Circuit Court for Montgomery County
Case No. 458028-V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 233

September Term, 2020

GALINA RAKITYANSKAYA

v.

LESLIE SCOTT BLEVINS

Gould,
Ripken,
Eyler, Deborah S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Ripken, J.

Filed: August 6, 2021

Galina Rakityanskaya ("Rakityanskaya") appeals the grant, by the Circuit Court for Montgomery County, of (1) a motion to disqualify her attorney from representing her in a civil lawsuit that she had filed against Leslie Scott Blevins ("Blevins") and (2) an award of attorneys' fees incurred in connection with the preparation and presentation of the motion to disqualify. For the reasons that follow, we hold that the circuit court did not err or abuse its discretion in its rulings. We shall affirm the circuit court's orders.

FACTUAL AND PROCEDURAL BACKGROUND

In 2018, Rakityanskaya, a licensed attorney in Maryland, represented Blevins's wife in the couple's divorce action. The proceedings became acrimonious. Blevins filed a criminal application for a statement of charges against Rakityanskaya, which resulted in her being charged with the crime of perjury. Rakityanskaya engaged Dmitri Chernov ("Chernov"), an attorney with whom she shared office space, to defend her in the criminal action. The State ultimately *nolle prossed* the perjury charge.

In November 2018, Rakityanskaya, again represented by Chernov, filed a civil lawsuit against Blevins. Rakityanskaya's complaint included counts of malicious prosecution, abuse of process, malicious use of process, and intentional infliction of emotional distress, all related to Blevins's instigation of the criminal case.

Blevins filed an answer to Rakityanskaya's complaint, and the case continued to the discovery phase. In response to Blevins's interrogatory seeking the names of "all persons having personal knowledge of facts material to this case," and the nature of each person's knowledge, Rakityanskaya included her attorney, Dmitri Chernov, detailing that he had represented her in court in relation to the criminal matter. In her answer to the next

interrogatory, which requested the identification of persons she intended to call as expert witnesses at trial, Rakityanskaya referred to the same people she had identified in her preceding answer, including Chernov.[1]

Blevins, through his attorney, then filed a motion to disqualify Chernov as Rakityanskaya's attorney, on the ground that Rakityanskaya, in her answers to interrogatories, had acknowledged that Chernov had personal knowledge of facts material to the case and that he might be called as an expert witness at trial. Because Chernov was listed as a fact witness and an expert witness subject to examination, Blevins continued, Chernov's representation of Rakityanskaya as her attorney violated Maryland Rule 19-303.7.[2] In addition to his request that the court disqualify Chernov as Rakityanskaya's

[1] Rakityanskaya affirmed, under penalty of perjury, that her answers to interrogatories were true, and Chernov made the same affirmation "[a]s to objections."

[2] Rule 19-303.7 states:

> (a) An attorney shall not act as advocate at a trial in which the attorney is likely to be a necessary witness unless:
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> > (1) the testimony relates to an uncontested issue;
> > (2) the testimony relates to the nature and value of legal services rendered in the case; or
> > (3) disqualification of the attorney would work substantial hardship on the client.
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> (b) An attorney may act as advocate in a trial in which another attorney in the attorney's firm is likely to be called as a witness unless precluded from doing so by Rule 19-301.7 (1.7) or Rule 19-301.9 (1.9).

attorney, Blevins sought monetary sanctions, if the court believed that to be an appropriate remedy.[3]

In her response to Blevins's motion, Rakityanskaya, again through Chernov, agreed that Chernov had represented her in the criminal matter that formed the basis of the civil suit. However, she claimed that he was not "a witness to most of this at all." According to Rakityanskaya, Chernov had done nothing more than: (1) accept service of the summons for her in the criminal case; (2) send a letter to the State's Attorney's Office asking that the charges be dropped; and (3) invoice her $1,225 for those services.

Despite acknowledging that Chernov might be a witness in the civil matter, Rakityanskaya denied that he was "*likely* to be a *necessary* witness" because there was no genuine controversy about the fact that she had been criminally charged. (Emphasis in original). In addition, she claimed that Chernov's disqualification, at that stage of the litigation, would work a substantial hardship on her.

The circuit court held a hearing on Blevins's motion to disqualify on October 10, 2019. Blevins's counsel argued that Rule 19-303.7, which prohibits an attorney from acting as an advocate at a trial in which the attorney is likely to be a necessary witness, required Chernov's disqualification because none of the exceptions set forth in the Rule applied to the facts of the matter. Blevins's counsel averred that combining the roles of advocate and

[3] Blevins's attorney later filed an affidavit in support of his claim for attorneys' fees, stating that he had spent 11.59 hours, at $300 per hour, working on the matter, for a total of $3,477. His co-counsel also submitted an affidavit, claiming an additional $3,531.49, for a total claim of $7,008.49 for the preparation of the 15-page motion to disqualify.

witness, particularly in a jury trial, would prejudice both Blevins and the court and would create a conflict of interest between Rakityanskaya and her attorney.

In response, Chernov contended that Rule 19-303.7 precluded an attorney from acting as both witness and counsel at *trial*, but it did not require his disqualification from representing his client *entirely*. He went on to explain that the Rule would only require his disqualification if the defense intended to call him as a necessary witness. He expounded that he did not expect to be a witness for Rakityanskaya at the trial or during any deposition.

The circuit court found that Chernov was "clearly aware of the fact of a potential conflict between [his] role as a lawyer and as a witness" because he had identified himself as a fact witness in Rakityanskaya's answers to interrogatories. Therefore, the court placed the burden on Chernov to identify an exception to Rule 19-303.7 that would preclude his disqualification.

Chernov reiterated that he was not a necessary witness and was not likely to be a witness at all. In addition, he continued, the only issues about which he could testify, if called, were his undisputed role in the request that the State's Attorney's Office terminate its prosecution of Rakityanskaya for perjury, and the value of his legal services. Because the civil case had been pending for a year, Chernov reiterated, his disqualification would work a substantial hardship on Rakityanskaya.

The circuit court ruled:

> So, based upon what has been filed here, first we have the answers to interrogatories that have been filed on behalf of the plaintiff, signed under oath by the plaintiff who is a lawyer, and also signed by counsel in this case, and in answer to interrogatory number seven, Mr. Chernov is identified as a person with knowledge, having personal knowledge of the facts material to

> this case, not immaterial but facts material to the case, and then state the relationship to the parties and give the nature of each person's knowledge, and then in number eight, he's also identified as a person who is an expert witness.
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> I guess there's been no expert witness disclosure beyond that but in answers to interrogatories, he's identified as a person who has the facts that are material and also an expert witness. It's pretty clear from the rule that at this point, he is a person who would likely be a witness in this case which clearly violates the ethical rules and so at this point under this case, the burden shifts to counsel to identify which exception under this 19-303.7 would apply and clearly there are none, and so at this point, I'll grant the motion to disqualify Mr. Chernov in this case at this point.

In response to Chernov's request for clarification as to whether the court was disqualifying him from representing Rakityanskaya at trial or in the case entirely, the court explained that he was disqualified from representing her altogether in this matter. The court also indicated it would, at a later time, consider Blevin's request for attorneys' fees related to the preparation of, and representation during the hearing on, the motion. The court filed its written order on November 7, 2019.

On March 6, 2020, Rakityanskaya voluntarily dismissed her lawsuit pursuant to Rule 2-506(a).[4] On March 9, 2020, the circuit court reconvened the parties on the one

[4] Rule 2-506(a) states:

> [e]xcept as otherwise provided in these rules or by statute, a party who has filed a complaint, counterclaim, cross-claim, or third-party claim may dismiss all or part of the claim without leave of court by filing . . . a stipulation of dismissal signed by all parties to the claim being dismissed.

remaining issue in the matter—Blevins's request for reasonable attorneys' fees related to the motion to disqualify.[5] The court ruled:

> So we turn now to the defendant's motion to disqualify plaintiff's counsel. And the defense attorney has asked for a total of $7,008.49 and had submitted affidavits in support of that. Each attorney here—[Blevins's counsel] apparently each are requesting monies for 21 hours of work related to that motion. Again, I don't think it's a—there's a rule associated with attorneys appearing as witnesses. It's Maryland Rule 19-303.7. When you look at some of the factors the Court must consider in deciding whether or not to award fees, again, I'm going to consider things such as the time and labor required, the novelty or difficulty of the question. I can't imagine for a minute that this was a novel or difficult question. It is obvious that Mr. Chernov listed himself as a witness. He listed himself as an expert witness on top of just being a lay witness. And then he asked to be counsel of record. It's clear Maryland Rule 19-303.7 forbids that.

The court then reasoned that because Blevins's counsel was "forced to come to court and forced to have a hearing" as a result of Chernov's reluctance to admit there was a rule violation, attorneys' fees were warranted. However, in addressing the amount requested, the court noted that the issue was not novel or intricate. The court thus reduced the attorneys' fees to half the amount requested and awarded $3,500 "for the filing of and the defense of the motion to recuse counsel."

[5] Blevins's counsel had also requested attorneys' fees related to the drafting of a motion to compel discovery, but the court denied that request, and that issue is not pertinent to this appeal.

The court allowed Rakityanskaya six months to pay the amount due before it entered a judgment against her. Rakityanskaya filed a timely notice of appeal after the court entered its written order.[6]

ISSUES PRESENTED FOR REVIEW

Rakityanskaya presents two issues for our review:

I. Whether the circuit court erred in disqualifying [Rakityanskaya's] counsel in the underlying proceeding?

II. Whether the circuit court erred in awarding [Blevins's attorneys] sanctions of $3,500.00?

DISCUSSION

Rakityanskaya contends that the circuit court erred in granting Blevins's motion to disqualify Chernov from acting as her attorney in the civil matter because Chernov was not a necessary witness at trial, and Blevins had not demonstrated that Chernov would have provided material evidence not obtainable elsewhere. In her view, the court should not have

[6] In a bizarre turn of events, Rakityanskaya, or someone purporting to be Rakityanskaya, filed a notice of dismissal of her appeal on July 14, 2020, and this Court dismissed the appeal by mandate dated July 21, 2020. On August 7, 2020, Rakityanskaya moved to strike the dismissal of the appeal and have it reinstated, alleging that she had not filed the notice of dismissal and that it had been forged. We struck the notice of dismissal of the appeal and our mandate on September 17, 2020.

In October 2020, Blevins's attorney, who had withdrawn his appearance on behalf of Blevins, notified the circuit court that a woman claiming to be Blevins's sister had emailed him to advise that Blevins had died in Colorado, but she did not provide the death certificate he requested, and he could not vouch for the validity of the email or confirm Blevins's death. We therefore stayed the appeal and suspended all deadlines for 60 days to permit an appropriate party to be substituted for Blevins, if necessary. No such timely request was received, so we lifted the stay order on January 5, 2021, and ordered the appeal to proceed. Despite Rakityanskaya's claim that news of Blevins's death "may be exaggerated," Blevins did not file a brief.

disqualified Chernov at all, but if it were permitted to do so, it should only have precluded Chernov from representing her during the trial of the matter, not during pre-trial and post-trial procedures. And, because the court improvidently granted Blevins's motion to disqualify Chernov, Rakityanskaya concludes, it further erred in awarding Blevins attorneys' fees in relation to the preparation and presentation of the motion to disqualify because she had not acted in bad faith or with lack of justification in opposing the motion to disqualify.[7]

I. THE COURT DID NOT ERR IN DISQUALIFYING CHERNOV IN THE UNDERLYING PROCEEDING.

This Court reviews the circuit court's factual findings regarding disqualification for clear error and its ultimate decision whether to disqualify counsel for abuse of discretion. *Klupt v. Krongard*, 126 Md. App. 179, 204 (1999). In deciding whether the circuit court's factual findings were supported by substantial evidence in the record, we view all the evidence "'in a light most favorable to the prevailing party.'" *Goss v. C.A.N. Wildlife Trust, Inc.*, 157 Md. App. 447, 455–56 (2004) (quoting *GMC v. Schmitz*, 362 Md. 299, 234 (2001)).

In *Klupt v. Krongard*, we explained the procedure the circuit court must follow in deciding a motion to disqualify opposing counsel. 126 Md. App. at 203. "First, the moving party must identify a specific violation of a Rule of Professional Conduct." *Id.* If a violation is identified, "the court must determine whether there was an actual violation of the

[7] As Rakityanskaya acknowledges in her brief, her dismissal of the lawsuit would render her appeal relating to her attorney's disqualification moot were it not for the circuit court's award of attorneys' fees in relation to the motion.

rule." *Id*. If the circuit court finds a violation of an ethical rule, it is then within the court's discretion whether to impose the sanction of disqualification. *Id*.

To reiterate, Rule 19-303.7 provides, in pertinent part:

> (a) An attorney shall not act as advocate at a trial in which the attorney is likely to be a necessary witness unless:
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> > (1) the testimony relates to an uncontested issue;
> > (2) the testimony relates to the nature and value of legal services rendered in the case; or
> > (3) disqualification of the attorney would work substantial hardship on the client.

The Comments following the Rule explain the policy behind it: "[c]ombining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the attorney and client." Rule 19-303.7 cmt. 1. In other words, an opposing party has a proper objection when the combination of the attorney's roles may prejudice that party's rights in the litigation because "'[a] witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.'" *Klupt*, 126 Md. App. at 206 (quoting Rule 19-303.7 cmt. 2). While the burden is usually on the party arguing for disqualification to show why disqualification is proper, when the opposing attorney *knows* of the potential of being called as a witness, the onus is on him or her to show that an exception to the Rule should apply. *Id.* at 207–08.

Permitting Chernov to act as Rakityanskaya's attorney would clearly violate Rule 19-303.7 because Chernov, having represented Rakityanskaya in the criminal matter, was

likely a necessary witness at the civil trial based on Blevins's instigation of the criminal investigation. Moreover, Chernov was well aware of the likelihood that he would be a trial witness because he assisted Rakityanskaya in drafting her answers to interrogatories under oath, and he identified himself as a person having knowledge of the facts and as a potential expert witness. Because Chernov knew that his testimony would likely be required at trial, the circuit court properly shifted the burden to him to show that one of the exceptions to Rule 19-303.7 applied.

In attempting to provide a reason why an exception to Rule 19-303.7 should apply, Chernov simply stated that he was not a necessary witness and was unlikely to be a witness at all. Chernov argued this was so because the only issues on which he could testify if called were his uncontested role in the request that the State's Attorney's Office terminate its prosecution of Rakityanskaya for perjury and the value of his legal services. First, whether Chernov was necessary or likely to be called was not at issue because Chernov had knowledge that Rakityanskaya previously identified him as a potential lay and expert witness, thus Rule 19-303.7 applied. Second, the facts of the underlying criminal matter were undoubtedly relevant to the civil suit.

Chernov also argued, and Rakityanskaya maintains on appeal, that his disqualification would be a substantial hardship on Rakityanskaya because the lawsuit had "progressed passed midpoint" at the time Chernov was disqualified. She provides no basis for which we can conclude that she was unable to engage another attorney to represent her following Chernov's disqualification. We perceive no substantial hardship to Rakityanskaya in the disqualification of Chernov. *See Abrishamian v. Wash. Med. Grp.,*

P.C., 216 Md. App. 386, 408 (2014) (holding the circuit court did not err in disqualifying counsel when the party for whom counsel represented had "more than enough time before trial to secure other counsel[.]").

Rakityanskaya also avers that the circuit court should have limited its disqualification of Chernov to his role at trial, rather than entirely. While Rule 19-303.7 may technically apply to disqualify "an advocate at a trial," we note that, in *Klupt*, we upheld the circuit court's disqualification of counsel almost immediately after he entered his appearance, well before trial. 126 Md. App. at 189. In fact, the same issue was raised in *Abrishamian v. Wash. Med. Grp., P.C.* In that case, we explained that *Klupt* "did not suggest that any sort of piecemeal disqualification at the trial level would have been appropriate[.]" *Abrishamian*, 216 Md. App. at 408. Rather, we held that "[d]isqualification of counsel at the trial level can extend to any aspect of the litigation the circuit court deems appropriate under the circumstances, and the circuit court properly prohibited [the disqualified attorney's] involvement in discovery as well as at trial[.]" *Id.* So too here, given the clear conflict of interest between Chernov and Rakityanskaya, the circuit court did not err in disqualifying Chernov from all matters in this case.

We therefore perceive no clear error in the circuit court's factual determinations regarding Chernov's disqualification, nor an abuse of discretion in its ultimate decision to disqualify him from representing Rakityanskaya in the civil matter.

II. THE COURT DID NOT ERR IN AWARDING ATTORNEYS' FEES TO BLEVINS'S COUNSEL.

We next turn to Rakityanskaya's claim that the circuit court erred in awarding Blevins attorneys' fees in relation to the preparation and presentation of the motion to disqualify. According to Rakityanskaya, attorneys' fees were unjustified because there was no bad faith on the part of Chernov in opposing the motion to disqualify, and there was substantial justification to do so.

The existence of bad faith or lack of substantial justification as contemplated by Rule 1-341 is a question of fact we review for clear error. *Johnson v. Baker*, 84 Md. App. 521, 528 (1990). If the circuit court has awarded attorneys' fees, we will not disturb the imposed sanction unless the court abused its discretion. *Id.* at 529.We generally leave the determination of the amount of the award under Rule 1-341 to the discretion of the circuit court, according to its "own knowledge of the case and the legal effort and expertise required" and the affidavits of the parties. *Id.* at 543 (quoting *Century 1 Condo. Ass'n, v. Plaza Cond. Joint Venture*, 64 Md. App. 107, 121–22 (1985)). "Since compensation is the goal, the test of an appropriate sanction is determined by what constitutes a reasonable amount for counsel fees." *Jenkins v. Cameron & Hornbostel*, 91 Md. App. 316, 336 (1992).

Under the so-called "American Rule," litigants generally pay their own attorneys' fees, regardless of the lawsuit's outcome. *Johnson*, 84 Md. App. at 527. "Exceptions to the American Rule are premised on underlying equitable or policy considerations which support the need for such recovery." *Garcia v. Foulger Pratt Dev., Inc.*, 155 Md. App. 634, 660–61 (2003).

Rule 1-341 provides one such "limited exception" to the American Rule. *Johnson,* 84 Md. App. at 527. The Rule outlines the circumstances in which the circuit court may require a party and/or that party's attorney to pay the adverse party's costs of litigation, including attorneys' fees:

> (a) **Remedial Authority of 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.

"Rule 1-341 sanctions are judicially guided missiles pointed at those who proceed in the courts without any colorable right to do so." *Parler & Wobber v. Miles & Stockbridge*, 359 Md. 671, 706 (2000) (quoting *Legal Aid Bureau, Inc. v. Bishop's Garth Assoc. Ltd. P'ship*, 75 Md. App. 214, 224 (1988)). However, an award of sanctions under Rule 1-341 is compensatory rather than punitive; the purpose "is to put the wronged party in the same position as if the offending conduct had not occurred." *Kilsheimer v. Dewberry & Davis*, 106 Md. App. 600, 622 (1995); s*ee also In re Chaires*, 249 B.R. 101, 105 (Bankr. D. Md. 2000) ("The remedy under Rule 1-341 is to award to the adverse party reasonable expenses, including reasonable attorneys' fees, incurred by the adverse party in opposing the objectionable proceeding. This standard makes the adverse party whole with respect to the cost of a proceeding which should not have been endured, and it is, in that sense, compensatory.").

Here, the circuit court ruled that "[i]t's clear that Maryland Rule 19-303.7 forbids" Chernov from acting as Rakityanskaya's attorney after identifying himself as a potential

lay and expert witness. In commenting that Chernov refused to acknowledge he was in violation of the Rule and to withdraw voluntarily his appearance in Rakityanskaya's lawsuit, the court implicitly found he acted either in bad faith or without substantial justification in continuing his representation and in forcing opposing counsel to draft a motion to disqualify and participate in a hearing on the motion. We discern no clear error in that finding.

The circuit court then determined the reasonable amount of attorneys' fees, explaining that the creation of the motion to disqualify and appearance in court was not a novel or difficult question. Therefore, the court found that, despite Blevins's counsel's affidavits supporting fees of approximately $7,000, a more reasonable award would be half of that, or $3,500 based on the nature of the motions. We cannot say that the court's award was unreasonable or that it abused its discretion in awarding Blevins attorneys' fees in that amount.

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