Court of Appeals

STATE OF ARIZONA
DIVISION TWO

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

APPELLANT'S OPENING BRIEF

David S. Gingras, #021097
Gingras Law Office, PLLC
4802 E. Ray Road, #23-271
Phoenix, AZ 85044
Tel.: (480) 264-1400
David@GingrasLaw.com
Attorney for Petitioner/Appellant
Laura Owens

TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF THE CASE & FACTS 2

A. Laura's Pregnancy Claim—May 2023 2

B. Litigation Begins 4

C. Post-Trial Developments 11

III. STATEMENT OF ISSUES 15

IV. ARGUMENT..16

A. Clayton's Failure To Comply With The Safe Harbor Requirements Of Rule 26 Precluded Sua Sponte Sanctions 16

1. Citations To Record & Standard of Review 16

2. Discussion...17

a) Summary of Rule 26's Requirements...17

b) Clayton Did Not Comply With Rule 26's Procedural & Safe Harbor Requirements...20

c) Clayton's Failure To Comply With Rule 26 Precludes Any Award of Sanctions 23

d) Rule 26's Safe Harbor Protects Laura From Sanctions Under Other Authority 35

B. The Trial Court Committed Structural Error Requiring Automatic Reversal By Performing An Independent Investigation Into the Facts.....40

1. Citations To Record & Standard of Review 40

2. Discussion......40

C. The Award of Fees/Sanctions Under A.R.S. § 25–324 and/or 25-415 Was Plainly Erroneous......57

1. Citations to Record & Standard of Review......57

2. Discussion......58

D. The Award of Fees Was Erroneous Because The Fees Incurred Were Not Necessary Nor Reasonable......61

1. Citations to Record & Standard of Review......61

2. Discussion......62

E. Laura Is Entitled To Fees On Appeal......64

V. CONCLUSION......65

TABLE OF AUTHORITIES

Cases

Arizona v. Fulminante, 499 U.S. 279 (1991)..60
A.W. v. L.M.Y., 457 P.23d 216 (Kan.App. 2020) 59
Barber v. Miller, 146 F.3d 707 (9th Cir. 1998) 26, 28, 30, 33
Beitman v. Herrick, CV-17-08229-PCT-JAT, 2022 U.S. Dist. LEXIS 13358, 2022 WL 220492 (D. Ariz. Jan. 25, 2022) 31
Buonincontri v. ORHub, Inc., 2023 WL 2250355, 2023 Ariz. App. Unpub. LEXIS 205 (App. 2023)..30
Chalmers v. Theut, Ariz. App. Unpub. LEXIS 879; 2022 WL 14971946 (App. 2022) 35
De Freitas v. Thomas, 2016 U.S. Dist. LEXIS 121482, 2016 WL 8674572 (D.Ariz., May 6, 2016)..28
Gallagher v. Surrano Law Offices P.C., 2020 Ariz. Super. LEXIS 514 (Nov. 23, 2020) 29
Great Dynasty Int'l Fin. Holdings Ltd. v. Haiting Li, 2014 U.S. Dist. LEXIS 94658, 2014 WL 3381416 (N.D. Cal. 2014) 32
Groat v. Equity Am. Ins. Co., 180 Ariz. 342 (App. Div. 1 1994) 42
Holgate v. Baldwin, 425 F.3d 671 (9th Cir. 2005)... 29, 38
Hull v. DaimlerChrysler Corp., 209 Ariz. 256 (App. Div. 2 2004) 42
In re Marriage of Thorn, 235 Ariz. 216 (App. 2014) 40
In re Pennie & Edmonds LLP, 323 F.3d 86 (2nd Cir. 2003) 35
Islamic Shura Council of S. California v. F.B.I., 757 F.3d 870 (9th Cir. 2014) 23
Johnson v. Hillstrom, 37 Minn. 122, 33 N.W. 547 (1887) 57
James, Cooke & Hobson, Inc. v. Lake Havasu Plumbing & Fire Protection, 177 Ariz. 316, 868 P.2d 329 (App. 1994)...28
Marriage of DePriest, 422 P.3d 687, 2018 WL 3485722 (Kan. App. 2018)........59
Northern Illinois Tel., Inc., v. PNC Bank, N.A., 850 F.3d 880 (7th Cir. 2017) ...29
Radcliffe v. Rainbow Constr. Co., 254 F.3d 772 (9th Cir. 2001)........ 26, 29, 31, 33

Retail Flooring Dealers of Am., Inc. v. Beaulieu of Am., LLC, 339 F.3d 1146 (9th Cir. 2003) 23, 37
Silence v. Betts, 553 P.3d 192 (App. 2024) 66
Smith v. Lucia, 173 Ariz. 290 (App. 1992) 28
Smith v. State, 64 Md. App. 625, 498 A.2d 284 (Md. Ct. Spec. App. 1985) 58
State v. Ring, 204 Ariz. 534 (Ariz. 2003) 56
State v. Anderson, 197 Ariz. 314 (2000) 60
State v. Dayton, 544 P.3d 94 (App. 2024) 44
State v. McCorquodale, 2021 WL 5446915 (Minn. App. 2021) 59
State v. Valverde, 220 Ariz. 582 (2009) 60
Strom v. United States, 641 F.3d 1051 (9th Cir. 2011) 22
Tilley v. Delci, 220 Ariz. 233, 238, 204 P.3d 1082 (App. 2009)). 66
Townsend v. Holman Consulting Corp., 929 F.2d 1358 (9th Cir. 1990) 31
Trs. of the N. Nev. Laborers Health & Welfare Trust Fund v. Randy's Blasting, Inc., 2013 U.S. App. LEXIS 25934 (9th Cir. 2013) 36
Villa De Jardines Ass'n v. Flagstar Bank, 227 Ariz. 91 (App. 2011) 20
Westerkamp v. Mueller, 2023 U.S. Dist. LEXIS 96531; 2023 WL 3792739, (D.Ariz. 2023) 31
Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986). 21

Statutes

A.R.S. § 12–349 .... 30, 41, 42
A.R.S. § 25–324 .... 41, 62, 65
A.R.S. § 25-415 .... 41, 64
A.R.S. § 25–807(D) 8
A.R.S. § 25-809(G) 41, 63, 68

Rules

Ariz. R. Civ. P. 11 .... *passim*
Ariz. R. Civ. P. 11(c) 28
Ariz. R. Civ. App. P. 21(a) 68
Ariz. R. Fam. L.P. 6(f)(1) 45

Ariz. R. Fam. L.P. 26 .... *passim*
Ariz. R. Fam. L.P. 26(b)(3) 22
Ariz. R. Fam. L.P. 26(c)(2)(A) 23, 24, 25, 27
Ariz. R. Fam. L.P. 26(c)(2)(B) 23, 25
Ariz. R. Fam. L.P. 35(a)(1) 43
Ariz. Sup. Ct. R. 111(c)(1)(C) 29
Rule 2.9(C) of the Model Code of Judicial Conduct 58

Other Authorities

American Bar Ass'n Formal Opinion 478, *Independent Factual Research by Judges Via the Internet*, Dec. 8, 2017 58

I. INTRODUCTION

This case presents some bizarre, interesting, frightening and salacious facts. The story involves sex, celebrity, even an alleged fake pregnancy. The cast includes an inexperienced trial judge who apparently broke the law to ensure a pyrrhic victory for a famous litigant from a popular TV show.

At the end of the day, the strange facts of this case are almost irrelevant to this Court's task—answering a very simple, yes-or-no question: <u>do the rules of procedure matter, or can the rules be casually tossed aside when they require an undesirable result?</u>

This rhetorical question answers itself. *Of course* the rules adopted by the Arizona Supreme Court matter. Like all other statutes and regulations, procedural rules carry the full force of law. All judges, all lawyers, and all litigants must follow them, whether they agree with the rules or not.

It is undisputed that did not happen here. The trial court ignored one of the clearest and arguably the single most important rule in all of civil litigation; the "safe harbor" provision of Family Law Rule 26 (the family court variant of Civil Procedure Rule 11). Rather than applying the safe harbor as the law requires, the trial court transformed it into the proverbial screen door on a submarine; a pointless, useless nullity.

The obviousness of this legal error is surpassed only by the ease with which this Court may correct it—by reversing the lower court's judgment and remanding this case with instructions to dismiss the action with prejudice. Of course, this appeal raises other arguments and issues, but the Court need not reach or decide any of them. The trial court's error of law on the first point is fully dispositive of this entire appeal.

II. STATEMENT OF THE CASE & FACTS

Most points in this appeal involve legal errors which are subject to *de novo* review. Although Laura disputes many of the trial court's factual findings, she recognizes this Court will generally, "defer to the trial court's factual findings but review *de novo* all legal conclusions." *McDaniel v. Payson Healthcare Mgmt.*, 253 Ariz. 250, 255 (Ariz. 2022).

Thus, plentiful and egregious factual mistakes notwithstanding, factual errors are not the primary focus here. With those standards in mind, Laura offers the following background facts for context.

A. Laura's Pregnancy Claim—May 2023

In her establishment petition [ROA 1], and later in her trial testimony [ROA 129 ep 71-141], Petitioner/Appellant Laura Owens ("Laura") claimed that on May 20, 2023, she had a brief (one-night) sexual encounter with

Respondent/Appellee Clayton Echard ("Clayton"). [ROA 129 ep 72] Eleven days later, Laura learned she was pregnant by taking a home pregnancy test or "HPT". [*See id; see also* ROA 127 Petitioner's Exhibit A0 (timeline)]

Laura sought medical confirmation of the pregnancy the next day at a Banner Urgent Care facility in Scottsdale. [ROA 129 ep 73] The pregnancy test at Banner Urgent Care was positive. [*See id.*]

On June 17, 2023, Clayton invited Laura to his home in Scottsdale to discuss the situation. [*See id.*] When Laura arrived, Clayton (doubtful of Laura's pregnancy claim) surprised her with a home pregnancy test which he insisted she take immediately in front of him. [ROA 129 ep 73–74]

Laura took the test Clayton provided. It was positive. [ROA 129 ep 74; ROA 126 ep 5 (trial court finding regarding June 17th meeting: "[Clayton] provided a pregnancy test for [Laura] to take …. Both parties agree the test was positive.") (emphasis added)]

Clayton later confirmed seeing the positive test in an email entitled "*Something to Consider*" which he sent to Laura a few days later on June 21, 2023. In that email, Clayton made several admissions about the pregnancy:

> Even after *seeing a positive pregnancy test,* I still had doubts in my head. Something was telling me to look deeper into things. So, I did and came up with a theory that could potentially be realistic.

> Considering you only performed oral sex on me (and no vaginal penetration occurred), the chances of you being pregnant seem considerably low. Although again, maybe rubbing up against one another allowed a sperm to make its way inside you, but it's a very low probability. Nonetheless, it is one.

[ROA 127 Petitioner's Ex. A2; *see also* ROA 129 ep 74–75 (emphasis added)].

Laura and Clayton discussed the situation over the next several weeks, but could not agree what to do. After another positive HPT on August 1, [ROA 129 ep 79], Laura filed her establishment petition later that same day.

B. Litigation Begins

After two months of unsuccessful private discussions, and multiple positive pregnancy tests, on August 1, 2023, Laura filed a petition to establish paternity. [ROA 1] On August 21, 2023, Clayton filed a response denying paternity. [ROA 9] From the inception of the case, and for months to follow, both parties were *pro se*.

In September 2023, Laura and Clayton agreed to submit samples for DNA testing through a company called Ravgen. [ROA 129 ep 81–82] A Ravgen representative later indicated the tests were "inconclusive" because there was "little to no fetal DNA found" thus there was insufficient genetic material to establish (or exclude) Clayton as the father within the 95% certainty requirement of A.R.S. § 25–807(D). [ROA 129 ep 82]

Bad news arrived a few weeks later. On October 16, 2023, Laura had a blood test which showed her HCG (pregnancy hormone) levels were 102. [ROA 129 ep 82] Although this test confirmed Laura was still technically pregnant, the level of 102 was far lower than normal for a *healthy* pregnancy at that stage. This indicated Laura had either miscarried, or that a miscarriage was inevitable. [ROA 129 ep 146 (testimony of Dr. Medchill)]

On November 14, 2023, Laura saw a medical provider at MomDoc, an OB/GYN facility. At that time, Laura was given two pregnancy tests, both of which were negative, confirming her pregnancy had failed and she was no longer pregnant as of that date. [ROA 129 ep 83]

After learning of the miscarriage in mid-November, Laura (who, like Clayton, remained *pro se*) filed nothing further in the case. She pursued no discovery, and otherwise had no case-related contact with Clayton.

Due to inactivity, on December 4, 2023, court administration notified the parties the action was scheduled for dismissal. [ROA 30] After receiving the notice of impending dismissal, Laura filed nothing further and took no action to keep the case active. However, before the case was dismissed, Clayton retained counsel, Gregg R. Woodnick, Esq., who appeared and immediately filed pleadings seeking to avoid dismissal.

First, on December 12, 2023, Mr. Woodnick filed a Motion for Leave to Amend Clayton's response to the original petition. [ROA 33] Next, on December 13, Mr. Woodnick filed an "Expedited" Motion to Extend the Dismissal Date and a request for an evidentiary hearing. [ROA 34]

Just days later, on December 22, 2023, Laura retained counsel of her own. [ROA 35] Six days later on December 28, 2023, Laura moved to dismiss her petition *with prejudice*, explaining: "Petitioner is not now pregnant with Respondent's children .... Here, there is no paternity or maternity to establish, <u>as Petitioner is no longer pregnant</u>. Accordingly, this case must be dismissed." [ROA 37] (emphasis added)

On January 3, 2024, *after* Laura moved to dismiss her petition, Mr. Woodnick filed a Motion for Sanctions. [ROA 45] In his motion, Mr. Woodnick claimed Laura violated Family Law Rule 26 by filing the establishment petition "without medical evidence":

> Petitioner filed the underlying action for an improper purpose without medical evidence to support her claim that she was pregnant and/or that she was pregnant by Respondent. Petitioner could not have become pregnant from the limited encounter the parties had and therefore premised this entire action on a fiction. Petitioner violated Rule 26(b)(1)-(3) in her Petition and subsequent filings.

[ROA 45 ep 1-2; Motion for Sanctions at 1:25–2:2]

Immediately following the Rule 26 motion, the record becomes a confusing and contradictory mess. To begin, on January 24, 2024, the trial court issued an order *granting* Laura's Motion to Dismiss. [ROA 56] In that dismissal order, affirmed for a second time the next day [ROA 59], the court indicated: "Petitioner advises she is no longer pregnant and has filed a Motion to Dismiss. *While the Court will grant the Motion*, the issue of sanctions and attorney's fees remain." (emphasis added).

On February 2, 2024, the trial court issued a new order "setting an Evidentiary Hearing regarding the issue of sanctions and attorney's fees" for February 27, 2024. [ROA 63] Shortly before the original hearing date (which was later continued until June 10, 2024 [ROA 73]), on February 21, 2024, the court issued a new order [ROA 71] *denying* Laura's Motion to Dismiss despite the fact the dismissal motion had previously been granted, ***twice***, a month earlier. [ROA 56 & ROA 59]

Matters then became even more convoluted and confusing. First, on April 3, 2024, Clayton moved to *withdraw* his Rule 26 motion. [ROA 83] After more than a month passed without any decision from the court on that request, on May 10, 2024 Laura filed a Motion for Judgment on the Pleadings asking the court to deny Clayton's still-pending Rule 26 motion as a matter

of law. [ROA 108] That motion argued that because Clayton failed to comply with the procedural requirements of Rule 26, sanctions were unavailable under Rule 26 *or* any other authority (such as the court's inherent authority). The motion also renewed Laura's request to dismiss the action since there were no other issues for the court to resolve. [*See id.*]

On May 16, 2024, the trial court issued an order granting Clayton's request to withdraw his Rule 26 Motion for Sanctions. [ROA 112] That order did not, however, resolve Laura's request for judgment on the pleadings, nor did the court mention Laura's renewed request to dismiss her petition.

About two weeks later, on May 28, 2024, the court issued yet *another* confusing order [ROA 117] explaining that "due to a clerical error", the court had intended to issue a ruling on Laura's Motion for Judgment on the Pleadings, but due to this undescribed error, the court's decision "was not remitted to the parties ...." [*Id.*] The court discussed various arguments raised by each side on the question of whether Laura could still be sanctioned, given that Clayton's Rule 26 motion was withdrawn, and no other sanctions motions were pending. Inexplicably, the court concluded Laura's legal arguments regarding sanctions were "**moot**", therefore, "LET THE RECORD REFLECT the Court declines to take further action." [*Id.*]

To recap—at the end of May 2024, Clayton's Rule 26 sanctions motion was withdrawn, the court ruled the issue of sanctions was "moot", and no other motions remained pending. Despite this posture and with nothing left to decide, the court still held an evidentiary hearing on June 10, 2024.

Following a two-hour hearing, on June 18, 2024, the trial court issued a lengthy (19-page) decision which contained findings on the issues of "sanctions, paternity, attorney's fees, and costs." [ROA 126] Many of these findings are either directly contrary to the admitted evidence, or supported by no evidence of any kind. [*See* ROA 132 ep 20–28] In the end, the court found Laura "acted unreasonably when she initiated litigation without basis or merit. Without an authentic ultrasound, sonogram, physical examination, and in conjunction with a belief she passed tissue in July 2023, the Court finds the underlying Petition premature at best." [ROA 126 ep 17]

In the post-trial ruling, the court again recognized Laura's argument that Rule 26 sanctions were inapplicable because Clayton failed to comply with the procedural requirements of Rule 26. The court further noted a separate problem—Clayton's Rule 26 motion was withdrawn; "The question thus becomes, can the court still award Rule 26 sanctions, considering Respondent's withdrawal of his motion." [ROA 126 ep 15]

Without allowing any input from the parties, the court held despite the withdrawal of Clayton's motion, and ignoring his failure to comply with the requirements of Rule 26, and contrary to its prior order [ROA 117] holding the issue of sanctions was "moot", and despite the fact the case had previously been dismissed, *twice*, sanctions could still be awarded *sua sponte*:

> This lends credence to the idea that the family court's inherent authority to award sanctions under ARFLP 26 should not be read to be limited by the course of the case or by the litigation strategy pursued by the parties. The power is there by rule and can be used by the court when necessary and appropriate.

[ROA 126 ep 16]

In addition to awarding sanctions *sua sponte* under Rule 26, the court also concluded Laura: "knowingly presented a false claim, knowingly violated a court order compelling disclosure or discovery such that an award of attorney fees and costs is appropriate under A.R.S. § 25-415" and A.R.S. § 25–324. The court later awarded Clayton costs and fees in the amount of $149,219.76 in a judgment entered on August 16, 2024. [ROA 137]

C. Post-Trial Developments

Before the final judgment awarding fees/costs was entered, several critical events occurred. These developments warrant further discussion as they relate directly to legal arguments presented in this appeal.

First, immediately after the trial ended on June 10th, Laura learned several individuals posted videos on social media claiming the trial judge's father, Mr. Harry Howe, personally attended the trial and allegedly spoke with them about the case. Among other things, these supporters claimed Mr. Howe told them he discussed the case with his daughter, Hon. Julie Mata, and that she printed out case-related documents for him, and said, *inter alia*: "Dad, come here, *you have GOT to see this*!" [ROA 129 ep 15–16, ¶ 68]

Second, and far more concerning, after receiving the court's post-trial ruling [ROA 126], Laura immediately noticed one of the most critical factual findings was not based on any evidence admitted at trial. Rather, the key finding appeared to have been **copied from a social media post** made by an anonymous third party ***after*** **the trial concluded.**

Specifically, in summarizing the trial testimony of Clayton's medical expert, Dr. Samantha Deans, the court made the following "findings":

> She [Dr. Deans] testified that Planned Parenthood does not accept anonymous patients. They do not accept patients using an alias. Patients are required to provide a government issued form of identification. She further testified that Planned Parenthood is not open on Sundays, when Petitioner testified, she sought care [on] July 2, 2023.

[ROA 126 ep 10] (emphasis added).

The specific finding that "Planned Parenthood *is not open on Sundays*" was attributed to the trial testimony of Dr. Deans. **But as the trial transcript [ROA 129 ep 59–196] clearly shows, Dr. Deans said no such thing.** Instead, it appears the only basis for the court's finding was social media posts published online *after the trial concluded*. [ROA 129 ep 17–21]

Immediately upon discovering this extremely serious misconduct by the trial judge, Laura filed several pleadings including a Notice of Change of Judge For Cause [ROA 128] supported by an extensive affidavit of counsel [ROA 129]. Laura also moved to vacate the judgment, moved for a new trial, and moved to alter/amend the judgment. [ROA 132] Simultaneously, Laura also reported these matters to the Commission on Judicial Conduct which opened an investigation (which remains ongoing as of the date this brief was filed).

On July 18, 2024, despite having no authority to do so while she was subject to a pending Notice of Change of Judge, and before Clayton filed any brief opposing the motion, Judge Mata *denied* Laura's new trial motion and her request for other relief. [ROA 133] Several days later, after this apparent act of retaliation was reported to the Judicial Conduct Commission as a violation of Commission Rule 14 (prohibiting acts of retaliation by a judge

in response to a complaint to the Commission), Judge Mata issued a new order *withdrawing* her prior order, claiming she was "unaware of the Notice [of Change of Judge] that would suspend the Court's authority" [ROA 134] (even though the Notice of Change of Judge was mentioned on the very first page of the Motion for New trial she just denied).

On August 13, 2024, the Presiding Family Court Judge, Hon. Ronda R. Fisk, denied Laura's Notice of Change of Judge. [ROA 136] In her order, Judge Fisk recognized: "[Laura] correctly points out that Judge Mata's July 17 [sic] Ruling contains a factual error, i.e., the transcript from the June 10 Hearing shows that Dr. Samantha Deans **did not testify** 'that Planned Parenthood is not open on Sundays.'" [ROA 136 ep 4] (emphasis added). Despite this, Judge Fisk concluded the evidence failed to show Judge Mata independently investigated the facts; "The Court finds [Laura] relies on mere speculation and suspicion when alleging that Judge Mata engaged in a 'secret, undisclosed investigation' and therefore is biased." [ROA 136 ep 5]

Despite this, Judge Fisk could not explain, and did not explain, how Judge Mata could have *properly* found "Planned Parenthood is closed on Sundays", since no trial testimony or evidence addressed that issue. Judge Fisk ultimately brushed that concern aside, concluding the question of

Planned Parenthood's business hours "is of little to no importance given the rest of the findings in the July 17 [sic; should be June 17] Ruling." [*Id.*]

After Judge Fisk denied Laura's Notice of Change of Judge, she authorized Judge Mata to rule on any remaining issues. This resulted in the court granting Clayton's request for fees/costs in a judgment entered August 19, 2024, [ROA 137] and denying all of Laura's post-trial motions for a second time. [ROA 140]

This timely appeal followed. As explained in Laura's Notice of Appeal [ROA 139] and her Amended Notice [ROA 142], this Court has jurisdiction pursuant to A.R.S. §§ 12-2101(A)(1), 12-2101(A)(3), 12-2101(A)(5)(a), and, if needed, *Barassi v. Matison*, 130 Ariz. 418, 636 P.2d 1200 (Ariz. 1981) and *Maldonado v. Ashton Co.*, 2024 WL 1364107, *4 (App. March 29, 2024).

III. STATEMENT OF ISSUES

ISSUE 1: As a matter of first impression, when a party files a motion seeking sanctions for an alleged violation of Family Law Rule 26, but that party does not comply with *any* of the procedural requirements of the rule and later withdraws the motion, may the trial court nevertheless award Rule 26 sanctions *sua sponte* in a manner that wholly ignores the procedural and safe harbor requirements of that rule? And assuming sanctions were unavailable under Rule 26, did the trial court err by sanctioning Laura for a Rule 26 violation using its inherent authority or other law?

ISSUE 2: Did the trial judge commit structural error, entitling Laura to a new trial, by conducting an independent investigation into the facts?

ISSUE 3: Did the trial court err by awarding sanctions under A.R.S. §§ 25-324 and/or 25-415 when there was no basis for such an award and no motion for sanctions under those statutes was ever filed?

ISSUE 4: Did the trial court err by awarding legal fees of $150,000.00 when the alleged misconduct did not cause those fees to be incurred?

ISSUE 5: Is Laura entitled to her attorney's fees and costs on appeal?

IV. ARGUMENT

A. Clayton's Failure To Comply With The Safe Harbor Requirements Of Rule 26 Precluded *Sua Sponte* Sanctions

1. Citations To Record & Standard of Review

The question of whether a court may *sua sponte* sanction a litigant for violating Rule 26 in a manner that ignores the procedural requirements of that rule was raised at least three times below; first in Laura's Motion for Judgment on the Pleadings on that exact issue [ROA 108], second in Laura's Pretrial Statement, [ROA 120 ep 5–6 (contested issues of law)], and third in Laura's post-trial Motion for New Trial (and other relief). [ROA 132]

Both substantive motions were denied with no explanation for the trial court's position. Laura's Motion for Judgment on the Pleadings was denied by minute entry order dated May 28, 2024 in which the Court held the issue of sanctions was "moot". [ROA 117] Laura's post-trial Motion for New Trial (and other relief) was denied by a one-line minute entry order dated Sept. 6, 2024 which contained no discussion at all. [ROA 140]

When sanctions are challenged purely on factual grounds, an abuse of discretion standard applies. *See Villa De Jardines Ass'n v. Flagstar Bank*, 227 Ariz. 91, 96 (App. 2011) ("We review an award of attorney fees under Rule

11 for an abuse of discretion.") However, when sanctions are challenged as to their legal basis, review is *de novo*; "[W]hether the basis for awarding fees is proper is an issue of law that we review *de novo*." *Villa De Jardines*, 227 Ariz. at 96.

2. Discussion

a) Summary of Rule 26's Requirements

Rule 26 is simple, clear, and dispositive of this appeal. Because the correct interpretation of this rule presents a threshold question of law which this Court considers *de novo*, it is worth starting with a basic discussion of how Rule 26 *should* work, followed by an explanation of how the rule was clearly violated here.

Every lawyer is familiar with how Ariz. R. Civ. P. 11, and its lesser-known but substantially identical sibling—Family Law Rule 26—function. Both rules require a party (or attorney) to certify each pleading is *believed* to have at least some minimal factual and legal merit, and that a reasonable inquiry has been performed before the pleading is filed. That part is obvious.

Regarding factual allegations, Rules 11/26 <u>have never</u> demanded perfect accuracy. Rather, the rules only require a party to certify "the factual

contentions have evidentiary support or, if specifically so identified, *will likely have evidentiary support* after a reasonable opportunity for further investigation or discovery . . . ." Ariz. R. Fam. L.P. 26(b)(3). In this way, Rules 11 and 26 have always forbidden a party from making *knowingly* false allegations of fact, but this is a low threshold to clear; "*Rule 11 sets a low bar*: It deters 'baseless filings' by requiring a 'reasonable inquiry' that there is *some plausible basis* for the theories alleged. When there is a plausible basis, even a very weak one, supporting the litigant's position, imposition of Civil Rule 11 sanctions is inappropriate." *Strom v. United States*, 641 F.3d 1051, 1059 (9th Cir. 2011) (emphasis added).

If a party has any *plausible* basis to believe a factual allegation *may* be true, the rule does not allow sanctions simply because that belief is later proven incorrect; a reasonable but mistaken belief does *not* violate the rule. In this way, Rules 11/26 bar knowingly false claims, but they also provide leeway for parties to bring cases based on what they ***think is true at the time,*** even if that belief turns out to be completely wrong.

When a pleading is filed in violation of these requirements, Family Law Rule 26 (like Civil Rule 11) sets forth a crystal-clear three-step process to follow. This process must be followed *before* sanctions may be requested:

Step 1: The party claiming the violation must make a good faith effort to talk directly with the alleged violator. In family court, this conversation must satisfy Family Law Rule 9(c) which states the discussion: "must be in person or by telephone, and not merely by letter or email." Ariz. R. Fam. L.P. 26(c)(2)(A).

Step 2: If the issue is not resolved at Step 1, the party claiming the violation must serve the opposing party written notice of the alleged violation. *See* Ariz. R. Fam. L.P. 26(c)(2)(B). Notably, Rule 11 previously required service of a full *draft motion for sanctions*, but that requirement has been changed to a written notice of the alleged violation, not a motion.

Step 3: After the alleged violator is served with the written notice required in Step 2, they have 10 business days within which to "withdraw or appropriately correct the alleged violation(s) ...." If the violation is corrected or the pleading withdrawn within this **safe harbor** period, sanctions cannot be imposed (or even requested). *See* Ariz. R. Fam. L.P. 26(c)(2)(B).[1]

---

1 *See, e.g.*, *Islamic Shura Council of S. California v. F.B.I.*, 757 F.3d 870, 872-73 (9th Cir. 2014) ("The safe harbor provision further dictates that the motion may not be filed if the offending party timely withdraws or appropriately corrects the challenged contention during the safe harbor period.") (emphasis added) (cleaned up); *Retail Flooring Dealers of Am., Inc. v. Beaulieu of Am., LLC*, 339 F.3d 1146, 1151 (9th Cir. 2003) ("Rule 11 sanctions are not appropriate, given the safe harbor provision, unless an offending party has an opportunity to withdraw the complaint without suffering sanctions.") (emphasis added).

b) Clayton Did Not Comply With Rule 26's Procedural & Safe Harbor Requirements

As explained *supra*, Laura raised the issue of Clayton's non-compliance with Rule 26 multiple times; first in a Motion for Judgment on the Pleadings, [ROA 108] and lastly in her post-trial motion. [ROA 132]. Unfortunately, the trial court denied Laura's post-trial motion *before* Clayton responded. However, Clayton *did* provide a helpful response to Laura's Motion for Judgment on the Pleadings. [*See* ROA 111] Clayton's argument in that brief shows he knowingly failed to comply with Rule 26's procedural or safe harbor requirements.

To begin, Clayton failed to comply with Ariz. R. Fam. L.P. 26(c)(2)(A) and Rule 9(c) which required him to have an in-person (or at least telephonic) conversation with Laura prior to seeking sanctions. It is undisputed Clayton ignored that requirement because his later-filed (and then withdrawn) Rule 26 motion, [ROA 45], admitted as much, as did his response to Laura's Motion for Judgment on the Pleadings. [ROA 111]

Specifically, in the "good faith consultation certificate" attached to the original Motion for Sanctions, [ROA 45 at ep 10], Clayton's counsel, Mr. Woodnick, never claimed he made any effort to speak directly with Laura

about the specific issue of Rule 26 sanctions *before* the motion was filed. Instead, Mr. Woodnick's certificate claimed *Clayton* complied with the conferral requirement because *more than four months earlier* (in August 2023), he sent two text messages to Laura "that indicated he could not be the father of her alleged twin fetuses …." Those two text messages [ROA 45 at ep 11–12] said nothing about Rule 26 sanctions and do not satisfy the rule.

Mr. Woodnick's good faith certificate also claims he had one phone conversation with Laura's prior counsel on December 27, 2023 (the substance of which is *not* mentioned in the certificate). But even assuming that call included a discussion about sanctions, this only further proves Clayton did not meet the other strict requirements of Rule 26. This is so because Mr. Woodnick claimed the phone call took place on December 27, 2023 and Clayton's Rule 26 motion was filed on January 3, 2024; just five business days after the call. Even if the phone conversation met the conferral requirements of Rule 26(c)(2)(A) and was followed by a written notice, Clayton did not provide the 10-business day safe harbor required by Rule 26(c)(2)(B).

That violation is further established by the fact Clayton's Rule 26 motion did not include an attached copy of the *written* notice required by Rule 26(c)(2)(B). *See* Rule 26(c)(3)(D) (providing a motion for sanctions must

"attach a copy of the written notice provided to the opposing party under subpart (c)(2)(B).") That notice was not attached to Clayton's motion for one obvious reason – the required written notice was never sent.

In his brief opposing Laura's Motion for Judgment on the Pleadings, Clayton basically admitted these violations but claimed they were harmless. In short, Clayton argued his violations of the rule were immaterial because Laura should have guessed from other pleadings (such as Clayton's Motion for Leave to Amend; filed December 12, 2023; ROA 33) that Clayton intended to seek sanctions at some point in the future. However, as explained *infra*, the law on this issue is 100% clear – passing threats, settlement demands, and/or other oblique references to an intent to seek sanctions in the future do not satisfy the "strict compliance" standards of Rule 26. *See Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772, 789 (9th Cir. 2001) (explaining "informal warnings" including a threat to seek sanctions made in other pleadings do not "satisfy the strict requirement that a [written notice] be *served* on the opposing party ... prior to filing.") (emphasis in original) (citing *Barber v. Miller*, 146 F.3d 707 (9th Cir. 1998)).

c) Clayton's Failure To Comply With Rule 26 Precludes <u>Any</u> Award of Sanctions

Factually, Clayton did not comply with the strict procedural requirement of Family Law Rule 26(c)(2). Even assuming the vague reference to a single phone call with Laura's former counsel on December 27, 2023 included a discussion about Rule 26 and thus satisfied the conferral requirement of Rule 26(c)(2)(A) (which is far from clear), it is undisputed ***after that call,*** Clayton did not serve Laura with a written notice as required by Rule 26(c)(2)(B), nor did he wait 10 business days to give Laura an opportunity to withdraw her petition. Instead, Clayton's Rule 26 motion was filed on January 3, 2024, <u>*after* Laura had already moved to dismiss the action with prejudice on December 28, 2023.</u>

The question thus becomes – could the trial court still properly award Rule 26 sanctions when the procedural requirements of the rule were not met but Laura nevertheless moved to dismiss with prejudice? Surprisingly, published Arizona cases interpreting the safe harbor provision of Family Law Rule 26 (and even Civil Rule 11) are limited in scope and largely silent as to this discrete question. As such, this appears to raise an important matter of first impression for this Court.

Thankfully, this Court will not write on a blank slate. There is *extensive* federal authority on this issue which this Court may properly consider. *See James, Cooke & Hobson, Inc. v. Lake Havasu Plumbing & Fire Protection*, 177 Ariz. 316, 318-19, 868 P.2d 329, 331-32 (App. 1994) (Arizona state courts consider federal court interpretation of Rule 11); *Smith v. Lucia*, 173 Ariz. 290, 297 (App. 1992) (same). Federal courts faced with the same problem have repeatedly agreed – when a party is accused of a Rule 11 violation but the technical requirements of the rule are not strictly followed *to-the-letter* (or the accused party moves to dismiss), sanctions are unavailable as a matter of law under Rule 11 *or* any other authority.

That straightforward result was succinctly explained by a recent Maricopa County Superior Court decision which perfectly summarized, and then fully adopted, the standards of Rule 11 by citing exclusively to federal case law (citations remain as in original):

> Subsection 2 of Ariz. R. Civ. P. 11(c), the so-called "safe harbor" provision, is intended to "give the offending party the opportunity" to "withdraw the offending pleading *and thereby escape sanctions*." *Barber v. Miller*, 146 F.3d 707, 710 (9th Cir. 1998). A party is not entitled to seek or obtain Rule 11 sanctions if it fails to comply with the "safe harbor" requirements. *De Freitas v. Thomas*, 2016 U.S. Dist. LEXIS 121482, 2016 WL 8674572 at * 2 (D.Ariz., May 6, 2016) ("Failure to comply with the safe harbor provision precludes an award of Rule 11 sanctions.") *See also*

> *Holgate v. Baldwin*, 425 F.3d 671, 678 (9th Cir. 2005) ("We must reverse the award of sanctions when the challenging party failed to comply with the safe harbor provisions, even when the underlying filing is frivolous.") Moreover, the "safe harbor" provisions of Rule 11 are construed strictly. *See Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772, 788 (9th Cir. 2001) (discussing the "strict procedural requirements" that parties must follow "when they move for sanctions under Rule 11"). Rule 11 sanctions are not available to a party that fails to strictly comply with the requirements of the "safe harbor" provision.

Gallagher v. Surrano Law Offices P.C., 2020 Ariz. Super. LEXIS 514, *5–6, Maricopa County Superior Court Case No. CV2019-011348 (Nov. 23, 2020)[2] (emphasis added) (denying Rule 11 motion for sanctions where motion was filed without strict compliance with "safe harbor" provision of rule, and explaining, "A demand for dismissal and a threat to seek sanctions does not transform a settlement demand into a Rule 11-compliant notice.") (citing *Northern Illinois Telecom, Inc., v. PNC Bank, N.A.*, 850 F.3d 880, 888 (7th Cir. 2017) ("The Rule 11 threats did not transform" settlement letters demanding dismissal of claims "into communications" that complied with Rule 11's "safe harbor" provision)).

[2] Unpublished authority is cited for persuasive value only pursuant to Ariz. Sup. Ct. R. 111(c)(1)(C).

This result—that sanctions cannot be awarded when the procedural requirements of the rule are not followed or a party moves to voluntarily dismiss—is not only required by the plain language of the rule, but also by the underlying *purpose* of the rule—to streamline resolution of cases by encouraging parties to withdraw untenable claims without fear of life-altering consequences. The Ninth Circuit has recognized that core purpose:

> These provisions are intended to provide a type of "safe harbor" against motions under Rule 11 in that a party will not be subject to sanctions on the basis of another party's motion unless, after receiving the motion, it *refused* to withdraw that position .... Under the former rule, parties were sometimes reluctant to abandon a questionable contention *lest that be viewed as evidence of a violation of Rule 11*; under the revision, **the timely withdrawal of a contention will protect a party against a motion for sanctions**.

Barber v. Miller, 146 F.3d 707, 710 (9th Cir. 1998) (emphasis added) (quoting Adv. Comm. Notes, 1993 Amend.)

While our state court decisions have been less clear about the safe harbor's purpose, Arizona courts nevertheless agree: "Rule 11 and A.R.S. § 12-349 share the common purpose of promoting judicial economy by deterring meritless and wasteful litigation." *Buonincontri v. ORHub, Inc.*, 2023 WL 2250355, *11 2023 Ariz. App. Unpub. LEXIS 205, *11 (App. 2023) (citing *Beitman v. Herrick*, CV-17-08229-PCT-JAT, 2022 U.S. Dist. LEXIS

13358, 2022 WL 220492, slip op. at 1 (D. Ariz. Jan. 25, 2022) ("The purpose of Federal Rule of Civil Procedure 11 is to promote judicial economy ...") (cleaned up); *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1363 (9th Cir. 1990) (Rule 11 "must be read in light of concerns that it will spawn satellite litigation and chill vigorous advocacy.")

Again, while there is a dearth of published state court decisions on this issue, federal courts have answered this question *repeatedly*. Laura explained this at length in her Motion for Judgment on the Pleadings. [ROA 108]

In that motion, Laura cited several extremely helpful cases including *Westerkamp v. Mueller*, 2023 U.S. Dist. LEXIS 96531; 2023 WL 3792739 (D.Ariz. 2023) and *Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772 (9th Cir. 2001).

In *Westerkamp*, the defendant gave written notice threatening to seek Rule 11 sanctions based on a frivolous pleading filed by the plaintiff. Eight days later, within the safe harbor period of Rule 11 (as Laura did here, even though no valid written notice was ever sent), the plaintiff moved to voluntarily dismiss the case. In *Westerkamp*, despite the plaintiff's clear attempt to invoke the safe harbor of Rule 11 by moving to dismiss *before* sanctions were sought, the defendant still moved for sanctions.

The District Court denied the motion. The court held Rule 11 sanctions

were unavailable as a matter of law because the plaintiff had every right to invoke the safe harbor *without* punishment; "Defendant's basis for even threatening to seek Rule 11 sanctions based on the [allegedly frivolous pleading]—let alone formally moving for such sanctions—evaporated on March 2, 2023, when [plaintiff's] Counsel offered to stipulate to a dismissal of the entire case with prejudice." *Westerkamp*, 2023 WL 3792739, *9.

Because the alleged wrongdoer in *Westerkamp* (the plaintiff) offered to withdraw his complaint and dismiss the action within the safe harbor and before the defendant moved for Rule 11 sanctions, the Court held it was powerless to even consider sanctions; "once Plaintiff moved for voluntary dismissal, Defendant was precluded from filing the Rule 11 motion." *Id.* at *10 (emphasis added) (citing *Great Dynasty Int'l Fin. Holdings Ltd. v. Haiting Li*, 2014 U.S. Dist. LEXIS 94658, 2014 WL 3381416, *6 (N.D. Cal. 2014) ("[T]he underlying purpose of the safe harbor *precludes [a movant's] ability to move for sanctions* given the offending pleading had already been withdrawn [via voluntary dismissal].") (emphasis added)).

The posture of *Westerkamp* is not similar to this case; it is identical. Here, like in *Westerkamp*, Laura commenced the proceeding but then, once Clayton's counsel *verbally* threatened sanctions, Laura immediately moved

to dismiss with prejudice the very next day, on December 28, 2023—before Clayton's Rule 26 motion was filed. As the court held in *Westerkamp*, the fact Laura moved to withdraw her petition before any motion for sanctions was filed caused the basis for Clayton's motion to "evaporate". In short, once Laura invoked the safe harbor, her reward was protection against sanctions; "the timely withdrawal of a contention **will protect a party against a motion for sanctions**." *Barber*, 146 F.3d at 710 (emphasis added).

Here, the trial court plainly erred when it ignored the law and refused to accept Laura's safe harbor-invoking Motion to Dismiss. The court further erred as a matter of law by sanctioning Laura *after* she invoked the safe harbor. Both errors require reversal of the sanctions award and remand with instructions to grant Laura's request to dismiss with prejudice.

This conclusion is further supported by another helpful and even more closely analogous case cited by Laura in her Motion for Judgment on the Pleadings—*Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772 (9th Cir. 2001). In that case, like here, the defendant (Rainbow) filed a motion for Rule 11 sanctions without first providing a written pre-motion notice to the alleged offender (the plaintiff, Radcliffe). Procedurally, like *Westerkamp*, *Radcliffe* is identical to this case.

Even though Rainbow failed to follow the requirements of Rule 11 (like Clayton), the trial court held sanctions could still be awarded on the Court's own initiative (the same legal conclusion applied here). In fact, like Judge Mata did here, the trial court in *Radcliffe* held a "literal application of the safe harbor provision was unnecessary in this case." *Radcliffe*, 254 F.3d at 789. The trial court then awarded $75,000 in sanctions to Rainbow. *See id.*

On appeal, the Ninth Circuit *reversed*. The court explained when a party seeks Rule 11 sanctions, they must comply with the text of the rule. Compliance is mandatory, not optional. When strict compliance does not occur, a trial court cannot gratuitously "fix" the mistake by converting a *defective* Rule 11 motion into a *sua sponte* motion (even though Rule 11 otherwise permits *sua sponte* sanctions).

The Ninth Circuit rejected this attempt to end-run around the rule's safe harbor. Thus, to ensure the safe harbor was not stripped of all value, the Court held a "noncompliant" Rule 11 motion by a party cannot be converted into a *sua sponte* motion by the court because doing so would eviscerate the safe harbor function of the rule:

> We reject Rainbow's argument that the district court's order for sanctions can be interpreted as a Rule 11 motion on the court's own initiative, pursuant to Fed. R. Civ. P. 11(c)(1)(B). This

> provision does not require twenty-day advance notice. We reject Rainbow's contention because it was Rainbow, not the court, that initiated the award of sanctions. The district court's discussion of the safe harbor provision in its order concerning sanctions serves to emphasize this point. 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. **Because Rainbow did not follow the mandatory service procedure of Rule 11(c)(1)(A), we reverse the award of sanctions**.

Radcliffe, 254 F.3d at 789 (lots of emphasis added).

The Ninth Circuit in *Radcliffe* got it exactly right—Rule 11 (and Family Law Rule 26) are not single-sided coins, used *only* to punish. On the contrary, these rules serve powerful *dual* functions—acting as both a sword to punish bad conduct but also a shield to *encourage and reward good behavior* by allowing pleadings to be withdrawn without fear of crippling sanctions. That is the *whole* point of a "safe harbor"—to provide **safety**.

To be sure, Rules 11/26 do allow courts to punish violators *sua sponte* when the facts warrant it. *See, e.g., Chalmers v. Theut*, Ariz. App. Unpub. LEXIS 879; 2022 WL 14971946 (App. 2022) (affirming *sua sponte* sanctions under Rule 11). Courts have noted *sua sponte* sanctions are extremely rare, and, "will ordinarily be issued only in situations that are akin to a contempt of court …." *In re Pennie & Edmonds LLP*, 323 F.3d 86, 90 (2nd Cir. 2003).

But as the Committee comments to the 1993 amendment to Rule 11 make clear, that power requires an **order to show cause** (which did not occur here), and *sua sponte* sanctions are payable *only to the court* (which did not occur here). Furthermore, *sua sponte* sanctions cannot be imposed when a party moves to voluntarily dismiss before a show-cause order is issued:

> The power of the court to act on its own initiative is retained, but with the condition that this be done through a show cause order. This procedure provides the person with notice and an opportunity to respond. The revision provides that a monetary sanction imposed after a court-initiated show cause order be **limited to a penalty payable to the court** and that it be imposed only if the show cause order is issued *before any voluntary dismissal* ....

Advisory Committee notes to 1993 amendment of Fed. R. Civ. P. 11 (emphasis added); *see also Trs. of the N. Nev. Laborers Health & Welfare Trust Fund v. Randy's Blasting, Inc.*, 2013 U.S. App. LEXIS 25934, *2 (9th Cir. 2013) (adopting Committee notes to Rule 11 as providing court cannot impose *sua sponte* sanctions unless a show-cause order was issued before any voluntary dismissal or an agreement of the parties to settle).

Here, the trial court never issued any show-cause order to Laura. That fact alone precludes *sua sponte* sanctions. In addition, Laura moved to dismiss her petition *with prejudice immediately* (literally the very next day)

after Clayton's counsel spoke with her counsel. This voluntary dismissal *before* a show cause order was issued also separately precluded an award of *sua sponte* sanctions. Either or both of those points are sufficient, standing alone, to require reversal of the judgment in this case.

Because the trial court did not follow the mandatory process for ordering *sua sponte* sanctions, that means the only remaining option was for Clayton to move for sanctions. But as noted above, Clayton's Rule 26 motion was procedurally defective and later withdrawn. As such, to the extent Laura was sanctioned as a result of Clayton's motion, reversal is required; "Rule 11 sanctions are not appropriate, given the safe harbor provision, unless an offending party has an opportunity to withdraw the complaint without suffering sanction." *Retail Flooring Dealers of Am., Inc. v. Beaulieu of Am., LLC,* 339 F.3d 1146, 1151 (9th Cir. 2003); *Barber*, 146 F.3d at 710 ("[t]he purpose of the safe harbor ... is to give the offending party the opportunity ... to withdraw the offending pleading *and thereby escape sanctions ....*") (emphasis in original).

By design, Rules 11 & 26 permit even the most malicious wrongdoer to change his mind and withdraw a disputed pleading without punishment. As the saying goes: **<u>That's a feature, not a bug</u>**.

The safe harbor is offered to *all takers*, not just innocent ones. A party can take the safe harbor because of a good faith mistake. Or a party may withdraw a pleading because they feel the risk of proceeding is just not worth it. In short, the *reasons* are not relevant. Rule 26 is blind to the wrongdoer's intent or motive. Whatever the reason may be, Rules 11 and 26 allow parties threatened with sanctions to raise the white flag, invoke the safe harbor, and safely withdraw their offending pleading **without fear**.

Under these facts, and for the same reasons explained by the Ninth Circuit in *Radcliffe*, the District Court in *Westerkamp*, and the Superior Court in *Gallagher v. Surrano Law Offices*, the trial court erred as a matter of law by awarding sanctions to Clayton. Laura's timely motion to dismiss her petition *with prejudice* terminated Clayton's right to sanctions as a matter of law.

Accordingly, this Court must *reverse* the judgment and remand this case with instructions to dismiss the action with prejudice, as should have occurred in response to Laura's motion filed on December 28, 2023. *See Holgate v. Baldwin*, 425 F.3d 671, 678 (9th Cir. 2005) ("We must reverse the award of sanctions when the challenging party failed to comply with the safe harbor provisions, even when the underlying filing is frivolous.")

d) Rule 26's Safe Harbor Protects Laura From Sanctions Under Other Authority

Assuming the Court agrees the award of sanctions under Rule 26 was improper, a different but related question must be addressed—could Laura still be sanctioned under *other* authority (such as the Court's inherent authority)? The answer to that question is NO – Rule 26's safe harbor shields Laura from any punishment arising from her alleged violation of Rule 26.

That conclusion is required by several different points of law. First, as noted above, the central purpose of the safe harbor is to ensure a party can withdraw even frivolous pleadings without fear of life-altering punishment. This *quid pro quo* benefits the courts (and litigants) by streamlining litigation and by making it *easier* for parties to drop claims early without risk of endless "satellite litigation" (such as occurred here).

Indeed, the Ninth Circuit has recognized the value of Rule 11 comes from the safe harbor allowing people to withdraw claims safely:

> Under the former rule, parties were sometimes reluctant to abandon a questionable contention lest that be viewed as evidence of a violation of Rule 11; under the revision, the timely withdrawal of a contention will protect a party against a motion for sanctions.

Barber, 146 F.3d at 710.

This is also why, as noted above, the Ninth Circuit held in *Radcliffe* that a defective Rule 11 motion cannot be "saved" by converting it into a *sua sponte* motion based on a trial court's own authority (even though Rule 11 otherwise permits *sua sponte* sanctions using an OSC process). *See Radcliffe*, 254 F.3d at 789. In plain English—a safe harbor that provides no safety from punishment is no safe harbor at all.

For that reason, Rule 26's safe harbor must be construed as not only shielding litigants from punishment under Rule 26, but also from punishment under *any* other authority (to the extent the punishment is based on the same conduct that allegedly violated Rule 26). That conclusion is required by both the language and intent of Rule 26, but also by the general legal principle (long applied by Arizona courts) that "where two rules deal with the same subject, the more specific rule controls." *In re Marriage of Thorn*, 235 Ariz. 216, 218 (App. 2014) (emphasis added) (citing *Pima Cnty. v. Heinfeld*, 134 Ariz. 133, 134-35, 654 P.2d 281, 282-83 (1982) ("where two statutes deal with the same subject, the more specific statute controls ...."); *Sierra Tucson, Inc. v. Lee ex rel. Cnty. of Pima*, 230 Ariz. 255, ¶ 16, 282 P.3d 1275, 1279 (App. 2012) ("We interpret procedural rules according to the same principles we apply to the interpretation of statutes.")

To be sure—as Clayton correctly argued in his brief opposing Laura's Motion for Judgment on the Pleadings, many *other* rules/statutes generally authorize sanctions for various different types of litigation misconduct. [*See* ROA 111 at ep 2, arguing, "Title 25 contains at least three (3) statutes that expressly instruct the Court to award attorney fees and sanction a party in response to unreasonable conduct in the litigation..." and citing as examples, A.R.S. § 25-324, A.R.S. § 25-415, and A.R.S. § 25-809(G))].

At least on that one point, Clayton is right—*numerous* other rules and laws of general application DO permit sanctions, including, for instance, A.R.S. § 12-349. But when a party claims a specific act violated Rule 26 (as Clayton did here, in his counsel's very first filing - *see* ROA 33 at ep 2; asking "this Court sanction Petitioner under Rule 26 ..."], the question is whether a specific violation of Rule 26 can also *separately* be punished under some *other* rule or law of more general application, such as A.R.S. § 12-349 or the other laws mentioned in Clayton's brief like A.R.S. § 25-324.

The answer is clearly *no*. This is so because a violation of Rule 26 must be governed by the terms of Rule 26, including the rule's safe harbor. Rule 26 is a highly-specific law which addresses exactly the type of conduct Clayton accused Laura of committing - filing a baseless petition.

In addition to proscribing exactly that conduct, Rule 26 also sets forth a very specific process for how a violation should be addressed, and how the violator may (or may not be) punished for the violation. Rule 26 could not be more directly applicable to the conduct in question. The rule therefore controls exactly how and when sanctions may be imposed, and how and when they may *not* be.

As such, even if other *general* rules could arguably reach the same conduct, Rule 26 must control and must provide the *exclusive* remedy for a violation of Rule 26; "When a statute creates a right and also creates a remedy for the right created, the remedy thereby given is exclusive." *Hull v. DaimlerChrysler Corp.*, 209 Ariz. 256, 257 (App. Div. 2 2004); *Groat v. Equity Am. Ins. Co.*, 180 Ariz. 342, 347 (App. Div. 1 1994) ("The rules of civil procedure have the force and effect of [a] statute ....") (cleaned up)

That limitation is implicitly acknowledged by general laws such as A.R.S. § 12-349 which *permits* sanctions for "unjustified actions", but only in a manner that is consistent with other more specific laws (like Rule 26). That limitation is, in fact, expressly written into A.R.S. § 12-349 which allows courts to impose sanctions, in general, but only: "*Except as otherwise provided by and not inconsistent with another statute ... .*" (emphasis added)

Here, putting aside the fact Clayton never actually moved for sanctions under any other authority[3] (after withdrawing his Rule 26 motion), the trial court nevertheless concluded (like the lower court in *Radcliffe*) that sanctions could be imposed under other legal authority (without need for a motion) and in a manner that was entirely *inconsistent* with Rule 26. That holding was plainly wrong as a matter of law.

The holding was wrong because if a party withdraws a pleading in response to a threat to seek Rule 26 sanctions, the safe harbor provision of Rule 26 must provide meaningful protection by allowing the error to be corrected *without sanctions under other rules*. This safe harbor is needed to ensure the rule functions as intended – incentivizing parties to promptly drop claims when challenged *without* fear of life-altering punishment as a result. If a party invokes the safe harbor of Rule 26 (as Laura did here) but is then punished under other authority for exactly the same conduct that violated Rule 26, the safe harbor will literally be stripped of all meaning. This Court must firmly and clearly reject that outcome.

---

[3] It is both axiomatic, and required by rule, that if a party wants relief, they must bring a motion seeking that 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.")

B. The Trial Court Committed Structural Error Requiring Automatic Reversal By Performing An Independent Investigation Into the Facts

1. Citations To Record & Standard of Review

Laura raised the issue of structural error in her post-trial Motion for New Trial. [ROA 132]. The factual basis for Laura's argument (misconduct by the trial judge) was also raised in her Notice of Change of Judge for Cause [ROA 128] and supporting affidavit of counsel. [ROA 129]

The Notice of Change of Judge was denied by the Presiding Judge on August 13, 2024 [ROA 136], and the Motion for New Trial was denied by a one-line minute entry order dated Sept. 6, 2024. [ROA 140]

As for these points, the standard of review is *de novo*; "We review both constitutional and structural error claims *de novo*. We defer to the court's factual findings, but we review *de novo* its ultimate legal determination." *State v. Dayton*, 544 P.3d 94, 97 (App. 2024).

2. Discussion

Assuming this Court agrees with Laura's interpretation of Rule 26, the inquiry ends. The safe harbor is dispositive of this appeal, and the Court need not consider any other issues (other than Laura's request for fees).

However, if this Court chooses to part company with the extensive authority supporting Laura's interpretation of Rule 26, the lower court's judgment still cannot stand. This is so because as explained in Laura's Notice of Change of Judge [ROA 128], the supporting affidavit [ROA 129] and Laura's Motion for New Trial (and other relief) [ROA 132], clear and irrefutable evidence showed the trial judge committed structural error resulting in a violation of Laura's constitutional right to due process. This violation occurred when the trial judge performed an independent and undisclosed investigation into the facts of this case, and made post-trial findings based not on the evidence admitted at trial, but rather on social media posts published on the Internet *after* the trial concluded.

Although the Presiding Judge rejected this argument (insofar as it was raised in Laura's Notice of Change of Judge)[4] and although the trial court

[4] If this Court remands for a new trial (which it should *not*, given the primary argument and relief raised above), Laura would be automatically entitled to a change of judge as a matter of right. *See* Ariz. R. Fam. L.P. 6(f)(1). For that reason, it is not necessary for this Court to separately decide whether the Presiding Judge erred when she denied Laura's Notice of Change of Judge For Cause, because that relief is subsumed within the structural error arguments raised in Laura's Motion for New Trial (which this Court must review *de novo*). In other words, remanding for a new trial would automatically entitle Laura to a change of judge as a matter of right *anyway*, so this Court need not decide that separate issue.

denied Laura's Motion for New Trial, structural error is subject to *de novo* review. *See Dayton*, 544 P.3d at 97.

To help summarize the structural error problem, clearly the single most important (and most aggressively disputed) fact below was the question of whether Laura was ever actually pregnant. Laura claimed that prior to filing the establishment petition, she tested positive for pregnancy **five times,** including the surprise, unannounced test given to her by Clayton which he later confirmed, in writing, **was positive for pregnancy**. Indeed, Clayton not only *admitted* seeing the positive test, he took a photo of the positive test and emailed it to Laura. [ROA 127 Petitioner's Ex. A2; *see also* ROA 129 ep 74–75 (emphasis added)].

Despite this compelling evidence of pregnancy, Clayton theorized Laura somehow "faked" the pregnancy as a way of "trapping him" into a romantic relationship. To support this theory, Clayton retained a medical expert, Dr. Samantha Deans, an OB/GYN who previously worked for Planned Parenthood on the East Coast.

In her expert report [ROA 96], Dr. Deans never claimed Laura was *not* pregnant. Instead, Dr. Deans expressed an opinion that a woman cannot be regarded as "*clinically* pregnant" unless the pregnancy is confirmed by an

ultrasound or other "clinical signs of pregnancy". Based on this strange technical definition of "clinical pregnancy", Dr. Deans opined because Laura did not provide a *verified* ultrasound, that meant it was impossible to know whether she was "clinically pregnant" (implying Laura was never actually *pregnant* at all, whether in the clinical sense, or otherwise):

> We cannot confirm by any objective data that Ms Owens had an ongoing, viable clinical pregnancy at any time in the last year. Clinical pregnancy is defined as "a pregnancy diagnosed by ultrasonographic visualization of one or more gestational sacs or definitive clinical signs of pregnancy. In addition to intra-uterine pregnancy, it includes a clinically documented ectopic pregnancy."[2] We have received no verifiable documentation of a clinical pregnancy as defined.

[ROA 96 ep 8] (emphasis added).

Thus, according to Clayton, the existence (or absence) of a *verified* ultrasound was the single most important evidentiary issue in the case. Just one small problem—Laura could not provide a *verified* ultrasound. The reason *why* is the crux of the problem, and it explains why (beyond question) the trial judge committed structural error.

In short, *before* Laura's petition was filed on August 1, 2023, Laura provided Clayton with a document she claimed was a sonogram taken in early July 2023 at a facility called Scottsdale Medical Imaging or "SMIL". The

"SMIL" sonogram is found in the record at [ROA 97 ep 29] as part of an affidavit Laura submitted as part of the report of her medical expert, Dr. Michael Medchill (a retired OB/GYN physician who was the former Chair of the OB/GYN department at St. Joseph's Hospital in Phoenix).

In her affidavit, Laura admitted that, in fact, the SMIL sonogram given was not created at Scottsdale Medical Imaging. Rather, Laura's affidavit explained the SMIL sonogram was taken at Planned Parenthood in California on July 2, 2023. [ROA 97 ep 28, Affidavit of Laura Owens at ¶¶28–30, explaining, "I did not want Clayton to know where I had gone for the appointment. To conceal that information, I modified the image to change the facility name from Planned Parenthood to SMIL (Scottsdale Medical Imaging), and I also changed the date from July 2, 2023 to July 7, 2023."]

Putting aside the extreme lapse in judgment that resulted in Laura providing a modified, non-authentic sonogram to Clayton (again, *before* this action was filed), Laura steadfastly maintained the sonogram was otherwise genuine. On that point, Laura's affidavit was clear:

> Other than changing the top part of the image to alter the facility name and date, I did not change any other part of the image. This image was taken at Planned Parenthood in California on July 2, 2023. I did not find this image online, and I did not take someone else's image and pretend it was mine. I obviously regret doing

this, but I made a mistake due to the amount of stress, anxiety and depression I was experiencing.

[ROA 97 ep 29, ¶ 31] (emphasis in original).

Clearly, because Clayton's expert opined the *only* way to confirm a pregnancy was with a sonogram, Laura's testimony on this point was critical—if the sonogram was real, Laura's pregnancy was real. Of course, because Laura admitted to modifying the original sonogram to change the name from Planned Parenthood to SMIL, Clayton understandably did not believe, and wanted to independently verify, Laura's story.

But, there was another problem - according to Laura, she did not use her real name for the appointment at Planned Parenthood. As a result, Planned Parenthood could not verify the sonogram was taken there.

Laura's testimony on these issues was the subject of harsh cross-examination at trial by Clayton's counsel. During the colloquy, Clayton's counsel attempted to argue (using hearsay) that someone from Planned Parenthood claimed Laura's sonogram did not appear to be "consistent with ultrasound images generated by *their practice*" ("their practice" meaning a specific office in Mission Viejo, California which is located in Orange County, CA). [*See* ROA 129 ep 118–19]

On this point, the following trial testimony was offered:

BY MS. ARENA [Clayton's counsel]:

Q. And while you've indicated today that you went to Planned Parenthood under a fake name, this letter actually indicates that you had scheduled an appointment for July 2nd, but that you failed to attend?

BY MS. OWENS:

A. Correct.

Q. It also indicates that the ultrasound image that you claimed was from Planned Parenthood was not from Planned Parenthood because it was not consistent with ultrasound images generated by their practice, right?

A. Not by the one in Mission Viejo, correct.

Q. Ms. Owens, these are yes or no questions. This document states that the ultrasound image you have claimed is from Planned Parenthood is not consistent with ultrasound images generated by their practice, right?

A. By that practice. But as they said, it -- I could have been seen by another -- different ent- -- entity.

Q. Ms. Owens, you're well aware that this request covered all of Orange County and San Bernardino, Cal- --

A. <u>It didn't cover Los Angeles, though.</u>

Q. So now you're saying <u>you went to Planned Parenthood in Los Angeles?</u>

A. <u>Yes</u>.

Q. So you're telling us you went to Planned Parenthood in Los Angeles on the day of trial, today?

A. Yes.

Q. Okay. When did you go to Planned Parenthood in Los Angeles?

A. Exactly when I said I went.

Q. When was that?

A. July 2nd [2023].

[ROA 129 ep 118–19, trial transcript at p. 60:5–61:11]

To summarize the key events—prior to trial, Laura always maintained she went to Planned Parenthood in California on July 2, 2023 and had a sonogram done at that time. Originally, when asked to identity the specific address of the facility she went to, Laura said she went to a location in Mission Viejo, which is a city in Orange County, California.

At trial, when pressed about this claim, Laura changed her testimony and said the location she went to was actually somewhere in *Los Angeles*, not Mission Viejo. Why is that address change SO important?

Here's why: unbeknownst to anyone at trial (because the business hours of Planned Parenthood were never discussed at trial, as the transcript plainly shows), after the trial ended, several of Clayton's "fans" conducted research which they claimed showed Planned Parenthood locations in *Orange County* have different office hours than those in *Los Angeles*.

According to these online sleuths, Planned Parenthood locations in Orange County are open on Sundays, but offices in Los Angeles county are **closed on Sundays**. [ROA 129 ep 20-21] This information (if accurate) would appear to directly contradict Laura's claim that she went to a Planned Parenthood location in Los Angeles on July 2, 2023, because as the calendar shows – that day was, in fact, a Sunday.

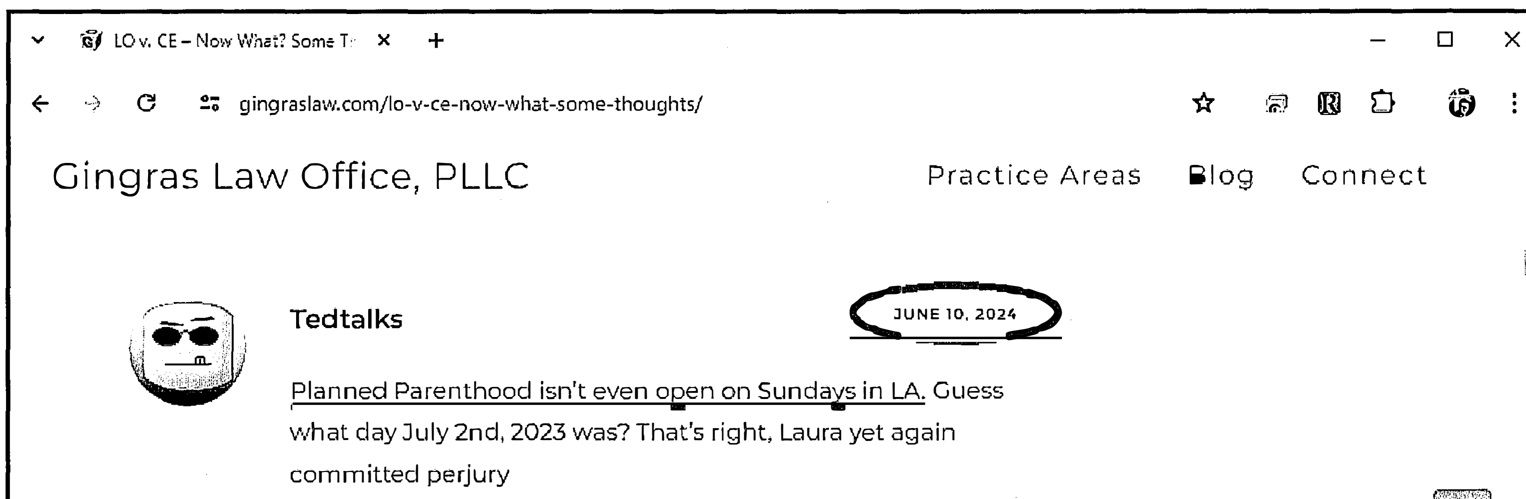
Again, when understanding this problem, it is essential to consider prior to the day of trial, Laura never said she went to Planned Parenthood in Los Angeles. She always claimed she went to the Mission Viejo location in Orange County (which IS open Sunday).

This is why Clayton's counsel (rightly) expressed such surprise and frustration at Laura's change in testimony; "So you're telling us you went to Planned Parenthood in Los Angeles *on the day of trial, today*?" [ROA 129 ep 119, trial transcript at p. 61:3–5] (emphasis added) Prior to that moment, Laura never said anything about visiting a Planned Parenthood location in Los Angeles. But Planned Parenthood locations in Orange County *are* open on Sunday, so that meant Laura's testimony about going to Planned Parenthood in Mission Viejo on July 2, 2023 (a Sunday) was a non-issue—until the very moment Laura's story changed at trial.

This proves several key points. First, it explains why Dr. Deans was never asked about Planned Parenthood being closed on Sundays in Los Angeles. Putting aside the fact that she never claimed to have worked at Planned Parenthood *in California* and thus lacked personal knowledge of this point (her only work experience for Planned Parenthood was on the East Coast), Dr. Deans had no reason to discuss the business hours of Planned Parenthood in California for one very simple reason—no one in the courtroom had *any idea* Los Angeles Planned Parenthood locations have different business hours than those in neighboring Orange County, nor did anyone realize (or mention) Planned Parenthood locations in Los Angeles are closed on Sunday. That information was *only* discovered by Clayton's supporters who posted about it on social media *after the trial ended.*

This is why it is so clear the trial judge violated Laura's rights by performing a secret, independent investigation into the facts which included reviewing (and adopting as fact) statements posted on social media. Like everyone else in court (who were oblivious to the problem at the time) the trial judge could not possibly have known about the "closed on Sunday" issue unless she viewed social media posts *after the trial was over*, because those posts were the first and only instance where the issue was ever raised.

While it is impossible to know exactly *what* websites the trial judge reviewed, Laura's Notice of Change of Judge offered examples of social media posts (made by anonymous third parties on Twitter and the website of undersigned counsel) after the trial was over where the issue of Planned Parenthood's business hours was *emphatically* celebrated [ROA 129 ep. 20]:



In light of this evidence, it was plainly wrong for the Presiding Judge to suggest Laura offered nothing but "mere speculation and suspicion when alleging that Judge Mata engaged in a 'secret, undisclosed investigation' ...." [ROA 136, ep. 5] To be sure, because Laura asked for an evidentiary hearing on this issue, which the Presiding Judge denied [*see id.*], it is impossible to know precisely *where* the trial judge found the online statements claiming that "all Planned Parenthood locations [in Los Angeles] are CLOSED on a SUNDAY."

But that does not matter. It is clear with 100% certainty that the source cited by the trial judge—Dr. Deans—never said anything about the business hours of Planned Parenthood in Los Angeles. Given that fact, and given that Clayton's fame-obsessed fans DID vociferously post about this issue online hours after the trial ended, the only plausible conclusion is that the trial judge did exactly what Laura claimed—after the trial ended, she went online and performed an undisclosed investigation into the facts, and she then tried to conceal that misconduct by falsely attributing the testimony to Dr. Deans (who said no such thing). In this way, by performing her own investigation into the facts, the trial judge committed structural error which violated Laura's constitutional right to a fair trial.

The law supporting this point was discussed extensively in Laura's Motion for New Trial. [ROA 132] In short, virtually every court that has considered similar facts agrees—when a trial judge independently investigates the facts of a case, that conduct constitutes structural error entitling the affected party to a new trial *automatically*, without regard to harmless error analysis.

The Arizona Supreme Court embraces the same standard:

> In cases involving trial error, we consider whether the error, so assessed, was harmless beyond a reasonable doubt. If so, we uphold the verdict entered. In a limited number of cases, however, structural error occurs. In such instances, *we automatically reverse the guilty verdict entered*. Unlike trial errors, structural errors deprive defendants of basic protections without which a ... trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no ... punishment may be regarded as fundamentally fair.

State v. Ring, 204 Ariz. 534, 552 (Ariz. 2003) (emphasis added) (cleaned up).

Presumably due to the high ethical standards of most Arizona jurists, comparable instances of a judge conducting an undisclosed investigation into the facts of a case and then adopting findings based on that investigation, as occurred here, are essentially non-existent. However, courts in other states, applying the same constitutional standards, are in unanimous agreement – it is structural error, requiring automatic reversal, when a trial

judge independently investigates the facts of a case. This is so because the bedrock due process requirement of fairness: "requires that conclusions reached by the trier of fact be based upon the facts in evidence, and prohibits the trier of fact from reaching conclusions based on evidence sought or obtained beyond that adduced in court." *State v. Dorsey*, 701 N.W.2d 238, 249–50 (Minn. 2005) (emphasis added) (citing *Johnson v. Hillstrom*, 37 Minn. 122, 123, 33 N.W. 547, 548 (1887)).

Thus, if a judge (especially in a bench trial) personally investigates the facts of a dispute, or makes findings based on his/her own independent research or knowledge (rather than based on evidence admitted at trial), this conduct is a *per se* violation of the Due Process Clause which constitutes structural, not harmless, error:

> First, the judge--sitting as the finder of fact--indicated by her comments during Worthy's testimony that she believed, based on facts not in evidence, that Worthy's statements about the date of Paige's death were likely false. These comments disregarded the judge's duty as the finder of fact to make factual determinations solely on the basis of evidence in the record.
>
> Second, the judge independently investigated a fact not introduced into evidence, violating her obligation as the finder of fact to refrain from seeking or obtaining evidence outside that presented by the parties during the trial. In *Price Bros. Co. v. Phila. Gear Co.*, the Sixth Circuit Court of Appeals stated: "Unquestionably, it would be impermissible for a trial judge to

deliberately set about gathering facts outside the record of a bench trial over which he was to preside."

Dorsey, 701 N.W.2nd at 250 (emphasis added) (cleaned up) (reversing defendant's conviction and ordering new trial, upon finding trial judge conducted improper *ex parte* investigation into the facts of the case) (quoting *Smith v. State*, 64 Md. App. 625, 498 A.2d 284, 285–86 (Md. Ct. Spec. App. 1985) (citing *People v. Wallenberg*, 24 Ill. 2d 350, 181 N.E.2d 143, 145 (Ill. 1962) (ordering new trial where judge in bench trial considered facts not admitted into evidence in reaching his conclusion)).

Of course, judges *are* permitted to consider facts outside the record if those facts are proper subjects of judicial notice. However, as the American Bar Association has explained, the business hours of Planned Parenthood in July 2023 would *not* fall within that exception. *See* American Bar Ass'n Formal Opinion 478, *Independent Factual Research by Judges Via the Internet*, Dec. 8, 2017 (explaining a judge may not use an Internet search to determine hours of operation of a business, nor are business hours properly subject to judicial notice; "This [internet] search violates Rule 2.9(C) of the Model Code of Judicial Conduct because the restaurant's hours of operation are key to whether the plaintiff could prevail ....")

When a judge ignores these most basic principles and conducts an independent investigation, the result is structural error requiring *automatic* reversal. This is true regardless of whether the *ex parte* evidence found by the judge is true, false, or completely accurate:

> We conclude that Dorsey was deprived of the basic protection of an impartial judge and finder of fact when the judge independently investigated a factual assertion made by a key defense witness and revealed the results of her investigation to counsel. This deprivation constituted a structural error, which precludes harmless-error analysis and requires that we reverse *without regard to the evidence* in Dorsey's particular case.

Dorsey, 701 N.W.2nd at 253 (emphasis added) (cleaned up) (citing/quoting *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991)); *see also A.W. v. L.M.Y.*, 457 P.23d 216 (Kan.App. 2020) (reversing, in a family law case, trial court's order vacating stalking order where judge investigated facts independently; "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.") (citing *Marriage of DePriest*, 422 P.3d 687, 2018 WL 3485722, at *4 (Kan. App. 2018)); *State v. McCorquodale*, 2021 WL 5446915 (Minn. App. 2021) (reversing conviction, and ordering a new trial before different judge where: "the district court made an important finding of fact

that is not based on any evidence introduced at trial but, rather, is based on facts otherwise known or believed by the district court judge .... The district court's error is a structural error [that] requires automatic reversal of the conviction and a new trial.")

Although the Presiding Judge attempted to minimize the misconduct of her colleague by suggesting "this singular factual finding [regarding the business hours of Planned Parenthood] is of little to no importance given the rest of the findings in the July 17 [sic] Ruling[]" [ROA 136 ep. 5], that conclusion applied the *wrong* legal standard. It was also factually incorrect given that the issue of Planned Parenthood's hours was *vitally* important.

This is so because harmless error analysis does not apply to structural error. *See State v. Valverde*, 220 Ariz. 582, 585, ¶ 10 (2009) (explaining if structural error exists, reversal is required regardless whether the defendant objected in superior court and without the need for any separate showing of resulting prejudice); *see also State v. Anderson*, 197 Ariz. 314, 323–24, ¶ 22 (2000) (structural errors "create 'defects . . . in the trial mechanism' itself [and] affect the 'entire conduct of the trial from beginning to end,' damag[ing] 'the framework within which the trial proceeds.'" (ellipsis in original) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309–10 (1991)).

For those reasons, although this Court should *not* force the parties to waste any further time or resources on a retrial (because the safe harbor issue discussed above is dispositive), the lower court's judgment must be reversed because the trial judge committed structural error which violated Laura's constitutional right to a fair trial.

C. The Award of Fees/Sanctions Under A.R.S. § 25–324 and/or 25-415 Was Plainly Erroneous

1. Citations to Record & Standard of Review

If the Court reverses for either or both reasons set forth above, it need not reach any other arguments. However, Laura raised the trial court's erroneous award of sanctions under A.R.S. § 25–324 (and other authority) in her Motion for New Trial (and other relief). [ROA 132 ep 19–20]. As noted above, the Motion for New Trial was denied by a one-line minute entry order dated Sept. 6, 2024. [ROA 140]

As also noted above, when sanctions are challenged on factual grounds, abuse of discretion applies. *Villa De Jardines*, 227 Ariz. at 96. However, the legal basis is challenged, review is *de novo*; "[W]hether the basis for awarding fees is proper is an issue of law that we review *de novo*." *Id.*

2. Discussion

In addition to sanctioning Laura under Rule 26, the trial court also cited A.R.S. § 25–324 as a separate basis for a fee award. [ROA 126 ep 16] However, as Laura explained in her Motion for New Trial, [ROA 132 ep 19–20], by its own terms, A.R.S. § 25–324 does not apply to paternity proceedings; it only applies to "the costs and expenses of maintaining or defending any proceeding under this chapter [3] or chapter 4, article 1 of this title." (emphasis added) By definition, this does not include statutory paternity proceedings under A.R.S. title 25, *chapter 6*.

That motion further explained that although the correct statute (A.R.S. § 25-809(g)) does permit fees to be awarded where a party has engaged in unreasonable litigation conduct and such conduct necessarily caused the other party to incur fees/costs, the facts here could not support such an award because, once again, Laura attempted to invoke the safe harbor provisions of Rule 26 by moving to dismiss her petition *before* the vast majority of Clayton's legal fees were incurred and before any fees were actually necessary. Again, it was undisputed that both Clayton and Laura were *pro se* from the time the original petition was filed on August 1, 2023 until Clayton retained counsel who appeared in mid-December 2023.

At the time Laura moved to dismiss (December 28, 2023; ROA 37] Laura had miscarried over a month earlier, and the case was set for administrative dismissal. Laura did nothing whatsoever to keep the case active once she learned she was no longer pregnant. While perhaps it would have been preferable for Laura to notify the court of her intent to dismiss sooner, this delay did not cause Clayton to incur legal fees; the case was already scheduled for dismissal due to a lack of activity *before* Clayton's counsel even appeared. [ROA 30]

If Clayton's counsel had done nothing, the case would have been dismissed without a single dollar of fees incurred by either side. The only reason that did not occur was Clayton's decision to file his Rule 26 motion for sanctions (which he later withdrew). For that reason, there was no factual or legal basis for an award of fees under A.R.S. § 25-809(g) because even assuming *arguendo* the original filing of the petition was unreasonable, that act did not cause any fees to be incurred, since the action was scheduled for dismissal *before* Clayton even retained counsel.

Similarly, the trial court found sanctions were justified because: "Laura Owens knowingly presented a false claim, knowingly violated a court order compelling disclosure or discovery such that an award of

attorney fees and costs is appropriate under A.R.S. § 25-415." That holding was also incorrect as a matter of law and must be reversed.

This is so because by its own terms, A.R.S. § 25–415 permits sanctions when a party has "presented a false claim under section 25-403, 25-403.03 or 25-403.04 with knowledge that the claim was false." But none of those statutory provisions applied here. A.R.S. § 25-403 involves issues such as "legal decision-making and parenting time". A.R.S. § 25-403.03 addresses issues of domestic violence, while A.R.S. § 25-403.04 permits a court to consider "that a parent has abused drugs or alcohol or has been convicted of any drug offense" when making custody determinations.

Clearly, there was no basis for the court to conclude that Laura knowingly presented a false claim under A.R.S. § 25-403, 25-403.03 or 25-403.04. This was a simple paternity establishment proceeding which, unfortunately, ended without the birth of any child/children. Therefore there was no basis for the court to find that Laura made a false claim under A.R.S. § 25-403, 403.03 or 403.04 because none of those statutes applied here.

Of course, A.R.S. § 25–415 also permits sanctions if a party has "Violated a court order compelling disclosure or discovery ...." But here, there was literally no basis for the court to hold that Laura violated any order

compelling discovery. Specifically, in the proceedings below the court did grant one Motion to Compel resulting in a single disclosure order. [ROA 87] That order required Laura to provide five categories of information, but Laura fully complied with that order by disclosing all required information.

Indeed, that point is demonstrated by the fact Clayton never brought any motion seeking sanctions under A.R.S. § 25–415. Had he done so, naturally Laura would have responded with evidence proving she fully complied with every aspect of the court's discovery order. But Laura had no opportunity to offer that explanation because no motion was ever filed seeking sanctions under A.R.S. § 25–415 (or any of the other authority cited in the trial court's June 17th ruling. That fact alone warrants reversal of the trial court's judgment to the extent it found sanctions were proper under A.R.S. § 25–324, A.R.S. § 25–415 and/or A.R.S. § 25-809(g).

D. The Award of Fees Was Erroneous Because The Fees Incurred Were Not Necessary Nor Reasonable

1. Citations to Record & Standard of Review

Here, after Clayton applied for fees and costs, Laura objected. [ROA 135] Among other things, Laura noted an award of fees was *factually* improper for one simple reason—because Clayton did not incur any fees

prior to the time the case was scheduled for administrative dismissal. [ROA 135 ep 2–3; 11] Laura also noted the *amount* of fees was patently unreasonable in light of the controlling standard of ER 1.5. [*See id.* Ep 7–11] The trial court never expressly ruled on Laura's objection, but it was implicitly denied when the court granted Clayton's request for fees. [ROA 137]

As noted several times above, when a fee award is challenged on factual grounds, an abuse of discretion standard applies. *Villa De Jardines*, 227 Ariz. at 96. A court abuses its discretion when its discretion is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Silence v. Betts*, 553 P.3d 192, 195 (App. 2024) (quoting *Tilley v. Delci*, 220 Ariz. 233, 238, 204 P.3d 1082, ¶ 16 (App. 2009)).

2. Discussion

Again, because this appeal may be fully resolved on other grounds, the Court need not address this point. However, it is worth briefly explaining that even if Clayton's position was correct, and even if the trial court had the ability to sanction Laura under Rule 26 (or any other legal authority) that does not mean the award of nearly $150,000 in fees was appropriate here.

The simple fact remains that even if Clayton's factual allegations are true, and even if Laura was never pregnant (which she obviously disputes as vigorously as possible), the filing of Laura's petition did not cause Clayton to incur $150,000 in fees and costs. This is so because both parties were *pro se* during the entire period between the initial filing of the petition on August 1, 2023, and the time when Laura learned she miscarried in November 2023.

Had Clayton's counsel simply picked up the phone in mid-December and asked Laura about her intentions (as Family Law Rule 9(c) required him to do), she would have informed him that she was no longer pregnant, and there was nothing further to litigate. Again, at that point, Clayton's fees were literally $0.

There is simply no legal authority of any kind to support what occurred here—Clayton asked the trial court to *force* Laura to *involuntarily* continue litigating this matter, and he then asked the court to *sanction her for continuing to litigate this matter*. The trial court's decision to permit this sham was clearly an abuse of discretion in every sense of the term. For that reason, *even if* all of Laura's other arguments are rejected, this Court should still reverse the fee award in its entirety on the basis the trial court abused its discretion in both the legal and factual basis for the award.

E. Laura Is Entitled To Fees On Appeal

Pursuant to Ariz. R. Civ. App. P. 21(a), Laura gives notice that she seeks an award of attorney's fees incurred in this appeal pursuant to A.R.S. § 25-809(G) (permitting, in any paternity proceeding, award of "attorney fees, deposition costs, appellate costs and other reasonable expenses the court determines were necessary.")

In the proceedings below, Clayton committed multiple violations of the Rules of Family Law Procedure including, but not limited to, filing a Rule 26 Motion for Sanctions without complying with the procedural prerequisites of that rule. Of course, Clayton later *withdrew* his Rule 26 motion (after Laura's counsel threatened to seek sanctions under Rule 26 on the basis Clayton's actions violated that rule). Because Clayton invoked the safe harbor of Rule 26, Laura is *not* requesting sanctions against him under that rule.

Nevertheless, Clayton's *other* conduct is more than sufficient to entitle Laura to fees under A.R.S. § 25-809(G). Clayton continued to aggressively litigate this *paternity establishment* action despite knowing Laura was no longer pregnant. That fact alone was and is sufficiently unreasonable to entitle Laura to her fees on this appeal.

V. CONCLUSION

For the reasons stated above, Laura respectfully asks this Court to reverse the trial court's judgment in its entirety, and remand this matter with instructions to dismiss the case with prejudice. In the alternative, Laura requests an order reversing the judgment and remanding this matter for a new trial. In either case, Laura also requests an award of fees and costs incurred in this appeal.

DATED November 14, 2024.

GINGRAS LAW OFFICE, PLLC

David S. Gingras
Attorney for Petitioner/Appellant
Laura Owens

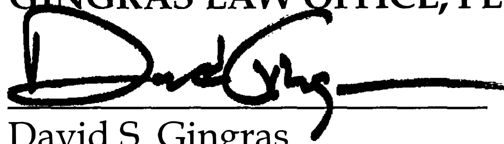
CERTIFICATE OF COMPLIANCE

Pursuant to Ariz. R. Civ. App. P. 14, 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 13,952 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 November 14, 2024.

GINGRAS LAW OFFICE, PLLC



David S. Gingras
Attorney for Petitioner/Appellant
Laura Owens

CERTIFICATE OF SERVICE

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

Gregg R. Woodnick, Esq.
Markus Risinger, Esq.
Deandra M. Arena, Esq.
Isabel Ranney, Esq.
WOODNICK LAW, PLLC
1747 E. Morten Avenue, Suite 205
Phoenix, Arizona 85020
Attorneys for Appellee Clayton Echard

DATED November 14, 2024.

GINGRAS LAW OFFICE, PLLC

David S. Gingras
Attorney for Petitioner/Appellant
Laura Owens