Circuit Court for Montgomery County
Case No. 441184-V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 570

September Term, 2021

STATE OF MARYLAND, ET AL.

v.

JOHN DOE

Fader, C.J.,
Graeff,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Fader, C.J.

Filed: April 4, 2022

John Doe, the appellee, filed an action seeking a declaratory judgment that he was not required to register as a sex offender under the Maryland Sex Offender Registration Act ("MSORA"), §§ 11-701–11-727 of the Criminal Procedure Article (2018 Repl.; 2021 Supp.). After the Circuit Court for Montgomery County entered summary judgment in Mr. Doe's favor, declaring that he was not required to register as a sex offender, Mr. Doe sought an award of Rule 1-341 sanctions against the appellants, the Maryland Department of Public Safety and Correctional Services (the "Department") and the State of Maryland (collectively with the Department, the "State"). The circuit court found that the State lacked substantial justification in defending against Mr. Doe's declaratory judgment action and awarded sanctions. Because we conclude that the State's defense was not lacking in substantial justification as set forth in our caselaw, we will reverse.

BACKGROUND

Statutory Scheme

We begin with a brief review of the statute at the center of the underlying dispute. Maryland established its sex offender registry in 1995, 1995 Md. Laws, ch. 142, in response to the federal Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. 103-322, which Congress enacted in 1994. As originally enacted, MSORA mandated registration for offenders who committed qualifying sex crimes in Maryland on or after October 1, 1995, against victims aged 14 or younger. *See* Maryland Sexual Offender Advisory Board, *Report to the Maryland General Assembly* 11 (2014), https://msa.maryland.gov/megafile/msa/speccol/sc5300/sc5339/000113/021000/021771/unrestricted/20160015e.pdf (last accessed Mar. 30, 2022). The General Assembly later

expanded the registry to include offenders who committed qualifying sex crimes against victims 15 and older, 1997 Md. Laws, ch. 754, as well as those who committed qualifying sex crimes in other jurisdictions, 1998 Md. Laws, chs. 473 & 521. In addition, the requirements of registration changed over time, gradually becoming more onerous and, the Court of Appeals has held, punitive. *See Doe v. Dep't of Pub. Safety & Corr. Servs*., 430 Md. 535, 565 (2013) ("*Doe I*") (plurality opinion) (concluding that "the dissemination of information about registrants . . . is the equivalent of shaming them, and is, therefore, punitive for *ex post facto* purposes"); *id.* at 578 (McDonald, J., concurring) (concluding that the "amendments of the State's sex offender registration law took that law across the line from civil regulation to an element of the punishment of offenders").

Mr. Doe moved to Maryland in 2007. At that time, MSORA required individuals who had been convicted of specified sex offenses to register with a "supervising authority."[1] Md. Code Ann., Crim. Proc. § 11-701 (2001; 2006 Supp.) (defining terms, including "child sexual offender," "offender," "sexually violent offender," and "sexually violent predator," by reference to convictions for specified sex offenses); *id.* § 11-704(a)(1)-(4) (requiring registration of child sexual offenders, offenders, sexually violent offenders, and sexually violent predators). When initially enacted in 1995 (for child sex offenders) and 1997 (for other sex offenders), those provisions were expressly made

[1] In 2007, the "supervising authority" for an individual who "move[d] to this State from another state where the registrant was required to register" was the Secretary of the Department. Crim. Proc. § 11-701(i)(9) (2001; 2006 Supp.).

prospective, applicable only to convictions for crimes committed after the effective date of the relevant statute. *See* 1995 Md. Laws, ch. 143 §§ 3, 4; 1997 Md. Laws, ch. 754 § 4.

The version of MSORA in effect in 2007, however, also contained two provisions that purported to extend the registration obligation to individuals convicted of offenses based on conduct occurring before the effective date of the Act.[2] First, the Act required registration of individuals who, before moving to Maryland, were required to register in

[2] "As enacted, [MSORA] applied prospectively to sex offenders who committed their crimes after the statute went into effect on October 1, 1995," *Doe I*, 430 Md. at 545 (citing 1995 Md. Laws, ch. 142 § 3), and did not "have any effect on or application to any individual who commit[ted] an offense" before October 1, 1995, 1995 Md. Laws, ch. 142 § 3. In 1997, when MSORA was expanded to cover both child sexual offenders and other types of offenders, *see* 1997 Md. Laws, ch. 754, it applied "only prospectively . . . to offenses that are committed on or after July 1, 1997," *id.* § 4. At that time, the Act did not "have any effect on or application to any individual who commit[ted] an offense before July 1, 1997." *Id.* In 2001, as part of Maryland's code revision project, MSORA was re-codified as part of the Criminal Procedure Article. 2001 Md. Laws, ch. 10. At that time, "the sex offender registration statute was amended and was applied retrospectively to different groups of sex offenders," *Doe I*, 430 Md. at 545, including a "registrant convicted of an offense committed before July 1, 1997" and "a child sexual offender who committed the sexual offense on or before October 1, 1995," if either were "under the custody or supervision of a supervising authority on October 1, 2001," Crim. Proc. § 11-702.1 (2001). "In 2009, the retroactive application of the statute was once again amended and registration was required of a child sex offender who committed [a] crime before October 1, 1995 but was convicted on or after October 1, 1995, irrespective of when the offender was incarcerated or under supervision." *Doe I*, 430 Md. at 546 (citing Crim. Proc. § 11-702.1 (2008 Repl.; 2009 Supp.)). "In 2010, the sex offender registration statute was amended again, and among other things, the amendment . . . required retroactive registration of all persons who were already required to register on September 30, 2010, the day before the amendment went into effect." *Doe I*, 430 Md. at 546 (citing Crim. Proc. § 11-702.1 (2008 Repl.; 2010 Supp.)). That "language had the consequence of incorporating the retroactive application of the statute as amended in 2009," *Doe I*, 430 Md. at 546, an obligation which has carried through to the current version of the retroactivity provision, Crim. Proc. § 11-702.1 (2018 Repl.; 2021 Supp.) ("[T]his subtitle shall be applied retroactively to include a person who . . . was subject to registration under this subtitle on September 30, 2010.").

another jurisdiction due to a qualifying conviction for a crime committed before those dates. Crim Proc. § 11-704(a)(5), (6) (2001; 2006 Supp.). Specifically, as relevant here, § 11-704(a)(6) of the Criminal Procedure Article required registration by a "sexually violent offender . . . who, before moving into this State, was required to register in another state . . . for a crime that occurred before July 1, 1997." Second, the Act also included the following general retroactivity provision:

> Notwithstanding any other provision of law to the contrary, . . . this subtitle shall be applied retroactively to include a registrant convicted of an offense committed before July 1, 1997, and who is under the custody or supervision of a supervising authority on October 1, 2001.

Crim. Proc. § 11-702.1(a); *see Dep't of Pub. Safety & Corr. Servs. v. Doe*, 439 Md. 201, 223 (2014) ("*Doe II*") (observing that "the application of the registration requirements to pre-Act offenders" was one of the "'minimum national standards'" imposed on states by the federal Sex Offender Registration and Notification Act (quoting 42 U.S.C. § 16912 (2006))).

Mr. Doe filed his declaratory judgment complaint in December 2017. At that time, as now, § 11-704 of the Criminal Procedure Article required registration with a "supervising authority"[3] by an individual convicted of specified sex offenses under

[3] As of 2017, "supervising authority" "means an agency or person that is responsible for collecting the information for the initial registration of a sex offender." Crim. Proc. § 11-701(n) (2008 Repl.; 2017 Supp.). For persons who reside in Montgomery County, the supervising authority is the Montgomery County Police Department. *See id.* § 11-701(n)(8) ("if the sex offender is not under the supervision, custody, or control of another supervising authority," then the supervising authority is "the local law enforcement unit where the sex offender is a resident, is a transient, or habitually lives on moving from another jurisdiction or foreign country that requires registration").

Maryland law, or equivalent offenses in other jurisdictions. *See* Crim. Proc. § 11-701 (2008 Repl.; 2017 Supp.) (defining categories of individuals required to register); *id.* § 11-704(a)(1), (2), (3), (4) (identifying general registration obligation); 2010 Md. Laws, ch. 174.

As with the version of the Act in place in 2007, the 2017 version of MSORA contained a provision extending the registration requirement to individuals entering Maryland who were required to register in another jurisdiction. Specifically, § 11-704(a)(4)(i) required registration of "a sex offender who is required to register by another jurisdiction . . . and who is not a resident of this State, and who enters this State . . . to begin residing or to habitually live." Crim. Proc. § 11-704(a)(4)(i).

The version of MSORA in place in December 2017, as now, also included the following general retroactivity provision:

> Notwithstanding any other provision of law to the contrary, this subtitle shall be applied retroactively to include a person who:
>
> > (1) is under the custody or supervision of a supervising authority on October 1, 2010;
> >
> > (2) was subject to registration under this subtitle on September 30, 2010;
> >
> > (3) is convicted of any felony on or after October 1, 2010, and has a prior conviction for an offense for which registration as a sex offender is required under this subtitle; or
> >
> > (4) was convicted on or after October 1, 2010, of a violation of § 3-324 of the Criminal Law Article, regardless of whether the victim was a minor.

Crim. Proc. § 11-702.1(a).

The Underlying Facts

In 1988, Mr. Doe was convicted in Hawaii of two counts of second-degree rape, among other offenses, for conduct that occurred in 1986. The Hawaii Paroling Authority discharged Mr. Doe in 1995 after he had completed his terms of incarceration and probation. As Hawaii did not enact its sex offender registry until 1997, Mr. Doe was not required to register as a sex offender upon his discharge. At some point after his discharge that is not clear in the record, Mr. Doe left Hawaii. He moved to Montgomery County, Maryland in 2007. In the circuit court, the State alleged that Mr. Doe had lived in both North Carolina and the District of Columbia after leaving Hawaii and before arriving in Maryland.

On August 30, 2017, an individual apparently affiliated with the Montgomery County Police Department emailed the Hawaii Criminal Justice Data Center (the "Hawaii Center") and explained that Montgomery County (the "County") had recently learned that Mr. Doe was residing in Maryland and had committed a sex offense in Hawaii. The County inquired whether Mr. Doe had any requirements to register as a sex offender in Hawaii. The Hawaii Center responded that Mr. Doe:

> left [Hawaii] without being notified of his requirements to register as a covered offender (sex offender or crime against minor). If [Mr. Doe] is to return to Hawaii, he is required to register.

On November 8, 2017, the County Police Department sent Mr. Doe a letter stating:

> This is to serve as your only notification that under Maryland law, you are required to register with the Montgomery County Department of Police Sex Offender Registry due to your 1988 conviction in Hawaii . . . . Your failure

> to contact this office by December 7, 2017 will result in the issuance of a warrant for your arrest.

On November 20, 2017, the Hawaii Center sent Mr. Doe a letter of its own, which it copied to the Department and the County, stating that the:

> State of Hawaii's criminal history records indicate that you were convicted of [two counts of rape and one count of kidnapping], which would require you to register as a covered offender . . . . Pursuant to Chapter 846E-2(h)(1), HRS, the registration provisions of this section shall apply to all covered offenders without regard to the date of the covered offender's conviction. Should you return to Hawaii for more than 10 days or an aggregate period of 30 days in one calendar year, you will be required to register.

On December 5, 2017, the Department sent Mr. Doe a letter informing him that he is:

> required to register in the State of Maryland and under Federal law as a convicted sexual offender. The State of Maryland has taken this position based upon [Mr. Doe's] 1988 out-of-state conviction for (2 cts) Rape and (1 ct) Kidnapping in [Hawaii]. In 1998, the Maryland General Assembly created a prospective law that requires individuals to register in this State who have moved to Maryland on or after October 1, 1998, are required to register in the state of conviction, and who have committed an offense substantially similar to a sex offense in Maryland.

Additionally, on April 6, 2018, upon inquiry by the County, the Court Services and Offender Supervision Agency for the District of Columbia stated in a letter to the County Police Department that:

> Mr. [Doe] would have to register as a Class A sex offender, with a lifetime registration requirement, if he ever resides, attends school, or works in D.C.

Similarly, on May 15, 2018, also upon inquiry by the County, the State of North Carolina Department of Justice stated in a letter to the County Police Department:

> Since you indicated in your inquiry that Mr. [Doe] would be required to register in Hawaii and since his conviction qualifies as a sexually violent

> offense, Mr. [Doe] would have been required to register in Hawaii and in North Carolina if he resided here.[4]

The letters from the District of Columbia and North Carolina did not indicate whether Mr. Doe ever resided in either jurisdiction.

The Motion for Summary Judgment

In December 2017, Mr. Doe initiated this lawsuit by filing a complaint against the State and the County in which he sought a declaratory judgment that his 1988 Hawaii convictions do not require him to register as a sex offender in Maryland. Mr. Doe also requested "reasonable attorney['s] fees and costs for his expenses in bringing this action as there is no good faith or substantial justification on the part of the [State and the County] in demanding [Mr. Doe] register on the Maryland sex offender registry[.]" The State and the County moved separately for summary judgment, and Mr. Doe filed a cross-motion for summary judgment. In support of its motion, the State argued:

- Mr. Doe was required to register as a sex offender in Hawaii and the District of Columbia before he moved to Maryland in 2007, but Mr. Doe did not register in any of those jurisdictions at any point.
- At the time Mr. Doe moved to Maryland in 2007, § 11-704(a)(6) of MSORA required "any sexually violent offender who, before moving into this State, was required to register in another state . . . for an offense occurring before July 1, 1997," to register as sex offender in Maryland.[5]

[4] The North Carolina letter suggests that its Department of Justice interpreted its MSORA analogue the same way the State did here, stating that "North Carolina requires offenders to register on its registry if the offender would have been required to register in the state of conviction."

[5] In its motion, the State cited the 2004 supplement to Criminal Procedure § 11-704(a)(6). That version of § 11-704(a)(6) was the same as the one in effect in 2007.

- "No dispute exists that before relocating to Maryland, [Mr. Doe] was required to register in Hawaii and the District of Columbia." Accordingly, Mr. Doe was subject to registration in Maryland.
- "Offenders, like [Mr. Doe], should not be permitted to avoid registration requirements in a matter involving public safety by moving and residing in Maryland." When Mr. Doe moved to Maryland in 2007, he was required to register as a "sexually violent offender," and that requirement continues under current law.
- In 1998, the General Assembly amended MSORA to include a retroactivity provision, with the intent to "prevent Maryland from becoming a haven for sex offenders from other jurisdictions."
- "The ex post facto prohibition contained in Article 17 of the Maryland Declaration of Rights holds no application in this matter." Appellate decisions finding that retroactive application of MSORA, such as *Doe I*, 430 Md. 535 (2013), *Doe II*, 439 Md. 201 (2014), and *Quispe del Pino v. Maryland Dep't of Pub. Safety & Corr. Servs.*, 222 Md. App. 44 (2015), are "inapposite" because those cases addressed 2009 and 2010 amendments to the MSORA, neither of which apply to Mr. Doe. Additionally, there was no *ex post facto* violation because Mr. Doe was already required to register in other states at the time he moved to Maryland.
- *Dietrich v. State*, 235 Md. App. 92 (2017), controls the court's analysis of any alleged *ex post facto* violations. That case establishes that the relevant date for the *ex post facto* analysis is the date an individual moved to Maryland, not the date of his offenses. *Id.* at 100. Here, on the date he moved to Maryland, Mr. Doe was already required to register in Hawaii and the District of Columbia.

During a hearing, when asked by the court how to "reconcile the statute in 2007 with the retroactivity statute," the State responded that "the retroactivity provision applies to people who committed a crime in Maryland." Alternatively, the State contended that the retroactivity provision in § 11-702.1 encompassed Mr. Doe because, at the time he moved to Maryland in 2007, "he was already subject to registration."

The circuit court ultimately concluded that Mr. Doe was not required to register as a sex offender under MSORA because, at the time Mr. Doe moved to Maryland, he was

not presently required to register as a sex offender in Hawaii. The court also concluded that application of the registry to Mr. Doe "would violate ex post facto laws and impose a lifetime probation sentence." The court therefore granted Mr. Doe's motion for summary judgment and denied those of the State and County. Neither the State nor the County appealed that ruling.

The First Motion for Costs and Attorney's Fees

After prevailing on summary judgment, Mr. Doe filed a motion for costs and attorney's fees pursuant to Rule 1-341 against the State and the County. In February 2019, the court granted Mr. Doe's motion without holding a hearing. In April 2020, this Court reversed the award of sanctions as to the County, vacated the award as to the State, and remanded for further proceedings. *State v. Doe*, No. 106, Sept. Term 2019, 2020 WL 1899822, at *8 (Md. Ct. Spec. App. Apr. 16, 2020).

The Second Motion for Costs and Attorney's Fees

On remand, Mr. Doe filed a second motion for costs and attorney's fees, this time against only the State. After a hearing, the court granted Mr. Doe's motion, found that the State acted without substantial justification in defending Mr. Doe's declaratory judgment action, and found that an award of costs and attorney's fees was merited. In doing so, the court made the following determinations:

- In November 2017, the Department "demanded that Doe, under threat of arrest and prosecution, register with the Maryland sex offender registry for convictions arising in 1988 in Hawaii."
- The Department was "notified in writing by Hawaii that it had no record of Doe ever having to register as a sex offender in Hawaii and that Doe would have to register in Hawaii only if Doe returned to reside in Hawaii for ten

(10) consecutive days or more than 30 aggregate days over one calendar year." The Department "nevertheless continued to insist to Doe and in filings with this Court that Doe is *presently* required to register in Hawaii."

- "[I]n a December 2017 letter from DPSCS to Doe, DPSCS cited a 1998 outdated version of [MSORA] to insist that Doe must register."
- "Doe reasonably filed an action for declaratory relief from registration, reasonably citing current retroactivity provisions of MSOR[A], as well as case law indicating that MSOR[A] could not be enforced against Doe without violating Doe's rights against *ex post facto* enforcement of laws."
- "DPSCS continued to cite . . . 1998 and 2004 MSOR[A] provisions that may have been more self-serving to its arguments while at the same time failing to acknowledge or refer to other statutory authority from 2004 or current retroactivity provisions indicating that Doe does not have to register per MSOR[A]."
- Requiring Mr. Doe to register "is contrary to the clear legislative intent of current retroactivity provisions that DPSCS should or must be familiar with" and the "numerous published appellate holdings indicating that enforcing MSOR[A] against Doe would violate his ex post facto rights."
- Granting of attorney's fees and costs in favor of Mr. Doe is appropriate in that the Department's "efforts relied on clearly inaccurate factual descriptions of Doe's registration status in another jurisdiction . . . and readily available statutory provisions and case law."
- "DPSCS has at its disposal able counsel of the Attorney General's Office for guidance on such matters." "[S]taff with DPSCS and attorneys with the Attorney General's Office regularly work on issues regarding updates of MSOR[A] and the application of MSOR[A]."
- "[E]fforts to force someone in Doe's position to register confronts a citizen with a Hobson's choice to either register or incur a substantial financial loss/penalty of defending against such efforts."

The court also found that "[t]he fees and costs incurred by Doe appear to be fair and reasonable," and made specific findings supporting that determination. The court therefore ordered the State to pay Mr. Doe $19,655 in attorney's fees and $720 in costs. The State filed this timely appeal.

DISCUSSION

"Maryland generally adheres to the common law, or American rule, that each party to a case is responsible for the fees of its own attorneys, regardless of the outcome." *Friolo v. Frankel*, 403 Md. 443, 456 (2008). The Court of Appeals has recognized four exceptions to the American Rule, permitting attorney's fees and costs to be recovered where: "(1) the parties to a contract have an agreement to that effect, (2) there is a statute [or rule] that allows the imposition of such fees, (3) the wrongful conduct of a defendant forces a plaintiff into litigation with a third party, or (4) a plaintiff is forced to defend against a malicious prosecution." *Thomas v. Gladstone*, 386 Md. 693, 699 (2005). Unless one of those exceptions applies, a prevailing party must bear its own attorney's fees and costs regardless of the outcome of the litigation, the strength of its legal or financial positions, or any other equitable considerations.

Here, we are concerned with the second exception because the Court of Appeals has promulgated Rule 1-341 as "a limited exception to the American Rule." *Christian v. Maternal-Fetal Med. Assocs. of Md., LLC*, 459 Md. 1, 18 (2018). Rule 1-341(a) 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, 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.

Importantly, "because [Rule 1-341] serves as a deterrent and is intended to compensate as opposed to punish," *Christian*, 459 Md. at 19, "[a]n award of counsel fees pursuant to Rule

1-341 is an 'extraordinary remedy,' which should be exercised only in rare and exceptional cases," *Barnes v. Rosenthal Toyota, Inc.*, 126 Md. App. 97, 105 (1999) (quoting *Black v. Fox Hills N. Cmty. Ass'n, Inc*., 90 Md. App. 75, 83 (1992)).

To impose sanctions under Rule 1-341(a), "a court [must] make two separate findings, each with different, but related, standards of review." *Christian*, 459 Md. at 20. First, the "court must make an explicit finding that a party conducted litigation either in bad faith or without substantial justification." *URS Corp. v. Fort Myer Constr. Corp.*, 452 Md. 48, 72 (2017). "This finding should be supported by a 'brief exposition of the facts upon which [it] is based,'" and "will be upheld on appellate review unless it is clearly erroneous or involves an erroneous application of law." *Id.* (quoting *Talley v. Talley*, 317 Md. 428, 436 (1989)). The appellate court owes "significant deference" to the trial court's "factual determinations," *L.W. Wolfe Enters., Inc. v. Md. Nat'l Golf, L.P.*, 165 Md. App. 339, 344 (2005), and must view "evidence . . . 'in a light most favorable to the prevailing party,'" *Christian,* 459 Md. at 21 (quoting *Liberty Mut. Ins. Co. v. Md. Auto. Ins. Fund,* 154 Md. App. 604, 609 (2004)). No such deference "appl[ies] to legal conclusions," however. *YIVO Inst. for Jewish Rsch. v. Zaleski*, 386 Md. 654, 662 (2005) (quoting *Nesbit v. GEICO*, 382 Md. 65, 72 (2004)). "When the trial court's [decision] 'involves an interpretation and application of Maryland statutory and case law, our Court must determine whether the lower court's conclusions are legally correct under a *de novo* standard of review.'" *Id.* (alteration in *Zaleski*).

Second, should the court determine that a litigant or attorney acted in bad faith or without substantial justification, it "must separately find," *Christian*, 459 Md. at 21, "whether the party's conduct merits the assessment of costs and attorney's fees," *Fort Myer Constr. Corp.*, 452 Md. at 72. The separate finding "will be upheld on appellate review unless found to be an abuse of discretion." *Id.* A court abuses its discretion when it "acts 'without reference to any guiding rules or principles,'" *Wilson v. John Crane, Inc.*, 385 Md. 185, 198 (2005) (quoting *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312 (1997)), or "adopts a position that no reasonable person would accept," *Ibru v. Ibru*, 239 Md. App. 17, 47 (2018) (quoting *Pinnacle Grp. v. Kelly*, 239 Md. App. 436, 476 (2018)); *see also Sydnor v. Hathaway*, 228 Md. App. 691, 708 (2016) ("[A] court's discretion is always tempered by the requirement that the court correctly apply the law applicable to the case." (quoting *Scholtzhauer v. Morton*, 224 Md. App. 72, 84 (2015))). Although "[t]he trial court enjoys a large measure of discretion in fixing the reasonable value of legal services," *DeLeon Enters., Inc. v. Zaino*, 92 Md. App. 399, 419 (1992) (quoting *Head v. Head*, 66 Md. App. 655, 669 (1986)), the court must support its decision with "specific findings of fact on the record" to ensure that "the imposed fees are not arbitrary" and that the appellate court "has [the] means to review [the] court's exercise of discretion," *Christian*, 459 Md. at 30-34 (quoting *Barnes*, 126 Md. App. at 106).

Here, the circuit court found that the State's defense of Mr. Doe's declaratory judgment action lacked substantial justification; the court made no finding of bad faith. A "litigation position is 'without substantial justification' if it is not fairly debatable, not

colorable, or not within the realm of legitimate advocacy," *Fort Myer Constr. Corp.*, 452 Md. at 72 (internal citations omitted), or if it is "patently frivolous," *Christian*, 459 Md. at 25, 27. "[C]onduct lacks substantial justification when there is no basis in law and/or in fact to support the plaintiff's claim against the defendants who seek fees and costs," *Johnson v. Baker*, 84 Md. App. 521, 529 (1990), or where a party has "no reasonable basis for believing that the claims would generate an issue of fact for the fact finder," *State v. Braverman*, 228 Md. App. 239, 260 (2016) (internal quotations omitted) (quoting *Inlet Assocs. v. Harrison Inn Inlet, Inc.*, 324 Md. 254, 268 (1991)).

Of course, "lack[of] substantial justification . . . cannot be found exclusively on the basis that 'a court rejects the proposition advanced by counsel and finds it to be without merit.'" *Christian*, 459 Md. at 25 (quoting *Braverman*, 228 Md. App. at 260). "A litigant ought not be penalized for innovation or exploration beyond existing legal horizons unless such exploration is frivolous." *Christian*, 459 Md. at 20 (quoting *Dent v. Simmons*, 61 Md. App. 122, 128 (1985)). Instead, "[j]udges must cautiously award attorney's fees to avoid firing 'judicially guided missiles' . . . thereby chilling access to the courts," *Christian*, 459 Md. at 19-20 (quoting *Legal Aid Bureau, Inc. v. Bishop's Garth Assocs. Ltd. P'ship*, 75 Md. App. 214, 224 (1988)), in accordance with the purpose of Rule 1-341(a). For those reasons, "Rule 1-341 sanctions should be imposed only when there is a clear, serious abuse of judicial process." *Black*, 90 Md. App. at 84.

Against that backdrop, we consider the circuit court's finding that the State's defense of Mr. Doe's declaratory judgment action lacked substantial justification. The

State argued that Mr. Doe was required to register as a sex offender in 2007, when he moved to Maryland, based on his two 1988 second-degree rape convictions from Hawaii. Because he was required to register in 2007, the State contended, his registration obligation continued through to 2017, when the Department became aware of his prior convictions.[6] We therefore begin with the statutory provision the State contends imposed an obligation on Mr. Doe to register as a sex offender in 2007, § 11-704(a)(6) of the Criminal Procedure Article.

In 2007, § 11-704(a)(6) provided, in relevant part: "A person shall register with the person's supervising authority if the person is: . . . a[] . . . sexually violent offender . . . who, before moving into this State, was required to register in another state . . . for a crime that occurred before July 1, 1997." Crim. Proc. § 11-704(a)(6) (2001; 2006 Supp.). The statute thus required registration if a person satisfied three criteria: (1) the person met the statutory definition of a "sexually violent offender"; (2) the person "was required to register [as a sex offender] in another state" before moving to Maryland; and (3) the crime that gave rise to the registration obligation occurred before July 1, 1997. Here, it is undisputed

[6] The relevant subsection of MSORA's retroactivity provision was adopted in 2010. *See Doe I*, 430 Md. at 546. That version contains a retroactivity provision making it applicable to any person who, among other things, "was subject to registration under this subtitle on September 30, 2010." Crim. Proc. § 11-702.1(a)(2) (2008 Repl.; 2010 Supp.). Thus, if the State is correct that Mr. Doe was "subject to" the subtitle when he moved to Maryland in 2007, with a lifetime registration requirement, he would have continued to be subject to the subtitle as of September 30, 2010 and, therefore, covered by the retroactivity provision.

that Mr. Doe satisfied the first and third criteria.[7] It is also undisputed that Mr. Doe moved to Maryland in 2007. The issue at the core of the parties' disagreement was whether Mr. Doe "was required to register in another state" at that time.

Central to this dispute are two pieces of correspondence the Hawaii Center sent the County, the Department, and Mr. Doe in 2017 outlining his registration obligation in Hawaii. In an email to the County, the Hawaii Center stated that "[i]f [Mr. Doe] is to return to Hawaii, he is required to register." The letter to Mr. Doe, which was also sent to the County and the Department, informed him that his convictions made him a covered offender under Hawaii's registration statute and, therefore, "[s]hould you return to Hawaii for more than 10 days or an aggregate period of 30 days in one calendar year, you will be required to register." In the circuit court, Mr. Doe contended that both of those correspondences made clear that he would be required to register in Hawaii only if he returned there for a specified period of time; that he was therefore *not* required to register in Hawaii at the time he moved to Maryland or at any time since; and that he therefore did not meet the second requirement of § 11-704(a)(6).

The State offered a different interpretation of the second requirement of § 11-704(a)(6). The State argued that Mr. Doe "was required to register" in Hawaii

[7] In 2007, a "sexually violent offender" was someone who "has been convicted of a sexually violent offense," which included a crime committed in another state that, if committed in Maryland, would constitute a violation of § 3-303 of the Criminal Law Article. Crim. Proc. § 11-701(f)(1), (g)(1), (g)(3). Mr. Doe does not dispute that the conduct underlying his second-degree rape convictions in Hawaii would have constituted a violation of Criminal Law § 3-303 if committed in Maryland. It is also undisputed that Mr. Doe's offenses occurred before 1997.

because the Hawaii statute imposed an obligation to register as a sex offender for life based on his second-degree rape convictions. Thus, the State contended that "[e]ven though [Mr. Doe] left Hawaii without being notified of his requirement to register as a covered offender . . . he has an obligation to register for life in another State."[8] In effect, the State

[8] The State argues that an additional reason its defense of this action was substantially justified was its argument that Mr. Doe was also required to register under Criminal Procedure § 11-704(a)(6) because, at the time he moved to Maryland, he was also required to register as a sex offender in North Carolina and Washington, D.C., both based on the Hawaii convictions. The State contends that the circuit court erred by ignoring those arguments. Mr. Doe contends that the court did not err in not addressing those arguments because the State expressly disavowed them at the summary judgment motions hearing. The State denies disavowing those arguments.

In its written motion for summary judgment, the State argued that Mr. Doe had an obligation to register as a sex offender in Maryland because he had an obligation to register in Washington, D.C. at the time he moved to Maryland. However, the following exchange occurred at the motions hearing:

> THE COURT: And how do you determine that [Mr. Doe] would have been required, well, you haven't mentioned it, required to register in the District of Columbia?
>
> [THE STATE]: . . . Maryland is not basing, nor did it base its decision to require [Mr. Doe] to register based on the fact that he would have been required to register in D.C.
>
> THE COURT: Okay.
>
> [THE STATE]: It's based on the fact that he's required to register in Hawaii, and that the State was notified by Hawaii of that fact. . . . It's also looked to see where he had resided prior to that and if he had registered in those jurisdictions, but he had not, and it's our understanding that until Maryland was contacted, Hawaii had not contacted any other jurisdiction to notify them that he was required, that under Hawaii law he would be required to register.

The State contends that it did not disavow reliance on a Washington, D.C. registration obligation as a source of Mr. Doe's obligation to register in Maryland, relying on its reference in the final paragraph above to the fact that it "also looked to see where he had

interpreted "was required to register" as addressed to whether the individual satisfied another jurisdiction's general registration obligation requirements, an inquiry distinct from whether that obligation was presently enforceable in the other jurisdiction based on the offender's current residence.

In support of its interpretation of the statutory language, the State relied on the legislative purpose of MSORA, which, the State argued, "is designed, in part, to prevent [Maryland] from becoming a haven jurisdiction for those wishing to escape registration requirements elsewhere." Accordingly, the State contends that "[o]ffenders, like [Mr. Doe], should not be permitted to avoid registration requirements in a matter involving public safety by moving and residing in Maryland."

The State is, of course, correct that a purpose underlying MSORA is "to protect the public." *Rogers v. State*, 468 Md. 1, 42 (2020) ("[I]t is clear that the registration statutes have a purpose other than punishment—to protect the public."); *Young v. State*, 370 Md. 686, 712 (2002) ("[A] reading of [MSORA's predecessor] demonstrates that . . . the registration provisions are tailored to protect the public[.]"); *see also In re Nick H.*, 224 Md. App. 668, 690 (2015) ("[W]e conclude that the plain language and overall design of [MSORA's predecessor] . . . was intended as a regulatory requirement aimed at protection of the public." (quoting *Young*, 370 Md. at 712)). The State is also correct that that purpose

resided prior to that." We disagree. At the summary judgment hearing, the State expressly disavowed reliance on Mr. Doe's purported obligation to register in Washington, D.C. Although that did not necessarily preclude the State from raising that obligation in connection with the sanctions motion, we need not resolve that issue in light of our other conclusions.

would be frustrated if offenders could escape registration requirements to which they would be subject in other states by moving to Maryland. Viewed in that light, and in the absence of any controlling legal authority precluding that interpretation of the statutory language, it was not "patently frivolous" or "outside the realm of legitimate advocacy" for the State to take the position that the relevant consideration for whether an individual "was required to register in another jurisdiction" was whether the individual met the criteria for registration in that jurisdiction based on an offense committed in that jurisdiction. Nor is the language of the statute so clear as to foreclose that as a non-frivolous possible interpretation.

Mr. Doe contends that the State lacked substantial justification for its argument that he "was required to register" in Hawaii based on the Hawaii Center's letter confirming that he would be required to register there only if he returned for ten days in a month or 30 days in a year. The State responds that that did not reflect a lack of substantial justification because "the sole reason Mr. Doe was not required to register in Hawaii at that time was that he no longer lived there." To Mr. Doe, that response proves his point and highlights the State's absence of substantial justification. The circuit court agreed. We think they both misapprehend the State's argument. Mr. Doe believes that there is only one conceivable interpretation of "was required to register." He therefore takes the position that when the State has said that Mr. Doe "was," "is," or "are" "required to register" in Hawaii, it was misrepresenting facts. But in both the circuit court and on appeal, the State acknowledged that Mr. Doe would be required to register in Hawaii only if he returned

there. The State's argument, as already discussed, has been that Mr. Doe "was required to register in Hawaii" by virtue of having been convicted in that State of an offense that requires him to register there for life, which may or may not be triggered at any particular time based on where Mr. Doe is living. Under the State's interpretation of "was required to register," the provision was intended to guard against exactly what happened here: an individual with an obligation to register in another jurisdiction, if he were living there, was able to avoid that obligation by living in Maryland instead. Although the State's position (1) did not prevail, (2) may not be the best interpretation of the statutory language, and (3) could have been stated with greater clarity, it was not lacking substantial justification as a proposed application of the statutory text in a sense that would permit imposition of sanctions pursuant to Rule 1-341.

Mr. Doe makes additional arguments suggesting that even if the State's interpretation of § 11-704(a)(6), standing alone, did not lack substantial justification, its position overall lacked substantial justification in light of other provisions of the statute. For example, he contends that the State lacked substantial justification to base its position on § 11-704(a)(6) without considering MSORA's retroactivity provision as it existed in 2007 in § 11-702.1(a). Even worse, Mr. Doe asserts, is that the State repeatedly and misleadingly cited an earlier retroactivity provision that was more favorable to the State's position but is no longer in force.[9] In 2007, § 11-702.1(a) provided: "Notwithstanding any

[9] Mr. Doe repeatedly attacks the State for reliance on a repealed retroactivity provision from the 1998 version of MSORA. Many of those attacks either take the State's arguments out of context or are inaccurate. For example, at page 8 of his brief, Mr. Doe

other provision of law to the contrary . . . this subtitle shall be applied retroactively to include a registrant convicted of an offense committed before July 1, 1997, and who is under the custody or supervision of a supervising authority on October 1, 2001." Crim. Proc. § 11-702.1(a) (2001). According to Mr. Doe, that provision makes clear that MSORA could be applied retroactively only to people who were under the custody or supervision of a supervising authority on October 1, 2001, which he was not.

In the circuit court, when asked to reconcile the two provisions, the State argued that § 11-702.1(a) addressed retroactive application of the statute to in-state offenders,

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quotes two statements by the State that he contends erroneously relied on "a retroactivity provision from a 1998 version of MSORA." The first, from a December 2017 letter to Mr. Doe: (1) seems to be providing general background about the statute; and (2) says that MSORA applied only to people moving to Maryland who "are required to register in the state of conviction," which is not better for the State than the language of § 11-704(a)(6) that Mr. Doe says is dispositive in his favor. The second, from the State's summary judgment motion: (1) discusses the history of MSORA, highlighting that provisions of the Act making it applicable to people moving into Maryland were put in place years before Mr. Doe moved to Maryland; and (2) appears in a motion that elsewhere cites accurately to then-current provisions of MSORA and provisions that were in place in 2007. Neither reference suggests that repealed provisions were still applicable.

Apparently without irony, in his attempt to take the State to task for relying on an allegedly inapplicable retroactivity provision, Mr. Doe does so himself. The retroactivity provision of MSORA that has been in place since 2011 contains four different circumstances in which, "[n]otwithstanding any other provision of law to the contrary," the Act is to be applied retroactively. *See* Crim. Proc. § 11-702.1 (2008 Repl.; 2011 Supp.). One of those circumstances is where a person "was subject to registration under this subtitle on September 30, 2010." *Id.* § 11-702.1(a)(2). Another is where the person was convicted of "any felony on or after October 1, 2010" and has a prior conviction for which registration is required. *Id.* § 11-702.1(a)(3). Mr. Doe contends that the entire retroactivity provision cannot possibly apply to him because he has not been convicted of any felonies since October 1, 2010. In doing so, he knocks down a strawman argument that the State does not make—that § 11-702.1(a)(3) applies—and ignores the provision that would plainly be applicable to him if he was, in fact, subject to the subtitle when he moved to Maryland in 2007—§ 11-702.1(a)(2).

while § 11-704(a)(6) addressed the statute's application to out-of-state offenders. Once again, we cannot say that the State's position lacked substantial justification in light of the text of the two provisions, both of which, by their plain language, purport to extend the registration obligation to certain individuals who committed offenses before certain dates. Section 11-704(a)(6) purports to bring within the ambit of the statute certain persons moving into the State who committed certain offenses before 1997. Section 11-702.1(a) also purports to extend the application of the registration obligation, by making it retroactive to certain individuals who committed earlier offenses and were in custody "[n]otwithstanding any other provision of law to the contrary." The two provisions both extend a registration obligation to individuals who committed certain acts before the effective date of the statute and neither purports to limit or modify the other.[10] We cannot say that the State's interpretation was beyond the realm of legitimate advocacy.

Mr. Doe also contends that the State's position relied on "inaccurate descriptions of readily available" caselaw from the Court of Appeals and this Court establishing that it would violate the *ex post facto* protections of Article 17 of the Declaration of Rights to require Mr. Doe to register based on an offense he committed before Maryland adopted MSORA. Mr. Doe relies specifically on *Doe I*, *Doe II*, and *Quispe del Pino v. Maryland Department of Public Safety and Correctional Services*, 222 Md. App. 44 (2015). The

[10] To the extent that Mr. Doe reads "[n]otwithstanding any other provision of law to the contrary" as a limitation on the operation of § 11-704(a)(6), we do not agree. The natural import of that language, read as part of a provision that extends the registration obligation, is that it is intended to supersede other provisions of law that might otherwise be interpreted to limit the obligation.

State argued that those cases did not apply. In *Doe I*, the Court of Appeals held that a 2009 amendment to MSORA that required an individual to register as a sex offender based on conduct pre-dating MSORA, and who had not previously been required to register, "violates the prohibition against *ex post facto* laws[.]" 430 Md. at 537. In *Doe II*, the Court held that the independent federal obligation to register as a sex offender did not preclude circuit courts from "direct[ing] the State to remove sex offender registration information from Maryland's sex offender registry when the inclusion of such information is unconstitutional as articulated in *Doe I*." 439 Md. at 207. And in *Quispe del Pino*, this Court extended the reasoning of *Doe I* in holding that the prohibition against *ex post facto* laws prohibited a retroactive increase in the duration of an offender's registration obligation from ten to 25 years, pursuant to a 2010 amendment to MSORA. 222 Md. App. at 46.

The State distinguished those cases from Mr. Doe's by arguing that his registration obligation predated the 2009 and 2010 amendments to MSORA and was created, as an initial matter, by the application of the Hawaii statute, not by Maryland's laws or any retroactive application of them. The specific grounds for invoking the *ex post facto* clause in *Doe I*, *Doe II*, and *Quispe del Pino* were thus not present in Mr. Doe's case. The State also pointed out that, in *Dietrich v. State*, this Court held that the relevant date for *ex post facto* analysis for an individual who moves to Maryland from out-of-state is the date of the move, not the date of the offense. 235 Md. App. 92, 99-100 (2017). While the circuit court did not agree with the State's interpretation of the relevant caselaw, it was not patently

frivolous or outside the realm of legitimate advocacy to rely on the distinctions the State raised or on this Court's decision in *Dietrich*.[11]

In sum, we hold that, in light of the properly high bar established by caselaw to demonstrate lack of substantial justification for purposes of Rule 1-341, the circuit court abused its discretion in finding a lack of substantial justification. The State's position was not outside the realm of legitimate advocacy so as to justify the extraordinary remedy of a fee award.

ORDER OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED; COSTS TO BE PAID BY APPELLEE.

[11] Mr. Doe believes that *Dietrich* was wrongly decided. That belief does not alter the fact that the State was justified in relying on it in this case.

The correction notice(s) for this opinion(s) can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/0570s21cn.pdf