Circuit Court for St. Mary's County
Case No. C-18-CV-17-000221

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1160

September Term, 2019

RICHARD M. HANSON

v.

JOSEPH R. DENSFORD

Friedman,
Wells,
Adkins, Sally D.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Adkins, Sally D., J.

Filed: March 1, 2021

Earl Bonds died, owning property in St. Mary's County ("Bonds property"). Joseph Densford became the executor of his estate ("Bonds estate"). Before Densford sold the property, Richard Hanson, who owned adjacent property ("Hanson property"), contacted Densford about ongoing disagreements concerning easements running across each property for the benefit of the other. When these disagreements were not resolved, Hanson filed a complaint for declaratory judgment, and an amended complaint, followed by Densford's counter-complaint. The trial judge found against Hanson on all counts.

Hanson presented us with six questions for review:

1. Was the Circuit Court legally correct in holding that the Appellant failed to Establish his claim for a Prescriptive Easement in favor of Hanson Parcel Two?

2. Was the Circuit Court legally correct in holding that the Appellant failed to Establish his claim for an Easement by Necessity in favor of Hanson Parcel Two?

3. Did the Circuit Court commit reversible error in refusing to permit Andrew Havrilla to testify as an Expert in Real Property Development?

4. Did the Appellees abandon their deeded Easement Across Appellant's property?

5. Was the Circuit Court legally correct in holding that the Appellee met his burden to Establish his claim for an Easement by Prescription generally, and in particular was there error in determining that an easement had been established that would run appurtenant to Bonds Parcel One?

6. Did the Circuit Court commit error in granting the Appellee's Motion for Sanctions?

For the reasons set forth below, we affirm the trial court on all questions.

FACTS AND PROCEDURAL HISTORY

The Hanson property consists of three parcels: Parcel One, acquired in 1979, containing his prior residence; Parcel Two, acquired in 1983 (containing the "fishtail" portion), and Parcel Three, acquired in 2011 (the "pizza slice" parcel). In 2003, Bonds bought two adjacent parcels that were from the same original tract as Hanson's. A predecessor in title to both properties earlier granted the Bonds property an easement across Hanson's property, described by metes and bounds, for ingress and egress.

Richard Steinmetz, Hanson's counsel, contacted Densford in September 2017 to express his client's interest in relocating the current deeded easement over the Hanson property, benefitting the Bonds property. Hanson and Steinmetz knew that the Bonds property was under contract. In this communication, Steinmetz expressed that Hanson wanted to "enter into a driveway maintenance agreement . . . prior to the property being conveyed" in addition to "obtaining an easement across the Bonds property so that [Hanson] has a legal means to access the back portion of his property, which . . . [was] inaccessible as a result of the terrain."

When the parties could not reach an agreement, Hanson filed a complaint in November 2017 to establish an easement across the Bonds property to access the fishtail portion of his property. He relied on the doctrines of both easement by prescription and easement by necessity. Hanson then amended his complaint to seek a declaratory judgment that Densford's predecessors in interest abandoned their deeded easement across the

Hanson property. Densford filed a counterclaim seeking to establish a prescriptive easement, separate from the Bonds property's deeded forty-foot easement across the Hanson property.

Mediation & Communications

The parties attempted to settle, attending multiple days of mediation in May and June 2018. Hanson, Densford, and the potential purchasers of the Bonds property participated in the mediation sessions. In doing so, they unofficially postponed discovery for the upcoming September trial. At the end of the second session, Densford believed that they "had formed a consensus or an agreement on six principal points that . . . had previously been in dispute." He recalled that Steinmetz "volunteered to draft a settlement agreement for the parties to actually sign on a very short timetable."

When the end of July 2018 arrived with no settlement agreement, Densford's counsel, Christopher Longmore, contacted Steinmetz. He asked Steinmetz about the agreement again on August 30, 2018. Steinmetz responded the same day that the agreement was "being reviewed by Mr. Hanson" and would be forwarded "as soon as he approves the draft." On September 4, 2018, Longmore advised Steinmetz that Densford "currently has a binding contract with the current purchasers and therefore is looking forward to seeing the draft of the settlement agreement, with the terms the parties agreed to at our prior mediation." Longmore expressed concern because the trial was set for the following week on September 13. Finally, on September 6, Steinmetz forwarded the draft settlement agreement with the caveat that Hanson "has not committed to signing the

agreement as drafted at the moment, but has indicated . . . that it reasonably encompasses the terms he desires."

Densford filed a Motion For Sanctions, asserting that the draft "was completely different than the terms the parties had agreed upon [during mediation] and, in fact, sought provisions for [Hanson] that went beyond the relief he was seeking in the case even if he were successful in receiving all requested relief in the Complaint." The trial date was not able to go forward the following week and was rescheduled for May 2019.

Densford moved for sanctions "as a result of [Hanson's] actions with regard to a mediation in this matter that were taken in bad faith and without substantial justification." He asked for "costs and attorney's fees relating to the mediation process, the proceedings that occurred with the Court regarding scheduling while [he] was waiting for a draft settlement agreement," among other related fees.

The Sanctions Hearing & Trial

The court held a hearing on the sanctions in November 2018. Hanson did not attend the hearing but was represented by Steinmetz. Over objection, Densford testified about the six points he thought the parties agreed upon during the mediation. Steinmetz objected first on hearsay, then on the inadmissibility of settlement discussions, and finally, on the statute of frauds. The court disagreed: "[i]t's not an enforcement action. It's a bad faith sanctions action." It continued: "in order . . . to rule whether there is any bad faith or frivolous dealings or anything like that, I have to know what the facts are."

Steinmetz did not "present any evidence" or witnesses on Hanson's behalf. Hanson's defense was primarily limited to his counsel's closing argument, where he argued that the alleged agreement that was really just "a verbal agreement" and that the parties "did not and cannot be bound by that agreement." Steinmetz thought sanctions would "send a chilling message to the parties that, be careful what you discuss in settlement discussions; because even if you don't come to an agreement, it might come back to bite you."

The court was unconvinced:

> Mr. Hanson is not here. That's his prerogative. But what that left you with, Mr. Steinmetz, was no evidence. No evidence whatsoever.
>
> Nothing to refute anything Mr. Densford said other than your arguments, which are not evidence; nothing to refute Mr. Densford's opinion and understanding of what had been accomplished on June 12 [in mediation].
>
> Nothing to refute that you were supposed to do a written agreement that reflected what was in that agreement within a couple of days, and that didn't happen for months; and that never happened, actually.

It found Steinmetz and Hanson's actions to be "extremely frivolous . . . for the purposes of delay." The court continued: "there is no question in my mind that this was a—tactical or nontactical delay, I don't know. But it was certainly an unreasonable delay. And it fits right into Rule 1-341. There's no justification for it whatsoever." It awarded Densford attorney's fees and costs for the mediation, among other related fees.

The parties finally went to trial in May 2019. At trial, Hanson sought a prescriptive easement across the Bonds property to access the fishtail portion of his property, or, in the

alternative, an easement by necessity for the same parcel. Hanson also asserted that Densford's predecessors in interest abandoned the deeded easement across the Hanson property from non-use. Densford sought a prescriptive easement across the Hanson property for access to the Bonds property. The court ultimately found in favor of Densford on all claims. This appeal followed.

STANDARD OF REVIEW

We review actions tried without a jury "on both the law and the evidence. [We] will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Md. Rule. 8-131(c). We will not "disturb the factual findings of the trial court if they are supported by competent and material evidence." *Agency Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 193 Md. App. 666, 671–72 (2010). Our review of legal conclusions is without deference. *Id.* at 672.

DISCUSSION

Question 1: Hanson's Prescriptive Easement

Hanson argues that the trial court erred in finding that he failed to establish his prescriptive easement across the Bonds' property because he met the twenty-year requirement.

The Court of Appeals described the required elements for easements by prescription: "[a] prescriptive easement arises when a party makes an adverse, exclusive, and uninterrupted use of another's real property for twenty years." *Kirby v. Hook*, 347 Md.

380, 392 (1997). The use is adverse "if it occurs without license or permission." *Id.* Further, if a party "has used a right of way openly, continuously, and without explanation for twenty years, it is presumed that the use has been adverse under a claim of right." *Id.* Once the required elements are established, "[t]he burden then shifts to the landowner to show that the use was permissive." *Id.*

Hanson used Parcel One as his primary residence "[f]rom 1979 to somewhere between 1997 and 2000." Hanson testified that he used a tractor along the purported easement regularly from "about 1980 or '81, to about '98 or '99," despite not owning the fishtail portion until 1983. Densford's counsel sought to clarify whether Hanson used his tractor along the easement less frequently before and after that time period. Hanson agreed that his primary use was between 1980 and 1999 "[i]n terms of using a vehicle to get back there." As noted by the trial court, he testified that he primarily used the alleged right of way across the Bonds property in 1983 until his move around 1999. Hanson even admitted that the prior owners of the Bonds property blocked his access to the easement while they "excavated for the basement in the house." This occurred for "probably a couple [of] years," so Hanson took a detour from the path during that time.

The trial court denied Hanson's prescriptive easement because it found that he failed to meet the time period of twenty years usage:

> [Hanson's] testimony was that he used [the path across the Bonds property] during the time period—mostly used it during the time period when he lived on the property, and by his testimony that period of time is less than 20 years.
>
> ***

> [T]he evidence I think is clear that it was only during the time period . . . when he was living on the premises, burning wood and using it for the purposes of scavenging wood; and that if he used it more or less frequently before that, as [Hanson's] counsel has indicated, that wasn't the nature and use as it's indicated in the testimony in this case.
>
> So as it relates to the prescriptive easement, the Court does not find that he has met the 20-year requirement for continued use of this . . . claimed right of way.

Hanson cites *Clayton v. Jensen*, 240 Md. 337 (1965) for the proposition that the two-year interruption in his use did not bar him from meeting the twenty-year requirement. In *Clayton*, a prescriptive easement for a driveway was in question because there was a one-year period where a predecessor in interest did not own an automobile or use the driveway. *Id.* at 345. In holding that the brief lapse failed to destroy what was otherwise a forty-year period, the Court of Appeals acknowledged that "[d]aily use of the right of way is not required, but only that use normally resulting from the nature of the use itself. It is only required that a cessation of use not indicate a voluntary abandonment of the use by the person claiming it." *Id.* at 344–45. The Court continued:

> Indeed we have held that the absence of the person seeking to establish the easement from the dominant tenement for 'a few years' during which time the right of way was not used by that person, who, however, resumed the use upon her return, did not prevent the use from being continuous or indicate an abandonment of the use.

Id. at 345.

Clayton is inapposite. Hanson did not meet the twenty-year requirement when he used the pathway frequently, and his testimony failed to show a regular frequency after 1999. He admitted that he used the right of way with a tractor less frequently after he

moved. His only testimony as to how much he used his property after he moved was that he "visit[s] all parts of the property," "maintain[s] all the property lines," "scavenge[s] the trees off of wherever they happened to occur to fall down" for firewood, "use[s] part of the area for target practice," and "stroll[s] the property regularly just to keep track of what's going on, a form of exercise." He did not do target practice on the fishtail portion or "personally hunt" on the fishtail portion. He allowed his friends to hunt on the fishtail portion but did not know whether they used his alleged prescriptive easement to go there. We hardly see consistent, regular use after 1999. We hold that the trial court was not clearly erroneous in finding that Hanson failed to establish the twenty-year period of use, and thus failed to establish a prescriptive easement.

Question 2: Hanson's Easement By Necessity

Hanson asserts that the court erred by not finding an easement by necessity in favor of Hanson Parcel Two because the alternative would be difficult and costly. Densford responds that the court properly denied the easement by necessity because the doctrine applies in cases of actual necessity and not when it is expensive or difficult to access a portion of property.

An easement by necessity arises "from a presumption that the parties intended that the party needing the easement should have access over the land." *Stansbury v. MDR Development, L.L.C.*, 390 Md. 476, 487 (2006). Typically, it occurs when "a grantor conveys a tract of land which has no outlet to a public highway except over his remaining

land or over that of a stranger[.]" *Id.* (cleaned up). We construe easements by necessity "with strictness" in our analysis:

> Mere inconvenience will not be sufficient to justify the finding of a way of necessity. It is only in the case of strictest necessity, where it would not be reasonable to suppose that the parties intended the contrary, that the principle of implied easement can be invoked.

Id. at 488 (cleaned up).

It is undisputed that the Hanson property and the Bonds property come from the same original tract. Hanson sought an easement by necessity to access the fishtail portion of his property—which is only part of his land—through the Bonds property. The trial court found "at least two ways for which Mr. Hanson can access the totality of his property off of the main road . . . at least one that is done by deed; and the other is the purchase of the pizza slice." Additionally, it relied on Hunt's expert testimony that accessing the fishtail portion would be "[d]ifficult, costly, but not impossible." The trial court ultimately declined to find "that the elements have been met for easement by necessity." In light of the expert testimony that other routes of access exist, we see no error in this conclusion.

Question 3: Hanson's Real Property Development Expert

Part of Hanson's evidence to support his claim for easement by necessity was testimony from Andrew Havrilla, proffered as an expert in real property development. Hanson attacks the trial court's exclusion of this witness as a decision erroneously based merely on Havrilla's reliance on other experts—engineers and surveyors—in making decisions, a practice typical in his field. Densford counters that the court did not rely on

such a limited ground; rather it properly considered the expert opinion sought to be beyond Havrilla's expertise.

Maryland Rule 5-702 discusses the court's role in allowing expert witness testimony:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

Experts "may base an opinion on facts or data in the case that the expert has been made aware of or personally observed." Md. Rule 5-703(a). Trial courts have "broad discretion over the admissibility of expert testimony, and appellate review is "for abuse of discretion[.]" *Morton v. State*, 200 Md. App. 529, 542–45 (2011).

Hanson sought to use Havrilla "as a real property development expert." Hanson represented that Havrilla would "offer[] testimony in this case solely on the claim for the easement by necessity." The trial court initially allowed Havrilla to testify about his professional experience, and, to a limited extent, about Hanson's property and its relation to the Bonds property.

Havrilla explained that, while developing property, he works with an engineer to map out information, and then puts together a concept plan "in conjunction with the engineer." After Havrilla would draw property boundaries, he would take the survey and

frequently "show up at the engineer's office with [his] own concept plan of how [he] wanted things to go and where [he] thought—and then [he] would give it to them." He would "retain engineers to prepare the concept plans that actually get submitted to the county or city where [he was] developing."

After repeated objections by Densford, the trial court cut short Havrilla's testimony because it "appear[ed] very clear that [he does] rely on engineers, [he does] rely on surveyors, [he does] rely on consulting with other individuals to make [his] decisions." It also found that he was "being offered as an expert in an area where [his] testimony sounds like [he relies] on the expertise of other individuals to make those decisions."

Hanson compares this denial to "not allowing an orthopedic doctor to testify because he relies on radiologist reports like x-rays and MRIs." We do not see this analogy as apt. Although experts may rely on reports of other experts, they must also possess independent expertise that informs their opinion on the topic of their testimony. Havrilla was offered as an expert land developer, and as explained below, his proffered expert testimony was outside of the scope of his expertise.[1]

In the critical portion of Havrilla's testimony he opined that the soils were highly erodible, saying that the high likelihood of erosion made it impracticable for Hanson to build a road solely on his own property. It was within the discretion of the trial court to conclude that Havrilla, although a competent and experienced developer, was not trained

[1] We express no opinion on what expert testimony a land developer might be qualified to give.

as an engineer or soil scientist and had no expertise sufficient to opine on whether the property had "highly erodible soils" or what impact the nature of the soils would have, in scientific and regulatory terms, on the permitted location of a road. He could opine that a developer would ordinarily obtain an engineering report before purchasing property and rely on that report to determine a road location, but his experience in reading and relying on such reports does not qualify him to opine on the composition of soils.

Moreover, in excluding his testimony, the trial court also appropriately took into account Havrilla's error, admitted on cross-examination, in saying that "you'd never be able to build a road in there because you're inside the critical area"—referring to the "Critical Area" as defined by Maryland environmental law[2] with its various restrictions.[3] Havrilla's erroneous references to this environmental law supported the court's determination that the witness was giving opinions outside of his field of expertise—he

[2] *See* Md. Code (1974, 2018 Repl. Vol.), § 8-1801(b) Natural Resources Article ("It is the purpose of the General Assembly in enacting this subtitle: (1) To establish a Resource Protection Program for the Chesapeake and the Atlantic Coastal Bays and their tributaries by fostering more sensitive development activity for certain shoreline areas so as to minimize damage to water quality and natural habitats[.]"); Md. Code (1974, 2018 Repl. Vol.), § 8-1802 Natural Resources Article ("Critical Area" means the Chesapeake Bay Critical Area and the Atlantic Coastal Bays Critical Area."). This property, containing a non-tidal stream, was not within the "Critical Area".

[3] On cross-examination, Havrilla acknowledged that he had made this error, indicating that he just knew that property adjacent to streams was highly regulated. The trial court also observed that Hanson's other expert witness, a licensed surveyor, prepared a survey that contained no designation that a portion of Hanson's property lay within the Critical Area.

had familiarity with work other experts had done in the field but had not achieved his own expertise.

In short, we see no abuse of discretion by the trial court in excluding Havrilla's testimony.

Question 4: The Bonds' Deeded Easement

This issue—raised by Hanson in an amended complaint—seeks a declaratory judgment that Densford's predecessors in interest abandoned the deeded easement running over Hanson's property. The easement was also referenced in the deeds to both Hanson and Bonds. Hanson alleged that Densford's predecessors in interest abandoned the deeded easement by not using it for forty years.

The trial court rejected Hanson's claim of abandonment. Hanson argues that the trial court erred because non-use for forty years amounts to abandonment. Densford obviously disagrees.

Express easements are abandoned by showing "that the owner intended to abandon the easement." *Purnell v. Beard & Bone, LLC*, 203 Md. App. 495, 527 (2012). But "[m]ere non-use of the easement is insufficient to show intent to abandon." *Id.* A litigant must also prove "an act or a combination of acts that unequivocally demonstrates the party's intent to abandon the easement." *Id.* The party asserting abandonment of an easement bears the burden. *Id.* at 531.

Hanson relies on *Maryland & P.R. Co. v. Mercantile-Safe Deposit & Trust Co.*, 224 Md. 34 (1960). There, a railroad company removed its rails and ties from an easement. *Id.*

at 39. Finding that the railroad had abandoned its easement, the trial court entered judgment against the railroad company. *Id.* at 35–36. The Court of Appeals affirmed, stating:

> The general rule is that the right and title to a *mere* easement in land acquired by a *quasi*-public corporation . . . for a public purpose is dependent upon the continued use of the property for that purpose, and when such public use is abandoned the right to hold the land ceases, and the property reverts to its original owner or his successors in title.

Id. at 39 (emphasis in original). In conjunction with the physical act of removing its property, the Court saw "no evidence disclaiming an intent to abandon the right of way." *Id.* at 39–40. The rule applied in *Maryland & P.R. Co.*—applicable to quasi-public corporations for a public purpose—is not the same as that applied to private citizens or business entities, as we have here. *See* 3 Herbert T. Tiffany, The Law of Real Property § 825 (3d ed 1975, 2020 Cum. Supp.) ("[A]bandonment will be more readily inferred when the easement has been granted for a public purpose rather than a private use.").

The rule used in the private sector is set forth in *Purnell v. Beard & Bone, LLC*. *Purnell* 203 Md. App. at 527. There, the Purnells sought to prove abandonment through testimony that "there was no evidence . . . that anyone had used the property to gain access . . . during the last 50 years." *Id.* at 525. They presented no evidence other than non-use. *Id.* Beard & Bone countered that "there was no evidence of abandonment, which must be decisive, clear, and unequivocal." *Id.* at 526. The trial court found that the Purnells failed to "show that the owner intended to abandon the easement," and did not prove "an act or a combination of acts that unequivocally demonstrate[d] the party's intent to abandon

the easement." *Id.* at 527. We affirmed, pointing out the absence of "any intention or overt act by Beard & Bone, or by any of [its] predecessors in title, to abandon the easement." *Id.* at 532.

As in *Purnell*, Hanson bases his argument entirely on non-use: "the easement as described in the deed had not been used in forty years." He asserts that "the non-use of the deeded easement coupled with the continuous use of the adjacent strip of property clearly evidences an intent to abandon the deeded easement in favor of the physical location upon which its prescriptive right is based."

The trial court stated that "there needs to be some act showing an intention to abandon the easement which would be sufficient to release the claims." It continued: "the case law is clear, the fact that they didn't use it by itself is not sufficient for a claim of abandonment." It found no "sufficient evidence or facts to support the claim of abandonment of the deeded easement." We see no error. *See* 3 Herbert T. Tiffany, The Law of Real Property § 825 (3d ed 1975, 2020 Cum. Supp.) ("The mere use of a new right-of-way will not extinguish the old right-of-way."). Non-use alone is not enough to abandon a private-sector easement, and neither is using an adjacent path.

We affirm the trial court.

Question 5: The Bonds' Easement By Prescription

The trial court found that Densford proved a prescriptive easement over the existing driveway that runs through Hanson's property that is adjacent to the deeded forty-foot easement discussed above. Hanson believes the court erred because Densford failed to

establish both the uninterrupted element and that the Bonds or their predecessors failed to use the driveway for twenty or more years. Densford replies that the trial court was correct because the easement had always been the sole physical access to the Bonds property for decades.

We stated earlier that the requirements for an easement by prescription are adverse, exclusive, and uninterrupted use of another's real property for twenty years. *See Kirby*, 347 Md. at 392. Hanson's primary challenge rests on evidence that "tenants and family members were all dependent upon the claim that [Densford's predecessor in interest] had to an easement." He believes this negates exclusivity.

The term "exclusivity" in this context can be misleading—it is not as restrictive as it sounds. As explained in a seminal treatise,

> It is sometimes said that, in order to acquire a right of user by prescription, the user during the prescriptive period must be exclusive, but this appears to be so in a very limited sense, if at all. It means . . . no more than that the claimant's right must rest upon its own foundations and not depend upon a like right in any other person; it is not necessary that he should have been the only one who used or was entitled to use it, so long as he used it under a claim of right independently of others.

4 Herbert T. Tiffany, The Law of Real Property § 1199 (3d ed 1975, 2020 Cum. Supp.) (cleaned up). Our decisions are similar.

We have said that "exclusivity" means that "the claim of user must not depend on the claim of someone else." *Turner v. Bouchard*, 202 Md. App. 428, 451 (2011) (cleaned up). We have further explained that the claimant need "not have been the only user, it is sufficient if he used the way under a claim of right independently of others." *Id.* at 452

(cleaned up). For prescriptive easements, exclusivity is primarily discussed "in the context of distinguishing a private use from a public use." *Id.* If the disputed area was not used by the general public and only private, permissive use by the claimant, it is likely exclusive. *See id.* ("Here, there is no evidence that the disputed area was used by the general public; only Bouchard and his tenants used the disputed area.").

The trial court considered Hanson's own testimony that "the entire time he lived there, everybody who ever went on the Bonds properties drove across the gravel portion of the driveway to access those properties." Hanson was not the only one to say so: other witnesses "also testified that they had to use the gravel road in order to travel across into the Bonds property."[4]

Use of the gravel driveway to access the Bonds property by family members and tenants would not destroy exclusivity or prevent the prescriptive easement. *See* Wilson v. Waters, 192 Md. 221, 229 (1949) ("We adopt the rule that if a road led at its start only to the premises of the persons using it, such circumstance is sufficient to prove their user under a claim of exclusive right, in the absence of proof to the contrary. If a road, which was started in such a manner as to make the user adverse and exclusive, is afterwards enjoyed in common with the public, the user does not lose its exclusive character as the result of the joinder of the public therein.").

[4] Regarding the element of adversity, the court found that Hanson "has never given anybody permission to use the gravel driveway to cross over, and that all of the individuals who have crossed over that property have done so without his permission."

We see no error by the trial court in its enforcement of the prescriptive easement acquired by Bonds over Hanson's property.

Question 6: Densford's Motion For Sanctions

The trial court, on Densford's motion, granted him an award of sanctions against Hanson pursuant to Maryland Rule 1-341 on grounds that Hanson unreasonably delayed the judicial proceedings without substantial justification. The delay occurred when, allegedly, after a consensual mediation, Hanson undertook to draft a document and kept Densford waiting for three months, despite repeated demands. The document—not produced until one week before the scheduled trial—contained terms substantially at odds with those tentatively agreed to at the mediation. This delay allegedly caused a postponement of trial, which was then rescheduled for a date eight months later. Hanson challenges the court's award of sanctions against Hanson on grounds that no agreement was reached during the settlement negotiations, so there was no unjust delay. He believes that it was error to allow Densford to testify about the terms from the mediation. Densford asserts that the sanctions were wholly proper because Hanson engaged in conduct to unjustifiably delay the proceedings, causing harm to the Bonds estate. Densford sees no issues with his testimony because he did not discuss settlement discussions—only terms the parties agreed upon—and it was to establish the stark contrast to the circulated agreement.

Densford moved for sanctions under Rule 1-341:

> **(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.

Md. Rule 1-341.

Hanson first contends that the "trial court erred in allowing testimony concerning the confidential settlement discussions between the parties." He believes that this testimony was in violation of Rule 5-408:

> **(a)** The following evidence is not admissible to prove the validity, invalidity, or amount of a civil claim in dispute:
>
> (1) Furnishing or offering or promising to furnish a valuable consideration for the purpose of compromising or attempting to compromise the claim or any other claim;
>
> (2) Accepting or offering to accept such consideration for that purpose; and
>
> (3) Conduct or statements made in compromise negotiations or mediation.
>
> ***
>
> **(c)** Except as otherwise provided by law, *evidence of a type specified in section (a) of this Rule is not excluded under this Rule when offered for another purpose* . . . but exclusion is required where the sole purpose for offering the evidence is to impeach a party by showing a prior inconsistent statement.

Md. Rule 5-408 (emphasis added). The motions court reminded the parties of the hearing's purpose: "in order for me to rule whether there is bad faith or frivolous dealings or anything like that, I have to know what the facts are. So I think it has to come in."

The direct language of the rule allows for using evidence "when offered for another purpose"—one not to prove the validity or enforce the terms. Md. Rule 5-408. Densford

testified that the parties reached an agreement as to six specific terms, none of which were included draft agreement Steinmetz circulated. It was circulated three months after the mediation, which in effect delayed the trial by eight months. Densford did not seek to enforce the terms; he sought relevant costs for the mediation and sanctions motion.

The trial court acted within its discretion in deciding that Densford's testimony was relevant and admissible, believing that it had no way to meaningfully evaluate the draft settlement agreement's terms otherwise. Densford's testimony was appropriate under the circumstances because it was not used to enforce the settlement terms, but to allow the court to analyze whether sanctions for unreasonable delay were justified. [5]

Hanson next contends that sanctions were inappropriate because the mediation was not a proceeding under Rule 1-202. Rule 1-202(w) defines proceeding: "any part of an

[5] We do not ignore the strict rule of confidentiality in mediations under the Maryland Mediation Confidentiality Act ("Mediation Act"). *See* Md. Code (1974, 2020 Repl. Vol.), §§ 3-1801 et seq. Courts & Judicial Proceedings ("CJP") Article. If the Mediation Act applied, the court could not admit into evidence, over objection, confidential mediation communications without finding that a narrow exception applied. *See* CJP § 3-1804(c) ("A court may order mediation communications to be disclosed only to the extent that the court determines that the disclosure is necessary to prevent an injustice or harm to the public interest that is of sufficient magnitude in the particular case to outweigh the integrity of mediation proceedings."). Neither party suggests that this Act applies under these circumstances. *See* CJP § 3-1802(a) ("Except as [otherwise] provided . . . this subtitle applies to a mediation in which: (1) The parties are required to mediate by law; (2) The parties are referred to mediation by an administrative agency or arbitrator; or (3) The mediator states in writing to any and all parties to the mediation and persons with whom the mediator has engaged in mediation communications that: (i) The mediation communications will remain confidential[.]"). The record does not establish that the mediation falls within any of these criteria. Although it appears the mediation was not court-ordered—the parties agreed on their own to mediate—we are unable to determine the specifics of the mediator's communications to the parties about confidentiality. In the absence of a party raising the applicability of the Act, we will not assume that it governs.

action." Md. Rule 1-202(w). It defines action as: "collectively all the steps by which a party seeks to enforce any right in a court[.]" Md. Rule 1-202(a). Hanson asserts that Rule 1-341 is thus inapplicable because "the court granted sanctions not based on any steps taken by either party to enforce any right in court but based on conduct that occurred in connection with mediation." We see no merit to this argument: the mediation—occurring in the midst of court litigation—was an attempt to reduce costs and avoid the risks of trial, and the trial court found that Hanson's actions caused the trial to be postponed from September 2018 to May 2019.

Hanson continues his argument—saying that the grant of sanctions was inappropriate because Hanson "was acting in good faith to reach a workable resolution to the case in accordance with what the parties had discussed." He references his affidavit to prove his point. Hanson's affidavit, notably, is dated January 8, 2019—two months after the November 5, 2018 hearing. In addition, Densford's entire motion for sanctions was based on both the delay and the fact that the terms were in direct contradiction to what the parties discussed. If Hanson believed his delay was in good faith, the best place to present relevant evidence would have been the sanctions hearing—an opportunity he elected to forego. It was within the trial court's discretion to conclude that the delay in preparing and sending the proposed settlement agreement was unjustifiable.

Hanson's final argument regarding sanctions is that "the amount awarded by the trial court is too much." He believes that the court should only have awarded costs attributable to the delay, and not the entirety of the mediation. Densford asserts that

"[t]here was clear evidence in the record as to the exact amount requested by [Densford] and the bases of that amount, i.e., the attorney's fees and costs of the mediation process."

The motions court awarded Densford attorney's fees relating to mediation because it "was a waste of everybody's time; because although it was successful, it has now turned out to be unsuccessful through no fault of [Densford]." It also awarded mediation costs because they "again turned out to be unsuccessful through no fault of [Densford]." We see no abuse of discretion in the court's award of costs for the mediation and related attorney's fees. We affirm the sanctions.

CONCLUSION

For the reasons stated above, we affirm the judgment of the trial court.

JUDGMENT OF THE CIRCUIT COURT FOR ST. MARY'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.