Court of Appeals

STATE OF ARIZONA
DIVISION TWO

Laura Owens, Petitioner/Appellant, v. Clayton Echard, Respondent/Appellee.	Case No. 2 CA-CV 2024-0315 FC Maricopa County Superior Court Case No. FC2023-052114 Judge Julie A. Mata

APPELLANT'S REPLY BRIEF

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I. PREFACE

Like any appeal, the primary focus *should be*: did the lower court commit any reversible legal errors? Sometimes the answer to that question depends heavily on a factual issue, and sometimes not.

This case involves complicated facts, and, without doubt, the record reflects *numerous* factual errors committed by the trial court. Indeed, the very first fact the trial court found — that Laura commenced this action on *May 20, 2023* — was wrong.[1]

But the trial court's minor mistake as to the filing date is not why we are here. Laura's Opening Brief made that clear: "plentiful and egregious factual mistakes notwithstanding, factual errors are not the primary focus here." Opening Brief (OB) at 2. That statement was, and is, still true.

At the same time, it is critically important for this Court to receive accurate information about the facts to help guide the Court's legal analysis. Unfortunately, Clayton's Answering Brief contains inaccurate statements about the record, some of which are highly inflammatory. Laura's Reply thus begins with some clarifying points to avoid confusion about the record.

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[1] The case was filed on August 1, 2023, not May 20, 2023. See ROA 1.

Laura's Opening Brief explained the trial court made multiple errors of fact: "Many of [the trial court's] findings are either directly contrary to the admitted evidence, or supported by no evidence of any kind." [OB at ep 15] (emphasis added). Despite this warning (which was not news to either side), in his discussion of the facts Clayton repeats numerous findings made by the trial court as if they are accurate and supported by the record, even when they plainly are not.

A few of the more serious examples:

- **Laura "admitted" sending Clayton a sonogram video she copied from YouTube**

Clayton claims Laura ***admitted*** "to providing Clayton a seven-year-old sonogram video of twins she obtained online months earlier." AB at 39. As support, Clayton cites the under-advisement ruling (ROA 126, ep 12), and sure enough, it does contain that finding:

> - Petitioner told Respondent the twins were a boy and a girl.
> - Petitioner provided Respondent with a sonogram that was posted on YouTube seven years ago. Petitioner admitted to this during her deposition (Ex. A. 28).
> - Petitioner sent a threatening letter to Respondent indicating her intention to sue

The UAR states Laura "*admitted to this during her deposition*". The UAR cites trial Exhibit A28 as support, but that exhibit was not admitted in evidence, and it was not Laura's deposition.

Worse yet, in her deposition (which *was* received in evidence as trial Exhibit B49), Laura did not admit to sending Clayton a sonogram video from YouTube. On the contrary, Laura flatly denied this allegation:

```
17   end.  If you pull up your "sent" account and you
18   looked at October 6, 2023, in an E-mail exchange with
19   Clayton -- and by the way there is other E-mails on
20   this chain and we are going to get to them, and you
21   saw in your "sent" account that you attached this
22   ultrasound image, you would agree you sent it then,
23   correct?
24            A.   I'm positive I did not send this
25   ultrasound video.  This is not --
```

Ex. B49 at 95:17–25.

Laura gave exactly the same response at trial:

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                                                        37
1   BY MR. GINGRAS:
2         Q.    Laura, Exhibit -- Clayton's Exhibit 31 is a --
3   appears to be an e-mail from you to Clayton.  It says
4   "Ultrasound Video Proof."  "Clayton, here's my 100
5   billion percent real" -- "real ultrasound video."
6               Do you recognize that?
7         A.    It's not an e-mail that I sent, but I've seen it
8   since.
```

ROA 129 at ep 95.

In short, there not a shred of evidence in the record to show Laura admitted sending Clayton a sonogram video copied from YouTube. It is false to say Laura *admitted this in her deposition*. On the contrary, Laura *denied* this in her deposition, and she *denied* it again at trial.

- **Laura knew she was not pregnant when she filed this action because she did not allege sexual intercourse occurred in her original petition**

One of Clayton's central themes is that Laura *knew* she was not pregnant because "**only oral sex occurred.**" Clayton's brief repeats that story; "On May 20th, 2023, Laura performed 'oral sex' on Clayton." AB at 7. In a footnote to that sentence, Clayton further suggests, "Laura alleged there was nonconsensual sexual intercourse but this was 'not alleged initially in the court filings. It was not alleged until 2024.'" (emphasis added).

Laura's original petition, [ROA 1, ep 3] conclusively disproves this.[2]

☒ **SEXUAL INTERCOURSE:** Parties A and B were not living together but had sexual intercourse at the probable date(s) of conception of the minor child(ren). The mother of the minor children did not have sexual intercourse with anyone else during the periods in which the minor child(ren) could have been conceived.

[2] There was a *separate* dispute as to whether the intercourse was consensual, but Clayton does not frame the issue as limited to that question. Moreover, the alleged lack of consent was *not* new and was *not* raised only after Clayton sought sanctions; it was described in correspondence between the parties shortly after the case began. *See, e.g.*, [ROA 127; Ex. B9 (email from Laura sent Oct. 14, 2023)].

- **Multiple Other Men Believed Laura Fabricated Pregnancies And Doctored Medical Records**

One of the most harrowing examples of an inflammatory yet baseless "fact" offered by Clayton is this: "This was the fourth (4th) time [Laura] had tested positive for pregnancy in her lifetime. **All prior alleged fathers 'believed she fabricated the pregnancy and doctored medical records**.'" AB at 7–8 (emphasis added).

To support this shocking "fact", Clayton *quotes* from the UAR. And, once again, page 4 contains those exact findings. *See* [ROA 126 at ep 4]

What *admitted* trial evidence supported that finding? Absolutely nothing. Due to the extreme brevity of the June 10th evidentiary hearing, no other "prior alleged fathers" testified (just Clayton), nor was their testimony offered by others means (stipulation or deposition). In fact, the only *attempt* to support this allegation was a question which led to an objection that was sustained: ROA 129 at ep 77–78.

```
25        Q.    And they also believe that you doctored medical

              MARICOPA COUNTY SUPERIOR COURT
                                                          78
 1   records, right?
 2              MR. GINGRAS:  Objection.  Foundation.
 3              THE COURT:  Sustained.
```

The above examples are only a few instances of several inaccurate statements Clayton makes about the record below. To be clear about the *actual* facts in the record:

- **Laura *did not* admit sending someone else's sonogram video copied from YouTube (in her deposition or anywhere else);**
- **Laura *did not* file this paternity action without alleging sexual intercourse occurred or alleging that only oral sex occurred; and**
- **There was zero admitted trial evidence to show either that Laura fabricated a pregnancy in the past, or that other putative fathers believed she "doctored medical records".**

Of course, Laura recognizes the trial court found the above points were true, and she understands factual findings normally receive deference, except where (as here) they are clearly erroneous. *Gibbs v. Gibbs*, 227 Ariz. 403, 410 (App. 2011). It suffices to say the trial court's factual errors are *extensive*, and Clayton's discussion of the facts is misleading, at best.

But there is good news: resolving this appeal does *not* require reversing the trial court's factual errors. As such, this brief does *not* identify or explain every factual error. Because factual disputes have no effect on this appeal, this Court should not linger on them; it should just be aware Laura firmly disputes the accuracy of the record as discussed in Clayton's brief.

II. DISCUSSION

Turning to the merits, we begin with a subtle theme in Clayton's brief. While he never specifically says so, his position rests heavily on the old maxim; "equity will not suffer a wrong without a remedy." *Tumacacori Mission Land Dev., Ltd. v. Union Pac. R.R. Co.*, 231 Ariz. 517, 520 (App. 2013).

Clayton argues Laura's position is inequitable because, in his view, "the core issue is whether a person may … tamper with evidence and lie under oath … and [then] … opt out of the litigation consequence-free." AB at 6 (emphasis added). If ever there was a histrionic argument invoking the all-flexible power of equity, that's it.

But Clayton is wrong to suggest Laura will walk-away "consequence-free" if she prevails here. Putting aside the *devastating* reputational, emotional, and financial harm she has already suffered, in addition to the nearly $150,000 judgment, the trial court also referred Laura for investigation and potential criminal prosecution. The Maricopa County Attorney has not yet charged Laura with any crime, despite making public statements about her investigation. It is impossible to know *why* charges have not been filed. Whatever the reason, Clayton is wrong to say if Laura prevails, she will walk away without any consequences. Hardly.

Clayton also ignores another point — even assuming this Court orders the paternity case dismissed, that does not mean Clayton has no remedy. Indeed, while Clayton argues Arizona's Civil Rule 11 and Family Law 26 are materially different (i.e., *less* protective of litigants like Laura) than the federal version on which they are based, the comments to the 1993 revision of Fed. R. Civ. P. 11 are clear – the rule's safe harbor does *not* provide immunity from *civil liability* arising from litigation abuse; "it should be noted that Rule 11 does not preclude a party from initiating an independent action for malicious prosecution or abuse of process."

If Laura wins this appeal, Clayton *could* potentially still bring a separate civil action against her. While this option exists, it may be a bad idea – Clayton's trial counsel used a similar approach in an earlier case and lost.[3] Nevertheless, if Clayton wants more relief, other options exist.

This leads to a final point that is extremely important – it is clear what *really* happened in the case below: Clayton *tried* to litigate civil tort counterclaims against Laura in family court, but he forgot one key thing – the family court has no subject matter jurisdiction over tort claims.

3 *See* ROA 90 at ep 3 and ROA 93.

This is so because although Arizona family courts sit in equity, their jurisdiction is strictly defined, and constrained, by statute:

> Despite the application of equitable standards in a dissolution proceeding, it remains a statutory action, and the trial court has only such jurisdiction as is granted by statute …. Thus, Title 25 defines the boundaries of a dissolution court's jurisdiction, and the court may not exceed its jurisdiction even when exercising its equitable powers.

Weaver v. Weaver, 131 Ariz. 586 (Ariz. 1982); *see also* A.R.S. § 25-801 (giving family court limited jurisdiction to "to establish maternity or paternity.")

Once Laura informed the family court on December 28, 2023 that she was no longer pregnant [ROA 37], there was no paternity to establish. Nothing in Title 25 authorized the family court to exceed its limited jurisdiction by granting Clayton limitless, free-wheeling power to endlessly investigate and litigate civil tort claims in family court. Those claims belong in *civil*, not *family*, court. In any case, Clayton is simply wrong to suggest Laura winning this appeal means she walks away consequence-free.

A. Issue 1 - Rule 26

Laura's brief presented five questions for review. Clayton's response breaks each into multiple subparts. This reply will follow a similar format.

i. Laura Was Sanctioned Under Rule 26, But Even If She Was Not, The Safe Harbor Still Protects Her

Clayton begins by challenging the "centerpiece" of Laura's argument – i.e., that Clayton did not follow the requirements of Family Law Rule 26, so the award of sanctions under Rule 26 was improper. Clayton says this argument is misplaced because he thinks the trial court did not sanction Laura under Rule 26. Therefore, Clayton contends Laura's arguments about Rule 26 are moot.

Clayton's rebuttal echoes René Magritte's famous surrealist painting, *The Treachery of Images*. To make a point, Magritte absurdly painted a smoking pipe, then captioned the painting with the famous line: "*Ceci n'est pas une pipe*" (*This is not a pipe*). It's a painting *of a pipe*, with a caption that reads: "*This is not a pipe*." Get it?

Much like Magritte's painting, Clayton's Rule 26 argument is equal parts surreal and absurd. *Of course* the trial court sanctioned Laura under Rule 26. Putting aside the fact that Clayton filed *only* a Rule 26 Motion for Sanctions (and *no other motions for fees or sanctions*), the UAR specifically cited Rule 26 as a proper basis for sanctions [ROA 126 at ep 14–16]. Furthermore, the June 10th hearing was set in response to Clayton's Rule 26 motion. [ROA 63; 2/1/2024 setting evidentiary hearing, "regarding the issue of sanctions and attorney's fees …."].

At the time the evidentiary hearing was set, Clayton's Rule 26 motion was the *only* pending motion in which sanctions or fees were requested. As Laura has noted many times, the Rules of Family Law Procedure require parties seeking relief to bring a *motion* for relief. *See* Ariz. R. Fam. L.P. 35(a)(1) (explaining, "A party must request a court order in a pending action by motion, unless otherwise provided by these rules.") Expressing a desire for fees in a response to a petition or verbally at a hearing is not sufficient; a *motion* is required, yet the only fee-seeking motion Clayton ever filed sought fees *only* based on Rule 26.

Since Clayton brought a motion for sanctions under Rule 26, and did not bring any motions for fees under any other authority, the trial court

must have granted relief under Rule 26 based on the court's own authority, *precisely* as the UAR states it did. *See* ROA 126 at ep 15–16 (noting, "The power is there by rule and can be used by the court when necessary and appropriate.") (emphasis added).

A painting of a pipe is still a pipe, no matter the caption, and an order granting sanctions under Rule 26 is a Rule 26 order. The question of whether the award was proper under Rule 26 is hardly moot.

Obviously hoping to side-step this landmine, Clayton shrugs his shoulders and suggests the lengthy Rule 26 analysis in the UAR does not actually mean Rule 26 was invoked. Like Magritte, Clayton points to an unmistakable painting of a pipe and proclaims, "That's no pipe."

According to Clayton, the court's lengthy discussion of Rule 26 was pure illusory fluff; academic surplusage and nothing more; "The court included detailed findings about the Rule 26 issue in the UAR, but the court ultimately only awarded attorney fees and costs under Title 25 statutes based on *relative financial positions, unreasonable positions, and discovery and disclosure violations*." AB at 21 (emphasis added).

Or did it? Ignoring that the court did rely on Rule 26, even if it did not, there are three other significant problems with Clayton's argument.

First, contrary to Clayton's suggestion, the court *declined* to award fees based on "relative financial positions". On that, the UAR was unambiguous: "THE COURT FINDS there is no substantial disparity of financial resources between the parties." [ROA 126 at ep 17].

Second, Clayton is correct the court based its decision, in part, on "unreasonable positions", but what unreasonable position did Laura take? Again, the UAR leaves no doubt: "THE COURT FURTHER FINDS that Petitioner acted unreasonably in the litigation. Specifically, Petitioner acted unreasonably when she initiated litigation without basis or merit." [ROA 126 at ep 17] (emphasis added). So, per the court, Laura's "unreasonable position" was *the same Rule 26 violation* raised in Clayton's Rule 26 motion. This time, the painting and the caption say the same thing: "This *is* a pipe."

This leads to the third, and perhaps biggest, problem with Clayton's argument – it ultimately does not matter whether fees were awarded under Rule 26 or some other authority (such as the court's inherent authority). That was *precisely* the point of cases cited in Laura's Opening Brief like *Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772 (9th Cir. 2001).

Radcliffe held the safe harbor of Rule 11/26 protects litigants from life-changing sanctions when they are accused of litigation misconduct. The

rule gives accused wrongdoers a safe harbor to correct (or stop) the alleged violation and thereby "*escape sanctions*." *Barber v. Miller*, 146 F.3d 707, 710 (9th Cir. 1998) (emphasis added). A safe harbor that offers protection from sanctions under one legal authority, while offering no shelter from sanctions for the identical conduct under a different legal authority, is no safe harbor at all.

As the Ninth Circuit explained in *Radcliffe*, to ensure the law works as intended, the safe harbor cannot grant *partial* safety (otherwise it's just a screen door on a submarine). For that reason, a court cannot "fix" a defective motion by awarding sanctions *sua sponte* (precisely as happened here); "It would render Rule 11(c)(1)(A)'s 'safe harbor' provision meaningless to permit a party's noncompliant motion to be converted automatically into a court-initiated motion, thereby escaping the service requirement." *Radcliffe*, 254 F.3d at 789. Yet that is exactly what happened here.

This Court is free, of course, to disagree with the Ninth Circuit's decision in *Radcliffe*. On page 25 of his response, Clayton argues for that result. In support, Clayton cites *dicta* from cases like *Caranchini v. Nationstar Mortgage, LLC*, 97 F.4th 1099 (8th Cir. 2024), but on closer inspection, *Caranchini* supports Laura's position, not Clayton's.

Caranchini involved a vexatious litigant who filed multiple lawsuits trying to avoid foreclosure on her home. In the fourth such case, Ms. Caranchini was represented by attorney Gregory Leyh. One of the defendants, a trustee named Martin Leigh, was dismissed from the case for reasons not explained in the decision. *See Caranchini*, 97 F.4th at 1011.

Two months *after* Mr. Leigh was dismissed from the case, he served Ms. Caranchini's attorney (Leyh) with a draft Rule 11 motion, "and a letter warning that the motion would be filed with the district court after thirty days 'unless [the issue was] resolved to the firm's satisfaction.'" *Id*. Of course, by that point, Ms. Caranchini's claims against Mr. Leigh had already been dismissed, leaving her way to "withdraw or correct" the alleged Rule 11 violation; the violation was an unfixable *fait accompli*.

Mr. Leigh's Rule 11 motion was filed. The court granted it and awarded $107,710.10 in fees plus an additional $50,000 penalty. The outcome of *Caranchini* is thus *extremely* similar to this case.

As this Court should do, the Court of Appeals *reversed*. Indeed, despite finding the underlying action was frivolous and filed in bad faith, the Court of Appeals held the sanctions award was improper, and this part is key — the award was improper because it was imposed in a manner that deprived

Mr. Leyh of any chance to take the safe harbor (this part should sound *very* familiar):

> Here, Martin Leigh served its motion for sanctions on October 5, 2018, a month and a half after it had been dismissed from the case. Thus, [attorney] **Leyh was not afforded an opportunity to remedy the sanctionable conduct *and avoid the sanction***. The district court speculated that even if Leyh had been given the opportunity, he would not have dismissed the claims, given his colorable record in this case. But assumptions do not excuse compliance with the text of Rule 11. Therefore, the imposition of Rule 11 sanctions against Leyh cannot be sustained.

Id. at 1102 (emphasis added).

In *dicta*, the Court strongly condemned Mr. Leyh's conduct in filing the frivolous action. In that criticism, the Court offered closing comments which Clayton cites as support for his position:

> The tactics employed by Leyh were an abuse of the legal system. Unfortunately, Martin Leigh did not follow the safe-harbor requirements outlined in Rule 11(c)(2). To be sure, this does not mean Leyh was protected from all sanctions. The district court could have imposed sanctions pursuant to Rule 11(c)(3), awarded costs through 28 U.S.C. § 1927, or used its inherent powers to impose sanctions. But because none of these alternative avenues were pursued, we are left with no other choice but to reverse the district court's sanction award.

Id. (emphasis added).

The problem, of course, is that these statements are pure *obiter dicta*. Because the lower court did *not* impose *sua sponte* sanctions (but rather just

granted Mr. Leigh's motion for Rule 11 sanctions), the Court of Appeals merely assumed in passing, without actually deciding, that an award under *other* authority *might* have been legally proper. But again, that exact issue *was* considered and *rejected* by the Ninth Circuit in *Radcliffe*, where the court held a *sua sponte* award was *not* proper.

In the face of these adverse authorities, Clayton offers a wistful warning: this Court should not "assign a *talismanic* quality to Rule 26" because doing so would have undesirable consequences:

> Under Laura's interpretation, the offending filer would have an unconditional right to opt out of the litigation no matter how egregious their conduct or unreasonable their positions if the opponent invokes the rule. However, if a party never invokes Rule 26, instead pleading a request for attorney fees under A.R.S. § 25-324 (or other applicable statutes), then the "safe harbor" opportunity would never materialize.

AB at 25.

OKAY…right. So? What's wrong with that? Clayton sees these scenarios as conflicting, but clearly they are not. *Any* litigant who thinks the opposing party has violated Rule 11/26 has a choice – they can: A.) send an immediate notice threatening sanctions (and hope the opposing party responds by dismissing the case, as Laura did here) or B.) they can wait; litigate the case, win, and *then* seek fees under any available authority.

Here, Clayton took neither approach, at least not exactly. Instead, he allowed the case to languish for over four months, to the point it was set for administrative dismissal due to inactivity. Then, once the case was already functionally dead, he retained counsel who threatened Laura with *retroactive* sanctions (à la *Caranchini*).

In response, Laura immediately moved to drop her petition, which by then was moot (à la *Caranchini*). Clayton inexplicably *opposed* this, putting Laura in a position where she was given no chance "to remedy the sanctionable conduct *and avoid the sanction*." (à la *Caranchini*).

This is where the heart of the procedural error lies – had the law been followed correctly, the trial court would have *granted* Laura's dismissal request on December 28, 2023 (because Rule 26(c)(B) gave her the absolute right to invoke the safe harbor in response to a threat). That would have terminated the case, *before* either party incurred any significant fees. That outcome is exactly the result Rule 26 was written to achieve, but which was *not* achieved here, solely based on Clayton's dilatory invocation of the rule and the trial court's erroneous refusal to apply the rule correctly.

Instead of granting Laura the safe harbor to which she was entitled, the trial judge erred by rejecting Laura's attempt to drop her petition. The

court then further erred by forcing Laura to involuntarily litigate the case, ultimately ordering her to pay $150,000 in fees for acting "unreasonably" by: A.) filing the case without a sufficient basis, *and* B.) by *continuing to litigate the case against her will*.

Here, there is nothing unfair or inappropriate about a rule which gives a party accused of misconduct the option (indeed, the unconditional right) to *stop that conduct*. That is exactly what the rule was intended to *encourage*. Rules 11/26 were adopted for the express purpose of *permitting* litigants to drop claims *without facing sanctions*, no matter how egregious the violation.

The problem here (aside from the fact that Clayton could and should have invoked Rule 26 four *months* earlier) is the trial court *refused* to allow Laura to take the safe harbor. The court then punished Laura (severely) for continuing to litigate the case even though she was forced to do so against her will.

This is *exactly* the wasteful, absurd result Rule 26 was designed to prevent. The trial court's refusal to grant Laura the safe harbor was a pure error of law. That error standing alone requires reversal of the judgment below. This Court should therefore remand with instructions to dismiss the case with prejudice without regard to any other issues.

B. Issue 2 – Structural Error

Let's assume this Court rejects Laura's Rule 26 arguments. Further assume the Court finds the safe harbor of Rule 26 does not affect the trial court's ability to award fees under *other* authorities. Does that mean the $150,000 judgment in Clayton's favor may be affirmed? Absolutely not.

Laura alleges the trial judge violated her Constitutional right to due process by performing a secret, undisclosed investigation into the facts. This resulted in the court making a key finding (that Planned Parenthood is closed on Sunday) which was supported by no admitted trial evidence.

Laura argues these facts constitute structural error because they prove the trial judge was biased, as shown by the judge's decision to engage in unlawful conduct which violated Laura's right to due process. Laura further claims the *only* available remedy for this violation is automatic reversal of the judgment and a new trial before a different judge (bearing in mind – Laura also maintains there is nothing left to try here).

Understandably, Clayton challenges each point, except the main one – that the trial court's finding about Planned Parenthood's business hours was *not* supported by any admitted trial evidence. Clayton calls this a "harmless error", and he argues the issued of Planned Parenthood's business hours

was "cumulative" and thus unimportant. He also suggests that even though the trial court never claimed it took judicial notice of Planned Parenthood's business hours, it could hypothetically have done so.

Laura firmly disagrees with every aspect of Claytons' response.

i. Structural Error Applies In Family Court

To begin, Clayton argues structural error does not apply in Arizona family courts, because: "Counsel cannot find any example of Arizona courts applying structural error analysis in a family law case." AB at 35. Laura agrees this is a question of first impression (at least in family court)[4] and for good reason — serious acts of judicial misconduct such as occurred in this case are thankfully rare in Arizona, especially in family court.

But as this case shows, judicial misconduct *does happen*. And as Laura explained in her Opening Brief and other pleadings (see ROA 128 & ROA 132), many other courts agree — *any* independent factual investigation by a trial judge is unlawful, shows bias, and it constitutes structural error as a

[4] The question of whether structural error might apply in family court, or in a civil vexatious litigant proceeding arising from a divorce case, was briefly mentioned in *Contreras v. Bourke*, 556 P.3d 291 (App. 2024). There, this Court held the issue was waived since it was raised for the first time on appeal, so the question was not decided.

matter of law; "The [U.S. Supreme] Court has limited structural errors to the following: the complete denial of counsel; a biased trial judge … ." *State v. Torres*, 208 Ariz. 340, 344 (Ariz. 2004); *see also State v. West*, 168 Ohio St. 3d 605, 623 (Ohio 2022) ("The presence of a biased judge on the bench is, of course, a paradigmatic example of structural constitutional error, which if shown requires reversal without resort to harmless-error analysis.") (citing extensive authorities).

Laura does not dispute that it appears no published (or unpublished) Arizona opinions have considered the question of whether structural error analysis applies *in family court*. Clayton suggests otherwise, claiming something similar occurred in *Black v. Black*, 114 Ariz. 282 (Ariz. 1977), which he calls "extremely instructive" to the point "[t]he relevance of *Black* is difficult to overstate." AB at 44.

There are two reasons why *Black* is not remotely helpful. First, *Black* was decided in 1977 – nearly 50 years ago, more than a decade *before* the United States Supreme Court adopted the modern structural error doctrine which is, of course, binding law in Arizona. Structural error itself is a function of the due process clause, and while courts have always wrestled with the remedy for specific types and degrees of due process violations,

the modern-day application of structural error was not fully embraced until *Arizona v. Fulminante*, 499 U.S. 279 (1991) and refined in later cases such as *Neder v. United States*, 527 U.S. 1 (1999).

That is why *Black* limited its discussion to harmless error and never mentioned structural error – because the modern rule did not exist (at least not in the current form) when *Black* was decided. *See State v. Ring*, 204 Ariz. 534, 552 (Ariz. 2003) (discussing origins of structural error, and citing *Fulminante*). Clearly, in light of more recent decisions applying structural error analysis to judicial misconduct, whether *Black* remains valid law is questionable at best.

The second reason *Black* is not helpful is it appears Clayton misstates the facts of that case. Specifically, *Black* involved a petition to change custody of two minor children. At some point, "the trial court conducted an off-the-record interview with the Black children. This was done without a stipulation by the parties." Based on the interview, the Court changed custody, finding, among other things, "Both children have expressed the opinion *to the Court* that they do not want to continue living with their mother …." *Black*, 114 Ariz. at 284 (emphasis in original).

Clayton says *Black* is thus analogous; "In *Black*, just as Laura alleges occurred below, the trial judge independently investigated material facts without notice to the parties. The parties only learned about the interview via one finding in the final judgment …." AB at 44 (emphasis added).

Uh, not so fast. Clayton appears to have invented these "facts" from thin air. Nothing in *Black* says the trial judge "investigated material facts *without notice to the parties*" nor does the case say the parties only learned of the interview by reading the final judgment. Rather, the case merely says the parties did not *stipulate* to the interview occurring, not that the parents were unaware of it.[5]

Here, Laura agrees she did not stipulate to allow the trial judge to secretly scroll through social media posts after the trial and then make factual findings based solely on those posts while discussing the case with her father. In that regard, this case is marginally similar to *Black*.

[5] *Black* does not explain the specific circumstances of how the interview took place, but children were just six and eight years old. Presumably, a family court judge would not have access to interview such young children without at least one parent's direct involvement, and nothing in the case suggests the interview was done *ex parte* without the other parent's knowledge (which would have been a separate problem). The case simply says the interview was not stipulated to by both parties.

But unlike in *Black*, the trial judge's horrific misconduct in this case is not subject to harmless error review. This misconduct was structural in every sense, because it completely deprived Laura of her fundamental right to a fair hearing before an unbiased judge. While this question is a matter of first impression for Arizona, the issue is hardly novel.

Multiple courts in other states agree structural error applies in family court. For example, in *Marchese v. Aebersold*, 530 S.W.3d 441 (Ky. 2017), the Supreme Court of Kentucky considered the question of structural error in a family court case where the trial judge independently investigated the criminal history of a party. In an extensive and well-reasoned opinion, the Court held the family court's independent secret investigation of a single fact constituted structural error requiring automatic reversal.

Indeed, in *Marchese*, the Kentucky Supreme Court *rejected* many of the same arguments Clayton presents here. Specifically, in *Marchese*, during a hearing on a petition for a domestic violence restraining order, the trial judge called a recess, then asked the respondent to provide his social security number, which he "reluctantly did". When the hearing resumed, the judge informed the respondent he had a criminal charge from another jurisdiction.

As the Kentucky Supreme Court's opinion tersely explains, "At no time did the trial judge disclose the source of her knowledge of the alleged Virginia Beach assault conviction or describe the legal grounds upon which that information was interjected into the DVO hearing; nor did the judge give Marchese an opportunity to address the issue." *Marchese*, 530 S.W.3d at 445 (emphasis added). The Kentucky Supreme Court unanimously held the judge's misconduct constituted structural error:

> [W]e conclude that the trial judge's undertaking to obtain and use as evidence extrajudicial information relating to a party in the case caused her disqualification from proceeding further as the presiding judge in this matter. Her failure to recuse at that point was structural error undermining the integrity of the resulting DVO. Because structural error supersedes harmless error review, we need not review the finding of the Court of Appeals that the error was harmless.

Marchese, 530 S.W.3d at 449.

Notably, the Court reached that conclusion even though the source of the trial judge's research was unknown (because, as in this case, the judge failed to explain where the "extrajudicial" information came from). Here, like in *Marchese*, the trial judge never disclosed the fact of her investigation, nor did she ever disclose the source of the knowledge gained.

Clayton suggests this is "no big deal", because the trial court could have taken judicial notice of Planned Parenthood's business hours (contrary to an ABA formal opinion which says exactly the opposite). The *Marchese* Court rejected that argument: "Because the judge failed to disclose the source of the information upon which she relied, the record fails to support that the information was obtained from a properly-authenticated public record … [T]he use of the information acquired by the judge from an unidentified source is simply an inappropriate use of extrajudicial evidence to guide a ruling in a matter." 530 S.W.3d at 447–48 (emphasis added).

Many other courts concur with *Marchese* – because structural error derives from the due process clause, it applies in family law cases where due process is mandatory. *See In re Marriage of Carlsson*, 163 Cal. App. 4th 281, 293 (Cal.App. 2008) (rejecting argument structural error does not exist in family court, and concluding, "Whether we call this error 'structural' or not is inconsequential. The failure to accord a party litigant his constitutional right to due process is reversible *per se*, and not subject to the harmless error doctrine."); *In re Dependency of A.N.G.*, 12 Wn. App. 2d 789, 794 (Wash.App. 2020) (structural error applies in family court); *Ryan v. Ryan*, 260 Mich. App. 315, 332 (Mich.App. 2004) (finding structural error in

family law case where child filed "complaint for divorce from parents."); *Walworth County HHS v. Roberta W.*, 2008 Wisc. App. LEXIS 879, *2 (Wisc.App. 2008) (structural error applies in family court).

Clearly aware a finding of structural error requires reversal, Clayton pleads for this Court to adopt a *harmless error* standard for judicial misconduct. He asserts under that standard, Laura must still demonstrate prejudice (which he claims she has failed to do).

To support his argument, Clayton cites two cases previously mentioned by Laura: *A.W. v. L.M.Y.*, 457 P.3d 216 (Kan. App. 2020) and *In re Marriage of DePriest*, 422 P.3d 687 (Kan. App. 2018). Clayton claims both cases "espouse *harmless error* review that is nearly identical to Arizona's approach." AB at 36.

Clayton's argument is half-right and all wrong. In both cases, the appellate courts did suggest a showing of prejudice is necessary (as would be true in harmless error review). So Clayton got that part right.

But in both cases, the courts held any *ex parte* investigation by a judge is *always* unlawful and prejudicial if used to decide any fact in the case; "an improper ex parte investigation by a district court is prejudicial when it bases its ruling, even in part, on the investigation and a fact that it inferred

from that investigation …. We find the district court's judicial misconduct prejudiced Mother's substantial rights by depriving her of the right to procedural due process." *A.W. v. L.M.Y.*, 2020 Kan. App. Unpub. LEXIS 85, *10; *see also DePriest*, 2018 Kan. App. Unpub. LEXIS 536, *10 (same).

In short, the cases Clayton cites do not help his position. They *destroy* his only argument – that a showing of *separate* prejudice still must be made in a case involved an unlawful judicial investigation into the facts. That is wrong. *DePriest*, *A.W.* and *Marchese* all say the same thing – independent judicial investigation is *per se* prejudicial and requires reversal under the U.S. Supreme Court's modern structural error jurisprudence.

Here, there is no dispute the trial court made a factual finding (that Planned Parenthood is closed on Sunday) that was not supported by any evidence at trial. There is no dispute this issue was not discussed or mentioned at trial, but it *was* discussed in social media posts after trial. The only reasonable conclusion is the trial judge looked at social media after the trial ended, and she then based her factual finding on those posts.

This misconduct is *per se* structural error of the most obvious kind. Assuming this Court agrees, automatic reversal of the judgment is mandatory without regard to prejudice.

C. Issues 3 & 4 – The Court Erred By Awarding Fees Awarded Under Other Authority

If Rule 26 is the "centerpiece" of Laura's argument, Clayton's centerpiece is this: ignoring Rule 26, the court still could have awarded fees under *other* authority like A.R.S. §§ 25–324, 25–415 and/or 25–809. That argument has superficial appeal, but it suffers from multiple fatal flaws.

Flaw #1 – Clayton never moved for fees under any of the authority he cites. The docket is clear – the *only* fee-related motion Clayton ever filed was his Rule 26 Motion for Sanctions. [ROA 45] And as explained above, the Rules of Family Law Procedure require parties seeking relief to bring a *motion* for relief. *See* Ariz. R. Fam. L.P. 35(a)(1) (explaining, "A party must request a court order in a pending action by motion, unless otherwise provided by these rules.") No motion, no fees. End of discussion.

Flaw #2 —Even if the trial court did not sanction Laura under Rule 26, she was still entitled to the safe harbor of Rule 26(c)(2)(B) by withdrawing her petition after Clayton's counsel threatened her. Laura unambiguously attempted to do exactly that when she moved to dismiss her petition on December 28, 2023. [ROA 37]

The trial court erred by refusing to permit Laura to withdraw her petition; Laura had an absolute right under Rule 26(c)(2)(B) to do exactly that. At that time, Clayton had *not* incurred $150,000 in fees, and any fees he did incur in late December were unnecessary and unreasonable, because a simple phone call from Clayton's counsel would have revealed Laura was no longer pregnant and thus there was no need for Clayton to "defend" the paternity allegation.

To be clear -- if the family court had complied with Rule 26(c)(2)(B) and allowed Laura to withdraw her petition in late December, does that mean Clayton could *not* have sought fees under any other authority? NO! <u>Of course not</u> – <u>IF</u> there was a <u>factual basis</u> for fees under *other* authority, Clayton could have brought a motion for fees at that time. He simply chose not to do so.

This is where Clayton's position is so deeply confused, so let's try to finally put this to bed – Laura is *not* claiming Rule 26 is the *only* authority by which fees/sanctions may ever be awarded. By extension, Laura is *not* saying a person who violates Rule 26 could *never* be ordered to pay fees based on *other* authority. Rather, Laura is simply saying that to award fees or sanctions under *other* authority, <u>there must be a separate factual basis for</u>

such an award *beyond just* the Rule 26 violation (because conduct in violation of Rule 26 must be resolved under the provisions of Rule 26).

Put differently, conduct that violates some *other* rule, or supports a fee award under some *other* statute (aside from Rule 26), can *always* be addressed by the *other rule/law*. But a violation of Rule 26, resolved by invoking the rule's safe harbor, is not punishable under other authority without any other basis.

Clayton's deep confusion on this point is best demonstrated by his discussion of *Holgate v. Baldwin*, 425 F.3d 671 (9th Cir. 2005) on page 31 of his brief. In *Holgate*, the Ninth Circuit *reversed* an award of Rule 11 sanctions because the moving party did not comply with Rule 11. The Ninth Circuit then briefly noted the trial court *could have* awarded sanctions (against a *different* party) under *different* authority (28 U.S.C. § 1927). However, such an award was not made because the trial court did not find bad faith *as to that other party*.

Clayton suggests this *supports* his position, because in this case, the trial court did make a finding of bad faith. Problem solved, right?

Wrong – because Clayton misunderstands the federal law referenced in *Holgate*. The federal statute mentioned in *Holgate* – 28 U.S.C. § 1927 – is

not analogous to, nor coextensive with, Rule 11. Rather, § 1927 addresses something completely different – *vexatious* conduct *by an attorney*:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927 (emphasis added).

Rule 11 and § 1927 deal with totally different things. Rule 11 is limited to meritless *pleadings* (not litigation conduct), while § 1927 is focused on litigation *conduct* which unnecessarily "multiplies the proceedings". Thus, a discrete single violation of Rule 11 *cannot* be punished under § 1927 unless the violator *also* did something else to unreasonably "multiply" the proceedings.

Contrary to Clayton's argument, *Holgate* does not stand for the idea that a court can use § 1927 as an alternative means to punish the same act which violated Rule 11. Rather, the *Holgate* court explained that if a person violates Rule 11 and also *separately* engages in *different* conduct that violates § 1927, then a failed attempt to invoke Rule 11 does not mean the violator could not be punished under § 1927. But in *Holgate*, the trial court did not

find any such vexatious conduct occurred, therefore no award of sanctions under § 1927 was made.

This is the crux of the problem – when Laura moved to dismiss her petition on December 28, 2023, even if we accept Clayton's allegation that Laura violated Rule 26 by filing a petition she knew was groundless, at that time she had *not* engaged in any *other* unreasonable litigation conduct sufficient to support an award of fees under other authority. On the contrary, from August 1 (when the case began) to the time Laura learned her pregnancy had failed in mid-November, Clayton was *not* represented by counsel in the paternity case, and he incurred no fees defending that action. All that happened was Clayton took a DNA test which was inconclusive, and shortly thereafter Laura learned the pregnancy had failed and she basically abandoned the case. That's it.

Thus, this case is *exactly* like *Holgate* insofar as the only basis the trial court had to sanction Laura in late-December was for violating Rule 26 at the time her petition was filed. But as to the period between August 1 and December 28, Clayton does not allege Laura did anything to justify *any* award of fees (much less $150,000 in fees) under any authority *other than* Rule 26. Even if Laura did something improper during that time period, it

did not cause Clayton to incur any additional fees because he was *pro se*.

Flaw #3 — Again, as in *Holgate*, Clayton's "other authority" argument fails because there was no separate *factual basis* for any award, much less $150,000, under A.R.S. §§ 25–324, 25–415 and/or 25–809. Clayton mistakenly assumes a Rule 26 violation will *always* support relief under *other* law, without any separate basis. That is incorrect. Here's why…

The award of $150,000 in fees is not warranted under A.R.S. § 25-324. That statute allows recovery for the fees and costs "of maintaining or defending any proceeding under this chapter or chapter 4, article 1 of this title." The reference to "this chapter" means Title 25, Chapter 3 (involving *dissolution of marriage*) which is clearly inapplicable here.

Chapter 4, Article 1 involves "legal decision-making and parenting time", and although Laura's original petition [ROA 1] certainly asked the court to make future orders regarding parenting time, no such orders were ever made. It is undisputed no children were born, and nothing in Clayton's fee application [ROA 130] suggests Clayton incurred even $1 in fees "defending" any *parenting time issues*.

Similarly, the $150,000 award is not supportable under A.R.S. § 25-809(G) for one simple reason – because even if Laura acted unreasonably by

filing her petition "without medical evidence" (as Clayton argued and the trial court found), **this "unreasonable" conduct stopped once Laura received confirmation she was no longer pregnant in mid-November**. Yes, ideally Laura might have moved for voluntary dismissal under Family Law Rule 46 sooner, but her failure to do so did not cause Clayton to incur any fees "defending" the paternity aspect of the proceeding.

On the contrary, court administration issued a notice on December 4, 2024 [ROA 30] setting the matter for dismissal due to inactivity. Laura did nothing further after that date to keep the case active. Therefore, because A.R.S. § 25-809(G) only permits an award of fees reasonably incurred "maintaining or defending" a proceeding, and because Clayton did not incur any reasonable fees *defending* Laura's petition prior to her withdrawing the petition, the $150,000 award cannot be sustained under § 809(G).

Finally, the $150,000 award cannot be sustained under A.R.S. § 25–415. That section authorizes fee awards for various things, but the only part Clayton invokes is § 415(A)(3) which applies to violations of a court order compelling discovery.

Here, putting aside the fact Clayton never filed a motion seeking fees under § 25–415 and thus no award under that section could be made, there

was one order compelling discovery – ROA 87 (dated April 4, 2024). This order required Laura to produce five categories of information, but there is not a shred of evidence in the record showing that Laura failed to comply with this order.

Instead, what Clayton seems to believe is that Laura had a general duty to disclose information under Rule 49, and because she changed her story about the *location* of the Planned Parenthood location she visited, that change violated Rule 49 (because Clayton believes Rule 49 required Laura to disclose that specific information prior to trial).

Clayton's argument fails in multiple ways. First, even assuming Laura was required to disclose something under Rule 49, the failure to do so is *not*, by itself, punishable with fees under § 25-415. Again, by its own terms, § 25-415(A)(3) only permits fee awards when a litigant violates a court *order* compelling disclosure or discovery. That is materially different than a litigant failing to disclose information under the duties imposed by Rule 49.

Furthermore, Laura did *not* violate any disclosure duty under Rule 49. Nothing in that rule required her to disclose information about the specific Planned Parenthood location she visited (Clayton could have asked for that information in an interrogatory under Rule 60, but never did).

Rule 49(*i*) does, of course, require parties to disclose "the names, addresses, and telephone numbers of any witness whom ***the disclosing party*** expects to call at trial", but Laura did not plan to call any witness from Planned Parenthood at trial (Clayton did). The fact *Clayton* wanted to call a witness did not require Laura to disclose that information under Rule 49.

Nothing else in Rule 49 required Laura to disclose the type of information which Clayton claims was omitted. But again, fees cannot be awarded under § 25-415(A)(3) for a disclosure violation under Rule 49; only the violation of a discovery *order*, which did not occur here.

D. Issue 5 – Laura Is Entitled To Fees

Very little of Clayton's fee argument requires any response except for this: Clayton argues dismissal of Laura's petition would have been improper, "because his claims, including a determination about whether Laura was ever pregnant by him in the first place, still needed to be adjudicated." AB at 59 (emphasis added).

This argument weighs *heavily* in favor of Laura's request for fees. Here's why – the question of "whether Laura was ever pregnant by [Clayton] in the first place" is clearly outside the limited scope of the family court's jurisdiction. This allegation is, if anything, an element of a civil abuse

of process/malicious prosecution claim. *See, e.g.*, *Crackel v. Allstate Ins. Co.*, 92 P.3d 882 (App. 2004). In other words, Clayton's description of his "claims" show the only claim he was seeking to resolve is one he knew, or should have known, the family court had no jurisdiction to decide. Nothing in Title 25 permits a family court to adjudicate civil tort claims like this.

That fact alone, and Clayton's otherwise unreasonable positions in this appeal, warrant an award of fees to Laura.

III. CONCLUSION

This Court should reverse the trial court's judgment in its entirety, award Laura her appellate fees/costs, and remand this matter with instructions to dismiss the case with prejudice.

DATED January 30, 2025.

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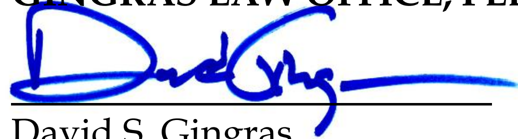
CERTIFICATE OF COMPLIANCE

Pursuant to Ariz. R. Civ. App. P. 14, *and the Order issued in this matter on January 29, 2025 granting leave to file an overlength reply*, the undersigned certifies that the brief to which this Certificate is attached uses Book Antiqua 14 point font, is double-spaced (where required), and contains 7,986 words.

The document to which this Certificate is attached does not exceed the word limit that is set by Rule 14, Rule 22, Rule 23, or Rule 29, as applicable

DATED January 30, 2025.

GINGRAS LAW OFFICE, PLLC



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CERTIFICATE OF SERVICE

On this date, the below-signing lawyer e-filed Appellant's "Reply Brief" with the Clerk of the Court for Division Two, and e-mailed copies of it to the following:

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