Circuit Court for Prince George's County
Case No. CAL 14-11830

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 525

September Term, 2016

TODD ALLAN MAILING, LLC, *ET. AL.*

v.

CRAIG HOLCOMB

Woodward, C.J.,
Friedman,
Sharer, J., Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: February 23, 2018

Appellants, Todd Allan Mailing, LLC (TAM), David Burke (Burke) and their attorney Dana Paul (Paul), seek review of an order of the Circuit Court for Prince George's County granting appellee, Craig Holcomb's (Holcomb), motion for sanctions and award of attorney's fees.

TAM and Burke had filed an action for claims of Debt and Fraudulent Conveyance, which was amended several times to include a total of nine defendants. The third amended complaint added a claim against Holcomb for tortious interference with a business relationship between Burke and his employer. Multiple motions for summary judgment were filed by the various defendants, all of which were granted against TAM and Burke. TAM and Burke moved to alter or amend the summary judgment awards, which was summarily denied. As a result of the entry of summary judgment in his favor, Holcomb moved for sanctions against Burke, and his attorney, Paul, which the court granted, awarding Holcomb $10,248 in attorneys' fees.

Appellants present two questions for our review:

1. Did the trial court err by finding that the proceeding was maintained in bad faith?

2. Did the trial court abuse its discretion in awarding attorney's fees as sanctions?

Finding no error, we shall affirm the grant of summary judgment. Nonetheless, we will remand with instructions for the circuit court to recalculate the amount of attorneys' fees.

BACKGROUND

Prior Litigation

TAM and Burke have been involved in a protracted course of litigation with several of the named defendants, particularly with Todd Allan Printing Company, Inc. (TAPCO) and Allan Kullen, since 2009. The various lawsuits, filed in both Delaware and Maryland state courts, dealt primarily with breach of contract causes of action. On March 21, 2014, TAM and Burke obtained a consent judgment against TAPCO, which prompted post-judgment enforcement efforts. As a result of the post-judgment enforcement efforts, TAM and Burke learned for the first time that TAPCO had been sold, in a private foreclosure sale, to its former vice-president, and was now insolvent. That information resulted in TAM filing the lawsuit that underlies this appeal.

Underlying Lawsuit

On May 22, 2014, in order to undo the TAPCO foreclosure sale, TAM filed suit against several named defendants involved in that sale. The lawsuit initially named three defendants and included claims for debt and fraudulent conveyance, but was subsequently amended three times to add Burke as a plaintiff, and six additional defendants, including appellee, Holcomb. Prior to being added as a defendant, Holcomb had been counsel for two of the defendants in the lawsuit. In October 2014, he withdrew as counsel for those defendants following TAM's motion to disqualify him. On April 14, 2015, TAM filed a third amended complaint, which added the additional parties, and also added a claim of tortious interference with a business relationship against Holcomb, the sole claim against him, and his two former clients whom he had represented in the lawsuit prior to being compelled to withdraw.

The tortious interference claim was based on a letter Holcomb had mailed, on behalf of his clients, to Burke's employer five days after TAM filed its original complaint. The letter questioned the legality of Burke's conveyance of certain TAM property that allegedly belonged to Holcomb's clients, as secured lien holders. Holcomb asserted representation of his clients in their attempt to repossess any known business property of TAPCO in order to satisfy its debt owed to them. The letter further stated that there was a settlement agreement executed between TAPCO and Burke, but "indicates that Burke is materially in breach of several provisions of the Settlement Agreement." The alleged breach had occurred when Burke supposedly sold the equipment to Corporate Press, his current employer, as a condition of his employment. The letter claimed that if the foreclosure was found to be invalid, Holcomb's clients would be entitled to repossess the equipment and that "the Secured Lenders may be entitled to damages from the improper employment of Burke by Corporate Press." In closing, the letter explained that in their attempt to investigate the matter, his clients were requesting answers to several questions regarding the sale of the equipment and Burke's employment.

Prior to trial, Holcomb and the remaining[1] defendants filed multiple motions to dismiss or alternatively for summary judgment. Following a hearing, all pending

[1] The action against TAPCO had been stayed pending its bankruptcy, but the claims against it were dismissed by the court during its oral ruling on the other defendants' dispositive motions. A defendant, Marian K. Malasky, was never served so the court dismissed the claims against her.

dispositive motions were granted in an oral ruling on October 2, 2015,[2] against Burke and TAM. As a result, TAM and Burke moved to alter or amend those judgments on October 16, 2015. Shortly thereafter, Holcomb filed a motion for sanctions against Burke and Paul, jointly and severally, alleging the claim against Holcomb was made in bad faith and without substantial justification. The court summarily denied the motion to amend and granted Holcomb's motion for sanctions, awarding him $10,248 in attorneys' fees.

DISCUSSION

Standard of Review

In order for the court to impose sanctions,

> the judge must make two separate findings that are subject to scrutiny under two related standards of appellate review. 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.

Worsham v. Greenfield, 187 Md. App. 323, 342 (2009) (quoting *Inlet Associates v. Harrison Inn Inlet, Inc.*, 324 Md. 254, 267–68 (1991)), *aff'd*, 435 Md. 349 (2013).

For a cause of action "to constitute substantial justification, the parties position should be 'fairly debatable' and 'within the realm of legitimate advocacy.'" *Inlet Associates*, 324 Md. at 268 (quoting *Newman v. Reilly*, 314 Md. 364, 381 (1988)). Additionally, "[a] party acts in bad faith when it acts 'vexatiously, for the purpose of

[2] The "Daily Sheet – Docket Entries" document memorializing the court's oral rulings was entered on October 9, 2015.

harassment or unreasonable delay, or for other improper reasons.'" *State v. Braverman*, 228 Md. App. 239, 262 (quoting *Inlet Associates*, 324 Md. at 268), *cert. denied sub nom. Goldberg v. State*, 450 Md. 115 (2016).

Post-Notice of Appeal Argument

We first take up a procedural matter that arose in appellants' assertion of a new argument not advanced below or in their brief. Essentially, they argue that this Court has the authority to review and, *sua sponte*, grant summary judgment in their favor despite the fact that appellants had not previously moved for summary judgment in the circuit court and had failed to appeal the entry of summary judgment or the court's denial of its motion to alter or amend.[3]

For support, they rely on *Nat'l Union Fire Ins. Co. of Pittsburgh, PA. (NUFI II) v. The Fund for Animals, Inc.*, 451 Md. 431 (2017), which was decided two months prior to the date the present appeal was scheduled for oral argument and which, in relevant part, merely affirmed this Court's intermediate decision in *Fund for Animals, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA. (NUFI I)*, 226 Md. App. 644 (2016), to vacate and remand the circuit court's entry of summary judgment with instructions. *NUFI II*, 451 Md. at 466-67. *See also NUFI I*, 226 Md. App. at 669 n. 12, 670. Appellants' reliance on *NUFI II* is misplaced.

[3] Although appellants mention in their "Civil Appeal Information Report" one of their issues on appeal as being, "was summary judgment correct," they fail to provide this Court with any argument in their brief.

First, in presenting a new argument that had not been made in their brief, and without a motion prior to argument requesting supplemental briefing in light of the *NUFI II* decision, we decline to exercise our revisory authority.

Notwithstanding the affirmance of our decision in *NUFI I* two months before oral argument for the instant appeal, this Court's opinion had been reported on February 1, 2016, seven months before appellants filed their appellate brief. Even if we were inclined to accept appellants' belated argument, it is of no help to them.

In *NUFI I*, at the close of the plaintiff (insured's) case, the defendant (National Union) moved for judgment, which the circuit court granted. *NUFI I*, 226 Md. App. at 658-61. On the insured's appeal of that judgment, this Court found that National Union had failed to show that it had been actually prejudiced by the delayed notice of a related lawsuit, as required by the relevant statute in order to deny coverage. *Id*. at 669. Further, that "[i]n the absence of evidence that there was something National Union could and would have done during the delayed notice period that, more likely than not, would have changed the outcome in the [related] Case, the causal link could not be proven." *Id*. (footnote omitted). Because of that, we held that "the trial court erred by entering judgment in favor of National Union as a matter of law." *Id.* (footnote omitted).

We explained our holding in a footnote, acknowledging that:

> Because the [insured] satisfied its burden of proof on coverage, upon the failure of proof on National Union's late notice defense, the [insured] was entitled to judgment in its favor as a matter of law on liability. If the [insured] had moved for judgment, we would direct the circuit court to enter judgment in its favor on liability. The [insured] did not move for judgment, however. If, on remand, the [insured] moves for summary judgment on liability, the same

> result should obtain. The adequacy of the evidence on damages is not before us on appeal and damages will need to be decided on remand.

NUFI I, 226 Md. App. at 669 n. 12.

In *NUFI II*, the Court of Appeals affirmed, holding that this Court "did not exceed its authority and abuse its discretion, by instructing the trial court on remand to permit the filing and granting of a belated motion for judgment, even though such a motion was never filed at the time of trial." *NUFI II*, 451 Md. at 466.

In the instant appeal, there is no clear evidentiary finding, as in *NUFI I*, that would preclude judgment from being entered in favor of Holcomb as a matter of law. To the contrary, as we will discuss, *infra*, appellants failed to satisfy all the elements of their tortious interference claim. Thus, reliance on either *NUFI I* or *NUFI II* is not helpful to appellants.

The Bad Faith/Without Substantial Justification Determination

Appellants first ask this Court to determine if the circuit court erred by finding the claim against Holcomb was maintained in bad faith.

Appellants contend, without more than a cursory argument, that "[the court] merely wrote '[i]t is apparent to this Court that Plaintiff's case was brought against Appellee [sic] in bad faith and without substantial justification.' This edict is clearly erroneous." (Citation omitted)**.** They fail to explain how the court erred in reaching that decision. Appellants next assert that their "actions were far from bad faith: Appellants' actions were entirely justified. Summary Judgment was erroneously and prematurely granted by the trial court." Because appellant did not appeal the summary judgment, or offer any argument in support

of their position, the single reference to summary judgment is merely conclusory. Furthermore, appellants offered no evidence in support of Burke having suffered actual damages as a result of Holcomb's letter.

Holcomb's motion for sanctions asserted that that appellants Burke and Paul brought the tortious interference claim against Holcomb in bad faith and without substantial justification. Holcomb supported that accusation in his motion with a very brief discussion of appellants' course of conduct.

Holcomb proffered that, prior to the litigation, Burke and Paul had filed a "baseless" attorney grievance complaint against him for sending the May 27, 2014 letter. He asserted that the grievance was "brought frivolously" and "with the knowledge that there was no substantial justification for the same." In support, Holcomb attached a copy of the private and confidential letter from the Attorney Grievance Commission of Maryland (Commission) that had been addressed to Paul and copied to Holcomb, dismissing the grievance because "it found no sufficient basis to take further action, as [it] is only able to review conduct that may be a violation of the Maryland Rules of Professional Conduct."

In addition, Holcomb stated that Burke and Paul filed the lawsuit against him after the grievance was dismissed and "with certainty that they were doing so past the deadline assigned on the Scheduling Order . . . and misrepresented to this Court that [he] was served before the deadline." Holcomb contended that he was not properly served within the

scheduling order deadlines[4] and that attorney Paul had misrepresented to the court the circumstances and date of service.

In response, appellants insist that Holcomb had sent the letter in question five days after they had filed the lawsuit in an attempt "to jeopardize Plaintiff Burke's employment." Further, that "Holcomb, knowing that Mr. Burke was represented by counsel, and in violation of the Maryland Rule of Professional Conduct 4.2 (a), sent a letter to Plaintiff Burke's employer threatening legal action . . . for improperly employing [Burke] and selling equipment[.]" Appellants contend, as to the equipment sold, that Holcomb had "alleged to be the property of TAPCO, but in reality was owned by Plaintiffs. [Defendant] TAPCO had conveyed all its interest in [TAM] to [Burke] on February 2, 2012, more than two and one-half (2 ½) years before Mr. Holcomb maliciously wrote his letter."

Appellants then address Holcomb's two arguments relating to the attorney grievance claim and improper service. Relating to the attorney grievance claim, appellants contend that "MRPC Rule 8.3 (a) makes it mandatory upon a lawyer to file a grievance against any attorney who has committed misconduct, whether on behalf on [sic] the client, as in this case, or solely by the attorney." Additionally, appellants aver that "there is an absolute privilege accorded to the [attorney grievance] process[,]" and that "[t]here can be

[4] Holcomb filed two motions to dismiss regarding service: "Motion to Dismiss Defendant Craig L. Holcomb for Insufficient Process," filed on June 26, 2015; and the "Motion to Dismiss Third Amended Complaint or in the Alternative Dismiss Defendant Craig L. Holcomb for Plaintiff's Failure to Comply with the Scheduling Order or in the Alternative Enter a Protective Order," filed on July 10, 2015. The allegation of insufficient service of process was briefly mentioned at the September 23, 2015 hearing on the motions for summary judgment, but it was never actually adjudicated at that time or during the court's oral ruling on October 2, 2015.

no sanctions for filing a grievance." Appellants also challenge Holcomb's counsel's asserted timing of the sequence of events by contending that "[s]ince [Holcomb] was served with the complaint on May 12, 2015, and the grievance was dismissed on July 27, 2015, [it] is a factual impossibility" the claim was brought against Holcomb after the grievance had been dismissed.

As to Holcomb's argument concerning insufficient service and misrepresentation of the same, appellants contend that the allegations are "blatantly false." Instead, they offer an alternative version of events, insisting that Holcomb's secretary had been served on May 12, 2015, but was re-served, as a courtesy, on May 28, 2015. They then provide as an exhibit to their opposition, what they assert to be an "Affidavit of Jim Bailey, process server" [5] in support of their assertions.

In its memorandum and order, the court ruled on TAM and Burke's motion to alter or amend summary judgment together with Holcomb's motion for sanctions. It determined that "[u]pon review of the motions and the record, it is apparent to this Court that the Court's previous ruling in favor of Defendants was appropriate." After briefly acknowledging the arguments asserted in the motion for sanctions, the court granted Holcomb's motion, finding that: "[u]pon review of [the] motion, it is apparent to this Court

[5] The document attached to TAM and Burke's opposition to Holcomb's motion for sanctions as "Plaintiff's Exhibit 1" is not an affidavit of the process server, as it fails to contain a sworn statement signed by Jim Bailey. Additionally, the document's title provides that it is a "SERVICE OF PROCESS CASE FINAL REPORT" and does not purport to be an affidavit.

that Plaintiff's case was brought against [Holcomb] in bad faith and without substantial justification[.]"

Our review of the grant of Holcomb's motion for summary judgment makes clear that the circuit court's findings of bad faith and without substantial justification, and the finding that the cause of action against Holcomb was brought and maintained without merit, was not clearly erroneous.[6]

A claim for tortious interference with a business relationship requires: "'(1) intentional and wilful acts; (2) calculated to cause damage to the plaintiffs in their lawful business; (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendants (which constitutes malice); and (4) actual damage and loss resulting.'" *Blondell v. Littlepage*, 413 Md. 96, 125 (2010) (quoting *Kaser v. Financial Protection Marketing, Inc.*, 376 Md. 621, 628-29 (2003)).

In his motion for summary judgment, Holcomb contended that the claim of tortious interference with a business relationship against him was without merit, as, *inter alia*, he was justified in sending the letter and Burke never showed or offered any evidence of quantifiable damages or losses as a result of the letter being delivered to Burke's employer.

In response, Burke attempted to challenge Holcomb's allegation that he suffered no damages by averring that he was denied promotions and pay raises and was asked to resign as a result of the letter. However, Burke failed to support those assertions with evidence

[6] While appellants have not challenged the circuit court's grant of summary judgment, the filings are part of the record before us and the arguments by the parties, and rulings of the court, are an essential underlying aspect of the sanctions issue before us.

of quantifiable damages or of actual loss. In fact, his deposition belies those assertions, as Burke conceded that he had not sought a promotion even though there were opportunities for him to do so. Further, Burke testified that he did not resign, despite having been asked to, and that he did not inquire as to why he did not receive a pay raise, despite being eligible for one annually. When asked if he had suffered any other financial loss as a result of the letter being sent, he responded: "Work, just work. No others."

In its ruling on Holcomb's motion for summary judgment, the court had found that:

> There is just really simply nothing in here that supports this claim, and I think really Holcomb was sued because he was representing his clients. I think the only, perhaps, from the Court's perspective, may be an inappropriate thing would be that he sent a letter directly to the plaintiff as opposed to through his counsel.
>
> But that . . . doesn't give rise to a cause of action for interference with a business relationship. And certainly plaintiff has not set forth any facts to demonstrate how he was allegedly damaged as a result of the alleged . . . . action of sending this letter.

We agree with the circuit court's assessment. The letter was sent May 27, 2014, but the claim against Holcomb was not added until April 14, 2015, almost a year later. Additionally, TAM and Burke concede in the third amended complaint that the letter was sent "at the behest" of Holcomb's clients. The tortious interference claim only charges Holcomb with being on "inquiry notice" of a wrongdoing because the settlement document attached to his letter contained the phrase "For Discussion Purposes Only," suggesting it was not a final executed settlement agreement, and that Holcomb failed to properly investigate the matter prior to sending the letter. Interestingly, TAM's motion to disqualify

Holcomb as counsel for his clients, which was filed five months after the letter had been sent, states that:

> While Plaintiff does not believe that Mr. Holcomb was a knowing participant in the fraudulent conveyance, the circumstances of the foreclosure sale, including the notification of debtors and whether the sale was commercially reasonable, are all topics that will arise at trial and which will mandate Mr. Holcomb testifying about the facts of the foreclosure and sale.

No new or supporting evidence or allegations were offered in support of the claim against Holcomb in the third amended complaint, which contrasts the position taken in the motion to disqualify. This concession, coupled with the lack of factual support in the third amended complaint, support the court's finding during its oral ruling on the motion for summary judgment that "Holcomb was sued because he was representing his clients." That supports the court's subsequent finding that the "case was brought against [Holcomb] in bad faith and without substantial justification[.]" We shall affirm the imposition of sanctions.

Imposition of Attorney's Fees as Sanctions

Upon a finding that an action has been maintained or defended in bad faith or without substantial justification, Maryland Rule 1-341 affords the circuit court discretion to order the offending party, as well as that party's counsel, "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(a).

Holcomb's motion for sanctions asked the court for an award of $14,915.02 in attorneys' fees, to be "reimbursed for the attorney's fees he incurred, which are thoroughly described in the attached and are reasonable on their face." For support, Holcomb attached

his affidavit affirming the reasonableness of the fees, a detailed statement of his billable hours for work defending himself in the case, and a detailed statement of his hired counsel, Samantha Manganaro's (Manganaro), billable hours.

In its finding that the case against Holcomb was brought in bad faith and without substantial justification, the circuit court determined that "Holcomb is entitled to sanctions against Plaintiff and Plaintiff's counsel[,]" and ordered that "Plaintiff and Plaintiff's Counsel, Dana Paul, are jointly and severally liable to Defendant Holcomb for sanctions in the form of attorney's fees in the amount of $10,248.00."

Appellants argue that the amount of attorneys' fees awarded improperly included fees that Holcomb calculated based on the time he expended while appearing *pro se*, prior to obtaining counsel. While Holcomb contends in his brief that the award of fees did not include compensation for the *pro se* period, he fails to provide any explanation for how the court arrived at $10,248, nor does the record reveal the court's calculation.

The circuit court's order does not provide for costs incurred by Holcomb, only an award of "sanctions in the form of attorney's fees," but fails to delineate how those fees were calculated. The $10,248 awarded is roughly $1,000 more than Holcomb's own $9,338.12 claim in billable hours for his *pro se*, time, and is $4,671.10 more than the $5,576.90 incurred by his counsel in billable hours.

Without an explanation or justification, the amount awarded could be construed as, in part, punitive. As this Court has consistently held, "'[a]n award of 'sanctions' under this rule is compensatory, not punitive, in nature.'" *Frison v. Mathis*, 188 Md. App. 97, 104 (2009) (quoting *Kilsheimer v. Dewberry & Davis,* 106 Md. App. 600, 622 (1995)). Rule

1-341 "does not provide for a monetary award to punish a party that misbehaves[,] . . . [rather, its] purpose is to put a prevailing *party* in the same position as if the wrongful party's offending conduct had not occurred." *Seney v. Seney*, 97 Md. App. 544, 552 (1993) (citations omitted). Additionally, *pro se* litigants are not entitled to attorneys' fees for their personal defense of a claim because "the plain language of Rule 1–341 limits the attorney's fees recoverable to those *incurred*. . . . [and] [a] *pro se* attorney litigant has not 'incurred' any actual expenses in the nature of attorney's fees." *Frison*, 188 Md. App. at 102–03. Thus, an award of attorneys' fees for all or some of the billable hours Holcomb alleged to have incurred while acting *pro se* would be improper.

Because the amount of sanctions award is unsupported by the record and the court's order fails to explain or justify the amount awarded, we shall remand with instructions that the circuit court recalculate the award and place its rationale on the record.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED IN PART AND REVERSED IN PART.
CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.
COSTS ASSESSED TO APPELLANTS.