

ARIZONA SUPREME COURT

ARIZONA REPUBLICAN
PARTY,

Petitioner,

v.

STEPHEN RICHER, as Maricopa
County Recorder; and the
MARICOPA COUNTY BOARD OF
SUPERVISORS, by and through,
CLINT HICKMAN, JACK
SELLERS, THOMAS GALVIN,
BILL GATES, and STEVE
GALLARDO; ADRIAN FONTES,
in his official capacity as Arizona
Secretary of State; and ARIZONA
DEMOCRATIC PARTY,

Respondents.

Arizona Supreme Court
No. CV-23-0208-PR

Court of Appeals
No. 1 CA-CV 21-0201

Maricopa County Superior Court
No. CV2020-014553

SECRETARY OF STATE ADRIAN FONTES' RESPONSE TO BRIEF OF AMICUS CURIAE STATECRAFT PLLC

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INTRODUCTION

Amicus Curiae Statecraft PLLC (“Statecraft”) estimates that “[r]oughly half of all political cases in Arizona, . . . now see either private threats to seek to shift fees, or public filings demanding fee shifting, against opposing parties and counsel.” (Statecraft Br., at 2.)¹ Statecraft does not provide any evidentiary support for this estimation or even any definition of what constitutes a “political case.” But as Arizona’s chief election officer (and formerly the county recorder in Arizona’s largest county), Secretary of State Adrian Fontes is aware of the substantial increase in election-related litigation, including many groundless cases, that began following the 2020 election and has only grown. Moreover, the Secretary has been party to many election cases in which one or more parties has sought sanctions under A.R.S. § 12-349—a statute “enacted with the express purpose of reducing groundless lawsuits.” *Phx. Newspapers*, 188 Ariz. at 244.

This is such a case, and the superior court and court of appeals correctly sanctioned Petitioner the Arizona Republican Party (“ARP”) for filing and

¹ Statecraft repeatedly refers to A.R.S. § 12-349 as a “fee shifting” statute. But unlike A.R.S. §§ 12-348.01 or 39-121.02, which shift attorneys’ fees to a prevailing party, A.R.S. § 12-349 is a sanctions statute designed to deter frivolous and litigation that is not brought in good faith. *Phx. Newspapers, Inc. v. Dept. of Corrs.*, 188 Ariz. 237, 244 (App. 1997). Fee shifting is “[t]he transfer of responsibility for paying fees, especially attorney’s fees, from the prevailing party to the losing party.” Fee Shifting Definition, Black’s Law Dictionary (11th ed. 2019). A sanction is a “provision that gives force to a legal imperative by either rewarding obedience or punishing disobedience.” Sanction Definition, Black’s Law Dictionary (11th ed. 2019). A.R.S. § 12-349 is a critical mechanism to disincentivize bad faith litigation.

maintaining the action without substantial justification. *See Ariz. Republican Party v. Richer*, 255 Ariz. 363, 375-76, ¶¶ 59-60 (App. 2023); A.R.S. § 12-349(A). Statecraft expressly disclaims any position on whether that sanction was properly levied. (Statecraft Br. at 1.) Instead, it argues that courts “too often base findings of frivolousness on novel legal theories” and “too often base findings of ‘subjective bad faith’ on inapposite evidence.” (*Id.* at 3, 8.) Novel legal theories, however, are distinct from wholly baseless theories, and Amicus identifies no such novel legal theory that ARP advanced in this case. Nor does Amicus point to any inapposite evidence on which the courts below relied. Accordingly, this Court should affirm the courts below.

ARGUMENT

I. Statecraft’s Arguments Will Not Help This Court to Decide This Case.

Nonparties to an appeal may submit briefs as amicus curiae when they “can provide information, perspective, or argument that can help the appellate court beyond the help that the parties’ lawyers provide.” ARCAP 16(b)(1)(C)(iii). An amicus brief is not merely an academic exercise; it should help the court decide the case before it. *Id.* But Statecraft expressly “takes no position” on the merits of the sanctions that the superior court and the court of appeals awarded in this case. (Statecraft Br. at 1.) Moreover, Statecraft’s Brief provides no insight as to how its arguments should guide the Court’s decision *in this case*.

Indeed, Statecraft agrees that it is appropriate for a court to impose sanctions for “[f]alse factual allegations that could have been identified with reasonable diligence before a case is initiated, or that are identified in the course of litigation but maintained notwithstanding the newly discovered evidence.” (*Id.* at 3.) But Amicus posits that “the judicial system and adverse parties tolerate legal theories, even if squarely contradicted by controlling precedents, to incentivize zealous advocacy and allow for the possibility of changes in the law.”² (*Id.* at 6.) Statecraft does not identify any “novel” legal theory or a basis for a change to the law that the ARP argued in the courts below. Indeed, the Amicus Brief cites the lower courts’ decisions in this case only twice. (*Id.* at 8 [superior court ruling imposing sanctions], 10 [court of appeals’ opinion].) Consequently, it is a mystery how Amicus can help the Court decide the question on which it granted review: “[w]ere the awards of attorneys’ fees by the superior court and the court of appeals appropriate?”

There is, however, a clue to the mystery of Amicus’s Brief: it twice cites [*Statecraft PLLC v. Town of Snowflake*, No. 1 CA-CV 17-0691, 2018 WL 5729344 \(App. Oct. 30, 2018\)](#) (memorandum decision).³ In that case, the court of appeals

² Of course, Arizona’s Rules of Professional Conduct dispensed with the “zealous advocacy” directive several years ago—largely because it led to a “win at all costs” mindset that was detrimental to doing justice. See David Dodge, *When Lawyers Behave Badly: The “Z” Word, Civility & the Ethical Rules*, Arizona Attorney, at 19-21 (Apr. 2008).

³ In citing *Statecraft PLLC*, Amicus was required to indicate that the case was a

affirmed sanctions awarded against Amicus under A.R.S. § 12-349, applying the same standards of review that the court of appeals applied in this case. *Id.* at *4, ¶ 17. This Court denied Statecraft’s petition for review, in which it made very similar arguments to the ones that it makes in the Amicus Brief here. *See Statecraft PLLC v. Town of Snowflake*, CV-18-0313-PR, Ariz. Sup. Ct. Minutes (May 28, 2019). While another chance to persuade this Court may be helpful to Amicus, it does not help the Court to decide this case.

II. The Court of Appeals Applied the Appropriate Standard of Review in This Case.

The crux of Statecraft’s argument seems to be that the court of appeals applied an incorrect standard of review to the superior court’s order sanctioning ARP under A.R.S. § 12-349 in this case or, more generally, that the court of appeals has “struggled to articulate and apply a coherent standard of review for Section 12-349 orders.” (Statecraft Br. at 10.) But the standard that the court of appeals used in this case is perfectly coherent, and the court applied it correctly.

The court of appeals explained that it reviews “the court’s application of § 12-349 de novo, but we view the evidence in a manner most favorable to sustaining the decision, and we will affirm unless the court’s findings are clearly erroneous.” *Ariz. Republican Party*, 255 Ariz. at 370, ¶ 32 (citing *Phoenix Newspapers, Inc.*, 188 Ariz. at 243-44). Far from incoherent, this is the long-

memorandum decision, Ariz. R. Sup. Ct. 111(c)(2), but it failed to do so.

established standard of review that distinguishes between legal conclusions—here, “the application of § 12-349”—which the court reviews de novo, and factual findings, which the court reviews for clear error. Statecraft does not seem to disagree. (*See* Statecraft Br. at 11 [arguing that a sanctions award that “relies on conclusions of law” is subject to de novo review and that to the extent that such an award relies factual findings “clear error review is appropriate”] [citing *Helvetica Servicing Inc. v. Pasquan*, 249 Ariz. 349, 352, ¶ 10 (2020) [“When an appeal presents a mixed question of law and fact, we defer to the trial court’s factual findings but review de novo all legal conclusions.”].)

Using this standard, the court of appeals reviewed the superior court’s extensive findings and affirmed them all. *See Ariz. Republican Party*, 255 Ariz. at 370-75, ¶¶ 32-60. Amicus does not identify any legal conclusion that the court of appeals should have subjected to de novo review, or any reason to believe that the court of appeals would have reached a different decision had it subjected some portion of the superior court’s decision to a more searching review. Simply put, the court of appeals applied the correct standard of review and Statecraft provides no alternative that would lead to a different result in this case.

CONCLUSION

For the foregoing reasons, this Court should affirm the superior court’s and the court of appeals’ awards of sanctions against ARP.

RESPECTFULLY SUBMITTED this 4th day of March, 2024.

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