Circuit Court for Cecil County
Case No. 07-C-14-000391

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 272

September Term, 2016

EDWARD C. DANT, *ET AL.*

v.

ALLEN PHILIPSON, *ET AL.*

Krauser, C. J.,
Kehoe,
Battaglia, Lynne A.,
(Senior Judge, Specially Assigned)
JJ.

Opinion by Kehoe, J.

Filed: April 4, 2017

This is an appeal from an order of the Circuit Court for Cecil County that awarded Allen and Tammy Philipson attorney's fees and costs in their lawsuit against Edward C. and Donna M. Dant. The Dants present one issue, which we have reworded to better articulate what is the dispositive issue in this appeal:

> Does Md. Rule 1-341 authorize a court to award sanctions against a litigant based upon the litigant's misconduct prior to the filing of the lawsuit?

Because the answer to this question is "no," we must reverse the circuit court's sanctions order.

Background

In 1995, Mr. and Mrs. Dant sought to subdivide property located adjacent to a portion of the Elk Neck State Forest in Cecil County. The property was bisected by an unnamed tributary (the "Stream") of the Elk River. The Stream runs in a more or less east-west direction. The Army Corps of Engineers exercises regulatory jurisdiction over the Stream because it constitutes part of the waters of the United States. Anyone seeking to build a structure that crosses the waters of the United States must first obtain the permission from the Corps. After reviewing the Dants' proposal, the Corps gave permission for one crossing of the Stream to accommodate no more than two dwellings. The Corps' restriction influenced the design of the Dants' subdivision, which we will now describe.

The subdivision consists of seven lots. Two lots have direct frontage on a public road but the remaining five abut a private road called "Dant Court," which ends in a cul-de-sac about 100 feet south of the Stream. Of these, Lots 6 and 7 are "flagstaff lots," that is, they

have very limited road frontage, in this case about 50 feet each, on Dant Court, and extend across the Stream and further on for a considerable distance, between 300 to 500 feet or so, to the parts of the lots that are buildable. As the subdivision was originally approved, these two lots shared the stream crossing permitted by the Corps of Engineers.

Lot 5 had frontage on Dant Court. The approved subdivision plan showed that the residence, and its septic tank, were to be located south of the Stream but that the septic drainage field for Lot 5 was to be located north of the Stream. Necessarily, the pipe connecting the septic tank and the septic field would have to cross the Stream. A second stream crossing, however, would violate the Corps of Engineers' permit. But this discrepancy apparently went unnoticed and the subdivision plan was approved by the Cecil County Planning Commission in 1995. In 1998, the Philipsons purchased Lot 7, which is one of the flagstaff lots.

In 1999, the Dants filed an application to reconfigure the boundaries between Lots 4 and 5. The application eliminated Lot 5 and replaced it with Lot 5A. The primary significance of this application is that it changed the site for the proposed residence from a location that was south of the Stream to one that was north of the Stream and further provided that Lot 5A would have access to Dant Court over the "flagstaff" portions of Lots 6 and 7. The Dants did not seek approval from the Corps of Engineers for this change. Nor did they ask permission from the Philipsons to use their property for access purposes. Nor did they inform the County planning staff that they had sold Lot 7 to the Philipsons; in fact their application indicated that they owned Lots 6 and 7. The

resubdivision application was approved and the Dants then built a driveway across a portion of the Philipsons' property to Lot 5A.

The Dants and the Philipsons did not have a cordial relationship and there were numerous disputes between them. In 2014, the Philipsons filed the present action, asserting that the Dants had no right to use any portion of their property for access purposes. In response, the Dants claimed that they had an easement of necessity across the Philipson property for access to a public road.

After a court trial, the circuit court filed a memorandum opinion in which the court found that the Dants were entitled to an easement by necessity, that the Dants had used asphalt milling to pave a portion of the parties' common driveway, which practice posed an environmental threat to the Elk River, and that the 1999 subdivision application was false. The court further stated:

> [B]ecause the easement of necessity, the false application, and the creation of wetlands were all solely caused by [the Dants], the court orders counsel fees of the [Philipsons], as well as any additional suit costs, to be assessed [against the Dants].

The Philipsons' counsel submitted a petition for counsel fees requesting an award of $10,872.50. The Dants filed a response to the petition, asserting, among other things, that the circuit court was without authority to award attorney's fees. They also filed a motion to alter or amend the judgment on the same grounds.

The court addressed these motions in a written opinion in which the court granted the Philipsons' request for attorney's fees and denied the Dants' motion to alter or amend the

judgment. After reviewing the underlying facts and analyzing a number of appellate opinions interpreting Md. Rule 1-341, the court stated in pertinent part:

> [T]he Plaintiff was forced to file the lawsuit in an attempt to establish his right to use the driveway lest his parcel of land become entirely landlocked. However, the Defendant's defense to this action, that any plans for a driveway of their own to use had been approved by the County, was completely inapplicable due to the fact that the Defendant, as the court found at trial, falsified the documents required to obtain such approval.
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> A proceeding is not substantially justified if it lacks any basis in law or fact. *Worsham v. Greenfield*, 187 Md. App. 323, 342-43 (2009). It is abundantly clear to this court that the Defendant defended this case without substantial justification because the defense in this matter, as a result of the falsification, was devoid of any merit and lacked any supporting evidence. Further, the court finds that the Defendant acted in bad faith because even though he had knowledge that any permission to later construct a driveway for his lot to access was based upon a misrepresentation to the agency in charge of approving such an action, he continued to harass the Plaintiff until the Plaintiff was essentially compelled to seek resolution of the issue via this litigation.
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> . . . .
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> [T]he remedy of attorney fees was specifically designed by the court to address the fact that the Defendant, as stated in the October opinion, was directly responsible for the suit having been filed in the first place.

Analysis

Maryland adheres to the so-called "American Rule," which provides that parties to a lawsuit bear their own legal fees. *Nova Research, Inc. v. Penske Truck Leasing Co.*, 405 Md. 435, 445 (2008). There are exceptions to this rule and one of them is that a court may award fees when authorized to do so by a statute. *Id.* There is no statute that empowers a court to award attorney's fees as a sanction for litigation misconduct, but the Court of Appeals has promulgated Md. Rule 1-341. It states in pertinent part (emphasis added):

> (a) 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. . . .

For the purposes of the Maryland Rules, a "proceeding" is defined as "any part of an action." Md. Rule 1-202(v). "Action," in turn, "means collectively all the steps by which a party seeks to enforce any right in a court or all the steps of a criminal prosecution." Md. Rule 1-202(a). In the Maryland Rules, the term "court" refers to a court of this State. Md. Rule 1-202(i).

The concepts of "bad faith" and "without substantial justification" in the context of Rule 1-341 are similarly well-defined. This Court recently explained that:

> A party lacks substantial justification to maintain or defend a proceeding when it has no reasonable basis for believing that the claims would generate an issue of fact for the fact finder or when the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for extension, modification or reversal of existing law. . . . The fact that a court rejects the proposition advanced by counsel and finds it to be without merit does not mean the proposition was advanced without substantial justification or in bad faith.

State v. Braverman, 228 Md. App. 239, 260, *cert. denied sub nom. Goldberg v. State*, 450 Md. 115 (2016) (quotation marks, citations, and bracketing omitted). "'In bad faith' means vexatiously, for the purpose of harassment or unreasonable delay, or for other improper reasons." *Inlet Assocs. v. Harrison Inn Inlet, Inc.*, 324 Md. 254, 268 (1991). With this in mind, we turn to the substance of the parties' contentions.

We can place the reasons for the court's fee award into three categories.

First, the court found that the Dants raised as a "defense to this action, that any plans for a driveway of their own to use had been approved by the County," and that defense was "inapplicable" and "without substantial justification" because the Dants falsified the documents required to obtain the 1994 approval of the resubdivision. We read the record somewhat differently.

At trial, the Dants did not argue that the approval of the 1999 resubdivision application gave them the right to use the Philipsons' property to access their own. Rather, they contended that Mr. Philipson learned in 1999 that the driveway to Lot 5A would cross his property but waited until 2014 to challenge the Dants' right to do so. Based on this premise, the Dants asserted that the Philipsons were guilty of laches and/or were equitably estopped from their claim of exclusive use and possession of Lot 7. In other words, the circuit court did not base its award on the actual defense asserted by the Dants.[1]

The court also concluded that the Dants' defense was "without substantial justification because the defense in this matter, as a result of the falsification, was devoid of any merit and lacked any supporting evidence." This conclusion cannot be squared

[1] Moreover, in our view, there was a colorable basis to assert the defenses of laches and equitable estoppel in light of the passage of time between the time that Mr. Philipson became aware of Dant's plan to access Lot 5A from the Philipson property and Dant's testimony that he did not intentionally mispresent anything to the County during the course of the 1999 resubdivision application process. Although it apparently concluded that Mr. Dant himself did not lie to the County during the 1999 application, the court did not accept the Dants' laches and estoppel arguments. That the court found these contentions to be unpersuasive does not mean that they were made without substantial justification.

with the fact that the court entered a judgment that the Dants had an easement of necessity across a portion of the Philipsons' property, which was precisely the relief that the Dants sought from the court.

Second, the court found that Mr. Dant "acted in bad faith because even though he had knowledge that any permission to later construct a driveway for his lot to access was based upon a misrepresentation to the agency in charge of approving such an action, he continued to harass the Plaintiff until the Plaintiff was essentially compelled to seek resolution of the issue via this litigation." However, as we have explained, the scope of Rule 1-341 is limited to conduct by parties in actions in Maryland courts. The harassment was not part of any "action," as the term is used in the Maryland Rules. If the harassment was not part of an action, it cannot be part of a "proceeding" for purposes of Rule 1-341. However wrongful the harassment might have been, if it was not part of a proceeding—and it was not—then it cannot be the basis of an award of attorney's fees under Rule 1-341.

Finally, the court concluded that the Dants were "directly responsible for suit being filed in the first place" because they had misrepresented facts to the Planning Commission to obtain the 1999 resubdivision approval. However, Rule 1-341 does not authorize a court to sanction misconduct before administrative agencies. The reason for this is the fundamental constitutional principle of separation of powers.

Rule 1-341 was adopted by the Court of Appeals in an exercise of its constitutionally-granted authority to promulgate rules for the "'the practice and procedure

in and the administration of the appellate courts and in the other courts of this State[.]'" *Newman v. Reilly*, 314 Md. 364, 377 (1988) (quoting Maryland Constitution Article IV, § 18(a)).[2]

Extending Rule 1-341's scope to include misconduct before administrative agencies "raises substantial questions concerning the constitutional power of this Court to regulate conduct before an executive agency." *Newman*, 314 Md. at 377. For that reason, the Court of Appeals in *Newman* held that a court's authority under Rule 1-341 did not extend to awarding attorney's fees as a sanction for misconduct that occurred in proceedings before an executive agency, specifically, the Health Claims Arbitration Office. *Id.* Similarly, in *Marquardt v. Papenfuse*, 92 Md. App. 683, 716 (1992), this Court held that Rule 1-341 did not permit a court to award fees as a sanction for unjustified and bad faith proceedings before an executive official, the Commissioner of Land Patents, because to do so without legislative authorization would violate the doctrine of separation of powers.

Even though it is a local agency, the Cecil County Planning Commission is nonetheless part of the executive branch of government. *See* Dan Friedman, THE

[2] Article IV, § 18(a) states:

> (a) The Court of Appeals from time to time shall adopt rules and regulations concerning the practice and procedure in and the administration of the appellate courts and in the other courts of this State, which shall have the force of law until rescinded, changed or modified by the Court of Appeals or otherwise by law. The power of courts other than the Court of Appeals to make rules of practice and procedure, or administrative rules, shall be subject to the rules and regulations adopted by the Court of Appeals or otherwise by law.

MARYLAND STATE CONSTITUTION 19 (2006) ("Core executive functions include the administration and enforcement of the laws."). Therefore, Rule 1-341 does not authorize the circuit court to enter an order awarding attorney's fees as a sanction for misconduct before the Planning Commission.

In conclusion, Rule 1-341 is not a broad grant of authority for a court to shift responsibility for paying attorney's fees based upon the court's assessment of the equities of a case. Rather, "Rule 1-341 sanctions are judicially guided missiles pointed at those who proceed in the courts" without substantial justification or in bad faith. *Legal Aid Bureau, Inc. v. Bishop's Garth Assocs. Ltd. P'ship,* 75 Md. App. 214, 224 (1988) (emphasis added). Because Rule 1-341 does not authorize an award of attorney's fees based on the facts of this case, we must reverse that portion of the court's judgment.

On a final note, Md. Rule 8-607(a) provides that, unless the appellate court orders otherwise, the prevailing party on an appeal is entitled to an award of court costs. We will order otherwise in this case. Although we must reverse the sanctions order, we agree with the circuit court that the responsibility for this lawsuit lies solely with the Dants. Under these circumstances, it is appropriate for the Dants to pay the court costs. *See Mason v. Wolfing,* 265 Md. 234, 236–37 (1972); *Watkins v. Barnes,* 203 Md. 518, 526 (1954).

THE SANCTIONS ORDER OF THE CIRCUIT COURT FOR CECIL COUNTY DATED MARCH 30, 2016 IS REVERSED. APPELLANTS TO PAY COSTS.