CHRISTOPHER ZEAUSKAS	*	IN THE
Plaintiff		CIRCUIT COURT
v.	*	FOR
CECIL COUNTY EXECUTIVE TARI MOORE, AND THE CECIL COUNTY GOVERNMENT OFFICE OF THE COUNTY EXECUTIVE AND COUNTY COUNCIL	*	CECIL COUNTY
	*	CASE NO.: 07-C-13-000089
Defendants	*	

* * * * *

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR COSTS AND ATTORNEYS' FEES PURSUANT TO *RULE 1-341*

Cecil County Executive Tari Moore (hereinafter, "Moore"), and the Cecil County Government Office of the County Executive and County Council (hereinafter, "County Government"), Defendants (collectively, the "County" or "Defendants"), by and through Jason L. Allison, Jason L. Allison, P.A., their attorneys, file this Memorandum of Points and Authorities in Support of Motion for Costs and Attorneys' Fees Pursuant to *Rule 1-341*, and say:

Preliminary Statement

This Memorandum of Points and Authorities (hereinafter, the "Memorandum") is filed in support of the County's Motion for Costs and Attorneys' Fees Pursuant to *Rule 1-341* (hereinafter, the "Motion") that has been filed against Michael D. Smigiel, Sr., Esquire (hereinafter, "Smigiel"), counsel for Christopher Zeauskas (hereinafter, "Zeauskas"), the Plaintiff in the underlying suit. Facts in the underlying action, which are iterated in the Court's Memorandum Opinion and Order entered on October 8, 2013 (the "Order") and incorporated herein by reference, reveal a substantial lack of justification for the interposition of litigation against any of the Defendants based on the grounds pleaded in the Complaint, as well as a rather

startling amount of inertia on the part of Plaintiff's counsel in furthering his client's cause post-filing, a "radio silence" and gross inaction that can be characterized as nothing other than bad faith. The County now requests the imposition of sanctions against Smigiel under *Rule 1-341*.

Standard of Review

Pursuant to *Rule 1-341*, "[i]n 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 may require the offending party or the attorney advising the conduct or both of them to pay the adverse party the costs of the proceeding and the reasonable expenses, including reasonable attorney's fees, incurred by the adverse party in opposing it." *Id.* A trial court has the power under *Rule 1-341* to impose sanctions for continuing an action vexatiously, wantonly, or for oppressive reasons. See, *Needle v. White, Mindel, Clarke & Hill*, 81 Md. App. 463, 568 A.2d 856, cert. denied, 319 Md. 582, 573 A.2d 1338 (1990). Such action, however, requires clear evidence that the action is entirely without color and taken for other improper purposes amounting to bad faith. See, *Id.*

Maryland courts employ a two-step process to determine if sanctions under *Rule 1-341* are warranted: (1) The trial court must determine if the party or attorney maintained the action in bad faith or without substantial justification, taking into consideration that bad faith exists when a party litigates with the purpose of intentional harassment or unreasonable delay, that substantial justification exists when the litigant's position is fairly debatable and within the realm of legitimate advocacy, and that the action must be viewed at the time it was taken, not from judicial hindsight; and, (2) If a trial court finds a claim was pursued in bad faith or without substantial justification, it then has to determine whether to award sanctions. See, *Garcia v. Foulger Pratt Dev., Inc.*, 155 Md. App. 634, 845 A.2d 16 (2003); See also, *Inlet Assocs. v. Harrison Inn Inlet, Inc.*, 324 Md. 254, 596 A.2d 1049 (1991).

Of note, sanctions may be imposed upon attorneys, and the trial court has statutory authority pursuant to *Rule 1-341* to impose litigation expenses and attorney fees upon counsel who willfully abuse judicial process. See, *Watson v. Watson*, 73 Md. App. 483, 534 A.2d 1365 (1988).

I. The Complaint filed in the underlying case was without substantial justification.

Sanctions should be assessed against Smigiel pursuant to *Rule 1-341* because the Complaint filed in the underlying case was interposed without substantial justification.

As a threshold matter, it is axiomatic that "the existence of a justiciable controversy is an absolute prerequisite to the maintenance of a declaratory judgment action." *Kendall, et al. v. Howard County, Maryland*, 431 Md. 590 (2013), quoting *Md. State Admin. Bd. of Election Laws v. Talbot Cnty.*, 316 Md. 332, 339, 558 A.2d 724 (1988) (emphasis supplied). There is no equivocation in the Court of Appeals' recitation of this long-standing and fundamental principal of Maryland law as it relates to actions filed pursuant to *Title 3, Subtitle 4, Declaratory Judgment, Courts and Judicial Proceedings Article, Annotated Code of Maryland.* In order to present a justiciable controversy, the plaintiff must have standing to bring suit, e.g., a party seeking relief must have a sufficiently cognizable stake in the outcome of the case so as to present a court with a dispute that is capable of judicial resolution. See, *Kendall, supra*, 431 Md. 590, citing *Hand. v. Mfrs. & Traders Trust Co.*, 405 Md. 375, 399, 952 A.2d 240 (2008); see also, *Talbot, supra*, 316 Md. at 339 ("Justiciability encompasses a number of requirements [including that] the plaintiffs must have standing to bring suit").

Maryland common law related to standing is yet more specific when applied to declaratory judgment actions arising from governmental action. In this respect, standing to bring a judicial action in connection with governmental decisions in this State generally depends on whether one is "aggrieved," vis-à-vis, the plaintiff must have an interest such that he [or she] is

personally and specifically affected in a way different from the public generally. See, *Kendall, supra*, 431 Md. 590, citing *Sugarloaf Citizens Association, et al. v. Maryland Department of Environment, et al.*, 344 Md. 271, 686 A.2d 605 (1996). If follows then that "an individual or an organization has no standing in court unless he has also suffered some kind of special damage from such wrong differing in character and kind from that suffered by the general public." *Kendall, supra*, quoting *Medical Waste Assoc., Inc., v. Md. Waste Coalition, Inc.*, 327 Md. 596, 612, 612 A.2d 241 (1992).

In the case at bar, Smigiel filed a Complaint on behalf of the Plaintiff which sought a declaratory judgment pursuant to *Title 3, Subtitle 4, Declaratory Judgment, Courts and Judicial Proceedings Article, Annotated Code of Maryland.* As asserted in the Defendants' respective Motions to Dismiss, the Complaint is completely bereft of facts that demonstrate, or from which it could be reasonably inferred, that Zeauskas has suffered any special damage, let alone some kind of special damage differing in character and kind from that suffered by the general public. In fact, the Complaint entirely fails to address this fundamental element of the Plaintiff's claims for relief. To this effect, the Complaint is patently deficient in that it fails to meet the most basic requirement of pleadings practice in this State as set forth in *Rule 2-305*, specifically, that "[a] pleading that sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain a clear statement of the facts necessary to state a cause of action and a demand for judgment for relief sought." *Id.* (emphasis supplied). The Court's Order in the case at bar is instructive: "the complaint herein fails to allege any particularized harm suffered by the petitioner in connection with the governmental decisions being contested." See, Order dated October 8, 2013, P. 4. Simply put, the Complaint did not contain a clear statement of facts necessary to establish standing or, therefore, to state a cause of action. As a result, the Complaint was dismissed.

Smigiel is a seasoned attorney, who has been in practice in the State of Maryland for almost twenty five (25) years (date of admission: 12/19/1989). Throughout the course of his practice, Smigiel has brought a number of suits against the State of Maryland, its officials, and various agencies and subdivisions of the State, including but not limited to Cecil County, Maryland. Smigiel is also a State Delegate, and has served as such for almost ten (10) years. Surely, if any attorney should be charged with awareness of the particularized requirements for pleading a cause of action for declaratory judgment against a government entity, then that attorney is Smigiel. Yet inexplicably, the Complaint filed here fails to state one fact establishing that the Plaintiff had a sufficiently cognizable stake in the outcome of this case. The failure to plead this "absolute prerequisite" was fatal to the Plaintiff's claim, as it presented to the Court a dispute that was incapable of judicial resolution.

Legal counsel, particularly an attorney with Smigiel's credentials and experience in government litigation, either knew, or should well have known, that the pleading filed in this case was patently groundless. In fact, Defendants' counsel, on three occasions prior to filing the Motions to Dismiss, sent correspondence to Smigiel specifically addressing the spuriousness of Plaintiff's action and requesting that the case be voluntarily dismissed. The gross lack of justification for the underlying action in this case is perhaps best summarized in this Court's statement on P. 4 of the Order, in which the Court states that, "[h]aving had ample notice of Defendants' challenges premised on standing, Plaintiff has eschewed the opportunity to amend his Complaint even in light of the motions to dismiss." Smigiel knew (or should well have known) that the Plaintiff lacked standing, yet he failed and refused to mitigate the financial harm to the County in defending this suit by voluntarily dismissing the Complaint, despite repeated demand and in the face of Motions that clearly put him on notice of this fatal deficiency.

The only reasonable conclusion here is that the Plaintiff simply could not establish that he

suffered some kind of special damage from the County's action, or that such a wrong, if properly alleged, differed in character and kind from that suffered by the general public. Such facts didn't exist when the Complaint was filed, such facts didn't exist when the Defendants put Smigiel on notice and requested that the case be voluntarily dismissed, and such facts didn't exist after Motions were filed. Simply put, the action in this case was interposed despite the fact that the pleading did not, and could never even with amendment, state a cause of action for the relief sought. Moreover, there is absolutely no ambiguity in the text of Section 209 of the Cecil County Charter. Rather, the language of Section 209 is clear and unambiguous, and the plain language of this Charter provision is therefore given its ordinary meaning. See, *G.E. Capital Mortgage Services, Inc. v. Edwards*, 144 Md. App. 449 (2002). As succinctly stated by this Court on P. 6 of the Order, "[t]here is no support whatsoever to be found in the language of section 209 for Plaintiff's contention that because of Ms. Moore's past association with the Republican Party when she was elected, her successor must be appointed from a list submitted by the Cecil County Republican Central Committee." The Court's holding in this case demonstrates that there was no reasonable basis for Smigiel to believe that the Plaintiff's claim would generate a factual issue for the fact finder at trial; to the contrary, the plain language of Section 209 and the action taken by Moore thereunder could not have more clearly alerted Smigiel that that there was insubstantial justification for the initiation of this action. See, *Needle v. White, Mindel, Clarke & Hill*, 81 Md. App. 463, 568 A.2d 856, cert. denied, 319 Md. 582, 573 A.2d 1338 (1990).

Beneath the thin veneer, it is apparent that this action was initiated for two reasons: To make a public political splash, and in the process, to vex, delay, and oppress the efficient functioning of County government. This Court is inhered with the authority under *Rule 1-341* to impose sanctions where, as here, an action is continued "vexatiously, wantonly, or for oppressive

reasons." *Optic Graphics, Inc. v. Agee*, 87 Md. App. 770, 591 A.2d 578, cert. denied, 324 Md. 658, 598 A.2d 565 (1991); *Needle v. White, Mindel, Clarke & Hill*, 81 Md. App. 463, 568 A.2d 856, cert. denied, 319 Md. 582, 573 A.2d 1338 (1990). Clear evidence here demonstrates that the underlying action was entirely without color and taken for improper purposes amounting to a substantial lack of justification. Simply put, this case should never have been filed. Accordingly, the Court should impose sanctions upon Smigiel, as an officer of this Court, and assess the Defendants' costs and attorneys' fees against him pursuant to *Rule 1-341*.

II. The underlying action in this case was maintained in bad faith.

The procedural history of this case is telling. On January 14, 2013, the Plaintiff filed a Verified Complaint for Declaratory Judgment and Temporary Restraining Order and for Temporary and Permanent Injunctive Relief. The gravamen of an action for temporary restraining order under *Rule 15-504* is that the Plaintiff will, without immediate judicial action enjoining an act, suffer immediate, substantial, and irreparable harm. See, *Rule 15-504(a)*. The *Rule 15-504* TRO is a siren call, a request for action to enjoin an act that is so grave in its potential consequence that the Plaintiff can obtain such temporary relief ex parte, in many instances, the same day that the pleading is filed. See, *Rule 15-504(b)*. The procedural history in the case *sub judice* belies the urgency raised by the Plaintiff's pleading.

As more fully set forth above, the Complaint, including claims for temporary restraining order and preliminary and permanent injunctive relief, was filed on January 14, 2013. Notwithstanding the grave consequences foretold in the Zeauskas Affidavit, the Plaintiff, for the next six weeks following filing of the Complaint, did ... nothing. On February 26, 2013, the Defendants filed Motions to Dismiss the Complaint. In response, the Plaintiff did ... nothing. On March 12, 2013, Smigiel filed notice that he was asserting the legislative privilege as a member of the House of Delegates pursuant to *Courts and Judicial Proceedings, Section 6-402,*

et seq., Annotated Code of Maryland. The legislative session and "wait" period thereafter expired on or about April 23, 2013. On April 23, 2013, the Defendants withdrew their request for hearing on the Motion to Dismiss and asked that the Court enter a decision based on the Motions; in response, the Plaintiff did ... nothing. On or about May 17, 2013, the Defendant's request was granted, and the Plaintiff was provided with an additional thirty (30) days within which to answer the Motions to Dismiss. Between April 23, 2013 and June 16, 2013, the Plaintiff continued to do ... nothing. From June 16, 2013 up until the entry of the Order dismissing the Complaint on October 8, 2013, Smigiel continued to engage in a course of non-conduct pursuant which he did absolutely nothing to further his client's cause. Once the Complaint was filed and the political headline had hit the front page of the local newspapers, both the Plaintiff and his attorney virtually disappeared.

The fact is, Smigiel failed and refused to take any action whatsoever in furtherance of the underlying action after the Complaint was filed. Notwithstanding his claim that the Plaintiff would suffer immediate, substantial, and irreparable harm without immediate judicial action enjoining the appointment of Joyce Bowlsbey to the County Council, Smigiel did nothing in furtherance of the request for temporary restraining order or preliminary injunction. As a result, County government operated for months under the cloud cast by the underlying cause of action, a constant threat that each and every action taken by the County Council could be rendered ultra vires and later undone based upon the outcome of the litigation.

Smigiel's lack of engagement and inactivity in this case was pervasive, oppressive, and unbroken by any action whatsoever in maintenance of his client's suit. The prejudice sustained by the County as a result of the filing and subsequent abandonment by Plaintiff of his cause of action is, frankly, astounding. In addition to the pall of uncertainty that the suit cast over County government, the County incurred substantial costs and attorneys' fees in defense of the case. In

this respect, the County has incurred over Thirty Eight Thousand Dollars ($38,000.00) in legal fees and One Thousand Fifty One Dollars and Fifty Six Cents ($1,051.56) in costs in defense of this suit. Conversely, the Plaintiff's costs to-date are One Hundred Forty Five Dollars ($145.00) – the filing fee in a Circuit Court civil action. As the Defendants, Moore, the Office of the County Executive, and the County Council had no choice but to defend once the action was filed. Plaintiff's counsel, however, chose to file a spurious case, and chose not act in furtherance of his client's cause. The financial consequences to the County and, therefore, the taxpayers of Cecil County, as the direct and proximate result of what can only be characterized as bad faith on the part of Smigiel in this case, are untenable. In short, Smigiel filed this action without substantial justification and, despite multiple requests by the Defendants to voluntarily dismiss the case, and in the face of Motions to Dismiss which provided clear notification of the many deficiencies in the Complaint, Smigiel did ... nothing ... to the detriment of the County, and to the detriment of the taxpayers of this community.

Based on the foregoing, there are clear legal grounds for the imposition of sanctions against Smigiel for maintaining this action in bad faith, and the County respectfully requests that the Court exercise its discretion and enter an order sanctioning Smigiel pursuant to *Rule 1-341*.

Conclusion

For the foregoing reasons, Cecil County Executive Tari Moore, and the Cecil County Government Office of the County Executive and County Council, Defendants, respectfully request that the Court impose sanctions pursuant to *Rule 1-341* against Michael D. Smigiel, Sr., Esquire, for costs and attorneys' fees incurred in defense of the underlying suit.

Jason L. Allison, Esquire
Jason L. Allison, P.A.
157 East Main Street
Elkton, Maryland 21921
PH: (410) 398-2100
FAX: (410) 398-6868
jallison@torberthouse.com

Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 7th day of November, 2013, a copy of the foregoing Memorandum was sent via first class U.S. mail, postage pre-paid, to: Michael D. Smigiel, Sr., Esquire, Michael D. Smigiel, Sr., P.A., 138 East Main Street, Elkton, Maryland 21921, *Attorney for Plaintiff.*

Jason L. Allison, Esquire
Jason L. Allison, P.A.
157 East Main Street
Elkton, Maryland 21921
PH: (410) 398-2100
FAX: (410) 398-6868
jallison@torberthouse.com