Circuit Court for Baltimore City
Case No.: 24-C-09-004361

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2014

September Term, 2016

SHAWN RAVER

v.

CHRISTIAN BECKMAN

Meredith,
Friedman,
Wilner, Alan M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: December 19, 2017

This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This appeal addresses the denial, by the Circuit Court for Baltimore City, of a motion for sanctions pursuant to Maryland Rule 1-341, filed by Shawn Raver ("Raver"), appellant, against Christian Beckman ("Beckman"), appellee, after Raver had prevailed in having the court dismiss a defamation suit filed by Beckman. Raver presents two questions for our review:

1. Did the trial court err by denying sanctions against [Beckman] and his counsel for filing an action in bad faith and/or pursuing an action without substantial justification pursuant to Maryland Rule 1-341?

2. Did the trial court err by failing to award attorneys' fees to [Raver]?

Because the trial court stated in its opinion that it "cannot" make a finding of either bad faith or a lack of substantial justification by appellee in pursuing the underlying litigation, and that ruling was not clearly erroneous or based upon an erroneous application of law, there was no abuse of discretion in the court's refusal to make an award of attorney's fees under Rule 1-341. Accordingly, we will affirm the ruling of the trial court.

FACTS AND PROCEDURAL HISTORY

On July 13, 2009, Beckman filed a two-count complaint against Raver, asserting that, on or about July 21, 2008, Raver had defamed Beckman, a tattoo artist, by communicating to one of Beckman's customers that Raver "was HIV positive," and that the customer, Molly Palmer, "should not allow [Beckman] to continue [to] provide tattooing services to her." [Complaint, ¶ 5.] Beckman asserted that Raver's statements to Palmer were false and made either with actual malice or a reckless disregard for the truth,

and with the intent to injure Beckman. Beckman asked for damages for defamation (Count I) and intentional infliction of emotional distress (Count II).

After Raver was served with process on December 13, 2009, his attorney attempted, without success, to contact Beckman's counsel to ask for an additional thirty days to file an answer. Beckman's counsel did not respond. On January 13, 2010, the day Raver's counsel believed the answer was due, Beckman's counsel finally responded to Raver's counsel and advised counsel that he would not agree to an extension. Accordingly, Raver filed an answer that same day.

On January 14, 2010, Beckman filed a "request/motion for order of default," asserting that Beckman's answer had been due on January 12, 2010; that it had not been filed on or before the due date; and that Maryland Rule 2-613 made it mandatory that the court enter an order of default on his written request. Counsel candidly admitted in a footnote to this motion that he knew Raver's counsel had been trying to contact him since late December to request an extension, but "no actual communications took place until January 13, 2010," when "counsel spoke," and he informed Raver's counsel that the answer was late, he would not agree to an extension, and he would be seeking a default order. Raver filed an answer to the "request/motion for order of default," and asserted that it was Raver's position that the answer was not due until January 13, and had been filed timely. On February 18, 2010, Beckman filed a reply to Raver's answer regarding the "request/motion for order of default," contending that Raver's filing of the answer

one day late "can only be viewed as defiant," and that the court should enter an order of default.

The court disposed of the "request/motion for order of default" by signing a one-page order denying the motion on April 20, 2010.[1]

On July 19, 2010, Raver filed a motion to dismiss, or alternatively, for summary judgment, and motion for sanctions pursuant to Maryland Rule 1-341. The motion was supported by the affidavits of: Shawn Raver, who was alleged to have made the defamatory statements; Raver's brother Brian; Catherine Truax, Brian's girlfriend; and Molly Palmer, the tattoo customer and friend of Beckman who supposedly conveyed to Beckman the defamatory statements allegedly made by Shawn Raver. Whereas Beckman had alleged in his complaint that Shawn Raver "had uttered defamatory oral statements about him, to wit, that [he] was HIV positive and that a business customer of [his], Molly Palmer, should not allow [him] to continue [to] provide tattooing services to her," the affidavits contradicted the allegations.

In Shawn Raver's affidavit, he attested that he and Beckman had attended high school together, and that he had "never harbored any ill-will, malicious intent or hatred towards" Beckman. Regarding the incident giving rise to Beckman's claim, Shawn Raver averred:

[1] In November 2009, before Raver was served, the Circuit Court had sent Beckman's counsel a Notice of Contemplated Dismissal for failure to timely serve the summons pursuant to Maryland Rule 2-507. In an order docketed February 5, 2010, the court declared the notice of contemplated dismissal to be moot, and stated that "the case should proceed once an answer is filed."

> [4.] I was with my family at a local restaurant on or about July 4, 2008. Brian Raver and Catherine Truax were engaged in a semi-private conversation about Ms. Truax having received a tattoo in an intimate part of her body from [Beckman] the day before, July 3, 2008. A brief and general conversation about the dangers associated with tattoos was discussed. From my recollection, I made a general statement that one must be careful about from whom one receives a tattoo. There was a brief nonspecific discussion about health concerns. I do not recall anything specific being said about Christian Beckman. After a brief time, the conversation changed to other topics.
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> [5.] I have never had a conversation with Molly Palmer about tattoos, health related issues, or the plaintiff, Christian Beckman. I have not seen or spoken to Molly Palmer in several years. I do not even recall the last time that I saw or spoke with Molly Palmer.
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> [6.] I did not state to anyone that the Plaintiff, Christian Beckman, had any specific disease or medical condition, including being HIV positive.

Molly Palmer swore in her affidavit that she knew Catherine Truax and Brian Raver from high school, and stated: "I have never had any conversation with the Defendant Shawn Raver about the Plaintiff Christian Beckman. I do not recall when [sic] the last time that I was in the company of the Defendant Shaw[n] Raver." She attested that Beckman had "told [her] directly . . . that he has used illegal drugs in the past, including but not limited to intravenous drug use." Palmer's affidavit also affirmed:

> [5.] There was a time when I was present at the home of Brian Raver. I do not have any specific recall as to the time period. I overheard an argument between Catherine Truax and Brian Raver about Catherine having received a tattoo from the Plaintiff Christian Beckman in an intimate place on her body. Brian Raver was upset about the tattoo.
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> [6.] During the argument I recall hearing statements about the Plaintiff Christian Beckman's prior drug use and the possibility of contracting some type of communicable disease.

> [7.] During the argument I also overheard from either Catherine Truax or Brian Raver that Shawn Raver had gone to school with the Plaintiff Christian Beckman and that even Shawn knew about the Plaintiff Christian Beckman's prior illegal use. They further talked about the need to be careful about getting tattoos.
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> * * *
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> [9.] As a result of overhearing the argument, I was concerned that maybe the Plaintiff Christian Beckman had a medical condition of which he did not inform me. I had previously had sexual relations with the Plaintiff Christian Beckman and had allowed him to give me tattoos. I was worried about my health and well being. I realized that given the history of the Plaintiff Christian Beckman, I decided that I should question him and verify that he does not have any medical problem. Once I spoke with the Plaintiff Christian Beckman and he verified that he did not have any diseases, I then allowed him to complete a large tattoo over several sessions. I also continued to engage in sexual activity with the Plaintiff Christian Beckman.
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> [10.] I never expressed my concerns with anyone else about the Plaintiff Christian Beckman.

The affidavits of Brian Raver and Catherine Truax were to similar effect: there was a conversation at a restaurant on or about July 4, 2008, regarding the tattoo Beckman had given Catherine Truax the previous day "in an intimate area," which led to a "discussion" wherein "the potential for infectious diseases in the process of receiving a tattoo was brought up," and Shawn Raver "made a broad statement about being careful with regards to who gives you a tattoo." Molly Palmer then overheard, a day or two later, a private "heated conversation" between Truax and Brian Raver "about her having received a tattoo from the Plaintiff, Christian Beckman." In support of the motion to dismiss or for summary judgment, Raver also filed Beckman's answers to interrogatories, in which Beckman indicated that the only witness to the allegedly defamatory statement

was Molly Palmer, and that he intended to prove his case via her testimony "and the contemporaneous emails from the time of the defamatory statements."

Beckman filed an opposition arguing that the motion should be denied because he had not yet taken depositions, and accordingly, "has not yet obtained the sworn testimony of the Defendant and several crucial fact witnesses." Beckman argued that, without depositions, he "had not been able to solidify the evidence related to the circumstances surrounding the defamatory statements made by [Shawn Raver] and the extent to which these comments were published."

The motion to dismiss or for summary judgment was heard by the circuit court on August 11, 2010. At that time, the court denied the motion, but informed Beckman that it would grant the motion unless Beckman was able to produce some kind of sworn evidence by August 23 to support his case. On August 20, 2010, Beckman deposed Molly Palmer, and on August 23, Beckman filed her deposition transcript, arguing that it sufficed as evidentiary support for Beckman's *prima facie* case. The court denied the motion on the same day.

Trial was set for early January 2011. On September 14, 2010, Raver filed a motion in limine to exclude an e-mail that Beckman alleged had been sent to him by Molly Palmer on July 21, 2008, and which, Beckman claimed, substantiated his defamation claim. The e-mail said nothing about HIV or AIDS. Dated July 21, 2008, it read in its entirety:

> hey hun, so i was going to make an appointment for this week, but i heard you were on a fishing trip.? so hopefully i can make one with you

> when you get back.? sorry for this email however, but i have a question for you only cause sean raver told me a few things and i got a little freaked out only cause you are gonna tattoo me and you already have.? I guess i just need reassurance now, cause well sean is not the most reliable source, but i wanted to talk with you first before asking anyone else.? sorry hope to hear from you soon
> Molly ~**

(Punctuation, capitalization, and spellings as in original.)

But Palmer would neither confirm nor deny having written it. Raver argued that the e-mail lacked authentication, and was rife with hearsay not within any exception. On November 19, 2010, before the court ruled on the motion in limine, Raver filed a "Motion for Separation of Question for Decision by Court," asking the court to determine that the e-mail was inadmissible. On December 20, 2010, the court conducted a hearing, and on January 11, 2011, the court issued an opinion granting Raver's motion to exclude the e-mail and dismissing the case.

Beckman noted an appeal, and in an unreported opinion filed on June 11, 2012, we affirmed. *Christian Beckman v. Shawn Raver*, No. 2671, Sept. Term 2010. We held that the e-mail was properly excluded even "[a]ssuming, as the circuit court did, that [it] was properly authenticated," slip op. at 14, and that the case had been properly dismissed. Beckman's petition for *writ of certiorari* was denied by the Court of Appeals on October 24, 2012.

On April 19, 2013, Raver filed a motion pursuant to Rule 1-341, seeking attorney's fees incurred in defending Beckman's claims. Raver argued that Beckman's case was brought in bad faith and without substantial justification, as evidenced by the

fact that the fundamental basis of the complaint — that Shawn Raver had uttered defamatory comments about Beckman to Molly Palmer — was "patently false" and unsupported by any admissible evidence, and further, that Beckman had failed to make any effort to corroborate any of his claims prior to filing suit. Raver argued that Beckman had never obtained an affidavit from Molly Palmer supporting his version of events, and had misrepresented Palmer's statements. Raver asserted that he had incurred in excess of $50,000 in attorneys' fees defending against a case that Beckman and his counsel, who was Beckman's uncle, knew from the outset, or should have known from an early stage, lacked any factual basis.

Beckman filed an opposition to the motion for sanctions, and also filed his own "Motion for Sanctions, and Request for Show Cause Order and Determination of MPRC Rule 3.1 Violation." The court conducted a hearing on the open motions on October 17, 2013. Before the conclusion of the hearing, the court denied Beckman's request for show cause order. The court held the matter *sub curia*.

Nearly three years later, on September 27, 2016, the court issued an order denying Raver's motion for sanctions. The court's explanatory memorandum indicated that, while it had many "concerns" (which it described in the opinion) about how the case was handled by Beckman's counsel, the court ultimately concluded it could not make the

finding it needed to make to support an award of attorney's fees under Rule 1-341.[2] The court explained its denial of Raver's motion:

> Obviously, from the discussion and analysis it should be clear there are a host of matters about which the Court has concerns. There can be no question that [Beckman's] counsel from the time of filing the suit engaged in less than stellar conduct in his pursuit of redressing the alleged wrongs done to his client. The examples include the attempt to run out the clock so that an order of default could be obtained, the attempt throughout the case and even to the appellate courts to claim that liability had somehow been determined although no judgment of default was ever entered, the continued involvement of counsel when he knew or should have known he was witness to contested issues, the shifting to an associate of the alleged responsibility for determining what actions the plaintiff's attorney could take without running afoul of the Code of Professional Responsibility; something which ordinarily, for obvious reasons, cannot be shifted to someone else and especially not to a subordinate.[3]
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> Because of those issues and the Court's knowledge of the fate of the case [Beckman had filed] in Baltimore County which was dismissed for lack of prosecution and then dismissed by plaintiff/appellant in the Court of Special Appeals, if the Court were permitted to exercise general equity powers and thus could balance the equities it would be not only fair but right to assess the substantial costs incurred by the defendant to the plaintiff and more particularly to his attorney.
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> The focus of [Rule] 1-341 is
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> > "if the court finds that the conduct of any party in maintaining or defending any proceeding was in bad faith or

[2] The court's memorandum also explained the lengthy delay between the hearing and the issuance of the order as resulting from "the difficulty of the issue with which the Court was dealing," and specifically noted that "[e]arlier drafts [of the opinion] were directed toward producing a result different than the decision here, because of the Court's belief that there is a fundamental problem with the case and how it was pursued[.]"

[3] The court's reference to Beckman's counsel being a witness to contested issues related to representations counsel had made regarding his personal conversations with Palmer.

> without substantial justification [costs and fees may be awarded]"
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> **Which leaves this court to decide essentially whether the action, when initiated was brought "in bad faith or without substantial justification" or were the actions after the suit was initiated taken ". . . in bad faith or without substantial justification." The court cannot make that finding and therefore [an] Order denying the motion will be issued contemporaneous with this Memorandum Opinion.**

(Emphasis added.)

This appeal followed.

STANDARD OF REVIEW

Rule 1-341(a) provides:

> In any civil action, if the court finds that the conduct of any party in maintaining or defending any proceeding was in bad faith or without substantial justification, the court, on motion by an adverse party, may require the offending party or the attorney advising the conduct or both of them to pay to the adverse party the costs of the proceeding and the reasonable expenses, including reasonable attorneys' fees, incurred by the adverse party in opposing it.

In *Seney v. Seney*, 97 Md. App. 544, 549-50 (1993), we said:

> The Court of Appeals has expressly adopted a standard of review for an award of attorney's fees under this rule.
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> > . . . [B]efore imposing sanctions in the form of costs and/or attorney's fees under Rule 1-341, the judge must make two separate findings that are subject to scrutiny under two related standards of appellate review. First, the judge must find that the proceeding was maintained or defended in bad faith and/or without substantial justification. This finding will be affirmed unless it is clearly erroneous or involves an erroneous application of law. Second, the judge must find that the bad faith and/or lack of substantial justification merits the assessment of costs and/or attorney's fees. This finding will be affirmed unless it was an abuse of discretion.

> *Inlet Associates v. Harrison Inn Inlet, Inc.,* 324 Md. 254, 267-68, 596 A.2d 1049 (1991). *See also Deleon Enterprises, Inc. v. Zaino,* 92 Md. App. 399, 415, 608 A.2d 828 (1992); *Art Form Interiors, Inc. v. Columbia Homes, Inc.,* 92 Md. App. 587, 593-94, 609 A.2d 370 *cert. denied,* 328 Md. 567, 616 A.2d 378 (1992).
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> Awarding attorney's fees under this rule is an extraordinary remedy, and it should be used sparingly. *Inlet Associates,* 324 Md. at 277, n. 4, 596 A.2d 1049 (Bell, J. dissenting); *Talley v. Talley,* 317 Md. 428, 438, 564 A.2d 777 (1989) (rule is extraordinary remedy and should reach only intentional misconduct); *Black v. Fox Hills N. Community Ass'n, Inc.,* 90 Md. App. 75, 84, 599 A.2d 1228, *cert. denied,* 326 Md. 177, 604 A.2d 444 (1992) (rule should be invoked only for clear, serious abuses of judicial processes). "Rule 1-341 sanctions are judicially guided missiles pointed at those who proceed in the courts without any colorable right to do so." *Legal Aid Bureau, Inc. v. Bishop's Garth,* 75 Md. App. 214, 224, 540 A.2d 1175, *cert. denied,* 313 Md. 611, 547 A.2d 188 (1988). *See also Dixon v. DeLance,* 84 Md. App. 441, 451, 579 A.2d 1213 (1990), *cert. denied,* 321 Md. 501, 583 A.2d 275 (1991); *Kelley v. Dowell,* 81 Md. App. 338, 341, 567 A.2d 521 *cert. denied,* 319 Md. 303, 572 A.2d 182 (1990); *Needle v. White, Mindel, Clarke and Hill,* 81 Md. App. 463, 470, *cert. denied,* 319 Md. 582, 573 A.2d 1338 (1990); *Legal Aid Bureau, Inc. v. Farmer,* 74 Md. App. 707, 722, 539 A.2d 1173 (1988).

In *Legal Aid Bureau, Inc. v. Bishop's Garth Assocs. Ltd. P'ship*, 75 Md. App. 214, 220-21, 540 A.2d 1175, 1178 (1988), citing to *Century I Condominium Association, Inc. v. Plaza Condominium Joint Venture,* 64 Md. App. 107, 117, 494 A.2d 713 (1985), we said:

> Whether bad faith or lack of substantial justification is found by a court to exist in any given case is a question of fact subject to a "clearly erroneous" standard of review. Once a court finds that a party or counsel has acted in bad faith or without substantial justification the court may apportion costs and reasonable attorney's fees or may choose not to award fees at all.

That decision is committed to the discretion of the trial court, and will be disturbed only for an abuse of discretion. *Williams v. Work*, 192 Md. App. 438, 467 (2010).

DISCUSSION

In this case, Raver contends that the trial court erred in failing to award him attorneys' fees pursuant to Rule 1-341. Raver emphasizes the evidence that could support a finding of Beckman's bad faith or lack of substantial justification in bringing or, at a minimum, continuing to prosecute the action. Raver asserts: "Given the multiple unfavorable rulings towards [Beckman], there can be no question that the Complaint was brought without substantial justification and in bad faith." We note that the trial court, in its memorandum, recited much evidence of Beckman's, and his counsel's, "less than stellar conduct" in the case. But, ultimately, the court stated that it was not able to make the requisite finding of bad faith or lack of substantial justification upon which a Rule 1-341 award must be predicated.[4]

The court's failure to be persuaded to make the requisite finding was not clearly erroneous. As we observed in *Starke v. Starke*, 134 Md. App. 663, 680, 683 (2000):

> [I]t is far easier to sustain as not clearly erroneous the decisional phenomenon of not being persuaded than it is to sustain the very different decisional phenomenon of being persuaded. Mere non-persuasion . . . requires nothing but a state of honest doubt. It is virtually, albeit perhaps not totally, impossible to find reversible error in that regard.
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> * * *

[4] We recognize that, at one place in the court's opinion, the court made a seemingly contradictory statement: "it does appear that the matter was brought without substantial justification." But the court's ultimate finding was that it "cannot make [the required] finding," and Raver has not argued that the seemingly contradictory statement is controlling.

> Resolving disputed credibility and weighing disputed evidence are matters, of course, in the unfettered control of the fact finder. Where either the credibility of a witness or the weight of the evidence is in dispute, therefore, there is no way in which a fact finder, with such matters properly before him, could ever be clearly erroneous for not being persuaded.

The court was required to make a finding as to whether Beckman's conduct in this litigation was in bad faith or pursued despite a lack of substantial justification. The court acknowledged in its opinion that it had anguished over this case, and had tentatively considered reaching an opposite conclusion. But, the court ultimately concluded that it could not make a finding of facts that are required to support an award of fees pursuant to Maryland Rule 1-341. If we consider all evidence in the light most favorable to the prevailing party, we must conclude that the court was not clearly erroneous in being unpersuaded.

Moreover, even if we were to conclude that the circuit court's finding was clearly erroneous with respect to the existence of bad faith or lack of substantial justification, the court was not required to award any fees. The language of Maryland Rule 1-341 is permissive and discretionary: "the court . . . *may* require" the offending party to pay fees. (Emphasis added.) As we noted in *Century I Condo. Ass'n, Inc. v. Plaza Condo. Joint Venture*, 64 Md. App. 107, 119–20 (1985):

> Rule 1-341 provides only that a "court *may* require the offending party . . . to pay . . . reasonable expenses, including reasonable attorney's fees" if bad faith or lack of substantial justification is found [emphasis supplied]. The language of the [then] new rule implies that a court may, under some circumstances, exercise its discretion not to award fees despite the existence of a predicate for so doing. The existence of that discretion means that the court must make a judgment call with which we may disagree (in the sense that we might have called it otherwise sitting at the trial bench) but which

> we will not disturb unless the judgment call is so far off the mark as to amount to an abuse of discretion. That is, a trial judge may decide one way or another in a close case involving discretion and not commit reversible error whichever way he decides. *Danz v. Schafer,* 47 Md. App. 51, 57-58, 422 A.2d 1 (1980).

Because it would have been within the circuit court's discretion not to award any fees even if Raver had persuaded the court to make a finding of bad faith or lack of substantial justification, we do not perceive any abuse of discretion in the court's failure to award any fees in this case.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.