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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

28 U.S.C. § 1927 (emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Issue 5 – Laura Is Entitled To Fees

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

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

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

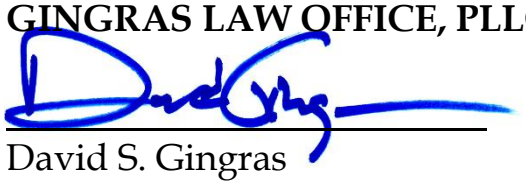
That fact alone, and Clayton's otherwise unreasonable positions in this appeal, warrant an award of fees to Laura.

III. CONCLUSION

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

DATED January 30, 2025.

GINGRAS LAW OFFICE, PLLC



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CERTIFICATE OF COMPLIANCE

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

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

DATED January 30, 2025.

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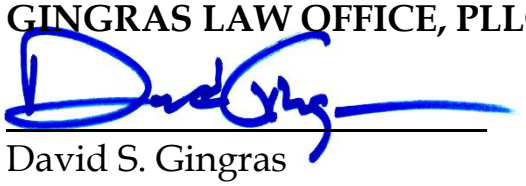

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CERTIFICATE OF SERVICE

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

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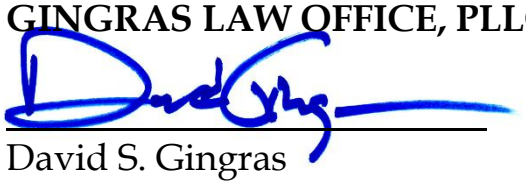

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