ARIZONA COURT OF APPEALS
DIVISION ONE

KAREN FANN, in her official capacity as President of the Arizona Senate; WARREN PETERSEN, in his official capacity as Chairman of the Senate Judiciary Committee; the ARIZONA SENATE, a house of the Arizona Legislature; and SUSAN ACEVES, in her official capacity as Secretary of the Arizona State Senate,

Petitioners,

v.

THE HONORABLE MICHAEL KEMP, in his official capacity as a judge of the Superior Court for Maricopa County, , *et al.*,

Respondent; and

AMERICAN OVERSIGHT; PHOENIX NEWSPAPERS INC., an Arizona corporation; KATHY TULUMELLO; and CYBER NINJAS INC.,

Real Parties in Interest.

No. _____

Maricopa County Superior Court Nos.
CV2021-008265
LC2021-000180-001
[Consolidated]

PETITION FOR SPECIAL ACTION

Kory Langhofer, Ariz. Bar No. 024722
kory@statecraftlaw.com
Thomas Basile, Ariz. Bar. No. 031150
tom@statecraftlaw.com
STATECRAFT
LAW · GOVERNMENT · CRISIS MANAGEMENT
649 North Fourth Avenue, First Floor
Phoenix, Arizona 85003
(602) 382-4078
Attorneys for Petitioners

INTRODUCTION

Judge Kemp is unlawfully denying the Arizona State Senate its right to reassignment of a pending case. He claims that the Court of Appeals has not "revers[ed] . . . specific findings by [the Superior] Court" and that "[t]he Court of Appeals did not remand anything" to the Superior Court, *see* APP062—which would likely come as quite a surprise to the panel in *Fann v. Kemp*, No. 1 CA-SA 21-0216, 2022 WL 189825 (App. Jan. 21, 2022) ("*Fann II*"). Judge Kemp further muses that there may not be a new trial following the remand, *see* APP061, because, as far as he knows, the Senate might abandon its defense of the case rather than submit evidence in support of its position. Judge Kemp finally asserts that the plaintiffs would be prejudiced if a randomly selected judge were assigned to the case, *see* APP062—an argument built on an unsettling premise about the effect of Judge Kemp's personal tenure on the case, and foreclosed by the precedents of this Court.

Special action relief is appropriate under the precedents of this court, and necessary to vindicate the policy underlying Arizona Rule of Civil Procedure 42.1(e).

STATEMENT OF THE CASE

In October, Judge Kemp was presented the following question: Does the legislative privilege apply to certain records in the possession of the Arizona State Senate?

Judge Kemp made his position on that issue exceedingly clear. He held that the privilege did not apply to any of the records, for each of three independent reasons. First, Judge Kemp found that the Senate had waived any claim of legislative privilege. Second,

Judge Kemp found that even if the privilege applied, it was "qualified" and the Senate's confidentiality interests are less compelling than the public's interest in transparency. Third, Judge Kemp found that the legislative privilege is so narrow that it could not apply to the records at all. *See* APP004-12. Judge Kemp reached these conclusions without viewing any evidence, *see id.*, and ordered the Senate immediately[1] to produce the disputed records, *see* APP015—essentially entering summary judgment against the Senate on the issue presented.

The Court of Appeals accepted special action jurisdiction, vacated Judge Kemp's finding of waiver, rebuffed his finding that the privilege is "qualified," and directed Judge Kemp to review *in camera* any records as to which the privilege remains in dispute. *See* APP021-33. The Senate now plans to submit such records for *in camera* review. Consequently, the very same issue—Does the legislative privilege apply to certain records in the possession of the Arizona State Senate—must now be reconsidered in the Superior Court.

The Arizona State Senate exercised its right to reassign the case to another division of the Superior Court pursuant to Arizona Rule of Civil Procedure 42.1(e). *See* APP034-37. The plaintiffs immediately urged Judge Kemp **not** to reassign the case; American

[1] Judge Kemp also denied a motion to stay his order pending special action review. This Court immediately reversed on that issue and entered a stay pending special action review.

Oversight argued, perhaps with unintentional candor, that reassignment to another division of the Superior Court would "prejudice" its interests. *See* APP041-58. Kemp then recharacterized the Senate's notice as a "motion," and denied reassignment. *See* APP060-61.

This special action followed because the Senate is entitled to reassignment as of right under Rule 42.1(e).

STATEMENT OF THE ISSUE

In finding "error" and vacating the Superior Court's earlier determination as to legislative privilege, and directing the Superior Court to consider new evidence *in camera* when reconsidering the applicability of legislative privilege, did *Fann II* remand for a new trial within the meaning of Arizona Rule of Civil Procedure 42.1(e)?

STATEMENT OF JURISDICTION

In determining whether to accept special action jurisdiction, this Court considers several factors, including whether (1) the issues presented are of statewide significance; (2) the petition proffers pure questions of law; and (3) the petitioner lacks an equally plain, speedy, and adequate remedy by appeal. *See Quality Educ. & Jobs Supporting I-16-2012 v. Bennett*, 231 Ariz. 206, 207, ¶ 2 (2013).

Applying these factors, appellate courts in Arizona have repeatedly held that special action jurisdiction is appropriate to review the denial of a preemptory notice for change of judge. *Taliaferro v. Taliaferro*, 186 Ariz. 221, 222-23 (1996) ("[R]ulings by noticed

judges on the propriety of the notice are reviewable only by way of special action relief. . . . [W]e have long recognized that special action relief lies for testing rulings dealing with a peremptory challenge of a judge."); *Coffee v. Ryan-Touhill*, 247 Ariz. 68, 71, 445 P.3d 666, 669 (App. 2019) ("We accept jurisdiction of this special action because it presents a pure legal question and the denial of a peremptory request for a change of judge is properly reviewed only by special action." (cleaned up)); *Smith v. Mitchell*, 214 Ariz. 78, 79, 148 P.3d 1151, 1152 (App. 2006) ("It is appropriate that we accept jurisdiction of this special action because the denial of a peremptory request for a change of judge is properly reviewed only by special action. It is also appropriate because the issue here is solely a question of law." (citations omitted)); *Valenzuela v. Brown*, 186 Ariz. 105, 107 (App. 1996) ("Petitioners have no 'equally plain, speedy, and adequate remedy by appeal,' . . . and a special action is the proper method for obtaining review of the denial of a change of judge.").

ARGUMENT

I. Standard of Review

This Court reviews the denial of a change of judge for abuse of discretion, but interprets Rule 42.1(e) *de novo*. *Coffee*, 247 Ariz. at 72 ¶ 17.

II. The Senate Is Entitled to Reassignment as of Right

Arizona Rule of Civil Procedure 42.1(e)[2] provides that remand from an appellate court renews a party's right to reassignment of a case if (1) the appellate decision requires a new trial and (2) the party seeking the change of judge has not previously exercised its right to a change of judge in the action.

The parties agree on the second prong; the Senate has never before exercised its right to reassign this case. They disagree, however, on whether *Fann II* operates as a "remand" for a "new trial."

A. Special Action Relief Directing an Additional Evidentiary Proceeding Is a "Remand"

Notwithstanding its procedural distinction, special action relief is the equivalent of a "remand" for purposes of Rule 42.1. As this Court held in *Coffee*:

> [W]e recognize that Rule 42.1(e) is couched in terms of a 'remand,' an unnecessary term in the special action lexicon because jurisdiction never transfers from the superior court to the court of appeals. A narrow reading of Rule 42.1(e) might thus imply that the right to change judges is *never* renewed after special action review. We reject that interpretation, and hold that an order granting relief and directing additional evidentiary proceedings to redo an earlier proceeding is the functional equivalent of a remand under Rule 42.1(e).

247 Ariz. at 74 ¶ 27.

---

[2] Rule 42.1 was temporarily suspended during the pandemic, but was reinstated in late 2021. *See* Ariz. Supreme Ct. Admin. Order 2021-187 (eff. Dec. 14, 2021).

B. Reconsideration of the Same Issue, Based on New Evidence, Is a "New Trial"

"Rule 42.1(e) does not require any magic words, but instead turns on what the superior court must do after the appeal or special action to resolve the error." *Coffee*, 247 Ariz. at 73 ¶ 22.

On one hand, a remand merely for clarification or a ministerial recalculation is **not** a remand for a new trial. *See Anderson v. Contes*, 212 Ariz. 122, 124 (App. 2006); *Coffee*, 247 Ariz. at 73 ¶ 25 (discussing *Contes*).

On the other hand, there **is** a new trial when the Superior Court must review new evidence after a vacatur of summary judgment, *see Valenzuela*, 186 Ariz. 105; or when an appellate "decision direct[s] the superior court to reexamine issues it already decided based on evidence it never heard," *Coffee*, 247 Ariz. at 72-73 ¶¶ 19, 22.

The language of *Coffee* is controlling. *Fann II* concluded that the "[trial] court must . . . determine" the issue of legislative privilege—which the Superior Court had already decided once (albeit incorrectly, in the now-vacated order)—based on new evidence submitted by the Senate for *in camera* review. *Fann II*, 2022 WL 189825 at *8, ¶ 38. Because the appellate "decision direct[s] the superior court to reexamine issues it already decided based on evidence it never heard," *Fann II* requires a new trial within the meaning of Rule 42.1. *Coffee*, 247 Ariz. at 72-73, ¶¶ 19, 22.

III. Judge Kemp's Order Is an Abuse of Discretion Because It Relies on Impermissible Factors and a Material Misstatement of the Procedural Posture.

Judge Kemp's order denying reassignment relies on material misunderstandings of the posture of the case and factors that are impermissible as a matter of law.

First, Judge Kemp denied that *Fann II* was "a reversal . . . of specific findings by this Court." *See* APP062. This would undoubtedly come as a surprise to the Court of Appeals, which held that Kemp's finding of a qualified privilege "was error," and "vacat[ed Judge Kemp's] decision finding global waiver of the privilege." *Fann II* at *4, 8 ¶ 20, 37.

Second, Judge Kemp claimed that "[t]he Court of Appeals did not remand anything." *See* APP062. This perplexing statement comes only five sentences after Judge Kemp acknowledged "[t]he remand to this Court for a possible or potential *in camera* review." *See* APP061. More importantly, it cannot be reconciled with the language of *Fann II*, which ordered that the "[trial] court must . . . determine" the issue of legislative privilege based on evidence submitted by the Senate for *in camera* review. *Fann II* at *8, ¶ 38. Judge Kemp's reliance on the absence of a remand is self-contradictory and wrong.

Third, Judge Kemp reasoned that Rule 42.1 did not apply because "[t]here may be no *in camera* review at all." *See* APP061. This catch-22 could be argued after literally ***every*** remand for a new trial because it is ***always*** conceivable that the parties will settle or one will balk before commencing a new trial. Consequently, Judge Kemp's logic would create an exception that swallows Rule 42.1(e) whole. And for the avoidance of doubt, the

Senate fully intends to proceed with the submission of its evidence (and has never indicated otherwise), so there is no factual basis for such an end-run around Rule 42.1.

Fourth, Judge Kemp said reassignment was unnecessary because "there has been no trial, no substantive evidentiary hearing." *See* APP061. But the case law rejects that position. *Valenzuela* granted reassignment as a matter of right when the Superior Court had entered judgment in the absence of a trial or evidentiary hearing. The failure of the Superior Court to hold an initial trial or evidentiary hearing is immaterial under the precedents of this Court.

Fifth, Judge Kemp said reassignment was unnecessary because "there has been . . . no final adjudication on the merits in this case." But Judge Kemp (incorrectly) found on the merits that none of the disputed records were privileged, and then ordered the Senate immediately to produce such records to the public—an act that cannot be undone—while denying a stay to permit appellate review. *See* APP003, APP011-12, APP015. His order, if it had not been stayed and vacated by the appellate courts, would have represented the final word on the merits of the last substantive issue in the case. A member of the Superior Court cannot immunize himself from Rule 42.1 by entering an order on the merits of the last substantive issue in a case, ordering immediate compliance, (improperly) denying a stay pending expedited appellate review—and then after vacatur claiming that reassignment is not required because he refrained from ruling on the merits. *See Coffee*, 247 Ariz. 68, 73 ¶ 22 ("Substance controls over form"); *Valenzuela*, 186 Ariz. at 108 ("We

conclude that the summary judgment granted in this case was the equivalent of a trial because it disposed of all of petitioners' substantive claims on the merits. . . [O]rders and judgments must be considered in context and . . . form should not be elevated over substance.").

Sixth, Judge Kemp expressly relied on the specter of delay. *See* APP062. But as a matter of law, delay and inefficiency are **in**valid bases for refusing reassignment under Rule 42.1. *Valenzuela*, 186 Ariz. at 109 ("That Judge Buchanan has been sitting on this case since 1989 and has been educated over the years on issues all parties characterize as complex is not a reason for denying a party its right under Rule 42.1(e). As we stated [previously], judicial economy is not a basis for denying a party the right to an automatic change of judge."). And as a matter of fact, the Arizona Supreme Court has stayed the Superior Court's orders to produce Senate records, *see* APP039-40, so there is no exigency that lies in tension with a prompt reassignment.

CONCLUSION

Judge Kemp wrongly decided the issue of legislative privilege—and after vacatur of his first ruling and a directive to reconsider the issue based on new evidence, Judge Kemp badly misapprehended the procedural posture and law in order to deny reassignment under Rule 42.1. As a result, Judge Kemp is poised to re-decide the same issue a second time in contravention of the Senate's right to a random reassignment.

Under these circumstances, the policy concerns underlying Rule 42.1(e) are fully present:

> In the case of an appeal, reversal and a remand for a new trial, it is always possible that the trial judge may subconsciously resent the lawyer or defendant who got the judgment reversed. The mere possibility of such a thought in the back of a trial judge's mind means that a new judge should be found. Where, as here, the judge has made a decision on the merits of the case, he has shown unequivocally what he believes the proper outcome of the case to be, even more so, perhaps, than if the case had been tried to a jury.

Valenzuela, 186 Ariz. at 109 (internal quotation marks and citations omitted).

For these reasons, this court should accept special action jurisdiction and grant relief, directing the reassignment of the case to a randomly selected member of the Maricopa County Superior Court.

RESPECTFULLY SUBMITTED this 7th day of February, 2021.

STATECRAFT PLLC

By: */s/ Kory Langhofer*
Kory Langhofer
Thomas Basile
649 North Fourth Avenue, First Floor
Phoenix, Arizona 85003
Attorneys for Petitioners