

Circuit Court for Anne Arundel County
Case No.02-C-14-187383

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 97

September Term, 2016

DANIEL B. HOLT

v.

LAURIE L. HOLT

Reed,
Beachley,
Kenney, James A., III.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: July 9, 2018

*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.

On December 4, 2014, about six weeks prior to their divorce, Daniel Holt (“Appellant”) and Laurie Holt (“Appellee”) reached an agreement, which was then memorialized in a Consent Order of Court. The agreement provided that Appellant would return all of Appellee’s computer files. On June 22, 2015, Appellee filed a Petition for Contempt, alleging that Appellant violated the Consent Order by refusing to return the files. As a result of her efforts to recover the files, Appellee filed a Request for Counsel Fees and Other Relief in the Circuit Court for Anne Arundel County on August 28, 2015. The circuit court granted the request awarding fees and costs on October 8, 2015, and set the matter for a hearing to determine the amount of costs incurred. On March 10, 2016, the circuit court awarded Appellee reasonable attorney’s fees of \$9,000 and \$8,721 in expert fees, despite finding that Appellant was not in contempt. Appellant timely appealed that decision, and presents four questions for our consideration, which, for clarity, we have reduced to three and rephrased:

- I. Did the trial court err by awarding attorney’s fees and expert costs to Appellee?
- II. Did the trial court err in its determination of the expert cost award amount?
- III. Did the trial court err by enforcing the Consent Order?

For the following reasons, we answer the first question in the affirmative, vacate the award, and remand to the Circuit Court for Anne Arundel County. Therefore, we need not address Appellant’s second question and answer the third question in the negative.

FACTUAL AND PROCEDURAL BACKGROUND

The parties were married for ten years before their uncontested divorce in January, 2015. Prior to their divorce, on December 4, 2014, the Circuit Court for Anne Arundel County executed a Consent Order based on an agreement between Appellant and Appellee. The Consent Order provided for the return of all of Appellee’s files¹ stored on computers at the marital home, where Appellant still resided. The order states, in pertinent part:

ORDERED, by the agreement of the parties, that [Appellee] shall retain sole ownership and control of . . . all of her electronic files currently in [Appellant’s] possession, including e-mail archives from “laurie” and “welau” omegaquest e-mail domains[.]

The Judgment of Absolute Divorce, entered on January 15, 2015, states that “all terms of this Court’s Consent Order of Court shall remain in full force and effect.”

Appellant failed to return all of Appellee’s electronic files. Initially, he turned over a thumb drive containing some files, but after reviewing the drive, Appellee reported that “the vast majority” of the files were missing. Appellant claimed that he deleted the files “in a fit of rage” one year prior to the Consent Order’s issuance, and that the thumb drive contained “all electronic files then currently in [his] possession.” When Appellee asked to review the hard drives where the files had been stored in order to recover the deleted items, Appellant stated that the hard drives had been damaged when he moved from the marital home and he discarded them.

¹ The files included photos, financial records, tax returns, medical records, personal writings and correspondence, video files, and other documents.

On April 29, 2015, Appellee filed a Request for Emergency Injunctive Relief, asking that Appellant be ordered to surrender the computer hard drives in order to avoid further destruction. She later filed a Petition for Contempt on June 22, 2015, alleging that Appellant violated the Consent Order. In both pleadings, Appellee requested that the court “order [Appellant] to pay costs including reasonable attorney’s fees” incurred as a result of Appellant’s failure to produce the electronic files.

On August 10, 2015, during the emergency hearing on Appellee’s request for injunctive relief and prior to the contempt hearing, the parties reached an agreement and placed it on the record. The agreement was later reduced to writing as a Preliminary Injunction on August 19, 2015. Appellant was required to “turn over to his counsel, Jonathan Gladstone, all computers, servers, laptops (including internal and external hard drives) in his possession or control for inspection by [Appellee] . . . and her computer expert.” Appellant turned over twelve hard drives to his attorney, which were copied, scanned, and reviewed by Appellee’s computer expert, Matthew Lempka. Each hard drive required eight to twelve hours for copying and several more hours for scanning and reviewing. Mr. Lempka located and recovered over 35,000 files belonging to Appellee. He testified that his work took in excess of 250 hours, and that he charged Appellee \$8,721 for his services.

On August 28, 2015, Appellee filed a Request for Counsel Fees and Other Relief, arguing that she incurred fees as a result of Appellant’s failure to comply with the Consent Order. A trial judge, in the Circuit Court for Anne Arundel County, granted Appellee’s request without a hearing. In its order, the court stated, “[Appellee] shall be entitled to the

reasonable costs incurred employing an expert to review and analyze [Appellant's] computer hard drives" and "the reasonable attorney's fees incurred in bringing her Petition for Contempt and related matters." The order set the matter for a hearing to determine the amount of Appellee's costs incurred. The hearing was held on March 8, 2016. The court found: (1) Appellant was not in contempt because he eventually complied with the Consent Order and (2) Appellee incurred reasonable attorney's fees of \$9,000 and \$8,721 in costs for her computer expert to recover the files. The award was entered on March 10, 2016, and Appellant noted this appeal on March 29, 2016.

DISCUSSION

A. Parties' Contentions

Appellant argues that the trial court erred in ordering him to pay Appellee's attorney's fees and expert costs. Appellant contends that it is "improper for a court to order that legal fees and other sanctions be imposed absent a finding of any factual or legal basis for the imposition of legal fees or expert activities[.]" Initially noting that Maryland generally adheres to the "'American Rule,' in which each party is responsible for its own legal fees" *Henriquez v. Henriquez*, 413 Md. 287, 294 (2010), Appellant asserts that deviating from that standard was inappropriate because the request for attorney's fees "contained no allegation of any authority which justified the award of fees[.]" Appellant further argues that the award was improper absent a finding of contempt.

Appellant also contends, seemingly in the alternative, that the trial court should not have included time spent on recovering the computer files in Appellee's award of expert fees. Rather, Appellant insists the award amount should have been limited to the expert's

time spent on preparing to testify at the contempt hearing as an expert witness. Lastly, Appellant challenges whether the Consent Order was incorporated into the Judgment of Absolute Divorce, or simply merged into it, thereby barring any enforcement or sanctions under the merger doctrine. Appellant notes that this issue may be moot “[d]ue to the peculiar procedural status [of] this case,” but makes the argument nonetheless.

Conversely, Appellee argues that the circuit court had the authority to order attorney’s fees and expert fees, without a finding of contempt, pursuant to Maryland Rule 1-341, which permits the award if the court finds that the conduct of the offending party was in bad faith or without substantial justification. Furthermore, Appellee argues that Appellant failed to preserve his objections to the award of fees and costs because he did not appeal the order dated October 8, 2015, which granted the award initially. Appellee also argues that the record supports a finding of contempt. Specifically, Appellee asserts that contempt was established through the Preliminary Injunction entered on August 19, 2015, when the court ordered Appellant to comply with the Consent Order and granted Appellee’s Request for Emergency Injunctive Relief. Finally, Appellee contends that the Consent Order was properly incorporated into the Judgment of Absolute Divorce as evidenced by its “plain language and clear meaning.”

B. Standard of Review

This Court has stated that an appellate court’s review of an award of attorney’s fees is reviewed under an abuse of discretion standard. *See Ledvinka v. Ledvinka*, 154 Md. App. 420, 432 (2003) (“[review of an award of attorney’s fees] is governed by the abuse of discretion standard and such an award should not be modified unless it is arbitrary or

clearly wrong...”). In this instance, an abuse of discretion is determined by evaluating the trial judge's application of the applicable law and the facts of the case. Consideration of the statutory criteria is mandatory in making an award and failure to do so constitutes legal error.

C. Analysis

1. Award of Attorney's Fees and Expert Costs

The circuit court did not conduct an evidentiary hearing or make any findings before granting Appellee's request for attorney's fees and expert costs. This, we hold, was legal error. We explain.

In *Bahena v. Foster*, 164 Md. App. 275 (2005), this Court held that it is improper to award attorney's fees in contempt proceedings. There, neighboring homeowners entered into a consent order dividing the responsibility for the removal of the tree between their properties. When the Bahenas failed to comply with that order, the Circuit Court for Anne Arundel County held them in contempt and ordered them to pay the Fosters' attorney's fees and expert witness fees. *Id.* On appeal, the Bahenas cited the “American Rule” and argued that “in the absence of agreement, rule, statutory provision or limited case law exception, such fees are not recoverable.” *Id.* at 288. This Court agreed and vacated the award. We held that “[t]here is no statutory provision or rule authorizing the recovery of attorney's fees in contempt proceedings.” *Id.* at 289.

The Fosters also sought to recover their fees and costs under Maryland Rule 1-341² by alleging that the Bahenas had “shown bad faith . . . by their failure to comply with the Court’s Order.” *Id.* at 291. Appellee makes the same argument here, and contends that the circuit court granted her request for attorney’s fees and expert costs based on Maryland Rule 1-341, because the language used in her Request for Counsel Fees and Other Relief (and later in her Supplemental Motion for Contempt, Attorney’s Fees, Expert Costs and Other Relief) suggests that Appellant acted in bad faith. However, there is simply no evidence in the record to support such an assertion.

Here, the circuit court did not address any legal basis, bad faith or otherwise, for granting Appellee’s request. The record shows that the court granted the request after considering Appellee’s request and the lack of opposition by Appellant. If bad faith was the basis for the court’s decision, the court was required to make that finding. We explained in *Bahena* “the bad faith for which Md. Rule 1-341 permits the recovery of attorney’s fees and costs is in ‘maintaining or defending any proceeding,’ not in violating a court order,

² Maryland Rule 1-341 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 part 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.

though the latter may be evidence of the former.” *Id.* at 292. Ultimately, we vacated the award and remanded the case back to the lower court for it to consider whether to grant the request for fees and costs after applying the appropriate rule and standard. We do the same here.

It was legal error for the circuit court to award attorney’s fees and expert costs to Appellee without an evidentiary hearing and finding of bad faith. Therefore, we vacate the award and remand the case to the Circuit Court for Anne Arundel County. On remand, we commend to the trial court the Court of Appeals’ thorough discussion of Rule 1-341 in *Christian v. Maternal-Fetal Med. Assoc. of Md., LLC*, 459 Md. 1 (2018).

2. Consent Order

Appellant argues that the Consent Order is unenforceable because it was not incorporated into the Judgment of Absolute Divorce. He states, as we mentioned *supra*, “due to the peculiar procedural status [of] this case, wherein the denial of contempt is now final and the legal basis for the issue under appeal is dubious, it is possible that the merger issue is moot.” Moreover he contends, that the consent order has no “language that the deed, agreement, or settlement [that has been] incorporated but not merged into the divorce decree.” Rather, he states, that the consent order provides that the terms of the earlier order be incorporated into the judgement, but contains no provision for the December 2014 Consent Order. Appellant misunderstands the legal effect of the Consent Order, which was later ratified in the Judgement of Absolute Divorce. While the terms of the January 22, 2014 Separation Agreement were incorporated, but not merged, into the Judgement of Absolute Divorce, the Consent Order independently provided that Appellee was the sole

owner of “all of her electronic files currently in [Appellant’s] possession[.]” The Judgement of Absolute Divorce simply provided that all terms of the Consent Order “shall remain in full force and effect.” It is beyond cavil that a court may enforce the express terms of its orders. The doctrine of merger therefore has no applicability in this case.³

Appellee, does not raise the question of whether the consent merger of the consent order was moot, but rather argues that “the consent order was properly incorporated and thus was not subsumed by the merger doctrine.” We agree.

The Judgment states: “all terms of *this Court’s Consent Order of Court shall remain in full force and effect.*” (emphasis added). It is clear that the circuit court intended for the parties to remain bound by the Consent Order. Thus it was not necessary to issue an entirely new judgement incorporating the December 2014 agreement. Therefore, we reject Appellant’s argument and hold that the Consent Order is enforceable.

**JUDGMENT OF THE CIRCUIT
COURT FOR ANNE ARUNDEL
COUNTY VACATED AND
REMANDED FOR PROCEEDINGS
CONSISTENT WITH THIS OPINION.
COSTS TO BE PAID 1/2 BY
APPELLANT AND 1/2 BY APPELLEE.**

³ In his reply brief, Appellant states that he “believes that the issue may be moot in light of the finding that there was no contempt[.]” As we discussed above, however, whether the trial court may award attorney’s fees and expert costs in this case is an appropriate consideration on remand, and therefore is not moot.