IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION, AT NASHVILLE

JERRY SCOTT WILSON,	§	
	§	
Respondent-Appellant,	§	
	§	
v.	§	Case No.: M2023-00232-COA-R3-CV
	§	
BRITTANY SHARAYAH LEHMANN,	§	Rutherford County Circuit Court
	§	Case No. 22-CV-712
	§	
Petitioner-Appellee.	§	

REPLY BRIEF OF APPELLANT JERRY SCOTT WILSON

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Dated: August 11, 2023

ORAL ARGUMENT REQUESTED

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III. INTRODUCTION

This appeal concerns two defective criminal contempt convictions. The Appellee concedes material error below. *See* Br. of Appellee at 54 ("Appellee concedes that the trial court did not make specific findings of fact and conclusions of law in it's [sic] written order."). The Appellee also admits that she herself construed the August 1, 2022 Agreed Order to permit communication that she now claims was categorically forbidden. *Id.* at 39 ("Appellee was clearly incorrect in her belief that the parties could communicate regarding the minor child."). That admission—and the Appellee's testimony supporting it—proves that the order was not clear. It also provided powerful evidence that Dr. Wilson's similar understanding of the order was a reasonable attempt to comply with it, rather than proof of his intent to violate it. The Appellee's admission thus dooms her contempt claims, compelling dismissal of Dr. Wilson's charges on both ambiguity and willfulness grounds alike.

The Appellee's concessions are not even the simplest grounds for reversal, though. Instead, this Court should dismiss Dr. Wilson's contempt charges because:

1. The Appellee failed to introduce evidence of the order that she charged Dr. Wilson with violating;

2. The trial court did not take judicial notice of the order; and

3. The Appellee has not now raised—in her Statement of the Issues on appeal—the issue of whether this Court should take judicial notice of the order in the first instance, *see* Br. of Appellee at 8, thereby rendering the issue waived.

Without evidence of an essential element of Dr. Wilson's charges,

this Court's task is easy. *See Cottingham v. Cottingham*, 193 S.W.3d 531, 539 (Tenn. 2006) ("we hold that the evidence is insufficient to support the convictions for criminal contempt. The constitutional provisions against double jeopardy require that the criminal contempt charges be dismissed."). Thus, the other issues presented in this appeal need not be addressed. Instead, because the Appellee's contempt charges fail due to insufficient evidence at their first element, further analysis is unnecessary, and Dr. Wilson's convictions must be **DISMISSED**.

IV. ARGUMENT

A. THE APPELLEE FAILED TO INTRODUCE EVIDENCE OF THE ORDER SHE CLAIMS DR. WILSON VIOLATED; THE TRIAL COURT DID NOT TAKE JUDICIAL NOTICE OF THE MISSING EVIDENCE; AND ANY CLAIM THAT THIS COURT SHOULD DO SO IN THE FIRST INSTANCE IS WAIVED.

"[A] court order" is the first element of a criminal contempt charge. *Pruitt v. Pruitt*, 293 S.W.3d 537, 545 (Tenn. Ct. App. 2008). The Appellee disclaims any violation of the "derogatory comments" provision of the August 1, 2022 Agreed Order. *See* Br. of Appellee at 36. Thus, this Court need only determine whether the Appellee introduced evidence of the April 19, 2022 Ex-Parte Order.

As detailed below, she did not. The trial court also did not take judicial notice of the order. Further, any claim that this Court should do so in the first instance is waived, and taking judicial notice on appeal would be an inappropriate exercise of this Court's discretion regardless.

1. The Appellee failed to introduce evidence of the April 19, 2022 Ex-Parte Order, and the trial court did not take judicial notice of it.

The record reflects that the April 19, 2022 Ex-Parte Order was

never introduced as an exhibit. *See* Tr. of Proceedings at 3. Nor did any witness testify about its contents. *See generally* Tr. of Proceedings. The Appellee does not dispute these facts.

Instead, the Appellee argues that "the trial court properly took judicial notice of the Ex Parte Order of Protection." Br. of Appellee at 23. Assuming—for the sake of argument—that the trial court *could have* taken judicial notice of an essential element of a criminal offense, though, the record makes plain that trial court *did not* do so.

To begin, the Appellee never requested that the trial court take judicial notice of the missing order. Thus, Tenn. R. Evid. 201(d)'s provision concerning mandatory notice is inapplicable. All agree, too, that judicial notice of the missing order was never taken during trial.

Thus, the only question is whether, after the close of proof, the trial court *sua sponte* took judicial notice of the order under Tenn. R. Evid. 201(c). Review of the record confirms that it did not.

Arguing otherwise, the Appellee asserts that the trial court "took judicial notice of the Ex Parte Order of Protection" following the close of proof because it "not only referenced the orders, but read the relevant provisions of the Ex Parte Order of Protection into the record when asking questions of counsel prior to its ruling." *See* Br. of Appellee at 26. The transcript confirms that the trial court never stated that it was taking judicial notice of anything, though, *see* Tr. of Proceedings at 67:7–16, which falls well short of a "definitive ruling." *Cf.* Tenn. R. Evid. 103(a) (contemplating "a definitive ruling on the record admitting or excluding evidence"). That matters, because "if a judge takes judicial notice of a

fact, the judge must alert the parties that he or she has done so." *See Friend v. Garrett Cnty. Dep't of Soc. Servs.*, No. 2296, Sept. Term, 2018, 2020 WL 91571, at *7 (Md. Ct. Spec. App. Jan. 8, 2020). Such notice to the parties is expressly contemplated by Tenn. R. Evid. 201(e). Thus, a trial court may not silently take judicial notice under Tenn. R. Evid. 201(c) without informing the Parties that that is what it is doing.

The record thus settles the matter. *Accord Garner v. State of La.*, 368 U.S. 157, 173, (1961) ("There is nothing in the records to indicate that the trial judge did in fact take judicial notice of anything. To extend the doctrine of judicial notice to the length pressed by the respondent would require us to allow the prosecution to do through argument to this Court what it is required by due process to do at the trial[.]"). It also renders unnecessary this Court's resolution of several complex constitutional questions that this Court would otherwise be required to answer, since "courts should avoid deciding constitutional issues" when a case "can be resolved on non-constitutional grounds[.]" *Owens v. State*, 908 S.W.2d 923, 926 (Tenn. 1995).

To begin, if, as the Appellee proposes, the record were creatively reimagined to reflect that the trial court took judicial notice without saying so, this Court would have to determine whether a trial court may *ever* take judicial notice of a missing essential element in a criminal case after the close of proof, which would preclude a criminal defendant from responding to the evidence. *Cf. State v. Rhome*, 333 P.3d 786, 789 (Ariz. Ct. App. 2014) ("taking judicial notice of an element of the offense for which no evidence was presented at trial would violate Rhome's constitutional rights and be contrary to the rules of criminal procedure.").

That question matters here, because the issue at trial was not merely the existence of the April 19, 2022 Ex-Parte Order, but how its terms were affected by a subsequent (and also never-introduced) order that modified them.

Without preliminary evidence that an order was violated, it also is not necessary for a criminal defendant to introduce countervailing evidence about related issues—like willfulness, for instance. *See Garner*, 368 U.S. at 173 ("unless an accused is informed at the trial of the facts of which the court is taking judicial notice, . . . he is deprived of any opportunity to challenge the deductions drawn from such notice or to dispute the notoriety or truth of the facts allegedly relied upon."). Thus, by taking judicial notice of a missing essential element only after the close of proof, a trial court likely deprives a defendant of his constitutional right to present a defense. *Id.*; *State v. Brown*, 29 S.W.3d 427, 432 (Tenn. 2000) ("The Sixth Amendment and the Due Process Clause of the Fourteenth Amendment clearly guarantee a criminal defendant the right to present a defense"). A trial court would necessarily abuse its discretion under Tenn. R. Evid. 201(c) as a result.

The broader issue of whether an essential element of a criminal charge may *ever* be established through judicial notice is also complex. Some courts regard taking judicial notice of an unproven element as structural constitutional error, at least in a jury trial. *See Rae v. State*, 884 P.2d 163, 167 (Alaska Ct. App. 1994) ("The taking of conclusive judicial notice of an element of a criminal charge . . . deprives the defendant of his right to be convicted only upon a jury's finding of proof beyond a reasonable doubt of every element of the offense. This is

reversible error without regard either to whether there was an objection from the defense"); *Rhome*, 333 P.3d at 789. *Cf. United States v. Kail*, No. 18-CR-00172-BLF-1, 2018 WL 6511154, at *1 (N.D. Cal. Dec. 11, 2018) ("A court may not take judicial notice of an element of an offense, since a criminal defendant is entitled to have a jury determine every element of the charged crime."). Others do not distinguish between fact-finders and require that judicially noticed facts always be treated as non-binding. *State v. Willard*, 772 P.2d 948, 949 (Or. 1989) ("a trial judge, sitting as a trier of fact, is no more entitled to treat a judicially noticed fact as conclusively proven in a criminal case than would be a jury."). Still others regard the issue as constitutional error that is non-structural. *State v. Odom*, 772 S.E.2d 149, 156 (S.C. 2015) (holding that "[t]he taking of judicial notice of Appellant's date of birth was tantamount to a directed verdict on the element of the accused's age, a practice which is clearly forbidden[,]" but applying harmless error review). Others hold that judicial notice may be used to supply evidence of an essential element, but only when admitted as evidence during trial. *Mejia-Cortez v. United States*, 256 A.3d 210, 216–17 (D.C. 2021) ("giving the government the benefit of a judicially noticed fact that the trial court never admitted into evidence would 'allow the prosecution to do through argument to this Court what it is required by due process to do at the trial,' and would 'turn the [judicial notice] doctrine into a pretext for dispensing with a trial.'") (cleaned up).

This Court need not resolve these constitutional questions here. Instead, it may simply hold—consistent with the record—that the trial court never took judicial notice of the April 19, 2022 Ex-Parte Order and

that the order was not otherwise admitted into evidence. Consequently, the Appellee failed to establish the first element of her contempt charges, and Dr. Wilson's convictions must be reversed. *See City of Cleveland v. Patterson*, 2020-Ohio-1628, 2020 WL 1951545 (Ohio Ct. App. Apr. 23, 2020) at ¶10 ("Because the city failed to introduce a court order into evidence and the court did not take judicial notice of a court order, that element of criminal contempt was not supported by sufficient evidence.").

2. <u>This Court should not take judicial notice in the first instance.</u>

The Appellee alternatively argues that if this Court "were to determine that the trial court did not properly take judicial notice of the Ex Parte Order of Protection and the August 1, 2022 Agreed Order, this Court could take judicial notice of said orders since they are included in the technical record." Br. of Appellee at 28. No such issue is presented in the Appellee's Statement of the Issues, though. *Id.* at 8. Indeed, the Appellee has not properly presented any issues of her own, since her listed "issues" are not issues, but *arguments*. *Id.*; *cf. Frogge v. Joseph*, No. M2020-01422-COA-R3-CV, 2022 WL 2197509, at *9 (Tenn. Ct. App. June 20, 2022) (disregarding as improper all arguments included in a litigant's Statement of the Issues, and holding that "[t]o the extent that Metro analyzes any other issues within the body of its brief on appeal, we deem them waived."). Thus, even though argued in her brief, the issue is waived. *See Childress v. Union Realty Co.*, 97 S.W.3d 573, 578 (Tenn. Ct. App. 2002) ("We consider an issue waived where it is argued in the brief but not designated as an issue.").

Even if she had not waived the issue, though—and even

disregarding the (abundant) constitutional concerns detailed above—it still would not be appropriate for this Court to take judicial notice of an essential element of a criminal charge for the first time on appeal. "Judicial notice is an inappropriate device for remedying a failure of proof." *Glover v. Cole*, 762 F.2d 1197, 1200 n.7 (4th Cir. 1985). That the trial court did not take judicial notice in the first instance and was never asked to do so also militates against doing so now. *See United States v. Herrera-Ochoa*, 245 F.3d 495, 501–02 (5th Cir. 2001) ("our conclusion not to accept the government's argument on appeal to take judicial notice of Herrera's whereabouts on or about the date of the indictment is buttressed by the fact that the district court failed to take such action"); *United States v. Hawkins*, 76 F.3d 545, 551 (4th Cir.1995) (declining to take judicial notice of defendant's identity on appeal when judicial notice was neither requested by the government nor taken sua sponte by the trial judge); *United States v. James*, 987 F.2d 648, 651 (9th Cir.1993) (overturning defendant's robbery conviction on the grounds of insufficient evidence, and refusing to find harmless the government's failure to prove one element of the crime, where judicial notice regarding the existence of the unproven element was neither requested nor taken at trial). The Appellee's request should be rejected as both waived and an inappropriate exercise of this Court's discretion as a result.

3. <u>The Appellee's contrary arguments are unpersuasive.</u>

Though not stated as such, the Appellee appears to contend that Dr. Wilson's challenge to the sufficiency of the convicting evidence was waived or conceded because Dr. Wilson's counsel stated—during closing argument—that: "It's a technical violation." Br. of Appellee at 27 (citing

Tr. of Proceedings at 67:22–23). Not so. A defendant "cannot waive plenary review of any issue for which the remedy is dismissal of the charge," *State v. Lee*, No. M2021-01084-CCA-R3-CD, 2022 WL 16843485, at *10 (Tenn. Crim. App. Nov. 10, 2022), and insufficient convicting evidence qualifies. Further, "statements and arguments of counsel are neither evidence nor a substitute for testimony[,]" *Elliott v. Cobb*, 320 S.W.3d 246, 250 (Tenn. 2010), so the statement cannot cure an evidentiary deficiency. The statement was also made in the context of an argument about what *penalty* would be appropriate for a "silly" dispute in which no threat or assertion of harm was presented. Tr. of Proceedings at 67:25–68:7. Thus, the Appellee exaggerates the concession, which carried no evidentiary value regardless.

B. THE APPELLEE FAILED TO PROVE THAT THE APRIL 19, 2022 EX-PARTE ORDER—AS MODIFIED BY THE AUGUST 1, 2022 AGREED ORDER—WAS CLEAR, SPECIFIC, AND UNAMBIGUOUS.

1. Waiver does not apply.

The Appellee inarguably failed to introduce either the April 19, 2022 Ex-Parte Order or the August 1, 2022 Agreed Order into evidence at trial. As explained above, she also failed to request or obtain judicial notice as to either order. Those failures dispensed with the need for argument—or proof—about the clarity, specificity, and ambiguity of the April 19, 2022 Ex-Parte Order, as modified by the August 1, 2022 Agreed Order. They also suffice to dispatch the Appellee's insistence, on appeal, that waiver applies to Dr. Wilson's claims of ambiguity, *see* Br. of Appellee at 44, because Dr. Wilson was not required to raise arguments about evidence that the Appellee never introduced.

2. The chronology of the two orders rendered their conflicting terms ambiguous.

If this Court considers absent evidence that was never admitted at trial, though, Dr. Wilson has shown that the August 1, 2022 Agreed Order rendered at least ambiguous the non-contact provision of the April 19, 2022 Ex-Parte Order. His argument on the matter is straightforward, and the Appellee has no serious response to it.

In particular, Dr. Wilson has observed that the earlier April 19, 2022 Ex-Parte Order forbade all contact between the Parties. *See* R. at 10 ("Do not contact the Petitioner"); *id.* ("Do not come about the Petitioner"); *id.* ("Do not come about the Petitioner and/or protected minor children for any purpose."). Dr. Wilson has also observed that the later August 1, 2022 Agreed Order ordered visitation and a corresponding exchange that *required* contact between the parties. R. at 34–35. The August 1, 2022 Agreed Order specifically instructed that exchanges of the Parties' minor child "shall . . . occur[]" at the Parties' "childcare provider" and the "Rutherford County Sheriff Department" at specified days and times. *Id.* Thus, even disregarding the ambiguity introduced by the derogatory comments provision of the August 1, 2022 Agreed Order, it would have been *impossible* for Dr. Wilson to comply with both the non-contact provision of the first order and the exchange provision of the second order simultaneously.

That reasonable reading of the two orders—which the Appellee shared, *see* Tr. of Proceedings at 27:2–7—is fatal to the Appellee's contempt claims. As this Court has explained: "'orders that are susceptible to more than one reasonable interpretation cannot support a

finding of civil [or criminal] contempt.'" *Beyer v. Beyer*, 428 S.W.3d 59, 78 (Tenn. Ct. App. 2013) (alteration in original) (quoting *Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, 249 S.W.3d 346, 356 (Tenn. 2008)). They must also "'leave no reasonable basis for doubt regarding their meaning'" and "'should be interpreted in favor of the person facing the contempt charge.'" *Id.* "[T]he audience to whom the order is addressed"—both of whom testified that they construed the August 1, 2022 Agreed Order as supplanting earlier non-contact restrictions—are considered as well. *Id.*

The Appellee's response is twofold. First, she insists that: "The RCSO safe exchange location was designated for the purpose of exchanging the minor child without having to communicate. When an Order of Protection is in place, parties are expected to exchange children without violating the terms of the same." Br. of Appellee at 39.

This claim is unsupportable. For one thing, the August 1, 2022 Agreed Order does not say that—and to the contrary, its express purpose was to alter the terms of an order of protection that the Appellee characterizes as being "in place[.]" *Id.* For another, the Appellee fails to address the problem that *contact* between the Parties was an affirmative requirement of the August 1, 2022 Agreed Order, R. at 34–35 (requiring Dr. Wilson to come about the Appellee to exchange their child at specified times), even though contact was expressly forbidden by the earlier April 19, 2022 Ex-Parte Order, *see* R. at 10 ("Do not come about the Petitioner"). Given this chronology, Dr. Wilson reasonably assumed that the August 1, 2022 Agreed Order—a later and more specific provision—

supplanted the non-contact provision of the April 19, 2022 Ex-Parte Order. The Appellee's apparent attempt to draw a never-before-articulated distinction between the order's contact restriction and its communication restriction does not hold water, either, particularly given that the April 19, 2022 Ex-Parte Order treats the terms as being synonymous. *See* R. at 10 ("Do not contact the Petitioner and/or Petitioner's minor children protected by this order either directly or indirectly, by phone, email, messages, mail or any other type of communication or contact."). Thus, the Appellee's argument—or, more accurately, her counsel's, because the Appellee testified differently—fails, because it was at least ambiguous whether the April 19, 2022 Ex-Parte Order's non-contact provision survived the more specific and conflicting order that followed it.

Trying another approach, the Appellee draws an analogy to a "fist fight." Br. of Appellee at 40. Specifically, she insists that "[u]nder Appellant's theory one party to a fist fight would not be able to be charged criminally for assault if the other party also threw punches." *Id.*

To be sure, that is not Dr. Wilson's theory. This also is not a situation where both Parties understood that they were breaking the law. Indeed, it is the polar opposite of that scenario, given that both Parties believed they were *not* violating the non-contact provisions of any earlier order in light of the conflicting provisions of a later order that supplanted it. *See* Tr. of Proceedings at 27:2–7 (in which the Appellee states her understanding that communication about the Parties' minor child was permitted after the August 1, 2022 Agreed Order was entered); *id.* at 60:7–13 (in which Dr. Wilson explains his attempt to clarify uncertainty

due to the "different interpretations between [Appellee's counsel] and [Appellee] about any kind of communication that would be acceptable under the August 1st update."). Because both the recency canon and the general-specific canon support that conclusion, both Parties were also *correct* about the matter. Thus, the Appellee's contempt claims not only fail on ambiguity grounds; they also fail because Dr. Wilson never "actually violated the order" underlying his contempt charges at all. *Konvalinka*, 249 S.W.3d at 356.

C. THE APPELLEE FAILED TO PROVE THAT THE CHARGED VIOLATIONS WERE "WILLFUL."

For similar reasons, the Appellee failed to establish willfulness. The Appellee seems to believe that because Dr. Wilson "intentionally communicated with Appellee," willfulness was established. Br. of Appellee at 46. The Appellee is wrong.

To sustain a contempt conviction, it is not enough to prove intentional conduct. A prosecutor must also prove that a defendant acted with "a culpable state of mind." *Saleh v. Pratt*, No. E2021-00965-COA-R3-CV, 2022 WL 1564170, at *4 (Tenn. Ct. App. May 17, 2022) (citing *State v. Beeler*, 387 S.W.3d 511, 523 (Tenn. 2012)). That means a prosecutor must prove that the act was done not only "voluntarily and intentionally[,]" but also "'with the specific intent to do something the law forbids.'" *Mawn v. Tarquinio*, No. M2019-00933-COA-R3-CV, 2020 WL 1491368, at *6 (Tenn. Ct. App. Mar. 27, 2020).

This requirement, too, dooms the Appellee's contempt claims, because there is no evidence that Dr. Wilson knew he was violating a court order. To the contrary, the evidence showed that Dr. Wilson—like

the Appellee—believed that contact between the Parties was *permitted* after the August 1, 2022 Agreed Order was entered. *See* Tr. of Proceedings at 27:2–7; *id.* at 60:7–13.

Despite insisting that she was "misquoted" about her gross misunderstanding of willfulness, *compare* Br. of Appellees at 47, *with* Tr. at 65:5–6; *id.* at 65:19–22, the Appellee's counsel also repeats the same error on appeal. She claims once more that: "As long as [Dr. Wilson] intended to contact or communicate with Appellee his actions were willful." *Id.* That emphatically is not the law, though. *See Saleh*, 2022 WL 1564170, at *4 (requiring "a culpable state of mind"); *Mawn*, 2020 WL 1491368, at *6 (requiring proof that the act was not only "voluntarily and intentionally'" committed, but also that it was committed "'with the specific intent to do something the law forbids.'"); *In re Sydney T.C.H.*, No. M2009-01230-COA-R3-JV, 2010 WL 1254349, at *6 (Tenn. Ct. App. Mar. 31, 2010) ("it must be shown that the defendant intentionally and deliberately disobeyed the [court] order."). Thus, the Appellee's claims fail.

The Appellee alternatively seeks to address the missing proof by referencing evidence that she failed to introduce at trial. Br. of Appellee at 48 (referencing an affidavit executed by Dr. Wilson that was not admitted at trial and that he was not examined about). This Court's rules permit citations only to facts that were "'relied upon,'" though. *See* Court of Appeals Rule 6(a)(4). The reason why is that "this is a court of appellate review only, and [it does] not consider evidence that was neither presented to nor considered by the trial court[.]" *Britt v.*

Chambers, No. W2006-00061-COA-R3CV, 2007 WL 177902, at *3 (Tenn. Ct. App. Jan. 25, 2007). Thus, the Appellee's underhanded attempt to cite evidence that was never admitted is improper.

D. NOTICE DEFECTS PRECLUDE DR. WILSON'S CONVICTIONS.

Minutes before Dr. Wilson's criminal trial began, his counsel stated that: "I'm not here for a criminal proceeding. I don't think [Appellee's counsel] is either." Tr. of Proceedings at 4:19–20. Dr. Wilson's trial counsel also repeatedly expressed his "confusion" about "whether this is a criminal matter or not." *Id.* at 35:10–12.

These facts notwithstanding, the Appellee disputes any notice defects, insisting that "[t]he record contains an Order Authorizing Law Enforcement Arrest on Contempt of Ex Parte Order of Protection which satisfies the notice requirements required by Rule 42 . . . ." Br. of Appellee at 50 (citing R. at 40–42). That order makes no mention of a criminal proceeding, though. *See* R. at 40–42. It also instructs Dr. Wilson to "show cause why he should not be held in contempt of court." *Id.* at 40.

Such defective notice is problematic for two reasons. The first is that criminal contempt is not mentioned. The second is that if criminal contempt were contemplated, such "show cause" language reverses the standard of proof and suggests that the proceeding is *not* criminal, because "[t]he reference in Rule 42(b)(2) to 'a show cause order' was deleted" from Tenn. R. Crim. P. 42 nine years ago. *Id.* at ADVISORY COMMISSION COMMENT [2014]; *see also id.* ("requiring an alleged contemner to 'show cause' why he or she should not be held in contempt

impermissibly placed the burden of proof on the alleged contemner."). Because a fine and incarceration pending compliance with an order are available as remedies in civil contempt cases, the document also did not "enable the accused to understand that the object of the charge is punishment—not merely to secure compliance with a previously existing order[.]" *McLean v. McLean*, No. E2008-02796-COA-R3-CV, 2010 WL 2160752, at *5 (Tenn. Ct. App. May 28, 2010).

The Appellee cannot handwave these notice defects away by claiming waiver, either. Br. of Appellee at 53. "Waiver is a voluntary relinquishment or abandonment of a *known* right or privilege." *Faught v. Est. of Faught*, 730 S.W.2d 323, 325 (Tenn. 1987) (emphasis added). "Thus, when an individual does not know of his rights or when he fails to fully understand them"—precisely what pretrial notice was supposed to provide Dr. Wilson—"there can be no effective waiver of those rights." *Id.* at 326. Consequently, when Dr. Wilson received a notice stating he needed to "show cause why he should not be held in contempt of court," R. at 40, R. at 58, he not only was not meaningfully apprised of the criminal nature of the proceeding—he was affirmatively *misled* about it. His convictions must be reversed accordingly.

E. THE TRIAL COURT'S FAILURE TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW COMPELS REVERSAL.

The Appellee "concedes that the trial court did not make specific findings of fact and conclusions of law in it's [sic] written order." Br. of Appellee at 54. Still, she asserts that "[i]t would be appropriate for this Honorable Court to decide this matter based upon the record." *Id.* at 55.

The Appellee is correct, though not in the way she means. In

particular, based on the insufficient evidence of any element of contempt, it is appropriate for this Court to reverse and remand with instructions that Dr. Wilson's charges be dismissed. *Lovlace v. Copley*, 418 S.W.3d 1, 37 (Tenn. 2013) ("We therefore invoke Rule 36(a) and provide the relief on the law and the facts that this proceeding requires. We vacate the trial court's judgment finding Mrs. Copley in contempt and dismiss the Lovlaces' allegations of contempt.").

What this Court may *not* do, though, is affirm. Doing so would require this Court to find that Dr. Wilson's uncontradicted testimony that he did not willfully violate either order was not credible. "Embarking on independent appellate credibility determinations would be a drastic change in the settled principles of appellate review[,]" however. *See Mitchell v. Archibald*, 971 S.W.2d 25, 30 (Tenn. Ct. App. 1998). Thus, at minimum—and only if it can first locate evidence in the record that could be deemed sufficient to sustain each element of the Appellee's claims—this Court would have to vacate Dr. Wilson's convictions and remand.

F. THE APPELLEE MAY NOT RECOVER HER ATTORNEY'S FEES.

The Appellee separately claims she "should be awarded her attorney's fees on appeal pursuant to T.C.A. § 36-3-617(a)(1)." Br. of Appellee at 55. This argument fails, too.

To begin, the portion of Tenn. Code Ann. § 36-3-617(a)(1) that the Appellee quotes does not concern attorney's fees. Br. of Appellee at 55. Instead, it concerns "costs, including any court costs, filing fees, litigation taxes, or any other costs[,]" *see* Tenn. Code Ann. § 36-3-617(a)(1), which are different.

Tenn. Code Ann. § 36-3-617(a)(1) does have an attorney's fee

provision, though. It provides that: "If the court, **after the hearing on the petition**, issues or extends an order of protection, all court costs, filing fees, litigation taxes and attorney fees shall be assessed against the respondent." *Id.* (emphasis added). This limitation negates the Appellee's claim, because she never set her allegations for hearing. The ex-parte order that she obtained also "automatically expire[d]" on April 18, 2023 before any hearing occurred. *See* R. at 35. This case is not a proceeding to "issue[] or extend[]" an order of protection, either.

As a final matter, it is inappropriate for the Appellee's Brief to state and cite repeatedly—as purported facts—the untested, never admitted, never relied upon, and emphatically denied allegations of physical abuse set forth in her ex parte petition, all of which are irrelevant to this appeal regardless. Br. of Appellee at 9, 16. That naked attempt to generate outrage by flouting briefing rules is totally improper. *See* Court of Appeals Rule 6(a)(4). With that context in mind, the only evidence anywhere in this proceeding that someone intentionally violated the law comes not from Dr. Wilson, but from the Appellee's attorneys, who have repeatedly violated briefing rules for cynical and disappointing reasons.

V. CONCLUSION

The trial court's decision should be reversed, and Dr. Wilson's contempt convictions should be dismissed.

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC FILING COMPLIANCE

Pursuant to Tennessee Supreme Court Rule 46, § 3.02, this brief (Sections III-V) contains 4,998 words pursuant to § 3.02(a)(1)(b), as calculated by Microsoft Word, and it was prepared using 14-point Century Schoolbook font pursuant to § 3.02(a)(3).

By: /s/ Daniel A. Horwitz
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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of August, 2023, a copy of the foregoing was served via the Court's electronic filing system upon the following parties:

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