No. _____

In The

Supreme Court of the United States

KRISTIN ROEBUCK BETHELL,

Petitioner,

v.

BRYAN M. STEPHENS,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Arizona

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether counsel Roebuck Bethell's Petition for Writ of Certiorari should be granted after she was sanctioned by the Arizona courts for: (1) believing her own client's verified statement; and (2) for stating in writing that her client was not vindictive, even though such rulings go against the very heart of what it means to be an advocate and conflict with other decisions from state courts of last resort as well as federal decisions.

LIST OF THE PARTIES

PETITIONER: KRISTIN ROEBUCK BETHELL

RESPONDENT: BRYAN M. STEPHENS

REAL PARTIES IN INTEREST: THE HON. PAUL J. MCMURDIE, THE HON. LAWRENCE F. WINTHROP, and THE HON. JENNIFER B. CAMPBELL, Judges of the Court of Appeals

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On August 10, 2016, the Hon. Judge Stephen M. Hopkins, of the Arizona Superior Court, entered a minute entry requesting that Father, Bryan M. Stephens ("Father"), submit a memorandum on why, Mother, Slava Kostadinova ("Mother"), or her attorney, Kristin Roebuck Bethell ("Counsel"), should be sanctioned pursuant to Rule 31 of the Arizona Rules of Civil Procedure. (Appendix ("APP"), APP00007-00010).

On September 28, 2018, Judge Hopkins, following the requested memorandum, determined that Father was entitled to attorney's fees. Judge Hopkins awarded Father his reasonable attorney's fees. (APP00013-00016). On December 14, 2016, Judge Hopkins issued a Judgment For Attorney's Fees against Mother in the amount of $5684.50 and included Father's $52.50 in expenses. (APP00017-00018). On the same day, Judge Hopkins also denied Mother's Motion For New Trial and/or Amended Judgment Pursuant to Rule 83, *A.R.F.L.P.* (APP00019-00020). On January 11, 2017, Judge Hopkins entered a *nunc pro tunc* order on the Judgment For Attorney's Fees charging Counsel with the sanction instead of Mother. (APP00021-00022).

On March 15, 2018, the Court of Appeals of Arizona, issued its Memorandum Decision which is cited at: *Kostadinova v. Stephens*, 1 CA-CV 17-0099 FC, 2018 WL 1321498 (App. Mar. 15, 2018), *review denied* (Nov. 19, 2018). (APP00001-00006). On April 26, 2018, the Arizona appellate court also issued their Order

Regarding The Granting Of Attorney's Fees and Costs. (APP00023-00024).

On November 19, 2018, the Arizona Supreme Court denied Counsel's Petition for Review. (APP00025).

JURISDICTION

On November 19, 2018, the Arizona Supreme Court denied Counsel's Petition For Review exhausting her state court remedies. The Arizona appellate court's memorandum decision was issued on March 15, 2018. Following Counsel's Motion For Reconsideration, the Arizona appellate court vacated the portion of its memorandum decision awarding Father his attorney's fees and costs on appeal on April 26, 2018.

The Jurisdiction of this Court to review the memorandum decision of the Arizona appellate court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS AT ISSUE

The United States Constitution, Amendment Fourteen

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 31, Arizona Rules of Family Law Procedure

A. Signing of Pleadings, Motions and Other Papers; Sanctions.

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleads need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of the litigation. If a pleading, motion or other paper is not

signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, including a reasonable attorney's fee.

Rule 11, Federal Rules of Civil Procedure

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge,

information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) 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; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) Sanctions.

(1) ***In General.*** If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) ***Motion for Sanctions.*** A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under *Rule 5*, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) ***On the Court's Initiative.*** On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) ***Nature of a Sanction.*** A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) ***Limitations on Monetary Sanctions.*** The court must not impose a monetary sanction:

> **(A)** against a represented party for violating Rule 11(b)(2); or
>
> **(B)** on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.
>
> **(6)** ***Requirements for an Order.*** An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.
>
> **(d) Inapplicability to Discovery.** This rule does not apply to disclosures and discovery requests, responses, objections, and motions under *Rules 26* through *37*.

STATEMENT OF THE CASE

Counsel, Kristin Roebuck Bethell ("Counsel"), was sanctioned by the Arizona trial court for believing her client's declaration that the facts contained in Counsel's response to Father's (second) Request For Protected Address were true. (APP00026-00044). Attached to Counsel's Response was the following:

DECLARATION

> I, SLAVA KOSTADINOVA, under penalty of perjury do hereby swear, avow and affirm that I am the Petitioner/Mother in the above-entitled and numbered case, that I have read the foregoing Response To Request For Protected

> Address and knows the contents thereof; that the matters herein set forth are true and correct upon information and belief.

(APP00049).

On August 10, 2016, the Arizona trial court determined: "that no later than **August 22, 2016** counsel for Father may file with the Court a legal memorandum addressing whether Mother and/or her counsel should be sanctioned pursuant to Rule 31 of the Arizona Rules of Family Law Procedure based upon the filing of the Response." (APP00012).

On June 20, 2016, the Arizona trial court had determined, *inter alia*, that:

> It is undisputed that Father has not provided his residence address. This is a court requirement and a typical order in Family Court in child custody cases so that information regarding a parent's living circumstances can be discovered. However, Rule 7 of the Arizona Rules of Family Law Procedure provides for protected or unpublished addresses. **Father has never requested a protected address under Rule 7, *nor do Father's reasons articulated to date satisfy the requirements of Rule 7***.

(APP00026-00044) (Emphasis added). On July 6, 2016, Father, again, renewed his request to protect his address pursuant to Rule 7, A.R.F.L.P. This time Father only added to that request *that Mother was vindictive*. (APP00026-00044). This one new adjective was the only change from Father's previously denied request.

In response to Father's request, Counsel's response included the declaration (under the penalty of perjury) of Mother that she had read the document and that all of the contents were true and correct based upon her knowledge. (APP00026-00044). In the response, Counsel added the following statement to contradict Father's bald accusation of "vindictiveness" by Mother: "Mother has done nothing vindictive in this case and has always acted in the best interest of the minor child." (APP00026-00044).

Subsequently, the Arizona trial court determined that sanctions pursuant to Rule 31, A.R.F.L.P. were necessary and found:

> Here, Mother raised **essentially two separate arguments**. First, Mother ***claimed that Father was requesting a protected address to protect him from his own former business associates***. But, Mother never provided a shred of evidence, or even argument, that these former business associates would not engage in conduct that might be inappropriate. [. . .] Rather than address this question, Mother simply engaged in a continued personal attack regarding issues that had been made moot by the agreement.
>
> ***Second, Mother claimed that she was entitled to know Father's address as being reflective of a best interest finding.*** This claim was entirely pretextual. After years of litigation and arduous and protracted litigation the parties entered into a settlement that was specific and detailed. If Mother

> had thought Father's physical address was an essential item, the agreement never would have been reached. Again, rather than acknowledge that the agreement made this issue entirely moot, Mother referenced a police report from three years ago, and even more incredibly requested an award of attorney fees for responding to the request for protected address. The positions taken by counsel on Mother's behalf were objectively unreasonable.

(APP00013-00016) (Emphasis added). Additionally, the trial court pinned the label of a "shill" on Counsel for arguing her client's position. (APP00013-00016). The trial court did not hold any evidentiary hearings despite Counsel's specific request for one. (APP00026-00044).

Counsel was hired on March 14, 2016, three years into the litigation in this matter, was sanctioned for believing her client. Furthermore, the Arizona appellate court affirmed the sanction while adding new findings never before made and without any evidentiary hearing at any time. Furthermore, the Arizona appellate court affirmed the ruling despite the reasoning of the Arizona trial court that Counsel should have been aware of rulings and decisions by Mother to file for bankruptcy that occurred after the filing of the response to Father's Request for Protected Address.

Specifically, the Arizona trial court stated:

> Here, counsel knew or should have known that the Court would find Mother's conduct to

> be unreasonable. At the same time, Mother was in the process of filing for bankruptcy protection, apparently in the hopes she would not [be] ordered to pay Father's attorney fees. Given that with Mother's bankruptcy filing she may have felt immune from an award of fees counsel should have been especially diligent to ensure that only meritorious and reasonable legal positions would be taken. Counsel has a responsibility to the legal system to act as an officer of the Court and not merely a shill for the client, continuing this pattern of unreasonable conduct.

(APP00013-00016). To be clear, Counsel filed the response to Father's Request For Protected Address on July 26, 2016. The Arizona trial court found Mother acted unreasonably in not signing the settlement agreement on August 9, 2016. Mother filed for divorce on August 5, 2016. All of these actions occurred after Counsel filed the response in question.

At the time Counsel filed her response to Father's Request For Protected Address, the following facts were available and cannot be disputed:

- Dr. David Weinstock stated: "It is recommended that both parents share information as to where Zane will be staying overnight during each parent's standard parenting time (e.g. each home address)." (APP00026-00044).
- The settlement agreement argued by Father to be enforceable stated: "Each parent shall notify the other of a change of

> address and/or phone number, within ten (10) days of such a change." (APP00026-00044).

It was clear to Counsel that her original request for Father to provide his address, the original objection to Father's address being protected, and the subsequent Response to Father's Request For Protected Address were all reasonable. Furthermore, each and every word was read by Mother and declared under the penalty of perjury to be true and correct.

The Arizona appellate court affirmed the Arizona trial court's sanction of Mother. While the memorandum decision is not precedential, pursuant to Arizona Rules of Supreme Court, Rule 111, the decision has persuasive authority.

Additionally, the Arizona appellate court made two brand new findings never made previously: (1) "Counsel's statement that Mother promised not to disclose Father's address to anyone was not credible given Mother's previously taken positions and allegations"; and (2) "Moreover, Counsel represented to the court Mother has done nothing vindictive in this case, which, on this record, was groundless, unjustified, and specious position." (APP00001-00006). The Arizona appellate court made these new findings without any evidentiary hearing. No evidentiary hearing was held in the Arizona trial court, nor was there ever any evidentiary hearing before the Arizona appellate court.

Following the memorandum decision of the Arizona appellate court, Counsel moved for reconsideration on

the Arizona appellate court's decision including, *inter alia*, the award of costs and attorneys' fees to Father for the appeal. On April 26, 2018, the Arizona appellate court vacated that portion of their decision awarding attorney's fees, but still awarded costs to Father. (APP00023-00024). While the attorney's fee issue was pending, Mother filed her Petition for Review with the Arizona Supreme Court. (APP00026-00044).

On November 19, 2018, the Arizona Supreme Court denied the Petition for Review filed by Counsel. (APP00025). On November 28, 2018, Counsel requested that the Arizona appellate court stay the issuance of the official mandate. This timely Petition for Certiorari follows.

REASONS WHY CERTIORARI SHOULD BE GRANTED

COUNSEL ROEBUCK BETHELL'S PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED AFTER SHE WAS SANCTIONED BY THE ARIZONA COURTS FOR: (1) BELIEVING HER OWN CLIENT'S VERIFIED STATEMENT; AND (2) FOR STATING IN WRITING THAT HER CLIENT WAS NOT VINDICTIVE, EVEN THOUGH SUCH RULINGS GO AGAINST THE VERY HEART OF WHAT IT MEANS TO BE AN ADVOCATE AND CONFLICT WITH OTHER DECISIONS FROM STATE COURTS OF LAST RESORT AS WELL AS FEDERAL DECISIONS.

A. Introduction

At first glance this case may not appear to be of the magnitude typically coming before this Court on a Petition for Certiorari. Here, a young lawyer, Kristin Roebuck Bethell, was sanctioned by the Arizona trial court (affirmed by the appellate court) for essentially believing her own client in a sworn statement supporting her Response and for writing in the trial court pleading that her client was not "vindictive" (after the other side asserted, she was "vindictive"). The sanction was a mere $5,000 in attorney's fees but goes to the heart of what it means to be an advocate in our system of jurisprudence. Although small in dollar amount, the issues in this Petition effect lawyers throughout Arizona and across the country. The essence of Counsel Roebuck Bethell's case is worthy of this court review: Do lawyers have a right to believe their own clients?

After the Appellate Court's decision basically stating that Counsel Roebuck Bethell did not have the right to believe her own client nor to describe her client as ***not*** vindictive, the role of an advocate is now blurred with apprehension and a sense of chilled restraint that equals nothing less than fear: (1) that any lawyer can be sanctioned by a Court (even without an evidentiary hearing) for merely standing up for her client; (2) when a lawyer attempts to deny descriptive allegations made against her client in the negative she will be sanctioned for such denial.

This case arises from a father's request to protect his address from the mother (Counsel's client) on an allegation that she would disclose his address to third parties. The trial court had already denied virtually the same request in the past. Counsel submitted a written Response to the request, which her client verified under oath to be true and correct. This action would have been taken by any reasonable and prudent lawyer under the circumstances. Nevertheless, the trial court granted father his protected address and ultimately sanctioned Counsel for filing that very Response pursuant to the family Court's rule (Rule 31, Arizona Rules of Family Law Procedure) similar to the Federal Rule of Civil Procedure, Rule 11. This was astonishing, because the basis of the Response was a previous ruling by the trial court denying virtually the same relief. In the trial court sanction, aside from the monetary penalty imposed the trial court actually called Counsel Roebuck Bethell the demeaning and negative name of a "shill" for her own client. A black

mark was placed upon the name of Ms. Roebuck Bethell who at that time had been practicing law only two years.

Even more astounding is when the Arizona Appellate Court found new bases for the sanctions rooted in the credibility of Counsel's client without any evidentiary hearing or finding below. This conflicts with state courts of the highest level and federal courts (including this court).

This Petition for Certiorari requests the Supreme Court to accept Review to defend the integrity of the legal system and protect the precious role of what it means to be an advocate in our system of justice. Therefore, while this case only pertains to one $5,000 sanction issued against one young lawyer, it affects all lawyers everywhere who are attempting to advocate for their clients.

This Court must intervene and prevent the sanction of Counsel for simply believing her client. There is no precedent from this Court which finally decides the issue of whether an attorney can believe their client when there is no evidence to contradict such belief. Here, absent any evidentiary hearing, the Arizona appellate court made two new credibility findings in affirming Counsel's sanction essentially authorizing Arizona trial courts to sanction a lawyer for responding to allegations of opposing counsel.

State and the federal courts have rules regarding the signing of pleadings, motions or other papers filed with them. In the Arizona family court, Rule 31

A.R.F.L.P. governs the signings of pleadings. Rule 31 reads in pertinent part:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of the litigation.

See Rule 31, A.R.F.L.P.

Similarly, Rule 11, Federal Rules of Civil Procedure, governs the signing of documents in federal court. Rule 11 reads in pertinent part:

> **(b) Representations to the Court.** By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> **(1)** it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

> **(2)** the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
>
> **(3)** 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; and
>
> **(4)** the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

See Rule 11, FRCP.

Here, the Arizona appellate court used Rule 11, Arizona Rules of Civil Procedure as an analogous rule when deciding this matter. *See Kostadinova*, 18 WL 1321498 at * 3, 14. So too here, Rule 11, FRCP cases that demonstrate legal precedent shall be used to interpret Rule 31, A.R.F.L.P. *See In re Marriage of Dougall*, 234 Ariz. 2, 6 ¶ 9, n. 5, ¶ 9 (App. 2013).

B. The Arizona Decision Conflicts with the North Carolina Supreme Court's Ruling together with the Ruling of the Second, Third, and Fifth Circuit Appellate Courts

The Arizona appellate court's memorandum decision which affirms the sanction of Counsel on reasoning that was determined subsequent to the filing of

Counsel's response conflicts with the North Carolina Supreme Court's decision in *Bryson v. Sullivan*, 330 N.C. 644, 655–57 (1992).

The North Carolina Supreme Court has stated in *Bryson* in pertinent part: "The text of the Rule requires that whether the document complies with the legal sufficiency prong of the Rule is determined as of the time it was signed." *Id.* at 657. Here, the Arizona appellate court went beyond what was known at the time of the filing.

In the present case, the Arizona trial court issued a ruling stating, as quoted previously, in pertinent part:

> Here, counsel knew or should have known that the Court would find Mother's conduct to be unreasonable. At the same time, Mother was in the process of filing for bankruptcy protection, apparently in the hopes she would not be ordered to pay Father's attorney fees.

(APP00014). Both of these occurrences happened subsequent to Counsel's response. The Arizona trial court found Mother's decision not to sign the settlement agreement unreasonable on August 9, 2016. Mother filed for Chapter 7 Bankruptcy on August 5, 2016. Both of these took place after Counsel filed her response on July 26, 2016.

The Bryson court stated: "We hold that reference should be made to the document itself, and the reasonableness of the belief that it is warranted by existing law should be judged as of the time the document was

signed." *Bryson*, 330 N.C. at 656 (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990) (violation of the Rule is complete when paper is signed); *Sheets v. Yamaha Motors Corp., U.S.A.*, 891 F.2d 533, 536 (5th Cir. 1990); *Thomas v. Capital Sec. Services, Inc.*, 836 F.2d 866, 874 (5th Cir. 1988) ("Like a snapshot, Rule 11 review focuses upon the instant when the picture is taken-when the signature is placed on the document."); *Oliveri v. Thompson*, 803 F.2d 1265, 1274 (2d Cir. 1986) ("Limiting the application of rule 11 to testing the attorney's conduct at the time a paper is signed is virtually mandated by the plain language of the rule.")).

The Arizona decision also conflicts with the ruling of the Second Circuit Court of Appeals opinion in *Oliveri*, 803 F.2d 1265, 1274. There the *Oliveri* court stated: "a district court should avoid taking the benefit of hindsight and instead focus on whether, *at the time it was signed*, the paper was well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." Here, in the present case, Counsel's response was reviewed with actions that took place subsequent to the signing of the document.

The Third Circuit Court of Appeals opinion in *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 94 (3d Cir. 1988), conflicts with the Arizona decision. In *Mary Ann Pensiero*, the Third Circuit specifically stated: "The wisdom of hindsight should be avoided; the attorney's conduct must be judged by "what was reasonable to believe at the time the pleading, motion, or other paper was submitted." *Id.* at 94. There, the Third Circuit

following the grant of summary judgment determined that the district court's imposition of Rule 11 sanctions was not warranted. At the time the complaint was filed, the attorney's prefiling inquiry was sufficient. *Id.* at 96. In so doing the Third Circuit stated: "The correct *Rule 11* inquiry is "whether, at the time he filed the complaint, counsel . . . *could* reasonably have argued in support" of his legal theory. *Id.* at 96 (quoting *Teamsters Local Union No. 430 v. Cement Exp., Inc.*, 841 F.2d 66, 70 (3d Cir. 1988)). Here, the inquiry of the Arizona trial court, affirmed by the Arizona appellate court, involved specific events which took place after the filing of Counsel's response.

Finally, the Fifth Circuit's decision in *Thomas*, 836 F.2d 866, determined *en banc* the proper procedure for imposition of sanctions under Rule 11. There, the Fifth Circuit stated:

> Like a snapshot, Rule 11 review focuses upon the instant when the picture is taken—when the signature is placed on the document. Rule 11 was promulgated for a particular purpose—to check abuses in the signing of pleadings.

Id. at 874. Here, unlike in *Thomas*, the Arizona courts have applied facts after the "snapshot" was taken when determining whether counsel should be sanctioned.

It is clear that the following facts existed prior to Counsel's filing:

- Dr. Weinstock's recommendation that the parties share their home address
- The settlement agreement requiring that each party inform the other party of a new address within ten days after the move.
- The trial court's previous decision that Father had not met the requirement of Rule 7, A.R.F.L.P., in a virtually similar argument to the one made in Father's Request For Protected Address.

The following facts did not exist at the time of Counsel's filing:

- The trial court would determine that Mother had taken unreasonable positions.
- Mother's filing for Chapter 7 Bankruptcy.

The trial court relied on these facts that only existed post Counsel's response in imposing the Rule 31, A.R.F.L.P. sanctions. Such action by the Arizona courts directly conflicts with the decisions of state courts of last resort and federal appellate court rulings. *See* Rule 10, Supreme Court Rules.

C. The Arizona Decision Finally Decides the Issue of Whether Counsel Is Entitled to Believe Her Client Which Should Be Determined by this Court

The Arizona courts have rendered a decision that stands for the proposition that an attorney is not entitled to believe their own client. However, this decision directly conflicts with *Xcentric Ventures, L.L.C. v. Borodkin*, 908 F. Supp. 2d 1040, 1048 (D. Ariz. 2012). *See also* 7A C.J.S. Attorney & Client § 344; Model Rules of Professional Conduct, Preamble [2].

In *Xcentric Ventures*, the Federal District Court of Arizona, in the context of malicious prosecution, determined in pertinent part: " 'In general, a lawyer is entitled to rely on information provided by the client. But [i]f the lawyer discovers the client's statements are false, the lawyer cannot rely on such statements in prosecuting an action.' " 908 F. Supp. 2d at 1048 (quoting *Daniels v. Robbins*, 182 Cal. App. 4th 204 (2010). There, the defendants filed a malicious prosecution claim against the plaintiffs' attorney. There, the clients corrected their affidavits after being provided with tape recordings which flatly contradicted the statement made by the clients in previous affidavits. The attorney in *Xcentric* had received correspondence that her clients had perjured themselves, and that all the claims made by the clients were groundless. *Id.* at 1044. The Arizona District Court stated:

> Without knowledge that her client has made specific false statements, an attorney "may, without being guilty of malicious prosecution,

> vigorously pursue litigation in which [s]he is unsure of whether h[er] client or the client's adversary is truthful, so long as that issue is genuinely in doubt."

Id. at 1048–49. Here, in the present matter there was never any evidence that Mother had made false statements, or any other evidence to demonstrate that Mother's statements were false.

Here, Counsel filed a Response to Father's request to protect his address which was verified true and correct by Mother herself. Attached to Counsel's response was the following statement:

DECLARATION

> I, SLAVA KOSTADINOVA, under penalty of perjury do hereby swear, avow and affirm that I am the Petitioner/Mother in the above-entitled and numbered case, that I have read the foregoing Response To Request For Protected Address and knows the contents thereof; that the matters herein set forth are true and correct upon information and belief.

(APP00049). Mother declared under penalty of perjury that the contents of the Response were true and correct.

In the Arizona appellate court's memorandum decision, that court made two new findings, never before issued, to support the affirmance of the sanction of Counsel. First, the appellate court found in pertinent part: "Counsel's statement that Mother promised not to disclose Father's address to anyone was not credible

given Mother's previously taken positions and allegations." *See Kostadinova*, 2018 WL 1321498 at ¶ 14. Second, the Arizona appellate court additionally found: "Moreover, Counsel represented to the court 'Mother has done nothing vindictive in this case,' which, on this record, was groundless, unjustified, and specious position." *See Id.* In so doing the Arizona appellate court affirmed a decision that attorneys were not able to believe their clients which conflicts with the opinions of state courts of last resort together with Federal appellate courts.

The overriding principle entrenched among Rule 11 cases is: Specific findings are required by the trial court regarding the sanctioned conduct to avoid the harsh light of hindsight. *See Cooter & Gell*, 496 U.S. at 395; *Oliveri*, 803 F.2d at 1274; *Mary Ann Pensiero, Inc.*, 847 F.2d at 94; *Thomas*, 836 F.2d at 874; *Bryson*, 330 N.C. at 656.

The Arizona appellate court decision also conflicts with the fact that Counsel should be entitled to believe her client. *See Xcentric Ventures, L.L.C.*, 908 F. Supp. 2d at 1048. Such an issue of whether an attorney can believe their client must be decided by this Court.

Finally, it is also well established in the United States that the Due Process clause of the Fourteenth Amendment requires that credibility of a witness be determined only after an evidentiary hearing. *See Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). Prior to the Arizona appellate court's memorandum decision there

was never an evidentiary hearing where Mother was permitted to testify.

The Arizona appellate court stated in pertinent part: "The reasonableness of a factual inquiry depends on the totality of the circumstances, which may change as the case progresses." *Kostadinova*, 2018 WL 1321498 at ¶13 (citing *Wright v. Hills*, 161 Ariz. 583, 590 (App. 1989) ("An attorney is obligated to review and examine his [or her] position as facts of the case are developed, and . . . he [or she] may be obligated to reevaluate his [or her] earlier certification under Rule 11.")). Here, absent any evidentiary hearing, the Arizona appellate court independently made two new findings in affirming the Arizona trial court's decision to sanction counsel.

The Arizona appellate court specifically found:

> Counsel's statement that Mother promised not to disclose Father's address to anyone was not credible given Mother's previously taken positions and allegations. [. . .] Moreover, Counsel represented to the court "Mother has done nothing vindictive in this case," which, on this record, was a groundless, unjustified, and specious position.

See Kostadinova, 2018 WL 1321498 at * 3, ¶ 14. Neither of these findings were made by the Arizona trial court, nor was there any evidentiary hearing in the present matter.

In *Goldberg*, this Court stated in pertinent part: "In almost every setting where important decisions

turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg*, 397 U.S. at 269. In so determining, this Court quoted its decision in *Greene v. McElroy*:

> 'Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment * * *. This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, * * * but also in all types of cases where administrative * * * actions were under scrutiny.'

Greene v. McElroy, 360 U.S. 474, 496–97 (1959). Therefore, it is clear that when the issue is the credibility of a witness and their statements there must be an evidentiary hearing allowing the trial court to make the reasonable determination of credibility.

Here, Mother was never present before the Arizona courts at all, nor did she provide any testimony which could be reviewed for credibility. The only evidence provided by Mother was her "Declaration" attached to Counsel's response which stated that Mother, under the penalty of perjury, that the contents of the Counsel's response were true and correct. Pursuant to *Goldberg* and *Greene*, Counsel's due process rights were violated when there was a determination of Mother's credibility after the fact and without any evidentiary hearing.

CONCLUSION

Based upon the foregoing, Counsel, Kristin Roebuck Bethell, requests that this Court intervene in this matter and grant her Petition for Certiorari reversing the decision by the Arizona trial court, affirmed by the Arizona appellate court, which presents the position that she was not entitled to believe her client.

Originally Filed: February 19, 2019
Refiled: May 6, 2019

Respectfully submitted,

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