Circuit Court for Anne Arundel County
Case No. C-02-FM-18-826

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND

No. 1605

September Term, 2021

AFSHAN HINA

v.

SYED AFZAL HYAT

Kehoe,
Leahy,
Kenney, James A., III,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: January 31, 2023

At the November 8, 2022, general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

Afshan Hina, appellant ("Mother"), filed the underlying appeal challenging, among other things, an award of attorneys' fees in ongoing litigation between herself and Syed Afzal Hyat, appellee ("Father"), regarding custody, visitation, and support of their minor son, A. This appeal is the last that Mother filed in a series of appeals from orders issued in the case by the Circuit Court for Anne Arundel County in 2021.

Earlier this year we issued an unreported opinion, *Hina v. Hyat*, No. 1016, Sept. Term, 2021, slip op. at 10-11 (filed Mar. 7, 2022) ("*Hina I*"), that consolidated two of Mother's prior appeals from four separate orders. In *Hina I*, we held that only the August 20, 2021, order for attorneys' fees was properly before us. *Id.* at 11. We reversed the August 20 judgment awarding Father attorneys' fees in the amount of $7,500 after concluding that the circuit court failed to make the necessary finding that Mother proceeded in bad faith or without substantial justification, as required to support a Rule 1-341 sanction. *Id.* at 20-21.

In the instant appeal, filed on December 13, 2021, Mother challenges the judgment entered on December 10, 2021, awarding Father attorneys' fees in the amount of $1,207. That judgment,[1] issued well before our opinion was issued in *Hina I*, suffers from some of the same deficits that required our reversal of the attorneys' fee award in *Hina I*. As before,

[1] As noted *infra*, Mother claims that in the circuit court's order denying Mother's motion for reconsideration issued on October 20, 2021, the court struck the language from the proposed order granting Father attorneys' fees. The order, as it appears on MDEC and in Appendix A of this opinion, contains the following language which is partially obscured: "ORDERED, [Mother] shall pay the attorney's fees and costs incurred by [Father] in having to respond to [her] Motion for Reconsideration upon submission of [Father's] counsel of a verified statement of attorney's fees and costs and fee/cost summary chart."

the record does not show that the court made the predicate finding that Mother lacked substantial justification or acted in bad faith in seeking reconsideration of the *pendente lite* order. Because we conclude, however, that the record does not necessarily preclude a fee award, we shall vacate the judgment and remand the case for further proceedings.

BACKGROUND

Hina I

The history of this litigation supplies essential background for our resolution of this appeal. In *Hina I*, we detailed the parties' litigation in the Circuit Court for Anne Arundel County. *See Hina I*, No. 1016, slip op. at 1-10. Mother, who has represented herself throughout these proceedings, noted two appeals from four separate orders that were consolidated into that appeal. *See id*. at 9-10. The rulings she challenged were made during litigation over her motion to modify the terms of an order incorporating the parties' agreement regarding custody, visitation, and child support. *See id.* at 2-9. We determined that only one order was properly before this Court; namely, the August 20, 2021, order awarding attorneys' fees to Father in the amount of $7,500. *See id*. at 10-11, 14.

First, we reviewed the standards governing an award of attorneys' fees under Maryland Rule 1-341, explaining:

> Maryland adheres to the American rule that generally requires each party to a litigation to pay its own attorneys' fees. *Bainbridge St. Elmo Bethesda Apts., LLC v. White Flint Express Realty Grp. Ltd. P'Ship, LLLP*, 454 Md. 475, 486 (2017). There are four exceptions to this rule, including, as relevant, when "there is a statute [or rule] that allows the imposition of such fees[.]" *Id*. at 487 (quoting *Nova Research, Inc. v. Penske Truck Leasing Co.*, 405 Md. 435, 445 (2008)).

Fees awarded under Rule 1-341 fall within this exception. The rule functions "'as a deterrent' against abusive litigation." *Christian v. Maternal-Fetal Med. Assocs. of Md., LLC*, 459 Md. 1, 19 (2018) (quoting *Worsham v. Greenfield*, 435 Md. 349, 369 (2013)). It provides:

> **(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.

It is not punitive, but rather operates as "a mechanism to place 'the wronged party in the same position as if the offending conduct had not occurred.'" *Christian*, 459 Md. at 19 (quoting *Major v. First Virginia Bank-Central Md.*, 97 Md. App. 520, 530 (1993)). An award of attorneys' fees under the rule "is considered an 'extraordinary remedy,' which should be exercised only in rare and exceptional cases." *Id*. (quoting *Barnes v. Rosenthal Toyota, Inc.*, 126 Md. App. 97, 105 (1999)).

Before imposing sanctions under Rule 1-341(a), "a court [must] make two separate findings, each with different, but related, standards of review." *Id*. 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**.'" *Id*. (quoting *Talley v. Talley*, 317 Md. 428, 436 (1989)). The "logic" behind that requirement is "that before such an extraordinary sanction is imposed there should be evidence that there has been a clear focus upon the criteria justifying it and a specific finding that these criteria have been met." *Talley*, 317 Md. at 436. That finding is reviewed "for clear error or an erroneous application of the law." *Christian*, 459 Md. at 21. **Second, upon a finding that the predicate for an award of sanctions exists, a court must make a separate finding of "whether the party's conduct merits the assessment of costs and attorney's fees[.]**" *Fort Myer*, 452 Md. at 72. This finding "will be upheld on appellate review unless found to be an abuse of discretion." *Id*.

Hina I, No. 1016, slip op. at 15-17 (emphasis added).

Next, we addressed Mother's contention that the $7,500 judgment also did not comply with Maryland Code, Family Law Article (1984, 2019 Repl. Vol.) ("FL"), section 12-103, which applies in modification cases.[2] *See id*. at 19-21. Acknowledging the difference between that statute and Rule 1-341, we examined "the interplay in this case" between the two fee provisions:

> Rule 1-341 does not mandate consideration of a party's financial status, needs, or ability to pay fees. In contrast, the statute permitting an award of attorneys' fees in custody, visitation, and child support cases does so require. Section 12-103(a) of the Family Law Article empowers a court to award "costs and counsel fees that are just and proper under all the circumstances" in those cases. At subsection (b), it mandates that the court "consider: (1) the financial status of each party; (2) the needs of each party; and (3) whether there was substantial justification for bringing, maintaining, or defending the proceeding" before making a fee award. This Court has recognized that, among its purposes, **section 12-103** "**allow[s] a court to ensure that the**

[2] Section 12-103 of the Family Law Article provides in pertinent part:

> (a) The court may award to either party the costs and counsel fees **that are just and proper under all the circumstances** in any case in which a person:
>
> > (1) applies for . . . modification of a decree concerning the custody, support, or visitation of a child of the parties . . ..
> >
> > * * *
>
> (b) Before a court may award costs and counsel fees under this section, the court shall consider:
>
> > (1) **the financial status of each party**;
> >
> > (2) **the needs of each party**; and
> >
> > (3) **whether there was substantial justification for bringing, maintaining, or defending the proceeding**.
>
> (c) Upon a finding by the court that there was an absence of substantial justification of a party for prosecuting or defending the proceeding, and absent a finding by the court of good cause to the contrary, the court shall award to the other party costs and counsel fees.

FL § 12-103 (emphasis added).

> **child who is the subject of a dispute is not further disadvantaged as a result of the dispute by leaving the party or parties who have custody or visitation with inadequate resources to provide for the child**." *David A. v. Karen S.*, 242 Md. App. 1, 37, *cert. denied*, 466 Md. 219 (2019). **Section 12-103 thus ensures that the best interests of the child factor into any fee award made under the statute**. *See Ross v. Hoffman*, 280 Md. 172, 174-75 (1977) (the best interest of the child standard is "firmly entrenched in Maryland and is deemed to be of transcendent importance."); *Petrini* [*v. Petrini*, 336 Md. 453, 468 (1993)] (consideration of "the benefit to the child of awarding attorney's fees to the mother" was appropriate under FL § 12-103).
>
> Though Rule 1-341 serves a different purpose than section 12-103, we nevertheless conclude that it would be inconsistent with a child's "indefeasible right" to have his or her best interests considered in cases concerning custody, visitation, or child support to permit a party to circumvent these considerations by pursuing fees only under Rule 1-341. *A.A. v. Ab.D.*, 246 Md. App. 418, 422 (2020) (citing *Flynn v. May*, 157 Md. App. 389, 410 (2004), *cert. denied*, 471 Md. 75 (2020). We are persuaded that in the unique context of child custody and child support cases, upon making a predicate finding that a party pursued litigation in bad faith or without substantial justification under Rule 1-341, the court may need to consider the best interests of the child in making the secondary finding that a party's conduct merits an award of attorneys' fees.

Hina I, No. 1016, slip op. at 19-21 (footnote omitted) (emphasis added).

Ultimately, we reversed the award of $7,500 in attorneys' fees because "the circuit court failed to make the necessary findings that Mother proceeded in bad faith or without substantial justification to support a Rule 1-341 sanction." *Id*. at 21. We explained that the circuit court's summary finding that "this case was filed without substantial justification" was not supported by a '"brief exposition of the facts upon which [it] [was] based.'" *Id.* at 18 (quoting *URS Corp. v. Fort Myer Constr. Corp*., 452 Md. 48, 72 (2017)). Also, the court failed to make the secondary finding required by Rule 1-341, that Mother's conduct warranted the imposition of costs and attorneys' fees. *Id.* With no explanation

from the court to support its imposition of the sanction, we had only the record to review, which revealed that:

> Mother's motion for modification of child custody and visitation was not patently frivolous. She alleged a change in Father's living conditions since the entry of the Virginia Custody Order and testified about how, in her view, that change had affected A. She further alleged that A. was negatively impacted by the lack of time with Father and argued, in the alternative, that if Father moved to a residence with a bedroom for A., she would welcome expanding his access to A. That the court rejected Mother's positions as without merit does not transform a weak but colorable claim for modification of custody and visitation into one maintained without substantial justification.
>
> Likewise, Mother's allegations and testimony that her rental expenses had increased, that Father's income had increased since the divorce hearing, and that A. should be enrolled in a preschool to assist with an alleged speech delay all were bases upon which the court could have concluded that an upward modification in child support was warranted. The court's legal ruling that it lacked jurisdiction to modify the Amended Virginia Support Order was based upon a statutory analysis that Father's attorney did not raise in his motion to dismiss or at the merits hearing.[] Mother's misapprehension of the law on this point did not justify the extraordinary imposition of sanctions. *See Talley*, 317 Md. at 438 (negligence or ineptitude is insufficient to warrant sanctions under Rule 1-341, which is "intended to reach only intentional misconduct.").

Hina I, No. 1016, slip op. at 18-19 (footnote omitted). We also noted that an order directing Mother to pay $7,500 in attorneys' fees could disadvantage A. "by depleting the limited financial resources available to his primary caregiver"—observing that because Mother is unable to work legally in the United States, her sole income is the $2,100 in monthly spousal support that she receives from Father. *Id.* at 21. Accordingly, after reversing the judgment, we declined to remand for further consideration of Father's fee request, "conclud[ing] that the sanction cannot be sustained on this record because there is no evidence Mother proceeded in bad faith and Mother's motion for modification of child

custody and visitation was not patently frivolous as she alleged, among other things, a change in Father's salary and living conditions." *Id.*

This Appeal

This appeal, and more specifically, Father's award of attorneys' fees for opposing Mother's motion for reconsideration, arises from the motion originally filed by Father to modify custody, visitation, and support after Mother filed a change of residence. As we related in *Hina I*,

> on August 14, 2021, Mother filed an address change request, notifying the court of her intended move to Illinois. In response, Father filed a complaint to modify custody, visitation, and child support along with an emergency motion for temporary custody or, in the alternative, for an expedited *pendente lite* hearing. On September 8, 2021, an *ex parte* emergency hearing took place before a family law magistrate, who recommended that the emergency relief be denied, but that Father's request for an expedited *pendente lite* hearing be granted. The recommendation was adopted by the court that same day and an order was entered setting the *pendente lite* hearing for September 13, 2021.

Hina I, No. 1016, slip op. at 8-9.

On September 9, Mother noted an appeal and requested a stay on "execution of Order entered . . . on September 8, 2021[.]" That evening, Father filed a response and opposition.

On September 10, Father filed an affidavit of service, asserting that Mother had been served with notice of the *pendente lite* hearing earlier that morning while entering a vehicle, identified by make and license plate number, in the parking garage of her apartment building in Arundel Mills. When Mother did not appear at the *pendente lite* hearing on September 13, counsel for Father proffered that Father exchanged text messages with her

the day before and earlier that morning. According to Father, when Mother advised that she had moved with the child that day, he asked whether she was "coming to court for the 1:30 p.m. expedited PL hearing on custody" given that she had been "properly served." She allegedly replied, "No, that's not true." Mother offered no other response to Father's message.

The day after the *pendente lite* hearing, on September 14, Mother filed a line noting that, having given 30 days' notice, she had relocated with the child to an address in Naperville, Illinois. That same day, the court denied Mother's motion to stay execution of the *ex parte* order scheduling the *pendente lite* hearing and, on September 16 "entered a *pendente lite* order that 'slightly modified' Father's weekend access and holiday access schedule and ordered Mother to arrange for and pay the costs associated with transporting A. for the visits." *Hina I*, No. 1016, slip op. at 9. The order expressly "supersede[d] the corresponding terms in the parties' Agreed Custody and Visitation Order dated December 21, 2017[.]"

On September 15, Father filed his response and opposition to Mother's request to stay execution of the *pendente lite* order. In support of denying such relief, Father asserted that Mother "was properly served with the September 8, 2021 Order setting this matter for an expedited *Pendente Lite* hearing on September 13," but "chose not to appear" and "instead, relocate[ed] to Illinois with the parties' minor child." According to Father, Mother had been denying him all access with the child since August 24, 2021.

On September 16, 2021, Mother filed a notarized counter-affidavit disputing that she was personally served with a summons and notice for the expedited *pendente lite* hearing. In support, Mother averred that she "DO[ES] NOT OWN ANY CAR OR VEHICLE as mentioned" in Father's affidavit of service, and that she was "not present in the State of Maryland" on "September 10, 2021 and the entire week of September 6th, 2021 with limited to no access to emails." (Emphasis supplied by Mother). On the morning of September 22, 2021, Mother filed a motion to reconsider and to quash the *pendente lite* order, arguing, *inter alia*, that she was not served. At 8:37 P.M. that evening, Father filed a notice dismissing his complaint to modify custody, visitation, and child support because Mother "ha[d] not filed an Answer to [Father's] Complaint to Modify[.]". (Emphasis supplied by Father).

On October 5, Father also moved to strike Mother's motion for reconsideration, or, in the alternative, respond in opposition to Mother's motion on the ground that she had been properly served but failed to appear for the *pendente lite* hearing. According to Father, Mother cannot truthfully claim under oath that she was not in Maryland during the week of September 6 because the court's docket entry comment states that on September 9, 2021, a "Civil Information Report [was] handed to Afshan Hina at civil front counter[.]" Father requested "attorney's fees and costs associated with having to file this motion upon submission of a verified Attorney's Fees Affidavit and Fee Summary[.]"

On October 6, Mother moved to dismiss the *pendente lite* order entered on September 14, citing, among other things, Father's voluntary dismissal of his petition to

modify custody. Notably, in support of her motion to dismiss the *pendente lite* order, Mother stated: "There was NO HEARING docketed in the scheduling calendar for the 13th of September 2021 [i]n this case" because "[t]he TV screens in the Court did not show any scheduled hearing in this case on [the] 13th of September 2021." (Emphasis supplied by Mother). Father filed a response in opposition to Mother's motion to dismiss on October 15, arguing that the *pendente lite* order remained in effect.

On October 20, the circuit court issued an order denying Mother's motion for reconsideration, without a hearing. That same order, as it appears on MDEC, in Mother's briefing, and in Appendix A of this opinion, contains the following language that is partially obscured: "ORDERED, [Mother] shall pay the attorney's fees and costs incurred by [Father] in having to respond to [her] Motion for Reconsideration upon submission of [Father's] counsel of a verified statement of attorney's fees and costs and fee/cost summary chart."

On November 17, 2021, Father submitted, with supporting documentation, a verified statement of costs and fees totaling $1,207. Then, by order entered December 10, 2021, the court, by a different judge, determined the fees were "reasonable" and ordered Mother to pay $1,207 in attorneys' fees. *Hina I*, No. 1016, slip op. at 10 n.5. That same day, the court entered a notice of recorded judgment for the same amount.

Mother noted this appeal on December 13, 2021.

DISCUSSION

Contentions On Appeal

Mother's notice of appeal filed on December 13, 2021, challenges: (1) the judgment entered on December 10, 2021, awarding Father attorneys' fees under Maryland Rule 1-341 in the amount of $1,207; (2) a *pendente lite* order docketed September 16, 2021; and (3) another order docketed November 30, 2021, denying Mother's motion to reconsider a court order denying her request to waive pre-paid costs for assembling the record.

Mother's informal brief, however, only addresses whether the circuit court erred or abused its discretion in awarding Father $1,207 in attorneys' fees as reimbursement for the costs of responding to Mother's motion for reconsideration of the court's *pendente lite* order. Aside from the fact that Mother's appeal of the September 16, 2021, *pendente lite* order is untimely, we will not review the propriety of the circuit court's orders issued on September 16 and November 30, 2021, because Mother does not raise or argue in her informal brief why or how the trial court erred in entering them. *See* Md. Rule 8-504(a)(6) ("A brief shall . . . include . . . [an] [a]rgument in support of the party's position on each issue."); *see also Klauenberg v. State*, 355 Md. 528, 552 (1999) ("arguments not presented in a brief or not presented with particularity will not be considered on appeal.") (citation omitted).

In regard to the issue of attorneys' fees, Mother asserts that Father submitted the Verified Statement of Attorneys' Fees "without any authority or order" from the circuit court because in the order dated October 20, 2021, the trial judge "struck off the attorney

fees and other damaging phrases and only ordered denial of the reconsideration motion." Mother further argues that the circuit court erred in awarding attorneys' fees without "fulfill[ing] the legal requirements" established by FL § 12-103, mandating consideration of "the financial means of the parties."

Father has not filed a brief.

Analysis

At the threshold, we conclude that it is unclear from the court's orders whether the court ordered attorneys' fees under Maryland Rule 1-341 or FL § 12-103 or both. Correspondingly, the court failed to make the predicate findings required by either Maryland Rule 1-341 or FL § 12-103.[3] Accordingly, we must vacate the court's orders dated October 20 and December 10, 2021. *See Petrini v. Petrini*, 336 Md. 453, 468 (1994) ("Consideration of the statutory criteria is mandatory in making an award and failure to do so constitutes legal error.") (citing *Carroll Cnty. v. Edelmann*, 320 Md. 150, 177 (1990)).

Assuming the court did not intend strike the language, the order awarding attorneys' fees dated October 20, 2021, states that Mother shall "pay the attorney's fees and costs incurred by [Father] in having to respond to [Mother's] Motion for Reconsideration upon submission by [Father's] counsel of a verified statement of attorney's fees and costs and fee/cost summary chart." *See* Appendix A. On November 17, counsel filed a Verified

[3] Mother insists, based on the obvious obstruction of the words on the available copy, that the court intended to strike the attorneys' fees from the order issued on October 20, 2021. We presume that is not the case given that the court followed that order with the order issued on December 10 specifying the amount of attorneys' fees to be awarded. In any case, the court will have the opportunity to clarify this on remand.

Statement of Attorney's Fees, attaching a "chart detailing the fees incurred[,]" an "October 30, 2021 invoice itemizing said attorney's fees[,]" and a proposed order. Then, on December 10, without any finding that Mother acted in bad faith or without substantial justification, or any analysis of the parties' financial status , the court signed the proposed order stating that "the fees and costs sought by [Father] are reasonable" and instructing the clerk to enter judgment against Mother for $1,207. As in *Hina I*, we conclude that the court erred in doing so.

As mentioned previously, there was no hearing or memorandum issued, and both orders fail to state any finding, as required by Rule 1-341 *and* FL §12-103(a), that Mother sought reconsideration of the *pendente lite* order either in bad faith or without substantial justification. Nowhere does the court articulate "a 'brief exposition of the facts upon which'" any such finding could be based. *See URS Corp. v. Fort Myer Constr. Corp.*, 452 Md. 48, 72 (2017) (quoting *Talley v. Talley*, 317 Md. 428, 436 (1989)).

In *Hina I*, we did not remand for further consideration of Father's original fee request because we concluded that the record could not support a finding that Mother acted in bad faith or otherwise lacked justification for seeking modification of parties' agreement regarding custody, visitation, and support. *See Hina I*, No. 1016, slip op. at 21. In the present case, we cannot say as a matter of law that the record could not support a determination that Mother acted in bad faith or lacked justification in challenging the *pendente lite* order. As we have detailed, there was conflicting evidence about whether Mother was served with notice and a summons for the *pendente lite* hearing, which was a

primary basis for her challenge to the ensuing order. If the court were to conclude that Mother was served, but proceeded to challenge the *pendente lite* order on the ground that she had not been served, the court could determine that Mother acted in bad faith or lacked justification for her motion to reconsider. Moreover, because the court did not expressly consider the financial circumstances of the parties, the court could determine that mother cannot pay the fee, even though Mother filed her motion to reconsider in bad faith or without justification, and even if the fees were "reasonable." Of course, if the court determines that the attorneys' fee award was actually stricken from October 20, 2021 order, no other finding would be required. Consequently, we vacate the judgment awarding attorneys' fees and remand for the circuit court for further proceedings as outlined above.

ATTORNEYS' FEES JUDGMENT VACATED AND CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY ½ BY APPELLANT, ½ BY APPELLEE.

APPENDIX A

E-FILED; Anne Arundel Circuit Court
Docket: 10/5/2021 8:59 PM; Submission: 10/5/2021 8:59 PM

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

AFSHAN HINA	*	
Plaintiff	*	
v.	*	Case No.: C-02-FM-18-000826
SYED AFZAL HYAT	*	
Defendant.	*	

* * * * * * * * * * * * * *

ORDER

Upon consideration of Plaintiff's Motion for Reconsideration and Quashing of Pendente Lite Order of September 14, 2021 by Honorable Judge Alison L. Asti (hereinafter "Plaintiff's Motion for Reconsideration"), and Defendant's Motion to Strike Plaintiff's Motion for Reconsideration, or in the Alternative, Defendant's Response in Opposition to Plaintiff's Motion for Reconsideration, it is this 10/20/2021, 2021, by the Circuit Court for Anne Arundel County, Maryland:

10/20/2021 ANV

ORDERED, that Plaintiff's Motion for Reconsideration be, and hereby is, STRICKEN, or, in the alternative,

ORDERED, that Plaintiff's Motion for Reconsideration and the relief requested therein, be, and hereby is, **DENIED**; and it is further

ORDERED, that Plaintiff shall pay the attorney's fees and costs incurred by Defendant in having to respond to Plaintiff's Motion for Reconsideration upon submission by Defendant's counsel of a verified statement of attorney's fees and costs and fee/cost summary chart.

ALL SUBJECT TO FURTHER ORDER OF COURT.

10/20/2021 10:31:56 AM

[redacted]

Circuit Court for Anne Arundel County, Maryland

To the Clerk: Please kindly email copies of this Order to Counsel for Defendant and Pro Se Plaintiff.

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