend the claims brought by Dr. Christian without substantial justification.

The trial judge then directed the clerk to enter a judgment of $300,000.00 in attorney's fees against Dr. Christian pursuant to Maryland Rule 1-341.

STANDARD OF REVIEW

Maryland Rule 1-341 provides:

> 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 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 attorney's fees, incurred by the adverse party in opposing it.

"Before meting out the extraordinary sanction of attorney's fees the judge must make two separate findings that are subject to scrutiny under two related standards of appellate review." *DeLeon Enterprises, Inc. v. Zaino*, 92 Md. App. 399, 414 (1992); *Major v. First Virginia Bank-Central Maryland*, 97 Md. App. 520, 530 (1993) ("The trial judge must make explicit findings of fact that a proceeding was maintained or defended in bad faith and/or without substantial justification."). In *Inlet Associates v. Harrison Inn Inlet, Inc.*, 324 Md. 254 (1991), the Court of Appeals described as follows the two-part test a

court must apply in deciding whether to impose sanctions pursuant to Rule 1-341, and also described standards of appellate review of a decision to impose sanctions:

> 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.

324 Md. at 267–68.

DISCUSSION

In *Inlet Associates*, *supra*, the Court of Appeals provided the following guidance for determining when a party's conduct lacks substantial justification:

> [I]n *Needle v. White*, 81 Md. App. at 476, 568 A.2d at 863, the Court of Special Appeals defined substantial justification as "a reasonable basis for believing that a case will generate a factual issue for the fact-finder at trial." See also *Newman v. Reilly*, 314 Md. 364, 550 A.2d 959 (1988), where this Court stated that, to constitute substantial justification, the parties['] position should be "fairly debatable" and "within the realm of legitimate advocacy." *Id.* at 381, 550 A.2d at 967-68. Additional guidelines are also found in the comment to Rule 3.1 of the Maryland Lawyers' Rules of Professional Conduct, which states that an action is frivolous if "the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for extension, modification, or reversal of existing law."

324 Md. at 268.

Further, the Court of Appeals has cautioned that a finding of bad faith or substantial justification must be supported by "some brief exposition of the facts upon which the finding is based and an articulation of the particular finding involved." *Talley v. Talley*, 317 Md. 428, 520 (1989).

Dr. Christian contends that the circuit court "failed to apply the correct legal standard or to make the required factual findings, [and] it ignored the substantial record in this case as well as controlling Maryland precedent." Dr. Christian further contends that "the extensive record demonstrates that Dr[.] Christian had a reasonable basis to make the claims asserted --- even though the claims were ultimately unsuccessful. . . ."

Dr. Christian asserts that "[t]he gravamen of the Amended Complaint was that Dr. Christian had been hired under false pretenses and that many of the practices of [Maternal-Fetal] and Dr. Hamersley, particularly as to billing, were unethical, unlawful and otherwise fell below the standards required of any physician . . . ." Dr. Christian argues that, even though she did not prevail on her claims, she nonetheless had a reasonable basis for bringing those claims based upon her view of the appellees' conduct.

Dr. Christian alleged that medical bills were "upcoded" to indicate that a healthcare provider performed services not actually performed, and that time spent with patients was inflated. For instance, Dr. Christian claimed that Dr. Hamersley instructed Dr. Christian to submit a bill or "fee ticket" for at least a forty-five minute visit regardless of the actual duration of the patient visit. The evidence adduced at trial revealed that Dr. Christian began documenting these perceived irregularities on March 27, 2006, her very first day of employment at Maternal-Fetal. That day, Dr. Christian wrote in a journal entry that "[Dr. Hamersley] told me that EVERYONE should be billed for a 45 minute office visit, no exceptions - I saw two people today for only 15 mins." The next day, Dr. Christian

continued to document what she perceived as her employer's improper practices, writing: "[A]m I dealing with a boss that is shady and lacks credibility?"

Additionally, Dr. Christian alleged in the amended complaint, and in a deposition, that Dr. Hamersley violated the law by signing fee tickets for work performed by Dr. Christian between April 7, 2006, and April 17, 2006, when Dr. Hamersley was on vacation. Dr. Christian asserted that Dr. Hamersley fraudulently signed bills for work that she neither performed nor personally supervised.

Appellees vigorously disputed (and dispute) these allegations, and assert that Dr. Christian admitted at trial that she had no evidence to support her allegations of billing fraud. Appellees draw our attention to the portion of the cross-examination of Dr. Christian during which the following exchange occurred:

> Q [COUNSEL FOR APPELLEES] You had absolutely zero evidence whatsoever that one single word of your reports was altered?
>
> A [DR. CHRISTIAN] I don't trust that it wasn't altered.
>
> Q You do not have one single piece of evidence that a word of any of your medical reports that you prepared were in any way altered by anybody at [Maternal-Fetal]?
>
> A There's so many patients. You're right. **I don't have a single piece of evidence, but based on what was going on, I did not trust that my signatures and my reports were not being changed.**

(Emphasis added.)

With regard to the allegation that her employer improperly signed fee tickets for work performed by Dr. Christian, Dr. Christian conceded at trial that she, in fact, signed the fee tickets herself. . The following exchange occurred:

Q. [BY COUNSEL FOR APPELLEES] And would you please review those fee tickets and let me know if any one of those tickets does not contain your signature?

A. [BY DR. CHRISTIAN] These are my signatures.

Q. So when you made your representation in your amended complaint, you testified at your deposition that on that particular date, you never signed a fee ticket. That testimony by you, wasn't that false?

A. That's correct.

The tickets at issue were produced, and the following dialogue occurred:

Q. Every one of those fee tickets has your name, signed by you.

A. Correct.

Q. So again, when you stated in your amended complaint and again under oath that you did not sign a single fee tickets between April 7th to April 17, 2006, your testimony, the allegation in the amended complaint, wasn't that false?

A. Correct.

Each of Dr. Christian's claims, with the exception of her claim for wrongful discharge/constructive discharge (Count Four), were disposed of at the summary judgment stage of the litigation. And, at trial, the trial judge granted appellees' motion for judgment on Dr. Christian's wrongful discharge claim (which was the only one of her claims that survived summary judgment).

At trial, Dr. Christian did not present any expert testimony to prove that appellees' billing practices were improper. In contrast, appellees presented Dr. Robin Roche, who testified as an expert witness that the billing and coding practices at Maternal-Fetal were not improper. On appeal, Dr. Christian contends that an expert witness was not required

to prove that appellees' practices were unethical or illegal, arguing that other evidence presented, including purported evidence of "upcoding" insurance claim forms, obviated the need for an expert witness. Dr. Christian argues that failing to retain an expert on medical billing "is not sanctionable conduct, particularly when Plaintiff believed such conduct as was proved demonstrated a violation of law without any such expert testimony." In support of this contention, Dr. Christian contends that Dr. Hamersley's signing fee tickets for work that she did not perform constitutes a violation of the law, citing *United States v. Campbell*, 845 F.2d 1374, 1375 (6th Cir. 1988), where the U.S. Court of Appeals stated that "submitting a false form 1500 is a criminal violation."

But *Campbell* bears little resemblance to this case. In *Campbell*, the United States Court of Appeals for the Sixth Circuit affirmed the conviction of an ophthalmologist under the false claim statute, 18 U.S.C. § 287, and the mail fraud statute, 18 U.S.C. § 1341. In that case, the government alleged that Dr. Campbell submitted claims for reimbursement to the medicare program after performing unnecessary medical procedures. The court explained that, "where a physician submits a medicare claim to the government through an insurer, and the physician knows that the treatments performed were unnecessary or non-therapeutic, he or she is criminally liable under section 287." 845 F.2d at 1382.

In *Campbell*, the court noted that Form 1500 requires a physician to certify that "the services shown on this form were medically indicated and necessary for the health of the patient and were personally rendered by me or were rendered incident to my professional service by my employees." *Id.* at 1376. Here, there was no evidence that appellee subjected

patients to unnecessary medical procedures, or that she submitted claims to an insurer for work not performed or supervised by the physician who performed the work.

Appellees respond that, despite Dr. Christian's allegations of improper billing practices,

> [Dr.] Christian produced "**nothing**" to demonstrate that Defendants had fraudulently or even improperly billed patients. . . . The evidence unequivocally demonstrated that Christian had no basis to believe that that [sic] Defendants' billing practices were in any way unlawful or improper. Nonetheless, the allegations forced Defendants to expend significant attorney fees and costs, including expert witness fees, over a nearly two (2) year period, to defend Christian's false and meritless medical billing claims.

(Emphasis in original.)

The amended complaint set forth six counts. We will review each.

Fraud in the Inducement (Count One)

In the amended complaint, Dr. Christian asserted a claim of fraud in the inducement (Count One). The circuit court granted appellees' motion for summary judgment on this count. In *Sass v. Andrew*, 152 Md. App. 406, 422 (2003), we noted that "fraud in the inducement is a subspecies of fraud," explaining:

> "Fraud encompasses, among other things, theories of fraudulent misrepresentation, fraudulent concealment, and fraudulent inducement." *Iverson v. Johnson Gas Appliance Co.*, 172 F.3d 524, 529 (8th Cir.1999) (footnote omitted) (applying Minnesota law). *See Wedeman v. City Chevrolet Co.*, 278 Md. 524, 529, 366 A.2d 7 (1976) ("[W]hen one may be induced by fraud to enter into a contract, the tort in that instance cannot be said to arise out of the contractual relationship. It is the tortious conduct which conversely induces the innocent party to enter into the contractual relationship."). *Councill v. Sun Ins. Office*, 146 Md. 137, 126 A. 229 (1924), is instructive in demonstrating that **fraudulent inducement is simply a means of committing fraud.**

> In *Councill*, the Court of Appeals recognized that there are instances when the evidence in a particular case may give rise to an inference of fraudulent conduct; a promise made to induce another to execute a contract, which the promisor never intended to perform, may create liability for fraud. The *Councill* Court said: "**[A] false promise, not intended to be performed, but made to trick and deceive another into the execution of a written instrument, is a fraud.**" *Id.* at 150, 126 A. 229. Further, the Court said:
>
> > It is true that in a sense a promise to do some act or refrain from some act in the future may establish a merely contractual relation, but **where it is made with a fraudulent design to induce the promisee to do something he would not otherwise have done, it is more than that, it is a misrepresentation of the promisor's state of mind**, which may be, and in a case such as that before us is, a very material thing.

Sass v. Andrew, 152 Md. App. 406, 432 (2003) (quoting *Councill*, 146 Md. at 150) (emphasis added).

On remand, in addressing whether Dr. Christian was substantially justified in prosecuting a fraud claim, the trial court stated:

> Dr. Christian alleged Dr. Hamersley made material omissions about patient care, billing practices, and the treatment of employee doctor's medical judgment and patient relations.
>
> At summary judgment, this Court found that Dr. Christian failed to establish any material misrepresentation made by Defendants, and failed to show that Defendants had any intent to defraud Dr. Christian. In Dr. Christian's deposition she said that she had consulted with her mentors about the opportunity and decided to take the position. Dr. Christian did not mention any representations by Defendants that caused her to enter the employment contract. Because Dr. Christian failed to bring forth a fraudulent misrepresentation, this claim was also without substantial justification.

Having reviewed the record, we are satisfied that the trial judge did not err in concluding that Dr. Christian's claim that appellees fraudulently induced Dr. Christian to

sign the Employment Agreement was without substantial justification. Dr. Christian failed to create a triable issue of fact as to appellees' intent to deceive Dr. Christian, and the record is devoid of evidence to support this claim. Dr. Christian's claims about Maternal-Fetal's billing practices were not based on any fraudulent misrepresentation or concealments Dr. Hamersley committed prior to the execution of the contract, but were based on Dr. Christian's assumptions and misconceptions regarding how the practice billed insurers for medical services that they provided.

The trial judge's finding that the fraudulent inducement claim was brought and maintained without substantial justification was not clearly erroneous or based on an erroneous application of law. *Inlet Associates*, *supra*, 324 Md. at 267-68.

Breach of Contract (Count Two)

In the Amended Complaint, Dr. Christian included the following allegations in Count Two, captioned "Breach of Contract and Duty of Good Faith and Fair Dealing (MFMA)":

> 69. Defendant entered into the Agreement with Plaintiff but failed to provide any consideration for the Non-Compete clause in the agreement, beyond what a perinatologist of Plaintiff's qualifications and experience would receive without such agreement and commensurate with what would be required to obtain a non-compete as interpreted by Defendant.
>
> 70. Defendant by its actions, constructively discharged Plaintiff after less than four months of full time work and attempted to prevent all employment after that, and by the actions set out above, breached its duty of good faith and fair dealing inherent in the term contract for employment, and its actions constituted cause under the Agreement for plaintiff's departure.
>
> 71. The Non-Compete is unenforceable under Maryland law and MFMA's attempts to enforce it are prohibited.
>
> 72. Plaintiff Stanley-Christian was damaged by the breaches of contract and the breach of the duty of good faith and fair dealing, and by defendants' attempts to enforce an ultra vires contract.

In making a finding on Dr. Christian's lack of justification for asserting a breach of contract claim, the trial court stated:

> Dr. Christian was not justified in bringing forth a breach of contract claim. Dr. Christian failed to provide any specific claims about how Defendants breached the parties' Employment Agreement.

In our opinion in the previous appeal, however, we concluded "that there was sufficient evidence, that is 'some evidence,' to permit the trial court to give the material breach [of contract] instruction" requested by Dr. Christian, Slip op. at 17, and that **"there**

was evidence from which the jury could have concluded that Maternal Fetal itself breached the Agreement." Slip op. at 21 (emphasis added). We explained:

> Christian testified that Hamersley was unresponsive to her concerns about billing and patient procedures at Maternal-Fetal. **While we agree with the trial court's characterization of Dr. Provar's testimony as 'slim,' it was evidence that was nonetheless before the jury.** We conclude that this evidence satisfied the 'some evidence' and **we cannot conclude that the court abused its discretion in giving the instruction or permitting closing argument on the question of Maternal-Fetal's breach.**

Slip op. at 18 (emphasis added).

Dr. Christian contends that "the trial court erred in finding that Dr. Christian did not have any[] reasonable basis to bring a breach of contract claim where this Court already held that there was sufficient evidence for a jury to have found that MFMA breached the contract." (Underlining in original.)

We agree that the trial judge erred in disregarding the controlling appellate ruling on that point in our previous opinion in this case. There, we held that Dr. Christian produced a sufficient quantum of evidence to generate a jury instruction that Maternal-Fetal had committed a material breach of the Employment Agreement, thereby relieving Dr. Christian of her obligations thereunder. "[O]ur decision became the law of the case, to be respected as the 'controlling legal rule of decision.'" *Stokes v. Am. Airlines, Inc.*, 142 Md. App. 440 (2002) (citing *Kline v. Kline*, 93 Md. App. 696, 700 (1992)). In *Stokes*, 140 Md. App. 442, we explained that

> [t]he law of the case doctrine, specifically a subset of the doctrine known as "the mandate rule," prevents trial courts from dismissing appellate judgment and re-litigating matters already resolved by the appellate court. *Tu v. State*, 336 Md. 406, 416, (1994); *Kline*, 93 Md. App. at 702. Once an appellate

> court has answered a question of law in a given case, the issue is settled for all future proceedings. *See Turner v. Housing Auth.*, 364 Md. 24, 31-33 (2001); *Hagez v. State*, 131 Md. App. 402, 418-19 (2000).

142 Md. App. at 446 (emphasis added).

Accordingly, the 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.

Tortious Interference With Contract (Count Three)

"A claim for tortious interference with contract requires that the defendant know of an existing contract and engage in improper conduct to induce a third party's breach of that contract." *Mixter v. Farmer*, 215 Md. App. 536, 548 (2013) (citing *Orfanos v. Athenian Inc.*, 66 Md. App. 507, 520–21 (1986)). In *Fowler v. Printers II, Inc.*, 89 Md. App. 448, 466 (1991), we stated: "This tort has five elements: (1) existence of a contract between the plaintiff and a third party; (2) defendant's knowledge of that contract; (3) defendant's intentional interference with that contract; (4) breach of that contract by the third party; and (5) resulting damages to the plaintiff."

In *Orfanos*, *supra*, Judge Wilner explained:

> The tort, as it exists in Maryland, has been described thusly: "a third party who, without legal justification, intentionally interferes with the rights of a party to a contract, or induces a breach thereof, is liable in tort to the injured contracting party." *Wilmington Trust Co. v. Clark,* 289 Md. 313, 329, 424 A.2d 744 (1981); *Natural Design, Inc. v. Rouse Co.,* 302 Md. 47, 485 A.2d 663 (1984); *Vane v. Nocella,* 303 Md. 362, 383 n. 6, 494 A.2d 181 (1985). This is not substantially different from the description set forth in Restatement (Second) of Torts § 766:

"One who intentionally and improperly interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract."

The point at issue here is whether, assuming the facts to be as averred, Dr. Christians acted "without legal justification" or, as stated in the Restatement, *supra,* "improperly" in attempting by judicial action, to block the payment to Athenian, Inc., and thus to interfere with Athenian's rights under its insurance contract. There can be little doubt that the other elements of the tort — an existing contract and intentional interference with Athenian's rights under it — have at least been pled. The question is whether Dr. Christians' acts were without legal justification and thus improper.

In this regard, Restatement (Second) of Torts § 767 is instructive. It provides:

"In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:

(a) the nature of the actor's conduct,
(b) the actor's motive,
(c) the interests of the other with which the actor's conduct interferes,
(d) the interests sought to be advanced by the actor,
(e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
(f) the proximity or remoteness of the actor's conduct to the interference and
(g) the relations between the parties."

In Comment k to § 766, the Restatement notes that "[t]here is no technical requirement as to the kind of conduct that may result in interference with the third party's performance of the contract." Several methods are discussed in a Comment to clause (a) of § 767, among them the prosecution of civil suits. That Comment states, in relevant part:

> "In a very early instance of liability for intentional interference, the means of inducement employed were threats of 'mayhem and suits,' and both types of threats were deemed

> tortious. Litigation and **the threat of litigation** are powerful weapons. When wrongfully instituted, litigation entails harmful consequences to the public interest in judicial administration as well as to the actor's adversaries. **The use of these weapons of inducement is ordinarily wrongful if the actor** has no belief in the merit of the litigation *or if,* ***though having some belief in its merit, he nevertheless institutes or threatens to institute the litigation in bad faith, intending only to harass the third parties and not to bring his claim to definitive adjudication.*** (See §§ 674–681B)." (Emphasis added.)

66 Md. App. at 520–22 (bold emphasis added).

Here, Dr. Christian's claim stemmed in part from appellees' communications with Dr. Christian's new employer, Greater Washington Maternal-Fetal Medicine and Genetics, P.A., warning that the employment agreement entered into between Greater Washington and Dr. Christian on March 7, 2007, and Dr. Christian's work activities at Holy Cross Hospital pursuant to that agreement, violated the Non-Compete Provision.[1]

[1] The letter, dated March 12, 2007, provides, in part: "As you may be aware, Dr. Stanley Christian remains subject to a contractual covenant not to compete with MFMA. This covenant not to compete specifically precludes Dr. Stanley-Christian from engaging in the practice of medicine in certain areas in and around Washington[,] D.C., including Montgomery County, Maryland. . . . Please be advised, therefore, that Dr. Stanley-Christian's employment with your practice violates the terms of her Employment Agreement with MFMA. Accordingly, demand is hereby made for you to either refrain from employing Dr. Stanley-Christian or to immediately terminate and discontinue her employment with your practice. In the event that you employ or continue to employ Dr. Stanley-Christian, MFMA will have no other choice but to institute legal proceedings to enjoin and restrain her employment with you."

In finding that this claim lacked substantial justification, the circuit court concluded: "MFMA was justified in enforcing the parties' restrictive covenant. . . . At the very least, the Defendant had reasonable grounds to notify the other employer that this non-compete clause existed. Dr. Christian therefore did not have substantial justification to bring forth this claim."

But, the jury found in favor of Dr. Christian, and against Maternal-Fetal, on its claim that she had violated the Non-Compete Provision. And the fact that Maternal-Fetal may have "had reasonable grounds" to seek enforcement of the covenant against competition does not mean that Dr. Christian had no substantial justification to assert that the restriction was unenforceable. *Cf. Ecology Services, Inc. v. Clym Environmental Services, LLC*, 181 Md. App. 1, 24 (2008) (noting that many "factors . . . go into the process of determining whether the non-competition covenants are unenforceable as a matter of law"). Although we affirmed the trial court's conclusion that the covenant in this case was enforceable, Dr. Christian's arguments to the contrary were not frivolous. And, as the Court of Appeals said in *Newman v. Reilly*, 314 Md. 364, 380 (1988): "'Rule 1-341 is not intended to penalize a party and/or counsel for asserting a colorable claim or defense.' *Yamaner* [*v. Orkin*], 313 Md. [508] at 516, 545 A.2d at 1349 [(1988)]."

Dr. Christian contends: "[J]ust because the trial court held that Maryland medical ethical rules did not have the force of law, does not mean that Dr[.] Christian acted in bad faith [or without substantial justification] in asserting that they did or at least could under

the circumstances presented in this case." Dr. Christian's reference to "the medical ethical rules" refers to an opinion of the MedChi that states:

> Restrictive covenants are unethical if they are excessive in geographic scope or duration in the circumstances presented, or if they fail to make reasonable accommodation of patients' choice of physician. Restrictive covenants which prevent a physician from treating patients in a hospital or freestanding ambulatory care facility violates the public interest.

The Non-Compete Provision provides:

> [T]he Employee expressly covenants and agrees that during the term of this Agreement and upon the termination of Employee's employment with the Company . . . whether voluntarily or involuntarily . . . the Employee will not, directly or indirectly, (1) engage in the practice . . . of medicine . . . in Montgomery County the North West section of Washington, D.C. and/or within twenty (20) miles of . . . any office from which the Company currently provides medical services . . . in each case for a period of twenty-four (24) months following the date of such termination, ...

On its face, this covenant prohibits Dr. Christian from practicing medicine in any capacity in a fairly broad geographical territory regardless of whether she would be taking any unfair advantage of contacts or information she gained while employed by Maternal-Fetal, and regardless of whether Dr. Christian's subsequent employment had any economic impact whatsoever upon Maternal-Fetal or Dr. Hamersley.

In our opinion in the previous appeal, Judge Kehoe explained that Dr. Christian had met her burden of production on her claim that appellees' breach of the Employment Agreement, if found, would release Dr. Christian from her obligations under the Non-Compete Provision. Moreover, although we affirmed the trial court's ruling that the restrictive covenant was enforceable, Dr. Christian's claim that it was excessively broad in geographical scope and total prohibition against the practice of medicine was not

unsupported by legal authority. Generally, a restrictive covenant may be enforced only if it is appropriately tailored to protect a legitimate interest of the employer, *Becker v. Bailey*, 268 Md. 93, 97 (1973), and the harm to Maternal-Fetal that would be caused by Dr. Christian's engagement to treat uninsured indigent patients at a clinic is not immediately apparent. Dr. Christian argues that, if she had succeeded in arguing that the non-compete provisions were overbroad and unenforceable, then her employment with Greater Washington was valid, and appellees' interference with the same was tortious. Similarly, appellees' communication with another prospective employer was potentially problematic.

Even though the court ruled against Dr. Christian on the merits of her claim, her arguments were neither absurd nor totally lacking any chance of success. Consequently, the trial court's finding that the tortious interference with contract claim lacked substantial justification was clearly erroneous. Whether the Non-Compete Provision was enforceable with respect to Dr. Christian's employment at Greater Washington was a legitimate legal question for her to raise and pursue. Consequently, the claim of tortious interference was not without substantial justification.

Wrongful Termination/Constructive Discharge (Count Four)

In concluding that the claim for wrongful termination (constructive discharge) (Count Four) lacked substantial justification, the trial judge stated:

> Dr. Christian claimed that the conditions at MFMA were so intolerable that she had to leave; however, she was willing to remain and purchase half of the practice if her financial conditions were met. Clearly the conditions were not so intolerable that a reasonable person in her position would leave because she was negotiating to stay if her demands were met. Consequently,

> the evidence presented by Dr. Christian was not even close to the standard required for a constructive discharge claim.

In our previous opinion, we concluded that there was no error in granting Maternal-Fetal's motion for judgment on this claim:

> Based on our review of the record, unassisted by citations to that record by Christian because there are none, we conclude that the court properly granted Maternal-Fetal's motion for judgment. In an action for constructive discharge, the plaintiff has the burden to prove that the "employer deliberately caused or allow[ed] the employee's working conditions to become so intolerable that the employee is forced into an involuntary resignation." *Williams v. Maryland Dep't of Human Resources*, 136 Md. App. 153, 178 (2000) (internal quotations omitted) (quoting *Beye v. Bureau of Nat'l Affairs*, 59 Md. App. 642, 650, *cert. denied*, 301 Md. 639 (1984)). The facts before the court were as follows: In Christian's opinion, the billing practices at Maternal-Fetal were improper and illegal. Christian was not qualified as an expert. Christian presented no expert in support of this contention. Christian also did not rebut the testimony of Dr. Roche, Maternal-Fetal and Hamersley's medical billing and coding expert, that there was no impropriety. Moreover, by Christian's own testimony, she wanted to stay at Maternal-Fetal and proposed to amend the Agreement for that reason. Of the proposed amendments, only one referred to Maternal-Fetal's billing practices. Christian's other amendments were not focused on billing practices, but instead targeted her own economic aspirations. Hamersley declined to amend the Agreement. Baker, the office manager at Maternal-Fetal, testified that the work environment at the clinic was "happy" and one founded on "mutual respect" among the employees and that she had never witnessed Hamersley and Christian have an altercation or hostile incident at the practice.
>
> From this, **we determine that there was not even slight evidence to generate a jury question as to whether Maternal-Fetal "deliberately cause[d] or allow[ed] [Christian's] working conditions to become so intolerable that [she was] forced into an involuntary resignation."** *Williams*, 136 Md. App. at 178.

Maternal-Fetal Medicine Associates of Md., LLC. v. Heather Stanley-Christian, No. 0967, September Term, 2009 (filed July 24, 2013), Slip op. at 43–45.

Accordingly, the trial judge did not err in finding that there was no substantial justification for the constructive discharge claim.

Negligent Misrepresentation (Count Five)

In Count Five of the amended complaint, Dr. Christian asserted a claim for negligent misrepresentation, stating: "[t]he Defendants, once making statements to Dr. Stanley Christian when she sought employment, owed a duty of care to Plaintiff not to omit material information in those discussions," and that "Defendants, as well as anyone in the medical professional, had knowledge that Plaintiff would rely on the material omissions concerning billing, patient care, and practice, which if erroneous would cause her loss or injury." In the memorandum opinion explaining the award of attorney's fees, on remand, the circuit court judge found: "Similar to the issue of Fraud in the Inducement, Dr. Christian failed to plead or prove any facts to support a claim of Negligent Misrepresentation. There is no evidence that Dr. Hamersley intended Dr. Christian to act on any omission or negligent misrepresentation."

In *Goldstein v. Miles*, 159 Md. App. 403, 435 (2004), we listed the elements of a claim for negligent misrepresentation as follows:

> (1) the defendant, owing a duty of care to the plaintiff, negligently assert[ed] a false statement;
>
> (2) the defendant intend[ed] that his statement [would] be acted upon by the plaintiff;
>
> (3) the defendant ha[d] knowledge that the plaintiff [would] probably rely on the statement, which, if erroneous, [would] cause loss or injury;

> (4) the plaintiff, justifiably, [took] action in reliance on the statement; and
>
> (5) the plaintiff suffer[ed] damage proximately caused by the defendant's negligence.

Id. at 435 (quoting *Martens Chevrolet, Inc. v. Seney*, 292 Md. 328, 337 (1982)) (alterations added in *Goldstein*).

As we concluded previously in our discussion of Dr. Christian's claim of fraud in the inducement, the conclusory allegations in this count were not supported by evidence of false representations upon which Dr. Christian justifiably relied to her detriment. And, in our opinion in the previous appeal, we observed that Dr. Christian had not identified for us the material misrepresentations that might support this count. We said:

> Christian contends that the circuit court erred by granting summary judgment in favor of Maternal-Fetal and Hamersley on her claim for negligent misrepresentation. To make this argument to this Court, Christian provides a one sentence argument on this issue, apart from citation and defining the tort. Christian argues: "Here the relationship developed between the parties and the omissions of billing practices should have sent the question to the jury." Christian does not provide any citation to the record extract as to her factual assertions and we will not cull the record to supplement her argument.

Slip op. at 40. Accordingly, the trial judge did not err in concluding that there was no substantial justification for this count.

Declaratory Judgment (Six)

In Count Six of the amended complaint, Dr. Christian sought a declaration that the Non-Compete Provision was unenforceable with respect to her employment at Holy Cross Hospital's Perinatal Diagnostic Clinic, "a charitable facility operated by Holy Cross Hospital and staffed by Greater Washington." Slip op. at 6. "[A] declaratory judgment action is a proper vehicle to determine the validity of a contract[.]" *Young v. Anne Arundel Cty.*, 146 Md. App. 526, 595 (2002).

As noted above, the breadth of the Non-Compete Provision gives rise to a colorable legal argument that it is not enforceable on its face, let alone as applied to Dr. Christian's work treating uninsured indigent patients at a clinic. Moreover, our previous conclusion in the first appeal that there was sufficient evidence for the trial court to instruct the jury as to a material breach of contract by the appellees, and the jury's verdict in favor of Dr. Christian on Maternal-Fetal's claim asserting breach of the Non-Compete Provision, support our conclusion that Dr. Christian had a reasonable basis for seeking a declaration of her rights and obligations under the Non-Compete Provision.

Consequently, the trial court was clearly erroneous in concluding that there was no substantial justification for Dr. Christian seeking a declaratory judgment on the enforceability of the restrictive covenant.

Remand Required

"Rule 1-341 sanctions are judicially guided missiles pointed at those who proceed in the courts without any colorable right to do so." *Legal Aid Bureau, Inc. v. Bishop's Garth Associates Ltd. P'ship*, 75 Md. App. 214, 224 (1988).

We have stated that, "[w]here the trial court's grant of sanctions was at least partially in error, we have remanded the case for findings by the lower court as to whether and to what extent fees should have been granted." *Fowler v. Printers II, Inc.*, 89 Md. App. 448, 487 (1991) (citing *Miller v. Miller*, 70 Md. App. 1, 13 (1987)). For instance, in *Beery v. Maryland Medical Laboratory, Inc.*, 89 Md. App. 81, 102 (1991), we vacated a judgment for attorney's fees and remanded the case to the circuit court for additional development of the record. We explained:

> [W]e must vacate the judgment for attorney's fees and remand for a determination of what part of appellees's claimed expenses and attorney's fees are specifically attributable to the unjustified maintenance of meritless claims, provided counsel can establish what portions of their fees are specifically attributable to that conduct.
>
> * * *
>
> In reaching that determination, the court must be guided by the principle that an award of counsel fees pursuant to Rule 1-341, despite our occasional use of the word "sanction," is not punitive but is intended merely to compensate the aggrieved party for their reasonable costs and expenses, including reasonable attorney's fees, actually incurred in opposing the unjustified or bad faith conduct. As in any other judicial proceeding, the party seeking relief has the burden of establishing his entitlement to that relief. 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 difficult 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.**
>
> From a practical standpoint, the major item of expense incurred in opposing an unjustified claim or defense will almost always be the attorney's fee, and in most cases these days that fee will be based upon "billable hours" expenses by the attorney. **An attorney who intends to claim compensation under Rule 1-341 for defending a multiple-count claim in which at least one count has 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. A *post facto* arbitrary apportionment of generalized time records will not suffice.**

89 Md. App. at 101–02 (emphasis added).

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.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY VACATED. CASE REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEES.