UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1796

September Term, 2015

MARIA MARTIN

v.

PETER MEYER

Eyler, Deborah S.,
Berger,
Reed,

JJ.

Opinion by Reed, J.

Filed: June 20, 2016

This is an appeal from a custody modification case, following an acrimonious divorce, in which Maria Martin ("Mother") alleges—and, indeed, steadfastly maintains—that Peter Meyer ("Father"), exposed their four children to pornographic materials, which, perhaps not coincidentally, depict the same subject matter as the lurid "secret life" led by Father that (at least in part) caused Mother to file for divorce in the first place. The dispute centered on the children's behavior which, depending on who you ask, was either: (A) benign collateral damage of a terribly contentious parental conflict, or (B) highly-sexualized behavior that can only be explained by the children's direct exposure to Father's preferred type of pornography.

Following the divorce, Father was to have the children for six overnights in a two week period, as per the terms of a custody agreement. In June 2014, following a mental health evaluation of their eldest child, Mother filed her Defendant/Counter-Plaintiff's Combined Emergency Motion for Immediate Stay of Custody Order and Motion for Expedited Review of Custody Order in the Circuit Court for Montgomery County, and the trial court set the matter in for a four-day custody trial that ultimately took place a year later in June 2015.

After receiving dozens of exhibits and hearing testimony from 22 witnesses, including several mental health professionals and numerous fact witnesses, the trial court issued an oral ruling in September of that year, and found that: (1) no material change in circumstances occurred; (2) any change in the children's behavior was due to the parental conflict, not exposure to pornographic images; (3) Mother was substantially justified in bringing the litigation; and (4) Mother was not entitled to reimbursement of any of her fees.

Feeling aggrieved by several decisions of the trial court, Mother appealed, and presents the following questions for our review:

1. Did the trial court err in allowing the undisclosed expert testimony of Emily Jones?

2. Did the trial court err in excluding testimony concerning the children's usage of atypical bondage terminology on the grounds that such testimony constitutes hearsay?

3. Did the trial court err in finding that credible expert testimony supported the conclusion that the children's sexualized behaviors could be explained by parental conflict alone?

4. Did the trial court err i[n] failing to award Mother attorney's fees?

Perceiving no error, we answer all four questions in the negative, and accordingly, we affirm the judgments of the trial court.

FACTUAL AND PROCEDURAL HISTORY

Mother and Father were married in 1999 and have four children together: S.M., born August 2004; M.M., born November 2005; L.M., born June 2008; and W.M., born July 2009. The parties lived and parented together, each taking an active role in their children's lives, until August 2012, when Mother learned—as the trial court put it—that Father "had been living another secret life in addition to the one he lived with her and their children." After initially denying it, Father eventually confessed to Mother that, since 2009, he had sought and found multiple sex partners on an online dating website that caters to affluent men. Father explained that he was a masochist (a fact previously unbeknownst to Mother), and he had used the website to seek relationships with women who were willing to interact

with him accordingly. On top of that, Father also confessed to concealing significant financial issues from her; issues that stemmed directly from his extramarital infidelities.[1]

Mother, concerned about the effect of Father's sexual preferences on the children, began restricting Father's contact with them, limiting it to only supervised visits. The parties agreed that Father needed professional help, and in September 2012, Father entered a six-week program for sexual addiction treatment at a rehabilitation clinic in Boca Raton, Florida. Prior to discharge, Mother advised Father that she did not want him returning to the marital home, and the parties have lived separately ever since.

Upon his return to Maryland, the parties came to an agreement regarding custody, where Father would have limited access to the children that was always supervised by a third party, usually Mother. Father sought to increase his time with the children, but Mother—whose fears ranged all the way from potential inadvertent exposure to images on Father's electronics to Father's direct sexual abuse of the children—resisted. In an effort to resolve these issues out of court, the parties jointly retained Dr. William Zuckerman, a licensed clinical psychologist, to evaluate the children and each parent, and to render findings and recommendations regarding an appropriate custodial arrangement as a part of their cooperative divorce process. After an exhaustive evaluation, Dr. Zuckerman found that Father was not a danger to the children, and recommended shared custody. Despite that recommendation, Mother continued to restrict Father's access to the children.

[1] The trial court found that Father "had spent marital funds on the women he became involved with, even going so far as to hire one of them[,] and had failed to pay income taxes."

In response, Father filed a Complaint for Custody and Other Relief on July 15, 2013, in the circuit court. After the matter came before the court for two days of hearings, on September 19, and October 16, 2013, the court granted Father's Motion for Appointment of Best Interests Attorney for the children (a move opposed by Mother), and granted Father unsupervised access *pendite lite*. After the first of three planned days for the custody merits trial, the parties agreed to share custody on an almost equal basis, and the agreement was placed on the record and incorporated into an order by the trial court on January 29, 2014. An order of absolute divorce was entered on April 24, 2014.

As part of the January 2014 custody agreement, the parties agreed to have the oldest child, S.M, undergo a psychological evaluation.[2] The parties eventually agreed on a neutral expert, Dr. Alicia Meyer,[3] to perform the evaluation.[4] According to Mother, after "[Dr. Meyer's] evaluations identified a much broader range of concerning sexualized behaviors than had been presented to the court in October 2013," she filed her "Defendant/Counter-Plaintiff's Combined Emergency Motion for Immediate Stay of Custody Order and Motion

[2] The record does not appear to be entirely clear as to why S.M. was the only child to be singled out in the agreement for this evaluation, but we presume it was because, as the trial court put it, "[o]f the parties' four children, [S.M.]'s behaviors have caused the most concern." Similarly, while Mother's allegations are framed as to all four children, the majority of the issues presented in this appeal are discussed mainly in the context of S.M.'s behavior. For that reason, unless otherwise noted, our opinion too focuses on S.M.'s behavior.

[3] Dr. Meyer is of no relation to the parties.

[4] According to Father, after Dr. Meyer performed the evaluation on S.M., "Mother then insisted, in spite of Father's reservations, that Dr. Meyer evaluate their youngest daughter, L.M., as well." Indeed, the record reflects that (1) only S.M. was required to be evaluated by Dr. Meyer, and (2), Dr. Meyer's evaluation explains that L.M. was referred to her by Mother after Mother "expressed concerns related to [L.M.]'s alleged sexualized behaviors and interests."

for Expedited Review of Custody Order" ("Mother's Motion"). Mother's Motion led to a four-day custody modification trial involving all four children, that was held from June 1-4, 2015, where the court heard from numerous mental health experts, teachers, former and current nannies, and the parents themselves.

On September 21, 2015, the trial court issued an oral ruling on Mother's Motion, in favor of Father. After rejecting Mother's allegations by carefully outlining and applying the evidence that was presented at trial, the trial court explained its rationale:

> The issues before me are virtually identical in theme as those that were before the [c]ourt at the [*pendete lite*] hearing and before the [c]ourt at the time the January, 2014 [sic] custody order was entered. That [Mother] alleges now as she alleged then that [Father] is sexually abusing the children or exposing them to sexually explicit material. And [Mother]'s evidence does not support such a finding.
>
> This [c]ourt is concerned about the mental health of these children. Had the [c]ourt found that their statements and behaviors constituted a material change in circumstance, the [c]ourt opines now that their best interest[s] still would not be served by modifying custody as requested by [Mother]. As already noted, there has been no credible evidence presented which would link the children's concerning behaviors to any conduct of [Father] or to any exposure to inappropriate material while in [Father]'s care.
>
> In contrast to the allegations made by [Mother], the evidence presented would support a finding that [Father] is a loving and attentive father and a fit parent who has been dedicated to treating his sexual addiction.
>
> That being said, given the concerns presented in this case, the [c]ourt will order that [Father] be prohibited from using any electronic device that he shares with his children to access pornography. I would strongly urge [Father] to keep any personal computers stored in a manner that is completely inaccessible to the children.
>
> The evidence and testimony presented gives the [c]ourt great concern regarding [Mother]'s acceptance of reality; her interference with [Father]'s legal and physical custodial rights; and the effects of her actions on the children.
>
> In Dr. Meyer's addendum, she noted that [Mother]'s attempt to gather evidence to support her hypothesis that her children have histories involving sexual abuse, she may be unintentionally distorting or inappropriately interpreting events in her children's lives.

The court also ordered that there would be no changes in the children's therapists without consent of both parties. With regard to Mother's request for attorney's fees, the court ruled that both parties were substantially justified in maintaining the action, but that Mother was not entitled to fees. The court entered its written order reflecting those rulings on October 2, 2015, and Mother noted timely appeal.

Additional facts will be included as needed.[5]

DISCUSSION

I. EXPERT TESTIMONY OF EMILY JONES

The majority of Mother's appeal centers on the trial court's decision to allow Emily Jones, one of S.M.'s former therapists, to testify over Mother's objection. On the third day of trial, Mother rested her case. As Father's counsel began to call Ms. Jones as their first witness, Mother's counsel immediately announced to the court that he was "going to object to the presentation of this witness." He explained that, after serving Father with interrogatories asking for disclosure of expert witnesses on November 18, 2014, the initial response, which they received on December 22, did not identify Ms. Jones as an expert witness. On January 30, 2015, Mother received a supplemental response from Father, which stated, according to Mother's counsel:

> Emily Jones, expert witness, is an expert in clinical social work. She may . . . testify regarding her therapy with [S.M.], her interactions with the parties and her opinions with respect thereto as a licensed mental health professional. Ms. Jones may also testify regarding her fees associated with the matter.

[5] To the extent Mother would have us re-hash the trial testimony, in all its detail, we decline. Rather, we will simply recite the facts that are pertinent to Mother's questions presented.

Then, Mother's counsel explained that he did not receive anything else until around May 22, 2015,[6] when Father's counsel sent a pretrial statement that slightly expounded on the January 30 disclosure, adding that Ms. Jones was an expert in clinical social work and on "children with trauma and children with behavior and emotional dis-regulation." The disclosure further added that Ms. Jones was expected to testify about S.M.'s anxiety during the time Ms. Jones was providing therapy to her and gave certain broad categories of facts that supported that opinion. Mother's counsel explained that Father's disclosures "sandbag[ged]" Mother's case and that he "did not have a fair opportunity to depose [Ms. Jones]."

In response, Father's counsel explained that Mother's counsel had known that Ms. Jones was expected to testify since the January 30 disclosure, yet chose not to take her deposition. Father's counsel argued she was unable to note Ms. Jones as an expert before she did because she was unsure if the children's best interest attorney was going to waive S.M.'s privilege, which was apparently done a day before she did note it. After the best interest attorney corroborated that information, the discussion concluded as follows:

> [Mother's Counsel]: And . . . to clarify, Your Honor, I'm not objecting to January 30th having been too late to identify Ms. Jones.
>
> THE COURT: I understand.

[6] The transcript is slightly unclear as to the exact date, as it reflects Mother's counsel saying he received the statement both "the Friday of Memorial Day weekend" and "the Friday after Memorial Day weekend, four days business [sic] left prior to trial." We assume Mother's counsel meant the former, in light of the fact that the latter date's qualification falls on the exact same date as the Friday *of* Memorial Day weekend.

> [Mother's Counsel]: I'm objecting to the absence of anything that was stated disclosure.
>
> THE COURT: Okay. Overruled.

Ms. Jones then proceeded to testify, without objection, until she began to discuss a conversation she had with a Dr. Joy Silberg at the behest of Mother. Mother's counsel objected on the grounds that it was hearsay and outside the scope of disclosure, and the trial court tentatively allowed it but explained that it wanted "to reconsider it after [it] hear[d] what she has to say."

The next day, June 4, 2015, before Father called his next witness, Father's counsel explained that she received an email from Mother's counsel "last night after court" saying that he might want to call Dr. Silberg as a rebuttal witness to address the conversation that Ms. Jones testified about. The court sustained Father's objection as to Dr. Silberg testifying as an expert on rebuttal, but said that she "may testify as a fact witness to the conversation she had," which is precisely what ultimately happened.

A. Parties' Contentions

Mother argues that the trial court abused its discretion in allowing Ms. Jones to testify, on the grounds that her expert opinions were not properly disclosed, and the court "then compounded that error by permitting Jones to testify on a wide-ranging variety of subjects that went well beyond the skeletal disclosures in Father's late-breaking pretrial statement, further prejudicing Mother." Mother then contends that she was further prejudiced when, "[i]n an ultimate twist of irony," the trial court refused to allow her to rebut Ms. Jones' "undisclosed opinions" with expert testimony of her own, *i.e.*, Dr. Silberg.

Father argues that the trial court ruled correctly as to Ms. Jones for several reasons; namely, (1) Father disclosed the witness the day after the privilege was waived, (2) Mother gave no indication between January 30 and the third day of trial to note any dissatisfaction with the disclosure, (3) Mother had known Ms. Jones for three years and her "silence with regard to Ms. Jones' designation by Father was in keeping with her pattern of choosing not to conduct discovery with respect to anything that she thought would be detrimental to her case." He further argues that Ms. Jones' opinion was not formed in anticipation of litigation, and therefore, his disclosure was "more than sufficient to satisfy his obligations under Maryland law." With respect to Dr. Silberg, Father argues that Dr. Silberg was a psychologist that had been involved in the matter since before the *pendente lite* hearing, and Mother never identified her as a potential expert witness until the night before the last day of trial.

B. Standard of Review

"Generally, 'our review of the trial court's resolution of a discovery dispute is quite narrow.'" *Puppolo v. Adventist Healthcare, Inc.*, 215 Md. App. 517, 534 (2013) (quoting *Klupt v. Krongard*, 126 Md. App. 179, 193 (1999)). "Trial judges administer the discovery rules, and are vested with a reasonable, sound discretion in applying them, which discretion will not be disturbed in the absence of abuse." *Johnson v. Clark*, 199 Md. App. 305, 323 (2011). "A trial court abuses its discretion only if no reasonable person would take the view adopted by the trial court in denying discovery." *Jones v. Rosenberg*, 178 Md. App. 54, 66 (2011).

C. Analysis

While the parties devoted a significant amount of their briefs to this subject, we need not dwell on it long, because its resolution is quite simple: we hold that the trial court did not abuse its discretion, with regard to either witness.

Discovery in Maryland is governed by Title 2, Chapter 400 of the Maryland Rules. It is well-established that:

> The fundamental objective of discovery is to advance "the sound and expeditious administration of justice" by "eliminat[ing], as far as possible, the necessity of any party to litigation going to trial in a confused or muddled state of mind, concerning the facts that gave rise to the litigation."

Rodriguez v. Clarke, 400 Md. 39, 57 (2007) (quoting *Baltimore Transit Co. v. Mezzanotti*, 227 Md. App. 8, 13 (1961)). More relevant here, however, is the converse of that objective. In *Food Lion v. McNeill*, 393 Md. 715, 736 (2006), the Court of Appeals explained:

> A party who answers a discovery request timely and does not receive any indication from the other party that the answers are inadequate or otherwise deficient *should be able to rely, for discovery purposes, on the absence of a challenge* as an indication that those answers are in compliance, and, *thus not later subject to challenge as inadequate and deficient when offered at trial*.

(emphasis added.)

Contrary to what Mother argues, we do not believe that Ms. Jones' testimony "constituted unfair surprise," for at least three reasons. First, as Father points out, Mother provides no explanation as to why she did not indicate, at any point between January 30, 2015 (when she first learned of Father's plan to call Ms. Jones), and June 1, 2015 (the first day of trial), that she believed Father's discovery responses were unsatisfactory. Mother failed to utilize any of the discovery tools available to her—ranging from a simple phone

call to Father to note her deposition to filing a motion to compel—and Father should have been able to rely on that silence as tacit satisfaction with her disclosure. Second, from a practical standpoint, Mother cannot truly argue that Ms. Jones, or her opinions, were a "surprise" to her. Mother had interacted with her plenty of times during S.M.'s therapy, in light of the fact that Ms. Jones testified that her therapeutic relationship with S.M. ended because of Mother's persistence in trying to spin Ms. Jones' therapy against Father. And finally, and perhaps most importantly, Mother provides no explanation as to why she waited until the third day of trial to object to what is obviously a discovery issue. On the very first day of trial, the court asked if there were any preliminary matters to address, and Mother voiced no objection to any disclosure concerns. Even assuming, *arguendo*, that Father's disclosure was insufficient, the time for addressing it was before trial, not more than halfway through it. *See Food Lion*, 393 Md. at 735.

Similarly, we perceive no abuse of discretion regarding Dr. Silberg's testimony. At no point was Dr. Silberg listed as an expert witness. Accordingly, the court, in its discretion, permitted Dr. Silberg to testify as a fact witness on rebuttal as to the conversation she had with Ms. Jones, but not as an expert. Like Ms. Jones, Dr. Silberg was known to Mother, as her involvement in the case also stretched back to before the *pendente lite* hearing.

ii. Children's Statements as Hearsay

On the morning of the second day of trial, Mother called Dr. Sharon Cooper to the stand as an expert in general pediatrics, developmental pediatrics, and forensic pediatrics. Dr. Cooper testified that, while she had not directly evaluated the children in person, based on her examination of the children's treatment records and the rest of the evidence, it was

her opinion "to a reasonable degree of medical certainty[,] that these children have at least been very significantly exposed to sexually explicit content and . . . . [a]t most these children may have been victims of child sexual abuse." In forming that opinion, Dr. Cooper testified that based on the children's atypical use of "bondage language"—such as calling their toys "torture princesses" and using the phrase "bound and gagged"—was "the kind of situation where you almost always have to assume that this child has been significantly exposed to that kind of content," which she has found has "[u]sually . . . come from someone with whom they are familiar."

Later, in an attempt to supply direct testimony regarding the children's usage of the terminology, Mother's counsel, during direct examination of Mother, asked the following question: "Now we heard Dr. Cooper testify about the term [']torture['] being used by the children. Are there other occasions under which you've heard that particular terminology used?" Father's counsel objected, and after confirming the question was about whether it had been used by the children, the court sustained. Mother, generally citing *In re: Rachael T.*, 77 Md. App. 20 (1988), argued that it was not hearsay because it was not being offered for the truth of the matter asserted. After the court recessed to read the case, the court asked Father's counsel and the children's best interest attorney to weigh in, and both agreed it was hearsay. The court then ruled on the objection as follows:

> THE COURT: Okay. Well, I'm . . . looking at . . . *In re: Rachael T.*, and in that case there was an issue about whether there was the proper exclusion of a child's statement to her foster mother that the Department [of Social Services for Carroll County] argued . . . wasn't offered for [its] truth, but was offer[ed] to show evidence of precocious sexuality. And the trial court did not admit that evidence and did determine that it was hearsay and that was upheld on appeal. And it seem to me that that's exactly what's

> happening here, you're offering it to show evidence of precocious sexuality or knowledge of sex beyond their years and it's still an out-of-court statement that you're offering to get to that point and I think its hearsay. So I'm going to sustain the objection.

A. Parties' Contentions

Here, Mother maintains that "the trial court erred as a matter of law in denying Mother the opportunity to offer direct testimony about the children's terminology," because the statement in question was not offered for the truth of the matter asserted—namely, that the children were tortured—but to show the children's "atypical" usage of the term. Mother argues that, after Dr. Cooper laid the "expert foundation," Mother "needed to supply direct testimony establishing the circumstances and frequency of such terminology in order to state her case." After citing numerous out-of-state cases she believes supports her position (and, in a footnote, arguing that *In re: Rachel T.*—the case specifically cited by her to the trial court for support—is "inapposite"), Mother sums up her position as follows:

> Mother's direct testimony that the children began to use the term "torture" in a variety of circumstances after they started to have unsupervised contact with Father would accordingly have been highly probative of the likelihood that Father exposed the children to sadomasochistic images, scenarios, and language in a manner that constitutes sexual abuse, and Mother was highly prejudiced by the trial court's improper exclusion of the testimony.

This, in Mother's view, prevented her from "developing a key aspect of her case, requiring reversal."

Father, in response, argues that the statement was in fact offered for the truth of the matter asserted—namely, "the purpose of showing the sexual precocity of the children"—and therefore, the trial court was correct in excluding the statements as hearsay. Father then

argues that even if it was not hearsay, this Court should give deference to the trial court's finding that "Mother was not a credible witness." Father concludes by asserting that even if the statements were not hearsay and she was an "accurate reporter," then any error was harmless, because the court specifically credited the other experts more than Dr. Cooper because Dr. Cooper did not have direct contact with the children.

B. Standard of Review

Mother argues that her statements were nonhearsay, and therefore, as this Court recently reiterated: "when the issue involves whether evidence constitutes hearsay, that is a legal question that we review *de novo*." *Baker v. State*, 223 Md. App. 750, 760 (2015).

C. Analysis

Under the Maryland Rules, "hearsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," Md. Rule 5-801(c). Thus, "[a] statement that 'is not offered for the truth of the matter asserted . . . is not hearsay and it will not be excluded under' Rule 5–802." *Frobouck v. State*, 212 Md. App. 262, 282 (2013) (quoting *Stoddard v. State*, 389 Md. 681, 689 (2005)). Accordingly, this contention turns on whether Mother's testimony regarding the children's alleged use of the term "torture" was offered for "the truth of the matter asserted." Under the circumstances of this case, we hold that it was.

In *In re: Rachel T.*, 77 Md. App. at 28, the trial court excluded three "groups of allegedly hearsay statements" made by the minor (two of which are relevant here) indicating potential sexual abuse by her father. One group was a set a statements made to a clinical psychologist "about her daddy's 'tutor' [(a word she used to describe a penis),]

as well as statements made by Rachel [using anatomically correct dolls] which, in Dr. Sweeney's opinion, showed unusual detail of sexual matters for a child of five. *Id*. at 27-28. The other was a group of statements made to her foster mother after being removed from the house that also implicated her father. *Id.* at 28.

With regard to the statements made to the psychologist, this Court held that the trial court "erred in striking from Dr. Sweeney's testimony Rachel's statements about her father's 'tutor,' as well as statements made to Dr. Sweeney, via the dolls, which showed Rachel's unusual sexual precocity." *In re: Rachel T.*, 77 Md. App. at 37. This was because the statements "were therefore data which formed the basis of her opinion, and were thus not offered as substantive proof," and we "s[aw] little sense in allowing Dr. Sweeney's opinion without the data which supports it." *Id*.

On the other hand, this Court held that the trial court did *not* err in excluding the statements made to the foster mother. *Id*. at 38. Rather than offer an exception to the hearsay rule to fit her statements, the Department of Social Services contended "that it did not offer these statements for their truth, *i.e.,* that Rachel's father had sexual intercourse with Rachel, but offered them to show evidence of precocious sexuality, a principal theory on which the Department relied to show that Rachel was a CINA." *Id*. We explained:

> If these statements showed precocious sexuality on Rachel's part, they were merely cumulative to other evidence showing that Rachel had been sexually abused, a matter on which everyone involved in the proceeding below agreed. As such, their omission was harmless. *It appears to us that the Department instead was using the statements to show that Rachel's family was not providing proper care because the father was the abuser. When viewed in this light, the statements were being offered for their truth and*

> *constitute hearsay.* We hold that the trial court did not err in excluding these statements.

Id. (emphasis added).

Here, while the parties obviously disagree on whether or not the children were subject to abuse (be it direct or indirect), we find *In re: Rachel T.* no less instructive. Mother, like the Department in that case, argues that she was not offering the statements for their truth, *i.e.*, that Father had actually tortured the children, but offered them to prove what she calls a "key aspect of her case"—namely, that the children started using those terms after they began having unsupervised contact with Father, which "would accordingly have been highly probative of the likelihood that Father exposed the children to sadomasochistic images, scenarios, and language in a manner that constitutes sexual abuse." When viewed in that light, the statements were being offered for their truth and constituted hearsay, and were therefore properly excluded. Moreover, again like in *In re: Rachel T.*, that any omission was harmless, because those statements would have been merely cumulative to the other evidence regarding the children's alleged sexualized behavior—for example, S.M.'s use of the phrase "bound and gagged," not to mention Dr. Meyer's testimony regarding S.M.'s description of marriage as "torture"—which the trial court carefully considered and laid out in great detail in its final ruling. The trial court did not err in excluding these statements.

III. BASIS FOR THE TRIAL COURT'S RULING

A. Parties' Contentions

Mother argues that the trial court erred in finding that the children's sexualized behavior can be explained by parental conflict, as opposed to her fervent belief that "several elements of the children's behavior could not be explained away in this manner, rendering exposure to bondage and sadomasochism imagery the substantially more plausible explanation." Mother contends that the trial court "flatly mischaracterized Dr. Meyer's testimony" when it "purported to base this ruling on its view that 'Dr. Meyer acknowledged on the stand that [S.M.'s] behavior, including her sexualized behavior, could be explained by parental conflict.'" Thus, the "trial court's clearly erroneous [finding] on this point rendered the court incapable of properly assessing the circumstantial evidence presented by Mother, requiring that the [judgment] below be reversed."

Father's response is essentially twofold. His first main point is that Mother failed to mention the rest of the evidence relied on by the trial court; *e.g.*, that (1) no mental health professional that had worked directly with the children ever reported a concern of sexual abuse; (2) there was no forensic evidence of abuse; (3) that Dr. Meyer wrote in an addendum that she believed Mother's concerns about sexual abuse were rooted in her knowledge of Father's sexual preferences, not his actions with the children; and (4) that Dr. Meyer was Mother's own witness and she asked the trial court in her closing argument to rely on Dr. Meyer's testimony. His other main point is that, above all, "the behaviors Mother argues in her brief were new to the trial court in June of 2015, but the salient point is that they were not new to her prior to entering the custody agreement," and "[a]s a result,

the trial court properly found Mother had not proven a material change of circumstances had occurred."

B. Standard of Review

Our standard of review is straight-forward:

> Because the trial below was a non-jury trial, our standard of review is governed by Maryland Rule 8-131. *Boyd v. State,* 22 Md. App. 539, 323 A.2d 684, *cert. denied,* 272 Md. 738 (1974). That rule provides that this Court "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). "If there is any competent and material evidence to support the factual findings of the trial court, those findings cannot be held to be clearly erroneous." *Yivo Institute for Jewish Research v. Zaleski,* 386 Md. 654, 663, 874 A.2d 411 (2005).
>
> Moreover, "[u]nder the clearly erroneous standard, this Court does not sit as a second trial court, reviewing all the facts to determine whether an appellant has proven his case." *Lemley v. Lemley,* 109 Md. App. 620, 628, 675 A.2d 596 (1996). Our task is limited to deciding whether the circuit court's factual findings were supported by substantial evidence in the record: "The appellate court must consider evidence produced at the trial in a light most favorable to the prevailing party and if substantial evidence was presented to support the trial court's determination, it is not clearly erroneous and cannot be disturbed." *GMC v. Schmitz,* 362 Md. 229, 234, 764 A.2d 838 (2001) (quoting *Ryan v. Thurston,* 276 Md. 390, 392, 347 A.2d 834 (1975)).

L.W. Wolfe Enterprises, Inc. v. Maryland National Golf, L.P., 165 Md. App. 339, 343-44 (2005).

C. Analysis

Based on the evidence before us, we are unable to conclude—especially in light of such a deferential standard of review—that the trial judge was clearly erroneous in its determination, and thus, it shall not be disturbed. For one thing, we disagree with the way Mother characterized the trial court's interpretation of Dr. Meyer's testimony. Mother

directs us to the trial court's statement that "Dr. Meyer acknowledged on the stand that [S.M.]'s behavior, including her sexualized behavior, could be explained by parental conflict," but ignores the context in which it is reflected in the record:

> [Mother's Counsel]: Is there any psychological literature that would suggest that the sweep of symptoms we've discussed is a likely result of exposure to parental conflict alone?
>
> [Dr. Meyer]: I do think that the parental conflict piece can account for a number of the symptoms that are there, including some of the sexualized behaviors again based on more of the recent conferences I've attended and so forth.
>
> [Mother's Counsel]: But not all of them?
>
> [Dr. Meyer]: But perhaps not all of it.

Moreover, Mother also ignores the statement of the trial court that *immediately preceded* the parental conflict language she quotes in her brief: "Dr. Meyer ultimately concluded during [Mother]'s direct examination that, while [S.M.]'s behavior may be consistent with someone who has been exposed to age-inappropriate sexual knowledge, Dr. Meyer could not say that this, more likely than not, occurred." To say that the trial court incorrectly assessed Dr. Meyer's testimony is, at best, disingenuous.

Mother attempts to bolster her argument by pointing to the trial court's statement that Dr. Cooper "explicitly disagreed" with Dr. Meyer's unwillingness to definitively rule out parental conflict as a potential factor. We think a more accurate characterization of the court's determination was that, in order to arrive at its conclusion, the trial court weighed the credibility of those two witnesses and contrasted their findings. Ultimately, the court sided with Dr. Meyer, who, after dealing directly with the children, was unable to rule out

parental conflict as the impetus for the unusual behavior, over Dr. Cooper, who, despite never dealing directly with the children, was willing to rule it out.

However, even if we agreed with Mother and held that the trial court mischaracterized Dr. Meyer's testimony, our holding would still not change. As Chief Judge Krauser recently explained: "this Court may 'affirm a circuit court's judgment on any ground adequately shown by the record, even one upon which the circuit court has not relied or one that the parties have not raised.'" *A Guy Named Moe, LLC v. Chipotle Mexican Grill of Colorado, LLC*, 223 Md. App. 240, 246 (2015) (quoting *Puppolo v. Adventist Healthcare, Inc.*, 215 Md. App. 517, 530 (2013)), *aff'd*, 447 Md. 425 (2016). Even if we were to completely disregard Dr. Meyer's testimony, the record amply supports the trial court's conclusion that "there was no credible evidence presented which would link the children's concerning behaviors to any conduct" of Father. The trial court did not err in its determination.

IV. MOTHER'S REQUEST FOR ATTORNEY'S FEES

A. Parties' Contentions

Mother contends that the trial court erred in denying the two types of fees she requested at trial: those pursuant to Md. Code (1984, 2012 Repl. Vol.) § 12-103 of the Family Law Article ("FL"), and those pursuant to Md. Rule 1-341(a). With regard to the former, Mother argues the court erred in delaying its ruling until after the merits hearing and in failing to consider all of the statutory requirements set forth in FL § 12-103. With regard to the latter, Mother argues that Father had acted in bad faith by deleting his internet browser history, thus unnecessarily prolonging discovery, and accordingly, entitling her to

fees. Mother contends the court erred both in denying her request itself and also by "provid[ing] no explanation."

Father responds by arguing that the trial court did in fact consider the statutory factors in FL § 12-103, and thus, the court's decision was "not arbitrary, and there was no abuse of discretion." Father goes on to argue that the trial court did not err with respect to the alleged bad faith on his part because (1) Mother did not move for fees during trial, only before trial, and (2) "not only did Mother not appeal the issue of spoliation, her claim of spoliation of evidence as the basis for a finding of bad faith is meritless because the trial court affirmatively found that Father's conduct was not improper." Father concludes by pointing the blame at Mother for driving up the costs of litigation, noting that Mother hired four separate attorneys to work on the matter, hired three out-of-state experts, and extended discovery by four months to pursue the spoliation claim, which ultimately proved fruitless.

B. Standard of Review

"The standard of review for the award of counsel fees and costs in a domestic case is that of whether the trial judge abused his discretion in making or denying the award." *Steinhoff v. Sommerfelt*, 144 Md. App. 463, 487 (2002). Further, "[w]e review a circuit court's determination whether a party maintained or defended an action in bad faith or without substantial justification under a clearly erroneous standard." *Toliver v. Waicker*, 210 Md. App. 52, 72 (2013).

C. Analysis

We first hold that the trial court did not abuse its discretion in denying Mother counsel fees under FL § 12-103. That section provides, in pertinent part:

> (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.

FL § 12-103(b).

With respect to the timing, Mother is apparently reading a requirement into the statute that we are unable to find. Compounding this error, she also gives no caselaw to support her contention that the trial court erred by not ruling prior to the conclusion of litigation. This is with good reason, however, because such a temporal requirement does not exist. In fact, awards under FL § 12-103 are routinely awarded after the conclusion of litigation. *See, e.g.*, *Fitzzaland v. Zahn*, 218 Md. App. 312, 335 (2014) ("In sum, after applying the required factors . . . , the circuit court awarded appellee . . . attorney's fees . . . *incurred by appellee in the instant case*. We find no error or abuse of discretion in the award of attorney's fees to appellee." (emphasis added)); *Corapcioglu v. Roosevelt*, 170 Md. App. 572, 609 (2006) ("An award of counsel fees and costs under FL section 12-103 is compensatory in nature, in that it either directs payment of expenses the movant will be required to pay himself or herself, absent the award, *or reimburses the movant for expenses he or she already has paid*." (emphasis added)). Clearly, there is no requirement that the fees and costs must be awarded prior to the conclusion of litigation.

Similarly, we disagree that the trial court failed to address the statutory factors of FL § 12-103(b). After expressly noting that it was required to address those three factors,

the trial court then proceeded to note (1) the income disparity between the parties, with Father making $900,000 a year and Mother making $140,000 a year; (2) Father's ongoing child support obligations of $20,000 a month plus other expenses; (3) the actual fees accrued by both parties; and (4) that "given the ongoing concerns about the mental health of the children, especially [S.M.]," both parties were "substantially justified in maintaining their respective positions in this case." We are unpersuaded the trial court abused its discretion in denying the request for fees.

We also hold that the trial court did not err in denying Mother's request for fees pursuant to Md. Rule 1-341.[7] First, we disagree with Mother regarding the trial court's explanation. After addressing the § 12-103 fees—not to mention after Mother's counsel told the court he had "[n]o questions about the ruling, Your Honor," despite the fact that the trial court did not address the separate request for fees—the court, on its own prompting, clarified that "[i]t's the intention of the [c]ourt that this opinion be dispositive of all open motions." That, combined with the trial court's previous ruling that Father did not act in bad faith regarding the spoliation issue, shows that the court did not find any bad

[7] That section provides, in pertinent part:

> 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(a).

faith on Father's part, and found that he was substantially justified in bringing the litigation. The trial court committed no error.

CONCLUSION

For the above-stated reasons, the judgments of the Circuit Court for Montgomery County are affirmed.

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